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Status of OSHA's Electronic Recordkeeping Rule - 1st Deadline (Dec. 15) to Submit Injury Data is Upon Us

The December 15, 2017 deadline for large employers and small employers in certain “high hazard industries” to submit injury and illness data to OSHA is less than a month away. We have been tracking closely the Trump Administration’s treatment of OSHA’s new E-Recordkeeping and Anti-Retaliation Rule, and while there have been plenty of signals that this rule is due for an overhaul, or even possibly to be rescinded, it appears that the initial data submission deadline of December 15th is going to stand.

Therefore, if employers have not already done so, they should immediately evaluate whether the rule applies to any or all of their workplaces, get familiar with and set up an account in OSHA’s Injury Tracking Application (the portal that will receive the injury data), and submit covered injury data (i.e., their 2016 OSHA 300A Annual Summary data) by December 15, 2017.

Background about the Electronic Recordkeeping Rule

Historically, unless OSHA opened an enforcement inspection at an employer’s workplace or the Bureau of Labor Statistics requested an employer’s participation in its annual injury data survey, employers’ Injury and Illness Recordkeeping Logs and related forms remained strictly in-house. Employers kept the data and their OSHA logs in their HR or Safety Department office, posted them internally for employees to view for a couple of months each year, used the data *themselves* to make decisions about how to reduce risks of injuries and illnesses in their workplaces, and then stored the records in a cabinet or desk drawer for five years. Now, OSHA’s new rule requires hundreds of thousands of employers to proactively submit these historically private records to OSHA, which in turn may publish the data online for all the world to see.

Key Changes in [OSHA's New Recordkeeping Rule](#):

1. Establishments with 20-249 employees in [certain so-called “high hazard industries”](#) must each year submit information from their 300A Annual Summaries only.
2. All establishments with 250 or more employees (in industries not exempt from keeping injury logs) must submit to OSHA annually their injury and illness data from their OSHA 300 Logs, 301 Incident Reports, and 300A Annual Summaries. In this first year of the rule, however, for 2016 injury data to be submitted in calendar year 2017, all employers, irrespective of size, are only required to submit 300A Annual Summary data.

3. The submissions to OSHA must be made electronically, via a purportedly secure web portal.

4. OSHA stated its original intent was to publish the data online, likely in a manner that is sortable, searchable, filterable, and as embarrassing to employers as possible. It is unclear whether the Trump Administration will publish the data, but the records may nonetheless be subject to Freedom of Information Act requests by plaintiffs' attorneys, the media, union organizers, and competitors, to use the data in a variety of ways to harm employers.

Deadline to Submit Data - A Moving Target

The deadline to submit data has been a moving topic and source of uncertainty since the Trump Administration took the reins at OSHA. The original deadline to submit data this year was July 1st. On May 17, 2017, OSHA announced an indefinite suspension of the original July 1 deadline, and later published a [Notice of Proposed Rulemaking](#) on June 26, 2017 to extend the submission deadline to December 1, 2017. The proposed rule was finally cleared by OMB last week, but has not yet been published in the federal register.

However, an [advance copy of the Federal Register Publication](#) shows yet another change to the data submission deadline. After reviewing comments to the proposed rule to push the deadline to December 1st, and considering delays launching the portal, getting OMB approval, and a brief stint when the portal was taken down because of a potential hack, OSHA tacked on two more weeks for a final date submission deadline of December 15, 2017.

Having passed on this last opportunity for a substantial delay to allow time to re-write the rule, it is time now to concede that the first data submission is going to happen. With just three weeks left to meet the December 15 deadline, and tens of thousands of workplaces already having submitted their data, it appears OSHA is standing by this deadline, and will at least collect 2016 data here in 2017. What, when and if data is collected in 2018 and beyond is far less certain.

New Rulemaking to Rescind or Amend the E-Recordkeeping Rule

The Trump administration has taken significant steps towards amending or even rescinding this rule in the near future. Immediately after the Rule was promulgated by the Obama Administration Industry opponents to the Rule brought a legal challenge to the Rule in the U.S. District Court for the Western District of Oklahoma, (Case No. No. 5:17-cv-00009). The Trump Administration joined a request by the Industry plaintiffs to stay the legal challenge because the new Administration indicated its intent to re-open the rulemaking to either rescind or amend the Rule.

The District Court Judge granted the stay in July 11, 2017, but Ordered OSHA to submit a status update about its reconsideration of the rule every 90 days. On October 10, 2017, OSHA filed its [first status update](#) indicating that OSHA "*continues to develop a Notice of Proposed Rulemaking ('NPRM') to reconsider, revise, or remove provisions of the [Rule],*" as announced in Pres. Trump's [First Regulatory \(and Deregulatory\) Agenda](#) issued on July 20, 2017. OSHA further explained that OSHA has "*drafted substantial portions of the NPRM, including draft regulatory text and a summary and explanation of the proposed changes,*" and that "*OSHA's economists have made significant progress on the economic analysis*" and continue to refine it.

This tells us two things. First, OSHA appears to be following through on its stated intent to revisit the E-Recordkeeping Rule. Second, it appears that the manner in which OSHA revisits the rule will be significant. The Administrative Procedure Act requires economic analysis of proposed rules only for substantial rulemakings. So, if OSHA was planning only to nibble around the edges of this Rule, there would not likely be involvement of OSHA’s economists, as reported. The next status report is not due until January 8, 2018, so we will have to wait and see what progress OSHA has made on issuing the NPRM. As of today, all elements of the rule are still in effect, including limits on post-injury drug testing and safety incentive programs, and barring a change in the next two weeks, which is unlikely at this point, employers should proceed to submit injury and illness recordkeeping data to OSHA.

Implementation of E-Recordkeeping Rule in State Plan States

One important caveat to note is that several states that operate their own federal OSHA-approved State OSH Programs have not yet adopted a final version of OSHA’s E-Recordkeeping rule, including California, Maryland, Minnesota, South Carolina, Utah, Wyoming, and Washington. As explained in our prior [blog post](#) and the table below, employers in those states are not required to submit any data to OSHA this year.

State	Deadline to Submit Injury Data	Where to Submit the Data
Alaska	December 1, 2017	Fed. OSHA Portal
Arizona	December 1, 2017	Fed. OSHA Portal
California	Not yet adopted, but expected in 2018 for 2017 data	
Hawaii	December 1, 2017	Fed. OSHA Portal
Indiana	December 1, 2017	Fed. OSHA Portal
Iowa	December 1, 2017	Fed. OSHA Portal
Kentucky	July 1, 2017	Fed. OSHA Portal
Maryland	Not yet adopted, but expected in 2018 for 2017 data	
Michigan	December 1, 2017	Fed. OSHA Portal
Minnesota	Not yet adopted, but expected in 2018 for 2017 data	
Nevada	December 1, 2017	Fed. OSHA Portal
New Mexico	December 1, 2017	Fed. OSHA Portal
North Carolina	December 1, 2017	Fed. OSHA Portal
Oregon	December 1, 2017	Fed. OSHA Portal
South Carolina	Not yet adopted, but expected in 2018 for 2017 data	
Tennessee	December 1, 2017	Fed. OSHA Portal
Utah	Not yet adopted, but expected in 2018 for 2017 data	
Vermont	In 2018 for 2017 data	Fed OSHA Portal
Virginia	December 1, 2017	Fed. OSHA Portal
Washington	Not yet adopted, but expected in 2018 for 2017 data	
Wyoming	Not yet adopted, but expected in 2018 for 2017 data	

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The OSHA Practice Group at Conn Maciel Carey will continue to follow this Rule closely, so look out for updates on our blog or feel free to contact us directly with questions regarding compliance with the Rule and how to properly operate the Injury Tracking Application.

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Conn Maciel Carey’s national OSHA Practice Group is focused exclusively on Workplace Safety legal issues with attorneys who have extensive, hands-on experience in all aspects of OSHA law, at both the federal and state levels, and who can provide the full range of occupational safety and health law services to a diverse range of clients. Our experienced team understands the legal issues and knows the agencies and people involved in the full range of safety matters that our clients face. Our breadth of experience spans both private practice and government positions, offering us unique insight into how best to advise our clients.