

# Legal Update: OSHA Electronic Reporting Rule

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OSHA has just issued a new electronic reporting requirement that becomes effective Jan. 1, 2017. Starting in 2017, employers with more than 250 employees must report the data on their Form 300A electronically via a secure connection on OSHA's website, by July 1, 2017. The following year, these large employers must report the data on their Forms 300, 300A and 301 electronically by July 1, 2018. Employers with 20-249 employees and that are included on OSHA's list of "industries with historically high rates of occupational injuries and illnesses" (attached as Appendix A) will need to report the data on their Form 300A electronically by July 1, 2017. The data will be "scrubbed" of personal identifier information and be publically available so that businesses (and, importantly, insurers, clients and investors, etc.) can see a company's incident rate.

In addition, as part of this new regulation, the new reporting rule significantly beefs up OSHA's enforcement power to prevent retaliation against employees for reporting injury/illness. The enforcement provisions initially were set to become effective Aug. 10, 2016 but OSHA recently delayed the effective date to **Dec. 1, 2016** in order to conduct additional outreach and to provide employers with educational materials and guidance. Prior to this rule, OSHA could investigate possible employer retaliation against employees for reporting injuries **only** if the employee filed a complaint. Under the new provision, OSHA can issue citations (and fines) if it believes an employer discourages reporting, either through drug testing following every injury or illness, or by implementing incentive programs that improperly discourage reporting. OSHA's rationale for including this enforcement provision in the electronic reporting regulation is that anything that discourages reporting will tend to distort the data that will be collected in the new electronic format. OSHA calls this an "enhanced enforcement tool for ensuring the accuracy of employer injury and illness logs."

While the rule does not prohibit drug testing of employees, it does prohibit its use as an "adverse action against employees who report injuries or illnesses. To strike the appropriate balance here, drug testing policies should **limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident**, and for which the drug test can accurately identify impairment caused by drug use. For example, it would likely not be reasonable to drug-test an employee who reports a bee sting, a repetitive strain injury or an injury caused by a lack of machine guarding or a machine or tool malfunction. Such a policy is likely only to deter reporting without contributing to the employee's understanding of why the injury occurred, or in any other way contributing to workplace safety. **Employers need not specifically suspect drug use before testing, but there should be a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness in order for an employer to require drug testing.**"

That said, the rule does **not** prohibit employer drug testing that is done to comply with any state or federal testing requirements, such as in compliance with state workers' compensation law.

With respect to incentive programs, OSHA has concluded that "rate-based incentive programs, which reward workers for achieving low rate of reported injury and illnesses, may discourage reporting." As a result, OSHA has declared that **"it is a violation for an employer to use an incentive program to take adverse action, including denying a benefit, because an employee reports a work-related injury or illness, such as disqualifying the employee for a monetary bonus or any other action that would discourage or deter a reasonable employee from reporting the work-related injury or illness."** In contrast, OSHA considers programs that provide "modest" rewards to employees for following safety rules or protocols, or provide t-shirts to workers on safety committees, or having a small party to celebrate completion of safety training to be appropriate.

States that have state-based OSH plans, such as SC, NC and TN, must enact substantially identical regulations within six months of publication of the rule, so practically by year's end.

For questions, please contact MGC attorney [Helen Hiser](#).

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