



TOSHA INSTRUCTION

TENNESSEE DEPARTMENT OF LABOR & WORKFORCE DEVELOPMENT
DIVISION OF OCCUPATIONAL SAFETY & HEALTH

DIRECTIVE NUMBER: CPL-TN 02-02-020
(CPL-TN 2-2.22)

EFFECTIVE DATE: March 1, 1982

SUBJECT: Access To Employee Medical Records

- A. **PURPOSE:** To set forth policy and procedures concerning access to employee medical records.
- B. **STANDARD REFERENCED:** 29 CFR 1910.20, Access to Employee Exposure and Medical Records (final standard as published in the Federal Register, Volume 45, No. 102, on Friday, May 23, 1980 (45 FR 35277-35281) and adopted by TDL Rule 0800-1-1-.14(d)1.).
- C. **DOCUMENT REFERENCED:** This instruction incorporates the provisions of 29 CFR 1913 - Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records, 29 CFR 1913.10, as published in the Federal Register, Volume 45, No. 102, on Friday, May 23, 1980 (45 FR 35294-35297), into the Tennessee Occupational Safety and Health Program.
- D. **BACKGROUND:**
1. OSHA promulgated 29 CFR 1913.10 to protect the substantial personal privacy interests inherent in identifiable medical records while also permitting beneficial use of such records to be made for occupational safety and health purposes. The provisions of 29 CFR 1913.10 regulate the manner in which OSHA will seek access to employee medical records, and how the medical information will be protected once in the agency's possession.
 2. In order to maintain "as effective as" status and to provide comparable protection to personal privacy interests, 18(b) State Plans must contain provisions. While it would probably be best to promulgate a rule comparable to 29 CFR 1913.10 under TDL Rules, Chapter 0800-1-4, the State's statutory authority to do this is questionable. Since no specific statutory authority could be determined, since such authority is a legal requirement for promulgation of a rule, and since the adoption of the policy and procedures set forth in 29 CFR 1913.10 is considered a necessity, they are hereby adopted in this instruction.
- E. **GENERAL POLICY:** Access to employee medical records will in certain circumstances be important to the Division of Occupational Safety and Health's performance of its statutory functions. Medical records, however, contain personal details concerning the lives of employees. Due to the substantial privacy interests involved, authority of the Division of Occupational Safety and Health to gain access to personally identifiable employee medical information will be exercised only after the agency has made a careful determination of its need for this information, and only with appropriate safeguards to protect individual privacy. Once this information is obtained, agency examination and use of it will be limited to only that information needed to accomplish the purpose for access. Personally identifiable employee medical information will be retained by the Division of Occupational Safety and Health only for so long as needed to

accomplish the purpose for access, will be kept secure while being used, and will not be disclosed to other agencies or members of the public except to the U. S. Department of Labor, Occupational Safety and Health Administration (OSHA), the U. S. Department of Health and Human Services, National Institute for Occupational Safety and Health (NIOSH), or in narrowly defined circumstances. This instruction establishes procedures to implement these policies

F SCOPE AND APPLICATION:

1. This instruction applies to all persons, agencies, organizations, etc. who need access to personally identifiable employee medical information under a contract to perform services or under an inter-agency agreement with the Division of Occupational Safety and Health and, except as provided in paragraphs F.3. - F.6. below, this instruction applies to all requests by the Division of Occupational Safety and Health personnel to obtain access to records in order to examine or copy personally identifiable employee medical information, whether or not pursuant to the access provisions of occupational safety and health standard 29 CFR 1910.20(e) as adopted by Rule 0800-1-1-.14(d)1.
2. For the purposes of this instruction, "personally identifiable employee medical information" means employee medical information accompanied by either direct identifiers (name, address, social security number, payroll number, etc.) or by information which could reasonably be used in the particular circumstances indirectly to identify specific employees (e.g., exact age, height, weight, race, sex, date of initial employment, job title, etc.).
3. This instruction does not apply to Division of Occupational Safety and Health access to, or the use of, aggregate employee medical information or medical records on individual employees which is not in a personally identifiable form. This instruction does not apply to records required by TDL Rules in Chapter 0800-1-3, to death certificates, or to employee exposure records, including biological monitoring records treated by 29 CFR 1910.20(c)(5) as adopted by Rule 0800-1-1-.14(d)1. or by specific occupational safety and health standards adopted by rules contained in Chapters 0800-1-0 and/or 0800-1-1 as exposure records.
4. This instruction does not apply where Division of Occupational Safety and Health personnel conduct an examination of employee medical records solely to verify employer compliance with the medical surveillance recordkeeping requirements of an occupational safety and health standard adopted by a rule in Chapters 0800-1-0 and/or 0800-1-1, or with 29 CFR 1910.20 as adopted by Rule 0800-1-1-.14(d)1. An examination of this nature shall be conducted on-site and, if requested, shall be conducted under the observation of the recordholder. The Division of Occupational Safety and Health personnel shall not record and take off-site any information from medical records other than documentation of the fact of compliance or non-compliance, except as provided in paragraph K.
5. This instruction does not apply to Division of Occupational Safety and Health access to, or the use of, personally identifiable employee medical information obtained in the course of litigation.

6. This instruction does not apply where a written directive by the Director, Division of Occupational Safety and Health, authorizes appropriately qualified personnel to conduct limited reviews of specific medical information mandated by an occupational safety and health standard adopted by Chapters 0800-1-0 and/or 0800-1-1, or of specific biological monitoring test results.
7. Even if not covered by the terms of this instruction, all medically related information reported in a personally identifiable form shall be handled with appropriate discretion and care befitting all information concerning specific employees. There may, for example, be personal privacy interests involved which militate against disclosure of this kind of information to the public.

G. RESPONSIBLE PERSONS:

1. Director. The Director, Division of Occupational Safety and Health, shall be responsible for the overall administration and implementation of the procedures contained in this instruction, including making final determinations concerning:
 - a. Access to personally identifiable employee medical information (paragraph H. of this instruction), and
 - b. Inter-agency transfer or public disclosure of personally identifiable employee medical information (paragraph R. of this instruction).
2. TOSHA Medical Records Officer. The Chief of Health Compliance of the Division of Occupational Safety and Health is designated as the official with experience or training in the evaluation, use, and privacy protection of medical records to be the TOSHA Medical Records Officer. The TOSHA Medical Records Officer shall report directly to the Director, Division of Occupational Safety and Health, on matters concerning this instruction and shall be responsible for:
 - a. Making recommendations to the Director as to the approval or denial of written access orders (paragraph H. of this instruction),
 - b. Assuring that written access orders meet the requirements of paragraphs H.2. and H.3. of this instruction,
 - c. Responding to employee, collective bargaining agent, and employer objectives concerning written access orders (paragraph J. of this instruction),
 - d. Regulating the use of direct personal identifiers (paragraph K. of this instruction),
 - e. Regulating internal agency use and security of personally identifiable employee medical information (paragraphs L.-N. of this instruction),
Assuring that the results of agency analyses of personally identifiable medical information are, where appropriate, communicated to employees (paragraph O. of this instruction),

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- g. Preparing an annual report of the Division of Occupational Safety and Health's experience under this rule (paragraph P. of this instruction), and
 - h. Assuring that advance notice is given of intended inter-agency transfers or public disclosures (paragraph Q. of this instruction).
3. Principal TOSHA Investigator. The Principal TOSHA Investigator shall be the employee of the Department of Labor, Division of Occupational Safety and Health, in each instance of access to personally identifiable employee medical information who is made primarily responsible for assuring that the examination and use of this information is performed in the manner prescribed by a written access order and the requirements of this instruction (paragraphs H.-Q. of this instruction). When access is pursuant to a written access order, the Principal TOSHA Investigator shall be a compliance officer or consultant filling a position classified as Industrial Hygienist 1, 2, 3, 4, or 5.

H WRITTEN ACCESS ORDERS.

1. Requirement for Written Access Order. Except as provided in paragraph H.4. below, each request by a compliance officer or consultant of the Division of Occupational Safety and Health to examine or copy personally identifiable employee medical information contained in a record held by an employer or other recordholder shall be made pursuant to a written access order which has been approved by the Director, Division of Occupational Safety and Health, upon the recommendation of the TOSHA Medical Records Officer. If deemed appropriate, a written access order may constitute, or be accompanied by, an administrative subpoena issued by the Commissioner of Labor pursuant to T.C.A. § 50-521 or an administrative warrant obtained, issued, and served pursuant to T.C.A. §§ 50-601 - 50-608.
2. Approval Criteria for Written Access Order. Before approving a written access order, the Director, Division of Occupational Safety and Health, and the TOSHA Medical Officer shall determine that:
 - a. The medical information to be examined or copied is relevant to a statutory purpose and there is a need to gain access to this personally identifiable information,
 - b. The personally identifiable information to be examined or copied is limited to only that information needed to accomplish the purpose for access, and
 - c. The personnel authorized to review and analyze the personally identifiable medical information are limited to those who have a need for access and have appropriate professional qualifications.
 - d. Also, when the written access order is in the form of or accompanied by an administrative subpoena or warrant, the rules and/or statutory requirements governing such subpoenas or warrants are complied with in addition to meeting the criteria set forth in paragraphs H.2.a., b., and c. above.

3. Content of Written Access Order. Each written access order shall state with reasonable particularity:
 - a. The statutory purpose for which access is sought,
 - b. A general description of the kind of employee medical information that will be examined and why there is a need to examine personally identifiable information,
 - c. Whether medical information will be examined on-site, and what type of information will be copied and removed off-site,
 - d. The name, office address, and office phone number of the Principal TOSHA Investigator and the names of any other authorized persons who are expected to review and analyze the medical information,
 - e. The name, office address, and phone number of the TOSHA Medical Records Officer, and

The anticipated period of time during which the Division of Occupational Safety and Health expects to retain the employee medical information in a personally identifiable form.

4. Special Situations. Written access orders need not be obtained to examine or copy personally identifiable employee medical information under the following circumstances:
 - a. Specific written consent. If the specific written consent of an employee is obtained pursuant to 29 CFR 1910.20(e)(2)(ii) as adopted by Rule 0800-1-1-.14(d)1. and the Division of Occupational Safety and Health or an employee thereof is listed on the authorization as the designated representative to receive the medical information, then a written access order need not be obtained. Whenever personally identifiable employee medical information is obtained through specific written consent and taken off-site, the Principal TOSHA Investigator shall be promptly named to assure protection of the information, and the TOSHA Medical Records Officer shall be notified of this person's identity. The personally identifiable medical information obtained shall thereafter be subject to the use and security requirements of paragraphs L.-Q. of this instruction.
 - b. Physician consultations. A written access order need not be obtained where a physician under contract with the Division of Occupational Safety and Health consults with an employer's physician concerning an occupational safety or health issue. In a situation of this nature, the physician under contract may conduct on-site evaluation of employee medical records in consultation with the employer's physician, and may make necessary personal notes of his or her findings. No employee medical records, however, shall be taken off-site in the absence of a written access order or the specific written consent of an employee, and no notes of personally identifiable employee medical information made by the physician under contract shall leave his or her control without the permission of the TOSHA Medical Records Officer.

PRESENTATION OF WRITTEN ACCESS ORDER AND NOTICE TO EMPLOYEES:

1. The Principal TOSHA Investigator, or someone under his or her supervision, shall present at least two (2) copies each of the written access order and an accompanying cover letter to the employer prior to examining or obtaining medical information subject to a written access order. At least one (1) copy of the written access order shall not identify specific employees by direct personal identifier. The accompanying cover letter shall summarize the requirements of this instruction and indicate that questions or objections concerning the written access order may be directed to the Principal TOSHA Investigator or to the TOSHA Medical Records Officer.
 2. The Principal TOSHA Investigator shall promptly present a copy of the written access order, which does not identify specific employees by direct personal identifier, and its accompanying cover letter to each collective bargaining agent representing employees whose medical records are subject to the written access order.
 3. The Principal TOSHA Investigator shall indicate that the employer must promptly post a copy of the written access order, which does not identify specific employees by direct personal identifier, as well as post its accompanying cover letter. The written access order and its accompanying cover letter shall be posted in a prominent place and remain posted for at least fifteen (15) working days pursuant to 29 CFR 1910.20(e)(3)(ii) as adopted by Department of Labor Rule 0800-1-1-.14(d)1.
 4. The Principal TOSHA Investigator shall discuss with any collective bargaining agent and with the employer the appropriateness of individual notice to employees affected by the written access order. Where it is agreed that individual notice is appropriate, the Principal TOSHA Investigator shall promptly provide to the employer an adequate number of copies of the written access order, which does not identify specific employees by direct personal identifier, and its accompanying cover letter to enable the employer either to individually notify each employer either to individually notify each employee or to place a copy in each employee's medical file.
- J. OBJECTIONS CONCERNING A WRITTEN ACCESS ORDER: All employee, collective bargaining agent, and employer objections concerning access to records pursuant to a written access order shall, unless resolved on-site, be reduced to writing and transmitted to the TOSHA Medical Records Officer. Unless the Division of Occupational Safety and Health decides otherwise, access to records shall proceed without delay notwithstanding the lodging of an objection. The TOSHA Medical Records Officer shall respond in writing to each employee's and collective bargaining agent's written objections to Division of Occupational Safety and Health access. Where appropriate, the TOSHA Medical Records Officer may revoke a written access order and direct that any medical information obtained by it be returned to the original recordholder or destroyed. The Principal TOSHA Investigator shall assure that such instructions by the TOSHA Medical Records Officer are promptly implemented.
- K. REMOVAL OF DIRECT PERSONAL IDENTIFIERS: Whenever employee medical information obtained pursuant to a written access order is taken off-site with direct personal identifiers included, the Principal TOSHA Investigator shall, unless otherwise authorized by the TOSHA Medical Records Officer, promptly separate all

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direct personal identifiers from the medical information, and code the medical information and the list of direct identifiers with a unique identifying number for each employee. The medical information with its numerical code shall thereafter be used and kept secured as though still in a directly identifiable form. The Principal TOSHA Investigator shall also hand deliver or mail the list of direct personal identifiers with their corresponding numerical codes to the TOSHA Medical Records Officer. The TOSHA Medical Records Officer shall thereafter limit the use and distribution of the list of coded identifiers to those with a need to know its contents.

L INTERNAL AGENCY USE OF PERSONALLY IDENTIFIABLE EMPLOYEE MEDICAL INFORMATION:

1. The Principal TOSHA Investigator shall in each instance of access be primarily responsible for assuring that personally identifiable employee medical information is used and kept secured in accordance with this instruction.
2. The Principal TOSHA Investigator, the TOSHA Medical Records Officer, the Director of the Division of Occupational Safety and Health, and any other authorized person listed on a written access order may permit the examination or use of personally identifiable employee medical information by agency employees and contractors who have a need for access, and appropriate qualifications for the purpose for which they are using the information. No employee or contractor of the Division of Occupational Safety and Health is authorized to examine or otherwise use personally identifiable employee medical information unless so permitted.
3. Where a need exists, access to personally identifiable employee medical information may be provided to the Department of Labor Staff Attorney or staff members of the Office of the Attorney General and Reporter, and to agency contractors who are physicians or who have contractually agreed to abide by the requirements of this instruction and any other implementing agency directives and instructions.
4. Employees and contractors of the Division of Occupational Safety and Health are only authorized to use personally identifiable employee medical information for the purposes for which it was obtained, unless the specific written consent of an employee is obtained as to a secondary purpose, or the procedures of paragraphs H.-K. of this instruction are repeated with respect to the secondary purpose.
5. Whenever practicable, the examination of personally identifiable employee medical information shall be performed on-site with a minimum of medical information taken off-site in a personally identifiable form.

M SECURITY PROCEDURES:

1. Agency files containing personally identifiable employee medical information, shall be segregated from other agency files. When not in use, files containing this information shall be kept secured in a locked cabinet or room.

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- 2 The TOSHA Medical Records Officer and the Principal TOSHA Investigator shall each maintain a log of uses and transfers of personally identifiable employee medical information and lists of coded direct identifiers, except as to necessary uses by staff under their direct personal supervision.
3. The photocopying or other duplication of personally identifiable employee medical information shall be kept to the minimum necessary to accomplish the purposes for which the information was obtained.
- 4 The protective measures established by this instruction apply to all worksheets, duplicate copies, or other agency documents containing personally identifiable employee medical information.
5. Intra-agency transfers of personally identifiable employee medical information shall be by hand delivery, United States mail marked "PERSONAL", or equally protective means. Inter-office mailing channels shall not be used.

N RETENTION AND DESTRUCTION OF RECORDS:

1. Consistent with the records management program of the State as administered by the Department of Finance and Administration and carried out by the Department of Labor, Division of Occupational Safety and Health, personally identifiable employee medical information and lists of coded direct personal identifiers shall be destroyed or returned to the original recordholder when no longer needed for the purposes for which they were obtained.
- 2 Personally identifiable employee medical information which is currently not being used actively but may be needed for future use shall be transferred to the TOSHA Medical Records Officer. The TOSHA Medical Records Officer shall conduct an annual review of all centrally-held information to determine which information is no longer needed for the purposes for which it was obtained.

O RESULTS OF AGENCY ANALYSIS USING PERSONALLY IDENTIFIABLE EMPLOYEE MEDICAL INFORMATION: The TOSHA Medical Records Officer shall, as appropriate, assure that the results of any agency analysis using personally identifiable employee medical information are communicated to the employees whose personal medical information was used as a part of the analysis.

P ANNUAL REPORT: The TOSHA Medical Records Officer shall on an annual basis review the experience of the Division of Occupational Safety and Health under this instruction during the previous year, and prepare a report to the Director, Division of Occupational Safety and Health, and the Commissioner of Labor which shall be made available to the public. The report shall be prepared within thirty (30) days following the end of the State fiscal year (i.e., by August 29 of each year). If there was no experience under this rule for the previous year, a negative report shall be submitted. The report shall discuss:

1. the number of written access orders approved and a summary of the purposes for access;

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2. the nature and disposition of employee, collective bargaining agent, and employer written objections concerning access to personally identifiable employee medical information by the Division of Occupational Safety and Health; and
3. the nature and disposition of requests for inter-agency transfer (i.e., OSHA or NIOSH) or public disclosure of personally identifiable employee medical information.

Q. INTER-AGENCY TRANSFER AND PUBLIC DISCLOSURE:

1. Personally identifiable employee medical information shall not be transferred to another agency or office of either State or Federal government, except to the Department of Labor Staff Attorney, or disclosed to the public, except to the employee(s) to whom the information pertains or the original recordholder(s), except when required by law or when approved by the Director, Division of Occupational Safety and Health pursuant to applicable law.
2. Except as provided in paragraph Q.3. below, the Director, Division of Occupational Safety and Health, shall not approve a request for an inter-agency transfer of personally identifiable employee medical information, which has not been consented to by the affected employee(s), unless the request is by a public health agency which:
 - a. needs the information in a personally identifiable form for a substantial public health purpose,
 - b. will not use the requested information to make individual determinations concerning affected employees which could be to their detriment,
 - c. has rules or regulations or established written procedures providing protection for personally identifiable medical information substantially equivalent to that of this instruction, and
 - d. satisfies an exemption to the Privacy Act to the extent that the Privacy Act applies to the requested information.
3. Upon approval of the Director, Division of Occupational Safety and Health, personally identifiable employee medical information may be transferred to:
 - a. the Occupational Safety and Health Administration (OSHA), U. S. Department of Labor,
 - b. the National Institute for Occupational Safety and Health (NIOSH), U. S. Department of Health and Human Services, and
 - c. the office of the Attorney General and Reporter when necessary with respect to a specific action under the Tennessee Occupational Safety and Health Act as amended, T.C.A. § 50-501 et seq.

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4. The Director, Division of Occupational Safety and Health, shall not approve a request for public disclosure of employee medical information containing direct personal identifiers unless there are compelling circumstances affecting the health or safety of an individual.
 5. The Director, Division of Occupational Safety and Health, shall not approve a request for public disclosure of employee medical information which contains information which could reasonably be used indirectly to identify specific employees when the disclosure would constitute a clearly unwarranted invasion of personal privacy.
 6. Except as to inter-agency transfers to OSHA, NIOSH, or the office of the Attorney General and Reporter, the TOSHA Medical Records Officer shall assure that advance notice is provided to any collective bargaining agent representing affected employees and to the employer on each occasion that the Division of Occupational Safety and Health intends to either transfer personally identifiable employee medical information to another agency or employee. When feasible, the TOSHA Medical Records Officer shall take reasonable steps to assure that advance notice is provided to affected employees when the employee medical information to be transferred or disclosed contains direct personal identifiers.
- R. ACTION: All TOSHA personnel are responsible for insuring compliance with the policies and procedures set forth in paragraphs E. through Q. of this instruction.
- S. EFFECTIVE DATE: This instruction shall be effective on the effective date of TDL Rule 0800-1-1-.14(d) and shall remain in effect thereafter until cancelled or superseded.