

Compliance Date Nears for OSHA's New Recordkeeping Anti-Retaliation Rule

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Practices

Workplace Safety and Health

Employers must ensure they are in compliance with the anti-retaliation provisions of the Occupational Safety and Health Administration's new electronic recordkeeping and reporting rule by August 10, 2016. The rest of the new regulation requiring certain employers to submit injury and illness data electronically to OSHA becomes effective on January 1, 2017.

The [new regulation](#) requires certain employers to submit injury and illness data electronically to OSHA. OSHA plans to post some of the information on its public access website. OSHA hopes public disclosure will encourage employers to improve workplace safety and provide valuable information to stakeholders and the general public.

To assure employees feel free to report injuries and illnesses without fear of retaliation, the new rule also contains three provisions (at 29 CFR 1904.35) that OSHA says are designed "to promote complete and accurate reporting of work-related injuries and illnesses." The first provision requires employers to inform employees of their right to report work-related injuries and illnesses free from employer retaliation. Posting OSHA's [worker rights poster](#) from April 2015, or later will satisfy this obligation, said the agency.

The second provision adds text to the existing rule to clarify that reporting procedures must be reasonable, and that a procedure that would deter or discourage reporting is not reasonable. In the new rule's preamble, OSHA provided an example of what it views as *not* reasonable: an employee reported work-related neck and shoulder pain a week after symptoms first appeared and was issued a final warning for failing to report his medical condition promptly.

"This policy was not reasonable because it did not allow for reporting within a reasonable time after the employee realized that he or she had suffered a work-related injury," said OSHA, adding, "[t]he final rule will have an important enforcement effect for the minority of employers who do not currently have reasonable reporting procedures."

The final anti-retaliation provision expands on the existing anti-discrimination prohibition in section 11(c) of OSHA's governing statute. Section 11(c) of the Occupational Safety and Health Act prohibits any employer from discharging, retaliating, or discriminating against any employee "because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." This new provision, which OSHA describes as "an additional enforcement tool," allows inspectors to cite an employer for retaliation and require abatement even if no section 11(c) complaint has been filed. A separate provision at § 1904.36 clarifies that section 11(c) also prohibits retaliation for injury and illness reporting.

The rule will be phased in over two years. It directs establishments with at least 250 employees in industries covered by the recordkeeping regulation to submit information from their 2016 Form 300A by July 1, 2017, and from all 2017 forms (300A, 300, and 301) by July 1, 2018. Beginning in 2019, and every year thereafter, the information must be submitted by March 2. Those compliance dates also apply to establishments with 20-249 employees in in [certain high-risk industries](#), but only for the 300A form. The rule was published on May 12, 2016. OSHA State Plan states have six months from then to adopt requirements substantially identical to the new requirements.

Because the changes carry a host of legal implications for employers, our attorneys are helping companies to prepare for the anticipated impacts of this rule on their businesses. Please contact Jackson Lewis for assistance.

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