Pennsylvania Farm Bureau

510 S. 31st Street, P.O. Box 8736 | Camp Hill, PA 17001-8736 | 717.761.2740 | www.pfb.com

March 7, 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

Re: Docket No. OSHA-2013-0023
Proposed Rule to Improve Tracking of Workplace Injuries and Illnesses

Dear Assistant Secretary Michaels:

Pennsylvania Farm Bureau (PFB) appreciates this opportunity to provide comments to the U.S. Department of Labor's (DOL) Occupational Safety and Health Administration (OSHA) regarding the above-referenced notice of proposed rulemaking (NPRM), published in the *Federal Register* on November 8, 2013 at *78 Federal Register 67254*.

PFB is a general farm organization, made up of more than 58,000 members, providing legislative support, information, and services to Pennsylvania's farmers and rural families since 1950. Our organization includes 54 local organizations (county Farm Bureaus) that actively operate in 64 of Pennsylvania's 67 counties. PFB is the state affiliate of the American Farm Bureau Federation (AFBF), an organization representing more than six million member families throughout the United States. Many of those families—in Pennsylvania and in the rest of the United States—would be affected by the proposed rule. In addition to the comments we are offering today, we want to affirm our support of comments to be filed by AFBF on this topic, and would request that AFBF's comments be treated as part of the comments contained herein.

General Comments

PFB and its members fully understand the importance of promoting safety in the workplace and strive to minimize the incidence of workplace injuries and illnesses. OSHA's NPRM, however, appears to do nothing to achieve its stated goal of reducing injuries, illnesses and fatalities. Instead, if enacted as proposed, it will consume large amounts of agency and employer resources that could be put to better use. It will also force employers to disclose sensitive information to the public that can easily be manipulated, mischaracterized, and misused for reasons wholly unrelated to safety, and therefore potentially subject employers to illegitimate attacks and employees to violations of their privacy. In addition, the proposal will reverse the long-standing "no-fault" approach to recordkeeping and reduce employers' incentive to record questionable injuries. At the same time, OSHA failed to account for the total costs its rulemaking will impose on businesses—in particular electronic record-keeping requirements that many small farmers will be hard-pressed to comply with—while citing vast benefits without proper support for such claims. Finally, the proposed rule does not address how a seasonal or temporary workforce, which comprises a significant portion of farm labor, would be treated for reporting purposes. The following specific comments will address each of these concerns.

1. **The proposed rulemaking would require the expenditure of scarce public and private sector resources that could be used more effectively in the service of other goals, and OSHA has not provided documentation sufficient to demonstrate that its benefits will outweigh its costs to**

employers—especially small farmers who do not have the capacity to meet the rule's electronic reporting requirements.

The benefits OSHA attributes to the proposed rule are entirely speculative. The agency claims the rule's benefits will "significantly exceed the annual costs," yet the only benefits calculation done by the agency relates to costs of fatalities prevented, while the bulk of the data submitted under the rule will concern injuries, not fatalities. OSHA also claims "the data submission requirements of the proposed rule will improve quality of the information and lead employers to increase workplace safety," even though no data, surveys, studies, or anecdotal comments are offered as evidence. (78 Fed. Reg. p. 67276).

Moreover, OSHA does not take into account any consequential costs imposed on the employer due to the submission of records. Such costs include future inspections by the agency in response to the records submitted, or business or job loss as a result of misuse and mischaracterization of the data during union-conducted anti-corporate campaigns or other efforts intended to harm a given business or industry. While these may be indirect costs, the probability of such a result is higher than that of the possible benefits OSHA claims.

At the same time, under the proposed rule, OSHA would require all records be submitted electronically. The agency has assumed that most employers are keeping their records in such a manner. In its comments, AFBF notes that while OSHA acknowledges that a small portion of businesses do not have immediate access to computers or the internet, the agency has not put the rule before a small business review panel as required under the Small Business Regulatory Enforcement Fairness Act of 1996 to fully assess the impact disallowing paper submissions will have on small businesses.

OSHA claims that all businesses affected by the rule have internet access, but publicly available information refutes OSHA's claim, particularly as it is applied to agriculture. In its comments, AFBF cited surveys of farmers' computer usage, conducted beginning in 1997 and repeated every odd-numbered year since, by the United States Department of Agriculture (USDA). The results of the 2013 survey, published this past August, show that only 68 percent of farmers (both livestock/poultry and crop producers) have a computer and only 67 percent have internet access (or put another way, 32-33 percent of farmers have neither a computer nor internet access). However, the same USDA report shows that only 40 percent of farmers actually use a computer to conduct their farming business. Because submission of these records will be mandatory, failing to do so will create a hardship on agricultural employers, and increase the cost burden of the rule for employers. Therefore, should OSHA move forward with the rule, the agency must give consideration to allowing paper submissions.

2. **The proposed rulemaking will force employers to publicly release sensitive, confidential information about their employees and operations that could be used in a false, misleading manner to harm the businesses providing it.**

As currently proposed, the rule would allow OSHA to obtain and release to the public detailed information regarding specific workplace injuries and illnesses, including the company, location, and incident-specific data—but that data would lack any meaningful context. As a result, the information would not be a reliable measure of an employer's safety record or its efforts to promote a safe work environment.

Many factors outside an employer's control contribute to workplace accidents, and many injuries that have no bearing on an employer's safety program must be recorded. Data about a specific incident is meaningless without information about the employer's injury and illness rates over time as compared to similarly sized companies in the same industry facing the same challenges (even similar companies in the same industry may face substantially different challenges with respect to workplace safety based on climate, topography,

population density, workforce demographics, criminal activity in the area, proximity and quality of medical care, etc.).

Providing raw data without putting such data in context invites improper conclusions or assumptions about the employer—honestly arrived at or not—which could lead to unnecessary damage to a company's reputation, related economic losses, and misallocation of public and private sector resources. An incident report on its own is of limited usefulness—it makes no conclusions regarding whether the injury was the fault of the employer, the employee or both. Therefore, the incident data is not the appropriate tool for educating the public about workplace safety, and OSHA's collection and publication of the raw information does not further OSHA's statutory goal of improving workplace safety. Again, by making such information publicly accessible in the manner contemplated under the rule, OSHA invites those with an incentive to target and harm agricultural and other businesses the opportunity to purposefully mischaracterize and misuse this data.

3. **The proposed rulemaking's shift to "regulation by shaming" from the previously adopted "no-fault" recordkeeping system is not supported by any information, explanation or analysis, and actually creates disincentives for employers to record all possible qualifying incidents.**

In 2001, OSHA adopted a "no-fault" recordkeeping system as the foundation of its revisions to recordkeeping requirements. The agency implemented a "geographic" presumption, claiming an injury or illness that occurred at the workplace would be deemed a work-related injury regardless of circumstances surrounding the incident. In its comments, AFBF notes that the presumption came with the disclosure 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*).

Yet, under the proposal, OSHA intends to use the information reported for targeting purposes and to release the data without context or restraints. Thus, the presumption under the NPRM is that all injuries or illnesses are preventable, suggesting all incidents ultimately are the fault of the employer. The proposal essentially turns the "no-fault" reporting system into one where employers will be blamed for idiosyncratic events arising as a result of forces beyond their control or actions by workers in direct contravention of workplace rules. This is a clear abandonment of the "no-fault" system in favor of OSHA's controversial and counterproductive "regulation by shaming" enforcement doctrine. OSHA has failed to even acknowledge its reversal, or provide any justification or an analysis for this significant change, despite being required to comply with the Administrative Procedure Act and provide a reasoned explanation for this change of policy, starting by recognizing past policy and a justification for the change. OSHA has not done so in this case, and failure to do so makes this change arbitrary and capricious.

Finally, under its existing rules, OSHA encourages employers to record all possible qualifying incidents, counseling that those which turn out to be outside the reporting requirements can later be stricken. With quarterly reporting, employers will have an incentive not to record "borderline" cases because, in many instances, striking them later may be impossible as the information has already been reported and posted publicly by OSHA. The effect of the change will likely be that, rather than assume such an additional burden, employers will not record such incidents if any doubt exists. The result could provide less insight into workplace injuries for OSHA—the opposite outcome the recordkeeping initiative was intended to achieve.

4. **The proposed regulation, by identifying employers, locations, and data specifically tied to injuries, severely compromises business confidentiality and employee privacy.**

The proposed rule would require employers to submit confidential details about a business and information about its employees. Many companies consider the number of employees and hours worked at a given establishment to be proprietary information, as it can reveal sensitive details about business processes, security and overall operations. In formulating this aspect of the proposed rule, OSHA ignores several court rulings that have found employers to possess a privacy interest in such data, and fails to consider the implications of publishing it. Public disclosure of the data not only provides a company's competitors with confidential business information, but it can also jeopardize security, putting workers and the public in danger. For example, OSHA intends to publish the addresses of certain businesses that produce, store, or maintain highly sensitive, hazardous or valuable products or commodities.

This issue is of particular concern to PFB. In the agricultural industry, most employers and their families live where they work—on the farm. By creating a publicly searchable database, OSHA is proposing to make broadly and publicly available a database of farmers' personal names, home address and other home contact information. In most instances, this information is not readily available to the public, and certainly not available to the public in a database searchable by the farmer's name and locality.

In its comments, AFBF notes that a lawsuit is currently pending that would determine whether EPA is required to withhold personal farmer information in response to FOIA requests. (*AFBF v. EPA, Docket No. 0:13-cv-01751(D. Minn. 2013)*). AFBF has also expressed similar concerns in commenting on an EPA NPRM seeking to collect and develop a similar publicly searchable database of NPDES permit information. OSHA must consider the privacy interests of farmers and is obligated under federal law to do a review under the Privacy Act. The fact that many farmers conduct a business out of their homes does not eliminate their privacy interests.

Employee privacy is also a concern. While OSHA has committed to protecting the identity of employees, the agency has failed to provide satisfactory answers regarding how it intends to fulfill this mission, especially considering that there will be hundreds of thousands of records that would need to be scrubbed of employee details. This is made even more problematic because the proposal would require the submission and publication of data that could nonetheless identify individuals, particularly at smaller farms. By requiring date of injury, injured body part, treatment and job title, the identity of the employee could be easily determined by an outside entity or by other employees. In the small, rural communities where most PFB members are located, information concerning an employer is likely to be discernible even if the name of the worker is redacted.

Finally, OSHA's proposal does not explain the source of legal authority to "publish" the type of information it intends to collect. Federal law provides OSHA the authority to "develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics" (*29 U.S.C. § 673(a)).* Absent from that grant of authority, however, is any power to publish that information, even if to do so would meet OSHA's stated goal of improving occupational safety.

5. **The proposed rule does not adequately address how a seasonal or temporary workforce would be treated in determining reporting requirements.**

In the agricultural industry, much of the labor force is seasonal and temporary in nature. According to DOL, 60 percent of such workers reported that their job was seasonal, with only 25 percent reporting year-round

employment. Due to crop patterns, agricultural employers generally hire more workers during peak seasonal times, and the remainder of the year they hire fewer workers, meaning that different reporting requirements would apply for farmers at different points in the year. The proposed rule does not explain how seasonal workers would be calculated and which reporting requirement would apply. If the proposed rule is adopted, this must be clarified.

Conclusion

The proposed rule raises numerous, serious concerns for PFB and its members. It is our understanding that in its comments, AFBF will strongly urge OSHA to withdraw the proposed rule, and PFB concurs with that request. Thank you for the opportunity to submit comments regarding the proposal.

Sincerely,
Grant R. Gulibon
Director, Regulatory Affairs