An Industry View and Update of OSHA's New Recordkeeping and Reporting Rule

By Rick L. Ingram, Chairperson, National STEPS Network

In the January, 2017 issue of Well Servicing Magazine, Doug Huddleston with OSHA wrote an article detailing the electronic reporting of injuries and illnesses. I am touching on a portion of that information, but this article will primarily focus on the portions of the recordkeeping rule dealing with employee involvement, drug testing, employee disciplinary actions and anti-retaliation, and safety incentives and the use of leading and lagging metrics.

I spoke to OSHA's Dave Schmidt with the OSHA Office of Statistical Analysis in DC in preparation for this article. Some employers and advisors seem to be confusing parts of the new final recordkeeping rule with statistical summary data, which has been in place for over twenty years. I want to start with that.

The Occupational Safety and Health Administration (OSHA) collected work-related injury and illness data from employers meeting specific industry and employment size criteria from 1996 through 2011. The "OSHA Data Initiative" or ODI is available at: https://www.osha.gov/pls/odi/establishment_search.html. The data provided was used by OSHA to calculate establishment specific injury and illness incidence rates.

OSHA enforcement data including corporate settlement agreements, inspections and citations, fatality reports and Severe Violator Enforcement Program data are all available on OSHA.gov under the enforcement tab. A large amount of employer-specific summary data has been available for many years.

Now let's talk about OSHA 29 CFR 1904, *Recording and Reporting Occupational Injuries and Illnesses,* which has been in place for forty years. Those rules were recently updated to allow OSHA the authority for the electronic collection and publication of case-specific injury, illness and fatality data based on employer reporting, and to enable OSHA to cite employers in cases of retaliation against workers for reporting injuries and illnesses. OSHA's intent with the "Improve Tracking of Workplace Injuries and Illnesses" final rule is to allow the agency to receive more accurate and timely data, and enable researchers to better study injury causation, identify new workplace safety hazards before they become widespread and evaluate the effectiveness of injury and illness prevention activities. The rule specifies that all personal information will be removed before this data is made public.

The final rule states that establishments with at least 250 workers must electronically submit to OSHA – on an annual basis – information from their OSHA Forms 300, 300A and 301. Establishments with 20 to 249 employees in certain high-hazard industries will be required to submit information from their annual summary form, OSHA Form 300A.

Note 1: Court challenges are pending regarding the publishing of case specific data from electronically reported OSHA 300, 301 and 301A data, as well as the anti-retaliation portion of the final rule. AESC will update its members when this is resolved.

Note 2: Affected employers do not have to comply with the electronic submission of data to OSHA until the Department of Labor publishes a separate document in the Federal Register announcing that the Office of Management and Budget has approved them, and the website is completed. This is all under review by the new administration.

Note 3: US Onshore Upstream is not included in the high hazard industry category with respect to the small establishment reporting requirements.

The following are specific portions of the recordkeeping rule which may likely affect your business. Please bear in mind that I am providing a few personal opinions along the way which, as a former business owner and manager I believe are worth considering and will help lead you to a practical application of the rule.

Employee Involvement: The final rule requires an employer to inform employees of their right to report work-related injuries and illnesses free from retaliation. An employer also should be able to provide proof that the employees received this information. A simple way for employers to meet this requirement is by posting the April, 2015 or later version of OSHA's Job Safety and Health: It's the Law poster and reviewing it with the workers.

The previous version of the recordkeeping rule required employers to establish a reasonable way for employees to report work-related injuries and illnesses promptly, but this rule goes on to say that a procedure is not reasonable if it would deter or discourage a reasonable employee from reporting a workplace injury or illness. Employers must establish their own procedures for reporting and should ensure their procedure accounts for work-related injuries and illnesses that build up over time, have latency periods between exposure and the appearance of symptoms, or do not initially appear serious enough to the employee to require reporting immediately. A procedure that requires immediate reporting without accounting for these circumstances would not be considered reasonable by OSHA. Another thing to consider is whether the procedure makes reporting so difficult or complicated that an employee is discouraged from reporting an injury or illness. For example, it may be considered unreasonable if an employee must travel a significant distance to report, or must report the same injury or illness multiple times to multiple levels of management.

*In my opinion, t*he key to compliance and success in dealing with this rule is communication between employer and employee. Once your company's program is developed, consider explaining your procedures as well as the "why" with the workers. One of the challenges we deal with in case management is an injury or illness which is not reported in a timely manner, but gets worse with time, such as a simple first aid leading to an infection causing a more serious illness or injury. This is not OSHA's intent. I always told my employees that they will never get into trouble for reporting an incident, but not reporting an incident complicates everything. A culture of open and honest reporting without the threat of retaliation is imperative, regardless of this rule. Developing that type of culture takes trust and time, and is a true test of good management leadership with many benefits for employers and employees.

Drug Testing: There has been a lot of concern about this portion of the final rule. The fact is that the rule does not prohibit drug testing of employees, including DOT drug testing rules or any other federal or state law. It only prohibits employers from using drug testing, or the threat of drug testing, to retaliate against an employee for reporting an injury or illness. Random drug testing and pre-employment drug testing are not affected by this rule. Employers may also conduct post-incident drug testing if there is a reasonable possibility that employee drug use could have contributed to the reported injury or illness.
As an example, if employee drug use could not have contributed to the injury or illness, such as the development of carpal tunnel syndrome, post-incident drug testing would likely only discourage reporting and could constitute retaliation. Other OSHA example scenarios can be found by following this link:
https://www.osha.gov/recordkeeping/modernization_guidance.html

In my opinion, employers should consider developing and implementing "Reasonable Suspicion" training mirroring examples used in the OSHA recordkeeping rule for all supervisors, managers and employees. This will prepare leaders for identifying problems and preventing serious incidents, but can also help your employees recognize behaviors in others which might put the worker himself or the team in danger.

If you conduct post-accident drug and alcohol testing, consider documenting your reasons including what led you to believe that impairment due to drugs or alcohol was a "reasonable possibility", and list any witnesses who observed these behaviors or facts. As a best practice, explaining your program will serve as training, but may also serve to deter drug use, which should be our ultimate goal as employers.

Employee Discipline:
The rule does not prohibit corporate disciplinary programs; however employers must not use disciplinary action, or the threat of disciplinary action to retaliate against an employee for reporting an injury or illness. The rule does prohibit disciplining employees simply because they report work-related injuries or illnesses, no matter the circumstances. The rule also prohibits disciplining an employee who reports a work-related injury or illness under the pretext that the employee violated a work rule if the real reason for the discipline was the reporting of an injury or illness.

Simply put, OSHA would consider it a violation if an employer disciplines an employee for breaking a work rule after reporting a work-related injury, but doesn't discipline other employees for breaking the same work rule who *didn't* report an injury or illness. Employers should also reinforce expectations that employees who are injured as a result of a safety infraction should not be disciplined more harshly than employees who commit the same safety infraction but who are not injured.

Safety Incentives and leading vs lagging indicators:
This rule does not prohibit incentive programs; however, employers must not use incentive programs in a way that penalizes workers for reporting work-related injuries or illnesses. If an employee reports an injury or illness and is subsequently denied a benefit as part of an incentive program, this may constitute retaliatory action. OSHA recommends that employers consider programs that reward worker participation in proactive safety program activities and evaluations such as worker completion of safety and health training, reporting and responding to hazards, reporting close calls/near misses, safety walkthroughs and identification of hazards, conformance to planned preventive maintenance schedules, and compliance with legitimate workplace safety rules. Key Performance Indicators in our industry currently depend primarily on lagging metrics or indicators after an event has occurred to measure the progress of a safety and health program.

In my opinion, Lagging indicators provide important historical data which help us benchmark progress, and hopefully learn from and prevent reoccurrences of incidents, but when used in incentive programs they could discourage reporting. Leading indicators encourage an organization to think proactively to prevent incidents and promote open reporting. More and more companies in our industry are moving away from lagging indicators to leading indicators. This is one of the hottest topics in modern HSE management, and a matter of opinion and corporate philosophy.

On a separate but connected point for AESC members, and also in my opinion, another leading indicator is comprehensive contractor/service company evaluations prior to awarding a contract, including inspections of equipment prior to use. The same goes for contractors or service companies using sub-contractors. These steps are especially important now that the industry is beginning resurgence and new companies and workers are coming on board.

The National STEPS Network is currently polling companies in our industry segment through our National Alliance with OSHA and NIOSH to benchmark commonly used metrics. To see the poll questions and examples of leading and lagging indicators, and to review the data when this work is completed, go to www.nationalstepsnetwork.com. Thanks to Kyla Retzer and Ryan Hill for collecting the data and preparing reports.

Thanks to Kenny Jordan and all of the members of AESC for all of your fine work, to Doug Huddleston for writing the original article, and to David Schmidt, Mike Marshall and Marianne McGee with OSHA for your guidance and for vetting facts regarding the final rule.