June 28, 2022

ATTORNEY GENERAL RAOUL JOINS LETTER SUPPORTING OSHA'S PROPOSED RULE TO BETTER PROTECT WORKERS, PROMOTE WORKPLACE SAFETY

Chicago — Attorney General Kwame Raoul joined a coalition of attorneys general in supporting a proposed federal rule that would empower workers and expand public awareness of on-the-job dangers.

The proposed rule would require many employers to report significantly more detailed information about workplace injuries and illnesses to the Occupational Safety and Health Administration (OSHA) and would make that information publicly available. In a letter submitted Monday to U.S. Secretary of Labor Martin J. Walsh, Raoul and the other 16 participating attorneys general expressed support for the proposed rule, describing it as "a significant improvement" on current reporting requirements.

The new rule will empower workers, encourage the improvement of working conditions, and provide for added transparency, the attorneys general note. As the letter observes, transparency will help state regulators more effectively enforce state labor and safety laws and address workplace hazards, while at the same time increasing understanding of occupational dangers among job seekers, researchers, the general public and others.

"Having sound data on workplace injuries allows employers to improve safety, which benefits everyone," Raoul said. "Employees deserve safe working environments. Having better information about potential hazards could also reduce employers' costs in defending against workers' compensation claims and potentially prevent costs from being passed on to consumers."

Among other things, the proposed rule would require certain employers with more than 100 employees in high-risk industries to annually submit three detailed forms to OSHA electronically: a Log of Work-Related Injuries and Illnesses (OSHA Form 300), an Injury and Illness Report (OSHA Form 301), and summary information (OSHA Form 300A). These submissions to OSHA would exclude any employee-identifying information and, critically, would be made available to the public electronically.

The proposed rule would also largely maintain the current requirement that employers with 20 or more employees in certain industries submit information from the summary form on an annual basis.

In the letter, Raoul and the coalition stress the limitations of the current rule, which requires employers to submit only annual summary information. Far more can be learned, the letter observes, from some of the information collected on the Log of Work-Related Injuries and Illnesses (OSHA Form 300) and the Injury and Illness Report (OSHA Form 301).

These two forms collect detailed, narrative information about each injury or illness. Together, they paint a picture of the nature and severity of workplace safety incidents, rather than simply the number of reported cases. This includes explaining what an employee was doing before the accident, how the injury occurred, what the specific injury or illness was and which part or parts of the employee's body were affected. The forms also include information regarding where on the premises the injury happened, the affected employee's job title and what object or substance directly harmed the employee.

The letter also praises the steps OSHA takes in the proposed rule to ensure that workers' privacy and identifying information are safeguarded.

To increase public awareness about the data that will be made available by the proposed rule, Raoul and the attorneys general suggest OSHA consider requiring that designated industries post information about the availability of the data, conduct outreach programs in collaboration with state departments of labor and health, and create partnerships with non-profit and non-governmental industries to provide training and outreach.

Joining Attorney General Raoul in supporting the proposed OSHA reporting rule are the attorneys general of California, Connecticut, Delaware, District of Columbia, Hawaii, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island and Vermont.

THE STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL

June 27, 2022

Via Federal eRulemaking Portal, www.regulations.gov
The Honorable Martin J. Walsh
Secretary of Labor
Douglas L. Parker
Assistant Secretary of Labor for Occupational Safety and Health
United States Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: Notice of Proposed Rulemaking: "Improve Tracking of Workplace Injuries and Illnesses"
Docket No. OSHA-2021-0006, RIN 1218-AD40
87 Fed. Reg. 18,528 (Mar. 30, 2022)

Dear Secretary Walsh and Assistant Secretary Parker:

The undersigned Attorneys General of New Jersey, California, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, New York, Oregon, Rhode Island, and Vermont ("the States") write in support of the U.S. Department of Labor, Occupational Safety and Health Administration's ("OSHA") Notice of Proposed Rulemaking, "Improve Tracking of Workplace Injuries and Illnesses," 87 Fed. Reg. 18,528 ("proposed rule" or "2022 NPRM").

Under the Occupational Safety and Health Act of 1970 ("OSH Act" or "Act"), OSHA is tasked with ensuring "safe and healthful working conditions" for workers in the United States. 29 U.S.C. §§ 651-678. Since 1971, OSHA has used that authority to require the tracking of workplace injuries and illnesses and has gradually increased the type of information the agency gathers over time, with the aim of improving workplace health and safety. More recently, OSHA has started to make some of this information public so that employees, employers, states, and the public in general can benefit from access to workplace injury information.

OSHA regulations require employers with more than 10 employees in most industries to keep records of occupational injuries and illnesses at their establishments. 29 CFR part 1904.0-1904.46. Employers covered by the regulation must log each recordable employee injury and illness on OSHA Forms 300, 301, and 300A. Form 300, "Log of Work-Related Injuries and Illnesses," includes information about each injury or illness, including the date, location, description of the injury/illness, outcome, and the employee's name and job title. Form 301, "Injury and Illness Incident Report," contains detailed information about the injury or illness, as well as the names and addresses of the employee and the healthcare professional that treated the employee. And Form 300A, "Summary of Work-Related Injuries and Illnesses," is an end-of-year

summary report, which summarizes the total number, types, and outcomes of injuries and illnesses at the establishment. Employers must post Form 300A in a visible location in the workplace.

The States agree with OSHA's determination that the number of on-the-job injuries and illnesses remains "unacceptably high," with American workers experiencing more than 3 million "serious" injuries and illnesses per year. 87 Fed. Reg. at 18,533. And currently, OSHA has limited information about such injuries and illness in certain fields, hindering its ability to focus enforcement and outreach efforts on workplaces where employees face the highest risks. *Id.*

To combat this problem, in 2016, OSHA promulgated a rule ("2016 Rule") that attempted to expand public access to specific workplace injury data by requiring employers to submit detailed injury and illness forms to OSHA; that rule required OSHA to de-identify the forms and make them publicly available through its web portal. In 2019, before the 2016 Rule could go into effect, OSHA reversed course and abandoned the requirement that employers submit more detailed information.

The 2022 NPRM returns to the transparent approach of the 2016 Rule. It reinstates the requirement for certain employers in designated industries to annually submit information from their OSHA Forms 300, 301, and 300A, excluding employees' identifying information, but lowers the threshold for reporting from employers with 250 employees to those with 100 employees. *See* 87 Fed. Reg. 18,528, 29. The 2022 NPRM maintains the requirement that establishments in designated industries with 20 or more employees submit Form 300A once a year. *Id.* However, it narrows the types of industries subject to this requirement and dispenses with the blanket requirement that employers with 250 or more employees submit Form 300A. *Id.* Additionally, the proposed rule requires OSHA to make the de-identified documents electronically available to the public. *Id.* Currently, only certain industries with 20 or more employees and all industries with 250 or more employees must submit the 300A summary form, which OSHA must make publicly available. 29 C.F.R. § 1904.41.

Requiring the submission of certain data from Forms 300 and 301, in addition to the summary Form 300A, will provide the public with injury-specific data that is critical for helping workers, employers, regulators, researchers, and consumers understand and prevent occupational injuries and illnesses. Using annual summary information about an establishment from Form 300A alone, interested parties can only learn three things: (1) the total number of injuries or illnesses that resulted in death, days away from work, and/or job transfer; (2) the total number of work days missed or restricted; and (3) the total number of injuries or illnesses, broken into six broad categories: injuries, skin disorders, respiratory conditions, poisoning, hearing loss, or "other." This "establishment-specific" data is a summary of what happened in one establishment in one year; there is no way to zoom in on an injury or illness to learn more about what happened or why.

In stark contrast, Forms 300 and 301 collect detailed, narrative information about each injury or illness (i.e., "case-specific data"), including what the injured employee was doing before the accident, how the injury occurred, what the specific injury or illness was, which part(s) of the body were affected, where in the establishment the injury occurred, the job title of the affected employee, and what object or substance directly harmed an employee. These fields paint a far more detailed picture of the nature and severity of workplace safety incidents and risks.

The proposed rule recognizes the importance of this more detailed information, which will help OSHA and states better target their workplace safety and enforcement programs; encourage employers to abate workplace hazards; empower workers to identify risks and demand improvements; and provide information to researchers who work on occupational safety and health.

OSHA's rulemaking is well within its statutory authority and represents a significant improvement on the current reporting requirements. As described further below, the States have a strong interest in ensuring that the employers operating within their borders and employing their residents maintain safe and healthful working conditions. This is particularly so during the COVID-19 pandemic, which has only intensified the need for greater understanding of workplace health and safety. As some of the States have previously explained, shielding workplace safety information from the public does a tremendous disservice to the working population of this country and to consumers.[1] Moreover, the States agree with OSHA that the reasons provided for the current rule, which limits data collection and publication, are not compelling. 87 Fed. Reg. at 18,538. And safety measures and advancements in technology have significantly reduced the risk that the 2022 NPRM's reporting requirements will result in any identifying information being publicly disclosed. *Id.*

The States therefore commend OSHA for exercising its statutory authority and taking important steps to increase access to workplace safety data for regulators, employees, employers, researchers, and the general public. In so doing, OSHA recognizes the significant benefits of transparency, which will allow states and local governments to better target enforcement and outreach efforts. We encourage OSHA to ensure employees and the public have easy access to the information collected as a result of the proposed rule.

I. The 2022 NPRM Is Consistent with OSHA's Statutory and Regulatory History.

A. The Occupational Safety and Health Act of 1970 Requires that OSHA Take Steps to Keep Workers Safe.

The OSH Act was enacted to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions[.]" 29 U.S.C. § 651. It sought to do so "by encouraging employers and employees in their efforts to reduce the number of occupational health and safety hazards at their places of employment," by "stimulat[ing] employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions." *Id.* The Act also promoted employees' health and welfare "by providing for research in the field of occupational safety and health," "by developing innovative methods, techniques, and approaches for dealing with occupation safety and health problems," "by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems," and "by providing for appropriate reporting procedures with respect to occupational safety and health [that]

[1] Comments of the Attorneys General of New Jersey, Maryland, Massachusetts, New York, Pennsylvania, Rhode Island, and Washington, Docket No. OSHA-2013-0023 (Sept. 28, 2018), *available at* https://www.nj.gov/oag/newsreleases18/2018-0928_NJ-AG-OSHA-Workplace-Injury-Comments.pdf.

will help achieve the objectives of [the Act] and accurately describe the nature of occupational safety and health problem." *Id.*

Since 1971, OSHA has exercised its authority to require employers to record work-related injuries. *See, e.g.*, "Recording and Reporting Occupational Injuries and Illnesses," 36 Fed. Reg. 12,612 (July 2, 1971) (requiring employers to keep a log of all workplace injuries and illnesses). More recently, since 2001, OSHA has required employers to keep three specific records: Forms 300, 300A, and 301. *See* "Occupational Injury and Illness Recording and Reporting Requirements," 66 Fed. Reg. 5916, 5921 (Jan. 19, 2001). But OSHA's own access to these forms (as well as the public's) is limited. And since 2019, OSHA has received and made public only the summary Form 300A from certain employers with 20 or more employees and all establishments with 250 or more employees. *See* Tracking of Workplace Injuries and Illnesses, 84 Fed. Reg. 380, 381 (Jan. 25, 2019) ("2019 Rule"). OSHA receives immediate reports of fatalities and injuries involving hospitalization, amputation, or loss of an eye, 29 C.F.R. § 1904.39, but such events constitute a small fraction of workplace injuries and illnesses. OSHA can also request the forms from employers in the course of an investigation or site visit, but does not have regular access to the logs of specific workplace illnesses and injuries across employers and industries. 87 Fed. Reg. at 18,533. In most cases, information that OSHA gathers during an inspection is not available to the public.

B. OSHA's Prior Rulemaking Demonstrates a Commitment to Provide Transparency Regarding Workplace Injuries and Illnesses.

In 2016, OSHA completed a thorough rulemaking aimed at improving the tracking of workplace injuries and illnesses. *See* "Improve Tracking of Workplace Injuries & Illnesses," 81 Fed. Reg. 29,624 (May 12, 2016). OSHA did not impose new record-keeping burdens; instead, the 2016 Rule required OSHA to collect existing injury and illness information and make it publicly available through an online database after ensuring the removal of personally identifiable information ("PII"). *Id.* at 29,624-25. Specifically, the 2016 Rule required employers with more than 250 employees to electronically submit, on an annual basis, information from Forms 300 (except employee name), 301 (except names and addresses of employee and treating physician), and 300A that employers were already required to keep on-site. *Id.* The rule also required employers in certain designated industries with more than 20 employees, but fewer than 250 employees, to submit information from Form 300A electronically. *Id.* at 29,625.

At the time of the 2016 Rulemaking, there was "very limited information" publicly available about specific injuries and illnesses occurring in the workplace. *Id.* at 29,629. The 2016 Rule was thus a substantial step toward improving worker health and safety, and received significant support from workers, labor unions, professional associations, and researchers. *Id.* at 29,633. In that rulemaking, OSHA discussed in detail the ways in which the electronic collection and publication of detailed injury and illness reports benefit employees, potential employees, employers, researchers, workplace safety and health professionals, state and county governments, the general public, and OSHA itself. *Id.* at 29,629-32. OSHA anticipated, among other things, that employers would improve workplace safety and health to support their reputations; employers would be able to "benchmark" their health and safety performance against comparable establishments; employees and potential employees would have information to enable them to

choose to work at safer workplaces; investors would be able to identify investment opportunities at safer firms; customers could make employer safety performance a factor in their purchasing and contracting decisions; and researchers could identify previously unrecognized patterns of injuries and illnesses to prevent them from occurring. *Id.* at 29,630-31.

OSHA also considered concerns raised by commenters and made several changes, including requiring annual rather than quarterly data submission to reduce the burden on employers, and excluding certain information from submission requirements to protect workers' privacy. *Id.* at 29,633-34, 29,661. With respect to employee privacy, OSHA confirmed that it would use software that would search for and de-identify PII before submitted data could be posted; reiterated that small establishments were only required to submit Form 300A (obviating the concern that individual employees at some companies could be identified based on reported information); and indicated that it planned to introduce a data collection system that would isolate data behind a separate firewall until sensitive fields had been scrubbed. *Id.* at 29,662.

OSHA was scheduled to begin collecting the information in Form 300A on December 15, 2017, and the more detailed information in Forms 300 and 301 on July 1, 2018. In 2017, however, OSHA abruptly delayed the implementation of the 2016 rule, twice. *See* "Improve Tracking of Workplace Injuries and Illnesses: Delay of Compliance Date," 82 Fed. Reg. 29,261 (June 28, 2017), 82 Fed. Reg. 55,761 (Nov. 24, 2017). Two years later, in a subsequent rulemaking, OSHA reversed its position regarding the collection of Forms 300 and 301, effectively shielding detailed workplace injury and illness information from the public. *See* "Tracking of Workplace Injuries and Illnesses," 83 Fed. Reg. 36,494 (July 30, 2018); 84 Fed. Reg. at 380. The 2019 Rule rescinded the requirement for establishments with more than 250 employees that are required to keep records to annually submit information from their Forms 300 and 301. 84 Fed. Reg. at 380. The 2019 Rule maintained the Form 300A annual summary reporting requirements for certain establishments with 20 or more employees and all establishments with 250 or more employees. *Id.*

In contrast to the extensive, thorough, and well-reasoned 2016 Rule, the 2019 Rule relied upon an inadequate analysis. First, OSHA indicated that the benefits of collection and publication of the workplace safety information would be limited in light of OSHA's supposed inability to use more detailed data in targeting its own enforcement efforts. *Id.* at 381, 383-84, 389-93. However, OSHA's own use of the data was only one of many relevant benefits OSHA and commenters had anticipated based on the 2016 Rule. Second, OSHA noted that it was rolling back the 2016 Rule to protect worker privacy. *Id.* at 381, 383-89. However, the 2019 Rule not only ignored the ways the 2016 rulemaking had addressed privacy concerns, but also failed to sufficiently explain why OSHA believed the 2016 Rule's safeguarding measures were no longer adequate. OSHA did not revisit multiple layers of protection it had previously planned to integrate into its data collection system. Instead, OSHA simply conjectured that there was some possibility that some PII might be released even after being processed through de-identification software. *Id.* at 385. Additionally, OSHA ignored the experiences of other federal agencies that routinely publish similar information, which it had recognized in its 2016 rulemaking. *See* 81 Fed. Reg. at 29,632.[2]

[2] Shortly after OSHA implemented the 2019 Rule, a group of public health organizations and a group of States filed separate lawsuits challenging the 2019 Rule in *Public Citizen Health Research Group et al. v. Pizella* (D.D.C. 1:19-cv-00166) and *State of New Jersey et al. v. Pizella* (D.D.C. 1:19-cv-00621). Both cases are currently in abeyance in light of the 2022 NPRM.

C. The 2022 NPRM Increases Transparency Regarding Workplace Safety.

On March 30, 2022, OSHA issued a Notice of Proposed Rulemaking that will require certain employers to submit information from Forms 300, 301, and 300A to OSHA. *See* 87 Fed. Reg. 18,528, 18,529. Specifically, the 2022 NPRM will require employers with more than 100 employees in certain designated industries to electronically submit information from Forms 300 (except employee name), 301 (except names and addresses of employee and treating physician), and 300A once a year, while employers with more than 20 employees in certain designated industries would continue to electronically submit information from Form 300A. *Id.* OSHA will then make much of this information public. *Id.* at 18,521-32. The proposed rule eliminates the requirement that all establishments with more than 250 employees submit information from Form 300A. Additionally, the 2022 NPRM requires companies to identify their legal name. 87 Fed. Reg. 18,529.

In the 2022 NPRM, OSHA notes that it will implement multiple measures to protect employees' privacy, including limiting the employee information submitted by employers; designing its collection system to provide extra protections for some of the information that employers will be required to submit; withholding certain information from public disclosure; and using automated software to identify and remove information that is reasonably likely to identify individuals, such as employee names, contact information, and the names of physicians or health care professionals. *Id.* at 18,529, 18,538-39.

Additionally, OSHA explains that the reasons it had given to justify the 2019 Rule are no longer compelling due to recent advancements in technology. *Id.* at 18,538. OSHA represents that the improved technology has "reduced the risk that information that reasonably identifies individuals directly … will be disclosed to the public" and "decreased the resources required to analyze the data." *Id.* OSHA further provides that its prior experience successfully collecting and analyzing Form 300A data demonstrates its ability to collect, analyze, and use large volumes of data. That experience has also demonstrated the limits of the Form 300A information, which does not include the level of detail required to address specific occupational hazards. *Id.* For example, OSHA is currently developing a National Emphasis Program to address the hazards associated with environmental heat. OSHA recognizes that it requires case-specific injury and illness information from Forms 300 and 301 to identify specific establishments where employees are suffering work-related heat disorders. OSHA thus concludes that "the anticipated benefits of collecting the [Forms 300 and 301] data are more certain" at this time. *Id.*

II. The Proposed Rule Benefits Key Stakeholders.

Public reporting of case-specific data under the proposed rule will yield a litany of benefits for employees, consumers, and employers in the States, the States themselves, and researchers. Public reporting of detailed injury data will empower employees to make informed choices about their workplaces and will allow consumers to make informed choices regarding purchases, while rewarding safe workplaces with increased consumer demand. State agencies will be able to better target their own enforcement efforts with more detailed data and improve their outreach and education to employers and employees. Public access to detailed workplace data will also allow

researchers to conduct and expand studies that lead to better understanding of workplace injury and illness causation, prevention, and consequences.

A. Detailed Injury and Illness Information Empowers Workers and Benefits Consumers.

The detailed case-specific information that will be publicly available as a result of the proposed rule will give workers information they can use to protect their health and safety, both in deciding where to work and while on the job.

Public access to workplace injury and illness data will enable job-seekers to identify potential employers with good health and safety outcomes, to make informed decisions about where to work, and to bargain for wages, benefits, and other conditions of employment in light of the true health and safety status of a workplace. Critically, the proposed rule improves on the existing reporting requirements by requiring companies to identify their legal name. 87 Fed. Reg. 18,529. By contrast, under the current rule, companies with multiple establishments merely have the option of disclosing their name, 87 Fed. Reg. 18,546, and many chose not to. Job-seekers can only make informed decisions based on workplace safety if they are able to attribute injury and illness data to a specific employer. Additionally, the requirement to disclose a legal name resolves an existing asymmetry in information between employers and their potential employees.

The detailed information captured in Forms 300 and 301 is valuable to job-seekers for at least two reasons. First, the raw number of annual injuries and illnesses at an establishment is a weak proxy for its true health and safety status. Two establishments with identical injury counts may have different risk profiles. Consider, for example, an establishment where one employee is injured by a hot tool after failing to wear employer-provided gloves, compared to an establishment where one employee was injured by a hot tool despite wearing protective equipment. A job-seeker might reasonably conclude that the first establishment is safer, so long as they wear protective gear. Using establishment-specific data, like that in Form 300A, those two establishments would not be distinguishable. But the information in Forms 300 and 301 will facilitate these important assessments.

Second, only detailed injury information can enable workers to identify the establishments, job roles, and even locations *within* establishments that are the most and least safe. Similarly, case-specific information allows workers to understand the specific injuries and illnesses, and the severity of those injuries and illnesses, that befall workers in certain roles and locations. Armed with detailed data, jobseekers might forego jobs in more accident-prone regions of establishments, or jobs that tend to result in more severe health outcomes when accidents do occur, or jobs with employers whose data reflects repeated, similar accidents. Alternatively, informed workers could bargain for commensurate wages and benefits, considering the true risk profile of the job. And this information may be of particular import to some jobseekers: those with specific health and safety concerns or conditions, like pre-existing injuries, disabilities, or those who are pregnant or hope to become so, could use this information to avoid workplaces that may pose a particular risk to them in light of their circumstances.

Public access to case-specific data will generate additional benefits for workers on the job. As it does for job-seekers, it will enable workers to identify risks specific to their jobs and worksites, and it may further empower workers to demand improvements tailored to their unique roles and risks. Public access to data will also enable workers to make informed decisions about whether to leave a high-risk workplace, or a workplace where conditions are worsening or not improving. And even if workers do not themselves access the data, organizations like unions and non-profits could provide the information to workers.

Further, public access to data may improve workplace safety by encouraging employers to abate existing hazards and invest in worker health and safety. Image-conscious companies may very well be motivated by public visibility into their workers' safety. And relatedly, public access may encourage employers to accurately report all workplace injuries. This benefit is hardly theoretical. Researchers have estimated that up to 70 percent of workplace injuries and illnesses currently go unreported to authorities like OSHA, the Mine Safety and Health Administration ("MSHA"), and the Bureau of Labor Statistics ("BLS").[3] These findings reflect the reality that employers can often save costs or evade scrutiny by declining to report. Public access to data may increase reporting because workers who experienced a work-related injury or illness, or who are aware of a coworker who did, will be able to confirm that their cases were reported. This knowledge, and the attendant risk of liability for failure to report,[4] also incentivizes employers to be thorough in their reporting. More accurate reporting benefits workers, whose data-informed decisions are only as good as the data on which those decisions are based.

Increased transparency about workplace risks may uniquely benefit low-income and minority workers, who experience the greatest harms from occupational injuries and illnesses. Studies have found that racial and ethnic minorities face higher workplace risk of injury or illness because they have fewer economic opportunities and often work in more hazardous jobs as a result.[5] Specifically, non-Hispanic black workers and foreign-born Hispanic workers experience the highest risks, adjusting for education and gender.[6] Scholars have also found that low-income

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[3] John W. Ruser, *Examining Evidence on Whether BLS Undercounts Workplace Injuries and Illnesses*, Monthly Labor Review (2008): 20-32; J. Paul Leigh et al, *An Estimate of the U.S. Government's Undercount of Nonfatal Occupational Injuries*, 46 J. OCC. AND ENV'L MEDICINE 10–18 (2004); Alison Morantz, *Putting Data to Work for Workers: The Role of Information Technology in U.S. Worker Protection Agencies*, 67 ILR REVIEW 681 (2014), *available at* https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.480.6034&rep=rep1&type=pdf). This "underreporting" phenomenon even occurs with severe injuries. J. Wiatrowski, *Examining the Completeness of Occupational Injury and Illness Data: An Update on Current Research*, MONTHLY LAB. REV. (June 2014) (finding one quarter of amputations are not reported to OSHA).

[4] OSHA, *Fatality Investigation Brings Injury and Illness Record Keeping Violations to Light; OSHA Citations and Fines Total $81,600* (2006), https://www.osha.gov/news/newsreleases/region6/06202006.

[5] Seth A. Seabury, *Racial and Ethnic Differences in the Frequency of Workplace Injuries and the Prevalence of Work-Related Disability*, 36 HEALTH AFF (MILLWOOD) 266, 273 (2017).

[6] *Id*. at 270.

individuals and families face the greatest harms from workplace injuries and illnesses.[7] As OSHA itself has noted, the costs of workplace injury and illness are borne primarily by injured workers, their families, and taxpayer-supported safety nets (as opposed to high-hazard employers). As a result, occupational injuries can trap low-income workers and their families in poverty.[8] Public access to detailed injury and illness data will empower these workers and consumers who are most impacted by occupational hazards to make informed decisions regarding where they choose to work.

Finally, the proposed rule will also benefit consumers, who can use information about employer safety to inform their purchasing and contracting decisions. This benefit is not theoretical: scholarship bears out that many consumers choose brands based on worker health and safety and how well they treat their employees.[9] Related scholarship has also found that workplace safety influences customer satisfaction, suggesting that workplace health and safety has spillover effects on service.[10] Just as workers can assess an employer's true health and safety status with case-specific data, so too can consumers and consumer interest organizations.

B. Employers Benefit from Transparency in the Workplace.

Public access to case-specific data will also benefit employers by enabling them to compare their health and safety outcomes against those of other establishments and identify areas for improvement. As an example, using detailed case-specific information reported in Forms 300 and 301, an employer might realize that comparable workplaces report lower levels of work-related carpal tunnel syndrome, leading them to invest in ergonomics programs or to identify cost-effective strategies used in other workplaces to reduce the incidence of carpal tunnel syndrome.

Conversely, case-specific data will also enable employers (and other interested parties) to identify areas in which they are exceeding industry standards for health and safety and tout their results. Employers that exceed standards may benefit from more competitive employee applications, increased consumer awareness and purchasing, and positive acknowledgement and accolades from regulatory bodies and researchers.

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[7] Leslie I. Boden, *Running on Empty: Families, Time, and Workplace Injuries*, 95 AM. J. PUB. HEALTH 1894, 1896 (2005).

[8] OSHA, *Adding Inequality to Injury: The Costs of Failing to Protect Workers on the Job* (2015), https://www.osha.gov/sites/default/files/inequality_michaels_june2015.pdf.

[9] Qualtrix, *Consumers Increasingly Choose Brands Based on Safety Measures and How They Treat Their Employees During the Pandemic* (Jan. 2022), https://www.qualtrics.com/news/consumers-increasingly-choose-brands-based-on-safety-measures-and-how-they-treat-their-employees-during-the-pandemic.

[10] P. Geoffrey Willis et al, *Does Employee Safety Influence Customer Satisfaction? Evidence From the Electric Utility Industry*, 43 J. SAFETY RES. 389 (2012), *available at* https://www.sciencedirect.com/science/article/abs/pii/S0022437512000783.

C. The Proposed Rule Benefits States' Enforcement and Regulatory Efforts.

Public reporting of detailed workplace injury and illness information will benefit states in several ways.

First, states will be able to use case-specific data to target their enforcement efforts to achieve the greatest impact with limited resources. Targeted enforcement has proven effective in many contexts. For example, OSHA itself conducts targeted inspections through its Site-Specific Targeting ("SST") program. Under SST, agency officials select workplaces with high rates of injuries and illnesses for inspection, as reported on Form 300A.[11] One study found that SST inspections reduced serious injuries and illnesses by an average of nine (9) percent, and the same paper showed how alternative methodologies for determining which inspections to conduct could double that reduction.[12] Making case-specific data public will enable states to experiment with alternative targeting methodologies that may produce even better results.

Several state agencies use OSHA data to target their enforcement efforts and are prepared to use the additional data that will be published under the proposed rule. For example:

- The New Jersey Department of Labor and Workforce Development ("NJLWD") intends to use the data to better target its inspections and outreach programs. NJLWD currently uses BLS data to prepare its strategic plans for enforcement, and case-specific information will allow it to better prioritize and evaluate its work.

- The Connecticut Department of Labor's Workplace Safety Division ("CONN-OSHA") indicates that it could use the data made publicly available by the proposed rule to develop its next five-year strategic inspection plan.

- The Hawaii Department of Labor and Industrial Relations, Occupational Safety and Health Division ("HIOSH") requests OSHA Forms as part of its surveys and uses this information to determine state and public sector injury rates and to prioritize public sector establishments for inspection. By making OSHA forms public, the proposed rule eases HIOSH's administrative burden.

- The Illinois Department of Labor currently uses OSHA data to look for establishments with inaccurate illness and injury reporting and then works with employers to improve the accuracy of their submissions. Electronic reporting of data would allow the state to better target inaccuracies.

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[11] Similarly, MSHA conducts monthly targeted inspections based on injury data it collects. Notably, MSHA collects injury data from each mining establishment quarterly and, in recent years, has published anonymized versions of that data on its website. *See* MSHA, Accident, Illness and Injury and Employment Self-Extracting Files (Part 50 Data), https://arlweb.msha.gov/STATS/PART50/p50y2k/p50y2k.HTM.

[12] Matthew S. Johnson et al, *Improving Regulatory Effectiveness through Better Targeting: Evidence from OSHA*, NBER WORKING PAPER (Aug. 2019), *available at* https://irle.berkeley.edu/files/2019/09/Improving-Regulatory-Effectiveness-through-Better-Targeting.pdf.

- Maryland's Occupational Safety and Health ("MOSH") Compliance Unit investigates accidents and employee complaints and conducts targeted inspections of high-hazard industries, as well as general scheduled inspections. With a limited number of officers, its enforcement efforts require an inspection regime that is efficiently targeted and prioritizes the most dangerous conditions for monitoring and remediation. Access to OSHA Forms 300, 301, and 300A could also help better target inspections.

- In Massachusetts, the Governor appoints an advisory board on occupational health and safety, which evaluates injury and illness data and recommends training and implementation of health and safety measures, monitors the effectiveness of such measures, and determines whether additional resources are needed to protect the health and safety of employees. The board relies on existing data sources, mainly workers' compensation reporting, which do not include information related to causation and contain little information regarding types of injuries and illnesses. More comprehensive data from OSHA would allow the board to perform more complete analyses, which could then inform workplace injury prevention programming. The detailed illness and injury data would exponentially improve the ability of the advisory board to address specific issues and focus compliance efforts to address the areas of concern.

- As part of its worksite inspections, Minnesota's Workplace Safety Program ("MNWSP") reviews Forms 300, 300A, and 301 to assess the frequency and severity of particular injuries at a given location. With the data made publicly available by the proposed rule, Minnesota would be better able to discern patterns. The data would also allow Minnesota to engage in more targeted inspection and enforcement activities.

- Nevada's Department of Business and Industry's Occupational Health and Safety Administration carries out targeted enforcement based on BLS data or reports of injuries or illnesses. It reviews OSHA forms on site during enforcement efforts, such as during inspections where recordkeeping is an element of the allegations or where there have been an alarming number of recordable workplace incidents reported on OSHA Form 300A. These enforcement efforts would benefit from greater transparency regarding workplace incidents, and Nevada could potentially use Forms 300 and 301 to inform future enforcement plans.

Second, beyond inspections, states will be able to use data from the proposed rule to conduct targeted outreach and training, design appropriate health and safety interventions, and evaluate the efficacy of such programs. States will be able to explore where injuries happen—at the level of particular companies, establishments, jobs, and sites within establishments. They will be able to identify whether there are specific times of year when certain injuries are more likely to occur or identify shifts that are uniquely dangerous, or whether an employee is at greater risk after a certain number of hours worked. All of these insights might lend themselves to specific interventions. For example, if a state determines that serious injuries happen in a given industry when employees work long shifts and interact with machinery, then they could require additional break times, equipment safety training, or other preventative measures. Or if injuries occur in a particular establishment after sunset, the state could require additional lighting and states will be able to use future injury data to evaluate the efficacy of any such interventions.

Indeed, agencies and private entities in several states already conduct targeted training and outreach based on available injury data. CONN-OSHA uses publicly available Form 300A as part of its on-site Consultation Program for private sector businesses. It identifies businesses with high injury rates and helps employers identify hazards and improve safety management systems to reduce injuries and illnesses in the workplace. The public availability of case-specific data could help the agency better target and evaluate its consultation program. Similarly, the University of Minnesota's Midwest Center for Occupational Health and Safety delivers public health training to private and public sector employers and workers, and the University's Upper Midwest Agricultural Safety and Health Center works to enhance the health and wellbeing of the people who produce our food. Access to the detailed injury and illness information would allow both centers to better understand the injuries and illnesses that are having the greatest impact on workers in Minnesota and, in turn, allow researchers to identify patterns of injuries in underserved and high-risk workers in need of supports to prevent injuries and reduce long-term adverse impacts.

Third, using injury narratives provided in the case-specific data from Forms 300 and 301, states will also be able to identify and investigate particularly severe or otherwise concerning incidents and whether worksite healthcare was provided to adequately deal with the injuries. States will be able to explore whether certain cases were likely caused by workplace hazards or violations, and if so, whether those conditions were abated in a timely manner. Similarly, states will be able to explore whether certain injuries or illnesses have long-term effects on workers, and whether appropriate workplace accommodations have been made in response. For example, if a certain type of occupational injury regularly leads to ongoing disability in a particular industry or place of work, States can explore what accommodations those employers provide, for example, whether affected workers have been placed in appropriate positions with reasonable accommodations as required under the Americans with Disabilities Act and similar State laws. States could also analyze whether protected characteristics like pregnancy or disability status render some workers less safe at their worksites, thereby enhancing states' enforcement of their anti-discrimination laws.

Fourth, states will also be able to compare injury and illness data with other data sources to generate further insights about employers and workers compensation programs. For example, states will be able to compare injury and illness data with data about labor violations, to determine whether the worst labor law violators also have a greater number of safety issues than other employers. States can also compare the data to workers' compensation filings to identify injuries and illnesses omitted from either source. Doing so could help enable states to probe whether non-occupational health care systems, other programs, or individuals are absorbing the costs of workplace cases, or whether workers' compensation is absorbing the costs of non-work-related cases. This could also help enable states to identify whether workers' compensation premiums are accurately calculated. Most states utilize "experience rating systems," in which an employer's premium is calculated proportionate to the number of compensable incidents, like injuries or illnesses, that they experience relative to other, similar employers. That is, under experience rating, high-risk employers should be paying the highest premiums but this is only the case if states have accurate information about the employer's true risk profile. Case-specific data could help enable states to determine if that is the case.

Fifth, States could use case-specific data to identify workplace injury underreporting. For example, states could examine the distributions of reported injuries across industries, and audit establishments that differ from their peers in ways that suggest underreporting. States could also compare the detailed data to other employer-reported data about fatalities and severe injuries, which is already required and collected by OSHA, to confirm accurate reporting. Several researchers have proposed methodologies for identifying underreporting, but they are only viable with the data collected and published under the proposed rule.[13]

Sixth, detailed, case-specific data that is attributable to particular companies will empower states not just as regulators, but also as consumers. Detailed data made public under the proposed rule will empower states to make more informed decisions about which companies to contract with on the basis of their workplace health and safety standards.

Seventh, state health agencies may also benefit from specific data about injuries and illnesses in workplaces. For example, the New Jersey Department of Health's ("NJDOH") Environmental and Occupational Health Surveillance Program reviews multiple data sources, such as laboratory reporting of heavy metals and emergency department hospitalization data, to identify at-risk workers and to characterize the preventable events leading to injury and illness. NJDOH's ultimate objective is to translate its surveillance findings into educational materials to raise awareness and reduce the number and severity of injuries and illnesses among New Jersey workers. Similarly, the Illinois Department of Public Health, the New York Department of Public Health's Occupational Health Surveillance Program, and the Massachusetts Department of Public Health's Occupational Health Surveillance Program rely on certain limited data sets, including the summary information in Form 300A, to develop and implement injury and illness prevention strategies. The States' workplace health and safety programs will be more responsive to potential statewide injuries and illnesses because of the detailed data the proposed rule makes publicly available.

Notably, however, these benefits will only accrue if OSHA collects and publishes such data. Not all states have the resources to create and manage their own databases, and, in any event, it is costlier and more inefficient for individual states to create separate databases. Data from a single jurisdiction is also much less likely to reveal patterns in workplace health and safety. Uniform national data collection efforts, by contrast, will also allow states to benchmark their performance—overall or in specific industries—against peer states in ways that might encourage or promote reforms, interventions, or legislation to address workplace safety issues.

Moreover, even if the States are not able to engage in targeted enforcement now, it is nonetheless important to begin collecting and publishing more detailed data now. Collecting data from the companies annually, at the time that companies are required to record the data, will likely improve data quality, as compared to retroactively compiling historic data about specific injuries, which may also disincentivize timely recording. And when the States implement targeting in the future, having a larger database of historic data on which to "train" targeting algorithms will ensure that these algorithms are more accurate.

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[13] *See, e.g.*, Alison Morantz, *Filing Not Found: Which Injuries Go Unreported to Worker Protection Agencies, and Why?*, U.S. Dep't of Lab. Working Paper (2014), *available at* https://www.dol.gov/sites/dolgov/files/OASP/legacy/files/2013-2014_DOL_Scholars_Paper_Series_Morantz_Chapter.pdf.

D. Researchers Benefit from Publicly Available Injury and Illness Data.

Public access to detailed data will allow researchers to conduct countless studies to expand our understanding of occupational injury and illness causation, prevention, and consequences. For example:

- Researchers in New Jersey at the Center for Public Health Workforce Development at the Rutgers School of Public Health will be able to use data available under the proposed rule to better understand the particular injuries and illnesses that impact New Jersey workers, and to develop better training programs to address them. Moreover, case-specific data will allow them to evaluate the efficacy of state-level and company-level prevention efforts by comparing case rates over time. For example, the Center would investigate changes in the type and volume of injuries after conducting trainings. Similarly, the New Jersey Safe Schools Program at the Rutgers School of Public Health, which provides health and safety surveillance and training for all career and technical education programs in the state, could use case-specific data to better understand the hazards at the public and private worksites where New Jersey students are placed. Among other things, they could examine the number of days lost from work due to disabilities, investigate the causes of common injuries, and glean insights about non-traumatic injuries like chronic back problems and repetitive strain injuries.

- The Illinois Occupational Surveillance Program obtains data from a variety of state sources, counts the numbers and types of work-related illnesses and injuries across sectors and workplaces, and conducts research to determine causes, circumstances, and health and economic consequences of work-related illnesses and injuries. This data is then used to evaluate existing laws and preventive programming, and to drive policies that further protect the workforce. Data made publicly available by OSHA would be a critical source of information about new and emerging hazards that will help fill gaps in the occupational health surveillance system.

- The mission of the University of Maryland School of Medicine's Division of Occupational and Environmental Medicine is to prevent occupational and environmental diseases and related disability through the provision of clinical services, employer consultation, and worker training. Access to detailed injury and illness information from OSHA Forms 300 and 301 would allow researchers to better understand the injuries and illnesses having the greatest impact on Maryland workers and develop better training programs that would address these concerns and improve worker health and safety. With the data in these forms, researchers could evaluate the effectiveness of public health programs by comparing rates of specific injuries and illnesses over time, and conduct research to investigate the causes associated with increases or reductions in injury rates in specific industries.

- Researchers at the City University of New York's Graduate School of Public Health and Health Policy and the Barry Commoner Center for Health and Environment at

Queens College planned to use data collected with Forms 300 and 301 after the 2016 Rule to track specific industries and develop interventions to target specific worker populations. The 2019 Rule prevented those efforts and researchers do not currently have access to the necessary breadth of information, leaving them to rely on alternative, less comprehensive information. The availability of case-specific data under the 2022 NPRM could allow these researchers to conduct more comprehensive research on workplace injuries.

- Finally, a researcher at the University of Minnesota evaluated the effectiveness of Minnesota's Safe Patient Handling Act in reducing injuries to caregivers in nursing homes. Using the summary counts from the 300A logs would not be sufficient for this type of research, as detailed injury data for each case are needed to disentangle confounding factors (e.g., age, gender, job type, and type of injury) that could obscure the effects of the law. Forms 300 and 301 were necessary in order to complete the analysis, but they were voluntarily submitted and difficult to obtain. Making these forms publicly available, as the proposed rule will, could bolster this type of research in the future.

Researchers may also combine Form 300 and 301 data with other datasets, which in turn may help policymakers identify new enforcement protocols or interventions. For instance, researchers could combine case-specific data with data about inspections to measure the marginal deterrent effect of inspections by industry, employer size, and other workplace features. Understanding the true deterrent effect of enforcement activities enables enforcers to optimize limited resources.[14] Similarly, researchers could combine the Form 300 and 301 data with data about establishment union status to measure whether unionization impacts workplace safety.[15] Researchers could also combine this data with data about the productivity of industries, companies, or establishments to measure the relationship between productivity and worker safety. All of these analyses, and countless others, would provide valuable insights with implications for employees, employers, and enforcers, and none are possible without case-specific data.

III. The Proposed Rule Could Be Further Strengthened to Produce Additional Benefits for Employees, Employers, States, and Other Stakeholders.

The proposed rule will greatly expand stakeholders' access to necessary data to evaluate and improve workplace health and safety conditions. As explained above, OSHA has provided a

[14] Previously, scholars who examined the effect of inspections on injuries could only consider large firms, because those were most likely to be included in BLS data sample sampling, which skews results. *See, e.g.*, Wayne B. Gray & John M. Mendeloff, *The Declining Effects of OSHA Inspections on Manufacturing Injuries*, 1979-1998, 58 INDUS. & LAB. REL. REV. 571, 575 (2005) (noting that large establishments are over-represented).

[15] Scholars have long probed the effects of unions on safety but, in the words of one researcher, they remain "elusive" due in part to the paucity of case-specific data. Alison Morantz, *The Elusive Union Safety Effect: Toward a New Empirical Research Agenda*, LERA 61 WORKING PAPER (2009), *available at* https://docplayer.net/226031940-The-elusive-union-safety-effect-toward-a-new-empirical-research-agenda.html.

well-reasoned basis for the rule and for revising certain aspects of the 2019 Rule. Nonetheless, three aspects of the rulemaking merit further consideration.

First, when finalizing this rule, OSHA should provide further information that would help states, regulated parties, and the public better evaluate OSHA's proposal to rescind existing summary data-reporting requirements for all establishments with 250 or more employees. Under the proposed rule, establishments in industries not designated in either Appendix A or B of the proposed rule are not subject to any submission requirements. 87 Fed. Reg. at 18,536. OSHA notes that this will exclude over 2600 employers from reporting requirements. *Id.* This is a change from both current policy, *id.*, and from the 2016 Rule, *id.* at 18,530 (describing the 2016 Rule's requirements). Further explanation in the final rule would allow the public to understand OSHA's reasoning for the change and its potential effects.

OSHA should explain any analysis it has conducted into the effects of rescinding data reporting or surveillance on a worksite and describe data that informed the change, including how many employees are employed in the excluded industries. The States understand that OSHA has "preliminarily determined" that such collection from "lower-hazard" industries "is not a priority for OSHA inspection targeting or compliance assistance activities." *Id.* at 18,536. However, the States are concerned that removing existing reporting requirements for non-designated industries may disincentivize some establishments in those industries from adequate recordkeeping and investing in worker safety. It could also exclude significant injuries and illness from being reported and tracked. As a result, OSHA and the States would have little way of determining whether "lower-hazard" industries have become more hazardous for workers over time. Furthermore, this may affect the States' enforcement and outreach efforts. For example, if States had previously conducted enforcement and outreach in "low hazard" industries, thus keeping risks down, but deprioritize such enforcement based on a lack of reporting, any uptick of illnesses and injuries in those industries, requiring enforcement efforts, may initially go unnoticed by the States. In light of these concerns, the States need additional information regarding OSHA's reasoning in order to determine the proposed rule's impacts with respect to industries not designated in Appendix A or B of the proposed rule.

Second, as OSHA is well aware, the States are concerned about the misclassification of independent contractors.[16] The proposed rule will have many benefits, as detailed *supra*. The States, however, are concerned that it may not capture the full picture of workplace injuries and illness because many workers in designated industries have been misclassified as independent contractors, and the rule does not appear to apply to them.[17] In fact, certain industries designated

[16] *See, e.g.*, Comment of 24 States and 3 municipalities on the "Independent Contractor Status Under the Fair Labor Standards Act," 85 Fed. Reg. 60,600 (Sept. 25, 2020), RIN 1235-AA34, submitted Oct. 26, 2020; Comment of 21 States and State Agencies on the "Independent Contractor Status Under the Fair Labor Standards Act; Withdrawal," 86 Fed. Reg. 14,027 (Mar. 12, 2021), RIN: 1235-AA34, submitted Apr. 12, 2021.

[17] National Employment Law Project, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries* (Oct. 2022), *available at* https://s27147.pcdn.co/wp-

by the 2022 NPRM for reporting have raised particular misclassification concerns.[18] This lack of data regarding independent contractors will not just affect workers and consumers. It will also make it difficult for enforcement authorities and researchers to evaluate the true occupational risks of certain industries, employers, and jobs because a large portion of the workforce is excluded from the data. We therefore encourage OSHA to study the benefits of data collection for all workers, regardless of classification, including those who may be improperly designated as independent contractors.

Finally, the public can only benefit from the tracking and publicizing of workplace injury reporting if it is aware of its existence. Accordingly, OSHA should consider ways to not only allow for public access to the data made available through the rule, but to increase public awareness of the availability of this information. While the proposed rule, commendably, will empower employees to determine the safety of certain workplaces, many may not be aware that such data and resources exist. The States therefore encourage OSHA to evaluate and choose effective avenues for publicizing the availability of the data including, for example, requiring designated industries to post information about the availability of the data within their workplaces, conducting or funding outreach programs through state departments of labor and health, and creating partnerships with non-profit and non-governmental industries for training and outreach.

* * *

The States commend OSHA on the proposed rule, ask the agency to consider strengthening certain aspects of the proposed rule, and urge swift publication and implementation of a final rule in line with the 2022 NPRM.

content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf (detailing the costs of misclassification of employees).

[18] *See, e.g.*, Mark Elrich, *Misclassification in Construction: The Original Gig Economy*, 74 ILR REV. 1202, 1203 (2020), *available at* https://journals.sagepub.com/doi/abs/10.1177/0019793920972321 (reporting that while independent contractors represent only 7 percent of the total national workforce, roughly 20 percent of all independent contractors work in the construction industry); Ratna Sinroja et al, *Misclassification in California: A Snapshot of the Janitorial Services, Construction, and Trucking Industries*, UC Berkeley Labor Center Report (Mar. 2019), *available at* https://laborcenter.berkeley.edu/misclassification-in-california-a-snapshot-of-the-janitorial-services-construction-and-trucking-industries (noting that "[w]hile we do not have a good estimate of exactly how many janitors are misclassified as independent contractors," precisely because of the paucity of data regarding contractors, "the many cases that have been successfully fought through the legal system or complaints with state labor agencies suggest that it is common within the industry.").

Respectfully Submitted,

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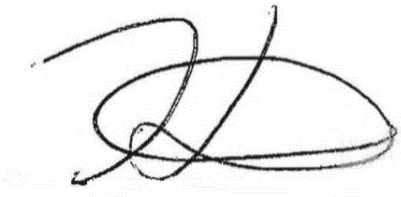

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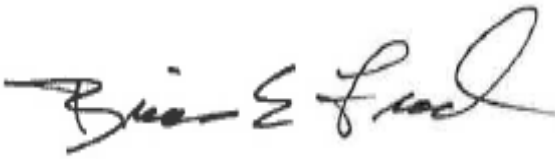

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