NOVEMBER 1, 2018 | OSHA RULEMAKINGS & STANDARDS

In the Wake of Criticism of the E-Recordkeeping Anti-Retaliation Rule, OSHA Issues New "Guidance"

By Eric J. Conn and Beeta B. Lashkari

On May 11, 2016, OSHA published its Final Rule for injury and illness recordkeeping electronic data submissions — what we refer to as the E-Recordkeeping Rule. The rule fundamentally changed OSHA's long-standing injury and illness recordkeeping program by requiring injury and illness data to be proactively shared with OSHA, which intended originally (and still, but after some delay) to publicize the data for all the world to see. The 2016 E-Recordkeeping Rule required:


OSHA FactSheet

Updates to OSHA's Recordkeeping Rule: Reporting Fatalities and Severe Injuries

OSHA's updated recordkeeping rule expands the list of severe injuries that all employers must report to OSHA. Establishments located in states under Federal OSHA jurisdiction must begin to comply with the new requirements on January 1, 2015. Establishments located in states that operate their own safety and health programs should check with their state plan for the implementation date of the new requirements.

What am I required to report under the new rule?

Previously, employers had to report the following to OSHA:

- All work-related fatalities
- Work-related hospitalizations of three or more employees

Starting in 2015, employers will have to report the following to OSHA:

- All work-related fatalities
- All work-related inpatient hospitalizations of one or more employees
- All work-related amputations
- All work-related losses of an eye

Employers only have to report fatalities that occurred within 30 days of a work-related incident.

For any inpatient hospitalization, amputation, or eye loss **employers must report the incident within 24 hours of learning about it.** Employers only have to report an inpatient hospitalization, amputation or loss of an eye that occurs within 24 hours of a work-related incident.

Emergency

1. All establishments with 250 or more employees in industries covered by the recordkeeping regulation to submit to OSHA annually their injury and illness data and information from their OSHA 300 Logs, 301 Incident Reports, and 300A Annual Summaries.
2. Establishments with 20-249 employees in select "high hazard industries" to annually submit information from their 300A Annual Summaries only.

In addition to the electronic data submission requirements, the E-Recordkeeping also introduced (out of left field) some new anti-retaliation restrictions that were intended to eliminate employer policies that may discourage employees from reporting injuries, purportedly for the nefarious purpose of reducing the numbers of injuries the

employer has to share with OSHA. These anti-retaliation provisions included very generic, vague language, but through a series of memos, interpretation letters, and other guidance, we have learned that the anti-retaliation elements primarily restrict employers' use of safety incentive programs (prizes for injury-free work), post-incident drug testing, executive compensation and bonuses, and post-incident discipline. Although none of those terms even appears in the 2016 regulatory text, OSHA included a panoply of new restrictions impacting very common workplace policies and programs in the Preamble to the Final Rule. For more information about the controversial anti-retaliation elements of the E-Recordkeeping Rule, check out our previous blog post.

Since promulgation in May 2016, implementation of all aspects of the Rule has been mired in difficulty. Shortly after launching the Injury Tracking Application (ITA) to collect injury data, OSHA had to disable the site to work out some data security issues. Then the deadlines to submit data became a moving target. As OSHA was repeatedly pushing the data submission deadline, OSHA made several announcements about expected changes to the Rule (and possible rescission), including a Spring 2018 announcement that it would not require submission of 300 and 301 data from any employer — just the 300A Annual Summary data. Then there were the legal challenges. Shortly after the rule was promulgated, industry groups brought a legal challenge to the anti-retaliation elements of the rule and sought a preliminary injunction to prohibit enforcement of those portions of the rule. (*TEXO ABC/AGC v. Perez*, No. 3:16-cv-01998-D (N.D. Tex. July 8, 2016)). On June 29, 2017, the Trump Administration filed a motion to stay the proceedings on the basis that OSHA was considering revisions to the rule that could make the legal challenge moot; i.e., signalling that it was likely the anti-retaliation provisions would be rescinded. The judge administratively closed the case pending further rulemaking by OSHA.


IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

TEXO ABC/AGC, INC.,
ASSOCIATED BUILDERS AND CONTRACTORS, INC.,
NATIONAL ASSOCIATION OF MANUFACTURERS,
AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS,
GREAT AMERICAN INSURANCE COMPANY,
ATLANTIC PRECAST CONCRETE, INC.,
OWEN STEEL COMPANY, and
OXFORD PROPERTY MANAGEMENT LLC,
PLAINTIFFS,
v.
THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, in his official capacity,
DAVID MICHAELS, ASSISTANT SECRETARY OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, in his official capacity, and
UNITED STATES DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
DEFENDANTS.

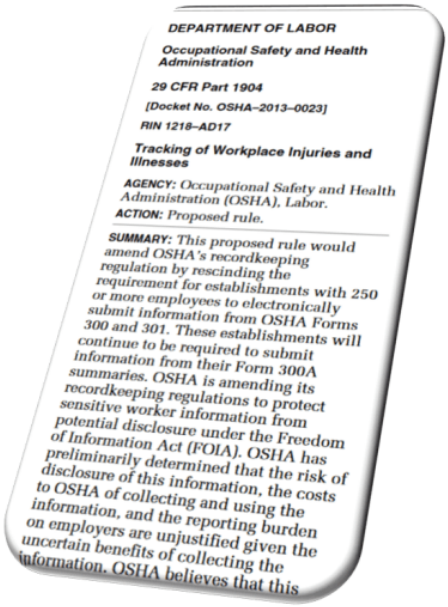
CIVIL ACTION NO. 3:16-CV-1998

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

After a couple of years of these informal changes, extended deadlines, industry challenges, shifting guidance, and signals of big change to come, on July 30, 2018, OSHA finally rolled out a Notice of Proposed Rulemaking to amend the E-Recordkeeping Rule. However, rather than settling the status of this Rule, this proposal just mired the Rule in further controversy. The Proposed Rule includes only one significant change to the current regulation — elimination of the requirement for the largest employers, those with establishments with 250 or more employees, to annually submit to OSHA the data from their 300 logs and 301 detailed incident reports. The proposal leaves intact the requirements for these large employers and many smaller employers to annually submit 300A annual summary data via OSHA's electronic portal.

What was surprising and most concerning to employers, however, is that the proposed rule does not disturb in

any manner the highly controversial "anti-retaliation" provisions, or the interpretations of those provisions included in Preamble to the 2016 Final Rule. OSHA's rationale for the proposal is based on protecting worker privacy by eliminating the electronic collection of case-specific data containing identifying employee information and sensitive health information about specific individuals. The agency has apparently now recognized that collection of such information, which is all over OSHA Forms 300 and 301, adds uncertain enforcement value, yet poses a potential privacy risk because, even if the agency successfully scrubbed the portal data to protect this information, it might still be made public pursuant to a Freedom of Information Act (FOIA) request. Because no such employee privacy concern exists associated with the 300A Annual Summary data (because that data is not included on 300A forms).



DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1904

[Docket No. OSHA–2013–0023]

RIN 1218–AD17

Tracking of Workplace Injuries and Illnesses

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

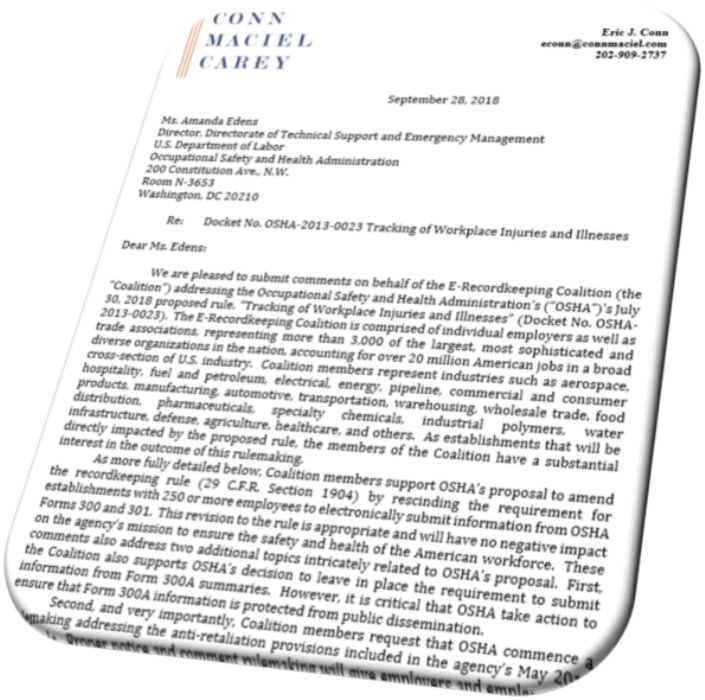
ACTION: Proposed rule.

SUMMARY: This proposed rule would amend OSHA's recordkeeping regulation by rescinding the requirement for establishments with 250 or more employees to electronically submit information from OSHA Forms 300 and 301. These establishments will continue to be required to submit information from their Form 300A summaries. OSHA is amending its recordkeeping regulations to protect sensitive worker information from potential disclosure under the Freedom of Information Act (FOIA). OSHA has preliminarily determined that the risk of disclosure of this information, the costs to OSHA of collecting and using the information, and the reporting burden on employers are unjustified given the uncertain benefits of collecting the information. OSHA believes that this

However, because of the tiny scope of this proposed change (i.e., not touching the controversial anti-retaliation elements), employers' other concerns with the Rule were ignored. Given President Trump's commitment to deregulation and clearing unnecessary burdens from employers, the proposed change – which took more than a year to publish – is a major disappointment.

Comments to the proposed amendments were due to OSHA by September 28, 2018. Conn Maciel Carey LLP organized a very large coalition of employers and trade groups to comment on the rule. Although OSHA was specifically seeking comment only on the proposal to cut out the 300 and 301 data submission requirements, our E-Recordkeeping Coalition delivered comments to OSHA that also addressed the anti-retaliation elements that restrict safety incentive programs, post-injury drug testing, and post-incident discipline. Here is a link to the full set of comments submitted on behalf of our E-Recordkeeping Coalition.

Whether prompted by our comments or already in the works, a couple weeks after the close of the comment period, OSHA issued a new memo clarifying OSHA's position on safety incentive programs and post-incident drug testing. The memo addresses some of the issues our E-Recordkeeping Coalition raised to OSHA.



CONN MACIEL CAREY

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September 28, 2018

Ms. Amanda Edens
Director, Directorate of Technical Support and Emergency Management
U.S. Department of Labor
Occupational Safety and Health Administration
200 Constitution Ave., N.W.
Room N-3653
Washington, DC 20210

Re: Docket No. OSHA-2013-0023 Tracking of Workplace Injuries and Illnesses

Dear Ms. Edens:

We are pleased to submit comments on behalf of the E-Recordkeeping Coalition (the "Coalition") addressing the Occupational Safety and Health Administration's ("OSHA") July 30, 2018 proposed rule, "Tracking of Workplace Injuries and Illnesses" (Docket No. OSHA-2013-0023). The E-Recordkeeping Coalition is comprised of individual employers as well as trade associations, representing more than 3,000 of the largest, most sophisticated and diverse organizations in the nation, accounting for over 20 million American jobs in a broad cross-section of U.S. industry. Coalition members represent industries such as aerospace, hospitality, fuel and petroleum, electrical, energy, pipeline, commercial and consumer products, manufacturing, automotive, transportation, warehousing, wholesale trade, food distribution, pharmaceuticals, specialty chemicals, industrial polymers, water infrastructure, defense, agriculture, healthcare, and others. As establishments that will be directly impacted by the proposed rule, the members of the Coalition have a substantial interest in the outcome of this rulemaking.

As more fully detailed below, Coalition members support OSHA's proposal to amend the recordkeeping rule (29 C.F.R. Section 1904) by rescinding the requirement for establishments with 250 or more employees to electronically submit information from OSHA Forms 300 and 301. This revision to the rule is appropriate and will have no negative impact on the agency's mission to ensure the safety and health of the American workforce. These comments also address two additional topics intricately related to OSHA's proposal. First, the Coalition also supports OSHA's decision to leave in place the requirement to submit information from Form 300A summaries. However, it is critical that OSHA take action to ensure that Form 300A information is protected from public dissemination.

Second, and very importantly, Coalition members request that OSHA commence a [illegible] making addressing the anti-retaliation provisions included in the agency's May 20[illegible]

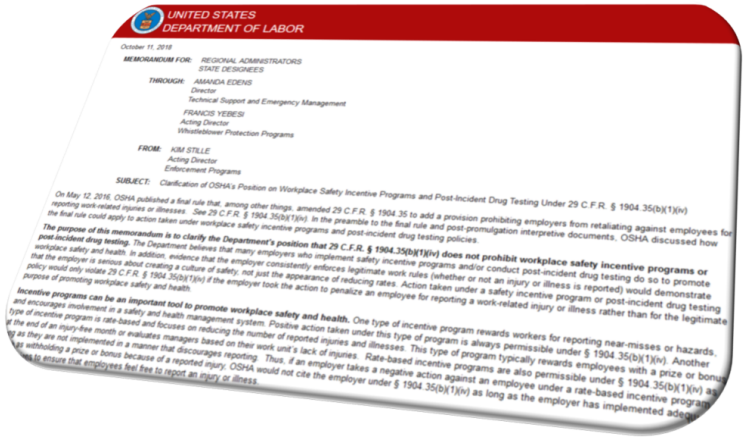
[illegible] notice and comment rulemaking will give employers and emplo[illegible]

For example, in our comments, we raised the fact that there was confusion over OSHA's guidance on safety incentive programs, particularly with respect to the types of precautions OSHA would consider sufficient to balance rate-based safety incentives to avoid discouraging reporting. OSHA provides some guidance on this in its new memo, describing those types of precautions by way of a few examples.

With respect to drug testing, we raised several issues related to OSHA's October 19, 2016 guidance, commenting that it provided employers with inadequate notice as to when post-incident drug testing would run afoul of the Rule's anti-retaliation provisions. OSHA's new memo attempts to resolve those concerns, stating that most instances of workplace drug testing are permissible under the rule, and providing a list of examples of permissible drug testing. The memo makes clear that it supersedes previous guidance on these topics insofar as inconsistencies are identified. This of course would include the October 19, 2016 guidance document on workplace drug testing that we criticized in our comments.

While the new guidance seems to be helpful, our initial review suggests that it does not move the needle very much, nor does it resolve the fundamental uncertainties and concerns with OSHA's anti-retaliation provisions in a clear and permanent way. First, as to safety incentive programs, the memo appears to be nearly identical to the

2017 updated VPP memo on the same topic. Although the new memo does provide select elements that employers can implement to avoid any inadvertent deterrent effects of their safety incentive programs, the elements are limited, and the descriptions are vague, at best.


UNITED STATES
DEPARTMENT OF LABOR

October 11, 2018

MEMORANDUM FOR: REGIONAL ADMINISTRATORS
STATE DESIGNEES

THROUGH: AMANDA EDENS
Director
Technical Support and Emergency Management

FRANCIS YEBESI
Acting Director
Whistleblower Protection Programs

FROM: KIM STILLE
Acting Director
Enforcement Programs

SUBJECT: Clarification of OSHA's Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under 29 C.F.R. § 1904.35(b)(1)(iv)

On May 12, 2016, OSHA published a final rule that, among other things, amended 29 C.F.R. § 1904.35 to add a provision prohibiting employers from retaliating against employees for reporting work-related injuries or illnesses. See 29 C.F.R. § 1904.35(b)(1)(iv). In the preamble to the final rule and post-promulgation interpretive documents, OSHA discussed how the final rule could apply to action taken under workplace safety incentive programs and post-incident drug testing policies.

The purpose of this memorandum is to clarify the Department's position that 29 C.F.R. § 1904.35(b)(1)(iv) does not prohibit workplace safety incentive programs or post-incident drug testing. The Department believes that many employers who implement safety incentive programs and/or conduct post-incident drug testing do so to promote workplace safety and health. In addition, evidence that the employer consistently enforces legitimate work rules (whether or not an injury or illness is reported) would demonstrate that the employer is serious about creating a culture of safety, not just the appearance of reducing rates. Action taken under a safety incentive program or post-incident drug testing policy would only violate 29 C.F.R. § 1904.35(b)(1)(iv) if the employer took the action to penalize an employee for reporting a work-related injury or illness rather than for the legitimate purpose of promoting workplace safety and health.

Incentive programs can be an important tool to promote workplace safety and health. One type of incentive program rewards workers for reporting near-misses or hazards, and encourages involvement in a safety and health management system. Positive action taken under this type of program is always permissible under § 1904.35(b)(1)(iv). Another type of incentive program is rate-based and focuses on reducing the number of reported injuries and illnesses. This type of program typically rewards employees with a prize or bonus at the end of an injury-free month or evaluates managers based on their work unit's lack of injuries. Rate-based incentive programs are also permissible under § 1904.35(b)(1)(iv). Another ng as they are not implemented in a manner that discourages reporting. Thus, if an employer takes a negative action against an employee under a rate-based incentive program as withholding a prize or bonus because of a reported injury, OSHA would not cite the employer under § 1904.35(b)(1)(iv) as long as the employer has implemented adequate ns to ensure that employees feel free to report an injury or illness.

Second, as to drug testing, the new memo also appears similar to all of the past guidance on that topic. For example, OSHA states that drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees is permissible, so long as all employees whose conduct could have contributed to the incident, not just employees who report injuries, are tested. We posted an article about this almost two years ago, and based on the available guidance, we were already advising that drug testing must have a reasonable connection to the cause of an incident, and that testing should be applied to all who may have caused or contributed to the incident, as opposed to those who reported a resulting injury. Granted, rather than focusing on whether there is a reasonable basis that the incident type was one which drugs or alcohol may contribute, the new memo allows employers to just show the testing was done in connection with an investigation to determine the root cause of an incident. We are concerned, nevertheless, that employers will have just as hard a time showing that they conducted the testing to evaluate root causes as a showing that they tested because of a "reasonable suspicion" that drugs could have contributed to the accident.

Regardless of what the memo actually says, the fact that OSHA decided to issue yet one more guidance document on the topic highlights the fundamental concern we raised in our comments. That is, the solution we believe is necessary is to either eliminate the anti-retaliation provisions or provide real, clear definitions around the provisions *through rulemaking, not guidance*. As the long line of memos and other guidance demonstrates, guidance comes and goes, and can be flipped or dropped on a whim. Rulemaking, on the other hand, tends to stand the test of time. A rulemaking would provide employers and employees alike the opportunity to submit comments on these provisions, and to gain some certainty about the future of the Rule.

Accordingly, while we are pleased to see some movement, we continue to believe further rulemaking is necessary. In the meantime, however, employers should become familiar with the latest round of guidance issued by OSHA on safety incentive programs and drug testing and adapt their policies and procedures as necessary.