



March 10, 2014

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; Proposed Rule to Improve Tracking of Workplace Injuries and Illnesses (78 Fed. Reg. 67254, November 8, 2013)

Dear Dr. Michaels:

The Coalition for Workplace Safety (CWS) is comprised of a group of associations and employers who believe in improving workplace safety through cooperation, assistance, transparency, clarity, and accountability. The CWS believes that workplace safety is everyone's concern and improving safety can only happen when all parties—employers, employees, and OSHA—have a strong working relationship.

CWS members are deeply troubled by OSHA's Proposed Rule, *Improve Tracking of Workplace Injuries and Illnesses* (78 Fed. Reg. 67254, November 8, 2013) and urge OSHA to withdraw the proposal. The proposed rule would allow OSHA to obtain and release to the public detailed information regarding specific workplace injuries and illnesses, including the company, location, and incident-specific data. OSHA states in the proposal that the rule would provide employees, potential employees, consumers, labor organizations and businesses and other members of the public with important information about companies' workplace safety records. Yet, OSHA is providing the data without any meaningful context. As a result, the information is not a reliable measure of an employer's safety record or its efforts to promote a safe work environment. Many factors outside of an employer's control contribute to workplace accidents, and many injuries that have no bearing on an employer's safety program must be recorded.

CWS objects to the rule on several grounds. First, OSHA simply lacks the authority to issue the regulation. Additionally, the agency has failed to provide any evidence that the burdensome and costly proposal is necessary or will improve workplace safety and health. At the same time, OSHA has ignored the significant negative consequences of the proposed rule's required public disclosure of sensitive and confidential business information that is otherwise prohibited from release under the Freedom of Information Act ("FOIA") and public release of personally identifiable information. Public disclosure of this information will lead to underreporting of injuries and illness, creating a problem that

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does not currently exist. And, it will allow those who wish to do so, to mischaracterize and misuse the information for reasons wholly unrelated to safety.

Finally, this proposed rule embodies significant reversals in enduring OSHA policies and positions without adequate explanation or justification. OSHA has a longstanding position of treating employee hours worked as commercial and broad public disclosure of injury and illness data as unnecessary. Also, for over a decade, the agency has had a “no-fault” recordkeeping system to encourage employers to record injuries and illnesses, and has long recognized that mandatory electronic submission creates a burden on employers.

I. The OSH Act Does Not Authorize This Proposed Rule, Nor Has OSHA Shown a Need For It

Sections 8(c)(1), 8(c)(2), 8(g)(2), and 24 of the Occupational Safety and Health Act of 1970 (OSH Act), upon which OSHA relies as legislative authority for this rulemaking, only authorizes OSHA to create reporting requirements that provide information to the Secretary of Labor and the Secretary of Health and Human Services. The consistent connection and theme through all of these statutory sections is that the Secretary of Labor may collect data and information for his own, or the Secretary of Health and Human Service’s, internal use, NOT for public dissemination.

Entirely missing from any of these provisions is any suggestion that OSHA is authorized to release to the public sensitive, proprietary, and confidential information for any reason, including the Agency’s unsupported belief that doing so will improve workplace safety. While Congress could have granted OSHA authority to make public the company and incident specific information contemplated under this proposed rule, it did not do so at the time it passed the OSH Act or by amendment in the intervening years since the original enactment. Indeed, none of the various proposals, including those offered by Democrats, to reform the Agency has proposed granting OSHA such authority. Instead, Congress granted OSHA limited authority to collect information for internal purposes and stopped short of authorizing OSHA to make this information public in a raw form.¹

In addition to lacking adequate statutory authority, OSHA fails to demonstrate a need for this rule. OSHA tries to use their listing of unsupported speculative benefits (78 Fed. Reg. 67256) as justification for this rule, however, nowhere does OSHA assert that this rule is actually needed to correct a current problem. While OSHA claims that the new level of data that will flow to the Agency from this rule is needed to better target inspection resources, this will merely be more of the same since the annual reporting requirement from this rule will replace the current OSHA Data Initiative. Indeed, as described below, the level of resources OSHA will have to expend to make sure personally identifiable information is not released to the public will make whatever extra data OSHA acquires a net negative deal for the Agency.

II. The Rule Will Cause Disclosure of Confidential Business Information and Personally Identifiable Information

¹ For a thorough discussion of the statutory authority issues and problems of this rule, see the comments submitted by the U.S. Chamber of Commerce.

CWS members have told us they are concerned with the release of confidential business information and employee personally identifiable information. OSHA cites to portions of the OSH Act that allegedly support its position that the Secretary has authority to require employers to submit records of work-related injuries and illnesses to OSHA. However, there is absolutely no legal authority supporting the requirement to make such records publically available, and in fact OSHA has an obligation to protect such information from disclosure.

The Agency has stated, “It’ll be OSHA’s responsibility to make sure that the information that we [make] public does not include anything that is prohibited by the Privacy Act or the FOIA...” (Transcript of DOL Meeting: Improve Tracking of Workplace Injuries and Illnesses (Transcript) p. 78, lines 7-10). However, OSHA has conducted no analysis of precisely what information is prohibited from disclosure under the Privacy Act, the Freedom of Information Act (FOIA) or any other federal or state law. Nor is the Agency able to explain how this information will be removed, or the resources necessary to carry out this requirement. In fact, based on the preamble to the proposed rule, OSHA claims it will make available all the information from Form 300 (the Log) except Column B (the employee’s name) and the right-hand portion of Form 301 (Incident Report) from item 10 through 18. Additionally, OSHA has said it will make all the information contained on the Form 300A publically available, including the “annual average of number of employees” and “[t]otal hours worked by all employees last year.”

Other than simply stating that it will be the Agency’s responsibility to make sure some information is protected from disclosure, OSHA has done no analysis nor explained to the regulated community what information is in fact protected from disclosure under the Privacy Act, FOIA and/or other federal or state laws. Moreover, OSHA has given no consideration as to whether publishing any such information contained in the Form 300, 300A or 301 would be a violation of 18 U.S.C. § 1905, which makes it a criminal act for government officials to disclose “information concern[ing] or relat[ing] to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association....”

A. Employee Hours Worked is Commercial Information

Many companies, including CWS members, consider employee hours worked to be proprietary information that is not subject to disclosure because it is confidential business information. Such information gives insight into processes and could open up companies for hostile takeover by competitors or could result in other competitive harm to the companies who submit such information to OSHA if made publically available.

Moreover, OSHA’s position with respect to publishing such data is entirely contradictory to claims the Agency has made in the past. For example, in response to a FOIA request from The New York Times Company (the “Times”) for Lost Work Day Illness and Injury (“LWDII”) rates for roughly 13,000 worksites that submitted OSHA Data Initiative (ODI) surveys, OSHA alleged that such information was exempt from FOIA, under Exemption 4.² OSHA vigorously claimed that LWDII was

² Under the FOIA certain documents and information are exempt from release to the general public. 5 U.S.C. § 552. Exemption 4 prohibits the government from disclosing to the public, “a trade secret or privileged or confidential commercial or financial information obtained from a person.” 5 U.S.C. § 552(b)(4) (2000).

exempt from public disclosure because such information is “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.” *New York Times Co. v. U.S. Dept. of Labor*, 340 F. Supp. 2d 394, 401 (S.D.N.Y. 2004). In this same case, the Agency argued “disclosure of employee hours ‘can cause substantial competitive injury.’ ” *Id.* at 402 (internal citation omitted). Here, since OSHA states that such injury and illness data will be published on a quarterly basis, this would be contemporaneous information that competitors could use to their advantage, resulting in substantial competitive injury.

In a more recent case involving a FIOA request submitted to the Department of Interior, the U.S. District Court for the Eastern District of New York held:

[I]ittle more than common sense establishes that the number of hours an employee works is commercial or financial in character. Whatever “commercial or financial” means at the margin, at its core are ‘records that reveal basic commercial operations, such as sales statistics, profits and losses, and inventories, or relate to the income-producing aspects of a business.’

Plumbers & Gasfitters Local Union No. 1 v. Dep’t of the Interior, No10-CV-4882, 2011 U.S. Dist. LEXIS 123868 (E.D.N.Y. Oct. 26, 2011) (citation omitted). The Court went on to find that hours worked is a component of labor costs and “the ‘hours worked’ data is commercial or financial in nature.” *Id.* at * 6.

In addition to “hours worked” being commercial in nature, it is also “privileged or confidential” under § 552(b)(4). Competitors can simply take an employer’s total hours worked from the Form 300A and multiply by the prevailing wage for the industry and job category and determine an establishment’s labor costs and then undercut such costs to gain a competitive advantage.

Further, the mere fact that the Form 300A, which includes total hours worked by all employees, is posted for a period of three months on an annual basis does not preclude protection under Exemption 4. This posting amounts to a limited disclosure to only employees not the general public and therefore cannot be considered a waiver of the exemption. This posting is a “limited disclosure to a limited audience, a disclosure which is surely insufficient to render the data publically available.” *OSHA Data/CIH, Inc. v. U.S. Dept. of Labor*, 220 F.3d 153, 163 n.25 (3d Cir. 2000).

Without any explanation and completely contrary to earlier positions, OSHA now “conclude[s] that the information contained on the OSHA recordkeeping forms does not constitute confidential commercial information.” (78 Fed. Reg. at 67263). OSHA cannot simply disavow earlier positions with no explanation or justification.

Many CWS members treat employee hours worked as confidential business information. Should OSHA finalize this regulation, it would have a duty to ensure that such information collected is protected to avoid competitive harm and prohibit such information from being disclosed because it is protected from release under the FOIA. 5 U.S.C. § 552.

B. OSHA Cannot Protect Personally Identifiable Information When it Publicly Discloses the Collected Information

OSHA claims that the only personally identifiable information it believes should be withheld from public disclosure is an employee's name. OSHA fails to recognize that information other than an employee's name or social security number (such as date of injury, injured body part, treatment, job title) can be used to identify an employee, particularly in a small community.

While OSHA states that it will redact all personally identifiable information, the Agency has provided no specific information regarding how this will be done, what information the Agency will consider to be personally identifiable information and what resources the Agency anticipates using to review and redact such information. During the public meeting, OSHA was asked what the Agency anticipated redacting as personally identifiable information. In response, Mr. David Schmidt, OSHA's Director of Office of Statistical Analysis, stated, "what we envision is...in narratives you find everything, so you could find a Social Security number in there, so names, Social Security numbers, telephone numbers, things like that, that's what I envision." (Transcript, p. 209). Such a vague answer makes clear that the Agency has given no consideration or conducted any legal analysis as to its obligations to protect personally identifiable information.

In addition, OSHA has provided no explanation or strategic plan as to how it will review and redact such information from the Form 301 on a quarterly basis for roughly 38,000 establishments with 250 or more employees. OSHA estimates that 890,288 injury and illness cases will be reported per year by such establishments. (78 Fed. Reg. at 67273). On average, then, OSHA will receive 222,572 OSHA 301 forms every three months from establishments with 250 or more employees. How OSHA anticipates reviewing and redacting personally identifiable information from 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 unclear and beyond comprehension.

Another privacy concern that OSHA has failed to consider is confidentiality of addresses for some employers, depending on the nature of their work. Take for example, a facility that stores and maintains sensitive medical pharmaceuticals. The employer has a forklift operator who is injured while moving controlled substances. An employer that maintains a storage facility of sensitive medical pharmaceuticals has every reason to be concerned with potential thefts if its address is made public. Similarly, makers of explosives, or other industries where products or commodities are highly sensitive have concerns with the release of their physical addresses. OSHA cannot possibly imagine the scenarios where providing such information is potentially detrimental to the employer, the safety of employees, customers and other members of the public.

C. This Rule's Public Disclosure of Injury and Illness Data Is Contrary to Longstanding OSHA Policy

Most significantly, though, is that the Agency's current position regarding public disclosure of such information contradicts earlier positions and statements OSHA has made regarding balancing the interests of privacy and access to such information. In the revisions to the recordkeeping requirements in 2001, OSHA broadened access of injury and illness records to employees and their representatives. 66 Fed. Reg. 5916 (January 19, 2001). However, "[i]n 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.*” (emphasis added).

In addressing commenters concerns about the public release of such information, OSHA stated in the preamble to the final rule:

OSHA agrees that confidentiality of injury and illness records should be maintained except for those persons with a legitimate need to know the information. This is a logical extension of the agency’s position that a balancing test is appropriate in determining the scope of access to be granted employees and their representatives. Under this test, ‘the fact that protected information must be disclosed to a party who has a need for it * * * does not strip the information of its protections against disclosure to those who have no similar need. **Fraternal Order of Police**, 812 F2d at 118. 66 Fed. Reg. at 6057.

In granting access to such records to *only* employees and their representatives, OSHA determined:

...that this provision protects employee privacy to a reasonable degree consistent with the legitimate business needs of employers and sound public policy considerations. *The record does not demonstrate that routine access by the general public to personally identifiable injury and illness data is necessary or useful.* Indeed, several prominent industry representatives stated that the OSHA log should not be made available to the general public. *Id.* (emphasis added).

Apparently, OSHA no longer believes a balancing test is necessary to determine access to injury and illness information. Thus, in addition to abandoning its long-standing position on treating employee hours worked as confidential business information, OSHA now abandons its long-standing position on public access to injury and illness data. Indeed, in the proposed regulation, OSHA abandons, without any explanation, several long-standing positions (see discussion below on how the proposal also abandons the Agency’s no-fault recordkeeping system). These dramatic reversals by OSHA, do nothing to instill confidence in employers that the government agency charged with overseeing workplace safety and health will apply the law consistently with respect to precedent. The Agency’s actions also send a message to businesses that OSHA is no longer concerned with either consistency or maintaining a balanced approach between the interests of employers and the interests of advocates whose agenda OSHA wishes to advance.

D. OSHA’s Reliance on the Open Government Initiative Is Misguided

In an effort to find support for the proposal where none exists, OSHA claims that the basis for requiring such records to be publically disclosed is President Obama’s Open Government Initiative. For OSHA to suggest that such a requirement is “encouraged by President Obama’s Open Government Initiative” is misleading and manipulates the intent of the Open Government Initiative. The Open Government Directive issued on December 8, 2009 directs *agencies* to put information about their operations and decisions online and available to the public. The Initiative and Directive focus on *government* actions and transparency, not on private employers or 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.

III. The Rule Will Have A Negative Impact on Recordkeeping

As many commenters noted during the public meeting, this proposed rule would ultimately have a potential chilling effect on injury and illness reporting. Currently, employers are likely to record a questionable work-related incident even if there is a colorable claim that the incident is not work-related as there is no consequence to over reporting. However, making such information publically available, and the prospect that reporting such information may lead to OSHA enforcement actions are likely to result in employers not recording a questionable work-related incident and leading to fewer injuries and illnesses being reported. Moreover, employees who are concerned about the public perception of their employer or who are concerned about their own private medical information may be less likely to report injuries they know will be made public.

OSHA assumes, contrary to the results of its National Emphasis Program on Recordkeeping, that employers are underreporting and therefore, this proposed regulation will “shame” employers into recording more of their injuries and illnesses. However, this proposed regulation is likely to have just the opposite effect—encouraging employers to more carefully examine their decisions whether to record injuries and illnesses which will lead to fewer injuries and illnesses being recorded. This belief was echoed many times during the public meeting—not merely from employers, but from safety professionals, such as the American Society of Safety Engineers (“ASSE”).³

IV. Raw Injury Data Will Not Be Useful for Targeting and OSHA Has Proposed No Quality Controls

CWS members anticipate that making raw injury and illness data public will undermine the efficient use of federal resources. The data that OSHA will collect and make publically available is not a reliable measure of an employer’s safety record or its efforts to promote a safe work environment. Many factors outside of an employer’s control contribute to workplace accidents, and many injuries that have no bearing on an employer’s safety program must be recorded. Data about a specific incident is meaningless without information about the employer’s injuries and illness rates over time as compared to similarly sized companies in the same industry facing the same challenges (even similar companies in the same industry may face substantially different challenges with respect to workplace safety based on climate, topography, population density, workforce demographics, criminal activity in the region, proximity and quality of medical care, etc.).⁴

Therefore, targeting employers based on the data collected is unlikely to result in greater regulatory compliance. Employers with high injury and illness rate are not necessarily failing to comply

³ See comments of James Thornton on behalf of ASSE, Transcript for January 9, 2014, pages 97-109.

⁴ A useful comparison is the effort by the Federal Motor Carrier Safety Administration when it developed the Compliance, Safety and Accountability (“CSA”) program. In theory, CSA was designed to take data from roadside inspections (safety-based violations) and Commercial Motor Vehicles (CMV) crashes to assess a motor vehicle carrier’s safety performance and allow the FMCSA to focus its limited resources on the least safe carriers. This is a similar objective that OSHA asserts – better use of federal resources. However, studies and analysis of the CSA have demonstrated that these scores do not reliably identify carriers that are more likely to have future crashes.

with the OSHA standards and sending a compliance officer to a workplace based on the data collected will not necessarily result in finding a greater number of OSHA violations.

In the final rule to § 1904.17, (now § 1904.41) OSHA acknowledged that “misreporting, whether intentional or unintentional can affect the value of the collected data and any conclusions drawn from that data.” 62 Fed. Reg. 6434, 6440 (February 11, 1997). In acknowledging this issue for data collected in response to ODI surveys, OSHA stated, “OSHA is implementing a quality control initiative for the current collection of injury and illness records data required by Part 1904 that will include three components: outreach and training for the regulated community to reduce unintentional errors, error screening and follow-back procedures to correct or verify questionable data reported to the Agency, and under certain circumstances, on-site records inspections.” *Id.*

OSHA now proposes to expand the type and volume of data collected by collecting more information and from more establishments, but fails to establish how it will maintain quality control of the data that is collected and the data made publically available. OSHA asserts that this data is going to help OSHA “use its resources more effectively by enabling the Agency to identify the workplaces where workers are at greatest risk...and to target its compliance assistance and enforcement efforts accordingly.” 78 Fed. Reg. at 67256. However, as the Agency recognized years ago, misreporting can affect the value of the data collected. If OSHA goes forward with this rule, the agency must implement similar error screening and follow-back procedures to correct and/or verify questionable data reported. And because OSHA claims that they will be using the quarterly reports as part of their targeting, this error screening and review procedures will have to be done on a similarly quarterly basis to ensure that the information collected has sufficient quality controls such that any conclusions drawn from this data are reliable and as accurate as possible for use in targeting outreach and enforcement efforts.

For CWS members, the potential consequences that flow from making the information publically available contribute to their sense of unease and erode their belief in the value of this proposed rule.

V. The Rule is Not Supported by the Regulated Community

The comments during the public meeting and even a cursory review of the written comments already submitted make clear that this rule is not supported by employers or safety professionals, including ASSE. The sole support for this rule seems to come from unions who have made known that they intend to use such information for organizing purposes and pressuring employers.

Pursuant to 29 C.F.R. § 1904.35, employee representatives—that is, the authorized collective bargaining agent of employees—already have access to OSHA 300 logs, 300A summaries and 301 forms. However, this provision is limited to union employers. Currently, unions do not have access to injury and illness data for nonunion employers. There is no doubt that the unions’ interest in such information is for organizing purposes. The desire for greater access to employer safety records was expressly stated in the AFL-CIO’s submission to President Obama’s transition team⁵ and their intent to use this data in corporate campaigns and other pressure tactics against employers was made clear at the public meeting.

⁵ *Turn Around America, AFL-CIO Recommendations for the Obama Administration: Worker Safety and Health*, pages 2, 9.

The absence of support from the employer community undercuts OSHA's claims that this regulation will be seen as a management tool to improve workplace safety and that employers will take advantage of these injury and illness records to benchmark and compare themselves with other employers. Not only does OSHA fail to cite *any* source for this claim, but employers generally regard their safety practices as proprietary and part of their competitive advantage. Thus, they have no interest in sharing data revealing their safety practices.

VI. The Proposed Rule Reverses OSHA's No-Fault Recordkeeping System

In 2001, OSHA revised the recordkeeping requirements and the foundation of those revisions in what OSHA deemed a "no-fault" system. During the revisions to the recordkeeping requirements, OSHA had to determine what the scope of recordkeeping would be. For a variety of reasons OSHA concluded that a "geographic" presumption was the most comprehensive way to achieve Congress's objective for determining work-related injuries and illness. However, at the same time, OSHA recognized that the "geographic" presumption did not necessarily correlate to an employer's behavior and therefore injuries and illness that were beyond an employer's control would be recorded.

OSHA stated in the 2001 final rule, that "it is not necessary that the injury or illness result from conditions, activities, or hazards that are uniquely occupational in nature. Accordingly, the presumption encompasses cases in which injury or illness results from an event at work that are outside the employer's control, such as a lightning strike, or involves activities that occur at work but that are not directly productive, such as horseplay." 66 Fed. Reg. 5929. There is no denying that when OSHA relied on the geographic presumption it recognized that *many* circumstances that lead to a recordable work-related injury or illness are "beyond the employer's control." *Id.* at 5934.

During the 2001 revisions, OSHA recognized that this no-fault recordkeeping system includes work-related injuries and illnesses, regardless of the level of employer control or non-control involved.

As CWS explained during the public meeting, there are plenty of actual examples of injuries recorded based on the geographic presumption that in no way exemplify whether an employer's workplace is truly safe and in compliance with OSHA standards. Such examples include employees who have sneezed and hurt their back, employees who have tripped while walking on a smooth dry surface, bee stings or spider bites.

Now, OSHA intends to use this no-fault system to target employers for enforcement efforts, to shame employers into compliance, to allow members of the public to make decisions about with which companies to do business, and to allow current employees to compare their workplaces to the "best" workplaces for safety and health. This proposed regulation fundamentally upends the no-fault system that OSHA originally adopted in 2001 during the Clinton administration—the very no-fault system that was encouraged and fully supported by the AFL-CIO. In its comments submitted in response to the proposed rule, the AFL-CIO stated:

...the Agency must encourage employers to adopt a "no-fault system" philosophy in the workplace and remove barriers which discourage the reporting of injuries and illnesses by employees. This philosophy will not only encourage workers to report injuries and

illnesses, but also encourage those individuals (e.g., supervisors, safety personnel) responsible for recording this data to report all recordable incidents.

In an effort to “allay any fears employers and employees may have about recording injuries and illnesses” OSHA specifically set out this no-fault philosophy under Part 1904. 66 Fed. Reg. at 5934. Specifically, the Note to 1904.0, the section which addresses the purpose of the Part 1904 recordkeeping and reporting requirements 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 was unequivocal that “recording a case does not indicate fault, negligence, or compensability.” *Id.* OSHA now wants to use this very system designed to encourage reporting and recordkeeping to target employers for enforcement and enable “the Agency to identify the workplaces where workers are at greatest risk, in general and/or from specific hazards....” 78 Fed. Reg. at 67256. This is the antithesis of a no-fault system.

In the web-mock up created by Eastern Research Group (“ERG”), on the page for public searches of injury/illness information for specific establishments, there is a disclaimer in an explanatory note that states:

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.⁶

This disclaimer is completely contrary to the stated benefits OSHA claims flow from this proposed regulation. OSHA wants the public and employees to rely on these rates to make decisions about with whom to do business or where to work. However, the only way to make such decisions is to look at the rates—without any context of the raw numbers, the public and employees are left only to review high and low rates, drawing conclusions that the lowest rates are the “best” workplaces for safety and health and that the highest rates are the “worst.” OSHA cannot on one hand carve out a caveat that establishments with high rates are not dangerous and on the other encourage the public, employees, and its compliance officers to rely on those same rates to determine “best” workplaces for safety and health. This logic is internally inconsistent.

VII. The Proposed Rule Creates Additional Burdens on Employers

⁶ In comparison, currently the ODI establishment search webpage sets out an explanatory note as follows, “**Data quality:** While OSHA takes multiple steps to ensure the data collected is accurate, problems and errors invariably exist for a small percentage of establishments. OSHA does not believe the data for the establishments with the highest rates on this file are accurate in absolute terms. Efforts were made during the collection cycle to correct submission errors, however some remain unresolved. 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.

OSHA insists that this proposed rule does not create new obligations. In OSHA's view it simply expands access to information employers are already maintaining. This rule is far from being the benign, modest, and limited rule that OSHA portrays it to be. At the very least, this proposed regulation creates obligations on some employers to provide injury and illness information to OSHA on a quarterly basis, and for other employers to submit annual reports—obligations employers currently do not have.

OSHA also claims that all information contained on an employer's 300, 301 and 300A forms that they intend to make public is currently made public from the ODI surveys the Agency collects. This simply is not accurate. What OSHA makes public from the ODI surveys is the following:

- Year
- Establishment name
- Address
- Standard Industrial Code (SIC)
- Total Case Rate (TCR)
- Days Away, Restricted, and Transfer (DART),
- Days Away From Work (DAFWII)

The above data is not raw data, but rather rates generated from calculated formulas using raw data submitted to OSHA. These are rates calculated from the various components of information an employer submits in response to an ODI survey. OSHA does not publish the completed surveys from each establishment.

While employers may be required to maintain these records already, the regulation imposes a new obligation to submit this data to OSHA quarterly and annually. It requires employers to ensure processes are in place to timely submit such information to OSHA. For OSHA to claim that this regulation places no new obligations or burdens on an employer ignores the realities of managing and operating a business and belies the mandatory nature of OSHA's proposed reporting requirement.

VIII. Electronic Submission Only Is A Burden On Employers

There is a significant impact and burden on employers, particularly small employers, from a regulation that does not permit paper submission. When OSHA first promulgated the OSHA Data Initiative in 1997, the Agency recognized that electronic submission should not be mandatory. 62 Fed. Reg. 6434 (February 11, 1997). Specifically, OSHA stated:

OSHA does not believe that computerized reporting systems should be mandatory for all employers. Mandatory computer systems could actually increase the burden on those employers who do not have computer systems and on those employers who have computer systems that do not provide simple electronic communications options.

Even with the proliferation of electronic and digital technology, for various reasons, some CWS members currently do not keep injury and illness records electronically. Therefore, for some employers, such as some CWS members, being required to submit such data electronically creates an additional burden. Rather than being allowed to simply copy and mail injury and illness records, which could take a matter of minutes, these employers will have to type in all the information and data being requested

which would take considerable time, much more than the 10 minutes per electronic submission that OSHA suggests.

Moreover, OSHA readily acknowledges that 30% of the establishments responding to the 2010 ODI survey did not submit data electronically. 78 Fed. Reg. 67254. In an effort to explain why this is so, OSHA noted, “for some of the establishments...it is difficult to submit data electronically. Most agencies currently allow non-electronic filing of information, and some businesses continue to use this option, despite strong encouragement by agencies to file electronically.” *Id.* at 67273. Obviously, OSHA recognizes that electronic submission is simply not feasible for some employers and to mandate such is an unjustifiably increased burden on employers. Because submitting reports will be mandatory, OSHA must provide for other means than only electronic submission for those employers that are unable or unwilling to use that approach. Failing to provide employers the choice of how to submit such data is irresponsible government action.

IX. Enterprise-Wide Submission (Alternative I) Is Also Flawed

In the preamble OSHA sets out several alternatives the Agency is considering in lieu of, or in addition to, the proposed regulation. One of these proposed alternatives is Alternative I – Enterprise Wide Submission. Under this alternative, OSHA is considering requiring enterprises with multiple establishments, such as five or more establishments, to collect and submit all the required records from all its establishments.

This alternative in no way cures the issues with the proposed regulation itself. In fact, the alternative only creates additional burdens and would add unnecessary confusion to OSHA’s recordkeeping requirements. Likewise, given the number of questions OSHA posed to the regulated community regarding this alternative, if OSHA were to consider adopting this alternative it would likely have to engage in a separate notice of proposed rulemaking fully laying out the requirements and definitions for enterprise wide submission. Currently, employers have no notice as to how “enterprise” or “ownership or control” would be defined, or what other possible definition might be suggested by other commenters.

CWS members have conveyed that such a requirement would create additional obligations on employers. Many enterprises with multiple establishments function very independently for a variety of reasons. And, for an enterprise to collect and submit such records in a timely way it would need the records from each establishment several weeks, if not months, in advance of submission to OSHA. Further, by the time an enterprise collects the information, possible corrections and edits will have been made to entries, making the data collected outdated and further outdated by the time it would be electronically submitted to OSHA. Thus, in some cases requiring enterprise-wide submission will result in data that is unrepresentative of actual work-place injuries and illnesses.

OSHA’s discussion of this alternative suggests it is receiving serious consideration. If OSHA moves forward with this alternative, CWS believes OSHA should do so only after the Agency has done a comprehensive analysis of the added costs and burdens it will create. Merely floating it as an alternative in the preamble to this rulemaking, with no regulatory language, is not an appropriate way to put affected employers on notice of this major change to their current operations. Among the analyses OSHA would have to conduct, would be whether the agency could certify that this proposal would not

trigger the requirements of the Regulatory Flexibility Act and the small business panel review of the Small Business Regulatory Enforcement Fairness Act (SBREFA). CWS unequivocally believes that OSHA would be well served to conduct a small business review panel under the provisions of if the agency intends go any further with the enterprise-wide alternative, even if the agency can certify that such a proposal does not have enough impact to require it. For a more extended discussion of OSHA's treatment of this proposed rule under SBREFA, see below in Section XI.

X. OSHA's Estimates of Costs and Benefits Are Defective and Unsupported

During the public meeting, and in some public comments, many stakeholders have expressed concern regarding the estimated costs of this proposed regulation. OSHA would like the regulated community to believe this proposed regulation means nothing more than having to simply hit the "send" button. OSHA asserts:

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.

This is simply far from the truth. Many, including CWS members, believe that the costs of this proposed regulation are significantly underestimated.

Under OSHA's analysis, this regulation is estimated to cost each employer with establishments of 250 or more employees, only \$183 and only \$9 per year for establishments with 20 or more employees in designated industries. OSHA reaches this average cost based in part on the time estimated it would take an employee to submit the data, which OSHA calculated as a mere 10 minutes per each Form 301 submission and a similarly scant 10 minutes for the submission of both Form 300 and 300A. OSHA's overly simplistic approach to its cost and benefits estimates is troubling and severely underestimates the cost of compliance for employers while overestimating benefits due to the following factors:

- Training for implementing a new system of maintaining records and submitting to OSHA;
- Training for employee turnover;
- Manually entering each separate injury or illness from an employer's Form 300 Log;
- Increased time in the decision making process to determine recordability;
- Implementation of electronic recordkeeping systems for those using only paper format;
- Inappropriate reliance on BLS data; and
- Unsupported estimates of benefits.

A. Initial Training for implementing a new system of maintaining records and submission

While OSHA portrays this rule as merely copying information from one form into an electronic database, the failure to do so correctly has significant negative impacts on an employer. Therefore, employers will undoubtedly spend time familiarizing those employees tasked with submitting this data to OSHA on how to access the website, where to locate the necessary OSHA Forms, and completing and reviewing the information or in some cases, on an entirely new system of maintaining records.

Moreover, since such information will be made publically available, employers will likely assign this task to those who have proper training about the recordkeeping rule and the employer's recordkeeping system. In essence, this individual would serve as a quality check as the data is being inputted electronically. This would help to ensure the most accurate and complete recording of work-related injuries and illnesses. Therefore, OSHA's assumption that employers will assign this task to a Human Resources Specialist is misplaced. In fact, OSHA provides no basis for its claim and merely states, "OSHA assumed that recordkeeping tasks are most commonly performed by a . . . Human Resources Specialist." Additionally, OSHA relies on outdated BLS hourly wage data from May 2008 to get a mean hourly wage of \$28 for a Human Resources Specialist.

B. Training for Turnovers

In contrast to the recordkeeping revisions in 2001, under this proposed regulation, OSHA did not calculate "Costs of Learning the Basics of the Recordkeeping System De Novo." 66 Fed. Reg. 5916. In the economic analysis to the revisions to the recordkeeping requirements, OSHA accounted for the costs an employer would incur for training a new person on recordkeeping as a result of staff turnover. No such cost estimate was considered for this proposed regulation.

Just as an employer will need to train the employee submitting the information to OSHA, it will need to train new employees who perform this task as a result of turnover. CWS members believe this is a cost that OSHA has failed to take into account.

C. Manual Entry

OSHA alleges that part of this "relatively simple and quick" process will include "copying the required injury and illness information from the establishment's paper forms into the electronic submission forms." And yet despite acknowledging that the most time intensive part of the process will be copying the required injury and illness information, OSHA has completely ignored the costs associated with manually entering *each and every* recorded injury or illness on an employer's Form 300. In fact, OSHA estimates that it will only take an employer 10 minutes for submission of *both* the Form 300 and 300A.

How OSHA could believe an employer who does not maintain records electronically would need less than 10 minutes to input all the data from a 300 log alone is unimaginable. The information submitted for *each* entry in a Form 300 includes:

- the case number;
- the employee name (which must be included because OSHA will redact that information);
- job title;

- date of injury;
- where the event occurred;
- description of injury/illness and affected body part;
- classification of injury or illness;
- potential number days away or transferred/restricted; and
- injury classification.

As discussed above, since the geographic presumption encompasses many injuries and illness that are beyond an employer’s control, some employers may have several pages of entries. Additionally, larger employers, just due to the sheer volume of employees, will have several pages of entries. Even assuming that entries are done on a quarterly basis, it is possible for establishments to have many entries that would require manual entry and entering this data alone could take well over 10 minutes.

OSHA does not estimate how many employers currently maintain electronic records. As OSHA asserts, 30 percent of ODI respondents do not *submit* records electronically; therefore, one can assume that these records are not *maintained* electronically. From this, it can be safely assumed that a sizeable number of employers will also be copying the required injury and illness information from the establishment’s paper forms into the electronic submission forms—a cost OSHA simply ignores when calculating the average cost per affected establishment with 250 or more employees.

Moreover, OSHA has not analyzed whether current existing electronic programs would present such data in a format acceptable to be uploaded to OSHA. Without knowing what types of electronic forms OSHA would consider for uploading, the regulated community is unable to estimate whether uploading such information would impose increased costs.

D. Additional Time to Determine Recordability

OSHA also fails to account for the additional expense employers will incur to determine whether an injury or illness is work-related. Rather than expend substantial time, money and resources to determine whether an event is recordable, most employers now will default to recording the event—currently there is no penalty or negative impact for over recording. However, this proposed regulation will significantly impact that decision making process because recording will now have a greater consequence—a higher injury and illness rate that is publically available and enforcement targeting by OSHA.

Because of the consequences of recording an injury under this proposal, employers can be expected to involve more experts in some cases. This is particularly the case with musculoskeletal disorders (“MSD”). OSHA plans to finalize its proposed rule revising the 300 log to include a column for MSDs. The combination of the MSD recordkeeping regulation and this proposed regulation will cause employers to engage in a different decision making process—one that will incur additional costs for employers.

Some employers already go to great lengths to ensure that an injury is correctly classified as work-related. For example, in the recent case of Caterpillar Logistics, Inc. (“Caterpillar”), one of Caterpillar’s employees developed epicondylitis (tennis elbow). *Caterpillar Logistics, Inc. v. Perez*, No-13-1106 (7th Cir. December 12, 2013). This employee’s routine job function involved repetitive

hand movements and pronation of wrists, elbows and shoulders. *Id.* In the process of determining whether the injury was work-related and therefore required to be recorded on the OSHA Form 300, Caterpillar’s internal physician concluded that the employee’s work activities did not contribute to her injury. *Id.* As an additional level of review, Caterpillar convened a review panel, consisting of five members, three of which were board-certified in musculoskeletal disorders. *Id.* This panel agreed that the injury was not work-related. *Id.* Despite this extensive evaluation and internal determination regarding work-relatedness, OSHA substituted its own judgment and cited Caterpillar for failing to record a work-related injury. The U.S. Court of Appeals for the Seventh Circuit vacated the citation. *Id.*

This case is a cautionary one for two reasons. First, it demonstrates the level of expertise some employers are willing to engage, with associated expense, to ensure their recording decision is well supported. Secondly, it shows how little respect and deference OSHA is willing to show even when the employer has relied on substantial expertise—and how obsessed OSHA is with accumulating MSD citations.

Under this proposed regulation, employers are more likely to incur substantial costs to conduct evaluations similar to Caterpillar’s in order to determine whether an injury is truly work-related. This is particularly the case with musculoskeletal disorder injuries. OSHA has not accounted for these additional costs that are likely to flow from this proposed regulation.

E. Implementation of Electronic Recordkeeping

OSHA claims that “[i]n many cases, especially for large establishments, OSHA data are already kept electronically, so step 3 [copying the required injury and illness information from paper forms into the electronic submission forms], which is likely the most time-intensive, would not be necessary.” 78 Fed. Reg. at 67272. OSHA states no basis for its assertion that many large establishments already keep records in electronic form and in fact, OSHA’s assumption is contradicted by the fact that 30% of the ODI surveys are submitted in non-electronic format.

Since OSHA is proposing that employers will be required to submit this data electronically, a realistic impact from this regulation would be that employers who currently do not maintain records electronically will choose to implement electronic recordkeeping to minimize the burden of manually entering its injury and illness information. OSHA’s economic analysis fails to include costs associated with implementing an electronic recordkeeping system, which might be particularly impactful for small businesses.

F. Reliance on BLS Time Estimates is Erroneous

In addition to the above costs OSHA has failed to include in its preliminary economic analysis, OSHA’s reliance on the BLS time estimates is improper. OSHA relied on the estimated unit time requirements reported by BLS for electronic submission of similar information to BLS. Specifically, according to OSHA, BLS estimated “10 minutes per recordable injury/illness case for electronic submission of the information on Form 301...[and] 10 minutes per establishment, total, for electronic submission of the information on both Form 300...and 300A.” *Id.* OSHA’s reliance on BLS estimated time requirements fail to recognize the significant differences between what OSHA is proposing and what limited injury and illness data BLS currently collects.

In another attempt to over simplify this regulation, OSHA fails to acknowledge the quantity of data being submitted under this proposed regulation in comparison to BLS. BLS does not include submission of an employer's entire OSHA Form 300. It requires some information from an employer's 300A and it requires submission of information for up to 15 cases classified as days away or job transfer/restricted.

In contrast to what OSHA would require to be submitted under this proposed regulation, BLS collects a limited amount of information from an employer's Form 300. BLS limits the information collected to injury and illness cases resulting in days away from work or job transfer or restriction; a much smaller subset of information than what OSHA is proposing employers submit in this regulation.

More importantly, the survey is designed "to ensure that [employers] do not have to report more than approximately 15 cases." (U.S. Dept. of Labor, Bureau of Labor Statics – Survey of Occupational Injuries and Illnesses, 2013 p. 5) The difference between manually entering 15 cases from an employer's Form 300 and entering the *entire* form for each and every recorded injury or illness, which could be several pages, is substantial. This difference alone invalidates OSHA's estimate that it will take 10 minutes of time per establishment to submit information on *both* the Form 300 and 300A.

G. Benefits Estimates Are Unsupported and Entirely Speculative

OSHA not only underestimates the compliance costs associated with the proposal, but also fails to quantify the alleged benefits of the rule. Despite this failure, OSHA concludes that annual benefits will exceed the annual costs. More importantly, all the benefits alleged are based on mere conjecture. There are no scientific analyses, data, reports, or studies to support any of the putative benefits claimed by the agency. The closest OSHA comes to supporting its benefits assessment is an unsubstantiated claim that the rule will lead to positive outcomes such as reduced fatalities and injuries, yet the agency fails to provide supporting evidence to explain *how* the rule will do so. This assertion is speculative at best, particularly in light of the fact that employers are already required to report fatalities and this rule would have no impact on that requirement. 78 Fed. Reg. 67277.

XI. OSHA Should Have Conducted a Small Business Review Panel under SBREFA

Once again, OSHA has declined to conduct a review of this proposal under the process in the Small Business Regulatory Enforcement Fairness Act (SBREFA).

OSHA proposes to certify that this regulation will not have "a significant economic impact on a substantial number of small entities" and so a SBREFA panel is not required. 78 Fed. Reg. 67279. However, OSHA always has the option of convening such a panel voluntarily and taking comments directly from affected small businesses before a regulation is proposed to better understand the impact of the proposal and identify specific concerns from small entities that will have to comply.⁷ The provisions of this proposal will directly affect small businesses of many different types with more than 20 employees, and even OSHA's 250 employee threshold is still within many of the SBA size standards that often go as high as 500 employees, or are determined not by employee count, but by average receipts. Accordingly, OSHA would have benefited from convening a Small Business Advocacy

⁷ 5 U.S.C. 609 (c).

Review panel as provided for under the Small Business Regulatory Enforcement Fairness Act (SBREFA).⁸

Since the industries where small entities will have to report are already identified in this rulemaking, this would have been an ideal rulemaking for OSHA to exercise its prerogative to conduct a panel even if they could have certified the impact does not require it. Instead of seeing these panels as obstacles to be avoided, OSHA should welcome the value of the input from small businesses they provide. OSHA has shown a determined resistance to the SBREFA process and avoided it whenever possible. This is another example where OSHA could have taken the extra step to develop a better understanding of their proposal, but chose to rush forward with the rulemaking instead.

XII. OSHA Must Withdraw This Proposed Regulation

This proposed rule suffers from many serious flaws:

- OSHA does not have the statutory authority to publicly disseminate the information the Agency plans to publish under this regulation;
- It will result in confidential, sensitive and proprietary business information being made public;
- It will provide material for those who wish to mischaracterize employers;
- The rule will cause fewer injuries to be recorded rather than more;
- The electronic only reporting requirement adds another burden to employers who are being forced to submit reports;
- The proposal upends longstanding policies about recordkeeping with no justification or explanation;
- OSHA's cost and benefit estimates are entirely speculative and without any credibility; and
- OSHA should have conducted a small business review panel under SBREFA to understand better the impact this rule will have on small businesses.

Fundamentally, this proposal will do nothing to improve workplace safety, while causing significant harm to employers through the public disclosure of information and data that has long been protected and which employers go to great lengths to keep from being released into the public domain. As a result, the CWS and its members urge OSHA to withdraw this proposal.

Sincerely,

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⁸ 5 U.S.C. 609 (b).