


JULY 18, 2023 | OSHA RULEMAKINGS &amp; STANDARDS

# White House Clears the Final Amended Electronic Recordkeeping Rule

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The White House has given final sign-off on OSHA's Amended Regulation — Improved Tracking of Workplace Injuries and Illnesses (aka the Electronic Recordkeeping or E-Recordkeeping Rule). The Preamble and the Final Rule have been sent to the Federal Register for official publication. The rule package will appear in the Federal Register this Friday (July 21, 2023), but in the meantime, the Administration has posted a [pre-publication version of the final rule package](#). So we now have the final regulatory text, OSHA's rationale for its final rulemaking decisions, and its analysis of the stakeholder comments about the proposed amended rule. Here's what we know. 

## Details About the Final Rule

The final amended E-Recordkeeping Rule will take effect on January 1, 2024. The regulatory text and the Preamble make clear that because this final rule becomes effective before the next E-Recordkeeping submission deadline in 2024, OSHA intends for March 2, 2024 to be the first submission deadline for the new information required to be submitted under this rule.

Unfortunately, OSHA has included each of the proposed changes in the final rule, and even worse, it added in an element that goes beyond what had originally been proposed. As a reminder, the proposed amended rule published by OSHA in March 2022 included three key revisions:

1. Establishments with 20 or more employees, in certain high-hazard industries, continue to electronically submit Form 300A Annual Summary information once a year to OSHA under a slightly modified Appendix A;
2. Establishments with 100 or more employees in the highest-hazard industries in a new Appendix B to submit 300A Annual Summary, Form 300 Log, and Form 301 Incident Report information once a year to OSHA; and
3. Establishments with 250 or more employees, not in designated high-hazard industries, would no longer be required to electronically submit recordkeeping information to OSHA.

The final rule makes those changes for 20+ employee and 100+ employee workplaces as proposed, but OSHA

backtracked on its proposal to drop the requirement for establishments with 250+ employees to submit 300A Annual Summary data regardless of the industry. So now: (i) workplaces with 100+ employees in Appendix B workplaces will have to submit 300 Log, 301 Incident Report, and 300A Annual Summary data; (ii) workplaces with 20-249 employees in Appendix A industries will have to submit their 300A Annual Summary data; AND (iii) workplaces with 250+ employees in any industry will also still have to submit their 300A Annual Summary data.

In a Press Release this morning about the final rule, Doug Parker, the Assistant Secretary of Labor for OSHA stated:

***Congress intended for the OSH Act to include reporting procedures that would provide the agency and the public with an understanding of the safety and health problems workers face, and this rule is a big step in finally realizing that objective. OSHA will use these data to intervene through strategic outreach and enforcement to reduce worker injuries and illnesses in high-hazard industries. The safety and health community will benefit from the insights this information will provide at the industry level, while workers and employers will be able to make more informed decisions about their workplace's safety and health.***

OSHA offered several reasons for why it backtracked on its proposal to remove the data submission requirement for larger establishments in low hazard industries, including:

- A need for continued oversight over large establishments in lower-hazard industries in general and certain industries in particular;
- The ability to use the data to protect the large number of employees employed in these establishments;
- The value of the public information to employee safety and health efforts;
- Although the *industries* not listed in Appendix A may have relatively low injury rates overall, "injury rates can vary greatly across employers and establishments within industries, and the requirement for large establishments to submit a 300A Log annually would be a reasonable way to identify establishments that have higher injury rates than their industry average, and to identify subsegments of industries that may have more hazardous work processes and activities; and
- There would be no significant burden on employers because these employers are already required to submit the data.

### **Notable Excerpts from the Preamble to the Final Rule**

The Preamble to the Final Rule consists of 319 pages, which address a variety of topics raised in public comments and stakeholder meetings. We have made a quick pass through the Preamble and wanted to highlight some of the notable excerpts:

#### ***Justification for Collecting 300/301 Level Data***

- By having access to more precise information about the kinds of injuries and illnesses affecting workers performing different kinds of operations at different kinds of workplaces, OSHA believes it can deploy its resources in ways more calculated to address the specific hazards that actually exist in specific

workplaces.

- OSHA stated that many of the comments questioning the utility of the data seemed to be premised on an “erroneous belief” that OSHA’s primary use of the data would be to target enforcement efforts at workplaces with higher injury and illness rates. But OSHA claims that the utility of case-specific data is much broader. Specifically, while the data certainly can be used to help target enforcement, as well as compliance assistance efforts, it also allows for “the types of analyses that can make all of OSHA’s work more effective.” The collection and publication of data from Forms 300 and 301 will not only increase the amount of information available for analysis, but also result in more accurate statistics regarding work-related injuries and illnesses, including more detailed statistics on injuries and illnesses for specific occupations and industries.
- OSHA concluded that the significant benefits associated with the collection and publication of Forms 300 and 301 data outweigh the slight risk to employee privacy. In fact, OSHA stated that “the benefits of collection alone would outweigh the slight risk to employee privacy.”

### ***Publication of the Data and Privacy Concerns***

- Although publication was not part of the regulatory requirements of this final rule, OSHA intends to post the collected establishment-specific, case-specific injury and illness information online. OSHA concluded that the bases for the removal of the 300 and 301 data submission requirements, which were previously supported by OSHA in the last update to the E-Recordkeeping Rule under the Trump Administration, are no longer compelling. OSHA states that it will seek to minimize the possibility of the release of information that could reasonably be expected to identify individuals directly, such as employee name, contact information, and name of physician or health care professional by limiting the worker information collected, designing the collection system to provide extra protections for some of the information that employers will be required to submit, withholding certain fields from public disclosure, and using automated software to identify and remove information that could reasonably be expected to identify individuals directly.
- In terms of the multiple layers of protection to protect information that could reasonably be expected to identify individuals directly, e.g., names and addresses, OSHA first measure is to not collect most of that information in the first place. Establishments that are required to submit 300 and 301 information must submit all the information from the OSHA Forms 300 and 301 except for the following case-specific information:
  - Employee name (column B), from the Log of Work-Related Injuries and Illnesses (OSHA Form 300).
  - Employee name (Field 1), employee address (Field 2), name of physician or other health care professional (Field 6), and facility name and address if treatment was given away from the worksite (Field 7) from the Injury and Illness Incident Report (OSHA Form 301).
- OSHA’s second measure to prevent the release of information that could reasonably be expected to identify individuals directly relates to system design. Specifically, the agency explained that it planned to design its data collection system to provide extra protections for the personal information that establishments would be required to submit under the proposal. For example, OSHA stated that although

the proposal would require employers to submit the employee's date of birth from Form 301 (Field 3), it planned to design the data collection system to immediately calculate the employee's age based on the date of birth entered and then store only the employee's age, not the employee's date of birth. OSHA also indicated its intent to post reminders to establishments to omit from the text fields they submit any information that could reasonably be expected to identify individuals directly, including names, addresses, Social Security numbers, and any other identifying information.

- OSHA's third measure to prevent the release of information that could reasonably be expected to identify individuals directly is to withhold certain information that is submitted to it from public disclosure. OSHA specifically states that it will make only the following data from Forms 300 and 301 available in a searchable online database:
  - Form 300 (the Log)—All collected data fields on the 300 Log will generally be made available on OSHA's website; however, as stated above, employee names will not be collected.
  - Form 301 (Incident Report)—All collected data fields on the right-hand side of the form (Fields 10 through 18) will generally be made available. As specified in § 1904.41(b)(9), employee name (Field 1), employee address (Field 2), name of physician or other health care professional (Field 6), and facility name and address if treatment was given away from the worksite (Field 7) will not be collected.
  - However, the Final Rule does require the submission of some fields that do contain personal information, including date of birth (which will be converted to age) (Field 3), date hired (Field 4), gender (Field 5), whether the employee was treated in the emergency room (Field 8), and whether the employee was hospitalized overnight as an in-patient (Field 9). OSHA states that it will withhold from publication all identifying material in those columns and redact any identifying material from the portions of the forms it does intend to publish (e.g., Fields 10 through 18 of Form 301).
- OSHA's fourth measure to prevent the release of information that could reasonably be expected to identify individuals directly is through the use of scrubbing technology. OSHA will supplement the selected system with some manual review of the data, in order to ensure the system adequately protects such information.

### ***Underreporting Concerns***

- OSHA responded to commenters' concerns that the publishing of case-specific data would lead to underreporting. OSHA explained that the public availability of case-specific data will allow employees to assess whether their personally experienced injuries and illnesses have been accurately recorded on their employers' Forms 300 and 301. Although others would not be able to identify that a specific employee suffered a particular injury or illness, OSHA expects that the injured or ill worker would be able to determine whether their particular injury or illness was recorded. This check would work in tandem with employees' ability to check such things in an employer's Forms 300 and 301 and would address employees' fear that asking to view those forms could result in retaliation.

### ***Public Misinterpretation of Data***

- OSHA acknowledged commenters' concerns about potential misinterpretation of the data and recognized

that the public may need more assistance in understanding the data than employers, researchers, and other similar interested parties. To alleviate this concern, OSHA intends to provide information to the public to aid their understanding of the data with updates on the ITA portal that contain several contains several explanations of the data, including:

- “Recording or reporting a work-related injury, illness, or fatality does not mean that the employer or employee was at fault, that an OSHA rule has been violated, or that the employee is eligible for workers’ compensation or other benefits.”
- “While OSHA takes multiple steps to ensure the data collected is accurate, problems and errors invariably exist for a small percentage of establishments. OSHA does not believe the data for the establishments with the highest rates in these files are accurate in absolute terms. Efforts are made during the collection cycle to correct submission errors; however, some remain unresolved. It would be a mistake to say establishments with the highest rates in these files are the ‘most dangerous’ or ‘worst’ establishments in the nation.”

### ***Economic/Cost Analysis***

- OSHA grossly underestimates the time and resources employers will expend to comply with these changes. OSHA estimates that this rule will have economic costs of \$7.7 million per year, including \$7.1 million per year to the private sector, with **average costs of only \$136 per year for affected establishments with 100 or more employees**, annualized over 10 years with a discount rate of seven percent. OSHA believes that the annual benefits, while unquantified, significantly exceed the annual costs.

### ***Intersection of OSHA E-Recordkeeping and the BLS Survey***

- OSHA is looking into ways to minimize duplicative reporting with the Bureau of Labor Statistics. As you all know, each year, BLS collects data from Forms 300, 301, and 300A from a scientifically selected probability sample of about 230,000 establishments, covering nearly all private-sector industries, as well as State and local government. BLS has modified its collection procedures to be able to automatically import certain Form 300A submissions from the OSHA ITA into the BLS SOII Internet Data Collection Facility (IDCF). So there may be some modifications in the future that will ease the burden on employers and perhaps eliminate duplicative reporting to BLS.


### ***Reducing the Threshold for 300/301 Submission from 250+ employees to 100+ Employees in Certain Industries***

- OSHA explained that the 100+ employee threshold will allow OSHA to strike an appropriate balance between the total number of establishments required to submit case-specific data to OSHA and the total number of injury and illness cases collected, on the one hand, with burden on employers (especially smaller employers) on the other. By setting the threshold at 100 or more employees and limiting the covered industries to the higher hazard industries listed in final appendix B to subpart E, the agency is focusing its data collection efforts in a more targeted manner and strikes a balance between the utility of the information collection for enforcement, outreach, and research, on the one hand, and the burden on employers to provide the information to OSHA, on the other hand.

***Where to set the Total Case Rate (TCR) for the 100+ Employee Workplaces to Submit All Data.***

- OSHA also addressed commenters' requests to increase the Total Case Rate (TCR) threshold for establishing the select high-hazard industry list in Appendix B to a rate consistent with BLS's high incident rate averages. OSHA explained that the 3.5 TCR cut-off represents a balance between more information and more employer burden with a lower cut-off, and less information and less employer burden with a higher cut-off. For instance, utilizing the 6.8 TCR rate taken from the 2019 BLS table 19SNR01 "Highest incidence rates of total nonfatal occupational injury and illness cases or the 4.2 DART rate taken from 2019 BLS table 19SNR02 "Highest incidence rates of nonfatal occupational injury and illness cases with days away from work, restricted work activity, or job transfer" would severely restrict the list of industries which would be required to submit data pursuant to this rulemaking, which would, in turn, restrict OSHA's ability to target its enforcement and compliance assistance efforts beyond that small subset of industries.

**OSHA Injury and Illness Recordkeeping and Reporting Masterclass**

As we discussed in a recent article on the OSHA Defense Report Blog – [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](#) – OSHA's collection and publication of employers' recordkeeping data under the E-Recordkeeping Rule  is a key reason to make sure you are getting OSHA recordkeeping right. CMC has developed an [OSHA Injury and Illness Recordkeeping and Reporting Masterclass](#) to help with that.

We are putting together a briefing about the new Final Amended E-Recordkeeping Rule soon. In the meantime, [let us know if you have any questions.](#)