



What's Next Now that OSHA Rescinded Part of the Electronic Recordkeeping Requirements?

Insights

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As [we reported earlier today](#), OSHA released its [Final Rule](#) eliminating the responsibility of certain employers to electronically submit to OSHA data from its Form 300 Workplace Injury and Illness Log and the 300A forms which correspond generally to State First report of Injury forms. Below is an excerpt from the Summary on page 1 of the Final Rule:

- OSHA is amending the recordkeeping regulation by rescinding the requirement for establishments with 250 or more employees to electronically submit information from OSHA Forms 300 and 301.
- These establishments will continue to be required to maintain those records on-site, and OSHA will continue to obtain them as needed through inspections and enforcement actions.
- In addition to reporting required after severe injuries, establishments will continue to submit information from their Form 300A. Such submissions provide OSHA with ample data that it will continue seeking to fully utilize.
- In addition, OSHA is amending the recordkeeping regulation to require covered employers to submit their Employer Identification Number (EIN) electronically along with their injury and illness data submission, which will facilitate use of the data and may help reduce duplicative employer reporting.
- Nothing in the final rule revokes an employer's duty to maintain OSHA Forms 300 and 301 for OSHA inspection.

Employers are relieved that such data will not be publicly accessible to any union, third party or individual who wants to shame a company or use the data for purposes for which it was not collected.

On [July 30, 2018, OSHA](#) had announced its Rulemaking to eliminate the Form 300 and 301 electronic submissions and was not accepting 300 and 300A data. For more details, read our July 28, 2018 Post, [What's Up with OSHA's New Electronic Reporting Requirements](#).

What's Next?

While this confirmation was welcome, the revised Rule requires:

1. By March 1, 2019, establishments with 250 or more employees that are required to keep the injury records must submit information from their 2018 Form 300A Summary.
2. By March 2 2019, establishments with 20-249 employees in certain High Risk Industries must electronically submit their 2018 Form 300A.

What about State OSHA Plans?

Several State Plans delayed adopting the Electronic recordkeeping requirements due to the uncertainty surrounding the Rule. Federal OSHA attempted to force covered employers in these State Plans to submit 300A data despite not being subject to the rule or Fed-OSHA's jurisdiction. On April 30, 2018, Fed-OSHA issued a press release announcing that *employers* in all State Plan States (not the State agencies themselves) must implement OSHA's E-Recordkeeping Rule. While employers were not required to submit 300A data and faced no enforcement risk for not doing so, most State OSHA Plans acted to adopt the Rule. At the end of 2018, only three (3) States had not adopted the Rule: Maryland, Washington and Wyoming.

California Adopted its Own Electronic reporting Obligations.

On September 19, then-Governor Brown signed California Assembly Bill 2234 (See Analysis).

On October 18, 2018 published an Emergency proposed regulation to temporarily (tardily) adopt and implement Fed-OSHA's Electronic reporting requirements. The regulations were approved on November 1, 2018.

Covered establishments are required to submit 300A data through federal OSHA's ITA portal by the deadlines specified in the emergency regulation. The following workplaces are covered by the rule:

1. Establishments with 250 or more employees who are subject to Cal/OSHA recordkeeping requirements, unless specifically exempted by section 14300.2 of Title 8 of the California Code of Regulations
2. Establishments with 20 to 249 employees in designated industries listed in Appendix H.
3. Establishments notified by Cal/OSHA to submit injury data.

Similar to South Carolina's 2018 approach, California imposed a "catch-up" provision to collect FY2017 300A data even though the rule was adopted after federal OSHA's deadline for 2017 data.

- Covered establishments in California must submit FY2017 300A data by **December 31, 2018**.
- Covered establishments also must then submit FY2018 300A by **March 2, 2019**.

California AB 2334 also Brought Back the Volks Rule.

AB 2334 includes a provision that impacts the statute of limitations for issuing recordkeeping citations. Despite the D.C. Circuit's decision in AKM LLC dba Volks Constructors v. Secretary of Labor, 675 F.3d 752 (D.C. Cir. 2012) and the Cal/OSHA Appeals Board decision in *Kev Energy*

Letter, OSHA 15-0255-0256, and the Cal/OSHA Appeals Board decision in Id., Energy.

Services [DAR-15-0255-0256], which held that Cal/OSHA cannot cite employers for failing to record injuries and illness if the violation took place more than six months before the citation was issued, AB 2334 seeks to establish recordkeeping violations as continuing violations, so as to expand the statute of limitations for such violations for the entire five-year period the record must be kept:

A citation or notice shall not be issued by the division more than six months after the occurrence of the violation. For purposes of issuing a citation or notice for a violation of subdivision (b) or (c) of Section 6410, including any implementing related regulations, ***an “occurrence” continues until it is corrected, or the division discovers the violation, or the duty to comply with the violated requirement ceases to exist.*** Nothing in this paragraph is intended to alter the meaning of the term “occurrence” for violations of health and safety standards other than the recordkeeping requirements set forth in subdivision (b) or (c) of Section 6410, including any implementing related regulations.

At least for California, this is a shift back to the Obama Administration’s midnight “Volks Rule,” where Fed-OSHA adopted a five-year statute of limitations for recordkeeping violations during the final days of the Obama Administration. The Republican Congress and the new President Trump signed a resolution to revoke the rule under the Congressional Review Act.

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