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OSHA Docket Office
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U.S. Department of Labor
Room N-2625
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Washington, D.C. 20210

VIA ELECTRONIC SUBMISSION TO REGULATIONS.GOV

RE: Improved Tracking of Workplace Injuries and Illnesses Rulemaking, Docket Number OSHA-2013-0023, Regulatory Identification Number (RIN 1218-AC49)

The National Lumber and Building Material Dealers Association (NLBMDA) and its members are strong advocates for improving workplace safety through education, training and communication, and recognize the need for adequate levels of transparency and accountability in reporting and recordkeeping, where such reporting and recordkeeping requirements are justified. Furthermore, NLBMDA understands the important role that OSHA’s guidelines for safe working conditions play in fostering a safe workplace. The association’s members strive to provide the safest working conditions possible and stress the importance of compliance with all workplace safety requirements and best practices applicable to the lumber and building material sector.

However, NLBMDA opposes the proposed Improved Tracking of Workplace Injuries and Illnesses (78 Fed. Reg. 67254, November 8, 2013). OSHA does not have the statutory authority to make the information subject to this rule publicly available and the agency’s reliance on the Open Government Initiative is flawed. NLBMDA also disagrees with the Agency’s unproven assertion that putting the proposed rule into practice will improve workplace health and safety.
If implemented, the rule as proposed will stifle timely and complete recordkeeping by unnecessarily subjecting proprietary business and sensitive personal information to public scrutiny. The rule violates the reasonable expectations of privacy of employers and employees by requiring confidential business information and personally identifiable employee information to be disclosed to the public at large. Not only does this rule do nothing to enhance workplace safety, but it also provides no meaningful background or context for reported injuries or illnesses, and it provides no specific safeguards against misuse or misinterpretation. Additionally, it will impose an economic burden on employers that OSHA dismisses based on inaccurate estimates that are well below the allocation of time and expense that employers large and small will incur.

I. OSHA Does Not Have Legal Authority to Implement this Rule and Has Failed to Show it is Necessary

A. Occupational Safety and Health Act

The Agency relies on the Occupational Safety and Health Act (OSH Act) as the basis for legal authority in this rulemaking. While the OSH Act grants OSHA the authority to preserve records and require employers to maintain records on and submit reports of work-related deaths, injuries and illnesses, that authority does not extend to the provisions in this proposed rule that mandate making confidential and personally identifiable information available to the public online.

The proposed rule also violates the employer’s and employee’s reasonable expectations of privacy. The requirement for employers to maintain records and submit reports with details outlining injuries and illnesses at the workplace to OSHA does not destroy the employer’s or employee’s legitimate expectation of privacy from publication or use beyond the legitimate governmental functions of oversight, enforcement and compliance assistance. OSHA has failed to make the case that the current regime of recordkeeping and reporting is inadequate for these needs.

OSHA’s proposal that the submitted information be published and widely available is an unreasonable intrusion and increases the likelihood for arbitrary invasions of privacy anytime members of the public choose to use unbridled discretion to target employers or employees based on the sensitive information in the reports. In addition to creating opportunities for misuse of this information, OSHA has failed to demonstrate that the publication of this information will improve workplace health and safety.
Furthermore, OSHA’s assertion that the proposed rule is similar to the OSHA Data Initiative and is therefore reasonable under the Fourth Amendment is flawed and incorrect. The OSHA Data Initiative, established in 1995, was created to collect information from private industries to allow the Agency to ascertain rates of injuries and illnesses and to effectively target enforcement actions and compliance assistance activities. However, unlike the proposal, the OSHA Data Initiative does not publish for public consumption these individual injury and illness reports. The proposed rule takes a significant and counter-productive step beyond the current Data Initiative, exceeding the Agency’s authority under the OSH Act.

B. Open Government Initiative

The Open Government Initiative (OGI) was established to increase government transparency with a balanced approach that respects citizens’ privacy. The Open Government National Action Plan seeks to modernize the management of government records to assess the impact of programs and reduce redundant efforts within the Agency and across federal government organizations.\(^1\) The electronic submission of injury and illness reports and subsequent online publication of those reports does nothing to reduce redundancies within OSHA. Furthermore, the proposed rule does not improve OSHA’s ability to assess the impact of workplace safety programs because the Agency already has access to the data being submitted. OSHA has failed to demonstrate that publishing the reported information to the public will improve its ability to measure program effectiveness or otherwise undertake its legitimate governmental responsibilities.

The Open Government Initiative anticipates consultations with industry subject to governmental regulations and requires data security and privacy measures as part of any such regulations. The Initiative states that the National Archives and Records Administration (NARA) will collaborate with industry to find methods of data submission that balance the goal of improving public access to government agencies and limiting the exposure of personally identifiable information. No NLBMDA members have been consulted by any NARA representative and none were invited to the NARA Industry Day meeting, an event that consulted only possible vendors for implementing the OGI.\(^2\)

Furthermore, the OGI implementation directed the Office of Management and Budget (OMB) to create *Digital Government: Building a 21st Century Platform to Better Serve the American*
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People, a document outlining a strategy for increasing digital government resources.\(^3\) The OMB specifically states that to be “good stewards of data security and privacy, the Federal Government must ensure that there are safeguards to prevent the improper collection, retention, use, or disclosure of sensitive data such as personally identifiable information.”\(^4\)

This proposed rule directly contradicts OMB’s guidance for the proper and legal implementation of the OGI. The proposed rule provides no safeguards to prevent the improper collection, retention, use, or disclosure of the employee’s personally identifiable information. In fact, the proposed rule increases the likelihood that sensitive personally identifiable information will be misused by creating the improper mandate that employers submit sensitive data for online publication. Without a means to safely and securely submit data to the Agency and with no limitation on the use of such data for legitimate governmental purposes, the proposal fails to meet the mandates of the OGI, ignores the OMB report and strategy for good stewardship of data, and threatens the current reporting regime that OSHA has failed to demonstrate needs modification.

C. OSHA Failed to Satisfy the Requirements of Executive Order 12866

The Agency failed to comply with the requirements of Executive Order 12866 that set forth several factors that agencies must consider when drafting regulations. Agencies must only issue regulations that are necessary, not duplicative, and implement the least burdensome alternative to meet a stated policy objective.

The Agency failed to consider existing regulations and government programs that are already in place to achieve any legitimate governmental goals as required by Executive Order 12866.\(^5\) No evaluation of the effectiveness of the current recordkeeping and reporting process was completed to establish the need for change.

OSHA’s analysis failed to identify and assess available alternatives to its proposal as required by Executive Order 12866.\(^6\) In this circumstance, there is no need to change the submission format for illnesses and injuries reports because the current procedure encourages forthcoming submissions of workplace incidents, a policy that should be enhanced, not discouraged.\(^7\) The

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\(^7\) Exec. Order No. 12,866 §1(b)(7), 58 F.R. 51735 (1993).
current regime also provides the Agency with the information it needs to fulfill its regulatory mandate of improving workplace safety through appropriate oversight, enforcement and compliance assistance.

The Agency failed to design this proposed regulation in the most cost-effective manner to achieve the regulatory objective as required by Executive Order 12866. Specifically, the Agency relied on faulty data and inaccurate assumptions about the time it would take employers to learn a new method of reporting, train to that method, and complete each report. The most cost-effective method of submitting the records to OSHA is to maintain the current process. Absent demonstrating that exposing injury and illness information to the public will enhance workplace safety and absent showing that the enhancements outweigh the reasonable expectations of privacy already discussed, the additional costs imposed on employers are not justified.

Additionally, the proposal does not provide the flexibility necessary for small businesses to comply with the new requirements. These costs, associated with equipment, training and additional time associated with reporting, unfairly affects smaller businesses with fewer resources to comply with this rule.

For all the reasons outlined above the Department has failed to follow the principles set forth in Executive Order 12866.

D. OSHA Failed to Satisfy the Requirements of Executive Order 13563

OSHA did not fully consider the future costs associated with this rulemaking as required in Executive Order 13563. The estimated economic cost of $183 per year for affected establishments with 250 or more employees and $9 per year for affected establishments with 20 or more employees in designated industries is not realistic. In addition to the implementation costs, the Agency failed to consider the negative economic and personal impacts on both employees and employers of having confidential information shared indiscriminately with the public at large.

E. Paperwork Reduction Act of 1995

The proposed rule makes changes to existing methods of information collection that requires a review by the Office of Management and Budget under the Paperwork Reduction Act of 1995.

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9 Id.
The Information Collection Request OSHA submitted to OMB asked for comments on the necessity of the proposed information collection for the proper performance of OSHA’s performance, including whether the information has practical utility; whether the burden estimate was accurate; ways to enhance the quality, utility, and clarity of the information collected; and ways to minimize the burden of the collection of information on employers; and ways to further reduce the collection burden on small businesses. However, OSHA failed to ask questions related to the burden and negative consequences created in allowing the general public to access injury and illness information.

OSHA asserts that making the information publicly accessible online will encourage employers to improve workplace safety more than the penalties in the current regulations. It also asserts that researchers will benefit from access to this information. NLBMDA disagrees with these assertions. Public scrutiny of this particular type of information will more likely have the opposite effect. NLBMDA also disagrees that the proposed public scrutiny will be more compelling than genuine concern for employees’ safety or the threat of penalties from OSHA. In fact, public access will instead have a chilling effect on full and accurate reporting because of concerns that this sensitive information will be placed in the public domain without the important context of the specific circumstances for each injury.

OSHA also asserts the compelling role of researchers. However, as with concerns about exposing this information to the general public, researchers will also have no context to the circumstances surrounding an injury and may incorrectly assign blame or perceive patterns that fail to correctly identify conditions that lead to injuries. The Agency also failed to explore in its proposal existing means it may have for sharing data with researchers for legitimate oversight and public policy objectives.

II. Failure to Show Rule is Necessary to Improve Workplace Health or Safety

While these regulations are not required by law, OSHA has the authority to issue regulations with recordkeeping requirements that “provid[e] appropriate reporting procedures...[that] will help achieve the objectives of this Act and accurately describe the nature of the occupational safety and health problem,” so long as the regulations further the enforcement and detection purposes of the OSH Act. The purpose of the Act is to “assure so far as possible every working man and woman in the Nation safe and healthful working conditions.” The OSH Act authorizes the Secretary of Health and Human Services to issue recordkeeping regulations that result in an

\[12\] Occupational Safety and Health Act 29 U.S.C. 651(b)(12); Workplace Health & Safety Council v. Reich, 56 F.3d 1465, 1468 (D.C. Cir. 1995)(citing Louisiana Chemical Ass’n, 657 F.2d 777, 781-82 (5th Cir. 1981)).

\[13\] id.at 29 U.S.C. 641(b).
effective program of recordkeeping that allows OSHA to “compile accurate statistics on work injuries and illnesses.”\textsuperscript{14}

The proposed rule is unnecessary because an effective program of recordkeeping and reporting injuries and illnesses is already in place. OSHA has not shown that the current regime inhibits its ability to compile statistics or that it prevents the Agency from achieving the objective of assuring American workers “safe and healthful working conditions”. OSHA provides no compelling need to change the means of reporting or to make this information available to the general public. In fact, OSHA ignores compelling reasons not to do so.

III. Proposed Rule Will Have a Chilling Effect on Employer Reporting

A. Reverses Successful OSHA Tradition of No-Fault Recordkeeping

The proposed rule’s public disclosure requirements directly contradict OSHA’s “no-fault recording system” that has been in effect since 2002.\textsuperscript{15} The “no-fault recordkeeping system” was the cornerstone of the 2001 recordkeeping revisions. Specifically, the “no-fault recordkeeping system” was created with OSHA’s implementation of a new ‘geographic presumption’ policy. This policy presumed that the definition of “work-related” injuries and illnesses included any injury or illness that occurred on the employer’s premises, or occurred off the employer’s premises when the employee was engaged in a work activity, or was present as a condition of employment.\textsuperscript{16}

OSHA stated that instituting the geographic presumption would reduce underreporting, improve the quality of workplace injury and illness records, and reflect a theory of causation in line with judicial review theories.\textsuperscript{17} OSHA explicitly noted that the incidents recorded may not be caused by the employer in any way:

\textit{“Under this ‘but for’ approach to work-relationship, 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 an injury or illness results from an event at work that is outside the employer’s control, such as a lightning strike, or involves activities that occur at work but are not directly productive, such as horseplay.”}\textsuperscript{18} (Emphasis added).

\textsuperscript{14} Id. at 29 U.S.C. 673(a).
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
OSHA clearly and directly established that instituting this geographic presumption would result, in de facto if not explicit, “no-fault recordkeeping.”

B. Proposed Rule Creates a Presumption that the Employer was at Fault

Under the current reporting regime, employers are required to submit to OSHA injury and illness reports that include incidents that the employer was not responsible for and could not have prevented. For OSHA to publish this information creates a presumption that the employer was at fault. It is especially concerning that as proposed, the information would be publicly available without the geographic presumption being prominently displayed throughout the website and individual records.

Additionally, the failure to provide the context of each injury adds to the presumption that the employer was at fault. OSHA is incapable of correcting this issue without an entirely new recordkeeping regulation that requires extensively detailed submissions from employers with each report. This would be onerous and overly-burdensome for employers of all sizes, but especially small businesses with smaller workforces and fewer working hours to dedicate to OSHA reporting.

OSHA is incapable of providing the public with adequate context to overcome the presumption that employers are at fault for all reported injuries and illnesses because Form 300 and Form 300A do not allow for adequate detail to describe circumstances beyond the employer’s control, a history of the employer’s precautionary measures, or the history of an exemplary safety record.\(^{19}\) In fact, the most space provided on Form 300, Form 300A, and Form 301 is less than a full line of text across a standard 8 by 11 piece of paper.\(^{20}\) This is not enough space to provide meaningful context to overcome the presumption of employer fault.

C. Proposed Rule Requires Public Disclosure of Confidential Business Information

OSHA’s current claims that the work-related illness and injury reports do not contain confidential business information is wrong and in contradiction with previous Agency statements and decisions.

Employee hours worked is proprietary information that is not subject to disclosure because it qualifies as confidential business information. For example, information on hours worked


\(^{20}\) Id.
provides competitors with insight into proprietary business processes. There is a long history in
the courts and in the administrative record that employee hours worked is proprietary
information that should not be disclosed.\textsuperscript{21}

The employers’ addresses should also not be subject to unnecessary public disclosure when
associated with information found in injury and illness report. For example, hazards identified in
these reports may also identify substances or materials that may be subject to nefarious or
criminal interests, providing a ready data base by industry and address.

\textbf{D. The Proposed Rule Will Punish Good Actors for Diligently Following Recordkeeping
Requirements}

The proposed rule will punish good actors, employers that record all injuries within the scope of
current reporting requirements. The proposal would discourage accurate and complete reporting
because the perception of a business with a lengthy record is that the business operates with
unsafe work conditions. In reality these good actors are the businesses most likely to constantly
review the safety of the workplace and immediately remedy any possibly hazardous conditions.

Conversely, the proposal would reward bad actors, employers who underreport injuries and
illnesses, thereby creating the perception that their comparatively smaller number of reports
equate to safe working conditions. This does nothing to enable OSHA to better identify and
remedy workplace hazards or to identify those workplaces where greater scrutiny or dialogue is
called for.

\textbf{IV. Proposed Rule Discourages Employees from Reporting Injuries and Illnesses}

Not only does the proposal have the potential of discouraging employer reporting and
compliance, it also has the potential to discourage the employee from reporting injuries and
illnesses. The knowledge that the public will have unfettered access to any information OSHA
deems acceptable about an employee in an injury and illness report could result in a chilling
effect on an employee’s decision to report the injury or illness. OSHA’s proposal to redact
merely the name of the employee(s) in order to address the legal prohibition on disclosing
personally identifiable information is insufficient. At a stakeholder meeting OSHA later stated
additional information the Agency considered personally identifiable only included Social
Security numbers and telephone numbers.\textsuperscript{22}

\textsuperscript{21} Plumbers & Gasfitters Local Union No. 1 v. Dep’t of the Interior, (E.D.N.Y. Oct. 26, 2011); OSHA Data/CIH, Inc. v.
\textsuperscript{22} Transcript of DOL Meeting: Improve Tracking of Workplace Injuries and Illnesses (Transcript).
The injury and illness reports submitted to OSHA include details that when viewed collectively and in association with the company name or locale, in many, if not most instances, will make it easy to identify the individual employee involved. For example, a person’s job title, the date of injury, type of injury, and medical treatment is all information that should be protected from disclosure because it allows the public audience to identify the employee in the report, threatening reasonable expectations of privacy and serving no legitimate governmental purpose.

Any regulation that results in fewer employees reporting their injuries has several negative consequences. First, the employee may not receive medical treatment he or she is entitled to receive. Second, a lack of reporting may lead to delayed or inadequate medical treatment for employee injuries which could result in emergent and life-threatening medical conditions. Third, a failure to report their injuries and illnesses fails to alert employers (and OSHA) to the condition and could lead to more unnecessary injuries.

V. Burdens Imposed on Small Businesses

OSHA severely underestimates both the burden on employers and the costs of implementing the regulation. The employer’s burden will increase with the new requirement for quarterly and annual submissions. This increase in frequency alone will require more employee work hours than OSHA estimates. These work hours also exceed the $9 and $183 estimated cost to employers of following this rule.23

OSHA also underestimated the training required to ensure employers will be able to remain in compliance with injury and illness reporting. The training will need to be thorough enough to make sure that the employer reports do not contain errors, are not submitted in error, and are timely filed.

OSHA failed to consider that these reports may be drafted, edited, and submitted by one or more employees that do not regularly interact with computers on a regular basis. For example, many establishments, particularly small businesses, will have employees who have multiple responsibilities. This proposal may result in loss of productivity in other areas of responsibility or require overtime pay, costs not considered by OSHA.

The costs-benefits analysis conducted by OSHA is speculative and unsupported by accurate research into real-world conditions. The Agency dramatically underestimates costs and fails to consider several costs that will inevitably be imposed on the employer under this rule. The Agency also fails to provide any evidence that the proposal would enhance workplace safety.

23 Improve Tracking of Workplace Injuries and Illnesses; Proposed Rule, Docket No. OSHA-2013-0023.
The Agency’s assumption that the rule would lead to fewer fatalities is not substantiated. As discussed above, the proposal is more likely to discourage reporting by employers and employees, undermining OSHA’s ability to review accurate data, identify areas that require enforcement and find opportunities for compliance assistance. The proposal will also keep important information from employers who would otherwise not only seek to fully comply with the recordkeeping and reporting requirements under the current regime, but also address the cause of any incidents under their control.

In conclusion, OSHA lacks the authority to implement this rule. The Agency does not have legal authority because it cannot rely on the OSH Act for authority to make sensitive information publicly available, it fails to demonstrate a need and rationale for the proposal as required by Executive Order, and it does not follow important guidelines OMB establishing the importance of safeguarding information in the custody of or otherwise required by the Agency.

Further, OSHA has failed to demonstrate that the proposal is necessary or will enhance workplace safety. Publication of sensitive information found in injury and illness reports will discourage good actors who currently report accurately to OSHA and encourage bad actors to underreport. This will serve to erode the data OSHA needs to be effective in its oversight, enforcement and compliance assistance. The rule will also discourage employees concerned about their privacy from reporting injuries and illnesses to their employers. This too works against the public policy of encouraging employers to respond to hazards under their control. Finally, the costs-benefits analysis OSHA relied on is flawed. OSHA grossly underestimated the costs associated with the proposal and used a benefits measurement that does not relate to recordkeeping.

NLBMDA supports the comments submitted by the Coalition for Workplace Safety. NLBMDA looks forward to working with OSHA to promote health and safety in the workplace while respecting the necessary limits on public disclosure of sensitive confidential information.

Respectfully Submitted,

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