



## OSHA'S PROPOSED CHANGES TO CONTROVERSIAL E-RECORDKEEPING RULE FALL SHORT, FOR NOW

by Eric J. Conn and Dan C. Deacon

After years of criticism from regulated entities, the Occupational Health and Safety Administration (OSHA) has taken a step to pare down the controversial Obama-era rule titled “Improve Tracking of Workplace Injuries and Illnesses,” 81 Fed. Reg. 29623 (Jan. 1, 2017) (aka, the E-Recordkeeping Rule). Specifically, OSHA issued a Notice of Proposed Rulemaking (NPRM), 83 Fed. Reg. 36494 (July 30, 2018), to amend the E-Recordkeeping Rule by eliminating the requirement that establishments with 250 or more employees submit to OSHA the injury-and-illness data from their 300 logs and 301 incident reports through OSHA’s web-based Injury Tracking Application (ITA).

Though employers have welcomed the proposed change, it fails to address most of the fundamental concerns that the rule’s critics have repeatedly raised. The proposal leaves intact the mandate that forces hundreds of thousands of establishments to annually submit 300A annual summary data to OSHA, and OSHA apparently still intends to publish the data linked with the employers’ names. Even more problematic, the proposal leaves untouched the “anti-retaliation” provisions that purport to limit post-injury drug testing and discipline, safety incentive programs, and executive compensation and bonuses linked to injury rates.

### **Tortured History and Difficulties Implementing OSHA’s E-Recordkeeping Rule**

The E-Recordkeeping Rule fundamentally changed OSHA’s long-standing injury-and-illness recordkeeping program by requiring injury data to be proactively shared with OSHA, which intended to publicize the data in an online database. Specifically, the 2016 E-Recordkeeping Rule required:

1. All establishments with 250 or more employees in industries covered by the recordkeeping regulation to annually submit their injury-and-illness data and information from their OSHA 300 Logs, 301 Incident Reports, and 300A Annual Summaries.
2. Establishments with 20-249 employees in select “high hazard industries” to annually submit information from their 300A Annual Summaries only.
3. All submissions to be done electronically, via a purportedly secure OSHA website portal.

Since promulgation in May 2016, implementation of the Rule has been mired in difficulty. The July 1, 2017 original data-submission deadline became a moving target and source of uncertainty as to the future of the Rule, as OSHA extended the submission deadline three separate times within six months—ultimately resulting in a December 31, 2017 deadline. On top of all this, OSHA had serious difficulty launching and operating the ITA. OSHA’s initial roll-out of the ITA was delayed, and then, almost immediately after it

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was rolled out, notification from the Department of Homeland Security about a data breach and potential compromise of user information caused yet another setback, legitimizing employers' privacy concerns.

Then there were the legal challenges. Shortly after the rule was promulgated, industry groups brought a legal challenge to the anti-retaliation elements of the rule and sought a preliminary injunction to prohibit enforcement of those portions. *TEXO ABC/AGC v. Perez*, No. 3:16-cv-01998-D (N.D. Tex. July 8, 2016). Industry opponents also brought a second legal challenge to the rule's electronic data-submission requirements. *Nat'l Assn. of Home Builders et al. v. Perez et al.*, No. 5:17-cv-00009 (W.D. Okla. Jan. 4, 2017). Both of these cases were indefinitely stayed pending OSHA's Notice of Proposed Rulemaking.

### The July 30, 2018 Proposed Rule

The NPRM announces two amendments to the E-Recordkeeping Rule:

1. Amend 29 C.F.R. § 1904.41 by removing the requirement for establishments with 250 or more employees to electronically submit information from OSHA Forms 300 and 301; and
2. Require employers to submit their Employer Identification Number (EIN) with the data.

OSHA's rationale for the proposal is based on protecting worker privacy by eliminating the electronic collection of case-specific data containing identifying employee information and sensitive health information about individuals—a concern industry raised during the comment period under the initial NPRM between November 2013 and February 2014.

OSHA's proposal to narrow the scope of the rule is not surprising. It had telegraphed that intent in two Regulatory Agendas, numerous speeches, postings on its website, and court filings in the legal challenges to the Rule. The agency had also already implemented some changes as interim measures without rulemaking earlier this year. However, because of the tiny scope of this proposed change, employers' other concerns with the Rule were seemingly ignored, and this proposed revision falls far short of industry expectations.

### Notice of Proposed Rulemaking Fails to Address the Controversial Anti-Retaliation Provisions

With the arrival of a new administration touting a deregulatory agenda, industry was hopeful that E-Recordkeeping would be one of the first Obama-era rules subject to major revisions. Industry, however, is left with one rather simple and unsurprising change. What OSHA failed to address—which received much scrutiny and backlash from industry following promulgation of the Rule—were the new employer obligations and prohibitions related to internal employee injury-reporting procedures and the vague anti-retaliation provisions. Particularly controversial is the impact of OSHA's rule on post-injury drug testing, safety incentive programs, and executive compensation and bonuses, which appeared only in the Preamble to the Final Rule.

***Reasonable Reporting Procedures & Employee Discipline.*** The NPRM does not address any of the anti-retaliation provisions, including the "workers' rights" anti-retaliation provisions that added language to 29 C.F.R. §§ 1904.35 (employee involvement) and 1904.36 (prohibition against discrimination for reporting an injury). Specifically, the original E-Recordkeeping Rule made three changes to §§ 1904.35 and 1904.36:

1. Requires employers to "inform" employees of their right to report work-related injuries and illnesses free from retaliation (with which can be complied by posting the latest version of the "OSHA: It's the Law" Worker Rights Poster);
2. Clarifies the existing implicit requirement that employers' procedures for reporting work-related injuries and illnesses must be reasonable and must not discourage employees from reporting; and

3. Reiterates the existing prohibition to employers from retaliating against employees for reporting work-related injuries or illnesses.

The Rule does not define reasonableness, and OSHA did not explain in the Preamble to the final rule what would be considered a reasonable reporting policy. The Preamble did, however, make clear that a policy that either requires “immediate” reporting of an injury, or that creates an “undue burden” on employees to complete a report violates this requirement.

OSHA’s October 2016 Guidance Memo on the anti-retaliation provisions provided some additional insight as to what OSHA considers a reasonable reporting policy. The Memo states that employers may implement policies that require employees to report a work-related injury or illness: “*as soon as practicable after realizing they have the kind of injury or illness they are required to report to the employer,*” such as the next business day. While this explanation contemplates some leniency, it offers no guidepost for employer compliance. As such, employers are left to guess whether and when they can lawfully discipline employees for failing to report workplace injuries and illness.

The addition of ¶ (b)(1)(iv) to 1904.35, which incorporates the prohibition against retaliating for reporting a work-related injury or illness into the regulation, also caused confusion for employers, as neither the vague language of the regulation nor the Preamble to the final rule offer any clear sense of what policies would and would not be considered “retaliatory.” Although the Memo attempted to provide clarification by explaining that employee discipline for violating workplace-safety rules is not prohibited, the Rule has blurred the line between what is legitimate and what is retaliatory, and the risk of a costly 11(c) Complaint has begun to deter employers from strictly enforcing legitimate workplace-safety policies.

**Safety-Incentive Programs.** The NPRM also fails to address OSHA’s provisions restricting safety-incentive programs. The Preamble expressed particular concern with the supposed chilling effect and retaliatory nature of employee incentive programs. While recognizing that incentive programs can be helpful in driving a positive safety culture, OSHA explained in the Preamble that “if the programs are not structured carefully, they have the potential to discourage reporting of work-related injuries and illnesses without improving workplace safety.”

OSHA singled out for criticism incentive programs that reward the absence of injury or withhold rewards from an individual or group if a recordable injury is reported, as well as those that withhold rewards if a workplace does not achieve a certain injury rate. The October 2016 Guidance noted those concerns, but also provides examples of permissible incentive programs—namely “positive” safety-incentive programs. For instance, raffling off a \$500 gift card each month in which employees universally complied with legitimate workplace-safety rules—such as using hard hats and fall protection—would not violate the rule. The key factor for OSHA is whether the reward or benefit to the employee is based on *leading indicators (such as complying with a safety rule, completing training, etc.) v. lagging factors (injury rates)*.

The Rule forced many employers to modify their incentive programs and compensation packages—a move unpopular with employers and employees. Whether such restrictions on safety incentives and bonuses actually increase reporting or have any effect on worker safety are uncertain, but OSHA’s modification to traditional incentive and bonus compensation structures without evidence of any benefit and no input from industry makes this an issue ripe to be revisited with a new rulemaking.

**Post-Accident Drug Testing.** Another provision that the NPRM fails to address is OSHA’s prohibition of blanket post-injury drug-testing policies. The Final Rule’s Preamble makes clear that post-accident drug-testing programs, while not categorically prohibited, are highly suspect, and blanket post-incident drug testing is strictly prohibited *unless* required by some other law or the workers’ compensation insurer.

OSHA's October 2016 Guidance clarified that employers are not categorically barred from performing post-incident drug testing. For instance, OSHA will not issue citations for drug testing when it is required under some other law, or by a workers' compensation obligation. Beyond this, OSHA's Guidance states:

[t]he general principle here is that drug testing may not be used by the employer as a form of discipline against employees who report an injury or illness, but may be used as a tool to evaluate the root causes of workplace injuries and illness in appropriate circumstances.

According to OSHA, the rule is tailored to prohibit only "drug testing for reporting work-related injuries or illnesses without an objectively reasonable basis for doing so." OSHA's guidance states that when evaluating whether an employer had an "objectively reasonable basis" for post-injury drug testing an employee who reports a work-related injury, the central inquiry is whether the employer had a reasonable basis for believing that drug use by the reporting employee *could have contributed* to the injury.

Although this rule did not alter other forms of employee drug testing—*e.g.*, pre-employment, random, Department of Transportation-required—employers lost a significant tool to help keep the workplace safe. The new regulatory hurdles deter employers from conducting post-incident drug tests, jeopardizes the safety of other employees in the workplace, and can lead to significant financial losses for employers. Employers are put between a rock and a hard place—either conduct post-incident drug tests as a matter of course and face the potential consequences of an 11(c) Complaint or risk employee safety. The onus to maintain a drug-free workplace is already difficult for employers and OSHA added an additional burden.

### What Should Employers Do Now?

Employers have the opportunity to **submit comments on the proposed rule though September 28, 2018**. OSHA is specifically seeking comment only on the proposal to cut out the 300 and 301 data submission requirement for large employers and the impact of that requirement on worker privacy. Employers should submit comments on that proposal. However, with the rulemaking record being re-opened, even if just cracked open for now, industry should seize this opportunity to advocate for further revisions, including:

1. Increase the threshold DART rate for determining "high hazard industries" covered by the Rule;
2. Increase the threshold number of employees at an establishment to trigger the data-submission requirements;
3. Collect data on an employer-anonymous basis—*e.g.* submissions identify the company's NAICS Code, but not its name or EIN #;
4. Memorialize a commitment from OSHA not to publish the data and to protect it from FOIA requests; and
5. Eliminate the anti-retaliation elements because they:
  - Are duplicative of § 11(c) of the Occupational Safety and Health Act
  - Deter employers from disciplining employees for violating legitimate workplace safety rules
  - Incentivize unnecessary and costly whistleblower claims
  - Restrict safety incentives that actually improve safety and health
  - Limit drug testing in the midst of an epic opioid crisis
  - Have shown no connection to improving protection from retaliation

Even if OSHA does not specifically address these topics in a new Final Rule, a unified, strong industry voice imploring OSHA to further modify this rule, especially the controversial anti-retaliation provisions, may spark the agency to issue another Notice of Proposed Rulemaking to more substantially revise the Rule.