This Week's Feature

Recent Changes to OSHA Regulations That Employers Seem to Miss

By John D. Surma

On January 10, 2017, Dr. David Michaels resigned as the Assistant Secretary of Labor for Occupational Safety and Health. Though Scott Mugno was nominated by President Trump to take that position in October, 2017, the Senate has yet to confirm him and the Occupational Safety and Health Administration (OSHA) remains without an appointed leader. As a consequence of OSHA remaining without a political appointee at the helm, OSHA has remained largely committed to regulatory changes implemented during Dr. Michaels' administration but has not undertaken significant rule making.

While there aren't a large number of changes looming on the horizon, employers continue to grapple with a number of the rules and changes to rules implemented under Dr. Michaels. This article discusses several rules implemented under Dr. Michaels that remain compliance issues for employers, in some cases years after implementation.

Though it became effective on January 1, 2015, the revision to 29 C.F.R. §1904.39 (related to the reporting of certain incidents to OSHA) continues to be misunderstood by employers and their environmental health and safety (EHS) staff. This rule, perhaps because of employer misunderstanding, continues to be "innocently" violated today on a fairly regular basis. The old version of the rule required that employers report the hospitalization of three or more employees and the death of one or more employees. The new version requires employers to report deaths of an employee, amputations, eye losses, and overnight hospitalizations for more than observation.

The terms "overnight hospitalization for more than observation" and "amputation" are the terms of greatest nuance and cause employers the most difficulty. For instance, though an employer can provide an employee non-prescription strength ibuprofen and doing so is not considered medical treatment, if that same non-prescription strength ibuprofen is administered during an overnight hospitalization, even if for reasons completely unrelated to the purpose of the hospitalization, OSHA considers the hospitalization to be for more than observation, and it is reportable. Additionally, though not clearly set forth in the materials that OSHA issued to publicize the change in these rules, testing during an overnight hospitalization does not trigger an obligation to report the hospitalization to OSHA. What is not clear, however, is if testing that requires the administration of medicine (radioactive materials for certain imagining studies) would trigger the reporting obligation.

Amputation is generally understood as the removal of a digit, appendage, or other body part, regardless of the method of removal (including surgical). The definition of amputation under 29 C.F.R. §1904.39(b)(11) is

> the traumatic loss of a limb or other external body part… such as a limb or appendage, that has been severed, cut off, amputated (either completely or partially); fingertip amputations with or without bone loss; medical amputations resulting from irreparable damage; amputations of body parts that have since been reattached.

Removal of the ear, regardless of the means, is not considered an amputation. However, removal of even the most miniscule portion of the fingertip is considered an amputation.

Another "rule" that has created an enormous amount of confusion for employers, EHS personnel, and others is the new "rule" concerning post-incident drug and alcohol testing. 29 C.F.R. §1904.35(b)(1)(iv) prohibits an employer from discharging or discriminating against an employee for reporting a work-related injury or illness. The preamble to this rule interprets the regulation broadly to prohibit any "adverse action that could well dissuade a reasonable employee from reporting a work-related injury or illness." OSHA applies the prohibition to any "blanket post-injury drug testing polic[y]," concluding that drug testing alone constitutes an "adverse employment action."

While many employers and safety professionals have focused on the prohibition against mandatory post-incident drug testing, OSHA's perspective on the issue of discrimination and retaliation against employees who report occupational injuries and illnesses is much broader. In publications issued in association with the rules concerning the reporting of workplace injuries, illnesses, and deaths set forth above, OSHA outlined a number of relatively common practices that it views as discriminatory and/or retaliatory. The activities deemed by OSHA to have a discriminatory

and/or retaliatory effect on employees reporting work-related injuries and illnesses include the following:

1. Mandatory post-incident drug and alcohol testing.
2. Demanding that employees report illnesses and injuries within a certain time after being injured or becoming ill (*i.e.*, requiring employees report injuries before the end of their shift).
3. Requiring employees report injuries and illnesses in-person to someone at a distant location (*i.e.*, requiring field employees to report to someone in the office as opposed to their supervisor in the field).
4. Terminating employees who are injured because they failed to abide by the employer's safety rules.
5. Disciplining employees who report injuries or illnesses or terminating employees who have more than X injuries.
6. Enforcing vague safety rules such as "situational awareness" and "work carefully" only after an employee is injured.
7. Enrolling employees in "repeat offender" programs.

While employers have largely been focused on the question of mandatory post-incident drug and alcohol testing, many employers have one or more of the other six listed policies in effect, each of which is as discouraged as mandatory post-incident drug and alcohol testing.

OSHA has made clear that there are exceptions to the prohibition on mandatory post-incident drug and alcohol testing, specifically when it is required by another law. One clear instance when OSHA permits automatic post-incident drug and alcohol testing as required by law is as required by the FMCSA (for commercial drivers). Another such exception is when a workers' compensation law requires drug and alcohol testing when an employee makes a workers' compensation claim. Typically, drug-free workplace laws are voluntary, and accordingly, OSHA does not grant an exception for compliance with those laws.

OSHA offered a number of seminars and explanatory documents related to these rules, though primarily focused on the mandatory post-incident drug and alcohol testing prohibition. OSHA has repeatedly made it clear that this was not a complete ban of post-incident drug and alcohol testing. OSHA has taken the position that post-incident drug and alcohol testing is not completely prohibited, but it has established a number of prerequisites to such testing. Included among those prerequisites is a requirement that there be a reasonable basis for believing that drug or alcohol use created impairment that caused the incident, using tests that quantify the level of impairment, and testing of those that are in the area where the incident occurred (not just testing the injured employee).

The rules relating to exposure to respirable silica dust were also revised, and employers are struggling to comply with the new rules. Included among the changes under the new rules are the following:

- The Permissible Exposure Limit (PEL) is reduced to 50 micrograms per cubic meter of air (a 50 percent reduction for general industry and maritime and an 80 percent reduction for construction).
- Engineering controls and/or work practice changes are emphasized over respiratory protection.
- Written exposure control plans must be created whenever employee exposure to respirable silica dust is expected.
- Employers must perform pre-work assessments to determine the employee's exposure level and act according to the exposure level.
- Employers are required to establish "regulated" or "controlled-access areas" when silica dust-producing activities are undertaken and must exclude those not authorized to perform the work.
- Employers are required to establish respiratory protection programs, in addition to employee training and information programs.
- Medical surveillance is required for employees who work in areas where the amount of respirable silica dust exceeds the *action level (one-half the PEL)* for more than 30 days in a year (must be implemented by June 23, 2020).
- Medical surveillance records are subject to a new level of confidentiality that allows employers only a limited amount of access to the results of the medical examination under the new rules.
- New record-keeping requirements require maintenance of records relating to air monitoring data, "objective data," and medical surveillance.

Industry of all types challenged these new rules and the challenges failed. The new rules went into effect and enforcement began on September 23, 2017.

Lastly, OSHA implemented a new rule related to the electronic record keeping applicable to all employers with 250 or more employees and employers with 20–249 employees

in certain "hazardous" industries. In short, employers that are required to submit their records electronically are reporting far more often than they are actually required to report. Employers need to be mindful that only specific employers are required to submit their records electronically, and far more employers are submitting records than are actually required to do so (and that they do not want to be among those employers).

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