DECEMBER 18, 2018 | CAL/OSHA INSPECTIONS, CITATIONS & ENFORCEMENT

Delinquent State OSH Agencies Adopt E-Recordkeeping; Calif. Employers to Submit 2017 Injury Data by Year End

By Andrew Sommer, Megan Shaked, and Dan Deacon

As we have reviewed previously on the OSHA Defense Report, federal OSHA's Rule to "Improve Tracking of Workplace Injuries and Illnesses" (aka the E-Recordkeeping Rule) requires small employers that operate in certain "high hazard industries" and all large employers to proactively submit their electronic injury and illness data to OSHA through a web portal – the Injury Tracking Application ("ITA").

When federal OSHA promulgated the Rule in 2016, it built into the Rule a mandate that all State Plans adopt substantially identical requirements within six months after its publication. Implementation of the federal Rule, however, has been mired in difficulty from industry challenges, shifting guidance, informal changes, extended deadlines and mixed signals about the future of the rule as we transitioned from the Obama administration to the Trump administration. As a result, numerous State OSH programs failed to initially adopt the rule. After some headbutting with federal OSHA, almost all of the delinquent states, including California, have now implemented rules to "catch-up" to the federal OSHA data submission rule.

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Parts 1904 and 1902

[Docket No. OSHA-2013-0023]

RIN 1218-AC49

Improve Tracking of Workplace Injuries and Illnesses

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Final rule.

SUMMARY: OSHA is issuing a final rule to revise its Recording and Reporting Occupational Injuries and Illnesses regulation. The final rule requires employers in certain industries to electronically submit to OSHA injury and illness data that employers are already required to keep under existing OSHA regulations. The frequency and content of these establishment-specific submissions is set out in the final rule and is dependent on the size and industry of the employer. OSHA intends to post the data from these submissions on a publicly accessible Web site. OSHA does not intend to post any information on the Web site that could be used to identify individual employees.

The final rule also amends OSHA's recordkeeping regulation to update requirements on how employers inform employees to report work-related injuries and illnesses to their employer. The final rule requires employers to inform employees of their right to report work-related injuries and illnesses free from retaliation; clarifies the existing implicit requirement that an employer's procedure for reporting work-related injuries and illnesses must be reasonable and

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Delinquent State Plans Began Adopting E-Recordkeeping

In the midst of uncertainty surrounding federal OSHA's E-Recordkeeping Rule, several State Plans delayed adopting state versions, even after OSHA made it clear that state plans needed to act soon. While the majority of

State Plans acted promptly to promulgate their own version of the E-Recordkeeping rule by the end of 2017, eight State Plans had not yet adopted the rule, including:

- California (Cal/OSHA);
- Washington (WA DLI, WISHA, or DOSH);
- Maryland (MOSH);
- Minnesota (MNOSHA);
- South Carolina (SC OSHA);
- Utah (UOSH);
- Wyoming (Wy OSHA); and
- Vermont (VOSHA)

Give the substantial number of State Plans that failed to comply with the Rule's order, federal OSHA attempted to force covered employers in these State Plans to submit 300A data despite not being subject to the rule or federal OSHA's jurisdiction. Specifically, on April 30, 2018, federal OSHA issued a press release announcing that *employers* in all State Plan States (not the State agencies themselves) must implement OSHA's E-Recordkeeping Rule. While employers were not required to submit 300A data and faced no enforcement risk for not doing so, federal OSHA's demand did resonate with delinquent State Plan administrators.

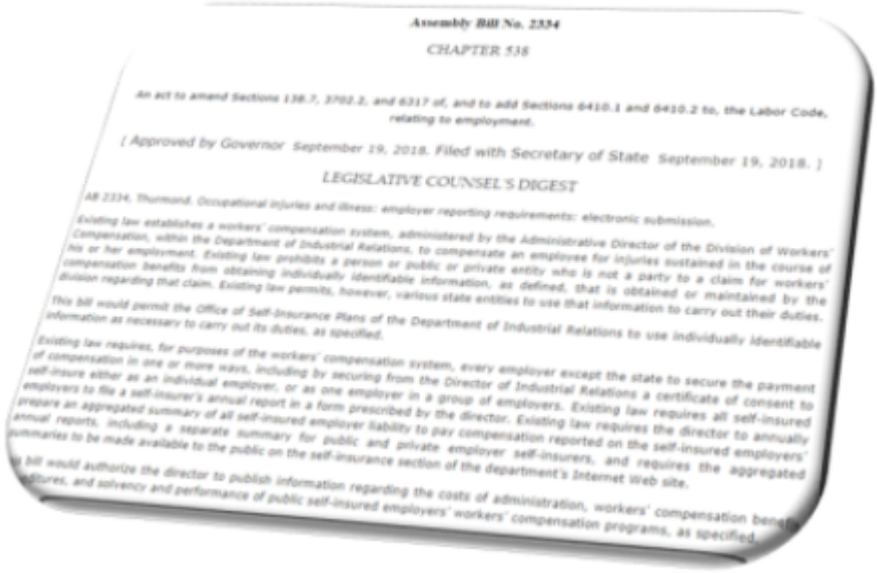
Shortly after federal OSHA's April 30, 2018 press release, some of the delinquent states quickly moved to adopt the E-Recordkeeping Rule, including Minnesota, South Carolina, and Utah. South Carolina, even implemented a catch-up provision because the rule was finalized so close to federal OSHA's July 1, 2018 submission deadline – instead requiring employers submit 2017 300A data by November 25, 2018. Utah, on the other hand, passed on submission of 2017 300A data and simply required employers to comply with the upcoming March 1, 2019 deadline to submit 2018 300A data.

Heading into 2019, however, there are still three State Plans that have declined to adopt the Rule – Maryland, Washington, and Wyoming. Therefore, unless one of these State Plans adopts the rule prior to the March 2, 2019 deadline to submit FY2018 300A data, covered establishments in those states are still not required to submit 300A data.

California: Dec. 31, 2018 Deadline to Submit 2017 300A Data Approaching

California did finally adopt an E-Recordkeeping Rule of its own, tracking the federal OSHA E-Recordkeeping

Rule. On September 19, 2018, California Governor Jerry Brown signed California Assembly Bill 2334 ("AB 2334") largely in response to fed OSHA's recent proposal to eliminate the requirement for large employers to submit 300 Log and 301 Incident Report level data.



Assembly Bill No. 2334

CHAPTER 538

An act to amend Sections 138.7, 3702.2, and 6317 of, and to add Sections 6410.1 and 6410.2 to, the Labor Code, relating to employment.

[Approved by Governor September 19, 2018. Filed with Secretary of State September 19, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2334, Thurmond. Occupational injuries and illness: employer reporting requirements: electronic submission.

Existing law establishes a workers' compensation system, administered by the Administrative Director of the Division of Workers' Compensation, within the Department of Industrial Relations, to compensate an employee for injuries sustained in the course of his or her employment. Existing law prohibits a person or public or private entity who is not a party to a claim for workers' compensation benefits from obtaining individually identifiable information, as defined, that is obtained or maintained by the division regarding that claim. Existing law permits, however, various state entities to use that information to carry out their duties.

This bill would permit the Office of Self-Insurance Plans of the Department of Industrial Relations to use individually identifiable information as necessary to carry out its duties, as specified.

Existing law requires, for purposes of the workers' compensation system, every employer except the state to secure the payment of compensation in one or more ways, including by securing from the Director of Industrial Relations a certificate of consent to self-insure either as an individual employer, or as one employer in a group of employers. Existing law requires all self-insured employers to file a self-insurer's annual report in a form prescribed by the director. Existing law requires the director to annually prepare an aggregated summary of all self-insured employer liability to pay compensation reported on the self-insured employers' annual reports, including a separate summary for public and private employer self-insurers, and requires the aggregated summaries to be made available to the public on the self-insurance section of the department's Internet Web site.

This bill would authorize the director to publish information regarding the costs of administration, workers' compensation benefits, and solvency and performance of public self-insured employers' workers' compensation programs, as specified.

Then, approximately one month later on October 18, 2018, Cal/OSHA published an emergency proposed regulation intended to temporarily adopt and implement the federal OSHA E-Recordkeeping Rule's data submission requirements. The Cal/OSHA emergency regulations were approved by the California Office of Administrative Law and officially went into effect on November 1, 2018.

The regulations amend Title 8 of the California Code of Regulations sections 14300.35 and 14300.41. However, since the California regulations were approved as emergency regulations, Cal/OSHA will now proceed with the formal rulemaking process.

Who must submit injury data?

Covered establishments are required to submit 300A data through federal OSHA's ITA portal by the deadlines specified in the emergency regulation. The following workplaces are covered by the rule:

1. Establishments with 250 or more employees who are subject to Cal/OSHA recordkeeping requirements, unless specifically exempted by section 14300.2 of Title 8 of the California Code of Regulations
2. Establishments with 20 to 249 employees in designated industries listed in Appendix H.
3. Establishments notified by Cal/OSHA to submit injury data.

When Must Covered Establishments Submit 300A Data?

The first deadline under Cal/OSHA's emergency regulation is approaching soon, and covered establishments

should take immediate steps to ensure they comply with the rule's requirements. Similar to South Carolina, California imposed a "catch-up" provision to collect FY2017 300A data even though the rule was adopted after federal OSHA's deadline for 2017 data. Specifically, **covered establishments in California must submit FY2017 300A data by December 31, 2018**. Covered establishments also have a short turnaround time to submit FY2018 300A by March 2, 2019.

Next Steps for Employers

Covered establishments should follow the instructions set forth on federal OSHA's Injury Tracking Application website to set up an account and account. Covered establishments should promptly review their 2017 300A data to ensure that it is accurate and ensure that a designated company representative is familiar with the ITA portal and prepared to submit the data by the initial December 31st deadline.

Employers should also stay tuned for further rulemaking to determine if Cal/OSHA amends the current rule in the near future. AB 2334 requires Cal/OSHA to "monitor" rulemaking at the federal level and, if Cal/OSHA determines that fed OSHA has "eliminated or substantially diminished" the electronic recordkeeping rule, the California agency is required to convene an advisory committee within 120 days to "evaluate how to implement the changes necessary to protect the goals" of the proposed federal rule as issued in May 2016 under the Obama Administration. Thus, Cal/OSHA did not rule out the possibility of imposing its own requirements – perhaps more stringent than those required by federal OSHA.

Cal/OSHA Resurrects Obama-era Recordkeeping Statute of Limitations Rule

In other injury and illness recordkeeping news, AB 2334 goes even one step further by resurrecting a former controversial Obama-era safety and health rules. Notably, the Bill includes a provision that impacts the statute of limitations for issuing recordkeeping citations. Despite the D.C. Circuit's decision in AKM LLC dba Volks Constructors v. Secretary of Labor, 675 F.3d 752 (D.C. Cir. 2012) and the Cal/OSHA Appeals Board decision in Key Energy Services (DAR-15-0255-0256), which held that Cal/OSHA cannot cite employers for failing to record injuries and illness if the violation took place more than six months before the citation was issued, AB

2334 seeks to establish recordkeeping violations as continuing violations, so as to expand the statute of limitations for such violations for the entire five-year period the record must be kept:

> **A citation or notice shall not be issued by the division more than six months after the occurrence of the violation. For purposes of issuing a citation or notice for a violation of subdivision (b) or (c) of Section 6410, including any implementing related regulations, *an "occurrence" continues until it is corrected, or the division discovers the violation, or the duty to comply with the violated requirement ceases to exist.* Nothing in this paragraph is intended to alter the meaning of the term "occurrence" for violations of health and safety standards other than the recordkeeping requirements set forth in subdivision (b) or (c) of Section 6410, including any implementing related regulations.**

This is a major shift back to the Obama Administration's midnight "Volks Rule," where fed OSHA adopted a five-year statute of limitations for recordkeeping violations during the final days of the Obama Administration. The federal rule was repealed quickly by the Trump Administration when the Republican Congress and new President Trump signed a resolution to revoke the rule under the Congressional Review Act.