

PUBLICATION

OSHA Postpones Its New Workplace Injury and Illness Reporting Rule in the Face of Scrutiny and a New Lawsuit

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Over the past few months, we have published articles related to the U.S. Department of Labor's Occupational Safety and Health Administration's (OSHA) publication of amendments related to its workplace injury and illness recordkeeping requirements.

In the amendments, titled "Improve Tracking of Workplace Injuries and Illness," OSHA not only outlined new requirements for electronically reporting workplace injuries and illness, but created a new anti-retaliation provision which identifies routinely used drug-testing policies that would no longer be compliant with the law. The new rules and guidelines signaled a major shake-up for internal employer policies.

After the amendments were finalized mid-May, the House Subcommittee on Workforce Protections held a hearing titled "Promoting safe workplaces through effective and responsible recordkeeping standards," during which employers and their advocates expressed significant concerns. More recently, on July 8, 2016, the National Association of Manufacturers, Associated Builders and Contractors, Inc., as well as several national, state, and local business groups, joined to file a federal lawsuit, *TEXO ABC/AGC, et al. v. Thomas, et al.*, No. 3:16-cv-1998 (N.D. Tx July 8, 2016), alleging that OSHA's amendments went too far.

In the lawsuit, the plaintiffs accuse OSHA of exceeding its statutory authority, failing to follow required rulemaking procedures, failing to conduct adequate regulatory analysis, interfering with state workers' compensation laws, and violating the Administrative Procedure Act by creating a rule that is both arbitrary and capricious. More specifically, the plaintiffs assert that OSHA's restrictions on post-accident drug and alcohol testing under the anti-retaliation provision of the new rule improperly limits an employer's ability to investigate an incident, and competes with the laws of several states that actually require employers to conduct post-accident drug testing. The lawsuit demands that the court issue a preliminary injunction in order to prevent OSHA from implementing the portion of the amendments related to restrictions on employer drug-testing policies.

At this point, there is no indication as to whether or how quickly the court may act on the request for a preliminary injunction in the lawsuit. Moreover, even if the court were to act quickly, there is no indication as to what, if any implications, such action would practically have on OSHA. In the meantime, OSHA has postponed the effective date of the anti-retaliation provision in the new rule from August 10, 2016 to November 1, 2016, to allow for an additional public comment period. Ober|Kaler's Employment Group will continue to provide updates as this issue evolves.