OSHA Rescinds Mandate for Large Employers to Submit Forms 300 and 301 Data Electronically

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Despite the partial shutdown, some Federal agencies were still hard at work. Count the Occupational Safety and Health Administration (OSHA) among them. The agency, on January 25, 2019, published a final rule[1] (the "final rule") that amends its recordkeeping regulation by rescinding a requirement in a 2016 overhaul of the regulation[2] (the "2016 rule") that establishments with 250 or more employees electronically submit information from OSHA Forms 300 and 301 to the agency. While these employers, along with all other covered employers, will continue to be required to submit electronically OSHA Form 300A, which is an annual summary of all recordable workplace injuries and illnesses, the more detailed OSHA Forms 300 and 301 will only be required to be maintained on-site at the employer's establishment and made available to OSHA as needed during inspections and enforcement actions.

Forms 300 and 301:

OSHA cited several reasons for its reversal on the issue of requiring electronic submission of the Form 300 and 301 data, foremost among them being the inability to guarantee that sensitive personal information contained in these forms would not be publicly disclosed. The agency pointed out that the resources required to screen for and remove personally-identifiable information (PII) from approximately 775,000 reports submitted on Forms 300 and 301 would be significant and would necessarily require the agency to divert such resources from other agency priorities. Moreover, OSHA stated that even if data reported on Forms 300 and 301 were scrubbed of PII by the agency, PII could be obtained through "re-identification" by piecing together other data points on the forms to reveal the identity of the individual workers. An example of re-identification would be taking the job title, place where the event occurred and details about the injury on the Form 300 and piecing that data together to determine the identity of the worker, particularly if the event occurred in a small town. OSHA also stated that despite a Freedom of Information Act exemption on disclosure of PII, it nevertheless could be compelled by a court to release the data. Finally, OSHA noted that it would realize only "incremental" and "uncertain" benefits from requiring electronic submission of the Forms 300 and 301 data and had sufficient information on which to base its targeted inspection and enforcement efforts from the summary Form 300A data. As a result, the agency concluded:

- After considering all of the comments in the [rulemaking] record and balancing the risk to worker privacy against the uncertain extent of the benefits of collecting the data and OSHA's resource priorities, OSHA has determined that the final rule is necessary to preserve sensitive worker information and conserve agency resources for initiatives with more concrete benefits to OSHA's mission of assuring safe and healthful workplaces.[3]

Employer Identification Number:

In addition to the action on electronic reporting of OSHA Form 300 and 301 data, the final rule also requires all employers covered by the agency's recordkeeping rule to submit their Employer Identification Number (EIN) electronically along with their Form 300A. OSHA stated in the final rule that the requirement promises a number of benefits and will increase the utility of the data for use by

1 The "final rule" is available at: https://www.govinfo.gov/content/pkg/FR-2019-01-25/pdf/2019-00101.pdf
2 The "2016 rule" is available at: https://www.govinfo.gov/content/pkg/FR-2016-12-19/pdf/2016-30410.pdf
3 84 Fed. Reg. 380 (Jan. 25, 2019), at 383.

OSHA and the Bureau of Labor Statistics in identifying occupational injury and illness trends and emerging issues. Unlike the privacy concerns cited by OSHA with respect to the requirement that Forms 300 and 301 be submitted electronically, the agency stated that the EIN of an employer is required to be publicly disclosed in a variety of contexts.

Effective Date:

The final rule becomes effective on February 25, 2019; however the compliance date for the EIN requirement is March 2, 2020. As a result, establishments will not be required to include their EIN along with the 2018 Form 300A data (due March 2, 2019), but will be required to include it when submitting their 2019 Form 300A data (due March 2, 2020).

Effect on Long-Term Care and Aging Services Providers:

The final rule brings OSHA electronic reporting requirements applicable to large long-term care and aging services employers, such as nursing homes and continuing care retirement communities/life plan communities, in line with the reporting requirements of smaller providers and lends some much needed consistency for employers with multiple service lines. The final rule also provides some limited assurance to employees that their PII will not be publicly disclosed.

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