UNITED STATES DEPARTMENT OF LABOR

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

29 CFR PARTS 1904 AND 1952
"IMPROVE TRACKING OF WORKPLACE INJURIES AND ILLNESSES"
PROPOSED RULE

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COMMENTS OF THE FOOD MARKETING INSTITUTE

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The Food Marketing Institute ("FMI") appreciates the opportunity to provide a response to the proposed amendments to the Occupational Safety and Health Administration's ("OSHA") recordkeeping regulations.

FMI is an organization that advocates on behalf of the food retail industry. FMI's U.S. members operate nearly 40,000 retail food stores and 25,000 pharmacies, representing a combined annual sales volume of almost $770 billion. Through programs in public affairs, food safety, research, education and industry relations, FMI offers resources and provides valuable benefits to more than 1,225 food retail and wholesale member companies in the United States and around the world.

For the reasons set forth below, FMI urges OSHA not to adopt the current proposal. The proposed rule greatly underestimates the burdens associated with the electronic submission of injury and illness information. Furthermore, regardless of such submission, multiple criticisms and problems weigh heavily against the public disclosure of the information, including, the potential for misuse of the information, the unreliability of the information, numerous confidentiality and privacy concerns, and the disclosure's ineffective shaming and potentially chilling effects. Finally, the financial cost to employers of the new submission and publication requirements will significantly exceed the estimates asserted in the proposal.

I. OSHA Underestimates the Significant Burdens Employers will Face if Required to Electronically Submit Injury and Illness Information

The proposed rule quickly dismisses the burdens that will be imposed upon employers by the electronic submission requirements, characterizing electronic submission as "a relatively small burden" and concluding "the annual benefits, while unquantified, significantly exceed the annual costs." 78 Fed. Reg. 67253, 67260, 67271. Unfortunately, this assessment disregards

many of the realities that employers likely will face when implementing and maintaining an electronic submission program. A reasonable assessment of the proposed rule reveals that the burdens of the electronic submission requirements will be far greater than described in the proposal, particularly with regard to small businesses.

A. The Burdens Associated with Implementing an Electronic Submission Program are Substantial

OSHA ignores the significant burdens of initial implementation of the electronic submission requirement. To initiate electronic submission of injury and illness information, employers will need to audit their entire recordkeeping programs. While it is true that the proposed rule does not require the collection of new or additional information, employers do not necessarily retain records in such a manner as to support easy electronic submission. New processes and procedures likely will need to be established to assure that the required information is readily available and accurately presented for regular electronic submission. Because of these new processes and procedures, the drafting of new recordkeeping policies as well as amendments to current employer manuals and handbooks will no doubt be required, causing additional investment of time and resources and, potentially, incurring attorney's fees and other costs. Similarly, job descriptions will need to be rewritten and work duties changed to assign the responsibility for the new quarterly and annual electronic submissions to one or more employees. Plainly stated, before the actual electronic submission process can even begin, establishments will be burdened with significant infrastructural, procedural, and temporal costs for which the current proposed rule offers no account.

B. Meeting the Electronic Submission Requirements is Far More Burdensome to Employers than Represented in the Proposed Rule

Calling compliance with the proposed electronic submission requirement "a relatively simple and quick matter," OSHA suggests that, "in most cases," submission of the necessary injury and illness information would require only four steps: "(1) Logging on to OSHA's web-based submission system; (2) entering basic establishment information into the system; (3) copying the required injury and illness information from the establishment's paper forms into the electronic submission forms; and (4) hitting a button to submit the information to OSHA." 78 Fed. Reg. 67253, 67272. OSHA estimates that each establishment would require only ten (10) minutes to submit the information, presumably following the four steps. *Id.* This simplistic view of the electronic submission procedure and gross underestimate of the likely time investment involved in submitting the information is patently unrealistic.

For instance, until OSHA's web-interface is finalized, there is no way to estimate how long the login procedure will take and, regardless, there will undoubtedly be a "learning curve" in using the interface. Certainly, employers will need to invest time and resources to familiarize themselves with the new OSHA website and information submission process, reviewing the online forms, acknowledgments, and procedures. This alone could take significantly more than ten minutes without any establishment beginning the actual information submission process.

Further, once employers overcome the initial obstacles, the task of manually typing injury and illness data, particularly for the proposed quarterly reports (which could include data across numerous incidents), is work-intensive and plainly would take longer than ten minutes. Indeed, depending on the number of reported injuries and illnesses, the employer's familiarity with the new system, and the accessibility of the necessary data, such a task would reasonably take far more time to complete. For example, particularly if OSHA were to adopt the enterprise-wide

submission alternative, discussed in greater detail below, a corporate safety representative of one of FMI's member companies could conceivably be required to submit hundreds of OSHA 300 Logs and OSHA 301 forms for individual grocery stores and warehouses, each of which would qualify as an "establishment." In such a situation, one could reasonably expect electronic submission to take hundreds of hours.

Moreover, after entry, employers will need to take additional time to assure that the injury and illness data was accurately entered before finalizing the submission. While this accuracy assurance is certainly prudent for compliance purposes, it will be absolutely necessary under the proposed rule because failure to provide accurate information could expose an employer to significant liability, including criminal liability. In the past, employers had no submission requirement with regard to injury and illness information. With the advent of the proposed rule, however, such a requirement will be created and, consequently, the terms of 18 U.S.C. § 1001 may apply to employers. This statute requires punishment by fine and/or imprisonment of up to five (5) years for anyone or any entity who knowingly and willfully makes any false, fictitious, or fraudulent statements or representations, or "makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry" in any matter within the jurisdiction of the Government, including, *expressly*, "administrative matters." 18 U.S.C. § 1001. Arguably, if employers submit injury and illness information through OSHA's web-interface that is later found to be inaccurate or false, employers could be fined, imprisoned, or both. In short, it is simply unrealistic to believe that an employee could locate the necessary information, organize it for entry, login to OSHA's website, manually submit multiple sets of data, and assure the *complete accuracy* of the data so as to avoid criminal liability in the small time period estimated by OSHA.

Notably, without the benefit of evidence, OSHA attempts to circumvent some of these concerns by representing that, "in many cases," employers already keep OSHA data electronically and would be able to submit the data "in the format in which it is kept . . . without having to transfer it into OSHA's online format." 78 Fed. Reg. 67253, 67272. Beyond the fact that these assertions are mere speculation regarding *how* employers are currently maintaining their injury and illness records, there is no basis to believe any substantial number of employers utilize software that will allow the data to be easily submitted to OSHA or, for that matter, easily moved into the forms on OSHA's website. Certainly, software can be and frequently is incompatible with other software and web-tools. A fair estimate of the burden the electronic submission requirement will place on employers cannot be based upon speculation that unidentified technology that employers may have could possibly increase the efficiency of the submission process some time in the future.

Finally, as with all technology-based procedures, OSHA fails to recognize that technical issues will arise and likely will account for a great deal of time spent troubleshooting and communicating with OSHA (or its contracted service provider) for support. As the recent creation of the Government's Affordable Care Act website has made undeniably clear, these potential technical issues both *will* occur and *cannot* be ignored as insignificant. The electronic submission requirement is *not* a light burden upon employers, the proposed rule greatly understates the time and resources that will be spent complying with the new regulations, and the requirement should not be instituted.

C. The Burdens of Compliance with the Proposed Rule will be Amplified for Small Businesses

The significant burdens of the proposed rule will only be greater in the context of small businesses. Small businesses are less capable of compliance because they have fewer resources

and are less sophisticated than larger organizations. Indeed, OSHA acknowledges that 30% of 2010 ODI establishments did not electronically submit injury and illness information and that "most agencies" currently allow paper submission of information. *Id.* at 67273. This confirms that OSHA is aware that not all small businesses will have the access necessary for electronic submission and that other government agencies have resolved this problem by allowing paper submission. Regardless of this awareness, however, rather than seeking a resolution of these issues in a manner that would lessen burdens on small employers – such as allowing paper submission – OSHA simply announces that approximately 22,043 establishments "would have to either buy additional equipment and/or services or use off-site facilities, such as public libraries." *Id.* at 67274. It is unreasonable to create a data submission regulation which requires tens of thousands of small businesses across the country to expend significant resources on additional equipment, services, and software, and any assertion by OSHA that such a requirement will not create substantial hardship to small businesses that have historically used paper methods of reporting is unrealistic.[1]

II. Publication to the Public of Electronically Submitted Injury and Illness Information

In the 2001 Final Rule to the current recordkeeping requirements, OSHA weighed the positives and negatives of any form of disclosure of the injury and illness information contained in Forms 300, 300A, and 301. *See* 66 Fed. Reg. 5916. Even with regard to disclosing the information contained in those forms to *the injured employees* and their representatives, OSHA discussed at length the dangers to privacy and confidentiality interests and, ultimately, created

[1] Notably, should small businesses be required to go to off-site facilities to comply with the new electronic submission requirements, such as public libraries, OSHA estimates that it will take approximately one (1) hour to do so. As with the ten-minute estimate for submission of electronic data for employers who already have the necessary internal resources, estimating a single hour for an employer to gather necessary data, travel to a third-party location, evaluate and assess the submission process, enter the necessary data, assure the accuracy of the data, and finalize the submission, borders on the absurd.

several standards requiring redaction of information and other protections. *Id.* When looking to the question of wide-spread public disclosure, OSHA was quite clear in 2001:

- "At the same time, **OSHA did not intend to provide access to the general public.** The proposed standard stated: 'OSHA asks for input on possible methodologies for providing easy access to workers while restricting access to the general public' (61 FR 4048)." *Id.* at 6054 (emphasis added).

- "In the proposal, OSHA noted that the access requirements were intended as a tool for employees and their representatives to affect safety and health conditions at the workplace, **not as a mechanism for broad public disclosure of injury and illness information** (61 FR 4048)." *Id.* at 6057 (emphasis added).

- "**The record does not demonstrate that routine access by the general public to personally identifiable injury and illness data is necessary or useful.** Indeed, several prominent industry representatives stated that the OSHA log should not be made available to the general public." *Id.* (emphasis added).

Indeed, in the final form of the rule, the only disclosure to persons other than government representatives, employees, former employees or authorized representatives was left as a decision to be made by the employer and, with the exception of requiring that personal identifiers be hidden, allowed the employer discretion as to how much of the records to share. *See, e.g.*, 29 C.F.R. § 1904.29(b)(10).

Despite clearly recognizing the highly sensitive nature of the injury and illness data contained in Forms 300, 300A, and 301, and despite clearly agreeing that broad public disclosure was *not necessary or useful*, OSHA now flips its logic and seeks to force employers to allow the public disclosure of the information on an immense scale. As detailed below, there is simply no valid basis to justify the large scale public disclosure of employer's injury and illness information. What does exist, however, are multiple criticisms and problems weighing *against* such needless disclosure, including, as detailed below, the potential for misuse of the information, the unreliability of the information, numerous confidentiality and privacy concerns, and the disclosure's ineffective shaming and potentially chilling effects.

A. Published Injury and Illness Information will be Out-of-Context and Misused by Third Parties

OSHA claims that the primary purpose of the publication of detailed company and injury and illness information is to "encourage employers to improve and/or maintain workplace safety/health to support their reputations as good places to work or do business with." 78 Fed. Reg. 67253, 67258. If the proposed rule is adopted, however, it is precisely the "good reputations" and safe and healthy work practices of employers that OSHA will place at risk.

The information OSHA intends to regularly publish presents an extremely limited and one-sided understanding of the circumstances from which that information is derived. Particularly, there is no information provided regarding mitigating or exculpatory circumstances. When reviewing data in such a vacuum, a reviewer will be able to see that an employer experienced several injuries to employees in a given quarter or year, but will be entirely unaware of such critical factors as whether the employee was injured because he or she did something in violation of company policies, or whether the employer had provided the injured employee training that he or she failed to follow. In this way, the published data is without context and presents employers in the worst possible light; sharing data of injuries and illnesses without any indication as to whether the establishment is "unsafe" or even did anything wrong.

Because of the one-sided nature of the injury and illness information, it likely will be of greatest interest to those parties seeking to identify establishments as bad actors for any number of reasons. To be sure, the information almost certainly will be used by third parties to misinform and mislead both employees and the public about establishments' and entire industries' safety practices. At the very least, union organizations will be able to utilize out-of-context injury and illness information to pressure employers and persuade employees. Competitors will have access to technically accurate but factually misleading information to use

against opposing companies. Potential litigants could use deceptive information to bring ultimately frivolous lawsuits, causing companies to expend substantial resources. Special interest groups could utilize the misleading data as leverage to realize agendas against companies that have nothing to do with workplace safety. In short, the publication of information contemplated by the proposed rule would leave employers defenseless against a litany of potential accusations and mischaracterizations.

B. The Information to be Published Under the Proposed Rule is Unreliable

OSHA asserts that the injury and illness data to be published will provide a number of ambiguous benefits, including, for instance, employees and consumers can evaluate the safety of businesses, researchers can analyze the data to increase awareness of unsafe work practices, and workplace safety professionals can identify establishments that could benefit from their services. In reality, however, these benefits will not be realized because the data will be unreliable.

The injuries and illnesses recorded on Forms 300, 300A, and 301 are collected under OSHA's "geographic presumption"; that is, it is generally presumed that injuries and illnesses that occur in the workplace are considered "work-related" regardless of the circumstances. *See* 1904.5(a) ("Work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment . . . .") While this serves OSHA's purpose of applying a comprehensive test to capture a record of all potential work-related illnesses and injuries, it is, in fact, *too* comprehensive to provide reliable information for accurate study and assessment. As OSHA itself has recognized, the geographic presumption results in the recording of illnesses and injuries that have absolutely nothing to do with the employer's safety program and are not indicative of truly work-related incidents within the employer's control.

In the 2001 Final Rule to the recordkeeping regulation, OSHA explained:

> The final rule's geographic presumption reflects a theory of causation similar to that applied by courts in some workers' compensation cases. Under the "positional-risk" test, an injury may be found to "arise out of" employment for compensation purposes if it would not have occurred but for the fact that the conditions and obligations of employment placed the claimant in the position where he or she was injured. **Under this "but for" approach to work-relationship, it is not necessary that the injury or illness result from conditions, activities or hazards that are uniquely occupational in nature. Accordingly, the presumption encompasses cases in which an injury or illness results from an event at work that is outside the employer's control, such as a lightning strike, or involves activities that occur at work but that are not directly productive, such as horseplay.**

66 Fed. Reg. 5916, 5929 (emphasis added; internal citations omitted). OSHA later continues:

> Reliance on the geographic presumption . . . covers cases in which an event in the work environment is believed likely to be a causal factor in an injury or illness but the effect of work cannot be quantified. **It also covers cases in which the injury or illness is not caused by uniquely occupational activities or processes. These cases may arise, for example, when: (a) an accident at work results in an injury, but the cause of the accident cannot be determined; (b) an injury or illness results from an event that occurs at work but is not caused by an activity peculiar to work, such as a random assault or an instance of horseplay; (c) an injury or illness results from a number of factors, including both occupational and personal causes, and the relative contribution of the occupational factor cannot be readily measured; or (d) a pre-existing injury or illness is significantly aggravated by an event or exposure at work.**

66 Fed. Reg. 5916, 5948. Thus, OSHA has expressly and repeatedly recognized that injury and illness records encompass injuries and illnesses that have *no correlation* to the safety and health practices of the employers. *See also*, 29 C.F.R. § 1904.0 (in "Note to § 1904.0," stating: "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.").

Given OSHA's stated goals to gather and publish data to inform employees about their workplace's safety, to allow employees to accurately compare workplaces, to allow the public to assess business for purposes of doing business, and to provide researchers and workplace safety

professionals trustworthy data to identify previously unrecognized patterns of injuries and illnesses, the *accuracy* of the data should be paramount. Under the proposed rule, the data will be false and inaccurate for purposes of assessing workplace safety programs.

C. The Proposed Rule Raises Serious Confidentiality and Privacy Concerns

The proposed rule risks the exposure of significant confidential and private information. OSHA states that it intends to publish all information except, primarily, those pieces of information which would identify an injured employee, including, for instance, the employee's name, address, health care professional, etc. 78 Fed. Reg. 67253, 67263. Unfortunately, given the size and cultures of many organizations that will be required to report specific details of injury and illness incidents, these "direct" personal identifiers are not needed to specifically identify an injured employee. Indeed, it is far from unreasonable to believe that the information OSHA intends to make public from the Form 301 could be used to identify a particular employee. Form 301 makes it possible to derive what the employee's work duties involved, when the employee's work day begins, the date and time of the injury, where the employee was working, where the injury occurred, and how the injury occurred. When OSHA intends to share the "what, when, and how" of an incident along with information making the injured employee's position, location, and hours readily determinable, even workers in a company with over 250 employees can easily determine which employees likely relate to which incidents.

Further, it is unclear from the proposed rule exactly *how* OSHA intends to safeguard the personal identifier information that will be excluded from public disclosure. Presumably, OSHA will be gathering via electronic submission all the information available on Forms 300, 300A, and 301. If this is the case, OSHA should detail the process that will be in place to assure that only select information from the greater electronic submission will be made public. Also,

considering the highly sensitive nature of the personal identifiers, the question remains as to how OSHA will protect against electronic intrusion into the information. In these modern times, the government and corporations alike are often the victim of "hacking" and other invasions of electronically recorded information. If OSHA intends to avoid these issues by placing the responsibility of omitting certain pieces of information upon the employer during the submission process, the threat of unwanted divulging of information may be lessened but only at the cost of what would surely be a considerable burden to employers in terms of substantial additional costs and time.

Looking beyond the employees' personal information, and despite OSHA's representations to the contrary, public disclosure of injury and illness information also risks the sharing of confidential and sensitive company information. To many employers, "the number of employees and the hours worked at an establishment" is considered the sort of confidential information from the disclosure of which the employers would seek protection. *Id.* Such information provides internal knowledge of an employer's structure and processes; information that other companies could use against the employer in highly competitive industries. Moreover, using industry formulas, ratios, rates, and other factors, this information could easily be used to draw more specific financial conclusions regarding a company. The privacy and confidentiality concerns raised under the proposed rule are substantial and weigh heavily against the rule's implementation.[2]

[2] OSHA relies upon the federal district court opinion in *New York Times Co. v. U.S. Dep't. of Labor,* 340 F. Supp. 2d 394 (S.D.N.Y. 2004), to purportedly support that no commercially sensitive information is at stake in the public disclosure of injury and illness data. This reliance is misplaced. First, the case concerned the disclosure of a limited amount of "Lost Work Day Illness and Injury rates" ("LDWII rates"), not widespread public disclosure of the information on Forms 300, 300A, and 301 for all establishments. *Id.* at 394-97. Second, it was significant to the outcome of the decision that employee work hours – which the Department of Labor argued constituted confidential commercial information – was available only to a limited number of people and that the information sought by the New York Times would be outdated by four years. *Id.* at 401-02. Finally, the Department expressly and repeatedly makes it clear that it considers even sharing LDWII rates to be "tantamount to revealing confidential commercial

D. The Publication of Injury and Illness Information Amounts to Shaming Employers and May Create a Chilling Effect on Reporting

OSHA delicately states that the online posting of establishment-specific injury and illness information will "encourage employers" to improve their safety programs to "support their reputations as good places to work or do business with." 78 Fed. Reg. 67253, 67258. Of course, because employers obviously are already aware of the information pertaining to their own establishments, the only purpose of publication of the information would be to publicly display incidents, actively *harm* the employer's reputation, and effectively *shame* the employer even when its safety program is adequate or even exemplary. This is not an appropriate or effective way to "encourage" employers to improve compliance.

On its face, there is no evidence – and OSHA provides no evidence – that "shaming" is an effective means of changing employer behavior. This is particularly questionable with regard to the proposed rule because, as discussed above, the rule will force the public disclosure of incidents that have *no correlation* to the employer's safety program, thereby shaming employers for incidents that are not within their control. Considering that one of the primary purposes of the proposed rule is to force employers to improve workplace safety by publicly disclosing all injuries and illnesses, some evidence that shaming would even positively affect employer behavior must first be established and presented.

In stark contrast, one negative consequence of such a shaming program is readily ascertained: a chilling effect on reporting of workplace injuries and illnesses. As it currently stands, employers can and often do choose to err on the side of recording injuries that are debatably work-related. This is because the employer is seeking to comply with OSHA's regulations and, importantly, if the employer "over reports" incidents, there likely will be no

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information." *Id.* at 403. OSHA should not base its *new opinion* on the confidential nature of the information it intends to publish on *dicta* found in a single highly distinguishable district court opinion.

negative consequences. Once the frequent public disclosure of such incidents begins, however, employers likely will view each incident as another opportunity for the company to be publicly shamed; something employers would seek to avoid or minimize to the extent possible. At the very least, OSHA likely will see an increase in employers failing to report the "debatably" work-related incidents. This, in turn, will decrease the overall number of reported incidents, skew the data OSHA seeks to gather through the electronic submission requirements, and fail to effectively increase workplace safety.

E. The Mass Publication of Injury and Illness Information Exceeds OSHA's Authority

In support for the authority to publicize injury and illness information on a massive scale, OSHA appears to primarily rely upon a provision that states that "[t]he Secretary . . . [is] authorized to compile, analyze, and publish, either in summary or detailed form, all reports or information obtained under this section." 78 Fed. Reg. 67253, 67263; 29 U.S.C. § 657(g)(1). However, there is no basis to believe that the term "publish" was ever intended to authorize the sort of purposeless and immense publication of information contemplated under the proposed rule. Indeed, as detailed above, past regulatory recordkeeping guidance demonstrates that OSHA historically recognized that broad public disclosure of injury and illness information was neither necessary nor useful. *See* 66 Fed. Reg. 6057. Moreover, any authority to "publish" granted to OSHA certainly is within the confines of the overarching purposes of the Occupational Safety and Health Act (the "Act"); namely, in this context, to provide for "appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of [the Act]" to achieve safe and healthful working conditions. 29 U.S.C. § 651(b)(12). As outlined above, rather than achieving the purposes of the Act, the mass publication of injury and illness information likely will attain little more than the distribution of

unreliable and potentially confidential data, the shaming of employers who may already have effective safety programs, and the chilling of reporting of workplace injuries and illnesses. Thus, OSHA does not have the authority to disseminate information on the scale presented in the proposed rule, and the proposal should not be adopted.

F. If Public Disclosure of Injury and Illness Information Must Occur, Such Information Should be Limited to Industry Data

If OSHA maintains that the public disclosure of injury and illness information is necessary, such disclosures should be limited to industry-wide data. If the true goals of the Administration are to increase awareness of effective safety practices, decrease workplace incidents, provide employees with information regarding employers, provide the public with helpful information regarding companies, and offer researchers and workplace safety professionals data to further the understanding of better safety practices and potential hazards, all of these goals are met by industry-wide information. Indeed, as acknowledged in the proposed rule, some of the most significant questions OSHA raises would be answered by industry-wide information:

1. What are the lowest injury/illness rates for establishments in a particular high-hazard industry?

2. What are the long-term changes over time in injuries and illnesses in a particular industry?

3. What is the effect of an OSHA intervention program targeted at a particular industry or particular industry-related hazard on injuries/illnesses in that industry?

4. What are the injury/illness outcomes of an OSHA intervention, as determined by a case-control study?

5. What are the common hazards in low-rate establishments compared to high-rate establishments in a particular industry?

6. How do injuries and illnesses in a particular industry vary by season?

7. How do injuries and illnesses in a particular industry vary by geographical location of the establishment?

Id. In fact, industry-wide data revealing the top injuries and illnesses in certain industries and identifying injuries and illnesses that are appearing across industries would be far more helpful than, as currently proposed, shaming particular employers for incidents which may not even be indicative of an unsafe workplace.

Moreover, publication of industry-wide data avoids the sharing of confidential and private information, the ineffective shaming of individual employers, and the potential chilling effect on the reporting of work-related injuries and illnesses by individual employers. In short, data provided on an industry-wide scale would better meet the beneficial goals of the proposed rule while simultaneously avoiding many of the largest concerns. Safety professionals at FMI member companies report that the ability to access data showing the types of injuries occurring in the industry would be invaluable – much more so than access to individual OSHA 300 Logs and OSHA 301 forms identifiable by company. In fact, FMI members state that they would be unlikely to access individual OSHA 300 logs and OSHA 301 forms, both because they do not show industry trends and because the data for an individual company is largely meaningless.

III. The Proposed Rule Underestimates the Financial Costs Associated with Electronic Submission and Public Disclosure of Injury and Illness Information

OSHA estimates that establishments with 250 or more employees will incur costs of only $183 annually, and establishments with 20 or more employees in designated industries will incur annual costs of only $9 annually. These figures grossly underestimate and ignore significant costs that will be incurred by employers under the proposed rule.

As an initial matter, the costs estimated in the proposed rule fail to account for the inherent costs of implementation. For instance, employers may need to update computer systems

or, where a company has historically relied on paper recordkeeping, actually buy new computer equipment. In addition, many companies will need to purchase new software packages to streamline electronic collection and reporting of data. Further, employers will no doubt spend significant time and financial resources on training personnel, auditing recordkeeping practices and procedures, creating new procedures to comply with the new regulation, updating and amending written employee manuals and handbooks, and revising job descriptions, all of which will potentially incur legal fees, consultant fees, and other expenses.

OSHA also fails to account for the opportunity costs intrinsic in the new proposed requirements. OSHA estimates that each establishment will require a mere 10 minutes to electronically submit required records. As discussed in Section I(B), *supra*, this 10 minute estimate is unreasonable given the burdens involved in complying with the proposed requirements. In reality, the electronic submission process likely will take significantly more time; time that employees and employers would otherwise be spending on other important matters, such as workplace safety and maintaining productivity. For instance, while OSHA asserts the new responsibilities will be shouldered by human resources personnel, it is far more likely that each establishment's safety professionals will be burdened with the task. Thus, time spent addressing the proposed rule's many requirements is time that the safety personnel cannot spend providing safety training, completing safety audits, or handling other matters critical to the ongoing safety of the workplace. The opportunity costs created by the proposed rule are potentially significant and must be accounted for in the proposal's overall cost to employers.

Finally, as discussed above, the public disclosure of injury and illness information also will expose employers to significant potential costs and liabilities due to the high likelihood of misuse by third parties. The disclosures likely will increase costs associated with litigation, labor

relations, and defenses against baseless accusations and mischaracterizations. In addition, considering the extremely high value placed on reputation and "good will" in many if not all industries, the biased and unreliable injury and illness data likely will cause some companies significant financial harm in the form of lost business and financial relationships. Many companies avoid entering into contracts or other work relationships with companies that appear to have poor safety records, regardless of whether or not those records actually correlate with poor safety practices.

Despite the above, OSHA asserts without adequate support that "the annual benefits, while unquantified, significantly exceed the annual costs." *Id.* at 67271. Notably lacking from the proposed rule is any evidence that electronic submission of injury and illness data coupled with public disclosure of that data will do *anything* to advance workplace safety. OSHA attempts to estimate "the imputed value of life-saving programs," but relies on nothing but conjecture and speculation to apply that value as a "benefit" of the program. And, even if the baseless calculations presented by OSHA as the "possible monetary benefits of the rule" were reasonably accurate, which is doubtful, any comparison to the associated costs of the proposed rule is flawed because, as detailed above, those costs have been greatly underestimated. Ultimately, the proposed rule presents no studies, analysis, reports, or other evidence supporting that workplace safety will be improved by the electronic submission and public sharing of injury and illness data, the little "monetary benefit" data set forth in the proposal is based upon mere speculation, and, because the costs associated with the proposal are unrealistically low, there is no valid basis from which to argue that the supposed annual benefits of the proposed rule would in any way exceed the purported costs.

IV. Alternative I (The "Enterprise-Wide Submission") Should Not be Adopted

Of the "alternatives" presented in the proposed rule, OSHA invests the most discussion to the "Enterprise-Wide Submission," a provision which would "require some enterprises with multiple establishments to collect and submit some Part 1904 data for those establishments." *Id.* at 67268. This alternative should not be incorporated into the regulations because the purported benefits are unsupported and the rule would create little more than uncertainty and confusion.

OSHA states that an enterprise-wide submission would be beneficial because it would "improve employer awareness and oversight of workplace safety and health at the enterprise level" and would "enable OSHA to calculate enterprise-wide injury and illness rates." *Id.* at 67269. First, there is no evidence to support that forcing parent corporations to monitor and gather injury and illness information from all their subsidiary establishments would "increase awareness and oversight" or cause "enterprises" to "deploy existing safety and health resources more effectively." *Id.* If an enterprise needs to increase its awareness and deploy its resources more effectively, there are any number of ways in which the enterprise can achieve that goal, none of which require reporting information to OSHA and many of which would be far more effective than OSHA's reporting system. In addition, there are many corporate hierarchies in which there are "enterprises" above "establishments" that are not involved in or responsible for the safety controls in place at the establishments. Indeed, there are many instances in which a parent company may own 51% of the stock of a subsidiary but is in no way involved in that subsidiary's day-to-day activities. OSHA presumes that the parent is both involved and seeking to become ever more involved in the intricacies of each subsidiary's daily activities.

Second, OSHA's desire to be able to calculate "enterprise-wide injury and illness rates" so that the agency can "leverage a limited number of interventions into improved compliance and

reductions in injuries and illnesses" is a tenuous and ambiguous "benefit" at best. *Id.* There is no information provided regarding how OSHA intends to "leverage" this data to more effectively "intervene" and how this would impact workplace safety. Moreover, as with many of the claimed benefits throughout the proposed rule, there is simply no evidence that enterprise-wide injury and illness rates will be useful in such a way. Regardless, if OSHA wishes to calculate enterprise-wide injury and illness rates, there is no reason they cannot do so without forcing "enterprises" to gather that information for them. OSHA already proposes to gather information from every establishment. If OSHA wants this information presented on an enterprise-level, OSHA should compile and calculate that information itself based upon the establishment data, not pass the burden of gathering and presenting the data to "enterprises."

Finally, beyond these so-called benefits, the rule itself is full of uncertainty. As OSHA concedes, new definitions will have to be created for all the core terminology (e.g., "enterprise") and, as legal history has demonstrated repeatedly, regardless of the definition, much litigation will be generated before the true bounds of the terms are discovered.[3] Further, the opportunities for wide-scale confusion and error are abundant: determining which parent company of several should be considered the "enterprise"; when an enterprise should submit data for its subsidiary establishments; for which establishments data should be submitted; which establishments do not need to submit data because the enterprise is submitting data; how are establishments and enterprises going to communicate these decisions and coordinate appropriately; and how much duplication of documentation will occur, to name but a few. To be sure, the sheer level of coordination among multiple corporate entities that the proposed "alternative" apparently

[3] At first blush, one can foresee six establishments with two parent companies each owning 50%. Under the proposed "enterprise" definition, neither 50% owner would be an "enterprise" yet, because the establishments are owned by parent companies, they *should* be relieved of reporting because an enterprise above them in the hierarchy should be reporting for them. This situation alone already would foreseeably lead to confusion and, potentially, litigation.

presumes to exist is staggering and unrealistic. This is to say nothing of the vastly increased burden an enterprise-wide submission process would place upon employers. As discussed above, FMI can easily foresee an enterprise-level corporate safety representative being required to spend hundreds of hours submitting OSHA 300 Logs and OSHA 301 forms for individual grocery stores and warehouses across the country. The enterprise-wide submission alternative should not be adopted.

CONCLUSION

The Improve Tracking of Workplace Injuries and Illnesses proposed rule should not be implemented. The burdens that will be placed upon employers by the electronic submission of injury and illness information are significant while the benefits of such a submission are unsupported. Further, there is simply no valid basis to support the widespread public disclosure of the injury and illness information covered by the proposed rule. The information is unreliable and subject to abuse by third parties. Moreover, publication exposes potentially confidential and private information, needlessly shames employers, and likely will cause a chilling effect on the reporting of injuries and illnesses. Finally, the costs to employers of the proposed rule's requirements have been grossly underestimated. In light of these significant issues and concerns, the ambiguous and unsupported benefits of the proposed rule are insufficient to warrant the adoption of the proposal.

Respectfully submitted,

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