

## Set the Records Straight: OSHA's Recordkeeping NEP Creates Employer Liability

*Editor's Note – Mark A. Lies II is a labor and employment law attorney and partner with the Chicago, IL, law firm of Seyfarth Shaw, LLP. He specializes in occupational safety and health and related employment law and personal injury litigation.*

*Daniel R. Flynn is an environmental and safety attorney with Seyfarth Shaw, specializing in both occupational safety and health and environmental compliance and litigation matters.*

*Legal topics provide general information, not specific legal advice. Individual circumstances may limit or modify this information.*

Frequently, failure to comply with the Occupational Safety and Health Administration's (OSHA's) recordkeeping standards (29 Code of Federal Regulations (CFR) Part 1904, and the OSHA Form 300 log) are oftentimes viewed by employers as less serious than other failures to comply with OSHA's standards set forth under the General Industry and Construction standards (e.g., 29 CFR Parts 1910 and 1926). Indeed, the Occupational Safety and Health Review Commission has in the past acknowledged that "recordkeeping violations are generally characterized as other-than-serious." (*Secretary of Labor v. Manganas Painting Co.*, 21 BNA OSHC 1964, 2007.)

However, compliance with OSHA's recordkeeping standards cannot be taken lightly since there is a potential for significant monetary liability. On September 30, 2009, OSHA commenced its National Emphasis Program (NEP) that focuses on inspecting the accuracy of the occupational injury and illness recording and reporting requirements in order to discover and correct under-recording (that is, failure to record qualifying injuries and illnesses on the 300 log). Additionally, where OSHA has found numerous and apparently

systemic recordkeeping violations, the agency can and has issued separate citations for each distinct violation and has, in some instances, classified each individual citation item as willful. There is also potential criminal liability for intentionally certifying that the record entries are true, accurate, and complete when that is not the case.

### Industries Subject to the NEP

The NEP applies to the industries listed in the below chart, which can be found in OSHA's NEP Directive No. 09-08 (CPL 02). These industries have been identified by OSHA as having a high days away, restricted, or transferred (DART) rate. OSHA will select for inspection specific establishments within these industries that reported a low DART rate (between 0.0 and 4.2) in calendar year 2007. OSHA will not inspect establishments that otherwise meet these criteria but are participating

■

**What may begin as a recordkeeping inspection could be expanded to include multiple areas of a facility and could result in citations that are not related to recordkeeping.**

■

in an OSHA Strategic Partnership, Voluntary Protection, or Safety and Health Achievement Recognition Program.

Establishments that are selected by OSHA to participate in the NEP inspection process should review their North American Industry Classification System (NAICS), DART rate, and any

List of In-scope Industries		
Industry	NAICS	2007 DART
Animal (except poultry) slaughtering	311611	8.1
Scheduled passenger air transportations	481111	8.1
Steel foundries (except investment)	331513	7.9
Other nonferrous foundries (except die-casting)	331528	7.6
Concrete pipe manufacturing	327332	7.5
Soft drink manufacturing	312111	7.3
Couriers	492110	7.3
Manufactured home (mobile home) manufacturing	321991	7.1
Rolling mill machinery and equipment manufacturing	333516	7.1
Iron foundries	331511	6.7
Nursing care facilities	623110	6.2
Fluid milk manufacturing	311511	6.1
Seafood canning	311711	6.1
Marine cargo handling	488320	6.1
Copper foundries (except die-casting)	331525	6.0
Bottled water manufacturing	312112	5.9
Refrigerated warehousing and storage	493120	5.9
Motor vehicle seating and interior trim manufacturing	336360	5.8
Pet and pet supplies stores	453910	5.7
Note - NAICS 311615, Poultry processing, and NAICS 115210, Support activities for animal production, are also covered by the NEP.		

other relevant factors to ensure that the selection is not erroneous.

### **Scope of the Inspection**

Once an establishment has been selected to be inspected under the NEP, a compliance safety and health officer (CSHO) will conduct a comprehensive review of the employer's records. Designated records officers have been instructed to review a wide variety of employer documents, including "medical records, workers' compensation records, insurance records, payroll/absentee records, and, if available, company safety incident reports, company first-aid logs, alternate duty rosters, and disciplinary records pertaining to injuries and illness," including any records stored off-site. The CSHO will use these records to evaluate whether the employer has correctly reported all injuries and illnesses required to be recorded on its 300 log. OSHA has further directed its CSHOs to interview the designated record keeper, employees, management, and first-aid providers and health care professionals.

Furthermore, OSHA has directed its safety officers to conduct a limited walk around inspection of the main plant operations area. While the CSHO should be ensuring that the employer has properly recorded injuries and illnesses as required by the recordkeeping standards, OSHA has instructed its officers to address any violations observed in plain view and "expand the scope of this inspection or make a referral in order to address other areas of the plant that may pose safety and health risks." Therefore, what may begin as a recordkeeping inspection could be expanded to include multiple areas of a facility and could result in citations that are not related to recordkeeping.

### **Citations**

OSHA has directed its CSHOs to generally classify any recordkeeping violations as "other-than-serious." However, OSHA has further acknowledged that certain violations may be characterized as "willful," "repeat," or "failure to abate." Additionally, OSHA has instructed its officers to consider "violation-by-violation" citation and penalty procedures. Instances of over-reporting will be identified but should not be cited.

### **Impermissible Incentive Programs**

One additional issue that will become known during the NEP process is OSHA's inquiry of employers and employees whether the employer may have an incentive policy (e.g., prizes, other rewards) to employees for not incurring injuries or illnesses at the workplace. OSHA has been very critical of such programs because they believe that they encourage employees not to report recordable injuries or illnesses so they will not forfeit the incentive, thus concealing the true number of work-related injuries and illnesses.

### **Industries Not Subject to NEP Face Additional Scrutiny**

As indicated above, there are certain industries that have been targeted under the NEP. Many employers who are not covered by the NEP may feel that this program will not impact them. Relying upon that assumption could be a serious mistake since OSHA has conducted extensive training for its CSHOs who will perform the NEP inspections and these same officers now have a heightened awareness of OSHA recordkeeping that they will undoubtedly utilize when they inspect OSHA 300 logs at non-NEP employer locations. It is reasonable to expect a surge in recordkeeping citations at non-NEP employer locations.

In addition, there are potential criminal liabilities associated with record-

keeping where the agency can establish the failure to record was intentional. As an example, there are potential personal criminal liabilities associated with executing the annual Summary of Work-Related Injuries and Illnesses (OSHA Form 300A) if the summary is not true, accurate, and complete.

### **Conclusion**

OSHA's NEP on recordkeeping indicates that OSHA may not only be seeking to correct instances of under-reporting, but also to increase its enforcement efforts and issue willful or repeat citations where appropriate. Furthermore, OSHA has authorized its CSHOs to expand the scope of a recordkeeping inspection where appropriate, which could lead to additional citations. Therefore, all establishments that meet the criteria for the NEP should review their OSHA 300 logs to ensure that they are up to date, true, accurate, and complete.

As part of this preplanning, it is critical that the employer's record keeper be properly trained on OSHA's recordkeeping requirements and be prepared to direct the CSHO through the recordkeeping process, using medical records, workers' compensation reports, and other documents, as to how the decision was made to record or not record a particular injury or illness on the OSHA 300 log. **R**