haynesboone

MATTHEW DEFFEBACH
PARTNER
matthew.deffebach@haynesboone.com
T +1 713.547.2064

VICTOR WRIGHT
COUNSEL
victor.wright@haynesboone.com
T +1 713.547.2020

PUNAM KAJI
ASSOCIATE
punam.kaji@haynesboone.com
T +1 713.547.2693

MODINAT "ABBY" KOTUN
ASSOCIATE
abby.kotun@haynesboone.com
T +1 713.547.2660

BRENDAN FRADKIN
ASSOCIATE
brendan.fradkin@haynesboone.com
T +1 713.547.2062

OSHA NEWSLETTER

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OSHA's New Recordkeeping Rule's Reporting Provisions: Delayed and Being Challenged in Court

Matthew Thomas Deffebach

The Occupational Safety and Health Administration ("OSHA") issued a new rule on May 11, 2016, which requires certain employers to electronically submit information regarding workplace injuries and illnesses. The recordkeeping rule primarily addresses a new requirement that many employers will have to upload injury and illness data included on various OSHA logs to an OSHA website for public review. That aspect of the rule becomes effective on January 1, 2017. However, this recordkeeping rule also includes a number of other requirements regarding post-accident drug testing and safety incentive programs that were scheduled to become effective on August 10, 2016, but have now been delayed until November 1, 2016.

Haynes and Boone published an **alert** regarding the recordkeeping requirements that affect all employers with 250 or more employers, and certain "high risk" employers with 25 to 249 employees. A legal challenge was filed on July 8, 2016 against the recordkeeping rule's provisions regarding drug testing and safety incentive programs in the United States District Court for the Northern District of Texas. The plaintiff employer groups are seeking injunctive relief to stop the introduction of these new provisions. This part of the recordkeeping rule regarding employer policies to encourage and not deter the reporting of workplace injuries and illnesses was to become effective August 10, 2016, but OSHA announced on July 13, 2016 that it would delay the effective date until November 1, 2016. Companies should closely monitor whether this recent lawsuit successfully prevents the implementation of these provisions before the new deadline. If not, these onerous requirements go into effect on November 1, 2016. As of this publication, the parties will have submitted all briefing to the presiding judge by September 2, 2016. Thereafter, the judge will decide if oral argument is necessary before ruling on the request to enjoin this part of the rule.

The requirements going into effect this fall, unless enjoined by the Court are summarized below:

Providing Notice to Employees: By November 1, 2016, employers must include in their handbooks or other relevant policy documents a provision

explaining that employees have a right to report any injury or illness without fear of retaliation for making the report.

Changes to Specific Policies: By November 1, 2016, employers must include a policy for reporting injuries and illnesses that is "reasonable" and does not deter the employee from reporting. OSHA has targeted harsh disciplinary policies and the following two programs as potentially deterring employees from reporting injuries and illnesses:

- Post-Accident Drug and Alcohol Testing Policies. These policies often require employees to submit to a drug test after an accident, regardless of the nature of the incident. According to OSHA, such a policy may deter employees from reporting an accident or injury due to the inconvenience, burden or invasion of privacy associated with the drug test. Based on this theory, the agency believes that it is unreasonable to require employees to submit to a drug test after certain minor accidents such as a repetitive back strain or a bug bite. If an injury or illness is unlikely to have been caused by employee drug use, requiring the employee to submit to a drug test may deter reporting. Likewise, the agency believes that drug testing methods that do not identify impairment related to the accident but only test drug use at some time in the recent past may deter reporting.
- Safety Incentive Programs. Employers often reward employees for positive outcomes such as low injury or illness ratings. OSHA believes that such policies based on lagging indicators (*i.e.* recordable injuries) deter injury and illness reporting and may be unlawful. Programs that provide a financial incentive such as a monetary bonus are particularly scrutinized by OSHA. The agency maintains that a safety incentive program based on leading indicators, such as a program that incentivizes compliance with safety rules, completion of voluntary additional safety training or participation in voluntary safety committees or meetings, would avoid deterring the reporting of injuries.

Reminder Regarding Section 11(c) Retaliation: The new rule also reminds employers what constitutes protected activity under Section 11(c) of the Occupational Safety and Health Act ("OSH Act"). Section 11(c) of the OSH Act prohibits employers from discriminating against an employee for reporting a work-related fatality, injury or illness. The revised provision under 29 C.F.R. § 1904.36 further clarifies that in addition to the protections against retaliation described above, Section 11(c) continues to protect the employee who files a safety and health complaint, asks for access to safety records or otherwise exercises any rights afforded to the employee by the OSH Act. These types of claims have been on the rise this year as OSHA has taken a more aggressive approach to enforcing whistleblower protections.

OSHA Provides Information Regarding New Fine Amount Calculations in New OSHA Field Manual

Punam Kaji and Brendan Fradkin

OSHA increased fine amounts by 78 percent effective August 1, 2016. The maximum penalty for a serious violation will increase from $7,000 to $12,471. The maximum penalty for a repeat or willful violation will increase from $70,000 to $124,709. Failure to abate citations will increase from $7,000 per day beyond the abatement date to $12,471 per day beyond the abatement date.

On August 2, 2016, OSHA released a new **Field Operations Manual**, which explains how OSHA will calculate fine amounts for employers who violate OSHA regulations.

Specifically, the fine amounts for a Serious violation vary depending on the violation's "Severity" and "Probability" as determined by OSHA when calculating the fine. Below is a guide of fine amounts for a Serious violation without considering potential discounts based on the employer's size and good faith.

Severity	Probability	Fine Amount	Increase from Prior Penalty Amount
High	Greater	$12,471	$5,471
Medium	Greater	$10,689	$4,689
Low	Greater	$8,908	$3,908
High	Lesser	$8,908	$3,908
Medium	Lesser	$7,126	$3,126
Low	Lesser	$5,345	$2,345

Similarly, for Willful citations, the Field Operations Manual contains a chart explaining the fine amounts based on "Gravity." Below is a guide of fine amounts for a Willful violation without considering potential discounts based on the employer's size and good faith.

Gravity	Fine Amount
High	$124,709
Moderate	$106,890
Low	$89,080

The manual contains other information regarding calculating penalties; however, the formulas are mostly unchanged from previous years.

Deputy Attorney General Details New Policy of Criminal Liability for Companies and Employees

Brendan Fradkin and Modinat "Abby" Kotun

The Department of Justice continues to underscore its policy to prosecute individuals in corporate cases. Following the DOJ's controversial September 2015 mandate instructing federal attorneys to prosecute individual employees in addition to companies, Deputy Attorney General Sally Quillian Yates defended the position at the New York City Bar Association White Collar Criminal Law Committee Conference on May 10, 2016. Yates focused on the parts of the so-called "Yates Memo" that involve privileged communications in response to worries and criticisms from corporations.[1]

Yates attempted to assuage concerns regarding disclosure of privileged information. The Yates Memo instructs prosecutors to only give corporations cooperation credit if "all relevant facts" relating to individuals who participated in alleged crimes are turned over. This instruction raised issues regarding privileged information and whether corporations may still receive cooperation credit without revealing information that could otherwise be legally withheld under the attorney-client privilege.

Yates clarified that this policy relates specifically to facts, not communications writ large. If any facts were truly privileged, Yates suggested they be brought to the prosecutor's attention for evaluation. While this may still be troubling for many companies and individuals who are under investigation, Yates suggested that there is no blank check for access to attorney-client communications. Yates even went as far as to urge companies to report prosecutors who force waiver of privileges to her office. However, Yates noted that the DOJ plans to increase prosecution of individuals within companies and that investigations into individual culpability will begin at the early stages of probes. Taken together, when a corporation does want cooperation credit, it must be aware that more information will be turned over to the DOJ. Therefore, its employees may be at further risk for liability and it

may be pushed to defend the applicability of privileged information being withheld.

Companies and individuals should therefore be prepared as the DOJ is taking its increased disclosure requirements seriously. Individuals within corporations should not depend on the rules of privilege to shield themselves from prosecution.

[1] See Haynes and Boone's previous **alert** on this topic.

OSHA Launches Pilot Program for Whistleblower Violators in Region VII

Matthew Thomas Deffebach and Punam Kaji

OSHA launched a pilot program in Region VII entitled W-SVEP, effective May 27, 2016 as an enforcement mechanism for alleged severe violators of whistleblower retaliation regulations. Region VII includes employers in Kansas, Missouri and Nebraska, and those companies under federal enforcement in Iowa.[1]

The program will model the National Severe Violator Enforcement Program (SVEP), which puts employers on a public log for certain alleged violations of OSHA safety regulations. OSHA has explained that employers will be placed on the W-SVEP log if certain criteria are met.

The following types of cases subject an employer to W-SVEP:

1. "Significant" whistleblower cases;
2. Merit whistleblower cases in connection with egregious citations, a fatality, or a rate-based incentive program for work-related injuries;
3. Merit whistleblower cases where the employer is already on the enforcement SVEP log; or
4. A company with three or more merit whistleblower cases within the past three years.

If the listed criteria are met, the employer will be placed on the log.

To be removed from the W-SVEP log, after three years, a company may petition the regional administrator for a follow-up visit and removal from the program. At that time, OSHA will complete a comprehensive review of the company's policies and practices to determine if they have addressed and remedied the retaliation and its effects sufficiently.

Information regarding this new program is limited, however Haynes and Boone, LLP was able to obtain an OSHA Regional Notice[2] regarding the program upon request which is not publicly available. Employers in Region VII or otherwise interested in learning more about the W-SVEP pilot program may contact the firm's OSHA team for more information.

[1] The Iowa State Plan applies to all public and private sector workplaces in the state with the exception of: private sector maritime activities, marine terminals, and longshoring; federal government-owned and contractor-operated military facilities; bridge construction projects spanning the Mississippi and Missouri Rivers between Iowa and other states; federal government employers and employees; and the United States Postal Service (these fall under OSHA jurisdiction).

[2] US Dep't of Labor, Occupational Safety & Health Admin., OSHA Regional Notice, Subject: Regional Whistleblower Severe Violator Enforcement Program (not publicly available, but provided to Haynes and Boone upon request.)

Appeals Court Overturns Injunction Against Employer for Alleged Whistleblower Violations

Punam Kaji and Modinat "Abby" Kotun

The Secretary of Labor ("SOL") sought injunctive relief to prevent Lear Corp. from terminating, suspending, harassing or taking any other adverse employment action against current or former employees who engage with OSHA or otherwise publicly discuss safety issues at Lear Corp. The injunctive relief further prevented Lear Corp. from filing suits such as the one it filed in an Alabama state court to enjoin an employee from further defaming the company.[1]

On May 7, 2015, the Southern District of Alabama decided in favor of the SOL and granted the broad injunctive relief against Lear Corp. The Southern District of Alabama granted the injunctive relief before the SOL had concluded its investigation. Indeed, at the time of obtaining this relief, the SOL had not yet filed suit against Lear Corp. for an alleged violation of Section 11(c). Lear Corp. appealed this decision and almost one year later, on May 16, 2016, the Eleventh Circuit Court of Appeals decided that the May 7, 2015 injunction was overbroad.

The Appellate Court's decision first clarifies that injunctive relief is a type of "appropriate relief" available to the SOL. The Eleventh Circuit further states that an investigation may be on-going when such injunctive relief is sought, so long as the SOL has concluded that "some unlawful retaliation against [an] employee had already occurred." Essentially, whether an investigation is complete enough to find that retaliation has taken place and request injunctive relief is in the discretion of the SOL.

However, the Eleventh Circuit Court of Appeals did find one aspect of the injunctive relief to be overbroad — the order preventing Lear Corp. from filing state court actions against former and current employees. In order to grant such injunctive relief, the lower court should have found that the state court action was retaliatory in nature and otherwise baseless, which it did not do. The lower court also did not consider state preemption on the issue. Based on these findings, the Eleventh Circuit remanded.

[1] Haynes and Boone drafted previous alerts on this case, available **here** and **here**.

Sexual Assault of Home Healthcare Worker Results in OSHA Citation

Brendan Fradkin and Punam Kaji

OSHA has previously emphasized issues of workplace violence in the healthcare industry related to patient and client interactions. Employers of home health companies and other similar service providers should be aware that OSHA may cite employers who do not adequately protect employees from sexual assault. On July 5, 2016, OSHA issued Epic Health Services a $98,000 fine for an alleged willful violation related to employee exposure to workplace violence, including physical and sexual assault

The citation followed an investigation opened on February 1, 2016 after an employee of Epic Health Services was allegedly sexually assaulted by a home care client. There had been previous warnings of sexual assaults by another employee. According to OSHA regional administrator Richard Mendelson, "Epic Health Services failed to protect its employees from life-threatening hazards of workplace violence and failed to provide an effective workplace violence prevention program."

OSHA primarily took issue with two types of conduct by Epic Health: (1) employees were exposed to physical assault; and (2) there was no system in place for reporting threats and incidents of violence. OSHA recommended several means of abatement to Epic Health, including: (1) a written, comprehensive workplace violence prevention program; (2) a workplace violence hazard assessment; (3) workplace violence control such as an option to refuse to provide services in a hazardous situation; (4) a workplace violence training program; (5) procedures to follow in the event of a violent incident, including reporting and investigating; and (6) a system for employees to report all instances of workplace violence, regardless of severity. OSHA has previously provided guidance on workplace violence in the healthcare industry.[1]

Epic Health Services denies these allegations. The company has 15 business days to comply, request a conference with the area director, or contest the findings.

[1] Haynes and Boone issued a previous **alert** regarding OSHA's guidance regarding workplace violence in the healthcare industry and suggested best practices.

OSHA Provides New Guidance on Good Engineering Practices

Modinat "Abby" Kotun and Brendan Fradkin

OSHA has issued a memorandum clarifying the enforcement of the Process Safety Management (PSM) standard's recognized and generally accepted good engineering practices (RAGAGEP) requirements.[1] Employers covered under the PSM Standard, 29 C.F.R. § 1910.119, may want to review their compliance. This standard directly references or implies the use of RAGAGEP in several provisions:

- (d)(3)(ii): Employers must document that all equipment in PSM-covered processes complies with RAGAGEP;
- (j)(4)(ii): Inspections and tests are performed on process equipment subject to the standard's mechanical integrity requirements in accordance with RAGAGEP; and
- (j)(4)(iii): Inspection and test frequency follows manufacturer's recommendations and good engineering practice, and more frequently if indicated by operating experience.

OSHA defines four categories of acceptable RAGAGEP. Employers may satisfy their compliance through: (1) "widely adopted codes" such as NFPA 70 National Electric codes; (2) "consensus documents" such as ASME B31.3 Process Piping Code; (3) "non-consensus documents" such as the Chlorine Institute's "pamphlets"; and (4) "internal standards" set by manufacturers and employers themselves. However, OSHA will have to evaluate those standards on a case-by-case basis to determine if they accurately represent RAGAGEP.

OSHA will carefully review the language used in the selected RAGAGEP. The words "shall," "must," or other similar language denote requirements. OSHA will presume that any deviation from the standard to be a violation, which the employer must disprove. Conversely, the word "should" denotes recommendations. Any deviation will lead to further evaluation of whether it reflects RAGAGEP.

OSHA additionally made clear that when more than one RAGAGEP applies to a particular process, both are protective and are actionable by OSHA. However, utilizing RAGAGEP in an unintended area of application may result in citation by OSHA. Moreover, violation of internal or manufacturer-recommended processes may be grounds for citation. All compliance measures should be documented in order to demonstrate such compliance upon inspection.

Other enforcement considerations include standards for frequency of inspection and testing procedures, guidance on using older equipment that was not designed or constructed under an adequate RAGAGEP, and a strong focus on employer documentation of applicable RAGAGEP. Investigators are encouraged to always cite an employer for failing to follow RAGAGEP in inspection and testing procedures or failing to inspect and test equipment at a frequency that is not consistent with manufacturer's recommendations, good engineering processes, or prior operating experience.

[1] The entire guidance from OSHA is **available online**.

In Other News

Employers should also be aware of the following:

- As a service to the industry, the Haynes and Boone Labor and Employment practice has released its inaugural *Retail Industry OSHA Monitor*, a survey and analysis of Occupational Safety and Health Administration investigations and citations of retail establishments throughout the nation that reveals the government's enforcement trends. The Haynes and Boone article regarding the *Retail Industry OSHA Monitor and the Monitor* can be **viewed here**.

If you have any questions, please visit the Haynes and Boone Occupational Safety and Health Act (OSHA) and Workplace Disasters page of our website or contact one of the lawyers listed in this newsletter.