



March 30, 2010

Occupational Safety and Health Administration
OSHA Docket Office
Docket Number OSHA-2009-0044
U. S. Department of Labor
Room N-2625
200 Constitution Avenue, NW
Washington, D. C. 20210

**Re: Occupational Injury and Illness Recording and Reporting Requirements; Docket
No. OSHA-2009-0044**

Dear Sir or Madam:

The Food Marketing Institute (FMI) respectfully submits the following comments in response to the proposed rulemaking by the Occupational Safety and Health Administration (OSHA) regarding Occupational Injury and Illness Recording and Reporting Requirements as published in the Federal Register on January 29, 2010.

By way of background, FMI is a national trade association conducting programs in public affairs, food safety, research, education and industry relations on behalf of its 1,500 member companies – food retailers and wholesalers – in the United States and around the world. FMI's U.S. members operate approximately 26,000 retail food stores and 14,000 pharmacies. Their combined annual sales volume of \$680 billion represents three-quarters of all retail food sales in the United States. FMI's retail membership is composed of large multi-store chains, regional firms and independent supermarkets. Its international membership includes 200 companies from more than 50 countries. FMI's associate members include the supplier partners of its retail and wholesale members.

FMI member companies employ some four million Americans who are engaged in the transportation, distribution and sales of food and grocery products to our nation's consumers. On a routine, daily basis, our industry provides consumers with a variety and choice of high quality, safe products at prices that are the envy of the world. The supermarket industry is proud of its outstanding record in the food offerings it makes available to consumers and for the contributions our members make to their local communities. In serving consumers, our employees and associates are clearly our most important assets. Their health and safety is of utmost importance as evident by

the major emphasis and commitment that the supermarket industry has made over the years to reduce injuries and illnesses of all types.

For almost two decades, FMI has been developing educational materials, sponsoring discussion forums and conferences for our retail and wholesaler members in an effort to assist them in preventing and reducing injuries at their facilities. Most recently, FMI and our industry initiated a number of programs to educate our associates on prevention measures in anticipation of the 2009 – 2010 Flu Season and H1N1 which included outreach materials for consumers and the availability of H1N1 flu vaccines in supermarket pharmacy departments.

Supermarket Commitment to Reduce Injuries

Without question, the supermarket industry has made measurable progress in our continuing commitment to reduce workplace injuries. We are proud of the fact that injuries in the grocery store sector have been reduced by approximately one-third over the past decade and a half.¹ Many FMI member companies report that not only have they reduced injuries, but the severity of the injuries has also diminished.

As OSHA readily knows, FMI and its members have worked closely in the past to further reduce injuries in the workplace. OSHA acknowledged this ongoing effort when the agency issued its “Ergonomics for the Prevention of Musculoskeletal Disorders: Guidelines for Retail Grocery Stores” in May of 2004. As OSHA noted in the Executive Summary to those Guidelines: “The purpose of these voluntary guidelines is to build on the progress that the grocery store industry has made in addressing causes of work-related injuries and illnesses”. FMI considers the Guidelines to be a useful resource and reference point for our industry as we strive to reduce and prevent these types of injuries from occurring in the future. FMI and our members would again welcome the opportunity to partner with OSHA in the development of new outreach training and education programs that would be specifically tailored for supermarkets and grocery wholesalers based on new information, scientific studies and technology advancements that have been published and developed since 2004.

Moreover, supermarkets and wholesalers have told FMI that when they need to identify problems in the workplace which need to be addressed they would not necessarily look at injury data that they have reported to OSHA. Instead, they look at their workers’ compensation claims to quickly focus on the cause of the injury and how it can be prevented in the future.

OSHA Proposal for MSDs

OSHA is seeking to revise its Occupational Injury and Illness Recording and Reporting (Recordkeeping) regulations and to restore a column to the OSHA 300 Log that employers would

¹ Food Marketing Institute, *Suggestions for Ergonomic Improvement of Scanning Check Stand Designs*.

use to record work-related musculoskeletal disorders (MSD). According to the agency, a 2001 Recordkeeping final regulation included an MSD column, but the requirement was deleted before the regulation became effective. This new rulemaking further proposes a definition for MSDs that is identical to the definition of MSDs that was included in the 2001 final Recordkeeping rule. Additionally, OSHA is proposing to require employers to include the total number of MSDs on the OSHA 300A form that they use to annually summarize their work-related injuries and illnesses. Although OSHA dropped the MSD provisions back in 2003, the agency now believes that information generated from the MSD column will improve the accuracy and completeness of national occupational injury and illness statistics and argues that this is appropriate justification for restoring the Recordkeeping regulation. Moreover, OSHA believes that MSD information will help the agency in effectively targeting its inspections, outreach, guidance and enforcement efforts to address workplace MSDs.

No Consensus on MSD Definition

FMI strongly disagrees with the above enumerated reasons that OSHA has put forth purporting to justify restoring a recordkeeping regulation for MSDs. Most importantly, OSHA's proposal completely ignores final recommendations issued by the agency's National Advisory Committee on Ergonomics (NACE). These recommendations are intended to assist OSHA in the development of future guidelines, outreach and assistance as well as research. For example on the issue of a definition for MSDs, NACE stated, "The pursuit of a single definition of MSDs has not reached consensus. The numerous MSD definitions cover a host of conditions, limited only by those doing the defining, none of which directly help to reduce the number of such disorders. OSHA should continue the development of guidelines independent of any final definition of MSDs."² FMI strongly concurs with this recommendation from NACE. With no consensus on a single definition for MSDs among the medical community, scientists, the employer risk management community, human resource experts and even the federal government, FMI seriously questions the wisdom, benefit, logic or desirability of promulgating a regulation that includes a single definition for MSD, especially one that was written back in 2001.

Compounding the problems and confusion that will arise from requiring employers to report MSD work-related injuries is the criteria OSHA sets out for employers to be in compliance with the proposed rule. An employer must first make a determination about whether an MSD is work-related and therefore subject to the recordkeeping requirement. Then the employer must determine whether the injury is a work-related new case and not a reoccurrence and that it results in medical treatment, job transfer or restrictions or days away from work. Then the employer must take into account whether the employee is experiencing "pain, tingling, burning, numbness or any other subjective symptom of an MSD" in order for the employer to conclude that the injury should be tallied in the MSD column. Such a process is extremely complicated and time consuming, and in

² National Advisory Committee on Ergonomics, *NACE Committee Recommendations*, <http://www.osha.gov/SLTC/ergonomics/recommendations.html> (17 Nov 2004).

many instances would require the employer to refer the employee to a physician in order to make an accurate diagnosis, including taking the individual's medical history in order to assess if the MSD is worked-related. Involving a physician will be expensive and this potential cost is not reflected in OSHA's economic impact analysis of its rulemaking. In addition, this whole process raises serious privacy concerns. It is a given that many associates will not want an employer to inquire as to what they do on their own private time away from the workplace.

Complicating the matter is that when an employer refers an employee to a physician, it is very possible the physician will not be able to determine if the injury is work-related or due to other factors outside the work environment. The medical community and ergonomics experts remain divided not only over defining MSDs but also the factors that cause or contribute to MSDs. Doctor Peter Amadio, MD of the Mayo Clinic College of Medicine, who served on NACE, stated there is a strong need for much more multidisciplinary research looking at all the components of this complicated subject.

MSDs Are Not Always Work-Related

As pointed out by NACE in its final recommendations to OSHA, "MSDs are a consequence of exposures to risk factors of a multi-factorial nature. Although the exact cause of a specific MSD may not be known, and the precise effectiveness of an intervention may not be predictable, the objective of ergonomics is to reduce, to a practical minimum, the demands, such as physiological, cognitive, behavioral, of doing the work by controlling these exposures. To this end, a number of tools and guidelines may be useful."

NACE further noted in its recommendations that "it must be recognized that there are non-occupational components, such as general health, non-work, leisure, play and physical daily living activities that also contribute to the development and occurrence of MSDs. To reach outside the work arena, these components are best addressed by educating the workforce concerning non-work hazards." Thus, FMI sees no measurable benefit to be gained by requiring employers to report injury information that may not be accurate because other factors outside of the workplace can and do contribute to an MSD injury. FMI believes that our members and their employees would derive greater benefit not from additional recordkeeping requirements but by having OSHA engaged in new studies, research, safety education programs, outreach and technology advancements among other things that would enhance safety in both the workplace and away from the workplace. The need for additional studies and research was also recommended by the NACE Research Workgroup.

OSHA Already Collects MSD Data

To the extent that OSHA already captures injury and illness data by requiring employers to complete three different forms (Form 300, Form 300A and Form 301), additional recordkeeping for MSDs is clearly unnecessary, burdensome, and potentially expensive. On this point OSHA stated

in a June 30, 2003 Trade News Release that “OSHA concluded that an additional recordkeeping column would not substantially improve the national injury statistics, nor would it be of benefit to employers and workers because the column would not provide additional information useful to identifying possible causes or methods to prevent injury.” OSHA went on further to say “The agency also determined that useful information about MSD cases is available from currently published statistics. Current Bureau of Labor Statistics (BLS) national statistics already include comprehensive information about ergonomic-related injuries that result in days away from work, the number and incidence rate of these disorders, and detailed information on the nature of MSD injuries and illnesses. In addition, the agency believes such information is currently available for individual establishments in the case description section of the OSHA 300 log and in the 301 Incident Report.”³

OSHA has acknowledged on its website under Frequently-Asked Questions that injuries and illnesses related to MSDs have consistently declined over the last ten years. “For example, on a national basis, rates for carpal tunnel injuries with days away from work have gone down 39 percent from 1992 to 1999. For the same period, rates for strains and sprains with days away from work have also gone down by 39 percent, and rates for back injuries with days away from work have gone down by 45 percent.” This overall reduction in injuries further underscores the fact that additional MSD reporting and recordkeeping is not needed.

While the number of injuries and illnesses are clearly trending downward as acknowledged by OSHA, some critics including the General Accountability Office in a report issued in November of 2009 believe employers are under-reporting of injuries and illnesses. FMI supports the accurate reporting of illnesses and injuries, but we are concerned that the proposed MSD recordkeeping rule, as currently constructed, would result in under-reporting of injuries and illnesses. Rather than targeting establishments for alleged under-reporting, if such is the case, FMI recommends and urges OSHA to educate and assist companies in properly reporting injury and illness data, especially smaller businesses, such as independent grocery stores and others who may not be aware of their obligations under the law.

In summary, FMI urges OSHA not to promulgate this regulation. A new, burdensome, recordkeeping requirement will do nothing to reduce the incidents of injuries and illnesses in the workplace. Moreover, the collection of such data is likely to be very expensive and time consuming with employers having to rely on health care providers to make a diagnosis that the MSD injury was solely work-related. This process would raise serious privacy issues that would need to be addressed. Rather than issuing a final rule relating to MSDs, supermarkets and food wholesaler would welcome the opportunity to partner with OSHA in activities and programs that will help to further reduce injuries in the workplace.

³ U.S. Department of Labor, Occupational Safety and Health Administration, *OSHA Issues Final Rule On Recordkeeping Form*, http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_id=10281&p_table=NEWS_RELEASES (30 Jun 2003).

The supermarket industry looks forward to continued progress in reducing injuries at both store level and in our distribution centers. FMI appreciates the opportunity to submit these comments and requests the agency give them full consideration.

Sincerely,

A handwritten signature in black ink that reads "Leslie G. Sarasin". The signature is written in a cursive, flowing style.

Leslie G. Sarasin, Esq., CAE
President and CEO