



July 13, 2017

OSHA Docket Office  
Docket No. OSHA 2013-0023  
Room N-3653  
U.S. Department of Labor  
200 Constitution Ave., N.W.  
Washington, DC 20210

**VIA ELECTRONIC SUBMISSION:** <http://www.regulations.gov>

**Re: OSHA Docket No. OSHA-2013-0023; Proposed Rule to Delay Compliance Date for Reporting Requirement under Final Improve Tracking of Workplace Injuries and Illnesses Regulation (82 Fed. Reg. 29261, June 28, 2017)**

To the Docket:

The Coalition for Workplace Safety (CWS) is comprised 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.

The undersigned members of the Coalition welcome OSHA's proposal to delay the reporting requirement under the final regulation titled, "Improve Tracking of Workplace Injuries and Illnesses" issued May 12, 2016 ("final reg," "underlying reg") as a necessary first step to a more substantial revision or rescission of that regulation. Although the proposed delay in the reporting requirement from July 1, 2017 to December 1, 2017 is a positive action, the CWS believes the more appropriate action would be to stay this reporting requirement indefinitely pending the results of OSHA's announced further rulemaking (82 Fed. Reg. 29261).

If OSHA merely delays this reporting requirement, but then has it go into effect before eventually eliminating it through the more comprehensive rulemaking, employers will have had to go through the expense and uncertainty of developing their compliance regimes for naught. Even if OSHA ultimately leaves the reporting requirement in place, there is no harm to suspending it until the comprehensive rulemaking to review the full regulation is complete.

*The CWS is comprised of associations and employers who believe in improving workplace safety through cooperation, assistance, transparency, clarity, and accountability.*

More importantly, in the final regulation preamble, OSHA makes clear that any reports, even the annual summaries (Form 300A) that are the subject of this proposed delay, will be posted online, and subject to Freedom of Information Act requests thus assuring that confidential business information (CBI) contained in the summaries will be publicly available against the interests and wishes of employers (81 Fed. Reg. 29650, 29658). The Form 300A, while only a summary of recordable injuries, still contains sensitive confidential business information in the form of average number of employees and total hours worked. This data can be used by competitors to calculate production rates and efficiencies. Employers typically make significant efforts to protect this data. Even OSHA has historically recognized the sensitive nature of this data and sought to protect this information from being released under Freedom of Information Act requests. Unfortunately, OSHA makes clear in the preamble to the final regulation that the policy since 2004 is to not protect this information from FOIA requests, and that accordingly the agency intends to post this information online along with all other information collected on the Form 300A (*Id.*).

As detailed in our comments, the CWS strongly opposed this regulation when it was proposed in November 2013, and when the supplemental was proposed in August 2014 (see attached comments). OSHA made no attempt to cure the problems the CWS raised in our comments to both of these proposals. Accordingly, our opposition to the underlying regulation has not changed and we continue to believe it should be rescinded. Among our criticisms is that OSHA provided no evidentiary support for their assertion of benefits flowing from the regulation and the reporting requirement. Coupled with OSHA's commitment to posting company information online, the CWS had legitimate and serious concerns about protecting company data.

In addition to our belief that OSHA should stay the reporting requirement indefinitely, OSHA's proposal for a delay is flawed for practical reasons. OSHA states the online portal will be available by August 1 so that employers may become familiar with it (82 Fed. Reg. 29261). However, OSHA never indicates how, or whether, it will be compatible with various digital recordkeeping systems currently in use. OSHA makes no claim to having field tested the online portal, or beta testing it, only that employers will have four months with which to learn it. While digital recordkeeping is certainly a widespread practice, and may be preferred, how digital records get transferred to OSHA's portal is not explained. If the systems are incompatible there may actually be manual data entry required which would defeat the point of OSHA specifying only digital submission. There may also be significant effort required to coordinate and compile records from throughout a company for submission purposes. None of these possible, perhaps likely, steps are accounted for in the economic analysis accompanying this regulation, nor the underlying final regulation.

Furthermore, notwithstanding the advantages of digital recordkeeping, OSHA's requirement of digital-only submission is inappropriate considering this will be a legal requirement. For comparison, the Internal Revenue Service still permits paper filing of tax returns. Employers must be given options across the technology spectrum if they will be required to comply. Specifying only one option, even if it is preferred, shows a lack of willingness to accommodate all employers.

The CWS welcomes OSHA's determination to review the underlying regulation, but for the above reasons strongly urges OSHA to stay the reporting requirement until the comprehensive rulemaking is complete.

Sincerely,

Airlines for America  
American Bakers Association  
American Coke and Coal Chemicals Institute  
American Composites Manufacturers Association  
American Feed Industry Association  
American Forest & Paper Association  
American Foundry Society  
American Iron and Steel Institute  
American Pipeline Contractors Association  
American Road & Transportation Builders Association  
American Staffing Association  
American Subcontractors Association, Inc.  
American Supply Association  
American Trucking Associations  
Associated Builders and Contractors  
Associated General Contractors of America  
Associated Wire Rope Fabricators  
Corn Refiners Association  
Distribution Contractors Association  
Flexible Packaging Association  
Forging Industry Association  
Global Cold Chain Alliance  
Healthcare Distribution Alliance  
Independent Electrical Contractors  
Industrial Fasteners Institute  
Institute of Makers of Explosives  
International Association of Amusement Parks and Attractions  
International Foodservice Distributors Association  
International Liquid Terminals Association  
IPC- Association Connecting Electronics Industries  
LeadingAge  
Mechanical Contractors Association of America  
Motor & Equipment Manufacturers Association  
National Association of Chemical Distributors  
National Association of Home Builders  
National Association of Manufacturers  
National Association of Wholesaler-Distributors  
National Automobile Dealers Association  
National Cotton Ginners Association  
National Demolition Association  
National Federation of Independent Business

National Grain and Feed Association  
National Restaurant Association  
National Retail Federation  
National Roofing Contractors Association  
National School Transportation Association  
National Tooling and Machining Association  
National Utility Contractors Association  
Non-Ferrous Founders' Society  
North American Die Casting Association  
North American Meat Institute  
Power and Communication Contractors Association  
Precision Machined Products Association  
Precision Metalforming Association  
Printing Industries of America  
Retail Industry Leaders Association  
Sheet Metal and Air Conditioning Contractors' National Association  
Steel Manufacturers Association  
Texas Cotton Ginners' Association  
Tree Care Industry Association  
U.S. Chamber of Commerce

Attachments

- Attachment 1: CWS Comments on OSHA Injury and Illness Electronic Reporting Rule
- Attachment 2: CWS Written Comments on Supplemental NPRM

# Attachment 1



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 *The CWS is comprised of associations and employers who believe in improving workplace safety through cooperation, assistance, transparency, clarity, and accountability.*

Marc Freedman [mfreedman@uschamber.com](mailto:mfreedman@uschamber.com) / Josh Ulman [josh@ulmanpolicy.com](mailto:josh@ulmanpolicy.com)  
Sean Thurman [thurman@abc.org](mailto:thurman@abc.org) / Amanda Wood [awood@nam.org](mailto:awood@nam.org)  
[www.workingforsafety.com](http://www.workingforsafety.com)

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 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 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.<sup>1</sup>

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.

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<sup>1</sup> 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.

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

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.<sup>2</sup> OSHA vigorously claimed that LWDII was 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

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<sup>2</sup> 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).

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").<sup>3</sup>

### **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.).<sup>4</sup>

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

<sup>4</sup> 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.

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 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. Furthermore, OSHA conducts about 40,000 inspections a year. Of that number, approximately 60% are planned, with the balance resulting from unplanned complaints, accidents, etc. OSHA's proposal would require it to go through and rearrange priorities quarterly yet the Agency does not account for how it will manage this additional burden, or how it will improve in any meaningful way inspection targeting.

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 and Will Be Used for Purposes Unrelated to Workplace Safety**

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 team<sup>5</sup> and their intent to use this data in corporate campaigns and other pressure tactics against employers was made clear at the public meeting.

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

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

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.<sup>6</sup>

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

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<sup>6</sup> 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.

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**

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.<sup>7</sup> 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 Review panel as provided for under the Small Business Regulatory Enforcement Fairness Act (SBREFA).<sup>8</sup>

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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<sup>7</sup> 5 U.S.C. 609 (c).

<sup>8</sup> 5 U.S.C. 609 (b).

Air Conditioning Contractors of America  
Air Conditioning Trade Association  
American Bakers Association  
American Chemistry Council  
American Coke & Coal Chemicals  
American Feed Industry Association  
American Forest & Paper Association  
American Foundry Society  
American Health Care Association  
American Hotel & Lodging Association  
American Iron and Steel Institute  
American Loggers Council  
American Meat Institute  
American Staffing Association  
American Truck Dealers, a division of National Automobile Dealers Association  
American Trucking Associations  
Asian American Hotel Owners Association  
Associated Builders and Contractors  
Associated Builders and Contractors of California  
Associated General Contractors  
Associated General Contractors of California  
Automotive Aftermarket Industry Association  
Automotive Recyclers Association  
California Automotive Wholesalers' Association  
California Building Industry Association  
California Chamber of Commerce  
California Construction & Industrial Materials Association  
California Farm Bureau Federation  
California Framing Contractors Association  
California Lodging Industry Association  
California Manufacturers & Technology Association  
California Metals Coalition  
California Professional Association of Specialty Contractors  
California Retailers Association  
Can Manufacturers Institute  
Civil Justice Association of California  
College and University Professional Association for Human Resources  
Corn Refiners Association  
Flexible Packaging Association  
Food Marketing Institute  
Forging Industry Association  
Glendora (CA) Chamber of Commerce  
Global Cold Chain Alliance  
Greater North Dakota Chamber  
GT Petroleum Co.  
Healthcare Distribution Management Association

INDA, Association of the Nonwoven Fabrics Industry  
Independent Lodging Industry Association  
Industrial Fasteners Institute  
Institute of Makers of Explosives  
International Fragrance Association, North America  
International Franchise Association  
International Liquid Terminals Association  
International Sign Association  
IPC – Association Connecting Electronics Industries  
Kitchen Cabinet Manufacturers Association  
Manufacturers Alliance for Productivity and Innovation  
Metals Service Center Institute  
Motor & Equipment Manufacturers Association  
National Association of Chemical Distributors  
National Association of Electrical Distributors  
National Association of Home Builders  
National Association of Manufacturers  
National Association of Waterfront Employers  
National Association of Wholesaler-Distributors  
National Center for Assisted Living  
National Federation of Independent Business  
National Grain and Feed Association  
National Lumber and Building Material Dealers Association  
National Maritime Safety Association  
National Oilseed Processors Association  
National Pest Management Association  
National Ready Mixed Concrete Association  
National Retail Federation  
National Roofing Contractors Association  
National Tooling and Machining Association  
Non-Ferrous Founders' Society  
North American Die Casting Association  
NPES The Association for Suppliers of Printing, Publishing and Converting Technologies  
Plastics Pipe Institute  
Plumbing-Heating-Cooling Contractors Association of California  
Portland Cement Association  
Precision Machined Products Association  
Precision Metalforming Association  
Printing Industries of America  
Professional Landcare Network  
Residential Contractors Association  
Retail Industry Leaders Association  
Shipbuilders Council of America  
Society of American Florists  
Specialty Steel Industry of North America  
SPI: The Plastics Industry Trade Association

Summer Industries, LLC  
Textile Rental Services Association  
Thomas W. Lawrence, Jr. CSP, P.E., Principal, Safety and Compliance Management  
Tree Care Industry Association  
U.S. Chamber of Commerce  
U.S. Poultry & Egg Association  
Walter & Prince, LLP  
Western Electrical Contractors Association  
Western Steel Council

*Of Counsel*

Tressi L. Cordaro  
Attorney at Law  
Jackson Lewis LLP  
10701 Parkridge Blvd.  
Suite 300  
Reston, VA 20191

# Attachment 2



October 14, 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: Comments on OSHA Docket No. OSHA-2013-0023; Improve Tracking of Workplace Injuries and Illnesses, Supplemental Notice of Proposed Rulemaking (79 Fed. Reg. 47605, August 14, 2014)**

Dear Dr. Michaels:

The Coalition for Workplace Safety (“CWS”) submits the following comments on OSHA’s Supplemental Notice of Proposed Rulemaking (supplemental notice or NPRM), *Improve Tracking of Workplace Injuries and Illnesses* (79 Fed. Reg. 47605, August 14, 2014). The CWS is comprised 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. Improving safety can only happen when all parties – employers, employees, and OSHA – have a strong working relationship.

As CWS indicated in its comments to the initial Notice of Proposed Rulemaking (NPRM), OSHA-2013-0023-1411, CWS members are deeply troubled by this proposed rule and what appear to be significant reversals in long-standing OSHA policies and positions. This supplemental notice does nothing to cure the issues identified in CWS’s first comments, including the lack of statutory authority for the public disclosure of injury and illness recordkeeping information. In fact, the supplemental notice raises additional troubling issues.

Without providing any actual proposed regulatory text, the supplemental notice seeks to: (1) require that employers inform their employees of their right to report injuries and illnesses; (2) require that any injury and illness reporting requirements established by the employer be reasonable and not unduly burdensome; and (3) prohibit employers from taking adverse action [termination, reduction in pay, reassignment to less desirable position] against employees for reporting injuries and illnesses. 79 Fed. Reg. 47605.

*The CWS is comprised of associations and employers who believe in improving workplace safety through cooperation, assistance, transparency, clarity, and accountability.*

Marc Freedman [mfreedman@uschamber.com](mailto:mfreedman@uschamber.com) / Josh Ulman [josh@ulmanpolicy.com](mailto:josh@ulmanpolicy.com)  
Sean Thurman [thurman@abc.org](mailto:thurman@abc.org) / Amanda Wood [awood@nam.org](mailto:awood@nam.org)  
[www.workingforsafety.com](http://www.workingforsafety.com)

As detailed below, the supplemental NPRM suffers from an absence of any supporting data or evidence, a lack of statutory authority, and a failure of regulatory procedure. Accordingly it, along with the initial NPRM, must be withdrawn.

## **I. The Supplemental Notice Lacks Supporting Evidence, Data or Academic Research**

- a. There is no evidence of underreporting due to employer policies that allegedly discourage reporting of injuries and illnesses.*

Similar to the initial proposed rule, the supplemental notice lacks any supporting evidence, data, science or academic literature. Instead, to justify this supplemental OSHA relies entirely on unsupported comments made at the public meeting January 9-10, 2014 by a handful of stakeholders who supported the initial NPRM.

Even President Obama's executive order on regulatory policy, E.O. 13563, makes clear the need for legitimate data and science. It states:

Section 1. General Principles of Regulation. (a) Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. **It must be based on the best available science....**

Exec. Order No. 13563 (2011) (emphasis added).

Regulatory action must be developed and promulgated on a foundation of strong, available, peer-reviewed, or empirical science establishing the need for regulatory action, not merely on unsupported assertions or hypotheses. Our regulatory system "must be based on the best available science." *Id.*

In this rulemaking process, those notions seem lost on OSHA. This entire rulemaking, including the supplemental notice, is sorely lacking in any scientific basis, any empirical evidence, any academic literature, let alone the *best* available science. In fact, there is so little evidence in this rulemaking record justifying the supplemental notice that OSHA spends only five short paragraphs on the issue in its entire Federal Register notice. Rather than rely on any type of supporting evidence, OSHA merely asserts that these provisions are necessary "[i]n order to protect the integrity of the injury and illness data." 79 Fed. Reg. 47605.

Further, this supplemental notice, similar to the original proposal, reads like an Advance Notice of Proposed Rulemaking ("ANPR"), providing questions for comment rather than setting forth explicit regulatory text for notice and comment.<sup>1</sup> For example, one question asks: "Are you aware of any studies or reports on practices that discourage injury and illness reporting? If so, please provide them." 79 Fed. Reg. 47607. Such a question is acceptable for an ANPR, however, the Agency should already be aware of such studies or reports and rely upon them in issuing a supplemental notice proposing to amend an existing rule in significant ways.

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<sup>1</sup> Indeed OSHA never discusses what this supplemental represents. Is this a prelude to an actual proposed regulation, with actual regulatory text that employers can review and submit comments? Or is this all employers will see before a final regulation, leaving them guessing about the actual requirements that will be imposed on them?

*(b) OSHA has been unable to uncover employer policies that might discourage employee reporting.*

Further, the evidence that currently does exist firmly establishes that underreporting, i.e., the legal requirement to report and the failure to do so, is not a systematic problem in American workplaces. Moreover, OSHA has been unable to establish that employer policies, such as safety incentive policies, post-accident drug testing or disciplinary policies, in anyway discourage employees from reporting injury and illnesses.

The 2009 Omnibus Appropriations Bill included \$1.0 million for OSHA to conduct an initiative on injury and illness recordkeeping.

The enforcement initiative would review the accuracy of individual employers' injury and illness records to **determine whether there are policies and practices in place that cause incomplete reporting of injuries and illnesses by employees.**

*Report on the findings of the Occupational Safety and Health Administration's National Emphasis Program on Recordkeeping and Other Department of Labor Activities Related to the Accuracy of Employer Reporting of Injury and Illness Data* ("OSHA NEP Report to Congress"), May 7, 2012. (emphasis added)

From 2009 through early 2012, OSHA implemented a Recordkeeping National Emphasis Program ("NEP"). Under this program, OSHA inspectors conducted extensive and intrusive recordkeeping audits and interviewed employees, supervisors and medical personnel to determine, among other things, whether company incentives or disciplinary programs discouraged employees from reporting work-related injuries.

Interestingly, the questionnaires developed for the OSHA inspectors under both the 2009 and 2010 revised NEP included specific questions for employees, healthcare providers and management officials regarding safety incentive programs. What is more telling is that in the 2010 NEP when OSHA revised the program, the questions pertaining to such policies were significantly expanded. For example, in the 2009 NEP, OSHA only posed the question, "Are there any safety incentive programs, contests, or promotions or any disciplinary programs here? Do these – or anything else – affect your decision whether to report an injury or illness?" In contrast, when OSHA revised the NEP in 2010, the questions posed to employees were as follows:

7. Are any of the following programs or policies present at your workplace?
  - a. Safety incentive programs or programs that provide prizes, rewards or bonuses to an individual or groups of workers that is based on the number of injuries and illnesses recorded on the OSHA log?
    - a1. If yes, briefly describe the programs or policies.

- a2. If yes, do you think these programs encourage or discourage the reporting of injuries or illnesses?
- b. In your workplace, are there prizes, rewards or bonuses to supervisors or managers that are linked to the number of injuries or illnesses recorded on the OSHA log?
  - b1. If yes, briefly describe the programs or policies.
  - b2. If yes, do you think these programs encourage or discourage the reporting of or illnesses to your employer?
- c. In your workplace, are there demerits, punishment or disciplinary policies for reporting injuries or illnesses?
  - c1. If yes, briefly describe the programs or policies.
  - c2. If yes, do you think these programs discourage the reporting of injuries or illnesses to your employer?
- d. In your workplace, are there absenteeism policies that count absences due to work-related injuries as unexcused absences or assign demerits or points if a worker is absent due to a work-related injury?
  - d1. If yes, briefly describe the programs or policies.
  - d2. If yes, do you think these programs discourage the reporting of injuries or illnesses to your employer?
- e. In your workplace, is there post-injury drug testing for all or most work-related injuries and illnesses?
  - e1. If yes, briefly describe the programs or policies.
  - e2. If yes, do you think these programs discourage the reporting of injuries or neither encourage or discourage whether workers report injuries or illnesses to your employer?

OSHA Directive No. 10-02, CPL 2, *Injury and Illness Recordkeeping National Emphasis Program*, February 19, 2010.

During the course of the NEP, OSHA conducted roughly 550 federal and state recordkeeping inspections. *OSHA NEP Report to Congress* at p. 3. Out of roughly 550 inspections, only six establishments were cited for willful and repeat violations. *Id.* at 5. Despite the significant focus on identifying policies or procedures that might discourage employees from reporting injuries and illness, OSHA makes no mention in the initial NPRM or the supplement notice of the data gathered, any findings or any potential conclusions the Agency may have made from its interviews with employees,

healthcare providers and management officials regarding these policies in its report to Congress. *Id.* Based on OSHA’s avoidance of any mention of this point, the only conclusion that can be drawn is that employers are not intentionally underreporting and that if policies, such as safety incentive programs or post-injury drug testing are implemented, they have no effect on the reporting of injuries and illnesses. Nothing in this supplemental notice supports a contrary position.

*c. OSHA relies on a few anecdotal public comments as supporting evidence.*

In the supplemental notice, OSHA references public comments that the Agency claims support the need for such regulatory action, despite acknowledging that much of what is set forth in the supplemental notice is already required either by Section 1904.35 of OSHA’s regulations, or Section 11(c) of the statute. While there were a few statements outlining concerns that such policies *might* discourage employees from reporting injuries and illnesses, OSHA greatly exaggerates the depth and value of these comments in supporting this supplemental notice.

First, OSHA claims that “[s]everal participants at the public meeting described situations where workers did not report injuries or illnesses for fear of retaliation from their employers.” 79 Fed. Reg. 47607. Out of roughly thirty or so public commenters at the two day hearing, only *two* participants made such an allegation – the International Brotherhood of Teamsters, Local 804 (“Local 804”) and the Communications Workers of America.

Further, Mr. Sylvester with the Teamsters Local Union 804 referenced a safety survey he conducted of over 2000 members in which one question was “were you ever harassed or intimidated to not or asked not to fill out [an injury] report.” Day 1 TR 200, 203. He claims that “the answer was overwhelmingly yes.” *Id.* He was asked whether that survey could be put into the docket, which he replied “absolutely.” *Id.* at 204. Further he noted that the information was probably still on the Local’s website. *Id.* A review of Local Union 804’s website did not unveil any safety surveys or results from any such surveys. More importantly, while Mr. Sylvester provides what he alleges to be results from this survey, no raw data, including redacted completed surveys were actually submitted to the docket. This certainly is not the “best available science” that can serve to support this supplemental notice.

Second, in order to suggest that employers are adopting reporting procedures that are unreasonably burdensome, OSHA relies on *one* overly broad public comment from the Service Employees International Union (“SEIU”) that claims – without any supporting evidence – “employers are often discouraging people from reporting incidents of violence because they’re often so routine they make the reporting so cumbersome that many times our members tell us they don’t even bother to report...” Day 2 TR 91-92.

Mr. Catlin, the SEIU representative, goes on to state, “we’ll provide much more detail on this in our written comments...” *Id.* However, the SEIU’s written comments, OSHA-2013-0023-1387, provide no additional detail, no specific evidence, no member surveys, but simply conclusory statements that employers have policies that discourage reporting of injuries. The SEIU’s comments claim that “Based on our experience...some employers may try to suppress the reporting of work-related injuries to keep injuries low.” Yet, the comments fail to describe with any particularity what that experience is, what ways they have experienced that employers try to suppress such reporting, nothing but mere conclusory

conjecture. Further, the SEIU alleges that such programs and policies used by employers are documented by “numerous reports and studies” and yet fails to even cite one.

Third, OSHA relies on less than a dozen alleged examples of disciplinary actions taken for employees reporting injuries or illnesses. 79 Fed Reg. 47608. And at the same time, equally acknowledges that “these retaliatory actions would likely be actionable under 11(c). . . .” *Id.*

This “data” simply cannot be the basis for supporting this supplemental notice. OSHA’s attempt to rewrite Section 11(c) into an enforcement tool carrying a civil penalty, even assuming such an attempt was not in direct conflict with the statute and Congressional intent, must surely require more supporting evidence than a handful of unsupported, unsubstantiated, overly broad accusations about employer policies in the workplace.

## **II. Current Regulations and the Statute are Available to Sufficiently “Protect the Integrity of the Injury and Illness Data.”**

*a. Section 1904.35 requires reporting procedures and requires that such procedures be reasonable.*

OSHA’s current recordkeeping rule at 29 C.F.R. § 1904.35 states:

1904.35(a) Basic requirement. Your employees and their representatives must be involved in the recordkeeping system in several ways.

1904.35(a)(1) **You must inform each employee of how he or she is to report an injury or illness to you.**

1904.35(a)(2) You must provide limited access to your injury and illness records for your employees and their representatives.

1904.35(b) Implementation.

1904.35(b)(1) What must I do to make sure that employees report work-related injuries and illnesses to me?

1904.35(b)(1)(i) **You must set up a way for employees to report work-related injuries and illnesses promptly;** and

1904.35(b)(1)(ii) **You must tell each employee how to report work-related injuries and illnesses to you.**

29 C.F.R. § 1904.35 (emphasis added).

The current recordkeeping requirements already require employers to inform employees how to report an injury or illness and require that the mechanism for reporting work-related injuries allow for “prompt” reporting. 29 C.F.R. § 1904.35. More importantly, “OSHA believes that onerous and

unreasonable reporting requirements are already prohibited by the regulation (i.e. one has not created a “way to report” injuries if the “way” is too difficult to use). . . .” 79 Fed. Reg. 47608.

OSHA readily concedes that the activity it is looking to regulate is already regulated but that “this proposal would add additional text to communicate that point more clearly.” *Id.* Additional regulatory language, which the supplemental notice fails to provide, defies the Presidential Executive Order to simplify the regulatory rulemaking process and write regulations in plain language, making them easy to understand. Absent compelling evidence and data, that OSHA has not provided, suggestions that the current requirements need additional “text to communicate the point more clearly” are illogical. The current requirements found in Section 1904.35 are simple and clear, no additional regulatory language is necessary for employers to know they must inform employees how to report an injury or illness or for employers to know they must establish a system that allows for the prompt reporting of injuries and illnesses.

*b. Section 11(c) prohibits the primary conduct that OSHA seeks to regulate in this supplemental notice.*

As part of this supplemental notice, OSHA proposes to prohibit employers from disciplining employees for reporting injuries and illnesses or taking “any other action that might dissuade a reasonable employee from reporting an injury.” 79 Fed. Reg. 47608. OSHA concedes that “much of the primary conduct that would be prohibited by the new provision is likely already proscribed by 11(c).” 79 Fed. Reg. 47607.

Further, Section 1904.36 within the recordkeeping requirements, specifically states, “[s]ection 11(c) of the Act prohibits you from discriminating against an employee for reporting a work-related fatality, injury or illness. That provision of the Act also protects the employee who files a safety and health complaint, asks for access to the Part 1904 records, or otherwise exercises any rights afforded by the OSH Act.” 29 C.F.R. § 1904.36.

In addition to attempting to create a civil penalty for discriminatory actions already prohibited by Section 11(c) of the OSH Act without Congressional intent, any regulation to such effect is duplicative of the current protections already afforded by the Act. Again, OSHA has sufficient mechanisms in place to adequately protect the integrity of injury and illness data that the agency is proposing that employers will be required to submit.

### **III. Reporting Injuries and Illnesses is a Duty Not a Right**

OSHA proposes to “require employers to inform their employees that the employees have a right to report injuries or illnesses, and that it is unlawful for an employer to take adverse action against an employee for reporting an injury or illness.”<sup>2</sup> 79 Fed. Reg. 47607.

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<sup>2</sup> One way OSHA proposes that employers “inform” employees of this alleged “right” is through a poster. While the OSH Act does grant authority for OSHA to require “that employers, through posting of notices or other appropriate means, keep their employees informed of their *protections and obligations* under this Act, *including the provisions of applicable standards*” the Agency does not have unlimited authority to require employers to post any information. 29 U.S.C. § 657(c)(1) (emphasis added). The authority granted to OSHA is specific and not limitless. Moreover, Congress was fully capable of including “rights” and rather used “protections and

Under the OSH Act, employers and employees have “separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions.” 29 U.S.C. § 651(b)(1). To fulfill this stated purpose, Section 5 of the OSH Act titled “Duties” sets out the duties of both employers and employees. Pursuant to Section 5, employers are “required to comply with occupational safety and health standards promulgated under this Act” and “*employees shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.*” 29 U.S.C. § 654(b)(1) (emphasis added).

Without doubt employees have a duty to comply with recordkeeping regulations, including the reporting of work-related injuries and illnesses. And while no civil penalty attaches for failing to comply, it is each employee’s responsibility under the Act and Section 1904.35 to report any injury or illness that occurs to him or her. Section 1904.35 establishes a duty on the employer to ensure that employees report work-related injuries and illness by setting up a way for employees to promptly report such injuries and illnesses and to inform employees how to report work-related injuries and illnesses. The employee’s dependent responsibility is reporting work-related injuries and illnesses and it is the employee’s duty, not right, to comply with such recordkeeping regulations.

In the supplemental notice OSHA speculates that “if employees do not know that the OSH Act protects their right to report an injury or illness, they might be less likely to report an injury or illness to their employers.” 79 Fed. Reg. 47607. However, employees must already be made aware that they are protected under the Act “against discharge or discrimination for the exercise of their rights under Federal and State law.” 29 C.F.R. §§ 1903.2 and 1952.10. Specifically, OSHA requires that employers post OSHA 3165, *Job Safety and Health – It’s the law!* This posting unambiguously states that as to employees, “You can file a complaint with OSHA within 30 days of retaliation or discrimination by your employer for making safety and health complaints or for exercising your rights under the OSH Act” and as to employers, “You must comply with the occupational safety and health standards under the OSH Act.”

Once again, OSHA offers no evidence or data to suggest that employees are unaware that employers are required to maintain accurate injury and illness records. In fact, given that employers are required to post the 300A Annual Summary of work-related injuries and illnesses, employees very likely fully recognize their employers must record and report injuries and illnesses under OSHA. Further, the OSHA 3165 poster makes clear that employees are protected from discrimination. Employees are already aware of the need to inform employers of injuries or illnesses and similarly they are aware, in part, from the required poster, that they are protected from discrimination.

#### **IV. Injury and Illness Reporting Requirements Must Already Be Reasonable and Not Unduly Burdensome**

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obligations, including provisions of applicable standards.” See 29 U.S.C. §§ 651(b)(2), 653(b)(4), 655(b)(6), 660(c). For example, “the information to employees shall also inform them of their *right to petition* the Secretary for a hearing. 29 U.S.C. § 655(b)(6).

Next, OSHA proposes “a provision requiring that any injury and illness reporting requirements established by the employer be reasonable and not unduly burdensome.” 79 Fed. Reg. 47607.

Such an additional provision is absolutely unnecessary in light of existing requirements and clearly would only be duplicative in nature. As noted above, Section 1904.35 requires that employers set up injury and illness reporting requirements which allow for prompt reporting to employers and inform employees how to report work-related injuries and illness under the employer’s reporting system. OSHA has already fully conceded that onerous and unreasonable reporting requirements are already prohibited by Section 1904.35. 79 Fed. Reg. 47608. What benefits the Agency expects to flow from adding additional regulatory text is uncertain. Moreover, OSHA alleges that the “proposal would add additional text to communicate that point more clearly,” however, fails to provide the precise text it believes would effectuate this goal.

For years, employers have been setting up reporting requirements for employees, and at no point has OSHA ever suggested, through a directive, an interpretation letter, a memorandum or any other guidance document that during inspections OSHA is finding evidence that employers are creating systems which would suggest employers do not clearly understand the requirements set out in Section 1904.35. Rather, contrary to what may be believed by OSHA or other stakeholders, employers have every incentive to make sure that the reporting system allows for prompt, efficient, reasonable reporting and is not unduly burdensome so that employees report injuries or illnesses immediately.

Ensuring employees receive prompt medical attention, even for minor injuries, prevents aggravating the injury, extending the pain or discomfort and can avoid delaying a return to work. In cases of minor injuries, where an employee fails to immediately report an injury that may have been initially treated with first aid, the delay of medical treatment may result in more significant treatment beyond first aid. Additionally, injuries and illnesses reported promptly allow employers to take appropriate corrective actions to ensure that other employees are not similarly injured. And, employees who report in a timely manner protect their rights to workers' compensation benefits.

#### **V. OSHA’s Supplemental Would Fundamentally Change Section 11(c) of the OSH Act That Already Adequately Protects Employees from Retaliation, Discrimination or Other Adverse Action Based on the Reporting of Injuries or Illnesses**

Finally, OSHA proposes to “prohibit employers from disciplining employees for reporting injuries and illnesses...or any other action that might discourage a reasonable employee from reporting an injury.” 79 Fed. Reg. 47608. As the legislative history detailed below shows, Congress never intended for OSHA to have to such authority, nor did it expressly grant it such authority. *See* Subcommittee on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970 (Committee Print 1971).

The written comments for Teamsters Local 804, the AFL-CIO, and other unions make clear that they believe Section 11(c) is too difficult a process – which clearly is the impetus for this provision. Local 804 stated, “We have attempted to curtail discriminatory Company practices through the 11(c) process and have learned of the difficulties of this route. This suggested provision should be enforceable through penalties and citations...” The AFL-CIO similarly stated, “[t]he enforcement tools under 11(c) are weak, cumbersome and resource intensive....”

In support of this proposed “provision” OSHA relies on examples from commenters alleging adverse action for reporting injuries and illnesses. The supplemental notice states:

Adverse actions mentioned by participants in the public meeting included requiring employees who reported an injury to wear fluorescent orange vests, disqualifying employees who reported two injuries or illnesses from their current job, requiring an employee who reported an injury to undergo drug testing where there was no reason to suspect drug use, automatically disciplining those who seek medical attention, and enrolling employees who report an injury in an “Accident Repeater Program” that included mandatory counseling on workplace safety and progressively more serious sanctions of additional reports, ending in termination....

\* \* \*

Also falling under this prohibition would be pre-textual disciplinary actions – that is where an employer disciplines an employee for violating a safety rule, but the real reason for the action is the employee’s injury or illness report.

79 Fed. Reg. 47608.

While OSHA has provided no precise regulatory text on which interested parties might comment, the likelihood is that such a provision would be broad and overly subjective. OSHA can be expected to consider anything that in its opinion remotely could be seen as discouraging employees from reporting an injury or illness to be an “adverse action.” Moreover, while not expressly referenced in the supplemental notice, given the Agency’s position with respect to employer safety incentive programs, there is little doubt that such programs would be encompassed within “other action that might dissuade a reasonable employee from reporting an injury.” *Id.*

Since OSHA has not provided any draft regulatory language, what OSHA would consider falling within this prohibition is impossible to know. However, in light of the memorandum issued on March 12, 2012, by then-Deputy Assistant Secretary Richard Fairfax to Regional Administrators claiming that incentive programs discourage employees from reporting injuries and illnesses we can reasonably surmise that at least these programs would be on OSHA’s list. That memorandum states:

some employers establish programs that unintentionally or intentionally provide employees an incentive to not report injuries. For example, an employer might enter all employees who have not been injured in the previous year in a drawing to win a prize, or a team of employees might be awarded a bonus if no one from the team is injured over some period of time....

\* \* \*

Incentive programs that discourage employees from reporting their injuries are problematic because, under section 11(c), an employer may not “in any manner

discriminate” against an employee because the employee exercises a protected right, such as the right to report an injury.

*a. OSHA lacks statutory authority to rewrite Section 11(c) into a recordkeeping requirement.*

Congress expressly provided a remedy for employees who were discharged, or discriminated against because of the exercise of any right under the Act. 29 U.S.C. § 660(c) (1). And, OSHA concedes that “the primary conduct that would be prohibited by the new provision is likely already proscribed by 11(c).” OSHA is clearly adopting the unions’ view that Section 11(c) is too weak and cumbersome – the agency would much prefer an enforcement tool so that they can bypass the statutorily required element of an employee complaint. OSHA would prefer to decide when employers are engaging in adverse action rather than waiting for an employee to allege such action in a complaint. *The effect of this would be to enforce the whistleblower protections without a whistleblower.* OSHA does not have the authority to simply rewrite the statute more to its liking, substituting the Agency for the key actor contemplated by Congress under Section 11(c).

OSHA suggests that Sections 8 and 24 of the Act provide legal authority for such a provision. Yet, “Congress...does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not...hide elephants in mouseholes.” *Whitman v. American Trucking Ass’n, Inc.*, 531 U.S. 457, 468 (2001). In holding that the FDA did not have Congressional authority to regulate tobacco, the Supreme Court held, “Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). Similarly here, where Congress expressly addressed the issue of retaliation and discrimination in Section 11(c), there is nothing within Sections 8 and 24 that would provide support for bypassing Congressional intent through the simple means of promulgating a regulation establishing a civil penalty for discriminatory action, contrary to the text of Section 11(c).

Moreover, the legislative history is clear that Congress *contemplated and rejected* making retaliation and/or discriminatory actions subject to a civil penalty through the issuance of a citation. See Subcommittee on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970 (Committee Print 1971). Specifically, H.R. 19200 introduced in the 91<sup>st</sup> Congress, 2<sup>nd</sup> Session, proposed language under Section 17 – Penalties that stated:

(g) Any person who discharges or in any other manner discriminates against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, shall be assessed a civil penalty by the Commission of up to \$10,000. Such a person may also be subject to a fine of not more than \$10,000 or imprisonment of a period of not to exceed ten years or both.

House of Representatives Bill No. 19200 (September 15, 1970), 91<sup>st</sup> 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 763.

Similar language is found in various other proposed bills, such as H.R. 16785. *See* House of Representatives Bill No. 16785 (July 9, 1970), 91<sup>st</sup> 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 961.

The final bill rejected the concept of the Secretary issuing citations and establishing a civil penalty for discriminatory actions and instead set out a full process whereby employees could file complaints of such discriminatory action and employers could have an opportunity for judicial review in a U.S. District Court. 29 U.S.C. § 660(c). It is not meaningless that Congress rejected such language from the “Penalties” section of the Act and instead placed it in the “Judicial Review” section of the Act. The final Conference Report explained precisely this difference.

The Senate bill provided for administrative action to obtain relief for an employee discriminated against for asserting rights under this Act, including reinstatement with back pay. The House bill contained no provision for obtaining such administrative relief; rather it provided civil and criminal penalties for employers who discriminate against employees in such cases. With respect to the first matter, the House receded with an amendment making specific jurisdiction of the district courts for proceedings brought by the Secretary to restrain violations and other appropriate relief. With respect to the second matter dealing with civil and criminal penalties for employers, the House receded.

Conference Report No. 91-1765 (December 16, 1970), 91<sup>st</sup> 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 1192.

Here, OSHA proposes to do the very thing Congress rejected. In the supplemental notice OSHA states, “Under this provision, OSHA could issue citations and...[t]he citations would carry civil penalties in accordance with Section 17 of the OSH Act...” 79 Fed. Reg. 47608. There is no doubt that OSHA does not have the statutory authority to do what it is attempting to do in this supplemental notice – to allow a civil penalty at the discretion of the Secretary would undermine Congress’s clear and expressly stated intent.

Moreover, Section 9 of the Act sets out the requirements for a citation issued by the Secretary and requires that:

Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, *the citation shall fix a reasonable time for the abatement of the violation.* The Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health. (emphasis added)

OSHA states that abatement could include reinstatement and back pay, however applying the requirements set out in Section 9 to a discriminatory allegation is illogical. What precisely will the citation set as a “reasonable time for the abatement of the violation”? Congress did not intend for discriminatory actions to be handled as simple matters of enforcement through the issuance of a citation

with a fixed “reasonable time for the abatement of the violation.” Congress intended citations to be issued for violations of safety and health standards, such as replacing a missing machine guard that required abatement within a reasonable time.

In the face of clear, unambiguous Congressional intent and supporting legislative history, any argument by OSHA that it has legal authority to promulgate a regulation prohibiting employers from disciplining employees for reporting injuries or illnesses or for any other action that discourages employees from reporting an injury is simply without merit. Similarly, OSHA cannot upend the manner in which Section 11(c) operates to suit its own desires.

*b. OSHA’s anticipated provision is also contrary to Section 4(b)(4).*

In the supplemental notice, OSHA specifically alleges that adverse action would include “requiring an employee who reported an injury to undergo drug testing where there was no reason to suspect drug use.” 79 Fed. Reg. 47608.

Section 4(b)(4) of the OSH Act states:

Nothing in this Act shall be construed to supersede or **in any manner affect any workmen's compensation law** or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

29 U.S.C. § 653(b)(4) (emphasis added).

OSHA has failed to consider the ramifications of such a prohibition on workers’ compensation laws. Section 4(b)(4) of the Act is what some refer to as the “savings clause,” the specific section of the Act that Congress clearly reserved for the states. Section 4(b)(4) expressly prohibits OSHA from taking any regulatory action that affects state workers’ compensation laws. *Id.*

Various state workers’ compensation laws *require* employers to implement a drug free workplace program.<sup>3</sup> For example, under Florida’s Workers’ Compensation Statute, Section 440.09, employers who maintain a drug-free workplace program, pursuant to sections 440.101 and 440.102, may *require* employees to submit to post-accident accident drug testing where there is “information that an employee has caused, contributed to, or been involved in an accident while at work.” Fla. Stat. 440.102(n)(5). The results of such testing can be used in negating an employer’s liability under Florida’s workers’ compensation. Fla. Stat. 440.09(7). Georgia sets out a similar requirement under workers’ compensation. Under Georgia Code § 34-9-415 an employer who maintains a drug-free workplace program is *required* to conduct specified types of testing, including job applicants, fitness-

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<sup>3</sup> Some workers’ compensation laws pertaining to drug testing are voluntary, rather than mandatory, and where an employer elects to implement such programs they are required to follow all the established workers’ compensation laws for the drug testing program. In doing so, employers will receive a specified discount on insurance premiums or will be protected from certain actions for damages. CWS’s comments are not intended to be an exhaustive listing of states with workers’ compensations laws directly regulating drug free workplace programs. Indeed, the majority, if not all, of state workers’ compensation laws have some type of drug free workplace program requirements.

for-duty, and “if the employee has caused or contributed to an on the job injury which resulted in a loss of worktime.” Ga. Code Ann. § 34-9-415.

The OSH Act is preventative – it does not remedy injured employees – that is left to state workers’ compensations laws, laws that Congress clearly prohibited OSHA from affecting in any manner. *Ries v. Amtrak*, 960 F.2d. 1156, 1164 (3rd Cir. 1992) (holding that “the purpose of OSHA is preventative rather than compensatory”). Case law holds that Section 4(b)(4) of the Act is “satisfactorily explained as intended to protect worker's compensation acts from competition by a new private right of action and to keep *OSHA regulations from having any effect on the operation of the worker's compensation scheme itself.*” *Pratico v. Portland Terminal Co.*, 783 F.2d. 255, 266 (1st Cir. 1985) (emphasis added). Further, any proposed provision prohibiting the post-accident, post-injury drug testing of an employee goes beyond merely effecting workers’ compensation claims themselves, rather such a regulation would in fact dismantle portions of state workers’ compensation. As such, it would not “leave the state schemes wholly intact as a legal matter,” and therefore would violate Section 4(b)(4). See *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1236 (D.C. Cir. 1980) (finding “that though MRP may indeed have a great practical effect on workmen's compensation claims, it leaves the state schemes wholly intact as a legal matter, and so does not violate Section 4(b)(4)”).

Further, not only is prohibiting policies or programs that require post-accident, post-injury drug testing (with or without a reason to suspect drug use) in conflict with Section 4(b)(4) of the Act, but it is completely contrary to what the Department of Health and Human Services, Substance Abuse Mental Health Services Administration (“SAMHSA”) advocates, contrary to requirements for Federal Workplace Drug Testing under Executive Order 12564 and Public Law 100-71 for agencies with drug testing policies for federal employees, and contrary to what the Department of Labor advocates for a Drug-Free Workplace Policy. Apparently, OSHA seems to believe that private employers must be held to a higher standard than the federal government.

Mandatory Guidelines for Federal Workplace Drug Testing, required by Executive Order 12564, detail the procedures for federal workplace drug testing programs.<sup>4</sup> 73 Fed. Reg. 71873 (November 25, 2008). According to SAMHSA, the Federal Drug-Free Workplace Program is a program that addresses illegal drug use by federal employees, certifies executive agency drug-free workplace plans and identifies safety-sensitive positions subject to random drug testing. SAMHSA has developed and made available a model plan, which in pertinent part includes a section on “Injury, Illness, Unsafe, or Unhealthful Practice Testing.” This section provides:

[Agency] is committed to providing a safe and secure working environment. It also has a legitimate interest in determining the cause of serious accidents so that it can undertake appropriate corrective measures. Post-accident drug testing can provide invaluable information in furtherance of that interest. Accordingly, employees may be subject to testing when, based upon the circumstances of the accident, their actions are reasonably suspected of having caused or contributed to an accident that meets the following criteria:

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<sup>4</sup> Section 2.2 of the Mandatory Guidelines expressly states that “A Federal agency may collect a specimen for the following reasons: (a) Federal agency applicant/Pre-employment test; (b) Random test; (c) Reasonable suspicion/cause test; (d) Post-accident test; (e) Return to duty test; or (f) Follow-up test.” 73 Fed. Reg. at 71880.

1. The accident results in a death or personal injury requiring immediate hospitalization; or
2. The accident results in damage to government or private property estimated to be in excess of \$10,000.

Available at: [beta.samhsa.gov/sites/default/files/workplace/ModelPlan508.pdf](https://beta.samhsa.gov/sites/default/files/workplace/ModelPlan508.pdf).

OSHA's inclusion of post-accident drug testing as an adverse action also conflicts with the Department of Labor's ("DOL") encouragement of employers to develop Drug-Free Workplace policies.<sup>5</sup> In fact, as part of DOL's elaws there is a Drug-Free Workplace Advisor that helps employers develop a drug free policy. Section 7 of that policy builder requires employers to select the type of drug-testing that the employer will require, and some options include pre-employment, periodic, random, *post-accident*, reasonable suspicion and return-to-duty. Available at: <http://www.dol.gov/elaws/asp/drugfree/drugs/screen1.asp>.

- c. Neither safety incentive programs nor disciplinary programs have been established as discouraging employees from reporting injuries and illnesses.*

While OSHA never uses the term "safety incentive programs" in the supplemental notice there is no doubt that the Agency considers such programs as potentially discouraging employees from reporting injuries and illnesses and violating Section 11(c). The "Fairfax Memo" claimed "Incentive programs that discourage employees from reporting their injuries are problematic because, under section 11(c), an employer may not 'in any manner discriminate' against an employee because the employee exercises a protected right, such as the right to report an injury."

Despite a two year NEP on recordkeeping hunting for policies and programs that may discourage employees from reporting injuries and illnesses as described above, OSHA makes no mention in the supplemental notice of the data they collected during the roughly 550 inspections from the numerous employees, healthcare providers and management officials they interviewed. Nor does it mention any conclusions drawn based on the extensive questions pertaining to safety incentive programs, drug-testing, disciplinary programs, absenteeism policies or other programs. Moreover, the report OSHA was forced to submit to Congress makes no mention of any such results, findings or conclusions. This makes clear OSHA in that two year time-frame under the NEP was unable to find any supporting evidence to suggest that such policies or programs discourage employees for reporting injuries or illnesses. Therefore, this proposed provision is based on nothing more than mere conjecture and speculation.

- d. Cases OSHA relies on are inapposite and the proposed provision is not analogous to medical removal protection benefits*

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<sup>5</sup> According to the Department of Labor, Assistant Secretary for Policy, "Federal agencies conducting drug testing must follow standardized procedures established by the Substance Abuse and Mental Health Services Administration (SAMHSA), part of the U.S. Department of Health and Human Services (DHHS). While private employers are not required to follow these guidelines, doing so can help them stay on safe legal ground. Court decisions have supported following these guidelines, and as a result, many employers choose to follow them." Available at: <http://www.dol.gov/elaws/asp/drugfree/drugs/dt.asp>.

In an effort to find some legal support for the supplemental notice and the proposed provisions, OSHA misreads the holdings in case law. OSHA claims that “[w]here retaliation threatens to undermine a program that Congress required the Secretary to adopt, the Secretary may proscribe that retaliation through a regulatory provision.” 79 Fed. Reg. 47607. To support such a claim, OSHA looks to the medical removal protection (“MRP”) provisions contained in the lead standard. 29 C.F.R. § 1910.1025(k). However, the cases OSHA relies on start with the premise that MRP is not in violation of Section 4(b)(4). As discussed above, this proposed provision would be in violation of Section (4)(b)(4), so OSHA’s reliance on cases relating to MRP provisions, such as *United Steelworkers of America v. St. Joe Resources* (“*St. Joe Resources*”), 916 F.2d 294 (5th Cir. 1990), is misplaced. Further, in *St. Joe Resources* the court did not hold MRP was remedial but rather MRP was preventative to secure worker cooperation in medical examinations, such medical examinations that are expressly authorized by Congress under Section 6(b) of the Act.<sup>6</sup> *Id.* at 298. The MRP requirements were not a means to prevent retaliation; they were a means to ensure worker cooperation for medical examinations. *See St. Joe Resources*, 916 F.2d at 298 (“We noted in *Schuylkill Metals* that ‘[a] central goal of the lead standard’s MRP benefits was to secure worker-cooperation with the medical surveillance component of the rule.’”). The proposed provision here is entirely aimed at preventing retaliation or adverse action, activity that is squarely covered by Section 11(c).

Further, OSHA places reliance on *United Steelworkers v. Marshall* to support the promulgation of a separate enforcement tool for retaliation in a regulation. 647 F.2d. at 1238. In *Marshall* the threshold question was whether the Secretary exceeded statutory authority in promulgating the MRP provisions contained in the lead standard. While the D.C. Circuit held that OSHA had general statutory authority to promulgate the MRP provisions, the Court found support for its holding in the legislative history of the Act and the statute’s mandate – that is to “ensure worker safety and health.” In short, the Court viewed MRP not as a remedy for retaliation but as an innovative method for dealing with occupational safety and health problems, specifically the problem of ensuring that employees participated in medical surveillance so that in accordance with the statute, it could be determined “whether the health of such employees is adversely affected by such exposure.” 29 U.S.C. § 655(b).

OSHA has distorted the findings and holdings in case law and in contrast to *Marshall*, OSHA is clearly exceeding its statutory authority. This proposed provision is not an “innovative method” for ensuring that employees exposed to a health hazard receive the appropriate medical surveillance, it is not preventative in any manner. It is an attempt to regulate alleged retaliation through a civil penalty and abatement of reinstatement and/or back pay because, in OSHA’s opinion, Section 11(c) is too weak. There is no possibility that this proposed provision is remedial in nature and no question that it is in clear opposition to Congressional intent which specifically prohibited such adverse actions through Section 11(c) whereby an employer will have access to full judicial review.

## **VII. The Supplemental Notice Violates the Administrative Procedure Act**

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<sup>6</sup> Section 6(b) states “In addition, where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure.”) 29 U.S.C. § 655(b).

Pursuant to the Administrative Procedure Act (“APA”), agency actions must be set aside if they are found to be arbitrary and capricious or in excess of statutory authority. 5 U.S.C. § 706(2). Under the arbitrary and capricious standard, an agency “must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Further “an agency rule would be arbitrary or capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Id.*

The D.C. Circuit recently vacated a Federal Communications Commission rule where the “Commission’s rule relies on one unsubstantiated conclusion heaped on top of another.” *Sorenson Communications Inc., v. FCC*, No. 13-1122, *slip op.* D.C. Cir. (June 20, 2014). The D.C. Circuit went to state:

The Commission may hoist the standard of common sense, of course but the wisdom of agency action is rarely so self-evident that no explanation is required. *See Checkosky v. S.E.C.*, 23 F.3d 452, 463 (D.C. Cir. 1994) (noting that in *Tex Tin Corp. v. EPA*, 935 F.3d 1321 (D.C. Cir. 1991), we declined to affirm “the agency’s decision to place a hazardous waste facility on the National Priorities List” on common sense alone, remanding the case to the EPA “for a better explanation before finally deciding that the agency’s action was arbitrary and capricious.”

*Id.* at 11.

Similarly, while OSHA may believe that the supplemental notice is grounded in common sense “such that a reinforcement of the importance of these rights might be valuable...” there is no evidence supporting these proposed provisions and no explanation for the agency’s action. 79 Fed. Reg. 47608.

Moreover, the Agency has provided no proposed regulatory text to let employers know what will be expected of them. While OSHA appears to be relying on a generous interpretation of a final regulation being a “logical outgrowth” of this supplemental, the absence of any regulatory text, or specific indications of what will be required, is at least a breach of sound rulemaking practices. As has been frequently stated, the purpose of notice and comment rulemaking is to provide interested parties the opportunity to meaningfully participate in the rulemaking. Agencies have significant latitude in how they present their proposals, but this supplemental represents the most theoretical concept of a proposal imaginable, especially with respect to OSHA’s intention to radically alter how the whistleblower provisions under Section 11(c) will be enforced which is only referred to in the abstract as “this provision” and other terms that suggest it has been explained earlier even though there is no such explanation. 79 Fed. Reg. 47607. The absence of any proposed regulatory text or specific details of what will be required undermines the opportunity for interested parties to meaningfully participate in this rulemaking.

Not only has OSHA not provided proposed regulatory text for review, but the agency has not indicated how it has complied with various rulemaking requirements such as the Paperwork

Reduction Act, Unfunded Mandates Reform Act, and Executive Order 12866. Clearly this supplemental was never reviewed under E.O. 12866 as it was never posted on the Office of Information and Regulatory Affairs' webpage—one reason why its issuance was such a surprise. While these laws and requirements may indeed require only cursory treatment, (such as OSHA's disposal of the Regulatory Flexibility Act issues, 79 Fed. Reg. 47609) not including such discussions suggests this notice is less than an actual proposal. This issue is further muddied by the fact that OSHA never indicates whether there will be another action before a final regulation. As noted earlier, this notice reads more like an ANPR suggesting there will be another notice with actual regulatory text and full rulemaking treatments, however, OSHA has not said so. The absence of any proposed regulatory text or details about requirements also means that OSHA was unable to perform any of the customary analyses required for rulemakings.

### **VIII. OSHA Must Withdraw This Proposed Regulation and the Supplemental Notice**

In both notices that comprise this rulemaking, OSHA has exceeded the bounds of its statutory authority, and in this supplemental notice, the Agency attempts to proscribe activity in a manner that Congress clearly never intended. In this supplemental OSHA provides no actual regulatory text for CWS members or any of the regulated community to comment on. Rather, interested parties are left to speculate as to precisely what the Agency may consider "adverse action" and therefore are not fully able to comment about the extent of the impact this supplemental notice may have on employers and employees. Nor does OSHA provide any supporting evidence for this regulatory action.

CWS reiterates its position that OSHA should withdraw this proposed regulation including the supplemental notice. There is no indication that the current recordkeeping requirements in place are ineffective or that even if such requirements would be implemented that the current requirements contained in 1904.35 and in the statute are somehow inadequate to "protect the integrity of injury and illness data."

Air Conditioning Contractors of America  
American Bakers Association  
American Chemistry Council  
American Coatings Association  
American Coke & Coal Chemicals Institute  
American Composites Manufacturers Association  
American Foundry Society  
American Health Care Association  
American Hotel and Lodging Association  
American Iron and Steel Institute  
American Meat Institute  
American Staffing Association  
American Supply Association  
Arkansas State Chamber of Commerce  
Associated Builders and Contractors  
Associated General Contractors of America  
Associated Industries of Arkansas  
Associated Wire Rope Fabricators  
California Cotton Ginners Association

California Cotton Growers Association  
California Manufacturers & Technology Association  
Can Manufacturers Institute  
Corn Refiners Association  
Food Marketing Institute  
Global Cold Chain Alliance  
Healthcare Distribution Management Association  
Institute of Makers of Explosives  
International Association of Amusement Parks and Attractions  
International Dairy Foods Association  
International Foodservice Distributors Association  
International Fragrance Association, North America  
International Warehouse Logistics Association  
Motor & Equipment Manufacturers Association  
National Association for Surface Finishing  
National Association of Chemical Distributors  
National Association of Home Builders  
National Association of Manufacturers  
National Association of Wholesaler-Distributors  
National Automobile Dealers Association  
National Center for Assisted Living  
National Chicken Council  
National Cotton Ginners' Association  
National Federation of Independent Business  
National Grain and Feed Association  
National Marine Manufacturers Association  
National Oilseed Processors Association  
National Pest Management Association  
National Retail Federation  
National Roofing Contractors Association  
National School Transportation Association  
National Systems Contractors Association  
National Tooling and Machining Association  
National Turkey Federation  
National Utility Contractors Association  
North American Die Casting Association  
Precision Machined Products Association  
Precision Metalforming Association  
Printing Industries of America  
Retail Industry Leaders Association  
Shipbuilders Council of America  
Society for Human Resource Management  
Specialty Steel Industry of North America  
SPI: The Plastics Industry Trade Association  
Texas Cotton Ginners' Association  
Thomas W. Lawrence, Jr., Consultant, Safety and Compliance Mgt.

Tree Care Industry Association  
U.S. Chamber of Commerce  
U.S. Poultry & Egg Association  
United States Beet Sugar Association  
Western Agricultural Processors Association

*Of Counsel*

Tressi L. Cordaro  
Attorney at Law  
Jackson Lewis LLP  
10701 Parkridge Blvd.  
Suite 300  
Reston, VA 20191