Abstract

OSHA’s Final Rule on Tracking Workplace Injuries and Illnesses makes three main changes to current Injury and Illness recordkeeping regulations. Injury and illness data must be electronically submitted annually to OSHA, the data electronically submitted will be publically disclosed, and OSHA’s already existing anti-retaliation policy is strengthened.

Introduction

Since OSHA’s Establishment under the Department of Labor by the Occupational Safety and Health Act in 1970, its mandate has been to “assure safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education, and assistance.” OSHA is constantly updating and reexamining its standards and regulations in response to the ever-changing modern workplace. OSHA’s most recent update is its Final Rule on Tracking Workplace Injuries and Illnesses.

This new regulation makes three main changes to existing regulations: the requirement to electronically submit injury and illness data, the public disclosure of this information, and a strengthening of the existing anti-retaliation policy for employees that report an injury. OSHA claims that this new regulation will have benefits for both the bottom line of businesses and the safety of employees. To understand how this Final Rule impacts employees and businesses, it is important to understand what existing regulations the Final Rule is modifying.

Before OSHA’s Final Rule

Reporting workplace injuries and illnesses

Before the Final Rule, Workplace injury and illness data was required to be kept on three forms (300, 301, 300A) or forms with equivalent information. One of those forms, 300A, which is a summary of annual establishment injury and illness information, was required to be displayed in a visible location in the workplace. Additionally, this data was not publically accessible, and OSHA would only reveal data in very broad strokes, such as injury and illness data for a whole industry.

Anti-retaliation policy and procedure

The OSH Act sets forth a procedure for investigating retaliation complaints and enforcing any violations through a federal lawsuit filed by the Department of Labor Solicitor’s Office. However, OSHA could only respond to a complaint by an employee. If there was no complaint, even if OSHA was aware of a retaliation, there was nothing they could do. Furthermore, while OSHA’s existing regulations required employers to inform employees about how to report occupational injuries and illnesses, there was no explicit requirement that employer’s procedure for reporting work-related injuries and illnesses must be reasonable so as not to deter or discourage employees from reporting.
New Rule Provisions

Electronic filing and public disclosure
OSHA’s Final Rule requires all businesses with 250 or more employees to electronically submit their annual report of injuries and illnesses (Form 300A) for 2016 by July 1, 2017, their Form 300A for 2017 by July 1 2018, and then must submit Form 300A by March 2 for every year thereafter. Establishments with 20-249 employees in specifically mentioned high-risk industries must follow the same guidelines.

The requirement for electronic submission does two things at once, it removes the ability of employers to maintain and submit “equivalent forms”, and it provides OSHA with access to this information, which it then may publically disclose. By publically disclosing businesses’ injury and illness data OSHA intends to “nudge” them towards a greater focus on workplace safety.

Changes to Anti-Retaliation Policy
In a preliminary hearing on the tracking of workplace injuries and illnesses, many commenters brought up the concern that mandatory electronic filing carried the risk that employers would simply choose to underreport injuries or put pressure on their employee to discourage them from reporting. Commenters noted that this practice exists today, without electronic filing. In order to address this concern and shore up any weakness in the proposed rule, the Final Rule updates and strengthens OSHA’s already existing anti-retaliation language. This amendment requires employers to inform their employees about their right to report injuries and illnesses without the fear of retaliation. It also increases the burden on employers by explicitly stating that an employer’s work-related injury and illness reporting procedure “must be reasonable, and not deter or discourage employees from reporting”. The Final Rule also reiterates the existing prohibition on retaliating against employees for reporting work-related injuries and illnesses. The final element of retaliation protection included in the final rule is a clarification of employee’s rights to access injury and illness records for their place of work.

Update: This rule was delayed multiple times due to court injunctions, this element of the rule was ultimately put into effect December 1, 2016.

Beyond the Rule
This final rule has not been without controversy. Many businesses have expressed concerns about their publicly accessible injury and illness data being mishandled or intentionally manipulated in order to damage their business’s image. Some have gone a step further, questioning the legality and constitutionality of the Final Rule. In these claims, many have cited potential violations of the 1st and 4th amendments, both of which have been dismissed as not applicable to the type of data being collected. However, a few concerns remain. Perhaps the most risk-prone aspect of the Final Rule is the potential that it may lead to under reporting of workplace injuries and illnesses. This concern is based on the assumption that some businesses would rather risk underreporting their injury and illness data than allow the true data to be publically revealed. The anti-retaliation provision of this Final Rule helps provide some protection against this potential effect of underreporting. Strengthening the anti-retaliation provision forces employers to let their employees know they cannot be
punished for reporting an injury or illness to OSHA, thus increasing the risk of underreporting to OSHA.

### How employers can prepare

Employers can take some simple steps in order to prepare for the Final Rule, neutralizing many of the potential difficulties that the regulation may present. Aside from ensuring that all establishments follow OSHA standards (fewer injuries is always a good thing!), the first and most important step a business can take is to review its injury and illness reporting protocol. Employers should be sure that any work-related injuries and illnesses are reported promptly and accurately above all.

Employers should also check to ensure that hiring procedures include OSHA’s assurance against retaliation, and this assurance should also be displayed in a prominent location. Finally, all employers should review any safety incentive programs that are active and confirm that they cannot be alleged to deter or discourage accurate and prompt reporting of work-related illness and injury.

Despite presenting an obstacle for businesses that are used to using equivalent forms or have safety incentive programs in place, with a few minor adjustments any business will be able to adapt to the new regulations present in the Final Rule.

### Bibliography

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