September 28, 2018

Submitted via Regulations.gov

Deputy Assistant Secretary Loren E. Sweatt
OSHA Docket Office
Room N-3653
U.S. Department of Labor
200 Constitution Avenue NW
Washington DC 20210

Re: **OSHA NPRM on Tracking of Workplace Injuries and Illnesses (RIN 1218-AD17); Docket No. OSHA-2013-0023**

Dear Deputy Assistant Secretary Sweatt:

We write to express our opposition to the provisions of OSHA's notice of proposed rulemaking (NPRM) that would revise the May 2016 final rule, Improve Tracking of Workplace Injuries and Illnesses,[1] to roll back the requirement for large employers to submit all OSHA recordkeeping forms electronically. The agency's reasoning for backtracking on the requirement that large employers electronically submit OSHA Forms 300 and 301, in addition to Form 300-A, is predicated on an alleged concern about employee privacy that is not only unsupported by the prior rule, but is also easily dispelled. The consequence of moving forward with this rule would be to overlook the many improvements to worker health and safety that electronic reporting of OSHA Forms would deliver, all of which the agency itself recognized and touted in its May 2016 final rule.

OSHA claims in its NPRM that the basis for rolling back the requirement for large firms to submit OSHA Forms 300 and 301 electronically is due to concerns over workers' privacy. In sum, OSHA claims that a court may one day compel it to release personally identifiable information contained on OSHA Forms 300 and 301. This claim is completely unfounded. The agency's 2016 final rule expressly states that OSHA is not collecting personally identifiable information from OSHA Form 300 Column B (employee's name) or from OSHA 301 Field 1 (employee name), Field 2 (employee address), Field 6 (name of treating physician or health care provider), or Field 7 (name and address of non-workplace treating facility).[2] Additionally, if other information on the OSHA Forms could be used to identify information about an employee, or if an employer

accidentally reports private information, the final rule makes clear that OSHA would withhold the personal information in accordance with Freedom of Information Act (FOIA) exemptions.[3]

OSHA's regulations, FOIA, and the courts all serve to *protect* against disclosure of personally identifiable information, not compel its release. Thus, OSHA's concern about a court one day compelling it to ignore worker privacy concerns is highly speculative and contrary to the agency's assertion in the NPRM.[4] OSHA refers to a FOIA request it received for information on OSHA Forms 300-A, 300, and 301 as evidence of the potential risk. However, members of the public are well within their rights to submit FOIA requests to the agency, and the filing of a FOIA request itself is not evidence of risk. In this instance, the agency notes that it declined to provide any information from OSHA Form 300-A, and the requester sued to compel disclosure of information otherwise not exempted by FOIA. OSHA's explanation of this request does not raise a reasonable concern about the disclosure of personally identifiable information. As OSHA itself explained in the 2016 final rule, OSHA, like all other agencies, is authorized by FOIA to exercise an exemption and withhold personally identifiable information.

OSHA then turns to a 2007 court decision, *Finkel v. U.S. Department of Labor*, as support for its claim that a court may one day compel it to release personally identifiable information.[5] However, in this case, the requester specifically asked OSHA for de-identified data pursuant to FOIA. When the agency claimed employee identification numbers were personally identifiable information, the court concluded that there was no private information in those numbers, and thus, compelled their release. OSHA undercuts its own arguments in the NPRM, recognizing that "*Finkel* would be distinguishable from any future cases seeking FOIA disclosure of information . . . ."[6] Accordingly, OSHA's assertion that this court decision somehow suggests a court would one day compel it to release personally identifiable information is not, as the NPRM claims, "reasonably foreseeable." To the contrary, that assertion is incredibly far-fetched and unreasonable.

As OSHA explains in the 2016 final rule, it "currently has very limited information about the injury/illness risk facing workers in specific establishments."[7] This is in large part because employers need only maintain OSHA Forms on-site at the establishment. With federal OSHA's scant resources, it would take the agency roughly 158 years to visit each worksite under its jurisdiction just once.[8] In other words, unless OSHA requires employers to submit data electronically, it cannot make good use of the information employers are required to collect because it has insufficient access to the information.

In the 2016 final rule, OSHA describes the benefits in detail. To summarize, OSHA emphasizes that the rule would help increase prevention of work-related injuries and illnesses "as a result of expanded access to timely, establishment-specific injury/illness information by OSHA, employers, employees, employee representatives, potential employees, customers, potential customers, and researchers."[9]

By revising the final 2016 rule to require large employers with 250 or more employees to submit only OSHA Form 300-A, OSHA is proposing to go back to an antiquated system for collecting this data, preventing itself from accessing this information except on the rare occurrence when it visits a worksite. It is unnecessary for the agency to operate in this manner. In 2018, where internet access is robust and electronic transmission of documents is the norm for most large employers, it is only practical that the agency modernize its recordkeeping rules pertaining to those employers. By doing so, the agency's recordkeeping regulations become substantially

more useful for compiling data and performing analysis to determine trends in injuries and illnesses while that information is still timely for setting priorities.

OSHA notes in its NPRM that it has determined that the perceived risk of a court one day ordering it to release sensitive information is not so substantial to stop it from collecting Form 300-A summaries, recognizing that "collection offers significant enforcement value with little privacy risk."[10] Collecting information from Forms 300 and 301 for large employers similarly provides substantial benefit to the agency without any reasonably ascertainable risk. Because of the many benefits of requiring large employers to submit all OSHA Forms electronically, and because OSHA has failed to justify its concerns over employee privacy, we urge the agency to roll back this requirement in the proposal.

Sincerely,

Thomas McGarity
Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law
University of Texas at Austin School of Law

Sidney Shapiro
Fletcher Chair in Administrative Law
Wake Forest University School of Law

Katie Tracy
Policy Analyst
Center for Progressive Reform

[1] 81 Fed. Reg. 29,624 (2016), https://www.gpo.gov/fdsys/pkg/FR-2016-05-12/pdf/2016-10443.pdf.
[2] *Id*. at 29,658.
[3] *Id.*
[4] 83 Fed. Reg. 36,494, 36,497–98 (proposed 2018).
[5] *Id.* at 36,498 (citing Finkel v. U.S. Dep't of Labor, No. 05-5525, 2007 WL 1963163 (D.N.J. June 29, 2007)).
[6] *Id.*
[7] 81 Fed. Reg. at 29,629.
[8] AFL-CIO, DEATH ON THE JOB: THE TOLL OF NEGLECT 3 (2018), https://aflcio.org/sites/default/files/2018-04/DOTJ2018nb.pdf.
[9] 81 Fed. Reg. at 29,624.
[10] 83 Fed. Reg. at 36,498.