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Docket Number: OSHA-2013-0023

OSHA Docket Office
Docket No. OSHA-2013-0023
U.S. Department of Labor, Room N-2625,
200 Constitution Avenue, NW
Washington, DC 20210

Re: Comments of the National Retail Federation ("NRF");
Occupational Safety and Health Administration's Proposed
Rule to Improve Tracking of Workplace Injuries and Illnesses

Dear Sir:

We are writing on behalf of the National Retail Federation ("NRF"), a Washington, DC-based trade association representing a vast array of US and international retailers. We are pleased to have the opportunity to comment on the Occupational Safety and Health Administration's (OSHA or the Agency) Proposed Rule to Improve Tracking of Workplace Injuries and Illnesses, 78 Federal Register 67254 (November 8, 2013) ("Proposed Regulation or Proposal"). We hope the Agency will thoughtfully consider the comments provided herein.

NRF is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs - 42 million working Americans. Contributing $2.5 trillion to annual GDP, retail is a daily barometer for the nation's economy.

I. General Comments Concerning Promulgation of OSHA's Proposed Rule.

NRF is a member of the Coalition for Workplace Safety ("CWS") and, as such, we support and incorporate by reference the comments submitted today by the CWS. In particular, the membership of the

NRF would like to highlight and emphasize the following concerns raised by CWS and various other employer groups:

- NRF is concerned that the Proposed Regulation will require disclosure of what OSHA has already correctly concluded is confidential and privileged "commercial information." OSHA has long recognized that "Lost Work Day Illness and Injury" rates would not be subject to a request for information under the Freedom of Information Act in part because the number of employee hours worked is confidential commercial information. OSHA in fact has stood fast on this position. Now, for reasons that remain unexplained, OSHA is reversing its position in this rulemaking, supporting the notion that this information should be available to the general public, including, of course subject companies' competitors.

  The Proposed Regulation is contrary to OSHA's long-standing policy that employer injury and illness data should be kept from public dissemination. OSHA's abandonment of its protection of this private information from the general public is unsupported, and should be reconsidered by the Agency before finalizing the Proposed Rule.

- OSHA has inappropriately relied on President Obama's "Open Government" initiative to support public disclosure of injury and illness records. The Administration's intention and purpose in issuing the Open Government initiative is to foster transparency in *government* actions. The Obama "Open Government" initiative relates in no way to industry data collected by an agency. Accordingly, the NRF is disappointed that OSHA is attempting to rely on this initiative as justification for its proposal to make private employer information generally available to the public.

- To the extent that there is any merit to OSHA's conclusions that employers generally significantly underreport injuries and illnesses, it seems evident that promulgation of this rule would very likely serve only to exacerbate and exaggerate this problem rather than to minimize or eliminate underreporting. NRF is aware of no underreporting among its member industries, however, it is of great concern to NRF that publication of the injury and illness data will trigger numerous negative consequences (including unfair market disadvantages; potential image and brand damage; being subjected to Labor organizing efforts, etc.). While its membership will remain fully in compliance with the recordkeeping requirements, this rule certainly is likely to dampen the current inclination on the part of employers generally to "err on the side of caution" in logging injuries that likely would not be deemed "reportable" events and generally will incentivize employers to interpret the reporting regulations as narrowly as legally plausible.

- NRF is concerned that publication of injury and illness data will be used by unions to pursue a more aggressive organizing agenda. Currently, unions do not have access to injury and illness data of non-unionized employers. Our membership has expressed concern that such information, taken out of context, could be used by union organizers to muster up support in an organizing campaign or to put unfair pressure on an employer during negotiations.

- NRF is concerned that, while OSHA recognizes and in fact promotes the recordkeeping rule as a "no-fault" regulation, the entire expressed purpose of this Proposed Regulation is based on an assumption of employer fault. OSHA recognizes that recordable employee injuries can result

from incidents at the workplace well outside of the employer's control. The purpose of logging injuries and illnesses has never before been to, by definition, "blame" the employer for these recordable events. OSHA itself states expressly in its recordkeeping regulation:

> Recordkeeping or reporting a work-related injury, illness or fatality does not mean that the employer or employee was at fault, that an OSHA rule has been violated, or that the employee is eligible for worker's compensation or other benefits.

See Note to 29 C.F.R. 1904.0.

Nevertheless, OSHA now promotes its Proposed Regulation by claiming that data collected under the Proposal will allow the public to make an assessment of the workplaces which pose the greatest risk or danger, without any context for the injuries that are publicized. Undoubtedly, employers will be held responsible, or "blamed" for these incidents.

- NRF is concerned that OSHA's burden estimates are extremely inaccurate. Numerous NRF members do not currently maintain electronic injury and illness logs. In its Proposal, OSHA estimates that it will take an employer approximately 10 minutes to submit the requisite data electronically. For employers like the many NRF members who do not maintain electronic records and who will be required to transfer their paper records to electronic format, however, this process would take considerably more time. It is not unreasonable to assume that compliance with OSHA's Proposal would take several orders of magnitude longer than OSHA's estimates for the many NRF members who fall within OSHA's "selected industries" and who also have more than 250 employees. This is in part because OSHA bases its time estimates on the time it takes employers to submit data to the Bureau of Labor Statistics ("BLS") in response to its survey. The data submitted for the BLS survey, however, is more limited in terms of information requested. BLS requests only certain data for up to 15 cases, but the Proposed Regulation would require all relevant Form 300 and/or 300A information from the entire injury and illness record. Thus the time burden would actually be much greater than OSHA predicts. Furthermore, OSHA underestimates the time and expense of training employees to input and submit this data correctly.

II. Revision of the Threshold for Rule Applicability to a DART rate of 3.6.

In addition to emphasizing the concerns highlighted above regarding the underpinnings, purpose, and consequences of OSHA's Proposed Recordkeeping Rule, NRF raises an additional issue that has not been raised by others, as far as NRF is aware. NRF specifically requests that OSHA reconsider the threshold trigger for applicability of the two primary records submission requirements. Narrowing the scope of the reporting requirements under proposed § 1904.41(a)(1) and (2) (Alternative H) would lessen the high burden on retail employers by excluding most retailers from coverage of this rule. In our view, this is an appropriate and justified outcome. We, therefore, respectfully request serious consideration to be given to this recommendation.

In its Proposal, OSHA suggests several alternatives to the current rule. One alternative, Alternative H, proposes to limit industry coverage under the first two sections of the Proposed Regulation by applying a

threshold DART rate to *both* proposed rule sections (rather than simply the second section relating to electronic submission of 300A log information), and, further, by possibly raising that threshold DART rate to 3.0 (from the 2.0 rate proposed). Raising the DART rate would alleviate the onus on a broad segment of our membership, including a number of smaller businesses, who are more likely to be severely impacted by the aforementioned burdens, while still assuring that higher-hazard industries provide the requisite injury and illness data. This would focus OSHA's and the public's attention on truly high-hazard industries.

OSHA's suggestion that consideration be given to and comment generated on a higher threshold DART rate suggests that the Agency may have at least some concern that the 2.0 DART threshold for rule coverage is set too low. **In NRF's view, both the 2.0 as well as the 3.0 DART rate are too low.** NRF believes that, if OSHA is going to promulgate this standard at all, it should revise the proposed threshold DART rate to ensure that this rule is designed to focus attention on true high hazard industries.

The best source of an appropriate threshold for coverage of OSHA's recordkeeping rule is the Agency's own plan for identifying high hazard injuries for enforcement focus. OSHA develops a Site-Specific Targeting Plan (the "Plan"), applicable nationwide, designed specifically to focus workplace inspections on high hazard industries and employers. *See Site-Specific Targeting 2014 (SST-14)*, OSHA Notice 14-01 (CPL 02), Occupational Safety and Health Administration (Feb. 2, 2014). This plan is the main programmed inspection plan for general industry workplaces that have 20 or more employees. OSHA relies on this Plan to appropriately focus enforcement resources in an effort to achieve its goal of reducing the number of workplace injuries and illnesses by directing the Agency's attention to workplaces with the highest injury and illness rates. *Id.*

In implementing the 2014 Site Specific Targeting program, OSHA established a tiered list to direct the priority of inspections. **The *lowest* tier, the Tertiary Inspection List, included establishments with a DART rate of 3.6 or lower.** *Id.* OSHA calculates this DART rate by doubling the national average DART rate in private industry. Employers with DART rates lower than 3.6 do not qualify – under OSHA's own analysis – for focused enforcement efforts under OSHA's Site Specific Targeting Plan.

NRF believes that carrying this threshold over from OSHA's enforcement targeting plan as a threshold for rule applicability makes sense. A DART cut-off of 3.6 derives from current data and is reasonably connected to the goal of the Proposed Regulation and any inspection plan that originates from the data collection. In contrast, the proposed 2.0 threshold DART threshold in the Proposed Regulation is disconnected from currently available injury and illness data, and as such, seems arbitrary. NRF therefore encourages the Agency to revise the threshold for application of this rule if it moves forward to promulgation.

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NRF appreciates the opportunity to participate in OSHA's public comment process on its Proposed Rule to Improve Tracking of Workplace Injuries and Illnesses, and encourages the Agency to give serious consideration to its comments. We look forward to further dialog in this area.

Sincerely,

David French
Senior Vice President, Government Relations
National Retail Federation

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