CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

RANDEL K. JOHNSON
SENIOR VICE PRESIDENT
LABOR, IMMIGRATION & EMPLOYEE BENEFITS

1615 H STREET, N.W.
WASHINGTON, D.C. 20062
202/463-5448

MARC D. FREEDMAN
EXEC. DIRECTOR, LABOR LAW POLICY
LABOR, IMMIGRATION & EMPLOYEE BENEFITS

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Room N-2625
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200 Constitution Avenue, N.W.
Washington, DC 20210

By electronic submission: http://www.regulations.gov

**Re: OSHA Docket No. 2010-0019, Occupational Injury and Illness Recording and Reporting Requirements—NAICS Update and Reporting Revisions; 76 Fed. Reg. 36414, (June 22, 2011)**

To the Docket:

The U.S. Chamber of Commerce (Chamber), the world's largest business federation with over three million members, represents businesses of all sizes and in every market sector and throughout the United States which will be directly affected by the Occupational Safety and Health Administration's (OSHA) promulgation of this regulation updating the industry codes used to identify industries that are partially exempt from the recordkeeping requirements from the Standard Industrial Classification (SIC) system to the North American Industry Classification System (NAICS) and the additional changes to reporting requirements for work related hospitalizations and amputations.

While the Chamber understands and supports OSHA's conversion from the SIC codes to the NAICS codes, there are implications of this move that suggest the need for more examination than OSHA has given it. Additionally, many employers and members have indicated concern with the new requirement that all work related employee hospitalizations will have to be reported within eight hours, instead of the current requirement which only requires reporting when three or more employees are hospitalized. Finally, OSHA's reliance on Bureau of Labor Statistics (BLS) data to support the determination of which industries qualify to be partially exempt from recordkeeping requirements belies the agency's criticism of this data as unreliable because employers self report and some have incentive programs in place which OSHA believes suppress employees from coming forward with injuries.

**OSHA Should Have Convened a SBREFA Panel to Examine the Impact Changing to NAICS Would Have on Small Businesses Who Would Now Have to Maintain Records**

While the conversion from SIC to NAICS is close, it is not seamless. As OSHA makes clear in Tables III—6 (Economic Impacts of Industries that Include Establishments that Would be Newly Required to Keep Records), III—1A (Industries that Include Establishments that Would be Newly Required to Keep Records), III—3A (Annualized Costs to Industries that Include Establishments that Would be Newly Required to Keep Records), and III—6A (Economic Impacts of Industries that Include Establishments that Would be Newly Required to Keep Records) there are a significant number of industries and establishments that will now have to keep records, and there are economic impacts on these establishments.

Many of these establishments are small businesses. Accordingly, OSHA would have benefited from convening a Small Business Advocacy Review panel as provided for under the Small Business Regulatory Enforcement Fairness Act (SBREFA).[1] OSHA certified that this regulation will not have "a significant economic impact on a substantial number of small entities" and so a SBREFA panel is not required.[2] However, OSHA always has the option of convening such a panel voluntarily and taking comments directly from affected small businesses before a regulation is proposed to better understand the impact of their proposal and identify specific concerns from small entities that will have to comply.[3] Since the industries where small entities will now have to comply with the recordkeeping regulation are already identified in this rulemaking, this would seem to be an ideal regulation where such a panel would have provided OSHA with valuable information.

Instead of seeing these panels as obstacles to be avoided, OSHA should welcome the value of the input from small businesses they provide. OSHA has shown a determined resistance to the SBREFA process and avoided it whenever possible. Indeed, in the MSD Recordkeeping rulemaking OSHA was forced to withdraw their final regulation from the clearance process at the Office of Information and Regulatory Affairs so they could gather more input from small businesses since the agency did not convene a SBREFA panel during the rulemaking. This is another example where OSHA could have taken the extra step to develop a better understanding of their proposal but chose to emphasize moving forward with the rulemaking instead.

**Concerns with the New Hospitalization Reporting Requirement**

OSHA is proposing that employers will now have to report directly to OSHA "within eight hours after the in-patient hospitalization of any employee" where the hospitalization is work related.[4] OSHA further defines "in-patient hospitalization" as "when a person is 'formally

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[1] See, 5 U.S.C. 609 (b).
[2] 76 Fed. Reg. 36427.
[3] See, 5 U.S.C. 609 (c).
[4] 76 Fed. Reg. 36437.

admitted' to a hospital or clinic for at least one overnight stay."[5] Despite this attempt at clarification, questions remain about this new requirement and employers have concerns about whether this is truly necessary or just adding more complications to an already presumably difficult moment.

OSHA seems to be carrying over from the current reporting requirement, which only applies when there are three or more employees hospitalized the clarity of whether the hospitalization is work related. When three or more employees are involved, there is greater certainty that their hospitalization is work related. However, when the threshold is any single employee, that certainty can be much less. Since the regulation specifies that any hospitalization within 30 days of an incident must be reported,[6] this leaves a significant window of time where an employee might develop a reason to be hospitalized that may have a questionable relationship to the workplace. Indeed, the employee may be hospitalized after he or she is no longer employed by the employer which would significantly complicate an employer's ability to know about the hospitalization.

What actually constitutes being "formally admitted" thus triggering the eight hour clock may also not be clear. While the eight hour window is the current standard, again applying it to all employee hospitalizations increases the possibilities of compliance problems. If an employee is brought to an emergency room, delays of some hours are often common raising questions of the exact window for when an employer will be required to report. Employers have also raised concerns about whether they need to report the hospitalization if it is only for observation or as a precautionary measure. If the employee arrives at the hospital late at night, they might be admitted just so they can be observed until a specialist arrives. Indeed, this scenario would raise questions about what constitutes an "overnight stay." Finally, large employers have raised the concern that the incident may happen at a remote facility and the person responsible for reporting may not learn of the hospitalization in time to meet the eight hour deadline.

The proposal also adds a new requirement that amputations be reported to OSHA within 24 hours. Employers do not object to having to report amputations, but OSHA has failed to explain how an employer is to deal with an amputation that leads to a hospitalization as will most likely happen. The Chamber suggests that for simplicity these two categories should trigger the same reporting window, and that it should be longer than the mere 24 hours for amputations or the eight hours for hospitalizations OSHA has proposed. OSHA will not be able to respond to any of these incidents in such a quick way that expanding these reporting windows from 24 and eight hours will undermine its ability to respond in a timely way. The fact that OSHA says a hospitalization occurring as much as 30 days after the work related incident still needs to be reported makes clear that an eight hour window for reporting such a hospitalization has nothing to do with mitigating the workplace condition and is entirely arbitrary.

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[5] 76 Fed. Reg. 36419.
[6] 76 Fed. Reg. 36438.

OSHA justifies this expansion of the hospitalization reporting requirement by saying it "will provide OSHA with additional information on the causes of workplace incidents and lead to greater prevention of injuries."[7] Yet there is every reason to believe that the significantly increased level of reporting this will generate will overwhelm OSHA's limited resources and that OSHA will not learn anything more about the "causes of workplace incidents" than if the agency was only receiving hospitalization reports triggered by three or more employees. In fact, since an incident involving three or more employees would certainly be a more obvious marker of a problem in that workplace, requiring reporting for every employee who is hospitalized will likely have the effect of burying OSHA in so many reports that the significant ones may not get the attention they deserve.

The more likely explanation for expanding the reporting requirement is to create more opportunity for enforcement. OSHA attempts to justify the expanded reporting requirements by speculating that "if such improvements in information and *enforcement* save even one life every three to four years as a result of this proposed rule, they will more than pay for the costs associated with such notifications."[8] (Emphasis added.) OSHA seems to be just guessing that this new approach may have some benefits. And why just one life over three to four years? Why not some higher number of lives every year? As it has done since it came into office, this administration's OSHA is equating more enforcement with better workplace safety. After more than two and a half years, the injury and illness and fatality rates have all but leveled off—dropping only by the slimmest amounts in the last reported year.[9] The increased emphasis on enforcement is not generating equivalent decreases in workplace injuries, illnesses, and fatalities. Indeed, against the backdrop of persistently high unemployment in some of the key dangerous industries such as construction and manufacturing, these numbers look more like increases.

Finally, OSHA should provide for more methods of reporting than merely calling in an oral report. With the availability of so many more sophisticated technology platforms, restricting reporting to a phone number is not only limiting, it does not provide a record that the employer satisfied the requirement. OSHA should allow for reporting via email, interactive web site, texting and faxing to provide maximum flexibility for employers and give them a record they can use to demonstrate compliance.

**OSHA's Reliance on BLS Data to Distinguish Low Hazard Industries Belies the Agency's National Emphasis Program on Recordkeeping and Public Statements**

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[7] 76 Fed. Reg. 36419.

[8] 76 Fed. Reg. 36426.

[9] See, DOL Press Release Number 11-1547-NAT, October 20, 2011: "The U.S. Department of Labor's Bureau of Labor Statistics today announced that nonfatal workplace injuries and illnesses among private industry employers declined in 2010 to a rate of 3.5 cases per 100 equivalent full-time workers, down from a total case rate of 3.6 in 2009." Additionally see, DOL Press Release Number 11-1280-NAT, August 25, 2011: "Preliminary results from the Bureau of Labor Statistics' National Census of Fatal Occupational Injuries released today show little change in the number of workplace fatalities in 2010 compared with 2009. Last year, 4,547 workers died from work-related injuries, down from a final count of 4,551 fatal work injuries in 2009."

OSHA relies on BLS data for this rulemaking to distinguish those industries which qualify for the partial exemption from record keeping and reporting.[10] This reliance on BLS injury data is at odds with other OSHA efforts and comments that indicate a lack of faith in the credibility of this data since it is generated by employers self reporting. Chief among OSHA's actions has been a National Emphasis Program (NEP) on Recordkeeping which seeks to establish that employers have been underreporting injuries and discouraging employees from coming forward on a level that undermines the value of the BLS data. Then Acting Assistant Secretary Jordan Barab gave the following remarks to the American Society of Safety Engineers in 2009:

> We are…preparing an NEP to confront recordkeeping problems. Congressional hearings, studies and media reports have all described serious accounts of underreporting injuries and illnesses, as well as policies that discourage workers from reporting when they're sick or hurt. To address this problem, OSHA received $1 million for Fiscal Year 2009, which we're putting to work. Ensuring the accuracy of injury and illness numbers is critically important to OSHA's ability to accurately target enforcement and evaluate our effectiveness.
>
> And one more thing on recordkeeping: We will also be taking a close look at programs that have the effect of discouraging workers from reporting injuries and illnesses. These include programs that discipline workers who are injured or safety competitions that penalize individual workers or groups of workers when someone reports an injury or illness.

Secretary of Labor Solis has even expressed doubt about the credibility of this data while noting improvements in injury rates: "We are concerned about the widespread existence of programs that discourage workers from reporting injuries…"[11]

Yet despite all the effort, tax dollars, and comments, OSHA has not been able to confirm that the BLS data is inaccurate or not credible. Indeed, the fact that the agency has enough confidence to rely on it for this rulemaking suggests otherwise. OSHA cannot have this both ways: either BLS data on injuries and illnesses is sufficiently reliable to use as the foundation for a rulemaking, or employers have corrupted this data by under reporting and suppressing employees' ability to come forward with their injuries.

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[10] Employers who are in industries listed by OSHA in Appendix A and those with 10 or fewer employees are exempt from maintaining injury and illness records unless required to by BLS as part of its Annual Survey, or by OSHA as part of its Data Initiative. All employers under OSHA's jurisdiction are required to report fatalities, in-patient hospitalizations, and under this proposal, amputations.

[11] Press Release Number 10-1481-NAT, October 21, 2010.

**Conclusion**

OSHA is moving in the right direction by transitioning from the SIC codes to the NAICS codes. Unfortunately, the agency did not take the time to do a SBREFA panel that would have given them direct input from small businesses who will now be required comply with the recordkeeping regulation. The new requirement for reporting hospitalizations of every employee within eight hours will create confusion, burden and exposure to citations for employers and OSHA has not provided sufficient explanation of the benefits of this proposed change. Finally, OSHA relies on BLS data based on employer reports for determining which industries should be partially exempt. This is the same data the agency claims is tainted by employer underreporting and incentive programs that suppress employees coming forward.

Sincerely,

Randel K. Johnson
Senior Vice President
Labor, Immigration & Employee Benefits

Marc Freedman
Executive Director, Labor Law Policy
Labor, Immigration & Employee Benefits

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