OSHA Issues New Illness and Injury Recordkeeping Rule Which Affects Employer Drug Testing and Safety Incentive Policies

Taking effect August 10, 2016, OSHA released its final rule to “modernize injury data collection to better inform workers, employers, the public and OSHA about workplace hazards.” OSHA acknowledges in its press release that the rule is intended to “nudge” employers to enhance methods to prevent workplace injuries and illnesses. But, OSHA appears to want to push employers to enhance workplace safety efforts as if it is assuming that there were none in the first place. Plus, there are significant elements that will require changes to drug testing and incentive policies that may necessitate amending long-established policies and procedures.

Overview of the New Recording and Reporting Requirements

Signaling a serious departure from standard injury recording, the new rule will require employers to electronically submit their records to OSHA each year. OSHA will then publish this data online in a format that anyone with access to the internet can see (including competitors, prospective clients and employees, union organizers … and the list goes on), so they can use the information for their own purposes, including publication. The data submission requirements will be phased in over two years: employers with 250 or more employees must submit the required 300A Annual Summary by July 1, 2017; and employers with 20 to 249 employees in “high-hazard” industries must submit their 2016 and 2017 300A Summaries by July 1, 2017, and 2018, respectively.

Employers operating in State Plan states are covered and must adopt “substantially identical” requirements within six months. Employers with employees in Alaska, Arizona, California, Connecticut, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, and Utah should be ready to comply with the new rule.

The employee involvement portion of the rule explicitly requires employers to “inform each employee how he or she is to report a work-related injury or illness” and “establish a reasonable procedure for employees to report work-related injuries and illnesses promptly and accurately.” A procedure is not reasonable if it would “deter or discourage a reasonable employee from accurately reporting a workplace injury or illness.” Employers must also inform employees that they have the right to report injuries and illnesses, in addition to advising them that their employer is “prohibited from discharging or in any manner discriminating against [them] for reporting work-related injuries or illnesses.”

Post-Injury Drug Testing and Safety Incentive Policies

Drug Testing: Most employers should be alarmed with OSHA’s announcing that “blanket post-injury drug testing policies deter proper reporting” of injuries. OSHA instructs employers to utilize post-injury drug testing only where “there is a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness,” and only where “the drug test can accurately identify impairment caused by drug use.” OSHA suggests that employees who report bee stings, repetitive strain
injuries or other injuries where drug use could not reasonably have contributed to the occurrence, should not be tested. Can you see the issue here? Where is the line going to be for testing or not?

OSHA warns employers that even when the decision to conduct a post-injury drug test is reasonable, the agency may still find that the testing unlawfully deterred injury reporting and constituted retaliation if the drug testing procedure itself is punitive or embarrassing to the employee, whatever that means. Interestingly, OSHA recognizes that employers which conduct post-accident testing mandated by federal regulations (e.g., interstate transportation) or pursuant to state workers’ compensation laws, many of which include “drug-free workplace” incentive programs, are not affected by the new rule. As such, an employer's efforts to comply with the requirements of applicable federal regulations or state laws will not be viewed as retaliatory.

**Safety Incentive Policies:** The new rule also takes aim at employer safety incentive and disincentive policies and practices. The language found in the rule will likely force many employers to develop new policies with the intention of ensuring workplace safety without incurring the wrath of OSHA. In the meantime, employers would be well-advised to avoid using 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 from reporting the work related injury or illness.” For example, if the company has a BBQ planned due to an injury-free month and an injury is reported and the BBQ cancelled – that would be problematic. On the other hand, OSHA indicates that if “an incentive program makes a reward contingent upon, for example, [correctly following] legitimate safety rules rather than whether they reported any injuries or illnesses, the program would not violate this provision.”

**What Should Employers Do Now?**

- Modify your drug and alcohol testing policies to allow for discretion on obvious cases in which drug use or testing are clearly unrelated to an employee’s injuries and review the reasonableness of your drug testing procedures with legal counsel. Be mindful of the potential for inconsistent application of policies and follow-on disparate treatment claims.

- Examine your safety incentive and disincentive policies and practices and ask yourself whether the policies and/or practices could be perceived as deterring or discouraging employees from reporting an injury or illness. Some bonus plans may similarly be viewed as incentivizing managers to discriminate against employees who report illnesses and injuries if the effect of doing so negatively impacts the manager’s bonus eligibility (i.e., where the bonus is tied to the OSHA recordable rates). If the potential for either conclusion exists, consider discontinuing or revising those policies and/or practices.

- Begin planning for the switch from paper-based recordkeeping methods to an electronic system compatible with OSHA’s data submission portal. Provide training to ensure the reporter understands the new rule.

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