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Legal & Regulatory Group

October 28, 2011

Electronically Submitted
The Honorable David Michaels
Assistant Secretary Labor for Occupational Safety and Health (OSHA)
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Occupational Injury and Illness Recording and Reporting Requirements-NAICS Update and Reporting Revisions; 29 CFR Part 1904; Doc. No. OSHA-2010-0019

Dear Dr. Michaels:

The National Automobile Dealers Association (NADA) represents more than 16,000 franchised automobile and truck dealers who sell new and used motor vehicles and engage in service, repair and parts sales. Together they employ upwards of 1,000,000 people nationwide yet the majority are small businesses as defined by the Small Business Administration.

I. Introduction

Earlier this year, the Occupational Safety and Health Administration (OSHA) sought comment on a proposal to revise its list of industries partially exempt from injury and illness recordkeeping and reporting. 76 Fed. Reg. 36414, *et. seq*. (June 22, 2011). The revised list largely results from OSHA's decision to transition from classifying industries using Standard Industrial Classification (SIC) codes to the North American Industry Classification System (NAICS). 29 CFR Part 1904, Subpart B, Appendix A; 76 Fed. Reg. 36436. The notice also seeks comment on a proposal to revise the requirement that employers notify OSHA upon the occurrence of a workplace death or certain serious reportable injuries. In response to these proposals, NADA offers the following comments and suggestions.

II. Prior History of the Partially Exempt Industries List (PEIL)

OSHA first established the PEIL in late 1982. 47 Fed. Reg. 57699, *et seq*. (December 28, 1982); 29 CFR 1904.12(h) and 1904.16. The then universe of industry sectors potentially eligible for inclusion in the PEIL included the two digit SICs 52-59 (retail trades), 60-67 (finance, insurance and real estate), and 70-89 (services). After reviewing average lost workday case injury rates (LWCIR) for 1978, 1979, and 1980 from Bureau of Labor Statistics (BLS) survey data, OSHA narrowed the prospective universe of eligible industries using an arbitrary cut-off of 75% of the overall private employer average LWICR. Specifically, SICs 52-54, 70, 75, 76, 79, and 80 did not make the cut as they had sector-specific LWCIRs above the 75% cutoff. Thus, all establishments within those sectors with more than 10 employees became subject to annual injury and illness recording. Motor Vehicle Dealers (SIC 5511), by virtue of falling within the two-digit SIC Group 55 (Automotive Dealers and Gasoline Service Stations), met the 75% cutoff and qualified for the PEIL. Like all other industry sectors in the PEIL, Motor Vehicle Dealers remained subject to workplace injury and illness surveys and to fatality/catastrophe (FAT/CAT) reporting under 39 CFR §1904.39. In the final rule, which took effect on January 1, 1983, OSHA stressed that industries qualifying for the PEIL were not included in OSHA's general inspection program, and that the rule would reduce paperwork burdens on employers without compromising worker health and safety.

OSHA began a review of the PEIL in 1996, proposing to move from evaluating industry sectors at the two digit SIC (used in the 1982 rule) to the three digit SIC level. 61 Fed. Reg. 23, *et seq.* (February 2, 1996), As a consequence, several industry sectors joined the PEIL, while several others dropped off. OSHA did not finalize its review until 2001 at which time it also established a new form and methodology for annual injury and illness recordkeeping. With respect to the revised PEIL, OSHA examined BLS survey data statistics for 1996, 1997, and 1998, focusing on the average Days Away, Restricted, or Transferred (DART) rates for all private employers and for SIC Codes 52-89. As in 1982, a 75% cutoff was applied to the overall average DART rate for all private employers. 66 Fed. Reg. 5916, *et seq.* (January 19, 2001).

The 2001 rule moved the partial exemption provision to 29 CFR Section 1904.2. By disaggregating to the 3 digit SIC level, it more closely examined whether certain potentially partially exempt sectors encompassed sub-industry sectors with average DART rates below the cutoff. 66 Fed. Reg. 5916, 6122-3. Listing some 56 two and three digit SIC Codes, the revised PEIL set out in Appendix A to Subpart B of Part 1904 included New Car Dealers within SIC 551 (New and Used Car Dealers). Apparently, the final rule caused some 60,000 net fewer establishments to qualify for the PEIL. 66 Fed. Reg. 5916, 6094.

As in 1982, the final 2001 rule stressed the appropriateness of striking a balance between the need for injury and illness information, and the paperwork burdens imposed by annual recordkeeping. OSHA specifically noted that industry sectors in the PEIL would still be subject to the BLS Annual Survey that analyzes a statistically representative sample of all industry sectors, whether or not partially exempt.

III. Proposed PEIL Revisions

The current proposal looks at 2007, 2008, and 2009 BLS Survey Data. However, instead of examining three digit SICs, OSHA now proposes to evaluate potentially exempt industries at the four digit NAICS level. This appears appropriate given that NAICS is the industrial classification system currently used by the BLS and other federal statistical agencies to classify business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. In addition, focusing on a four digit level NAICS code should provide for sufficient granularity without going overboard.

The proposed universe of industry sectors potentially eligible for the PEIL includes two digit NAICS codes 44-89. Similar to what it did in 1982 and 2001, OSHA proposes to evaluate the average DART rates of potentially exempt four digit NAICS industry sectors against a cutoff of 75% of the private employer overall average DART rate. By shifting to four-digit NAICS codes, the proposed PEIL includes a larger number of industry subgroups than the 2001 three-digit SIC-based PEIL. NAICS 4411 (Automobile Dealers) is virtually identical in scope to SIC 551 (Motor Vehicle Dealers) however; unlike in 1982 and again in 2001, Automobile Dealers are not being proposed for inclusion in the PEIL.

IV. The Final Rule Should Continue to Include Automobile Dealers in the PEIL

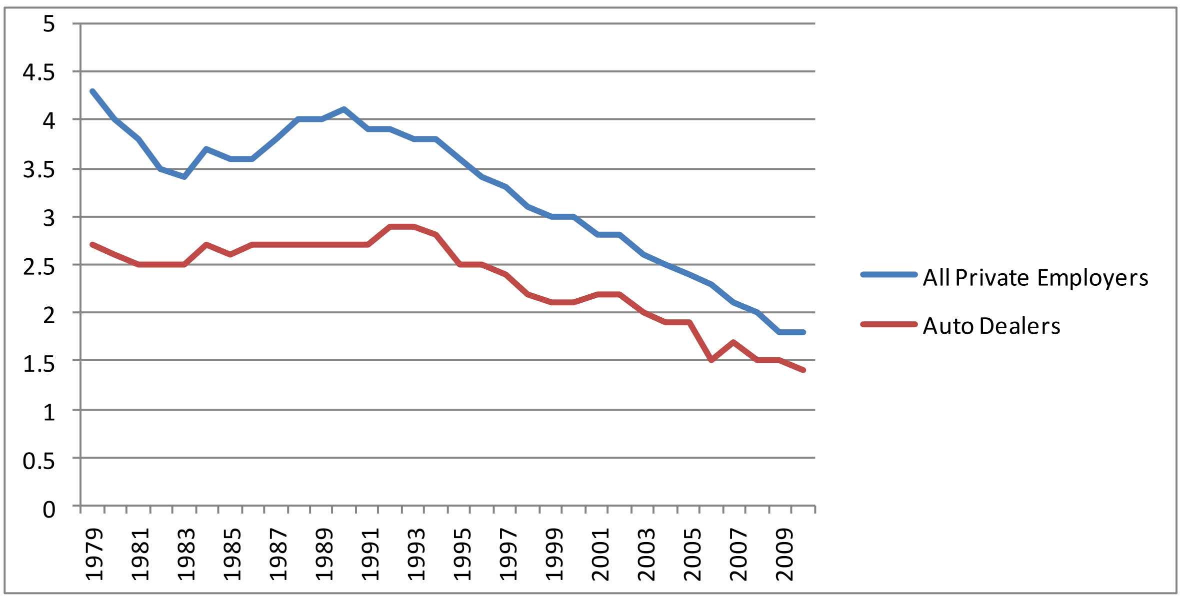
Based on BLS survey Data for 2007, 2008, and 2009, the average DART rate for all private employers is 2.0, resulting in a 75% cutoff of 1.5. Based on the same data set, the average DART rate for Automobile Dealers was 1.6, just above the 1.5 cutoff.

Earlier this month, the BLS released data for 2010. Based on 2008, 2009, and 2010 data, the average DART rate for all private employers appears to be 1.9, resulting in a75% cutoff of 1.4. Again based on the same data set, Automobile Dealers have an average DART rate of 1.5, again missing the cutoff by the slimmest of margins. In any event, NADA urges OSHA to always use the most current annual BLS survey data available to it when it finalizes this rule. Of course, doing so may necessitate the issuance of a Supplemental Notice of Proposed Rulemaking to accommodate substantive differences from what is set out in the June 2011 proposal.

The final rule should recognize and adjust for certain realities which call into question the degree to which it makes sense to apply the methodology used in 1982 and 2001 to determine which industry sectors should fall within (or without) the PEIL. For example, as shown in Table I below, the average DART rate for all private employers has fallen from 4.3 in 1979 to 1.8 in 2009 (and 2010). This laudable trend primarily results from continuous improvements in workplace health and safety, along with a decline in the relative number of higher risk establishments. Table I also shows that the average DART rate of Automobile Dealers has fallen significantly over time from 2.7 in 1979 to 1.4 in 2010. This similarly laudable 30-plus year decline in average injury and illness rates largely results from the concerted efforts dealers make to continuously enhance workplace health and safety. For example, in almost every state where allowed to by law, state dealership trade associations run new car dealership worker's compensation programs involving strong injury and illness prevention components and a consistent history of declining loss ratios. Many other state and local dealer associations make available health and safety consultations for their dealership members, which on average employ 50 people and which typically lack a full-time in-house health and safety expert.

As Table I clearly shows, the spread between the two declining average DART rates has narrowed. This trend will likely continue as the declining rate of decline becomes more pronounced. While the overall private employer industry average DART rate has in recent years fallen at a somewhat faster rate, the declining rate for Automobile Dealers continues to improve without let up. Clearly, this simple mathematically anomaly will make it increasing difficult of all potentially eligible industry sectors, not just Automobile Dealers, to qualify for the PEIL. *This trend alone warrants that OSHA adjust its cutoff metric so as to avoid penalizing industry sectors, such as Automobile Dealers, that have successfully kept average DART rates low and declining, albeit at not the same rate of decline as all private employers.*

Table I. Average DART Rates of All Private Employers vs. Automobile Dealers



As discussed below, unless appropriate adjustments are made, the rule as proposed will impose significant recordkeeping costs and burdens on Automobile Dealers with no offsetting benefits. At the very least, imposing annual injury and illness recordkeeping burdens on Automobile Dealerships will conflict with constraints imposed by the Occupational Safety and Health Act and the Paperwork Reduction Act. 29 USC 657(d) and 44 USC 3501. OSHA must not allow a statistical happenstance to result in a mandate that the Automobile Dealership sector divert resources to annual injury and illness recordkeeping, especially in light of the fact that for almost 30 years of continuously declining DART rates, adequate injury and illness data has been (and will continue to be) collected for the sector through the annual BLS Survey of Occupational Injuries and Illnesses. Moreover, it is of no small importance that Automobile Dealers have and will continue to keep injury and illness records for workers compensation insurance purposes.

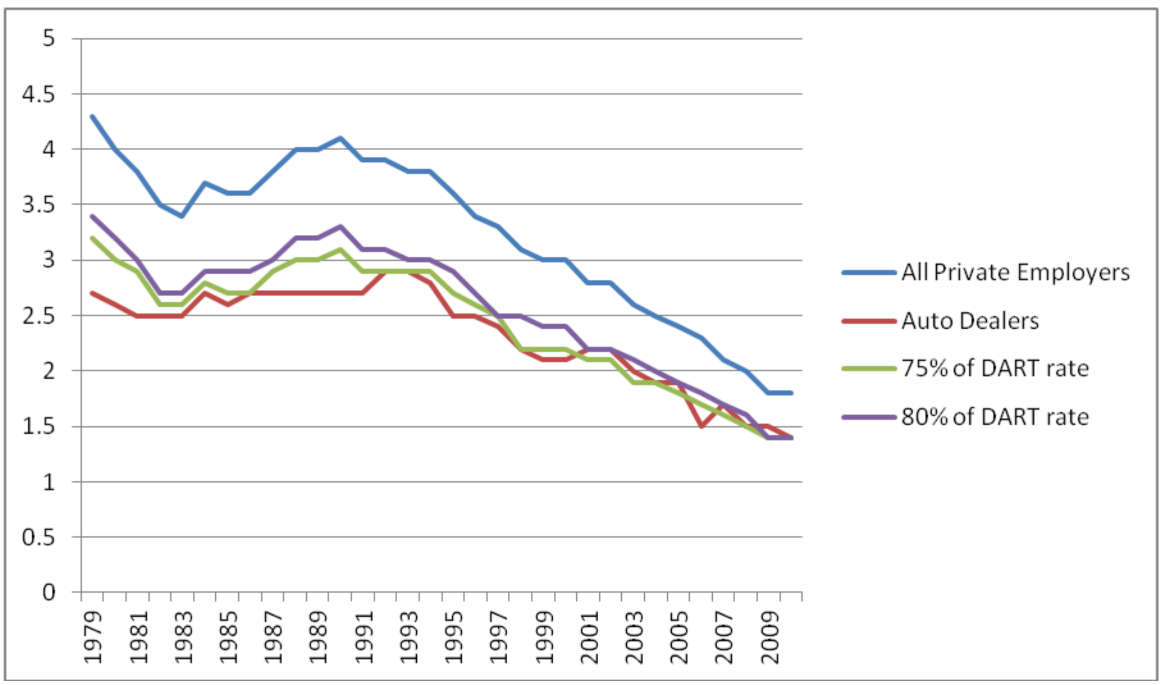
V. Solutions to the Declining-Rate-of-Decline Statistical Phenomenon

As noted above, OSHA st up the PEIL as one way to reduce unnecessary paperwork burdens on employers without compromising worker health and safety. 47 Fed. Reg 57699, 57700. As an industry, Motor Vehicle Dealers were PEIL eligible in 1982 with an average LWICR of 2.6 in 1982, and New Car Dealers made the list in 2001 with a DART rate of 2.4. The following ideas represent of just a few of many potential options which, alone or together, could serve to preserve the partial exemption for an industry sector that, based on 2010 data, achieved an all-time-low average DART rate:

1. <u>Incrementally Increasing the Cutoff Percentage</u>

As the overall average DART rate for private employers continues to trend down, the cutoff percentage should be increased incrementally to compensate. For example, as depicted in Table II, a cutoff percentage of 80% would enable Automobile Dealers to qualify for the PEIL whether OSHA were to use 2007, 2008, 2009 or 2008, 2009, 2010 data.

Table II. Average DART Rates of All Private Employers and Automobile Dealers Plotted With Cutoffs of 75% and 80%



An 80% cutoff for the PEIL would serve just as the 75% cutoff metric did to strike a balance between collecting sufficient, useful data while minimizing unnecessary recordkeeping burdens. The stated purposes for a cutoff metric, as eloquently discussed in the 2001 rule, would be better served by such an adjustment. 66 Fed. Reg. 5916, 5942. As the overall DART rate for private employers predictably continues to decline, OSHA will need revisit and adjust the cutoff percentage upwards so as to avoid imposing undue burdens on an increasing number of lowhazard, declining DART rate industry sectors. For that purpose and in any event, OSHA should initiate a review the PEIL soon after he results of a new economic census become available.

2. Using the Overall Private Employer Average as the Cutoff

OSHA could avoid having to make continuous adjustments to its "cutoff" percentage by setting a 100% cutoff, that is, by using the overall private employer DART average as the cutoff. This can be justified by noting that the current 1.8/1.7 overall average falls well below the 1982 cutoff of 3.1 and the 2001 cutoff of 2.5. In point of fact, given where the "curve" has moved to, OSHA should give serious consideration to setting the overall private employer average as the appropriate PEIL cutoff.

3. An Increasing Rate Backstop

In additon to selecting and applying a new cutoff metric to rationalize the PEIL qualification process, OSHA may want to consider an increasing DART rate backstop. For example, if after reviewing three years of DART data it becomes apparent that an industry sector's rate is *increasing*, perhaps that sector should become subject to annual recordkeeping, until the next PEIL review. Such a backstop could help serve to identify, explore, and remediate new sector-wide injury and illness concerns.

VI. Costs to Employers of Annual OSHA Form 300 Recordkeeping

In the proposed rule, OSHA has significantly underestimated the cost to Automobile Dealers were they to be required to comply with annual Form 300 recordkeeping. In particular, the proposal indicates that it will cost all newly regulated establishments only some $8.5 million, with a range of establishment costs of $50-100, and a per dealership cost of $84/year.

Using 2006 Census data, the proposal indicates that 23,351 Automobile Dealers each will be impacted by having to train at least one person on Form 300 injury and illness recordkeeping. A cursory review of the training offered by nationally known safety training organizations suggests that the cost will be much more than OSHA estimates. For example, the National Safety Council provides a one-day OSHA recordkeeping training course to the tune of $300 for non-members. This figure does not include travel, lost income, and other related expenses which could easily exceed the $300 fee. Thus, the Automobile Dealers sector alone reasonably may be expected to incur up to $15 million in initial training costs. Using OSHA's 20% turnover rate, Automobile Dealers would incur ongoing training and related costs of $3 million annually. In addition, compliance will require that each establishment have at least one employee earning $30/hour devote some 3-5 hours/per year for the remaining compliance responsibilities, including monitoring for workplace related injuries and illnesses, and completing, certifying, and posting the log.

To the extent Automobile Dealers compile similar records for workers' compensation insurance purposes; some of these new costs (and burdens) will be duplicative. Also, NADA recognizes that the costs for potentially newly regulated establishments in a given sector are partially offset by the costs traditionally incurred by compliance with the annual BLS survey. Of course, the benefits associated with newly regulating a sector (if any) must be off-set against the benefits associated with requiring that sector to respond to the BLS survey.

VII. Proposed Revisions to 29 CFR Section 1904.39

The proposal would amend the current mandate that establishments, including Automobile Dealers, orally report to OSHA within eight hours after the work-related death of an employee, or the in-patient hospitalization of three or more employees, by requiring instead the oral reporting to OSHA *any* in-patient employee hospitalization. In addition, work-related amputations would need to be reported within 24 hours.

NADA supports the proposed fatality and amputation reporting requirements, but suggests that the existing standard for reporting in-patient hospitalizations adequately serves to meet the legitimate need for OSHA to respond to and/or learn from serious workplace incidents. Requiring the reporting of *all* employee in-patient hospitalizations would unnecessarily burden both employers and OSHA with an unduly large number of reports, many of which will reflect nothing more than precautionary hospitalizations directed at concerns that may or may not be work-related. Unfortunately, the litigious nature of modern day society often causes hospitals to admit patients for observation in an abundance of caution.

On behalf of NADA, I thank OSHA for the opportunity to comment on this matter.

Respectfully submitted,

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