March 10, 2014

OSHA Docket Office
Docket No. OSHA–2013–0023
U.S. Department of Labor
Room N–2625
200 Constitution Avenue NW
Washington, DC 20210

RE: Docket No. OSHA–2013–0023 – Improve Tracking of Workplace Injuries and Illnesses

These comments are submitted for the record to the Occupational Safety and Health Administration (OSHA) on behalf of the National Federation of Independent Business (NFIB) in response to the notice of proposed rulemaking (NPRM): Improve Tracking of Workplace Injuries and Illnesses published in the November 8, 2013 edition of the *Federal Register*.

NFIB is the nation's leading small-business advocacy association, representing members in Washington, DC, and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 independent-business owners who are located throughout the United States.

Summary

OSHA proposes "to improve workplace safety and health through the collection of useful, accessible, establishment specific injury and illness data to which OSHA currently does not have direct, timely, and systematic access. With the information acquired through this proposed rule, employers, employees, employee representatives, the government, and researchers will be better able to identify and abate workplace hazards. OSHA is proposing to amend its recordkeeping regulations to add requirements for the electronic submission of injury and illness information employers are already required to keep under OSHA's regulations for recording and reporting occupational injuries and illnesses."

Unfortunately, NFIB believes that this proposed rule is not as straightforward as the agency contends. Nor does the agency adequately show how workers will be made safer by the public disclosure of this information. If finalized, this proposed rule will have serious and negative consequences for both employees and small businesses.

First, sensitive information on employees and small businesses will become widely available. OSHA's intended use of the information will allow for abuse and misuse of the data by persons and groups to make damaging accusations against small businesses, or will simply be taken out

of context. Second, because of these repercussions, the proposed rule will make small businesses less likely to report injuries. Third, NFIB believes OSHA's rule has not adequately considered the impact of this rule on small businesses under the Regulatory Flexibility Act (RFA) and has substantially underestimated the compliance burden.

Small business owners value the safety of their employees. A small business's employees tend to be family, friends and neighbors; so there is a clear interest in preventing injuries. In addition, keeping employees safe keeps costs down. However, this rule will not increase employee safety. Because of these concerns, NFIB respectfully requests that OSHA withdraw the proposed rule.

Elements of the proposed rule

OSHA is proposing to require small businesses already subject to the agency's existing recordkeeping rules to submit this information electronically to OSHA at intervals throughout the year. These small businesses will fall into one of the following scenarios:

> 250 or more employees: These firms will have to submit information included on the individual entries on the OSHA Form 300 (injury and illness log) and the information entered on each OSHA Form 301 (incident report) on a quarterly basis. On an annual basis, these businesses must submit the summary data found on OSHA Form 300A (summary report).
>
> 20 or more employees: These small businesses in designated industries – of which there are 54 listed – must submit Form 300A on an annual basis.
>
> Employers notified by OSHA: Other small businesses outside the two categories listed must provide information for a certain period time as directed by OSHA in a notification from the agency.

Small businesses will have to visit a "secure website" built by OSHA and register for a username and password. These companies will have to input data into the system directly, though OSHA also describes a limited number of formats in which data can be batch uploaded to the agency. Small businesses cannot simply scan in the required forms.

OSHA will then build another website that will function as a database for the public to search and obtain desired information. The information that will be available are all of the data on the Form 300A, all of the data except for the employee's name (column B) on the Form 300, and items 10-18 on the Form 301 (the "Information about the case" section).

Concern 1: sensitive information lacks context, will be misused

NFIB is very concerned about the wide availability of this information because it will be easily accessed by the public without any context whatsoever. To be sure, the information does not give any basis for judgment on the effectiveness of a company's safety program. Yet OSHA is inviting the public to do just that. We believe this represents an irresponsible misuse of the agency's authority.

Unfortunately, workplace injuries happen despite the best safety programs. They can happen even when an employee follows a company's safety process perfectly. Injuries can also occur due to employee errors or other factors far beyond a small business's control. Because the information provided to OSHA lacks the context behind an injury, the public receives an incomplete picture. This problem is exacerbated by the fact that many small businesses over-log injuries (log injuries that are not required to be logged) because there is no real consequence for over-reporting injuries.

For example, assume Company X has 20 employees. In 2013, the company had five injuries occur that warranted inclusion on the company's log. To a member of the public using the new database, it appears that the company has a problem. However, if four of them happened for reasons beyond the employer's control and the fifth didn't need to be logged, the public would not see the entire picture.

Even worse, this lack of context could lead organizations – or even competitor businesses – to make gross mischaracterizations regarding a small business. NFIB believes that the proposed rule will lead to misuse and abuse of sensitive information regarding employees and small businesses.

It is easy to see how some organizations, such as labor unions, would seek to use this information to initiate an organizing campaign against certain small businesses. In fact, access to these records has been a top priority of many labor unions. Unions are likely to use this information out of context, in an attempt to show a small business's employees that the company does not have an adequate safety program.

Similarly, a consumer group or competitor business may begin a campaign against a small business by declaring the business unsafe or claiming it disregards their employees' well-being.

Furthermore, identifying information regarding employees will be widely disseminated if the proposed rule is finalized. Though OSHA will delete otherwise not receive specific identifying information on an employee, it is likely that a user could piece together the identity of an individual and the circumstances of the injury given the information that is provided. This is especially true in rural areas and small communities. OSHA's proposed rule does not adequately protect the privacy of employees injured in the workplace.

Concern 2: the proposed rule will lead to fewer injuries being logged

NFIB expects that as a result of the privacy concerns faced by small businesses and their employees, many small businesses will report fewer injuries because the negative consequences of logging too many injuries will be so great. This chilling effect runs counter to the mission of OSHA and the agency's goal with this particular rule.

Specifically, the proposed rule makes it more likely that a small business will not log an injury if it has any reason to question that the injury is work related. In addition, an employee that may have suffered a minor-but-embarrassing work-related injury might not tell his or her employer for fear that someone that might connect the dots and give the employee a hard time.

Concern 3: OSHA has not met its obligations under the RFA

NFIB believes that OSHA has not met its legal obligations under the RFA and its amending law, the Small Business Regulatory Enforcement Fairness Act (SBREFA). Specifically, NFIB believes that OSHA has incorrectly certified that this proposed rule will not have significant impact on a substantial number of small entities.

Congress passed these laws to ensure that agencies consider the effect its regulations – which studies show disproportionately impact small businesses – have on small businesses. Unless an agency can certify the rule has no significant impact, it must conduct a Regulatory Flexibility Analysis. In OSHA's case, when a rule will have a significant impact, it must convene a Small Business Advocacy Review (SBAR) panel. These panels are useful tools to give OSHA suggestions and feedback that help minimize burden and increase flexibility of a rule.

OSHA's incorrect certification of this rule as not having a significant impact is deeply concerning. The agency's cost estimates are substantially underestimated. OSHA has estimated that it will cost each employer with establishments of 250 or more employees only $183 per year and only nine dollars per year for establishments with 20 or more in designated industries to comply with this proposed rule. However, these estimates don't account for many costs that will be incurred by small businesses.

For example, there will be initial costs for implementing a new system of recordkeeping, since many small businesses keep these records only on paper. There will also be training of the employee entering the information. In addition, other reasonably foreseeable costs will be incurred. As proposed, the log in procedure will be associated with a specific employee's email address. There will be turnover in the employees who handle these duties which means having to reset the contact information and start all over again. These added costs are not included.

If the owner inputs the data, which is also likely, then the value of the time OSHA used is substantially underestimated. Entering the information will take time away from the owner, which should be used to try to grow the business. In addition, because the owner is not likely a data-input expert, it will expectedly take him or her longer than a specialist that inputs data into different systems frequently.

Aside from pure dollar costs, the concerns mentioned earlier will have a substantial impact on small businesses. The cost of having sensitive information on employees and business practices wide open to the public is considerable.

OSHA estimated 10 minutes per establishment for the electronic submission of the records. OSHA's estimate is unrealistic and does not accurately account for the time it will take for familiarization with the process and to review making sure all requirements are met. Furthermore, OSHA has not explained how employee identifying information will be kept from public disclosure. If this becomes the responsibility of the employer—and there may be good reasons why this should be the case—it will add considerably to the time and cost for compliance.

The agency also wrongly assumes that all businesses have internet access, but has not provided the necessary supporting evidence. Should OSHA move forward with the rule, the agency must give consideration to allowing paper submissions. Because submission of these records will be mandatory, failing to do so will create a hardship on small businesses and increase the cost burden of the rule for employers.

Had OSHA convened an SBAR panel, it could have better understood these missing costs and received feedback on how to make this rule less burdensome. The agency also would have realized that this proposed rule is not nearly as simple as the agency makes it appear in the preamble. Unfortunately, OSHA incorrectly certified this rule in an apparent effort to shortcut proper administrative procedure – in violation of its legally binding obligations.

Conclusion

NFIB believes that this proposed rule is not as straightforward as the agency contends. Nor does the agency adequately show how workers will be made safer by the public disclosure of this information. If finalized, this proposed rule will have serious and negative consequences for both employees and small businesses.

First, sensitive information on employees and small businesses will become widely available. OSHA's intended use of the information will allow for abuse and misuse of the data by persons and groups to make damaging accusations against small businesses, or will simply be taken out of context. Second, because of these repercussions, the proposed rule will make small businesses less likely to report minor injuries. Third, NFIB believes OSHA's rule has not adequately considered the impact of this rule on small businesses under the RFA and has substantially underestimated the compliance burden.

Small business owners value the safety of their employees. A small business's employees tend to be family, friends and neighbors; so there is a clear interest in preventing injuries. In addition, keeping employees safe keeps costs down. However, this rule will not increase employee safety. Because of these concerns, NFIB respectfully requests that OSHA withdraw the proposed rule.

We appreciate the opportunity to comment on the NPRM. Should OSHA require additional information, please contact NFIB's manager of regulatory policy, Daniel Bosch, at 202-314-2052.

Sincerely,

Dan Danner
President and CEO
NFIB