

# The OSHA Compliance Data Challenge ? The Next Steps to Meet the Requirement of the Electronic Recordkeeping Rule

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By Matthew Thomas Deffebach | February 21, 2017

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July 1, 2017 is swiftly approaching and companies need to electronically upload information related to injuries and illnesses on OSHA's Injury Tracking Application (ITA) website. The ITA website is scheduled to go live this month (February 2017) and all covered establishments must complete Form 300A by the July 1 deadline. Covered establishments include those with 250 or more employees and those with 20-249 employees that are considered industries with historically high rates of occupational injuries and illnesses. OSHA's intent behind the rule was to increase workplace safety, protect employees from retaliation for reporting incidents, and to make conditions of workplace environments more transparent.

## **Recent Developments in Washington D.C. Have Not Changed the Compliance Obligation**

The President's Executive Order on "Reducing Regulation and Controlling Regulatory Costs," signed on January 30, 2017, is not likely to impact OSHA. The Executive Order mandates that for every new regulation proposed, executive departments and agencies must repeal two regulations. The electronic recordkeeping rule is already law and it is unlikely that OSHA will issue a new rule just to repeal the electronic recordkeeping rule, particularly given that the administration is opposed to new regulations. The Executive Order also has a fiscal cap for 2017 that reduces incremental costs to zero for new proposed regulations and repealed regulations. This is a high standard to achieve and problematic for an agency like OSHA that is currently without a permanent leader.

Jordan Barab, the Deputy Assistant Secretary of OSHA, is currently the interim head of the agency. The Secretary of Labor is charged with appointing the head of OSHA and to-date there is no confirmed Secretary of Labor. The President's nominee, Andrew Pudzer, withdrew his nomination for the Secretary of Labor position and Alexander Acosta is the new nominee. Thus, without a Secretary of Labor to appoint a new head of OSHA, Jordan Barab, who worked with the former head of OSHA under the Obama Administration, Dr. David Michaels, is likely to continue to apply and enforce the rules and regulations implemented under Dr. Michaels's leadership. Even if Acosta is confirmed, there is no timetable for how quickly he will appoint the new head of OSHA.

Furthermore, when President Trump imposed a hiring freeze on federal employees on January 24, 2017, this meant that unless terminated or subject to voluntary resignation, federal employees from the Obama Administration remained at their desks. Thus, those OSHA staff and investigators who worked on the rule and who are now working on the website and inspection schedules will continue to perform their duties. OSHA did recently remove a section on its website justifying the rule, but did not indicate why or otherwise indicate any change to an employer's obligations under the rule. And with the upcoming July 1 compliance date, OSHA employees should be working to integrate the electronic recordkeeping rule into their processes and inspection programs.

## **Immediate Action Items**

Employers must be cautious to delay compliance as potentially problematic aspects of uploading data to OSHA's ITA require potentially months of preparation in advance of the July 1 deadline. Companies need to perform a risk assessment and gap analysis to determine their readiness to meet the compliance deadline. This includes conversations with the relevant staff from IT, legal, compliance, and operations to consider this data management challenge. Most importantly, upload of data to OSHA's ITA potentially places companies at risk for inadvertently exposing protected health information under HIPAA and personally identifiable information under state privacy laws.

For more information, please contact the lawyer listed below.

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