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## OSHA Gets a Green Light: Court Refuses to Stop OSHA from Enforcing its New Anti-Retaliation Standards

On Nov. 28, 2016, the United States District Court for the Northern District of Texas declined to grant a nationwide preliminary injunction enjoining the Department of Labor (DOL) and the Occupational Safety and Health Administration (OSHA) from enforcing subparagraphs 1904.35(b)(1)(i), (iii), and (iv) of the final rule issued by OSHA titled *“Improve Tracking Workplace Injuries and Illnesses,”* 81 Fed. Reg. 29,624 (May 12, 2016) (the New Rule). *Texo ABC/AGC, Inc., et al. v. Thomas E. Perez, et al.*, No. 16-cv-1998-L (N.D. TX. July 2016).

The Plaintiffs in *Texo*, a group of trade organizations and companies, sought to enjoin the DOL and OSHA from enforcing these subparagraphs because they are “unlawful to the extent that they prohibit or otherwise limit incident-based employer safety incentive programs and/or routine mandatory post-accident drug testing programs.” The court determined that the plaintiffs failed to meet their burden of establishing that they were likely to suffer irreparable harm in the absence of a preliminary injunction.

### **Background**

On May 11, 2016, OSHA issued its controversial New Rule on recordkeeping and reporting. The New Rule sets forth, among other things, regulations designed to prohibit retaliation against employees who report work-related injuries or illnesses.

The New Rule requires employers to inform employees of their right to report work-related injuries and illnesses free from retaliation, and clarifies the existing implicit requirement that an employer must provide reasonable procedures for reporting work-related injuries and illnesses that do not deter or discourage employees from reporting them.

The New Rule adds paragraph (b)(1)(iv) to section 1904.35 to “incorporate explicitly into part 1904 the existing prohibition on retaliating against employees for reporting work-related injuries or illness that employers are already obligated to follow under section 11(c) of the OSH Act.” Thus, under 29 C.F.R. § 1904.35(b)(1)(iv), OSHA is permitted to cite an employer for taking an adverse action against an employee for reporting an injury or illness, even if the employee does not file a Section 11(c) complaint with OSHA. Citable discrimination under paragraph (b)(1)(iv) would include termination, reduction in pay, reassignment to a less desirable position, or any other adverse action that could dissuade a reasonable employee from reporting a work related injury or illness.

The New Rule also explains that it is a violation for an employer to use a safety incentive program to take adverse employment action, such as denying a benefit, because an employee reports a work-related injury or illness.

The New Rule also prohibits employers from “using drug testing (or the threat of drug testing) as a form of adverse action against employees who report injuries or illnesses.” Employers may, however, perform post incident drug testing where: (1) there is a reasonable possibility that employee drug use contributed to the incident; (2) the drug test can accurately identify impairment caused by drug use.

Nothing in the New Rule, however, prohibits employers from disciplining employees for violating legitimate safety rules, even if the same employee that violated a safety rule also was injured as a result of that violation and reported the injury or illness. With that said, the final rule explicitly warns employers that disciplining employees for violating “vague” safety rules like “work carefully” is often pretext for retaliating against employees who report work-related injuries or illnesses. For more information on the New Rule, please see our previous [GT Alert, “OSHA’s Final Rule on ‘Improving Tracking of Workplace Injuries and Illnesses’: Employers’ Injury and Illness Information Becomes Public and Expanded Protections for Employees that Report Injuries and Illnesses.”](#)

#### **Texo ABC/AGC, Inc., et al. v. Thomas E. Perez, et al.**

The court declined to grant the plaintiffs’ nationwide injunction because the plaintiffs failed to explain why they would be subjected to irreparable harm should OSHA enforce the New Rule.

Plaintiffs argued that OSHA’s New Rule was an overreach of the agency’s authority, hindered employers’ ability to investigate incidents, and limited employers’ ability to reduce workplace injuries by prohibiting employers from having incident-based safety incentive programs.

However, the court found that the “[p]laintiffs’ evidence is based almost entirely on unsupported beliefs, unfounded fear, and speculation regarding the general efficacy of mandatory post-accident drug testing and incident-based safety incentive programs, which are insufficient to establish a substantial threat that irreparable harm will occur if a preliminary injunction is not granted.” The court was also skeptical of the statistics, surveys, and declarations plaintiffs presented to establish irreparable harm, because the evidence failed to identify whether employer safety programs could be modified to comply with OSHA’s New Rule without losing their effectiveness.

The New Rule, the judge explained, merely incorporates existing rules that prevent employers from both retaliating against workers for reporting work-related injuries and from implementing procedures that would discourage an employee from reporting an injury.

Although the judge declined to grant a nationwide injunction, the judge noted that the New Rule does not include a “‘per se’ ban on . . . safety incentive programs” and that the plaintiffs’ safety incentive programs require a “case-by-case analysis . . . because it is apparent from [the] evidence that their safety programs share some similarities but are not identical in nature.”

#### **Takeaways**

Because the court declined to grant the plaintiffs’ request for a nationwide injunction, the DOL and OSHA will begin to enforce subparagraphs 1904.35(b)(1)(i), (iii), and (iv) of the New Rule on Dec. 1, 2016.

Employers should consult with counsel to review their injury reporting requirements, post-incident drug testing protocols, and safety incentive programs to ensure compliance with the New Rule. Specifically, these policies and programs should be reviewed to ensure that they would not dissuade a reasonable employee from reporting a workplace injury. Employers should also consider informing managers and supervisors to reiterate to employees to report workplace injuries and that they will not suffer retaliation for doing so.

OSHA's new anti-retaliation provisions in its New Rule further underscore the importance of employers to maintain documentation of all disciplinary actions and to ensure that safety work rules are clearly communicated and consistently applied. Employers should proceed with caution or consult with their counsel when implementing an adverse employment action against an employee shortly after an employee reports an injury or illness.

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