Labor and Employment Alert: OSHA Amends Recordkeeping Rules with Hidden Surprises for Employers

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CLIENT ALERT | 7.25.2016

Update: OSHA Rule Delayed

Since this *Labor and Employment Alert* was published there has been a development. On May 17, 2017, OSHA announced that it "is not accepting electronic submissions at this time, and intends to propose extending the July 1, 2017 date by which certain employers are required to submit the information" electronically. To learn more read this *Labor and Employment Alert*.

Original Alert:

On May 12, 2016, the federal Occupational Safety and Health Administration (OSHA) amended its recordkeeping rules. While the amendment did not change the basics of recordkeeping, OSHA announced three significant initiatives.

First, employers that are currently required to keep records must submit recordkeeping information to OSHA electronically, which OSHA will then make public on its website with the idea of shaming employers with poor safety records.

Date	Affected Employers	Necessary Action
January 1, 2017	250 or more employees	Submit Form 300A for 2016 by July 1, 2017
	Certain industries with more than 20 but fewer than 250 employees	Submit Form 300A for 2016 by July 1, 2017

January 1, 2018

250 or more employees

Submit Forms 300A, 300 and 301 for 2017 by July 1, 2018

Certain industries with more than 20 but fewer than 250 employees

Submit Form 300A for 2017 by July 1, 2018

January 1, 2019 and annually thereafter

All employers

All forms must be submitted by March 2

Second, effective November 1, 2016, employers must establish a reasonable procedure for employees to report work-related injuries and illnesses promptly and accurately. OSHA may cite an employer if it finds that an employer's procedure would deter or discourage a reasonable employee from reporting an injury or illness. In addition, employers must inform their employees (1) of the procedure for reporting, (2) of their right to report injuries and illnesses, and (3) that employers are prohibited from discharging or otherwise discriminating against an employee for such reporting. The amended rule repeats that employers may not discharge or discriminate against an employee – which is already specifically included within the OSH Act (Section 11(c)). So why is this duplicative procedure needed? According to OSHA:

> *"OSHA may not act under that section [11(c)] unless an employee files a complaint … within 30 days of the retaliation. Under the final rule, OSHA will be able to cite an employer for retaliation even if the employee did not file a complaint, or if the employer has a program that deters or discourages reporting through the threat of retaliation."*

Third, under the guise of enforcing its recordkeeping rule, OSHA announced it will scrutinize post-accident drug testing and safety incentive programs. The recordkeeping rule does not mention either. However, if OSHA believes a drug testing or incentive program deters reporting, it will issue a citation (even if there has not been an employee complaint). OSHA believes that "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." Given this, OSHA would likely view automatic post-accident testing as something that would cause a reasonable person to be hesitant to report an injury or illness or retaliation.

OSHA also believes that employee incentive programs inherently deter or discourage employees from reporting injuries and illnesses. Rather than put anything into a rule, OSHA noted in its FAQ section that:

> *"The rule does not prohibit incentive programs. However, employers must not create incentive programs that deter or discourage an employee from reporting an injury or illness. Incentive programs should encourage safe work practices and promote worker participation in safety-related activities."*

While the plain language of the rule does not mention, let alone prohibit, incentive programs, OSHA has made clear its belief that such programs deter and discourage employees from reporting.

On July 8, 2016, several trade associations filed a lawsuit in federal court in Texas challenging OSHA's prohibition of mandatory post-accident drug testing and employer safety incentive programs. Given the litigation, the ultimate fate of the rule is uncertain, and we will report on any significant developments. Contact your Vorys lawyer if you have questions about the amended OSHA recordkeeping rule and how it may impact your operations.