OSHA's Final Rule on Recording and Reporting Workplace Injuries

3/3/17

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On May 12, 2016, the Occupational Safety & Health Administration (OSHA) issued a final rule amending 29 C.F.R. 1904 which pertains to the recording and reporting of occupational injuries and illnesses.[1] The purpose of this final rule was to improve the tracking of workplace injuries and illnesses and prevent employment policies that can be used to retaliate against workers for reporting work-related injuries and illnesses, and in turn, deter accurate reporting.

Certain provisions of OSHA's final rule became effective on August 10, 2016. As of August 10, employers are required to: 1) inform employees of their right to report work-related injuries and illness free from retaliation, 2) maintain reasonable reporting methods that do not deter or discourage employees from reporting work-related injuries and illnesses, and 3) avoid prohibited action/retaliation against an employee for reporting a work-related accident. As of January 1, 2017, OSHA will require electronic submission of certain records pertaining to workplace injuries and illnesses.

OSHA's final rule requires covered employers in most industries to keep records of occupational injuries and illnesses using OSHA Form 300, OSHA Form 301, and OSHA Form 300A.[2] All forms are available on OSHA's website. OSHA's final rule does not change any prior requirements of Section 1904 with regard to recording, but the final rule will require covered employers to submit electronically the information they were previously required to record.

In order to comply with OSHA's final rule, employers must establish reasonable procedures for employees to report work-related injuries and illnesses. OSHA specifically stated that it will not consider a procedure to be reasonable if it would *deter or discourage* an employee from reporting. OSHA is primarily concerned with three types of policies which it believes discourage reporting: post-accident drug testing, disciplinary policies, and incentive programs.

OSHA concluded that policies mandating automatic post-accident drug testing are seen as adverse action that can discourage reporting because employees perceive drug testing as an invasion of privacy. OSHA suggests that drug testing policies should be limited to situations where there is a *reasonable possibility* that alcohol or drug use is likely to have contributed to the incident AND where the drug test can accurately identify impairment caused by drug use.

So what does OSHA's final rule mean for employers' current drug testing policies and how can an employer administer a drug test without violating OSHA's final rule?

In order to avoid scrutiny from OSHA, employers should no longer mandate blanket automatic post-accident drug testing. Employers must establish written policies requiring an employee to submit to a post-accident drug test where there is a reasonable possibility that alcohol or drug use is likely to have contributed to the injury or illness. Circumstances that might lead an employer to have a reasonable basis to perform a drug test include evidence of drug or alcohol use in the workplace, such as smelling alcohol on an employee's breath, blood shot eyes or a witness to drug use. Note that employers that maintain a drug-free workplace can continue to utilize policies that require employees to submit to random drug tests. Random drug test policies will not violate OSHA's final rule because they are not dependant on an employee reporting a workplace injury.

Employers administering a post-accident drug test must now be sure that all employees involved in the workplace accident are given a drug test (not just the employees who are injured or who reported an injury) or the drug testing policy may be viewed as retaliation for reporting. Further, keep in mind that

a drug or alcohol test cannot be administered in circumstances where there is NO possibility that drugs or alcohol contributed to the workplace injury or illness or an employer risks being in violation of OSHA's final rule. For example, if an employee alleges his injury was caused by his repetitive job duties, then there is no possibility that drugs or alcohol could have contributed to the injury and a test would violate OSHA's final rule.

On October 19, 2016, OSHA issued a memorandum to regional administrators interpreting its final rule.[3] Specific evidence of drug or alcohol use is not a necessity for an employer to believe there is a reasonable possibility of drug or alcohol use. With regard to drug testing, OSHA instructed that it would be reasonable to administer a drug test in circumstances where a work accident occurred, but the employer does not know the cause of the accident. OSHA indicated an employer would have a reasonable basis to perform post-accident drug testing of all employees involved under these circumstances because the test could lead to the root cause of the accident. OSHA also clarified that it will only consider whether the test can identify current impairment in the case of alcohol. OSHA acknowledged that no test exists for identifying current impairment with drug use.

Commentary in the final rule indicates that drug tests administered in compliance with state and federal laws, including workers' compensation laws, will not violate the final rule. Under these circumstances, OSHA stated it will not issue citations to employers because drug tests administered in compliance with state and federal laws are performed pursuant to valid laws and will not be considered retaliatory.

However, at this time, the Illinois Workers' Compensation Act, 820 ILCS 305, has not been interpreted to require blanket post-accident drug testing. Section 11 of the Act provides employers with an intoxication defense to certain claims and also provides the procedure for proving intoxication. A drug test is key to proving intoxication, but is not required. Because the Act does not state blanket post-accident drug testing is required, the best practice for Illinois employers at this time would be to require drug tests only when the employer has a reasonable belief that drug or alcohol use is likely to have contributed to the workplace injury or illness. A test administered under these circumstances will preserve an employer's possible defense to a workers' compensation claim and will also comply with OSHA's final rule.

Of note, OSHA also found that incentive programs will not be considered reasonable if the program deters reporting workplace injuries and illnesses. OSHA encourages compliance with safety rules, regulations and activities and finds that incentive programs that promote safety in the workplace are acceptable. For example, an incentive policy awarding a bonus to employees that comply with workplace safety rules, such as always wearing a hard hat, are acceptable policies. However, incentive programs that award a bonus to all employees that did not report a workplace injury do not comply with OSHA's final rule as these programs deter reporting of workplace injuries.

Moving forward, it will be important for employers to review their policies and ensure their current policies comply with OSHA's final rule. Employers must be vigilant and take as much control of their workplace safety as possible in order to avoid OSHA's scrutiny.

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[1] 81 Fed. Reg. 29624 (May 12, 2016). https://www.federalregister.gov/documents/2016/05/12/2016-10443/improve-tracking-of-workplace-injuries-and-illnesses

[2] *See* 29 C.F.R. 1904 (B), App. A. Exempt industries not required to record workplace injuries and illnesses unless specifically asked in writing by OSHA.

[3] https://www.osha.gov/recordkeeping/finalrule/interp_recordkeeping_101816.html