A Recent Legal Challenge to OSHA's Controversial Stance on Post-Accident Drug Testing and Safety Inventive Programs May Provide Some Relief

July 18, 2016 Matthew Deffebach

PRACTICES Labor and Employment, OSHA

The Occupational Safety and Health Administration's ("**OSHA**") recent 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.[1] That aspect of the rule becomes effective on January 1, 2017. However, this recordkeeping rule also includes a number of other requirements that were scheduled to become effective on August 10, 2016, but have now been delayed until November 1, 2016.[2]

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.

The new requirements 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.

In sum, unless modified by the recent legal action, employers should review the following by November 1, 2016:

- Handbooks and policies that provide notice to employees regarding the right to report injuries and illness
- Policies and procedures for reporting injuries and illnesses
- Post-Accident Drug and Alcohol Testing
- Safety Incentive Programs
- Disciplinary Policies
- Policies preventing retaliation for exercising rights under the OSH Act.

Finally, as a reminder, OSHA is increasing 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.

For more information contact one of the lawyers listed below.

---

[1] Haynes Boone previously published an alert regarding these new recordkeeping requirements, which can be viewed here.

[2] The sections going into effect this Fall are 29 C.F.R. §§ 1904.35 and 1904.36.