FBN – next safety article

**2016 Electronic Recordkeeping – Anti-Retaliation Rules**

The new OSHA anti-retaliation rules became effective after I submitted my last article for Frame Building News. Because these provisions are so critical and have been the subject of so much controversy, I have delayed my planned article on the remaining five steps for a good safety program until the next issue of Frame Building News.

As you all know the New OSHA Electronic Recordkeeping Rules went into effect on January 1, 2017. On December 1, 2016 the New OSHA Anti-Retaliation Rules concerning recordkeeping and reporting work related injuries and illnesses to employers went into effect after several delays. Since the4 effective date for the anti-retaliation rules there has been quite a bit of speculation as to whether the new Administration will enforce these new rules or will take steps to eliminate or circumvent them. Since the rules were adopted as part of the electronic recordkeeping standard, which was adopted under the formal Administrative Procedures Act, they cannot be eliminated with the stroke of a pen. But, the new Secretary of Labor and the new OSHA Administrator can set parameters for their enforcement.

Even guidelines from the new administration, should they occur, for the enforcement of part or all of the new anti-retaliation rules will take time to be effective. Until such time (if it occurs) all employers are bound by the new rules. But, all is not lost. OSHA has issued several interpretive documents regarding the new rules. OSHA has reminded us that it still has to prove that a company rule for reporting workplace injuries or illnesses that appears to be retaliatory to employees was established to discourage employees from reporting workplace injuries.

**Work-Related Injury and Illness Reporting Procedures**

The first requirement under the new rules is that employers must establish and train their employees on procedures for reporting workplace injuries and illnesses. The procedure must be easy to understand and must be reasonable. For example, OSHA will consider a prompt reporting rule, that results in employee discipline for late reporting, even when the employee could not reasonably have reported the injury or illness earlier, to be a violation of Section 1904.35(b)(1)(iv). OSHA will consider your reporting procedure to be reasonable if it is not unduly burdensome and would not deter a reasonable employee from reporting.

OSHA has stated in a memorandum for regional administrators dated October 19, 2016, that: “While employers have an interest in maintaining accurate records and ensuring that employees are reporting work-related injuries and illnesses in a reasonably prompt manner, these interests must be balanced with the importance of accurate injury reporting and therefore employers’ reporting policies must be designed so as not to discourage employees from reporting.” In other words, if your injury and illness reporting policies are so complicated or time restrictive, while bring connected with disciplinary measures so as to discourage an employee from reporting an injury or illness for fear of not correctly following all the steps in a timely manner, you will likely be cited under this standard.

**Safety Discipline**

Another concern under the new rules is the prohibition of disciplining an employee for violation a safety rule, which violation results in an injury. In the same informational memo referred to above OSHA has reminded employers as well as its own regional directors that the new standard does not prohibit employers from disciplining employees who violate safety rules; it does prohibit employers from disciplining employees simply because they reported a work-related injury or illness. If OSHA cites an employer for disciplining an employee for violating a safety rule which violation resulted in a report of an injury, OSHA will have to prove that the discipline was for reporting the injury, not for violation the safety rule. In other words OSHA will have to prove that the alleged rule violation was merely a pretext for being able to discipline the employee for reporting the injury. OSHA points out that circumstantial evidence may be sufficient to prove its retaliation case.

So, what does an employer need to do to avoid such a result? As I have stated many times, every employer needs to have a safety enforcement program. How can you say that you are a reasonably responsible employer from a safety perspective if all you do is provide safety rules, but never ensure that your employees comply with them? Again, as I have “preached” over and over again – YOU NEED AN EFFECTIVE SAFETY COMMUNICATION AND ENFORCEMENT PROGRAM. First, you must determine the hazards to which your employees will be exposed. Second, you need to develop rules for protecting your employees from those hazards. This might include guards, the use of PPE, or the adoption of administrative controls. Third, you need to communicate those rules to all of your employees and remind them that they will receive discipline up to and including termination from employment for violation of those rules. Fourth, you need to be sure they understand the rules and their obligations to comply with them. Fifth, you need to establish an audit program to monitor your employees for their compliance. And, sixth, you need to issue discipline and provide retraining for each safety violation, not matter how serious.

If you follow the steps noted in the preceding paragraph and enforce your safety rules consistently and objectively, you should never have a problem demonstrating that the discipline you issued for the safety rule violation that lead to the work-related injury or illness was a legitimate enforcement of your safety rules. One key here is to be to show that you issue discipline as needed to enforce your safety program whether or not an injury resulted from the safety violation.

**Mandatory Post-Accident Drug Testing**

The last point I will address is the one probably causing the most confusion among employers. This relates to the announced prohibition of mandatory post-accident drug testing. My experience in working with my trade association members is that many have a requirement for mandatory post-accident drug testing as part of their drug free workplace program. The concern here is that many of these programs, established for a legitimate purpose, will have to be eliminated. OSHA has pointed out that mandatory drug testing programs which are required by local, state or federal laws will be permitted as they are legally mandated. But, what about those other programs that also have a legitimate purpose, but do not have the protection of a law?

Some confusion has arisen on this issue. There appear to be mixed interpretations of this prohibition coming out of different OSHA area offices. We have not yet seen how all of the state-OSHA states, will handle mandatory post-accident drug testing. First, this mandatory post-accident drug testing prohibition applies only to drug testing connected to injury reporting. So, an employer may still require post-accident drug testing following property damage accidents as well as for other identified reasons, not related to injury reporting.

The same memorandum referred to above states that: ”section 1904.35(b) (1) (iv) only prohibits drug testing employees for reporting work-related injuries or illnesses without an objectively reasonable basis for doing so. As in all cases under section 1904.35(b) (1) (iv), OSHA will need to establish the three elements of retaliation to prove a violation: a protected report of an injury or illness; adverse action; and causation.” In the next paragraph OSHA advises that in evaluating whether an employer had a reasonable basis for drug testing following the report of a work-related injury or illness, OSHA will look to whether the employer had a reasonable basis for believing that he drug used by the employee who reported the injury could have contributed to the injury or illness.

Unfortunately, as OSHA attempts to further clarify their rationale they seem to create more confusion. An example is provided by OSHA of several employees who are injured in a crane accident in which the crane operator is not injured. OSHA advises that in this instance it would be reasonable to require all employees whose conduct could have contributed to the incident and/or injuries to be tested, whether or not they reported an injury. *However*, OSHA points out that it would not be reasonable to drug test only those employees who reported an injury and not test other uninjured employees who conduct could also have contributed to the incident. OSHA uses this to underscore the main principle that drug testing may not be used as a form o9f discipline against employees who report an injury or illness.

OSHA follows this illustration with: “drug testing an employee whose injury could not possibly have been caused by drug use would likely violate section 1904.35(b) (1) (iv).” Of course, this last statement would require you to separate those injuries reported because of an accidental occurrence from those occasioned by happenstance. I suggest that a blanket post-accident drug testing policy following any accidental occurrence with or without an injury is the best way to reduce the chance of a problem.

The example in the preceding paragraph is fairly easy to understand. Unfortunately most on the job injuries involve only one employee, whose actions or inactions cause the injury or illness to that same employee. So when viewed in its totality, it appears that the memorandum released by OSHA on October 19, 2016 reaffirms the prohibition against mandatory post-accident drug testing. Some OSHA area offices for some reason have placed their own “spin” on this language. Some are stating that if state law provides for a drug free workplace program (DFWP), with a promise of lower workers’ comp premiums for those who participate, the area director will consider that program to provide a reasonable non-retaliatory reason for mandating post-accident drug tests, even if the state law only requires the employer’s DFWP to provide for reasonable suspicion testing.

So, where does this leave the employer? It appears that employers have several options. The first option, and the most likely not to result in a citation will be to stop requiring mandatory post-accident drug testing, unless such testing is specifically required by a state or federal law. Of course, if you take this option you may institute a reasonable suspicion testing program.

A second option would be to be sure that any mandatory drug-testing program extends to all employees involved in any mishap while working, whether or not an injury occurs. This would be similar to the OSHA example with the crane. So, any employee involved in any mishap would have to submit to a drug and/or alcohol test. If you take this approach you should not make any exceptions, especially as to employees in a non-injury causing mishap. This option, if properly crafted and implemented should permit you to continue with mandatory post-accident drug testing with little or no risk of drawing a citation.

A third option is to contact your local federal OSHA area director or the head of your state OSHA to see what his/her approach will be.

Finally, you can conduct business as usual hoping that no employee or employee representative complains about your mandatory post-accident drug testing program. I know there will be a group of companies who chose to take this approach, at least until the new administration takes office and establishes its own priorities. There are inherent risks associated with this last option.

Here we have a new broad rule that impacts all employers, whether or not they ever considered their post-accident testing protocol to anything more than part of their accident investigation/prevention process – an assist in determining the cause of an on-the- job accident. That tool has been significantly impacted and ALL employers need to take a look at their current post accident procedures to ENSURE that they do not fall into the category of retaliatory conduct designed to inhibit or discourage employees from reporting on the job injuries and/or illnesses.