



Comments of the
Motor & Equipment Manufacturers Association
to the
Occupational Safety and Health Administration
U.S. Department of Labor
on the
Improve Tracking of Workplace Injuries and Illnesses
Notice of Proposed Rulemaking
Docket No. OSHA-2021-0006; RIN 1218-AD40
June 30, 2022

The Motor & Equipment Manufacturers Association (“MEMA”) is pleased to submit these comments in response to the Occupational Safety and Health Administration’s (“OSHA”) proposed rule revising the agency’s injury and illness reporting requirements, issued on March 30, 2022 (Docket No. OSHA-2022-06546) (the “Proposed Rule”).

MEMA shares OSHA’s commitment to continually improving workplace safety and minimizing the incidence of workplace injuries and illnesses. Keeping employees safe has been and remains a top priority of MEMA and its member organizations. Nonetheless, MEMA’s members are concerned about the Proposed Rule and urge OSHA to withdraw the proposal. OSHA’s contemplated revisions to its current injury and illness reporting requirements would result in the publication of detailed information regarding specific workplace injuries and illnesses, which MEMA believes would include confidential commercial information. MEMA believes that certain information fields in employers’ OSHA Forms 300 and 301 could be used, in some cases, to identify individual injured employees, particularly in small communities. Even though the Proposed Rule would not require employers to submit personally identifiable information such as the names and contact information for injured employees and their medical providers, covered employers will need to expend significant time and resources ensuring that their submissions have been stripped of all such data.

Unfortunately, it is MEMA’s opinion that these risks cannot be justified because the Proposed Rule is unlikely to achieve OSHA’s goal—the reduction of occupational injuries and illnesses. The Proposed Rule includes a number of asserted benefits that OSHA believes are likely to accrue if establishment- and case-specific injury and illness data is collected and made public, which include allowing OSHA to “focus its enforcement and compliance assistance efforts on individual workplaces with ongoing serious safety and health problems.”¹ OSHA also claims that publicizing such data—which, for the first time, must contain the employer’s name—will permit job seekers and other “stakeholders” to “make a more informed decision about a future place of employment,” and thus incentivize employers to make workplace safety improvements in order to attract talent.² These claims ignore the fact that injury and illness data would become stale by the time it is made

¹ *Improve Tracking of Workplace Injuries and Illnesses*, 87 Fed. Reg. 18528, 18531 (Mar. 30, 2022).

² *Id.* at 18534.

public, and in any event, many workplace injuries occur due to circumstances entirely outside of an employer's control. In the absence of additional context, there is a substantial likelihood that the detailed injury and illness data that is made public will be misinterpreted and will result in unwarranted harm to a company's reputation.

Of even greater concern is the chance that publication of detailed injury and illness data will actually impede accurate and complete recording. It is not always easy to discern whether an injury or illness is work-related and thus recordable, and OSHA's current "no-fault" approach to recordkeeping thus encourages employers to err on the side of recording marginal cases. Given that an employer's injury and illness data will be published under the employer's name and potentially open to misinterpretation, the Proposed Rule will now create a perverse incentive for employers to be more restrictive in the injuries and illnesses they record.

MEMA encourages OSHA to take steps to assess and improve the quality of the source data provided by employers. The OSHA recordkeeping criteria are excessively complicated and not well understood and applied. Once that assessment is completed, OSHA may have an enhanced understanding of whether and how any new data is needed to effectively oversee workplace safety, but at this point, a new reporting requirement would be premature.

MEMA appreciates the opportunity to submit comments on the Proposed Rule and strongly encourages OSHA to set aside the amount of time necessary to analyze comments submitted by the regulated community to provide a reasonable and workable final rule for all affected parties.

Introduction

About MEMA

MEMA is the leading national trade association representing motor vehicle parts manufacturers, also known as vehicle suppliers. MEMA represents over 900 companies that develop innovative technologies and manufacture original equipment ("OE") and aftermarket components and systems for passenger cars and commercial trucks.³ Vehicle suppliers operate in all 50 states, directly employ over 907,000 Americans, and represent the largest sector of manufacturing jobs in the United States. Direct, indirect, and induced vehicle supplier employment accounts for over 4.8 million U.S. jobs and contributes 2.5 percent to U.S. GDP. The average U.S. wage for direct vehicle supplier jobs reached \$80,300—exceeding the average of all U.S. manufacturing sectors.⁴

Across the entire range of new vehicle innovation—from automated driving systems to zero emission technologies—vehicle suppliers are leading the way. Vehicle suppliers conceive, design, and manufacture the OE components, systems, and technologies that make up more than 77 percent of the value in new vehicles. A typical vehicle can include 30,000 components and subsystems, the majority of which are developed through vehicle part manufacturers. Additionally, vehicle suppliers manufacture and remanufacture a multitude of aftermarket parts and materials for vehicle service, maintenance, and repair. Overall, vehicle suppliers invest billions of dollars leading the industry development of an array of technologies and products that improve vehicle safety, emissions, and efficiency.

³ MEMA represents its member companies through its four divisions: Automotive Aftermarket Suppliers Association (AASA); Heavy Duty Manufacturers Association (HDMA); MERA - The Association for Sustainable Manufacturing; and Original Equipment Suppliers Association (OESA).

⁴ [U.S. Labor and Economic Impact of Vehicle Supplier Industry](#), MEMA and IHS Markit. February 2021.

Challenges Currently Facing Vehicle Suppliers

Now, more than ever, the U.S. vehicle industry is at a critical inflection point as it envisions an ambitious future of zero emissions and zero fatalities with new, cutting-edge powertrain and advanced safety technologies. The U.S. must stay in the lead on key vehicle technologies to strengthen domestic investments and remain globally competitive on emerging technologies. Vehicle suppliers face a myriad of current challenges within their U.S., North American, and global operations. These broad risks to motor vehicle parts manufacturers include the acute shortage of vehicle-grade semiconductors, international and domestic shipping delays, and significant increases in logistics expenses. Moreover, skyrocketing raw material and input costs as well as shortages of critical minerals, resins, steel and other metals, and other commodities are also adversely impacting the sector and adding to the overall threat of inflation facing the country. Last but not least, workforce development is one of the most significant challenges facing the industry. Severe worker shortages continue to plague all tiers of the vehicle supply chain.

The Proposed Rule is Likely to Result in the Publication of Confidential Business Information and Personally Identifiable Information

MEMA's concerns regarding the publication of confidential business information and sensitive employee data are not new. In fact, when OSHA issued a final rule in 2016 requiring the submission and publication of certain employers' OSHA Form 300 and Form 301 data, numerous commenters expressed similar dismay at the material likelihood that confidential information would be disclosed or would be discernable from published injury and illness data.⁵ These considerations were central to OSHA's decision in 2019 to rescind the Form 300 and 301 submission requirement, with the agency stating that it had "determined that the [rescission] rule is necessary to preserve sensitive worker information" and prevent the exposure of employers' "confidential and proprietary information to their competitors and adversaries."⁶

The Proposed Rule provides no basis to reverse OSHA's prior judgment that publication of Form 300 and Form 301 data presents a meaningful risk of public disclosure of confidential information.

Personally Identifiable Information

With respect to employee personally identifiable information ("PII"), OSHA asserts that "the reasons given in the preamble to the 2019 final rule for the removal of the 300 and 301 data submission requirement are no longer compelling" for several reasons.⁷ First, for the Form 300, OSHA says that it will not require employers to submit employee names (column B); for the Form 301, employers will not submit employee names (field 1), employee addresses (field 2), names of physicians or other health care professionals (field 6), and facility names and addresses if treatment was given away from the worksite (field 7).⁸ However, employers will still be required to maintain complete 300 and 301 Forms even if they submit only certain portions. As such, this will require employers to collect all of the necessary data, and then expend significant time and resources to create versions for submission from which the data listed above has been removed. This will also require employers to spend time and resources to train employees on the new submission requirements and, given the increased volume of data that must be submitted, presents a material risk that PII will be missed and submitted inadvertently. This risk is higher for employers

⁵ *Improve Tracking of Workplace Injuries and Illnesses*, 81 Fed. Reg. 29624, 29657 – 63 (May 12, 2016).

⁶ *Tracking of Workplace Injuries and Illnesses*, 84 FR 380 (Jan. 25, 2019).

⁷ 87 Fed. Reg. 18528, 18538.

⁸ *Id.*

who still maintain their OSHA Forms 300 and 301 in paper format, and thus must manually enter their reportable data into OSHA's web-based submission system, increasing the chance of clerical errors.

Second, OSHA intends to address the concern that PII will be submitted inadvertently by reminding employers that they should strip their data submissions of any PII that may be present in text fields.⁹ However, this too will require a significant expenditure of resources because it will require employers to assign someone the task of reading every Form 301 to ensure that the narrative fields do not refer to the injured employee by name or include other PII, which OSHA admits is a common occurrence.¹⁰ OSHA says it will also address this risk by using existing privacy scrubbing technology that it claims is capable of de-identifying information that reasonably identifies individuals directly (such as name, phone number, email address, etc.).¹¹ However, OSHA made this same claim in the preamble to the 2016 injury and illness reporting rule, which the agency rejected in the preamble to the 2019 rescission rule:

After carefully considering commenters' submissions on this issue, OSHA finds that there is a meaningful risk to worker privacy if OSHA requires employers to electronically file detailed injury and illness data on Forms 300 and 301 because de-identification software cannot fully eliminate the risk of disclosure of PII or re-identification of a specific individual and manual review of the data would not be feasible. OSHA's past experience with case-by-case release of 300 and 301 data and severe injury reports reveals that these concerns are far from speculative.¹²

Although OSHA states that this rationale is no longer compelling given "recent technological developments in automated data coding for text-based fields,"¹³ the Proposed Rule provides no details on the systems, software, or platforms that are available now but were not available at the time of the 2019 rescission rule. In fact, all but one of the data scrubbing products identified by OSHA in the Proposed Rule were commercially available prior to the issuance of the rescission rule.¹⁴

Finally, even though OSHA will not collect or publish clearly identifying information such as names or contact information, the Form 300 and 301 data that will be published can easily be used to determine an injured employee's identity. For example, by cross-referencing the job title and date from a particular entry in an employer's Form 300, with the date, description of injury, and description of the incident in an employer's Form 301, members of the public would in many cases be able to identify the individual employee who is the subject of these records—particularly in small communities. Efforts to identify individual employees will be made even easier by the fact that the Proposed Rule would require employers to include their company name in their submissions.

Again, concerns that individual data fields could be linked and used to identify injured employees—even if the information, standing alone, would not be considered traditional PII—were raised in prior rulemakings and were a part of OSHA's justification for issuing the 2019 rescission rule.¹⁵ The Proposed Rule does not address this possibility or explain why its judgment as to the feasibility of identifying individual employees from Form 300 or 301 data has changed.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² 84 Fed. Reg. 380, 386.

¹³ 87 Fed. Reg. 18528, 18540.

¹⁴ *Id.*

¹⁵ 84 Fed. Reg. 380.

Employee privacy is a very serious concern for MEMA's members. While OSHA has committed to protecting the identify of injured employees, the agency has failed to address these issues fully in the Proposed Rule and has not provided satisfactory answers regarding how it intends to implement these protections and maintain data quality control.

Confidential Business Information

Similarly, the Proposed Rule fails to satisfactorily address the possibility that confidential business information will be disclosed as a result of the contemplated publishing requirements. For example, OSHA Form 301 requires employers to provide detailed information regarding what the injured employee was doing immediately before the incident occurred, describe how the employee was injured, and identify the object or substance that directly harmed the employee. In many cases, these data fields will contain confidential and proprietary business information regarding the employer's processes and equipment, proprietary chemicals or substances in use at the employer's facility, and proprietary technologies. These concerns were among those that caused OSHA to issue the 2019 rescission rule, and the Proposed Rule fails to adequately address them here.

Publication of Establishment-Specific Injury and Illness Data That Is Susceptible to Misinterpretation Is Not Likely to Produce Improvements In Safety

OSHA asserts that the collection and publication of the establishment-specific, case-specific data reflected in OSHA Forms 300 and 301 will facilitate the prevention of worker injuries and illnesses because the information obtained through the Proposed rule will permit "employers, employees, employee representatives, the government, and researchers [to] . . . identify and mitigate workplace hazards."¹⁶ The Proposed Rule provides several examples of how OSHA believes the Proposed Rule will "increase its impact on the many thousands of establishments where workers are being injured or made ill but which OSHA does not have the resources to inspect."¹⁷ Specifically, OSHA asserts that collection of establishment-specific, case-specific data would permit it to:

- More effectively allow OSHA to identify the workplaces where workers are at high risk;
- Send hazard-specific educational materials to employers who report high rates of injuries or illnesses related to those hazards;
- Use the information to identify emerging hazards, support an agency response, and reach out to employers whose workplaces might include those hazards;
- Focus its Emphasis Program inspections on establishments with specific hazards;
- Refer employers who report certain types of injuries/illnesses to OSHA's free on-site consultation program; and,
- Add specific hazards or types of injury or illness to its Site-Specific Targeting program.¹⁸

However, the collection and publication of OSHA Form 300 and 301 data is unlikely to achieve these objectives. First, this data is collected annually, meaning that reported injuries and illnesses could be stale even at the time of submission. Form 300 and 301 information is likely to be even further outdated by the time it is made public after what is likely to be a lengthy scrubbing process to ensure it is free of PII and other confidential information. As such, by the time this data is available for use and analysis, it is unlikely to reflect the current working conditions and safety efforts at the subject establishment. Moreover, the published data would not reflect subsequent

¹⁶ 87 Fed. Reg. 18528.

¹⁷ *Id.*

¹⁸ *Id.*

remedial measures that an establishment may have implemented in response to reportable employee injuries or illnesses, and thus would have limited utility in allowing OSHA to identify, more effectively, those workplaces where employees are at risk.

OSHA also proffers several justifications for why the collection and publication of OSHA Forms 300 and 301 are necessary that have no bearing on OSHA's enforcement efforts. These include the assertion that this data will "improve the workings of the labor market by providing more complete information to job seekers" regarding a potential future place of employment, and in doing so "help address a problem of information asymmetry in the labor market."¹⁹ Even if that were true, these objectives fall far outside of OSHA's statutory mission to ensure safe and healthful working conditions for working men and women.

The Proposed Rule attempts to link these objectives to its core safety mission by arguing that the publication of Form 300 and 301 data will incentivize employers to take steps to improve safety at its establishments in an effort to compete for talent. However, these justifications are similarly unlikely to produce the benefits that OSHA envisions will be the result of the Proposed Rule. It is undeniable that many workplace injuries and illnesses are the result of factors entirely outside of an employer's control. For this reason, raw data regarding workplace accidents fails to provide a reliable measure of an employer's safety record or its efforts to foster a safe working environment. Publication of injury and illness data without providing additional context necessary to interpret the data paints a distorted picture of an employer's workplace that is ripe for misinterpretation. Making such data publicly available would allow third parties to use it for reasons wholly unrelated to safety. For example, plaintiffs' attorneys, labor unions, competitors, and special interest groups would be able to use such information—selectively or otherwise—as leverage against companies during legal disputes, union organizing drives, contract negotiations, or as part of an effort to prevent a company from entering a specific market. This misuse of the data—in conjunction with the fact that it is directly tied to a company name—risks unwarranted damage to a company's reputation and subsequent loss of business and jobs.

Abandoning OSHA's Longstanding Policy of No-Fault Recordkeeping Will Hinder Accurate Reporting

Of particular concern to MEMA's members, the Proposed Rule would abrogate OSHA's longstanding policy of "no-fault" recordkeeping that dates back decades. In 2001, OSHA revised its recordkeeping requirements to adopt a "no-fault" system, and since then, the note to 29 C.F.R. § 1904 states unambiguously:

Recording 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, or that the employee is eligible for workers' compensation or other benefits.²⁰

During the 2001 rulemaking, OSHA concluded that a "geographic" presumption was the best method of furthering Congress's objectives for determining work-related injuries and illnesses, meaning that injuries and illnesses are recordable if they occur or have a nexus to the workplace.²¹ In doing so, OSHA stated expressly that a "geographic" presumption meant that some injuries and illnesses would be considered work-related, and thus recordable, even if they result "from an event at work that [is] outside the employer's control, such as a lightning strike, or involve[] activities

¹⁹ *Id.*

²⁰ 29 C.F.R. § 1904

²¹ 66 Fed. Reg. 5929.

that occur at work but that are not directly productive, such as horseplay."²² This understanding serves an important purpose, in that employers are more likely to record injuries and illnesses if they do not fear that doing so would be interpreted as an admission of fault.

Now, however, OSHA intends to abandon this “no-fault” system by using reported injury and illness data as a tool to target employers for enforcement actions and shame employers by making such data public and allowing it to be used by third parties to further interests entirely unrelated to safety. MEMA’s members believe that the Proposed Rule would significantly impair accurate and complete injury and illness reporting—employees will be more reluctant to report injuries to their employers, knowing that their personal injury information will be made public, and employers will be more reluctant to record injuries out of a fear that it will be misinterpreted and misused by third parties.

For example, in many cases, it is very difficult for employers to conclusively determine whether an injury or illnesses is work-related and recordable. The COVID-19 pandemic has brought these challenges into stark relief. For example, in many—if not most—cases where an employee contracts COVID-19, it is impossible for an employer to determine whether the employee contracted the illness at work with any degree of confidence. Throughout the pandemic, employers have expended substantial resources to perform contact tracing and conduct thorough investigations, and nonetheless are unable to make a conclusion as to the source of the employee’s illness. Under the current “no-fault” system, employers are comfortable recording inconclusive cases out of an abundance of caution. However, abandoning that system would create serious incentives for employers to err in the other direction, and avoid recording marginal injuries or illnesses out of a fear that their 300 and 301 data, once made public, will be used against them. Employers would also feel concern that they may be targeted by OSHA for enforcement action even if there is no clear evidence that safety or health hazards are present in their workplace. Abandoning the “no-fault” system that has worked so well, for so long, would seriously impair injury and illness reporting and, in fact, undermine the very objective that OSHA’s Proposed Rule is intended to achieve.

Conclusion

MEMA appreciates the agency’s consideration of these comments concerning the Proposed Rule. MEMA’s members are committed to the safety of their workplaces and employees and continue to prioritize their efforts to minimize the risk of occupational injuries and illnesses. However, serious concerns exist that the Proposed Rule will do little to reduce the incidence of work-related injuries and illnesses, will jeopardize the security of highly sensitive commercial information and information personal to employees, will compel the publication of injury and illness data that is susceptible to being misconstrued and will provide unproven safety benefits, and will hinder accurate and fulsome reporting.

For more information or questions, please contact Catherine Boland, vice president, legislative affairs, at cboland@mema.org or 202-312-9241.

²² *Id.*