

New OSHA Rule Requires Employers To Reevaluate Certain Workplace Policies

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On May 12, 2016, the Occupational Safety & Health Administration (OSHA) published a final rule regarding reporting injuries and illnesses in the workplace and protecting employees who make those reports. The new rule expands OSHA's enforcement powers, requires employers to make disclosures to employees, and requires employers to submit information regarding injuries and illnesses to OSHA. OSHA will then publish the information provided by employers on a publicly available searchable online database. Certain of the requirements take effect next month. Other requirements of the new rule will phase in over the next two years. This alert describes various aspects of the new rule and how employers can prepare for compliance with it.

Anti-Retaliation Provisions Take Effect Next Month

Beginning August 10, 2016, all employers, regardless of size, must inform employees of their right to report work-related injuries and illnesses free from retaliation. OSHA has provided a poster that employers can use to meet this requirement. Employers must also ensure that any procedure for reporting work-related injuries and illnesses is reasonable. A reporting policy will not be considered reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness.

OSHA has targeted two common workplace safety policies in the final rule: incentive programs and mandatory post-incident drug testing. OSHA warns that it will closely scrutinize incentive programs. In general, OSHA will consider such programs retaliatory if they offer benefits to employers who do not report injuries and illnesses. For example, OSHA considers unlawful a company incentive program that eliminates a group safety bonus if one employee in that group is injured.

OSHA recognizes, however, that properly-focused safety incentive programs can contribute positively to the safety culture of a workplace. Incentive programs that, for example, reward employees for correctly following legitimate safety rules or promote participation in safety trainings or investigations will likely pass muster.

On the other hand, OSHA concluded in the final rule that blanket post-injury drug testing deters proper reporting. OSHA has therefore prohibited mandatory post-accident drug testing. Under the new rule, employers must limit post-incident testing to situations where 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 explained that drug tests are not reasonable, for instance, for employees who report a bee sting, repetitive strain injury, or an injury caused by a lack of machine guarding or a machine or tool malfunction. OSHA clarified that post-incident drug testing will not be considered retaliatory if it is required by state law, such as a workers' compensation requirement.

The rule also grants OSHA additional enforcement powers beginning next month. OSHA compliance officers performing an inspection will have the authority to issue citations for retaliation even if the employee has not filed a claim or otherwise reported to OSHA the alleged retaliation. OSHA previously had to wait for an employee to file a complaint related to the OSH Act to commence an investigation into potential retaliation. Employees had to file a complaint within 30 days of the alleged retaliatory treatment.

OSHA's New Reporting Requirements

Under current regulations, many employers could go a lifetime without ever making a report to OSHA. Current regulations require employers to make reports to OSHA only in the event of certain, serious injuries, such as amputations, fatalities, or accidents requiring hospitalization. Most employers are only required to maintain injury and illness records on a log (called OSHA Form 300) with supporting documentation (on OSHA Form 301 or an equivalent). That information must be summarized annually onto an OSHA Form 300A. Form 300A must be posted at the workplace from February 1 through April 30.

The new rule changes these reporting obligations significantly. Certain employers will be required to submit information to OSHA annually. And, OSHA will make that information available online. Specifically, establishments with 250 or more employees must submit summary information from the Form 300A by July 1, 2017. They must submit more detailed information from all the 2017 forms by July 1, 2018. Beginning in 2019, and every year thereafter, the submission deadline will be March 2.

Establishments with 20-249 employees in certain industries OSHA has deemed high risk will also have submission requirements. Those industries include all employers in agriculture, utilities, construction, manufacturing, department stores, and nursing homes. Those establishments must submit summary information by July 1, 2017. They are also required to submit summary information from the 2017 Form 300A by July 1, 2018. Beginning in 2019, and every year thereafter, those establishments must submit the information by March 2.

In an effort to protect the privacy of employees, OSHA will not require worksites to submit certain personal, identifying information from the relevant forms. However, it is not difficult to imagine how in small towns, or a catastrophic incident, individual employees and incidents will be easily identifiable.

OSHA intends to publish the information it receives online. In the final rule, the agency suggested this disclosure requirement will "shame" employers into improving workplace health and safety.

Increased Fines

Once these procedures go into effect, OSHA will have a new weapon in its enforcement arsenal – increased penalties. As of August 1, 2016, penalties for violations of OSHA regulations will increase. Currently, the penalty for a willful or repeat violation of an OSHA policy is \$70,000. On August 1, those penalties will increase to \$124,709. Similarly, the penalty for serious violation, other than serious violations, and failures to abate is currently \$7,000. On August 1, 2016, those penalties will increase to \$12,471.

Employers' Responsibilities As A Result Of The New Rule

With increased penalties and new regulations less than a month away, employers should immediately review their workplace policies and procedures. Policies regarding drug testing should be amended to require testing only in situations in which the drug or alcohol use is likely to have contributed to the accident or injury and when the test can accurately identify the impairment caused by the drug or alcohol use. Employers should also consider whether any federal or state laws require post-incident drug testing.

Similarly, safety incentive programs should be reviewed to ensure that they incentivize reports of injuries and illnesses. Employers should be aware that OSHA may find retaliatory policies that require an employee to report an injury or illness immediately. The employer must allow a reasonable amount of time for the employer to report, after the employer learns of the injury or illness. Employers should also review their workplace policies and remind management about best practices for handling an OSHA inspection.

To comply with OSHA's new reporting policies, employers should review the types of injuries and illnesses that will need to be reported, bearing in mind that the reports will be made publicly available online. OSHA generally requires employers to record work-related injuries or illnesses, ones that involve a loss of consciousness, restricted work activity, or a job transfer, days away from work or medical treatment beyond first aid, or hearing loss. Employers should be aware that reporting obligations run to the worksite, not the employer, so individual employers may have to make many reports each year.

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