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OSHA Rulemaking Increases Reporting Obligations

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BEGINNING IN 2017, EMPLOYERS WILL BE REQUIRED TO AFFIRMATIVELY SUBMIT TO OSHA WHATEVER INJURY/ILLNESS INFORMATION AND FORMS THEY WERE ALREADY REQUIRED TO COMPILE.

In a recent rulemaking titled "Improve Tracking of Workplace Injuries and Illnesses," 81 Fed. Reg. 29,624 (May 12, 2016) (Final Rule), the Occupational Safety and Health Administration (OSHA) introduced new mandatory reporting obligations for certain employers and increased its scrutiny of potentially discriminatory or retaliatory policies and practices that may discourage reporting by employees of injuries or illnesses. OSHA emphasized that employers will not have to collect or maintain any new or additional data as a result of the Final Rule but will have to affirmatively submit data that previously had to be submitted only if requested. The Final Rule amends various subparts of 29 C.F.R. parts 1904 and 1902.[1]

What to Submit

Currently, most employers are required to keep records of workplace injuries and illnesses on one or more of three forms: Form 300 (the injury and illness log), Form 301 (injury and illness reports for each case) and Form 300A (the annual summary of work-related injuries and illnesses). Employers are required to post the injury/illness summary, Form 300A, once per year for employees to view. None of the forms must be affirmatively sent to OSHA, although OSHA may request such information (and forms) during a site inspection or through its survey process, known as the OSHA Data Initiative (ODI). Until now, the information only had to be submitted to OSHA if OSHA formally requested it, and, in general, it was used only for either enforcement purposes (if obtained during a site inspection) or for OSHA's internal analysis of injury/illness rates, trends, etc. if obtained via the ODI. That is about to change.

Beginning in 2017, employers will be required to affirmatively submit to OSHA whatever injury/illness information and forms they were already required to compile.[2] The Final Rule does not create additional requirements for the compilation of data, but only the requirement to affirmatively submit it on an annual basis.[3] Such submissions must also be made *electronically*.

The requirements of the Final Rule will be phased in over a three-year period, from 2017 through 2019, and will vary somewhat, depending on the size and nature of the employer. Once OSHA has compiled three years of data, it plans to conduct a "retrospective review" to determine if any changes to the Final Rule may be warranted. Note that employers currently exempt from OSHA reporting and recordkeeping will retain their exemptions.

In submitting the required information, employers are instructed not to submit information that could be used to personally identify the affected employees, such as the name and address of the employee, the name of the physician or other health care professional, or the name and address of any off-site location (hospital, doctor's office, etc.) where treatment was administered. The revised regulation directs employers to omit information from certain specified columns or fields on the various forms prior to submission.

A controversial element of the Final Rule is that the information OSHA receives will be made publicly available on a searchable online database. Many commenters objected to this, claiming, among other things, that those reading the "raw data" will misinterpret it or simply not be able to understand it without any context about the circumstances of injuries or illnesses, the level of commitment to worker safety by any particular employer or its dedication of resources, etc. OSHA rejected all such claims.

When to Submit

Under the Final Rule, employers will be required to submit data for the first time in July 2017. The data will be for calendar year 2016. As shown below, the deadline for the first two years of implementation of the Final Rule is *July 1* — but changes to *March 2* in the third year, 2019, and stays at March 2 each year thereafter. Slightly more than half of the U.S. states and territories have their own state-level versions of OSHA. OSHA has determined that these so-called "state plan states" must, within six months of publication of the Final Rule in the *Federal Register*, promulgate requirements "essentially identical" to those in 29 C.F.R. § 1904 (Recording and Reporting Occupational Injuries and Illnesses).

PHASED-IN SUBMISSION DEADLINES UNDER THE FINAL RULE

Employers with 250 or more employees:

By July 1, 2017 – Submit Form 300A
By July 1, 2018 – Submit Forms 300, 300A and 301
By March 2, 2019 (and every March 2 thereafter) – Submit Forms 300, 300A and 301

Employers with more than 20 but fewer than 250 employees.[4]

By July 1, 2017 – Submit Form 300A
By July 1, 2018 – Submit Form 300A
By March 2, 2019 (and every March 2 thereafter) – Submit Form 300A

Employee Involvement

A final, but significant, aspect of the Final Rule is that it requires employers to inform employees of their right to report injuries and illnesses and prohibits discrimination against employees who do report injuries and illnesses. This may not seem new, but OSHA appears poised to put renewed emphasis on this area and possibly increase its enforcement efforts. OSHA has expressed concern that employees may be intentionally or inadvertently discouraged from or, in some cases, disciplined for reporting injuries and illnesses. For example, OSHA generally discourages safety-performance-based incentive policies. These plans often offer "rewards" (such as a company picnic or a monetary bonus) for extended periods of time with no reported injuries or illnesses. The concern is that an injured worker will not want to be responsible for nullifying the reward for himself, or for his fellow workers, and will therefore not report an injury or illness. *Note that, unlike the 2017 implementation for the new reporting obligations, the revisions relating to employee involvement take effect on August 10, 2016.*

OSHA also used the preamble to the Final Rule to caution employers about "blanket" post-injury drug-testing policies. The Final Rule does not prohibit drug-testing policies, but language in the preamble cautions that any such policy must be very narrowly tailored and there must be a reasonable possibility that drug use by the reporting employee was a contributing factor to the injury. OSHA states that such policies should be limited to situations in which the employee's drug use is likely to have contributed to the incident and for which the drug test can accurately identify impairment caused by drug use. For example, OSHA would likely not consider drug testing reasonable following an injury caused by lack of machine guarding or a tool malfunction. Also, a test that merely indicates the presence of drugs in an employee's system, or "recent" drug use, and that does not necessarily identify an impairment that resulted from the drug use may run afoul of the Final Rule. OSHA does make clear, however, that drug or alcohol testing that is required to comply with state or federal law (for example, testing of commercial drivers under Department of Transportation regulations) will not violate the Final Rule because its motives are not retaliatory.

With little more than the (unenforceable) guidance provided by the preamble to the Final Rule, it is difficult to predict at this early stage how OSHA will respond to issues relating to drug-testing policies. However, the treatment of this issue in the preamble would suggest that OSHA will take a strict view of any such policies. Going forward, employers are cautioned to consider very carefully how drug-testing policies are crafted and implemented.

Endnotes

1. Subparts affected by the Final Rule include §§1904.35, 1904.36, 1904.41 and 1902.7.

2. Note that, for the first year only, employers will only be required to submit Form 300A, the summary of injuries and illnesses.

3. In its *proposed* rule, OSHA anticipated that employers would have to submit information on a quarterly basis. However, after considering public comment, only annual submission will be required under the Final Rule.

4. Applies to certain designated industries as set forth in Appendix A to Subpart E of 29 C.F.R. § 1904.