

## New OSHA Reporting Tactics Cause Confusion for Employers

An expansion of the reporting requirements and changes in the way OSHA responds to them, are causing concern for some employers. While keeping the same 8 hour reporting obligation for fatalities, since the start of 2015, employers must also report within 24 hours any workplace injury requiring inpatient hospitalization, an amputation or loss of an eye. In addition, OSHA has created a new framework for how it responds to these reports. Depending upon many factors, OSHA may determine that an immediate inspection is needed, or instead make the injury the subject of a Rapid Response Investigation (“RRI”).

If OSHA decides that an RRI is necessary, it will request that the employer conduct an investigation and report the results to the Agency. The process is often initiated by a local OSHA official contacting the business, asking that an investigation be performed, and then following up with a letter enclosing an “incident investigation” form.

The investigation document sent by OSHA asks the employer to conduct a root cause analysis. It seeks to have the business determine and report whether safety procedures were being followed, whether equipment was faulty or safety devices failed, and why any injury causing factors were not addressed before the accident.

While reporting a fatality or relevant injury is required, performing an investigation and disclosing the results to OSHA is not. Some employers have become confused, however, and upon interacting with OSHA are left with the impression that the law obliges them to take these steps. The law does not, although OSHA’s communications may suggest that it will inspect the business if the employer does not respond in a manner it considers adequate.

There are valid reasons for an employer to decline to participate in the RRI investigatory process. In complex cases, a root cause analysis could take many months, far longer than the period of time typically given by OSHA to respond. Many employers lack the sophistication to conduct an investigation that accurately reflects all contributing factors. Also, any information submitted to OSHA is likely subject to public examination through a Freedom of Information Act request. Given how common workplace injury litigation is in West Virginia, an employer could determine that it is appropriate to maintain a legal privilege regarding an investigation by retaining counsel to perform it. This is particularly true if the event involves a fatality or serious injury.

Whether to provide the investigative information OSHA seeks in an RRI depends upon many things. Contrary to what may be implied in some Agency communications, an employer is not required to conduct an investigation or provide the results to OSHA. Under certain circumstances, there are good reasons for an employer to be circumspect about participating in this process.