

**COMMENTS OF THE ATTORNEYS GENERAL OF NEW JERSEY, MARYLAND,  
MASSACHUSETTS, NEW YORK, PENNSYLVANIA, RHODE ISLAND, AND  
WASHINGTON**

September 28, 2018

By electronic submission to [www.regulations.gov](http://www.regulations.gov)

The Honorable R. Alexander Acosta  
Secretary of Labor  
United States Department of Labor  
200 Constitution Avenue NW  
Washington, DC 20210

Re: Docket No. OSHA-2013-0023/RIN 1218-AD17  
Proposal to Limit Reporting of Workplace Injuries and Illnesses,  
83 Fed. Reg. 36,494 (July 30, 2018)

Dear Secretary Acosta:

We, the undersigned State Attorneys General, write to oppose the U.S. Department of Labor's proposal to roll back critical public reporting of workplace injuries and illnesses. On July 30, 2018, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) announced plans to shield information about workplace injuries and illnesses from the public eye—just two years after OSHA first decided to make that information available. Back in 2016, OSHA recognized the ways that collection and publication of detailed workplace-specific injury reports would benefit employees, researchers, state and local governments, workplace safety and health professionals, and the general public. Nothing has changed since, and there is no basis for OSHA's about-face: reporting on workplace injuries is as vital as ever. Shielding workplace safety information from public disclosure, as OSHA now proposes to do, would be a tremendous disservice to the working men and women of America.

Of particular concern, OSHA ignores the significant benefits that public reporting of workplace injuries and illnesses can bring—which makes this proposal arbitrary and capricious. Although OSHA now says that public reporting offers no significant benefit because OSHA has no current plan to use such information in its enforcement efforts, OSHA ignores myriad other benefits that support public disclosure of workplace safety information. For one, disclosure encourages employers to self-police and improve their workplace safety practices. For another, the release of this information gives employees, potential employees, and contracting entities the tools they need to demand better workplace safety from employers. And most importantly to our own work, public reporting of detailed workplace injury and illness information allows state and local government agencies to better target our own enforcement efforts.

Worse still, OSHA's purported reason for making this change cannot stand up to serious scrutiny—another reason why its action is unlawful. OSHA contends that it cannot release this information because of concerns about employees' privacy, but two years ago OSHA developed a workable and effective system for mitigating those very concerns. OSHA, for one thing, already declined to collect the most sensitive employee information, like names and addresses. For another, other agencies collect similar information without violating individual privacy. And most importantly, individual case information that would invade a worker's privacy is already exempt from disclosure under FOIA. OSHA's asserted fears are overblown.

OSHA's abrupt change of course, based on no new facts and an invented argument about worker privacy, is a textbook example of arbitrary and capricious rulemaking. We urge OSHA to remain faithful to its mission of ensuring safe conditions for workers by withdrawing this harmful and flawed proposal.

## **I. BACKGROUND ON THE WORKPLACE ILLNESS AND INJURY REPORTING RULE**

Just over two years ago, OSHA completed a thorough rulemaking aimed at improving the tracking of workplace injuries and illnesses. *See* Improve Tracking of Workplace Injuries & Illnesses, 81 Fed. Reg. 29,624 (May 12, 2016) (2016 Rule). The 2016 Rule required employers with 250+ employees to annually submit information electronically from three workplace injury and illness tracking forms that employers were already required to keep on-site. These forms are Form 300, Log of Work-Related Injuries and Illnesses, which provides information about each injury or illness, including date, location, job title, description of injury/illness, and outcome (employee names not submitted); Form 301, Injury and Illness Incident Report, which contains detailed information about the injury or illness and how it occurred (employee name and address and name and address of doctor and treating facility not submitted); and Form 300A, Summary of Work-Related Injuries and Illnesses, which summarizes the total number, types, and outcomes of injuries and illnesses at the establishment.<sup>1</sup> Under the 2016 Rule, OSHA planned to make the injury and illness data publicly available through an online database after ensuring the removal of personally identifiable information (such as names and social security numbers).

During the 2016 rulemaking process, OSHA considered the views of private businesses, industry groups, workers' organizations, unions, academics, state agencies, and private citizens as expressed in three stakeholder meetings and 1,820 comment letters. OSHA discussed in detail the ways in which the electronic collection and publication of establishment-specific injury and illness reports benefit employees, potential employees, employers, researchers, workplace safety and health professionals, state and county governments, the general public, and OSHA itself. OSHA also considered the concerns raised by commenters and made several changes, including requiring annual rather than quarterly data submission to reduce the burden on employers, and excluding certain information from submission requirements to protect workers' privacy.

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<sup>1</sup> Employers with 20-249 employees in certain higher-risk industries were required to electronically submit the Form 300A only.

Prior to the 2016 Rule, there was “very limited information” publicly available about specific injuries and illnesses occurring in the workplace. *Id.* at 29,629. The 2016 Rule, which allowed OSHA for the first time to “obtain a much larger data set of more timely, establishment-specific information about injuries and illnesses in the workplace,” was thus a substantial step towards improving worker health and safety and received significant support from workers, labor unions, professional associations, and researchers.

OSHA was supposed to begin collecting the information on the Annual Summary Form 300A on December 15, 2017, and the more detailed information in Forms 300 and 301 on July 1, 2018. Importantly, the detailed records that OSHA now seeks to stop collecting from employers are records employers must maintain anyway. Thus, the 2016 Rule did not impose new record-keeping burdens; rather the Rule provided the means for OSHA to systematically collect existing public safety information and disseminate it to workers, researchers, health care professionals, government agencies, and the public. But OSHA has so far declined to begin collecting the data from Forms 300 and 301, and through this proposed rulemaking, it seeks authority to rescind altogether its obligation to collect this more-detailed illness and injury data.

## **II. OSHA FAILED TO CONSIDER MYRIAD BENEFITS OF REPORTING AND PUBLISHING DETAILED WORKPLACE INJURY AND ILLNESS INFORMATION.**

In contrast to the extensive, thorough, and well-reasoned 2016 Rule, OSHA’s current plans to terminate public reporting of workplace injury and illness data rely upon an inadequate analysis. Simply put, OSHA ignores multiple important benefits that it previously noted would result from the collection and publication of illness and injury data, all of which formed the basis for the 2016 Rule.<sup>2</sup> Specifically, in support of its current proposal, OSHA maintains that the benefits of collection and publication of this workplace safety information are limited in light of its supposed inability to use more detailed data in targeting its own enforcement efforts—because, OSHA says, it does not yet have sufficient experience with (or systems for using) the data. *See* 83 Fed. Reg. 36,494, 36,498 (July 30, 2018). (That is unsurprising: OSHA has not begun collecting the data and has not attempted to develop systems to analyze it.) But OSHA’s own use of the data was only one of many relevant benefits OSHA and commenters anticipated from the 2016 Rule, and OSHA’s proposal fails to grapple with those benefits. OSHA is simply ignoring the role that public disclosure of this data has in encouraging employers to change their practices, in providing workers’ information they need to advocate for safer workplaces, and most importantly to our work, in enabling states to better target our own enforcement efforts.

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<sup>2</sup> As the Supreme Court has made clear, although an agency “need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate,” “[s]ometimes it must,” including when “its new policy rests upon factual findings that contradict those which underlay its prior policy.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). A “reasoned explanation is needed for disregarding facts and circumstances that underlay . . . the prior policy,” and it “would be arbitrary and capricious to ignore such matters.” *Id.* at 515-16. OSHA provided no explanation at all for its complete disregard of nearly all the factual findings in the 2016 Rule, and its failure renders its proposal arbitrary and capricious.

First, as OSHA anticipated in 2016, because “public disclosure of data can be a powerful tool in changing behavior,” “disclosure of and public access to these data will . . . ‘nudge’ some employers to abate hazards and thereby prevent workplace injuries and illnesses without OSHA having to conduct onsite inspection.” 81 Fed. Reg. at 29,629. OSHA identified multiple reasons that it believed the 2016 Rule would have this effect: employers would be able to “benchmark” their health and safety performance against comparable establishments; employers would fear for their public image; employees and potential employees would have information to enable them to choose to work at safer workplaces, depriving less safe employers of valuable employees; and customers could make employer safety performance a factor in their purchasing and contracting decisions. *Id.* at 29,630-31 & 29,647-48; Improve Tracking of Workplace Injuries & Illnesses, 78 Fed. Reg. 67,254, 67,258-59 (proposed Nov. 8, 2013). While OSHA’s publication of the summary data alone could have some impact on such choices, the detailed information available in the logs and incident reports would be much more useful to an employer trying to compare its performance against others in the field and identify specific areas for improvement. OSHA fails to grapple with this benefit entirely in its current rule proposal.

Second, this information would give workers themselves information they could use to protect their health and safety. Based on the more detailed establishment-specific data—which employees are often reluctant to request from employers for fear of retaliation—employees would be able to “better identify hazards within their own workplace and take actions to have the hazards abated.” 81 Fed. Reg. at 29,630 & 29,648. Employees could also protect themselves by choosing to leave workplaces with unacceptable levels of hazards, or workplaces where conditions are worsening or not improving in response to employee concerns. *Id.* at 29,648. Similarly, potential employees could “make a more informed decision about a future place of employment.” *Id.* at 29,631. Public release of workplace safety data would thus empower workers and, as OSHA previously recognized, would “help address a problem of information asymmetry in the labor market.” *Id.* For such purposes, summary information, which contains no details about how an accident or illness occurred, would be of significantly less help. OSHA fails to address this benefit too—even though it formed a basis for the 2016 rule.

Third, public access to detailed workplace injury and illness data would allow researchers “to identify patterns of injuries and illnesses that are masked by the aggregation of data,” and, by allowing them to link data from OSHA reports with other publicly available data, would “enable researchers to conduct rigorous studies that will increase our understanding of injury causation, prevention, and consequences.” *Id.* As the Council of State and Territorial Epidemiologists advised OSHA, access to this data would “facilitate timely identification of emerging hazards.” *Id.* at 29,647. Moreover, the data would allow safety and health professionals and organizations to develop and evaluate the effectiveness of private workplace safety initiatives, and to target educational and outreach efforts. *Id.* at 29,631 & 29,647. As the AFL-CIO commented, the data would “assist unions in their efforts to collect injury and illness information from employers to assess conditions in individual workplaces and across employers and industries where they represent workers.” *Id.* at 29,647. Again, OSHA ignores this benefit altogether.

Finally, as State Attorneys General, we are particularly concerned with the impact that rescinding the 2016 Rule would have on efforts by state and local government entities to protect workers in our states. A number of states enjoy authority under so-called State Plans to enforce federal occupational health and safety standards, and these states are required to promulgate regulations “substantially identical” to those adopted by OSHA, including the 2016 Rule. *Id.* at 29,688. Even if OSHA itself no longer plans to use the detailed information from Forms 300 and 301 in its enforcement efforts, this information remains valuable to state agencies when carrying out enforcement and consultation work. For example, the New Jersey Department of Labor and Workforce Development intended to use the reported information to better target its inspections and outreach programs. Although the Department uses data from the Bureau of Labor Statistics to prepare its Annual and Five-Year Strategic Plans, the detailed information that would have been reported under the 2016 Rule would have allowed it to better prioritize and evaluate its work. Additionally, New Jersey state inspectors planned to access the detailed establishment-specific data from the public database in advance of onsite inspections so that they could tailor their inspections to the particular hazards and conditions previously reported in the facility.

Importantly, Departments of Labor in State Plan states are not the only state and local public entities that would be affected by the rescission of the 2016 Rule. As OSHA itself noted, the publicly available information would have been “of great use to county, state, and territorial Departments of Health and other public institutions charged with injury and illness surveillance.” *Id.* at 29,631. Specifically, the Rule would have rectified the problem that “[t]here are currently no comparable data sets available” so “public health surveillance programs must primarily rely on reporting of cases seen by medical practitioners, any one of whom would rarely see enough cases to identify an occupational etiology.” *Id.* Moreover, as the Council of State and Territorial Epidemiologists commented, the availability of detailed data would have allowed public health entities to “incorporate occupational health concerns in community health planning, which is increasingly providing the basis for setting community health and prevention priorities.” *Id.* at 29,648. This type of analysis requires the detailed information in Forms 300 and 301 and would not be possible based only on the summary information that OSHA now intends to collect.

Because, as OSHA agrees, *see* 83 Fed. Reg. at 36,505, the Occupational Safety and Health Act does not preempt more stringent state regulations, we strongly believe that State Plan states remain free to adopt regulations requiring submission of detailed data or data from smaller employers. However, because OSHA requires states to “consult with OSHA and obtain approval of such additional or more stringent reporting and recording requirements to ensure that they will not interfere with uniform reporting requirements,” *id.*, the rescission of the 2016 Rule would make it more difficult for states that want to obtain this information under the State Plans to do so. Moreover, not all states may have the resources to create and manage separate databases, and even if they do, it is less efficient to require multiple separate state databases rather than a single national database. Indeed, analysis of smaller quantities of data from an individual state would be less likely to reveal important workplace health and safety trends. Further, the ability to adopt additional reporting requirements under a State Plan would do nothing to help the public health

agencies in states, like many signatories of this letter, that do not have State Plans or only have State Plans that cover public sector employers.

These are all significant and concrete benefits that OSHA had recognized and discussed in detail in its 2016 rulemaking. *All* of these benefits derive from OSHA's publication of the detailed data, and *none* depend on how OSHA itself uses the detailed information it was required to collect under the 2016 Rule. OSHA's current failure to even consider these benefits is arbitrary and capricious, and shows a blatant disregard for the workers that OSHA is required by statute to protect.

### **III. OSHA'S ASSERTION THAT PRIVACY CONCERNS SUPPORT ITS ABOUT-FACE CANNOT WITHSTAND SERIOUS SCRUTINY.**

As concerning as OSHA's failure to consider the benefits of publishing workplace illness and injury data may be, the agency's slipshod attempt to provide a rationale for its decision is even worse. The principal reason OSHA provides is the supposed risk that a court may one day force the agency to improperly disclose the personal identifying information contained in these reports. This concern is unfounded. OSHA not only ignores the ways the 2016 rulemaking had addressed these privacy concerns, but also ignores the experiences of other federal agencies that routinely publish similar information. By misrepresenting the danger of forced disclosure of sensitive information, OSHA's implausible justification for hiding this important safety data from the public is arbitrary and capricious.

As part of its 2016 rulemaking, OSHA requested and received numerous comments on the privacy implications of collecting and publishing information from Forms 300 and 301, and it carefully considered those comments—in substantially greater detail than it did in the current proposal—even making modifications to the final rule. OSHA decided not to collect data from certain fields (employee names from Form 300, and the names and addresses of employees and treating physicians and medical facilities from Form 301) because it determined that such data would create a risk of release of sensitive information without helping users identify workplace hazards. 81 Fed. Reg. at 29,660-61. OSHA also addressed commenters' concern that employees at small companies could be identified based on other information (such as job title or date of injury) by noting that only establishments with 250 or more employees would be required to report detailed information. *Id.* at 29,662. As OSHA explained, "it is less likely that employees in such large establishments will be identified based on the posted recordkeeping data." *Id.* And in response to the concerns that employers would accidentally include personally identifiable information in their descriptions of accidents and illnesses, OSHA noted that it could reduce the likelihood of errors on the front end by including instructions to inform employers not to include such personal or confidential information, and on the back end by segregating data received in encrypted format behind a separate firewall until sensitive fields had been scrubbed. *Id.* at 29,659 & 29,662-63. In its new proposal, OSHA fails to discuss *any* of these measures and fails to state why it no longer believes that they would be adequate. OSHA cites no new evidence or changed circumstances to support its changed position.

Moreover, collection and public disclosure of the type of information contained in Forms 300 and 301 has been standard operating procedure in other federal agencies. For example, the Mine Safety and Health Administration posts fatal accident reports that include the employee's name and age and a description of the accident, including the causes and the names of any other employees involved; the Federal Railroad Administration posts accident investigation reports which, in the case of railway crossing incidents, include the age and gender of the persons struck, and the time and place of the incidents; and the Federal Aviation Administration posts aviation accident reports that include personally identifiable information such as job history and medical information. 81 Fed. Reg. at 29,632. OSHA recognized the other agencies' practices in its 2016 rulemaking. *See, e.g., id.* at 29,632, 29,644, 26,551 & 26,660. However, in its 2018 proposal, OSHA does not address any of this, does not explain why it no longer considers these practices relevant, and does not describe why its collection of similar information would be riskier.

Finally, OSHA cannot seriously argue against collecting information from Forms 300 and 301 on the grounds that courts might require disclosure under FOIA. OSHA believes sensitive personal information is exempt from disclosure under FOIA. *See* 83 Fed. Reg. at 36,497-98. That is correct. FOIA's disclosure requirements do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (Exemption 6). Exemption 6 "cover[s] detailed Government records on an individual which can be identified as applying to that individual." *U.S. Dep't of State v. Wa. Post Co.*, 456 U.S. 595, 602 (1982). To withhold information under Exemption 6, an agency need merely show "some nontrivial privacy interest" is at stake. *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 501 (1994). As employees have a "nontrivial privacy interest" in the personal information OSHA is concerned about (such as "descriptions of injuries and body parts affected," 83 Fed. Reg. at 36,497), the information is protected from disclosure.<sup>3</sup>

OSHA's current proposal also fails to consider any alternatives to enhance protection of worker privacy other than abandoning collection of all the information from Forms 300 and 301. For example, for Form 300, OSHA could have considered excluding additional fields such as job title or precise date, which could reduce the risk of identifying individuals. Likewise, for Form 301, OSHA could have considered not collecting data from the fields it does not intend to make available. OSHA also could have considered providing more detailed instructions about the information to be provided, or making certain fields check boxes rather than text entry fields, to

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<sup>3</sup> *Finkel v. U.S. Dep't of Labor*, No. 05-5525, 2007 WL 1963163 (D.N.J. Jun. 29, 2007), the case OSHA cites as a cautionary tale to the contrary, is wholly inapplicable. The plaintiff in *Finkel* had requested records relating to possible exposure of OSHA inspectors to hazardous chemicals. *Id.* at \*1. Because OSHA did not want to release employees' ID numbers, which consisted of the last four digits of employees' social security numbers, it had assigned a random number to each record instead. *Id.* at \*2. The court found that this was inadequate because it made it impossible to track how many records belonged to each individual. *Id.* However, the court offered an easy solution: OSHA could replace the ID numbers that were based on social security numbers with the newer inspector ID numbers that OSHA had recently begun using, which would allow OSHA to release accurate data without compromising employee privacy. *Id.* at \*9. *Finkel* therefore demonstrates a court's commitment to finding ways to allow transparency while protecting worker privacy, rather than representing a court ordering the release of sensitive information. We are not aware of cases where a court has ordered release of personally identifiable sensitive medical information, and, despite its professed concerns, OSHA cites none.

reduce the risk of employers accidentally including personally identifiable information. Because OSHA failed to discuss *any* of these reasonable “alternative way[s] of achieving [its] objectives” and “did not even consider” them, OSHA’s proposal is arbitrary and capricious. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983).

For all these reasons, OSHA’s reliance on workers’ privacy to justify rescission of a rule that was widely supported by workers and their advocates cannot withstand serious scrutiny.

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OSHA’s proposal to no longer require systematic public reporting of workplace-specific injuries and illnesses is arbitrary and capricious, plain and simple. Under the guise of protecting employee privacy, OSHA’s proposal will protect employers from public scrutiny at the expense of its mission to ensure safe workplaces for all workers. We strongly urge OSHA to withdraw its proposed rule and to instead fully implement the 2016 Rule.

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