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PROMOTING SAFE WORKPLACES THROUGH EFFECTIVE AND RESPONSIBLE RECORDKEEPING STANDARDS

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

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PROMOTING SAFE WORKPLACES THROUGH EFFECTIVE AND RESPONSIBLE RECORDKEEPING STANDARDS

Wednesday, May 25, 2016
U.S. House of Representatives
Committee on Education and the Workforce
Subcommittee on Workforce Protections
Washington, D.C.

The subcommittee met, pursuant to call, at 10:07 a.m., in Room 2175, Rayburn House Office Building. Hon. Tim Walberg [Chairman of the subcommittee] presiding.

Present: Representatives Walberg, Bishop, Stefanik, Wilson, Pocan, and DeSaulnier.

Also Present: Representatives Kline and Scott.

Staff Present: Bethany Aronhalt, Press Secretary; Janelle Belland, Coalitions and Members Services Coordinator; Ed Gilroy, Director of Workforce Policy; Jessica Goodman, Legislative Assistant; Callie Harman, Legislative Assistant; Nancy Locke, Chief Clerk; John Martin, Professional Staff Member; Dominique McKay, Deputy Press Secretary; Krisann Pearce, General Counsel; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Alissa Strawcutter, Deputy Clerk; Loren Sweatt, Senior Policy Advisor; Olivia Voslow, Staff Assistant; Joseph Wheeler, Professional Staff Member; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Christine Godinez, Minority Staff Assistant; Brian Kennedy, Minority General Counsel; Richard Miller, Minority Senior Labor Policy Advisor; Veronique Pluviose, Minority Civil Rights Counsel; and Marni von Wilpert, Minority Labor Detailee.

Chairman WALBERG. A quorum being present, the subcommittee will come to order. Good morning. I want to start by thanking our witnesses for being here today.

As members of the Subcommittee on Workforce Protections, we greatly benefit from your expertise, and we appreciate that you took time out of your busy schedules to testify here today, and walked in from beautiful weather outside as well. Representative Pocan and I were trying to figure out how we could do this outdoors instead of indoors, but protocol continues.

There are many issues under our jurisdiction that touch workplaces across the country. One of the more important issues is employee health and safety. This is a challenging issue that directly

impacts the lives of America's workers and their families, and one that demands thoughtful and meaningful solutions.

As I said at a hearing last month, we all agree that hardworking men and women should be able to earn a paycheck without risking a serious injury or being exposed to a deadly disease, and every family deserves the peace of mind that their loved ones are safe on the job and will come home to them.

There is no one in this room who doubts the need for strong health and safety protections or that OSHA has a role to play in promoting safe workplaces. Reducing occupational injuries, illnesses, and fatalities is a priority that crosses party lines and stretches from the White House to the halls of Congress.

However, there are times when we share a difference of opinion in how to reach that goal. One illness, one injury, or one fatality in the workplace is one too many. That is why as a Committee we believe bad actors who cut corners and put workers in harm's way must be held accountable. At the same time, the administration should work with employers to address gaps in safety in order to prevent injuries and illnesses before they occur.

We also believe health and safety policies should be created with input from the public. Employers and their employees know better than most the unique safety challenges facing their workplaces. They are there.

If rules coming out of Washington fail to account for those unique challenges, or if they are too complex and confusing to understand, they will not deliver the protections workers need. That is why the rulemaking process should be transparent and allow for public feedback.

Unfortunately, time and time again, the Obama administration has pursued a different, more punitive approach. The majority of employers want to do the right thing, and I truly believe that, but instead of working with those employers to develop proactive safety measures, the agency is focused more on punishing everyone for actions of a few. Regulation by shaming.

As I said, employers who jeopardize the safety of workers must be held accountable, but the agency's reactive approach does nothing to help employers understand complicated regulations, and it does nothing to achieve our common goal of preventing tragedies from occurring in the first place.

Several recent changes to OSHA's injury and illness reporting standards are the latest example of this flawed approach and the focus of our hearing today. These new requirements significantly change who the standards apply to, what needs to be reported, and how and when OSHA must be notified.

As is often the case, these changes will create additional layers of red tape, especially for small businesses with limited resources to fully understand complex safety standards. To make matters worse, the administration has advanced these expensive changes despite broad public concerns.

One of the most concerning requirements calls for public posting of injury and illness records online without corresponding context. This regulatory scheme designed to shame employers will do little, if anything, to advance the cause of worker safety.

What it will do is make it easier for big labor to organize and for trial lawyers to bring frivolous lawsuits. The agency will need to spend millions of dollars on this special interest tool which will shift scarce resources away from proactive policies to improve safety, such as inspections and compliance assistance programs, VPP and the like, and in the process, the agency is jeopardizing the privacy of workers' personal information.

This rule is not about serving the best interests of workers, it is about serving powerful special interests at the expense of workers. We owe it to working families to hold the administration accountable for its misguided policies and to call on OSHA to take a more responsible, effective, and collaborative approach.

This oversight hearing is an important part of that effort and our commitment to protecting the health and safety of American workers.

I look forward to today's important discussion, and will recognize the Ranking Member, Ms. Wilson, for her opening remarks.

[The statement of Chairman Walberg follows:]

Prepared Statement of Hon. Tim Walberg, Chairman, Subcommittee on Workforce Protections

There are many issues under our jurisdiction that touch workplaces across the country. One of the more important issues is employee health and safety. This is a challenging issue that directly impacts the lives of America's workers and their families, and one that demands thoughtful and meaningful solutions.

As I said at a hearing last month, we all agree that hardworking men and women should be able to earn a paycheck without risking a serious injury or being exposed to a deadly disease, and every family deserves the peace of mind that their loved ones are safe on the job. There is no one in this room who doubts the need for strong health and safety protections, or that OSHA has a role to play in promoting safe workplaces. Reducing occupational injuries, illnesses, and fatalities is a priority that crosses party lines, and stretches from the White House to the halls of Congress.

However, there are times when we share a difference of opinion in how to reach that goal. One illness, one injury, or one fatality in the workplace is one too many. That's why, as a committee, we believe bad actors who cut corners and put workers in harm's way must be held accountable. At the same time, the administration should work with employers to address gaps in safety in order to prevent injuries and illnesses before they occur.

We also believe health and safety policies should be created with input from the public. Employers and their employees know better than most the unique safety challenges facing their workplaces. If rules coming out of Washington fail to account for those unique challenges, or if they're too complex and confusing to understand, they won't deliver the protections workers need. That's why the rulemaking process should be transparent and allow for public feedback.

Unfortunately, time and again, the Obama administration has pursued a different, more punitive approach. The majority of employers want to do the right thing. But instead of working with those employers to develop proactive safety measures, the agency is focused more on punishing everyone for the actions of a few.

As I said, employers who jeopardize the safety of workers must be held accountable. But the agency's reactive approach does nothing to help employers understand complicated regulations, and it does nothing to achieve our common goal of preventing tragedies from occurring in the first place.

Several recent changes to OSHA's injury and illness reporting standards are the latest example of this flawed approach, and the focus of our hearing. These new requirements significantly change who the standards apply to, what needs to be reported, and how and when OSHA must be notified. As is often the case, these changes will create additional layers of red tape—especially for small businesses with limited resources to fully understand complex safety standards. And to make matters worse, the administration has advanced these expansive changes despite broad, public concerns.

One of the most concerning requirements calls for public posting of injury and illness records online without corresponding context. This regulatory scheme designed

to shame employers will do little—if anything—to advance the cause of worker safety. What it will do is make it easier for Big Labor to organize, and for trial lawyers to bring frivolous lawsuits. The agency will need to spend millions of dollars on this special interest tool, which will shift scarce resources away from proactive policies to improve safety, such as inspections and compliance assistance programs. And in the process, the agency is jeopardizing the privacy of workers' personal information. This rule isn't about serving the best interests of workers—it's about serving powerful special interests at the expense of workers.

We owe it to working families to hold the administration accountable for its misguided policies and to call on OSHA to take a more responsible, effective, and collaborative approach. This oversight hearing is an important part of that effort and our commitment to protecting the health and safety of America's workers.

Ms. WILSON. Thank you, Chair Walberg, and many thanks to the witnesses who are with us here today. Thank you.

Mr. Chairman, the Occupational Safety and Health Administration was established to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.

Sadly, every year, tens of thousands of Americans are severely injured on the job, with significant, sometimes permanent impact to self and family. Until last year, OSHA lacked information vital for effectively responding to these workplace injuries.

In its ongoing efforts to improve workplace safety, OSHA has issued two rules to provide transparency about injury and illness rates and to ensure disclosed information is accurate.

First, as of January 2015, OSHA requires employers to report work-related amputations, inpatient hospitalizations, or loss of eye within 24 hours. This severe injury reporting requirement is in addition to OSHA's preexisting requirement to report all fatalities within eight hours.

In the year since this requirement took effect, over 10,000 incidents were reported to Federal OSHA alone, including 2,644 amputations and 7,636 inpatient hospitalizations.

Ideally, OSHA would inspect each workplace where a severe injury occurs, but because Congress has literally starved OSHA of much-needed resources, the Federal agency lacks a sufficient number of facility inspectors. For example, with only 63 inspectors in my home state of Florida, it would take 266 years for OSHA to inspect each workplace in Florida.

Despite its limited resources with 24-hour reporting of severe injuries, OSHA was able to work with employers, asking them to conduct their own incident investigations, report their findings to OSHA, and implement remedies to eliminate hazards and prevent recurrence.

For example, while a worker at a Missouri meat processing plant was cleaning a blender, it started up suddenly, amputating both of the worker's lower arms. The employer immediately reengineered the blender's computer control system, changed safety interlocks, and enhanced worker training and supervision, significantly reducing the risk of amputation. According to OSHA, the worker's arms were surgically reattached and he is undergoing rehabilitation.

Under its more recent efforts to protect worker safety, OSHA issued a final rule on May 12, 2016, requiring large employers and those in high hazard industries to electronically transmit to OSHA injury logs and annual summaries employers are already required to maintain and make available to their employees. OSHA will

make this information publically available on its Web site. OSHA will not collect personal identifiers.

Prior to this rule, most workplace injury and illness logs were only available at the workplace, making it impossible for OSHA, other employers, prospective employees, investors, and public health researchers to know which employers have bad or good injury records.

Some object to posting this data to OSHA's Web site, claiming it could harm reputations and damage businesses. However, under OSHA's 1995 data initiative, 80,000 establishments in high-risk industries were required to provide OSHA with annual summaries. Since 2004, OSHA posted this data to its Web site and used it to target its inspections to the most hazardous worksites. Under this new rule, however, the universe is expanded to approximately 460,000 establishments.

Furthermore, for the past 15 years, the Mine Safety and Health Administration has posted injury and illness rates allowing mine operators, prospective employees, and current workers to access the information. Indeed, MSHA posts even more information to its Web site than required under OSHA's new rule.

I would again argue that responsible employers want to demonstrate to their employees, investors, and the public eye that they are committed to workplace safety. Public disclosure can help nudge employers towards improved safety outcomes.

DOL's reporting rules also seek to ensure injury and illness reports and records are accurate. This means addressing the major problem of underreporting of injuries, as recommended by two GAO reports for this Committee. These GAO reports document how employer policies, such as rate-based safety incentive programs, discourage workers from reporting injuries.

One can easily imagine how programs that cut potential employee bonuses when the worksite injury rate goes up can have a chilling effect on reporting. In addition, the Committee will be releasing a new GAO report examining underreporting of injuries in the poultry and meat process industries.

To further ensure accuracy of data, OSHA's rule also makes it clear employers may not discriminate against workers for reporting injuries or establish policies discouraging them from doing so. We know that the accuracy of reporting rests on employees' confidence that reporting injuries will not lead to job loss.

Mr. Chairman, I ask unanimous consent to enter these three GAO reports into the record.

Chairman WALBERG. Without objection, and hearing none, they will be entered.

[The information follows:]

October 2009

GAO
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Highlights

Highlights of GAO-10-10, a report to congressional requesters

WORKPLACE SAFETY AND HEALTH

Enhancing OSHA's Records Audit Process Could Improve the Accuracy of Worker Injury and Illness Data

Why GAO Did This Study

Under the Occupational Safety and Health Act of 1970, the Department of Labor's (DOL) Occupational Safety and Health Administration (OSHA) is responsible for protecting the safety and health of the nation's workers. The act requires DOL to collect and compile work-related injury and illness data. GAO was asked to determine (1) whether DOL verifies that employers are accurately recording workers' injuries and illnesses and, if so, the adequacy of these efforts, and (2) what factors may affect the accuracy of employers' injury and illness records. GAO analyzed OSHA's audits of employers' injury and illness records, interviewed inspectors who conducted the audits, surveyed occupational safety and health practitioners, and obtained the views of various stakeholders regarding factors that may affect the accuracy of the data.

What GAO Recommends

GAO is recommending that the Secretary of Labor direct OSHA to (1) require inspectors to interview workers during records audits, and substitute other workers when those initially selected are unavailable; (2) minimize the time between the date injuries and illnesses are recorded by employers and the date they are audited; (3) update the list of high hazard industries used to select worksites for records audits; and (4) increase education and training to help employers better understand the recordkeeping requirements. OSHA agreed with these recommendations.

View GAO-10-10 or key components.
For more information, contact Revae Moran (202) 512-7215 or moranr@gao.gov.

What GAO Found

DOL verifies some of the workplace injury and illness data it collects from employers through OSHA's audits of employers' records, but these efforts may not be adequate. OSHA overlooks information from workers about injuries and illnesses because it does not routinely interview them as part of its records audits. OSHA annually audits the records of a representative sample of about 250 of the approximately 130,000 worksites in the high hazard industries it surveys to verify the accuracy of the data on injuries and illnesses recorded by employers. However, OSHA does not always require inspectors to interview workers about injuries and illnesses—the only source of data not provided by employers—which could assist them in evaluating the accuracy of the records. In addition, some OSHA inspectors reported they rarely learn about injuries and illnesses from workers since the records audits are conducted about 2 years after incidents are recorded. Moreover, many workers are no longer employed at the worksite and therefore cannot be interviewed. OSHA also does not review the accuracy of injury and illness records for worksites in eight high hazard industries because it has not updated the industry codes used to identify these industries since 2002. OSHA officials told GAO they have not updated the industry codes because it would require a regulatory change that is not currently an agency priority. The Bureau of Labor Statistics (BLS) also collects data on work-related injuries and illnesses recorded by employers through its annual Survey of Occupational Injuries and Illnesses (SOII), but it does not verify the accuracy of the data. Although BLS is not required to verify the accuracy of the SOII data, it has recognized several limitations in the data, such as its limited scope, and has taken or is planning several actions to improve the quality and completeness of the SOII.

According to stakeholders interviewed and the occupational health practitioners GAO surveyed, many factors affect the accuracy of employers' injury and illness data, including disincentives that may discourage workers from reporting work-related injuries and illnesses to their employers and disincentives that may discourage employers from recording them. For example, workers may not report a work-related injury or illness because they fear job loss or other disciplinary action, or fear jeopardizing rewards based on having low injury and illness rates. In addition, employers may not record injuries or illnesses because they are afraid of increasing their workers' compensation costs or jeopardizing their chances of winning contract bids for new work. Disincentives for reporting and recording injuries and illnesses can result in pressure on occupational health practitioners from employers or workers to provide insufficient medical treatment that avoids the need to record the injury or illness. From its survey of U.S. health practitioners, GAO found that over a third of them had been subjected to such pressure. In addition, stakeholders and the survey results indicated that other factors may affect the accuracy of employers' injury and illness data, including a lack of understanding of OSHA's recordkeeping requirements by individuals responsible for recording injuries and illnesses.

GAO
Accountability * Integrity * Reliability
Highlights

Highlights of GAO-12-329, a report to congressional requesters

April 2012

WORKPLACE SAFETY AND HEALTH

Better OSHA Guidance Needed on Safety Incentive Programs

Why GAO Did This Study

OSHA relies on employer injury and illness records to target its enforcement efforts. Questions have been raised as to whether some safety incentive programs and other workplace safety policies may discourage workers' reporting of injuries and illnesses. GAO examined (1) what is known about the effect of workplace safety incentive programs and other workplace safety policies on injury and illness reporting, (2) the prevalence of safety incentive programs as well as other policies that may affect reporting, and (3) actions OSHA has taken to address how safety incentive programs and other policies may affect injury and illness reporting. GAO reviewed academic literature, federal laws, regulations, and OSHA guidance; surveyed a nationally representative sample of manufacturing worksites; and interviewed federal and state occupational safety and health officials, union and employer representatives, and researchers.

What GAO Recommends

GAO recommends that OSHA provide guidance about safety incentive programs and other workplace safety policies consistently across the agency's cooperative programs, and add language about safety incentive programs and other workplace safety policies to the guidance provided to inspectors in its field operations manual. OSHA agreed with the recommendations, and noted its plans to address them.

View GAO-12-329. For more information, contact Revae Moran at (202) 512-7215 or moranr@gao.gov.

What GAO Found

Little research exists on the effect of workplace safety incentive programs and other workplace safety policies on workers' reporting of injuries and illnesses, but several experts identified a link between certain types of programs and policies and reporting. Researchers distinguish between rate-based safety incentive programs, which reward workers for achieving low rates of reported injuries or illnesses, and behavior-based programs, which reward workers for certain behaviors, such as recommending safety improvements. Of the six studies GAO identified that assessed the effect of safety incentive programs, two analyzed the potential effect on workers' reporting of injuries or illnesses, but they concluded that there was no relationship between the programs and injury and illness reporting. Experts and industry officials, however, suggest that rate-based programs may discourage reporting of injuries and illnesses. Experts and industry officials also reported that certain workplace polices, such as post-incident drug and alcohol testing, may discourage workers from reporting injuries and illnesses. Researchers and workplace safety experts also noted that how safety is managed in the workplace, including employer practices such as fostering open communication about safety issues, may encourage reporting of injuries and illnesses.

The Two Types of Safety Incentive Programs

Rate-based programs	Behavior-based programs
Reward workers who had few or no reported injuries or illnesses during a set time period	Reward workers for behaviors such as reporting near-miss incidents or recommending safety improvements

Source: GAO analysis of workplace safety literature

In 2010, from its survey, GAO estimated that 25 percent of U.S. manufacturers had safety incentive programs, and most had other workplace safety policies that, according to experts and industry officials, may affect injury and illness reporting. GAO estimated that 22 percent of manufacturers had rate-based safety incentive programs, and 14 percent had behavior-based programs. Almost 70 percent of manufacturers also had demerit systems, which discipline workers for unsafe behaviors, and 56 percent had post-incident drug and alcohol testing policies according to GAO's estimates. Most manufacturers had more than one safety incentive program or other workplace safety policy and more than 20 percent had several. Such programs and policies were more common among larger manufacturers.

Although the Occupational Safety and Health Administration (OSHA) is not required to regulate safety incentive programs, it has taken limited action to address the potential effect of such programs and other workplace safety policies on injury and illness reporting. These programs and policies, however, are not addressed in key guidance such as OSHA's field operations manual for inspectors. OSHA has cooperative programs that exempt employers with exemplary safety and health management systems from routine inspections. One such program prohibits participants from having rate-based safety incentive programs, but guidance on OSHA's other cooperative programs does not address safety incentive programs. Similarly, OSHA inspectors and outreach specialists provide information to employers about the potential benefits and risks of safety incentive programs, but the guidance provided to inspectors in its field operations manual does not address these programs.

GAO Highlights

Highlights of GAO-16-337, a report to congressional requesters

Why GAO Did This Study

DOL is responsible for gathering data on workplace injuries and illnesses, including those in the meat and poultry industry, where workers may experience injuries and illnesses such as sprains, cuts, burns, amputations, repetitive motion injuries, and skin disorders. GAO was asked to examine developments since its 2005 report, which found this industry was one of the most hazardous in the United States and that DOL data on worker injuries and illnesses may not be accurate, and recommended that DOL improve its data collection.

This report (1) describes what is known about injuries, illnesses, and hazards in the meat and poultry industry since GAO last reported, and (2) examines DOL's challenges gathering injury and illness data in this industry. GAO analyzed DOL data from 2004 through 2015, including injury and illness data through 2013, the most recent data available, and examined academic and government studies and evaluations on injuries and illnesses. GAO interviewed DOL and other federal officials, worker advocates, industry officials, and workers, and visited six meat and poultry plants selected for a mix of species and states. The information gathered in these visits is not generalizable to all plants or workers.

What GAO Recommends

GAO is making three recommendations, including that DOL improve its data on musculoskeletal disorders and sanitation workers in the meat and poultry industry. DOL, USDA, and CDC concurred with GAO's recommendations.

View GAO-16-337. For more information, contact Cindy Brown Barnes at (202) 512-7215 or brownbarnesc@gao.gov, or Steve Morris at (202) 512-3841 or morriss@gao.gov.

April 2016

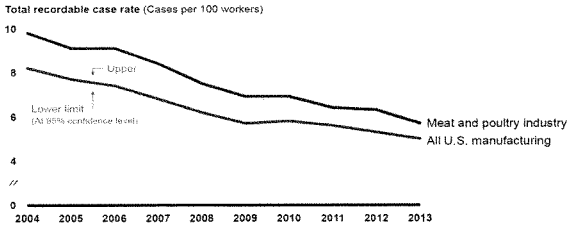
WORKPLACE SAFETY AND HEALTH

Additional Data Needed to Address Continued Hazards in the Meat and Poultry Industry

What GAO Found

Injury and illness rates in the meat and poultry slaughtering and processing industry declined from 2004 through 2013, similar to rates in all U.S. manufacturing, according to Department of Labor (DOL) data (see figure), yet hazardous conditions remain. The rates declined from an estimated 9.8 cases per 100 full-time workers in 2004 to 5.7 in 2013. However, these rates continued to be higher than rates for manufacturing overall. Meat workers sustained a higher estimated rate of injuries and illnesses than poultry workers, according to DOL data. Centers for Disease Control and Prevention (CDC) evaluations and academic studies have found that workers continue to face the hazardous conditions GAO cited in 2005, including tasks associated with musculoskeletal disorders, exposure to chemicals and pathogens, and traumatic injuries from machines and tools.

Injury and Illness Rates among Workers in the Meat and Poultry Industry, Compared with Rates in All U.S. Manufacturing, Calendar Years 2004 through 2013



Source: GAO analysis of Bureau of Labor Statistics injury and illness data. | GAO-16-337

Note: The meat and poultry industry refers to the animal slaughtering and processing industry, North American Industry Classification System code 31161, which includes animal (except poultry) slaughtering, meat processed from carcasses, rendering and meat byproduct processing, and poultry processing including slaughter.

DOL faces challenges gathering data on injury and illness rates for meat and poultry workers because of underreporting and inadequate data collection. For example, workers may underreport injuries and illnesses because they fear losing their jobs, and employers may underreport because of concerns about potential costs. Another data gathering challenge is that DOL only collects detailed data for those injuries and illnesses that result in a worker having to take days away from work. These detailed data do not include injuries and illnesses such as musculoskeletal disorders that result in a worker being placed on work restriction or transferred to another job. Further, DOL does not have complete injury and illness data on meat and poultry sanitation workers because they may not be classified in the meat and poultry industry if they work for contractors. Federal internal control standards require agencies to track data to help them make decisions and meet their goals. These limitations in DOL's data collection raise questions about whether the federal government is doing all it can to collect the data it needs to support worker protection and workplace safety.

GAO Report Links:

Here's 2009: http://www.gao.gov/products/GAO-10-10

And 2012: http://www.gao.gov/products/GAO-12-329

And 2016: http://www.gao.gov/assets/680/676796.pdf

Most recent one will be released tomorrow so there's no link yet

Ms. WILSON. Mr. Chairman, as we begin this hearing, I want to remind all in attendance that we should focus on ensuring safe workplaces for those we represent. Our constituents have families. They have loved ones. They deserve our efforts to come together as the Subcommittee on Workforce Protections to promote and protect safe and healthy workplaces for all Americans.

I also want to welcome visiting with me today, Paridas Gouba, from Burkina Faso, West Africa. Paridas, raise your hand so they can see you. She is shadowing me today from West Africa.

I want to thank the witnesses for their testimony today, and I yield back the balance of my time.

[The statement of Ranking Member Wilson follows:]

Prepared Statement of Hon. Frederica S. Wilson, Ranking Member, Subcommittee on Workforce Protections

Mr. Chairman, the Occupational Safety and Health Administration was established "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions."

Sadly, every year, tens of thousands of Americans are severely injured on the job, with significant, sometimes permanent, impact to self and family. Until last year, OSHA lacked information vital for effectively responding to these workplace injuries.

In its ongoing efforts to improve workplace safety, OSHA has issued two rules to provide greater transparency about injury and illness rates and to ensure disclosed information is accurate.

First, as of January 2015, OSHA requires employers to report work-related amputations, inpatient hospitalizations or loss of eye within 24 hours. This severe injury reporting requirement is in addition to OSHA's pre-existing requirement to report fatalities within 8 hours.

In the year since this requirement took effect, over 10,000 incidents were reported to federal OSHA alone—including 2,644 amputations and 7,636 in-patient hospitalizations.

Ideally, OSHA would inspect each workplace where a severe injury occurs, but because Congress has starved OSHA of much-needed resources, the federal agency lacks a sufficient number of facility inspectors. For example, with only 63 inspectors in my home state of Florida, it would take 266 years for OSHA to inspect each workplace.

Despite its limited resources, with 24 hour reporting of severe injuries, OSHA was able to work with employers, asking them to conduct their own incident investigations, report their findings to OSHA, and implement remedies to eliminate hazards and prevent recurrence.

For example, while a worker at a Missouri meat processing plant was cleaning a blender, it started up suddenly, amputating both of the worker's lower arms. The employer immediately re-engineered the blender's computer control system, changed safety interlocks, and enhanced worker training and supervision, significantly reducing the risk of amputation. According to OSHA, the worker's arms were surgically reattached, and he is undergoing rehabilitation.

Under its more recent efforts to protect worker safety, OSHA issued a final rule on May 12, 2016 requiring large employers and those in high hazard industries to electronically transmit to OSHA injury logs and annual summaries employers are already required to maintain and make available to their employees. OSHA will make this information publically available on its website. OSHA will not collect personal identifiers.

Prior to this new rule, most workplace injury and illness logs were only available at the workplace, making it impossible for OSHA, other employers, prospective employees, investors and public health researchers to know which employers have bad or good injury records.

Some object to posting this data to OSHA's web site, claiming it could harm reputations and damage businesses.

However, under OSHA's 1995 Data Initiative, 80,000 establishments in high risk industries were required to provide OSHA with annual summaries. Since 2004, OSHA posted this data to its website and used it to target its inspections to the most hazardous worksites. Under this new rule, however, the universe is expanded to approximately 460,000 establishments.

Furthermore, for the past 15 years, the Mine Safety and Health Administration has posted injury and illness rates, allowing mine operators, prospective employees, and current workers to access the information. Indeed, MSHA posts even more information to its website than required under OSHA's new rule.

I would also argue that responsible employers want to demonstrate to their employees, investors, and the public that they are committed to workplace safety. Public disclosure can help nudge employers towards improved safety outcomes.

DOL's reporting rule also seeks to ensure injury and illness reports and records are accurate.

This means addressing the major problem of underreporting of injuries, as recommended by two GAO reports for this committee. These GAO reports document how employer policies, such as rate based safety incentive programs, discourage workers from reporting injuries. One can easily imagine how programs that cut potential employee bonuses when the worksite injury rate goes up can have a chilling effect on reporting. In addition, the committee will be releasing a new GAO report examining underreporting of injuries in the poultry and meat process industries.

To further ensure accuracy of data, OSHA's rule also makes it clear employers may not discriminate against workers for reporting injuries or establish policies discouraging them from doing so. We know that the accuracy of reporting rests on employees' confidence that reporting injuries will not lead to job loss.

Mr. Chairman, I ask unanimous consent to enter these three GAO reports into the record.

Mr. Chairman, as we begin this hearing, I want to remind all in attendance that we should focus on ensuring safe workplaces for those we represent. Our constituents have families. They have loved ones. They deserve our efforts to come together as the Subcommittee on Workforce Protections to promote and protect safe and healthy workplaces for all Americans.

I want to thank the witnesses for their testimony today and yield back the balance of my time.

Chairman WALBERG. I thank the gentlelady, and having been to Burkina Faso a number of times, welcome, good to see you here.

Pursuant to Rule 7(c), all subcommittee members will be permitted to submit written statements to be included in the permanent hearing record, and without objection, the hearing record will remain open for 14 days to allow statements, questions for the record, and other extraneous material referenced during the hearing to be submitted in the official hearing record.

It is now my pleasure to introduce today's witnesses beginning with Mr. David Sarvadi, who is a partner with Keller and Heckman LLP here in Washington, D.C., and will testify on behalf of the Coalition for Workplace Safety.

Mr. Sarvadi represents clients before a variety of Federal and State enforcement agencies in legal proceedings involving OSHA citations, EPA notices of violation, and EEOC charges of discrimination. He works with clients in developing, reviewing, and auditing compliance programs in all of these areas, and in obtaining agency rulings on proposed activities and questions. Welcome.

Ms. Lisa Sprick is president of Sprick Roofing in Corvallis, Oregon, a great place for fly fishing as well, and will testify on behalf of the National Roofing Contractors Association. Sprick Roofing, a family-owned business established in 1952, installs low and steep slope roof systems on both commercial and residential buildings. Welcome.

Dr. Rosemary Sokas is chair of the Department of Human Science at the Georgetown University School of Nursing and Health Studies here in Washington, D.C., and will testify on behalf of the American Public Health Association. Dr. Sokas has more than 30 years of experience in the field of occupational and environmental medicine and public health. Welcome.

Finally, Mr. Arthur G. Sapper, is a partner with McDermott Will & Emery LLP here in Washington, D.C. Mr. Sapper practices administrative and regulatory law, focusing on all areas of occupational safety and health law, and mine safety and health law, regularly litigating before the Occupational Safety and Health Review Commission, the Federal Mine Safety and Health Review Commission, the Federal appellate courts, and various administrative bodies. Welcome.

I will now ask our witnesses to raise your right hands.

[Witnesses sworn.]

Chairman WALBERG. Let the record reflect the witnesses answered in the affirmative. Before I recognize you to provide your testimony, let me briefly explain our lighting system, which is pretty self-explanatory. Green, your five minutes continue on until you see yellow, which is a caution light that says you have one minute remaining, and when red hits, please do your best to finish up your statement in the next paragraph or so. We would appreciate that, and we will hold our Committee to that standard as well.

Let me now ask Mr. Sarvadi to lead us in his five minutes of testimony.

TESTIMONY OF DAVID SARVADI, PARTNER, KELLER AND HECKMAN LLP, WASHINGTON, D.C., TESTIFYING ON BEHALF OF THE COALITION FOR WORKPLACE SAFETY

Mr. SARVADI. Thank you, Mr. Chairman. Mr. Chairman, Ranking Member Wilson, members, honored guests, and fellow panelists, I am honored to be asked to participate in this important hearing.

Looking back on now the long history of the Occupational Safety and Health Administration, I have concluded that workplace safety and health efforts in the United States have been a great success. I actually started my career prior to the creation of the Occupational Safety and Health Administration, and I spent 15 years as an industrial hygienist in the real world dealing with these kinds of problems before I came to Washington.

From 1970 to 2014, the overall case rate has declined by more than five times, and fatalities from 14,000 to 4,800. Of the fatalities, roadway accidents represent 36 percent of the total, homicides, 9 percent, and aircraft incidents, 17 percent, which means that more than half of all fatalities are related to transportation.

Those are areas that most employers do not normally involve themselves in. Obviously, there are employers who do, and those employers have in many cases robust programs to address those kinds of hazards.

What I am pointing out here is the focus of our attention on workplace incidents and injuries needs to be focused on things that we can actually control and correct.

While my remarks will be critical of the path OSHA has taken in recent years, I do not want to be misinterpreted. Workplace safety and health is a very important topic, and I am not suggesting in any way that our efforts should be lessened, but I am challenging the mindset that suggests it is best seen as a competition between management and labor, more characteristic of 1930s' thinking. In 2016, we should be looking at ways to cooperate rather than to be at loggerheads.

The Bush administration, in my view, made significant progress in that area, but I think OSHA has gotten off track. The emphasis on enforcement has been overwhelming while the results have been less than impressive. The rate for both fatalities and total cases has stagnated.

Worse, OSHA's reputation has reverted to be a poster child of government high-handedness. Only the IRS is likely to have a worse and perhaps well-deserved reputation among the citizens.

OSHA's direction needs to be changed. They are exceeding limits of congressional authority repeatedly and ignoring administrative law guardrails that help preserve our tripartite system of government. Its purpose is to assure that liberty is preserved and government is focused on things it can control.

OSHA has moved far beyond merely establishing reasonably necessary and appropriate standards and regulations to achieve Congress' goal of safe and healthy workplaces. OSHA's job is not to save lives, contrary to its relentless propaganda. Congress placed the responsibility for protecting employees on employers, not OSHA. OSHA's job is to make the rules, provide education and support to employers and employees, and for those who fail to do so, surely to enforce to the full extent of the law. The current administration's emphasis on enforcement is misplaced and training and supporting have been given short shrift.

The proposals and regulations discussed in my written testimony wrongly focus on the details of paperwork, distracting both OSHA and employers from the real task at hand. We have a pretty good handle on the trends in workplace safety statistics.

The Bureau of Labor Statistics does a good job of surveying employees using widely accepted statistical techniques, about which I was privileged to be educated as part of a National Academy of Sciences' committee. The BLS approach is sound and is constantly being improved by its staff.

Unless there is something really wrong with the BLS approach or statistical theory, the trends are well known and will not be affected by OSHA's obsession with counting cases.

I wish I could be optimistic in this field, that we could have a real conversation about why things have stalled and what can be done about it. I see no evidence that the current administration is interested in doing so.

As evidence of that fact, I would point to the advisory committees that OSHA uses. Few, if any, of the people on the committees depart from the current orthodoxy, technological change long ago overtook practices that have been entrenched only due to intellectual inertia.

Here is what I think should be done. The recently adopted proposals should be shelved until the details of the program can be developed in conjunction with employers who will have to use the system. OSHA should be prohibited from publishing specific case data on injuries and illnesses and the regulation allowing OSHA to issue citations for retaliation should be rejected by Congress and the courts as usurpation of congressional legislative authority.

For those in favor of these approaches, I remind them eventually people with different viewpoints will be in charge and they may not

like what is then permitted under the loose interpretation of their authority.

Thank you again, Mr. Chairman and Ranking Member, for the opportunity to participate in this hearing, and for your interest in workplace safety and health. I will be happy to answer any questions you may have.

[The statement of Mr. Sarvadi follows:]

STATEMENT OF THE COALITION FOR WORKPLACE SAFETY

HEARING ON:	**Promoting Safe Workplaces Through Effective and Responsible Recordkeeping Standards**
COMMITTEE:	**Subcommittee on Workforce Protections, House Committee on Education and the Workforce**
BY:	**David Sarvadi, Keller and Heckman**
DATE:	**May 25, 2016**

THE CWS's APPROACH TO WORKPLACE SAFETY

The Coalition for Workplace Safety (CWS) is comprised of a wide range of employers and employers' associations representing every type of industry from coast to coast. The goal of the CWS is to work with its members to improve workplace safety and health through the following principles:

- Cooperation. The CWS believes that workplace safety can be improved through a cooperative approach when all parties involved in this process (employers, employees, and OSHA) work together to achieve better results. Cooperation includes training and education so that employers, employees and OSHA all have a clear understand of what is required to comply with all applicable workplace safety and health obligations.

- Assistance. The CWS believes that most employers want to protect their employees and to maintain safe and healthy workplaces, and that OSHA should serve as a resource to assist employers to understand their obligations.

- Transparency. The CWS believes that OSHA safety and health regulations must be developed with the full transparency of the data, science and studies relied upon by OSHA. The CWS further believes that an open process with a sufficient opportunity for the public including employers, employees and stakeholders to participate in the rulemaking process and to provide helpful information to OSHA will achieve the best result in the development of a rulemaking that is clearly understandable and takes into account the impact of such rulemaking on employers and employees.

- Clarity. The CWS believes that standards and regulations must be written in simple and clear language so that all employers, especially small employers, will be able to understand their requirements without the expense of consultants and attorneys. The CWS further believes that greater clarity will result in greater compliance and lead to improved workplace safety and health.

- Accountability. The CWS believes that all parties (employers and employees) must be held accountable for their roles and responsibilities. Employers must provide the necessary training, equipment, resources and company emphasis to ensure that workplace safety and health is a priority and employees must accept that workplace safety depends on their actions and decisions.

More information is at www.workingforsafety.com

Written Testimony of David G. Sarvadi on behalf of the Coalition for Workplace Safety for the House Subcommittee on Workforce Protections hearing on "Promoting Safe Workplaces Through Effective and Responsible Recordkeeping Standards."

Mr. Chairman, Ranking Member Wilson, and distinguished members of the Subcommittee, thank you for inviting me to speak with you today. I appreciate the opportunity to testify on the use of responsible recordkeeping standards to promote safe workplaces and, more specifically, on the potential impact of the Occupational Safety and Health Administration's (OSHA) new recordkeeping regulations. I am a partner at Keller and Heckman LLP and have worked in the area of occupational health and safety for nearly 40 years, first as an industrial hygienist and then an attorney. I have had direct experience in both careers dealing with the complexities and vagaries of OSHA's injury and illness recordkeeping systems, and understand its utility as well as its faults from both perspectives.

I am here today representing the Coalition for Workplace Safety (CWS), which is a group of associations and employers who seek to improve workplace safety through cooperation, assistance, transparency, clarity, and accountability. CWS has submitted comments on the Agency's recordkeeping proposals, and is concerned about the potential impact of OSHA's new recordkeeping regulations. Specifically, CWS does not believe that OSHA has adequately considered the unintended consequences of the revisions adopted, and has grossly overstated any potential benefit, understated the potential costs, and dismissed the negative impacts from making injury and illness data publicly available. Indeed, OSHA's approach in the final rule shifts substantial costs related to protecting employees' privacy from the agency to the employer community.

OSHA's changes directly contradict statutory language as well as public policies regarding drug and alcohol testing programs and unfairly characterize safety incentive programs. Worse, the changes provide a strong message that will deter effective disciplinary policies, undermining the OSH Act's policy of placing employers at the front line of assuring that employees follow all OSHA standards and employer safety rules and regulations.

OSHA's focus on recordkeeping at the level we have seen in this administration is, in my personal view, misplaced. We have seen, since 2008, a National Emphasis Program (NEP) looking for underreporting by employers with low injury and illness rates; a revision to the NEP to refocus on employers with "mid-range" injury and illness rates; a proposed change to require continual and unlimited updating of records for six years, subjecting employers to potential liability beyond the six-month statute of limitations Congress adopted in the OSH Act; a recently adopted proposal to require electronic submission of injury and illness records, including a plan to publish in an internet accessible format

records for individual employer worksites; a new requirement for reporting hospitalization of any employee which includes the intent to post on the internet the reports; and a reopening of the record on the proposal to add a column for "musculoskeletal disorders."

OSHA has argued in support of publishing the records on the internet that this is consistent with the "open and transparent" process under the Administration's Open Government initiative. It is not. The Open Government Initiative is about opening the government's records and processes to public scrutiny; OSHA's plan discloses records of *private citizens*, both employers and individuals. OSHA's double talk on this issue only reinforces the public's increasing cynicism about government and the bureaucracy.

None of the above initiatives has any significant impact on practices in the field related to safety and health programs, but are focused solely on the paperwork. The only thing tying them together is OSHA's obsession with capturing every last incident. Even if we accept the maxim that "only those things that are measured can be managed," OSHA is pursuing a plan that is beyond yielding any measurable returns. Moreover, the maxim does not say that the measurement has to be perfect. In many domains, surrogates or samples are used to provide estimates that are completely sufficient to achieve the purpose of the measurement. We are suggesting that OSHA's obsession is detracting from achieving Congress' objective.

To be clear, OSHA has repeatedly asserted that the new recordkeeping regulations are needed to improve workplace safety based on an unsubstantiated institutional belief that there is widespread under-reporting of and inaccuracy in injury and illness data, which OSHA's own efforts have shown not to be the case. OSHA's focus on hypothetical occurrences of failures or mis-recording of individual cases and its obsession with obtaining 100% accuracy in employer reporting has significantly detracted from real efforts to improve workplace safety. Resources that could be better used to enhance safety and health programs are diverted to marginal improvements in the records of individual employers, while overall trends remain on the same path that existed before OSHA was created.

Much of OSHA's more recent activity on recordkeeping is inconsistent with the compromise that was key to passage of the Occupational Safety and Health Act (OSH Act) in 1970. Congress debated and resolved the question of which records should be kept, and decided against a blanket requirement. OSHA's bureaucrats have never been happy about that decision, and have positioned the regulation since the beginning to require everything to be recorded, regardless of the utility of the data. The latest iteration is merely a continuation of that effort.

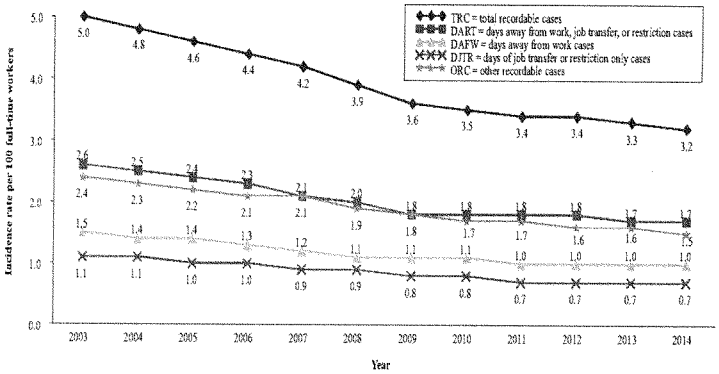
I have some personal experience of having been involved in the NAS Committee that reviewed the Bureau of Labor Statistics methodology for collecting data on workplace injuries and illnesses as part of a review of a survey conducted by NIOSH on the use of respirators in 2001. NIOSH selected the study participants by relying on the establishments BLS identified for its Survey of Occupational Injuries and Illnesses, the survey BLS conducts annually to develop the workplace statistics on which OSHA and employers rely for nationwide and intra-industry comparisons. Without going into detail, it was clear from the descriptions of how BLS created the list from which the establishments were selected, that the methods used to choose them were soundly based on standard statistical techniques and principles, and provide a reliable estimate of statistics that draw the picture of workplace safety and health in the U.S. This leads me to my conclusion that OSHA's efforts at increasing the capture of cases on its forms are misguided and not likely to lead to improvements in workplace safety for the reasons I discuss below.

I. There Is No Evidence That Current Reporting and Recording Requirements Do Not Accurately Capture Trends In Workplace Safety Improvements

Current statistics on workplace injuries and illnesses have, since before the creation of OSHA, demonstrated a continuing decline in both the rate and severity of injuries in the workplace. In 1970, when the OSH Act was passed, the overall case rate estimated by the National Safety Council program that was so widely discounted by members of the Congress was 15 per 100 full time employees, and there were 14,000 fatalities, with 78 million people working in the private sector.[1] By the year 2000, the overall case rate was 6.1 per 100 full time employees, with 5344 fatalities and roughly 136 million covered employees. The last available number in 2014 shows that the rate has declined to 3.2 per 100 full time employees, and the number of fatalities declining to 4821among approximately 146 million covered employees. Similar comparisons can be made for rates for lost workday/lost time cases, severity measures, and fatalities, the statistics that define the state of workplace injuries and illnesses in the U.S. These numbers demonstrate continuous progress and a real success story. The more recent history of total cases is shown in the chart below.

[1] Data on employment from the Bureau of Labor Statistics Current Population Survey, http://www.bls.gov/cps/aa2014/cpsaat01.htm, accessed May 24, 2016. Nonfarm employment only.

Chart 1. Nonfatal occupational injury and illness incidence rates by case type, private industry, 2003-2014



There are various contributing factors to the decline, including greater adherence to good safety and health practices. Among them are changes in the nature of work, where much manual labor has been supplemented by mechanical devices and engineered improvements in processes. What people in many workplaces now do is vastly different from how work was performed in earlier decades. Robotics and other technological changes on the horizon promise to make work even less of an effort and less dangerous.

But that does not change the fact that the current system of obtaining these data is based on a statistical methodology developed and refined over many years. As noted above, the BLS data is a statistically-based sampling of the entire US economy. Statistics teaches us that it is not necessary to count every occurrence in a universe of events to be able to predict with reasonable accuracy the frequency of various types of events in that universe. Sampling the universe of interest, here occupational injuries and illnesses, with an appropriate technique to create random samples provides a reasonably accurate description of the universe being observed. That is precisely what the BLS data collection and analysis program does.

So if the BLS program is based on a solid statistical foundation, one can only conclude that additional effort to count more events will produce less and less useful information at greater and greater cost. We are all familiar with the Law of Diminishing Returns through common experience. The harder we try to achieve perfection, in practically any endeavor, the more it costs to achieve the next incremental increase in the objective. I believe we have far surpassed the point where additional counting of cases of workplace injuries and illnesses will produce the kinds of insights that will materially change the outcomes.

OSHA for years has suffered from the paralysis that results from not accepting a good result in favor of pursuing a perfect outcome. The recent history of OSHA's recordkeeping is a good example of this phenomenon. OSHA and BLS could certainly spend a lot more money trying to capture more of what some believe are the cases that are not recorded or are incorrectly recorded, either by omission or misclassification. But the additional data will not change the essential characteristics of the picture of workplace injuries and fatalities. For fatalities, vehicular accidents and homicide will likely remain the primary causes of death. For injuries and illnesses, back injuries are likely to remain the primary cost driver of workers' compensation, while slip, trips, and falls will be a primary driver of injuries. [2]

One unfortunate fact remains hidden in these statistics. There is little impact that OSHA can have on either vehicular accidents or homicides, as both types of causes, with few exceptions, have variables affecting their occurrence that are outside the control of either OSHA or employers. For injuries, the etiology of back injuries remains a mystery, with little progress in the last 40 years in understanding what causes idiopathic back pain, differentiated from back injuries with apparent pathological causes.

For slips, trips, and falls, the current hypothesis seems to be that these injuries are caused by the lack of fall protection, for example in construction. But the current classification of fall injuries does not take into account what activities a person is performing when the injury occurs, so it is difficult to analyze what factors are amenable to control or changes in work practices. Personal fall protection is the answer only because we do not understand enough about the other factors that relate to the real risks that affect both frequency and severity of injury. Sometimes the obvious is not the right answer.

With the above types of injury cases, a refocus of research in two areas other than those OSHA apparently thinks are necessary has the potential to produce real benefits. Understanding back pain and its causes is critical to making progress in this area. For falls, looking beyond the obvious is necessary, because the current recommendations may not be directed at the true causes of the cases. OSHA's suggestion that more research on the industries and types of cases will bear fruit to advance safety and health are, in my view, misplaced. We do not need more details on where these things are occurring, we need more granular information on the circumstances surrounding slips, trips, and falls cases, and better medical understanding of back pain and its real causes. Neither receive the kind of

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[2] BLS data from 2014 show that slips, trips, and falls account for approximately 27% of all cases involving days away from work, while cases involving overexertion in lifting and lowering (likely mostly back cases) represent about 10%. See Table 5, *Number, incidence rate1, and median days away from work2 for nonfatal occupational injuries and illnesses involving days away from work3 by injury or illness characteristics and ownership, 2014* , http://www.bls.gov/news.release/archives/osh2_11192015.pdf accessed May 24, 2016.

attention needed, and OSHA would do well to work with the National Institute for Occupational Safety and Health (NIOSH) to develop a research plan in these areas.

II. Background on OSHA's Recordkeeping Regulations

OSHA's initial recordkeeping rule was enacted in July 1971 shortly after Congress adopted the OSH Act. The initial recordkeeping rule was relatively simple and required employers to record work related injuries during the calendar year and maintain a log of the recorded injuries for a five year period. Since then however, the recordkeeping rule has morphed into a complex set of requirements comprising numerous sections in the Code of Federal Regulations and required substantial clarification in numerous question and answer sheets and interpretation letters. Overtime, OSHA's modifications to the rule have resulted in the following changes to the recordkeeping requirements:

- 1977: OSHA altered the recording obligation to require employers to record cases "as early as practicable but no later than 6 working days after receiving information that a recordable injury or illness has occurred." OSHA further required that employers maintain a log at each establishment that was current within 45 days and certified by an appropriate representative.
- 1982: OSHA expanded the requirements related to recordkeeping access by providing a mechanism for employees to obtain and review an employer's recordkeeping logs in the regulations.
- 2001: OSHA dramatically altered the recordkeeping requirements by changing the scope and content of required recordkeeping forms to include the employee's date of hire, emergency room visits, time the employee began work (starting time of shift), and time of the accident. Employers were also now required to provide OSHA with the records upon request, within 4 hours.
- 2014: OSHA substantially modified the recordkeeping regulations to limit the list of employers exempt from recordkeeping obligations to only those employers with fewer than 10 employees during the previous calendar year or employees in a "low-hazard industry" listed in the regulations. OSHA also expanded the list of work-related injuries and illnesses required to be recorded. Specifically, under the new regulations, covered employers were required to report all fatalities, work-related inpatient hospitalizations, amputations, and losses of an eye within defined time parameters.
- 2016: OSHA amended the recordkeeping regulations to require:
    - Employers with at least 250 employees (including part-time, seasonal, or temporary workers) in each establishment to submit data from their Forms 300 (log of occupational injuries and illnesses), 300A

(annual summary), and 301 (incident reports with further information for entries on the logs) to OSHA on an annual basis;

- Employers with at least 20 employees, but fewer than 250, in certain identified high-hazard industries to electronically submit data from their 300A form on an annual basis; and
- All covered employers must inform employees of procedures for promptly and accurately reporting work-related injuries and illnesses and their right to report work-related injuries. Employers are further prohibited from maintaining recordkeeping procedures that would deter or discourage employees from reporting injuries or illnesses.

Even after the most recent changes to the recordkeeping requirements, there is a strong likelihood that the requirements will be significantly modified again in the very near future following OSHA's finalization of its 2015 proposed rule, titled *Clarification of Employer's Continuing Obligation to Make and Maintain Accurate Records of Each Recordable Injury and Illness*. In that rule, OSHA proposed a "clarification" to the recordkeeping rule that would characterize any failure to update or record a workplace injury or illness case as a "continuous" violation subject to citation for the full 5 year plus period during which injury and illness records must be maintained. Even though OSHA's proposed modification to the rule maintains that it is only "clarifying" employers' recordkeeping obligations, the proposed rule runs counter to a 2012 District of Columbia Court of Appeals decision titled *Volks II* and makes a substantive changes to the regulations. In *Volks II,* the District of Columbia Court of Appeals specifically held that a statute of limitations of six months applied to recordkeeping violations, which were a single violation, rather than a continuing violation.

Following OSHA's extensive modifications to the recordkeeping regulations, what was supposed to be a simple collection of cases for the purpose of evaluating workplace safety trends across the United States has turned into an overly complex and unnecessary reporting requirement, which necessitates significant investments of time, resources, and personnel. Indeed, compliance with these regulations is often so difficult, that employers need assistance from outside consultants and counsel to verify recordkeeping accuracy. The time and resources needed to complete the required forms is also a significant burden, with numerous administrative hours being devoted to the determination of whether an injury or illness is recordable, collecting information required for the forms, and ensuring that the forms are properly maintained and updated. These regulations further demonstrate a disturbing trend in OSHA's regulatory approach, in that OSHA significantly underestimates the burden imposed on employers as a result of a regulation and overestimates its potential benefits.

III. OSHA Did not Have Authority Under the OSH Act to Enact the New Recordkeeping Regulations

In reviewing the OSH Act's legislative history, we see that Congress recognized recordkeeping was a meaningful administrative and data collection tool. In adopting the OSH Act however, Congress directed OSHA to ensure that it did not subject employers to "unnecessary" recordkeeping requests. OSHA's initial recordkeeping requirements under the OSH Act were therefore limited and relatively simple.

Since 1971, OSHA has significantly expanded these requirements into a complex set of regulations, which now span 30 separate sections in the Code of Federal Regulations and impose significant obligations on employers. Instead of keeping a simple list of workplace injuries and illnesses for a three year period, as provided in the initial recordkeeping requirements from 1971, employers are now required to extensively document employee information (i.e., date of hire, training, personal information), details about the incident or injury, and emergency treatment. Compliance with these regulations is often so difficult, that employers need assistance from outside consultants and counsel to verify recordkeeping accuracy. The time and resources needed to complete the required forms is also a significant burden, with numerous administrative hours being devoted to the determination of whether an injury or illness is recordable, collecting information required for the forms, and ensuring that the forms are properly maintained and updated and any mistakes are grounds for citations.

OSHA's most recent changes to the regulations, which were published to the Federal Register in the Final Rule titled- *Improve Tracking of Workplace Injuries and Illnesses*- on May 12, 2016, expand employers' recordkeeping obligations and the Administration's enforcement authority far beyond what is needed to collect and maintain injury and illness data, or the limits Congress envisioned when the OSH Act was passed. As a result of the new regulations, many employers will be required to electronically submit injury and illness data on an annual basis, which will then be made publicly available. Employers will also have to evaluate programs, policies, and practices that are tangentially related to employee reporting to ensure that these procedures are not "unreasonable" and do not have any potential to discourage or deter employee reporting, or they may risk being cited for whistleblower violations.

Even if the additional obligations imposed on employers to submit electronic reports to OSHA were insignificant, the regulations would still be an overreach. This is because, electronic reporting and publication of injury and illness data is not required for accurate administrative data collection or to improve workplace safety, which is the entire purpose behind the recordkeeping requirements under the OSH Act. By publishing injury and illness data, OSHA will be making sensitive employer data available without any context or

obligation, which could result in significant harm to employers. Publication of injury and illness data is therefore meant only to have the very real effect of shaming employers who have had a workplace injury or illness during the reporting period. Following publication of the injury and illness data, many employers will be falsely branded as unsafe in spite of a real commitment to maintain a safe and healthy work environment.

Further, despite the agency's rambling attempt to suggest otherwise, nothing in the OSH Act gives OSHA authority to publish workplace injury and illness data. The agency's unprincipled expansion of delegated statutory authority, if allowed to stand, would contort the legislative mandate beyond all recognition and in the process likely exceed even the loose delegation of authority criteria currently in vogue in the Supreme Court. In essence, it would replace the traditional understanding that an agency can only do those things Congress has said it can do, with one that says it can do anything not explicitly prohibited. OSHA further asserts that if there is some nexus to an otherwise legitimate purpose, anything is permitted regardless of what the statute might say. This is an abundantly clear usurpation of the legislative power of Congress by a rogue executive.

The new recordkeeping regulations also permit OSHA to prohibit and enforce against employment practices that <u>it perceives</u> as having the potential to discourage employee reporting, <u>even without any evidence that an employee was discouraged</u> from reporting a workplace accident. Notably, remedies for discrimination and retaliation are already addressed in Section 11(c) of the OSH Act, which establishes whistleblower protections for employees engaged in protected activities. Under 11(c), OSHA can investigate and remedy instances of retaliation after an employee has filed a complaint. Under OSHA's new rule however, OSHA is authorized to issue citations against employers for retaliating against employees prior to a complaint ever having been filed. OSHA's ability to issue citations to an employer for retaliation without an employee complaint was specifically considered during Congress' adoption of the OSH Act. In fact, in review of the legislative history, it is apparent that Congress intended to limit OSHA's whistleblower provisions to only apply after an employee had filed a complaint. OSHA's introduction of a new enforcement mechanism outside of the complainant process is a clear circumvention of the intended limitation on the OSH Act's whistleblower provision.

Furthermore, because the issue of prohibiting employment practices with an alleged potential to result in discrimination, or retaliation, is entirely distinct from the administrative and data collection purpose of the recordkeeping regulations, the Administration should have pursued a separate rulemaking initiative specific to those provisions, rather than tacking them on to the recordkeeping rule as an afterthought. By including the prohibition on certain employment procedures following a Supplemental Rulemaking Notice, which did not definite the programs and procedures that could be

effected, OSHA prevented the regulated community from having any meaningful engagement in the rulemaking process, and without any proposed regulatory text, or the other typical components of a rulemaking. This is a clear violation of the spirit if not the letter of the Administrative Procedure Act's requirements that the regulated community be put on notice of what is contemplated by the agency in sufficient detail that the implications and consequences of the changes can be anticipated, so that the defects and obvious unintended consequences can be identified and corrected before the regulation is finalized. It almost seems as if OSHA intentionally did not include that information so as to mask its real intentions. We should all be outraged.

IV. There is no Conclusive or Persuasive Evidence Available to Suggest that Additional Recordkeeping Regulations are Needed to Address Widespread Underreporting or Recordkeeping Inaccuracies

OSHA's primary basis for enacting the new recordkeeping regulations is the purported concern that employers are not recording or are mis-recording workplace injuries and illnesses. Yet, OSHA has never been able to produce conclusive evidence, or even persuasive evidence, of under-recording. In fact, numerous studies and reports, some of which have even been commissioned by OSHA, have concluded the exact opposite. From these studies, employers even appear to have an accuracy rate above 90 percent.

- *Analysis of OSHA's National Emphasis Program on Injury and Illness Recordkeeping* (R.K. NEP), ERG (Nov. 1, 2013): found that over 50% of the surveyed workplaces did not have a single instance of unrecorded or under-recorded recordable cases.
- *Workplace Safety and Health: Enhancing OSHA's Records Audit Process Could Improve the Accuracy of Worker Injury and Illness Data,* GAO (Oct. 2009): found an overall accuracy of employer recordkeeping to be above 90% for both total recordable and days away/restricted job transfer (DART) injury and illness cases.
- *OSHA Data Initiative Collection Quality Control: Analysis of Audits on CY 2006 Employer Injury and Illness Recordkeeping,* ERG, (Nov. 25, 2009): found an overall accuracy of employer recordkeeping to be above 96% for both total recordable and DART injury and illness cases.

The results of these efforts demonstrate that most employers appear to be accurately recording workplace injuries and illnesses on the required forms. Thus, the new recordkeeping requirements will have little to no effect on the overall accuracy of injury and illness recordkeeping, or on nationwide injury and illness statistics. One can only conclude that OSHA's true purpose is to create new enforcement mechanisms to further pressure employers to focus on recordkeeping. But the new regulations will only detract from the accuracy, by imposing new and unnecessary burdens on employers, and will reduce safety

and health efforts and lower economic vitality by diverting resources from more productive endeavors.

V. OSHA Recordkeeping Regulations Will not Enhance Workplace Safety or Improve Workplace Injury and Illness Statistics

OSHA, in addition to arguing that the new regulations will prevent and redress under-recording, has also argued that the new regulations will assist the Administration in better identifying trends and allocating resources. But, as shown above, additional accuracy in recordkeeping will be of no significant consequence to workplace safety and health outcomes unless the underlying trends changes as a result. There is no evidence this would occur, and in fact, the only evidence in the record to date is that the BLS data are sufficient and sufficiently accurate to achieve Congress' stated public health objective.

The potential impact of occasionally failing to record an injury or illness or of failing to record the case correctly as required by the regulations is that the history of that employer will be somewhat incorrect. These one-off errors have little or no impact on the overall statistics nationwide or identified safety and health trends. Indeed, even systematic errors in recording by a single employer do not affect the overall accuracy of the statistics on nationwide injury and illness rates, because not all employers are included in the annual nationwide survey conducted by the Bureau of Labor Statistics (BLS) and potential recordkeeping errors are assessed as a statistical factor by the BLS. Further, BLS continually assesses the completeness and accuracy of injury and illness statistics to analyze any undercount trends overtime. Following its assessment of potential undercounting, BLS concluded that the injury and illness statistics would not affect the overall trends, because even with some undercounts BLS could still "obtain statistically significant results." The results of OSHA's own National Emphasis Program demonstrate this fact.

Even without the recordkeeping requirements imposed by the new regulations, significant data and trends are available from historical BLS surveys, the BLS annual report, and ongoing regulatory initiatives that demonstrate trends in workplace accidents, areas where additional resources should be allocated, and ongoing safety and health priorities. OSHA's desire to have accurate reporting of every individual workplace accident is further shown to be unnecessary, because injury and illness rates have been steadily declining since 2001, which is clearly evidenced in BLS data. From 2003 to 2014, the number of fatalities occurring nationally declined from 5,575 to 4,821. The fatal work injury rate per 100,000 full-time equivalent workers also declined from 4.2 in 2003 to 3.4 in 2014. Further, the overall incidence rate of nonfatal occupational injury and illness cases requiring days away from work to recuperate was 107.1 cases per 10,000 full-time workers in 2014, which was down significantly from the 2013 rate of 109.4. These BLS statistics demonstrate that the current regulatory regime is working and adequate in achieving improvements in health and safety, such that additional recordkeeping requirements are not needed to enhance

workplace safety. OSHA's new recordkeeping requirements therefore provide no additional benefit for workplace safety and health are long past the point of diminishing returns, in that continued efforts to emphasize and enhance recordkeeping requirements actually divert resources that are better spent on substantive safety and health program components.

VI. OSHA's Focus on Under-Recording Unjustifiably Detracts Time, Energy, and Resources That Could Otherwise be Invested in Workplace Safety Initiatives

As a final point of consideration, I would like to emphasize that OSHA's focus on recordkeeping is a clear distraction from the Act's true purpose, which is to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions. . .."[3] OSHA's job is to set and enforce standards and by providing training, outreach, education and assistance. The Act places the primary responsibility for providing a safe and healthful workplace on the employer.[4] As a direct result of OSHA's extensive recordkeeping regulations, employers must invest significant time, energy, and resources into monitoring potential cases, including incidents that had previously been considered non-recordable, collect information required for recordkeeping forms, and fill out required information on the OSHA 300 forms. These compliance efforts require far more expense than a simple recording cost and result in substantial indirect and overhead costs, including, for example, costs for training, quality control, human resource services, and consultation services.

Indeed, OSHA has yet to set up its electronic portal for submitting records, so employers do not yet know what is going to be required. Many employers, particularly smaller employers, still maintain such records by hand. Even in large organizations, the initial reports are frequently on paper, and then are entered into what are often proprietary recordkeeping systems. To the extent OSHA's data collection system will involve new formatting or data entry, this will be another layer of expense not identified in the regulatory analysis, a not insignificant cost that OSHA has not factored into its assessment. For many employers compliance with OSHA's recordkeeping obligations means they must divert resources to cover these indirect and overhead costs, which results in resources being diverted away from safety and health initiatives. To actually improve workplace safety, OSHA and employers should be focusing on identifying true causes of injuries and illnesses and developing new technological means of correcting them to prevent injuries from occurring in the first place. Instead OSHA's proposals on recordkeeping focus on how and

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[3] Occupational Safety and Health Act of 1970, Public Law 91-596, 84 Stat. 1590 (1970)., 29 U.S.C. § 651(b).
[4] The enumerated subparagraphs in section (2)(b) of the Act clearly contemplate that employers and employees have the primary responsibility for achieving Congressional objectives. Of the thirteen subparagraphs outlining Congress' findings and purposes, the Secretary of Labor is mentioned in only one, authorizing the Secretary to set standards, and is not mentioned in the subparagraph providing for enforcement. Obviously, Congress did not intend that enforcement would be the primary means of achieving safe working conditions.

whether all injuries are documented, which we have shown above does not advance the cause of safety and health practice.

One point that has not received adequate attention is that whether an injury is recordable is not always obvious, and there are subjective factors at issue such as was the injury work related, and did it require more attention than mere first aid? [5] Resolving these issues, with the consequences of legal liability hanging in the balance, requires judgment, training, and experience. Up until OSHA's new reporting regulation, employers often are required to record an injury as a default assumption because of the presumption that a case reported at work is work-related. In fact, this presumption causes over-recording of cases, and employers have to document decisions not to record far more substantially. There is already significant pressure and incentive on employers to record doubtful cases, which distorts the OSHA injury incidence reports. This makes them less, not more, useful as internal management tools. Now that every injury that will be recorded will be reported and made publicly available, employers will spend more effort to make sure that only truly work-related cases will be recorded, subjecting them to greater risk of citation because OSHA will conclude that marginal cases should have been reported. So not only will OSHA's reporting regulation impose new burdens and costs, but by converting an internal data collection tool to a public disclosure form, it will undermine the very purpose OSHA has put forward for the regulation.

A more detailed analysis of other components of OSHA's recently adopted changes would suggest a misplaced emphasis as well. The attempt to negate Congress' decision in section 11(c) to require an employee complaint before an investigation and the decision to outlaw certain employment practices without considering the unintended consequences and costs are two major examples.

If we look closely at all of OSHA's other proposals, including that to extend the statute of limitations for recordkeeping violations that will be discussed by another member of today's panel, it is clear that the only purpose of these changes is to give OSHA another enforcement bludgeon. One defining characteristic of the current administration is that they have doubled down in the last few months of their regime to create even more bureaucratic impediments to economic vitality. It is time to recognize that some regulations are simply not worth the price.

Thank you again for the opportunity to participate in this hearing and for your attention on this important topic of workplace safety and health.

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[5] Comments from the UAW in the rulemaking argued in favor of requiring that cases requiring only first aid be recorded. Congress already resolved that debate by limiting OSHA's authority to requiring only "serious injuries and illnesses." No one rationally thinks first aid cases are serious.

Chairman WALBERG. Thank you. Ms. Sprick, we recognize you now for five minutes of testimony.

TESTIMONY OF LISA SPRICK, PRESIDENT, SPRICK ROOFING CO., INC., CORVALLIS, OR, TESTIFYING ON BEHALF OF THE NATIONAL ROOFING CONTRACTORS ASSOCIATION

Ms. SPRICK. Thank you, Mr. Chairman, and members of the subcommittee. My name is Lisa Sprick, and I am president of Sprick Roofing in Corvallis, Oregon. I am testifying today on behalf of the National Roofing Contractors Association, and appreciate the opportunity to provide the perspective of professional roofing contractors on workplace safety regulations.

Sprick Roofing was founded in 1952 and currently has 25 employees. To date, we have worked 1,360 work days or more than five years without a time loss accident, and I believe this speaks to my company's exceptional commitment to safety.

There is concern within our industry regarding OSHA regulations and impacts they will have on worker safety and businesses like mine. I believe these regulations will do little to promote safer workplaces and could prove to be counterproductive to this goal.

OSHA's overreaching regulatory approach seems to be stuck in a "Washington, D.C. knows best" mode of regulating our industry, and I do not believe that Washington always knows best.

The first concern I will discuss is OSHA's regulation to require companies to submit their injury and illness records electronically to the agency. OSHA states that posting these records online will provide employees and others with information that will enhance workplace safety. However, the data as included in the reports lack meaningful context, which is critical to understanding the information properly. Without context, it is unclear how the information being made public will improve workplace safety.

Also, misuse of the information by third parties could be harmful to employers. It is not hard to imagine one of my competitors gathering this information and using it to sell against me.

Another concern is possible inadvertent public disclosure of private employee information that could cause harm to my workers. Our company goes to great lengths to protect sensitive employee data. As a small business owner, I have many questions about what would happen if this information was inadvertently disclosed.

It is also unclear to me what impact the rule will have on employee incentive programs designed to promote workplace safety. I share OSHA's intent to ensure employees must not be deterred from reporting injuries, and our program provides incentives to employees to follow the rules that meet or exceed OSHA standards.

We take a proactive approach to safety and even encourage our employees to report near misses so we can identify problems and prevent injuries from occurring.

This regulation and the other OSHA actions have produced much ambiguity with respect to how OSHA views incentive programs. The expanded authority in this regulation may remove a key tool that employers use to ensure safe workplaces.

Another concern with this regulation is adding unnecessary costs, which is always a concern to small businesses that operate on a thin margin. This is especially true for responsible employers,

like my company, which comply and often exceed government regulations, when competing against contractors who do not always work under the same compliance with laws and regulations.

I feel that adding new reporting burdens that promise unspecified benefits merely diverts valuable resources from risk management strategies that truly protect workers. Efforts to improve workplace safety could be more effective if OSHA worked with employers on such strategies.

Another very serious concern I have is OSHA's recent efforts to impose Federal fall protection regulations on States like Oregon. This could jeopardize the safety of workers in Oregon and other States like California and Michigan.

I recently learned that Oregon will adopt Federal fall protection rules after OSHA demanded our State change its rules or be faced with losing its State plan status. This will limit fall protection options which may be the most effective in preventing falls in many situations.

Oregon rules now allow for more fall protection options, including the use of slide guards installed at the roof edge to prevent falls. My company has been using this option for 63 years and we have never had a fatality or serious accident related to their use. We believe that under many circumstances, slide guards are the most effective option for preventing injuries.

It is disturbing that OSHA will impose Federal rules on our State given that Oregon's record in preventing falls is better than other States operating under Federal rules. I do not understand why OSHA would insist on imposing changes without having empirical evidence that the Federal rules are more effective than the State rules.

I would urge Congress to prevent OSHA from imposing its rules on State plans like Oregon's and similar States unless the agency has data to clearly demonstrate that its rules produce better results that actually protect workers.

To conclude, I want to reiterate that there is great concern within the roofing industry with respect to OSHA's overreaching approach to regulation. It is vital that employers, workers, government agencies, and other stakeholders work together to craft effective safety policies based on sound risk management principles and reliable data.

NRCA and its members stand ready to work with Congress and OSHA on efforts to improve workplace safety in the future. I appreciate the opportunity to testify today, and I welcome any questions you may have. Thank you.

[The statement of Ms. Sprick follows:]

Statement of Lisa Sprick

President, Sprick Roofing Co., Inc.

On behalf of the National Roofing Contractors Association

Workforce Protections Subcommittee

House Committee on Education and the Workforce

May 25, 2016

Mr. Chairman and members of the subcommittee,

My name is Lisa Sprick and I am president of Sprick Roofing Co., Inc. in Corvallis, Oregon. Today I am testifying on behalf of the National Roofing Contractors Association, of which my company is a long-time member. I greatly appreciate the opportunity to provide the perspectives of a roofing contractor with respect to the policies of the Occupational Safety and Health Administration (OSHA) and the impact of such polices on workplace safety.

Established in 1886, NRCA is one of the nation's oldest trade associations and the voice of professional roofing contractors worldwide. NRCA has approximately 3,500 contractors in all 50 states who are typically small, privately held companies, with the average member employing 45 people and attaining sales of about $4.5 million per year. NRCA members also include manufacturers, distributors, architects, consultants, government agency and academic representatives. NRCA has developed more than 50 roofing safety-related publications, programs or training materials on diverse topics including asbestos, hazard communication, fall protection and cranes. In addition, over the past fourteen years, OSHA has awarded NRCA eleven individual grants to develop programs designed to improve workplace safety in the roofing industry. NRCA also represents the roofing industry in proceedings before OSHA's Advisory Committee for Construction Safety and Health, is a member of the American National Standards Institute's A10 Committee on Construction and Demolition Operations, ISO 45001 Occupational Safety and Health Management Systems Technical Advisory Group, and participates in other organizations that impact safety in the roofing industry.

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Sprick Roofing Co., Inc. was founded in 1952 and currently has 25 employees; however, with our current workload we will be hiring 10-15 more if and when we are able to find qualified workers. Our company installs low and steep slope roof systems on commercial, industrial and residential buildings. To date, we have worked 1,360 workdays, or more than five years, without a time-loss accident, with our previous record being 1,182 days. Our worker's compensation experience modification rate (EMR) is .73. As you may know, EMR is a metric used by insurance companies to measure an employer's rate of accidents and injuries. The EMR compares an employer's losses against an average of the employers in the same industry in the same state, with the "average" being an EMR of 1.0. Given our company's size with minimum annual premium requirements, the lowest EMR we could hope to achieve with zero claims would be .71. I believe the fact that it was been over five years since having a time-loss accident coupled with our excellent EMR clearly speaks to our commitment to safety and the culture we've fostered among our employees to work every day with a focus on their personal safety.

My primary message today is that there is great concern within the roofing industry about a number of OSHA regulations and the impacts they will have on worker safety and on businesses like mine. I believe that these regulations will do little, if anything, to promote safer workplaces in our industry. Moreover, I am concerned that some OSHA regulations and actions could prove to be counterproductive toward making workplaces safer, which is a goal I know we all share. This would be truly tragic given the inherent danger of roofing work.

My company, and most professional roofing contractors, would very much like to work with OSHA on a cooperative basis to ensure the safest possible workplace for our workers. We have always had a respectful and cooperative relationship with Oregon OSHA officials and this is one of the keys to our excellent safety record. But federal OSHA's rigid and overreaching regulatory approach to safety, as exemplified in regulations and unilateral actions, does not help responsible contractors who are working very hard to provide the safest possible work environment for our employees. OSHA seems stuck in a "Washington, DC, knows best" mode of regulating our industry, and it is not helping to make workplaces safer. OSHA should focus on working cooperatively with responsible contractors who are making every effort to implement the most effective safety programs rather than moving forward with regulatory approaches that merely divert time, resources and best practices away from efforts to truly make workplaces safer.

Today I will comment on a few examples of how recent OSHA regulations are taking the wrong approach to improving workplace safety in our industry.

Injury and Illness Reporting Regulation

The first concern is OSHA's new regulation to require companies like mine to submit our injury and illness records electronically to the agency. The agency will then post the records on the

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Internet for public inspection. The regulation also requires employers to inform employees of their right to report injuries and illnesses and prohibits discrimination against employees who exercise this right. OSHA indicates this regulation is the result of "applying the insights of behavioral economics" to "nudge" employers to prevent workplace injuries and illnesses.

As a roofing contractor, I have several serious concerns with this new regulation. Overall, OSHA does not provide any convincing evidence that this regulation will improve workplace safety by preventing injuries and illnesses. The supposed benefits of the proposal are primarily speculative and not supported by empirical data sufficient to justify the costs of implementation.

The agency states that posting the information online will provide employees, potential employees, consumers, labor unions and other organizations with what now is confidential information about companies' safety records. However, the data will be presented without any meaningful context (such as company size, workforce size, business history, etc.) which is absolutely critical to understanding the information properly. Without presenting the whole picture of how certain injuries and illnesses occurred, the information is meaningless, so it is unclear how this information being made public will help advance the cause of improved workplace safety.

I am concerned that reported information taken out of context may have the opposite effect of OSHA's stated goal of allowing workers to pick supposedly safer companies to work for or to improve the behavior of unprofessional contractors. Additionally, misuse of the reported information by third parties, including those whose primary interest is not promoting safety, could cause significant harm to employers. It's not hard to imagine one of my competitors gathering this information, without knowing anything about the circumstances, and using it to sell against me, as just one example.

As an employer with 25 employees, I will be required to submit Form 300A annually under the new rule. The release of this summary document would seem to provide little if any information about my company's safety program. However, it is my understanding that while the new regulation does not require me to submit Forms 300 and 301 automatically, the rule does give OSHA the authority to request the documents and post them online. These documents contain more information but again they lack context, which is critical to giving the information meaning and providing insights into a firm's risk management practices.

Another concern with this regulation is the possible inadvertent public disclosure of private employee information and the harm this could cause to workers and employers. Our company currently goes to great lengths to protect sensitive employee data in all circumstances, be it electronic data we secure behind continually tested fire-walls or hard copies safely stored in separate, locked filing cabinets within a locked fire-safe room within in our office, monitored with cameras and security system. The regulation says that "OSHA does not intend to post any

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information on the Web site that could be used to identify individual employees." That statement does not sound very reassuring. Will my company be liable if the private information of one of my employees is somehow posted for public dissemination? Will companies or individuals harmed by such disclosure of personal information have any recourse if this happens? Are there implications for disclosure of such information under the HIPPA law? Given the very serious and numerous concerns with privacy in today's interconnected world, the possibility of inadvertent publication or intentionally hacked data of sensitive employee information should be of paramount concern. I could site numerous examples of electronic data hacking as it has almost become daily news in today's electronic world, but suffice it to say I feel it is not unfair to state that data hacking has become our world's next "big business."

Another major concern of this rule is that it is unclear to me what impact it may have on employee incentive programs designed to promote workplace safety. I understand and share OSHA's intent to ensure that employees are not deterred from reporting injuries, and our company program is focused on promoting safety by providing incentives to employees to follow rules that meet or exceed OSHA standards. We take a proactive approach to safety and even encourage our employees to report near misses so that we can identify problems or trends in a way that prevents injuries or illnesses from occurring. But this regulation and other statements and actions from OSHA officials have produced a great deal of ambiguity with respect to OSHA's approval of incentive programs. My company has an excellent safety record and this is the result of the effective safety program we have implemented over many years. Employee incentives and discipline are key components of any effective safety program. Many of my fellow NRCA members have understood these statements to mean that any incentive program could be worthy of a violation of the rule. By creating uncertainty in how OSHA views incentive programs and disciplinary actions, the expanded authority in this regulation coupled with other agency actions may remove a key tool that employers now use to ensure a safe workplace.

Another concern with this new regulation is, of course, increased costs for the employer. While the costs of this regulation are more modest than many other regulations, adding unnecessary costs is a great concern to all small employers. This is especially true when responsible employers like my company, which make good faith attempts to comply with, often exceeding, government regulations, are often competing in highly competitive markets against contractors who are flying under the radar and may be actively skirting government regulations to gain a competitive advantage.

Ultimately, I fear that adding new reporting burdens that promise unspecified and elusive benefits merely diverts valuable resources from proven risk management strategies that truly protect workers. In disseminating information to the public that is out of context, this regulation disregards and possibly hinders proven safety programs that companies like mine have already implemented. Based on my experiences as a small business person, efforts to improve

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workplace safety would be much more effective if OSHA worked with safety-minded employers in a cooperative manner to employ proven strategies consistent with risk management principles, rather than issue unproven or unsubstantiated regulations.

Fall Protection Regulations

Another very serious concern that I and many other NRCA members have is OSHA's tendency to work outside the normal regulatory process to achieve regulatory objectives. OSHA's recent efforts to impose federal fall protection regulations on state-plan states like Oregon, even when injury rates demonstrate that state plan rules are more effective in preventing injuries than OSHA's rules, is alarming. I fear that this could seriously jeopardize the safety of my employees and many other workers in Oregon and other states such as California and Michigan.

As you will recall, OSHA issued a directive in 2010 that made significant changes in fall protection rules for residential construction over the objections of NRCA. NRCA member Pete Korellis of Korellis Roofing in Hammond, Indiana, testified before this subcommittee in 2011 to express the serious concerns of the roofing industry regarding OSHA's unilateral changes in fall protection regulations. The new rules effectively limit the options that are available to protect workers from falls, which of course can result in serious injury or death in our inherently dangerous industry. From a practical standpoint, OSHA's rules, which were fully implemented in early 2013, effectively impose a one-size-fits-all regulatory regime for fall protection by mandating the use of personal fall arrest systems (PFAs) in virtually all instances.

PFAs are clearly an effective fall protection option in many situations, but other options are sometimes more effective in preventing falls depending on key situational factors such as the slope of the roof and the type of roofing material being used. NRCA believes that contractors should follow long-established risk management principles in choosing the most effective form of fall protection for workers. This involves assessing each worksite individually based on the slope and height of the roof, type of building and roofing materials and other factors in order to determine the most effective form of fall protection.

The state of Oregon's fall protection rules currently allow more fall protection options than OSHA's rules issued in 2010, including the use of what are commonly called "slide guards" (brackets supporting 2" x 6" or greater-sized planks) installed at the roof edge to prevent falls. My company has been using slide guards to protect our workers for 63 years and has never had a fatality or serious accident related to the use of slide guards. We believe that under many circumstances on moderately sloped roofs, slide guards are the most effective option for preventing slips, trips and falls for our workers.

Much to my dismay, I have recently learned that, next year, Oregon will adopt the federal fall protection rules after OSHA demanded that the state change its rules or be faced with losing its

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state-plan status. This will have the practical effect of limiting the fall protection options that my company, and others across Oregon, believe are the most effective in preventing falls in many situations based on decades of experience.

This is disturbing given that Oregon's record of preventing falls is also better than other states with similar populations that operate under federal OSHA rules, according to Bureau of Labor Statistics (BLS) data. In 2014, the state of Oregon, with a construction workforce of about 81,000 workers, had nine deaths but zero reported from falls. In comparison, two states under federal jurisdiction, Alabama and Oklahoma, with construction workforces comparable to Oregon's at 81,000 and 76,000 workers respectively, had comparably worse fatality rates. In 2014 Alabama had 11 deaths in construction with 6 from falls, and Oklahoma had 20 fatalities with 4 from falls.

I am also informed that the state of California, which also has rules that allow for more fall protection options than allowed by federal rules, has a significantly lower rate of falls in construction compared with states with similar size workforces under federal jurisdiction. In 2014, there were 47 fatalities in the California construction industry compared to 105 in Texas, a state with similar size construction workforce that operates under federal rules.

These statistics demonstrate that fatality rates in Oregon and California are significantly lower than most states under OSHA's jurisdiction. I know that regulators in Oregon and California work very closely with industry and labor to understand and devise safety rules that meet the needs of industries like roofing, and they appear to be having consistent success. In fact, the original directive issued in 1995 by OSHA under the Clinton administration that allowed slide guards under federal rules was the result of a collaborative process involving industry, labor unions and other stakeholders. Maybe instead of forcing Oregon, California and other states to adopt the federal fall protection rules, OSHA should work cooperatively with stakeholders to establish the most effective rules. Isn't that how the regulatory process should work?

Additionally, it should be noted that since OSHA changed the rules for fall protection in 2010, the number of fatal falls nationwide has actually increased. According to BLS data, there were 61 fatalities from falls in roofing in 2012, and this number unfortunately climbed to 66 in 2013 and 71 in 2014. OSHA's promise that safer workplaces for roofing workers would result from its change in fall protection rules has not materialized to date.

I do not understand why the federal government would insist on imposing regulations that are different from state rules without having empirical evidence that the federal rules are more effective than the state rules. In this instance in Oregon, and possibly other states such as California, it appears that OSHA is imposing its rules on states despite statistical evidence indicating that the state rules have produced better results and over the objection of industry employers with decades of experience.

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Mr. Chairman, I understand that you raised this issue with Assistance Secretary David Michaels in a hearing in this subcommittee last October, and that he replied that OSHA has developed "metrics" to determine when state-plan state rules that are different from OSHA's rules are "at least as effective" as the federal rules, as required under the OSH Act. He went on to say that OSHA is "now collecting data from the state plans and I think we are doing very well." NRCA is not aware of any of these metrics, or any of the data that was to have been collected, and we would implore you to follow up on this matter. It would be extremely helpful to all who want to improve workplace safety for OSHA to provide fully transparent information on how the agency determines whether state rules are "at least as effective" as federal rules. I would urge Congress to prevent OSHA from imposing its rules on state-plan states like Oregon unless it has objective data to clearly demonstrate that its rules produce better results that actually protect workers.

Conclusion

To conclude, I want to reiterate that there is great concern within the roofing industry with respect to the impact of OSHA regulations on workers and employers. Roofing is dangerous work, and it is vital that employers, workers, government officials and other stakeholders work together to craft effective safety policies that are based on sound risk management principles and reliable data.

Mr. Chairman, on behalf of NRCA I want to commend you for holding this hearing to review OSHA regulatory issues with the goal of improving workplace safety. I very much appreciate the opportunity to share the perspective of a roofing contractor with members of Congress on these very important issues. NRCA and its members stand ready to work with Congress and OSHA on efforts to improve workplace safety in the future.

Thank you for your consideration of our views and concerns.

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Chairman WALBERG. Thank you. Dr. Sokas, we welcome you and recognize you for five minutes.

TESTIMONY OF ROSEMARY SOKAS, M.D., PROFESSOR AND CHAIR, DEPARTMENT OF HUMAN SCIENCE, GEORGETOWN UNIVERSITY SCHOOL OF NURSING AND HEALTH STUDIES, TESTIFYING ON BEHALF OF THE AMERICAN PUBLIC HEALTH ASSOCIATION

Dr. SOKAS. Thank you. Chairman Walberg, Ranking Member Wilson, and members of the subcommittee, thank you for this invitation. My name is Rosemary Sokas, and I am providing these remarks on behalf of the American Public Health Association.

My testimony will cover three areas. First, OSHA's recordkeeping rule and its severe injury reporting rule will help prevent workplace illness and injury and improve transparency. Second, there is a need to improve accuracy of information by addressing the problem of underreporting. And third, APHA supports OSHA's efforts to protect vulnerable workers from retaliation for reporting workplace illness or injury.

OSHA's new recordkeeping rule will bring injury and illness reporting into the 21st century through an efficient Web-based mechanism that allows employers to upload information they are already collecting. This rule does not impose any new recordkeeping responsibilities, but rather requires the information to be electronically transmitted.

Personally identifiable information will not be collected by OSHA, so that should alleviate most of the privacy concerns.

Accurate and timely information is important not only to identify problems but to make sure that solutions work. With OSHA's severe injury reporting program, as you have heard already, the employers are now reporting hospitalization, amputations, and loss of an eye, and OSHA has had the chance to investigate and to encourage the employers to investigate over 10,000 severe injury cases.

One example of immediate benefit is that grocery stores, which are only rarely investigated by OSHA, turned out to be a leading locust for amputations. This information helped pinpoint problems with food slicing and allowed OSHA to provide outreach and compliance assistance. In some cases, a single sentinel event may serve to alert the industry to an unrecognized hazard.

Public health agencies at the State and local levels will now have worksite data to evaluate the impact of their policies by comparing baseline and follow-up data across a particular industry as well as by conducting comparisons with States that have different programs or regulations.

Industry associations and academics will have access to information across a large enough population to be able to draw meaningful conclusions.

OSHA's rule takes needed steps to address underreporting, a problem that has been well reported by GAO investigations, as well as BLS, as well as academics.

NIOSH has conducted a series of health hazard evaluations in poultry processing where in one plant, fully 34 percent of the workforce, 64 out of 191 people, met strict case definitions for carpal tunnel syndrome while only four cases had been reported on the

OSHA logs during the previous four years. When surveyed, 20 workers described work-related illness or injury meeting OSHA's criteria for recordkeeping, but only one of these incidents was recorded in the log for that year.

Aggressive return-to-work policies can suppress reporting. I have reviewed cases in which workers were driven to work on the day of the surgery or the day after while still on narcotic medication in order to reduce the days away rate.

The OSHA record is full of reports from workers in a variety of industries who received demerits when they suffered an injury or go through safety and health investigations that focus on punishing the worker, including threats of firing.

As OSHA's chief medical officer, I interviewed poultry workers who impressed on me the widespread fear of job loss and a sense of fatalism among many that they had grown used to living with pain and disability from their jobs. The particular corporation not only failed to protect its workers but failed to protect its products, and was subject to then the largest beef recall in U.S. history and went bankrupt.

High-performing organizations, on the other hand, will encourage the reporting of hazards and near-miss events and reward rather than discipline workers for identifying hazards and solutions.

Data collection is not a paperwork exercise. It is a tool to identify problems and ensure that solutions work.

I worked in a hospital that tried to reduce needle stick injuries by installing boxes to dispose of the sharps in crowded rooms, where they put the boxes too high and the nurses got stuck when they went to put the sharps in. Had those nurses been prevented from reporting by being shamed or criticized, we would never have found out that in fact the boxes were a problem and been able to fix the problem.

During OSHA's comment period, APHA urged OSHA to recognize and discourage attempts to systematically suppress illness and injury reporting, and even carpenters have expressed concerns about loss of jobs from reporting.

I am going to close with two quotes from a researcher at Duke who found carpenters saying things like, "With my company, people are afraid to report injuries even when they get hurt because they will lose their jobs, not immediately, but in like two or three months when it blows over, you are fired." That is the concern we are grateful to OSHA for addressing.

[The statement of Dr. Sokas follows:]

AMERICAN PUBLIC HEALTH ASSOCIATION
For science. For action. For health.

Testimony of Rosemary Sokas, MD
on behalf of the American Public Health Association
"Promoting Safe Workplaces Through Effective and Responsible Recordkeeping Standards"
Subcommittee on Workforce Protections
Committee on Education and the Workforce
U.S. House of Representatives
May 25, 2016

Chairman Walberg, Ranking Member Wilson and members of the Subcommittee, my name is Dr. Rosemary Sokas, I'm an occupational medicine physician currently serving as professor and chair of the Department of Human Science at the Georgetown University School of Nursing and Health Studies. I have previously served on faculty in medical schools at the University of Pennsylvania and George Washington University, and at the University of Illinois at Chicago School of Public Health, and have served as Chief Medical Officer at both OSHA and NIOSH. I am currently a member of the governing council of the American Public Health Association (APHA), a diverse community of public health professionals who champion the health of all people and communities. In addition, I serve on the Advisory Board on Toxic Substances and Worker Health which advises the Secretary of Labor regarding its implementation of the Energy Employees' Occupational Illness Compensation Program Act.

My testimony today will cover 3 key points:

1. APHA supports updates in OSHA's recordkeeping rule as important steps towards preventing workplace illness and injury and reducing occupational health disparities;
2. APHA supports OSHA's efforts to improve data accuracy and transparency;

3. APHA supports OSHA's efforts to protect vulnerable workers from retaliation for reporting workplace illness or injury.

On behalf of APHA, I express our strong support for the Occupational Safety and Health Administration's final rule to improve tracking of workplace injuries and illnesses as well as for the updated reporting requirement for severe injuries that has been successfully implemented this past year.[1] The new rules will provide important information to help identify hazardous workplace conditions and prevent future injuries and illnesses. In addition, the new injury tracking rule will help ensure that injury and illness data is complete and accurate.
These regulatory updates require employers to report workplace fatalities, injuries requiring hospitalization, and those resulting in amputation or in loss of an eye to OSHA; and soon will require employers from establishments in certain high-hazard industries with 250 or more employees to provide OSHA electronic information to include the record of injuries and illnesses (300 log), the summary report (300A), and the information on the incident reports (301 form). Establishments in the same high-hazard industries that have between 20 and 249 employees will be required to electronically submit the summary report only. I note that employers have been required to complete and keep these forms since the enactment of the OSH Act. The update also clarifies the employer's responsibility to inform employees of their right to report work-related illness and injury and addresses illegal employer retaliation against workers for reporting a work-related injury or illness. OSHA will make select data elements available to the public, while excluding personally identifiable information.

[1] Occupational Safety and Health Administration website "OSHA's Recordkeeping Rule" https://www.osha.gov/recordkeeping2014/ [Accessed 5/21/16]

As public health professionals, we understand the critically important role of gathering accurate information to help identify hazards in order to develop and implement better health and safety protections. We further understand the importance of preventing retaliation against workers for reporting work-related illness and injury and to prevent vulnerable workers from experiencing job loss as a result of reporting an injury.

We applaud OSHA efforts to bring injury and illness reporting into the 21st century through an efficient web-based mechanism that allows employers to upload information they are already collecting. Concerns about widespread under-counting of workplace injuries and illnesses have been raised by the academic and public health communities.[2] The U.S. Government Accountability Office has issued several reports exploring the issue of under-reporting of injuries in poultry and meatpacking and throughout U.S. industry, and is preparing an updated report.[3,4] My experience interviewing workers in poultry processing impressed on me the widespread fear of job loss, and a sense of fatalism among many of the workers – they had grown used to living with pain, experiencing sleep disruption and limitations lifting children or performing routine household tasks; many saw no alternative to working until they were disabled. More recently, NIOSH has conducted a series of Health Hazard Evaluations in poultry processing plants to evaluate risk factors for musculoskeletal injuries. In one report evaluating a Maryland poultry processing plant, fully 34% of the workforce (64/191) met strict case definitions for carpal tunnel

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[2] Spieler EA, Wagner GR. Counting matters: implications of undercounting in the BLS survey of occupational injuries and illnesses. Am J Ind Med. 2014 Oct;57(10):1077-84. doi: 10.1002/ajim.22382.

[3] U.S. GAO Workplace Safety and Health: Safety in the Meat and Poultry Industry, While Improving, Could Be Further Strengthened GAO-05-96: Published: Jan 12, 2005. Publicly Released: Jan 28, 2005. http://www.gao.gov/products/GAO-05-96 [Accessed 5/21/16]

[4] U.S. GAO Workplace Safety and Health: Enhancing OSHA's Records Audit Process Could Improve the Accuracy of Worker Injury and Illness Data. GAO-10-10: October 2009 [Accessed 5/21/16]

syndrome, while only four cases had been recorded on the employer's OSHA logs during the previous four years. Twenty of the surveyed workers reported work-related illness or injury meeting OSHA criteria for recording in 2013; of these, 18 reported having notified a company representative (supervisor, manager, plant nurse, other). However, only one of these incidents was recorded on the employer's OSHA log during that year.[5] This level of underreporting of injury cases supports the GAO conclusions that false signals are being sent about work related injuries.

The goal of OSHA's updated recordkeeping approach is to prevent fatal and non-fatal workplace injuries and illnesses. Transparency helps improve data accuracy, and accurate information will be invaluable for employers, workers and public health researchers and others interested in identifying sources of injury and illness and evaluating the effectiveness of interventions to prevent injury and illness.

Public health professionals working at the state, county and urban levels rely on publicly available data for a variety of community health assessments; unfortunately, they have not had access to workplace illness and injury data, a problem this regulation addresses. Having access to specific, local illness and injury information will help public health departments and other state and local agencies to identify important problems, such as disabling back injuries among workers in particular nursing homes, to provide assistance to employers to identify appropriate solutions, and to evaluate the effectiveness of these solutions. Many worksites already make use of their internal data for quality improvement, with important results. As APHA has described in

[5] Ramsey JG, Musolin K, Mueller C. Evaluation of Carpal Tunnel Syndrome and Other Musculoskeletal Disorders Among Employees at a Poultry Processing Plant. NIOSH HHE Report No. 2014-0040-3232. https://www.cdc.gov/niosh/hhe/reports/pdfs/2014-0040-3232.pdf [Accessed 5/21/16]

several of its policy statements,[6,7,8] the use of this kind of feedback loop to improve health and safety is essential - "injury/illness prevention programs require accurate data collection to correctly identify hazards and determine whether remediation efforts have been successful."[7]

We are all familiar with the potential for attempted improvements to backfire, which is why the collection of accurate information is so important. For example, a hospital attempting to reduce needlestick injuries installed new sharps collection equipment in patient rooms that were already crowded with equipment, so the collection boxes were installed at a height too high for most nurses – they couldn't see when the boxes were full, and got stuck trying to dispose of sharps. Frontline feedback of course is critical here, but in fact the data demonstrating a spike in reported needlesticks first alerted the health and safety team to the problem, prompting root cause analyses that changed protocols for both location and routine collection of the containers. Subsequent data collection confirmed success.

Public health researchers in academia and in public health agencies can use a similar approach to evaluate policy interventions. State regulations addressing safe patient handling can be assessed by comparing baseline and follow-up data across the industry as well as by conducting comparisons with states that don't have the regulation. Similarly, the information will be

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[2] APHA Policy Statement 201314 Supporting and Sustaining the Practice of Quality Improvement in Public Health https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/14/09/11/supporting-and-sustaining-the-practice-of-quality-improvement-in-public-health

[7] APHA Policy Statement 20138 Support for Workplace Illness and Injury Programs https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/08/09/03/support-for-workplace-injury-and-illness-prevention-programs [Accessed 5/21/16]

[8] APHA Policy Statement 201513 Improving Availability of and Access to Individual Worker Fatality Data https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2016/01/12/13/33/improving-availability-of-and-access-to-individual-worker-fatality-data [Accessed 5/21/16]

valuable to municipalities that have adapted building codes designed to reduce safety hazards by allowing them to benchmark injury data. Industry associations or academic researchers interested in determining whether the switch to green cleaning practices improves health and safety for workers (through use of less hazardous cleaning agents or microfiber mops) would have access to information about skin and respiratory outcomes as well as other injuries across a large enough population to draw meaningful conclusions.

Equally important, individual employers or their associations will have ready access to reports of injuries that are common within an entire industry, but are not frequent enough to have alerted the individual employers in question. With easy access to these "sentinel case" data across an entire industry or community, employers will now be in a position to learn about these hazards and take action to prevent problems in their own establishments without having to wait for tragedy to strike.

Experience with OSHA's Severe Injury Reporting Program demonstrates the importance of a national approach to collecting more in-depth injury information. Employers now report not only fatalities but hospitalizations, amputations, and loss of an eye directly to OSHA. Because of this, new information offers much more detail than was available through other sources, and does so quickly while a timely investigation by OSHA or the employer is still possible. Grocery stores, which are only rarely inspected by OSHA, emerged unexpectedly as a leading site for amputations; additional available information helped pinpoint problems with both food slicing and meat grinding, leading to timely OSHA outreach and assistance efforts to improve safety,

and further identifying areas where engineering or other research may be needed[9]. As indicated above, a single, sentinel event may serve to alert the industry to an unrecognized hazard. It is important to share that information widely, as air transportation safety specialists do, if the information is to be useful for prevention. The larger dataset that is now possible through OSHA recordkeeping will make it possible to identify and find patterns in rare events, to expand our ability to identify hazards, and evaluate the effectiveness of proposed solutions, as well as to increase our understanding of the patterns of more common injuries and illnesses.

But the information has to be accurate. As Mendeloff and Burns have demonstrated, existing state-level data for non-fatal injuries is deeply suspect, with states experiencing higher workplace fatality rates reporting fewer non-fatal injuries.[10] Because fatality reporting is much more complete and accurate, such findings suggest two things: that some areas of the country experience greater levels of underreporting of non-fatal injuries and illnesses; and that these same areas experience higher fatality rates, possibly as a result of the failure to identify and count the less severe, non-fatal cases.

APHA members have documented workers from a variety of industries reporting that they receive demerits when they suffer an injury, or public criticism through safety and health investigations that focus on punishing the worker rather than identifying the cause, including threats of firing. Employers with such policies should be focusing instead on the hazard that

[9] Michaels D. "Year One of OSHA's Severe Injury Reporting Program: An Impact Evaluation" https://www.osha.gov/injuryreport/2015.pdf [Accessed 5/21/16]

[10] Mendeloff J and Burns R. States with low non-fatal injury rates have high fatality rates and vice-versa. Am J Ind Med. 2013 May;56(5):509-19. doi: 10.1002/ajim.22047. Epub 2012 Apr 2.

caused the injury rather than blaming their workers being injured. This kind of punitive policy is guaranteed to discourage injury reporting. When management refuses to hear bad news, problems are papered over and fester, and may lead to disastrous outcomes. The poultry processing plant in which I interviewed workers was part of a larger corporation that not only failed to protect its workers, but failed to protect its products, becoming subject to what was at the time the largest beef recall in U.S. history, which lead to bankruptcy. In the hospital example above, had the nurses been criticized for carelessness and discouraged from reporting needlesticks, the problem with the disposal boxes would never have been identified.

Instead of suppressing reports of illness or injury, organizations that value safety encourage the reporting of hazards and near-miss events, and reward workers for identifying hazards and solutions. These are the leaders in the American business community, who demonstrate management commitment to sustainability, transparency, and respect, engage frontline workers and their representatives, and benefit from safety professionals who are able to improve safety and health. These organizations want to be able to benchmark their performance against others in the industry, to set themselves higher goals.

As public health professionals, however, we focus on the gaps – workers whose employers do not have the skills or the values to promote safety and health, low-wage, high risk workers who sustain disproportionate injury and illness rates. Our job is to identify and reduce these disparities, and inaccurate information is an enormous stumbling block.

During OSHA's comment period, APHA urged OSHA to recognize and discourage attempts to systematically suppress injury and illness reporting and to provide clear guidance. We are pleased that the regulation takes a preventive approach to addressing this concern and believe these provisions are integral to the success of the rule and enormously important for the most vulnerable workers.

Because this information is so important, we would like to highlight challenges that result in under-reporting.

We remain concerned that many practices, policies, and programs present in workplaces today discourage workers from reporting injuries, illnesses, incidents, and accidents, obscuring the hazards that cause and contribute to injuries and illnesses. We note that suppressed reporting has occurred through aggressive return-to-work policies in which workers have been driven to work on the day of surgery or the day after, when still on narcotic medication for analgesia, in order to reduce the employer's DART rate of disabling illnesses and injuries. Or, in other instances, the systematic attribution of non-work related noise exposure as the sole cause of noise-induced hearing loss among workers in manufacturing settings has resulted in complete under-reporting of noise-induced hearing loss.

However, the retaliation that results in job loss or fear of job loss is the most harmful. Jobs are important not only for the health of society but for the health of the individual; research in the U.S. and elsewhere has demonstrated increased mortality from heart attacks, suicide and other causes associated with episodes of unemployment. Low wage, high risk workers in particular

fear job loss. Work-related illness and injury has long-term health and economic consequences, and research confirms that workers experience increased job loss following a work-related injury. Dr. Hester Lipscomb and others studied unionized carpenters and found surprising levels of fear in the construction industry.[11] Comments from interviewed workers included:

> "With my company, people are afraid to report injuries even when they get hurt because they will lose their jobs. Not immediately, but in like 2 or 3 months when it blows over, you're fired."

> "It was common knowledge at [XX construction] that most foremen and safety would push you to go to the hospital under your own insurance."

> "From experience with many companies, if you get hurt you're looking for a new job. We do not report injuries because we're threatened with discipline most of the time."

As a practicing occupational health physician, I frequently encountered patients who refused to have their employer notified of a workplace injury, creating an ethical dilemma – medical ethics dictate that the patient has the autonomy to determine their course of care, and I would respect that, although I would worry about the others in the same workplace, and would try to explain that OSHA had protections for them in place. This updated rule gives OSHA a must needed

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[11] Lipscomb HJ, Nolan J, Patterson D, Sticca V, Myers DJ. Safety, incentives, and the reporting of work-related injuries among union carpenters: "you're pretty much screwed if you get hurt at work". Am J Ind Med. 2013 Apr;56(4):389-99. doi: 10.1002/ajim.22128. Epub 2012 Oct 25.

enforcement tool to protect workers- especially low wage workers -- from illegal discrimination and retaliation and to address systematic policies and practices that result in such discrimination or discourage reporting. The record of the rule is replete with examples of workers being fired and retaliated against when reporting an injury, clearly underscoring the inadequacy of current protections. We applaud the language in OSHA's new rule that addresses illegal employer retaliation against workers for reporting a work-related injury or illness. It should pre-empt the situations my patients encountered and is essential if we are to expect accurate reporting.

In conclusion, OSHA's new rule will make workplaces safer and will save lives.

Chairman WALBERG. Thank you, Dr. Sokas. I will now recognize Mr. Sapper for your five minutes of testimony.

TESTIMONY OF ARTHUR G. SAPPER, PARTNER, McDERMOTT WILL & EMERY LLP, WASHINGTON, D.C.

Mr. SAPPER. Thank you, Mr. Chairman. Mr. Chairman and members of the subcommittee, I am testifying here about a concern of the rule of law. OSHA is behaving like an imperial bureaucracy. It is trying to do what simple logic indicates is impossible, to extend the statute of limitations by merely amending regulations.

In the Volks case, which I had the privilege of appearing in, the U.S. Court of Appeals for the D.C. Circuit held that the statute of limitations in the *Occupational Safety and Health Act* means what it says, that no citation may be issued following the expiration of six months after the occurrence of a violation. OSHA had been issuing citations against employers alleging violations as old as five years. The D.C. Circuit said OSHA could not do that, and it spoke unanimously on that point.

Nevertheless, OSHA is trying to get around that court decision by merely changing its regulations to state that an employer is under a continuing obligation when the Court of Appeals said there is no continuing obligation, you cannot do that.

The court specifically told OSHA that the idea of extending the statute of limitations by merely amending its regulations is absurd and madness, "There is truly no end to such madness."

Not only that, but the United States Supreme Court in the Toussie case held that questions of the statute of limitations are matters of legislative, not administrative decision. The statute itself, apart from the regulations, must justify what the agency is doing.

Most troubling of all, OSHA's proposal, which it has published in the Federal Register, would defeat the core purpose of the statute of limitations, to prevent the bringing of stale charges. Here, the charges would be as stale as five years.

By the way, in the Volks case, in the years since the alleged violations occurred, one of the recordkeepers had died, crippling the employer's ability to defend. OSHA's proposal ignores the effect of staleness.

The Committee should make clear to the administration that it may not do this. It is also troubling that OSHA has ignored the literal effect of its proposal. As Judge Garland's concurring opinion in the Volks case points out, it would "obligate an employer to constantly reexamine unrecorded injuries and illnesses."

The cost of constant reexamination of unrecorded cases, of every day reexamining whether or not an unrecorded wound should have been recorded would be staggering, $2 billion I estimate for just a single unrecorded case. Yet OSHA itself estimates that the benefit of its proposed regulation would merely be a 1 percent increase in the compliance rate.

The Committee may ask why OSHA thinks it may do such questionable things. There are two basic reasons, in my view. First, the Federal courts under the Chevron and Auer doctrines have told agencies that they, not the courts, are the authoritative interpreter of statutes and regulations.

This doctrine gives agencies enormous power, and in my experience, contributes to their sense of arrogance, for agencies almost never think they are unreasonable and they will not get deference.

Second, the Office of Management and Budget has an office called Information and Regulatory Affairs, OIRA. That office has been reluctant to question OSHA's representations that their proposed regulations are not significant within the meaning of Executive Order 12866.

That reluctance was particularly striking in this case because OSHA's reasoning on costs made no sense. It completely ignored the cost of what Judge Garland called "constant reexamination."

OSHA's proposal clearly met another criterion for examination under the executive order, that the proposal "raises novel legal issues." I submit that whether a mere regulation can effectively override a statute of limitations is certainly a "novel legal issue."

I thank the Committee, and I would be happy to answer your questions.

[The statement of Mr. Sapper follows:]

Full Written Statement of Testimony
before The Subcommittee on Workforce Protections of
the Committee on Education and the Workforce of the U.S. House of Representatives

May An Agency Extend A Statute of Limitations by Regulation?: OSHA's Attempt to Overrule *AKM LLC dba Volks Constructors v. Sec'y of Labor*, 675 F.3d 752 (D.C. Cir. 2012)

by Arthur G. Sapper
McDermott Will & Emery
Washington, D.C.
May 25, 2016

Mr. Chairman, I am Arthur G. Sapper, a partner in the OSHA Practice Group of McDermott, Will & Emery. I practice administrative law generally, but tend to specialize in appellate litigation and cases arising under the Occupational Safety and Health Act. I am also the former Deputy General Counsel of the Occupational Safety and Health Review Commission, and was for nine years an adjunct professor at Georgetown University Law Center, where I taught a graduate course in occupational safety and health law. I thank the committee for permitting me to place this written statement into the record.

Background

Since the earliest day of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (OSH Act), the Occupational Safety and Health Administration (OSHA) has required employers to keep logs of certain work-related injuries and illnesses. In 2001, OSHA substantially overhauled those regulations (they are in 29 C.F.R. Part 1904), but their basic contours remained much the same.

The statute of limitations in the OSH Act, 29 U.S.C. § 658(c), states that "[n]o citation may be issued … after the expiration of six months following the *occurrence* of any violation." (Emphasis added.) Although the OSH Act's limitation period is six months, OSHA took the position that it could cite an employer for failing to record a case on its log, even if the failure

occurred years before. It reasoned that, because employers were required to retain their logs for five years, they could be cited throughout that five-year retention period.

The *Volks* Case

In late 2006, OSHA issued a citation to a small- to medium-size company called Volks Constructors, which I had the privilege of representing. Despite the six-month statute of limitations in the OSH Act, OSHA alleged recordkeeping violations going back as much as almost five years. Not only were the cases long stale, but during those five years one of Volks's recordkeepers died, making it difficult for the company to defend itself.

We appealed to the Review Commission, arguing that the OSH Act's statute of limitations requires an "occurrence" of a violation within the limitations period and that there had been no such "occurrence." The Commission, in a 2-1 decision that used frail logic, held that the recordkeeping violations continued through the five-year retention period.

The D.C. Circuit unanimously reversed. *AKM LLC dba Volks Constructors v. Sec'y of Labor,* 675 F.3d 752 (D.C. Cir. 2012). The court, speaking through Judges Henderson and Brown, held the statute is "clear and the agency's interpretation unreasonable." It reasoned that, because the OSH Act's statute of limitations used the phrase "*occurrence* of a violation" and nothing had *occurred* within the six-months limitation period, the citations were untimely. "[T]he word 'occurrence' clearly refers to a discrete antecedent event—something that 'happened' or 'came to pass' 'in the past.'" The court noted that, under OSHA's position, "the real statute of limitations for recordmaking violations [would be] the length of the agency's record retention period plus the limitations period Congress proposed—here, five years beyond the six months" in the statute. This would "diminish[] [the limitation period] to a mere six-month addition to whatever retention/limitations period [OSHA] desires. We do not believe

Congress expressly established a statute of limitations only to implicitly encourage [OSHA] to ignore it."

The majority opinion also addressed the prospect that OSHA might try to change the result by amending its regulations. It found that that would have "absurd consequences": "Under [OSHA's] interpretation, the statute of limitations Congress included in the Act could be expanded *ad infinitum* if, for example, [OSHA] promulgated a regulation requiring that a record be kept of every violation for as long as [OSHA] would like to be able to bring an action based on that violation. There is truly no end to such madness. If the record retention regulation in this case instead required, say, a thirty-year retention period, the Secretary's theory would allow her to cite Volks for the original failure to record an injury thirty years after it happened." "Nothing in the statute suggests Congress sought to endow this bureaucracy with the power to hold a discrete record-making violation over employers for years ...." 675 F.3d at 758-59.

A concurring opinion by Judge Merrick Garland, however, seems to have given OSHA the impression that OSHA might, by merely changing the wording of its regulations, alter the result in *Volks*, regardless of the staleness that would ensue. Judge Garland found that the regulations as then worded "do not impose continuing obligations that may be continually violated." As the regulations are written, "the requirement to update a stored log does not obligate an employer **to constantly reexamine injuries and illnesses."** 675 F.3d at 760 (Garland, J., concurring in the judgment) (bolding added.) (I will return to this bolded language later in my testimony.)

At this point, OSHA could have sought panel rehearing; *en banc* rehearing by the full court; *certiorari* from the Supreme Court; or a statutory amendment from Congress.

OSHA's Response: Change The Regulations

OSHA chose none of those alternatives. Instead, in an astounding display of bureaucratic arrogance, it proposed to alter the result in *Volks* by merely changing its regulations. See "Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness," 80 Fed. Reg. 45116 (July 29, 2015). It proposed to change, for example, 29 C.F.R. § 1904.29(b)(3) to state that the employer is under a "continuing obligation" to record and that, "This obligation continues throughout the entire [five-year] record retention period ...." This, it believes, will avoid the *Volks* decision.

The Problems with OSHA's Proposal

1. OSHA's proposal will defeat the purpose of the statute of limitation; for example, it will result in the same stale prosecutions that the limitations period was intended to avoid. "[T]he basic policies of all limitations provisions [are] repose, elimination of stale claims, and certainty about a plaintiff 's opportunity for recovery and a defendant's potential liabilities." *Rotella v. Wood*, 528 U. S. 549, 555 (2000). OSHA's proposal would defeat all three of these purposes.

Take staleness. Under OSHA's proposal, citations could rest on facts that would be stale by years, for no new event would have occurred within the limitations period. We know this because OSHA has told us so. An OSHA attorney responded as follows to questions by a member of the Advisory Committee on Construction Safety and Health (ACCSH), which was required to review a draft of the proposed amendment:

> MR. CANNON: ... [T]his continuing duty would apply even if an employer had not received any new information that a recordable injury or illness had occurred, right?
>
> MS. GOODMAN: That's correct.
>
> MR. CANNON: And so the continuing duty would be triggered by the same information that would have triggered the original duty to record, correct?

> MS. GOODMAN: Right. Ultimately, the employer has a duty to assess each case and determine whether it's recordable, and if they don't do that on day one, then the obligation continues.
>
> MR. CANNON: And so, say, for instance --I'm going to use a hypothetical situation here. Say an employer mistakenly fails to record an injury or illness within the seven-day period, as required. They don't get any new information that would suggest that this was a recordable injury or illness, and nothing else ever happens with that particular case. So, based on what you're saying, is that they could be cited ... during that five-year retention period ... for ... missing that initial seven-day period.
>
> MS. GOODMAN: That's correct.

Amended Transcript, Advisory Comm. on Constr. Safety and Health, at pp. 110-111 (Dec. 4, 2014) (www.osha.gov/doc/accsh/transcripts/accsh_20141203_amended.pdf). So, according to OSHA's lawyers, an employer could be cited even if there were no new facts—no new recordability information had been received, and nothing else had happened within the limitations period. There would be only same facts known and the same mistake made, years before, during the original seven-day recording period.

The proposal's preamble argues that staleness would not occur because an employer need only examine his medical records to see if a case is recordable. That is demonstrably untrue, for many facts crucial to recordability are not recorded there. For example, one of the most common kinds of recordable injuries involves "restrictions"—a physician or employer instruction that an employee not perform a certain activity that he regularly performs at least weekly (for example, climbing a ladder). § 1904.7(b)(4)(ii). So to determine whether an employee had been "restricted," the employer must know whether the task was regularly performed at least weekly. That detail is never stated in medical records and it is often impossible to reconstruct nearly five years later. For example, rare is the welder who can recall nearly five years later how often he climbed a ladder on a particular job. So there is nothing to OSHA's non-staleness argument.

2. OSHA's proposal will still violate the statute of limitations, and thus result in pointless and confused litigation. The proposed amendments will be pointless because they

will, after much confused and pointless litigation, fail. The courts are very highly likely to follow the *Volks* court's holding that the language of the statute is "clear," that there must be an "occurrence" within the limitations period, and that, inasmuch as nothing would have "occurred" within the limitations period, the statute of limitations will have run.

Moreover, the courts are unlikely to tolerate OSHA's arrogant attempt at regulatory hocus-pocus—*i.e.*, to evade a statute of limitations by merely changing the wording of a regulation. Not only will the courts likely quote the "madness" language of the *Volks* court quoted above but they may well point to the Supreme Court decision in *Toussie v. United States,* 397 U.S. 112, 121-22 (1970), which held that, because "questions of limitations are fundamentally matters of legislative not administrative decision," "the statute itself, apart from the regulation, [must] justif[y]" any continuing violation holding.

Until a court issues such a decision, however, the Nation's employers will be pointlessly incurring lawyers' fees to defend themselves against stale and unlawful charges. They will pay the price of OSHA's bureaucratic arrogance.

3. If the proposal is not a sham—an empty form of words—it will impose huge and unjustifiable costs on the Nation's economy. One of the greatest problems with the proposal, and the one that should be of concern to this Committee, is that, OSHA's proposal would, if read literally, impose huge and unjustifiable costs on the Nation's economy.

As Judge Garland's concurring opinion in *Volks* stated, for a regulation to impose a continuing duty to record, it must "obligate an employer to *constantly reexamine* [unrecorded] injuries and illnesses" to determine whether they should have been recorded. (Emphasis added.) But that cost would be massive. Speaking conservatively (for example, assuming a daily duty to re-examine), such a daily reconsideration duty would cost the economy almost two billion

dollars for a ***single*** unrecorded case.[1] The costs pertaining to all unrecorded cases throughout the Nation would be astronomical.

OSHA has so far refused to own up to that burden. The preamble to the proposal included as costs only the cost of recording a case *once* its recordability is spotted.[2] It completely ignored the duty of daily reconsideration. So OSHA wants to have its cake and eat it too: It wants the regulations to *say* that they impose a continuing duty to record but it refuses to acknowledge the massive cost of that duty. OSHA ignores the simple truth that Judge Garland saw: A regulation that imposes a continuing duty to record necessarily imposes a continuing duty to "***constantly*** reexamine" past injuries.

If OSHA owned up to this, it would have to acknowledge that its proposal would impose a massive burden on American employers—and for little gain, what OSHA itself estimates to be but a one percent increase in compliance. OSHA would have to acknowledge that its proposal violates section 8(d) of the OSH Act, which requires that, "Any information obtained by the Secretary... shall be obtained with a minimum burden upon employers, especially those operating small businesses. Unnecessary duplication of efforts in obtaining information shall be reduced to the maximum extent feasible."

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[1] Assuming that daily reconsideration would take one minute per unrecorded injury (a conservative assumption), then repeating that effort every day for five years would require every establishment in the Nation to devote up to 30.3 man-hours to the task [((365 x 4) + (365-7) = 1818 days) x 1/60 man-hrs/case/day = 30.3 man-hours/case]. Factoring in what OSHA estimated in 2001 as the 1,365,985 establishments covered by Part 1904, and the $46.72/man-hr. labor-time cost used in the current proposal, then the cost to the economy of daily reconsideration over the five-year retention period of a ***single*** unrecorded injury per establishment would be up to 41,389,346 man-hours (1,365,985 establishments x 30.3 man-hours/case x 1 case/establishment) x $46.72/man-hr. = $1,933,710,222, *i.e.*, almost two billion dollars.

[2] OSHA's "Preliminary Economic Analysis" (80 Fed. Reg. at 45128-45129) states that, "The proposed revisions impose no new cost burden" for "OSHA estimated the costs to employers of these requirements when the existing regulations were promulgated in 2001, see 66 FR 6081–6120, January 19, 2001." 80 Fed. Reg. at 45128 cols. 2-3. The cited preamble pages from 2001 estimate only the one-time cost of recording an injury, not the cost of daily reconsideration.

One dodge that OSHA might present to this Committee is the assertion that, if an employer once considers recordability, the employer need not consider it again. OSHA's attorneys attempted to give this impression to the Advisory Committee on Construction Safety and Health. See ACCSH Tr. 116-117.[3] The suggestion was dishonest double-talk, for the wording of the proposed amendments draws no such distinction. The proposed amendments unqualifiedly state that one must "record" and that this obligation continues to the end of the retention period, unless one records—*not* unless one records or has *once considered* whether the case is recordable. See, *e.g.*, proposed § 1904.29(b)(3). To smoke OSHA out, the Committee might consider asking whether OSHA would agree to actually write into the proposal the distinction it suggested to the ACCSH committee. For example, proposed § 1904.29(b)(3) might have this language: "This obligation continues throughout the entire record retention period described in § 1904.33 *until the case is correctly recorded or until the employer has once considered whether the case is recordable, whichever occurs first*." (New language italicized.)

OSHA will never agree to such language, for it would prevent OSHA from evading the limitations period. An employer could defeat a citation by showing that he had previously considered recordability once, not continually, *even if his conclusion was wrong*.

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[3] Tr. 116-117 states:

> MR. PRATT [ACCSH committee member]: Okay. ... Let's say that there is a recordable case by the employer and he reaches the wrong conclusion about the recordability of that particular case, and he did not record by the eighth day.... You're saying that the employer would have to consider re-recordability again, let's say, on the ninth day.
>
> MS. GOODMAN: That is not what we're saying.
>
> * * *
>
> MR. PRATT: Well, then what are you saying?
>
> MS. GOODMAN: ... [I]f you do not do the assessment, if you do not evaluate the recordability of the case on day one, you have an ongoing duty to evaluate the recordability of that case and make a determination. We are not saying that determination needs to remade on every day during the retention period.

In sum, OSHA's proposal is either a sham—an attempt, through an insincere form of words, to effectively extend a statute of limitations without owning up to the consequences of its words—or an unjustifiable imposition of massive burdens on the economy for little gain.

For further information on this topic, I respectfully refer the Committee to rulemaking comments I filed with OSHA on October 27, 2015, on behalf of the National Federation of Independent Business; the Dewberry Companies; the United States Beet Sugar Association; the North American Meat Institute; and AKM LLC dba Volks Constructors, which I have attached as an exhibit.

The Reasons for OSHA's Behavior

The Committee might ask, why does OSHA behave as if it were an imperial bureaucracy? There are two basic reasons:

The first reason is that the federal courts have effectively encouraged such behavior. They have held in cases such as *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), and *Auer v. Robbins*, 519 U.S. 452 (1997), that, if a statute or regulation is ambiguous, the courts must follow the agency's view so long as it is merely "reasonable," *even if the court concludes that the agency's view is wrong*. Agencies now happily see ambiguities everywhere, and almost never conclude that their positions are unreasonable. They are thereby emboldened to force the citizenry to shoulder the massive cost of proving their view unreasonable. Given the difficulty of proving an agency unreasonable (even when it *is* unreasonable), that is always a good gamble for the agency. As a result, an atmosphere of arrogance and lawlessness thrives among federal agencies. For more on this subject, I refer the Committee to—

- Materials supporting the "Separation of Powers Restoration Act of 2016," H.R. 4768 and S. 2724;

- A. Sapper and M. Baker, "Why Federal Agencies Run Amok," Forbes Online (April 14, 2014); and
- Prepared Statement and Testimony of Arthur G. Sapper before the Senate Subcommittee on Employment and Workplace Safety (May 10, 2005).

The second reason why OSHA behaves with such arrogance is that the Office of Management and Budget (through its Office of Information and Regulatory Affairs (OIRA)) appears to uncritically accept its statements that proposed regulations would not have a "significant" effect on the economy. As a result, OIRA did not review this proposal and, apparently, will not review the final rule before it comes out. This is inexcusable.

The reasoning on costs in OSHA's economic impact statement is so transparently illogical that even a casual analysis of it should have caused OIRA to question OSHA's representation that the proposal would not "[h]ave an annual effect on the economy of $100 million or more," one of the key criteria in Executive Order 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993).

Moreover, the proposal met another key trigger in the Executive Order for OIRA review—that the proposal "[r]aise[s] novel legal ... issues arising out of legal mandates." Not only would OSHA's proposal effectively overrule a court decision on the meaning of a *statute* that the court has already called "clear," but it would do so by merely amending a *regulation*. That obviously raises a "novel legal issue."

As a result of these failures by OSHA and OIRA, a final rule that would pointlessly drag employers into court and impose massive burdens on the economy is now looming on the horizon. The Committee might inquire into how OIRA review procedures should be changed to avoid this specter.

Thank you, and I am happy to answer any questions that you have.

Exhibit: Comments by A. G. Sapper, in Docket No. OSHA-2015-0006, "Clarification of Employer's Continuing Obligation To Make and Maintain an Accurate Record of Each Recordable Injury and Illness" (filed Oct. 27, 2015), available at https://www.regulations.gov/contentStreamer?documentId=OSHA-2015-0006-0014&attachmentNumber=1&disposition=attachment&contentType=pdf

Chairman WALBERG. Thank you, Mr. Sapper, for your testimony. Now, I recognize the gentleman from Minnesota, the Chairman of the full Committee, Mr. Kline, for his five minutes.

Mr. KLINE. Thank you, Mr. Chairman. Thank you to the witnesses for being here, excellent testimony.

Ms. Sprick, you have a fascinating story, a very successful business. I have a note here that says Sprick Roofing has worked for more than five years without a time loss accident. You tell us you have a safety incentive program, and I would assume that this program is contributing to your company's really successful safety record.

Could you expand for us on how you think OSHA's actions would hinder your efforts to continue to implement this successful safety program?

Ms. SPRICK. Thank you. Our safety program, safety incentive program, is based on following the rules and regulations OSHA has outlined, as well as beyond that, things that we have identified through our internal incident reports, to track and look at trends of potential injuries that could occur.

I am afraid that if OSHA takes away those incentives, then my employees will not—incentivizing positive behavior is basically what we are doing. I am afraid taking that away will just give our employees the impression that it is not as important.

Not only do we do safety incentives, we do quality control incentives, we do all across the board. We do several different things to incentivize our employees to do the right thing and reward their positive behavior.

I am afraid since safety is probably the most important of anything we do, taking away that incentive and that impression that it is not important is concerning to me.

Mr. KLINE. Thank you. Mr. Chairman, I yield the remainder of my time to you.

Chairman WALBERG. Thank you, Mr. Chairman, I appreciate that. I certainly have plenty of questions I could ask, so thank you.

Let me follow on that, Ms. Sprick. Recording an injury is not preventing an injury. I think we could agree on that.

Ms. SPRICK. Yes.

Chairman WALBERG. Can you explain the safety protocols your company employs to prevent workplace injuries for us?

Ms. SPRICK. What we do to prevent injuries?

Chairman WALBERG. Yes, the protocols that you have in place, what are those?

Ms. SPRICK. Well, we do a safety orientation. Every job has a particular safety plan that we analyze on every job before we go out, so we can be sure we have all our bases covered. We do safety meetings daily, and also for each job, and then we also have job site inspections. Our safety director goes out and does our own internal inspections during the course of the work that is being done to check and make sure that everything we discussed to be done is happening according to plan.

Chairman WALBERG. This is done daily with the employees on the site or back at the office?

Ms. SPRICK. The job site inspections or the safety plan?

Chairman WALBERG. The safety plan, the safety instructions.

Ms. SPRICK. It starts at our office. It actually starts at the bidding process when we look at a job and we look at the particulars of a job, look at what needs to be done, and then from there once we get the job, it starts at the office with the crew before they go out. Once they go out, they are inspected on the job as well.

Chairman WALBERG. Thank you. Mr. Sapper, your testimony highlights the Volks decision, overturning OSHA's attempt to issue citations for an alleged violation of *Occupational Safety and Health Act* more than six months old, as you indicated.

Does OSHA have the authority to overturn a court ruling through a rulemaking?

Mr. SAPPER. No, Mr. Chairman, it does not, and I will be happy to explain why. The Supreme Court has already said in the Toussie case that questions of limitations are statutory questions, not regulatory ones. As I said before, the D.C. Circuit in the Volks case said that OSHA's attempt to manipulate the result by merely changing its regulations would be "madness" and "absurd." OSHA—

Chairman WALBERG. Madness and absurd?

Mr. SAPPER. Madness and absurd. Now, in fairness to OSHA, the court was talking about a slightly different amendment to the regulations, but these two amendments would have the same effect.

Chairman WALBERG. Same principle.

Mr. SAPPER. Yes, they would have the exact same effect. In principle, they would still be absurd and madness.

Chairman WALBERG. Let me ask, why do you believe OSHA is relying on the concurring decision rather than majority opinion in the rulemaking process? Does holding of the case come from majority opinion or concurrence?

Mr. SAPPER. I think the agency understands that the majority opinion of the court is against its position, but it is using the concurring opinion or it is using what it thinks the concurring opinion says.

The concurring opinion said regulations do not permit OSHA to do what it is doing. OSHA thinks, okay, then we will just change the regulations. What OSHA ignores is Judge Garland's very astute observation that if OSHA tried to do that, it would be imposing a duty of constant reexamination, and OSHA has refused to own up to that effect.

In fact, before the Advisory Committee on Construction Safety and Health, when that very question was asked, OSHA said no, no, no, there is no duty of constant reexamination. Well, I am afraid the agency is being inconsistent on this point. It is not owning up to the actual effect of what its proposal would mean.

Chairman WALBERG. Thank you. That was Judge Garland's opinion. I need to move on. I now recognize the Ranking Member, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. Mr. Sarvadi, you indicated in your testimony on page 11 that nothing in the OSH Act gives OSHA the authority to publish workplace injury and illness data, is that right? Is that your testimony?

Mr. SARVADI. I do not believe I quoted that section but, yes, it does give OSHA the authority to publish data on workplace injuries and accidents in aggregate form. It does not address the question of disclosing individual employee conditions.

Mr. SCOTT. You say it is a clear usurpation of legislative power. The act in Section 8(g) says, "The Secretary of Labor and the Secretary of Health and Human Services are authorized to compile, analyze, and publish either in summary or detailed form, all reports or information obtained under this section.

The Secretary and the Secretary of Health and Human Services shall each prescribe such rules and regulations as he may deem necessary to carry out their responsibilities under this act, including rules and regulations dealing with inspection of employer's establishment."

The language is "publish either in summary or detailed form," what does that mean?

Mr. SARVADI. To me it means summary form, meaning total accident statistics or whatever the statistics they collect. I believe it refers to the BLS survey, and it reflected at the time the system that was in place that was operated by the National Safety Council. There was some criticism of it by members of Congress at the time, but what Congress was trying to do was improve on what had been the system in place. Nowhere were individual company or establishment data being published by the National Safety Council—

Mr. SCOTT. Just to remind you, the words are "in summary or detailed form, all reports or information obtained under this section."

Is there any information that is required to be published under this rule that is not already being collected?

Mr. SARVADI. I do not believe it is, but it is not being provided to OSHA in the detail they are talking about. It is available to OSHA in an inspection, and it is the first thing that inspectors look at when they come through the door.

Mr. SCOTT. But the information is already being collected. Let me ask another question. Ms. Sokas, can you indicate why it is important to collect this data and what data is not being reported because of threats?

Dr. SOKAS. I am glad to answer that question. I would just like to briefly state—

Chairman WALBERG. Use your microphone.

Dr. SOKAS. I would just briefly like to say, if I might, that the proactive program that Ms. Sprick discussed is actually the kind of incentive programs that the GAO report was positive about in 2012. The kind that it was criticizing were the ones where people got bonuses based on not reporting illnesses, that kind of thing. This is exactly the kind of thing that is supposed to happen.

The question about the suppression of information through punitive responses to reporting a hazard or reporting an injury shows that—as an example, when I did chart review of people who had, unfortunately, died from being in a confined space with solvents or some other kind of chemical exposures where they were overcome.

Almost inevitably we would find examples in that person's life where they had previously either passed out at work or complained at work, and the early adverse information was not taken seriously, was not acted upon. People were just kind of revived and resuscitated and sent back into the same location, and that is when they died.

This is the kind of thing that we hope to prevent by having the information acted upon as opposed to suppressed.

Mr. SCOTT. Is this level of information disclosed now under the mine safety laws?

Dr. SOKAS. Absolutely.

Mr. SCOTT. Have there been any frivolous lawsuits or any adverse effects?

Dr. SOKAS. Not to my knowledge. You can go online for MSHA and find all kinds of detailed information equivalent to or more than what OSHA is now going to be publishing. That information is readily available and has been used by MSHA, which is trying to deal with—as you can imagine, the mining industry is among the most hazardous—they are able to actually target effectively and work with employers. They have had substantial success with that.

Chairman WALBERG. I thank the gentleman. I recognize the gentlelady from New York, Ms. Stefanik.

Ms. STEFANIK. Thank you, Mr. Chairman. Thank you to our witnesses for your testimony today. Data, as we know, has become increasingly present in our everyday lives, from data at worksites to Fitbits, which I happen to not be wearing mine today. We are exposed to endless quantifications of what we do on a daily basis.

This expansive collection of data can be extremely helpful when it is utilized with purpose and context to achieve a needed goal. We must carefully consider the implications on our Nation's small businesses when this collection solves no particular problem.

As we know, it serves no purpose to collect the data just for the collection sake, when we should be focusing our efforts on preventing workplace accidents in the first place.

Ms. Sprick, in your testimony you indicate that the data the department is requiring from you lacks important context and, therefore, will not help you as an employer improve worker safety.

Do you have suggestions for improving the department's data collection practices, and how might the Federal Government better collect context along with the data?

Ms. SPRICK. Well, if they are just collecting the injury and illness side of things, it is just telling one side of the story, and they are posting that information, and it gives absolutely no context or information about how it occurred, the circumstances, the size of business, the number of hours worked, the part that will give meaning to that information.

If they are just posting that information only and you are comparing company A to company B and they each have 2 injuries reported, the exact same injuries, you do not know that company A has 100 employees and company B has 2. Company B is the worse company of the two, but you do not have that context to be able to evaluate that.

To me, that is, one, unfair, and it is not showing the real story, and the other part of it is that I will have to be trying to defend that if I am even given the opportunity, if it would go that far. They may just look at that information and say okay, that is all I need to know and move on.

Ms. STEFANIK. Thanks for the comments. I think continuing to get feedback on the context, to make sure this data is viewed,

whether it is the size of the business, whether it is the hours worked, is extremely important. Data is one thing, but the context in which the data exists is extremely important.

Ms. SPRICK. The circumstances as well. If one of my employees slips and falls on a sidewalk, it will be listed as a fall. The assumption will be made because I am a roofing contractor that person fell off the roof. That kind of information would be helpful.

Ms. STEFANIK. Thanks for those comments. I yield back. I yield to Mr. Walberg.

Chairman WALBERG. Thank you. I see good time on the board. Thank you. Ms. Sprick, let me go on with some practical examples coming from your experience. What are some specific actions that OSHA could undertake if they were willing to help your company further improve on its safety program? The program you defined a bit, how could they help?

Ms. SPRICK. I can use the example just in Oregon. We have a very good and collaborative relationship with the Oregon compliance officers in our area. We work with them continually.

Sometimes there is a difficult building configuration that we want to make sure we are following procedures and we are interpreting the regulations appropriately. We bring them in. We set up a safety plan and get their suggestions and work with them.

It is more of a collaborative effort that I feel in the big picture will help everyone in the long run. What I think really should happen is they should set up a task force with the stakeholders that are involved, having to deal with these regulations, bring in the trades, bring in the government, National Safety Council.

People that have real life experience and know what it is like out in the real world, they are just not sitting around a table and coming up with these ideas and thinking this is a good one on paper, when in reality, there is no reality.

I think that is the place they really need to put their efforts, and also look at employers and incentivize and reward those companies that are doing the right thing versus being punitive and punishing the good ones for the few bad apples that are out there.

Chairman WALBERG. Mr. Sarvadi, OSHA's public reporting regulation also appears to create new whistleblower protections. Did OSHA publish this in the proposed regulatory text, and were stakeholders given an opportunity to evaluate and comment on this provision?

Mr. SARVADI. Unfortunately, Mr. Chairman, they did not. It was added as a supplemental proposal, but they did not include anything about the language that would be used or give people an adequate opportunity to reflect on it.

I would point out that they already have sufficient authority under section 11(c). The difference is under 11(c), a complaint initiates the investigation and OSHA's actions. What OSHA is trying to do is create an opportunity for them to issue a citation when they think they have a retaliation claim without waiting for the complaint.

I do not know if that is a good thing or a bad thing, I think that is what the hearings and comments would have addressed if we had the opportunity to do so.

Chairman WALBERG. The gentlelady's time has expired. I now recognize Ms. Wilson, Ranking Member, for her five minutes of questioning.

Ms. WILSON. Thank you. First of all, let me thank you, Dr. Sokas, for wearing red today. This is our "Wear Red" Wednesday. Thank you so much.

Your testimony noted that the Government Accountability Office has issued several reports exploring the issue of under-recording of workplace injuries and illnesses. One GAO report examined employer and worker pressure on health care providers to downgrade severity of injuries in order to ensure that the injury would not be classified as an OSHA recordable incident.

What did GAO find, and is this something you have encountered?

Dr. SOKAS. Thank you. Yes, I am an active member of the American College of Occupational and Environmental Medicine. It has been on the radar screen for our members for years.

The GAO found that over half of the healthcare professionals who were surveyed had experienced some pressure from management to downgrade the treatment being offered in a particular instance in order to make it not recordable, use Steri-Strips, not sutures, that kind of thing, to the point where they felt uncomfortable. Almost half felt the same pressure from the employees.

As a practicing physician, I felt the same thing, where the workers are too afraid to have either a workers' comp case filed or to have anybody call their worksite, because they are afraid of being fired, of punitive responses.

The pressure from both the workers and from the employers has impacted the practice of occupational medicine and occupational health nursing and other people as well, clinicians in general.

I did also want to mention that I think the detailed information on context for reporting is available already in the OSHA Form 301, and that is what the larger companies are now being required to submit. The fact that the smaller ones are not being required to submit it, I do not think it would be difficult to submit it voluntarily if people wanted to do that, to address that one concern that was raised.

Ms. WILSON. GAO issued a report in April 2012 and called upon OSHA to clarify its guidance on safety incentive programs. Did GAO find that safety incentive programs that are tied to low injury and illness rate may lead to underreporting, and how has OSHA accomplished this in its rule?

Dr. SOKAS. Exactly. That is exactly the distinction between the good incentive programs that encourage people to recognize hazards and do something about them and give training, and the bad programs that are based on a single number that encourages people not to report the injury, not to report the illness because somebody is going to lose money in their bonus or somebody will lose the ability to participate in a positive manner.

OSHA in this report, in this rule, is very carefully making the distinction between those two kinds of incentive programs and saying the ones that have the effect of chilling, of reducing people's willingness to report, are the ones that they are going to look at carefully. The other incentive programs that promote healthy rec-

ognition of hazards and solutions to them, they obviously encourage.

Ms. WILSON. It appears as if opponents of this rule contend that underreporting is not systemic, it is not a systemic problem in American workplaces.

They also claim OSHA has been unable to establish that employer policies, such as safety incentive policies, drug testing, or disciplinary policies in any way discourage employees from reporting injuries and illnesses. Is OSHA chasing a non-existent problem? What do credible studies tell us about this?

Dr. SOKAS. There are numbers of studies from the academic literature and from the GAO reports that you mentioned, from the Bureau of Labor Statistics itself, that show that systematically there is underreporting in OSHA illness and injury logs and in BLS data itself.

It varies depending on the methods that are used, but if you go to a workplace and interview workers, or if you take any survey where you interview people and ask the questions, you will always find under-recording in the OSHA logs for a variety of reasons. Either people do not want to report to their supervisors or the supervisors do not want to record it, for many different motivations, but the information—there is always a difference there in all of the studies.

Ms. WILSON. Thank you.

Chairman WALBERG. The gentlelady's time has expired. Now, I recognize Mr. Pocan for your five minutes.

Mr. POCAN. Thank you, Mr. Chairman, I appreciate it, and thank you to the witnesses. I am usually not too much at a loss of words at a hearing, but this one, I have to admit, I am a little surprised that there is opposition to this rule specifically. I know it was mentioned we feel like we are back to the 1930s. I was thinking more a little before that, the turn of a century, when workers had absolutely no rights and we did not record these sort of things, and there was no recognition whatsoever.

When I hear people talking about OSHA and the "madness" and the "arrogance," and how after six months something is stale—losing a limb is not stale after six months, losing a family member is not stale. Those words seem to drip in a little bit of arrogance. I do have a little bit of non-understanding on that.

I do have one question, Mr. Sarvadi. I know your association is largely funded by the U.S. Chamber and NAM, and both of those organizations opposed the creation of OSHA in the early 1970s. Do those organizations still oppose the creation of OSHA?

Mr. SARVADI. I do not recall they opposed it, and I do not know what their position is—

Mr. POCAN. They did. No problem, thank you. I will reclaim my time.

Mr. SARVADI. I would say—

Mr. POCAN. I reclaim my time, sir. Thank you.

Mr. SARVADI. If I could—

Mr. POCAN. No, no. Actually, I am reclaiming my time, thank you. The problem is both those organizations did. I understand they have a beef with the overall concept.

You said it is not their job to save lives. I looked at the mission of OSHA very clearly. I think the public expects—if you read the mission, it is to make sure you are saving lives. Of course, that does happen to the employer, and I am most sympathetic to Ms. Sprick, because you list your concerns. I am a small business owner as well.

I look at the things you brought up, and I think what came out of the hearing—sometimes people like to create fear among small business owners, and they come here—I am just really glad we have a small business owner. Usually, they just bring us lawyers, and they all get paid to say stuff. You and I are just trying to make sure we are employing people and doing a business.

Some of the things you brought up, I think, did come out around the inadvertent public disclosure for individuals, that information will not be collected, so we do not have to worry directly on that.

On the context of information, if you are over 250 employees, you are going to have that incident where you write down if it was a fall but there is going to be more written about it, so you are going to have the broader context. If you are under 250, which I would assume are most of the roofing association's members, at least in my district, they are not 250 employees or more, it is not even mentioned, a fall. It is very much days loss data, a simple line listing that is published.

I do not think you are going to have that problem that is out there. For the bigger employers, they will have the rest of the context of information put there, and I think that is going to be very helpful.

I believe there was a concern about the misuse, harmful to employers. I understand what you are saying, but at the same time, I look at the comments from the former head of Alcoa, who talked about why this has been good for his business.

In fact, he said when they had someone who passed away, that made them really look at what they did, and during a period of 13 years that he was there, they dropped the rate from 1.86 to .20 loss rate, and their market value jumped from $3 billion to $27 billion, and their net income went from $200 million to $1.48 billion. I think the context of the person's comment is it actually made them focus on things.

If I go to New York City and I want to have Thai food, I see two Thai restaurants, one has an A and one has a C, unless they have really, really good Thai iced tea that I know is worldwide at the C, I am probably going to the A. That is part of why we collect that information.

I think many of your concerns will probably be more addressed, and I think the fear factor is out there.

I do have a very specific question for Dr. Sokas. You started talking about the one example with the nurses. This has been collected now for a year. Can you provide how this rule is having a difference? Do you have some examples that you can offer? I think that might be helpful in the full context.

Dr. SOKAS. There is a great report that OSHA put out, David Michaels wrote, about what has happened with the 10,000 serious cases that the Ranking Member already alluded to. One of the companies, for example, had hospitalization for a heat stress injury,

and then they went back and they decided to change their rest breaks. They had water available. They started installing fans. It was a waste company. Another company had the problem with the amputations, as you heard. What they did was they went back and installed guards.

The goal of all of this is to find the problems, have the employer, wherever possible, find and fix them, and then share the information across the industry so other people do not have to wait and experience their own tragedies before they can identify a problem and then fix it.

The report is full of those kinds of examples. I think OSHA used its scarce resources to go out to maybe 40 percent of the locations reporting, but fully 60 percent or more wound up having the employers themselves respond and fix it before the next person could lose an arm.

Mr. POCAN. Thank you.

Chairman WALBERG. I thank the gentleman. Now, I recognize the gentleman from California, Mr. DeSaulnier.

Mr. DESAULNIER. Thank you, Mr. Chairman. I want to thank the witnesses, too. Like my colleague from Wisconsin, having owned small businesses, restaurants, for many years, I always struggled with my aversion for unnecessary regulation and the overhead that caused versus what Mr. Pocan said, if you do the right thing, you do not have these problems.

I had a bigger problem with competitors, usually larger food and restaurant companies, that clearly were run on a path to the bottom.

Ms. Sprick, my sort of frustration is if you do the right thing, as you do, in your industry, and certainly in California, we have a lot of evidence that in the roofing industry there are a lot of non-licensed contractors who were not paying workers' compensation, were not paying payroll taxes, and you are doing the right thing.

Certainly, there is a general conveyance or confluence of interest where in your interest for your company and other companies like this, you want to get rid of those people who are non-licensed and are not doing workers' compensation much less reporting those incidents.

Could you just comment on that?

Ms. SPRICK. We have the same problem in Oregon, unfortunately, of unlicensed contractors. It is not only the reporting part but the non-context. If they are unscrupulous in business practices, they are going to be unscrupulous in how they are going to use that information and how they are going to take that information out of context and use it however they see fit. That is my concern.

The concern is not only the accident itself but the context to size of business, how long they have been in business. You are just looking at one side of the story, and as we all know, how one side of the story can be swayed in any way, shape, or form that you see fit. That is my concern.

My greater concern is the electronic reporting of this is going to provide another conduit for breach of potential privacy that I protect fervently in my company to protect my workers, so you are exposing me to another way that I, myself, could be held up for liability but more so, that my workers' private information could be

accessed either inadvertentedly—the rule that I saw, it said the information will be redacted. It does not say it will not be collected. That is where my concern is as well.

Mr. DESAULNIER. If I could just interrupt, Dr. Sokas, can you respond to that? There are contentions, not just as has just been expressed, but that there will be frivolous lawsuits because of this information. I understand the Department has for 10 years gotten information from 80,000 employers. I am just wondering if you could respond to both the concern, but also the fact that we have already been doing this for some period of time and it does not seem to have led to frivolous lawsuits.

Dr. SOKAS. Two things. One is that my understanding of the rule—I think there is a little confusion because there is this one page that I think says it differently. My understanding of the rule itself is that they are not going to collect those pieces of information, worker's name, address, all those pieces of information would not be collected, and certainly not from small businesses—they are not collected by anybody, even the large businesses. That is not really—should not be a problem at all.

The issue with MSHA is even when they do present information, that is available, you can go online. I am unaware of any time when they have been sued or one mining company has gone after another. There is a lot of other stuff that goes on in mining, but that is not one of them.

Mr. DESAULNIER. Dr. Sokas, maybe you can explain, is there anything else, that this information will help in terms of research for prevention?

Dr. SOKAS. There is a ton of stuff. For example—

Mr. DESAULNIER. What are a few of the things?

Dr. SOKAS. One, for example, there is a lot of places that are going to green cleaners for schools, for hospitals, all kinds of places, to be more sustainable environmentally, and the problem is you do not really know if the new procedures are better or worse for the people who are doing the cleaning. There are microfiber mops that use less water.

Does that reduce musculoskeletal problems or does it increase them? Unfortunately, we do not have a musculoskeletal column, but nevertheless, you could do total injury to see across this whole industry, all these people are using green cleaners, do they have fewer respiratory complaints? Do they have fewer skin complaints? Those kinds of things.

Currently, you have to have a research assistant or a student or you have to kind of traipse out to the place, talk to the people, get the information, and it is virtually impossible to do it on a scale that would allow you to get meaningful statistics.

Mr. DESAULNIER. Thank you. I yield back.

Chairman WALBERG. I thank the gentleman. I recognize myself for five minutes of questioning. Mr. Sarvadi, safety experts discussed the difference between leading indicators, such as preventative risk management tools, lagging indicators, such as injury and illness rates, leading/lagging, which indicate when a worker has not been protected.

Do you agree injury and illness records are lagging indicators?

Mr. SARVADI. They are, certainly. We are looking in the rearview mirror because we are only looking at what happened in the past.

Chairman WALBERG. Should OSHA be relying on lagging indicators?

Mr. SARVADI. I would say OSHA probably ought to listen to its own advice. They have been telling employers for more than 10 years that employers should be providing and looking for leading indicators and should be focused on the leading indicators. I think they might take their own advice.

Chairman WALBERG. Hard message but an appropriate message. For calendar year 2015, I was struck with the fact that OSHA received fewer than 11,000 reports of hospitalizations and amputations, significant problems.

While the regulatory proposal suggests that OSHA would receive 117,000, OSHA believes fiscal year 2015 reports represent only 50 percent of annual occupational injuries. That is a lot of cover, if that is true.

Have you seen any evidence from OSHA or other studies that would justify OSHA's assumption?

Mr. SARVADI. I have not. I think the numbers that they are seeing are probably realistic based on my experience over the years and in paying attention to the trade press and that sort of thing. I think the numbers that we are seeing are probably very realistic in terms of what is actually happening.

Chairman WALBERG. We would certainly conclude there might be some out there—there are construction workers under union representation who indicated they held back reporting because of fear of being hurt on the job or being fired, and yet they had union representation to protect them from that, so that seems a little bit strange, that would be an actual experience, that would be something OSHA was hiding.

Mr. SARVADI. I think the point that I was trying to make in the testimony is we are focusing an awful lot on keeping track of things that happened in the past and not taking advantage of what we know already to make corrections in the future.

The anecdotes that we have heard about these things being underreported, misreported, certainly, those kinds of things happen, given the number of questions that we get in our office from people in the employment community who are asking is this case recordable, how do I record it, suggests there are bound to be some errors.

My point is if the BLS approach is correct, and it is statistically reliable, then all this effort to generate more information about underreported or misreported cases is not going to change the outcome. It is not going to change the understanding of what the real significant problems are.

What I would suggest is OSHA take advantage of what it has right now and refocus its efforts to begin looking at ways for employers to work together with their employees to come up with better systems, like the one Ms. Sprick has talked about.

Chairman WALBERG. Thank you. Ms. Sprick, can you tell what you do to protect your employees' personal health information?

Ms. SPRICK. Can I? I am sorry, I did not hear what you said. Yes. For hard copy, they have separate medical files that are stored in

separate locked filing cabinets in a separate locked fireproof room within our office that has security cameras and is also monitored with security systems.

Our electronic data, our firewalls are continually tested for hacking, which is my other concern, not only inadvertent disclosure but intentional hacking is a very large concern of mine, as it should be all of ours. We hear it in the news almost daily.

My IT guy is a former professional hacker, so companies actually hired him to sit outside their office and see how long it took him to get into their system. That is my guy that protects my electronic data from anyone being able to access it.

Chairman WALBERG. This would cause you some concern going the direction—it is going away from the protection that you are providing, including using a professional hacker?

Ms. SPRICK. Absolutely, yes. For me, it is one more conduit for somebody to be able to access information that is private. Also, the concern about the information being redacted. I am a small company. If one of my guys breaks their ankle and it is posted on a Web site saying this person broke this ankle, it is pretty easy to figure out which guy that is. Their personal health and privacy has been breached, in my opinion. That is another way that I am concerned.

Chairman WALBERG. Thank you. I want to thank each of the witnesses for your time and attention. You have been a valuable reference tool and experienced tool for us today in developing our context and understanding of what is going on.

Our time has expired, so now I recognize my friend and colleague, Ranking Member Wilson, for her closing comments.

Ms. WILSON. Mr. Chairman, the law is clear: Section 8(c)(2), Section 8(g), and Section 24(a) of the OSH Act expressly tasks the Secretary of Labor with, one, requiring reporting and recordkeeping on serious workplace injuries; two, ensuring this information is accurate; three, compiling, analyzing, and publishing either in summary or detailed form, all reports or information obtained under this authority.

OSHA's recordkeeping rule is clearly grounded in this statutory duty and will promote safer workplaces. This rule will give OSHA the ability to more quickly identify hazards and target its limited funds to prevent injury reoccurrence.

Publicly available injury data will also help workers that are advocates for improved safety conditions. It will allow responsible employers to better understand and develop ways to mitigate workplace hazards.

We must reject arguments that workplace safety transparency is incompatible with good business. Nothing refutes this point more than the work and words of Paul O'Neill, former Secretary of Treasury under George W. Bush and former CEO of Alcoa, a global leader in aluminum manufacturing based in Pittsburgh, Pennsylvania.

In a recent op-ed, Mr. O'Neill wrote, "Don't fear transparency, embrace it. A focus on safety, even in the glare of public scrutiny, will not only help your workers, but it will also improve your bottom line."

Mr. O'Neill, upon taking the helm of Alcoa, made a now infamous inaugural speech declaring his commitment to worker safety that would catapult Alcoa's profits. In the 13 years, Mr. O'Neill made worker safety and transparency mission one, Alcoa saw its market value climb from $3 billion to $27.53 billion, and net income soared from $200 million to $1.484 billion. Today, Alcoa's corporate Web site publishes real time injury and illness rates.

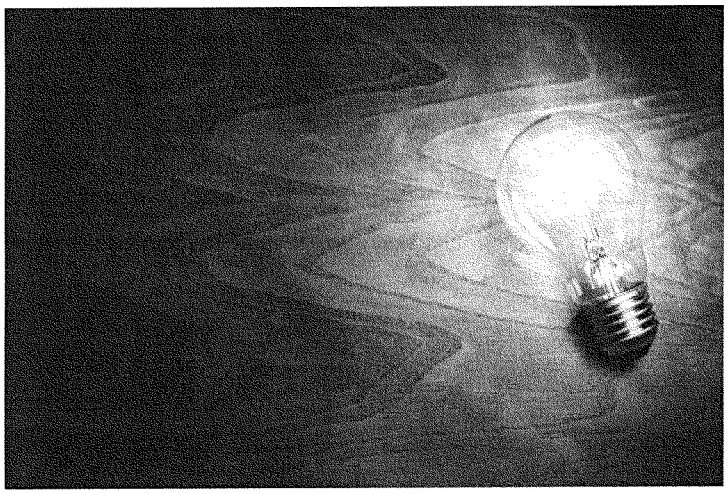
As Mr. O'Neill states, bottom lines and safety transparency are definitely compatible and sustainable.

Mr. Chairman, I ask unanimous consent to offer into the record an op-ed from Mr. O'Neill entitled, "Don't Fear the Injury Data."

Chairman WALBERG. Without objection, it will be entered, and hearing no objection, it is done.

[The information follows:]

Don't Fear the Injury Data



For 45 years, the Department of Labor has required employers to record the injuries and illnesses that workers suffer in their workplaces. But a new rule from the department is generating controversy because it requires employers to electronically submit some of that data to OSHA, with the intention that *it will be made public.*

Well, my message to the business community is this: Don't fear transparency. Embrace it. A focus on safety – even in the glare of public scrutiny – will not only help your workers, it will also improve your bottom line.

I know, because I've lived it.

In October 1987, I took the helm as CEO of Alcoa, the aluminum manufacturing giant based in Pittsburgh. I surprised more than a few people when, in my opening remarks, I insisted that our primary focus going forward was to be on worker safety. Not profit margins. Not product lines. Not output. Safety for workers was number one and my goal was zero lost workdays from on-the-job injuries.

Alcoa already was a relatively safe company, sitting below the average for its industry at 1.86 lost work days per 100 workers. The safety director was very proud of that record, and even he was startled by the idea that zero was the goal. There's always a litany of reasons why you can't get there. But I knew

we had to try, and I reinforced that idea in every meeting I had – with division presidents, workers and supervisors, and even shareholders.

After I'd been there a few months, there was an incident at an extrusion plant in Arizona. An 18-year-old worker, only three weeks on the job, jumped over a protective barrier to clear a jam on a machine. A circulating boom came around and hit him in the head, killing him instantly. He left behind a wife who was six months pregnant.

I got the whole executive crowd together, down to plant supervisor level, and we spent a day reviewing what happened. It was a grueling process, and when it was over, I got up and said, "We killed him. The supervisors were there, but we killed him. *I* killed him, because I didn't go a good enough job of communicating the principal that people will never be hurt at work."

That's when we started seeing real change. During my 13 years at Alcoa, we saw the lost workday rate drop from 1.86 to .20. No one would have thought it possible when I started. And guess what? During that time, Alcoa's market value jumped from $3 billion to $27.53 billion, while net income increased from $200 million to $1.484 billion.

Bottom lines and safety transparency are definitely compatible, and sustainable.

Long after I left Alcoa, the corporation continues to make safety a priority, and to brag about it to the world. A page on the corporate website documents its real time injury and illnesses rates and Alcoa's continuing efforts to keep workers safe.

Zero work-related injuries and illnesses have been long-standing goals for Alcoa. But when zero first became the target, it seemed unreachable. "Accidents are inevitable" was often the response. They're not. We can attain zero. It is possible, and, in many locations, it is already here thanks to dedicated effort and a firm commitment to our core values, one of which is to work safely, promote wellness, and protect the environment.

On Monday of this week, I checked the page. Alcoa's global rate for lost days due to injury was .076. That's pretty good for where we started, but I still wish it was zero.

Paul O'Neill is a former secretary of the treasury and former CEO of ALCOA.

Ms. WILSON. The OSH Act clearly states that the Secretary has a duty to ensure the accuracy of workplace injury records and reports. This rule ensures accuracy by addressing underreporting that stems from fear of retaliation for reporting.

As we have heard, workplace safety incentive programs, although sometimes well meaning, can actually undermine safety by discouraging employees from reporting injuries. More egregious policies and procedures punish workers instead of focusing on addressing workplace hazards.

For example, I have a warning note sent to an employee after he sustained several injuries over a three-year period. This note chastises the employee and clearly discourages reporting.

It states, "The worker demonstrates a serious lack of attention to the worker's own safety. The employee was suspended for three days, stripped of operator classification, and warned he would be fired should he have another OSHA recordable injury."

There is no mention of working with the employee to better understand the cause of injuries or efforts to prevent injury reoccurrence. Just blame, blame, blame; blame for the worker.

I ask unanimous consent to enter this warning notice into the record.

Chairman WALBERG. Without objection, it will be entered.

[The information follows:]

PLANT

DISTRIBUTION
Human Resources
Employee
Union
Foreman
Cc: President - Local

WARNING NOTICE

(EMPLOYEES NAME)

Date Issued: 4/19/10 Department: PRESS

Over the course of the past 2.7 years, you have had four OSHA Recordable injuries. The last two were within the past 7 months while you were working as a Press Operator. This alarming rate is 2600% higher than fellow workers who have been accident free and demonstrates a serious lack of attention to your own safety and potentially the safety of your fellow workers. This demonstrated and potential for serious injury is unacceptable and cannot be tolerated.

Action taken: 1) You are being issued a three day disciplinary suspension (Monday, April 19, Tuesday, April 20, and Wednesday, April 21). **2)** You are being disqualified from the Press Operator, automatic press classification. **3)** This will serve as your notice that should you have any further OSHA Recordable injuries, or serious near-miss events, you will be terminated immediately.

Any complaint against this action must be filed with management in writing within forty-eight hours (48) hours after the suspension or the complaint will be considered withdrawn.

By (FOREMAN) Approved

Copy Received DID NOT SIGN (EMPLOYEE) (UNION REPRESENTATIVE)

Ms. WILSON. I applaud OSHA for finalizing rules to improve worker safety and increase transparency. No working American should head off to work wondering if today is the day she will sustain an injury that seriously impacts her life or takes her life. No mother, father, son, or daughter should dread getting a phone call informing them that their loved one has been seriously injured on the job.

We should support OSHA in its efforts to promote the better injury and illness recording/reporting that leads to safer workplaces. Instead of holding hearings attacking OSHA's efforts to promote worker safety, let's hold hearings on ways we can support OSHA by increasing its budget for better enforcement, or passing H.R. 2090, *Protecting America's Workers Act*, to strengthen OSHA's ability to protect workers.

Finally, Mr. Chairman, I ask unanimous consent to place into the record letters in support of OSHA's rule from the following organizations: Public Citizen, American Federation of State, County, and Municipal Employees (AFSCME), United Steelworkers, Harvard Kennedy School's Ash Center for Democratic Governance and Innovation.

I yield the remainder of my time.

Chairman WALBERG. Without objection, they will be entered.

[The information follows:]

215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • www.citizen.org

May 25, 2016

The Honorable Tim Walberg
Chairman, Subcommittee on Workforce Protections
House Committee on Education and the Workforce
2176 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Frederica S. Wilson
Ranking Member, Subcommittee on Workforce Protections
House Committee on Education and the Workforce
2101 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Walberg and Ranking Member Wilson,

My name is Emily Gardner and I am the worker health and safety advocate in Public Citizen's Congress Watch division. Public Citizen is a national, nonprofit public interest organization with 400,000 members and supporters nationwide that advocates for public health and safety interests before legislative bodies, executive branch agencies, and the courts. We welcome the opportunity to comment on the subject of today's hearing, the need for effective injury and illness recordkeeping systems that guarantee the safety of our nation's workers.

As you know, the U.S. Occupational Safety and Health Administration (OSHA) recently released a rule modernizing its recordkeeping and data collection systems for workplace injuries and illnesses. The rule will ensure that OSHA receives timely data by requiring certain employers to electronically submit occupational injury and illness records they are required to keep. Once the rule is implemented, the agency will make this data available to the public through a searchable online database.

The rule will significantly improve the way OSHA monitors and responds to preventable injuries and illnesses. Currently, the agency relies on data sources that are too limited to allow it to effectively respond to deadly workplace conditions. OSHA may access establishment-specific data through workplace inspections, the OSHA Data Initiative, and mandatory employer reports of work-related fatalities and severe workplace injuries involving hospitalizations, amputations, and losses of an eye. However, this current system does not provide a clear picture of existing threats to workers.

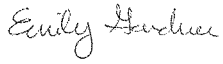
Furthermore, the recordkeeping rule will increase the accuracy of OSHA's records by safeguarding workers who report their injuries. Workers often do not report injuries to their bosses out of fear of retaliation. Simply put, OSHA cannot properly respond to unreported injuries. Ensuring that employees can report injuries without fear will enable employers to keep complete and accurate records necessary for OSHA to monitor and prevent occupational hazards.

Anti-worker activists claim that the recordkeeping rule will shame employers by making their safety and health records available online. In reality, making this data public will drive employers to focus on workplace safety in order to demonstrate to OSHA, job applicants, researchers, and the public that they provide safe workplaces for their employees. Employers will be able to compare their safety records against other firms in their industry and set goals for improvement. Additionally, the data collection will help OSHA and other government agencies identify and offer services to high-risk employers and provide assistance in preventing unsafe conditions. Employers may even see an improvement in their bottom line over time. Studies show that investing in workplace safety and health management programs not only reduces worker injuries, but it also reduces costs associated with those injuries such as workers' compensation payments and productivity losses.

OSHA's recordkeeping rule will create safer workplaces and save lives. With systematic access to current injury and illness data, OSHA can use its resources to target the most dangerous conditions facing workers across the country. Public Citizen supports OSHA's efforts to improve tracking of workplace injuries and illnesses and urges the subcommittee to do everything in its power to support the agency's important work on this matter.

Thank you for your consideration.

Sincerely,



Emily A. Gardner, J.D.
Worker Health and Safety Advocate
Public Citizen's Congress Watch division

May 24, 2016

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Laura Reyes
Secretary-Treasurer
Vice Presidents
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Jeanette D. Wynn
Tallahassee, FL
397-15
11/15

The Honorable Tim Walberg
Chairman
Workforce Protections Subcommittee
Education and the Workforce Committee
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Frederica S. Wilson
Ranking Member
Workforce Protections Subcommittee
Education and the Workforce Committee
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Walberg and Ranking Member Wilson:

On behalf of the 1.6 million members of the American Federation of State, County and Municipal Employees (AFSCME), I write concerning the subject of today's hearing, the need for effective injury and illness recordkeeping systems that guarantee the safety of our nation's workers. AFSCME strongly supports the Occupational Safety and Health Administration (OSHA) final rule to "Improve Tracking of Workplace Injuries and Illnesses." We urge the rejection of any calls to delay, weaken or thwart implementation of this reasonable and practical rule.

Electronic Recordkeeping of Injuries and Illnesses is Reasonable and Will Promote Safer Workplaces.

The rule does not create any new recordkeeping requirements. For decades, OSHA has required employers to keep track of their workers' injuries and illnesses by recording them in what is often called the "OSHA log." The rule changes the way employers send some of this recorded and collected information to OSHA. Instead of mailing OSHA the required forms, certain employers will electronically submit information from the OSHA logs.

Requiring employers to send OSHA injury and illness information electronically is not onerous. The rule moves workplace safety information into the 21st century. This update to the regulation is realistic considering that employers are already collecting this information. It is feasible because of the widespread use of electronic databases used daily by most employers for payroll, monitoring sick and other leave, and other business operations. In addition, OSHA's rule provides employers with ample time to transition their process for collecting and recording injury and illness information into an electronic form.

Although most public employers use some type of electronic data system, many smaller municipalities and school districts maintain paper log sheets. AFSCME has reviewed paper OSHA logs as part of our efforts to improve workplace safety. We have seen firsthand that some employer logs can be inaccurate or incomplete. Outdated information, poor quality and incomplete data all contribute to unnecessary injuries because employers fail to implement interventions that could address a safety hazard. By having employers move to electronic reporting, more timely and accurate data will be available to all stakeholders to identify and address workplace safety and health issues.

American Federation of State, County and Municipal Employees, AFL-CIO
TEL (202) 429-1000 FAX (202) 429-1293 TDD (202) 659-0446 WEB www.afscme.org 1625 L Street, NW, Washington, DC 20036-5687

It is Sensible and Fair to Protect Workers who Report Injuries from Employer Retaliation.

The data tracking workplace injuries and illnesses will only be correct if workers feel free to report those injuries and illnesses. The updated recordkeeping helps ensure that employees are not discouraged, either purposefully or incidentally through policy and practices, from reporting injuries and illnesses.

The new rule has simple and clear requirements to address retaliation and barriers workers often face reporting injuries or illnesses.

- Employers must inform employees that they have a right to report injuries and illnesses.
- Employers must inform employees that employers are prohibited from retaliating against workers for reporting an injury or illness.
- Employers are required to establish a reasonable procedure for employees to report their injuries and illnesses promptly and accurately. A procedure is not reasonable if it would deter or discourage an employee from reporting.
- Employers must not retaliate against workers for reporting a work-related injury or illness.
- Violations of these requirements are regulatory violations subject to citations, penalties and abatement.

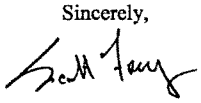
OSHA gives employers time before the anti-retaliation provisions become effective August 10, 2016.

The Anti-Retaliation Provisions are Particularly Important for Addressing Workplace Violence in Health Care Facilities.

At the request of Ranking Members Bobby Scott and Frederica Wilson, and Representative Joe Courtney and Senator Patty Murray, the Government Accountability Office conducted a study of efforts by OSHA and states to address workplace violence in health care facilities. The GAO report found workplace violence is a serious concern for the approximately 15 million health care workers in the United States, but the full extent of injuries that are the result of workplace violence are unknown because many health care workers may not always report such incidents. The rule's anti-retaliation provisions and updated electronic information will help address the problem of under-reporting workplace violence injuries. Accurate reporting will help OSHA, employers, workers and their representatives respond more effectively to this prevalent workplace hazard.

In conclusion, AFSCME strongly supports this reasonable and practical rule. We oppose any efforts to delay, weaken or otherwise undermine its implementation.

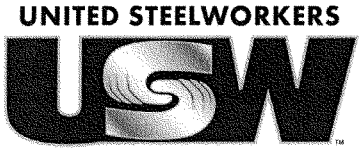
Sincerely,



Scott Frey
Director of Federal Government Affairs

SF:LB:dmg

cc: Members of the Subcommittee on Workforce Protections



May 24, 2016

VIA E-MAIL
The Honorable Tim Walberg
Chairman
Subcommittee on Workforce Protections
House Committee on Education & the Workforce
2176 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Frederica Wilson
Ranking Minority Member
Subcommittee on Workforce Protections
House Committee on Education & the Workforce
2101 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Walberg and Ranking Minority Member Wilson:

I write to you today on behalf of the 1.2 million active and retired members of the United Steelworkers (USW) in strong support of the Occupational Safety & Health Administration (OSHA) and the recently finalized rule to Improve Tracking of Workplace Injuries and Illnesses. This important rule takes critical steps to modernize the existing OSHA recordkeeping requirements, promote hazard identification and correction, encourage worker reporting of injuries and prohibit retaliation against workers for making those reports.

The rule modernizes reporting and recordkeeping by requiring certain employers who already keep OSHA injury and illness records to electronically submit this information. Establishments with 20-250 or more employees would submit summary information about job injuries and illnesses (OSHA Form 300A); and establishments with 250 or more would also submit their OSHA Logs of Work-Related Injuries and Illnesses and 301 Incident Report Forms.

OSHA will remove all personally identifiable information and then place these reports on its website. The public posting of this information will assist those

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interested in workplace health and safety - workers, unions, employers, public health researchers and others - in efforts to identify injuries, illnesses and their trends; and address the hazards that contributed to them. It will also provide OSHA with data necessary to improve compliance assistance, target problems in particular sectors and better focus its resources toward important prevention activities.

The rule also has provisions that will help ensure the accuracy and completeness of the injury and illness data that employers report and that OSHA collects. These new provisions require employers to inform employees about their right to report job injuries and illnesses without fear of retaliation; ensure that employer procedures for job injury and illness reporting are reasonable and will not deter reporting; and prohibit employers from retaliating against employees for reporting.

Government and academic studies have identified the presence of employer policies, programs and practices that discourage workers from reporting job injuries and illnesses. If such practices continue or increase as a result of employers not wanting to report the true toll of injuries and illnesses in their workplaces, the new rule provides OSHA with an additional enforcement tool beyond a worker's right to file an OSHA 11c whistleblower complaint within 30 days of an adverse action. This new provision allows OSHA to issue citations to employers for retaliating against employees for reporting work-related injuries and illnesses and require abatement even if no employee has filed an 11c complaint. This provision will not only help address retaliation, but will serve to prevent retaliatory actions and enhance the ability of workers to make injury and illness reports freely. It will in turn enhance the accuracy of the data being reported as well as support hazard identification and control activities and thus, safer, healthier workplaces.

We urge this subcommittee to support the finalized regulation and enhance OSHA's efforts to protect workers from the many uncontrolled hazards that injure, sicken, or kill workers every day.

Sincerely,

Holly R. Hart

Holly R. Hart
Assistant to the International President
Legislative Director

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union

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Elena Fagotto
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Chairman
Subcommittee on Workforce Protections
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Honorable Frederica S. Wilson
Ranking Member
Subcommittee on Workforce Protections
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May 23rd, 2016

Dear Chairman Walberg and Ranking Member Wilson,

For nearly fifteen years, the Transparency Policy Project, based at the Harvard Kennedy School's Ash Center for Democratic Governance and Innovation, has analyzed domestic and international efforts to reduce risks to the public using transparency.[1] Our work has identified the conditions that make transparency systems effective and sustainable. We have learned that the effectiveness of transparency as a tool to regulate risks often depends on the relevance and quality of the data, as well as when, where and in what format it is disclosed.[2] In that regard, we believe that the US Department of Labor's Occupational Safety and Health Administration (OSHA) final rule revising OSHA's regulation on Recording and Reporting Occupational Injuries and Illnesses (29 CFR 1904) is an important step in fostering greater transparency surrounding workforce injury and illness rates. We believe the new rule (Improve Tracking of Workplace Injuries and Illnesses) will benefit not only employees but employers, regulators and the public at large. In the interest of transparency, we note that David Weil, now Administrator of the Wage and Hour Division, served as co-director of the Transparency Policy Project before he joined the Department of Labor in 2014.

American workplaces are much safer than they used to be, but the important work of keeping workers safe is far from over. In 2014 alone, employers reported nearly 3 million nonfatal injuries and illnesses, while over 4,800 workers were killed on the job. This new transparency rule to improve the tracking of injuries and illnesses requires establishments with 250 and more employees and smaller establishments in certain high-risk industries, from manufacturing to grocery stores, to electronically disclose injury and illness data to OSHA – information they are already required to collect and make available to employees and OSHA. OSHA will make some of these data publicly available, in de-identified format to protect employees' privacy, on its website.

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[1] To access our findings and publications visit www.transparencypolicy.net.
[2] Archon Fung, Mary Graham, and David Weil. *Full Disclosure: The Perils and Promise of Transparency.* Cambridge; New York: Cambridge University Press, 2007.

This rule has been thoughtfully and narrowly crafted. It is important to note that this new rule does not require employers to collect new data. It merely requires them to report electronically once per year. The costs of the new rule appear modest, compared to the benefits we describe below. In response to concerns raised that the new rule would create incentives for under-reporting and result in adverse actions for employees, OSHA has strengthened anti-retaliation protections for employees.

With this new rule, OSHA harnesses the power of transparency to improve safety in the workplace. The disclosure of injury and illness data is likely to influence the behavior of employers, employees, unions, health and safety administrators, laying the ground for a more systemic approach to workplace safety. We believe this new rule has the potential to help both workers and employers maintain safer workplaces.

First, employers will be able to compare their performance to that of competitors across their industry. Disparities among companies with similar characteristics will allow employers to learn about gaps in their safety systems and introduce corrective measures, or seek assistance from OSHA to improve safety. Other companies in the supply chain, such as buyers, more informed by this new workforce safety data, may demand higher safety levels or threaten to switch to safer suppliers -- amplifying the incentives and the competitive dimension of workplace safety. Investors and insurers are also likely to use the data to question workplace safety practices and pressure management for meaningful safety improvements.

Research shows that well-designed transparency interventions can prompt industry to reduce certain risks. For example, hospitals have learned about safety gaps and adopted corrective measures after being asked to publicly report information on overall hospital quality.[3] The disclosure of hazardous chemicals' information has prompted many employers to switch to safer chemicals as a way to protect their workers.[4] When firms were asked to disclose the amount of toxic pollutants they release into the environment, under EPA's Toxics Release Inventory, investors and clients paid attention, prompting some companies to cut emissions.[5]

Second, employees can benefit from the new disclosure requirements by using this new data to evaluate their workplaces' safety, to compare injury rates among similar workplaces, and to advocate for safety improvements.

Third, employee organizations will have a way to target their actions by comparing workplace safety performance across industry and focusing on facilities that pose a higher risk to employees. Further, retrospective analysis of data will identify establishments that have made progress and ones that require pressure to improve safety standards.

Fourth, health and safety administrators will be able to use these data to improve their safety efforts by targeting inspections and assisting establishments in their safety improvement actions, important steps to improve injuries and illness prevention.

Finally, the technology industry, advocacy groups, journalists and researchers could use the data in ways that contribute to improving workplace safety. Technologists may be able to repackage the

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[3] Dana B. Mukamel, Simon F. Haeder, and David L. Weimer. "Top-Down and Bottom-Up Approaches to Health Care Quality: The Impacts of Regulation and Report Cards," *Annual Review of Public Health*, Vol. 35, 2014, pp. 477-497.
[4] General Accounting Office. *Occupational Safety & Health: Employers' Experiences in Complying with the Hazard Communication Standard. Briefing Report to Congressional Requesters*. GAO/HRD-92-63BR. Washington, DC: General Accounting Office, 1992.
[5] James Hamilton. *Regulation Through Revelation: The Origin, Politics, and Impacts of the Toxics Release Inventory Program*. New York: Cambridge University Press, 2005.

data and build websites and apps to allow comparison and to single out worst and best performance, stimulating workplace safety competition. Journalists are increasingly using data sets to strengthen their reporting. These data savvy reporters could use the new information on injuries and illnesses to bring broader public attention to workplace hazards. Researchers could use the data to identify trends, learn about hidden or new risks, and draw lessons from industries and establishments that excel in safety.

We anticipate that the new data disclosed by OSHA will stimulate action from multiple fronts – employers, employees, workplace safety agencies, journalists, and civic organizations– and contribute to making American workplaces safer.

Sincerely,

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Chairman WALBERG. I thank the gentlelady. I thank again the panel, as well as my colleagues, in taking action or taking part in this hearing. As we started out the hearing, I think we made it very clear, Democrat/Republican, employee/employer, bureaucrat, there is no one that I have met who wants an unsafe workplace. There is no one who wants to see employees injured in the workplace who wants to succeed in the workplace or as an employer.

We are not, thankfully, in the 1920s and 1930s, or even in the 1960s, as I remember working at U.S. Steel in a plant that had carried on for many, many years, but workplace conditions are not what I see now, at least from my perspective of taking 149 workplace visits this last year myself in my district, seeing workplace environments in steel mills, manufacturing sites, in small businesses, that do not compare to what went on in the past.

They are clean. They are up-to-date. They are safe and, frankly, they are always in an effort of improving.

We certainly do not fear transparency. We want transparency. We do not fear accuracy in reporting. We want accuracy in reporting. We also want our regulators to understand that there are best practices that are better than anything that are being offered, and there is a context that needs to be considered as well if you are going to have transparency and accuracy.

When you refuse to take the advice or even offer the opportunity for people who live and work and provide jobs and do those jobs in the real world, you have a problem that has developed.

We saw the ability, I believe three years ago, when we had a hearing in this subcommittee on fall protection, and we had real world testimony coming from some of our Committee members who were in the industry and knew what went on, and like Ms. Sprick, had an unbelievably good safety record, were able to instruct OSHA on the fact that they were going to hurt people if they took an one-size-fits-all plan on fall protection. We saw them thankfully back away. They heard good advice with context, with accuracy, with transparency.

We are, however, in the twenty-first century, and there is something we did not have back in the 1920s and 1930s, and even to a great degree in the 1960s, and that is global competition, massive global competition, that do not deal with some of the things we put in the way of in certain cases success for our own industry.

We saw last year $1.9 trillion annual costs to our employers simply for regulatory compliance costs. We need certain regulations, but we also need to understand that if we over regulate or we regulate without rationality and regulate even worse without context that promotes the value of that regulation, those costs will increase. Those costs are not found in our competitors. They have to come up to our standards. Right now, they are just trying to beat us.

Partnership is what we are looking for. Best practices primarily developed by business and industry and leading the way for regulators to understand, pushing things like VPP. There is a partnership that allows both sides to learn from each other.

Rather than going in that direction, we continue to push for more regulation for regulation sake, without consideration of context and reality.

To my colleagues and others in the room, that is what this hearing is about, not trying to make the workplace less safe or give special benefit to employers over employees, it is rather to make the workplace safe with rational, transparent, and accurate regulation that comes in.

I, again, thank each one involved this morning in this hearing, and hopefully, OSHA and other regulators are listening to our concerns and the reality that comes in life itself.

With no further business to be carried on by the subcommittee, the subcommittee stands adjourned.

[Additional submission by Mr. Sapper follows:]

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October 27, 2015

Via electronic submission: http://www.regulations.gov	**Via electronic mail to OIRA_submission@omb.eop.gov and telefacsimile: 202–395–5806**	**Via telefacsimile to (202) 205-6928**
OSHA Docket Office Docket Number OSHA-2015-0006 Technical Data Center, OSHA U.S. Department of Labor 200 Constitution Avenue N.W. Room N-2625 Washington, D.C. 20210	Office of Information and Regulatory Affairs Attn: OMB Desk Officer for the Department of Labor, OSHA Office of Management and Budget Room 10235 Washington, D.C. 20503 Reference: Control number 1218–0176	Chief Counsel for Advocacy Small Business Administration Suite 7800 409 3rd. St., S.W. Washington, D.C. 20416

Re: Docket No. OSHA-2015-0006; Clarification of Employer's Continuing Obligation To Make and Maintain an Accurate Record of Each Recordable Injury and Illness

Dear Sir or Madam:

These comments are submitted in response to the proposed regulations published at 80 Fed. Reg. 45116 (July 29, 2015) and on behalf of the National Federation of Independent Business; the Dewberry Companies; the United States Beet Sugar Association; the North American Meat Institute; and AKM LLC dba Volks Constructors.

The commenters respectfully urge that the proposed amendments not be adopted. As we explain more fully below, they will be legally ineffective because OSHA has no authority to by regulation extend a statute of limitations. A regulation cannot merely decree that a case involves the "occurrence" of a violation (*i.e.*, a happening, incident or event) within the limitations period if there was not, *in fact*, a violative happening, incident or event, a duty-triggering happening, incident or event, within the limitations period.

In addition to being legally ineffective, the proposed amendments will confuse employers, cause avoidable litigation around the Nation, and impose enormous compliance burdens on American industry—all in return for what OSHA estimates to be a one percent improvement in the compliance rate. See our comments in full beginning on page 7 below.

Furthermore, the manner in which OSHA is proceeding—adopting regulations interpreting the OSH Act's statute of limitations in a manner inconsistent with the decision of the United States Court of Appeals for the District of Columbia Circuit in *AKM LLC dba Volks Constructors v. Sec'y of Labor*, 675 F.3d 752, 755 (D.C. Cir. 2012), and reflective of only a minority, concurring opinion there—shows disrespect for that court and the rule of law. See our comments in full beginning on page 6 below.

The Proposed Regulation Would Be Legally Ineffective, and Will Sow Confusion and Litigation.

One problem with the proposed regulatory amendments is that they would be legally irrelevant because, under the statute of limitations as written, whether an obligation or a violation is "continuing" (as the regulations would provide) is not the issue. The issue under section 9(c) is whether a violation "occurred" or, more precisely, whether there is the "occurrence" of a violation, within the limitations period. That is why the term "continuing" did not appear in the first substantive and dispositive paragraph of the *Volks* opinion, the second full paragraph on page 755.

"Occurrence" is not ambiguous. As the Supreme Court held about the word "occurred" in *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), and as the D.C. Circuit held in *Volks*, "the word 'occurrence' *clearly* refers to a discrete antecedent event—something that "happened" or "came to pass" "in the past." 675 F.3d at 755 (emphasis added), quoting *Morgan*, 536 U.S. 109–10 & n.5 (citing dictionaries) and also citing "Black's Law Dictionary 1080 (6th ed. 1990) (defining 'occurrence' as 'a coming or happening[;] [a]ny incident or event'); Webster's Third New Int'l Dictionary 1561 (1981) (defining 'occurrence' as 'something that takes place' and noting that it is a term that 'lacks much connotational range' for which synonyms are 'incident, episode, [or] event')." Even the definition mentioned in the preamble—"the existence or presence of something" (http://dictionary.cambridge.org/dictionary/american-english/occurrence_2)—requires there be some*thing* within the limitations period (as indicated by the usage example given, "The tests can detect the occurrence of certain cancers.").

The next question—whether there *was* a happening, incident or event within the limitations period—is a question of fact, as to which the regulations would be irrelevant, for the Secretary cannot by regulation declare that there was an occurrence within the limitations period when there was not. And the Secretary has already told us what that finding of fact would be: No happening, incident or event would have occurred within the limitations period. In an appearance before the Advisory Committee on Construction Safety and Health, attorneys for the Secretary responded as follows to a series of questions by a committee member:

> MR. CANNON: ... [T]his continuing duty would apply even if an employer had not received any new information that a recordable injury or illness had occurred, right?
>
> MS. GOODMAN: That's correct.
>
> MR. CANNON: And so the continuing duty would be triggered by the same information that would have triggered the original duty to record, correct?

> MS. GOODMAN: Right. Ultimately, the employer has a duty to assess each case and determine whether it's recordable, and if they don't do that on day one, then the obligation continues.
>
> MR. CANNON: And so, say, for instance --I'm going to use a hypothetical situation here. Say an employer mistakenly fails to record an injury or illness within the seven-day period, as required. They don't get any new information that would suggest that this was a recordable injury or illness, and nothing else ever happens with that particular case. So, based on what you're saying, is that they could be cited ... during that five-year retention period ... for ... missing that initial seven-day period.
>
> MS. GOODMAN: That's correct.

Amended Transcript, Advisory Comm. on Constr. Safety and Health, at pp. 110-111 (Dec. 4, 2014) (www.osha.gov/doc/accsh/transcripts/accsh_20141203_amended.pdf). So, according to the Secretary, one could be cited even if no new information would be received, and nothing else had happened within the limitations period. There would be only same facts known and the same mistake made, perhaps years before, during the original seven-day period.

On those facts—and those are the core facts upon which the proposal would operate—no administrative law judge would hold that there was an "occurrence" during the limitations period, for it would be contrary to fact: There would have been no violative happening, incident or event or, as the *Volks* decision made clear, no duty-triggering happening, incident or event, within the limitations period—so there could not have been an "occurrence" of a violation. The proposed amendments could not change that. They cannot create a happening, incident or event that did not otherwise exist.

This is the central error of the proposal. A declaration in a regulation that an obligation continues will not suspend the running of a limitations period that runs from the "occurrence" of a violation unless there is, in fact, a violative "occurrence" (*i.e.,* a violative happening, incident or event) or a duty-triggering "occurrence" (*i.e.,* a duty-triggering happening, incident or event) within the limitations period. Any other rule would permit agencies to, by regulation, artificially extend statutes of limitations without regard to their words and without regard to the facts.

Thus, the proposed amendments will be irrelevant, no matter what they say about "continuing" obligations or violations. Instead of clarifying the law, the proposed amendments will only sow confusion and cause pointless litigation.

OSHA May Not By Regulation Suspend the Running of a Statute of Limitations.

The proposal assumes that a declaration in a regulation that a violation "continues" will suffice to suspend the running of a statute of limitation. In addition to the reason stated above, there are additional reasons why this is not so.

Some courts will likely observe that the effect of calling a violation "continuing" is to suspend the running of a statute of limitations until the violation ends. Such a suspension would

constitute a departure from the "standard rule" stated by the Supreme Court in *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997)—that a limitations period is triggered by the existence of a complete cause of action. The Court there also told us of both an exception to that standard rule and who may make it. It applies when "***Congress*** has told us otherwise in the legislation at issue." (Emphasis added.) An agency will not do. This principle was also stated in *Toussie v. United States*, 397 U.S. 112, 121-122 (1970), which held that "questions of limitations are fundamentally matters of legislative not administrative decision" and that "the statute itself, apart from the regulation, [must] justif[y]" any continuing violation holding. Although *Toussie* was a criminal case, its statements on this point reflected administrative law, not criminal law, precepts. The courts may also observe that, Congress in the Administrative Procedure Act (APA), 5 U.S.C. § 558(b), stated that, "a substantive rule or order [may not be] issued except within jurisdiction delegated to the agency and as authorized by law." Such courts may observe that nothing in the OSH Act even hints that OSHA may, in effect, manipulate statutes of limitations by stating that their duties continue to run even in the absence of duty-triggering facts within the limitations period.

None of the cases cited in the preamble (from page 45119 cols. 1 & 2) deal with whether, or suggests that, an agency may define a limitations period by regulation. They are cases in which Congress wrote both the limitations period and the substantive duty. The proposal , therefore, conflicts with Supreme Court precedent in *Bay Area Laundry*.

The preamble attempts to derive such an exception from section 8(c). Although the preamble's discussion of section 8(e) is long and gives several supposed reasons for extracting from that section the idea that recordkeeping failures continue until corrected, it never mentions or comes to grips with the principal reasons given by the *Volks* court for holding that that section provides insufficient ground for departing from the "standard rule" in *Bay Area Laundry* that a limitations period is triggered by the existence of a complete cause of action. Without repeating all of the *Volks* court's reasons, we observe that they continue to stand in good stead, particularly the idea that OSHA's view "leaves little room for [the statute of limitations], and we must be 'hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law,'" citing *United States v. Jicarilla Apache Nation,* 131 S.Ct. 2313, 2330 (2011). As the Court stated, "At best, the Secretary's approach diminishes Section 658(c) to a mere six-month addition to whatever retention/limitations period she desires. We do not believe Congress expressly established a statute of limitations only to implicitly encourage the Secretary to ignore it." The preamble ignores all these points.

As to the court decisions cited by OSHA on page 45121 cols. 1-2, all but two pre-dated *Bd. of Trs. of Leland Stanford Jr. Univ. v. Roche Molecular Sys., Inc.,* 131 S.Ct. 2188, 2197, 180 L.Ed.2d 1 (2011), which held that "retain" means "to hold or continue to hold in possession or use," and thus "[y]ou cannot retain something unless you already have it"—a Supreme Court decision not cited anywhere in the preamble but cited in *Volks*. The two Tax Court exceptions (*Park v. Comm'r of Internal Revenue,* 136 T.C. 569, 574 (U.S. Tax Ct. 2011), *rev'd and remanded on other grounds,* 722 F.3d 384 (D.C. Cir. 2013); and *Powerstein v. Comm'r of*

Internal Revenue, T.C. Memo 2011–271, 2011 WL 5572600, at *13 (U.S. Tax Ct. Nov. 16, 2011) did not discuss or note that Supreme Court decision.

We also observe that the preamble never explains what section 8(c) has to do with the wording of the proposed regulations. If section 8(c) has the effect OSHA posits, it will have it no matter what the regulations say, and so there is no point to the proposal.

Other courts may observe that, to call a violation "continuing" is to carve an exception into a statute of limitations passed by Congress. *Volks*, quoting *Cherosky v. Henderson*, 330 F.3d 1243, 1248 (9th Cir. 2003) ("exception"), as well as *Fitzgerald v. Seamans*, 553 F.2d 220, 230 (D.C. Cir. 1977) ("exception") and *Felter v. Kempthorne*, 473 F.3d 1255, 1260 (D.C. Cir. 2007) ("judicial exception"); *Nat'l Souvenir Ctr., Inc. v. Historic Figures, Inc.*, 728 F.2d 503 (D.C. Cir. 1984) ("'continuing violation' exception"); *Conn. Light & Power Co. v. Sec'y of Labor*, 85 F.3d 89, 96 (2d Cir. 1996) ("exception"); *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 405 (1st Cir. 2002) ("equitable exception"); *Burzynski v. Cohen*, 264 F.3d 611, 617 (6th Cir. 2001) (same); *Cowell v. Palmer Twp.*, 263 F.3d 286, 292 (3d Cir. 2001) (same); *Klein v. McGowan*, 198 F.3d 705, 709 (8th Cir. 1999) ("exception"); *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989) ("equitable exception"). The courts will likely hold that any such exception must be derived from legislation, not regulation.

OSHA also fails to explain why the "absurdity" and "madness" pointed out in *Volks* would not be realized here—that OSHA could by mere regulation expand the limitations period "for as long as [OSHA] would like to be able to bring an action…." (Indeed, during the rulemaking leading to the 2001 amendments to Part 1904, "[t]he American Industrial Hygiene Association recommended a retention period of up to 30 years for the OSHA 301 form to accommodate occupational diseases with long latency periods…." 66 Fed. Reg. at 6049 col. 2.) Although the *Volks* court expressly condemned a slightly different regulatory change—a change in or elimination[1] of the retention period rather than a declaration of a continuing duty—the

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[1] The following exchange occurred before the court of appeals during oral argument in *Volks* (Oral Arg. Recording at 23:23 to 24:35):

> Judge Garland: What about opposing counsel's argument that, if taken to the extreme, this would … effectively mean no statute of limitations?
>
> Ms. Phillips: … I assume Your Honor is referring to the regulations that he cites that have 30 year record retention.
>
> Judge Garland: … [F]orgetting about those, but if we were to accept your position you could write a regulation that says … instead of a five-year retention, … you just always have to retain the records. … Effectively it would mean no statute of limitations. … [E]ffectively there would be no limitations on ability to sue. Is that right?
>
> Ms. Phillips: I think you have to look at 8(c), which is the statutory provision that grants the Secretary the authority to issue these regulations. And if you look at that provision, it's very broad. In fact, the only restriction—it requires the Secretary ….
>
> Judge Garland: The answer is yes?
>
> Ms. Phillips: Pardon me, oh…
>
> Judge Garland: The answer is yes?
>
> Ms. Phillips: Well ultimately yes, but I wanted to explain a little further.

point remains the same: "Nothing in the statute suggests Congress sought to endow this bureaucracy with the power to hold a discrete record-making violation over employers for years...."

OSHA's Discussion of Whether a Violation "Continues" Is Illogical.

OSHA attempts, beginning on page 45122, to show the relevance of the concept of "continuing" violations to the limitations period in the OSH Act. The discussion is, however, illogical. There is no point in calling something a "continuing" violation if it occurs within the limitations period anyway. Yet, in all the cases and examples mentioned there, such as the exposure of employees to machines without guards and to chemicals without training, are events ("affirmative acts" OSHA calls them on page 45124) and thus "occurrences" within the limitations period. It is therefore unnecessary and confusing to also claim that they are "continuing" violations.

The preamble is similarly confused and illogical with respect to failures to act and continuing violations. If a duty-triggering fact occurs, then a failure to act would, for six months, be citable, without need to resort to a continuing violation theory. If thereafter that duty-triggering fact does not occur, there would be only the "lingering effect of an unlawful act" and "mere failure to right a wrong," which the *Volks* court observed, "'cannot be a continuing wrong which tolls the statute of limitations,' for if it were, 'the exception would obliterate the rule,'" quoting *Fitzgerald v. Seamans,* 553 F.2d 220, 230 (D.C. Cir. 1977), and also citing *Lorance v. AT&T Techs., Inc.,* 490 U.S. 900, 908 (1989); *Local Lodge No. 1424 v. NLRB,* 362 U.S. 411, 422 (1960); *Chalabi v. Hashemite Kingdom of Jordan,* 543 F.3d 725, 730 (D.C. Cir. 2008); and *Kyriakopoulos v. George Washington Univ.,* 866 F.2d 438, 448 (D.C. Cir. 1989). It is again telling that the preamble does not mention a single one of these cases or the principle for which they stand.

In sum, the legal theory at the heart of the proposal is fatally flawed. OSHA has no authority to adopt the amendments. Only Congress or the courts can act here.

OSHA's Manner of Proceeding Is Disrespectful of the Rule of Law.

The manner in which OSHA is proceeding shows open disrespect for the United States Court of Appeals for the District of Columbia Circuit and for the rule of law.

Although the preamble states that the proposed amendments would "clarify" the duty imposed by Part 1904, the preamble never points to any place in *Volks* where the court misapprehended or was confused by the requirements of Part 1904 or by the OSH Act. Instead, OSHA just disagrees with the court or, more accurately, its majority opinion. OSHA's proposal to amend the regulations rests on a minority view—the concurring opinion of Judge Garland, which held that Part 1904 as currently worded did not create continuing obligations. The majority, by contrast, rested its holding on the wording of the statute, and made it plain that Congress did not permit OSHA to create a different result by merely amending its regulations.

Subordinate federal judges seek to avoid "the embarrassing, insubordinate error of ignoring the majority opinion and embracing the dissent."[2] Federal agencies subject to judicial review, such as OSHA, should do the same. The proper course for OSHA to take is to bring its arguments to the D.C. Circuit *en banc*, to another court of appeals, to the Supreme Court of the United States, or to the Congress of the United States. It is not to conduct a rulemaking.

The Proposal, If Adopted, Would Violate Section 8(d) of the OSH Act, and Be Invalid as Arbitrary and Capricious.

The proposal would also be invalid because it would violate Section 8(d) of the OSH Act, and would be arbitrary and capricious with respect to the burdens it would impose on employers.

OSHA's "Preliminary Economic Analysis" (80 Fed. Reg. at 45128-45129) states that, "The proposed revisions impose no new cost burden" for "OSHA estimated the costs to employers of these requirements when the existing regulations were promulgated in 2001, see 66 FR 6081–6120, January 19, 2001." 80 Fed. Reg. at 45128 cols. 2-3. OSHA says that this is so because the proposal is merely a "clarification" (*id.*; *see also id.* at 45120).

But if this current proposal were truly a "clarification" of the duty originally imposed in 2001, then we should find on those cited pages from 2001 estimates of the labor costs of every day reconsidering past decisions (a) to not record certain injuries entirely; and (b) to only partially record others, *i.e.*, to not record them as, say, days away from work or as work restrictions but only as medical treatment. After all, if the duty to record continues every day for five years, and if one must think about recordability before one can undo a previous decision to not record or not fully record, then there necessarily must be a duty to every day reconsider a decision to not record or not fully record an injury. And without a duty of daily reconsideration, there will be no duty-triggering fact within the limitations period.

No such cost estimates can be found, however, in either the 2001 preamble (or the preamble to the current proposal). The 2001 preamble states only the one-time cost of recording a case. The current proposal's preamble adds the costs, as a result of the proposal, of recording additional cases that were erroneously not previously recorded—but also as a one-time cost. Both preambles ignore the main burden imposed by the proposal—the cost of reconsidering every day whether one should have recorded unrecorded injuries, or should have more fully recorded partially-recorded injuries. Nowhere does OSHA acknowledge or estimate this burden, let alone its enormity, or consider whether it is worth bearing.

That cost to the economy would be huge. Let us assume that each covered establishment experiences one unrecorded or not fully recorded injury a year (whether recordable or not), a conservative assumption. OSHA estimates that it takes an average of 14 minutes per case to

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[2] *United States v. McGoff*, 831 F.2d 1071, 1079 (D.C. Cir. 1987) ("we have not fallen into the embarrassing, insubordinate error of ignoring the majority opinion and embracing the dissent.").

decide on recordability.[3] Assuming that daily reconsideration would take one minute per unrecorded or partially-recorded injury (another conservative assumption), then repeating that effort every day for five years would require every establishment in the Nation to devote up to 30.3 man-hours to the task [((365 x 4) + (365-7) = 1818 days) x 1/60 man-hrs/case/day = 30.3 man-hours/case]. Factoring in what OSHA estimated in 2001 as the 1,365,985 establishments covered by Part 1904, and the $46.72/man-hr. labor-time cost used in the current proposal, then the cost to the economy of daily reconsideration over the five-year retention period of a ***single*** unrecorded or partially-recorded injury per establishment would be up to 41,389,346 man-hours (1,365,985 establishments x 30.3 man-hours/case x 1 case/establishment) x $46.72/man-hr. = $1,933,710,222, *i.e.,* almost two billion dollars. Yet, the benefit that OSHA estimates from this enormous burden would be only a one percent improvement in the compliance rate. 80 Fed. Reg. at 45128 col. 3.

Worse, there would likely be many more than one unrecorded case per establishment per year, for employers commonly misunderstand the recordability of injuries and there is no reason to believe that they will not repeat their original errors when they briefly re-examine past cases. For example, work-relatedness is widely misunderstood, even by OSHA. Shortly after the current version of Part 1904 was adopted in 2001, OSHA conducted a public education session at which two knowledgeable OSHA officials answered questions from the public on what the new regulations meant. They were asked about the work-relatedness of an employee pulling a muscle while walking normally down a normal workplace hallway. One OSHA official stated that the case would not be recordable—a view that OSHA later had to disavow.[4] Work restriction cases are likewise widely misunderstood. The 1989 OSHA-commissioned Keystone Report stated the consensus of knowledgeable persons from OSHA, industry and unions that "the recording of restricted work is perhaps the least understood and least accepted concept in the recordkeeping system." Keystone Center, "Keystone National Policy Dialogue on Work-Related Illness and Injury Recording" (1989). Furthermore, employers often misunderstand other restriction concepts, such as the need to determine the frequency of a restricted task (§ 1904.7(b)(4)(ii)), and to determine the import of a physician's vague notation "take it easy" (see § 1904.7(b)(3)(vii)). Similarly, employers often confuse the rule for tetanus injection (not recordable; § 1904.7(b)(5)(ii)(B)) with that for gamma globulin shots (recordable "medical treatment"), and confuse the work-relatedness rule regarding the contraction of hepatitis with that for influenza (§ 1904.5(b)(2)(viii)). They often confuse the rules for using medical glue to close a wound with the rule for covering a wound (§ 1904.7(b)(5)(ii)(D)). Other common mistakes include a failure to determine how an eye cinder was treated or why an x-ray was taken. A requirement to daily re-think these decisions is highly unlikely to result in a marked improvement in compliance.

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[3] The OSHA Form 300 Log states: "Public reporting burden for this collection of information is estimated to average 14 minutes per response, including time to review the instructions, search and gather the data needed, and complete and review the collection of information."

[4] Letter from F. Frodyma (OSHA) to B. Fellner (Nov. 19, 2002), available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=24329.

Adopting the proposal would therefore be arbitrary and capricious, and thus invalid, for it would impose massive costs that OSHA has ignored, costs that OSHA has not weighed against their benefits, and costs that could not be justified by any benefits, let alone by the minor benefits OSHA does estimate.

Furthermore, the daily reconsideration duty imposed by the proposal would violate section 8(d) of the OSH Act, which states that, "Any information obtained by the Secretary ... under this Act shall be obtained with a minimum burden upon employers, especially those operating small businesses. Unnecessary duplication of efforts in obtaining information shall be reduced to the maximum extent feasible." The daily reconsideration required by the proposal is not a "minimum burden" and it would result in "unnecessary duplication of efforts in obtaining information." Thus, the proposal would be invalid and subject to challenge on this ground.

It is possible that OSHA might argue in response to the above that, if an employer once considers recordability, the employer need not consider it again. OSHA's attorneys attempted to give this impression to the Advisory Committee on Construction Safety and Health. See Tr. 116-117.[5] The wording of the proposed amendments draws no such distinction, however. They unequivocally state that one must "record" and that this obligation continues to the end of the retention period, unless one records—not unless one records or has *considered* whether the case is recordable. See, *e.g.*, proposed § 1904.29(b)(3). More precisely, they do not distinguish between unrecorded cases that the employer previously examined but erroneously omitted from the log (as to which the employer would, if the comments at ACCSH by OSHA's attorneys are to be credited, hypothetically have no continuing duty to record), and unrecorded cases that the employer failed to examine for recordability at all (as to which it would).

If, however, OSHA truly means that recordability or partial recordability once considered (even erroneously) need not be re-considered, then the regulations must be amended to state that an employer has no further obligation to consider recordability after considering it once. That would presumably mean that if an employer considered recordability but wrongly decided not to record, OSHA would not issue a citation for violations more than six months thereafter. If that is what OSHA means, and especially if this is the reason why there is no daily duty of re-

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[5] Tr. 116-117 states:

> MR. PRATT [ACCSH committee member]: Okay. ... Let's say that there is a recordable case by the employer and he reaches the wrong conclusion about the recordability of that particular case, and he did not record by the eighth day.... You're saying that the employer would have to consider re-recordability again, let's say, on the ninth day.
>
> MS. GOODMAN: That is not what we're saying.
>
> * * *
>
> MR. PRATT: Well, then what you saying?
>
> MS. GOODMAN: We are saying, if you do not do the assessment, if you do not evaluate the recordability of the case on day one, you have an ongoing duty to evaluate the recordability of that case and make a determination. We are not saying that determination needs to remade on every day during the retention period.

examination, then the regulations must so state. We suggest that OSHA adopt the following regulatory language in proposed § 1904.29(b)(3), and other such provisions:

> This obligation continues throughout the entire record retention period described in § 1904.33 until the case is correctly recorded or until the employer has once considered whether the case is recordable, whichever occurs first. See §§ 1904.4(a); 1904.32(a)(1); 1904.33(b)(1); and 1904.40(a).

Such language would prevent the "burden" and "[u]nnecessary duplication" barred by section 8(d), and insulate the proposal from an invalidity challenge on that ground.

The Proposal Requires OSHA to Comply With SBREFA, the Regulatory Flexibility Act, Executive Order 12866, and the Paperwork Reduction Act.

OSHA's "Preliminary Economic Analysis," 80 Fed. Reg. at 45128-129, caused OSHA to—

- "[D]etermine[] that this proposal does not meet the definition of a major rule under the Congressional Review provisions of" the Small Business Regulatory Enforcement Fairness Act amendments (SBREFA) to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, evidently because OSHA determined that it will not have "an annual effect on the economy of $100,000,000 or more" within the meaning of 5 U.S.C. § 804(2)(A).

- "[C]ertif[y] that the proposed rule would not have a significant economic impact on a substantial number of small entities" under the Regulatory Flexibility Act, 5 U.S.C. 601 et seq. (as amended) (RFA). OSHA stated that, the proposed rule will "have no effect, or at most a nominal effect, on compliance costs and regulatory burden for employers, whether large or small."

- State that the proposed rule would not be economically significant under Executive Order 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993), because it will not have an annual effect on the economy of $100 million or more.

- State that "there are no increases or decreases to the Recording and Reporting Occupational Injuries and Illnesses burden hour and cost estimates" made under the Paperwork Reduction Act, 44 U.S.C. §§ 3501–3521. Under that statute, the Secretary and the Office of Management and Budget must determine that a recordkeeping requirement will have practical utility and will not be unduly burdensome. 44 U.S.C. § 3506(c)(3).

OSHA invited the public to comment on "[t]he accuracy of OSHA's estimate of the burden (time and cost) of the information collection requirements, including the validity of the methodology and assumptions used...."

We therefore submit that, as shown on pages 7 to 9 above, OSHA's "Preliminary Economic Analysis" omits so many burdens of compliance—indeed, omits the principal burden of compliance—and is so flawed in its reasoning as to make its preliminary analysis entirely unreliable. We showed on pages 7 to 9 above that the cost of daily reconsideration over the entire economy over the five-year retention period of a ***single*** unrecorded or partially-recorded injury per establishment would be up to $1,933,710,222, *i.e.*, almost two billion dollars. And that figure assumes just one unrecorded or partially recorded case per establishment annually—an unrealistically low figure. OSHA's preliminary analysis is therefore so flawed as to make its conclusions not merely wrong, not merely arbitrary and capricious, but faithless to the words and purposes of the governing laws and executive order.

OSHA must therefore reconsider the reasoning of its "Preliminary Economic Analysis" and conclude that the proposal will, as written, vastly exceed the threshold of $100 million, and that it will be unduly burdensome and unjustifiably so. OSHA must determine that the proposal meets the definition of a "major rule" under SBREFA's Congressional Review provisions, and notify Congress and the U.S. Small Business Administration's (SBA) Office of Advocacy accordingly. It must certify that the proposed rule would be economically significant under Executive Order 12866 and conduct the economic analysis required by Executive Order 12866. It must conclude that the proposal will cause increases to the Recording and Reporting Occupational Injuries and Illnesses burden hour and cost estimates previously made to OMB under the Paperwork Reduction Act. It must conclude that the proposal will have a significant economic impact on a substantial number of small entities" under the RFA and SBREFA, and convene a SBREFA panel.

If OSHA does not acknowledge that a daily-reconsideration duty is the logical consequence of the proposal as currently, or refuses to amend the proposal to state that an employer has no further obligation to consider recordability after considering it once, or to correct its economic analysis and, *inter alia*, convene a SBREFA panel, then the proposal is a sham—an attempt, through an insincere form of words, to effectively extend a statute of limitations without the agency owning up to the words' consequences. Courts will have no difficulty seeing through that pretense.

The Proposal, If Adopted, Would Be Invalid as Arbitrary and Capricious Because It Would Permit Prosecution of Cases That Are Stale by Years.

The proposal would also be invalid as arbitrary and capricious because, contrary to the purpose of section 9(c) of the OSHA, it would permit employers to be prosecuted on the basis of facts that are stale by years.

The preamble states that "concerns about stale claims have little bearing on OSHA recordkeeping cases," for "[o]ne can ordinarily ascertain whether an injury or illness occurred, and what treatment was necessary, by looking at medical reports, workers' compensation documents, and other relevant records, even if the affected employee or other witnesses are no longer available." This view is so demonstrably wrong as to further make the proposal arbitrary and capricious.

- *Restrictions*. OSHA's assertion is always untrue in restriction cases, for medical records are never sufficient on that issue. To determine whether an employee was "restricted," the employer must know details of the employee's duties, such as how often certain tasks are performed. § 1904.7(b)(4)(ii). Those details are never stated in medical records and they are often impossible to reconstruct nearly five years later; for example, rare is the welder who can recall nearly five years before how often he had climbed a ladder on a particular project. As shown above, restriction cases are among the most poorly understand among employers. OSHA's statement is therefore always untrue in this common situation.
- *Work-relatedness*. OSHA does not mention work relatedness with regard to staleness. That is understandable for, as OSHA is well aware, medical records often say nothing about work-relatedness, and what they do say is often unreliable, because medical professionals both commonly receive sketchy information about work-relatedness and commonly misunderstand the concepts of work-relatedness in Part 1904, often confusing them with work-relatedness concepts used in their states' workers' compensation laws. Establishing work-relatedness can be doubly difficult when, as OSHA acknowledges is common, recordkeepers leave their employment or, as occurred in the *Volks* case, the recordkeeper dies. In such cases, the ability to reconstruct why a case was not recorded will often be nil. OSHA's statement is therefore untrue in this common situation.
- *"Light duty" cases*. As OSHA must concede, it is common for physicians to write "light duty" on medical records—common enough that Part 1904 has a provision about it, § 1904.7(b)(4)(vii). The provision calls these statements "vague" and states that, to determine recordability, clarification from the physician will be needed. But even if such a clarification had been obtained, medical records will nearly always fail to memorialize it, and physicians cannot be expected to remember it years later. OSHA's statement is therefore untrue in this common situation.
- *X-rays*. OSHA's statement about staleness is untrue when trying to determine whether x-rays were taken solely for diagnosis (§1904.7(b)(5)(i)(B)), because such statements are almost never made in medical records. OSHA's statement is therefore untrue in these common situations.

The proposal should, therefore, not be adopted.

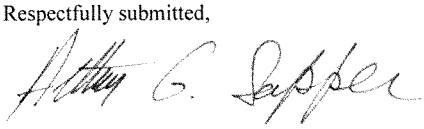
Request for Official Notice; Request for Inclusion of Document in Rulemaking Record

1. We request that the Secretary take official notice under the APA of the Amended Transcript, Advisory Comm. on Constr. Safety and Health (Dec. 4, 2014) (www.osha.gov/doc/accsh/transcripts/accsh_20141203_amended.pdf). For the agency's convenience, we have attached the transcript.

2. We further request that the Secretary formally enter this transcript into the rulemaking record here. We are mystified as to why this has not already been done here, as it had been done in numerous previous rulemakings affecting the construction industry.

The discussion above demonstrates that the proposed regulations are not founded in law or fact. For the reasons stated there, the commenters respectfully request that the proposed regulations be withdrawn.

Respectfully submitted,



On behalf of the National Federation of Independent Business; the Dewberry Companies; the United States Beet Sugar Association; the North American Meat Institute; and AKM LLC dba Volks Constructors

Enclosure: Amended Transcript, Advisory Comm. on Constr. Safety and Health (Dec. 4, 2014)

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May 31, 2016

VIA ELECTRONIC MAIL

The Honorable Tim Walberg
Subcommittee on Workforce Protections
Committee on Education and the Workforce
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

Re: Supplement to testimony during May 25, 2016, hearing on "Promoting Safe Workplaces Through Effective and Responsible Recordkeeping Standards"

Dear Mr. Chairman:

It was my privilege on May 25, 2016, to testify during the above hearing before the Subcommittee on Workforce Protections of the Committee on Education and the Workplace of the House of Representatives. I would appreciate your entering this letter into the record to supplement my testimony.

During the hearing, at about time mark 1:26:20, Representative Mark Pocan directed a remark at my testimony, though without posing a question to me. He stated he did not believe tha the memory of "losing a limb" or of "losing a family member" would be "stale" after six months.

The cases mentioned in Mr. Pocan's remark represent a very small fraction of the vast majority of recordable cases, which typically require one to recall details far less vivid. Take, for example, the following common examples:

- A physician's use of medical glue to close a wound is recordable, but not to cover a wound. § 1904.7(b)(5)(ii)(D). Medical records almost never record to which purpose the glue was used, and physicians cannot be expected to recall it years later.
- X-rays are not recordable if taken solely for diagnosis (§ 1904.7(b)(5)(i)(B)) but otherwise are recordable. Such details are almost never recorded in medical records and physicians cannot be expected to recall them years later.
- Removing an eye cinder with a loop is recordable but not if removed with a cotton swab. § 1904.7(b)(5)(ii)(J). Employers cannot be expected years later to recall which device was used in a particular case.
- OSHA regulations require employers to record injuries involving a work restriction, which is defined as a physician or employer instruction that an employee not perform a certain activity that he regularly performs at least weekly, such as climbing a ladder on a

construction site. § 1904.7(b)(4)(ii). But whether such a task was regularly performed at least weekly is never stated in medical records and it is often impossible to reconstruct nearly five years later.

- Physicians often write notes prescribing "light duty." OSHA's regulations call such notes "vague" (§ 1904.7(b)(4)(vii)) and require employers to obtain clarification from the physician as to whether they amount to a work restriction. But physicians rarely can remember years later whether they intended such a note to amount to a restriction.

Many more such examples could be described.

Finally, Representative Pocan seem to have been under the impression that the proposition that cases are stale after six months represents merely my opinion. It does not; it represents the opinion of the United States Congress. Section 9(c) of the Occupational Safety and Health Act states: "No citation may be issued … after the expiration of *six months* following the occurrence of any violation." (Emphasis added.)

Finally, in reviewing my testimony, I may have failed to address a question posed to me by the Chairman at time mark 1:07:47 about the status of Judge Garland's separate opinion in *AKM LLC dba Volks Constructors v. Sec'y of Labor*, 675 F.3d 752 (D.C. Cir. 2012): "Does the holding of the case come from the majority opinion or the concurrence?" The holding of the case comes from the majority opinion, not the concurrence. *E.g., Alexander v. Sandoval*, 532 U.S. 275, 285 n. 5 (2001). This is especially true in the *Volks* case, for Judge Garland styled his concurring opinion as one that concurred in the "judgment," rather than in the majority opinion.

Respectfully submitted,

Arthur G. Sapper

[Additional submissions by Mr. Walberg follows:]

MARK KNIGHT, President
ART DANIEL, Senior Vice President
B.E. STEWART, JR., Vice President
SCOTT WILLIAMS, Treasurer
STEPHEN E. SANDHERR, Chief Executive Officer
DAVID LUKENS, Chief Operating Officer

AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.

May 24, 2016

The Honorable Tim Walberg
Chairman
Committee on Education and the Workforce
Subcommittee on Workforce Protections
U.S. House of Representatives
Washington, DC 20515

Re: AGC Concerns with OSHA's Improved Tracking of Workplace Injuries and Illnesses

Dear Chairman Walberg:

The Associated General Contractors of America (AGC) thanks you for holding the hearing, "Promoting Safe Workplaces Through Effective and Responsible Recordkeeping Standards," which looks at the Occupational Safety & Health Administration's (OSHA) final rule – Improved Tracking of Workplace Injuries and Illnesses. This rule will significantly limit how employers are able to enforce policies that have been established to ensure timely reporting of incidents, as well as implement and enforce other safety and health policies.

Employers trying to comply with the rule have to make substantial changes to their current safety and health policies. Many of the safety policies that could be prohibited by this proposal are commonplace in today's businesses and promote a safe and healthy workplace. The policies are not designed to discourage injury or illness reporting.

The rule suggests that post-accident drug testing could be considered a practice that would discourage employees from reporting work-related injuries or illnesses; however, nothing could be further from the truth. While OSHA states that the final rule does not ban employee drug testing, the rule does create a system where employers may be apprehensive to do so. The rule also places employer safety incentive programs in jeopardy. OSHA claims that safety incentive programs might dissuade a reasonable employee from reporting an injury. However, AGC has evidence that these programs have proven track records of improving the safety and health of workers in the industry.

The rule's creation of more data and reporting will lead to an inappropriate misallocation of resources that will detract from efforts to advance workplace safety and health in the construction industry to one focused on data collection. AGC views the rule as flawed and urges Congress to evaluate mechanisms to urge OSHA to place resources in compliance assistance and other initiatives to improve workplace safety rather than data collection.

Sincerely,

Jeffrey D. Shoaf
Senior Executive Director, Government Affairs

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May 31, 2016

VIA HAND DELIVERY

Dr. David Michaels
Assistant Secretary of Labor for Occupational Safety and Health
United States Department of Labor, Occupational Safety and Health Administration
200 Constitution Ave., NW
Room S2315
Washington, DC 20210

Re: Enforcement of Improve Tracking of Workplace Injuries and Illnesses Final Rule

Dear Dr. Michaels:

This letter is on behalf of a number of companies that our firm represents that have serious concerns about certain aspects of the revised 29 C.F.R. §§ 1904.35 and 1904.36 published in the Federal Register on May 12, 2016 ("Final Rule"). Collectively, these companies employ tens of thousands of employees, and they have sophisticated safety programs and admirable safety records. In particular, they respectfully request that OSHA indefinitely delay enforcement of the Final Rule so that the agency can solicit and meaningfully consider public comments on OSHA's statement in the Preamble that it intends to use the anti-retaliation provision in the Final Rule (1) to effectively prohibit employer safety incentive programs tied to occupational injury and illness rates; and (2) to limit employer use of drug testing. OSHA's proposed interpretation of the Final Rule in these two respects is legally deficient, and the rulemaking process failed to put employers on notice of these significant proposed changes.

The restrictions on safety incentive programs and post-incident drug testing will have a significant impact on the American workplace. In both cases, OSHA is attempting to regulate important workplace activities through commentary in the Preamble to the Final Rule, rather than providing the regulated community with fair notice of the law in regulatory text. Indeed, neither policy change is apparent from the language of the Final Rule itself. Moreover, neither the restrictions on incentive programs nor the limitations on post-accident drug testing were subject to fair notice by OSHA in the rulemaking process or an opportunity for industry to comment. As a consequence, the rulemaking record lacks any meaningful evidence of the nature, scope, and extent of the alleged problems that the changes are ostensibly designed to address. OSHA also has not given sufficient attention to the legal and logistical problems employers will face in implementing these changes. The banning of safety incentive programs as of August 10, 2016, is particularly problematic because it will require many employers to

modify their compensation packages mid-year, after employees have worked under those programs for six or more months.

As discussed more fully below, OSHA should re-open the rulemaking process with respect to these policies so that the public is given an opportunity to provide comment and OSHA can consider the impact of those comments before it attempts to cite and penalize employers. In the meantime, and at a minimum, the agency should delay enforcement of the Final Rule until at least January 1, 2017, so that employers are not forced to change compensation structures for employees in the middle of the year. Otherwise, employers will be at risk of legal liability to their workers under wage and hour and other laws.

I. The Final Rule fails to provide stakeholders with adequate notice that it prohibits safety incentive programs tied to injury and illness rates.

The Preamble to the Final Rule makes clear that OSHA intends to treat paragraph (b)(1)(iv) of the revised 29 C.F.R. § 1904.35 as prohibiting certain employer safety incentive programs. *See* Improve Tracking of Workplace Injuries and Illnesses, 81 Fed. Reg. 29,624, 29,674 (May 12, 2016). In particular, OSHA states that it will interpret the Final Rule to prohibit financial or other rewards for employees whose teams, departments, or divisions do not experience a recordable event. *See id.* The changes to §§1904.35 and 1904.36 are scheduled to take effect on August 10, 2016. *Id.* at 29,624. However, nothing in the language of the Final Rule would suggest to the ordinary reader that the Rule prohibits safety incentive programs tied to recordable injuries and illnesses. This failure renders this interpretation of the Final Rule legally deficient.

The text of Paragraph 1904.35(b)(1)(i) states that an employer must establish a "reasonable" procedure for employees to report occupational injuries and illnesses promptly and accurately, and that a procedure "is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness." Paragraph 1904.35(b)(1)(iv) states further that an employer "must not . . . in any manner discriminate against any employee for reporting a work-related injury or illness." Nothing in this regulatory text puts employers on notice that incentive programs that reward employees for not having a recordable event are prohibited. Yet, based on this language, and a reference in § 1904.36 that § 1904.35 and Section 11(c) of the OSHA Act prohibit an employer from discriminating against an employee for reporting a work-related fatality, injury, or illness, the Preamble states the sweeping proposition that OSHA will effectively bar *all* employer incentive programs that depend in any way on recordable injuries and illnesses. In addition, the use of the term "reasonable" is unduly vague,

leaves employers without any useful guidance as to how the new regulation will be applied, and gives compliance officers unfair and unpredictable discretion in applying the Final Rule.

If OSHA does indeed intend to take the position that all incentive programs dependent on recordable injuries and illnesses will be unlawful after August 10, 2016, then OSHA must be up front with the regulated community and make clear in the text of the regulation itself what is permitted and prohibited. As a matter of law, OSHA's interpretation of the Final Rule will be given effect only if it "sensibly conforms to the purpose and wording of the regulation." *See Beaver Plant Operations, Inc. v. Herman*, 223 F.3d 25, 29 (1st Cir. 2000) (citation and internal quotation marks omitted). A backdoor effort to ban certain safety incentive programs through vague regulatory text and a discussion buried in the Preamble of the Final Rule fails this standard, denies employers fair notice, and will not survive legal scrutiny.

II. OSHA did not provide sufficient notice during the rulemaking process of its intent to use anti-retaliation provisions to effectively prohibit incentive programs tied to recordable injuries or illnesses.

Under the Administrative Procedure Act ("APA"), a notice of proposed rulemaking must include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3) (2012). The final rule must be a "logical outgrowth" of the rule proposed. *In re E.P.A.*, 803 F.3d 804, 807 (6th Cir. 2015) (citing *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007)). "General notice that a new standard will be adopted affords the parties scant opportunity for comment." *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 169 (2d Cir. 2013) (quoting *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994)). The agency must therefore "describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decision-making." *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011) (internal quotation marks omitted).

OSHA's notices prior to issuance of the Final Rule did not alert the public in any way that it intended to ban financial and other rewards related to recordable injury and illness rates. Neither the initial proposed rule concerning electronic reporting of workplace injuries and illnesses nor the supplemental notice proposing changes to § 1904.35 mentioned safety incentive programs at all. *See* Improve Tracking of Workplace Injuries and Illnesses (proposed rule), 78 Fed. Reg. 67,254–83 (Nov. 8, 2013); Improve Tracking of Workplace Injuries and Illnesses (supplemental notice of proposed rulemaking), 79 Fed. Reg. 47,605–10 (Aug. 14, 2014). The fact that the United Steelworkers and the American College of Occupational and Environmental Medicine—the only commenters named in the Preamble—discussed certain "employer incentive

policies" in their comments does not cure this deficiency. *See Wagner Elec. Corp. v. Volpe*, 466 F.2d 1013, 1019 (3d Cir. 1972) (holding notice inadequate even though "some knowledgeable" commenters appreciated and discussed the link between the subject of the notice and a subject ultimately covered by the final rule).

III. The rulemaking record lacks evidentiary support for OSHA's sweeping prohibition on employer incentive programs tied to recordable injuries and illnesses.

Because of OSHA's failure to provide ample notice in the rulemaking process, the rulemaking record itself lacks ample evidentiary support for the sweeping policy changes discussed in the Preamble to the Final Rule. The agency appears to rely on (1) union anecdotes; (2) two GAO studies concluding that certain incentive programs *may* discourage reporting; (3) a single majority staff report from a Democrat-controlled House of Representatives committee; and (4) a California State Auditor report that noted that "safety experts . . . indicate that incentives . . . which have been shown to reduce injury rates in some studies, also could contribute to some managers and employees not properly reporting injuries." (Ex. 1695). *See* Final Rule at 29,673.

This "evidence" is insufficient to justify the policy changes contained in the Final Rule. At most, these sources raise the *possibility* that certain incentive programs may discourage reporting, but further evidence needs to be developed. In particular, with respect to the California State Auditor report, the Preamble states that the Auditor "found that an employee incentive program had likely caused the significant underreporting of injuries by the company working on reconstruction of a portion of the San Francisco Bay Bridge (Ex. 1695)." Final Rule at 29,673. While the AFL-CIO described the Auditor's findings in this way in its comments, *see* Ex. 1695, the Auditor drew no such conclusion. Rather, the Auditor's report states that "[e]xperts say that providing incentives such as cash, vacations, and awards to employees in promotion of workplace safety is a common practice throughout the construction industry and may indeed produce positive results." *Id.* at Attachment 4, page 24. The report also noted that "[a] number of studies indicate companies with a safety incentive program have lower injury rates." *Id. Cf. In re E.P.A.*, 803 F.3d at 807 (staying enforcement of a final rule, in part because the EPA failed to identify "specific scientific support substantiating the reasonableness" of the rule).

In the absence of any real evidence, OSHA's discussion in the Preamble about safety incentive programs tied to recordable injuries and illnesses cynically ascribes the worst intention

and behaviors to both employers and employees. In particular, OSHA assumes in the Preamble that any employer that utilizes a safety incentive program tied to injury and illness rates is necessarily preventing or discouraging employees from reporting such events, or retaliating against employees for doing so. And it further assumes that employees subject to such incentive programs will hide the injuries and illnesses they sustain. However, it is equally plausible that incentive programs cause employees to behave *more safely* so that they avoid the exposures and conduct that lead to recordable incidents in the first place. Many companies have successfully and properly utilized such programs not to discourage reporting, but to encourage actual safe behavior. Before implementing such a profound change, OSHA should provide proper notice of the proposed changes so that comments on all relevant aspects of the issue can be submitted and OSHA can consider them.

The evidence in the rulemaking record upon which OSHA relies to support its approach to safety incentive programs simply is inadequate to justify such a sweeping regulatory change. The Preamble lacks any information about an actual problem, never mind any sort of data to suggest that OSHA's proposed solution – banning incentive programs tied to injury and illness rates – is the (or even *a*) valid solution. The Preamble contains no information, for example, on:

(i) the number of workplaces that use such incentive programs;

(ii) the extent to which such programs cause under-reporting;

(iii) an estimate of the number of additional occupational injuries and illnesses that would be reported each year if OSHA's ban becomes law;

(iv) whether workplaces are actually made safer by such incentive programs because they encourage employees to work more carefully;

(v) any empirical evidence on the extent to which employees who are subject to such incentive programs actually perceive such programs to discourage reporting;

(vi) whether all types of incentive programs tied to injury and illness rates should be treated the same, or whether certain types are more problematic than others; and, among other things,

(vii) whether banning incentive programs tied to injury and illness rates might lead employees to work less safely and produce a more dangerous workplace.

Indeed, OSHA has failed even to consider the possibility that incentive programs tied to injury and illness rates might actually make workplaces more safe, as the California State Auditor report referenced above suggests.

For those reasons, employers, and the public at large, should be afforded an opportunity to comment upon the change before it takes effect.

IV. Prohibiting safety incentive programs in the middle of a calendar year creates an untenable "catch-22" for employers of violating either federal or state law, and possibly both.

OSHA's plan to implement the anti-retaliation provisions to prohibit safety incentive programs in the middle of a calendar year will create an untenable situation for many employers that utilize such programs. Companies typically establish their compensation structures for a year well in advance of January 1 of that year so that employees understand what their pay will be and can guide their conduct according to their employer's incentive programs.

Moreover, many companies and workers have structured compensation packages for fiscal year 2016 to include incentives that may now be deemed by OSHA to violate the Final Rule. Yet, the Final Rule was issued nearly five months into 2016, and it is scheduled to take effect in the third quarter, which is the final quarter of fiscal year 2016 for many companies. Thus, by the time the Final Rule takes effect, many workers will arguably have a vested right to certain 2016 compensation that ostensibly violates the Final Rule but, at the same time, was a legal and promised feature of the workers' compensation before the Final Rule was issued.

Our clients are legitimately concerned about the legal exposure they may have under state and local wage laws, to breach of contract claims, and to equitable causes of action if they err on the side of caution by modifying or eliminating certain safety-related compensation to avoid the risk of a citation from OSHA. *See, e.g.*, *Pleitez v. Carney*, 594 F. Supp. 2d 47, 49 (D.D.C. 2009) (holding that bonuses constitute wages under the District of Columbia Wage Payment and Collection Law and awarding a plaintiff the amount of a promised bonus plus liquidated damages).

By delaying application of the Final Rule to safety incentive programs until January 1, 2017, OSHA will afford employers an opportunity to honor their 2016 safety incentive commitments to their workers. Employers and employees can then take the Final Rule into consideration when structuring their fiscal year 2017 compensation packages.

V. OSHA's attempt in the Final Rule to limit employer drug testing fails to comply with the Administrative Procedure Act.

In the Preamble, OSHA states that the Final Rule "prohibit[s] employers from using drug testing (or the threat of drug testing) as a form of adverse action against employees who report injuries or illnesses." The Preamble goes on to state that "drug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use." OSHA states that it will not require that the employer specifically suspect drug use before testing, "but there should be a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness in order for an employer to require drug testing."

OSHA's approach to drug testing in the Final Rule suffers from numerous legal and practical infirmities that must be explored further in the rulemaking process, with specific notice to stakeholders and a more developed record, before a sweeping new legal mandate can be issued.

First, nothing in the text of the Final Rule would enable a regulated employer to divine the new limitations that OSHA intends to place on employer drug testing of employees. As noted above, this point alone renders the Final Rule vulnerable to challenges.

Second, like the record with respect to incentive programs, the rulemaking record with respect to employer use of drug-testing to retaliate against employees for reporting occupational injuries or illnesses is wholly lacking. Aside from one anecdotal report related to an employer in Las Vegas and normative judgments about the inappropriateness of using drug testing to discourage reporting of injuries and illnesses, the record lacks any evidence that employers perform drug testing on employees to interfere with or retaliate against employees for reporting. This record is an inadequate basis upon which to implement a regulatory change that potentially affects hundreds of thousands of American workplaces and millions of employees.

Third, even for those employers who are able to locate OSHA's discussion of drug testing buried in the Preamble, no reasonable employer reading the discussion would have a clear

sense as to when drug testing is permitted or prohibited. The Preamble states that the employer should be able to show that "drug use by the reporting employee was a contributing factor to the reported injury or illness" before testing may occur. Yet, neither the regulatory text nor the Preamble provides any guidance as to what level of evidence would be sufficient to satisfy the employer's burden. Similarly, what if the employer suspects that drug use *by another* employee caused the reporting employee's injury and the employer drug tests the whole crew with which the injured employee works? This practice is common in many industries and is not designed to single out or sanction the reporting employee. Yet, under the discussion in the Preamble, the employer could well be at risk of a citation.

In short, OSHA's discussion of drug testing raises far more questions than it answers and creates substantial uncertainty for employers. It fails the most basic tests under the APA of providing employers with fair notice of what their legal rights and obligations are with respect to drug testing.

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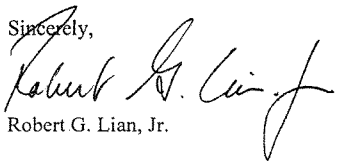
Thank you for your consideration of the above concerns. If you wish to discuss them further, I would be happy to meet with you.

Sincerely,



Robert G. Lian, Jr.

[Whereupon, at 11:37 a.m., the Subcommittee was adjourned.]

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