

# Recordkeeping + Whistleblower Claims + Organized Labor = ?

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EMPLOYERS AND  
LAWYERS

WORKING  
TOGETHER

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# Agenda

- New injury/illness reporting requirements
- OSHA proposal/compliance guidance on electronic recordkeeping
- What does it mean for whistleblower claims/recordkeeping citations?
- How will the labor unions use this data?
- How will OSHA and the NLRB work together?

# OLD: 2014 Reporting Requirements

- Must be reported to OSHA within eight hours
  - Any fatality
  - Hospitalization of **three or more** employees



# NEW: Reporting – Effective 1/1/15

- No Change: Must be reported to OSHA within eight hours
  - Any fatality
- NEW: Must now be reported to OSHA **within 24 hours**
  - Hospitalization of **one or more** employees
  - **Amputations**
  - **Loss of an eye or eyes**

# How to Report

- Call OSHA's toll-free number at 1-800-321-OSHA (6742)
- Call your closest Area Office during normal business hours
- Use the new online form “that will soon be available”

# How to Report





# How to Report



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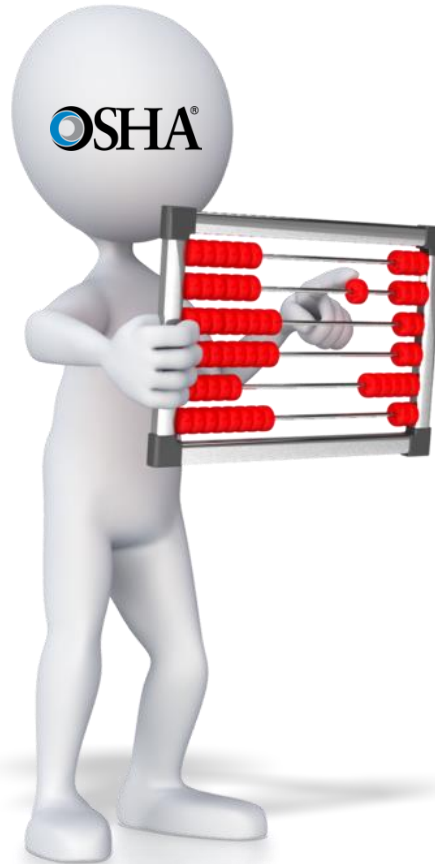
# How to Report



These new reports of severe injuries and illnesses will all be public, on the OSHA website,



# Electronic Recordkeeping Proposal



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# Electronic Recordkeeping

- Submit 300 logs, 300A, 301 reports to OSHA when requested



# Proposed Regulation

- Employers with 250+
  - Quarterly – 300 & 301s
  - Annual - 300A
- Employers with 20+ in certain industries
  - Annual – 300A





# Electronic Recordkeeping

- “Enterprise-wide” electronic reporting
  - OSHA may require companies with multiple facilities to report even if the 250 employee-threshold is not met
  - Example: Company A has 15 facilities with 50 employees each – each facility must submit electronically
- What about privacy?
  - Employee names redacted out
  - Identifying information on OSHA 301 forms redacted

# Electronic Recordkeeping

- What does this mean from an enforcement standpoint?
  - OSHA has much more data at its fingertips
  - Facility in New Jersey has an injury resulting from a forklift accident
  - Compliance officer in Texas can now see the NJ injury as well as any other injuries
  - Could help form the basis for “willful” violations



# Electronic Recordkeeping – Treasure Trove for Unions

- Will give unions access to information (ammunition) about employers not previously available
- Safety is a “hook” issue
  - Integral part of many campaigns
- Paired with “Ambush Election” rules very dangerous situation





# Retaliation Issues

- Section 11(c) of the Act
  - Employer cannot retaliation against an employee for reporting an injury
- Recordkeeping Regulation
  - Record injury or illness in seven days
  - Employee must be able to report an injury or illness promptly
- Under consideration:
  - Inform employees of right to report injury or illness
  - Establish easy system for employees to report injury and illnesses
  - Prohibition against disciplining employees for reporting injuries or illnesses

# Retaliation Issues

- Section 11(c) of the Act: Employer cannot retaliate against an employee for reporting an injury
- OSHA Section 11(c) guidance: What is retaliation?
  - Employee or group of employees miss out on a bonus/pizza party/raffle
  - Employee disciplined for violating a vague safety rule
  - Also: Be careful of management bonuses – they may cause management to “cook the books”



# Retaliation Issues

- OSHA proposes:
  - Inform employees of right to report injury or illness
  - Establish easy system for employees to report injury and illnesses
  - Prohibition against disciplining employees for reporting injuries or illnesses
- Why?
  - OSHA concern that electronic recordkeeping will make employers under-report
  - Employers will look for ways to discourage employees from reporting



# Retaliation Issues

- What constitutes retaliation?
  - Mandatory drug-testing when no reason to suspect drug use
  - Only enforcing safety rules when there is an injury
  - Disqualifying employees who report multiple injuries from their jobs
  - Disciplining an employee for failing to report an injury during a certain time period

# Retaliation Issues

- What is the remedy?
  - Violation of OSHA's Recordkeeping regulation
  - Abatement = backpay/reinstatement
- This is troubling...
  - OSHA second-guessing disciplinary process
  - Interaction with grievance/arbitration process
  - Splitting hairs – when is the discipline for a rule violation as opposed to reporting an injury?

# Retaliation Issues

- Employee must file an 11(c) claim within 30 days
- What if the employee doesn't make this deadline?



# NLRB to the Rescue!

- The NLRB and OSHA entered into a program under which OSHA will notify all complainants who file untimely OSHA whistleblower charges of their right to file an unfair labor practice charge over the same conduct with the NLRB.
  - Ex: instances of employer retaliation for group complaints concerning unsafe working conditions (30-day SOL), these complaints may still be timely filed under the NLRB's six-month statute of limitation.

Office of the General Counsel OM 14-6- (May 21, 2014)



# Effect of Non-Compliance with NLRA

- National Labor Relations Act applicable to all employers – regardless of union status
- Unfair labor practice charges
- Potential ramifications of ULP charges
  - Generally
  - During a campaign
  - Possible remedies

# Safety Issues and Protected Concerted Activity

- Section 7 rights
- Applicable in both unionized and non-unionized settings
- Generally involves more than one employee
  - But also protects one employee acting on matters affecting other workers (on behalf of...)
- Discipline or termination in response could result in a ULP charge

# Refusals to Work

- Employees have right to refuse to work in conditions they believe to be unsafe
  - Employees should have reasonable, good-faith belief working would be unsafe
- Act protects employees if “honestly mistaken”
- Standards differ under NLRA and OSH Act

# Bargaining Obligations

- Requests for information
- Review collective bargaining agreements for applicable provisions
  - Management rights
  - Safety
  - “No Strike”
- May be obligated to bargain over changes
  - Decision versus effects



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