SEYFARTH SHAW

Management Alert

Despite Lawsuit, OSHA Publishes Interpretation for New Workplace Injury and Illness Reporting Rule

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Seyfarth Synopsis: *Despite an ongoing lawsuit over its rules, OSHA issues interpretation for its May 2016 retaliation and recordkeeping rule.*

We previously blogged that OSHA had again delayed, to December 1, 2016, enforcement of the anti-retaliation provisions of its new rule to *Improve Tracking of Workplace Injuries and Illnesses* (Rule), 81 Fed. Reg. 29624 (May 12, 2016). Enforcement of the rule was originally scheduled to begin in August 2016. Although enforcement of the Rule has been delayed and the Rule is being challenged in Court, on October 19, 2016, OSHA hastily issued a non-binding interpretation of the Rule, along with an interesting list of "Q&As."

The interpretation clarifies the longstanding implication that employers must have a "reasonable" procedure for employees to report work-related injuries and illnesses under 29 C.F.R. § 1904.35(b)(1)(i), reiterates the existing prohibition on retaliation against employees for reporting work-related injuries or illnesses under section 11(c) of the OSH Act, 29 U.S.C. § 660(c), discusses discipline of employees for violating employer health and safety policies, explains OSHA's position that post-accident drug testing policies be "objectively reasonable," and clarifies OSHA's policy on employer incentive programs.

Under the interpretation, for OSHA to establish an employer violation of section 1904.35(b)(1)(i), the Agency must show that the employer either wholly "*lacked a procedure* for reporting work-related injuries or illnesses, or that the employer had a procedure that was *unreasonable*." Previously, the reasonableness requirement was implied. Specifically, an "employer's reporting procedure is reasonable if it is not unduly burdensome and would not deter a reasonable employee from reporting."

For example, the interpretation states that it would be reasonable to require an employee to report a work-related injury or illness "as soon as practicable," but unreasonable to require employee reporting "immediately." Further, it would be reasonable to require reporting through means such as phone, email, or in person, but unreasonable to require employees to report in person if they are unable to do so.

The interpretation also discusses OSHA's stance in the preamble to the final Rule that its compliance officers can investigate employee retaliation claims and cite an employer, even though they lack the specialized training that section 11(c) investigators receive. The interpretation takes the position that the Rule merely clarifies the employer policies that OSHA believes are unreasonable, but does not establish new obligations or restrictions on employers. Even so, OSHA's Q&A makes clear that it's new anti-retaliation provision would allow OSHA to cite an employer for alleged retaliatory action well beyond the 30-day time limitation for bringing a complaint under section 11(c).

To establish a violation of section 1904.35(b)(1)(iv), prohibiting retaliation for reporting injuries and illnesses, OSHA must have "reasonable cause to believe that a violation occurred." To make this showing, the interpretation requires OSHA to demonstrate that:

1. The employee reported a work-related injury or illness;

2. The employer took adverse action against the employee (that is, action that would deter a reasonable employee from accurately reporting a work-related injury or illness); and

3. The employer took the adverse action because the employee reported a work-related injury or illness.

OSHA's interpretation clarifies that section 1904.35(b)(1)(iv) is not intended to prevent employers from taking disciplinary steps against employees who violate employer health and safety policies. Rather, it "prohibits disciplining employees simply because they report a work-related injury or illness" without any underlying misconduct. OSHA will look to circumstantial and direct evidence, as well as whether the employer treated other employees who violated the same rule the same way, to determine whether the employee's discipline was due to the violation of an employer health and safety policy or if it was retaliatory.

In addition, the interpretation addresses employer post-accident drug testing policies and when OSHA believes those policies may be retaliatory rather than investigatory or disciplinary. Under section 1904.35(b)(1)(iv), a post-accident drug testing policy will not be retaliatory when the employer has an "objectively reasonable" basis for conducting the testing. Drug testing conducted pursuant to state and federal requirements will not be considered retaliatory either.

OSHA asserts that the central inquiry as to whether a post-accident drug testing policy is objectively reasonable is "whether the employer had a reasonable basis for believing that drug use by the reporting employee could have contributed to the injury or illness." Again, OSHA will look to see if the employer treated all employees in a similar manner or whether the employer only tested the reporting employee. For example, if a forklift runs into a pallet of boxes and the boxes fall on an employee, injuring that employee but not the forklift driver, and the employer only drug tests the injured employee, OSHA will likely find retaliation. However, if the employer drug tests both the injured employee and the uninjured forklift driver or only the uninjured forklift driver, OSHA will likely *not* find retaliation.

Finally, OSHA explains that section 1904.35(b)(1)(iv) does not *prohibit* employer safety incentive programs. Rather, "it prohibits taking adverse action against employees simply because they report work-related injuries or illnesses." OSHA mentions "substantial award(s)" and suggests some level of materiality, then states that withholding *any* benefit due to the reporting of a work-related injury or illness, related to an incentive program or not, would likely be found retaliatory. However, OSHA says that conditioning a benefit on compliance with safety rules or policies or participation in safety-related activities would *not* be retaliatory.

For example, raffling off a gift card to employees who attend a safety training or providing a free lunch at the end of the month if employees have universal compliance with safety rules, such as wearing hard hats, would not be retaliatory. OSHA "encourages employers to find creative ways to incentivize safe work practices and accident-prevention" that do not penalize employees for reporting work-related injuries or illnesses.

Whether or not an adverse action is taken pursuant to a disciplinary policy, post-accident drug testing policy, or employee incentive program, "OSHA's ultimate burden is to prove that the employer took the adverse action because the employee reported a work-related injury or illness, not for a legitimate business reason."

While OSHA has issued its guidance on how it hopes to enforce Section 1904.35(b)(1)(i) and (iv), such guidance may be premature as the Texas District Court must still decide whether it will order OSHA to delay enforcement of the Rule until the court has fully decided the Rule's legality. Further, OSHA's interpretation is not a law or regulation and is not necessarily how a judge will view the Rule.

We will continue to keep you updated as this issue develops.

For more information on this or any related topic please contact the authors, your Seyfarth attorney, or any member of the OSHA Compliance, Enforcement & Litigation Team.

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