CHEAT SHEET

- *The past.* Under the Occupational Safety and Health Act of 1970 (OSH Act), employers are required to keep a record of serious work-related injuries and illnesses that occur in the workplace. In 2014, OSHA issued a proposal to prohibit employers from retaliating against employees for such reporting.
- *The present.* The final rule of the OSH Act implemented anti-retaliation provisions that: (1) require employers to inform employees of their right to report illnesses and injuries; (2) clarify the existing requirement that an employer's procedure for reporting injuries is reasonable; and (3) incorporate the existing statutory prohibition on retaliating against employees for reporting illnesses and injuries.
- *On the horizon.* While it remains to be seen how aggressively the new US administration will enforce retaliation provisions, employers should understand the final rule and implement strategies to avoid OSHA investigations.
- *Written in stone.* Create an internal written policy that informs employees of their right to a safe workplace and communicate their ability to report injuries and illnesses free of retaliation.

Complying with OSHA's "New" Anti-Retaliation Provisions

By Jennifer Jaskolka, Jim Goh, and LaLonnie Gray The New Year — a season for resolutions and hitting the "refresh" button. It is no different for the Occupational Safety and Health Administration (OSHA), which issued considerable revisions to its anti-retaliation policies last year that will appreciably affect employers in 2017. Beginning January 1, 2017, employers became subject to a new electronic injury recordkeeping rule that includes anti-retaliation provisions that create employer obligations and prohibitions related to internal employee injury reporting procedures. It also expands OSHA's enforcement authority by introducing an enigmatic new set of anti-retaliation provisions addressed more thoroughly below. Particularly controversial is the impact of OSHA's new rule on policies related to post-injury drug testing and safety incentive programs. Because US employers may face citations and hefty fines for violations of OSHA standards, it is imperative that employers adopt a renewed commitment to understanding and complying with the new requirements mandated by OSHA.

The past

Under the Occupational Safety and Health Act (OSH Act) of 1970, US employers are required to keep a record of serious work-related injuries and illnesses that occur in the workplace.[1] In 2013, OSHA announced that it planned to amend its record-keeping regulation by requiring employers to submit their injury and illness records electronically.[2] In the preamble of the proposed rule, OSHA explained that it intended to post the recordkeeping data it collected from employers on its website in an effort to "name and shame" employers that violate its standards.[3] Many participants expressed concerns that the proposed rule "might create a motivation for employers to under-report injuries and illnesses."[4] To counter those concerns and lead to more accurate reporting, OSHA issued a supplemental proposal in 2014 to prohibit employers from retaliating against employees for reporting workplace injuries and illnesses.[5]

The present

The final rule and its inherent anti-retaliation mandate have four components that employers should know well to avoid an OSHA violation. First, the final rule requires employers "in certain industries to electronically submit to OSHA injury and illness data that employers are already required to keep under existing OSHA regulations."[6] While the reporting data will be posted on "a publicly accessible website," the agency agreed not to post any identifying information about the employers submitting the information.[7] Frankly, it remains to be seen how the new electronic system will work and how effective it will be.

Second, the final rule implemented anti-retaliation provisions that: (1) require employers to inform employees of their right to report work-related injuries and illnesses free from retaliation; (2) clarify the existing and implicit requirement that an employer's procedure for reporting work-related injuries and illnesses be reasonable and not deter or discourage employees from reporting; and (3) incorporate the existing statutory prohibition on retaliating against employees for reporting work-related injuries and illnesses.[8] While Section 11(c) of the OSH Act already prohibits employers from retaliating against an employee for reporting a workplace injury or illness, the final rule allows it to cite an employer for retaliation even absent an employee complaint and lowers OSHA's burden of proof as to whether OSHA has reasonable cause to believe a violation occurred.[9] Previously, OSHA was not allowed to act under Section 11(c) unless an employee filed a complaint with OSHA within 30 days of the retaliation.[10] This is a game changer.

Third, under the final rule, and as a component of OSHA's overhaul of the anti-retaliation rule, employers are prohibited from using drug testing or the threat of drug testing as a form of retaliation; however, they are not prohibited from conducting post-incident drug testing of employees who report a workplace injury or illness or if required under some other federal or state laws or by a workers' compensation obligation.[11] Moreover, pre-employment and random drug testing is not affected by the final rule. Instead, the final rule seeks to prevent employers from using drug testing as a form of discipline or retaliation against employees who report an injury or illness (i.e., drug-testing an employee as a result of a bee sting).

Finally, OSHA has expressed concern about the chilling effect of certain types of safety incentive programs. While incentive programs can help drive an effective safety program, OSHA has cautioned that if safety incentive programs are not configured carefully, they have the potential to discourage reporting of work-related injuries and illnesses. OSHA's primary example is a safety incentive program that rewards the absence of injury or withholds rewards from an individual or group when someone reports a recordable injury or achieves a certain injury rate. The key is whether the reward or benefit to the employee is based on leading indicators, such as complying with safety rules and completing training. These values counteract lagging indicators, such as injury rates. Lagging indicator programs are likely to be found unacceptable because, again, they focus on recordable injuries and single out an individual or group.[12]

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Pending litigation

Industry groups oppose the final rule. In *TEXO ABC/AGC, Inc. v. Perez*, filed on July 8, 2016, employer groups challenged the final rule and requested declaratory and injunctive relief, arguing that the discrimination and retaliation provisions "are not in accordance with law because they exceed the statutory authority Congress granted on OSHA" under the OSH Act.[13] Plaintiffs specifically requested a nationwide preliminary injunction to urge the government against implementing the challenged provisions.

On November 28, 2016 — two days before the anti-retaliation provisions were scheduled to go into effect — the court denied the plaintiffs' motion for a preliminary injunction.[14] The court found that the plaintiffs failed to show that a substantial threat of irreparable harm would result if the injunction was not granted and that the granting of the preliminary injunction would not disserve the public interest. According to the court, the new regulations "simply incorporate 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."[15] With that said, the court cautioned that its final ruling will be made independent of its preliminary ruling. And given the change in the political climate, a Republican-controlled Congress may use its Congressional Review Act authority to repeal the final rule, which would make the issue moot. Many unknowns will be fleshed out in 2017.

Complying with the final rule

While it remains to be seen how aggressively the new US administration will enforce the discrimination and retaliation provisions, employers should understand the final rule and implement strategies to avoid OSHA investigations and citations. Recommended strategies include:

- Creating an internal written policy that informs employees of their right to a safe workplace and communicates their ability to report work-related injuries and illnesses free from retaliation by their employer. Employers can meet this requirement by posting the OSHA "It's The Law" worker-rights poster in a conspicuous location, available at *www.osha.gov/Publications/poster.html*, or otherwise informing their employees of their right to report work-related injuries and illnesses.
- Reviewing internal reporting procedures for elements that might deter or discourage a reasonable employee from accurately reporting a workplace injury or illness. While this requirement is not a model of clarity, a "reasonable" procedure should account for work-related injuries and illnesses that build up over time, provide for latency periods (i.e., time between exposure and appearance of symptoms), and that do not initially appear serious enough to the employee to require reporting to the employer.[16] Additionally, a reasonable procedure does not make reporting difficult or complicated such that a reasonable employee would be discouraged from reporting an injury or illness.[17] A written policy that is at least annually communicated to employees should be considered.
- Training supervisory and managerial personnel to understand that "adverse action" against employees for reporting work-related injuries and illnesses include the following:
  - Discharging, demoting, or denying a substantial bonus or other significant benefit.
  - Assigning the employee "points" that could lead to future consequences.
  - Demeaning or embarrassing the employee.
  - Threatening to penalize or otherwise discipline an employee for reporting.
  - Requiring employees to take a drug test for reporting without a legitimate business reason for doing so.
- Examining drug-testing policies and evaluating whether they include procedures that limit accident-related drug testing to situations in which intoxication is suspected. The policies must also require that all facts leading to such a suspicion are documented and, if appropriate, investigated.
- Implementing accident-prevention programs or other training requirements for employees across the board.
- Ensuring that disciplinary action for workplace safety violations is issued consistently to all employees.

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Conclusion

This year, continue with the "new year, new you" proactive approach in ensuring compliance with OSHA's safety standards. Reducing exposure to possible citations and fines may be the best resolution of all.

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NOTES

1 29 U.S.C. § 1904.4(a).
2 US Dep't of Labor, *OSHA announces a proposed new rule to improve the tracking of workplace injuries and illnesses*, Occupational Safety and Health Administration (Nov. 7, 2013), *www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=25047*.
3 Improving Tracking of Workplace Injuries and Illnesses, 81 Fed. Reg. 29625 (May 12, 2016) (to be codified at 29 C.F.R. § 1904, 1902), *www.osha.gov/FedReg_osha_pdf/FED20160512.pdf*.
4 *Id.*
5 *Id.*
6 *Id.* at 29624.
7 *Id.*
8 29 C.F.R. § 1904.35(b)(i).
9 US Dep't of Labor, *Final Rule to Improve Tracking of Workplace Injuries and Illnesses Frequently Asked Questions*, Occupational Safety and Health Administration, *www.osha.gov/recordkeeping/finalrule/finalrule_faq.html* (last visited Dec. 12, 2016).
10 *Id.*
11 *Id.*
12 *Id.*
13 Complaint at 3, *TEXO ABC/AGC, Inc. v. Perez*, No. 16-cv-1998 (N.D. Tex. July 8, 2016).
14 *TEXO ABC/AGC, Inc. v. Perez,* No. 16-cv-1998, 2016 WL 6947911, at *1 (N.D. Tex. Nov. 28, 2016).
15 *Id.* at *8.
16 US Dep't of Labor, *Improve Tracking of Workplace Injuries and Illnesses*, Occupational Safety and Health Administration, *www.osha.gov/recordkeeping/modernization_guidance.html* (last visited Dec. 12, 2016).
17 *Id.*

ACC EXTRS ON... Anti-retaliation provisions

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How Changes to the Employment Standards Act Will Impact Employment Practices (Oct. 2016). *www.accdocket.com/articles/fair-labor-standards-act.cfm*

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