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Via Electronic Submission: http://www.regulations.gov

The Honorable David Michaels
Assistant Secretary
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Docket No. OSHA-2013-0023
Proposed Rule to Improve Tracking of Workplace Injuries and Illnesses

Dear Assistant Secretary Michaels:

The Retail Industry Leaders Association ("RILA") submits the following comments to the U.S. Department of Labor's (DOL) Occupational Safety and Health Administration (OSHA) in response to the above-referenced notice of proposed rulemaking (NPRM) published in the *Federal Register* on November 8, 2013 at 78 Federal Register 67253. The retail industry places the utmost importance on workplace safety and health, and the accurate reporting of workplace incidents. While OSHA has long been a partner in those efforts, retailers are concerned that publicizing details of work place incidents, including sensitive information, injects suspicion, where cooperation has previously existed and potentially eliminates the benefits of that strong partnership. For example, the proposal would also reverse the agency's long-standing, "no-fault" approach to recordkeeping, by releasing the data without context. Furthermore, the NPRM underestimates the burden and costs of implementation, places employee and company private information at risk, and lacks a demonstrated benefit to a change in the current reporting requirements. The proposed rule raises many concerns for our organization and its members and we strongly urge OSHA to withdraw it. Our specific concerns are set forth below.

I. About RILA

RILA is the trade association of the world's largest and most innovative retail companies. RILA members include more than 200 retailers, as well as product manufacturers and service companies, which together account for more than $1.5 trillion in annual sales and millions of

American jobs. RILA members have more than 100,000 stores, manufacturing facilities, and distribution centers in the U.S. and other countries.

II. Posting Sensitive Information by Employer, Location, and Injury-Specific Data Raises Business Confidentiality and Employee Privacy Concerns

The proposed rule would require employers to submit information that places employee privacy at risk. Specifically, the proposal would require publication of date of injury, injured body part, treatment and job title. An outside entity could readily use the information to identify the employee, particularly in small or rural communities. Although OSHA has committed to protect employee identities, the agency has failed to provide satisfactory answers regarding the means it will use to fulfill this important goal given the information that it seeks to make publicly available even if the employee's name is redacted.

The proposed rule would also require employers to submit confidential details about operations of the establishment. Many companies consider the number of employees and hours worked at a given establishment to be proprietary information, as it can reveal sensitive information about business processes, security and overall operations. OSHA ignores several court rulings that have found employers to possess a privacy interest in such data, and fails to consider the implications of publishing it. While it is appropriate for an inspector to review personal information to determine safety issues, it is inappropriate for that information to be widely distributed.

III. The Proposed Rule Abandons OSHA's "No-fault" Approach to Recordkeeping Without Justification or Analysis

In 2001, OSHA adopted the no-fault recordkeeping system as the foundation of the revisions to its recordkeeping requirements. The agency implemented a "geographic" presumption, claiming an injury or illness that occurred at the workplace would be deemed a work-related injury regardless of circumstances surrounding the incident. The presumption came with the disclosure that, "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 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. 5929 (DATE). OSHA made clear "no fault" would be attributed to injuries or illnesses submitted.

Yet, under the proposal, OSHA intends to use the information reported for targeting purposes and to release the data without context or restraints.[1] Thus, the presumption under the NPRM is

[1] The database search feature that OSHA provides has the following caveat: "OSHA does not believe the data for the establishments with the highest rates on this file are accurate in absolute terms. It would be a mistake to say establishments with the highest rates on this file are the 'most dangerous' or 'worst' establishments in the Nation." At the same time, OSHA admits in

that all injuries or illnesses were preventable, suggesting all incidents are at the fault of the employer. The proposal essentially turns the "no fault" reporting system into one where employers will be blamed for idiosyncratic events arising as a result of forces beyond their control or actions by workers in direct contravention of workplace rules. This is a clear abandonment of the "no-fault" system in favor of its controversial and counterproductive "regulation by shaming" enforcement doctrine. Surprisingly, OSHA fails to even acknowledge its reversal, let alone provide any justification or an analysis of such a change, as required under the Administrative Procedure Act.

IV. The Reported Information Is Not A Reliable Measure of an Employer's Safety Record and May be Misconstrued and Misused Causing Misallocation of Resources and Loss of Business and Jobs

As currently proposed, the rule would allow OSHA to obtain and release to the public detailed information regarding specific workplace injuries and illnesses, including the company, location, and incident-specific data. OSHA states in its preamble to the NPRM that the rule would provide employees, potential employees, consumers, businesses and other members of the public with important information about companies' workplace safety records. OSHA is providing the data without any meaningful context, however. As a result, the information is not a reliable measure of an employer's safety record or its efforts to promote a safe work environment. Many factors outside of an employer's control contribute to workplace accidents. Data about a specific incident is meaningless without information about the employer's injuries and illness rates over time as compared to similarly-sized companies in the same industry facing the same challenges (even similar companies in the same industry may face substantially different challenges with respect to workplace safety based on climate, topography, population density, workforce demographics, criminal activity in the region, proximity and quality of medical care, etc.).

Providing raw data without putting such data in context is not helpful to public interest entities that want to use the information for safety. Moreover, it invites improper conclusions or assumptions about the employer, which could lead to unnecessary harm to a company, its ability to provide jobs, and misallocation of resources by the public, government and industry. Data without context from the Agency may be used by organizations adverse to the employer for reasons wholly unrelated to safety.

V. NPRM Creates Disincentives to Reporting

Under its existing rules, OSHA encourages employers to record all possible qualifying incidents, counseling that those that later turn out to be outside the reporting requirements can be stricken

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the NPRM that it intends to use the information for targeting and cites as its primary justification for the rule the fact that third parties could and should base employment, business and government resource allocation decisions on the data.

at that time. With quarterly reporting, employers are unlikely to record close cases because, in many instances, striking them later may be impossible as the information has already been reported and posted publicly by OSHA. Rather than assume such an additional burden, employers will likely elect not to record the incident. The result is less insight into workplace injuries for OSHA, the opposite outcome the recordkeeping initiative was intended to achieve.

VI. Underestimated costs and overestimated benefits

OSHA estimates it will cost each employer with establishments of 250 or more employees only $183 per year and only $9 per year for establishments with 20 or more employees in specified industries. The agency fails to account for many costs associated with the rule, including but not limited to the possible cost of adopting a new system to accommodate OSHA's filing system,[2] training for a new system, and implementation of electronic systems for businesses only using paper format, as mentioned above. For employers, like RILA members, who may have hundreds, if not thousands of stores, there is that added complexity of not only training individuals at each establishment, but also a centralized oversight to ensure enterprise consistency. This would certainly cost more than the $183 estimates it will cost to accomplish. Additionally, in cases where companies use 3rd party vendors, the costs to the vendors to make the required reprogramming changes to ensure their programs can effectively and efficiently communicate with the OSHA e-file systems, will be passed (at least in part) to the company.

OSHA estimates the electronic submission process would take each establishment 10 minutes for each OSHA 301 submission and 10 minutes for the submission of *both* the OSHA 300 and 300A. This fails to accurately account for the time it will take for employees to familiarize themselves with the process and review reports to ensure compliance with all regulations. Furthermore, if employers become responsible for removing all employee identifiers from the records, considerably more time and resources will be needed for compliance.

The benefits OSHA attributes to the rule are speculative at best, given that it already has access to sufficient data. The agency claims the rule's benefits will "significantly exceed the annual costs." The only benefits calculation done by the agency relates to costs of fatalities prevented, yet the bulk of the data will concern injuries, not fatalities. OSHA also claims "the data submission requirements of the proposed rule will improve quality of the information and lead employers to increase workplace safety," even though no data, surveys, studies, or anecdotal comments are offered as evidence.

Moreover, OSHA does not take into account any consequential costs imposed on the employer due to the submission of records. Such costs include future inspections by the agency in response

[2] OSHA's estimates related to the enterprise wide submission alternative also significantly under estimate costs. The increased investments in creating and implementing internal systems to allowing tracking and reporting at that level would vastly increase the costs of the proposed rule to small and large multi-establishment businesses.

to the records submitted, or business or job loss as a result of misuse and mischaracterization of the data. While these may be indirect costs, the probability of such a result is higher than that of the possible benefits OSHA claims.

Conclusion

OSHA's proposed rule will not advance our common goal of reducing injuries, illnesses and fatalities. Indeed, if finalized as proposed, it would jeopardize employee privacy, consume disproportionate amounts of agency and employer resources, and direct employers to disclose sensitive information to the public that can easily be manipulated, mischaracterized, and misused for reasons wholly unrelated to safety. The proposal would also reverse the agency's long-standing, "no-fault" approach to recordkeeping. Finally, OSHA failed to account for the total costs its rulemaking will impose on businesses, while citing vast benefits without proper support for such claims.

RILA welcomes the opportunity to provide the OSHA with input on this matter of great importance to the retail community and appreciates the administration's consideration of our views. Please do not hesitate to contact me directly at bill.hughes@rila.org or 703.600.2012 if we may provide any questions regarding our comments.

Respectfully submitted,

Bill Hughes
Senior Vice President, Government Relations