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OSHA Docket Office
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U.S. Department of Labor
Room N-2625
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Washington, DC 20210

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


To the Docket:

The American Health Care Association and the National Center for Assisted Living (AHCA/NCAL) thank OSHA for the opportunity to comment on the agency’s proposed rule, Improve Tracking of Workplace Injuries and Illnesses. 78 Fed. Reg. 67254, November 8, 2013. AHCA/NCAL applauds OSHA’s effort to improve the collection of injury and illness data; however, as the association representing the long term care community, AHCA/NCAL is troubled with aspects of this proposed rule and provides the following comments for consideration.

Introduction

AHCA/NCAL is the nation’s largest association of assisted living, long term and post-acute care, and intermediate care for individuals with intellectual disabilities providers. AHCA/NCAL represents more than 11,500 non-profit and proprietary facilities. Association members provide essential care to approximately one million individuals in not-for-profit and proprietary member facilities. On a day-to-day basis, AHCA/NCAL represents the long term care community to the nation at large – to government, business leaders, and the general public. AHCA/NCAL, its affiliates, and member providers advocate for individuals who – because of social needs, disability, trauma or illness – require services provided in an assisted living or a long term care setting.

AHCA/NCAL is also a member of the Coalition for Workplace Safety (“CWS”). CWS has submitted comments on this proposed regulation and AHCA/NCAL is a signatory to those comments. AHCA/NCAL fully supports the position of CWS regarding this proposed regulation.

In order to address the industry specific concerns of its members, AHCA/NCAL is filing these separate comments. The association’s members are concerned that this proposed rule has the potential to compromise a resident’s privacy and confidentiality. Additionally, our members question the extent to which this proposed rule will encourage employers and employees to focus on leading indicators of safety, as opposed to lagging indicators. Furthermore, AHCA/NCAL members are concerned with how the information may be used – unfairly – by third parties whose interests are not related to employee safety and health.
Specific Concerns

1) Compromising Resident’s Privacy and Confidentiality

OSHA has made clear in the proposed regulation that each establishment covered will be required to provide all recordkeeping information unredacted and “the publication of specific data elements will in part be restricted by provisions under the Freedom of Information Act (‘FOIA’) and the Privacy Act, as well as specific provisions within Part 1904.” 78 Fed. Reg. at 67259. Based on the preamble and the comments from OSHA officials during the public meeting, OSHA has not determined or described in detail what information, beyond an employee’s name, it believes will be required to be protected from disclosure.

When OSHA’s Director of the Office of Statistical Analysis, David Schmidt, was asked during the public meeting what the agency anticipated redacting as personally identifiable information, he responded “what we envision is ... in narratives you find everything, so you could find a Social Security number in there, so names, Social Security numbers, telephone numbers, things like that, that’s what I envision.” Transcript of DOL Meeting: Improve Tracking of Workplace Injuries and Illnesses, January 9, 2014 (“Transcript”) p. 209. While well-intentioned, this answer does not provide AHCA/NCAL members with certainty that OSHA will correctly and reliably recognize all personally identifiable information in the various forms submitted and fully redact this information on a quarterly basis.

AHCA/NCAL members are particularly concerned that whether intentionally or unintentionally, a resident’s privacy may also be compromised with the release of injury and illness data. For example, an employee is injured while assisting a resident to transfer from bed to chair. The injury is partially a result of the resident becoming frightened and striking out at the employee. In completing the injury and illness incident report (OSHA Form 301) and describing how the incident occurred, the resident’s name is included or some other reference is made to the resident that would allow people in the community to identify him/her. Will the OSHA staff reviewing and redacting information be instructed to remove all names? If not, how will they decide which names to redact? Only employee names? What about names or other potentially private and confidential information that is inadvertently unredacted? How will OSHA assure the regulated community and specifically AHCA/NCAL members that there is a process for quality control?

Take this example one step further and assume the incident report describes that the nurse on staff was providing the resident with a dosage of Atripla, a common drug used to treat HIV patients. The release of the resident’s name, along with the medical information would undoubtedly be considered an unwarranted invasion of the personal privacy of that resident.

To state the obvious, long term care providers do not move “things,” nor do they “make” things. Rather they assist and care for people. This involves day-to-day interactions with residents and their families who expect that their privacy will be protected and that personal information about them or their conditions will not be broadcast on OSHA’s webpage. Long term care providers understand this and are sensitive to these issues when completing OSHA’s recordkeeping forms. It is unclear, however, if OSHA has fully considered the broad scope of information that its staff will need to understand if this proposed regulation becomes final. Even if OSHA staff were fully trained in the gamut of privacy concerns that could arise in the long term care environment, AHCA/NCAL is very concerned that a redacting misstep
could occur, resulting in a resident’s personal and medical information being made publicly available. This would have very serious consequences for the long term care provider affected and, presumably, for OSHA. The privacy concerns from this proposed regulation for the health care providers and those they care for are particularly acute.

OSHA asserts that “other agencies post establishment-specific health and safety data with personal identifiers, including names. For example, the Mine Safety and Health Administration (MSHA) publish coded information pertaining to each accident, illness, or injury reported to MSHA . . . . as well as narratives associated with specific accidents . . . .” 66 Fed. Reg. at 67260. The difference between MSHA and OSHA, however, is that MSHA regulates one industry, which has fewer establishments than long term care. Further, a mining environment does not present the types of privacy challenges identified above that exist in the long term care centers or other health care settings regulated by OSHA. Because of OSHA’s broad coverage, we believe it would be very difficult if not impossible for the agency to fully understand the full impact resulting from the potential release of private or confidential information that could come from report narratives.

In the long term care environment, privacy concerns affect not just employees, but the residents of the centers as well. An agency error with respect to how it treats private information can have very troubling consequences. ANCA/NCAL requests OSHA to consider this issue and address in detail how these privacy concerns will be handled.

2) Limited View of an Employer’s Safety Program

Injury and illness records without proper context are not a reliable measure of an employer’s safety record. Not only is the proposed rule inconsistent with the foundation of the recordkeeping requirements – OSHA’s “no-fault” system – but publication of such data shifts safety towards lagging indicators rather than leading indicators. Lagging indicators are a limited view of the past and really do not tell how an employer is doing at preventing incidents and accidents. Leading measures, on the other hand, are factors that indicate future value or direction of performance. This is not to say that lagging indicators should not be used, but as OSHA itself acknowledges, lagging indicators alone are not sufficient to assess preventative action. Leading indicators are also necessary.

Despite OSHA’s alleged position regarding the value of leading indicators as opposed to lagging indicators, OSHA continues to push employers into focusing resources and energy in the wrong direction. Furthermore, it seems that employers’ safety programs will be judged by these lagging indicators, rather than a thoughtful, robust review of numerous measures of safety performance. Providing raw data to those who do not know how to interpret it or without putting such data in context will create significant concerns. Drawing conclusions from such data is unreliable. Contrary to what OSHA alleges, such data will not reliably identify those employers more likely to have future injuries or illnesses. Moreover, to suggest that public access to such information will allow members of the public to make more informed decisions about current and potential companies with which to do business is wrong. These lagging indicators are not indicative of the future performance of an employer or workplace.

The effectiveness of a safety program of a long term care center is complicated and, often not reflective of a center’s injury and illness rates. For example, OSHA has stated that often injury and illness rates at centers go up after introduction of an ergonomics program. Often this initial spike in injury and illness rates is an indicator that the program is working effectively, not that the center is ignoring safety and health issues. Yet, without context, publication of injury rates that are spiking may be misinterpreted by the public to mean that a particular center is unsafe. This is actually counterproductive to workplace safety and health.
3) Use by Third Parties

The underlying purpose of the recordkeeping rule is to provide data to employers, employees, their designated representatives, and OSHA regarding workplace injuries and illnesses in order to evaluate and improve workplace safety and health. That purpose is served – and has been served for over a decade – by the current recordkeeping system. AHCA/NCAL believes that this proposal will, in part, shift the purpose of the data collection away from workplace safety and toward other uses outside of the OSHA context.

For example, at the public meeting on this proposed regulation, Mark Catlin, Health and Safety Director for the Service Employees International Union provided examples where a local union has used the data from the OSHA 300 Log of a private sector mental health hospital to bargain for a new contract. Specifically, Mr. Catlin noted that they were in the process of negotiating an increased staffing ratio where the union believed the Logs identified “clusters” of higher rates of injuries among employees. (Transcript p. 82-83.) Staffing rates are determined by numerous factors, including needs of the residents as well as requirements set forth in other state and federal rules. Identifying “clusters” of injuries does not necessarily indicate that staffing issues exist.

The greater concern stemming from this example is that this type of allegation can be made by any third party who gets on OSHA’s webpage and just observes injury rates without context. The private bar may seize on this information and attempt to pursue actions having nothing to do with worker safety and health. If publically available injury and illness data falls into the hands of third parties that do not understand the information and utilize it for purposes that go beyond those set forth in the Occupational Safety and Health Act of 1970, AHCA/NCAL believes that workplace safety and health is not furthered.

Conclusion

AHCA/NCAL and our members are deeply concerned about OSHA’s proposed rule, Improve Tracking of Workplace Injuries and Illnesses. We believe that OSHA has failed to recognize and consider the potential negative consequences that are sure to flow from the proposal. One significant consequence is the potential release of resident information, as set forth above. OSHA has provided no explanation or process that will be used to ensure such privacy interests are protected.

For all the reasons stated above, AHCA/NCAL and our members strongly urge OSHA to reconsider this proposed rule, in light of the concerns raised in these comments.

Sincerely,

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