

PUBLICATION

The So-Called "Rollback Rule": OSHA Reverses Electronic Recordkeeping Requirement

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In a controversial, complete reversal of itself, OSHA recently issued a final rule, entitled Tracking of Workplace Injuries and Illnesses (84 FR 380), which removes the requirement for employers who have 250 or more employees, or who are in designated high-risk industries, to electronically submit the OSHA Forms 300 and 301 each year. Form 300 is the Log of Work-Related Injuries and Illnesses, and 301 is the corresponding Injury and Illness Incident Report which includes additional details on each item listed on the 300 Log. Employers are still required to electronically submit the OSHA Form 300A, which is a summary of the information in the 300 Log. This changes the requirements for electronic submission of all three documents, which were put in place in May 2016. Under the new rule, the deadline for electronic submission of the required Form 300A for 2018 remains March 2, 2019. In addition, the Form 300A should also be posted from February 1 to April 30 each year, in a common area where notices to employees are usually posted. The new rule was effective on February 25, 2019.

As an explanation for the relaxation of the electronic submission requirements, OSHA cites increased worker privacy, preventing routine government collection of sensitive information, including descriptions of workers' injuries and the body parts affected. OSHA also concluded that any benefit of collecting data from Forms 300 and 301 "is uncertain." The agency explained that it could not guarantee that personal identifying information (PII) would be redacted from employer submissions due to the volume of data submitted by employers, forcing the agency to resort to "de-identification software," which "is not 100% effective." Thus, OSHA felt "avoiding this risk to worker privacy outweighs the data's uncertain incremental benefits to enforcement."

Employers are required to continue to track this information and to have the OSHA Forms 300 and 301 available onsite. However, OSHA has explained that removing the automatic submission requirements protects the information from public disclosure under a Freedom of Information Act request or through OSHA's Injury Tracking Application. OSHA also amended the recordkeeping rule to require covered employers to submit their Employer Identification Number (EIN) electronically along with the Form 300A, in order to facilitate the use of the data by OSHA.

Unions and health organizations who were proponents of the 2016 rule requiring Forms 300 and 301 to be electronically submitted are not pleased with this development. Lawsuits were already pending from this past summer based on OSHA's suspension of the deadlines for electronic submission of the 2017 Forms 300 and 301. Further, the Public Citizen's Health Research Group, the American Public Health Association, and the Council of State and Territorial Epidemiologists filed suit against the Department of Labor and OSHA seeking both declaratory and injunctive relief. This lawsuit was filed on January 25, 2019, the same day the final rule was issued. The health organizations are asking a federal district court in the District of Columbia to overturn the rollback of the reporting requirements from the previous electronic reporting rule. Specifically, the complaint challenges the new rule under the Administrative Procedure Act, stating that "[t]he Rollback Rule should be declared unlawful and set aside because OSHA has failed to provide a reasoned explanation for its change in position, failed to adequately consider comments submitted in opposition to the change, and relied on considerations that have no sound basis in law."

These health organizations argue that the data that would have been supplied by the rule is crucial to protecting worker health and safety and facilitating independent research into workplace hazards. They further argue that the agency violated the Administrative Procedure Act by reversing course from the 2016 version, where OSHA maintained it could adequately protect any PII. The attorney for the Public Citizen's Health Research Group has stated "When it issued the electronic reporting rule after an exhaustive process, OSHA concluded that requiring the submission of workplace injury and illness data would greatly enhance worker health and safety." OSHA is now accused of rushing through this new rule-making, drawing exactly the opposite conclusion that it did in 2016. The Complaint asserts that "OSHA has failed to provide a reasoned explanation for reversing its position regarding the risks and benefits of requiring" employers to submit the OSHA 300 and 301 forms. Conversely, OSHA asserts that the new rule will allow it to better focus its resources on the collection and use of the 300A data and severe injury reports, rather than using those resources to develop a secure portal for collecting this data, as well as the time and energy required to review and analyze the data.

For assistance in understanding OSHA's electronic recordkeeping requirement, please contact the author, [Ashley Strittmatter](#), or any member of Baker Donelson's [Labor & Employment Group](#).