Industry Coalition Lodges First Legal Challenge to OSHA's Electronic Recordkeeping Rule

A month before portions of a problematic Department of Labor rule are scheduled to take effect, a coalition of employers has filed a complaint in a Texas federal district court challenging their legality.[1] Earlier this year, the DOL's Occupational Safety and Health Administration (OSHA) published its final rule, *Improve Tracking of Workplace Injuries and Illnesses*.[2] While the electronic reporting of workplace injury and illness requirements are onerous and arguably outside the scope of OSHA's authority, those provisions do not take effect until January 1, 2017. The rule, however, imposes other employer obligations that will take effect much sooner – August 10, 2016. These provisions, discussed below, are the subject of the present litigation.

What Portions of the Rule are Scheduled to Take Effect in August?

In its expansive final rule, OSHA includes a section entitled "Employee involvement" that imposes new anti-discrimination and anti-retaliation obligations on employers. The applicable portions of this new section require an employer to "establish a reasonable procedure for employees to report work-related injuries and illnesses promptly and accurately. A procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness." The rule cautions further that employers "must not discharge or in any manner discriminate against any employee for reporting a work-related injury or illness."

OSHA's interpretation of these provisions is quite broad. Notably, the rule's Preamble states that incident-based employer safety incentive programs, which are implemented to promote workplace safety by rewarding employees who have avoided workplace accidents by following safe work practices, violate the rule:

> [I]t is a violation for an employer to use an incentive program to take adverse action, including denying a benefit, because an employee reports a work-related injury or illness, such as disqualifying the employee for a monetary bonus or any other action that would discourage or deter a reasonable employee from reporting the work-related injury or illness.

In addition, the Preamble claims that routine mandatory post-incident drug and alcohol-testing would also run afoul of these anti-retaliation provisions. According to the agency:

> Although drug testing of employees may be a reasonable workplace policy in some situations, it is often perceived as an invasion of privacy, so 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.

The agency concludes that the only type of post-accident testing that would be permissible is one in which the drug use "is likely to have contributed to the incident, and for which the drug test can **accurately identify impairment caused by drug use**." (emphasis added) However, no such

generally recognized and accepted drug test exists. Thus, the new rule effectively bans *all* post-accident drug testing.

These broad prohibitions substantially limit an employer's ability to institute policies and practices that *promote* workplace safety and significantly *reduce* the incidents of workplace injuries and illness, thereby running contrary to OSHA's *raison d'être*. The Complaint notes also that the rule unlawfully impinges upon state workers compensation laws that require and/or encourage incident-based safety incentive programs and/or post-accident drug testing programs.

The Complaint also points out that OSHA does not provide sufficient support for taking this anomalous position. In its rule, OSHA declares incident-based safety incentive programs and mandatory post-accident testing unlawful without showing that either program has any significant bearing on employee injury reporting in the first place. As noted in the Complaint:

> OSHA failed to distinguish between the anecdotal impact of such programs on employee reporting of injuries, and the injuries themselves. As to safety incentive programs, OSHA cited no study connecting such programs to reduced reporting of injuries and cited no study refuting the clear evidence that safety incentive programs reduce the number of workplace injuries.

In addition to taking a counter-intuitive and unjustified stance on workplace safety programs, OSHA overstepped its statutory bounds, according to the Complaint. Among other arguments, the Complaint asserts that OSHA exceeded its statutory authority in promulgating the new anti-retaliation provisions. Section 11(c) of the Occupational Safety and Health (OSH) Act provides an exclusive mechanism for employees seeking redress for discrimination or retaliation in connection with reporting workplace injuries and illnesses. Although Congress did not give OSHA additional authority to regulate retaliation, the new section of the rule unjustifiably confers additional powers on the agency to serve as the arbiter of retaliation through citation enforcement regardless of whether any employee files a safety and health complaint, asks for access to the part 1904 injury and illness records, or exercises any rights afforded by the OSH Act.

What Happens Next?

Unless and until the court issues a preliminary injunction, the new regulatory requirements become the law as of August 10, 2016. Employers that maintain post-accident drug testing policies or safety incentive programs are advised to consult with counsel in the interim.

Ben Huggett, Shareholder
267.402.3035 direct TBHuggett@littler.com
Three Parkway, 1601 Cherry Street, Suite 1400 | Philadelphia, PA 19102-1321