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OSHA Docket Office
Docket No. OSHA 2013-0023
Room N-3653
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, DC 20210

VIA ELECTRONIC SUBMISSION: <http://www.regulations.gov>

Re: OSHA Docket No. OSHA-2013-0023; Proposed Rule to Delay Compliance Date for Reporting Requirement under Final Improve Tracking of Workplace Injuries and Illnesses Regulation (82 Fed. Reg. 29261, June 28, 2017)

To the Docket:

The U.S. Chamber of Commerce (the “Chamber”) is the world’s largest business organization representing the interests of more than three million businesses of all sizes and in every market sector and region throughout the United States. Our members range from small businesses to large multinational corporations, and local chambers to leading industry associations.

As many of our members would be impacted by OSHA’s regulation, “Improve Tracking of Workplace Injuries and Illnesses” (“final regulation,” “underlying regulation,” “reporting regulation”) the Chamber vigorously opposed the rulemaking that produced this regulation, and since it was issued as a final regulation on May 12, 2016 has sought ways to block, revise or rescind it. We submitted comprehensive comments to both proposals (attached), appeared at the public meeting held in January 2014, and joined a legal challenge to the regulation.

Accordingly, the Chamber welcomes OSHA’s proposal to delay the compliance date for employers required to submit¹ their Form 300As (annual summaries) from July 1, 2017 to December 1, 2017. However, the Chamber believes OSHA and employers would be better served by the agency staying the reporting requirement indefinitely pending the outcome of the comprehensive rulemaking OSHA has committed to undertaking to fully review this regulation (82 Fed. Reg. 29261).

¹ The regulation requires establishments with more than 250 or more employees (at any time of the year), and establishments with 20-249 employees (at any time of the year) who are listed in industry codes associated with high rates of injuries to electronically submit to OSHA their annual summaries (Form 300A) by July 1, 2017.

Merely delaying the submission of these reports suggests OSHA will activate the requirement on December 1. Employers will begin preparing to submit their forms months ahead of that date. If OSHA then concludes, through the comprehensive rulemaking, to rescind this requirement, then employers will have spent their resources for no purpose.

Furthermore, since the only benefits OSHA claims will flow from this regulation are entirely speculative and non-quantifiable, there is no harm to staying the requirement indefinitely pending the outcome of the upcoming rulemaking.² Indeed, this administration adopts the previous administration's conclusions with respect to the unquantifiable and uncertain nature of the benefits associated with the reporting requirement to make the point that the proposed delay would not "have any effect on these benefits" (82 Fed. Reg. 29262).

Beyond the inconvenience is the more important point that OSHA has stated clearly that any submitted reports, even the annual summaries that are the subject of this proposed delay, will be posted online, and subject to Freedom of Information Act (FOIA) requests (81 Fed. Reg. 29650, 29658). While the Form 300As do not include personal information, they do include confidential business information (CBI) in the form of average number of employees and hours worked. Employers regard this data as very sensitive since competitors can use it to calculate production and efficiency rates. Indeed, since the reports to be filed will be by establishment, competitors will be able to glean establishment-specific details.

Ironically, OSHA previously regarded this information as deserving of protection. As we stated in our comments to the proposed regulation in March 2014:

OSHA and the Chamber's position are, or at least were, the same: Total hours worked at individual establishments is confidential and proprietary information. *See New York Times Co.*, 340 F. Supp. 2d at 402. Indeed, in the *New York Times Co.* case, OSHA asserted that this number was not only confidential information, but had the capacity to "cause substantial competitive injury." *Id.* (citing Dep't of Labor Mem. of Law, Ex. B at 17). This is because, as OSHA itself argued, the total hours worked by a company's employees "corresponds with business productivity," Dep't of Labor Mem. of Law, Ex. B at 4, and could be used "to calculate a business[']s costs and profit margins," *id.* at 17 (citing *Westinghouse Elec. Corp. v. Schlesinger*, 392 F. Supp. 1264, 1249 (E.D. Va. 1976), *aff'd*, 542 F.2d 1190 (4th Cir. 1976)). The confidentiality problems relating to hours worked are only exacerbated in this Proposed Rule by OSHA's insistence on collecting and publishing this information on an establishment-by-establishment basis, *including the number of employees at each establishment*. Armed with total hours worked plus an establishment's employee count, a business' overall capacity and productivity can easily be determined.

Unfortunately, OSHA now maintains that this information is not worthy of protection and in the preamble to final rule makes clear that all fields in the Form 300As will be posted, (81

² See final regulation preamble discussion that "if the final rule leads to either 1.5 fewer fatalities or .025 percent fewer injuries per year, the rule's benefits will be equal to or greater than the costs." 81 Fed. Reg. 29686 (emphasis added).

Fed. Reg. 29650) and that since 2004 the agency has taken the position that the annual average number of employees and total hours worked data is available through FOIA requests. (*Id.* at 29658).

OSHA has before it an administrative petition submitted by all the litigants in the two legal challenges to the regulation that asks OSHA to stay the initial compliance date of July 1, 2017, and to further stay implementation and enforcement of the final regulation until the conclusion of any reconsideration of the regulation. The petition makes clear that OSHA has both the authority to stay the regulation, and a history of doing so when appropriate. Furthermore, the approach requested in the petition would provide time for OSHA to develop a strong record in support of a proposed regulation that would revise or rescind the underlying regulation. The Chamber renews its request that OSHA implements the steps included in the petition. The petition is attached for OSHA's convenience.

OSHA's proposal for a delay also has practical flaws. OSHA states the online portal will be available so that employers may become familiar with it by August 1. However, OSHA never indicates how, or whether, it will be compatible with various digital recordkeeping systems currently in use. OSHA makes no claim to having field tested the online portal, or beta testing it, only that employers will have four months with which to learn it. While digital recordkeeping is certainly a widespread practice and may be preferred, how digital records get transferred to OSHA's portal is not explained. If the systems are incompatible, there may actually be manual data entry involved which would defeat the point of OSHA specifying only digital submission. Even though submission will be at the establishment level, there may still be significant effort required to coordinate and compile records for submission purposes. None of these possible, perhaps likely, steps are accounted for in the economic analysis accompanying this regulation, nor the underlying final regulation.

The Chamber is pleased to see OSHA moving towards a rulemaking to revise or rescind the Improve Tracking of Workplace Injuries and Illnesses final regulation. Instead of merely delaying the compliance date for reporting from July 1, 2017 to December 1, 2017, we urge OSHA to stay the reporting date indefinitely pending the outcome of the comprehensive rulemaking OSHA has committed to undertaking. We further urge the agency to act on the petition submitted by all the litigants involved in the legal challenge to this regulation.

Sincerely,



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Senior Vice President
Labor, Immigration & Employee Benefits



Marc Freedman
Executive Director of Labor Law Policy
Labor, Immigration & Employee Benefits

Attachments

Attachment 1: U.S. Chamber Comments on OSHA Injury and Illness Electronic Reporting Rule

Attachment 2: U.S. Chamber Comments on Supplemental NPRM

Attachment 3: Electronic Recordkeeping Petition