J. W. Szcygielski
Employee Relations Manager
WAUKEGAN PLANT

Johns-Manville

Internal Correspondence

To: Plant Managers (U.S. only)
Employee Relations Managers (U.S. only)
Division General Managers
General Production Managers
Contract Unit Managers
C. U. Culrer, M.D., Waukegan
R. M. Liss, M.D., Manville

Date: August 15, 1980

From: W. B. Reitze 1-06, Ext. 3115

CC:

P. Fotin, M.D.	1-06	N. J. Young	1-06
W. R. Paul, M.D.	1-06	N. Marsh	2-18
J. Lonnquist	PAO		

Subject: OSHA REGULATIONS EFFECTIVE AUGUST 21, 1980, ACCESS TO EMPLOYEE EXPOSURE AND MEDICAL RECORDS

Attached are:

(1) A copy of the new regulations on the above subject published in the Federal Register. (Actual regulations begin on page 35277 and run through page 35280. Other pages of the attachment contain the preamble and backup data.)

(2) An attempt at summarizing and interpreting same.

As you can see, the regulation is an extremely lengthy document. It is difficult reading and even more difficult to interpret. Since the review and interpretation does not cover every paragraph in the regulation, I would urge each and every one of you to read this document carefully.

It is very important that an appropriate notice, as discussed herein, be posted in conspicuous places in the plant where the employees are most likely to see it. A memo to the file, stating that this information has been posted and the employees have thereby been notified, should also be written and filed. It is important to ensure that all new employees be notified of this information and that a copy of the regulation is on file for their inspection. The notice should contain the name of the person responsible for keeping the document, where and when that person can be reached. This notification document should be permanently placed on a bulletin board.

I would further suggest that copies of this document, with perhaps some notations specifically aimed at clarifying a situation which may be unique at a plant location, be given to all persons in Employee Relations or the Medical Departments, including nurses or other health professionals, as well as physicians. A distribution to our contract physicians of the document has already been made by our Medical

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This discussion and comment section was prepared by me and reviewed by W. R. Paul, M.D., Medical Director, and Helen Marsh of our Legal staff. I would suggest that any general questions on the regulations be addressed to me, and any problems dealing with medical matters, including medical ethics, be referred to W. R. Paul, M.D.

Attachments:

1. "Access to Employee Exposure and Medical Records," Federal Register, Vol. 45, No. 102, May 23, 1980.

2. Summary and Interpretation

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Section 1910.20 - ACCESS TO EMPLOYEE EXPOSURE AND MEDICAL RECORDS

(a) *Purpose.* The stated purpose of this section is to provide "employees" and their designated representatives, as well as representatives of the Assistant Secretary, that is, OSHA inspectors, the right to examine all exposure records as well as employee medical records. The burden for complying with this regulation is placed upon the employer and it is his responsibility to see that all physicians and health care personnel in his employ, either full-time or contract, comply with this regulation. Also, this section states that no parts of the regulation are to interfere with existing legal or ethical obligations regarding physician/patient relationships. While we anticipate that physicians may, in certain circumstances, feel that there is a conflict between the regulation and their ethical or legal obligations, every effort must be made to adhere to the requirements of the regulation without jeopardizing physician/patient confidentiality.

(b) *Scope and application.* The regulations apply to general industry--that would be all manufacturing operations as well as construction sites (contract units).

(2) The regulation applies to "all employee exposure and medical records and analyses thereof." In our case, this would mean all industrial hygiene records, all medical records, as well as the analyses of both categories. (See Section 1910.20 (c)(2).) The full meaning of the word "analyses" as used in this section is not clear, but I would suspect that their interpretation would include comments, conclusions or summaries drawn from these records. This section further broadens the coverage to include even those records that are not related to specific occupational safety and health standards.

(3) This section indicates that employee exposure and medical records, whether performed by in-house teams or performed by outside contractors, are subject to the regulations. This includes outside contract physicians and any outside industrial hygiene contract work.

(c) *Definitions.*

(1) It is important to note that the word "access" means the right to examine and copy.

(2) The word "analysis" is said to include any compilation of data or research statistics, or any study based on any of the individual employee exposure or medical records. This most certainly would include any research work done either in-house or by outside investigators. In the case of research work such as epidemiology studies, morbidity or mortality compilations, or long-range industrial hygiene surveys or projections, these records would not be open for inspection until

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the work has been completed. Work of this nature would only be considered completed when the work is in a form suitable for publication. Any prepublication preliminary reports that are transmitted to management groups outside the HS&E department could also be construed as falling under this right of access. It is extremely important that any request of this type of information should be promptly forwarded to this office for action.

(3) Designated representative. Any individual to whom an employee gives written authorization may exercise the right to access. Note: Written authorization from the employee is not needed in the case of a recognized or certified collective bargaining union agent for review of employee exposure records or analyses of these medical records. A certified bargaining agent or legal representative of an incompetent or deceased employee must have written permit from the employee or his legal representative to inspect individual medical records.

(4) Employee. This means a current or former employee, as well as a legal representative of an incompetent or deceased employee.

(5) Employee exposure record. This term is interpreted very broadly to include all workplace monitoring or measuring and the related analytical methodologies, that is, those analytical methods used by the industrial hygiene laboratories. It also includes listing of raw materials, material safety data sheets, and results of biological monitoring.

(6) Employee medical record. This is interpreted to include all the following medical and employment histories, results of medical examinations, preemployment, periodic and special. It includes laboratory tests, including x-ray examinations. It also includes medical opinions, diagnoses, progress notes and recommendations, as well as treatments and employee medical complaints. It does not include such reports as health insurance claims and alcohol and drug abuse assistance programs if these records are maintained separately and individual employees are not identifiable to Employee Relations personnel through payroll or Social Security numbers. If records in these two categories are merged with the employee's general medical records or if they are identifiable by plant personnel through payroll or Social Security numbers, then access must be permitted.

(7) Employer. Employer means the former employer as well as the current employer.

(8) Exposure. This definition includes any potentially harmful agent that an employe may come in contact with during his work day. Groups of exposure are inhalation, ingestion, skin contact, absorption, etc.

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(9) & (10) These sections are rather clear, but it should be noted under (G) that the written authorization expires in one year.

(11) Toxic substance or harmful physical agent. This broad definition includes almost any agent that we use as a raw material in our plants, plus such other physical agents as noise, heat, cold, vibration, radiation. "Repetitive motion" is also included. This term, I am sure, is going to be open to many definitions, particularly in light of the recent Workers' Compensation Awards Program allowing generous settlements for alleged damage due to repetitive motions.

(d) *Preservation of records.* In almost all cases, all records must be preserved for at least 30 years after termination of the individual's employment. It is well to note that there are no prescribed methods for retaining employee exposure and medical records.

(e) *Access to records.* In all cases, records are to be produced in a timely manner, but in no instance, no later than 15 working days after request. This 15-day period will allow the plant time to consult HS&E or the Legal Department if necessary in a particular instance. A copy of the requested record must be supplied to the employee or his designated representative free of charge, or copying devices must be made available to the employee or his representative for use free of charge. The option contained in (c) to give the original to the employee and permit him to take it away and copy it should not be exercised by any of our locations. Once a single copy of a record has been provided to an employee or his designated representative, a reasonable charge may be assessed for additional copies.

(2) Employee and designated representative access. This section includes specifically which employee exposure records are to be made available. Included are employee's past or present exposure to toxic substances or physical agents. A request may also be made for exposure records of other employees with similar duties and working conditions. An employee also has the right to request exposure records for workplaces in which he has been offered a future assignment.

(ii) Employee medical records.

(C) This section points out several options which physicians may recommend as alternatives to employees who request access to their medical records. The first option indicates that the employee or designated representative may consult with the physician for purposes of reviewing and discussing the records requested. The second option for the employee is that he will accept a summary in lieu of records, and the third, the physician may recommend to the employee or designated representative

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that the records be released only to designated persons such as a family physician. It should be noted that these are employee options and, while the employer physician may make recommendations, the options belong to the employee.

(D) The only exception to this provision is where the employee medical record contains notations relating to a specific terminal illness or a psychiatric condition, and the physician believes that access to the notations could prove harmful to the employee's health. In such a case, the information must be released to the employee's designated representative, who, in turn, is free to disclose the information to the employee.

(E) It should be emphasized that the provision allowing for deletions in medical records is extremely narrow and relates only to confidential communications relating to an employee made to a physician by others.

(iii) Analysis using exposure or medical records.

(A) Specifically requires each employer to furnish analysis where employee exposure data or medical records were used as the basis for the analysis.

(B) Access to analytical information drawn from personal exposure or medical records does have to be furnished; only the specific details which would identify specific employees can be deleted.

(3) OSHA access. Also see Section 1913.10.

(i) This section provides for immediate access by representative of the Assistant Secretary of Labor (OSHA inspectors) to all employee exposure and medical records, as well as analyses of same.

(ii) Any OSHA orders seeking personally identifiable employee medical information must be posted for 15 working days.

(f) *Trade secrets.*

(1) To the extent that the employer feels there are trade secrets involved, he may delete such trade secrets from the requested records. If such deletion makes the records useless for determining health conditions, the employer must furnish supplemental data.

(2) This trade secret provision cannot be used by the employer to restrict access to chemical or physical agent identities.

(3) This provision attempts to protect trade secret information when it is required to be given to an employee or his designated agent. In all such instances, a confidentiality agreement must be obtained from an employee prior to granting.

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access. Practically, this is a useless provision, because under the Freedom of Information Act, sooner or later all data is leaked.

(g) *Employee information.*

(1) This provision directs the employer to furnish certain information to the employee before he begins to work at a specific location, and annually thereafter. Such information to be furnished to the employee includes knowledge of the potentially toxic substances handled, as well as the availability of records and the employee's right of access to the records. A notice should be posted stating very clearly that the access regulations are available for inspection by contacting a certain person at a certain place and time. The notice should also contain a general summary outlining the content of the regulation. This notice should be posted in a conspicuous place on the bulletin board. In the event of new employees, a copy of the bulletin should be presented to them at the time of their employment.

(2) We must make available copies of this regulation to all our employees. We interpret this to mean that copies of the regulation are available for their discussion. It is not our intent to furnish each employee with the many pages that are attached to this document.

(h) *Transfer of records.* This section deals with retention of employee exposure and medical records. In the event of a plant closure, all employees must be notified three months in advance that the plant is closing and they have the right of inspecting their exposure and medical records. This notification applies only to those plants that are ceasing to do business. If a particular plant is either sold to another, or if only a single department is being shut down within a plant, this notification is not required.

(j) *Effective date.* This regulation becomes effective August 21, 1980. It is mandatory that we notify every employee within 60 days from the August 21, 1980, date, by the methods described above, that the regulation is now in effect. Notification of new employees must begin on August 21.

There are a number of other items included in the regulation which are certainly worth a few lines of explanation:

1. It must be reemphasized that lay personnel, including Employee Relations managers and staffs, are not to review actual medical records. Their need for medical information should be furnished

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through the physician at the location. This is a very important point that must not be overlooked.

2. In the Appendix of the attached regulation, there are recommended release forms for employers to use prior to making any records available to employees and their representatives. These recommended forms should be reviewed and great care should be taken to have the employee be very specific regarding what information he wishes to have released. If the release is couched in broad terms, such as all records, the employee should be made aware of the fact that his complete record will then be laid open for inspection. If he wishes to limit inspection of his records to narrow parameters, he may do so. Here, again, medical personnel should make every effort to determine the specific area of the record which the employee wishes to have divulged to other sources.

3. This regulation does not deal with the sister agency, NIOSH. NIOSH has its own regulations and is not affected by this particular regulation.

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