

DOL Challenges Injury and Accident Reporting Policy Under OSHA's Anti-Retaliation Rule

2 min read

Jun 1, 2017

OSHA's new anti-retaliation rule went into effect on December 1, 2016. The purpose of the new rule was to clarify what OSHA considered "the existing implicit requirement" that an employer work-related injury and illness policies be reasonable and not deter or discourage employees from reporting injuries. Since that time, employers and lawyers alike have waited to see what types of policies OSHA would target under the new rule. The Department of Labor's recent complaint filed in the Eastern District of Wisconsin sheds some light on that question.

The suit challenges several provisions of the employer's "Accident Reporting/Investigation Plan" (the Plan). The Plan required employees to "immediately" notify their immediate supervisor or lead of an "injury," "accident," or "near miss" in which they were involved. Leads are required to report the injury, accident, or near miss up the chain to his or her supervisor. Employees who fail to report an accident or near miss "in a timely fashion" are subject to disciplinary action under the union contract's point-based disciplinary system. Employees who fail to report an injury or accident before the end of his or shift may be assessed 8 points for the infraction. Employees who commit an "unsafe act" may be assessed 4-8 points. Accrual of 24 points results in termination.

A lead accumulated 12 points under the disciplinary system after he failed to report a subordinate's shoulder injury "in a timely fashion" and committed an unsafe act when he twisted his ankle. Because the supervisor had already accumulated 12 points, the employer terminated his employment. The employee filed a complaint with OSHA.

OSHA determined the employer violated OSHA's anti-retaliation rule by assessing the supervisor points and terminating his employment. However, the employer refused to reinstate, leading to the DOL action.

The DOL cites several problems with the Plan and disciplinary system. First, and foremost, employees who discover their injury after the incident are being disciplined under the plan, even when it is impossible to comply because the injury is asymptomatic on the date of the accident. In addition, the DOL alleges the Plan discourages reporting of injuries (1) when they occur because they may be assessed disciplinary points for a timely reported

injury as an “unsafe act;” (2) after they occur because they may be assessed disciplinary points; and (3) by giving individual managers too much discretion to determine what constitutes an “unsafe act” and an “injury” and whether an occurrence is an “accident” or a “near miss,” removing any predictability of appropriate disciplinary action

This lawsuit serves as a good example of the types of policies OSHA deems violative of its anti-retaliation rule. Now is a good time to review your safety program to assess whether it discourages employees from reporting injuries, either due to time constraints on injury reporting or by removing predictability from what conduct is subject to discipline.

Hinshaw & Culbertson LLP is a U.S.-based law firm with offices nationwide. The firm’s national reputation spans the insurance industry, the financial services sector, professional services, and other highly regulated industries. Hinshaw provides holistic legal solutions—from litigation and dispute resolution, and business advisory and transactional services, to regulatory compliance—for clients of all sizes. Visit www.hinshawlaw.com for more information and follow @Hinshaw on LinkedIn and X.

Topics

OSHA, Retaliation, Policies, Employer Policies, Workplace Injury, Occupational Safety And Health Administration, Injury And Illness Reporting, Workplace Injury Reporting, Anti-Retaliation Rule, Safety Programs, Workplace Policies