

LEGAL UPDATES

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OSHA Anti-Retaliation Rule Takes Effect After Judge Denies Injunction

On November 28, 2016, a federal judge in Texas rejected a request by several business groups for a national injunction on the Occupational Safety and Health Administration's new rule on injury and illness reporting. The decision means that OSHA is free to enforce the rule's anti-retaliation provisions as of the rule's scheduled implementation date of December 1, 2016.

The Court Challenge

The challenge focused on portions of OSHA's "Improve Tracking of Workplace Injuries and Illnesses" final rule affecting mandatory post-accident drug testing and incident-based safety incentive programs. (Read our previous alert about the OSHA rule [here](#).)

The plaintiffs, including industry associations such as the National Association of Manufacturers and the Associated Builders and Contractors Inc. and private companies, argued that the rule would cause irreparable harm because their members would either have to restrict their safety programs, limiting their ability to reduce workplace injuries, or incur increased scrutiny and penalties from OSHA.

Judge Sam Lindsay of the U.S. District Court for the Northern District of Texas, Dallas Division, found that the evidence submitted by the plaintiffs, consisting of six witness declarations, was insufficient to show a substantial threat of increased injury. Lindsay concluded that the business groups did not prove that the threat was real and immediate but instead was merely speculative, because they relied on beliefs rather than specific data on the effect of incentive programs on workplace safety.

The judge also noted that the final rule does not include a per se ban on post-accident drug-testing or incident-based safety incentive programs and leaves room for employers to modify their programs to comply with the rule. Lindsay held that without a case-by-case analysis of the specific programs used by each of the plaintiffs, they failed to explain why their safety incentive programs could not be modified without sacrificing effectiveness. Indeed, Lindsay determined that “it is not entirely clear whether any of the programs currently implemented by Plaintiffs would violate the Rule.” Lindsay also rejected plaintiffs’ argument that the increased likelihood of inspections, citations and severe penalties from OSHA under the new rule constituted irreparable harm.

Importantly, Lindsay did not address the merits of the case: “That the court has denied injunctive relief requested by Plaintiffs is not a comment or indication as to whether Defendants will ultimately prevail on the merits. This determination is left for another day.” That is to say, this ruling is not a decision on whether the final rule is lawful and whether the business groups may ultimately prevail in proving that the anti-retaliation provisions are an overreach of the agency’s authority.

What This Means to You

For now, OSHA is free to enforce the anti-retaliation provisions of the rule. These provisions are controversial, even within OSHA, and it remains to be seen how OSHA will enforce them. The provisions may not survive a ruling on the merits of the case, and the next administration will have an opportunity to address the issue. As of December 1, though, employers’ post-accident drug testing and incident-based safety incentive programs must comply with the rule. Thus, employers should be sure to review and, if necessary, revise their current anti-retaliation policies and practices.

Contact Us

For more information on OSHA compliance, contact Brad Hiles, Brian Hendrix or your Husch Blackwell Labor & Employment attorney.