**DATE:** April 19, 2022

**TO:** Phylmar Regulatory Roundtable (PRR), OSH Forum

**FROM:** Helen Cleary

**RE:** FedOSHA NPRM: Improve Tracking of Workplace Injuries and Illnesses (Electronic Recordkeeping Rule)

On March 30, 2022, the U.S. Department of Labor’s (DOL) Occupational Safety and Health Administration (OSHA/FedOSHA) published a Notice of Proposed Rulemaking ([NPRM](https://www.federalregister.gov/documents/2022/03/30/2022-06546/improve-tracking-of-workplace-injuries-and-illnesses)) to update its electronic recordkeeping regulation: [§1904.41](https://www.osha.gov/laws-regs/regulations/standardnumber/1904/1904.41).

**OSHA is accepting public comment until May 31, 2022.** In 2018, PRR submitted written comments opposing the expansion of the electronic recordkeeping rule; PRR is anticipating submitting comment for this NPRM, as well. **PRR members interested in PRR submitting comments should contact Helen Cleary by April 27, 2022, so that a Recordkeeping Task Force can be convened, and comments drafted.**

## Background

In 2016, OSHA amended the regulation on recording and reporting occupational injuries and illnesses requiring employers with 250 or more employees that are routinely required to keep records, to annually submit, electronically, their OSHA Forms 300 (Log), 300A (Annual Summary), and 301 (Incident Report). In addition, establishments with 20-249 employees in certain industries would need to electronically submit Form 300A. The deadline to submit was extended and due to a subsequent rulemaking, OSHA did not receive submissions of Form 300 and 301.

In 2019, OSHA issued a final rule that removed the requirement to submit Forms 300 and 301 and added a requirement for employers to submit their Employer Identification Number (EIN). The requirement to submit Form 300A was maintained and is still in place.

**Overview of Proposed Updates**

OSHA is proposing the following amendments to the electronic recordkeeping rule:

* Establishments with **100 or more employees in designated industries** ([Proposed Appendix B](https://www.federalregister.gov/documents/2022/03/30/2022-06546/improve-tracking-of-workplace-injuries-and-illnesses#p-196)) will be required to electronically submit their OSHA Forms 300, 300A and 301, annually.
* The current requirement for all establishments with **250 or more employees to electronically submit** Form 300A (Annual Summary) **will be removed**.
* Establishments will be required to **include their company name** with electronic submissions.
* The requirement for establishments with **20 or more employees in certain industries** to electronically submit Form 300A **will remain**; the list of certain industries has been updated in the [Proposed Appendix A](https://www.federalregister.gov/documents/2022/03/30/2022-06546/improve-tracking-of-workplace-injuries-and-illnesses#p-125).
* OSHA intends to **post the submitted data on a public website** and the **online database will be searchable**. (Information that can reasonably identify an individual will be removed.)

*OSHA currently* [*posts 300A data*](https://www.osha.gov/Establishment-Specific-Injury-and-Illness-Data) *that is collected electronically: Establishment Specific Injury and Illness Data (Injury Tracking Application), for calendar years as far back 2016.*

**Potential Benefits**

OSHA claims that there are “numerous benefits” from the collection of establishment-specific and case-specific information from Forms 300 and 301. In addition to the ultimate benefit of preventing worker injuries and illnesses, OSHA has also identified the additional benefits:

* Employers, workers, representatives, the government, and researchers would be better able to identify and mitigate workplace hazards.
* The additional information would increase the Agency’s ability to focus resources on high-risk workplaces.
* Public access to establishment-specific and case-specific information may encourage employers to abate hazards because an employer’s establishment data can be seen by the public, job seekers, and investors.
* OSHA would be able to identify workplaces where workers are at high-risk and use its enforcement and compliance assistance resources more effectively.
* The Agency would be able to focus its Emphasis Program inspections on establishments with specific hazards and add specific hazards or types of injuries to the Site-Specific Targeting (STT) program.
* Improved data analysis will enable OSHA to be more effective and efficient in its evaluation of programs, interventions, geographic areas, etc.
* Employers will benefit by being able to compare information and benchmark. Workers will also benefit by having access to establishment specific information so that they can make more informed employment decisions.
* This would help address “a problem of information asymmetry in the labor market, where the businesses with the greatest problems have the lowest incentive to self-disclose.”
* Access to this level of data will improve research on workplace injuries and illnesses including recognition of patterns.
* County, state, and territorial public health institutions and their public health surveillance programs would benefit from having access to this information.
* Trade associations, unions, industries, and EHS professionals would be able to evaluate effectiveness of initiatives. In addition, the information could support development of innovative solutions including software development of tools.

**Additional Information**

One of PRR’s major concerns outlined in the previously submitted comments was the issue of potential worker PII (Personally Identifiable Information) violations. According to the NPRM, OSHA has preliminarily determined that the potential risk to employee privacy, through new technologies, has been greatly reduced and the benefit outweighs the “slight risk to employee privacy.” Also, OSHA expects a Privacy Impact Assessment to be completed before issuing a final rule.

*The NPRM expands on why OSHA is confident it can adequately protect workers’ privacy.*

**Request for Comment**

**OSHA is requesting public comment on any aspect of the rule by May 31, 2022**. In addition, the Agency is particularly interested in receiving comments on the following:

“1. Is Total Case Rate (TCR) the most appropriate incidence rate to use for proposed appendix B to subpart E, or would the Days Away Restricted or Transferred (DART) rate be more appropriate?

2. Is 100 or more employees the appropriate size criterion for the proposed requirement to electronically submit data from the OSHA Form 300, 301, and 300A? Would a different size criterion be more appropriate?

3. Is it appropriate for OSHA to remove the requirement for establishments with 250 or more employees, in industries not included in appendix A, to submit the information from their OSHA Form 300A?

4. Are there electronic interface features that would help users electronically submit part 1904 data, particularly for case data from the OSHA Form 300 and Form 301 and for establishments that submit using batch files? For example, would it be helpful for OSHA to provide a forms package or software application that exports the required files into a submission-ready format?

5. What features could OSHA provide to help establishments determine which submission requirements apply to their establishment?

6. What additional guidance could OSHA add to the instructions for electronic submission to remind employers not to include information that reasonably identifies individuals directly in the information they submit from the text-based fields on the OSHA Form 300 or Form 301?

7. What other agencies and organizations use automated de-identification systems to remove information that reasonably identifies individuals directly from text data before making the data available to the general public? What levels of sensitivity for the automated system for the identification and removal of information that reasonably identifies individuals directly from text data do these agencies use?

8. What other open-source and/or proprietary software is available to remove information that reasonably identifies individuals directly from text data?

9. What methods or systems exist to identify and remove information that reasonably identifies individuals directly from text data before the data are submitted?

10. What criteria should OSHA use to determine whether the sensitivity of automated systems to identify and remove information that reasonably identifies individuals directly is sufficient for OSHA to make the data available to the general public?

11. What processes could OSHA establish to remove inadvertently-published information that reasonably identifies individuals directly as soon as OSHA became aware of the information that reasonably identifies individuals directly?

12. OSHA is proposing not to collect employee names under proposed § 1904.41(a)(2) and (b)(9), consistent with worker privacy concerns expressed in public comments during previous rulemakings. However, BLS uses the “employee name” field on the Form 300 and Form 301 in their data collection for the SOII. Beginning in 2021, a data-sharing feature has allowed some establishments that are required to submit Form 300A information to both OSHA and BLS, under the current regulation, to use their data submission to the OSHA ITA in their submission to the BLS SOII. BLS anticipates an inability to use this data-sharing feature for establishments required to submit under proposed § 1904.41(a)(2), unless OSHA requires these establishments to submit the “employee name” field on the Form 300 and 301. Without the data-sharing feature, establishments that submit data to OSHA under proposed § 1904.41(a)(2), and that also submit data to the BLS SOII, would not be able to use their OSHA data submission of case-specific data to prefill their BLS SOII submission. What would be the advantages and disadvantages, in terms of employer burden and worker privacy concerns or otherwise, of requiring all establishments subject to proposed § 1904.41(a)(2) to submit employee names, to support this data-sharing feature for Form 300 and 301 submissions? (Please note that OSHA would not intend to publish employee names.)

13. NAICS codes are reviewed and revised every five years to keep the classification system current with changes in economic activities. The 2022 NAICS became effective on January 1, 2022. Going forward, OSHA intends to use the 2022 NAICS in the ITA for establishments that are newly creating accounts. However, for establishments that already have accounts in the ITA, the version of NAICS used is the 2012 NAICS. BLS anticipates that establishments that already have accounts in the ITA, are also subject to the SOII, and have 2022 NAICS codes that are different from their 2012 NAICS codes, would be unable to use the data-sharing feature (also discussed in question 13) to prefill their BLS SOII submission with data already submitted through the OSHA ITA, unless these establishments updated their accounts to revise their industry classification from the 2012 NAICS to the 2022 NAICS. What are the advantages and disadvantages of requiring establishments that already have accounts in the ITA to update their accounts to the 2022 NAICS? How much time would an establishment require to determine whether their 2022 NAICS is different from their 2012 NAICS? How much time would an establishment require to edit their NAICS code in the ITA to reflect any changes?

14. In addition to the automated methods for coding text-based data discussed above, what additional automated methods exist to code text-based data?

15. What are some ways that employers could use the collected data to improve the safety and health of their workplaces?

16. What are some ways that employees could use the collected data to improve the safety and health of their workplaces?

17. What are some ways that federal and state agencies could use the collected data to improve workplace safety and health?

18. What are some ways that researchers could use the collected data to improve workplace safety and health?

19. What are some ways that workplace safety consultants could use the collected data to improve workplace safety and health?

20. What are some ways that members of the public and other stakeholders, such as job-seekers, could use the collected data to improve workplace safety and health?

21. Are there potential negative consequences to the collection of this data that OSHA has not considered here?

22. The proposed regulatory text is structured as follows: § 1904.41(a)(1) Annual electronic submission of information from OSHA Form 300A Summary of Work-Related Injuries and Illnesses by establishments with 20 or more employees in designated industries; § 1904.41(a)(2) Annual electronic submission of information from OSHA Form 300 Log of Work-Related Injuries and Illnesses, OSHA Form 301 Injury and Illness Incident Report, and OSHA Form 300A Summary of Work-Related Injuries and Illnesses by establishments with 100 or more employees in designated industries. This is the structure used by the 2016 and 2019 rulemakings. An alternative structure would be as follows: § 1904.41(a)(1) Annual electronic submission of information from OSHA Form 300A Summary of Work-Related Injuries and Illnesses by establishments with 20 or more employees in designated industries; § 1904.41(a)(2) Annual electronic submission of information from OSHA Form 300 Log of Work-Related Injuries and Illnesses and OSHA Form 301 Injury and Illness Incident Report by establishments with 100 or more employees in designated industries. Which structure would result in better understanding of the requirements by employers?

**Next Steps**

**PRR members should contact Helen Cleary by Wednesday April 27, 2022, if they would like PRR to convene a Task Force to discuss and draft written comments for submission to OSHA.**