

OSHA Electronic Recordkeeping Rule Creates Significant Reporting Requirements, Potential Enforcement Risks

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OSHA issues long-anticipated amendments to its recordkeeping regulations.

On May 12, the **Occupational Safety and Health Administration (OSHA)** issued its long-anticipated amendments to its recordkeeping regulations.^[1] Most significantly, the revised regulations impose a new obligation that requires many employers to annually submit certain electronic injury and illness data directly to OSHA, which will thereafter become publicly available. The new rule also includes anti-retaliation language that covers the entire scope of employer policies on the reporting of workplace injuries and illnesses.

The annual electronic reporting requirements don't go into effect until January 1, 2017, but the anti-retaliation provisions go into effect much earlier, on August 10, 2016.

Annual Electronic Reporting

The most significant part of the rule is the new electronic reporting requirement. In the past, employers covered by OSHA's recordkeeping regulations collected and maintained injury and illness data internally. Generally, OSHA only gained access to such records as part of an inspection or pursuant to a limited number of specific written requests. Under the new rule, however, covered employers must now provide injury and illness data to OSHA annually. Perhaps most importantly, OSHA intends to make the data publicly available.

The annual electronic reporting requirements apply to three categories of employers:

1. Large employers (i.e., establishments with 250 or more employees that are not exempt from OSHA's recordkeeping rules)
2. "High risk" employers (i.e., establishments with 20-249 employees in certain "high-risk" industries (see [Chart](#) of OSHA's "High Risk" Industries for Electronic Reporting for a list of "high-risk" industries covered by the new rule)
3. Any other employers from which OSHA makes a written request for data

One significant change from the proposed rule is that the reporting requirement for large employers (250+) has been decreased from quarterly submissions to an annual submission. For the purposes of counting employees, all employees working at an establishment^[2] during the previous calendar year (including full-time, part-time, seasonal, or temporary workers) are counted.

The new reporting requirements will be phased in over the next two years as follows:^[3]

	July 1, 2017	July 1, 2018	March 2, 2019 (and every
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			March 2 thereafter)
Non-Exempt Employers with 250+ Employees	2016 OSHA Form 300A Logs due	2017 OSHA Forms 300, 300A, and 301 due	Prior year's OSHA Forms 300, 300A, and 301 due
Employers in "High Risk" Industries with 20-249 Employees	2016 OSHA Form 300A Logs due	2017 OSHA Form 300A Logs due	Prior year's OSHA Form 300A Logs due

Employer Notice Obligations, Procedures, and Anti-Retaliation

Employers already are required to have work-related injury and illness reporting procedures for employees and to inform employees how to report injuries and illnesses, and are prohibited from retaliating against employees for reporting injuries and illnesses under Section 11(c) of the OSH Act. However, the new rule bolsters these requirements in the following ways:

- Employers must now affirmatively inform employees that they have **a right** to report work-related injuries and illnesses **free from retaliation**.
- Employers must ensure that their procedures for reporting work-related injuries and illnesses are **reasonable** and **do not deter or discourage employees from reporting**.
- Section 11(c)'s prohibition on retaliating against employees for reporting work-related injuries or illnesses is now separately codified.

While these changes do not substantively alter an employer's existing responsibilities, they are significant because they provide OSHA with new mechanisms for issuing citations. Previously, an employer could only be cited for failing to have a procedure for reporting workplace injuries and illnesses. Now, OSHA may cite an employer for any such procedures that it believes are not "reasonable" or that it believes discourage employees from reporting. It is expected that OSHA will use the revised regulation as a means to cite employers with the types of safety incentive programs of which OSHA disapproves. See OSHA's [2012 Memorandum on safety incentive programs](#).

Further, OSHA previously did not have a mechanism to pursue whistleblower retaliation claims itself, instead having to rely on an employee to first file a complaint with OSHA within 30 days of the alleged retaliation. Now, OSHA can cite and fine employers directly and demand abatement for alleged retaliation against employees who report workplace injuries and illnesses. The potential impact of these provisions is expansive given that employers may now be cited for failing to comply with the somewhat subjective requirements of the rule.

Employer Concerns

The implications of OSHA's new reporting requirements are significant, as the new rule creates a number of concerns and challenges due to the public disclosure of employer safety data. For one, the OSHA recordkeeping process has always allowed a continuing opportunity to revise injury and illness records with new changes to the reported event. But once the injury and illness data is initially reported and disclosed, it may be difficult for employers to revise this public information. Additionally, the data may be misinterpreted or misrepresented by the media or competitors. Further, employee privacy is a concern. Although OSHA states that it will use software to remove private employee information from the disclosures before posting, the effectiveness of this software remains to be seen. Finally, the cost and resources necessary to implement electronic data collection and maintenance will be significant. OSHA's financial estimates likely ignore the time and effort required to bring an employer into compliance, especially ones without any electronic collection procedures currently in place. Moreover, OSHA is still in the process of developing a data collection system for the voluminous electronic submissions that begin in 2017. There is real doubt as to whether a functioning system will be in place by next year and whether OSHA has the capacity to effectively collect, process, and post the data it receives.

In sum, the new rule has serious implications for employers and creates new burdens. Legal challenges by

employers and employer groups are expected.

Recommendations

Employers subject to OSHA's recordkeeping regulations can take certain steps now to comply with the new rules and limit citation liability:

- Begin to develop a process for collecting OSHA 300A forms (and 300 and 301 forms for large employers) electronically, to the extent that this is not already being done, to assist in meeting the electronic submission deadline.
- Post the newly revised [OSHA poster](#) to ensure compliance with the rule's revised informational requirements.
- Review reporting procedures (and, if applicable, any safety incentive programs) to ensure that such programs are reasonable and do not discourage injury and illness reporting.
- Remind managers of anti-retaliation practices in light of the increased scrutiny employers will face under the revised rule. OSHA will look at programs and reporting procedures more closely now that there is a specific means for citing employers for alleged violations.

We will be following OSHA's enforcement of the new rules closely over the coming months.

[1] See 29 C.F.R. §§ 1904.35, 1904.36, and 1904.41

[2] OSHA defines "establishment" as "a single physical location where business is conducted or where services or industrial operations are performed. For activities where employees do not work at a single physical location, such as construction; transportation; communications, electric, gas, and sanitary services; and similar operations, the establishment is represented by main or branch offices, terminals, stations, etc. that either supervise such activities or are the base from which personnel carry out these activities." See 29 C.F.R. § 1904.46.

[3] Certain fields from OSHA's forms (such as employee name and address) will not have to be submitted.

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