OSHA Electronic Recordkeeping Final Rule

During November, 2013, OSHA issued a proposed rule to require certain employers to electronically submit injury and illness records to it on an annual and/or quarterly basis. The proposed rule would also create a web portal where OSHA would make these injury and illness records available to the public. OSHA believes that making this information public will force employers to put an increased focus on workplace safety, as well as enable OSHA to better target enforcement resources toward workplaces where workers are at the greatest risk.

OSHA held a public meeting during January, 2014 where it gathered public comments regarding the proposal. During August, 2014, OSHA published a proposed rule which included provisions that would prevent retaliatory measures against employees who report injuries and illnesses. On May 11, 2016, OSHA issued the final electronic rule, "Improve Tracking of Workplace Injuries and Illnesses," and the rule was released in the Federal Register on May 12, 2016.

The final rule contains two main parts. The first part of the final rule concerns the electronic submission of injury and illness data, and the second part of the rule directs employers to develop injury and illness reporting policies that meet certain criteria.

With regard to electronic submission of injury and illness records, the final rule requires the following:

- Employers with 250 more employees in each establishment must electronically submit their 300, 300A, and 301 forms to OSHA on annual basis;
- Employers with more than 20 to 249 employees in certain industries (such as construction) are required to submit only the 300A form on an annual basis; and
- Employers must also electronically submit their 300, 300A, and 301 forms whenever they are specifically requested by OSHA.

According to OSHA's Injury and Illness Recordkeeping regulations, an establishment is defined as a "single physical location where business is conducted or where services or industrial operations are performed." As a result, the final rule requires a location-by-location determination of whether it meets the threshold requirement for employees (based on peak employment at any time during the year, including temporary, seasonal and part-time workers) to trigger the data submission requirements.

OSHA will post the data from employer submissions on their web portal, which will be available to the public. According to the final rule, however, OSHA does not intend to post information that could be used to identify individual employees.

The second part of the rule requires employers to inform employees of the following:

- Employees have a right to report work-related injuries and illnesses;
- Employers are prohibited from retaliating or discriminating (i.e., termination, pay reduction, or re-assignments) against employees who report work-related injuries or illnesses; and

- Company procedures for reporting work-related injuries and illnesses. According to the final rule, a procedure is not reasonable if it would discourage employees from reporting as required.

In the proposed rule, OSHA raised concerns that post-accident drug testing and safety incentive programs could discourage employees from reporting work-related injuries and, therefore, could be considered discriminatory practices. Regarding drug testing, the final rule states that it prohibits employers from using drug testing (or the threat of drug testing) as an adverse action against employees who report injuries or illness. It also warns employers that they should "limit post-incident [drug] 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 does acknowledge in its comments, however, that if an employer conducts drug testing to comply with the requirements of a state or federal law or regulation, the employer's motive would not be retaliatory and the rule would not prohibit such testing.

OSHA also warned against the use of safety incentive programs that, in some cases, might encourage under-reporting of injuries and illness. Safety incentive programs could come in many forms, such as a prize or a financial bonus for an individual or team of employees if there are no injuries for a given period of time. While an employer may have the best of intentions with its use of a safety-incentive program, programs that are not properly designed could potentially discourage the reporting of actual work-related injuries and illnesses. OSHA mentioned that this under-reporting may lead to employer liability for inaccurate recordkeeping, and that this concern is "being addressed by [the] final rule's prohibition on employers using incentive programs in a way that impairs accurate recordkeeping."

The new rule went into effect on August 16, 2016. The requirements for electronic submissions of illness and injury records take effect in phases after January 1, 2017. Establishments with 250 or more employees are required to submit their 2016 300A form by July 1, 2017. In 2018, establishments with 250 or more employees will be required to submit all 2017 forms (300A, 300, and 301) by July 1, 2018. Beginning in 2019, all required OSHA forms must be submitted by March 2. Establishments with 20 to 249 employees in certain industries (such as construction) must submit their 2016 form 300A by July 1, 2017, and their 2017 form 300A by July 1, 2018. Like establishments with 250 or more employees, they will also have to submit their information by March 2, beginning in 2019.

On July 8, 2016, the Associated Builders and Contractors (ABC) and several other industry organizations filed a lawsuit to challenge OSHA's electronic injury submission rule, Tracking of Workplace Injuries and Illnesses. The lawsuit seeks to block the implementation of the rule's anti-retaliation provisions, which, among other things, limit post-accident drug and alcohol testing. OSHA believes that these tests will deter employees from reporting workplace accidents and injuries accurately or at all. In effect, this rule will essentially limit post-accident drug testing unless, according to OSHA, the employee's "drug use is likely to have contributed to the accident."

On July 13, 2016, OSHA announced that it will delay the enforcement of the anti-retaliation provisions from August 10, 2016 to November 1, 2016. In a news release, OSHA stated that it

chose to delay the provisions in order to "conduct additional research and provide educational materials and guidance for employers."

Any questions about OSHA's new rule or the legality of your company's drug testing policy in light of the new rule can be directed to Philip Siegel, a partner with the firm Hendrick, Phillips, Salzman & Flatt, who can be reached at pjs@hpsf-law.com or at 404-469-9197.