

September 28, 2011

BY ELECTRONIC MAIL

The Honorable David Michaels, PhD, MPH
Assistant Secretary of Labor for Occupational Safety and Health
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210
Electronic Address: <http://www.regulations.gov> (RIN 1218-AC50; Docket No. OSHA-2010-0019)

Re: Comments on OSHA's Proposed Occupational Injury and Illness Recording and Reporting Requirements – NAICS Update and Reporting Revisions Rule

Dear Assistant Secretary Michaels:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) submits the following comments on the Occupational Safety and Health Administration's (OSHA) *Proposed Occupational Injury and Illness Recording and Reporting Requirements – NAICS Update and Reporting Revisions Rule*.¹ OSHA's proposed rule would revise the list of employers that are required to maintain an OSHA 300 Log of Work-Related Injuries and Illnesses² and expand the list of work-related injuries and illnesses that must be reported directly to OSHA. Specifically, the proposed rule would convert for reporting purposes the classification of industries from the old Standard Industrial Classification (SIC) codes to the newer North American Industry Classification System (NAICS), revise the list of industries that must maintain OSHA 300 Logs based on more recent DART (Days Away, Restricted, or Transferred) rates, and require all employers to report directly to OSHA any work-related fatality or in-patient hospitalization of any employee (within eight hours), or any work-related amputation (within twenty-four hours).³ A more detailed discussion of the proposed rule is provided below.

Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the

¹ 76 Fed. Reg. 36414 (June 22, 2011).

² An OSHA 300 Log is a record of work-related injuries and illnesses that certain non-exempt employers are required to maintain. A copy of OSHA's 300 Log and instructions can be found at <http://www.osha.gov/recordkeeping/new-osh300form1-1-04.pdf>.

³ 76 Fed. Reg. 36415.

Administration. The Regulatory Flexibility Act (RFA),⁴ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),⁵ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives. Moreover, Executive Order 13272⁶ requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. Further, both Executive Order 13272 and a recent amendment to the RFA, codified at 5 U.S.C. 604(a)(3), require the agency to include in any final rule the response of the agency to any comments filed by Advocacy, and a detailed statement of any change made to the proposed rule as a result of the comments.

Background

As discussed in the proposed rule, OSHA is proposing to convert for reporting purposes the classification of industries from the old SIC codes to the newer NAICS codes, revise the list of industries that are partially exempt from maintaining OSHA 300 Logs (based on more recent DART rates), and require employers to report directly to OSHA any work-related fatality or in-patient hospitalization of an employee (within eight hours), or any work-related amputation (within twenty-four hours).⁷ Industries falling in the bottom twenty-five percent of the average DART rates would be required to maintain OSHA 300 Logs, while all work-related employee fatalities, in-patient hospitalizations, and amputations would have to be reported by all employers directly to OSHA within the specified time periods.⁸

The proposed changes would have several significant effects. Most notably, certain industries that have not been required to maintain OSHA 300 Logs in the past would now have to maintain them, and other industries that have had to maintain OSHA 300 Logs in the past would no longer have to keep them.⁹ According to OSHA's analysis, the net effect of this change would be that some 40,000 additional firms and 80,000 additional establishments (employing nearly 1.4 million additional employees) would have to maintain OSHA 300 Logs as compared to the current rule.¹⁰ OSHA has certified under the RFA that the proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.¹¹ Accordingly, the agency did not convene a Small Business Advocacy Review panel for the proposed rule in accordance with SBREFA.

⁴ 5 U.S.C. § 601 et seq.

⁵ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

⁶ Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking* (67 Fed. Reg. 53461) (August 16, 2002).

⁷ 76 Fed. Reg. 36415.

⁸ Employers with 10 or fewer employees are exempt from maintaining OSHA 300 Logs (unless requested to do so by OSHA or BLS) and would remain so under the proposed rule; however, these small employers are required to report the other specified injuries and illnesses directly to OSHA as are all employers.

⁹ 76 Fed. Reg. 36416.

¹⁰ 76 Fed. Reg. 36421.

¹¹ 76 Fed. Reg. 36427.

Small Entities Have Expressed Some Concerns With The Proposed Rule

Following publication of the proposed rule, Advocacy discussed the proposed rule with small business representatives at its regular small business labor safety roundtable on July 15, 2011, where a representative from OSHA provided a background briefing and answered questions about the proposed rule. Advocacy also discussed the proposed rule with small business representatives who have expressed some concerns with the proposed changes. The following comments are reflective of some of the issues raised during these discussions.

- 1. Advocacy supports OSHA's conversion from SIC to NAICS.** NAICS is the standard used by federal statistical agencies for classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. NAICS was developed under the auspices of the Office of Management and Budget, and adopted in 1997 to replace the SIC system.¹² Further, the U.S. Small Business Administration has matched its official small business size standards to the NAICS codes,¹³ and all federal agencies are required to use NAICS codes to classify small businesses for the purposes of RFA analysis. Accordingly, Advocacy applauds OSHA's proposed transition from SIC to NAICS and believes this change will result in improved data for OSHA programs.
- 2. Small business representatives are concerned that industries with declining injury and illness rates would now be required to maintain OSHA 300 Logs even though their workplaces have become safer.** As noted above, under OSHA's proposed rule certain industries that have not been required to maintain OSHA 300 Logs in the past would now have to maintain them, and other industries that have had to maintain OSHA 300 Logs in the past would no longer have to keep them. Small business representatives have complained that industries that have had declining injury and illness rates over many years will essentially be penalized with new recordkeeping and reporting burdens because their injury and illness rates have declined, but not as fast as other industries (even though they are still low). This results from OSHA's use of an arbitrary threshold of the bottom twenty-five percent of average DART rates to determine who is required to maintain OSHA 300 Logs.¹⁴ However, since overall injury and illness rates have been steadily declining across industries,¹⁵ OSHA should consider reducing the number of employers required to maintain OSHA 300 Logs, by, for example, lowering the threshold level from twenty-five percent to twenty, fifteen, or even ten percent of the average DART rates, or utilizing some other more flexible approach. However, OSHA's analysis shows that the number of employers who would be required to maintain OSHA 300 Logs under the proposed rule would increase by

¹² See, U.S. Bureau of Census at <http://www.census.gov/eos/www/naics/>.

¹³ See, U.S. Small Business Administration's Table of Small Business Size Standards available at http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf.

¹⁴ 76 Fed. Reg. 36416.

¹⁵ See, U.S. Department of Labor, Bureau of Labor Statistics, *Workplace Injury and Illness Summary – 2009* at <http://www.bls.gov/news.release/osh.nr0.htm>. BLS's report states that "[t]he total recordable case (TRC) injury and illness incidence rate among private industry employers has declined significantly each year since 2003, when estimates from the Survey of Occupational Injuries and Illnesses (SOII) were first published using the North American Industry Classification System (NAICS)."

some 40,000 firms and 80,000 establishments covering nearly 1.4 million employees.¹⁶ Ideally, OSHA should determine what data it needs to evaluate workplace conditions and set the recordkeeping levels accordingly. Even if OSHA adjusted the DART threshold level to partially exempt more employers, OSHA could still obtain objective, industry data through representative employer surveys as is done now. Under such an approach, representative employers from various industries would be required to report, but many others could be partially exempt from recordkeeping requirements. Other possible approaches might be to partially exempt more categories of industries or to raise the current exemption level above the “ten or fewer employee” standard.

Advocacy notes that small businesses consistently rank government paperwork burdens as one of their major complaints.¹⁷ However, in the face of declining injury and illness rates across industries, OSHA proposes to increase recording and reporting requirements on employers rather than ease them to reflect improved safety conditions. Moreover, Executive Order 13563, *Improving Regulation and Regulatory Review*, and associated memoranda issued by President Obama in January, 2011, clearly call upon federal regulatory agencies to minimize the cost and cumulative impact of regulations and to give special consideration to small business concerns.¹⁸ Accordingly, Advocacy recommends that OSHA carefully consider its data needs and set its recording and reporting levels so as to maximize the practical utility of the data collection and minimize unnecessary paperwork burdens on small businesses.

- 3. Some of the requirements in the proposed rule need further consideration.** Small business representatives have raised several other concerns with the proposed rule that should merit consideration by OSHA. First, small business representatives have stated that OSHA uses the wage rate of a Human Resources Specialist to calculate costs under the proposed rule;¹⁹ however, many small businesses do not employ such personnel and it is often the small business owner or other senior person who conducts these activities. Advocacy recommends that OSHA consider whether its wage rate assumption is valid for many small businesses. Second, small business representatives have expressed concern that OSHA’s definition of “in-patient hospitalization” as “being formally admitted for an overnight stay”²⁰ would be inappropriate for someone who arrives in the late evening and is held for several hours. Advocacy recommends that OSHA consider a more flexible definition of “in-patient hospitalization,” such as twenty-four hour admittance, and consider whether admittances solely for observation, diagnosis, or precaution would have to be reported directly to OSHA since these cases would already have to be recorded on the employer’s OSHA 300 Log (as medical treatment beyond first-aid). Finally, small business representatives are concerned that requiring employers to notify OSHA of the in-patient hospitalization of any single

¹⁶ 76 Fed. Reg. 36421.

¹⁷ See for example, *Small Business Problems and Priorities*, National Federation of Independent Business, June, 2008, available at <http://www.nfib.com/Portals/0/ProblemsAndPriorities08.pdf>.

¹⁸ See, Executive Order 13563, *Improving Regulations and Regulatory Review*, 76 Fed. Reg. 3821 and *Presidential Memoranda – Regulatory Flexibility, Small Business, and Job Creation* available at <http://www.whitehouse.gov/the-press-office/2011/01/18/presidential-memoranda-regulatory-flexibility-small-business-and-job-cre>.

¹⁹ 76 Fed. Reg. 36423,

²⁰ 76 Fed. Reg. 36422.

employee within eight hours²¹ is problematic because the cause may not be difficult to ascertain and a single injury or illness often does not indicate an unsafe workplace. These representatives believe that the current requirement to notify OSHA directly if three or more employees are hospitalized is more appropriate because the injuries or illnesses are more likely to result from a common, unsafe condition and requiring notification of single hospitalizations is overbroad. Advocacy recommends that OSHA consider retaining the current three-employee standard for reporting in-patient hospitalizations directly to OSHA since single employee hospitalizations often do not signify an emergency situation and would already have to be recorded on the employer's OSHA 300 Log.

- 4. OSHA would have benefited from small business input on the proposed rule.** OSHA does not report conducting small business outreach on the proposed rule to determine how the proposed changes would impact small business or to obtain input on less burdensome alternative approaches.²² Because OSHA certified that the proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities, the agency was not required to convene a Small Business Advocacy Review panel under SBREFA. However, Advocacy recommends that OSHA carefully consider any small business comments it receives on the proposed rule and consider conducting additional outreach before proceeding. Advocacy would be happy to assist OSHA in any way we can to obtain additional small business input on the proposed rule.

Conclusion

Advocacy appreciates the opportunity to comment on OSHA's *Proposed Occupational Injury and Illness Recording and Reporting Requirements – NAICS Update and Reporting Revisions Rule* and hopes these comments are helpful and constructive. Please feel free contact me or Bruce Lundegren (at (202) 205-6144 or bruce.lundegren@sba.gov) if you have any questions or require additional information.

Sincerely,

Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy

Bruce E. Lundegren
Assistant Chief Counsel for Advocacy

²¹ *Id.*

²² Section 2(c) of Executive Order 13563, *Improving Regulations and Regulatory Review*, states that “before issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.”

Copy to: The Honorable Cass R. Sunstein, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget