
LEGAL ALERT

OSHA Announces National Emphasis Program On Injury and Illness Recordkeeping

On October 1, the Occupational Safety and Health Administration released its plan for implementing its National Emphasis Program (NEP) to assess the accuracy of injury-and-illness data recorded by employers. The NEP was enacted in response to several studies, including one by the Government Accountability Office (GAO), that have claimed that there exists a serious problem of underreporting workplace injuries and illnesses on the OSHA Form 300. Specifically the NEP will focus on auditing employers' reports of workplace injuries and illnesses to identify instances of underreporting in high-hazard industries.

What Businesses Are At Risk?

The NEP will target employers that have low rates of reported injuries or illnesses but that operate in historically high-rate industries. OSHA has identified the following as high-rate industries:

- animal (except poultry) slaughtering;
- bottled-water manufacturing;
- concrete pipe manufacturing;
- couriers;
- fluid-milk manufacturing;
- foundries: copper (except die casting), iron, steel (except investment), other nonferrous foundries (except die casting);
- manufactured-home manufacturing;
- marine-cargo handling;
- motor vehicle seating and interior trim manufacturing;
- nursing-care facilities;
- pet and pet-supplies stores;
- poultry processing;
- refrigerated warehouse and storage;
- rolling-mill machinery and equipment manufacturing;
- scheduled passenger air transportation;
- seafood canning;
- soft-drink manufacturing; and
- support activities for animal production.



In addition, OSHA has specifically indicated that it has a suspicion as to the accuracy of the reporting in the poultry and construction industries. Employers in these industries should be on heightened alert.

OSHA has formally stated that there has been such a dramatic decrease in the poultry industry's injury and illness rates that it "raise[s] a question about the validity of the data on which these rates are based." The GAO report noted that data involving cleaning and sanitation functions associated with meat and poultry slaughtering and processing was incomplete; these groups are included in the NEP coverage.

Regarding the construction industry, OSHA has opined that "recordkeeping in the construction industry has a long history of complexity and questions raised due to the nature of the workforce associated with mobile worksites. The NEP will initially pilot several inspections of construction employers to better understand how to approach this industry on a broad scale."

Within these industries, OSHA will conduct an audit only if employers have a relatively low rate of reported injuries or illnesses and at least 40 employees.

What Happens If Your Business Is Selected?

Any business selected will find the audit to be intrusive and time consuming, especially if the facility has a large number of employees. Because the audits expressly involved medical records regulated under the

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ADA and HIPAA, employers may also be exposed to legal claims if they mishandle employee information for which they may not normally have responsibility. OSHA's NEP procedures highlight the importance of having first reviewed one's recordkeeping processes and maintaining well-trained employees to whom injury and illness responsibilities are designated. Businesses selected as part of the NEP should be prepared to handle a full blown OSHA inspection at that facility involving multiple days onsite.

Here is what you can expect if your business is selected:

Opening Conference

The OSHA Compliance Safety and Health Officer (CSHO) must do the following before the audit may proceed:

- present an explanatory letter outlining the purpose, scope, and process for the records inspection;
- present at least two copies of a Medical Access Order (MAO) attached to a cover letter which addresses the medical records review process. An MAO is required for OSHA staff to review medical information with personal identifiers;
- provide information about OSHA's citation policy and when citations will be issued;
- note that any complaints received during the audit, which are not related to recordkeeping, will be cited as part of the current inspection or referred to the Area Office for processing;
- verify from the employer representative what actions are taken when an employee experiences an injury or illness;
- verify the business's NAICS code to ensure that the business is eligible for inspection.

Under the NEP and OSHA's recordkeeping standard, once the CSHO requests records, they must be provided within four hours. But the CSHO *does not need to wait* until the records are provided to begin the walk around portion of the inspection or conduct interviews (discussed below). The walk around or interviews may begin as soon as the opening conference is completed.

Record Inspection

OSHA will review records only to identify occupational injuries and illnesses that may have occurred during 2007 and 2008. The CSHO will use your employee roster to select a random sampling of employees whose records will be reviewed. If you have 100 or fewer employees, all employees' records will be reviewed. If you have 101 to 250 employees, 50% of your employees will be reviewed. If you have more than 250 employees, 33% of the employees will be reviewed.

After determining which employees' records to audit, the CSHO will review medical records, workers' compensation records, insurance records, payroll and absentee records, company safety incident reports, company first aid logs, alternate duty rosters, and disciplinary records pertaining to injuries and illnesses for each employee. He will then verify

that each identified recordable injury or illness is properly recorded on OSHA Form 300 and Form 301.

If the sampled employees' records indicate that under-recording exists, OSHA may expand the records inspection beyond the sampled employees.

Interview of Designated Recordkeeper

The CSHO will also interview your designated recordkeeper(s) regarding the manner in which injuries and illnesses are recorded at the establishment. Therefore it is crucial that the recordkeeper has a working knowledge of the OSHA injury and illness recordkeeping requirements. Employers should determine if more than one employee has recordkeeping responsibilities and, if so, whether they are coordinating their handling of attendance, worker's compensation or OSHA records. If the CSHO learns of any policies that allegedly discourages the recording of injuries and illnesses, it will be noted and reported to the Area Office.

Employee Interviews

The CSHO must also personally interview a sub-sample of employees who are selected from the list of employees who were selected for the records inspection. If you have 100 or fewer employees, at least 10 will be interviewed. If you have 101 to 250 employees, at least 15 will be interviewed. If you have more than 250 employees, at least 20 will be interviewed. Unlike the records inspection, these employees are not chosen randomly. Rather, OSHA will interview those most likely to be injured or become ill, such as those working in high-hazard areas.

Conduct Management Interviews

In addition to the designated recordkeeper, the CSHO will interview management representatives regarding the manner in which injuries and illnesses are recorded, and to determine the existence of incentive or disciplinary programs that may influence recordkeeping. OSHA will want to know whether you have rewards programs that are tied to the number of injuries and illnesses recorded on the OSHA Log.

Conduct Interviews of First-Aid Providers and Health Care Professionals

The CSHO will interview the staff who participate in first-aid or medical treatment of employees with occupational injuries or illnesses to determine the consistency of information regarding the manner in which injuries and illnesses are recorded and to determine the existence of incentive or disciplinary programs that may influence recordkeeping. The interview will also seek to determine the extent to which management influences the medical treatment of injured or ill employees for the purposes of modifying OSHA recordability.

Conduct "Limited" Walk Around Inspection

Every recordkeeping inspection will also include what OSHA has called a "limited" walk around inspection of the main plant operations areas. The regulations are vague enough that, in practice, this could result in a full blown inspection of a plant. It appears to be in the inspector's discretion to determine what constitutes the "main plant operations areas." In fact, upon consultation with the Area Office, the representative may expand the scope of the inspection.

The CSHO will be permitted to issue citations for any violations that are observed in plain view during the walk around inspection. Therefore,

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even if OSHA is there only to audit the facility's records, it is imperative that every business be prepared, and that the designated management personnel are properly trained to handle an OSHA inspection of the entire premises.

Closing Conference

At the conclusion of the inspection, the CSHO will discuss with the employer's representatives the strengths and weaknesses of the employer's recordkeeping program and describe any alleged violations he found.

If Underreporting Is Found

OSHA will issue citations and propose penalties against the employer. The citations can be characterized as "willful," "repeat," "failure to abate," "serious," or "other-than-serious," and the corresponding penalty will depend on how the violation is classified. When determining how to classify the violation, OSHA will take into account the existence of incentive or disciplinary programs that affect the recording of injuries and illnesses, so it is imperative that you have proper disciplinary processes in place.

How To Protect Your Business

The most important point is to be proactive, rather than reactive. If you implement the proper recordkeeping procedures and policies before OSHA arrives, the audit will not only be much less intrusive to your daily operations, but it will also result in substantially fewer citations and penalties. This may even include performing self or third-party audits to ensure that your recordkeeping meets the standard requirements should OSHA come knocking.

Other things you can do in order to minimize risk include:

- conducting a safety and health compliance audit of your facility to ensure that the facility is not in violation of any OSHA regulations;
- ensuring that the facility's designated company representatives are well trained in how to handle an OSHA inspection;
- reviewing all recordkeeping processes which involve injury and illness information to ensure that the processes are coordinated and consistent;
- knowing what rights employers have during an OSHA inspection or NEP;
- training site managers to avoid violations of the ADA, ADAAA, GINA in the handling of medical information; and
- knowing what limits the law places on OSHA.

For more information visit our website at www.laborlawyers.com. For help with ensuring that you are in compliance, or advice concerning preparing for an audit or inspection, contact your regular Fisher & Phillips attorney, or any of the lawyers in our [Workplace Safety and Catastrophe Management Practice Group](#).

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