

DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES LICENSING AND REGULATORY AFFAIRS

BUREAU OF SAFETY AND REGULATION DIRECTOR'S OFFICE

OCCUPATIONAL HEALTH STANDARDS COMMISSION

EMPLOYEE MEDICAL RECORDS AND TRADE SECRETS

Filed with the Secretary of State on January 10, 2014

These rules become effective immediately upon filing with the Secretary of State unless adopted under section 33, 44, or 45a(6) of 1969 PA 306. Rules adopted under these sections become effective 7 days after filing with the Secretary of State.

(By authority conferred on the **director of the department of licensing and regulatory affairs by sections 14 and 24 of 1974 PA 154, MCL 408.4014 and MCL 408.4024, and Executive Reorganization Order Nos. 1996-2, 2003-1, 2008-4, and 2011-4, MCL 445.2001, 445.2011, 445.2025, and 445.2030** occupational health standards commission by section 24 of Act No. 154 of the Public Acts of 1974, as amended, being S408.1024 of the Michigan Compiled Laws)

R 325.3452, R 325.3453, R 325.3457, R 325.3466, R 325.3472, R 325.3472a, and R 325.3475 of the Michigan Administrative Code are amended, and R 325.3451a is added, and R 325.3476 is rescinded, to read as follows:

**PART 470. EMPLOYEE MEDICAL RECORDS AND TRADE SECRETS**

**R 325.3451a Referenced standard and appendices.**

**Rule 1a. (1) The Occupational Health Standard Part 430 "Hazard Communication," R 325.77001 to R 325.77003, is referenced in this standard. Up to 5 copies of this standard may be obtained at no charge from the Michigan Department of Licensing and Regulatory Affairs, MIOSHA Standards Section, 7150 Harris Drive, P.O. Box 30643, Lansing, Michigan 48909-8143, or via the internet at: [www.michigan.gov/mioshastandards](http://www.michigan.gov/mioshastandards). For quantities greater than 5, the cost, at the time of adoption of these rules, is 4 cents per page.**

**(2) The standard referenced in subrule (1) of this rule is also available for inspection at the Department of Licensing and Regulatory Affairs, MIOSHA Standards Section, 7150 Harris Drive, P.O. Box 30643, Lansing, Michigan, 48909-8143.**

**(3) Copies of the standard referenced in subrule (1) of this rule may be obtained from the publisher or may also be obtained from the Department of Licensing and Regulatory Affairs, MIOSHA Standards Section, 7150 Harris Drive, P.O. Box 30643, Lansing, Michigan, 48909-8143, at the cost charged in this rule, plus \$20.00 for shipping and handling.**

**(4) The information contained in the appendices to these rules is informational and is not intended, by itself, to create any additional obligations not otherwise imposed by these rules, nor to detract from any existing obligations.**

R 325.3452 Definitions; A to E.

Rule 2. As used in these rules:

(a) "Access" means the right and opportunity to examine and copy.

(b) "Act" means **the Michigan occupational safety and health act (MIOSHA), 1974 PA 154, MCL 408.1001 to 408.1094.** Act No. 154 of the Public Acts of 1974, as amended, being 408.1001 et seq. of the Michigan Compiled Laws.

(c) "Analysis using exposure or medical records" means any compilation of data or any research, statistical, or other study based, at least in part, on information collected from individual employee exposure or medical records or information collected from health insurance claim records, if either the analysis has been reported to an employer or no further work is currently being done by the person who is responsible for preparing the analysis.

(d) "Department" means the department of **licensing and regulatory affairs.** ~~consumer and industry services.~~

(e) "Designated representative" means an individual or organization to whom or to which an employee gives written authorization to exercise a right of access. For purposes of access to employee exposure records and analyses using exposure or medical records, a recognized or certified collective bargaining agent shall be treated automatically as a designated representative.

(f) "Director" means the director of the department.

(g) "Employee" means a current employee, a former employee, or an employee who is being assigned or transferred to work where there will be exposure to toxic substances or harmful physical agents. In the case of a deceased or legally incapacitated employee, the employee's legal representative may directly exercise all of the employee's rights under these rules.

(h) "Employee exposure record" means a record that contains any of the following kinds of information concerning employee exposure to toxic substances or harmful physical agents:

(i) Workplace environmental monitoring or measuring, including personal, area, grab, wipe, or other forms of sampling, and related collection and analytical methodologies, calculations, and other background data relevant to the interpretation of the results obtained.

(ii) Biological monitoring results that directly assess the absorption of a substance or agent by body systems, such as the level of a chemical in the blood, urine, breath, hair, or fingernails, but not including results that assess the biological effect of a substance or agent or which assess an employee's use of alcohol or drugs.

(iii) Material safety data sheets **or safety data sheets** indicating that the material may pose a hazard to human health.

(iv) In the absence of the information identified in **subdivision (h)(i) to (iii) of this rule**, ~~paragraphs (i) to (iii) of this subdivision~~, any other record, such as chemical, common, or trade name, that reveals the identity of a toxic substance or harmful physical agent.

(i) "Employee medical record" means a record concerning any medical tests, examinations, or health status of an employee that is made or maintained by a physician, nurse, technician, or other health care personnel, including the items listed in **subdivision (i)(i) to (vi) of this rule**, ~~paragraphs (i) to (vi) of this subdivision~~, but does not include the items listed in **subdivision (i)(vii) to (x) of this rule**: ~~paragraphs (vii) to (x) of this subdivision~~:

(i) Medical and employment questionnaires or histories, including job descriptions and occupational exposures.

(ii) The results of preplacement, periodic, or episodic medical examinations and laboratory tests, including x-ray examinations and all biological monitoring.

(iii) Medical opinions, diagnoses, progress notes, and recommendations.

(iv) Descriptions of treatments and prescriptions, including first aid records.

(v) Employee medical complaints.

(vi) Death certificates.

(vii) Physical specimens, such as blood or urine samples, which are routinely discarded as a part of normal medical practice and which are not required to be maintained by other legal requirements.

(viii) Records concerning health insurance claims which are maintained separately from an employer's medical program and its records and which are not accessible to the employer by employee name or other direct personal identifier, such as a social security number or payroll number.

(ix) Records concerning voluntary employee assistance programs, such as alcohol, drug abuse, or personal counseling programs, if maintained separately from an employer's medical program and its records.

(x) Records which are created solely in preparation for litigation and which are privileged from discovery under the applicable rules of procedure or evidence.

(j) "Employer" means a current employer, a former employer, or a successor employer.

(k) "Exposure" or "exposed" means subjection of an employee to a toxic substance or harmful physical agent in the course of employment through any route of entry, including inhalation, ingestion, skin contact, or absorption, and includes past and potential exposure. "Exposure" or "exposed" does not include situations where an employer can demonstrate that a toxic substance or harmful physical agent is not used, handled, stored, generated, or present in the workplace in any manner different from typical non-occupational situations.

(l) "Health professional" means any of the following persons who provide medical or other occupational health services to exposed employees:

(i) A physician.

(ii) A nurse.

(iii) An industrial hygienist.

(iv) A toxicologist.

(v) An epidemiologist.

R 325.3453 Definitions; R to T.

Rule 3. As used in these rules:

(a) "Record" means an item, a collection, or a grouping of information, regardless of the form or process by which it is maintained, including paper documents, microfilm, microfiche, x-ray film, or automated data processing.

(b) "Specific chemical identity" means the chemical name, chemical abstract service (CAS) registry number, or any other information that reveals the precise chemical designation of the substance.

(c) "Specific written consent" means a written authorization that contains all of the following information:

(i) The name and signature of the employee who authorized the release of medical information.

(ii) The date of written authorization.

(iii) The name of the individual or organization that is authorized to release the medical information.

(iv) The name of the designated representative, either an individual or an organization, that is authorized to receive the released information.

(v) A general description of the medical information that is authorized to be released.

(vi) A general description of the purpose for the release of the medical information.

(vii) A date or condition upon which the written authorization shall expire, if less than 1 year. A written authorization does not operate to authorize the release of medical information that is not in existence on the date of written authorization, unless expressly authorized, and does not operate for more than 1 year from the date of written authorization. A written authorization may be revoked, in writing, prospectively at any time.

(d) "Toxic substance or harmful physical agent" means a chemical substance, a biological agent, or physical stress, such as noise, heat, cold, vibration, repetitive motion, ionizing and nonionizing radiation, hypobaric or hyperbaric pressure, or other commonly recognized environmental stress, to which any of the following provisions apply:

(i) Is regulated by a federal or state law or rule due to a health hazard.

(ii) Is listed in the latest printed edition of the national institute for occupational safety and health (NIOSH) registry of toxic effects of chemical substances. Appendix B to these rules describes the availability of the NIOSH registry of toxic effects of chemical substances. ~~Appendix B may be obtained pursuant to the provisions of R 325.3476.~~

(iii) Has yielded positive evidence of an acute or chronic health hazard in human, animal, or other biological testing that is conducted by, or known to, an employer.

(iv) Has a material safety data sheet **or safety data sheet** which is available to an employer and which indicates that the material may pose a hazard to human health.

(e) "Trade secret" means any confidential formula, pattern, process, device, or information or compilation of information that is used in an employer's business and that gives the employer an opportunity to obtain an advantage over competitors who do not know or use it.

#### R 325.3457 Preservation of employee exposure records.

Rule 7. (1) Each employee exposure record shall be preserved and maintained for not less than 30 years, except as follows:

(a) Background data that is relative to workplace environmental monitoring or measuring, such as laboratory reports and worksheets, shall be required to be retained only for 1 year if the sampling results, the collection methodology, a description of the analytical and mathematical methods used, and a summary of other background data relevant to interpretation of the results obtained are retained for not less than 30 years.

(b) Material safety data sheets, **safety data sheets**, and records that are identified in R 325.3452(h)(iv) concerning the identity of a substance or agent shall not be required for any specified period of time if some record of the identity of the substance or agent, such as the chemical name if known, where it was used, and when it was used is retained for not less than 30 years.

(c) Records may be transferred or disposed of pursuant to the provisions of R 325.3475.

(2) Biological monitoring results that are designated as exposure records by specific occupational health rules promulgated pursuant to the act shall be preserved and maintained as required by such specific rules.

**(3) Safety data sheets shall be kept for those chemicals currently in use in accordance with Occupational Health Standard Part 430 "Hazard Communication," as referenced in R 325.3451a.**

#### R 325.3466 Employee medical records; access by employee-designated representative.

Rule 16. An employer shall, upon request, assure the access of each designated representative to employee medical records of an employee who has given the designated representative specific written consent, except that death certificates shall be made available to the designated representative without specific written consent. Appendix A to these rules contains a sample form which may be used to establish specific written consent for access to employee medical records. ~~Appendix A may be obtained pursuant to R 325.3476.~~

#### R 325.3472 Trade secrets; employee requests, procedures; discrimination complaints.

Rule 22. (1) Except as provided in subrule (3) of this rule, an employer may delete, from records that are requested by a health professional, employee, or designated representative, a trade secret, as defined by section 6(7) of the act, which discloses manufacturing processes or which discloses the percentage of a chemical substance in a mixture, if the employer notifies the health professional, employee, or designated representative, in writing, that the trade secret information has been deleted.

(2) If deletion of trade secret information by an employer pursuant to the provisions of subrule (1) of this rule substantially impairs the evaluation of a place where, or a time when, exposure of an employee to a toxic substance or harmful physical agent occurred, the employer shall provide alternative information that is sufficient to permit the employee or designated representative to identify where and when exposure occurred.

(3) An employer may withhold a specific chemical name and identity, **the exact percentage (concentration) of the substance in a mixture, and other specific identification** of a toxic substance from a disclosable record if all of the following provisions are satisfied:

(a) The claim that the information withheld is a trade secret can be supported pursuant to the provisions of section 14d of the act.

(b) All other available information on the properties and toxic effects of the substances is disclosed.

(c) The employer informs the requesting party that the specific chemical identity **and percentage composition are** withheld as a trade secret.

(d) The specific chemical identity **and percentage composition** are made available, upon request, to health professionals, employees, and designated representatives pursuant to the applicable provisions of R 325.3472a.

~~(4) If trade secret information is provided to a health professional, employee, or designated representative, an employer may require, as a condition of access to the information, that the receiving party agree, in writing, not to use the trade secret information for the purpose of commercial gain and not to permit misuse of the trade secret information by a competitor or potential competitor of the employer.~~

~~(5) An employee who is aggrieved by a determination of an employer to delete trade secret information may appeal the determination of the employer by filing a discrimination complaint pursuant to the provisions of section 65 of the act.~~

R 325.3472a Trade secrets; disclosure in medical emergency and nonemergency.

Rule 22a. (1) If a treating physician or nurse determines that a medical emergency exists and the specific chemical identity **or specific percentage of composition** of a toxic substance is necessary for emergency or first aid treatment, an employer shall immediately disclose the specific chemical identity **or percentage composition** of a trade secret chemical to the treating physician or nurse, regardless of the existence of a written statement of need or a confidentiality agreement. The employer may require a written statement of need and confidentiality agreement, pursuant to the provisions of subrules (2) and (3) of this rule, as soon as circumstances permit.

(2) In nonemergency situations, an employer shall, upon request, disclose a specific chemical identity **or percentage composition**, otherwise permitted to be withheld pursuant to the provisions of R 325.3472(4), to a health professional, employee, or designated representative if all of the following provisions are met:

(a) The request is in writing.

(b) The request describes, with reasonable detail, 1 or more of the following occupational health needs for the information:

(i) To assess the hazards of the chemicals to which employees will be exposed.

(ii) To conduct or assess sampling of the workplace atmosphere to determine employee exposure levels.

(iii) To conduct preassignment or periodic medical surveillance of exposed employees.

(iv) To provide medical treatment to exposed employees.

(v) To select or assess appropriate personal protective equipment for exposed employees.

(vi) To design or assess engineering controls or other protective measures for exposed employees.

(vii) To conduct studies to determine the health effects of exposure.

(c) The request explains, in detail, why the disclosure of the specific chemical identity **or percentage composition** is essential and why the disclosure of the following information would not enable the health professional, employee, or designated representative to provide the occupational health services described in **subrule (2)(b) of this rule**: ~~subdivision (b) of this subrule:~~

(i) The properties and effects of the chemical.

(ii) Measures for controlling workers' exposure to the chemical.

(iii) Methods of monitoring and analyzing worker exposure to the chemical.

(iv) Methods of diagnosing and treating harmful exposures to the chemical.

(d) The request includes a description of the procedures to be used to maintain the confidentiality of the disclosed information.

(e) The health professional, employee, or designated representative and the employer or contractor of the services of the health professional or designated representative agree, in a written confidentiality agreement, that the health professional, employee, or designated representative will not use the trade secret information for any purpose other than the health need asserted and agree not to release the information under any circumstances other than to the department, as provided in subrule (7) of this rule, except as authorized by the terms of the agreement or by the employer.

(3) The confidentiality agreement that is authorized by subrule (2) of this rule may do either of the following:

(a) Restrict the use of the information to the health purposes indicated in the written statement of need.

(b) Provide for appropriate legal remedies for a breach of the agreement, including stipulation of a reasonable estimate of likely damages. The agreement shall not include requirements for the posting of a penalty bond.

(4) Nothing in these rules is meant to preclude the parties from pursuing non-contractual remedies to the extent permitted by law.

(5) If the health professional, employee, or designated representative who receives the trade secret information decides that there is a need to disclose it to the department, then the employer who provided the information shall be informed by the health professional before, or at the same time as, the disclosure.

(6) If an employer denies a written request for disclosure of a specific chemical identity **or percentage composition**, then the denial shall be in compliance with all of the following provisions:

(a) Be provided to the health professional, employee, or designated representative within 30 days of the request.

(b) Be in writing.

(c) Include evidence to support the claim that the specific chemical identity **or percentage composition** is a trade secret according to the provisions of section 14d of the act.

(d) State the specific reasons why the request is being denied.

(e) Explain in detail how alternative information may satisfy the specific medical or occupational health need without revealing the specific chemical identity **or percentage composition**.

(7) The health professional, employee, or designated representative whose request for information is denied pursuant to the provisions of subrule (2) of this rule, may refer the request and the written denial of the request to the department for consideration.

(8) If a health professional, employee, or designated representative refers a denial to the department pursuant to ~~the provisions of~~ subrule (2) of this rule, the department shall consider the evidence to determine which of the following are true:

(a) The employer has supported the claim that the specific chemical identity **or percentage composition** is a trade secret.

(b) The health professional, employee, or designated representative has supported the claim that there is a medical or occupational health need for the information.

(c) The health professional, employee, or designated representative has demonstrated adequate means to maintain confidentiality.

(9) With regard to an investigation, both of the following provisions apply:

(a) If the department determines that the specific chemical identity **or percentage composition** requested pursuant to the provisions of subrule (2) of this rule is not a bona fide trade secret, or that it is a trade secret, but the requesting health professional, employee, or designated representative has a legitimate medical or occupational health need for the information, has executed a written confidentiality agreement, and has shown adequate means for complying with the terms of such agreement, then the employer will be subject to citation by the department.

(b) If an employer demonstrates to the department that the execution of a confidentiality agreement would not provide sufficient protection against the potential harm from the authorized disclosure of a trade secret specific chemical identity **or percentage composition**, then the department may issue such orders or impose such additional limitations or conditions upon the disclosure of the requested chemical information as may be appropriate to assure that the occupational health needs are met without an undue risk of harm to the employer.

(10) Notwithstanding the existence of a trade secret claim, an employer shall, upon request, disclose to the director any information that these rules require the employer to make available. If there is a trade secret claim, the claim shall be made not later than at the time the information is provided to the director so that suitable determinations of trade secret status can be made and the necessary protections can be implemented.

(11) Nothing in these rules shall be construed as requiring, under any circumstances, the disclosure of process or percentage of mixture information that is a trade secret.

#### R 325.3475 Transfer of records.

Rule 25. (1) If an employer ceases to do business, the employer shall transfer all records subject to these rules to a successor employer. The successor employer shall receive and maintain the records.

(2) If an employer ceases to do business and there is no successor employer to receive and maintain the records subject to these rules, the employer shall notify affected employees of their right of access to the records not less than 3 months prior to the cessation of the employer's business.

~~(3) If an employer either ceases to do business and there is no successor employer to receive and maintain the records or intends to dispose of any records required to be preserved for not less than 30 years, the employer shall do either of the following:~~

~~(a) Transfer the records to the director, upon request of the director. Prior to transfer of records, the employer shall notify the current affected employees in writing.~~

~~(b) Notify the director and the current affected employees, in writing, of the impending disposal of the records not less than 3 months prior to the disposal of the records.~~

~~(4) If an employer regularly disposes of records required to be preserved for not less than 30 years, the employer may, with not less than 3 months notice, notify the director on an annual basis of the records intended to be disposed of in the coming year.~~

#### R 325.3476 **Rescinded.** Rules and appendices; obligations; availability; permission to reproduce.

~~Rule 26. (1) The information contained in the appendices to these rules is informational and is not intended, by itself, to create any additional obligations not otherwise imposed by these rules, nor to detract from any existing obligations.~~

~~(2) Copies of these rules and appendix A and appendix B are available to affected employers and employees at no cost from the Michigan Department of Consumer and Industry Services, MIOSHA Standards Division, P. O. Box 30643, Lansing, Michigan 48909.~~

~~(3) Permission to reproduce any of these documents in full is granted by the director.~~