

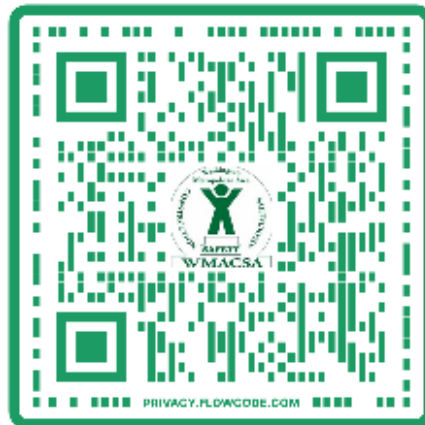


A Decade of Recordkeeping Updates

ADELE ABRAMS

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TO SUBMIT A QUESTION





OSHA Recordkeeping Update (and more)

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3

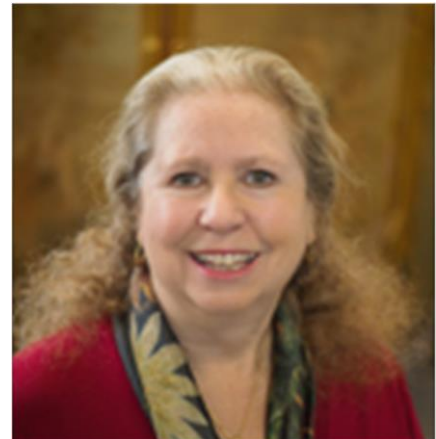
Presented By

Adele L. Abrams is an attorney, Associate Safety Professional (ASP) and Certified Mine Safety Professional (CMSP) who is president of the Law Office of Adele L. Abrams P.C., a multi-attorney firm with offices in Beltsville, Maryland, Denver, Colorado, and Charleston, West Virginia. The firm represents employers in OSHA and MSHA litigation nationwide, and her firm also handles employment law matters in a large number of states. Abrams and her firm colleagues provide employment and safety law consultation, safety audits, industrial hygiene assistance, and training services to companies in a variety of industries.

She is a member of the Maryland, D.C., and PA Bars; the U.S. District Courts of Maryland, D.C., and TN; the U.S. Court of Appeals, D.C. Circuit 3rd Circuit, and 4th Circuit; and the United States Supreme Court. She also serves on the adjunct faculties of the Catholic University of America in Washington, D.C., and the University of Colorado-Boulder, where she teaches on employment, labor and occupational safety law.

Abrams is a professional member of ASSP and is an active member of the National Safety Council, where she was awarded the Distinguished Service to Safety Award (DSSA) in 2017. She is also an Avetta Fellow. Abrams has coauthored several textbooks on employment law, occupational and mine safety and health, and is a regular columnist on safety law issues for multiple magazines.

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OSHA E-Recordkeeping

- OSHA reopened e-Recordkeeping rule 3/30/22—**Final rule released July 2023 and took effect 1/1/2024**
 - **CY 2023 data must be electronically submitted by 3/2/24 – Logs must also be posted 2/1/24-4/30/24**
- All records are submitted electronically through OSHA's portal (Injury Tracking Application, or "ITA") - <https://www.osha.gov/injuryreporting/ita/>
- Establishments that meet **any** of the following criteria during the previous calendar year do **not** need to electronically submit their information to OSHA:
 - The establishment's peak employment during the previous calendar year was **19 or fewer employees**, regardless of the establishment's industry.
 - The establishment's industry is **listed on Appendix A to Subpart B** of OSHA's recordkeeping regulation, regardless of the number of employees working at the establishment (**Partially Exempt Industries**)
 - The establishment had a peak employment **between 20 and 249 employees** during the previous calendar year AND the establishment's industry is **not** on **Appendix A to Subpart E** of OSHA's recordkeeping regulation.
- Records are publicly searchable on OSHA website but will redact personal identifiers of workers (company name WILL be identified)
 - Revises NAICS codes that trigger submission of 300A logs by "small" employers (redefined as 20-99 employees at a worksite)
 - Adds new submission requirements for specified employers (using NAICS) with 100+ workers at a worksite—would have to submit 300 and 301 logs PLUS 300A summary
 - ALL employers with 250+ employees at a **WORKSITE** must submit 300A, regardless of NAICS

Examples of Mandatory Reporting Categories (Appendix A to Subpart E)

NAICS	Industry
11	Agriculture, forestry, fishing and hunting
22	Utilities
23	Construction
31-33	Manufacturing
42	Wholesale trade
4441	Building material and supplies dealers
4442	Lawn and garden equipment and supplies stores
4931	Warehousing and storage
8113	Commercial and industrial machinery and equipment (except automotive and electronic) repair and maintenance

6

FAQ for I/I Data Submission

Size trigger is establishment size (not overall “firm” or company size).

Data need only be submitted for those establishments' meetings criteria (size or NAICS).

Establishments that are partially exempt from OSHA recordkeeping due to industry, need not submit any data.

Third parties can handle submission for the employer, but employer remains legally responsible.

If employer also gets BLS data request, must still submit data to both OSHA and BLS.

Site-Specific Targeting & E-Recordkeeping Data

OSHA revised its SST “programmed inspection” program in February 2023 – these are typically “wall to wall”

- The main changes:
 - For high-rate establishments, the SST plan will select individual worksites for inspection using CY 2021 Form 300 A data, rather than CY 2019 data.
 - For upward trending establishments, the SST plan selects individual establishments based on CY 2019-2021 Form 300 A data, rather than CY 2017-2019 information.
 - Low rate establishment lists will be generated using CY 2021 Form 300A data, instead of CY 2019 data.
 - The “non-responders” list will be generated using CY 2021 data, rather than CY 2019.
 - Non-responders are identified by OSHA generating a random sample of establishments that failed to electronically submit data (based on NAICS code).
- If OSHA arrives and finds the establishment is an administrative office and not high hazard, they will stand down.
- If the worksite does not meet the criteria due to being under 20 employees, the inspection will be terminated.
- There may also be a “records only” inspection conducted that includes employee interviews, to verify the employer injury and illness data.
- Any violations in plain view or brought to OSHA’s attention during discussion with workers can expand the scope of the inspection.

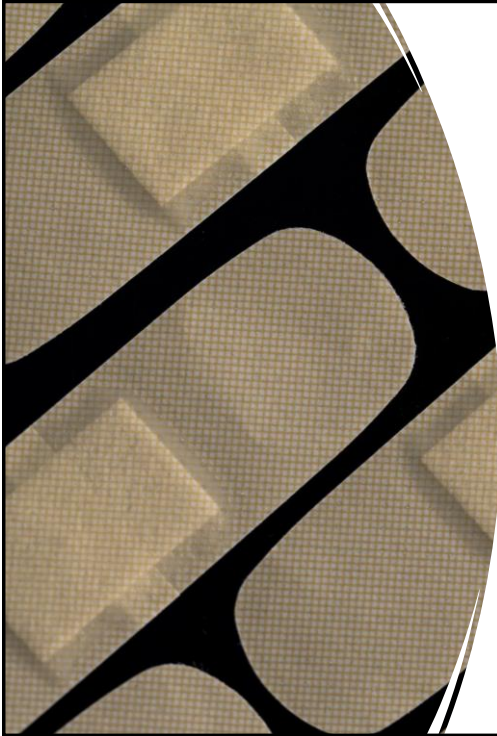
Non-Responder Enforcement Program

- Program launched by OSHA in 4/22, to provide enforcement guidance regarding potential violations of OSHA's rule requiring electronic submittal of injury and illness records
- OSHA will match open inspections against list of establishments that may have failed to submit their CY 2021/2022 Form 300A data, creating a list of potential non-responders by area office
- The Area Office will review their weekly list to verify the following:
 - a. The inspection status.* If the inspection is closed, the Area Office will take no further action for that establishment.
 - b. The establishment meets the ITA reporting requirements.* The Area Office reviewer will check the inspection data to verify that the establishment meets 29 CFR 1904.41's size and industry criteria. If the establishment does not meet these requirements, the Area Office will take no further action for that establishment.
 - c. The match is valid.* The Area Office Potential Matches Report includes these nine data elements from the two datasets side by side. The Area Offices will review each match to determine if the match is invalid, and if so, the Area Office will take no further action for that establishment.
- For establishments/inspections that ARE valid matches, CSHO informs employer of reporting obligation and follows enforcement procedures in 5/6/21 memorandum [Enforcement Procedures for Failure to Submit Electronic Illness & Injury Records under 29 CFR 1904.41\(a\)\(1\) & \(a\)\(2\)](#).
- The data for calendar year 2021 must have been submitted to OSHA by March 2, 2022.
- <https://www.osha.gov/memos/2022-04-04/ita-non-responder-enforcement-computer-program>



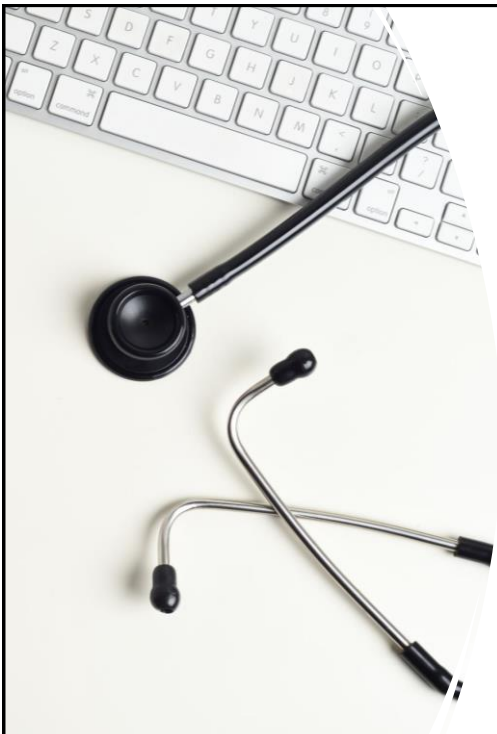
Severe Injury Reporting Requirements

- 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)
- 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 inpatient 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



OSHA “Triage” on Reports

- In determining whether OSHA will send an inspection team, they ask:
- What was the injured EE doing just before injury;
- What tools, equipment or materials was he using;
- What directly caused the harm;
- Is the hazard that caused the harm still in the workplace;
- Could other persons potentially be harmed;
- What steps have been taken to remove the hazard;
- Has there been a similar incident or near miss?



OSHA Triage on Reports

- ▶ Priority inspections for I/I reports will be given to Category 1 reports:
 - ▶ Fatalities or at least 2 persons hospitalized;
 - ▶ Injury to worker under age 18;
 - ▶ Employers with known history of multiple injuries (same/similar events in past 12 mo);
 - ▶ Repeat offenders (those with history of egregious violations, willful and repeat violations, and failure to abate situations)
 - ▶ Employers in SVEP
 - ▶ Those employers covered by National Emphasis Program
 - ▶ OSHA will also give priority to those workplaces with whistleblower complaints pending, those in VPP or SHARP, and those involving temporary workers or health issues

Whistleblower Prosecutions

- Sec 11(C) of OSH Act protects workers from retaliation for engaging in protected activity if complaint filed within 30 days with OSHA (federal or state agency)
 - Speaking privately to OSHA
 - Testifying against employer in OSHA case
 - Making internal safety complaints
 - Making formal complaint to OSHA
- Growing OSHA enforcement area
- Interface with e-Recordkeeping rule – SOL extended via citation power (from 30 to 180 days) via 29 CFR 1904.36
- Remedies include: reinstatement, back pay, awarding of retroactive seniority, benefits
- Currently, no private right of action ... but OSHA obtained over \$1 million in recent case for compensatory damages

E-Recordkeeping Whistleblower Provisions

- 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:
 - Employers must inform employees of their right to report work-related injuries and illnesses free from retaliation. This obligation can be satisfied by posting the April 2015 (or later) version of OSHA's *Job Safety and Health – It's the Law* poster (www.osha.gov/Publications/poster.html).
 - 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
 - This was interpreted under Obama to include drug testing solely due to injury report, disparate discipline and safety incentive programs where worker was denied prize or benefit due to injury

OSHA's Whistleblower Provisions

Statute: Section 11(c)(1) of Occupational Safety & Health Act of 1970:

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." [30 DAY STATUTE OF LIMITATIONS]

Code: 29 CFR 1904.36 states:

"In addition to protections in 1904.35, the final rule also codifies Section 11(c) into recordkeeping regs, stating:

Section 11(c) of the OSH Act also prohibits you [Employer] from discriminating against an employee for reporting a work-related fatality, injury or illness. That provision of the Act also protects the employee who files a safety and health complaint, asks for access to the part 1904 records, or otherwise exercises any rights afforded by the OSH Act."

[180-day SOL for issuance of citations]

OSHA Policy on Drug Tests

- Trump OSHA issued "clarifying" policy on 10/11/2018: <https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11>
 - **Biden administration affirmed the 2018 policy in its 2022 whistleblower handbook rev:**
 - Random drug testing.
 - Drug testing unrelated to the reporting of a work-related injury or illness.
 - Drug testing under a state workers' compensation law.
 - Drug testing under other federal law, such as DOT regs for CDL
 - Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees
 - ***If the employer chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries, and DOCUMENT!***

Agency Collaboration

- 11/21: DOL, NLRB, & EEOC launched joint initiative on retaliation issues when workers exercise their protected labor rights
 - Includes collaboration among agencies to protect workers on issues of unlawful retaliatory conduct, worker outreach, educating public; and engaging with employers, business organizations, labor organizations, and civil rights groups
- 1/2022: DOL & NLRB signed new MOU strengthening the agencies' partnership and outlining procedures on information-sharing, joint investigations, and enforcement activity, as well as training, education, and community outreach
- 10/23: NLRB & OSHA entered new agreement, enabling the agencies to closely collaborate by more broadly sharing information, conducting cross-training for staff at each agency, partnering on investigative efforts within each agency's authority, and enforcing anti-retaliation provisions.
 - The agencies also [released a resource](#) on "Building Safe & Healthy Workplaces by Promoting Worker Voice" which provides tools and key references for employers and workers on working collaboratively to create and maintain safe workplaces, including resources on collective bargaining and compliance.

IBI Enforcement Policy 2023

- OSHA expanded its "egregious violation" policy to allow its use in high gravity serious violation cases, and recordkeeping cases, rather than limiting it to willful/repeated citations.
- Now called "instance-by-instance" (IBI) cases, the 1/26/23 policy revisions take effect in 60 days, and allow multiple citations and penalties for a single occurrence
- Factors to be considered include:
 - The employer has received a willful, repeat, or failure to abate violation within the past five years where that classification is current
 - The employer has failed to report a fatality, inpatient hospitalization, amputation, or loss of an eye pursuant to the requirements of 29 CFR 1904.39
 - The proposed citations are related to a fatality/catastrophe
 - **The proposed recordkeeping citations are related to injury or illness(es) that occurred as a result of a serious hazard.**
 - Instance-by-instance citations may be applied when the text of the relevant standard allows (such as, but not limited to, per machine, location, entry, or employee), and when the instances of violation cannot be abated by a single method of abatement.



OSHA Subpoena Powers

- OSHA may issue subpoenas *duces tecum* to the following:
 - Employer
 - 3rd party consultants (i.e. industrial hygienists and safety professionals)
 - Insurance companies (*Grinnell* case)
 - Contractors and sub-contractors
- Subpoenas are often issued **PRIOR** to citations, as part of investigative process, where **documents** are not voluntarily produced during inspection, or where **witnesses** refuse to give statements.

Subpoena *duces tecum*

OSHA can subpoena documents before or after the issuance of citations, and can subpoena testimony from the creator/custodian of records or other witnesses (direct and 3rd party)

Documents sought by OSHA can include all non-privileged:

- Accident reports
- Audits and workplace examinations
- Self-inspection forms
- Insurance company audits
- Worker's compensation reports
- Sampling results,
- Purchase orders,
- Consultants' logs,
- Calibration records,
- Training syllabi and attendance records.

OSHA is in process of adopting regulation to clarify use of administrative subpoenas during OSHA investigations

Audit Mandatory Records



- Training Records;
- OSHA 300/301 Log (electronic submission requirements change starting 1/2024)
- Hazard Communication program materials
- Worksite examination reports
- Hearing conservation program
- Mobile equipment inspection reports
- Other equipment inspection records (e.g., hoists, cranes etc.)
- Respiratory Protection programs
- Electrical test reports
- Analyses performed with respect to toxic substances (e.g., lead, asbestos, crystalline silica, beryllium, HexChrom)

Volks: OSHA Statute of Limitations for Records

- In 2017, Congress enacted H. Res. 83, rescinding OSHA's new rule on "continuing violations" for recordkeeping citations beyond the 6 mo. Statute of Limitations under the CRA
- Obama's Continuing Violations rule had reversed the earlier USCA "Volks" decision – 2016 OSHA rule would have allowed failure to keep injury/illness records for entire mandated period to be cited as "continuing violation"
 - OSHA still reviews I/I records for errors and omissions and to identify pattern/practice of hazards that result in injuries, as well as to identify emergent hazards
- Impact of rescission on other OSHA documentation requirements that extend beyond 6 months is now at issue – Training Docs, Inspections, Exposure Monitoring etc.
- **NOTE: Mine Act has NO statute of limitations for citing MSHA violations or paperwork requirements (so defaults to federal 5 yr SOL)**

Proactive Strategies

- Do NOT take adverse action against employees for reporting injuries/illnesses, complaining of hazards, speaking with OSHA, or filing complaints – this violates Sec. 11C of OSH Act and is now actionable under 29 CFR 1904.36
- Understand difference between mandatory (statutorily required – including OSHA 300/301 logs) and non-mandatory documents (e.g., internal memoranda, accident investigation reports, worker's comp records, informal notes, work orders, self-inspection checklists)
- Understand and track upcoming changes to OSHA's administrative subpoena process
- Have document production and document retention policies in advance of inspection
- Follow them, to avoid citations and spoliation of evidence claims!



QUESTIONS?????

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February Meeting: Wednesday February 14, 2024

Topic: Workers Comp Panel Discussion – What you need to know! CCIP/OCIP discussion

HITT CONTRACTING – FALLS CHURCH VA

BREAKFAST MEETING – 8:00 AM



Raffle – 50/50

RYAN & MARTIN



Thank you

DRIVE SAFE