



New reporting requirements

OSHA moves to electronic submittal of injury and illness records

June 2016

The Occupational Safety and Health Administration (OSHA) recently finalized a rule regarding electronic submission of injury and illness record-keeping forms a majority of employers are required to complete and maintain. OSHA originally proposed this rule in November 2013, and the final rule has not changed significantly since the preliminary version.

The new rule requires most employers (those with 20 to 249 employees) to electronically submit, on an annual basis, OSHA Form 300A, "Summary of Work-related Injuries and Illnesses." Larger companies (those with 250 or more employees) have greater obligations under the rule. In addition, rule changes have been finalized to encourage reporting of injuries and illnesses and penalize retaliatory actions against workers for reporting injuries and illnesses.

Overview

The new regulation applies to all businesses with 250 or more employees and industries with high incidence rates of injuries and illnesses, including roofing. Whether a company is in a designated industry is based on its North American Industry Classification System (NAICS) code listed in an appendix to the new rule.

Under the new rule, roofing contractors (NAICS 23816) with 20 to 249 employees are required, on an annual basis, to submit Form 300A electronically. When fully implemented, any employer with 250 or more employees also must submit OSHA Form 300, "Log of Work-related Injuries and Illnesses," and Form 301, "Injury and Illness Incident Report."

Some employers in select NAICS categories, including roofing, may be required to submit all OSHA forms annually regardless of any regulatory obligation to keep those records under the original rule and without regard to the total employee requirements under the new rule.

For example, under current rules, employers with 10 or fewer employees are not required to complete and maintain forms 300, 300A or 301 unless OSHA makes a written demand of the employer to keep them. The new rule requires those forms be submitted by the employer to OSHA electronically if the agency makes a written demand of the employer (usually this demand will be for the upcoming calendar year).

Similarly, a roofing contracting company with 11 to 19 employees that currently is obligated to complete and maintain OSHA Forms 300, 300A and 301 only is required to submit electronically if OSHA makes a written demand. OSHA noted in the proposed rule and also explains in the final version it is not changing an employer's current obligation to complete and maintain records of injuries and illnesses but only now is requiring electronic submission of some of those records that previously were completed and retained by the employer.

Reason for the rule

In a recently published OSHA Fact Sheet describing the new rule, the agency says it will use the submitted information "to help keep workers safer and make employers, the public, and the government better informed about workplace hazards." OSHA plans to publish the injury and illness information on a website accessible to all to get employers to increase efforts to prevent worker injuries and illnesses and allow researchers to examine the data "in innovative ways" to help employers make workplaces safer.

According to OSHA, injury and illness data collected will "advance the fields of injury and illness causation and prevention research." Although an admirable purpose, it is difficult to see how this can be achieved based on the information submitted under the rule.

The most common form to be submitted, Form 300A, collects injury information from an employer under the broad category of "injuries" without further explanation of the type, nature or circumstances of the events, and an employer submits only a total number of injuries under the "injuries" line on the form. Researchers who can draw conclusions solely from a total injury number and produce valuable direction to employers regarding injury "causation and prevention" most certainly will not be using a traditional scientific method of analysis to deliver reliable directions for employers to reduce injuries.

OSHA also has argued publishing company-specific information on a website for all to see will "nudge" employers to focus on injury prevention to show potential employees, investors, customers and the public that their workplaces are safe and well-managed. NRCA sees some pitfalls to this reasoning.

OSHA plans to publish the information on a website accessible to all

First, absent information regarding the surrounding facts of an injury or set of injuries, it would be highly unlikely a reviewer of the superficial data could draw appropriate and meaningful conclusions. In addition, NRCA is concerned about the possibility of inadvertent publication of private worker information especially with respect to health information contained on OSHA Form 301.

This concern was a key component of recent testimony regarding the new rule before the U.S. House of Representatives Workforce Protections Subcommittee by Lisa Sprick, president of NRCA member Sprick Roofing Co. Inc., Corvallis, Ore. Testifying on behalf of NRCA, Sprick detailed the extraordinary safeguards her company employs to protect sensitive employee information and expressed worry publication of injury and illness data will compromise worker privacy and could be used out of context by competitors to gain a business advantage.

OSHA has stated it will not collect workers' names, workers' addresses, physicians' names and healthcare facility addresses. In addition, the agency will use software to scrub data of any personally identifiable information before the data is posted. In light of recent reports of electronic eavesdropping and hacking into government databases resulting in an enormous amount of confidential individual information being released, company owners and workers most likely are not confident OSHA is capable of securing their valuable personal information.

In the explanation of the final rule, OSHA claims the rule will cost the average company with 20 to 249 employees \$11.13 per year. Because the agency has estimated costs to comply with the rule so minimally, it was not required to perform a more comprehensive assessment of costs and benefits under the federal unfunded mandates rule. Although the agency cites a broad estimate of \$9 million saved for avoiding a workplace fatality, the agency merely offers speculation about how this rule might produce tangible, quantifiable benefits for avoiding a defined set of injuries or fatalities.

In NRCA's original comments about the proposed rule, it questioned OSHA's estimate of the time involved for an employer to comply with this rule and the costs of compliance along with a lack of specific benefits—those concerns still remain.

Retaliation provisions

Also included in the rule is a requirement that employers inform workers of their right to report an injury or illness without fear of retaliation by the employer for reporting an injury or illness. This added requirement has drawn criticism of the agency for overstepping its authority because Section 11(c) of the Occupational Safety and Health Act already provides no discriminatory action by an employer may be taken against a worker who files a complaint under the act.

OSHA argues it has authority to provide alternative remedies to those statutory mechanisms set out in the act, citing similar provisions it enforces for back pay under the medical removal portion of the lead standard. In addition to informing workers of their right to report an injury, an employer's procedure for reporting work-related injuries and illnesses must be reasonable and not deter or discourage employees from reporting.

Many employers believe the vagueness of the regulatory language will allow OSHA compliance officers to arbitrarily cite employers for their safety and health program provisions requiring timely reporting of injuries, incentives or rewards for compliance with job-site safety rules and discipline for noncompliance with those rules. OSHA argues the regulatory language is clear enough to notify employers of their obligations under the rule and gives them flexibility to design policies tailored to their workplaces.

Effective dates

Compliance with the electronic submission requirements of the rule will be phased in during a two-year period. Provisions related to the employer obligation to have in place reasonable reporting procedures for workplace injuries and illnesses that do not discourage reporting and regulatory remedies to address retaliatory actions by employers for reporting injuries and illnesses are effective Aug. 10.

Electronic submission of OSHA forms required under the rule will start with submission of the 2016 calendar year forms to be submitted by July 1, 2017. Forms covering calendar year 2017 must be submitted by July 1, 2018. After that, electronic submission of all forms must be done by March 2 of the year following the calendar year covered. For calendar year 2016 reporting, due July 1, 2017, only Form 300A will be required to be submitted by employers with 250 or more employees.

In 2018, such employers must submit all forms (300, 300A and 301) by July 1, 2018, for calendar year 2017. An employer with 20 to 249 employees will submit only the required Form 300A starting with calendar year 2016 due July 1, 2017.

As this rule moves closer to the implementation date, OSHA is analyzing the nature of the data collection system it will put in place and whether it will be an independent system or allow for transfer of existing employer files that contain the injury and illness information. Those details will be critical to employer compliance with the rule, as well as affect the security of the information submitted by employers.

For more information about the reporting requirements, contact Harry Dietz, NRCA's director of enterprise risk management, at (847) 493-7502 or hdietz@nrca.net, or visit www.osha.gov.

Harry Dietz is NRCA's director of enterprise risk management.

