As many employers know all too well, the Occupational Safety and Health Administration ("OSHA") requires them to record work-related injuries and illnesses and to maintain the OSHA 300 Log for five years. Moreover, OSHA requires all employers to report to OSHA certain serious injuries within a short time period. On September 11, 2014, OSHA announced its Final Rule revising the current recordkeeping standard, which will significantly expand the recordkeeping rule’s reach to hundreds of thousands of new employers and place further burdens on employers to report additional workplace injuries and illnesses. Since these new rules become effective on January 1, 2015, employers have little time to modify their practices and prepare for the coming wave of enforcement.

OSHA’S RECORDKEEPING REGULATIONS

Under OSHA’s recordkeeping regulations, 29 C.F.R. 1904, certain employers with more than 10 employees must record work-related injuries and maintain written records for five (5) years. Those records include the 300 Log, the 301 form, and the 300A annual summary. Though it may sound simple, recordkeeping is not an easy task, as it involves numerous issues including work-relatedness, the nature and scope of an injury or illness, and the counting of employee days off from work or restricted duty, all of which many times involve analysis of incomplete or conflicting evidence. For instance, an employer may disagree with an employee’s claim that his or her injury or illness is work-related. In such circumstances, the employer must evaluate the employee’s claim to determine whether the injury or illness should be recorded on the OSHA 300 Log or should be found to be non-work-related. If the employer finds that the injury is non-work-related, the employer will have to maintain documentation to support its determination in case OSHA were to challenge that decision.

THOUSANDS OF NEW EMPLOYERS ARE NOW SUBJECT TO OSHA’S RECORDKEEPING REQUIREMENT

Under OSHA’s current rule, employers with 10 or fewer employees are exempt from maintaining OSHA 300, 301, and 300A records, which track work-related injuries. The current rule also exempts thousands of employers based on their Standard Industrial Classification ("SIC") codes. Under the new rule, the list of exempted employers will be based on North American Industry Classification System ("NAICS") codes. As a result, many employers who were once exempted from OSHA’s recordkeeping requirements will now have to begin maintaining OSHA 300, 301, and 300A records. Some of the industries now covered by the recordkeeping rules include:

- “Bakeries and tortilla manufacturing;”
- “Automobile dealers;”
- “Automotive parts, accessories and tire stores;”
• "Lessors of real estate;"
• "Facilities support services;"
• "Beer, wine, and liquor stores;"
• "Commercial and industrial machinery and equipment rental and leasing;"
• "Direct selling establishments;"
• "Performing arts companies;"
• "Museums, historical sites, and similar institutions;"
• "Amusement and recreation industries; and
• "Other personal services."

The first question that comes to mind when seeing this list of industries now covered under the recordkeeping rule is, "What is OSHA even talking about?" Thus, it is important that employers learn what their NAICS code is to determine if they are now covered by the recordkeeping rule. If so, the employer will then have to count its number of employees to see if it has 10 or fewer. There is information available from OSHA at www.osha.gov/recordkeeping2014 on how to conduct this assessment and also identify the employers now subject to the rule.

In short, OSHA’s new rule will encompass hundreds of thousands of employers who never had to keep these records. Moreover, because of the January 1, 2015 implementation date, these employers must take prompt action to ensure that they are prepared to record injuries and illnesses in the future.

**INCREASED REPORTING OF INJURIES AND INCIDENTS WILL LEAD TO INCREASED OSHA INSPECTIONS**

Under the current rule, all employers are required to report to OSHA “[w]ithin eight (8) hours of the death of an employee from a work-related incident or the in-patient hospitalization of three or more employees as a result of a work-related incident.” 29 C.F.R. § 1904.39(a). This requirement applies to all employers, regardless if they have 10 or fewer employees and regardless of if they are exempt from maintaining recordkeeping logs.

Under the new standard, all employers are required to report to OSHA:

• **Within eight (8) hours** after the death of any employee as a result of a work-related incident;” and

• **Within twenty-four (24) hours** after the in-patient hospitalization of one or more employees or an employee’s amputation or an employee’s loss of an eye, as a result of a work-related incident.”
OSHA’s new reporting rule raises several questions as to what it even means. For instance, what constitutes an amputation? Under the new rule, an amputation does not require bone loss. Thus, does the cutting-off of the very tip of a finger, no matter how small, constitute an amputation? Also, what constitutes the loss of an eye? Does it require an immediate incident resulting in the loss of an eye? The fact that these questions exist means that OSHA may have a different interpretation of the rule than the employer, which could result in a citation.

Moreover, the new standard’s implications are significant. As you may expect, the reporting of a death or serious injury often leads to an OSHA inspection, which brings its own set of issues. Thus, by requiring employers to now report more injuries and illnesses, the number of OSHA inspections, and citations issued as a result, will certainly increase.

MULTI-EMPLOYER WORKSITES

As this rule unfolds, it will have implications relating to OSHA’s “multi-employer” worksite doctrine which is applicable when there are multiple employers engaged in performing work at the same worksite.

Section 5(a) of the Occupational Safety and Health Act broadly requires employers to furnish each of its employees a workplace free from recognized hazards and to comply with all occupational safety and health standards developed by OSHA. Thus, the Act creates two types of obligations: 1) a “general duty” obligation running only to the employer’s own employees; and 2) an obligation to obey all OSHA standards with respect to all employees, regardless of their employer.

This second obligation formed the basis for OSHA’s “multi-employer worksite policy,” under which the Agency decided it had the authority to issue citations not only to employers who exposed their own employees to hazardous conditions, but also to employers who created a hazardous condition that endangered employees, whether its own or those of another employer. This policy gave OSHA the ability to issue citations to multiple employers even for violations that did not directly affect the employer’s own employees. This policy had particular import in the construction industry, with many different employers having employees at a site at any given time.

Since the early 1980s, OSHA has continuously expanded the scope of its multi-employer worksite policy. Under OSHA’s current enforcement policy, compliance officers are instructed to issue citations to any employer who:

1) **exposed** its own employees to a hazardous condition;

2) **created** a hazardous condition that endangered any employer’s employees;

3) was responsible for **correcting** a hazardous condition even if its own employees were not exposed to the hazard; or
4) had the ability to control to prevent or abate a hazardous condition through the exercise of reasonable supervisory authority.

This fourth category, the “controlling employer,” has historically caused the most consternation among employers as well as courts. The new OSHA enforcement policy regarding reporting of injuries or illness and monitoring the OSHA 300 Log and related documents will raise numerous issues, for example:

- Does the controlling employer at the worksite have OSHA liability if another employer, such as a subcontractor or a temporary staffing service, at the worksite fails to report an injury or illness involving the subcontractor’s or temporary staffing service’s employee to OSHA within the required time period?

- What obligation does the controlling employer have to inquire with other employers to determine whether a subcontractor or temporary staffing service had a reportable or recordable injury or illness and whether the subcontractor or temporary staffing service complied with the rule?

- Who is responsible for maintaining the OSHA 300 Log at the worksite since OSHA has specific rules regarding which employer(s) is/are required to maintain the Log if there are multiple employers at the worksite?

**INSPECTION PREPARATION**

As many employers have learned who have been inspected by OSHA, there are respective rights of the employer, employees and OSHA during an OSHA inspection. Unfortunately, most employers are unaware of these respective rights, as well as their employees, and, therefore, may waive important rights regarding the scope of the inspection, what documents the agency is and is not entitled to and how to respond to requests for employee interviews. Since there will be many more inspections generated, it is critical in the next several months that employers train their supervisors and make employees aware of these rights.

**TRAINING OF THE OSHA RECORDKEEPER**

Because many thousands of new employers will now be responsible for maintaining the OSHA 300 Log, the training process must begin now so that the recordkeepers can begin to properly document recordable injuries and illnesses on the Log, as of January 1, 2015. The recordkeeper will need to learn the various categories of recordable injuries and illnesses, how to evaluate medical records to determine whether an incident is recordable and then become aware of how to insert the data into the correct categories in the Log. The learning curve will be steep since the Log must be completed for each recordable incident within seven (7) calendar days of the employer becoming aware that there has been a recordable injury or illness.

**RECOMMENDATIONS**

In order to be prepared to meet these new compliance obligations, employers should consider the following:
• determine whether the employer is now subject to the requirement to maintain the OSHA 300 Log, and if so, designate and train an employee who will be competent to perform this responsibility

• conduct training for its recordkeeper or other responsible employee regarding the new requirements to report the expanded categories of reportable severe injuries and illnesses within twenty-four (24) hours to OSHA

• because there will be many more OSHA inspections due to the new reportable categories of severe injuries and illnesses, conduct training on the various rights and responsibilities of employers, employees and OSHA during an OSHA inspection so that these rights can be properly exercised to limit the scope of potential employer liability.

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