

OSHA Update

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OSHA Penalties Increased 78%

- Bipartisan Budget Act of 2015 (November 2015):
Congress ordered federal agencies to adjust civil penalties for inflation by August 1, 2016
 - One-time catch up adjustment, plus
 - Annual inflation adjustments
- OSHA's prior penalties in place since 1990
- OSHA issues maximum catch up adjustment:
 - Serious/Failure to Abate : \$7,000 → \$12,471
 - Willful/Repeat : \$70,000 → \$124,709

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OSHA Penalties Increased 78%

- Announced June 30, 2016
- Applicable to citations issued on or after August 2, 2016, for violations that occurred after November 2, 2015

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More Changes to the Injury and Illness Recordkeeping and Reporting Rule

- January 2015 – new reporting requirements for fatalities, hospitalizations, amputations, eye loss
- May 11, 2016 – OSHA announces Final Rule to Improve Tracking of Workplace Injuries and Illnesses:
 - Electronic submission and public disclosure of injury and illness data
 - New anti-retaliation protections to prohibit policies that discourage workers from reporting an injury or illness

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Electronic Submission and Public Disclosure of Injury and Illness Data

- Purpose – improve worker safety by better informing workers, employers, and the public about hazards in the workplace
 - “Behavioral economics tells us that making injury information publicly available will ‘nudge’ employers to focus on safety.”
- Electronic submission requirements effective January 1, 2017
- Data will be submitted via secure website (TBD), expected to go live February 2017

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Electronic Submission Criteria

- Based on size of each establishment, not the company as a whole
- 250+ Employees – submit annually data from Forms 300 (Injury/Illness Log), 300A (Summary), and 301 (Incident Reports)
- 20-249 Employees for establishments in certain high risk industries – submit annually data from Form 300A
- Less than 20 Employees – no e-submission required (unless specifically requested by OSHA)

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Electronic Submission Timeline

Submission Year	250+ Employees	20-249 Employees	Submission Deadline
2017 (2016 data)	300A	300A	July 1, 2017
2018 (2017 data)	300, 300A, 301	300A	July 1, 2018
2019 and beyond	300, 300A, 301	300A	March 2 each year

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Anti-Retaliation Provisions

- 3 new provisions in recordkeeping rule to improve accuracy and completeness of injury and illness data:
 1. Must specifically inform employees of their *right* to report work-related injuries and illnesses without fear of retaliation
 2. Reporting procedure must be reasonable, cannot deter or discourage reporting
 3. Employers cannot retaliate or discriminate against employees for reporting work-related injuries or illnesses

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Anti-Retaliation Provisions

- Effective August 10, 2016
- July 8 – Lawsuit challenging anti-retaliation provisions
- July 12 – Emergency motion for preliminary injunction
- July 13 – OSHA delayed enforcement to November 1, “to allow time for additional outreach to the regulated community”
- October 18 – OSHA delayed enforcement to December 1, at the Court’s request to allow additional briefing in the lawsuit
- October 19 – OSHA released enforcement guidance as promised in July, interpreting anti-retaliation provisions

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Enforcement Guidance: Reporting Procedures

- Time to report – reasonable to require employees to report injury/illness as soon as practicable after becoming aware
- Method of reporting – must not be unduly burdensome under the circumstances

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Enforcement Guidance: Anti-Retaliation

- Key to reasonable policy – adverse action cannot be taken *because* the employee reports an injury/illness, must be related to legitimate business interest
- To issue a citation, OSHA must be able to show:
 1. Employee reported work-related injury/illness
 2. Adverse action taken against employee
 3. BECAUSE the employee reported the injury/illness
 - Fact-specific inquiry, OSHA must be able to show pretext or lack of legitimate business reason

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Enforcement Guidance: Discipline Policies

- Discipline for violation of legitimate safety rules OK, as long as consistent whether or not there is a reported injury
 - Disciplining only violators who report injury is evidence of retaliation, rule violation not the real motivation if uninjured violators go undisciplined or receive lighter penalties
- Discipline for violation of reporting procedure OK, as long as procedure is reasonable, deviation was not excusable, and discipline is not excessive

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Enforcement Guidance: Drug and Alcohol Testing Policies

- OSHA only concerned with employers' voluntary post-accident drug and alcohol testing policies
 - No impact on pre-employment or random testing
 - No impact on post-accident testing done pursuant to federal or state law (Department of Transportation or state workers' compensation drug free workplace policies)
- Post-accident drug testing policy cannot deter or discourage reasonable employees from reporting injuries

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Enforcement Guidance: Drug and Alcohol Testing Policies

- Must have objectively reasonable basis to administer post-accident drug test.
- OSHA will consider various factors:
 - Reasonable belief drug use by the reporting employee could have contributed to the injury/illness (and results could provide insight into the cause)
 - Whether other employees involved in the incident were also tested (versus only the reporting employee)
 - Whether employer has heightened interest in determining if drug use contributed to the incident based on hazardous nature of the work
 - Whether test is capable of measuring impairment
 - for alcohol testing only at this time, since other drug tests largely incapable of measuring impairment

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Enforcement Guidance: Drug and Alcohol Testing Policies

- Automatic, mandatory testing following any injury, regardless of the circumstances of the injury or whether or not the victim contributed to the cause, is not objectively reasonable
- Unless done pursuant to federal or state law
 - DOT requirements
 - State workers' compensation drug free workplace program (including private carrier plans that mirror state law)
 - BUT NOT COLLECTIVE BARGAINING AGREEMENTS



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Enforcement Guidance: Safety Incentive Programs

- Safety incentive programs are OK (including cash prizes), *unless* the act of reporting an injury/illness likely to result in loss of benefit
 - Incentive conditioned on injury rates (based on reported injuries) without consideration of the circumstances surrounding an injury likely to discourage employees from reporting
- OSHA wants to see benefits conditioned on compliance with legitimate safety rules, or participation in safety-related activities

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2016 Top Ten Cited Standards

	HAZARD	REGULATION	TOTAL CITATIONS*
1	Fall Protection	29 C.F.R. § 1926.501	6,929 (+208 from 2015)
2	Hazard Communication	29 C.F.R. § 1910.1200	5,677 (+485 from 2015)
3	Scaffolding	29 C.F.R. § 1926.451	3,906 (-389 from 2015)
4	Respiratory Protection	29 C.F.R. § 1910.134	3,585 (+280 from 2015)
5	Lockout/Tagout	29 C.F.R. § 1910.147	3,414 (+412 from 2015)
6	Powered Industrial Trucks	29 C.F.R. § 1910.178	2,860 (+100 from 2015)
7	Ladders	29 C.F.R. § 1926.1053	2,639 (+150 from 2015)
8	Machine Guarding	29 C.F.R. § 1910.212	2,451 (+156 from 2015)
9	Electrical—Wiring Methods	29 C.F.R. § 1910.305	1,940 (-464 from 2015)
10	Electrical—General Requirements	29 C.F.R. § 1910.303	1,704 (-269 from 2015)

*Because inspectors have six months to issue citations, adjusted numbers may issue later in the calendar year.

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Recent Enforcement Cases

- Ashley Furniture - \$1.75 million settlement involving multiple willful and repeat machine guarding violations
- Sunfield Inc. (OH car parts company) - \$3.42 million penalty involving machine guarding and LOTO violations, as well as failure to train temporary workers

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Recent Enforcement Cases

- USPS - \$44,000 penalty involving improper use of a relocatable power tap (RPT) (a.k.a. power strip) and damaged extension cord, and hazard communication and asbestos violations

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