FEBRUARY 2, 2023 | OSHA RULEMAKINGS & STANDARDS

Timing for OSHA to Finalize the Amended E-Recordkeeping Rule Is Becoming More Clear

By Dan C. Deacon and Eric J. Conn

We have a quick update for you about OSHA's rulemaking to expand the Electronic Recordkeeping Rule. Throughout the last year, OSHA's intent to finalize this rule ahead of the next deadline for employers to submit E-Recordkeeping data (i.e., well ahead of March 2023) was clear, but that will not be the case. OSHA delayed finalizing the proposed revisions to the E-Recordkeeping Rule several times. The delays have now prompted further litigation by a pro-worker activist group in furtherance of a challenge initiated during the Trump Administration to the rollback of the E-Recordkeeping rule by Trump's OSHA early in his term.

The challenging groups are resuming their 2019 lawsuit (*State of New Jersey, et al., v. Walsh*) because the Biden Administration recently moved its target date for finalizing the updated rule from pre-March 2023 to June 2023, arguing that OSHA's "pattern of reneging on its agreements" means litigation is the only sure path to resolve their claims. OSHA had previously signaled that the rule would be finalized by March 2023 in its Fall 2022 regulatory agenda, but OSHA's counsel recently informed the petitioners and the Court that OSHA would not make that commitment by at least three months. A short time later, the petitioners filed a couple of briefs with the U.S. Court of Appeals for the District of Columbia Circuit earlier this month (on January 11th and 12th), asking the DC Circuit to bring the case out of abeyance and set a quick schedule. The petitions brief requesting to revive the case under a scheduling order notes that OSHA's Counsel stated that OSHA now hoped to finalize the Rule by the end of June 2023. OSHA is seeking to keep the case in abeyance, as the extension of time to issue a final rule represents a minor change in the rulemaking timeline and advancing the litigation would not serve the interest of judicial economy.

OSHA appears to be taking its time reviewing and analyzing written comments to the proposed rule, but OSHA's latest declaration of a June 2023 deadline with renewed pressure by the petitioners to finalize this rulemaking makes it highly likely we will see a final rule this Summer. To do that, we will likely see a proposed final rule delivered to the White House's Office of Management and Budget within the next couple of months. This has no impact on the submission of Calendar Year 2022 data that is coming due in about a month – March 2, 20**23**, but this timing does make it likely that the changes will apply to the next data submission – March 2, 20**24**.

As a reminder for what is at stake in this rulemaking, OSHA's current 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

panoply of recordkeeping data (i.e., data from 300 Logs, 301 incident reports, and the 300A annual summaries), 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 the so-called "high hazard industries" reflected in new Appendix B to annually submit to OSHA via an electronic portal the data from their OSHA Forms 300 (the OSHA Log), 301 (individual incident reports for each injury recorded on the 300 Log), and 300A (the Annual Summary Report of recorded injuries);
- Establishments with 20 or more employees in high-hazard industries will still be required to electronically submit information only from their OSHA Form 300A annual summary, but the list of covered industries in this category is expanded per new Appendix A; and
- All submitting establishments must also now include their proper legal company name (rather than a dba or informal descriptor).

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Because of where we find ourselves on the recordkeeping calendar, we also wanted to take this opportunity to remind you all about OSHA's requirement to prepare, certify, and post your 300A Annual Summary of workplace injuries and illness in the workplace this week (by February 1st). For further information on this annual requirement, here is a blog article we prepared that details this requirement and highlights five common 300A mistakes that employers make.

As always, feel free to reach out if you have any questions about the E-Recordkeeping Rule, the status of the rulemaking, or any safety and health matters.