



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: Comments on OSHA Docket No. OSHA-2013-0023; Improve Tracking of Workplace Injuries and Illnesses, Supplemental Notice of Proposed Rulemaking (79 Fed. Reg. 47605, August 14, 2014)

Dear Dr. Michaels:

The Coalition for Workplace Safety (“CWS”) submits the following comments on OSHA’s Supplemental Notice of Proposed Rulemaking (supplemental notice or NPRM), *Improve Tracking of Workplace Injuries and Illnesses* (79 Fed. Reg. 47605, August 14, 2014). The CWS is comprised of associations and employers who believe in improving workplace safety through cooperation, assistance, transparency, clarity, and accountability. The CWS believes that workplace safety is everyone’s concern. Improving safety can only happen when all parties – employers, employees, and OSHA – have a strong working relationship.

As CWS indicated in its comments to the initial Notice of Proposed Rulemaking (NPRM), OSHA-2013-0023-1411, CWS members are deeply troubled by this proposed rule and what appear to be significant reversals in long-standing OSHA policies and positions. This supplemental notice does nothing to cure the issues identified in CWS’s first comments, including the lack of statutory authority for the public disclosure of injury and illness recordkeeping information. In fact, the supplemental notice raises additional troubling issues.

Without providing any actual proposed regulatory text, the supplemental notice seeks 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 [termination, reduction in pay, reassignment to less desirable position] against employees for reporting injuries and illnesses. 79 Fed. Reg. 47605.

As detailed below, the supplemental NPRM suffers from an absence of any supporting data or evidence, a lack of statutory authority, and a failure of regulatory procedure. Accordingly it, along with *The CWS is comprised of associations and employers who believe in improving workplace safety through cooperation, assistance, transparency, clarity, and accountability.*

Marc Freedman mfreedman@uschamber.com / Josh Ulman josh@ulmanpolicy.com
Sean Thurman thurman@abc.org / Amanda Wood awood@nam.org
www.workingforsafety.com

the initial NPRM, must be withdrawn.

I. The Supplemental Notice Lacks Supporting Evidence, Data or Academic Research

a. There is no evidence of underreporting due to employer policies that allegedly discourage reporting of injuries and illnesses.

Similar to the initial proposed rule, the supplemental notice lacks any supporting evidence, data, science or academic literature. Instead, to justify this supplemental OSHA relies entirely on unsupported comments made at the public meeting January 9-10, 2014 by a handful of stakeholders who supported the initial NPRM.

Even President Obama's executive order on regulatory policy, E.O. 13563, makes clear the need for legitimate data and science. It states:

Section 1. General Principles of Regulation. (a) Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. **It must be based on the best available science....**

Exec. Order No. 13563 (2011) (emphasis added).

Regulatory action must be developed and promulgated on a foundation of strong, available, peer-reviewed, or empirical science establishing the need for regulatory action, not merely on unsupported assertions or hypotheses. Our regulatory system “must be based on the best available science.” *Id.*

In this rulemaking process, those notions seem lost on OSHA. This entire rulemaking, including the supplemental notice, is sorely lacking in any scientific basis, any empirical evidence, any academic literature, let alone the *best* available science. In fact, there is so little evidence in this rulemaking record justifying the supplemental notice that OSHA spends only five short paragraphs on the issue in its entire Federal Register notice. Rather than rely on any type of supporting evidence, OSHA merely asserts that these provisions are necessary “[i]n order to protect the integrity of the injury and illness data.” 79 Fed. Reg. 47605.

Further, this supplemental notice, similar to the original proposal, reads like an Advance Notice of Proposed Rulemaking (“ANPR”), providing questions for comment rather than setting forth explicit regulatory text for notice and comment.¹ For example, one question asks: “Are you aware of any studies or reports on practices that discourage injury and illness reporting? If so, please provide them.” 79 Fed. Reg. 47607. Such a question is acceptable for an ANPR, however, the Agency should already be aware of such studies or reports and rely upon them in issuing a supplemental notice proposing to amend an existing rule in significant ways.

¹ Indeed OSHA never discusses what this supplemental represents. Is this a prelude to an actual proposed regulation, with actual regulatory text that employers can review and submit comments? Or is this all employers will see before a final regulation, leaving them guessing about the actual requirements that will be imposed on them?

(b) OSHA has been unable to uncover employer policies that might discourage employee reporting.

Further, the evidence that currently does exist firmly establishes that underreporting, i.e., the legal requirement to report and the failure to do so, is not a systematic problem in American workplaces. Moreover, OSHA has been unable to establish that employer policies, such as safety incentive policies, post-accident drug testing or disciplinary policies, in anyway discourage employees from reporting injury and illnesses.

The 2009 Omnibus Appropriations Bill included \$1.0 million for OSHA to conduct an initiative on injury and illness recordkeeping.

The enforcement initiative would review the accuracy of individual employers' injury and illness records to **determine whether there are policies and practices in place that cause incomplete reporting of injuries and illnesses by employees.**

Report on the findings of the Occupational Safety and Health Administration's National Emphasis Program on Recordkeeping and Other Department of Labor Activities Related to the Accuracy of Employer Reporting of Injury and Illness Data ("OSHA NEP Report to Congress"), May 7, 2012. (emphasis added)

From 2009 through early 2012, OSHA implemented a Recordkeeping National Emphasis Program ("NEP"). Under this program, OSHA inspectors conducted extensive and intrusive recordkeeping audits and interviewed employees, supervisors and medical personnel to determine, among other things, whether company incentives or disciplinary programs discouraged employees from reporting work-related injuries.

Interestingly, the questionnaires developed for the OSHA inspectors under both the 2009 and 2010 revised NEP included specific questions for employees, healthcare providers and management officials regarding safety incentive programs. What is more telling is that in the 2010 NEP when OSHA revised the program, the questions pertaining to such policies were significantly expanded. For example, in the 2009 NEP, OSHA only posed the question, "Are there any safety incentive programs, contests, or promotions or any disciplinary programs here? Do these – or anything else – affect your decision whether to report an injury or illness?" In contrast, when OSHA revised the NEP in 2010, the questions posed to employees were as follows:

7. Are any of the following programs or policies present at your workplace?
 - a. 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?
 - a1. If yes, briefly describe the programs or policies.
 - a2. If yes, do you think these programs encourage or discourage the reporting of injuries or illnesses?

- b. In your workplace, 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?
 - b1. If yes, briefly describe the programs or policies.
 - b2. If yes, do you think these programs encourage or discourage the reporting of or illnesses to your employer?
- c. In your workplace, are there demerits, punishment or disciplinary policies for reporting injuries or illnesses?
 - c1. If yes, briefly describe the programs or policies.
 - c2. If yes, do you think these programs discourage the reporting of injuries or illnesses to your employer?
- d. In your workplace, are there absenteeism policies that count absences due to work-related injuries as unexcused absences or assign demerits or points if a worker is absent due to a work-related injury?
 - d1. If yes, briefly describe the programs or policies.
 - d2. If yes, do you think these programs discourage the reporting of injuries or illnesses to your employer?
- e. In your workplace, is there post-injury drug testing for all or most work-related injuries and illnesses?
 - e1. If yes, briefly describe the programs or policies.
 - e2. If yes, do you think these programs discourage the reporting of injuries or neither encourage or discourage whether workers report injuries or illnesses to your employer?

OSHA Directive No. 10-02, CPL 2, *Injury and Illness Recordkeeping National Emphasis Program*, February 19, 2010.

During the course of the NEP, OSHA conducted roughly 550 federal and state recordkeeping inspections. *OSHA NEP Report to Congress* at p. 3. Out of roughly 550 inspections, only six establishments were cited for willful and repeat violations. *Id.* at 5. Despite the significant focus on identifying policies or procedures that might discourage employees from reporting injuries and illness, OSHA makes no mention in the initial NPRM or the supplement notice of the 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.* Based on OSHA's avoidance of any mention of this point, the only conclusion that can be drawn is that

employers are not intentionally underreporting 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. Nothing in this supplemental notice supports a contrary position.

c. OSHA relies on a few anecdotal public comments as supporting evidence.

In the supplemental notice, OSHA references public comments that the Agency claims support the need for such regulatory action, despite acknowledging that much of what is set forth in the supplemental notice is already required either by Section 1904.35 of OSHA's regulations, or Section 11(c) of the statute. While there were a few statements outlining concerns that such policies *might* discourage employees from reporting injuries and illnesses, OSHA greatly exaggerates the depth and value of these comments in supporting this supplemental notice.

First, OSHA claims that “[s]everal 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. Out of roughly thirty or so public commenters at the two day hearing, only *two* participants made such an allegation – the International Brotherhood of Teamsters, Local 804 (“Local 804”) and the Communications Workers of America.

Further, Mr. Sylvester with the Teamsters Local Union 804 referenced a safety survey he conducted of over 2000 members in which one question was “were you ever harassed or intimidated to not or asked not to fill out [an injury] report.” Day 1 TR 200, 203. He claims that “the answer was overwhelmingly yes.” *Id.* He was asked whether that survey could be put into the docket, which he replied “absolutely.” *Id.* at 204. Further he noted that the information was probably still on the Local's website. *Id.* A review of Local Union 804's website did not unveil any safety surveys or results from any such surveys. More importantly, while Mr. Sylvester provides what he alleges to be results from this survey, no raw data, including redacted completed surveys were actually submitted to the docket. This certainly is not the “best available science” that can serve to support this supplemental notice.

Second, in order to suggest that employers are adopting reporting procedures that are unreasonably burdensome, OSHA relies on *one* overly broad public comment from the Service Employees International Union (“SEIU”) that claims – without any supporting evidence – “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.

Mr. Catlin, the SEIU representative, goes on to state, “we'll provide much more detail on this in our written comments...” *Id.* However, the SEIU's written comments, OSHA-2013-0023-1387, provide no additional detail, no specific evidence, no member surveys, but simply conclusory statements that employers have policies that discourage reporting of injuries. The SEIU's comments claim that “Based on our experience...some employers may try to suppress the reporting of work-related injuries to keep injuries low.” Yet, the comments fail to describe with any particularity what that experience is, what ways they have experienced that employers try to suppress such reporting, nothing but mere conclusory conjecture. Further, the SEIU alleges that such programs and policies used by employers are documented by “numerous reports and studies” and yet fails to even cite one.

Third, OSHA relies on less than a dozen alleged examples of disciplinary actions taken for employees reporting injuries or illnesses. 79 Fed Reg. 47608. And at the same time, equally acknowledges that “these retaliatory actions would likely be actionable under 11(c). . . .” *Id.*

This “data” simply cannot be the basis for supporting this supplemental notice. OSHA’s attempt to rewrite Section 11(c) into an enforcement tool carrying a civil penalty, even assuming such an attempt was not in direct conflict with the statute and Congressional intent, must surely require more supporting evidence than a handful of unsupported, unsubstantiated, overly broad accusations about employer policies in the workplace.

II. Current Regulations and the Statute are Available to Sufficiently “Protect the Integrity of the Injury and Illness Data.”

a. Section 1904.35 requires reporting procedures and requires that such procedures be reasonable.

OSHA’s current recordkeeping rule at 29 C.F.R. § 1904.35 states:

1904.35(a) Basic requirement. Your employees and their representatives must be involved in the recordkeeping system in several ways.

1904.35(a)(1) You must inform each employee of how he or she is to report an injury or illness to you.

1904.35(a)(2) You must provide limited access to your injury and illness records for your employees and their representatives.

1904.35(b) Implementation.

1904.35(b)(1) What must I do to make sure that employees report work-related injuries and illnesses to me?

1904.35(b)(1)(i) You must set up a way for employees to report work-related injuries and illnesses promptly; and

1904.35(b)(1)(ii) You must tell each employee how to report work-related injuries and illnesses to you.

29 C.F.R. § 1904.35 (emphasis added).

The current recordkeeping requirements already require employers to inform employees how to report an injury or illness and require that the mechanism for reporting work-related injuries allow for “prompt” reporting. 29 C.F.R. § 1904.35. More importantly, “OSHA believes that onerous and unreasonable reporting requirements are already prohibited by the regulation (i.e. one has not created a “way to report” injuries if the “way” is too difficult to use). . . .” 79 Fed. Reg. 47608.

OSHA readily concedes that the activity it is looking to regulate is already regulated but that “this proposal would add additional text to communicate that point more clearly.” *Id.* Additional regulatory language, which the supplemental notice fails to provide, defies the Presidential Executive Order to simplify the regulatory rulemaking process and write regulations in plain language, making them easy to understand. Absent compelling evidence and data, that OSHA has not provided, suggestions that the current requirements need additional “text to communicate the point more clearly” are illogical. The current requirements found in Section 1904.35 are simple and clear, no additional regulatory language is necessary for employers to know they must inform employees how to report an injury or illness or for employers to know they must establish a system that allows for the prompt reporting of injuries and illnesses.

b. Section 11(c) prohibits the primary conduct that OSHA seeks to regulate in this supplemental notice.

As part of this supplemental notice, OSHA proposes to prohibit employers from disciplining employees for reporting injuries and illnesses or taking “any other action that might dissuade a reasonable employee from reporting an injury.” 79 Fed. Reg. 47608. OSHA concedes that “much of the primary conduct that would be prohibited by the new provision is likely already proscribed by 11(c).” 79 Fed. Reg. 47607.

Further, Section 1904.36 within the recordkeeping requirements, specifically states, “[s]ection 11(c) of the Act prohibits you from discriminating against an employee for reporting a work-related fatality, injury or illness. That provision of the Act also protects the employee who files a safety and health complaint, asks for access to the Part 1904 records, or otherwise exercises any rights afforded by the OSH Act.” 29 C.F.R. § 1904.36.

In addition to attempting to create a civil penalty for discriminatory actions already prohibited by Section 11(c) of the OSH Act without Congressional intent, any regulation to such effect is duplicative of the current protections already afforded by the Act. Again, OSHA has sufficient mechanisms in place to adequately protect the integrity of injury and illness data that the agency is proposing that employers will be required to submit.

III. Reporting Injuries and Illnesses is a Duty Not a Right

OSHA proposes to “require employers to inform their employees that the employees have a right to report injuries or illnesses, and that it is unlawful for an employer to take adverse action against an employee for reporting an injury or illness.”² 79 Fed. Reg. 47607.

² One way OSHA proposes that employers “inform” employees of this alleged “right” is through a poster. While the OSH Act does grant authority for OSHA to require “that employers, through posting of notices or other appropriate means, keep their employees informed of their *protections and obligations* under this Act, *including the provisions of applicable standards*” the Agency does not have unlimited authority to require employers to post any information. 29 U.S.C. § 657(c)(1) (emphasis added). The authority granted to OSHA is specific and not limitless. Moreover, Congress was fully capable of including “rights” and rather used “protections and obligations, including provisions of applicable standards.” *See* 29 U.S.C. §§ 651(b)(2), 653(b)(4), 655(b)(6), 660(c). For example, “the information to employees shall also inform them of their *right to petition* the Secretary for a hearing. 29 U.S.C. § 655(b)(6).

Under the OSH Act, employers and employees have “separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions.” 29 U.S.C. § 651(b)(1). To fulfill this stated purpose, Section 5 of the OSH Act titled “Duties” sets out the duties of both employers and employees. Pursuant to Section 5, employers are “required to comply with occupational safety and health standards promulgated under this Act” and “*employees shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.*” 29 U.S.C. § 654(b)(1) (emphasis added).

Without doubt employees have a duty to comply with recordkeeping regulations, including the reporting of work-related injuries and illnesses. And while no civil penalty attaches for failing to comply, it is each employee’s responsibility under the Act and Section 1904.35 to report any injury or illness that occurs to him or her. Section 1904.35 establishes a duty on the employer to ensure that employees report work-related injuries and illness by setting up a way for employees to promptly report such injuries and illnesses and to inform employees how to report work-related injuries and illnesses. The employee’s dependent responsibility is reporting work-related injuries and illnesses and it is the employee’s duty, not right, to comply with such recordkeeping regulations.

In the supplemental notice OSHA speculates that “if employees do not know that the OSH Act protects their right to report an injury or illness, they might be less likely to report an injury or illness to their employers.” 79 Fed. Reg. 47607. However, employees must already be made aware that they are protected under the Act “against discharge or discrimination for the exercise of their rights under Federal and State law.” 29 C.F.R. §§ 1903.2 and 1952.10. Specifically, OSHA requires that employers post OSHA 3165, *Job Safety and Health – It’s the law!* This posting unambiguously states that as to employees, “You can file a complaint with OSHA within 30 days of retaliation or discrimination by your employer for making safety and health complaints or for exercising your rights under the OSH Act” and as to employers, “You must comply with the occupational safety and health standards under the OSH Act.”

Once again, OSHA offers no evidence or data to suggest that employees are unaware that employers are required to maintain accurate injury and illness records. In fact, given that employers are required to post the 300A Annual Summary of work-related injuries and illnesses, employees very likely fully recognize their employers must record and report injuries and illnesses under OSHA. Further, the OSHA 3165 poster makes clear that employees are protected from discrimination. Employees are already aware of the need to inform employers of injuries or illnesses and similarly they are aware, in part, from the required poster, that they are protected from discrimination.

IV. Injury and Illness Reporting Requirements Must Already Be Reasonable and Not Unduly Burdensome

Next, OSHA proposes “a provision requiring that any injury and illness reporting requirements established by the employer be reasonable and not unduly burdensome.” 79 Fed. Reg. 47607.

Such an additional provision is absolutely unnecessary in light of existing requirements and clearly would only be duplicative in nature. As noted above, Section 1904.35 requires that employers set up injury and illness reporting requirements which allow for prompt reporting to employers and inform employees how to report work-related injuries and illness under the employer's reporting system. OSHA has already fully conceded that onerous and unreasonable reporting requirements are already prohibited by Section 1904.35. 79 Fed. Reg. 47608. What benefits the Agency expects to flow from adding additional regulatory text is uncertain. Moreover, OSHA alleges that the "proposal would add additional text to communicate that point more clearly," however, fails to provide the precise text it believes would effectuate this goal.

For years, employers have been setting up reporting requirements for employees, and at no point has OSHA ever suggested, through a directive, an interpretation letter, a memorandum or any other guidance document that during inspections OSHA is finding evidence that employers are creating systems which would suggest employers do not clearly understand the requirements set out in Section 1904.35. Rather, contrary to what may be believed by OSHA or other stakeholders, employers have every incentive to make sure that the reporting system allows for prompt, efficient, reasonable reporting and is not unduly burdensome so that employees report injuries or illnesses immediately.

Ensuring employees receive prompt medical attention, even for minor injuries, prevents aggravating the injury, extending the pain or discomfort and can avoid delaying a return to work. In cases of minor injuries, where an employee fails to immediately report an injury that may have been initially treated with first aid, the delay of medical treatment may result in more significant treatment beyond first aid. Additionally, injuries and illnesses reported promptly allow employers to take appropriate corrective actions to ensure that other employees are not similarly injured. And, employees who report in a timely manner protect their rights to workers' compensation benefits.

V. OSHA's Supplemental Would Fundamentally Change Section 11(c) of the OSH Act That Already Adequately Protects Employees from Retaliation, Discrimination or Other Adverse Action Based on the Reporting of Injuries or Illnesses

Finally, OSHA proposes to "prohibit employers from disciplining employees for reporting injuries and illnesses...or any other action that might discourage a reasonable employee from reporting an injury." 79 Fed. Reg. 47608. As the legislative history detailed below shows, Congress never intended for OSHA to have to such authority, nor did it expressly grant it such authority. *See* Subcommittee on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970 (Committee Print 1971).

The written comments for Teamsters Local 804, the AFL-CIO, and other unions make clear that they believe Section 11(c) is too difficult a process – which clearly is the impetus for this provision. Local 804 stated, "We 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..." The AFL-CIO similarly stated, "[t]he enforcement tools under 11(c) are weak, cumbersome and resource intensive...."

In support of this proposed "provision" OSHA relies on examples from commenters alleging adverse action for reporting injuries and illnesses. The supplemental notice states:

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....

* * *

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.

79 Fed. Reg. 47608.

While OSHA has provided no precise regulatory text on which interested parties might comment, the likelihood is that such a provision would be broad and overly subjective. OSHA can be expected to consider anything that in its opinion remotely could be seen as discouraging employees from reporting an injury or illness to be an “adverse action.” Moreover, while not expressly referenced in the supplemental notice, given the Agency’s position with respect to employer safety incentive programs, there is little doubt that such programs would be encompassed within “other action that might dissuade a reasonable employee from reporting an injury.” *Id.*

Since OSHA has not provided any draft regulatory language, what OSHA would consider falling within this prohibition is impossible to know. However, in light of the memorandum issued on March 12, 2012, by then-Deputy Assistant Secretary Richard Fairfax to Regional Administrators claiming that incentive programs discourage employees from reporting injuries and illnesses we can reasonably surmise that at least these programs would be on OSHA’s list. That memorandum states:

some employers establish programs that unintentionally or intentionally provide employees an incentive to not report injuries. For example, an employer might enter all employees who have not been injured in the previous year in a drawing to win a prize, or a team of employees might be awarded a bonus if no one from the team is injured over some period of time....

* * *

Incentive programs that discourage employees from reporting their injuries are problematic because, under section 11(c), an employer may not “in any manner discriminate” against an employee because the employee exercises a protected right, such as the right to report an injury.

a. *OSHA lacks statutory authority to rewrite Section 11(c) into a recordkeeping requirement.*

Congress expressly provided a remedy for employees who were discharged, or discriminated against because of the exercise of any right under the Act. 29 U.S.C. § 660(c) (1). And, OSHA concedes that “the primary conduct that would be prohibited by the new provision is likely already proscribed by 11(c).” OSHA is clearly adopting the unions’ view that Section 11(c) is too weak and cumbersome – the agency would much prefer an enforcement tool so that they can bypass the statutorily required element of an employee complaint. OSHA would prefer to decide when employers are engaging in adverse action rather than waiting for an employee to allege such action in a complaint. *The effect of this would be to enforce the whistleblower protections without a whistleblower.* OSHA does not have the authority to simply rewrite the statute more to its liking, substituting the Agency for the key actor contemplated by Congress under Section 11(c).

OSHA suggests that Sections 8 and 24 of the Act provide legal authority for such a provision. Yet, “Congress...does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not...hide elephants in mouseholes.” *Whitman v. American Trucking Ass’n, Inc.*, 531 U.S. 457, 468 (2001). 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 retaliation and discrimination in Section 11(c), there is nothing within Sections 8 and 24 that would provide support for bypassing Congressional intent through the simple means of promulgating a regulation establishing a civil penalty for discriminatory action, contrary to the text of Section 11(c).

Moreover, the legislative history is clear that Congress *contemplated and rejected* making retaliation and/or discriminatory actions subject to a civil penalty through the issuance of a citation. See Subcommittee on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970 (Committee Print 1971). Specifically, H.R. 19200 introduced in the 91st Congress, 2nd Session, proposed language under 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.

House of Representatives Bill No. 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.

Similar language is found in various other proposed bills, such as H.R. 16785. See House of Representatives Bill No. 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.

The final bill rejected the concept of the Secretary issuing citations and establishing a civil penalty for discriminatory actions and instead set out a full process whereby employees could file complaints of such discriminatory action and employers could have an opportunity for judicial review in a U.S. District Court. 29 U.S.C. § 660(c). It is not meaningless that Congress rejected such language from the “Penalties” section of the Act and instead placed it in the “Judicial Review” section of the Act. The final Conference Report explained precisely this difference.

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.

Here, OSHA proposes to do the very thing Congress rejected. In the supplemental notice OSHA states, “Under 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. There is no doubt that OSHA does not have the statutory authority to do what it is attempting to do in this supplemental notice – to allow a civil penalty at the discretion of the Secretary would undermine Congress’s clear and expressly stated intent.

Moreover, Section 9 of the Act sets out the requirements for a citation issued by the Secretary and requires that:

Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, *the citation shall fix a reasonable time for the abatement of the violation.* The Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health. (emphasis added)

OSHA states that abatement could include reinstatement and back pay, however applying the requirements set out in Section 9 to a discriminatory allegation is illogical. What precisely will the citation set as a “reasonable time for the abatement of the violation”? Congress did not intend for discriminatory actions to be handled as simple matters of enforcement through the issuance of a citation with a fixed “reasonable time for the abatement of the violation.” Congress intended citations to be

issued for violations of safety and health standards, such as replacing a missing machine guard that required abatement within a reasonable time.

In the face of clear, unambiguous Congressional intent and supporting legislative history, any argument by OSHA that it has legal authority to promulgate a regulation prohibiting employers from disciplining employees for reporting injuries or illnesses or for any other action that discourages employees from reporting an injury is simply without merit. Similarly, OSHA cannot upend the manner in which Section 11(c) operates to suit its own desires.

b. OSHA's anticipated provision is also contrary to Section 4(b)(4).

In the supplemental notice, OSHA specifically alleges that adverse action would include “requiring an employee who reported an injury to undergo drug testing where there was no reason to suspect drug use.” 79 Fed. Reg. 47608.

Section 4(b)(4) of the OSH Act states:

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).

OSHA has failed to consider the ramifications of such a prohibition on workers' compensation laws. Section 4(b)(4) of the Act is what some refer to as the “savings clause,” the specific section of the Act that Congress clearly reserved for the states. Section 4(b)(4) expressly prohibits OSHA from taking any regulatory action that affects state workers' compensation laws. *Id.*

Various state workers' compensation laws *require* employers to implement a drug free workplace program.³ For example, under Florida's Workers' Compensation Statute, Section 440.09, employers who maintain a drug-free workplace program, pursuant to sections 440.101 and 440.102, may *require* employees to submit to post-accident accident drug testing where there is “information that an employee has caused, contributed to, or been involved in an accident while at work.” Fla. Stat. 440.102(n)(5). The results of such testing can be used in negating an employer's liability under Florida's workers' compensation. Fla. Stat. 440.09(7). Georgia sets out a similar requirement under workers' compensation. Under Georgia Code § 34-9-415 an employer who maintains a drug-free workplace program is *required* to conduct specified types of testing, including job applicants, fitness-

³ Some workers' compensation laws pertaining to drug testing are voluntary, rather than mandatory, and where an employer elects to implement such programs they are required to follow all the established workers' compensation laws for the drug testing program. In doing so, employers will receive a specified discount on insurance premiums or will be protected from certain actions for damages. CWS's comments are not intended to be an exhaustive listing of states with workers' compensations laws directly regulating drug free workplace programs. Indeed, the majority, if not all, of state workers' compensation laws have some type of drug free workplace program requirements.

for-duty, and “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.

The OSH Act is preventative – it does not remedy injured employees – that is left to state workers’ compensations laws, laws that Congress clearly prohibited OSHA from affecting in any manner. *Ries v. Amtrak*, 960 F.2d. 1156, 1164 (3rd Cir. 1992) (holding that “the purpose of OSHA is preventative rather than compensatory”). Case law holds that Section 4(b)(4) of the 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). Further, any proposed provision prohibiting the post-accident, post-injury drug testing of an employee goes beyond merely effecting workers’ compensation claims themselves, rather such a regulation would in fact dismantle portions of state workers’ compensation. As such, it 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)”).

Further, not only is prohibiting policies or programs that require post-accident, post-injury drug testing (with or without a reason to suspect drug use) in conflict with Section 4(b)(4) of the Act, but it is completely contrary to what the Department of Health and Human Services, Substance Abuse Mental Health Services Administration (“SAMHSA”) advocates, contrary to requirements for Federal Workplace Drug Testing under Executive Order 12564 and Public Law 100-71 for agencies with drug testing policies for federal employees, and contrary to what the Department of Labor advocates for a Drug-Free Workplace Policy. Apparently, OSHA seems to believe that private employers must be held to a higher standard than the federal government.

Mandatory Guidelines for Federal Workplace Drug Testing, required by Executive Order 12564, detail the procedures for federal workplace drug testing programs.⁴ 73 Fed. Reg. 71873 (November 25, 2008). According to SAMHSA, the Federal Drug-Free Workplace Program is a program that addresses illegal drug use by federal employees, certifies executive agency drug-free workplace plans and identifies safety-sensitive positions subject to random drug testing. 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:

⁴ 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.” 73 Fed. Reg. at 71880.

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.

OSHA's inclusion of post-accident drug testing as an adverse action also conflicts with the Department of Labor's ("DOL") encouragement of employers to develop Drug-Free Workplace policies.⁵ In fact, as part of DOL's elaws there is a Drug-Free Workplace Advisor that helps employers develop a drug free policy. 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>.

- c. Neither safety incentive programs nor disciplinary programs have been established as discouraging employees from reporting injuries and illnesses.*

While OSHA never uses the term "safety incentive programs" in the supplemental notice there is no doubt that the Agency considers such programs as potentially discouraging employees from reporting injuries and illnesses and violating Section 11(c). The "Fairfax Memo" claimed "Incentive programs that discourage employees from reporting their injuries are problematic because, under section 11(c), an employer may not 'in any manner discriminate' against an employee because the employee exercises a protected right, such as the right to report an injury."

Despite a two year NEP on recordkeeping hunting for policies and programs that may discourage employees from reporting injuries and illnesses as described above, OSHA makes no mention in the supplemental notice of the data they collected during the roughly 550 inspections from the numerous employees, healthcare providers and management officials they interviewed. Nor does it mention any conclusions drawn based on the extensive questions pertaining to safety incentive programs, drug-testing, disciplinary programs, absenteeism policies or other programs. Moreover, the report OSHA was forced to submit to Congress makes no mention of any such results, findings or conclusions. This makes clear OSHA in that two year time-frame under the NEP was unable to find any supporting evidence to suggest that such policies or programs discourage employees for reporting injuries or illnesses. Therefore, this proposed provision is based on nothing more than mere conjecture and speculation.

- d. Cases OSHA relies on are inapposite and the proposed provision is not analogous to medical removal protection benefits*

⁵ 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>.

In an effort to find some legal support for the supplemental notice and the proposed provisions, OSHA misreads the holdings in case law. OSHA claims that “[w]here retaliation threatens to undermine a program that Congress required the Secretary to adopt, the Secretary may proscribe that retaliation through a regulatory provision.” 79 Fed. Reg. 47607. To support such a claim, OSHA looks to the medical removal protection (“MRP”) provisions contained in the lead standard. 29 C.F.R. § 1910.1025(k). However, the cases OSHA relies on start with the premise that MRP is not in violation of Section 4(b)(4). As discussed above, this proposed provision would be in violation of Section (4)(b)(4), so OSHA’s reliance on cases relating to MRP provisions, such as *United Steelworkers of America v. St. Joe Resources* (“*St. Joe Resources*”), 916 F.2d 294 (5th Cir. 1990), is misplaced. Further, in *St. Joe Resources* the court did not hold MRP was remedial but rather MRP was preventative to secure worker cooperation in medical examinations, such medical examinations that are expressly authorized by Congress under Section 6(b) of the Act.⁶ *Id.* at 298. The MRP requirements were not a means to prevent retaliation; they were a means to ensure worker cooperation for medical examinations. *See St. Joe Resources*, 916 F.2d at 298 (“We noted in *Schuylkill Metals* that ‘[a] central goal of the lead standard’s MRP benefits was to secure worker-cooperation with the medical surveillance component of the rule.’”). The proposed provision here is entirely aimed at preventing retaliation or adverse action, activity that is squarely covered by Section 11(c).

Further, OSHA places reliance on *United Steelworkers v. Marshall* to support the promulgation of a separate enforcement tool for retaliation in a regulation. 647 F.2d. at 1238. In *Marshall* the threshold question was whether the Secretary exceeded statutory authority in promulgating the MRP provisions contained in the lead standard. While the D.C. Circuit held that OSHA had general statutory authority to promulgate the MRP provisions, the Court found support for its holding in the legislative history of the Act and the statute’s mandate – that is to “ensure worker safety and health.” In short, the Court viewed MRP not as a remedy for retaliation but as an innovative method for dealing with occupational safety and health problems, specifically the problem of ensuring that employees participated in medical surveillance so that in accordance with the statute, it could be determined “whether the health of such employees is adversely affected by such exposure.” 29 U.S.C. § 655(b).

OSHA has distorted the findings and holdings in case law and in contrast to *Marshall*, OSHA is clearly exceeding its statutory authority. This proposed provision is not an “innovative method” for ensuring that employees exposed to a health hazard receive the appropriate medical surveillance, it is not preventative in any manner. It is an attempt to regulate alleged retaliation through a civil penalty and abatement of reinstatement and/or back pay because, in OSHA’s opinion, Section 11(c) is too weak. There is no possibility that this proposed provision is remedial in nature and no question that it is in clear opposition to Congressional intent which specifically prohibited such adverse actions through Section 11(c) whereby an employer will have access to full judicial review.

VII. The Supplemental Notice Violates the Administrative Procedure Act

⁶ Section 6(b) states “In addition, where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure.”) 29 U.S.C. § 655(b).

Pursuant to the Administrative Procedure Act (“APA”), agency actions must be set aside if they are found to be arbitrary and capricious or in excess of statutory authority. 5 U.S.C. § 706(2). Under the arbitrary and capricious standard, an agency “must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). 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.*

The D.C. Circuit recently vacated a Federal Communications Commission rule where the “Commission’s rule relies on one unsubstantiated conclusion heaped on top of another.” *Sorenson Communications Inc., v. FCC*, No. 13-1122, *slip op.* D.C. Cir. (June 20, 2014). The D.C. Circuit went to state:

The Commission may hoist the standard of common sense, of course but the wisdom of agency action is rarely so self-evident that no explanation is required. *See Checkosky v. S.E.C.*, 23 F.3d 452, 463 (D.C. Cir. 1994) (noting that in *Tex Tin Corp. v. EPA*, 935 F.3d 1321 (D.C. Cir. 1991), we declined to affirm “the agency’s decision to place a hazardous waste facility on the National Priorities List” on common sense alone, remanding the case to the EPA “for a better explanation before finally deciding that the agency’s action was arbitrary and capricious.”

Id. at 11.

Similarly, while OSHA may believe that the supplemental notice is grounded in common sense “such that a reinforcement of the importance of these rights might be valuable...” there is no evidence supporting these proposed provisions and no explanation for the agency’s action. 79 Fed. Reg. 47608.

Moreover, the Agency has provided no proposed regulatory text to let employers know what will be expected of them. While OSHA appears to be relying on a generous interpretation of a final regulation being a “logical outgrowth” of this supplemental, the absence of any regulatory text, or specific indications of what will be required, is at least a breach of sound rulemaking practices. As has been frequently stated, the purpose of notice and comment rulemaking is to provide interested parties the opportunity to meaningfully participate in the rulemaking. Agencies have significant latitude in how they present their proposals, but this supplemental represents the most theoretical concept of a proposal imaginable, especially with respect to OSHA’s intention to radically alter how the whistleblower provisions under Section 11(c) will be enforced which is only referred to in the abstract as “this provision” and other terms that suggest it has been explained earlier even though there is no such explanation. 79 Fed. Reg. 47607. The absence of any proposed regulatory text or specific details of what will be required undermines the opportunity for interested parties to meaningfully participate in this rulemaking.

Not only has OSHA not provided proposed regulatory text for review, but the agency has not indicated how it has complied with various rulemaking requirements such as the Paperwork

Reduction Act, Unfunded Mandates Reform Act, and Executive Order 12866. Clearly this supplemental was never reviewed under E.O. 12866 as it was never posted on the Office of Information and Regulatory Affairs' webpage—one reason why its issuance was such a surprise. While these laws and requirements may indeed require only cursory treatment, (such as OSHA's disposal of the Regulatory Flexibility Act issues, 79 Fed. Reg. 47609) not including such discussions suggests this notice is less than an actual proposal. This issue is further muddled by the fact that OSHA never indicates whether there will be another action before a final regulation. As noted earlier, this notice reads more like an ANPR suggesting there will be another notice with actual regulatory text and full rulemaking treatments, however, OSHA has not said so. The absence of any proposed regulatory text or details about requirements also means that OSHA was unable to perform any of the customary analyses required for rulemakings.

VIII. OSHA Must Withdraw This Proposed Regulation and the Supplemental Notice

In both notices that comprise this rulemaking, OSHA has exceeded the bounds of its statutory authority, and in this supplemental notice, the Agency attempts to proscribe activity in a manner that Congress clearly never intended. In this supplemental OSHA provides no actual regulatory text for CWS members or any of the regulated community to comment on. Rather, interested parties are left to speculate as to precisely what the Agency may consider "adverse action" and therefore are not fully able to comment about the extent of the impact this supplemental notice may have on employers and employees. Nor does OSHA provide any supporting evidence for this regulatory action.

CWS reiterates its position that OSHA should withdraw this proposed regulation including the supplemental notice. There is no indication that the current recordkeeping requirements in place are ineffective or that even if such requirements would be implemented that the current requirements contained in 1904.35 and in the statute are somehow inadequate to "protect the integrity of injury and illness data."

Air Conditioning Contractors of America
American Bakers Association
American Chemistry Council
American Coatings Association
American Coke & Coal Chemicals Institute
American Composites Manufacturers Association
American Foundry Society
American Health Care Association
American Hotel and Lodging Association
American Iron and Steel Institute
American Meat Institute
American Staffing Association
American Supply Association
Arkansas State Chamber of Commerce
Associated Builders and Contractors
Associated General Contractors of America
Associated Industries of Arkansas
Associated Wire Rope Fabricators
California Cotton Ginners Association

California Cotton Growers Association
California Manufacturers & Technology Association
Can Manufacturers Institute
Corn Refiners Association
Food Marketing Institute
Global Cold Chain Alliance
Healthcare Distribution Management Association
Institute of Makers of Explosives
International Association of Amusement Parks and Attractions
International Dairy Foods Association
International Foodservice Distributors Association
International Fragrance Association, North America
International Warehouse Logistics Association
Motor & Equipment Manufacturers Association
National Association for Surface Finishing
National Association of Chemical Distributors
National Association of Home Builders
National Association of Manufacturers
National Association of Wholesaler-Distributors
National Automobile Dealers Association
National Center for Assisted Living
National Chicken Council
National Cotton Ginners' Association
National Federation of Independent Business
National Grain and Feed Association
National Marine Manufacturers Association
National Oilseed Processors Association
National Pest Management Association
National Retail Federation
National Roofing Contractors Association
National School Transportation Association
National Systems Contractors Association
National Tooling and Machining Association
National Turkey Federation
National Utility Contractors Association
North American Die Casting Association
Precision Machined Products Association
Precision Metalforming Association
Printing Industries of America
Retail Industry Leaders Association
Shipbuilders Council of America
Society for Human Resource Management
Specialty Steel Industry of North America
SPI: The Plastics Industry Trade Association
Texas Cotton Ginners' Association
Thomas W. Lawrence, Jr., Consultant, Safety and Compliance Mgt.

Tree Care Industry Association
U.S. Chamber of Commerce
U.S. Poultry & Egg Association
United States Beet Sugar Association
Western Agricultural Processors Association

Of Counsel

Tressi L. Cordaro
Attorney at Law
Jackson Lewis LLP
10701 Parkridge Blvd.
Suite 300
Reston, VA 20191