BLOWBACK

How OSHA's Requirement to Upload Employer-Identified Injury Information Is Colliding With the Law of Unintended Consequences

By Arthur G. Sapper

In 2016, OSHA required many employers to upload to OSHA's computer systems information taken from their OSHA Form 300A, the Summary of Work-Related Injuries and Illnesses. The agency also announced that it intended to post this employer data on its website.

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These actions will likely eventually be studied by economists and political scientists as yet another example of the law of unintended consequences.

For many years as an attorney counseling employers about compliance with OSHA requirements, I had consistently advised non-construction-industry clients that "when in doubt, record." The reason for this advice was that for non-construction clients, there were few, if any, instances in which recording an injury would lead to adverse consequences. Recording would also avoid an OSHA citation and its consequences.

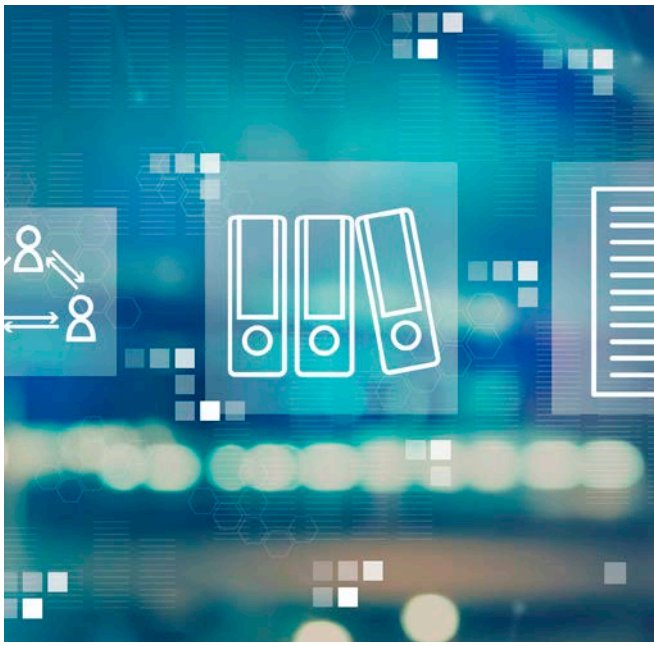
My advice amounted to putting a pro-recording thumb on the scale, and it did not always go over well with clients. Sometimes a client may have had some especially strong feelings about the case, often that recording would be "unfair" because the employer was not at fault (e.g., an infected mosquito bite had been treated with an antibiotic). Sometimes the client feared that, inasmuch as work-relatedness for OSHA recordability purposes and workers' compensation purposes were not so different, recording would be used as evidence of compensability. In such cases, I would often advise the client that it could record but place an asterisked note at the bottom of the log page stating, "Arguably not recordable," "Of doubtful recordability," or "Of doubtful work-relatedness." I was also able to point to an OSHA regulation stating that recording or reporting an injury "does not mean that the employer or employee was at fault, that an OSHA rule has been violated, or that the employee is eligible for workers' compensation or other benefits." Together, this often mollified the client and protected it from an OSHA citation.

The reason I treated construction companies differently was that they *were* subject to an adverse consequence from recording doubtful cases: They could lose work. Owners seeking bids for work would often require bidders to disclose their OSHA injury statistics. Many a lucrative contract has been lost because a bidder had high numbers on its Form 300A. For these companies, I did not advise that they put a thumb on the scale in favor of recording. Instead, I advised straightforward compliance: Record when the injury appeared recordable and not otherwise. If the case were close but judged nonrecordable, I would advise the company to write a memorandum to the file explaining why. That would preserve details that might slip from memory and might help fend off a "willful" allegation by OSHA if it were to disagree.

But actions OSHA took in 2016 and thereafter threatened to upset the dynamic and to make me reconsider my advice, for OSHA was now threatening to indirectly visit adverse consequences on all employers from recording injuries.

In 2016, OSHA at first adopted a requirement that employers upload data from their Forms 300, 300A and 301, but without disclosure of employee names and other identifying information. OSHA also announced its intent to post workplace-specific data from these redacted submissions on a publicly accessible website. In a rulemaking comment, the U.S. Chamber of Commerce warned OSHA that a result of posting the data on the internet will be "that employers will reconsider whether to record as many injuries or illnesses."

After President Trump took office, OSHA changed the regulations to require only data from Form 300As to be uploaded, and not Form 300s or 301s. OSHA at that time also tried to argue to three federal district courts that Form 300As were confidential and not subject to disclosure requirements under the Freedom of Information Act (FOIA), but it lost each time. And



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recently, OSHA under President Biden has proposed to partially reverse course and additionally require uploading of data from Form 300s and 301s (with personal employee identifiers redacted), as well as making them and the Form 300As available on its website. Uploading employers would be required to more clearly identify themselves.

There are drawbacks to all this. Once this information comes into OSHA's hands, it would be available under FOIA to anyone, including labor unions, personal injury lawyers and political activists, who could then use it against the reporting employers. Unions have already used FOIA to obtain the data on 300As. They have also used—some might say, misused—those data to accuse employers they wish to organize of having more injuries than their competitors. What such accusations overlook is that the kind of employers that could most easily be so accused are those that most faithfully recorded, and especially those that resolved doubtful cases in favor of recording. Under this regime, the "good guys" lose, and their less careful competitors gain. Worse, OSHA is apparently now using such data in the same way—to identify whom it thinks is an unsafe employer when the employer may just be a much more conscientious recorder of injuries than others.

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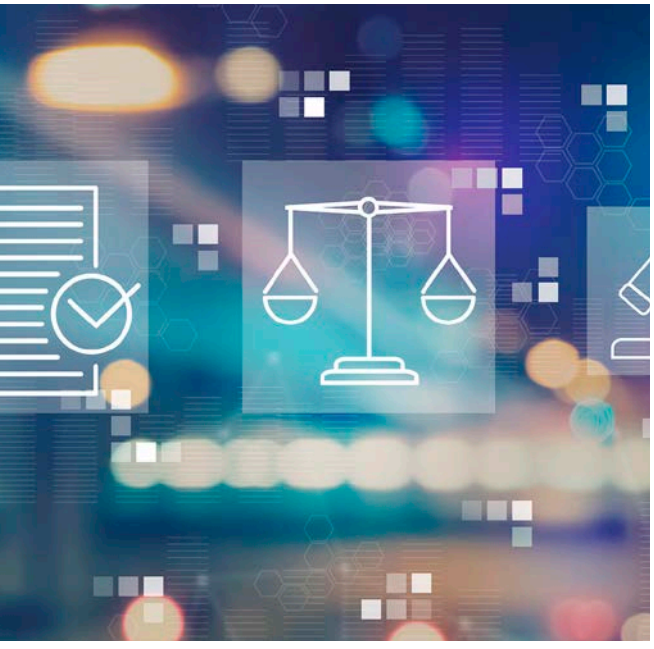
The effect of widespread disclosure of this employer-identified injury data and the use that has been made of it by unions, activists and even OSHA threatens to eventually unravel the compromise that long underlay employer cooperation with the recordkeeping system: The system has long required employers to record cases without regard to fault, and thus promised that employers who recorded cases in which they were not at fault would not suffer adverse consequences. But now they would suffer them. When this prospect was brought to OSHA's attention during a rulemaking, it gave only half an answer: It insisted that recording still does not mean the employer was at fault (which is true) but said nothing about the prospect that employers that recorded without regard to fault would now suffer adverse consequences.

So, now I have partially changed my advice. Especially if the employer is subject to the requirement in 29 CFR 1904.41 to upload injury information, I no longer always advise it to record when in doubt. Instead, I advise straightforward compliance: Record when the injury appears recordable and not otherwise, though with a memorandum to the file in close cases.

An economist would likely call my change in advice an example of the working of the law of unintended consequences. As a result of the interaction between OSHA's regulation and FOIA, employers are now likely to record and report fewer injuries, and those that do record or report in reliance on the no-fault character of the recordkeeping system are more likely to be unfairly treated.

The careful reader will note that the problems discussed here do not arise from OSHA's requirement that employers upload employer-identified data from recordkeeping forms. The problems arise from their availability to the public, either from OSHA posting them on its website or from their availability under FOIA to the public, which, unfortunately, includes unscrupulous persons who will misuse the information and portray conscientious employers in a false light. In the long run, this misuse will undermine the no-fault basis of the recordkeeping system and give conscientious employers even more reason to resent an agency that seems to have lost its sense of balance.

OSHA should therefore seriously consider two steps: First, not posting employer-identifiable injury information on its website; and second, suggesting to Congress, or at least not opposing, an amendment to FOIA that would permit it to either not disclose the injury and illness data it forces employers to provide, or to at least withhold from the public information that can be used to identify employers and their workplaces. To those who would object to such an amendment by invoking Justice Louis Brandeis's declaration that "sunlight . . . is the best disinfectant," one might respond as Iowa law professor Arthur Bonfield once did: "Too much sunshine causes sunburn." **PSJ**



Cite this article

Sapper, A.G. (2022, Oct.). Blowback: How OSHA's requirement to upload employer-identified injury information is colliding with the law of unintended consequences. *Professional Safety, 67*(10), 14-15.