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Insights: Alerts

OSHA's New Final Rule on Reporting Work-Related Injuries and Illnesses May Have Far-Reaching Consequences for Employers

May 16, 2016

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On May 11, 2016, the Occupational Safety and Health Administration ("OSHA") issued a new final rule governing the tracking and reporting of workplace injuries and illnesses. The new rule, which takes effect, in part, on July 1, 2017, is expected to have significant consequences for employers going far beyond the new reporting obligations set forth in the rule.

The New Reporting Rule

The new rule has three main components:

1. Electronic reporting requirements. Establishments with 250 or more employees will be required to submit electronically to OSHA the injury and illness data that they are already required to record on OSHA Injury and Illness Forms. The first year, these employers are required to submit information from their 2016 Form 300A only; from 2018 onward, they must submit information from all three OSHA Injury and Illness Forms (300A, 300, and 301). Establishments with 20 to 249 employees in certain high-risk industries will be required to submit electronically information from their Form 300A only. Once OSHA has this employer data, it will remove "personally identifiable information" and then publish a database of work injuries and illnesses by employer on its website.

2. Required internal reporting and anti-retaliation policies. All employers, regardless of size, will be required to implement a policy that contains, at a minimum, a procedure for employees to report injuries to the employer and informs workers of their right to report work-related illnesses and injuries without fear of retaliation. The policy must be reasonable and "not deter or discourage employees from reporting."

3. Cause of action for retaliation. Even before the issuance of the new rule, employers were prohibited from retaliating against employees for reporting work-related injuries or illnesses. Under the new rule, however, OSHA will be empowered for the first time to issue citations to employers for retaliating against employees for reporting work-related injuries and illnesses. (Previously, OSHA was authorized to take action against an employer for retaliating against an employee only if the employee filed what is known as a section 11(c) complaint with OSHA within 30 days of the alleged retaliation, and OSHA had to file a lawsuit in federal court to

pursue a retaliation claim against an employer.) Under the new rule, OSHA may directly order various remedies for retaliation; for example, it could order an employer to reinstate a wrongfully terminated employee with back pay.

Practical Implications

According to OSHA's website, "making injury information publicly available will 'nudge' employers to focus on safety," but there are various potential issues that could arise in light of the new rule.

The requirement that certain employers submit work-related injury and illness information to OSHA electronically will make that information more easily accessible to the agency and may lead to an increase in "willful violation" citations if OSHA determines that continued injuries or illnesses of a certain type indicate that an employer has not remedied previously recognized hazards.

OSHA's publication of an employer's injury/illness data on its website raises a number of concerns. Privacy issues relating to the health conditions of individual employees may be implicated, though OSHA claims it will use software to remove personally identifiable information. Of equal concern is the potentially false image of an employer's safety record that can be painted by the raw data that will appear on the OSHA website. That data can be mined and used by unions seeking to organize an employer's employees. Unions will be able to point to specific injuries in arguing that an employer is lax on safety matters and that employees need a union to protect them from future harm.

The anti-retaliation and internal injury-reporting portion of the new rule is likely to lead to increased claims of many varieties. For example, workers may have an avenue for relief in states without existing workers' compensation retaliation laws on the books. In addition, employees and plaintiffs' attorneys may argue that an employer's existing policies and procedures function as a disincentive for employees to report injuries and illnesses, thereby violating the rule. Even seemingly beneficial or innocuous employer policies or practices could be deemed to violate the new rule. For example, some employers maintain incentive programs for employees who go "injury free" for a certain period of time. While an "injury free" reward program may encourage employees to be more careful, it may also be viewed under the new rule as an unlawful incentive not to report injuries. Of equal concern are group incentives dependent on the actions of multiple employees (for example, rewards for departments that are "injury free"), which OSHA believes could lead to peer pressure not to report injuries. OSHA recommends, instead, incentive programs that make a reward contingent upon, for example, whether employees correctly follow legitimate safety rules or participate in safety-related activities, rather than whether they reported any injuries or illnesses.

Drug-testing policies that automatically authorize a drug test after an accident or injury could also prove problematic under the new rule. OSHA believes that blanket post-injury drug testing policies deter proper reporting. Instead, OSHA recommends that drug-testing policies 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.

Employers should, of course, maintain and enforce an appropriate policy requiring employees to report work-related injuries, but OSHA has thus far provided little guidance as to what it will or will not consider to be a "reasonable" injury-reporting policy. A policy cannot be overly onerous in its requirements for employees to report an injury or illness, such as by containing too many steps. Further, a policy that imposes discipline on employees for late reporting could be an issue, as some injuries and illnesses build up over time. Perhaps paradoxically, disciplining an employee for late reporting of an injury or illness could subject an employer to liability for violating the rule's retaliation prohibition. OSHA states, "[f]or a reporting procedure to be reasonable and not unduly burdensome, it must allow for reporting of work-related injuries and illnesses within a reasonable timeframe after the employee has realized that he or she has suffered a work-related injury or illness."

The bottom line is that employers need to review their safety policies carefully and tread with caution when disciplining an employee who has reported an illness or injury.

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