BNA Insights

Recordkeeping

Injury & Illness Reporting

This is the first story in a two-part series offering opposing views on the Occupational Safety and Health Administration's injury tracking rule. This first viewpoint is written by Eric Frumin, safety and health director at Change to Win, and is followed by a counterpoint from Josh LeBrun, president and chief operating officer of eCompliance. The next story in this series will feature LeBrun's viewpoint followed by a counterpoint from Frumin (see related story).

OSHA's Injury Tracking Rule: A Reasonable and Urgent Step Forward for Worker Safety and Health

By Eric Frumin, Safety and Health Director, Change to Win

The Department of Labor has finally entered the age of ''Big Data.'' The Labor Department is making a significant step forward into the 21st Century by requiring employers in the highest-risk sectors to electronically provide OSHA information that employers have been recording since shortly after the passage of the Occupational Safety and Health Act in 1971.

Unfortunately, until now—in contrast to its sister agency the Mine Safety and Health Administration, as well as other federal labor and public health agencies—OSHA has failed to make most of the covered employers send these data directly to the Labor Department.

This is exactly the data OSHA needs to effectively target its limited number of inspections as well as its compliance assistance programs. It is unfathomable that OSHA did not have easy access to it before.

OSHA has hard evidence for why this step is needed. But that evidence seems to matter little to the corporate trade associations and their GOP allies who oppose virtually every new agency mandate, no matter how well-founded or ultimately helpful to the employers themselves. In this case, they claim that public disclosure will somehow irreparably harm employers.

However, since 1997, OSHA has already required a small subset of affected employers in only the highest-risk sectors to provide their annual statistical summaries of worker injuries and illnesses to OSHA on request, in part for the purpose of assisting the agency in targeting enforcement inspections. This is called the OSHA Data Initiative (''ODI''). In 2005, OSHA finally released these summary data to the public on OSHA's website, and only as a result of an order from a Federal District Court in response to a Freedom of Information Act lawsuit by The New York Times.

Fortunately, OSHA has proceeded to use the ODI data for targeting its inspections to specific establishments with self-reported high rates within these already high-risk sectors, and often with remarkable results. While 23 states have exercised the option to run their own enforcement programs in the private sector, very few of them have made use of these important targeting data. Some have relied instead on equivalent state workers' compensation data, but most—including California, the biggest state program—have not, nor has Federal OSHA forced them to adopt this technique.

After sending letters to the worksites with the highest rates, OSHA then inspected roughly 25 percent of these pre-notified employers under its Site-Specific Targeting (''SST'') emphasis program, and found violations in roughly 70 percent of all inspected sites. With these

Eric Frumin is the Safety and Health Director for Change to Win, the partnership of four national labor unions founded in 2005 representing 4 million workers. He is a leading national trade union spokesperson on issues of job safety, health and disability, including OSHA standard setting and enforcement, and occupational disease and injury surveillance. He also has directed the safety and health programs for Change to Win-affiliated unions since 1974, and testifies frequently before congressional committees on workplace safety and health and related issues.

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ODI data in hand, OSHA has been able to assure that its inspectors are going to the workplaces with serious hazards and likely violations. The DOL Inspector General reported that for FY 2011, SST inspections ''resulted in more [violations] per inspection (4.7 average) than other targeting programs (2.8 average).''

Such inspections are critically important to OSHA's overall prevention mission. As the RAND Corp. found in its often-ignored but revealing 1998-2005 study of OSHA inspections in relatively small manufacturing plants in Pennsylvania, inspections which both found any violations and imposed penalties resulted in a cumulative 20 percent drop in workers' compensation claims over the following two years (A. Haviland et al, ''What kinds of injuries do OSHA inspections prevent?'' Journal of Safety Research, August 2010).

Equally important, RAND found that even for violations of the Personal Protective Equipment standard, there was a 17.5 percent reduction in claims for overexertion injuries—indicating that the violations prompted employers to do a wider evaluation of their overall safety and health problems.

The RAND Corp. findings also were confirmed by a joint Harvard University-California Berkeley study for a comparable period, which also reported that inspections with penalties by California state inspectors were associated with a 9.4 percent annual drop in rates of workers' compensation claims (D Levine et al, ''Randomized Government Safety Inspections Reduce Worker Injuries with No Detectable Job Loss,'' Science, 309: 907, 2012).

OSHA has been severely underfunded for much of its existence. The Obama administration immediately sought to remedy that gap, and saw both federal and state plan enforcement funding in particular jump by 13 percent in 2010. However, the Republican congressional leadership has consistently refused to provide any further funding, and frequently sought to cut resources for enforcement in DOL appropriations bills. But the existence of the SST program, based on these fundamental targeting data, has helped DOL to find a key point of leverage against employers who would ignore their basic job safety and health obligations.

So it is a welcome relief that OSHA will now be able to formalize this vital targeting tool, and apply it as a critical additional criterion in designing other targeted emphasis programs in industries where individual employers report persistently high injury rates, like nursing homes, heavy manufacturing, poultry processing, warehousing, waste-handling and other dangerous sectors.

But beyond the mere summary rate information about individual worksites, an additional wealth of valuable information has simply lain fallow in employers' worksite records, awaiting the review by an actual OSHA inspector as part of the rare on-site inspection. The additional data, including details on individual worker injury and illness cases, will now be available to OSHA inspectors, workers, employers and others as a result of OSHA's recent rulemaking. For 34,000 large, sophisticated worksites with more than 250 employees each, OSHA will now require that they annually submit to OSHA both the lists of significant work-related injuries and illnesses, as well as the employer's required ''Incident Report'' describing the circumstances and underlying causes. None of the submitted information will include personally identifiable data.

Equally important, OSHA will make these reports public, so that workers, counterpart employers, public health researchers and the media will be able to understand in much greater detail the nature of the hazards and injuries that workers face on a daily basis.

For decades, workers at these sites have already had a legal right to all of these lists of injuries, including workers' names, as well as their own Incident Reports. But finally, all workers will now have the easy ability to obtain this important information without having to request it from their bosses—and risk the consequences of being labeled ''troublemaker,'' or worse. (Since the vast majority of America's private-sector workers have no job-security protection, employers can easily discipline, terminate or otherwise discourage workers from ''asking too many questions.'')

It is certainly reasonable to expect that this new scrutiny will promote more accurate recordkeeping by large employers concerned with assuring that accurate information is publicly available.

However, we also expect that this heightened attention by the employers themselves will promote better use of existing records for prevention purposes, by both large and small employers, because of the additional attention that these records will now receive within the enterprise.

Workers' enhanced access to the details found in the Logs and Incident Reports at larger worksites will also promote prevention. As workers learn about the history of incidents that affect them, they will be better prepared to request employer action to fix such hazards going forward. The availability of the Incident Reports will also reveal past problems with the investigation of those incidents (such as ''blame the victim'' conclusions rather than failures of the employer's training and supervision regimens). Such omissions or misguided excuses interfere in the identification of root causes of those problems in the first place. Without root cause identification, the hazards will continue and resulting injuries and illnesses will recur.

In response to this proposal, employers and their GOP allies have raised several false alarms, including a supposed concerns about confidentiality of workers' personal information. Such concerns are misplaced: OSHA will not even collect workers names or any other information most likely to allow those outside the workplace to identify individual workers. Assuming employers comply with the reporting framework, OSHA will neither hold such data, nor be subject to any unauthorized release of it.

Corporate trade associations also have complained about the ''threat'' of misuse or misinterpretation of their own injury reports, once OSHA makes them public, supposedly rendering the Fortune 500 or even the smaller businesses the subject of unfair comparisons which will irreparably harm the companies' reputations. This barely passes the laugh test. First, much of this data has already been on OSHA's website for more than a decade. During the public comment period, industry representatives were repeatedly pressed to identify examples of such unfair comparisons and wounded reputations. They could not. The truth speaks for itself.

And since when does Google censor corporate press releases or websites? In the age of Citizens United, corporate America certainly need not feel any threats to its mythical rights to free speech.

But if the truth hurts, so do infections—a good warning sign of problems needing attention. Injury/illness rates may be so-called ''lagging indicators,'' and in individual companies or industries other ''leading indicators'' may be preferable for guiding prevention efforts. But corporate managers are certainly misguided—and putting their workers in continued peril—if they ignore either historical trends or recent incidents. OSHA will now give both them and their at-risk workers the ability to see those trends and incidents in similar or identical situations well beyond the walls and horizons of their own worksites and companies.

In sum, OSHA's willingness to obtain this information and share it will provide an important service to corporate managers, their workers and others with tangible interest in this issue: investors, prospective workers, and community leaders. If we were looking for a cheaper and more efficient system to engage that interest, it would be hard to do so.

The other important innovation is OSHA's new provision requiring employers to assure that employers' reporting procedures are reasonable, and that employers train workers about both the procedure and their right to report injuries without any discrimination or retaliation. And for the first time, OSHA incorporates that prohibition on retaliation directly into its enforceable regulations.

OSHA has good reason to do so. There is ample evidence that some employers systematically discourage workers from reporting work-related injuries and illnesses, on a scale large enough to affect not only the validity of the statistics at individual worksites but, according to the Bureau of Labor Statistics, nationally as well. Indeed, the Government Accountability Office's recent analysis of employer practices found a shockingly common pressure on medical providers to modify their treatment decisions such that the cases will no longer meet OSHA's recordability criteria.

''Disincentives for reporting and recording injuries and illnesses can result in pressure on occupational health practitioners from employers or workers to provide insufficient medical treatment that avoids the need to record the injury or illness. From its survey of U.S. health practitioners, GAO found that over a third of them had been subjected to such pressure'' (US Government Accountability Office, ''Enhancing OSHA's Records Audit Process Could Improve the Accuracy of Worker Injury and Illness Data,'' GAO 10-10, October 2009).

For several years, OSHA also has been very concerned about employers' deliberate policies which discouraged worker reporting of recordable cases, and taken action within its highly limited existing authority under Section 11(c) to stop them. However, OSHA was not the only party to the rulemaking that emphasized that employers affirmatively seek to reduce their reported injuries—without necessarily preventing them. As the National Federation of Independent Business, one of the largest and most sophisticated corporate lobbyists, stated it:

''[T]he proposed rule will make small businesses less likely to report injuries. NFIB expects that . . . many small businesses will report fewer injuries because the negative consequences of logging too many injuries will be so great.''

The stakes are simply too high for OSHA to allow employers to continue with these abusive policies, and its decision to make use of its full statutory and enforcement authority is long overdue.

Counterpoint: Josh LeBrun, president and chief executive officer at eCompliance.

In such a polarized political environment, it's easy to see how one side opposes every new regulation and the other blatantly promotes every new regulation. Unfortunately, both are making decisions based on politics, not on the merit of the proposed regulations. OSHA's final rule is a perfect demonstration of this phenomenon. As someone who has no political affiliation, it's evident that while OSHA's statutory directive is to improve the working conditions of ALL employees, their actions are unashamedly focused on improving the working conditions for a small subset.

Eric Frumin makes a valiant effort to defend the minority-focused approach that OSHA has taken. OSHA's recordkeeping regulation has jurisdiction over 600,000 employers. In 2015, OSHA completed 35,820 federal inspections and 43,471 state planned inspections, which means that approximately 13 percent of employers under OSHA's jurisdiction were inspected last year. With the final rule, OSHA is requiring all employers with more than 250 employees and employers in 67 historically at-risk industries with 249 to 20 employees to go through an administrative change. However, with such a small percentage of employers being inspected, this means that a majority are being inconvenienced with no tangible benefit whatsoever.

Mr. Frumin also states that OSHA's new regulation is increasing transparency, making it easier for OSHA to punish employers who have the highest incident rates. The suggestion that the fear of punishment is the most effective motivator for improving workplace safety is outright flawed. In fact, academics all over the world have stated the exact opposite. A culture of punishment promulgated by OSHA may actually benefit these dangerous employers. Research by E. Scott Geller, professor of psychology at Virginia Tech, indicates that punishment may cause workers to hide injuries, benefiting dangerous employers by reducing their incident rate.

Clearly, punishment is not the answer. Although OSHA's role is not just to enforce, but to educate and train, its 2016 budget paints a completely different picture. Enforcement activities represent more than 60 percent of the budget while educational activities represent only 16 percent. It's clear what the priorities are. What's even more damning is that the same DOL budget states: ''The penalties for labor law violations are so low that unscrupulous employers treat them as the cost of doing business, and employers who play by the rules are put at a competitive disadvantage.'' Evidently, OSHA allocates 60 percent of its $550 million taxpayer-funded budget toward the very activities that, according to DOL, don't work.

Lastly, Mr. Frumin implies that the new regulations give employees the power and freedom to circumvent their employer and access injury data. This activity of pitting workers and employers against each other is counter to the findings of available research. Participation and communication have been identified as two of the most important factors for improving workplace safety. Activities that reduce this two-way conversation will have long-term damaging effects on the safety of the workplace.

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If OSHA truly wants to improve workplace safety, it needs to promote a collaborative environment where workers and management are encouraged to work together. Instead of using inspections to write fines, OSHA can encourage worker participation by using the time it spends on-site to have meaningful conversations with workers about what is and isn't working related to their safety program. OSHA can document that information, compare it with the thousands of other conversations the agency has across the country, and look for trends to write regulations that actually work.

Are fines really the best OSHA can do? With all its resources and influence, are we going to accept that OSHA should only work on a improving small minority of companies, leaving the majority with an administrative burden but nothing to show for it?

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Missing the Mark—Two Critical Issues With OSHA's Final Rule

BY JOSH LEBRUN, PRESIDENT AND COO, ECOMPLIANCE

The federal government, with its vast resources, is in a formidable position to influence worker safety in America. With nearly 5,000 workers killed on the job in 2014, it's essential that OSHA uses its influence to make positive changes.

''To assure safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance.'' OSHA's statutory directive is altruistic and inarguably necessary. In light of its immense regulatory power, the choices OSHA makes have a lasting impact on the day-to-day activities of corporate safety professionals. However, with great power comes great responsibility and, sadly, two critical oversights of OSHA's final rule will result in more bureaucratic disruption than actionable risk reduction activities. If OSHA doesn't reconsider their most recent regulation, they could find themselves obstructing the very mission they've set out to achieve.

Josh LeBrun is the president and COO of eCompliance Safety Software. Prior to joining eCompliance, Josh managed High Park Capital Partners, an entrepreneurial private investment firm he co-founded with his partner Adrian Bartha. Previously, Josh was an investment professional within the Private Markets Group of OPTrust, which manages $5 billion of assets for one of Canada's largest pension funds.

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The Injury and Illness Reporting requirements have been the subject of debate since they were first updated in September 2014. OSHA's most recent regulation will require companies in specified industries to electronically submit injury and illness data. This data will be used to publicly rank companies according to safety performance. Much like OSHA's mission statement, the intentions behind the new regulations are altruistic: publicly displaying the names of the highest risk companies will pressure them to improve working conditions. By improving data accuracy and timeliness, OSHA expects prospective employees, investors and customers to make more informed decisions by studying the incident rate list and choosing lower risk companies over ones with high incident rates. However, a growing group of influential safety leaders, including Michael Belcher, president of the American Society of Safety Engineers, and Greg Sizemore, vice president of the Associated Builders and Contractors Inc., have spoken out against the change in an effort to inform the public about how the new regulations will fail to achieve OSHA's goals.

Belcher has referred to the rule as ''a step backwards for safety professionals,'' and Sizemore has claimed that OSHA has ''empowered itself to disseminate records and data to the public that fails to show the complete narrative of a company's safety record.'' Both men have concerns about the first of the two critical oversights, which is that injury and illness data or lagging indicators are not sufficient metrics for determining the

risk levels of an organization. Such data sets merely measure past incidents and do not indicate the current or future corporate risk levels. In fact, many leaders in the EHS industry have been actively advocating for companies to abandon this flawed approach of benchmarking performance on lagging indicators given that this data cannot accurately depict corporate safety risk.

Consider equity investing as an analogy. You wouldn't assess the value of a company based entirely on last year's profits. Rather, you would look at expectations for future profits. You would consider their business plan and assign probability to whether the company can execute its stated goals. This forward-looking approach of assessing profit risk is the same approach that should be used for assessing safety risk. Companies need to measure and track leading indicators—proactive measures that identify potential hazards before they result in an incident. Relying entirely on backwards looking metrics provides absolutely no insight into future performance and can be extremely dangerous, leaving workers exposed to unidentified hazards.

Not only is the approach flawed but it has actually proven to be quite dangerous, as seen with the Deepwater Horizon rig explosion in the Gulf of Mexico in 2010. On the day of the explosion, representatives from both BP and Transocean were aboard the rig to celebrate seven straight years without a lost-time incident. Additionally, in 2008, Minerals Management Services (MMS) presented Transocean with an award for its safety record and in the two years leading up to the explosion, BP had been a finalist for the MMS national safety award.

Benchmarking safety performance on lagging indicators gave BP and Transocean a false sense of success and failed to reveal the underlying risks that were manifesting. This lack of foresight eventually reached a boiling point which resulted in 11 fatalities and immense damage to the environment. Had they chosen to benchmark safety performance using leading indicators, they would have been able to more accurately identify risks and possibly prevent the rig explosion, saving BP nearly $54 billion dollars, saving shareholders 55 percent of their investment and, most importantly saving 11 lives.

As the Deepwater Horizon disaster demonstrates, positive lagging indicators do not accurately reflect whether a company is safe or not, or adequately reduces risk. If OSHA truly wants to reduce risk and improve transparency on safety performance, they need to rethink how they define and assess risk levels. They need to consider a way to collect and share leading indicators in a cooperative fashion.

Traditionally, the employer collects readily available leading indicators like training compliance or observations of workplace hazards. However, this one-way stream of information (from frontline workers to management) inevitably misses half of the potential leading indicator data available. Instead, employers need to actively involve their workers to participate in their safety programs and encourage a two-way stream of information exchange. Involving on-site employees, who are best equipped to recognize hazards, and asking for their opinions and ideas is the only way to collect 100 percent of available leading indicators. While this is not a new strategy, it hasn't been executed effectively by most organizations. A recent study by EHS Daily Advisor, a leading safety publication, revealed that:

1) 90 percent of safety professionals believe increased worker participation has the biggest impact on improving workplace safety.

2) Inconsistency and miscommunication of information and inability to share real-time data is the biggest challenge of managing safety across multiple job sites.

3) One of the largest barriers to worker participation is management's refusal to adopt technology.

Worker participation is a key component of a successful safety program, yet it is not executed effectively by most organizations. The vast majority of companies operating in high risk industries aren't yet equipped with technology to even have a two-sided conversation about safety, let alone store the information captured. In fact, the EHS Daily Advisor research also revealed that 79 percent of companies are not currently using any modern technology to collect, analyze and report on safety performance.

Now we've come to OSHA's second critical oversight: The current process for companies to collect and share data is antiquated, creating a profound technology gap that limits the actionable insight gained from information collected. So why does OSHA assume electronically sending incident data will be a simple change? It won't. While OSHA's push toward electronic submissions does acknowledge the crucial role technology can play in reducing risk, they're putting the cart before the horse by not addressing the growing technology gap. Before mandating companies to share information, OSHA should use its vast resources to close the gap by encouraging companies to first embrace internal technology. In the meantime, OSHA could build a web interface that automatically retrieves the data and bypasses any administration, allowing companies who do adopt technology to be *positively featured* on a list of safety conscious companies.

The need for at-risk companies to close the technology gap is irrefutable and it's OSHA's responsibility to mandate changes to address this growing obligation. Instead, OSHA is focused on addressing its own need for improved data accuracy and transparency, and is failing to prioritize the true challenges facing safety professionals.

OSHA's mission is to ensure employees are provided with safe working conditions. The simplicity of this directive is a disservice to all those safety leaders working in companies across America who recognize that there's no bright line or simple solution for creating ''safe and healthful working conditions.'' Safety leaders are screaming from the rooftops that the level of risk that employees face day-to-day is not static and cannot be defined by a single, lagging metric. Rather, risk levels are fluid and exist only on a spectrum, moving in one way or the other based on a number of factors, all of which can be captured by leading, not lagging indicators. The way OSHA currently defines risk levels through the use of lagging indicators leaves them with limited capability to actually influence positive change and fulfill its directive of providing safe working conditions.

If OSHA wants to fulfil its directive, it should use those considerable resources to support companies that are proactively improving safety performance, rather than falsely assuming that companies with low incident rates are safe places to work. This starts with mandating and collecting metrics that accurately reflect risk

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levels of an organization, in a two-way exchange of information. Technology plays a crucial role in this exchange and when implemented internally can help in reducing an organization's overall risk. Unless OSHA rethinks how risk is defined, the final rule, in its current state, will not result in increased protection for the majority of American workers and will not result in reducing risk levels across the country, as intended.

Counterpoint: Eric Frumin, safety and health director at Change to Win.

Josh LeBrun makes several important observations about the new OSHA rule, but wrongly finds fault in two ways.

He says first that OSHA relies wrongly on ''lagging indicators [that] are not sufficient metrics for determining the risk levels of an organization . . . given that this data cannot accurately depict corporate safety risk.'' He then suggests that ''[OSHA] needs . . . to collect and share leading indicators.''

Worker advocates certainly agree that there are multiple ways to evaluate risk, include leading indicators. We continue to be dismayed, for instance, that the wealth of ''leading indicators'' kept by employers in compliance with OSHA standards are stored and viewed only in the workplaces, and only rarely by workers themselves. Were OSHA to require that employers report OSHA-mandated exposure measurements, or incident reports compiled by employers under the Process Safety Management standard, both OSHA and the company's workers would be far better equipped to address known, preventable hazards pro-actively without waiting for the next death or severe injury or illness. We have proposed that requirement for decades, to no avail.

But relying solely on ''leading indicators,'' however well-intentioned, is also a serious problem for public policy. Nothing prevents employers themselves from defining, collecting and publicizing important leading indicators, as some employers already do, and proactive organizations like safety consulting company ORCHSE Strategies LLC have helped lead the effort to explore such issues. But it's wrong to limit OSHA's ability to collect lagging indicators—and known cases of worker injury, no less—in the search for acceptable leading indicators. One reason: the utter lack of broad, actionable consensus on a definition. As OSHA chief David Michaels said recently to the committee convened by the National Academy of Sciences on Smart OSH Surveillance, ''Ten years ago industry groups started telling me about the need to rely on leading indicators, but they have yet to give me one they agree on.'' Likewise, no industry participant provided a broadly applicable ''leading indicator'' during the rulemaking OSHA could use instead. OSHA addressed this directly in the preamble to the final rule.

Finally, as discussed in my initial op-ed, the RAND and Harvard/Berkeley studies do indeed demonstrate that targeted enforcement in high-risk workplaces works is effective. Additionally it produces measureable, consistent drops in rates of recordable injuries and illnesses.

LeBrun's second misplaced concern is that OSHA is entrenching antiquated information technology systems, and he encourages OSHA to develop a web interface to facilitate data exchanges with existing company systems. OSHA explicitly agreed in the final rule to explore that obvious option, and experienced IT practitioners should be actively assisting that effort rather than complaining OSHA has somehow already failed to achieve this goal.

Finally, LeBrun usefully asserts that workers need to be actively involved in data collection, reporting and evaluation in order to maximize the accuracy and value of the data. We couldn't agree more, and believe that OSHA's strengthened provisions on workers' participation will help accomplish that goal.

As W. Edwards Deming famously said, the overarching key to effective industrial management is to ''drive out fear.''