



OSHA Rule Overview:

Improve Tracking of Workplace Injuries and Illnesses

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What we'll cover today

Changes associated with OSHA's Final Rule:

- Overview of the Final Rule
- Effect on Drug and Alcohol Policies
- Effect on Incentive Programs
- Legal Challenges to Rule

Overview of the Final Rule

Improve Tracking of Workplace Injuries and Illnesses

- Section 1904.41 – Electronic Submission of Records
 - certain employers must electronically submit injury and illness data
 - improves OSHA enforcement efficiency
- Section 1904.35 – Reasonable Reporting Procedures
 - procedures must be “reasonable and not deter or discourage employees from reporting”
- Section 1904.36 - Anti-Retaliation
 - increases focus on anti-retaliation

Overview of the Final Rule

Section 1904.41 – Electronic Submission of Records

- Form 300A – Summary of Work-Related Injuries and Illnesses
 - Submitted in their entirety
- Form 300 – Log of Work-Related Injuries and Illnesses
 - Redact employee names
- Form 301 – Injury and Illness Report
 - Redact employee name and address
 - Redact treating health care professional's name
 - Redact name and address of treating facility

Overview of the Final Rule

Section 1904.41 – Electronic Submission of Records

- > 250 employees at location
 - Extended to December 1, 2017 – Form 300A
 - July 1, 2018 – Forms 300A, 300, 301
- 20 -249 Employees in certain industries
 - Extended to December 1, 2017 – Form 300A
 - July 1, 2018 – Form 300A
- Beginning in 2019, reports due on March 2.
- OSHA intends to post the establishment-specific injury and illness data it collects under the rule publicly at *www.osha.gov*

Overview of the Final Rule

Section 1904.35 – Reasonable Reporting Procedures

Section 1904.36 – Anti-Retaliation

- Purpose is “to ensure completeness and accuracy of injury and illness data...”
- The final rule:
 - clarifies that a procedure for reporting work-related injuries and illnesses must be reasonable and not discourage employees from reporting; and
 - prohibits employers from retaliating against employees for reporting work-related injuries.

Overview of the Final Rule

Section 1904.35 – Reasonable Reporting Procedures

Section 1904.36 – Anti-Retaliation

- ...a reporting procedure is not reasonable if it would deter or discourage a reasonable employee from reporting...
 - *Is the reporting procedure too complicated or difficult?*
 - *Unduly burdensome reporting procedures are not reasonable*
 - *Policies requiring “immediate” reporting regardless of the circumstances are not reasonable*
- ...for a reporting procedure to be reasonable...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...

Effect on Drug and Alcohol Policies

Section 1904.35 – Reasonable Reporting Procedures

Section 1904.36 – Anti-Retaliation

- OSHA believes that blanket post-injury drug testing policies deter proper reporting.
- ...if the method of drug testing does not identify impairment but only use at some time in the recent past, requiring the employee to be drug tested may inappropriately deter reporting...
 - *Perceived as retaliation for reporting*

Effect on Drug and Alcohol Policies

How do you avoid retaliation?

- ...need not specifically suspect drug use...but there should be a reasonable possibility that drug use...was a contributing factor...for the employer to require drug testing...
 - *Could marijuana use last month have contributed to a car accident today?*
- ...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...
 - *Don't drug test a bee sting!*
 - *How do you quantify impairment?*
- If drug testing done to comply with requirements of a state or federal law or regulation, then it is not retaliatory in nature.
 - *Workers' Compensation*

Effect on Incentive Programs

Section 1904.35 – Reasonable Reporting Procedures

Section 1904.36 – Anti-Retaliation

- OSHA believes that if not carefully structured, incentive programs have the potential to discourage reporting of work-place injuries.
- ...rate-based incentive programs, which reward workers for achieving low rates of reported injury and illnesses, may discourage reporting...
- ...injury and illness reporting through incentive programs predicated on workers remaining “injury free,” leading to peer pressure on employees not to report...
 - *How is management’s expectation of “zero” incidents being communicated?*

Effect on Incentive Programs?

How do you avoid retaliation?

- Incentive programs that make a reward contingent upon, for example, whether employees correctly follow legitimate safety rules, rather than whether they reported any injuries
- Incentive programs that promote employee participation in safety-related activities, such as identifying hazards or participating in investigations of injuries, incidents, or “near misses”

Effect on Incentive Programs?

When can rate-based incentive programs work?

- ...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, such as disqualifying the employee for a monetary bonus or any other action that would discourage or deter a reasonable employee from reporting...
- ...[o]ne important factor to consider is whether the incentive involved is of sufficient magnitude that failure to receive it “might have dissuaded reasonable workers” from reporting...
 - OSHA Memo re: *Employer Safety Incentive and Disincentive Policies and Practices* (Mar 12, 2012)
 - *Burlington Northern & Santa Fe Railway Co. v White*, 548 US 53, 68 (2006).

Challenges to the Final Rule

National Association of Home Builders et al v. Perez et al

- Filed in the Western District of Oklahoma on January 4, 2017
 - Alleges the rule exceeds statutory authority granted to OSHA
 - Alleges rule is arbitrary and capricious
 - Alleges the rule was promulgated without proper APA procedures
- OSHA filed Motion to Stay on 7/10/17
 - ... so OSHA can determine whether to reconsider, revise, or remove portions of the rule at issue in this case...
- Stay granted on July 11, 2017

Challenges to the Final Rule

TEXO ABC/AGC, Inc. et al v. Perez et al

- Filed in the Northern District of Texas on July 8, 2016
 - Alleges rule exceeds statutory authority granted to OSHA
 - Alleges rule is arbitrary and capricious
 - Alleges the rule was promulgated without proper APA procedures
- Also, specifically alleges portions of rule are unlawful to the extent the that they prohibit or otherwise limit:
 - incident-based employer safety programs; or
 - routine post-accident drug testing programs

Challenges to the Final Rule

TEXO ABC/AGC, Inc. et al v. Perez et al

- Motion for Preliminary Injunction filed July 12, 2016
 - Requested preliminary injunction to prevent OSHA from implementing the rule until after the court rules on the merits of case
 - Motion was denied on November 28, 2016
- OSHA filed Motion to Stay on June 29, 2017
 - ... so OSHA can determine whether to reconsider, revise, or remove portions of the rule at issue in this case...
- Court administratively closed the case on June 30, 2017

What's Next?

- OSHA also intends to issue a proposal to reconsider, revise, or remove other provisions of the final rule.
 - *Action expected from OSHA as early as October 2017*
 - *Not clear what OSHA might propose*
- Electronic reporting date extended to December 2017
- Other provisions technically in effect
 - *OSHA does not appear to be pursuing enforcement portions of the rule pending further guidance*