Attachment 3

Improve Tracking of Workplace Injuries and Illnesses
29 CFR Part 1904 and 1902
Docket No. OSHA-2013-0023

Petition for Administrative Stay and Reopening of the Rulemaking Record

The National Association of Home Builders of the United States; Chamber of Commerce of the United States of America; Oklahoma State Home Builders Association; State Chamber of Oklahoma; National Chicken Council; National Turkey Federation; and U.S. Poultry & Egg Association (collectively the "Oklahoma Petitioners"), and Texo ABC/AGC, Inc.; Associated Builders and Contractors, Inc.; National Association of Manufacturers; American Fuel & Petrochemical Manufacturers; Great American Insurance Company; Atlantic Precast Concrete, Inc.; Owen Steel Company; and Oxford Property Management LLC (collectively the "Texas Petitioners"), together the "Petitioners," hereby request that the Department of Labor ("DOL" or "Department") and the Occupational Safety and Health Administration ("OSHA" or the "Agency") stay the initial date of submission of the Form 300A (currently set for July 1, 2017) and further stay implementation and enforcement of its final rule *Improve Tracking of Workplace Injuries and Illnesses,* 29 C.F.R. Parts 1904 and 1902 ("Electronic Recordkeeping Rule" or "Rule") published in the *Federal Register* on May 12, 2016 (81 Fed. Reg. 29,624). In addition, Petitioners request that the Agency reopen the rulemaking record to reconsider the legal authority for the Rule and its impact on workplace safety and health. Petitioners seek a stay of the Rule until the conclusion of any reconsideration of the Rule.[1]

[1] Petitioners have filed two separate lawsuits in federal district court challenging the legality of the Rule. *See National Association of Homebuilders of the United States et al. v. Perez,* No. 17-cv-0009 (W.D. Okla); *TEXO ABC/AGC, Inc. et al. v. Perez,* Civil Action No. 16-cv-1998 (N.D. Tex.). Both of these cases are currently stayed (until June 5, 2017), on Motion by the Government, to allow an opportunity for incoming departmental leadership to review the issues involved in the cases. In addition to the reasons to stay the rule and reopen the rulemaking record given in this

A stay of the Rule is in the interests of justice. The Rule, published in the final year of President Obama's administration, exceeds OSHA's statutory authority under the Occupational Safety and Health Act of 1970 ("OSH Act" or "Act") (29 U.S.C. § 651 *et seq.*), and will have an adverse impact on workplace safety and health. In addition, portions of the Rule were promulgated without proper observance of procedure required by the Administrative Procedure Act ("APA") (5 U.S.C. § 551 *et seq.*). It is incumbent upon the Agency to stay further implementation and enforcement of this Rule, which is unlawful and contrary to OSHA's statutory mission, in order to conduct a full review of the Rule in a manner consistent with this Administration's desire to review rules promulgated at the end of President Obama's term. *Accord* January 20, 2017 memorandum, "Regulatory Freeze Pending Review" Reince Priebus, Assistant to the President and Chief of Staff. 82 Fed. Reg. 8,346 (Jan. 24, 2017). An administrative stay of the Rule is authorized under OSHA's rulemaking authority found in Section 8(g)(2) of the Act and 5 U.S.C. §§ 553 and 705. A stay would give the Agency time to reassess the legality and propriety of OSHA's actions with the benefit of additional notice and comment.

Furthermore, both employers and employees will be harmed if a stay is not granted. Electronic submission and public posting of the Form 300A, as OSHA has committed to doing, will divulge employers' confidential business information. In addition, any further implementation and enforcement of the requirements related to "reasonable reporting" procedures would put employers at risk of citation and penalty for routine post-accident drug testing policies and incident-based safety incentive programs known to protect the safety and health of employees. Moreover, the Final Rule will unfortunately undermine, rather than advance, employee safety and

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Petition, Petitioners hereby incorporate their respective claims as stated in the two complaints regarding the unlawful nature of the Rule and the procedures OSHA took to promulgate it.

accident prevention; and thus the implementation of the Rule is more likely to endanger employee health and safety.

For all of these reasons and as described in greater detail below, a stay and reconsideration of the Rule are warranted.

BACKGROUND

OSHA promulgated its first recordkeeping rule in 1971. 36 Fed. Reg. 12,612 (July 2, 1971). In 2001, OSHA revised this recordkeeping rule and established a comprehensive "no-fault" recordkeeping system, which requires certain employers covered by the OSH Act to maintain records about every workplace injury or illness involving death, loss of consciousness, days away from work, restriction of work or motion, transfer to another job, medical treatment other than first aid, or diagnosis of a significant injury or illness. 66 Fed. Reg. 5,916, at 5,917 (Jan. 19, 2001). Under this rule, certain employers are required to maintain injury and illness records. These records include the Form 300 Log ("Form 300" or "OSHA 300 Log"), the Form 301 "Injury and Illness Incident Report" ("Form 301"), and the Form 300A "Summary of Work-related Injuries and Illnesses" ("Form 300A").

On November 8, 2013, OSHA published a Notice of Proposed Rulemaking ("NPRM") entitled *Improve Tracking of Workplace Injuries and Illnesses*, 78 Fed. Reg. 67,254 (Nov. 8, 2013), to revise the 2001 rule. OSHA proposed to require certain employers to submit electronically their Forms 300, 301, and 300A to OSHA on a regular basis, and the Agency stated that it would make this information publicly available in an online database. *Id*. at 67,258. The purported safety and health benefits from the rule flowed from the Agency's commitment to make the data publicly available. OSHA stated that "the online posting of establishment-specific injury and illness information will encourage employers to improve and/or maintain workplace safety/health to

support their reputations as good places to work or do business with." *Id.* at 67,258. Many commenters opposed this proposed rule, including the Petitioners, arguing that the Agency had no legal authority for making such information publicly available and warning of the negative impact it would have on workplace safety and health.

In response to a few comments from organized labor that the proposal would cause employers to discourage injury and illness reporting, on August 14, 2014, OSHA published a Supplemental Notice of Proposed Rulemaking in the *Federal Register*. 79 Fed. Reg. 47,605 (Aug. 14, 2014). This Supplemental Notice was just six pages and provided no regulatory text. In the notice, OSHA specifically sought comment on whether "to (1) require that employers inform their employees of their right to report injuries and illnesses; (2) require that any injury and illness reporting requirements established by the employer be reasonable and not unduly burdensome; and (3) prohibit an employer from taking adverse action against employees for reporting injuries and illnesses." *Id*.

Despite significant objections from the regulated community, including from safety organizations, OSHA finalized the Rule on May 12, 2016. 81 Fed. Reg. 29,624. The Rule has three primary components. First, it requires certain employers for the first time to submit injury and illness recordkeeping forms to OSHA only by electronic methods (29 C.F.R. § 1904.41), which OSHA has committed to then making publicly available in an online database. 81 Fed. Reg. at 29,692. Second, it requires employers to establish reasonable procedures for employees to report work-related injuries (29 C.F.R. § 1904.35). 81 Fed. Reg. at 29,691. Third, it gives OSHA additional authority to redress alleged discrimination and retaliation against employees for reporting a work-related injury or illness beyond that expressly given the Agency by Congress (29 C.F.R. §§ 1904.35(b)(1) & 1904.36). 81 Fed. Reg. at 29,691-92. The preamble to the Rule

indicated further that certain long established workplace safety practices would be deemed to be unlawfully retaliatory, including routine post-accident drug testing programs and incident-based safety incentive programs relied on by many employers to protect the safety and health of their employees. *Id*. at 29,691-92.

The original effective date for certain provisions of the Rule was August 10, 2016. *Id.* at 29,624. At the invitation of Judge Lindsay in the U.S. District Court for the Northern District of Texas, OSHA agreed to delay enforcement of the requirement that employers establish reasonable reporting procedures, and the effective date of the anti-discrimination and anti-retaliation provisions, until November 1, 2016, and then again to December 1, 2016. These provisions are now in effect.

The electronic reporting requirement is set to take effect on July 1, 2017, when certain employers will be required to submit their Form 300A to the Agency. As of the date of this Petition, OSHA had not finalized an electronic portal to allow for the submission of the Forms, despite the Agency's public statements that the portal would be available starting in February, 2017.

DISCUSSION

I. A Stay is Necessary to Avoid Harm to Employers and Employees.

Petitioners respectfully request that the Agency stay the initial date of submission of the Form 300A (currently set for July 1, 2017) and further stay implementation and enforcement of the "reasonable reporting" requirements of the Rule. OSHA has on numerous occasions administratively stayed rules to allow the Agency to reassess their key aspects. For example, OSHA stayed compliance with the PEL for certain industries affected by the cotton dust standard based on "feasibility problems" recognized after promulgation of the final rule. 49 Fed. Reg. 6,717

(Feb. 23, 1984). OSHA did the same for portions of its formaldehyde standard (53 Fed. Reg. 50,198, Dec. 13, 1988) and the asbestos standard (51 Fed. Reg. 37,002, Oct. 17, 1986). Most recently, OSHA delayed enforcement of its respirable crystalline silica rule for construction and twice delayed the effective date of its beryllium standard. *See* https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=33810; 82 Fed. Reg. 8,901 (Feb. 1, 2017), 82 Fed. Reg. 14,439 (Mar. 21, 2017).

The July 1, 2017 compliance date for the electronic submission of certain employers' Form 300A is less than two months away. The Form contains confidential business information that OSHA has previously considered protected from public disclosure. Specifically, the Form 300A requires employers to disclose the total hours worked for all employees in the year. "Hours worked" has historically been considered confidential commercial information protected from disclosure under the Freedom of Information Act. 5 U.S.C. § 552(b)(4) (2000). *See New York Times Co. v. U.S. Dept. of Labor*, 340 F. Supp. 2d 394, 401 (S.D.N.Y. 2004) (release of Lost Work Day Illness and Injury (LWDII) rates for roughly 13,000 worksites is "tantamount to release of confidential commercial information, specifically the number of employee hours worked, because this number can be easily ascertained from LWDII rates"). Further, these Forms contain employer addresses, which may be confidential for certain employers, such as the makers of explosives or other products or commodities that are security sensitive.

In addition, the online portal for submission of these forms is still not available, despite previous assurances from the Agency that it would be at this time. Employers are unsure of the mechanisms to electronically submit this information. OSHA's website (last accessed on May 3, 2017) states:

> OSHA will provide a secure website that offers three options for data submission. First, users will be able to manually enter data into a webform. Second, users will

> be able to upload a CSV file to process single or multiple establishments at the same time. Last, users of automated recordkeeping systems will have the ability to transmit data electronically via an API (application programming interface). OSHA is not accepting electronic submissions at this time. Updates will be posted to the OSHA website at www.osha.gov/recordkeeping when they are available.

Despite these statements, it is just weeks out from the submission date and OSHA's portal is non-existent.

Of course once OSHA's secure website *is* available for submission, employers will need time to familiarize themselves with the options for data submission, determine which option works best for their collection of data, train employees on the use and submission of the data and then eventually submit the data. In addition, the Agency should provide sufficient time for compliance assistance and employer outreach and allow time to address questions that may arise once the secure website is available. To date, none of this has occurred.

The Agency should also stay the provisions regarding reasonable reporting procedures while the issues in this Petition are reexamined. As further discussed below, employers now face the prospect of guessing what constitutes a "reasonable reporting procedure" under the Rule. Some are making decisions to stop programs that have a proven track record of improving workplace safety and health, based on OSHA's preamble language and subsequent guidance material. The Agency should stay compliance and stop any enforcement of this provision while it reassesses its approach and reviews its own legal authority in this area.

II. Reopening the Rulemaking Record Is Appropriate to Consider the Significant Legal and Policy Issues Raised by the Rule.

An administrative stay and reconsideration of the Rule are warranted because the Rule raises at least four significant legal issues, which in turn have significant policy ramifications for employers and employees. To provide time for the new administration to consider these legal and policy issues, a stay is appropriate to preserve the status quo.

A. OSHA Lacks Authority to Post Workplace Injury and Illness Information.

First, OSHA lacks statutory authority to create an online database meant for the public dissemination of employers' injury and illness records. OSHA has stated that it has authority for the Rule under Sections 8 and 24 of the OSH Act, but neither of those sections authorizes OSHA to publicly disseminate reports collected under the Rule. *See, e.g.*, Comments of the National Association of Home Builders of the United States, OSHA-2013-0023-1408, p.7 ("The OSH Act omits any language that would provide OSHA authority to make an employer's injury and illness records available to the public."); Comments from the U.S. Chamber of Commerce, OSHA-2013-0023-1396, p.3 ("Conspicuously absent from [the statute] is any mention, let alone express or implied authority, that OSHA may create an online database meant for the public dissemination of an employer's injury and illness records containing confidential and proprietary information.").

The Congress's treatment of other similar online databases underscores that it did not intend to give OSHA authority to create such a database. For example, the Consumer Product Safety Improvement Act of 2008 expressly requires that the Consumer Product Safety Commission create and maintain a publicly available online database of incidents related to the safety of consumer products. 15 U.S.C. § 2055a. This database is meant to provide consumers with information regarding "injuries caused by consumer products," so that consumers may make informed decisions about what products they buy. *See* 154 Cong. Rec. S7867, S7870 (daily ed., July 31, 2008) (statement of Sen. Carl Levin). This or similar language is *not* included in the OSH Act. Had Congress wanted OSHA to create an online database of workplace injury and illness records, it would have said so. OSHA's authority with respect to recordkeeping is limited, and

Congress has not given the Agency the authority to publish injury and illness data, as it has with other regulatory agencies.

Numerous commenters made these arguments to the Agency during the rulemaking process, as well as during a public meeting held by OSHA January 9-10, 2014. Yet, OSHA failed to respond adequately to them in promulgating the Rule. These are significant questions of authority that deserved careful consideration in promulgating the Rule. Reopening the rulemaking record would give the Agency an opportunity to fully consider the extent to which it has the statutory authority to publicly post confidential injury and illness information.

In addition, the rulemaking record failed to demonstrate any safety and health benefit from the electronic submission and posting requirements. OSHA failed to consider evidence of reputational harm to businesses based on misleading information of the safety and health efforts of employers. OSHA also failed to explain its change in position with respect to the public release of information previously found by the Agency to be confidential and *not* subject to public dissemination.

Instead, OSHA announced that its objective in the Rule is to "nudge" employers to abate hazards by publicly shaming them with the disclosure of injury and illness data. *Id*. at 29,629. This objective, in effect, reverses the entire concept of a "no-fault" recordkeeping system and raises constitutional concerns under the First Amendment. *See Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir. 2014), *adhered to on reh'g*, 800 F.3d 518 (D.C. Cir. 2015) (vacating SEC's public disclosure rule). OSHA readily acknowledged that many injuries contained on an employer's OSHA 300 Log are not within the control of the employer. 66 Fed. Reg. at 5,934. Yet, OSHA wants the public and future employees to rely on this data to establish which workplaces are safe and which companies have strong safety records. 81 Fed. Reg. at 29,649.

This is, at best, an internally inconsistent position and, at worst, a demonstration of how the Agency does not understand its own past positions on recordkeeping and the elements of an effective safety and health programs in worksites across the country.

The electronic submission requirement and public posting exceed the Agency's authority. Petitioners request that OSHA re-open the rulemaking record to consider these significant issues, reexamine the underlying purposes of its recordkeeping system, and consider how the reporting requirements impact workplace safety and health.

B. OSHA May not Create a Separate Mechanism to Address Discrimination Claims Beyond Section 11(c) of the OSH Act.

As stated above, the Rule creates a new scheme to prohibit alleged discrimination and retaliation against employees. This, too, exceeds OSHA's statutory authority, as it contravenes the statutory scheme established by Congress in Section 11(c) of the OSH Act.

Section 1904.35(b)(1)(iv) of the Rule prohibits employers from "discharg[ing] or in any manner discriminat[ing] against any employee for reporting a work-related injury or illness." 29 C.F.R. § 1904.35(b)(1)(iv). This provision goes far beyond the substantive prohibition against discrimination and the procedures specified for discrimination claims found in Section 11(c) of the OSH Act. Section 11(c) prohibits discrimination where an employee "has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf or himself or others of any right afforded by this Act." 29 U.S.C. § 660(c)(1). An employee who allegedly suffered such discrimination may then "file a complaint with the Secretary," who must then conduct an investigation to determine whether discrimination occurred. *Id.* at § 660(c)(2). If the Secretary determines that there has been a violation, then the Secretary shall bring an

enforcement action in federal court to obtain injunctive relief, as well as any appropriate reinstatement, rehiring, and backpay. *Id.*

With Section 1904.35(b)(1)(iv), OSHA is circumventing the procedural requirements provided in Section 11(c) and giving itself the right to pursue citations against employers for certain alleged retaliatory conduct and giving the Occupational Safety and Health Review Commission the jurisdiction to hear and decide these matters in contravention of the statute and congressional intent. In promulgating this Rule, OSHA admitted that Section 1904.35(b)(1)(iv) provides an "additional enforcement tool for ensuring the accuracy of work-related injury and illness records that is not dependent on employees filing complaints on their own behalf…. The final rule 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 a section 11(c) complaint." 81 Fed. Reg. at 29,671.

But Section 11(c) prescribes the *exclusive* procedure for employee discrimination and retaliation claims pertaining to safety and health in the workplace. Congress did not provide OSHA the authority to perform enforcement actions or issue citations on its own, without having received a complaint from an employee, for what it would deem to be discriminatory or retaliatory actions. OSHA's Rule would circumvent this exclusive procedure by establishing an enforcement tool by which it could cite employers and seek civil penalties, reinstatement, and back-pay through an administrative process, without even having an employee file a complaint as the statute clearly requires. 81 Fed. Reg. at 29,627.

C. The Rule's Requirement for "Reasonable Reporting Procedures" is Vague and Unenforceable.

In the Rule, OSHA requires that "any injury and illness reporting requirements established by the employer be reasonable." 29 C.F.R. § 1904.35(b)(1)(i). However, OSHA provides little

guidance on what may or may not be "reasonable." In fact, OSHA never precisely defines what a "reasonable" or "unreasonable" reporting procedure might be under this provision.

For example, in describing its position on timely reporting of injuries and illnesses, OSHA recognizes employer interests in timely and accurate reporting, but then notes a balancing of fairness "to employees who cannot reasonably discover their injuries or illnesses" and the need for understanding the "overriding objective of part 1904." 81 Fed. Reg. at 29,670. OSHA then states in undefined terms that "for a reporting procedure to be reasonable and not unduly burdensome, it must allow for reporting of work-related injuries and illnesses within a reasonable timeframe after the employee has realized that he or she has suffered a work-related injury or illness." *Id.* An employer cannot have certainty that its policy is appropriate until OSHA makes a *post hoc* determination of whether it is (or is not).

D. OSHA's Language Identifying Certain Drug Testing and Safety Incentive Programs as Retaliation is Arbitrary and Capricious.

In the preamble to the final Rule, OSHA states that drug testing "is often perceived as an invasion of privacy, so if an injury or illness is very unlikely to have been caused by employee drug use, or if the method of drug testing does not identify impairment by only use at some time in the recent past, requiring the employee to be drug tested may inappropriately deter reporting." *Id*. at 29,673. Such a policy is completely counter to what the U.S. Department of Health and Human Services, Substance Abuse Mental Health Services Administration ("SAMHSA") advocates and contrary to requirements for Federal Workplace Drug Testing under Executive Order 12564.

In addition, numerous statements in the preamble indicate that routine, post-accident drug testing will be deemed to be retaliatory if an employer cannot show that "employee drug use is likely to have contributed to the incident." The contradictory messages promulgated by the

Agency have left employers with inadequate notice as to when drug testing in the work environment would run afoul of this final Rule and when it would not. Moreover, the Agency failed to consider the adverse impact on employee safety and health of prohibiting certain workplace drug testing.

Similarly, OSHA takes aim at employer safety incentive programs with little guidance to employers as to what would be considered acceptable under the Rule, and what guidance is given improperly declares unlawful long established, incident-based safety incentive programs. 81 Fed. Reg. at 29,671 and 29,674.[2] OSHA states, "the specific rules and details of implementation of any given incentive program must be considered to determine whether it could give rise to a violation of paragraph (b)(1)(iv) of the final rule." 81 Fed. Reg. at 29,674. Such language suggests that employers can never truly be assured whether an incentive program they implement would be in violation of the Rule or not. And to the extent that the prohibitory language that appears in the Rule is read as declaring invalid many incident-based safety incentive programs, such a Rule (or agency guidance to the same effect) is arbitrary and capricious.

OSHA provided no evidence that the implementation of safety incentive programs and routine mandatory post-incident drug testing of injured employees has adversely impacted workplace safety. OSHA cited no study connecting safety incentive programs to reduced reporting of injuries and cited no study refuting the clear evidence that safety incentive programs reduce the number of workplace injuries. To the contrary, OSHA failed to consider available evidence that demonstrates various safety programs potentially deemed as "retaliatory" under this Rule

[2] "It is a violation for an employer to use an incentive program to take adverse action, including denying a benefit, because an employee reports a work-related injury or illness, such as disqualifying the employee for a monetary bonus or any other action that would discourage or deter a reasonable employee from reporting the work-related injury or illness." 81 Fed. Reg. at 29,674.

significantly reduce workplace injuries, illnesses, and deaths. In reviewing several studies that evaluated employer safety incentive programs, for example, a 2012 GAO Report noted that three of those studies concluded that incentive programs reduced work-related injuries. United States Government Accountability Office Report to Congressional Requesters on Workplace Safety & Health, GAO 12-329 (April 2012).

If OSHA decides to "enforce" the preamble "guidance" on reasonable reporting procedures, it could have a devastating effect on worker safety and health. To the extent the Rule is interpreted to prohibit certain safety incentive programs or post-incident drug testing of injured employees, evidence demonstrates this could significantly increase work-related injuries, illnesses, and deaths. Finally, to the extent that the enforcement of the Rule is dependent on previous guidance issued prior to the Rule itself, *see Memorandum to Regional Administrators* from Richard Fairfax dated Mar. 12, 2012, that guidance is itself arbitrary and capricious and should be withdrawn.

Petitioners urge OSHA to reopen the record to accept and review additional evidence including, but not limited to, the benefits of safety incentive programs and post-accident drug testing. The Agency and all stakeholders will benefit from a reexamination of the Rule.[3]

CONCLUSION

Petitioners support the Agency's mission of ensuring that employers keep and maintain accurate injury and illness records. This Rule, however, exceeds OSHA's authority to establish

[3] Petitioners also challenge the rulemaking process undertaken by the Agency to promulgate the requirements regarding reasonable-reporting procedures. As stated above, OSHA "proposed" these provisions in a six-page supplemental notice. The Agency provided no regulatory text and no meaningful notice regarding the wide range of practices that could potentially be considered unlawful. Under the APA, an agency must provide fair notice and an opportunity to comment on its proposed rules. OSHA did not do so here. Reopening the rulemaking record would be a positive step toward correcting this fatal procedural flaw.

recordkeeping rules and will have an adverse impact on workplace safety and health. The Agency should stay the initial date of submission of the Form 300A and further implementation and enforcement of the other portions of the Rule. Furthermore, the Agency should reopen the rulemaking to take comments and further review and reconsider the Rule.

Dated: May 5, 2017

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