

Explanation of Rulemaking, Final Action
Recordkeeping Exceptions Rulemaking (in re Schools)
Oregon OSHA
August 1, 2017

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History of Current Rulemaking

Oregon OSHA's rules for employer recordkeeping of workplace injuries and illnesses can be found in Oregon Administrative Rules (OAR) 431-001-0700 through OAR 437-001-0742. The rule includes a set of requirements related to keeping and posting injury and illness records that employers must follow. However, employers in certain industries are exempt from these requirements. Exempt industries are listed in Table 1, found in OAR 431-001-0700, using North American Industrial Classification System (NAICS) codes. The industries listed are exempt because they are considered to be "low-hazard" industries.

In January of 2017, the Oregon School Employees Association formally petitioned Oregon OSHA, asking the agency to initiate rulemaking to remove the following NAICS codes from the exempt list: NAICS 6111 (Elementary and Secondary Schools), 6116 (Other Schools of Instruction), and 6117 (Educational Support Services). The petition was accompanied with extensive supporting documentation drawing into question the designation of these classifications as "low hazard." The documentation demonstrated a significantly higher risk of injury than would be expected in a low-hazard activity – for example, the rate of injuries resulting in days away from work, transfers or other restricted duty (known as the "DART rate") from 2011 through 2015 is actually slightly higher than that of non-residential construction as a whole.

With this initial record in hand, Oregon OSHA responded to the petition by proposing on April 18, 2017, to remove the exemptions as requested. In addition to announcements on Oregon OSHA's website and distribution through Oregon OSHA's electronic mailing lists, the formal "Notice of Proposed Rulemaking" was published in the *Oregon Bulletin* by the Secretary of State on May 1, 2017. Oregon OSHA accepted public comment in two hearings (held May 23, 2017 and May 24, 2017) and by written means through June 21, 2017.

Description of the Rule as Adopted

The rule as adopted simply eliminates three NAICS codes – NAICS 6111 (Elementary and Secondary Schools), NAICS 6116 (Other Schools of Instruction), and NAICS 6117 (Educational Support Services) – from the list of exempt industries in Table 1 of the rule, effective January 1, 2018. This means that the existing recordkeeping rules will apply to those industries from that date forward.

It is probably worthwhile to note certain things that the rule does not do.

In spite of the extensive comments in the record related to "workplace violence" or "human-caused injury" in the public record, the rule does not create any new requirements related to workplace violence beyond those related to recordkeeping and apart from those already inherent in the general duty clause and in various other "general obligation" requirements to address hazards that exist in the workplace. It also does not, on its face, require regular submission of the required records to Oregon OSHA (although the existing provisions do enable Oregon OSHA – as well as workers and their representatives – to request copies of the records that will now be kept).

The Basis for the Rule’s Adoption

Oregon OSHA takes note of the comments in the record suggesting that recordkeeping may not be particularly useful in identifying workplace risks.¹ Even some of those testifying in support of the rule noted that recordkeeping is more useful if it goes beyond tracking injury events and includes “near miss” incidents.² Oregon OSHA agrees that identifying and tracking the injuries and illnesses that occur is neither as complete nor as useful as using a system that also tracks non-injury incidents and events. The rule is, as is often the case, a minimum requirement that does not necessarily reflect the best safety and health practice. However, the question before us in this rulemaking is whether to adopt the proposed change to the existing recordkeeping rules. For the purpose of that rulemaking, Oregon OSHA begins with a strong presumption that the rules themselves have value and that the only appropriate reason to exempt a category of employers from those rules is if that group of employers genuinely presents a low risk of workplace injury or illness.

The record was itself summarized by a representative of the Oregon School Employees Association (OSEA) during the second public hearing: “And as you have heard, schools are no longer low-hazard zones. And we absolutely need the data to begin to address this issue.”³

In addition, it is worth noting the extensive testimony in the record that suggests that the absence of required recordkeeping interferes with even minimal recordkeeping efforts in at least some school settings. For example, Oregon OSHA takes note of one employee’s statement:

*In some schools, staff members are discouraged from filling out incident reports because their school does not want to have a record that suggests that they are unable to handle their students.*⁴

The record includes several more detailed descriptions (in both oral testimony and written comments) of the practical effects of the absence of a requirement to keep the records:

And, yet, what I find worse is when we have administrators telling you not to document or not to fill out the incident report forms, when they only want you to fill things out when it's serious, when you may go to the doctor or when you're filing a claim.

Then those reports don't seem to go anywhere except in a file at either the building level or at the special ed director or coordinator's drawer. However, in my opinion, that by not filling out those records, one isn't collecting the data that's needed for change.

For example, if the safety team received two or five, ten reports of people tripping over the curb, maybe not everybody got hurt to the extent of going to the doctor, you would fill out the incident report, you would have data, and then you could do something about the curb.

*The same thing could be said for our students. If everyone, every time, filled out an incident, including the near-misses, or an injury report form, the team would be able to make decisions whether they should switch out staff, do a functional behavior analysis or create a behavior intervention plan or maybe it's just a change in placement.*⁵

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¹See, for example, the testimony of William White, Risk Manager for the Salem-Keizer School District, May 24, 2017, Public Hearing Transcript, pp. 50-51.

²See, for example, the testimony of Kathy Forbes of Tillamook, Oregon, May 24, 2017, Public Hearing Transcript, pp. 9-10.

³Soren Metzger, OSEA, May 24, 2017, Public Hearing Transcript, p.19.

⁴Ruth Creek of Ontario, Oregon, May 24, 2017 Public Hearing Transcript, p. 9.

⁵Kathy Forbes of Tillamook, Oregon, May 24, 2017, Public Hearing Transcript, pp. 9-10.

*We do have forms to report incidents, but we didn't always and that is because it wasn't required. For a time I was not allowed to write any negative incidents with my student because the specialist said every day had to be a new day with him, and it also upset his parents. But as the incidents escalated, then the school district had nothing to show that escalation was happening, and was sued when they tried to suspend him.*⁶

The first consideration in determining whether to adopt the rule change is whether the schools are appropriately categorized as “low-hazard.” The material provided as part of the petition and the extensive public comment (both anecdotal and otherwise) clearly suggests that schools are no longer low-hazard places of employment. Indeed, the testimony submitted on behalf of the school districts does not attempt to contradict that assessment, and in some cases confirms it.⁷ In offering alternatives and suggesting that recordkeeping is not the best use of limited resources, the statewide employer organizations did not dispute the reality of the hazards involved, although they did not acknowledge it explicitly.⁸

The reasons offered in the record to not adopt the rule are essentially two-fold (and inter-related): the rule will not help to address the problem, and the rule will require the use of limited resources that could be better used to address hazards rather than keeping records. Examples of the first of these arguments can be found in the testimony from the public hearings:

*The use of substantial resources to begin recordkeeping 300 Logs for each establishment will not help schools identify trends or directly lead to employers implementing measures to prevent injuries.*⁹

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*Recordkeeping on 300 Logs for each individual school, in our opinion, will do little to nothing to help most educational employers identify trends. Most, if not all, educational employers already collect injury reports and can best identify trends at the organizational level.*¹⁰

In contrast, testimony in the record from and on behalf of the workers involved suggests a belief that the application of OSHA’s recordkeeping requirements would have a beneficial effect on injury prevention efforts.

*So I am here in support of Oregon's OSHA's proposed rule change removing K-12 schools from its recordkeeping exempt list. I believe better recordkeeping will help students and staff members avoid being hurt in the future.*¹¹

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*I believe the proposed reporting requirement will provide the data needed to address the issue of school violence.*¹²

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⁶Monica McCanna of Burns, Oregon, May 24, 2017, Public Hearing Transcript, p. 17.

⁷See, for example, the testimony of William White, Risk Manager for the Salem-Keizer School District, May 24, 2017, Public Hearing Transcript, pp. 39-40.

⁸Letter from Morgan Allen, Deputy Executive Director of the Confederation of Oregon School Administrators, June 20, 2017 and letter from Loren Sattenspiel, Interim Legislative Director, Oregon School Boards Association, June 20, 2017.

⁹William White, Risk Manager for the Salem-Keizer School District, May 24, 2017, Public Hearing Transcript, p. 42.

¹⁰*Ibid*, p. 51.

¹¹Ruth Creek of Ontario, Oregon, May 24, 2017 Public Hearing Transcript, p. 6.

¹²*Ibid*, p. 8.

*I believe changing the recordkeeping requirements for K-12 schools will benefit the students, their classmates, the teachers and staff. More data will give us more options on how to solve this growing problem.*¹³

*Further, we believe that reporting the injuries under the rule will enable the employer, again, to identify causes and trends of injuries and create corrective actions to eliminate reoccurrence. We absolutely agree with that. And currently we feel that it is necessary, as you have heard from our folks.*¹⁴

Clearly, the ability to identify hazards based on history (even in the absence of statistically significant formal “trends”) is a benefit to an employer when considering what interventions may be necessary. It is certainly true that many employers keep records that go well beyond what the recordkeeping rule requires. However, Oregon OSHA is not persuaded by the argument that such employers – with considerable data readily available – will face a significant burden in complying with the rule. The testimony of both risk management professionals in the public hearing – although they suggested the burdens would be significant – illustrated a familiarity with the injuries and illnesses in their workplaces that is inconsistent with the suggestion that compliance would involve a considerable effort.

For example, one of the district representatives provided a summary he developed over the weekend of what would be reported in his district’s injury and illness logs.

What I will tell you is that I, over the weekend, looked at last calendar year. Say, for instance, if I was going through and trying to create the 37 OSHA 300 Logs for my district, and what I will tell you is that of those 37 locations, 28 of them are schools.

*The information you would get that 300 Log would tell you that ... 13 of our schools would have zero claims or zero incidents listed on their 300 Log. Fifteen would have one to three incidents on their log, and I mean in total. I'm not talking about in SLC or special ed. They would have one to three. Eleven of those schools would have one incident on their 300 Log. And of those 11, only one of them would involve a special ed student attacking the employee. Two of the schools would have two incidents. Only one of those two would involve the situation we're discussing today. Two of the schools would have three incidents on their 300 Log, and of those only one of them would be involving a special learning situation.*¹⁵

Although intended to illustrate the limitations of the data available on the log, the information also illustrates that an employer who is already tracking such information can make adjustments to enable 300 Log reporting without a significant outlay of additional resources.

It may be that certain employers will face meaningful burdens in creating and implementing a recordkeeping system. However, those would be employers who are currently doing little to track incidents and identify trends – and those are precisely the situations where the benefit of implementing the rule would be greatest.

Those questioning the rule’s value note that a statutory requirement adopted in 2013 requires injury recordkeeping by educational employers.¹⁶ In this context, the rule is suggested to be a duplicative requirement that would involve a separate set of records. However, the statutory requirement can clearly be satisfied by the OSHA 300 log recordkeeping, and Oregon OSHA’s requirement would include an enforcement mechanism that appears to be lacking in the existing statutory framework. Again, if employers are already satisfying the 2013 requirement they should be able to meet the Oregon OSHA requirement by fine-tuning their existing approach, rather than developing one from scratch. If they are

¹³*Ibid*, p. 9.

¹⁴Soren Metzger, OSEA, May 24, 2017, Public Hearing Transcript, p.19.

¹⁵David Kruse, Risk Manager for the North Clackamas School District, May 24, 2017, Public Hearing Transcript, pp. 62-63.

¹⁶William White, Risk Manager for the Salem-Keizer School District, May 24, 2017, Public Hearing Transcript, p. 50 .

not satisfying the legislative direction already provided, then they clearly should do so and the OSHA 300 log provides a framework within which such records can be maintained.

Finally, at least one employer representative raised the challenges of reconciling workers' compensation records with OSHA 300 log records, noting the differences between the two approaches.¹⁷ While Oregon OSHA acknowledges that there are modest differences between the two at the level of what is recordable (the differences are somewhat more extensive when it comes to comparing DART reports to compensable claims in the workers' compensation system), Oregon OSHA also notes that "over-reporting" on the OSHA 300 logs does not represent a particular problem. Indeed, if incidents that are not strictly required to be reported are mistakenly tracked and reported, that will make the data source a richer one than it would be otherwise. And schools, unlike some employers, are not competing for bids or otherwise engaging in activities that will make modest "over-reporting" an economically challenging issue.

Again, Oregon OSHA's conclusion is that employers who are keeping extensive injury and illness records will be able to make the necessary adjustments to comply with the recordkeeping requirements. Employers who are not already keeping injury and illness records will face greater burdens with initial compliance – but they, and their employees, also will experience greater benefits.

Discussion of Financial Impacts

Oregon OSHA filed an estimate of the costs of compliance as part of the proposed rulemaking. Several commenters also offered their own observations about the financial impacts.

For example, one large school district estimated that the cost of compliance would require a single employee paid roughly \$60,000 per year to spend at least one-fifth of his or her time doing the work¹⁸. That appears to be broadly consistent with the estimates provided by Oregon OSHA are part of the original rule filing.

Oregon OSHA's estimate of the cost of compliance does not reflect the benefits to be obtained by compliance. At least one commenter suggested that such benefits would be considerable.

That being said, we think that the fiscal impact of this proposed rule change is going to be minimal to school districts.

School districts have very, very large budgets, sometimes up into the millions of dollars. We don't feel that staff and student safety should be a separate line item on a school budget, that it should absolutely be incorporated into every single thing that happens in a school.

So that being said, if it's two and a half hours of additional work with an HR person making \$44 an hour, which we think, in fact, that probably these tasks will be passed on to classified folks, and I guarantee you our classified folks are not making \$44 an hour. So that being said, we don't feel that this would be a huge financial burden to districts and, in fact, in the long run could potentially really help districts because, as you have heard, there are more workers' compensation claims coming from school employees than there are in the nonresidential construction industry. And I'm sure you know this, but there are huge expenses associated with workers' compensation claims, because while these folks are out receiving medical care for their injuries, the school districts must still find recruits, train substitutes, and there is a huge expense

¹⁷William White, Risk Manager for the Salem-Keizer School District, May 24, 2017, Public Hearing Transcript, pp. 54-55.

¹⁸William White, Risk Manager for the Salem-Keizer School District, May 24, 2017, Public Hearing Transcript, p. 59 .

*that goes along with that. So I would argue that this would actually, in the long run, save districts money.*¹⁹

Conclusion

As noted previously, Oregon OSHA begins its consideration of this rule proposal with a strong presumption that industries where there are meaningful hazards should be covered by the recordkeeping requirement. It seems unavoidable, based on the record available, that schools represent such an industry.

The record, rather than providing a basis to overcome this presumption, instead makes it clear that in many situations the lack of recordkeeping has become a barrier to addressing injuries in the workplace, particularly in relation to workplace violence. While Oregon OSHA acknowledges the limitations and imperfections of the recordkeeping requirement, it remains the case that some data is better than no data and that an imperfect system is more effective than a non-existent system. And nothing in this rule would restrict employers in their ability to implement more effective and comprehensive incident tracking systems.

Many of the problems raised in the record will not, admittedly, be addressed by this rulemaking. However, many of them can be better addressed in the presence of information – and with the information sharing requirements found in the Oregon OSHA rule. Indeed, Oregon OSHA notes that the Oregon Legislative Assembly has already made its policy preference clear – schools must keep records of injuries and illnesses. With that statutory provision in place, and with the real risk of harm documented in the present record, it seems clear that adopting the proposed rule is the best course of action.

At the same time, Oregon OSHA shares the conclusion offered by one proponent of the rule:

*We do recognize that this is not the silver bullet, that this is not going to make everything go away. We think that this is a step in the right direction.*²⁰

¹⁹Soren Metzger, OSEA, May 24, 2017, Public Hearing Transcript, pp. 20-21.

²⁰*Ibid*, p. 67.