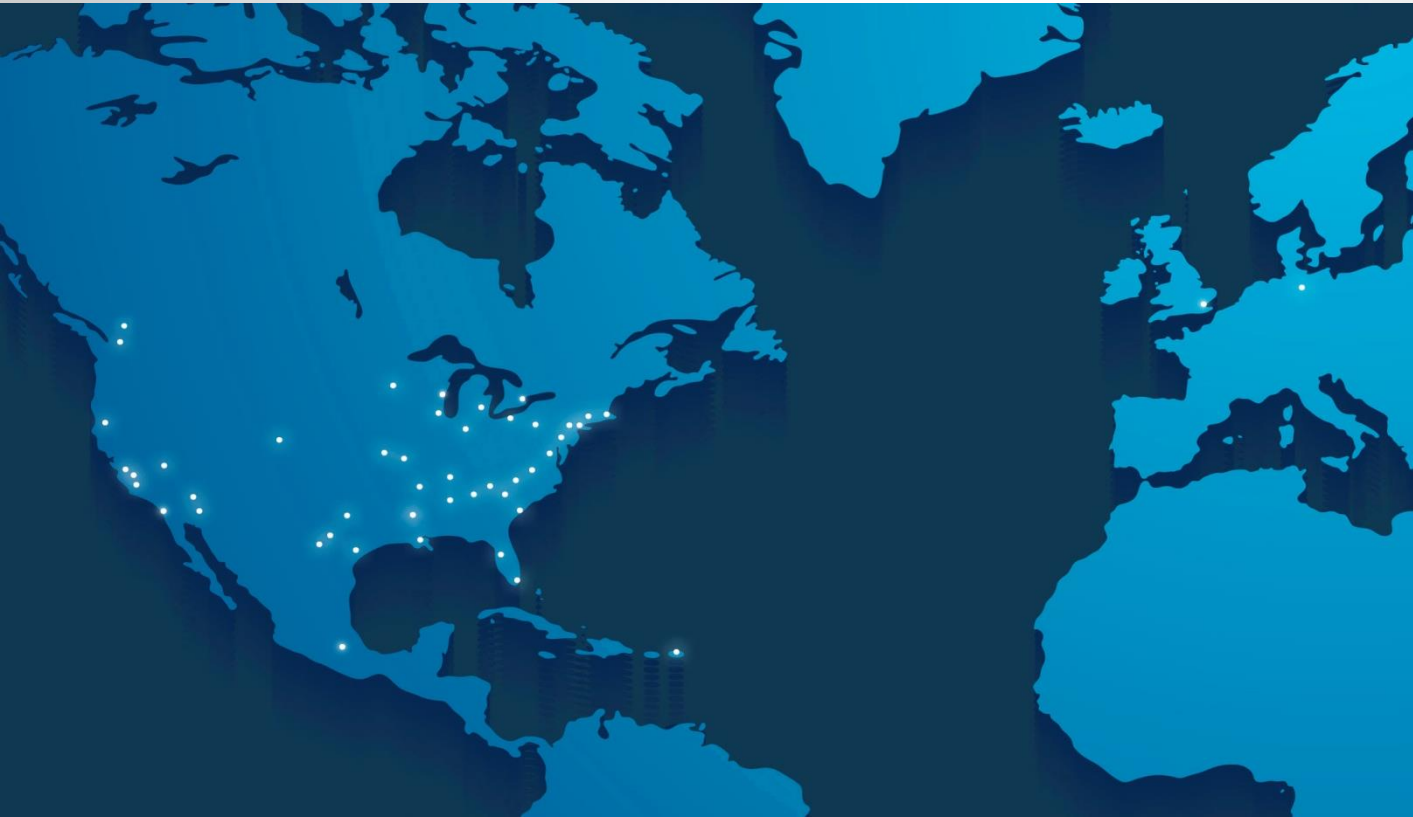


OSHA's New Electronic Recordkeeping Requirements

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For: The Pulp and Paper Safety Association



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New Regulation

- “Improve Tracking of Workplace Injuries and Illnesses”
- On May 12, 2016, OSHA amended its Recordkeeping regulation:
 - To require some employers to submit injury and illness records electronically to OSHA annually
 - To include explicit anti-retaliation provisions

Current Regulation

- Submit 300 logs, 300A, 301 reports to OSHA when requested
 - On-site Inspection
 - BLS Survey



New Regulation

- Establishments with 250+ employees must annually submit
 - 300 Log
 - 301 Forms
 - 300A Summary
- Establishments with 20-249 employees in certain industries must annually submit
 - 300A Summary



Industries Covered for 300As

NAICS	Industry
11	Agriculture, forestry, fishing and hunting.
22	Utilities.
23	Construction.
31-33	Manufacturing.
42	Wholesale trade.
4413	Automotive parts, accessories, and tire stores.
4421	Furniture stores.
4422	Home furnishings stores.
4441	Building material and supplies dealers.
4442	Lawn and garden equipment and supplies stores.
4451	Grocery stores.
4452	Specialty food stores.
4521	Department stores.
4529	Other general merchandise stores.
4533	Used merchandise stores.
4542	Vending machine operators.
4543	Direct selling establishments.
4811	Scheduled air transportation.
4841	General freight trucking.
4842	Specialized freight trucking.
4851	Urban transit systems.
4852	Interurban and rural bus transportation.
4853	Taxi and limousine service.
4854	School and employee bus transportation.
4855	Charter bus industry.
4859	Other transit and ground passenger transportation.
4871	Scenic and sightseeing transportation, land.
4881	Support activities for air transportation.
4882	Support activities for rail transportation.
4883	Support activities for water transportation.
4884	Support activities for road transportation.
4889	Other support activities for transportation.
4911	Postal service.
4921	Couriers and express delivery services.
4922	Local messengers and local delivery.
4931	Warehousing and storage.
5152	Cable and other subscription programming.
5311	Lessors of real estate.
5321	Automotive equipment rental and leasing.
5322	Consumer goods rental.
5323	General rental centers.
5617	Services to buildings and dwellings.
5621	Waste collection.
5622	Waste treatment and disposal.
5629	Remediation and other waste management services.
6219	Other ambulatory health care services.

Triggered by Establishment Size

- Electronic submission requirements are on establishment basis
- Electronic submission requirements are **NOT** triggered by size of entire company
- Company with multiple establishments may have different reporting requirements depending on the size of each establishment

What is an “Establishment”?

- A single physical location where business is conducted or services provided
- For mobile crews – main or branch offices, terminals, stations that either supervise work activities or are the “base” for employees
- Must include full-time, part-time, seasonal, and temporary employees from previous calendar year

What Information Must Be Submitted?

- Employer submits all information with the following redactions:
 - 300 Logs – employee names
 - 301 Incident reports
 - Employee name/address
 - Treating health care professional's name
 - Name and address of treating facility
 - 300As must be submitted in their entirety

How Will Information Be Submitted?

- No specifics on reporting system provided in final rule
 - System may enable employers to transmit data electronically instead of completing online forms
 - OSHA intends to make system compatible for 301-equivalent forms
- OSHA will implement a system that allows, but does not require, updates
- The corporate office may submit information on behalf of establishments covered by rule

Why the Redactions?

- OSHA will publish the electronic data on publicly-available website.
- OSHA may also provide reporting and analytical tools from submitted data.
- OSHA will not publish employee names/personally-identifiable information

How Might the Public Use the Information?

- **Host employers:** Use for bid selections
- **Employees:** May access injury and illness information without requesting from employer
- **Unions:** May use to organize and in bargaining
- **Plaintiffs' attorneys:** May use to establish “gross negligence” or recklessness to overcome workers’ compensation bar

How Might OSHA Use the Information?

- Prioritize to perform more inspections at worksites with high incident rates or certain types of injuries
- Cite as alleged willful violation based on reports of similar accidents occurring at multiple locations

This is a potential game-changer from an enforcement perspective.

Filing Dates

Submission year	Establishments with 250 or more employees	Establishments with 20-249 employees	Submission deadline
2017	Form 300A	Form 300A	July 1, 2017
2018	Forms 300A, 300, 301	Form 300A	July 1, 2018

- Beginning in 2019, reports due on March 2 of each year

Anti-Retaliation Provisions



Current Anti-Retaliation Provisions

■ Recordkeeping Rule

- Record injury or illness within 7 days.
- Employee must be able to report an injury or illness promptly.

■ Section 11(c) of the OSH Act

- Prohibits retaliation for injury reporting.
- Employee has 30 days to file a complaint.
- No right to a *de novo* hearing before an ALJ.
- Only DOL may prosecute complaint.

New Anti-Retaliation Provisions

- Under new provisions, employer must:
 - Inform employees of their right to report injuries and illnesses.
 - Provide “reasonable” reporting procedures that do not deter employees from reporting injuries and illnesses.
 - Refrain from taking “adverse action” against employees for reporting injuries or illnesses.
- Based on “evidence” that “workers did not report injuries or illnesses for fear of retaliation from their employers”
- “Additional benefit of reminding the employer that such adverse actions are illegal.”

Informing Employees of Right to Report Injury or Illness

- What additional steps would employers need to take?
 - Rule already requires employers to inform employees how and when to report injuries/illnesses.
 - Employees already required to post OSHA poster that includes information about right to file a whistleblower complaint.

This will become the new poster in the break room.

Reasonable Reporting System

- Prohibits employers from adopting “unreasonable” reporting procedures.
- What makes a system “unreasonable”?
- **Test:** Whether the action would deter a “reasonable employee” from reporting a work-related injury or illness?

Reasonable Reporting System

- Reporting procedure should not require multiple steps.
- “Rigid” reporting requirement
 - Reporting rules “cannot penalize workers who do not realize immediately that their injuries are serious enough to report, or even that they are injured at all.” *Fairfax Memo (3/12/12)*
 - Reporting procedure must allow reporting of injury/illness within reasonable timeframe after employee realizes injury occurred.
 - Many comments focused on MSDs.

Adverse Action: Disciplinary Policies

- Disciplining employee who reports injury/illness regardless of whether employee violated safety rule
- Disqualifying employee who reports injury/illness from promotion, bonus or other benefit of employment
- Pretextual discipline based on violation of safety rules
 - Safety rule enforced only when employee injured
 - Rule is vague – “maintain situational awareness” or “work carefully”

Adverse Action: Drug Testing

- Regulation “does not ban drug testing of employees”.
- However, drug testing limited to incidents in which “employee drug use is likely to have contributed to the incident” and where testing “can accurately identify impairment caused by drug use”
- Presumption: “Blanket post-injury drug testing policies deter proper reporting”

Adverse Action: Drug Testing

- Examples where drug testing is unreasonable:
 - Bee sting
 - Repetitive motion strain
 - Injury caused by “lack of machine guarding or a machine or tool malfunction”
- “Employers need not specifically suspect drug use before testing, but there should be a reasonable possibility that drug use” was a factor

Adverse Action: Drug Testing

- Does the test measure level of impairment at the time of the injury? Scientific community says that no test, other than for alcohol, can measure “impairment”.
- Employers can continue to test to comply with other federal laws (DOT, NRC) and state workers’ compensation programs that *require* post-accident testing.
- Does employer have probable cause to test?

Adverse Action: Drug Testing

■ Practical Impact:

- Employers should review post-accident testing policies for red flags/pot holes.
- Considering the particular facts of a situation before testing post-accident will help ... but may expose employer to claims of other discrimination.
- Probable cause arguably required: “drug use is likely to have contributed to the incident”
- Safety in the workplace will be worsened, not improved, if OSHA gets its way.
- OSHA’s position so unreasonable that OSHRC/courts unlikely to give significant, if any, deference.

Adverse Action: Incentive/Disincentive Programs

- “OSHA encourages incentive programs that promote worker participation in safety-related activities, such as identifying hazards or participating in investigations or injuries, incidents, or ‘near misses’”
- “It is a violation for an employer to use an incentive program to take adverse action, including denying a benefit, because an employee reports”

Adverse Action: Incentive/Disincentive Programs

- “Denying a benefit” includes disqualifying an employee or group of employees from receiving a bonus
- Examples of programs that **could** violate rule
 - Entering employees who did not report injuries in drawing
 - Awarding bonus to team if no one reported injuries
 - Rate-based incentive programs that reward workers for achieving low rates of reported injuries and illnesses

What is the Remedy?

- To “abate” a violation of the anti-retaliation provisions in the recordkeeping regulation, employer could be required to:
 - Remove discipline from file
 - Reinstatement employee
 - Pay back pay
 - Pay a bonus to an employee or group
- Similar to authority OSHA has under medical removal provisions in the lead and other standards

Implications

- Compliance officers become EEO-type investigators
 - Injured employees as the protected class
 - Examination of employer's motives in issuing discipline
 - Review of comparators: Were uninjured employees who violated the same safety rule treated the same way?
- A big issue: ***OSHA second-guessing disciplinary actions taken***

What About Section 11(c)?

- How does OSHA have this authority under the OSH Act?
- Section 11(c) of the Act already prohibits retaliation
 - OSHA: Employer practices that discourage reporting lead to inaccurate data
 - “Prohibiting employers from taking adverse actions against their employees is ‘necessary to carry out’” OSHA recordkeeping function
- OSHA has been vocal about saying that Section 11(c) is not protective enough

Legal Challenge to Rule

- National Association of Manufacturers has sued OSHA in Texas federal court.
- Challenge supposedly to both reporting requirements/provisions and retaliation prohibitions/provisions
- Details yet to come.

Effective Date

- Anti-retaliation provisions effective on **August 10, 2016**
- These provisions apply to all employers required to maintain injury and illness records regardless of establishment size

State Plan States

- State plans states must adopt injury and illness recordkeeping requirements that are substantially the same by **November 2016**



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2016

TOPICS INCLUDE

- Key enforcement issues, including enterprise-wide liability, expanded criminal enforcement, and other late-breaking enforcement initiatives
- OSHA's enforcement weighting system: What it means for employers with potential ergonomic, process safety management, and other "complex" hazards
- Electronic recordkeeping, including a closer look at restrictions on incentive and disincentive programs and injured employees as a "protected class"
- The practical implications of recent Review Commission and appellate court decisions
- The Fair Pay and Safe Workplaces Executive Order: Higher stakes for federal contractors and their subcontractors

SAVE THE DATE

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Thank You

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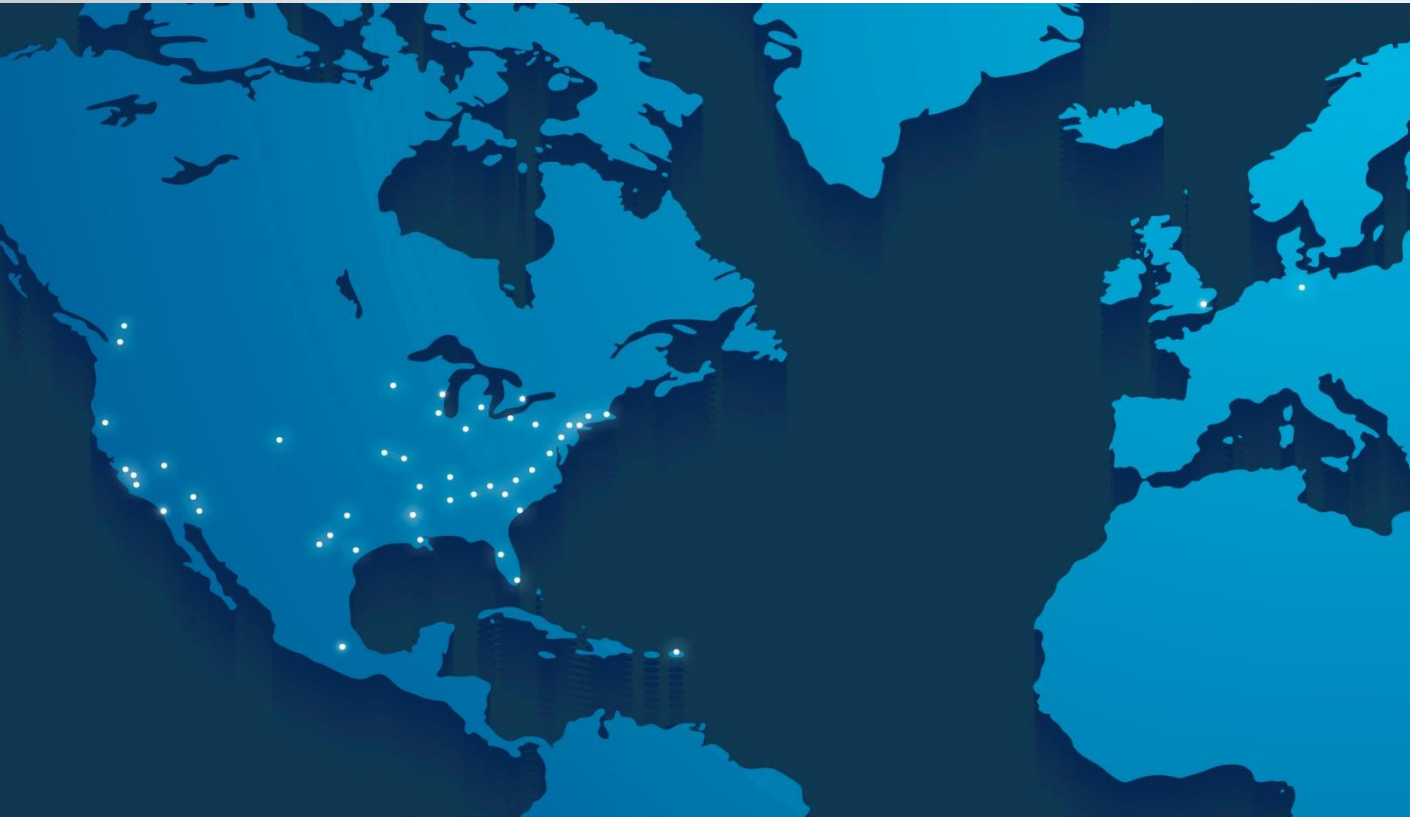
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OSHA's New Electronic Recordkeeping Requirements: Ramifications for Employers

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