
OSHA's New Recordkeeping and Anti-Retaliation Rules

Welcome to today's webinar.

The line will be silent until the program
begins at 10:00 a.m. MDT.



Welcome



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OSHA's New Recordkeeping and Anti-Retaliation Rules:

A Solution in Search of a Problem



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Two Components of New Rule

1. Electronic submission of OSHA Forms
2. New Anti-Retaliation Provisions

Electronic Submission of OSHA Forms

The rule contains no new requirements when it comes to how to fill out OSHA 300, 300A, or 301 forms, nor does it remove exemptions for certain employers that do not have to keep these records.

Electronic Submission of OSHA Forms

“Establishments” with 250+ employees, *at any point during the year*, will be required to electronically submit their OSHA 300, 300A, and 301 forms.

Electronic Submission of OSHA Forms

“Establishments” with 20-249 employees, at any point during the year, and who are in certain NAICS Codes, will be required to electronically submit their OSHA 300A annual summaries.

Electronic Submission of OSHA Forms

Includes part-time, seasonal, and temporary workers.

NAICS Codes: 20-249 Employees

- Construction (NAICS Code 23)
- Manufacturing (NAICS Code 31-33)
- Utilities (NAICS Code 22)
- Grocery stores (NAICS Code 4451)
- Furniture stores (NAICS Code 4421)

The Website

- OSHA assures us a secure website (what could possibly go wrong?).
- Employers will be able to redact employee names and addresses and health care provider information.
- OSHA will not make entire forms public.
 - E.g. it will not release certain information on the 301 incident report.
- OSHA also promises a search for personally identifiable information.

The Website

- OSHA has not yet figured out exactly how it will collect all of the information, and in what form.
 - E.g. OSHA 301 forms often are not used by employers who prefer to use workers' compensation first reports.
- Updates to logs that are submitted will be allowed, but not required.

What is the Schedule?

- July 1, 2017
 - 300A forms
- July 1, 2018
 - 300, 300A, and 301 forms (250+)
- 2019
 - All forms due by March 2 annually

New Anti-Retaliation Rules

The Background

- Section 11(c) of the Act already covers retaliation.
- Congress has already decided that retaliation claims must be brought by the Department of Labor in federal district court.
- Very few claims brought under 11(c).

The Requirements

- Employers must:
 - Inform employees of their right to report injuries and illnesses and that they cannot be discriminated against for doing so.
 - Notify employees of the reporting procedure.

The Requirements

- Reporting procedure must be “reasonable.”
 - A procedure is NOT reasonable if it “would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness.”

When To Report

- Policies requiring “immediate” reporting are being scrutinized.
- How soon is not too soon?
 - “As soon as possible?”
 - “As soon as feasible?”
 - “When you get around to it?”
 - “As soon as you sober up?”

Incentive Programs

- Safety incentive programs: per se illegal?
 - Policies that link reward entirely to reportable injuries should be examined.

Post-Accident Testing

- What about post-accident drug and alcohol testing?
 - OSHA takes the position that blanket testing violates the new rule.
 - Problem, there are numerous reasons to test:
 - Mandatory testing requirements (DOT, e.g.)
 - Insurance investigations
 - Workers' compensation

Employee Protection

- Requirement not to discriminate against employees who report an injury or illness.
- Merely reporting an injury insulates employees who violate safety rules from adverse action.
- Be prepared for every termination for safety-related reasons to turn into an OSHA investigation.

Employee Protections

- Places retaliation cases squarely in the hands of OSHA safety and health compliance officers and administrative law judges of the Occupational Safety and Health Review Commission.

What This Means For Employers

- Employers will receive citations seeking, as abatement, back pay and reinstatement.
- Will employers have defenses available to it (e.g. failure to mitigate damages)?

Timeline

- OSHA originally delayed enforcement of the anti-retaliation portions of the rule until November 1, 2016.
- The result of federal litigation.
- Had promised employer outreach in the meantime.
- The court has requested a further delay, until December 1, 2016.

LESSONS

- Policies need to be scrutinized and updated, as necessary.
- Policies must be applied in a common-sense and consistent manner.
- HR departments will have to be involved.

Questions?

Please submit questions using the
chat section of the webinar.

Thank you!

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