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# 10 Reasons Why It Is Critical For Employers To Get OSHA Injury and Illness Recordkeeping and Reporting Right — And How to Ensure It is Done Right

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Although OSHA injury and illness recordkeeping and reporting has always been important from an OSHA compliance perspective, making correct recording and reporting decisions (i.e., not over- or under- recording or reporting) has never been more vital than it is today. We are at a moment in OSHA's history when the agency is clearly staffing up and ramping up inspections and enforcement generally, and with respect to injury and illness recordkeeping specifically, OSHA is on the precipice of issuing a significant expansion of the injury and illness data required to be submitted to OSHA each year. Indeed, OSHA sent the final Electronic Recordkeeping Rule to OMB for final review, which is the last step in the rulemaking process before the rule is published.

OSHA developed and repeatedly touted its injury and illness recordkeeping program as a "no fault" system, requiring certain injuries and illnesses to be recorded (or proactively reported to OSHA), regardless whether the employer or its safety program could have prevented the injury. In practice, however, recordkeeping data has become another tool OSHA uses to justify enforcement efforts and actions against specific employers or their industries. From publicizing recordkeeping data to "shame" employers, or using the data to target enforcement resources, OSHA has made it essential for employers not to over-record cases; i.e., they must carefully scrutinize each potential recordable injury or illness, rather than erring on the side of recording every close call. Of course, there are also real and growing enforcement risks for under-recording; i.e., failing to record or report cases that should have been recorded or reported.

Accordingly, it is more important than ever before to make sure your organization fully understands the nuances of OSHA's recordkeeping and reporting requirements.

Here is our take on the Top 10 reasons it is critical for employers to get OSHA injury and illness recordkeeping and reporting right (not recording or reporting more cases than necessary, and not failing to record or report cases that should be):




**1. OSHA's Electronic Recordkeeping, which puts previously internal data now in OSHA's hands and on its public website, is about to expand significantly.**

As a result of OSHA's E-Recordkeeping rule, employers' injury and illness data is now published on OSHA's public website. Unfortunately, because OSHA's injury and illness recordkeeping program was designed to be a "no-fault" program (i.e., cases must be recorded even if the injury was entirely the fault of the employee or otherwise beyond the control of the employer), the raw data alone does not present a complete picture of how or why an injury or illness occurred, and more importantly, may not be a reflection at all of the employer's safety program.

Nonetheless, public access to this data can impact an employer's reputation and potentially deter potential customers or prospective employees. It also means that competitors have access to the data and can use it against the employer. Similarly, unions can use the data in collective bargaining negotiations or to promote organizing efforts, and plaintiff's attorneys could potentially rely on the data to target companies for lawsuits.

And if that was not bad enough, OSHA is days away from issuing an amended E-Recordkeeping Rule that will greatly expand the number of employers who have to submit their data and the amount of data required to be shared with OSHA. This further underscores the importance of accurate recordkeeping. [OSHA recently submitted its final Electronic Recordkeeping Rule to the Office of Management and Budget \("OMB"\)](#), which has the final review before the Rule is promulgated and ultimately becomes effective for employers, so OSHA is one small step away from finalizing a rule that more closely mirrors the original broad scope of the regulation issued during the Obama Administration in 2016.

As a reminder, OSHA's proposed changes to the E-Recordkeeping Rule seek not only to restore the requirement from the original 2016 rule to have larger employers submit the full array of recordkeeping data (i.e., data from their 300A Annual Summaries like they do now, plus data from their 300 Logs and detailed 301 incident reports), but also to expand the number of employers that must submit data by lowering the threshold number of employees from 250 to 100 and by expanding the list of covered high-hazard industries. Specifically, under the proposed amendments to the E-Recordkeeping Rule:

- The current requirement for all establishments with more than 250 employees to electronically submit 300A data is replaced by a new requirement for establishments with 100 or more employees in so-called "high hazard industries" reflected in new [Appendix B](#) to annually submit to OSHA via an electronic portal the data from their 300 Logs, 301 Incident Reports, and 300A Annual Summaries; 
- Establishments with 20 or more employees in a separate, expanded list of high-hazard industries per [new Appendix A](#) will be required to electronically submit information only from their OSHA Form 300A Annual Summaries; and
- All submitting establishments must also now include their proper legal company name (rather than a dba or informal descriptor) with the electronic data submission.

Conn Maciel Carey's Employers E-Recordkeeping Rulemaking Coalition submitted numerous [written comments to OSHA and OMB about this rulemaking](#) and participated in a stakeholder meeting with OIRA last month. There do not appear to be any further stakeholder meetings scheduled with OIRA, so we anticipate the rule will be cleared and issued by mid-summer 2023.

For all of these reasons, it is important to ensure recordkeeping data is accurate; i.e., to not exclude cases that legally should be recorded because OSHA will have access to the data, and not to over-record (i.e., to not record cases that are not legally required to be recorded) because higher injury rates have numerous negative consequences.

## **2. Injury data determines whether your company qualifies for OSHA’s Site-Specific Targeting (“SST”) Enforcement Program.**

In October 2018, OSHA redesigned the agency’s long-standing [Site-Specific Targeting Enforcement Program](#) around employer recordkeeping data collected under the late-Obama era promulgated *Improved Tracking of Workplace Injuries and Illnesses Regulation* at [29 C.F.R. 1904.31](#) (i.e., the E-Recordkeeping Rule), which requires many employers to make annual electronic submissions to OSHA of the data from their 300A Annual Summaries of injury and illness recordkeeping data. The SST Enforcement Program has been regularly updated since then to account for later years’ of injury data submitted under the E-Recordkeeping Rule, and lays out how the agency will select establishments for programmed, comprehensive (wall-to-wall) inspections. Under SST, OSHA creates targeted inspection lists that made up of workplaces with:

- Higher than average Days Away, Restricted, or Transfer (“DART”) rates;
- Rates at or above twice the private sector national average in CY 2019, that have continued to trend upward;
- Unusually low DART rates relative to its industry average so as to verify the credibility of the reported data; and
- No data having been submitted that year pursuant to E-Recordkeeping; i.e., non-responders.


Staying off the SST list makes it vital that employers not unnecessarily over-record injuries. But just as important is to ensure the data submitted is accurate – that it reflects all cases required by the regulation to be recorded, properly recorded. That is because if an SST inspection does occur, such inspections are so comprehensive that the Logs will be carefully scrutinized and the likelihood of some OSHA citations are higher. It is rare that OSHA opens an inspection and closes it without issuing any citations, most often characterized as at least Serious violations. Indeed, approx. 75% of inspections result in at least one citation, and nearly 85% of those citations are characterized as Serious or more significant.

## **3. Recordkeeping violations carrying a heightened risk of Repeat citations with 10x the penalty amount.**

Injury and illness recordkeeping violations are among the most easily repeated violations in OSHA’s portfolio. The very first records requested by OSHA at the start of every OSHA inspection is several years of the employer’s 300 Logs and 300A Annual Summaries. Thus, an employer’s recordkeeping practices are under scrutiny during every single inspection, regardless what prompted it. If noncompliance is detected, a Repeat violation could be issued if the employer has the same or a substantially similar affirmed recordkeeping violation in the past.

Under current OSHA policy, the Agency will also look back at an employer’s violation history for five years for any similar prior violations. And it would be easy for OSHA to issue a Repeat citation for recordkeeping as it can be for failure to record or properly record *any* injury or illness, even dissimilar injuries arising from dissimilar incidents. Repeat violations carry 10x higher penalties than Serious and Other-than-Serious violations, currently up to \$156,259 per Repeat violation.

**4. Injury and Illness Recordkeeping requirements are among the few that OSHA has successfully cited on a “per instance” basis of the years.**

Under most of its regulations, OSHA is limited to issuing a single citation item for any group of deficiencies under a general course of action. However, when it comes to injury and illness recordkeeping, OSHA can issue separate recordkeeping citation items on a “per instance” basis, each with their own penalties, for each instance of failing to record or not properly recording a recordable injury or illness. That is because the regulatory text of the recordkeeping regulation sets individualized duties to record *each* work-related injury or illness that meets the recording criteria. 

Notably, OSHA just rolled out a [new Instance-By-Instance Citation Policy](#) that makes it even easier for OSHA to issue per instance recordkeeping violations. OSHA used to need a Willful violation and some additional aggravating factor, such as an extensive history of prior violations or conduct that demonstrates clear bad faith, in order to issue instance-by-instance violations. The new Instance-by-Instance Citation Policy permits multiple citations of the same standard, including recordkeeping violations, for non-willful violations, even Other-than-Serious violations so long as the underlying injury or illness relates to a Serious regulatory violation. Thus, depending on the number of violations, the IBI policy could result in substantial penalties.

OSHA’s new Instance-by-Instance citation policy also lists as one factor that will make the agency pursue per instance citations against an employer is a finding that the employer has ever failed to report a fatality, inpatient hospitalization or amputation pursuant to OSHA’s reporting regulation at 1904.39. OSHA’s intent here is to enhance the punishment for reporting violations beyond just the usual Other-than-Serious citation and penalty.

**5. Injury and Illness Recordkeeping data impacts workers’ compensation rates.**

Another reason employers should ensure they are recording only cases that are legally required to be recorded is because an employer’s DART rate is often used by insurance companies to determine workers’ compensation insurance premiums. The more cases that are recorded, the higher the DART rate, and the higher the DART rate, the more employers can expect to pay in workers’ compensation premiums. Thus, employers should carefully evaluate whether an injury or illness is work-related and whether it actually resulted in a recordable criterion. For example, before recording a work restriction case, assess whether the restriction actually impacted one of the employee’s routine job functions.

**6. The data impacts eligibility for Voluntary Protection Programs.**

OSHA’s coveted [Voluntary Protection Programs](#) (“VPP”) are programs for employers who demonstrate success in prevention and control of workplace hazards. There are advantages to employers who qualify for VPP, from the positive reputational impact the designation carries, both in the eyes of OSHA as well as potential customers and prospective employees, to being removed from most of OSHA’s programmed inspection lists. Employers must have a certain injury and illness rate to qualify for VPP, and in order to remain eligible for VPP status, their injury data must remain low and trending in the right direction. To maintain a low injury and illness rate, in addition to implementing an effective safety program, employers must also effectively evaluate injuries and illnesses that occur for recordability and ensure data is accurate.

**7. High injury rates among employers in the same industry could result in emphasis programs or even**

**targeted rulemaking.**

Another way OSHA uses injury and illness data is to set enforcement priorities and direct enforcement resources. Specifically, OSHA can use injury and illness data from a certain industry to justify a National or Regional Emphasis Program or to support the need for a new regulation. The agency can also use injury and illness data to select employers to be included on the Programmed Inspection List for the particular National or Regional Emphasis Program. For example, OSHA decided to target amputations in manufacturing and chose the specific covered industries based on an analysis of injury and illness data collected by OSHA and the Bureau of Labor Statistics.

**8. OSHA has employed AI to determine whether companies are failing to comply with its E-Recordkeeping Rule.**

By collecting injury and illness data electronically pursuant to the E-Recordkeeping Rule, OSHA is now able to review and scrutinize recordkeeping practices without even opening an inspection of a specific employer. OSHA has begun to use AI technology to assist in analyzing the large amount of data collected, which can efficiently detect trends in data for specific employers and industries, to, among other things, identify deficiencies more effectively than an individual compliance officer during an individual inspection.

**9. Injuries recorded on 300 Logs can provide OSHA a roadmap for enforcement during inspections.**

During an inspection, if the compliance officer observes repeated instances of certain types of injuries or causes of injuries on the log, they could focus the inspection on certain areas of the worksite, a particular piece of equipment or task, or a certain safety program (i.e., lockout/tagout or forklift operation). The compliance officer could even potentially expand an inspection if information on the 300 Log provides administrative probable cause to support a broader scope inspection.

**10. Injuries recorded on 300 Logs can be used by OSHA to establish employer knowledge/recognition of a hazardous condition.**

For OSHA to establish any violation of any OSHA standard, the agency must be able to demonstrate that the employer had knowledge – that the employer actually knew or should have known – of the violative condition. One of the ways OSHA goes about establishing employer knowledge is to point to injuries recorded on the employer’s 300 Log that would show that the particular hazardous condition is known to be present in the workplace; i.e., a recorded laceration to the hand from a particular machine could indicate knowledge of inadequate machine guarding.

OSHA must prove employer or industry recognition of a hazard to cite a General Duty Clause violation. Information on employers’ 300 Logs can be used by OSHA to make that requisite showing; e.g., numerous musculoskeletal disorders or incidents of workplace violence on the 300 Logs could establish an employer’s recognition of ergonomics or workplace violence hazards to establish a General Duty Clause violation.

Finally, a history of common injuries on 300 Logs could be used by OSHA to ratchet up citations in a couple of different ways. One way is that OSHA is more likely to use its new Instance-by-Instance by citation authority relative to substantive violations (e.g., fall protection or lockout/tagout violations) if the employer’s 300 Logs


show a history of related injuries. And OSHA often uses numerous injuries on the 300 Log to support a Willful characterization.

## **What Employers Should Do Now**

The big takeaway here should be that it is critical to get recordkeeping right. A philosophy that errs on the side of caution and records cases that are not required to be recorded can have significant adverse consequences, and a hyper-aggressive approach to exclude recordable cases from the 300 Logs has ever-increasing enforcement consequences. So employers need to ensure their team responsible for OSHA Injury and Illness Recordkeeping has the requisite knowledge to get it right.

### **Introducing Conn Maciel Carey's OSHA Injury and Illness Recordkeeping and Reporting Masterclass**

The [national OSHA Practice at Conn Maciel Carey](#) has designed an [OSHA Injury and Illness Recordkeeping and Reporting Masterclass](#), that covers all the nuances of recordkeeping and reporting, from the basics of what constitutes an injury, to navigating the complexities of determining work-relatedness and whether an incident results in a covered in-patient hospitalization as defined by the Serious Injury Reporting regulation.

Specifically, during CMC's half-day (or shorter) Injury and Illness Recordkeeping and Reporting Masterclass,  participants will learn about:

#### **1. OSHA Recordkeeping**

- Scope of OSHA's Recordkeeping Authority
- OSHA Recordkeeping Forms
- How Do Employers Use These Forms?
- Steps to Recordkeeping
- Verify, Summarize, Certify, Post & Maintain

#### **2. Electronic Recordkeeping**

- History of E-Recordkeeping Rule
- E-Recordkeeping Data Submission Requirements
- How to Use the Injury Tracking Application
- Editing Data Submissions

#### **3. Significant Injury and Fatality Reporting**


- Hospitalization, Amputation and Fatality Reporting Requirements
- Reporting Timing Issues
- Common Reporting Mistakes
- Reporting Best Practices

#### **4. COVID-19 Recordkeeping and Reporting**

- COVID-19 Recordkeeping Requirements
- Determining Work-Relatedness of COVID-19 Cases

- Enhanced COVID-19 Reporting Requirements for Healthcare (if applicable)
- Unique COVID-19 Shadow Log Requirements for Healthcare (if applicable)

In addition to the live presentation, participants will also be provided a comprehensive **Injury and Illness Recordkeeping Resource Manual**, which includes:

- A recording of the Masterclass presentation
- Slides from the Masterclass
- A comprehensive Injury and Illness Recordkeeping Checklist
- An OSHA Serious Injury and Fatality Reporting Flow Chart
- An Informational Graphic on 5 Common Recordkeeping Mistakes
- A detailed review of the nuances of  hospitalization and amputation reporting requirements
- An Injury and Illness Recording Quiz/Practical Exercise
- A separate attachment with an answer key for the Quiz/Exercise
- A COVID-19 OSHA Recordkeeping and Reporting Resource Guide

If your organization is interested in learning more about CMC's OSHA Injury and Illness Recordkeeping and Reporting Masterclass, or if you have questions about OSHA injury and illness recordkeeping and reporting or any other OSHA issues, please contact Eric Conn ([econn@connmaciel.com](mailto:econn@connmaciel.com)) or Lindsay DiSalvo ([ldisalvo@connmaciel.com](mailto:ldisalvo@connmaciel.com)).