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
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 Drug and Alcohol Policies
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 workplace 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?
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.”
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...

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 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