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Via Electronic Submission: http://www.regulations.gov

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:

The American Farm Bureau Federation (Farm Bureau) 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 Nov. 8, 2013, at 78 Federal Register 67254.

About AFBF

American Farm Bureau Federation is the voice of agricultural producers at all levels and represents growers in virtually every facet of U.S. agricultural production in all 50 states and Puerto Rico. Nationwide, Farm Bureau represents more than 6 million member families. Our members are large and small employers that would be directly affected by this NPRM.

Comments in Response to OSHA's Proposed Rule

The proposed rule would require employers to electronically submit injury and illness information currently in the 300A, 300, 301 Forms to OSHA. Each establishment with 250 or more employees would have to report on a quarterly basis and establishments with 20 or more employees in certain designated industries would have to report annually. The agency also would have discretion under the proposal to require any employer to submit more detailed information about specific injuries and illnesses. OSHA intends to provide public online access to the injury and illness records so that "the public, including employees and potential employees, researchers, employers, and workplace safety consultants, to use and benefit from the data." (78 Fed. Reg. p. 67276). Currently, the information is not generally available to the public and is available to researchers on a basis consistent with confidential data.

The proposed rule raises many concerns for Farm Bureau and our members and we strongly urge OSHA to withdraw it. Our specific concerns are set forth below.

I. The Reported Information Is Not a Reliable Measure of an Employer's Safety Record, and will be Misconstrued and Misused Causing Misallocation of Resources and Loss of Business and Jobs

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. OSHA states in its preamble to the NPRM that the rule would provide employees, potential employees, consumers, labor organizations and businesses and other members of the public with important information about companies' workplace safety records. OSHA would providing the data without any meaningful context, however. 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 of 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 injuries 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 region, proximity and quality of medical care, etc.).

Providing raw data to those who do not know how to interpret it or without putting such data in context invites improper conclusions or assumptions about the employer, which could lead to unnecessary damage to a company's reputation, related loss of business and jobs and misallocation of resources by the public, government and industry. An incident report is just that – an incident report. 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. Nor does OSHA's collection and publication of the raw information further OSHA's statutory goals of improving workplace safety.

Furthermore, by making such information publicly accessible, OSHA invites those targeting agricultural farms and businesses the opportunity to purposefully mischaracterize and misuse information for reasons wholly unrelated to safety. For example, plaintiff's attorneys, labor unions, competitors and special interest groups may well seize on the opportunity to use such information, selectively or otherwise, as leverage against agricultural farms and businesses during legal disputes, union organizing drives, contract negotiations or as part of an effort to prevent a company from entering a specific market.

II. Posting of Sensitive Information of Employer, Location, and Injury-Specific Data Raises Business Confidentiality and Employee Privacy Concerns

The proposed rule would require employers to submit confidential details about the farm 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 information

about business processes, security and overall operations. 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 on publishing the addresses of certain businesses that produce, store, or maintain highly sensitive, hazardous or valuable products or commodities.

There are additional concerns regarding the personal privacy of farmers and their families that are of particular concern to Farm Bureau. Many farm employers and their families live where they work – on the farm. As part of this proposal, OSHA would develop and make broadly and publicly available a database of farmers' personal names, home address and other home contact information. In many 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. A lawsuit is currently pending that would determine whether the Environmental Protection Agency (EPA)is required to withhold similar personal farmer information from public disclosure under the Freedom of Information Act and Privacy Act. (*AFBF v. EPA*, Docket No. 0:13-cv-01751(D. Minn. 2013)). AFBF has also expressed similar privacy concerns in commenting on an EPA regulatory proposal seeking to collect and develop a similar publicly searchable database of National Pollutant Discharge Elimination System permit information. OSHA must consider the privacy interests of farmers' names and home contact information and is obligated under federal law to do a review under the Privacy Act. The fact that farmers conduct businesses 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 personal 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 in particular, the identity of the employee could be easily determined by an outside entity or other employees. For example, in small or rural communities where most Farm Bureau members are located, information concerning an employer is likely to be discernible even if the name of the worker is redacted.

III. The Proposed Rule Abandons OSHA's "No-fault" Approach to Recordkeeping Without Justification or Analysis

In 2001, OSHA adopted the no-fault recordkeeping system as the foundation of the 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. 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). OSHA made clear "no fault" would be attributed to injuries or illnesses submitted.

Yet, under the proposal, OSHA intends to use the information reported for targeting purposes and to release the data without context or restraints.[1] 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. Surprisingly, OSHA fails to even acknowledge its reversal, or provide any justification or an analysis for this significant change. OSHA is 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 here and failure to do so here makes this change arbitrary and capricious.

IV. NPRM Creates Disincentives to Reporting

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 close cases because, in many instances, striking them later may be impossible as the information has already been reported and posted publicly by OSHA. Rather than assume such an additional burden, employers will likely err on the side of not recording those incidents where in doubt. The result could provide less insight into workplace injuries for OSHA, the opposite outcome the recordkeeping initiative was intended to achieve.

V. Only Accepting Electronic Submissions Raises Concerns for Small Business

With 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. 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 has not provided the necessary supporting evidence.

Publicly available information, in fact, refutes OSHA's claim, particularly as it is applied to agriculture. The US Department of Agriculture has regularly surveyed farmers' computer usage in every odd year starting in 1997 with the results of the 2013 survey published this past August. The table below summarizes key findings from the survey for 2013, as reported for all farms on average.

% of Farms in 2013 that…	US (%)
Own or lease computer (pg 8)	68

[1] On the web mock-up OSHA provides the database search feature came with a caveat: "OSHA does not believe the data for the establishments with the highest rates on this file are accurate in absolute terms. It would be a mistake to say establishments with the highest rates on this file are the 'most dangerous' or 'worst' establishments in the Nation." At the same time, OSHA admits in the NPRM it intends to use the information for targeting and sites as its primary justification for the rule the fact third parties could and should base employment, business and government resource allocation decisions on the data.

Have internet access (pg 9)	67
Purchase ag inputs online (pg 10)	14
Market ag products online (pg 10)	30
Access federal websites over internet (pg 11)	14
Conduct business with USDA website (pg 12)	6
Conduct business with any other federal website (pg 12)	5

As the above chart demonstrates, 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 a mere 40 percent of farmers actually use a computer to conduct their farming business. Should OSHA move forward with the rule, the agency must give consideration to allowing paper submissions. 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.

VI. Treatment of Seasonal Workers

The proposed rule does not adequately address how a seasonal or temporary workforce would be counted 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 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. For instance, during peak harvest a farmer may have a month long need for 300 workers, but the rest of the year the farmer may only hire 20 full-time workers. Different reporting requirements would apply for this farmer 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 is an important issue that must be clarified.

VII. Underestimated costs and overestimated benefits

OSHA estimates it will cost each employer with establishments of 250 or more employees only $183 per year and only $9 per year for establishments with 20 or more employees in specified industries. The agency fails to account for many costs associated with the rule, including but not limited to the possible cost of adopting a new system to accommodate OSHA's filing system,[2] training for a new system, and implementation of electronic systems for businesses only using paper format, as mentioned above. As the numbers relating to farm use of computers and access to internet demonstrate, one-third of farmers do not have access to high-speed internet, and approximately sixty percent do not currently rely on computers to operate their business, and thus would be unable to electronically file OSHA 301, 300 and 300A. Certainly, this data raises serious concerns about the adequacy of the Agency's cost estimates for compliance with electronic reporting.

[2] OSHA's estimates related to the enterprise wide submission alternative also significantly under estimate costs. The increased investments in creating and implementing internal systems to allowing tracking and reporting at that level would vastly increase the costs of the proposed rule to small and large multi-establishment businesses.

OSHA estimates the electronic submission process would take each establishment only 10 minutes for each OSHA 301 submission and 10 minutes for the submission of *both* the OSHA 300 and 300A. This fails to accurately account for the time it will take employees to familiarize themselves with the process and review of the reports to ensure compliance with all regulations. Furthermore, if employers become responsible for removing all employee identifiers from the records, considerably more time and resources will be needed for compliance.

The benefits OSHA attributes to the rule are entirely speculative. The agency claims the rule's benefits will "significantly exceed the annual costs." The only benefits calculation done by the agency relates to costs of fatalities prevented, yet the bulk of the data 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 for instance during union conducted corporate campaigns. While these may be indirect costs, the probability of such a result is higher than that of the possible benefits OSHA claims.

Conclusion

OSHA's NPRM appears to do nothing to achieve its stated goal of reducing injuries, illnesses and fatalities, yet as proposed, it will consume large amounts of agency and employer resources that could be put to better use. The proposal will force employers to disclose sensitive employee information to the public that can easily be manipulated, mischaracterized, and misused for reasons wholly unrelated to safety, and 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. Finally, OSHA failed to account for the total costs its rulemaking will impose on businesses, while citing vast benefits without proper support for such claims.

For all these reasons, the American Farm Bureau Federation urges OSHA to withdraw the rulemaking. Thank you for the opportunity to submit comments on this matter.

Respectfully submitted,

Dale W. Moore

Dale Moore
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Public Policy