

# EXPERT UPDATE



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## OSHA's Anti-Retaliation Rules to Take Effect Nov. 1

By Zywave Compliance Team

On May 12, 2016, the Occupational Safety and Health Administration (OSHA) issued a final rule requiring certain employers to electronically submit data from their work-related injury records to OSHA. OSHA also indicated its intention to publish this employer information on a public website.

Fearing that the publicity of workplace injury and illnesses would motivate employers to discourage their employees from reporting injuries and illnesses, OSHA included three major anti-retaliation provisions in the final rule.

OSHA's initial plan was to begin enforcing the new anti-retaliation provisions on Aug. 10, 2016. However, on July 13, 2016, due to considerable pushback from employers, OSHA announced it would delay enforcing the anti-retaliation provisions until Nov. 1, 2016.

Though the new anti-retaliation provisions are being challenged in court, these provisions are still scheduled to come into force by Nov. 1, 2016. For this reason, employers should review their workplace safety incentive programs and drug-testing policies to make sure they do not contravene the upcoming standards.

### ***The New Anti-Retaliation Provisions***

OSHA's new anti-retaliation provisions impose two main requirements on employers:

- Employers must inform employees that they have a right to report work-related injuries and illnesses free from retaliation; and
- Employers must adopt reasonable procedures that employees can use to report workplace injuries and illnesses.

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According to the final rule, a procedure or system is reasonable if it does not deter or discourage employees from reporting workplace injuries or illnesses.

## ***Implications for Employers***

The final rule does not specifically prohibit employers from performing drug tests on employees or implementing incentive programs. However, the application of the new anti-retaliation provisions prevents employers from using drug-testing and incentive programs in a way that deters or discourages employees from reporting workplace incidents.

### ***Drug Testing***

The final rule does not prohibit an employer from performing drug tests on employees who are injured at the workplace. However, the final rule does limit how drug testing is approached at the workplace.

For example, according to OSHA, adopting a blanket policy that requires all employees to submit to drug testing after a workplace safety incident violates anti-retaliation protections. OSHA presents two reasons why mandatory blanket policies violate anti-retaliation employee protections:

- A blanket policy would require drug testing even for injuries or illnesses that may have no connection to the use of drugs or alcohol; and
- Employees may not report injuries for fear of having to submit to drug-testing procedures.

For this reason, employers should take the time to review their current drug-testing policies to ensure that there are no blanket, mandatory drug-testing policies that may contravene the final rule's anti-retaliation provisions. However, because drug-testing policies may still be required in some cases (including state workers' compensation premium reduction programs)

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employers are encouraged to consult with legal counsel and implement any necessary changes before the anti-retaliation provisions become effective.

## Incentive Programs

For several years, OSHA has been concerned with employer-sponsored incentive programs that intentionally or inadvertently discourage appropriate reporting of workplace safety incidents. The rationale for OSHA's concern is that if employees are sufficiently motivated, they will under-report incidents in order to reach the incentive.

For example, an incentive program that rewards employees with a bonus or a prize if there are no injuries reported for at least 90 consecutive days may discourage employees from reporting incidents solely to receive the bonus or prize.

On the other hand, OSHA continues to encourage employers to implement incentive plans that reward employees to improve workplace safety without discouraging reporting.

## **Enforcement**

Currently, under whistleblower anti-retaliation protections, OSHA's role is reactive, meaning that it can investigate and cite employers after receiving a retaliation claim.

However, the new anti-retaliation provisions will allow OSHA to take a more proactive enforcement role, meaning that OSHA will not need to wait until a retaliation claim is filed to issue a citation against an employer if OSHA feels that the employer is discouraging appropriate reporting. This is possible because the new rule integrates the new anti-retaliation provisions into OSHA's regulations, allowing OSHA to enforce them through its citation process.

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In light of OSHA's recent announcement of increased penalties and of a new, more comprehensive inspection process, OSHA's ability to cite employers for anti-retaliation violations becomes a greater potential threat to noncompliant employers.

## ***More Information***

We will continue to monitor this and other OSHA developments and update you with relevant information. In the meantime, please contact Henderson Brothers for more information on the anti-retaliation provisions, the electronic reporting final rule or other OSHA compliance questions.

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