Is OSHA Backpedaling On the New Electronic Reporting of Workplace Injury and Illness Data?

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We're all scrambling for any hint of impending OSHA changes, but are limited largely to speculation because we do not yet have a new Secretary of Labor or an Assistant Secretary of Labor for OSHA. Career OSHA management at the DC, Regional and Area Office level simply advise that *"it's business as usual."*

We speculate that the already effective Anti-retaliation provisions of the Electronic Recordkeeping Rule will be eliminated or changed as soon as new OSHA leadership moves in. We've also wondered if the Electronic Submission and Posting of individual employers' Workplace Injury Records will be implemented in a process beginning in July 2017. Employers dislike the further effort by the previous Administration to *"shame"* employers. Moreover, the submission and posting of this data requires a massive undertaking by OSHA to build an electronic architecture and obtain personnel in an already underfunded and understaffed Agency.

Today, we saw that the *"Justifications"* language from the FAQ on the OSHA.gov website, with no explanation. The language was the usual self-serving justification for requiring over 460,000 employers to develop architecture and submit injury records for public scrutiny by 2019.

Court actions challenging the Rule are pending and there has been speculation that the new Administration may decide to cease its defense against such court efforts. Congress might attach a rider to a Budget bill denying funds to enforce the new requirement. To fully change the regulation, full Rulemaking would be required, which does not seem to fit the shock and awe approach of the first weeks of the new Administration. Because the public posting provision is part of the Rule's preamble commentary and not in the regulatory text, the Justifications provision can be changed without rulemaking.

We wonder if the removal of the Justification language may indicate that the Trump Administration is planning to change the requirement without Rulemaking.

The Anti-retaliation provisions' attacks on automatic post-accident testing and safety incentive programs can be more easily altered without Rulemaking by simply issuing new Interpretations and Enforcement Guidance. Even career OSHA leaders have no enthusiasm for the anti-drug testing provisions, and want more guidance on how to analyze safety incentive programs.

Stay tuned for more developments. As with the previous Administration, we are living in interesting times.

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