

# FAQ to Chapter 296-27 WAC Recordkeeping and Reporting Proposal January 30, 2019

## What does the DOSH proposed rule do?

The DOSH proposed changes to chapter 296-27 WAC, Recording and Reporting Occupational Injuries and Illnesses, adopts the same or similar language under federal OSHA's revisions to Title 29 CFR Part 1904. The proposed changes to DOSH's rule are required in order to be at least as effective as OSHA. The proposed changes include:

- Requiring certain employers (depending on size and industry type) to annually submit electronic injury and illness records to federal OSHA that they are already required to keep under the recordkeeping regulations. Under the current rule, employers do not electronically submit work-related injury and illness records.
- Ensuring the completeness and accuracy of injury and illness data collected by employers and reported to OSHA. The DOSH proposed rule also:
  - Revises the existing requirement that employers establish procedures for employees to report occupational injuries and illness, to clarify that these procedures must be "reasonable" and not deter or discourage reporting;
  - Requires employers to inform employees of their right to report work-related injuries and illnesses free from retaliation; and
  - Incorporates the existing statutory prohibition on retaliating against employees for reporting work-related injuries or illnesses.

## How will the rule benefit workers?

The information obtained through this final rule will help DOSH, OSHA, employers, employees, employee representatives, other government agencies, and researchers to better identify and remove workplace hazards and thereby prevent worker injuries and illnesses.

## Why is OSHA collecting the data and how will it be used?

- Electronic submission of establishment-specific injury and illness data will enable OSHA and state plan states to use its enforcement and compliance assistance resources more efficiently.
  - Analysis of the data will improve OSHA's ability to identify, target, and remove safety and health hazards, thereby preventing workplace injuries, illnesses, and deaths.
- Federal OSHA plans to publish injury and illness data on their website after removing personally identifiable information.
  - Interested parties will be able to search and download the data. OSHA believes that posting timely, establishment-specific injury and illness data will provide valuable information to employers, employees, employee representatives, and researchers.
- OSHA believes that public disclosure of the data will "nudge" employers to improve workplace safety (without an inspection) in order to demonstrate to investors, job seekers, customers, and the broader public that their workplaces provide safe and healthy work environments for their employees. OSHA cited the principles of behavioral economics as discussed in the federal Executive Order 13707, "Using Behavioral Science Insights to Better Serve the American People".
- NOTE:

- DO NOT send DOSH your records
- If you experience problems/issues with OSHA's secure website (ITA), you must contact Federal OSHA, not DOSH.

**Does the rule require employers to start keeping new records or change how they keep records?**

No. The new requirement does not add to or change an employer's obligation to complete, retain, and certify injury and illness records. It only requires certain employers to electronically submit some of the information from these records to OSHA.

**Why is retaliation in the DOSH proposed rule? Isn't it already against the law to retaliate against an employee for reporting a workplace injury or illness and doesn't L&I already have a process for addressing workers' compensation discrimination?**

- RCW 49.17.160, and WAC 296-27-02113 already prohibit employers from discharging or discriminating against employees requesting records their employer is required to keep/maintain under chapter 296-27 WAC, and/or employees reporting any fatalities, injuries, illnesses, safety and/or health complaints, or exercise any other rights extended under the Washington Industrial Safety and Health Act. However, DOSH may not act under that section unless an employee files a complaint with DOSH within 30 days of the retaliation.
- In contrast, under the DOSH proposed rule, DOSH will be able to cite an employer for retaliation even if the employee did not file a complaint, or if the employer has a program that deters or discourages reporting through the threat of retaliation.
  - Often the point of retaliating against an employee who reports a hazard is to intimidate them from asserting their rights.
  - This new rule gives DOSH a tool to protect workers who have been subject to retaliation, even when they cannot speak up for themselves.

**Under the DOSH proposed rule, how should an employer inform employees of their right to report work-related injuries and illnesses free from retaliation by their employer?**

One way for employers to meet this requirement is by posting Labor and Industries "Job Safety and Health Law" worker rights poster from April 2015 or later. Current versions of the required L&I posters, including the "Job Safety and Health Law" poster, can be found on L&I's website, or see here: <https://www.lni.wa.gov/FormPub/results.asp?Section=8&SubSection=0&DocType=0>

**Under the proposed rules, may an employer require post-incident drug testing for an employee who reports a workplace injury or illness?**

The proposed rule does not prohibit drug testing of employees. It only prohibits employers from using drug testing, or the threat of drug testing, as a form of retaliation against employees who report injuries or illnesses. 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 this rule would not prohibit such testing.

For guidance on establishing reasonable post-accident drug testing programs, refer to the following sources;

The preamble to federal OSHA's final rule 81 FR 29673, (<https://www.federalregister.gov/d/2016-10443/page-29673>)

The October 11, 2018 Memorandum from Kim Stille “*Clarification of OSHA’s Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under 29 C.F.R. § 1904.35(b)(1)(iv)*”, (<https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11>)

### **Does the proposed rule allow an employer to have an employee incentive program?**

The proposed rule does not prohibit incentive programs. However, employers must not create incentive programs that deter or discourage an employee from reporting an injury or illness. Incentive programs should encourage safe work practices and promote worker participation in safety-related activities.

### **How can employers use the posted injury and illness information to improve their own safety record?**

Employers will have the ability to use this information to benchmark their own safety performance by comparing it with other firms in their industry and set workplace safety goals.

### **Who must submit information electronically to OSHA under the final rule?**

- **Establishments with 250 or more employees** that are already required to keep OSHA Form 300 logs must electronically submit to OSHA information from the Summary of Work-Related Injuries and Illnesses (OSHA Form 300A).
- **Establishments with 20-249 employees** in [certain high-risk industries](#) (TABLE-4 in Appendix B of chapter 27) must electronically submit to OSHA information from the Summary of Work-Related Injuries and Illnesses (OSHA Form 300A). Only those establishments that meet **BOTH** criteria must electronically submit their records annually.
- **Establishments with fewer than 20 employees** at all times during the year (or who are normally exempt by size or industry) will only need to electronically submit records to Federal OSHA “**Upon Written Notification**” from Federal OSHA. This group must follow the instructions in the written notification.

### **Are the electronic reporting requirements based on the size of the establishment or the size of the firm?**

- The electronic reporting requirements are based on the size of the establishment. An establishment is defined as a single physical location where business is conducted or where services or industrial operations are performed.
- A firm may be comprised of one or more establishments. To determine if you need to provide OSHA with the required data for an *establishment*, you need to determine the establishment's peak employment during the last calendar year.
- Each individual employed in the establishment at any time during the calendar year counts as one employee, including full-time, part-time, seasonal, and temporary workers.
  - All establishments with 250 or more employees in industries covered by the recordkeeping regulation must electronically submit to OSHA injury and illness information from OSHA Form 300A only.
  - Establishments with 20-249 employees in certain high-risk industries (TABLE-4 in Appendix B of chapter 27) must electronically submit information from OSHA Form 300A only.

## When do OSHA and DOSH's final rules become effective?

January 1, 2017 is when OSHA final rule was effective, and DOSH intends to have its final rule effective on January 1, 2020.

## When do I have to submit data electronically to OSHA?

The final rule takes effect January 1, 2020, as follows:

- **Establishments with 250 or more employees** must begin submitting information from OSHA Forms 300A by March 2, 2021.
- **Establishments with 20-249 employees** in [certain high-risk industries](#) must begin submitting information from OSHA Forms 300A by March 2, 2021.

## How should the data be submitted and how long will it take?

- OSHA will provide a secure website for the electronic submission of information. The website will include web forms for direct data entry and instructions for other means of submission (e.g. file uploads).
  - For establishments with 20-249 employees that are required to report, OSHA estimates that it will take a typical employer about 10 minutes to create an account and another 10 minutes to enter the required information from the Summary of Work-Related Injuries and Illnesses (Form 300A).
  - For establishments with 250 or more employees, OSHA estimates that it will take a typical employer about 10 minutes to create an account, 10 minutes to enter the required information from the Summary of Work-Related Injuries and Illnesses (Form 300A).
- Establishments must submit the information electronically. OSHA will not accept paper copies.
  - Employers who do not have the necessary equipment or internet connection may submit their data from a public facility, such as a library.

## How will Personally Identifiable Information (PII) be protected?

- OSHA has effective safeguards in place to prevent the disclosure of personal or confidential information contained in the recordkeeping forms and submitted to OSHA.
- OSHA will not collect employee names, employee addresses, names of physicians or other licensed health care professionals, or names and addresses of healthcare facilities if treatment was given away from the worksite.
- All of the case specific narrative information in employer reports will be scrubbed for PII using software that will search for, and de-identify personally identifiable information before the data are posted.