

New OSHA Rule Changes Workplace Injury & Illness Reporting

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The Occupational Safety and Health Administration (OSHA) has authority to enforce its final rule to Improve Tracking of Workplace Injuries and Illnesses as of December 1, 2016. The rule significantly impacts employers' electronic reporting, required employee notifications, drug testing, and safety incentive policies. Further, the rule grants OSHA the ability to cite employers for OSHA violations, even when an employee has not filed a complaint.

For Oregon employers, Oregon adopted changes to its State Plan on November 18, 2016, to conform to the new federal requirements. Oregon's new rule requires Oregon employers to establish reasonable procedures for reporting work-related injuries and illnesses. Similar to the new federal rule, an Oregon employer's procedure is not reasonable "if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness." OAR 437-001-0070. Further, Oregon employers must inform all employees of the procedure and that employees have the right to report work-related injuries free from discrimination or retaliation. Oregon's State Plan goes into effect May 1, 2017, and includes similar reporting electronic reporting requirements to the federal rules.

What employers should do now to maintain compliance:

Have a clear procedure. Make sure that you have a clear work-related injury reporting procedure. Explicitly notify all employees that they have the right to report work-related injuries and that no employees will be discriminated or retaliated against for their reporting. The timelines required under the reporting



procedure must also be reasonable. OSHA is particularly suspicious of prompt-reporting requirements that result in employee discipline for late reporting, even where employees could not reasonably have reported their injuries or illnesses earlier.

The rule's commentary specifically notes that musculoskeletal disorders, by nature, develop over time, and that it would be unreasonable for an employee to be required to report such an injury immediately. Therefore, employers' policies should address reporting timelines for employees who may initially be unaware that they have suffered an injury, who suffer from injuries with latency periods, or where no single incident is the exact date of onset.

Check your handbook. Under the new rule, OSHA prohibits employers from having blanket post-injury drug testing or safety-incentive policies that would discourage accurate reporting. OSHA warns that, although post-accident testing may be reasonable in some circumstances, mandatory drug testing after every accident is a form of intimidation that discourages employees from reporting workplace injuries. OSHA explains that post-accident employee drug testing and safety-incentive programs are still possible

under the new rule and that employers do not need to specifically suspect drug use before testing.

However, employers should only require drug testing if there is a reasonable possibility that drug use by the employee involved in the accident contributed to the injury.

For example, OSHA comments that it would probably be unreasonable to drug test employees after "a bee sting, a repetitive strain injury, or an injury caused by a lack of machine guarding, or a machine or tool malfunction." Additionally, if the method of drug testing only indicates recent use of the drug, but not actual impairment, it may also deter reporting.

Employers should revisit handbook policies that have automatic post-accident testing procedures or safety incentive programs. Unless another federal law requires the employees to be drug-tested, like Department of Transportation regulations, modify the policy so that testing is only required after the company evaluates whether there's a reasonable possibility that drug use contributed to the accident or injury. OSHA also gave examples of safety incentive programs that unlawfully deter reporting, including raffle drawings for all employees who have not reported an injury during the year, rate-based incentive programs, or team bonuses for injury-free time periods.

Instead, OSHA encourages programs that make rewards contingent upon whether employees correctly follow legitimate safety rules, that reward workers for recommending safety improvements, or that promote worker participation in safety-related activities,

like identifying hazards.

Prepare to report. Once Oregon's new rule takes effect, employers will be required to e-submit injury and illness data from current OSHA injury and illness forms. OSHA predicts that the website for reporting will be available to employers beginning in February 2017. The types of forms that the new rules require depend on the size of the employer, but most Oregon employers will have to file by July 1, 2017. OSHA plans to publicly disclose some of the injury data by industry to encourage employers to improve workplace safety.

Watch for updates. A challenge to the final rule in the U.S. District Court for the Northern District of Texas had delayed the initial August 2016 enforcement date of the federal rule. However, on November 28, 2016, District Judge Sam Lindsay denied the temporary injunction, finding that the plaintiffs had not shown that the rule would cause irreparable harm. While there are still many pending challenges to the final rule, OSHA now has full authority to begin enforcing the rule's anti-retaliation provisions.

However, further changes could be in the works when President-Elect Donald Trump takes office. So stay tuned!

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