

OSHA Update

New Electronic Injury and Illness Data Reporting Rule

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On May 11, 2016, the Occupational Safety and Health Administration (OSHA) released its new recordkeeping rule requiring employers to submit injury and illness data annually, beginning in July 2017. The rule, Improve Tracking of Workplace Injuries

and Illnesses, has two components. The first component requires companies to submit records of workplace injuries and illnesses electronically to OSHA. The second component prohibits retaliation against employees who report workplace injuries or illnesses.

This controversial rule resulted in legal challenges to its validity by industry groups. As a result, OSHA delayed implementation of the anti-retaliation provisions and issued additional guidance on several provisions in the rule, which can be found at <http://prnt.in/2016osharule>. Since the federal court in Texas did not enjoin the rule, it became effective on December 1, 2016. The two lawsuits are still active, and a court has not ruled on the merits of the rule.

Electronic Submission Requirements

The rule requires certain employers, including printing operations, to electronically submit

the injury and illness information to OSHA. The requirement applies to the following:

- Establishments with 250 or more employees that are currently required to keep OSHA injury and illness records
- Establishments with 20-249 employees that are classified in certain industries with historically high rates of occupational injuries and illnesses

Data submission requirements for these businesses will be phased in according to **Chart 1**.

OSHA will remove personally identifiable information and then post the establishment-specific injury and illness data it collects on its website at www.osha.gov.

Informing Employees about Injury Reporting and Anti-Retaliation

While not in the rule itself, OSHA's preamble explanation of the rule states that an employer must provide reasonable procedures for reporting work-related injuries and illnesses that do not deter or discourage employees from reporting them.

According to OSHA, informing employees about their right to report injuries can be met by posting the OSHA *Job Safety and Health — It's The Law* poster

New Electronic Form and Submission Requirements

| Recordkeeping Forms for Year | Establishments* with 250+ Employees | Establishments* with 20-249 Employees | Deadline to Submit Form |
|------------------------------|-------------------------------------|---------------------------------------|-------------------------|
| 2016 | Form 300A | Form 300A | July 1, 2017 |
| 2017 | Form 300 Log, Form 300A & Form 301 | Form 300A | July 1, 2018 |
| 2018 and thereafter | Form 300 Log, Form 300A & Form 301 | Form 300A | March 2, 2019 |

Chart 1. New electronic form and date submission requirements

*Establishment means a single location and not a total company enrollment amount.

from www.osha.gov/Publications/poster.html (provided it is a version from April 2015 or later). It is highly recommended that printing operations include a policy in their handbooks stating employees have a right to report any injury or illness without fear of retaliation and specifying the procedure for reporting work-related injuries and illnesses. The procedure must be reasonable and not deter or discourage employees from reporting.

OSHA gave examples of unacceptable programs and disciplinary policies that might deter employees from reporting injuries and illnesses. These include post-accident drug and alcohol testing, certain types of injury and illness reduction incentive programs, and indiscriminate discipline.

- **Post-Accident Drug and Alcohol Testing**

Policies. According to OSHA, such testing may deter employees from reporting an accident or injury due to the inconvenience, burden, or invasion of privacy resulting from the test. If, however, the employer has an “objectively reasonable basis” that drug/alcohol use by the reporting employee could have contributed to the injury or illness, post-accident drug and alcohol testing does not violate the rule. If more than one employee is involved in an accident, then all involved employees must be tested.

OSHA was clear it cannot prevent any post-incident drug testing that is consistent with the terms of a state’s Drug-Free Workplace or workers’ compensation statutes, or federal law (such as U.S. Department of Transportation regulations). In addition, testing is permissible under the rule even in the absence of such a state or federal law if an employer’s private insurance carrier offers discounted rates for having a post-incident drug testing policy. Random, pre-employment, and reasonable suspicion testing are not covered by the rule and are permissible.

- **Safety Incentive Programs.** Companies may not create employee reward programs for positive outcomes such as low injury or illness ratings or number of days without a lost-work-time incident. OSHA stated that these incentive programs

may deter injury and illness reporting and are not allowed under the rule. It is OSHA’s position, however, that a safety incentive program based on leading indicators, such as a program that incentivizes compliance with safety rules, completion of voluntary additional safety training, or participation in voluntary safety committees or meetings, would not deter the reporting of injuries.

- **Indiscriminate Discipline.** The new rule prohibits employers from taking adverse action against employees that report work-related injuries or illnesses, such as discharge, demotion, or denying a significant benefit (e.g., bonus). Also prohibited is assigning the employee “points” that could lead to future consequences, demeaning or embarrassing the employee, threatening to penalize or otherwise discipline an employee for reporting, or dismissing them for not following vague safety rules such as “Work Carefully.”

OSHA is very clear that the new rule allows employers to discipline employees for violating legitimate safety rules. In instances where an employee violated a safety rule and was also injured as a result of that violation, then reported the injury or illness, that employee could be disciplined without violating the rule. To conform to the rule, the company must have specific safety rules and demonstrate that these rules are enforced uniformly.

Conclusion

Because the federal court did not issue an injunction or a final ruling, printing operations need to conform to the provisions of the new rule. Otherwise, nonconforming companies are at risk of OSHA citations.

Printing operations should also review their injury reporting procedures as recommended. The best practice is to require employees to sign a form showing that they have received and read the policy. In addition, supervisors and other management personnel should be trained on the disciplinary procedures to ensure that they are implemented uniformly.