

## **New Regulatory Enforcement Concern - OSHA Recordkeeping**

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When guarding against enforcement actions, ensuring proper recording of workplace illnesses and injuries may not seem like a high priority. However, this is changing. On September 30, 2009, the Occupational Safety and Health Administration (OSHA) initiated a targeted one-year Injury and Illness Recordkeeping National Emphasis Program (RK NEP). Because OSHA believes that inaccurate reporting of occupational illnesses and injuries is a serious issue, it issued Directive Number 09-08 (CPL 02) establishing inspection procedures to assess the accuracy of employer records of work-related injuries and illnesses that must be maintained under federal regulations (29 CFR Part 1904). The RK NEP will pilot test OSHA's ability to effectively target establishments to identify under-recording of occupational injuries and illnesses. This NEP will also help OSHA work with the Government Accountability Office (GAO) in its ongoing study of the accuracy of employer injury and illness records, which was requested by the U.S. Senate.

OSHA postulates the most likely places where under-recorded injuries and illnesses may exist would be in industries with historically high rates of injury and illness. Thus, OSHA's Compliance Safety and Health Officers (CSHOs) will implement the RK NEP focused on establishments in historically high-rate industries that report low rates of injuries and illnesses. OSHA will use data from the Department of Labor's Bureau of Labor Statistics (BLS) to identify high-rate industries and compare the information to data from the OSHA Data Initiative (ODI) to identify low-rate establishments within those industries. For example, BLS reported that in 2007, the soft drink manufacturing industry had one of the highest incidence rates for cases with days away from work, restricted work activity, or job transfer. In this example, OSHA will use ODI data to identify specific soft drink manufacturing establishments that reported low rates of injuries and illnesses, then select some number of those specific establishment to be inspected as part of this NEP. OSHA anticipates conducting approximately 350 inspections focused on the RK NEP. However, the RK NEP is limited in scope to industries with historically high rates of injury and illness, and a complete list of targeted industries appears in OSHA's Directive initiating this NEP.

The inspections contemplated by this NEP will occupy significant time, delve deeply into an organization's records, and carry potentially serious penalties. Inspections will include three components: a comprehensive records review; interviews with workers, management, record keepers, and staff that provided first-aid or medical treatment; and a limited safety and health inspection of the workplace. During each records review, the CSHO will examine worker medical records, workers' compensation records, insurance records, payroll/absentee records, company first-aid reports, company accident reports, and other records to identify OSHA recordable injuries and illnesses. The CSHO will verify that these cases were correctly recorded on the OSHA-required injury and illness recordkeeping forms (e.g., OSHA Forms 300 and 301). Also, the CSHO will review establishment policies pertaining to injury and illness reporting and recording identified through the interview process. Finally, the CSHO will conduct a "walk-around" safety and health inspection of the workplace to observe the consistency of the recorded injuries and illnesses with the workplace conditions. Inspected businesses can expect to receive one or more citations for any identified under-reporting, and the proposed penalties could be significant.

OSHA's increased emphasis on recordkeeping does not appear likely to change in the near future. At the

onset of the NEP, then-acting Assistant Secretary of Labor for OSHA Jordan Barab stated, "Accurate and honest recordkeeping is vitally important to workers' health and safety because it is used by OSHA to determine which workplaces to inspect and by employers and workers to identify health and safety problems in their workplaces." The RK NEP is just one of several efforts to address inaccurate reporting of workplace illnesses and injuries. OSHA intends to institute comprehensive training of its compliance staff on this issue, and to develop other enforcement and quality assurance programs to address recordkeeping in industries and establishments outside the scope of this NEP.

### **H1N1 - A Recordable Illness**

Properly recording illnesses is a significant concern for the broader business community; generally, companies with more than 10 employees are required to record illnesses and injuries unless they operate in an exempt category, such as liquor stores or salons, as set forth in OSHA regulations. (A list of exempt categories and a brief related discussion can be found [here](#).) For those companies that must record illnesses and injuries, it is critical to recognize that absences related to the current H1N1 influenza pandemic are recordable illnesses under certain circumstances.

This may be a surprise to some, as the seasonal flu is not a recordable illness. However, OSHA has made it clear that employers are responsible for recording cases of H1N1 illnesses if three criteria are met, which include:

1. The case must be a confirmed case of H1N1 as defined by the CDC;
2. the case must be "work-related" as defined by OSHA's regulations and;
3. the case of H1N1 must involve death, days away from work, restricted work or transfer, medical treatment beyond first aid, or loss of consciousness.

Although pandemic preparedness plans may differ, it is practically certain that a confirmed case of H1N1 will result in an employee's absence for several days due to physical incapacity and contagion concerns. When deciding whether a confirmed case of H1N1 is "work-related" and should be recorded, the challenge lies in determining where the H1N1 was contracted. For example, an employee diagnosed with H1N1 may have been exposed to the virus both in the work environment and while engaged in personal activities. This would make it very difficult to determine whether the infected employee contracted the virus through workplace exposure or otherwise. Making this judgment may become a highly fact-specific process, especially for employees with travel-related duties that may have been exposed outside the confines of their principal workplace but while still performing their duties. OSHA has not provided specific guidance for companies dealing with the myriad issues raised by this recording requirement. Nevertheless, the issue of recording H1N1 illnesses cannot be ignored in light of OSHA's present emphasis on accurate recordkeeping.