U.S. SMALL BUSINESS ADMINISTRATION

OFFICE OF ADVOCACY

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September 27, 2018

BY ELECTRONIC SUBMISSION
Ms. Loren Sweatt
Acting Assistant Secretary of Labor for Occupational Safety and Health
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210
Electronic Address: http://www.regulations.gov (Docket No. OSHA-2013-0023)

Re: Comments on OSHA's Proposed Tracking of Workplace Injuries and Illnesses Rule (commonly known as the "Electronic Reporting" Rule)

Dear Acting Assistant Secretary Sweatt:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) submits the following comments on the Occupational Safety and Health Administration's (OSHA's) *Proposed Tracking of Workplace Injuries and Illnesses Rule* (commonly known as the "*Electronic Reporting*" Rule) that was published in the Federal Register on July 30, 2018.[1] The proposed rule is a deregulatory action that would amend OSHA's recordkeeping and reporting regulations[2] by rescinding the requirement that employers with 250 or more employees electronically submit to OSHA the information from their OSHA 300 (Log of Work-Related Injuries and Illnesses) and 301 (Injury and Illness Incident Reports) forms. However, the rule would retain the requirement that these employers electronically submit the information from their OSHA 300A (Summary of Work-Related Injuries and Illnesses) form.[3] OSHA states that it is proposing this action to protect sensitive worker information from potential disclosure under the Freedom of Information Act (FOIA) and that the costs to the agency of collecting this information and the reporting burdens on employers do not justify its benefits.[4] While Advocacy supports the proposed regulatory changes, Advocacy believes OSHA should consider additional

[1] 83 Fed. Reg. 36494 (July 30, 2018).
[2] 29 CFR 1904.
[3] The rule would not change the requirement for employers with more than 20 but less than 250 employees in certain designated industries from submitting their 300A forms to OSHA electronically.
[4] 83 Fed. Reg. 36494 (July 30, 2018).

changes that would further reduce the paperwork and regulatory burdens on small business and also protect the disclosure of sensitive employer information.

Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of SBA or the Administration. The Regulatory Flexibility Act (RFA),[5] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[6] gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives. Moreover, the Small Business Jobs Act of 2010 requires federal agencies to give every appropriate consideration to comments provided by Advocacy.[7] Specifically, the agency must include, in any explanation or discussion of a final rule published in the Federal Register, the agency's response to comments submitted by Advocacy and a detailed statement of any changes made to the final rule as a result of those comments, unless the agency certifies that the public interest is not served by doing so.[8]

Background

On May 12, 2016, OSHA issued a final rule called "*Improve Tracking of Workplace Injuries and Illness*" (commonly known as the "*Electronic Reporting* Rule").[9] This final rule revised OSHA's employer recordkeeping and reporting of injuries and illnesses rule (29 CFR 1904) to require employers with 250 or more employees to annually submit to OSHA or its designee their OSHA 300, 300A, and 301 injury and illness reporting forms electronically. In addition, the rule required employers with 20 or more but less than 250 employees in certain "Designated Industries" to submit only their OSHA 300A Summary of Work-Related Injuries and Illnesses to OSHA electronically. OSHA's stated goal was to encourage (or "nudge") employers into improving health and safety conditions by making their injuries and illness reports publicly available.

OSHA stated in the final rule that it planned to make the reports publicly available on the internet so that the public, employee representatives, researchers, and potential employees could assess and evaluate the health and safety records of a company. The rule also required employers to establish "reasonable procedures" (a term not defined) that did not discourage employees from reporting work-related injuries and illnesses. This provision, per the discussion in the preamble, prohibited safety incentive programs (such as rewards for days worked without an injury) and drug testing policies that could potentially discourage an employee from reporting a work-related injury or illness. The final rule was widely opposed by the small business community, who thought the disclosure of this information was potentially misleading and could

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[5] 5 U.S.C. § 601 et seq.
[6] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).
[7] Small Business Jobs Act of 2010 (P.L. 111-240) §1601.
[8] *Id.*, codified at 5 U.S.C. 604(a)(3).
[9] 81 Fed. Reg. 29624 (May 12, 2016).

jeopardize the privacy rights of employees and the confidential business information of employers. They also argued that the prohibition of safety incentive programs and post-incident drug testing could jeopardize safety at work sites.

On July 30, 2018, OSHA issued the current proposed rule that would eliminate the requirement that employers with more than 250 employees submit their OSHA 300 and 301 forms electronically, but would still require them to submit their 300A summaries of work-related injuries and illnesses electronically. The proposed rule would also require employers to include their Employee Identification Number (EIN) in their submissions.

Small Entities Have Expressed Concerns with OSHA's Proposed Beryllium Rule

This rule has been discussed at several of Advocacy's regular small business labor safety (OSHA/MSHA) roundtables over the past several years and has also been raised at a number of Advocacy's Regional Regulatory Reform Roundtables that have been hosted around the country in furtherance of Executive Orders 13771 (Reducing Regulation and Controlling Regulatory Costs)[10] and 13777 (Enforcing the Regulatory Agenda).[11] In addition, the issue has been the subject of several Executive Order 12866 meetings that Advocacy has attended and was most recently discussed at Advocacy's regular Small business Labor Safety (OSHA/MSHA) Roundtable on Friday, September 21, 2018. Small business representatives stated that they are opposed to the requirement to submit injury and illness information to OSHA electronically and believe the current proposed rule, while a burden reduction, does not go far enough to eliminating the electronic submission mandate altogether. The following comments are reflective of the issues raised during the roundtables and meetings and in other discussions with small businesses and their representatives. Advocacy recommends that OSHA carefully consider these and other comments it receives from small business and incorporate those concerns into any final rule.

1. **OSHA should consider eliminating the electronic submission requirement as well as the potential disclosure of confidential business information.** Small businesses and their representatives have stated that the proposed elimination of the electronic submission of 300 and 301 data, while a burden reduction, is too narrow and that OSHA should consider eliminating the requirement to submit any injury and illness data electronically, including the 300A data. Small business representatives noted that OSHA's policy in its 2016 final rule to publicly disclose injury and illness data was a departure from long-standing agency policy, and applaud OSHA's acknowledgment that sensitive employee information could be disclosed under FOIA. They noted that the current administration's policy of nondisclosure under FOIA could be changed by a subsequent administration or through litigation. They conclude, therefore, that OSHA should not collect this information electronically at all. Small business representatives have also stated that confidential business information of employers (such as employee hours worked) could also be released or disclosed. For these reasons, Advocacy recommends that OSHA consider eliminating the requirement to submit 300A data as well as 300 and 301 data.

[10] 82 Fed. Reg. 9339 (February 3, 2017)
[11] 82 Fed. Reg. 12285 (March 1, 2017)

2. **OSHA should reconsider its data collection requirements for firms in the "Designated Industries" (Appendix A) and "Partially Exempt" categories to further reduce paperwork burdens on small business.** Small businesses and their representatives have stated that OSHA should reassess its list of "Designated Industries" (Appendix A)[12] to relieve more small businesses of the requirement to record and report workplace injuries and illnesses. They noted that the Appendix A list of designated industries is so broad that nearly every significant sector is covered. Similarly, they have stated that OSHA should expand the list of "Partially Exempt" [13] industries so that more small businesses are exempt from maintaining injury and illness records at all. Advocacy made similar comments in its September 28, 2011 comment letter[14] to OSHA on OSHA's *Proposed Occupational Injury and Illness Recording and Reporting Requirements – NAICS Update and Reporting Revisions Rule*,[15] suggesting that OSHA should consider exempting more industries from recordkeeping requirements, particularly those in industries with declining injury and illness rates. Advocacy also noted that OSHA could still obtain objective industry data through representative employer surveys as is currently done. For these reasons, Advocacy recommends that OSHA reconsider its data collection requirements for firms in the "Designated Industries" and "Partially Exempt" categories to further reduce paperwork burdens on small business.

3. **OSHA should either eliminate or more clearly define "reasonable procedures" for its anti-retaliation provisions.** OSHA's final 2016 rule provided that employers must establish reasonable procedures for employees to report work-related injuries promptly and accurately. Further, it stated that a policy is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness. OSHA describes various safety incentive programs and post-accident drug testing policies as violating this provision. Small businesses representatives have complained that the term "reasonable procedures" is undefined and unclear and believe the prohibition on safety incentive programs and post-accident drug testing would have a negative impact on safety. While the proposed rule does not address this issue, small business representatives have called on OSHA to expand the rulemaking to reconsider this policy. Accordingly, Advocacy recommends that OSHA reconsider its anti-retaliation policy and either eliminate this provision or clearly define the term "reasonable procedures" for its anti-retaliation policies.

4. **OSHA should not require the submission of Employer Identification Numbers (EIN).** Small businesses and their representatives stated that they consider the EIN, a specific number assigned to a business by the Internal Revenue Service for the purposes of tax identification (and similar to a personal Social Security Number), to be confidential due to the potential for its fraudulent usage. While they acknowledged that the EIN is disclosed on some public filings, they said that OSHA should not make this information

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[12] 81 Fed. Reg. 29693 (May 12, 2016)
[13] 29 CFR 1904.2.
[14] See, https://www.sba.gov/content/letter-dated-092811-department-labor-occupational-safety-and-health-administration.
[15] 76 Fed. Reg. 36414 (June 22, 2011).

more readily available than is necessary and questioned OSHA's ability to protect it. They also stated that they feared these numbers could be jeopardized by cyber incursion and questioned the value OSHA would obtain by collecting and retaining it. Several stated that it was just another unnecessary data collection by OSHA. Accordingly, Advocacy recommends that OSHA carefully consider the need for and value of collecting Employer Identification Numbers (EIN) before imposing such a mandate.

Conclusion

Thank you for the opportunity to comment on OSHA's *Proposed Tracking of Workplace Injuries and Illnesses Rule*. Advocacy supports OSHA's proposed changes, but believes OSHA should consider additional changes that would further reduce the paperwork and regulatory burdens on small business and also protect the disclosure of sensitive employer information. One of the primary functions of the Office of Advocacy is to assist federal agencies in understanding the impact of their regulatory programs on small entities. To that end, Advocacy hopes these comments are helpful and constructive. Please feel free to contact me or Bruce Lundegren at (202) 205-6144 or bruce.lundegren@sba.gov) if you have any questions or require additional information.

Sincerely,

Major L. Clark, III
Acting Chief Counsel for Advocacy

Bruce E. Lundegren
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Copy to: The Honorable Neomi Rao, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget