NATIONAL ASSOCIATION OF Manufacturers

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October 14, 2014

The Honorable David Michaels
Assistant Secretary
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

VIA ELECTRONIC SUBMISSION: http://www.regulations.gov

Re: OSHA Docket No. OSHA-2013-0023
Improve Tracking of Workplace Injuries and Illnesses – Supplemental Notice of Proposed Rulemaking
79 Federal Register 47605, August 14, 2014

Dear Dr. Michaels:

The National Association of Manufacturers ("NAM") is pleased to provide OSHA with these comments on the Agency's Supplemental Notice of Proposed Rule, *Improve Tracking of Workplace Injuries and Illnesses* (79 Fed. Reg. 47605, August 14, 2014). The NAM filed comments to the original proposed notice on March 10, 2014, Docket ID No. OSHA-2013-0023-1279.

The NAM is the largest manufacturing association in the United States, 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 $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds 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.

The NAM expressed serious concerns over the original proposed rule. Specifically, the NAM raised concerns over OSHA's legal authority and various policy implications, including the impact to the current no-fault recordkeeping system that would flow from such a proposed regulation. The NAM continues to believe that the existing recordkeeping system is sufficient to allow employers to identify and address hazards in their workplaces. Moreover, the supplemental notice in no way allays these concerns, but rather raises new concerns, which are addressed below.

In the supplemental notice, OSHA proposed, albeit without providing regulatory text, to add three additional provisions to the rule. These provisions would:

> (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.

79 Fed. Reg. 47606.

These comments address each proposed provision; the NAM will first address the third proposed provision prohibiting employers from taking adverse action against employees for reporting injuries and illnesses.

For all the reasons stated below, the NAM requests that OSHA withdraw this proposed regulation, in its entirety, including the supplemental notice.

I. The OSH Act, Section 11(c), Clearly Articulates Whistleblower Protections for Employees

a. The language in the supplemental notice exceeds statutory authority and is in clear contravention of legislative history.

The NAM is extremely troubled by OSHA's third proposed provision.In the supplemental notice, without providing any actual regulatory text, OSHA proposes to "prohibit employers from taking adverse action against employees for reporting injuries and illnesses." *Id.*

In its written comments to the proposed rule, the AFL-CIO alleges that Section 11(c) is "weak, cumbersome and resource intensive…." Docket ID No. OSHA-2013-0023-1350. Similarly, Local 804, an affiliate of the International Brotherhood of Teamsters claims that "[w]e have attempted to curtail discriminatory Company practices through the 11(c) process and have learned of the difficulties of this route. This suggested provision should be enforceable through penalties and citations…." Docket ID No. OSHA-2013-0023-1188.

It seems OSHA likewise believes that Section 11(c) is weak.[1] However, this belief does not grant the Agency authority to rewrite the statute. The AFL-CIO and Local 804's concerns are more appropriate for Congress's consideration as an amendment to the statue, not OSHA's as regulatory action.

[1] This belief aligns with OSHA's recent pronouncement that it will lower the standard of proof OSHA uses in determining whether whistleblower cases have merit. In remarks before the Whistleblower Advisory Committee on September 3, 2014, Dr. Michaels stated, "We are working on a new policy memo clarifying the Agency's position regarding burden of proof in whistleblower investigations. The memo will change the burden of proof to be based on a "reasonable cause" that a violation occurred, which is a lesser burden to prove than a "preponderance of the evidence." OSHA and the office of the Solicitor of Labor are working on this policy memo and it should be completed shortly." *Available at:* https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=SPEECHES&p_id=3259

Although OSHA fails to provide any regulatory text specifically identifying the types of adverse action prohibited under this proposed provision, the Agency alludes to the types of "adverse action" that *might* be prohibited.

> Adverse actions mentioned by participants in the public meeting included requiring employees who reported an injury to wear fluorescent orange vests, disqualifying employees who reported two injuries or illnesses from their current job, requiring an employee who reported an injury to undergo drug testing where there was no reason to suspect drug use, automatically disciplining those who seek medical attention, and enrolling employees who report an injury in an "Accident Repeater Program" that included mandatory counseling on workplace safety and progressively more serious sanctions of additional reports, ending in termination….
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> * * *
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> Also falling under this prohibition would be pre-textual disciplinary actions – that is where an employer disciplines an employee for violating a safety rule, but the real reason for the action is the employee's injury or illness report.

Id. at 47608.

Included in this list is post-injury drug testing and progressive discipline. In addition, given the Agency's very vocal opinion regarding safety incentive programs serving as a disincentive for employees to report injuries and illnesses, there is no doubt that safety incentive programs would be considered "adverse action" under this proposed provision. *See* Memorandum from Richard Fairfax to Regional Administrators and Whistleblower Program Managers, dated March 12, 2013.

Regardless of the type of adverse action that OSHA seeks to prohibit through regulatory action, any such attempt at regulating discrimination in any manner is a clear abuse of statutory authority, Congressional intent and legislative history.

Section 11(c) of the OSH Act proscribes:

> No 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 or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.

29 U.S.C. § 660(c).

In a very broad manner, through Section 11(c), Congress has spoken directly to the precise issue of discrimination against employees by employers. *Chevron U.S.A. vs. Natural Resources Defense Council*, 467 U.S. 837 (1984). OSHA asserts that its authority to promulgate such a proposed provision comes from Sections 8 and 24 of the Act. However, there is no need

to look beyond Section 11(c) which speaks precisely to the issue of discrimination. There is no Congressional silence which one can draw inferences from to support this proposed provision and there is no gap-filling that must be done. *Id*. Indeed, OSHA makes no such claims. In holding that the FDA did not have Congressional authority to regulate tobacco, the Supreme Court held, "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). Similarly here, where Congress expressly addressed the issue of discrimination in Section 11(c) there is nothing within Sections 8 and 24 that provides support for bypassing Congressional intent and permits promulgating a regulation establishing a civil penalty for discriminatory action.

Furthermore, the plain language of Section 11(c) clearly illustrates the express intent of Congress by rejecting provisions to the Act where discriminatory actions would be subject to civil penalties. During the development of the OSH Act, Congress did in fact contemplate the idea. *See* Subcommittee on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970 (Committee Print 1971).

In one bill submitted for consideration by the House of Representatives ("House") H.R. 19200, there was proposed language specifically assessing a civil penalty for discriminatory actions. H.R. 19200, contained Section 17 – Penalties that stated:

> (g) Any person who discharges or in any other manner discriminates 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, 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 a person may also be subject to a fine of not more than $10,000 or imprisonment of a period of not to exceed ten years or both.

H.R. Bill 19200 (September 15, 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 763.

Based on similar language in other proposed bills from the House, such as H.R. 16785, legislative history evinces that the House preferred that discrimination against employees under the Act be subject to a civil penalty and handled through an administrative process. In comparison, the U.S. Senate ("Senate") bills, which ultimately prevailed, preferred that discrimination be handled through a formal judicial review process. See, House Resolution 16785 (July 9, 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 961. In the supplemental notice OSHA states, "[u]nder this provision, OSHA could issue citations and…[t]he citations would carry civil penalties in accordance with Section 17 of the OSH Act…" 79 Fed. Reg. 47608. The final Conference Report makes irrefutably clear that OSHA is exceeding its statutory authority.

> The Senate bill 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 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. Because Congress already rejected the very notion that OSHA proposes in the proposed supplemental provision, the legislative history of the OSH Act forecloses any doubt that OSHA is exceeding its authority.

b. There is no evidence illustrating that safety incentive programs, disciplinary programs or other similar company policies and programs discourage employees from reporting injuries and illnesses resulting in under reporting.

The supplemental notice is void of any evidence to support OSHA's assertion that safety incentive programs, disciplinary programs or other similar company policies or programs discourage employees from reporting injuries and illnesses. In fact, the evidence that does exist fundamentally undermines OSHA's position. Despite two years of OSHA's National Emphasis Program ("NEP") focused on Recordkeeping, including looking at policies that would discourage employees from reporting injuries and illnesses, OSHA has no available data or conclusions establishing a link or correlation to such policies and underreporting. Additionally, a 2012 Government Accountability Office Report reviewed several studies that assessed the effect of safety incentive programs, two of the studies specifically analyzed the potential effect on workers' reporting of injuries and illnesses and concluded that there was *no relationship between the programs and injury and illness reporting*. United States Government Accountability Office Report to Congressional Requesters on Workplace Safety and Health, GAO-12-329, April 2012 ("GAO Report ").

In 2009 OSHA implemented a Recordkeeping 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. As part of the NEP, OSHA developed questionnaires for compliance officers when interviewing employees, healthcare providers and management officials. These questionnaires had very specific questions pertaining to safety incentive policies. For example, OSHA asked employees whether certain policies existed in their workplace, including "safety incentive programs or programs that provide prizes, rewards or bonuses to an individual or groups of workers that is based on the number of injuries and illnesses recorded on the OSHA log," or "are there prizes, rewards or bonuses to supervisors or managers that are linked to the number of injuries or illnesses recorded on the OSHA log," or "are there demerits, punishment or disciplinary policies for reporting injuries or illnesses?" OSHA Directive No.10-02, CPL 02, *Injury and Illness Recordkeeping National Emphasis Program*, February 19, 2010. Further, the questionnaire sought to determine whether employees believed that any such policies or programs encouraged or discouraged the reporting of injuries or illnesses to the employee's employer.

The NEP resulted in 550 federal and state recordkeeping inspections. *OSHA NEP Report to Congress* at p. 3. OSHA spent a considerable amount of time and energy during the NEP inspections on safety incentive policies and other similar policies the Agency believes discourage reporting. And yet, OSHA does not provide any data gathered, any findings or any potential conclusions the Agency may have made from its interviews with employees, healthcare providers and management officials regarding these policies in its report to Congress. *Id*. Implicit in this lack of evidence is that employers are not intentionally under reporting and that if policies, such as safety incentive programs or post-injury drug testing are implemented they have no effect on the reporting of injuries and illnesses. OSHA provides no evidence to the contrary.

OSHA's lack of evidence from the NEP program linking safety incentive programs, drug-testing policies or other similar policies to underreporting is not surprising, particularly in light of the GAO Report issued after the completion of the NEP. The 2012 GAO Report found little research available on the effect of workplace safety incentive programs or other policies on workers' reporting injuries and illnesses. *See* GAO Report at GAO Highlights. More importantly, the studies that they did review found there was *no link* between such policies and employee reporting. *Id*.

> Of the six studies GAO identified that assessed the effect of safety incentive programs, two 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.*

Id. (emphasis added).

One of the two studies GAO relied on that actually examined the potential effect of such policies on workers' reporting of injuries and illness found that "rate-based safety incentive programs had *no effect on injury reporting*." GAO Report at p. 8 (emphasis added). "Three studies that did not focus on only one type of safety incentive program [rate-based or behavior-based] found that the programs *reduced* injuries…." *Id*. (emphasis added). What the GAO Report did establish was that "how employers manage safety has a greater influence on workers' actions, including whether they are likely to report injuries and illnesses, than any one program or policy." GAO Report at p. 10.

Despite efforts to establish a relationship between safety incentive policies, drug-testing policies, discipline policies or other similar policies and employee reporting of injuries and illnesses, OSHA has not been able to find evidence drawing a correlation between the two. As such, this supplemental notice lacks any supporting evidence for any proposed provision prohibiting such policies.

c. To the extent such a provision would prohibit post-accident or post-injury drug-testing it violates Section 4(b)(4).

Under Section 4(b)(4) Congress specifically reserved certain responsibilities to the states, including any remedies afforded to employees under workers' compensation laws.

> Nothing in this Act shall be construed to supersede or *in any manner affect any workmen's compensation law* or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

29 U.S.C. § 653(b)(4) (emphasis added).

Drug-free workplace programs are a fundamental part of the workers' compensation scheme in many, if not all states. Many of NAM's members have implemented such programs in accordance with their state's workers' compensation laws whether they are mandatory or voluntary. More importantly, many of these drug-free workplace programs require some form of post-accident or post-injury testing regardless of suspected drug use.

The following are a few examples of states where NAM members operate and have some form of post-accident, post-injury testing within the state's workers' compensation laws.

- Alabama: Employers who establish drug-free workplace programs pursuant to Section 25-5-330 et. seq. to receive discounts on insurance premiums are required to conduct drug testing "if the employee has caused or contributed to an on-the-job-injury which resulted in a loss of work time." Ala. Code § 25-5-335(a)(5).

- Georgia: Under Georgia Code § 34-9-415 an employer who maintains a drug-free workplace program is required to conduct drug testing "if the employee has caused or contributed to an on the job injury which resulted in a loss of worktime." Ga. Code Ann. § 34-9-415.

- Ohio: As part of Ohio's drug-free safety program through the Bureau of Workers' Compensation, Ohio requires post-accident alcohol and/or other drug testing. Ohio Admin. Code § 4123-17-58(C)(5)(b).

As illustrated above, many, if not all, state worker's compensation laws have intricate legal requirements pertaining to drug-free workplace policies that include post-accident or post-injury testing, some without regard to whether the employee is suspected of drug use. Any attempt by OSHA to prohibit such drug testing would be in violation of Section 4(b)(4) since such prohibition would clearly affect workers' compensation laws. 29 U.S.C. § 653(b)(4).

> Section 653(b)(4) makes clear that OSHA was not intended to redefine or affect an employer's common law or statutory duties. OSHA's overriding purpose is to prevent workplace injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 100 SCt 883, 890, 63 L. Ed. 2d 154 (1980) (OSHA "is prophylactic in nature.") It is enforceable by administrative civil and criminal penalties. It, however, does not provide remedies to injured employees.

Ries v. Amtrak, 960 F.2d. 1156, 1168 (3rd Cir. 1992) (Nygarrd, concurring). The majority opinion in *Ries* held that "the purpose of OSHA is preventative rather than compensatory." *Id*. at 1164. This is exactly how Congress intended the statute to operate

– remedies for injured employees were carved out of the authority under the OSH Act and specifically left to state workers' compensations laws, an area that Congress expressly prohibited OSHA from affecting in any manner.

At a time when positive drug tests in the workplace are on the rise and encouraged, OSHA with this supplemental notice alludes to potentially restricting post-accident, post-injury alcohol and/or substance testing because such testing allegedly discourages employees from reporting injuries and illnesses. According to Quest Diagnostics

> [t]he percentage of positive drug tests among American workers has increased for the first time in more than a decade, fueled by a rise in marijuana and amphetamines, according to an analysis of 8.5 million urine, oral fluid and hair workplace drug test results….
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> The Quest Diagnostics Drug Testing Index (DTI) shows that the positivity rate for 7.6 million urine drug tests in the combined U.S. workforce increased to 3.7 percent in 2013, compared to 3.5 percent in 2012. The relative increase of 5.7 percent year-over-year is the first time the positivity rate for combined national workplace urine drug tests has increased since 2003.

Quest Diagnostics Press Release, *Workforce Drug Test Positivity Rate Increases for the First Time in 10 Years, Driven by Marijuana and Amphetamines, Finds Quest Diagnostics Drug Testing Index™ Analysis of Employment Drug Tests*, September 11, 2014, available at: http://newsroom.questdiagnostics.com/2014-09-11-Workforce-Drug-Test-Positivity-Rate-Increases-for-the-First-Time-in-10-Years-Driven-by-Marijuana-and-Amphetamines-Finds-Quest-Diagnostics-Drug-Testing-Index-Analysis-of-Employment-Drug-Tests.

Section 4(b)(4) of the OSH Act is "satisfactorily explained as intended to protect worker's compensation acts from competition by a new private right of action and to *keep OSHA regulations from having any effect on the operation of the worker's compensation scheme itself*." *Pratico v. Portland Terminal Co*., 783 F.2d. 255, 266 (1st Cir. 1985) (emphasis added). Therefore, any proposed provision prohibiting post-accident, post-injury testing would in fact dismantle portions of state workers' compensation systems. Employers have developed programs in compliance with workers' compensation laws, have trained and educated employees, managers and supervisors on a drug-free work place program and have incurred costs associated with implementing such a program. More importantly, such programs are fundamental to the workers' compensation scheme – they provide insurance premium discounts, or prohibit actions on certain types of claims for damages and depending on the results can entirely negate liability for workers' compensation altogether. Any provision that would impact an employer's current drug-testing policy or program would not "leave the state schemes wholly intact as a legal matter," and therefore would violate Section 4(b)(4). *See United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1236 (D.C. Cir. 1980) (finding "that though MRP may indeed have a great practical effect on workmen's compensation claims, *it leaves the state schemes wholly intact as a legal matter*, and so does not violate Section 4(b)(4)").

Furthermore, the Federal government has developed its own programs and guidance for drug-free workplaces. As part of the Department of Labor's own e-laws there is a Drug-Free

Workplace Advisor that helps employers develop a drug free policy. It provides employers with a step by step process to building their own drug-free workplace policy. Specifically, Section 7 of that policy builder requires employers to select the type of drug-testing that the employer will require, and some options include pre-employment, periodic, random, *post-accident,* reasonable suspicion and return-to-duty. Available at:
http://www.dol.gov/elaws/asp/drugfree/drugs/screen1.asp

Additionally, the e-laws Drug Free Workplace Advisor addresses the question, "When are Drug Tests Conducted?" In the answer DOL states:

> There are a variety of circumstances under which an organization may require a drug test. Following are the most common or widespread:
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> * * *
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> Post-Accident: Since property damage or personal injury may result from accidents, testing following an accident can help determine whether drugs and/or alcohol were a factor. It is important to establish objective criteria that will trigger a post-accident test and how and by whom they will be determined and documented. *Examples of criteria used by employers include: fatalities; injuries that require anyone to be removed from the scene for medical care; damage to vehicles or property above a specified monetary amount; and citations issued by the police.* Although the results of a post-accident test determine drug use, a positive test result in and of itself cannot prove that drug use caused an accident. When post-accident testing is conducted, it is a good idea for employers not to allow employees involved in any accident to return to work prior to or following the testing. Employers also need to have guidelines to specify how soon following an accident testing must occur so results are relevant. Substances remain in a person's system for various amounts of time, and it is usually recommended that post-accident testing be done within 12 hours. *Some employers expand the test trigger to incidents even if an accident or injury was averted and hence use term "post-incident."*

elaws – Drug-Free Workplace Advisor, Workplace Drug Testing (emphasis added), *available at*: http://www.dol.gov/elaws/asp/drugfree/drugs/dt.asp#q4.

Equally important is the fact the Department of Health and Human Services, Substance Abuse Mental Health Services Administration ("SAMHSA") advocates drug-free workplace programs, ones that include post-accident testing not only for Federal agencies but for private workplaces. OSHA should be well aware that there are Mandatory Guidelines for Federal Workplace Drug Testing, required by Executive Order 12564. Exec. Order No. 12564 (1986), 51 Fed. Reg. 32889. [2] These mandatory guidelines detail the procedures for federal workplace drug

[2] "The Federal government, as the largest employer in the Nation, can and should show the way towards achieving drug-free workplaces through a program designed to offer drug users a helping hand and, at the same time, demonstrating to drug users and potential drug users that drugs will not be tolerated in the Federal workplace…. Federal employees who use illegal drugs, on or off duty, tend to be less productive, less reliable, and prone to

testing programs. 73 Fed. Reg. 71873 (November 25, 2008). Section 2.2 of the Mandatory Guidelines expressly states that "A Federal agency may collect a specimen for the following reasons: (a) Federal agency applicant/Pre-employment test; (b) Random test; (c) Reasonable suspicion/cause test; *(d) Post-accident test*; (e) Return to duty test; or (f) Follow-up test." *Id*. at 71880 (emphasis added).

According to the Department of Labor, Assistant Secretary for Policy,

> Federal agencies conducting drug testing must follow standardized procedures established by the Substance Abuse and Mental Health Services Administration (SAMHSA), part of the U.S. Department of Health and Human Services (DHHS). *While private employers are not required to follow these guidelines, doing so can help them stay on safe legal ground. Court decisions have supported following these guidelines, and as a result, many employers choose to follow them.*

Available at: http://www.dol.gov/elaws/asp/drugfree/drugs/dt.asp (emphasis added).

SAMHSA has developed and made available a model plan, which in pertinent part includes a section on "Injury, Illness, Unsafe, or Unhealthful Practice Testing." This section provides:

> [Agency] is committed to providing a safe and secure working environment. It also has a legitimate interest in determining the cause of serious accidents so that it can undertake appropriate corrective measures. Post-accident drug testing can provide invaluable information in furtherance of that interest. Accordingly, employees may be subject to testing when, based upon the circumstances of the accident, their actions are reasonably suspected of having caused or contributed to an accident that meets the following criteria:
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> 1. The accident results in a death or personal injury requiring immediate hospitalization; or
> 2. The accident results in damage to government or private property estimated to be in excess of $10,000.

Available at: beta.samhsa.gov/sites/default/files/workplace/ModelPlan508.pdf.

In order to create a more safe work environment, NAM members have also developed drug-free workplace programs, to include post-accident, post-incident and/or post-injury drug testing. Many of these programs were developed in accordance with state workers' compensation laws, as well as the Federal guidance issued through DOL and various other Federal agencies and administrations, such as SAMHSA. Should OSHA move forward with this supplemental notice and attempt to prohibit such testing as an adverse action discouraging employees for

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greater absenteeism than their fellow employees who do not use illegal drugs; the use of illegal drugs, on or off duty, by Federal employees impairs the efficiency of Federal departments and agencies, undermines public confidence in them, and makes it more difficult for other employees who do not use illegal drugs to perform their jobs effectively. *The use of illegal drugs, on or off duty, by Federal employees also can pose a serious health and safety threat to members of the public and to other Federal employees*…" Exec. Order No. 12564 (1986)(emphasis added).

reporting injuries and illnesses it would be contrary to state and federal law. Moreover, the promulgation of any such provision would be an abuse of statutory authority and in direct violation of Section 4(b)(4).

II. Existing Requirements Already Require Reporting Procedures Established by the Employer to be Reasonable and not Unduly Burdensome

OSHA is also proposing a requirement that "injury and illness reporting procedures established by the employer under 29 C.F.R. 1904.35(a)(1) and (b)(1) [] be reasonable and not unduly burdensome." 79 Fed. Reg. 47607-608. OSHA acknowledges that the current requirements already prohibit onerous and unreasonable reporting requirements. *Id*. ("i.e., one has not created a 'way to report' injuries if the 'way' is too difficult to use").[3]

Section 1904.35 requires employers to (1) "inform each employee of how he or she is to report an injury or illness to you;" (2) set up a way for employees to report work-related injuries and illnesses promptly; and (3) tell each employee how to report work-related injuries and illnesses to you. 29 C.F.R. § 1904.35.

Under the existing requirements, employers must already establish reporting requirements that facilitate the prompt reporting of injuries and illnesses. Yet again, OSHA provides no evidence, data, science or academic research suggesting that the current reporting requirements employers are implementing are "onerous and unreasonable." Certainly if this were as big of a concern as OSHA seems to suggest, such that additional regulatory action is necessary, there would be plenty of data gathered from OSHA inspections, particularly during the Recordkeeping NEP, to support that position. Perhaps even a plethora of citations issued under the existing requirements might provide some basis for the need for "additional text to communicate that point more clearly."

Yet the supplemental notice is void of any such evidence. OSHA relies on *one* single public comment from the Service Employees International Union ("SEIU") that "employers are often discouraging people from reporting incidents of violence because they're often so routine they make the reporting so cumbersome that many times our members tell us they don't even bother to report…" Day 2 TR 91-92. Despite claiming that additional detail would be provided in the SEIU's written comments, OSHA-2013-0023-1387, a review of those comments merely reiterates that same conclusory statement made at the public hearing. SEIU's written comments allege that "[b]ased on our experience…some employers may try to suppress the reporting of work-related injuries to keep injuries low." *Id*. There is no additional detail, no member surveys, no explanation as to what the experience is, what it is based on or other similar types of evidence to support such a statement. Despite referencing that such programs and policies used by employers are documented by "numerous reports and studies," the SEIU fails to submit any such studies to the record, let alone cite to them in their written comments.

This proposed provision is not grounded in real evidence and is duplicative of existing regulations.

[3] Promulgating additional regulations where the Agency fully acknowledges that existing regulations prohibit the proposed regulated activity is contrary to the President's commitment to ensure Regulation Reform, including riding of unnecessary, duplicative and costly regulations. Exec. Order. 13563 (January 21, 2011).

III. The Supplemental Notice Raises Other Policy and Procedural Concerns

a. Any final rule without supporting evidence violates the Administrative Procedure Act

In the supplemental notice, OSHA states

> many stakeholders…expressed concern that the proposal could promote an increase in workplace policies and procedures that deter or discourage employees from reporting work relate injuries and illness. These include adopting unreasonable requirements for reporting injuries and illnesses and retaliating against employees who report injuries and illnesses. In order to protect the integrity of the injury and illness data, OSHA is considering adding provisions that will make it a violation for an employer to discourage employee reporting in these ways.

79 Fed. Reg. 47605.

The NAM believes that OSHA greatly exaggerates the extent that these concerns were raised by stakeholders. More importantly, the lack of evidence in the record supporting alleged concerns simply do not justify the supplemental notice and any Agency action finalizing these proposed provisions would violate the Administrative Procedure Act.

At the outset, OSHA claims that "Several participants at the public meeting described situations where workers did not report injuries or illnesses for fear of retaliation from their employers." 79 Fed. Reg. 47607. What OSHA really meant was that there were *two* participants that made such an allegation, two participants out of approximately 30 public commenters during the two day hearing, Local 804 ("Local 804") an affiliate with the International Brotherhood of Teamsters and the Communication Workers of America.

As discussed above, in order to suggest that employers are adopting reporting procedures that are unreasonably burdensome, OSHA relies on the single comment from the SEIU alleging, without any substantiation, that "employers are often discouraging people from reporting incidents of violence because they're often so routine they make the reporting so cumbersome that many times our members tell us they don't even bother to report…" Day 2 TR 91-92.

Lastly, in support of the third provision prohibiting employers from taking adverse action against employees for reporting injuries and illnesses, OSHA relies on just a handful of alleged examples. 79 Fed. Reg. 47608. These examples simply do not establish that there is a systematic problem in workplaces that justify the regulatory action suggested here.

Final agency actions are reviewed by courts under the APA to determine whether such conduct was "arbitrary or capricious" or in excess of statutory authority. *Id*. At a minimum, OSHA must rely upon relevant data and provide an adequate explanation for the rule, drawing a connection between the facts found and the choices made. *See Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

Here, OSHA has presented absolutely no evidence that would support any final decision or "choice made." Further "an agency rule would be arbitrary or capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* Again, here the evidence that does exist simply does not support such regulatory action, rather it supports withdrawing the supplemental notice.

However, should OSHA decide to finalize the proposed rule and the supplemental notice, despite failing to provide actual regulatory text, the NAM believes such final agency action will be arbitrary and capricious and in violation of the Administrative Procedure Act ("APA"). 5 U.S.C. § 706(2).

b. OSHA fails to provide proposed regulatory text that allows the regulated community a reasonable opportunity to comment.

Notice must 'appris[e] the public of the nature and basis of the regulation or rule sufficiently to enable them to understand and identify the material issues relating to the justification for the regulation or rule so that they can comment thereon intelligently." *Ohio Valley Envtl. Coal. v. United States Army Corps of Eng'gs*, 674 F. Supp. 2d 783, 803 (S.D. W. Va 2009) (citing to *Nat'l Asphalt Pavement Ass'n v. Train*, 539 F.2d 775, 779 n. 2 (D.C. Cir. 1976) and *Appalachian Power Co. v. EPA*, 579 F.2 846, 852-53 (4th Cir. 1978). OSHA fails to provide proposed regulatory text in the supplemental notice, although this seemingly would have been simple to do. Instead, OSHA simple states it

> is seeking 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.

One might easily mistake the supplemental notice as an Advance Notice of Proposed Rulemaking ("ANPR") particularly in light of the numerous questions posed, such as "what other actions can OSHA take to address the issue of employers who discourage employees from reporting injuries and illnesses." "Are you aware of situations where employers have discouraged the reporting of injuries and illness? If so, describe any techniques, practices, or procedures used by employers…."

The NAM is principally concerned that without any proposed regulatory text, OSHA's proposed provision prohibiting employers from taking adverse action against employees for reporting injuries and illnesses is likely to be subjective and overly broad. OSHA seems to suggest that it would define "adverse action" to include "termination, reduction in pay, reassignment to a less desirable position, *or any other action that might dissuade a reasonable employee from reporting an injury."* 79 Fed. Reg. 47608 (emphasis added).

While OSHA provides some examples of what might be considered "adverse action," OSHA has not set out any criteria for how it would determine whether certain policies or programs would dissuade a reasonable employee from reporting or how employers would

evaluate their policies or programs to determine compliance with the proposed provision. This leaves the NAM to question whether even mounting a safety banner displaying the number of accident free or number of days without a lost work time accident would be considered an adverse action. These types of banners are a source of pride for many members – they serve as a visual reminder of how hard management and employees work toward maintaining a safe and healthy work environment. While it is hard to imagine that OSHA would take such a position, the lack of regulatory text and the broad nature of the proposed provision make it difficult for NAM members to clearly understand the scope of the prohibited activity.

Further, employers should be provided an opportunity to refute whether specific policies and programs would be considered as discouraging employees from reporting injuries and illness. OSHA has not specifically identified any such policies or programs but merely lists those examples mentioned by participants at the public meeting. 79 Fed. Reg. 47608 (requiring an employee who reports an injury to wear a fluorescent orange vest, requiring post injury drug testing, implementing an "Accident Repeater Program" including counseling on workplace safety, progressive discipline policies). The NAM has no way of knowing whether any, some, or all of those listed would be encompassed in a regulation.

> The process of notice and comment rulemaking is not to be an empty charade. It is to be a process of reasoned decision-making. One particularly important component of the reasoning process is the opportunity for interested parties to parties to participate in a meaningful way in the discussion and final formulation of rules.
>
> * * *
>
> The purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rulemaking process….

Connecticut Light and Power v. Nuclear Regulatory Comm'n, 673 F.2d 525, 528 (D.C. Cir. 1982)(citations omitted).

By failing to provide regulatory text with any level of sufficient detail to inform the regulated community of the specific policies and programs that OSHA would consider as "adverse action" the NAM is unable to fully "communicate information, concerns, and criticisms" of its members to OSHA during the rulemaking process so that the Agency can make a fully informed decision in taking final action.

c. The supplemental notice contradicts the Agency's belief about the benefits of public disclosure.

There is a strongly held belief among Agency officials that the public disclosure of information, such as work-related injuries, illnesses, reported fatalities, hospitalizations, amputations, as well as the public release of alleged citations against employers will result in greater compliance with safety and health standards. Prior to his appointment as Assistant Secretary for OSHA, Dr. Michaels described his belief that public disclosure or "shaming"

encourages compliance in a written contribution to the public health and occupational safety blog The Pump Handle:

> As a mechanism for restricting undesirable behavior, or promoting desirable behavior, shaming is far less expensive or bureaucratic than most rules enforced by federal agency. Some of our most effective public health programs work on this principle – think about the impact of potential customers reading graphic descriptions of restaurant health code violations.
>
> Fear of public disclosure of hazards (and the associated scorn and anger) can be a powerful motivation to clean them up. *Public disclosure encourages the responsible parties to control hazards rather than suffer the public embarrassment and political pressure that often follows disclosure.*

Dr. David Michaels, "Regulation by Shaming," The Pump Handle, Nov. 29, 2006, *available at:* http://thepumphandle.wordpress.com/2006/11/29/regulation-by-shaming/ (emphasis added).

In proposing this rule, OSHA took the position that public disclosure of an employer's injury and illness records would lead to more accurate data and greater compliance. This supplemental notice is completely contrary to the basis for the proposed rule – OSHA simply does not believe that under reporting will result, rather the Agency believes *less* under reporting is likely to result. In the November 2013 proposed notice OSHA stated:

> This regulation may also improve the accuracy of the reported data….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.
>
> 78 Fed. Reg. 67254, 67259 (November 8, 2013) (emphasis added).

Prior to the release of the proposed rule, OSHA held a teleconference and Dr. Michaels explicitly claimed that public disclosure of injuries and illness would *not* have a negative effect on recordkeeping. In response to a question about whether the proposed rule would deter companies from keeping accurate injury data, Dr. Michaels stated:

> *No we actually think that public disclosure will improve the quality of the data through a self-correcting mechanism. We believe that by making the reports public employees will be able to tell if their employer is under reporting and that's going to encourage more accurate reporting by employers who may not have done so in the past.*
>
> *In addition though I think senior managers don't want to publicly report inaccurate data I think they recognize that. So I believe that as a result of this they're going to pay more attention to the accuracy of the data and therefore see the meaning of the data to the injury rates.*

> And presumably to the causes of injury as well so that self-correcting mechanism I think will actually contribute to safer workplaces. Plus, you know, we've had this data up for a long time and I think employers, many employers are used to sending this in.

Available at: https://www.osha.gov/recordkeeping/recordkeeping_press_call.html (emphasis added).

If OSHA believed that underreporting will result from this proposed rule then the answer is to abandon the proposed rule in its entirety, not attempt to regulate its way out of the problem.

V. Conclusion

The NAM appreciates the opportunity to submit these comments on the supplemental notice. However, based on the above concerns, as well as those stated in the NAM's initial-filed comments, it appears that OSHA in a haste to move toward finalizing this rule has failed to truly consider the evidence or lack thereof, as well as the overall implications of implementing this

rule, including the proposed "provisions" in the supplemental notice. The NAM strongly encourages OSHA to withdraw this proposed regulation.

Sincerely,

Joe Trauger
Vice President
Human Resources Policy