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CLIENT ALERT

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OSHA INCREASES ITS RECORD KEEPING STANDARDS

A publication addressing legal and business issues of interest to our clients and friends. The information in this publication should not be construed as legal advice. For more information, please contact Anthony N. Luti at the Firm.

BY ANTHONY N. LUTI

On February 1, 2003, the Occupational Safety & Health Administration of the Department of Labor ("OSHA") implemented its new recordkeeping accountability provisions. As of that date, all covered employers must designate a company executive to certify the employer's annual summary of work-related injuries and illnesses. The employer's chosen executive must certify in writing that (a) he or she has examined the injury summary and (b) injury summary is true, accurate, and complete.

In light of the provisions in the new Sarbanes-Oxley Act, the newly implemented OSHA provisions have not received much attention. However, these seemingly innocuous provisions have significant implications for all covered employers that are covered by OSHA. Specifically, an executive's failure to properly certify the injury summary can not only result in fines for the employer at issue, but may also increase the penalties for and OSHA-discovered errors. Moreover, a false certification can lead to personal liability of the certifying executive for any falsities.

This Client Alert summarizes the newly implemented provisions and highlights some of the issues raised by them.

The New Provisions

The purpose of the revised recordkeeping provisions is to encourage accurate recordkeeping. OSHA has attempted to do this by putting a high-ranking corporate official at personal risk of criminal prosecution if the summary is inaccurate.

Previously, OSHA only required certification by the actual record-keeper of the injury log. In most companies, the duty of keeping the injury log invariably rests with a safety or human resources employee, rather than an executive. However, the new OSHA provisions have changed this. According to the new provisions, a company "executive" is defined as one of the following:

- an owner of the company – this definition is only applicable if the covered employer is a sole proprietorship or partnership;
- a company officer;
- the highest ranking establishment official; or
- the immediate supervisor of the highest ranking official working at the establishment.

Thus, in most cases, the new recordkeeping provisions place the certification duties on individuals that normally would not be directly responsible for monitoring work-related injuries and illnesses. The company executive must certify that "he or she has examined the OSHA 300 log and that he or she reasonably believes, based on his or her knowledge of the process by which information was recorded, that the annual summary is correct and complete." As a result, employer executives – many with no prior human resource safety expertise – will now be placed in a position where they are forced to learn the delineated criteria for determining what constitutes a recordable injury or illness pursuant to OSHA standards. Specifically, under the new recordkeeping provisions, the certifying executive must reasonable believe that the injury summary is accurate based on his or her knowledge of the process by which the injury information was recorded.

What Are The Implication Of The New Provisions

According to OSHA's released commentary on the provisions, at a minimum, the certifying executive *must* be familiar with the OSHA recordkeeping requirements, the company's actual injury log, and the company's specific recordkeeping practices. Beyond this limited commentary, however, the new provisions raise numerous questions for the affected employer and, more importantly, the affected executive. For example, the new provisions do not delineate exactly how much knowledge the affected executive is now also responsible for evaluating particular injuries that should have been recorded, but were not.

Given the grey areas now created by these new recordkeeping provisions, covered employers should proceed with caution and diligence. Indeed, at a minimum, covered employers should ensure that any executive designated to certify the employer's annual summary of work-related injuries and illnesses not only receive adequate training to gain a satisfactory understanding of OSHA's new recordkeeping criteria, but also competently apply that knowledge to the employer's injury log. Moreover, covered employers need to evaluate and if necessary, revise their operating procedures to account for the new recordkeeping provision. Specifically, covered employers should also consider instituting specific operating and legal procedures for protecting the designated executive that makes the summary certification.



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