OSHA Publishes Final Electronic Recordkeeping Rule

The Occupational Safety and Health Administration (OSHA) published a final rule on May 12, 2016 which it says will improve tracking of workplace injuries and illnesses. Portions of the rule go into effect on August 10, 2016; while other portions of the rule will be phased in over time.

Key Provisions of the Rule:

- **Electronic Submission** – The final rule calls for electronic submission of injury and illness reports; however, what needs to be filed generally is dependent on the number of employees employed at an establishment. Part-time, seasonal and temporary workers at any time during the calendar year are to be included in the number of employees for purposes of the electronic submission requirement.
    - 250 or more employees – The employer must submit electronically OSHA Forms 300, 300A and 301 annually.
    - 20 or more but less than 250 in certain identified industries – The employer must submit electronically OSHA Form 300A annually. Included in the list of identified industries are nursing care facilities (NAICS 6231), community care facilities for the elderly (NAICS 6233) and other residential care facilities (NAICS 6239).
    - Other employers who receive notification from OSHA to electronically submit their OSHA Forms 300, 300A and 301.
- **Public Posting of Data** – Data from the public submissions will be posted in a publicly accessible website. Information that could be used to identify individual employees will be scrubbed from the website.
- **Employee Injury and Illness Reporting Requirements** – Employers must develop reasonable procedures for employees to report work-related injuries and illnesses promptly and accurately. A procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness. Additionally, employers must inform employees of the procedures it develops and that:
    - Employees have a right to report work-related injuries and illnesses.
    - Employers are prohibited from discharging or in any way discriminating against employees for reporting work-related injuries and illnesses.
        - OSHA will now be able to enforce this provision through citation issued as a result of any OSHA inspection. Previously, retaliation claims would have to be initiated in Federal court.

Incentive Programs – Because of OSHA's concerns that many commonly used incentive programs may deter reporting illnesses or injuries, or incentivize underreporting thereof, OSHA is warning employers that they must be careful in designing and implementing their incentive programs. Employers should avoid incentive programs designed around lagging indicators, such as those that rewards employees for going a certain period of time without an injury or illness. Rather, incentive programs should be designed very carefully around leading indicators, such as those that reward employees for identifying and reporting hazards or for participating in the employer's safety committee. Going forward, OSHA will assess the acceptability of incentive programs on a case-by-case and has no plans, at the present time, to provide specific guidance to employers.

Post-Accident Drug and Alcohol Testing – The final rule promises to affect employers' ability to perform post-accident and post-injury drug and alcohol testing, again because OSHA believes that broad testing policies deter employees from reporting workplace injuries. As a result, the agency maintains that any deterrence to reporting ultimately results in misleading injury and illness statistics. Under the final rule, employers may not use drug/alcohol testing (or the threat thereof) as a form of adverse action against employees who report injuries illnesses. The rule, however, does not apply to post-accident testing required by Federal regulations or permitted by state workers' compensation laws. Some guidelines moving forward:

- Blanket testing policies are prohibited – Employers should limit post-accident testing to those situations in which drug or alcohol use is *likely* to have contributed to the accident.

    - If the injury or illness is such that there is no plausible connection to drug or alcohol use, testing should not be performed. Examples of injuries/illnesses with no such connection include back or muscle strains caused by overexertion, carpal tunnel syndrome, animal bites, bee stings and the like.

    - OSHA states in the rule that "[e]mployers need not specifically suspect drug use before testing, but there should be a reasonable possibility that drug use by the reporting employee was a contributing factor . . . . In addition, drug testing that is designed in a way that may be *perceived* as punitive or embarrassing to the employee is likely to deter injury reporting." (emphasis added). This statement is very troubling in that it is impossible for an employer to know beforehand what an employee perceives, and this seemingly gives employees who do not want to be tested wide latitude for objection on the basis that they perceive it to be punitive or merely embarrassing.

- At least a cursory investigation into the facts surrounding the accident should precede any decision to conduct a drug/alcohol test – The focus of such an investigation would be to rule out any condition attributable to the employer, especially if that condition would be an OSHA violation, and to determine if there are any facts indicating that drug or alcohol use could be a contributing factor.

    - Employers should be mindful of Centers for Disease Control (CDC) parameters of 8 hours for alcohol testing and 32 hours for drug testing.

- Employers must not tie drug and alcohol testing to whether (a) an OSHA recordable injury or illness is involved, or (b) an employee files a state workers' compensation claim. The accident and the circumstances surrounding it should be the trigger; not the injury.

- It is critical for supervisors to be trained to consult with HR personnel before ordering a post-accident drug or alcohol test so that the appropriate investigation can be undertaken.

Effective Dates/Dates for Submitting Required Forms Electronically – As noted above, the rule has varying effective dates.

- August 10, 2016 – Employers must be in compliance with those provisions of the rule dealing with (a) employee injury and illness reporting policies, (b) informing employees of their right to report a work-related injury or illness, and (c) the prohibition against discharging or otherwise discriminating against employees for reporting an injury or illness.

- January 1, 2017

    - Requirements relating to electronic submission of Part 1904 recordkeeping forms.

- July 1, 2017

    - Deadline for all employers with 250 or more employees in their establishment to submit their 2016 Form 300A electronically.

    - Deadline for all employers with at least 20 but less than 250 employees in their establishment within the NAICS categories listed above to submit their Form 300A electronically.

- July 1, 2018

    - Deadline for all employers with 250 or more employees in their establishment to submit their 2017 Forms 300A, 300 and 301 electronically.

    - Deadline for all employers with at least 20 but less than 250 employees in their establishment within the NAICS categories listed above to submit their Form 300A electronically.

- Beginning in 2019 and going forward, all forms must be submitted by March 2 of every year.

Conclusion – The final rule presents significant compliance challenges to LeadingAge members as it does to all employers, particularly in the area of incentive program design and implementation and post-accident drug and alcohol testing. Moreover, the ability of the public to access all electronic injury and illness reports will subject LeadingAge members to increased scrutiny, not just from OSHA inspectors but employee advocates and interest groups as well. Given the historically high rates of injuries and illnesses within the aging services field, LeadingAge members should be working with their workplace safety committees, consultants and legal counsel to meet these challenges now.

Link to Final Rule: https://www.gpo.gov/fdsys/pkg/FR-2016-05-12/pdf/2016-10443.pdf