LEGAL UPDATES

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New OSHA Anti-Retaliation Rules May Require Employers to Change Drug-Testing Practices

Part of the Occupational Safety and Health Administration's final rule on tracking workplace injuries and illnesses will be implemented November 1, 2016. Before that date, employers should be sure to review and, if necessary, revise their current anti-retaliation policies and practices.

OSHA delayed implementation of the final rule's anti-retaliation provisions from August 10, 2016, to November 1, 2016, after employer groups filed a legal challenge to the new requirements.

The Department of Labor's final rule on Recording and Reporting Occupational Injuries and Illnesses:

Requires employers to inform employees of their right to report work-related injuries and illnesses free from retaliation.

Clarifies the existing implicit requirement that an employer's procedure for reporting work-related injuries and illnesses must be reasonable and not deter or discourage employees from reporting.

Incorporates the existing statutory prohibition on retaliating against employees for reporting work-related injuries or illnesses.

What This Means to You

Employers must update personnel policies to comply with the changes.

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Many employers are concerned that post-accident drug testing and safety incentive programs might run afoul of the new rule. They are right to be concerned.

According to the DOL, the "rule does not prohibit drug testing of employees. It only prohibits employers from using drug testing, or the threat of drug testing, as a form of retaliation against employees who report injuries or illnesses. [For example], if an employer conducts drug testing to comply with the requirements of a state or federal law or regulation, the employer's motive would not be retaliatory and this rule would not prohibit such testing."

Outside of the clear-cut example offered by the DOL, it is unclear when an employer will be able to safely drug-test employees after on-the-job accidents. What seems clear is that a blanket policy will not pass muster. OSHA's guidance states that "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." It is unclear how an employer would be able to prove that impairment contributed to the incident. This also raises new concerns that post-accident testing will now be subject to discriminatory rather than neutral application.

The DOL claims that this rule does not prohibit safety incentive programs. However, employers must not create incentive programs that deter or discourage employees from reporting injuries or illness. The DOL states that incentive programs should encourage safe work practices and promote worker participation in safety-related activities.

Employers must comply with requirements on publicly reporting injuries.

The final rule also requires certain employers to electronically submit injury and illness data to OSHA that they are already required to keep under OSHA regulations. The content of these establishment-specific submissions depends on the size and industry of the employer. After personally identifying information is removed, this data will be available to the public at osha.gov. The new reporting requirements will be phased in over two years.

Establishments with 250 or more employees in industries covered by the recordkeeping regulation must submit information 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.

Establishments with 20 to 249 employees in certain high-risk industries 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 doesn't deny that this is a campaign to publicly shame employers into caring more about their records because they will now be available for anyone to see or use.

Employers must update OSHA posters and adopt compliant reporting procedures.

One way for employers to meet the notice requirement is by posting the OSHA "It's the Law" worker rights poster from April 2015 or later. Employers can find guidance here on how to get the right poster.

Employers also must establish a reporting procedure that does not deter or discourage employees from reporting work-related injuries and illnesses. That means it is time to review HR and safety policies on accident reporting, investigation and responses. At a minimum, employers will want to consider training for supervisors and HR employees so they can be equipped to determine if an employee is under the influence, whether post-accident or at other key times during the workday.

Further, worker's compensation insurance policies may require testing; therefore, employers must review their insurance policies as well. It is unclear whether insurance requirements, drug-free workplace programs and/or union contracts that require post-accident testing will be sufficient to protect an employer from liability under OSHA. The outcome of the litigation could help answer these questions, but that could come months, or even years, from now.

Employers must be aware of the impact on retaliation claims.

Section 11(c) of the Occupational Safety and Health Act already prohibits any person from discharging or otherwise discriminating against an employee who reports a fatality, injury or illness. However, OSHA may not act under that section unless an employee files a complaint with OSHA within 30 days of the retaliation. Under the final rule, OSHA will be able to cite an employer for retaliation even if the employee did not file a complaint, or if the employer has a program that deters or discourages reporting through the threat of retaliation.

Stay tuned for future updates on how the new OSHA rules will work with your state unemployment laws, worker's compensation and collective bargaining agreements. We will monitor regulatory developments and litigation to keep you apprised.

Contact Us

For more information on OSHA compliance, contact Sonni Nolan at 314.480.1963 or your Husch Blackwell Labor & Employment attorney.