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INFORMATION MEMO
OCCUPATIONAL SAFETY AND HEALTH LAW

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What is the Current Status of OSHA's Injury and Illness Reporting Rule?

As reported in the May 12, 2016 New York Labor and Employment Law Report, OSHA recently made sweeping changes to its injury and illness reporting rule. The agency delayed enforcement of the rule until December 1, 2016. Many industry advocates were hoping for a reprieve, and several industry groups, including the Associated Builders and Contractors and the National Association of Manufacturers, had filed suit, seeking a preliminary injunction to prevent the rule from going into effect. Unfortunately, the injunction was denied and the rule did go into effect on December 1. However, the rule is still being challenged. Interestingly, the incoming administration recently jointly filed a letter with the court along with the plaintiffs, stating that each side planned to move for summary judgment, strongly suggesting that the incoming administration has no plans to revise or revoke the rule.

One of the more troubling aspects of the rule was not in the rule itself, but in the preamble to the rule — OSHA's stated position that it would consider blanket rules that require drug testing of employees after any accident to be unreasonable, i.e., to discourage the reporting of injuries and illnesses. Without announcement, OSHA issued guidance on its position late last year that should ameliorate employers' concerns. Simply put, employers do not have to have reasonable suspicion of drug use, but reasonable suspicion that drug use could have led to the accident causing illness or injury. OSHA provides the following examples:

"Consider the example of a crane accident that injures several employees working nearby but not the operator. The employer does not know the causes of the accident, but there is a reasonable possibility that it could have been caused by operator error or by mistakes made by other employees responsible for ensuring that the crane was in safe working condition. In this scenario, it would be reasonable to require all employees whose conduct could have contributed to the accident to take a drug test, whether or not they reported an injury or illness. Testing would be appropriate in these circumstances because there is a reasonable possibility that the results of drug testing could provide the employer insight on the root causes of the incident. However, if the employer only tested the injured employees but did not test the operator and other employees whose conduct could have contributed to the incident, such disproportionate testing of reporting employees would likely violate section 1904.35(b)(1)(iv).

Furthermore, drug testing an employee whose injury could not possibly have been caused by drug use would likely violate section 1904.35(b)(1)(iv). For example, drug testing an employee for reporting a repetitive strain injury would likely not be objectively reasonable because drug use could not have contributed to the injury. And, section 1904.35(b)(1)(iv) prohibits employers from administering a drug test in an unnecessarily punitive manner regardless of whether the employer had a reasonable basis for requiring the test."

So, if an employee on a scaffold dropped a piece of lumber, striking an employee below in an area the employee was allowed to walk, it would not be proper to test the employee below, but it would be proper to test the employee on the scaffold, because operator error — and possible drug impairment — could have contributed to the accident.

It still remains to be seen whether this rule will be rescinded through the Congressional Review Act or vacated through the lawsuit filed in the Northern District of Texas, but in the meantime, employers should make sure their policies regarding injury and illness reporting comport with the new requirements.

If you have any questions about this Information Memo, please contact Michael D. Billok, or any of the attorneys in our Occupational Safety and Health Law practice, or the attorney in the firm with whom you are regularly in contact.

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