VIA ELECTRONIC SUBMISSION

March 10, 2014

The Honorable David Michaels, PhD, 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 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 notice of proposed rulemaking (NPRM) published in the *Federal Register* on November 8, 2013, at 78 Fed. Reg. 67254.[1]

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 members know exceptional jobsite safety and health practices are inherently good for business. 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 programs in the industry, often far exceeding OSHA requirements.

[1] 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

In 1971, OSHA promulgated a rule that required the recording of work-related injuries and illnesses. In 2001, the agency issued a final rule amending its requirements for reporting and recording injuries and illnesses, along with the forms employers use to record those injuries and illnesses. Under current regulations, OSHA does not collect the forms unless the establishment receives an inspection or is a part of the OSHA Data Initiative (ODI).[2]

Under the proposed rule,[3] OSHA would make the submission of the injury and illness forms[4] mandatory and exclusively electronic for most employers regardless of whether they have been inspected. For the first time, OSHA plans to make this information publically available on the internet through a new searchable database. In the proposal, establishments with at least 20 employees at any time in the previous calendar year will be required to electronically submit the OSHA Form 300A on an annual basis. Establishments with at least 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. OSHA has indicated that for the first time it will use the data for enforcement purposes.

ABC's Comments in Response to OSHA's Proposed Rule

OSHA's proposed rule exceeds the authority delegated to it by Congress and does nothing to achieve the agency's stated goal of reducing injuries and illnesses. Instead, the proposal will force employers to disclose sensitive information to the public that can easily be manipulated, mischaracterized, and misused for reasons wholly unrelated to safety, as well as subject employers to illegitimate attacks and employees to violations of their privacy.

ABC has a number of specific concerns with OSHA's NPRM, each of which is addressed below.

I. Public Disclosure of Injury and Illness Forms Will Result in Mischaracterization and Misuse of Employer Safety Records in a Manner Never Intended by Congress.

The records at issue in the present rulemaking are not reliable measures of a company's safety record or of its efforts to promote a safe work environment. As OSHA itself has long recognized, many injuries and illnesses on worksites result from conditions, activities and hazards that are outside an employer's control.[5] These records could easily be misconstrued, and improper conclusions or assumptions can be made about an employer. For example, OSHA's proposal puts smaller companies

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[2] 78 Fed. Reg., at 67256; OSHA conducts the ODI annually; it pulls data from large establishments (20 or more employees) in the manufacturing industry and in 70 non-manufacturing industries. Historically, these industries have high occupational injury and illnesses (including construction). Currently, there are 160,000 establishments who participate in the ODI. The ODI collects information from OSHA's 300A form, which is a summary of work-related injuries and illnesses. Employers are allowed to submit the information to OSHA electronically or through paper submission. The information from the ODI is used to calculate establishment-specific injury and illness rates. OSHA uses the information in its Site-Specific Targeting (SST) enforcement program and high rate letter outreach. OSHA's proposed rule to improve tracking of workplace injuries and illnesses, published in the *Federal Register* on November 8, 2013, will replace the ODI.

[3] 78 Fed. Reg., at 67254.

[4] 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.

[5] 66 Fed. Reg., at 5934.

at a disadvantage by making them appear to be less safe than larger companies by comparison. A smaller company with the same number of injuries and illnesses as a larger company is likely to have a higher incident rate.

Providing such data to the public without appropriate context 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. In addition, those wishing to target a company can use the data to mischaracterize it for reasons unrelated to safety. For merit shop construction contractors, these are not hypothetical concerns. Many high quality, safety conscious contractors have been targeted maliciously by unions and union front organizations making false or distorted claims of "unsafe" contracting based on isolated incidents taken out of context. Such distortions are frequently a component of so-called "corporate campaigns" that seek to damage employers' businesses through negative publicity in order to unfairly pressure them into signing union agreements.

By making the present proposal to publicize employer injury and illness records, OSHA is aligning itself with those who seek to distort the truth about workplace safety and unfairly blame employers for every injury or illness that occurs in a workplace. Adoption of the proposed rule will undermine OSHA's claim to workplace neutrality by injecting the agency into labor disputes.

Nowhere in the Occupational Safety and Health Act of 1970 has Congress authorized OSHA to publicize raw injury and illness records outside the employer's own workplace. Whatever limited authority Congress gave to the agency to create reporting requirements has been confined to the internal use of the agency and/or employers' own employees, not for dissemination without any context to the public at large. The proposed rule is an open invitation for mischaracterization and misuse of the records in ways that Congress never intended. The rule should be withdrawn for this reason alone.

II. Disclosure of Confidential Business and Personally Identifiable Information

Another reason why Congress withheld authority from OSHA to publicize employer injury and illness records is because such disclosure would require employers to publically reveal confidential details about the company and information about its employees. For example, under the proposed rule OSHA will collect from employers and make public confidential business details that are contained in the injury and illness records, including the number of employee hours worked. Particularly for a labor intensive industry such as construction, publicizing this information gives outsiders insight into confidential processes and operations of a business, which could be used against the company by competitors and others. The unprecedented disclosure requirement also conflicts with the agency's prior position on release of this information to the public. OSHA previously stated it considers hours worked by employees to be commercial and "privileged and confidential" information, which the agency would not release to the public. OSHA fails to give any explanation or justification for its change in position in the NPRM. ABC believes information such as hours worked is proprietary and should be protected by OSHA.

The proposal also will allow OSHA to obtain and release to the public detailed information regarding specific workplace injuries and illnesses, including location- and incident-specific data. OSHA claims the only personally identifiable information that should be withheld from public disclosure is an employee's name and social security number. However, OSHA has failed to recognize that other

information can be used to identify an employee. Particularly in a small community, the date of an injury, injured body part, treatment and job title can identify an employee.

Under the proposed rule, OSHA indicated it will be responsible for preventing personal information from being publicly disclosed, precluding employers from self-redacting personal employee information before their records are handed over to the agency. Clearly, this means OSHA will be forced to review and redact a tremendous amount of information, yet the agency has failed to explain how it plans to do so. At the public meeting held on Jan. 9 in Washington D.C., OSHA was asked about these potentially problematic details, but failed to provide additional specificity. It was clear the agency had not conducted any legal analysis into these issues.[6]

III. Disincentives to Reporting Under the Proposed Rule

This proposal could result in underreporting of injuries and illnesses. OSHA's lack of concern for this by-product of its proposal is ironic and confusing, given that the agency has made underreporting a top enforcement priority in recent years. Under OSHA's current "no fault" recordkeeping regulations, employers are more likely to record a questionable work-related incident, as there is no consequence to the employer for over reporting. [7] If an employer knows that the records will be publically available, however, and that such reporting also could lead to heightened enforcement from OSHA, it could result in employers choosing not to record a questionable work-related incident. This also could lead to employees not reporting the information if they are concerned about the public perception of their employer or their medical information being made public. Employers are not the only ones concerned; safety professionals have also expressed concerns that the proposal could lead to underreporting.[8] OSHA's rule could ultimately have a chilling effect on injury and illness reporting.

IV. Additional Construction Industry Concerns With the Proposed Rule

Construction is a unique industry that is highly transient, which makes complying with OSHA's proposal especially burdensome. Under the proposal, if an employer has 250 employees *at any time in the previous calendar year*, it will be required to submit injury and illness records on a quarterly basis. On construction worksites, the number of workers on-site is constantly changing based on the tasks at hand. Construction employers often obtain craftsmen and other workers through third-party skilled labor firms. OSHA's proposal to include temporary employees toward the establishment total will cause confusion among construction contractors that enter into a variety of contract relationships with third-party labor firms. In addition, senior level management often travels to multiple jobsites

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[6] See Transcript for January 9, 2014, page 209 (http://1.usa.gov/1iipOim).

[7] OSHA's "no-fault" recordkeeping system stems from a 2001 agency rulemaking on injury and illness recordkeeping. Under the rule's "geographic presumption" (in which an injury or illness that occurred or manifested itself at the workplace would be deemed work-related for the purposes of OSHA recordkeeping), injuries and illnesses beyond an employer's control would be recorded, which in turn meant that not all injuries and illnesses were necessarily due to an employer's behavior (some examples cited by OSHA in 2001 include lightning strikes and horseplay). In exchange for capturing the broadest possible array of work-related injuries, OSHA understood that a certain portion of these injuries would not be relevant to assessing an employer's safety and health program. And because employers were only required to submit these records to OSHA upon request (and the data was not publicly available), there was an assurance that there would be "no fault" attached to such incidents being recorded.

[8] See comments of James Thornton on behalf of American Society of Safety Engineers (ASSE), Transcript for January 9, 2014, pages 97-109 (http://1.usa.gov/1iipOim).

throughout the day. Therefore, their presence on a jobsite could trigger additional reporting. This is a potentially confusing issue that OSHA has not fully considered.

In addition, OSHA uses the McGraw-Hill Dodge Report for enforcement efforts in the construction industry. At the Jan. 9 public meeting, OSHA was asked whether the records collected through the proposed rule would be used for targeting and enforcement purposes in the construction industry. In response, an OSHA official stated that, "within the rule, we say that we can use the data we have now for inspection targeting and we will use the data we collect under this program for inspection targeting."[9] Furthermore, OSHA's unwillingness to more clearly answer the question is of particular concern to construction employers, as the collected data could have a major impact on whether they are likely to be targeted for enforcement.[10] Any enforcement targeting based off of this information is unlikely to result in greater regulatory compliance, because the data does not necessarily mean an employer is failing to comply with OSHA standards. OSHA has acknowledged this issue in the Site-Specific Targeting enforcement program and implemented appropriate quality controls. ABC recommends that OSHA outline similar quality controls to stakeholders before the agency considers moving forward.

V. Enterprise-Wide Alternative

Enterprise-wide submission of injury and illness records is one stated alternative OSHA is considering in lieu of, or in addition to, the proposed regulation. Under this alternative, enterprises with multiple establishments (five or more, in OSHA's example), are required to collect and submit records from all of its establishments. This is particularly concerning to the construction industry because contractors often have multiple establishments at a given time. This proposal would create added burdens and confusion for employers. For example, OSHA has yet to clearly define "enterprise" or "ownership control." And OSHA itself appears to be unsure how this alternative would work.

In addition, the record collection process for enterprise-wide submission could result in data that is unrepresentative of the actual workplace injuries and illnesses. Under the proposed rule, the enterprise would have to collect the information from the establishments weeks in advance of it being submitted, which could result in outdated information. If OSHA intends to move forward with this alternative, the agency must conduct an economic analysis of the costs and burdens of this proposal, including but not limited to the convening of a Small Business Regulatory Enforcement Fairness Act panel.

VI. Costs of the Proposed Rule

OSHA has greatly underestimated the cost of the proposed rule. The agency estimated the cost to comply with the proposed rule at $183 per year for an establishment of 250 or more employees, and only $9 per year for an establishment with 20 or more. This estimate is based off of the amount of time OSHA believes it will take an employer to submit the data electronically, which OSHA calculates will take ten minutes per each Form 301, Form 300 and Form 300A. Based on feedback from ABC's members, OSHA has greatly underestimated the cost of the proposal by taking an oversimplified approach to determining costs and benefits.

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[9] See Transcript for January 9, 2014, pages 94-95 (http://1.usa.gov/1iipOim).

[10] Along with enforcement, OSHA's proposal will offer DOL another tool to unfairly pressure employers with respect to labor standards in their supply chain. DOL could use the data to unfairly pressure contractors based on the actions of their subcontractors, suppliers, etc.

In determining the costs, OSHA failed to consider a number of factors. Because the employer's records would be made publically available, the employer would want to spend additional time to ensure the records reflect only unequivocally work-related incidents (something an employer would not have to worry about under the "no fault" recordkeeping system). In addition, employees tasked with recordkeeping and/or reporting duties will need to be instructed about any new processes that result from the proposed rules submission requirements—including learning how to use OSHA's website or submission portal (about which OSHA has provided little detail). OSHA also did not account for the costs of training new employees on the system as a result of staff turnover.

OSHA only accounts for 10 minutes to be spent on each form submission, however if an employer was not already keeping the information electronically, it will inevitably take substantially more time to input data into the system. For larger employers, this will likely result in multiple pages of entries. OSHA also failed to consider in its estimate how many employers are currently keeping the information electronically. OSHA has stated that 30 percent of ODI respondents submitted their forms through paper submission rather than electronically. Therefore, it is puzzling why OSHA would assume for the purposes of this rulemaking that employers are keeping the information electronically.

OSHA states the benefits of its proposal will "significantly exceed the annual costs."[11] However, OSHA has failed to quantify the benefits of the proposed rule, instead basing its claims on speculation. ABC concludes that OSHA simply cannot demonstrate that this proposed rule will result in fewer injuries and illnesses.

VII. Conclusion

The proposed rule will do nothing to achieve OSHA's stated goal of reducing injuries and illnesses and fatalities, and will instead force employers to consume large amounts of time and resources on electronic reporting which could be put to better use. The proposal risks bringing significant harm to well-meaning, responsible employers by facilitating unwarranted enforcement activity, and by publically disclosing confidential business information and information that can be used to identify individual employees. OSHA is attempting to shame employers into what it believes is a higher level of compliance by disseminating records and data that fail to show a complete narrative of a company's safety record.

For the reasons outlined above, as well as those in comments filed by the Coalition for Workplace Safety, ABC urges OSHA to withdraw this burdensome proposal without delay.

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

Respectfully submitted,

Geoffrey Burr
Vice President, Government Affairs

[11] 78 Fed. Reg., at 67271.

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.[1]

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.

[1] 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[2] that would make the submission of the injury and illness forms[3] mandatory and exclusively electronic for most employers.[4] 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.[5]

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.[6] 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.[7] 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.[8] 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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[2] 78 Fed. Reg., at 67254.
[3] 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.
[4] Please see ABC's comments filed to the docket on March 10, 2014 [Docket ID OSHA-2013-0023-1356]
[5] Informal public meetings took place in Washington, D.C., on Jan. 9-10, 2014.
[6] 78 Fed. Reg., at 67254.
[7] Please see CWS' comments on pages 6-7.
[8] Employers are required to post OSHA 3165, Job Safety and Health – It's the Law (https://www.osha.gov/Publications/osha3165.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."[9] 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."[10]

The supplemental notice provides no evidence to show there is underreporting due to employer polices, 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,

Geoffrey Burr
Vice President, Government Affairs

[9] 79 Fed. Reg., at 47608.
[10] OSHA Memorandum issued March 12, 2012, by Assistant Secretary Richard Fairfax to Regional Administrators. Please refer to CWS's comments on page 10.