



Coalition for Workplace Safety Statement
OSHA Public Meeting on Proposed Rule to Improve Tracking of Workplace
Injuries and Illnesses
January 9, 2014

Introduction/Opening

My name is Tressi Cordaro; I am an attorney with Jackson Lewis representing 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. CWS's core principle is that improving safety requires the involvement of all parties—employers, employees, and OSHA.

The members of CWS and the millions of employers who are part of the associations are deeply troubled by this proposed regulation and believe it is anything but the modest and “limited” rulemaking OSHA has tried to portray it as. Indeed, it would profoundly change how employers interact with the agency. There are significant negative impacts that would flow from this proposal that I will address in my remarks.

Chief among these is that OSHA's intention to post employer, location, and incident specific injury data will lead to misuse and abuse by those trying to mischaracterize employer safety efforts. Just as important will be the damage from the disclosure of sensitive and proprietary information that companies go to great lengths to protect.

This proposal also represents a fundamental reversal in the long standing “no-fault” approach to recordkeeping. The public disclosure will also lead to employers recalibrating their decisions on whether to record injuries.

OSHA and their allies in Congress have claimed that employers have been underreporting injuries and thus, the data collected during is unreliable and inaccurate. OSHA cannot now claim that these same injury and illness records are so reliable that they should be posted on the internet and used as benchmarks and references by any interested party.

Accordingly, CWS urges OSHA to withdraw this rulemaking.

Problems with Public Disclosure of Sensitive Information

CWS predicts that if OSHA proceeds with this rulemaking as proposed and releases to the public the detailed company, location and incident specific information this data will form

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the basis of various attacks and mischaracterizations of employer safety records. OSHA claims there are several benign uses of this data that may occur, but we know that this proposal will trigger malicious uses because these are already occurring without easy access to such specific information.

Another reason we are convinced this data will be used by unions to pressure companies is because the AFL-CIO explicitly requested that OSHA provide more access to company safety and health information in their submission to the Obama transition team in 2009. Unions are known for taking company injury reports out of context when they are trying to organize an employer or pressure one during contract negotiations. The injury and illness records OSHA will require employers to submit will be devoid of context and will not at all give a complete picture of a company's efforts to maintain a safe workplace.

In addition to being subject to misuse, the data OSHA will require employers to submit will contain details that many companies try very hard to keep confidential. Specifically, many companies consider the number of employees and hours worked as proprietary information that should not be disclosed. Such information gives insight into processes and could open up companies for hostile takeover by competitors or reveal proprietary information.

There are other privacy concerns with making some, if not most of this data publicly available. While OSHA's has committed to protecting the identity of employees, the Agency fails to recognize that other information (such as date of injury, injured body part, treatment, job title) can be used as an identifier, particularly in a small community. This information, even without the identity of the employee, can be compiled to personally identify the employee. In addition, although OSHA has stated that they will protect employee sensitive information, the proposal gives no description of how this will happen. If employers will be required to delete this information from the records before submittal that will be another cost factor that will significantly increase the burden of this regulation.

Another privacy concern that OSHA has failed to consider is confidentiality of addresses for some employers, depending on the nature of their work. For example, a facility that stores and maintains sensitive medical pharmaceuticals, where a forklift operator who moves controlled substances gets injured, would be concerned with potential thefts if its address is made public. The same is true for makers of explosives, or other industries where products or commodities are highly sensitive. OSHA cannot possibly imagine the scenarios where providing such information is potentially detrimental to the employer, and possibly the safety of its employees. OSHA's cavalier attitude towards protecting employer information will expose employers to various misuses and potentially serious or even criminal acts.

Injury and illness records made public without proper context are not a reliable measure of an employer's safety record. Providing raw data to those who do not know how to interpret it or without putting such data in context will lead to improper conclusions or assumptions. Contrary to what OSHA alleges, such data will not reliably identify those employers more likely to have future injuries/illnesses. Moreover, to suggest that public access to such information will allow members of the public to make more informed decisions about current and potential companies with which to do business is myopic. OSHA provides no data, surveys, or objective

support for its assertions of the benefits that will supposedly flow from this regulation. OSHA's claims are mere speculation and conjecture that these benefits will emerge, while simultaneously ignoring entirely the various negative consequences that are sure to occur.

The Proposed Regulation Reverses “No-Fault” Recordkeeping

This proposed rule upends the “no-fault recordkeeping system” OSHA adopted in 2001. This no-fault system was the foundation of the revisions to the recordkeeping requirements in 2001. At that time, OSHA implemented a “geographic” presumption—that if an injury or illness happened at the workplace it would be deemed work-related as the most comprehensive way to achieve Congress's objective for determining work-related injuries and illness. The disadvantage of this broad scope is 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. p. 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” (p. 5934). The result was that in exchange for capturing the broadest possible array of work-related injuries, OSHA accepted that a certain portion of these injuries would not be relevant to assessing an employer's safety and health program. Because employers were only required to submit these records to OSHA upon request or as part of a survey, there would be “no fault” attached to these injuries being recorded.

A few real life examples of injuries recorded based on the geographic presumption can illustrate this point:

- Employees who have sneezed and hurt their back;
- Employees have tripped while walking on a smooth dry surface;
- Turbulence in an airplane bathroom causing a laceration that required stitches;
- Employees chasing a feral cat (that came off a truck) around a warehouse until captured bare-handed and the cat bit the employee; and
- Bee stings, spider bites (spider came out of package sent by another company).

Because OSHA will be using this data for targeting purposes, and releasing this data to the public to be used with no context or restraints, this proposal represents OSHA abandoning the concept of recordkeeping being a no-fault system. Instead, the proposed regulation is based on the presumption that all recorded injury and illnesses are preventable and OSHA asserts that “this tracking tool is a tool to change what's going on in workplaces, to tell employers to work a little harder to prevent workplace injuries and workplace deaths.” Indeed, Dr. Michaels recently noted in an interview that the two main objectives of this rule were (1) better use of federal resources and (2) behavior economics. (Interview on NPR—get specific citation) Suggesting

that every injury and accident is necessarily the fault of the employer is naïve, simplistic, and ignores reality.

Yet, even as OSHA touts the benefits of this data and the public disclosure of it, OSHA also undermines its value. In the web-mock up created by ERG, on the page for public searches of injury/illness information for specific establishments there is a disclaimer 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.” Mere caveats like this will be no bar to this data being misused, or employers being described “the most dangerous” or “worst” if someone wants to say that.

As an example of where data based on presumed non-compliance has not produced the anticipated results, CWS urges OSHA to consider the issues that are plaguing the FMCSA under the Compliance, Safety and Accountability (CSA) program. In theory, CSA was designed to take data from roadside inspections (safety-based violations) and commercial motor vehicle (CMV) crashes to assess a motor vehicle carrier’s safety performance and allow the Agency to focus its limited resources on the least safe carriers. Studies and analysis of this program have demonstrated that these scores do NOT reliably identify carriers that are more likely to have future crashes.

Potential Chilling Effect on Injury and Illness Reporting

One of the potential consequences of this proposed rule is that it will likely be counterproductive with respect to encouraging employers to record injuries. Currently, employers are likely to err on the side of recording a questionable work-related incident, even if there is a colorable claim that the incident is not work-related because the record serves a valuable internal role, and there is virtually no consequence to over recording. However, making such information publicly available will upend this calculation and is likely to result in employers NOT recording a questionable work-related incident, leading to less injuries being recorded, not more.

Impacts on Small Businesses from Not Allowing Paper Submissions

OSHA assumes, without supporting evidence that most employers are already keeping records electronically. OSHA acknowledges that there is a portion of small businesses that do not have immediate access to computers and internet service. OSHA acknowledges that 30% of ODI establishments do not submit data electronically. Since this rule has not been put before a SBREFA panel, OSHA has not assessed the impact that not allowing paper submission will have on small businesses. While OSHA cites to various studies and reports to build its case that requiring only electronic submission is justified, none of the data to which the agency cites makes an unequivocal case that 100% employers covered by this regulation will already have computers and internet access. This may be widespread, but OSHA’s assumption is presumptuous. Indeed, OSHA lists several other agencies that also have reporting requirements where non-electronic means are still permitted. Should OSHA move forward with this proposed rule, the Agency must give consideration to allowing paper submission. Failing to do so will

create a hardship on small businesses, and other businesses that are not currently using electronic means to record their injuries.

OSHA has also arbitrarily divided the employers who are covered by this regulation into two classes—those with 250 or more employees per establishment and those between 20 and 249 employees per establishment. OSHA appears to be claiming that employers with 250 or more employees are not small businesses, yet many of the SBA size standards include businesses as large as 500 employees as small businesses. Moreover, OSHA’s employee count is based on the employer having any type of employee for any length of time. Thus, if a small retailer adds extra part time, temporary help during a peak season, it may trigger the reporting requirement even though for the overwhelming majority of the year, it does not have enough employees. This is likely to become a disincentive for employers to add more employees, especially short term or seasonal workers. If OSHA moves forward with this regulation, the agency should revise how employees are counted for the purposes of this regulation.

OSHA Has Underestimated the Costs and Overestimated the Benefits of the Rule

OSHA has estimated that 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 in designated industries to comply with this proposed rule. CWS believes OSHA has not accounted for many unforeseen costs associated with this proposed rule. Some of these include the initial costs for training for implementing a new system of maintaining records if an employer has to adopt a new system to accommodate OSHA’s filing system; similarly there may be revisions to existing electronic recordkeeping systems; and as mentioned above, implementation of electronic recordkeeping systems for those using only paper format. Also, the mock-up of the web page indicates that the log in procedure will be associated with a specific employee’s email address. There will be turnover in the employees who handle these duties which means having to reset the contact information and start all over again.

Although OSHA has not quantified the benefits of this rule it still concludes that annual benefits will “significantly exceed the annual costs.” The only benefits calculation the agency does relates to costs of fatalities prevented, yet the bulk of the data will concern injuries not fatalities. OSHA also claims that “the data submission requirements of the proposed rule will improve quality of the information and lead employers to increase workplace safety.” No data, surveys, studies, reports, analyses, or even anecdotal comments are offered for this supposition; nothing but speculation.

Further, OSHA estimated 10 minutes per establishment for the electronic submission of the records. OSHA’s estimate is unrealistic and does not accurately account for the time it will take for familiarization with the process and to review to make sure all requirements are met. Furthermore, OSHA has not explained how employee identifying information will be kept from public disclosure. If this becomes the responsibility of the employer—and there may be good reasons why this should be the case—it will add considerably to the time and cost for compliance.

Finally, OSHA does not take into account any costs related to the posting of an employer's information such as the costs of being inspected by OSHA or becoming the target of a union organizing campaign. While these may be indirect, they are more likely to occur than the putative benefits OSHA outlines.

Conclusion

In conclusion, this proposed rule will force employers to reveal sensitive and in many cases proprietary information that will then become available for anyone to access and use in whatever way they wish. This will lead to employers' safety records being mischaracterized and subjecting them to illegitimate attacks. The proposed regulation reverses a long standing "no-fault" approach to recordkeeping and will cause employers to reconsider whether injuries that might not need to be recorded will be recorded. OSHA has not adequately accounted for the full costs of this regulation on small businesses and other employers, and has asserted that many benefits will flow from this regulation without proper support for these claims. For all these reasons, the Coalition for Workplace Safety urges OSHA in the strongest possible terms to withdraw this rulemaking.