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OSHA's Final Rule on 'Improving Tracking of Workplace Injuries and Illnesses': *Employers' Injury and Illness Information Becomes Public and Expanded Protections for Employees that Report Injuries and Illnesses*

On May 11, 2016, the Occupational Safety and Health Administration (OSHA) issued its much anticipated final rule on recordkeeping and reporting. The final rule requires employers in certain industries to electronically submit information about workplace injuries and illnesses to OSHA. OSHA will post the electronically submitted information, according to the final rule, on its public website. The final rule's new recordkeeping requirement does not go into effect until July 1, 2017.

The final rule also provides updated requirements on how employers must inform employees to report work-related injuries and illnesses to their employer. In short, the final rule requires employers to inform employees of their right to report work-related injuries and illnesses free from retaliation, and clarifies the existing implicit requirement that an employer must provide reasonable procedures for reporting work-related injuries and illnesses that do not deter or discourage employees from reporting them. To this end, OSHA will now be permitted to cite an employer for taking an adverse employment action against an employee for reporting an injury or illness, even if the employee does not file a retaliation complaint with OSHA. The expanded protections for employees who report workplace injuries or illnesses go into effect 90 days after the final rule is published in the Federal Register.

Background on OSHA's Recordkeeping Requirements

As a general matter, 29 C.F.R. § 1904 requires employers with more than 10 employees in most industries to keep records of occupational injuries and illnesses at their establishments. Employees covered by these rules must record each recordable injury and illness on an OSHA 300 Form (Log of Work-Related Injuries and Illnesses) or equivalent. Employers must also prepare a supplementary OSHA 301 Form (Injury and Illness Incident Report) or equivalent that provides additional details about each recorded case on the OSHA 300 Form. At the end of each year, employers are required to

prepare a summary report of all injuries and illnesses on the OSHA 300A Form (Summary of Work-Related Injuries and Illnesses) and post the form in the workplace. OSHA generally only has access to an employer's injury and illness data when OSHA inspects an employer's workplace.

Amendments to OSHA's Recordkeeping Requirements

The final rule adds three new requirements to OSHA's recordkeeping requirements under 29 C.F.R. § 1904.41:

1. Establishments with 250 or more employees must electronically submit information from their OSHA 300, 300A, and 301 Forms to OSHA on an annual basis;
2. Establishments with 20 or more employees and less than 250 employees, in certain designated industries, must also electronically submit information from their OSHA 300A Forms on an annual basis. These designated industries include construction, manufacturing, furniture stores, waste collection, and nursing care facilities; and
3. Upon notification by OSHA, employers must electronically submit information from their OSHA 300, 300A, and 301 Forms to OSHA.

These changes do not alter or reduce an employer's obligation to complete and retain injury and illness records under OSHA's current recordkeeping requirements.

OSHA intends to post the establishment-specific injury and illness data it collects on its website. OSHA will not, however, post any information that could be used to identify individual employees.

According to the final rule, "requiring regular electronic submission of injury and illness data will allow OSHA to obtain a much larger database of timely, establishment-specific information about injuries and illnesses in the workplace." OSHA contends that the information will help it more effectively allocate resources to workplaces where workers are at the greatest risk.

OSHA will phase in the implementation of the data collection requirement. The key implementation dates are:

- > **July 1, 2017** – Employers with 250 employees or more that are required to routinely submit information under the final rule will be required to submit only information from their OSHA 300A Forms.
- > **July 1, 2018** – Employers with 250 employees or more that are required to routinely submit information under the final rule will be responsible for submitting information from their OSHA 300, 301, and 300A Forms.
- > **March 2, 2019** – Employers with 250 employees or more that are required to routinely submit information under the final rule will be responsible for submitting information from OSHA 300, 301, and 300A Forms. Employers with 20-249 employees in designated industries will be responsible for electronically submitting information from their OSHA 300A Forms.

Background on Retaliation Under OSHA

Section 11(c), 29 C.F.R. § 660(c)(1), of OSHA prohibits any person from discharging or otherwise discriminating against any employee because the employee has exercised any protected right. Under this provision, an employee who believes he or she has been discriminated against may file a complaint with OSHA. The employee must file the complaint within 30 days of the alleged discrimination or retaliation. If, after an investigation, the Secretary of Labor has reasonable cause to believe the employer violated section 11(c), then the Secretary may file suit against the employer in U.S. District Court. The Secretary of Labor may obtain all available relief including rehiring or reinstating the employee to his or her former position with back pay. Discriminating or retaliating against an employee who reports a fatality, injury, or illness is a violation of section 11(c).

Final Rule Expands OSHA's Anti-Retaliation Protections

The final rule contains three new provisions under 29 C.F.R. § 1904.35 that, according to OSHA, will promote accurate reporting of work-related injuries and illnesses while also expanding OSHA's anti-retaliation protections. Specifically, the final rule:

1. Requires employers to inform employees of their right to report work-related injuries without fear of retaliation;
2. Clarifies that an employer's procedure for reporting work-related injuries and illnesses must be reasonable and not deter or discourage reporting injuries or illnesses; and
3. Prohibits employers from retaliating against employees for reporting work-related injuries or illnesses.

Notably, the final rule suggests that employers that have "rigid prompt-reporting requirements" that result in employee discipline for late reporting likely runs afoul of OSHA's new requirement that an employer's procedure for reporting work-related injuries must be reasonable and not deter or discourage reporting injuries or illnesses. To read about this issue in more detail, please see our previous *GT Alert*, "[Secretary of Labor v. U.S. Steel Corporation, Inc. and OSHA's Continued Stand Against Employer Retaliation.](#)"

The final rule also explains that under 29 C.F.R. § 1904.35(b)(1)(iv), OSHA will be permitted to cite an employer for taking an adverse action against an employee for reporting an injury or illness, even if the employee does not file a section 11(c) complaint with OSHA. Nothing in the final rule, however, appears to prohibit employers from disciplining employees for violating legitimate safety rules.

Section 1904.35(b)(1)(iv) provides OSHA an additional avenue to ensure the "accuracy of work-related injury and illness records that is not dependent on employees filing [section 11(c)] complaints [to OSHA] on their own behalf." OSHA believes this additional enforcement tool is necessary because "[s]ome employees may not have the time or knowledge necessary to file a section 11(c) complaint or may fear additional retaliation from their employer if they file a complaint."

OSHA anticipates that feasible means of abatement – an element that the Secretary of Labor must prove to establish a violation under OSHA – for a violation under section 1904.35(b)(1)(iv) would "mirror" remedies available under section 11(c) including eliminating the source of retaliation and making whole any employees that suffered adverse employment actions as a result of the retaliation.

Key Takeaways

OSHA's final rule sends a clear message to employers that the agency is increasing its focus on employers accurately reporting injuries and illnesses and protecting employees from retaliation who report injuries and illnesses to employers. OSHA's new requirement that certain employers electronically submit injury and illness data, which will be accessible to the public, provides employers an additional incentive to maintain a safe and healthful workplace for its employees in order to avoid public criticism regarding their injury and illness data. Employers should be mindful of the final rule's implementation dates for certain employers to electronically submit injury and illness data. Employers are encouraged to review their injury and illness reporting procedures to ensure it is in compliance with OSHA regulations before the final rule's first implementation date, July 1, 2017.

Separately, employers should proceed with extreme caution or consult with their counsel when implementing an adverse employment action against an employee shortly after an employee reports an injury or illness. Indeed, the final rule explains that OSHA is now permitted to cite an employer for taking an adverse action against an employee for reporting an injury or illness, even if the employee **does not** file a section 11(c) complaint with OSHA.

Employers are encouraged to contact labor and employment counsel to ensure compliance with OSHA's new recordkeeping and reporting requirements under 29 C.F.R. § 1904.

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