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New OSHA Reporting and Drug Testing Rules

On May 11, 2016, the Occupational Safety and Health Administration (OSHA) published a rule that will revise its Recording and Reporting of Occupational Injuries and Illnesses regulations. The changes establish a new system in which many employers will be required to submit to OSHA reportable injury and illness information on an annual basis through a secure website. That information will then be published in a searchable and publicly accessible online database.

At this time, the secure website is not available for viewing, but here are the reporting requirements that OSHA has outlined:

Establishments with 250 or more employees

- July 1, 2017 – submit information from Form 300A
- July 1, 2018 – submit information from all forms (300A, 300, and 301)
- Beginning in 2019 all form information must be submitted by March 2 each year.

Establishments with 20-249 employees in certain high-risk industries

- July 1, 2017 – Submit information from Form 300A
- July 1, 2018 – Submit information from Form 300A
- Beginning in 2019 all form information must be submitted by March 2 each year

To determine if your industry falls in one of these high-risk industries, review the list here.

Establishments with fewer than 20 employees

- Do not have to routinely submit information electronically to OSHA.

Remember, these are establishment sizes not corporation sizes. Recordkeeping information is maintained at the establishment level with an establishment defined as a single physical location where business is conducted or where services or industrial operations are performed in duration of one year or longer. In order to determine if you need to provide OSHA with the required data for any of your establishments, determine that establishment's peak employment during the last calendar year.

In addition to electronic reporting, the rules make dramatic changes to OSHA's retaliation and discrimination enforcement abilities, **which go into effect on November 1, 2016**.

Under the new "Improve Tracking of Workplace Injuries and Illnesses" rule, OSHA implies that post-accident drug testing may be a violation of the anti-relation provisions. There is discussion that post-accident testing encourages employees to not report work related injuries and illnesses for fear of the post-accident screening. OSHA's preamble to the rule says this about post-accident testing:

"The final rule does prohibit employers from using drug testing (or the threat of drug testing) as a form of adverse action against employees who report injuries or illnesses. To strike the appropriate balance here, drug 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."

As with any new OSHA regulation, time will tell how it is enforced in the field. After speaking with various insurance carrier Risk Control employees, representatives from two OSHA offices and a local labor attorney, it seems as if everyone is encouraging employers to keep their current drug testing program in place.

The initial indication of enforcement seems to say that OSHA does not want to discourage post-incident testing and that employer's should be consistent with their post-incident testing procedures. The overwhelming opinion is that additional comments will be released from OSHA on this topic in the near future. In the meantime, do not hesitate to contact your local Marsh & McLennan Agency office if you have any questions.