Littler | ASAP®

RECENT DEVELOPMENT

OSHA Issues Final Rule Rescinding Certain Recordkeeping Requirements and Clarifying Guidance on Drug Testing and Incentive Programs

By Thomas Metzger and Bryan Gramlich on January 31, 2019

The Occupational Safety and Health Administration (OSHA) recently issued a final rule rescinding major portions of its electronic reporting rule. Specifically, the rule (1) amends the recordkeeping rules for employers with 250 or more employees; (2) further clarifies OSHA's position on post-incident drug testing and workplace incentive programs; and (3) reaffirms OSHA's position that certain injury and illness data can be used to expand the scope of an on-site inspection. The rule takes effect on February 25, 2019.

Electronic Submission of Injury and Illness Information

The Occupational Safety and Health Act of 1970 (29 U.S.C. §651 *et seq*.) established workplace safety standards and delegated authority to the Secretary of Labor to enforce those standards. Among other provisions, the Act requires employers to record work-related injuries and illnesses on three separate OSHA forms. The OSHA Form 300 is a log of work-related injuries and illnesses. The OSHA Form 301 provides additional details about the injuries and illnesses on the 300 log. Finally, the OSHA 300A is a summary report of all work-related injuries and illnesses in a given calendar year.

In 2016, OSHA amended its rules to require establishments with 250 or more employees to electronically submit information from their OSHA 300, 300A, and 301 forms once a year. Establishments with 20 to 249 employees in certain industries were also required to electronically submit information on a yearly basis, but these employers only needed to submit information from the 300A summary form to OSHA. However, in July 2018, OSHA sought input on a proposed rule to eliminate the electronic submission requirement for employers with 250 or more employees with respect to information from the 300 and 301 forms.

After the comment period ended, OSHA determined that there was a meaningful risk of public disclosure of private employee information if the rule requiring electronic submission of the information in Forms 300 and 301 was kept in place. OSHA weighed this risk against the uncertain, incremental benefits to workplace safety if OSHA were to continue to electronically collect the injury and illness data. OSHA also considered that collection of the Forms 300 and 301 data was diverting agency resources from analyzing the information to which OSHA already has access, including severe injury reports, and 300A data from employers with over 20 employees. OSHA determined that the data contained in the 300 and 301 logs did not need to be publicly available because it is already available to workers, their representatives, and OSHA upon request.

The final rule therefore rescinds the requirement that employers with 250 or more employees electronically submit information from their OSHA 300 and 301 forms to OSHA on a yearly basis. OSHA did not rescind an employer's obligation to electronically submit summary information on Form 300A, either for employers with over 250 employees or employers with over 20 employees in certain industries. These employers must still submit the summary reports on Form 300A by March 2 of the following calendar year.

Post-Incident Drug Testing and Incentive Programs

The final rule reiterates that the antiretaliation provision of the reporting rule does not prohibit workplace safety incentive programs or post-incident drug testing. The final rule makes clear that OSHA's October 11, 2018 memorandum and update regarding drug testing and incentive programs remains the agency's position. OSHA reaffirmed that the antiretaliation provisions in § 1904.35(b) do not ban post-incident drug testing or incident-based incentive programs. OSHA again clarified that the antiretaliation provisions prohibit employers from implementing drug testing and incentive programs to penalize workers for reporting injuries or illnesses. To avoid confusion going forward, OSHA has confirmed that to the extent the earlier OSHA preamble stated otherwise, it has now been superseded. Employers should note that the final rule does not affect the provision in OSHA's electronic recordkeeping rule that may permit the Agency to cite employers for alleged retaliatory conduct outside of Section 11(c) of the OSH Act.

Expanding the Scope of On-Site Inspections

OSHA continues to assert that 300 and 301 logs have value for identifying potential violations during an inspection, despite a recent Eleventh Circuit Court of Appeals decision holding that information from 300 logs cannot be used to expand the scope of an inspection. *See United States v. Mar-Jac Poultry, Inc.*, No. 16-17745 (11th Cir. Oct. 9, 2018). OSHA maintains that the

court's ruling in *Mar-Jac* was limited to the use of data from 300A logs, not the data from Forms 300 and 301. Employers should see this as a sign that OSHA does not intend to be broadly bound by the *Mar-Jac* ruling.

Scope and Limitations of the Final Rule

For employers with 250 or more employees, OSHA no longer requires any electronic submission of the injury and illness data contained on Forms 300 and 301. OSHA's final rule does not change the reporting requirements for 300A data from employers with 20 to 249 employees in certain industries or for employers with 250 or more employers. It also does not change the date of compliance for submitting the data from OSHA 300A logs. One new requirement employers should be aware of is that employers must submit their Employer Identification Number (EIN) with their injury and illness data submission.

This final rule is an important policy change and clarification for OSHA and should save employers with 250 or more employees a significant amount of time that would otherwise be spent entering 300 and 301 data in OSHA's electronic system. The rule will also prevent third parties from mining the data for their own purposes. Employers should continue to be vigilant in following all of OSHA's reporting and recording rules as violations can be coupled with significant fines.