



June 30, 2022

The Honorable Doug Parker
Assistant Secretary
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: Docket No. OSHA-2021-0006; RIN 1218-AD40; Comments on Proposed Rule to *Improve Tracking of Workplace Injuries and Illnesses*; 87 Fed. Reg. 18528 (March 30, 2022)

Dear Assistant Secretary Parker:

The Coalition for Workplace Safety (“CWS”) submits these comments in response to the Occupational Safety and Health Administration’s (“OSHA”) Proposed Rule, *Improve Tracking of Workplace Injuries and Illnesses* (87 Fed. Reg. 18528, March 30, 2022). 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.

CWS members are deeply troubled by this proposed rule which reprises OSHA’s 2014 rulemaking requiring the submission of all three required injury records and the expressed intent to post them on OSHA’s website. CWS opposed OSHA’s rulemaking in 2014 and we renew our objections to this iteration.

OSHA’s current proposal would require electronic submission of employer summary data and individual employee injury and illness data on a much larger scale. OSHA predicts its proposal “will ultimately result in the reduction of occupational injuries and illnesses,” but provides no data in support of this claim. 87 Fed. Reg. 18529. OSHA goes so far as to predict that “the annual benefits [of the proposal], while unquantified, would significantly exceed the annual costs,” based on the unfounded premise that public disclosure of information would increase employers’ attention to employee safety and health. *Id.*

OSHA’s proposed rule does not serve to prevent employee injuries or illnesses in the workplace. Instead, as CWS told OSHA with respect to its 2016 rulemaking (proposing to cancel collection of 300 Logs and Forms 301), electronic submission and public posting of this data serves only to put employers at risk for improper disclosure, mischaracterization of the data and release of sensitive employer as well as employee information. Smaller entities are particularly vulnerable to release of such information, where mischaracterization of data can

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irreparably harm their business and individual employee information may be easier to ascertain. As a result, OSHA's plan to extend the requirements to smaller entities is particularly concerning. These risks are exacerbated by the duplicative recordkeeping that this iteration of OSHA's rule would necessitate. Moreover, OSHA makes this proposal without any evidence to show that its previous collection and disclosure of summary injury and illness data resulted in the "reduction of occupational injuries and illnesses" which it predicts the current rulemaking will achieve. 87 Fed. Reg. 18529. For these reasons, and as detailed below, CWS urges OSHA to withdraw this proposed rule.

These comments will address (1) concerns with duplicative recordkeeping and reporting requirements; (2) concerns regarding OSHA's ability to appropriately manage this increased data collection; (3) continued concerns regarding confidentiality and protection of sensitive employer data; and (4) uncertainties in compliance resulting from OSHA's ever-changing recordkeeping requirements. We appreciate OSHA's consideration of these comments as it prepares to issue a final rule.

1. OSHA's proposed data collection raises significant concerns regarding duplicative reporting and recordkeeping.

a. Employers must not be required to submit duplicative data to OSHA and the Bureau of Labor Statistics ("BLS").

Some employers, including CWS members, subject to OSHA's electronic submission requirement must also respond with the same or similar data to BLS's Survey of Occupational Injuries and Illnesses ("SOII"). Since OSHA began collecting Form 300A Summary data in 2017, employers subject to both submission requirements have had to submit the same data in different forms to each agency. OSHA and BLS have undertaken efforts to "reduce duplicative burden" by permitting a SOII respondent to provide their OSHA identification number so that BLS could import information already submitted to OSHA. Bureau of Labor Statistics, Injuries, Illnesses, and Fatalities, OSHA ITA Information (Dec. 21, 2020). However, this process has been unhelpful as many companies do not know their OSHA identification number, and this code is not consistently provided to employers upon submission of Form 300A data.

Employers who submit data to OSHA should not be required to separately submit the same data to BLS. These duplicative reporting requirements are unacceptable, and OSHA's current proposal only serves to exacerbate this existing problem. Before any new data collection goes into effect, OSHA and BLS must improve their processes to ensure this issue is addressed. BLS's retrieval of information already submitted to OSHA should be automatic and should require no additional action by an employer.

b. OSHA's proposal creates dual recordkeeping requirements for employers.

In order to protect sensitive employee information (the collection of which is mandated by OSHA), in this rulemaking (as discussed in detail in the following sections) OSHA does not require employers to submit all the data kept on the OSHA Forms 300 and 301. However, because employers are required to scrub the forms of sensitive employee data prior to submitting them, OSHA essentially requires employers to maintain two separate sets of records—one complete set to maintain on file and a separate set reflecting the "scrubbed" submission to

OSHA. OSHA must take responsibility for its data collection requirements, instead of placing this burden on employers.

Further complicating these requirements, OSHA proposes to use the 2017 version of the North American Industry Classification System (“NAICS”) (published by the Office of Management and Budget every five years to reflect changes in economic activities) to identify industries subject to electronic submission requirements on Appendices A and B, even though the 2022 NAICS codes have already been released. OSHA also states that establishments creating new accounts within the Injury Tracking Application (“ITA”) that OSHA uses for data submission will be identified using 2022 NAICS codes, while establishments with existing ITA accounts will continue to be identified by the 2017 NAICS code. These inconsistencies will cause confusion for employers, may require employers to keep multiple sets of records, and may result in either over- or under-reporting.

2. OSHA must improve internal data handling processes before any new data collections go into effect.

- a. The effective date of any final rule must account for time needed to develop and test OSHA submission portals and data-scrubbing technologies, as well as time needed for employers to collect and submit required data.*

While OSHA’s proposal specifies that the required data for a calendar year must be submitted by March 2 of the following year, it does not provide an estimated effective date for the proposed changes to submission requirements. These changes will require significant technological improvements within OSHA, which it does not yet seem to have initiated, and will require changes to employer processes for collecting, reviewing, and submitting this information. These processes, both within and outside of OSHA, will need to be tested for accuracy and effectiveness. OSHA must account for the time it will take to make these adjustments in determining the effective date of any final rule. Employers must have notice of the exact requirements of any final rule at the *beginning* of the year for which collected data will be submitted. The amount of time required to collect and submit the data will be significant. Any 2022 changes to submission requirements cannot apply to the submission of data for that calendar year. This would not provide employers with sufficient notice to adjust their information collection and review processes in time to comply with any changes. In addition, OSHA should push future deadlines to allow companies to submit past March 2; this date is too early in the year and does not provide enough time for companies to collect and submit this data.

- b. OSHA’s current process to correct errors in online data is too slow.*

OSHA must establish clear procedures for employers to make corrections to already-submitted data, and improve internal processes to ensure those corrections are reflected in the publicly posted data. Sometimes an employer’s investigation into whether an injury or illness requires reporting can take months or even years. Information discovered through an investigation may require a change in how or whether an injury is recorded. Currently, upon notice from an employer of a required correction, it takes months for OSHA to make these corrections online. OSHA must address these concerns in any final rule.

3. Information contained in OSHA Forms 300 and 301 includes sensitive business information, which deserves protection from public disclosure including through FOIA.

- a. *Forms 300 and 301 contain private employee information and other sensitive medical information that should not be made publicly available.*

In the proposed rule, OSHA seeks to amend its recordkeeping regulation to require certain establishments to annually submit information from their OSHA Forms 300, 301, and 300A. Most of this reported information will then be made publicly available online. This is an alarming reversal of the agency's longstanding position, which was again expressed less than four years ago, that collecting sensitive and private employee information from Forms 300 and 301 "adds uncertain enforcement benefits, while significantly increasing the risk to worker privacy, considering that those forms, if collected by OSHA, could be found disclosable under FOIA." 83 Fed. Reg. 36494, 36496 (July 30, 2018). OSHA reiterated this position in its 2019 final rule, explaining that "OSHA cannot justify that risk [of disclosure of sensitive worker information] given its resource allocation concerns and the uncertain incremental benefits to OSHA of collecting the data..." 84 Fed. Reg. 380, 387 (January 25, 2019). The agency's new position is an unwarranted departure from prior OSHA approaches to protecting sensitive information.

The OSHA 300 Log contains employee names, job titles, descriptions of injuries and body parts affected (as well as the extent of the injury suffered by the employee) and whether the injury resulted in days away from work or restricted duty. Similarly, the 301 Form contains comparable content as well as personal identifiers including an employee's home address, date of birth, and physician information for each recorded injury. A Form 301 contains even more detailed information about the injury, such as whether it resulted in hospitalization, how the incident occurred and what body parts are affected.

For many employees, the information contained in the 300 Log and 301 Form is sensitive private and personal medical information that the government must protect from disclosure to the public, as it has historically done. In 1996, OSHA proposed various revisions to part 1904 - Recordkeeping and Reporting Occupational Injuries and Illnesses, including revising the right of access to recordkeeping information by employees, former employees, and their representatives. At that time, OSHA rightly noted, "total accessibility [to all the information on an employer's injury and illness records] may infringe on an individual employee's privacy interest." 61 Fed. Reg. 4030, 4048 (February 2, 1996).

In the 1996 proposed revisions to part 1904, OSHA noted, "[T]he privacy interest of the individual employee versus the interest in access to health and safety information concerning one's own workplace – are potentially at odds with one another." *Id.* The agency concluded, however, that due to concerns for protecting the privacy interests of employees, "OSHA does not intend to provide access to the general public. OSHA asks for input on possible methodologies for providing easy access to workers while restricting access to the general public." *Id.*

OSHA has historically acknowledged the privacy concerns surrounding sensitive and personal employee medical information. OSHA again recognized this in the 2001 revisions to the recordkeeping requirements.

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 F.2d. at 118. 66 Fed. Reg. 5916, 6057 (January 19, 2001).

Most recently, OSHA reiterated its commitment to its "historical emphasis on protecting the privacy of workers and its longstanding practice of releasing sensitive data on a case-by-case basis only to those with a 'need to know'" basis when it rescinded its requirements for certain establishments to submit information from their OSHA Forms 300 and 301. See 84 Fed. Reg. 380, 384 (January 25, 2019). Many courts have similarly recognized that such information invokes privacy concerns. "In our society, individuals generally have a large measure of control over the disclosure of their own identities and whereabouts." *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 875 (D.C.Cir.1989). See *Yelder v. DOD*, 577 F. Supp. 2d 342, 346 (D.D.C. 2008) (names, addresses, and other personally identifying information creates a real threat to privacy.), *Nat'l Sec. News Serv. V. U.S. Dep't of Navy*, 584 F. Supp. 2d 94, 96 (D.D.C. 2008) ("Records...indicating that individuals sought medical treatment at a hospital are particularly sensitive.")

OSHA's position in the proposed rule is nothing short of a complete departure from the agency's historical commitment to protecting private employee information. While the agency has outlined various mechanisms that it believes will protect this information, it admits that it has not conducted a Privacy Impact Assessment to properly evaluate the privacy risks posed by the NPRM. Moreover, CWS members are concerned that the tools outlined in the proposed rule do not adequately protect this sensitive information. For instance, OSHA has stated that it will not require employers to provide information that can be used to directly identify individuals. OSHA concludes that, as a result, "there would be little risk of public disclosure of this information," but acknowledges in some circumstances this information still "may be submitted by employers into the system." 87 Fed. Reg. 18539. OSHA offers no proof of its ability to protect this information when it is mistakenly provided by an employer, which will inevitably occur. Instead, OSHA simply notes its "preliminary find[ing] that existing privacy scrubbing technology is capable of de-identifying certain information that reasonably identifies individuals directly..." *Id.* OSHA has not yet conducted tests of this technology on the Forms 300 or 301. In addition, OSHA acknowledges that the information it will collect and publish can still be used to identify individuals indirectly by combining it with other publicly available information. See 87 Fed. Reg. at 18538. OSHA also relies heavily on automated information technology to remove information that can directly identify individuals. This technology is not 100 percent accurate so there will still be information made publicly available which can be used to directly identify individuals. All of this is incredibly problematic and concerning.

Further, OSHA asserts that this information will be protected from public disclosure through FOIA exemptions. This position is not convincing in light of recent judicial decisions. The agency admits that information collected from Forms 300 and 301 "will likely be the subject of multiple FOIA requests in the future." 87 Fed. Reg. at 18535. Although OSHA suggests that various FOIA exemptions will protect this private employee information from disclosure, the agency concedes that numerous courts have repeatedly rejected its argument that FOIA

exemptions protect similar information from disclosure. Specifically, since 2020, three courts have disagreed with OSHA's position that 300A injury and illness data was covered under the confidential exemption in FOIA Exemption 4. See, *Center for Investigative Reporting, et al., v. Department of Labor*, No. 4:18-cv-02414-DMR, 2020 WL 2995209 (N.D. Cal. June 4, 2020); *Public Citizen Foundation v. United States Department of Labor, et al.*, No. 1:18-cv-00117 (D.D.C. June 23, 2020); *Center for Investigative Reporting, et al., v. Department of Labor*, No. 3:19-cv-05603-SK, 2020 WL 3639646 (N.D. Cal. July 6, 2020). Given these recent decisions, CWS members have little confidence that courts will now agree that the FOIA exemptions listed in the proposed rule serve to protect information contained in Forms 300 and 301. The only way to ensure this information is truly protected is not to collect it at all.

b. Forms 300 and 301 provide no valuable enforcement data to OSHA.

Contrary to OSHA's statements, CWS members do not believe there are enforcement-related benefits to collecting 300 Logs and 301 Forms. The electronic submission of the 300 Logs and 301 Forms occurs well after the recording of a work-related injury or illness, making the data stale by the time OSHA receives it. More importantly, information contained on the 300 Log or 301 Forms is not necessarily indicative of potential hazards in a workplace, or of potential violations of existing OSHA regulations. *U.S. v. Mar-Jac Poultry, Inc.*, Civil Action No. 2:16-CB-192-WCO-JC (N.D. Ga. November 2, 2016) (holding "[t]he fact that an injury or illness is recordable does not show that it was the result of a violation of an OSHA standard. Not all hazards are the result of a violation.") During the 2001 revision to the recordkeeping requirements, OSHA noted:

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. at 5929.

The 300 Log and 301 Forms may be valuable to the employer of the establishment who can process the data to determine trends and also distinguish entries resulting from occupational exposure that can be prevented or reduced, versus those outside the employer's control. In contrast, OSHA is unable to make such distinctions using the raw data. As CWS previously stated during similar rulemakings, there are many injuries recorded on an employer's 300 Log based solely on a geographic presumption (i.e., they occurred at the workplace), that in no way indicate whether an employer's workplace is unsafe or out of compliance with OSHA standards. Therefore, to use these data to establish enforcement measures would be misguided and contrary to the original intent of the no-fault recordkeeping system. In keeping with the agency's original intent of the recordkeeping provisions, an employer's 300 Log and 301 Forms should not be used to trigger enforcement.

4. OSHA must be mindful of the impact of frequent changes to recordkeeping and reporting requirements on employers' compliance efforts.

OSHA's frequent changes and reversals to its recordkeeping policies, including requirements surrounding electronic submission of injury and illness data, has resulted in significant confusion among employers, particularly small employers, regarding what

requirements apply to their business. OSHA has recognized that "...it took several years for the regulated community to understand which industries were and were not required to submit information" after the 2016 rule change, and that such "[m]isunderstandings result in both underreporting and overreporting." 87 Fed. Reg. 18552-18553. OSHA must be mindful of how these changes impact employers as it considers finalizing this proposal, determining effective dates, and issuing any future proposals.

5. Conclusion

For the reasons indicated above, the CWS urges OSHA to withdraw the proposed rule.

Sincerely,

American Bakers Association
American Composites Manufacturers Association
American Coke and Coal Chemicals Institute
American Foundry Society
American Iron and Steel Institute
American Mold Builders Association
American Pyrotechnics Association
American Road & Transportation Builders Association (ARTBA)
Associated Builders and Contractors
Associated General Contractors of America
Associated Equipment Distributors
Associated Wire Rope Fabricators
Brick Industry Association
Distribution Contractors Association
FMI – The Food Industry Association
Forging Industry Association
FP2, formerly the Foundation for Pavement Preservation
Global Cold Chain Alliance
Healthcare Distribution Alliance
Heating, Air-conditioning, & Refrigeration Distributors International
HR Policy Association
IAAPA, The Global Association for the Attractions Industry
Institute of Makers of Explosives
Independent Electrical Contractors
Industrial Fasteners Institute
Industrial Minerals Association - North America
International Dairy Foods Association
International Foodservice Distributors Association
International Warehouse Logistics Association
Manufactured Housing Institute
Mechanical Contractors Association of America
Motor & Equipment Manufacturers Association
National Association of Home Builders
National Association of Wholesaler-Distributors
National Automobile Dealers Association
National Club Association

National Cotton Ginners Association
National Council of Chain Restaurants
National Demolition Association
National Federation of Independent Business
National Grain and Feed Association
National Lumber and Building Material Dealers Association
National Ready Mixed Concrete Association
National Restaurant Association
National Retail Federation
National Roofing Contractors Association
National Stone, Sand & Gravel Association
National Tooling and Machining Association
National Utility Contractors Association
Non-Ferrous Founders' Society
North American Die Casting Association
Plastics Industry Association (PLASTICS)
Portland Cement Association
Precision Machined Products Association
Precision Metalforming Association
PRINTING United Alliance
Restaurant Law Center
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