My Thoughts on OSHA's New Electronic Recordkeeping Rule

Insights
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Read our May 12 Alert for a basic description of the Rule.

The Good

1. From an employer's perspective it could have been worse. OSHA apparently recognized the logistical challenges of defining *"the Enterprise"* to include every affiliate or related company, but OSHA will continue its increased focus on entire corporate entities.
2. OSHA chose not to require additional quarterly or other submissions which would have taxed employers and resulted in employers posting injuries later corrected as not work related.
3. There are problems with publicizing this data, as discussed below, but there are positive reasons as well.

The Bad

1. This *"regulation by shame"* strategy will continue to focus employer efforts on the ***"Lagging indicators"*** of workplace injuries instead incentivizing the ***"leading indicator"*** activities that actually prevent injuries. I'm not alone in this opinion. After drafting this Post, I read American Society of Safety Engineers (ASSE) President Michael Belcher's comments in *EHS Today*:

   "The rule's emphasis on data collected after injuries and fatalities occur is a step backward for safety professionals who work hard to move organizations toward measuring leading indicators, which better indicate how to avoid injuries and illnesses."
   Belcher notes that injury and Illness rates "were never intended to be used as a performance measurement, but that's exactly what's going to happen if they are published.

1. OSHA's Injury and Illness process was designed to determine patterns and hazards requiring new regulatory efforts. Therefore, the process over counts workplace injuries. Non-work-related injuries get counted. Almost all manifestations of a preexisting condition are treated as an aggravation. The definition of medical treatment is broad, and the process makes it difficult to prove an injury is non work-related. None of these facts would matter if the system was not now being used to evaluate employers.
2. Finance-driven executives love numbers, so injury and illness numbers are now used near-exclusively to evaluate the safety performance of many contractors and vendors. That's too

narrow a focus and distracts employers from putting in effective leading indicator-driven systems.

3. The current Administration underutilizes the *"carrot,"* but a *"stick"* is a valid part of the safety process. Publicizing establishment injury data is another motivator to employers to get serious about safety, but unions and third parties will misuse the data to achieve non-safety-related goals. UNITE-HERE's *"Hyatt Hurts"* ergonomic injury campaign was motivated to organize non-union hotels and gain contract advantages at unionized properties. As my economics thesis advisor reminded me, *"torture a number enough and it will confess to anything."*
4. The irritant that most effectively causes employees to vote in a union is a belief that their employer doesn't care about employee safety. I don't think that many unions will be energetic enough to use this data for organizing campaigns, but let this risk serve as further motivation for employers to develop an effective business plan for safety and adequately fund and man it.

The Ugly … and I do mean "Ugly."

1. The Administration overstates the problem of employees underreporting injuries and of employers retaliating against employees or discouraging reporting injuries. Sure, some employers actively discourage the reporting of legitimate injuries or retaliate for doing so, and they should be vigorously punished, but they are a small minority. Somehow this concern has morphed into a belief that employees are so fragile and timid, that any "legitimate" procedure that could maybe, kind-of, sort-of discourage reporting should be eliminated.
2. The Administration first attacked railroads who strictly enforced rules requiring promptly reporting injuries because of the small crews. OSHA has made it clear that employers can discipline an employee for tardy reporting only where the action was clearly intentional or fraudulent … and OSHA bridles at any such rule.
3. OSHA also attacked Incentive programs based on not getting injured, which admittedly focuses on Lagging Indicators and is ineffective, but no decisions held these programs as per se unlawful.
4. Now, OSHA has sought through this Rule to not only cite employers for such policies but also the application of post-accident drug testing.
5. Pages 190 through 200 of the Preamble and Rule offer what can only be described as outrageous unscientific attacks on drug testing, and which ignore legitimate safety concerns. Here's OSHA's Guidance:

> ***To strike the appropriate balance here, drug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately. Identify impairment caused by drug use.***

Let's break down this statement:

a. Post-accident testing under DOT and other recognized schemes is automatically triggered by accidents or injuries because (i) drugs leave the system swiftly; and (ii) even if available, supervisors are not competent to determine *"where drug use is likely to have contributed to the injury."*

b. Stakeholders in the 80s argued for objective triggers to prevent arbitrary application of drug tests.

c. Unlike alcohol, numerous properly validated studies have proven that judgment and reflexes may be affected even when drug impairment is NOT obvious.

d. Finally and most dishonestly, OSHA demands tests "which can accurately identify impairment caused by drugs." OSHA knows that legally, confirmed positive drug test results only establish the presence of unlawfully used drugs. I wish that we did have a test or result that automatically prove impairment because we could more easily regulate driving in states which legalize marijuana use.

The rule itself only states:

What must I do to make sure that employees report work-related injuries and illnesses to me? (i) You must establish a reasonable procedure for employees to report work-related injuries and illnesses promptly and accurately. A procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness;

We'll have to see what happens next.

Read the Alert we sent out today. Here's the Preamble and Final Rule. We'll talk in future Posts about preparing for and complying with the new Rule.

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