

NEW OSHA RECORD-KEEPING AND ANTI-RETALIATION RULES: PREPARING FOR THE ONSLAUGHT

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THOMAS CUNNINGHAM is a shareholder in Nyemaster's Labor and Employment Department. Tom represents management of private and public sector employers, ranging from small and medium-sized businesses to publicly traded Fortune 500 companies in Iowa and throughout the Midwest. Tom has litigated discrimination and civil rights cases, and wrongful termination, FMLA, ADA, wage/hour, OSHA, and trade secret/non-competition cases in jury and non-jury trials in federal and state courts and before administrative agencies. Tom represents employers in the traditional labor law arena, having advised employers in union avoidance tactics and organizational campaign strategies. He has also defended employers confronted with unfair labor practice charges before the National Labor Relations Board. Tom has defended employers in audits conducted by the Department of Labor, EEOC, OFCCP, and Wage/Hour Division. He represents federal contractors and subcontractors with OFCCP/Executive Order 11246 and VEVRAA compliance issues. Tom also advises employers in affirmative action plan development.

OSHA: OCCUPATIONAL SAFETY & HEALTH ACT

- **1970 federal law governing workplace health and safety**
- **Occupational Safety & Health Administration**
- **State law plans: IOSHA and the Iowa Labor Commissioner**
- **Manufacturing, construction, grain bins / co-ops**
- **Workplace inspections, citations, and fines**

2015 OSHA RECORD-KEEPING RULES

- Reportable injuries – any work-related injury or illness which results in more than 3 days of disability, or PTD, PPD, death (first report of injury – workers comp claims)
- within 8 hours of death or 24 hours of inpatient hospitalization of single employee, amputation, or loss of eye
- report via hotline number, in person, or via web portal
- Pre-08/18/2015 rule applied only when 3 or more employees hospitalized

2015 OSHA RECORD-KEEPING RULES

- Recordable injuries – for each separate workplace injury or illness, must complete OSHA 301 report
- All workplace injuries and illnesses recorded on OSHA 300 Log – must produce within 4 hours if asked by OSHA
- Annual summary of entries in OSHA 300 Log (OSHA 300A summary)
- Certain industries exempt from record-keeping but not reporting

2015 OSHA RECORD-KEEPING RULES

- **Result: more inspections of industries never really targeted**
- **Hospitals – ergonomics and workplace violence**
- **Warehouses and distribution sites - ergonomics**
- **Retail – blocked exits, electrical panels, fire extinguishers**

NEW OSHA RECORD-KEEPING RULES

- Establishments of 250 or more employees
- 7/1/2017 – Electronic submission of OSHA 300A summaries
- 7/1/2018 – Electronic submission of OSHA 300 logs, 301 forms, and 300A summaries; deadline changes to March 2 in 2019 and after.
- Establishments of 20 to 249 employees in certain industries – summaries only; some industries previously exempt now covered
- Manufacturing, construction, agriculture, utilities, transportation, grocery stores, wholesalers and distributors, hospitals and health care facilities, gambling, general merchandise / department stores, traveler accommodation facilities, residential care facilities

WHAT WILL OSHA DO WITH THIS MATERIAL?

- **Post it ! (names of injured workers and identifying information redacted) – “regulation-by-shaming” enforcement**
- **Available to the public, including plaintiff’s employment counsel and union organizers**
- **Developing a database from which to issue more willful violation citations based on company-wide reports**
- **IOSHA will adopt no sooner than October 5, no later than November 12, 2016 (six months from May 12, 2016)**

RAISE THE FINES EFFECTIVE AUGUST 1, 2016!

Federal OSHA maximum fines are set in 29 U.S.C . § 666

- 1. Other than serious, serious, and failure to abate violations from \$7,000 to \$12,471**
- 2. Repeat violations from \$70,000 to \$ 124,709**
- 3. Willful violations minimum fine from \$5,000 to \$8,908; maximum fine from \$70,000 to \$124,709**

Authority: Bipartisan Budget Act of 2015, Pub. L. 114-74, 701

Raising fines in Iowa will require legislative action: stay tuned

NEW OSHA ANTI-RETALIATION RULES

- **Currently: 29 USC § 660(c) / Iowa Code § 88.9(3) prohibit an employer from terminating or otherwise discriminating or retaliating against any employee who files a complaint with OSHA / IOSHA or who cooperates or testifies in investigation**
- **Employee must file complaint with OSHA / IOSHA within 30 days of discriminatory or retaliatory act - IOSHA investigates**
- **Common law claim for wrongful termination in violation of public policy - *Kohrt v. Mid-American Energy* (8th Cir. 2004)**

NEW OSHA ANTI-RETALIATION RULES

- **8/10/2016 – New anti-retaliation regulation requirements**
- **Establish reasonable procedure for employees to promptly and accurately report work-related injuries / illnesses and communicate same to employees (i.e., new handbook policy if you don't already have it); guarantee retaliation will not occur**
- **Employees have right to report work-related injuries and illnesses and employers prohibited from discharging or discriminating / retaliating against employees**

NEW OSHA ANTI-RETALIATION RULES

- **Reporting procedure is not reasonable if it would “deter or discourage a reasonable employee from accurately reporting a workplace injury or illness”**
- **New: complaints can be made directly to OSHA Inspectors, who can now issue retaliation citations at any time within 180 days of alleged incident**
- **Citations can be issued for not having a reporting procedure OSHA inspector deems “reasonable,” without a complaint**

OSHA DOUBLE-TALK: EMPLOYEE DISCIPLINE

- Nothing in this rule “prohibits employers from disciplining employees for violating legitimate safety rules, even if [the employee] also was injured as a result of that violation and reported that injury or illness”
- “provided that employees who violate the same work rule are treated similarly without regard to whether they also reported a work-related illness or injury”
- OSHA inspectors now determine similarly-situated status

INTERPRETATION: SAFETY INCENTIVE PLANS

- **Safety incentive programs that disqualify employees from bonuses or deny other benefits because the employee reported a work-related injury or illness (got injured on the job) is retaliatory adverse action**
- **Incentive programs that condition bonus or incentive on correctly following “legitimate safety rules” do not violate rule**
- **OSHA will allow only programs that encourage safety but do not discourage reporting – how to administer?**

INTERPRETATION: POST-ACCIDENT DRUG TESTS

- **Blanket post-accident drug testing policies discourage reporting of workplace injuries or illnesses and are thus retaliatory adverse action**
- **Will not apply this interpretation to post-accident testing required by federal or state law (DOT, law enforcement)**
- **Drug testing policies must limit post-accident testing to:**
 1. **Situations in which employee drug use is likely to have contributed to the accident; and**
 2. **Test can accurately identify impairment caused by drug use**

INTERPRETATION: POST-ACCIDENT DRUG TESTS

- Iowa law permits drug testing as part of employer's investigation of an accident that results in OSHA-recordable injuries or property damage - not a "post-injury" test
- Iowa Court of Appeals: must be an accident, a "sudden event" caused by carelessness, unawareness, etc. *Skipton v. S & J Tube, Inc.*, 2012 WL 3860446 (Iowa Ct. App. 2012)
- Not testing for bee stings, repetitive motion injuries, or injuries resulting from tool or machine malfunctions
- OSHA will seek to push limits: reasonable suspicion

INTERPRETATION: POST-ACCIDENT DRUG TESTS

- **But – technologically impossible standard to meet when dealing with drug screens**
- **Employment drug tests are not designed to measure impairment, only recent drug use, presence in body**
- **OSHA candidly admits that it prefers reasonable suspicion testing to post-accident testing - so does organized labor**
- **One potential result: increase unannounced testing programs**

TAKE-AWAYS

- **Revise / update handbook procedures for reporting workplace injuries and illnesses; eliminate threats of discipline for failing to timely report workplace injuries; roll-out to employees**
- **Review and revise incentive programs that penalize employees for safety violations (as opposed to rewarding safe behaviors)**
- **Review administration of post-accident drug testing policies – make certain it is not being administered as a post-injury test**

QUESTIONS?

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