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INSIGHTS

Does Your Company Have "Reasonable" Procedures for Employee Reporting of Work-Related Injuries and Illnesses Consistent with OSHA's New Rule Effective August 10th?

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OSHA's May 12, 2016 final rule revising its recording and reporting regulations received a great deal of publicity, in large part, because of the new requirements beginning in 2017 for some employers to electronically submit on-the-job injury and illness information. Many employers, however, have not focused on the fact that the new OSHA regulations also establish an August 10, 2016 deadline for employers to adopt, and communicate to employees, reasonable procedures for employee reporting of work-related injuries and illnesses. This August 10 deadline is particularly important because of OSHA's assertions in the preamble to those regulations that the new rule effectively bars certain (i) "blanket" post-injury drug testing policies, and (ii) safety-related incentive programs tied to the absence, or low level, of reported injuries.

Adoption of Reporting Procedure

The new OSHA rule requires an employer to (1) establish a "reasonable" procedure for employee reporting of workplace injuries and illnesses that does not in any way deter or discourage employees from reporting, (2) inform employees of that procedure, and (3) inform employees of their right to report work-related injuries and illnesses and the prohibition on an employer discharging or otherwise discriminating against an employee for making such a report. Notably, one way to satisfy the requirement to inform employees of their right to report work-related injuries and illnesses free from retaliation is posting the current OSHA "It's The Law" poster.

Impact on Post-Injury Drug Testing

Although the text of the new regulations does not address drug testing, OSHA's preamble to those regulations explained the agency's position as to when post-accident drug testing might be regarded as an impermissible deterrent to injury reporting. OSHA observed in the preamble that it has concluded that "blanket post-injury drug testing policies deter proper reporting." While OSHA emphasized that the new rule in no sense bans drug testing generally, the agency instructed that the "final rule does prohibit employers from using drug testing (or the threat of drug testing) as a form of adverse action against employees who report injuries or illnesses."

Importantly, the agency very specifically concluded in the preamble that "[t]o 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."

The agency noted that a repetitive strain condition or an injury caused by an equipment malfunction are two examples of when post-injury drug testing would be plainly unreasonable. The agency further explained that "[e]mployers need not specifically suspect drug use before testing, but there should be a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness in order for an employer to require drug testing."

In sum, OSHA has effectively served notice that it will regard an employer's "blanket" policy or practice of testing all employees who are injured on the job as an unreasonable deterrent on injury reporting and thus a violation of the new regulations. Importantly, OSHA does recognize that these new regulations do not impact drug testing conducted pursuant to federal or state requirements, such as United States Department of Transportation rules.

Employee Incentive Programs

Many employers, particularly in safety-sensitive industries, maintain policies that reward employees for the absence, or a prescribed low level, of reported injuries.

In the preamble to the new rule, the agency specifically warned that "it is a violation 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, such as disqualifying the employee for a monetary bonus or any other action that would discourage or deter a reasonable employee for reporting the work-related injury or illness."

In its preamble, OSHA emphasized that not all safety incentive programs are prohibited. OSHA suggested, however, that only incentive programs not tied to the absence or low level of reported injuries are acceptable under the new regulations. For instance, in the preamble, OSHA explained that "an incentive program [that] makes a reward contingent upon, for example, whether employees correctly follow the legitimate safety rules rather than whether they reported any injury or illnesses… would not violate [the new regulations]."

Importantly, there are a variety of legal arguments that might be made to challenge these new OSHA regulatory requirements - including OSHA's position with regard to permissible post-injury drug testing and safety incentive programs. Whether there will be a court challenge leading to these new regulations being struck down, in whole or part, remains to be seen.

Potential for Citations and Fines

OSHA takes the position that it has the authority to issue citations and fines for employers who are noncompliant with these new rules, including the new anti-retaliation language in the regulations. OSHA has rejected the contention by some commentators that the agency should not have the authority to issue citations and fines for retaliation because Section 11(c) of the Occupational Safety and Health Act already provides employees with the right to file a retaliation complaint with the agency within 30 days of a discharge or other adverse action and seek conventional employment-type remedies such as lost wages, reinstatement, and punitive damages. According to OSHA, an employer now faces a potential citation and fine even if no employee files a timely complaint.

Notably, as a result of separate regulatory action by OSHA, effective August 1, 2016, the amount of potential OSHA fines increases significantly. Specifically, the $7,000 limitation for other-than-serious and serious violations increases to $12,471. Further, the limit for a repeat or willful violation increases from $70,000 to $124,709.

Next Steps for Employers

In anticipation of the August 10, 2016 effective date, an employer should consider taking the following steps:

1. Review its procedures (and, if necessary, implement new procedures) for employee reporting of work-related injuries and illnesses consistent with the new rule;

2. Inform employees in writing of (i) that procedure, (ii) employees' right to report work-related injuries and illnesses and (iii) the prohibition on discharge or any other adverse actions by an employer motivated by an employee's reporting of a work-related injury or illness (Again, one way to satisfy the requirement that the employer inform employees of their right to report work-related injuries and illnesses free from retaliation is posting the current OSHA "It's The Law" worker rights poster.)

3. Review its post-accident drug testing procedures to determine if it is clear that the decision to test an injured employee after an accident or injury will not be an automatic "blanket" approach, but instead will be based upon a determination as to whether the employee's own conduct, including potential impairment, may have caused the injury; and

4. Review its safety incentive programs to confirm that there is not a direct link between those incentives and the number of reported workplace injuries.