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Douglas Parker
Assistant Secretary of Labor for OSHA
U.S. Department of Labor – OSHA
200 Constitution Avenue, N.W.
Washington, DC 20210

**Re: Docket No. OSHA-2021-0006
Proposed Rule – Improve Tracking of Workplace Injuries and Illnesses**

Dear Assistant Secretary Parker:

On behalf of the Employers E-Recordkeeping Coalition (“Coalition”) we are pleased to submit comments addressing the Occupational Safety and Health Administration’s (“OSHA” or “the Agency”) March 30, 2022 proposal to amend the rule, “Improve Tracking of Workplace Injuries and Illnesses” (Docket No. OSHA-2021-0006).

The Employers E-Recordkeeping Coalition is comprised of individual employers as well as trade associations, representing more than 3,000 of the largest, most sophisticated and diverse organizations in the nation, accounting for over 20 million American jobs in a broad cross-section of U.S. industry. Coalition members represent industries such as aerospace, hospitality, petroleum refining and chemical manufacturing, electrical, energy, pipeline, commercial and consumer products, manufacturing, automotive, transportation, warehousing, wholesale trade, food distribution, pharmaceuticals, specialty chemicals, water infrastructure, defense, agriculture, healthcare, and others. As establishments that will be directly impacted by the proposed rule, the members of the Coalition have a substantial interest in the outcome of this rulemaking.

SPECIFIC COMMENTS

I. OSHA Should Not Collect 300 or 301 Level Data from Any Establishments, Regardless of Size or Industry.

The Coalition strongly opposes OSHA’s proposal to expand its data collection beyond the 300A Annual Summary level data to require select establishments with 100 or more employees to submit the detailed data from their 300 Logs and 301 Incident Reports. The collection of 300 and 301 level data would not better aid OSHA in targeting its enforcement resources than the 300A level data OSHA already collects; however, requiring submission of the more detailed data would be exponentially more onerous and expensive, would create

significant new risk of publishing employee personal and health information, and would undermine the purpose and effectiveness of the injury and illness recordkeeping program.

Both OSHA and employers would have to allocate substantial time and resources to process the data in a way it can be submitted and/or reviewed and to ensure that it is adequately scrubbed of employee-identifying personal and health information. The risk of releasing personal and medical information significantly outweighs any enforcement benefit that OSHA may obtain from collecting this data. Accordingly, the Coalition requests that OSHA reconsider its position that 300 and 301 level information be submitted, by any employer. At the very least, the Coalition urges OSHA to eliminate the proposed requirement to submit the highly confidential and personal 301 information.¹

A. Collecting 300 and 301 Level Data Provides Negligible Enforcement Benefit

300 and 301 level information does not provide any meaningful value to OSHA's enforcement targeting strategies or decisions. This is because the Section 1904 recording criteria neither assume nor require any correlation between a recordable incident and any regulatory non-compliance or employer fault. In particular, the geographic presumption for determining work-relatedness and the broad definition of work-relatedness require employers to record injuries that reveal nothing necessarily about the effectiveness of their safety and health programs or the status of compliance at that workplace. In fact, a survey of Coalition members' high-level review of employer 300 Logs reveals that only a very small percentage of recordable injuries and illnesses relate to conduct or a condition that could be considered a violation of an OSHA standard or OSH Act obligation. OSHA has long recognized the limited correlation between recordkeeping data and non-compliance in its own interpretive guidance. For example, in a Letter of Interpretation entitled, "OSHA's No-Fault Recordkeeping System Requires Recording Work-Related Injuries and Illnesses, Regardless of the Level of Employer Control or Non-Control Involved" (February 6, 2002), OSHA states:

The concept of fault has never been a consideration in any recordkeeping system of the U.S. Department of Labor. Both the Note to Subpart A of the final rule and the new OSHA Form 300 expressly state that recording a case does not indicate fault, negligence, or compensability. In addition, OSHA recognizes that injury and illness rates do not necessarily indicate a lack of interest in safety and health or success or failure per se. OSHA feels it is to the benefit of all parties to go beyond the numbers and look at an employer's safety and health program.

¹ Pursuant to 1904.35(b)(2)(v)(B), "when an authorized employee representative asks for copies of the OSHA 301 Incident Reports for an establishment where the agent represents employees under a collective bargaining agreement," employers "are only required to give the authorized employee representative information from the ... section titled 'Tell us about the case.' [The employer] must remove all other information from the copy of the OSHA 301 Incident Report...." Thus, despite employees' and unions' extremely broad rights of access to injury and illness recordkeeping data, almost all of the fields of the 301 Incident Report that OSHA intends to collect under this proposed rule are not even accessible to other employees or unions at the same workplace.

Furthermore, from an enforcement standpoint, by the time this data could be evaluated for use in selecting OSHA's enforcement targets, the data would surely be stale and provide no useful basis for the Agency to initiate enforcement against employers within the six-month statute of limitations set forth in the OSH Act. Because the data is insufficient in and of itself as a targeting tool, and because OSHA would be able to rely on such data only when it likely no longer reflects current conditions at a particular worksite, OSHA's enforcement program is better served by continuing to use 300A summary data to target enforcement resources, and then, at the commencement of an enforcement inspection, request a copy of the employer's 300 and 301 level data. Using the more detailed 300 and 301 data in the context of an individual inspection, as the Agency has historically done, is a better and more effective use of this data than OSHA's proposed new plan.

In fact, reliance on 300 and 301 information could actually hinder OSHA's effort to accurately identify and target hazardous workplace conditions because any effort to collect and evaluate Form 300 and 301 information would draw resources from other valid OSHA enforcement programs, diverting OSHA from its mission.

Beyond this, OSHA has neither the budget nor resources to analyze and process 300 and 301 level data in a manner that would allow it to be used in a meaningful way. The large swath of information that OSHA proposes to collect cannot be segregated by numbers, averages, or some type of algorithm that can be used for enforcement targeting, like the 300A summary can be and has been. The 300 and 301 forms contain hand- or type-written narrative information that does not conform to any pre-selected options like 300A summary data, and contains employee-identifying personal and medical information, which takes employers significant time and resources to complete.

The proposed use of an automated system to assign standardized codes based on text identified in the 300 and 301 forms is unrealistic. Keyword searches are literal in the sense that computers find terms wherever they appear—even if part of a larger phrase or used in a different context. Words often have multiple meanings, so keyword searches tend to return irrelevant results (false positives), failing to disambiguate unstructured text. Keyword searches also may fail to identify useful information that does not use the express search terms (false negatives). Additionally, OSHA's proposed use depends on employers typing words without spelling errors, abbreviated text, or industry-specific language, acronyms or codes that are not encapsulated in a word search. Under these conditions, OSHA would miss mountains of pertinent information, be flooded by irrelevant information, and, in our view, simply would not effectively identify workplaces that should be targeted for enforcement. An accurate analysis of employer 300 and 301 information requires individualized analyses by real people – not IT systems using word searches. That cannot be done en masse with data collected under the E-Recordkeeping Rule. OSHA already has the ability collect and effectively use this information by obtaining the data at the commencement of inspections.

OSHA previously acknowledged the difficulties and complications of utilizing 300 and 301 level data, in the context of its 2019 rulemaking to remove the requirement for

establishments with 250 or more employees to submit 300 and 301 data. In legal challenges to OSHA's rescission of this requirement, the reviewing court agreed with OSHA's determinations that costly manual review of collected 300 and 301 data would be needed to avoid a meaningful risk of exposing sensitive worker information to public disclosure, finding that the uncertain benefits of collecting the 300 and 301 data did not justify diverting OSHA's resources from other efforts.²

Although the 300A data is not a reliable indicator of high hazard workplaces, the criteria to analyze such data is simple and much easier to manage, as current enforcement targeting is based solely on an employers' and industries' average DART rates. The 300A data provides ample data for OSHA to develop, initiate, and streamline targeted enforcement efforts. Accordingly, while Coalition members do not oppose the continued collection of 300A data, we strongly disagree that 300 and 301 data can serve as an effective tool in targeting OSHA's enforcement efforts.

B. Collection of 300 Log and 301 Incident Report Level Data Creates Significant Risk of Irreparable Harm by Public Disclosure of Employee-Identifying Personal and Health Information.

It is imperative to recognize the serious employee privacy concerns associated with OSHA's proposed plan to collect 300 and 301 level data, raised by both employers and employees during the initial E-recordkeeping rulemaking. The publication of 300 and 301 data, either intentionally, inadvertently, or pursuant to a mandated requirement under FOIA, virtually inevitably would pose a serious breach of employees' privacy.

There are at least three ways in which recordable data and information collected by OSHA could become public, only one of which OSHA controls.

First, the potential for data to be compromised on OSHA's Injury Tracking Application ("ITA") is apparent and a realistic possibility. As OSHA is well aware, industry concerns about worker privacy breaches came to fruition shortly after the ITA was rolled-out. As determined by the Department of Homeland Security ("DHS"), a serious potential breach of the ITA system occurred in 2019 virtually immediately after the ITA system had gone live. Although the security issues associated with that breach have since been resolved, industry is fearful of submitting hundreds of thousands of pieces of personal data with personal identifier information ("PII") on a portal that has already had suspicious activity that warranted DHS scrutiny. As OSHA notes, the ITA episode demonstrated that such large data collection will inevitably encounter malware and may even incentivize cyber-attacks on the Department of Labor's ("DOL") IT system.

We are aware of OSHA's view that, since 2019, the DOL's cybersecurity protective software has improved. However, the cyber security risk of employees' highly confidential and personal medical information being hacked and published, or used in other even more

² See *Pub. Citizen Health Research Grp. et al. v. Pizella*, 513 F. Supp 3d 10 (D.D.C. 2010).

nefarious ways, has become even more serious since the Agency decided it was too risky to collect 300 and 301 level data a few years ago. Since 2019, the threat and sophistication of cybersecurity attacks has also grown immensely, outpacing the development of cybersecurity protections. The lack of confidence in protecting data has never been greater in this country.

It was just two years ago that a Russian cyberattack resulted in thousands of organizations globally being penetrated, including multiple parts of the United States federal government, leading to massive, catastrophic data breaches. The cyberattack and data breach were reported to be among the worst cyber-espionage incidents ever suffered by the U.S. due to the sensitivity and high profile of the targets, as well as the long duration – nearly a full year – in which the hackers had access to federal agency data. Affected organizations worldwide included NATO, the U.K. government, the European Parliament, Microsoft and others. The attackers exploited software or credentials from at least three U.S. firms: Microsoft, SolarWinds, and VMware. In addition to the theft of data, the attack caused costly inconvenience to tens of thousands of SolarWinds customers, who had to check whether they had been breached, and had to take systems offline and begin months-long decontamination procedures as a precaution.

Earlier this year, the Biden Administration issued an urgent warning about dangerous new malware that could cripple IT systems worldwide, coming on the heels of Ukraine withstanding an attempt by Russian hackers to knock out power to 2 million Ukrainians in that war-torn country. The Administration has been releasing sensitive intelligence and dire warnings that the Kremlin is preparing to launch a new generation of cyberattacks in America. Jen Easterly, the Director of the Cybersecurity and Infrastructure Security Agency (“CISA”), the federal agency that helps secure computer networks in sixteen sectors deemed vital to national security, like energy, finance and communications, warned that CISA is seeing evolving intelligence about Russian planning for potential attacks. “We have to assume that there's going to be a breach. There's going to be an incident. There's going to be an attack,” she told 60 Minutes in an April 2022 interview. “I think we are dealing with a very dangerous, very sophisticated, very well-resourced cyber actor. And that's why we've been telling everybody consistently, ‘shields up.’ What does that mean? It means assume there will be disruptive cyber activity and make sure you are prepared for it.” Surely, OSHA does not believe its portal would be immune from or buffered against such attacks.

Second, because 300 Logs and 301 Incident Reports obtained by OSHA are records that generally fall within the scope of the Freedom of Information Act (“FOIA”), and they are subject to potential disclosure whether OSHA supports publication of this information or not. Concern over compelled disclosure is real. As noted by OSHA, DOL has been ordered to disclose OSHA records revealing employee-identifying information.³ Although 300 and 301

³ See e.g., *Finkel v. U.S. Dep't of Labor*, Civil Action No. 05-5525 (MLC), 2007 U.S. Dist LEXIS 47307 (D.N.J. June 29, 2007).

data might be exempt from disclosure under Section 552(b)(6)⁴ as “personnel and medical files,” under Subsection (b)(4) as “confidential commercial information,” and/or under Subsection (b)(7)(E) because it is being collected for law enforcement purposes, the significant *Public Citizen* lawsuit⁵ addressing this topic demonstrates that the Agency’s ability to insulate this data is highly uncertain. OSHA’s conclusory statement that it is capable of withholding from FOIA disclosures information that would reasonably identify individuals directly, such as Social Security Numbers or telephone numbers is made without any rationale or support. There certainly appears to be no current plan to do so under the proposed rule.

Third, even if OSHA or employers attempt to remove PII from the 300 and 301 data, this would not ensure employee privacy, as employee-identifying information can be discernable from so much of the information in those forms. It is not possible to fully redact all identifying information in a way that would eliminate the overriding privacy risk, and certainly not by simply using automated privacy scrubbing technology (as opposed to labor-intensive manual removal). This is especially apt when considering the detailed information contained in 301 reports concerning the location and type of injury sustained, which may allow employees and members of the public to identify the injured employee.

On this point, OSHA’s assertion that its prior stated rationale for not collecting 300 and 301 data (presented in the 2019 rulemaking and subsequent litigation) are no longer compelling is simply not supported by any objective analysis. The supposed improved technology to decrease the number of resources required to analyze this data has neither been presented to employers nor explained in the Notice of Proposed Rulemaking. The “scrubbing application” and automated information technology is neither tested or verified, nor is there any reason to consider it trustworthy. In fact, the proposed use of automated information technology to detect and remove information that reasonably identifies individuals is, OSHA admits, a “preliminary” finding that has not been vetted.⁶

The idea that OSHA would even consider proposing – let alone issuing – a mandatory regulation requiring the submission of 300 and 301 data based on hypothetical, unvetted technology is remarkable in light of the privacy concerns shared by both employees and employers, and not that long ago, also shared by OSHA.

The potential for inadvertent disclosure of employee personal identifying information or medical information is not speculative; it is real and has occurred countless times just over the past few years. In fact, several employers in this Coalition have had personal experience

⁴ The U.S. Supreme Court has held that, in applying FOIA Exemption 6, the courts must balance (1) the degree of invasion of personal privacy, and (2) the public interest in disclosure for the purpose of contributing significantly to public understanding of government activities. *U.S. Dep’t of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 496-97 (1994).

⁵ *Public Citizen Found. v. United States Dep’t of Labor et al.*, No. 1:18-cv-00117 (EGS/GMH), 2020 U.S. Dist. LEXIS 182375 (D.D.C. June 23, 2020).

⁶ The point is further underscored by the Agency’s request for information on what proprietary software is out there that is capable of removing information that reasonably identifies individuals directly from text data.

with third parties, most notably the media, contacting employees about their personal and medical information because their identities were discerned from information provided to OSHA and released by OSHA to the public. For example, COVID-19 cases have been disclosed through injury and illness data and inspection files, and the media has identified and contacted Coalition members' employees. And while this is an upsetting experience for employers, employees are particularly dismayed by this misuse and mishandling of their personal information – not by their employer but by their government.

C. OSHA Grossly Underestimates the Time and Resource Burdens That Will be Required to Submit 300 and 301 Level Data (Especially 301 Data).

The scope of data that OSHA proposes to collect is far greater than what employers have been submitting for the past five years and requires significantly more time and resources to complete, verify, and accurately submit through the ITA.

Many Coalition members use either internally developed software or software applications from third parties that are designed to assist with the maintenance and submission of 300A data into OSHA's ITA. Not one of those employers' current software programs are currently set up to facilitate transmission of 300 and 301 information. It would cost a substantial amount of time and resources to integrate such software into current IT systems, if it is even possible at all. Indeed, many Coalition members, including sophisticated, large companies, maintain 301 information (and a few also their 300 Logs) in handwritten forms, at individual establishments. The time and resources would be substantial to transition to a fully automated system for these records, and more importantly, would be overwhelming to manually key in that data for submission to OSHA, including for large employers with many covered establishments.

For example, one national employer with approximately 700 establishments that would be covered by the new requirement to submit 300 and 301 level data currently takes approximately 3 months to audit and submit its injury and illness records to ensure that its 300A data submissions are accurate. Manually keying in every line of hundreds of 300 log data, or if that is not necessary, at least keying in thousands of 301 Reports would be exponentially more burdensome – likely infeasible given the annual March 2nd submission deadline.

Ultimately, the costs to modify the internal software, purchase new software, automate injury and illness recordkeeping, audit the records, and in many instances, manually key in huge volumes of data would cost hundreds of thousands of dollars. These costs were completely unaccounted for in OSHA's cost analysis for the proposed rule.

More important than the substantial technology costs and challenges is the fact that spending months auditing and manually keying in injury and illness data would undoubtedly take safety professionals away from their central mission, which includes auditing their workplaces, conducting employee training, and supporting business efforts to engage in

continuous improvement by focusing on best practices, all of which are geared to eliminating safety and health hazards and, therefore, reducing injuries and illnesses in the workplace.

In sum, the substantial costs and drained resources associated with the challenge of submitting 300 and 301 information outweighs any minimal utility that OSHA might gain from holding a vast, likely unusable database of 300 and 301 information.

D. OSHA Should Not Collect/Publish Form 300 or 301 Information Because Doing So Undermines OSHA's Historical No-Fault Recordkeeping Program (Publishes Data Without Context).

Collection and use of 300 and 301 data and information is in direct conflict with OSHA's long-standing policy position that the injury and illness recording requirements are based on a "no-fault" presumption. While OSHA recognizes and continues to promote the recordkeeping rule as a "no-fault" regulation, this proposed rule would run afoul and undermine that policy position in that the principle reason that the data collected pursuant to this proposed rule is published by OSHA presumes and is based on a premise of employer fault.⁷

OSHA recognizes that recordable employee injuries can result from incidents at the workplace well outside of the employer's control. The purpose of logging injuries and illnesses has never before been to "blame" the employer for these recordable events. OSHA itself states expressly in its recordkeeping regulation:

Recordkeeping or reporting a work-related injury, illness or fatality does not mean that the employer or employee was at fault, that an OSHA rule has been violated ...

See Note to 29 C.F.R. 1904.0. Indeed, the data as collected, and potentially publicly reported, poses additional harm to small businesses because their injury and illness rates are more significantly impacted by even a single recordable case that can skew the perception of their safety records. In other words, due to employees working fewer total hours one incident can

⁷ This distortion of OSHA's original injury and illness program is just one of numerous reasons revealed over the last couple of decades that there is a need for OSHA to revisit and revamp its injury and illness recordkeeping regulations at 29 CFR 1904 *et seq.* While this current rulemaking focused on electronic recordkeeping may not be the appropriate process to implement the type of large-scale overhaul that is needed, several members of the Coalition encourage OSHA to empanel a committee, or to task NACOSH or some other existing advisory committee, to explore major structural changes to injury and illness recordkeeping. For example, OSHA should have such a recordkeeping committee evaluate and consider adopting ASTM E2920-14 (Standard Guide for Recordkeeping Occupations Injuries and Illnesses), as several other countries have done or are in the process of doing. The approach to recordkeeping outlined in the ASTM standard would yield much more valuable data for OSHA and employers. In addition, aligning US occupational injury and illness data with much of the rest of the world would make the data collected more meaningful, as it could be compared apples-to-apples with other countries. OSHA has already realized the great benefits in the area of chemical right-to-know requirements by taking steps to adopt and keep up with the globally harmonized standard for hazard communication. The same benefits could be achieved by moving to the ASTM international model for occupational injury and illness recordkeeping.

impact their total recordable incident rate in the same manner that 5 incidents could at an establishment for a larger company. Nevertheless, OSHA now promotes its proposed rule by claiming that data collected under the proposal will allow the public to make an assessment of the workplaces which pose the greatest risk or danger, without any context for the injuries or data that are publicized. The Coalition is very concerned that employers will inevitably be seen as responsible for and "blamed" for these incidents.

E. Collection and Publication of 300/301 Level Data Increases the Likelihood of Under-Reporting.

Another downside and negative consequence of OSHA's proposal to collect and publish 300/301 data and information is that it will increase the likelihood of employee under-reporting of injuries.

The Coalition is very concerned that the increased risk of employee personal and medical information being collected by a federal agency and then publicized, albeit inadvertently, will create a significant disincentive for employees to report workplace injuries that are recordable events. Our Coalition members have and support a strong culture of injury and illness reporting, but the knowledge that such a report could go on the 300 Log and be shared with regulators or the public would undermine that established culture and hinder opportunities to further improve injury and illness reporting. If the Agency believes this concern is frivolous or contrived, it need look no further than the experience employers and the Agency faced when employees were required to share COVID-19 vaccination status under OSHA's now defunct vaccinate-or-test ETS. As OSHA knows, huge swaths of employees fiercely opposed any requirement to share vaccine status with their employers. Employers were put between a rock and a hard place with this. Imagine the reaction these employees will have if they learn that their personal medical and other PII must be shared outside of the workplace with a federal government agency and might become available to the entire world for viewing. The Coalition believes our collective experience with the visceral negative reaction employees had to what seemed like an innocuous requirement to share vaccine status should provide insight into the likely consequence of this new data collection effort by OSHA – some not insignificant portion of employees will not report injuries that should be known by employers and captured on their logs. Thus, this proposal will likely incite under-reporting by employees.

II. The Threshold for Submission of Data for Appendix B Industries Should Be Set at 250 or More Employees, Not 100 or More Employees.

To the extent employers in industries designated by Appendix B are required to submit information from their OSHA 300, 301, and 300A, such requirement should apply to employers with 250 or more employees, not employers with 100 or more employees as proposed by OSHA. OSHA does not appear to provide any rationale for lowering the threshold of what it considers to be "larger employers" from those with 250 or more

employees to those with 100 or more employees. Indeed, in the 2016 rulemaking, OSHA stated:

In response, **OSHA agrees with commenters who stated that larger companies (those with 250 or more employees) have the resources to electronically submit injury and illness data to OSHA in the first year.** According to commenters, in many cases, larger companies already keep OSHA injury and illness records electronically, so a requirement to submit such records electronically is **not unduly burdensome.**"

See 81 FR 29624 at 29635 (May 12, 2016) (emphasis added).

In fact, OSHA considered a lower threshold of 100 or more employees, and expressly denied that approach in the 2016 rulemaking. The Agency stated that it "agrees with commenters who stated that reducing the size criterion to 100 would increase the burden on employers with diminishing benefit." *See id.* at 29636 (emphasis added).

While the Coalition acknowledges that, under the current proposal, only employers *in industries designated by Appendix B* (as opposed to all industries, as contemplated in the 2016 rulemaking) would be required to submit information from their OSHA 300, 301, and 300A, that distinction makes no difference from an employer burden perspective. Employers with 100-250 employees in industries designated by Appendix B would still face enormous administrative challenges, and the rule would be unduly burdensome on them. Accordingly, to the extent larger employers in industries designated by Appendix B are required to submit information from their OSHA 300, 301, and 300A, such requirement should apply to employers with 250 or more employees, not employers with 100 or more employees, in those industries.

III. To the Extent Appendix B Becomes a Part of the Final Rule, it Should be Based on the DART Rate, Not Total Case Rate, and Should be Set at a Higher Threshold Value.

The Coalition understands that OSHA developed Appendix B based on Total Case Rate ("TCR"). As OSHA describes in its March 30, 2022 Notice:

In the 2016 final rule, OSHA estimated that establishments with 250 or more employees covered by that section of the submission requirement would report 713,397 injury and illness cases per year. For this rulemaking, to identify the appropriate balance of utility versus burden, OSHA analyzed five years of injury and illness summary data collected through OSHA's Injury Tracking Application (ITA). OSHA examined combinations of establishment size and industry hazardousness that, like the 2016 final rule, would provide the Agency with information on roughly 750,000 cases of injuries and illnesses per year. Based on this analysis, OSHA is proposing a reporting requirement

for establishments with 100 or more employees in 4-digit NAICS (2017) industries that:

1. Had a 3-year-average rate of total recordable cases (Total Case Rate, or TCR) in the BLS SOII for 2017, 2018, and 2019, of at least 3.5 cases per 100 full-time-equivalent employees, and
2. Are included in proposed appendix A to subpart E. (All of the industries in proposed appendix B are also in appendix A.)

See 87 FR 18528 at 18543. In explaining its departure from the use of the DART rate (rate of cases with days away from work, job restriction, or transfer), OSHA goes on to state:

In the 2016 final rule that revised § 1904.41, OSHA used the rate of cases with days away from work, job restriction, or transfer (DART) from the BLS SOII to determine the industries included in appendix A to subpart E of part 1904. However, proposed appendix B to subpart E is based on the TCR, which includes both cases resulting in days away from work, job restriction, or transfer, as well as other recordable cases such as those resulting in medical treatment beyond first aid. OSHA believes that TCR is the appropriate rate to use for determining the list of industries in proposed appendix B to subpart E because covered establishments will be required to electronically submit information to OSHA on all of their recordable cases, not just cases that resulted in days away from work, job restriction, or transfer. In 2020, OSHA received submissions of 2019 Form 300A data from 46,911 establishments that had 100 or more employees and were in one of the industries listed in proposed appendix B to subpart E, accounting for 680,930 total recordable cases and a TCR of 3.6. OSHA requests comment on whether TCR is the appropriate method for determining the list of industries in proposed appendix B to subpart E.

See id. The Coalition respectfully disagrees with OSHA's new approach and believes the DART rate should remain the threshold for Appendix B industries rather than the TCR because, as OSHA points out, Appendix B is meant to reflect employers in higher hazard industries. While a higher DART may reflect such industries to some extent, a higher TCR does not. This is because the TCR captures relatively minor incidents – those that do not result in days away from work, job restriction, or transfer. The Coalition is concerned that, for example, under the proposal, employers in industries with very few or no “major” incidents (i.e., those that result in days away from work, job restriction, or transfer), but a larger number of “minor” incidents will unfairly be included in Appendix B.

To be clear, the Coalition does not suggest that employers disregard minor incidents or not address patterns around these types of injuries. To the contrary. However, for purposes of establishing a baseline for “higher hazard” industries, the DART rate is more likely to identify

those industries than the TCR and thus is the more appropriate threshold for determining Appendix B industries.

Additionally, the Coalition suggests, whether the DART or TCR rate is used, that OSHA should establish a higher threshold value than it proposes. As set forth above, it appears that OSHA used a threshold TCR value of at least 3.5 cases per 100 full-time-equivalent employees, based on BLS SOII data for 2017, 2018, and 2019, to develop Appendix B. BLS data – specifically data representing the highest rates for cases with days away from work, restricted work activity, or job transfer (DART) – from the same time period (2017, 2018, 2019) demonstrates that the **lowest** incidence rate was 4.2. See BLS Injuries, Illnesses, and Fatalities: Industry Injury and Illness Data (last modified November 3, 2021) (datasets snipped below).

Industry ²	NAICS Code ³	Incidence Rate
Prefabricated wood building manufacturing (Private industry)	321992	7.8
Nursing and residential care facilities (State government)	623	7.3
Couriers and express delivery services (Private industry)	4921	6.5
Scheduled passenger air transportation (Private industry)	481111	5.9
Steel foundries (except investment) (Private industry)	331513	5.7
Skiing facilities (Private industry)	71392	5.2
Amusement and theme parks (Private industry)	71311	5.0
Elevator and moving stairway manufacturing (Private industry)	333921	4.9
Rendering and meat byproduct processing (Private industry)	311613	4.8
Seafood product preparation and packaging (Private industry)	3117	4.8
Soft drink manufacturing (Private industry)	312111	4.8
Urban transit systems (Private industry)	4851	4.7
Hospitals (State government)	622	4.7
Dried and dehydrated food manufacturing (Private industry)	311423	4.6
Truss manufacturing (Private industry)	321214	4.6
Nursing and residential care facilities (Local government)	623	4.6
Framing contractors (Private industry)	23813	4.5
Refrigerated warehousing and storage (Private industry)	49312	4.5
Ambulance services (Private industry)	62191	4.5
Solid waste collection (Private industry)	562111	4.4
Aluminum foundries (except die-casting) (Private industry)	331524	4.3
Light truck and utility vehicle manufacturing (Private industry)	336112	4.3
Industrial launderers (Private industry)	812332	4.3
Correctional institutions (State government)	92214	4.3
Manufactured home (mobile home) manufacturing (Private industry)	321991	4.2
Automobile manufacturing (Private industry)	336111	4.2
All industries including state and local government ⁴		1.8

¹ The incidence rates represent the number of injuries and illnesses per 100 full-time equivalent workers and 1 N = number of injuries and illnesses
EH = total hours worked by all employees during the calendar year
200,000 = base for 100 full-time equivalent workers (working 40 hours per week, 50 weeks per year)

² High rate industries were those having the highest incidence rate of injury and illness cases with days away from work or job transfer and at least 500 total recordable cases at the most detailed level of publication, based on the 1

³ North American Industry Classification System -- United States, 2017

⁴ Excludes farms with fewer than 11 employees.

SOURCE: U.S. Bureau of Labor Statistics, U.S. Department of Labor

TABLE SNR02. Highest incidence rates¹ of nonfatal occupational injury and illness cases with days away from restricted work activity, or job transfer, 2018

Industry ²	NAICS Code ³	Incidence Rate
Manufactured home (mobile home) manufacturing (Private industry)	321991	7.2
Nursing and residential care facilities (State government)	623	7.2
Couriers and express delivery services (Private industry)	4921	6.5
Motor home manufacturing (Private industry)	336213	6.3
Steel foundries (except investment) (Private industry)	331513	5.9
Scheduled passenger air transportation (Private industry)	481111	5.6
Hog and pig farming (Private industry)	1122	5.3
Soft drink manufacturing (Private industry)	312111	5.3
Concrete block and brick manufacturing (Private industry)	327331	5.3
Beef cattle ranching and farming, including feedlots (Private industry)	11211	5.0
Prefabricated wood building manufacturing (Private industry)	321992	5.0
Amusement and theme parks (Private industry)	71311	5.0
Skiing facilities (Private industry)	71392	5.0
Framing contractors (Private industry)	23813	4.9
Steel wire drawing (Private industry)	331222	4.9
Nursing and residential care facilities (Local government)	623	4.9
Crop harvesting, primarily by machine (Private industry)	115113	4.8
Aluminum foundries (except die-casting) (Private industry)	331524	4.7
Other animal production (Private industry)	1129	4.6
Truss manufacturing (Private industry)	321214	4.6
Urban transit systems (Private industry)	4851	4.6
Hospitals (State government)	622	4.6
Used household and office goods moving (Private industry)	48421	4.5
Ambulance services (Private industry)	62191	4.5
Psychiatric and substance abuse hospitals (Private industry)	6222	4.5
All industries including state and local government ⁴		1.7

¹ The incidence rates represent the number of injuries and illnesses per 100 full-time equivalent workers and v
N = number of injuries and illnesses

EH = total hours worked by all employees during the calendar year

200,000 = base for 100 full-time equivalent workers (working 40 hours per week, 50 weeks per year)

² High rate industries were those having the highest incidence rate of injury and illness cases with days away f
or job transfer and at least 500 total recordable cases at the most detailed level of publication, based on the A

³ North American Industry Classification System -- United States, 2012

⁴ Excludes farms with fewer than 11 employees.

SOURCE: U.S. Bureau of Labor Statistics, U.S. Department of Labor

TABLE SNR02. Highest incidence rates¹ of nonfatal occupational injury and illness cases with days away from restricted work activity, or job transfer, 2017

Industry ²	NAICS Code ³	Incidence Rate
Motor home manufacturing (Private industry)	336213	7.0
Nursing and residential care facilities (State government)	623	7.0
Couriers and express delivery services (Private industry)	4921	6.4
Skiing facilities (Private industry)	71392	6.0
Materials recovery facilities (Private industry)	56292	5.8
Other waste collection (Private industry)	562119	5.4
Scheduled passenger air transportation (Private industry)	481111	5.3
Rendering and meat byproduct processing (Private industry)	311613	5.0
Amusement and theme parks (Private industry)	71311	4.9
Framing contractors (Private industry)	23813	4.8
Soft drink manufacturing (Private industry)	312111	4.7
Iron foundries (Private industry)	331511	4.7
Used household and office goods moving (Private industry)	48421	4.7
All industries including state and local government ⁴		1.6

¹ The incidence rates represent the number of injuries and illnesses per 100 full-time equivalent workers and v
N = number of injuries and illnesses

EH = total hours worked by all employees during the calendar year

200,000 = base for 100 full-time equivalent workers (working 40 hours per week, 50 weeks per year)

² High rate industries were those having the highest incidence rate of injury and illness cases with days away f
or job transfer and at least 500 total recordable cases at the most detailed level of publication, based on the A

³ North American Industry Classification System -- United States, 2012

⁴ Excludes farms with fewer than 11 employees.

SOURCE: U.S. Bureau of Labor Statistics, U.S. Department of Labor

Accordingly, the Coalition recommends that a threshold value DART rate should be set at no less than 4.2.

Similarly, even if use of the TCR for purposes of determining those industries that should be included in Appendix B is maintained in the final rule, a higher threshold value should be used. According to BLS data representing highest rates for total cases from the same time period (2017, 2018, 2019), the **lowest** incidence rate was 6.8. See BLS Injuries, Illnesses, and Fatalities: Industry Injury and Illness Data (last modified November 3, 2021) (datasets snipped below).

Industry ²	NAICS Code ³	Incidence Rate
Prefabricated wood building manufacturing (Private industry)	321992	13.8
Nursing and residential care facilities (State government)	623	11.5
Veterinary services (Private industry)	54194	10.7
Steel foundries (except investment) (Private industry)	331513	9.7
Couriers and express delivery services (Private industry)	4921	8.8
Armored car services (Private industry)	561613	8.8
Skiing facilities (Private industry)	71392	8.5
Hospitals (State government)	622	8.1
Ambulance services (Private industry)	62191	7.9
Truss manufacturing (Private industry)	321214	7.7
Truck trailer manufacturing (Private industry)	336212	7.6
Nursing and residential care facilities (Local government)	623	7.6
Hog and pig farming (Private industry)	1122	7.5
Dried and dehydrated food manufacturing (Private industry)	311423	7.5
Aluminum foundries (except die-casting) (Private industry)	331524	7.4
Light truck and utility vehicle manufacturing (Private industry)	336112	7.4
Psychiatric and substance abuse hospitals (Private industry)	6222	7.2
Performing arts companies (Private industry)	7111	7.2
Travel trailer and camper manufacturing (Private industry)	336214	7.1
Scheduled passenger air transportation (Private industry)	481111	7.1
Framing contractors (Private industry)	23813	7.0
Seafood product preparation and packaging (Private industry)	3117	6.9
Manufactured home (mobile home) manufacturing (Private industry)	321991	6.8
Pet and pet supplies stores (Private industry)	45391	6.8
Correctional institutions (State government)	92214	6.8
All industries including state and local government ⁴		3.0

¹ The incidence rates represent the number of injuries and illnesses per 100 full-time equivalent workers and
N = number of injuries and illnesses
EH = total hours worked by all employees during the calendar year
200,000 = base for 100 full-time equivalent workers (working 40 hours per week, 50 weeks per year)

² High rate industries were those having the highest incidence rate of total recordable cases of injuries and illnesses at the most detailed level of publication based on the *North American Industry Classification*

³ *North American Industry Classification System* -- United States, 2017

⁴ Excludes farms with fewer than 11 employees.

SOURCE: U.S. Bureau of Labor Statistics, U.S. Department of Labor

TABLE SNR01. Highest incidence rates¹ of total nonfatal occupational injury and illness cases, 2018

Industry ²	NAICS Code ³	Incidence Rate
Nursing and residential care facilities (State government)	623	11.9
Pet care (except veterinary) services (Private industry)	81291	11.4
Veterinary services (Private industry)	54194	10.4
Steel foundries (except investment) (Private industry)	331513	10.2
Skiing facilities (Private industry)	71392	10
Manufactured home (mobile home) manufacturing (Private industry)	321991	9.7
Travel trailer and camper manufacturing (Private industry)	336214	9.3
Motor home manufacturing (Private industry)	336213	9.2
Other animal production (Private industry)	1129	8.9
Beef cattle ranching and farming, including feedlots (Private industry)	11211	8.5
Aluminum foundries (except die-casting) (Private industry)	331524	8.5
Couriers and express delivery services (Private industry)	4921	8.2
Consumer electronics and appliances rental (Private industry)	53221	8.2
Hospitals (State government)	622	8.1
All other miscellaneous wood product manufacturing (Private industry)	321999	7.8
Hog and pig farming (Private industry)	1122	7.7
Interurban and rural bus transportation (Private industry)	4852	7.7
Concrete block and brick manufacturing (Private industry)	327331	7.5
Ambulance services (Private industry)	62191	7.5
Psychiatric and substance abuse hospitals (Private industry)	6222	7.4
Pet and pet supplies stores (Private industry)	45391	7.3
Nursing and residential care facilities (Local government)	623	7.3
Correctional institutions (State government)	92214	7.3
Ice cream and frozen dessert manufacturing (Private industry)	31152	7.2
Truss manufacturing (Private industry)	321214	7.1
Truck trailer manufacturing (Private industry)	336212	7.1
All industries including state and local government ⁴		3.1

¹ The incidence rates represent the number of injuries and illnesses per 100 full-time equivalent workers and v
N = number of injuries and illnesses

EH = total hours worked by all employees during the calendar year

200,000 = base for 100 full-time equivalent workers (working 40 hours per week, 50 weeks per year)

² High rate industries were those having the highest incidence rate of total recordable cases of injuries and illn
recordable cases at the most detailed level of publication based on the *North American Industry Classification*

³ *North American Industry Classification System* -- United States, 2012

⁴ Excludes farms with fewer than 11 employees.

SOURCE: U.S. Bureau of Labor Statistics, U.S. Department of Labor

TABLE SNR01. Highest incidence rates¹ of total nonfatal occupational injury and illness cases, 2017

Industry ²	NAICS Code ³	Incidence Rate
Nursing and residential care facilities (State government)	623	10.9
Motor home manufacturing (Private industry)	336213	10.3
Skiing facilities (Private industry)	71392	10.2
Veterinary services (Private industry)	54194	9.8
Materials recovery facilities (Private industry)	56292	9.8
Iron foundries (Private industry)	331511	8.5
Wood container and pallet manufacturing (Private industry)	32192	8.3
Manufactured home (mobile home) manufacturing (Private industry)	321991	8.2
Couriers and express delivery services (Private industry)	4921	8.2
Travel trailer and camper manufacturing (Private industry)	336214	8.0
Pet and pet supplies stores (Private industry)	45391	8.0
Correctional institutions (State government)	92214	7.9
Beet sugar manufacturing (Private industry)	311313	7.8
Psychiatric and substance abuse hospitals (Private industry)	6222	7.8
Hog and pig farming (Private industry)	1122	7.7
Hospitals (State government)	622	7.7
Framing contractors (Private industry)	23813	7.5
Steel foundries (except investment) (Private industry)	331513	7.4
Used household and office goods moving (Private industry)	48421	7.4
Roasted nuts and peanut butter manufacturing (Private industry)	311911	7.3
Light truck and utility vehicle manufacturing (Private industry)	336112	7.2
Police protection (State government)	92212	7.2
Ambulance services (Private industry)	62191	7.1
Seafood product preparation and packaging (Private industry)	3117	7.0
Nonferrous forging (Private industry)	332112	7.0
Truck trailer manufacturing (Private industry)	336212	7.0
All industries including state and local government ⁴		3.1

¹ The incidence rates represent the number of injuries and illnesses per 100 full-time equivalent workers and were calculated as: $\frac{N}{EH} \times 200,000$, where N = number of injuries and illnesses, EH = total hours worked by all employees during the calendar year, 200,000 = base for 100 full-time equivalent workers (working 40 hours per week, 50 weeks per year)

² High rate industries were those having the highest incidence rate of total recordable cases of injuries and illnesses as a percentage of total hours worked at the most detailed level of publication based on the *North American Industry Classification System*

³ *North American Industry Classification System* -- United States, 2012

⁴ Excludes farms with fewer than 11 employees.

SOURCE: U.S. Bureau of Labor Statistics, U.S. Department of Labor

Accordingly, the Coalition recommends that, to the extent the TCR is used for purposes of determining those industries that should be included in Appendix B, the threshold value should be set at no less than 6.8.⁸

⁸ A note of caution should be considered regarding the use of threshold values in general. As one Coalition member notes, companies manage occupational injuries/illnesses vastly differently. Some employers are singularly focused on avoiding recordable cases as they measure them as Key Performance Indicators while others are less concerned with incident rates and focus more on encouraging a culture of "reporting everything no matter how small." Therefore, it is likely that there will be a high variability of incident rates within a given industry. It is unreasonable to assume that a higher incident rate automatically indicates a "less safe" workplace filled with higher risks and hazards. Accordingly, to the extent an approach that does not rely on a threshold value can be used, the Coalition may support such approach, depending on its specifics.

CONCLUSION

The Coalition respectfully requests that the Administration give meaningful consideration to the comments and recommendations provided herein as the Agency moves forward to develop a final rule to improve tracking of workplace injuries and illnesses.

Sincerely,



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