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BUILDING TRADES UNIONS
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October 14, 2014

OSHA Docket Office
U.S. Department of Labor
Room N–2625
200 Constitution Avenue NW
Washington, DC 20210

Re: OSHA's Proposed Rule to Improve Tracking of Workplace Injuries and Illnesses
Docket Number OSHA–2013–0023—Supplemental Notice of Proposed Rulemaking of August 14, 2014

Dear Sir or Madam:

North America's Building Trades Unions (Building Trades), on behalf of the approximately three million members represented by our 14 affiliated national and international construction unions, is pleased to provide these comments in response to OSHA's supplemental notice of proposed rulemaking to Improve Tracking of Workplace Injuries and Illnesses (Docket number OSHA-2013-0023).

The Building Trades continues to support OSHA's proposal for new electronic reporting requirements and appreciates the opportunity to comment further on the issues raised in the August 14, 2014 federal register notice. Our comments are attached.

Again, thank you for the opportunity to comment on this important rulemaking, and please do not hesitate to contact me if you have any questions regarding our position.

Sincerely,

Pete Stafford
Director of Safety and Health

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Comments of the Building and Construction Trades Department, AFL-CIO, on OSHA's Supplemental Notice of Proposed Rulemaking on Improving the Tracking of Workplace Injuries and Illnesses

Docket No. OSHA-2013-0023

The Building and Construction Trades Department, AFL-CIO ("the Building Trades") appreciates this opportunity to comment on OSHA's proposal to add provisions to its recordkeeping requirements to clarify that employees have the right to report workplace illnesses and injuries and that their employers must provide them with the opportunity to do so without fear of retaliation. For the reasons set forth in our comments in response to OSHA's original notice of proposed rulemaking, the Building Trades supports the agency's proposed electronic reporting requirements, with several modifications that we believe will enhance the accuracy and utility of the posted information. *See* OSHA-2013-0023-1346. We fully agree with the agency, however, that increasing the visibility of this data may exacerbate a serious problem that already plagues our workplaces: employer policies and practices that discourage employees from reporting their work-related injuries and illnesses in order to make the employer's numbers look better. As explained below, this is a particular problem in the construction industry, and we accordingly urge OSHA to include in its recordkeeping rules provisions that make it explicit that employers must enable employees to report illnesses and injuries, and that it is a violation of these rules to maintain policies or practices or take actions that discourage employees from making these reports.

Construction workers face an overwhelming risk of being injured on the job over the course of their careers. Although only about 7% of the current U.S. workforce is employed in

construction, work-related deaths in our industry account for 17% of all occupational fatalities.[1] One study concluded that for a working life in construction, the risk of having a fatal injury is approximately one death per 200 full-time equivalent workers ("FTEs"), and for non-fatal injuries resulting in days away from work, the lifetime risk is an astonishing 78 per 100 FTEs.[2] It is important for employers, OSHA, workers and their representatives, and occupational safety and health researchers to have accurate data about where, when and why these injuries and illnesses are occurring to understand how to improve worksite safety. As the U.S. House of Representatives Committee on Education and Labor explained,

> Accurate counting of injuries, illnesses and other safety and health indicators is essential to identify the root causes of workplace incidents and illnesses, to address unsafe workplace conditions, to ensure that workers get appropriate medical treatment and to establish an effective management safety system.[3]

Yet, it is well-documented that illnesses and injuries in the construction industry are seriously underreported. For example, a comparison of the significant drop in non-fatal workplace injury statistics, at the same time that the number of cases of workers with restricted work activity increased and the fatality rate remained stubbornly high, suggested that the numbers do not come close to accurately representing what is going happening on our

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[1] CPWR - The Center for Construction Research and Training (2013), *The Construction Chart Book: The U.S. Construction Industry and its Workers, 5th edition*. Silver Spring: CPWR.

[2] Dong, X. S., Ringen, K., Welch, L. and Dement, J. (2014), Risks of a lifetime in construction Part I: Traumatic injuries. Am. J. Ind. Med., 57: 973–983.

[3] The Committee on Education and Labor, U.S. House of Representatives, Hidden Tragedy: Underreporting of Workplace Illnesses and Injuries, p. 4 (2008), available at http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg42881/pdf/CHRG-110hhrg42881.pdf (accessed October 14, 2014).

worksites.[4] Indeed, a study of a Denver International Airport construction project revealed overall total injury rates twice the national rates the Bureau of Labor Statistics (BLS) published for each year of the project, and for contractors of every size, a discrepancy the authors attributed to underreporting to BLS. As the authors noted, "the burden of on-site work-related construction injury may be higher and more costly than has been evident from national data."[5] The numbers are especially skewed on small establishments, which make up an overwhelming majority – 80% - of construction firms. [6] An analysis of BLS's SOII data showed it captured only 60% of severe injuries among white, non-Hispanic workers, and only 25% of severe injuries among Hispanic workers in small construction establishments.[7]

There are significant economic incentives for construction employers to underreport workplace injuries and illnesses. As with employers generally, construction contractors' insurance rates are often based largely on lagging indicators, whether their recordable injury and illness rates, or their Experience Modification Rates, which include their workers compensation rates. Moreover, the lower an employers' injury rates, the less likely they are to be inspected. In addition, these lagging indicators are used in our industry to prequalify or otherwise evaluate contractors bidding for work. We seriously question the utility of using lagging indicators to evaluate the quality of an employer's safety and health program or the safety of its workplace,

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4 Welch, L.S., Dong, X., Carre, F., Ringen, K. (2007), Is the Apparent Decrease in Injury and Illness Rates in Construction the Result of Changes in Reporting?, Int. J. Occup. Environ. Health, 13:39-45.

5 Glanzer, J.E., Borgerding, J., Lowery, J.T., Bondy, J., Mueller, K.L., Kreiss, K. (1998), Construction Injury Rates May Exceed National Estimates: Evidence from the Construction of Denver International Airport, Am. J. Ind. Med., 34:105-112.

6 CPWR - The Center for Construction Research and Training (2013), *The Construction Chart Book: The U.S. Construction Industry and its Workers, 5th edition*. Silver Spring: CPWR.

7 Dong, X.S., Fujimoto, A., Ringen, K., Stafford, E., Platner, J., Gittleman, J., Wang, X. (2011), Injury Underreporting in the Construction Industry, Am. J. Ind. Med., 54:339-349.

since the number of incidents reported may bear little relationship to the severity of the injuries experienced or the accuracy of the data (and, indeed, higher numbers sometimes simply reflect better employer reporting policies). Regardless, however, the fact that these numbers influence whether contractors actually get work places huge pressure on contractors to keep their numbers down, whether by creating better safety programs or – too often – by simply undercounting illnesses and injuries.

Construction employees feel this pressure. As was evident from testimony by construction workers and their representatives during OSHA's recent hearings on its proposed silica standard, construction workers fear reporting their injuries and illnesses. Throughout the hearings, there was widespread agreement among workers, their representatives and medical and public health experts that employees would not participate in medical surveillance without assurances that the findings would be kept confidential, due to their fears that their employers would discriminate against them if they believed they were physically or medically impaired. *See generally* BCTD Post-Hearing Brief (OSHA-2010-0034-4223) at 131-32. Contractors even confirmed that they would be likely to refuse to hire employees whose medical records revealed decreased lung function. *See* Comments of the Construction Industry Safety Coalition (OSHA-2010-0034-2319) at 117.

While the testimony regarding medical surveillance focused on concerns about disclosing information about illnesses, workers carry the same fears about reporting injuries. Cement mason Deven Johnson put it this way:

> In the construction industry, there's a term called the bloody hand in the pocket syndrome, and that is, if you're injured, don't tell anybody about it because you don't want to be blacklisted. You don't want to be reported as having been injured.

> I've seen guys go around the corner on a job. They're pouring concrete and will twist their knee or hurt their shoulder or strain a back and will quickly put themselves out of view of everyone else while they recover because they don't want the foreman or superintendent or somebody see that they tweaked their back or they did something.

OSHA-2010-0034-3581 at 1655-56 (Mar. 25, 2014 Transcript).

The patterns of employment in the construction industry make employees particularly vulnerable to employer practices aimed at minimizing reporting. Employment is transient. Employees are generally hired on a short-term basis and are laid off as soon as a job is completed or work generally slows. Even for represented employees who are referred to jobs from hiring halls, employers have the final say over whether to accept a referred employee, and they can reject an employee without giving any reason. Employees rightly fear that if they will be black-balled if they report their injuries, or even complain about safety issues at the worksite. And as bricklayer Sean Barrett explained,

> Nobody wants to get black-balled. You don't want to be the complainer, you don't want to be the troublemaker. . . . [In this business,] the squeaky wheel gets fired. . . . [T]hey'll find a way to get rid of you and have you go home and then they'll tell the other contractors, "oh, always safety with him."

OSHA-2010-0034-3585 at 3101 (Mar. 31, 2014 Transcript). Mr. Barrett's co-panelist, bricklayer Dale McNabb, concurred, noting that "[e]ven union guys know that if you spoke up or complained too much, [you] probably wouldn't be rehired by that contractor or there would be a possibility you might not get hired . . . by another contractor." *Id.* at 3023.

Research confirms what these workers reported. One-quarter of the represented construction workers surveyed in a recent study reported that they had failed to report a work-related injury – a number that is undoubtedly significantly lower than the proportion of unrepresented workers who fail to report. Among the reasons these workers gave for not reporting were fear of retaliation or loss of work opportunities and concerns about being viewed

as weak by either their employers or coworkers. Citing other reasons that echo issues raised in this rulemaking, other employees explained they failed to report because they wanted to remain eligible for safety incentive plans or found the processes for reporting daunting.[8]

There accordingly are already strong incentives for underreporting in the construction industry. While we believe it will ultimately enhance the quality and availability of important information for employers to post their illness and injury records electronically – and hopefully, shift the incentives so employers will address the problems the data reveal – the Building Trades is also concerned that the increased visibility of this information will make construction employers even more intent on discouraging employees from reporting injuries. We therefore encourage OSHA to modify the recordkeeping rules as follows:

1. The standard should explicitly require employers to inform their employees that they have the right to report illnesses and injuries. As noted in the Federal Register notice, Section 1910.35(a)(1) and (b) already require employers to establish systems for reporting illnesses and injuries and to inform employees how to report. We urge OSHA to require employers also to advise their employees the Occupational Safety and Health Act protects their right to make these reports. 79 Fed. Reg. 47607.

We believe that most construction workers are not aware that the OSH Act gives them this right or that it is unlawful under the Act for employers to discourage or penalize them for reporting. We further believe that employees would be more inclined to report their injuries and illnesses if they knew they had these protections. Moreover, an employer that tells employees they have this right will send an implicit message that the employer will respect their right to

[8] Moore, J.T., Cigularov, K.P., Sampson, J.M., Rosecrance, J.C., Chen, P.Y. (2013), Construction Workers' Reasons for Not Reporting Work-Related Injuries: An Exploratory Study, 19 Int'l J. of Occ. Safety and Ergo. 97-105.

report and may, in fact, expect them to exercise it. Because, as described above, much of the reluctance employees express about reporting injuries is based on their assumptions that they will face negative consequences for doing so, affirmative statements from their employers should go a long way to allaying these fears.

While the purpose and direct effect of this communication would be to improve the accuracy of the employer's records, it is our view that it may have the beneficial side-effect of improving the safety culture on a worksite, by making the importance of reporting workplace incidents – and the employer's recognition that this is important – part of the workplace conversation. Indeed, researchers examining the reasons for underreporting in the construction industry recommend that workers will be more likely to report "in a climate of open communication with a focus on problem solving and learning."[9] In some workplaces, the employers' statements that employees have a protected right to report could be the first step towards creating that climate.

This requirement should not impose any additional burdens on the employer, who can include this information when carrying out its existing duty to inform employees about the mechanisms for reporting. In construction, this communication can easily be accomplished by posting notices in trailers on the worksite, including the information in pre-job briefings, making it part of the regular tool-box talks, or otherwise incorporating it into the site-specific safety training.

2. The standard should explicitly prohibit employers from implementing any policies, practices or procedures that discourage employees from, or penalizes them for, reporting illnesses and injuries. OSHA has asked whether the standard should require the

[9] *Id.* at 102.

employer's injury and illness reporting requirements to be reasonable and not overly burdensome. 79 Fed. Reg. 47607-08. The answer to is definitely "yes." Particularly on the kinds of temporary, transient sites where construction workers typically work, it is crucial that they have easily accessible mechanisms for reporting.

In addition to stating, as an affirmative matter, that employers' reporting requirements must be reasonable, we believe OSHA should include in the standard a broader prohibition on employers implementing any procedure, policy or practice that discourages employees from, or penalizes employees for reporting illnesses and injuries. OSHA has already made clear that Section 11(c) of the Act prohibits employers from "discriminating against an employee for reporting a work-related fatality, injury or illness." *See* § 1904.36. While, as discussed below, we urge OSHA to similarly clarify that such discrimination can also violate the recordkeeping standard itself, these provisions focus on just one aspect of the problem: specific actions taken against specific employees. They do not clearly address more systemic practices, policies and procedures that have the effect of discouraging reporting, while not necessarily "discriminating against" individual employees.

For example, maintaining an incentive program that rewards managers for having low reportable injuries may improperly discourage reporting, without having an identifiably discriminatory impact on any one particular employee, and therefore without triggering a Section 11(c) complaint. OSHA has already explained, in its March 12, 2012 Memorandum, "Employer Safety Incentive and Disincentive Policies and Practices," that it views such policies as violating the recordkeeping rules.[10] Incorporating this interpretation into the standard would put employers

[10] Memorandum from Richard Fairfax, Deputy Assistant Secretary, to Regional Administrators, Whistleblower Program Managers, available at https://www.osha.gov/as/opa/whistleblowermemo.html.

on clearer notice and give the agency a stronger enforcement tool for eradicating these kinds of systemic policies.

3. The standard should prohibit employers from taking any adverse action against employees for reporting injuries and illnesses. OSHA has asked whether the standard should prohibit employers from "*disciplining* employees for reporting injuries and illnesses." 79 Fed. Reg. at 47608 (emphasis added). As just discussed, because any actions that discourage employees from reporting directly affect the quality of employer's illness and injury records, we believe it should be a violation of this standard to discipline or in any way penalize employees for making such reports.

We therefore recommend that OSHA include a provision that prohibits employers from taking *any* "adverse action" against employees for reporting, and not just for imposing "discipline." There are a range of adverse actions that are discriminatory without being necessarily qualifying as "discipline," such as layoffs, refusals to accept referrals and assignments to less desirable work. The standard should make clear that employers are prohibited from imposing *any* job-related penalties against employees in these circumstances.

The same fears that inhibit employees from reporting their injuries in the first instance may also make them wary of filing Section 11(c) claims. Including this provision in the standard would provide employees an additional level of protection by enabling OSHA compliance officers to enforce these prohibitions by issuing citations under the standard, rather than relying entirely on employees to come forward on their own behalf.

Employers railing against OSHA's proposal have argued that the proposed revisions will preclude them from disciplining employees for violating safety rules. This argument is baseless, as nothing in the current language of Section 1910.36, the Federal Register notice, the "Fairfax

memorandum," or any of OSHA's enforcement actions suggests that the agency opposes reasonable workplace safety rules. OSHA can easily allay any such concerns by specifically stating that employers may not take adverse actions against employees *for reporting* a work-related fatality, injury or illness. That would make clear that the prohibition is tied to protecting workers who exercise the rights under this standard.

The Building Trades understands that in issuing its 2001 revisions to the recordkeeping rules, OSHA rejected proposals by employee representatives that it include similar antidiscrimination provisions in the rules. 66 Fed. Reg. 5916, 6052-53 (Jan. 19, 2001). The data we cited above shows that underreporting remains a serious problem in the construction industry. And the workers' testimony and current research make clear that employees remain fearful that reporting will jeopardize their ability to work in the industry. We urge OSHA to take this record evidence seriously, and to include in the revised standard express provisions stating that it is a violation of the recordkeeping rules *both* to take adverse action against employees for reporting, and to maintain policies, practices or procedures that discourage reporting or penalize employees for reporting illnesses and injuries.