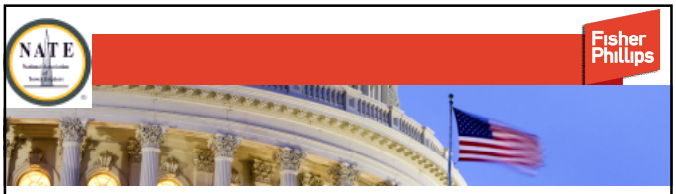
Today's webinar will begin shortly. We are waiting for attendees to log on.



NATIONAL ASSOCIATION OF TOWER ERECTORS
Safety and ADA:
Strategies To Assure Compliance For Both

October 6, 2016

Presented by:
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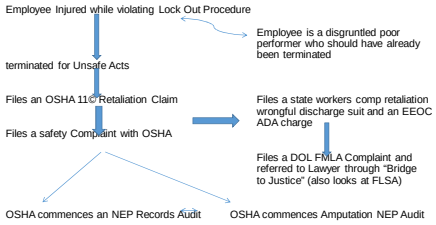
WHY THIS TOPIC HAS BECOME SO URGENT

1. Compliance with regulations in one area may put you into direct conflict with complying another set of regulations.
2. Effective Safety Management has always been intertwined with HR issues.
3. Ever more complex legal restrictions increasingly require a broad knowledge of risk management, labor, employment, and legal principles.
4. Now, more than ever, Safety and HR Managers can contribute to the success of the Company.
5. Claims and litigation are up.

AN EXAMPLE: HOW A WORKPLACE INJURY MAY LEAD TO MULTIPLE ISSUES



TRIAL LAWYERS, REGULATORS, & UNIONS LOOKING FOR MULTIPLE EXPOSURE AREAS

- The Feds have used OSHA as their "test agency," but now they are using the same approach at the NLRB, OFCCP, Wage-Hour, and EEOC.
- Recognize the Role of the DOL "Plan-Prevent-Protect" Strategy – 5 Year Plan.
- Fed agencies are not passing legislation and doing rulemaking because they often just change the rules.
- August 1, 2016 OSHA penalty increases.
- May, 2016 Recordkeeping revisions, including electronic filing.

TRIAL LAWYERS, REGULATORS, & UNIONS LOOKING FOR MULTIPLE EXPOSURE AREAS

- All agencies vigorously promote whistleblower claims.
- U.S. DOL is encouraging complainants to make multiple claims using private counsel, such as DOL "Bridge-to-Justice" program for wage-hour and FMLA.
- Focus on government contractors, as shown by the 10/10 GAO Report, "Assessments and Citations of Federal Labor Law Violations by Selected Federal Contractors."
- Use of Hispanic Summits to encourage organizing and legal claims.

REGULATORS, UNIONS, TRIAL LAWYERS FOCUSING ON MULTIPLE EXPOSURE AREAS

Worker Health and Safety
In April 2010, the Teamsters presented a poster on occupational health and safety in the waste sector at the OSHA National Action Summit for Latino Worker Health & Safety. To learn more about the issues facing sanitation workers, see the report In Harm's Way.

http://www.recyclingworkscampaign.org/wp-content/themes/thesis_151/thesis_151/custom/images/Teamster_OSHA_poster_sm.pdf

EMPLOYMENT LITIGATION TRENDS

- Lawsuits up almost **400%** in 20 years
- Most common target for lawsuits: employers with **15-100 employees**
- In federal court:
  - **67%** chance the award will exceed **$100,000**
  - average compensatory damages are almost **$500,000**

RECENT STATISTICAL TRENDS EEOC CHARGES IN FY 2015

- 89,385 charges filed in FY 2015
  - Increase from FY 2014 of $88,778
  - FY 2011 charges filed (99,947) represented highest number in the agency's 45-year history
- EEOC filed 174 lawsuits

STATISTICAL BREAKDOWN EEOC CHARGES - 2015

• Race charges	- 34.7%
• Gina	+ 0.3%
• ADA charges	- 30.2%
• National origin charges	- 10.6%
• Religion charges	- 3.5%
• Equal pay charges	- 1.1%
• Age charges	- 22.5%
• Sex charges	- 28.5%

ADA PROTECTIONS

- "Qualified" individuals with a disability who can perform the "essential functions" of the job with or without reasonable accommodation

EMPLOYEE'S BURDEN OF PROOF

- Employee disabled
- Employee can perform essential job functions with or without reasonable accommodation

ADA AMENDMENT ACT

- Protects significantly more employees
- Alters statutory interpretations of key terms
- Imposes less demanding standards
- Shifts focus to “Did discrimination occur?”

MAJOR LIFE ACTIVITIES (RECOGNIZED)

- Performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working, **sitting, reaching**, **interacting with others**, **caring for oneself**.
- Working is still a major life activity but EEOC thinks it will be used rarely.
- Court decisions concerning numerous other major life activities, remain valid.

MAJOR LIFE ACTIVITIES

Major Life Activities (Major bodily functions)

The operation of a major bodily function, including but not limited to functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, reproductive functions, circulatory system, **special sense organs, skin, genitourinary, cardiovascular, hemic, lymphatic and musculoskeletal.**

ADA AMENDMENTS ACT

Congress rejected Supreme Court definition of “substantially limited” and directed the EEOC to redefine the term in a manner consistent with the broad coverage Congress intended

ACTUALLY DISABLED

New Definition

Impairment must substantially limit the ability of an individual to perform a major life activity as compared to most people in the general population.

SUBSTANTIALLY LIMITED

- Must be construed in favor of broad coverage
- Analysis should focus on effect of impairment on individual, not what individual has achieved despite impairment
- Permanent or significant limitation not required
- Comparison usually will not require scientific, medical, or statistical analysis

SUBSTANTIALLY LIMITED: MITIGATING MEASURES

- In the ADA Amendments Act of 2008 (ADAAA), Congress explicitly rejected the requirement enunciated by the Supreme Court in Sutton v. United Air Lines, Inc., that if an individual takes measures "to correct for, or mitigate, a physical or mental impairment, the effects of those measures – both positive and negative – must be taken into account when judging whether that person is 'substantially limited' in a major life activity." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).
- The ADA now provides that the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures other than ordinary eyeglasses or contact lenses. 42 U.S.C. § 12102(4)(E) (2012).

SUBSTANTIALLY LIMITED: MITIGATING MEASURES

- Examples of mitigating measures that should NOT be considered in determining whether an impairment substantially limits a major life activity
  - Medication, medical supplies, equipment, or appliances, low vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
  - Use of assistive technology
  - Reasonable accommodations or auxiliary aids or services or
  - Learned behavioral or adaptive neurological modifications. 42 U.S.C. § 12102(4)(E)(i)

SUBSTANTIALLY LIMITED: MITIGATING MEASURES

- Ordinary eyeglasses and contact lenses are considered when determining whether someone is substantially limited in seeing.
- Service animal, job coach, or personal assistant would fall within statute.

SUBSTANTIALLY LIMITED: HOW LONG?

- Impairment can be substantially limiting even if lasts less than six months
- Several months may be sufficient
- "Short time" insufficient unless "sufficiently severe"
- Episodic impairment and impairment in remission are disabilities if substantially limiting when active

SUBSTANTIALLY LIMITED: CONDITION, MANNER, AND DURATION

- Condition perform major life activity under
- Manner in which perform
- How long takes to do
- How long can do
- Difficulty, effort or time required
- Pain experienced when performing

VIRTUALLY ALWAYS

- Deafness
- Blindness
- Intellectual disability
- Missing limbs
- HIV/AIDS
- Cancer
- Bipolar
- Schizophrenia
- PTSD
- Obsessive-compulsive disorder
- Major depression
- Cerebral palsy
- Diabetes
- Epilepsy
- Autism
- Multiple sclerosis
- Muscular dystrophy

RECORD OF A SUBSTANTIALLY LIMITING IMPAIRMENT

Formerly had an impairment that substantially limited a major life activity

"REGARDED AS"

Discriminated against because of actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to substantially limit a major life activity

"Transitory and minor" defense

IMPLICATIONS - ESSENTIAL JOB FUNCTIONS

- Written job descriptions
- Employer's judgment
- Consequences if employee cannot do
- Amount of time spent performing function
- Actual experience
- Collective bargaining agreement

IMPLICATIONS – REASONABLE ACCOMMODATION

- More requests for accommodation
- Evaluate on case-by-case basis
- Employer allowed to define essential functions
- Requires interactive process
- Not required if "regarded as" alone without regard to mitigating measures

REASONABLE ACCOMMODATIONS

- Changes to the job application or return-to-work process
- Modifications to the work environment – including how a job is performed
- Changes so that a disabled employee can enjoy equal benefits and privileges

POSSIBLE REASONABLE ACCOMMODATIONS

- Job restructuring
  - Job descriptions
- Modified workplace policies
- Reassignment to a vacant position
- Part time or modified work schedules
- Leave of known duration
- www.disability.gov

HOW LONG?

- Permanent not required
- Does not have to last y months to be actual disability
- Several months may be sufficient
- “Short time” insufficient unless impairment sufficiently severe

UNDUE HARDSHIP

- Accommodation can be reasonable but impose undue hardship
- Even if requested, accommodation imposes an undue hardship, employer still has obligation to attempt to provide an alternative that does not

PRE-OFFER INQUIRES AND EXAMINATIONS

Employers may not ask disability-related questions or requiring physical examinations before making a conditional offer of employment to an applicant


"Sounds good. No, wait – that's my iPod."

DISABILITY-RELATED INQUIRIES

- A "disability-related inquiry" is a question that is likely to elicit information about a disability
- Prohibited questions include:
  - Why do you use a wheelchair? (i.e., how s/he became disabled or severity of disability)
  - Has anyone in your family had heart disease? (i.e., genetic information)
  - Do you take any prescription medications? Have you in the past?
  - Have you ever applied for workers' compensation?
  - What impairments do you have? (i.e., broad impairment questions)

NON-DISABILITY-RELATED INQUIRIES

- Permitted questions to applicants include:
  - How are you? (i.e. asking generally about an employee's well being)
  - Can you perform the essential functions of this job?
  - Have you been drinking?
  - Do you currently use illegal drugs?

MEDICAL EXAMINATIONS UNDER ADA

- Medical examinations include, but are not limited to:
  - Vision tests; blood, urine, and breath analyses to check for alcohol use; blood, urine, saliva, and hair analyses to detect disease or genetic markers; blood pressure screening and cholesterol testing
- Medical examinations generally do not include:
  - Tests to determine current illegal use of drugs; physical agility tests; physical fitness tests; tests that measure personality traits such as honesty, preferences, and habits; and polygraph examinations

APPLICANTS WITH CONDITIONAL OFFERS

- After extending a conditional offer of employment, an employer may ask disability-related questions or require a medical examination as long as it does so for all entering employees in the same job category
  - GINA caveat
- If an employer withdraws the offer based on medical information, it must show that the reason for doing so was job-related and consistent with business necessity

IMPLICATIONS – MEDICAL EXAMINATIONS AND INQUIRIES

- Pre-employment: prohibited
- Post-offer pre-employment: permitted
- Post-employment: job related and consistent with business necessity
- Confidentiality

FITNESS FOR DUTY EXAMINATIONS – WHEN AVAILABLE?

When employee poses a danger to self or others.

FITNESS FOR DUTY EXAMINATIONS – WHEN AVAILABLE?

When, on account of a disability, employee appears no longer able to perform essential functions of the job.

FITNESS FOR DUTY EXAMINATIONS – WHEN AVAILABLE?

When employee returns from leave of absence and there is a question whether he can safely perform essential functions of job.

LIGHT DUTY ASSIGNMENTS

- The ADA encourages light duty
  - May be considered a required "reasonable accommodation"
    - Need not create a light duty position
    - Must consider temporary assignment to existing light duty position

OSHA

The Occupational Safety and Health Act of 1970 (the Act) was passed by a bipartisan Congress ". . . *to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources*."

1970 statistics influencing the passage of the Act:
- 2.5 million disabled Americans
- 10x as many lost work days from disabilities than from strikes

OSHA'S PURPOSE

- Safer and healthier working conditions.
- Maintain a reporting and recordkeeping system to monitor job-related injuries and illnesses;
- Establish training programs to increase the number and competence of occupational safety and health personnel;
- Develop mandatory job safety and health standards and enforce them effectively; and
- Provide for the development, analysis, evaluation and approval of state occupational safety and health programs.

OSHA COMPLIANCE

- OSHA imposes two distinct duties on employers
  - Must comply with specific work place health and safety standards established by OSHA. See 29 U.S.C. § 654(a)(2).
  - A general duty to provide "employment and a place of employment which are free from recognized hazards. 29 U.S.C. 654 (a)(i).

PENALTIES

- Other than Serious
  - Up to $12,471 per violation
- Serious
  - Up to $12,471 per violation
- Willful
  - Up to $124,709 per violation
  - Grouping Permitted $5,000 minimum
- Repeat
  - Up to $124,709 per violation
- Egregious
  - Up to $124,709 per violation
  - No Grouping
- Failure to Abate
  - Up to $12,471 per day

INTERSECTION BETWEEN ADA & OSHA

ADA and OSHA intersect in 3 areas
- Employment Testing and Screening
- Confidentiality Requirements Regarding Medical Records
- Reasonable Accommodation
- Discipline for Unsafe Behavior

INTERSECTION BETWEEN ADA & OSHA: EMPLOYMENT TESTING & SCREENING

- Some employers have used pre-employment physical fitness tests and other exams to screen out applicants prone to ergonomic hazard injuries.
- ADA places limitations on employee testing.
- OSHA, on the other hand, affirmatively requires employers to monitor and test employees in a variety of situations to assure safety.
  - This may include testing employees to ensure that can perform certain physical functions of the job.

INTERSECTION BETWEEN ADA & OSHA: EMPLOYMENT TESTING & SCREENING

- ADA Testing and Screening Limitations
  - if individual with a disability or a class of individuals with disabilities is screened out by a test or other qualification standard,
    - MUST show that the test or standard is JOB RELATED and consistent with BUSINESS NECESSITY and that the standard CANNOT be met with reasonable accommodation.
  - In most instances, the risk of a future injury will not satisfy the ADA standard.
  - After the person is hired, any medical inquiries and examinations MUST be JOB RELATED and consistent with BUSINESS NECESSITY.

OSHA AS A DEFENSE TO AN ADA CLAIM?

- EEOC Regulations provide that "[i]t may be a defense to a charge of discrimination under this part that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action … that would otherwise be required by this part." 29 C.F.R. § 1630.15(e).
- This defense may be rebutted by a showing of pretext or by showing that the federal standard did not require the discriminatory action or could have been complied with in a non-exclusionary way.

OSHA AS A DEFENSE TO AN ADA CLAIM?

- Case law generally shows this is not a defense unless the OSHA regulations are explicitly clear.
- *EEOC v Murray, Inc.,* 175 F.Supp.2d 1053 (M.D. Tenn. 2001)

EMPLOYEE MEDICAL INFORMATION

ADA'S CONFIDENTIALITY REQUIREMENTS

- ADA sets out 3 specific circumstances under which an employer must protect the confidentiality of employee medical records
  - where an employer requires new employees to undergo a medical exam
  - where an employer requires an employee to undergo a medical exam where the exam is shown to be job related and consistent with business necessity
  - where an employer conducts voluntary medical exams as part of an employee health program available to all employees

EMPLOYEE MEDICAL INFORMATION

OSHA Recordkeeping Requirements

- OSHA requires employers to keep records of workplace injuries and grants OSHA personnel access to such records in the interest of exposing potential hazards and their causes.
- Medical Access Order

BALANCING REQUIREMENTS

- Employers should take steps to guarantee the security of the employee's medical information.
- Employers may disclose the medical records, if necessary, to supervisors or managers in regard to work restrictions or necessary accommodations, and to first aid and safety personnel.
- *Ballard v. Healthsouth Corp.,* 147 F.Supp.2D 529 (N.D. Tex 2001)

BOTTOM LINE…

- If OSHA prompts a medical examination, such information must be kept confidential. Otherwise, the employer risks potential liability under the ADA.
- OSHA requirements should be construed in a manner that also complies with the ADA's confidential provisions whenever possible.

ADA REASONABLE ACCOMMODATION AND OSHA

- If OSHA requires a standard, an employer must comply with it.
- The ADA requires that the employer consider the possibility of reasonable accommodation to enable the disabled employee to perform his or her current job in accordance with OSHA.
- Under the ADA, employers have a duty to engage in an interactive process with disabled employees.
- *Rohr v. Salt River Project Agricultural Imp, & Power Dist.,* 555 F.3d 850 (9th Cir. 2009)

RETURN TO WORK & MODIFIED DUTY POLICIES AND PROCEDURES

- What are they?
  - Policies set forth by the employer to assist employees who have sustained a work-related injury to return to gainful, productive employment with the company.
- What is their purpose?
  - To help the employer avoid facing potential ADA litigation.

RETURN TO WORK & MODIFIED DUTY POLICIES AND PROCEDURES

- To whom do they apply?
  - All employees who are eligible to return to work on a modified duty status considering that the following criterion apply
    - The injury sustained has been determined by employer to be work related & compensable under workers' comp legislation
    - The physical restrictions imposed by the treating physician are specific
    - Work-related tasks within the physical limitations of the treating physician are available, and are within the physical and skill capacities of the injured employee, with reasonable accommodations made by the employer, employee, or both

A NOTE ON WORKERS' COMPENSATION

- Beware of inflexible return-to-work policies following exhaustion of worker's compensation leave
  - ADA applies to workers' compensation claims
  - *EEOC v. Sears*

HELP YOUR COMPANY PROTECT ITSELF FROM COSTLY LITIGATION

- Amend worker's comp leave policy and practices to require notification of employee's right to request reasonable accommodation, sufficiently in advance of the expiration of the leave period
- Designate individual or team to send out timely notice pursuant to the terms of the policy
- Review requests for reasonable accommodations and explore available accommodations with employees returning from workers' compensation leave.

HELP YOUR COMPANY PROTECT ITSELF FROM COSTLY LITIGATION

- Participate in an interactive process with the employee.
- Do not terminate an injured employee whose leave has expired without seriously exploring possible accommodations.
- By offering an employee a reasonable accommodation, even if it is not an employee's preferred accommodation, an employer is in a better position to demonstrate that it complied with the requirements of the statute.

DRUGS AND ALCOHOL

- Under the ADA use is not protected
- Addiction may be protected
- Always remove employees under the influence from the job for safety reasons
- Evaluate under the ADA before taking disciplinary action
- Issues raised regarding medical marijuana

DISCIPLINE FOR UNSAFE BEHAVIORS

- Discipline is an important part of any safety program
- Consider whether non-compliance is due to a disability or actual misconduct
- Promptly remove unsafe employees, but engage in proper interactive process if disability or potential disability is involved
- You can always wait to determine discipline

Final Questions

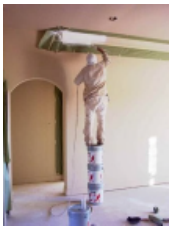
"Judge a man by his questions, rather than his answers."

~ Voltaire

Fisher & Phillips LLP
is dedicated exclusively to
representing employers in the practice of
employment, labor, benefits, OSHA, and immigration law
and related litigation.

THESE MATERIALS AND THE INFORMATION PROVIDED DURING THE PROGRAM SHOULD NOT BE CONSTRUED AS LEGAL ADVICE OR AS CRITICAL OF THE CURRENT OR PAST ADMINISTRATIONS.

Be Safe!



REMEMBER:

Bad decisions make good stories and usually the evening news.

Thank You

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OSHA Announces Final Rule On Recordkeeping Dramatically Increases Employers' Reporting Requirements Which OSHA Will Make Public

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9.18.14

On September 18, 2014, OSHA published its final rule for Occupational Injury and Illness Recording and Reporting Requirements. The rule, which takes effect on January 1, 2015, makes several important changes that significantly expands reporting requirements for all employers while publishing the employer provided information on the OSHA website.

First, the new reporting requirements expand the list of severe injuries that employers must report. Currently, employers must notify OSHA of all work-related fatalities and work-related hospitalizations of three or more employees within eight hours of the incident. Under the new rule, employers will be required to report all work-related fatalities, in addition to the following: 1) all work-related inpatient hospitalizations of one or more employees; 2) all work-related amputations; and 3) all work-related losses of an eye.

The new rule retains the requirement for reporting all work-related fatalities within eight hours of an incident, but it imposes a 24-hour reporting window for work-related inpatient hospitalizations, amputations, and losses of an eye. All employers are subject to these reporting requirements, even those employers who are otherwise exempt from routinely keeping OSHA 300 Logs.

You can report these incidents to OSHA over the phone by calling the local OSHA Area Office site or the 24-hour OSHA hotline or, alternatively, electronically on OSHA's public website. Additional

information is available on OSHA's webpage: https://www.osha.gov/recordkeeping2014/.

The new recordkeeping rule also updates the list of industries that are partially exempt from OSHA recordkeeping requirements. Under the current regulations, two classes of employers are partially exempt from routinely keeping records of serious employee injuries and illnesses, including employers with 10 or fewer employees and employers in certain low-hazard industries, as classified by the Standard Industrial Classification (SIC) system.

The new rule retains the exemption for employers with 10 or fewer employees, but it relies on the North American Industry Classification System (NAICS) to categorize an industry as low hazard. As a result, employers in 25 industries previously exempt, who now do not fit within the new NAICS list of exempt industries must now comply with all OSHA's recordkeeping requirements.

Conversely, employers in a small number of industries who previously had to comply with the recordkeeping requirements will now be exempted under the new NAICS exemption list. A list of the industries previously exempt that now will be required to keep OSHA injury and illness records can be found at https://www.osha.gov/recordkeeping2014/reporting_industries.html. For step-by-step instructions to determine whether your company is categorized as an exempt industry under the new rule, visit https://www.osha.gov/recordkeeping2014/OSHA3746.pdf.

In a surprise move, OSHA's Assistant Secretary, Dr. David Michaels, announced that the fatality and injury reports will be posted online on the OSHA website. Online posting was not mentioned by OSHA during the three year-long rulemaking process. Michaels indicated that publishing severe injury and illness reports on the OSHA website was in part to publicly shame or "nudge" employers to take steps to prevent injuries so they are not seen as unsafe places to work.

OSHA intends for its new rule to have far-reaching implications to address concerns about serious hazards in the workplace. In the press statement accompanying the release of the final rule, OSHA representatives stated that OSHA would not send inspectors to investigate every reported incident, but it will question the employer about the cause of the injury and the steps the employer plans to take to prevent future injuries.

For more information, visit our website at www.fisherphillips.com or contact your regular Fisher Phillips attorney.

The November Surprise: OSHA Raises Penalties 82% And No One Notices

11.4.15

Employers woke up to a surprise on November 3. That's when we learned that the Federal Budget Agreement, which was quickly worked out behind closed doors and signed the day before, includes surprise provisions authorizing the Occupational Safety and Health Administration (OSHA) to increase penalties for the first time since 1990. To the surprise of almost all observers, the amount of the increase could be as much as 82%.

Feds Tell OSHA To Play Catch-Up

The Agreement requires OSHA to make a one-time "catch-up" increase to compensate for more than two decades of no increases. The catch-up increase can't exceed the inflation rate from 1990 through 2015 as measured by the Consumer Price Index (CPI), which is expected to be around 82%.

Assuming OSHA applies the maximum catch-up increase allowed, the current maximum $70,000 fine for Repeat and Willful violations would grow to a maximum of $125,438, and the $7,000 maximum fine for Serious and Failure-to-Abate violations would increase to $12,744.

After the one-time "catch-up" increase is implemented, OSHA will then annually increase maximum penalties the amount of the inflation rate for the prior fiscal year.

Significant Increases Likely

OSHA has not yet commented on this development, and it is not clear whether it will choose to increase penalties to the full extent allowed. However, based on the consistent comments from OSHA

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SERVICES

Workplace Safety and Catastrophe Management

leadership about the benefits of stiffer regulatory punishments, it's highly likely that it will implement most, if not all, of the increases.

The initial penalty increases must become effective by August 1, 2016, but we can expect to learn well before then the extent to which OSHA will increase these amounts. The Federal Office of Management and Budget will issue guidance on implementing the bill's provisions by January 31, 2016. Raising the maximum fines in line with the CPI for the catch-up boost requires OSHA to publish an interim final rule by July 1, 2016, allowing the adjustment to take effect by August 31.

Who Is Most At Risk?

Many employers fail to recognize that the most hazardous businesses may not be the employers most at risk of incurring OSHA penalties. You need to remember that compliance with OSHA standards and having an accident-free workplace are not necessarily the same thing. Although there are clear correlations between the two, the fact that few of your employees are getting hurt does not always mean that you are in compliance with OSHA's many standards.

For example, there have been hundreds of thousands of dollars in recent citations against retailers for a handful of the same items: blocked exits, fire extinguishers, and electric cabinets among others. The sooner you realize that your business is at risk of OSHA violations, the better.

The employers most at risk under the increased-penalty scheme are those with many locations, those in industries where safety is not as prominent as in construction and foundries, those where supervision may be unsophisticated about safety issues, and those where turnover is high. Another common target group for OSHA is any company in the manufacturing industry, or any other business that requires a lot of guarding, lockout/tagout procedures, and related training.

What Should You Do Now?

You have over nine months to adjust to this new reality, so we recommend you use that time well. These potential sledgehammer penalties can be used as a way to get the attention of corporate decision-makers. Rather than just treating safety as a cost center, you should work with your company safety professionals to develop a business plan to achieve your company's goals in this area.

Executives should to roll up their sleeves and set the right tone on this subject, keeping your eyes on making safety a genuine core value of the company and a regular part of how business is conducted.

If you have any questions about this development, or how it may affect your business, please contact your Fisher Phillips attorney or one of the attorneys in our Workplace Safety and Catastrophe Management Practice Group.

This Legal Alert provides an overview of a specific budgetary development. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

OSHA Greatly Increases Workplace Injury Reporting Requirements

5.12.16

The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) issued a final rule on May 11, 2016 that greatly enhances injury and illness data collection from employers. The new rule will require many employers to electronically submit information about workplace injuries and illnesses to the government, and OSHA has announced it intends to post this data on its public website.

Details Of Finalized Rule: Who, What, And When

Under the final rule, OSHA has revised its requirements for recording and submitting records of work-based injuries and illnesses. Once the new rule takes effect, you will be required to electronically submit the recorded information for posting on the OSHA website. Establishments with 250 or more employees that are currently required to keep OSHA injury and illness records must electronically submit information from the OSHA 300 Logs, the 300A Summaries, and the 301 Injury and Illness Incident Reports to the agency.

For these establishments, there will be a phase-in where only the 300A Summaries for 2016 will be required to be electronically submitted by July 1, 2017. Meanwhile, the OSHA Forms 300A, 300, and 301s for 2017 will all be required to be submitted by July 1, 2018.

This new rule will also cover those establishments with 20 to 249 employees that are classified in 67 specific industries which have historically high rates of occupational injury and illness. These businesses must also electronically submit information from their 2016 OSHA 300A Summaries to OSHA by July 1, 2017. Beginning in

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SERVICES

OSHA Inspections and Litigation

Workplace Safety and Catastrophe Management

2019, the submission deadline will be changed from July 1 to March 2 for the previous year.

The final rule also allows OSHA to collect information from employers that are not required to submit information to the agency on a routine basis. These employers would only be required to submit the data requested upon written notification from OSHA.

Anti-Retaliation Protections

Under the new rule, OSHA reemphasizes the requirements of the whistleblower protections found in Section 11c of the federal law for employees to report injury and illnesses without fear of retaliation. The final rule contains three provisions to highlight the retaliation protection.

Specifically, you must inform employees of their right to report work-related injuries and illnesses free from retaliation. OSHA has stated that you may meet this obligation by posting the "Job Safety and Health – It's the Law" Workers' Right Poster from April 2015.

Second, your procedures for reporting work-related injuries and illnesses must be reasonable and must not deter or discourage employees from reporting. Finally, you may not retaliate against employees for reporting work-related injuries or illnesses.

Under this expanded retaliation provision, arguably, you can now be specifically cited for retaliation under the recordkeeping standard and, at the same time, your employees can file Section 11c retaliation complaints. If so, this greatly enhances the potential liability against you for any discipline issued for violation of safety rules.

Public Posting Of Information Causes Concern

As noted above, OSHA will post the establishment's specific injury and illness data it collects under this final recordkeeping rule on its public website (www.OSHA.gov). OSHA has stated that it will remove any personally identified information (PII) before the data is released to the public.

While the agency believes that public access to this very large set of workplace injury occurrences will provide public health researchers with an unprecedented opportunity to advance the field of injury and illness causation and prevention research, it also opens the door for unprecedented opportunities for significant OSHA citations and penalties, as well as negative consequences from other third parties utilizing this data.

The agency also claims that this new recordkeeping reporting requirement will help you and your employees to identify hazards, fix problems, and prevent additional injuries and illnesses. However, the business community has expressed its concerns about a number of unintended negative consequences that could result from this revision of the recordkeeping standard throughout the rulemaking process.

Specifically, the business community believes that this new requirement will force companies to publicly reveal confidential business details which had in the past been considered privileged and confidential. It will also give undo access to business processes to competitors, plaintiffs' lawyers, community activists, and union organizers for use against the company. Finally, there is serious concern that the new rule places an excessive burden on employers while lacking statutory authority.

If you have any questions about this new rule, or how it may affect your business, please contact your Fisher Phillips attorney or any member of our Workplace Safety and Catastrophe Management Practice Group at 404.231.1400.

This Legal Alert provides an overview of an agency rule. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.