



# Independent Lubricant Manufacturers Association

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October 28, 2015

*Via Electronic Mail*

The Honorable Dr. David Michaels  
Assistant Secretary  
U.S. Department of Labor  
Occupational Safety and Health Administration  
Room S-2002  
200 Constitution Avenue, NW  
Washington, DC 20210

**Re: Docket No. OSHA-2015-0006 Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness; Notice of Proposed Rule**

Dear Dr. Michaels:

The Independent Lubricant Manufacturers Association ("ILMA" or "Association") submits these comments on the Occupational Safety and Health Administration's ("OSHA" or "Agency") proposed rule regarding an employer's continuing obligation to make and maintain an accurate record of each recordable injury and illness.

For the reasons set forth below, ILMA objects and disagrees with OSHA's clarification regarding employer's reporting duties, and the Association respectfully requests that the Administration withdraw the proposed rule.

## **Introduction of ILMA**

ILMA is national trade association with 332 member companies that is headquartered in Alexandria, Virginia. ILMA's manufacturing members blend, compound and sell over 25 percent of the United States' lubricant needs and over 75 percent of the metalworking fluids utilized in the country. Independent lubricant manufacturers are by definition neither owned nor controlled by companies that explore for or refine crude oil to produce lubricant base stocks or that produce chemical additives. Base oils are purchased from chemical refiners, who are also competitors in the sale of finished products. Additives are purchased from suppliers, who also may be competitors in the sale of finished products. ILMA members succeed by processing, producing and distributing high-quality, often specialized, lubricants.

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## **Background**

OSHA makes clear that its proposed rulemaking is in direct response to the decision of the United States Court of Appeals for the District of Columbia Circuit in *AKM LLC v. Sec’y of Labor*, 675 F.3d 752 (D.C. Cir. 2012) where the court articulated that the Agency may not cite an employer for failure to make a record of a work-related injury or illness beyond the six month limitations period proscribed by the “*Occupational Safety and Health Act of 1970*” (“OSHA Act”). Congress was clear and unambiguous in its intent by explicitly outlining a six-month limitations period. From ILMA’s vantage point, it appears OSHA is trying to fashion its own limitations period with this proposed rule that is in direct conflict with the plain language of the OSHA Act, as well as the appellate court’s decision that was not appealed by the Agency to either the full D.C. Circuit or the U.S. Supreme Court.

## **The Proposed Rule Imposes an Undue Burden on Small Businesses**

The proposed rule creates a logistically impracticable guideline for small businesses. The OSHA Act currently requires employers to make and record a work-related injury or illness within seven days of the incident and then maintain a record of that incident for five years. The vast majority of ILMA’s manufacturing members are small businesses under the Small Business Administration’s size standard definition, and this proposed affirmative obligation to record a workplace incident, potentially years after its occurrence, imposes an onerous standard on those businesses. This is not to say that ILMA members do not fully support safe and supportive work environments for their employees; the Association’s members have both a financial and moral interest to ensure that their work areas are safe and conducive to productivity. ILMA firmly believes that the current statutory obligation provides a workable standard with specific deadlines to report and maintain records of incidents and illnesses. This proposed regulation muddies the waters significantly and unnecessarily.

The additional requirements set out in OSHA’s proposed rule may potentially be workable for bigger companies with regulatory compliance departments; however, small to medium-sized businesses will be overly burdened by this regulation, if promulgated as proposed. Existing regulatory standards ensure that U.S. businesses are held accountable for incidents that occur within their facilities and provide the appropriate level of worker protection to those businesses’ employees. The proposed rule by OSHA would force small businesses to divert scarce resources needlessly as the current reporting regulations already achieve the desired results.

## **The Proposed Rule is Beyond OSHA’s Authority**

The “Administrative Procedures Act” requires that upon judicial review of a rule, the “reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, *authority*, or limitations.”

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The OSHA Act provides a clear requirement to make and report illnesses and injuries and a clear limitations period. In its proposed rule, OSHA is attempting to override definitive statutory language that expressly provides for a six-month limitations period in an effort to substitute the Agency's own judgment of a much longer limitations period of five years. While it may be an interesting reading of the statute and a novel regulatory approach to impose an "ongoing duty," the court in *Volks* already ruled on the issue and the plain language of the statute clearly indicates that OSHA is overstepping its legal authority with this proposed rule.

### **Conclusion**

ILMA appreciates this opportunity to submit comments to OSHA regarding an employer's ongoing obligation to make and maintain an accurate record of each reportable injury and illness. For the reasons set forth above, ILMA respectfully requests that OSHA withdraw the proposed rule.

Sincerely,

A handwritten signature in black ink, appearing to read "Holly Alfano". The signature is fluid and cursive, with the first name "Holly" being more prominent than the last name "Alfano".

Holly Alfano  
Executive Director

cc: ILMA Board of Directors  
Jeffrey L. Leiter, Esq.  
Daniel T. Bryant, Esq.