Overview of OSHA Amended Electronic Recordkeeping Rule

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Introduction

The Occupational Safety and Health Administration (OSHA) issued a final amended E-Recordkeeping Rule that will take effect on January 1, 2024. OSHA intends for March 2, 2024, to be the first submission deadline for the latest information required to be submitted under this rule.

Background

Specifically, OSHA is amending its regulation to require establishments with 100 or more employees in certain designated industries to electronically submit information from their OSHA Forms 300 and 301 to OSHA once a year. Establishments with 20 to 249 employees in certain industries will continue to be required to electronically submit information from their OSHA Form 300A annual summary to OSHA once a year. All establishments with 250 or more employees that are required to keep records under OSHA's injury and illness regulation will also continue to be required to electronically submit information from their Form 300A to OSHA on an annual basis.

Although publication was not part of the regulatory requirements of this final rule, OSHA intends to post the collected establishment-specific, case-specific injury and illness information online. OSHA concluded that the bases for the removal of the 300 and 301 data submission requirements, which were previously supported by OSHA in the last update to the E-Recordkeeping Rule under the Trump Administration, are no longer compelling. OSHA states that it will seek to minimize the possibility of the release of information that could reasonably be expected to identify individuals directly, such as employee name, contact information, and name of physician or health care professional by limiting the worker information collected, designing the collection system to provide extra protections for some of the information that employers will be required to submit, withholding certain fields from public disclosure, and using automated software to identify and remove information that could reasonably be expected to identify individuals directly. OSHA's second measure to prevent the release of information that could reasonably be expected to identify individuals directly relates to system design. Specifically, the agency explained that it planned to design its data collection system to provide extra protections for the personal information that establishments would be required to submit under the proposal.

The new rule updates the list of employers considered to be in "high-hazard" industries and creates new obligations for some employers. One positive aspect of the final rule is that the grain, feed, processing and milling industries have been removed from the list of high-hazard industries according to the NAICS codes. As you recall, the grain, feed, processing, and milling industries were considered high hazard in the previous version.

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Previous Versions of the Rule

On May 12, 2016, OSHA published the first version of an electronic submission rule, which required employers (except those exempted from OSHA recordkeeping) with 250 or more employees and establishments with 20 to 249 employees in designated industries to electronically submit information from their OSHA Forms 300, 300A, and 301.

Implementation of that rule was delayed until July 2018, but due to various challenges and rulemaking activities, OSHA Forms 300A and 301 were not submitted to OSHA under that version of the rule. The grain, feed, processing, and milling industries were considered high hazard and were included in Appendix A.

OSHA again revised the rule on January 25, 2019, and eliminated the requirement for electronic submission of OSHA Forms 300 and 301 data by establishments with 250 or more employees. Accordingly, no employer of any size would be required to submit anything more than the OSHA Form 300A.

The most recent version of the rule, as published, will require establishments in certain identified industry sectors with more than 100 employees to electronically submit their OSHA Forms 300A, 300, and 301. The data that is collected from the OSHA Forms 300A, 300, and 301 will be made available to the public, with limitations on the data that is available from the OSHA Form 301. The grain, feed and processing industry was removed from Appendix A in this version of the rule.

Affected Establishments

OSHA's final amended rule on mandatory electronic reporting of occupational injuries-and-illness data updates OSHA recordkeeping includes three key revisions:

1. Establishments with 20 or more employees, in certain high hazard industries, continue to submit Form 300A Annual Summary Information once a year under a modified Appendix A.
2. Establishments with 100 or more employees in highest hazard industries in a new Appendix B submit the Form 300A Annual Summary, Form 300 Log, and Form 301 Incident Report information once a year to OSHA.
3. Establishments with 250 or more employees, not in designated-high hazard industries would no longer be required to electronically submit recordkeeping information to OSHA.

OSHA collects this information to identify establishments with specific hazards and interact directly with those establishments through enforcement and/or outreach activities to address and abate the hazards and improve worker safety and health. OSHA also claims that the data will allow the agency to better analyze industry trends related to specific industries, processes, or hazards. OSHA believes that access to establishment-specific case-specific injury and illness data will allow employers, employees, potential employees, employee representatives,

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customers, potential customers, and the general public to make more informed decisions about safety and health at a given establishment.

According to OSHA, the "employer," is an ***individual establishment*** *(i.e., a single physical location)* where business is conducted or where services or industrial operations are performed. Therefore, if your company has a total of 10 individual facilities – including the main corporate office – and only four of the 10 facilities have more than 20 employees, then those four facilities are required to submit the OSHA 300 form electronically. The company itself is ***not*** required to submit a single 300 form with a compilation of data from the four facilities with more than 20 employees. The 20-employee threshold does include temporary and seasonal workers. As a result, it could vary on a year-to-year basis whether each of the four facilities would need to submit the 300 form.

Electronic Data Submission

OSHA has provided a secure website, known as the Injury Tracking Application (ITA), which offers three options for data submission:

1. Users can manually enter data into a webform.
2. Users can upload a CSV file to process single or multiple establishments at the same time.
3. Users with automated recordkeeping systems can transmit data electronically via an application programming interface (API).

The ITA is accessible at www.osha.gov/injuryreporting/ita/. Employers are required to submit to OSHA the information from their completed Form 300 and Form 301 by March 2 of the calendar year covered by the forms.

Establishments under Federal OSHA jurisdiction can use the ITA Coverage Application to determine if they are required to electronically report their injury and illness information to OSHA. Establishments under State Plan jurisdiction directly contact their State Plan office.

Incident Report Forms will be required to enter the date, physical location, and severity of the injury or illness; details about how the worker was injured and details about how the injury or illness occurred.

OSHA has communicated that it will make most of the data submitted under these new requirements available to the public. OSHA plans to protect worker privacy by taking the following steps:

- Not collecting worker names and addresses.
- Converting birth dates to age and discarding birth dates.
- Reminding employers not to submit information that could directly identify workers, such as names, addresses, telephone numbers, etc.
- Withholding from publication the information on age, gender, date hired, and whether the worker was treated in an emergency room and/or hospitalized overnight as an in-patient.

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- Using automated information technology to detect and remove any remaining information that could directly identify workers.

The data from the OSHA Form 301 that will not be made available to the public includes the data from fields one through nine. Data from Field 1- employee name, Field 2- employee address, Field 6- name of physician or other health care professional, and Field 7-facility name and address if treatment was given away from the worksite will not be collected.

Moreover, OSHA will try to reduce the possibility of the release of information that could be expected to identify individuals directly in multiple ways, including by limiting the worker information collected, designing the collection system to provide extra protections for some of the information that employers will be required to submit, withholding certain fields from public disclosure, and using automated software to identify and remove information that could reasonably be expected to identify individuals directly.

These electronic disclosure requirements also will apply to employers located in State Plan States.

State Recordkeeping Laws

The revised regulations do not preempt state laws. Some states may choose to allow employers in their state to use the federal OSHA data collection website to meet the new reporting obligations. Other states may provide their own data-collection sites.

Employee Anti-Retaliation Provisions

The final rule contains three anti-retaliation protection provisions.

These provisions:

- Require employers to inform employees of their right to report work-related injuries and illnesses free from retaliation.
- Clarify that work-related injury-and-illness reporting methods must be reasonable and should not deter or discourage employees from reporting health and safety incidents.
- Prohibit employers from retaliating against employees for reporting work-related injuries or illnesses.

One way for employers to meet this requirement is by posting the OSHA "It's The Law" worker rights poster. Employers also are required to establish a reporting procedure that does not deter or discourage an employee from reporting work-related injuries and illnesses.

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Important Issues Your Company May Wish to Revisit

1. "**Shaming" Provisions: Publication of injury-and-illness data has the potential to influence investors, consumers, contractors, or prospective employees:** Among other things, OSHA's language accompanying the final rule regarding the public nature of the reporting signals its intent to have an impact on companies' investors, consumers, contractors and prospective employees (among others), reasoning these groups are likely to support companies with strong safety track records. Publication of this information also creates the opportunity for negative impacts to a company's reputation and companies subject to the rule might consider and prepare for any such potential occurrence. **Employers might consider reviewing their Injury/Illness Reporting Policies to evaluate how illnesses and injuries are reported (by whom, if there is standard narrative language, etc.) and consider retraining employees who manage OSHA Injury-and-Illness Records.**

2. **Review of Drug Testing Policies Strongly Recommended.** Section 1904.35(b)(1)(iv) of the OSHA final rule prohibits an employer from discharging or discriminating against an employee for reporting a work-related injury or illness. OSHA's preamble to the final rule interprets the regulation broadly to prohibit any "adverse action that could well dissuade a reasonable employee from reporting a work-related injury or illness." OSHA applies this prohibition to any "blanket post-injury drug-testing policies (that) deter proper reporting," concluding that drug testing alone constitutes an "adverse employment action." OSHA instructs employers to "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." OSHA explains with examples: 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. Types of drug testing include:

   - **Reasonable Suspicion:** This form of testing is used when an employer has a reasonable suspicion or probable cause to believe that an employee is under the influence of drugs in the workplace. This is by far the most discretionary of the drug-testing policies and therefore is subject to the most scrutiny. Employers and supervisors should have their suspicions corroborated by another supervisor to ensure that the employee is not being arbitrarily targeted for drug testing. In addition, employers need to make sure they are not being discriminatory in their drug testing policies, as a testing policy that singles out a certain group of people may be a violation of the Civil Rights Act.

   - **Random Drug Testing:** The OSHA regulation does ***not*** affect an employer's prerogative to perform random drug tests. Employers can continue such policies as they have in the past. Because random drug testing is done on an entirely random basis at unannounced times, it can serve as an effective deterrent to employee drug use. And if all employees are equally subject to random drug tests, there can be no allegations of discrimination.

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- **Post-Incident Testing:** The new OSHA rule affects most directly employers who want to continue drug testing after a workplace incident has taken place. Under the rule, employers will no longer be able to perform blanket post-incident drug tests. Instead, they are only permitted to test employees if employee drug use likely was a contributing factor to the incident, and a drug test would accurately identify the impairment caused by drug use. **Accordingly, employers may need to review and alter their policies, if warranted.**

- **Discrimination.** It is worth reemphasizing that employers should avoid any appearance of singling out any specific class of workers for drug testing. There are legitimate safety situations where it makes sense to test groups of workers, such as those who work with heavy machinery or dangerous chemicals, on a regular basis. However, employers should be aware that, if their drug-testing policies disproportionately affect minority groups, they may face allegations of discrimination – regardless of whether the policy appears neutral on its face. Accordingly, it may be advisable to consult an employment law attorney, licensed in your state.

3. **Safety Incentive Programs**. In its preamble to the final rule, OSHA similarly warns against employer safety "incentive programs" being used as a form of retaliation. This position is consistent with OSHA's past rulings and guidance on employer incentive programs but goes further in widening its prohibition on incentive programs even when they are part of a broader compliance program. The rules explain that "it is a violation of paragraph (b)(1)(iv) for an employer to take adverse action against an employee for reporting a work-related injury or illness, whether or not such adverse action was part of an incentive program." OSHA's interpretation prohibits all programs in which employees are denied a benefit on the basis of any injury or illness report. An example would be a situation in which an entire shift loses a safety bonus as a result of a single employee being injured.

   However, an incentive program ***may*** make a reward contingent upon, for example, whether employees correctly follow legitimate safety rules, rather than whether they reported any injuries or illnesses. OSHA further encourages incentive programs that promote worker participation in safety-related activities, such as identifying hazards or participating in investigations of injuries, incidents, or ''near misses.'' Accordingly, employers should consider OSHA's new interpretation when reassessing their incentive programs to ensure they are offering a benefit or reward based on the reporting of injuries or illnesses. These types of programs could be adjusted to provide benefits on the basis of compliance with safety rules, or for attending safety training or persevering on safety quizzes.

4. **Anti-Retaliation Rules**. In the preamble to the anti-retaliation portion of its final rule, OSHA takes the position that its compliance officers can issue citations to employers who discipline workers for reporting injuries and illnesses when employers believe that no legitimate workplace safety rule has been violated. Accordingly, OSHA intends to

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give its compliance officers, who might have no formal training in employment discrimination law, the authority to issue citations based on perceived retaliation in the workplace.

OSHA's interpretation overturns the agency's longstanding statutory framework for retaliating complaints under Section 11(c) of the Act, under which employees are required to report allegations of retaliation, which then are investigated by specialized investigators. Unlike a Section 11(c) complaint, in which an employee is required to file a retaliation claim with OSHA within 30 days, a compliance officer has six months to issue OSHA citations from the last day that the alleged violation occurred.

Importantly, in its explanation accompanying the final rule, the agency also posits that employer policies requiring an employee to immediately report an injury or be disciplined also may be retaliatory. OSHA states it believes that "immediate-reporting policies" will chill employees from reporting slow-developing or chronic injuries or illnesses, such as musculoskeletal disorders or poisoning from prolonged lead exposure. According to OSHA, to be reasonable, a policy is required to allow for reporting within a reasonable time after the employee realizes he or she has suffered a work-related injury, rather than just immediately following the occurrence of an injury.

5. **OSHA Penalties** OSHA adjusted its civil penalties, effective January 15, 2023, OSHA has the authority to adjust civil penalty amounts on an annual basis based upon the Consumer Price Index. The current penalty for a serious, other than serious, or posting-related requirement is currently $15,625 per violation, the penalty for failure to abate is $15,625 per day beyond the abatement date and the penalty amount for a willful or repeat violation is $156,259 per violation. State Plans are required to adopt maximum penalty levels that are at least as effective as Federal OSHA's.

Conclusion

Employers should consider taking steps to ensure that they are in compliance with the amended Recordkeeping Rule as soon as possible. Proactive steps in the face of this regulatory scrutiny now may allow the employer to avoid costly enforcement and litigation in the future.