



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.

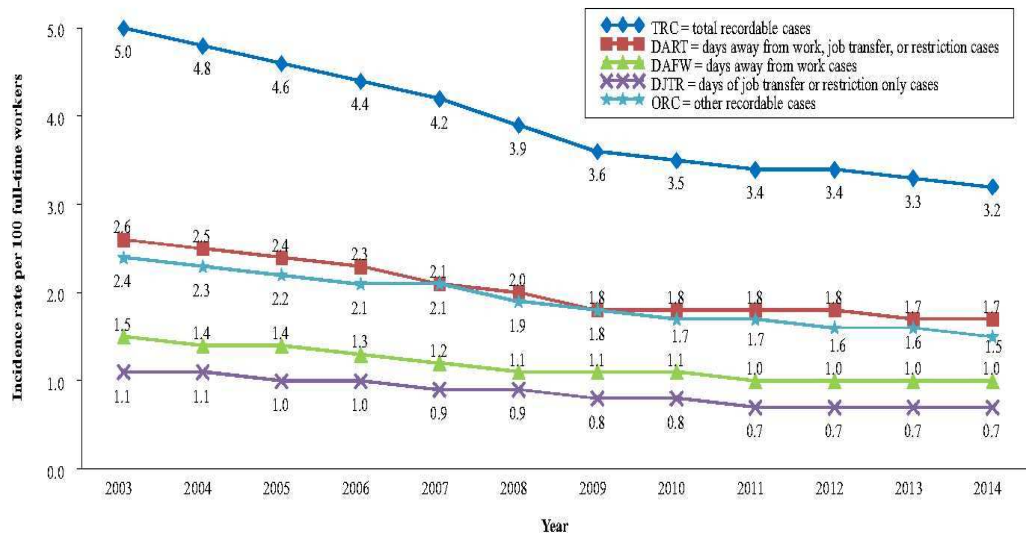
I have some personal experience of having been involved in the NAS Committee that reviewed the Bureau of Labor Statistics methodology for collecting data on workplace injuries and illnesses as part of a review of a survey conducted by NIOSH on the use of respirators in 2001. NIOSH selected the study 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 4821 among 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

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.

back pain and its real causes. Neither receive the kind of 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 proposed 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; 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 are 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 employer-specific 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 it perceives as having the potential to discourage employee reporting, even without any evidence that an employee was discouraged 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, 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 to provide 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

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 were 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 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.

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.

4814-9825-2338, v. 1