

CHAPTER XIV

ACCESS TO EMPLOYEE MEDICAL RECORDS

- A. General Policy. Department access to employee medical records will, in certain circumstances, be important to the Department's performance of its statutory functions. Medical records, however, contain personal details concerning the lives of employees.
1. Due to the substantial personal privacy interests involved, Department authority to gain access to personally identifiable employee medical information will be exercised only after the Department has made a careful determination of its need for this information.
 2. Information obtained under the provisions of this chapter will be retained by the Department only for so long as needed to accomplish the purpose requiring access.
 3. The information will be kept secure while it is used, and will not be disclosed to other agencies or members of the public, except in narrowly defined circumstances.
 4. This chapter establishes procedures concerning access to, and protection of, employee medical records.
- B. Scope and Application.
1. Except as provided below, this chapter applies to any requests by Department personnel to obtain access to records in order to examine or copy personally identifiable employee medical information, including those conducted as part of an on-site consultative visit.
 2. For the purposes of this section, "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 to indirectly identify specific employees (e.g., exact age, height, weight, race, sex, date of initial employment, job title, etc.).
 3. This section does not apply:
 - a. To Department access to, or the use of, aggregate employee medical information, or medical records on individual employees, which is not in a personally identifiable form.

- b. To records required by 11 NMAC 5.1.16, to death certificates, or to employee exposure records, including biological monitoring records treated by 29 CFR 1910.20(c)(5) or by specific occupational safety and health standards as exposure records.
 - c. Where compliance 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, or with 11 NMAC 5.2, 1910.20. Examination of this nature shall be conducted under the observation of the record holder. Compliance personnel shall not record and take off-site any information from medical records other than documentation of the fact of compliance or noncompliance.
 - d. The Department access to, or the use of, personally identifiable employee medical information obtained in the course of litigation.
 - e. Where a written directive by the Bureau Chief authorizes appropriately qualified personnel to conduct limited reviews of specific medical information mandated by an occupational health and safety standard, or of specific biological monitoring test results.
4. Even if not covered by the terms of this section, 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 mitigate against disclosure of this kind of information to the public.
5. Responsible Persons.
- a. Bureau Chief. The Bureau Chief shall be responsible for the overall administration and implementation of the procedures contained in this section, including:
 - (1) Making final determination concerning access to personally identifiable employee medical information; and,
 - (2) Making final determination on inter-agency transfer or public disclosure of personally identifiable employee medical information.

- b. OHS Medical Records Officer. The Bureau Chief shall designate the Compliance Manager as the OHS Medical Records Officer. The OHS Medical Records Officer shall report directly to the Bureau Chief on matters concerning this chapter and shall be responsible for:
- (1) Making recommendations to the Bureau Chief on the approval or denial of written access requests;
 - (2) Assuring that written access requests meet the requirements of this chapter;
 - (3) Responding to employee, collective bargaining agent, and employer objections concerning written access orders;
 - (4) Regulating the use of direct personal identifiers;
 - (5) Regulating internal agency use and security of personally identifiable employee medical information;
 - (6) Assuring that the results of agency analyses of personally identifiable medical information are, where appropriate, communicated to employees; and
 - (7) Assuring that advance notice is given of intended inter-agency transfer or public disclosures.
- c. Principal OHS Investigator. The Principal OHS Investigator shall be assigned by the Compliance Manager 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 request and the requirements of this chapter. When access is pursuant to a written access request, the Principal OHS Investigator shall be professionally trained in medicine, public health, or allied fields (epidemiology, toxicology, industrial hygiene, biostatistics, environmental health, etc.).

6. Written Access Requests.

- a. Requirement for Written Access Order. Except as provided below, each request by an OHS representative to examine or copy personally identifiable employee medical information contained in a record held by an employer or other record holder, shall be made pursuant to a written access request which has been approved by the Bureau Chief upon the recommendation of the OHS Medical Records Officer. If deemed appropriate, a subpoena may be obtained requiring the production of evidence under oath.

- b. Approval Criteria for Written Access Order. Before approving a written access order, the Bureau Chief and OHS Medical Records Officer shall determine that:
 - (1) The medical information to be examined or copies is relevant to a statutory purpose and there is a need to gain access to this personally identifiable information;
 - (2) The personally identifiable medical information to be examined or copied is limited to only that information needed to accomplish the purpose for access; and
 - (3) 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.

- c. Contest of Written Access Request. Each written access request shall state with reasonable particularity:
 - (1) The statutory purposes for which access is sought.
 - (2) 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.
 - (3) Whether medical information will be examined on-site, and what type of information will be copies and removed off-site.

- (4) The name, address, and phone number of the Principal OHS Investigator and the names of any other authorized persons who are expected to review and analyze the medical information.
- (5) The name, address, and phone number of the OHS Medical Records Officer.
- (6) The anticipated period of time during which the Department expects to retain the employee medical information in a personally identifiable form.

d. Special Situations. Written access requests need not be obtained to examine or copy personally identifiable employee medical information under the following circumstances:

- (1) Physician Consultations. If the specific written consent of the employee is obtained pursuant to 29 CFR 1910.20(e)(2)(ii), and the Department or a Department employee is listed on the authorization as the designated representative to receive the medical information, the written access request need not be obtained.
 - (a) Whenever personally identifiable employee medical information is obtained through specific written consent and taken off-site, a Principal OHS Investigator shall be promptly named to assure protection of the information.
 - (b) The OHS Medical Records Officer shall be notified of this person's identity.
 - (c) The personally identifiable medical information obtained shall thereafter be subject to the use and security requirements of this chapter.
- (2) A written access request need not be obtained where an OHS staff or contract physician consults with an employer's physician concerning an occupational safety or health issue.
 - (a) In a situation of this nature, the OHS physician may conduct on-site evaluation

of employee medical records in consultation with the employer's physician, and may make the necessary personal notes of his/her findings.

- (b) No employee medical records, however, shall be taken off-site in the absence of a written access request or the specific written consent of an employee, and no notes of personally identifiable employee medical information made by the OHS physician shall leave his/her control without the permission of the OHS Medical Records Officer.

7. Presentation of Written Access Request and Notice to Employees.

- a. The Principal OHS Investigator, or someone under his/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 request. At least one copy of the written access request shall not identify specific employees by direct personal identifier. The accompanying cover letter shall summarize the requirements of this chapter and indicate that questions or objections concerning the written access order may be directed to the Principal OHS Investigator or to the OHS Medical Records Officer.
- b. The Principal OHS Investigator shall promptly present a copy of the written access request (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 request.
- c. The Principal OHS Investigator shall indicate that the employer must promptly post a copy of the written access request which does not identify specific employees by direct personal identifier, as well as post its accompanying cover letter (see 29 CFR 1910.20(e)(3)(ii)).
- d. The Principal OHS Investigator shall discuss with any collective bargaining agent and with the employer, the appropriateness of individual notice to employees affected by the written access

request. Where it is agreed that individual notice is appropriate, the Principal OHS Investigator shall promptly provide to the employer and adequate number of copies of the written access request which does not identify specific employees by direct personal identifier, and its accompanying cover letter, to enable the employer either to individually notify each employee or to place a copy in each employee's medical file.

8. Objections Concerning a Written Access Request. All employee collective bargaining agents and employer written objections concerning access to records pursuant to a written access request, shall be transmitted to the OHS Medical Records Officer. (Unless the Department decides otherwise, access to the records shall proceed without delay, notwithstanding the lodging of an objection.) The OHS Medical Records Officer shall respond in writing to each employee's and collective bargaining agent's written objection to OHS access. Where appropriate, the OHS Medical Records Officer may revoke a written access request and direct that any medical information obtained by it be returned to the original record holder or destroyed. The Principal OHS Investigator shall assure that such instructions by the OHS Medical Records Officer are promptly implemented.

9. Removal of Direct Personal Identifiers. Whenever employee medical information obtained pursuant to a written access request is taken off-site with direct personal identifiers included, the Principal OHS Investigator shall, unless otherwise authorized by the OHS Medical Records Officer, promptly separate all 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.
 - a. The medical information, with its numerical code, shall thereafter be used and kept secured as though still in a directly identifiable form.
 - b. The Principal OHS Investigator shall also hand deliver the list of direct personal identifiers with their corresponding numerical codes to the OHS Medical Records Officer.
 - c. The OHS 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.

10. Internal Division Use of Personally Identifiable Employee Medical Information.

- a. The Principal OHS 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 chapter.
- b. The Principal OHS Investigator, the OHS Medical Records Officer, the Bureau Chief, and any other authorized person listed on a written access request may permit the examination or use of personally identifiable employee medical information by Department employees and contractors who have a need for access, and have appropriate qualifications for the purpose of which they are using the information. No OHS employee or contractor is authorized to examine or otherwise use personally identifiable employee medical information unless so permitted.
- c. Where a need exists, access to personally identifiable employee medical information may be provided to the Office of General Counsel, Environment Department, and to Department contractors who are physicians or who have contractually agreed to abide by the requirements of this chapter and other Department directives and instructions.
- d. 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.

11. Security Procedures.

- a. Department files containing personally identifiable employee medical information shall be segregated from other Department files. When not in active use, files containing this information shall be kept secured in a locked cabinet or vault.
- b. The OHS Medical Records Officer shall maintain a log of uses and transfers of personally identifiable employee medical information and lists of coded direct personal identifiers, except as to

necessary uses by staff under their direct personal supervision.

- c. 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.
- d. The protective measures established by this chapter apply to all worksheets, duplicate copies, or other Department documents containing personally identifiable employee medical information.
- e. Intra-division transfers of personally identifiable employee medical information shall be by hand delivery, United States mail, or equally protective means. Inter-office mailing channels shall not be used.

12. Retention and Destruction of Records.

- a. Consistent with State records disposition programs, personally identifiable employee medical information and lists of coded direct personal identifiers shall be destroyed or returned to the original record holder when no longer needed for the purposes for which they were obtained.
- b. Personally identifiable employee medical information which is currently not being used actively, but may be need for future use, shall be transferred to the OHS Medical Records Officer. The OHS 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.

13. Results of an Agency Analysis Using Personally Identifiable Employee Medical Information. The OHS Medical Records Officer shall, as appropriate, assure that the results of an agency analysis using personally identifiable employee medical information, are communicated to the company that medical information was used as a part of the analysis.

14. Inter-Agency Transfer and Public Disclosure.

- a. Personally identifiable employee medical information shall not be transferred to another agency or office outside of the Department or disclosed to the public (other than to the affected employee or the original record holder) except when required by law or when approved by the Bureau Chief.
- b. Except as provided below, the Bureau Chief 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 employees, unless the request is by a public health agency which:
 - (1) Needs the requested information in a personally identifiable form for a substantial public health purpose;
 - (2) Will not use the requested information to make individual determinations concerning affected employees which could be to their detriment;
 - (3) Has regulations or established written procedures providing protection for personally identifiable medical information substantially equivalent to that of this section; and
 - (4) Satisfied an exemption to the Privacy Act to the extent that the Privacy Act applies to the requested information (see 5 U.S.C. 552a (b); 29 CFR 70a.3).
- c. Upon the approval of the Bureau Chief, personally identifiable employee medical information may be transferred to:
 - (1) The National Institute for Occupational Safety and Health (NIOSH);
 - (2) The Department of Justice, when necessary with respect to a specific action under the Occupational Safety and Health Act.
 - (3) The State Epidemiologist's Office; and
 - (4) The State Attorney General.
- d. The Bureau Chief shall not approve a request for public disclosure of employee medical information containing direct personal identifiers unless there

are compelling circumstances affecting the health and safety of an individual.

- e. The Bureau Chief 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 (see 29 CFR 70.26).

- f. Except as to inter-agency transfers to NIOSH, the Department of Justice, the State Epidemiologist, or the State Attorney General, the OHS 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 Department intends to either transfer personally identifiable employee medical information or disclose it to a member of the public other than an affected employee. When feasible, the OHS 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.