

Are the Days of Mandatory Post-Incident Drug Testing and Safety Incentive Programs Numbered? - Four Things You Need to Know about OSHA's New Anti-Retaliation Protections

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OSHA's recently announced rulemaking changes have major implications for employers. Effective January 1, 2017, certain employers will be required to electronically submit injury and illness data to OSHA, which will then be posted to the OSHA website. Currently, employers are expected to log the data on OSHA Injury and Illness forms, which remain with the employer until OSHA requests that the logs be produced in the course of an inspection or investigation.

Another major change is OSHA's heightened emphasis on injury reporting and anti-retaliation protections. There are four things that you need to know about these changes.

1. Employers Must Establish Procedures to Report Work-Related Injuries and Illness and Inform Employees of the Right to Use These Procedures Without Fear of Retaliation.

Under the new rule, an employer must specifically inform employees (i) of the procedure to promptly and accurately report work-related injuries and illnesses; (ii) that employees have the right to report work-related injuries and illnesses; and (iii) that employers are prohibited from discharging or in any manner discriminating against employees for reporting work-related injuries or illnesses.

2. Employers Must Carefully Review Their Drug Testing and Safety Incentive Programs to Determine if the Programs Interfere with Reporting Injuries and Illnesses.

Many employers have implemented mandatory post-incident drug testing programs. OSHA will take a close look at these programs to ensure that the testing requirement is reasonable and is not implemented for the purpose of dissuading an employee from reporting an injury or illness. OSHA appears to sanction drug-testing when an employee's drug use is likely to have contributed to the accident and the drug test can accurately identify impairment from drug use. However, an automatic rule for drug testing in all work-related accidents, regardless of whether it appears that drug use

contributed to the accident, will most likely not be approved by OSHA unless the program is implemented to comply with the requirements of a state or federal law or regulation. Along the same lines, safety incentive programs which provide monetary rewards to employees for “accident free” months could give rise to a record keeping violation if OSHA determines that the program discourages the reporting of workplace injuries without improving workplace safety.

3. OSHA Can Now Issue Citations and Penalties for Retaliation Claims, Even Where There Is No Complaint from an Employee.

Currently, OSHA can investigate a complaint of retaliation under Section 11(c) of the OSHA Act upon receipt of a complaint from an employee. The new rule gives OSHA a new regulatory enforcement mechanism which allows OSHA to cite an employer for retaliation if evidence is found during a routine OSHA inspection or OSHA investigation arising out of an injury or accident. As a result, the new rules will allow OSHA to assess statutory penalties for retaliatory conduct – which could be as high as \$121,710.00 if a willful violation is found – in addition to the effected employee filing a complaint under Section 11(c).

4. Employers Must Take Action Now.

Although the new requirements concerning anti-retaliation protection become effective on August 10, 2016, OSHA recently announced that it would not enforce the new rules until November 1, 2016.

In the meantime, employers are well-advised to conduct a self-audit of their reporting procedures, drug testing and safety incentive programs to ensure compliance with the expanded obligations imposed under the new rule.

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