Insight

IN-DEPTH DISCUSSION

NOVEMBER 29, 2016

Court Declines to Enjoin OSHA Drug Testing and Safety Incentives Under the Electronic Recordkeeping Reporting Rule

BY THOMAS BENJAMIN HUGGETT, STEVE R. MCCOWN, AND MAURY BASKIN

On a very limited legal basis, a federal district court has declined to enjoin the U.S. Occupational Safety and Health Administration from enforcing portions of its new recordkeeping rule related to potentially retaliatory post-accident drug testing and safety incentive programs. Published on May 12, 2016, the OSHA rule expressly prohibits retaliation for reporting a work-related injury or illness, requires various employers to submit injury and illness data electronically, and changes employer obligations for ensuring employees report all work-related injuries and illnesses.[1] The focus on the instant litigation was on the anti-retaliation portions only. The court primarily found that employers would not be irreparably harmed by allowing the new anti-retaliation rule from going into effect, without reaching the merits of the legal challenge to the new rule. The court's narrow ruling means that OSHA's enforcement of the rule's anti-retaliation provision can begin on December 1, 2016. The ruling does not, however, end challenges to the legality of the rule in general.

Court's Stance on the Anti-Retaliation Provision

Commentary accompanying OSHA's final rule implied that employer post-incident drug or alcohol testing and incident-based safety incentive programs could constitute prohibited retaliation.[2] The court, however, emphasized that despite this commentary, the rule itself does not ban such practices:

---

1 *See* Thomas Benjamin (Ben) Huggett, *OSHA's Final Rule on Electronic Tracking of Workplace Injuries and Illnesses*, Littler Insight (May 12, 2016).

2 *See* Dale L. Deitchler, Nancy N. Delogu and Jennifer L. Mora, *OSHA's New Electronic Accident Reporting Rule Seeks to Dramatically Impair Post-Accident Drug and Alcohol Testing*, Littler Insight (May 13, 2016).

> the court agrees with [OSHA] that the Rule simply incorporates the existing prohibition on employer retaliation against employees for reporting work–related injuries and employer procedures that would discourage a reasonable employee from reporting an injury. Although the preamble to the Rule references the types of safety programs that Plaintiffs seek to maintain, **the Rule does not include a per se ban on post-accident drug testing or incident-based safety incentive programs**, and it is not entirely clear whether any of the programs currently implemented by Plaintiffs would violate the Rule. Regardless, any such determination would require a case-by-case analysis of the specific programs used by Plaintiffs, and Plaintiffs' members and insureds because it is apparent from Plaintiffs' evidence that their safety programs share some similarities but are not identical in nature.[3]

The emphasis in the decision is significant because throughout the litigation, OSHA and the government argued they had not found that any employer safety incentive or drug-testing program was illegal; rather, OSHA merely identified some programs it could question. The court did not address Plaintiffs' significant argument that the new rule violates congressional intent underlying Section 11 of the OSH Act by creating an entirely new and unlawful enforcement scheme within OSHA. Those arguments remain to be decided before the new rule is established as a final regulatory requirement.

Continued District Court Litigation Against the Rule

Although this ruling allows OSHA to implement the new rule against retaliation on December 1, 2016, it does not end the litigation or establish that the rule is valid. As noted above, significant legal challenges to the validity of the new rule have yet to be decided, and probably will not be resolved before the Trump administration takes charge of OSHA and revisits the rule. In the meantime, Plaintiffs have the right to continue their litigation in order to obtain a final determination on the merits of their claims.

OSHA Inspections and Contests on or after December 1, 2016

The district court's preliminary ruling does mean that starting on December 1, 2016, OSHA can conduct inspections to determine whether a safety incentive or drug-testing program retaliates against an employee for reporting his or her injury or illness.

Importantly, as with any inspection, OSHA must have probable cause as defined by the Fourth Amendment to the Constitution and the Supreme Court in order to conduct such an inspection. These programs are not "in plain view" or subject to some "random" inspection. In practical terms, because there is no neutral program for inspection of these issues, OSHA will have to have a complaint about an adverse employment action related to a program to conduct an inspection.

Even assuming it receives such a complaint, OSHA will have to establish that:

- The employee engaged in protected activity (reported a recordable injury or illness);
- The employer knew about or suspected the protected activity;
- The employer took an adverse action (denied a safety incentive or disciplined an employee); and
- The protected activity motivated or contributed to the adverse action.

Importantly, the discrimination rule only prohibits employers from taking adverse action against employees for reporting work-related injuries or illnesses. OSHA has given guidance on what will be considered an adverse action:

3 Memorandum and Opinion at pages 13-14 (emphasis added).

- Discharge, demotion, or denying a substantial bonus or other significant benefit.
- Assigning the employee "points" that could lead to future consequences.
- Demeaning or embarrassing the employee (for example, requiring an employee who reports an illness or injury to wear a fluorescent orange vest for a week).
- Threatening to penalize or otherwise discipline an employee for reporting.
- Requiring employees to take a drug test for reporting without a legitimate business reason.

Further, because safety incentive and drug-testing programs have been established by employers for purposes of improving health and safety, discovering the causes of accidents, and discouraging drug use in the workplace, it will be very difficult for OSHA to prove the final element of its case.

Within six months following an inspection, OSHA can issue a Citation and Notification of Penalty and, in response, employers can file a Notice of Contest and move to a hearing in front of an Administrative Law Judge (ALJ) of the Occupational Safety and Health Review Commission. In all cases before the Review Commission, OSHA will have the burden of proof as to each of the four elements, listed above, required to establish a violation.

It is possible that OSHA may have completed an inspection and issued a citation before the new administration takes office on January 20, 2017 and thereafter appoints a new Assistant Secretary to head OSHA, but no case will have proceeded to a hearing before an ALJ by that time. Accordingly, the new administration will be able to review and reconsider all enforcement strategies for any pending citations, and settle them as it determines appropriate.

Employer Options

This decision presents practical issues for employers going forward, which include considering the following possible responses to the new rule:

- **Safety-Incentive Program revisions:**
  - Revise incentive programs to address only leading indicators (e.g., completing safety assessments, suggestion cards, etc.).
  - Revise incentive programs so that individual cases are not dispositive and only group rates are utilized to avoid any singular adverse action.
  - Retain and defend existing safety incentive programs on the basis the program does not discriminate, understanding the risk of drawing OSHA penalties.
  - Eliminate safety incentives altogether.
- **Compliance/Policy Options for Drug Testing:**
  - Establish and document the federal law or state workers' compensation law basis for requiring drug testing after an injury and illness.
  - Add a "caused or contributed to" requirement for selecting which employees will be and which will not be subject to testing.
  - Broaden the drug testing triggers to include property damage and non-injury scenarios.
  - Implement timelines (e.g., 8 hours for alcohol, 32 for drugs).
  - Testing method (e.g., oral fluids/saliva) showing current use.
  - Retain traditional reasonable suspicion testing and consider, where lawful, implementing or enhancing random testing.

- Retain and defend blanket testing, on basis the program does not discriminate understanding the risk of drawing penalties.
- Eliminate blanket post-accident testing.

As every workplace and situation is different, employers are advised to consult with counsel before implementing any of the above policy and program options.

Littler Mendelson will keep employers apprised of all future developments with respect to the court's decision and the ongoing litigation.