STATE OF MINNESOTA

DEPARTMENT OF LABOR & INDUSTRY

OCCUPATIONAL SAFETY & HEALTH DIVISIO

In the Matter of the Proposed
Adoption of Rules Governing
(A) Recording and Reporting
Occupational Injuries and Illnesses,
(B) Discrimination Against Employees,
and (C) Access to Employee Exposure
and Medical Records.

STATEMENT OF
NEED AND REASONABLENESS

On December 29, 1970, Congress passed the Williams-Steiger Occupational Safety and Health Act of 1970 for the purpose of assuring so far as possible every working man and woman in the nation safe and healthful working conditions and to preserve human resources. Section 18 of that Act provided guidelines for states to assume responsibility for development and enforcement of Occupational Safety and Health Standards under an approved State Plan. One criteria that must be met for State Plan approval provides for the development and enforcement of safety and health standards which are at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under the Occupational Safety and Health Act of 1970.

Minnesota submitted a plan for the development and enforcement of state occupational safety and health standards to the Federal Occupational Safety and Health Administration (hereinafter "Federal OSHA") on November 9, 1972. The plan included provisions for making changes in Minnesota's occupational safety and health program to bring it into full conformity with the requirements of Section 18 of the Occupational Safety and Health Act of 1970. The Department of Labor and Industry was designated as the state agency to administer the plan. The Commissioner of Labor and Industry adopted Federal OSHA standards promulgated prior to October 1972 (effective in Minnesota in February 1973). The plan included a provision that the commissioner would continue to adopt Federal OSHA standards and retain those Minnesota standards not covered by Federal standards in accordance with Section 18 of the Act. The Minnesota Legislature passed the "Occupational Safety and Health Act of 1973" (Laws 1973, Chapter 732) on May 24, 1973.

Authority to promulgate the above-captioned rules is in Minn. Stat. § 182.657. This section requires the Commissioner of Labor and Industry to promulgate rules and regulations deemed necessary to carry out the responsibilities of Laws 1973, Chapter 732.

(A) Section 182.663, Subd. 2 of the Minnesota Occupational Safety and Health Act requires employers to make, keep and preserve records concerning activity under the Act in accordance with rules promulgated by the Commissioner of Labor and Industry. Those rules are contained in Chapter Twenty-Two (8 MCAR §§ 1.7290-1.7309), "Recording and Reporting Occupational Injuries and Illnesses." These rules, adopted by Minnesota OSHA on May 30, 1978 (2 S.R. 2122), are similar to the recordkeeping requirements of Federal OSHA. These rules require employers to maintain a log and summary of recordable occupational injuries and illnesses. "Recordable" injuries and illnesses are those injuries or illnesses that result in fatalities, lost workday cases or that result in transfer to another job, in termination of employment, or require medical treatment other than first aid. The employer must maintain the log on a yearly basis and, during the month of February, post a summary of those injuries and illnesses that occurred during the previous year. The OSHA record-keeping forms provided for this purpose have been revised and

streamlined to incorporate two forms into one. Also, Federal OSHA has adopted an amendment to their recordkeeping rules which allows employees, former employees and employee representatives access to the log and summary of occupational injuries and illnesses. Amendments to Chapter Twenty-Two are proposed at this time for two reasons: first, nonsubstantial changes are made to delete references to obsolete form numbers and titles and insert current form numbers and titles. Secondly, revisions to 8 MCAR § 1.7297 "Access to records" incorporate amendments made to the Federal OSHA standards in July 1978 (FEDERAL REGISTER, Volume 43, Number 141, July 21, 1978).

These amendments are necessary because 8 MCAR §§ 1.7292, 1.7295, and 1.7304 refer to obsolete form numbers and titles; the proposed amendments remove these references and insert current form titles and numbers. These changes are necessary to prevent confusion and misunderstanding on the part of employees, employers, and the general public.

These amendments are necessary to implement the requirements of Minn. Stat. § 182.654 which allows employees the basic right to know about workplace hazards. Since the log of occupational injuries and illnesses contains a record of each reported workplace injury and illness, allowing employees access to this information will more fully alert them to present and possible hazards in the workplace and thus significantly assist them in their efforts, under the Act, to protect themselves from hazards. The proposed amendment to 8 MCAR § 1.7297 includes this provision.

These amendments to existing rules are reasonable since they do not require the generation of additional reports or forms on the part of the employer; the employer must maintain the log and summary of occupational injuries and illnesses under the Act.

These amendments are reasonable since access to the log and summary by employees can be easily accomplished by allowing the employees to review the log and/or providing a copy of the log to the employee or employee representative.

These amendments are reasonable since access to this information will allow employees to use this information as the first step in tracing the nature and effects of toxic substances, as well as substances not known to be toxic, and in identifying patterns of injuries or symptoms which indicate need for further exploration.

These amendments are reasonable since they are similar to Federal OSHA rules adopted in July 1978 following review of approximately 260 written comments received from interested and affected parties. Adoption of this rule will attain an "as effective as" level of enforcement by Minnesota OSHA.

(B) New Chapter Nineteen (8 MCAR §§ 1.7240-1.7249) "Discrimination Against Employees" is proposed for two reasons: to implement the provisions of Minn. Stat. § 182.669 and to adopt rules similar to those currently enforced by Federal OSHA (29 CFR Part 1977) in order to attain an "as effective as" level of enforcement by Minnesota OSHA.

The Minnesota Occupational Safety and Health Act of 1973 affords employees certain rights; e.g., the right to bring unsafe or unhealthful working conditions to the attention of their employer and/or OSHA; the right to participate in an OSHA inspection of their workplace, etc. The purpose of Minn. Stat. § 182.669 is to protect employees who exercise any of their rights under the Act from being discriminated against by their employer. Under the provisions of Minn. Stat. § 182.669, any employee who believes that he/she has been discharged or otherwise discriminated against by any person because such employee has exercised any right authorized under the provisions of the Act may file a complaint with the Commissioner of Labor and Industry alleging such discriminatory act. The commissioner is mandated to conduct such investigation as he deems appropriate. Chapter Nineteen describes protected and unprotected activities under this statute, the claim procedures that must be followed,

enforcement proceedings, and other actions that may be taken by the employee and/or the commissioner. The rules in proposed Chapter Nineteen are similar to those enforced by Federal OSHA. (The Federal rules were published in the FEDERAL REGISTER, Volume 38, on January 29, 1973.)

The rules in new Chapter Nineteen are necessary to clarify the mandates of Minn. Stat. § 182.669 to assure that all affected parties are aware of their rights and responsibilities under this statute. The statute does not define "protected" or "unprotected" activities under the Act nor does it describe enforcement proceedings and claim procedures; therefore, it is necessary to promulgate these rules to accomplish this task.

These rules are necessary to protect employees, who in good faith exercise any of their rights under the Act, from harassment, discharge, or other discriminatory action on the part of their employer. Without this protection, employees may be reluctant to bring unsafe or unhealthful working conditions to the attention of their employer and/or the OSH Division because they fear harassment or possible loss of their jobs.

These rules are necessary to attain an "as effective as" level of enforcement by Minnesota OSHA.

These rules are reasonable since they conform to the Act's fundamental objective of preventing occupational deaths and serious injuries. These rules allow an employee to refuse to perform an assigned task which he/she, in good faith, believes would be a potential cause of serious injury or death. The Supreme Court, in Whirlpool vs. Marshall, upheld the validity of the Federal OSHA rule which allows an employee to refuse to perform an assigned task because of a reasonable apprehension of serious injury or death.

These rules are reasonable in that they do not require employers to pay workers who refuse to perform assigned tasks because of a reasonable apprehension of death or serious injury coupled with a reasonable belief that no less drastic alternative is available. The rules simply provide that in such cases, the employer may not discriminate against the employees involved.

These rules are reasonable in that they effectuate the Act's "general duty" clause which requires an employer to furnish each of his employees employment and a place of employment free from recognized hazards that are causing or likely to cause death or serious injury to employees.

These rules are reasonable since they accord no authority to government officials to "shut down" an unsafe or unhealthful workplace, but simply permit private employees of a private employer to avoid workplace conditions that they believe pose grave dangers to their own safety and does not empower such employees to order their employers to correct the hazardous condition.

(C) Proposed new Chapter Eighteen (8 MCAR §§ 1.7230-1.7239) "Access to Employee Exposure and Medical Records" adopts by reference Federal Occupational Safety and Health Standard 29 CFR Part 1910.20, "Access to Employee Exposure and Medical Records." This standard was adopted by Federal OSHA on May 23, 1980 (FEDERAL REGISTER, Volume 45, Number 102, dated May 23, 1980). Based on experience, expertise, and the rulemaking record, Federal OSHA determined employee exposure and medical records are critically important to the detection, treatment, and prevention of occupational disease; and workers and their representatives need direct access to this information as well as to analyses of these records. Representatives of OSHA also need access to this information to fulfill responsibilities under the Occupational Safety and Health Act. Employee exposure records reveal the identity of, and extent of exposure to, toxic substances or harmful physical agents. Employee medical records contain individual health status information which may indicate whether or not an employee's health is being or has been impaired by exposure to toxic chemicals or harmful physical agents.

These rules are necessary if workers and their representatives are to play a meaningful role in detecting, treating, and preventing occupational disease. These rules provide employees and their designated representatives with the right and opportunity to learn what they are or were exposed to on the job, what are or were the levels of exposure, and what are or were the health consequences of these exposures. Access to this information will also enable an employee's personal physician to diagnose, treat, and possibly prevent permanent health impairment.

These rules are necessary to assure the effectiveness of employee rights established by the Minnesota Occupational Safety and Health Act of 1973. Access to this information is crucial to the effectiveness of Minn. Stat. § 182.654, Subd. 10 which affords employees, who have been exposed or are being exposed to toxic materials or harmful physical agents in concentrations at levelss in excess of that provided by any applicable standard, the right to know of these hazards, the relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure. Access to this information will also enhance employee and employee representative participation in OSHA inspections to identify where and how various toxic substances are used, which plant operations generate the greatest exposure, etc. In addition, access to this information will enable workers to better exercise their rights to contest the reasonableness of abatement periods proposed by OSHA and to participate in Review Board adjudicatory proceedings.

These rules are necessary to attain an "as effective as" level of enforcement for the Minnesota Occupational Safety and Health Program; Federal OSHA adopted similar rules in May 1980.

These rules are reasonable because they establish rights of access to basic information by employees, their designated representatives, and OSHA representatives, while at the same time affording appropriate privacy and confidentiality protection against uninvolved third parties.

These rules are reasonable since they are similar to Federal OSHA rules which were the subject of several public hearings in July 1978. The views of a wide range of employer, business, trade and medical associations; labor unions; physicians and other health professionals; legal experts; and public interest groups were presented at these hearings. These views and arguments raised for and against these proposed rules were reviewed and carefully evaluated by Federal OSHA. Based on these comments, the agency's expertise and experience, and the legal and practical context in which the standard will operate, the proposed rule was modified in a number of respects to: (1) assure that the direct release of medical records to an employee is accomplished in a professional manner which minimizes any potential for harm or misinterpretation; (2) access to medical records by a designated representative is the result of specific written employee consent rather than a blanket release; and (3) the potential for competitive harm resulting from an unauthorized release of trade secret information is minimized.

These rules are reasonable since they do not require the generation of additional employer records but only allow access to records the employer is already generating and maintaining. Employers who generate neither exposure nor medical records will experience little or no impact from this rule. Further, these rules provide employers with substantial flexibility in determining the method(s) they will use to preserve records subject to this rule and how these records will be made available to employees and their designated representatives.

In summary, the new rules and amendments to existing rules proposed for adoption are necessary to maintain an "as effective as" level of enforcement by Minnesota OSHA. The proposed rules are

similar to Federal OSHA rules. In all cases, Federal OSHA has previously proposed the rules by publication in the FEDERAL REGISTER; allowed a period for comment; and held public hearings, where necessary, before adopting the final rules. Therefore, holding a public hearing on the proposed rules by Minnesota OSHA would be superfluous. Failure to adopt these rules, however, will restrict employee rights as described in this Statement of Need and Reasonableness and may result in the withdrawal of the Minnesota State Plan for the enforcement of occupational safety and health by the Federal Occupational Safety and Health Administratior

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