

March 10, 2014

Via Electronic Submission: <http://www.regulations.gov>

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

**Re: Docket No. OSHA-2013-0023
Proposed Rule to Improve Tracking of Workplace Injuries and Illnesses**

Dear Assistant Secretary Michaels:

The National Association of Chemical Distributors (NACD) submits the following comments to the U.S. Department of Labor's (DOL) Occupational Safety and Health Administration (OSHA) in response to the agency's Proposed Rule to Improve Tracking of Workplace Injuries and Illnesses, Docket No. OSHA-2013-0023.

About NACD

NACD is an international association of more than 400 chemical distributors and their supply-chain partners. NACD represents more than 85% of the chemical distribution capacity in the nation and 90% of the industry's gross revenue. NACD members are responsible for more than 150,000 direct and indirect jobs in the United States while operating in all 50 states through nearly 1700 facilities. NACD members are predominantly small regional businesses, many of whom are multi-generational family-owned. The typical chemical distributor has 26 employees and operates under an extremely low margin.

Worker safety is a top priority for NACD members. NACD members meet the highest standards in safety and performance through mandatory participation in Responsible Distribution, NACD's third-party verified environmental, health, safety, and security (EHS&S) program. Through Responsible Distribution, NACD members demonstrate their commitment to continuous performance improvement in every phase of chemical storage, handling, transportation, and disposal operations. NACD members have achieved a strong safety record under Responsible Distribution. Member companies' safety rating is consistently better than non-member

companies in the Chemical & Allied Merchant Wholesale Industry and nearly twice as good as all manufacturing combined.¹

Comments in Response to OSHA's Proposed Rule

The proposed rule would require employers to electronically submit injury and illness information currently in the 300A, 300, 301 Forms to OSHA. Each establishment with 250 or more employees would have to report on a quarterly basis, and establishments with 20 or more employees in certain designated industries would be required to report annually. The agency would also have discretion under the proposal to require any employer to submit more detailed information about specific injuries and illnesses. OSHA intends to provide public online access to the injury and illness records allowing "the public, including employees and potential employees, researchers, employers, and workplace safety consultants, to use and benefit from the data." (78 *Federal Register* p. 67276). Currently, the information is not generally available to the public and is available to researchers on a basis consistent with confidential data.

NACD and its members have several concerns about the proposed rule, and we strongly urge OSHA to withdraw it. Our specific concerns are set forth below.

The Reported Information Is Not A Reliable Measure of an Employer's Safety Record and Will be Misconstrued and Misused Causing Misallocation of Resources and Loss of Business and Jobs

As currently proposed, the 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 its preamble to the Notice of Proposed Rulemaking 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. However, the agency would provide this data without any meaningful context. As a result, the information would not provide 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.).

Providing raw data to those who do not know how to interpret it or without putting such data in context invites improper conclusions or assumptions about the employer, which could lead

¹ Based on 2012 data reported by 100% of NACD Member Companies, and the most recent data from the U.S. Bureau of Labor Statistics and the U.S. Bureau of Economic Analysis.

to unnecessary damage to a company's reputation, related loss of business and jobs and misallocation of resources by the public, government and industry.

Furthermore, by making such information publicly accessible, OSHA invites those targeting companies to purposefully mischaracterize and misuse the information for reasons wholly unrelated to safety. For example, plaintiff's attorneys, labor unions, competitors and special interest groups will unquestionably attempt to use such information, selectively or otherwise, as leverage against companies during legal disputes, union organizing drives, contract negotiations or as part of an effort to prevent a company from entering a specific market.

Posting of Sensitive Information by Employer, Location, and Injury-Specific Data Raises Business Confidentiality and Employee Privacy Concerns

The proposed rule would require employers to submit confidential details about the company and information about its employees. Many companies consider the number of employees and hours worked at a given establishment to be proprietary information, as it can reveal sensitive information about business processes, security and overall operations. The proposal ignores several court rulings that have found employers to possess a privacy interest in such data, and fails to consider the implications of publishing it. Public disclosure of the data not only provides a company's competitors with confidential business information, but it also jeopardizes security, putting workers and the public in danger. For example, OSHA intends on publishing the addresses of certain businesses that produce, store, or maintain highly sensitive, hazardous or valuable products or commodities. Depending on the nature of the business, publicizing locations and number of employees could leave a business vulnerable to criminals or worse.

Employee privacy is also a concern. While OSHA has committed to protecting the identity of employees, the agency has failed to provide satisfactory answers regarding how it intends to fulfill this mission, especially considering there will be hundreds of thousands of records that would need to be scrubbed of employee details. This is made even more problematic because the proposal would require the submission and publication of data that could nonetheless identify individuals. By requiring date of injury, injured body part, treatment and job title, the identity of the employee could be easily determined by an outside entity. For example, in small or rural communities, information concerning an employer is likely to be discernible even if the name of the worker is redacted.

The Proposed Rule Abandons OSHA's "No-fault" Approach to Recordkeeping Without Justification or Analysis

In 2001, OSHA adopted the no-fault recordkeeping system as the foundation of the revisions to recordkeeping requirements. The agency implemented a "geographic" presumption, claiming an injury or illness that occurred at the workplace would be deemed a work-related injury regardless of circumstances surrounding the incident. The presumption came with the disclosure 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. p. 5929). OSHA made clear "no fault" would be attributed to injuries or illnesses submitted.

Yet, under the proposal, OSHA intends to use the information reported for targeting purposes and to release the data without context or restraints.² Thus, the presumption under the NPRM is that all injuries or illnesses are preventable, suggesting all incidents are the fault of the employer. The proposal essentially turns the "no fault" reporting system into one where employers will be blamed for idiosyncratic events arising as a result of forces beyond their control or actions by workers in direct contravention of workplace rules. This is a clear abandonment of the "no-fault" system in favor of OSHA's controversial and counterproductive "regulation by shaming" enforcement doctrine. Surprisingly, OSHA fails to even acknowledge its reversal, or provide any justification or an analysis for this significant change.

NPRM Creates Disincentives to Reporting

Under its existing rules, OSHA encourages employers to record all possible qualifying incidents, counseling that those ultimately outside of the reporting requirements can later be stricken. With quarterly reporting, employers are unlikely to record close cases because, in many instances, striking them later may be impossible as the information has already been reported and posted publicly. Rather than assume such an additional burden, employers will likely err on the side of not recording those incidents where in doubt. The result is less insight into workplace injuries for OSHA, the opposite outcome the recordkeeping initiative was intended to achieve.

Only Accepting Electronic Submissions Raises Small Business Concerns

With the proposed rule, OSHA would require all records be submitted electronically. The agency has assumed that most employers are keeping their records in such a manner. While OSHA acknowledges a small portion of businesses do not have immediate access to computers or the internet, the agency has not put the rule before a small business review panel as required under the Small Business Regulatory Enforcement Fairness Act of 1996 to fully assess the impact disallowing paper submissions will have on small businesses. OSHA claims that all businesses affected by the rule have internet access, but has not provided the necessary supporting evidence. Should OSHA move forward with the rule, the agency must give consideration to allowing paper submissions. Because submission of these records will be

² On the web mock-up OSHA provides the database search feature came with a caveat: "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." At the same time, OSHA admits in the NPRM it intends to use the information for targeting and sites as its primary justification for the rule the fact third parties could and should base employment, business and government resource allocation decisions on the data.

mandatory, failing to do so will create a hardship on small businesses and increase the cost burden of the rule for employers.

The Proposal Underestimates Costs and Overestimates Benefits

OSHA estimates it will cost each employer with establishments of 250 or more employees only \$183 per year and only \$9 per year for establishments with 20 or more employees in specified industries. The agency fails to account for many costs associated with the rule, including but not limited to the possible cost of adopting a new system to accommodate OSHA's filing system,³ training for a new system, and implementation of electronic systems for businesses only using paper format, as mentioned above.

OSHA estimates the electronic submission process would take each establishment only 10 minutes for each OSHA 301 submission and 10 minutes for the submission of *both* the OSHA 300 and 300A. This fails to accurately account for the time it will take employees to familiarize themselves with the process and review of the reports to ensure compliance with all regulations. Furthermore, if employers become responsible for removing all employee identifiers from the records, considerably more time and resources will be needed for compliance.

The benefits OSHA attributes to the rule are entirely speculative. The agency claims the rule's benefits will "significantly exceed the annual costs." The only benefits calculation done by the agency relates to costs of fatalities prevented, yet the bulk of the data will concern injuries, not fatalities. OSHA also claims "the data submission requirements of the proposed rule will improve quality of the information and lead employers to increase workplace safety," even though no data, surveys, studies, or anecdotal comments are offered as evidence. (78 Fed. Reg. p. 67276).

Moreover, OSHA does not take into account any consequential costs imposed on the employer due to the submission of records. Such costs include future inspections by the agency in response to the records submitted, or business or job loss as a result of misuse and mischaracterization of the data, for instance during union conducted corporate campaigns. Another likely substantial cost is the time company management may have to spend discussing and explaining the data to both customers and the public when concerns and clarifications are needed to sustain business as well as in public/community outreach situations. While these may be indirect costs, the probability of such a result is higher than that of the possible benefits OSHA claims.

³ OSHA's estimates related to the enterprise wide submission alternative also significantly under estimate costs. The increased investments in creating and implementing internal systems to allowing tracking and reporting at that level would vastly increase the costs of the proposed rule to small and large multi-establishment businesses.

Conclusion

The Tracking Workplace Injuries and Illnesses proposed rule does nothing to achieve its stated goal of reducing injuries, illnesses and fatalities; yet as proposed, it will consume large amounts of agency and employer resources that could be put to better use. The proposal will force employers to disclose sensitive information to the public that can easily be manipulated, mischaracterized, and misused for reasons wholly unrelated to safety, and subject employers to illegitimate attacks and employees to violations of their privacy. In addition, the proposal will reverse the long-standing, "no-fault" approach to recordkeeping, and reduce employers' incentive to record questionable injuries. Finally, OSHA failed to account for the total costs its rulemaking will impose on businesses, while citing vast benefits without adequate support for such claims.

For all these reasons, NACD urges OSHA to withdraw the rulemaking.

Thank you for the opportunity to submit comments on this matter.

Sincerely,



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