Insight

IN-DEPTH DISCUSSION

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OSHA's Final Rule on Electronic Tracking of Workplace Injuries and Illnesses

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In keeping with Assistant Secretary of Labor Dr. David Michaels' promise to "shame" employers into compliance, on May 12, 2016, the Occupational Safety and Health Administration (OSHA) published its final rule on electronic reporting of workplace injuries and illnesses.[1] Under this rule, OSHA will be publishing employer injury and illness records on the internet without any explanation of the facts and circumstances of the particular cases involved. Further, OSHA has changed the requirements for directing employees on reporting injuries and illnesses and assumed new authority to prosecute alleged retaliation against employees for reporting injuries and illnesses. Finally, OSHA takes the position that to ensure injury and illness reporting, employers must notify employees of their rights, and the agency must be able to police any program that might discourage reporting, such as employer safety incentive programs.

What Does the Rule Require?

Electronic Reporting

The new rule provisions on reporting, which take effect on January 1, 2017, require various employers to submit injury and illness data electronically. OSHA is requiring each and every establishment (i.e., each separate workplace) with 250 or more employees in industries covered by the recordkeeping regulation to submit information from their 2016 injury and illness recordkeeping Form 300A by July 1, 2017. The following year, these employers are required to submit information from all 2017 forms (300A, 300, and 301) by July 1, 2018. Beginning in 2019 and for every year thereafter, the information must be submitted by March 2. For those employers who utilize an alternative to the OSHA Form 301, such as a workers' compensation first report of injury, as expressly allowed by the existing rules, these changes will in essence require that the employer also complete the OSHA Form 301.

1 OSHA, *Improve Tracking of Workplace Injuries and Illnesses*, 81 Fed. Reg. 29623 -29694 (May 12, 2016).

Establishments with 20-249 employees in specified "high-risk industries" – identified on a specific list and including all employers in the agriculture, utilities, construction, and manufacturing industries – must submit their Form 300A by July 1 in 2017 and 2018, and by March 2 every year thereafter. Because the information is kept and must be submitted by each establishment, many companies will be required to submit thousands of reports every year.

Those employers with establishments that are not required to submit records yearly may still be required to submit information upon OSHA's direction. OSHA intends to provide notification of these data collections through direct mailings, publication in the *Federal Register,* and publication on its website and other notices. It remains to be seen whether these data collections will be part of inspection programs like the former Site Specific Targeting (SST) program.

Employee Involvement

The rule also changes employer obligations for ensuring employees report all work-related injuries and illnesses. Effective 90 days after publication of the rule, on August 10, 2016, employers must establish "a reasonable procedure" for employees to report work-related injuries and illnesses promptly and accurately. The rule does not specify whether this procedure must be in writing, but for practical purposes of proving the existence of the procedure, employers will need to do so. In addition, employers must keep in mind that OSHA is presently litigating a case against U.S. Steel asserting that any program requiring reporting sooner than seven days after the injury or illness is illegal because it would discourage reporting.

As set forth in the new rule, no employer procedure can deter or discourage a reasonable employee from accurately reporting a workplace injury or illness. In its explanation of the rule, OSHA expects this provision will allow it to regulate employer safety incentive programs, which the agency believes interfere with reporting injuries and illnesses.

After establishing the procedure for reporting work-related injuries and illnesses, employers must inform each employee about it. OSHA does not formally call this training or an educational program, but it is clear an employer will need to be able to prove its employees received the information. Specifically, the employer must tell all employees: (A) they have the right to report work-related injuries and illnesses; and (B) a company is prohibited from discharging or in any manner discriminating against employees for reporting work-related injuries or illnesses.

Anti-Retaliation Protections

The new rule also expressly prohibits retaliation for reporting a work-related injury or illness. In a new section of regulations, OSHA sets itself up as the arbiter of retaliation through citation enforcement for any employee who files a safety and health complaint, asks for access to the part 1904 injury and illness records, or exercises any rights afforded by the Occupational Safety and Health Act (OSH Act).

Why is the Rule Problematic?

The Rule is Inconsistent with the OSH Act

Nowhere in the OSH Act has Congress authorized OSHA to publicize establishment-specific injury and illness records outside of the employer's own workplace. Although Congress gave the agency limited authority to create reporting requirements, for 40 years such information was provided to OSHA and the employer's own

employees only; it was never disseminated to the public. In the proposed rulemaking record, OSHA expressly acknowledged the Confidential Information Protection and Statistical Efficiency Act of 2002[2] that prohibits the Bureau of Labor Statistics (BLS) from releasing establishment-specific data to the general public. Although the law is in fact applicable only to the BLS, the intent of the law is expressly stated to protect the confidentiality of the information OSHA now proposes to disclose. OSHA does not explain how its release of the information is consistent with the congressional mandate expressed in the law. In other actions, OSHA has argued that this information is confidential and should not be disclosed.[3] Although in at least one case OSHA was ordered to disclose the Lost Work Day Illness and Injury (LWDII) rates, the court made no findings regarding disclosure of the actual numbers of cases in distinct categories or the actual number of hours worked, much less specific information on individual injury and illness cases. OSHA asserted that all items were confidential. The new final rule is an open invitation for mischaracterization and misuse of the records in ways Congress never intended.

OSHA is Eliminating Use of Equivalent Forms

OSHA's existing injury and illness recordkeeping rules allow employers to use forms equivalent to the Form 300, Form 301, and Form 300A, so long as same information is recorded.[4] Many employers utilize equivalent forms – particularly insurance and accident investigation forms – in place of the Form 301. In requiring electronic reporting in a particular software format, OSHA is mandating the use of a specific form and eliminating the widespread use of equivalent forms by employers. This change has not been identified or evaluated (benefits, or lack thereof) under the Paperwork Reduction Act provisions applicable to this rulemaking. The incremental benefit (if any) of this rule is significantly outweighed by the increased paperwork duplication created by the use of mandatory forms and elimination of equivalent forms.

The Burden of Electronic Submission

OSHA's rule requires employers to adopt an electronic recordkeeping system or to transfer all paper records to electronic format for submission. There is no option for a paper submission for large or small employers. OSHA previously acknowledged that 30% of the establishments responding to the 2010 recordkeeping survey did not submit data electronically.[5] By way of explanation, OSHA noted, "for some of the establishments…it is difficult to submit data electronically. Most agencies currently allow non-electronic filing of information, and some businesses continue to use this option, despite strong encouragement by agencies to file electronically."[6] That recognition is missing in the final rule.

OSHA further failed to explain how it will establish and maintain a confidential and reliable means of electronic submission by employers. The U.S. government famously failed to implement reliable website access for the Affordable Care Act when that was a major policy initiative with full funding. OSHA has received no additional funding or resources for implementing this new rule.

2 Pub. Law 107-347 (Dec. 17, 2002).

3 *See, e.g., New York Times Co. v. U.S. Dept. of Labor*, 340 F.Supp.2d 394 (S.D.N.Y. 2004).

4 C.F.R. §§ 1904.29(a), 1904.29(b)(4).

5 78 Fed. Reg. 67254.

6 *Id.* at 67273.

OSHA is Likely Discouraging Reporting and Recording

Many employers have expressed a legitimate concern that the new rule may discourage recording of cases. Knowing they will be scrutinized on this data by the agency, the public, potential customers, and competitors, and in order to protect their reputation, employers will likely be conservative in analyzing whether to record each and every case in their logs. Putting aside cases involving failure to record covered cases, the inescapable fact is that questionable cases might not be recorded. Further, knowing the impact of their injuries on their employers' ability to secure future work, employees may be incentivized by OSHA's new rule not to report cases to their employer.

The rule might also motivate employees not to report injuries and illnesses in order to protect their own privacy. Employees will recognize that their case will be reported on the internet, and even without their name appearing on OSHA's website, in small towns across America, their neighbors and co-workers will know to whom the entry refers. The overall effect of these changes will be to decrease (not increase) the amount of information on injuries and illnesses available to review and effectively create a safer workplace.

The "Supplemental" Amending of the Whistleblower Provisions

Although not included in OSHA's August 2014 proposed rulemaking, OSHA published a supplemental notice proposing to amend the rule to include a direct prohibition on retaliation. Section 11(c) of the OSH Act sets forth a specific procedure for the investigation of retaliation complaints with a procedure for enforcement through a federal lawsuit filed by the Department of Labor Solicitor's Office. However, section 11(c) does not provide for OSHA to establish a separate enforcement scheme where citations and penalties can be issued, nor does it allow OSHA to proceed without a complaint from an employee. Further, because the proposed rulemaking did not include any regulatory text or analysis of the rulemaking, there is a strong argument that this provision in the final rule has not been enacted properly under the OSHA rulemaking requirements.

Conclusion and Employer Actions

Although there are concerns about the new rule and its enactment will likely result in legal challenges, it is, for the time being, an official and final rule, with its requirements for procedures, employee information, and prohibition on retaliation becoming enforceable on August 10, 2016. Accordingly, employers should consider the following actions:

- Review and revise procedure for employees to report work-related injuries and illnesses promptly and accurately;
- Ensure procedures include OSHA's notice of the right to report and the assurance against retaliation;
- Review and revise how the procedure is communicated to employees and update that communication for any revised procedure; and
- Review all safety incentive programs to ensure they will not be alleged to deter or discourage a reasonable employee from accurately reporting a workplace injury or illness.

Littler Mendelson's Workplace Safety and Health ractice Group will continue to monitor developments under this rule and provide timely updates.