Insurance and Safety

No More Secrets from OSHA

This article is courtesy of Keystone, in partnership with our agency partners, Duncan Financial Group and Ottawa Kent Insurance. By David R. Leng and Dustin Boss

On Thursday, May 12, 2016, OSHA changed the way the workplace injury game is played. And there are many who believe the playing field was definitely tipped in OSHA's direction.

With the sweep of a pen, new regulations were implemented where the U.S. Occupational Safety and Health Administration (OSHA) will require employers to submit detailed annual reports of workplace injuries and illnesses for publication online on a public website. Think of this site as a kind of cyber-clothesline, where all your dirty laundry will now be hung up for all to see. This is the same information that employers were already collecting and typically revealed to OSHA only during inspections or surveys.

OSHA says its intent behind the new regulations isn't malicious or to cause harm to businesses. According to Dr. David Michaels, the Assistant Secretary of Labor for OSHA, "Our new rule will 'nudge' employers to prevent work injuries, to show investors, job seekers, customers and the public they operate safe and well-managed facilities. Access to injury data will also help OSHA better target compliance assistance and enforcement resources, and enable 'big data' researchers to apply their skills to making workplaces safer."

Up until now, OSHA had only been able access 1% of all workplace injury reports, mostly through audits and surprise inspections. But what they really wanted and needed was the remaining 99%, so they came up with a plan where instead of OSHA trying to find the infractions, employers would now be required to report all incidents. It's a classic example of if you aren't catching enough fish on your next trip out on the lake, come up with a way to have all the fish in the lake actually *jump* into the boat "voluntarily."

For those not already up on the new regulations, the new rule provisions on reporting, which take effect on January 1, 2017, require various employers (based on establishment size) to submit injury and illness data electronically to OSHA.

Establishments with over 20 employees in specified "high-risk industries," such as agriculture, utilities, construction, and manufacturing industries, must submit their Form 300A by July 1 in 2017 and 2018, and by March 2 every year thereafter. You can find a detailed list of all the industries impacted by this OSHA requirement at http://bit.ly/2ePzE4y. **You will see this OSHA regulation applies to ALL school bus operators!**

For those with over 250 employees, OSHA is requiring these establishments to submit information from their 2016 injury and illness recordkeeping Form 300A by July 1, 2017 as well. However, the following year, these employers are also required to then submit information from all 2017 forms (300A, 300, and 301) by July 1, 2018. Beginning in 2019 and for every year thereafter, the information must be submitted by March 2.

For those employers who utilize an alternative to the OSHA Form 301, such as a workers' compensation first report of injury, as expressly allowed by the existing rules, these changes may now require that the employer also complete the OSHA Form 301. It is unclear how this will work, but it is assumed OSHA will provide clarification on this subject shortly.

The rule also invokes penalties for employers that take actions deemed as retaliation against employees who report accidents. These rules went into effect August 1, 2016, but OSHA isn't enforcing them until November 1, 2017. These rules will be tough for employers that have safety incentive programs or that require drug testing of each employee after an accident.

Requiring drug tests for those with job-related injuries also could be seen as pressure not to report an accident. Understandably, many employers are concerned with the provisions of OSHA's new rule, claiming drug testing

To simplify it, here is how the new rules fall into place:

Submission Year	Employers with 250+ Employees	Employers with 20-249 Employees	Submission Deadline
2017	Form 300A	Form 300A	July 1, 2017
2018	Forms 300A, 300, 301	Form 300A	July 1, 2018
2019 and beyond	Forms 300A, 300, 301	Form 300A	March 2, 2019

after an accident occurs is a critical tool to keep their organization safe. OSHA agrees, but states employers cannot use drug testing (or the threat of drug testing) as a form of adverse action against employees who report injuries or illnesses.

The new OSHA regulations stress the need for a balanced approach, one which requires 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 abuse by using the drugs.

For example, per OSHA, it would not be a reasonable request 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 tool malfunction.

Employers need not specifically suspect drug use caused an accident before implementing testing, but the reporting employee should at least suspect a *reasonable* possibility that drug use was in play and a contributing factor in the reported injury or illness, *before* an order is given for drug testing.

That being said, we recommend employers take the following steps:

1. Update your injury and illness reporting procedures.
2. If you do not have an injury and illness reporting procedure, it is important to create one.
3. Revise your post-injury drug testing policy to eliminate automatic post-injury drug testing and replace it with a policy that requires an individual assessment of each employee and accident.
4. Train supervisors on how to identify impaired employees and how to document any incidents that may trigger OSHA reporting.

In the end, the new rules will benefit those employers who have already committed to engraining a safety culture for their organization, and provide a "nudge" (which may feel like a PUSH to some) to those employers who put safety on the back burner. No longer will a "strong safety culture" be a plus or a bonus for an organization.

The new rules now require employers to take safety seriously, by further reinforcing the need and importance of establishing a strong safety culture, one that trickles down from the C-suite to the workers on the floor. Because it will be extremely important that if you are now in compliance and made your injury reports available for public viewing, that what your customers, competition, union, contractors and, most importantly, your business prospects see is that your company puts safety above all other concerns.

Finally, having said all that, I can't stress enough that what you accomplish will surely be misconstrued by all parties should your reporting be inaccurate, and that perhaps the best course of action is to enlist the services of someone primed to handle the task. Any report you generate should show your company as one that advocates healthy and safety-conscious employees, because once that misinformation is out there, it's a bell you can't unring. An errant report has the potential to paint your company in shades of doubt, which you will want to avoid at all costs. And the key is timely and accurate reporting.

KEYSTONE

If you are interested in knowing more about our insurance program for members or talking with one of our professionals about safety or loss control services, please call Keystone at 888.892.5860 or email programs@keystoneinsgrp.com.

David R. Leng, CPCU, CIC, CBWA, CWCA, CRM is a Certified Risk Manager and the author of the International Best Seller - *The Laws of Insurance Attraction* and *Stop Being Frustrated & Overcharged (By Your Workers' Compensation Program)*. He is Executive Vice President for Irwin, PA's Duncan Financial Group, a Keystone partner agency, and an instructor for the Institute of Work-Comp Professionals. David may be reached at dleng@duncangrp.com. www.StopBeingFrustrated.com.

Dustin Boss, CRA, MWCA is a Certified Risk Architects with Ottawa Kent Insurance in Jenison, MI, a Keystone partner agency. He is also the creator of OSHALogs.com, a web application designed to assist employers in dealing with the new OSHA regulations. Dustin may be reached at dboss@ottawakent.com. www.OttawaKent.com

Disclaimer: Content for this article was provided by the authors. The information included in this publication was developed or obtained from sources believed to be reliable. Keystone, its related entities, and employees make no guarantee of results and assume no liability in connection with the information provided. This article is for informational purposes only, does not provide a substitute for engaging legal counsel, and does not constitute legal advice. It is the user's responsibility to confirm compliance with any applicable local, state, or federal regulations.