OSHA's New Electronic Reporting Rule Contains Hidden Employer Obligations

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The Occupational Safety and Health Administration (OSHA) recently released its final rule on electronic reporting of workplace injury and illness reports, but if you skipped OSHA's commentary that accompanies the rule, it would be easy to miss additional notification and anti-discrimination implications for covered employers. OSHA's position on what may constitute retaliatory adverse actions is especially controversial, resulting in a court challenge filed by industry groups and employers to prevent the August 10th implementation of those aspects of the final rule. As a result, on July 13, 2016, OSHA announced that it will delay enforcement of the new anti-retaliation provisions until November 1, 2016. OSHA states that the additional three months will allow the agency to “conduct additional outreach and provide educational materials and guidance for employers.”

Despite the delayed enforcement and court challenge, employers need to be aware of the sweeping nature of the changes implicated in OSHA's final rule. Here is a breakdown of the key employer requirements.

Informing Employees About Reasonable, Non-Retaliatory Reporting Mechanism

The final rule amends existing OSHA regulations related to employer procedures for employees to report work-related injuries and illnesses. With a new enforcement date of November 1, 2016, employers must ensure that their reporting procedures are reasonable, meaning that they are designed not to deter or discourage employees from reporting job-related injuries and illnesses. Reporting mechanisms that are too burdensome, or require employees to take too many steps to report an injury or illness promptly will be deemed unreasonable and in violation of the rule.

In addition, according to OSHA, employer policies that discipline employees for failing to timely report an injury could violate the rule to the extent that discipline is applied to workers whose injuries develop gradually over time, such as due to work-related repetitive motions. OSHA states that an employer's reporting mechanism and discipline policies must allow for reporting of injuries and illnesses within a reasonable timeframe after the employee has realized that he or she has suffered a work-related injury or illness.

OSHA also strengthened the existing requirement that employers inform employees on the proper reporting procedure for work-related injuries and

illnesses. Employers must inform employees that they have a right to report work-related injuries and illnesses free from retaliation. Believing that many employees avoid reporting injuries and illnesses out of fear of retaliation, OSHA determined that requiring employers to inform employees of their right to report without retaliation will promote more accurate reporting. One way for employers to meet this requirement is by posting the OSHA "It's The Law" worker rights poster from April 2015 or later.

Prohibition of Discrimination and Retaliation

Discriminating or retaliating against an employee who reports a work-related injury or illness has long been prohibited under the Occupational Safety and Health Act. But through its final rule, OSHA added a new provision to its regulations stating that employers must not discharge or in any manner discriminate against any employee for reporting a work-related injury or illness.

The effect of adding that anti-retaliation language into the regulation is to permit OSHA to issue citations to employers for retaliating against employees who report workplace injuries or illnesses, and require abatement, even if no employee has filed a discrimination or retaliation complaint under the Act. Previously, the retaliation prohibition could be enforced only by the Secretary of Labor taking action against an employer after an employee filed a retaliation complaint with OSHA. An employee has just 30 days after the alleged retaliation to file his or her complaint. Under the new final rule, OSHA can pursue remedies designed to eliminate the source of the retaliation on its own as well as seek to make whole any employees treated adversely due to the retaliation. OSHA sees this as an important, new enforcement tool. The increased burden on employers remains to be seen.

Limitations on Post-Incident Drug Testing

Commenters on OSHA's proposed rule complained that employer policies that require automatic post-injury drug testing can be a form of adverse action that discourages reporting of workplace injuries and illnesses. While not including specific language about drug testing in the final rule, OSHA stated in its commentary that blanket post-injury drug testing policies can be a form of retaliation. OSHA writes “To strike the appropriate balance here, drug testing policies should 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.”

According to OSHA, examples of unreasonable (and potentially retaliatory) post-incident drug tests would include testing an employee who reports a bee sting, a repetitive strain injury, or an injury caused by a tool malfunction or lack of a machine guard. In OSHA's view, employers may conduct post-incident drug tests only if there is a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness, or testing is required by state or federal law.

This stated limitation on post-incident drug testing is a game changer for many employers. It may require that employers review and potentially revise their drug testing policies and practices to allow for this reasonableness standard related to post-incident testing. It also raises significant questions about how to test for impairment as most current testing methodologies are unable to test for impairment of alcohol, marijuana, and other drugs but instead only provide whether levels are present in the employee's system at the time of testing.

Incentive Programs for Remaining Injury Free

OSHA also believes that certain incentive programs that reward employees for remaining injury-free at work can be retaliatory and deter reporting of workplace injuries and illnesses. Although some employers offer to pay employees or a bonus or enter their names in a drawing for a prize in an effort to encourage workplace safety, OSHA states that these types of incentive programs result in the significant underreporting of recordable injuries, especially if employees are subjected to peer pressure from coworkers who also will be denied the award/prize as a result of a reported injury.

OSHA states that it is a violation of the anti-retaliation regulation for an employer to use an incentive program to take adverse action, including denying a benefit, because an employee reports a work-related injury or illness. OSHA instead encourages employers to adopt incentives for employees who correctly follow legitimate safety rules, or who identify hazards, participate on safety committees, or other similar activities.

Electronic Submission of OSHA Forms

Effective January 1, 2017, certain employers will be required to submit electronically their injury and illness recordkeeping forms to OSHA on an annual basis. Currently, most employers with ten or more employees must keep records of workplace injuries and illnesses but those records are not submitted directly to OSHA unless requested by OSHA during an onsite investigation or in a survey under the OSH Data Initiative. Through the new electronic filing requirement, OSHA will receive data every year so that the agency may use the information to identify and target the most hazardous worksites.

Most larger employers with 250 or more employees will need to electronically submit annually its Forms 300, 300A, and 301. Smaller employers in certain industries with between 20 and 249 employees will need to electronically submit the summary form, Form 300A, annually. Other employers may be requested by OSHA to electronically submit recordkeeping forms as well.

Although OSHA stresses that it is not adding to or changing its recordkeeping requirements, it clearly wants that data in order to focus its enforcement efforts.

Public Access of Employer-Submitted Information

OSHA will also publish the electronically submitted injury and illness data provided by covered employers on its public website. It will not, however, provide any personally identifiable information, such as employee names, addresses, healthcare providers, etc. The public will be able to look up the injury and illness records of reporting companies. OSHA believes that public access to such information will serve to encourage employers to eliminate workplace hazards and prevent work-related injuries and illnesses without OSHA having to conduct onsite inspections. It remains to be seen if public disclosure serves this purpose or if it will cause employers to unfairly face public and regulatory scrutiny without the benefit of an "on the ground" inspection and the opportunity to contest allegations of regulatory violations.

Free Webinar Will Offer Practical Tips

With OSHA's final rule raising so many compliance issues for employers, we are offering a complimentary webinar on August 2, 2016 from 11:00 a.m. until 12:00 p.m. to further discuss OSHA's new rule. Register for the webinar here. You don't want to miss it!

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