

PUBLICATION

OSHA's New Recordkeeping Rule

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On Wednesday, May 11, 2016, the U.S. Occupational Safety and Health Administration (OSHA) finalized its controversial workplace injury and illness reporting rules. The new requirements are effective August 10, 2016, with phased-in data submissions beginning in 2017. So why all the fuss about a rule that's been around since 1971? Well, under the new rule, all employers who are covered by the recordkeeping regulation and who have 250 or more employees must electronically submit their recordkeeping forms to OSHA. But OSHA didn't stop there ... those electronic records of workplace injuries and illnesses will now be posted on OSHA's website for all to see and review.

Previously, OSHA has obtained employers' records primarily in two ways: at the beginning of an inspection or upon request by OSHA (or NIOSH). When the rule was initially proposed and subsequently finalized in 1971, the internet didn't exist. One of the stated purposes of the (then) new rule was to educate employers about workplace hazards (whether related to a violative condition or not), and to inform employees about their workplaces. Providing "big data" to the government – let alone the public – was not contemplated. Significantly, OSHA requires that injuries and illnesses meeting the applicable criteria be recorded even when, for example, an employee is injured as a result of horseplay.

OSHA touts its revised rule as a win for employees who will be able to research which organizations take health and safety seriously. Employers see this as a way for the agency to publically shame them for workplace injuries and illnesses. Information on workplace injuries and illnesses, now publically available for review, does not necessarily correlate with whether the employer has a good safety program. Workplace accidents happen despite well-documented policies, well-implemented safety protocols and well-trained employees. The newly published information will be a treasure trove for the plaintiff's bar in areas such as workers' compensation, personal injury, premises liability and product liability litigation.

Smaller businesses with 20 – 249 employees in certain industries (such as agriculture, forestry, construction and manufacturing) have a lesser burden; they are required to electronically submit information from their annual summaries. In keeping with OSHA's focus on preventing retaliation against employees who report injuries and illnesses ensure that the reporting done by employers is "accurate and complete," the final rule specifically bars employers from retaliating against employees and mandates that employers have a reasonable procedure for employees to report work-related injuries and illnesses without the fear of retaliation.

Employer takeaways: Based on the size of your company and your industry, review the new rule for applicability and be aware of the phased-in requirement to electronically report injuries and illnesses. Be ready for increased publicity and scrutiny for all recordable work-related injuries or illnesses and for the likelihood that these statistics will be used, regardless of relevancy, in pending litigation. Review and update, if necessary, your policies and procedures for reporting workplace injuries.