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OSHA Docket Office
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U.S. Department of Labor
200 Constitution Avenue, NW.
Washington D.C., 20210

VIA ELECTRONIC SUBMISSION
TIA Comments on OSHA's Proposed Rule
to Improve Tracking of Workplace Injuries and Illnesses

On November 8, 2013, the Department of Labor, Occupational and Safety and Health Administration (OSHA) published a proposed rule to "Improve Tracking of Workplace Injuries and Illnesses" (RIN 1218-AC49). The Tire Industry Association (TIA) is submitting the following comments on behalf of its members.

TIA is an international association representing all segments of the tire industry, including those that manufacture, repair, recycle, sell, service or use new or retreaded tires and also those suppliers who furnish equipment, material or services to the industry. TIA has a combined history that spans more than 90 years and has almost 7,000 members that operate more than 15,000 locations.

The proposed rule would require "electronic" submission of injury and illness data from employers that are already required to maintain the information under existing OSHA regulations in three specific instances: 1) establishments with 250 or more employees would be required to file data on quarterly basis, 2) establishments with 20 or more employees would be required to submit information from the OSHA annual summary form (form 300A) on an annual basis and 3) employers who receive notification from OSHA to submit specified information from their Part 1904 injury and illness records. These electronic submissions would then be accessible by the public via the OSHA website.

While TIA supports OSHA's laudable goal of promoting safe and healthy working conditions for American workers, we would like to register our strong opposition to the rule as proposed and suggest that the Agency withdraw this proposal. Our primary concerns are with the conceptual methodology underlying the rule and the economic costs associated with compliance. We have also included answers to some of the questions that the Agency has raised regarding this proposal.

METHODOLOGY

Under 29 CFR 1904.1 and 1904.2, employers are currently required to keep injury and illness records. The proposed rule does not add to or change the employer's obligation to complete and retain these injury and illness records. Nor does it change the criteria and definitions for these records. We understand the rationale for OSHA's access to a larger database of injury and illness data in order to target resources more effectively and to facilitate compliance and enforcement efforts. We also acknowledge the perceived efficiency of electronic reporting.

However, we do not see the advantage of increasing the burden on large employers by requiring quarterly reporting as opposed to the current annual requirements. Our members invest hundreds of thousands of dollars each year to maintain safe work environments because it is simply good business. Between workers' compensation premiums, lost productivity, and the high cost of training new employees, there are significant financial advantages to a workplace that promotes health and safety.

Additionally, this data is highly sensitive and must be treated as confidential. The crux of our concern is that this rule provides for much more than simple data submission by electronic transmission. Unfortunately, the rule also provides for the online posting of this "case" data. The raw, establishment-specific case data, lacking context or explanation, could easily be manipulated by third parties causing irreparable damage to the reputation and economic viability of affected businesses while not providing accurate or useful information to consumers.

The Department has invited comment on the issue of whether these records should be considered confidential. The Secretary relies on New York Times Co. v. U.S. Dept. of Labor (340 F. Supp. 2d 394, 403 (S.D.N.Y. 2004) to conclude that the information contained on the OSHA injury and illness recordkeeping forms does not constitute confidential commercial information. We believe this reliance is misplaced. The New York Times case turned on the question of whether the disclosure of the illness and injury rates (in response to a Freedom of Information Act [FOIA] request), could result in "reverse engineering" to determine employee hours, and in turn whether employee hours constituted confidential commercial information. When addressing that narrow question, the Court concluded that such records were not confidential material.

However, the question here is not the confidentiality of the number of employees, their hours or whether or not this information can be deduced through disclosure of illness and injury data. There is also no claim of trade secret status for this data. For purposes of this rule, those issues are akin to red herrings. Unlike the New York Times case, the relevant policy question in terms of confidentiality is whether the raw injury and illness data, if published on a website, could be misused to the detriment of the employer supplying it and the extent to which information in this form is in fact useful in consumer decision making. We strongly believe that the nature of this data would be vulnerable to misuse by competitors and that it lacks the proper context to be a valuable tool for consumers.

It's also important to note that while the Confidential Information Protection and Statistical Efficiency Act of 2002 prohibits the Bureau of Labor Statistics (BLS) from releasing establishment-specific injury and illness data, OSHA cites President Obama's Open Government Initiative as the basis for allowing public access to the same establishment-specific injuries and illnesses. We do not believe that the publication of this confidential information reduces the influence of special interests, tracks how the government uses tax dollars, or empowers the public to influence the decisions that affect their lives. Therefore, using the Open Government Initiative as the legal foundation for public access to injury and illness data is not consistent with the goals and intent outlined by the Memorandum on Transparency and Open Government.

In the background materials accompanying the rule, OSHA refers to the alleged benefits of "public" access to these reports in terms of customer decision-making. While this approach may be well intentioned, it ignores the realities of the marketplace. Competitors have obvious incentives to use injury and illness data for competitive advantage. Meanwhile, customers viewing the raw data out of context may well draw incorrect conclusions, particularly if aided by the self-interested and distorted representations of these competitors. Absent proper context, raw data on workplace injuries and

illnesses is an unreliable measure of an employer's safety record. In addition to commercial competitors, other hostile interests (political, personal, ideological) could use or threaten to use this data to fashion negative ad campaigns, create frivolous litigation, or engage in other mischief based on easy access to sensitive information in its most raw form.

We are also concerned that the posting of this raw data will negatively affect the accuracy of reporting based on a company's knowledge that competitors and consumers will be able to view the data. There will be a strong incentive to "fudge" the data or participate in "creative " reporting, based in part on the assumption that "everyone's doing it." The more companies that believe consumers are viewing this data, the greater the incentive for distorting their own data or designing schemes to have their competitor's data viewed negatively.

ECONOMICS

We believe that OSHA is significantly underestimating the additional economic cost of $183 per year for establishments with 250 or more employees. A TIA member with 65 locations in multiple states estimates that it takes one $12/hour employee approximately 24 hours to verify, compile and prepare the data from each of the stores in order to fulfill the current annual reporting requirements and one day with a $400/day consultant to ensure it is compliant. Assuming that it will require the same amount of time to verify, compile and prepare the injury and illness data on a quarterly basis so it can be submitted electronically, this particular member is anticipating that the additional economic cost will be at least $2,064.

OSHA QUESTIONS

How hard is it for a multi-establishment enterprise to identify all of the establishments under its ownership or control?

When it comes to multi-establishment enterprises in the tire industry, ownership is generally not an issue because locations are either company-owned or owned by franchisees. On the other hand, control over each of the establishments under a company name is an issue that is subject to much debate. Large retail chains are often a combination of locations owned by the parent company and franchises. While the parent company has a certain degree of control over their franchisees, each franchise remains a privately owned business. Since the employer is ultimately responsible for reporting workplace injuries and illnesses, only the employees of company-owned establishments should be counted with regard to this proposal. Further complicating the matter is the fact that some franchises may also be over the 250-employee threshold, which raises questions about how that data will be reported and under what name.

Are there types of multi-establishment firms or multi-level firms for which this would represent a greater burden than for others?

Large retail chains in multiple states will definitely have a more significant burden than others. A company with 500 locations would have to decide whether each individual location will submit the injury/illness data on their own or send it to the corporate office where someone would input the data from each individual establishment.

Would the burden on multi-establishment enterprises to collect and submit their OSHA data be more, less, or the same as the burden to collect and submit data from their establishments to the EEOC?

We estimate that it will be a greater burden because the EEOC report can be completed at the corporate level for each establishment and is only required on an annual basis. It's also important to note that human resources software often tracks the information required for the EEO-1, so the gathering of the information would consist of running a report and transferring the data. And unlike the proposed quarterly OSHA reports, the EEOC reporting does not depend on receiving information from the individual locations since the employee files for multi-establishment enterprises are kept at the corporate office. In most instances, the establishments themselves play no role in the generation of the data for the EEO-1 report or the actual reporting.

Which occupation or occupations would describe the employee(s) likely to perform the task of identifying all of the establishments under its ownership or control?

In the tire industry, that task would likely fall on the employee(s) who are responsible for overseeing the franchises.

How probable is it that the employee(s) likely to perform this task for OSHA's requirements would be performing the same task for the EEOC's requirements?

That would depend on the size of the company, but it is unlikely. The largest companies typically have dedicated health and safety departments that would be responsible for gathering the information required for the OSHA reporting requirements. These same companies also have human resources personnel that would likely be responsible for the EEOC reporting and may be tasked with the OSHA reporting as well. Smaller companies, by comparison, may have to rely on the same people or departments for both requirements.

Which occupation or occupations would describe the employee(s) likely to perform the task of collecting, compiling, and submitting the establishment-specific annual summary data from each establishment under the enterprise's ownership or control?

In most cases, the store manager or assistant manager would be responsible for collecting and compiling the annual summary data for their location and they would submit it to the corporate office where another employee(s) (usually in the human resources department) would submit the data for the entire company.

Would the burden of enterprise-wide collection increase as the number of establishments per enterprise increases, and if so, how?

The burden of enterprise-wide collection would definitely increase as a company with multiple locations adds new stores. With each new establishment comes the increased cost of collecting and compiling the data as well as the additional time required at the corporate level to organize and submit the data to OSHA.

To what extent do enterprises already collect establishment-specific injury/illness data from all of their establishments?

Most of the enterprises with multiple establishments collect the injury/illness data at the store level and then send it to the corporate office so it can be compiled and reported.

Do enterprises generally know their corporate linkage identifiers (i.e., their Universal DUNS number)? How much additional burden would it be for the enterprise to provide this information?

The enterprises definitely know their linkage identifiers and we do not believe it would be an additional burden to provide this information.

What are the implications of requiring all data to be submitted electronically? This proposed rule would be among the first in the federal government without a paper submission option. More current BLS injury and illness data will be available at the time of the final rulemaking. Use of newer data may result in changes to the proposed industry coverage.

The implications of requiring all data to be submitted electronically will depend largely on the effectiveness of the website and the time limits. For example, a company with multiple establishments would need time to compile the data in each location and then submit it to the corporate office. The administrator responsible for the reporting would then have to make sure all of the locations have submitted data before it can be entered it into the website. OSHA would need to provide businesses with additional time to enter the data and then the Agency would have to expect large numbers of entries during that time. If the reporting website is not able to handle the volume of enterprises, then it will be an additional burden to continually attempt to log on and report the injury/illness data. There is also the matter of training for the individuals responsible for the electronic reporting. If the website is not easy to use and intuitive, then companies will need to allocate additional time to train the person(s) who is(are) responsible for reporting the data.

Should the electronic submission requirement be phased in, with a paper submission option available for a certain period of time at the beginning for some or all of the establishments subject to the proposed rule, or should the electronic submission requirement take effect immediately?

There would definitely need to be a phase in period where paper submissions are allowed until the Agency could guarantee that the reporting website was capable of handling the volume and the process was not too complicated or difficult.

What additional steps, if any, should the Agency take to protect employee privacy interests?

As long as the Agency intends to make the establishment-specific injury and illness data available to the public, there is little that can be done to protect employee privacy. Multi-establishment companies in the tire industry typically have fewer than 20 employees per location, so it won't be difficult to determine which employee suffered an injury or illness.

Are there views on the issue of OSHA recordkeeping forms and confidential commercial information?

We believe that the number of employees and hours worked should remain confidential since the dissemination of this information does not serve any purpose with regards to improving health and safety in the workplace.

Which categories of information, from which OSHA-required form, would it be useful to publish?

None of the information from the OSHA-required forms should be published. We understand the need for the Agency to collect this information since it will identify the employers that require additional attention. But the publishing of any injury and illness data will only encourage more under-reporting as companies will be less likely to report incidents if they are destined for public access.

Should this data collection be limited to the records required under Part 1904? Are there other required OSHA records that could be collected and made available to the public in order to improve workplace safety and health?

None of the OSHA records should be made available to the public. We believe this is outside the scope of the Agency and it will have an overall negative impact on workplace safety and health.

For the proposed Sec. 1904.41(a)(1) (Quarterly electronic submission of Part 1904 records by establishments with 250 or more employees), what would be the advantages and disadvantages of making submission monthly, rather than quarterly?

Monthly submissions will only increase the costs for enterprises with 250 or more employees, especially those with multiple establishments in multiple states.

For the proposed Sec. 1904.41(a)(1) (Quarterly electronic submission of Part 1904 records by establishments with 250 or more employees), what would be the advantages and disadvantages of making submission annually, rather than quarterly?

Annual submissions will definitely lower the costs when compared to quarterly, but it will still increase the amount of time and therefore create additional expense.

How much burden would this impose on establishments with 250-500 employees? If the size criterion were lowered to 100 or more employees, how much burden would this impose on establishments with 100-250 employees?

The burden on large enterprises in the tire industry with multiple establishments will be increased regardless of the threshold for quarterly reporting.

SUMMARY

OSHA offers alternatives that deal with the timeliness of submissions and reflect varying degrees of burden upon reporting companies. Although throughout the proposed rule OSHA seeks to define the burden in terms of the minutes needed to "send" the response, the reality is that with this data subject to review by customers and competitors, the amount of scrutiny and review given to each entry will be substantially increased. For these reasons, we view quarterly and monthly submissions as extremely burdensome and unfeasible. We would like to emphasize that when evaluating this proposed rule, OSHA should keep in mind that for small businesses, valuable employee time will ultimately have to be used to enter raw data electronically, time which is taken from other productive endeavors.

The Agency also indicates concern with a concurrent reduction in the amount of injury and illness data that would be made available. Our view is that this touches upon the key problem with the proposed rule…overly optimistic assumptions that the additional data will enable the Agency to identify and remove workplace hazards, encourage employers to improve or maintain workplace safety and health, help employees to better identify hazards within their workplace, and enable customers to make better decisions.

Unfortunately, none of these assumptions have been tested. It might make sense to test and evaluate them on a smaller scale and then determine if the desired policy actions actually occur. In an age when data mining is an accepted phenomenon, there is a tendency to conclude that more data equates to better outcomes. We would argue that since the data collection is a significant burden on the businesses required to collect and submit, it should be minimized until there is concrete evidence that there will be a positive result. For example, what if the use of this data does not lead to a significant reduction in workplace hazards because of marginal costs, but rather results in an increase in frivolous

litigation? Thus, we believe more study is necessary so these assumptions can be tested on a smaller scale before broadening the burden on American businesses.

As indicated above, our primary objection is to the "publication" and public access to raw injury and illness data without the benefit of a contextual explanation. There is a great risk of misuse of such highly sensitive data by both competitors and other adversaries. Since it would be in such a raw form and subject to distortion, this data will be of questionable value in consumer decision-making. Our members understand OSHA's desire for this data to direct its policy making, but we urge that the data remains confidential between the Agency and the employer. We also urge that the scope of this rule be pared down to a much smaller volume of data, impacting far fewer establishments and targeted to obtain only the most serious injury and illness information. Then there must be an evaluation of the data collection and reporting program to determine whether it actually leads to concrete improvements in workplace health and safety. Finally, any form of electronic reporting must be phased in to allow for a smooth transition for those establishments that have not moved to entirely electronic systems.

Without any empirical data to support the perceived benefits or justify the additional costs, OSHA is speculating that the implementation of this proposed rule will have a positive impact on workplace health and safety. In many instances, businesses will be forced to reallocate resources from proven risk management practices in order to comply with the increased reporting requirements. While we agree that employees are entitled to workplaces that are free from occupational hazards, we strongly believe that education and training are the keys to success. And if OSHA remains intent on improving the tracking of injuries and illnesses, there must be additional research to ensure it is necessary and the perceived benefits will be realized.

The Tire Industry Association appreciates this opportunity to share our views on this important matter.

Respectfully,

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