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Management Alert

OSHA New Rules Address Post-Accident Drug Testing, Retaliation Claims, and Electronic Injury/ Illness Reporting

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Seyfarth Synopsis: *OSHA's new final rules call into question mandatory post-accident drug screenings and safety incentive programs, open the door to new retaliation citations, and will require employers to post OSHA logs electronically.*

Introduction

On May 12, 2016 the Occupational Safety and Health Administration published new final rules on discrimination and injury and illness reporting. 81 Fed. Reg. 29624. First, a new anti-discrimination and anti-retaliation rule will come into force on August 10, 2016 for all employers, as discussed below. Employees must be informed about the requirements of the anti-retaliation rule relating to reporting injuries and illnesses by that date. OSHA's interprets this rule broadly to prohibit mandatory post-accident drug testing, concluding that such tests discriminate against employees on the basis of injury and illness reporting. OSHA further explains that incentive programs are retaliatory if they offer benefits to employees or workforces who do not report injuries and illnesses. Finally, OSHA uses the rule-making to allow compliance officers to issue citations for retaliation, upending the current statutory employee retaliation enforcement framework under Section 11(c) of the Act.

The regulations further require employers to post workplace recordable injury and illness information electronically. OSHA will release this employer injury and illness information publicly on its website, believing that its disclosure will "shame" employers into improving workplace safety and health. The electronic data submission requirement will also ease OSHA's data analysis, presumably to ramp up citations against employers based on the frequency of certain types of injuries (such as OSHA's renewed focus on "ergonomics" injuries) or injuries caused by exposures to certain chemicals or toxic materials. The remaining provisions of the final rule, including the electronic reporting provisions, will take effect on January 1, 2017.

Drug Testing

Section 1904.35(b)(1)(iv) of the final rules prohibits an employer from discharging or discriminating against an employee for reporting a work-related injury or illness. OSHA's Preamble to the Final Rule interprets the regulation broadly to prohibit any "adverse action that could well dissuade a reasonable employee from reporting a work-related injury or illness." OSHA applies the prohibition to any "blanket post-injury drug testing policies deter proper reporting," concluding that drug-testing alone constitutes an "adverse employment action." OSHA instructs employers to "limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify

impairment caused by drug use." OSHA explains with examples: it "would likely not be reasonable to drug test an employee who reports a bee sting, a repetitive strain injury, or an injury caused by a lack of machine guarding or a machine or tool malfunction."

OSHA's interpretation of its new rule calls into question the widespread use of mandatory post-accident drug testing programs. While federal courts probably will not uphold OSHA's reasoning that a drug-test, standing alone, is a form of an "adverse employment action," employers should be mindful of their policies and should consider taking action to ensure compliance with the regulation. To comply with OSHA's interpretation of its new regulation, employers could amend their post-accident drug-testing policy to provide for potential, rather than mandatory, drug and alcohol testing. The policy should explain that employees will be tested where there is a reasonable basis to believe alcohol or drug use contributed to the accident. Further, employers should document the reasons that prompted suspicion of drug and alcohol use when ordering a drug test. For example, if an employee was driving a forklift and may have caused an accident, an employer should document exactly what the Company suspects may have happened, and how the employee's actions may have been consistent with a potential risk of alcohol or drug abuse.

Drug-testing policies should be revisited for compliance by August 10, 2016 since the rule requires that the employer have a compliant anti-retaliation policy by that date.

Incentive Programs

In its Preamble on the Final Rule, OSHA similarly condemns employer safety "incentive programs" as form of retaliation. This position is consistent with OSHA's past rulings and guidance on employer incentive programs, but goes further in widening its prohibition on incentive programs even when they are part of a broader compliance program. The new rules explain that "it is a violation of paragraph (b)(1)(iv) for an employer to take adverse action against an employee for reporting a work-related injury or illness, whether or not such adverse action was part of an incentive program." OSHA's interpretation prohibits all programs in which employees are denied a benefit on the basis of any injury or illness report. For example, if an entire shift loses a safety bonus due to a single employee being injured.

However, an incentive program **may** make a reward contingent upon, for example, whether employees correctly follow legitimate safety rules, rather than whether they reported any injuries or illnesses. OSHA further encourages incentive programs that promote worker participation in safety-related activities, such as identifying hazards or participating in investigations of injuries, incidents, or ''near misses.'' Accordingly, employers should consider OSHA's new interpretation when reassessing their incentive programs to ensure they are offering a benefit or reward based on the reporting of injuries or illnesses. These types of programs could be adjusted to provide benefits on the basis of compliance with safety rules, or for attending safety trainings or persevering on safety quizzes.

These rules will take effect on August 10, 2016 as part of the required anti-retaliation policy.

New Retaliation Rules

In the Preamble to the anti-retaliation portion of the Final Rule, OSHA takes the position that its compliance officers can issue citations to employers who discipline workers for reporting injuries and illnesses when it believes that no legitimate workplace safety rule has been violated. Accordingly, OSHA intends to give its compliance officers, who have no formal training in employment discrimination law, the authority to issue citations based on perceived retaliation in the workplace. OSHA's interpretation overturns the Agency's longstanding statutory framework for retaliation complaints under Section 11(c) of the Act, under which employees must report allegations of retaliation, which are then investigated by specialized investigators. Unlike a Section 11(c) complaint, in which an employee must file a retaliation claim with OSHA within 30 days, a compliance officer has 6 months to issue OSHA citations from the last day that the alleged violation occurred. The employee is not required to file any complaint. Accordingly, the statute of limitations for retaliation claims could be significantly expanded. We anticipate that the new interpretation will result in additional unfounded retaliation citations.

In its expanation to the Final Rule, the Agency also posits that employer policies requiring an employee to immediately report

an injury or be disciplined may also be retaliatory. OSHA believes that immediate-reporting policies will chill employees from reporting slow-developing or chronic injuries or illnesses, such as musculoskeletal disorders or poisoning from prolonged lead exposure. According to OSHA, to be reasonable, a policy must allow for reporting within a reasonable time after the employee realized that he or she had suffered a work-related injury, rather than just immediately following the occurrence of an injury.

These rules also will take effect August 10, 2016.

Electronic Submission of Injury and Illness Data

Unlike the anti-retaliation provisions in the new Rule, OSHA spends minimal time interpreting the Electronic Submission requirements, which are supposedly the real purpose behind the new Rule. The Electronic Submission portion of the Final Rule requires individual employer establishments with 250 or more employees to submit information electronically from their 2016 Form 300A by July 1, 2017. These same employers will be required to submit information from all 2017 forms (300A, 300, and 301) by July 1, 2018. Beginning in 2019 and every year thereafter, the information must be submitted by March 2.

Those establishments with 20-249 employees operating in what OSHA designates as "high hazard industries" (including department stores, nursing homes, construction) must submit information from their 2016 Form 300A by July 1, 2017, and their 2017 Form 300A by July 1, 2018. Beginning in 2019 and every year thereafter, the information must be submitted by March 2.

OSHA will require employers to submit all information from their logs, except information in the columns with employee names, employee addresses, health care professional names, and health care treatment facilities. The final rules do not specify how this information will be submitted electronically. Though we do not know that this will be a problem, due to privacy laws, employers should not submit information that identifies a specific employee or an employee's medical information. The electronic disclosure requirements will also apply to employers located in State Plan States.

Online Posting

OSHA will post this data on a publicly available website, which will be accessible by competitors, contractors, employees, and employee representatives. The specifics of its new data disclosure portal are not explained in the regulations.

Conclusion

These new rules require certain employer policies to be reevaluated during the next two months, including the anti-retaliation policy and employee training. Employers should take steps to ensure that they are in compliance with OSHA and local laws and regulations as quickly as possible. Proactive steps in the face of this regulatory scrutiny now may allow the employer to avoid costly enforcement and litigation in the future.

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