COMMENTS

of

THE WASHINGTON LEGAL FOUNDATION

to the

U.S. DEPARTMENT OF LABOR OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION

Concerning

PROPOSED RULE TO IMPROVE TRACKING OF WORKPLACE INJURIES AND ILLNESSES (Docket No. OSHA-2013-0023)

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OSHA Docket Office
Docket # OSHA-2013-0023
U.S. Department of Labor
Room N-2625
200 Constitution Avenue, NW
Washington, DC 20210

Re: Comments Concerning OSHA's Proposed Rule To Improve Tracking Of Workplace Injuries And Illnesses Under 29 CFR Parts 1904 and 1952

Dear Sir/Madam:

The Washington Legal Foundation (WLF) appreciates the opportunity to submit these comments in opposition to the Occupational Safety and Health Administration's (OSHA) proposed rule to "Improve Tracking of Workplace Injuries and Illnesses" (78 Fed. Reg. 67253).

I. Interests of WLF

Founded in 1977, the Washington Legal Foundation is a public-interest law firm and policy center with members and supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF has successfully opposed according binding deference to the Department of Labor's novel reinterpretation of the Fair Labor Standards Act's "outside sales" exemption. *See Christopher v. SmithKline Beecham*, 132 S. Ct. 2156 (2012). WLF has also successfully litigated against state regulation of occupational safety and health issues as being impliedly preempted under the OSH Act. *See Gade v. Nat'l Solid Wastes Mgmnt. Assoc.*, 505 U.S. 88 (1992).

Furthermore, WLF's Legal Studies division, the publishing arm of WLF, frequently publishes articles on a wide array of legal issues related to OSHA's regulation of the workplace. *See, e.g.*, Eric J. Conn, *"Off To A Strong Start?": OSHA's Dubious Assessment of Severe Violator Enforcement Program*, WLF LEGAL BACKGROUNDER (July 19, 2013); Eric J. Conn, *OSHA Continues Trend of Informally Imposing New Rules*,

WLF LEGAL OPINION LETTER (Sep. 7, 2012); Willis J. Goldsmith, *Court Reverses OSHA Ruling on Willful Violations*, WLF LEGAL OPINION LETTER (May 11, 2012).

WLF is concerned that OSHA's proposed rule to "Improve Tracking of Workplace Injuries and Illnesses," by imposing burdensome new workplace reporting requirements, will substantially increase the costs borne by employers, both in workforce hours and monetary outlays, without any empirical support that imposing such additional burdens will advance workplace safety and health. WLF is particularly concerned that the proposed rule, by authorizing OSHA to publicize all workplace injury and illness data, implicitly places the fault for all workplace injuries on the employer and raises legitimate privacy concerns about the public release of sensitive employee data. WLF also fears that unintended disincentives wrought by the proposed rule may actually discourage the accurate reporting and recording of employee injuries, contrary to the rule's intended purpose. For these reasons, presented in more detail below, WLF respectfully requests that OSHA withdraw the proposed rule in its entirety.

II. The Proposed Rule Furthers No Statutory Purpose And Otherwise Exceeds OSHA's Statutory Mandate

Because OSHA already has the authority and means to collect the data it seeks, the proposed rule would impose duplicative, arbitrary, and undue burdens on employers of all sizes. Under the new rule, OSHA seeks to amend its recordkeeping regulations by adding requirements for the electronic submission of certain injury and illness information that employers are already required to keep under OSHA's regulations for recording and reporting occupational injuries and illnesses. The proposed rule amends the regulation on the annual OSHA injury and illness survey of ten or more employers to add mandatory electronic reporting requirements. Whereas the current rule requires employers to maintain employees' injury and illness records internally—and to share them only in very limited circumstances—the proposed rule would regularly require employers to electronically submit their injury and illness records to OSHA, which intends to publish that information on a public website for no apparent safety reason.

As a preliminary matter, the mandatory public disclosure of private employers' internal employee data is completely beyond OSHA's mandate. Indeed, OSHA lacks statutory authority under the OSH Act for disseminating an employer's raw injury and illness data to the general public. While Section 657(c)(2) grants the Secretary of Labor the authority to implement regulations requiring employers to *maintain* their own internal

records of work-related deaths, injuries, and illnesses, nothing in the OSH Act authorizes the agency to publish these internal records to the general public. *See* 29 U.S.C. § 657(c)(2).

In all events, the unprecedented publication of such information is not reasonably related to furthering the statutory purposes of the OSH Act. For over 40 years, OSHA has carried out its statutory duties with the implicit assumption that making such information available to the general public is not only unnecessary, but counterproductive, to furthering its goals. The Secretary offers no evidence to support the claim that making such information public will somehow further workplace safety and health. OSHA's published notice of the proposed rule cites no empirical data, scholarly survey, peer-reviewed studies or even anecdotal evidence to support the alleged benefits of the proposed rule. Simply put, there is no relevant data to support OSHA's conclusion that making an employer's injury and illness records public is necessary to carry out the agency's statutory mandate.

III. The Proposed Rule Impliedly Places The Fault For All Workplace Injuries On The Employer And Raises Legitimate Privacy Concerns About The Public Release Of Sensitive Employer/Employee Data

OSHA has no reason to disseminate employers' internal injury and illness data other than for public shaming. WLF is concerned that OSHA seemingly views tarnishing a company's public image as a legitimate regulatory tool. Indeed, David Michaels, Assistant Secretary of Labor for Occupational Safety and Health, has publicly endorsed this notion of "regulation by shaming," stating in 2010:

> In some cases, 'regulation by shaming' may be the most effective means for OSHA to encourage elimination of life-threatening hazards, and we will not hesitate to publicize the names of violators, especially when their actions place the safety and health of workers in danger.[1]

[1] David Michaels, *OSHA at Forty: New Challenges and New Directions* (July 19, 2010), available at https://www.osha.gov/as/opa/Michaels_vision.html.

While disparaging a company's reputation is undoubtedly an effective way of inflicting pain on targeted employers, it remains far less clear that publicly releasing an employer's overall injury and illness statistics, in isolation, accurately reflects the quality of that company's safety program, much less the commitment that company has to workplace safety. For example, an increase in the total number of injuries reported may simply result from the implementation of a better safety program, which does a better job of tracking workplace accidents.

OSHA obviously anticipates that employees and the public will make decisions about where to work and where to conduct business based on the published reports. Certainly, the public's perception of certain employers would be unduly skewed if such internal injury and illness reports were publicized. Under the proposed rule, OSHA would only disclose the raw data provided in injury and illness forms. Such raw data cannot reliably be used to identify those employers who are more likely to have future injuries or illnesses. Many factors beyond an employer's control can contribute to workplace accidents, as well as to overall injury and illness rates. The rule thus unduly exposes companies to public criticism by mandating the publishing of data that does not honestly represent the actual performance of a company's safety program and employees. It also puts the company in a difficult position because the raw data will be published without the benefit of additional context or explanation from the company.

Nevertheless, the public, including the media, will likely take the published injury and illness data out of context, regardless of the details behind any given injury, any safety measures implemented by the employer, how the given data compares to industry averages, and other information relevant to the circumstances of the injury or illness data. Such unfair inferences, now encouraged by OSHA, contradict the stated purpose of OSHA's recordkeeping standard, which expressly provides that merely recording a work-related injury or illness "does not mean that the employer or employee was at fault, [or] that an OSHA rule has been violated." 29 C.F.R. § 1904.0. This latest proposal, however, implies that all recorded injuries are the fault of the employer, because OSHA's sole motivation for publishing the information appears to be to hold employers out for being shamed in public. Such a punitive approach is simply not an effective means for achieving OSHA's objective of promoting safer workplaces.

Regardless of its effectiveness, many employers consider the total number of employee hours worked to be confidential commercial information. Historically, OSHA has always treated the number of employee hours worked as confidential and commercial

information—and has even litigated to protect such information form disclosure pursuant to FOIA Exemption 4, which prohibits the release of confidential and commercial information provided to the government. *See, e.g., OSHA Data/CIG, Inc. v. U.S. Dep't of Labor*, 220 F.3d 153, 166 n.30 (3d Cir. 2000) (finding number of employee hours worked to be confidential commercial information based in part on the Department of Labor's "evidence that legislators and businesses consider information of this sort to be confidential because of its risk of causing 'substantial competitive harm' if disclosed").

Moreover, although an employee's "personally identifying information" would not be published under the proposed rule, OSHA has provided no detailed guidance on what information it views as "personally identifying." An employee's job title, for instance, will in many cases be as identifying as a name. Of course, employees have an interest in the privacy of their medical and employment records, and simply redacting an employee's name from the various OSHA recordkeeping forms cannot guarantee employees that their privacy will be adequately protected. Even without names and other identifying information, it will not be difficult for people familiar with smaller workforces located in smaller communities to know exactly which employee was the subject of an injury or illness report, thereby invading that employee's privacy.

IV. OSHA'S Published Data Will Be Subject to Misuse By Third Parties, Creating A Disincentive For Employees and Employers To Accurately Report Workplace Injuries And Illnesses

Finally, while OSHA claims that the publication of employee injury and illness data will improve occupational safety and health, the agency should not ignore the fact that this information will be used by other third parties for purposes other than health safety. Labor unions, for instance, will almost certainly use the raw injury and illness data to agitate employees, facilitate organizing, and gain leverage in contract negotiations. Even more disturbing, the plaintiffs' bar will view these new reports as a source of potential business. Every incident report, once made public, will be viewed as an opportunity to apply pressure on the employer company. This would have the undesirable effect of increasing the costs (legal and otherwise) of every company subject to OSHA's rule.

When these third-party uses are combined with the aforementioned "public shaming" effect, it is quite likely that the proposed rule will have an effect on reporting that is opposite from the one intended. Companies will have every reason in the world not

to accurately report their workplace injury data. Many employers may refrain from accurately recording all workplace injury and illnesses, preferring to make the reported numbers appear as low as possible when they are to be published to the public. OSHA Moreover, invasion of privacy concerns (as outlined above) may actually deter employees from reporting relatively minor or embarrassing injuries in the first place. Such a perverse disincentive actively undermines the very policy objectives that OSHA hopes to achieve through the proposed rule.

V. Conclusion

While WLF appreciates OSHA's commitment to furthering workplace health and safety, WLF is concerned that the proposed rule, by seeking to publicly shame poor performers as bad actors, will expose every OSHA-regulated company in America to increased administrative and legal costs and frivolous legal actions, regardless of that company's overall track record or commitment to safety. Even worse, WLF fears that the proposed rule will create perverse incentives that will combine to produce the unintended consequence of less accurate employer reporting of workplace injuries and illnesses. WLF urges OSHA to withdraw the proposed rule in its entirety.