On May 12, 2016, the Occupational Safety and Health Administration (OSHA) published its final rule modernizing injury and illness (I/I) data collection and requiring that most OSHA-regulated employers submit their mandatory OSHA forms on an annual basis, effective July 1, 2017. The forms that must be submitted vary by company size and type, as explained in this brief. The original proposal would have required larger employees to submit data on a quarterly basis, rather than annually. OSHA’s regulations require employers with more than 10 employees in most industries to keep records of occupational I/I at their establishments, but only those with 20 or more workers are affected by the e-recordkeeping requirements in the new rule. It does not change the recording criteria or definitions that were previously codified in 29 CFR Part 1904.

While employers will have to file data annually through the forthcoming electronic data entry system, they will still be obligated under 29 CFR Part 1904 to maintain the OSHA Forms 300, 300A and 301, to make them available to inspectors upon request, and to post the Form 300A (Annual Injury and Illness Summary Log) in the workplace between Feb. 1 and April 30 of the following calendar year.

The reports must cover injuries and illnesses affecting full- and part-time employees, seasonal workers and temporary workers who are supervised in their work activities by the host employer. All of these workers count toward the total number of employees for purposes of the reporting thresholds contained in the rule. OSHA clarified that if an enterprise or corporate office has control over one or more establishments required to electronically submit their data, the corporate office can collect and electronically submit the information for its establishments.

In addition to the electronic reporting requirements, the rule adds provisions clarifying employees’ rights to report I/I to their employer without fear of retaliation, supplementing the rights provided by Section 11(c) of the OSH Act of 1970. The rule clarifies that an employer must have a reasonable procedure for reporting work-related I/I that does not deter workers from filing such reports. This portion of the rule applies in all OSHA-regulated workplaces, effective Aug. 10, 2016.

KEY POINTS
- OSHA says applying behavioral economics principles will “nudge” employers to improve safety.
- OSHA says the initiative will create the largest, publicly available data set on occupational injuries and illnesses, which will support more study of injury causation and lead to better evaluation of the effectiveness of injury and illness prevention activities.
- Business and industry groups such as ASSE opposed the rulemaking, with ASSE calling it as a “step backward” for OSH professionals who have worked to move their organizations toward measurement using leading indicators, which better indicate how to avoid injuries and illnesses.
OSHA said that it is applying “behavioral economics” to improve workplace safety. Assistant Secretary of Labor Dr. David Michaels stated, “Our new reporting requirements will ‘nudge’ employers to prevent workplace injuries and illnesses to demonstrate to investors, job seekers, customers and the public that they operate safe and well-managed facilities.”

Currently, employers can obtain data from OSHA and the Bureau of Labor Statistics about I/I rates by industry sector, but not by comparison to other specific employers. OSHA maintains that the new rule will enable employers to benchmark their safety and health performance against industry leaders, and can lead to improvement of safety programs. All data will appear, in a searchable format, on OSHA’s website.

OSHA stresses that the rule does not require collection of additional data and says that the economic burden of transmitting the data to OSHA will cost less than $15 million per year. It anticipates that the rule covers only about 500,000 of the nation’s 7 million work sites.

Costs for the smaller establishments will total $4.6 million for electronic submission, while costs for the larger employer category will reach $7.2 million per year. While OSHA could not quantify the annual benefits of the final rule, it stated belief that these exceed the annual costs by helping to ensure that workers are better protected through prevention of I/I and by promotion of complete and accurate reporting.

RESPONSE TO THE RULEMAKING

Many employers and organizations, such as ASSE had opposed the rule. Upon its release, many expressed concern that while good employers will strive to meet the new rule and comply, the worst employers will be encouraged by the publication of the data to report even fewer incidents. Commenters raised questions about the appropriateness of requiring I/I data to be posted, regardless of whether the case arose from worker negligence.

In its response to the final rule, ASSE stressed that I/I rates are not intended to be used as a performance measure. It added that the final rule represents a “step backward” for safety professionals who have worked to move their organizations toward measurement using leading indicators, which better indicate how to avoid injuries and illnesses.

The measure was praised by labor groups, among them the United Steelworkers, which says that the rule will help both union and management officials “efficiently identify workplace hazards and unsafe conditions and to take action to prevent future injuries.”

Some groups, including the U.S. Chamber of Commerce, claim that OSHA lacks statutory authority to compel submission of the data or to make it publicly available, and say that “shaming employers” will not lead to better results. The agency responded that Sections 8 and 24 of the OSH Act require employers to make available records that the Secretary of Labor prescribes by regulation, and that OSHA is required by statute to compile, analyze and publish injury data. While OSHA has not previously made I/I data available by employer name, nor searchable on its website by company, its sister agency MSHA has done so for years, albeit in a more limited manner. In addition, Section 11(c) of the
OSH Act provides workers with protection against retaliation or discrimination for engaging in protected activities, which has always included the right to report injuries and illnesses to the employer.

**USING THE DATA**

OSHA plans to use the data it receives from employers to target both enforcement resources (e.g., the site-specific targeting approach to programmed OSHA inspections) and to offer compliance assistance at establishments where workers are at risk. The data collection effort will also facilitate research on occupational injuries and illnesses and enable the government to identify emergent hazards that are harming workers, so that interventions can occur.

OSHA maintains that making the data available in an open format will:
- encourage employers to increase their efforts to prevent worker injuries and illnesses, and “compelled by their competitive spirit,” to race to the top in terms of worker safety;
- enable researchers to examine these data in innovative ways that may help employers make workplaces safer and healthier.

The outcome of the e-recordkeeping initiative will be creation of the largest, publicly available, data set on occupational injuries and illnesses, more study of injury causation and evaluation of the effectiveness of I/I prevention activities. OSHA has pledged that it will scrub personally identifiable information from the data before the data are made publicly available. The release of personal information, or the ability to “reverse engineer” accident information in order to identify the victim, was among the concerns expressed by commenters during the rulemaking process.

**KEY DEADLINES & REQUIREMENTS**

Although the e-recordkeeping portion of the final rule becomes effective Jan. 1, 2017, the first reports will not be due until July 1, 2017, at which time all covered employers will have to submit the Form 300A (Summary of Work-Related Injuries and Illnesses) only. In calendar 2018, establishments with 250 or more employees will have to submit Forms 300A, Form 300 (Log of Work-Related Injuries and Illnesses) and Form 301 (Injury and Illness Incident Report) by July 1, 2018.

Establishments with between 20 and 249 employees that are classified by NAICS code in certain industries that have historically high rates of occupational injuries and illnesses will have to file electronically, but their submission requirement is limited to the summary, Form 300A. These include all employers within that size range involved with agriculture, forestry, fishing, hunting, utilities, construction, manufacturing and wholesale trade. Subsectors of other industries are covered as well, and the expansive list is included in Appendix A to subpart E of Part 1904. The e-recordkeeping requirements are codified at 29 CFR 1904.41.

Beginning in 2019, the submission deadline for filing the mandated reports will move to March 2 (instead of July 1). The rule retains the provision that permits OSHA to collect information from other employers, who will not submit the information to the agency routinely elec-
tronically, upon written notification from OSHA or its designee.

States that manage their own OSHA programs (22 states cover private-sector employers and are designated as state-plan states) will have to adopt requirements that are substantially identical within 6 months from May 12, 2016.

With respect to the workers’ protections, the rule contains three provisions—29 CFR 1904.35 (Employee involvement) and 1904.36 (Prohibition against discrimination)—that are 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.

• 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.

Similarly, disciplinary programs that punish all workers who are injured, regardless of fault or that impose harsher discipline on workers who are injured than is imposed on workers who violate the same safety rule but are uninjured, would be a violation. Workers who are retaliated against in violation of their whistleblower rights have 30 days to file a complaint with OSHA, which will prosecute the case on the employee’s behalf.

If incentive and discipline programs resulted in underreporting of injuries, citations and civil penalties will be issued. On March 12, 2012, OSHA issued a memorandum to its regional administrators advising them to critically scrutinize workplace incentive and discipline programs to see if they interfered with reporting of injuries and illnesses, and framed the issue as one of whistleblower rights as well as compliance with Part 1904.

The final rule is expected to result in litigation, but OSHA was successful in publishing the rule prior to May 23, 2016, which insulates it from repeal by Congress using the Congressional Review Act.

INCENTIVE PROGRAMS & INJURY/IllNESS REPORTING

During the briefing, Michaels made it clear that incentive programs that deprive a worker, or his/her work unit, from receiving a bonus or other prize because an employee suffered an injury would be considered as interference with the worker’s protected rights under Section 11(c) of the OSH Act.