



## Labor & Employment ADVISORY ■

**MAY 17, 2016**

### OSHA Plans for Public Disclosure of Employer Illness and Injury Statistics

On May 12, 2016, the Occupational Safety and Health Administration (OSHA) published its [final rule](#) amending the recordkeeping requirements for employers. The regulation requires electronic submission of OSHA injury and illness records from certain employers, indicates data from such records will be made publicly available, imposes new training requirements, requires that employers maintain “reasonable” injury and illness reporting procedures, and allows OSHA to issue citations and impose penalties for alleged retaliation for reporting work-related injuries and illnesses, in addition to the enforcement scheme under Section 11(c) of the OSH Act.

#### Deadlines and Summary of Requirements

On August 10, 2016, the regulation’s provisions prohibiting discrimination against employees for reporting a work-related injury or illness will go into effect. Also effective on August 10, 2016, will be the regulation’s requirements that all employers ensure employees are informed of the following: (1) how to report an injury; (2) the employee’s right to report such injuries; and (3) and the prohibition against discrimination for such reporting.

Effective January 1, 2017, the following establishments (defined as single physical locations of an employer) will be required to electronically submit their OSHA injury and illness records annually:

- Establishments with 250 or more employees.
- Establishments with 20 or more employees but fewer than 250 employees that are in an industry listed in [Appendix A](#) of the new regulation.
- Establishments that receive “notification” from OSHA.

#### Public Access to an Establishment’s Injury and Illness Data

In the preamble to the new regulation, OSHA is explicit about its plan to allow public access to the electronically submitted injury and illness data, stating that its main purpose is to influence employers who do not wish to be seen by “members of the public, including investors and job seekers,” as having unsafe workplaces. OSHA plans to make most data from all injury and illness forms and logs available, except for employee names and personal identifiers.

OSHA contends that “behavioral science insights” support the logic that public disclosure of unfavorable injury and illness statistics will provide incentive to employers to improve worker safety. Ironically, OSHA had been critical of employer programs designed to improve safety that are too closely tied with reportable injuries or illnesses, stating

This advisory is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

"[s]uch programs might be well-intentioned efforts by employers to encourage their workers to use safe practices. However, there are better ways to encourage safe work practices, such as incentives that promote worker participation in safety-related activities, such as identifying hazards or participating in investigations of injuries, incidents or 'near misses.'" See [Employer Safety Incentive and Disincentive Policies and Practices, March 12, 2012](#).

## **Citations Now Possible for Alleged Discrimination**

The new regulation now includes a specific provision prohibiting the discharge of or discrimination against any employee for reporting a work-related injury or illness. Retaliation for reporting injuries and illnesses is currently prohibited by Section 11(c) of the OSH Act. Under Section 11(c), an investigation by OSHA is only triggered by an employee complaint, OSHA must file an action to pursue such a claim in federal court, and remedies are typically limited to back pay and reinstatement. With the new regulation, OSHA can issue citations for alleged discrimination, assess penalties and presumably require "abatement" of the discrimination, like any other alleged violative condition.

## **Requirement for "Reasonable Procedures" to Report Work-Related Injuries**

OSHA's new requirement that employers maintain "reasonable procedures" for reporting work-related injuries is directed at policies and procedures that OSHA believes inhibit reporting. The new regulation provides no definition of what is "reasonable," which will likely bring court challenges, but does provide that "[a] procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness." In the preamble to the new regulation, OSHA is critical of employer policies that impose deadlines on reporting injuries, stating "[e]mployer reporting requirements must account for injuries and illnesses that build up over time, have latency periods, or do not initially appear serious enough to be recordable." OSHA further opines in the preamble that "for a reporting procedure to be reasonable and not unduly burdensome, it must allow for reporting of work-related injuries and illnesses within a reasonable timeframe after the employee has realized that he or she has suffered a work-related injury or illness."

## **Training Requirements**

The current OSHA recordkeeping regulations require employers to inform employees of how they are to report injuries and illnesses. The new regulation, however, carries these communication requirements further, requiring specific notification to employees of how to report an injury, the employee's right to report such injuries and the prohibition against discrimination. The new regulation also reiterates the existing requirement to provide access to injury and illness records for employees and their representatives.

Going forward, employers should prepare for the August 10, 2016, deadline by revisiting their injury and illness reporting procedures and developing a plan to communicate the required elements of the new regulation. In preparing for the January 1, 2017, deadline, as always, employers should ensure that personnel who are responsible for completing the OSHA injury and illness forms are well trained and that the OSHA logs are reviewed periodically to ensure that they are accurate and complete.

If you would like to receive future *Labor & Employment Advisories* electronically, please forward your contact information to [labor.advisory@alston.com](mailto:labor.advisory@alston.com). Be sure to put "subscribe" in the subject line.

If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

**ATLANTA**

Alexandra Garrison Barnett  
404.881.7190  
alex.barnett@alston.com

Ashley D. Brightwell  
404.881.7767  
ashley.brightwell@alston.com

Lisa H. Cassilly  
404.881.7945  
lisa.cassilly@alston.com

Brett E. Coburn  
404.881.4990  
brett.coburn@alston.com

Eleanor L. deGolian  
404.881.7186  
eleanor.degolian@alston.com

Clare H. Draper IV  
404.881.7191  
clare.draper@alston.com

R. Steve Ensor  
404.881.7448  
steve.ensor@alston.com

Kimberly L. Fogarty  
404.881.4502  
kim.fogarty@alston.com

Kristen Fox  
404.881.4284  
kristen.fox@alston.com

Kandis Wood Jackson  
404.881.7969  
kandis.jackson@alston.com

J. Thomas Kilpatrick  
404.881.7819  
tom.kilpatrick@alston.com

Isabella Lee  
404.881.7163  
isabella.lee@alston.com

Christopher C. Marquardt  
404.881.7827  
chris.marquardt@alston.com

Charles H. Morgan  
404.881.7187  
charlie.morgan@alston.com

Glenn G. Patton  
404.881.7785  
glenn.patton@alston.com

Eileen M. Scofield  
404.881.7375  
eileen.scofield@alston.com

Katherine H. Smith  
404.881.4575  
katherine.smith@alston.com

Brooks Suttle  
404.881.7551  
brooks.suttle@alston.com

**LOS ANGELES**

Martha S. Doty  
213.576.1145  
martha.doty@alston.com

James R. Evans, Jr.  
213.576.1146  
james.evans@alston.com

Jesse M. Jauregui  
213.576.1157  
jesse.jauregui@alston.com

Ryan T. McCoy  
213.576.1062  
ryan.mccoy@alston.com

Nicole C. Rivas  
213.576.1021  
nicole.rivas@alston.com

**ALSTON & BIRD**

WWW.ALSTON.COM

© ALSTON &amp; BIRD LLP 2016

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777

BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghua Road ■ Chaoyang District ■ Beijing, 100004 CN

BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719

CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111

DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899

LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100

NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444

RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-85802 ■ 919.862.2200 ■ Fax: 919.862.2260

SILICON VALLEY: 1950 University Avenue ■ 5th Floor ■ East Palo Alto, California, USA, 94303-2282 ■ 650.838.2000 ■ Fax: 650.838.2001

WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333