

# OSHA

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## Public Citizen, other groups file second lawsuit against rollback of OSHA electronic recordkeeping requirements



At press time, OSHA had rescinded two major parts of its electronic recordkeeping rule, no longer requiring the submission of injury and illness data from Forms 300 and 301.

The agency published its changes to the Improve Tracking of Workplace Injuries and Illnesses final rule in the Jan. 25 *Federal Register*.

OSHA now will require only the submission of Form 300A – an annual summary of injuries and illnesses – instead of the two more detailed forms from certain covered establishments. Those include

establishments with 250 or more workers and with 20 to 249 employees in certain industries with historically high occupational injury and illness rates.

OSHA claims its main reason for making the change is protecting workers' privacy from any inadvertent disclosure of information.

"Although OSHA believes data from Forms 300 and 301 would be exempt from disclosure under [Freedom of Information Act] exemptions, OSHA is concerned that it still could be required by a court to release the data. Many commenters echoed this concern," the agency states in its final rule.

On July 30, OSHA issued a proposed rule, which underwent a relatively quick review by the White House Office of Budget and Management's Office of Information and Regulatory Affairs, former OSHA Deputy Assistant Secretary

Jordan Barab wrote on his "Confined Space" blog. The fall 2018 regulatory agenda estimated the new recordkeeping rule would be published in June.

The AFL-CIO and other unions requested a meeting with OIRA on Dec. 19 before the government shutdown, according to news site Politico, but the sub-agency did not respond to the request. Although those meetings are not required by law, Barab notes that "requests for meetings are almost never denied or ignored."

In a statement issued Jan. 24, AFL-CIO Director Peg Seminario said the rollback "allows employers to hide their injury records and keep workers, the public and OSHA in the dark about dangerous conditions in American workplaces." She added, "This backward action flies in the face of recommendations from the National Academy of Sciences, Engineering, and Medicine and the public health community strongly endorsing the collection and use of this injury data for prevention."

The deadline for Form 300A moves to March 2, beginning this year.

— article continues on p. 4

## Scott Mugno again re-nominated to head OSHA

Scott Mugno's nomination to lead OSHA was resubmitted to the Senate a second time by President Donald Trump on Jan. 16.

The Trump administration first nominated Mugno, formerly vice president of safety, sustainability and vehicle maintenance at FedEx Ground, to be assistant secretary of labor on Nov. 1, 2017. He was re-nominated on Jan. 8, 2018, and retired from FedEx the next month.

In January, a source close to Mugno told Politico's "Morning Shift" that the nominee was "extremely frustrated by the Senate's inability

to get its act together to confirm his nomination."

For the first time in its history, OSHA has gone at least two years without a permanent head, and Loren Sweatt's tenure as acting administrator is the longest for the nearly 48-year-old agency.

Mugno still needs another approval from the Senate Health, Education, Labor and Pensions Committee, but a vote scheduled for Feb. 6 was postponed. At press time, the committee had not rescheduled the vote.

Mugno appeared before the HELP committee on Dec. 5, 2017, and

emphasized the importance of teamwork. "If confirmed, I will work very hard every day side by side with the best safety professionals at America's ultimate safety department," Mugno said in his opening statement. "The discussions or debates on how to reach that goal (of safety) can, at times, lead some to believe one side or another doesn't believe in the goal. Nothing could be further from the truth."

The Senate's current makeup would appear more favorable to Mugno's chances, with Republicans now holding a 53-47 majority.

### OSHA ALLIANCES

*The OSHA Alliance Program fosters collaborative relationships with groups committed to worker safety and health. Alliance partners help OSHA reach targeted audiences and give them better access to workplace safety and health tools and information. For more on OSHA alliances, go to [osha.gov/dcsp/alliances/index.html](https://osha.gov/dcsp/alliances/index.html).*

## Montana Contractors Association

**Date of alliance:** Dec. 19, 2018

The OSHA area office in Billings, MT, and the Montana Contractors Association recognize the value of maintaining a collaborative relationship to foster safer and more healthful workplaces in the United States. To that end, OSHA and MCA hereby form an alliance to provide MCA members and others with information, guidance and access to training resources that will help them protect the health and safety of workers – particularly by reducing and preventing exposure to fall and trenching hazards or addressing the hazards associated with construction operations, as well as understanding the rights of workers and the responsibilities of employers under the Occupational Safety and Health Act.

Through the alliance, the organizations will use relevant injury, illness and hazard exposure data when appropriate to help identify areas of emphasis for alliance awareness, outreach and communication activities. The alliance also will

explore and implement selected options to evaluate the effectiveness of the alliance and measure the impact of its overall effort on improving workplace safety for employers and workers.

#### **Raising awareness of OSHA's rule-making and enforcement initiatives:**

- To share information on OSHA's emphasis programs, regulatory agenda and opportunities to participate in the rulemaking process.
- To share information on occupational safety and health laws and standards, including the rights and responsibilities of workers and employers.
- To convene or participate in forums, roundtable discussions or stakeholder meetings on addressing the hazards associated with construction operations, to help forge innovative solutions in the workplace, or to provide input on safety and health issues.
- To encourage participation in workplace safety and health by partaking in annual conferences, National



Safety Stand-Downs and Workers Memorial Day.

#### **Training and education:**

- To develop effective training and education programs for the recognition and prevention of workplace hazards regarding those associated with construction operations.
- To develop effective training and education programs for small employers to promote understanding of workers' rights.

#### **Outreach and communication:**

- To develop information on the recognition and prevention of workplace hazards, and to develop ways of communicating such information to employers and workers in the industry.

Excerpted from [osha.gov/dcsp/alliances/regional/reg8/mca\\_final2018.html](https://osha.gov/dcsp/alliances/regional/reg8/mca_final2018.html).

## In Other News...

### OSHA answers FAQs on silica standard for general industry

OSHA has published answers to a list of frequently asked questions regarding the agency's respirable crystalline silica standard for general industry.

The agency developed the FAQs after consulting with industry and union stakeholders, the Department of Labor states in a Jan. 23 press release. The answers to the 64 questions, organized by topic, provide guidance to employers and workers on the standard's requirements, including exposure assessments, hazard communication and methods of compliance.

OSHA's silica rule for general industry was published March 25, 2016, and went into effect June 23, 2018. The agency released a set of compliance assistance resources in August 2018.

The FAQ document is available at [sb-m.ag/2RrfTy6](http://sb-m.ag/2RrfTy6).

### OSHA shares fall prevention resources

To help employers prepare for the sixth annual National Safety Stand-Down to Prevent Falls in Construction, set to take place May 6-10, OSHA is offering free compliance assistance resources online.

Falls are the leading cause of worker fatalities in the construction industry, according to OSHA. The stand-down gives employers and workers an opportunity to address common fall hazards, as well as ways to reduce related injuries and deaths.

Among the resources are the agency's Fall Prevention Training Guide, which includes a lesson plan for employers and several toolbox talks; a 40-second video; and fact sheets on the safe use of ladders and scaffolding.

Find the resources at [osha.gov/StopFallsStandDown/resources.html](http://osha.gov/StopFallsStandDown/resources.html).

## OSHA STANDARD INTERPRETATIONS

*OSHA requirements are set by statute, standards and regulations. Interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. Enforcement guidance may be affected by changes to OSHA rules.*

### Restriction on using performance option/objective data for repeat monitoring in OSHA's general industry lead and cadmium standards

**Standards:** 1910.1025, 1910.1026, 1910.1027 and 1910.1053

**Date of response:** Oct. 23, 2018

**Background:** In your letter, you state that the term "objective data" has been discussed to different degrees in OSHA's chromium (VI), cadmium and respirable crystalline silica standards. You also state that the chromium (VI) and respirable crystalline silica standards use the term "performance option" and allow employers to use any combination of air sampling data, historical data or objective data to determine employee exposures. Further, you note that the lead in general industry standard, which was promulgated before the cadmium, chromium (VI) and respirable crystalline silica standards, does not address objective data or the performance option. Finally, you assert that employers also should be able to use objective data to describe second- or third-shift exposures in situations where the work essentially is identical from one shift to the next, especially for routine compliance monitoring where sampling of all shifts has been done initially. You do not think such use of first-shift data could be made if different operations are done on other shifts. In that case, an employer would have to monitor on both the first and second shifts to sample the different operations and that a thorough analysis of the jobs on each shift must always be done before the sampling plan is determined.

**Question 1:** *Does OSHA intend that its lead in general industry and cadmium standards be more restrictive by not allowing the use of a performance option and/or objective data that is allowed by the respirable crystalline silica and chromium (VI) standards, when considering repeat compliance monitoring across multiple shifts?*

**Response:** Yes, because OSHA had not envisioned the use of the performance option for repeat monitoring at the time its older standards were promulgated. The intent of the performance option in OSHA's standards for silica and chromium (VI) is to give employers more flexibility to characterize employee exposures than OSHA provided in its older standards, such as lead in general industry and cadmium.

**Question 2:** *Would OSHA allow the use of professional judgment in evaluating objective/historical data and applicable documentation in determining what would constitute representative samples that could be applied to multiple shifts?*

**Response:** OSHA accepts application of professional judgment to evaluate any objective/historical data and its supporting documentation to ensure the data meets all definitions, criteria and limitations identified by OSHA for such data and for representative sampling assessment, provided use of representative sampling and use of objective/historical data in lieu of monitoring is permitted by the particular OSHA standard(s) applicable to the workplace. When objective data is used to illustrate employee exposures, the burden is on the employer to demonstrate that the data meets the parameters specified for objective/historical data in the pertinent standards.

**Kimberly Stille, Acting Director**  
Directorate of Enforcement Programs

Excerpted from [osha.gov/laws-regs/standardinterpretations/2018-10-23](http://osha.gov/laws-regs/standardinterpretations/2018-10-23).

### In This Issue

- Public Citizen, other groups file second lawsuit against rollback of OSHA electronic recordkeeping requirements
- Scott Mugno again re-nominated to head OSHA
- OSHA Alliances: Montana Contractors Association
- OSHA Standard Interpretations

VOL. 48, NO. 3 | MARCH 2019

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— continued from p. 1

### No 'reasoned explanation' for rollback

The day the rule was published, Public Citizen's Health Research Group and two other public health advocacy groups filed a second lawsuit against the rollback.

The American Public Health Association and the Council of State and Territorial Epidemiologists are listed as plaintiffs in the lawsuit, which seeks to rescind the final rule.

The complaint asserts that OSHA has not provided "a reasoned explanation for reversing its position regarding the risks and benefits" of the final rule, initially published in May 2016. The lawsuit also claims that the agency did not "adequately consider" opposing comments before making its change.

"When it issued the electronic reporting rule after an exhaustive process, OSHA concluded that requiring the submission of workplace injury and illness data would

greatly enhance worker health and safety," Public Citizen attorney Michael Kirkpatrick said in a Jan. 25 press release. "OSHA has now rushed through a new rule drawing exactly the opposite conclusion, but OSHA has failed to provide any good reason for reversing itself."

In May, OSHA first posted on its website that it no longer was requiring submission of 2017 Forms 300 and 301 injury and illness data. The same three groups filed suit July 25 contending that action was a violation of the Administrative Procedure Act's notice-and-comment protocol. The agency formally issued a proposed rule July 30.

OSHA sought dismissal of that lawsuit, which also was filed in the U.S. District Court for the District of Columbia, but the motion was denied Dec. 12.

For more information on submitting data, log on to OSHA's Injury Tracking Application at [osha.gov/injuryreporting](http://osha.gov/injuryreporting). To read the Jan. 25 *Federal Register* notice, go to [sb-m.ag/2RcmfsA](http://sb-m.ag/2RcmfsA).

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