

purpose of collecting covered data is so that this information can be provided to DOL for inter-industry comparison. The general rule is as follows: Where a doctor orders days of rest for an employee because of a work-related injury or illness, the railroad must report the resulting actual days away from work unless the employee misses no days of work because of the injury or illness, in which case, the railroad must report one day. Note: If the employee takes more days than the doctor ordered, the railroad must still report actual days away from work unless the railroad can show that the employee should have returned to work sooner. The following examples illustrate the application of this principle in combination with existing requirements that would be carried forward.

- If the doctor orders the patient to five days of rest, and the employee reports to work the next day and takes no other days off as a result of the injury or illness, the railroad must report one day away from work. (This case would be separately coded and not included in FRA accident/incident aggregate statistics.)

- If, on the other hand, the employee takes three days of rest, when the doctor ordered five days of rest, then the railroad must report the actual number of days away from work as three days away from work.

- Of course, if the doctor orders five days of rest and the employee takes five days of rest, then the railroad must report the full five days away from work.

- Finally, if the doctor orders five days of rest, and the employee takes more than the five days ordered, then the railroad must report the actual number of days away from work, unless the railroad can show that the employee should have returned to work sooner than the employee actually did.

FRA noted that it may be appropriate to take into consideration special circumstances in determining the appropriate reporting system for the railroad industry. While compensation for injuries and illnesses in most industries is determined under state-level worker compensation systems, which provide recovery on a "no-fault" basis with fixed benefits, railroad claims departments generally compensate railroad employees for lost workdays resulting from injuries or occupational illnesses. In the event a railroad employee is not satisfied with the level of compensation offered by the railroad, the injured or ill employee may seek relief under FELA (Federal Employer's Liability Act), which is a fault-based

system and subject to full recovery for compensatory damages. Further, railroad employees generally are subject to a federally-administered sickness program, which provides benefits less generous than under some private sector plans. Although it is not readily apparent in any quantitative sense how this combination of factors influences actual practices with respect to medical advice provided and employee decisions to return to work, clearly the external stimuli are different than one would expect to be found in a typical workplace. Accordingly, it seemed appropriate that the Working Group found it wise to recommend that FRA adopt a compromise approach that blends the new OSHA approach with the traditional emphasis on actual outcomes. The approach described above will foster continuity in rail accident/incident trend analysis while permitting inter-industry comparability, as well.

Comments

In its comments, AAR sought clarification as to whether the same principles that applied to counting days away from work applied to counting days of restricted work. AAR also commented that the Guide needed to be clearer in its discussion of covered data. At the post-NPRM Working Group meeting, FRA confirmed that the same principles that applied to counting days away from work would also apply to counting days of restricted work and vice versa.

Final Rule/Decision

With some slight modifications in accordance with AAR's request for greater clarity, FRA has adopted the proposed method for counting days away from work and days of restricted work. FRA will address the slight variations on this issue in its MOU with OSHA.

2. Changes in the "Cap" on Days Away From Work and Days Restricted; Including All Calendar Days in the Count of Days Away From Work and Days of Restricted Work Activity

Proposal

In addition, to conform to OSHA's Final Rule, FRA proposed amendments to its Guide that lower the maximum number of days away or days of restricted work activity that must be reported, from 365 days to 180 days, and change the method of counting days away from work and days of restricted work activity. The Working Group noted that counting calendar days is administratively simpler for employers than counting scheduled days of work

that are missed. Using this simpler method of counting days away from work provides employers who keep records some relief from the complexities of counting days away from work under FRA's former system. Moreover, the calendar day approach makes it easier to compare an injury/illness date with a return-to-work date and to compute the difference between those two dates. The calendar method also facilitates computerized day counts. In addition, calendar day counts are a better measure of severity, because they are based on the length of disability instead of being dependent on the individual employee's work schedule. Accordingly, FRA proposed to adopt OSHA's approach of counting calendar days because this approach was easier than the former system and provided a more accurate and consistent measure of disability duration resulting from occupational injury and illness and thus would generate more reliable data. Under FRA's 1997 Guide, days away from work and days of restricted work activity were counted only if the employee was scheduled to work on those days. In the 2003 Guide, because it is a preferred approach, and to be consistent with OSHA's Final Rule, days away from work includes all calendar days, even a Saturday, Sunday, holiday, vacation day, or other day off, after the day of the injury and before the employee reports to work, even if the employee was not scheduled to work on those days.

Comments

Although there were no specific comments directly related to the proposed 180-day cap amendment, there was a comment with respect to an alleged disparity between the time period of the proposed cap and the time period of a pre-existing requirement for updating reports. AAR commented that there was a disparity between the proposed Guide's discussion of updating reports and the discussion that took place in the RSAC meetings. The proposed Guide stated that railroads were required to monitor employee illnesses and injuries for 180 days after the occurrence of the injury or the diagnosis of the illness and update accident/incident reports during that period. See Question and Answer No. 91 in the proposed Guide, Ch. 6, pp. 34–35. AAR concluded that this policy was inconsistent with FRA's requirement that a railroad file late reports for up to five years after the end of the calendar year to which the reports relate. See proposed Guide, Ch. 1, p. 12. It appears there was some confusion on what had actually been agreed upon related to this