

## OSHA Delays Anti-Retaliation Rule Enforcement for Second Time

NOVEMBER 15, 2016

The Occupational Safety and Health Administration (OSHA) has agreed to delay until December 1, 2016, enforcement of the controversial anti-retaliation provisions of its recent amendments to its Recording and Reporting Occupational Injuries and Illness regulation.

The amended rule was published on May 12, 2016. According to OSHA's response to [frequently asked questions](#) regarding the rule, the rule:

1. Requires employers to inform employees of their right to report work-related injuries and illnesses free from retaliation;
2. Clarifies the existing implicit requirement that an employer's procedure for reporting work-related injuries and illnesses must be reasonable and not deter or discourage employees from reporting; and
3. Incorporates the existing statutory prohibition on retaliating against employees for reporting work-related injuries or illnesses.

The rule prohibits employers from discouraging workers from reporting an injury or illness. Specifically, 29 C.F.R. 1904.35(b)(1)(iv), as amended, states, "You [the employer] must not discharge or in any manner discriminate against any employee for reporting a work-related injury or illness." Post-accident reporting drug testing is not explicitly mentioned in the amendments but is discussed in the *Federal Register* notice, which states in part:

[D]rug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use. For example, it would likely not be reasonable to drug-test an employee who reports a bee sting, a repetitive strain injury, or an injury caused by a lack of machine guarding or a machine or tool malfunction. Such a policy is likely only to deter reporting without contributing to the employer's understanding of why the injury occurred, or in any other way contributing to workplace safety. Employers need not specifically suspect drug use before testing, but 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 drug testing.

The anti-retaliation provisions of the rule became effective August 10, 2016, but OSHA initially delayed their enforcement until November 1, 2016. OSHA's most recent extension was in response to a request by the U.S.

District Court for the Northern District of Texas to allow additional time to consider a motion pending before the court in a case challenging the new provisions, *TEXO ABC/AGC Inc. v. Perez*, No. 3:16-cv-01998-D (N.D. Tex.).

On October 19, 2016, OSHA issued a memorandum intended to provide additional guidance on its new rule. The memorandum states that when OSHA evaluates the reasonableness of an incidence of post-accident drug testing, it will consider the following factors:

- Whether the employer had a reasonable basis for concluding that drug use could have contributed to the injury or illness (and therefore the result of the drug test could provide insight into why the injury or illness occurred);
- Whether other employees involved in the incident that caused the injury or illness were also tested or whether the employer only tested the employee who reported the injury or illness; and
- Whether the employer has a heightened interest in determining if drug use could have contributed to the injury or illness due the hazardousness of the work being performed when the injury or illness occurred.

As stated above, OSHA's post-accident drug testing commentary is not found in the rule itself, but in the *Federal Register* notice. While such commentary does not have the force and effect of law, OSHA's October 19th memorandum makes clear its view that the subject regulation, as amended, "prohibits drug testing employees for reporting work-related injuries or illnesses without an objectively reasonable basis for doing so." Employers need to review their post-accident drug testing policies to evaluate compliance with OSHA's policy and interpretation of the regulation; for many employers, this may require consideration of abandoning an existing blanket post-accident drug testing policy.

3 Min Read

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