



Employment Law Update

OSHA Promulgates New Rule

The Occupational Health and Safety Administration ("OSHA") recently finalized proposed changes to its regulations regarding the reporting of workplace injuries. The revised regulations require that certain employers electronically submit injury and illness data that they are already required to record on their onsite OSHA Injury and Illness forms. Some of the electronically submitted data will be posted for the public on the OSHA website.

OSHA believes that "public disclosure will encourage employers to improve workplace safety" by "nudging" employers to make safety a priority. While some were concerned that this public reporting requirement might cause employers to discourage employees from reporting workplace injuries, OSHA reemphasized that the new rule also prohibits employers from retaliating against employees who report work-related injuries and illnesses.

Effective August 10, 2016 (though enforcement will not begin until November 1, 2016), employers must take the following actions:

1. Employers must inform employees of their right to report work-related injuries and illnesses free from retaliation (this obligation may be met by posting the "OSHA Job Safety and Health - It's the Law" worker rights poster); and
2. Employers must have a procedure for reporting work-related



David B. Dibble



Katherine E. Priest

Our Team

Scott A. Hagen, Chair
Rick Thaler, Vice Chair
Paul C. Burke
David B. Dibble
Aaron K. Olsen
Robert O. Rice
Liesel B. Stevens
D. Zachary Wiseman

Visit our Website

[Join Our Mailing List!](#)

injuries that is reasonable and does not discourage employees from making reports.

While there is no provision in the final rule that refers to drug testing as being retaliatory, OSHA has taken the position that mandatory post-accident drug and alcohol testing deters the reporting of workplace safety incidents. Thus, as an enforcement matter, OSHA states it will penalize employers that apply such policies in the workplace. Specifically, OSHA explained that "if an injury or illness is very unlikely to have been caused by employee drug use, or if the method of drug testing does not identify impairment but only use at some time in the recent past, requiring the employee to be drug tested may inappropriately deter reporting."

OSHA concludes that "[t]o strike the appropriate balance . . . 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." OSHA further clarified that "[e]mployers need not specifically suspect drug use before testing, but there should be a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness in order for an employer to require drug testing."

To comply with this new rule, employers should revise their policies and procedures to make clear that drug and alcohol testing after all work-related accidents is not mandatory, but is required only where the accident was likely caused by an impaired employee. Employers should also consider training all managers, supervisors, or other individuals responsible for the implementation of the policy not to require alcohol and drug testing in scenarios where it would not be reasonable to suspect drugs or alcohol contributed to the incident. We recommend that employers consult with counsel to modify their policies consistent with this new OSHA rule.

If you have any employment-related questions, please contact a member of our firm's Labor and Employment Section.

The Employment Law Update features selected developments in the law. It should not be relied upon for substantive employment law advice. Contact your attorney to resolve any legal questions.