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LEGAL ALERT

OSHA Proposes Publishing Worker Injury Data

OSHA has announced a proposed rule which will require establishments with 20 or more employees in certain industries with high injury and illness rates, to electronically submit their summary of work-related injuries and illnesses to OSHA every year. The change may affect between 450,000 and 1,500,000 sites. The first proposed new requirement is for establishments with more than 250 employees (and who are already required to keep records) to electronically submit the records on a quarterly basis to OSHA.

Currently, OSHA requires approximately 80,000 employers per year to submit data as part of its OSHA Data Initiative. OSHA uses its data to target certain industries or establishments for inspections and other initiatives. The Bureau of Labor Statistics surveys another 250,000 sites.

One can see many ways in which OSHA could use this data for more effective targeting. The biggest concern seems to be how others would use this data, which OSHA would make accessible to the public. On first blush, one could argue that there is no downside to sharing individual employers' injury-and-illness summaries. If properly handled, no "identifiable" embarrassing individual employee information would be available. But when the full implications of this proposal are considered, there appears to be the possibility of abuse.

Regulation By Shame?

OSHA press releases emphasize that the data collection would allow OSHA to better target inspection efforts and would even highlight employers with especially strong commitments to safety. But since a November 2010 conference where Dr. David Michaels, Assistant Secretary, OSHA, stated that, *"we will continue to practice regulation by shaming,"* this Administration has championed such an approach. The Administration also gutted OSHA consultation efforts and has shown little interest in OSHA's showcase cooperative effort, the Voluntary Protection Program (VPP).

It seems unlikely that a significant reason for the initiative is to highlight good employer performance. At least, that's not how the Administration has worked so far. Dr. Michaels and his leaders would probably readily admit their interest in highlighting employers with higher numbers. But who determines which numbers suggest bad behavior? And what about factors beyond the safety culture? Of course, one workplace injury is one too many incidents, but how will these numbers be interpreted and used by others?

Potential For Misuse

Some also question the extent to which this expansion is driven at the request of unions and other third parties who want access to the data in order to attack specific employers. As an example, consider the 10-year campaign against Hyatt by the union, UNITE-HERE. UNITE-HERE created its "Hyatt Hurts" campaign arguably in order to compel Hyatt to recognize the union at nonunion facilities or to give in to collective-bargaining demands at other sites. The union focused on injuries associated with housekeepers, and was involved in studies which purported to show that the hospitality industry, and Hyatt in particular, required housekeepers to change too many beds per shift, which contributed to ergonomic injuries. The union was then involved in persuading OSHA to investigate dozens of alleged instances of ergonomic violations throughout the country. Dr. Michaels actually took the extraordinary step of writing a highly publicized Hazard Alert letter to Hyatt criticizing their practices. The campaign finally cooled, in part, after the union shifted its attention to opposing the nomination of Hyatt principal and former Obama fundraiser, Penny Pritzker for Secretary of Commerce.

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How did the union and the research groups obtain Hyatt-specific information which purported to show that Hyatt workers suffered disproportionately from ergonomic injuries? Much of the data was not available on a government site. Rather, the union probably used existing OSHA provisions allowing employees, former employees, and their "representatives" to obtain extensive injury and illness data. The parties then fed this data to groups for analysis.

It's not clear how much merit the claims possessed, but the tactics often employed by the union seemed designed to cause the maximum business disruption possible, and it's questionable whether the campaign benefitted Hyatt or its workers. Hyatt is just one example. Consider the increase of public attacks on large international retailers for a host of alleged safety hazards. The allegations may or may not have merit, but almost all of the attacks are against nonunion employers, which raises questions about their purpose.

A main concern is balancing the value of establishing a better database for OSHA to use in determining where to focus its limited enforcement resources, against the potential anti-competitive mischief presented by the easy access to previously private data. Will OSHA be further pulled from its core safety enforcement duties?

Some recent OSHA actions raise questions about the reasons for OSHA's priorities, such as the divisive February 2013 Interpretation in which OSHA changed 40 years of precedent to propose that community organizers, union personnel at companies where they were not the certified bargaining agents, and other third parties could participate in OSHA inspections. Adding third parties to OSHA onsite inspections seem likely to generate conflict between OSHA, employers and third parties, and generate an increase in employer demands for a warrant.

And in an apparent inconsistency, OSHA has led the charge attacking employer safety plans which measure their success based on this same injury data, claiming that reliance on this data may lead employers to discourage employees from reporting workplace injuries. Moreover, employers and OSHA agree that it is ineffectual to target one's safety efforts on "lagging indicators."

Instead of focusing on injuries, which are lagging indicators, employers should focus on the "leading indicators," which are the actions which will prevent injuries. A major problem is that many customers select suppliers and construction contractors based on various injury statistics, which further create the risk of chilling employee injury reports. Moreover, such statistics can be affected by other factors.

The public will have 90 days, through February 6, 2014, to submit written comments on the proposed rule. On January 9, 2014, OSHA will hold a public meeting on the proposed rule in Washington, D.C. A Federal Register notice announcing the public meeting will be published shortly.

Every employer supports efforts that improve worker safety. The question is whether this proposal would improve worker safety or be used to create distractions from real safety issues.

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