

Week of **January 27, 2014**

Recordkeeping Rule Must Be Withdrawn, Employer Coalition Tells OSHA

An industry coalition, foreseeing “significant negative impacts” from OSHA’s proposed recordkeeping and reporting rule, has asked the agency “in the strongest possible terms” to withdraw it.

At a public meeting Jan. 9, the U.S. Chamber of Commerce and the Coalition for Workplace Safety (CWS) cited a variety of reasons why OSHA’s proposal to require public disclosure of occupational safety and health injury and illness data is a bad idea.

OSHA’s proposed rule would require disclosure of company, location and incident specific information. “We know that this proposal will trigger malicious uses because these are already occurring without easy access to such specific information,” said Marc Freedman, Executive Director of Labor Law Policy at the Chamber.

Noting that a request for such disclosure was part of a wish list made to the Obama transition team by the AFL-CIO in 2009, Freedman said, “Unions are known for taking company injury reports out of context when they are trying to organize an employer or pressure one during contract negotiations.”

Injury and illness records OSHA will require employers to submit will be devoid of context and will not give a complete picture of a company’s efforts to maintain a safe workplace, commented Jackson Lewis attorney Tressi Cordaro, speaking on behalf of the CWS, an employer-association coalition.

The CWS said that, among a host of privacy concerns, the data will result in disclosure of information on the number of employees and hours worked that many companies consider confidential because they give insight into processes and could open up companies for hostile takeover by competitors or reveal proprietary information.

The proposed regulation presumes all recorded injuries and illnesses are preventable. The CWS pointed out that presumption overturns one OSHA adopted when recordkeeping requirements were revised in 2001. The foundation of those changes was a “no fault” recordkeeping system.

At the time, OSHA adopted a presumption that any injury or illness occurring in the workplace was assumed to be work-related. However, some clearly were not because they were outside the employer’s control. Since employers were only required to submit these records to OSHA upon request or as a part of a survey, the approach was accepted because there would be “no fault” attached if these types of injuries or illnesses were recorded. The CWS warned that if OSHA’s new presumption is adopted, an outcome could be that employers will think twice about recording injuries they believe are not work-related.

OSHA’s proposal requires electronic submission of the data, but fails to consider the impact of this mandate on small businesses which do not keep such records in electronic form or have ready access to computers or the internet. The measure understates costs, including for

initial training on new system requirements compelled by the regulation and programming changes to existing recordkeeping systems. It also does not account for the increased training that will be required to make sure employees understand which injuries should be recorded or when they do not have to be recorded since there will now be significant consequences for making that decision

correctly. OSHA asserts annual benefits would significantly exceed the annual costs, yet the agency has failed to adequately quantify those benefits, the CWS said.

The comment period for the proposal, entitled Improve Tracking of Workplace Injuries and Illnesses, closes March 8, a Saturday.

Potato Chip Maker Caught Up in OSHA's SST Program

A New York potato chip maker is among the latest manufacturing firms to feel the bite of OSHA's Site-Specific Targeting (SST) Program.

[Terrell's Potato Chip Co.](#) in DeWitt faces \$115,500 in fines for [23 alleged violations of workplace safety standards](#), OSHA said in a recent news release.

Citations were written following an inspection last June for lack of guards on machinery, unsecured stacks of materials, damaged electrical parts, lack of training and other alleged deficiencies. The company was targeted under the SST program due to the number of injuries and illnesses it had reported.

OSHA's SST program is the agency's main programmed inspection plan for non-construction workplaces that have at least 20 employees. The SST initiative, now in its 15th year, is based on data received from the prior year's OSHA Data Initiative survey. It is designed to reduce injuries and illnesses by directing enforcement resources to where the highest injury and illness rates have occurred.

Many more workplaces meet SST program targeting criteria than the agency inspects in a given year. For instance, from August 2010 through September 2011, 13,827 worksites met the criteria, but only 2,146 were inspected. OSHA is currently conducting a study on the impact of the program on employee safety.



Time to Post OSHA 300A Form

Feb. 1 is the deadline to post OSHA Form 300A, a summary of your log of work-related injuries and illness from 2013. The summary must go in a visible location for employees to read and remain posted until April 30. Firms with 10 or fewer employees and certain other industries are exempt.

Employment Law Q&A

Q:

We operate our business in an “at will” state. Is it really necessary to document all performance problems, if we can discharge our employees for any reason or no reason?

A:

Although in most states employment is “at will,” there are many exceptions to the “at-will employment” rule. Employees cannot be discharged due to their age, race, national origin, gender or any other protected category, nor for raising concerns about discrimination or harassment. They cannot be discharged for requesting “Family and Medical Leave Act” leave, or asking for an accommodation under the Americans with Disabilities Act, or for filing a worker’s compensation claim. Employees cannot be discharged for filing an overtime complaint. Many federal and state laws now protect employees who act as “whistleblowers” to bring fraudulent or criminal behavior to light. Because nearly every discharged employee falls into one of these categories, nearly everyone can make an argument that the “real” reason for his/her discharge was illegal.

As a result, every employment-related decision – hiring, termination, layoff, promotions/demotions, salary decisions, training opportunities, etc. – should always be based on legitimate reasons that are supported by solid documentation. Good documentation is created at the time the incident or concern arises – not later on – and identifies the author and date it is prepared. When a personnel decision is made, the company should always be able to articulate (1) who made the decision and (2) the legitimate business reasons on which it was based, using good documentation as backup. If an employee files a claim with the EEOC or other agency, or a lawsuit challenging an employment decision, the employer should be prepared to provide the answers to these questions, and show the documentation supporting its reasoning.



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