VIA ELECTRONIC SUBMISSION

September 28, 2018

Loren Sweatt
Deputy Assistant Secretary
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: Docket ID No. OSHA-2013-0023, Comments on OSHA's Notice of Proposed Rulemaking on Tracking of Workplace Injuries and Illnesses (RIN 1218-AD17)

Dear Deputy Assistant Secretary Sweatt:

Associated Builders and Contractors submits the following comments to the Occupational Safety and Health Administration in response to the above-referenced request for comment published in the *Federal Register* on July 30, 2018, at 83 Fed. Reg. 36,494.

About Associated Builders and Contractors

ABC is a national construction industry trade association representing more than 21,000 members. ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

ABC members know exceptional jobsite safety and health practices are inherently good for business. ABC understands the importance of common-sense regulations based on sound evidence and scientific analysis with appropriate consideration paid to implementation costs and input from employers. Many ABC companies have implemented safety programs that are among the best in the industry, often far exceeding OSHA requirements.

ABC is a member of the Coalition for Workplace Safety, which is filing a detailed set of comments on OSHA's proposed revisions. ABC supports CWS' comments and hereby incorporates them by reference.

Background

On May 12, 2016, OSHA issued the Improve Tracking of Workplace Injuries and Illnesses final rule, (hereinafter the 2016 Rule), which required establishments with 250 or more employers to electronically submit detailed injury and illness records (OSHA Forms 300, 300A and 301) to OSHA annually, which were to be posted publicly on the internet.[1]

Establishments in certain high-hazard industries, including construction, with 20-249 employees are required to annually submit a summary of work-related injuries and illnesses (OSHA Form 300A). Additionally, the 2016 Rule deemed some forms of post-accident drug testing and accident-free incentive programs to be unlawfully retaliatory.

ABC consistently opposed OSHA's proposed revisions during the rulemaking process, arguing that the proposal exceeded the authority delegated to it by Congress and did nothing to achieve the agency's stated goal of reducing workplace injuries and illnesses.[2] ABC also pushed back against OSHA's supplemental notice of proposed rulemaking, which lacked any supporting evidence to justify its claim of underreporting due to employer policies that allegedly discourage reporting of injuries and illnesses.[3]

After the rule was finalized, ABC and other stakeholders filed a lawsuit against OSHA's 2016 Rule, [4] which has been paused awaiting the outcome of the current rulemaking.

On July 30, OSHA issued a notice of proposed rulemaking entitled Tracking of Workplace Injuries and Illnesses, which proposes to remove certain provisions of the 2016 Rule. Specifically, the proposal would rescind the requirement for establishments with 250 or more employees to electronically submit information from OSHA Forms 300 and 301.[5] Additionally, OSHA is proposing to require covered employers to submit their Employer Identification Number electronically along with their injury and illness submission.

Comments on OSHA's Proposed Rule

ABC appreciates that OSHA is proposing to rescind the requirement for establishments with 250 or more employees to electronically submit information from OSHA Forms 300 and 301. However, we continue to have concerns with the requirement that certain employers submit Form 300A, given the confidential business details included in the form and the high risk of disclosure. Further, despite significant opposition from ABC members, OSHA's proposal fails to make any revisions to the anti-retaliation provisions included in the 2016 Rule. ABC has previously argued, and reiterates now, that the anti-retaliation provisions impose significant burdens on ABC members and threaten workplace safety.

Based on the below arguments, it is essential that OSHA rescind the mandatory submission of Form 300A and the anti-retaliation provisions included in the 2016 Rule.

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[1] 81 Fed. Reg. 29,624.
[2] See ABC's comments filed on March 10, 2014 (Docket ID: OSHA-2013-0023-1356).
[3] See ABC's comments filed on Oct. 14, 2014 (Docket ID: OSHA-2013-0023-1646).
[4] *TEXO ABC/AGC et al v. Perez* (N.D. Tex.); Another suit was filed against the 2016 Rule by the NAHB and the Chamber of Commerce in Oklahoma. That suit is also being held in abeyance for now. *NAHB v. Acosta* (W.D. OK).
[5] 83 Fed. Reg. 36,494.

1) **Public Disclosure of Forms 300, 300A and 301 Will Harm Employees and Employers and Provides No Enforcement Value to OSHA.**

ABC agrees with OSHA's proposal to rescind the requirement for establishments with 250 or more employees to electronically submit information from OSHA Forms 300 and 301, given that they contain sensitive and private employee information. As OSHA states in the NPRM, the risk of public disclosure of this information to employee privacy and the reporting burden on employers are unjustified given the uncertain benefits of collecting the information.[6]

The OSHA Form 300 in particular contains sensitive and personal medical information about individual employees, which the government has historically kept private. It includes employee names, job titles, descriptions of injuries and body parts affected as well as the extent of the injury suffered by the employee and whether the injury resulted in lost work days or restricted duty. The Form 301 contains much of the same information as the Form 300 but also includes additional information about the employee, such as home address, date of birth, physician information and detailed information about the injury, such as whether it resulted in the employee being hospitalized, how the incident occurred and what body parts are affected.

ABC agrees with OSHA's assertion that Forms 300 and 301 do not provide valuable enforcement data for the agency. As ABC pointed out in its 2014 comment letter, OSHA has long recognized that many injuries and illnesses on worksites result from conditions, activities and hazards that are outside an employer's control.[7] Therefore, any enforcement targeting based on this information is unlikely to result in greater regulatory compliance, because the data does not necessarily mean an employer is failing to comply with OSHA standards. OSHA has acknowledged this issue in the Site-Specific Targeting enforcement program and implemented appropriate quality controls. Additionally, the records submitted to OSHA contain data that could be more than a year old. Not only is the information not necessarily predictive of a present hazard, but it also does not take into account any corrective actions that an employer may have taken in the meantime to improve workplace safety. These records provide little value to the agency as to whether a recorded incident should have resulted in citation, and are antithetical to the original intent of a "no-fault" recordkeeping system.

ABC continues to have concerns with the requirement that certain employers submit Form 300A, given the confidential business details included in the form and the high risk of disclosure. As OSHA has itself argued in opposition to the Freedom of Information Act demands of Public Citizen in the currently pending case,[8] OSHA's Form 300A contains business information that is "clearly within the definition of commercial or financial information" and is therefore entitled to protection from public disclosure. Further, OSHA has correctly asserted in the Public Citizen litigation that the mere threat of public disclosure of the Form 300A submissions is harming compliance and effectiveness of the injury tracking and reporting program.
OSHA stated in its initial proposal that its objective in the 2016 Rule was to "nudge" employers to abate hazards by publicly shaming them with the disclosure of injury and illness data.[9] This objective, in effect,

[6] 83 Fed. Reg. 36,494.
[7] See ABC's Comments filed on March 10, 2014 (Docket ID: OSHA-2013-0023-1356).
[8] *Public Citizen Foundation v.US DOL*,18-cv-00117-EGS (D.D.C.).
[9] 78 Fed. Reg. 67,254.

reverses the entire concept of a "no-fault" recordkeeping system and raises constitutional concerns under the First Amendment.[10] OSHA readily acknowledges that many injuries contained on an employer's OSHA 300 Log are not within the control of the employer. Yet OSHA wants the public and future employees to rely on this data to establish which workplaces are safe and which companies have strong safety records.[11] This is, at best, an internally inconsistent position and, at worst, a demonstration of how the agency does not understand its own past positions on recordkeeping and the elements of effective safety and health programs at worksites across the country.

Further, OSHA lacks statutory authority to create an online database meant for the public dissemination of any employers' injury and illness records at any time. OSHA has based its authority for the 2016 Rule under Sections 8 and 24 of the Occupational Safety and Health Act, but neither of those sections authorizes OSHA to publicly disseminate reports collected under the rule. See, e.g., Comments from the U.S. Chamber of Commerce, OSHA-2013-0023-1396, p.3 ("Conspicuously absent from [the statute] is any mention, let alone express or implied authority, that OSHA may create an online database meant for the public dissemination of an employer's injury and illness records containing confidential and proprietary information.").

Congress's treatment of other similar online databases underscores that it did not intend to give OSHA authority to create such a database. Compare the OSH Act to the Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2055a. Had Congress wanted OSHA to create an online database of workplace injury and illness records, it would have said so. OSHA's authority with respect to recordkeeping is limited.

In addition, ABC member employers are particularly concerned about the potential disclosure of the OSHA Form 300A because it includes confidential business information such as the number of employee hours worked. Especially in a labor-intensive industry like as construction, publicizing this information gives outsiders insight into confidential processes and operations of a business, which could be used against the company by competitors and others. The unprecedented disclosure requirement also conflicts with the agency's prior position on release of this information to the public. OSHA previously stated it considers hours worked by employees to be commercial and "privileged and confidential" information, which the agency would not release to the public.[12] ABC believes information such as hours worked is proprietary and should be protected by OSHA.

Also, ABC members are rightfully concerned that the public disclosure of this information could cause reputational harm based on misleading information on the safety and health efforts of employers. These records could easily be misconstrued, and improper conclusions or assumptions can be made about an employer. For example, OSHA's proposal puts smaller companies at a disadvantage by making them appear to be less safe than larger companies by comparison. A smaller company with the same number of injuries and illnesses as a larger company is likely to have a higher incident rate. Providing such data to the public without appropriate context could lead to unnecessary damage to a company's reputation, related loss of business and jobs and misallocation of resources by the public, government and industry.

[10] See Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359 (D.C. Cir. 2014), adhered to on reh'g, 800 F.3d 518 (D.C. Cir. 2015) (vacating SEC's public disclosure rule).
[11] 81 Fed. Reg. at 29,649.
[12] 5 U.S.C. § 552(b)(4) (2000).

Again, ABC agrees with OSHA's proposal to rescind the mandate for employers with more than 250 employees to electronically submit Forms 300 and 301, given that they contain sensitive and private employee information. ABC remains concerned, however, about the potential for public disclosure of the OSHA Form 300A and urges the agency to rescind this provision.

1) **The Collection of Employer Identification Numbers Puts Employers at Risk for Potential Fraud.**

ABC encourages OSHA to withdraw its proposal to require covered employers to electronically submit their EIN along with their injury and illness records. While ABC appreciates the agency's attempt to reduce duplicative reporting, we are concerned about the potential impact of this provision on employer privacy. Similar to an individual's social security number, an employer's EIN is a unique number assigned to business entities that is used for vital businesses operations like opening a bank account in a company name, for applying for business licenses and filing tax returns. For this reason, many employers consider their EIN to be confidential business information.

While EINs are not necessarily considered protected information since some company EINs are on public records filed with the Security and Exchange Commission, many employers have concerns about making this information more readily available to third parties through a simple FOIA request given the high potential for fraud. For example, a 2013 audit by the U.S. Department of the Treasury identified 767,071 corporate tax returns with potentially fraudulent refunds totaling almost $2.3 billion due to stolen and falsely obtained EINs.[13] Absent a compelling reason for OSHA to collect this data in the first place, ABC encourages OSHA to withdraw this provision in the proposal.

2) **OSHA Should Withdraw the Anti-retaliation Provisions Included in the 2016 Rule**

OSHA Should Withdraw the 2016 Rule's Creation of an Unauthorized Separate Mechanism to Address Discrimination Claims Beyond Section 11(c) of the Occupational Safety and Health Act.

The 2016 Rule created a new enforcement scheme in Sections 1904.35 and 1904.36 to prohibit alleged discrimination and retaliation against employees. This exceeded OSHA's statutory authority, as it contravened the statutory scheme established by Congress in Section 11(c) of the OSH Act.

Section 1904.35(b)(1)(iv) of the 2016 Rule prohibits employers from "discharg[ing] or in any manner discriminat[ing] against any employee for reporting a work-related injury or illness." In promulgating the 2016 Rule, OSHA admitted that Section 1904.35(b)(1)(iv) provides an "additional enforcement tool for ensuring the accuracy of work-related injury and illness records that is not dependent on employees filing complaints on their own behalf….The 2016 Rule allows OSHA to issue citations to employers for retaliating against employees for reporting work-related injuries and illnesses and require abatement even if no employee has filed a section 11(c) complaint."[14]

[13] https://www.treasury.gov/tigta/auditreports/2013reports/201340120fr.pdf
[14] 81 Fed. Reg. at 29,671.

The 2016 Rule goes far beyond the substantive prohibition against discrimination and the procedures specified for discrimination claims found in Section 11(c) of the OSH Act. Therefore, OSHA should withdraw the unauthorized new enforcement procedure in the 2016 Rule. At a minimum, this provision must be conformed to the requirements of Section 11(c) of the OSH Act that an employee must have "filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf or himself or others of any right afforded by this Act."[15] Only then can an investigation be authorized, leading to enforcement action in federal court to obtain injunctive relief as well as any appropriate reinstatement, rehiring and back pay.[16]

By arrogating to itself a new power to cite employers for alleged discrimination or retaliation against employees who report injuries, OSHA is circumventing the procedural requirements provided in Section 11(c) and purporting to give the Occupational Safety and Health Review Commission the jurisdiction to hear and decide these matters in contravention of the statute and congressional intent.

ABC urges OSHA to withdraw the 2016 Rule's burdensome and unauthorized new enforcement procedure.

OSHA Must Correct the 2016 Rule's Requirement for "Reasonable Reporting Procedures" to the Extent OSHA Sought Thereby to Prohibit "Immediate" Reporting Requirements.

In the 2016 Rule, OSHA required that "any injury and illness reporting requirements established by the employer be reasonable."[17] OSHA provided little guidance on what it considered to be "reasonable," but the guidance OSHA did provide was contrary to common workplace safety practices.

In describing its position on timely reporting of injuries and illnesses, OSHA stated in undefined terms that "for a reporting procedure to be reasonable and not unduly burdensome, it must allow for reporting of work-related injuries and illnesses within a reasonable time frame after the employee has realized that he or she has suffered a work-related injury or illness."[18] Many employers require immediate reporting of an injury or illness as soon as an employee discovers it, in order to allow prompt investigation into the cause. OSHA's 2016 Rule arbitrarily prohibited such immediate reporting requirements without any safety-based justification. ABC urges OSHA to correct this aspect of the 2016 Rule.

OSHA Should Withdraw Any Language in the 2016 Rule, Including Its Preamble, Purporting to Prohibit Routine Post-incident Drug Testing Programs as "Retaliatory."

In the preamble to the 2016 Rule, OSHA stated that drug testing "is often perceived as an invasion of privacy, so if an injury or illness is very unlikely to have been caused by employee drug use, or if the method of drug testing does not identify impairment but only use at some time in the recent past, requiring the employee to be drug tested may inappropriately deter reporting."[19] In addition, numerous

[15] 29 U.S.C. § 660(c)(1).
[16] *Id.* at § 660(c)(2).
[17] 29 C.F.R. § 1904.35(b)(1)(i).
[18] 81 Fed. Reg. at 29,670.
[19] 81 Fed. Reg. at 29,672 and 29,673.

statements in the preamble indicate that routine, post-accident drug testing will be deemed to be retaliatory if an employer cannot show that "employee drug use is likely to have contributed to the incident."[20]

After publication of the 2016 Rule and the litigation filed by ABC and other stakeholders,[21] OSHA scaled back somewhat its overbroad pronouncements, at least recognizing that drug testing is not yet capable of identifying drug "impairment," and OSHA therefore declared that it would not enforce this element of the 2016 preamble. OSHA has reiterated in its guidance FAQs, however, that routine post-accident drug testing will be found to be retaliatory if such testing is not restricted to drug use that is "likely to have contributed to the incident."[22]

The 2016 Rule contained no evidence that the implementation of routine mandatory post-incident drug testing of employees (regardless of which employees report the incident) has adversely impacted workplace safety. The sole support for the claim that injury reporting was in any way impacted by such drug testing was anecdotal and unsupported by any statistical evidence.

ABC continues to take strong issue with the "anti-safety" rationale underlying the 2016 Rule's prohibition of routine post-accident drug testing. Numerous construction industry employers have complained that the 2016 Rule removes or casts doubt on an important defense in the war on drugs in the workplace. It is the automatic nature of post-accident testing that makes it objective and avoids supervisory favoritism or difficult questions underlying "reasonable suspicion" testing. It must also be reiterated that post-accident testing does not target the individual who reports an injury (or an accident) but is focused on deterring drug use itself, which undeniably causes many accidents in the workplace. Waiting until the cause of an accident is definitively determined, as required by OSHA's preamble and more recent FAQs on this issue, will render drug testing ineffective, leading to more accidents in the future.

ABC urges OSHA immediately to disavow any language in the preamble and current guidance regarding the 2016 Rule that states or implies post-accident drug testing is in any way unlawful merely because such testing is not preceded by a determination that drug use was likely to have contributed to the accident in question. To the extent necessary to disavow the 2016 preamble, OSHA should supplement the current notice of proposed rulemaking to withdraw any express or implied prohibition against routine, post-accident drug testing.

OSHA Should Withdraw or Disclaim Any Language in the 2016 Rule, Including Its Preamble, Identifying Incident-based Safety Incentive Programs as "Retaliatory."

In the preamble to the 2016 Rule, OSHA improperly declared as unlawful long-established, incident-based safety incentive programs.[23] OSHA stated that "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

[20] Id. at 29,673.
[21] *TEXO ABC/AGC et al v. Perez* (N.D. Tex.); Another suit was filed against the Obama rule by the NAHB and the Chamber of Commerce in Oklahoma. That suit is also being held in abeyance for now. *NAHB v. Acosta* (W.D. OK).
[22] https://www.osha.gov/recordkeeping/finalrule/finalrule_faq.html
[23] Id. at 29,674.

action that would discourage or deter a reasonable employee from reporting the work-related injury or illness."

Although the agency added that it would consider "the specific rules and details of implementation of any given incentive program,[24] OSHA has offered no guidance differing from the 2016 preamble declaring invalid many incident-based safety incentive programs.

The record contains strong evidence that safety incentive programs reduce injuries and save lives. It makes no sense for OSHA to prohibit them for the sake of reporting injuries when the goal should be to prevent injuries.

ABC urges OSHA immediately to withdraw any express or implied prohibition against incident-based safety incentive programs. To the extent necessary to disavow the 2016 preamble in this regard, OSHA should supplement the current notice of proposed rulemaking to achieve this result.

Conclusion

ABC agrees with OSHA's proposal to rescind the requirement to submit Forms 300 and 301. However, we continue to have serious concerns regarding the submission of Form 300A and the anti-retaliation provisions included in the 2016 Rule. We urge OSHA to withdraw the requirement that Form 300As be submitted or publicly disclosed at any time after submission. In addition, we urge OSHA to withdraw all aspects of the 2016 Rule, including its preamble and current guidance, that purport to authorize OSHA to restrict or prohibit employers from utilizing post-accident drug testing and/or incident-based incentive programs. OSHA should specifically withdraw and disavow any characterization of such programs as discriminating or retaliating against employees based upon their reporting of workplace injuries or authorizing OSHA to issue citations against employers using such programs in the absence of employee complaints of actual discrimination or retaliation pursuant to Section 11(c) of the Act. To the extent necessary to accomplish the foregoing, we urge OSHA to issue a supplemental notice of proposed rulemaking.

Respectfully submitted,

Ben Brubeck
Vice President of Regulatory,
Labor and State Affairs

Of Counsel: Maurice Baskin, Esq.
Littler Mendelson, P.C.
815 Connecticut Ave., N.W.
Washington, DC 20006

[24] 81 Fed. Reg. at 29,674.