

Writer's direct phone
(312) 460-5877

Writer's e-mail
mlies@seyfarth.com

Writer's direct fax
(312) 460-7877



131 South Dearborn Street
Suite 2400
Chicago, Illinois 60603
(312) 460-5000
fax (312) 460-7000
www.seyfarth.com

FOR THE RECORD: OSHA RECORDKEEPING AND REPORTING REQUIREMENTS AND STATE VARIATIONS

**By Mark A. Lies II¹
& Elizabeth Leifel Ash^{**}**

INTRODUCTION

In the universe of complex OSHA regulations that govern day-to-day operations and have a direct effect on employee safety, it is easy for OSHA's more prosaic recordkeeping and reporting requirements to get lost in the shuffle. However, OSHA can issue citations to employers for failing to follow recordkeeping and reporting rules just as it can for machine guarding or lockout/tagout violations. In fact, in 2009, OSHA introduced a National Emphasis Program (NEP) targeting injury and illness recordkeeping on the OSHA 300 Log, designed to ferret out violations of recordkeeping regulations. While many employers will not be subjected to a NEP recordkeeping inspection, even a routine OSHA inspection will now focus on recordkeeping. It is critical, therefore, for employers to keep up with changes to OSHA's recordkeeping and reporting requirements and to be aware of state-specific variations depending on where the employer does business.

¹ Mark A. Lies, II, is a partner with the law firm of Seyfarth Shaw LLP, 131 South Dearborn Street, Suite 2400, Chicago, IL 60603 (312) 460-5877, mlies@seyfarth.com. He specializes in occupational safety and health and related employment law and civil litigation.

^{**} Elizabeth Leifel Ash is an associate with Seyfarth Shaw, (312) 460-5845, eash@seyfarth.com. Her practice focuses on regulatory compliance and litigation, including occupational safety and health and environmental matters.

INJURY AND ILLNESS NOTIFICATION REQUIREMENTS

A. Federal

Part 1904 of OSHA's regulations contains the employer's obligations with respect to recordkeeping and reporting of occupational injuries and illnesses. Under the current rules, an employer must notify OSHA ***within 8 hours of the death of an employee from a work-related incident, or the in-patient hospitalization of three or more employees as the result of a work-related incident.***

Recently, OSHA announced a proposal to revise its injury and illness notification requirements. The proposed revisions would require employers to notify OSHA ***within 8 hours of any work-related in-patient hospitalization, regardless of the number of hospitalized employees, and within 24 hours of an amputation.*** This proposed revision would result in a significant increase in the number of cases that would require notification to OSHA. Because an OSHA inspection is often triggered by an employer's notification of a fatality or catastrophe, an increase in the number of "reportable" events would also increase the number of OSHA inspections. OSHA is accepting comments on the proposed rule through September 20, 2011. A copy of the proposed rule can be found at: <http://www.gpo.gov/fdsys/pkg/FR-2011-06-22/html/2011-15277.htm>.

B. State

Notwithstanding the federal regulations, many states that operate their own occupational safety and health programs have varying injury and illness notification requirements. For example:

- **Washington:** Employers must notify the state agency where two or more employees are hospitalized due to a work-related incident.

- California and Utah: Employers must report all “serious” injuries to the respective state agency.
- Kentucky: Employers must report any amputation suffered by an employee within 72 hours of the incident.

INJURY AND ILLNESS RECORDKEEPING

In addition to reporting fatalities and catastrophes, OSHA requires employers to maintain an OSHA 300 Log for *all work-related illnesses and injuries* that meet any of the following criteria:

- The employee was off work for one or more days (excluding the date of the actual injury or the onset of illness) because of the injury or illness;
- The employee experienced one or more days of restricted duty as a result of the injury or illness;
- The employee received a job transfer as a result of the injury or illness;
- The employee received medical treatment beyond first aid;
- The employee experienced a loss of consciousness;
- The employee experienced a “significant injury or illness” diagnosed by a physician or other licensed health care provider.

The purpose of keeping a log of work-related injuries and illnesses is to highlight potential workplace hazards that lead to severe injuries and illnesses. The OSHA 300 Logs, therefore, provide a roadmap for an OSHA inspector in conducting an inspection. If, for example, several injuries on the Log are related to a particular piece of machinery, the inspector will undoubtedly scrutinize that piece of machinery for potential hazards. In some cases, OSHA will use a pattern of injuries as the basis for a willful citation, using the Log to show that the employer was on notice

that a hazard existed and did nothing to correct the issue. Employers, therefore, should pay close attention to the 300 Logs, particularly where multiple employees experience similar injuries in similar areas of a facility, as the Logs can indicate hazardous conditions.

Most employers are probably already familiar with the illness and injury log, referred to as the OSHA 300 log. However, the decision whether to record an injury or illness is often a difficult exercise, involving complicated issues of medical causation, issues in computing days away from work, and confusion over the definition of “medical treatment.” We therefore take this opportunity to provide some tips to avoid common pitfalls in injury and illness recordkeeping:

- 1) **Evaluate work-relatedness carefully.** This can be a particular challenge where an employee is suffering from a musculoskeletal disorder or respiratory illness that developed over time. Where the cause of a particular injury or illness is unclear, the employer must evaluate the employee’s workplace activities to determine whether work activities were a discernible cause of the injury or illness. Consultation with a physician is permitted and encouraged for difficult cases.
- 2) **Don’t confuse recordability with fault or blame.** The OSHA recordkeeping requirements are designed to be no-fault. If an employee is injured at work in a bizarre accident, or even because of the employee’s own misconduct that violated the employer’s safety policies, the injury may still be recordable if it meets the definition of “work-related” and meets any of the other recording criteria.
- 3) **Be aware of employees who travel or work from home.** Don’t assume that just because an injury occurs “off site” that it is not recordable. Employees who are injured while traveling for work or working from home may still be recordable.
- 4) **Even pre-existing conditions may be recordable.** If an event or exposure in the workplace causes or contributes to the significant aggravation of a pre-existing condition, the injury or illness may be recordable.
- 5) **Don’t confuse workers’ comp with recordkeeping obligations.** While there is some overlap in these two systems (for example, the workers’ compensation insurer’s first report of injury or illness forms can be used for OSHA recordkeeping purposes), a recordable injury for OSHA purposes is not necessarily a compensable injury. OSHA has very deliberately stated that recording an injury on the OSHA 300 log is not a concession by the employer that the injury is compensable, and vice versa. 29 C.F.R. §1904.0.

- 6) **“Light duty” may trigger the obligation to record.** If the employer keeps an employee from performing one or more of the routine functions of his or her job as a result of a work-related injury or illness, the injury or illness is probably recordable because it may constitute “restricted duty” or “job transfer” under the meaning of the regulations. In some cases, employers can give “light duty” to an injured employee to prevent aggravation or additional injury without triggering the obligation to record the injury or illness, but only if the employee is fully capable of performing all of the routine functions of his or her job even with the injury or illness.

CONCLUSION

In light of OSHA’s National Emphasis Program on recordkeeping and the proposed revisions to the injury notification regulations, employers must be diligent in evaluating and properly recording work-related injuries and illnesses. During a recordkeeping inspection, OSHA will request first aid logs and interview employees to find out about injuries and illnesses that may not be included on the employer’s OSHA 300 Log. Accordingly, it is recommended that employers consider the following to ensure compliance with recordkeeping and notification requirements:

- Establish a system through which employees are required to report injuries or illnesses in the workplace. Inform employees that they will not be subject to retaliation or other negative action for reporting a work-related injury or illness. Train supervisors to respond to employee reports of injuries and illnesses to ensure that employees receive prompt medical attention. Ensure that injuries and illnesses are reported to the safety manager for evaluation of work-relatedness and recordability.
- Ensure that the person assigned to maintain the required OSHA records is trained to complete these forms accurately and in accordance with OSHA requirements.
- Keep supporting documentation of all injuries and illnesses reported by employees. If the employer determines that the injury or illness is not recordable, document the basis for that determination.
- Ensure that OSHA is notified within 8 hours of any work-related fatality or the in-patient hospitalization of three or more employees. If you operate in a state with its own occupational safety and health program, check for varying notification requirements.

- Evaluate OSHA 300 Logs to identify potential hazardous conditions or practices that have led to employee injuries. Document any corrective action taken to address such conditions.