EMPLOYMENT BLOG

October OSHA News in Brief – New Interpretation on Drug Testing and Safety Incentives, Targeting Employers Using Form 300A Data, and Limiting Inspection Warrants

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Three related developments on the OSHA front in October have implications for employers.

First, OSHA has walked back its previous interpretation of the anti-retaliation rule it implemented in 2016. That rule prohibits employers from retaliating against employees for or discouraging them from reporting on-the-job injuries and illnesses. OSHA had interpreted the rule, controversially, as prohibiting employers from having policies requiring automatic drug tests in all accident and injury cases, and outlawing company safety incentive programs that could be seen as coercing employees not to report injuries and illnesses.

Last month, OSHA issued guidance and interpretations which are meant to "clarify" its positions regarding the drug testing and safety incentive rules. OSHA now says that "most instances of workplace drug testing are permissible." The standard now 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.

OSHA also gave the following examples of permissible drug testing:

- Random drug testing
- Testing unrelated to the reporting of a work-related injury or illness
- Testing under a state workers' compensation law
- Testing under other federal law, such as a U.S. DOT rule
- Testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees.

OSHA also now says that, in general, workplace safety incentive programs are not prohibited. Action taken against an employee under a safety incentive program will only be a violation if the employer takes the action to penalize an employee for reporting a work-related injury or illness rather than for the legitimate purpose of promoting workplace safety and health.

OSHA says the new interpretations supersede anything it has said before to the contrary. This is only a brief overview of the new interpretations. Further information can be found at https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11.

The second recent development concerns another part of the OSHA 2016 anti-retaliation rule, namely the requirement that certain employers submit injury and illness reporting data electronically. On October 17, OSHA announced that it will "target high injury rate establishments in both the manufacturing and non-manufacturing sectors for inspection". https://www.osha.gov/news/newsreleases/trade/10172018. It will also perform random inspections of

employers it believes should have submitted Form 300A data for calendar year 2016, but did not. This information was supposed to have been submitted electronically by December 15, 2017. (The deadline for submitting calendar year 2017 data was July 1, 2018, but employers can still provide it.)

Under OSHA's current enforcement of the reporting rule, employers with 250 or more employees and employers with 20 to 249 employees in industries with historically high injury and illness rates are required to electronically submit Form 300A data each year by March 2.

This new announcement by OSHA demonstrates that failure to submit the required information each year can have undesired consequences.

The third October development involved a court case that prevented OSHA from getting an inspection warrant it wanted. The U.S. Court of Appeals for the 11th Circuit ruled that OSHA lacked probable cause for an inspection warrant based on injuries listed in a company's Form 300 logs.

The case started when an employee was severely burned while working on an electrical panel. OSHA inspectors came to the facility and asked to do a comprehensive, wall-to-wall inspection. The employer objected but allowed a limited inspection, during which violations were discovered.

As part of the inspection, OSHA also asked for the employer's Form 300 logs. OSHA alleged that the logs indicated several violations common to the employer's industry, and went to court to request a warrant for an unlimited inspection. The warrant was denied, and OSHA appealed, eventually to the 11th Circuit.

The 11th Circuit ruled that OSHA lacked probable cause for the inspection warrant because its request was based on information in Form 300 logs and was not related to the employee injury that caused OSHA to do the initial inspection. The Court pointed out that recording injuries in 300 logs does not mean safety violations also occurred. The Court ruled that vague descriptions of employee injuries in 300 logs did not support OSHA's burden to prove probable cause sufficient to obtain an inspection warrant.

This decision was very fact-specific, but it demonstrates there are limits to OSHA's ability to expand inspections. Depending on individual circumstances, the ruling potentially is very useful for employers faced with demands for unlimited inspections of their facilities.

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