NATIONAL ASSOCIATION OF Manufacturers

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The Honorable David Michaels
Assistant Secretary
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

VIA ELECTRONIC SUBMISSION: http://www.regulations.gov

Re: OSHA Docket No. OSHA-2013-0023
Improve Tracking of Workplace Injuries and Illnesses
78 Federal Register 67254, November 8, 2013

Dr. Michaels:

The National Association of Manufacturers ("NAM") is pleased to provide OSHA with the following comments on the Agency's Proposed Rule, *Improve Tracking of Workplace Injuries and Illnesses* (78 Fed. Reg. 67254, November 8, 2013).

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The NAM's members have expressed concern over this proposed regulation and strongly believe the proposed changes to the existing recordkeeping system will have a negative impact on the traditional no-fault recordkeeping system. The NAM believes the existing recordkeeping system is sufficient to allow employers to identify and address hazards in their work-places. Additionally, the NAM questions OSHA's legal authority for the promulgation of such a regulation and have several policy-related concerns. These issues are addressed below.

For all the reasons stated below, the NAM and its members request OSHA withdraw this proposed regulation.

I. Current Recordkeeping Requirements Are Adequate

In 2001 OSHA revised Part 1904 - Recording and Reporting Occupational Injuries and Illnesses. 66 Fed. Reg. 5916 (January 19, 2001). The reasons OSHA provided at the time of these revisions were "to improve the quality of workplace injury and illness records." OSHA noted that higher quality records would serve important purposes, such as employer awareness of workplace hazards, reduce underreporting and lessen the recordkeeping burden on employers. *Id*. at 5918.

Based on the decline in injury and illness rates since 2001, it is evident that the current recordkeeping system in place is achieving these stated goals. In fact, the incidence rate for injuries and illnesses per 100 full-time employees in 2001 was 5.7 compared to the rate of 6.1 in 2000. In a Bureau of Labor Statistics ("BLS") news release announcing the 2001 injuries and illnesses statistics, BLS noted "[t]he rate for 2001 was the lowest since the Bureau began reporting this information in the early 1970s." (US DL 02-687, December 19, 2002).

BLS statistics establish that for the entire manufacturing sector injury and illness rates have dropped from 12.2 per 100 employees in 1994 to 4.3 per 100 employees in 2012. Similar trends in injury and illness rates are also evident in other industries. This steady rate of improvement across industry sectors is confirmation that the existing recording and reporting rules are working and are adequate. The NAM, therefore, believes the revisions OSHA proposes to Part 1904 in this regulation are unnecessary.

II. The OSH Act Does Not Grant Authority for this Proposed Regulation

Even if the current recordkeeping system was somehow inadequate or in need of revising, OSHA lacks the legal authority to promulgate *this* proposed regulation. Contrary to OSHA's assertions, the Occupational Safety and Health Act of 1970 ("OSH Act" or "Act") does not expressly grant authority through sections 8 and 24 for this proposed rule. Specifically, there is no language in section 8 or section 24 that permits the Secretary to promulgate regulations requiring the public disclosure of an employer's injury and illness records through a searchable webpage.

a. No express grant of authority is found in Sections 8 or 24.

Section 8(c)(2) merely grants the Secretary the authority to promulgate regulations requiring employers to maintain injury and illness records. Nothing in this section expressly grants authority for the public dissemination of such information. 29 U.S.C. § 657(c).

Moreover, had Congress intended to make such information available to the public they know how to do so. In various other sections of the OSH Act Congress explicitly granted authority requiring that other types of records be made available to the public. For example, section 12(g) requires the U.S. Occupational Safety and Health Review Commission records to be made publically available. 29 U.S.C. § 661(g). *U.S. v. Doig*, 950 F.2d 411, 414-15 (1991) ("Where Congress includes particular language in one section of a statute but omits it in another

section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (internal citation omitted).

Further, section 8(g)(1) specifically and uniquely limits the information the Secretary may publish to information that is "compiled and analyzed." 29 U.S.C. § 657(g)(1). This does not mean that OSHA can publish raw data from employer injury and illness records, but rather that it can compile information, analyze it, and then publish its analysis of that information in either summary or detailed form. The information being published, however, is the agency's analysis of the information, not the raw data itself.

Equally, such authority does not exist in section 8(g)(2). This provision grants the Secretary broad authority to promulgate regulations as "necessary to carry out their responsibilities under this Act." This section cannot be read in isolation and nothing in the Act suggests that making employers' work-related injury and illness records publically available is necessary for the Secretary to carry out his responsibilities under the Act. Furthermore, OSHA makes no assertion that such publication is necessary to carry out any of its responsibilities under the Act.

Section 24 also fails to grant any such express authority to the Secretary. Section 24(e) grants the Secretary authority to require employers to submit reports to the agency. 29 U.S.C. § 673(e). These reports are based on the records made and kept as required by section 8(c) of the Act. *Id*. Therefore, the authority granted in section 24 is limited to the collection of reports made based on the records employers maintain, such as work-related injury and illness records, not the collection of the records themselves. And nothing in this section grants authority to make these reports, let alone the records, available to the public.

b. OSHA implicitly acknowledged this lack of authority in the final rule for Part 1904.

In 2001, OSHA acknowledged that the agency had no means of protecting against unwarranted disclosure of private information contained in an employer's injury and illness records or that there were sufficient safeguards in place to protect against misuse of private information. But more importantly, OSHA acknowledged that "[t]he right to collect and use [private] data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures." 66 Fed. Reg. at 6056.

Nothing in the Act authorizes the Secretary to make data from an employer's injury and illness records (including the private medical information of employees) available to the public. Appropriately, there is nothing in the Act that would protect employers or individuals from unwarranted disclosures or misuse of private information contained in work-related injury and illness records – because public disclosures of the nature proposed are not authorized under current statute.

III. OSHA's Proposed Regulation Creates Unnecessary Duplication of Reporting in Violation of the OSH Act.

Section 8(d) of the OSH Act requires that "any information obtained by the Secretary…be obtained with a minimum burden upon employers…unnecessary duplication of efforts in obtaining information shall be reduced…" 29 U.S.C. § 657(d). This section specifically recognizes that submission of information from employers to the Secretary could be burdensome.

It was Congress's intention to limit or reduce that burden and Congressional Reports make this intention very clear:

> …that wherever possible, reporting requirements should be satisfied by having an employer report relevant data only to one Governmental agency and that other Governmental agencies, if any, should then acquire their information from the original agency.

H.R. Rep. No. 16785, 91st Cong., 2d Sess. (1970), reprinted in Subcommittee on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970 (Committee Print 1971) at 861.

Section 8 and its legislative history are explicit in that information provided to the Secretary should be obtained from one agency and employers should not be required to duplicate efforts. Throughout this proposed rule and during the public meetings, OSHA has been insistent that the information employers will be providing OSHA is the same they are already providing to BLS. However, this proposed rule is not a replacement for the BLS survey. As a result, the field of employers subjected to filing duplicative reports is greatly expanded.

The concern of double reporting was raised by the National Safety Council ("NSC") during the public meetings for this proposal held on January 9-10. NSC's representative stated, "there are some possible issues that need to be considered….The Survey of Occupational Injuries and Illnesses, or SOII, managed by BLS does not change. A large number of employers will be required to submit nearly identical data twice, once to OSHA under this proposed rule and once to BLS as part of SOII." (Transcript of DOL Meeting: Improve Tracking of Workplace Injuries and Illnesses – January 9, 2014 ("Transcript") p. 21-22).

The NAM believes NSC is correct in its analysis. While it is as yet unclear how many employers will be required to report twice, there is very good reason to believe the number will be significant. BLS collects roughly 230,000 surveys and OSHA anticipates the collection of records from roughly 440,000 establishments. (Transcript p. 13). Subjecting any portion of these employers to double reporting is unnecessary and contrary to Congress's intent and instruction to the agency to reduce such burdens.

OSHA must act within the confines of its authority. It appears that OSHA gave no consideration to its obligations under the OSH Act and its requirement to minimize the burden on employers, especially small employers, in obtaining information from them.

IV. Confidential Commercial Information is Protected from Disclosure.

Under the Freedom of Information Act ("FOIA"), certain documents are exempt from public disclosure. 5 U.S.C. § 552. Exemption 4 protects "a trade secret or privileged or confidential commercial or financial information obtained from a person." 5 U.S.C. § 552(b)(4). The NAM and its members believe employee hours worked on the OSHA Form 300A is confidential business information, because that information gives insight into the state of a business at any given time and creates a competitive harm. As such, this information is entitled to protection from disclosure to the public under FOIA, which would be consistent with how OSHA has historically treated employee hours worked.[1]

In *New York Times Co. v. U.S. Dep't. of Labor ("New York Times"),* OSHA argued that employee hours worked is confidential commercial information and not subject to disclosure under FOIA. 340 F. Supp. 2d 394 (S.D.N.Y. 2004). In this case, pursuant to FOIA, the New York Times Co. sought the lost work day illness and injury ("LWDII") rates for all establishments that submitted surveys to ODI in 2000. In response, OSHA asserted the LWDII information was:

> tantamount to release of confidential commercial information, specifically the number of employee hours worked, because this number can be easily ascertained from LWDII rate…the LWDII can be "reversed-engineered" to reveal EH, or employee hours.

Id. at 401.

Contrary to earlier positions, and relying solely on the holding in *New York Times*, OSHA now asserts that employee hours are not confidential commercial information. Certainly, OSHA does not base its entire proposition that employee hours worked are no longer confidential commercial information on one case - particularly where a review of more recent case law establishes that employee hours worked is commercial in nature, and would have been confidential but for the fact that the information was previously disclosed to the public. *Plumbers and Gasfitters Local Union No. 1 v. Dep't of Interior*, No. 10-CV-4822, 2011 U.S. Dist. LEXIS 123868 at *6 (E.D.N.Y. Oct. 26, 2011) ("*Plumbers and Gasfitters*").

Moreover, there appears to be an inconsistency in the Court's analysis reaching its conclusion in *New York Times*. The Court concluded that OSHA no longer regarded employee hours as confidential because it began requiring the posting of such information and therefore employers had no expectation of a competitive advantage based on confidentiality of this information. However, this conclusion is in conflict with the Court's acceptance of OSHA's

[1] Similarly, other federal agencies have treated employee hours worked as confidential commercial information. *See, e.g., Torres Consulting and Law Group, LLC, v. Dep't of Energy*, No. CV-13-00858-PHX-NVW, 2013 U.S. Dist. LEXIS 168772 (November 27, 2013) (DOE withholding hours worked from disclosed information pursuant to Exemption 4), *Painters Dist. Council # 6 v. Gen. Services Admin.*, No. C85-2971, 1986 U.S. Dist. LEXIS 31056 (July 23, 1986) (GSA denying FOIA request for payroll reports, which included hours worked pursuant to Exemption 4.)

argument that "the posting of an annual injury and illness summary at the work site itself is a limited disclosure to a limited audience, a disclosure which is surely insufficient to render the data publically available." *New York Times Co*. at 401. Therefore, even a limited disclosure of employee hours worked "does not lessen the likelihood that…[the employer] might suffer competitive harm if it is disclosed again." *Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37, 40 (D.D.C 1997) ("the prior release of information to a limited number of requesters does not necessarily make the information a matter of common public knowledge, or does it lessen the likelihood that [the submitter] might suffer competitive harm if disclosed again…").

Courts have routinely applied a broad scope to the term "commercial" and have found that information that is provided to the government in which the submitter has a commercial interest in them is protected from disclosure. *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). Employee hours worked have been held to be an element of labor costs and therefore commercial information. *Plumbers and Gasfitters*, 2011 U.S. Dist. LEXIS 123868 at *7.

Likewise, such information is confidential because its disclosure creates a substantial competitive harm. Specifically, release of employee hours worked, coupled with other accessible information, such as the prevailing wage, would allow competitors to undercut pricing creating a competitive harm. In *OSHA Data*, the Department of Labor argued that "a competitor could use information about a business's number of employees and employee work-hours to calculate estimates of that company's labor costs and productivity, which would give that competitor valuable inside information to assist its pricing strategies." *OSHA Data/CIH, Inc. v. U.S. Dep't. of Labor*, 220 F.3d 153, 166-67 (3d Cir. 2000).

The Department of Labor, including OSHA, as well as other federal agencies have considered employee hours worked as confidential commercial information not subject to disclosure pursuant to FOIA Exemption 4. Courts, as well as employers, including NAM members, treat employee hours worked as confidential commercial information – information that is entitled to protection from disclosure under FIOA, and information that NAM members fully expect OSHA to protect from disclosure.

In addition, as noted above, merely because such information is disclosed to a limited audience, such as employees and their representatives by being posted for three months a year does not vitiate the confidentiality of the information. *Id*. at n. 25. *See also*, *Martin Marietta Corp.*, 974 F. Supp. at 40, *New York Times Co.*, 340 F. Supp. 2d at 401-02. The NAM would expect OSHA to protect such confidential commercial information pursuant to its obligations under FOIA and legal precedent.

V. Personally Identifiable Information Must Be Protected from Disclosure.

a. An individual employee's privacy interest outweighs an alleged benefit of public disclosure.

In 1996, OSHA proposed various revisions to Part 1904 – Recordkeeping and Reporting Occupational Injuries and Illnesses. One proposed revision was to expand the right of access of

employees, former employees and their representatives to include the Form 301 (Incident Report). At that time access was limited to the OSHA 300.

As OSHA rightly noted in the proposed rule to the revisions for Part 1904, "total accessibility [to all the information on an employer's injury and illness records] may infringe on an individual employee's privacy interest." 61 Fed. Reg. 4030, 4048 (February 2, 1996).

When OSHA last revised the Part 1904 recordkeeping requirements (1996, 2001) it made considerable efforts to recognize and address this potential infringement on the privacy of injured or ill employees. This is in stark contrast to the proposed rule that the NAM comments on now – where it appears that OSHA now dismisses the notion that the public dissemination of injury and illness records could infringe on an employee's privacy.

In addressing employee access, the 1996 proposed rule to the revisions of Part 1904 confronted the issue head on and acknowledged, "the privacy interest of the individual employee versus the interest in access to health and safety information concerning one's own workplace – are potentially at odds with one another." *Id*.

In fact, out of concern for protecting the privacy interests of employees, OSHA made clear in the 1996 proposed rule that "OSHA does not intend to provide access to the general public. OSHA asks for input on possible methodologies for providing easy access to workers *while restricting access to the general public*." *Id*. (emphasis added).

Without any explanation as to why such privacy concerns may no longer exist, this proposed regulation tips the balance OSHA sought to achieve between providing employees with full accesses to injury and illness records and the privacy interests of the individual employees.

In the Federal Register publishing the final rule to the Part 1904 revisions, OSHA acknowledged the existence of a U.S. Constitutional right of privacy in personal information. In doing so, OSHA cited to various U.S. Supreme Court and federal circuit court decisions that have suggested that such a right exists. 66 Fed. Reg. at 6054. *See, e.g.*, *Whalen v. Roe*, 429 U.S. 588 (1977), *Nixon v. Adm'r of General Services*, 433 U.S. 425 (1977), *Paul v. Verniero*, 170 F.3d 396, 402 (3d Cir. 1999), *Norman-Bloodsay v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998).

Further, OSHA recognized that "information about the state of a person's health, including his or her medical treatment, prescription drug use, HIV status and related matters is entitled to privacy protection" and that "there are few matters that are quite so personal as the status of one's health, and few matters the dissemination of which one would prefer to maintain greater control over." 66 Fed. Reg. at 6054. OSHA went on to acknowledge that "[t]he right to privacy is not limited to medical records. Other types of records containing medical information are also covered." *Id.* at 6055. (citations omitted).

After recognizing that a right of privacy exists and is entitled to protection, OSHA applied a balancing test – weighing the individual's interest in confidentiality against the public interest in disclosure to employees and representatives. *Id*. After lengthy analysis, OSHA

concluded that allowing employees access to information contained on the Form 301 served a legitimate public interest – that is helping employees to protect themselves from future injuries or illness.

The proposed regulation discussed in these comments, ignores this right of privacy and abandons any type of balancing test. OSHA does not allege any reasons that making such information available to the public outweighs the privacy interests of the individual employees. Merely redacting an employee's name does not provide sufficient protection from the release, even inadvertently, of other personally identifiable information or medical information that employees maintain a privacy interest in.

In holding that a New York statute requiring the identification of patients obtaining prescriptions for certain classification of drugs did not invade any privacy interest protected by the Fourteenth Amendment, the Supreme Court stated:

> We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures.

Whalen, 429 U.S. at 605.

Here, not only does OSHA lack the statutory authority (as described above) but they have not established procedures or any safeguards for the protection of an employee's interest in privacy. In fact, the agency seems to dismiss all concerns about the misuse or potential abuse of such immense amounts of information. *Id.* at 607 (Brennan, J., concurring) ("The central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information…").

Rather than engage in appropriate legal analysis to determine the agency's obligations under Federal and/or state law, OSHA summarily points to other agencies that release personally identifiable information about employees, accidents and other medical information. This alone does not make the release of personally identifiable information, particularly medical information, legally permissible. OSHA simply abandons its historical approach of applying a balancing test and provides no detail on how it will protect an individual employee's privacy rights. There is no public purpose served here that outweighs the privacy interests of injured or ill employees.

b. OSHA Previously Determined Access by the General Public Was Unnecessary.

"In the proposal, OSHA noted that the access requirements were intended as a tool for employees and their representatives to affect safety and health conditions at the workplace, *not as a mechanism for broad public disclosure of injury and illness information*." 66 Fed. Reg. at 6057 (emphasis added).

In addressing commenters' concerns about the public release of such information, OSHA stated, *OSHA agrees that confidentiality of injury and illness records should be maintained except for those persons with a legitimate need to know the information. Id.* (emphasis added). More importantly, OSHA clearly determined that "[t]he record does not demonstrate that routine access by the general public to personally identifiable injury and illness data is necessary or useful." *Id.* In this proposed regulation, OSHA fails to even acknowledge its previously held position or attempt in any manner to explain what dramatically altered this determination so that there is now a need to provide broad public disclosure of injury and illness information.

The NAM believes this change in agency position is unwarranted, particularly in light of the lack of information and evidence supporting the need for, or benefit of, the proposed regulation.

c. The Proposed Regulation is in Conflict with Section 1904.29.

This proposed regulation appears to conflict with OSHA's requirement that employers must protect employee privacy where access to the OSHA Form is provided to those other than employees, former employees or employee representatives. 29 C.F.R. § 1904.29.

Section 1904.29(b)(10) specifically states:

> **What must I do to protect employee privacy if I wish to provide access to the OSHA Forms 300 and 301 to persons other than government representatives, employees, former employees or authorized representatives?** If you decide to voluntarily disclose the Forms to persons other than government representatives, employees, former employees or authorized representatives (as required by §§ 1904.35 and 1904.40), ***you must remove or hide the employees' names and other personally identifying information***, except for the following cases. You may disclose the Forms with personally identifying information only:
>
> to an auditor or consultant hired by the employer to evaluate the safety and health program;
>
> to the extent necessary for processing a claim for workers' compensation or other insurance benefits; or
>
> to a public health authority or law enforcement agency for uses and disclosures for which consent, an authorization, or opportunity to agree or object is not required under Department of Health and Human Services Standards for Privacy of Individually Identifiable Health Information, 45 CFR 164.512.

29 C.F.R. § 1904.29(b)(10) (second emphasis added).

OSHA has failed to address how § 1904.29 is impacted by this proposed regulation. There is a very real possibility that what an employer redacts as "personally identifying information" under this requirement would dramatically differ from what OSHA considers personally identifying information for purposes of public disclosure on its webpage.

Assume that an employer voluntarily provides its OSHA Forms 300 and 301 to an outside safety and health organization. In choosing to do so, the employer is required to redact the employees' names and "other personally identifying information." Depending on a variety of factors, the employer chooses to redact certain information, including job titles and dates of injuries. Yet, months later when OSHA receives this employer's injury and illness records *it* decides to only redact the employees' names. The safety and health organization could put both sets of data together – something OSHA seems to want to encourage – and the safety and health organization could conceivably identify various individuals. Using this information, the safety and health organization contacts the employee. In many instances, the employee may not want to be contacted or have their information used and disseminated any further, constituting an unwarranted and ongoing invasion of the employee's privacy.

Under OSHA's revision to § 1904.41, this provision becomes obsolete. OSHA cannot require employers to remove employees' names and other personally identifying information and then hold itself to another standard. OSHA's failure to address the interplay of the proposed regulation with the existing requirements is troubling. For § 1904.29 to work in harmony with these proposed revisions there must be uniformity as to what is considered personally identifiable information.

Again, it appears that the agency has not thoroughly considered the consequences of this proposed regulation and the negative implications that are likely to flow from it.

d. While HIPPA may not be directly implicated, the principles underlying the protection of individually identifiable health information should be considered.

At the core of the Health Insurance Portability and Accountability Act of 1996 ("HIPPA") is a privacy rule that protects all "individually identifiable health information" held or transmitted by a covered entity or its business associate. 45 C.F.R Part 160. Such individually identifiable health information is protected and considered "protected health information (PHI)."

"Individually identifiable health information" in part, is information, including demographic data that relates to the past, present or future physical or mental health or condition of an individual and identifies the individual (or establishes a reasonable basis to believe it can be used to identify the individual). 45 C.F.R. § 160.103. Examples of individually identifiable health information include name, address, birth date, social security number.

Under HIPPA, if information is "de-identified" then it is no longer individually identifiable health information and there may no longer be privacy concerns. Health information can be de-identified either by a formal determination of a qualified statistician or removing specified identifiers, including for example, names, geographic subdivisions (street address, city,

county, etc.), all dates directly related to an individual, except the year, telephone numbers, and any other unique identifying characteristic. 45 C.F.R. §164.514.

If OSHA moves forward with this proposed rule, the NAM urges OSHA to consider the principles underlying HIPPA and consider whether applying a similar privacy rule and de-identification process would or should be implemented for any information the agency makes publically available from an employer's injury and illness records.

e. OSHA Offers no Strategic Plan for Reviewing and Redacting this Information.

OSHA estimates that 890,288 injury and illness cases will be reported per year by the establishments covered by this proposed regulation. 78 Fed. Reg. at 67273. It can be assumed then that OSHA will receive roughly 222,572 OSHA 301 forms every three months from establishments with 250 or more employees. Despite the considerable issues that are raised from this proposed regulation, such as privacy and confidential commercial information, and the massive amount of information that would be submitted on a quarterly basis, OSHA has in no way established how they will manage, review, and redact this amount of highly sensitive information. The procedure for OSHA reviewing this should have been thoroughly considered and addressed in the proposed regulation, including what information OSHA would redact, how it would undertake that task, and what safeguards will be put in place to ensure that certain information is not inadvertently or otherwise released to the general public. How OSHA anticipates reviewing and redacting personally identifiable information for such a tremendous amount of information on a quarterly basis, including a review of each and every written narrative contained in OSHA 301 forms, is incomprehensible. The NAM is deeply concerned about the irreparable damage "mistakes" by the Agency in its data processing efforts would have on individuals and employers.

VI. OSHA Has Not Made Federal Agency Records Publically Available.

Similar to the private sector, Federal agencies are required by statute to keep adequate records for occupational injuries and illnesses. 29 U.S.C. § 668. The recordkeeping requirements for Federal agencies are found in 29 C.F.R. § 1960. Recently, OSHA issued a final rule, adding § 1960.72 which requires Federal agencies, beginning May 1, 2014, to submit their previous calendar year occupational injury and illness recordkeeping data to OSHA on an annual basis. 78 Fed. Reg. 47180 (August 13, 2013).

Specifically 29 C.F.R. § 1960.72 states,

Reporting Federal Agency Injury and Illness Information.

(a) Each agency must submit to the Secretary by May 1 of each year all information included on the agency's previous calendar year's occupational injury and illness recordkeeping forms. The information submitted must include all data entered on the OSHA Form 300, Log of Work-Related Injuries and Illness (or equivalent); OSHA Form 301, Injury and Illness

> Incident Report (or equivalent); and OSHA Form 300A, Summary of Work-Related Injuries and Illnesses (or equivalent).

While this final regulation for Federal agencies to annually submit to OSHA their injury and illness information is very similar to the proposed regulation for the private sector, it differs in two respects. First, while a portion of private sector employers will be required to submit records on a quarterly basis, yet Federal agencies are only required to submit their injury and illness data to OSHA on an annual basis. Second, and most importantly, the injury and illness records for Federal agencies are not required to be made public and searchable on OSHA's website. The inconsistency in how OSHA is treating Federal agencies in comparison to the private sector is disconcerting. There is no explanation for such disparity, particularly since the final rule for Federal agencies was issued just three months prior to the proposed rule for the private sector was issued. One has to assume that the same benefits that OSHA claims will result from making such private sector information publically available, equally applies to the Federal government.

It seems that making this type of information, as opposed to private sector information, publically available is more aligned with President Obama's Open Government Initiative, which encourages government agencies to put information about their operations and decisions online and available to the public. The concept of "open government" focuses on the transparency of *government* actions, operations and decision. This initiative in no way supports making private employers' data publically available. The objective of this policy is to provide "the public with information about what the Government is doing" – not to provide the public with private information of private employers and individuals.

VII. Policy Considerations

a. Misuse of Raw Data by Third Parties.

OSHA cannot ignore the reality that the publication of employers' injury and illness records can and will be misused by those who have no interest in safety and health. In fact, OSHA recognized this reality in the final rule to the Part 1904 revisions in 2001. OSHA stated:

> The public interest that is served when information contained in the records is used to promote safety and health must be balanced against the possible harm that would result from the misuse of private information. There are two ways in which harm could occur. First, the information could be used for unauthorized purposes, such as to harass or embarrass employees. Second, employees and their representatives with access to records could, deliberately or inadvertently, disclose private information to others who have no need for it.

66 Fed. Reg. at 6056.

This statement acknowledges what many of NAM's members fear – the public disclosure of injury and illness records will be misused for purposes wholly unrelated to safety and health. Given that we live in an ever advancing electronic age, there are many businesses whose sole

purpose is to mine data - that is perform analysis on computerized data to gather certain information and discern trends. Data mining in conjunction with aggregating data from other sources has the potential not only to disclose an employee's identity, but to target employers and/or employees for harassment, intimidation or threats. The NAM is aware of instances in which OSHA's enforcement actions have been used solely and precisely for those purposes.

b. Reversal of OSHA's No-Fault Recordkeeping System.

As a means to encourage employers to record injuries and illnesses and employees to report such injuries and illnesses, OSHA revised the recordkeeping provisions in Part 1904 in 2001. 66 Fed. Reg. at 5918. As part of these revisions, OSHA adopted the geographic presumption to work-relatedness. *Id*. at 5929. OSHA viewed this approach to determining work-relatedness as the most effective in fulfilling its statutory mandate. However, at the same time, OSHA recognized that many injuries and/or illnesses that would fall within this geographic presumption would not necessarily be within an employer's control. *Id*. at 5934. In fact, OSHA recognized that "many circumstances that lead to a recordable work-related injury are 'beyond the employer's control'…." *Id*.

To balance this approach of work-relatedness and encouraging employers to record injuries and illnesses, OSHA made explicitly clear to employers that the recordkeeping requirements in no way established an employer's fault – that recording an injury or illness was not an admission that the employer was at fault or that it violated an OSHA standard. *Id*.

Contained in the purpose section of the final rule there is a Note to § 1904.0 that specifically states:

> Note to 1904.0: Recordkeeping or reporting a work-related injury, illness or fatality **does not mean that the employer or employee was at fault, that an OSHA rule has been violated**, or that the employee is eligible for workers' compensation or other benefits.

29 C.F.R. § 1904.0 (emphasis added).

OSHA now wants to take this same system, the one it assured employers did not establish fault or non-compliance and revise it to collect employers' injury and illness records and make them publically available, using this information against employers. The purported benefits of these revisions are better agency targeting and enforcement and compliance efforts, allowing employees to compare their workplaces or impact potential decisions for future employment, and allowing the public to determine companies with which to do business. 78 Fed. Reg. at 67256. These benefits are completely contrary to the no-fault system, and in fact, they actually suggest that OSHA believes a high injury and illness rate correlates to non-compliance of OSHA standards – placing the fault for injuries and illnesses squarely at the feet of employers.

The NAM is troubled that the assurances provided to the regulated community during the last recordkeeping revisions are now apparently not applicable and rather than encouraging

employers to record injuries and illnesses OSHA is developing a system designed and focused on attempting to cudgel employers into compliance or submission.

b. Unfair Portrayal of an Employer's Safety & Health Program.

As if the above reasons were not enough to consider withdrawing this proposed regulation, OSHA is fully aware that the raw data from an employer's injury and illness records is not a reliable measure of an employer's safety record. These records and the injury and illness rate that is computed from these records cannot be viewed in isolation. This information is limited in value without proper context and as noted above, many injuries and illnesses that are beyond an employer's control are captured in this information. Moreover, such information is in no way indicative of an employer's present or future performance in safety and health.

For example, OSHA acknowledges that an increase in recorded musculoskeletal disorders ("MSDs") can be due to an increased awareness of these hazards by industries, employers, labor, and government, and the reporting of these disorders. So an employer who implements an ergonomics program will likely see an increase in the number of reported and recorded MSD injuries – this is because of proper training, awareness of what constitutes a MSDs and the encouragement to report such injuries. In fact, this example illustrates that an initial increase in rates is a proactive step towards the reduction of work-place injuries and illnesses and not as OSHA claims an illustration of "…the workplaces where workers are at greatest risk." In such a scenario, if OSHA were to target this employer for enforcement or compliance purposes based on an overall injury and illness rate increase, it would be futile and a waste of such scare federal resources on an employer who is or already has taken the initiative to implement a program and is proactively addressing safety and health issues in the workplace according to best practices.

Even BLS acknowledges that there are many factors influencing injury and illness rates. In the *BLS Handbook of Methods*, Chapter 9 focuses on Occupational Safety & Health statistics. https://www.bls.gov/opub/hom/pdf/homch9.pdf (last visited March 5, 2014). In this chapter BLS recognizes that injury and illness rates are influenced initially by an employer's understanding of what is considered a recordable event. BLS goes on to state, "[t]he number of injuries and illnesses reported in any given year also can be influenced by the level of economic activity, working conditions and work practices, worker experience and training, and the number of hours worked." *Id*. at 15. This holds true for individual employers and these factors are not and could not be accounted for in the raw data OSHA anticipates disseminating to the general public.

The NAM has also heard from its members that this winter's weather may be increasing the number of slips and falls due to ice and snow. Even with aggressive snow removal and clean up efforts there are likely to be recordable incidents due to the geographic presumption mentioned earlier. This is but one example illustrating the many factors outside an employer's control that are captured in these numbers, numbers which alone do not provide enough data for others to draw objective and fair conclusions and make business-related decisions.

The NAM, as well as many other commenters, including the American Society of Safety Engineers ("ASSE"), believes the publication of an employer's injury and illness data moves

safety backwards towards lagging indicators. Lagging indicators are not indicative of the future and they do not tell how an employer is doing at preventing incidents and accidents. Rather, lagging indicators are a snapshot of the past – leading measures are factors that indicate future value or direction of performance. Lagging indicators, such as an employers' injury and illness rates, alone, are not sufficient to assess preventative action, leading indicators are also necessary.

Without proper context this raw data will result in inaccurate and unreliable conclusions that may result in irreparable harm to employers, such as harm to reputation and/or commercial business data, especially from those, such as the general public, who most likely would not know how to interpret the data. Such data will not reliably identify those employers more likely to have future injuries/illnesses. As discussed above, this data includes injuries and illnesses related to the workplace solely by geographic relationship and are not necessarily related to safety – therefore negatively impacting overall rates.

c. Disincentive to Recording Injuries & Illnesses.

Based on nothing more than mere speculation, OSHA alleges that public access to such information will "encourage employers to maintain and improve workplace safety/health in order to support their reputations as good places to work and/or do business with…" 78 Fed. Reg. at 67256. This assertion fits squarely in the agency's current enforcement theory of "regulation by shaming" and lacks any empirical or anecdotal support.

The NAM believes that rather than encourage employers to record injuries and illnesses, this proposed regulation will have the opposite effect and will create a disincentive for employers to record injuries and illnesses. Rather than carry on with the current system's approach of treating recorded injuries and illnesses as "no-fault," OSHA wants to use this data to target compliance assistance and enforcement efforts and attempt to shame employers into improving workplace safety and health. The objectives of this proposed regulation are antithetical to the current recordkeeping and recording system.

In addition, OSHA specifically inserted a disclaimer in an explanatory note for the web-mock up on the page for public searches of injury/illness information for specific establishments:

> OSHA does not believe the data for the establishments with the highest rates on this file are accurate in absolute terms. It would be a mistake to say establishments with the highest rates on this file are the "most dangerous" or "worst" establishments in the Nation.

This disclaimer is at odds with what OSHA asserts are the benefits of this rule. OSHA wants the public and employees to rely on these rates to make decisions about who to do business with or where to work – they want the public and employees to use these numbers to determine who are the best and worst employers. By providing raw data alone, OSHA forces the public to draw conclusions that the lowest rates are the "best" workplaces for safety and health and that the highest rates are the "worst."

d. Less Detailed Information – Diluting Value of Information.

In addition to being concerned that this proposed regulation will provide a disincentive to recording injuries and illnesses, the NAM is also concerned that employers will start including fewer details about injuries and illnesses in their recordkeeping forms since such information will be made publicly available on a searchable website. Part of this will likely be due to privacy concerns for employees, as discussed above. Additionally, employers will be unwilling to provide details of their operations or incidents knowing that such information could be misconstrued by members of the general public who have no understanding of their business operations.

Employers will undoubtedly limit the information filled in on recordkeeping forms and rather than encouraging employers to provide more detailed information to assist employers in recognizing trends, patterns, and analyzing these records, this proposed rule will dilute the information, potentially making these records unusable for recognizing trends or raising an employer's awareness of potential workplace hazards.

VIII. Alternatives – Enterprise-Wide Submission

OSHA has proposed several alternatives to this proposed regulation, such as monthly submissions, annual submissions, widening the scope of establishments required to report to establishments with 100 or more employees or narrowing the scope to establishments with 500 or more employees. The NAM does not believe that any of these options provide acceptable alternatives to the proposed regulation. The NAM believes that this regulation is unsound as proposed and that these alternatives in no way resolve the legal and policy issues as discussed in these comments.

Of all the alternatives outlined, the alternative for enterprise-wide submission is the only alternative OSHA has provided costs estimates and proposed actual regulatory text. Such actions suggest that OSHA is seriously considering this alternative. The NAM's members have conveyed that an enterprise-wide submission will create new burdensome obligations. Many enterprises with multiple establishments function very independently for a variety of reasons – legal, financial or other reasons. Requiring enterprises who wish to allow their establishments to operate wholly independently, to now collect and submit certain workplace injury and illness records, impinges on this independence and may have other negative impacts that OSHA has failed to realize.

Further, enterprises will have to collect the 300A forms in advance of submission. Since these records are essentially living documents, it is possible that the data collected would be outdated by the time it would be electronically submitted to OSHA.

One benefit OSHA alleges that will result from enterprise-wide submission is the improvement of "communication and reporting between establishments and enterprises." 78 Fed. Reg. at 67278. There is no evidence suggesting that there is currently a lack of communication regarding safety and health between establishments and enterprises, nor is there any evidence that this alleged benefit will somehow reduce workplace injuries and illnesses.

Again, OSHA suggests these benefits will result from this proposed regulation, but there is nothing in the record supporting the assertion that such benefits are actual or even potential. They are nothing more than mere conjecture and assumptions.

IX. No Actual Benefits Calculated and Underestimated Costs.

Using BLS time estimates, OSHA estimated the cost of compliance with this proposed regulation for each employer with establishments of 250 or more employees would be $183 a year, and $9 per year for establishments with 20 or more employees in designated industries.

OSHA believes these costs are offset because the purported benefits will be equal to or greater than these costs. Not only does OSHA underestimate the costs associated with compliance with this proposed regulation, OSHA has not adequately quantified the benefits of this rule. Despite a lack of reviewable analysis, OSHA concludes that annual benefits will "significantly exceed the annual costs." *Id*. at 67256.

More importantly, all the benefits alleged are based on mere speculation. There are no scientific analyses, data, reports, or studies to support any of the benefits claimed by the Agency. The NAM absolutely supports fewer workplace injuries and fatalities, but OSHA provides a flawed means to determine whether the rule will actually result in altering the trend line for the future. Further, it should be noted that employers are already required to report certain injuries and fatalities within specified time frames and the rule would have no impact on those requirements.

a. Rule Fails to Calculate Benefits.

Nothing in OSHA's analysis suggests that any benefits will in fact result if the proposed rule is adopted. Strikingly, there is *no* data or evidence cited in the proposal to suggest that OSHA's alleged benefits will occur – no studies or even anecdotal references are offered to support the assertion of a net benefit. OSHA's benefits analysis is simply speculation stacked on top of assumptions about what *may* occur if the proposed rule is finalized. The NAM respectfully asserts that OSHA is not allowed to justify a rule based purely on speculation, with no data whatsoever. Even if OSHA had the statutory authority to issue this proposed rule, which NAM disagrees with as stated above, OSHA must establish that a particular rule is reasonably necessary and appropriate. The proposed rule, as offered, does not meet this criterion.

b. Rule Does Not Account for Use of Equivalent Forms.

Under the current requirements, employers are permitted to use "equivalent" forms instead of the OSHA 300, 300-A, and 301 forms. 29 C.F.R. § 1904.29(a). This is an option many employers utilize to avoid duplication of efforts, for example with workers compensation requirements. The proposed rule will require reporting of all information currently on the OSHA 300 Log and 301 Form. The preliminary mock-up of the reporting system shows an online OSHA 300 and 301 that can be used for reporting.

Many employers do not actually use the OSHA 301 Form. Instead, they use an equivalent form. Presumably, OSHA would require employers to translate the information into the "301 Form" on the internet. This may not be as straightforward as OSHA makes it seem, and certainly it may be more costly than OSHA anticipates. It also increases the risks of errors occurring in the translation.

c. Other Factors Not Considered in Costs Analysis.

The NAM is concerned that OSHA has not contemplated significant costs of compliance with this proposed regulation. OSHA would like to believe, and would like the regulated community to believe, that this regulation is simple, easy to comply with, and results in no real costs to employers. To this point, OSHA claims that:

> The electronic submission of information to OSHA would be a relatively simple and quick matter. In most cases, submitting information to OSHA would require several basic steps: (1) Logging on to OSHA's web-based submission system; (2) entering basic establishment information into the system; (3) copying the required injury and illness information from the establishment's paper forms into the electronic submissions forms; and (4) hitting a button to submit the information to OSHA. In many cases, especially for large establishments, OSHA data are already kept electronically, so step 3, which is likely the most time-intensive, would not be necessary.

78 Fed. Reg. at 67272.

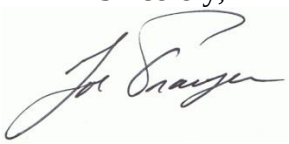
This proposed regulation is far from being simple and is certainly more time-intensive than OSHA acknowledges. While OSHA does acknowledge the most time-intensive part of the process will be copying the required injury and illness information, it fails to calculate costs associated with the manual entry of each and every recorded injury or illness on an employer's Form 300. Rather, OSHA estimates that it will take an employer 10 minutes for submission of *both* the Form 300 and 300 A. *Id*. This is simply an unrealistic estimate for the manual entry of this information.

Additionally, OSHA has not considered the costs associated with training for employee turnover, or for additional training of staff that may be required to manage state and federal privacy laws that could be impacted by employers knowing the information they submit will be made available to the public through an online searchable database. This is a concern employers do not currently have and therefore does not require any special training to make such determinations. OSHA did not factor costs associated with employers having to extrapolate data from equivalent forms. Additionally, it does not consider that some employers utilize proprietary electronic recordkeeping systems that would require program changes, possibly at a significant cost, so that the information could be electronically submitted to OSHA. Nor did OSHA consider that some employers, who currently use a paper format, will choose to implement an electronic recordkeeping system to comply with this rule.

X. Conclusion

The NAM appreciates the opportunity to submit these comments on this proposed rule. However, based on the above concerns, it appears that OSHA has failed to truly consider the implications of implementing this rule. The NAM does not believe that this proposed rule will result in increased workplace safety. Rather, the NAM is concerned about the negative consequences that are likely to result should OSHA move forward with this rule. The NAM strongly encourages OSHA to withdraw this proposed regulation.

Sincerely,



Joe Trauger
Vice President
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