Pacific Maritime Association
Headquarters

March 10, 2014

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

Submitted Electronically: *http:/www.regulations.gov*

Re: Proposed Rule: *Improve Tracking of Workplace Injuries and Illness* (78 Fed. Reg. 67254-67283, Nov 8, 2013). Docket No. OSHA-2013-0023

Dear Assistant Secretary Michaels:

The Pacific Maritime Association ("PMA") appreciates the opportunity to comment on OSHA's proposed rule.

PMA is a nonprofit mutual benefit corporation that serves as the multi-employer collective bargaining and centralized payroll representative for approximately 74 member companies. PMA's members include shipping lines, stevedoring companies, marine terminal operators, and maintenance contractors who employ longshore and other dockworkers at marine cargo handling facilities at all 29 trading ports in California, Oregon, and Washington.

PMA and its members are committed to lowering the frequency of workplace injuries. As a result of its partnership with the International Longshore and Warehouse Union ("ILWU"), PMA and the ILWU have established local Joint Accident Prevention Committees in each port and a Pacific Coast Marine Safety Committee comprised of management and labor to address both port level and coastwise safety and health concerns. This partnership has been extremely successful at reducing the Days Away from Work rate ("DAFWII"). We are proud to say that as of 2013, the loss time injury rate has dropped 71% over the past three decades. Today we are seeing the lowest injury rates on the West Coast in our recorded history. PMA is concerned that this proposed regulation will not contribute to the success of our joint efforts and will not further the overall objective of workplace safety and health.

For the following reasons, PMA respectfully requests that OSHA reconsider and withdraw this proposed regulation.

OSHA's Proposed Regulation Will Not Provide Meaningful Information to OSHA, Employees, or the Public

OSHA has stated that as a result of the database of injury and illness records "acquired through this proposed rule, employers, employees, employee representatives, the government, and researchers will be better able to identify and remove workplace hazards." 78 Fed. Reg. 67258.

However, injury and illness data, absent context or analysis, will neither provide interested parties with meaningful information nor enable more effective targeting or enforcement. Moreover, providing raw data to employees and the public who do not necessarily know how to properly interpret it and who do not necessarily have the underlying facts required to assess and respond, will only lead to confusion and inaccurate assumptions. Valuable time and resources of OSH-dedicated staff will need to be allocated in such a manner as to alleviate such avoidable confusion and faulty assumptions. That time, we believe, is much more productively spent in the reduction of workplace hazards.

Even for those employers whose employees perform similar jobs under similar conditions, it is impossible to meaningfully compare ports based on injury and illness data alone. Rather, several fundamental differences make such a comparison useless. For instance, collectively bargained arrangements at several ports on the West Coast do not allow employees with minor or less serious injuries to engage in light-duty work or to transfer to unassigned jobs. As a result, employees will have no choice but to take days off and these employers will have artificially increased lost time injury frequency rates compared to employers at other ports that do not have similar limitations.

For instance, consider a situation in which a longshore worker suffers a minor injury. After seeing a doctor, the longshore worker is told not to lift more than 20 pounds for the next seven days, and is given a note explaining this restriction. If that longshore worker happens to work at the port in Los Angeles/Long Beach, the following day he or she may simply show the note to the hiring hall dispatcher, who will assign a job that does not require lifting over that weight. Conversely, if that worker is employed at the port in Oakland, upon showing the dispatcher the same doctor's slip, that worker is likely to be denied work that day since under the local collective agreement, he or she cannot be reassigned to another position without the approval of a joint-labor-management board that may take up to a week to consider the transfer. As a result, for the same minor injury, the employer at one port will never hear that anything has happened while another, through no fault of their own, will be required to record and report a serious injury requiring missed work.

Such artificial distinctions between employers will be wholly unrelated to the seriousness of the injury that will be recorded or the overall safety of the employer's workplace. Instead of addressing this, and many other complicating factors, OSHA has proposed to impose a one-size-fits-all database that invites inappropriate comparisons and will unfairly malign some ports and employers through no fault of their own.

Finally, we strongly recommend that OSHA undertake a realistic assessment into the manner that provisions of the DOL (OWCP)-administered Longshore & Harbor Workers' Compensation Act [33 U.S.C. 18) creates dramatically disparate benefit levels between maritime industry workers and nearly all other workers under OSHA's protective umbrella. Such disparities have historically (and artificially) inflated our industry's frequency and severity rates, and should reasonably be plugged into any equation that considers the subject of injury and illness reporting.

OSHA's Proposed Regulation Will Burden the Maritime Industry

The maritime industry operates through a unique mix of employees who work consistently for a single employer ("steadies") and employees that are hired through hiring halls and therefore work for a number of employers over a short period of time. As a result of this system, employers who employ steadies will be disproportionately negatively affected under this proposed regulation. This is because, while an injury to a steady would have to be reported and published, an injury to an employee working out of a hiring hall may result in his self-selection to a less physically demanding job or to declining work altogether until he feels better. As a result, employers who rely on staffing through a hiring hall will experience lower or less serious reportable injury rates. This will lead those viewing the information that would be published under this proposed regulation to draw inappropriate comparisons, and will unfairly harm the reputations of certain businesses.

This proposed regulation will also cause the maritime industry as a whole to be unfairly tarnished because a single injury may well be recorded and reported by numerous employers. Owing to the maritime industry's reliance on hiring halls, employees will often work for two or more employers over a short period of time. Accordingly, when employees suffer workplace injuries, they will report these injuries to each of their employers. As a result, the total number of injuries reported within the maritime industry will be higher per hour worked when compared with other industries.

Another routine occurrence arising out of the use of a hiring hall versus steadies involves an employee who aggravates a pre-existing injury or illness. Under a non-hiring hall employment relationship, such an occurrence may be recorded as a single injury with an update on the OSHA log. However, in the maritime industry, an employee who has worked for numerous employers through a hiring hall would report the initial injury to one employer and the re-aggravation to another. Such double counting again would distort the accuracy and usefulness of this information and the proposed database.

This is especially problematic when the requirements of the Longshore and Harbor Workers' Compensation Act ("LHWCA") are taken into account. For example, the LHWCA imposes liability on employers for cumulative injuries. Accordingly, an employee who has worked for one employer over a long period of time, and complains about a cumulative injury on his first day of work with a second employer will trigger an injury report that will be attributed to that second employer. Publication of this report is obviously unfair and inaccurate.

Further, owing to contractual obligations and developing regional working rules, the standards and conditions at different ports change with a degree of frequency. Accordingly, without the proper context—something that OSHA has not proposed to provide as part of this database—it will be impossible for the public to even compare the injury rates of a single port. Without an awareness and understanding of these changing variables, information posted on OSHA's database regarding the maritime industry will be misleading and meaningless.

Even more troublesome, as OSHA has itself acknowledged, would be the comparison between the maritime industry, with its unique conditions, and other industries. Indeed, as OSHA has stated:

> In regards to the longshoring industry, OSHA has traditionally performed separate analyses of broader databases to prepare employer lists specific to the longshoring industry. OSHA recognizes the unique qualities of this industry, has developed separate standards for maritime industries, including longshoring, and normally performs specialized investigations for longshoring facilities. The problems with data from the longshoring industry can be solved by continuing to look at this industry in a way that does not compare these employers to employers in other industries.

62 Fed. Reg. 6439–6440.

As noted above, any attempt to compare the maritime industry to other industries based on this information is further complicated by the application of the LHWCA. The LHWCA, which is among the most generous of any workers' compensation schemes in the country, will further distort the injury and illness rates of PMA's members. Because of the LHWCA's generous payment schedule, employers in the maritime industry will have higher rates of reported injuries as employees have a greater incentive to seek compensation by reporting injuries to their employer compared to employees in other industries.

OSHA's Proposed Electronic Reporting Requirements Are Unclear and Will Impose an Undue Burden on the Maritime Industry

OSHA's proposed regulation would require establishments with 250 or more employees to electronically submit injury and illness information on a quarterly basis. Many of PMA's members hire employees on a daily "as-needed" basis through local hiring halls. Several problems arise when the maritime industry—and this system—are forced to conform to requirements established for traditional employee-employer relationships in other industries. For instance, because of the hiring hall format, a company that only has a total of 150 full-time employees at any one time may employ hundreds of other employees throughout the year who only work for the company for a few days. It is unclear under this proposal if this company would be forced to submit reports to OSHA annually or quarterly. Further, if this company is required to submit reports quarterly, this would place an unfair burden on companies that use hiring halls compared to those that have steady employees. In this case, the employer who has steady employees would only have 150 employees and would therefore not have to report quarterly while the employer who uses hiring halls would.

OSHA's Proposed Regulation Would Publish Private, Confidential, and Proprietary Information

First, PMA's members consider employee related information such as headcounts and hours worked to be proprietary information that should not be disclosed. In the marine cargo handling industry, an establishment's man-hour count can be used to estimate the cost to operate the

facility. Disclosure of this information to the public has the potential to cause employers substantial competitive harm.

Second, despite OSHA's assertion that it will protect the identity of employees, OSHA has failed to recognize that the information provided under this proposed regulation (such as, the date of injury, job title, nature of treatment, injured body part), can be used to identify employees, particularly in small ports or at marine terminals with infrequent injuries. While OSHA has stated that it will protect the identity of the injured employee, the proposal gives no description of how this will happen.

PMA's Members May Be Subjected to Duplicate Reporting Requirements

Many longshore workers work both in marine terminals and on seagoing vessels, moving back and forth between these positions throughout their shift. During these transitions, the employee moves seamlessly between OSHA's jurisdiction and that of the local state workplace safety and health agency. For the sake of simplicity, however, injuries that occur under both federal and state occupational safety and health plans are maintained on a single OSHA 300 log. Faced with the prospect of injuries being published on the proposed database, employers may have to engage in the onerous exercise of distinguishing between injuries that occurred under federal OSHA jurisdiction and those that did not. Further, they may also have to submit this information to OSHA electronically in one form while simultaneously maintaining nearly identical information in another for state regulators.

OSHA's Economic Analysis Does Not Consider Additional Costs to the Maritime Industry

PMA also believes that OSHA's estimated annual costs of $9 for smaller companies and $183 for larger companies that will result from this proposed regulation are far too low and fail to account for many unforeseen costs associated with this proposed rule.

OSHA states that the electronic submission of information would be a relatively simple and quick matter. In support of this assertion, OSHA points to the Bureau of Labor Statistics' ("BLS") annual submission as a similar exercise. This, OSHA says, is a simple process consisting of little more than logging onto a website, entering log-in credentials, copying the required information from a paper form onto the website, and hitting the send button. The experience of PMA and its members has been markedly different. The BLS survey collection website is a time consuming and expensive exercise.

PMA itself has had the experience of submitting hundreds of BLS Occupational Injuries and Illness Surveys over the past years and can attest to how burdensome electronic submission of information can be. Further, PMA is concerned that the data errors which regularly occur in the BLS' surveys will be replicated by OSHA. This is only exacerbated by the fact that OSHA intends to publish this data, errors and all, on a public website.

OSHA has also failed to take into account the costs associated with having to train employees to record injuries in a manner suitable for publication; to implement a new electronic reporting

system; to maintain electronic databases; and the numerous unforeseen compatibility issues that are sure to arise. For example, while PMA maintains its OSHA 300 log information electronically, we have no ability to export the data to any format besides printing it in hardcopy. An OSHA official, during the public hearing in Washington, D.C. on January 9, 2014, stated that employers can just use their current electronic recordkeeping systems and export the data and upload it to the OSHA website. We do not see how this can be the case. Under the current recording system, PMA and other employers have not maintained electronic records that are capable of being uploaded or transmitted because they are only inspected during an OSHA inspection. Accordingly, moving to an electronic recording system capable of transmission will be both time consuming and costly.

Finally, OSHA's estimates do not take into account the costs described above that are unique to the maritime industry. In particular, the man-hours that will have to be devoted to attempting to prevent, if possible, duplicative reporting will be enormous. As discussed above, such reporting would result from overlapping jurisdictions and the hiring hall process. Until OSHA clarifies the confusion created by its proposal, it is virtually impossible for PMA to put a price tag on these considerable costs.

OSHA's Has Failed to Address How Employers Will Be Able to Update Injury and Illness Information

OSHA has asked the public to submit comments on whether the data submission system and database that would be created under this proposed regulation should be designed so that information may be removed or edited. PMA is deeply concerned that OSHA has progressed to this stage in the rulemaking and has not yet addressed such a crucially important issue.

It is common for an employer to record an employee's complaint at the time it is reported, prior to performing an evaluation of whether an injury has actually occurred or whether it is indeed workplace related. However, following an examination by a physician or consideration of the recordkeeping factors in Section 1904, recorded injuries regularly have to be removed or edited. The information submitted to OSHA and included on its database will be no different.

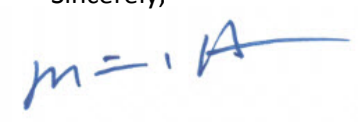
Additionally, it is particularly troublesome that OSHA will base its enforcement and targeting efforts on this information, while at the same time conceding that there may be no way to update or amend information to ensure that it is accurate. Accordingly, if OSHA proceeds with this rule, PMA believes that it is imperative that this system be designed to allow for amendments. It is difficult for us to conceive of such an up-to-date database that would allow for daily and immediate changes in order to remain accurate.

Conclusion

As this comment illustrates, OSHA's proposed regulation will have a significant, disproportionate, and burdensome impact on PMA, its members, and the maritime industry as a whole. For these reasons, PMA recommends that this proposed rule should be withdrawn.

Thank you for this opportunity to comment.

Sincerely,



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