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OSHA Makes Sweeping Changes To Its Injury and Illness Reporting Rule – What This Means for Employers

Most employers traditionally have had little to no interaction with the Occupational Safety and Health Administration (OSHA), the federal agency tasked with overseeing workplace safety. Unless they were inspected by OSHA—and the 35,820 inspections conducted in FY 2015 pales in comparison to the tens of millions of employers across the country—most businesses, particularly smaller businesses, may have gone for many years without interacting with the agency. But that is about to change.

Currently, most employers other than those in partially-exempt industries are required to maintain injury and illness reporting records on a log (OSHA Form 300), with supporting documentation (OSHA Form 301, or other equivalent document such as workers compensation records). Each employer then summarizes that information each year onto OSHA Form 300A, which the employer then posts at the workplace from February 1 to April 30. Other than serious injuries such as amputations, fatalities, or accidents requiring hospitalization, which require more immediate reporting, employers have not been required to submit injury and illness data to OSHA. Now, however, many businesses will have to submit injury and illness information periodically to OSHA electronically. *Not only that, but OSHA also will post this information online.*

The reporting changes affect businesses depending on their size and classification:

- Businesses with 250 or more employees. These businesses will have to submit the annual summary form 300A electronically by July 1, 2017; submit the Forms 300, 301, and 300A electronically by July 1, 2018; and then submit Forms 300, 301, and 300A by March 2 annually thereafter.
- Businesses with 20-249 employees in "high-hazard" industries. OSHA has compiled a long list of high-hazard industries, including but not limited to hospitals, nursing homes, long-term care facilities, agriculture, utilities, construction, manufacturing, grocery stores, department stores, transportation companies, that must also submit information electronically if they have 20-249 employees, albeit less information than larger businesses. These businesses need only submit Form 300A by July 1, 2017 and July 1, 2018, and then continue submission of Form 300A each year by March 2 thereafter.

In determining business size, the final rule states: "each individual employed in the establishment at any time during the calendar year counts as one employee, including full-time, part-time, seasonal, and temporary workers."

OSHA claims that Personally Identifiable Information (PII) will be removed before the data it receives is released on its web site, but OSHA's stated reliance on software to perform this function has raised concerns with employers and privacy advocates alike. Also, it is unclear as to what form OSHA's online publication will take, and how third parties may seek to utilize this information.

The above rule revisions represent a sea change in employers' interaction with OSHA regarding injury and illness reporting. But OSHA did not stop there. OSHA also published changes in its final rule, effective August 10, 2016, that affect all employers, regardless of size:

- Employers must establish a "reasonable" procedure for employees to report work-related injuries and illnesses, and inform employees of that procedure. The rule states that "[a] procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness."
- Employers must inform employees of their right to report work-related injuries and illnesses free from retaliation. OSHA has issued a Fact Sheet stating this obligation may be met by posting the "OSHA Job Safety and Health — It's The Law" poster from April 2015 or later.
- The rule also adds a provision prohibiting discrimination against an employee for reporting a work-related injury, files a safety or health complaint, or who asks to see the employer's injury and illness logs.

These provisions have raised additional concerns for employers. The rule regarding "reasonable" procedures is targeted at employers' safety incentive plans. If an employer has a safety incentive plan wherein employees get a bonus, or days off, or an award, if the employee, department, or company has a certain number of days without injury—so the theory goes—employees may be hesitant to report injuries and illnesses. It is precisely these kind of incentive plans the new rule intends to eliminate. In addition, Section 11(c) of the Occupational Safety and Health Act, which has certain requirements before OSHA can initiate enforcement action against an employer in federal district court, has been the exclusive provision for employees to make complaints about retaliation for exercising their rights under the Act. To the extent that OSHA now intends to issue citations against employers under a different process – and even if an individual employee has not alleged or filed a Section 11(c) retaliation complaint – this will be another sea change in enforcement.

The bottom line is this: employers with 20 or more employees in "high-hazard" industries, and with 250 or more employees in all industries, will have to report their injury and illness information electronically by July 1, 2017, which will be made available to the public in some form with personally identifiable information about employees removed. And, all employers, regardless of size, should review their handbooks, safety incentive plans, and incident reporting policies to ensure they provide a "reasonable procedure for employees to report work-related injuries and illnesses."

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