OSHA’s Revised Recordkeeping Rule, and Post-Incident Drug Test Issue

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Law, 91-596, OSH Act (in the United States Code)

Standards/Regulations

Policy: Instruction/Notice
(CPL 02-00-159 Effective Date: October 1, 2015, Subject: Field Operations Manual(FOM));

Letters of Interpretation, Memorandums, Guidance, …
Occupational Safety and Health Act

Public Law 91-596
84 STAT. 1590
91st Congress, S.2193
December 29, 1970

29 United States Code 651
Recordkeeping

2 Sections of the Occupational Safety and Health Act

Section 8 Inspections, Investigations, and Recordkeeping

Section 24 Statistics
(c)(1) Each employer shall make, keep and preserve, and make available to the Secretary or the Secretary of Health and Human Services, such records regarding his activities relating to this Act ..., may prescribe by regulation as necessary or appropriate for the enforcement of this Act or for developing information regarding the causes and prevention of occupational accidents and illnesses...
29 CFR 1904 is a regulation
(c)(1) ... The Secretary shall also issue regulations requiring that employers, through posting of notices or other appropriate means, keep their employees informed of their protections and obligations under this Act, including the provisions of applicable standards ...
(a) In order to further the purposes of this Act, the Secretary, in consultation with the Secretary of Health and Human Services, shall develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics.
(a) … The Secretary shall compile **accurate** statistics on work injuries and illnesses which shall include all disabling, serious, or significant injuries and illnesses, whether or not involving loss of time from work, other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job. …
(e) On the basis of the records made and kept pursuant to section 8(c) of this Act, employers shall file such reports with the Secretary as he shall prescribe by regulation, as necessary to carry out his functions under this Act.
Subpart C
Recordkeeping Forms and Recording Criteria

36 FR 12612  July 2  1971
29 CFR 1904

January 19, 2001
Effective January 1, 2002

Standard is written in
Question and Answer Format
Improve Tracking of Workplace Injuries and Illnesses

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Final Rule

Effective on January 1, 2017, except 1904.35 and 1904.36, which become effective on August 10, 2016
Federal Register Vol. 81, No. 98
May 20, 2016
ACTION: Final Rule; CORRECTION

Occupational Safety and Health Administration
29 CFR Parts 1902; 1904
[Docket No. OSHA–2013–0023]
RIN 1218–AC49

Improve Tracking of Workplace Injuries and Illnesses

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.
ACTION: Final Rule; Correction
Effective August 10, 2016

Need for Correction

Inadvertently 1904.35(b)(2)
Was designated as reserved.
This document reinserts that paragraph
1904.35(b)(2) Do I have to give my employees and their representatives access to the OSHA injury and illness records?
Yes, your employees, former employees, their personal representatives, and their authorized employee representatives have the right to access the OSHA injury and illness records, with some limitations, …
ACTION: Final Rule;

Clarification of Employer's Continuing Obligation To Make and Maintain an Accurate Record of Each Recordable Injury and Illness

Effective January 18, 2017

Revised Sections

1904.0, 4, 29, 32, 33, 34, 35, 40
ACTION: Final Rule; 
Clarification of Employer's Continuing Obligation
To Make and Maintain an Accurate Record of Each
Recordable Injury and Illness
Effective January 18, 2017

Need
… to clarify that the duty to make and maintain accurate records of work-related injuries and illnesses is an ongoing obligation…
Prior

1904.0 Purpose
The purpose of this rule (Part 1904) is to require employers to record and report work-related fatalities, injuries and illnesses.

REVISED

1904.0 The purpose of this rule (part 1904) is to require employers to make and maintain accurate records of and report work-related fatalities, injuries, and illnesses, and to make such records available to the Government and to employees and their representatives so that they can be used to secure safe and healthful working conditions. For purposes of this part, accurate records are records of each and every recordable injury and illness that are made and maintained in accordance with the requirements of this part.
(a) Basic requirement. Each employer required by this part to keep records of fatalities, injuries, and illnesses must record each fatality, injury, and illness that:

(1) Is work-related; and
(2) Is a new case; and
(3) Meets one or more of the general recording criteria of §1904.7 or the application to specific cases of §1904.8 through §1904.12
1904.35(b)(2) Do I have to give my employees and their representatives access to the OSHA injury and illness records?
Yes, your employees, former employees, their personal representatives, and their authorized employee representatives have the right to access accurate OSHA injury and illness records, with some limitations, as discussed below.
Improve Tracking of Workplace Injuries and Illnesses

Of the 18 questions 5 main questions address Adverse action or discipline that may discourage an employee from reporting and injury or illness. In this group is the mention of drug testing.
OSHA received a number of comments expressing concern that this section of the final rule will have a chilling effect on employers disciplining employees who violate safety rules, thereby contributing to a less safe work environment. It is important to note that the final rule prohibits employers only from taking adverse action against an employee because the employee reported an injury or illness. Nothing in the final rule prohibits employers from disciplining employees for violating legitimate safety rules, even if the same employee who violated a safety rule also was injured as a result of that violation and reported that injury or illness (provided that employees who violate the same work rule are treated similarly without regard to whether they also reported a work-related illness or injury).
Effective on January 1, 2017, Except 1904.35 and 1904.36, which become effective on August 10, 2016

From the Preamble p 29672:

… Nothing in the final rule prohibits employers from disciplining employees for violating legitimate safety rules, even if the same employee who violated a safety rule also was injured as a result of that violation and reported that injury or illness (provided that employees who violate the same work rule are treated similarly without regard to whether they also reported a work-related illness or injury)…
Commenter's also pointed to policies mandating automatic post-injury drug testing as a form of adverse action that can discourage reporting. See, e.g., Exs. 1675, 1695. Although drug testing of employees may be a reasonable workplace policy in some situations, it is often perceived as an invasion of privacy, so if an injury or illness is very unlikely to have been caused by employee drug use, or if the method of drug testing does not identify impairment but only use at some time in the recent past, requiring the employee to be drug tested may inappropriately deter reporting.
Some commenter's stated their belief that drug testing of employees is important for a safe workplace;
Post-accident drug testing is a critical part of any satisfactory company safety and health program.

... purpose of protecting all workers on the jobsite, not just the would-be users.

[sic Also], being found under the influence of a drug following post-accident testing is often all it takes to prompt an affected employee to seek help through an employee assistance program or some other source.
From the Preamble p 29673:

... some [sic Commenter's] expressed concern that OSHA planned a wholesale ban on drug testing (Exs. 1667, 1674) ...
... To the contrary, this final rule does not ban drug testing of employees...
OSHA believes the evidence in the rulemaking record shows that blanket post-injury drug testing policies deter proper reporting ...
... this final rule does not ban drug testing of employees ...
However, the final rule does prohibit employers from using drug testing (or the threat of drug testing) as a form of adverse action against employees who report injuries or illnesses.
Employers need not specifically suspect drug use before testing, but there should be a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness in order for an employer to require drug testing …
... An employee was operating a powered industrial truck (a "walkie"). Her foot became jammed between the walkie and a pallet and her steel toed shoe bent and cut the top of her toe. She received four stitches for the laceration. At the time of the incident, the employee was taking prescription medication for a non-work related condition...
... Section 1904.5(a) states, [the employer] must consider an injury or illness to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition ...
The injury described in your scenario resulted from operation of workplace equipment. ...
… Under Section 1904.5(b)(2)(ii),… an event or exposure in the work environment can play no part in the injury. The facts of your scenario do not meet this exception because the injury described resulted from operation of workplace equipment … [sic HAS TO BE RECORDED]
… the exemption to work relatedness under Section 1904.5(b)(2)(vi) would not apply for the same reason. Under Section 1904.5(b)(2)(vi) you are not required to record an injury or illness if the injury or illness is solely the result of self-medication for a non-work-related condition …

[sic HAS TO BE RECORDED]
1904.5(b)(2)

Are there situations where an injury or illness occurs in the work environment and is not considered work-related?

Yes, an injury or illness occurring in the work environment that falls under one of the following exceptions is not work-related, and therefore is not recordable.
Table of 9 Exemptions

(ii) The injury or illness involves signs or symptoms that surface at work but result solely from a non-work-related event or exposure that occurs outside the work environment.

(vi) The injury or illness is solely the result of personal grooming, self medication for a non-work-related condition, or is intentionally self-inflicted.
...his hand was caught between two objects. After receiving treatment for the injury, the employee was immediately given a post-accident drug test. The results of the drug test indicated the employee was intoxicated from alcohol ...

Letter of Interpretation  March 21, 2016

…OSHA's Office of Occupational Medicine and Nursing … concluded that the intake of alcohol does not treat the disorder of alcoholism. Instead, drinking alcohol is a manifestation of the disorder. Accordingly, the injury described in the scenario above does not meet the exception in Section 1904.5(b)(2)(vi) for self-medication.

Letter of Interpretation  March 21, 2016
...drinking alcohol is a manifestation of the disorder. Accordingly, the injury described in the scenario above does not meet the exception [sic for work related] in 1904.5(b)(2)(vi) for self-medication. Has to Be Recorded
...commenter's also raised the concern that the final rule will conflict with drug testing requirements contained in workers' compensation laws ...

If an employer conducts drug testing to comply with the requirements of a state or federal law or regulation, the employer's motive would not be retaliatory and the final rule would not prohibit such testing ...

Section 4(b)(4) of the Act prohibits OSHA from superseding or affecting workers' compensation laws...
Section 11(c) of the Act prohibits you from discriminating against an employee for reporting a work-related fatality, injury or illness. That provision of the Act also protects the employee who files a safety and health complaint, asks for access to the Part 1904 records, or otherwise exercises any rights afforded by the OSH Act.
(a) Basic requirement. Your employees and their representatives must be involved in the recordkeeping system in several ways.

(a)(1) You must inform each employee of how he or she is to report a work-related injury or illness to you.

(a)(2) You must provide limited access to your injury and illness records for your employees and their representatives.
(a)(2) You must provide limited access to your injury and illness records for your employees and their representatives.

(a)(3) You must provide access to your injury and illness records for your employees and their representatives as described in paragraph (b)(2) of this section.
You must set up a way for employees to report work-related injuries and illnesses promptly; and

You must establish a reasonable procedure for employees to report work-related injuries and illnesses promptly and accurately. A procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness;
(b)(1)(ii) You must tell each employee how to report work-related injuries and illnesses to you.

(b)(1)(iii) You must inform each employee of your procedure for reporting work-related injuries and illnesses;

(b)(1)(iii) (A) Employees have the right to report work-related injuries and illnesses; and ...
(b)(1)(ii) You must inform each employee of your procedure for reporting work-related injuries and illnesses;

(b)(1)(iii) You must inform each employee that:

(b)(1)(iii) (A) Employees have the right to report work-related injuries and illnesses; and …

How to Inform

Federal Register Vol. 81, No. 92, May 12, 2016, Final Rule

Preamble p 29688

...inform...employees of their right to report injuries and illnesses. This requirement can be met by posting a recently-revised version of the OSHA Poster...
All workers have the right to:

- A safe workplace.
- Raise a safety or health concern with your employer or OSHA, or report a work-related injury or illness, without being retaliated against.
- Receive information and training on job hazards, including all hazardous substances in your workplace.
- Request an OSHA inspection of your workplace if you believe there are unsafe or unhealthy conditions. OSHA will keep your name confidential. You have the right to have a representative contact OSHA on your behalf.
- Participate (or have your representative participate) in an OSHA inspection and speak in private to the inspector.
- File a complaint with OSHA within 30 days (by phone, online, or by mail) if you have been retaliated against for using your rights.
- See any OSHA citations issued to your employer.
- Request copies of your medical records, tests that measure hazards in the workplace, and the workplace injury and illness log.

Employers must:

- Provide employees a workplace free from recognized hazards. It is illegal to retaliate against an employee for using any of their rights under the law, including raising a health and safety concern with you or with OSHA, or reporting a work-related injury or illness.
- Comply with all applicable OSHA standards.
- Report to OSHA all work-related fatalities within 8 hours, and all inpatient hospitalizations, amputations and losses of an eye within 24 hours.
- Provide required training to all workers in a language and vocabulary they can understand.
- Prominently display this poster in the workplace.
- Post OSHA citations at or near the place of the alleged violations.

FREE ASSISTANCE to identify and correct hazards is available to small and medium-sized employers, without citation or penalty, through OSHA-supported consultation programs in every state.

Contact OSHA. We can help.

1-800-321-OSHA (6742) · TTY 1-877-889-5627 · www.osha.gov
if OSHA determines that the employer has not posted the poster and has not otherwise informed employees… CSHO will provide the employer a copy of the poster.

If the employer posts the poster, immediate abatement is accomplished and no citation will be issued.

If the employer does not post the poster, a citation may be issued.
(b)(1)(iii) (B) Employers are prohibited from discharging or in any manner discriminating against employees for reporting work-related injuries or illnesses; and

(b)(1)(iv) You must not discharge or in any manner discriminate against any employee for reporting a work-related injury or illness.
From the Preamble p 29627:

... new provision 1904.35(b)(1)(iv) is that it provides OSHA with additional enforcement tools to promote the accuracy and integrity of the injury and illness records employers are required to keep under part 1904. For example, under section 11(c), OSHA may not act against an employer unless an employee files a complaint. ...

...
OSHA will be able to cite an employer for taking adverse action against an employee for reporting an injury or illness, even if the employee did not file a complaint...
1910.1020
Access to Employee Exposure and Medical Records is different from
1904.9 (a) ... If an employee is medically removed under the medical surveillance requirements of an OSHA standard, you must record the case on the OSHA 300 Log...
(c)(6)(ii) “Employee medical record” does not include medical information in the form of:

1020(c)(6)(ii)(D) Records concerning voluntary employee assistance programs (alcohol, drug abuse, or personal counseling programs) if maintained separately from the employer's medical program and its records ...
POLICY

OSHA Instruction  CPL 02-00-160
Effective Date: August 2, 2016
Subject: Field Operations Manual (FOM)

No mention of Drug Testing

Chapter 3 Inspection Procedures

VI. Review Of Records

Chapter 4 Violations
Chapter 9 Complaint and Referral Processing
Chapter 10 section II-Construction (Reserved)
Chapter 3 INSPECTIONS III. B. 2. CSHOs shall use established written guidelines and criteria, such as Agency directives and LEPs, in conjunction with information gathered during the records or program review and walkthrough inspection, to determine whether expanding the scope of an inspection is warranted.

Chapter 4 VIOLATIONS. B. 4. c.
All relevant documents (e.g., autopsy reports, police reports, job specifications, site plans, OSHA-300/301, equipment manuals, employer work rules, employer sampling results, employer safety and health programs, and employer disciplinary policies).

From the Preamble p 29672:

...Vague work rules are particularly subject to abuse by the employer ...

... vague work rules such as work carefully or maintain situational awareness ...

...Vague work rules are particularly subject to abuse by the employer ... such as work carefully or maintain situational awareness ...

... legitimate workplace safety rule should require or prohibit specific conduct related to employee safety or health so it can be applied fairly and not used as a pretext for retaliation...
(a) At the start of each inspection, the CSHO shall review the employer’s injury and illness records for five prior calendar years, record the information on a copy of the OSHA-300 screen, and enter the employer’s data using the OIS Application on the NCR (micro). This shall be done for all general industry, construction, maritime, and agriculture inspections and investigations.
...There is little or no expectation of privacy in records that are required by the government to be kept and made available...The requirement serves a substantial government interest in the health and safety of workers, has a strong statutory basis, and rests on reasonable, objective criteria for determining which employers must report information to OSHA...
VI. A. 5. Construction.
For construction inspections/investigations, only the OSHA-300 information for the prime/general contractor needs to be recorded (where such records exist and are maintained).

It will be left to the discretion of the Area Director or the CSHO as to whether OSHA-300 data should also be recorded for any of the subcontractors.
VIII. Closing Conference.
B. 3. CSHOs shall discuss the strengths and weaknesses of the employer’s occupational safety and health system and any other applicable programs, and advise the employer of the benefits of an effective program and provide information, such as OSHA’s website, describing program elements.
X. Penalty and Citation Policy for Parts 1903 and 1904 Regulatory Requirements

D. Injury and Illness Records and Reporting under Part 1904

1. Part 1904 violations are always other-than-serious.

| Maximum Amount | Other-Than-Serious | $12,471 per violation |

Expected Penalty for 1904.35(i)to(iv)$5345

OSHA MEMORANDUM Regional Administrators
(c) If recordkeeping deficiencies or unsound employer safety incentive policies are discovered, the CSHO and the Area Director (or designee) may request assistance from the Regional Recordkeeping Coordinator. See Richard E. Fairfax Memo, Employer Safety Incentive and Disincentive Policies and Practices (March 12, 2012) at: http://www.osha.gov/as/opa/whistleblowermemo.html
... Incentive programs that discourage employees from reporting their injuries are problematic because, under section 11(c), an employer may not "in any manner discriminate" against an employee because the employee exercises a protected right, such as the right to report an injury...
If an employee of a firm with a safety incentive program reports an injury, the employee, or the employee's entire work group, will be disqualified from receiving the incentive, which could be considered unlawful discrimination. ...
... if the incentive is great enough that its loss dissuades reasonable workers from reporting injuries, the program would result in the employer's failure to record injuries that it is required to record under Part 1904......a referral for a recordkeeping investigation should be made ...
...If OSHA determines that the real reason for the discipline was the report of an injury or illness, OSHA may issue a citation under section 1904.35(b)(1)(iv)
...

OSHA Memorandum for Regional Administrators, October 19, 2016

Interpretation of 1904.35(b)(1)(i) and (iv)
https://www.osha.gov/recordkeeping/finalrule/interp_recordkeeping_101816.html
... A rigid prompt-reporting requirement that results in employee discipline for late reporting even when the employee could not reasonably have reported the injury or illness earlier would violate section 1904.35(b)(1)(iv) ...
Evidence that the employer consistently applied the rule when employees violated it regardless of whether the employees also reported a work-related injury or illness is evidence that the real reason for the discipline was the work rule violation, not the injury or illness report ...
Interpretation of 1904.35(b)(1)(i) and (iv)
https://www.osha.gov/recordkeeping/finalrule/interp_recordkeeping_101816.html

... the rule does not apply to drug testing employees for reasons other than injury-reporting ...
... [sic OSHA] inquiry will be whether the employer had a reasonable basis for believing that drug use by the reporting employee could have contributed to the injury or illness...
… … [sic OSHA inquiry]
the drug test
could provide insight
into why the injury or illness occurred…
… OSHA will only consider whether the drug test is capable of measuring impairment at the time the injury or illness occurred where such a test is available.
Therefore, at this time, OSHA will consider this factor for tests that measure alcohol use, but not for tests that measure the use of any other drugs …
... if the employer only tested the injured employees but did not test ... other employees whose conduct could have contributed to the incident, such disproportionate testing of reporting employees would likely violate section 1904.35(b)(1)(iv) ...
drug testing an employee whose injury could not possibly have been caused by drug use would likely violate section 1904.35(b)(1)(iv) ...
However, the final rule does prohibit employers from using drug testing (or the threat of drug testing) as a form of adverse action against employees who report injuries or illnesses.
If the employer cancels the raffle in a particular month simply because an employee reported a lost-time injury without regard to the circumstances of the injury, such a cancellation would likely violate section 1904.35(b)(1)(iv) because it would constitute adverse action against an employee simply for reporting a work-related injury ...
… raffling off a $500 gift card each month in which employees universally complied with legitimate workplace safety rules such as using required hard hats and fall protection and following lockout-tagout procedures … rewarding employees for participating in safety training or identifying unsafe working conditions would not violate the rule…
1904.32 Annual summary.
... no later than February 1 of the year following the year covered by the records and keep the posting in place until April 30...
<table>
<thead>
<tr>
<th>Year for</th>
<th>250 employees or more</th>
<th>20-249 employees</th>
<th>1-19 employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>2017 for 2016 By July 1</td>
<td>Form 300A</td>
<td>Form 300A</td>
<td>Records to OSHA only if OSHA notifies you to do so for an individual data collection</td>
</tr>
<tr>
<td>2018 for 2017 By July 1</td>
<td>Form 300A 300 301</td>
<td>Form 300A</td>
<td>Records to OSHA only if OSHA notifies you to do so for an individual data collection</td>
</tr>
<tr>
<td>2019 for 2018 - on By March 2</td>
<td>Form 300A 300 301</td>
<td>Form 300A</td>
<td>Records to OSHA only if OSHA notifies you to do so for an individual data collection</td>
</tr>
</tbody>
</table>
OSHA Injury and Illness Recordkeeping and Reporting Requirements

Recordkeeping Requirements

Many employers with more than 10 employees are required to keep a record of serious work-related injuries and illnesses. (Certain low-risk industries are exempted.) Minor injuries requiring first aid only do not need to be recorded.

- How does OSHA define a reportable injury or illness?
- How does OSHA define first aid?

This information helps employers, workers and OSHA evaluate the safety of a workplace, understand industry hazards, and implement worker protections to reduce and eliminate hazards—preventing future workplace injuries and illnesses.

Maintaining and Posting Records
http://www.ecfr.gov
Current to within a few days
with links to current
Federal Registers Revisions
29 CFR
in the range 1900-1910
Part 1904 is in this range