UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, *et al.*,	)	
Plaintiffs,	)	CIV-17-009-R
v.	)	
EDWARD C. HUGLER, ACTING SECRETARY OF LABOR, in his official capacity, *et al.*,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF PUBLIC HEALTH INTERVENORS' MOTION TO INTERVENE AS DEFENDANTS

Plaintiffs brought this action to challenge as unlawful a Rule issued by the Occupational Safety and Health Administration (OSHA), titled "Improve Tracking of Workplace Injuries and Illnesses," 81 Fed. Reg. 29,624 (May 12, 2016), as revised at 81 Fed. Reg. 31,854 (May 20, 2016).[1] In part, the Rule requires certain employers to submit work-related injury and illness data to OSHA electronically. OSHA makes such data public to enable research on issues of workplace health and safety. Movants Public Citizen Health Research Group, American Public Health Association, Council of State and Territorial Epidemiologists, and Center for Media and Democracy (collectively,

[1] Plaintiffs have sued the Acting Secretary of Labor, the Acting Assistant Secretary of Labor for OSHA, OSHA, and the United States Department of Labor. Throughout this memorandum, the Public Health Intervenors refer to defendants collectively as OSHA.

"Public Health Intervenors") are groups that will use and benefit from the electronic reporting and public disclosure provisions of the Rule. They seek to intervene as defendants in this case either as of right or permissively to defend the reporting and disclosure requirements of the Rule.

BACKGROUND ON THE PUBLIC HEALTH INTERVENORS

Public Citizen Health Research Group (HRG) is a division of Public Citizen, a nonprofit research, litigation, and advocacy organization that represents the public interest before the executive branch, Congress, and the courts. Among other things, Public Citizen fights for openness and democratic accountability in government; for strong health, safety, and environmental protections; and for safe, effective, and affordable medicines and health care. HRG promotes research-based, system-wide changes in health care policy, including in the area of occupational health, and advocates for improved safety standards at work sites. In particular, HRG seeks to reduce worker exposure to hazardous chemicals. For example, HRG's advocacy before OSHA and in the courts resulted in increased worker protection from exposure to ethylene oxide and hexavalent chromium. HRG intends to use the work-related injury and illness data submitted to OSHA and publically disclosed under the Rule to conduct research on issues of workplace health and safety. HRG has often used information reported to government agencies and made available to the public to analyze threats to human health. For example, HRG has leveraged publicly available OSHA data to issue reports on OSHA enforcement, to comment on workplace beryllium exposures, and to petition the agency for a regulation on occupational heat stress. In addition, HRG has extensive experience

utilizing publicly available data from other federal agencies, such as the Food and Drug Administration's pharmaceutical Adverse Event Reporting System and the Health Resources and Services Administration's National Practitioner Data Bank. Public Citizen submitted comments to OSHA in support of the Rule. *See* Declaration of Sammy Almashat, attached as Exhibit 1.

American Public Health Association (APHA) champions the health of people and communities and strengthens the profession of public health, shares the latest research and information, promotes best practices, and advocates for public health policies grounded in research. APHA represents over 20,000 individual members. APHA has an Occupational Health and Safety Section that advocates for the health, safety and well-being of workers, families, communities and the environment. The Section's members represent a multitude of disciplines from medicine, nursing and industrial hygiene to epidemiology, environmental health, statistics, community organizing, teaching, history, law and journalism. APHA's members intend to use the work-related injury and illness data submitted to OSHA under the Rule at issue in this case to conduct research on issues of workplace health and safety. APHA members often use information reported to government agencies and made available to the public to analyze threats to human health. For example, APHA members collaborate with community-based organizations that educate workers about on-the-job safety. The data that OSHA will receive and make available to the public under the Rule will assist APHA members in developing training and education programs. APHA members will use the data to map the injury incidence experience of workplaces in the localities served by the organizations. This information

will enhance the safety training curriculum with community-specific and employer-specific data, and facilitate health promotion activities related to workplace safety. APHA submitted comments to OSHA in support of the Rule. *See* Declaration of Georges C. Benjamin, attached as Exhibit 2.

Council of State and Territorial Epidemiologists (CSTE) is an organization of member states and territories representing public health epidemiologists. CSTE provides technical advice and assistance to partner organizations and to the federal Centers for Disease Control and Prevention (CDC). CSTE members work closely with the CDC to track work-related injuries, relying on multiple sources of data, including reports by employers to regulatory agencies. CSTE and their members rely on the type of data required to be reported electronically and made publicly available under the Rule at issue in order to effectively track, investigate and prevent work-related injury and disease in the United States. CSTE epidemiologists have relied on reports from employers to identify serious and immediate threats to workplace health, including sudden death from methylene chloride in paint strippers used by trades workers; the inhalation of solvent vapors during gauging of tanks by oil and gas workers; serious and disabling injuries from repetitive work in poultry and meatpacking plants; and back injuries in nurses due to patient lifting and transferring. CSTE epidemiologists have used both state and national data to track the incidence of these work-related injuries and diseases, have performed public health investigations to understand the underlying risk factors that exist in the workplace, and have used this information to implement public health recommendations and inform regulatory action that has led to the prevention of these

serious and disabling conditions. If the electronic submission and public disclosure requirements in the Rule are weakened or eliminated, CSTE members would lose access to an important source of timely, establishment-specific injury and illness information. CSTE submitted comments to OSHA in support of the Rule. *See* Declaration of Robert Harrison, attached as Exhibit 3.

Center for Media and Democracy (CMD) is a nonprofit media organization that conducts investigations into special-interest influence and corruption in government. CMD regularly conducts research into issues related to government transparency, agency action and inaction, and corporate compliance with and opposition to regulations, including occupational health and safety laws, and has published extensively on OSHA issues, including the need for greater transparency at OSHA. CMD intends to use the work-related injury and illness data that will be electronically submitted to OSHA and publicly disclosed under the Rule at issue in this case to conduct research on issues of corporate compliance with workplace health and safety regulations, government transparency, and corporate lobbying concerning health and safety laws. *See* Declaration of Mary Bottari, attached as Exhibit 4.

ARGUMENT

"Federal courts should allow intervention where no one would be hurt and greater justice could be attained." *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001) (internal quotation marks and citation omitted). Courts in this circuit "follow a somewhat liberal line in allowing intervention." *WildEarth Guardians v. Nat'l Park*

Serv., 604 F.3d 1192, 1198 (10th Cir. 2010) (internal quotation marks and citation omitted).

I. The Public Health Intervenors Should Be Allowed to Intervene as of Right.

Intervention as of right is permitted under Rule 24(a)(2) if the prospective intervenor files a timely motion, claims an interest in the proceeding, shows that disposition of the action threatens to impair or impede that interest, and the existing parties may not adequately represent that interest. Fed. R. Civ. P. 24(a)(2). "The factors of Rule 24(a)(2) are intended to 'capture the circumstances in which the practical effect on the prospective intervenor justifies its participation in the litigation,' and "those factors are not rigid, technical requirements.'" *WildEarth Guardians*, 604 F.3d at 1198 (quoting *San Juan County v. United States*, 503 F.3d 1163, 1195 (10th Cir. 2007) (en banc)). The Public Health Intervenors satisfy all four requirements.

A. The motion to intervene is timely.

"The timeliness of a motion to intervene is assessed in light of all the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances." *Clinton*, 255 F.3d at 1250 (internal quotation marks and citation omitted). "The analysis is contextual; absolute measures of timeliness should be ignored." *Id.* (internal quotation marks and citations omitted).

The Public Health Intervenors have filed a timely motion. This case was filed in January 2017, OSHA has not yet responded to the complaint, and the parties have until

April 10, 2017, to propose a schedule for summary judgment briefing. Because this case is in an early stage, the Public Health Intervenors' motion is timely and granting the motion will not prejudice the existing parties or delay resolution of the litigation.

In contrast, the Public Health Intervenors would be prejudiced if intervention is denied because, as explained in section D below, recent actions raise doubts about the government's commitment to the defense of existing regulations such as the one challenged in this case. The new presidential administration has vowed to repeal or weaken regulations promulgated under the prior administration, creating a significant risk that OSHA will not adequately defend the Rule. Should the electronic reporting and public disclosure requirements of the Rule be set aside or weakened, the Public Health Intervenors will be unable to obtain the information that they would otherwise have used to study issues of workplace health and safety.

B. The Public Health Intervenors have a strong interest in the electronic reporting and public disclosure of information under the Rule.

The interest test is "'a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'" *WildEarth Guardians*, 604 F.3d at 1198 (quoting *San Juan County*, 503 F.3d at 1195). The Court of Appeals has consistently recognized that where entities have devoted time advocating for an agency action, they have an interest that supports intervention as of right. *See WildEarth Guardians*, 604 F.3d at 1200 (granting intervention as of right where interest groups had submitted written comments during rulemaking); *see also New*

Mexico Off-Highway Vehicle Alliance v. U.S. Forest Serv., 540 F. App'x 877, 880 (10th Cir. 2013) (same).

Three of the Public Health Intervenors filed comments in support of the Rule, and thus have a legally protectable interest in its defense. Further, the Public Health Intervenors have an interest in defending the Rule because they are intended beneficiaries of the data that will be reported electronically and made available under the public disclosure requirement. *See* 81 Fed. Reg. at 29625 (noting that the benefits of the rule include "access to timely, establishment-specific injury/illness information by … researchers"); *id.* at 29631 (explaining that "[d]isclosure of and access to injury and illness data have the potential to improve research" and that "[u]sing the data collected under this final rule, researchers might identify previously unrecognized patterns of injuries and illnesses"). Because the Public Health Intervenors plan to use the data that will be available pursuant to the Rule, they have an interest sufficient to support intervention as of right.

C. Disposition of this case in the absence of the Public Health Intervenors would impair or impede their ability to protect their interests.

The impairment factor of Rule 24(a)(2) "presents a minimal burden." *WildEarth Guardian*s, 604 F.3d at 1199. "A would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied." *Id.* (internal quotation marks and citation omitted). "'[I]ntervention may be based on an interest that is contingent upon the outcome of the litigation.'" *New Mexico Off-Highway Vehicle Alliance*, 540 F. App'x at 880 (quoting *San Juan County*, 503 F.3d at 1203). "[T]he

interest of a prospective defendant-intervenor may be impaired where a decision in the plaintiff's favor would return the issue to the administrative decision-making process, notwithstanding the prospective intervenor's ability to participate in formulating any revised rule or plan." *WildEarth Guardian*s, 604 F.3d at 1199 (citation omitted).

The outcome of this action may, as a legal and practical matter, block the Public Health Intervenors' access to information that would otherwise be available to them as a result of the Rule. Should the litigation result in either a judicial determination that the electronic reporting and public disclosure requirements are unlawful, or a settlement leading to the elimination or weakening of those portions of the Rule, the Public Health Intervenors' interests will be impaired. As the Rule explains, the data that it mandates employers submit and that OSHA will subsequently post publicly is currently unavailable to the public. 81 Fed. Reg. at 29631. Without the provisions at issue, the Public Health Intervenors will have no other method for obtaining the information.

D. OSHA does not adequately represent the interests of the Public Health Intervenors as to the public disclosure requirement.

"[T]he inadequate representation element of Rule 24(a)(2) also presents a minimal burden." *WildEarth Guardians*, 604 F.3d at 1200. "The movant must show only the possibility that representation may be inadequate," and "[t]he possibility that the interests of the applicant and the parties may diverge need not be great in order to satisfy this minimal burden." *Id.* (internal quotation marks and citations omitted). Moreover, the Court of Appeals has "repeatedly recognized that it is on its face impossible for a government agency to carry the task of protecting the public's interests and the private

interests of a prospective intervenor." *Id.* (internal quotation marks and citations omitted); "Where a government agency may be placed in the position of defending both public and private interests, the burden of showing inadequacy of representation is satisfied." *Id.* (citation omitted). "This is because 'the government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a particular member of the public merely because both entities occupy the same posture in the litigation.'" *New Mexico Off-Highway Vehicle Alliance*, 540 F. App'x at 880-81 (quoting *Clinton*, 255 F.3d at 1255-56). "This potential conflict exists even when the government is called upon to defend against a claim which the would-be intervenor also wishes to contest." *Id.* at 881 (internal quotation marks and citation omitted).

The Public Health Intervenors and OSHA have divergent interests with respect to the public disclosure requirement. If, for example, the electronic submission requirement survives this litigation but the public disclosure requirement does not, OSHA will obtain the data it seeks from employers and will be able to use that data as described in the Rule. *See* 81 Fed. Reg. at 29629–30 (explaining that electronic submission of employer data will provide a much larger data set for OSHA's enforcement and compliance programs). Because OSHA obtains no appreciable benefit from the public disclosure of the data it obtains from employers, OSHA may not have a strong interest in maintaining a robust public disclosure requirement. OSHA may, therefore, be willing to compromise, weaken, or eliminate the public disclosure component of the Rule. By contrast, without the public disclosure requirement, the Public Health Intervenors would have no practical means of

obtaining the data in a manner that would benefit their work on issues of occupational health.

Finally, OSHA and the Public Health Intervenors appear not to share the same objective with regard to defense of the Rule. Recent executive orders and memoranda from the new presidential administration reflect an intent to rescind or weaken regulations promulgated by the prior administration. *See, e.g.*, Executive Order 13771, *Reducing Regulation and Controlling Regulatory Costs*, 82 Fed. Reg. 9339 (2017); Reince Priebus, *Memorandum for the Heads of Executive Departments and Agencies; Regulatory Freeze Pending Review*, 82 Fed. Reg. 8346-01 (2017). Indeed, recent news reports indicate that OSHA is backing away from the electronic submission and public disclosure requirements. *See* Barry Meier & Danielle Ivory, *Federal Rules on Worker Safety and Record Keeping Are Likely Targets for Rollbacks*, N.Y. Times, Mar. 14, 2017, at A14 (noting that OSHA's website recently changed its electronic submission provision from indicating that it would be live in February to a statement that "OSHA is not accepting electronic submissions at this time"), *available at* https://www.nytimes.com/2017/03/13/business/us-worker-safety-rules-osha.html?_r=0. Thus, OSHA may decline to defend the Rule forcefully in this Court. In light of the uncertainty surrounding the new administration's views of the Rule, the Public Health Intervenors' interests in this litigation are sufficiently different from those of OSHA to justify intervention. [2]

[2] The Public Health Intervenors recognize that the AFL-CIO and USW (the "Union Intervenors") have also moved for intervention, but are not yet parties. The Union

II. The Public Health Intervenors Should Be Granted Permissive Intervention.

As an alternative to intervention as of right, the Court may allow the Public Health Intervenors to intervene under Federal Rule of Civil Procedure 24(b). The Court may grant permissive intervention where the motion to intervene is timely, the putative intervenor "has a claim or defense that shares with the main action a common question of law or fact," and intervention will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(1), (3). The Public Health Intervenors satisfy this test.

First, the motion to intervene is timely. As described above, the Public Health Intervenors moved to intervene less than three months after this case was filed, before OSHA filed a responsive pleading, and before the parties' deadline for submitting a proposed schedule for dispositive motions. Second, the Public Health Intervenors meet the commonality requirement because they seek to defend the Rule from plaintiffs' challenge, particularly with regard to the electronic reporting and public disclosure requirements. Third, the Public Health Intervenors will comply with any scheduling or briefing orders entered by the Court. Thus, intervention will not delay resolution of the case and will not prejudice the rights of any existing party. Therefore, if the Court does not grant intervention as of right under Rule 24(a), it should grant permissive intervention under Rule 24(b).

Intervenors will not adequately represent the interests of the Public Health Intervenors because they are primarily concerned with the reporting and anti-retaliation provisions of the Rule, not the electronic reporting and public disclosure requirements.

CONCLUSION

The Court should grant the Public Health Intervenors' motion to intervene as defendants.

Dated: March 21, 2017

Respectfully submitted,

s/ Michael T. Kirkpatrick
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(*motion to appear pro hac vice to be filed*)
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Counsel for Public Health Intervenors

CERTIFICATE OF SERVICE

I certify that on March 21, 2017, I filed the attached document with the Clerk of the Court using the Court's ECF system. Based on the records currently on file in this case, the Clerk of the Court will transmit a Notice of Electronic Filing to those registered participants of the ECF system.

s/ Matthew J. Sill
Matthew J. Sill

Exhibit 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, *et al.*,	)	
Plaintiffs,	)	CIV-17-009-R
v.	)	
EDWARD C. HUGLER, ACTING SECRETARY OF LABOR, in his official capacity, *et al.*,	)	
Defendants.	)	

Declaration of Sammy Almashat

I, Sammy Almashat, M.D., declare as follows:

1. I am a physician and a researcher with Public Citizen Health Research Group (HRG), an arm of Public Citizen Foundation. I have worked at Public Citizen for more than five years. As part of my work at HRG, I conduct research and advocacy on chemical and physical workplace hazards regulated by the Occupational Safety and Health Administration (OSHA).

2. HRG conducts research and advocates on issues related to occupational health, and has done so since its founding in 1971. For example, HRG has successfully sued OSHA to enact or modify regulations pertaining to several different occupational chemical exposures, including ethylene oxide (http://law.justia.com/cases/federal/appellate-courts/F2/823/626/221390/) and hexavalent chromium (http://citizen.org/Page.aspx?pid=2046).

3. HRG intends to use the work-related injury and illness data submitted to OSHA and publicly disclosed under the Rule at issue in this case to conduct research on issues of workplace

health and safety. HRG has often used information reported to government agencies and made available to the public to analyze threats to human health. For example, HRG has leveraged publicly available OSHA data in, among other publications, reports on OSHA enforcement (http://citizen.org/Page.aspx?pid=2376) and workplace beryllium exposures (http://citizen.org/Page.aspx?pid=2039) and in a petition to the agency for a regulation on occupational heat stress (http://www.citizen.org/documents/Petition-for-a-heat-standard-090111.pdf). In addition, HRG has extensive experience utilizing publicly available data from other federal agencies, such as the Food and Drug Administration's pharmaceutical Adverse Event Reporting System (e.g., a report on the adverse effects of the drug liraglutide, http://www.citizen.org/hrg2204) and the Health Resources and Services Administration's National Practitioner Data Bank (e.g., a report on physician sexual misconduct, http://www.citizen.org/hrg2300).

4. If the electronic submission and public disclosure requirements in the Rule are eliminated, HRG will be unable to obtain the data from other sources.

5. Public Citizen submitted comments to OSHA in support of the Rule at issue in this case. Those comments are attached to this Declaration.

Pursuant to 28 U.S.C. § 1746, I hereby certify under penalty of perjury that the foregoing is true and correct.

Executed in Washington, D.C. on March 16, 2017.

215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • www.citizen.org

The Honorable David Michaels
Assistant Secretary of Labor
Occupational Safety and Health Administration
U.S. Department of Labor
Room S-2002
200 Constitution Ave., N.W.
Washington, DC 20210

RE: Docket OSHA-2013-0023-0146, Comment on Proposed Improvement and Tracking of Workplace Injuries and Illnesses

March 10, 2014

Public Citizen welcomes the opportunity to comment on the Occupational Safety and Health Administration's (OSHA) proposed standard to Improve Tracking of Workplace Injuries and Illnesses published on November 8, 2013.[1] Public Citizen is a national, nonprofit public interest organization with 300,000 members and supporters that advocates for public health and safety interests before Congress, the executive branch agencies and the courts.

More than 8,400 of our members support OSHA's move to modernize recordkeeping system and have called for improvements to the proposed rule. The 8,416 members and supporters of Public Citizen whose names are gathered in the attached petition signed onto the following statement:

> *We, the undersigned, encourage the Occupational Safety and Health Administration to move full steam ahead with the "Improve Tracking of Workplace Injuries and Illnesses" rulemaking. In order to keep America's workers safe, OSHA needs access to information about companies' safety records in a timely manner. Further, that information must be delivered in a format that allows OSHA to efficiently analyze it for workplace hazards.*
>
> *Protecting America's greatest asset, its workers, should be the top priority of the agency. Any rule that would make the process more efficient should be adopted.*

The online petition can be found on Public Citizen's website at the following URL: http://pubc.it/oSHa32014 and the listed names of the signers have also been made a part of this comment (attached).

[1] Federal Register, Docket OSHA-2013-0023-0146, November 8, 2013 https://federalregister.gov/a/2013-27366.

Introduction

We applaud OSHA for putting forth a new standard to improve tracking of workplace injuries and illnesses. As demonstrated by the extensive evidence compiled by OSHA, the current recordkeeping standard is badly outdated and does not adequately allow workers, their representatives and the public access to injury and illness data in a timely fashion.

OSHA's amendments to the current rule will improve workplace safety and health through the collection of useful, accessible, establishment-specific injury and illness data. At present, OSHA does not have direct access to an establishment's injury and illness data log. This void leaves the agency to rely on data that is over a year old when attempting to respond to hazardous workplace conditions.

While we are generally supportive of OSHA's proposed rule, we believe there are ways to improve and strengthen the rule that we identify in further detail below. We believe it is crucial that OSHA adopt the most protective standard with respect to recordkeeping, and we encourage OSHA to consider and adopt the recommendations below that we believe are fully within OSHA's authority and responsibility under the Occupational Safety and Health Act (OSH Act).[2]

Electronic Reporting

OSHA has said it is proposing to amend its recordkeeping regulations to add requirements for the electronic submission of the injury and illness information that employers are already required to keep under Part 1904 of the Occupational Safety and Health Act, 1970.

The proposed rule amends 29 CFR 1904.41 to add new electronic reporting requirements which would require all establishments with 250 or more employees, to electronically send all their recordkeeping data to OSHA quarterly. The improved tracking system would also require establishments with 20 or more employees, in certain industries with high injury and illness rates, to electronically send their annual summary data to OSHA once a year.

Several government agencies require electronic submission of records and or some level of reporting annually, quarterly, monthly and in some cases biweekly. For example the Federal Elections Commission requires federal candidates to disclose their political contributions on a quarterly basis and during an election year these candidates are required to disclose their contributions monthly and in some cases biweekly.[3]

The Security and Exchange Commission requires publicly traded companies to disclose information on an ongoing basis. For example, domestic issuers (other than small business issuers) must submit annual reports on Form 10-K, and quarterly reports on Form 10-Q, and current reports on Form 8-K for a number of specified events and must comply with a variety of other disclosure requirements.[4]

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[2] The Occupational Safety and Health Act, 29 U.S.C. §651(1970).
[3] Federal Election Commission, *2014 Reporting Dates* http://www.fec.gov/info/report_dates.shtml.
[4] United States Securities and Exchange Commission, *Filings and Forms* (2014), http://www.sec.gov/edgar.shtml.

The Equal Employment Opportunity Commission (EEOC) collects workforce data from employers with more than 100 employees, with lower thresholds applied to federal contractors.[5] Employers meeting the reporting thresholds have a legal obligation to provide the data; it is not voluntary. EEOC data is collected using electronically submitted reports and is used for a variety of purposes including enforcement, self-assessment by employers, and research. Each of the reports collects data about gender and race/ethnicity by some type of job grouping.

The Department of Labor Office of Labor Management Standards requires that Form LM-2 be filed electronically using the OLMS Electronic Forms System.[6] The Electronic Forms System is a web-based system for completing, signing, and submitting Labor Organization Annual Financial Reports.

It is apparent that the government, particularly the Office of Labor Management Standards and the EEOC have enough experience in creating electronic filing systems that are downloadable, sortable and available to the public. There is no reason for OSHA to rely on the archaic method of paper filing, especially when other departments at the Department of Labor are already requiring electronic reporting.

Wider Protections Needed

Employer practices, policies and programs that discourage workers from reporting injuries and illnesses are prevalent in today's workplaces and they have devastating consequences. For example, in a recent study researchers found that fifty-eight percent of survey respondents reported some a negative consequence for reporting work-related injuries on their current jobsite and reporting of work-related injuries was fifty percent less prevalent when workers were disciplined for injury experiences.[7] In the same study it is also noted that workers experience considerable fear of reprisal for reporting injuries.[8] Less than half (46.4%) reported that work-related injuries were reported in their current workplace all or most of the time; thirty percent said they were almost never or rarely reported.[9]

OSHA's proposed changes to the recordkeeping rule will promote employers' increased use of these practices unless there is a provision added to the recordkeeping rule that prohibits employers from having programs, practices and policies that discourage workers from reporting injuries and illnesses. This provision must be enforceable through penalties and citations in the same manner as violations of other provisions of the recordkeeping rule itself.

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[5] United States Equal Employment Opportunity Commission, *EEO Reports and Surveys* (2014). http://www.eeoc.gov/employers/reporting.cfm.

[6] United States Department of Labor Office of Labor-Management Standards, Form LM-2 Labor Organization Annual Report (2014). http://www.dol.gov/olms/regs/compliance/lm2.htm.

[7] Lipscomb HJ, Nolan J, Patterson D, Sticca V, Myers DJ. Safety, incentives, and the reporting of work-related injuries among union carpenters: "you're pretty much screwed if you get hurt at work," (2013). http://www.ncbi.nlm.nih.gov/pubmed/23109103.

[8] I*d*.

[9] I*d*.

Without the addition of this provision banning employers' disincentive practices and programs, OSHA's goals for its proposed Recordkeeping Rule changes to improve workplace safety and health will not be realized. Employers submitting data showing low injury/illness rates could well be employers with effective practices that discourage workers from reporting injuries and illnesses. When injuries don't get reported, the hazards and hazardous conditions causing them don't get identified or addressed, and workplace health and safety is degraded as a result.

OSHA's proposed standard will substantially increase the amount, types and timeliness of workplace injury and illness data and will allow occupational safety and health researchers to identify emerging workplace hazards on a quarterly basis.

Again, Public Citizen applauds OSHA for its efforts to update badly outdated recordkeeping rules. Nevertheless, we believe that OSHA could significantly strengthen the new standard by banning employers' disincentive practices and programs. We appreciate OSHA's consideration of our comment and look forward to OSHA finalizing and instituting a new recordkeeping standard in a timely fashion.

Sincerely,

Keith Wrightson
Worker Safety and Health Advocate
Public Citizen
Congress Watch
(202)-454-5139

Exhibit 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, *et al.*, Plaintiffs, v. EDWARD C. HUGLER, ACTING SECRETARY OF LABOR, in his official capacity, *et al.*, Defendants.	CIV-17-009-R

DECLARATION OF Georges C. Benjamin

I, Georges C. Benjamin, declare as follows:

1. I am Georges C. Benjamin. I have worked at the American Public Health Association for 15 years. I am the Executive Director of the American Public Health Association.

2. The American Public Health Association champions the health of all people and all communities and strengthens the profession of public health, shares the latest research and information, promotes best practices and advocates for public health policies grounded in research. APHA represents over 20,000 individual members and is the only organization that combines a 140-plus year perspective, a broad-based member community and the ability to influence federal policy to improve the public's health. APHA also has an Occupational Health and Safety Section that advocates for the health, safety and well-being of workers, families, communities and the environment. The Section's members represent a multitude of disciplines

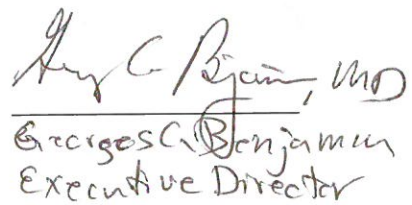
from medicine, nursing and industrial hygiene to epidemiology, environmental health, statistics, community organizing, teaching, history, law and journalism.

3. APHA's members intend to use the work-related injury and illness data submitted to OSHA under the Rule at issue in this case to conduct research on issues of workplace health and safety. APHA members often use information reported to government agencies and made available to the public to analyze threats to human health. For example, APHA members collaborate with community-based organizations that educate workers about on-the-job safety. The data that OSHA will receive pursuant to this new regulation will be instrumental in developing new innovative training and education programs. APHA members will be able to use the data to map the injury incidence experience of workplaces in the localities served by the organizations. This information will enhance the safety training curriculum with community-specific and employer-specific data. Two key principles of effective health promotion are empowerment and participation. They are fundamental to enable individuals to make more informed decisions about factors that affect their health. The OSHA data collected by this new regulation will facilitate health promotion activities related to workplace safety.

4. APHA submitted comments to OSHA in support of the rule at issue in this case. Those comments are attached to this Declaration.

Pursuant to 28 U.S.C. § 1746, I hereby certify under penalty of perjury that the foregoing is true and correct.

Executed in Washington, DC on March 15, 2017.



Georges C. Benjamin
Executive Director

March 10, 2014

David Michaels, PhD, MPH
Assistant Secretary of Labor for
Occupational Safety and Health
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

SUBMITTED VIA: Regulations.gov

Re: Occupational Safety and Health Administration
Improve Tracking of Workplace Injuries and Illnesses
Docket #: OSHA- 2013-0023-0146

Dear Dr. Michaels:

On behalf of the American Public Health Association, a diverse community of public health professionals who champion the health of all people and communities, I write to express our strong support for the Occupation Health and Safety Administration's proposed rule to improve tracking of occupational injuries and illnesses. As public health professionals, we understand the critically important role of gathering accurate information to help identify hazards in order to develop and implement better health and safety protections.

We applaud OSHA efforts to bring injury and illness reporting into the 21st century through an efficient web-based mechanism that allows employers to upload information they are already collecting. Draft information on the OSHA website suggests a thoughtful approach has already been used to prepare for this reporting. Given that the Mine Safety and Health Administration has collected and posted on its website far more detailed and comprehensive information on work-place injuries than is being proposed by OSHA, we believe that this more modest proposal is most feasible and necessary.

We also support OSHA's proposal to make select data elements available to the public. The information gathered will be invaluable for employers, workers and public health researchers interested in identifying sources of injury and illness and evaluating the effectiveness of interventions to reduce these.

As clearly described in the Advance Notice of Proposed Rulemaking, this information is of major importance to the public health community. The ability to evaluate the impact of different state requirements for safe patient handling in hospital settings on total injury and illness reporting or the ability to review respiratory illness outcomes in hospital systems that change to

environmentally friendly cleaning agents are just two examples of potential public health benefits.

Because this information is so important, we would like to highlight challenges that result in under-reporting under existing OSHA recordkeeping requirements that might otherwise be exacerbated with publicly available results. We urge enhanced vigilance and clear guidance from OSHA to reduce the temptation to suppress illness and injury data by employers.
As noted in APHA's Policy Statement 20138, *Support for Workplace Injury and Illness Prevention Programs*, "injury/illness prevention programs require accurate data collection to correctly identify hazards and determine whether remediation efforts have been successful."

We are concerned that many practices, policies, and programs present in workplaces today discourage workers from reporting injuries, illnesses, incidents, and accidents, obscuring the hazards that cause and contribute to injuries and illnesses. We note that suppressed reporting has occurred through aggressive return-to-work policies in which workers have been driven to work on the day of surgery or the day after, when still on narcotic medication for analgesia, in order to reduce the DART rate. Or, in other instances, the systematic attribution of non-work related noise exposure as the sole cause of noise-induced hearing loss among workers in manufacturing settings has resulted in complete under-reporting of noise-induced hearing loss. Under current law, workers who suffer retaliation for reporting injuries or illnesses must seek remedy after-the-fact through the often ineffective 11(c) whistleblower process. A more preventive approach would be to add a provision to the proposed rule that would enable OSHA to directly cite employers under the recordkeeping rule if they are found to have programs or policies that discourage employee reporting.

We urge OSHA to consider these issues as the proposed rule moves forward through the process and to contact me if we can be of further assistance.

Sincerely,

Georges Benjamin, MD
Executive Director

October 14, 2014

David Michaels, PhD, MPH
Assistant Secretary of Labor for Occupational Safety and Health
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Occupational Safety and Health Administration
Docket #: OSHA-2013-0023
Improve Tracking of Workplace Injuries & Illnesses (79 *Federal Register* 47605)

SUBMITTED VIA: Regulations.gov

Dear Dr. Michaels:

On behalf of the American Public Health Association, a diverse community of public health professionals who champion the health of all people and communities, I thank you for the opportunity to provide comments on OSHA's proposal to track occupational injuries and illnesses.

Surveillance is the keystone of most public health prevention and intervention strategies. Strong surveillance systems for work-related injuries and illnesses are also an essential part of public health and a key component of an effective safety management system. An effective workplace surveillance program provides feedback to an employer and employees on whether hazards are being properly identified and controlled. Similarly, a government surveillance program can identify workplaces and industry sectors where workers are at greatest risk of harm and take steps to prevent it. These comments are informed by several APHA policy statements related to the proposed rule including 20138: Support for Workplace Injury and Illness Prevention Programs, 20054: Occupational Health and Safety Protections for Immigrant Workers, 20097: Workers' Compensation Reform, and 20068: Resolution on the Right for Employee Free Choice to Form Unions.[1]

We support OSHA's proposal to collect injury and illness data from some employers and their plan to make these data available online. Receiving the data will help OSHA make better use of its limited resources. Posting the data online will allow workers, unions, trade associations, researchers, employers and others to use the data to inform and design prevention activities. However, APHA shares the concern expressed by other commenters that making this data available may have unintended consequences. Specifically, it could cause some employers to falsify their injury and illness records, and/or to discourage their employees from reporting injuries and illnesses. Some

[1] APHA policy statements 20138, 20054, 20097, and 20068, respectively. Available at: http://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database

employers have already adopted programs that thwart surveillance by implementing policies that dissuade workers from reporting injuries and illnesses. [2,3,4,5,6,7]

We urge OSHA, therefore, to amend 29 CFR 1904 with language that specifically prohibits policies, programs or practices that discourage employees from reporting occupational injuries and illnesses. These policies, programs and practices include, but are not limited to, safety incentive programs that provide rewards to individual workers as well as groups of workers when there are few or no reports of injuries or illnesses; injury discipline policies wherein employees receive threats of or actual discipline when they report work-related injuries or illnesses; mandated post-injury drug testing for employees who report work-related injuries or illnesses; and programs that focus on worker behaviors as the primary cause of occupational injuries and illnesses.[8] With these comments, we have included information collected from poultry and meatpacking workers highlighting some of the ways that their employers discourage reporting of occupational injuries and illnesses.

APHA recognizes that Section 11(c) of the Occupational Safety and Health Act provides a mechanism for workers to seek redress if they have been discriminated or otherwise retaliated against for making a safety complaint, including the reporting of an injury or illness. This is an important provision of the OSH Act, but is limited in that it only applies after the aggrieved worker suffers the adverse action. By explicitly prohibiting policies that discourage injury reporting in its recordkeeping regulation, OSHA will have the clear enforcement authority to compel employers to abolish such policies and programs.

Moreover, we urge OSHA to include provisions in its reporting requirements (29 CFR 1904) which would (1) require employers to inform their employees of their right to report work-related injuries and illnesses; (2) require employers to ensure that procedures in place for employees to report injuries and illnesses are not unduly burdensome such that they discourage reporting; and (3) prohibit employers from taking any adverse action against employees for reporting injuries and illnesses.

Thank you for taking our comments into consideration on this important OSHA rulemaking.

Sincerely,

Georges C. Benjamin, MD
Executive Director

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[2] Lipscomb HJ, Nolan J, et al. Safety, incentives, and the reporting of work-related injuries among union carpenters: "you're pretty much screwed if you get hurt at work." Am J Ind Med. 2013;56(4):389–399.

[3] Southern Poverty Law Center and Alabama Appleseed. Unsafe at these Speeds: Alabama's Poultry Industry and its Disposable Workers, 2013.

[4] Azaroff A, Levenstein C, Wegman D. Occupational injury and illness surveillance: conceptual filters explain underreporting. Am J Public Health. 2002;92(9):1421–1429 .

[5] Nebraska Appleseed. The Speed Kills You, 2009.

[6] Hidden Tragedy: Underreporting of Workplace Injuries and Illnesses. Washington, DC: Committee on Education and Labor, US House of Representatives; 2008.

[7] Pransky G, Snyder T, Dembe A, Himmelstein J. Under-reporting of work-related disorders in the workplace: a case study and review of the literature. Ergonomics. 1999;42(1):171–182.

[8] APHA policy statement 20138: Support for Workplace Injury and Illness Prevention Programs. Available at: http://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/08/09/03/support-for-workplace-injury-and-illness-prevention-programs

Exhibit 3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, *et al.*,	)	
Plaintiffs,	)	CIV-17-009-R
v.	)	
EDWARD C. HUGLER, ACTING SECRETARY OF LABOR, in his official capacity, *et al.*,	)	
Defendants.	)	

Declaration of Robert Harrison

I, Robert Harrison, MD, MPH, declare as follows:

1. I am an occupational medicine physician and epidemiologist with more than 30 years of experience investigating and preventing work-related injuries and diseases. I am Clinical Professor of Medicine at the University of California at San Francisco, where I founded the UCSF Occupational Health Services and have examined and treated over 10,000 patients with occupational and environmental injuries and diseases. I have authored or co-authored more than 35 medical and scientific articles in peer-reviewed journals, more than 30 other publications, including book chapters, contributed articles, and letters to journal editors, and more than 25 governmental and other reports. I am Visiting Professor in the School of Public Health at the University of California at Berkeley, and serve as Chief of the Occupational Health Surveillance and Evaluation Program of the California Department of Public Health. I have served on the Executive Board of the Society for Occupational and Environmental Health, on the Governing

Council and as Occupational Health Section Chair of the American Public Health Association, and as President of the Council of State and Territorial Epidemiologists (CSTE). From 2003-2006, I was appointed by the Governor of California to serve as the Occupational Health Representative on the California Occupational Safety and Health Standards Board. I have served on the NIOSH Board of Scientific Counselors and on the World Trade Center Scientific and Technical Advisory Committee. In 2011, I was elected to the Collegium Ramazzini, an international organization of occupational and environmental health scientists. In 2016, I was honored by CSTE with the Pump Handle Award for outstanding achievement in the field of applied epidemiology.

2. In my capacity as a public health epidemiologist with CSTE, I have worked in collaboration, and consulted with, other State and Federal scientists to track and investigate work-related injuries and diseases. In so doing, I rely upon numerous sources of data about work-related injuries and diseases, including reports from employers, employees and health care providers that provide essential information about the types and causes of these health problems. I have published the results of these studies, along with my colleagues from State and Federal agencies, in peer-reviewed scientific journals. These investigations and publications have led to the prevention of work-related injuries and diseases, substantially reducing the disability and cost to employers, employees and their families.

3. Based on my qualifications, experience and training, I submit this declaration on behalf of CSTE.

4. CSTE is an organization of member states and territories representing public health epidemiologists. CSTE provides technical advice and assistance to partner organizations and to the Federal Centers for Disease Control and Prevention (CDC). CSTE members work

closely with the CDC to track well recognized and new causes of work-related injuries. Since 1951, CSTE has the responsibility for defining and recommending which diseases and conditions are reportable within states and which of these diseases and conditions will be reported to the CDC. The list of these conditions includes work-related diseases such as lead poisoning, silicosis and acute pesticide illness. These conditions are compiled and published weekly by the CDC, and are the basis for setting the public health priorities for our nation. These reports rely upon multiple sources of data, including reports by employers to state public health and regulatory agencies.

5. CSTE and their members rely on the type of reports that are required under the Rule at issue in order to effectively track, investigate and prevent work-related injury and disease in the United States. The CSTE Occupational Health Subcommittee, composed of the senior occupational epidemiologists from many States, has worked with the CDC/NIOSH to define reportable occupational conditions in the US and to set guidelines for tracking of work-related injuries and diseases. These guidelines set forth the types of reports that are necessary for each state to receive to conduct effective public health programs to reduce the burden of work-related injuries and diseases, including reports from employers. In numerous instances, CSTE epidemiologists have relied upon reports from employers to identify serious and immediate injuries and diseases in the workplace. These include sudden death from methylene chloride in paint strippers used by trades workers, and the inhalation of solvent vapors during gauging of tanks by oil and gas workers; serious and disabling injuries from repetitive work in poultry and meatpacking plants; and back injuries in nurses due to patient lifting and transferring. In these cases, CSTE epidemiologists have used both state and national data to track the incidence of these work-related injuries and diseases, have performed public health investigations to

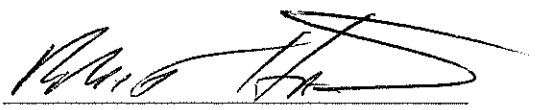
understand the underlying risk factors that exist in the workplace, and have used this information to implement public health recommendations and inform regulatory action that has led to the prevention of these serious and disabling conditions.

6. During the rulemaking on the employer reporting requirement at issue, comments were submitted to the Docket by two members of the CSTE Occupational Health Subcommittee (Letitia Davis, ScD and Kenneth Rosenman, MD). These comments set forth in detail the rationale for employer submission of electronic reports, the use of the publicly disclosed reports by CSTE epidemiologists, and the impact these employer reports have on reducing the large burden of work-related injuries and diseases in the US. These comments are attached to this declaration.

7. If the electronic submission and public disclosure requirements in the Rule are weakened or eliminated, CSTE members would lose access to an important source of timely, establishment-specific injury and illness information. Such information has the potential to improve research and contribute to prevention of serious workplace injuries.

Pursuant to 28 U.S.C. § 1746, I hereby certify under penalty of perjury that the foregoing is true and correct.

Executed in San Francisco, CA on March 16, 2017.



Robert Harrison, MD, MPH

CSTE
Council of State and Territorial Epidemiologists
Leaders in Applied Public Health Epidemiology

National Headquarters
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Atlanta, Georgia 30341
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www.cste.org

CSTE is an organization that supports epidemiologists practicing at the state, territorial, tribal, and local levels.

March 6, 2014

U.S. Department of Labor
Occupational Safety & Health Administration
200 Constitution Avenue
Washington, D.C. 20210

RE: OSHA Proposed Rule: Improve Tracking of Workplace Injuries and Illnesses Comment Period

Comments in response to OSHA's proposed rule to update and amend Occupational Injury and Illness Recording and Reporting Requirements to "Improve Tracking of Workplace Injuries and Illnesses"

Docket Number OSHA-2013-0023
Submitted by Letitia Davis, ScD, and Kenneth Rosenman, MD, on behalf of the Occupational Health Subcommittee of the Council of State and Territorial Epidemiologists

On behalf of the Occupational Health Subcommittee of the Council of State and Territorial Epidemiologists (CSTE), we are writing to express strong support for OSHA's proposal [Docket No.OSHA-2013-0023] to add requirements for electronic submission of information on occupational injuries and illnesses that employers are already required to keep under OSHA's record-keeping rule. We also support OSHA's proposed plans to make select data elements available to the public.

CSTE is an organization of member states and territories representing public health epidemiologists. CSTE works to establish more effective relationships among states and other health agencies. It also provides technical advice and assistance to partner organizations and federal public health agencies. The Occupational Health Subcommittee is comprised largely of health professionals working in state and local health agencies, who use a wide variety of data sources to document work-related injuries, illnesses and hazards and, in turn, promote use of the data to improve worker safety and health.

As public health practitioners, we underscore the critical importance of collection, analysis and dissemination of health data to those who need to know for purposes of prevention [Halperin and Baker, 1992; Lee and Thacker, 2011]. Surveillance is an essential component to any comprehensive approach to prevention work-related injuries and illnesses, whether it is at the federal, state, local or establishment level. 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. These establishment specific data would increase OSHA's ability to target is limited enforcement and compliance assistance resources more effectively. Access to these data would also facilitate public health agency efforts to reduce work-related injuries and illnesses in the states, and significantly increase the potential for more timely identification of emerging hazards. Additionally, we believe that the electronic collection of these data provides OSHA with a valuable opportunity not only to improve the standardization and quality of the data recorded and reported by employers but also to promote use of data by employers and workers to reduce work-related injuries and illness at the establishment and company-wide levels.

Electronic collection of these existing records is in line with many 21st century advances in health data collection made possible by advances in information technology that involve centralized collection and analysis and dissemination of existing data from multiple entities. These include, for example, collection at the state level of data on all hospitalizations, all emergency room visits, and all ambulance runs, and in over 20 states, data on all public and private insurance claims (excluding workers' compensation claim data). [See http://www.apcdcouncil.org.]
Lessons learned from developing these systems may be informative to OSHA. Making this information available more broadly is also consistent with the growing recognition, predominant in the patient safety field, that transparency – sharing of information, including information about hazards - is a critical aspect of safety culture [Leape et al., 2009].

In the following comments, we discuss some of the ways in which the data OSHA is proposing to collect could enhance our and others' efforts to reduce work-related injuries and illnesses and hazards at the state and community levels. We address several of specific questions raised in the notice of the proposed rule. We also include an example from Massachusetts that demonstrates the feasibility of electronically collecting establishment specific case level data on work-related injuries from establishments.

Identification of emerging problems:

Case-based occupational health surveillance activities ongoing in the states involve the collection of information about specific cases of health conditions reportable to public health agencies. Reportable conditions vary from state to state but include, for example, work-related respiratory diseases, chemical poisonings, heavy metal poisonings, traumatic amputations and fatal injuries. These sentinel cases are indications that the prevention system has failed and intervention is warranted. They can also be a first indication of a new or newly recognized hazard that needs to be addressed. The ability to search file level data not only in the establishment where the index case is/was employed but also other establishments in the industry to identify similar cases 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. Subsequent review of OSHA IMIS data identified 13 deaths associated with bath tub refinishing in a 12 year period. 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.

Targeting establishments for preventive outreach in our communities

Public health activities in occupational health bring to bear not only epidemiologic expertise but skills in health education and communication. Public health investigations of work-related incidents results not only in prevention recommendations to those involved in the incident, but to case studies which allow us to that take lessons learned and disseminate these lessons broadly to other stakeholders. The availability of information on high risk establishments will allow for more targeted and efficient information dissemination. The ability to identify lower risk establishments may also provide new opportunities to learn from employers who are implementing best practices – and potentially to help identify under reporters.

The 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. For example, under the Affordable Care Act, hospitals receiving CMS funding are required to prepare Community Health Needs Assessments to accelerate community health improvement and ultimately reduce healthcare costs. Hospitals are required to identify community health needs and health disparities and develop implementation plans to address these local concerns. [See www.CDC.gov/policy/chna.] Information about health and safety risks in local establishments within communities may encourage increased consideration of working conditions in these efforts to address health disparities and reduce work-related injuries and illnesses and associated health care costs. Epidemiologic methods that take into account establishment size are needed to effectively maximize use of the establishment specific data and should be further explored. CSTE looks forward to working with OSHA in this effort.

Improvement of data quality and use of the data

While the limitations of employer reported data on work-related injuries and illness are well recognized [Boden and Ozonoff, 2008; Ruser, 2010], these data remain a valuable source information to guide prevention activities at the federal, state and local level. Observations from interviews with OSHA record-keepers in Washington State suggest that incomplete OSHA records arise in part from lack of knowledge or confusion on the part of some employers about how to accurately and consistently record OSHA reportable cases as well as poor employer prioritization of this task [Wuellner S, and Bonauto, D, 2013]. We see electronic data collection and the public release of selected datasets as a means to improve data quality, knowledge and compliance with OSHA recordkeeping requirements. The 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. Standardized 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. Consider, for example, the National Healthcare Safety Network (NHSN) implemented by the CDC and used by more than 12,000 healthcare facilities for the collection of healthcare associated infection (HAI) data. Thirty states use NHSN as the platform to collect HAI data as part of the state's requirement for public reporting of HAIs. NHSN allows for tiered access at the facility, corporate or state level, and users can generate standardized reports to analyze their data. [See http://www.cdc.gov/nhsn.]

Public accountability via certification of the data reported by the responsible corporate executive also has the potential to contribute to more complete and accurate data collection. Notably, we recognize that the availability of establishment specific data to regulatory and public health agencies also has the potential to decrease reporting of injuries and illnesses by some employers. Some employers may be hesitant to accurately report all injuries and illnesses for fear of enforcement action, public health investigation, or damage to their reputation if disclosed by the media. Increased vigilance by OSHA to identify this potential problem is therefore necessary as OSHA proceeds with this initiative.
Additionally, we recognize the advisability of limiting case level reporting to the larger establishments in this initial effort at data modernization but urge OSHA to consider extending this requirement to smaller sized establishments that, on average experience higher rates of injury and illness, in the future.

Improvements in Medical Care

The proposed changes may also contribute to improvements in medical care. Availability of on line data on work-related injuries and illnesses will allow health care practitioners to assess the occurrence of particular injuries or illnesses at the establishments where their patients work. This information will both assist in the diagnosis and management of health conditions and allow health care practitioners to incorporate information on safe work practices into the general lifestyle education they or their ancillary staff provide. For example, a health care provider evaluating a patient with asthma could look at the on-line record of injuries and illnesses for where their patient works. If there were cases of work-related asthma on the log, this would prompt the health care provider to include questions about work-related asthma triggers in taking the patient's history. This new record keeping rule, by facilitating the diagnosis of work-related conditions, will allow for better diagnosis and management of workplace illnesses by health care providers in the community, thereby contributing to a reduction in morbidity, absenteeism and health care costs.

Employee privacy

Personally identifying information should be deleted from the online public access database of establishing specific injury and illness data. For research and public health practice purposes, more complete files should be made available. While initially only a more limited public use file may be available, we suggest that in the longer run, OSHA consider establishing multiple files with different levels of detail for different uses/users. It will be necessary to develop accompany requirements/review processes to determine who may have access to these data. This is common practice with many health data sets, for example, the Behavioral Risk Factor Surveillance System, and state hospital discharge data files.

Feasibility of collecting data electronically from establishments – a case example from Massachusetts

In 2000, Massachusetts enacted legislation requiring hospitals licensed by the Massachusetts Department of Public Health (MDPH) to develop sharps injury prevention control programs [MGL Chapter 111 sec 53D]. This law echoed the specific requirements of the OSHA bloodborne pathogen standard [29CFR 1910.1030] and added a requirement that hospitals report select data from the OSHA required log of sharps injuries annually to MDPH. MDPH hospitals and hospital workers collaborated in developing a system for reporting standardized data electronically. Each year since 2001, 100% of the MDPH licensed hospitals (n= 99) have submitted data on sharps injuries annually to the MDPH. In recent years, data from all hospitals, which range in size from less than 150 to over 20,000 employees, have submitted electronically through a secure electronic transmission. Annual hospital specific data and statewide reports prepared by MDPH provide information on patterns of sharps injury and sharps injury rates for use by hospitals and hospital workers as well as MDPH. (Findings indicate sharps injury rates have declined and use of devices without engineered safety features has increased, but that more remains to be done to reduce sharps injuries [Laramie, et al., 2012].) This experience in Massachusetts indicates that electronic reporting of case level occupational injury data to OSHA by employers is feasible and can provide useful information for targeting prevention efforts at multiple levels.

References:

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Ruser J. 2010. Allegations of Undercounting in the BLS Survey of Occupational Injuries and Illnesses, In 2010 JSM Proceedings, Statistical Computing Section, Alexandria, VA: American Statistical Association.

Wuellner S. and Bonauto D. Occupational injury recordkeeping among BLS sampled establishments; Implications for national surveillance. Conference presentation at: 2013 American Public Health Association Annual Meeting, Boston, MA. November 5, 2013.

Exhibit 4

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, *et al.*,	)	
Plaintiffs,	)	CIV-17-009-R
v.	)	
EDWARD C. HUGLER, ACTING SECRETARY OF LABOR, in his official capacity, *et al.*,	)	
Defendants.	)	

DECLARATION OF MARY BOTTARI

I, Mary Bottari, declare as follows:

1. I am Deputy Director for the Center for Media and Democracy (CMD). I have worked at CMD for eight years. As a reporter and an author of many of our major investigations, I conduct regular research on OSHA and public health issues and rely on OSHA's publicly available data for articles on workplace injuries and fatalities and to meticulously footnote my materials to protect against unfounded claims of libel. I have also reported on the large trade associations that have lobbied to weaken OSHA standards, including HR Policy Association and the Professional Services Council.

2. CMD is a nonprofit media organization that conducts investigations into special-interest influence and corruption in government. CMD regularly conducts research into issues related to government transparency, agency action and inaction, and corporate compliance with

and opposition to regulations, including occupational health and safety laws, and has published extensively on OSHA issues, including the need for greater transparency at OSHA. *See, e.g.*, *Reporter's Guide: Federal Contractors With History of OSHA Violations Battle New Safety Rules*, http://www.prwatch.org/news/2016/02/13041/federal-contractors-osha-violators-battle-new-rules; *Honeywell's String of Dangerous Close Calls Doesn't Stop Flow of Taxpayer Dollars*, http://www.prwatch.org/news/2016/02/13046/honeywell-contractor-osha-taxpayer-dollars; *Shaky Safety Record for Billion-Dollar Contractor AECOM Overseeing Nuclear Facilities*, http://www.prwatch.org/news/2016/03/13063/AECOM-shaky-safety-record-billion-dollar-contractor-overseeing-nuclear-facilities; *The Safety Violations That Billion-Dollar Contractor BAE Systems Should Have to Disclose*, http://www.huffingtonpost.com/mary-bottari/the-safety-violations-bil_b_9477512.html; *DuPont Rakes in Federal Dollars Despite History of Hazards*, http://www.huffingtonpost.com/mary-bottari/dupont-rakes-in-federal-d_b_9347798.html; *HR Policy Association*, http://www.sourcewatch.org/index.php/HR_Policy_Association; *Professional Services Council*, http://www.sourcewatch.org/index.php/Professional_Services_Council.

3. CMD intends to use the work-related injury and illness data that will be electronically submitted to OSHA and publicly disclosed under the Rule at issue in this case to conduct research on issues of corporate compliance with workplace health and safety regulations, government transparency, and corporate lobbying concerning health and safety laws.

4. CMD often uses information reported to government agencies and made available to the public to analyze these matters. For example, in 2016 CMD published a major report "Federal Contractors with History of OSHA Violations Battle New Safety Rules." This five-part series of articles detailed the safety record of multiple companies including DuPont, Honeywell,

BAE, and AECOM drawing heavily on OSHA's data set of injuries and death. This was a major investigation by our organization involving weeks of research in OSHA data sets, fact checking, and footnotes.

5. As part of that report, CMD detailed a series of accidents at Honeywell plants. Honeywell's Hopewell, Virginia plant was cited by OSHA for seven "serious" violations in three separate inspections from 2013-2015. The nearby Chesterfield plant was cited for one "Serious" violation and nine "Other-than- Serious" violations in three separate inspections. Honeywell's Golden Valley, Minnesota facility was cited for six "Serious" violations in three separate inspections. A separate Golden Valley facility owned by a Honeywell subsidiary, Honeywell Aerospace, was cited for one "Serious" violation, as was a facility in Chickasaw, Alabama owned by another Honeywell subsidiary. Our article series was picked up by many media sites and can be found here on Huffington Post: http://www.huffingtonpost.com/mary-bottari/honeywells-string-of-dang_b_9418746.html

6. Without OSHAs official online data set, this reporting would have been impossible, yet CMD was aware that the data set may not have reflected a fully accurate and timely picture of Honeywell's safety record that the electronic reporting requirement in the revised Rule will require. CMD intends to use the information that companies like Honeywell will electronically submit and OSHA will publicly disclose in its preparation of future reports. Without the public disclosure of the information by OSHA, CMD will be unable to obtain a fully accurate and timely picture of company safety records.

Pursuant to 28 U.S.C. § 1746, I hereby certify under penalty of perjury that the foregoing is true and correct.

Executed on March 15, 2017.

Mary Bottari