

OSHA's Proposed Electronic Recordkeeping Proposal:

Frequently Asked Questions

On Nov. 8, 2013, the Occupational Safety and Health Administration (OSHA) issued a Notice of Proposed Rulemaking (NPRM) to change injury and illness recordkeeping and reporting requirements for employers.¹ ABC National is opposed to OSHA's proposal, and has asked the agency to withdraw it without delay.

Below are several frequently asked questions related to OSHA's proposal and ABC's position on it. For additional information, please contact Lauren Williams at lewilliams@abc.org.

What are OSHA's current injury and illness recordkeeping requirements for construction employers?

What are the proposed changes to OSHA's recordkeeping requirements?

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What are OSHA's current injury and illness recordkeeping requirements for construction employers?

Under current OSHA regulations, construction industry employers with more than ten employees must record work-related injuries and illnesses using specific OSHA forms.² These employers are required to keep an injury and illness log and post a summary of work-related injuries and illnesses in the workplace for all employees to review (former employees also have the right to access these records upon request). Currently, OSHA only collects this information if a facility is inspected, or a workplace is part of the OSHA Data Initiative (ODI).³ In these instances, OSHA accepts the documents electronically or in paper format.

What are the proposed changes to OSHA's recordkeeping requirements?

OSHA's proposal would alter current practice by making submission of these forms mandatory and exclusively electronic for most employers, regardless of whether they have been inspected. Even worse,

¹ See: <https://federalregister.gov/a/2013-26711>.

² The OSHA forms in question are: Form 300 (Injury and Illness Log); Form 301 (Injury and Illness Incident Report); and Form 300A (Summary of Work-Related Injuries and Illnesses).

³ The ODI collects information from approximately 160,000 facilities (80,000 in any given year, or only 1.1 percent of all establishments nationwide) with 20 or more employees in industries with high injury rates—including roughly 20,000 in construction. Approximately, 30 percent of ODI participants submit hard copy data.

the agency intends for the first time to make this information publically available on the internet through a new, searchable online database. OSHA has indicated it will also for the first time use the data for enforcement purposes.

- Establishments with at least 20 employees at *any time in the previous calendar year* will be required to electronically submit:
 - OSHA Form 300A on an annual basis.
- Establishments (individual worksites) with at least 250 or more employees *at any time in the previous calendar year* will be required to electronically submit:
 - OSHA Form 300A (Summary of Work-Related Injuries and Illnesses) on an annual basis, and;
 - OSHA Forms 300 (Injury and Illness Log) and 301 (Incident Report) on a quarterly basis,

Why does ABC oppose OSHA's proposed rule?

ABC is opposed to OSHA's proposed rule for a number of reasons:

- OSHA's announced intention to collect and publicize confidential business information—including but not limited to employer-, location-, and incident-specific injury and illness data—will lead to misuse and abuse by the agency itself, and by those outside the agency (including labor unions, competitors, plaintiff's attorneys, etc.).
- The injury and illness data that OSHA is planning to post on the internet is an unreliable measure of any individual employer's safety record.⁴ OSHA's proposed database will likely be misused by those aiming to threaten or disrupt the security and overall operations of a merit shop employers, resulting in improper assumptions and conclusions.⁵
- OSHA's proposed rule does nothing to achieve the agency's stated goal of reducing injuries, illnesses and fatalities. The agency provided no objective support for the benefits it claims will result from this proposal. OSHA also ignored the many negative consequences likely to occur.
- OSHA's proposal reverses the agency's commitment to a "no-fault" recordkeeping system. Once recordkeeping data is used against employers (by the agency or other entities), many companies will rethink how (and to what extent) injuries and illnesses should be recorded.
- Even if employers are fully compliant with OSHA's recordkeeping and reporting requirements, the agency's proposal could lead to widespread underreporting of injuries and illnesses. If an employer knows its records will be publically available (and that such reporting could also lead to enforcement actions), it increases the likelihood that employers will record only those incidents that are unequivocally work-related.
- OSHA requires employers to submit employees' personal information (names, SSNs, etc.); employers are not afforded the ability to self-redact on behalf of their workers. However, the

⁴ For example, participants in ABC's Safety Training Evaluation Process (STEP) are required to submit injury and illness recordkeeping data—but this information is only one component of the overall STEP assessment. Participants are also evaluated on leading indicator use and self-assessment requirements, all of which combine to give a full, wide-ranging report on the entire nature of a company's safety program.

⁵ While injury and illness recordkeeping data is an unreliable measure of an *individual employer's* safety record, anonymous, aggregate data can be useful to identify broad industry trends—especially when considered alongside additional metrics. This is the motivation behind ABC's Safety Data Survey initiative. For further discussion, see: "*How does ABC's Safety Data Survey differ from OSHA's proposed rule?*"

agency has failed to explain how it plans to ensure that this information is never publicly disclosed.⁶

- According to public remarks made by OSHA officials, the data will be used by the agency for enforcement purposes.⁷ OSHA's proposal can also be viewed as an extension of its "regulation by shaming" doctrine, which ABC has previously opposed on the grounds that it is counterproductive to improving workplace safety.
- Along with enforcement, OSHA's proposal will offer DOL another tool to unfairly pressure employers with respect to labor standards in their supply chain. DOL could use the data to unfairly pressure contractors based on the actions of their subcontractors, suppliers, etc.
- OSHA has vastly underestimated the proposed rule's implementation and compliance costs, and failed to account for a variety of indirect costs. Furthermore, OSHA failed to adequately consider potential economic impacts on small businesses. The proposal only serves to force employers and OSHA itself to expend time and resources that could be put to better use.
- OSHA's proposal is also concerning in the context of an earlier plan to add an additional column on Form 300 solely for the recording of musculoskeletal disorders (MSDs).⁸

How did ABC formulate its position on OSHA's proposed rule?

ABC National Government Affairs Staff carefully reviewed OSHA's proposal and consulted with the association's national Environment, Health and Safety Committee and Legislative Committee. Individual ABC members contacted National directly to provide feedback and concerns as well. In addition, staff worked with the legal/regulatory and safety experts advising the Coalition for Workplace Safety (CWS) to help shape the broader business community's position.⁹ From all these sources, the feedback received was unanimously opposed to OSHA's proposal.

⁶ Recent high-profile electronic data breaches and the technological problems associated with government-run websites give reason to be cautious regarding the protection of private employee information—particularly in the absence of a solid plan from OSHA.

⁷ Although OSHA Assistant Secretary David Michaels stated in November 2013 that the proposal is "not an enforcement initiative," OSHA also has said it intends to use the data to steer enforcement priorities. In addition, OSHA officials refused to respond when asked during a public stakeholder meeting whether the agency would use the data collected under the proposed rulemaking to supplement current use of McGraw Hill "Dodge" reports for programmed inspections in the construction industry.

⁸ ABC opposed OSHA's MSD proposal in 2010 due to the vague and subjective definition of what would constitute a musculoskeletal disorder, the hardships and confusion it would impose on employers, and the concern that OSHA was making an end-around attempt to regulate ergonomics. The agency subsequently withdrew its proposal, but it is believed that the agency intends to reissue the proposal in the future. OSHA's electronic recordkeeping proposal will aid the agency in its efforts to pursue future musculoskeletal/ergonomic rulemakings.

⁹ CWS is a multi-industry coalition comprised of more than 160 associations and individual employer members. The coalition includes several construction industry trade associations, all of which are opposed to OSHA's proposal. Along with the U.S. Chamber of Commerce and the National Association of Manufacturers, ABC has served on the CWS executive committee since 2010.

How does ABC's Safety Data Survey differ from OSHA's proposed rule?

ABC's Safety Data Survey differs from OSHA's proposal in terms of both process and objective.

- ABC's survey is a *voluntary* initiative though which members are invited to submit injury and illness data *anonymously* without the collection of personal employee information.¹⁰
 - OSHA's proposal mandates submission of injury and illness data to a federal agency—which would in turn be made public on the internet and attributed to individual employers.
- The anonymous data collected through ABC's voluntary survey is part of a broader association objective to aggregate and analyze lagging safety indicator trends across ABC members and the construction industry in general.
 - The data to be collected under OSHA's proposal will be used for agency enforcement initiatives and by non-governmental entities—including labor unions engaged in corporate campaigns—aiming to mischaracterize employers' safety records.

What is OSHA's timeline for completing this rulemaking?

OSHA's proposal was originally published on Nov. 8, 2013. A public meeting took place in Washington, DC, on Jan. 9-10, 2014.¹¹ Stakeholder comments are due by March 10, 2014.¹²

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As builders of our nation's communities and infrastructure, ABC and its members know exceptional jobsite safety and health practices are inherently good for business. We also understand the importance of common-sense regulations based on sound scientific evidence and economic analysis, with appropriate consideration of employer input and concerns. ABC will continue to monitor and respond to OSHA's rulemaking and enforcement activity to ensure the administration works *with* employers to achieve safer workplaces. For more information, visit www.abc.org.

¹⁰ ABC's Safety Data Survey submission portal is available at: <http://www.abc.org/en-us/safety/abcsafetydatasurvey.aspx>.

¹¹ A recap of OSHA's public meeting on the electronic recordkeeping rule is available at: <http://www.abc.org/NewsMedia/Newsline/tabid/143/entryid/1855/employers-voice-serious-concerns-with-osh-electronic-recordkeeping-proposal.aspx>.

¹² Until 11:59pm on Mon., March 10, ABC members can take action against OSHA's proposal by visiting ABC's Action Center (<https://www.votervoice.net/ABC/Campaigns>). As of March 4, more than 700 members have taken action.