SEPTEMBER 27, 2018 | CAL/OSHA RULEMAKING & STANDARDS

Delinquent State OSH Plans, Particularly Cal/OSHA, Catch-up with Fed OSHA's E-Recordkeeping Rule

By Eric J. Conn and Dan C. Deacon

When fed OSHA promulgated the Final Rule to "Improve Tracking of Workplace Injuries and Illnesses" (aka the E-Recordkeeping Rule) in 2016, it built into the Rule a mandate that all State Plans adopt substantially identical requirements to the final E-Recordkeeping Rule within six months after its publication. However, because State Plans all have their own legislative or rulemaking processes, they cannot simply snap their fingers and instantly adopt a new Rule even if required to do so by fed OSHA. Also importantly, the State Plans, as well as all employers in the regulated community, were getting mixed signals about the future of the E-Recordkeeping Rule from fed OSHA under the new Trump Administration.

Accordingly, although most of the 20+ State Plans acted promptly to promulgate their own version of the E-Recordkeeping rule, leading up to the first injury data submission deadline last year, several State OSH Plans had not yet adopted their own version of an E-Recordkeeping Rule. Specifically, as of the end of 2017, these eight State Plans had not yet adopted (and some, like California, had not even started the process to adopt) an E-Recordkeeping Rule:

- 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).

Given the uncertainty of the fate of the E-Recordkeeping Rule after the transition to the Trump Administration and OSHA's announcement that it would soon issue a Notice of Proposed Rulemaking to revisit the E-Recordkeeping Rule, each of these State Plans except for Vermont OSHA continued to delay adopting the Rule even as we approached the second data submission deadline of July 2018. And that is when fed OSHA started to speak up.

OSHA's April 30, 2018 Press Release

On April 30, 2018, OSHA issued a press release announcing that *employers* in all State Plan States (not the State Plans themselves) must implement OHSA's E-Recordkeeping Rule. In the press release, OSHA states that it had determined that:


UNITED STATES
DEPARTMENT OF LABOR

OSHA Trade Release

U.S. Department of Labor
Occupational Safety and Health Administration
Office of Communications
Washington, D.C.
www.osha.gov
For immediate release

April 30, 2018
Contact: Office of Communications
Phone: 202-693-1999

U.S. Department of Labor Fixes Error Dating to 2016 Implementation of "Improve Tracking of Workplace Injuries and Illnesses" Regulation

WASHINGTON, DC – Following a review of the requirements put in place in 2016 regarding the "Improve Tracking of Workplace Injuries and Illnesses" regulation, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) has taken action to correct an error that was made with regard to implementing the final rule.

OSHA determined that Section 18(c)(7) of the Occupational Safety and Health Act, and relevant OSHA regulations pertaining to State Plans, require all affected employers to submit injury and illness data in the Injury Tracking Application (ITA) online portal, even if the employer is covered by a State Plan that has not completed adoption of their own state rule.

OSHA immediately notified State Plans and informed them that for Calendar Year 2017 all employers covered by State Plans will be expected to comply. An employer covered by a State Plan that has not completed adoption of a state rule must provide Form 300A data for Calendar Year 2017. Employers are required to submit their data by July 1, 2018. There will be no retroactive requirement for employers covered by State Plans that have not adopted a state rule to submit data for Calendar Year 2016.

A notice has been posted on the ITA website and related OSHA webpages informing stakeholders of the corrective action.

Under the Occupational Safety and Health Act of 1970, employers are responsible for providing safe and healthful workplaces for their employees. OSHA's role is to ensure these conditions for America's working men and women by setting and enforcing standards, and providing training, education and assistance. For more information, visit www.osha.gov.

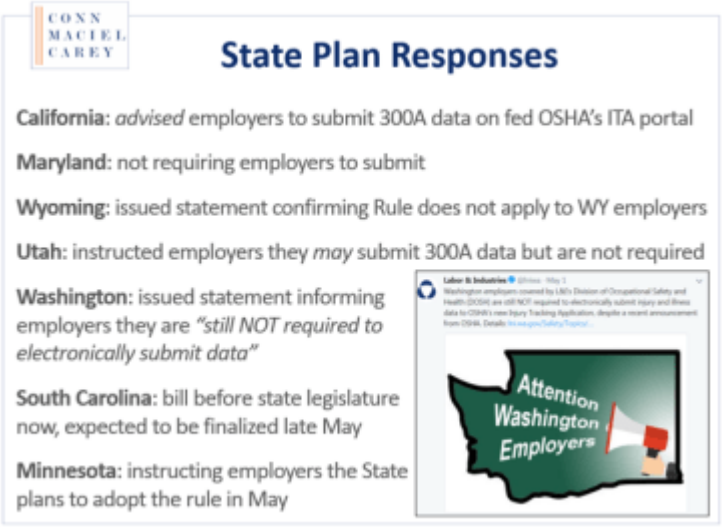
Section 18(c)(7) of the Occupational Safety and Health (OSH) Act, and relevant OSHA regulations pertaining to State Plans, require all affected employers to submit injury and illness data in the ITA, "even if the employer is covered by a State Plan that has not completed adoption of their own state rule."

State Plan State Responses

The remaining seven State Plan States provided conflicting responses to fed OSHA's directive – falling into three categories:

1. Advising employers in their states to submit their injury data before the July 1, 2018 deadline;
2. Reporting that the states would be adopting an E-Recordkeeping Rule imminently, so employers should plan to submit their 2017 injury data this year; or
3. Pushing back against fed OSHA's call for employers in their states to submit data

OSHA's Press Release and the conflicting responses from the State Plans caused significant confusion for employers. As we discussed in an earlier article, establishments in states that had not adopted an E-Recordkeeping Rule were not legally required to submit data, and there was no legal risk for declining to do so.



State Plan Action Following OSHA's Press Release

Although establishments in State Plan States that had not adopted the Rule got another pass on submitting 300A data, fed OSHA's April 30th Press Release did garner attention from State Plan administrators, and many of the still-delinquent states quickly moved to adopt an E-Recordkeeping Rule, including Minnesota, South Carolina, and Utah.

The only States that have still not adopted it are California, Maryland, Wyoming, and Washington. Currently, the Washington Division of Labor & Industries website still states that:

"Employers in Washington are still NOT required to electrically submit data to OSHA's new Injury Tracking Application, despite a recent announcement from OSHA."

The Maryland Department of Labor, Licensing, & Regulation has not adopted the Rule. Its website still says:

The State of Maryland has not yet adopted OSHA's new electronic reporting requirements found in 29 CFR, Part 1904 of the OSHA Recordkeeping Regulation. As such, Maryland employers are under no legal obligation to register and/or submit their OSHA 300 information to OSHA via OSHA's Injury Tracking Application (ITA). Additionally, the Maryland Occupational Safety and Health Agency is not accepting OSHA 300 log data at this time.

Similarly, Wyoming OSHA has a notice to employers on the Department of Workforce Services website stating:

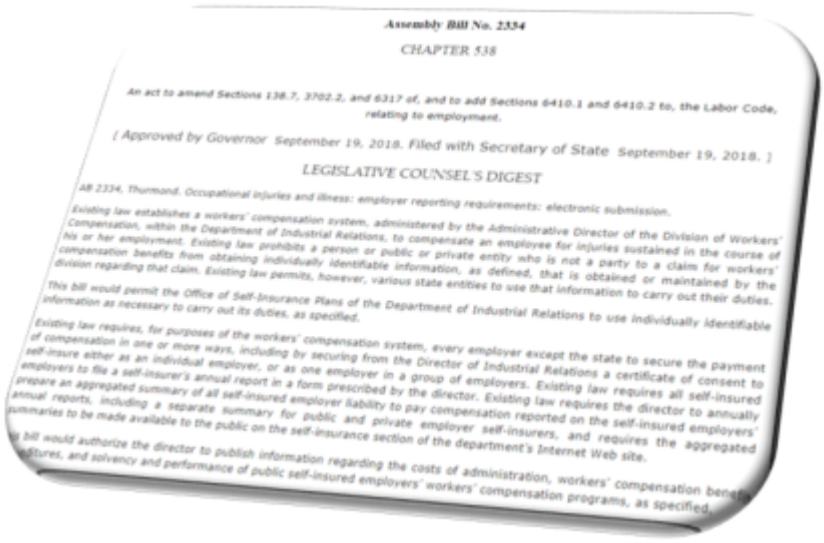
"The electronic reporting requirement does not apply to Wyoming OSHA covered employers, despite an April 30, 2018, OSHA news release stating all employers across the country are subject to the rule."

However, WY OSHA has taken steps to formally adopt the Rule. WY OSHA filed a proposed rule with the Secretary of State's office on April 20, 2018 and accepted public comments through June 4, 2018. The WY OSHA Commission is expected to vote on adopting the Rule soon.

California AB 2334 Sets Itself Apart

California has taken a different approach from those State Plans that formally adopted the Rule as-is and those that still have not. On September 19, 2018, California Governor Jerry Brown signed California Assembly Bill 2334 ("AB 2334") to make various workplace safety and health changes to California law, which is 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.

AB 2334 appears to be taking steps to impose its own version of fed OSHA's E-Recordkeeping Rule, including signaling a desire to maintain the requirement for large employees to submit 300 and 301 data. The California Bill 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.

AB 2334 goes even one step further to maintain former Obama-era safety and health rules. 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 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 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.

Therefore, California employers need to follow these new recordkeeping obligations and the potential additional requirements that may be in store if Cal/OSHA decides to go further.