



## Employment Law Update

### **New OSHA Regulations**

Earlier this year, the Occupational Safety and Health Administration (OSHA) issued new regulations (1) restricting the circumstances under which an employer may conduct post-accident drug testing, (2) requiring many employers to electronically submit injury and illness data to OSHA, and (3) requiring most employers to inform employees of their right to report work-related injuries and illnesses free from retaliation. A challenge to those regulations has been rejected by a federal court, clearing the way for them to become effective on December 1, 2016, though some reporting requirements become effective later depending on the size of the workplace and the industry.

One of the more significant changes is that employers who have a blanket policy to always do a drug test after a workplace injury will risk having the drug test being considered retaliatory unless there is some assessment made that it was possible employee impairment contributed to the accident. For all post-accident drug tests not required by law (for example, a DOT requirement), OSHA advises employers that "to strike the appropriate balance here, drug testing policies should limit post-incident testing to situations in which the employee's drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by the drug use." OSHA elaborates that "while employers need not specifically suspect drug use before testing, 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 the drug testing, and, even then testing should be limited to only the employee who caused the accident rather than everyone involved." As examples of injuries or circumstances unlikely to be caused by drug use, OSHA offers the following: a bee sting, a repetitive strain injury, or an injury caused by a machine or tool malfunction. Based on this OSHA guidance, going forward employers should make an assessment and document the reason for the post-accident drug test, stating the nature of the accident and how employee impairment might be a contributing factor.

With regard to the electronic reporting requirements, the new regulations do not change or add to an employer's obligation to complete and retain records of injuries and illnesses it already must complete and retain. It only now requires that same information to be reported electronically to OSHA. Establishments with 250 or more employees in industries covered by the recordkeeping regulation must submit information from their 2016 Form 300A by July 1, 2017. These same employers will be

required to submit information from all 2017 forms (300A, 300, and 301) by July 1, 2018. Beginning in 2019 and every year thereafter, the information must be submitted by March 2. Establishments with 20-249 employees in certain high-risk industries must submit information from their 2016 Form 300A by July 1, 2017, and their 2017 Form 300A by July 1, 2018. Beginning in 2019 and every year thereafter, the information must be submitted by March 2.

One way to be in compliance with the requirement to inform employees of their right to report work-related injuries and illnesses free from retaliation is to make sure an up-to-date OSHA poster is displayed in the workplace. OSHA requires that reproductions or facsimiles of the poster be at least 8.5" x 14" with at least 10-point type. See <https://www.osha.gov/Publications/poster.html>. Employers also must have a reporting procedure that does not deter or discourage employees from reporting work-related injuries and illnesses. Including a notice to employees in an employee handbook that there will be no retaliation for reporting any workplace injuries is advisable. Many employers likely already have that in their policies or handbooks, but a check to see if it does or not is prudent. In the past, OSHA had to have a complaint of retaliation against an employee to issue a citation to an employer for retaliation, but that is no longer the case. OSHA can now cite an employer for retaliation without an employee complaint.

If you have questions about this or with any other employment issues, please [contact us](#).

Here are links to additional information:

**Actual regulations -**

<https://www.federalregister.gov/documents/2016/05/12/2016-10443/improve-tracking-of-workplace-injuries-and-illnesses>

**Q&A -** <https://www.osha.gov/recordkeeping/finalrule/index.html>

**FAQ -** [https://www.osha.gov/recordkeeping/finalrule/finalrule\\_faq.html](https://www.osha.gov/recordkeeping/finalrule/finalrule_faq.html)

**OSHA Guidance -**

[https://www.osha.gov/recordkeeping/modernization\\_guidance.html](https://www.osha.gov/recordkeeping/modernization_guidance.html)

**What employers must keep records? -**

<https://www.osha.gov/recordkeeping2014/OSHA3746.pdf>

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<https://www.osha.gov/recordkeeping/>