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OSHA Rescinds Burdensome Occupational Safety Notification Requirements

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Environmental

The Occupational Safety and Health Administration (OSHA) recently proposed to eliminate some of the more burdensome requirements of its electronic records rule, which details how employers must report work-related injuries to the agency.

OSHA Rule and Implications

As part of the Trump Administration's regulatory reform effort, a proposed OSHA rule would eliminate parts of the electronic records rule that require establishments with 250 or more employees to submit the detailed OSHA Form 300 (Log of Work-Related Injuries and Illnesses) and OSHA Form 301 (Injury and Illness Incident Report). Instead, employers would be required to submit only the more streamlined Form 300A (Summary of Work-Related Injuries and Illnesses). OSHA estimates that electronic submission of Forms 300 and 301 requires 10 to 12 minutes per recordable injury or illness. Meanwhile, when all three forms were mandatory, OSHA estimated that establishments spent just under one hour completing, posting, and certifying Form 300A annually.

Employers were previously obliged to submit Forms 300, 301, and 300A. Form 300A will remain largely unchanged under the proposed rule, requiring employers to record high-level information about the number of workplace injuries or illnesses the company experienced during the year, the number of days employees were away from work or in a job transfer or restriction, and the types of injuries and illnesses that occurred. However, companies will no longer need to submit Forms 300 and 301, which prompt employers to identify the employee in question by name, describe the incident in detail, provide information about any health care professional involved, and state whether treatment occurred in an emergency room or required an overnight hospital stay. While the rulemaking is pending, OSHA will no longer accept Form 300 or 301 data and will not enforce deadlines for these forms.

When explaining its rationale for the proposed rule, OSHA cited concerns about the privacy of workers whose personally identifiable information or other sensitive data, once submitted to the agency by their employers without their explicit consent, could be accessible to members of the public pursuant to the Freedom of Information Act (FOIA).[1] Form 300A offers more privacy

[1] Members of the public can submit requests under FOIA to gain access to information or documents controlled by the government. If the request meets FOIA requirements and the requested information does not fall into a FOIA exception or exemption, the government is required to release this information. *See* 5 U.S.C. ch. 5, subch. II. OSHA

protections because it collects less sensitive information than did Forms 300 and 301, which required the disclosure of information about what an employee was doing just before the incident occurred, the specific symptoms experienced and body part injured, and the facility and physician the employee consulted for treatment.

Comment Period and Public Reactions

OSHA will accept comments on the proposed rulemaking until September 28, 2018. The agency has asked in particular for comments regarding the privacy risk to workers, the burden that submitting the more detailed forms places on employers, and the usefulness of the additional detail provided in Forms 300 and 301 for identifying enforcement targets.

Proponents of the proposed rule argue that it would protect employee data while reducing the regulatory burden on businesses. Some, however, believe the proposed change is inadequate because employers would still be required to submit confidential business information, leaving employer data vulnerable to a FOIA request.

Meanwhile, opponents of the rule argue that limiting data collection will both reduce incentives for employers to improve workplace safety and make it more difficult for them to do so in the absence of supporting data. For example, the International Brotherhood of Teamsters opposes the proposed rule because it would "significantly hamper the ability of workers and the public to access injury information" and "enable bad actor companies with dangerous health and safety practices to more easily keep full workplace injury and illness data from public view."

This new rule comes less than two years after OSHA adopted a rule requiring employers to keep electronic records of workplace injuries. In justifying the 2016 rule, OSHA stated that "making injury information publicly available will 'nudge' employers to focus on safety," noting that an increased focus on safety could save lives and improve employers' bottom lines. Challenges to the 2016 rule, which this notice of proposed rulemaking would amend, are ongoing, as they have been pending in federal court for more than a year. If successful, these cases could threaten the 2016 rule and impact the proposed rule.

Companies may wish to track the proposed rule through the rulemaking process and pending lawsuits to ensure compliance with OSHA's electronic records requirements. Companies and industry associations that would welcome fewer recordkeeping requirements—particularly those facing a large reporting burden or having limited capacity to maintain detailed records—can help shape the regulation by submitting comments to the agency.

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stated in the proposed rule that the Department of Labor "believes that the information in these forms should be held exempt under FOIA" due to the FOIA exemption for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *See* 83 Fed. Reg. 36497, col. 3 (July 30, 2018) (referencing 5 U.S.C. 552(b)(6)). However, the agency stated that "there remains a meaningful risk that a court may ultimately disagree and require disclosure." *Id.*

If you have any questions concerning the material discussed in this client alert, please contact the following members of our firm:

Don Elliott	+1 202 662 5631	delliott@cov.com
Kamila Lis-Coghlan	+1 202 662 5884	klis@cov.com
Lindsay Brewer	+1 202 662 5409	lbrewer@cov.com