

**FINDING OF EMERGENCY
OF THE
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF OCCUPATIONAL SAFETY AND HEALTH**

**REGARDING THE CALIFORNIA LABOR CODE
CALIFORNIA CODE OF REGULATIONS
TITLE 8, DIVISION 1, CHAPTER 7, SUBCHAPTER 1
OCCUPATIONAL INJURY OR ILLNESS REPORTS AND RECORDS**

Government Code Section 11346.1 requires a finding of emergency to include a written statement with the information required by paragraphs (2), (3), (4), (5) and (6) of subsection (a) of Section 11346.5 and a description of the specific facts showing the need for immediate action.

The Chief of the Division of Occupational Safety and Health (“the Division”) finds that the adoption of these proposed amendments is necessary for the immediate preservation of the public peace, health and safety, or general welfare, as follows:

FINDING OF EMERGENCY

Basis for the Finding of Emergency

- On May 12, 2016, the federal Occupational Safety and Health Administration (“OSHA”) published its final rule to revise its Recording and Reporting Occupational Injuries and Illnesses regulation (29 Code of Federal Regulations part 1904). The amendments to Section 1904.41 of the federal Recording and Reporting of Occupational Injuries and Illnesses regulation required designated employers to submit electronically certain injury and illness data to OSHA via an online web portal. The final rule set a series of dates for the implementation of the electronic reporting requirements: by July 1, 2017, affected employers would be required to submit electronically their Form 300A data to OSHA; by July 1, 2018, affected employers would have to submit electronically all of the injury and illness data specified in the amended regulation to OSHA.

- On June 28, 2017, OSHA extended the original July 1, 2017, deadline for electronic submission of injury and illness data to December 1, 2017 to “provide the new administration an opportunity to review the new electronic reporting requirements prior to their implementation and allow affected entities sufficient time to familiarize themselves with the electronic reporting system, which will not be available until [August 1, 2017.]”

- On November 11, 2017, OSHA again extended the deadline for electronic submission of injury and illness data, this time moving the deadline back to December 15, 2017. OSHA also announced that employers in State Plan states, such as California, were not required to submit their summary data to OSHA at that time unless they were under federal jurisdiction.¹
- On January 2, 2018, OSHA announced that affected employers could begin to submit electronically their Calendar year 2017 Form 300A data to OSHA. OSHA extended the deadline to submit such data to July 1, 2018.² OSHA also announced that it was “not accepting Form 300 and 301 information at this time.” OSHA stated that “it will issue a notice of proposed rulemaking (NPRM) to reconsider, revise, or remove provisions of the "Improve Tracking of Workplace Injuries and Illnesses" final rule, including the collection of the Forms 300/301 data.”
- On April 30, 2018, OSHA, citing 29 USC § 667(c)(7), announced that affected employers in State Plan states, such as California, would now be required to submit electronically their Form 300A data to OSHA via its online web portal, even if the State Plan has not completed adoption of its own state rule.³
- Cal/OSHA operates under a “State Plan” approved by OSHA under 29 CFR § 1902 *et seq.* A State Plan is an OSHA-approved occupational safety and health program operated by an individual state instead of by OSHA. OSHA approves and monitors all State Plans and provides funding for those plans. If OSHA establishes a new or revised standard, a State Plan must adopt its own standard that is at least as effective as the new or revised federal standard. (See 29 USC § 667(c)(2).) With regard to OSHA’s standards governing employers’ duties to record and report occupational injuries or illnesses, a State Plan must adopt standards that are “substantially identical” to the federal standards. (See 29 CFR §§ 1902.3(j), 1902.7, and 1904.37(a).)
- Because OSHA has now made clear its intention to enforce OSHA’s Form 300A electronic reporting requirement on employers in State Plan states, California

¹ See “OSHA National News Release” (Nov. 22, 2017).
<https://www.osha.gov/news/newsreleases/national/11222017> (accessed May 10, 2018).

² See “Injury Tracking Application Electronic Submission of Injury and Illness Records to OSHA.”
<https://www.osha.gov/injuryreporting/index.html> (accessed May 10, 2018).

³ See “OSHA Trade Release” (Apr. 30, 2018) <https://www.osha.gov/news/newsreleases/trade/04302018>
(accessed May 10, 2018).

must enact the proposed amendments at issue in this proposed emergency action. These proposed amendments are necessary so that California's injury and illness reporting requirements, which are set forth in 8 CCR section 14300.41, are "substantially similar" to the corresponding federal injury and illness reporting requirements.

- Should California fail to enact the proposed amendments to make its injury and illness reporting requirements "substantially similar" to the corresponding federal requirements, California would be at risk of federal OSHA withdrawing approval of its State Plan under 29 USC section 667(f). California is required by California Labor Code section 50.7(d) to "take all steps necessary to prevent withdrawal of approval for the state plan by the Federal government."
- Furthermore, should California fail to enact the proposed amendments to make its injury and illness reporting requirements "substantially similar" to the corresponding federal requirements, California would be at risk of federal OSHA exercising its authority under its Operational Status Agreement with the Division. Federal OSHA could invoke its authority under the Operational Status Agreement to take enforcement action in the state, arguing that California's injury and illness reporting standard is not as effective as federal law, or that California is not fully or effectively able to enforce the new federal injury and illness reporting requirements. (See Operation Status Agreement, Sections V(b) and (c).)⁴
- Since OSHA's April 30, 2018, announcement of its intention to enforce the Form 300A electronic reporting requirement in State Plan states, California employers have expressed considerable confusion about their obligations under the federal OSHA injury and illness reporting regulation. Passing a corresponding regulation that would specify California's injury and illness reporting requirements is necessary to provide clear guidance to employers in California.

AUTHORITY AND REFERENCE CITATIONS

Section 14300.35

Authority cited: Section 6410, Labor Code. Reference: Section 6410, Labor Code.

⁴ The Operational Services Agreement is accessible on-line at: <https://www.dir.ca.gov/dosh/documents/FED-OSHA-CA-Operational-Status-Agreement-signed-2014.04.30.pdf>

Section 14300.41

Authority cited: Section 6410, Labor Code. Reference: Section 6410, Labor Code.

NOTE: Under California Labor Code § 50.7, the Department of Industrial Relations is the state agency designated to administer the California Occupational Safety and Health Act of 1973 (Cal. Lab. Code § 6300 *et seq.*) The California Division of Labor Statistics and Research (“DLSR”), formerly a division within the Department of Industrial Relations, promulgated 8 CCR §§ 14300.35 and 14300.41. These regulations were promulgated by DLSR under the authority of California Labor Code §§ 50.7 and 6410 to fulfill the federal mandate established by 29 CFR §§ 1902.3(j); 1902.7, and 1904.37(a) that California’s occupational injury and illness recording and reporting requirements under its State plan be “substantially identical” to the federal requirements.

In 2012, Senate Bill 1038 abolished DLSR and amended Labor Code § 150 by transferring its responsibilities under Chapter 7, Subchapter 1, Article 1 of Title 8 of the California Code of Regulations (commencing with Section 14000) to the Division. Labor Code § 150(b), as amended, provides:

To the extent not in conflict with this or any other section, on the date this subdivision becomes operative, the responsibilities of the Division of Labor Statistics and Research that are specified in Subchapter 1 (commencing with Section 14000) and Subchapter 2 (commencing with Section 14900) of Chapter 7 of Division 1 of Title 8 of the California Code of Regulations are reassigned to the Division of Occupational Safety and Health and the responsibilities of the Division of Labor Statistics and Research that are specified in Subchapter 3 (commencing with Section 16000) of Chapter 8 of Division 1 of Title 8 of the California Code of Regulations are reassigned to the Division of Labor Standards Enforcement.

The Division is now proposing to amend Sections 14300.35 and 14300.41 of Title 8 of the California Code of Regulations under the authority provided in Sections 150(b) and 6410 of the Labor Code.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

The federal Occupational Safety and Health Act of 1970 (29 USC § 651 *et seq.*) covers most private sector employers and their employees in all 50 states either directly through the federal Occupational Safety and Health Administration (“OSHA”) or through a “State plan” approved by OSHA under 29 CFR 1902 *et seq.* A State plan is an OSHA-approved occupational safety and health program operated by an individual state instead of by OSHA. OSHA approves and monitors all State plans and provides funding for those plans. If OSHA establishes a new or revised standard, a State plan

must adopt its own standard that is at least as effective as the new or revised federal standard within six months. With regard to OSHA's standards governing employers' duties to record and report occupational injuries or illnesses, a State plan must adopt standards that are "substantially identical" to the federal standards. (See 29 CFR §§ 1902.3(j), 1902.7, and 1904.37(a).)

On May 12, 2016, OSHA issued a final rule amending the requirements for employers to record and report occupational injuries and illnesses set forth in 29 CFR § 1904.41. These amendments require affected employers to submit electronically certain injury and illness records to OSHA through an online web portal. OSHA delayed the deadline for compliance with the requirements several times, and on January 2, 2018, announced that its online portal was now active and that OSHA would now receive Form 300A data from affected employers. OSHA extended the deadline to submit the required Form 300A data to July 1, 2018.

On April 30, 2018, OSHA announced that affected employers in State Plan states, such as California, would now be required to submit electronically their Form 300A data to OSHA via its online web portal, even if the State Plan has not completed adoption of its own state rule.

DLSR previously promulgated Section 14300.41 of Title 8 of the California Code of Regulations to ensure that California's occupational injury and illness recording and reporting requirements for employers were "substantially identical" to the federal standard described above. OSHA has issued a final rule amending the corresponding federal standard. Because the Division has assumed the rulemaking authority for the corresponding standards in California, it must now amend 8 CCR section 14300.41 to ensure that it remains "substantially identical" to the federal regulations. The Division must also make changes to 8 CCR section 14300.35 (1) to clarify existing requirements that employers inform their employees how to report work-related injuries and illnesses and that employers make certain injury and illness records available to their employees and (2) to conform the references to industry codes with other previously amended Title 8 regulations. The minor proposed changes to 8 CCR section 14300.35 are declarative of existing law and do not have any regulatory effect.

Specific Benefits Anticipated

The proposed amendments will benefit worker safety and health in California. The electronic data-reporting provisions in the proposals will provide more timely and accurate reporting for the occupational injury and illness data that employers are required to record and report under Article 2. These provisions expand OSHA's access to timely, establishment-specific occupational injury and illness data, thus allowing OSHA (and Cal/OSHA) to direct more of its enforcement and compliance assistance resources to those establishments where workers are at greatest risks.

The public disclosure of the electronic data submission required by the proposals could also lead to safer workplaces for workers. The availability of this data would encourage

employers to abate workplace hazards; allow establishments to evaluate the effectiveness of their injury and illness prevention programs; and allow potential investors to evaluate a company's occupational injury and illness rates. This data could also better inform members of the public and job-seekers about which companies they would want to support or pursue employment with.

Finally, the proposed amendment would bring California's injury and illness reporting requirements in line with the current federal requirements, thus eliminating the risk of federal OSHA withdrawing approval of its State Plan under 29 USC section 667(f) or of federal OSHA exercising its authority under its Operational Status Agreement with the Division to take enforcement action in California.

Evaluation of Inconsistency/Incompatibility with Existing State Regulations.

Under Title 8 of the California Code of Regulations, the Division is responsible for promulgating and enforcing regulations requiring employers in California to record and report occupational injuries and illnesses. The Division has reviewed existing regulations on this topic and has concluded that these proposed amendments are not inconsistent or incompatible with existing state regulations.

TECHNICAL, THEORETICAL, OR EMPIRICAL STUDIES, REPORTS, OR DOCUMENTS RELIED UPON

The Division has relied upon the following documents as part of this emergency action:

- Improve Tracking of Workplace Injuries and Illnesses; Final Rule, 81 Fed. Reg. 92 (May 12, 2016);
- OSHA National News Release (Nov. 22, 2017).
<https://www.osha.gov/news/newsreleases/national/11222017> (accessed May 10, 2018);
- Injury Tracking Application Electronic Submission of Injury and Illness Records to OSHA. <https://www.osha.gov/injuryreporting/index.html> (accessed May 10, 2018);
- OSHA Trade Release (Apr. 30, 2018)
<https://www.osha.gov/news/newsreleases/trade/04302018> (accessed May 10, 2018).

SUMMARY OF PROPOSED REGULATIONS

§ 14300.35. Employee Involvement.

The proposed amendments of 8 CCR § 14300.35 clarifies existing requirements regarding an employer's obligation to inform workers how to report work-related injuries and to make available certain injury and illness data. The proposed amendments also conform the references to industry codes with other previously amended Title 8 regulations.

The proposed amendments would make the following specific changes to Section 14300.35:

- The phrase "a work-related" is being added to subsection (a)(1) to track the language from 29 CFR § 1904.35(a)(1).
- In subsection (a)(2), the word "limited" is being deleted, and the phrase "as described in paragraph (b)(2) of this section" is being added.
- In subsections (b)(2), subparagraphs (C) and (E), the SIC Code (or "Standard Industry Code") is being replaced by the NAICS Code (or "North American Industry Classification System" code) for the industry identified in the exception. A formatting change is also being made by adding the word "seven" before the numeral 7 in the phrase "seven (7) calendar days."

§ 14300.41. Annual OSHA Injury and Illness Survey.

29 CFR Section 1904.37(a) requires a State plan to adopt rules regarding employer recording and reporting of occupational injuries and illness that are "substantially identical" to the federal regulations. The proposed amendment of 8 CCR Section 14300.41 would generally track the language and format of its corresponding federal counterpart, 29 CFR Section 1904.41

The Proposed Rulemaking would make the following specific changes to Section 14300.41:

- Subsection (a)(1) is being amended to require employers that had 250 or more employees at any time during the previous calendar year and who are required to keep records to submit electronically certain occupational injury and illness data to OSHA once per year by the date listed in Section 14300.41(c). The language of this proposed amendment tracks federal OSHA's current requirements.
- Subsection (a)(2) is being amended to require employers in designated industries that had 20 to 249 employees at any time during the previous calendar year to submit electronically certain occupational injury and illness data to OSHA

once per year by the date listed in Section 14300.41(c). The language of this proposed amendment tracks the language in 29 CFR Section 1904.41(a)(2).

- Subsection (a)(3) is being amended to require employers to submit occupational injury and illness records to OSHA if notified by OSHA to do so. The language of this proposed amendment tracks the language in 29 CFR Section 1904.41(a)(3).
- Subsection (b)(1) is being amended to specify which categories of employers must routinely submit their occupational injury and illness data to OSHA. If an employer has 250 or more employees at any time during the preceding calendar year, and is required to keep records, then the employer must submit information on its Form 300A to OSHA once a year. Additionally, if an employer has between 20 and 249 employees and is classified as an industry listed in Appendix H, then it must submit information on its Form 300A to OSHA once a year. Employers who do not fall in either of the preceding categories must submit information from injury and illness records to OSHA only in response to a request from OSHA. The language of this proposed amendment tracks current federal OSHA requirements.
- Subsection (b)(3) is being amended to specify that part-time, seasonal, and temporary workers are included in the count of an employer's number of employees that triggers the requirement to report occupational injury and illness data to OSHA. The language of this proposed amendment tracks the language in 29 CFR Section 1904.41(b)(3).
- Subsection (b)(4) is being amended to specify that, if OSHA intends to notify an employer that it must submit occupational injury and illness data as required under Subsection (a)(3), OSHA will notify that employer by mail. The language of this proposed amendment tracks the language in 29 CFR Section 1904.41(b)(4).
- Subsection (b)(6) would be added to specify the frequency with which an affected employer must submit its occupational injury and illness data to OSHA. If an employer is required to submit information under paragraph (a)(1) or (a)(2) of Section 14300.41, then it must submit the information once a year. If the employer is submitting information because OSHA notified it to submit information as part of an individual data collection under paragraph (a)(3) of Section 14300.41, then it must submit as often as specified in the notification received. The language of this proposed amendment tracks the language in 29 CFR Section 1904.41(b)(5).
- Subsection (b)(7) would be added to specify how an affected employer must submit its occupational injury and illness data to OSHA. It would specify that employers are required to submit the information electronically through a secure

website provided by OSHA. The language of this proposed amendment tracks the language in 29 CFR Section 1904.41(b)(6).

- Subsection (b)(8) would be added to specify that a partially exempt employer is not required to submit its occupational injury and illness data to OSHA unless OSHA notifies the employer in writing that it must submit such information. The language of this proposed amendment tracks the language in 29 CFR Section 1904.41(b)(7).
- Subsection (b)(9) would be added to specify that an affected employer located in a State Plan State (like California) must submit its occupational injury and illness data to OSHA as required under this amended regulation. The language of this proposed amendment tracks the language in 29 CFR Section 1904.41(b)(8).
- Subsection (b)(10) would be added to specify that an enterprise or corporate office of an affected employer may submit the occupational injury and illness data for the affected employer to OSHA. The language of this proposed amendment tracks the language in 29 CFR Section 1904.41(b)(9).
- Subsections (c)(1) and (2) are added to specify the reporting date deadlines for affected employers to submit their occupational injury and illness data to OSHA. The language of this proposed amendment tracks the language in 29 CFR Section 1904.41(c)(1) and (2), with the exception of the submission deadline, which in 29 CFR Section 1904.41(c)(1) is July 1, 2018. The Division is setting the submission deadline in section 14300.41(c)(1) to December 31, 2018, since July 1, 2018, would impose an impermissible retroactive date and December 31, 2018, will provide a reasonable time for employers to comply with the amended regulation.
- Appendix H for Title 8 Sections 14300-14300.48 is added to specify which industries are included in the reporting requirements set forth in Subsection (a)(2) for employers that had 20 to 249 employees at any time in the previous calendar year. The language of this proposed appendix tracks the language of Appendix A to Subpart E of 29 CFR Section 1904.41.

LOCAL MANDATE

The proposals do not impose a mandate on local agencies or school districts. The Division has determined that the proposals do not impose a mandate requiring reimbursement by the State pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code because they do not constitute a “new program or

higher level of service of an existing program within the meaning of Section 6 or Article XIII B of the California Constitution.

The California Supreme Court has established that a “program” within the meaning of Section 6 or Article XIII of the California Constitution is one which carries out the governmental function of providing services to the public, or which, to implement a state policy, imposes unique requirements on local governments and does not apply generally to all residents and entities in the state. (County of Los Angeles v. State of California (1987) 43 Cal.3d 46.)

The proposed amendments do not require any local agency to carry out the governmental function of providing services to the public, nor do they impose unique requirements on local governments that do not apply generally to all entities in the state.

Furthermore, any costs associated with the recording and reporting of occupational injuries and illnesses required by the proposed amendments are costs mandated by the federal government. As such, even if the proposed amendments were held to constitute a “new program or higher level of service of an existing program” under Section 6 of Article XIII B of the California Constitution, any associated costs would not be considered costs mandated by the state. (See Cal.Gov.Code § 17556(c).)

FISCAL IMPACT

Costs or Savings to any local agency or school district which must be reimbursed in accordance with Government Code sections 17500 through 17630: None.

Costs or savings to any state agency: The cost to an individual state agency to comply with the proposals will be less than or equal to \$11.13 per year. There will be no savings.

Other nondiscretionary costs or savings imposed on local agencies: The cost to an individual local agency to comply with the proposals will be less than or equal to \$11.13 per year. There will be no savings.

Costs or savings in federal funding to the State: None.

HOUSING COSTS

The proposals will not significantly affect housing costs.

SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS, INCLUDING ABILITY TO COMPETE

Although the Proposed Rulemaking will directly affect businesses statewide that have employees, the Division anticipates that the statewide adverse economic impact will be insignificant. The Division anticipates that the proposals will have no effect on the ability of California businesses to compete with business in other states because all Federal OSHA states and other state-plan states will have to adopt substantially identical requirements.

RESULTS OF THE ECONOMIC IMPACT ASSESSMENT

Creation or Elimination of Jobs Within California: The Division concludes that it is unlikely that the proposals will either create or eliminate jobs within California.

Creation of New Business, Elimination of Existing Businesses, or Expansion of Businesses Currently Doing Business in California: The Division concludes that it is unlikely that the proposed amendments will: (1) create new businesses in California; (2) eliminate any existing businesses in California; or (3) result in the expansion of businesses currently doing business in California.

Benefits of the Proposed Amendments to the Health and Welfare of California Residents, Worker Safety, and the State's Environment:

The proposals will benefit worker safety and health in California. The electronic data-reporting provisions in the proposals will provide more timely and accurate reporting for the occupational injury and illness data that employers are required to record and report under Article 2. These provisions expand OSHA's access to timely, establishment-specific occupational injury and illness data, thus allowing OSHA (and Cal/OSHA) to direct more of its enforcement and compliance assistance resources to those establishments where workers are at greatest risks.

The public disclosure of the electronic data submission required by the proposals could also lead to safer workplaces for workers. The public disclosure of this information could:

- Encourage employers to abate hazards to prevent occupational injuries and illnesses to their workers so as to preserve their reputations as good places to work or do business with;
- Allow establishments to gauge the effectiveness of their injury and illness prevention programs by comparing their occupational injury and illness rates with those of comparable establishments;
- Allow investors to compare occupational injury and illness rates among competing establishments when looking for investment opportunities;

- Allow members of the public to make more informed decisions on what businesses to patronize based on competing establishments' ability to address workplace hazards impacting their workers; and
- Provide better information to job-seekers regarding the occupational injury and illness rates of prospective employers.

The proposals will not otherwise significantly benefit the health and welfare of California's residents, and will not likely benefit California's environment.

COST IMPACTS ON REPRESENTATIVE PERSON OR BUSINESS

The Division has determined that the proposed amendments will have some economic impacts on covered employers, but that these economic impacts will not be significantly adverse.

During its rulemaking process that led to the May 12, 2016 final rule, OSHA conducted an economic analysis to determine the economic impact on employers to comply with the new requirement to report injury and illness data electronically. According to OSHA, the amendments in their final rule made the following four changes to the prior recording and reporting requirements in 29 CFR, Part 1904:

- Establishments that are required to keep injury and illness records under part 1904 and that had 250 or more employees in the previous year, must electronically submit the required information from the OSHA annual summary form (Form 300A) to OSHA or OSHA's designee, on an annual basis.
- Establishments that are required to keep injury and illness records under part 1904, that had 20 to 249 employees in the previous year, and that are in certain designated industries, must electronically submit the required information from the OSHA annual summary form (Form 300A) to OSHA or OSHA's designee, on an annual basis.
- Employers who receive notification from OSHA, must electronically submit the requested information from their injury and illness records to OSHA or OSHA's designee, with any such notification subject to the approval process established by the Paperwork Reduction Act.

OSHA's final rule did not change an employer's obligation to complete and maintain occupational injury and illness records, nor did it change the recording criteria for the records.

OSHA determined that an employer's electronic submission of occupational injury and illness data to OSHA "would be a relatively simple and quick matter" involving, in most cases, these basic steps:

- (1) Logging on to OSHA's web-based submission system;
- (2) entering basic establishment information into the system (the first time only);
- (3) copying the required injury and illness information from the establishment's records into the electronic submission forms; and
- (4) hitting a button to submit the information to OSHA.

OSHA's economic analysis of its final rule determined that the average cost to employers to comply with the electronic reporting of Form 300A data would be \$11.13 per year.⁵

**STATEMENT OF CONFIRMATION OF
MAILING OF FIVE-DAY EMERGENCY NOTICE**
(Title 1, CCR section 50(a)(5)(A))

The Division of Occupational Safety and Health sent notice of the proposed emergency action to every person who has filed a request for notice of regulatory action at least five working days before submitting the emergency regulations to the Office of Administrative Law in accordance with the requirements of Government Code section 11346.1(a)(2).

⁵ OSHA arrived at these cost estimates by multiplying the compensation per hour, including wage and fringe benefits, of the employer's personnel expected to perform the task of electronic submission to OSHA by the time required for the electronic submission. In its calculation, OSHA identified the occupational class of "Industrial Health and Safety Specialists" as the representative class of workers who would be expected to transmit electronically the injury and illness data to OSHA. This class of workers had an estimated total compensation (wages and benefits) of \$48.78 per hour. OSHA then determined the amount of time that would be needed per year for covered employers to submit the electronic information.