U.S. Chamber of Commerce

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The Honorable Doug Parker
Assistant Secretary of Labor
Occupational Safety and Health Administration
U.S. Department of Labor
Washington, DC 20210

Submitted electronically: www.regulations.gov

Re: Proposed Rule, Occupational Safety and Health Administration; Improve Tracking of Workplace Injuries and Illnesses (87 Fed. Reg. 18,528, March 30, 2022)

Dear Assistant Secretary Parker:

The U.S. Chamber of Commerce ("the Chamber") submits these comments on OSHA's proposed rule that would require certain employers to submit to OSHA electronically data from their OSHA Forms 300, and 301. OSHA also states that this data will be posted on the internet, making it available to any party that may wish to use it for whatever purpose. This rulemaking is essentially a reprise of a rulemaking conducted during the Obama administration that resulted in a final regulation issued May 12, 2016 (81 Fed. Reg. 29624).[1] That rule was modified by the Trump administration so that only the annual summary Form 300A is required to be submitted. OSHA now seeks to restore the requirement for employers to submit the more detailed information on the 300 and 301 forms and expands the number of employers who would be required to do so.

The Chamber objected strongly to the previous rulemaking, and accordingly objects to this rulemaking and urges OSHA to withdraw it. Because of the similarities between these rulemakings, the points made in our comments submitted March 10, 2014 detailing the flaws in that rulemaking are still relevant, and those comments are appended to these comments for reference.

The Current Proposed Rule Expands the Number of Employers Required to Submit Data.

In the previous rulemaking, OSHA would have required all establishments (specific locations) with 250 or more employees (of any type, at any time of the previous calendar year) to submit all of the data from the Forms 300 and 301.[2] The current proposal changes that to

[1] The proposed rule would have required employers to submit their data quarterly while the final rule reduced that to an annual submission.

[2] Form 300, known as the "'Log of Work-Related Injuries and Illnesses' includes information about the employee's name, job title, date of the injury or illness, where the injury or illness occurred, description of the injury or illness

requiring establishments with 100 or more employees in certain designated industries to submit data from their 300 and 301 forms as well as continuing to submit their 300A annual summaries. Establishments with 20 or more employees in certain designated industries would continue to submit their 300A annual summaries. 87 Fed. Reg. 18528, 18535-18536.

While the proposal speaks of "certain designated industries" as defining the establishments that must submit the new data, those lists are long and not at all limiting. *See,* "Appendix A to Subpart E of Part 1904—Designated Industries for § 1904.41(a)(1) Annual Electronic Submission of Information From OSHA Form 300A Summary of Work-Related Injuries and Illnesses by Establishments With 20 or More Employees in Designated Industries," and "Appendix B to Subpart E of Part 1904—Designated Industries for § 1904.41(a)(2) Annual Electronic Submission of Information From OSHA Form 300 Log of Work-Related Injuries and Illnesses, OSHA Form 301 Injury and Illness Incident Report, and OSHA Form 300A Summary of Work-Related Injuries and Illnesses by Establishments With 100 or More Employees in Designated Industries." 87 Fed. Reg. 18556, 18557.

While OSHA is Concerned About Employee Sensitive Information, No Concern is Shown for Employer Sensitive Data; Employers Will Likely Adjust Recording Decisions.

OSHA goes to great length to describe the measures it will take and the technology available for preventing the public release of employee identifying information. *See,* "The Data Collection Will Adequately Protect Information That Reasonably Identifies Individuals Directly" 87 Fed. Reg. 18538-18540. Even then, OSHA concedes that the risk will not be zero: "the agency will *seek to minimize the possibility* that worker information, such as name and contact information, will be released…." 87 Fed. Reg. 18529 (emphasis added). OSHA then cavalierly asserts "that the benefits of collecting and publishing the data for improving safety and health outweigh potential privacy problems." 87 Fed. Reg. 18540.

Unfortunately, the same concern for employer sensitive data is nowhere to be found. As the Chamber has pointed out in the previous rulemakings related to the collection and posting of the 300A annual summaries, those forms contain specific data on the number of employees and number of hours worked—two subjects that employers protect zealously as competitors can use these data to gain insights into efficiencies and productivity rates.

Furthermore, the establishment-specific nature of the data from the 300 and 301 forms will mean that adversaries and parties wishing to mischaracterize an employer's safety record will have no trouble doing so with great specificity. Merely because an injury or illness is recorded does not mean that employer has a weak safety program, or any OSHA violations. However, those wishing to attack these employers will rely on these data to create the

(*e.g.,* body part affected), and the outcome of the injury or illness (*e.g.,* death, days away from work, restricted work activity)." While Form 301, the ""'Injury and Illness Incident Report' includes information about the employee's name and address, date of birth, date hired, gender, the name and address of the health care professional that treated the employee, as well as more detailed information about where and how the injury or illness occurred." 87 Fed. Reg. 18529.

impression that the workplace is unsafe regardless of the nature of the incidents recorded. This already happens, and the data to be posted from these reports will only exacerbate this practice.

One expected consequence of OSHA's decision to post these data on the internet is likely to be that employers will reconsider whether to record as many injuries or illnesses. Whether to record an injury or illness depends on whether it is work related. This may not always be clear, such as when an employee sustains an injury outside the workplace that leads to problems in the workplace. Also, whether an employee was exposed to COVID-19 at the workplace might have been very hard to determine. Previously, employers could use the Forms 300 and 301 as internal management tools to track workplace safety matters and identify problems, but since employers will now know that every incident that is recorded will be made public, they may look more closely as to whether the injury or illness is work related and needs to be recorded.

The Projected Benefits from This Rule Are Highly Speculative and Not Quantified.

As it did in the rulemaking that produced the 2016 rule, OSHA relies on gauzy, speculative notions to establish the benefits it believes will flow from the rule and particularly from making the case-specific and establishment-specific data publicly available. *See,* Benefits of Establishment-Specific, Case-Specific Data Collection and Publication. 87 Fed. Reg. 18533. For instance, without any actual studies, analyses, or statements, OSHA believes these data will influence the labor market as job seekers compare safety data for workplaces and employers strive to present a safe workplace. As noted above, making these data publicly available would very likely lead to less desirable outcomes, such as increased litigation from plaintiffs' attorneys looking to assert that the employer was at fault to overcome workers' compensation no-fault limitations, as well as unions using these data to mischaracterize an employer's safety record during organizing campaigns or contract negotiations.

OSHA claims that with the case-specific and establishment-specific data it will be able to reach out with targeted assistance and suggestions. However, the sheer volume of reports it will receive belies this targeted approach.

Review of Preliminary Economic Analysis: OSHA Significantly Underestimates the Cost of the Rule to Employers.

There are significant errors and omissions in the OSHA economic analysis in support of the proposed rule. 87 Fed. Reg. 18528. OSHA's first year private sector cost estimate of $4.5 million reasonably balloons to $130 million when these errors and omissions are corrected due to recurring annual recordkeeping and reporting costs of at least $71.1 million plus initial year familiarization costs of $58.9 million. Furthermore, as noted above, OSHA presents no quantitative estimate of benefits, and the qualitative description of benefits is vague and speculative. Given the significant risks and costs to employers that will arise from the proposed rule, it is incumbent on OSHA to demonstrate quantitatively what benefits in terms of reduced

occupational fatalities, injuries or illnesses it expects to result from each element of the proposed rule.

In subsequent years, the annual reporting cost will likely continue at least at the $71.1 million level, but annual costs could increase if the risk of reputational damage or employee privacy liability risks arising from OSHA's proposed public posting of company names and injury and incident details leads affected establishments to add outside legal counsel reviews to their submission processes.

A fundamental flaw in OSHA's economic analysis is the naïve assumption that there will only be a single "person expected to perform the task of electronic submission…" 87 Fed. Reg. 18548. This assumption is unrealistic because OSHA's intent to publicly post individual establishment-specific information has potential reputational impacts that will necessitate careful prior review by senior executives and legal counsel prior to each submission each year.

In addition to potential reputational impacts, OSHA recognizes in its proposed rule preamble that the proposed electronic reporting requirements raise concerns about violation of individual employee privacy rights. OSHA's stated intention to minimize the risk of exposure of employees' private health information does not guarantee that such exposure will not occur and may not protect the employer from civil damages liability if it does occur. This risk associated with the public posting element of the proposed rule will further increase the level of pre-submission due diligence review by senior executives and legal counsel that employers will find necessary each year.

A major flaw in OSHA's estimation of annual reporting costs is the assumption by OSHA that half of the 48,919 establishments directly affected by the regulation will be able to drastically reduce their report submission times and costs by using a "batch" process of submitting multiple individual case records through an electronic portal that OSHA will provide. The fact that the putative electronic data submission portal has not yet been fully designed, implemented, and tested makes this assumption unrealistic. For the first reporting year, and perhaps many future years, the reasonable assumption is that all 48,919 affected establishments will upload the required case information manually or will have to delete various fields to accommodate data OSHA does not want to collect. Using OSHA's assumptions of 14.7 cases per establishment per year, 10 minutes per case preparation time, and internal staff opportunity cost of $1.01 per minute ($60.96 per hour), dropping the batch submission assumption alone raises the annual reporting burden calculated by OSHA from $3.9 million to $7.3 million.

Another major flaw in OSHA's economic calculation involves the calculation of the opportunity cost of the human resource professional staff members' time associated with the process of compiling and submitting the required data. OSHA calculates the economic opportunity cost of this labor by adding to the direct compensation of $54.45 per hour (including wages of $37.55 per hour and benefits of $16.96 per hour) an additional "load" of $6.38 per hour to cover overhead (calculated by OSHA as .17 times the $37.55 hourly wage).

Analysis of National Income Accounts data demonstrates that the correct factor for computation of the overhead and profit opportunity cost element is .6949 times the labor unit wage. (*See,* Bureau of Economic Analysis, https://www.bea.gov/data/gdp/gross-domestic-product Table 7 "Relation of Gross Domestic Product, Gross National Income, and National income" May 26, 2022). Correction of this error increases the "load" for overhead and profit from $6.38 per labor hour to $26.09 per labor hour, and the previous calculation of $7.3 million annual cost increases to $9.6 million. (718,386 cases x 10 minutes per case x $1.34 fully loaded opportunity cost per labor minute).

OSHA also errs in assuming that the work of preparing and reviewing the case materials and information for submission to OSHA will be the exclusive responsibility of a human resources professional member of the employer company staff. Very likely, the assembling and preparation of these records will include members of the safety department, where there is one. Also, as noted above, the potential impacts of the information posting planned by OSHA on company reputation and the potential liability risk arising from possible exposure of employee privacy will necessitate review by senior executives and legal counsel. The hourly compensation for the BLS Employer Cost of Employee Compensation category of managers and professionals, which includes both human resource professionals and more senior executives and legal professionals in combination, is $67.01 per hour instead of the $54.45 human resource professional only cost parameter used by OSHA. This correction increases the previous annual cost calculation of $9.6 million to $11.9 million. (718,386 cases x 10 minutes per case x $1.65 per minute). This amount will increase significantly if the reputational and liability risks cause employers to call upon outside legal counsel. At the typical rate of $400 per hour ($6.67per minute) charged by law firms specializing in employment law, each minute of outside counsel services applied to OSHA's estimated 718,386 cases to be processed annually into the report format will add $4.8 million to this annual cost.

The OSHA assumption that an aggregate internal labor time of only 10 minutes per case will be adequate to accomplish all of the work to compile, analyze, prepare, review internally and submit the data electronically is not based on any empirical analysis by OSHA. In view of the necessity for internal review of each case and of the final compiled reports by various levels of management and internal legal counsel, an aggregate time of 60 minutes per case at the blended management and professional rate is a more reasonable assumption. This more realistic estimate of aggregate internal labor time for preparation and review increases the previous calculation of $11.9 million to $71.1 million. (718,386 cases x 60 minutes per case x $1.65 per minute). The need to add outside legal counsel to the process will increase this amount by $4.8 million per minute of outside legal counsel time applied to the estimated 718,386 cases.

The sensitivity of compliance cost to the key parameter of aggregate internal preparation and review time means that OSHA should devote considerable effort to empirical study of this aspect prior to proceeding with the proposed reporting revisions. The reporting required is not a simple mechanical transfer of data from previously recorded incident reports; it entails review and judgement. The implications of the proposed new aggregate reporting

format will also have repercussions on the time and expertise applied to create the source incident reports as well.

Familiarization cost is an initial year economic cost of any new or revised regulation. Every employer must become aware of the regulation at least to the degree of knowing that it exists and determining whether it applies to them currently. Even if a rule does not apply to an employer, it takes some time—perhaps only minutes to learn that. If the rule is not currently applicable because of current employment size or industry of operations, it is important to know of its existence in anticipation of possible future changes in the size or operations of a business.

- OSHA has identified 48,919 business establishments that will be affected by the proposed reporting rule changes based on their employment size and industry classification. OSHA calculated aggregate familiarization cost as 10 minutes per establishment times $1.16 per minute times 48,919 establishments ($60.96 per hour/60 minutes per hour). This is inaccurate in two ways: (1) It ignores the familiarization time cost that establishments not covered will incur to determine their non-covered status, and (2) it suggests an extremely optimistic but empirically baseless view of the time that will be required by those covered to read the rule, review its requirements relative to their current operations and procedures, identify and implement new policies and procedures to comply with the new rule, and to train administrative and operational employees in their new compliance duties.

- Overall, there are 1.9 million establishments with 10 to 99 employees. While many will be unaffected, it will likely take time for these establishments to make that determination because more than one reviewing manager will likely be involved: at 5 minutes familiarization time for each of these establishments the basic familiarization cost at $1.65 per minute would come to $15.9 million.

- For the 172,277 establishments with 100 or more employees, on average a 15-minute review by senior managers or in-house legal counsel may be able to answer the basic affected or not affected question for an aggregate familiarization cost of $4.3 million.

- For the 48,919 establishments OSHA has identified that are affected by the proposed rule, the familiarization step becomes more complicated: each of these having determined that it is subject to the reporting requirement, must now consider how the new requirements impact existing policies and procedures, what are the risks of reputational damage or of employee privacy violation liability and how can those risks be mitigated by changing policies and procedures. For some, these considerations will likely trigger establishment wide reviews of safety and health procedures and training at significant cost. More than one senior manager or other professional staff member is likely to be involved in this more detailed familiarization and initial compliance adaptation process. For these 48,919 establishments 8 hours (480 minutes) of combined executive, administrative and professional staff time is likely a lower-bound estimate for

this stage of the familiarization process, yielding an aggregate cost of $38.7 million (48,919 establishments x 480 minutes per establishment x $1.65 per minute). Summing the three components results in a total initial year familiarization cost of $58.9 million.

Contrary to OSHA's claim, the proposed rule is an economically significant regulatory action under Executive Order 12866. 87 Fed. Reg. 18548. Combining the final estimate of $71.1 million annual reporting cost with the $58.9 million familiarization cost results in a total first year cost of $130 million. This amount exceeds the level defining an economically significant regulation under Executive Order 12866.

OSHA's Proposed Rule Remains a Flawed Rule and Should Be Withdrawn.

OSHA's proposed rule to reinstate a requirement for certain employers to submit their Forms 300 and 301 electronically to OSHA would impose significantly more costs than OSHA has estimated, for only speculative benefits. More importantly, OSHA's intention to post case-specific and establishment-specific data on the internet would trample on both employee and employer privacy rights and expectations. Accordingly, the proposed rule should be withdrawn.

Sincerely,

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