

# The Year Ahead 2024: Workplace Safety

January 23, 2024

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Jackson Lewis P.C. · The Year Ahead 2024: Workplace Safety

## Transcript

### **Alitia Faccione:**

Welcome to We get work™ and The Year Ahead 2024 podcast series. Covering workplace issues from both subject matter and industry perspectives, the 19 episodes in our series provide both big picture trends and detailed tactics that can help employers achieve their workplace ideal, while remaining real about regulations, compliance challenges, and more in 2024. Jackson Lewis invites you and others at your organization to experience the report's legislative, regulatory, and litigation insights in full at our website, JacksonLewis.com, or listen to the podcast series on whichever platform you turn to for compelling content.

### **Melanie Paul:**

Thanks for joining us for the special episode of We get work™ for the Year Ahead 2024 report. Today we are talking about OSHA compliance issues on the horizon for enforcement this year. I'm Melanie Paul. I am co-leader of the Workplace Safety and Health Practice Group at Jackson Lewis in the Atlanta office. And joining me is my co-leader of the Practice Group, Courtney Malveaux, who is in our Richmond Virginia office.

### **Melanie Paul:**

Today we're going to be talking about OSHA record-keeping requirements, which have been revised and are now in effect since the first of this year, and also OSHA's new proposed rule on third-party representatives participating in OSHA walk-around inspections. So more to come on that, but let me just dive right into the record-keeping issues with what employers need to know about the revised record-keeping rule.

### **Melanie Paul:**

So basically, the electronic record-keeping rule as it stood before 2024 was that employers who had 250 or more employees at a single establishment had to electronically submit their OSHA 300A summary form directly to OSHA. In addition, there are a list of certain industries that are also required to submit their OSHA 300A summary form electronically to OSHA if they have between 20 and 200 and forty-nine employees at a single location. The update is now that there is an additional appendix, Appendix B, to the record-keeping rule, which is now going to require employers in certain industries that have a hundred or more employees at a single establishment to submit not only the 300A summary form, but also the OSHA 300 log

and the specific incident reports, the OSHA 301s, that correspond to the entries that are on the OSHA 300 injury and illness log.

**Melanie Paul:**

Some of the affected industries that appear on Appendix B include agricultural employers, certain manufacturing employers and wholesalers, general merchandise stores including warehouse clubs and super centers, the trucking industry and other transportation and support activity companies, nursing care, residential living, assisted living, general hospitals, medical surgical hospitals, psychiatric hospitals are just some of the industries that are now appearing on this Appendix B. Those industries are now going to be required to submit, like I said, the 300 log, the 300A, and the 301 incident reports.

**Melanie Paul:**

So Courtney, what are you hearing from the industries affected about any concerns with having to make these electronic submissions to OSHA now?

**Courtney Malveaux:**

You know what concerns me, Melanie? I haven't been hearing enough. This is going to have a big impact on a lot of employers. Some are on top of it and responding to it and preparing and some are not. And so the ones who are not, are the ones that concern me because we have a March 2nd deadline for them to submit the data and they're not used to doing this. And so I think a lot of them will be caught unaware. So March 2 is coming up superfast, this is an effective rule, if not on top of it. And if they let the deadline go past them, they might find themselves in line for enhanced inspections by OSHA.

**Melanie Paul:**

Yeah. You know, Courtney, I've seen where OSHA will generate target lists for inspections for employers that they know are in these industries and that they have information that they meet the threshold number of employees but have not submitted electronically the required forms. And that, as you're correct, can become the impetus of an inspection, which is not where any employer wants to be inviting OSHA into your house simply because you failed to electronically submit these records. So you're right, there is concern that there hasn't been a big uproar about this rule when in fact a similar rule was proposed during the Obama administration and there was definitely industry challenge in court in the federal courts to fight this rule. And this rule was finalized in 2023, but obviously had a delayed effective date until January one of this year. And surprisingly, we just haven't seen any challenges to it. So that just means that there's going to be more enforcement for the agency.

**Melanie Paul:**

One other point that I wanted to raise about this new rule is that employers are now also going to be required to use their legal entity name, not simply putting their DBA or their business name on the 300 logs. This is going to allow OSHA to have more of that big brother feel and really sort of figure out what businesses are linked to what legal names. So there's certainly going to be more oversight from the government

based on that new addition to the rule, but that's the high level view of the record keeping update. Another area of concern though is OSHA's proposed walk around rule. So Courtney, what can you tell us about that?

**Courtney Malveaux:**

Well, that one is definitely a very contentious rule and I definitely anticipate that I see legal challenges coming up on this. So just a quick one-minute history on this. So there's a requirement, OSHA has its own rules for its inspections and one of them is that the authorized representatives of employees shall be an employee themselves, but there are exceptions to that in a compliance officer does have leeway to allow a third-party representative like an industrial hygienist or a safety engineer to provide their expertise and assist the employees with the inspection. But now under the current administration, OSHA is trying to open the door not just to those types of safety professionals, but also to union representatives. And that is even in places of employment where there is no union. And so that's something that's really problematic and frankly alarming to a lot of folks on the employer community.

**Courtney Malveaux:**

So 2013 is when this all started. OSHA took a first shot at this by trying to issue an interpretation saying that union representatives could be employee representatives. Well, that got enjoined. And then in 2016, that was thrown out. And so OSHA rescinded the guidance and then it's come forward with a rulemaking to try to state that representative authorized by employees can assist them. And now OSHA has deleted the language specifying that it would necessarily be these types of say through professionals. And it does include examples of what types of representatives would be allowed to accompany and explicitly includes union representatives as an example.

**Courtney Malveaux:**

So that's something that's really concerning. The reason is that now for employers, if they don't have a union present, what is a union organizer doing there representing their employees? Well, the only answer that a lot of folks are seeing and are saying in the comments to the agency is that this is a means for union organizing, for recruitment, for injecting themselves into workplaces where they don't represent anyone. And so that's something that's really concerning. It is not yet a finalized rule, but OSHA has been taking comment and we'll see if that's something that OSHA decides is going to pull the trigger and turn into a final rule this year. What are your thoughts on this? What are you hearing?

**Melanie Paul:**

Well, Courtney, I mean obviously there is a lot of concern from the regulated community about what this means. I think that this proposed rule from OSHA really drives home the point that this administration is trying to make with strong union support. And we're seeing that with all of the activity coming out of the NLRB. And in fact, OSHA has entered into a memorandum of understanding or an MOU with the NLRB fairly recently in the last few months. And it's a promise between the two agencies essentially, or an agreement, to do more together, to work together on investigations to make referrals from one agency to another. So for example, when

OSHA can't address whistleblower claim because it was made untimely, they can refer that whistleblower action to the NLRB. So that's an example of how we're seeing this more symbiotic relationship between various federal agencies and really supporting this administration's push for unionization. So obviously all very concerning.

**Melanie Paul:**

The one concern I really have though is if the rule does take effect, is OSHA going to put out guidance to try to make this a more uniform rule? Or is the agency going to be leaving it to the discretion of the individual compliance officer or area office even to determine when it's appropriate to allow third parties to participate in the walk around? And I suspect there will certainly be challenges on that basis because if the agency does not put out some kind of formalized guidance and it's left to the discretion of the individual compliance officers or even the area directors of the area offices, I think that can be problematic from a due process standpoint.

**Courtney Malveaux:**

Absolutely. And I think honestly, either way it goes, it's a problem for a lot of employers, especially those where maybe employees have not seen a need to organize and there's been no union presence. So a lot on the plate happening in 2024 here. We have a rule that's in place and is effective and employers will have to be in line and submit their data by March 2nd. And we have another that, well, stay tuned. Let's see what happens.

**Courtney Malveaux:**

So with that, thanks for joining us. And please reach out to either of us if we can be of assistance on either of these issues or any OSHA issues. We have a great blog and our practice group is staying on top of this and keeping you updated.

**Alitia Faccone:**

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