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Fed/OSHA's new electronic reporting rule: a major change and significant hidden traps for employers

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The federal Occupational Safety and Health Administration ("OSHA") published its new final rule to "Improve Tracking of Workplace Injuries and Illnesses" on May 12, 2016. The new rule does not change *who* must engage in OSHA recordkeeping or *what* must be recorded. However, the new rule will now require many employers to also electronically report recordkeeping information to OSHA on an annual basis.

Of perhaps even greater importance, the new reporting rule contains a number of hidden traps. Most notably, OSHA has stated its intent to use the new rule in such a way as to publicly shame employers for little or no reason, and to target those safety incentive plans, drug testing programs and any other workplace policy or procedure which OSHA believes discourages employee reporting of injuries or illnesses.

The new rule may be subject to judicial challenge, but pending any judicial relief, employers will need to prepare for these changes.

Electronic reporting

The electronic reporting requirements are being phased in over the course of three years. All covered employers will have to submit only the Form 300A information in the first year, and will have until July 1, 2017 to do so. In the second year, employers with 250 or more employees will have to submit all required information, but will have until July 1, 2018 to do so. Starting in 2019, covered employers will have to submit the required information by the regular deadline—March 2 of each year.

Under the new rule, subject to the phase in period, covered employers with 250 or more employees must electronically submit information from their OSHA Form 300A, 300 and 301 to OSHA once a year. The information must be submitted by March 2 of each year for the previous year's records. Employers with 20 to 249 employees that are in specifically designated industries (listed in 29 CFR Part 1904, Subpart E, Appendix A) must submit information from their Form 300A logs by March 2 of each year. Other employers not covered by these mandatory reporting rules will have to submit information electronically when requested to do so by OSHA.

Employers will now want to determine whether they are required to electronically submit information from their 300A logs to OSHA next year.

Bringing back stocks and pillory

OSHA has made clear that it intends make the electronically submitted information publicly available on its website, subject to certain restrictions to protect employee privacy. 81 FR 29624.

The clear intent is to engage in public shaming of employers, although such injury and illness records do not tell anyone very much, if at all, about the quality of an employer's safety programs or an employer's commitment to safety. And it does not take much imagination to see how this information can be misused by competitors, the media, unions, employees and government agencies.

Safety incentive programs, alcohol and drug testing programs and other workplace policies and procedures all may be targeted

The new rule adds a prohibition on retaliating against employees for reporting work-related injuries or illnesses. 29 CFR 1904.36. On its face, such a rule does not look like a significant change since such conduct was already prohibited by Section 11(c) of the OSHA Act.

However, Fed/OSHA has hidden the real message here. As an important initial procedural matter, the regulatory notice for the final reporting rule states that the retaliation paragraph was added to the rule to provide OSHA with "an enhanced enforcement tool for ensuring the accuracy of employer injury and illness logs." Previously, Section 11(c)'s retaliation prohibition could only be enforced if the aggrieved employee filed a complaint. Under the new rule, OSHA can issue citations to employers for allegedly discouraging employee reporting. 81 FR 29669. OSHA has noted that potential abatement procedures for a violation of this rule could include "mak[ing] whole any employees treated adversely as a result of the retaliation," such as by reinstating a terminated employee with back pay. 81 FR 29671.

OSHA has also made it clear that it plans to challenge any action or procedure that could dissuade a reasonable employee from reporting a work-related accident or injury (81 FR 29672), and OSHA's view of what might dissuade reporting is unbelievably broad.

OSHA has often suggested that bonus plans based on a reduction in safety incidents discourage employees from reporting an incident. Under the new rule, this would now be considered a violation, and OSHA believes it now has the authority to require the employer to revise the bonus plan and pay the bonus to employees. 81 FR 29673.

OSHA's notice of the final rule even cautioned that in some cases employee drug testing "may inappropriately deter reporting," and hence would be prohibited, such as when an injury or illness "is very unlikely to have been caused by employee drug use." 81 FR 29673. Under the new rule, OSHA states that "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." 81 FR 29673.

OSHA has also questioned rules requiring an employee to report an incident within a certain period of time or face disciplinary action, claiming that this too discourages employee reporting. 81 FR 29670.

Although OSHA has acknowledged that the new rule does not prohibit employers from disciplining employees who violate legitimate safety rules (81 FR 29672), OSHA's broad and vague statements about what might or might not be a legitimate safety rule and what might discourage reporting will undoubtedly lead to claims of improper disciplinary action.

Employers will now want to carefully review their employment policies and procedures, including, but not limited to, safety incentive programs, drug testing programs and disciplinary action programs to determine if they might be viewed by OSHA as discouraging employee reporting. In general, to minimize targeting by OSHA, safety incentive programs should be based on "leading" safety indicators (attendance at training programs, participation on safety committees, making safety suggestions, etc.) rather than "trailing" indicators (reported incidents, etc.)

These new anti-discrimination/retaliation requirements go into effect on August 10, 2016.

Employers must establish reporting policies and notify employees

In addition to the prohibition on discrimination, the new rule also requires employers to establish "reasonable" procedures for employees to report work-related injuries and illnesses and inform employees of how they can report work-related injuries and illnesses. §1904.35(a), (b). The new rule states that a procedure is not reasonable "if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness." In addition, employers must inform employees of their procedure for reporting work-related injuries or illnesses, and they must inform employees that they have the right to report injuries, and that they will not be discriminated against for reporting. The rule also adds that employers must not, of course, discriminate against employees who report work-related injuries or illnesses.

These requirements also go into effect on August 10, 2016.

Employers in state-plan states are also covered

State-plan states must promulgate reporting and recording requirements that are substantially identical to the new federal OSHA rule within six months of the publication of OSHA's final rule—by November 12, 2016. §1902.7, 81 FR 29688. Thus, employers in state-plan states, such as California, Oregon and Washington, will also be subject to these new rules.

For more information about this rule, please contact your Nixon Peabody attorney or:

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