



VIA ELECTRONIC SUBMISSION

June 30, 2022

Douglas L. Parker
Assistant Secretary of Labor for Occupational Safety and Health
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Docket ID No. OSHA-2021-0006, Improve Tracking of Workplace Injuries and Illnesses (RIN 1218-AD40)

Dear Assistant Secretary Parker:

Associated Builders and Contractors submits the following comments to the Occupational Safety and Health Administration in response to the above-referenced request for comment published in the Federal Register on March 30, 2022, at 87 Fed. Reg. 18528.

About Associated Builders and Contractors

ABC is a national construction industry trade association representing more than 21,000 members. ABC and its 68 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work.

ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry, which is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

ABC and its chapters strive to provide all members with the knowledge and tools to achieve the highest standard for health, safety, wellness and environment in the construction industry. It is ABC's mission to ensure all of our construction workers go home in the same—or better—condition than when they arrived on the jobsite every day.

ABC is a member of the Coalition for Workplace Safety, which is filing a detailed set of comments on OSHA's proposed rule. ABC supports CWS' comments and hereby incorporates them by reference.

Background

On May 12, 2016, OSHA issued the Improve Tracking of Workplace Injuries and Illnesses final rule, which required establishments with 250 or more employees to electronically submit detailed injury and illness records (OSHA Forms 300, 301 and 300A) to OSHA annually, which were to be posted publicly.¹

Establishments in certain high-hazard industries, including construction, with 20 to 249 employees are required to annually submit a summary of work-related injuries and illnesses (OSHA Form 300A). Additionally, the 2016 final rule deemed some forms of post-accident drug testing and accident-free incentive programs to be unlawfully retaliatory.

ABC consistently opposed OSHA's proposed revisions during the rulemaking process, arguing that the proposal exceeded the authority delegated to it by Congress and did nothing to achieve the agency's stated goal of reducing workplace injuries and illnesses.² ABC also pushed back against OSHA's supplemental notice of proposed rulemaking, which lacked any supporting evidence to justify its claim of underreporting due to employer policies that allegedly discourage reporting of injuries and illnesses.³

Eventually, ABC and other stakeholders filed a lawsuit against OSHA's 2016 final rule.⁴ In response to the department's motion to stay proceedings pending the issuance of a new rulemaking proceeding in 2017, the district court administratively closed the case, subject to reopening on motion of any party seeking to initiate further proceedings.⁵

In 2019, OSHA issued a new final rule,⁶ which eliminated the 2016 final rule requirement for establishments with 250 or more employees to electronically submit information from OSHA Forms 300 and 301 to OSHA annually. ABC submitted comments in support of OSHA rescinding the mandate.⁷

Currently, covered establishments of 20 employees or more are required to electronically submit information from OSHA Form 300A to OSHA once a year.

Comments on OSHA's Proposed Rule

ABC is disappointed that the Biden administration is moving forward with a new rule to undo the ABC-supported provisions of the 2019 final rule under the Trump administration and reprise the 2016 Obama-era rule.

¹ 81 Federal Register 29624.

² See ABC's comments filed on March 10, 2014 (Docket ID: OSHA-2013-0023-1356).

³ See ABC's comments filed on Oct. 14, 2014 (Docket ID: OSHA-2013-0023-1646).

⁴ *TEXO ABC/AGC et al v. Perez*, No. 16-cv-01998-L (N.D. Tex.).

⁵ *Id.*, order dated June 30, 2017. Another suit was filed against the 2016 final rule by the NAHB and the Chamber of Commerce in Oklahoma, which remains pending. *NAHB v. Perez*, 17-cv-00009-PRW.

⁶ 84 Federal Register 380

⁷ See ABC's comments filed on Sept. 28, 2018 (Docket ID: OSHA-2013-0023-2057).

Similar to the 2016 final rule, which ABC objected to, the Biden administration proposed rule does nothing to achieve OSHA's stated goal of reducing injuries and illnesses. Instead, 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, as well as subject employers to illegitimate attacks and employees to violations of their privacy.

ABC's specific concerns with the proposal are addressed below and we urge OSHA to withdraw this harmful rule.

Public Disclosure of Forms 300, 301 and 300A Will Harm Employees and Employers in the Construction Industry and Provide No Enforcement Value to OSHA

In the current proposal, establishments with 20 to 99 employees at any time in the previous calendar year will be required to electronically submit the OSHA Form 300A on an annual basis. Establishments with 100 or more employees in the previous calendar year will be required to electronically submit OSHA Forms 300, 301 and 300A annually. The records at issue in the proposed rule contain sensitive and private employee information and are not reliable measures of a company's safety record or of its efforts to promote a safe work environment.

As OSHA stated in its 2018 proposal, the risk of public disclosure of OSHA Forms 300 and 301 information related to employee privacy and the reporting burden on employers are unjustified given the uncertain benefits of collecting the information.⁸ The OSHA Form 300 in particular contains sensitive and personal medical information about individual employees, which the government has historically kept private. It includes employee names, job titles, descriptions of injuries and body parts affected as well as the extent of the injury and whether the injury resulted in lost work days or restricted duty. The Form 301 contains much of the same information as the Form 300 but also includes additional information about the employee, for example, home address, date of birth, physician information and detailed information about the injury, such as whether it resulted in the employee being hospitalized, how the incident occurred and what body parts are affected.

OSHA Forms 300 and 301 do not provide valuable enforcement data for the agency. OSHA has long recognized that many injuries and illnesses on worksites result from conditions, activities and hazards that are outside an employer's control.⁹ Therefore, any enforcement targeting based on this information is unlikely to result in greater regulatory compliance, because the data does not necessarily mean an employer is failing to comply with OSHA standards. OSHA has acknowledged this issue in the Site-Specific Targeting enforcement program and implemented appropriate quality controls.

Additionally, the forms submitted to OSHA contain data that could be more than a year old. Not only is the information not necessarily predictive of a present hazard, but it also does not take into account any corrective actions that an employer may have taken in the meantime to improve workplace safety. OSHA Forms 300 and 301 provide little value to the agency as to

⁸ 83 Federal Register 36494.

⁹ See ABC's Comments filed on March 10, 2014 (Docket ID: OSHA-2013-0023-1356).

whether a recorded incident should have resulted in citation, and are antithetical to the original intent of a “no-fault” recordkeeping system.

ABC member employers also have serious concerns about the potential public disclosure of the OSHA Form 300A because it includes confidential business information such as the number of employee hours worked. Especially in a labor-intensive industry like construction, publicizing this information would give outsiders insight into confidential processes and operations of a business, which could be used against the company by competitors and others. The disclosure requirement conflicts with the agency’s prior position on release of this information to the public. OSHA previously stated it considers hours worked by employees to be commercial and “privileged and confidential” information, which the agency would not release to the public.¹⁰ ABC believes information such as hours worked is proprietary and should continue to be protected by OSHA.

As OSHA itself argued in opposition to the Freedom of Information Act demands of the *Public Citizen* case,¹¹ OSHA’s Form 300A contains business information that is “clearly within the definition of commercial or financial information” and is therefore entitled to protection from public disclosure. Further, OSHA has correctly asserted in the *Public Citizen* litigation that the mere threat of public disclosure of the Form 300A submissions is harming compliance and effectiveness of the injury tracking and reporting program.

Further, ABC members are rightfully concerned that the public disclosure of the information in OSHA Forms 300 and 301 and potential public disclosure of 300A could cause reputational harm based on misleading information on the safety and health efforts of employers. These records could easily be misconstrued, and improper conclusions or assumptions could be made about an employer. For merit shop construction contractors, these are not hypothetical concerns. Many high-quality, safety-conscious contractors have been targeted maliciously by unions and union-front organizations making false or distorted claims of “unsafe” contracting based on isolated incidents taken out of context. Such distortions are frequently a component of so-called “corporate campaigns” that seek to damage employers’ businesses through negative publicity in order to unfairly pressure them into signing union agreements.

Additionally, by expanding the mandate to 100 or more employees from 250, OSHA’s proposal puts smaller companies at a disadvantage by making them appear to be less safe than larger companies by comparison. A smaller company with the same number of injuries and illnesses as a larger company is likely to have a higher incident rate. Providing such data to the public without appropriate context could lead to unnecessary damage to a company’s reputation, related loss of business and jobs and misallocation of resources by the public, government and industry.

Nowhere in the Occupational Safety and Health Act of 1970 has Congress authorized OSHA to publicize raw injury and illness records outside the employer’s own workplace. Whatever limited authority Congress gave to the agency to create reporting requirements has been confined to the internal use of the agency and/or employers’ own employees, not for

¹⁰ 5 U.S.C. § 552(b)(4) (2000).

¹¹ *Public Citizen Foundation v. U.S. DOL*, 18-cv-00117-EGS (D.D.C.).

dissemination without any context to the public at large. The proposed rule is an open invitation for mischaracterization and misuse of the records in ways that Congress never intended. The rule should be withdrawn for this reason alone.

Further, OSHA lacks statutory authority to create an online database meant for the public dissemination of any employers' injury and illness records at any time. OSHA has based its authority for the 2016 final rule under Sections 8 and 24 of the OSH Act, but neither of those sections authorizes OSHA to publicly disseminate reports collected under the rule. See, e.g., comments from the U.S. Chamber of Commerce, OSHA-2013-0023-1396, pg. 3 (“Conspicuously absent from [the statute] is any mention, let alone express or implied authority, that OSHA may create an online database meant for the public dissemination of an employer’s injury and illness records containing confidential and proprietary information.”)

Congress’s treatment of other similar online databases underscores that it did not intend to give OSHA authority to create such a database. Compare the OSH Act to the Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2055a. Had Congress wanted OSHA to create an online database of workplace injury and illness records, it would have said so. OSHA’s authority with respect to recordkeeping is limited.

Finally, we hope that OSHA recognizes that the frequent revisions it has made related to the requirements surrounding electronic reporting of injury and illness data has caused confusion and uncertainty among construction contractor employers in respect to what requirements apply to their businesses, especially for small businesses. OSHA is required by the Administrative Procedure Act to consider reasonable alternatives to its proposed reversal of the current reporting requirements and the failure to do so will likely lead to nullification upon judicial review.¹²

Conclusion

The Biden administration’s proposed rule will do nothing to achieve OSHA’s stated goal of reducing injuries and illnesses and fatalities, and will instead risk bringing significant harm to well-meaning, responsible employers by facilitating unwarranted enforcement activity and by publicly disclosing confidential business information and information that can be used to identify individual employees.

¹² *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (U.S. 2020); *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm*, 463 U.S. 29 (1983).

For the reasons outlined above, as well as those in comments filed by the Coalition for Workplace Safety, ABC urges OSHA to withdraw this proposed rule.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ben Brubeck". The signature is fluid and cursive, with the first name "Ben" being more prominent than the last name "Brubeck".

Ben Brubeck

Vice President of Regulatory, Labor and State Affairs

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