

PUBLICATION

OSHA Changes Its Mind – Again

February 2, 2010

On January 29, 2010, OSHA published a proposed rule to revise its 300 Log of Work-Related Injuries and Illnesses. The proposed revision would restore a column dedicated to tracking musculoskeletal disorders (MSDs). OSHA announced that it will hold a public meeting on the proposal on March 9, 2010. If finalized, the new regulation would take effect beginning January 1, 2011. What remains unknown at this point is what OSHA will do with the new data, and whether it would – or could or should – promulgate a new ergonomics standard.

Background

OSHA's proposed rule would add a new 29 CFR 1904.12 recording criteria for cases involving work-related musculoskeletal disorders, instructing employers to check the MSD box on the 300 Log for qualifying work-related MSDs. The proposed rule also clarifies that disorders caused by slips, trips, falls, motor vehicle accidents, or other similar accidents are not MSDs, and states that the same criteria already in place to determine "work relatedness" for other injuries and illnesses will continue to apply for MSDs.

OSHA's position on the value of the MSD box on the Log has vacillated through the years. In 2001, OSHA's revised recordkeeping rule included the MSD box, but OSHA soon changed its mind. In rescinding the MSD column from the Log in 2003, OSHA stated that the stand-alone MSD column "would be of little statistical value...." Now, OSHA has changed its mind yet again, stating that "after careful reconsideration, OSHA believes that this conclusion substantially understated the usefulness of the MSD column information." OSHA also now believes that the data will provide "a strong statistical tool for researchers." OSHA also cites recent investigations into alleged employer underreporting as a reason for the MSD column. On the one hand, OSHA states that "many MSDs may not fully incapacitate workers and may still enable them to perform alternative work duties during the recovery period," but notes that it "is concerned that employers are increasingly using restricted work, job transfers and medical treatment or surgeries without lost work time to bring employees back to work more quickly and to avoid recording MSDs as cases with days away from work." Apparently, OSHA fears that employers are "cooking the Logs" and sees the new rule as means to combat the practice. Finally, OSHA is concerned that employers mistakenly believe that they are not required to record work-related MSDs on the Logs, since the 2003 removal of the MSD column. This will clarify that confusion. OSHA reminds us that employers have always been required to record work-related MSDs on the Log, under the "All Other Illnesses" category.

What Happens Next?

Ostensibly, employers have been tracking MSDs all along, and recording them under "All Other Illnesses." For those who have done so, this may be a tempest in a teapot, checking a box specifically for MSDs instead of the catchall box. Overall, the number of recordable injuries won't change. The MSD data, however, will no longer be hidden in that catchall box but will stand on its own, just like the existing skin disorder, respiratory condition, poisoning, and hearing loss boxes. And, if presented with sufficient data, OSHA could very well take another run at its ergonomics regulation (29 CFR 1910.900), which was repealed by Congress and then-President Bush in March 2001. But the regulation would likely end up in court, as the repeal also precludes OSHA from promulgating an ergonomics regulation that was "substantially similar" to the one that was repealed.

Steps to Consider

First, employers should carefully monitor this important regulation. Second, they should review their 300 logs to ensure that they have properly recorded all applicable injuries and illnesses. Finally, employers should continue to evaluate their workplaces and reduce or eliminate existing ergonomic hazards. These efforts will keep OSHA at bay, will keep worker compensation costs down, and will improve retention and morale. After all, an employer's greatest investment is its employees.

For a more in-depth analysis or for general information on the various aspects of OSHA regulations and how they affect you, please contact your Baker Donelson attorney.