IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

TEXO ABC/AGC, INC.,

ASSOCIATED BUILDERS AND CONTRACTORS, INC.,

NATIONAL ASSOCIATION OF MANUFACTURERS,

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS,

GREAT AMERICAN INSURANCE COMPANY,

ATLANTIC PRECAST CONCRETE, INC.,

OWEN STEEL COMPANY, and

OXFORD PROPERTY MANAGEMENT LLC,

PLAINTIFFS,

v.

THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, in his official capacity,

DAVID MICHAELS, ASSISTANT SECRETARY OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, in his official capacity, and

UNITED STATES DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,

DEFENDANTS.

CIVIL ACTION NO. 3:16-CV-1998

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

COME NOW, Plaintiffs, TEXO ABC/AGC, Inc. ("TEXO"), Associated Builders and Contractors, Inc. ("ABC"), the National Association of Manufacturers ("the NAM"), American Fuel & Petrochemical Manufacturers ("AFPM"), the Great American Insurance Company ("Great American"), Atlantic Precast Concrete, Inc. ("Atlantic Precast Concrete"), Owen Steel Company ("Owen Steel"), and Oxford Property Management ("Oxford"), by and through their undersigned counsel, and for their Complaint against the Defendants, herein state as follows:

Nature of the Action

1. Plaintiffs seek a declaratory judgment finding that Subparagraphs 1904.35(b)(1)(i), (iii), and (iv) of the final rule issued by the Occupational Safety and Health Administration ("OSHA"), titled "Improve Tracking Workplace Injuries and Illnesses", 81 Fed. Reg. 29,624 (May 12, 2016), as revised at 81 Fed. Reg. 31,854 (May 20, 2016), hereinafter referred to as "the New Rule," are unlawful to the extent that they prohibit or otherwise limit incident-based employer safety incentive programs and/or routine mandatory post-accident drug testing programs.
2. Incident-based safety incentive programs and routine, mandatory post-accident drug testing programs (collectively the "Safety Programs") help employers to promote workplace safety, which is supposed to be OSHA's primary mission also. Instead, out of a misguided zeal to improve accuracy of reporting on workplace injuries (albeit with no evidence that injuries are not already being accurately reported), OSHA has lost sight of the importance of ***reducing the number and severity of injuries themselves***.
3. Plaintiffs assert that the challenged provisions are unlawful and must be vacated because they exceed OSHA's statutory authority; because they were adopted without observance of the procedures required by law; and because the challenged provisions, and their

underlying findings and conclusions, are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

Summary of Claims

4. Subparagraphs 1904.35(b)(1)(i), (iii), and (iv) of the New Rule are not in accordance with law because they exceed the statutory authority Congress granted to OSHA under the Occupational Safety and Health Act ("OSH Act"), 29 U.S.C. § 651 *et seq*. (1970) in the following ways:

a. Congress specified in Section 11(c) of the Act an exclusive mechanism for protecting workers who are allegedly subject to discrimination or retaliation in connection with reporting work-related injuries or illnesses, and Congress expressly declined to delegate authority to OSHA to independently regulate outside Section 11(c)'s exclusive mechanism;

b. In promulgating the New Rule, OSHA did not provide interested parties with legally adequate notice of its intent to adopt a rule that would ban or limit the Safety Programs and therefore failed to comply with Section 4 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553;

c. OSHA did not sufficiently demonstrate that Subparagraphs 1904.35(b)(1)(i), (iii), and (iv) of the New Rule are reasonably necessary or appropriate for ensuring accurate injury and illness reporting, enforcement of the OSH Act, or for developing information on the causes and prevention of occupational accidents and illnesses, and therefore failed to comply with Section 8(c)(1) of the OSH Act; and,

d. OSHA failed to demonstrate that Subparagraphs 1904.35(b)(1)(i), (iii), and (iv) of the New Rule do not, directly or indirectly, impose an unreasonable burden on employers as required by Section 8(d) of the OSH Act.

e. The New Rule violates Section 4(b)(4) of the Act by "affecting" state workers compensation laws that require and/or encourage incident-based safety incentive programs and/or post-accident drug testing programs.

5. The New Rule is also arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law under Section 10(e) of the APA, 5 U.S.C. § 706(2)(A) for the following reasons:

a. OSHA has relied on factors which Congress did not intend it to consider, entirely failed to consider important aspects of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, and is so implausible that it cannot be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Mfrs. Assn. of U.S. v. State Farm Automobile Mutual Ins.*, 463 U.S. 29, 43 (1983). In addition, OSHA has failed to display awareness that it is changing its position nor shown that there are any good reasons for the new policy; nor has OSHA taken cognizance that its longstanding policies "may have engendered serious reliance interests that must be taken into account." *Encino Motorcars, LLC v. Navarro*, __ S. Ct. __ (June 20, 2016). Finally, OSHA has failed to explain numerous inconsistencies in its New Rule. *Id*. More specifically:

b. There is no reliable evidence to support OSHA's assertion that any category of safety incentive programs or post-accident drug testing programs lead to materially inaccurate reporting or underreporting of workplace injuries and illnesses;

c. OSHA failed to consider how an OSHA rule prohibiting or otherwise limiting these longstanding types of safety programs would impact workplace safety and health;

d. OSHA failed to consider strong available evidence demonstrating that the widely used safety programs improperly characterized as "retaliatory" in the New Rule, do in fact significantly reduce work-related injuries, illnesses, and deaths in a manner consistent with the OSH Act's ultimate goal of assuring "safe and healthful working conditions for working men and women;"

e. OSHA also failed to consider strong available evidence that any prohibition or other limitation on the safety programs improperly characterized as "retaliatory" in the New Rule will result in a significant increase in work-related injuries, illnesses, and deaths;

f. OSHA failed to demonstrate that the unquantified and speculative benefits of the purported increase in recordkeeping accuracy through more complete employee reporting outweigh the benefits to workplace safety and health (a reduction in serious incidents) provided by the safety programs improperly characterized as "retaliatory" in the new Rule;

g. OSHA failed to consider any of the record evidence submitted by Plaintiffs and others demonstrating the value of these safety incentives and post-accident drug testing to workplace safety and health;

h. OSHA prejudged the essential issues related to the safety programs improperly characterized as "retaliatory" in the new Rule; relied on non-safety related factors Congress did not intend it to consider, and ignored all available evidence contradicting its biased assertion that the safety incentives and post-accident drug testing somehow lead to materially inaccurate reporting or underreporting of workplace injuries or illnesses; and,

i. OSHA failed to conduct legally required regulatory impact analyses weighing the full costs associated with the regulation, including increased worker injuries and illnesses and corresponding costs, against the benefit of the New Rule's purported effect of improving recordkeeping accuracy and therefore failed to fulfill its obligations under the Regulatory Flexibility Act and Executive Order 12866.

Parties

6. Plaintiff TEXO is a non-profit trade association of hundreds of construction industry employers and related firms operating in North Texas and around the country. Headquartered in this judicial district at 11101 N Stemmons Fwy, Dallas, TX 75229, TEXO is a separately incorporated affiliate of the national construction industry trade association Plaintiff Associated Builders and Contractors, Inc., which represents nearly 21,000 member contractors and related firms throughout the country, from its headquarters in Washington, D.C. TEXO, ABC and their members take very seriously their obligation to provide safe workplaces for their employees. To achieve that objective, many of TEXO's and ABC's members rely on incident-based safety incentive programs and routine, mandatory post-accident drug testing and safety incentive programs, of the type that the new Rule declares for the first time to be unlawfully "retaliatory," to maintain safe workplaces. TEXO's and ABC's members will be irreparably harmed in their ability to reduce workplace injuries and illnesses by the new rule for the reasons stated in greater detail below.

7. Plaintiff the NAM, headquartered in Washington, D.C., is the largest manufacturing association in the United States. It is a national not-for-profit trade association representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $2.17

trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for three-quarters of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. Many manufacturers rely on incident-based safety incentive programs and/or routine, mandatory post-accident drug testing programs to reduce the number of injuries in their workplaces, and many such manufacturers will be harmed in their ability to reduce injuries and illnesses by the New Rule for the reasons stated in greater detail below.

8. Plaintiff AFPM, headquartered in Washington, D.C., is a national trade association of approximately 400 companies, including virtually all U.S. refiners and petrochemical manufacturers. AFPM represents high-tech American manufacturers of nearly the entire U.S. supply of gasoline, diesel, jet fuel, and home heating oil. AFPM members employ thousands of individuals to use high-tech machinery to manufacture petrochemicals used in a wide variety of products, including plastic, medicines and medical devices, cosmetics, televisions and radios, computers, solar power panels, and parts used in every mode of transportation. Many AFPM members rely on incident-based safety incentive programs and/or routine, mandatory post-accident drug testing programs to reduce the number of injuries in their workplaces. Many such AFPM members will be irreparably harmed in their ability to reduce workplace injuries and illnesses by the New Rule for the reasons stated in greater detail below.

9. TEXO, ABC, NAM, and AFPM, as trade associations representing thousands of employers in Texas and around the country, each have standing to bring this action on

behalf of their members under the three-part test of *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), because (1) Plaintiffs' members would otherwise have standing to sue in their own right; (2) the interests at stake in this case are germane to Plaintiffs' organizational purposes; and (3) neither the claims asserted nor the relief requested requires the participation of Plaintiffs' individual members.

10. Plaintiff Great American is incorporated under the laws of the State of Ohio and has its principal place of business in Cincinnati, Ohio. Great American through its Strategic Comp Division ("Strategic Comp") has provided workers compensation insurance to more than 1,000 companies over the past 23 years and has gained a reputation in the insurance market as having expertise in working with employers to implement comprehensive workplace safety and health programs that prevent workplace accidents, improve safety cultures, and significantly reduce the costs of work-related injuries, illnesses, and deaths. Great American specifically assists its insureds in implementing incident-based safety incentive programs of the types that are for the first time improperly declared to be "retaliatory" under the New Rule. Great American's ability to provide such insurance and assist its insureds in implementing safety programs preventing workplace injuries will be seriously jeopardized by the New Rule's unprecedented prohibition against such programs.

11. Plaintiff Atlantic Precast Concrete is incorporated under the laws of the State of Pennsylvania and has its principal place of business in Tullytown, Pennsylvania. Atlantic Precast Concrete purchases workers' compensation insurance from Great American through Strategic Comp and relies significantly on an incident-based safety

incentive program, of the type declared to be "retaliatory" under the New Rule, to reduce its incidents of workplace injuries. Atlantic Precast Concrete also relies on a routine, mandatory post-accident drug testing program, of a type again prohibited by the new Rule, to reduce the incidents of workplace injuries.

12. Plaintiff Owen Steel is incorporated under the laws of Delaware and has its principal place of business in Columbia, South Carolina. Owen Steel purchases workers' compensation insurance from Great American through Strategic Comp and relies significantly on an incident-based safety incentive program, of the type declared to be "retaliatory" under the New Rule, to reduce its incidents of workplace injuries. Owen Steel also relies on a routine, mandatory post-accident drug testing program, of a type again prohibited by the new Rule, to reduce the incidents of workplace injuries.

13. Plaintiff Oxford is incorporated under the laws of the State of Minnesota and has its principal place of business in Rochester, Minnesota. Oxford purchases workers' compensation insurance from Great American through Strategic Comp and relies significantly on an incident-based safety incentive program, of the type declared to be "retaliatory" under the new Rule, to reduce its incidents of workplace injuries. Oxford also relies on a routine, mandatory post-accident drug testing program, of a type again prohibited by the new Rule, to reduce the incidents of workplace injuries.

14. Thomas E. Perez is the Secretary of the United States Department of Labor (the "Secretary"). The Department of Labor ("DOL") published the New Rule in the Federal Register and is responsible for its enforcement. Secretary Perez is sued in his official capacity and the relief sought extends to all of his successors and all DOL employees, officers, and agents.

15. David Michaels, Ph.D., is the Assistant Secretary for the Occupational Safety and Health Administration of the United States Department of Labor. The New Rule was published in the Federal Register under Dr. Michaels' authority, and Dr. Michaels and OSHA are responsible for its enforcement. Assistant Secretary Michaels is sued in his official capacity, and the relief sought extends to all his successors and to all employees, officers, and agents of OSHA.

16. OSHA is a federal agency within DOL charged with implementing health and safety regulations under the OSH Act, 29 U.S.C. § 651 *et seq*. (1970).

Jurisdiction and Venue

17. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331 (federal question) because the Plaintiffs' causes of action arise under and allege violations of federal law, including: the OSH Act, 29 U.S.C. § 651 *et seq*. (1970); the APA, 5 U.S.C. §§ 701-706 (APA jurisdiction to review agency actions); and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 (declaratory and injunctive relief).

18. This Court has authority to grant declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201-02 and the provisions of the APA, 5 U.S.C. §§ 701-06.

19. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e) because one or more of the Plaintiffs are based in Dallas, Texas, within the judicial district of this Court

Factual Background

OSHA's Statutory Authority To Promulgate Injury and Illness Recordkeeping Regulations, But Not Anti-Retaliation Regulations

20. OSHA is authorized to adopt injury and illness recordkeeping requirements by Sections 8 and 24 of the OSH Act, which provide:

> [Section 8(c)(1):] Each employer shall make, keep and preserve, and make available to the [OSHA] … such records regarding his activities relating to this Act as [OSHA] … may prescribe by regulation as necessary or appropriate for the enforcement of this Act or for developing information regarding the causes and prevention of occupational accidents and illnesses . . .
>
> [Section 8(c)(2):] [OSHA shall] prescribe regulations requiring employers to maintain accurate records of and to make periodic reports on, work-related deaths, injuries and illnesses …
>
> [Section 8(d):] Any information obtained by the [OSHA] under this Act shall be obtained with a minimum burden upon employers, especially small employers.
>
> [Section 24(a):] [OSHA] … shall develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics… and … compile accurate statistics on work injuries and illnesses which shall include all disabling, serious, or significant injuries and illnesses . . ."

21. Section 11(c) of the OSH Act states, in relevant part, that "[n]o person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act . . . ." 29 U.S.C. § 660(c). OSHA acknowledges in the Preamble to the New Rule that "Section 11(c) only authorizes the Secretary to take action against an employer for retaliating against an employee for reporting a work-related illness or injury if the

employee files a complaint with OSHA within 30 days of the retaliation. 29 U.S.C. 660(c)." 81 Fed. Reg. 29,671. Neither Section 11(c) nor any other provision of the OSH Act grants the Secretary (OSHA) the authority to adopt substantive anti-discrimination or anti-retaliation rules for any other purpose.

22. The legislative history of the OSH Act makes clear that Congress considered, and rejected, administrative enforcement of the antidiscrimination provision of the kind now included in the New Rule. The final Conference Report stated:

> The Senate bill[1] provided for administrative action to obtain relief for an employee discriminated against for asserting rights under this Act, including reinstatement with back pay. The House bill[2]

---

[1] Section 10(f) of S. 2193 contained the following language:

> 10(f).-This subsection prohibits discharge or discrimination against an employee because of the exercise by the employee, on behalf of himself or others, of any rights under this act. Any employee who believes he has been discharged or discriminated against by any person in violation of this subsection may apply to the Secretary for a review of such discrimination. The Secretary shall investigate and provide the opportunity for a public hearing on the record and in accordance with title 5, United States Code 554 (Administrative Procedure Act). If the Secretary finds a violation, lie shall issue a decision and order requiring the person committing the violation to take such affirmative action as may be appropriate to abate the violation, including but not limited to, rehiring or reinstatement with back pay. Judicial review of proceedings under this subsection may be obtained pursuant to subsection 10(d) or (e) of this section.

See Legislative History of the Occupational Safety and Health Act of 1970 (S. 2193, P.L. 91-596), U.S. Government Printing Office, pg. 180 (1971).

[2] Section 15(d)(6) of H.R. 19200 contained the following language:

> Any person who discharges or in any other manner discriminates against any employee because such employee has filed a complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, shall be assessed a civil penalty by the Commission of up to $10,000. Such person may also be subject to a fine of not more than $10,000 or imprisonment of a period not to exceed ten years, or both.

Section 15(f) of H.R. 16785 contained the following language:

> contained no provision for obtaining such administrative relief; rather it provided civil and criminal penalties for employers who discriminate against employees in such cases. With respect to the first matter, the House receded with an amendment making specific jurisdiction of the district courts for proceedings brought by the Secretary to restrain violations and other appropriate relief. With respect to the second matter dealing with civil and criminal penalties for employers, the House receded.

Conference Report No. 91-1765 (December 16, 1970), 91st Cong., 2d Sess. (1970), *reprinted in* Subcommittee on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970 (Committee Print 1971) at 1192.[3]

23. In other words, Congress explicitly withheld from OSHA the authority to initiate enforcement actions or issue citations for unlawful discriminatory conduct or retaliation prohibited by Section 11(c); and it implicitly withheld from OSHA the authority to prescribe substantive anti-discrimination rules.

24. Through its approach to unlawful discrimination in Section 11(c) in the OSH Act, Congress clearly established the exclusive remedy for unlawful discrimination under the OSH Act – an employee complaint made within 30 days of the allegedly unlawful

---

> (f) Any person who discriminates against any employee because of any action such employee has taken on behalf of himself or others, to secure the protection afforded by this Act shall be fined not more than $1,000 or imprisoned not more than one year, or both.

[3] This interpretation is acknowledged and confirmed in the following quote from *Occupational Safety and Health Law*, ABA Section of Labor and Employment Law, Randy S. Rabinowitz, Editor-in-Chief (2nd ed. 2002):

> The Senate bill authorized administrative action to obtain relief for an employee discriminated against for asserting rights under the statute, including reinstatement with back pay. The House measure, however, called for criminal and civil penalties against employers who discriminated against employees in such circumstances. The conferees compromised; requiring that the Secretary seek relief (reinstatement with back pay) but that this be done in the district courts, not through administrative process. [footnote omitted.]

discriminatory action of the employer. Congress further determined the elements that OSHA (or the complaining employee if OSHA declined to pursue the case) would have to establish to prove a cause of action for discrimination.

25. Thus, the OSH Act does not permit OSHA to adopt regulations that go beyond a mandate to employ due diligence to keep accurate records of work-related injuries. If an employer fails to perform that obligation, the employer is subject to citation, and OSHA has clearly demonstrated the ability to discover violations of those requirements and impose substantial sanctions. The OSH Act does not provide OSHA with the authority to arbitrarily determine that the applicable legal mechanism for preventing discriminatory or retaliatory conduct will no longer be the one Congress fashioned as part of a balanced compromise following extensive legislative action, but instead one that OSHA determines 45 years later is more appropriate.

OSHA's Injury and Illness Recordkeeping Regulations Prior To The New Rule

26. OSHA's Injury and Illness Recordkeeping and Reporting Rule, codified in 29 C.F.R. Part 1904, hereinafter "the current Recordkeeping Rule," establishes broadly applicable requirements for the identification, recording, and reporting, to OSHA and the Bureau of Labor Statistics ("BLS"), of all work-related injuries and illnesses other than minor conditions that do not require more than first aid treatment.

27. OSHA's Recordkeeping Rule generally applies to all employers in most industries, including, for example, manufacturing, construction, and transportation, with establishments that employ ten or more employees at any time during the calendar year.

28. OSHA has explained the purpose of the Recordkeeping Rule as follows:

> Injury and illness statistics are used by OSHA … to help direct its programs and measure its own performance. Inspectors also use the

> data during inspections to help direct their efforts to the hazards that are hurting workers. The records are also used by employers and employees to implement safety and health programs at individual workplaces. Analysis of the data is a widely recognized method for discovering workplace safety and health problems and for tracking progress in solving those problems. The records provide the base data for the BLS Annual Survey of Occupational Injuries and Illnesses, the Nation's primary source of occupational injury and illness data.

See 29 C.F.R. 1904.0 Purpose Frequently Asked Questions, Question 0-1, https://www.osha.gov/recordkeeping/entryfaq.html. OSHA is, therefore, using injury and illness data to identify and respond to national workplace safety trends, rather than localized or individualized trends, and allocate resources to develop new regulations, training, or emphasis programs. For those uses, the impact of under-reporting would be negligible and there are available safeguards against under-reporting, which OSHA chose to ignore in the New Rule.

OSHA's Revision of the Recordkeeping Rule

A. The Rulemaking

29. On November 8, 2013, OSHA published a Notice of Proposed Rulemaking ("NPRM") titled "Improve Tracking of Workplace Injuries and Illnesses," 78 Fed. Reg. 67,254 (Nov. 8, 2013)("NPRM"). The NPRM proposed modifications to OSHA's Recordkeeping Rule that would require approximately 400,000 employers to electronically submit injury and illness recordkeeping data to OSHA. In previous years, OSHA had collected only a portion of this data, in hard copy, from approximately 80,000 employers. This is what OSHA meant by the phrase "Improve Tracking."

30. There was no mention in the NPRM of any concerns regarding employer policies or programs that might discourage employees from reporting injuries and illnesses, much

less an explicit reference to employer safety incentive programs or routine mandatory post-incident testing.

31. Nevertheless, on August 14, 2014, OSHA issued a Supplemental Notice of Proposed Rulemaking ("Supplemental NPRM") to the Federal Register on August 14, 2014 at 79 Fed. Reg. 47,605 (Aug. 14, 2014), asserting the unsubstantiated concern that the underlying proposal "could promote an increase in workplace policies and procedures that deter or discourage employees from reporting work related injuries and illnesses." More specifically, OSHA purported to identify two basic categories of employer policies or procedures that it asserted presented this concern: (1) "unreasonable requirements for reporting injuries and illnesses"; and (2) "retaliating against employees who report injuries and illnesses," which OSHA clarified to mean situations where "an employer disciplines or takes [other] adverse action against an employee for reporting an injury or illness."

32. OSHA then concluded the Supplemental NPRM by stating that it was "considering adding provisions [to the proposed rule] that will make it a violation for an employer to discourage employee reporting in these ways." In other words, under the misleading title of "Improve Tracking of Workplace Injuries and Illnesses," OSHA issued a supplemental notice of proposed rulemaking indicating that it was considering adopting a new recordkeeping provision allegedly designed to address alleged retaliatory conduct by employers, which has nothing to do with improving the tracking of workplace injuries and illnesses.

B. The Final Rule

33. OSHA's Final New Rule was issued on May 12, 2016, 81 Fed. Reg. 29,624 and revised at 81 Fed. Reg. 31,854 on May 20, 2016. In the Preamble to the Final Rule, OSHA

stated that the New Rule has two primary objectives: (1) improve the tracking and reporting of work-related injuries and illnesses, and (2) forbid discrimination or retaliation against an employee for reporting a work-related injury. *See* 81 Fed. Reg. 29,663, 29,670.

34. In the part of the New Rule that is most pertinent to this Complaint, OSHA added what it described as the anti-discrimination and anti-retaliation provisions in Sections 1904.35, titled "Employee involvement." Revised Section 1904.35(b) states:

> (b) Implementation—(1) What must I do to make sure that employees report work-related injuries and illnesses to me?
>
> (i) **You must establish a reasonable procedure for employees to report work-related injuries and illnesses promptly and accurately. A procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness;**
>
> (ii) You must inform each employee of your procedure for reporting work-related injuries and illnesses;
>
> (iii) You must inform each employee that: (A) Employees have the right to report work-related injuries and illnesses; and (B) Employers are prohibited from discharging or in any manner discriminating against employees for reporting work-related injuries or illnesses; and
>
> (iv) **You must not discharge or in any manner discriminate against any employee for reporting a work-related injury or illness.** [emphasis added].

35. In its Preamble discussion of the New Rule, OSHA further stated that incident-based employer safety incentive programs, which are designed to promote safety through a procedure of offering rewards to employees who have avoided workplace accidents through use of safe work practices and behaviors, somehow violate the New Rule. Thus, according to OSHA,

> It is a violation of paragraph (b)(1)(iv) for an employer to take adverse action against an employee for reporting a work-related injury or illness, whether or not such adverse action was part of an incentive program. Therefore, it is a violation for an employer to use an incentive program to take adverse action, including denying a benefit, because an employee reports a work-related injury or illness, such as disqualifying the employee for a monetary bonus or any other action that would discourage or deter a reasonable employee from reporting the work-related injury or illness.

81 Fed. Reg. at 29,674.

> If an employer retaliates against an employee for reporting a work-related illness or injury by denying a bonus to a group of employees, feasible means of abatement could include revising the bonus policy to correct its retaliatory effect and providing the bonus retroactively to all of the employees who would have received it absent the retaliation.

81 Fed. Reg. at 29,671.

36. In the Preamble to the new Rule, OSHA also stated that the well settled practice of routine mandatory post-incident testing would also violate the new Rule:

> [D]rug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use. [4] For example, it would likely not be reasonable to drug-test an employee who reports a bee sting, a repetitive strain injury, or an injury caused by a lack of machine guarding or a machine or tool malfunction. Such a policy is likely only to deter reporting without contributing to the employer's understanding of why the injury occurred, or in any other way

[4] Although the language in the Preamble to OSHA's Final Rule focuses solely on "automatic post-injury drug testing," OSHA has consistently identified alcohol as a "socially acceptable drug" and addressed alcohol as a factor in its drug-free workplace program initiatives. *See e.g., Drug Free Workplace Alliance,* OSHA, https://www.osha.gov/dcsp/alliances/drug_free/drug_free.html#!1B(identifying issues related to drug and alcohol use in the workplace). *See also,* Letter from John B. Miles to Patrick J. Robinson, Safety Coordinator, Starline Mfg. Co., (May 2, 1998), *available at* https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22577. Concerns over testing policies throughout this rulemaking have also consistently pointed to "drug and alcohol testing," not simply "drug testing." OSHA's Final Rule can therefore be read as applying to both post-incident drug testing and post-incident alcohol testing.

> contributing to workplace safety. Employers need not specifically suspect drug use before testing, but there should be a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness in order for an employer to require drug testing. In addition, drug testing that is designed in a way that may be perceived as punitive or embarrassing to the employee is likely to deter injury reporting.

81 Fed. Reg. 29,673.

37. By thus asserting that post-accident drug testing must be limited to those tests which can accurately identify impairment caused by drug use, OSHA has effectively prohibited all post-accident drug testing. This is so because, aside from alcohol tests, there are no generally recognized and accepted drug tests showing actual impairment that are available at this time. This scientific conclusion was recently reaffirmed by the National Highway Traffic Safety Administration (NHTSA), which conducted a peer reviewed panel evaluation of the state of current scientific knowledge in the area of drugs and human performance for 16 commonly abused drugs selected for evaluation. NHTSA found that impairment testing was not available or scientifically accurate for these drugs. http://www.nhtsa.gov/people/injury/research/job185drugs/technical-page.htm. Nevertheless, the U.S. Department of Transportation has declared that post-accident testing for such drugs increases workplace safety, and hence should be required, regardless of whether on-the-job impairment can be shown. *See, e.g.*, 49 C.F.R. Part 382.

38. OSHA has identified no basis for asserting that "it would likely not be reasonable to drug-test an employee who reports a bee sting, a repetitive strain injury, or an injury caused by a lack of machine guarding or a machine or tool malfunction." In reality, the impaired judgment resulting from drug use could contribute to or exacerbate any of the

injuries described by OSHA as "likely not reasonable to drug-test" under the New Rule. Further, OSHA failed to provide any analysis of: (1) how employers would be in a position to determine there was a reasonable possibility that drug use by the injured employee was a contributing factor to the reported injury or illness; (2) the cost of finding and training personnel qualified to perform those tasks; (3) the cost of implementing such a system; (4) the impact on employee morale of having the worksite under the oversight or surveillance of such personnel and (5) the problems created by having a program that gives supervisors and others the discretion to require drug and alcohol testing.

39. OSHA noted in the Preamble to the New Rule that otherwise prohibited mandatory post-incident testing would be permitted if required by state or federal law, or regulation, particularly if such law or regulation arises from a workers' compensation law. 81 Fed. Reg. at 29,673. OSHA rationalized that these testing programs would be permissible because compliance with such a requirement demonstrates that "the employer's motive would not be retaliatory…" Significantly, Section 4(b)(4) of the OSH Act prohibits OSHA from superseding or "affecting" workers' compensation laws. 29 U.S.C. § 653(b)(4). For drug and alcohol testing programs that are not required by another law, OSHA implies that any such program would, by OSHA's definition, be retaliatory without citing any basis for that conclusion. Furthermore, OSHA makes no claim that the presence of federal or state drug and alcohol testing requirements will not result in systemic underreporting of workplace injuries.

The Record Evidence That Incident-based Safety Incentive Programs Reduce Workplace Injuries And Illnesses.

40. Properly designed incident-based employer safety incentive programs are the most effective tool getting employees and supervisors immediately invested in workplace safety. Through these programs, employees are continuously motivated to improve their environment and to look out for their safety and the safety of others, and to eliminate unsafe behaviors. The result is a dramatic decrease in accident frequency and severity. Without these incident-based safety incentive programs, Plaintiffs have found that culture change is much more slow and difficult and seldom leads to the same dramatic reductions in serious accidents.

41. Incident-based employer safety incentive programs are designed to invest a company's employees, including supervisors, in workplace safety. They motivate supervisors and non-management employees to improve their work-place environment and to engage in a mutually supportive approach to workplace safety in which employees "watch each other's backs" to eliminate unsafe behaviors. By encouraging all employees, including supervisors, to improve workplace safety, incident-based safety incentive programs jump start a change in culture that results in a prompt and sustained decrease in accident frequency and severity.

42. A 2012 GAO report reviewed a number of studies evaluating incident-based employer safety incentive programs and found that three of those studies concluded that such incentive programs reduced injuries. *See* United States Government Accountability Office Report to Congressional Requesters on Workplace Safety and Health, GAO-12-329 (April 2012) ("2012 GAO Report").

43. In data submitted to OSHA during the present rulemaking, Plaintiff Great American showed that the incidence of indemnity claims (*i.e.*, serious claims that cause an

employee to either lose time from work, have a permanent impairment, or both) made by its insureds fell 39% in their first year in the Strategic Comp insurance program. Most of these companies implemented an incident-based safety incentive program during that first year. *See* Strategic Comp's Comments to OSHA Docket No. OSHA-2013-0023, available at www.regulations.gov.

44. Additionally, evidence was presented to OSHA demonstrating that, over the last five years, insureds' accident costs were 39% less than predicted by the National Council of Compensation Insurance ("NCCI") actuaries. The data also showed that insureds had 58% fewer catastrophic claims than actuarially predicted.

45. Many employers, including members of the Plaintiff associations and specifically Plaintiffs Atlantic Precast Concrete, Oxford, and Owens Steel, have implemented comprehensive incident-based safety incentive programs that encourage worker participation and interest in workplace safety. If these safety incentive programs are eliminated by implementation of Section 1904.35(b)(1) as they must be according to OSHA's statements in the New Rule, then Plaintiffs' workplace safety will be significantly jeopardized and workplace injuries and illnesses will significantly increase in both frequency and severity, causing irreparable harm to the Plaintiffs' members and insureds, and their employees. The elimination of these safety programs will also cause Plaintiffs to experience a significantly higher number and a significantly greater severity of workers compensation claims, resulting in significantly increased premiums to the Plaintiff insureds, and potentially eliminating the ability of insurers such as Great American to write worker compensation policies for certain high risk businesses.

The Federal Government and Many States Have Recognized the Value of Routine Mandatory Post-Incident Testing in Addressing Substance Abuse, Which is a Major Threat to Workplace Safety and Health in the U.S.

46. The United States Department of Health and Human Services (DHHS) reported in 2014 that "most illicit drug users were employed. Of the 22.4 million current users aged 18 or older in 2013, 15.4 million (68.9 percent) were employed either full-time or part-time." U.S. Dep't of Health and Human Services, Substance Abuse and Mental Health Services Administration, Center for Behavioral and Health Statistics and Quality, *Results from the 2013 National Survey on Drug Use and Health: Summary of National Findings, Highlights*, at 2 (Sep. 25, 2014). Among full-time employed adults, 9.5 % were substance-dependent while 9.3% of part-time employed adults were substance-dependent. *Id*. at 88.

47. DHHS reported that the situation for alcohol abusers is increasingly dire. DHHS reported that "[a]mong adults in 2013, most binge and health alcohol users were employed. Among 58.5 million adults who were binge drinkers, 44.5 million (76.1%) were employed either full-time or part-time. Among the 16.2 million adults who were heavy drinkers, 12.4 million (76.0 %) were employed." *Id*. at 41.

48. Alcohol abuse has also been linked to workplace injuries and workplace safety. For instance, Dawson showed a positive relationship between drinking five or more drinks daily in the past year and having an on-the-job injury among respondents. *See* Dawson, D.A., *Heavy drinking and the risk of occupational injury*, Accident Analysis and Prevention 26(5):655–665 (1994). Similarly, researchers who examined rates of drinking in the past 30 days and self-reported injuries while working for pay among high school–aged workers in Texas found that the likelihood of occupational injuries substantially increased in relative proportion to the amount of alcohol consumed on a

regular basis. *See* Shipp, et al., *Substance Use and Occupational Injuries Among High School Students in South Texas*, American Journal of Drug and Alcohol Abuse, Vol. 31, No. 2, pp. 253–265 (2005). Heavy drinkers therefore had the highest likelihood of occupational injuries. *Id.* The National Council on Alcoholism and Drug Dependence ("NCADD") also reported in 2015 that (1) workers with alcohol problems were "2.7 times more likely" than those without drinking problems to have injury-related absences; (2) "35% of patients with an occupational injury" that report to a hospital emergency department were at-risk drinkers; (3) breathalyzer tests used on emergency room patients injured at work detected alcohol 16% of the time; (4) a survey of workplace fatalities has demonstrated that 11% of the victims had been drinking; and (5) "one-fifth of workers and managers across a wide range of industries and company sizes report that a coworker's on-or off-the-job- drinking jeopardized their own productivity and safety." *Drugs and Alcohol in the Workplace*, NCADD, https://www.ncadd.org/about-addiction/addiction-update/drugs-and-alcohol-in-the-workplace. (last modified Apr. 26, 2015).

49. Many states have workers' compensation premium reduction statutes that encourage post-accident and post-injury drug testing. For example, Minnesota's Workers Compensation Act, which permits employers to conduct drug and alcohol testing in four limited circumstances (1) pre-employment, (2) routine physical examination testing, (3) random, and (4) on a reasonable suspicious basis, provides employers with a discount on workers' compensation premiums for implementing and maintaining drug free workplaces in compliance with the Act. *See* Minn. Stat. Ann. § 176.0001 *et seq*.; Minn. Stat. Ann. § 181.950 *et seq*. Notably, even though Minnesota's workers compensation

and drug and alcohol testing laws limit an employers' right to conduct testing to only specific employment scenarios or upon a reasonable suspicious basis, reasonable suspicion testing under Minnesota's Drug and Alcohol Testing in the Workplace Act explicitly includes situations wherein an employee "has sustained a personal injury," or "has caused another employee to sustain a personal injury." Minn. Stat. Ann. § 181.950 *et seq*.

50. Some states also require routine post-accident and post-injury drug testing in certain job classifications or for certain types of workplace accidents. For example, Alabama's Workers Compensation statute requires post-accident testing when an employee has caused or contributed to an on-the-job injury that resulted in lost time. *See* Ala. Code §§ 25-5-330 *et seq.* (2012).

51. A number of states have further developed model drug free workplace programs for employers to use, which incorporate mandatory, routine post-accident and post-injury drug testing. For example, Ohio's Bureau of Workers Compensation has provided guidance to employers titled "Drug Free Safety Program Guide," which advises employers to conduct post-accident alcohol and or/other drug testing of any employees who have caused or contributed to an accident. *See* Drug Free Safety Program (DFSP) information, BWC, https://www.bwc.ohio.gov/employer/programs/dfspinfo/dfspdescription.asp (last visited Jun. 3, 2016).

There is No Scientific Data in the Record Showing that Incident-Based Safety Incentive Programs or Routine, Mandatory, Post-Incident Testing Programs Result in Significant Under-Reporting of Injuries

52. Not long before issuing the Supplemental NPRM leading to the New Rule, OSHA for the first time asserted that some types of employer safety incentive programs may have the effect of "discouraging workers from reporting an injury or illness." *See Revised VPP Policy Memorandum #5: Further Improvements to the Voluntary Protection Programs (VPP),* OSHA, (Aug. 14, 2014), https://www.osha.gov/dcsp/vpp/policy_memo5.html [hereinafter "VPP Memo"]; *Memorandum on Employer Safety Incentive and Disincentive Policies and Practices,* Deputy Assistant Secretary Richard E. Fairfax, (Mar. 12, 2012), https://www.osha.gov/as/opa/whistleblowermemo.html [hereinafter "Fairfax Memo"]. However, none of these assertions have ever been directly, or even indirectly, supported by data or studies showing that incident-based safety incentive programs actually result in underreporting or inaccurate reporting of workplace injuries and illnesses. Instead, OSHA has merely asserted that "there are better ways to encourage safe work practices" and that the agency has received anecdotal reports of employees being discouraged by these types of programs. *See generally,* Fairfax Memo *supra* at ¶¶ 3-4.

53. In the one reported decision where OSHA claimed that an incentive program discouraged reporting, that contention was rejected because OSHA's evidence was not credible. *See Secretary v. Trico Tech. Corp*., OSHRC Docket No. 9100110 (1993). For instance, while one witness testified, "he was afraid to report injuries," he did in fact report a hernia. *Id.*

54. A 2009 ERG report on an audit of OSHA recordkeeping in 2006 also found that

> [t]he percent of establishments classified with accurate recordkeeping (at-or-above the 95 percent threshold) is above 96 percent for both total recordable and DART injury and illness cases. Based on 95 percent confidence intervals for the two estimates, the

> percentages of 98.34 percent for total recordable cases and 27 percent for DART cases are not statistically different. Overall, the universe estimates for this year are consistent with the level of accuracy observed for employer injury and illness recordkeeping over previous years of the audit program.

OSHA Data Initiative Collection Quality Control: Analysis of Audits on CY 2006 Employer Injury and Illness Recordkeeping, Final Report, ERG (November 25, 2009).

55. In 2009, OSHA implemented a Recordkeeping National Emphasis Program ("NEP") instructing OSHA inspectors to conduct recordkeeping audits and interview employees, supervisors, and medical personnel to determine, among other things, whether company incentives or disciplinary programs discouraged employees from reporting work-related injuries. *See* OSHA Directive No. 10-02, CPL 02, Injury and Illness Recordkeeping National Emphasis Program, February 19, 2010 ("NEP"). The program began in 2010 and continued for two years.

56. The NEP resulted in 550 federal and state recordkeeping inspections. *Analysis of OSHA's National Emphasis Program on Injury and Illness Recordkeeping*, ERG, pg. 3 (Nov. 1, 2013). A report on the NEP showed that almost three times as many of the interviewed workers felt that incentive programs encouraged reporting than those who felt they discouraged it. *Id.* The vast majority of workers felt that such programs neither encouraged nor discouraged reporting. *Id.* Notably, the analysis of the NEP program did not conclude that incentives caused under-reporting. OSHA also did not cite the NEP – the only study they have conducted on the topic – as support for the New Rule or as demonstrating that incentive and/or drug testing programs deter the reporting of workplace injuries.

57. In its 2012 report, the GAO identified six studies assessing the effect of safety incentive programs. GAO found that only two of those studies "analyzed the potential effect on workers' reporting of injuries and illnesses, but they concluded that there was no relationship between the programs and injury and illness reporting." *See* 2012 GAO Report.

58. Nevertheless, in its 2014 Supplemental NPRM, OSHA asked commenters, "[a]re you aware of any studies or reports on practices that discourage injury and illness reporting? If so, please provide them." 79 Fed. Reg. 47607 (Aug. 14, 2014). Plaintiff Great American through Strategic Comp submitted data to OSHA that shows the incident-based safety incentive programs implemented by its insureds do not impact the reporting of workplace accidents or injuries. According to the data, the ratio of indemnity claims to total claims was reduced by 17% among first year insureds. If safety incentives caused under-reporting, Strategic Comp would have expected to find evidence in their data that their insureds were suppressing the smaller (*i.e.,* more easily suppressible) claims, thereby inflating the ratio of indemnity to overall claims. The data shows the exact opposite, and the decrease in the ratio is evidence that the reporting has become more robust. Other data showed that 94% of indemnity claims were reported within two weeks of the accident date, which is better than the industry average of 82%, and which indicates that claims are not being ignored until they become so serious that they cannot be hidden but are being promptly reported.

59. Many of the categories of recordable injuries or illnesses covered by OSHA's Recordkeeping Rule would be difficult or nearly impossible for an employee to hide from his/her employer due to the injury's nature, the likelihood of witnesses to the

accident or incident that caused the injury, and/or the involvement of medical professionals. The universal availability of workers' compensation benefits, which cover lost wages and indemnify the worker for all medical expenses without deductibles or co-pays, also militates in favor of informing the employer of most of the recordable injuries. To ensure employers are made aware of work-related injuries and illnesses, most employers have instituted workplace policies requiring employees to report work-related injuries and illnesses and appropriately discipline employees for failing to report such incidents. Finally, laws such as mail and wire fraud discourage medical professionals as well as workers from hiding the true nature of an injury because false communications with the employer or the employee's insurance company would form the basis of criminal liability.

60. The New Rule is also inconsistent in allowing routine mandatory post-incident testing in instances where an individual (typically a supervisor) without any forensics or law enforcement training has determined there is "a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness." OSHA failed to provide any analysis of (1) how employers, as distinguished from forensics experts or trained police forces, would be in a position to make the "reasonable possibility" determinations, (2) the cost of finding and training personnel qualified to perform those tasks, (3) the cost of implementing such a system, (4) the impact on employee morale of having the worksite under the oversight or surveillance of such personnel, and (5) the problems created by placing such discretionary authority in the hands of supervisors and other personnel.

OSHA's Failure to Perform the Required Regulatory Analyses to Assess the Impact of the Final Rule on Workplace Safety and Health

61. OSHA did not provide any evidence that the implementation of safety incentive programs and routine mandatory post-incident testing of injured employees when not required by federal or state law was retaliatory or otherwise adversely impacted workplace safety. In particular, OSHA failed to distinguish between the anecdotal impact of such programs on employee reporting of injuries, and the injuries themselves. As to safety incentive programs, OSHA cited no study connecting such programs to reduced reporting of injuries and cited no study refuting the clear evidence that safety incentive programs reduce the number of workplace injuries.

62. With regard to drug testing, OSHA cited perceived invasions of privacy as the reason why employees purportedly chose not to report workplace injuries or illnesses. *See* 81 Fed. Reg. 29,663. OSHA claimed that requiring automatic post-accident drug and alcohol testing "is often perceived as an invasion of privacy, so if an injury or illness is very unlikely to have been caused by employee drug use, or if the method of drug testing does not identify impairment but only use at some time in the recent past, requiring the employee to be drug tested may inappropriately deter reporting." 81 Fed. Reg. at 29,673. However, protecting worker privacy in this context is not within OSHA's authority and therefore does not provide a rationale for the New Rule. Even if OSHA were authorized to protect workers' privacy in this fashion, it would be arbitrary and capricious and a clear abuse of discretion to allow speculative considerations of employee privacy to outweigh the prevention of injuries, illnesses, and deaths. OSHA's apparent prohibition in the New Rule against routine mandatory post-incident testing of

any employee who gets injured on the job, unless mandated by federal or state law, was made without any assessment of the relative costs and benefits of those practices. As discussed above, there is a substantial body of proof that drug testing practices prevent injuries, illnesses and deaths.

63. Section 8(c)(1) of the OSH Act required OSHA to weigh the value of incident-based safety incentive programs and routine, mandatory post-accident drug testing in terms of lives and limbs saved by preventing future workplace incidents against the speculative costs of that testing on the accuracy of OSHA recordkeeping. OSHA was also required to assign a value to the speculative and quite possibly *de minimis* reduction in the accuracy of injury and illness records that would result if the safety programs were permitted.

64. In other words, OSHA was required to determine that the number of individuals who would not report accidents or injuries was significant enough to affect the accuracy of the required reports. OSHA was further required to determine that the alleged improvement in the accuracy of recordkeeping justifies the sacrifice in lives and limbs from work-related incidents that clearly will result from banning the incident-based safety incentive programs and drug testing and allowing substance abuse to go undetected. Instead of carrying out this essential analysis, as required by the OSH Act, OSHA merely declared that the impact of its New Rule on safety and health is irrelevant, while focusing instead on recordkeeping accuracy at the expense of workplace safety.

COUNT ONE

(The Final Rule is Unlawful because it Exceeds OSHA's Statutory Authority)

65. Paragraphs 1 through 64 are incorporated by reference as if set forth fully herein.

66. Congressional delegation of rulemaking authority to an administrative agency is delimited by the literal language of its enabling statute. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). OSHA's rulemaking authority is prescribed within the confines of the OSH Act, which establishes the limited rulemaking power within which OSHA must operate. No such delegation of authority can be presumed by the agency. *State of Texas v. U.S. Dept. of Interior,* 497 F. 3d 491, 502 (2007).

67. In promulgating Subparagraphs 1904.35(b)(1)(i), (iii), and (iv) of the Final Rule, OSHA has ignored the boundaries of the authority Congress delegated it in the OSH Act; and invalidly seeks and exercises authority Congress explicitly refused to grant Defendants.

68. Such action exceeds the OSHA's statutory authority and is therefore contrary to law and invalid.

COUNT TWO

(Violation of the APA – Failure to Follow Required Procedures)

69. Paragraphs 1 through 68 are incorporated by reference as if set forth fully herein.

70. The New Rule is final agency action for purposes of 5 U.S.C. § 706(2)(A).

71. Section 4 of the APA generally requires substantive regulations, such as OSHA's New Rule, to provide adequate notice to interested parties and permit sufficient time for comment consistent with the notice and comment provisions of the APA. 5 U.S.C. § 553.

72. OSHA's regulation of the Safety Program Components through Subparagraphs 1904.35(b)(1)(i), (iii), and (iv) of the Final Rule is unlawful because OSHA failed to provide interested parties with legally adequate notice of its intent to adopt a rule that

would for the first time prohibit incident-based safety incentive programs and/or routine, mandatory post-accident drug testing.

COUNT THREE

(Violation of the OSH Act- Failure to Conduct Required Regulatory Analysis)

73. Paragraphs 1 through 72 are incorporated by reference as if set forth fully herein.

74. Section 8(c)(1) provides that any recordkeeping prescribed by regulation must be necessary or appropriate for the enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational accidents and illnesses.

75. OSHA's regulation of the Safety Program Components through Subparagraphs 1904.35(b)(1)(i), (iii), and (iv) of the Final Rule is unlawful because OSHA failed to demonstrate that those provisions are reasonably necessary or appropriate for the enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational accidents and illnesses as required by Section 8(c)(1) of the OSH Act.

76. In addition, under Section 8(c)(1) and 8(d) of the OSH Act, OSHA is prevented from enacting recordkeeping regulations that directly, or indirectly, impose unreasonable burdens on employers. *See* OSH Act Section 8(d), 29 U.S.C. 657(d) (1970); U.S. Senate Labor and Public Welfare Committee Report on the Occupational Safety and Health Act of 1970, (P.L. 91-596), No. 91-1282, 5193-51.

77. OSHA's regulation of the Safety Programs through Subparagraphs 1904.35(b)(1)(i), (iii), and (iv) of the New Rule is unlawful because OSHA failed to demonstrate that those provisions did not, directly or indirectly, impose unreasonable burdens on employers as required by Section 8(c)(1) and 8(d) of the OSH Act.

COUNT FOUR

(Violation of the OSH Act- Interference With State Workers Compensation Laws)

78. Paragraphs 1 through 77 are incorporated by reference as if set forth fully herein.

79. Section 4(b)(4) of the OSHA Act prohibits OSHA from "affecting" workers compensation laws. As noted above, many state workers compensation laws either require or encourage employers to routinely conduct post-accident drug testing. The New Rule interferes with, and clearly "affects" state workers compensation laws by prohibiting or otherwise limiting routine, post-incident drug testing programs that are encouraged by such laws.

COUNT FIVE

(Violation of the APA – Arbitrary and Capricious)

80. Paragraphs 1 through 79 are incorporated by reference as if set forth fully herein.

81. The New Rule is final agency action for purposes of 5 U.S.C. § 706(2)(A).

82. The APA requires a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

83. The New Rule is arbitrary, capricious, and an abuse of discretion because it is without any basis in fact in that there is no reliable evidence to support OSHA's assertion that safety incentive programs or post-accident drug testing programs lead to materially inaccurate reporting or underreporting.

84. The New Rule is arbitrary, capricious, and an abuse of discretion, because it regulates programs that are designed to, and effectively do, improve workplace safety which is the

stated goal of the OSH Act without any consideration of how the revised rule would impact workplace safety and health.

85. The New Rule is arbitrary, capricious, and an abuse of discretion, because OSHA enacted the regulation under an improper bias and from a prejudgment of the essential issues related to Employer Safety Incentive Programs and Routine Mandatory Post-Incident Testing Programs thereby ignoring all available evidence contradicting its assertion that the Safety Programs lead to materially inaccurate reporting or underreporting of workplace injuries or illnesses.

86. The New Rule is arbitrary and capricious, and an abuse of discretion, because OSHA failed to conduct required regulatory impact analyses demonstrating that the purported increase in recordkeeping accuracy and employee reporting outweighs the overall workplace safety benefits provided from the Safety Program Components.

87. The New Rule also fails adequately to acknowledge or explain OSHA's reversal of longstanding policy regarding the enforcement of the Act or to be cognizant that such longstanding policies have engendered serious reliance interests that must be taken into account. *Encino Motorcars, LLC v. Navarro*, __ S.Ct.__ (2016). It is also evident that OSHA relied on factors which Congress did not intend it to consider; failed to consider important aspects of the problem; and offered explanations for its New Rule that run counter to the evidence. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-43 (1983).

Request for Relief

WHEREFORE, Plaintiffs respectfully request that this Court grant them the following relief:

88. WHEREFORE, Plaintiffs respectfully request that this Court grant them the following relief:

a. A preliminary injunction prohibiting the defendants from implementing Subparagraphs 1904.35(b)(1)(i), (iii), and (iv) of the New Rule generally, or at least as it would apply to Employer Safety Incentive Programs and Routine Mandatory Post-Incident Testing;

b. A declaratory judgment and Order that Subparagraphs 1904.35(b)(1)(i), (iii), and (iv) of the New Rule are unlawful because they are:

c. in excess of OSHA's statutory jurisdiction and authority,

d. not adopted in accordance with OSHA's statutory authority,

e. not adopted in accordance with applicable procedural requirements, and

f. arbitrary, capricious, an abuse of discretion, and otherwise contrary to law;

g. An Order vacating and setting aside permanently any aspect of Subparagraphs 1904.35(b)(1)(i), (iii), and (iv) of the New Rule generally, or at least as they relate to incident-based employer safety incentive programs and routine mandatory post-incident testing;

h. An Order awarding Plaintiffs their reasonable costs and attorneys' fees in connection with this action; and

i. An Order granting such other and further relief as this Honorable Court deems just and proper.

Respectfully submitted,

Dated: July 8, 2016

/s/ Steven R. McCown

Steven R. McCown
TX Bar 13466500
Maurice Baskin*
DC Bar 248898
Thomas Benjamin Huggett
PA Bar 80538
LITTLER MENDELSON, P.C.
2001 Ross Avenue
Suite 1500, Lock Box 116
Dallas, TX 75201-2931
(214) 880-8100

Attorneys for Plaintiffs

*pro hac vice motion pending

Of Counsel:

Linda E. Kelly
Patrick N. Forrest
Leland P. Frost
Manufacturers' Center for Legal Action
733 10th Street, NW, Suite 700
Washington, DC 20001
(202) 637-3000
Counsel for the National Association of Manufacturers

Richard Moskowitz
General Counsel
American Fuel & Petrochemical Manufacturers
1667 K Street NW, Suite 700
Washington, DC 20006
202.552.8474

Lawrence P. Halprin
Douglas Behr
Keller and Heckman, LLP
1001 G St., N.W.
Suite 500 West
Washington, D.C. 20001
202-434-4177

FEDERAL REGISTER

Vol. 81 Thursday,
No. 92 May 12, 2016

Part II

Department of Labor

29 CFR Parts 1904 and 1902
Improve Tracking of Workplace Injuries and Illnesses; Final Rule

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Parts 1904 and 1902

[Docket No. OSHA–2013–0023]

RIN 1218–AC49

Improve Tracking of Workplace Injuries and Illnesses

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Final rule.

SUMMARY: OSHA is issuing a final rule to revise its Recording and Reporting Occupational Injuries and Illnesses regulation. The final rule requires employers in certain industries to electronically submit to OSHA injury and illness data that employers are already required to keep under existing OSHA regulations. The frequency and content of these establishment-specific submissions is set out in the final rule and is dependent on the size and industry of the employer. OSHA intends to post the data from these submissions on a publicly accessible Web site. OSHA does not intend to post any information on the Web site that could be used to identify individual employees.

The final rule also amends OSHA's recordkeeping regulation to update requirements on how employers inform employees to report work-related injuries and illnesses to their employer. The final rule requires employers to inform employees of their right to report work-related injuries and illnesses free from retaliation; clarifies the existing implicit requirement that an employer's procedure for reporting work-related injuries and illnesses must be reasonable and not deter or discourage employees from reporting; and incorporates the existing statutory prohibition on retaliating against employees for reporting work-related injuries or illnesses. The final rule also amends OSHA's existing recordkeeping regulation to clarify the rights of employees and their representatives to access the injury and illness records.

DATES: This final rule becomes effective on January 1, 2017, except for §§ 1904.35 and 1904.36, which become effective on August 10, 2016. Collections of information: There are collections of information contained in this final rule (*see* Section XI, Office of Management and Budget Review Under the Paperwork Reduction Act of 1995). Notwithstanding the general date of applicability that applies to all other requirements contained in the final rule, affected parties do not have to comply with the collections of information until the Department of Labor publishes a separate document in the **Federal Register** announcing that the Office of Management and Budget has approved them under the Paperwork Reduction Act.

ADDRESSES: In accordance with 28 U.S.C. 2112(a)(2), OSHA designates Ann Rosenthal, Associate Solicitor of Labor for Occupational Safety and Health, Office of the Solicitor, Room S–4004, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, to receive petitions for review of the final rule.

FOR FURTHER INFORMATION CONTACT: *For press inquiries:* Frank Meilinger, OSHA, Office of Communications, Room N–3647, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–1999; email: *meilinger.francis2@dol.gov*

For general and technical information: Miriam Schoenbaum, OSHA, Office of Statistical Analysis, Room N–3507, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–1841; email: *schoenbaum.miriam@dol.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

A. Table of Contents

The following table of contents identifies the major sections of the preamble to the final rule revising OSHA's Occupational Injury and Illness Recording and Reporting Requirements regulation (Improving tracking of workplace injuries and illnesses):

B. References and Exhibits

In this preamble, OSHA references documents in Docket No. OSHA–2013–0023, the docket for this rulemaking. The docket is available at *http://www.regulations.gov*, the Federal eRulemaking Portal.

References to documents in this rulemaking docket are given as ''Ex.'' followed by the document number. The document number is the last sequence of numbers in the Document ID Number on *http://www.regulations.gov*. For example, Ex. 1, the proposed rule, is Document ID Number OSHA–2013–0023–0001.

The exhibits in the docket, including public comments, supporting materials, meeting transcripts, and other documents, are listed on *http://www.regulations.gov*. All exhibits are listed in the docket index on *http://www.regulations.gov*. However, some exhibits (*e.g.,* copyrighted material) are not available to read or download from that Web page. All materials in the docket are available for inspection and copying at the OSHA Docket Office, Room N–2625, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–2350.

C. Introduction

OSHA's regulation at 29 CFR part 1904 requires employers with more than 10 employees in most industries to keep records of occupational injuries and illnesses at their establishments. Employers covered by these rules must record each recordable employee injury and illness on an OSHA Form 300, which is the ''Log of Work-Related Injuries and Illnesses,'' or equivalent. Employers must also prepare a supplementary OSHA Form 301 ''Injury and Illness Incident Report'' or equivalent that provides additional details about each case recorded on the OSHA Form 300. Finally, at the end of each year, employers are required to prepare a summary report of all injuries and illnesses on the OSHA Form 300A, which is the ''Summary of Work-Related Injuries and Illnesses,'' and post the form in a visible location in the workplace.

This final rule amends OSHA's recordkeeping regulations to add requirements for the electronic submission of injury and illness information employers are already required to keep under part 1904. First,

the final rule requires establishments with 250 or more employees to electronically submit information from their part 1904 recordkeeping forms (Forms 300, 300A, and 301) to OSHA or OSHA's designee on an annual basis. Second, the final rule requires establishments with 20 or more employees, but fewer than 250 employees, in certain designated industries, to electronically submit information from their part 1904 annual summary (Form 300A) to OSHA or OSHA's designee on an annual basis. Third, the final rule requires, upon notification, employers to electronically submit information from part 1904 recordkeeping forms to OSHA or OSHA's designee.

The electronic submission requirements in the final rule do not add to or change any employer's obligation to complete and retain injury and illness records under OSHA's regulations for recording and reporting occupational injuries and illnesses. The final rule also does not add to or change the recording criteria or definitions for these records.

OSHA intends to post the establishment-specific injury and illness data it collects under this final rule on its public Web site at *www.osha.gov*. The publication of specific data fields will be in part restricted by applicable federal law, including the Freedom of Information Act (FOIA), as well as specific provisions within part 1904. OSHA does not intend to post any information on the Web site that could be used to identify individual employees.

Additionally, OSHA's existing recordkeeping regulation requires employers to inform employees about how to report occupational injuries and illnesses (29 CFR 1904.35(a), (b)). This final rule amends OSHA's recordkeeping regulations to require employers to inform employees of their right to report work-related injuries and illnesses; clarifies the existing implicit requirement that an employer's procedure for reporting work-related injuries and illnesses must be reasonable and not deter or discourage employees from reporting; and incorporates the existing statutory prohibition on retaliating against employees for reporting work-related injuries or illnesses.

OSHA estimates that this final rule will have economic costs of $15 million per year, including $13.7 million per year to the private sector, with costs of $7.2 million per year for electronic submission for affected establishments with 250 or more employees and $4.6 million for electronic submission for affected establishments with 20 to 249 employees in designated industries. With respect to the anti-discrimination requirements of this final rule, OSHA estimates a first-year cost of $8.0 million and annualized costs of $0.9 million per year. When fully implemented, the first-year economic cost for all provisions of the final rule is estimated at $28 million. The rule will be phased in, which moves the annual cost for reporting case characteristic data from OSHA Forms 300 and 301 by 33,000 establishments from 2017 to 2018. This phase-in removes about $6.9 million from the first year costs, but those costs would reappear in years two through 10.

The Agency believes that the annual benefits, while unquantified, exceed the annual costs. These benefits include better compliance with OSHA's statutory directive ''to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources'' (29 U.S.C. 651(b)). They also include increased prevention of workplace injuries and illnesses as a result of expanded access to timely, establishment-specific injury/illness information by OSHA, employers, employees, employee representatives, potential employees, customers, potential customers, and researchers. The benefits of the final rule also include promotion of complete and accurate reporting of work-related injuries and illnesses.

D. Regulatory History

OSHA's regulations on recording and reporting occupational injuries and illnesses (29 CFR part 1904) were first issued in 1971 (36 FR 12612, July 2, 1971). This regulation requires the recording of work-related injuries and illnesses that involve death, loss of consciousness, days away from work, restriction of work, transfer to another job, medical treatment other than first aid, or diagnosis of a significant injury or illness by a physician or other licensed health care professional (29 CFR 1904.7).

On December 28, 1982, OSHA amended these regulations to partially exempt establishments in certain lower-hazard industries from the requirement to record occupational injuries and illnesses (47 FR 57699). OSHA also amended the recordkeeping regulations in 1994 (Reporting fatalities and multiple hospitalization incidents to OSHA, 29 CFR 1904.39) and 1997 (Annual OSHA injury and illness survey of ten or more employers, 29 CFR 1904.41).

In 2001, OSHA issued a final rule amending its requirements for the recording and reporting of occupational injuries and illnesses (29 CFR parts 1904 and 1902), along with the forms employers use to record those injuries and illnesses (66 FR 5916 (Jan. 19, 2001)). The final rule also updated the list of industries that are partially exempt from recording occupational injuries and illnesses. In 2014, OSHA again amended the part 1904 regulations to require employers to report work-related fatalities, in-patient hospitalizations, amputations, and losses of an eye to OSHA and to allow electronic reporting (79 FR 56130 (Sept. 18, 2014)). The final rule also revised the list of industries that are partially exempt from recording occupational injuries and illnesses.

On November 8, 2013, OSHA issued a proposed rule to amend its recordkeeping regulations to add requirements for electronic submission of injury and illness information that employers are already required to keep (78 FR 67254). In the preamble to the proposed rule, OSHA explained that, consistent with applicable Federal law, such as FOIA and specific provisions of part 1904, the Agency intended to post the recordkeeping data it collects on its public Web site. A public meeting on the proposed rule was held on January 9–10, 2014. A concern raised by many meeting participants was that the proposed electronic submission requirement might create a motivation for employers to under-report injuries and illnesses. Some participants also commented that some employers already discourage employees from reporting injuries or illnesses by disciplining or taking other adverse action against employees who file injury and illness reports. As a result, on August 14, 2014, OSHA issued a supplemental notice to the proposed rule seeking comments on whether to amend the part 1904 regulations to prohibit employers from taking adverse action against employees for reporting occupational injuries and illnesses. OSHA received 311 comments on the electronic submission section of the proposed rule and 142 comments on the supplemental notice to the proposed rule. The comments for the proposed rule and the supplemental notice to the proposed rule are addressed below.

II. Legal Authority

OSHA is issuing this final rule pursuant to authority expressly granted by sections 8 and 24 of the Occupational Safety and Health Act (the ''OSH Act'' or ''Act'') (29 U.S.C. 657, 673). Section 8(c)(1) requires each employer to ''make, keep and preserve, and make available to the Secretary [of Labor] or the

Secretary of Health and Human Services, such records regarding his activities relating to this Act as the Secretary . . . may prescribe by regulation as necessary or appropriate for the enforcement of this Act or for developing information regarding the causes and prevention of occupational accidents and illnesses'' (29 U.S.C. 657(c)(1)). Section 8(c)(2) directs the Secretary to prescribe regulations ''requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job'' (29 U.S.C. 657(c)(2)). Finally, section 8(g)(2) of the OSH Act broadly empowers the Secretary to ''prescribe such rules and regulations as he may deem necessary to carry out [his] responsibilities under this Act'' (29 U.S.C. 657(g)(2)).

Section 24 of the OSH Act (29 U.S.C. 673) contains a similar grant of authority. This section requires the Secretary to ''develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics'' and ''compile accurate statistics on work injuries and illnesses which shall include all disabling, serious, or significant injuries and illnesses . . .'' (29 U.S.C. 673(a)). Section 24 also requires employers to ''file such reports with the Secretary as he shall prescribe by regulation'' (29 U.S.C. 673(e)). These reports are to be based on ''the records made and kept pursuant to section 8(c) of this Act'' (29 U.S.C. 673(e)).

Further support for the Secretary's authority to require employers to keep and submit records of work-related illnesses and injuries can be found in the Congressional Findings and Purpose at the beginning of the OSH Act (29 U.S.C. 651). In this section, Congress declares the overarching purpose of the Act to be ''to assure so far as possible every working man and woman in the Nation safe and healthful working conditions'' (29 U.S.C. 651(b)). One of the ways in which the Act is meant to achieve this goal is ''by providing for appropriate reporting procedures . . . [that] will help achieve the objectives of this Act and accurately describe the nature of the occupational safety and health problem'' (29 U.S.C. 651(b)(12)).

The OSH Act authorizes the Secretary of Labor to issue two types of occupational safety and health rules: Standards and regulations. Standards, which are authorized by section 6 of the Act, specify remedial measures to be taken to prevent and control employee exposure to identified occupational hazards, while regulations are the means to effectuate other statutory purposes, including the collection and dissemination of records of occupational injuries and illnesses. For example, the OSHA requirements at 29 CFR 1910.95 are a ''standard'' because they include remedial measures to address the specific and already identified hazard of employee exposure to occupational noise. In contrast, a ''regulation'' is a purely administrative effort designed to uncover violations of the Act and discover unknown dangers.

Recordkeeping requirements promulgated under the Act are characterized as regulations (*see* 29 U.S.C. 657 (using the term ''regulations'' to describe recordkeeping requirements)). Also, courts of appeal have held that OSHA recordkeeping rules are regulations and not standards. *See, Workplace Health & Safety Council* v. *Reich,* 56 F.3d 1465, 1468 (D.C. Cir. 1995) (citing *Louisiana Chemical Association* v. *Bingham,* 657 F.2d 777, 781–82 (5th Cir. 1981); *United Steelworkers of America* v. *Auchter,* 763 F.2d 728, 735 (3d Cir. 1985)). Standards aim to correct particular identified workplace hazards, while regulations further the general enforcement and detection purposes of the OSH Act. *Id.*

This final rule does not infringe on employers' Fourth Amendment rights. The Fourth Amendment protects against searches and seizures of private property by the government, but only when a person has a ''legitimate expectation of privacy'' in the object of the search or seizure (*Rakas* v. *Illinois,* 439 U.S. 128, 143–47 (1978)). There is little or no expectation of privacy in records that are required by the government to be kept and made available (*Free Speech Coalition* v. *Holder,* 729 F.Supp.2d 691, 747, 750–51 (E.D. Pa. 2010) (citing cases); *United States* v. *Miller,* 425 U.S. 435, 442–43 (1976); *cf. Shapiro* v. *United States,* 335 U.S. 1, 33 (1948) (no Fifth Amendment interest in required records)). Accordingly, the Fourth Circuit held, in *McLaughlin* v. *A.B. Chance,* that an employer has little expectation of privacy in the records of occupational injuries and illnesses kept pursuant to OSHA regulations, and must disclose them to the Agency on request (842 F.2d 724, 727–28 (4th Cir. 1988)).

Even if there were an expectation of privacy, the Fourth Amendment prohibits only *unreasonable* intrusions by the government (*Kentucky* v. *King,* 131 S. Ct. 1849, 1856 (2011)). The information submission requirement in this final rule is reasonable. The requirement serves a substantial government interest in the health and safety of workers, has a strong statutory basis, and rests on reasonable, objective criteria for determining which employers must report information to OSHA (*see New York* v. *Burger,* 482 U.S. 691, 702–703 (1987)).

OSHA notes that two courts have held, contrary to *A.B. Chance,* that the Fourth Amendment requires prior judicial review of the reasonableness of an OSHA field inspector's demand for access to injury and illness logs before the Agency could issue a citation for denial of access (*McLaughlin* v. *Kings Island,* 849 F.2d 990 (6th Cir. 1988); *Brock* v. *Emerson Electric Co.,* 834 F.2d 994 (11th Cir. 1987)). Those decisions are inapposite here. The courts based their rulings on a concern that field enforcement staff had unbridled discretion to choose the employers they would inspect and the circumstances in which they would demand access to employer records. The *Emerson Electric* court specifically noted that in situations where ''businesses or individuals are required to report particular information to the government on a regular basis[,] a uniform statutory or regulatory reporting requirement [would] satisf[y] the Fourth Amendment concern regarding the potential for arbitrary invasions of privacy'' (834 F.2d at 997, fn.2). This final rule, like that hypothetical, establishes general reporting requirements based on objective criteria and does not vest field staff with any discretion. The employers that are required to report data, the information they must report, and the time when they must report it are clearly identified in the text of the rule and in supplemental documents that will be published pursuant to the Paperwork Reduction Act. The final rule is similar in these respects to the existing regulation in § 1904.41 that authorized reporting pursuant to the OSHA Data Initiative and is reasonable under the Fourth Amendment (*see* 62 FR 6434, 6437–38 (Feb. 11, 1997) for a discussion of Fourth Amendment issues in the final rule on Reporting Occupational Injury and Illness Data to OSHA). The existing regulation in § 1904.41 required employers who received OSHA's annual survey form to report the following information to OSHA for the year described on the form: Number of workers the employer employed, the number of hours the employees worked, and the requested information from the records that the employers keep under part 1904.

The Act's various statutory grants of authority that address recordkeeping provide authority for OSHA to prohibit employers from discouraging employee reports of injuries or illnesses. If employers may not discriminate against workers for reporting injuries or illnesses, then discrimination will not occur to deter workers from reporting their injuries and illnesses, and their employers' records and reports may be more ''accurate'', as required by sections 8 and 24 of the Act. Evidence in the administrative record establishes that some employers engage in practices that discourage injury and illness reporting, and many commenters provided support for OSHA's concern that the electronic submission requirements of this final rule and associated posting of data could provide additional motivation for employers to discourage accurate reporting of injuries and illnesses. Therefore, prohibiting employers from engaging in practices that discourage their employees from reporting injuries or illnesses, including discharging or in any manner discriminating against such employees, is ''necessary to carry out'' the recordkeeping requirements of the Act (*see* 29 U.S.C. 657(g)(2)).

As noted by many commenters, section 11(c) of the Act already prohibits any person from discharging or otherwise discriminating against any employee because that employee has exercised any right under the Act (29 U.S.C. 660(c)(1)). Under this provision, an employee who believes he or she has been discriminated against may file a complaint with OSHA, and if, after investigation, the Secretary has reasonable cause to believe that section 11(c) has been violated, then the Secretary may file suit against the employer in U.S. District Court seeking ''all appropriate relief,'' including reinstatement and back pay (29 U.S.C. 660(c)(2)). Discriminating against an employee who reports a fatality, injury, or illness is a violation of section 11(c) (*see* 29 CFR 1904.36), so the conduct prohibited by § 1904.35(b)(1)(iv) of the final rule is already proscribed by section 11(c).

The advantage of this new provision (§ 1904.35(b)(1)(iv)) is that it provides OSHA with additional enforcement tools to promote the accuracy and integrity of the injury and illness records employers are required to keep under part 1904. For example, under section 11(c), OSHA may not act against an employer unless an employee files a complaint. Under § 1904.35(b)(1)(iv) of the final rule, OSHA will be able to cite an employer for taking adverse action against an employee for reporting an injury or illness, even if the employee did not file a complaint. Moreover, citations can result in orders requiring employers to abate violations, which may be a more efficient tool to correct employer policies and practices than the remedies authorized under section 11(c), which are often employee-specific.

The fact that section 11(c) already provides a remedy for retaliation does not preclude the Secretary from implementing alternative remedies under the OSH Act. Where retaliation threatens to undermine a program that Congress required the Secretary to adopt, the Secretary may proscribe that retaliation through a regulatory provision unrelated to section 11(c). For example, under the medical removal protection (MRP) provision of the lead standard, employers are required to pay the salaries of workers who cannot work due to high blood lead levels (29 CFR 1910.1025(k); *see United Steelworkers, AFL–CIO* v. *Marshall,* 647 F.2d 1189, 1238 (D.C. Cir. 1980)). And it is well established that the Occupational Safety and Health Review Commission may order employers to pay back pay as abatement for violations of the MRP requirements (*see United Steelworkers, AFL–CIO* v. *St. Joe Resources,* 916 F.2d 294, 299 (5th Cir. 1990); *Dole* v. *East Penn Manufacturing Co.,* 894 F.2d 640, 646 (3d Cir. 1990)). If the reason that an employer decided not to pay MRP benefits was to retaliate for an employee's exercise of a right under the Act, OSHA can still cite the employer and seek the benefits as abatement, because payment of the benefits is important to vindicate the health interests underlying MRP. The mere fact that section 11(c) provides one remedial process does not require that OSHA treat the matter as an 11(c) case (*see St. Joe Resources,* 916 F.2d at 298 (stating that that 11(c) was not an exclusive remedy, because otherwise the remedial purposes of MRP would be undermined)). This would also be the case under the final rule. If employers reduce the accuracy of their injury and illness records by retaliating against employees who report an injury or illness, then OSHA's authority to collect accurate injury and illness records allows OSHA to proscribe such conduct even if the conduct would also be proscribed by section 11(c).

III. Section 1904.41

A. Background

OSHA regulations at 29 CFR part 1904 currently require employers with more than 10 employees in most industries to keep records of work-related injuries and illnesses at their establishments. Employers covered by these rules must prepare an injury and illness report for each case (Form 301), compile a log of these cases (Form 300), and complete and post in the workplace an annual summary of work-related injuries and illnesses (Form 300A).

OSHA currently obtains the injury and illness data entered on the three recordkeeping forms only through onsite inspections, which collect only the data from the individual establishment being inspected, or by inclusion of an establishment in a survey pursuant to the previous 29 CFR 1904.41, *Annual OSHA injury and illness survey of ten or more employers.* From 1997 to 2012, OSHA used the authority in the previous § 1904.41 to collect establishment-specific injury and illness data through the OSHA Data Initiative (ODI). Through the ODI, OSHA requested injury and illness data from approximately 80,000 larger establishments (20 or more employees) in selected industries each year.

The ODI collected only the aggregate data from the 300A annual summary form, and the data were not required to be submitted electronically. OSHA used the information obtained through the ODI to identify and target the most hazardous worksites.

The Department of Labor also collects occupational injury and illness data through the annual Survey of Occupational Injuries and Illnesses (SOII), which is conducted by the Bureau of Labor Statistics (BLS) pursuant to 29 CFR 1904.42, *Requests from the Bureau of Labor Statistics for data.* The SOII provides annual rates and numbers of work-related injuries and illnesses, but BLS is prohibited from releasing establishment-specific data to OSHA or the general public. The final rule does not affect the SOII.

OSHA's recordkeeping regulation currently covers more than 600,000 employers with approximately 1,300,000 establishments. Although the OSH Act gives OSHA the authority to require all employers covered by the Act to keep records of employee injuries and illnesses, two classes of employers are partially-exempted from the recordkeeping requirements in part 1904. First, as provided in § 1904.1, employers with 10 or fewer employees at all times during the previous calendar year are partially exempt from keeping OSHA injury and illness records. Second, as provided in § 1904.2, establishments in certain lower-hazard industries are also partially exempt. Partially-exempt employers are not required to maintain OSHA injury and illness records unless required to do so

by OSHA under the previous § 1904.41 or by BLS under § 1904.42.

The records required by part 1904 provide important information to OSHA, as well as to consultants in OSHA's On-Site Consultation Program. However, OSHA enforcement programs currently do not have access to the information in the records required by part 1904 unless the establishment receives an onsite inspection from OSHA or is part of an OSHA annual survey under the previous § 1904.41. At the beginning of an inspection, an OSHA representative reviews the establishment's injury and illness records to help focus the inspection on the safety and health hazards suggested by the records. (OSHA consultants conduct a similar review when an establishment has requested a consultation.) OSHA has used establishment-specific injury and illness information obtained through the ODI to help target the most hazardous worksites.

1. OSHA Data Initiative (ODI)

In the past, OSHA has used the authority in previous § 1904.41 to conduct injury and illness surveys of employers through the ODI. The purpose of the ODI was to collect data on injuries and acute illnesses attributable to work-related activities in private-sector industries from approximately 80,000 establishments in selected high-hazard industries. The Agency used these data to calculate establishment-specific injury/illness rates, and in combination with other data sources, to target enforcement and compliance assistance activities. The ODI consisted of larger establishments (20 or more employees) in the manufacturing industry and in an additional 70 non-manufacturing industries. These are industries with historically high rates of occupational injury and illness. Typically, there were over 180,000 unique establishments subject to participation in the ODI. The ODI was designed so that each eligible establishment received the ODI survey at least once every three-year cycle. In a given year, OSHA would send the ODI survey to approximately 80,000 establishments (1.1 percent of all establishments nationwide), which typically accounted for approximately 700,000 recordable injuries and illnesses (19 percent of injuries and illnesses recorded by employers nationwide).

The ODI survey collected the following data from the Form 300A (annual summary) from each establishment:

- Number of cases (total number of deaths, total number of cases with days away from work, total number of cases with job transfer or restrictions, and total number of other recordable cases);
- Number of days (total number of days away from work and total number of days of job transfer or restriction);
- Injury and illness types (total numbers of injuries, skin disorders, respiratory conditions, poisonings, hearing loss, and all other illnesses);
- Establishment information (name, street address, industry description, SIC or NAICS code, and employment information (annual average number of employees, and total hours worked by all employees));
- Contact information (Company contact name, title, telephone number, and date).

Employers had the option of submitting their data on paper forms or electronically. OSHA then calculated establishment-specific injury and illness rates and used the rates in its Site-Specific Targeting (SST) enforcement program and High Rate Letter outreach program. The Agency also made the establishment-specific data available to the public through its Web site at *http://www.osha.gov/pls/odi/establishment_search.html* and through President Obama's Open Government Initiative at Data.gov (*http://www.data.gov/raw/1461*).

2. BLS Survey of Occupational Injuries and Illnesses (SOII)

The primary purpose of the SOII is to provide annual information on the rates and numbers of work-related non-fatal injuries and illnesses in the United States, and on how these statistics vary by incident, industry, geography, occupation, and other characteristics. The Confidential Information Protection and Statistical Efficiency Act of 2002 (Pub. L. 107–347, Dec. 17, 2002) prohibits BLS from releasing establishment-specific data to the general public or to OSHA.

Each year, BLS collects data from the three recordkeeping forms from a scientifically-selected probability sample of about 230,000 establishments, covering nearly all private-sector industries, as well as state and local government. Employers may submit their data on paper forms or electronically. As stated above, the final rule will not affect the authority for the SOII.

3. OSHA Access to Establishment-Specific Injury and Illness Information

OSHA currently has only a limited ability to obtain part 1904 records, or the establishment-specific injury and illness information included on these forms. Right now, OSHA can access the information in three limited ways.

First, OSHA is able to obtain establishment-specific injury and illness information from employers through workplace inspections. OSHA inspectors examine all records kept under part 1904, including detailed information about specified injuries and illnesses. However, each year, OSHA inspects only a small percentage of all establishments subject to OSHA authority. For example, in Fiscal Year 2014, OSHA and its state partners inspected approximately 1 percent of establishments under OSHA authority (approximately 83,000 inspections, out of approximately 8 million total establishments). As a result, the Agency is not able to compile a comprehensive and timely database of establishment-specific injury/illness information from inspection activities.

Second, OSHA has been able to obtain establishment-specific injury and illness information from employers through the ODI. However, because the ODI collected only summary data from the Form 300A, it did not enable OSHA to identify specific hazards or problems in establishments included in the ODI. In addition, the data were not timely. The injury/illness information in each year's Site-Specific Targeting Program came from the previous year's ODI, which collected injury/illness data from the year before that. As a result, OSHA's site-specific targeting typically was based on injury/illness data that were two or three years old. Additionally, the group of 80,000 establishments in a given year's ODI was a very small fraction of establishments subject to OSHA oversight.

Finally, OSHA is able to obtain limited establishment-specific injury and illness information from employers through 29 CFR 1904.39, *Reporting fatalities, hospitalizations, amputations, and losses of an eye as a result of work-related incidents to OSHA*. OSHA's current regulation requires employers to report work-related fatalities to OSHA within 8 hours of the event. The regulation also requires employers to report work-related in-patient hospitalizations, amputations, and losses of an eye to OSHA within 24 hours of the event. These most severe workplace injuries and illnesses are fortunately rare. OSHA receives fewer than 2,000 establishment-specific reports of fatalities each year. From January 1, 2015, to April 10, 2015, OSHA had received roughly 2,270 reports of single in-patient hospitalizations, 750 reports of amputations, and 4 reports of a loss of

an eye. These fatality/severe injury reports do not include the establishment's injury and illness records unless OSHA also collects these records during a subsequent inspection.

Given the above, OSHA currently obtains limited establishment-specific injury and illness information from an establishment in a particular year only if the establishment was inspected or was part of the ODI.

As noted above, OSHA does obtain aggregate information from the injury and illness records collected through the BLS SOII. SOII data have a time lag of almost a year, with data for a given year not available until November of the following year.

d. Benefits of Electronic Data Collection

The main purpose of this section of the final rule is to prevent worker injuries and illnesses through the collection and use of timely, establishment-specific injury and illness data. With the information obtained through this final rule, employers, employees, employee representatives, the government, and researchers may be better able to identify and mitigate workplace hazards and thereby prevent worker injuries and illnesses.

This final rule will support OSHA's statutory directive to ''assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources'' (29 U.S.C. 651(b)) ''by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this Act and accurately describe the nature of the occupational safety and health problem'' (29 U.S.C. 651(b)(12)).

The importance of this rule in preventing worker injuries and illnesses can be understood in the context of workplace safety and health in the United States today. The number of workers injured or made ill on the job remains unacceptably high. According to the SOII, each year employees experience more than 3 million serious (requiring more than first aid) injuries and illnesses at work, and this number is widely recognized to be an undercount of the actual number of occupational injuries and illnesses that occur annually. As described above, OSHA currently has very limited information about the injury/illness risk facing workers in specific establishments, and this final rule increases the agency's ability to target those workplaces where workers are at greatest risk. However, even with improved targeting, OSHA Compliance Safety and Health Officers can inspect only a small proportion of the nation's workplaces each year, and it would take many decades to inspect each covered workplace in the nation even once. As a result, to reduce worker injuries and illnesses, it is of great importance for OSHA to increase its impact on the many thousands of establishments where workers are being injured or made ill but which OSHA does not have the resources to inspect. The final rule may accomplish this, through application of advances made in the field of behavioral economics in understanding and influencing decision-making in order to prevent worker injuries and illnesses. Specifically, the final rule recognizes that public disclosure of data can be a powerful tool in changing behavior. In this case, the objective of disclosure of data on injuries and illnesses is to encourage employers to abate hazards and thereby prevent injuries and illnesses, so that the employer's establishment can be seen by members of the public, including investors and job seekers, as one in which the risk to workers' safety and health is low.

OSHA believes that disclosure of and public access to these data will (using the word commonly used in the behavioral sciences literature) ''nudge'' some employers to abate hazards and thereby prevent workplace injuries and illnesses, without OSHA having to conduct onsite inspections (*see* the book *Nudge: Improving Decisions About Health, Wealth, and Happiness,* by Richard H. Thaler and Cass R. Sunstein (Penguin Books, 2009)).

The application of behavioral science insights to the prevention injuries and illnesses is consistent with Executive Order 13707 ''Using Behavioral Insights to Better Serve the American People,'' which states, ''(a) Executive departments and agencies (agencies) are encouraged to (i) identify policies, programs, and operations where applying behavioral science insights may yield substantial improvements in public welfare, program outcomes, and program cost effectiveness.''

This approach is also consistent with other Administration policies, including:

- Executive Order 13563, which states, ''Where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. These approaches include warnings, appropriate default rules, and disclosure requirements as well as provision of information to the public in a form that is clear and intelligible.''
- The September 8, 2011 memorandum from Cass R. Sunstein, Administrator of the Office of Information and Regulatory Affairs, entitled ''Informing Consumers through Smart Disclosure'', which provides guidance to agencies on how to promote smart disclosure, defined as ''the timely release of complex information and data in standardized, machine readable formats in ways that enable consumers to make informed decisions.''

In addition, the rule is consistent with President Obama's Open Government Initiative. In his Memorandum on Transparency and Open Government, issued on January 21, 2009, President Obama instructed the Director of the Office of Management and Budget (OMB) to issue an Open Government Directive. On December 8, 2009, OMB issued a Memorandum for the Heads of Executive Departments and Agencies, Open Government Directive, which requires federal agencies to take steps to ''expand access to information by making it available online in open formats.'' The Directive also states that the ''presumption shall be in favor of openness (to the extent permitted by law and subject to valid privacy, confidentiality, security, or other restrictions).'' In addition, the Directive states that ''agencies should proactively use modern technology to disseminate useful information, rather than waiting for specific requests under FOIA.''

A requirement for the electronic submission of recordkeeping data will help OSHA encourage employers to prevent worker injuries and illnesses by greatly expanding OSHA's access to the establishment-specific information employers are already required to record under part 1904. As described in the previous section, OSHA currently does not have systematic access to this information. OSHA has limited access to establishment-specific injury and illness information in a particular year. Typically, OSHA only had access if the establishment was inspected or was part of an OSHA injury and illness survey. In addition, the injury and illness data collected through the ODI were summary data only and not timely.

The final rule's provisions requiring regular electronic submission of injury and illness data will allow OSHA to obtain a much larger data set of more timely, establishment-specific information about injuries and illnesses in the workplace. This information will help OSHA use its enforcement and compliance assistance resources more effectively by enabling OSHA to identify

the workplaces where workers are at greatest risk.

For example, OSHA will be better able to identify small and medium-sized employers who report high overall injury/illness rates for referral to OSHA's free on-site consultation program. OSHA could also send hazard-specific educational materials to employers who report high rates of injuries or illnesses related to those hazards, or letters notifying employers that their reported injury/illness rates were higher than the industry-wide rates. A recent evaluation by Abt Associates of OSHA's practice of sending referral letters to high-hazard employers identified by OSHA through the ODI confirmed the value of these letters in increasing the number of workplaces requesting a consultation visit (Ex. 1833). OSHA has also found that such high-rate notification letters were associated with a 5 percent decrease in lost workday injuries and illnesses in the following three years. In addition, OSHA will be able to use the information to identify emerging hazards, support an Agency response, and reach out to employers whose workplaces might include those hazards.

The final rule will also allow OSHA to more effectively target its enforcement resources to establishments with high rates or numbers of workplaces injuries and illnesses, and better evaluate its interventions. Prior to 1997, OSHA randomly selected establishments in hazardous industries for inspection. This targeting system was based on aggregated industry data. Relatively safe workplaces in high-rate industries were selected for inspection as well as workplaces that were experiencing high rates of injuries and illnesses. In 1997, OSHA changed its method of targeting general-industry establishments for programmed inspections. The Agency began using establishment-specific injury and illness data collected through the OSHA Data Initiative (ODI) to identify and target for inspection individual establishments that were experiencing high rates of injury and illness. OSHA's Site-Specific Targeting (SST) program has been OSHA's main programmed inspection plan for non-construction workplaces from 1997 through 2014. OSHA intends to use the data collected under this final rule in the same manner for targeting inspections. This rule greatly expands the number and scope of establishments that will provide the Agency with their injury and illness data. As a result, the Agency will be able to focus its inspection resources on a wider population of establishments. The data collection will also enable the Agency to focus its Emphasis Program inspections on establishments with high injury and illness rates, as it did for the National Emphasis Program (NEP) addressing hazards in Nursing Homes (*see* CPL 03–00–016, April 5, 2012).

The new collection will provide establishment-specific injury and illness data for analyses that are not currently possible with the data sets from inspections, the ODI, and reporting of fatalities and severe injuries. For example, OSHA could analyze the data collected under this system to answer the following questions:

1. Within a given industry, what are the characteristics of establishments with the highest injury or illness rates (for example, size or geographic location)?

2. Within a given industry, what are the relationships between an establishment's injury and illness data and data from other agencies or departments, such as the Wage and Hour Division, the Environmental Protection Agency, or the Equal Employment Opportunities Commission?

3. Within a given industry, what are the characteristics of establishments with the lowest injury or illness rates?

4. What are the changes in types and rates of injuries and illnesses in a particular industry over time?

Furthermore, without access to establishment-specific injury and illness data, OSHA has had great difficulty evaluating the effectiveness of its enforcement and compliance assistance activities. Having these data will enable OSHA to conduct rigorous evaluations of different types of programs, initiatives, and interventions in different industries and geographic areas, enabling the agency to become more effective and efficient. For example, OSHA believes that some employers who have not been inspected, but who learn about the results (include monetary penalties) of certain OSHA's inspections in the same industry or geographic area, may voluntarily abate hazards out of concern that they will be the target of a future inspection. Access to these data will allow OSHA to compare injuries and illnesses at non-inspected establishments in the same industry or geographic areas as the inspected ones.

Publication of worker injury and illness data will encourage employers to prevent injuries and illnesses among their employees through several mechanisms:

First, the online posting of establishment-specific injury and illness information will encourage employers to improve workplace safety and health to support their reputations as good places to work or do business with. Many corporations now voluntarily report their worker injury and illness rates in annual ''Sustainability Reports'', in order to show investors, stakeholders, and the public that they are committed to positive social values, including workplace safety and health. Public access to these data will help address a well-known information problem present in all voluntary reporting initiatives: Voluntary disclosure tends to lead those with the worst records to underreport outcomes. By requiring complete, accurate reporting, interested parties will be able to gauge the full range of injury and illness outcomes.

Second, these data will be useful to employers who want to use benchmarking to improve their own safety and health performance. Under OSHA's current recordkeeping regulation, employers have access only to their own data, aggregate injury/illness data in the SOII, historic summary data from establishments in the ODI, and other severe injury/illness event reports. Using data collected under this final rule, employers can compare injury and illness rates at their establishments to those at comparable establishments, and set workplace safety/health goals benchmarked to the establishments they consider most comparable.

Third, online availability of establishment-specific injury and illness information will allow employees to compare their own workplaces to the safest workplaces in their industries. Further, while the current access provisions of the part 1904 regulation provide employees the right to access the information on the part 1904 recordkeeping forms, evidence shows that few employees exercise this right. During 2,836 inspections conducted by OSHA between 1996 and 2011 to assess the injury and illness recordkeeping practices of employers, 2,599 of the recordkeepers interviewed (92 percent) indicated that employees never requested access to the records required under part 1904. OSHA believes that employees in establishments with 250 or more employees will access and make use of the data more frequently when the case-specific information is available without having to request the information from their employers. Uninhibited access to the information will allow employees in these establishments to better identify hazards within their own workplace and to take actions to have the hazards abated. In addition, if employees preferentially choose employment at the safest

workplaces in their industries, then employers may take steps to improve workplace safety and health (preventing injuries and illnesses from occurring) in order to attract and retain employees.

Fourth, access to these data will improve the workings of the labor market by providing more complete information to job seekers, and, as a result, encourage employers to abate hazards in order to attract more desirable employees. Potential employees currently have access only to the limited injury/illness information currently available to the public, as discussed above. Injury and illness data for the vast majority of establishments are not publicly available. Using data newly accessible under this final rule, potential employees could examine the injury and illness records of establishments where they are interested in working, to help them make a more informed decision about a future place of employment. This would also encourage employers with more hazardous workplaces in a given industry to make improvements in workplace safety and health to prevent injuries and illnesses from occurring, because potential employees, especially the ones whose skills are most in demand, might be reluctant to work at more hazardous establishments. In addition, 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.

Fifth, access to data will permit investors to identify investment opportunities in firms with low injury and illness rates. If investors believe that firms that have low rates outperform firms with higher rates, presumably because the low-rate firms are better managed, and they preferentially invest in firms with low rates, then employers may take steps to improve workplace safety and health and prevent injuries and illnesses from occurring in order to attract investment.

Sixth, using data collected under this final rule, members of the public will be able to make more informed decisions about current and potential places with which to conduct business. For example, potential customers might choose to patronize only the businesses in a given industry with the lowest injury/illness rates. This is not possible at present because, as noted above, the general public has access only to very limited injury and illness data. Such decisions by customers would also encourage establishments with higher injury/illness rates in a given industry to improve workplace safety in order to become more attractive to potential customers.

Finally, in large construction contracts, particularly those involving work contracted for by state and local governments, preference is often given to subcontractors with lower injury and illness rates. In some cases, employers with rates above a certain level are not eligible for the contract work. Public disclosure of employers' injury and illness rates will be to enable corporate and individual customers to consider these rates in the selection of vendors and contractors. These data will also be useful to people who believe that low injury rates are correlated with high production quality, and who therefore prefer to purchase products made by manufacturers with low injury rates (Paul S. Adler, 1997) (Ex. 1832).

Disclosure of and access to injury and illness data have the potential to improve research on the distribution and determinants of workplace injuries and illnesses, and therefore to prevent workplace injuries and illnesses from occurring. Like the general public, researchers currently have access only to the limited injury/illness data described above. Using data collected under this final rule, researchers might identify previously unrecognized patterns of injuries and illnesses across establishments where workers are exposed to similar hazards. Such research would be especially useful in identifying hazards that result in a small number of injuries or illnesses in each establishment but a large number overall, due to a wide distribution of those hazards in a particular area, industry, or establishment type. Data made available under this final rule may also allow researchers to identify patterns of injuries or illnesses that are masked by the aggregation of injury/illness data in the SOII.

The availability of establishment-specific injury and illness data will also be of great use to county, state and territorial Departments of Health and other public institutions charged with injury and illness surveillance. In particular, aggregation of establishment-specific injury and illness reports and rates from similar establishments will facilitate identification of newly-emerging hazards that would not easily be identified without linkage to specific industries or occupations. There are currently no comparable data sets available, and these 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.

Workplace safety and health professionals might use data published under this final rule to identify establishments whose injury/illness records suggest that the establishments would benefit from their services. In general, online access to this large database of injury and illness information will support the development of innovative ideas for improving workplace safety and health, and will allow everyone with a stake in workplace safety and health to participate in improving occupational safety and health.

Furthermore, because the data will be publicly available, industries, trade associations, unions, and other groups representing employers and workers will be able to evaluate the effectiveness of privately-initiated injury and illness prevention initiatives that affect groups of establishments. In addition, linking these data with data residing in other administrative data sets will enable researchers to conduct rigorous studies that will increase our understanding of injury causation, prevention, and consequences. For example, by combining these data with data collected in the Annual Survey of Manufactures (conducted by the United States Census Bureau), it will be possible to examine the impact of a range of management practices on injury and illness rates, as well as the impact of injury and illness rates on the financial status of employers.

Finally, public access to these data will enable developers of software and smartphone applications to develop tools that facilitate use of these data by employers, workers, researchers, consumers and others. Examples of this in other areas is the use of OSHA and Wage and Hour Division violation information in the ''Eat/Shop/Sleep'' smartphone application and, in public transit, the wide-scale private development of applications for real-time information on bus and subway arrivals using public information.

This final rule will also improve the accuracy of the recorded data. Section 1904.32 already requires company executives subject to part 1904 requirements to certify that they have examined the annual summary (Form 300A) and that they reasonably believe, based on their knowledge of the process by which the information was recorded, that the annual summary is correct and complete. OSHA recognizes that most employers are diligent in complying with this requirement. However, a minority of employers is less diligent; in recent years, one-third or more of violations of § 1904.32, and up to one-tenth of all recordkeeping (part 1904)

violations, have involved this certification requirement. It is OSHA's belief that, if this minority of employers knows that their data must be submitted to the Agency and may also be examined by members of the public, then they will pay more attention to the requirements of part 1904, which could lead both to improvements in the quality and accuracy of the information and to better compliance with § 1904.32.

Finally, the National Advisory Committee on Occupational Safety and Health (NACOSH), composed of representatives of employers, workers, and the public, has expressed its support of the efforts of OSHA in consultation with NIOSH to modernize the system for collection of injury and illness data to assure that it is timely, complete, and accurate, as well as both accessible and useful to employers, employees, responsible government agencies, and members of the public.

e. Publication of Electronic Data

As discussed above, OSHA intends to make the data it collects public. As discussed below, the publication of specific data elements will in part be restricted by applicable federal law, including provisions under the Freedom of Information Act (FOIA), as well as specific provisions within part 1904. OSHA will make the following data from the various forms available in a searchable online database:

Form 300A (Annual Summary Form)—All collected data fields will be made available. In the past, OSHA has collected these data under the ODI and during OSHA workplace inspections and released them in response to FOIA requests. The annual summary form is also posted at workplaces under § 1904.32(a)(4) and (b)(5). OSHA currently posts establishment-specific injury and illness rates calculated from the data collected through the ODI on OSHA's public Web site at *http://www.osha.gov/pls/odi/establishment_search.html*. The 300A annual summary does not contain any personally-identifiable information.

Form 300 (the Log)—All collected data fields on the 300 Log will generally be made available on the Web site. Employee names will not be collected. OSHA occasionally collects these data during inspections as part of the enforcement case file. OSHA generally releases these data in response to FOIA requests. Also, § 1904.29(b)(10) prohibits release of employees' names and personal identifiers contained in the forms to individuals other than the government, employees, former employees, and authorized representatives. OSHA does not currently conduct a systematic collection of the information on the 300 Log.

Form 301 (Incident Report)—All collected data fields on the right-hand side of the form (Fields 10 through 18) will generally be made available. The Agency currently occasionally collects the form for enforcement case files. OSHA generally releases these data in response to FOIA requests. Section 1904.35(b)(2)(v)(B) prohibits employers from releasing the information in Fields 1 through 9 (the left-hand side of the form) to individuals other than the employee or former employee who suffered the injury or illness and his or her personal representatives. Similarly, OSHA will not publish establishment-specific data from the left side of Form 301. OSHA does not release data from Fields 1 through 9 in response to FOIA requests. The Agency does not currently conduct a systematic collection of the information on the Form 301. However, the Agency does review the entire Form 301 during some workplace inspections and occasionally collects the form for inclusion in the enforcement case file. Note that OSHA will not collect or publish Field 1 (employee name), Field 2 (employee address), Field 6 (name of treating physician or health care provider), or Field 7 (name and address of non-workplace treating facility).

While OSHA intends to make the information described above generally available, the Agency also wishes to emphasize that it does not intend to release personally identifiable information included on the forms. For example, in some cases, information entered in Column F (Describe injury or illness, parts of body affected, and object/substance that directly injured or made person ill) of the 300 Log contains personally-identifiable information, such as an employee's name or Social Security Number. As a result, OSHA plans to review the information submitted by employers for personally-identifiable information. As part of this review, the Agency will use software that will search for and de-identify personally identifiable information before OSHA posts the data.

It should also be noted that other federal agencies post establishment-specific health and safety data with personal identifiers, including names. For example, the Mine Safety and Health Administration (MSHA) publishes information gathered during the agency's investigations of fatal accidents. MSHA's Preliminary Report of Accident, Form 7000–13, provides information on fatal accidents including the employee's name, age, and a description of the accident. MSHA also publishes the written Accident Investigation Report, which details the nature and causes of the accident and includes the names of other employees involved in the fatal incident.

The Federal Railroad Administration (FRA) posts Accident Investigation Reports filed by railroad carriers under 49 U.S.C. 20901 or made by the Secretary of Transportation under 49 U.S.C. 20902; in the case of highway-rail grade crossing incidents, these reports include personally identifiable information (age and gender of the person(s) in the struck vehicle).

Finally, the Federal Aviation Administration (FAA) posts National Transportation Safety Board (NTSB) reports about aviation accidents. These reports include personally identifiable information about employees, including job history and medical information.

B. The Proposed Rule

The proposed rule would have amended OSHA's existing recordkeeping regulation at § 1904.41 to add three new electronic reporting requirements. First, OSHA would have required establishments that are required to keep injury and illness records under part 1904, and had 250 or more employees in the previous calendar year, to electronically submit information from these records to OSHA or OSHA's designee, on a quarterly basis (*proposed § 1904.41(a)(1)—Quarterly electronic submission of part 1904 records by establishments with 250 or more employees*).

Second, OSHA would have required establishments that are required to keep injury and illness records under part 1904, had 20 or more employees in the previous calendar year, and are in certain designated industries, to electronically submit the information from the OSHA annual summary form (Form 300A) to OSHA or OSHA's designee, on an annual basis (*proposed § 1904.41(a)(2)—Annual electronic submission of OSHA annual summary form (Form 300A) by establishments with 20 or more employees in designated industries*). This second submission requirement would have replaced OSHA's annual illness and injury survey, authorized by the then-current version of 29 CFR 1904.41.

Third, OSHA would have required all employers who receive notification from OSHA to electronically submit specified information from their part 1904 injury and illness records to OSHA or OSHA's designee (*proposed § 1904.41(a)(3)—Electronic submission of part 1904 records upon notification*).

As previously discussed, in addition to the new requirements for electronic

submission of part 1904 data, the preamble to the proposed rule stated that OSHA intended to make the collected data public in order to make the data useful to employers, employees, and the public in dealing with safety and health issues. OSHA also stated in the preamble to the proposed rule that the publication of specific data elements would have been restricted in part by provisions under the Freedom of Information Act (FOIA) and the Privacy Act, as well as specific provisions within part 1904. OSHA proposed to make the following data from the various forms available in a searchable online database:

Form 300A—All fields could have been made available. Form 300A does not contain any personally identifiable information.

Form 300 (the Log)—All fields could have been made available except for Column B (the employee's name).

Form 301 (Incident Report)—All fields on the right-hand side of the form (Fields 10 through 18) could typically have been made available.

C. Comments on the Proposed Rule

There were many comments supporting the proposed rule. Many commenters commented that the collection of recordkeeping data would allow OSHA to improve workplace safety and health and prevent injuries and illnesses. Other commenters commented that publication of information provided by the electronic submission of recordkeeping data from covered establishments would allow employers, employees, researchers, unions, safety and health professionals, and the public to improve workplace safety and health. There were also comments that the proposed rule was consistent with the actions of other federal and state agencies, which already require the submission of health and safety data.

However, many commenters also raised potential concerns about the proposed rule. Some commenters expressed concerns about the implications of the publication of safety and health data for employee privacy. There were also comments about the implications of the proposed rule for employer privacy, especially with regard to confidential commercial information. Other commenters commented that OSHA underestimated the cost to businesses of implementing the proposed rule, especially the proposed requirement that would have required large establishments to submit data on a quarterly basis. In addition, some commenters commented that the data provided to OSHA and to the public as a result of this rule would not be beneficial.

OSHA addresses all of the issues raised by commenters below.

Alternatives Included in the Proposed Rule

In the preamble to the proposed rule, in addition to providing proposed regulatory text, OSHA stated that it was considering several alternatives. [78 FR 67263–65270]. OSHA requested comment on the following regulatory alternatives.

Alternative A—Monthly Submission Under Proposed § 1904.41(a)(1)

In Alternative A, OSHA considered requiring monthly submission instead of quarterly submission from establishments with 250 or more employees.

However, almost all commenters opposed this alternative. Several commenters expressed concerns about the burdens of monthly submission on employers (Exs. 1211, 1112). Several commenters also expressed concerns about the effects of monthly submission on data quality (Exs. 1211, 1385, 1397). Other commenters commented that monthly reporting would not provide much, if any, benefit over quarterly reporting (Exs. 1384, 1391).

Ashok Chandran provided the only comment in support of this alternative. He commented that ''[m]ore frequent reporting will actually prevent distortion, as fewer reports would increase the chance of a limited sample misrepresenting the conditions of an establishment. So long as OSHA does not use reports in isolation to trigger investigation, this risk is low'' (Ex. 1393).

OSHA agrees with commenters who stated that monthly reporting would increase the burden on employers and could result in the submission of less accurate recordkeeping data. Given the potential extra burden without an added benefit, OSHA has decided not to adopt Alternative A from the proposed rule. As explained below, the final rule requires annual electronic submission of part 1904 records by establishments with 250 or more employees.

Alternative B—Annual Submission Under Proposed § 1904.41(a)(1)

In Alternative B, OSHA considered requiring annual submission for establishments with 250 or more employees instead of quarterly submission.

Most commenters supported Alternative B, on grounds that annual reporting would provide better-quality, more useful data and would be less burdensome for both employers and OSHA.

Commenters provided various reasons to support the idea that annual reporting would provide better-quality data. First, some commenters commented that one quarter is too short a period of time to generate meaningful data (Exs. 0258, 1338, 1385, 1399, 1413). For example, the American Meat Institute commented that ''breaking the data into quarterly 'bites' will produce numbers with no comparative value . . . In fact, it is more likely to generate misleading, incorrect information because injury and illness incidents typically occur on a much more random basis than is reflected in what would amount to three-month 'snapshots' '' (Ex. 0258).

Second, some commenters commented that quarterly reporting was more likely to lead to underreporting. The Allied Universal Corporation commented that ''[w]ith quarterly reporting, employers are unlikely to record close cases because, in many instances, striking them later may be impossible as the information has already been reported and posted publicly by OSHA. Rather than assume such an additional burden, employers will likely err on the side of not recording those incidents where in doubt'' (Ex. 1192). The American Chemistry Council, the Association of Energy Service Companies (AESC), and the International Association of Amusement Parks and Attractions (IAAPA) provided similar comments (Exs. 1092, 1323, 1427).

Third, several commenters commented that quarterly reporting would not provide enough time for employers to complete cases and catch data mistakes (Exs. 0035, 0247, 1110, 1206, 1214, 1339, 1379, 1385, 1389, 1399, 1405, 1406). For example, the Glass Packaging Institute commented that ''[t]he data is not static but will be a moving data set and consequently of little value for evaluation or decisions. Cases are added, deleted, change with time as information and cases and/or treatment improve or worsen'' (Ex. 1405).

ORCHSE Strategies, LLC commented that ''[employers] also review the data at the end of the year to insure its accuracy before it is included in company reports or submitted to OSHA or to BLS. They check on outstanding cases; track day-counts for cases involving restricted work activity, job transfer, and days away from work; check on ongoing employee job limitations; prepare estimates of future days that will be lost or restricted (beyond the end of the year) etc.'' (Ex. 1339). In addition, the American Petroleum Institute

commented that ''29 CFR 1904.32 requires annual certification of the 300 Forms and the quarterly submittals would not be certified; thus, [OSHA] would be relying on potentially inaccurate information'' (Ex. 1214).

As for the usefulness of data provided by quarterly reporting, many commenters stated that there is no evidence of benefits of quarterly reporting over annual reporting for worker safety and health (Exs. 0156, 0258, 1110, 1126, 1206, 1210, 1221, 1225, 1322, 1339, 1406, 1412). For example, the North American Insulation Manufacturers Association (NAIMA) commented that ''OSHA has failed to demonstrate that the increased frequency of reporting will improve worker safety, especially by imposing a four-fold burden increase on both employer and agency personnel for quarterly rather than annual reporting. Indeed, it cannot document such a result because there is no connection between quarterly reporting and improved worker safety'' (Ex. 1221). NAIMA also commented that ''the delay for OSHA to scrub the data [of PII before publication] will likely obviate any perceived 'timeliness' benefit OSHA might make in attempting to justify quarterly rather than annual data submission'' (Ex. 1221). The Fertilizer Institute (TFI) and the Agricultural Retailers Association (ARA) provided similar comments (Ex. 1412).

OSHA also received comments that quarterly reporting would be overly burdensome for employers (Exs. 0247, 1112, 1126, 1206, 1210, 1214, 1221, 1332, 1338, 1339, 1379, 1389, 1390, 1405). For example, ORCHSE Strategies, LLC commented that ''[v]erification is often an iterative process that involves back-and-forth between the corporate safety department and the site, with involvement of medical practitioners, the injured or ill employee, supervisors and others. Shifting from a single data submission to four data submissions per year would add substantially to the already significant cost and burden for these employers (at least by a factor of four). It would also complicate the process; employers would have to create estimated day counts for cases that are not closed at the time of each reporting and then correct them when the cases are finally resolved'' (Ex. 1339).

The Association of Union Constructors (TAUC) commented that ''[w]ith a proposed quarterly reporting frequency, often cases in the construction industry may not be resolved quickly and there is no method of recourse if the employer is found not at fault once the raw data is public . . . A lag in the period of time between updating and posting of injury/illness data could impose punitive consequences to the contractor if the public or customers are reviewing their data in real time'' (Ex. 1389). In addition, the Environmental, Health & Safety Communications Panel (EHSCP) commented that quarterly reporting would be a burden for safety and health professionals and ''strongly recommend[ed] that nothing more frequent than an annual submission be considered so as to minimize the time that safety and health professionals are required to devote to paperwork and data review rather than on proactive safety efforts'' (Ex. 1331).

Commenters commented particularly about the resources needed for OSHA to remove PII from the collected data before publishing the data. For example, the North American Insulation Manufacturers Association (NAIMA) commented that ''OSHA will tax its own resources to process, review, and scrub the data four times per year. This data will contain sensitive personal information, and OSHA will need to edit the data before making it public. To do this on a quarterly basis will be time consuming and resource intensive'' (Ex. 1221). The Phylmar Regulatory Roundtable (PRR) questioned whether OSHA has the capacity to analyze quarterly data, commenting that ''annual data submissions from 580,000 employers strike PRR as a large volume of data for OSHA to analyze. Multiplying that number by quarterly submissions has more potential for detriment than benefit'' (Ex. 1110).

However, several commenters opposed Alternative B on grounds that quarterly data would be more useful and would not increase the burden on employers (Exs. 1211, 1381, 1384). The International Brotherhood of Teamsters commented that ''[q]uarterly submissions will help identify emerging trends or serious incidents within a much more rapid timeframe than annual reporting, and allow for rapid intervention to stop such trends or respond to such incidents before they continue'' (Ex. 1381). Similarly, the International Union (UAW) commented that ''annual reporting would make it impossible to track seasonal variations in the type or rate of injuries and illnesses'' (Ex. 1384).

In response, OSHA agrees with commenters who stated that annual reporting would lessen the burden on employers. OSHA believes that companies' review of the data at the end of the year will help to improve the accuracy of the submitted data, because employers are already required to certify their records at the end of the calendar year under current part 1904. In addition, OSHA agrees that annual reporting will provide more meaningful data, as well as higher-quality data, because employers will have more time to update and revise the data before reporting to OSHA. Finally, OSHA agrees with the commenters who stated that annual reporting would lessen the burden on OSHA, by reducing both the total volume of data and the amount of personally identifiable information to remove before publication. Therefore, unlike the proposed rule, which would have required quarterly submission by establishments with 250 or more employees, § 1904.41(a)(1) of the final rule requires annual electronic submission of part 1904 records by establishments with 250 or more employees.

Alternative C—One Year Phase-in of Electronic Reporting Under Proposed § 1904.41(a)(1)

In Alternative C, OSHA considered a phase-in of the electronic reporting requirement, under which establishments with 250 or more employees would have had the option of submitting data on paper forms for the first year the rule would have been in effect.

Several commenters opposed Alternative C on grounds that large companies affected by this rule should be able to electronically submit data in the first year, especially the Form 300 (Log) and 300A (annual summary). These commenters explained that submission of data in paper form would delay the processing and publication of the data (Exs. 1211, 1345, 1350, 1381, 1384, 1387, 1424). The International Brotherhood of Teamsters commented that ''these companies are certainly large enough to handle the responsibility, and will receive the analytic benefits such a reporting system provides'' (Ex. 1381). Other commenters stated that there should not be a phase-in of the electronic submission requirement because OSHA does not have the resources to process thousands of submitted paper forms (Exs. 1395, 1211).

However, other commenters supported Alternative C to provide time for employers and OSHA to come up with methods for protecting worker confidentiality. The International Union (UAW) commented that ''OSHA may find it useful to have a phase-in period for submission of 301 reports by these employers to allow time for OSHA to come up with a method for scrubbing data to ensure worker confidentiality'' (Ex. 1384). The United Food & Commercial Workers International

Union (UFCW) and the Services Employees International Union (SEIU) provided similar comments (Exs. 1345, 1387). FedEx Corporation commented that ''if employers are required to collect Form 301 data, then given that the reporting of detailed injury and illness data is a wholly novel recordkeeping requirement which will require an investment of significant time and resources for implementation, FedEx supports a phase-in period of at *least* one-year'' (Ex. 1338).

In response, OSHA agrees with commenters who stated that larger companies (those with 250 or more employees) have the resources to electronically submit injury and illness data to OSHA in the first year. According to commenters, in many cases, larger companies already keep OSHA injury and illness records electronically, so a requirement to submit such records electronically is not unduly burdensome (Exs. 1103, 1188, 1209, 1211, 1387, 1393, 1424) (*see* also Section VI Final Economic Analysis and Regulatory Flexibility Analysis).

OSHA also agrees with commenters who stated that the Agency does not have the resources to handle the large volumes of non-electronic data that Alternative C would have produced. Based on OSHA's experience with paper submissions to the ODI, the Agency estimates that processing a paper submission might take 2 minutes for the data from Form 300A and 1 minute for processing the actual paper form. In addition, based on BLS's experience with paper submissions to the SOII, the Agency estimates that processing each reported case in a paper submission might take 2 minutes. OSHA estimates that 33,000 establishments will be subject to final § 1904.41(a)(1), accounting for 713,000 reported cases. In addition, roughly 30 percent of the establishments in the ODI submitted their data on paper. Based on these estimates (3 minutes per paper submission; 2 minutes per case; 30 percent of establishments submit on paper; 33,000 establishments; 713,000 cases), OSHA estimates that the one-year paper submission phase-in option in Alternative C would account for 495 hours for the Form 300A and 7,130 hours for the cases, for a total of 7,625 hours, or almost four full-time employees at 2,000 hours per full-time employee. Under a more optimistic scenario assuming 10 percent of establishments submitting on paper, the one-year paper submission phase-in option in Alternative C would account for 165 hours for the Form 300A and 2,377 hours for the cases, for a total of 2,542 hours, or more than one full-time employee. Under either scenario, OSHA would be unable to make timely use of the data.

Additionally, with respect to commenters who stated that a phase-in would provide more time for employers and OSHA to develop methods to protect employee confidentiality, OSHA notes that a requirement that only provides for electronic submission of data will help the Agency search for and redact confidential information. As noted elsewhere in this preamble, OSHA will use existing software to remove personally identifiable information before posting data on the publicly-accessible Web site. Also as noted above, the proposed rule would have required establishments with 250 or more employees to electronically submit data on a quarterly basis, whereas § 1904.41(a)(1) of the final rule requires annual submission. This change will provide large employers with additional time to prepare for the first electronic submission of recordkeeping data on March 2, 2017. Accordingly, the final rule requires electronic submission of part 1904 records by establishments with 250 or more employees, without a phase-in period for paper submission.

Alternative D—Three Year Phase-in of Electronic Reporting Under Proposed § 1904.41(a)(2)

In Alternative D, OSHA considered a phase-in of the electronic reporting requirement, under which establishments with 20 or more employees in designated industries would have had the option of submitting data on paper forms for the first three years this rule would have been in effect.

All of the commenters who specifically commented on Alternative D supported a phased-in electronic submission requirement to allow smaller companies to adjust to electronic reporting. Different commenters supported a phase-in period of different lengths—one, two, or three years, or an unspecified ''reasonable'' period of time (Exs. 1206, 1211, 1338, 1350, 1353, 1384, 1387, 1424).

OSHA also received a comment from the American College of Environmental Medicine (ACEM) stating that OSHA should provide a phase-in for ''employers who do not have access to the Internet pending full distribution of Internet services throughout the Nation'' (Ex. 1327). The Dow Chemical Company commented that ''a phase-in period should be provided for: At least one year after OSHA's web portal is created, debugged, tested and operational. However, a phase-in should consist of a period without a paper reporting requirement, so companies can deploy their resources toward developing the systems and information that will be necessary in order to report electronically'' (Ex. 1189). The National Ready Mixed Concrete Association (NRMCA), International Association of Industrial Accident Boards and Commissions (IAIBC), and Bray International made similar comments (Exs. 0210, 1104, 1401).

OSHA agrees with the comments for Alternative C, above, that OSHA does not have the resources to handle the large volumes of non-electronic data that Alternative D would produce. As above, based on OSHA's experience with paper submissions to the ODI, the Agency estimates that processing a paper submission might take 2 minutes for the data from Form 300A and 1 minute for processing the actual paper. OSHA estimates that 430,000 establishments will be subject to final § 1904.41(a)(2). In addition, OSHA estimated that roughly 30 percent of the establishments in the ODI submitted their data on paper. Based on these estimates (3 minutes per paper submission; 30 percent of establishments submit on paper; 430,000 establishments), OSHA estimates that the three-year paper submission phase-in option in Alternative D would account for 6,450 hours per year for three years, or 19,350 hours total. Under a more optimistic scenario assuming 10 percent of establishments submitting on paper, the three-year paper submission phase-in option in Alternative D would account for 2,150 hours per year for three years, or 6,450 hours total. Under either scenario, OSHA would be unable to make timely use of the data.

As with Alternative C, immediate electronic reporting will make the data available to employers, the public, and OSHA in a timelier manner, because OSHA will not have to take the time to convert paper entries into electronic format. Also, an electronic format will make it much easier and faster for OSHA to prepare the data for publication. Therefore, the final rule requires annual electronic submission of the OSHA Form 300A by establishments with 20 or more employees, but fewer than 250 employees, in designated industries, without a phase-in period for paper submission.

With respect to commenters' concern about Internet availability, OSHA believes that establishments with 20 or more employees are highly likely to have access to the Internet, and the burden of electronic reporting is low.

Alternative E—Widen the Scope of Establishments Required To Report Under Proposed § 1904.41(a)(1)

In Alternative E, OSHA considered widening the scope of establishments required to report under this proposed section of the rule from establishments with 250 or more employees to establishments with 100 or more employees.

In support of Alternative E, commenters stated that increasing the number of establishments required to report would in turn increase public access to establishment-specific injury and illness data (Exs. 1211, 1395). There were also comments that lowering the size criterion to 100 employees would pose little burden on medium-sized facilities, because establishments of that size often already have standardized recordkeeping (Exs. 1211, 1358).

However, there were also comments opposing Alternative E due to employer burden and volume of data. For employer burden, the National Automobile Dealers Association (NADA) commented that ''[u]nder no circumstances should the proposed threshold for quarterly reporting be expanded to include establishments with 100 or more employees. As noted above, the proposed mandate is unjustified at the proposed 250-employee threshold. Any expansion would just exacerbate the burden for a much larger universe of employers with no commensurate benefit'' (Ex. 1392).

For volume of data, several commenters commented that OSHA should assess the effect of lowering the size criterion to 200 employees and that 250 employees should be the maximum size criterion. For example, the AFL–CIO commented that ''the 250 employee cut-off should be the maximum cut-off for such reporting. We encourage the agency to examine the effect of lowering the establishment threshold to 200 employees to determine and assess the additional information that would be captured by such as change, particularly information from higher hazard industries that are of greater concern'' (Ex. 1350). The International Brotherhood of Teamsters and the International Union, United Automobile, Aerospace and Agriculture Implement Workers of America (UAW) provided similar comments (Ex. 1381, 1384). The Service Employees International Union (SEIU) commented that ''we believe 250 employees should be the maximum. We would support a phased in lowering of this number over several years to 100 employees as electronic reporting becomes even more routine and as the workforce continues to fragment into smaller units, as many expect'' (Ex. 1387).

OSHA agrees with commenters who stated that reducing the size criterion to 100 would increase the burden on employers with diminishing benefit. The number of establishments that would be required to report under this proposed section under Alternative E would increase from 34,000 to 120,000. This alternative would also increase the number of injury and illness cases with incident report (OSHA Form 301) and Log (OSHA Form 300) data from 720,000 to 1,170,000. Therefore, like the proposed rule, the final rule requires electronic submission of all three recordkeeping forms by establishments with 250 or more employees.

Alternative F—Narrow the Scope of Establishments Required To Report Under Proposed § 1904.41(a)(1)

In Alternative F, OSHA considered narrowing the scope of establishments required to report under this section of the rule from establishments with 250 or more employees to establishments with 500 or more employees.

Several commenters supported Alternative F, on grounds that it would lower the burden of the rule. The National Council of Farmer Cooperatives (NCFC) commented that ''[w]e encourage OSHA to broaden the scope of establishments that fall under this section from 250 to 500 employees, reducing the number of establishments burdened by quarterly reporting requirements'' (Ex. 1353). FedEx Corporation provided a similar comment (Ex. 1338), adding that raising the size criterion to 500 employees would still provide OSHA with a ''statistically significant pool of injury and illness data'' (Ex. 1338).

However, Logan Gowdey commented that raising the size criterion from 250 employees to 500 employees would reduce ''establishments covered from 38,000 to 13,800 and reports from 890,000 to 590,000. While the number of reports does not decrease that much, the number of establishments decreases dramatically, which will limit the importance of the data collected'' (Ex. 1211).

OSHA agrees that Alternative F's great reduction in the number of establishments and employees covered by § 1904.41(a)(1) would reduce the utility of the data. Under Alternative F, the number of establishments that would be required to report under § 1904.41(a)(1) would decrease from 34,000 to 12,000. This alternative would also decrease the number of injury and illness cases with incident report (OSHA Form 301) and Log (OSHA Form 300) data from 720,000 to 495,000. Therefore, like the proposed rule, the final rule requires electronic submission of part 1904 records by establishments with 250 or more employees.

Alternative G—Three-Step Process of Implementing the Reporting Requirements Under Proposed § 1904.41(a)(1) and (2)

In Alternative G, OSHA considered a three-step process of implementing the reporting requirements under the proposed § 1904.41(a)(1) and (2).

For this proposed alternative, high-hazard industry groups (four-digit NAICS) would have been defined as having rates of injuries and illnesses involving days away from work, restricted work activity, or job transfer (DART) that are greater than 2.0. High-hazard industry sectors (two-digit NAICS) would have been defined as agriculture, forestry, fishing and hunting; utilities; construction; manufacturing; and wholesale trade.

In the first step of this three-step implementation process, reporting would have been required only from the establishments in proposed § 1904.41(a)(1) and (2) that are in high-hazard industry groups (four-digit NAICS with a DART rate greater than or equal to 2.0).

In the second step of the three-step implementation process, OSHA would have conducted an analysis, after a specified period of time, to assess the effectiveness, adequacy, and burden of the reporting requirements in the first step. The results of this analysis would then have guided OSHA's next actions.

The third step of the three-step implementation process would therefore have depended on the results of OSHA's analysis.

The only comment in support of Alternative G was from Southern Company, which commented that ''[a] smaller pilot group of employers in historically the highest incident rates will allow OSHA to determine if its system works as intended'' (Ex. 1413). Other commenters opposed Alternative G for various reasons, including scope, effectiveness, and implementation (Exs. 1211, 1350, 1381, 1384, 1387). For example, the International Brotherhood of Teamsters commented that ''[w]e support the proposed approach rather than this confusing 3-step alternative. The current approach is a better means for capturing higher hazard industries

and establishments. The rule already has different requirements for different size employers. OSHA should keep this rule as simple as possible. Changing criteria through phase in would only complicate the implementation of the rule'' (Ex. 1381).

In response, OSHA agrees that Alternative G would reduce the effectiveness of the rule, increase uncertainty for employers, and make implementation more difficult. Therefore, like the proposed rule, the final rule requires electronic submission of part 1904 records by establishments with 250 or more employees, and annual electronic submission of the Form 300A annual summary by establishments with 20 to 249 employees in designated industries, without the multi-step implementation process in this alternative.

Alternative H—Narrow the Scope of the Reporting Requirements Under Proposed § 1904.41(a)(1) and (2)

The proposed § 1904.41(a)(1) would have applied to all establishments with 250 or more employees in all industries covered by the recordkeeping regulation. The proposed § 1904.41(a)(2) would have applied to establishments with 20 or more employees in designated, *i.e.,* high-hazard industry groups (classified at the four-digit level in NAICS) and/or high-hazard industry sectors (classified at the two-digit level in NAICS). High-hazard industry groups (four-digit NAICS) would have been defined as industries with DART rates that are greater than or equal to 2.0. High-hazard industry sectors (two-digit NAICS) would have included agriculture, forestry, fishing and hunting; utilities; construction; manufacturing; and wholesale trade.

In Alternative H, OSHA considered an alternative approach to defining the industry scope of these two sections of the proposed rule, by limiting the industry coverage to include only industry groups that meet a designated DART cut-off. This approach would not have included coverage of designated industry sectors as a criterion.

Some commenters supported Alternative H as a way for OSHA to focus its efforts on high-hazard industry groups. For example, FedEx Corporation supported Alternative H with a DART cut-off rate of 3.0, commenting that ''this would focus OSHA's limited resources on high hazard industries and employers with high DART rates'' (Ex. 1338). The American Coatings Association (ACA) and the Reusable Industrial Packaging Association (RIPA) made similar comments (Exs. 1329, 1367).

The National Retail Federation (NRF) commented, ''In NRF's view, both the 2.0 as well as the 3.0 DART rate are too low. NRF believes that, if OSHA is going to promulgate this standard at all, it should revise the proposed threshold DART rate to ensure that this rule is designed to focus attention on true high hazard industries . . . A DART cut-off of 3.6 derives from current data and is reasonably connected to the goal of the Proposed Regulation and any inspection plan that originates from the data collection'' (Ex. 1328).

However, other commenters opposed Alternative H because it would greatly reduce the coverage of the rule (Exs. 1211, 1350, 1374 1381, 1384, 1387). The International Brotherhood of Teamsters commented, ''We support the proposed approach rather than the alternative. The current approach is a better means for capturing higher hazard industries and establishments. Lowering [coverage] to industries with a DART rate of greater than/equal to 2.0 would reduce the number of smaller establishments covered by about 100,000 and the number of larger establishments covered by 16,000'' (Ex. 1381).

The AFL–CIO commented that ''[T]hese thresholds are too restrictive and limited. Indeed, according to the preamble, employing a DART threshold of 3.0 would cover fewer establishments (152,000) than are covered under the current ODI (160,000). The current ODI has employed a combination of 2 digit and 4 digit thresholds similar to the proposed rule. There is no reason to change this approach'' (Ex. 1350).

UNITE HERE also expressed concerns that Alternative H would leave vulnerable workers at risk, commenting that ''the alternative proposals to limit coverage to a DART threshold of 3.0 at the four digit level would result in excluding NAICS 7211—Traveler Accommodation. This industry sector is a growing sector with a growing workforce. Certain job titles are predominantly female, women of color and immigrant workers. We believe excluding 7211 would result in increased workplace injuries and illnesses and decreased prevention'' (Ex. 1374).

OSHA believes that Alternative H would overly limit the scope of the rule and agrees with commenters who stated that there is no compelling reason to change the approach OSHA used in the ODI of using a combination of industrial classification levels to identify high-hazard industry sectors and groups. In addition, using a DART cut-off of 3.0 would result in having less establishment-specific data for establishments with 20 or more employees available to OSHA and the public. As stated in the preamble to the proposed rule, the intention of this rulemaking is to increase the amount of establishment-specific data reported to OSHA. Therefore, like the proposed rule, the final rule requires electronic submission of part 1904 records by establishments with 250 or more employees, as well as annual electronic submission of the OSHA Form 300A by establishments with 20 to 249 employees in designated high-hazard industries (four-digit NAICS) and industry sectors (two-digit NAICS).

Alternative I—Enterprise-Wide Submission

In the preamble to the proposed rule, OSHA stated that it was considering adding a provision that would have required some enterprises with multiple establishments to collect and submit some part 1904 data for those establishments. Alternative I would have applied to enterprises with a minimum threshold number of establishments (such as five or more) that are required to keep records under part 1904. These enterprises would have been required to collect OSHA Form 300A (annual summary) data from each of their establishments that are required to keep injury/illness records under part 1904. The enterprise would then have electronically submitted the data from each establishment to OSHA. For example, if an enterprise had seven establishments required to keep injury/illness records under part 1904, the enterprise would have submitted seven sets of data, one for each establishment.

OSHA also stated in the preamble to the proposed rule that Alternative I would have applied to enterprises with multiple levels within the organization. For example, if XYZ Chemical Inc. owns three establishments, but is itself owned by XYZ Inc., which has several wholly owned subsidiaries, then XYZ Inc. would have done the reporting for all establishments it controls. These requirements would have only applied to establishments within the jurisdiction of OSHA and subject to OSHA's recordkeeping regulation. Establishments within the corporate structure but located on foreign soil would not have been subject to the requirement in Alternative I.

There were general comments supporting Alternative I, opposing Alternative I, and providing suggestions about the implementation of Alternative I. The proposed rule also asked 16 specific questions related to Alternative I, and OSHA received comments addressing those questions as well.

Commenters who generally supported Alternative I did so for a variety of reasons, including more useful information, more corporate involvement in establishment-level prevention of workplace injuries and illnesses, and coordination with current OSHA enterprise-level efforts.

For more useful information, NIOSH commented that a 2006 study by Mendeloff *et al.* found that ''firm size (or enterprise size) may be more important than establishment size in determining levels of risk . . . Theoretically, enterprise size may have a substantial impact on the ability to prevent injuries and illnesses. Business policies, practices, and strategies generally vary by size of employer, and large businesses may have more resources for protecting employee safety and health, and reducing workplace hazards and exposures compared with small businesses. Enterprise-level differences in occupational safety and health management systems may exist in specialization and expertise, development of training and reporting systems, amount of available data, and other factors'' (Ex. 0216).

Several commenters commented that enterprise-level safety and health data would be extremely useful to OSHA as well as other groups (Exs. 0241, 1278, 1327, 1345, 1350, 1384, 1387). For example, Worksafe commented that this data would be ''extremely useful, not only to OSHA but also to advocates, employers, employees, unions, and representatives to ensure improved identification and resolution of workplace health and safety hazards'' (Ex. 1278). The National Safety Council (NSC) added that ''[t]he value of benchmarking would be substantially enhanced if the Enterprise Wide Alternative is adopted. This option would allow for the calculation of enterprise wide rates and allow for more meaningful benchmarking among enterprises'' (Ex. 0241).

There were also several comments about the scarcity of enterprise-level data, especially for OSHA. NIOSH commented that ''few data are available at the enterprise level. This lack of data is a principal source of imprecision in defining small business. Greater clarity in measurement of both structure and size of employer would aid small business research and prevention efforts such as those conducted by the NIOSH Small Business Assistance and Outreach Program'' (Ex. 0216). The AFL–CIO and Change to Win provided similar comments (Exs. 1350, 1380).

With respect to corporate involvement in establishment-level prevention of workplace injuries and illnesses, the American College of Occupational and Environmental Medicine commented that ''enterprise-level reporting will increase the likelihood that the chief corporate officers are aware of potential variations in the safety of different business processes and establishment practices that put employees at risk. Greater corporate awareness may enhance corporate oversight and improve health and safety throughout all establishments'' (Ex. 1327). The AFL–CIO and the Service Employees International Union (SEIU) provided similar comments (Exs. 1350, 1387).

For coordination with current OSHA enterprise-level efforts, the AFL–CIO commented that ''[t]he concept of corporate level responsibility under the OSH Act is well-established. While the majority of OSHA's enforcement efforts are focused at the establishment level, the OSH Act itself and its obligations, including the recordkeeping requirements, apply to employers. For decades, OSHA has utilized corporate-wide settlements as a means to bring about compliance on a corporate-wide basis, and recently OSHA has attempted to utilize this corporate-wide approach in its initial enforcement actions. Under the current Severe Violator Enforcement Program (SVEP), violations at one establishment trigger expansion of oversight to other establishments of the same employer'' (Ex. 1350). The Service Employees International Union (SEIU) provided a similar comment (Ex. 1387).

Finally, the United Steelworkers (USW) commented that ''[e]nterprise wide data must retain discernible facility identification information so that stakeholders can determine which facility each injury or illness entry occurred [in]. This will provide stakeholders with the ability to determine where specific hazards exist and engage in efforts to eliminate or reduce these hazards'' (Ex. 1424).

On the other hand, several commenters generally opposed implementation of Alternative I for various reasons, including the comparative ineffectiveness of enterprises versus establishments in promoting workplace health and safety, reduced data quality, employer burden, and legality (Exs. 1198, 1206, 1221, 1338).

For the effectiveness of enterprises versus establishments in promoting workplace health and safety, the Food Marketing Institute commented that ''there are many corporate hierarchies in which there are 'enterprises' above 'establishments' that are not involved in or responsible for the safety controls in place at the establishments. Indeed, there are many instances in which a parent company may own 51% of the stock of a subsidiary but is in no way involved in that subsidiary's day-to-day activities'' (Ex. 1198). The North American Insulation Manufacturers Association (NAIMA) provided a similar comment (Ex. 1221).

FedEx Corporation commented that ''the safety resources in place at each FedEx operating company . . . are in the closest proximity to the unique day-to-day operations of their establishments, and are therefore best equipped to enhance the workplace safety of their employees'' (Ex. 1338). Similarly, the Interstate Natural Gas Association of America (INGAA) also commented that ''[i]t is well understood that separate establishments, even separate establishments that operate as part of a single larger enterprise, do not all operate the same: each establishment has different personnel, procedures, processes and protocols'' (Ex. 1206).

There were also comments that enterprise-level data would not be useful for improving workplace safety and health (Exs. 1198, 1279, 1338, 1408, 1412). For example, the National Association of Home Builders (NAHB) commented that ''OSHA claims that enterprise-wide submission of establishment data to the enterprise will improve communication and reporting between establishments and enterprises and this will lead to enterprise's ability to solve establishment safety and health problems . . . Again, the agency has failed to establish any benefits for the proposed rulemaking . . . That is readily apparent here with OSHA's proposed claims regarding the enterprise-wide alternative. OSHA fails to cite any example, research paper, case study, or journal article to support this claim'' (Ex. 1408).

The National Association of Manufacturers (NAM) commented that ''[t]here is no evidence suggesting that there is currently a lack of communication regarding safety and health between establishments and enterprises, nor is there any evidence that this alleged benefit will somehow reduce workplace injuries and illnesses'' (Ex. 1279).

For data quality, the North American Insulation Manufacturers Association (NAIMA) commented that ''[w]ith certain umbrella corporations holding levels upon levels of subsidiaries, it could conceivably turn into a never-ending task . . . OSHA will undoubtedly get multiple reports on the same sites, omitted reports, and have a massive burden trying to audit all that information. At best, it is impractical and imprudent to pursue enterprise-wide reporting (Ex. 1221). The

International Association of Drilling Contractors (IADC) commented that ''[m]any member companies have establishments (rigs) operating in multiple zip codes. Grouping them together in one enterprise report would not allow for data separation into various states'' (Ex. 1199).

Several commenters commented that enterprise-wide submission would create confusion when applying OSHA's recordkeeping requirements (Exs. 1198, 1338, 1343, 1356, 1411). For example, the Food Marketing Institute commented that ''new definitions will have to be created for all the core terminology (*e.g.,* 'enterprise') and, as legal history has demonstrated repeatedly, regardless of the definition, much litigation will be generated before the true bounds of the terms are discovered. Further, the opportunities for wide-scale confusion and error are abundant'' (Ex. 1198). Other commenters expressed similar concerns about definitions (Exs. 1200, 1221).

In response, OSHA has decided not to include a requirement in the final rule for enterprise-wide collection and submission of recordkeeping data. OSHA based this decision on two main reasons. First, OSHA agrees with commenters who stated that it would be difficult to administer an enterprise-wide collection and submission requirement. Specifically, because there are wide variations in corporate structure, OSHA believes that it would be difficult to establish a part 1904 definition of enterprise. This is particularly a concern when some corporate structures include establishments that are otherwise legally separate entities. Also, the question of enterprise ownership or control of specific establishments can be an extremely complex legal issue, especially when parent companies have multiple divisions or subsidiaries. OSHA also believes that in some cases it may be difficult for larger enterprises to identify all of the establishments under its ownership or control.

Second, when the proposed rule for this rulemaking was issued in November 2013, OSHA's recordkeeping regulation included a list of partially-exempt industries based on the Standard Industrial Classification (SIC) system. On September 18, 2014, OSHA published a final rule in the **Federal Register** revising the list of partially-exempt industries in appendix A to subpart B of part 1904. [79 FR 56130]. As part of this revision, partial exemption to OSHA's recordkeeping regulation is now based on the North American Industry Classification System (NAICS).

Compared to the SIC system, NAICS established several new industry categories, including specific categories for establishments conducting office or management activities. One of the industry classifications newly partially exempt from OSHA recordkeeping requirements is NAICS 5511, Company Management and Enterprises. Because of this change, OSHA believes it cannot now include a requirement in this final rule for enterprise-wide collection and submission of part 1904 data.

OSHA also wishes to point out that nothing in this final rule prevents enterprises or corporate offices from voluntarily collecting and submitting part 1904 data for their establishments. Based on the comments to Alternative I, as well as the Agency's own experience, OSHA believes that there are benefits for enterprise-wide collection and submission of recordkeeping data. As noted by commenters, large companies generally have more resources for protecting employee safety and health and reducing workplace hazards and exposures. Enterprise-level collection and submission of part 1904 data increases the likelihood that corporate offices will be aware of variations in establishment processes and practices that place employees at risk. OSHA believes that greater corporate involvement and oversight enhance safety and health at all establishments. Accordingly, OSHA encourages enterprises and corporate offices to voluntarily collect and electronically submit part 1904 records for their establishments required to submit such records under the final rule.

Questions in the NPRM

In addition to Alternatives A through I, the preamble to the proposed rule included several questions about specific issues in this rulemaking. Some of these issues are addressed elsewhere in this preamble. The remaining issues are addressed below.

Implications of Required Electronic Data Submission

In the preamble to the proposed rule, OSHA asked, ''What are the implications of requiring all data to be submitted electronically? This proposed rule would be among the first in the federal government without a paper submission option.'' [78 FR 67271].

Several commenters supported mandatory electronic submission. The Phylmar Regulatory Roundtable (PRR) commented that ''PRR company establishments currently collect and record injury and illness data manually and electronically. Members prefer submitting data electronically over paper submission'' (Ex. 1110). The United Food & Commercial Workers International Union (UFCW) commented that ''large employers (those greater than 250) can meet requirements for mandatory electronic reporting once OSHA provides the technical means to do so'' (Ex. 1345).

The American Federation of Teachers (AFT) commented, ''Once the [electronic reporting] requirement is in place, OSHA will for the first time have the most comprehensive and timely data base on large and high hazard establishments. The agency will be able to do frequent and systematic comparisons between like establishments and better target consultation and enforcement. There will also be opportunities to track patterns of specific injuries and illnesses as we have never had before. This ability will be important for research as well as enforcement . . . Electronic reporting will assist us in not only identifying new hazards but also measuring their impact of in a timely manner (Ex. 1358). The AFL–CIO made a similar comment (Ex. 1350).

However, many other commenters expressed concern that only allowing electronic submission would burden small establishments without Internet access, especially those in rural areas, and that OSHA should continue to allow a paper-based reporting option (Exs. 0179, 0211, 0253, 0255, 1092, 1113, 1123, 1124, 1190, 1198, 1199, 1200, 1205, 1273, 1322, 1327, 1332, 1342, 1343, 1359, 1366, 1370, 1386, 1401, 1408, 1410, 1411, 1416, 1417). For example, the American Forest & Paper Association commented that ''OSHA must continue to allow a paper-based reporting option. Many businesses, particularly small firms located in rural areas, do not have ready access to the Internet or may find electronic reporting burdensome because they currently have a paper-based record system'' (Ex. 0179). The Texas Cotton Ginners Association (TCGA) made a similar comment (Ex. 0211). The Food Marketing Institute further commented that ''OSHA acknowledges that 30% of 2010 ODI establishments did not electronically submit injury and illness information and that ''most agencies'' currently allow paper submission of information. *Id.* at 67273. This confirms that OSHA is aware that not all small businesses will have the access necessary for electronic submission'' (Ex. 1198).

Several commenters expressed particular concern about the burden of mandatory electronic submission on farmers. The California Farm Bureau Federation (CFBF) commented that a

recent USDA survey showed that ''68 percent of farmers (both livestock/poultry and crop producers) have a computer and only 67 percent have internet access . . . the same USDA report shows that only a mere 40 percent of farmers actually use a computer to conduct their farming business. Should OSHA move forward with the rule, the agency must give consideration to allowing paper submissions. Because submission of these records will be mandatory, failing to do so will create a hardship on agricultural employers, and increase the cost burden of the rule for employers'' (Ex. 1366). The American Farm Bureau Federation (AFBF), Pennsylvania Farm Bureau (PFB), the New York Farm Bureau (NYFB), and the Louisiana Farm Bureau Federation (LFBF) provided similar comments (Exs. 1113, 1359, 1370, 1386).

OSHA agrees with the commenters who supported electronic submission. Specifically, OSHA believes that electronic submission is necessary if a data system is to provide timely and useful establishment-specific information about occupational injuries and illnesses. In addition, as discussed in Section VI Final Economic Analysis and Regulatory Flexibility Analysis, OSHA believes that establishments with 20 or more employees are highly likely to have access to the Internet and that the burden of electronic reporting is low even for the few employers for whom it may be more difficult to access the Internet. Consequently, the final rule requires electronic submission of injury and illness records to OSHA.

Commenters also expressed several technical concerns about the electronic submission requirement. The Associated General Contractors of New York, LLC (AGC NYS) expressed the concern that ''those that attempted to submit their information but failed due to a Web site that does not function properly may also be considered to be non-compliant with such regulations'' (Ex. 1364). Both the National Ready Mixed Concrete Association (NRMCA) and the American Subcontractors Association (ASA) suggested that OSHA should maintain a paper submission option for establishments experiencing temporary technical difficulties with electronic submission (Exs. 0210, 1322).

In response, OSHA believes that there are more cost-effective ways to deal with Web site problems than maintaining a paper submission option. For example, OSHA plans to allocate resources to help employers who have difficulty submitting required information because of unforeseen circumstances. Specifically, OSHA intends to establish a help desk to support data collection and submission under the final rule. In addition, employers will be able to report the information from a different location, such as a public library. Further, for the data collection under the ODI, OSHA provided employers multiple chances after the due date to submit their data before issuing citations for non-response. OSHA expects to continue this practice when employers have technical issues and are unable to submit their information under this final rule.

In addition, OSHA will phase in implementation of the data collection system. In the first year, all establishments required to routinely submit information under the final rule will be required to submit only the information from the Form 300A (by July 1, 2017). In the second year, all establishments required to routinely submit information under the final rule will be required to submit all of the required information (by July 1, 2018). This means that, in the second year, establishments with 250 or more employees that are required to routinely submit information under the final rule will be responsible for submitting information from the Forms 300, 301, and 300A. In the third year, all establishments required to routinely submit under this final rule will be required to submit all of the required information (by March 2, 2019). This means that beginning in the third year (2019), establishments with 250 or more employees will be responsible for submitting information from the Forms 300, 301, and 300A, and establishments with 20–249 employees in an industry listed in appendix A to subpart E of part 1904 will be responsible for submitting information from the Form 300A by March 2 each year. This will provide sufficient time to ensure comprehensive outreach and compliance assistance in advance of implementation.

Finally, OSHA will use feedback from users of the data collection system from the first year of implementation to inform the development and improvement of the data collection system. OSHA will incorporate user experience and design improvements throughout the life of the data collection system, based on user feedback and emerging technology.

Coverage of Industries in § 1904.41(a)(2)

Section 1904.41(a)(2) of the proposed rule would have required establishments with 20 or more employees, but fewer than 250 employees, in designated industries, to electronically submit information from the 300A annual summary to OSHA or OSHA's designee on an annual basis. The list of designated industries subject to the annual submission requirement in proposed § 1904.41(a)(2) was included in proposed appendix A to subpart E. The designated industries in proposed Appendix A to Subpart E represented all industries covered by part 1904 with a 2009 DART rate in the BLS SOII of 2.0 or greater, excluding four selected transit industries where local government is a major employer.

In the preamble to the proposed rule, OSHA asked, ''More current BLS injury and illness data will be available at the time of the final rulemaking. Use of newer data may result in changes to the proposed industry coverage. Should OSHA use the most current data available in determining coverage for its final rule? Would this leave affected entities without proper notice and the opportunity to provide substantive comment?'' [78 FR 67271].

OSHA received several comments related to this question. Two commenters supported using 2009 BLS injury and illness data for determining coverage for high-hazard industries under the final rule, on grounds that more current data would leave affected entities without proper notice and the opportunity to provide comment (Exs. 1206, 1329). One commenter, the California Department of Industrial Relations (DIR), Office of the Director, recommended ''ways of increasing the stability of the system, namely, not changing industries required to report, not using a phased in approach to reporting, and encouraging use of data through a successful data sharing Web site'' (Ex. 1395). The International Brotherhood of Teamsters supported using the most current data available for determining coverage in the final rule, commenting that ''[w]e recommend that OSHA use the latest BLS data. The results of the Survey of Occupational Injuries and Illnesses (SOII) are one year behind, but they may point to emerging or immediate hazards'' (Ex. 1381). Another commenter supported OSHA's use of the most current BLS data available for determining coverage, and stated that OSHA should be able to use the new data without needing a new round of notice and comment because it discussed this possibility in the proposed rule. This commenter also commented that it would be counterproductive to limit OSHA to the BLS data available at the time of the proposed rule (Ex. 1211).

OSHA also received a comment from the National Automobile Dealers Association (NADA) stating that ''OSHA should drop the proposal's use of a one

year (2009) DART rate. Focusing on a single year risks mischaracterizing the injury and illness rates for a given industry and/or capturing an uncharacteristic decline or spike. A more appropriate approach would be a rolling three year average similar to what OSHA has used to periodically set partial exemptions from its injury/illness recording mandates. Of course, any reporting mandate should reset annually for each industry sector based on a three-year average of its most current BLS SOII data'' (Ex. 1392).

After carefully considering all of these comments, OSHA has decided to use a three-year average of BLS data from 2011, 2012, and 2013 to determine coverage for § 1904.41(a)(2) of the final rule. This three-year range represents the most current BLS data available at the time of this final rule. OSHA agrees with the International Brotherhood of Teamsters that using the most current BLS data available at the time of the final rule, rather than outdated data, is the most effective way to identify emerging workplace hazards, as well as the most effective way to identify the list of high hazard industries for inclusion in appendix A to subpart E. A three-year average will reduce the effects of natural year-to-year variation in industry injury/illness rates, and it is consistent with OSHA's current approach in determining the partial exemption of industries under existing § 1904.2. The alternative would have been to use a single year of BLS data from 2009 for a final rule that will go into effect in 2017.

OSHA also agrees with commenters who stated that the Agency provided sufficient notice and opportunity for comment in the NPRM by explicitly asking whether the Agency should use the most current data available when determining coverage for the final rule. The combination of OSHA's request for comment on the approach that it ultimately adopted in the final rule, and the comments and testimony received in response to the proposed rule, provided the regulated community with adequate notice regarding the outcome of the rulemaking. *See, e.g., Nat'l Mining Ass'n* v. *Mine Safety & Health Admin.,* 512 F.3d 696, 699 (D.C. Cir. 2008); *Miami-Dade County* v. *U.S. E.P.A.,* 529 F.3d 1049, 1059 (11th Cir. 2008); *United Steelworkers of America, AFL–CIO–CLC* v. *Marshall,* 647 F.2d 1189, 1221 (D.C. Cir. 1980) (''a final rule may properly differ from a proposed rule and indeed must so differ when the record evidence warrants the change . . . . Where the change between proposed and final rule is important, the question for the court is whether the final rule is a 'logical outgrowth' of the rulemaking proceeding''). The list of designated industries in Appendix A to Subpart E of the final rule is a logical outgrowth of the proposal, and the number of comments provides a clear indication that the affected members of the public are not only familiar with the issue of using the most current data, but also viewed the inclusion of such data as a potential outcome of this rulemaking. As a result, unlike the proposed rule, the final rule will use a three-year average (2011, 2012, 2013) DART rate of 2.0 or greater for determining the list of industries included in appendix A to subpart E.

Also in the preamble to the proposed rule, OSHA asked whether the list of designated industries in appendix A to subpart E should remain the same each year, or whether the list should be adjusted each year to reflect the most current BLS injury and illness data. OSHA also asked how OSHA could best inform affected establishments about the adjustments, if the list were adjusted.

One commenter supported adjusting the list of designated industries each year to reflect the most current BLS injury and illness data (Ex. 1211). Other commenters supported adjusting the list in other ways. For example, the International Union (UAW) commented that ''annual updating is too frequent and would leave employers confused as to whether or not they need to report. Updating every three years would be more appropriate'' (Ex. 1384). The International Brotherhood of Teamsters and the Service Employees International Union (SEIU) provided similar comments (Exs. 1381, 1387). The American Federation of Teachers (AFT) commented that ''[t]he AFT recommends that new establishments that meet the requirement of a DART rate of 2.0 be added every year but that the original list of high hazard establishments be maintained regardless of changes to their DART that puts them below the threshold. Those original establishments should continue reporting for a minimum of ten years in order to ascertain if their DART rates are trending lower over the long term'' (Ex. 1358).

On the other hand, the California Department of Industrial Relations (DIR), Office of the Director supported ''increasing the stability of the system, namely, [by] not changing industries required to report'' (Ex. 1395).

Finally, Thoron Bennett supported requiring establishments with 20 or more employees in all industries to report, rather than limiting the requirement to establishments with 20 or more employees on a list of designated high-hazard industries. He further commented that OSHA should ''[f]orget the tiered reporting based on employment numbers or designated industries. Simply require electronic data submission for all employers who have to fill out the OSHA 300/300A/301 logs'' (Ex. 0035).

OSHA agrees with the commenters who stated that the list of designated industries in appendix A to subpart E should not be updated each year. OSHA believes that moving industries in and out of appendix A to subpart E each year would be confusing. OSHA also believes that keeping the same industries in appendix A to subpart E each year will increase the stability of the system and reduce uncertainty for employers. Accordingly, OSHA will not, as part of this rulemaking, include a requirement to annually or periodically adjust the list of designated industries to reflect more recent BLS injury and illness data. Any such revision to the list of industries in appendix A to subpart E in the future would require additional notice and comment rulemaking.

The designated industries, which will be published in appendix A to subpart E of the final rule, will be as follows:

NAICS	Industry
11	Agriculture, forestry, fishing and hunting.
22	Utilities.
23	Construction.
31–33	Manufacturing.
42	Wholesale trade.
4413	Automotive parts, accessories, and tire stores.
4421	Furniture stores.
4422	Home furnishings stores.
4441	Building material and supplies dealers.

NAICS	Industry
4442	Lawn and garden equipment and supplies stores.
4451	Grocery stores.
4452	Specialty food stores.
4521	Department stores.
4529	Other general merchandise stores.
4533	Used merchandise stores.
4542	Vending machine operators.
4543	Direct selling establishments.
4811	Scheduled air transportation.
4841	General freight trucking.
4842	Specialized freight trucking.
4851	Urban transit systems.
4852	Interurban and rural bus transportation.
4853	Taxi and limousine service.
4854	School and employee bus transportation.
4855	Charter bus industry.
4859	Other transit and ground passenger transportation.
4871	Scenic and sightseeing transportation, land.
4881	Support activities for air transportation.
4882	Support activities for rail transportation.
4883	Support activities for water transportation.
4884	Support activities for road transportation.
4889	Other support activities for transportation.
4911	Postal service.
4921	Couriers and express delivery services.
4922	Local messengers and local delivery.
4931	Warehousing and storage.
5152	Cable and other subscription programming.
5311	Lessors of real estate.
5321	Automotive equipment rental and leasing.
5322	Consumer goods rental.
5323	General rental centers.
5617	Services to buildings and dwellings.
5621	Waste collection.
5622	Waste treatment and disposal.
5629	Remediation and other waste management services.
6219	Other ambulatory health care services.
6221	General medical and surgical hospitals.
6222	Psychiatric and substance abuse hospitals.
6223	Specialty (except psychiatric and substance abuse) hospitals.
6231	Nursing care facilities.
6232	Residential mental retardation, mental health and substance abuse facilities.
6233	Community care facilities for the elderly.
6239	Other residential care facilities.
6242	Community food and housing, and emergency and other relief services.
6243	Vocational rehabilitation services.
7111	Performing arts companies.
7112	Spectator sports.
7121	Museums, historical sites, and similar institutions.
7131	Amusement parks and arcades.
7132	Gambling industries.
7211	Traveler accommodation.
7212	RV (recreational vehicle) parks and recreational camps.
7213	Rooming and boarding houses.
7223	Special food services.
8113	Commercial and industrial machinery and equipment (except automotive and electronic) repair and maintenance.
8123	Dry-cleaning and laundry services.

OSHA notes that 15 industries in appendix A to subpart E in the final rule were not included in proposed appendix A to subpart E. These industries are Specialty Food Stores (NAICS 4452), Vending Machine Operators (NAICS 4542), Urban Transit Systems (NAICS 4851), Interurban and Rural Bus Transportation (NAICS 4852), Taxi and Limousine Service (NAICS 4853), School and Employee Bus Transportation (NAICS 4854), Other Transit and Ground Passenger Transportation (NAICS 4859), Postal Service (NAICS 4911), Other Ambulatory Health Care Services (NAICS 6219), Community Food and Housing, and Emergency and Other Relief Services (NAICS 6242), Performing Arts Companies (NAICS 7111), Museums, Historical Sites, and Similar Institutions (NAICS 7121), RV (Recreational Vehicle) Parks and Recreational Camps (NAICS 7212), Rooming and Boarding Houses (NAICS 7213), and Special Food Services (NAICS 7223). Conversely, three industries that were included in proposed appendix A to subpart E are not included in the final Appendix A to Subpart E. These industries are Inland Water Transportation (NAICS 4832), Scenic and Sightseeing Transportation, Water (NAICS 4872), and Home Health Care Services (NAICS 6216).

The following table summarizes the changes in affected industries by using the three-year average of BLS data (2011, 2012, 2013) compared to using 2009 BLS data and provides the expected number of affected establishments in each industry based on the most recent 2012 County Business Patterns data:

NAICS	Industry	Expected No. of affected establishments
In appendix A to subpart E of the final rule (using three-year average of 2011, 20012, 2013 BLS data), but NOT in appendix A to subpart E of the proposed rule (using 2009 BLS data)		
4452	Specialty food stores	1221
4542	Vending machine operators	493
4851	Urban transit systems	374
4852	Interurban and rural bus transportation	184
4853	Taxi and limousine service	740
4854	School and employee bus transportation	2025
4859	Other transit and ground passenger transportation	918
4911	Postal service	*
6219	Other ambulatory health care services	3282
6242	Community food and housing, and emergency and other relief services	2481
7111	Performing arts companies	1079
7121	Museums, historical sites, and similar institutions	1161
7212	RV (recreational vehicle) parks and recreational camps	392
7213	Rooming and boarding houses	67
7223	Special food services	7812
In Appendix A to Subpart E of the proposed rule (using 2009 BLS data), but NOT in Appendix A to Subpart E of the final rule (using three-year average of 2011, 2012, 2013 BLS data)		
4832	Inland water transportation	123
4872	Scenic and sightseeing transportation, water	131
6216	Home health care services	12801

* Insufficient data.

Design of the Electronic Submission System

In the preamble to the proposed rule, OSHA asked, ''How should the electronic data submission system be designed? How can OSHA create a system that is easy to use and compatible with other electronic systems that track and report establishment-specific injury and illness data?'' [78 FR 67271].

There were many comments with suggestions about the overall design of OSHA's electronic submission system. Several commenters commented that OSHA's electronic data submission system should be compatible with existing systems. The United Steelworkers (USW) commented that ''[i]t is important that OSHA ensure that electronic systems put in place for this initiative are compatible with existing systems in common use. We also encourage OSHA to update their system as necessary to keep up with advances in technology and facilitate the transfer of employer data'' (Ex. 1424). Rachel Armont; the California Department of Industrial Relations (DIR), Office of the Director; and Shawn Lewis provided similar comments (Exs. 0198, 1320, 1395).

The International Union (UAW) commented that ''such a system should allow for employers [to] upload existing files'' (Ex. 1384). Harvey Staple commented that ''the states and OSHA [could] work together to develop a system whereby one entry into an electronic log could be used for multiple information reporting (*i.e.,* state and federal). It would further enhance all parties involved if the system could be tied into the workers compensation system to maximize the data already captured without adding another paperwork burden'' (Ex. 0154).

In response, OSHA notes that, because there are many commercial software products on the market for recording and managing information on workplace injuries/illnesses to support compliance with OSHA recordkeeping requirements, OSHA plans to coordinate with trade associations and health and safety consultants to identify the products in widest use. OSHA would then review available information about these products to help inform relevant considerations during development of the OSHA system for ensuring ease-of-use and compatibility with commercial products in common use.

When OSHA develops the data collection system, the Agency will consider commercial systems used by establishments to maintain their injury/illness records. This means that the Agency's system may provide a mechanism and protocol for employers to transmit their data electronically instead of completing online forms. For example, the system could allow employers to securely transfer encrypted data over the Web in an acceptable data file format (*e.g.,* MS Excel, XML, or csv) for validation and import into the electronic reporting system. OSHA will provide users with easy-to-follow guidance that addresses required data elements (a data dictionary), format and other technical considerations, and steps involved in validation, transfer, and confirmation. Routines will be programmed to automate as much of the process as possible, with prompts for manual review as needed.

Quick Incidents suggested the use of an Application Programming Interface (API), commenting that ''Application Programming Interfaces (APIs) have gained widespread usage in the corporate world . . . Having this type of machine to machine communication ensures that data is transferred securely, accurately and quickly without any human intervention . . . An API would allow companies to connect their incident recording software directly to the OSHA reporting system. Incident reports would be transmitted seamlessly without any redundancy. For companies with an existing incident recording system this proposed API would allow

OSHA submission without any additional burden'' (Ex. 1220).

OSHA will explore this suggestion during development of the data collection system, in addition to the file transfer concept described above.

The Risk and Insurance Management Society suggested another approach, commenting that ''[m]any employers have in place systems to report their injury and illness data through the Electronic Data Interchange . . . If OSHA decides to move forward with the proposed rule, then an effort should be made to accept data submitted through the current Electronic Data Interchange system'' (Ex. 1222).

The International Association of Industrial Accident Boards and Commissions (IAIABC) suggested that OSHA should ''consider the benefits of using the IAIABC's established First and Subsequent Reports of Injury Standard (IAIABC EDI Claims Standard). Implementation of an existing electronic standard would be much faster and easier than developing a brand new electronic reporting protocol . . . All of the IAIABC's EDI standards have been developed by workers' compensation business and technical experts and are widely used and actively supported. To date, 40 jurisdictions have implemented at least one of the IAIABC's EDI standards'' (Ex. 1104).

In response, OSHA notes that IAIABC's EDI claim standards are used by many states for standardizing the submission of workers' compensation claims information. When OSHA develops the data collection system, the Agency will assess whether some variation of the standard or its basic logic might be appropriate for ensuring consistency in the submission and processing of data to OSHA.

However, the Dow Chemical Company commented that ''[i]t is probably literally impossible for OSHA to design its web portal to be compatible with every electronic system that some employer may be using. Dow is not aware of any web portal that is compatible with SAP-based systems, Excel spreadsheets, Adobe Acrobat, Lotus Notes, Oracle, and the multitude of other options for keeping electronic records'' (Ex. 1189).

Several commenters also expressed specific concerns about the electronic data submission system's compatibility with 301-equivalent forms. The U.S. Poultry & Egg Association commented that ''OSHA does not appear to realize that many employers do not actually use the OSHA 301 Form. Instead, they use an equivalent form, often for workers compensation purposes. Presumably, OSHA would require employers to translate the information into the '301 Form' on the internet. This may not be as straightforward as OSHA makes it seem and certainly it may be more costly than OSHA anticipates. It also not only increases the risks of errors occurring in the translation but eliminates the usefulness of equivalent forms'' (Ex. 1109). The National Association of Manufacturers and Littler Mendelson, P. C. provided similar comments (Exs. 1279, 1385).

OSHA's response is that, in developing the data collection system, OSHA may consider aspects of the IAIABC EDI standards that might inform and streamline data submission to the OSHA system, rather than designing the system to accept the workers' compensation forms or equivalent forms themselves. That is, because workers' compensation forms are for a specific purpose and can vary by state, the workers' compensation form data elements may not fit OSHA's reporting requirements.

The Association of Occupational Health Professionals in Healthcare (AOHP) commented about the importance of compatibility between existing systems and OSHA's electronic data submission system because ''[t]he need to double enter the data is a significant concern. Double data entry was a significant concern when NIOSH was proposing the Occupational Safety Health Network (OHSN). NIOSH considered this concern and was able to create an interface to eliminate double data entry into this national database. Double data entry is costly in terms of time and the use of scarce human resources to manage these record keeping requirements (Ex. 0246). The Risk and Insurance Management Society provided a similar comment (Ex. 1222).

Several other commenters provided comments about making the electronic data submission system user-friendly. The Association of Occupational Health Professionals in Healthcare (AOHP) commented that ''[c]onsideration should be given to a pilot to test the functioning of the Web site and the ease with which the data can be entered and submitted'' (Ex. 0246). The California Department of Industrial Relations (DIR), Office of the Director commented that ''[c]urrent OSHA guidelines for its forms are simple, easy-to-use, and are low-literacy friendly . . . Any electronic reporting system must balance the needs for uniform, easy to process data with the simplicity that paper records provided'' (Ex. 1395).

The Phylmar Regulatory Roundtable (PRR) commented that ''[t]he Proposed Rule calls for two methods of submitting data—use of online forms or batch submission of Excel or XML files. PRR supports this approach, as it appears to accommodate both establishment size (smaller establishments would likely use the online form) and the diverse software programs companies currently used to electronically manage injury and illness data'' (Ex. 1210). The International Brotherhood of Teamsters provided a similar comment (Ex. 1381).

The Dow Chemical Company suggested that it is ''vitally important for employers to receive immediate feedback as to whether their data entry was successful or unsuccessful. OSHA's web portal should respond to each and every attempt at data entry, by providing a confirmation of receipt or a confirmation of failure. The confirmation notice should describe what was received (or not received) with sufficient detail to be useful in resolving disputes in an enforcement context'' (Ex. 1189).

The Allied Universal Corporation commented about potential technical issues, suggesting that ''OSHA must also consider the heavy traffic flow as the submission deadline approaches, and ensure the Web site to submit electronically does not crash or cause further reporting problems'' (Ex. 1192). Thoron Bennett noted another potential issue, commenting that ''many companies have security measures that cause electronic reporting problems, particularly defense and research companies that safeguard their electronic information'' (Ex. 0035).

Several commenters suggested that OSHA should consult on this issue with other governmental agencies that collect establishment-specific injury and illness data. Senator Tom Harkin commented that ''OSHA's sister agency the Mine Safety and Health Administration (MSHA), along with other agencies like the Federal Railroad Administration (FRA) and Federal Aviation Administration (FAA), currently publish establishment-specific accident and injury and illness data. We believe that OSHA should consult with these agencies to learn about design problems and potential best practices to adopt before creating its database'' (Ex. 1371). The International Brotherhood of Teamsters provided a similar comment (Ex. 1381).

In response, OSHA intends to use submitter registration, which would enable OSHA to issue a unique ID for reporting establishments. With user self-registration via an online submission form, the employer would have to complete an online registration form (available from a link on the electronic reporting system's home/login page) to obtain login information before gaining

access to the new electronic reporting system for data submission. After the user submitted the online registration form, the user would receive a system-generated email confirming registration and providing login information. Registration for submission would be needed because, unlike under the ODI, employers required to submit data each year under this final rule will not receive notification. Alternate account registration and authentication provisions may be provided for electronic transmission of data. In contrast, special OSHA data collections under § 1904.41(a)(3) of this final rule will involve OSHA notifications to affected employers.

Updates for the Electronic Data Submission System

In the preamble to the proposed rule, OSHA asked, ''Should the electronic data submission system be designed to include updates? Section 1904.33(b) requires employers to update OSHA Logs to include newly-discovered recordable injuries or illnesses and to show any changes that have occurred in the classification of previously-recorded injuries and illnesses.'' [78 FR 67271].

There were many comments about the benefits of allowing updates in the electronic data submission system. Several commenters noted that the data would be inaccurate without updates, because more information about cases often becomes available over time, after investigation (Exs. 1205, 1217, 1219, 1275, 1326, 1327, 1331, 1355, 1358, 1360, 1378, 1389, 1396, 1399, 1408). For example, the Pacific Maritime Association commented that ''[i]t is common for an employer to record an employee's complaint at the time it is reported, prior to performing an evaluation of whether an injury has actually occurred or whether it is indeed workplace related. However, following an examination by a physician or consideration of the recordkeeping factors in Section 1904, recorded injuries regularly have to be removed or edited. The information submitted to OSHA and included on its database will be no different. Additionally, it is particularly troublesome that OSHA will base its enforcement and targeting efforts on this information, while at the same time conceding that there may be no way to update or amend information to ensure that it is accurate. Accordingly, if OSHA proceeds with this rule, PMA believes that it is imperative that this system be designed to allow for amendments'' (Ex. 1326).

The U.S. Chamber of Commerce further commented that ''OSHA acknowledges in its Notice for this Proposed Rule that the present recordkeeping rules require that employers update their OSHA Form 300 for five years. *See* 78 FR at 67271. Those updates will affect the forms described above which in turn would affect the accuracy of database entries. Thus, it is not a question of *whether* employers will need to update this information, but rather a question of *how* they will do so'' (Ex. 1396).

Several other commenters commented that companies will look bad unfairly if an injury or illness is later found to be non-work-related and updates are not allowed. The National Marine Manufacturers Association commented that ''it seems clear that companies will be held accountable for recordable incidents where either the actual cause was not under the employer's control or part of an employee's work or it is later discovered the injury was due to other causes. Based on the proposal, once these incidents are recorded and submitted to OSHA, NMMA understands that the reports cannot be amended. Both OSHA and the public would therefore have an inaccurate depiction of a company's safety record'' (Ex. 1217). The National Electrical Contractors Association (NECA), Innovative Holdings of Iowa, Inc., and the Association of Union Constructors provided similar comments (Exs. 1125, 1275, 1389).

Other commenters commented that not allowing updates could lead to underreporting of marginally work-related cases. United Parcel Service, Inc. (UPS) commented that ''[without updates] an employer would not want to err on the side of placing questionable entries onto the log. There would be no mechanism for striking through this data once it is publicly posted on OSHA's Web site. Rather than the rule promoting more revelations of injury and illness data, it would likely result in less data in circumstances where questions remained regarding recording of a case'' (Ex. 1391). The International Warehouse Logistics Association (IWLA) provided a similar comment (Ex. 1360).

There were also commenters who opposed allowing updates. Several commenters believed that updates would be burdensome to employers. The Phylmar Regulatory Roundtable (PRR) commented that ''updating quarterly submissions would be a major burden to employers. Consider the time involved for a record keeper at one establishment to communicate changes in status regarding particular injury cases on a regular basis to someone in an enterprise-level role who must then either access the online log or records to modify them or modify the enterprise database and resubmit it to the Web site'' (Ex. 1110). The AFL–CIO, the International Warehouse Logistics Association (IWLA), the International Brotherhood of Teamsters, and the International Union (UAW) all provided similar comments (Exs. 1350, 1360, 1381, 1384). The Puget Sound Shipbuilders Association provided a comment that updates would be especially burdensome for certain establishments, such as those located on sea vessels (Ex. 1379).

The Dow Chemical Company commented that ''[t]he system should not be designed to accept updates. This is because allowing updates is only half a step from requiring updates, and requiring updates would greatly increase the burden of the rule . . . . if the Agency ever wishes to see whether an employer has made any updates, OSHA already has the authority to pose that question to the employer—without imposing a universal obligation'' (Ex. 1189).

The U.S. Chamber of Commerce commented that updates would also be burdensome for OSHA, stating that ''any suggestion that OSHA will be able to keep up with this insurmountable task of maintaining an immediately accessible, accurate database is not credible'' (Ex. 1396). The Pacific Maritime Association made a similar comment (Ex. 1326).

Finally, the Phylmar Regulatory Roundtable (PRR) suggested that the benefits of updates might be insignificant overall, since ''[f]or large, established, legacy employers, many years of experience has shown that while updates are required by law, they are usually of minor consequence and/or correction and rarely, if ever, reflect a major and significant change in the safety performance of a company'' (Ex. 1110).

Several commenters provided OSHA with suggestions about how to proceed with the question of whether or not the electronic data submission system should include updates. The American College of Occupational and Environmental Medicine (ACOEM) suggested that the system should allow but not require updates. They commented that ''the accuracy of reported data could be optimized by permitting, though not requiring, employers to update their data after submission as new information becomes available about specific injuries, exposures, and diseases'' (Ex. 1327). The International Brotherhood of Teamsters and Thoron Bennett provided similar comments (Exs. 0035, 1381).

Finally, the U.S. Chamber of Commerce commented that ''if OSHA insists on pressing forward with a rule of this type, it must start over and reintroduce a proposed rule with an adequate system for updating submitted data that stakeholders may meaningfully consider and comment on'' (Ex. 1396).

In response, OSHA agrees with the commenters who stated that allowing updates but not requiring updates would improve the accuracy of the data while limiting the burden on employers. Accurate data will help OSHA, researchers, employers, employees, and the public in their efforts to improve workplace safety and health. In addition, because the final rule requires annual submission of records for establishments with 250 or more employees, rather than quarterly submission as proposed in the NPRM, employers will be able to update information throughout the year before they certify the 300A. Annual reporting also reduces the likelihood that employers will need to update information after reporting to OSHA. Therefore, OSHA plans to design a reporting system that will allow but not require updates.

Accuracy of the Collected and Published Data

In the preamble to the proposed rule, OSHA asked, ''How can OSHA use the electronic submission requirement to improve the accuracy of injury and illness records by encouraging careful reporting and recording of work-related injuries and illnesses?'' [78 FR 67271].

Several commenters provided technical comments on ways for OSHA to improve the accuracy of injury and illness records collected through electronic submission. As mentioned in the previous section, many commenters commented that allowing updates could improve the accuracy of collected data (Exs. 1205, 1217, 1219, 1275, 1326, 1327, 1331, 1355, 1358, 1360, 1378, 1389, 1396, 1399, 1408). Rachel Armont further commented that ''[o]n the data management side of things, perhaps [OSHA] could open up the site as a way to keep a real-time log of work-related injuries so it's not a one-time submission process'' (Ex. 0198).

The Council of State and Territorial Epidemiologists (CSTE) commented that ''[t]he proposed electronic collection of data, in the longer run, offers the opportunity to provide employers with electronic tools (prompts, definitions, consistency edits, and industry specific drop down lists) that have the potential to improve the quality of the data reported'' (Ex. 1106). The American Federation of State, County, and Municipal Employees (AFSCME) provided a similar comment (Ex. 1103).

ORCHSE Strategies, LLC commented that OSHA should develop ''a useful set of decision-making software to assist users in making accurate recordkeeping decisions. The current OSHA software does little more than summarize the text in the regulations. What is needed is software that employers can use to correctly answer their ''what if'' questions'' (Ex. 1339).

The American College of Occupational and Environmental Medicine (ACOEM) commented that OSHA could provide ''an electronic tool for employers to self-check their submitted information for recordkeeping errors and for deviance from industry averages (Ex. 1327). The American Federation of Teachers (AFT) provided a similar comment (Ex. 1358).

The American Federation of Teachers (AFT) also commented that ''[t]he agency could provide training through consultation to employers on the importance and value of accurate record-keeping. Training could also be provided to trade associations, labor unions and other advocacy groups on the importance and value of encouraging employees to report their injuries and illnesses. As well, the agency might consider a special emphasis program of targeted inspections for record-keeping. The agency could target those establishments with the highest rates as well as the lowest rates to ascertain accuracy'' (Ex. 1358).

Finally, the Phylmar Regulatory Roundtable (PRR) commented that ''if OSHA seeks to encourage careful, accurate reporting and recording of injuries and illnesses, promulgating an *annual* submission requirement (versus quarterly) makes the most sense. Companies will have the time to review the quality of records, correct errors, and obtain the approval of a senior company official before providing data to OSHA. Requiring quarterly submission and updating is overly burdensome for employers and likely to result in more errors in the database, leaving OSHA with information that is less accurate'' (Ex. 1110).

As mentioned in the previous section, OSHA agrees with the commenters who stated that allowing updates but not requiring updates would improve the accuracy of the data. Also as discussed above, although the proposed rule would have required quarterly reporting from companies with 250 or more employees, the final rule requires annual reporting. In addition, when OSHA develops the data collection system, the Agency will also incorporate a range of edit checks. Specifically, OSHA will leverage and expand on form validation routines and validation checks that were developed and refined over the years for the ODI online submission version of OSHA Form 300A (Form 196B). Edit checks can promote submission accuracy, for instance by alerting the submitter when input to a particular data field is outside the expected range or in conflict with other established parameters. The Agency also plans to program the data collection system so that, when the user logs in, the system will recognize the user and display appropriate user-specific information. For instance, for a first-time user, the system may present links for appropriate submission options (*e.g.,* annual summary data, special collections). For a return user, the system may display a dashboard page that shows recent submission history in a tabular format, including links to complete and draft (or in-process) submissions. From the dashboard, the user would be able to view a completed, executed form or continue with an in-progress submission. In this way, the user will be able to prepare a submission over multiple user sessions during the year before finalizing its submission to the Agency.

Finally, OSHA notes that, as discussed above, § 1904.32 already requires company executives subject to part 1904 requirements to certify that they have examined the annual summary (Form 300A) and reasonably believe, based on their knowledge of the process by which the information was recorded, that the annual summary is correct and complete. OSHA recognizes that most employers are diligent in complying with this requirement. However, a minority of employers is less diligent; in recent years, one third or more of violations of § 1904.32, and up to one tenth of all recordkeeping (part 1904) violations, have involved this certification requirement. It is OSHA's hope that, if this minority of employers knows that their data must be submitted to the Agency and may also be examined by members of the public, they may pay more attention to the requirements of part 1904, which could lead both to improvements in the quality and accuracy of the information and to better compliance with § 1904.32.

In the preamble to the proposed rule, OSHA also asked, ''How should OSHA design an effective quality assurance program for the electronic submission of injury and illness records?'' [78 FR 67271].

Several commenters commented on how OSHA could design an effective quality assurance program for the

electronic submission of injury and illness records. The Southern Poverty Law Center (SPLC) commented that OSHA could improve data quality by ''cross-checking [the data] with records kept in employers' own medical staff's offices, with workers' compensation records, and with any other available records'' (Ex. 1388).

The International Union (UAW) commented that ''[j]oint union-management methods of validating data through computerized systems have proven effective and can serve as a model for OSHA's modernization'' (Ex. 1384). The American College of Occupational and Environmental Medicine (ACOEM) commented that OSHA should ''increase medical record audits to assure accurate recordkeeping and reporting'' and ''increase the number of targeted inspections of companies deviating (positively or negatively) from the industry—norm incident and DART rates'' (Ex. 1327). The American Federation of Teachers (AFT) provided similar comments (Ex. 1358).

The International Brotherhood of Teamsters commented that ''OSHA may discuss [a quality assurance and audit program] with other government agencies that may have such programs. They would include FMCSA (SMS), MSHA and FRA, but could include other government agencies that receive electronic records as well'' (Ex. 1381). Finally, the Coalition for Workplace Safety (CWS) commented that OSHA should implement ''error screening and follow-back procedures to correct and/or verify questionable data reported'' (Ex. 1411).

In response, OSHA plans to look at examples from other federal agencies. Two examples from the U.S. EPA are the Toxics Release Inventory (TRI) Program and the Greenhouse Gas Reporting Program. The TRI Program, which collects data from a wide range of facilities nationwide, takes steps to promote data quality, including analyzing data for potential errors, contacting TRI facilities concerning potentially inaccurate submissions, providing guidance on reporting requirements and, as necessary, taking enforcement actions against facilities that fail to comply with TRI requirements. For the Greenhouse Gas Reporting Program, quality assurance checks include evaluating submitted data against an extensive array of electronic checks that ''flag'' potential errors. For example, statistical checks are used to evaluate data from similar facilities and identify data that might be outliers. Also, algorithm checks consider the relationships between different pieces of entered information and compare the information to an expected value. These flags are then manually reviewed to assess the cause of the flag; if EPA finds a potential error, EPA follows up with the reporter. The GHGRP has given some consideration to conducting on-site audits of reporting facilities.

In addition, actions OSHA has taken in the past as part of data collection for the ODI included running programmed routines that checked establishment submissions and then, based on results, assigned a submission status code indicating whether the data submitted passed the edits and was considered usable or not usable. These routines were informed by routines the BLS used for the Survey of Occupational Injuries and Illnesses.

OSHA will form a working group with BLS to assess data quality, timeliness, accuracy, and public use of the collected data, as well as to align the collection with the BLS SOII.

Categories of Information That Are Useful To Publish

In the preamble to the proposed rule, OSHA asked, ''Which categories of information, from which OSHA-required form, would it be useful to publish?'' [78 FR 67271].

OSHA received many comments about the benefits that would result from publishing all of the information that OSHA collects, except for PII, including improved research and analysis of injury and illness trends, improved motivation for employers to provide safe workplaces, more information for employees and potential employees, more information for customers and the public, injury and illness prevention, and various other benefits.

For improved research and analysis of injury and illness trends, there were many comments that publication of this information would allow employers, workers, researchers, unions, and the public to improve workplace safety by providing the data for better research and analysis of injury and illness trends (Exs. 0245, 0254, 1110, 1203, 1207, 1208, 1219, 1278, 1345, 1350, 1354, 1371, 1380, 1381, 1387, 1388, 1393, 1395, 1424). For example, the United Food & Commercial Workers International Union (UFCW) commented that publication of data would ''enable the public, unions, employees, and other employers to search and analyze the data. Further, by making the data available electronically from OSHA, interested parties can much more easily analyze trends, assess effective health and safety programs and track ongoing hazards by establishment, enterprise and industry'' (Ex. 1345). Andrew Sutton provided a similar comment (Ex. 0245).

There were also comments that publication of this data would improve the occupational safety and health surveillance capacity of the United States. The Council of State and Territorial Epidemiologists (CSTE) commented that ''OSHA's proposal to electronically collect and make available the data employers already record on work-related injuries and illnesses would substantially enhance occupational health surveillance capacity in the United States'' (Ex. 1106). The California Department of Industrial Relations (DIR), Office of the Director provided a similar comment (Ex. 1395).

Several commenters also commented that publication of the data would particularly help with identifying emerging hazards (Exs. 1106, 1211, 1327, 1330, 1347, 1371, 1382). For example, the Council of State and Territorial Epidemiologists (CSTE) commented that publication of establishment-level data ''has the potential to facilitate timely identification of emerging hazards. These include both new and newly recognized hazards. A relatively recent case example is illustrative. In 2010, the Michigan Fatality Assessment and Control Evaluation program identified three deaths associated with bath tub refinishing, raising new concern about hazards of chemical strippers used in this process . . . These findings led to the development of educational information about the hazards associated with tub refinishing and approaches to reducing risks that was disseminated nationwide to companies and workers in the industry'' (Ex. 1106).

For increased motivation for employers to provide safer workplaces, there were several comments that publication of the data would allow companies to benchmark their safety and health performance against similar companies (Exs. 0241, 0245, 1106, 1126, 1278, 1327, 1341, 1358, 1371, 1381, 1387, 1393). For example, the American Industrial Hygiene Association (AIHA) commented that data publication ''should also enable employers to benchmark against others in their industry. The sharing of statistics could also identify solid performers who might help others upgrade their processes and outcomes'' (Ex. 1126). Senator Tom Harkin made a similar comment (Ex. 1371).

Michael Houlihan further commented that ''the disclosure requirement may improve the performance of managers

by drawing public attention to the illness and injury rates at their facilities'' (Ex. 1219). Peter Strauss, Richard R, Sarah Wilensky, and Ashok Chandran provided similar comments (Exs. 0187, 1209, 1382, 1393).

For more information for employees and potential employees, there were multiple comments that publication of the data would allow employees to use the data to make better decisions about where to work (Exs. 0145, 1219, 1278, 1327, 1341, 1350, 1371, 1395). For example, Worksafe commented that ''electronic posting by OSHA of information related to fatality and injury and illness incidents would allow individuals who may be considering employment to assess the types, severity, and frequency of injuries and illnesses of a particular firm or workplace'' (Ex. 1278). Professor Sherry Brandt-Rauf of the School of Public Health at the University of Illinois at Chicago provided a similar comment (Ex. 1341).

Many commenters stated that data publication would be especially helpful because employees would be able to get safety and health data from their workplace anonymously and without fear of retaliation (Exs. 1188, 1211, 1278, 1345, 1381, 1387, 1388, 1393, 1424). For example, the Southern Poverty Law Center commented that ''[e]ven an employee's simple request to view an OSHA 300 log *might* be met by an employer in a dangerous, low-wage industry such as poultry or meat processing with suspicion, threats, or even termination. Given these realities in many American workplaces, any steps the Department takes to increase workers' access to records about health and safety in their own workplaces will provide workers with better tools with which to protect their bodies and their lives'' (Ex. 1388).

For more information for customers and the public, there were comments that publication of the data could help customers and the public decide whom to do business with (Exs. 0248, 1114, 1278, 1327, 1341, 1371, 1395). For example, Worksafe commented that ''there are potential benefits for current or potential suppliers, contractors for, and purchasers of a firm's goods or services. These parties would have the opportunity to consider the information in their business decisions, such as how a supplier's injury and illness experience would reflect on their own business'' (Ex. 1278). Senator Tom Harkin also commented that data publication ''may be of use not just to the public, but also by contracting officers at federal agencies when assessing prospective contractors' safety performance'' (Ex. 1371).

For prevention of workplace injuries and illnesses, NIOSH commented that ''electronically-collected and stored injury and illness data can be an asset to establishments/employers for planning prevention intervention activities'' (Ex. 0216). The AFL–CIO made a similar comment (Ex. 1350).

The New York States Nurses Association commented that ''having this data and information would greatly improve the ability to research trends which may contribute to preventing and mitigating workplace violence injuries'' (Ex. 0254). The AFL–CIO provided a similar comment (Ex. 1350). The United Food & Commercial Workers International Union (UFCW) emphasized the role that labor unions could play in such research, commenting that ''[a]nalysis of the information can identify trends among and between companies, and at specific sites within one company . . . Plant management in one location may be using effective strategies that result in a decrease in injuries and illnesses; these effective strategies can be passed on to sister plants in the same company. By examining other establishments' OSHA injury and illness data for those without declining injury rates, the [UFCW] has been able to target areas for improved prevention strategies'' (Ex. 1345). The Service Employees International Union (SEIU) provided a similar comment (Ex. 1387).

The California Department of Industrial Relations (DIR), Office of the Director commented that the proposed rule ''would specifically help identify and abate workplace hazards by improving the surveillance of occupational injury and illness. Complete and accurate surveillance of occupational injury and illness is essential for informed policy decisions and for effective intervention and prevention programs'' (Ex. 1395). The Council of State and Territorial Epidemiologists (CSTE) provided a similar comment (Ex. 1106).

There were also comments about various other benefits of data publication. Lancaster Safety Consulting, Inc. commented that ''[o]nline access to the injury and illness data will provide a means for occupational safety and health (OSH) professionals to reach out to companies that are in apparent need of assistance with their OSH programs'' (Ex. 0022). The Council of State and Territorial Epidemiologists (CSTE) and the International Brotherhood of Teamsters provided similar comments (Exs. 1106, 1381).

Several commenters commented that data publication would make it easier for labor unions to access safety and health data when representing workers (Exs. 0245, 1209, 1350, 1381, 1387, 1424). For example, the AFL–CIO commented that ''[i]t will 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. Many unions already collect this information under their rights of access under the recordkeeping rule. But currently, this information must be requested and collected establishment by establishment, making the collection and analysis of this data difficult and time consuming and hindering prevention efforts'' (Ex. 1350). The Council of State and Territorial Epidemiologists (CSTE) commented about the benefits for community health planning, stating that ''[t]he availability of establishment specific information also offers a potential opportunity to incorporate occupational health concerns in community health planning, which is increasingly providing the basis for setting community health and prevention priorities'' (Ex. 1106). Finally, the International Brotherhood of Teamsters commented that ''[g]iven the difficulties that both union and non-union workers face, and OSHA's inability to fully enforce the 1904 rules, the public release of the data is actually necessitated since it would allow workers to have a subsidiary role in ''enforcing'' those requirements'' (Ex. 1381).

On the other hand, the Interstate Natural Gas Association of America commented the ''[i]njury and illness data contained in 300–A Summaries is the only information that may be useful, but this information is limited'' (Ex. 1206).

In response, OSHA agrees with the commenters above who commented that the benefits that would result from publishing all of the information that OSHA collects, except for PII, include improved research and analysis of injury and illness trends, improved motivation for employers to provide safe workplaces, more information for employees and potential employees, more information for customers and the public, and injury and illness prevention.

There were also many comments that publishing the data would not be beneficial for various reasons, including the misleading nature of the published data and a focus on lagging instead of leading indicators.

For the misleading nature of the published data, many commenters commented that the published data will be misleading because the data do not tell the whole story and do not provide any context (Exs. 0138, 0162, 0163, 0171, 0174, 0179, 0181, 0188, 0189, 0194, 0218, 0224, 0234, 0242, 0255, 0256, 0258, 1084, 1090, 1091, 1092, 1093, 1109, 1111, 1112, 1113, 1116, 1123, 1187, 1190, 1192, 1193, 1194, 1195, 1196, 1198, 1199, 1200, 1201, 1204, 1205, 1206, 1210, 1214, 1215, 1217, 1218, 1222, 1225, 1272, 1273, 1275, 1276, 1279, 1318, 1321, 1322, 1323, 1324, 1326, 1327, 1328, 1329, 1332, 1333, 1334, 1336, 1338, 1340, 1342, 1343, 1349, 1355, 1356, 1359, 1360, 1363, 1364, 1365, 1368, 1370, 1373, 1376, 1378, 1379, 1385, 1386, 1389, 1390, 1391, 1392, 1394, 1396, 1397, 1399, 1400, 1402, 1406, 1408, 1409, 1410, 1411, 1416, 1426).

For example, the Coalition for Workplace Safety (CWS) commented that ''[t]he data that OSHA will collect and make publicly available is not a reliable measure of an employer's safety record or its efforts to promote a safe work environment. Many factors outside of an employer's control contribute to workplace accidents, and many injuries that have no bearing on an employer's safety program must be recorded. Data about a specific incident is meaningless without information about the employer's injuries and illness rates over time as compared to similarly sized companies in the same industry facing the same challenges (even similar companies in the same industry may face substantially different challenges with respect to workplace safety based on climate, topography, population density, workforce demographics, criminal activity in the region, proximity and quality of medical care, etc.)'' (Ex. 1411). The National Association of Manufacturers (NAM) provided a similar comment (Ex. 1279).

Many commenters also commented on a related concern that OSHA should not publish the data since the public will misinterpret the data (Exs. 0027, 0143, 0152, 0159, 0160, 0189, 0197, 0210, 0211, 0218, 0224, 0239, 0240, 0242, 0251, 0253, 0255, 0256, 0258, 1084, 1090, 1091, 1092, 1093, 1109, 1111, 1112, 1113, 1123, 1124, 1125, 1191, 1192, 1194, 1197, 1199, 1200, 1205, 1210, 1214, 1215, 1217, 1218, 1224, 1225, 1272, 1273, 1275, 1276, 1279, 1322, 1326, 1327, 1329, 1332, 1333, 1334, 1336, 1338, 1340, 1343, 1344, 1359, 1368, 1370, 1372, 1379, 1389, 1391, 1396, 1397, 1399, 1400, 1408, 1410, 1413, 1415, 1416). For example, the American Foundry Society commented that ''[t]he public . . . could take the injury and illness data out of context, as they would not be privy to the details behind the injuries, the safety measures employers adopt, or any other relevant information related to the circumstances of the injury or illness'' (Ex. 1397). The Puget Sound Shipbuilders Association also commented that ''[w]e are concerned about the level of knowledge and understanding the general public has about OSHA recordable cases and believe it is very limited'' (Ex. 1379).

Finally, there were comments that recordkeeping data collected under the proposed rule would not improve workplace safety and health since they are lagging indicators (Exs. 0163, 0250, 1194, 1279, 1342, 1363, 1389, 1408, 1410) and that leading indicators are necessary to improve future workplace safety and health outcomes (Exs. 0027, 0053, 0162, 0163, 0197, 1204, 1279, 1331, 1339, 1342, 1363, 1389, 1406, 1408, 1410, 1416, 1417).

For example, the Mechanical Contractors Association of America (MCAA) commented that ''that lagging indicators, such as OSHA Incidence Rates, are poor indicators of safety performance. Many occupational safety and health professionals share this belief. For example, The American National Standards Institute's (ANSI) A10 Construction and Demolition Operations Committee is currently working on a technical report to help educate government agencies, construction owners, and construction employers about the relative ineffectiveness of lagging indicators'' (Ex. 1363). The National Association of Manufacturers made a similar comment (Ex. 1279).

The National Association of Home Builders (NAHB) commented that ''[l]eading indicators measure what's happening right now and may be a better gauge of safety performance. The leading indicators attempt [to] measure safety performance by utilizing tools such as tracking safe or unsafe behaviors or workers, investigating near-miss incidents, performing workplace audits and inspections, and conducting safety training'' (Ex. 1408).

The American Society of Safety Engineers (ASSE) commented that ''ASSE and other leading safety and health organizations have put considerable work into developing resources and encouraging companies to move away from 'trailing' and towards 'leading' indicators for evaluating workplace safety. As OSHA itself knows, 'trailing' indicators focus an organization on safety after the fact of an injury or fatality. 'Leading' indicators better focus an organization on the best practices that prevent injuries and fatalities'' (Ex. 1204). However, the Environmental, Health & Safety Communications Panel (EHSCP) commented that OSHA should promote ''a balance of leading and lagging measures'' to measure safety performance (Ex. 1331). The National Rural Electric Cooperative Association (NRECA) provided a similar comment (Ex. 1417).

Several commenters also commented that the proposed rule could harm workplace safety and health by shifting employers' focus from leading indicators to lagging indicators (Exs. 0027, 0157, 0163, 1109, 1124, 1194, 1204, 1372, 1389, 1406, 1408, 1410, 1416). For example, the American Society of Safety Engineers (ASSE) commented that ''[p]ublic release of numbers and rates of injuries by establishment will cause many employers to use their resources to address 'trailing,' not 'leading' indicators . . . ASSE is concerned that this proposal, and the additional attention that a national database of injury rates and numbers will attract, works against the professions' [sic] years of effort in moving workplace safety towards 'leading' indicators'' (Ex. 1204). The American Feed Industry Association made a similar comment (Ex. 1372).

In response, OSHA does not agree that the publishing of recordkeeping data under this final rule will be misleading or that the public will misinterpret the data. The recordkeeping data represent real injuries and illnesses (injuries and illnesses that required more than first aid) that occurred at the workplace and were recordable under part 1904. While they do not, by themselves, provide a complete picture of workplace safety and health at that workplace, employers are free to post their own materials to provide context and explain their workplace safety and health programs. In addition, when OSHA publishes the data, the Agency will provide links to resources, such as industry rates from BLS, to help the public put the information in context. OSHA will also include language explaining the definitions and limitations of the data, as OSHA has done since the Agency began publishing establishment-specific injury and illness data from the OSHA Data Initiative on its public Web site in 2009. For the published ODI data, OSHA has included the following explanatory note on data quality: ''While OSHA takes multiple steps to ensure the data collected is accurate, problems and errors invariably exist for a small percentage of establishments. OSHA does not believe the data for the

establishments with the highest rates on this file are accurate in absolute terms. Efforts were made during the collection cycle to correct submission errors, however some remain unresolved. It would be a mistake to say establishments with the highest rates on this file are the ''most dangerous'' or ''worst'' establishments in the Nation.''

Similarly, OSHA does not agree that the part 1904 recordkeeping data will not improve workplace safety and health due to being lagging indicators instead of leading indicators. As stated above, the recordkeeping data represent real injuries and illnesses that occurred at the workplace and were recordable. In addition, as stated above, employers are free to post their own materials—including leading indicators—to provide context and explain their workplace safety and health programs. However, perhaps in a future rulemaking related to recordkeeping, OSHA might request information about leading indicators, including which leading indicators (if any) it would be most useful to add to the injury and illness records employers are required to keep under part 1904.

As discussed above, OSHA intends to make the data it collects public. The publication of specific data elements will in part be restricted by applicable federal law, including provisions under the Freedom of Information Act (FOIA), as well as specific provisions within part 1904. OSHA will make the following data from the various forms available in a searchable online database:

- *Form 300A (Annual Summary Form)*—All collected data fields will be made available. In the past, OSHA has collected these data under the ODI and during OSHA workplace inspections and released them in response to FOIA requests. The annual summary form is also posted at workplaces under § 1904.32(a)(4) and (b)(5). OSHA currently publishes establishment-specific injury and illness rates calculated from the data collected through the ODI on OSHA's public Web site at *http://www.osha.gov/pls/odi/establishment_search.html*. The 300A annual summary does not contain any personally-identifiable information.
- *Form 300 (the Log)*—All collected data fields on the 300 Log will generally be made available on the Web site. Employee names will not be collected. OSHA occasionally collects these data during inspections as part of the enforcement case file. OSHA generally releases these data in response to FOIA requests. Also, § 1904.29(b)(10) prohibits release of employees' names and personal identifiers contained in the forms to individuals other than the government, employees, former employees, and authorized representatives. OSHA does not currently conduct a systematic collection of the information on the 300 Log.
- *Form 301 (Incident Report)*—All collected data fields on the right-hand side of the form (Fields 10 through 18) will generally be made available. The Agency currently occasionally collects the form for enforcement case files. OSHA generally releases these data in response to FOIA requests. Section 1904.35(b)(2)(v)(B) prohibits employers from releasing the information in Fields 1 through 9 (the left-hand side of the form) to individuals other than the employee or former employee who suffered the injury or illness and his or her personal representatives. Similarly, OSHA will not publish establishment-specific data from the left side of Form 301. OSHA does not release data from Fields 1 through 9 in response to FOIA requests. The Agency does not currently conduct a systematic collection of the information on the Form 301. However, the Agency does review the entire Form 301 during some workplace inspections and occasionally collects the form for inclusion in the enforcement case file. Note that OSHA will not collect or publish Field 1 (employee name), Field 2 (employee address), Field 6 (name of treating physician or health care provider), or Field 7 (name and address of non-workplace treating facility).

Helping Employers, Employees, and Potential Employees Use the Collected Data

In the preamble to the proposed rule, OSHA asked, ''What analytical tools could be developed and provided to employers to increase their ability to effectively use the injury and illness data they submit electronically?'' [78 FR 67271].

There were several comments about analytical tools that could be developed and provided to employers to increase their ability to effectively use the injury and illness data they submit electronically. NIOSH commented about their current pilot project that provides employers with a tool to analyze their safety and health data, stating, ''NIOSH developed a web-portal and information system that accepts traumatic injury data electronically, including the fields/characteristics recorded on OSHA Form 300 . . . Participating establishments send all data voluntarily. The system does not accept personal data. Establishments are not identified and comparison data are in aggregate form. After receipt, the data undergo quality checks and are uploaded to an analyzable database that is available to the establishment via the web-portal in seven to 10 days. The establishment can use the online system to examine its injury patterns over time and to compare its rates with other establishments by size, region, type, and other variables. In addition, the system provides users with information on best practices for the industry, injury-reduction interventions, and other up-to-date health and safety information'' (Ex. 0216). The American College of Occupational and Environmental Medicine (ACOEM) also commented about the desirability of a tool similar to the one that NIOSH is piloting (Ex. 1327).

The International Brotherhood of Teamsters commented that ''two of our employers use injury/illness tracking systems to collect and record all OSHA-recordable occupational injuries/illnesses. We would encourage OSHA to provide tools that would bolster and enhance employer efforts aimed at preventing injuries and illnesses. These tools could be useful to our membership as well, especially at establishments that have joint labor- management health and safety committees'' (Ex. 1381).

The International Association of Industrial Accident Boards and Commissions (IAIABC) commented that if OSHA ''adopts an electronic reporting requirement, the IAIABC urges OSHA to consider the benefits of using the IAIABC's established First and Subsequent Reports of Injury Standard (IAIABC EDI Claims Standard). Implementation of an existing electronic standard would be much faster and easier than developing a brand new electronic reporting protocol. The IAIABC EDI Claims Standard fully supports differing types of transactions including new reports, updates/corrections to previous submissions, and even has the capacity to limit what data can be modified after it has been submitted. Furthermore, the IAIABC EDI Claims Standard includes an 'upon request' type of report which OSHA has indicated a potential need to support'' (Ex. 1104).

In response, OSHA notes that, in 2011, IAIABC and NIOSH signed a memorandum of understanding that outlined opportunities for collaboration, including utilizing workers' compensation data to identify emerging issues and trends in occupational safety and health. In addition, EPA's Toxics Release Inventory (TRI) Program provides a range of analytical tools that include the TRI Pollution Prevention (P2) Tool (users can explore and compare facility and parent company

information on the management of toxic chemical waste, including facilities' waste management practices and trends); TRI.NET (with this desktop application, users can build customized TRI data queries, then map results and overlay other data layers); and Envirofacts (an online tool that provides access to all publicly available TRI data in a searchable, downloadable format). Related analytical tools that make use of TRI data include the DMR Pollutant Loading Tool (users can determine what pollutants are being discharged into waterways and by which companies, and can compare DMR data search results against TRI data search results) and Enviromapper (users can generate maps that contain environmental information, including TRI information). Similarly, EPA's GHGRP provides a number of online tools for mapping, charting, comparing, and otherwise analyzing facility reported data.

OSHA is considering including reporting capabilities in future versions of the data collection system, so that employers can view useful outputs from their submitted data (*e.g.,* data visualizations of trends, data table displays, reports with summary counts and statistics). The intention, in part, will be to encourage employers to consider injury/illness trends at or across their establishment(s), so they can abate hazards without prompting by an OSHA intervention.

In the preamble to the proposed rule, OSHA also asked, ''How can OSHA help employees and potential employees use the data collected under this proposed rule?'' [78 FR 67271].

There were various comments about how OSHA could help employees and potential employees use the data collected under this rule. Many commenters supported provision of the data in a way that allows for easy analysis of the information. For example, the California Department of Industrial Relations (DIR), Office of the Director commented that ''data sharing needs to be timely, user-friendly, user-accessible, and searchable by common fields including geography (ideally to county level or smaller), employer, and industry. Industry codes should be uniform and up-to-date. Posted data should ensure entity resolution and easy searching by establishment name. Multiple establishments that are the same company should be identifiable as a single company. Employees, employers, researchers, and community members all have different uses for the data, and each should be taken into account. The underlying data (once cleaned of personally identifiable information) should be downloadable (similar to American Fact Finder) for manipulation and statistical calculations'' (Ex. 1395). The AFL–CIO, Senator Tom Harkin, Change to Win, the Service Employees International Union (SEIU), and the United Steelworkers provided similar comments (Exs. 1350, 1371, 1380, 1387, 1424).

Senator Harkin also commented that OSHA's ''sister agency the Mine Safety and Health Administration (MSHA), along with other agencies like the Federal Railroad Administration (FRA) and Federal Aviation Administration (FAA), currently publish establishment-specific accident and injury and illness data. We believe that OSHA should consult with these agencies to learn about design problems and potential best practices to adopt before creating its database'' (Ex. 1371). The Service Employees International Union (SEIU) provided a similar comment (Ex. 1387).

Other commenters had other ideas. For example, the Council of State and Territorial Epidemiologists (CSTE) commented that ''[s]tandardized feedback to establishments and potential reports of establishment specific data could be programmed that would promote use of the data by employers and workers to set health and safety priorities and monitor progress in reducing workplace risks'' (Ex. 1106).

The Building and Construction Trades Department, AFL–CIO commented that ''the data should be organized and made available in different formats for different data users. For example, an individual employee may be interested in the establishment for which he/she works, while a researcher is more likely to get statistics in general. Therefore, the new data collection should include multiple levels of data access to meet different needs'' (Ex. 1346).

In response, when OSHA develops the publicly-accessible Web site, the Agency will make the raw data available in multiple formats (after it has been scrubbed of PII) for use by employers, employees, researchers, and the public in evaluating opportunities to address workplace safety and health. The Agency may also provide reporting and analytics tools for employers to view useful outputs from their submitted data (*e.g.,* data visualizations of trends, data table displays, reports with summary counts and statistics). The intention, in part, will be to encourage employers to consider injury/illness trends at or across their establishment(s), so they can abate hazards without prompting by an OSHA intervention. The Agency plans to provide similar tools on the public Web site so that the data will be more useful and accessible to members of the public who may not need or want to download data and perform their own analysis.

Helping Small-Business Employers Comply With Electronic Data Submission Requirements

In the preamble to the proposed rule, OSHA asked, ''How can OSHA help employers, especially small-business employers, to comply with the requirements of electronic data submission of their injury and illness records? Would training help, and if so, what kind?'' [78 FR 67271].

There were five major issues addressed by commenters about how to help small employers comply with electronic data submission requirements: General characteristics of a system that would help small-business employers comply with electronic data submission requirements; capability for immediate feedback; connecting the recordkeeping system with the reporting system; training and outreach; and third-party capability.

For general characteristics, several commenters commented that careful overall design of its Web site and other technical support could help employers, especially small-business employers, comply with the requirements of electronic data submission. The Phylmar Regulatory Roundtable (PRR) commented that ''the 'user friendliness' of the Web site will be the key to success for this electronic data submission program. It should have an extensive and strong help menu, as well as a go-to phone number (as is currently provided in the BLS data request) for help with the system. A universal data language must be provided (*e.g.,* XML) so that regardless of the platform used for recordkeeping, the information may easily be uploaded to OSHA's Web site. OSHA's system must have sufficient capacity and be robust enough to handle the massive quantities of data that 580,000 employers will be submitting within roughly the same time frame'' (Ex. 1110). The American Subcontractors Association provided a similar comment (Ex. 1322).

For immediate feedback after data submission, the Dow Chemical Company commented that ''OSHA is proposing to require electronic reporting by strict deadlines. It is therefore vitally important for employers to receive immediate feedback as to whether their data entry was successful or unsuccessful. OSHA's web portal should respond to each and every attempt at data entry, by providing a confirmation of receipt or a confirmation of failure. The confirmation notice should describe

what was received (or not received) with sufficient detail to be useful in resolving disputes in an enforcement context'' (Ex. 1189). The Phylmar Regulatory Roundtable (PRR) provided a similar comment (Ex. 1110).

For connecting the recordkeeping and reporting systems, the AFL–CIO commented that ''[t]o assist smaller employers in reporting workplace injury and illness data electronically, it would helpful for OSHA to provide basic software for workplace injury and illness recordkeeping from which the data can be easily uploaded/reported to OSHA through a secure Web site as OSHA envisions'' (Ex. 1350). Ashok Chandran provided a similar comment, suggesting that OSHA provide ''a mobile application that employers could use to submit their records'' and ''a web portal that allows employers to enter data directly'' (Ex. 1393).

For outreach and training, the Allied Universal Corporation commented that ''OSHA should also develop a training program [about the requirements of electronic data submission], hosting webinars or similar events across the United States and reach out to many trade associations'' (Ex. 1192). The International Association of Industrial Accident Boards and Commissions (IAIABC) and the American Subcontractors Association (ASA) provided similar comments (Exs. 1104, 1322).

Other commenters commented that training on current OSHA requirements would also be helpful. The California Department of Industrial Relations (DIR), Office of the Director commented that ''many employers could benefit from outreach and education on how and what to report, including reference to 29 CFR 1904.31, employees covered by the OSHA recordkeeping standard'' (Ex. 1395). The Associated General Contractors of America (AGC) provided a similar comment (Ex. 1416).

For third-party capability, Veriforce also commented that third-party electronic submission capabilities could be helpful for employers. They commented that pipeline industry contractors could be helped if ''3rd party companies with contractor permission [could] electronically upload [the contractor's] data into the new OSHA Injuries and Illnesses reporting Web site[.] It will become more difficult for contractors to have to continue to report electronically to 3rd party companies and then now have to enter the same information into this new OSHA system when the 3rd party companies which have a contract with the contractor can just electronically forward the information to the this new OSHA Web site'' (Ex. 0243).

In addition to the comments related to the five major issues, some commenters commented with other ideas about how OSHA could help small-business employers comply with the new requirements. The United Food & Commercial Workers International Union (UFCW) commented that they support ''making the new reporting requirements as simple as possible . . . In the UFCW's experience, keeping the requests as simple as possible for all of our employers (including those who fall into the smaller business category), results in greater data acquisition'' (Ex. 1345). In addition, some commenters included comments about a phase-in period being helpful to employers, which were addressed above in comments to Alternatives C and D (Exs. 0210, 1104, 1322, 1401).

In response to these comments, when OSHA develops the data collection system, the Agency will make every effort to ensure ease of use with small-business employers in mind. To the extent possible, features will be incorporated to minimize the number of keystrokes and mouse-clicks required to complete a form (*e.g.,* pick-lists and widgets). Also, forms will be programmed to prefill establishment information where appropriate (*e.g.,* establishment name and address from registration or prior submissions) as well as to auto-calculate and/or carry totals over from associated forms (*e.g.,* Form 300 column totals will auto-calculate and be programmed to pre-populate Form 300A). Additional functionality will be provided to help avoid some types of entry errors, (*e.g.,* if column G [death] is selected, then disable controls for columns K [away from work] and L [on job transfer/restriction]).

In addition, OSHA plans to incorporate as many helper features as possible (*e.g.* help text, instruction sheets, etc.) to guide users through the data submission process. This information will be readily accessible from the collection system. Further, OSHA plans to implement an email/phone help line for providing quick-response user support.

For third-party capability, if a small business, for instance, enlists a third-party (*e.g.,* a consultant) to act as its representative in submitting its injury/illness information to OSHA's data collection system, the third-party would also provide their own contact information on the submission system as a representative of the business.

Finally, OSHA will phase in implementation of the data collection system. In the first year, all establishments required to routinely submit information under the final rule will be required to submit only the information from the Form 300A (by July 1, 2017). In the second year, all establishments required to routinely submit under the final rule will be required to submit all of the required information (by July 1, 2018). This means that, in the second year, establishments with 250 or more employees that are required to routinely submit information under the final rule will be responsible for submitting information from the Forms 300, 301, and 300A. In the third year, all establishments required to routinely submit under this final rule will be required to submit all of the required information (by March 2, 2019). This means that beginning in the third year (2019), establishments with 250 or more employees will be responsible for submitting information from the Forms 300, 301, and 300A, and establishments with 20–249 employees in an industry listed in appendix A to subpart E of part 1904 will be responsible for submitting information from the Form 300A by March 2 each year. This will provide sufficient time to ensure comprehensive outreach and compliance assistance in advance of implementation.

Scope of Data Collection

In the preamble to the proposed rule, OSHA asked, ''Should this data collection be limited to the records required under Part 1904? Are there other required OSHA records that could be collected and made available to the public in order to improve workplace safety and health?'' [78 FR 67271].

Some commenters commented that OSHA should limit this rule to the collection of part 1904 data while making the rule flexible enough to allow for the collection of other information in the future. For example, the International Brotherhood of Teamsters commented that ''[t]his rule should be limited to the 1904 data. However, OSHA should consider making this rule flexible enough to allow it to require reporting the other kinds of information in the future, particularly specific records (such as employee exposure data) that are already required by various OSHA standards. This would provide a better measure/indication of health risks faced by workers. In addition, OSHA may also wish to require employers to report other records currently mandated under other existing OSHA standards, such as employer reports of incidents investigated under the Process Safety Management (PSM) standard. The

system should be designed to accommodate such expansions in the future'' (Ex. 1381). Change to Win and the International Union (UAW) provided similar comments (Exs. 1380, 1384).

The American College of Occupational and Environmental Medicine (ACOEM) also commented about the collection of more data in the future, stating that ''[OSHA should] collaborate with the Bureau of Labor Statistics and The Council for State and Territorial Epidemiologists to publicize a broader suite of occupational health indicators, which, taken together, would provide a better picture of the true burden of occupational safety and health in the United States'' (Ex. 1327).

However, the Phylmar Regulatory Roundtable (PRR) commented that ''data collection should be limited to the records required under Part 1904'' (Ex. 1110).

OSHA agrees that the scope of the final rule should be the same as the scope of the proposed rule and include only the records required under part 1904. While OSHA notes some advantages for the collection of other data, the Agency believes that it did not receive enough information on this issue during this rulemaking to include such a requirement in the final rule. However, OSHA is open to considering additional data collection ideas for future rulemakings.

OSHA's Statutory Authority To Promulgate This Final Rule

Several commenters stated that OSHA lacks the statutory authority under the OSH Act to make raw injury and illness data available to the general public (Exs. 0218, 0224, 0240, 1084, 1093, 1123, 1198, 1218, 1225, 1272, 1279, 1332, 1336, 1342, 1344, 1356, 1359, 1360, 1372, 1385, 1393, 1394, 1396, 1404, 1408, 1411, 1412). These commenters acknowledged that Sections 8 and 24 of the OSH Act provide the Secretary of Labor with authority to issue regulations requiring employers to maintain accurate records of work-related injuries and illnesses. However, according to these commenters, nothing in the OSH Act authorizes OSHA to publish establishment-specific injury and illness records outside the employer's own workplace.

The U.S. Chamber of Commerce commented:

> A fundamental axiom of the regulatory process is that an agency must have statutory authority for any rule which it wishes to promulgate. *See, Am Library Ass'n* v. *FCC,* 406 F.3d 689, 708 (D.C. Cir. 2005) . . . OSHA has stated that it has authority for this Proposed Rule under sections 8 (c)(1), (c)(2), (g)(2) and 24 of the . . . OSH Act . . . None of these sections, however, provide OSHA with the statutory authority required to promulgate this Proposed Rule.
>
> Each of these sections upon which OSHA relies states that the information that OSHA is empowered to collect is for the use of the Secretary of Labor and the Secretary of Health and Human Services . . . Conspicuously absent from these provisions is any mention, let alone express or implied authority, that OSHA may create an online database meant for the public dissemination of an employer's injury and illness records containing confidential and proprietary information. Had Congress envisioned or intended that the Secretary of Labor would have the authority to publish this information it surely would have so provided. But of course, it did not and has not. (Ex. 1396)

The National Association of Manufacturers commented that Section 8(g)(1) of the OSH Act specifically and uniquely limits the information OSHA may publish to information that is '''compiled and analyzed.' This does not mean that OSHA can publish raw data from employer injury and illness records, but rather that it can compile information, analyze it, and then publish its analysis of the information in either summary or detailed form'' (Ex. 1279).

NAM also commented that while the OSH Act does explicitly give OSHA the authority to release some information, the Act does not expressly permit the public release of recordkeeping data:

> Section 8(c)(2) merely grants the Secretary the authority to promulgate regulations requiring employers to maintain injury and illness records. Nothing in this section expressly grants authority for the public dissemination of such information. 29 U.S.C. 657(c).
>
> Moreover, had Congress intended to make such information available to the public they know how to do so. In various other sections of the OSH Act Congress explicitly granted authority requiring that other types of records be made available to the public. For example, section 12(g) requires the U.S. Occupational Safety and Health Review Commission records to be made publicly available. 29 U.S.C. 661(g). *U.S.* v. *Doig,* 950 F.2d 411, 414–15 (1991) (''Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'') (internal citation omitted). (Ex. 1279).

In contrast, several commenters stated that the OSH Act does provide OSHA with authority to issue this final rule (Exs. 1208, 1209, 1211, 1219, 1371, 1382, 1424). Specifically, OSHA received comments from four members of Congress on this issue. A letter signed by Senator Tom Harkin, Senator Robert Casey, Representative George Miller, and Representative Joe Courtney stated:

> When Congress passed the OSH Act, it expressly stated that the purpose of the law was 'to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.' 29 U.S.C. 651(b). In order to effectuate this purpose, the Secretary of Labor was given the authority to issue regulations 'requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses.' 29 U.S.C. 657(c)(2). Additionally, the Secretary 'shall develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics.' 29 U.S.C. 673(a).
>
> It is clear from the plain language of the OSH Act that Congress intended for OSHA to acquire and maintain accurate records from employers regarding workplace injuries and illnesses for the purpose of protecting workers' safety and health. This proposed rule not only improves upon the current system of reporting and tracking injuries and illnesses, it further strengthens the ability of OSHA to live up to its statutory mandate to ensure that workers have healthy and safe workplaces . . .
>
> We agree with OSHA's proposal to post reported injury and illness data online so that employees, employers, researchers, consumers, government agencies, and other interested parties have easy access to that important information. This increased access to injury and illness data will allow employers to measure themselves against other employers' safety records so they know when they need to make improvements. Employees will similarly have greater knowledge about the hazards in their workplace and their employer's previous health and safety history . . . (Ex. 1371).

Additionally, Ashok Chandran commented, ''The proposed regulation in no way expands the substantive information employers must provide to OSHA. 29 CFR 1904 already requires employers to report injuries resulting in death, loss of consciousness, days away from work, restriction of work, transfer to another job, medical treatment other than first aid, or diagnosis of a significant injury or illness by a physician or other licensed health care professional. For over 40 years now, OSHA has been collecting injury reports without incident. Thus any challenges to the legality of this data collection must fail'' (Ex. 1393).

OSHA believes that the OSH Act provides statutory authority for OSHA to issue this final rule. As explained in the Legal Authority section of this preamble, the following provisions of the OSH Act give the Secretary of Labor broad authority to issue regulations that address the recording and reporting of occupational injuries and illnesses.

Section 2(b)(12) of the Act states that one of the purposes of the OSH Act is

to ''assure so far as possible . . . safe and healthful working conditions . . . by providing for appropriate reporting procedures . . . which will help achieve the objective of th[e] Act and accurately describe the nature of the occupational safety and health problem.'' 29 U.S.C. 651(b)(12).

Section 8(c)(1) requires each employer to ''make, keep and preserve, and make available to the Secretary . . . such records . . . prescribe[d] by regulation as necessary or appropriate for the enforcement of th[e] Act or for developing information regarding the causes and prevention of occupational accidents and illnesses.'' 29 U.S.C. 657(c)(1). The authorization to the Secretary to prescribe such recordkeeping regulations as he considers ''necessary or appropriate'' emphasizes the breadth of the Secretary's discretion in implementing the OSH Act. Section 8(c)(2) further provides that the ''Secretary . . . shall prescribe regulations requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses.'' 29 U.S.C. 657(c)(2).

Section 8(g)(1) authorizes the Secretary ''to compile, analyze, and publish, whether in summary or detailed form, all reports or information obtained under this section.'' Section 8(g)(2) of the Act generally empowers the Secretary ''to prescribe such rules and regulations as he may deem necessary to carry out his responsibilities under th[e] Act.'' 29 U.S.C. 657(g)(2).

Section 24 contains a similar grant of regulatory authority. Section 24(a) states that ''the Secretary . . . shall develop and maintain an effective program of collection, compilation and analysis of occupational safety and health statistics . . . [and] shall compile accurate statistics on work injuries and illnesses.'' 29 U.S.C. 673(a). Section 24(e) provides that ''[o]n the basis of the records made and kept pursuant to section 8(c) of th[e] Act, employers shall file such reports with the Secretary as he shall prescribe by regulation, as necessary to carry out his functions under th[e] Act.'' 29 U.S.C. 673(e).

OSHA has made the determination that the provisions in this final rule requiring electronic submission and publication of injury and illness recordkeeping data are ''necessary and appropriate'' for the enforcement of the OSH Act and for gathering information regarding the causes or prevention of occupational accidents or illnesses. Where an agency is authorized to prescribe regulations ''necessary'' to implement a statutory provision or purpose, a regulation promulgated under such authority is valid ''so long it is reasonably related to the enabling legislation.'' *Morning* v. *Family Publication Service, Inc.,* 441 U.S. 356, 359 (1973).

The Supreme Court recognizes a ''familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes.'' *Tcherepnin* v. *Knight,* 389 U.S. 332, 336 (1967). And reading the statute in light of its protective purposes further supports the Secretary's interpretation that the Act calls for electronic submission and publication of injury and illness recordkeeping data. *See, e.g., United States* v. *Advance Mach. Co.,* 547 F.Supp. 1085 (D.Minn. 1982) (requirement in Consumer Product Safety Act to ''immediately inform'' the government of product defects is read as creating a continuing obligation to report because any other reading would frustrate the statute's goal of protecting the public from hazards). In addition, injury and illness records ''are a cornerstone of the Act and play a crucial role in providing the information necessary to make workplaces safer and healthier.'' *Sec'y of Labor* v. *Gen. Motors Corp.,* 8 BNA OSHC 2036, 2041 (Rev. Comm'n 1980).

OSHA notes that not only are such recordkeeping regulations expressly called for by the language of Sections 8 and 24, but they are also consistent with Congressional intent and the purpose of the OSH Act. The legislative history of the OSH Act reflects Congress' concern about harm resulting to employees in workplaces with incomplete records of occupational injuries and illnesses. Most notably, a report of the Senate Committee on Labor and Public Welfare stated that ''[F]ull and accurate information is a precondition for meaningful administration of an occupational safety and health program.'' S. Rep. No. 91–1282, at 16 (1970), *reprinted in* Subcomm. on Labor of the Comm. on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970, at 156 (1971). Additionally, a report from the House of Representatives shows that Congress recognized ''comprehensive [injury and illness] reporting'' as playing a key role in ''effective safety programs.'' H.R. Rep. No. 91–1291, at 15 (1970), *reprinted in Subcomm. on Labor of the Comm. on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970,* at 845 (1971). As explained elsewhere in this preamble, the electronic submission and publication requirements of the final rule will lead to more accurate and complete occupational injury and illness records.

OSHA further notes that, contrary to comments made by some commenters, and as explained elsewhere in this preamble, the final rule will not result in the publication of raw injury and illness recordkeeping data or the release of records containing personally identifiable information or confidential commercial and/or proprietary information. The release or publication of submitted injury and illness recordkeeping data will be conducted in accordance with applicable federal law. (*See* discussion below).

Constitutional Issues

The First Amendment

Some commenters stated that the proposed rule would violate the First Amendment of the U.S. Constitution because it would force employers to submit their confidential and proprietary information for publication on a publicly available government online database (Exs. 1360, 1396). These commenters noted that the First Amendment protects both the right to speak and the right to refrain from speaking.

The U.S. Chamber of Commerce commented:

> While OSHA's stated goal of using the information it collects from employers ''to improve workplace safety and health,'' 78 FR at 67,254, is unobjectionable, ''significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest.'' *Buckley* v. *Valeo,* 424 U.S. 1, 64 (1976) (per curiam). Instead, where the government seeks to require companies to engage in the type of speech proposed here, the regulation must meet the higher standard of strict scrutiny: Meaning that it must be narrowly tailored to promote a compelling governmental interest. *See United States* v. *Playboy Entm't Grp., Inc.,* 529 U.S. 803, 819 (2000).
>
> Once subjected to strict scrutiny, the publication provision of this Proposed Rule must fail because it is not narrowly tailored towards accomplishing a compelling government interest. *See Playboy,* 529 U.S. at 819. Under the narrow tailoring prong of this analysis, the regulation must be *necessary* towards accomplishing the government's interest. *See, e.g., Republican Party of Minn.* v. *White,* 536 U.S. 765, 775 (2002) (''[T]o show that the [requirement] is narrowly tailored, [the government] must demonstrate that it does not 'unnecessarily circumscrib[e] protected expression.'' (fourth alteration in original) (quoting *Brown* v. *Hartlage,* 456 U.S. 45, 54 (1982))).

On the other hand, Logan Gowdey commented that recordkeeping data has been collected by OSHA in the past through the OSHA Data Initiative (ODI).

He adds, ''Furthermore, if there were a realistic claim to be made of First Amendment grounds, it surely would have been made against the EPA in relation to the Toxic Release Inventory (TRI) program, where toxic releases are published and include business names, far more 'speech' than will be required under this rule.'' (Ex. 1211).

In response, OSHA disagrees with the Chamber's comment that this rulemaking violates the First Amendment. OSHA notes that, contrary to the Chamber's comment, the decision in *Buckley* v. *Valeo* only applies to campaign contribution disclosures, and does not hold that other types of disclosure rules are subject to the strict scrutiny standard. *See,* 42 U.S. 1, 64 (reasoning that campaign contribution disclosures ''can seriously infringe on privacy of association and belief guaranteed by the First Amendment''). Later cases also clarify that disclosure requirements only trigger strict scrutiny ''in the electoral context.'' *See, John Doe No. 1* v. *Reed,* 561 U.S. 186, 196 (2010).

In *Zauderer* v. *Office of Disciplinary Counsel,* 471 U.S. 626, 653 (1985), the Supreme Court upheld Ohio state rules requiring disclosures in attorney advertising relating to client liability for court costs. The Court declined to apply the more rigorous strict scrutiny standard, because the government was not attempting to ''prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.'' 471 U.S. 626, 651. Because it concluded the disclosure at issue would convey ''purely factual and uncontroversial information,'' the rule only needed to be ''reasonably related to the State's interest in preventing deception of consumers.'' *Id.* Recently, in *American Meat Institute* v. *U.S. Dept. of Agriculture,* the U.S. Court of Appeals for the DC Circuit held that the *Zauderer* case's ''reasonably related'' test is not limited to rules aimed at preventing consumer deception, and applies to other disclosure rules dealing with ''purely factual and uncontroversial information.'' 760 F.3d 18, 22 (D.C. Cir. 2014) (finding that the speakers' interest in non-disclosure of such information is ''minimal''); *see also NY State Restaurant Ass'n* v. *NYC Bd. Of Health,* 556 F.3d 114, 133 (2d Cir. 2009) (accord), *Pharmaceutical Care Mgmt. Ass'n* v. *Rowe,* 429 F.3d 294, 310 (1st Cir. 2005) (accord).

This final rule only requires disclosure of purely factual and uncontroversial workplace injury and illness records that are already kept by employers. The rule does not violate the First Amendment because disclosure of workplace injury and illness records is reasonably related to the government's interest in assuring ''so far as possible every working man and woman in the Nation safe and healthful working conditions.'' 29 U.S.C. 651(b). The remainder of the Chamber's comment deals with ''essential rights'' that do not encompass an employer's minimal interest in non-disclosure of purely factual and uncontroversial information.

The Fourth Amendment

The U.S. Chamber of Commerce commented that, while OSHA addressed some issues related to the Fourth Amendment to the U.S. Constitution in the preamble to the proposed rule, the Agency neglected to consider other issues. Specifically, the Chamber stated that:

> The Notice for this Proposed Rule cites several cases that OSHA asserts confirm that the requirement to report injury and illness records comports with the Fourth Amendment's prohibition against unreasonable searches and seizures. 78 FR at 67,255–56. In making this preemptive defense, however, OSHA has neglected to address the more pressing Fourth Amendment problem with this Proposed Rule: That OSHA's use of the information collected for enforcement purposes will fail to constitute a ''neutral administrative scheme'' and will thus violate the Supreme Court's holding in *Marshall* v. *Barlow's Inc.,* 436 U.S. 307 (1978).

Additionally, the Chamber stated that the raw data to be collected under the proposed rule would fail to provide any defensible neutral predicate for enforcement decisions: ''Under this Proposed Rule, OSHA will be able to target any employer that submits a reportable injury or illness for any reason the agency chooses, or for no reason at all, under this unlimited discretion it has sought to grant itself to 'identify workplaces where workers are at great risk' '' *See,* 78 FR 67,256.'' (Ex. 1396).

In response, OSHA notes that *Barlow's* concerned the question of whether OSHA must have a warrant to inspect a worksite if the employer does not give consent. Section 1904.41 of this final rule involves electronic submission of injury and illness recordkeeping data; no entry of premises or compliance officer decision-making is involved. Thus, the *Barlow's* decision provides very little support for the commenter's sweeping Fourth Amendment objections. *See, Donovan* v. *Lone Steer, Inc.,* 464 U.S. 408, 414 (1984) (reasonableness of a subpoena is not to be determined on the basis of physical entry law, because subpoena requests for information involve no entry into nonpublic areas).

Moreover, the final rule is limited in scope and leaves OSHA with limited discretion. The recordkeeping information required to be submitted is highly relevant to accomplishing OSHA's mission. The submission of recordkeeping data is accomplished through remote electronic transmittal, without any intrusion of the employer's premises by OSHA, and is not unduly burdensome. Also, all of the injury and illness information required to be submitted is taken from records employers are already required to create, maintain, post, and provide to employees, employee representatives, and government officials upon request, which means the employer has a reduced expectation of privacy in the information.

With respect to the issue of enforcement, OSHA disagrees with the Chamber's Fourth Amendment objection that the Agency will target employers ''for any reason'' simply because they submit injury and illness data. Instead, OSHA plans to continue the practice of using a neutral-based scheme for identifying industries for closer inspection. More specifically, the Agency will use the data submitted by employers under this final rule in the same manner OSHA has used data from the ODI over the last 15 years. In the past, OSHA's Site-Specific Targeting (SST) program and Nursing Home and Recordkeeping National Emphasis Programs (NEPs) all used establishment-specific injury and illness rates as selection criteria for inspection. In the future, OSHA plans to analyze the recordkeeping data submitted by employers to identify injury and illness trends and make appropriate decisions regarding enforcement efforts.

OSHA also notes that the Agency currently uses establishment-specific fatality, injury, and illness reports submitted by employers under Section 1904.39 to target enforcement and compliance assistance resources. As with the SST and NEP programs, a neutral-based scheme is used to identify which establishments are inspected and which fall under a compliance assistance program. Accordingly, OSHA's targeting of employers for inspection will not be arbitrary or unconstitutional under the Fourth Amendment.

Due Process

Two commenters raised concerns about the proposed rule potentially violating an employer's due process protection under the Fifth Amendment of the U.S. Constitution. (Exs. 0245, 1360). Andrew Sutton commented ''There is the possibility of a substantial

due process claim lurking here. It is long settled law that ''where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. *Wisconsin* v. *Constantineau,* 400 U.S. 433, 437 (1971). But whether the same due process protections are warranted when government action threatens a business' goodwill is less clear'' (Ex. 0245).

The International Warehouse Logistics Association commented that the proposed rule would deny their members the right to due process:

> Citations will no doubt be issued under this standard for failures to report arguably work related injuries and illnesses accurately. Since the data reported will be published by OSHA, there will be a presumption of guilt attached to those injury reports. The proposed rulemaking acknowledges that this reporting may result in prospective employees and customers shunning businesses who report injuries and illnesses, so clearly the Department contemplates that the reported injuries create a presumption of guilt. Therefore, in every case where the employer is faced with an injury or illness that is not *clearly* recordable—and that is often the case—OSHA will violate an employer's right to due process under the Fifth Amendment of the United States Constitution. This violation of employer due process rights will result from the mandatory recording of injuries and illnesses within six days of their occurrence and their subsequent mandatory electronic reporting. The employer will be subjected to citation for failing to report questionable alleged injuries and illnesses, on the one hand, and will face the prospect of losing customers by reporting, on the other. Given the prospect of the reported injury and illness data being published by OSHA, the proposed rule does not provide a reasonable time frame for the employer to conduct an adequate evaluation of its legal obligations and exposures with respect to each case. And, in each such case, it will be faced with the catch-22 of either losing customers or employees or facing civil penalties. This evaluation and decision will have to be made four times per year and will be particularly onerous in the case of injuries and illnesses that occur in the third month of each quarter (Ex. 1360).

In response, OSHA disagrees with commenters who suggested that this rulemaking will violate an employer's right to due process under the Fifth Amendment. The due process clause of the Fifth Amendment provides that no person shall be ''deprived of life, liberty, or property, without due process of law.'' The case cited above by the commenter, *Wisconsin* v. *Constantineau,* involved the posting of notices in liquor stores forbidding the sale of liquor to designated individuals for one year. A state statute provided for the posting, without notice or hearing, of the names of individuals who had exhibited specified traits, such as becoming ''dangerous to the peace of the community,'' after consuming excessive amounts of alcohol. The Supreme Court held that because the posting of such information would result in harm to an individual's reputation, procedural due process requires notice and an opportunity to be heard. 400 U.S. 433 at 436–437.

In this circumstance, however, OSHA disagrees that the mere posting of injury and illness recordkeeping data on a publicly available Web site will adversely impact an employer's reputation. As the Note to § 1904.0 of OSHA's recordkeeping regulation makes clear, the recording or reporting of a work-related injury, illness, or fatality does not mean that an employer or employee was at fault, that an OSHA rule has been violated, or that the employee is eligible for workers' compensation or other benefits. OSHA currently publishes establishment-specific information on its Web site about reported work-related fatalities and hospitalizations. [*http://www.osha.gov/dep/fatcat/dep_fatcat.html*]; establishment-specific injury and illness rates calculated from the ODI [*http://www.osha.gov/pls/odi/establishment_search.html*]; and OSHA routinely publishes information about citations issued to employers for violations of OSHA standards and regulations. [*http://www.osha.gov/oshstats/index.html*]. Also, other agencies post establishment-specific health and safety data. For example, the Mine Safety and Health Administration (MSHA) publishes coded information about each accident, injury or illness reported to MSHA. The Federal Railroad Administration (FRA) posts headquarters-level Accident Investigation Reports filed by railroad carriers. OSHA also notes that employers have been given notice and an opportunity to comment through this rulemaking process.

With respect to the issue of whether employers have adequate time to record and report injuries and illnesses, § 1904.29(b)(3) of OSHA's recordkeeping regulation provides that employers must enter each recordable injury or illness on the OSHA 300 Log and 301 Incident Report within seven (7) calendar days of receiving information that a recordable injury or illness has occurred. In the vast majority of cases, employers know immediately or within a short time that a recordable case has occurred. In a few cases, however, it may be several days before the employer is informed that an employee's injury or illness meets one or more of the recording criteria. This regulation also allows employers to revise an entry simply by lining it out or amending it if further information justifying the revision becomes available. Accordingly, OSHA believes that the existing seven-calendar-day requirement provides employers with sufficient time to receive information and record a case. OSHA has resources, including information on its Web site at *www.osha.gov/recordkeeping* designed to assist employers in the accurate recording of injuries and illnesses.

Additionally, as explained elsewhere in this document, unlike the proposed rule, the final rule does not require employers to submit their injury and illness data to OSHA on a quarterly basis. The final rule's requirement for the electronic submission of recordkeeping data on an annual basis should reduce the burden on all employers when they make decisions on whether to record certain cases.

Administrative Issues

Public Meeting

A few commenters disagreed with OSHA's decision to hold an informal public meeting for this rulemaking. (Exs. 1332, 1396). Instead, these commenters recommended that, considering both the burden on employers and the far-reaching implications of publishing confidential information, OSHA should have held a formal public hearing pursuant to the Administrative Procedure Act (APA).

OSHA disagrees with these comments. The recordkeeping requirements promulgated under the OSH Act are regulations, not standards. Therefore, this rulemaking is governed by the notice and comment requirements in the APA (5 U.S.C. 553) rather than Section 6 of the OSH Act (29 U.S.C. 655) and 29 CFR part 1911. Section 6(b)(3) of the OSH Act (29 U.S.C. 655(b)(3)) and 29 CFR 1911.11, both of which state the requirement for OSHA to hold a public hearing on proposed rules, only apply to promulgating, modifying or revoking occupational safety and health ''standards.''

Section 553 of the APA, which governs this rulemaking, does not require a public hearing; instead, it states that the agency must ''give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation'' (5 U.S.C. 553(c)). As discussed elsewhere in this document, OSHA held a public meeting

for this rulemaking on January 9 and 10, 2014. OSHA believes that interested parties had a full and fair opportunity to participate in the rulemaking and comment on the proposed rule. OSHA also believes that the written comments submitted during this rulemaking, as well as the information obtained during the public meeting, greatly assisted the Agency in developing the final rule.

Advisory Committee on Construction Safety and Health (ACCSH)

The National Association of Home Builders commented that OSHA must seek input from the Advisory Committee on Construction Safety and Health (ACCSH) during this rulemaking: ''NAHB strongly urges OSHA to seek input from ACCSH to better understand the impacts and consequences of its proposal'' (Ex. 1408).

In response, and as pointed out by NAHB in their comments, ACCSH is a continuing advisory body established under Section 3704, paragraph (d), of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701 *et seq.,* commonly known as the Construction Safety Act), to advise the Secretary of Labor and Assistant Secretary for Occupational Safety and Health in the formulation of construction safety and health standards, and policy matters affecting federally financed or assisted construction. In addition, OSHA's regulation at 29 CFR 1912.3 provides that OSHA must consult with ACCSH regarding the setting of new construction standards under the OSH Act.

OSHA notes that both the Construction Safety Act and 29 CFR 1912.3 only require OSHA to consult with ACCSH regarding the setting of new construction ''standards.'' As discussed above, the requirements in 29 CFR part 1904 are regulations, not standards. In addition, and as discussed elsewhere in this preamble, OSHA did consult and received advice from NACOSH prior to issuing the proposed rule. NACOSH has indicated its support for OSHA's efforts in consultation with NIOSH to modernize the system for collection of injury and illness data to assure that the data are timely, complete, and accurate, as well as accessible and useful to employees, employers, responsible government agencies and members of the public.

Open Government Initiative

In the preamble to the proposed rule, OSHA stated that OSHA plans to post the injury and illness data online, as encouraged by President Obama's Open Government Initiative. *See,* 78 FR 67258. The Initiative includes executive orders, action plans, memoranda, etc., which espouses enhanced principles of open government, transparency and greater access to information.

Two commenters stated that the Open Government Initiative does not support publication of private establishment records (Exs. 1328, 1411). The National Retail Federation (NRF) commented, ''OSHA has inappropriately relied on President Obama's 'Open Government' initiative to support public disclosure of injury and illness records. The Administration's intention and purpose in issuing the Open Government initiative is to foster transparency in *government* actions. The Obama 'Open Government' initiative relates in no way to industry data collected by an agency. Accordingly, the NRF is disappointed that OSHA is attempting to rely on this initiative as justification for its proposal to make private employer information generally available to the public'' (Ex. 1328). The Coalition for Workplace Safety (CWS) provided a similar comment (Ex. 1411).

In response, OSHA notes that in the Memorandum on Transparency and Open Government, issued on January 21, 2009, President Obama instructed the Director of OMB to issue an Open Government Directive. On December 8, 2009, OMB issued a Memorandum for the Heads of Executive Departments and Agencies, Open Government Directive, which requires federal agencies to take steps to ''expand access to information by making it available online in open formats.'' The Directive also states that the ''presumption shall be in favor of openness (to the extent permitted by law and subject to valid privacy, confidentiality, security, or other restrictions).'' In addition, the Directive states that ''agencies should proactively use modern technology to disseminate useful information, rather than waiting for specific requests under FOIA.''

As noted elsewhere in this document, publication of recordkeeping data, subject to applicable privacy and confidentiality laws, will help disseminate information about occupational injuries and illnesses. Access to the data will help employers, employees, employee representatives, and researchers better identify and abate workplace hazards. Accordingly, OSHA believes that publication of injury and illness data on OSHA's Web site is consistent with President Obama's Open Government Initiative.

Privacy and Safeguarding Information

Freedom of Information Act

OSHA received several comments regarding the Freedom of Information Act (FOIA) 5 U.S.C. 552. (Exs. 1207, 1214, 1279, 1382, 1396). Some of these commenters claimed that the proposed rule was ''arbitrary'' and ''capricious'' under the Administrative Procedures Act (APA), 5 U.S.C. 706(2)(A), because OSHA has taken a different position during FOIA litigation. The U.S. Chamber of Commerce commented, ''On numerous occasions, OSHA has asserted that the very information that it now seeks to publish on the internet should not be made public because it includes confidential and proprietary business information. *See, e.g., New York Times Co.* v. *U.S. Dep't of Labor,* 340 F. Supp. 2d 394 (S.D.N.Y. 2004); *OSHA Data/CIH, Inc.* v. *U.S. Dep't of Labor,* 220 F.3d 153 (3d Cir. 2000). Indeed, as recently as 2004, Miriam McD. Miller, OSHA's Co-Counsel for Administrative Law, stated in a sworn declaration that the information contained in what now constitutes OSHA's Forms 300, 300A, and 301 ''is potentially confidential commercial information because it corresponds with business productivity.''Decl. of Miriam McD. Miller ¶ 5, *New York Times Co.* v. *U.S. Dep't of Labor,* 340 F. Supp. 2d 394 (S.D.N.Y. 2004) (No. 03 Civ. 8334), ECF No. 16 (attached as Exhibit A).''

The Chamber went on to comment, ''OSHA and the Chamber's position are, or at least were, the same: Total hours worked at individual establishments is confidential and proprietary information. *See New York Times Co.,* 340 F. Supp. 2d at 402. Indeed, in the *New York Times Co.* case, OSHA asserted that this number was not only confidential information, but had the capacity to ''cause substantial competitive injury.'' *Id.* (citing Dep't of Labor Mem. of Law, Ex. B at 17). This is because, as OSHA itself argued, the total hours worked by a company's employees ''corresponds with business productivity,'' Dep't of Labor Mem. of Law, Ex. B at 4, and could be used ''to calculate a business['s] costs and profit margins,'' *id.* at 17 (citing *Westinghouse Elec. Corp.* v. *Schlesinger,* 392 F. Supp. 1264, 1249 (E.D. Va. 1976), *aff'd,* 542 F.2d 1190 (4th Cir. 1976)). The confidentiality problems relating to hours worked are only exacerbated in this Proposed Rule by OSHA's insistence on collecting and publishing this information on an establishment-by-establishment basis, *including the number of employees at each establishment.* Armed with total hours worked plus an establishment's employee count, a business' overall capacity and productivity can easily be determined'' (Ex. 1396).

NAM commented, ''Under the Freedom of Information Act (FOIA),

certain documents are exempt from public disclosure. 5 U.S.C. 552. Exemption 4 protects 'a trade secret or privileged or confidential commercial or financial information obtained from a person.' 5 U.S.C. 552(b)(4). The NAM and its members believe employee hours worked on the OSHA Form 300A is confidential business information, because that information gives insight into the state of a business at any given time and creates a competitive harm. As such, this information is entitled to protection from disclosure to the public under FOIA, which would be consistent with how OSHA has historically treated employee hours worked'' (Ex. 1279). The American Petroleum Institute (API) made a comment similar to NAM (Ex. 1214).

In response, OSHA notes that, as discussed in the preamble to the proposed rule, the information required to be submitted by employers under this final rule is not of a kind that would include confidential commercial information. The Secretary carefully considered the issues addressed in the *New York Times* case, and concluded that the information on the OSHA recordkeeping forms, including the number of employees and hours worked at an establishment, is not confidential commercial information. *See,* 78 FR 67263. The decision in *New York Times,* along with the decision in *OSHA Data,* was based on the requirements in OSHA's previous recordkeeping regulation. Prior to 2001, employers were not required to record the total number of hours worked by all employees on the OSHA forms.

Many employers already routinely disclose information about the number of employees at an establishment. Since 2001, OSHA's recordkeeping regulation has required employers to record information about the average annual number of employees and total number of hours worked by all employees on the OSHA Form 300A. Section 1904.35 also requires employers to disclose to employees, former employees, and employee representatives non-redacted copies of the OSHA Form 300A. In addition, § 1904.32(a)(4) requires employers to publicly disclose information about the number of employees and total number of hours worked through the annual posting of the 300A in the workplace for three months from February 1 to April 30.

In the *New York Times* decision, the court concluded that basic injury and illness recordkeeping data regarding the average number of employees and total number of hours worked does not involve confidential commercial information. *See,* 350 F. Supp. 2d 394 at 403. The court held that competitive harm would not result from OSHA's release of lost workday injury and illness rates of individual establishments, from which the number of employee hours worked could theoretically be derived. *Id.* at 402–403. Additionally, the court explained that most employers do not view injury and illness data as confidential. *Id.* at 403.

As noted by commenters, during the *New York Times* litigation, the Secretary argued that the injury and illness rates requested in the FOIA suit could constitute commercial information under Exemption 4 of FOIA, 5 U.S.C. 552(b)(4). However, in the years since this decision, the Secretary has reconsidered his position. Since 2004, in response to FOIA requests, it has been OSHA's policy to release information from the Form 300A on the annual average number of employees and the total hours worked by all employees during the past year at an establishment. Thus, there was a statement in the preamble to the proposed rule explaining that the Secretary no longer believes the injury and illness information entered on the OSHA recordkeeping forms constitutes confidential commercial information. Accordingly, since the *New York Times* decision in 2004, OSHA has had a consistent policy concerning the release of information on the OSHA Form 300A.

Sarah Wilensky commented that OSHA is required under FOIA to disclose much of the data it accesses from an inspection or visit to a covered establishment, and that this obligation would not change if OSHA receives information as part of this rulemaking. (Ex. 1382). This commenter also suggested that, similar to other information in OSHA's possession, employers' commercially valuable information submitted as part of this rulemaking should be subject to exemption for trade secrets under FOIA (Ex. 1382). Another commenter, MIT Laboratories, commented that FOIA is not of much use as a standard to protect privacy in this rule (Ex. 1207).

OSHA agrees with the commenters who suggested that recordkeeping information collected as part of this final rule should be posted on the Web site in accordance with FOIA. As discussed in the preamble to the proposed rule, the publication of specific data elements will in part be restricted by the provisions of FOIA. [78 FR 67259]. Currently, when OSHA receives a FOIA request for employer recordkeeping forms, the Agency releases all data fields on the OSHA 300A annual summary, including the annual average number of employees and total hours worked by employees during the year. With respect to the OSHA 300 Log, because OSHA currently obtains part 1904 records during onsite inspections, the Agency applies Exemption 7(c) of FOIA to withhold from disclosure information in Column B (the employee's name). (Note that OSHA will not collect or publish Column B under this final rule.) FOIA Exemption 7(c) provides protection for personal information in law enforcement records. [5 U.S.C. 552(b)(7)(c)]. OSHA currently uses Exemption 7(c) to withhold personal information included in Column B as well as other columns of the 300 Log. For example, OSHA would not disclose the information in Column C (Job Title), if such information could be used to identify the injured or ill employee.

Similarly, OSHA uses FOIA exemptions to withhold from disclosure Fields 1 through 9 on the OSHA 301 Incident Report. Fields 1 through 9 (the left side of the 301) includes personal information about the injured or ill employee as well as the physician or other health care professional. (Note that under this final rule, OSHA will not collect or publish Field 1 (employee name), Field 2 (employee address), Field 6 (name of treating physician or health care provider), or Field 7 (name and address of non-workplace treating facility). All fields on the right side of the 301 (Fields 10 through 18) are generally released by OSHA in response to a FOIA request.

OSHA generally uses FOIA Exemption 7(c) to withhold from disclosure any personally identifiable information included anywhere on the three OSHA recordkeeping forms. For example, although information in Field 15 of the 301 incident report (Tell us how the injury occurred) is generally released in response to a FOIA request, if that data field includes any personally-identifiable information, such as a name or Social Security number, OSHA will apply Exemption 6 or 7(c) and not release that information. FOIA Exemption 6 protects information about individuals in ''personnel and medical and similar files'' when the disclosure of such information ''would constitute a clearly unwarranted invasion of personal privacy.'' [5 U.S.C. 552(b)(6)].

Additionally, OSHA currently uses FOIA Exemption 4 to withhold from disclosure information on the three recordkeeping forms regarding trade secrets or privileged or confidential commercial or financial information. [5 U.S.C. 552(b)(4)]. However, it is OSHA's experience that the inclusion of trade

secret information on recordkeeping forms is extremely rare. OSHA's recordkeeping regulation does not require employers to record information about, or provide detailed descriptions of, specific brands or processes that could be considered confidential commercial information. In any event, employers will have an opportunity to inform OSHA that submitted data may contain PII or confidential commercial information.

Again, OSHA wishes to emphasize that it will post injury and illness recordkeeping information collected by this final rule consistent with FOIA.

Privacy Act

Several commenters raised concerns about a possible conflict between the proposed rule and the Privacy Act of 1974, 5 U.S.C. 552a. (Exs. 1113, 1342, 1359, 1370, 1393). The American Farm Bureau Federation (AFBF) commented, ''OSHA must consider the privacy interests of farmers' names and home contact information and is obligated under federal law to do a review under the Privacy Act'' (Ex. 1113). The Society of the Plastics Industry, Inc. (SPI) commented, ''[G]iven the nature of the information that may be filed in the Section 1904 forms, OSHA's obligation to redact any personally identifiable medical information from those forms, and the fact that it will be infeasible to OSHA to meet that obligation, OSHA is precluded by the Federal Privacy Act from issuing the rule'' (Ex. 1342). Ashok Chandran made a similar comment (Ex. 1393).

In response, OSHA notes that the Privacy Act regulates the collection, maintenance, use, and dissemination of personal identifiable information by federal agencies. Section 552a(e)(4) of the Privacy Act requires that all federal agencies publish in the **Federal Register** a notice of the existence and character of their systems of records. The Privacy Act permits the disclosure of information about individuals without their consent pursuant to a published routine use where the information will be used for a purpose that is comparable to the purpose for which the information was originally collected.

The Privacy Act only applies to records that are located in a ''system of records.'' As defined in the Privacy Act, a system of records is ''a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.'' *See,* 5 U.S.C. 552a(a)(5). Because OSHA injury and illness records are retrieved neither by the name of an individual, nor by some other personal identifier, the Privacy Act does not apply to OSHA injury and illness recordkeeping records. As a result, the Privacy Act does not prevent OSHA from posting recordkeeping data on a publicly-accessible Web site. However, OSHA again wishes to emphasize that, consistent with FOIA, the Agency does not intend to post personally identifiable information on the Web site.

Trade Secrets Act

The Coalition for Workplace Safety (CWS) commented that publication of information contained in the 300, 300A, and 301 forms would be a violation of 18 U.S.C. 1905—*Disclosure of confidential information generally,* which makes it a criminal act for government officials to disclose information concerning or relating to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, loses, or expenditures of any person, firm, partnership, corporation, or association (Ex. 1411).

OSHA notes that the Trade Secrets Act, 18 U.S.C. 1905, states: ''Whoever, being an officer or employee of the United States, . . . publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties . . . or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential status, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; . . . shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.''

As discussed elsewhere in this document, the information required to be submitted under the final rule is not of a kind that would include confidential commercial information. The information is limited to the number and nature of recordable injuries or illnesses experienced by employees at particular establishments, and the data necessary to calculate injury/illness rates, *i.e.,* the number of employees and the hours worked at an establishment. Details about a company's products or production processes are generally not included on the OSHA recordkeeping forms, nor do the forms request financial information. The basic employee safety and health data required to be recorded do not involve trade secrets, and public availability of such information would not enable a competitor to obtain a competitive advantage. Accordingly, the posting of injury and illness recordkeeping data online by OSHA is not a release of confidential commercial information, and therefore is not a violation of the Trade Secrets Act. In some limited circumstances, the information recorded in compliance with part 1904 may contain commercial or financial information. OSHA considers such information to be potentially confidential, and, as appropriate, follows the procedures set forth in 29 CFR 70.26, which require OSHA to contact the employer which submitted the information prior to any potential release under FOIA Exemption 4, 5 U.S.C. 552(b)(4). Additionally, Section 15 of the OSH Act protects the confidentiality of trade secrets. 29 U.S.C. 664. Under this final rule, it will be OSHA policy not to post confidential commercial or financial information on the publicly available Web site. The case description information solicited in questions 14 through 17 on OSHA's Form 301 is broad in nature and does not call for detailed descriptions that include personal or commercially confidential information. The examples provided on the form for fields 14 and 15 include ''spraying chlorine from hand sprayer'' and ''worker was sprayed with chlorine when gasket broke during replacement''. OSHA will add additional guidance to these instructions to inform employers not to include personally identifiable information (PII) or confidential business information (CBI) within these fields.

Confidential Commercial Information

Multiple commenters stated that the proposed rule would require employers to submit proprietary and confidential business data to OSHA (Exs. 0057, 0160, 0171, 0179, 0205, 0218, 0224, 0240, 0251, 0252, 0257, 0258, 1084, 1090, 1091, 1092, 1093, 1111, 1112, 1113, 1116, 1123, 1192, 1193, 1195, 1196, 1197, 1198, 1199, 1205, 1209, 1214, 1216, 1217, 1218, 1219, 1225, 1272, 1275, 1276, 1279, 1318, 1323, 1326, 1328, 1332, 1333, 1334, 1336, 1338, 1343, 1349, 1356, 1359, 1366, 1367, 1370, 1372, 1386, 1392, 1394, 1396, 1397, 1399, 1408, 1411, 1415, 1426, 1427, 1430). In addition to the comments addressed above regarding the average number of employees and total hours worked by employees, commenters expressed concern about the confidentiality of other data on the

OSHA recordkeeping forms. IPC–Association Connecting Electronics Industries made a specific comment that ''the requirement in column F [OSHA 300 Log] to disclose the ''object/substance that directly injured or made person ill'' creates a mechanism that could lead to disclosure of intellectual property to competitors, both foreign and domestic, especially in research and development facilities'' (Ex. 1334). Darren Snikrep commented, ''The plan to provide public access to the data means a loss of privacy for employers and may adversely affect an employer's ability to obtain work'' (Ex. 0057). Similarly, the Louisiana Farm Bureau commented, ''The proposed rule states that the company's executive's signature, title, telephone number, the establishment's name and street address, industry description, SIC or NAICS code and employment information including annual average number of employees, total hours worked by all employees will all be non-protected information that is readily available to the public via the OSHA data portal and downloadable to anyone. This invites targeting of employers that may have no basis on actual workplace safety. We strongly feel that an employer's information identified with OSHA reporting should be kept private, the same as the privacy afforded workers under the proposed OSHA rule.'' (Ex. 1386).

On the other hand, the Associated General Contractors of Michigan commented that recordkeeping data are not proprietary and confidential business information: ''Companies with over 20 employees during the reporting year must electronically report annually using the OSHA 300A Summary Form. This type of reporting would not be a burden on employers and would avoid 'privacy issues', but would provide enough information for a more effective enforcement effort'' (Ex. 0250). J. Wilson made a similar comment (Ex. 0238).

In response, OSHA again wishes to emphasize that it is not the Agency's intention to post proprietary or confidential commercial information on the publicly-accessible Web site. The purpose for the publication of recordkeeping data under this final rule is to disseminate information about occupational injuries and illnesses. OSHA agrees with commenters who stated that recordkeeping data generally do not include proprietary or commercial business information. Specifically, information on the 300A annual summary, such as the establishment's name, business address, and NAICS code, are already publicly available.

As discussed above, OSHA is prohibited from releasing proprietary or confidential commercial information under FOIA Exemption 4. The term ''confidential commercial information'' means ''records provided to the government by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), because its disclosure could reasonably be expected to cause substantial competitive harm.'' *See,* Executive Order 12600, *Predisclosure notification procedures for confidential commercial information.* [June 23, 1987]. Additionally, because recordkeeping data will be posted on a publicly-accessible Web site, when recording injuries and illnesses at their establishment, OSHA encourages employers not to enter confidential commercial information on the recordkeeping forms.

Submission of Personally Identifiable Information and Employee Privacy

OSHA received several comments in support of electronic submission of part 1904 data with personally identifiable information (PII) (Exs. 0208, 1106, 1211, 1350, 1354, 1381, 1382, 1387, 1395). Many commenters commented that federal and state agencies require electronic submission of health and safety data without the misuse of personal identifiers (Exs. 0208, 1106, 1211, 1350, 1354, 1381, 1382, 1387, 1395). For example, the Department of Workplace Standards, Kentucky Labor Cabinet commented that they do ''not foresee misuse of the information; other agencies require electronic submission of similar data and have accomplished the requirement without misuse of personal identifiers'' (Ex. 0208). Sarah Wilensky, the Service Employees International Union (SEIU) and the California Department of Industrial Relations (DIR), Office of the Director provided similar comments (Exs. 1382, 1387, 1395).

The American Public Health Association (APHA) commented that OSHA's sister agency, the Mine Safety and Health Administration (MSHA), ''has collected and posted on its Web site far more detailed and comprehensive information on work-place injuries than is being proposed by OSHA'' (Ex. 1354). The AFL–CIO and the International Brotherhood of Teamsters provided similar comments (Exs. 1350, 1381).

However, there were also many comments opposing employer submission of certain data from the OSHA Form 300 and 301. Thoron Bennett commented that OSHA should not ''collect [employee] names from OSHA 300 or 301 logs'' (Ex. 0035). The International Association of Drilling Contractors (IADC) provided a similar comment (Ex. 1199).

The Phylmar Regulatory Roundtable commented that employers should ''not be required to submit information including names, dates of birth, addresses, Social Security Number, etc. . . . Requiring electronic submissions containing PII to OSHA unnecessarily creates an opportunity for private information to accidentally become public'' (Ex. 1110). The U.S. Poultry & Egg Association, Huntington Ingalls Industries—Newport News Shipbuilding, and Melinda Ward provided similar comments (Exs. 1109, 1196, 1223). Huntington Ingalls Industries—Newport News Shipbuilding also commented that employees could ''have the ability to opt out of having their personally identifiable information provided to OSHA'' (Ex. 1196).

MIT Laboratories commented that ''OSHA should consider developing a toolkit or educational materials to help employers identify information that poses a re-identification risk in their workplace records, especially if OSHA expect [sic] that its recordkeeping forms will continue to elicit textual descriptions of injuries and illnesses in the future. Such materials could help mitigate the risk that employers will include identifying information in the form'' (Ex. 1207).

OSHA partially agrees with commenters who stated that employers should submit their data to OSHA with PII about employees included on the 300 and 301 forms. In many cases, PII entered on the OSHA recordkeeping forms includes important information that the Agency uses for activities designed to increase workplace safety and health and prevent occupational injuries and illnesses, including outreach, compliance assistance, enforcement, and research. As discussed elsewhere in this preamble, other government agencies are able to handle vary large amounts of PII, and OSHA will follow accepted procedures and protocols to prevent the release of such information.

However, for some data fields, OSHA does not consider the data from these fields necessary to meet the various stated goals of the data collection. These fields primarily exist to help people doing incident investigations at the establishment. Collecting data from these fields would not add to OSHA's or any other user's ability to identify establishments with specific hazards or elevated injury and illness rates.

Therefore, OSHA has decided in this final rule to exclude from the submittal requirements several fields on the OSHA Forms 300 and 301 to minimize any potential release or unauthorized access to these data. The data elements are:

- Log of Work-Related Injuries and Illnesses (OSHA Form 300): Employee name (column B).
- Injury and Illness Incident Report (OSHA Form 301): Employee name (field 1), employee address (field 2), name of physician or other health care professional (field 6), facility name and address if treatment was given away from the worksite (field 7).

Additionally, several commenters expressed concern about the potential public release of personal information about employees from the OSHA recordkeeping forms. (Exs. 0171, 0189, 0209, 0210, 0215, 0250, 0253, 1091, 1113, 1199, 1201, 1206, 1207, 1276, 1329, 1359, 1370, 1386, 1408, 1410). These commenters stated that the OSHA recordkeeping forms contain private and highly confidential employee information, including medical information. Some commenters also raised concerns about previous OSHA rulemakings. For example, the National Association of Home Builders (NAHB) commented, ''OSHA has made specific findings related to privacy interest of employees and the utility of making certain recordkeeping forms public. Having done so, OSHA must explain why it is deviating from its past practice and positions . . . OSHA is required to comply with the Administrative Procedure Act and provide a reasoned explanation for this change of policy, starting by recognizing past policy and a justification for the change. OSHA has not done so here and failure to do so here makes this change arbitrary and capricious'' (Ex. 1408).

A few commenters suggested that OSHA should balance the public interest of disclosure with the employee's right to privacy (Exs. 1279, 1408, 1411). NAM commented:

> In the **Federal Register** publishing the final rule to the Part 1904 revisions, OSHA acknowledged the existence of a U.S. Constitutional right of privacy in personal information. In doing so, OSHA cited to various U.S. Supreme Court and federal circuit court decisions that have suggested that such a right exists. 66 FR at 6054. *See, e.g., Whalen* v. *Roe,* 429 U.S. 588 (1977), *Nixon* v. *Adm'r of General Services,* 433 U.S. 425 (1977), *Paul* v. *Verniero,* 170 F.3d 396, 402 (3d Cir. 1999), *Norman-Bloodsay* v. *Lawrence Berkeley Lab.,* 135 F.3d 1260, 1269 (9th Cir. 1998).
>
> Further, OSHA recognized that ''information about the state of a person's health, including his or her medical treatment, prescription drug use, HIV status and related matters is entitled to privacy protection'' and that ''there are few matters that are quite so personal as the status of one's health, and few matters the dissemination of which one would prefer to maintain greater control over.'' 66 FR at 6054. OSHA went on to acknowledge that ''[t]he right to privacy is not limited to medical records. Other types of records containing medical information are also covered.'' *Id.* at 6055. (citations omitted).
>
> After recognizing that a right of privacy exists and is entitled to protection, OSHA applied a balancing test—weighing the individual's interest in confidentiality against the public interest in disclosure to employees and representatives. *Id.* After lengthy analysis, OSHA concluded that allowing employees access to information contained on the Form 301 served a legitimate public interest—that is helping employees to protect themselves from future injuries or illness.
>
> The proposed regulation discussed in these comments, ignores this right of privacy and abandons any type of balancing test. OSHA does not allege any reasons that making such information available to the public outweighs the privacy interests of the individual employees. Merely redacting an employee's name does not provide sufficient protection from the release, even inadvertently, of other personally identifiable information or medical information that employees maintain a privacy interest in (Ex. 1279).

Other commenters raised a specific concern about the release of personal information in the agricultural industry, where many families live on farms where they work (Exs. 1113, 1359, 1370, 1386). Commenters stated that, under the proposed rule, a publicly-searchable database will include information about farmers' names, their home address, as well as other home contact information. These commenters also emphasized that the proposed rule would lead to serious security and privacy concerns that OSHA has not addressed.

Additionally, the American Health Care Association/National Center for Assisted Living (AHCA/NCAL) asked whether the proposed rule would compromise the privacy of patients in the health care industry. This commenter stated that they assist and care for people and that this involves day-to-day interactions with patients, residents, and their families—''who expect that their privacy will be protected and that personal information about them or their conditions will not be broadcast on OSHA's Web page'' (Ex. 1194).

In response, OSHA disagrees with commenters who suggested that the Agency is deviating from its past practice regarding recordkeeping information and the privacy interest of employees. In the preamble to the 2001 final rule revising the part 1904 recordkeeping regulation, OSHA explained that it has historically recognized that the OSHA 300 Log and 301 Incident Report may contain information that an individual would wish to remain confidential. [66 FR 6055]. OSHA also acknowledged that although the entries on the 300 Log are typically brief, they may contain medical information, including diagnosis of specific illnesses. *Id.* However, OSHA concluded that disclosure of the Log and Incident Report to employees, former employees, and their representatives benefits these employees generally by increasing their awareness and understanding of the safety and health hazards in the workplace. Thus, current § 1904.35, *Access to records,* permits employees, former employees, and employee representatives access to information on the OSHA recordkeeping forms. As the 2001 preamble makes clear, OSHA authorized this right of access after balancing the privacy rights of individuals with the public interest for disclosure. In addition, the 2001 preamble states that OSHA does not have the statutory authority to prevent the disclosure of private information once the records are in the possession of employees, former employees and their representatives. [66 FR 5056].

OSHA acknowledges commenters' concerns about the potential posting of private employee information on a publicly-accessible Web site. However, the posting or disclosure of private or confidential information has never been the intent of this rulemaking. OSHA believes it has effective safeguards in place to prevent the disclosure of personal or confidential information contained in the recordkeeping forms and submitted to OSHA. Specifically, as discussed above, OSHA will neither collect nor publish the following information:

- Log of Work-Related Injuries and Illnesses (OSHA Form 300): Employee name (column B).
- Injury and Illness Incident Report (OSHA Form 301): Employee name (field 1), employee address (field 2), name of physician or other health care professional (field 6), facility name and address if treatment was given away from the worksite (field 7).

Also, OSHA's recordkeeping regulation at § 1904.29(b)(10) prohibits the release of employees' names and personal identifiers related to ''privacy concern cases.'' OSHA will also withhold from publication all of the information on the left-hand side of the OSHA 301 Incident Report that is submitted to OSHA (employee date of birth (Field 3), employee date hired

(Field 4), and employee gender (Field 5)). All of the information on the right hand side (Fields 10 through 18) will generally be posted on the Web site (after it is scrubbed for PII). Finally, because the OSHA 300A Annual Summary does not contain any personally-identifiable information, all of the fields on the OSHA 300A Annual Summary will be posted.

OSHA also acknowledges that certain data fields on the OSHA 300 and 301 may contain personally-identifiable information. It has been OSHA's experience that information entered in Column F of the 300 Log may contain personally-identifiable information. For example, when describing an injury or illness, employers sometimes include names of employees. As a result, OSHA plans to review the information submitted by employers for personally-identifiable information. As part of this review, the Agency will use software that will search for, and de-identify, personally identifiable information before the submitted data are posted.

In response to commenters who expressed concern about the posting of personal information from family farms, OSHA notes that it is extremely unlikely that personal information from family farms will be collected or posted under this final rule. Section 1904.41(a)(1) of the final rule requires only establishments with 250 or more employees to submit information from the three OSHA recordkeeping forms. In addition, § 1904.41(a)(2) of the final rule makes clear that only establishments in designated industries with 20 more employees, but fewer than 250 employees, must submit information from the OSHA 300A annual summary. As a result, in most cases, family farms will not be required to submit injury and illness recordkeeping data to OSHA under this final rule.

As discussed elsewhere in this preamble, under § 1904.41(a)(3) of the final rule, some employers with 19 or fewer employees (including small farms) may be required to submit their injury and illness recordkeeping data to OSHA. Farm address and contact information is already commercially available, and the information can be purchased from such companies as D&B and Experian. Also, address and contact information for small farms that have been inspected by OSHA is already on the Agency's public Web site.

A number of commenters suggested that, even though OSHA intended to delete employee names and other identifying information, enough information would remain in the published data for the public to identify the injured or ill employee (Exs. 0189, 0211, 0218, 0224, 0240, 0241, 0242, 0252, 0253, 0258, 1084, 1090, 1092, 1093, 1109, 1113, 1122, 1123, 1190, 1192, 1194, 1197, 1198, 1199, 1200, 1205, 1206, 1207, 1209, 1214, 1217, 1218, 1219, 1223, 1272, 1273, 1275, 1276, 1279, 1318, 1321, 1322, 1323, 1326, 1327, 1331, 1333, 1334, 1336, 1338, 1342, 1343, 1348, 1349, 1353, 1355, 1356, 1359, 1360, 1370, 1372, 1376, 1378, 1386, 1389, 1392, 1394, 1396, 1397, 1399, 1402, 1408, 1410, 1411, 1412, 1415, 1417, 1427, 1430). Some of these commenters were specifically concerned about the anonymity of injured or ill employees working at small establishments located in small communities. For example, commenters noted that information such as type of injury or illness, date and location of injury or illness, type of body part injured, treatment, and job title, could be used to identify the employee.

In response, OSHA notes that the final rule requires only establishments with 250 or more employees to submit information from all three OSHA recordkeeping forms. The Agency believes it is less likely that employees in such large establishments will be identified based on the posted recordkeeping data. By contrast, establishments with 20 to 249 employees that are required to submit recordkeeping data under this final rule are only required to submit their OSHA 300A annual summary. As discussed above, the OSHA Form 300A includes only aggregate injury and illness data from a specific establishment.

Safeguarding Collected Information

OSHA received multiple comments on the issue of safeguarding the information collected under this final rule. Several commenters commented that OSHA should use and specify procedures for cybersecurity measures to protect confidential information (Exs. 1210, 1333, 1334, 1364, 1409). For example, IPC—Association Connecting Electronics Industries commented that ''IPC is concerned about the security of the injury and illness data reported to OSHA. IPC asks OSHA to specify the security measures that will be used to protect sensitive information'' (Ex. 1334).

MIT Laboratories commented more generally about the misuse of collected data. They stated that there is a lack of ''mechanisms that would provide accountability for harm arising from misuse of disclosed data . . . Accountability mechanisms should enable individuals to find out where data describing them has been distributed and used, set forth penalties for misuse, and provide harmed individuals with a right of action'' (Ex. 1207). The American Road and Transportation Builders Association (ARTBA) provided a similar comment (Ex. 1409).

In response, when OSHA develops the data collection system, the Agency plans to maintain two data repositories in the system: One as OSHA's data mart (or warehouse) for prescribed data behind a secure firewall, and a separate but similarly secured repository of data that has been verified as scrubbed and available for public access. Both systems will have multi-tiered access controls, and the internal system will specifically be designed to limit access to PII to as few users as possible. In addition, OSHA will consider the possible need to encrypt sensitive data in the data mart repository as a safeguard, so that data would be scrubbed (and rendered unreadable and useless) in the case of unauthorized access. Also, as discussed above, OSHA will not collect data from certain fields that primarily exist to help people doing incident investigations at the establishment and that would not add to OSHA's or any other user's ability to identify establishments with specific hazards or elevated injury and illness rates.

Additionally, NAM commented that, in the preamble to the 2001 final rule, OSHA acknowledged the inability to protect personal information in part 1904: ''In 2001, OSHA acknowledged that the agency had no means of protecting against unwarranted disclosure of private information contained in an employer's injury and illness records or that there were sufficient safeguards in place to protect against misuse of private information. But more importantly, OSHA acknowledged that ''[t]he right to collect and use [private] data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures.'' 66 FR at 6056.'' (Ex. 1279). Other commenters commented that there is no assurance that OSHA will be able to protect the privacy of the employee once the recordkeeping data is submitted (Exs. 0187, 1217, 1275).

In response, OSHA disagrees with commenters who suggested the Agency will not be able to protect employee information. As discussed above, two ways OSHA can protect the privacy of employee information are by not collecting certain information and by not releasing personally identifiable information on the publicly-accessible Web site. With respect to safeguarding the information submitted by employers, OSHA is strongly committed

to maintaining the confidentiality of the information it collects, as well as the security of its computer system. All federal agencies are required to establish appropriate administrative and technical safeguards to ensure that the security of all media containing confidential information is protected against unauthorized disclosures and anticipated threats or hazards to their security or integrity. Regardless of the category of information, all Department of Labor agencies must comply with the Privacy and Security Statement posted on DOL's Web site. As part of its efforts to ensure and maintain the integrity of the information disseminated to the public, DOL's IT security policy and planning framework is designed to protect information from unauthorized access or revision and to ensure that the information is not compromised through corruption or falsification.

Posting of the annual summary in the workplace is not public disclosure.

The International Association of Amusement Parks (IAAP) commented that OSHA only addressed the privacy concern by stating in the preamble to the proposed rule that an employer already has the obligation to publish recordkeeping data when they post the OSHA 300A. IAAP commented, however, that ''[t]his posting of the annual summary data by an employer is not comparable to posting injury and illness data on a searchable, publicly accessible database. Employers can post the annual summary data on employee bulletin boards which are typically not located in places where the public has access'' (Ex. 1427). The American Fuel & Petroleum Association (AFPA) also noted that ''[w]ith respect to posting annual summary data, the information stays within the place of employment. Even if an employee decides to distribute the information, the reach would probably be limited to the immediate, surrounding area'' (Ex. 1336).

In response, OSHA notes that one of the objectives of this rulemaking is to produce a wider public dissemination of information about recordable occupational injuries and illnesses. The Annual Summary does not include personally-identifiable information, and the posting of the information on the Web site should not involve privacy or confidentiality concerns. With respect to the posting on the Web site of information from the 300 Log and 301 Incident Report for establishments with 250 or more employees, such posting will not include personally-identifiable information. Again, the goal of the final rule is to disseminate injury and illness data, not to disseminate personal information about employers or employees.

Privacy Concern Cases

Some commenters raised concerns about the proposed rule and the protection of personally identifiable employee information included in ''privacy concern cases'' (Exs. 0150, 1207, 1279, 1335, 1339). Under OSHA's existing recordkeeping regulation, § 1904.29(b)(6)) requires employers to withhold the injured or ill employee's name from the 300 Log for injuries and illnesses defined as ''privacy concern cases.'' Section 1904.29(b)(7) defines privacy concern cases as those involving (i) an injury or illness to an intimate body part or the reproductive system; (ii) an injury or illness resulting from a sexual assault; (iii) a mental illness; (iv) a work-related HIV infection, hepatitis case, or tuberculosis case; (v) needlestick injuries and cuts from sharp objects that are contaminated with another person's blood or other potentially infectious material, or (vi) any other illness, if the employee independently and voluntarily requests that his or her name not be entered on the log. Additionally, § 1904.29(b)(10) includes provisions addressing employee privacy if the employer decides voluntarily to disclose the OSHA 300 and 301 forms to persons other than those who have a mandatory right of access under § 1904.35. The paragraph requires employers to remove or hide employees' names or other personally identifiable information before disclosing the forms to persons other than government representatives, former employees, or authorized representatives, as required by §§ 1904.40 and 1904.35, except in three cases. The employer may disclose the forms, complete with personally-identifiable information, only to: (i) An auditor or consultant hired by the employer to evaluate the safety and health program; (ii) the extent necessary for processing a claim for workers' compensation or other insurance benefits; or (iii) a public health authority or law enforcement agency for uses and disclosures for which consent, an authorization, or opportunity to agree or disagree or object is not required under 45 CFR 164.512 (Privacy Rule).

In its comments, NAM stated that OSHA failed to address how § 1904.29(b)(6)–(10) would be affected by the proposed rule. NAM commented that there may be differences between employers and OSHA as to what is considered personally identifiable information.

Assume that an employer voluntarily provides its OSHA Forms 300 and 301 to an outside safety and health organization. In choosing to do so, the employer is required to redact the employees' names and ''other personally identifying information.'' Depending on a variety of factors, the employer chooses to redact certain information, including job titles and dates of injuries. Yet, months later when OSHA receives this employer's injury and illness records *it* decides to only redact the employees' names. The safety and health organization could put both sets of data together—something OSHA seems to want to encourage—and the safety and health organization could conceivably identify various individuals. Using this information, the safety and health organization contacts the employee. In many instances, the employee may not want to be contacted or have their information used and disseminated any further, constituting an unwarranted and ongoing invasion of the employee's privacy (Ex. 1279).

Additionally, Portland Cement commented: ''The Agency has not shown the regulated community in this proposal what a revised Form 300, if developed, would show, and explicit wording in the proposed 1904.41 would require the employee's name to be shown in the electronic submission to OSHA. Because the Agency has clearly defined ''privacy concern cases'' in part 1904.29(b)(6) for when employers may keep confidential the identity of the injured or ill employee, there are concerns about why OSHA did not more clearly and explicitly address naming the employee in the proposed electronic submission requirement found in proposed 1904.41, and why the Agency did not provide a revised OSHA Form 300 for review in the proposed regulation'' (Ex. 1335).

In response, OSHA agrees with commenters who stated that the confidentiality of privacy concern cases is extremely important. The requirements in existing § 1904.29(b)(6) through (10) were issued by OSHA in 2001 as a result of the Agency's strong commitment to protect the identity of employees involved in privacy concern cases. As discussed above, the final rule requires employers at establishments with 250 or more employees to submit information about the employee and the employee's injury/illness recorded on the 300 and 301 forms, except employee name and address, treating physician name, and treating facility name and address. This includes the information related to privacy concern cases. Since OSHA will have the relevant information from the forms, employers are not required to submit the confidential list of privacy concern cases.

Also as discussed above, OSHA will not collect or post information from Column B (the employee's name) from the 300 Log or from Fields 1, 2, 6, or 7 from the 301 Incident Report. In addition, OSHA will not post information from Fields 3 through 5 of the 301 Incident Report. Information in items 14 through 17 will be scrubbed for PII before being released publicly. This will ensure that information about an employee's name, address, date of birth, date hired, and gender is not disclosed. OSHA also does not intend to post any other information on the Web site that could be used to identify an individual. Additionally, OSHA will conduct a special review of submitted privacy concern case information to ensure that the identity of the employee is protected.

With respect to NAM's comment regarding the definition of ''personally-identifiable information,'' OSHA uses the definition provided in the May 22, 2007, OMB Memorandum for the Heads of Executive Departments and Agencies, ''Safeguarding Against and Responding to the Breach of Personally Identifiable Information.'' The term ''personally-identifiable information'' refers to information which can be used to distinguish or trace an individual's identify, such as their name, Social Security number, biometric records, etc. alone, or when combined with other personal or identifying information which is linked or linkable to a specific individual, such as date and place of birth, mother's maiden name, etc. Based on this definition, certain information included on the OSHA recordkeeping forms is personally identifiable information. For example, an employee's name, address, date of birth, date hired, and gender would be personally identifiable information and not subject to posting on the publicly-accessible Web site as establishment-specific data. (However, note that OSHA will not collect information about the employee's name or address under this final rule.)

Other information included on the OSHA forms may also be personally identifiable information. As mentioned by a commenter, depending on the circumstances at a specific establishment, the information in Column C (Job Title) from the 300 Log could be used to identify an employee who was involved in a privacy concern case. In fact, OSHA's current recordkeeping Frequently Asked Question (FAQ) 29–3 permits an employer to delete information (such as Job Title) if they believe it will identify the employee. However, OSHA also believes that because only establishments with 250 or more employers will be required to submit the OSHA 300 Log and 301 Incident Report, it is less likely that information related to Job Title can be used to identify an employee.

OSHA further notes that comments that suggested additional categories for privacy concern cases are not within the scope of this rulemaking. Any revision to existing § 1904.29(b)(6) through (10) would require separate notice and comment rulemaking.

Confidential Information Protection and Statistical Efficiency Act

Several commenters stated that the online posting of covered employers injury and illness recordkeeping data violates the Confidential Information Protection and Statistical Efficiency Act of 2002 (CIPSEA) (Pub. L. 107–347, December 17, 2002) (Exs. 1225, 1392, 1399). These commenters noted that CIPSEA prohibits BLS from releasing establishment-specific injury and illness data to the general public or to OSHA, and that OSHA has not adequately addressed how the release of part 1904 information under this rulemaking is consistent with the Congressional mandate expressed in the law.

Two commenters also stated that publishing data from the OSHA recordkeeping forms would circumvent Congress's intent from 2002 (Exs. 1193, 1430). These commenters noted that data on the 300 and 301 forms are already reported to BLS, and when Congress passed CIPSEA, it made the determination that such information should be confidential and prohibited BLS from releasing establishment-specific data to the general public or to OSHA.

In response, OSHA notes that CIPSEA provides strong confidentiality protections for statistical information collections that are conducted or sponsored by federal agencies. The law prevents the disclosure of data or information in identifiable form if the information is acquired by an agency under a pledge of confidentiality for exclusively statistical purposes. *See,* section 512(b)(1). BLS, whose mission is to collect, process, analyze, and disseminate statistical information, uses a pledge of confidentiality when requesting occupational injury and illness information from respondents under the BLS Survey.

The provisions of CIPSEA apply when a federal agency both pledges to protect the confidentiality of the information it acquires and uses the information only for statistical purposes. Conversely, the provisions of CIPSEA do not apply if information is collected or used by a federal agency for any non-statistical purpose. As noted elsewhere in this document, the information collected and published by OSHA in the final rule will be used for several purposes, including for the targeting of OSHA enforcement activities. Therefore, the CIPSEA confidentiality provisions are not applicable to the final rule.

Data Quality Act

Peter Strauss commented that OSHA is entitled to collect the workplace injury and illness records as prescribed by the proposed rule, but the Data Quality Act assures against the mishandling of such data (Ex. 0187). Another commenter, Society of Plastics Industry, Inc., commented: ''Let us assume, solely for purposes of further analysis, and contrary to its stated purpose, that the publication of this information was designed solely to inform affected employers and employees of workplace incidents, and implicitly workplace conditions, so they could take remedial and/or preventive measures to prevent incidents from happening again. OSHA would be publishing information that has not been investigated or otherwise verified through appropriate quality controls, that would be misleading (in that it would be published without any meaningful context and in a manner designed to convey employer responsibility notwithstanding any accompanying disclaimers), and that may very well contain personal identifiers or personally identifiable information that could effectively result in the unlawful disclosure of personal medical information. This type of publication would conflict with the goals of the OSH Act, the requirements of the Data Quality Act, and the requirements of the applicable privacy laws'' (Ex. 1342).

In response, OSHA notes that the Data Quality Act, or Information Quality Act, was passed by Congress in Section 115 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658). The Act directs the Office of Management and Budget (OMB) to issue government-wide guidelines that ''provide policy and procedural guidance to federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by federal agencies.'' The Act also requires other federal agencies to publish their own implementation guidelines that include ''administrative mechanisms allowing affected persons to seek and obtain correction of information maintained

and disseminated by the agency'' that does not comply with the guidelines issued by OMB. The Department of Labor issued its implementing guidelines on October 1, 2002. [*http://www.dol.gov/informationquality.htm*]. The purpose of these guidelines is to establish Departmental guidelines for implementing an information quality program at DOL and to enhance the quality of information disseminated by DOL.

The DOL Guidelines state that ''dissemination'' includes agency initiated or sponsored distribution of information to the public.'' It does not include ''agency citations to or discussion of information that was prepared by others and considered by the agency in the performance of its responsibilities, unless an agency disseminates it in a manner that reasonably suggests that the agency agrees with the information.'' OSHA notes that it will make no determination as to whether the Agency agrees with the recordkeeping information electronically submitted under the final rule. In addition, with the exception of redacting personally identifiable information, OSHA will not amend the raw recordkeeping data submitted by employers. As a result, the provisions of the Information Quality Act, as well as the DOL information quality guidelines, do not apply to the recordkeeping information posted on the public Web site.

Although the provisions of the Information Quality Act do not apply, OSHA still wishes to emphasize that, as part of its efforts to ensure accuracy, the Agency encourages affected employers, employees, and other individuals to seek and obtain, where appropriate, correction of recordkeeping data posted on the public Web site. OSHA believes that in most cases, informal contacts with the Agency will be appropriate. However, OSHA will also make available on its Web site a list of officials to whom requests for corrections should be sent and where and how such officials may be contacted. The purpose of this correction process is to address inaccuracies in the posted information, not to resolve underlying substantive policy or legal issues.

Health Insurance Portability and Accountability Act

Several commenters raised concerns about whether the proposed rule would hinder individual privacy rights under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104–191. Some of these commenters stated that the HIPAA privacy regulation at 45 CFR parts 160 and 164 (Privacy Rule), prohibits OSHA from public disclosure of personally-identifiable health information. Other commenters expressed the concern that employers would be in violation of the Privacy Rule if this rulemaking requires them to submit protected health information to OSHA (Exs. 0218, 0224, 0240, 0252, 1084, 1093, 1109, 1111, 1123, 1197, 1200, 1205, 1206, 1210, 1214, 1217, 1218, 1223, 1272, 1275, 1279, 1331, 1338, 1342, 1362, 1370, 1386, 1402, 1408).

In response, OSHA notes that on December 28, 2000, the U.S. Department of Health and Human Services (HHS) issued a final rule, *Standard for Privacy of Individually-Identifiable Health Information* (65 FR 82462). The rule was modified on August 14, 2002 (67 FR 53182), which is codified at 45 CFR parts 160 and 164. Collectively known as the ''Privacy Rule,'' these standards protect the privacy of individually identifiable health information (''protected health information'' or ''PHI''), but is balanced to ensure that appropriate uses and disclosures of PHI still may be made when necessary to treat a patient, to protect the nation's public health, and for other critical purposes. A covered entity may not use or disclose protected health information unless permitted by the Privacy Rule. *See,* 45 CFR 164.502.

As required by HIPAA, the provisions of the Privacy Rule only apply to ''covered entities.'' The term ''covered entity'' includes health plans, health care clearinghouses, and health care providers who conduct certain financial and administrative transactions electronically. *See,* 45 CFR 160.103. OSHA notes that the Agency does not fall within the definition of a covered entity for purposes of the Privacy Rule. Therefore, the use and disclosure requirements of the Privacy Rule do not apply to OSHA, and do not prevent the Agency from publishing injury and illness recordkeeping information under this final rule.

Additionally, OSHA agrees with commenters who suggested that the Agency consider applying the principles set forth in the Privacy Rule for the de-identification of health information. OSHA believes that health information is individually identifiable if it does, or potentially could, identify the individual. As explained by commenters, once protected health information is de-identified, there may no longer be privacy concerns under HIPAA. Again, it is OSHA's policy under the final rule not to release any individually-identifiable information. As discussed elsewhere in this document, procedures are in place to ensure that individually-identifiable information, including health information, will not be publicly posted on the OSHA Web site.

With respect to the issue of whether HIPAA prevents covered entities from disclosing PHI to employers, and/or directly to OSHA, the Agency notes that the Privacy Rule specifically includes several exemptions for disclosures of health information without individual authorization. Of particular significance, is 45 CFR 164.512—*Uses and disclosures for which authorization or opportunity to agree or object is not required.* These standards, in themselves, do not compel a covered entity to disclose PHI. Instead, they merely permit the covered entity to make the requested disclosure without obtaining authorization from affected individuals. Section 164.512(a) of the Privacy Rule permits covered entities to use and disclose PHI, without authorization, when they are required to do so by another law. HHS has made clear that this disclosure encompasses the full array of binding legal authorities, including statutes, agency orders, regulations, or other federal, state or local governmental actions having the effect of law. *See,* 65 FR 82668. As a result, the Privacy Rule does not allow a covered entity to restrict or refuse to disclose PHI required by an OSHA standard or regulation.

A covered entity may also disclose PHI without individual authorization to ''public health authorities'' and to ''health oversight agencies.'' *See,* 45 CFR 164.512(b) and (d). The preamble to the Privacy Rule specifically mentions OSHA as an example of both. *See,* 65 FR 82492, 82526.

The Privacy Rule also permits a covered entity who is a member of the employer's workforce, or provides health care at the request of an employer, to disclose to employers protected health information concerning work-related injuries or illnesses or work-related medical surveillance in situations where the employer has a duty under the OSH Act, the Mine Act, or under a similar state law to keep records on or act on such information. Section 164.512(b)(1)(v)(C) specifically permits a covered entity to use or disclose protected health information if the employer needs such information in order to comply with obligations under 29 CFR parts 1904 through 1928.

Americans With Disabilities Act

The New York Farm Bureau (NYFB) commented that the Americans with Disabilities Act of 1990 (ADA), 42

U.S.C. 12101 *et seq.* prohibits the release of health and disability-related information (Ex. 1370). NYFB specifically requested that OSHA explain how compliance with the electronic reporting requirement can be accomplished while meeting the requirements of the ADA.

In response, OSHA notes that Section 12112(d)(3)(B) of the ADA permits an employer to require a job applicant to submit to a medical examination after an offer of employment has been made but before commencement of employment duties, provided that medical information obtained from the examination is kept in a confidential medical file and not disclosed except as necessary to inform supervisors, first aid and safety personnel, and government officials investigating compliance with the ADA. Section 12112(d)(4)(C) requires that the same confidentiality protection be accorded health information obtained from a voluntary medical examination that is part of an employee health program.

By its terms, the ADA requires confidentiality for information obtained from medical examinations given to prospective employees, and from medical examinations given as part of a voluntary employee health program. The OSHA injury and illness records are not derived from pre-employment or voluntary health programs. The information in the OSHA injury and illness records is similar to that found in workers' compensation forms, and may be obtained by employers by the same process used to record needed information for workers' compensation and insurance purposes. The Equal Employment Opportunity Commission (EEOC), the agency responsible for administering the ADA, recognizes a partial exception to the ADA's strict confidentiality requirements for medical information regarding an employee's occupational injury or workers' compensation claim. *See* EEOC Enforcement Guidance: Workers' Compensation and the ADA, 5 (September 3, 1996). Therefore, it is not clear that the ADA applies to the OSHA injury and illness records.

Even assuming that the OSHA injury and illness records fall within the literal scope of the ADA's confidentiality provisions, it does not follow that a conflict arises. The ADA states that ''nothing in this Act shall be construed to invalidate or limit the remedies, rights, and procedures of any federal law.'' *See,* 29 U.S.C. 12201(b). In enacting the ADA, Congress was aware that other federal standards imposed requirements for testing an employee's health, and for disseminating information about an employee's medical condition or history, determined to be necessary to preserve the health and safety of employees and the public. *See,* H.R. Rep. No. 101–485 pt. 2, 101st Cong., 2d Sess. 74–75 (1990), reprinted in 1990 U.S.C.C.A.N. 356, 357 (noting, *e.g.* medical surveillance requirements of standards promulgated under OSH Act and federal Mine Safety and Health Act, and stating ''[t]he Committee does not intend for [the ADA] to override any medical standard or requirement established by federal . . . law . . . that is job-related and consistent with business necessity''). *See also,* 29 CFR part 1630 App. p. 356. The ADA recognizes the primacy of federal safety and health regulations; therefore such regulations, including mandatory OSHA recordkeeping requirements, pose no conflict with the ADA. *Cf. Albertsons, Inc.* v. *Kirkingburg,* 527 U.S. 555, (1999) (''When Congress enacted the ADA, it recognized that federal safety and health rules would limit application of the ADA as a matter of law.'').

The EEOC has also recognized both in the implementing regulations at 29 CFR part 1630, as well as in interpretive guidelines, that the ADA yields to the requirements of other federal safety and health standards and regulations. The implementing regulation codified at 29 CFR 1630.15(e) explicitly states that an employer's compliance with another federal law or regulation may be a defense to a charge of violating the ADA.

Additionally, the EEOC Technical Assistance Manual on the ADA states that the ''ADA does not override health and safety requirements established under other Federal laws . . . For example, . . . Employers also must conform to health and safety requirements of the U.S. Occupational Safety and Health Administration (OSHA).'' For these reasons, OSHA does not believe that the mandatory submission and publication requirements in § 1904.41 of this final rule conflict with the confidentiality provisions of the ADA.

Other Issues

Alternate Forms

Some commenters commented that the requirement for electronic submission of part 1904 injury and illness data will lead to the elimination of alternate or equivalent recordkeeping forms by employers (Exs. 1385, 1399). Littler Mendelson, P.C. commented: ''Many employers utilize equivalent forms—particularly insurance and accident investigation forms in place of the Form 301. In establishing a requirement for electronic reporting in a particular software format OSHA will be mandating the use of a specific form and eliminating the widespread use of equivalent forms by employers. This change has not been identified or evaluated (benefits, or lack thereof) under the Paperwork Reduction Act provisions applicable to this rulemaking. Littler believes that the incremental benefit (if any) proposed in this rulemaking is significantly outweighed by the increased paperwork duplication which would be created by the use of mandatory forms and elimination of equivalent forms'' (Ex. 1385).

In response, OSHA notes that existing § 1904.29(a) provides that employers must use the OSHA 300 Log, 301 Incident Report, and 300A Annual Summary, or equivalent forms, when recording injuries and illnesses under part 1904. Section 1904.29(b)(4) states that an equivalent form is one that has the same information, is as readable and understandable, and is completed using the same instructions as the OSHA form it replaces. OSHA is aware that many employers use an insurance form instead of the 301 Incident Report, or supplement an insurance form by adding any additional information required by OSHA.

As discussed above, under the final rule, employers have two options for submitting recordkeeping data to OSHA's secure Web site. First, employers can directly enter data in a web form. Second, employers will be provided with a means of electronically transmitting the information, including information from equivalent forms, to OSHA. This is similar to how BLS collects data from establishments under the SOII. Accordingly, the final rule does not change the option for employers to use alternate or equivalent forms when recording OSHA injuries and illnesses.

No Fault Recordkeeping Policy

There were many comments that the proposed rule would reverse OSHA's long-standing ''no fault'' recordkeeping policy (Exs. 0160, 0174, 0179, 0192, 0218, 0224, 0240, 0251, 0255, 1084, 1091, 1092, 1093, 1109, 1113, 1123, 1191, 1192, 1194, 1197, 1199, 1200, 1214, 1218, 1272, 1273, 1276, 1279, 1323, 1324, 1328, 1329, 1334, 1336, 1338, 1342, 1343, 1349, 1359, 1370, 1386, 1391, 1394, 1397, 1399, 1401, 1411, 1427). For example, the Coalition for Workplace Safety commented that ''[i]n 2001, OSHA revised the recordkeeping requirements and the foundation of those revisions in what

OSHA deemed a ''no-fault'' system . . . For a variety of reasons OSHA concluded that a ''geographic'' presumption was the most comprehensive way to achieve Congress's objective for determining work-related injuries and illness. However, at the same time, OSHA recognized that the ''geographic'' presumption did not necessarily correlate to an employer's behavior and therefore injuries and illness that were beyond an employer's control would be recorded . . . [n]ow, OSHA intends to use this no-fault system to target employers for enforcement efforts, to shame employers into compliance, to allow members of the public to make decisions about with which companies to do business, and to allow current employees to compare their workplaces to the ''best'' workplaces for safety and health. This proposed regulation fundamentally upends the no-fault system that OSHA originally adopted in 2001'' (Ex. 1411). The International Association of Drilling Contractors (IADC) also commented that ''the presumption under the NPRM is that all injuries or illnesses are preventable, suggesting all incidents are the fault of the employer. The proposal essentially turns the ''no fault'' reporting system into one where employers will be blamed for idiosyncratic events arising as a result of forces beyond their control or actions by workers in direct contravention of workplace rules. This is a clear abandonment of the ''no-fault'' system in favor of OSHA's controversial and counterproductive ''regulation by shaming'' enforcement doctrine. Surprisingly, OSHA fails to even acknowledge its reversal, or provide any justification or an analysis for this significant change'' (Ex. 1199).

In response, OSHA disagrees with commenters who commented that the Agency has reversed its ''no fault'' recordkeeping policy. The Note to § 1904.0 of OSHA's existing recordkeeping regulation continues to provide that the recording or reporting of a work-related injury, illness, or fatality does not mean that an employer or employee was at fault, that an OSHA rule has been violated, or that the employee is eligible for workers' compensation or other benefits. As noted elsewhere in this preamble, the purpose of this rulemaking is to improve workplace safety and health through the collection of useful, accessible, establishment-specific injury and illness data to which OSHA currently does not have direct, timely, and systematic access. The information acquired through this final rule will assist employers, employees, employee representatives, researchers, and the government to better identify and correct workplace hazards.

OSHA also disagrees with commenters who suggested that the Agency will use the ''no fault'' recordkeeping system to target employers for enforcement efforts. As discussed elsewhere in this preamble, and consistent with the Agency's longstanding practice, OSHA will use a neutral administrative plan when targeting employers for onsite inspection, similar to how the Agency has administered enforcement activities under the Site-Specific Targeting program.

Section 1904.41(a)(3) Seems To Give OSHA Unlimited Power

Andrew Sutton commented that the language in proposed § 1904.41(a)(3) appears to give OSHA ''unfettered discretion.'' This section would have provided that upon notification, you must electronically send to OSHA or OSHA's designee the requested information, at the specified time interval, from the records that you keep under part 1904. According to the commenter, this section might be seen to give too much power to OSHA for *ad hoc* data collection: ''In fact, the authority contained in this section could be said to make the whole rest of 1904.41 redundant; OSHA could enact the whole rest of the proposed regulation via the power granted here.'' (Ex. 0245).

In response, OSHA notes that, like the proposed rule, § 1904.41(a)(3) of the rule requires that, upon request, employers must electronically submit their OSHA part 1904 records to OSHA or OSHA's designee. This section replaces OSHA's existing regulation at § 1904.41, *Annual OSHA injury and illness survey of ten or more employers.* In recent years, OSHA has used the authority in § 1904.41 to conduct surveys through the OSHA Data Initiative (ODI).

It has never been OSHA's intention to exercise unfettered discretion when collecting injury and illness records. Like the existing regulation, § 1904.41(a)(3) of the final rule provides OSHA with authority to conduct surveys of employers regarding their occupational injuries and illnesses. Historically, the information collected through these surveys has assisted OSHA in identifying trends in workplace hazards, evaluating the effectiveness of OSHA enforcement activities, and gathering information for the promulgation of new occupational safety and health standards and regulations.

OSHA further notes that data collection under final § 1904.41(a)(3) would be subject to the Paperwork Reduction Act, which provides that federal agencies generally cannot conduct or sponsor a collection of information, and the public is not required to respond to an information collection, unless it is approved by OMB and displays a valid OMB Control Number. Also, pursuant to the PRA, notice of information collections must be published in the **Federal Register**. As a result, employers will be able to determine which employers are within a survey group and which information will be collected each year before the survey begins. Once a survey has been given an OMB control number under the PRA, any substantive or material modification would require a new PRA clearance.

In addition, final § 1904.41(b)(7) provides that employers who are partially exempt from keeping injury and illness records under existing §§ 1904.1 and/or 1904.2 are required to submit recordkeeping data only if OSHA notifies them they will be required to participate in a particular information collection under § 1904.41(a)(3). OSHA will notify these employers in writing in advance of the year for which injury and illness records will be required.

D. The Final Rule

The final rule is similar to the proposed rule in requiring employers to electronically submit part 1904 records to OSHA. However, there are also several differences from the proposed rule. The major differences between the final rule and the proposed rule include the following:

1. In the final rule, establishments with 250 or more employees that are required to keep part 1904 records must electronically submit some of the information from the three recordkeeping forms that they keep under part 1904 (OSHA Form 300A Summary of Work-Related Injuries and Illnesses, OSHA Form 300 Log of Work-Related Injuries and Illnesses, and OSHA Form 301 Injury and Illness Incident Report) to OSHA or OSHA's designee once a year. In the proposed rule, these establishments would have been required to electronically submit all of the information from the OSHA Form 300 and OSHA Form 301 quarterly, and electronically submit all of the information from the OSHA Form 300A annually.

2. In the final rule, for establishments with 20 to 249 employees, the list of designated industries who must report in appendix A to subpart E of part 1904

is based on a three-year average of BLS data from 2011, 2012, and 2013. In the proposed rule, the list of designated industries in appendix A to subpart E of part 1904 would have been based on one year of BLS data from 2009.

Under the final rule, employers have the following requirements:

1. § 1904.41(a)(1)—Establishments with 250 or more employees that are required to keep part 1904 records must electronically submit the required information from the three recordkeeping forms that they keep under part 1904 (OSHA Form 300A Summary of Work-Related Injuries and Illnesses, OSHA Form 300 Log of Work-Related Injuries and Illnesses, and OSHA Form 301 Injury and Illness Incident Report) to OSHA or OSHA's designee annually. This information must be submitted no later than March 2 of the year after the calendar year covered by the form. The establishments are not required to submit the following information:

a. Log of Work-Related Injuries and Illnesses (OSHA Form 300): Employee name (column B).

b. Injury and Illness Incident Report (OSHA Form 301): Employee name (field 1), employee address (field 2), name of physician or other health care professional (field 6), facility name and address if treatment was given away from the worksite (field 7).

2. § 1904.41(a)(2)—Establishments with 20–249 employees that are classified in a designated industry listed in appendix A to subpart E of part 1904 must electronically submit the required information from the OSHA Form 300A annually to OSHA or OSHA's designee. This information must be submitted no later than March 2 of the year after the calendar year covered by the form.

3. § 1904.41(a)(3)—Establishments must electronically submit the requested information from their part 1904 records to OSHA or OSHA's designee after notification from OSHA.

Overall, the final rule's provisions requiring regular electronic submission of injury and illness data will allow OSHA to obtain a much larger database of timely, establishment-specific information about injuries and illnesses in the workplace. This information will help OSHA use its resources more effectively by enabling OSHA to identify the workplaces where workers are at greatest risk. This information will also help OSHA establish a comprehensive database that the Agency, researchers, and the public can use to identify hazards related to reportable events and to identify industries and processes where these hazards are prevalent. The change from quarterly to annual reporting of information from OSHA Form 300 and OSHA Form 301 by establishments with 250 or more employees will also lessen the burden of data collection on both employers and OSHA.

Note that OSHA will phase in implementation of the data collection system. In the first year, all establishments required to routinely submit information under the final rule will be required to submit only the information from the Form 300A (by July 1, 2017). In the second year, all establishments required to routinely submit information under the final rule will be required to submit all of the required information (by July 1, 2018). This means that, in the second year, establishments with 250 or more employees that are required to routinely submit information under the final rule will be responsible for submitting information from the Forms 300, 301, and 300A. In the third year, all establishments required to routinely submit under this final rule will be required to submit all of the required information (by March 2, 2019). This means that beginning in the third year (2019), establishments with 250 or more employees will be responsible for submitting information from the Forms 300, 301, and 300A, and establishments with 20–249 employees in an industry listed in appendix A to subpart E of part 1904 will be responsible for submitting information from the Form 300A by March 2 each year. This will provide sufficient time to ensure comprehensive outreach and compliance assistance in advance of implementation.

In addition, consistent with E.O. 13563, OSHA plans to conduct a retrospective review, once the Agency has collected three full years of data. OSHA will use the findings of the retrospective review to assess the electronic submission requirements in the final rule and modify them as appropriate and feasible.

IV. Section 1902.7—Injury and Illness Recording and Reporting Requirements

In 1997, OSHA issued a final rule at § 1904.17, *OSHA Surveys of 10 or More Employers* that required employers to submit occupational injury and illness data to OSHA when sent a survey form. The § 1904.17 rule enabled the Agency to conduct a mandatory survey of the 1904 data, which was named the OSHA Data Initiative (ODI). When OSHA issued the 1997 rule, the Agency determined that the States were not required to adopt a rule comparable to the federal § 1904.17 rule (62 FR 6441).

In 2001, § 1952.4(d) (now § 1902.7(d)) was added to the final rule to continue to provide the States with the flexibility to participate in the OSHA Data Initiative under the federal requirements or the State's own regulation (66 FR 5916–6135). At its outset, Federal OSHA conducted the OSHA data collection in all of the states, including those which administered approved State Plans. However, Federal OSHA then began to collect data only in the State-Plan States that wished to participate. The current § 1902.7(d) allowed the individual States to decide, on an annual basis, whether or not they would participate in the OSHA data collection. If the State elected to participate, the State could either adopt and enforce the requirements of current § 1904.41 as an identical or more stringent State regulation, or could defer to the federal regulation and federal enforcement with regard to the mandatory nature of the survey. If the State deferred to the current federal § 1904.41 regulation, OSHA's authority to implement the ODI was not affected either by operational agreement with a State-Plan State or by the granting of final State-Plan approval under section 18(e).

In this rulemaking, the proposed rule would have required State-Plan States to adopt requirements identical to those in 29 CFR 1904.41 in their recordkeeping and reporting regulations as enforceable State requirements, as provided in section 18(c)(7) of the OSH Act. The data collected by OSHA as authorized by § 1904.41 would have been made available to the State-Plan States. Nothing in any State Plan would have affected the duties of employers to comply with § 1904.41.

Three State-Plan States submitted comments on the proposed rule—Kentucky (Ex. 208), North Carolina (Ex. 1195), and California (Ex. 1395). However, they did not comment specifically on this part of the proposed rule. OSHA also did not receive any other comments on this part of the proposed rule.

The final rule is the same as the proposed rule. State-Plan States must adopt requirements identical to those in 29 CFR 1904.41 in their recordkeeping and reporting regulations as enforceable State requirements, as provided in section 18(c)(7) of the OSH Act. OSHA will make the data collected by OSHA under this final rule available to the State Plan States. Nothing in any State plan will affect the duties of employers to comply with § 1904.41.

V. Section 1904.35 and Section 1904.36

A. Background

One of the goals of the final rule is to ensure the completeness and accuracy

of injury and illness data collected by employers and reported to OSHA. Therefore, § 1904.35 of the final rule contains three new provisions that promote complete and accurate reporting of work-related injuries and illnesses by requiring employers to provide certain information on injury and illness reporting to employees, clarifying that employer reporting procedures must be reasonable, and prohibiting employers from retaliating against employees for reporting work-related injuries and illnesses, consistent with the existing prohibition in section 11(c) of the OSH Act.

In the initial comment period and at the public meeting, many commenters expressed concern that the public availability of OSHA data would motivate some employers to under-record injuries and illnesses, in part by attempting to reduce the number of recordable injuries and illness their employees report to them. *See, e.g.,* Exs. 0114, 1327, 1647, 1648, 1651, 1675, 1695. Exs. 0165, 01–09–2014 Tr. at 54–55; 01–10–2014 Tr. at 52–55. In addition, commenters in both comment periods pointed to numerous studies finding that under-recording is already a serious issue. *See, e.g.,* Exs. 1675, 1679, 1685, 1695. OSHA concludes that the rulemaking record supports these concerns. Therefore, this final rule includes provisions intended to promote accurate recording of work-related injuries and illnesses by preventing the under-recording that arises when workers are discouraged from reporting these occurrences. The rule also establishes an additional mechanism for OSHA to enforce the existing statutory prohibition on employer retaliation against employees.

Specifically, the rule makes three changes to §§ 1904.35 and 1904.36 consistent with the proposed changes set forth in the August 14, 2014 Supplemental Notice of Proposed Rulemaking. The final rule (1) requires employers to inform employees of their right to report work-related injuries and illnesses free from retaliation; (2) clarifies the existing implicit requirement that an employer's procedure for reporting work-related injuries and illnesses must be reasonable and not deter or discourage employees from reporting; and (3) prohibits employers from retaliating against employees for reporting work-related injuries or illnesses, consistent with the existing prohibition in section 11(c) of the OSH Act.

The final rule also makes a technical edit to § 1904.35(a)(3) to clarify that the rights of employees and their representatives to access injury and illness records are governed by § 1904.35(b)(2). Section 1904.35(a)(3) does not alter any of the substantive rights or limitations contained in § 1904.35(b)(2).

B. The Proposed Rule

On January 9 and 10, 2014, OSHA held a public meeting to discuss the November 8, 2013 Notice of Proposed Rulemaking. Many meeting participants expressed concern that the proposal to publish establishment-specific injury and illness data on OSHA's publicly available Web site might cause an increase in the number of employers that adopt policies or practices that have the effect of discouraging or deterring employees from reporting, including policies that result in retaliation against employees who report work-related injuries and illnesses. *See, e.g.,* Exs. 0165, 01–09–2014 Tr. at 33–40. Such policies and practices, when successful in deterring employee reporting, would undermine the benefits of the rule by compromising the accuracy of records and result in injustice for employees who do report their work-related injuries and illnesses and then suffer retaliation for doing so. OSHA seeks to ensure that employers, employees, and the public have access to the most accurate data possible about injuries and illnesses in workplaces so that they can take the most appropriate steps to protect worker safety and health.

Therefore, on August 14, 2014, OSHA issued a Supplemental Notice of Proposed Rulemaking to address this issue. OSHA requested comment on ''whether to amend the proposed rule to (1) require that employers inform their employees of their right to report injuries and illnesses; (2) require that any injury and illness reporting requirements established by the employer be reasonable and not unduly burdensome; and (3) prohibit employers from taking adverse action against employees for reporting injuries and illnesses.''

Some commenters took issue with procedural aspects of the supplemental notice to the propose rule. A few commenters asserted that the supplemental notice to the proposed rule denied the public the opportunity to meaningfully comment because it did not include proposed regulatory text and was not specific enough about what conduct was to be prohibited. Exs. 1566, 1650. However, under the Administrative Procedure Act, proposed regulatory text is not required; agencies must only include ''either the terms or substance of the proposed rule or a description of the subjects and issues involved.'' 5 U.S.C. 553(b)(3). Here, the proposal explained the substance of the proposed rule and the subjects and issues involved. In addition, the specificity and detail of the comments OSHA received indicate that commenters understood the issues under discussion. Furthermore, as discussed below, the final regulatory text closely tracks the concepts and language used in the proposal, meaning the proposal provided sufficient notice to the public of the conduct to be prohibited. *See Chocolate Mfrs. Ass'n* v. *Block,* 755 F.2d 1098, 1105 (4th Cir. 1985) (notice is sufficient as long as the final rule is a ''logical outgrowth'' from the notice). Therefore, the supplemental notice to the proposed rule provided adequate notice for commenters.

Other commenters, including the American Coatings Association, stated that the amendments suggested by the supplemental proposal were outside the scope of the original November 8, 2013 proposal (Ex. 1548). OSHA agrees that these changes to §§ 1904.35 and 1904.36 were outside the scope of the original proposal. That is why OSHA published a supplemental proposal and extended the public comment period. The final amendments to §§ 1904.35 and 1904.36 are within the scope of the supplemental proposal, and are therefore permissible under the Administrative Procedure Act.

C. The Final Rule

The final rule includes three new provisions in § 1904.35. These provisions follow directly and logically from the August 14, 2014 Supplemental Notice of Proposed Rulemaking. First, the final rule amends paragraphs (a)(2) and (b)(1)(iii) to require employers to inform employees of their right to report work-related injuries and illnesses free from retaliation. Second, paragraph (b)(1)(i) of the final rule clarifies that the reporting method already implicitly required by this section must be reasonable and not deter or discourage employees from reporting. And third, paragraph (b)(1)(iv) of the final rule prohibits employers from retaliating against employees for reporting work-related injuries or illnesses under section 1904.35 consistent with the existing prohibition contained in section 11(c) of the OSH Act.

Section 1904.35, Paragraphs (a)(2) and (b)(1)(iii): Employee Information on Reporting

The final rule strengthens paragraph (a) of § 1904.35 by expanding the previous requirement for employers to inform employees how to report work-related injuries and illnesses so that the rule now includes a mandate to inform

employees that they have a right to report work-related injuries and illnesses free from retaliation by their employer as described in paragraph (b)(1)(iii) of the final rule. OSHA has determined that this enhanced information-provision requirement will improve employee and employer understanding of their rights and responsibilities related to injury and illness reporting and thereby promote more accurate reporting.

The rulemaking record supports OSHA's determination that requiring employers to inform employees of their reporting rights will improve the quality of employers' injury and illness records. Commenters provided numerous examples and studies showing that many employees avoid reporting injuries and illnesses because they are afraid that doing so will result in retaliation. For example, Lipscomb *et al.* (2012) found that many carpenters' apprentices avoided reporting injuries and filing workers compensation claims because they feared discipline, termination, or other adverse action. Exs. 1648, 1675, 1695. Other researchers discovered similar fears among a variety of worker populations. *See, e.g.,* Moore *et al.* (2013) (construction), Southern Poverty Law Center and Alabama Appleseed (2013) (poultry processing), Nebraska Appleseed (2009) (meatpacking), Lashuay and Harrison (2006) (California low-wage workers), Scherzer *et al.* (2005) (hotel room cleaners), Pransky *et al.* (1999) (manufacturing) (Exs. 1648, 1675, 1685, 1695). *See also* below regarding actual retaliation against workers for reporting work-related injuries and illnesses. A 2009 survey by the U.S. Government Accountability Office (GAO) found that two thirds of occupational health practitioners observed worker fear of disciplinary action for reporting workplace injuries and illnesses (Exs. 1675, 1695). Although some commenters questioned whether underreporting is a real problem, the examples and studies cited above have convinced OSHA that employee fear of retaliation is a real barrier to reporting of work-related injuries and illnesses and that the information-provision requirements in the final rule will allay workers' fear of retaliation and lead to more accurate reporting.

Section 1904.35(b)(1)(i): Reasonable Reporting Procedures

The final rule amends paragraph (b)(1)(i) of § 1904.35 to state explicitly that employer procedures for employee reporting of work-related illnesses and injuries must be reasonable. The previous version of § 1904.35(b)(1)(i) already required employers to set up a way for employees to report work-related injuries and illnesses promptly. The final rule adds new text to clarify that reporting procedures must be reasonable, and that a procedure that would deter or discourage reporting is not reasonable, as explained in a 2012 OSHA enforcement memorandum. *See* OSHA Memorandum re: *Employer Safety Incentive and Disincentive Policies and Practices* (Mar. 12, 2012). Although the substantive obligations of employers will not change, the final rule will have an important enforcement effect for the minority of employers who do not currently have reasonable reporting procedures.

The rulemaking record supports OSHA's decision to include these clarifying revisions to paragraph (b)(1)(i) in the final rule. Commenters cited studies suggesting that employees are deterred from reporting injuries and illnesses where the procedure for doing so is too difficult. For example, Scherzer *et al.* (2005) found that many hotel room cleaners failed to report work-related pain to management because it took too many steps to do so (Ex. 1695). The revisions to paragraph (b)(1) clarify that such unduly burdensome reporting procedures would violate the final rule.

Commenters also raised concerns about rigid prompt-reporting requirements in place at some workplaces that have resulted in employee discipline for late reporting even though employees could not reasonably have reported their injuries or illnesses earlier. *See, e.g.,* Exs. 1675, 1679, 1695, 1696. Several of these commenters highlighted issues related to musculoskeletal disorders because such disorders develop over time and therefore cannot be reported immediately after an individual incident. The comment by the AFL–CIO (Ex. 1695) typifies the views of these commenters:

> Many employers have policies that require the immediate reporting of a work-related injury by the worker, and for some employers failure to follow this requirement will result in discipline, regardless of the circumstances. In some cases workers may be unaware that they have suffered an injury, since the pain or symptoms do not manifest until later . . . This is particularly true for musculoskeletal injuries. The worker reports the injury when they recognize it has occurred, but are disciplined because the reporting did not occur until after the event that caused the injury occurred.

OSHA shares these concerns. Employer reporting requirements must account for injuries and illnesses that build up over time, have latency periods, or do not initially appear serious enough to be recordable. The United Food and Commercial Workers International Union provides several examples of food processing workers receiving discipline for ''late'' reporting where it was not reasonable to have expected the injured employee to report earlier. In one such case, a worker reported shoulder and neck pain that had developed gradually due to work-related repetitive motions beginning one week earlier. Although there was no single incident that precipitated the injury, the worker received a ''final warning'' for failure to ''timely report an injury'' (Ex. 1679). This policy was not reasonable because it did not allow for reporting within a reasonable time after the employee realized that he or she had suffered a work-related injury.

OSHA disagrees with comments that express support for employers who require immediate reporting of injuries and illnesses on the grounds that such requirements are necessary for accurate recordkeeping, to prevent fraud, and to address injuries before they get worse (Exs. 1449, 1658, 1663). OSHA recognizes that employers have a legitimate interest in maintaining accurate records and ensuring that employees are reporting genuine work-related injuries and illnesses in a reasonably prompt manner. These interests, however, must be balanced with fairness to employees who cannot reasonably discover their injuries or illnesses within a rigid reporting period and with the overriding objective of part 1904 to ensure that all recordable work-related injuries and illnesses are recorded. Accordingly, for a reporting procedure to be reasonable and not unduly burdensome, it must allow for reporting of work-related injuries and illnesses within a reasonable timeframe after the employee has realized that he or she has suffered a work-related injury or illness.

A few commenters questioned whether reporting of work-related injuries and illnesses is properly characterized as an employee right, as opposed to an employee obligation. The Act provides that employees and employers ''have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions.'' 29 U.S.C. 651(b)(2). Part 1904 imposes the obligation to record and report work-related injuries and illnesses on the employer. *See* 29 CFR 1904.4. In turn, employers may require employees to report work-related injuries and illnesses, as long as the procedures for doing so are reasonable and the employer does not retaliate against employees when they report.

Some commenters expressed concern that the requirement described in the proposed rule—that reporting procedures ''be reasonable and not unduly burdensome''—was ambiguous and vague. *See, e.g.,* Exs. 1532, 1566. The final rule provides that employers must establish a ''reasonable'' procedure for employees to report work-related injuries and illnesses and clarifies that a reporting procedure is not reasonable if it would deter or discourage a reasonable employee from reporting. OSHA did not include the phrase ''unduly burdensome'' in the final rule. The ''reasonable person'' standard is an objective standard that is well-established and applied in many areas of the law, and which can be applied by laypeople without the use of experts. *See Godfrey* v. *Iverson,* 559 F.3d 569, 572 (D.C. Cir. 2009). OSHA believes the final rule's requirement that employers establish a reporting procedure that would not deter or discourage a reasonable employee from reporting work-related injuries and illnesses is sufficiently clear to notify employers of their obligations under the rule while giving employers flexibility to design policies that make sense for their workplaces. Like the previous version of the rule, the final rule imposes a performance requirement rather than prescribing specific procedures employers must establish, and therefore gives employers flexibility to tailor their programs to the needs of their workplaces. *See* 66 FR 6052 (Jan. 19, 2001).

Section 1904.35(b)(1)(iv): Prohibition of Discrimination Against Employees for Reporting a Work-Related Injury or Illness

The final rule adds paragraph (b)(1)(iv) to § 1904.35 to incorporate explicitly into part 1904 the existing prohibition on retaliating against employees for reporting work-related injuries or illnesses that is already imposed on employers under section 11(c) of the OSH Act. As discussed in the Legal Authority section of this preamble, paragraph (b)(1)(iv) of the final rule does not change the substantive obligations of employers. Rather, paragraph (b)(1)(iv) provides OSHA an enhanced enforcement tool for ensuring the accuracy of employer injury and illness logs. Section 1904.36 of the final rule further clarifies that section 11(c) also prohibits retaliating against employees for reporting work-related injuries or illnesses, as explained in the 2012 OSHA enforcement memorandum. *See* OSHA Memorandum re: *Employer Safety Incentive and Disincentive Policies and Practices* (Mar. 12, 2012). OSHA believes only a minority of employers engages in prohibited retaliation, and the final rule will enable more effective enforcement against those employers.

A number of commenters stated that there is no need to amend § 1904.35 to prohibit retaliating against employees for reporting injuries and illnesses because Section 11(c) of the Act already prohibits such retaliation. *See, e.g.,* Exs. 1473, 1549, 1655, 1662. OSHA disagrees. Although the substantive obligations of employers will not change under the new rule, the rule will have an important enforcement effect. Section 11(c) only authorizes the Secretary to take action against an employer for retaliating against an employee for reporting a work-related illness or injury if the employee files a complaint with OSHA within 30 days of the retaliation. 29 U.S.C. 660(c). The final rule provides OSHA with an additional enforcement tool for ensuring the accuracy of work-related injury and illness records that is not dependent on employees filing complaints on their own behalf. Some employees may not have the time or knowledge necessary to file a section 11(c) complaint or may fear additional retaliation from their employer if they file a complaint. The final rule allows OSHA to issue citations to employers for retaliating against employees for reporting work-related injuries and illnesses and require abatement even if no employee has filed a section 11(c) complaint.

Additionally, as noted by one commenter, adding a prohibition on retaliation to part 1904 provides clear notice to employers of what actions are prohibited, which will help to prevent retaliatory acts from occurring in the first place (Ex. 1561). In other words, the final rule serves a preventive purpose as well as a remedial one. The new rule also differs from section 11(c) because it is specifically designed to promote accurate recordkeeping. For comparison, under the medical removal protection (MRP) provision of the lead standard, if an employer denies MRP benefits in retaliation for an employee's exercise of a right under the Act, OSHA can cite the employer and seek the benefits as abatement, because payment of the benefits is important to vindicate the health interests underlying MRP; section 11(c) is not an exclusive remedy. *United Steelworkers, AFL–CIO* v. *St. Joe Resources,* 916 F.2d 294, 298 (5th Cir. 1990). Likewise, here OSHA can cite employers under the final rule in order to advance the rule's purpose of promoting accurate recordkeeping, which is grounded in OSHA's authority under Section 8(c)(2) of the OSH Act (29 U.S.C. 657(c)(2)) to require employers to maintain accurate records of work-related injuries and illnesses.

OSHA anticipates that feasible abatement methods for violations of paragraph (b)(1)(iv) will mirror some of the types of remedies available under section 11(c); the goal of abatement would be to eliminate the source of the retaliation and make whole any employees treated adversely as a result of the retaliation. For example, if an employer terminated an employee for reporting a work-related injury or illness, a feasible means of abatement would be to reinstate the employee with back pay. *See McKennon* v. *Nashville Banner Pub. Co.,* 513 U.S. 352, 362 (1995) (citing *Franks* v. *Bowman Transp. Co.,* 424 U.S. 747, 764 (1976)) (''[T]he object of compensation is to restore the employee to the position he or she would have been in absent the discrimination.''); *St. Joe Resources,* 916 F.2d at 299 (Occupational Safety and Health Review Commission may order employers to pay back pay as abatement for violations of the MRP requirements). If an employer retaliates against an employee for reporting a work-related illness or injury by denying a bonus to a group of employees, feasible means of abatement could include revising the bonus policy to correct its retaliatory effect and providing the bonus retroactively to all of the employees who would have received it absent the retaliation.

Some commenters acknowledged that the proposed rule gives OSHA additional enforcement tools but argued that doing so impermissibly interferes with section 11(c) by infringing on an employee's right to bring a section 11(c) claim and by eliminating section 11(c)'s 30-day window for employees to bring complaints. The final rule does not abrogate or interfere with the rights or restrictions contained in section 11(c). An employee who wishes to file a complaint under section 11(c) may do so within the statutory 30-day period regardless of whether OSHA has issued, or will issue, a citation to the employer for violating the final rule. OSHA believes that many employees will continue to file 11(c) complaints because of the broader range of equitable relief and punitive damages available under that provision. Finally, one commenter suggested that retaliation cases are too complex and fact-based to be suitable subjects of enforcement citations. Ex. 1645. OSHA disagrees. OSHA regularly issues citations based on complex factual scenarios and will provide its staff with appropriate training about enforcing the final rule.

Discrimination citable under paragraph (b)(1)(iv) could include termination, reduction in pay, reassignment to a less desirable position, or any other adverse action that ''could well dissuade'' a reasonable employee from reporting a work-related injury or illness. *See Burlington Northern & Santa Fe Railway Co.* v. *White,* 548 U.S. 53, 57 (2006) (holding that the test for determining whether a particular action is materially adverse is whether it would deter a reasonable person from engaging in protected activity under Title VII). The *Burlington Northern* case considered whether a particular action would deter a reasonable person from filing a claim of sex discrimination. In the context of the final rule, the test would be whether the action would deter a reasonable employee from reporting a work-related injury or illness. Commenters placed substantial emphasis on three specific types of policies, discussed in more detail below: Disciplinary policies, post-accident drug testing policies, and employee incentive programs.

Commenters cited numerous examples of employers disciplining employees who report injuries regardless of whether the employee violated company safety policy. *See, e.g.,* Exs. 1675, 1679, 1681, 1691, 1695, 1696. Although it is an employer's duty to enforce safety rules, disciplining an employee simply for reporting an injury or illness deters employees from reporting injuries and illnesses without improving safety. Numerous commenters identified cases in which employers suspended, reassigned, or even terminated employees simply for being injured. *See, e.g.,* Ex. 1695, attachment 16 (employee suspended, placed on work restrictions, and threatened with termination for having too many OSHA-recordable injuries), Ex. 1675 (employees suspended for having been injured), Ex. 1681 (employees harassed and terminated for reporting injuries or filing for workers compensation), Ex. 1679 (employees terminated for being injured). Some commenters pointed out progressive disciplinary policies involving increasingly serious sanctions for additional reports. *See, e.g.,* Exs. 1675, 1695. Others pointed to employer policies that make employees who report injuries ineligible for promotions (Ex. 1675) or automatically give poor performance evaluations to employees who report OSHA-recordable injuries (Ex. 1696). A report by the U.S. House of Representatives Committee on Education and Labor made a similar finding that many forms of ''direct intimidation'' are used by employers to discourage reporting. *See Hidden Tragedy: Underreporting of Workplace Injuries and Illnesses,* Majority Staff Report by the Committee on Education and Labor, U.S. House of Representatives (June 2008); Exs. 1675, 1679, 1695. Under paragraph (b)(1)(iv) of the final rule, OSHA can issue citations to employers who discipline workers for reporting injuries and illnesses when no legitimate workplace safety rule has been violated.

In addition, the United Steel, Paper and Forestry, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW) identified a number of cases where employers engaged in pretextual disciplinary actions—asserting that an employee was being disciplined for violating a safety rule where the real reason was the employee's injury or illness report (Ex. 1675). This includes situations when reporting employees are disciplined more severely than other employees who worked in the same way, or when reporting employees are selectively disciplined for violation of vague work rules such as ''work carefully'' or ''maintain situational awareness.'' Vague work rules are particularly subject to abuse by the employer and would not be considered legitimate workplace safety rules when they are used disproportionately to discipline workers who have reported an injury or illness. In contrast, a legitimate workplace safety rule should require or prohibit specific conduct related to employee safety or health so it can be applied fairly and not used as a pretext for retaliation. The AFL–CIO identified a series of cases in which a Michigan administrative law judge upheld findings of the Michigan Occupational Safety and Health Administration that AT&T used these types of vague safety policies as pretext for retaliating against employees who reported workplace injuries. *See* Ex. 1695 (citing *AT&T Servs.* v. *Aggeler,* No. D–11–242–1 (Mich. Admin. Hearing Sys., Jan. 13, 2013); *AT&T Servs.* v. *Wright,* No. D–11–101–1 (Mich. Admin. Hearing Sys., Apr. 8, 2013); *AT&T Servs.* v. *Swift,* No. D–11–200–1 (Mich. Admin. Hearing Sys., Mar. 6, 2013); *AT&T Servs.* v. *West,* No. D–11–311–1 (Mich. Admin. Hearing Sys., Apr. 23, 2013)). And even a legitimate work rule may not be applied selectively to discipline workers who report work-related illnesses or injuries but not employees who violate the same rule without reporting a work-related injury or illness. Paragraph (b)(1)(iv) of the final rule authorizes OSHA to issue citations to employers who engage in such pretextual disciplinary actions.

OSHA believes that the majority of employers do not discipline employees unless they have actually broken a legitimate workplace safety or health rule and do not selectively discipline employees who violate legitimate work rules only when they also report a work-related injury or illness. But in the minority of workplaces where employers may sanction employees for reporting, it is no surprise that workers are deterred from reporting because they fear the consequences of doing so. *See above* regarding worker fear of reporting work-related injuries and illnesses. Data collected during OSHA's National Emphasis Program on Injury and Illness Recordkeeping (Recordkeeping NEP) show that among the surveyed workplaces where such disciplinary policies exist, approximately 50 percent of workers reported that the policy deterred reporting. *See Analysis of OSHA's National Emphasis Program on Injury and Illness Recordkeeping,* Prepared for the Office of Statistical Analysis, Occupational Safety and Health Administration, by ERG (Nov. 1, 2013); Ex. 1835. Therefore, OSHA expects that enforcement of the provisions in the final rule will improve the rate and accuracy of injury and illness reporting.

OSHA received a number of comments expressing concern that this section of the final rule will have a chilling effect on employers disciplining employees who violate safety rules, thereby contributing to a less safe work environment. It is important to note that the final rule prohibits employers only from taking adverse action against an employee *because the employee reported* an injury or illness. Nothing in the final rule prohibits employers from disciplining employees for violating legitimate safety rules, even if the same employee who violated a safety rule also was injured as a result of that violation and reported that injury or illness (provided that employees who violate the same work rule are treated similarly without regard to whether they also reported a work-related illness or injury). What the final rule prohibits is retaliatory adverse action taken against an employee simply because he or she reported a work-related injury or illness.

Commenters also pointed to policies mandating automatic post-injury drug testing as a form of adverse action that can discourage reporting. *See, e.g.,* Exs. 1675, 1695. Although drug testing of employees may be a reasonable workplace policy in some situations, it is often perceived as an invasion of privacy, so if an injury or illness is very

unlikely to have been caused by employee drug use, or if the method of drug testing does not identify impairment but only use at some time in the recent past, requiring the employee to be drug tested may inappropriately deter reporting. The U.S. House of Representatives Committee on Education and Labor has recognized that ''to intimidate workers, employers may require that workers are tested for drugs or alcohol [after every incident or injury], irrespective of any potential role of drug intoxication in the incident'' (Exs. 1675, 1679, 1695). The Committee also pointed to Scherzer *et al.* (2005), which found that 32 percent of surveyed Las Vegas hotel workers who reported work-related pain were forced to take drug tests, even though studies like Krause *et al.* (2005) show that such injuries are often caused by physical workload, work intensification, and ergonomic problems—not by workplace mistakes that could have been caused by drugs. *Id.* The American National Standards Institute (ANSI) has similarly recognized the need for drug testing programs to be ''carefully designed and implemented to ensure employees are not discouraged from effective participation in [injury and illness reporting programs]'' (Ex. 1695).

OSHA believes the evidence in the rulemaking record shows that blanket post-injury drug testing policies deter proper reporting. Morantz and Mas (2008) conducted a study on a large retail chain and found that post-accident drug testing caused a substantial reduction in injury claims. The authors found suggestive evidence that at least part of that reduction was due to the reduced willingness of employees to report accidents (Ex. 1675). Crant and Bateman (1989) describe privacy concerns and other individual factors that can affect employee willingness to participate in drug testing programs and report accidents. *Id.* OSHA's Recordkeeping NEP data also supports that hypothesis because many workers reported that such post-injury drug testing programs deterred reporting (Ex. 1695).

Some commenters stated their belief that drug testing of employees is important for a safe workplace; some expressed concern that OSHA planned a wholesale ban on drug testing (Exs. 1667, 1674). To the contrary, this final rule does not ban drug testing of employees. However, the final rule does prohibit employers from using drug testing (or the threat of drug testing) as a form of adverse action against employees who report injuries or illnesses. To strike the appropriate balance here, drug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use. For example, it would likely not be reasonable to drug-test an employee who reports a bee sting, a repetitive strain injury, or an injury caused by a lack of machine guarding or a machine or tool malfunction. Such a policy is likely only to deter reporting without contributing to the employer's understanding of why the injury occurred, or in any other way contributing to workplace safety. Employers need not specifically suspect drug use before testing, but there should be a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness in order for an employer to require drug testing. In addition, drug testing that is designed in a way that may be perceived as punitive or embarrassing to the employee is likely to deter injury reporting.

A few commenters also raised the concern that the final rule will conflict with drug testing requirements contained in workers' compensation laws. This concern is unwarranted. If an employer conducts drug testing to comply with the requirements of a state or federal law or regulation, the employer's motive would not be retaliatory and the final rule would not prohibit such testing. This is doubly true because Section 4(b)(4) of the Act prohibits OSHA from superseding or affecting workers' compensation laws. 29 U.S.C. 653(b)(4).

Finally, many commenters expressed concern with the retaliatory nature of the employee incentive programs at some workplaces, providing myriad examples. *See, e.g.,* Exs. 1661, 1675, 1679, 1695. Employee incentive programs take many forms. An employer might enter all employees who have not been injured in the previous year in a drawing to win a prize, or a team of employees might be awarded a bonus if no one from the team is injured over some period of time. Such programs might be well-intentioned efforts by employers to encourage their workers to use safe practices. However, if the programs are not structured carefully, they have the potential to discourage reporting of work-related injuries and illnesses without improving workplace safety. The USW provided many examples of employer incentive policies that could discourage reporting of work-related injuries and illnesses. Ex. 1675. One employer had a policy that involved periodic prize drawings for items such as a large-screen television; workers who reported an OSHA-recordable injury were excluded from the drawing. *Id.* The American College of Occupational and Environmental Medicine noted that many of its member physicians reported knowledge of situations where employers discouraged injury and illness reporting through incentive programs predicated on workers remaining ''injury free,'' leading to peer pressure on employees not to report (Ex. 1661).

In addition, in recent years, a number of government reports have raised concerns about the effect of incentive programs on injury and illness reporting. A 2012 GAO study found that rate-based incentive programs, which reward workers for achieving low rates of reported injury and illnesses, may discourage reporting. Ex. 1695. Other, more positive incentive programs, which reward workers for activities like recommending safety improvements, did not have the same effect. A previous GAO study had also highlighted incentive programs as a cause of underreporting of work-related injuries and illnesses (Exs. 1675, 1695). The 2008 House Report listed examples of problematic incentive programs and found that ''depending on how an incentive program is structured, reluctance to lose the bonus or peer pressure from other crew members whose prizes are also threatened reduces the *reporting* of injuries and illnesses in the job, rather than reducing the actual number of workplace injuries and illnesses'' (Exs. 1675, 1679, 1695). In 2006, a report by the California State Auditor found that an employee incentive program had likely caused the significant underreporting of injuries by the company working on reconstruction of a portion of the San Francisco Bay Bridge (Ex. 1695). The company offered employees monetary incentives up to $1,500 only if zero recordable injuries were reported. This kind of incentive program is especially likely to discourage reporting because not only will the injured employee not receive the prize after reporting an injury, but the employee is even less likely to report out of fear of angering or disappointing the coworkers who will also be denied the prize, or because the coworkers actively pressure the worker not to report.

OSHA has previously recognized that incentive programs that discourage employees from reporting injuries and illnesses by denying a benefit to employees who report an injury or illness may be prohibited by section 11(c). *See* OSHA Memorandum re:

Employer Safety Incentive and Disincentive Policies and Practices (Mar. 12, 2012); *see also* ANSI/AIHA Z10–2012, Ex. 1695, attachment 5 (''incentive programs . . . should be carefully designed and implemented to ensure employees are not discouraged from effective participation in [injury and illness reporting programs'']. The same memorandum pointed out that, to the extent incentive programs cause under-reporting, they can result in under-recording of injuries and illnesses, which may lead to employer liability for inaccurate recordkeeping. The latter concern is what is being addressed by this final rule's prohibition on employers using incentive programs in a way that impairs accurate recordkeeping.

Some commenters expressed satisfaction with existing safety incentive programs that provide monetary incentives to employees who maintain low blood lead levels, and requested that OSHA not undermine such programs (Exs. 1488, 1654, 1683). OSHA does not intend the final rule to categorically ban all incentive programs. However, programs must be structured in such a way as to encourage safety in the workplace without discouraging the reporting of injuries and illnesses.

The specific rules and details of implementation of any given incentive program must be considered to determine whether it could give rise to a violation of paragraph (b)(1)(iv) of the final rule. It is a violation of paragraph (b)(1)(iv) for an employer to take adverse action against an employee for reporting a work-related injury or illness, whether or not such adverse action was part of an incentive program. Therefore, it is a violation for an employer to use an incentive program to take adverse action, including denying a benefit, because an employee reports a work-related injury or illness, such as disqualifying the employee for a monetary bonus or any other action that would discourage or deter a reasonable employee from reporting the work-related injury or illness. In contrast, if an incentive program makes a reward contingent upon, for example, whether employees correctly follow legitimate safety rules rather than whether they reported any injuries or illnesses, the program would not violate this provision. OSHA encourages incentive programs that promote worker participation in safety-related activities, such as identifying hazards or participating in investigations of injuries, incidents, or ''near misses.'' OSHA's Voluntary Protection Program (VPP) guidance materials refer to a number of positive incentives, including providing t-shirts to workers serving on safety and health committees; offering modest rewards for suggesting ways to strengthen safety and health; or throwing a recognition party at the successful completion of company-wide safety and health training. *See Revised VPP Policy Memo #5: Further Improvements to the Voluntary Protection Programs* (August 14, 2014).

VI. Final Economic Analysis and Regulatory Flexibility Certification

A. Introduction

Executive Orders 12866 and 13563 require that OSHA estimate the benefits, costs, and net benefits of proposed and final regulations. Executive Orders 12866 and 13563, the Regulatory Flexibility Act, and the Unfunded Mandates Reform Act also require OSHA to estimate the costs, assess the benefits, and analyze the impacts of certain rules that the Agency promulgates. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

In the proposal, OSHA estimated that this rule would have economic costs of $11.9 million per year, including $10.7 million per year to the private sector, with costs of $183 per year for affected establishments with 250 or more employees and $9 per year for affected establishments with 20 or more employees in designated industries. The Agency believed that the annual benefits, while unquantified, significantly exceed the annual costs.

In this final rule, OSHA estimates that the rule will have economic costs of $15.0 million per year, including $14 million per year to the private sector with costs of $214 per year to affected establishments with 250 or more employees and $11.13 per year for affected establishments with 20 to 249 employees in designated industries. The Agency continues to believe that the annual benefits, while unquantified, significantly exceed the annual costs.

The final rule is not an ''economically significant regulatory action'' under Executive Order 12866 or the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1532(a)), and it is not a ''major rule'' under the Congressional Review Act (5 U.S.C. 801 *et seq.*). The Agency estimates that the rulemaking imposes far less than $100 million in annual economic costs. In addition, it does not meet any of the other criteria specified by UMRA or the Congressional Review Act for a significant regulatory action or major rule. This Final Economic Analysis (FEA) addresses the costs, benefits, and economic impacts of the final rule.

The final rule will make four changes to the existing recording and reporting requirements in part 1904. These changes in existing requirements differ somewhat from those in the proposed rule.

First, OSHA will require establishments that are required to keep injury and illness records under part 1904, and that had 250 or more employees in the previous year, to electronically submit the required information from all three OSHA recordkeeping forms to OSHA or OSHA's designee, on an annual basis.

Second, OSHA will require establishments that are required to keep injury and illness records under part 1904, had 20 to 249 employees in the previous year, and are in certain designated industries, to electronically submit the required information from the OSHA annual summary form (Form 300A) to OSHA or OSHA's designee, on an annual basis.

Third, OSHA will require all employers who receive notification from OSHA to electronically submit the requested information from their injury and illness records to OSHA or OSHA's designee. Any such notification will be subject to the approval process established by the Paperwork Reduction Act.

Fourth, OSHA will require employers to inform employees of their right to report injuries and illness and prohibit discrimination against employees who report injuries and illnesses.

The final rule does not add to or change any employer's obligation to complete, retain, and certify injury and illness records. The final rule also does not add to or change the recording criteria or definitions for these records. The only changes are that, under certain circumstances, employers will be obligated to submit information from these records to OSHA in an electronic format and to assure that employees have, and understand they have, a right to report injuries and illnesses without fear of discrimination. OSHA requested comments and received many helpful comments throughout this process. For example, one commenter suggested that OSHA should run a pilot program of electronic reporting (Ex. 1109). In many

ways, OSHA's previous collection of these data through the OSHA Data Initiative (the ODI) was a lengthy pilot program, and a successful one which lasted for almost 20 years. This final rule is an extension of that effort, by expanding the collection to involve more establishments and to collect a larger set of injury and illness data. For many of the establishments affected by this final rule, the data submitted will be identical to the data that was collected by the ODI.

As OSHA explained in the preamble to the proposed rule, the electronic submission of information to OSHA would be a relatively simple and quick matter. In most cases, submitting information to OSHA would require several basic steps: (1) Logging on to OSHA's web-based submission system; (2) entering basic establishment information into the system (the first time only); (3) copying the required injury and illness information from the establishment's records into the electronic submission forms; and (4) hitting a button to submit the information to OSHA. In many cases, especially for large establishments, OSHA data are already kept electronically, so step 3 would be less time-intensive relative to cases in which records are kept on paper. The submission system, as anticipated, would also save an establishment's information from one submission to the next, so step 2 might be eliminated for most establishments after the first submission.

Many commenters questioned whether the process would be this simple. OSHA will first examine the costs of the activities outlined above, and then address a wide variety of comments on other costs in addition to those for the activities outlined above.

B. Costs

1. § 1904.41(a)(1)—Annual Electronic Submission of Part 1904 Records by Establishments With 250 or More Employees

In the Preliminary Economic Analysis (PEA), OSHA obtained the estimated cost of electronic data submission per establishment by multiplying the compensation per hour (in dollars) of the person expected to perform the task of electronic submission by the time required for the electronic data submission. OSHA then multiplied this cost per establishment by the estimated number of establishments that would be required to submit data, to obtain the total estimated costs of this part of the proposed rule. This methodology was retained in the FEA.

To estimate the compensation of the person expected to perform the task of electronic data submission in the PEA, OSHA suggested that recordkeeping tasks are most commonly performed by a Human Resource, Training, and Labor Relations Specialist, Not Elsewhere Classified (Human Resources Specialist). In the PEA, OSHA estimated compensation using May 2008 data from the BLS Occupational Employment Survey (OES), reporting a mean hourly wage of $28 for Human Resources Specialists, and June 2009 data from the BLS National Compensation Survey, reporting a mean fringe benefit factor of 1.43 for civilian workers in general. OSHA multiplied the mean hourly wage ($28) by the mean fringe benefit factor (1.43) to obtain an estimated total compensation (wages and benefits) for Human Resources Specialists of $40.04 per hour ([$28 per hour] × 1.43).

OSHA requested comments as to whether the Human Resources Specialist was a reasonable wage rate, and received only a few comments (Exs. 0211, 1110, 0194, 1198). Many comments on the subject of occupation performing the collection and submission stated that the use of a Human Resource Specialists was not reflective of their experience. For example, the Food Market Institute (FMI) commented, ''For instance, while OSHA asserts the new responsibilities will be shouldered by human resources personnel, it is far more likely that each establishment's safety professionals will be burdened with the task.'' (Ex. 1198) One comment from the American Subcontractors Association stated, ''Instead, among small and mid-sized ASA member firms, tasks like these are performed by high level management personnel. In larger construction firms, such tasks are likely to be performed by safety and health professionals'' (Ex. 1322). Other commenters suggested that a more senior person would be needed to go over the data. Aimee Brooks of Western Agricultural Processors Association (WAPA) stated, ''It is highly likely that upper level management would be inputting this information, as giving this information sensitive task to office staff at the workplace would be a liability to the business. If such responsibility is given to office staff, it would need to be accompanied with training regarding protecting sensitive information and privacy'' (Ex. 1273).

OSHA believes that throughout the economy, relatively low-wage employees handle sensitive information, including PII such as employee Social Security numbers, payroll information, and customers' credit card information. OSHA further believes that specialized training is not required before handling PII. For example, many restaurants do not train wait staff specifically in the handling of credit card information.

OSHA does agree with commenters who argued that the average compensation for recordkeepers might be greater than for a human resources specialist. For this Final Economic Analysis (FEA), OSHA updated those compensation numbers using the same sources, but a different occupational classification. This change was made so that this regulation will be consistent with OSHA's 2014 recordkeeping paperwork package and OSHA's September 2014 recordkeeping regulation. For the FEA, OSHA estimated compensation using May 2014 data from the BLS Occupational Employment Survey (OES), reporting a mean hourly wage of $33.88 for Industrial Health and Safety Specialists, and December 2014 data from the BLS National Compensation Survey, reporting a mean fringe benefit factor of 1.44 for civilian workers in general. OSHA multiplied the mean hourly wage ($33.88) by the mean fringe benefit factor (1.44) to obtain an estimated total compensation (wages and benefits) for Industrial Health and Safety Specialists of $48.78 per hour ([$33.88 per hour] × 1.44). This represents an increase in the wage rate of 22 percent over the wage used in the PEA.

OSHA recognizes that not all firms assign the responsibility for recordkeeping to an Industrial Health and Safety Specialist. For example, a smaller firm may use a bookkeeper or a plant manager, while a larger firm may use a higher level specialist. However, OSHA believes that the calculated cost of $48.78 per hour is a reasonable estimate of the hourly compensation of a typical recordkeeper. In the case of a very small firm, this wage rate may exceed the owner or proprietor's wage. BLS data from the Quarterly Census of Employment and Wages (2014) show that the average weekly wage for a worker in a firm with 20 to 49 employees is $848 per week, while the average wage for a worker in a firm with 1,000 or more employees is $1,699 per week—nearly twice as high as the smaller firm.

For time required for the data submission in the PEA, OSHA used the estimated unit time requirements reported by BLS in their paperwork burden analysis for the Survey of Occupational Injuries and Illnesses (SOII) (OMB Control Number 1220–

0045, expires October 31, 2013).[1] BLS estimated 10 minutes per recordable injury/illness case for electronic submission of the information on Form 301 (Injury and Illness Incident Report) and Form 300 (Log of Work-Related Injuries and Illnesses). BLS also estimated 10 minutes per establishment, total, for electronic submission of the information on Form 300A (Summary of Work-Related Injuries and Illnesses). For the FEA, OSHA used, where appropriate, the values reported in the latest BLS SOII paperwork package (OMB Control Number 1220–0045, expires September 30, 2016).

Many of the comments on the 10 minutes originally estimated by OSHA for submitting the requested data were general in nature and often conflated the time to submit the data with the time to audit the data (Exs. 1113, 1092, 1192, 1421, 1366). A typical statement was, ''OSHA estimates the electronic submission process would take each establishment only 10 minutes for each OSHA 301 submission and 10 minutes for the submission of both the OSHA 300 and 300A. This fails to accurately account for the time it would take employees to familiarize themselves with the process and review reports to ensure compliance with all regulations'' (Ex. 1421).

Some comments directly addressed the issue of the relevance of the BLS estimates to OSHA's requirements (Exs. 1328, 1411). Eric Conn, representing the National Retail Federation (NRF), commented on the use of BLS's time estimate for submitting data, stating, ''The data submitted for the BLS survey, however, is more limited in terms of information requested. BLS requests only certain data for up to 15 cases, but the Proposed Regulation would require all relevant Form 300 and/or 300A information from the entire injury and illness record. Thus the time burden would actually be much greater than OSHA predicts'' (Ex. 1328).

OSHA agrees that the final rule requires information on all individual cases and not just on 15 or fewer lost workday injuries and illnesses, as required by BLS. The requirement for information on all cases from Form 301 was addressed in the PEA by estimating ten minutes per form entered and multiplying this by the number of forms OSHA would require to be submitted, rather than the number BLS requires to be submitted. Such differences are trivial, with the possible exception of the individual injury/illness entries on Form 300. In the FEA, OSHA has added two minutes per injury or illness listed on the OSHA 300 Log to account for this difference. Along with the 10 minutes per 300A Summary, OSHA is estimating more time than the BLS paperwork burden. For example, in the simplest case, OSHA estimates that an establishment with more than 250 employees and a single injury will take (on average) 10 minutes to electronically submit the OSHA Summary (Form 300A), 10 minutes to submit the single injury report (Form 301) and 2 minutes to submit the one line that would be on the 300 Log for each recorded injury, for a total of 22 minutes. BLS estimates 20 minutes as the average time across all employers for any number of injuries.

In the PEA, using the information on estimated hourly compensation of recordkeepers and estimated time required for data submission, OSHA calculated that the estimated cost per establishment with 250 or more workers for quarterly data submission of the information on Forms 300 and 300A would be $26.69 per year ([10 minutes per data submission] × [1 hour per 60 minutes] × [$40.04 per hour] × [4 data submissions per year]). Because the final rule now requires data to be submitted once a year, rather than four times a year, the equation in the FEA for submitting the Form 300A data is: $8.13 per year ([10 minutes per data submission] × [1 hour per 60 minutes] × [$48.78 per hour] × [1 data submission per year]). Note that $8.13 per year is nearly 75 percent less than the annual cost in the PEA because OSHA will not require quarterly submission. In addition, the estimated cost per recordable injury/illness case in the final rule is $9.74 ([10 minutes per case for form 301 entries plus 2 minutes per case for entry of form 300 log entries] × [1 hour per 60 minutes] × [$48.78 per hour]).

To calculate the total estimated costs of this part of the rule in the PEA, OSHA used establishment and employment counts from the U.S. Census County Business Patterns (CBP), data from the U.S. Census Enterprise Statistics (ES), and injury and illness counts from the BLS Survey of Occupational Injuries and Illnesses (SOII).[2] In the PEA, CBP data showed that there were 38,094 establishments with 250 or more employees in the industries covered by this section. The CBP data also indicated that these large establishments employed 35.8 percent of all employees in the covered industries. In the FEA, using newer CBP data, OSHA finds that there are 33,674 establishments with 250 or more employees, a decrease of 11 percent.

For the PEA, the BLS data showed a total of 2,486,500 injuries and illnesses that occurred in the covered industries. For the FEA, more recent BLS data were aggregated, and a total of 1,992,458 injuries and illnesses were found in the covered industries.

In both the PEA and the FEA, to calculate the number of injuries and illnesses that will be reported by covered establishments with 250 or more employees, OSHA assumed that total recordable cases in establishments with 250 or more employees would be proportional to their share of employment within the industry. Thus in the PEA, OSHA estimated that 890,288 injury and illness cases would be reported per year by establishments with 250 or more employees that were covered by this section. In the FEA, using the same methodology and more recent data, OSHA estimates that 713,397 injury and illness cases will be reported per year by establishments with 250 or more employees covered by this section.

In the PEA, OSHA calculated an estimated total cost of quarterly data submission of non-case information of $1,016,729 ([38,094 establishments required to submit data quarterly] × [$26.69 for electronic data submission per year]). In addition, OSHA calculated an estimated total cost of quarterly data submission of case information of $5,938,221 ([890,288 injury/illness cases per year at affected establishments] × [$6.67 per injury/illness case]). Summing these two costs yielded a total cost of $6,954,950 per year for the proposed rule ($1,016,729 + $5,938,221), for an average cost per affected establishment of $183 per year.

In the FEA, OSHA used the same equations above, using newer data plus an additional two minutes per injury and illness case to enter Form 300 data, to estimate the total cost of annual data submission under this section of the final rule. OSHA estimates a total cost of annual data submission of non-case information of $273,770 ([33,674 establishments required to submit data annually] × [$8.13 for electronic data submission per year]). In addition, OSHA calculates an estimated total cost of annual data submission of case information of $6,948,487 ([713,397 injury/illness cases per year at affected establishments] × [$9.74 per injury/

[1] The ODI paperwork analysis (1218–0209) estimates an average time of 10 minutes per response for submitting Form 300A data. The ODI does not require submission of Form 301 data. The 10 minute estimate form the ODI is equal to the 10 minute estimate from the BLS SOII for submission of the same data.

[2] For the CBP see: *http://www.census.gov/econ/cbp/*. For the ES see: *http://www.census.gov/econ/esp/*. For the SOII see: *http://www.bls.gov/iif/oshsum.htm.*

illness case]). Summing these two costs yields a total cost of $7,222,257 per year for the final rule ($273,770 + $6,948,487), for an average cost per affected establishment of $214 per year.

OSHA requested comments on all aspects of the PEA, including examples of establishments with 250 or more employees that cannot report electronically with existing facilities and equipment or data sources showing that such establishments exist. Aimee Brooks commented on behalf of Western Agricultural Processors Association (WAPA): ''. . . in some areas of California, tree nut hullers and processors do not have a computer or internet access'' (Ex. 1273). Aimee Brooks also stated on behalf of California Cotton Ginners and Growers Association (CCGGA): ''Cotton growers and ginners are usually remotely located and access to internet or a computer is not only limited, but both hardware and software are generally out of date, unreliable, and slow, meaning the online reporting process will take much longer than the OSHA estimate of 10 minutes per establishment'' (Ex.1274).

As will be discussed below, many commenters were concerned that requiring electronic submission might be a problem for some small firms; however, no clear examples were provided of an establishment with over 250 employees that did not have computers and Internet access. Based on the comments to the proposed rule, and OSHA's own experience, the Agency continues to believe that large establishments with 250 or more employees have access to computers and the Internet.[3]

2. § 1904.41(a)(2)—Annual Electronic Submission of OSHA Annual Summary Form (Form 300A) by Establishments With 20 or More Employees but Fewer Than 250 Employees in Designated Industries

OSHA's methodology for estimating the costs of this section of the proposed rule in the PEA was similar to the methodology for estimating the costs of the previous section. OSHA first obtained the estimated cost of electronic data submission per establishment by multiplying the compensation per hour (in dollars) for the person expected to perform the task of electronic data submission by the time required for the electronic data submission. OSHA then multiplied this cost by the estimated number of establishments that would be required to submit data, to obtain the total estimated costs of this part of the proposed rule.

In the PEA, for compensation per hour, OSHA used the calculated cost of $40.04 per hour as a reasonable estimate of the hourly compensation of a representative recordkeeper. In the FEA, as discussed above, OSHA has increased this per-hour wage to $48.78.

In the PEA, OSHA used the BLS estimate of 10 minutes per establishment for electronic submission of the information on Forms 300 and 300A (Summary of Work-Related Injuries and Illnesses) to estimate the time required for this submission. The estimated cost per establishment for electronic submittal under this part of the proposed rule was $6.67 per year ([$40.04 per hour] × [10 minutes per data submission] × [1 hour per 60 minutes] × [one data submission per year]).

For the FEA, the estimated cost per establishment for electronic submittal under this part of the proposed rule is $8.13 per year ([$48.78 per hour] × [10 minutes per data submission] × [1 hour per 60 minutes] × [one data submission per year]).

In the PEA, OSHA estimated that the number of establishments subject to this part of the proposed rule would be 440,863. OSHA noted in the PEA that many of these establishments were already submitting these data to OSHA through the ODI. 47,700 establishments of the 68,600 establishments in the 2010 ODI (70 percent) submitted their data electronically.

As a result, OSHA estimated that the direct labor cost of this part of the proposed rule would have been $2,622,397 ([$6.67 per establishment per year] × ([440,863 establishments affected under the proposed rule] − [47,700 establishments already submitting electronically to the ODI])).

This estimate is based on the assumption that all of the affected establishments have on-site access to a computer and an adequate Internet connection. However, as noted above, 30 percent of establishments in the 2010 ODI did not submit data electronically. One possible reason for this choice is that, for some of those establishments, it was difficult to submit data electronically. Most agencies currently allow non-electronic filing of information, and some businesses continue to use this option, despite strong encouragement by agencies to file electronically.

OSHA searched for but was unable to find information on the proportion of all businesses without access to a computer and the Internet. However, OSHA did find a survey, conducted by a contractor for the Office of Advocacy of the Small Business Administration (SBA) in the spring of 2010, on the use of Internet connectivity by small businesses, called ''The Impact of Broadband Speed and Price on Small Business'' (*http://www.sba.gov/sites/default/files/rs373tot_0.pdf*). This survey suggests that at least 90 percent of small businesses surveyed use the Internet at their business. Further, the survey noted that 75 percent of all small businesses not using the Internet were small businesses with five or fewer employees. Given the survey's estimates that 50 percent of small businesses have fewer than 5 employees, this means that 95 percent of all small businesses with five or more employees have Internet connections. OSHA believes that even this 95 percent is an underestimate for two reasons. First, the survey is five years old, and during the past seven years the cost of both computer equipment and Internet access has fallen (for example, since May 2008 the BLS Personal Computer Index has fallen by nearly 20 percent; *http://data.bls.gov/timeseries/CUSR0000SEEE01?output_view=pct_3mths*). Second, the survey is of small entities, not establishments. OSHA can show that a significant proportion of small establishments are a part of non-small entities, and those larger entities are even more likely to have computers and Internet connections.

It also needs to be noted that the minimum establishment size affected by this proposed rule is 20 employees. It is reasonable to assume that an even smaller percentage of firms with 20 or more employees lack a computer with an Internet connection.

OSHA was able to find only two current Federal Government data collection programs that require data to be submitted electronically.

- Effective January 1, 2010, the Department of Labor's Employee Benefits Security Administration requires the electronic filing of all Form 5500 Annual Returns/Reports of Employee Benefit Plan and all Form 5500–SF Short Form Annual Returns/Reports of Small Employee Benefit Plan for 2009 and 2010 plan years, as well as any required schedules and attachments, using EFAST2-approved third-party software or iFile. EFAST2 is an all-electronic system designed by the Department of Labor, Internal Revenue Service, and Pension Benefit Guaranty Corporation to simplify and expedite the submission, receipt, and processing of the Form 5500 and Form 5500–SF.

[3] Note that the establishments subject to the requirements in this section of the final rule include establishments that previously submitted data under the OSHA Data Initiative (ODI). However, OSHA has decided not to subtract the existing costs of submitting data for the ODI from the total costs estimated for this section of the final rule.

These forms must be electronically filed each year by employee benefit plans to satisfy annual reporting requirements under the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code. Under EFAST2, filers choose between using EFAST2-approved vendor software or a free limited-function web application (IFILE) to prepare and submit the Form 5500 or Form 5500–SF. Completed forms are submitted via the Internet to EFAST2 for processing.

• Under the mandatory electronic filing provisions (11 CFR 104.18) of the Federal Election Commission (FEC), effective January 1, 2001, any political committee or other person that is required to file reports with the FEC and that receives contributions or makes expenditures in excess of $50,000 in the current calendar year, or has reason to expect to do so, must submit its reports electronically.

All other data collection programs identified by OSHA provide a non-electronic option for data submission, including the OSHA Data Initiative (ODI); various databases at the Environmental Protection Agency (EPA), including the Toxics Release Inventory Program (TRI); and programs administered by the Internal Revenue Service (IRS), the Bureau of Labor Statistics (BLS), and the U.S. Census Bureau (including business data).

As noted above, even a dated survey from 2010 found that 95 percent of small businesses with 5 or more employees had a computer with an Internet connection. The Department of Commerce estimated in 2009 that 69 percent and 64 percent of U.S. households, respectively, had some kind of Internet access and broad-band Internet access specifically (National Telecommunications and Information Administration, U.S. Department of Commerce, ''Table 2 Households using the Internet in and outside the home, by selected characteristics: Total, Urban, Rural, Principal City, 2009 (Numbers in Thousands)'', *http://www.ntia.doc.gov/legacy/data/CPS2009_Tables.html*). By 2013, high-speed broadband and Internet use had risen to 73 and 74 percent, respectively (Source: *http://www.census.gov/content/dam/Census/library/publications/2014/acs/acs-28.pdf*). In addition, households with higher incomes and levels of education were more likely to have Internet access at home, and home Internet access among employed householders was 78 percent, compared to 65 percent among unemployed householders and 52 percent among householders not in the labor force.

It seems reasonable to assume that business owners, as a group, have higher incomes and labor force participation rates than the U.S. population as a whole. And data from the 2007 Survey on Small Business Owners, conducted by the U.S. Census Bureau, show that business owners have higher levels of education; 74 percent of the business owners had at least some post-high school education and 45 percent had at least a bachelor's degree, compared to 55 percent and 30 percent among the general U.S. population aged 25 and older in 2010 (U.S. Census, ''Table 1. Educational Attainment of the Population 18 Years and Over, by Age, Sex, Race, and Hispanic Origin: 2010'', *http://www.census.gov/hhes/socdemo/education/data/cps/2010/Table1-01.xls*, accessed June 15, 2011). Further, a small-business owner without an office or home computer may own a smart phone, which could easily be used for transmitting the data for the 300A summary because it is a very simple form.

In the PEA, to account for the lack of direct data on computers and Internet access among small businesses and the presumed increase in Internet usage since the indirect data were obtained, OSHA estimated that 95 percent of the 440,863 establishments subject to this part of the proposed rule (*i.e.,* 418,820 establishments) had access to a computer with an Internet connection, either at home or at work. OSHA believed that the actual percentage of establishments with Internet access was larger than this estimated value. OSHA welcomed comment on this issue. The remaining 22,043 establishments would have to either buy additional equipment and/or services or use off-site facilities, such as public libraries. OSHA estimated in the PEA that finding and using such off-site facilities would add an hour (including transportation and waiting time), on average, to the time required by the recordkeeper to submit the data electronically. For some establishments, they might need to travel next door to find a computer or Internet access, while others might need to drive for an hour or more. In the proposal this led to additional costs of $882,607 per year ([440,863 establishments] × [5% of these establishments] × [1 hour for finding and using off-site facilities] × [$40.04 per hour]).

OSHA requested comments on all aspects of this preliminary estimate and received many comments. Some commenters requested that OSHA still provide a paper reporting option (Exs. 0179, 0211, 0253, 0255, 1092, 1112, 1123, 1190, 1192, 1199, 1205, 1322). The American Forest and Paper Association (AFPA) commented, ''Many businesses, particularly small firms located in rural areas, do not have ready access to the Internet or may find electronic reporting burdensome because they currently have a paper-based record system and should not be burdened with the cost of converting to an electronic format'' (Ex. 0179). Many commenters incorrectly asserted that OSHA had assumed everyone had a computer and kept records electronically (Exs. 1092, 1123, 1190, 1199, 1200, 1343, 1359, 1370, 1410, 1421). As discussed above, this assumption was inaccurate. Perhaps because of this inaccurate assumption, almost no commenters addressed OSHA's estimate of the number of establishments without computer access or OSHA's estimates of the costs for such establishments.

However, one commenter, the American Farm Bureau Federation (AFBF), provided information on computer use on farms: ''. . . only 68 percent of farmers (both livestock/poultry and crop producers) have a computer and only 67 percent have internet access . . .'' (Ex. 1113). Note that the figure of 67 percent of farms with Internet access is only a bit below the national average for households of 74 percent with Internet access. OSHA does not expect that many farms will be subject to reporting under this final rule, because few farms have 20 or more workers. Of the 2.2 million US farms, only about 550,000 have any hired help (about 25 percent). The 2012 Agricultural Census reports that there are just 40,661 farms with 10 or more workers in the U.S. OSHA believes that there are 20,623 farms with more than 20 hired workers that would be subject to this final rule. OSHA believes that farms with many workers are extremely large operations, heavily capitalized, and likely to have computers or smartphones and Internet access.

In the PEA, OSHA estimated the total costs of this part of the proposed rule as the direct labor cost of electronic submittal ($2,622,397) for the 393,163 establishments subject to the rule and not already electronically submitting the data to OSHA through the ODI, plus the additional cost for 5 percent of the affected 440,863 establishments of going off-site to submit the data electronically ($882,607). A last cost of $189,935 in the PEA, for those establishments that do not currently certify their records, is discussed below. Thus, the total cost of the proposed rule was $3,695,939 per year, or an approximate estimated average of $9.40 per affected establishment ([$3,695,939 per year]/

([440,863 establishments affected under the proposed rule] − [47,700 establishments already submitting electronically to the ODI])).

In the FEA, the estimate of affected establishments is smaller: 410,673 affected establishments versus 440,863 affected establishments with 20 or more employees in the PEA, or 6.8 percent less. Note that, since the ODI was not in effect in 2015, OSHA will not take an offset for establishments submitting data for the ODI.

The total costs of this part of the final rule are the direct labor cost of electronic submittal ($3,338,771) for the 410,673 non-farm establishments subject to the rule, plus the additional cost for 5 percent of the affected 410,673 establishments of going off-site to submit the data electronically ($1,001,631). A last cost of $231,192, for those establishments that do not currently certify their records, is discussed below. Thus, the total cost is $4,571,594 per year, or an approximate estimated average of $11.13 per affected establishment ([$4,571,594 per year]/([410,673 establishments affected under the proposed rule]).

In the PEA, OSHA recognized that a small percentage of establishments currently subject to part 1904 do not fully comply with the requirement in § 1904.32(a)(3) to certify the accuracy of each year's records. OSHA inspection data showed that in 2010, about 1.6 percent of establishments undergoing an inspection had a violation of the recordkeeping certification requirement. OSHA had previously estimated costs and a paperwork burden for the time these employers would spend reviewing their data for certification purposes (*see, for example,* OSHA's September 2014 recordkeeping paperwork package). Because the data collection under this section of the proposed rule would have made it obvious to these employers that the records had not been certified, OSHA included the full costs of certification for those not in compliance with § 1904.32(a)(3) as a cost of this rule. In the PEA, the number of not-in-compliance establishments was estimated by multiplying 1.6 percent times 360,863 establishments subject to the rule but not currently in the ODI (440,863 total establishments minus 80,000 in ODI). The resulting figure was only 5,774 establishments not in compliance with § 1904.32(a)(3). The cost for these non-compliers to comply with § 1904.32(a)(3) by completing certification was $189,935. This was calculated by multiplying [(30 minutes) × (5,774 establishments) × ($65.79 per hour) × (1 hour per 60 minutes)], where $65.79 was the adjusted hourly wage for a certifying official. This wage reflected the hourly wage plus benefits of an Industrial Production Manager (OES 11–3051), the same occupation used for certification of records in other OSHA recordkeeping regulations. OSHA invited comments on whether 1.6 percent is the actual certification non-compliance rate for firms subject to part 1904, and on whether the adjusted wage of $65.79 was, on average, the correct wage rate for individuals certifying annual recordkeeping logs. OSHA did not receive any comments disputing these figures. As a result, OSHA has retained the estimate of 1.6 percent of establishments not certifying their annual records.

In the FEA, OSHA updated the wage rate of the certifying official, using 2014 data. Thus the wage rate for the certifying official, based on the wage of an Industrial Production Manager (OES 11–3051), is $70.37, based on a mean hourly wage of $48.87 and a fringe benefit factor of 1.44 ($48.87 × 1.44 = $70.37). The estimated number of non-compliant establishments is 6,571 (1.6 percent of 410,673 non-farm establishments). The cost of certification for non-certifying establishments is $231,200 [(30 minutes) × (6,571 establishments) × ($70.37 per hour) × (1 hour per 60 minutes)].

OSHA believes, and current ICRs support, that 30 minutes is the appropriate amount of time required, on average, for certification. However, a range of time requirements is possible. For example, if the certifying officials are especially productive at certification, perhaps because the injury and illness records are well-maintained or because the officials are able to work off existing finalized summary reports sent to Workers' Compensation insurance agencies, then it may only take 15 minutes, on average, to complete the certification. In that case, the total cost would be just $115,596. On the other hand, perhaps the certifying officials have become less productive since the previous ICRs. If it now takes a certifying official one hour instead of 30 minutes to certify, then the total cost for non-complying establishments would be $462,384.

OSHA also notes that in the PEA, farms with 20 or more employees were not counted for cost purposes, though they were included in the scope of the regulation. A separate analysis follows for the FEA.

OSHA was not able to obtain a count of farms (crop and animal) with 20 or more employees. OSHA took the estimate of farms with 10 or more employees (41,246 farms), provided by the Census of Agriculture, and took 50 percent of that total (20,623 farms) as the best estimate of the number of farms with 20 or more employees. This is still possibly an over-estimate of the number of farms with 20 or more employees, because the inverse relationship between the number of farms and the number of farm employees rises geometrically. Other information, for example farm revenue data, also help to show that there are very few farms with revenues high enough to support 20 employees.

Following the methodology used elsewhere in the FEA, those 20,623 farms will on average take 10 minutes to submit their summary electronically to OSHA. OSHA has made two adjustments to this methodology for farms. First, OSHA estimates that five percent of farms subject to this section of the final rule (1,031 farms) will not have access to a computer, a smart phone, or the Internet. Second, OSHA estimates a travel time of one hour for data submitters at these establishments to travel off-site to an Internet connection.

OSHA estimates that 330 farms (1.6% × 20,623 farms) do not currently certify their injury/illness records, leading to an additional cost of $11,611 [(30 minutes) × (330 establishments) × ($70.37 per hour) × (1 hour per 60 minutes)]. The total cost for farms included in electronic reporting is $229,568, which is derived by multiplying [(20,623 farms) × ($48.78 per hour) × (10 minutes) × (1 hour per 60 minutes)] and adding [(1,031 farms without Internet) × ($48.78 per hour) × (1 hour)] and then adding [(330 farms that do not currently certify) × ($70.37 per hour) × (30 minutes) × (1 hour per 60 minutes)].

OSHA believes that the same computer ownership factor used in the PEA and FEA for general establishments also applies to farms. While there were comments, based on a USDA survey, that farms did not have as many computers or as much Internet access as the rest of the private sector, that survey was heavily weighted toward typical American farms, *i.e.,* farms operated by a single farmer or farm family, and many times smaller than an operation with 20 or more employees. OSHA again emphasizes that a smart phone with data access will be sufficient to submit summary data from the Form 300A to the OSHA Web site.

Several commenters expressed concern that OSHA was not allowing enough time for initial startup or familiarization for establishments that will be newly required to report their data electronically (Exs.1338, 1276, 1351, 0160, 1112, 1205, 1394, 1190,

1342, 1281, 1397, 1343, 1402, 1199, 1113, 1092, 1192, 1421, 1372, 1401, 1356, 1332, 1198, 1279, 1366). In response to these comments, OSHA has added ten minutes to the time estimate, in the first year the regulation is in effect, to account for the time establishments take to create their login accounts with OSHA and enter their basic information from the OSHA 300A form, such as establishment name and address. These ten minutes are not included in current paperwork packages, so the costs will apply to every establishment subject to reporting electronically to OSHA—a total of 431,296 establishments (including the 20,623 farms). Note that number of establishments includes both establishments with 20 to 249 employees, subject to the requirements in this section of the final rule, as well as establishments with 250 or more employees, subject to the requirements in the previous section of the final rule. The total first-year cost for familiarization is $3,506,436 [(431,296 establishments) × ($48.78 per hour) × (10 minutes) × (1 hour per 60 minutes). This one-time, first year cost can be amortized over 10 years at a 7 percent interest rate to yield $499,237 per year. At a 3 percent interest rate, it would yield $411,061 per year.

3. §§ 1904.35 and 1904.36

The last cost element is from the non-discrimination provisions of this final rule. In the economic analysis for the supplemental notice to the proposed rule, OSHA stated that ''these provisions do not require employers to provide any new or additional records not already required in existing standards. (When the existing standards were promulgated, OSHA estimated the costs to employers of the records that would be required.) These provisions add no new rights to employees, but are instead designed to assure that employers recognize the existing right of employees to report work-related injuries and illnesses.''

After examining the rulemaking record and adjusting the final regulatory text, OSHA now anticipates that the implementation of the non-discrimination provisions will have one cost component, namely an informational component that employers can meet by posting the new OSHA poster (*https://www.osha.gov/Publications/osha3165-8514.pdf*). The final rule requires employers to specifically inform employees that they have the right to report injuries and illness, and that employers are not to discourage or retaliate against an employee who reports an injury or illness. Posting this new poster will allow employers to meet this requirement, because it informs workers that they have the right to report injuries or illness, without being retaliated against, and informs employers that it is illegal to retaliate against an employee for reporting an injury or illness. (Note that the old poster mentioned that employees had the right to make safety/health complaints without retaliation in general, but made no specific reference to the reporting of injuries and illnesses.) Note also that this is not the only way an employer can meet this requirement; an employer may inform the employees in any way that the employer sees fit. However, OSHA believes that the use of a professionally-designed poster that is easily downloadable from many Web sites, including OSHA's, is the most inexpensive way for most employers to meet this requirement.

This section of the FEA accounts for the costs, discusses the benefits, and in addition addresses comments provided by the public on the subject of this part of the final rule.

For the costs—although employers are required to post the OSHA poster, OSHA is not requiring employers to replace the existing poster with the new poster. Putting up the OSHA poster is therefore a new cost for this final rule. To calculate the cost of posting the new OSHA poster, OSHA used the following judgments. First, it will take an employer five minutes to obtain and post the poster. Second, this task will be undertaken by an industrial manager with an hourly wage of $70.37, as above. Third, there are 1,364,503 establishments subject to this requirement in the final rule (including farms with 10 or more employees). The estimated one-time cost for posting the new OSHA poster is thus $8,001,673 [(1,364,503 establishments) × $70.37 per hour) × (5 minutes) × (1 hour per 60 minutes)]. Annualized over 10 years at 3 percent interest, this is a total cost of $938,040 per year. OSHA believes this cost estimate is a significant over-estimate because many establishments routinely download and post newer versions of OSHA's poster even without regulatory guidance. In addition, although OSHA is using an estimate of five minutes in the FEA, OSHA wrote in the supplemental notice to the proposed rule that posting the sign could take as few as three minutes.

OSHA received a few comments relating to the costs of the non-discrimination provisions of the proposed rule. Some commenters noted that OSHA already requires employers to post an OSHA sign that informs workers of their right to not be discriminated against for reporting (Exs. 1547, 1600, 1603). For example, the Association Connecting Electronics Industries commented, ''Employees must already be made aware that they are protected under the Act 'against discharge or discrimination for the exercise of their rights under Federal and State law.' Specifically, OSHA requires that employers post OSHA 3165, Job Safety and Health—It's the law! This posting clearly states that employees can file a complaint with OSHA within 30 days of retaliation or discrimination by an employer for making a safety or health complaint and employers must comply with the occupational safety and health standards under the OSH Act'' (Ex. 1668). OSHA agrees that workplaces must post an OSHA poster, but there is no requirement that establishments download the latest OSHA poster, which is the one that contains the specific information on the right to report injuries and illnesses, as required by the final rule.

OSHA did not quantify the benefits of the non-discrimination requirement in the supplemental notice to the proposed rule, because OSHA believed that since there would be no additional costs, there would be no additional benefits. In the supplemental notice to the proposed rule, OSHA stated, ''OSHA also expects that, because these three potential provisions will only clarify existing requirements, there are also no new economic benefits. The provisions will at most serve to counter the additional motivations for employers to discriminate against employees attempting to report injuries and illnesses.'' [79 FR 47605–47610]

However, OSHA believes that posting the newest OSHA poster will encourage both employees and employers to accurately report and record workplace injuries and illnesses. Many commenters commented that informing workers of their right to report injuries and illnesses without fear of discrimination was beneficial (Exs. 1489, 1529, 1603, 1640, 1647, 1679, 1682, 1688, 1695, 1696). The Communications Workers of America (CWA) stated, ''Employer notification to employees of their right to report occupational injuries and illnesses without fear of employer retaliation, employer development and implementation of reasonable injury and illness requirements, and the prohibition of employer's adverse action against the workers who report injuries and illnesses is extremely important towards improving and maintaining safe

and healthful working conditions and worker well-being'' (Ex. 1489).

4. § 1904.41(a)(3)—Electronic Submission of Part 1904 Records Upon Notification

This part of the final rule has no immediate costs or economic impacts. Under this part of the rule, an establishment will be required to submit data electronically if OSHA notifies the establishment to do so as part of a specified data collection. Each specified data collection would be associated with its own particular costs, benefits, and economic impacts, which OSHA would estimate as part of obtaining OMB approval for the specified data collection under the Paperwork Reduction Act of 1995.

5. Budget Costs to the Government for the Creation of the Reporting System, Helpdesk Assistance, and Administration of the Electronic Submission Program

While OSHA has not typically included the cost of administering a new regulation in the preliminary economic analysis, the Agency did include such costs in the PEA, because they represented a significant fraction of the total costs of the regulation. The program lifecycle costs can be categorized into IT hardware and software costs, helpdesk costs, and OSHA program management personnel costs. OSHA received estimates for the lifecycle costs from three sources: an OSHA contractor, the BLS, and the OSHA web-services office.

According to OSHA's Office of Web Services, the creation of the reporting system hardware and software infrastructure would have had an initial cost of $1,545,162. Annualized over 10 years at 3 percent interest, this is $181,140 per year.

BLS provided a unit cost estimate of 28 cents per transaction. This would have amounted to $372,000 per year for about 1.3 million transactions. Adding annual help desk costs of $200,000 would have made the total $572,000.

The contractor and OSHA's Office of Web Services provided higher budget estimates. The contractor suggested that annual costs could have been as high as $953,000, while the OSHA Office of Web Services suggested a cost of $626,000 per year.

Under the proposed rule, OSHA would have also continued to require three full-time-equivalent workers (FTEs) to administer the new electronic recordkeeping system. OSHA believed these FTEs would have cost the government $150,000 each, including salary and benefits, for a total of $450,000 per year. Added to the BLS cost of $572,000 and the annualized start-up cost of $220,000, this would have amounted to $1,242,000, or just over $1.2 million. Adding the FTE costs to the contractor and OSHA Office of Web Services estimates, along with the annualized start-up cost, would have yielded a range of between $1.2 million and $1.6 million per year. For its best estimate in the PEA, OSHA used the BLS estimated costs per transaction, because this estimate is based on actual experience with implementing a similar program.

For the FEA, OSHA used the estimate for costs to the government as published in the PEA and then adjusted the estimate by using the rate of inflation determined by the GDP deflator (source: St. Louis Federal Reserve Bank GDP deflator time series from January 2012 to January 2015: 3.0 percent) to adjust the estimated cost to the government. Thus the cost to the government for this final rule is $1,279,260.

Several commenters commented on the cost to the government. Several commenters expressed concerns that this data collection effort would strain the resources of OSHA by costing too much or requiring too many Federal employees to work on this project (Exs. 1187, 1193, 1199, 1204, 1219, 1336, 1339, 1382, 1389, 1399, 1430, 1461). A typical comment highlighting the possible additional costs to the government was submitted by the MYR Group: ''Although not technically required for notice and comment rulemaking under the OSH Act, MYR Group believes that OSHA should evaluate the cost of its own resources which would be required to be dedicated to this rule instead of other compliance assistance or enforcement activities. OSHA would have to establish and continuously maintain a special government Web site for these data collections. This involves not only hardware and software expenses, but also ongoing salaries. To utilize the data for injury and illness prevention, or for enforcement, OSHA would have to establish positions for analysis to review and interpret the data. MYR Group believes that shifting resources from prevention activities to data management would be detrimental to making the workplaces safer and certainly not worth the minor potential for an incremental benefit in the collection of statistically insignificant data'' (Ex. 1399).

In response, OSHA believes that the number of OSHA employees who will be assigned to collecting and analyzing the improved data will be the same number as those who worked on the ODI program. Based on examples of Web sites submitted by OSHA's contractor, OSHA believes that the data collection Web site will be a turn-key operation that will not require much human monitoring, just like the ODI data collection Web site. Further, OSHA believes that this data collection, even if it requires additional resources, will result in saving of other resources through better targeting of resources and better understanding of safety and health.

6. Discussion of Other Potential Costs of the Rule

Some commenters suggested that there were other possible costs associated with the rule, including costs for computers and computer systems, for training, and for review of submissions. Others commented that there might be indirect costs, for example through loss of reputation to a firm (or, presumably, an establishment), loss of confidential business data, higher OSHA fines, additional union organizing, additional training, and opportunity costs, as well as perhaps higher labor costs as the labor supply gets better information on the safety and health of a workplace. Commenters also suggested that liability costs might rise, or that the security of dangerous materials or processes might be compromised. Finally, commenters suggested that an untrained public might naively misinterpret the data. Each of these groups of comments will be addressed briefly in this section.

a. Computers and Computer Systems

Some commenters argued that OSHA was requiring the use of computerized record keeping. Troy Miller, a private citizen, commented, ''The literature included with the proposed rule suggests that OSHA assumes a majority of employers already keep their injury and illness records electronically, so submission to OSHA should be doable without much extra time or expense'' (Ex. 0160). A related set of comments suggested that many establishments or firms would need to buy new computer systems (Exs. 0035, 1205, 1225, 0179, 0210, 1092, 1123, 1189, 1190, 1192, 1199, 1275, 1281, 1092, 1113, 1279).

OSHA notes that nothing in this final rule, or in the existing part 1904 regulation, requires employers to create or maintain records electronically. Anyone who prefers to keep paper records for whatever reason may continue to do so. Employers who keep paper records will only have to enter the information from their paper records onto the forms on OSHA's Web site. OSHA estimates that this data entry will

require 10 minutes per form and two minutes per line entry on Form 300. It is possible that an employer who already keeps records electronically could take fewer than ten minutes per form and two minutes per line entry on Form 300 by electronically transferring the appropriate data to the OSHA Web site.

b. Training

Several commenters suggested that they would face additional training costs to train employees who already administer or keep OSHA 300-series forms to upload either summary or Log data to the OSHA Web site (Exs. 0160, 0179, 0194, 0196, 0210, 0215, 1091, 1092, 1326, 1339, 1340, 1372, 1393, 1394, 1396, 1401, 1408). A typical comment on training was submitted by the Pacific Maritime Association (PMA), which commented, ''OSHA has failed to take into account the costs associated with having to train employees to record injuries in a manner suitable for publication . . .'' (Ex. 1326).

OSHA continues to believe that additional training should not be necessary either to fill in a web form or to transmit records from an existing electronic system with which the employee is already familiar. This will be no more difficult than filling in order forms on private sites or other government forms online. It should be noted that more than 70 percent of respondents to the OSHA ODI and the BLS SOII collections choose to respond electronically. OSHA has already accounted for training for recordkeepers to understand the OSHA recordkeeping system and for the costs of familiarizing first-time recordkeepers with the Web site. No additional training will be necessary to transfer data from already-filled-in forms to a computer form. Note that OSHA's estimate of an hourly wage of $48.78 for the person entering the data assumes that the person is a technically-proficient employee; the hourly wage for an employee who is not technically proficient would typically be less.

c. Review

Several commenters suggested that some establishments might undertake an extra level of review, or an extra review effort, before sending the information to OSHA (Exs. 0258, 1110, 1123, 1205, 1336, 1356, 1399, 1401, 1413, 1427). For example, the Phylmar Regulatory Roundtable (PRR) commented, ''Online submission to OSHA will likely include the labor not just of record keepers, but of more senior health and safety staff to quality control the data before submission. Most members believe strongly that senior management would seek to review and approve all submissions (not just the 300A reports); again this would involve additional cost to comply'' (Ex. 1110).

As discussed above, comments on this issue were often conflated with other issues, for example the confidentiality of employees' records. The Texas Cotton Ginners' Association (TCGA), represents very small establishments that ''will have up to 20 or 30 employees during peak periods'' (Ex. 0211). The TCGA suggested that, because of the possibility of revealing confidential employee information, a manager might instead subject the data to further review and upload it themselves: ''The concern of management will be that this type of system will inherently set up situations where workers may feel their privacy is violated, and the worker is likely to blame their employer when this occurs. To minimize their liability, it is unlikely that a company will simply hand all the forms to a clerk and tell them to key the data into the public domain'' (Ex. 0211).

In response, OSHA notes that OSHA's estimate of an hourly wage for the recordkeeper submitting the data is based on the assumption of a safety and health specialist familiar with the establishment's safety and health records, and that this hourly wage may be larger than the hourly wage for managers of small firms. Second, OSHA notes that a firm with 20–30 employees is required to submit only the information from Form 300A (the annual summary), which contains no employee-specific information.

OSHA believes that existing regulations already provide an entirely adequate incentive to employers to thoroughly review their records and that publication of establishment-specific data through the final rule will require little further review. After all, OSHA records can already be accessed by OSHA at the time of inspection, as well as by employees and their representatives (including unions and employee attorneys). In addition, employers are already required to certify records under possible penalties of perjury.

Some commenters were concerned about confidential business information or personal information (Exs. 0038, 0150, 0159, 0210, 0215, 0252, 1090, 1091, 1110). As discussed above, there is no need for confidential business information in OSHA records, and OSHA already urges employers to avoid including confidential business information in OSHA records because OSHA allows employees and their representatives access to these records and places no limitations on the use of these records. There is no need for such confidential business information in OSHA records, and confidential business information should already be excluded, as the records can be made public at any time. Employers concerned with the time required to expunge personal information should also consider that the information in question could already be made public and that recordkeeping should exclude as much personal information as possible, consistent with the use of the records. In addition, OSHA intends to exclude the names and other PII of individuals from the records before publishing the data.

d. Harm to Reputation

Some commenters suggested that published injury and illness data will tarnish the reputations of some establishments, or enterprises, or perhaps their entire industry. The Pacific Maritime Association commented, ''. . . an employee who has worked for one employer over a long period of time, and complains about a cumulative injury on his first day of work with a second employer will trigger an injury report that will be attributed to that second employer. Publication of this report is obviously unfair and inaccurate. Further, owing to contractual obligations and developing regional working rules, the standards and conditions at different ports change with a degree of frequency. Accordingly, without the proper context—something that OSHA has not proposed to provide as part of this database—it will be impossible for the public to even compare the injury rates of a single port'' (Ex. 1326). OSHA agrees that it is important for users of the data to understand the rules under which the data was gathered, as shown by the ''Explanatory Notes'' OSHA includes with its currently-published ODI data. OSHA intends to include similar notes and explanations with the data collected under this rulemaking to minimize misunderstanding and misrepresentation of the data.

Many commenters wrote that they feared that publication of establishment-specific summaries of annual injuries and illnesses would harm the establishments' reputations, and therefore, their businesses (Exs. 0157, 0160, 0162, 0181, 0189, 0205, 0218, 0224, 0235, 0240, 0242, 0245, 0249, 0251, 0255, 1084, 1089, 1090, 1091, 1092, 1093, 1095, 1096, 1106, 1112, 1113, 1115, 1117, 1123, 1192, 1197, 1198, 1199, 1200, 1205, 1209, 1214, 1216, 1217, 1218, 1224, 1225, 1272, 1276, 1277, 1279, 1281, 1282, 1283, 1284, 1321, 1326, 1327, 1328, 1332,

1333, 1336, 1337, 1341, 1342, 1343, 1348, 1349, 1351, 1355, 1356, 1357, 1359, 1361, 1370, 1380, 1388, 1389, 1393, 1396, 1397, 1399, 1400, 1401, 1402, 1405, 1408, 1412, 1421). A typical comment was submitted by Grede Holdings, LLC (GH), which stated that ''[p]roviding raw data in a public forum to be viewed by individuals or groups that may not know how to interpret the data could result in incorrect conclusions or assumptions about the employer. This misunderstanding of the data could further result in unwarranted damage to a company's reputation, related loss of business and jobs, and unwarranted government inspections consuming the limited agency and company resources that could be used more effectively elsewhere'' (Ex. 1402). The National Association of Home Builders (NAHB) commented that ''OSHA also does not consider the adverse impacts on safety and health that could occur through the implementation of this rule. These impacts have been discussed above and include employers shifting resources away from safety and health initiatives toward lagging indicators, employers including fewer details of injuries and illnesses on recordkeeping forms, and employers with sound injury and illness prevention programs being subjected to reputation damage from employers, employees, and others making incorrect assessments of their safety and health efforts from extremely limited facts'' (Ex. 1408).

Regarding the first comment, OSHA is not aware of damage to the reputations of establishments or firms from other, similar data collection efforts. For example, MSHA has been collecting and publishing individual mine injury data on the Web for 15 years. OSHA itself has, for many years, published establishment-specific results of its inspections and, more recently, establishment-specific data collected through the ODI. There are other types of web-published data, which include public safety information (for example police or fire responses to a business's location), health inspector reports, court records, and information about a firm's financial condition. All of these sorts of information are subject to misinterpretation by members of the public.

Regarding the second comment, OSHA strongly disagrees with the commenter that a strong illness and injury prevention program can be based on hiding basic information on injury and illness rates from either employees or the public. Illness and injury prevention programs work best when data on injuries and illnesses is collected and analyzed frequently and used as a tool to improve safety and health. As discussed above, this data collection effort will allow scholars and public health experts to analyze establishment data, discover patterns in injuries and illnesses, and recommend solutions.

e. Opportunity Costs of the Regulation

Another comment about the proposed rule had to do with what one commenter explicitly identified as ''opportunity costs'', that is, the value of effort forgone due to the compliance costs for this final rule. The Food Marketing Institute (FMI) commented, ''Thus, time spent addressing the proposed rule's many requirements is time that the safety personnel cannot spend providing safety training, completing safety audits, or handling other matters critical to the ongoing safety of the workplace. The opportunity costs created by the proposed rule are potentially significant and must be accounted for in the proposal's overall cost to employers'' (Ex. 1198).

In response, the comment above is true for any government rule or regulation, or for that matter, any internal firm regulation or operating procedure. Time spent on compliance with any regulation is, by definition, time that cannot be spent on something else. That is one reason why OSHA has kept the requirements for this final rule as simple and as economical as possible. OSHA does not believe that an extra ten minutes, or even an extra hour, every year will significantly affect the ability of an establishment to have a safety program or generate profits. In fact, OSHA believes that when an establishment has access to the injury and illness information for other firms that will be generated by this final rule, it should make an establishment's safety and health program more efficient. Further, in principal, the labor costs of affected workers reflect the opportunity costs of that labor. If the opportunity cost is significantly higher than the labor costs, the firm should consider hiring more of the kind of labor in question.

f. Data Taken Out of Context

Last, many commenters stated that OSHA injury and illness data might be taken out of context or misinterpreted by the public. One commenter, the National Grain and Feed Association (NGFA), commented, ''Providing raw data to those who do not know how to interpret it or without putting such data in context invites improper and false conclusions or assumptions to be drawn about the employer, which could lead to unnecessary damage to a company's reputation, related loss of business and jobs, and misallocation of resources by the public, government and industry'' (Ex. 1351). OSHA strongly disagrees with comments criticizing the value of raw and un-interpreted injury and illness data. Standard economic principles show that information is valuable, even if it is difficult to interpret. As economists as early as Adam Smith, and including Friedrich Hayek and Milton Friedman, have shown, economic actors who have only a narrow view of the information available in the economy work together to efficiently allocate resources. Hayek wrote in ''The Use of Knowledge in Society'' (1945) that ''The whole acts as one market, not because any of its members survey the whole field, but because their limited individual fields of vision sufficiently overlap so that through many intermediaries the relevant information is communicated to all. The mere fact that there is one price for any commodity—or rather that local prices are connected in a manner determined by the cost of transport, etc.—brings about the solution which (it is just conceptually possible) might have been arrived at by one single mind possessing all the information which is in fact dispersed among all the people involved in the process.''

In addition, OSHA believes that the best solution to the ''problem of information'' is more information. Establishments, corporations, and industry groups will now have access to competitors' information on injuries and illnesses, and they will be able to distinguish themselves from others in their industry.

7. Total Costs of the Rule

As shown in the Table VI–1 below, the total costs of the final rule would be an estimated $15.0 million per year. These costs are shown in the middle column of Table VI–1. Also note that the last column, ''First Year Costs'', is broken out separately, but is also included in the Final Rule Annual Costs column, having been amortized over 10 years at 3 percent interest. It would be double-counting to add the total of the second and third columns together.

TABLE VI–1—TOTAL COSTS OF THE FINAL AND PROPOSED RULE

Cost element	Proposed rule	Final rule	Final rule
	Annual costs	Annualized costs	First year costs (if different from annualized costs)
Electronic submission of part 1904 records by establishments with 250 or more employees	$6,954,950	[4] $7,222,257	
Electronic submission of OSHA annual summary form (Form 300A) by establishments with 20 to 249 employees in designated industries	3,695,939	4,571,594	
This includes:			
Cost for establishments without a computer ($1,001,631).			
Cost for establishments with non-certified records ($231,192).			
Cost for Agricultural Establishments not in PEA		229,568	
Familiarization		411,061	3,506,436
Cost for check by unregulated establishments		370,283	3,158,593
Cost of non-discrimination provision		938,040	8,001,673
Electronic submission of part 1904 records upon notification	*0	*0	
Total Private Sector Costs	10,650,889	13,742,804	
Total Government Costs	1,242,000	1,279,260	1,545,162
Total	11,892,889	15,022,064	

*This part of the proposed rule has no immediate costs or economic impacts. Under this part of the rule, an establishment would be required to submit data electronically if OSHA notified the establishment to do so as part of a specified data collection. Each specified data collection would be associated with its own particular costs, benefits, and economic impacts, which OSHA would estimate as part of obtaining OMB approval for the specified data collection under the Paperwork Reduction Act of 1995.

First, as noted elsewhere in this document, the final rule does not add to or change any employer's obligation to complete, retain, and certify injury and illness records. The final rule also does not add to or change the recording criteria or definitions for these records. The only change is that, under certain circumstances, employers will be obligated to submit information from these records to OSHA in an electronic format. Many employers have already done this through the OSHA Data Initiative and BLS SOII survey; these employers have not commented, either on the proposed rule or on the paperwork analyses, that they incurred additional costs beyond those that OSHA estimated (*see* for example the ODI ICR 200912–1218–012 and the SOII ICR 201209–1220–001).

Second, employers are already required to examine and certify the information they collect. Employers who are already sufficiently satisfied with the accuracy of their records to accept the risk of a criminal penalty are unlikely to do more simply because they must electronically submit the records to OSHA. Therefore, the prospect of submitting their data to OSHA would not provide any additional incentive to carefully record injuries and illnesses.

Third, injury and illness records kept under part 1904 are already available to OSHA and the public in a variety of ways. The annual summary data must be posted where employees can see it. Employees or their representatives can also obtain and make public most of the information from these records at any time, if they wish. These are the people who are most likely to recognize if the records are inaccurate. Finally, OSHA Compliance Officers routinely review these records when they perform workplace inspections. While OSHA inspections are a rare event for the typical business, they are much more common for firms with over twenty employees in the kinds of higher-hazard industries subject to this rule.

OSHA requested comments on the issue of whether employers newly required to submit records to OSHA may spend additional time assuring the accuracy of their records, beyond what they spend now. If all 431,296 establishments were to spend an extra half hour for an industrial health and safety specialist to double-check the data prior to submission, then the costs of this final rule would increase by $10.5 million. While this would be a substantial addition to the costs of the rule, such an addition would not alter OSHA's conclusion that this is neither an economically-significant rule nor a rule that would impose significant costs on a substantial number of small businesses.

OSHA received two comments that provided alternative estimates of the total costs. OSHA will review these estimates here.

Miles Free at Precision Machined Products Association (PMPA) provided a detailed breakdown of estimated costs, itemizing the tasks firms would have to undertake due to the proposed regulation change (Ex. 194). The costs totaled $592 per firm. Most of these tasks were not included in OSHA's cost estimate. The total of $592 includes the use of a higher managerial wage ($30) and costs associated with reading the rule, reviewing, training, and development of IT resources; he notes ''many of these costs are initial setup''. OSHA believes that many of these costs seem inflated. For example, the second largest single cost element is for ''reading the rule'' which will require 4 hours. Given that the rule itself takes up less than one page of text, and can be readily explained in less than another page of text, it is difficult to imagine how someone could spend 4 hours reading the rule. In addition, as noted above, review of records is already required; no additional IT resources are required to submit a form electronically; and it is difficult to see how technically-qualified personnel will need training in order to submit already-gathered data on an Internet form.

For the Final Economic Analysis, OSHA added 5 minutes of time for establishments that are required to keep records, but are not newly required to submit annual records summaries to OSHA under this rule. OSHA believes those establishments might need 5 minutes to check OSHA's Web site, or various other Web sites or sources of

[4] This is the cost for every year of the rule except the first year. Because of the phase-in, in the first year establishments with 250 or more employees only have to submit their summary data, at a cost of $239,197. All other costs are unaffected by the phase-in.

information to determine if they are covered under this recordkeeping change. There are 889,327 establishments that are required to keep records but are not required to report under this new rule. If each establishment takes 5 minutes to check, using an Industrial Health and Safety Specialist with a loaded wage of $42.62, then the unit cost will be $3.55 [5/60 * $42.62] and the total cost, which occurs entirely in the first year and can be annualized over 10 years at 3 percent interest, is $370,283 [$3,158,593 in the first year, discounted at a 3 percent interest rate over 10 years].

The Chamber of Commerce asserts that ''OSHA's cost-benefit analysis is deeply flawed'' for multiple reasons and derives its own total costs of the regulation at over $1.1 billion (Ex. 1396). In the submitted comment, the Chamber states one of the sources of the higher cost would ''result from companies more closely scrutinizing whether an injury or illness is recordable and hence reportable.'' The discussion of this topic focused on the legal case of *Caterpillar Logistics Inc.* vs *Solis,* to ''illustrate the time and resources that employers will be forced to expend in making these recordability decisions.'' In their submitted comments, they describe the difficulty of diagnosing the source of musculoskeletal disorders (ergonomic injuries) which they cite as ''34% of all purported nonfatal workplace injuries and illnesses'' based on BLS statistics. The Chamber stated that ''OSHA's estimated costs barely scratch the surface of the resources that this proposed rule will require.'' Given that the costs to Caterpillar are associated entirely with OSHA's current part 1904 regulation, OSHA believes that this issue is not relevant to this rulemaking.

In their discussion of costs, the Chamber provides its own estimates for three specific elements: reviewing the rule, re-programming information systems, and training. They state, ''if each firm on average spent just one hour to review the rule's compliance requirements, the initial year cost would be over $342 million.'' The Chamber based its cost estimate on the BLS 2013 average compensation for private sector managers and administrators, and a total count of 7.4 million separate establishments. It should be noted that the overwhelming majority of these establishments are very small firms with fewer than 11 employees and firms in low-hazard industries that are partially exempt from OSHA's recordkeeping requirements. These firms already know that this rulemaking does not apply to them, because they are not required to routinely keep OSHA injury and illness records under part 1904.

Using reports by companies surveyed about HR information systems that would need to be modified, the Chamber estimates an initial-year cost of over $440 million to re-program information systems and software. The Chamber's comments describe multiple challenges associated with the costs for electronic submissions, including the integration of software or databases, and up to 16 hours of professional labor to retool information systems and software. The Chamber states, ''The majority of employers will find it necessary to change existing records systems and procedures in order to compile and submit information according to the format and periodicity of this proposed rule's reporting requirement.'' The Chamber estimates startup software modification costs of over $5,000 for large firms and $1,000 for small firms. These estimates seem high. The typical large firm has to track an average of 21 one-page records. It is difficult to imagine how it would be possible to spend $5,000 on a system designed to track 21 one-page records. In any case, however, firms must already track these records, although they need not do so electronically, so there is no need for a new system of any kind as a result of the final rule. In the case of small firms, the Chamber estimated that there would be $1,000 in software costs associated with submitting data on a one-page form that the employer already is required to fill out. OSHA believes that it is extremely unlikely that a small firm would spend $1,000 for this purpose.

Lastly in the submitted cost comments, the Chamber estimates training costs at nearly $150 million, ''based on just one hour of training plus the average cost for commercial occupational safety training materials.'' The Chamber's estimated training cost would be for corporate managers who ''will need to be trained to comply with the reporting formats, schedules and procedures.'' As discussed above, OSHA believes that such training is unnecessary for a person competent in computer use (or smart phone use) to fill in an on-line form.

C. Benefits

As OSHA explained in the preamble to the proposed rule, OSHA anticipates that establishments' electronic submission of establishment-specific injury/illness data will improve OSHA's ability to identify, target, and remove safety and health hazards, thereby preventing workplace injuries, illnesses, and deaths. In addition, OSHA believes that the data submission requirements of the final rule will improve the quality of the information and lead employers to increase workplace safety and health.

The Agency plans to make the injury and illness data public, as encouraged by President Obama's Open Government Initiative. Online access to these data will allow the public, including employees and potential employees, researchers, employers, unions, and workplace safety and health consultants, to use and benefit from the data. It will support the development of innovative ideas and allow everybody with a stake in workplace safety and health to participate in improving occupational safety and health.

The data collected by BLS is mostly used in the aggregate. While BLS makes micro data available in a restricted way to researchers, OSHA will make micro data, including case data, available to researchers and the public with far fewer restrictions.

The BLS SOII is used as a basis for much of the research on workplace safety and health in the US. Typical examples include Economic Burden of Occupational Injury and Illness in the United States, by J. Paul Leigh (2011); Analyzing the Equity and Efficiency of OSHA Enforcement, by Wayne B. Gray and John T. Scholz (1991); Establishment Size and Risk of Occupational Injury, by Dr. Arthur Oleinick MD, JD, MPH, Jeremy V. Gluck Ph.D., MPH, and Kenneth E. Guire (1995); and Occupational Injury Rates in the U.S Hotel Industry, by Susan Buchanan *et al.* in the American Journal of Industrial Medicine (2010). Some of these studies, such as Gray and Sholtz, use establishment-specific data previously only available on site at BLS.

The database resulting from this final rule will provide for the use of establishment-specific data without having to work under the restrictions imposed by BLS for the use of confidential data. It would also provide data on injury and illness classifications that are not currently available from any source, including the BLS SOII. Specifically, under this collection, there would be case-specific data for injuries and illnesses that do not involve days away from work. The BLS case and demographic data is limited to cases involving days away from work and a small subset of cases involving restricted work activity.

In order to determine possible monetary benefits to this rule, OSHA calculated the value of statistical life (VSL) using Viscusi & Aldy's (2003) meta-analysis of studies in the economics literature that use a willingness-to-pay methodology to

estimate the imputed value of life-saving programs. The authors found that each fatality avoided was valued at approximately $7 million in 2000 dollars. Using the GDP Deflator (Source: *https://research.stlouisfed.org/fred2/series/GDPDEF/#*), OSHA estimated that this $7 million base number in 2000 dollars yields an estimate of $9 million in 2012 dollars for each fatality avoided.

Many injuries, illnesses, and fatalities can be prevented at minimal cost. For example, the costs of greater use of already-purchased personal protective equipment are minimal, yet many fatalities described in OSHA's inspection data systems could have been prevented through the use of available personal protective equipment. This includes fatalities related to falls when a person was wearing fall protection but did not have the lanyard attached and to electric shocks where arc protection was available but unused or left in the truck. For such minimal-cost preventative measures, assuming they have costs of prevention of less than $1 million per fatality prevented and using the VSL of $9 million and other parameters typically used in OSHA benefits, if the final rule leads to either 1.5 fewer fatalities or 0.025 percent fewer injuries per year, the rule's benefits will be equal to or greater than the costs. Many accident-prevention measures will have some costs, but even if these costs are 75 percent of the benefits, the final rule will have benefits exceeding costs if it prevented 4.8 fatalities or 0.8 percent fewer injuries per year. OSHA expects the rule's beneficial effects to exceed these values.

OSHA received many comments concerning the possible benefits, or lack of benefits, for the final rule. Some of the benefit suggestions were innovative. One commenter suggested that having establishment-level injury and illness data on-line will be valuable for local medical care practitioners who can check to see whether their patient's illness or injury is because of their job (Ex. 1106). The Council of State and Territorial Epidemiologists (CSTE) commented, ''Availability of on line data on work-related injuries and illnesses will allow health care practitioners to assess the occurrence of particular injuries and illnesses at the establishments where their patients work'' (Ex. 1106).

CSTE provided an example of a similar regulation in Massachusetts which did reduce workplace injuries (Ex. 1106). The study by Laramie *et al.* (2011) showed that after implementing a needlestick injury reporting program in Massachusetts, the hospitals required to submit annual injury summaries had a 22 percent decrease in needle stick injuries over 5 years. While OSHA does not claim that this data collection initiative will result in a 5 percent annual decrease in injuries and illnesses, even two-hundredths of a percent decrease in injuries and illnesses would be an overall benefit of 400 fewer workplace injuries and illnesses in the United States per year.

Many commenters suggested that the benefits of this information collection and dissemination would be dissipated because of the poor quality of the information collected (Exs. 1219, 1333, 1391, 1199, 1343, 1342, 1110, 1110, 1402, 0258, 1359).

In response, OSHA notes that information is a unique good, which has special properties including non-exclusion and non-rivalness, and that the absence of information can create a market failure. The presence of some information can help to correct a market failure, even if the information is not perfect. The information can still provide a signal to the economic actors (firms, establishments, workers, etc.) even if the information stream is noisy.

The labor market may suffer from information asymmetries. If employers know the actual risk of performing a job and job applicants believe the job is safer than it actually is, then employees may accept a lower wage, in other words, a less efficient wage. The classic economics article on market information asymmetries is Akerlof's ''The Market for Lemons'', which describes a theoretical model for the market for used cars. For employers, there is an incentive to misrepresent the safety of their workplace because it would allow them to hire labor for less than the market clearing wage.

As discussed above, a common complaint of commenters was that injury and illness summaries are lagging, rather than leading, indicators of safety problems (Exs. 0027, 0163, 0210, 0250, 0258, 1109, 1124, 1193, 1194, 1198, 1204, 1206, 1217, 1219, 1222, 1275, 1279, 1321, 1326, 1331, 1333, 1334, 1336, 1339, 1341, 1342, 1343, 1355,, 1360, 1363, 1373, 1376, 1380, 1389, 1390, 1391, 1392, 1393, 1396, 1399, 1400, 1402, 1406, 1408, 1409, 1410, 1411, 1413, 1416, 1417, 1430, 1467, 1489). One commenter, the American Health Care Association (AHCA) commented, ''Despite OSHA's alleged position regarding the value of leading indicators as opposed to lagging indicators, OSHA continues to push employers into focusing resources and energy in the wrong direction'' (Ex. 1194). Another commenter, the Mechanical, Electrical, Sheet Metal Alliance (MCAA), stated: ''. . . OSHA Incidence Rates are poor indicators of safety performance'' (Ex. 1363). MCAA writes further that ''Construction owners often determine whether contractors are eligible to bid on their projects based on the owner's perception of the contractors' safety performance. Owner's evaluation of a company's lagging indicators on the OSHA's [sic] Web site would be misleading with regard to that company's safety culture and safety performance'' (Ex. 1363). OSHA disagrees, instead believing that OSHA's Web site information is better than no information and that it won't be misleading in the context of hundreds or thousands of other similar establishments reporting their injury and illness rates, which will be available for comparison.

The nomenclature of leading versus lagging indicators is unfortunate. OSHA is not requiring an annual data collection to attempt to judge the safety performance of any particular establishment, but rather to collect annual injury and illness data to use in ways similar to how the data collected from the ODI was used already. OSHA does not have a strong opinion on the question of injury and illness data as a lagging indicator, but the Agency knows that on average, current-year injury/illness rates are related to past-year as well as future-year injury and illness rates. OSHA wants to collect this information; further, the Agency has been requiring many establishments to record this information for decades. As discussed elsewhere, this data collection effort is not an exercise in judging safety and health reputations.

Other commenters who commented that the collection and electronic publication of these records would be helpful included many labor unions. A representative comment is from the International Brotherhood of Teamsters (IBT), which wrote that they currently have great difficulty obtaining these records for their membership from unionized workplaces. The IBT wrote, ''The cases are provided as an illustration of the fact that employers frequently deny union representatives access to this information, forcing the union to pursue charges with the NLRB'' (Ex. 1381).

D. Economic Feasibility

OSHA concludes that the final rule will be economically feasible. For the annual reporting requirement, affecting establishments with 250 or more employees, the average cost per affected establishment will be $215 per year. For the annual reporting requirement,

affecting establishments with 20 to 249 employees in designated high-hazard industries, the average cost per affected establishment will be $11.13 per year. In addition, the non-discrimination provision, which has a cost of $5.86, on average, in the first year for each of the 1.3 million establishments subject to the rule, should also be economically feasible. These costs will not affect the economic viability of these establishments.

E. Regulatory Flexibility Certification

The part of the final rule requiring annual reporting for establishments with 250 or more employees will affect some small firms, according to the definition of small firm used by the Small Business Administration (SBA). In some sectors, such as construction, where SBA's definition only allows relatively smaller firms, there are unlikely to be any firms with 250 or more employees that meet SBA small-business definitions. In other sectors, such as manufacturing, a small minority of SBA-defined small businesses will be subject to this rule. Thus, this part of the final rule will affect only a small percentage of all small firms. However, because some small firms will be affected, especially in manufacturing, OSHA has examined the impacts on small businesses of the costs of this rule. OSHA's procedures for assessing the significance of final rules on small businesses suggest that costs greater than 1 percent of revenues or 5 percent of profits may result in a significant impact on a substantial number of small businesses. To meet this level of significance at an estimated annual average cost of $215 per affected establishment per year, annual revenues for an establishment with 250 or more employees would have to be less than $21,500, and annual profits would have to be less than $4,300. These are extremely unlikely combinations of revenue and profits for firms of this size and would only occur for a very small number of firms in severe financial distress.

The part of the final rule requiring annual electronic submission of data from establishments with 20 to 249 employees in designated industries will also affect some small firms. As stated above, costs greater than 1 percent of revenues or 5 percent of profits may result in a significant economic impact on a substantial number of small businesses. To meet this level of significance at an estimated annual average cost of $11.13 per affected establishment per year, annual revenues for an establishment with 20 to 249 employees would have to be less than $1,113, and annual profits would have to be less than $226. These are extremely unlikely combinations of revenue and profits for establishments of this size.

As a result of these considerations, per section 605 of the Regulatory Flexibility Act, OSHA proposes to certify that this final rule will not have a significant economic impact on a substantial number of small entities. Thus, OSHA did not prepare an initial regulatory flexibility analysis or conduct a SBREFA Panel. OSHA requested comments on this certification. Many commenters stated that OSHA should have held a SBREFA Panel (Exs. 0179, 0205, 0250, 0255, 1092, 1103, 1113, 1123, 1190, 1199, 1200, 1205, 1208, 1209, 1211, 1216, 1217, 1275, 1278, 1343, 1356, 1359, 1370, 1387, 1395, 1396, 1408, 1410, 1411, 1421). Other commenters stated that specific aspects of the proposed regulation brought it to the level that should require a SBREFA Panel review. The American Public Power Association (APPA) commented, ''While OSHA representatives have asserted that the new elements of the proposed rule are only extensions of existing requirements, APPA is of the opinion that the proposed rule includes profound changes to the scope of the existing framework. As such, OSHA should have convened a Small Business Advocacy Review panel per the Small Business Regulatory Enforcement Fairness Act (''SBREFA'') to analyze the potential impact on the small business community'' (Ex. 1410).

In response, OSHA continues to assert that this regulation is similar to the ODI, though with a larger number of participating establishments. That data collection initiative ran successfully for nearly 20 years.

In another example, the International Association of Drilling Contractors wrote, ''While OSHA acknowledges a small portion of businesses do not have immediate access to computers or the Internet, the agency has not put the rule before a small business review panel as required under the Small Business Regulatory Enforcement Fairness Act of 1996 . . .'' (Ex. 1199). OSHA's response to the issue of computer and Internet access is discussed above.

Despite the comments, OSHA continues to believe that even if the costs per small establishment were ten or twenty times higher than the tiny per establishment costs of about $10 per average small business, those costs would be nowhere near one percent of revenues or five percent of profits. OSHA does note that during its past two SBREFA Panel exercises, in 2012 (on Injury and Illness Prevention Programs) and again in 2014 (on Infectious Diseases), all small-business panel participants had access to computers, the Internet, and email.

VII. Unfunded Mandates

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*), as well as Executive Order 12875, this final rule does not include any federal mandate that may result in increased expenditures by state, local, and tribal governments, or increased expenditures by the private sector of more than $100 million.

Section 3 of the Occupational Safety and Health Act makes clear that OSHA cannot enforce compliance with its regulations or standards on the U.S. government ''or any State or political subdivision of a State.'' Under voluntary agreement with OSHA, some States enforce compliance with their State standards on public sector entities, and these agreements specify that these State standards must be equivalent to OSHA standards. Thus, although OSHA may include compliance costs for affected public sector entities in its analysis of the expected impacts associated with the final rule, the rule does not involve any unfunded mandates being imposed on any State or local government entity.

Based on the evidence presented in this economic analysis, OSHA concludes that the final rule would not impose a Federal mandate on the private sector in excess of $100 million in expenditures in any one year. Accordingly, OSHA is not required to issue a written statement containing a qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate, as required under Section 202(a) of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532(a)).

VIII. Federalism

The final rule has been reviewed in accordance with Executive Order 13132 (64 FR 43255 (Aug. 10, 1999)), regarding Federalism. The final rule is a ''regulation'' issued under Sections 8 and 24 of the OSH Act (29 U.S.C. 657, 673) and not an ''occupational safety and health standard'' issued under Section 6 of the OSH Act (29 U.S.C. 655). Therefore, pursuant to section 667(a) of the OSH Act, the final rule does not preempt State law (29 U.S.C. 667(a)). The effect of the final rule on states is discussed in section IX. State Plan States.

IX. State Plan States

For the purposes of section 18 of the OSH Act (29 U.S.C. 667) and the requirements of 29 CFR 1904.37 and

1902.7, within 6 months after publication of the final OSHA rule, state-plan states must promulgate occupational injury and illness recording and reporting requirements that are substantially identical to those in 29 CFR part 1904 ''Recording and Reporting Occupational Injuries and Illnesses.'' All other injury and illness recording and reporting requirements (for example, industry exemptions, reporting of fatalities and hospitalizations, record retention, or employee involvement) that are promulgated by state-plan states may be more stringent than, or supplemental to, the federal requirements, but, because of the unique nature of the national recordkeeping program, states must 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 objectives (29 CFR 1904.37(b)(2), 29 CFR 1902.7(a)).

There are 27 state plan states and territories. The states and territories that cover private sector employers are Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. Connecticut, Illinois, New Jersey, New York, and the Virgin Islands have OSHA-approved state plans that apply to state and local government employees only.

X. Environmental Impact Assessment

OSHA has reviewed the provisions of this final rule in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality (CEQ) NEPA regulations (40 CFR parts 1500–1508), and the Department of Labor's NEPA Procedures (29 CFR part 11). As a result of this review, OSHA has determined that the final rule will have no significant adverse effect on air, water, or soil quality, plant or animal life, use of land, or other aspects of the environment.

XI. Office of Management and Budget Review Under the Paperwork Reduction Act of 1995

The final rule contains collection of information (paperwork) requirements that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) and OMB regulations (5 CFR part 1320). The PRA requires that agencies obtain approval from OMB before conducting any collection of information (44 U.S.C. 3507). The PRA defines a ''collection of information'' as ''the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public of facts or opinions by or for an agency regardless of form or format'' (44 U.S.C. 3502(3)(A)).

OSHA's existing recordkeeping forms consist of the OSHA 300 Log, the 300A Summary, and the 301 Incident Report. These forms are contained in the Information Collection Request (ICR) (paperwork package) titled 29 CFR part 1904 Recording and Reporting Occupational Injuries and Illnesses, which OMB approved under OMB Control Number 1218–0176 (expiration date 01/31/2018).

The final rule affects the ICR estimates in two programmatic ways: (1) Establishments that are subject to the part 1904 requirements and have 250 or more employees must electronically submit to OSHA on an annual basis the required information recorded on their OSHA Forms 300, 301, and 300A; and (2) Establishments in certain designated industries that have 20 to 249 employees must electronically submit to OSHA on an annual basis the required information recorded on their OSHA Form 300A. In addition to submitting the required data, employers subject to either of these requirements will also be required to create an account and learn to navigate the collection system.

The final rule also requires employers subject to the part 1904 requirements to inform their employees of their right to report injuries and illnesses. This requirement can be met by posting a recently-revised version of the OSHA Poster. The public disclosure of information originally supplied by the Federal Government to the recipient for the purpose of disclosure to the public is not included within the definition of collection of information (5 CFR 1320.3(c)(2)).

The burden hours for the final rule are estimated to be 173,406 for the initial year of implementation and 254,029 for subsequent years. There are no capital costs for this collection of information.

The table below presents the new components of the rule that comprise the ICR estimates.

Estimated Burden Hours

	Implementation of the Final Rule Initial Year			Implementation of the Final Rule Subsequent Years		
Actions entailing paperwork burden	Number of cases	Unit hours per case	Total burden hours	Number of cases	Unit hours per case	Total burden hours
1904.41(a)(1) - create an account and review navigation	33,674	0.167	5,624	6,735	0.167	1,125
1904.41(a)(1) - electronic submission of OSHA Form 300A data by establishments with 250 or more employees	33,674	0.167	5,624	33,674	0.167	5,624
1904.41(a)(1) - electronic submission of injury and illness case data by establishments with 250 or more employees	0	0.2	0	713,967	0.2	142,793
1904.41(a)(2) - create an account and review navigation	431,673	0.167	72,089	86,335	0.167	14,418
1904.41(a)(2) - electronic submission of OSHA Form 300A data by establishments with 20 or more employees but fewer than 250 employees in designated industries	410,089	0.167	68,485	410,089	0.167	68,485
1904.41(a)(2) - electronic submission of OSHA Form 300A data by establishments with 20 or more employees but fewer than 250 employees in designated industries - with no Internet connection	21,584	1	21,584	21,584	1	21,584
1904.41(a)(4) - Electronic submission of part 1904 records upon notification	0	0	0	0	0	0
Total Burden Hours			**173,406**			**254,029**

As required by 5 CFR 1320.5(a)(1)(iv) and 1320.8(d)(2), the following paragraphs provide information about this ICR.

1. *Title:* 29 CFR part 1904 Recording and Reporting Occupational Injuries and Illnesses.

2. *Number of respondents:* OSHA requires establishments that are required to keep injury and illness records under part 1904, and that had 250 or more employees in the previous year, to submit information from these records to OSHA or OSHA's designee, electronically, on an annual basis. There are approximately 34,000 establishments that will be subject to this requirement and that will submit detailed case characteristic data on approximately 700,000 occupational injuries and illnesses per year. OSHA also proposes to require establishments that are required to keep injury and illness records under part 1904, had 20 to 249 employees in the previous year, and are in certain designated industries to electronically submit the information from the OSHA annual summary form (Form 300A) to OSHA or OSHA's designee on an annual basis. There are approximately 430,000 establishments that will be subject to this requirement. Finally, OSHA proposes to require all employers who receive notification from OSHA to electronically submit specified information from their injury and illness records to OSHA or OSHA's designee. This requirement will only incur a paperwork burden when the agency implements a notice of collection. For each new data collection conducted under this proposed provision, the Agency will request OMB approval under separate PRA control numbers.

3. *Frequency of responses:* Annually.

4. *Number of responses:* 1,644,661.

5. *Average time per response:* Time per response varies from 20 minutes for establishments reporting only under § 1904.41(a)(2), to multiple hours for large establishments with many recordable injuries and illnesses reporting under § 1904.41(a)(1). The average time of response per establishment is 41 minutes.

6. *Estimated total burden hours:* The burden hours for the final rule are estimated to be 173,406 for the initial year of implementation and 254,029 for subsequent years. Also, there is an adjustment decrease of 750,637 burden hours due to decreases in (1) the number of establishments covered by the recordkeeping rule; (2) the number of injuries and illness recorded by covered employers; and (3) the number of fatalities, amputations, hospitalization, and loss of eye reported by employers. The proposed total burden hours for the recordkeeping (part 1904) ICR are 2,667,251.

7. *Estimated costs (capital-operation and maintenance):* There are no capital costs for the proposed information collection.

OSHA received a number of comments relating to the estimated time necessary to meet the paperwork requirements of the proposed changes published in the November 8, 2013 Improve Tracking of Workplace Injuries and Illnesses Notice of Proposed Rulemaking (78 FR 67254–67283) and its August 14, 2014 Supplemental Notice (79 FR 47605–47610). References to documents below are given as ''Ex.'' followed by the document number. The document number is the last sequence of numbers in the Document ID Number on *http://www.regulations.gov*. For example, Ex. 17, the proposed rule, is Document ID Number OSHA–2013–0023–0017. The comments are grouped and addressed by topic.

Topic 1: A number of comments were submitted pertaining to the extra time required to submit data on a quarterly basis, rather than an annual basis (Exs. 157, 247). Paula Loht of Gannett Fleming Inc. wrote, ''Based on my calculations, if the proposed reporting requirements are implemented, it would take my two-person staff two weeks of full-time work every quarter to comply,

and would also require input from our technical staff. That would be more than 160 person hours, four times per year.''

Response: In the final rule, OSHA requires case-specific data to be submitted electronically on an annual basis rather than a quarterly basis. This will effectively reduce the time required to log into the collection system multiple times per year. It will also allow employers to comply with the existing review and certification requirements under § 1904.32 prior to submitting their data to OSHA, eliminating the need for extra review employers would have taken prior to a quarterly submission. An annual submission, rather than a quarterly submission, results in a lower burden.

Topic 2: Several comments were submitted pertaining to the time required to verify the accuracy of the data prior to its submittal to OSHA (Exs. 157, 247, 1205). Rick Hartwig of the Graphic Arts Coalition wrote, ''The time estimates by OSHA with regard to the electronic submission process also does not accurately account for the real time it will take an employer or its staff to review the reports, verify information, ensure accuracy of the data entered, enlist the assistance of knowledgeable opinions as necessary, redacting personal information, and to ensure compliance with all applicable regulatory requirements, all prior to submittal to OSHA'' (Ex. 1205).

Response: The data is submitted after the employer has certified to the accuracy of the records in accordance with the already existing requirements of § 1904.32, Annual Summary. The time required to review and certify the records is accounted for under this provision. The new reporting requirements under § 1904.41 require the employer to submit the already verified information to OSHA. OSHA, therefore, did not adjust its estimates for this provision.

Topic 3: Several comments were submitted pertaining to the time OSHA used to estimate the submittal of data from the OSHA form 300 (Exs. 247, 1328, 1141). Eric Conn, representing the National Retail Federation (NRF), wrote, ''. . . OSHA bases its time estimates on the time it takes employers to submit data to the Bureau of Labor Statistics (BLS) in response to its survey. The data submitted for the BLS survey, however, is more limited in terms of information requested. BLS requests only certain data for up to 15 cases, but the Proposed Regulation would require all relevant Form 300 and/or 300A information from the entire injury and illness record. Thus the time burden would actually be much greater than OSHA predicts'' (Ex. 1328).

Response: OSHA agrees that using the estimate of 10 minutes per establishment for entry of the OSHA Forms 300 and 300A data underestimates the time that will be required to respond to this data collection. Establishments with 250 or more employees will be required to submit the Form 300 data for all cases entered on the log. Accordingly, OSHA is now basing its estimation of the time required to submit Log 300 data on the number of injury and illness cases that will be submitted rather than on an estimate of time per establishment. OSHA now estimates employers will require 2 minutes to enter the Form 300 one line entry for each of the 714,000 cases that will be submitted to OSHA. This is in addition to the 10 minutes per establishment for the data from the OSHA Form 300A. Basing estimates on case counts for Form 300 data provides a truer estimate of the total.

Topic 4: Several comments were submitted pertaining to keeping one's records electronically and to submitting a ''batch file'' in response to the new collection requirements (Exs. 247, 1326, 1336, 1141, 1205). Michael Hall of the Pacific Maritime Association (PMA) wrote, ''Under the current recording system, PMA and other employers have not maintained electronic records that are capable of being uploaded or transmitted because they are only inspected during an OSHA inspection. Accordingly, moving to an electronic recording system capable of transmission will be both time consuming and costly'' (Ex. 1326). Marc Freedman of the Coalition for Workplace Safety (CWS) wrote, ''OSHA does not estimate how many employers currently maintain electronic records. As OSHA asserts, 30 percent of ODI respondents do not *submit* records electronically; therefore, one can assume that these records are not *maintained* electronically. From this, it can be safely assumed that a sizeable number of employers will also be copying the required injury and illness information from the establishment's paper forms into the electronic submission forms—a cost OSHA simply ignores when calculating the average cost per affected establishment with 250 or more employees. Moreover, OSHA has not analyzed whether current existing electronic programs would present such data in a format acceptable to be uploaded to OSHA. Without knowing what types of electronic forms OSHA would consider for uploading, the regulated community is unable to estimate whether uploading such information would impose increased costs'' (Ex. 1141).

Response: The final rule does not require employers to adopt an electronic system to record occupational injuries and illnesses and to maintain OSHA Forms 300, 301 and 300A. The new provisions only require employers to submit to OSHA the information they have already recorded. One or more methods of data transmission (other than manual data entry) will be provided, but use is not required. If the employer has software with the ability to export or transmit data in a standard format that meets OSHA's specifications, they may use that method to meet their reporting obligations and minimize their burden to do so. Most commercially available recordkeeping software platforms have such functionality and many large employers regularly use this method for responding to the BLS SOII survey.

OSHA believes many large establishments subject to this requirement will already be keeping their records electronically and will export or transmit the required information rather than entering it into the web form. This will substantially reduce the time needed to comply with the reporting requirement. However, the estimates contained in the Final Economic Analysis (FEA) and the ICR are calculated with the assumption that all submissions will be made by manually entering the required data via the web form. No time savings are included in these estimates for employers that will submit their data through a batch file upload or electronic transmission. OSHA will adjust the estimates under renewed ICRs when we have solid information regarding the percentage of employers that take advantage of batch file upload or electronic transmission.

Topic 5: Several comments were submitted pertaining to the necessity to train employees on how to use the newly created reporting system (Exs. 1205, 1336, 1141). Susan Yashinskie of the American Fuel & Petrochemical Manufacturers (AFPM) wrote, ''This estimate is highly inaccurate and significantly understates the costs given the amount of time it will take for employers to learn how to use and navigate the proposed electronic reporting system . . .'' (Ex. 1336). Rick Hartwig of the Graphic Arts Coalition wrote, ''Regarding the cost estimates outlined within the proposal, they do not account for actual activities and efforts that will be required by the employer. These additional costs can include the training of personnel . . . to

learn the different elements of the new system . . .'' (Ex. 1205).

Response: OSHA agrees that employers will require time to create an account and familiarize themselves with the Web site prior to entering and submitting the required data. This will be a onetime cost in the initial year with costs in subsequent years for establishment with employee turnover. OSHA estimates employers will require 10 minutes to accomplish this task.

In addition to these five common topics, several comments were submitted on miscellaneous issues pertaining to paperwork burden.

Bill Taylor of the Public Agency Safety Management Association (PASMA)—South Chapter wrote, ''. . . One of our member sites has approximately 2,600 employees and their estimated cost of compliance with this proposed quarterly reporting requirement is $7,250 . . . This employer also assumed labor costs of $50 per hour, which includes benefits'' (Ex. 157). PASMA's labor cost estimate of $50 per hour including benefits is consistent with OSHA's estimate of $48.78 for an Occupational Health and Safety Specialist to perform the employer's day-to-day recordkeeping duties.

Michael Hall of the Pacific Maritime Association (PMA) wrote, ''OSHA's estimates do not take into account the costs described above that are unique to the maritime industry. In particular, the man-hours that will have to be devoted to attempting to prevent, if possible, duplicative reporting will be enormous'' (Ex. 1326). The costs of properly recording information on OSHA Forms 300, 301 and 300A are already accounted for in the current recordkeeping requirements burden estimates. The new reporting requirements under 1904.41 only require the employer to submit the data that is already recorded.

Marc Freedman of the Coalition for Workplace Safety (CWS) wrote, ''Because of the consequences of recording an injury under this proposal, employers can be expected to involve more experts in some cases. This is particularly the case with musculoskeletal disorders (''MSD'') . . . employers are more likely to incur substantial costs to conduct evaluations similar to Caterpillar's in order to determine whether an injury is truly work-related. This is particularly the case with musculoskeletal disorder injuries. OSHA has not accounted for these additional costs that are likely to flow from this proposed regulation'' (Ex. 1141). OSHA has not adjusted its estimate for the time it requires to determine the recordability of an injury or illness. Employers are already required to certify to the accuracy of the OSHA forms prior to submitting these data. The time required to record cases on the OSHA forms is already accounted for in the estimates. It should be noted that the ''MSD'' column Mr. Freedman references does not exist at this time. OSHA will account for burden associated with future rulemaking requirements in future ICRs. It should also be noted that OSHA currently publishes establishment-specific injury and illness rates on its Web site and has not observed any indication that publication of that data has increased the time needed to record injuries and illnesses. OSHA does not agree with Mr. Freedman's conjecture that publication of the data captured by these revised requirements will result in additional burden for recording injuries and illnesses.

The PRA specifies that Federal agencies cannot conduct or sponsor a collection of information unless it is approved by OMB and displays a currently valid OMB approval number (44 U.S.C. 3507). Also, notwithstanding any other provision of law, respondents are not required to respond to the information collection requirements until they have been approved and a currently valid control number is displayed. OSHA will publish a subsequent **Federal Register** document when OMB takes further action on the information collection requirements in the Recordkeeping and Recording Occupational Injuries and Illnesses rule.

XII. Consultation and Coordination With Indian Tribal Governments

OSHA reviewed this final rule in accordance with Executive Order 13175 (65 FR 67249 (Nov. 9, 2000)) and determined that it does not have ''tribal implications'' as defined in that order. This final rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

List of Subjects

29 CFR Part 1904

Health statistics, Occupational safety and health, Reporting and recordkeeping requirements, State plans.

29 CFR Part 1902

Health statistics, Intergovernmental relations, Occupational safety and health, Reporting and recordkeeping requirements, State plans.

Authority and Signature

This document was prepared under the direction of David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health. It is issued under Sections 8 and 24 of the Occupational Safety and Health Act (29 U.S.C. 657, 673), Section 553 of the Administrative Procedure Act (5 U.S.C. 553), and Secretary of Labor's Order No. 41–2012 (77 FR 3912 (Jan. 25, 2012)).

Signed at Washington, DC, on April 29, 2016.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

Final Rule

For the reasons stated in the preamble, OSHA amends parts 1904 and 1902 of chapter XVII of title 29 as follows:

PART 1904—[AMENDED]

■ 1. The authority citation for part 1904 continues to read as follows:

Authority: 29 U.S.C. 657, 658, 660, 666, 669, 673, Secretary of Labor's Order No. 1–2012 (77 FR 3912, Jan. 25, 2012).

■ 2. Revise § 1904.35 to read as follows:

§ 1904.35 Employee involvement.

(a) *Basic requirement.* Your employees and their representatives must be involved in the recordkeeping system in several ways.

(1) You must inform each employee of how he or she is to report a work-related injury or illness to you.

(2) You must provide employees with the information described in paragraph (b)(1)(iii) of this section.

(3) You must provide access to your injury and illness records for your employees and their representatives as described in paragraph (b)(2) of this section.

(b) *Implementation*—(1) *What must I do to make sure that employees report work-related injuries and illnesses to me?* (i) You must establish a reasonable procedure for employees to report work-related injuries and illnesses promptly and accurately. A procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness;

(ii) You must inform each employee of your procedure for reporting work-related injuries and illnesses;

(iii) You must inform each employee that:

(A) Employees have the right to report work-related injuries and illnesses; and

(B) Employers are prohibited from discharging or in any manner discriminating against employees for reporting work-related injuries or illnesses; and

(iv) You must not discharge or in any manner discriminate against any employee for reporting a work-related injury or illness.

(2) [Reserved]

■ 3. Revise § 1904.36 to read as follows:

§ 1904.36 Prohibition against discrimination.

In addition to § 1904.35, section 11(c) of the OSH Act also prohibits you from discriminating against an employee for reporting a work-related fatality, injury, or illness. That provision of the Act also protects the employee who files a safety and health complaint, asks for access to the part 1904 records, or otherwise exercises any rights afforded by the OSH Act.

Subpart E—Reporting Fatality, Injury and Illness Information to the Government

■ 4. Add an authority citation to subpart E of 29 CFR part 1904 to read as follows:

Authority: 29 U.S.C. 657, 673, 5 U.S.C. 553, and Secretary of Labor's Order 1–2012 (77 FR 3912, Jan. 25, 2012).

■ 5. Revise § 1904.41 to read as follows:

§ 1904.41 Electronic submission of injury and illness records to OSHA.

(a) *Basic requirements*—(1) *Annual electronic submission of part 1904 records by establishments with 250 or more employees.* If your establishment had 250 or more employees at any time during the previous calendar year, and this part requires your establishment to keep records, then you must electronically submit information from the three recordkeeping forms that you keep under this part (OSHA Form 300A Summary of Work-Related Injuries and Illnesses, OSHA Form 300 Log of Work-Related Injuries and Illnesses, and OSHA Form 301 Injury and Illness Incident Report) to OSHA or OSHA's designee. You must submit the information once a year, no later than the date listed in paragraph (c) of this section of the year after the calendar year covered by the forms.

(2) *Annual electronic submission of OSHA Form 300A Summary of Work-Related Injuries and Illnesses by establishments with 20 or more employees but fewer than 250 employees in designated industries.* If your establishment had 20 or more employees but fewer than 250 employees at any time during the previous calendar year, and your establishment is classified in an industry listed in appendix A to subpart E of this part, then you must electronically submit information from OSHA Form 300A Summary of Work-Related Injuries and Illnesses to OSHA or OSHA's designee. You must submit the information once a year, no later than the date listed in paragraph (c) of this section of the year after the calendar year covered by the form.

(3) *Electronic submission of part 1904 records upon notification.* Upon notification, you must electronically submit the requested information from your part 1904 records to OSHA or OSHA's designee.

(b) *Implementation*—(1) *Does every employer have to routinely submit information from the injury and illness records to OSHA?* No, only two categories of employers must routinely submit information from their injury and illness records. First, if your establishment had 250 or more employees at any time during the previous calendar year, and this part requires your establishment to keep records, then you must submit the required Form 300A, 300, and 301 information to OSHA once a year. Second, if your establishment had 20 or more employees but fewer than 250 employees at any time during the previous calendar year, and your establishment is classified in an industry listed in appendix A to subpart E of this part, then you must submit the required Form 300A information to OSHA once a year. Employers in these two categories must submit the required information by the date listed in paragraph (c) of this section of the year after the calendar year covered by the form or forms (for example, 2017 for the 2016 forms). If you are not in either of these two categories, then you must submit information from the injury and illness records to OSHA only if OSHA notifies you to do so for an individual data collection.

(2) *If I have to submit information under paragraph (a)(1) of this section, do I have to submit all of the information from the recordkeeping form?* No, you are required to submit all of the information from the form *except* the following:

(i) Log of Work-Related Injuries and Illnesses (OSHA Form 300): Employee name (column B).

(ii) Injury and Illness Incident Report (OSHA Form 301): Employee name (field 1), employee address (field 2), name of physician or other health care professional (field 6), facility name and address if treatment was given away from the worksite (field 7).

(3) *Do part-time, seasonal, or temporary workers count as employees in the criteria for number of employees in paragraph (a) of this section?* Yes, each individual employed in the establishment at any time during the calendar year counts as one employee, including full-time, part-time, seasonal, and temporary workers.

(4) *How will OSHA notify me that I must submit information from the injury and illness records as part of an individual data collection under paragraph (a)(3) of this section?* OSHA will notify you by mail if you will have to submit information as part of an individual data collection under paragraph (a)(3). OSHA will also announce individual data collections through publication in the **Federal Register** and the OSHA newsletter, and announcements on the OSHA Web site. If you are an employer who must routinely submit the information, then OSHA will not notify you about your routine submittal.

(5) *How often do I have to submit the information from the injury and illness records?* If you are required to submit information under paragraph (a)(1) or (2) of this section, then you must submit the information once a year, by the date listed in paragraph (c) of this section of the year after the calendar year covered by the form or forms. If you are submitting information because OSHA notified you to submit information as part of an individual data collection under paragraph (a)(3) of this section, then you must submit the information as often as specified in the notification.

(6) *How do I submit the information?* You must submit the information electronically. OSHA will provide a secure Web site for the electronic submission of information. For individual data collections under paragraph (a)(3) of this section, OSHA will include the Web site's location in the notification for the data collection.

(7) *Do I have to submit information if my establishment is partially exempt from keeping OSHA injury and illness records?* If you are partially exempt from keeping injury and illness records under §§ 1904.1 and/or 1904.2, then you do not have to routinely submit part 1904 information under paragraphs (a)(1) and (2) of this section. You will have to submit information under paragraph (a)(3) of this section if OSHA informs you in writing that it will collect injury and illness information from you. If you receive such a notification, then you must keep the injury and illness records required by this part and submit information as directed.

(8) *Do I have to submit information if I am located in a State Plan State?* Yes, the requirements apply to employers located in State Plan States.

(9) *May an enterprise or corporate office electronically submit part 1904 records for its establishment(s)?* Yes, if your enterprise or corporate office had ownership of or control over one or more establishments required to submit information under paragraph (a)(1) or (2) of this section, then the enterprise or corporate office may collect and electronically submit the information for the establishment(s).

(c) *Reporting dates.* (1) In 2017 and 2018, establishments required to submit under paragraph (a)(1) or (2) of this section must submit the required information according to the table in this paragraph (c)(1):

Submission year	Establishments submitting under paragraph (a)(1) of this section must submit the required information from this form/these forms:	Establishments submitting under paragraph (a)(2) of this section must submit the required information from this form:	Submission deadline
2017	300A	300A	July 1, 2017.
2018	300A, 300, 301	300A	July 1, 2018.

(2) Beginning in 2019, establishments that are required to submit under paragraph (a)(1) or (2) of this section will have to submit all of the required information by March 2 of the year after the calendar year covered by the form or forms (for example, by March 2, 2019, for the forms covering 2018).

■ 6. Add appendix A to subpart E of part 1904 to read as follows:

Appendix A to Subpart E of Part 1904—Designated Industries for § 1904.41(a)(2) Annual Electronic Submission of OSHA Form 300A Summary of Work-Related Injuries and Illnesses by Establishments With 20 or More Employees but Fewer Than 250 Employees in Designated Industries

NAICS	Industry
11	Agriculture, forestry, fishing and hunting.
22	Utilities.
23	Construction.
31–33	Manufacturing.
42	Wholesale trade.
4413	Automotive parts, accessories, and tire stores.
4421	Furniture stores.
4422	Home furnishings stores.
4441	Building material and supplies dealers.
4442	Lawn and garden equipment and supplies stores.
4451	Grocery stores.
4452	Specialty food stores.
4521	Department stores.
4529	Other general merchandise stores.
4533	Used merchandise stores.
4542	Vending machine operators.
4543	Direct selling establishments.
4811	Scheduled air transportation.
4841	General freight trucking.
4842	Specialized freight trucking.
4851	Urban transit systems.
4852	Interurban and rural bus transportation.
4853	Taxi and limousine service.
4854	School and employee bus transportation.
4855	Charter bus industry.
4859	Other transit and ground passenger transportation.
4871	Scenic and sightseeing transportation, land.
4881	Support activities for air transportation.
4882	Support activities for rail transportation.
4883	Support activities for water transportation.
4884	Support activities for road transportation.
4889	Other support activities for transportation.
4911	Postal service.
4921	Couriers and express delivery services.
4922	Local messengers and local delivery.
4931	Warehousing and storage.
5152	Cable and other subscription programming.
5311	Lessors of real estate.
5321	Automotive equipment rental and leasing.
5322	Consumer goods rental.
5323	General rental centers.
5617	Services to buildings and dwellings.
5621	Waste collection.
5622	Waste treatment and disposal.
5629	Remediation and other waste management services.
6219	Other ambulatory health care services.

NAICS	Industry
6221	General medical and surgical hospitals.
6222	Psychiatric and substance abuse hospitals.
6223	Specialty (except psychiatric and substance abuse) hospitals.
6231	Nursing care facilities.
6232	Residential mental retardation, mental health and substance abuse facilities.
6233	Community care facilities for the elderly.
6239	Other residential care facilities.
6242	Community food and housing, and emergency and other relief services.
6243	Vocational rehabilitation services.
7111	Performing arts companies.
7112	Spectator sports.
7121	Museums, historical sites, and similar institutions.
7131	Amusement parks and arcades.
7132	Gambling industries.
7211	Traveler accommodation.
7212	RV (recreational vehicle) parks and recreational camps.
7213	Rooming and boarding houses.
7223	Special food services.
8113	Commercial and industrial machinery and equipment (except automotive and electronic) repair and maintenance.
8123	Dry-cleaning and laundry services.

PART 1902—STATE PLANS FOR THE DEVELOPMENT AND ENFORCEMENT OF STATE STANDARDS

■ 7. The authority citation for part 1902 is revised to read as follows:

Authority: Sec. 18, 84 Stat. 1608 (29 U.S.C. 667); Secretary of Labor's Order No. 1–2012 (77 FR 3912, Jan. 25, 2012).

■ 8. In § 1902.7, revise paragraph (d) to read as follows:

§ 1902.7 Injury and illness recording and reporting requirements.

* * * * *

(d) As provided in section 18(c)(7) of the Act, State Plan States must adopt requirements identical to those in 29 CFR 1904.41 in their recordkeeping and reporting regulations as enforceable State requirements. The data collected by OSHA as authorized by § 1904.41 will be made available to the State Plan States. Nothing in any State plan shall affect the duties of employers to comply with § 1904.41.

[FR Doc. 2016–10443 Filed 5–11–16; 8:45 am]

BILLING CODE 4510–26–P

JS 44 (Rev. 07/16)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS
TEXO ABC/AGC, Inc., Associated Builders and Contractors, Inc., National Association of Manufacturers, American Fuel & Petrochemical Manufacturers, Great American Insurance Company, et al

(b) County of Residence of First Listed Plaintiff Dallas
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Steven R. McCown, Maurice Baskin, Thomas B. Huggett, Littler Mendelson, P.C., 2001 Ross Ave., Suite 1500, Dallas, TX 75201

DEFENDANTS
Thomas E. Perez, Secretary of Labor, United Sates Department of Labor, David Michaels, Assistant Secretary of Labor, Occupational Safety and Health Administration, et al

County of Residence of First Listed Defendant Washington
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☒ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
OSH Act, 29 USC 651; Administrative Procedure Act, 5 USC 701

Brief description of cause:
Plaintiffs seek declaratory and injunctive relief vacating an unlawful new rule of OSHA.

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P. **DEMAND $** CHECK YES only if demanded in complaint: **JURY DEMAND:** ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY *(See instructions)*: JUDGE _____ DOCKET NUMBER _____

DATE 07/08/2016

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____