



OSHA'S LATEST REPORTING AND RECORDKEEPING MANDATES: MORE BURDENS WITH FEW BENEFITS

by Eric J. Conn

Last September, the Occupational Safety and Health Administration (OSHA) issued a final rule that went into effect on January 1, 2015. The rule made major changes to the triggering events for reporting workplace accidents to OSHA, pursuant to the agency's Injury and Illness Recordkeeping regulations at 29 C.F.R. § 1904, *et. seq.* In addition to this now-effective rule, a proposed rule mandating employers' electronic submission of injury data and incident reports could be released as a final rule this year. This LEGAL BACKGROUNDER describes both the new final rule and the pending proposed rule and explains that the mandates will do little to improve worker safety and could in fact discourage greater employer transparency.

New Injury and Illness Reporting Rule

The new final rule changes employers' reporting requirements in four ways:

1. Lowers the threshold for proactively reporting a catastrophic incident to OSHA from the hospitalization of three or more employees to the ***hospitalization of a single employee***;
2. Adds amputations (including partial amputations) and loss of an eye to the types of injuries that employers must proactively report to OSHA;
3. Introduces an internet portal for employers to submit reportable events; and
4. Requires publication of the reporting events on OSHA's public website.

Requirements of the New Reporting Rule. The reporting rule has been long-referred to informally as the "Fat-Cat" rule, because it requires employers to report to OSHA all incidents that result in an employee fatality (Fat) or a catastrophe (Cat). The major change to the Fat-Cat rule that OSHA has just implemented is how OSHA redefines catastrophe. Prior to the new rule, a catastrophe was defined as an incident that resulted in the overnight hospitalization for treatment of **three** or more employees. By redefining what constitutes a catastrophe to include the hospitalization of a single employee, the new rule will dramatically increase the number of incidents that employers are required to report to OSHA.

The agency views such events as indicative of serious hazards at a workplace. David Michaels, Assistant Secretary of Labor for Occupational Safety and Health, explained that OSHA considers "hospitalizations and amputations [to be] sentinel events, indicating that serious hazards are likely to be present at a workplace and that an intervention is warranted to protect the other workers at the establishment."

In addition to lowering the threshold from three to one-employee hospitalizations, OSHA also changed the definition of "hospitalization." Historically, an employee's overnight hospital stay triggered the reporting requirement.

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Under the new rule, whether the hospitalization is a reportable event turns not on whether the employee stays overnight, but rather, whether the employee is formally admitted to the “in-patient” service of the hospital or clinic. In addition, the visit must involve medical care after the in-patient admission. A hospital visit only for observation or diagnostic testing, even if it involves in-patient admission, does not constitute a reportable event.

The concepts of “formal admission” and “in-patient service” are likely to cause significant confusion in the new rule’s early stages. OSHA is working on guidance for employers to clarify its intent in this area. In the meantime, however, a senior OSHA enforcement representative provided the following examples to informally shed light on OSHA’s intent in this area:

1. Employee breaks leg; goes to the hospital emergency room (*i.e.*, not the in-patient service of the hospital) where his leg is set and he is given prescription drugs for pain administered before release—*Not Reportable because not an “In-Patient” Hospitalization.*
2. Employee breaks leg; goes to the hospital emergency room where his leg is about to be set, but patient begins to bleed out, so the emergency room staff replenishes his blood before setting the leg. The employee is then admitted to a ward for monitoring/observation because of the blood loss—*Not Reportable because medical care provided in ER prior to admission, and admission was for observation only.*

Timing of Reporting Criteria. The new rule requires employers to report a hospitalization, amputation, or loss-of-eye injury to OSHA within 24 hours of when any management representative of the employer learns of the reportable injury. The injury must only be reported, however, if it *results* in a hospitalization, amputation (except for medical amputations) or loss of eye within 24 hours of the incident. Fatalities still must be reported within eight hours of when employers learn of them, unless a death occurs more than 30 days after the incident that caused it.

OSHA’s new rule became effective January 1, 2015 for all employers in the 30 states where federal OSHA enforces health and safety regulations. The states that operate their own federal-OSHA-approved state programs are also required to implement these changes, but they have discretion to roll them out on a different schedule than federal OSHA.

Increased Inspections and Citations. The “catastrophe” element of OSHA’s reporting rule was rarely triggered when it required the hospitalization of three or more employees from the same incident. Lowering the threshold from three employees to a single employee is expected to increase the number of reportable incidents from perhaps 50 a year to more than 25,000.

OSHA has long prioritized incident inspections over programmed inspections, and experience teaches that OSHA does not leave incident inspections without issuing citations. Accordingly, the revision to the “Fat-Cat” rule is also likely to dramatically increase the number of incident inspections that OSHA conducts, and therefore the number of citations issued.

Public Shaming. Equally troubling is how OSHA will now use the injury reports. The agency intends to follow the same model of using incident reports to publicly shame employers that it already uses with embarrassing and inflammatory press releases that accompany allegations in citations. Specifically, OSHA plans to publicize all reports of fatalities and severe injuries on its public website linked to and searchable by employers.

OSHA stated in a news release that it believes public disclosure will incentivize employers to ensure a safe workplace for their employees. This approach, of course, wrongly pre-supposes that all workplace injuries are a result of employers *not* providing a safe workplace, and it unfairly lumps all workplace injuries into a single bucket, regardless of the cause. It also disregards the privacy interests of employees, who may not want their incident data made public in certain cases.

Electronic Reporting and Inadvertent Admissions. Another concern about the new rule is introduction of a web portal by which employers can electronically report incidents, in addition to the historical telephone reporting options (*i.e.*, calling OSHA's 24-hour hotline [1-800-321-OSHA] or the nearest OSHA Area Office). Employers should be wary of using this web portal to report incidents because it requires them to detail in writing an explanation of an incident that just occurred a few hours earlier, and for which a thorough investigation could not yet have been completed.

Any preliminary descriptions entered will be memorialized as the employer's statement of the event and could later be used against it as admissions in an OSHA enforcement proceeding or a personal-injury or wrongful-death civil action. Indeed, anyone can access these written reports through a Freedom of Information Act request, including plaintiffs' attorneys, union organizers, the media, competitors, etc. Accordingly, the old-fashioned telephone call should remain the preferred method of reporting.

Proposed Rule to Require Frequent Submission of Injury Data

The new Fat-Cat reporting rule is not the last change to the long-standing recordkeeping process that OSHA has in store for employers. OSHA proposed another major change to the recordkeeping requirements in November 2013. Specifically, the proposed rule would require many employers to electronically submit their injury and illness logs (and in many instances, detailed incident reports) to OSHA on a quarterly or annual basis. Just as with the injury reports discussed above, OSHA intends to publish employers' injury data and incident reports online.

This proposal would dramatically alter the recordkeeping program. Currently, unless OSHA inspects an employer or the Bureau of Labor Statistics (BLS) requests that the employer participate in a survey, recordkeeping data remains strictly in house. Employers keep the data and their OSHA logs in their Human Resources' or Safety Director's office, post them for employees for a couple of months, and then store them in a desk drawer for five years.

Requirements of the Proposed Rule. The proposed rule would impose two different burdens on employers:

1. Employers with more than 250 workers (during peak employment the prior calendar year) must submit injury and illness recordkeeping logs and detailed incident reports to OSHA (*i.e.*, the 300 logs and 301 reports) on a quarterly basis;
2. Employers with more than 20 workers in certain "high hazard industries" must submit to OSHA their 300A Annual Summary data of recordable injuries on an annual basis.

Employers will be required to submit the data electronically to OSHA, supposedly via a secured website that has not yet been designed. These reports will include an incredible amount of data, including employees' personal and health-related information. In theory, OSHA would scrub employee-identifying information (but not employer-identifying information), and publish the data online, likely in a manner that is sortable, searchable, filterable, and as embarrassing to employers as possible.

Impact of the Proposed Rule. Every year, BLS or OSHA directs a group of employers to participate in a survey and submit 300A summary data. This survey includes a very small subset of the employers who would be affected by OSHA's new proposed rule, and the employers who must participate change every year. If this proposed rule were implemented, it would triple the number of employers required to submit their injury and illness data directly to OSHA: (1) from only approximately 35,000 large employers who now submit data annually to BLS, to approximately 130,000 that would have to submit data and incident reports quarterly; and (2) from 150,000 smaller employers that have submitted summary data annually, to approximately 500,000. The most remarkable data point is the number of detailed incident reports OSHA will receive. At present, no employer must submit 301 incident reports to OSHA (except by request during an active OSHA inspection), but under the proposed rule, large employers would have to proactively submit approximately 1.3 million 301 reports to OSHA.

OSHA does not have the capacity to do anything productive with this data. Such volume for such a small-budget agency could not possibly be useful in helping OSHA develop policy, target its resources, or implement any program that advances the cause of safety and health.

Industry's Response to the Proposed Rule. The business community has strongly opposed the proposal. Indeed, this rule received more public comment than perhaps any proposed OSHA rule in the agency's history. The most common criticisms are summarized below.

Significant Burdens for Little Value. In the rulemaking record, OSHA estimated that complying with this rule would require very little additional time and expense, because, the agency reasoned, employers already maintain injury and illness data, and many employers already use electronic recordkeeping systems. Stakeholders who evaluated the new burdens reached a very different conclusion. If employers do not currently use an electronic recordkeeping system, they will likely have to adopt some version to readily access the data to submit to OSHA. Even if employers already use an electronic system, they will have to modify it or adopt a new version that "speaks to" OSHA's reporting website, if that technology even exists. Otherwise, the new rule will require a tremendous amount of manual data entry and/or duplication of previously entered electronic data.

More importantly, any amount of burden is too great if there is no value to OSHA's data collection. Nowhere in the extensive rulemaking record did OSHA assert that a gap exists in the current data-collection regime. The agency also failed to explain what it intends to do with the additional data. As discussed above, OSHA lacks the capacity to analyze or use the additional data in any meaningful way.

Undermines "No-Fault" Recordkeeping Programs. OSHA has expressed that collecting and publishing injury and illness data will effectively shame employers into eliminating unsafe conditions. From its origins, however, injury and illness recordkeeping was intended to be a no-fault program. Employers and OSHA will have more reliable data if all recordable injuries are chronicled, regardless of cause. Accordingly, the recording criteria do not account at all for cause. An injury is recordable even if the injury was the result of employee misconduct, defective equipment, or an Act of God. Publicizing the data out of context for the purpose of shaming, however, completely nullifies the no-fault value of recordkeeping. In addition it wrongly presupposes that all workplace injuries are employers' fault and/or that employers can prevent all workplace injuries.

Likely to Result in Under-reporting and Under-recording of Injuries. Stakeholders also emphasized that the proposed rule would dramatically increase the risk of employees' under-reporting injuries and employers' under-recording them. If injury data will be shared with OSHA and the public essentially in real time, employers will find ways to keep their numbers down. OSHA hopes that employers will achieve that decrease through enhanced safety programs, but some employers will simply not record all recordable injuries, or at the very least, will take a very conservative approach. Historically, close calls would be recorded, but now, because of the publicity and risk of intervention by OSHA, those close calls will go the other way.

Nothing is guaranteed in the context of OSHA rulemaking, but OSHA has identified this rule as a high priority. It stands a very good chance of becoming law before the end of the Obama Administration.

Conclusion

Injury and illness recordkeeping and injury investigations have historically been an internal affair for employers. The new and proposed recordkeeping and reporting rules will lead to more frequent interactions with OSHA and more OSHA enforcement activity. On top of the pending enforcement surge, these changes will negatively impact employers' reputations as OSHA follows through on its pledge to convert the collected data into a tool for public shaming regardless of any proven wrongdoing. By undermining the no-fault recordkeeping regime, these OSHA rules also threaten to harm the very employee safety and health they purport to protect.