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OSHA Clarifies Employers' Recordkeeping Obligations

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On December 19, 2016, the Occupational Safety and Health Administration (OSHA) issued a final rule clarifying its position that an employer's duty to record work-related injuries and illnesses is an ongoing obligation that continues for the full five-year record retention period. Under this new rule, OSHA claims the authority to cite employers for recordkeeping violations for up to six months after the five-year retention period expires.

The Background

OSHA amended its recordkeeping rule in response to a 2012 decision (popularly known as *Volks II*) by the U.S. Court of Appeals for the District of Columbia. By way of background, the Occupational Safety and Health Act provides that "no citation may be issued … after the expiration of six months following the occurrence of any violation." The Act also requires employers to "make, keep and preserve" injury and illness records "as the Secretary prescribes," and OSHA's recordkeeping standard requires employers to maintain injury and illness records for five years.

In *Volks II*, OSHA argued that the statute of limitations did not bar it from citing an employer for a failure to record injuries that, for example, occurred 54 months before the issuance of the citation. Instead, OSHA claimed that the recordkeeping provision of the Act and OSHA's recordkeeping rule essentially extended the six-month statute of limitations by five years. The court firmly rejected OSHA's interpretation, holding that the Act "clearly renders the citations untimely and [OSHA's] argument to the contrary relies on an interpretation that is neither natural nor consistent with our precedents." The Act's six-month statute of limitations is six months, not five years and six months.

However, under the new rule, OSHA takes the position that an employer's duty to record an injury or illness continues for the full duration of the record retention and access period, i.e., for five years *after* the end of the calendar year in which the injury or illness became recordable. This means that if an employer initially fails to record a recordable injury or illness, the employer still has an ongoing duty to record that injury or illness for five years. OSHA's position is that the employer's recording obligation does not expire simply because the employer failed to record the case when it was first required to do so. The rule provides that, as long as an employer fails to comply with its ongoing duty to record an injury or illness and therefore with its obligation to maintain accurate records, the employer's violation of OSHA's recordkeeping requirements is ongoing and continues to occur every day.

An employer's recordkeeping obligations remain the same under the final rule: to record injuries and illnesses within seven days and maintain records for five years. The new rule clarifies, as OSHA would put it, OSHA's position that an employer's obligation to make the record continues throughout the five-year record retention period, even if the employer fails to meet its initial recording obligation.

What This Means to You

Several industry groups have objected to the new rule, and it may be challenged. Additionally, Congress may invalidate the rule under the Congressional Review Act, and the incoming administration may delay its enforcement. As of now, however, OSHA's new rule will take effect on January 18, 2017.

Given OSHA's present position, it is recommended that employers retain copies of their injury and illness logs for five and one-half years. In most inspections, OSHA compliance officers request copies of injury and illness logs for three years. In complying with that request, employers need not voluntarily produce logs older than three years in order to comply with the new rule.

Contact Us

For more information about OSHA recordkeeping requirements and how they impact your business, contact a member of Husch Blackwell's Labor & Employment team.