



OSHA Issues Final Rule Clarifying Ongoing Recordkeeping Obligations

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OSHA is scheduled to publish a final rule January 19, 2017 in the Federal Register, clarifying an employer's ongoing duty to correct records of injuries and illnesses. The rule, which modifies 29 CFR Part 1904, will become effective on February 18, 2017. In 2012, the D.C. Circuit Court of Appeals struck down OSHA's prior interpretation that the requirement for employers to update such records continues for five years following an event, because the underlying regulation was ambiguous. OSHA's new rule thus expressly states the ongoing nature of the requirement to correct and keep the records. The new rule does not expand the scope of the type of injuries or illnesses that must be tracked.

Under the regulation in 29 CFR 1904.7, an employer must log work-related injuries and illnesses that result in death, loss of consciousness, days away from work, restricted work activity or job transfer, medical treatment beyond first aid, or diagnosis of a significant injury or illness by a physician or other licensed health care professional. The logs must be verified, summarized and posted at the end of each calendar year, and retained for five years. Although there is no dispute that the failure to initially include a recordable injury or illness in a log is a violation of the Occupational Safety and Health Act, there was a question whether the failure to correct the log throughout the five year retention period was a continuing violation. For continuing violations, each day the action *is not taken* subjects an employer to penalty and/or enforcement action.

The revisions do not add any requirement to review or reassess existing records, but OSHA points out in the preamble to the new rule that the statutory duty is to maintain accurate records. Therefore the obligation to keep correct injury and illness records continues for each day employees work at a site. Consequently and in accordance with the OSH Act statute of limitations, the final rule clarifies and expressly authorizes OSHA to cite employers for such recordkeeping violations for up to six months after the five-year retention period expires.

If an employer updates the logs, however, OSHA may not issue a citation more than six months after the record is corrected. Further, the agency advises that "OSHA generally focuses its recordkeeping enforcement resources on systematic recording failures, not on one-time errors made in good-faith attempts at compliance." OSHA will cite an employer, nonetheless, who has knowledge of a mistake in the logs but does not correct them.

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