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OSHA's New Mandatory Electronic Recordkeeping Rule

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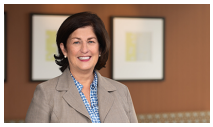

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As you may be aware, the Occupational Safety and Health Administration (OSHA) has published a new final rule revising the recordkeeping and reporting requirements. OSHA's summary of its new final rule can be found here and the full text of the recordkeeping regulations can be found here. While a lot of buzz is occurring around the new electronic submission requirements that become effective Jan. 1, 2017, there are significant developments which are not explicitly referenced in the regulations which require action by Aug. 10, 2016, or employers risk citation by OSHA. These are contained in the preamble explaining what OSHA feels would be an "unreasonable reporting policy" or that would constitute "discrimination." Whether these comments to the new rule will ultimately be upheld by administrative judges and the courts is unclear, but they do represent OSHA's intended enforcement positions. For state plans, the new rules will be effective at a later time depending on the state, but it will be no longer than six months.

1. New language prohibiting discharge or discrimination: Most employers already have a handbook section or policy that tells employees to report a work-related injury immediately. OSHA is now requiring an explicit statement that says employees have the *right* to report any injury/illness and that the employer will not discriminate against or discharge an employee for making such a report.
2. Anti-discrimination (new remedy): The new language will allow OSHA to cite an employer for alleged retaliation or discrimination as it could before under Section 11(c) of the OSH Act (i.e., a whistleblower claim). However, this citation could be issued up to 180 days after the occurrence without any employee having filed a claim. Currently, an employee must file a complaint within 30 days to pursue a whistleblower claim. Now retaliation claims can also be enforced and resolved through the OSHA citation enforcement process that has not before handled these issues.
3. Drug and alcohol programs: OSHA takes the position that a blanket post-accident test policy would discourage reporting of a work-related injury or illness. Employers should consider revising blanket post-accident test language to make the testing discretionary depending upon the facts and circumstances of the case and to account for the possibility there will be no testing where the incident was very unlikely to have been caused by employee drug or alcohol use (i.e., injuries caused by repetitive strain or bee sting).
4. Safety incentive programs: OSHA views policies that provide economic

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incentives to employees based upon low injury rates or achieving a certain number of days without a recordable injury as a discouragement to reporting. OSHA explains in the preamble to its final rule that such programs might be found to be “retaliatory” depending upon the “specific rules and details” of the program. This has been OSHA’s enforcement position since 2012. OSHA wants to see programs that encourage safety but do not discourage reporting.

Based on these significant changes, employers should consider reviewing and revising the above policies or programs to comply with the new regulations by the Aug. 10, 2016, deadline. *This article was co-authored by Jennifer Stocker, Patricia Ogden, Mark Kittaka and Don Lawless.*