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OSHA Docket Office  
Docket No. OSHA-2013-0023  
U.S. Department of Labor  
Room N-2695  
200 Constitution Avenue. NW  
Washington, DC 20210

Re: Improve Tracking of Workplace  
Injuries and Illnesses

Dear Sir/Madam:

ORCHSE Strategies, LLC (ORCHSE) welcomes this opportunity to comment on the Occupational Safety and Health Administration's (OSHA) August 14, 2014 Federal Register notice seeking comments on its Notice of Proposed Rule Making (NPRM) to Improve Tracking of Workplace Injuries and Illnesses.

ORCHSE Strategies (formerly known as ORC Worldwide and more recently as Mercer HSE Networks) is an international occupational safety, health, and environmental consulting firm that has for more than 40 years specialized in providing a wide array of services to American businesses. Currently, more than 120 large (mostly Fortune 500) companies in diverse industries are members of one or more of ORCHSE's Occupational Safety and Health networks. The focus of these groups is to promote effective occupational safety and health programs and practices in business, to facilitate constructive communications between business and government agencies responsible for establishing national occupational safety and health policy, and to advocate responsible business positions to regulators. The activities of ORCHSE's Occupational Safety and Health networks are based on the premise that providing safe and healthful working conditions is of mutual importance to employers, employees and government agencies.

It should be noted that companies that are members of ORCHSE's Occupational Safety and Health networks may have provided substantial information, opinion, and advice to ORCHSE in the development of its comments. However, the following comments are solely those of ORCHSE and may differ from the views and comments of individual member companies.

## **I. General Comments**

As noted in our March 8 comments to the original proposed rule, ORCHSE supports OSHA in its efforts to obtain more comprehensive data to better direct the Agency's scarce resources to the sites and processes where they are needed the most.

We also support the principles of openness and transparency that underpin OSHA's proposed rule. Many of our member companies already make their injury and illness data publicly available in safety, health, and sustainability portions of their Corporate Annual Reports, and many participate in Sustainability Indices that are transparent and administered by independent organizations.

However, we had serious reservations concerning the original proposal, and those reservations continue. We believe that as proposed, the rule is unlikely to achieve OSHA's stated (and implied) objectives. More importantly, the likely negative consequences of the rule outweigh its projected benefits.

### **A. Initial Reactions**

#### **1. Our initial comments included the following concerns:**

- a. The Proposal *lacked key details* to explain the need and justification for such a massive data collection; there was no explanation in specific terms of existing data gaps or how the proposed data collected will benefit OSHA and others.
- b. OSHA *did not adequately explain how the Agency would handle* the mass of data submitted on a flow basis. It would be a mistake for OSHA to release and publish the data before it has been edited and validated. The quarterly collections cycle presumes OSHA's ability to process and validate the data at an unrealistic speed,
- c. The proposed architecture of the quarterly collection is *inefficient and not well aligned with OSHA's real data needs*. The scope of the quarterly data collection is determined by size (sites with 250 or more employees) rather than risk. The bulk of the cases collected will be minor not serious. Data for targeting should be focused on risk and the tracking of higher hazard operations that are likely to experience more-serious cases. Data for research could be collected in a more effective and efficient manner by using representative rotating samples custom tailored for each study.
- d. The *quality of the source data* is already questionable and is likely to worsen with the added pressure from publication. Under current circumstances OSHA cannot reliably police the data on an ongoing basis without diverting resources from other priorities. That is not likely to change in the foreseeable future.

To be clear, we view "gaming the numbers" as a cancer that undermines an effective safety and health culture and negates the otherwise positive impact of a safety and health

management system. However, the employer is not the only source of bias that can impact the reporting and recording of cases; there are multiple sources of bias that affect the recordkeeping process (described in detail below).

e. Publication of the data is not likely to get OSHA the results it anticipates. We doubt that the net effect of “shaming” employers will be to improve overall worker safety and health. History has shown that, when under pressure, some employers manage their rates by manipulating the system. And, as we have stated, it seems clear that OSHA does not have the resources to maintain current inspection levels while effectively auditing the records on an ongoing basis.

f. The proposed rule may subject employers to increased liability for inadvertent release of private information. Given the huge volume of cases to be submitted, OSHA is not likely to catch unintended privacy disclosures prior to publication.

g. Many employers invest substantial time and effort checking and verifying their data prior to sending it into OSHA and/or BLS. Shifting from a single data submission to four data submissions per year would add substantially to the already significant cost and burden for these employers. It would also complicate the process; employers would have to create estimated day counts for cases that are not closed at the time of each reporting and then correct them each quarter or when the cases are finally resolved; a difficult task when applied to regular employees, and extremely cumbersome for contractors supervised on a day-to-day basis.

h. Under the proposal many companies will still have to deal with BLS and OSHA’s overlapping data requests, both of which are mandatory. Dual reporting creates unnecessary burden, adds to the government’s cost in administering safety and health programs, and detracts from US-based companies’ ability to compete in the global marketplace.

## **2. Initial Recommendations**

We sympathize with OSHA’s need for better data to administer its programs and direct its scarce resources. However, before launching a massive new data collection we recommended that OSHA:

*a. Take significant steps to assess and improve the quality of the source data.*

*b. Develop an interim plan to maximize the use of existing data NOW to target and address the most-serious hazards, while refining a long-term plan to fill key data gaps and needs.*

*c. Support the funding of a comprehensive study of the nation’s occupational injury and illness data systems to identify system gaps and current data needs, and eliminate system overlap and waste.*

*d. Work with BLS to eliminate the double reporting burden that exists when employers have to provide essentially the same data to both OSHA and BLS.*

## **B. Current Request for Additional Information**

Given the issues with the original proposal, we applaud OSHA for reopening the record to seek additional information. However, OSHA's current round of questions seems to focus on one issue: employers having processes in place that discourage employees from reporting cases that are potentially recordable. While this problem is real, we are concerned that the questions reflect a one-dimensional approach to a complex problem, and regrettably, a narrow understanding of the reasons that cases are not reported and/or recorded properly. Consequently we fear that focusing on these issues is likely to lead the Agency to an incomplete and ineffective solution.

When confronted with a potential under-reporting issue at one of his sites, one of our members catalogued 20 different sources of bias that impacted the reporting and recording of cases. Employee reporting of discretionary cases (those that can be hidden) is often made on the basis of perceived consequences to the injured/ill employee, and is influenced by factors such as:

1. Likelihood of discipline
2. Supervisory behavior
3. The employee's relationship with the supervisor
4. Incident investigation practices
5. Gain-sharing plans with recordable rate as one of the metrics
6. Company recognition programs
7. Benefit plan designs
8. Response of the initial treatment provider
9. Employee relationship with the company doctor
10. Accessibility of the medical provider
11. Perceived costs--workers compensation vs. company non-occupational coverage
12. Job content or schedule
13. Post-accident drug testing

Variables affecting employer recordkeeping practices include:

1. Knowledge of the rules by employees, the record keeper, supervisors, and key operations staff
2. Understanding complicated (and sometimes seemingly stupid) nuances
3. Information flow within the company
4. Dealing with pressure on the metric
5. Ability to check the thoroughness and accuracy of information provided by the employee

6. Company physician vs. personal medical care
7. Location of medical department (onsite vs. offsite)

Our collective staff experience (based on government experience and decades of servicing over 120 large corporations in 20 different industry sectors) confirms the thrust of those findings. Some pressures affecting the recording and reporting of cases are overt and can be traced back to the employer. However other pressures are subtle and more attributable to human nature and a byproduct of relationships in and outside of the organization.

## II. OSHA's Specific Questions

**Unfortunately, the narrow scope of OSHA's questions signals a bias on the part of the Agency and a misunderstanding of the recordkeeping process.**

*1. Are you aware of situations where employers have discouraged the reporting of injuries and illnesses? If so, describe any techniques, practices, or procedures used by employers that you are aware of. If such techniques, practices, or procedures are in writing, please provide a copy.*

See the list provided above. Some of the items are employer practices that may or may not be intended to discourage reporting. Some of the items are not really attributable to employers. Several sources of bias are inadvertent and probably can't be addressed by regulation. Publication of the data will likely increase the negative impact of many of these sources.

*2. Will the fact that employer injury and illness statistics will be publically available on the internet cause some employers to discourage their employees from reporting injuries and illnesses? Why or why not? If so, what practices or policies do you expect such employers to adopt?*

Yes. Businesses are driven by results and companies operate in a competitive business environment. So publication of the data will increase the focus on OSHA injury and illness rates. Some companies will respond by improving their injury and illness prevention process. Others will not. Even in the best companies there will be a natural tendency to want to avoid an OSHA recordable case if at all possible. We expect the new approach will undermine the adage that has existed since the system's inception, "when in doubt, put the case on the OSHA log."

*3. Are you aware of any studies or reports on practices that discourage injury and illness reporting? If so, please provide them.*

OSHA is aware of the results of its own NEP on recordkeeping; GAO's studies of recordkeeping; and the studies of under-reporting that were cited in the Congressional Report that covered under-reporting in the poultry processing industry. However, other

than those studies and the study referenced above, we are not aware of any studies of employer recordkeeping practices, good or bad.

Given the current lack of knowledge, we believe that a comprehensive study of the quality of the data and potential sources of bias is needed, and should be completed before any final action by OSHA.

*4. Do you or does your employer currently inform employees of their right to report injuries and illnesses? If so, please describe how and when this information is provided.*

In addition to a right to report, we believe that OSHA should make it clear that employees have an *obligation* to report. The obligation is not a legal one in terms of accountability under the Act. Rather it is a moral obligation to inform their employers of the hazard so that it can be abated and coworkers can be informed of the risk.

*5. Are there any difficulties or barriers an employer might face in trying to provide such information to its employees? If so, please describe them.*

Employees need a basic understanding of what types of injuries and illnesses are recordable if they are to effectively satisfy their reporting rights/obligations. Given the complex nature of the OSHA criteria, providing guidance to a large and diverse workforce can be challenging.

Part-time workers, workers in a distributed workforce, and workers with language issues all add to the challenge.

*6. How might an employer best provide this information: orally to the employee, through a written notice, posting, or in some other manner?*

Any of the above....depending on the business circumstance and the characteristics of the worker population.

*7. What procedures do you or does your employer have about the time and manner of reporting injuries and illnesses? How do these procedures assist in the collection and maintenance of accurate records? May an employee be disciplined for failing to observe these procedures? If so, what kind of discipline may be imposed?*

No response

*8. Are you aware of any examples of reporting requirements that you consider to be unreasonably burdensome and could discourage reporting? What are they?*

Some employers have established time requirements within which cases must be reported in order to be recorded on the OSHA Log. No doubt some employers have other requirements that discourage reporting.

However, we believe that OSHA has reporting requirements that also discourage compliance. For example, requiring that employers record mild muscle strain that is treated by the employee performing stretching exercises at home erodes confidence in the recordkeeping system, and leads employers to argue about putting cases on the log.

*9. How should OSHA clarify the requirement that reporting requirements are "reasonable and not unduly burdensome"?*

The Agency should provide clear examples of what employers should not do.

To clean up its own house, OSHA should revise some of the existing recordkeeping interpretations to better focus on cases that have significance for injury and illness prevention.

*10. Are you aware of employer practices or policies to take adverse action against persons who report injuries or illnesses? Please describe them.*

Some employers have cardinal safety and health rules, which require that employees who violate them be fired. Under such rules, employees who are injured will also be fired. Similarly, there are "safety is a condition of employment" policies that may discourage reporting because people who are injured while violating safety rules will be fired. These are examples of situations in which employers, in an effort to have good safety programs through a "zero tolerance" policy concerning critical safety rule violations, can actually be discouraging reporting. It will be difficult for OSHA to distinguish employers with a just culture that are responsibly enforcing their safety rules from those that are intentionally punishing employees for reporting cases.

*11. Are you aware of any particular situations where an employee decided not to report an injury or illness to his or her employer because of a fear that the employer would take adverse action against the employee? If so, please describe the situation, including the nature of the injury or illness and the reasons the employee had for believing he or she would be retaliated against.*

No response

*12. What kinds of adverse actions might lead an employee to decide not to report an injury or illness? Are there other employer actions that would not dissuade a reasonable employee from reporting an injury or illness?*

Adverse actions such as being made an example of, being fired for "violating safety rules", being the one who reports an injury and ruins the work group's record on number of days, hours, etc. without an injury might lead an employee to decide not to report an injury or illness. Also employees may be hesitant to report injuries and/or illnesses if that results in a mandatory drug test.

An employer that encourages near-miss reporting; that establishes a “learning organization” to find out what truly went wrong and makes earnest effort to repair it; that supports employees who come forward with their injuries; that focuses on eliminating the factors that lead up to incidents rather than the incidents themselves; will enhance employees’ confidence in reporting cases without suffering adverse consequences.

*13. OSHA encourages employers to enforce safety rules as part of a well- functioning workplace safety program. Are there any employer practices that OSHA should explicitly exclude under this provision to ensure that employers are able to run an effective workplace safety program?*

OSHA should discourage employers from summarily firing workers for violating safety rules, and encourage them to find out WHY safety rules are being violated. There should be a learning process that helps improve processes and procedures to make rules more likely to be observed and that communicates to employees that their challenges in getting the job done safely are being addressed.

*14. What other actions can OSHA take to address the issue of employers who discourage employees from reporting injuries and illnesses?*

OSHA can help by not using its injury and illness data to punish or reward employers, and by discouraging employers from evaluating their own and other companies’ safety and health performance based solely on OSHA recordable cases.

OSHA has used its data to decide which companies can be in the voluntary protection program (VPP) and which should not, and which employers to target for inspection and which to pass over. All of these actions send a message to employers that having low recordable rates will win favor with the Agency. There is a strong message that employers should do whatever it takes to keep cases off their logs.

OSHA data are used widely by companies to demonstrate the effectiveness of their safety and health programs, often as a means to obtain work as contractors with other companies or with the government. OSHA should discourage this practice, and should encourage companies to also use leading indicators such as percentage of safety inspections completed on time, percentage of corrective actions completed on time, and level of risk inherent in operations as indicators of safety. (See recommendations below.)

*15. Is the fact that retaliation for reporting workplace injuries and illnesses is illegal communicated in your workplace? How? What costs are associated with communicating this information?*

No response

*16. What kinds of existing reporting procedures might be prohibited by this requirement? What costs or other detrimental effects might employers incur if they are prevented from requiring these procedures?*



Firing workers for having an injury related to rule violation might actually be prohibited under the law that bans retaliation for reporting workplace injuries and illnesses. That could be problematic in those situations where, after a full investigation, firing is warranted.

*17. Do you anticipate any additional costs associated with the enforcement of the prohibition against discrimination through the citation and penalty provisions of the OSH Act that would not be incurred if OSHA instead used its authority under section 11(c) of the Act? If so, please describe them.*

No.

*18. OSHA welcomes any information you have on the costs, benefits, and feasibility of the three provisions discussed in this supplemental notice. What are the costs and benefits of using this rulemaking to address the issue of employers who discourage employees from reporting injuries and illnesses? Are the cost estimates in this document accurate?*

No response

### **III. Specific Recommendations**

***A. When it comes to worker safety and health in this country, OSHA has the ability to set the tone and lead by example. OSHA needs to change it's own posture with regard to OSHA recordkeeping and lessen the consequences for reporting cases. This rulemaking is an opportunity for OSHA to exercise that leadership.***

The current paradigm of associating negative consequences with reporting injuries and illnesses, starts with Federal OSHA in Washington DC and ends up on the shop floor in many establishments throughout the country. The net effect of current OSHA programs is that many employers feel punished for reporting injuries and illnesses. Sites with higher rates are more likely to be subject to OSHA inspections; others with rates above certain cut-off levels may be ineligible for VPP or other forms of recognition. *In short, OSHA establishes negative consequences for employers that report injuries and illnesses and then derides employers for doing the same.*

Learning organizations view reporting of injuries and illnesses (and near misses) as a good thing that is valued, recognized and rewarded.

OSHA should re-evaluate its own programs to set a similar tone. Understandably that will be no easy feat, since the Agency uses the data for so many purposes. But that conundrum is the same one faced by the very employers that OSHA regulates.

***B. This proposal is likely to drain scarce health and safety resources away from efforts that address more-serious issues, such as fatality and serious injury prevention. If***

***OSHA decides to move forward the Agency should institute measures to offset the resource shift, which will be significant.***

***Specific Concern:*** OSHA does not seem to fully appreciate the time and effort that many companies currently invest in verifying the records and screening the data before they report it to the government. This will increase dramatically if the process is ramped up from an annual submission to providing the data on a quarterly basis.

Furthermore, the complexity of efforts to track case outcomes (days away, days restricted, etc.) will increase as will the need to update prior entries for cases that continue through more than one quarter.

We are also concerned that the increased emphasis on the records caused by publication will result in more “churn.” Some companies will be “up in arms” over the perceived lack of fairness as they see companies and sites with less effective programs celebrated for having lower rates. Others, responding to pressure from business leaders to keep their rates low, will spend more and more time debating whether or not borderline cases need to be recorded on the OSHA log.

Given the current economy and the ongoing trend of many companies to lean their support functions, it is highly unlikely that employers will hire new staff to satisfy these new reporting obligations. Safety and health staff will likely be diverted from existing priorities – a counter-productive impact in a profession where resources are already stretched thin.

***Proposed Solution:*** ORCHSE continues to propose a three-step solution for streamlining the recordkeeping process and improving the quality of the data:

1. Remove the few “lightening rod” interpretations that provide the Agency with little additional data, but undermine Agency credibility and consistently inflame the regulated community. For example, an employee throwing out her back at work as a result of sneezing due to a common cold unrelated to work.
2. Develop a useful set of decision-making software to assist users in making accurate recordkeeping decisions. The current OSHA software does little more than summarize the text in the regulations. What is needed is software that employers can use to correctly answer their “what if?” questions.
3. Implement a cooperative compliance approach that would encourage employers to use the software. For example, if employers demonstrate that they are using OSHA’s software as the basis for making record keeping determinations, the Agency could offer to forgo a full records review when auditing their OSHA records and instead audit to determine that they were in fact using the software and using it correctly.

OSHA should explore other options to offset the anticipated drain in resources. For example, OSHA could streamline the recordkeeping process by coordinating the OSHA

301 form with State workers compensation first report of injury forms. Ideally employers could fill out one form to satisfy their OSHA, workers compensation needs, and insurance needs.

***C. Implementation of this proposal will increase the over emphasis on OSHA injury and illness rates as the primary and often sole metric to drive and assess safety and health performance. OSHA should take the lead in identifying and promoting the use of leading indicators.***

***Specific Concern:*** Publishing site specific OSHA data will increase the focus and attention paid to them. OSHA data summarize results. However, they provide little insight into the specific content and quality of a company's injury and illness prevention process. Many safety and health professionals are trying to move their companies away from focusing solely on the OSHA data to more robust metrics that incorporate the use of leading indicators. This proposal could undermine those important efforts.

***Proposed Solution:*** Leading indicators are the performance drivers that lead to results. OSHA should promote their adoption and use. That means more than just tacitly acknowledging their value in publications and speeches. OSHA should encourage their use by developing a catalog of potential leading indicators for key elements of a safety and health management system. OSHA should also provide employers guidance on how to develop their own leading indicators and how best to use them.

OSHA could fund case studies that demonstrate the use of leading indicators. OSHA could also support research to assess the link between key leading indicators and outcomes.

***D. Publication of the OSHA data will increase focus on less-serious cases and likely divert company attention from systems safety and preventing fatalities and catastrophic events.***

***Specific Concern:*** It appears that we are in the midst of a renaissance in safety and health thinking. Many companies are responding to a trend that has puzzled and upset them for years; the decline in their OSHA rates that has not been accompanied by a similar decline in fatalities and serious injuries. A new view of safety and health is evolving that places emphasis on identifying and controlling risk with high severity potential. The new view is grounded in systems safety and addresses issues related to human and organizational performance.

Part of the new view has been to shift the focus from blaming the injured employee to understanding the context and contributing factors in which they operate; part has been to rethink key concepts that underpin our profession, including the general over-emphasis on OSHA rates for measurement and accountability purposes. With the new view, companies are encouraged to be learning organizations. Part of the learning process is to

encourage the reporting of OSHA recordable cases and significant near misses as a means for identifying hazards.

Unless OSHA takes steps to counterbalance the initiative, wide-scale publication of the data will likely divert attention and energy from preventing more-serious cases to managing and reducing medical treatment cases and OSHA recordables.

***Proposed Solution:***

OSHA should consider limiting the reporting of cases outlined in the proposal to DART cases (cases involving days away, days of restricted work activity, or job transfer), and should avoid collecting case detail on medical treatment cases that have less value for prevention purposes.

Information on less-serious cases could be collected through special studies scientifically designed to address selected issues.

OSHA should also consider leveraging the new ASTM E2920 – 14: Standard Guide for Reporting Occupational Injuries and Illnesses for recording and reporting occupational injuries and illnesses. The standard was developed by ORCHSE member companies to highlight more-serious cases often hidden in the OSHA data and is designed to promote consistency and comparability in reporting and recording injuries and illnesses on a worldwide basis. OSHA should consider the principles that underpin these new data.

**IV. Conclusion**

Again, OSHA is to be congratulated for raising the issue of its growing need for better data to manage and deploy its scarce resources. It is an important issue for the Agency and for the safety and health community at large. We strongly support the Agency's need for better data. We also believe in the general principles of openness and data transparency that underpin this proposal.

Injury and illness rates clearly have value for prevention purposes, and there is much to be gained by sites or companies tracking their own safety and health performance over time. However, the situation becomes more complicated when the data are used for comparative purposes, which is at the heart of the OSHA proposal. Why? Because sites reporting lower OSHA rates are not necessarily the better performers. Without regular detailed recordkeeping audits (that access personal medical information) there is no way to tell whether sites reporting lower injury and illness rates actually have better safety and health programs. Lower rates may also reflect employer-driven under-reporting; new recordkeeping staff; the need for recordkeeping training; a lack of understanding of the nuances embedded in the rules; a culture of risk taking, where employees pride themselves in being tough; or a host of other issues that have very little to do with actual performance. Sites and companies that are diligent in recording and reporting cases will no doubt look worse than inferior performers that don't pay attention to the rules.

It is understandable that having seen other Agencies make their data transparent and read journal articles on the value of “big data” that OSHA would be infatuated with the concepts. But OSHA should realize that its situation is unique; it’s resource constraints real and likely to continue; with less and less staff available in industry to do this kind of work.

If implemented as proposed, the new OSHA requirements could negatively impact our profession and worker safety and health for years to come. Our belief is that, as currently constructed, the change would be not be for the better and could be to the detriment of the safety and well being of American workers.

The proposal needs to be rethought and foundational issues need to be addressed, such as the scope and method of collection as well as well-documented issues with the quality of the source data.

Instead of establishing a system that is likely to result in more enforcement, more churn, more disruption, and more animosity in the regulated community, OSHA should take a cue from other countries and modify the current recordkeeping system in a way that encourages employers to be proactive and do the right things.

We applaud OSHA for starting the dialogue, and pledge our support for finding ways to improve this important initiative.

Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in black ink, appearing to read "Frank White". The signature is written in a cursive style with a large initial "F" and "W".

Frank White  
President