OSHA's E-Recordkeeping Rule: Navigating the Anti-Retaliation Provisions Safely

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Overview

- ***The Occupational Safety and Health Act of 1970 (OSH Act)*** requires covered employers to prepare and maintain records of occupational injuries and illnesses.
  - OSHA's no-fault recordkeeping system requires recording work-related injuries and illnesses, regardless of the level of employer control or non-control involved.
- New e-Recordkeeping Rule – published 5/12/2016 in Federal Register
  - Multiple business groups filed lawsuit 7/8/16 challenging the rule and seeking stay in implementation
- OSHA tracks I/I records, by establishment, for many purposes, including:
  - inspection targeting,
  - performance measurement
  - standards development,
  - Identify emergent hazards
  - Voluntary Protection Program (VPP) eligibility, and
  - identifying "low-hazard" industry exemptions

Timeline

- REVISED effective date for whistleblower protections portion was December 1, 2016
- Due date for first submission of electronic injury/illness (I/I) data is July 1, 2017
  - Affected employers and types of information to be submitted varies by size and hazard level of NAICS code
- Employers must still keep the OSHA logs and post the preceding year's OSHA Form 300A in the workplace between February 1st and April 30th of each calendar year
- Certification of the 300A must be done by highest company official at the worksite, under penalty of criminal prosecution

Background

- OSHA is applying "behavioral economics" to "nudge" employers to prevent workplace I/I and demonstrate to investors, job applicants, customers and the public that they maintain safe and well-managed facilities
- Opponents of the rule call it "public shaming" of employers because the data will be searchable by establishment name
- Issues:
  - Will good employers look "worse" than bad ones because of being honest in the data they submit?
  - Will public accessibility encourage underreporting?
  - Will employee I/I information be sufficiently redacted to protect privacy?
- Current data available from OSHA or BLS is searchable by NAICS code or other categories but individual employer information is not publicly accessible
- The new OSHA database will likely be used to prequalify contractors or to verify information they've submitted

Electronic Submissions (1904.41)

- Effective July 1, 2017, all employers with 250+ employees will have to submit their OSHA 300A logs to OSHA electronically
  - On July 1, 2018, establishments with 250 or more employees will have to submit Forms 300A, Form 300 (Log of Work-Related Injuries and Illnesses) and Form 301 (Injury and Illness Incident Report) by July 1, 2018, and annually thereafter.
- Effective July 1, 2017, small employers (20-249) in "high hazard" sectors (NAICS code listed in Appendix A) must submit OSHA 300A logs annually
  - Employers with 11-20 workers must still keep records but are exempt from electronic submission
- Beginning in 2019, the submission deadline for filing the mandated reports will move to **March 2nd** (instead of July 1st) for all covered employers.
- States that manage their own OSHA programs will have to adopt requirements that are substantially identical within six months from May 12, 2016.

Which Small Employers Are Covered?

- Agriculture, forestry, fishing & hunting (NAICS 11)
- Utilities (NAICS 22)
- Construction (NAICS 23)
- Manufacturing (NAICS 31-33)
- Wholesale trade (NAICS 42)

- **Other NAICS (4 digit) high hazard sectors such as:**
- Automotive parts & accessories
- Furniture & Home Furnishing Stores
- Building Materials & Supplies Dealers
- Lawn & Garden Equipment & Supplies
- Grocery & Specialty Food Stores
- Department Stores
- Freight & Transport
- Postal Service & delivery services
- Warehousing & Storage
- Waste collection, treatment & disposal
- Hospitals, nursing homes & health care services
- Commercial & Industrial Machinery
- Dry-Cleaning and Laundry Services

Recording Criteria

- Covers I/I to full, part time and seasonal employees as well as temporary workers and day laborers directed by host employer
- Employee report alone does not trigger recording; employer can require evaluation by a physician or other licensed health care professional
  - Employer gets to make the call (except in STS hearing loss cases) but OSHA may second guess during inspections!
- If the professional diagnoses a significant injury or illness within the meaning of Section 1904.7(b)(7) and the employer determines that the case is work-related, the case must be recorded.

Work-Relatedness

- There must be a causal connection between the employment and the I/I before the case is recordable and OSHA has concluded that the determination of work-relatedness is best made by the employer (not by LHCP or agency).
- I/I is deemed work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing I/I.
- Work-relatedness is presumed for I/I resulting from events or exposures occurring in the work environment, unless an exception in Section 1904.5(b)(2) specifically applies.
  - The work event or exposure need only be one of the discernable causes; it need not be the sole or predominant cause.

New Severe Injury Reporting

- Final Rule took effect 1/1/2015 – report to local office during normal hours or call 1-800-321-OSHA (6742)
  - Nearly all state plan states have now adopted this.
- Rule retains the exemption for any employer with 10 or fewer employees, regardless of industry classification, from having to routinely keep records.
- Rule expands the list of severe work-related injuries that all employers **must report** to OSHA.
  - The revised rule retains the current requirement to report all work-related fatalities within 8 hours
  - Adds the requirement to report all work-related in-patient hospitalizations, amputations and loss of an eye within 24 hours to OSHA. Employers only have to report an inpatient hospitalization, amputation or loss of an eye that occurs within 24 hours of a work-related incident

OSHA "Triage" on Severe Injury Reports

In determining whether OSHA will send an inspection team, they ask:

- What was the injured EE doing just before injury;
- What tools, equipment or materials was he using;
- What directly caused the harm;
- Is the hazard that caused the harm still in the workplace;
- Could other persons potentially be harmed;
- What steps have been taken to remove the hazard;
- Has there been a similar incident or near miss?

Whistleblower Protection Provisions

- Final rule contains provisions -- 29 CFR 1904.35 (Employee involvement) and 1904.36 (Prohibition against discrimination) – intended to encourage complete and accurate reporting of workplace injuries and illnesses:
  - Employers must inform employees of their right to report work-related injuries and illnesses free from retaliation. This obligation can be satisfied by posting the April 2015 (or later) version of OSHA's *Job Safety and Health – It's the Law* poster (www.osha.gov/Publications/poster.html).
  - An employer's procedure for reporting work-related injuries and illnesses must be "reasonable" and must not deter or discourage employees from reporting.
  - An employer may not discharge or otherwise discriminate against employees for reporting work-related injuries or illnesses.

1904.35 – Employer Requirements

- ER must inform each employee how s/he is to report a work-related I/I
- ER must provide access to I/I records for employees and their personal or authorized representatives
  - Authorized Rep defined as "authorized collective bargaining agents of employees"
  - Personal Rep defined as any person the EE or former EE designates as such, in writing
- ER must have a "reasonable procedure" for EE to report work-related I/I promptly and accurately.
  - "A procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace I/I"
- EE must be trained on their right to report I/I
- ER are prohibited from discharging or in any manner discriminating against EEs for reporting I/I

OSHA 300 Disclosure Requirements

- If EE or Personal/Authorized Rep asks for access to OSHA 300 log, it must be provided by the end of the next business day
  - Names cannot be removed from OSHA 300 log prior to giving to EE or Rep; however, you may not record, on the 300 log, the worker's name in privacy concern cases
- If EE or Personal Rep asks for OSHA 301 Incident Report, it must be provided by the end of the next business day
- If Authorized Rep asks for OSHA 301 Report, it must be provided within 7 calendar days but need only provide the portion titled "Tell us about the case" – you must remove all other information from the copy of the 301 (or equivalent substitute form) given to the Authorized Rep
- You cannot charge for copies the first time they are requested

1904.36: Prohibition Against Discrimination

- In addition to protections in 1904.35, the final rule also codifies Section 11(c) into recordkeeping regs, stating:

  Section 11(c) of the OSH Act also prohibits you [Employer] from discriminating against an employee for reporting a work-related fatality, injury or illness. That provision of the Act also protects the employee who files a safety and health complaint, asks for access to the part 1904 records, or otherwise exercises any rights afforded by the OSH Act.

OSHA and Drug Testing

- OSHA has taken position that post-accident drug testing programs may be viewed as violation of Sec. 11(c) and subject to fines (of up to new high of $126,749 for willful violations)
  - Problem is programs that test all injured workers, regardless of fault
- OSHA believes drug testing may be viewed as discipline and could have chilling effect on willingness to report injuries
- OSHA says OK to drug test post-accident if required by other laws (e.g., DOT requirements for CDL drivers)
- If persons are tested in cases where impairment is not believed to be a causal factor in the accident, such tests are suspect and could be subject to OSHA investigation

OSHA's View: Incentives & Discipline

- Incentive & discipline programs that deprive an injured worker of a bonus or prize, or punish in a disparate manner, are also viewed as violating both Section 11(c) and Part 1904
  - Section 11(c) of the OSH Act prohibits an employer from discriminating against an employee because the employee reports an injury or illness.
- OSHA published policy on 3/12/2012 addressing Regional Administrators and encouraging critical scrutiny of programs during inspections to determine if they discourage employee reporting of I/I or penalize injured employees in some way
  - This was in response to Recordkeeping NEP and GAO Report
- OSHA has included language in CSA barring injury-rate-based incentive programs
- VPP status can be revoked if such incentive programs are used.

GAO Report on Incentive Programs

- GAO recommended that OSHA provide guidance on safety incentive programs consistently across its cooperative programs, and add language on this to FOM (done 10/15).
- OSHA is not required to regulate incentive programs but can take action to address the effects of such programs on reporting.
- If inspectors find underreporting of I/I and conclude that a safety incentive program was a contributing factor, the inspector can classify the violation as willful, which carries an increased penalty (up to $126,749 per affected worker – if under "egregious" approach, cost could reach millions and place employer in SVEP!)

OSHA Field Operations Manual

- 10/1/15 FOM revision addresses incentive programs, stating:
  - "There are several types of workplace policies and practices that could discourage employee reports of injuries and could constitute a violation of section 11(c) of the OSH Act. These policies and practices, otherwise known as employer safety incentive and disincentive policies and practices, may also violate OSHA's recordkeeping regulations."
  - As part of records review portion of inspection, "If recordkeeping deficiencies or unsound employer safety incentive policies are discovered, the CSHO and the Area Director (or designee) may request assistance from the Regional Recordkeeping Coordinator."

OSHA Policy: Incentives

- Incentive programs that discourage employees from reporting their injuries are problematic because, under section 11(c), an employer may not "in any manner discriminate" against an employee because the employee exercises a protected right, such as the right to report an injury.
- If an employee of a firm with a safety incentive program reports an injury, the employee, or the employee's entire work group, will be disqualified from receiving the incentive, which could be considered unlawful discrimination.
- OSHA says an important factor to consider is whether the incentive involved is of sufficient magnitude that failure to receive it "might have dissuaded reasonable workers from" reporting injuries.
- Therefore, if the incentive is great enough that its loss dissuades reasonable workers from reporting injuries, OSHA says the program would result in the employer's failure to record injuries that it is required to record under Part 1904, and the employer is violating that rule, and can be investigated and fined.

Alternative Safety Incentive Programs

- Recommended types of alternative types of incentives:
  - Promote worker participation in safety-related activities, such as identifying hazards or participating in investigations of injuries, incidents or "near misses"
  - Provide tee shirts to workers serving on safety projects or committees;
  - Offer modest rewards for suggesting ways to strengthen safety and health; or
  - Throw a recognition party at the successful completion of company-wide safety and health training.
  - *See also OSHA's Revised Policy Memo #5 - Further Improvements to VPP* (June 29, 2011).

OSHA Policy: Discipline

- An employer's policy to discipline all employees who are injured, regardless of fault, is not a legitimate nondiscriminatory reason that an employer may advance to justify adverse action against an employee who reports an injury.
- In OSHA's view, such a policy is inconsistent with the employer's obligation to establish a way for employees to report injuries under 29 CFR 1904.35, and a referral for a recordkeeping investigation should be made.
- Where an employee reports an I/I and is disciplined, and the stated reason is that the employee has violated an employer rule about the time or manner for reporting injuries and illnesses, OSHA will careful scrutinize the case for a potential violation of Section 11(c).
- In investigating such cases, factors such as the following may be considered:
  - whether the employee's deviation from the procedure was minor or extensive, inadvertent or deliberate,
  - whether the employee had a reasonable basis for acting as he or she did,
  - whether the employer can show a substantial interest in the rule and its enforcement, and
  - whether the discipline imposed appears disproportionate to the asserted interest.

OSHA Policy: Discipline

- Where an employee reports an injury, and the employer imposes discipline on the ground that the injury resulted from the violation of a safety rule by the employee, OSHA may investigate.
- Although OSHA encourages employers to maintain and enforce legitimate workplace safety rules in order to eliminate or reduce workplace hazards,
- OSHA alleges that an employer may attempt to use a work rule as a pretext for discrimination, and more stringent enforcement against violators who also report an I/I may be a Section 11(c) violation.

Legal Issues

- Those who report injuries (their own or other workers), who participate in incentive programs that include work on audit teams, safety committees, or who report unsafe conditions will have “protected status”
- To avoid Section 11(c) claims:
  - When an employee raises a safety concern, take it seriously, investigate and document
  - Never force anyone to work in equipment or areas that he/she believes is unsafe
  - Never fire, demote or discipline workers for expressing safety concerns or cooperating with OSHA during investigations (or for filing safety complaints with federal or state agencies)
  - If you must discipline someone who has engaged in protected activity, DOCUMENT the legitimate business reason for the disciplinary action and follow company’s normal disciplinary procedures.
    - Always have a witness present when disciplining or terminating a worker.

Bottom Line

- Inspectors are more likely now to interview workers about incentive and disciplinary programs, and any I/I that have occurred at the worksite
- If the workers indicate they did not report I/I because of fear loss of incentives, a record audit may ensue with resulting penalties
- Prudent employers will not rely on I/I rates (lagging indicators) to structure incentives
- Care must be taken when disciplining workers to ensure that those who have engaged in protected activity are not subject to disparate treatment!

Questions????

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