

June 30, 2022

OSHA Docket Office
Docket No. OSHA-2021-0006
U.S. Department of Labor
Room N-2625
200 Constitution Avenue, NW
Washington, DC 20210

RE: March 30, 2022, Proposed Rule "Improve Tracking of Workplace Injuries and Illness"

To Whom It May Concern:

Please accept these comments and recommendations from the **Phylmar Regulatory Roundtable (PRR) Occupational Safety and Health, OSH Forum** in response to the U.S. Department of Labor (DOL), Occupational Safety and Health Administration's (OSHA) request for public comment on the Proposed Rule: Improve Tracking of Workplace Injuries and Illness, [published](#) in the Federal Register on March 30, 2022.

PRR is a member-driven group of 37 companies and utilities, 19 of which rank amongst the Fortune 500. Combined, PRR members employ more than 1.7 million American workers and have annual revenues of more than \$1 trillion. Individual PRR members are Environmental Health and Safety (EHS) professionals committed to continuously improving workplace safety and health. PRR provides informal benchmarking and networking opportunities to share best practices for protecting employees. In addition, members work together during the rulemaking process to develop recommendations to federal and state occupational safety and health agencies for effective workplace regulatory requirements. The opinions expressed below are those of PRR and may differ from beliefs and comments of individual PRR members.

Please accept the following comments in response to OSHA's proposal to:

- Require establishments with over 100 or more employees in certain designated industries to electronically submit information from their OSHA Forms 300, 301, 300A, annually.
- Update its classification system used to determine the list of industries covered by the electronic submission requirement.

- Remove the requirement for establishments with 250 or more employees, not in a designated industry, to electronically submit information from their Form 300A to OSHA, annually.
- Post the data collected on a public website in a searchable database.
- Require establishments to include their company name with submission.

PRR's comments are organized in the following sections:

- I. PRR's General Concern
- II. Primary Reasons Why PRR Does Not Support OSHA's Proposal
- III. OSHA's Stated Benefits
- IV. Additional Concerns and Questions
- V. Proposed List of Industries in Appendix A and B to Subpart E
- VI. OSHA's Estimated Cost
- VII. Support for Elements of the Proposal
- VIII. PRR's Recommendation
- IX. Closing

I. PRR's General Concern

In 2018, PRR submitted extensive comments to OSHA that supported the rescinding of the requirement for employers with 250+ employees to electronically submit Form 300 (Log of Work-Related Injuries and Illnesses) and Form 301 (Injury and Illness Incident Report) primarily due to the substantial risk to worker privacy. We appreciated OSHA's final decision in 2019 that acknowledged the potential privacy risk to workers outweighed the benefit of collection; it was the right decision. However, we were disappointed to see that OSHA's March 30, 2022, proposed regulation has greatly increased the previous potential risk to worker privacy by proposing to not only collect Forms 300 and 301, but to post the data from submitted Forms 300, 301, and 300A publicly in an online searchable database.

Exposure of sensitive worker information and the privacy risk this proposal creates remains PRR's primary concern. The following sections elaborate on the potential risk to worker privacy and additional reasons that illustrate why PRR does not support OSHA's promulgation of this proposed rule.

II. Primary Reasons Why PRR Does Not Support OSHA's Proposal

A. OSHA's Posting of Forms 300, 301 and 300A on a Public Website with a Searchable Database

Most concerning about this proposal is the posting of potentially sensitive and private information that can be used to identify workers on a public website that is searchable.

OSHA claims that this database will be queryable and accessible via Application Programming Interfaces (API) and that web developers will be able to create, link and implement technologies to extract this information. It seems that the Agency fails to take into consideration that it is not just researchers and government agencies/websites that will interface with the API to utilize the data; once the data is posted it will be **accessible to any app developer, and person, in the world**. There are already data companies that have developed tools that scrape data and link to relational databases. The results are astounding and amazingly accurate. For example, individual profiles that include contact information (i.e., names, telephone numbers, email addresses, job titles, work locations) and photos can be compiled by extracting information from hundreds of sources on the internet. These sources include social media services, such as Facebook and LinkedIn, but also include details from a person's online history that is digitally tracked. This data is then collected and stored in data lakes¹ to be processed or sold. In addition to personal contact information, seemingly innocuous data that may be readily available online such as work histories, certifications, property records and address history, can be cross-referenced (relationally) and ultimately expose a worker's private information by creating a data profile. Companies currently use these types of techniques to develop targeted sales campaigns, recruitment strategies, and differential analysis. A few examples of data companies who design and successfully sell these services include: [Owler](#), [Dun and Bradstreet](#), [Bombora](#); [D&B Hoovers](#), [UpLead](#), and [Mergent Intellect](#).

Once injury and illness data is publicly available developers will be able to create tools that scrape this information, including job titles, facility locations, company names and facts from open narrative text fields. When this data is combined with information obtained via other internet sources (identified above), developers will be able to potentially re-identify individuals with a high degree of accuracy. As OSHA acknowledges and promotes in the NPRM, developers will be able to use the same tools, including artificial intelligence algorithms for a multitude of reasons; not all of which contribute to workplace safety.

One example of a web program that could be designed would be to **build worker risk profiles** that could influence hiring decisions. An employer NOT hiring a worker because they have a history of injuries and illnesses and a high number of days away from work is just one example of an unintended consequence of establishment specific injury and illness data being made public. PRR members have pointed out that many injuries are a result of repetitive motion from multiple years as a highly skilled worker on the job. Exposing this type of injury and illness data could inadvertently lead to aging workers not being

¹ "Data Lake" A data lake is a system or repository of data stored in its natural/raw format, usually object blobs or files. A data lake is usually a single store of data including raw copies of source system data, sensor data, social data, etc., and transformed data used for tasks such as reporting, visualization, advanced analytics and machine learning. *Wikipedia*, Wikimedia Foundation, 21 April 2022: https://en.wikipedia.org/wiki/Data_lake

discriminated against and not hired. To be clear, PRR does not support this type of discriminatory behavior and ill-use of injury and illness data. We are also not trying to be hyperbolic. It is crucial that OSHA understand that it is not just the worker who will have the ability to "examine the case-specific information at establishments where they are interested in working, to help them make a more informed decision about a future place of employment," or the researcher and EHS professional using the information for research purposes.² Any stakeholder, including employers, will have access to this information and it can be used in ways outside of the intent to mitigate risk and improve worker health and safety while providing unintended consequences.

This type of risk profile and data tool could also be used by insurance companies when determining policies and rates for a company's worker compensation insurance plan. In addition, an insurance company could use the risk profile and data tool to deny issuance of disability, long-term, and other types of insurance.

This proposal is a Pandora's box of exposure risk that will metastasize once this personal data is published; we ask that OSHA deeply consider the risk and burden to the employee and employer if this information becomes accessible to the wrong parties. If OSHA decides to move forward with a final rule requiring employers in Appendix B with 100+ employees to submit Forms 300, 301 and 300A in addition to publicly posting this information in a searchable online database, we believe there will be unintended and potentially serious and destructive consequences to employers and employees alike.

B. Privacy Concerns Identified in 2018 and 2019 Have Not Been Mitigated

OSHA has not demonstrated that the privacy concerns identified by the Agency in the 2018 NPRM to rescind the collection of Forms 300 and 301 and confirmed in the 2019 Final Rule have been effectively mitigated.

OSHA presents multiple points in the March 30th, 2022, NPRM that imply the reasons why privacy is no longer a concern. However, none of them address the privacy issues that could result from the expanded proposal to collect and publicly post Forms 301 and 300. Rather, they are arguments on the risk associated with FOIA requests and the current requirements. Therefore, they are not applicable to what is being proposed. More concerning, OSHA does not even consider the new privacy concerns this proposal raises. The following points explain this:

- i. *OSHA implies that the risk of violating an employee's privacy as a result of a FOIA request is no longer valid because "...courts rejected OSHA's claim that*

² U.S. Department of Labor. "Improve Tracking of Workplace Injuries and Illnesses." 87 Fed.Reg. 18534 (30 March 2022).

*electronically submitted 300A injury and illness data is covered under the confidentiality exemption in FOIA Exemption 4."*³

The cases cited by OSHA in the NPRM only address FOIA requests for the 300A. This proposal is specific to OSHA collecting and maintaining Forms 300 and 301.

- ii. *"OSHA generally releases copies of the 300 Logs maintained in inspection files in response to FOIA requests after redacting employee names (column B)"*⁴

It is not clear what is meant by "generally releases" but it can be assumed it is not often. Currently, OSHA only has access and, more importantly, the ability to release Form 300 Logs that are collected as part of an inspection. It is commonly known, and stated in the NPRM, that OSHA does not have the resources to conduct a fraction of the inspections that collection through the proposed rule would produce. In actuality, the previous risk is much lower than what OSHA is now proposing. Also, the privacy is no longer central to FOIA requests because once the data is posted, anyone will have access, without having to make any official requests. Finally, the little protection the FOIA process does provide to protect worker confidentiality will be gone as well.

- iii. *"All collected data fields on the right-hand side of the form [301] (Fields 10 through 18) will generally be made available. The agency currently occasionally collects the form for enforcement case files."*⁴

This argument is more concerning than (ii.) above because, in addition to the use of "generally," which is not clearly defined, OSHA does not state to whom it generally releases the Log. In addition, OSHA acknowledges in that same paragraph that the agency reviews the form during "some" inspections and "occasionally collects" Form 301. Again, this illustrates that the number of Form 301 currently subject to FOIA requests is minimal compared to what will be available, without a FOIA request if this provision is promulgated.

- iv. *"Once the copy is accessed, OSHA's recordkeeping regulation does not place any limitations on the use or release of the information obtained by employees and employee representatives." "...while agency policy is that employees and their representatives with access to records should treat the information contained therein as confidential except as necessary to further the purposes of the Act, the Secretary lacks statutory authority to enforce such a policy against employees*

³ U.S. Department of Labor. "Improve Tracking of Workplace Injuries and Illnesses." 87 Fed.Reg. 18531 (30 March 2022).

⁴ U.S. Department of Labor. "Improve Tracking of Workplace Injuries and Illnesses." 87 Fed.Reg. 18532 (30 March 2022).

*and representatives" "In other words...employees and their representatives can make the data they have accessed public if they wish to do so."*⁵

This point of view is disheartening. Simply put, two wrongs do not make a right. While true, that OSHA cannot control how information is distributed after copies are legally obtained by employees and their representatives, we caution the Agency not to play a part in the ability for these documents to be obtained and distributed to individuals that do not have a valid need to know for the purposes of advancing workplace safety and health. Also, if privacy is violated and harm is done by an employee or employee representative sharing the information, it would be easier for the negatively impacted party to determine who is responsible for the release and follow up appropriately, legally if necessary than it will if the information is public.

- v. *"...the agency has not been notified of issues regarding employee identification or re-identification, despite that some of the released fields could act as indirect identifiers if combined with additional information or data external to the agency release or already in the requestor's possession."*⁶

As stated above, the amount of data and number of forms that OSHA currently collects and may be subject to FOIA requests does not compare to: 1) The number of forms OSHA will have if this rule is promulgated as proposed and 2) The multitude of information from these forms published by OSHA on a public website with a searchable database with API integration. Simply because the Agency has not been notified yet, is not an indication that privacy violations made more likely, with the expansive requirements OSHA is now proposing, will not occur.

It is important to note that the Bureau of Labor Statistics (BLS), an Agency that successfully collects and analyzes nearly the same data OSHA is requesting through the annual Survey of Occupational Injuries and Illnesses (SOII) is able to successfully utilize and analyze this information without subjecting workers to privacy violations. Another significant point is that BLS has pledged confidentiality and is prohibited from releasing establishment-specific and case-specific data to the general public or to OSHA, under [Title 44 U.S.C. 3572](#). PRR can understand the benefit of OSHA having this information for statistical purposes, like BLS, but does not think that the benefits from *posting* this information publicly outweighs the risk of subjecting workers to privacy violations and potential risks.

⁵ U.S. Department of Labor. "Improve Tracking of Workplace Injuries and Illnesses." 87 Fed.Reg. 18532 (30 March 2022).

⁶ U.S. Department of Labor. "Improve Tracking of Workplace Injuries and Illnesses." 87 Fed.Reg. 18539 (30 March 2022).

More concerning is that the agency and authors of this proposal dismiss its previous acknowledgement of the potential privacy issues. The proposal goes so far as to state that in the 2019 final rule OSHA took “an expansive view of the term “PII”” as a reason for rescinding the collection of Forms 300 and 301.⁷ Specifically, the proposal states that descriptions of injuries and body parts is no longer considered “quite sensitive.”⁷ PRR strongly disagrees with this statement and believes that individual workers would as well – strangers knowing details of a person’s injury and affected body part can absolutely be considered quite sensitive. For example, details about an injury to a reproductive body part such as the groin, exposure to an infectious disease (e.g., HIV, hepatitis B/C), a diagnosis that impacts reproductive abilities (e.g., sperm abnormalities, birth defects), or a neurologic disorder should be considered private information. We believe that there is enough information on Forms 300 and 301 that an individual can be identified and PII exposed. In addition, details on those forms about the injury, illness, or situation (e.g., workplace assault), if released, could negatively impact the worker.

The U.S. Department of Homeland Security (DHS) defines SPII in its [Handbooks for Safeguarding Sensitive PII](#)⁸ as:

“Personally Identifiable Information, which if lost, compromised, or disclosed without authorization, could result in substantial harm, embarrassment, inconvenience, or unfairness to an individual.”

The understanding of SPII is not a novel concept, nor is it exclusive to DHS. Other government agencies, including the Environmental Protection Agency⁹ have policies in place and differentiate between PII and SPII.

DHS also clearly explains when determining what is considered sensitive data elements “context matters.”⁸ Considering the totality of the situation and context surrounding the injury and illness is central to OSHA’s proposal. Yet, in its proposal, OSHA fails to acknowledge that *any* injuries and illnesses may be deemed sensitive to a worker. Despite the redaction of names, addresses, age and gender, the injury and illness facts alone could result in exposing sensitive information and potentially violate SPII. Including more detail from information contained in the open text fields (14 – 18 on Form 301) can piece together the entire story. This information combined with data acquired from other sources (i.e., news reports, job titles from LinkedIn, the city and state the person lives in determined from Facebook, publicly known company establishment names and locations,

⁷ U.S. Department of Labor. “Improve Tracking of Workplace Injuries and Illnesses.” 87 Fed.Reg. 18539 (30 March 2022).

⁸ U.S. Department of Homeland Security. DHS Privacy Office. “Handbook for Safeguarding Sensitive PII.” [Privacy Policy Directive 047-01-007](#), Revision 3. (4 December 2017).

⁹ U.S. Environmental Protection Agency. “Protecting Sensitive Personally Identifiable Information.” [12/19/2016, CIO 2151-P-10.0](#). (24 February 2022).

etc.) the probability of reidentifying a person and having a clear understanding of what happened increases. The following charts illustrate how information on Forms 300 and 301 can be combined to determine who a person is and include sensitive information that, if exposed, could cause embarrassment for the worker.

Company Name: XX (Required with submission)	
Fields From Form 300	Submitted Data
Establishment Name	Retail Store XX
City, State	Fresno, CA
(C) Job Title	Store Manager
(E) Where the event occurred	Inside the storeroom at Fashion Fair Mall
(F) Describe injury or illness, parts of the body affected, and object/substance that directly injured or made person ill	Employee has multiple lacerations and contusions on face, arms, buttocks.
Fields from Form 301*	Submitted Data
(15) What happened? Tell us how the injury occurred.	Employee was closing for the night (working alone) when a customer in a hoodie and face covering came in. She offered assistance, he said no. After wandering around the store and searching on a clothing rack, he asked if she had more sizes in the back. When she went to the storeroom to check he followed her in and attacked/assaulted her. She called the police after he left.
(16) What was the injury or illness? Tell us the part of the body that was affected and how it was affected.	She was sexually assaulted and received multiple lacerations and contusions on her face, arms, buttocks.
(17) What object or substance directly harmed the employee?	He used his hands and she thinks the assailant had a knife or sharp object.

*Form 301 generally has more detail on the incident. Some employers use Form 301 as the investigative report.

Company Name: XX (Required with submission)	
Fields From Form 300	Submitted Data
Establishment Name	Research Site One
City, State	Mojave, CA
(C) Job Title	Senior Hydraulics Engineer
(E) Where the event occurred	Mohave research site in processing room

(F) Describe injury or illness, parts of the body affected, and object/substance that directly injured or made person ill	Hydraulic fluid from punctured hose injected into groin requiring surgery
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This proposal goes beyond the now narrow privacy concerns raised in 2018 via the potential exposure under FOIA requests. FOIA requests require an individual to follow an Agency's carefully laid out process which takes time, thought, and patience. It is also specific to individual forms. In this proposal OSHA is eliminating all barriers to access information that could be considered sensitive by creating an online database that is searchable by anyone in the world. Yet, the proposal boldly states that the Agency's previous statement in the preamble of the 2019 Final Rule that the collection of such data would expose sensitive worker information to a meaningful risk of disclosure is "no longer compelling."¹⁰ The reason given for this is "...recent advancements in technology have reduced the risk that information that reasonably identifies individuals directly, such as name and contact information, will be disclosed to the public."¹⁰ PRR believes the opposite is true – recent advancements make it *easier* to identify individuals, particularly when all the information is accessible in an online database. OSHA's position and statement only focuses on *direct identifiers that reasonably identify an individual*; it is not supported by the reality that the collection and posting of Forms 300, 301 and 300A in a searchable database (or further qualifying through other relational databases) has the potential to lead to **violations of worker privacy by re-identifying individuals using indirect identifiers.**

C. The Re-Identification of Individuals Using Indirect Identifiers

The NPRM consistently conveys that privacy concerns are not an issue and "...the agency would be able to adequately protect workers' information that reasonably identifies individuals directly (such as name and address) using the safeguards in the proposed rule and OSHA's planned data collection system in combination with warnings to employers and available automated information technology."¹¹ While we agree that this strategy would help prevent identifying an individual and we support this approach it only addresses *direct identifiers* - specific data points that can identify an individual; **it does not address collection of indirect data points that can be linked to re-identify an individual.**

It is important to recognize that while individual fields, standing alone, would not be considered traditional "PII," (e.g., name, address); however when data points can be

¹⁰ U.S. Department of Labor. "Improve Tracking of Workplace Injuries and Illnesses." 87 Fed.Reg. 18538 (30 March 2022).

¹¹ U.S. Department of Labor. "Improve Tracking of Workplace Injuries and Illnesses." 87 Fed.Reg. 18540 (30 March 2022).

linked, and the information viewed in totality, there is a substantial risk that employees may be identified, thus violating their privacy.

Although OSHA states specific fields that contain PII will not be collected (i.e., name and address) and additional fields (i.e., date of birth and gender) will be collected but not released, in addition to the risk of individuals being re-identified using data in other fields as illustrated above, particularly open text fields will contain sensitive information because, as DHS advises, "context matters."¹²

Today's technology and the ability to acquire and link data through machine learning, artificial intelligence and API's will continue to improve. Due to this, the privacy risk will increase on a massive scale by OSHA publishing the data so that it can be "queried via web-based tools"¹³ and accessible with other API's as highlighted above.

OSHA acknowledges that there are fields on Forms 300 and 301 that "could act as indirect identifiers if released and combined with other information, such as job title on the Form 300, time employee began work on the Form 301, and date of death on the Form 301."¹⁴ However, the proposal fails to address how the Agency will mitigate this stated risk.

In OSHA's 2018 NPRM that proposed rescinding the collection of Forms 300 and 301, OSHA concedes that re-identification of the injured employee is a major concern:

"Releasing case-specific data to a member of the public could result in the inadvertent release of personally identifiable information (PII) or re-identification of the data with a particular individual" despite scrubbing PII from the data set.¹⁵

The Agency went further to say that:

"...it is not possible to guarantee the non-release of PII" and "...even after all PII has been removed, there is a chance that somebody could re-identify some of the data by linking the fully identified data back to the specific person."¹⁵

Significantly, this position was taken in response to the risk to worker privacy associated with FOIA requests - a risk that is significantly lower than OSHA's current proposal to publicly post all of this information in a searchable database.

It is troublesome that these previous positions are not mentioned or addressed in the current NPRM. As stated above, OSHA has instead focused on mitigating the risk of

¹² U.S. Department of Homeland Security. DHS Privacy Office. "Handbook for Safeguarding Sensitive PII." [Privacy Policy Directive 047-01-007](#), Revision 3. (4 December 2017).

¹³ U.S. Department of Labor. "Improve Tracking of Workplace Injuries and Illnesses." 87 Fed.Reg. 18542 (30 March 2022).

¹⁴ U.S. Department of Labor. "Improve Tracking of Workplace Injuries and Illnesses." 87 Fed.Reg. 18538 (30 March 2022).

¹⁵ U.S. Department of Labor. "Improve Tracking of Workplace Injuries and Illnesses." 83 Fed.Reg. 36498 (30 July 2018).

identification through direct identifiers. It seems that despite definitive Agency recognition of re-identification in 2018, there is only one sentence addressing the risk from in-direct identifiers in the March 30, 2022, proposal. More disquieting is that although this risk still exists, OSHA, by failing to address and acknowledge it, signals there will be no attempt by the Agency to protect workers from re-identification using in-direct identifiers. For reasons illustrated in these comments OSHA's statement that "the benefits of collecting and publishing the data for improving safety and health outweigh potential privacy problems"¹⁶ is both inaccurate and short-sighted. We are hopeful that OSHA holds worker privacy to the same high standard that PRR members do and reconsiders this proposal. Until OSHA can confidently state that it can adequately protect workers' information that indirectly identifies them, OSHA should refrain from the massive collection and publication of Forms 300 and 301.

D. The Risk of Open-Ended Narrative Text Fields

Despite employers' and OSHA's commitment to remove fields containing PII from submission, PRR members believe that the fields which require descriptive written narratives (on both Forms 300 and 301) create a potential high-risk and increases the potential exposure of private and sensitive information. For example, Form 300 section (F) requires a detailed description of the injury or illness, parts of the body affected, and object/substance that directly injured or made the worker ill; and Form 301 (sections 14 – 17) request details on what the employee was doing just before the incident occurred, what happened, what was the injury or illness, and what object or substance directly harmed the employee. As illustrated in our examples above, answers to these questions can contain information that is quite sensitive and identifying.

PRR members recognize that Form 301 states: "please do not include any personally identifiable information (PII) pertaining to worker(s) involved in the incident (e.g., no names, phone numbers or SSNs)" and OSHA intends to scrub direct identifiers such as name and email in open fields. Member experience, however, is that open-ended fields requiring narratives significantly increase the risk of inadvertently including details of the incident that could include sensitive information. In addition to exposing information about the injured employee, open fields can contain information about co-workers. This could violate the privacy of not just the employee that was injured, but other employees who may have been involved. PRR members have mentioned that domestic violence at the workplace also raises concerns about open text fields. It is not unusual for employees to be involved in romantic relationships with co-workers. If a couple were involved in a domestic

¹⁶ U.S. Department of Labor. "Improve Tracking of Workplace Injuries and Illnesses." 87 Fed.Reg. 18540 (30 March 2022).

dispute at work, it would be nearly impossible to describe such an incident without including the details that the individuals would find sensitive.

One PRR member shared that Form 301 is used as an investigative tool. Those responsible for using this form are trained to include specific details that will aid in the investigation and employees have the understanding and expectation that it remains private. We believe that trust will be violated by the submission and public posting of Forms 301, as well as increasing the risk to privacy.

Another PRR member pointed out that employees of all levels and locations are responsible for completing Form 301. These individuals are not experts in writing summaries that protect an individual's privacy; nor have they ever needed to be because it is well-recognized that the document will remain private. If the proposed rule is promulgated employers will need to increase resources (e.g., time, training, personnel) to ensure that these documents do not contain personal information. PRR supports and agrees that there is artificial intelligence (AI) driven software to scrape the data and remove *direct identifiers*. But as we pointed out above, it is the indirect identifiers that remain the concern. Investigative details on Form 301, once linked to a person, will expose SPII. PRR advises OSHA to deeply consider this risk and the associated cost prior to moving forward and issuing a final rule.

III. OSHA's Stated Benefits

OSHA states that the proposal would result in numerous benefits. PRR agrees that there could be added benefit for OSHA to have additional details on worker illnesses and injuries. Doing so would help the Agency identify trends and develop programs and initiatives to educate and improve the safety and health of workers. However, PRR does not agree that the strategy OSHA is proposing will result in benefits that outweigh the risk to worker privacy. In addition, we have the following concerns with several of OSHA's assertions.

A. Case Rates As Leading Indicators

OSHA states that "the main purpose of the proposed rule is to prevent worker injuries and illnesses through the collection and use of timely, establishment-specific injury and illness data."¹⁷ It goes further to say that all stakeholders, using the data obtained through the proposed rule "...would be better able to identify and mitigate workplace hazards and thereby prevent worker injuries and illnesses."¹⁷ This assumption implies that illness and injury rates are leading indicators. However, the theory and strategy to evaluate the effectiveness of safety initiatives using injury and illness rates is one that EHS professionals, like PRR members, have been working to dismantle. One major reason

¹⁷ U.S. Department of Labor. "Improve Tracking of Workplace Injuries and Illnesses." 87 Fed.Reg. 18533 (30 March 2022).

being that it can result in a culture where people are unwilling to report incidents. Employers have learned that the more incidents that are reported, investigated, and addressed, the less likely there will be a serious injury or fatality.

Another one of OSHA's asserted benefits states that this information will help target employers whose workers are at "high-risk" for enforcement and compliance assistance.¹⁷ Again, the assumption leads the regulated community to believe that OSHA's philosophy is that injury and illness rates are an indicator of an unsafe work environment or negligent employer. This goes directly against OSHA's long-held declaration that "recording a case does not indicate fault, negligence, or compensability"¹⁸ and that "OSHA recognizes that injury and illness rates do not necessarily indicate a lack of interest in safety and health or success or failure per se."¹⁸ Also, the requirement to apply "geographic presumption" illustrates that all injuries are not the fault of the employer.

The safety community has been actively moving away from using case rates as indicators of a safety program's effectiveness and has been experimenting with various leading indicators (e.g., training completed, hazards identified and mitigated, recognizing worker safety). This proposal, and these supporting statements made by OSHA in the NPRM, indicate that OSHA is not in agreement with that approach. This is disappointing to employers in the regulated community who are working diligently to establish true leading indicators and metrics that will indeed improve worker safety and health. It also leads the general public, which is uninformed, to think that there is direct correlation between injury and illness rates and the effectiveness of an employer's worker safety and health programs and practices.

In addition, analysis of the level of microdata that OSHA is requesting (i.e., establishment specific data for employers with 100 or more employees) could also result in skewed results – an establishment with few employees may have a high case rate purely based on numbers which is not reflective of workplace hazards or employer commitment. High injury and illness rates are not an automatic indication that the company or establishment is operating an unsafe environment. Again, an uninformed public likely will not understand this. If OSHA moves forward with these requirements, PRR recommends that the number of employees triggering this requirement remains at 250.

As previously stated, PRR members also offer that many injuries are from repetitive motion with long-term employees where age and employment history is a major factor. We are skeptical that OSHA's analysis of establishment specific data will result in any

¹⁸ U.S. Department of Labor, Occupational Safety and Health Administration. Standard Interpretation. "OSHA's no-fault recordkeeping system requires recording work-related injuries and illnesses, regardless of the level of employer control or non-control involved." (2002-02-06): <https://www.osha.gov/laws-regs/standardinterpretations/2002-02-06>.

additional insight and mitigation measures that have not already been determined or advised.

B. Benchmarking with Other Companies

Many employers, such as PRR members are part of trade organizations and already participate in formal benchmarking on injury and illness data. PRR members also review BLS data. Therefore, we believe that OSHA's posting of establishment specific data will be of NO additional benefit to the resources already available to employers who actively pursue these methods.

IV. Additional Concerns

A. OSHA's Ability to Effectively Utilize a Massive Amount of Data

In 2016 OSHA declared that collection of Form 300A would enable the Agency to improve the safety and health of workers by mitigating risk. The current NPRM now says Form 300A is not enough. PRR recommends that OSHA publicly report its present use of Form 300A data and how it has improved targeting or helped the Agency meet other stated goals before requiring employers to submit even more information.

The amount of information and data points that this regulation will produce is exponentially larger than what OSHA currently collects from Form 300A alone. In addition, the NPRM does not explain exactly how OSHA intends to use or analyze all of this information.

The benefits given in the NPRM are assumptions and do not point to the critical component of how the information will be effectively processed or utilized. It is also not clear whether, despite the use of technology such as AI or deep learning models to process and interpret the data, OSHA has the resources in place to constructively utilize the information. OSHA should not place such a burden on the regulated community and risk on workers when the Agency does not have a clear strategy and approach to process and make use of the information.

In addition, to ensure the Agency remains fair, balanced, and trusted, any targeting for enforcement that results from submission of Forms 300, 301 and 300A should be based on a systematic approach that is standardized and impacts all industries in Appendix B subpart E, equally.

PRR appreciates that case-specific illness and injury data may be helpful for OSHA's research and strategic initiatives. BLS's statistical use of this data is an excellent example. PRR is concerned, however, about OSHA's, and particularly the public's, ability to remain

objective. To alleviate this concern, PRR recommends OSHA does not publish this information publicly, does not collect the company name, and uses this data for statistical purposes only.

The NPRM states that because OSHA has been able to successfully analyze 300,000 300A Forms annually since 2016, "this experience demonstrates OSHA's ability to collect, analyze, and use large volumes of data sets."¹⁹ Unfortunately, this number (300,000) and OSHA's optimistic assessment is not a direct indicator that the Agency will be able to successfully analyze and process the magnitude and significantly more detailed documents the Agency would collect if this rule promulgated.

Using OSHA's estimates in the NPRM:

- 48,919 establishments²⁰ will be impacted and required to electronically submit Forms 300 and 301; this is in addition to the current requirement to submit the 300A.
- 2,665 establishments will no longer be required to submit Form 300A.²⁰
- The mean number of cases per establishment is 14.7²¹ and OSHA estimates a total of 718,386 cases.²⁰
- OSHA's target for this rule it to obtain "roughly 750,000 cases of injuries and illnesses per year"²²

If this rule promulgated, the estimated **number of documents the Agency will receive is: 1,065,363**; this is **3 times more** than the number of documents OSHA has experience working with. We arrived at this number as follows:

- 300,000 (historical average of 300A submission) – 2,665 (establishments who will no longer be required to submit = 297,335
- 297,335 (Form 300A) + 48,919 (Form 300) + 718,386 (Form 301) = 1,065,363

In addition, Forms 300 and 301 contain open fields that will include a microdata. The amount of information OSHA will receive and be required to process is exponentially higher than the macro-level data OSHA has been processing from Form 300A, alone. PRR

¹⁹ U.S. Department of Labor. "Improve Tracking of Workplace Injuries and Illnesses." 87 Fed.Reg. 18538 (30 March 2022).

²⁰ U.S. Department of Labor. "Improve Tracking of Workplace Injuries and Illnesses." 87 Fed.Reg. 18549 (30 March 2022).

²¹ U.S. Department of Labor. "Improve Tracking of Workplace Injuries and Illnesses." 87 Fed.Reg. 18550 (30 March 2022).

²² U.S. Department of Labor. "Improve Tracking of Workplace Injuries and Illnesses" 87 Fed.Reg. 18543 (30 March 2022).

members question whether OSHA has the resources, processes, or systems in place to effectively manage what the Agency has proposed.

Finally, there is no discussion on how OSHA will evaluate the effectiveness of the proposed rule. Before requesting this large amount of information and placing such a burden on employers, OSHA should establish how it will validate its assertion of benefits.

B. Employee Authorization to Release Sensitive Data

PRR members have shared specific concern regarding employees' understanding of these proposed requirements. Many employees are very sensitive to privacy violations and already express concern and question how their data will be utilized. This interest and hesitancy to share personal health information has increased due to the COVID-19 pandemic. Employees are also familiar with the requirements of other institutions (i.e., banks, social media sites, shopping websites) to inform them of when and how their information will be used. Some members are distressed that OSHA is not subject to these types of notification requirements under the guise of its intent not to collect an employee's name, address, date of birth and gender.

PRR recommends that if OSHA moves forward with the posting of this data the Agency develop a communication campaign geared toward the worker population about the collection and use of this their injury and illness information.

Also, it is not clear whether OSHA will be responsible if a worker's privacy is violated by the public posting of this information. This will be important for members to understand prior to a final rule.

V. Proposed List of Industries in Appendix A and B to subpart E

PRR supports OSHA's update of industries to conform with the 2017 version of the North American Industry Classification System (NAICS codes). It is both practical and logical to align with the most recent codes from an accuracy standpoint.

OSHA asserts that the collection of establishment specific data from the identified industries, industries with injury and illness rates that trigger OSHA's specified threshold, will positively impact and reduce injury and illness rates. Based on this assumption, OSHA's ongoing analysis of injury and illness rates should show a decline in these specified industries. Continued analysis by the Agency of these trends would be an ideal way to analyze the effectiveness of this proposed rule. Furthermore, as these rates decrease OSHA should consider updating and removing industries from the appendices.

OSHA's statement in the NPRM that "when developing the final rule, OSHA may rely on the most current data available, as appropriate, for determining the list of industries in appendix B to subpart E."²³ While PRR agrees with the concept that the most up-to-date information is the most accurate and should determine the list of industries, we strongly recommend that additional industries are NOT added during the final rule. Doing so would not allow impacted industries the opportunity to comment on such significant changes. PRR recommends that any changes that result from OSHA utilizing updated data to determine included industries, specifically if new industries and sub-sets are added to the appendices, OSHA follows the Notice and Comment Process for Agency Rulemaking.

VI. OSHA's Estimated Cost and Burden

OSHA estimated average annual cost for an employer with more than 100 employees of \$81 is extremely low.²⁴

OSHA estimates that there will be a one-time cost of \$10.96 for employers to familiarize themselves with the rule. There is zero consideration or inclusion of cost to prepare to implement these changes or develop processes to comply with the new requirements.

OSHA also estimates that it will take 10 minutes to do one batch-upload and 10 minutes to manually enter each case. It seems that OSHA's estimate is limited to time of actual upload and does not consider or include any information about the time and resources it will take to manage, review, and redact details that are PII or considered sensitive. Despite OSHA's claim that machine learning and auto-coding will be implemented to scrub direct identifiers, employers will be responsible for removing PII and ensuring sensitive information is not submitted. We can only assume that in the event PII, or sensitive information is submitted by the employer and not removed by OSHA's system, it the burden of accountability for privacy violations will be on the employer, not OSHA.

A. Examples of Actual Time, Cost and Burden

The following are examples from employers that illustrate the additional time and burden they estimate it would take to comply with the additional requirements to electronically submit Forms 300 and 301. These estimates, from experienced technicians and Occupational Safety and Health experts do not align with OSHA's estimated cost and time spent to implement and manage the proposed requirements.

²³ U.S. Department of Labor. "Improve Tracking of Workplace Injuries and Illnesses." 87 Fed.Reg. 18543 (30 March 2022).

²⁴ U.S. Department of Labor. "Improve Tracking of Workplace Injuries and Illnesses." 87 Fed.Reg. 18547 (30 March 2022).

- Many PRR members in California use the “Employer’s Report of Occupational Injury or Illness,” Form 5020²⁵, as the equivalent to Form 301. This form contains the required information, but it is used for worker’s compensation and includes additional information not included on Form 301. This information is PII (i.e., social security number, phone number, gross wages/salary). In addition, Form 5020 is organized differently. Both of these factors will result in manual entry that will definitely take longer than 10 minutes per form for at least two reasons: 1) the numbers and entries on Form 5020 do not match Form 301 and the submitter will need to search Form 5020 for the required information; 2) they will be unable to submit a batch file because Form 5020 contains PII. These challenges will result in development of new processes, procedures, and new personnel. To be clear, this work will be duplicative as employers will still be required to complete and submit Form 5020; OSHA’s requirement to submit Form 301 will require time and resources in addition to what is already in place for workers compensation requirements.
- To reconfigure the coding and modify the current program they use to electronically upload Form 300A, a member estimates it will take at least two to three days’ worth of work to include submission of Forms 300 and 301.
- To manage the new requirements each year, a PRR member estimates that they will need to recruit and hire additional personnel.
- Submitting via batch file, PRR members confirm that it may take approximately 10 minutes to actually upload 300A data, but they spend at least 1-2 hours to generate and review the reports for submission. This will increase with additional forms.
- Other members confirm that it may only take 10 minutes to actually upload each 300 and 301 Form, but it is the additional time to review and ensure PII and sensitive information is not included that will add significant time to the process.

We understand that OSHA determined an *average* for time and cost that was influenced by the fact that facilities with low and even zero cases bring the estimates down. However, we still do not agree with a 14.7 case average and cost of \$81. For one, because the industries required to submit have a history of higher incident rates, it does not seem plausible that there are enough establishments with zero cases to bring the estimates this low. In addition, many employers have multiple establishments. The number of establishments will also increase the number of documents that will need to

²⁵ State of California Department of Industrial Relations. “Employer’s Report of Occupational Injury or Illness: [Form 5020](#)” (Rev 7.) (2002 June).

be submitted. This fact would directly impact the time and cost estimate; however, OSHA does not seem to include the submission of Form 300 in its estimates.

To illustrate why we do not agree with OSHA's cost estimates, we provide the following data.

- During the last five years, one member with approximately 2,000 employees and two (2) establishments, reported that they had a low of 74 recordable cases and high of 95. This employer would also need to manually submit Form 301 and estimates it will take at least 15 minutes to input using Form 5020. The estimated time it would take to complete ranges from 18 – 24 hours.
- During the last four years, another employer has had an average of 12,000 employees and 155 recordable cases on 60 Form 300 Logs. These documents are manually processed and maintained. Submission to OSHA would include a total of 216 documents. Using OSHA's low estimate of 10 minutes at \$60.96 an hour the cost would be \$1,317.
- A small employer with 218 employees reports 19 recordable cases on three (3) Logs; another with 341 employees reports 26 recordable cases on four (4) Logs; and the last example is an employer with 109 employees, 18 recordable cases on one (1) log.

These are just a sample of numbers and estimates from actual employers in the United States. PRR recommends OSHA revisit its estimated cost of 10 minutes and \$81. We also strongly believe that this estimate is inaccurate simply because preparation (beyond the estimated 10 minutes to review the regulation), reviewing the requirements, implementation on new procedures and policies, and review for redaction of PII and sensitive information was not considered in OSHA's NPRM.

VII. Support for Elements of the Proposal

As is made clear throughout our comments, PRR does not support OSHA's proposal to collect Forms 300 and 301 and is vehemently opposed to OSHA's publishing this information on a public website with a searchable database. However, to be prudent, PRR supports OSHA's strategy to integrate technologies and software to scrub and remove direct identifiers, and the use of auto-coding.

We also strongly support an in-depth privacy assessment of the proposal and suggest that OSHA not move forward until an objective privacy assessment is performed and OSHA is able to address and mitigate the potential risk of a worker's exposure of private and sensitive information.

VIII. PRR's Recommendation

PRR recommends that instead of requesting submission of Forms 300 and 301, OSHA proposes revising Form 300A so that the information collected would be more useful in identifying trends and learning about the types of illnesses and injuries occurring in the workplace. OSHA could also include a question about the location of the injury or illness. Expanding the categories would enable OSHA to capture more detail without the potential risk of violation to worker privacy and exposing sensitive information. For example, including "heat" as a type of illness and "indoor," "outdoor," "office," "distribution facility," "off-site" for a new field titled "location" on Form 300A would give OSHA the information it needs while providing protections against potential employee identifiers.

IX. Closing

In closing, despite OSHA's dedication and intention to protect the privacy of individuals after collecting Forms 300 and 301, there is no guarantee that efforts will be successful. The only way OSHA can ensure that workers and their privacy is protected is to NOT collect the information on Forms 300 and 301. This decision will make certain that workers cannot be identified by linking information contained in the documents, sensitive information is not disclosed, and redactions cannot be re-identified.

PRR believes that the privacy risk resulting from collection of Forms 300 and 301 is significant and believes that requiring their submission places OSHA in a position that unacceptably gambles with protecting worker privacy.

Sincerely,



Helen Cleary
Director
Phylmar Regulatory Roundtable