

Memorandum

To: Sherri Knoll
From: Russ Mitten
Date: December 9, 2016
Re: **Revisions to OSHA Workplace Injury and Illness Tracking Rule and Agency Guidance Regarding Post-Injury Drug Testing**

On May 11, 2016, the Occupational Safety and Health Administration (OSHA) issued its final rule, effective January 1, 2017, requiring certain employers to electronically submit information regarding workplace injuries and illnesses to an OSHA website.

The same date OSHA issued a second revised rule, which provided agency guidance regarding employer actions that will be considered discriminatory or retaliatory toward employees who suffer workplace injuries and illnesses. Although the rule – dubbed the Reasonable Reporting Protection rule – was scheduled to take effect August 1, 2016, a Texas federal judge stayed the effective date pending further review. A subsequent ruling in late November freed OSHA to begin enforcing the revised rule.

This memorandum summarizes the changes to these two rules and the potential impact of those changes on MADA's Certified Safety Program as well as post-injury drug testing policies in effect at MADA's member dealerships.

1. OSHA's Revised Rule Regarding Electronic Reporting of Workplace Injuries and Illness

For the most part, employers already provide information required by the revised rule in one of OSHA's paper logs. Rule changes will now require electronic submissions, and OSHA will make most data submitted by employers available to the public on the agency's website.

The table below summarizes new requirements for employers subject to the rule.

	Employers with more than 250 employees (at any time during the previous calendar year).	Employers with 20 or more employees but less than 250 (at any time during the previous calendar year) and classified on an industry list (appendix A) to the revised regulations.
Annual Electronic Submission requirement	Must electronically submit the information from Forms 300A (<i>Summary of Work-Related Injuries and Illnesses</i>), 300 (<i>Log of Work-Related Injuries and Illnesses</i>), and 301 (<i>Injury and Illness Incident Report</i>).	Must electronically submit the information from Form 300A (<i>Summary of Work-Related Injuries and Illnesses</i>).
What information must be submitted?	<p>Everything on Forms 300A, 300, and 301 except for:</p> <p>From OSHA Form 300:</p> <ul style="list-style-type: none"> • Employee name (Column B) from 300. <p>From OSHA Form 301:</p> <ul style="list-style-type: none"> • Employee name (Field 1); • Employee address (Field 2); • Name of physician (Field 6); • Facility name and address where treatment was 	Everything on the Form 300A.

	obtained (Field 7).	
Where is the information submitted?	OSHA will provide a secured website for the electronic submission.	OSHA will provide a secured website for the electronic submission.
When must information be submitted?	For the first two years (2017 and 2018), by July 1 st ; thereafter, by March 2nd.	For the first two years (2017 and 2018), by July 1 st ; thereafter, by March 2nd.

Employers who do not fit either category identified above – i.e. those with fewer than twenty employees – are not required to electronically file injury and illness data unless OSHA specifically orders them to do so. The rule changes also do not apply to employers currently exempt from filing OSHA 300, 301, or 300A logs. An appendix to the rule – a copy of which is attached to this memorandum – updates the list of industries exempted from reporting due to their historically low occupational illness and injury rates.

In its press release announcing the rule changes, OSHA claimed releasing employer data in standard, open, publicly-available formats will: 1) encourage employers to increase efforts to prevent worker injuries and illnesses; 2) foster a “race to the top” regarding employee safety among employers in the same industry; and 3) enable researchers to examine and analyze data in ways that may help employers make their workplaces safer and happier for employees. The release went on to claim public access to a large set of data regarding workplace injuries and illnesses also will give public health researchers “unprecedented opportunities to advance the fields of injury and illness causation and prevention research.”

OSHA emphasized objectives identified in the preceding paragraph can be achieved only if injury and illness data reported by employers is as complete and accurate as possible. Therefore, the revised rule requires covered employers to inform employees of their right to report work-related injuries and illnesses free of retaliation and to implement reporting policies and procedures that do not deter or discourage employees from reporting. Employers also are prohibited from retaliating against employees who report workplace injuries or illnesses.

Potential Effect on MADA Certified Safety Program

Changes to OSHA’s reporting rules should not directly affect MADA’s Certified Safety Program. Covered employers will continue to report workplace injuries and illnesses as they have done in the past, except future reports will be filed electronically and data from those reports will be readily available to third parties through OSHA’s website. This aspect of the revised rule may encourage participants in MADA’s program to redouble their efforts to prevent workplace injuries and

illnesses. Member dealerships whose data show a commitment to, and achievement of, a safer work environment could gain a competitive advantage over dealerships whose data show a lesser commitment or results. But another factor may provide a more compelling incentive for dealerships to at least revisit their injury and illness prevention efforts. Publicly available data will allow potential litigants – or lawyers hoping to stir-up claims or litigation – to identify and target dealerships whose injury and illness records are worse than industry averages. And even if claims ultimately are determined to be meritless, any increase in safety-related claims or litigation attributable to the rule changes could significantly impact a dealership’s insurance and other claims-related costs.

How policy changes associated with the incoming Trump administration will impact enforcement of the new rule is unclear. But for now, the prudent course would be to use the rule changes as an impetus for MADA and its member dealerships to review their current efforts at preventing workplace injuries and illness. If public reporting of injury and illness data becomes a reality, each dealership will want to ensure data it reports are as complementary or unremarkable as possible.

2. Rule Changes Affecting Post-Injury Drug Tests

OSHA’s other rule changes prohibit employers from discharging, disciplining, or otherwise discriminating against employees for reporting a work-related injury or illness. Its preamble makes clear OSHA will interpret the revised rules broadly to prohibit any “adverse action that could well dissuade a reasonable employee from reporting a work-related injury or illness.”

The focus of OSHA’s revised rule is on the potential effect an employer’s policies have on employees’ willingness to report work-related accidents, injuries, and illness. If OSHA subjectively – and speculatively – determines a policy deters employees from reporting, an employer could be cited for violating the agency’s rules. And that is possible even if the policy is facially neutral and there is no evidence of employer coercion.

OSHA believes blanket, post-incident drug testing policies likely deter proper reporting, and agency guidance issued in conjunction with the rule changes make clear drug testing alone can constitute an adverse employment action. Generally, employers must therefore limit post-incident drug testing to situations where: (1) drug use is likely to have contributed to the incident, and (2) a drug test can accurately identify impairment caused by drug use. Drug testing policies that fail to satisfy both these requirements may subject an employer to liability for retaliation.

Identifying incidents that satisfy the first prong – where drug use is likely to have contributed to an injury – is comparatively easy. But satisfying the second prong – where drug impairment can accurately be identified as an incident’s cause – likely

will be more difficult, and may require pre-testing consultation with medical experts. If experts reasonably believe impairment can be determined through a post-incident drug test, then a drug test is appropriate.

Guidance OSHA provided in October indicates the rule changes will not impact MADA and its member dealerships, because the agency has stated employers who conduct drug tests pursuant to “drug-free workplace” provisions of state workers compensation laws or private party insurance programs will not be subject to citation. Because MADA’s Certified Safety Program promotes a drug-free workplace and requires participants to drug test employees involved in on-the-job incidents, dealerships participating in the program should qualify for the safe harbor provided by OSHA’s guidance.

It’s hard to say whether courts will agree with OSHA’s position that drug testing alone constitutes adverse employment action, but for the time being it would be prudent for MADA’s member dealerships to review and revise their post-incident drug test policies to make sure they do not discourage employees from reporting work-related injuries or illness or discriminate against those employees who do.

REVISED LIST OF INDUSTRIES SUBJECT TO OSHA RULE CHANGES

4442	.....	Lawn and garden equipment and supplies stores.
4451	.....	Grocery stores.
4452	.....	Specialty food stores.
4521	.....	Department stores.
4529	.....	Other general merchandise stores.
4533	.....	Used merchandise stores.
4542	.....	Vending machine operators.
4543	.....	Direct selling establishments.
4811	.....	Scheduled air transportation.
4841	.....	General freight trucking.
4842	.....	Specialized freight trucking.
4851	.....	Urban transit systems.
4852	.....	Interurban and rural bus transportation.
4853	.....	Taxi and limousine service.
4854	.....	School and employee bus transportation.
4855	.....	Charter bus industry.
4859	.....	Other transit and ground passenger transportation.
4871	.....	Scenic and sightseeing transportation, land.
4881	.....	Support activities for air transportation.
4882	.....	Support activities for rail transportation.
4883	.....	Support activities for water transportation.
4884	.....	Support activities for road transportation.
4889	.....	Other support activities for transportation.
4911	.....	Postal service.
4921	.....	Couriers and express delivery services.
4922	.....	Local messengers and local delivery.
4931	.....	Warehousing and storage.
5152	.....	Cable and other subscription programming.
5311	.....	Lessors of real estate.
5321	.....	Automotive equipment rental and leasing.
5322	.....	Consumer goods rental.
5323	.....	General rental centers.
5617	.....	Services to buildings and dwellings.
5621	.....	Waste collection.
5622	.....	Waste treatment and disposal.
5629	.....	Remediation and other waste management services.
6219	.....	Other ambulatory health care services.
6221	.....	General medical and surgical hospitals.
6222	.....	Psychiatric and substance abuse hospitals.
6223	.....	Specialty (except psychiatric and substance abuse) hospitals.
6231	.....	Nursing care facilities.
6232	.....	Residential mental retardation, mental health and substance abuse facilities.
6233	.....	Community care facilities for the elderly.
6239	.....	Other residential care facilities.
6242	.....	Community food and housing, and emergency and other relief services.
6243	.....	Vocational rehabilitation services.
7111	.....	Performing arts companies.
7112	.....	Spectator sports.
7121	.....	Museums, historical sites, and similar institutions.
7131	.....	Amusement parks and arcades.
7132	.....	Gambling industries.
7211	.....	Traveler accommodation.
7212	.....	RV (recreational vehicle) parks and recreational camps.
7213	.....	Rooming and boarding houses.
7223	.....	Special food services.

- 8113 Commercial and industrial machinery and equipment (except automotive and electronic) repair and maintenance.
- 8123 Dry-cleaning and laundry services.