KING & SPALDING

Client Alert

Tort Litigation & Environmental Practice Group

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New OSHA Recordkeeping and Reporting Rule Mandates Electronic Submission, Online Publication of Employee Injuries

The Occupational Safety and Health Administration ("OSHA") recently finalized a new rule governing injury and illness recordkeeping and reporting.[1] Beginning in 2017, employers with 250 or more employees, and "high-risk" industries with more than 20 employees, must annually submit injury reports to an OSHA-run *public* website.

The most immediate effect of this rule is employee injury and illness data will be freely accessible to anyone online. This will result in much greater scrutiny of an employer's safety record by OSHA, competitors, and the general public. The rule also codifies and adds more enforcement leverage to OSHA's current practice of scrutinizing certain safety incentive programs and disciplinary policies to make sure employers do not discourage employees from reporting injuries or illnesses.

Overall, the new injury reporting rule represents a significant change in how employers report injuries, and—more importantly—the level of outside scrutiny injury and illness data will receive.

Workplace Injury Information To Be Published On-Line

The publication of workplace injury data, without context, may result in employers being branded "bad actors" for what seem to be unreasonably high injury and illness rates. While OSHA will allow employers to upload other documents that provide such context, the overall focus on "lagging" indicators of workplace safety may result in otherwise good employers being punished, either by OSHA or in the marketplace. Employers may want to take advantage of the uploading option to provide information on their tracking of "leading indicators" and behavior-based health and safety programs.

Employers Must Ensure Workplace Policies Do Not Discourage Reporting

While OSHA has long had a policy against unreasonable reporting procedures,[2] the final rule incorporates this policy into the

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regulations. Examples of unreasonable procedures include making reporting too difficult or time-consuming, and linking employee bonuses to recorded injuries. Thus, certain workplace policies designed to promote a safer workplace may now be considered unreasonable.[3] Companies must diligently review their recording and reporting procedures to ensure they do not run afoul of the reasonableness standard.

OSHA Gets New Power to Issue Citations Without Formal Complaints

OSHA will now be able to issue direct citations against employers for claims of retaliation. Under Section 11(c) of the OSH Act, employers may not retaliate against employees for reporting workplace injuries and illnesses. As a result of the new rule, after August 16, 2016 OSHA will have the power to investigate cases and issue citations for retaliation without a formal Section 11(c) complaint from the employee. This grants OSHA Compliance officers far greater power and responsibility over such cases, and could have significant repercussions for a company seeking to challenge a Compliance Officer's findings.[4]

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King & Spalding has significant experience in occupational health and safety matters, including leading privileged health and safety audits of facilities, as well as challenging OSHA citations and negotiating settlements. If you have questions about this new rule, or how OSHA regulations may affect you and your business, please contact Jim Vines or Joe Eisert.

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1 Improve Tracking of Workplace Injuries and Illnesses; Final Rule, 81 Fed. Reg. 29624 (to be codified at 29 C.F.R. Parts 1902 and 1904).

2 *See* OSHA Memorandum re: *Employer Safety Incentive and Disincentive Policies and Practices* (Mar. 12, 2012).

3 OSHA outlines the reasonableness of a policy by asking whether it would deter a reasonable employee from reporting a work-related injury or illness. According to OSHA, examples of unreasonable policies include punishments for reporting injuries and illnesses when no legitimate workplace safety rule has been violated, and mandatory post-accident drug testing in cases where the injury or illness is unlikely to have been caused by employee drug use. OSHA also highlighted drug testing when the testing method 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.

4 For more information on OSHA's enforcement of whistleblower protections, see *Remedy for Retaliation Against Employees: OSHA's Investigation of Whistleblower Claims*, by James K. Vines and Stephen A. McCullers, in the upcoming August edition of *Compliance Today*.