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COURT ALLOWS OSHA'S REPORTING RULE TO PROCEED AS SCHEDULED

Although Rule Can Still Be Challenged, December 1 Effective Date Is On Track

Insights
Nov 30, 2016

On November 28, a Texas federal court judge issued a ruling that cleared the way for the whistleblower provisions of the new Occupational Safety and Health Administration (OSHA) Recordkeeping Rule to take effect as scheduled. While the ruling permits OSHA's whistleblower requirements to take effect on December 1, 2016, the court's decision does not determine whether OSHA's controversial interpretations of this rule will ultimately be upheld in the long run, or whether the Trump administration will follow these interpretations.

BRIEF BACKGROUND AND COURT DECISION

In May 2016, OSHA revealed its new Electronic Recordkeeping Rule, which caught the attention of many employers. Once effective, it would greatly enhance injury and illness data collection by requiring many employers to electronically submit information about workplace injuries and illnesses to the government, which would then be posted on OSHA's public website. Furthermore, the rule would beef up the agency's anti-retaliation positions with respect to injury reporting, including some controversial agency interpretations that took aim at such commonplace activities as mandatory post-accident drug testing and safety incentive programs.

In response to this rule change, a consortium of business advocacy groups filed a lawsuit against the government hoping to both halt the rule from going into effect and, ultimately, have the rule wiped from the books as improper.

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OSHA agreed to delay implementation of the rule to December 1 so that the court case could resolve before employers would have to comply. Earlier this week, Judge Sam A. Lindsay rejected the groups' initial efforts to block the rule prior to December 1, clearing the way for immediate compliance.

The challengers argued that employers across the country would suffer irreparable harm if the rule took effect as scheduled, hoping that the judge would grant a preliminary injunction halting the rule. They argued that mandatory post-accident drug testing programs dramatically reduce workplace injuries, and that workplace injuries would increase if employers were forced to eliminate or modify their programs.

The judge rejected these arguments and denied the request for a preliminary injunction. He said that the employer groups did not explain why they simply couldn't just modify their drug testing programs to comply with the new rule, and said that he saw no evidence that the programs would lose any effectiveness if they were so modified. He concluded that the challengers' arguments were "based almost entirely on unsupported beliefs, unfounded fear, and speculation," which fell short of the evidence needed to meet the demanding standard justifying an injunction blocking the rule.

It is important to note that the court did not rule on whether the rule and OSHA's interpretations were actually lawful, but only determined that the employer groups could not prove that a substantial threat that irreparable harmwould occur if the rule were allowed to take effect on December 1. As Judge Lindsay noted in the concluding lines of his decision, "that the court has denied injunctive relief requested by Plaintiffs is not a comment or indication as to whether Defendants will ultimately prevail on the merits. This determination is left for another day."

WHAT SHOULD EMPLOYERS DO NOW?

Employers are faced with the question of whether to change their policies and procedures to comply with the December 1 effective date, or risk waiting to see what happens in 2017. Unfortunately, there is no easy answer. You should consider your corporate culture and your specific needs in

determining whether and how to change your policies relating to:

- automatic post-accident drug testing;
- rules requiring "immediate" reporting of workplace injuries and illnesses; and
- incentive programs based upon worker injury data.

The straightforward approach is to follow the examples and recommendations set out in OSHA's October 19 Guidance Memorandum. To comply with OSHA's current standards, you would no longer automatically test employees after all recordable workplace injuries, but would do so only when you have some level of reasonable suspicion that unlawful drug use might have been a factor in the accident. Similarly, you would completely eliminate all employee safety incentive programs which rely in whole or in part on injury and illness data. Finally, you would remove the word *"immediately"* from policies requiring the reporting of workplace injuries and illnesses.

However, some employers might feel uncomfortable shifting their approach with respect to these practices, especially since there remains some uncertainty about the future of OSHA's current positions on these matters.

AUTOMATIC POST-INJURY DRUG TESTING

The biggest problems arise with regard to automatic post-accident drug testing. OSHA wants employers to make some sort of initial determination that unlawful drug use may have contributed to the accident before requiring a drug test. However, the effects of unlawful drugs may not be evident, even to a trained manager. Furthermore, many employers have justified misgivings about requiring frontline supervisors to make a reasonable suspicion determination within the tight time confines of an injury. Nevertheless, many employers have indicated that they believe that they can devise easy guidance for supervisors and successfully train them about when to require a drug test.

Other employers may decide to continue to automatically test after recordable injuries, but may add additional trigger events that would justify a test. They would include such prerequisites as a certain estimated dollar amount of property damage, or an employee being involved with or

potentially causing an accident in which an employee was injured.

The reason employers may take different approaches is because OSHA's guidance admits that each procedure must be examined on a **case-by-case basis** to determine if it discourages employees from reporting workplace injuries and illnesses. OSHA's rule does not per se prohibit all automatic post-accident testing. Therefore, some employers may decide to stick with the status quo and risk a challenge from OSHA.

We recommend that you review your past experiences with post-accident drug testing and determine how often you obtain positive results. You should consider the importance of this type of testing to your overall drug-free workplace efforts. Ask yourself questions such as:

- Has automatic post-accident testing been useful in the past?
- Are there drug problems in the area where your facility is located?
- How often do employees test positive after injuries?

OSHA's guidance also states that the rule will not prohibit automatic post-injury testing where that testing is expressly required by state workers compensation laws. Over 20 states maintain "Drug Free Workplace" laws, which provide benefits to employers who implement Drug-Free Workplace Programs. However, not all of these states require employers to conduct automatic post-accident drug testing as part of their Drug Free Workplace Programs, so you will want to check the law in your specific jurisdiction before proceeding.

In its October 19 memorandum, OSHA also modified its position and indicated that it would not find an employer in violation of the rule if the testing would result in a premium discount under a state workers' compensation law or a workers' compensation policy that provides the discount as the applicable state law. This position will no doubt spark renewed interest in workers' compensation Drug Free Workplace Programs.

SAFETY INCENTIVE PROGRAMS

OSHA's interpretation also states that it would be a violation of the rule for an employer to use an incentive program to take adverse action, which could include denying a benefit, because an employee reports a work-related injury or illness. This could include disqualifying an employee for a monetary bonus or some other similar action that would discourage or deter a worker from reporting a workplace injury.

With respect to such safety programs, most studies indicate that simply rewarding employees for not getting hurt does not affect their safe habits. A better approach is to incentivize employer and management practices that prevent injuries. Therefore, it seems counterproductive to fight OSHA on this issue.

It is worth noting, however, that employers still do not know if OSHA will impose some sort of *de minimis* test to determine whether small rewards, such as a shirt or lunch box, in fact, affect employee reporting. This will be worth tracking in the future. Some State OSHA Plans have already informally stated that small rewards like these might be deemed acceptable.

WORKPLACE INJURY REPORTING PROCEDURES

OSHA has also taken aim at employer workplace injury reporting procedures, and has stated that these procedures must not deter reporting and must not be retaliatory in nature. The easiest response to ensure compliance is to develop an effective procedure for reporting workplace injuries and illnesses. OSHA's new interpretation is not meaningfully different from some of the existing case law.

As a starting point, you must ensure that the official OSHA poster is present and posted in a conspicuous location at your workplace. Next, you must ensure that your rules do not use the word *"immediately"* when describing an employee's obligation to report a workplace injury. You should instead utilize a more reasonable and forgiving standard. Examples include a requirement that injuries be reported as soon as the employee learns of them, and in any case, no later than the next business day; or that they must be reported "within eight hours" or some other similar reasonable time period. We recommend that employers make these report language changes based on existing case law, and not wait to see what 2017 holds.

Finally, you may also want to maintain a separate policy requiring employees to immediately report workplace hazards, accidents that do not involve injuries, and near misses.

THE BIGGER PROBLEM: RETALIATORY-APPEARING DISCIPLINE

OSHA's October 19 Memorandum also highlighted a common employer problem under existing case law. An OSHA investigator may conclude that the employer only disciplines employees after receiving reports of work-related injuries. Although it may appear to be illegal whistleblower retaliation, this pattern may innocently occur if the employer does not focus on unsafe behavior until it is brought to management's attention by a recordable injury.

The solution to avoid such problems to better train your supervisors to discipline employees for unsafe behavior before an injury occurs, and not just wait until after an incident is reported to begin the process of handing down discipline.

WHAT WILL THE FUTURE HOLD?

As noted above, the lawsuit against the rule will continue, even though the employer groups lost round one of the fight and failed to block the rule from going into effect on December 1. The employer groups will now gather additional evidence and develop arguments in hopes of convincing the judge that the rule runs counter to the statute and should be stricken from the books altogether. This fight will take time, however, and we cannot predict the outcome of this legal case.

Meanwhile, President-elect Trump will take office in just a few short weeks, and will have an opportunity to direct OSHA with respect to rules interpretations and enforcement efforts. The process of altering a rule once effective is not straightforward or simple, however, so even if the new administration wants to change course with respect to this rule, it could be a long and cumbersome process.

CONCLUSION

Unfortunately, there is no simple "one-size-fits-all" formula for complying with the new rule. In order to determine the

best course of action for your business, you must first decide upon your needs and risk tolerance, and then revise your policies accordingly.

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