



Overview of OSHA Final Rule on Electronic Reporting

By Jess McCluer, NGFA Vice President of Safety and Regulatory Affairs

National Grain and Feed Association

September 2016

Copyright©2016

Contact: jmcccluer@ngfa.org

All Rights Reserved. No portion of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, without prior permission in writing from the publisher.

Disclaimer: The National Grain and Feed Association make no warranties, expressed or implied, concerning the accuracy, application or use of the information contained in this publication. Further, nothing contained herein is intended as legal notice. Competent legal counsel should be consulted on legal issues.

Grain handling facilities should contact experienced safety and health legal counsel or a third-party expert if they have questions about the proper way to implement the items addressed in the document.

NGFA | 1400 Crystal Drive | Suite 260 | Arlington | VA | 22202; (202) 289-0873



Overview of OSHA Final Rule on Electronic Reporting

By Jess McCluer, Vice President of Safety and Regulatory Affairs

On May 12, 2016, the Occupational Safety and Health Administration (OSHA) issued a [final rule](#) requiring certain employers to submit data electronically from their work-related injury records to the agency. The final rule also solidifies OSHA's anti-retaliation protections for employees reporting work-related injuries and illnesses.

The final rule generally becomes effective on Jan. 1, 2017. However, compliance with anti-retaliation provisions and reporting deadlines will be phased in through 2019.

Affected Employers

OSHA's final rule on mandatory electronic reporting of occupational injuries-and-illness data updates OSHA recordkeeping obligations for employers that:

- Have at least 250 employees; or
- Have between 20 and 249 employees and are in what OSHA classifies as a "high-risk" industry (an OSHA classification that includes grain, feed and processing facilities)

OSHA collects the information on injuries and illnesses to identify emerging hazards, characterize specific areas of concern and/or target inspection and outreach initiatives under OSHA's emphasis program.

According to OSHA, the "employer," is an *individual establishment* (i.e. *single physical location*) where business is conducted or where services or industrial operations are performed. Therefore, if your company has a total of 10 individual facilities – including the main corporate office – and only four of the 10 facilities have more than 20 employees, then those four facilities are required to submit the OSHA 300 form electronically. The company itself is *not* required to submit a single 300 form with a compilation of data from the four facilities with more than 20 employees.

The 20-employee threshold does include temporary and seasonal workers. As a result, it could potentially vary on a year-to-year basis whether each of the four facilities would need to submit the 300 form.



Submitting Electronic Data

The new electronic submission requirements will be phased in. Covered employers will be required to submit electronically beginning next year. Specifically, on July 1, 2017, employers must electronically submit their 300A summaries for covered establishments. On July 1, 2018, employers must electronically submit their 300 Logs, 301 Forms, and 300A summaries for covered establishments. Beginning in 2019, the deadline will change from July 1 of each year to March 2 of each year. The final rule anticipates that states with their own OSHA plans will implement systems that meet these deadlines.

The final rule requires electronic submission of Part 1904 recordkeeping records by employers depending upon their size and industry:

- Employers with 250 or more employees (including part-time, seasonal or temporary workers) in each establishment must electronically submit their 300, 300A and 301 forms to OSHA annually;
- Employers with more than 20 (but less than 250) employees in certain identified industries must electronically submit their 300A form annually; or
- Employers who receive notification from OSHA to electronically submit their 300, 300A and 301 forms to the agency are required to do so.

OSHA then will post the data from employer submissions on a publically accessible Web site. According to the final rule, OSHA says it does not intend to post any information that could be used to identify individual employees.

| Submission Deadline | Number of Employees | |
|---------------------------|----------------------|--------------------|
| | 250 or more | Between 20 and 249 |
| July 1, 2017 | Form 300A | Form 300A |
| July 1, 2018 | Forms 300A, 300, 301 | Form 300A |
| March 2 (2019 and beyond) | Forms 300A, 300, 301 | Form 300A |

OSHA will require employers to submit all information from their logs, except information in the columns with employee names, employee addresses, health care professional names, and health care treatment facilities. The final rules do not specify how this information will be submitted electronically. Because of privacy laws, it is suggested that employers should not submit information that identifies a specific employee or an employee's medical information. The electronic disclosure requirements also will apply to employers located in State Plan States.



State Recordkeeping Laws

The new regulations do not preempt state laws. However, states have been charged by OSHA with enacting substantially similar rules within six months of the publication of the final OSHA rule. Some states may choose to allow employers in their state to use the federal OSHA data collection website to meet the new reporting obligations. Other states may provide their own data-collection sites.

Online Posting

OSHA will post these data on a publicly available website, which will be accessible by competitors, contractors, employees and employee representatives. The specifics of its new data-disclosure portal are not explained in the regulations.

Employee Anti-Retaliation Provisions

The final rule contains three new provisions aimed at strengthening OSHA's existing employee anti-retaliation protections, which become effective on **Aug. 10, 2016**, but for which the agency has [delayed enforcement](#) until **Nov. 1, 2016** to provide time for outreach to stakeholders.

These provisions include:

- Require employers to inform employees of their right to report work-related injuries and illnesses free from retaliation;
- Clarify that work-related injury-and-illness reporting methods must be reasonable and should not deter or discourage employees from reporting health and safety incidents; and
- Prohibit employers from retaliating against employees for reporting work-related injuries or illnesses

One way for employers to meet this requirement is by posting the OSHA "It's The Law" worker rights poster from April 2015 or later (<http://www.osha.gov/Publications/poster.html>).

Employers also are required to establish a reporting procedure that does not deter or discourage an employee from reporting work-related injuries and illnesses.

Important Issues Your Company May Wish to Consider

Given this OSHA final rule, there are some issues your company may wish to consider:

1. **"Shaming" Provisions: Publication of injury-and-illness data has the potential to influence investors, consumers, contractors, or prospective employees:** Among other things, OSHA's language accompanying the final rule regarding the public nature of the reporting signal its intent to have an impact on companies' investors, consumers, contractors and prospective employees (among others), reasoning these groups are likely



to support companies with strong safety track records. Publication of this information also creates the opportunity for negative impacts to a company's reputation and companies subject to the rule might consider and prepare for any such potential occurrence. **Employers might consider reviewing their Injury/Illness Reporting Policies to evaluate how illnesses and injuries are reported (by whom, if there is standard narrative language, etc.) and consider retraining employees who manage OSHA Injury-and-Illness Records.**

2. **Review of Drug Testing Policies Strongly Recommended.** Section 1904.35(b)(1)(iv) of the OSHA final rule prohibits an employer from discharging or discriminating against an employee for reporting a work-related injury or illness. OSHA's preamble to the final rule interprets the regulation broadly to prohibit any "adverse action that could well dissuade a reasonable employee from reporting a work-related injury or illness." OSHA applies this prohibition to any "blanket post-injury drug-testing policies (that) deter proper reporting," concluding that drug-testing alone constitutes an "adverse employment action." OSHA instructs employers to "limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use." OSHA explains with examples: it "would likely not be reasonable to drug test an employee who reports a bee sting, a repetitive strain injury, or an injury caused by a lack of machine guarding or a machine or tool malfunction. Types of drug testing include:

- **Reasonable Suspicion:** This form of testing is used when an employer has a reasonable suspicion or probable cause to believe that an employee is under the influence of drugs in the workplace. This is by far the most discretionary of the drug-testing policies, and therefore is subject to the most scrutiny. Employers and supervisors should have their suspicion corroborated by another supervisor to ensure that the employee is not being arbitrarily targeted for drug testing. In addition, employers need to make sure they are not being discriminatory in their drug testing policies, as a testing policy that singles out a certain group of people may be a violation of the Civil Rights Act.
- **Random Drug Testing:** The OSHA regulation does *not* affect an employer's prerogative to perform random drug tests. Employers can continue such policies as they have in the past. Because random drug testing is done on an entirely random basis at unannounced times, it can serve as an effective deterrent to employee drug use. And if all employees are equally subject to random drug tests, there can be no allegation of discrimination.
- **Post-Incident Testing:** The new OSHA rule affects most directly employers who want to continue drug testing after a workplace incident has taken place. Under the rule, employers no longer will be able to perform blanket post-incident drug tests. Instead, they only are permitted to test employees if employee drug use likely was a contributing factor to the incident, and a drug test would accurately identify the impairment caused by drug use. **Accordingly, employers may need to review and alter their policies, if warranted.**



- **Discrimination.** It is worth reemphasizing that employers should avoid any appearance of singling-out any specific class of workers for drug testing. There are legitimate safety situations where it makes sense to test groups of workers, such as those who work with heavy machinery or dangerous chemicals, on a regular basis. However, employers should be aware that, if their drug-testing policies disproportionately affect minority groups, they may face allegations of discrimination – regardless of whether the policy appears neutral on its face. Accordingly, it may be advisable to consult an employment law attorney, licensed in your state.

In light of this new regulation, and the changing regulatory practices at the state and local level, including state workers’ compensation premium reduction programs, it is recommended that employers review existing policies with competent legal counsel and implement any changes as soon as possible before enforcement of the rule begins in November 2016.

3. **Impact on Safety Incentive Programs.** In its preamble to the final rule, OSHA similarly warns against employer safety “incentive programs” being used as a form of retaliation. This position is consistent with OSHA’s past rulings and guidance on employer incentive programs, but goes further in widening its prohibition on incentive programs even when they are part of a broader compliance program. The new rules explain that “it is a violation of paragraph (b)(1)(iv) for an employer to take adverse action against an employee for reporting a work-related injury or illness, whether or not such adverse action was part of an incentive program.” OSHA’s interpretation prohibits all programs in which employees are denied a benefit on the basis of any injury or illness report. An example would be a situation in which an entire shift loses a safety bonus as a result of a single employee being injured.

However, an incentive program *may* make a reward contingent upon, for example, whether employees correctly follow legitimate safety rules, rather than whether they reported any injuries or illnesses. OSHA further encourages incentive programs that promote worker participation in safety-related activities, such as identifying hazards or participating in investigations of injuries, incidents, or “near misses.” Accordingly, employers should consider OSHA’s new interpretation when reassessing their incentive programs to ensure they are offering a benefit or reward based on the reporting of injuries or illnesses. These types of programs could be adjusted to provide benefits on the basis of compliance with safety rules, or for attending safety trainings or persevering on safety quizzes.

4. **New Anti-Retaliation Rules.** In the preamble to the anti-retaliation portion of its final rule, OSHA takes the position that its compliance officers can issue citations to employers who discipline workers for reporting injuries and illnesses when employers believe that no legitimate workplace safety rule has been violated. Accordingly, OSHA intends to give its compliance officers, who might have no formal training in employment discrimination law, the authority to issue citations based on perceived retaliation in the workplace.



OSHA's new interpretation overturns the agency's longstanding statutory framework for retaliating complaints under Section 11(c) of the Act, under which employees are required to report allegations of retaliation, which then are investigated by specialized investigators. Unlike a Section 11(c) complaint, in which an employee is required to file a retaliation claim with OSHA within 30 days, a compliance officer has six months to issue OSHA citations from the last day that the alleged violation occurred.

Importantly, in its explanation accompanying the final rule, the agency also posits that employer policies requiring an employee to immediately report an injury or be disciplined also may be retaliatory. OSHA states it believes that "immediate-reporting policies" will chill employees from reporting slow-developing or chronic injuries or illnesses, such as musculoskeletal disorders or poisoning from prolonged lead exposure. According to OSHA, to be reasonable, a policy is required to allow for reporting within a reasonable time after the employee realizes he or she has suffered a work-related injury, rather than just immediately following the occurrence of an injury.

- 5. Substantial Increase in OSHA Penalties, Effective Aug. 1, 2016:** OSHA will be adjusting its civil penalties, effective Aug. 1, for the first time in 26 years to account for inflation, and it has authority to continue doing so on an annual basis based upon the Consumer Price Index. The increase is expected to be significant (as much as 80 percent). An increase of this magnitude would hike the maximum penalty for an "other than serious" or "serious" citation to \$12,000 from the current \$7,000, while willful or repeat citations could jump to \$126,000 from the current \$70,000. The adjusted penalties went into effect on Aug. 1, 2016.

Conclusion

These new OSHA rules require certain employer policies to be reevaluated, including the anti-retaliation policy and employee training. Employers should consider taking steps to ensure that they are in compliance with OSHA and local laws and regulations as soon as possible. Proactive steps in the face of this regulatory scrutiny now may allow the employer to avoid costly enforcement and litigation in the future.