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September 28, 2018

The Honorable Alexander Acosta
Secretary
U.S. Department of Labor
200 Independence Ave, NW
Washington, D.C. 20210

RE: Comments on Proposed Deregulatory Action to Repeal Portions of the OSHA Rule "Tracking of Workplace Injuries and Illnesses", Docket # OSHA-2013-0023.

Dear Secretary Acosta:

We write to express our opposition to the Department of Labor's July 30, 2018 proposal[1] to revoke a key part of the Occupational Safety and Health Administration (OSHA) May 12, 2016 final rule entitled *Improve Tracking of Workplace Injuries and Illnesses*. This proposed rule will weaken OSHA's ability to effectively target its scarce inspection and compliance assistance resources to larger workplaces that have a pattern or elevated incidence of injuries and illnesses. At present, OSHA's resources are already constrained, and is only able to target each workplace on average once every 158 years. By intentionally blinding itself, OSHA impairs its ability to view information on larger workplaces that would enable it to more effectively pinpoint documented hazards and save workers from injury and illness.[2]

OSHA currently requires employers with more than 10 employees in high hazard industries to record detailed injury and illness data on OSHA Form 300 (Log of Work-Related Injuries and Illnesses) and to prepare a supplementary Form 301 for each recordable incident (Injury and Illness Incident Report). Each year, employers with at least 20 employees in a subset of these industries are also required to prepare and electronically submit to OSHA a summary report of all injuries and illnesses on the OSHA Form 300A (Summary of Work-Related Injuries and Illnesses). Form 300A provides an aggregate summary, but lacks details about individual incidents contained in the Log 300. Electronic submissions for Form 300A have been made for 2016 and 2017.

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[1] *Tracking of Workplace Injuries and Illnesses,* 83 Federal Register 36494, July 30, 2018
[2] Death on the Job: The Toll of Neglect, AFL-CIO, pp. 96 (2018) https://aflcio.org/sites/default/files/2018-04/DOTJ2018nb.pdf

The proposed rule eliminates an additional requirement contained in the May 12, 2016 rule which mandates large establishments with more than 250 employees to electronically submit to OSHA their Form 300 and Form 301(s) to OSHA (with individual employee identification deleted). OSHA has suspended enforcement of this requirement and will not accept electronic submissions because it is now revising the rule. Absent an annual electronic submission, OSHA must travel to the employer's worksite each year to review the Form 300 injury and illness log. The suspended rule would also make de-identified data from the Form 300 publicly available. Transparency has real benefits. Transparency of safety records helps "nudge" employers to focus on safety, according to OSHA. More attention to safety will save the lives and limbs of many workers, and as many leading companies have found, will ultimately help the employer's bottom line.

Employees currently have the right to request access to Form 300 in the workplace, but may fear retaliation for making that demand of their employer. However, the de-identified information on Form 300 or 301 would have been accessible to workers online in the privacy of their home—had its enforcement not been suspended. By accessing the information electronically, employees are in a position to assess whether their employer has underreported recordable injuries or illnesses. This could help deter the problem of employer underreporting: the DOL Inspector General reports that underreporting of severe injuries could be as high as 50%.[3]

OSHA claims that it is amending its recordkeeping regulations to protect "sensitive worker information from potential disclosure under the Freedom of Information Act (FOIA)." This explanation ignores the fact that the May 16, 2016 final rule already preserves workers' privacy by instructing employers not to provide any information that could identify employees. Specifically, it states the employers should not transmit the "employee name and address, treating physician name, and treating facility name and address" to OSHA on Forms 300 and 301. That rule also make clear employers should not transmit information related to "privacy concern" cases.[4] In addition, as a safeguard where sensitive information is inadvertently submitted by employers, the preamble to the May 2016 rule states that:

> "OSHA plans to review the information submitted by employers for personally-identifiable information. As part of this review, the Agency will use software that will search for, and de-identify, personally identifiable information before the submitted data are posted.[5]

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[3] *OSHA Needs to Improve the Guidance for its Fatality and Severe Injury Reporting Program to Better Protect Workers*, DOL Inspector General, Report No.: 02-18-203-10-105, pp. 3, September 13, 2018

[4] OSHA Regulations at 29 CFR 1904.29(b)(6) through (10) define "privacy concern" cases as: an injury or illness to an intimate body part or the reproductive system; an injury or illness resulting from a sexual assault; mental illnesses; HIV infection, hepatitis, or tuberculosis; needlestick injuries and cuts from sharp objects that are contaminated with another person's blood or other potentially infectious material; other illnesses, if the employee voluntarily requests that his or her name not be entered on the log; and if the employer has a reasonable basis to believe that information describing the privacy concern case may be personally identifiable even though the employee's name has been omitted, they may use discretion in describing the injury or illness on both the OSHA 300 and 301 forms.

[5] https://www.federalregister.gov/d/2016-10443/p-447

The professed rationale regarding employee privacy does not withstand scrutiny when examined against the experience of the Mine Safety and Health Administration (MSHA). Comparable injury and illness information recorded on Form 300 and Form 301 is already provided by mine operators to MSHA. De-identified information about each and every accident and injury is posted to MSHA's Mine Data Retrieval System for each mine and is searchable by the public. Details of each non-fatal injury or accident *exclude* the name of the miner, but *include* the date of the incident, degree of injury (including duration of work restriction or lost time), classification and description of the incident, and the duration of employment of the miner. To date, we are unaware of any sensitive information that was improperly posted to MSHA's Mine Data Retrieval System or released under FOIA.

Given that a sister agency in the DOL is able to protect employee privacy, OSHA has the burden of demonstrating why there will be inevitable harms to "sensitive worker information" for workers covered under the OSH Act. Further, there is nothing in the proposed rule that indicates the Privacy Act protected information submitted to MSHA has been unlawfully disclosed under the Freedom of Information Act. Fatality reports posted by MSHA do include the victim's name, but deceased workers' information is not protected under the Privacy Act.

The preamble to this proposed rule states that it will "maintain safety and health protections for workers while also reducing the burden to employers of complying with the current rule." The burdens imposed appear to be minor. With regards to electronic transmission of data, OSHA is continuing to retain the requirement in the May 2016 rule for employers in hazardous industries with more than 20 employees to electronically transmit annual Summary of Work Related Injuries and Illnesses (Form 300A). This includes those establishments with more than 250 employees. There is no evidence that requiring large employers to also transmit the OSHA Form 300 at the same time as they transmit the OSHA Form 300A imposes any meaningful additional burden.

Given that the stated basis for repealing the requirement to electronically submit OSHA Form 300 for large employers lacks substance, what underpins the proponents' advocacy for this deregulatory action? The U.S. Chamber of Commerce, which has led the opposition, stated:

> "The agency's excessive reporting requirements will lead to employers being falsely branded as unsafe and will not reflect a company's commitment to maintaining a safe workplace.... Among the misuses of these records will be unions mischaracterizing employers in organizing and corporate campaigns, and trial lawyers bringing frivolous lawsuits. Organized labor, who asked for this regulation, will exaggerate minor incidents to create the impression of an unsafe workplace. Trial lawyers will leverage these files against employers to extract settlements. [6]

[6] https://www.uschamber.com/press-release/us-chamber-responds-osha-s-misguided-regulation-requiring-employers-report-injuries

The concern about being unfairly branded as unsafe is a public relations concern that will be felt most acutely by those with unsafe workplaces. Hiding unsafe workplaces from public awareness surely does nothing to promote workplace safety. Increased transparency will help improve focus on workplace safety. Speculation about how information regarding injuries may be used by the public is not a valid basis under the OSH Act for repealing a rule whose objectives are to improve workplace safety through more efficient targeting and greater transparency.

Finally, the May 2016 rule included new requirements for employers to establish a reasonable procedure for employees to report work-related injuries and illnesses promptly and accurately, and to ensure workers are not deterred from reporting injuries and illnesses due to fear of retaliation. These provisions in 29 CFR 1904.35 and 1910.36 will help improve the accuracy of employer injury and illness records. We oppose any effort to remove these provisions as part of this rulemaking or to broaden this rulemaking to modify these provisions.

OSHA was created to ensure that employers provide safe and healthful workplaces for American workers. We urge you to abandon your efforts to rescind parts of the *Improve Tracking of Workplace Injuries and Illnesses* rule. This proposal is at odds with OSHA's mission "to assure safe and healthful working conditions for working men and women."

Thank you for your consideration.

Sincerely,

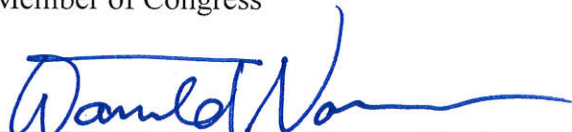
ROBERT C. "BOBBY" SCOTT
Ranking Member

MARK TAKANO
Ranking Member
Subcommittee on Workforce Protections

MARK DESAULNIER
Member of Congress

JOE COURTNEY
Member of Congress

FREDERICA S. WILSON
Member of Congress



DONALD NORCROSS
Member of Congress