

LABOR & EMPLOYMENT LAW E-BRIEF

OSHA Updates: Post-Accident Drug Testing, Safety Incentive Programs, Increased Penalties, and Electronic Reporting

Increased Penalties: Effective August 1, 2016

OSHA's penalties are being raised by more than 75 percent. Signed into law last fall with relatively little advance publicity, the increase will be going into effect on August 1, 2016. As an example, the maximum penalty for serious and other-than-serious violations has been \$7,000/violation since 1990. That maximum penalty is being raised to \$12,471.

Post-Accident Drug Testing: Compliance Date—November 1, 2016

In the context of the recent rulemaking on electronic reporting requirements, OSHA pronounced that mandatory post-accident drug testing may deter proper accident reporting. Notably, OSHA is not prohibiting all post-accident drug testing. Rather, according to the OSHA commentary, drug testing policies should be limited to situations where:

- Employee drug use “is likely to have contributed to the incident;” and
- “[T]he drug test can accurately identify impairment caused by drug use.”

While these criteria do not require employers to specifically suspect drug use prior to conducting a post-accident test, OSHA states that 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.” It is unclear what will constitute a “reasonable possibility” that drug use was a contributing factor where drug use is not specifically suspected by the employer.

These new statements from OSHA regarding post-accident testing dictate that employers review their drug testing policies and practices for compliance and, quite likely, revisions as soon as possible.

Electronic Reporting Requirements: Compliance Date—July 1, 2017

Employers are going to be required to electronically submit data that has historically been maintained in hard copy format at the business' location. Per OSHA, “some” of the data will be posted by it online. In support of the public disclosures, OSHA states:

OSHA believes that public disclosure will encourage employers to improve workplace safety and provide valuable information to workers, job seekers, customers, researchers and the general public. The amount of data submitted will vary depending on the size of company and type of industry.

Companies involved in construction, manufacturing, transportation, and other “high-risk industries” with 20 or more employees will need to begin reporting by July 1, 2017. Employers with 250 or more employees at an “establishment” (in other words: each separate workplace) in industries covered by OSHA's recordkeeping regulations must begin reporting at that time as well. Other employers may be directed to report electronically at OSHA's direction.

Safety Incentive Programs: Compliance Date—Already in Effect (and has been)

The issued guidance also takes aim at employer safety incentive programs. OSHA has warned against certain types of safety incentive programs for some time now, and the recent guidance makes clear that such programs are still under attack as potentially limiting employees' willingness to report workplace injuries or illnesses. If you are utilizing safety incentive programs, now would be a good time to have such a program reviewed for compliance with OSHA's guidance.

If you have any questions on this topic or need assistance, please contact our [Labor & Employment Law Practice Group](#). We encourage you to [subscribe](#) to our Labor & Employment E-Briefs to get the latest HR news, tips, and updates.