



June 30, 2022

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

**Re: Comments in Response to OSHA’s Improve Tracking of Workplace Injuries and Illnesses Proposed Rule; Request for Comments (87 Fed. Reg. 18528)**

Dear Assistant Secretary Parker:

The National Retail Federation (“NRF”) submits these comments in response to the Occupational Safety and Health Administration’s (“OSHA”) request for comments on its Improve Tracking of Workplace Injuries and Illnesses notice of proposed rulemaking (“NPRM” or “Proposed Rule”), published in the Federal Register on March 30, 2022. NRF is deeply concerned with the agency’s proposal to publicize the data it plans to collect on OSHA Forms 300, 300A, and 301, which may result in the release of confidential business information and employees’ sensitive personally identifiable information (“PII”), a chilling effect on recordkeeping, and inappropriate uses of the data for purposes unrelated to ensuring safe workplaces. Additionally, NRF believes the NPRM itself is fundamentally flawed in that the agency does not have the statutory authority to publish the data as proposed, it deviates from long-standing OSHA policy, and the cost-benefit analyses included in the NPRM are defective and unsupported. NRF strongly urges OSHA to withdraw this proposal.

NRF, the world’s largest retail trade association, passionately advocates for the people, brands, policies, and ideas that help retail thrive. Retail is the nation’s largest private-sector employer, contributing \$3.9 trillion to annual GDP and supporting one in four US jobs — 52 million working Americans. For over a century, NRF has been a voice for every retailer and every retail job, educating, inspiring, and communicating the powerful impact retail has on local communities and global economies.

**Publication of the Data from OSHA Forms 300, 300A, and 301 Will Create Significant Problems for the Regulated Community, Workers, and OSHA**

OSHA’s Proposed Rulemaking would require certain employers in specific industries to electronically submit their OSHA Forms 300, 300A, and 301. NRF is deeply concerned with the

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potential consequences of releasing such information. The information contained on those forms can be highly sensitive both in regard to the employer and the employees. Publishing the data could result in the unintentional release of vulnerable information that needlessly exposes workers and employers to potential risk. Additionally, the data in these forms would be provided without context, which if publicized, could create an unjust picture of an employer's workplace safety record and policies. The risk of the data being mischaracterized could result in a chilling effect in recordkeeping as well as malicious actors using the data for their own gain.

*Released Confidential Business Information Could Threaten Businesses' Viability and Safety*

OSHA Forms 300, 300A, and 301 include proprietary business information that, if publicized, could jeopardize the wellbeing and safety of a business.

Employee hours, for example, have repeatedly been determined to be confidential proprietary business information, and the employer community, several federal agencies, and OSHA itself have protected it as such. Having that information can easily provide competitors with insight into a business's practices and processes and could be used in an anticompetitive manner to harm the company in question.

As OSHA explained in 2004 in response to a Freedom of Information Act (FOIA) request from the *New York Times*, "disclosure of employee hours 'can cause substantial competitive injury.'"<sup>1</sup> The agency argued that Lost Work Day Illness and Injury ("LWDII") rates were exempt from public disclosure under FOIA, because the data is "tantamount to release of confidential commercial information, specifically the number of employee hours worked, because this number can be easily ascertained from LWDII rate...the LWDII can be 'reversed-engineered' to reveal EH, or employee hours."<sup>2</sup>

Even though some federal courts have weighed in on the applicability of FOIA exemptions to Form 300A data, no court has argued that OSHA is authorized to release the confidential business information of all employers of a certain size in a specific set of industries. This is a dramatic change in the agency's policy and should not be made in a cavalier manner. Businesses should not be required to release proprietary information, especially considering that publicizing the Forms 300, 300A, and 301 will not provide any meaningful insights into a business' workplace safety record, as explained below.

Additionally, OSHA should consider that some business locations need to remain confidential due to the sensitive nature of their operations or products. Many retailers deal with pharmaceuticals, hazardous materials, or other highly sought after and/or dangerous products. Exposing the locations of these operations could leave them vulnerable to bad actors seeking the

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<sup>1</sup> *New York Times Co. v. U.S. Dept. of Labor*, 340 F. Supp. 2d 394, at 402 (S.D.N.Y. 2004).

<sup>2</sup> *Id.* at 401.

materials for their own use or sale on the black market. These locations must be protected from public disclosure.

*Exposure of Workers' Personally Identifiable Information Will Leave Them Vulnerable*

The OSHA forms in question contain medical information of workers who are injured or become ill on the job. Despite OSHA's plans to limit the release of workers' PII through the various techniques listed in the NPRM, the potential for sensitive information being unintentionally publicized is high. Injury and illness information could easily be traced back to specific individuals, especially in smaller communities or at smaller workplaces. This is sensitive medical information that should be kept confidential.

Additionally, publication of Forms 300, 300A, and 301 could expose specific workers' locations. This could potentially be very dangerous to some workers, including in instances where the employer in question deals with sensitive products or if the worker is a victim of stalking, domestic violence, or other similar crimes. These workers could become targets if their work or work locations are publicized. Jeopardizing workers' safety is an unreasonable cost for the limited benefits of collecting and publicizing this data.

*Chilling Effect on Recordkeeping Will Hamper OSHA's Intended Goal of Ensuring Safe Workplaces*

The unintended consequence of publicizing this data will be a chilling effect on recordkeeping, as the data included in Forms 300, 300A, and 301 does not paint a reliable picture of an employer's workplace safety record or its efforts to promote a safe work environment. These logos will include no context about the injuries and illnesses recorded. Nonetheless, as OSHA itself says in the NPRM, it expects the public data will be used by "employers, employees, potential employees, employee representatives, customers, potential customers, researchers, and the general public to make informed decisions about the workplace safety and health at a given establishment."<sup>3</sup> The agency *expects* interested parties to use the data to make a judgement about the employer and workplace in question.

The publication of this data will therefore undoubtedly affect an employer's reputation, just as OSHA anticipates. The subsequent fear of developing a negative image in their communities, may cause managers to underreport injuries and illnesses that occur at the workplace to protect their business reputation and the business's wellbeing. This will negatively impact both the quality and value of the data and penalize employers that accurately report information. A better approach is the current OSHA's "no-fault" recordkeeping policy (as described below) which encourages accurate recordkeeping.

*Publicized Data Will Be Used Inappropriately for Purposes Unrelated to Workplace Safety*

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<sup>3</sup> 87 Fed. Reg. 18529 (proposed on March 30, 2022) (emphasis added).

As mentioned above, this data, if publicized, will not be a reliable measure of an employer's workplace safety record. Nevertheless, it will be used by various entities to judge an establishment or to intentionally mischaracterize an employer and their safety record.

Given President Biden's expressed desire to lead the "most pro-union Administration in American history,"<sup>4</sup> it is likely that the true motivation of this rulemaking is to weaponize injury and illness data for labor union leaders' benefit. Labor unions will likely use this data to gain support for their organizing efforts, claiming the data proves an employer is not protecting its workers. Similarly, they may use it to pressure employers in negotiations over collective bargaining agreements.

Moreover, competitors may use the information for anticompetitive purposes, such as poaching top workers or hurting the reporting entity's standing in the community.

Finally, throughout the COVID-19 pandemic and continuing beyond, various groups have targeted employers for implementing vaccine mandates in their workplaces. Such employers could face unwarranted attacks or unfair mischaracterizations of their workplace safety records due to vaccination policies. Sadly, we have already seen anti-vaccine advocates manipulate publicized workplace injuries and unjustly characterize them as vaccine-related.<sup>5</sup> Employers who implemented vaccine mandates consistent with the Administration's wishes, should not be unfairly targeted by those who would eagerly mischaracterize the impact of mandates and policies.

### **OSHA's Rulemaking Itself Is Fatally Flawed**

OSHA's Proposed Rule is flawed. OSHA's implementing statute, the Occupational Safety and Health Act ("OSH Act"), does not give the agency the authority to publish the records and data it collects from the regulated community. Additionally, the proposed changes included in the NPRM deviate dramatically from current and long-standing OSHA policy. Finally, the cost-benefit analysis used by OSHA to justify the Proposed Rule is defective and unsupported and, therefore, should not be used as a basis for such consequential changes in policy.

#### *OSHA Doesn't Have Authority to Publicize the Data in Question*

While the OSH Act provides the Secretary of Labor and Secretary of Health and Human Services to create reporting requirements for employers, nowhere in the agency's implementing

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<sup>4</sup> "Biden's vow to be 'most pro-union president' tested in first year." NBC News, Jan 20, 2022.

<https://www.nbcnews.com/business/economy/bidens-vow-union-president-tested-first-year-rcna12791>

<sup>5</sup> Chattanooga-area nurse at center of viral conspiracy. Chattanooga Times Free Press, April 20, 2022.

<https://www.timesfreepress.com/news/local/story/2022/apr/20/chattanooga-nurse-viral-conspiracy-theory/567478/>

statute are the agencies provided with the authority to publicly disseminate the information collected. If Congress intended for the agency to have the authority to publish employers' workplace injury and illness data, they would have included such language in the statute or amended the statute at some point in the five decades since the law's enactment. Congress' lack of action on this issue demonstrates the Legislative Branch had and continues to have no intention of giving OSHA such authority.

### *Rulemaking Is Contrary to Long-Standing OSHA Policy*

Since 2001, OSHA has based its recordkeeping requirements on a “no-fault” principle. Essentially, the agency based its data collection requirements on a “geographic” presumption, if an injury or illness occurred at the workplace, it should be recorded. This was done in order to ensure the most comprehensive collection of workplace injury and illness data. The agency importantly acknowledged that “many circumstances that lead to a recordable work-related injury or illness are “beyond the employer's control,”<sup>6</sup> including lightning strikes or unsafe behavior by workers. OSHA's implementing regulations specifically note this fact: “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.”<sup>7</sup>

Now, however, OSHA is proposing a rule that would abandon that standard and implement a new policy directly contradicting the no-fault system. OSHA now wants to use the data to target their enforcement efforts and even encourages the public to use the data to “make informed decisions” about an employer's workplace safety record.

Furthermore, in OSHA's 2001 Final Rule, OSHA decided to expand access to employers' workplace injury and illness records to *employees and their representatives* in order to help them “affect safety and health conditions at the workplace, not as a mechanism for broad public disclosure of injury and illness information.”<sup>8</sup> The Final Rule explained:

OSHA agrees [with commenters] that confidentiality of injury and illness records should be maintained except for those persons with a *legitimate need* to know the information. This is a logical extension of the agency's position that a balancing test is appropriate in determining the scope of access to be granted employees and their representatives. Under this test, “the fact that protected information must be disclosed to a party who has a need for it \*\*\* *does not strip the information of its protection against disclosure to those who have no similar need.*”<sup>9</sup>

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<sup>6</sup> 66 Fed. Reg. 5934.

<sup>7</sup> 29 C.F.R. §1904.0 (emphasis added).

<sup>8</sup> 66 Fed. Reg. 5916 at 6057.

<sup>9</sup> *Id.* (citing *Fraternal Order of Police*, 812 F2d at 118) (emphasis added).

The agency continued, “The record does not demonstrate that routine access by the general public to personally identifiable injury and illness data is necessary or useful.”<sup>10</sup> OSHA has, therefore, made it clear that public dissemination of the data is not necessary or appropriate, and the agency’s new attempts to do so clearly conflicts with this long-standing policy.

*Cost-Benefit Analysis Is Defective and Unsupported*

The rulemaking underestimates the cost this Proposed Rule will have on the economy and individual employers. To comply with these changes, employers must spend substantial time and effort to determine which injuries and illnesses are recordable. Some employers will need to transition to electronic systems for maintaining their records. Employers will also expend resources to alter extent tracking systems and train employees on how to maintain the logs and submit the data to OSHA.

**Conclusion**

The concerns outlined above demonstrate that OSHA’s Proposed Rule is gravely misguided. It will harm employers and employees across the country, as confidential data is released, entities inappropriately rely on the information as a measure of an employer’s record, and malicious actors use the data for their own purposes. It will result in a chilling effect on recordkeeping and runs counter to long-standing OSHA policy. NRF therefore strongly urges OSHA to withdraw this Proposed Rule.

Thank you for your consideration of these comments and concerns.

Sincerely,



David French  
Senior Vice President  
Government Relations

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<sup>10</sup> *Id.*