OSHA INJURY & ILLNESS RECORDKEEPING

OSHA I/I RECORDKEEPING REQUIREMENTS

- The Occupational Safety and Health Act of 1970 (OSH Act) requires covered employers to prepare and maintain records of occupational injuries and illnesses.
  - OSHA’s no-fault recordkeeping system requires recording work-related injuries and illnesses, regardless of the level of employer control or noncontrol involved.

- OSHA’s private sector recordkeeping regulations are codified at 29 CFR 1904
  - Injury & illness data are also collected and used by BLS.

- OSHA tracks I/I records, by establishment, for many purposes, including:
  - Inspection targeting
  - Performance measurement
  - Standards development
  - Voluntary Protection Program (VPP) eligibility, and
  - Identifying "low-hazard" industry exemptions
Each employer required by this Part to keep records of fatalities, injuries, and illnesses must record each fatality, injury and illness that:

- Is work-related; and
- Is a new case; and
- Meets one or more of the general recording criteria of Section 1904.7 or the application to specific cases of Section 1904.8 through Section 1904.11.

- Additional criteria apply to needlestick and sharps injury cases, tuberculosis cases, hearing loss cases, medical removal cases, and musculoskeletal disorder cases.

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**EXAMPLES OF WORK-RELATED I/I**

- Fatality
- Loss of consciousness
- Severe laceration
- Amputation
- Diagnosis of cancer, chronic irreversible diseases (e.g. silicosis, asbestosis)
- Fractured bones or broken teeth
- Punctured eardrum
- Electric shock requiring medical treatment
- Chronic dermatitis
- Blindness
- Assault resulting in medical treatment (violence on the workplace)
MANDATORY RECORDKEEPING FORMS

- ER must use OSHA 300, 300-A, and 301 forms, or equivalent forms, for recordable injuries and illnesses.
- ER must enter each case on the OSHA 300 Log and OSHA 301 Form within 7 calendar days of receiving information that a recordable injury or illness has occurred.
- You must save the OSHA 300 Log, the privacy case list (if one exists), the annual summary, and the OSHA 301 Incident Report forms for five (5) years following the end of the calendar year that these records cover.

- The OSHA 300 form is called the Log of Work-Related Injuries and Illnesses,
- The 300-A is the Summary of Work-Related Injuries and Illnesses,
- The OSHA 301 form is called the Injury and Illness Incident Report (An “equivalent form” (e.g., insurance, WC report) can be used in lieu of the OSHA 301 form).

- Forms may be kept on computer, but must be accessible so can produce to OSHA upon request.
- NEW E-Recordkeeping Requirements supplement the on-site forms

POSTING REQUIREMENTS

- A company executive (highest ranking at worksite – NOT a secretary!) must certify that he or she has examined the OSHA 300 Log and that he or she reasonably believes, based on his or her knowledge of the process by which the information was recorded, that the annual summary is correct and complete.

- Criminal penalties can be imposed for false certification as authorized by section 17(g) of the OSH Act

- At the end of each calendar year, ER must:
  
  (1) Review the OSHA 300 Log to verify that the entries are complete and accurate, and correct any deficiencies identified;

  (2) Create an annual summary of injuries and illnesses recorded on the OSHA 300 Log;

  (3) Certify the summary; and

  (4) Post the annual summary no later than Feb. 1st and keep posted through April 30th in conspicuous place where EE notices are normally posted.
MULTIPLE ESTABLISHMENTS

- Separate forms must be kept for each establishment that is expected to exist for at least one year.
- Short-term establishments can be combined into single report form.
- Records can be kept at HQ or other central location as long as the info is sent from the establishment to the report center within 7 calendar days of occurrence.

PRIVACY CONCERN CASES

ER can list “privacy concern case” instead of worker's name if I/I involves:

(i) An injury or illness to an intimate body part or the reproductive system;

(ii) An injury or illness resulting from a sexual assault;

(iii) Mental illnesses;

(iv) HIV infection, hepatitis, or tuberculosis;

(v) Needlestick injuries and cuts from sharp objects that are contaminated with another person's blood or other potentially infectious material (see Section 1904.8 for definitions); and

(vi) Other illnesses, if the employee independently and voluntarily requests that his or her name not be entered on the log.
WHAT MAKES AN INJURY OR ILLNESS(I/I) RECORDABLE?

KEY POINT - The injury or illness must be work-related and constitute a new case (29 C.F.R. 1904.4)

I. Work-relatedness must be considered if an event or exposure in the work environment either caused or contributed to the resulting condition OR significantly aggravated a pre-existing injury or illness (29 C.F.R. 1904.5)

II. OSHA defines the work environment as:

"the establishment and other locations where one or more employees are working or are present as a condition of their employment. The work environment includes not only physical locations, but also the equipment or materials used by the employee during the course of his or her work."

Examples: Construction site (commercial and residential); delivery route; telework; temporary worker/contract employee (only if the host employer supervises the EE); employer sponsored events (not recordable if injury/illness event is part of an employer sponsored health and wellness program)

WORK-RELATEDNESS EXCEPTIONS

III. Work-relatedness is presumed unless one of the following exceptions applies:

- The injury or illness involves signs or symptoms that surface at work but result solely from a non-work-related event or exposure that occurs outside the work environment.

- The injury or illness results solely from voluntary participation in a wellness program or in a medical, fitness, or recreational activity such as blood donation, physical examination, flu shot, exercise class, racquetball, or baseball.

- The injury or illness is solely the result of an employee eating, drinking, or preparing food or drink for personal consumption (whether bought on the employer's premises or brought in). For example, if the employee is injured by choking on a sandwich while in the employer’s establishment, the case would not be considered work-related.
WORK-RELATED EXCEPTIONS (CONTINUED)

- The injury or illness is solely the result of an employee doing personal tasks (unrelated to their employment) at the establishment outside of the employee's assigned working hours.

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- The illness is a mental illness. Mental illness will not be considered work-related unless the employee voluntarily provides the employer with an opinion from a physician or other licensed health care professional with appropriate training and experience (psychiatrist, psychologist, psychiatric nurse practitioner, etc.) stating that the employee has a mental illness that is work-related.

- When employee has established a “home away from home” while in travel status.

OSHA SIZE EXEMPTION

- If a company had ten (10) or fewer employees at all times during the last calendar year, it does not need to keep OSHA injury and illness records unless OSHA or the BLS informs it in writing that it must keep records under Section 1904.41 or Section 1904.42.

  - The number of employees is measured company-wide, not on a site-specific basis.

- Exempt establishments are still required to report fatalities, hospitalization, amputation & eye-loss events as required by Section 1904.39
OSHA NAICS EXEMPTIONS

- If a business establishment is classified in a specific low hazard retail, service, finance, insurance or real estate industry listed in Appendix A of Part 1904, it does not need to keep OSHA injury and illness records unless specifically requested by OSHA.
  - Businesses engaged in agriculture; mining; construction; manufacturing; transportation; communication; electric, gas and sanitary services; or wholesale trade are not eligible.
  - This exemption is site-specific, not company-wide.
- Exempt companies still must report to OSHA any workplace incident that results in a fatality or the hospitalization of three or more employees.

TRAVEL AND HOME WORK

- I/I occurring while on travel are recordable if the employee is engaged in work activities "in the interest of the employer" when it occurs.
  - Travel to and from customer contacts,
  - Conducting job tasks, and
  - Entertaining or being entertained to transact, discuss, or promote business.
- Injuries and illnesses that occur while an employee is working at home, including work in a home office, will be considered work-related if the injury or illness occurs while the employee is performing work for pay or compensation in the home, and the injury or illness is directly related to the performance of work rather than to the general home environment or setting.
  - Dropping box of company files on foot — recordable
  - Tripping on family dog while answering phone — not recordable
RESTRICTED WORK

Restricted work occurs when, as the result of a work-related injury or illness:

(A) You keep the employee from performing one or more of the routine functions of his or her job, or from working the full workday that he or she would otherwise have been scheduled to work; or

(B) A physician or other licensed health care professional recommends that the employee not perform one or more of the routine functions of his or her job, or not work the full workday that he or she would otherwise have been scheduled to work.

A recommended work restriction is recordable only if it affects one or more of the employee’s routine job functions.

MEDICAL TREATMENT

"Medical treatment" means the management and care of a patient to combat disease or disorder.

For the purposes of Part 1904, medical treatment does not include:

(A) Visits to a physician or other licensed health care professional solely for observation or counseling;

(B) The conduct of diagnostic procedures, such as x-rays and blood tests, including the administration of prescription medications used solely for diagnostic purposes (e.g., eye drops to dilate pupils); or

(C) "First aid"
FIRST AID: NON-RECORDABLE EVENTS

(A) Using a non-prescription medication at nonprescription strength;
(B) Administering tetanus immunizations (hepatitis B vaccine or rabies vaccine are considered medical treatment);
(C) Cleaning, flushing or soaking wound on the surface of the skin;
(D) Using wound coverings such as bandages, gauze pads, butterfly bandages or Steri-Strips™;
(E) Using hot or cold therapy;
(F) Using any non-rigid means of support, such as elastic bandages, wraps, nonrigid back belts, etc.;
(G) Using temporary immobilization devices while transporting an accident victim;
(H) Drilling of a fingernail or toenail to relieve pressure, or draining fluid from a blister;
(I) Using eye patches;
(J) Removing foreign bodies from the eye using only irrigation or a cotton swab;
(K) Removing splinters or foreign material from areas other than the eye by irrigation, tweezers, cotton swabs or other simple means;
(L) Using finger guards;
(M) Using massages (but physical therapy or chiropractic treatment are considered medical treatment); or
(N) Drinking fluids for relief of heat stress.

IMPORTANCE OF FIRST AID CASES

1. The difference between a first aid case and a recordable case is the degree of severity of the injury and not the nature of the hazard;
2. In many instances, a first aid case is evidence of a near-miss that requires an accident/incident investigation to identify relevant risk factors and necessary corrective action (i.e. engineering, administrative and work practice controls);
3. Each first aid case presented can be used to validate the effectiveness of an employer’s injury and illness reporting system;
4. First aid cases can turn into more serious injuries that are recordable if not properly treated and managed;
5. Evaluation of first aid cases from point of initial injury event to injury resolution is necessary to determine the effectiveness of an employer’s first aid program.

➤ Bottom line: perform hazard assessment and review cases for repetition elsewhere in facility (or throughout company, if similar equipment or health hazards involved)
LOST-WORKDAY COMPUTATION

- If the employee is out for an extended period of time, you must enter an estimate of the days that the employee will be away, and update the day count when the actual number of days is known.
- The count starts on the day following the I/I.
- Enter the number of calendar days away recommended by the physician or health care professional even if the EE does not follow the recommendation!
- You must count the number of calendar days the employee was unable to work as a result of the injury or illness, regardless of whether or not the employee was scheduled to work on those day(s).
  - Weekend days, holidays, vacation days or other days off are included in the total number of days recorded.
  - ER caps total days-away at 180 days.
- If the employee leaves your company for some reason unrelated to the injury or illness, such as retirement, a plant closing, or to take another job, you may stop counting days away from work or days of restriction/job transfer.

ELECTRONIC RECORDKEEPING

- OSHA Final Rule published 5/12/16 – took effect 12/1/16 for anti-discrimination provisions
  - Electronic data submission – some provisions stayed (submission of 300 and 301 not required until further notice) and data is NOT yet being made publicly searchable
    - Rule has been reopened and litigation is still pending over both aspects of the rule
- OSHA final rule require employers with 250+ workers to file electronic reports of all injuries and illnesses annually – Form 300A only in 2017 and until further notice …
  - Requirement to add Form 300 and Form 301 starting in 2018 has been stayed and will likely be eliminated
- Smaller employers (20-249) in high-hazard industries need to submit Form 300A only annually
- Does not relieve ER of requirement to post logs in workplace
  - Electronic data will be publicly available and searchable by employer name (employee info redacted) – this may be changed in the pending rulemaking
- Includes modification to 29 CFR part 1904.35 to clarify an employee’s right to report injury and illnesses to their employer without fear of retaliation, and makes it citable to violate any of the worker’s rights under Section 11(c) of OSH Act.
I/I REPORTING AND RECORDKEEPING SYSTEM

KEY ELEMENTS

I. Create work environment conducive to reporting injuries and illnesses;

II. Implement a simple and clear method for employees to report an injury or illness;

III. Ensure prompt first aid and medical treatment is provided;

IV. Conduct an accident/incident investigation as soon as possible following receipt of the injury & illness report to identify risk factors and necessary corrective action;

V. Utilize a form other than the OSHA 301 to document the results of the accident/incident investigation;

VI. Evaluate the severity of the injury or illness, work-relatedness and treatment rendered to determine whether the injury or illness is recordable;

VII. If recordable, complete OSHA 301 (or insurance equivalent) to fully document the injury or illness;

VIII. Record the work-related injury or illness on the OSHA 300 log applying OSHA’s recordkeeping standards and guidelines.

I/I RECORDKEEPING SYSTEM (CONTINUED)

KEY ELEMENTS

IX. Carefully track and document total number of employee hours worked;

X. Implement a training program that includes all employees and addresses specific injury and illness reporting responsibilities and procedures;

XI. Implement a comprehensive workplace accident/incident investigation program;

XII. Ensure that the official OSHA 300 log and 300A recordkeeper is well-trained and has the authority to determine whether an injury or illness is recordable;

XIII. Implement procedure for providing employee access to OSHA 300 log and 300A forms; and

XIV. Calculate incidence rates, including Lost Workday Injury and Illness Rate (“LWDII”), Total Case Incident Rate (“TCIR”), and Days Away, Restricted and Transferred Rate (“DART”)
PART 1904 & SECTION 11(C): ANTI-RETALIATION PROTECTIONS

- Employees are protected by Sec. 11(c) of OSH Act and Sec. 105(c) of the Mine Act from discrimination & retaliation on the basis of raising safety concerns, making complaints, or other protected activity.
- **EHS workers are covered too ... even consultants and contractors!**
- Statutes cover both actual discrimination and also “interference” actions that may discourage others from engaging in protected activity (and opposition to illegal discrimination or retaliation against other workers).
- Whistleblower protections under various Environmental Statutes (enforced by OSHA at all sites).
- DOT has whistleblower protections for: CDL drivers under STAA, rail workers, aviation workers etc. (enforced by OSHA).
- Statutes of limitations range from 30 days (OSHA), and 60 days (MSHA) to 180 days for many DOT and EPA laws.

“PROTECTED” ACTIVITY

- Raising safety and health (or environmental) complaints with management;
- Complaints to MSHA/OSHA/EPA
- Giving statement to government inspectors during inspections or investigations
- Reasonable work refusals based on unsafe conditions
- Medical removals and reporting injury/illness
- Deposition or trial testimony unfavorable to employer
- Even where the employee has not made a complaint or statement, he/she can be protected if management THINKS that the worker is an informant
- A complainant is protected even if the agency investigates and determines that no violation exists!
WHAT IS “ADVERSE ACTION”? 

- An employer is forbidden from considering any safety-related activity or complaints by a worker when making an employment decision that could be considered “adverse” by the employee or which constitutes “reprisal.” These include, but are not limited to:
  - termination,
  - lay-offs,
  - demotion,
  - shift or duty reassignment,
  - reduction in pay,
  - loss of overtime availability,
  - transfer to a different worksite, and
  - “blacklisting” an employee by giving his/her a bad reference.

WHISTLEBLOWER REMEDIES

- Remedies include:
  - Reinstatement
  - Purging of discipline
  - Institution of new anti-discrimination policies
  - Training of employees and supervisors on workers’ rights
  - Back pay and interest (if private counsel involved)
  - PERSONAL Civil penalties can imposed by MSHA against company AND supervisors involved with discrimination ($70K max)
  - Possible civil penalties by OSHA if discrimination involves injured worker (29 CFR 1904.36)
OSHA E-RECORDKEEPING PROTECTIONS

- Final rule contains provisions -- 29 CFR 1904.35 (Employee involvement) and 1904.36 (Prohibition against discrimination) – intended to encourage complete and accurate reporting of workplace injuries and illnesses
- These took effect 12/1/16 and carry penalties of up to $129,336, in addition to any relief employee might receive under Sec. 11(c) action (if filed w/in 30 days)
  - Employers must inform employees of their right to report work-related injuries and illnesses free from retaliation.
  - An employer’s procedure for reporting work-related injuries and illnesses must be “reasonable” and must not deter or discourage employees from reporting.
  - An employer may not discharge or otherwise discriminate against employees for reporting work-related injuries or illnesses.

29 CFR 1904.35 –REQUIREMENTS

- ER must inform each employee how s/he is to report a work-related I/I
- ER must provide access to I/I records for employees and their personal or authorized representatives
  - Authorized Rep defined as “authorized collective bargaining agents of employees”
  - Personal Rep defined as any person the EE or former EE designates as such, in writing
- ER must have a “reasonable procedure” for EE to report work-related I/I promptly and accurately.
  - “A procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace I/I”
- EE must be trained on their right to report I/I
- ER are prohibited from discharging or in any manner discriminating against EEs for reporting I/I
  - This includes some incentive programs (if employees lose an award based on injury), disciplinary programs (if employees are penalized more harshly due to injury), and post-injury drug testing!
Incentive & discipline programs that deprive an injured worker of a bonus or prize, or punish in a disparate manner, are also viewed as violating both Section 11(c) and new Part 1904.

Section 11(c) of the OSH Act prohibits an employer from discriminating against an employee because the employee reports an injury or illness.

OSHA published policy on 3/12/2012 addressing Regional Administrators and encouraging critical scrutiny of programs during inspections to determine if they discourage employee reporting of I/I or penalize injured employees in some way. This is used as guidance for enforcement of new 1904.35 and 1904.36.

An employer's policy to discipline all employees who are injured, regardless of fault, is not a legitimate nondiscriminatory reason that an employer may advance to justify adverse action against an employee who reports an injury.

In OSHA’s view, such a policy is inconsistent with the employer's obligation to establish a way for employees to report injuries under 29 CFR 1904.35(b), and a referral for a recordkeeping investigation should be made.

Where an employee reports an I/I and is disciplined, and the stated reason is that the employee has violated an employer rule about the time or manner for reporting injuries and illnesses, OSHA will careful scrutinize the case for a potential violation of Section 11(c).
OSHA POLICY: DISCIPLINE

- In investigating such cases, OSHA may consider factors such as the following:
  - whether the employee's deviation from the procedure was minor or extensive, inadvertent or deliberate,
  - whether the employee had a reasonable basis for acting as he or she did,
  - whether the employer can show a substantial interest in the rule and its enforcement, and
  - whether the discipline imposed appears disproportionate to the asserted interest.

OSHA POLICY: INCENTIVES

- Incentive programs that discourage employees from reporting their injuries are problematic because, under section 11(c), an employer may not "in any manner discriminate" against an employee because the employee exercises a protected right, such as the right to report an injury.
- If an employee of a firm with a safety incentive program reports an injury, the employee, or the employee's entire work group, will be disqualified from receiving the incentive, which could be considered unlawful discrimination.
- OSHA says an important factor to consider is whether the incentive involved is of sufficient magnitude that failure to receive it "might have dissuaded reasonable workers from" reporting injuries.
- Therefore, if the incentive is great enough that its loss dissuades reasonable workers from reporting injuries, OSHA says the program would result in the employer's failure to record injuries that it is required to record under Part 1904, and the employer is violating that rule, and can be investigated and fined.
OSHA POLICY: INCENTIVES

- OSHA’s memorandum recommends alternative types of incentives:
  - Promote worker participation in safety-related activities, such as identifying hazards or participating in investigations of injuries, incidents or "near misses
  - Provide tee shirts to workers serving on safety and health committees;
  - Offer modest rewards for suggesting ways to strengthen safety and health; or
  - Throw a recognition party at the successful completion of company-wide safety and health training.
  
  > See also OSHA’s Revised Policy Memo #5 - Further Improvements to VPP (June 29, 2011).

OSHA: RETALIATION & DRUG TESTING

- OSHA has taken position that post-accident drug testing programs may be viewed as violation of 29 CFR 1904.36 AND/OR Sec. 11(c) and subject to fines (of up to $129,336 for willful violations)
  - Problem is programs that test all injured workers, regardless of fault
  - Pre-hire, random, reasonable suspicion and fitness for duty testing is not affected
  - OSHA believes drug testing post-injury may be viewed as discipline and could have chilling effect on willingness to report injuries
  - OSHA says OK to drug test post-accident if required by other laws (e.g., DOT requirements for CDL drivers) or by existing contract (e.g., worker's compensation insurance requirement)
  - If persons are tested in cases where impairment is not believed to be a causal factor in the accident, such tests are suspect and could be subject to OSHA investigation
OSHA SEVERE INJURY REPORTING

- Final Rule took effect 1/1/2015 – report to local office during normal hours or call 1-800-321-OSHA (6742) – or file on-line report
- Rule expands the list of severe work-related injuries that all employers must report to OSHA.
  - The revised rule retains the current requirement to report all work-related fatalities within 8 hours
  - Adds the requirement to report all work-related in-patient hospitalizations, amputations and loss of an eye within 24 hours to OSHA.
  - Employers only have to report an inpatient hospitalization, amputation or loss of an eye that occurs within 24 hours of a work-related incident
  - Mandatory minimum penalty of $5,000+ per violation

OSHA INJURY AND ILLNESS RECORDKEEPING

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