WORKSAFE
safety, health, and justice for workers

Via Regulations.gov

June 30, 2022

Doug Parker
Assistant Secretary
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Ave, NW
Washington, DC 20210

Re: Proposed Rule, Improve Tracking of Workplace Injuries and Illnesses (Docket No. OSHA-2021-0006)

Dear Mr. Parker:

Worksafe appreciates the opportunity to comment in response to the Occupational Safety and Health Administration's (OSHA's) recent Proposed Rule that would require certain employers to electronically submit data on workplace injuries and illnesses and would require OSHA to publish some of the reported data. Improve Tracking of Workplace Injuries and Illnesses, 87 Fed. Reg. 18528 (March 30, 2022) (to be codified at 29 C.F.R. pt. 1904) ("Proposed Rule").

Worksafe is the only statewide nonprofit in California dedicated to promoting and protecting the basic right of all people to a safe and healthy workplace. Worksafe leads and supports worker campaigns and coalitions that advocate for strong worker health and safety laws as well as effective remedies for people who are injured on the job or suffer work-related illnesses. In addition to our advocacy and policy work, we are a support center for California legal aid organizations whose clients encounter workplace health or safety issues, workplace injuries, or retaliation for reporting unsafe work. We provide legal training, technical assistance, and advocacy support to legal aid programs that serve low-wage and immigrant workers, and thus help improve access to justice for workers who are most vulnerable to having their rights violated. Our work has convinced us of the need for the kind of transparency outlined in the Proposed Rule.

Worksafe strongly supports the Proposed Rule. Currently, employers electronically submit only summary information on annual workplace injuries and illnesses to OSHA (Form 300A). Although employers must *maintain* information on specific cases of injury and illness (Forms 300 and 301), only a sampling of employers is asked to submit that information to OSHA. When they do so, employers are allowed to submit that information on paper. The result is a significant gap in OSHA's, and the public's, access to information on specific cases. Worse, the paper submissions result in a significant lag in processing time that can be as long as two years from the date of submission, resulting in a delayed response time to workplace health and safety issues.

The Proposed Rule provides a straightforward process for electronic submission of case-specific information from Forms 300 and 301 and for electronic posting of some of the information. This will increase transparency and public accountability for workplace conditions and bring OSHA into the digital age. The burden on employers is low, as it would merely require electronic submission of information that employers are *already* required to collect and maintain. Conversely, as outlined below, the benefit to workers is huge. By making incident-specific data electronically available, OSHA, workers, and advocates will finally have meaningful access to real-time information that they can then use to improve workplace conditions.

This comment provides information on five topics. First, we explain that the process required by the Proposed Rule is similar to a process already successfully used by another federal agency. Second, we respond to OSHA's request for information on the utility of the data for various members of the public. Specifically, we explain how various stakeholders can use the data to improve workplace conditions and provide specific examples of ways that unions have used case-specific data in the past when (albeit limited) data was available. Third, in response to OSHA's request for suggestions on how to leverage technology to protect personally identifiable information, we refer the agency to technology experts within the federal government. Fourth, we encourage OSHA to ensure that the publication of case-specific data is not used to discourage employees from reporting injury and illness incidents. And fifth, we respond to some incorrect outside criticisms that the Proposed Rule would implicate First Amendment concerns.

I. The Requirements of the Proposed Rule are Similar to Requirements that Have Been Successfully Implemented at the Mine Safety and Health Administration.

The requirements proposed by OSHA are comparable to procedures already in use by other Department of Labor components. The Mine Safety and Health Administration (MSHA) requires that all mining firms report injuries, illnesses, and near-miss incidents to the agency within 10 working days of the event.[1] The reporting form (MSHA Form 7000-1) includes 27 mandatory items, including a description of the incident, the nature of the injury or illness, and the employee's work activity at the time of the injury or illness.

Since 2001, select information from every 7000-1 report submitted has been posted on MSHA's website.[2] This site-specific information includes the name and location of the mining operation, the controlling company, a brief description of the incident, the nature and severity of the injury, and the job title of the affected worker. The electronically available site-specific records of injuries, illnesses, and near-miss incidents date back to 1983. In addition, beginning in 2010, MSHA has electronically posted a complete, unredacted copy of the form for every fatal-injury incident.[3] The Proposed Rule is quite modest compared to the reporting requirements for employers in the mining industry.

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[1] *Mine Accident, Injury and Illness Report, MSHA Form 7000-1*, Mine Safety and Health Admin., https://www.msha.gov/sites/default/files/Support_Resources/Forms/7000-1.pdf.

[2] *Mining Industry Accident, Injuries, Employment, and Production Statistics and Reports*, Dep't of Lab., https://arlweb.msha.gov/ACCINJ/accinj.htm (last visited June 3, 2022).

[3] *Fatality Reports*, Dep't of Lab., https://www.msha.gov/data-reports/fatality-reports/search (last visited June 3, 2022).

II. Case-Specific Data on Workplace Injury and Illness Incidents Will Enable Stakeholders to Identify Safety Issues and Take Action to Improve Workplace Conditions.

In the Proposed Rule, OSHA requests information on how the electronic availability of case-specific data from Forms 300 and 301 will improve worker safety and health. 87 Fed. Reg. at 18,543. Our experience, expertise, and research all indicate that access to this data will indeed help multiple stakeholders—including OSHA itself, workers, job seekers, unions, and workplace safety organizations—take timely action to improve workplace conditions.

Under the current system, only general, summary information from Form 300A is readily available online. OSHA itself obtains case-specific information only when the establishment has been inspected or when there is a report of a fatality or hospitalization. As a result, those attempting to understand specific health and safety issues in specific workplaces have only outdated and limited information that often fails to track the real, current workplace issues that workers face. The Proposed Rule will improve access to information and ultimately improve workplace conditions for many workers.

a. Better data will benefit OSHA oversight, employees, and job seekers.

As an initial matter, the Proposed Rule would provide timely and systematic case and establishment-specific injury and illness information to OSHA itself. This will allow OSHA to focus and direct its enforcement efforts on hazards that are affecting workers *now,* not last year or the year before last. Electronic submissions, as proposed, will also allow OSHA to search and analyze the data, which will help the agency more efficiently direct its resources to appropriate enforcement.

Second, electronic publication of case-specific information on injuries, illnesses, and even fatalities will allow firms' own employees to access timely information that they can use to improve their own workplaces. Currently, concerned employees have online access only to general summary information in Form 300A. Employers are not required to (and in our experience most employers do not) make case-specific information from Forms 300 and 301 available to their own employees unless the employee requests to see the logs. This system, combined with the power dynamic between employers and workers, prevents most workers from ever learning about specific incidents. A significant percentage of workers, especially those who are not represented by a labor union, are unlikely to make such a request for fear of retaliation. Additionally, despite a requirement to provide this information upon request, we have found that employers frequently delay or obstruct employee requests for Form 300 logs. The Proposed Rule would allow concerned workers to review the records their employer submitted to OSHA without alerting their supervisors or fear of retribution. This would arm them with important information they could use to directly address safety issues or to raise concerns within their organizations.

Third, electronic availability of information related to specific injury and illness incidents would allow individuals considering employment to better assess the types, severity, and frequency of injuries and illnesses in a particular workplace. In our experience, job seekers with access to information on the injury and fatality risk of a job often consider that information in their employment decisions. Many workers find *case-specific* information more poignant, relatable, and simple to understand than the kind of summary information that is currently available.

Fourth, unions and worker advocacy groups will be able to use case-specific information to seek safety improvements. Currently, these groups can access Form 300 logs only by requesting them from employers, and the information may be provided in an inefficient manner such as in PDF files or on paper. As detailed below, unions and worker advocacy groups have the expertise to analyze this information to identify necessary workplace fixes. Electronic publication of more granular data will make it possible for them to better identify the cause of worker injuries and illnesses, more efficiently analyze large quantities of information, and appropriately direct their efforts.

Fifth, electronic data on case-specific information related to injury and illness incidents will allow press and advocacy organizations to monitor and report on the data. For example, the local press could report on injury and illness trends among employers in their community, and the national press could assess the injury experience of firms that have contracts with government agencies.

Finally, research indicates that the publication of case-specific data will also serve as a deterrent to employers.[4] When employers know that injury or illness incidents will be published online, the risk of social stigma will encourage them to take appropriate precautions and avoid violations. Additionally, more electronic data will allow businesses to compare their safety performance to other firms and enable competition for improved safety. Suppliers, contractors, and purchasers of a firm's goods or services could also consider the information in their business decisions, such as whether to support a business with a poor safety record.

b. Case studies show that worker safety benefits from the kind of data the Proposed Rule would routinely make public.

Although case-specific data is limited under the current regime, when people have been able to collect similar data on their own, the data has proven to be extremely important to worker safety efforts. As noted above, under the current system, most workers do not realistically have access to Form 300 logs because they bear the burden of requesting the logs, and they typically do not do this because of power dynamics. Unions are sometimes situated differently and have been able to access Form 300 logs in certain circumstances. Below, we have detailed specific examples we collected from our union partners demonstrating how the more specific information from Form 300 logs was used to implement specific safety improvements. These stories show that *specific* data can make a real difference in confirming that a safety or health issue exists, identifying the actual cause of the issue, and targeting workplace improvements that will realistically protect workers.

i. UFCW and Tyson

In 2008, leaders from the UFCW Tyson meatpacking locals union accessed Form 300 logs collected from one meatpacking plant for a one-month period. They analyzed injuries that could be related to ergonomic hazards and then placed red "sticky dots" on a hand-drawn map of a human body, depicting injury areas. The resulting body map looked as though the hands were dripping blood because so many red dots were placed in that area. The leaders were able to

[4] *See* Matthew S. Johnson, *Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws*, 110 Am. Econ. Rev. 1866 (2020).

confirm that, despite known under-reporting, a lot of hand-specific injuries occurred amongst their members.

The leaders later presented the body map in a meeting with Tyson management, where it became a powerful tool. This meeting included an individual who had been in charge of the company's ergonomics program some years earlier and who had recently returned as a top-level manager. Seeing the map, he agreed with the union to start a series of efforts to revitalize the ergonomics program.

ii. SFO Teamsters

Teamsters SFO Local 856/986 regularly integrates Form 300 logs into their health and safety monitoring.[5] The union compares the employer's internal injury and illness reporting database to the Form 300 logs. The union's Safety Committee is then able to identify any discrepancies between the internal reporting database and the Form 300 logs. This helps the union determine if there is any under-reporting or misreporting of injury and illness in the workplace.

Importantly, access to the logs also gives the union the opportunity to reach out to a worker who reported a workplace injury or illness. They can then discuss any safety concerns and hazards the worker encountered and what preventative fixes could be taken. That information is shared with management to address the concerns of the worker and get the hazards fixed.

Access to this information also helps the union identify emerging trends or serious incidents across different workplace departments and gives the union an opportunity to respond and investigate incidents before they continue. Without access to the logs, the union and workers have more difficulty advocating for the employer to address hazards that can lead to workplace injuries and illnesses.

iii. UAW and Auto Parts Plant

UAW members in an auto parts plant were part of a University of Michigan participatory action research project in the late 1990s. While metalworking fluids presented a concerning safety hazard at the time, the plant's joint health and safety committee was not convinced that the hazard affected more than one or two "complainers" in the workplace.

Project staff used data from three years of Form 300 logs to make layered body and workplace maps with color-coded dots for six types of health effects, including skin rashes (a common symptom of metalworking fluid use). Each year's information went on a plastic layer over the front and back of a body outline and a drawing of the workplace. UAW health and safety committee members were then presented with the maps. The union co-chair had a literal "aha" moment. He saw, and then talked about, how this format made visible the data showing that people doing specific jobs were getting rashes. It was not just someone complaining without cause. This helped the committee determine what actions should be taken to address the hazard.

[5] This practice was detailed in a 2019 letter to California's Department of Industrial Relations (Cal/OSHA). Ralph Ortiz, Safety Chairman, Teamsters SFO 856/986, Comment Letter on Electronic Reporting of Workplace Injury and Illness Data (May 30, 2019) (Attachment A).

iv. OCAW and Oil Refinery

Under a health and safety grant, the Oil, Chemical, and Atomic Workers International Union (OCAW) surveyed workers to identify possible causes of musculoskeletal injuries. Several workers mentioned that they had to use excessive force and long bars with claws at one end, called "cheater bars" or "SAPs," to open many valves. Originally, valve-related worker injuries were most frequently attributed to incorrect posture or body mechanics, but this was ultimately proven incorrect.

To document the extent of the problem, the union worked with the company's health and safety staff to review the Form 300 logs and incident descriptions with the plant nurse. Through detailed analysis of these records, the union was able to document the hazard (excessive force) and demonstrate that it was not only causing chronic musculoskeletal strains and sprains, but also numerous acute injuries. The acute injuries occurred when a cheater bar slipped off the valve, causing contact injuries including cuts, burns from touching hot pipes, falls, and other injuries. This information was then used to show plant management how a number of seemingly unrelated injuries shared a common underlying factor. They were able to document the full extent of the problem and convince plant management to address the issue.

After the analysis, a valve survey was conducted. Trained union leaders used a strain gauge device to measure the force required to operate valves. Most notably, the force required to open a fire hose valve exceeded the weight of the operator, requiring her to literally hold the cheater bar and jump up and down to provide enough force to open the valve. Once given this information, the company began to replace many of the most egregious valves and worked with the union to prioritize other valves for maintenance or replacement. Access to the Form 300 logs played a crucial role in identifying problem valves that needed to be fixed.

III. OSHA Should Consult with Technical Experts to Determine How to Accomplish its Privacy Goals.

The Proposed Rule seeks input on whether any specified fields should be excluded from publication to protect employee privacy, whether the company name should be published, and any technical suggestions for omitting personally identifiable information from narrative fields. 87 Fed. Reg. at 18,545-46.

Worksafe appreciates OSHA's focus on protecting worker privacy to the extent appropriate. Worksafe agrees with and supports OSHA's proposal to omit employee names and addresses, physician names, and treatment facilities from publication to protect their privacy.

Worksafe also supports OSHA's proposal to require employers to submit both establishment name and company name. Additionally, OSHA should require identified employers with multiple establishments (especially those identified by the OSHA Severe Violator Enforcement Program) to collect and submit Part 1904 occupational injury and illness data for those work locations and establishments. This requirement should apply to employers with five or more establishments that are required to collect OSHA Form 300A data from each and are required to maintain injury and illness records under Part 1904. This information is extremely useful for ensuring that advocates, employers, employees, unions, and representatives can identify and resolve workplace health and safety hazards.

With respect to the technical concerns raised in the proposal, Worksafe encourages OSHA to consult with technical experts. The federal government has two groups of experts that may be able to help: the U.S. Digital Service, a group of technology experts that assist agencies with pressing technology modernization,[6] and 18F, a "technology and design consultancy" housed within the General Services Administration.[7] Technical experts should be able to advise on both the capabilities and limits of software to accomplish the sort of filtering that OSHA has proposed.

IV. OSHA Should Ensure that Employers Do Not Discourage Workers from Reporting Injury or Illness Incidents.

While Worksafe strongly supports the Proposed Rule, it is crucial that OSHA ensure that case-specific publication of injury and illness incidents is not used to discourage employees from reporting their injuries and illnesses in the first place.

Injuries and illnesses that workers experience often go unreported or misreported. Many industries have policies, commonly referred to as "behavioral safety" policies, that provide incentives to withhold injury reports. In addition, many workers are poorly trained on the importance of reporting their injuries and illnesses and do not know about federally mandated recordkeeping. Most workers believe that reporting is primarily for Workers' Compensation or medical treatment. More troubling, many low-wage workers that we work with are employed by temporary agencies where the rules for reporting injuries and illnesses are even more complicated and reporting is disincentivized.

Ongoing surveys conducted by Worksafe have shown that many employers go to great lengths to discourage workers from reporting injuries and illnesses. One survey conducted at a legal aid clinic that serves low-income immigrant workers revealed that all team members at an establishment with more than 300 workers were provided with a monthly "reward" of $50 if their team (of about 10 or so workers) did not report any injuries or illnesses. The team leader received $75 if their team did not report any injuries and illnesses. On a monthly basis, this company is willing to pay at least $15,000 to maintain clean records. The worker reported that if any member of the team reported an injury or illness, none of the team members would receive their monthly "reward," including their team leader. This system did not prevent actual injuries or illnesses, it merely discouraged the reporting of incidents.

Another survey found that a worker in an auto mechanic shop was threatened so that he would not report an injury to his foot. His foot injury went unreported in the employer's Form 300 logs (and unreported to Workers' Compensation). Unfortunately, the worker developed an infection in the injured foot that spread to his other foot, resulting in the amputation of both.

Publication of incidents could provide yet another basis for employers acting in bad faith to intimidate workers into not reporting an injury or illness. We encourage OSHA to address these concerns proactively by adding a provision prohibiting programs, practices, and policies that

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[6] *See Using Design and Technology to Deliver Better Services to the American People*, U.S. Digit. Serv., https://www.usds.gov/ (last visited June 3, 2022).
[7] *18F is a Technology and Design Consultancy for the U.S. Government, Inside the Government*,18F, https://18f.gsa.gov/ (last visited June 3, 2022).

effectively discourage workers from reporting injuries and illnesses.[8] Any such provision should be enforceable through penalties and citations in the same manner as violations of other provisions of the recordkeeping rule.

Suggested language could read as follows:

> *(a) An employer shall not institute any program, policy, or practice that has the effect of discouraging the reporting of work-related injuries or illnesses.*
>
> *(b) An employer shall not discriminate or retaliate against any employee who reports a work-related injury or illness to the employee's employer, representative of the employer, or health care provider.*

Enforcement provisions could also be added and clarified as follows:

> *(c) Violation of Section [(a) above], which prohibits policies, practices, or programs that discourage the reporting of work-related injuries or illnesses, and of Section [(b) above] which prohibits retaliation against an employee who reports a work-related injury or illness may result in the issuance of citations and assessment of penalties as provided for in Sections 9, 10, and 17 of the Act.*

V. The Proposed Rule is consistent with the First Amendment.

Lastly, Worksafe responds briefly to arguments raised by some critics that the Proposed Rule would violate the First Amendment. It would not.

The Proposed Rule would merely compel employers to submit to OSHA information that they are already required to maintain about workplace incidents. This is a form of commercial speech. "The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."[9] Under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*,[10] the government may compel a disclosure that is "factual and uncontroversial" so "long as disclosure requirements are reasonably related to the [government] interest" at issue and is not unduly burdensome.[11] The speaker's constitutional interest in non-disclosure as "minimal."[12]

To address these concerns, OSHA could succinctly identify in the final rule (1) OSHA's interest in the case-specific reports and publication, (2) how the rule advances that interest, and (3) why the rule is not unduly burdensome.

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[8] A 2018 Memorandum expressly encourages such programs. Memorandum from OSHA to Regional Administrators and State Designees (Oct. 11, 2018), *available at* https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11.

[9] *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562–63 (1980).

[10] *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985).

[11] *Zauderer*, 471 U.S. at 651.

[12] *Id*. (reviewing requirement that attorneys advertising for contingency cases state that the client may have to bear certain expenses).

* * *

Worksafe appreciates the opportunity to comment and provide recommendations in this matter and would be happy to provide further information, if requested. If you have any questions or would like to discuss the information in this comment, please contact me and/or our counsel, Samara Spence, Senior Counsel at Democracy Forward, at 202-701-1785 or sspence@democracyforward.org.

Respectfully submitted,

Stephen Knight
Executive Director

Attachment A

May 30th, 2019

Attention: Glenn Shor
Cal/OSHA Advisory Committee on Electronic Reporting
Elihu Harris State Building
1515 Clay Street, Suite 1901
Oakland, CA 94612

[Comments filed electronically via ElectronicReporting@dir.ca.gov]
Comments from Ralph Ortiz; Teamsters SFO 856/986 Safety Chairman

Re: Electronic Reporting of Workplace Injury and Illness Data

Dear Cal/OSHA Advisory Committee,

How does the Union use the logs?

We compare the employer's internal occupational injury & illness reporting database to the OSHA 300 log which the employer submits to OSHA. The Union Safety Committee reviews these to determine if there are any discrepancies between the internal reporting database and the OSHA logs and to check if there were any injuries and illness that were not recorded. By having access to the OSHA logs, it helps the Union to determine if there is any under or misreporting of injury and illness in the workplace.

Having access to the logs provides the Union with the opportunity to speak with a worker (our member) who reported an injury or illness in the workplace and to find out what safety concerns and hazards the worker encountered and what fixes could be taken to prevent the injury or illness. Once we have that information, it is shared with the Management team to address the concerns of the worker and get the hazards fixed.

It also helps the Union to identify emerging trends or serious incidents across multiple departments in the workplace and gives the Union the opportunity to respond and investigate incidents before they continue. Without access to the logs, the Union and workers would have a difficult time in getting the employer to address hazards which lead to workplace injuries and illnesses.

Employee apprehension on reporting injury and illness, specifically new hires

The Union meets with new hires and has an orientation with them. As part of the orientation, the Union briefs the new hires on the importance of reporting any workplace injury and illness to Management. Even though these new hire employees are on probation and not covered by Union protection until the end of their probation period, we inform the employer that retaliation against a worker who reports an injury or illness is a potential violation of the Fairfax letter.

We also brief the new hires that if they are concerned about reporting a workplace hazard or unsafe condition due to fear of retaliation, they can call the Union and we will not reveal their name to Management.

There have been instances in which probationary employees expressed concerns about reporting an injury or illness to the employer and worried that if they did report it, they may not pass probation. Often this was due to the worker not being informed of the protections afforded to them.

If a new hire (probationary employee) wanted to review the employer injury and illness data/report but were afraid to request it from Management due to concerns of retaliation or harassment, the Union would make a request on behalf of the worker and privately share the information with the worker.

In the past, some employees (non-probationary) who reported an injury or illness were given a written notice of concern. When the Union was made aware of this practice from the employee, we immediately notified the employer that this action was potential violation of the Fairfax letter. The Employer has stopped the practice of issuing the notice of concern.

Access to the OSHA 300 logs.

Per our Collective Bargaining Agreement (CBA), the employer shall provide the Union with a copy of the OSHA 300 logs for review. Some Union Safety Representatives also have access to the employers online electronic internal injury and illness reporting database. Workers are not given access to that system.

Workers are also not given access the to employers OSHA 300 log electronic database.

Another case on the importance/value of access to an employer's OSHA logs is when an entity such as an Airport who is in the process of selecting a service provider/company to be a tenant at that Airport, having access to that potential tenant/service providers OSHA 300 logs would allow the Airport to see the health and safety record.

Employer sharing of data and privacy concern

At the Joint Union/Management Safety Committee meeting, injury and illness data from the employer's internal database is shared and reviewed. Serious injuries and illness and trends of similar type or multiple occurrences are discussed and recommendations are made to prevent them from reoccurring.

The employer's practice is to provide injury and illness information and distribute it monthly throughout the organization to be shared with employees at the various department monthly safety meetings. Names or identifiers of injured or ill workers are not listed or shown on these injury &illness reports, nor is the gender of the worker listed.

Information on the reports include; Injury date, summary of the incident/injury, type of injury/incident, root cause and corrective action taken. The employer has this information online via electronic format. Not all employees have access to the electronic database.

To my knowledge, our Union members have never raised or expressed concerns regarding privacy worries due to the company sharing and distribution of de-identified injury and illness data to other workers.

Sincerely,

Ralph Ortiz
Safety Committee Chairman
TeamstersSFO Local 856/986