



# My Real Worries about OSHA's Proposed Final Recordkeeping Rule

Insights

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Let's be honest. Many of us object to any expansion of OSHA workplace injury recordkeeping because it's burdensome, doesn't help develop a safety culture, and we expect the Administration to misuse the data. That said, there are some good aspects of OSHA's proposed Final Rule, and some of the worry is unfounded.

## **Auto Dealers Should Relax.**

Our first client back in the 1940s was an auto dealer, so we at Fisher Phillips are fond of and track the industry. Auto dealers are going to howl because they don't think that they should have to maintain and post the Form 300s and related documents. They're probably correct. Dealers present minimal meaningful safety hazards and it's difficult to see how extending the 300 obligation to them will improve safety. However, for the same reasons, maintaining OSHA Injury and Illness records won't impose too many burdens on auto dealers. They don't experience many recordable injuries and OSHA, with its limited resources, is unlikely to attract an OSHA emphasis effort.

However, auto dealers do need to follow a few basic rules.

1. Relax. It's manageable.
2. Train your record-keeper to understand that OSHA Injury and Illness Recordkeeping is counterintuitive and DIFFERENT from Workers Comp Recordkeeping. You're going to record some injuries that your Comp carrier may contest. And testing positive for unlawfully used drugs may affect workers comp but it does NOT affect OSHA injury recordkeeping obligations.
3. Review the instructions and do not make "rookie errors" such as, recording injuries covered by OSHA's very specific definition of "first aid."

We're doing a webinar on October 16 and we'll do more. It's not that bad.

## **Manufacturers Should NOT Relax.**

The requirement for employers to report "amputations" as broadly defined by OSHA is a sea change. OSHA does not have the resources to investigate every employee overnight hospitalization and amputation, but you can rest assured that they'll aggressively respond to many reports of amputations. Believe it or not, even after over 500 fatality investigations, I worry more about OSHA's amputation National Emphasis Program (NEP) investigations than I do most fatality inspections ... at

least from a standpoint of exposure. On a deeper level, nothing is as important as preventing another death of a coworker.

One of my senior partner mentors 30 years ago quite literally helped write and develop wage –hour regulations. He used to gleefully and fearfully tell new DOL investigators that if they returned from an investigation with no violations, he'd go back himself, and they would deeply regret his efforts. As Henry explained, no one can fully comply with this #@&! Law ... there are ALWAYS some violations. And Henry was probably right, as legions of wage-hour investigators will probably fearfully confirm. Everyone should have a truly scary Henry Huettner as a mentor at one point in their professional lives! I did, and while Henry and I fought like dog and cat, I'm a better lawyer as a result of his often unwanted attention. So forgive me for a shout-out to a truly unique person, may he rest in peace. I miss those battles.

It's the same with lock out and guarding (and related issues) at manufacturers. It's near impossible for manufacturing employers to 100% satisfy those related lock-out, guarding and electrical requirements. There are many obligations and all it takes is one employee to fall through training or one LOTO procedure to be inadequate. Let me share some example. Example 1. Do you annually require someone to watch and review an employee carry out every single LOTO procedure at your plant? Based on 30 years of experience, I doubt it. Example 2, do you follow the management of change approach and update LOTO procedures every time you add machines, change motors, modify conveyors or otherwise modify your machine processes. Such changes may lead to an overlooked disabled interlocks or a new pinch point where a machine is added. And don't get me started about guarding. OEMs are not covered by OSHA. You may not rely upon them to send you a press or conveyor that meets OSHA's guarding requirements. Moreover, the way in which modules and lines are crafted may create issues that the manufacturer never foresaw.

### **Moral of the Story?**

These are not the most difficult new regs that will come out of OSHA over the next two years. Even after midterm elections, you should not expect a lame duck OSHA. By all means, challenge the proposed regulations, but in the intervening period, you must scrupulously audit your guarding, lock-out, electrical and training performance. Or you could wait until you are the next employer defamed in a DOL News Release after a \$600,000 citation. Please take my concerns seriously.

Howard

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