OSHA’s New Electronic Recordkeeping Rule
Creates a Minefield for Employers

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By Valerie Butera

On May 12, 2016, the Occupational Safety and Health Administration ("OSHA") published its long-awaited electronic recordkeeping rule ("final rule"). The final rule creates numerous new recordkeeping obligations and additional administrative burdens for employers. Many employers will now be required to submit injury and illness information to OSHA electronically. OSHA will then attempt to remove identifying information from the records and publish them on a searchable database on its website. The final rule also includes several new anti-retaliation provisions that provide new protections for employees reporting work-related injuries and illnesses.

The electronic reporting requirements of the final rule will be phased in, beginning on January 1, 2017. Notably, however, the anti-retaliation provisions will become enforceable very soon, on August 10, 2016.

The Basics

The final rule requires certain employers to electronically submit to OSHA the injury and illness information that they are already required to keep under existing regulations. Specifically, establishments with 250 or more employees that are currently required to keep injury and illness records must electronically submit information from OSHA Forms 300 (Log of Work-Related Injuries and Illnesses), 300A (Summary of Work-Related Injuries and Illnesses), and 301 (Injury and Incident Report).

Establishments with 20 or more employees but fewer than 250 that conduct work in industries that OSHA considers highly hazardous must electronically submit information from Form 300A annually. The group of industries deemed highly hazardous is primarily comprised of utilities, construction, manufacturing, retail, transportation, and health care. All employers should be mindful that, when determining the number of employees who worked in their establishments each year, part-time, seasonal, and temporary workers must be included in that calculation.

OSHA may also collect information from employers that do not submit injury and illness data to the agency on a routine basis. These employers would be required to submit such data to OSHA only upon request.
All establishments required to submit electronic records must submit their annual Form 300A to OSHA by July 1, 2017. On July 1, 2018, establishments with 250 or more employees must submit Forms 300A, 300, and 301. Establishments with 20–249 employees will continue to submit only Form 300A.

Beginning in 2019, the submission deadline will change from July 1 to March 2. OSHA State Plan states must adopt rules that are substantially identical to the final rule within six months of its publication.

Notice and Anti-Retaliation Provisions

Employers must now involve their employees in the injury and illness recordkeeping process by informing them of how to report a work-related injury or illness within the establishment and the procedure used by the employer to report such incidents to OSHA. Employers must establish “a reasonable procedure” for employees to report work-related injuries and illnesses promptly and accurately—that is, the procedure cannot have the effect of discouraging employees from reporting a workplace injury or illness. Accordingly, an employer must also inform employees that:

- they have a right to report work-related injuries and illnesses,
- they will not be discharged or in any manner discriminated against for reporting work-related injuries and illnesses, and
- the employer is legally prohibited from discharging employees or discriminating against them in any way for reporting a work-related injury or illness.

As noted above, the final rule’s new anti-retaliation provisions go into effect on August 10, 2016. Because the final rule’s anti-retaliation provisions are far-reaching, employers are well-advised to confer with counsel before taking any action that could conceivably be perceived as retaliation for reporting a work-related injury or illness. For example, although the final rule does not prohibit post-incident drug testing of employees who filed an injury or illness report, if an employer tests such employees, it must be able to establish that the testing was not a form of retaliation. If the employer conducts drug testing to comply with the requirements of a state or federal law or regulation, the employer’s motive would not be considered retaliatory, and the final rule would not prohibit the testing. But, in the absence of such testing requirements, an employer should be prepared to demonstrate to OSHA that the testing was reasonable under the circumstances.

Employers’ New Challenges and Concerns

The final rule presents numerous challenges and concerns for employers.

First, OSHA has stated that it will use the information that it collects as employers comply with the rule to identify new bad actors—if an employer has a higher-than-average injury and illness rate, the chances of its establishment being visited by compliance officers will dramatically increase.
Second, although employers are to submit the recordkeeping forms to OSHA on a secure web-based application, if the application is hacked, the personal information of countless employees could be exposed before OSHA has the opportunity to remove such information from the records. Once the forms are received by OSHA, the agency will “scrub” any personal identifiers from them and place them on a publicly available searchable database on OSHA’s website. This step also opens the doors to an inadvertent disclosure of private employee information.

Third, the public exposure of work-related injury and illness information gives OSHA another avenue with which to continue its campaign of shaming companies that it believes are bad actors before employers are able to defend themselves, as the press will have access to this information.

Fourth, the public dissemination of work-related injury and illness information will aid unions in targeting companies for unionization—i.e., unions will have unfettered access to the lists of companies that have higher injury and illness rates and may, therefore, find employees more interested in becoming unionized.

Last, the final rule gives OSHA a new weapon against employers—broad discretion to issue citations if the agency considers any part of an employer’s procedures for reporting a work-related injury and illness to be “unreasonable.”

**What Should Employers Do Now**

- Train employees on the requirements of the final rule and when they go into effect.

- Ensure that employees understand that they will not be retaliated against for reporting work-related injuries and illnesses and are, in fact, encouraged to report them.

- Retrain the employee(s) responsible for injury and illness recordkeeping on the basics of recordkeeping and provide thorough training on the final rule with an emphasis on protecting personally identifiable information to the maximum extent possible while remaining in compliance with the new regulatory requirements.

- Review and revise drug testing policies to bring them into compliance with the requirements of the final rule.

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