Improved Tracking of Workplace Injuries and Illness

Jim Shelton, CAS
Houston North Area Office
Improved Tracking of Workplace Injuries and Illness

- Issued May 11 and published May 12, 2016 with an effective date of August 10, 2016 and phased in data submission beginning 2017
  - What does the rule cover
  - Who has to report
  - What has to be reported
  - Related issues:
    - Discrimination and OSHA citations
    - Post Incident Drug Testing
    - Incentive Programs
Why Collect the Data

- OSHA will be able to better identify small and medium employers who report high overall injury/illness rates for referral to the OSHCON program.
- Allow OSHA to identify emerging hazards and support a response and reach out to employers whose workplaces might include those hazards.
- Allow OSHA to more effectively target enforcement resources to establishments with high rates or numbers of injuries and illnesses and better evaluate its interventions.
- Data will be used for targeting inspections and emphasis programs.
- Enable OSHA to evaluate the impact of government injury prevention activities.
Why Publicize the Data

• Publicizing the data is expected to provide benefits for example:
  • Encourage employers to improve workplace safety and health to support their reputations as good places to work or to do business with
  • Assist employers who want to benchmark to improve safety and health performance
  • Allows employees to compare their workplace to the safest workplaces in their industries
  • Improve the workings of the labor market by providing information to job seekers which would encourage employers to abate hazards to attract more desirable employees
Why Publicize the Data

• Data will permit investors to identify investment opportunities in firms with low injury and illness rates

• Data will allow members of the public to be able to make more informed decisions about current and potential places with which to conduct business

• In construction projects preference is often given to subcontractors with lower injury and illness rates and above certain rates are not eligible for the contract work. Publication will allow corporate and individual customers to consider these rates in the selection of vendors and contractors

• Increase the accuracy of recorded data

There’s more additional expected benefits discussed in the FR...
How would the Data be Collected

• The data will be electronically submitted or manually entered
  • Maybe MS Excel, XML, or csv...
• It’s expected a help desk will be established to assist with data collection and submission
• Employers with technical difficulties would have multiple chances to submit the data before a citation is issued for non-response
OSHA Form 301

**Injury and Illness Incident Report**

This Injury and Illness Incident Report is one of the first forms you must fill out when a recordable work-related injury or illness has occurred. Together with the Log of Work-Related Injuries and Illnesses and the accompanying Summary, these forms help the employer and OSHA develop a picture of the extent and severity of work-related incidents.

Within 7 calendar days after you receive information that a recordable work-related injury or illness has occurred, you must fill out this form or an equivalent. Some state workers’ compensation, insurance, or other reports may be acceptable substitutes. To be considered an equivalent form, any substitute must contain all the information asked for on this form.

According to Public Law 91-596 and 29 CFR 1904, OSHA’s recordkeeping rule, you must keep this form on file for 5 years following the year to which it pertains.

If you need additional copies of this form, you may photocopy the printout or insert additional form pages in the PDF, and then use as many as you need.

### Information about the employee

1. **Full name**
2. **Street**
3. **City**
4. **State**
5. **ZIP**
6. **Date of birth**
7. **Gender**
8. **Name of physician or other health care professional**
9. **Facility**
10. **Street**
11. **City**
12. **State**
13. **ZIP**
14. **Was employee treated in an emergency room?**
15. **Was employee hospitalized overnight or in patient?**
16. **Date of death**

### Information about the case

1. **Case number from the Log**
2. **Date of injury or illness**
3. **Time employee began work**
4. **Time of event**
5. **What was the employee doing just before the incident occurred?**
6. **What happened?**
7. **What was the injury or illness?**
8. **What caused the injury or illness?**
9. **If death occurred, when did death occur?**

Public reporting burdens for this collection of information is estimated to average 22 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Persons are not required to respond to the collection of information unless it displays a currently valid OSHA control number. If you have any comments about this or any other aspects of this data collection, including suggestions for reducing the burden, contact: U.S. Department of Labor, OSHA-Office of Statistics Analysis, Room 2344B, 200 Constitution Avenue, NW, Washington, DC 20210. Do not send the completed forms to this office.
OSHA Form 300A

OSHA Form 300A (Rev. 01/2004)

Summary of Work-Related Injuries and Illnesses

All establishments covered by Part 1904 must complete this Summary page, even if no work-related injuries or illnesses occurred during the year. Remember to review the Log to verify that the entries are complete and accurate before completing this summary.

Using the Log, count the individual entries you made for each category. Then write the totals below, making sure you’ve added the entries from every page of the Log. If you had no cases, write “0.” Employees, former employees, and their representatives have the right to review the OSHA Form 300 in its entirety. They also have limited access to the OSHA Form 301 or its equivalent. See 29 CFR Part 1904.35, in OSHA’s recordkeeping rule, for further details on the access provisions for these forms.

<table>
<thead>
<tr>
<th>Number of Cases</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number of</td>
<td>Total number</td>
<td>Total number</td>
<td>Total number</td>
</tr>
<tr>
<td>deaths</td>
<td>cases with</td>
<td>of cases with</td>
<td>of other</td>
</tr>
<tr>
<td></td>
<td>days away</td>
<td>job transfers</td>
<td>recordable</td>
</tr>
<tr>
<td></td>
<td>from work</td>
<td>or restriction</td>
<td>cases</td>
</tr>
<tr>
<td>(5)</td>
<td>(6)</td>
<td>(7)</td>
<td>(8)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Number of Days</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number of</td>
<td>Total number of</td>
</tr>
<tr>
<td>days away from</td>
<td>days of job</td>
</tr>
<tr>
<td>work</td>
<td>transfer or</td>
</tr>
<tr>
<td></td>
<td>restriction</td>
</tr>
<tr>
<td>(9)</td>
<td>(10)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Injury and Illness Types</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number of</td>
<td></td>
</tr>
<tr>
<td>(1) Injuries</td>
<td>(4) Poisonings</td>
</tr>
<tr>
<td>(2) Skin disorders</td>
<td>(5) Hearing loss</td>
</tr>
<tr>
<td>(3) Respiratory conditions</td>
<td>(9) All other illnesses</td>
</tr>
<tr>
<td>(11)</td>
<td>(12)</td>
</tr>
</tbody>
</table>

Post this Summary page from February 1 to April 30 of the year following the year covered by this form.

Public reporting burden for this collection of information is estimated to average 10 minutes per response, including time to review the instructions, search and gather the data needed, and complete and review the collection of information. Persons are not required to respond to the collection of information unless it displays a currently valid OMB control number. If you have comments about this estimate or any aspect of this data collection, contact: U.S. Department of Labor, OSHA Office of Statistics Analysis, Room N1-4048, 1801 Constitution Avenue NW, Washington, DC 20210. Do not send the completed forms to this office.

Note: You can type input into this form and save it. Because the forms in this recordkeeping package are “fillable/editable” PDF documents, you can type into the input form fields and then save your inputs using the free Adobe PDF Reader.

Establishment information

Year establishment opened

City

State Zip

Employment information

If you don’t have these figures, use the Worksheet on the next page to estimate.

Annual average number of employees

Total hours worked by all employees last year

Sign here

I certify that I have examined this document and that to the best of my knowledge the entries are true, accurate, and complete.

Company executive

Title

Phone Date

Save Input
Who Keeps Injury and Illness Records

• Under the 1904 Recordkeeping standard establishments with 10 or less workers or those in a low hazard industry (regardless of size) do not normally have to maintain the OSHA 300, 301, and 300A injury and illness forms

• The list of low hazard industries was updated in 2014 as part of the new reporting requirements relating to hospitalizations, amputations, and loss of an eye. At that time some industries were added to the list e.g. New Car Dealers and others dropped off the list e.g. Death Care Services

• The determination of what was a ‘low hazard industry’ (in eligible industry sectors) were those with a DART rate at or below 75% (1.5) of the three year average DART rate for private industry (2.0)
So what does the new ‘Improved Tracking of Workplace Injuries and Illnesses’ mean?
Who Submits Injury and Illness Records

• What is an establishment...
  • ... a single physical location where business is conducted or where services or industrial operations are performed. For activities where employees do not work at a single physical location, such as construction; transportation; communications, electric, gas and sanitary services; and similar operations, the establishment is represented by main or branch offices, terminals, stations, etc. that either supervise such activities or are the base from which personnel carry out these activities

• What about size of a company
  • That’s determined by the size of the whole company for the small employer exemption in RK but for the electronic reporting it refers to the size of the establishment
Who Submits Injury and Illness Records

Reporting Establishments with 250+ Employees

Construction Sites > 1 Year (250+ or 20-249)

Construction/Establishments w Short Term Sites (250+ or 20-249)

Reporting Establishments with 20-249 Employees

ST Work sites

Every employee is tied to one establishment...
Who Submits Injury and Illness Records

• Establishments with 20 to 249 employees in designated high hazard Industries will be required to electronically submit their OSHA 300A each year

  • High hazard industries were those with a DART rate of 2.0 or greater (e.g. above the National DART three year average for private industry BLS years 2011, 2012, 2013)

• Appendix A to Subpart E of Part 1904—Designated Industries for § 1904.41(a)(2) Annual Electronic Submission of OSHA Form 300A Summary of Work-Related Injuries and Illnesses by Establishments...
The Designated Industries...

<table>
<thead>
<tr>
<th>NAICS</th>
<th>Industry</th>
</tr>
</thead>
<tbody>
<tr>
<td>11</td>
<td>Agriculture, forestry, fishing and hunting</td>
</tr>
<tr>
<td>22</td>
<td>Utilities</td>
</tr>
<tr>
<td>23</td>
<td>Construction</td>
</tr>
<tr>
<td>31-33</td>
<td>Manufacturing</td>
</tr>
<tr>
<td>42</td>
<td>Wholesale trade</td>
</tr>
<tr>
<td>4413</td>
<td>Automotive parts, accessories, and tire stores</td>
</tr>
<tr>
<td>4421</td>
<td>Furniture stores</td>
</tr>
<tr>
<td>4422</td>
<td>Home furnishings stores</td>
</tr>
<tr>
<td>4441</td>
<td>Building material and supplies dealers</td>
</tr>
<tr>
<td>4442</td>
<td>Lawn and garden equipment and supplies stores</td>
</tr>
<tr>
<td>4451</td>
<td>Grocery stores</td>
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The Designated Industries...

<table>
<thead>
<tr>
<th>NAICS</th>
<th>Industry</th>
</tr>
</thead>
<tbody>
<tr>
<td>4452</td>
<td>Specialty food stores</td>
</tr>
<tr>
<td>4521</td>
<td>Department stores</td>
</tr>
<tr>
<td>4529</td>
<td>Other general merchandise stores</td>
</tr>
<tr>
<td>4533</td>
<td>Used merchandise stores</td>
</tr>
<tr>
<td>4542</td>
<td>Vending machine operators</td>
</tr>
<tr>
<td>4543</td>
<td>Direct selling establishments</td>
</tr>
<tr>
<td>4811</td>
<td>Scheduled air transportation</td>
</tr>
<tr>
<td>4841</td>
<td>General freight trucking</td>
</tr>
<tr>
<td>4842</td>
<td>Specialized freight trucking</td>
</tr>
<tr>
<td>4851</td>
<td>Urban transit systems</td>
</tr>
<tr>
<td>4852</td>
<td>Interurban and rural bus transportation</td>
</tr>
</tbody>
</table>
The Designated Industries...

<table>
<thead>
<tr>
<th>NAICS</th>
<th>Industry</th>
</tr>
</thead>
<tbody>
<tr>
<td>4853</td>
<td>Taxi and limousine service</td>
</tr>
<tr>
<td>4854</td>
<td>School and employee bus transportation</td>
</tr>
<tr>
<td>4855</td>
<td>Charter bus industry</td>
</tr>
<tr>
<td>4859</td>
<td>Other transit and ground passenger transportation</td>
</tr>
<tr>
<td>4871</td>
<td>Scenic and sightseeing transportation, land</td>
</tr>
<tr>
<td>4881</td>
<td>Support activities for air transportation</td>
</tr>
<tr>
<td>4882</td>
<td>Support activities for rail transportation</td>
</tr>
<tr>
<td>4883</td>
<td>Support activities for water transportation</td>
</tr>
<tr>
<td>4884</td>
<td>Support activities for road transportation</td>
</tr>
<tr>
<td>4889</td>
<td>Other support activities for transportation</td>
</tr>
<tr>
<td>4911</td>
<td>Postal service</td>
</tr>
</tbody>
</table>
The Designated Industries...

<table>
<thead>
<tr>
<th>NAICS</th>
<th>Industry</th>
</tr>
</thead>
<tbody>
<tr>
<td>4921</td>
<td>Couriers and express delivery services</td>
</tr>
<tr>
<td>4922</td>
<td>Local messengers and local delivery</td>
</tr>
<tr>
<td>4931</td>
<td>Warehousing and storage</td>
</tr>
<tr>
<td>5152</td>
<td>Cable and other subscription programming</td>
</tr>
<tr>
<td>5311</td>
<td>Lessors of real estate</td>
</tr>
<tr>
<td>5321</td>
<td>Automotive equipment rental and leasing</td>
</tr>
<tr>
<td>5322</td>
<td>Consumer goods rental</td>
</tr>
<tr>
<td>5323</td>
<td>General rental centers</td>
</tr>
<tr>
<td>5617</td>
<td>Services to buildings and dwellings</td>
</tr>
<tr>
<td>5621</td>
<td>Waste collection</td>
</tr>
<tr>
<td>5622</td>
<td>Waste treatment and disposal</td>
</tr>
</tbody>
</table>
### The Designated Industries...

<table>
<thead>
<tr>
<th>NAICS</th>
<th>Industry</th>
</tr>
</thead>
<tbody>
<tr>
<td>5629</td>
<td>Remediation and other waste management services</td>
</tr>
<tr>
<td>6219</td>
<td>Other ambulatory health care services</td>
</tr>
<tr>
<td>6221</td>
<td>General medical and surgical hospitals</td>
</tr>
<tr>
<td>6222</td>
<td>Psychiatric and substance abuse hospitals</td>
</tr>
<tr>
<td>6223</td>
<td>Specialty (except psychiatric and substance abuse) hospitals</td>
</tr>
<tr>
<td>6231</td>
<td>Nursing care facilities</td>
</tr>
<tr>
<td>6232</td>
<td>Residential mental retardation, mental health and substance abuse facilities</td>
</tr>
<tr>
<td>6233</td>
<td>Community care facilities for the elderly</td>
</tr>
<tr>
<td>6239</td>
<td>Other residential care facilities</td>
</tr>
<tr>
<td>6242</td>
<td>Community food and housing, and emergency and other relief services</td>
</tr>
<tr>
<td>6243</td>
<td>Vocational rehabilitation services</td>
</tr>
</tbody>
</table>
The Designated Industries...

<table>
<thead>
<tr>
<th>NAICS</th>
<th>Industry</th>
</tr>
</thead>
<tbody>
<tr>
<td>7111</td>
<td>Performing arts companies</td>
</tr>
<tr>
<td>7112</td>
<td>Spectator sports</td>
</tr>
<tr>
<td>7121</td>
<td>Museums, historical sites, and similar institutions</td>
</tr>
<tr>
<td>7131</td>
<td>Amusement parks and arcades</td>
</tr>
<tr>
<td>7132</td>
<td>Gambling industries</td>
</tr>
<tr>
<td>7211</td>
<td>Traveler accommodation</td>
</tr>
<tr>
<td>7212</td>
<td>RV (recreational vehicle) parks and recreational camps</td>
</tr>
<tr>
<td>7213</td>
<td>Rooming and boarding houses</td>
</tr>
<tr>
<td>7223</td>
<td>Special food services</td>
</tr>
<tr>
<td>8113</td>
<td>Commercial and industrial machinery and equipment (except automotive and</td>
</tr>
<tr>
<td></td>
<td>electronic) repair and maintenance</td>
</tr>
<tr>
<td>8123</td>
<td>Dry-cleaning and laundry services</td>
</tr>
</tbody>
</table>
Who Submits Injury and Illness Records

- Establishments with 250 employees will be required to electronically submit their OSHA 300, 301, and 300A annually
  - Not related to whether they are a ‘high hazard’ or a ‘low hazard’ industry. It’s size based...
Who Submits Injury and Illness Records

- There will be a phase in period starting in January 2017...

- Beginning 2019 the submission deadline changes from July 1st to March 2nd

<table>
<thead>
<tr>
<th>Submission Year</th>
<th>Establishments With 250 or More Employees</th>
<th>Establishments With 20-249 Employees</th>
<th>Submission Deadline</th>
</tr>
</thead>
<tbody>
<tr>
<td>2017</td>
<td>Form 300A</td>
<td>Form 300A</td>
<td>July 1, 2017</td>
</tr>
<tr>
<td>2018</td>
<td>Form 300A, 300, 301</td>
<td>Form 300A</td>
<td>July 1, 2018</td>
</tr>
<tr>
<td>2019</td>
<td>Form 300A, 300, 301</td>
<td>Form 300A</td>
<td>March 2, 2019</td>
</tr>
</tbody>
</table>
Publicly Available

• Some of the submitted information will be available for public viewing through the OSHA website
• Software will be used to scrub any PII that may be entered into a publically available field
# OSHA’s Form 300A (Rev. 01/2004)

## Summary of Work-Related Injuries and Illnesses

All establishments covered by Part 1904 must complete this Summary page, even if no work-related injuries or illnesses occurred during the year. Remember to review the Log to verify that the entries are complete and accurate before completing this summary.

Using the Log, count the individual entries you made for each category. Then enter the totals below, making sure you are adding the entries from every page of the Log. If you had no entries, write “0.”

Employees, former employees, and their representatives have the right to review the OSHA Form 300 in its entirety. They also have the right to access the OSHA Form 301 or its equivalent. See 29 CFR Part 1904.58 in OSHA’s recordkeeping rule, for further details on the access provisions for these forms.

### Number of Cases

<table>
<thead>
<tr>
<th>Description</th>
<th>(a)</th>
<th>(b)</th>
<th>(c)</th>
<th>(d)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number of cases</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total number of cases with days away from work</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total number of cases with job transfer or restriction</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total number of other recordable cases</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Number of Days

<table>
<thead>
<tr>
<th>Description</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number of days away from work</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total number of days of job transfer or restriction</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Injury and Illness Types

<table>
<thead>
<tr>
<th>Description</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number of injuries</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) Skin disorders</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(b) All other illnesses</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(c) Respiratory conditions</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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**Establishment Information**

**Your establishment name**

**City**

**State**

**ZIP**

**Industry description (e.g., Manufacturer of paper products)**

**Standard Industrial Classification (SIC), if known (e.g., 321)

**North American Industrial Classification (NAICS), if known (e.g., 33432)**

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**Employment Information** *(if you don’t have these figures, see the Instructions on the back of this page or on our website)*

**Annual average number of employees**

**Total hours worked by all employees last year**

---

**Sign here**

Knowing that falsifying this document may result in a fine.

I certify that I have examined this document and to the best of my knowledge the entries are true, accurate, and complete.

**Company name**

**Date**

---

### Year 20___

**U.S. Department of Labor**

**Occupational Safety and Health Administration**

**Form approved OMB No. 1218-0027**
OSHA's Form 301
Injury and Illness Incident Report

This Injury and Illness Incident Report is one of the first forms you must fill out when a recordable work-related injury or illness has occurred. Together with the Log of Work-Related Injuries and Illnesses and the accompanying summary, these forms help the employer and OSHA develop a picture of the extent and severity of work-related injuries.

Within 7 calendar days after you receive information that a recordable work-related injury or illness has occurred, you must fill out this form or an equivalent. Some state workers’ compensation, insurance, or other reports may be acceptable substitutes. To be considered an equivalent form, any substitute must contain all the information asked for on this form.

According to Public Law 91-596 and 29 CFR 1904, OSHA’s recordkeeping rule, you must keep this form on file for 5 years following the year to which it pertains.

If you need additional copies of this form, you may photocopy and use as many as you need.

Information about the employee

[Fields for employee name, date of birth, etc.]

Information about the physician or other health care professional

[Fields for name of physician, date of service, etc.]

Information about the case

[Fields for case number, date of injury, time of injury, etc.]

Attention: This form contains information relating to employee health and must be used in a manner that protects the confidentiality of employees to the extent possible while the information is being used for occupational safety and health purposes.

U.S. Department of Labor
Occupational Safety and Health Administration

Form approved Oct. 26, 1989

Not Collected  Collected Public Access  Collected No Public Access
Will Data Need to be Updated

• OSHA 300 Logs are updated for five years... However, the system will be designed to allow updates to the electronically submitted Forms but updates will not be required
• A contact list will be established of officials to whom requests for corrections should be sent and where and how they may be contacted
What About HIPAA

• The Health Insurance Portability and Accountability Act (HIPAA) protects individual privacy rights. The ‘Privacy Rule’ standards protect the privacy of individually identifiable health information (Protected Health Data or ‘PHI’) but is balanced to ensure that appropriate uses and disclosures of PHI still may be made when necessary to treat a patient, to protect the nation’s health, and for other critical purposes. A covered entity may not use or disclose protected health information unless permitted by the Privacy Rule.

• As required by HIPAA the Privacy Rule only applies to ‘covered entities’
What About HIPAA

• A ‘Covered Entity’ includes health plans, health care clearinghouses, and health care providers who conduct certain financial and administrative transactions electronically

• OSHA does not fall within the definition of a covered entity for purposes of the Privacy Rule. Therefore, the use and disclosure requirements of the Privacy Rule do not apply to OSHA and do not prevent the Agency from publishing injury and illness recordkeeping information under this final rule
What About HIPAA

- The Privacy Rule specifically includes several exemptions for disclosures of health information without individual authorization
  - 164.512(a) of the Privacy Rule permits covered entities to use and disclose PHI without authorization when they are required to do so by another law. HHS has made clear that this disclosure encompasses the full array of binding legal authorities, including statutes, agency orders, regulations, or other federal, state or local governmental actions having the effect of law. As a result, the Privacy Rule does not allow a covered entity to restrict or refuse to disclose PHI required by an OSHA standard or regulation
What About HIPAA

• A covered entity may also disclose PHI without individual authorization to ‘public health authorities’ and health oversight agencies’. The preamble to the Privacy Rule specifically mentions OSHA as an example of both.

• The Privacy Rule permits a covered entity who is a member of the employer’s workforce, or provides health care at the employers request, to disclose to employers protected health information concerning work-related injuries or illnesses or work-related medical surveillance in situations where the employer has a duty under the OSH Act, the Mine Act, or similar state law to keep records on or act on such information.
What About HIPAA

- Section 164.512(b)(1)(v)(C) specifically permits a covered entity to use or disclose protected health information if the employer needs such information in order to comply with obligations under 29 CFR parts 1904 through 1928.
What About ADA

- The ADA requires confidentiality for information obtained from medical examinations given to prospective employees and from medical examinations given as part of a voluntary employee health program
  - OSHA injury and illness records are not derived from pre-employment or voluntary health programs
- EEOC recognizes a partial exemption to the ADA strict confidentiality requirements for medical information regarding occupational injury or workers’ compensation claim
The ADA recognizes the primacy of federal safety and health regulations; therefore such regulations, including mandatory OSHA recordkeeping requirements pose no conflict with the ADA.

The EEOC Technical Assistance Manual says that ‘ADA does not override health and safety requirements established under other Federal laws… For example.. Employers must conform to health and safety requirements of the U.S. Occupational Safety and Health Administration (OSHA).

Hence OSHA does not believe the submission and publication requirements in 1904.41 do not conflict with the confidentiality provisions of the ADA.

There’s a more information on HIPPA and ADA on pages 163-168 of the FR.
What about Alternative Forms

• Employers will have two options for submitting recordkeeping data to OSHA’s secure Web site
  • Employers can directly enter data in a web form or...
  • Employers will be provided with a means of electronically transmitting the information, including information from equivalent forms, to OSHA
    • We don’t know for sure what means will be provided yet. Specifics aren’t specified.
Is it Changing the ‘No Fault’ RK Policy

• The recording or reporting of a work-related injury, illness, or fatality does not mean that an employer or an employee was at fault, that an OSHA rule has been violated, or that the employee is eligible for workers’ compensation or other benefits
  • The purpose is to collect useful, assessable, establishment specific injury and illness data to better identify and correct workplace hazards
• OSHA will use a neutral administrative plan when targeting employers for on-site inspection, similar to the way the Site-Specific Targeting program was administered
What about State-Plan States

- State-Plan States must adopt requirements identical to those in 29 CFR 1904.41 in their recordkeeping and reporting regulations as enforceable State requirements within six months after publication of the final rule.
One goal of the final rule is to ensure completeness and accuracy of injury and illness data collected by employers and reported to OSHA. To promote completeness and accuracy three provisions were included:

- Requiring employers to inform employees of their right to report work-related injuries and illnesses free from retaliation
- Employer’s procedure for reporting work-related injuries and illnesses must be reasonable and not discourage employees from reporting
- Prohibiting employers from retaliating against employees for reporting work-related injuries and illnesses consisting with the existing prohibition in section 11(c) of the OSH Act
Accuracy of Records

- An additional mechanism for OSHA to enforce the existing statutory prohibition on employer retaliation against employees was also added.
Providing Reporting Information to Employees

• The final rule strengthens 1904.35 by expanding the previous requirement for employers to inform employees ‘how’ to report work-related injuries and illnesses so that now it includes a mandate to inform employees that they have a right to report work-related injuries and illnesses free from retaliation by their employers.

• The obligation may be met by posting the OSHA Job Safety and Health – It’s The Law worker rights poster from April 2015 or later.
Reasonable Reporting Procedures

• The final rule amends 1904.35 to state explicitly that employer procedures for employee reporting of work-related illness and injuries must be reasonable. Previously it required employers to set up a way for employees to report work-related injuries and illnesses promptly
  • Reporting procedures must be reasonable and a procedure that would deter or discourage reporting is not reasonable
    • Too many steps to do so...
    • Employer reporting requirements must account for injuries and illnesses that build up over time, have latency periods, or do not appear serious enough to be recordable
Reasonable Reporting Procedures

• For example, a worker reported shoulder and neck pain that had developed gradually due to work-related repetitive motions beginning one week earlier. Although no single incident precipitated the injury, the worker received a ‘final warning’ for failure to ‘timely report an injury’
  • This policy was not reasonable because it did not allow for reporting within a reasonable time after the employee realized that they had suffered a work-related injury

• For a reporting procedure to be reasonable and not unduly burdensome, it must allow for reporting of work-related injuries and illnesses within a reasonable timeframe after the employee has realized that they have suffered a work-related injury or illness
The employer must establish a ‘reasonable’ procedure for employees to report work-related injuries and illnesses and that a reporting procedure is not reasonable if it would deter or discourage a reasonable employee from reporting.

The requirement is a performance requirement rather than prescribing specific procedures employers must establish, and therefore gives employers flexibility to tailor their programs to the needs of their workplaces.
Prohibiting Discrimination for Reporting

• The rule incorporates explicitly the existing prohibition on retaliating against employees for reporting work-related injuries and illnesses that is already imposed under 11 (c) of the OSH Act
  • It doesn’t change the substantive obligations of the employer, rather it provides OSHA an enhanced enforcement tool for ensuring the accuracy of injury and illness logs not dependent on employees filing complaints
• The final rule allows OSHA to issue citations to employers for retaliating against employees for reporting work-related injuries and illnesses and require abatement even if no employee has filed an 11(C) complaint
Prohibiting Discrimination for Reporting

• Looking at the Medical Removal Protection (MRP) provisions of the lead standard, if an employer denies MRP benefits in retaliation for an employee's exercise of a right under the Act, OSHA can cite the employer and seek benefits as abatement because payment of the benefit is important to vindicate the health interests underlying MRP, Section 11(c) is not an exclusive remedy

• The goal of abatement would be to eliminate the source of the retaliation and make whole any employees treated adversely as a result of the retaliation
Prohibiting Discrimination for Reporting

- For example, if an employer terminated an employee for reporting a work-related injury or illness a feasible means of abatement would be to reinstate the employee with back pay.
- Or if an employer retaliates against an employee for reporting a work-related illness or injury by denying a bonus to a group of employees, feasible abatement could include revising the bonus policy to correct its retaliatory effect and providing the bonus retroactively to all employees who would have received it absent the retaliation.
- An employee can still file an 11(c) complaint within the statutory 30 days period regardless of whether OSHA issued, or will issue a citation.
  - 11(c) provides a broader range of relief and punitive damages...
Prohibiting Discrimination for Reporting

• Discrimination citable under (b)(1)(iv) could include termination, reduction in pay, reassignment to a less desirable positions, or any other adverse action that ‘could well dissuade’ a reasonable employee from reporting a work-related injury or illness.

• There are three types of policies that could deter an employee from reporting a work-related injury or illness: Disciplinary Policies, Post-Accident Drug Testing Policies, and Employee Incentive Programs.
Disciplinary Policies

• It’s the employers responsibility to enforce safety rules but disciplining an employee simply for reporting an injury or illness deters employees from reporting them without improving safety
  • Actions such as suspension, reassignment, harassment, termination
• Under the final rule OSHA can issue citations to employers who discipline workers for reporting injuries and illnesses when no legitimate workplace safety rule has been violated
Disciplinary Policies

- Pretextual disciplinary actions e.g. asserting an employee was being disciplined for violating a safety rule where the real reason was the employee’s injury or illness report. Situations like:
  - Reporting employees disciplined more severely than other employees who work the same way
  - Reporting employees selectively disciplined for violation of vague work rules such as ‘work carefully’ or ‘maintain situational awareness’
    - Vague work rules are particularly subject to abuse by the employer and would not be considered a legitimate workplace safety rule when used disproportionally to discipline workers who report injury or illness
    - A legitimate workplace safety rule should require or prohibit specific conduct so it can be applied fairly
Disciplinary Policies

• Legitimate work rules may not be applied selectively to discipline workers who report work-related illnesses and injuries but not employees who violate the same rule without reporting a work-related injury or illness.

• (b)(1)(iv) of the final rule authorizes OSHA to issue citations to employers who engage in pretextual disciplinary actions.

• The final rule prohibits employers only from taking adverse action against an employee because the employee reported an injury or illness.
Nothing prohibits an employer from disciplining employees for violating legitimate safety rules even if that employee also was injured as a result of that violation.

What is prohibited is retaliatory adverse action taken against an employee simply because they reported a work-related injury or illness.
Post Incident Drug Testing

• If an injury or illness is very unlikely to have caused by employee drug use or if the method of drug testing doesn’t identify impairment but only use at some point in the recent past, requiring the employee to be drug tested may inappropriately deter reporting

• Even ANSI has recognized the need for drug testing programs to be carefully designed and implemented to ensure employees are not discouraged from effective participation in injury and illness reporting programs
Post Incident Drug Testing

• The final rule does not ban drug testing, it does prohibit employers from using drug testing (or the threat of it) as a form of adverse action against employees who report injuries and illnesses.

• Drug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident and which the drug test can accurately identify impairment caused by drug use.
Post Incident Drug Testing

• For example, it would likely not be reasonable to drug test an employee who reports a bee sting, a repetitive strain injury, or an injury caused by lack of machine guarding, or a machine or tool malfunction
  • Likely it only deters reporting without contributing to an understanding of why the injury occurred or contributing to workplace safety

• Employers need to specifically suspect drug use before testing but there should be a reasonable possibility that drug use by the reporting employee was a contributing factor to the injury or illness in order to require drug testing

• Drug testing designed in a way to be punitive or embarrassing is likely to deter reporting
Post Incident Drug Testing

• If an employer conducts drug testing to comply with the requirements of a state or federal law or regulation the employer's motive would not be retaliatory and testing would not be prohibited
  • The OSH Act prohibits OSHA from superseding or affecting workers compensation laws
Incentive Programs

• If an incentive program is not structured carefully they have the potential to discourage reporting of work-related injuries and illnesses without improving workplace safety

• A 2012 GAO study found that rate-based incentive programs which reward workers for achieving low rates of reported injury and illnesses may discourage reporting while more positive incentive programs which reward workers for activities like recommending safety improvements did not have the same effect
Incentive Programs

• ANSI/AIHA Z10-2012 indicates that incentive programs... should be carefully designed and implemented to ensure employees are not discouraged from effective participation in injury and illness reporting programs

• OSHA previously recognized incentive programs that discourage employees from reporting injuries and illnesses by denying a benefit to employees who report an injury or illness may be prohibited by 11 (c)

• To the extent incentive programs cause under-reporting they can result in under-recording of injuries and illnesses which is what is addressed by the final rule’s prohibition on using incentive programs in a way that impairs accurate recordkeeping
It is a violation of (b)(1)(iv) to take adverse action against an employee for reporting a work-related injury or illness whether or not the adverse action was part of an incentive program so it would be a violation for an employer to use an incentive program to take adverse action including denying a benefit, because an employee reports a work related injury or illness such as disqualifying the employee for a monetary bonus or any other action that would deter a reasonable employee from reporting injuries and illnesses.
Incentive Programs

• An incentive program makes a reward contingent upon, for example, whether the employee correctly followed legitimate safety rules rather than whether they reported any injuries or illnesses the program would not violate this provision.

• OSHA encourages incentive programs that promote worker participation in safety-related activities such as identifying hazards or participating in investigations of injuries, incidents, or near misses:
  • Modest rewards for suggestions to strengthen safety and health, throwing a recognition party at the successful completion of company-wide training...
  • Revised VPP Policy Memo #5 suggestions...
Incentive Programs

• Remember this case...?

Safety manager sent to prison for lying about workplace injuries

A former safety manager of the Shaw Group has been sentenced to 18 months in prison for deliberately falsifying records of workplace injuries. Shaw, formerly Stone and Webster Construction, held a contract for construction services at several TVA facilities, and used the false injury reports to claim bonuses of more than $2.5 million under the contract.

Habner Carlin, 55, of Mentesa, La., was convicted in November 2012, after being charged by a federal grand jury with eight counts of mail fraud against the Tennessee Valley Authority (TVA).

False injury rates resulted in $2.5 million in safety bonuses

The indictment and subsequent conviction of Carlin was the result of a six-year investigation conducted by the TVA’s Office of Inspector General (TVA OIG). The trial revealed that Carlin, as safety manager at TVA’s Browns Ferry Nuclear site in Athens, Ala., provided false and misleading information about injuries at that facility as well as TVA’s Sequoyah Nuclear site in Soddy-Daisy, Tenn., and TVA’s Watts Bar Nuclear site near Spring City, Tenn. The Shaw Group had a contract with TVA to provide maintenance and modifications to the three facilities and to provide construction for the Brown’s Ferry Unit Number 1 reactor restart. Carlin generated false injury rates which were used by the Shaw Group to collect safety bonuses of over $2.5 million from TVA.

As part of a civil agreement filed with the United States in 2009, the Shaw Group paid back twice the amount of the ill-gotten safety bonuses.

Broken bones, torn ligaments and more

This case shows the destructive consequences that purely rate-based incentive programs can have,” said Dr. David Haddix, head of TVA. “Put simply, the bonuses led to a systematic effort to conceal injuries. Injured workers were denied or delayed medical treatment. Underlying workplace safety issues were unaddressed.”

The evidence presented at trial encompassed over 50 injuries, including broken bones, torn ligaments, hernias, lacerations, and shoulder, back, and knee injuries that were not properly recorded by Carlin. Some employees testified that they were denied or delayed proper medical treatment as a result of Carlin’s fraud. Evidence showed that Carlin intentionally misrepresented or simply lied about how the injuries had occurred and how serious the injuries were.
• There are two types of rules: Standards and Regulations
  • Standards specify remedial measures to be taken to prevent and control employee exposure to identified occupational hazards e.g. 1910.95 is a standard because it includes remedial measures to address the specific identified hazard of employee exposure to occupational noise...
  • Regulations are the means to effectuate other statutory purposes such as collection and dissemination of records of occupational injuries and illnesses e.g. an administrative effort to designed to uncover violations of the Act and discover unknown dangers
  • Standards aim to correct particular identified workplace hazards while regulations further the general enforcement and detection purposes of the OSH Act

An Odd Fact I Learned
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