

OSHA'S PART 1904 – FINAL RULE TO IMPROVE TRACKING OF WORKPLACE INJURIES AND ILLNESSES

OSHA revised the Part 1904 rule for recording and submitting records of workplace injuries and illnesses. OSHA will require some establishments to electronically submit injury and illness data, which will be posted to OSHA's website. However, these changes do not replace the long-standing requirement to prepare, retain, and post paper injury and illness records.

This final rule, which appeared in the May 12, 2016 issue of the Federal Register (Volume 81, Number 92), also added new regulations that require employers to inform employees of their rights and the process to report all workplace injuries and illnesses. Furthermore, it prohibits employers from retaliating against employees who report injuries and illnesses. It is estimated that this revised rule will affect more than 411,000 establishments, including nearly 34,000 establishments with 250 or more workers.

ELECTRONIC SUBMISSION OF INJURY AND ILLNESS DATA

The final rule requires companies to electronically submit OSHA Forms 300A, 300, and 301 if they have establishments with 250 or more employees and are presently not exempt from OSHA recordkeeping rules. Table 1 shows a list of low-hazard industries that are partially exempt from OSHA recordkeeping, including the new electronic submission requirement.

OSHA also created a new subset of higher-hazard establishments with between 20 to 249 workers that will be required to electronically submit Form 300A information annually beginning in 2017. This subset is based on a newly created table of NAICS codes (see table 2). Unlike the listing of low-hazard industries, which changes occasionally based on OSHA's review of recordable and lost time cases rates, this new list will not change.

OSHA will release an electronic reporting platform before the July 1, 2017 deadline for electronically reporting recordable cases that occurred in calendar year 2016. For covered employers (including those with establishments with 250 or more employees), only the single page Form 300A will need to be filed by the July 1, 2017 deadline. The more complicated electronic reporting of the Form 300 log of recordable cases and the Form 301 incident reports won't take effect for another year. Employers will likely receive the option to update electronically-submitted records for up to five years. Present rules require employers to update their Form 300 for five years.

IMPORTANT DEADLINE DATES

ACCIDENT YEAR	SUBMISSION YEAR	ESTB. WITH 250 OR MORE EMPLOYEES	ESTB. WITH 20 TO 249 EMPLOYEES	SUBMISSION DEADLINE
2016	2017	Form 300A	Form 300A	7/1/2017
2017	2018	Forms 300A, 300, and 301	Form 300A	7/1/2018
2018	2019	Forms 300A, 300, and 301	Form 300A	3/2/2019

OSHA intends to remove any personally identifiable information (PII) included in the submitted Form 300 log and Form 301 incident reports to protect individuals' privacy. For instance, the injured employee's name will not be collected, but his or her date of birth and date of hire, which appear on the Form 301, will be collected.

ESTABLISHMENT-SPECIFIC INJURY AND ILLNESS DATA PUBLICATION

OSHA intends to post establishment-specific injury and illness information on its website so that anyone can view the submitted information (less the PII) for any establishment.

OSHA believes that this will encourage more accurate reporting and drive down recordable case rates because, “public disclosure of data can be a powerful tool in changing behavior.” In other words, OSHA expects that showing the injury rates of particular establishments will encourage businesses to strive to lower these rates.

OSHA has dismissed the argument that the data released from Form 300A, such as the number of hours worked or staffing level at a particular establishment, might be confidential or proprietary information.

IMPACT ON FORM 301 REPORTING

Many companies use their workers’ compensation first report of injury or internal accident investigation and reporting forms in lieu of the OSHA-prescribed Form 301 for each recordable case. Employers may continue to use these equivalent forms if they contain the same information as that used in the OSHA Form 301.

OSHA did not detail how employers will transmit information contained in the Form 301, but they did specify the non-PII fields that the agency wants to collect. This will include all of the information on the Form 301 except: the employee’s name, employee address, name of the physician or health care provider, and the facility name and address if treatment was given away from the worksite. However, OSHA will collect the date of birth and date of hire of each worker who sustains a recordable injury or illness.

It appears that OSHA will prefer that the non-PII injury and illness information be provided in a flat file, such as Excel, txt, or CSV file format for all the recordable cases. However, OSHA may permit an establishment to upload the fields from each particular Form 301 onto its website.

EMPLOYEE RIGHTS TO REPORT INJURIES AND CONSEQUENCES OF RETALIATION

OSHA revised language in 1904.35 and 1904.36 to include three new provisions (effective August 10, 2016) that require employers to inform their employees:

- About the procedure to report work-related injuries and illnesses.
- Of their right to report work-related injuries and illnesses free from retaliation.
- That an employer is prohibited from discharging or in any manner discriminating against any employee for reporting a work-related injury or illness.

OSHA changed 1904.36 to expressly prohibit employers from discharging or in any manner discriminating against employees who report a work-related injury or illness. It is clear in the preamble to this rule that OSHA incorporated this language to add another enforcement tool to its arsenal against employers who raise real or perceived barriers to employees reporting injuries or illnesses.

In this rule’s preamble, OSHA suggests that injury rate-based safety incentive programs may be a barrier to reporting workplace injuries. OSHA also took issue with employers who discipline employees for late reporting of injuries and illnesses, citing several examples of cumulative disorders that may not be time and date-specific injuries. OSHA reasoned that it is not prohibiting employers from disciplining employees who violate workplace rules, but that a company’s disciplinary practices need to be applied consistently and regardless of whether or not the employee reported an injury. OSHA also commented that this final rule prohibits retaliatory adverse action taken against an employee simply because the employee reports a workplace injury or illness.



POST-INJURY DRUG TESTING PROGRAMS

OSHA believes that blanket post-injury drug testing (or the threat of such testing) deters reporting of work-related injuries or illnesses. OSHA suggests that a post-injury drug test that is required to comply with a state or federal law or regulation, such as in a safety-sensitive position or mandated by a state's workers' compensation law, would not be construed as retaliatory. However, in other cases, OSHA appears to have raised the bar by stating that there should "... be a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness." OSHA further suggests that drug testing must accurately identify whether or not an employee was impaired at the time of the accident – which may have reasonably contributed to the accident – and not simply that the employee recently used drugs.

With this final rule, OSHA is not specifically regulating injury rate-based safety incentive programs, employer accident reporting processes and procedures, or post-accident drug testing procedures. However, it is clear that OSHA's goal is for companies to change these management policies and practices if they raise a barrier to injury and illness reporting. By expressly prohibiting employers from implementing any impediments to an employee's right to report a workplace injury or illness, OSHA created a new "stick" to punish employers who do so.

Employers that do have a post-injury drug testing program, a restrictive accident reporting policy, or an injury rate-based safety incentive program, might want to consider the advice of a labor attorney on these very complicated matters.

Employers also should review their injury reporting procedure to ensure that it is a "reasonable" procedure to report work-related injuries and illnesses. According to OSHA, an injury or illness reporting procedure is "not reasonable if it would deter or discourage a reasonable employee from reporting."

Finally, employers should review injury and illness reporting procedures with all employees before the November 1, 2016 deadline. This obligation may be met by posting OSHA's "[Job Safety and Health – It's The Law](#)" workers' rights poster from April 2015 or later in each establishment.

IMPACT ON ESTABLISHMENTS LOCATED IN AN OSHA STATE PLAN STATE

This revised rule requires states and territories that operate their own state OSHA plan to adopt this rule within the next six months. State OSHA rules must be as restrictive as the federal rules. OSHA also modified Part 1902, which applies to all state OSHA plans, requiring each state plan to adopt identical requirements to the revised recordkeeping and reporting rules.

It is important to keep in mind that federal OSHA is collecting this electronic information and plans to share it with the states and territories that operate their own OSHA plans. By requiring the 25 state OSHA plans to adopt this rule, these states can initiate enforcement actions against employers who fail to electronically report injuries and illnesses.

WORKPLACE INJURIES AND ILLNESSES RECORD TYPES

OSHA requires the following three injury and illnesses records for employers with more than ten employees at any time during the year:

OSHA FORM 300

The OSHA Form 300 log is completed at each establishment, which is expected to be in operation for one year or longer, to record and maintain information about employee injuries and illnesses. An employer may keep one Form 300 log for all of its short-term establishments.

The Form 300 itself is divided into three general sections:

- Identity: Name, case number, and job title.
- Description: Date, injury location, and description of incident.
- Classification: Type of injury or illness, days away from work, and days of restricted activity.

OSHA FORM 301

If an injury or illness is recordable, the OSHA Form 301 — a supplementary incident report form — must be completed. The events leading up to the injury or illness, body parts affected, object(s) or substance(s) involved, and other relevant information must be included. Personal information on this form includes the home address, date of birth, and date of hire of the injured worker. A different form may be used if it contains the same information as the OSHA Form 301, such as state workers' compensation reports, insurance claim reports, or the employer's accident report form.

OSHA FORM 300A

The OSHA Form 300A is an annual summary of injuries and illnesses that occurred during the calendar year and includes information from the OSHA Form 300 log. The summary also displays the calendar year covered, establishment name and address, annual average number of employees, and total hours worked by all employees covered by the Form 300 log. The Form 300A does not display any of the personal information shown on the Form 300 log, but makes it easier to calculate incident rates.

The annual summary must be:

- Posted by February 1 and remain posted until April 30.
- Posted in areas where other notices are normally placed.
- Certified (signed) by a company executive, stating that the information is correct and completed to the best of the employer's ability.
- Retained for five years following the calendar year to which it relates.

If no cases are recorded during a reporting period, a summary must still be posted.

WHAT IS AN ESTABLISHMENT?

An establishment is a single physical location where business is conducted, services or industrial operations are performed, or where employees report to work, operate from, or from which they are paid.

Many organizations have multiple establishments, such as manufacturing sites, warehouses, offices, etc. For injury and illness recording purposes, every employee must be assigned to only one of these establishments – generally where the employee reports to work.

Organizations with multiple establishments cannot electronically submit all the injuries and illnesses reported by its employees on a single Form 300A summary or Form 300 log for the entire enterprise. A separate Form 300A summary must be prepared for each establishment. However, an employer's corporate headquarters may electronically submit the required separate reports for each of its establishments.

Whether this information along with the Form 300 log and Form 301 incident report will need to be reported electronically to OSHA depends on the NAICS code of that establishment and the number of employees who work (or report to work) at a particular establishment.

NAICS codes are based on a production-oriented or supply-based conceptual framework. Establishments are grouped into industries according to similarity in the processes used to produce goods and services.

An organization comprised of individual establishments performing distinct business functions – such as a corporate office, a warehouse, a manufacturing facility, and a regional sales office – would have different NAICS codes for each establishment.



Table 1: List of Industries Partially Exempt from OSHA Recordkeeping

NAICS Code and Industry Description					
4412	Other Motor Vehicle Dealers	5151	Radio and Television Broadcasting	5412	Accounting, Tax Preparation, Bookkeeping, and Payroll Services
4431	Electronics and Appliance Stores	5172	Wireless Telecommunications Carriers (except Satellite)	5413	Architectural, Engineering, and Related Services
4461	Health and Personal Care Stores	5173	Telecommunications Resellers	5414	Specialized Design Services
4471	Gasoline Stations	5179	Other Telecommunications	5415	Computer Systems Design and Related Services
4481	Clothing Stores	5181	Internet Service Providers and Web Search Portals	5416	Management, Scientific, and Technical Consulting Services
4482	Shoe Stores	5182	Data Processing, Hosting, and Related Services	5417	Scientific Research and Development Services
4483	Jewelry, Luggage, and Leather Goods Stores	5191	Other Information Services	5418	Advertising and Related Services
4511	Sporting Goods, Hobby, and Musical Instrument Stores	5211	Monetary Authorities - Central Bank	5511	Management of Companies and Enterprises
4512	Book, Periodical, and Music Stores	5221	Depository Credit Intermediation	5611	Office Administrative Services
4531	Florists	5222	Nondepository Credit Intermediation	5614	Business Support Services
4532	Office Supplies, Stationery, and Gift Stores	5223	Activities Related to Credit Intermediation	5615	Travel Arrangement and Reservation Services
4812	Nonscheduled Air Transportation	5231	Securities and Commodity Contracts Intermediation and Brokerage	5616	Investigation and Security Services
4861	Pipeline Transportation of Crude Oil	5232	Securities and Commodity Exchanges	6111	Elementary and Secondary Schools
4862	Pipeline Transportation of Natural Gas	5239	Other Financial Investment Activities	6112	Junior Colleges
4869	Other Pipeline Transportation	5241	Insurance Carriers	6113	Colleges, Universities, and Professional Schools
4879	Scenic and Sightseeing Transportation, Other	5242	Agencies, Brokerages, and Other Insurance Related Activities	6114	Business Schools and Computer and Management Training
4885	Freight Transportation Arrangement	5251	Insurance and Employee Benefit Funds	6115	Technical and Trade Schools
5111	Newspaper, Periodical, Book, and Directory Publishers	5259	Other Investment Pools and Funds	6116	Other Schools and Instruction
5112	Software Publishers	5312	Offices of Real Estate Agents and Brokers	6117	Educational Support Services
5121	Motion Picture and Video Industries	5331	Lessors of Nonfinancial Intangible Assets (except Copyrighted Works)	6211	Offices of Physicians
5122	Sound Recording Industries	5411	Legal Services	6212	Offices of Dentists
				6213	Offices of Other Health Practitioners
				6214	Outpatient Care Centers
				6215	Medical and Diagnostic Laboratories
				6244	Child Day Care Services
				7114	Agents and Managers for Artists, Athletes, Entertainers, and Other Public Figures
				7115	Independent Artists, Writers, and Performers
				7213	Rooming and Boarding Houses
				7221	Full-Service Restaurants
				7222	Limited-Service Eating Places
				7224	Drinking Places (Alcoholic Beverages)
				8112	Electronic and Precision Equipment Repair and Maintenance
				8114	Personal and Household Goods Repair and Maintenance
				8121	Personal Care Services
				8122	Death Care Services
				8131	Religious Organizations
				8132	Grantmaking and Giving Services
				8133	Social Advocacy Organizations
				8134	Civic and Social Organizations
				8139	Business, Professional, Labor, Political, and Similar Organizations

Table 2: Establishments With 20 - 249 Employees Which Must Electronically Submit OSHA Form 300A

NAICS Code and Industry Description							
11	Agriculture, Forestry, Fishing and Hunting	4811	Scheduled Air Transportation	4922	Local Messengers and Local Delivery	6233	Community Care Facilities for the Elderly
22	Utilities	4841	General Freight Trucking	4931	Warehousing and Storage	6239	Other Residential Care Facilities
23	Construction	4842	Specialized Freight Trucking	5152	Cable and Other Subscription Programming	6242	Community Food and Housing, and Emergency and Other Relief Services
31-33	Manufacturing	4851	Urban Transit Systems	5311	Lessors of Real Estate	6243	Vocational Rehabilitation Services
42	Wholesale Trade	4852	Interurban and Rural Bus Transportation	5321	Automotive Equipment Rental and Leasing	7111	Performing Arts Companies
4413	Automotive Parts, Accessories, and Tire Stores	4853	Taxi and Limousine Service	5322	Consumer Goods Rental	7112	Spectator Sports
4421	Furniture Stores	4854	School and Employee Bus Transportation	5323	General Rental Centers	7121	Museums, Historical Sites, and Similar Institutions
4422	Home Furnishings Stores	4855	Charter Bus Industry	5617	Services to Buildings and Dwellings	7131	Amusement Parks and Arcades
4441	Building Material and Supplies Dealers	4859	Other Transit and Ground Passenger Transportation	5621	Waste Collection	7132	Gambling Industries
4442	Lawn and Garden Equipment and Supplies Stores	4871	Scenic and Sightseeing Transportation, Land	5622	Waste Treatment and Disposal	7211	Traveler Accommodation
4451	Grocery Stores	4881	Support Activities for Air Transportation	5629	Remediation and Other Waste Management Services	7212	RV (Recreational Vehicle) Parks and Recreational Camps
4452	Specialty Food Stores	4882	Support Activities for Rail Transportation	6219	Other Ambulatory Health Care Services	7213	Rooming and Boarding Houses
4521	Department Stores	4883	Support Activities for Water Transportation	6221	General Medical and Surgical Hospitals	7223	Special Food Services
4529	Other General Merchandise Stores	4884	Support Activities for Road Transportation	6222	Psychiatric and Substance Abuse Hospitals	8113	Commercial and Industrial Machinery and Equipment (Except Automotive and Electronic) Repair and Maintenance
4533	Used Merchandise Stores	4889	Other Support Activities for Transportation	6223	Specialty (Except Psychiatric and Substance Abuse) Hospitals	8123	Dry-Cleaning and Laundry Services
4542	Vending Machine Operators	4911	Postal Service	6231	Nursing Care Facilities		
4543	Direct Selling Establishments	4921	Couriers and Express Delivery Services	6232	Residential Mental Retardation, Mental Health and Substance Abuse Facilities		

WHERE CAN I FIND MORE INFORMATION?

For more information about the new reporting requirements and updated industry lists, visit OSHA's dedicated [webpage](#).

MRC CAN HELP

Marsh Risk Consulting's (MRC) Workforce Strategies Practice and Risk IQ data consulting practice can conduct health and safety recordkeeping and reporting system audits and provide implementation support and training if your organization is concerned about the final rule and OSHA's impending compliance deadlines. They also can assist with designing your data capture and the workflow needed for efficient and accurate electronic submissions to OSHA. Additionally, our experts can help with assessing the current state of your health and safety programs and developing strategic solutions aimed at reducing injury rates and associated costs.

For more information about these solutions, please contact your local MRC or Marsh representative.

You can also speak with one of our MRC experts by calling us at 866-9AtRisk (866-928-7475) or by sending an e-mail to at.risk@marsh.com.

Additional information can be found on marshriskconsulting.com and www.marsh.com.

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