



VIA ELECTRONIC SUBMISSION

October 14, 2014

The Honorable David Michaels, Ph.D., MPH  
Assistant Secretary  
Occupational Safety and Health Administration  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

**Re: Docket ID OSHA-2013-0023, Comments on OSHA's Supplemental Notice of Proposed Rulemaking to Improve Tracking of Workplace Injuries and Illnesses**

Dear Assistant Secretary Michaels:

Associated Builders and Contractors, Inc. (ABC) submits the following comments to the U.S. Department of Labor's (DOL) Occupational Safety and Health Administration (OSHA) in response to the above-referenced supplemental notice of proposed rulemaking published in the *Federal Register* on August 14, 2014, at 79 Fed. Reg. 47605.<sup>1</sup>

**About Associated Builders and Contractors, Inc.**

ABC is a national construction industry trade association with 22,000 chapter members. ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which they work. ABC member contractors employ workers whose training and experience span all of the 20-plus skilled trades that comprise the construction industry. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy 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. This process assures that taxpayers and consumers will receive the most for their construction dollar.

ABC member companies believe safety is a core value, above all others. ABC understands the importance of common-sense regulations based on sound evidence and scientific analysis with appropriate consideration paid to implementation costs and input from employers. Many ABC companies have implemented safety programs that are among the best in the industry, often far exceeding OSHA requirements.

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<sup>1</sup> ABC shares the concerns and recommendations provided in comments filed to this docket by the Coalition for Workplace Safety (CWS) and incorporates them into this letter by reference.

## **Background**

On November 8, 2013, OSHA issued a proposed rule<sup>2</sup> that would make the submission of the injury and illness forms<sup>3</sup> mandatory and exclusively electronic for most employers.<sup>4</sup> Currently, OSHA only requires employers to submit the forms if the establishment receives an inspection or is part of the OSHA Data Initiative. In the proposal, establishments that have employed between 20 and 249 employees at any time in the previous calendar year will be required to electronically submit the OSHA Form 300A on an annual basis. Establishments that employed 250 or more employees in the previous calendar year will be required to electronically submit the OSHA 300A form annually and the OSHA Forms 300 and 301 quarterly. For the first time, OSHA plans to make this information publically available on the Internet through a new searchable database and use the data for enforcement purposes. In addition to the comment period, OSHA held informal public meetings on the proposal.<sup>5</sup>

The supplemental notice of proposed rulemaking published August 14, 2014, comes in response to concerns expressed by stakeholders that the proposal could motivate employers to under-record their employees' injuries and illnesses.

## **ABC's Comments in Response to OSHA's Supplemental Notice of Proposed Rulemaking**

The supplemental notice lacks any supporting evidence to justify the claim of underreporting due to employer policies that allegedly discourage reporting of injuries and illnesses. OSHA instead bases the notice on unsubstantiated comments by a few stakeholders who were supportive of the initial proposed rulemaking.<sup>6</sup> In addition, it reads more like an Advance Notice of Proposed Rulemaking by posing questions for comment instead of setting regulatory text. As no regulatory text has been provided for stakeholders to comment on, there is a strong likelihood the provision would be overly broad and subjective.

Current OSHA regulations are adequately protecting the integrity of injury and illness data.<sup>7</sup> OSHA's current recordkeeping requirements, under the Occupational Safety and Health Act, require employers to inform employees on how to report an injury or illness, as well as establish mechanisms for employees to "promptly" report work-related injuries.<sup>8</sup> ABC members regularly communicate to employees that reporting injuries and illness is a critically important obligation and is essential to protect the employee and others on the jobsite. ABC members inform employees of this obligation during training and the orientation process before entering each worksite, and reinforce this concept to their employees on a regular basis. Current practice in the industry is for the employee to immediately report any injury or illness to his or her supervisor. This policy provides protection to both the

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<sup>2</sup> 78 Fed. Reg., at 67254.

<sup>3</sup> OSHA Form 300A is a summary of work-related injuries and illnesses. OSHA Form 300 is an injury and illness log. OSHA Form 301 is an incident report.

<sup>4</sup> Please see ABC's comments filed to the docket on March 10, 2014 [Docket ID OSHA-2013-0023-1356]

<sup>5</sup> Informal public meetings took place in Washington, D.C., on Jan. 9-10, 2014.

<sup>6</sup> 78 Fed. Reg., at 67254.

<sup>7</sup> Please see CWS' comments on pages 6-7.

<sup>8</sup> Employers are required to post OSHA 3165, Job Safety and Health – It's the Law

(<https://www.osha.gov/Publications/osh3165.pdf>). The posting states that employees are protected from discrimination or retaliation by their employer for making safety and health complaints.

employee and others on the jobsite. ABC members empower their employees to report injuries and illnesses.

In the notice, OSHA proposes a provision “prohibiting employers from disciplining employees for reporting injuries and illnesses...or any other action that might dissuade a reasonable employee from reporting injuries and illnesses.”<sup>9</sup> However, OSHA failed to provide any regulatory text on such a provision. With no regulatory text to comment on and no data supporting additional regulation in this area, ABC can only speculate as to the types of employer programs and policies that the agency will find an “adverse action.” While not expressly mentioned in the supplemental notice, ABC is concerned that, based on OSHA’s position on safety incentive programs, it is likely it will be considered an “adverse action.”<sup>10</sup>

The supplemental notice provides no evidence to show there is underreporting due to employer policies, such as discipline and safety incentive programs. In 2009, Congress appropriated money to OSHA to conduct an initiative on injury and illness recordkeeping. The purpose of the initiative, known as the Recordkeeping National Emphasis Program, was for OSHA to determine if any employer policies and practices existed that resulted in incomplete reporting of injuries and illnesses. At the conclusion of the program in 2012, OSHA had conducted roughly 550 federal and state recordkeeping inspections. In the initial proposed rule and supplemental notice, OSHA fails to mention any data gathered from the program. This leaves the conclusion that employers are not intentionally underreporting. If policies are in place, they are having no effect on the reporting of injuries and illnesses.

The supplemental notice does not provide stakeholders with any regulatory text to comment on; instead, stakeholders must guess as to what the agency considers to be an “adverse action.” Without the proper context, ABC members cannot comment on the full impact this proposal would have on employers and employees. In addition, OSHA failed to provide any evidence for the supplemental notice. In both the initial proposed rule and the supplemental notice, OSHA exceeded the bounds of its statutory authority.

For the reasons outlined above, as well as those in comments filed by the Coalition for Workplace Safety, ABC urges OSHA to withdraw the burdensome initial proposed rule along with the supplemental notice.

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read "G. Burr", with a long horizontal flourish extending to the right.

Geoffrey Burr  
Vice President, Government Affairs

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<sup>9</sup> 79 Fed. Reg., at 47608.

<sup>10</sup> OSHA Memorandum issued March 12, 2012, by Assistant Secretary Richard Fairfax to Regional Administrators. Please refer to CWS’s comments on page 10.