

OSHA UPDATE

OSHA Targets Inaccurate Recordkeeping

by [Rod Smith](#) and [Pat Miller](#)

On October 1, 2009, OSHA announced a new initiative targeting employers who either fail to report or who underreport work-related injuries and illnesses. Although the reach of this initiative is limited, it sends a message to all employers that OSHA intends to strongly enforce recordkeeping violations. All employers, especially those covered by this initiative, are encouraged to review the accuracy of their recordkeeping practices.

OSHA requires nearly all employers with more than 10 employees to record on-the-job injuries and illnesses on the OSHA 300 Form. A year-end summary of this information, known as the OSHA 300A Form, must then be certified and posted. OSHA 300 data is used for a variety of reasons including the identification of workplaces for OSHA inspections. Some academic studies and two recent Congressional committee reports have asserted that employers are not reporting or are underreporting on their OSHA 300 Forms, particularly in industries that have a historically high rate of injuries and illnesses.

To address this issue, OSHA issued its Injury and Illness Recordkeeping National Emphasis Program (“NEP”) on September 30, 2009. The NEP will operate as a pilot program for one year to intensively inspect selected “low rate” facilities in traditionally “high rate” industries. The program will also be tested at five construction sites throughout the country. The selected industries and their respective NAICS codes are:

Selected Industry	NAICS
Animal (except poultry) slaughtering	311611
Scheduled passenger air transportation	481111
Steel foundries (except investment)	331513
Other nonferrous foundries (except die-casting)	331528
Concrete pipe manufacturing	327332
Soft drink manufacturing	312111
Couriers	492110
Manufactured home (mobile home) manufacturing	321991
Rolling mill machinery and equipment manufacturing	333516
Iron foundries	331511
Nursing care facilities	623110

Fluid milk manufacturing	311511
Seafood canning	311711
Marine cargo handling	488320
Copper foundries (except die-casting)	331525
Bottled water manufacturing	312112
Refrigerated warehousing and storage	493120
Motor vehicle seating and interior trim manufacturing	336360
Pet and pet supplies stores	453910
Poultry Processing	311615
Support Activities for Animal Production	115210

To qualify for inspection under the NEP, a workplace must be in a selected industry, have 40 or more employees, and show a Days Away, Restricted or Transferred (DART) rate of 4.2 or below based on 2007 OSHA 300 data.

Employers selected under this program will face a lengthy OSHA inspection involving the production and review of medical, worker's compensation, insurance and other records pertaining to injuries and illnesses, both on and off the job. The program calls for extensive interviews of the employer-designated recordkeeper, employees and management. Depending on the circumstances, OSHA may expand the scope of the recordkeeping inspection to a larger sample size and/or investigate other safety and health hazards on the job. Inspectors are directed to look for recordkeeping cases which may be ergonomically related, suggesting that OSHA may use this program to resurrect enforcement of ergonomic hazard violations in the workplace.

Targeted employers faced with a recordkeeping inspection under this program are well advised to seek legal or other competent advice immediately. OSHA's extensive requests for medical information may raise significant legal issues regarding the confidentiality and release of that information. The prospect of numerous employee and management interviews raises a concern that all witnesses be adequately prepared and represented where appropriate. Citations and penalties for non-compliance could be significant.

Even though most employers will not face an inspection under the NEP, the program sends a strong signal that OSHA is moving toward tougher enforcement of recordkeeping violations, particularly in cases of significant underreporting. If successful, this pilot NEP may be expanded to other industries in the future. Despite a 2001 revision and clarification of the rules, OSHA recordkeeping remains far from an exact science and at times can be difficult. Compliance is always the best defense to an OSHA inspection, and employers should ensure that they have the right procedures and personnel in place to ensure complete and accurate recordkeeping.

[Click here for a copy of OSHA's Recordkeeping NEP](#)

A copy is also found at the following link: www.osha.gov/OshDoc/Directive_pdf/CPL_02_09-08.pdf

Who We Are

Rodney Smith, Pat Miller, and Chuck Newcom are part of Sherman and Howard's Labor & Employment Law Department practicing in the areas of occupational safety and health law. We routinely appear before the federal Occupational Safety and Health Review Commission, the federal Mine Safety and Health Review Commission, and state occupational safety and health boards.

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