

September 28, 2018

Loren Sweatt
Acting Assistant Secretary
Occupational Safety & Health Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Re: Comments on the OSHA Docket No. OSHA-2013-0023. “Tracking of Workplace Injuries and Illnesses,” 83 Fed. Reg. 36494 (July 30, 2018)

The National Association of Manufacturers (“NAM”) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs 12.75 million men and women, contributes \$2.33 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Manufacturers share a common goal of maintaining safe workplaces. Through technological advancements, increased focus on promoting a safety culture, and collaboration with the Department of Labor’s (“DOL” or “the Department”) Occupational Safety and Health Administration (“OSHA” or “the Agency”), the manufacturing industry has made noteworthy progress in workplace safety over the past several decades. From 1994 to 2012, BLS data show a decrease in workplace incident rates in the manufacturing sector from 12.2 occupational injuries per 100 full-time workers to 3.9. This decrease substantially outpaced the private sector as a whole, but there is always more work to be done.¹

The NAM and its Council of Manufacturing Associations (“CMA”)² appreciate the opportunity to comment on OSHA’s proposed rule on the “Tracking of Workplace Injuries and Illnesses” (the “NPRM”). OSHA’s NPRM proposes several necessary improvements over its prior 2016 final rule, including rescinding the requirement that employers submit Forms 300 and 301, but it falls short of explicitly addressing critical issues such as drug testing, incentive programs, and the protection of personally-identifiable information (“PII”) from disclosure. Some of these issues relate back to the 2016 final rule’s preamble language rather than actual amendments to the Code of Federal Regulations (“CFR”). We therefore believe OSHA may address them in this action because doing so would merely amount to the targeted amendment or revocation of prior guidance.

¹ Mfg. Inst., *Rate of Occupational Injuries in Manufacturing*, (Apr. 2014), <http://www.themanufacturinginstitute.org/Research/Facts-About-Manufacturing/Workforce-and-Compensation/Occupational-Injuries/Occupational-Injuries.aspx>.

² The NAM’s Council of Manufacturing Associations is a group of over 250 trade association members that represent specific manufacturing sectors. Many of these members have also joined these comments in their individual capacity, see below.

Summary of Comments

- I. OSHA should not collect Forms 300 and 301 because they contain personally-identifiable information and do not aid OSHA's enforcement mission.
- II. The final rule should explicitly protect the contents of Form 300A from public disclosure.
- III. The final rule should rescind OSHA's confusing guidance regarding drug testing and incentive programs from the preamble to the 2016 final rule.

Discussion

I. OSHA should not collect Forms 300 and 301

OSHA proposes to end the requirement that employers electronically submit Forms 300 and 301 annually. The Agency believes that both Forms contain personally-identifiable information, and it is concerned that a judge may find their contents subject to disclosure under the Freedom of Information Act ("FOIA") once they have been submitted. In addition, the Agency is likely not equipped to adequately protect PII from external attacks. At the same time, OSHA does not believe the collection of these Forms aids in enforcement efforts or provides any measurable countervailing benefit to the public. We agree.

- a. Forms 300 and 301 contain Personally-Identifiable Information and collecting them imperils employee privacy for little to no benefit

OSHA's 2016 final rule establishing the collection requirement for Forms 300 and 301 created an unacceptable risk of accidental or intentional disclosure of PII. At the same time, these forms collect duplicative information without creating additional enforcement value. As a result of the meaningful risk to worker privacy and the lack of value to the Agency, Forms 300 and 301 should not be collected.

The Department's "Guidance on the Protection of Personal Identifiable Information" defines PII as "any representation of information that permits the identity of an individual to whom the information applies to be reasonably inferred by either direct or indirect means."³ It is any information "that directly identifies an individual (e.g., name, address, social security number or other identifying number or code, telephone number, email address, etc.)." PII also includes information that may be used to identify an individual "in conjunction with other data elements, i.e., indirect identification."⁴ According to DOL's definition, descriptors that constitute indirect identification include gender, race, birth date, and geographic indicators.⁵

Forms 300 and 301 clearly collect information that falls under the Department's definition of direct and indirect PII. Form 300 requires the employee's name, case number (an identifying

³ Dep't of Labor, *Guidance on the Protection of Personal Identifiable Information*, <https://www.dol.gov/general/ppii>.

⁴ *Id.*

⁵ *Id.*

number/code), and details of his or her injury and recovery process.⁶ Further, it includes an identifying location by including the employer's name and business location as well as the location where the injury occurred.⁷ Form 301 also calls for PII because it requests an employee's full name and the physician's information, their medical diagnosis, and a detailed description of the injury or illness reported.⁸ The Form further requires the employee's home address, date of birth, and sex, all of which may be used to indirectly identify the individual.⁹

The Labor Department has a "special responsibility to protect [PII] from loss and misuse."¹⁰ OSHA, however, has admitted that it lacks the capacity to meet this responsibility.¹¹ At the same time, the Agency itself has acknowledged that this information has value to nefarious actors.¹² OSHA admits in the NPRM that more cyber-attacks are inevitable.¹³ If OSHA intends to collect PII, it must take adequate steps to protect it from accidental or intentional disclosure because "[the] loss of PII can result in substantial harm to individuals, including identity theft or other fraudulent use of information."¹⁴ As such, employers should not be forced by regulation to expose their employees' PII without a guarantee of confidentiality and reasonable protection.

b. Forms 300 and 301 collect duplicative information that lacks enforcement value

Employers must report serious injuries and illnesses to OSHA as they arise.¹⁵ These notifications make the Agency aware of workplace events in a far timelier manner than annual filings can provide.¹⁶ Submitting Forms 300 and 301 to OSHA merely provides the Agency with an anthology of already-reported events. This format may be useful to an employer for internal purposes, but OSHA could prepare a similar internal anthology from prior employer notifications without creating additional reporting burdens or data risks.

The Occupational Safety and Health Act of 1970 ("OSH Act") makes clear that OSHA should minimize "to the maximum extent feasible" any unnecessarily duplicative collection of

⁶ See, Dep't of Labor, *OSHA's Form 300, OSHA's Form 300A, and OSHA's Form 301*, <https://www.osha.gov/recordkeeping/new-osha300form1-1-04-FormsOnly.pdf>.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Dep't of Labor, *supra* note 2.

¹¹ Tracking of Workplace Injuries and Illnesses, 83 Fed. Reg. 36494, 26498 (proposed July 30, 2018) ("[T]here remains a real risk that the private, sensitive information from those forms could be disclosed regardless of the Department's attempts to keep it private. In the Department's view, that risk to worker privacy is unacceptable.").

¹² See e.g., "OSHA Investigating Possible Hack Of Injury And Illness Reporting Portal," InsideOSHAOnline (Aug. 18, 2017), <https://insideoshaonline.com/daily-news/osha-investigating-possible-hack-injury-and-illness-reporting-portal> (noting a possible attempt to compromise the online portal).

¹³ 83 Fed. Reg. at 36498 ("The gathering of such data may also incentivize cyber-attacks...").

¹⁴ Dep't of Labor, *supra* note 2.

¹⁵ Employers must "notify OSHA when an employee is killed on the job or suffers a work-related hospitalization, amputation, or loss of an eye. A fatality must be reported within 8 hours. An in-patient hospitalization, amputation, or eye loss must be reported within 24 hours." Dep't of Labor, OSHA, *Report a Fatality or Severe Injury*, <https://www.osha.gov/report.html>.

¹⁶ See e.g., OSHA, *Serious Event Reporting Online Form*, <https://www.osha.gov/pls/ser/serform.html> (Form No. OSHA 6-40.1).

injury and illness information.¹⁷ Where information overlaps among these Forms and between the Forms and already-submitted reports—including the employees’ names as well as the locations, dates, and descriptions of the injuries—it is in tension with clear statutory language. Since the benefits of collecting this information do not outweigh the risks of exposure of PII through FOIA or outside attack, OSHA should end the requirement that employers submit Forms 300 and 301.

II. The final rule should explicitly protect the contents of Form 300A from public disclosure

In the 2016 final rule, OSHA discussed the potential benefit of public disclosure of the contents of Form 300A, stating that it may be a “powerful tool in changing behavior,” but the Agency declined to set forth particular circumstances, processes, or safeguards for how such information would be made public.¹⁸ OSHA believed that publicly embarrassing employers would result in employers taking more active measures to reduce the number of incidents in the workplace.

This overly adversarial regulatory approach, however, will not incentivize improvements in worker safety. If published, the information collected on Form 300A is likely to be untimely and misleading and it would pose a risk to employee privacy. The OSH Act establishes a default rule that the Agency will not publish information collected pursuant to reporting requirements and strongly implies that OSHA should identify categories of information to be made public through notice and comment rulemaking.¹⁹ Even if OSHA disagrees about that notice and comment rulemaking is required, the NAM believes that this information is so sensitive that robust comment is necessary to create a sound practice. The Agency failed in the 2016 final rule to justify publication of this sensitive information, and indeed failed to fully discuss any contemplated changes in the corresponding proposed rule.

For additional discussion on how OSHA’s contemplated disclosure of Form 300A data lacks a regulatory justification, we direct the Agency to comments submitted today by the Coalition for Workplace Safety (“CWS”), in which we concur fully. In particular, the CWS comments make clear that the contents of Forms 300A should not be made public as such disclosure would reveal sensitive business information and Employer Identification Numbers without any safety benefit or furtherance of OSHA’s stated mission.²⁰

¹⁷ 29 U.S.C. § 657(d) (“Any information obtained by the Secretary . . . shall be obtained with a minimum burden upon employers, especially those operating small businesses. Unnecessary duplication of efforts in obtaining information shall be reduced to the maximum extent feasible.”).

¹⁸ Improve Tracking of Workplace Injuries and Illnesses, 81 Fed. Reg. 29624, 29629 (final rule published May, 12, 2016).

¹⁹ 29 U.S.C. § 657(g)(1) (the Secretary is “authorized to compile, analyze, and **publish**, either in summary or detailed form, all reports or information obtained under this section.” [emphasis added]).

²⁰ OSHA, *About OSHA*, <https://www.osha.gov/about.html> (“to assure safe and healthful working conditions for working men and women by setting and enforcing standards by providing training, outreach, education and assistance.”).

- a. OSHA should not publicly release the contents of Form 300A—via Website or FOIA—because such information could be used to indirectly identify individuals

The NAM agrees with OSHA's view in the NPRM that "any risk to worker privacy is unacceptable."²¹ Form 300A requires disclosure of the total number of deaths, number of cases with days away from work, and the number and types of injury or illness that occurred. Not every employer must file Form 300A, but certain high-hazard employers, classified in Appendix A to Subpart E of Part 1904, must submit the Form if they employ at least 20 employees.²² More than 90 percent of NAM members are small to medium-sized businesses; and therefore, many of them will meet this definition.²³ For smaller manufacturers, it is highly likely that an individual employee's identity could be indirectly ascertained if the contents of the Form are made public due to relatively lower anonymity in the communities that surround smaller workplaces.

- b. Public disclosure of the contents of Form 300A provides little, if any, benefit to workers and employers

OSHA has been of multiple minds with regard to the value of the data collected on Form 300A. As OSHA notes in its motion for summary judgement in a pending court case, the Agency has grave concerns about the publication of Forms 300A because of "limitations in the data and risk of misinterpretation."²⁴ OSHA argues that "release of the data will cause unfair and irreparable harm to employers' reputations," and that "although the data have limited meaning when examined in isolation, the public is unlikely to understand that, and thus will draw faulty conclusions about the meaning and import of the data."²⁵ Although this position conflicts with the Agency's posture in the 2016 final rule, we believe the Agency's present understanding is the correct one. The public is likely to misinterpret the contents of Form 300A, if disclosed.

In addition, the Agency has suggested that any data to be disclosed would become public only long after it ceases to have enforcement value. In the same case referenced above, OSHA suggests that information in Form 300A will be made public "only when [OSHA] finishes using the data to target employers for inspection—approximately four years after the year to which the data relates."²⁶ Any data disclosed would be stale at best, and may be simply unrepresentative of a company's current safety culture, undermining any benefit OSHA hopes to achieve from making the information public. The threat of future public embarrassment is neither necessary nor sufficient to promote stronger safety cultures. Instead, the Agency should affirmatively protect this information from disclosure.

²¹ 83 Fed. Reg. at 36498.

²² 83 Fed. Reg. at 36506 ("[I]f your establishment had 20 or more employees but fewer than 250 employees at any time during the previous calendar year, and your establishment is classified in an industry listed in appendix A to subpart E of this part, then you must submit the required information to OSHA once a year.").

²³ Nat'l Ass'n of Mfr's., "Power of Small," <http://www.nam.org/powerofsmall/>.

²⁴ Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment at 18, Pub. Citizen Found. v. Dep't of Labor, No. 18-cv-00117 (D.D.C June 1, 2018) (citing comment from the National Association of Manufacturers pointing "out that the data would not show that an increase in employee slips and falls in some wintry geographic areas are unavoidable, even with aggressive snow removal and clean-up efforts").

²⁵ *Id.*

²⁶ *Id.* at 19.

c. OSHA has the statutory authority to protect Form 300A information from disclosure

The OSH Act gives the Secretary of Labor—and the OSHA Administrator via delegated authority—the power to publish collected information.²⁷ Under a plain reading of the statute, this grant of authority suggests that Congress intended for any information collected pursuant to the OSH Act’s recordkeeping requirements to remain private unless the Secretary (or his designee) finds that disclosure would further the Agency’s mission. OSHA therefore has the discretion to decide whether the information submitted in Form 300A will become public. For the reasons laid out above, however, the NAM believes the Agency should clarify in the final rule that such data will not be disclosed by default. Any future disclosure, though unwise, should at the very least be crafted through notice and comment rulemaking and must be narrowly tailored to benefit workers while minimizing negative impacts and unintended consequences.

d. OSHA should rescind its statements under the preamble to the 2016 final rule regarding publication of Form 300A data

In the preamble to the 2016 final rule, OSHA sets forth its intent to publish data from Forms 300A. The details of such disclosure were left unclear, and the public cannot reasonably anticipate how or when any such data will be presented or used. Furthermore, the Agency’s statements in the preamble merely constitute sub-regulatory guidance.²⁸

OSHA admits to this lack of clarity in its ongoing litigation in the *Public Citizen* case, stating that “the continued objection to the release of the data may stem from OSHA’s unintended failure during the rulemaking to state exactly *when* it would release the data.”²⁹ The final rule in this action presents an opportunity to resolve any uncertainty created in the preamble to the 2016 final rule. OSHA should make clear through this rulemaking action that any guidance set forth in the prior rule is no longer in effect.

III. The final rule should rescind OSHA’s confusing guidance regarding drug testing and incentive programs from the preamble to the 2016 final rule

OSHA included language in the preamble to its 2016 final rule that seemingly told employers that certain drug testing policies and incentive programs would be impermissible under the OSH Act because they disincentivize accurate reporting of injuries and illnesses.³⁰ This language caused immediate confusion among manufacturers who no longer know how to structure their drug testing policies and incentive programs to be compliant with OSHA’s apparent understanding of the law.

²⁷ *Supra* note 18.

²⁸ *Memorandum on the Prohibition of Improper Guidance Documents*, Office of the Attorney General, (Nov. 16, 2017) (“[G]uidance may not be used as a substitute for rulemaking and may not be used to impose new requirements on entities outside the Executive Branch. Nor should guidance create binding standards by which the Department will determine compliance with existing regulatory or statutory requirements.”).

²⁹ *Memorandum of Points and Authorities in Support of Defendant’s Motion for Summary Judgment* at 19, *Pub. Citizen Found. v. Dep’t of Labor*, No. 18-cv-00117 (D.D.C June 1, 2018) (*emphasis in original*).

³⁰ See, 81 Fed. Reg. 29624, 29673 (“drug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use.”).

As stated above, preamble language is generally best considered to be a form of sub-regulatory guidance that lacks the force of law.³¹ OSHA has in fact taken this position with regard to this language in subsequent litigation over the 2016 final rule.³² If OSHA still maintains this position, then the Agency may easily address and rescind these statements in the final rule in this action and should do so. The preamble language itself, however, shows OSHA's clear intent that these statements have binding effect on enforcement officials and the public.³³ If so, OSHA therefore introduced binding requirements on employers in the 2016 final rule without providing adequate notice in their corresponding proposal and they deprived the public of an opportunity to comment on such prohibitions. The Agency should take the opportunity in this final rule to clearly state that any such un-noticed prohibitions with binding intent are not a logical outgrowth of the proposed rule in that action and are therefore not in effect. To the extent OSHA wishes to put in place basic safeguards against abuse of these practices, they should instead conduct notice and comment rulemaking.³⁴

Until January 1, 2017, manufacturers were able to rely on policies that required automatic post-accident drug testing to determine in an objective manner whether drug or alcohol use played a material role in an accident. Automatic post-accident drug testing policies are clear-cut, and they remove any possibility of implicit bias or discrimination that might otherwise play a role in determining reasonable suspicion of a single worker prior to testing.³⁵ Further, impaired individuals near the site of an accident or further up the manufacturing line may have contributed to an accident occurring, and standard post-accident drug testing policies in manufacturing workplaces often reflect this basic fact. OSHA suggests that employers must use an amorphous standard when conducting drug testing, but the Agency provided essentially no useable framework for employers to make this determination, and seemingly did not consider the benefit and cost impacts of such an important policy shift at all.

Additionally, until the 2016 final rule, manufacturers were generally free to implement incentive-based safety programs designed to motivate employees to achieve better safety outcomes. Such programs encourage employees to actively discuss workplace safety and look out for one another in workplaces with inherent hazards.

When OSHA upended both of these practices in the preamble to the 2016 final rule, it provided little to no evidence that well-designed post-accident drug tests or safety incentive

³¹ See Part II(d).

³² See Opposition Brief for Respondent at 15-17, *Texo ABC/AGC et al. v. Perez*, No. 3:16-cv-1998 (N.D. Texas 2016).

³³ See e.g. 81 Fed. Reg. at 29,674 (“**[I]t is a violation** of paragraph (b)(1)(iv) for an employer to take adverse action against an employee for reporting a work-related injury or illness, whether or not such adverse action was part of an incentive program. Therefore, **it is a violation** for an employer to use an incentive program to take adverse action, including denying a benefit, because an employee reports a work-related injury or illness, such as disqualifying the employee for a monetary bonus or any other action that would discourage or deter a reasonable employee from reporting the work-related injury or illness.” (emphasis added)).

³⁴ In addition to the improper guidance in the preamble and elsewhere, the 2016 final rule itself exceeds OSHA's statutory authorization under Section 11(c) by creating a new and unlawful enforcement authority in cases involving claims of discrimination or retaliation. The current NPRM does not address this issue, which the NAM has highlighted in previous comments and litigation. OSHA should undertake a supplemental rulemaking to correct this unlawful aspect of the 2016 final rule.

³⁵ 81 Fed. Reg. 29624, 29673 (“there should be a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness in order for an employer to require drug testing”).

programs discourage reporting or fail to improve safety outcomes in general. In fact, the Agency ignored a 2012 Government Accountability Office (GAO) report that reviewed a number of studies evaluating safety incentive programs and found that these programs do in fact reduce injuries.³⁶ The NAM believes that the Agency did not intend this perverse outcome—actual reductions in workplace injuries should always outweigh speculative impediments to implementing paperwork or reporting requirements.

To the extent that OSHA seeks to discourage extreme programs that single out workers who report injuries for discrimination or retaliation, they should only do so in a targeted and narrowly-tailored manner. The specter of such programs should not be invoked to undermine and disproportionately limit the proven tools available to manufacturers that promote safer workplaces. Any changes to drug testing requirements or limits on safety incentive programs should only be made through notice and comment rulemaking, during which the Agency has the opportunity to develop a meaningful evidentiary basis for limiting these programs.

VI. Conclusion

We encourage OSHA to use this rulemaking process to correct mistakes made in the 2016 final rule, and to partner with employers and worker advocates alike to make the shop floor even safer. To the extent our comments above suggest clear changes to prior guidance, we encourage the Agency to make those changes in the preamble to this final rule and to clearly indicate that any future publication of sensitive data, or restrictions on programs that promote worker safety, be done only through rulemaking if at all. Finally, we join in full support of comments submitted by the Coalition for Workplace Safety regarding this proposed rule.

Submitted on behalf of:

American Bakers Association
American Coke and Coal Chemicals Institute
American Forest & Paper Association
American Foundry Society
American Iron and Steel Institute
American Supply Association
Can Manufacturers Institute
Copper & Brass Fabricators Council
Flexible Packaging Association
Global Cold Chain Alliance
Hearth, Patio & Barbecue Association
Interlocking Concrete Pavement Institute
Independent Lubricant Manufacturers Association
Investment Casting Institute
Motor & Equipment Manufacturers Association
National Association of Manufacturers
National Precast Concrete Association
National Waste & Recycling Association
National Wooden Pallet and Container Association
Non-Ferrous Founders' Society
North American Association of Food Equipment Manufacturers (NAFEM)

³⁶ Gov't Accountability Office, Report to Congressional Requesters, *Workplace Safety and Health: Better OSHA Guidance Needed on Safety Incentive Programs* (Apr. 2012).

Plastics Industry Association (PLASTICS)
Portland Cement Association
Printing Industries of America
Society of Chemical Manufacturers & Affiliates
Specialty Graphic Imaging Association
Steel Manufacturers Association
The Aluminum Association

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