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EXPERT ANALYSIS

Osha's New Rule on Tracking and Reporting Workplace Injuries And Illnesses

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On May 11 the Occupational Safety and Health Administration issued a final rule on tracking and reporting workplace injuries and illnesses. The rule is slated to go into effect in two phases, with the first phase taking effect Aug. 10 and the second Jan. 1, 2017.[1]

The new rule requires certain employers to electronically submit injury and illness information maintained on OSHA logs to a publicly accessible website. It also governs how employers are to ensure that employees report tracked workplace injuries or illnesses.

ELECTRONIC RECORDKEEPING

OSHA has been transparent regarding the intent of the new recordkeeping portion of the rule.

David Michaels, assistant secretary of labor for occupational safety and health, has explained the basis for the rule.

"Since high injury rates are a sign of poor management, no employer wants to be seen publicly as operating a dangerous workplace," he said. "Our new reporting requirements will 'nudge' employers to prevent worker injuries and illnesses to demonstrate to investors, job seekers, customers and the public that they operate safe and well-managed facilities."[2]

As most employers are already highly motivated to prevent injuries and illnesses for numerous reasons, this is a curious justification for the rule.

Nevertheless, starting in 2017 certain employer establishments must electronically submit to an OSHA website the injury and illness data contained in their various OSHA logs. Unless they are exempted (as discussed below), employers will be required to track certain information regarding injuries and illnesses in the form of logs mandated by OSHA.

Employers with 250 or more employees must electronically submit the information from the OSHA Form 300A (Summary of Work-Related Injuries and Illnesses), OSHA Form 300 (Log of Work-Related Injuries and Illnesses) and OSHA Form 301 (Injury and Illness Incident Report). Employers that retain between 20 and 249 employees (at any time during the previous calendar year) and are included on an industry list (Appendix A to the revised regulations) must electronically submit the information from the OSHA Form 300A.

Examples of industries on Appendix A include: construction, manufacturing, home furnishing stores, lawn and garden equipment and supply stores, grocery stores, department stores, general freight trucking, warehousing and storage, waste collection, general medical and surgical hospitals, and dry-cleaning and laundry services.

The obligation to upload injury and illness data applies only to employers with 250 or more employees and to employers on the Appendix A list with 20 to 249 employees. Barring notification from OSHA that the submission of electronic data is required, other employers are excluded..

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This reporting system is similar to the regime that existed before this change, under which employers had no obligation to share injury or illness data with OSHA unless they were selected to respond to an annual survey form.[3]

The new regulation revises 29 C.F.R. § 1904.41 regarding when injury/illness data must be shared with OSHA. However, it does not change the threshold requirement in the broader recordkeeping regulation, Section 1904, regarding what entities must keep OSHA logs.

Only an employer currently required to keep logs must electronically upload them if it meets the 250-employee or 20-to-249 employee (plus Appendix A) requirements. Thus, the following entities remain exempt from having to keep OSHA logs:

- Employers that retained 10 or fewer employees at all times during the last calendar year.
- Employers in low-hazard industries, as identified in another appendix to the existing regulation.[4]

However, even those exempt employers would have to submit data electronically if OSHA asked them to do so.

OSHA says it will provide a secure website for the submission of this data. For the first two years — 2017 and 2018 — employers must submit required information by July 1. Beginning in 2019, they must submit the data by March 2.

OSHA intends to post the establishment-specific injury and illness data it collects under this final rule on its website, www.osha.gov. The publication of specific data fields will be restricted by applicable federal law, including the Freedom of Information Act, as well as specific provisions within Section 1904 of the regulations.

OSHA will not post any information that could be used to identify individual employees. Presently, little is known about how it will set up and administer this portion of its website, both as to the collection of the data and its presentation to the public.

REPORTING INJURIES AND ILLNESSES

The new rule does more than just mandate employer uploading of injury and illness data to OSHA's website. It also addresses OSHA's belief that some employer procedures are designed to discourage employees from reporting injuries and illnesses.

In his comments regarding the new rule, assistant labor secretary Michaels reiterated the agency's disapproval of incentive programs that discourage employee reporting, such as programs that make special prizes unavailable to all team members if any member reports an incident.[5]

The basis for this part of the rule is also curious, since most employers go to great lengths to encourage the reporting of injuries and illnesses. However, as part of this larger concern that the employer community is somehow discouraging employees from disclosing workplace accidents and the like, the new rule adds a provision that addresses how employers must ensure proper reporting of injuries and illnesses.

Currently, employers are required to provide "limited" access to injury and illness records to their employees and their representatives. The revised regulation removes the word "limited."

More significantly, employers currently must inform employees on how to report injuries and illnesses, but under the new rule they must also ensure that the procedure for doing so is "reasonable." According to OSHA, a procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness.

In the preamble to the final rule, OSHA addressed the types of employer policies that it deems unreasonable and that can deter reporting. They include disciplinary policies, safety incentive programs and post-accident drug testing policies.

Regarding drug testing, OSHA believes the evidence in the rulemaking record shows that blanket post-injury drug testing policies deter proper reporting of injuries and illnesses. The final rule

does not prohibit employers from using drug testing (or the threat of drug testing) as a form of adverse action against employees who report injuries or illnesses.

"To strike the appropriate balance here, drug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use," the rule says.

OSHA says in the rule's preamble is that it would likely not be reasonable to drug-test an employee who reports a bee sting, a repetitive strain injury or an injury caused by a lack of machine guarding or a machine or tool malfunction.

OSHA added that testing in such situations would deter reporting without contributing to the employer's understanding of why the injury occurred. Nor would it contribute in any other way to workplace safety, the agency says. However, OSHA also explained that an employer need not specifically suspect drug use before testing, although it adds that there should be a "reasonable possibility" that drug use was a contributing factor to the reported injury or illness.

This obviously is news to employers who have other liability concerns and may require blanket post-accident drug testing to ensure they do not negligently retain an employee who was under the influence when an accident occurred, among other reasons.

OSHA's "reasonable possibility" standard also creates the potential for conflict between the agency and an employer regarding what was reasonable in a particular circumstance. Of course, nothing about drug testing is in the actual final rule text. Accordingly, employers should be prepared to address how their particular circumstances may differ from the general observations and data OSHA offers in the rule's preamble.

In addition to being advised as to the procedures for reporting work-related injuries and illnesses, employers must also specifically inform employees that:

- They have the right to report work-related injuries and illnesses.
- Employers are prohibited from discharging or in any manner discriminating against employees for reporting work-related injuries or illnesses.

As of June 10, no employer industry or trade group had challenged the new rule.

However, given the concerns over making injury and illness data publicly available and the rule's specific targeting of post-accident drug testing, a legal challenge seems likely.

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NOTES

[1] 81 Fed. Reg. 29623 (May 12, 2016). The new rule is published in the Federal Register and is available at http://1.usa.gov/295AF0I.

[2] David Sparkman, *New OSHA Electronic Reporting Puts a Target on Employers' Backs,* Material Handling & Logistics (June 6, 2016), http://bit.ly/1r9Ibje.

[3] 29 C.F.R. § 1904.41(a) (2016).

[4] 29 C.F.R. § 1904.1 and § 1904.2 (2016).

[5] *OSHA finalizes electronic recordkeeping rule,* Safety.BLR.com (May 12, 2016), http://bit.ly/293JRSD.

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