ELECTRONIC RECORDS, DRUG TESTING AND **INCREASED PENALTIES**

by Michael R. Lied Howard & Howard Attorneys PLLC

Recent OSHA developments may have a significant impact on employers.

THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA) recently made several rule changes that will affect employers. First, OSHA amended its occupational injury and illness recordkeeping rules to require certain establishments to submit their OSHA 300 Logs, 301 Incident Reports and 300A Annual Summaries electronically.

The new rule also requires smaller establishments with at least 20 employees in industries with high injury and illness rates (such as manufacturing, construction and agriculture) to submit the information from their 300A Annual Summary to the new OSHA injury and illness website. Second, OSHA now takes the position that mandatory post-accident drug testing may violate its rules. Finally, and most significantly, OSHA will increase penalties by slightly more than 78 percent.

ELECTRONIC INJURY RECORD SUBMISSION

The new electronic filing requirements to be phased in include:

- Establishments with at least 20 employees must submit only the 300A Annual Summary for calendar year 2016.
- In future years, establishments with 250 or more employees must also include their OSHA 300 Logs and OSHA 301 Incident Reports.
- In later years, establishments with 20 to 249 employees need only submit the 300A Annual Summary.

Submission deadlines will be July 1st (of the following year) for 2016 and 2017 records. Beginning in 2019, records are due by March 2nd. OSHA will use the information it gathers to conduct targeted inspections, and will be freely available to the public, unions, public interest groups and the media.

POST-ACCIDENT DRUG TESTING

OSHA's rules require employers to implement "a reasonable procedure" for employees to report workplace injuries; that procedure cannot deter employees from reporting a workplace injury. OSHA views mandatory post-accident testing as discouraging the reporting of workplace safety incidents. Therefore, employers who continue to use such policies will face penalties and enforcement scrutiny.

OSHA says that although drug testing of employees may be a reasonable workplace policy in some situations, it is often perceived as an invasion of privacy. If an injury or illness is very unlikely to have been caused by employee drug use—or if the method of drug testing does not identify impairment but only use at some time in the recent past—then requiring the employee to be drug-tested may inappropriately deter reporting. As an example, it is well known that marijuana can be detected in a drug test weeks after its use. OSHA maintains that drug testing policies should limit post-accident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use.

Examples of what OSHA considers to be unreasonable situations for drug-testing a reported injury include a bee sting, a repetitive strain injury or an injury caused by a lack of machine guarding or a machine or tool malfunction. Each post-accident drug test will involve a judgment call. One can predict that certain other employer practices—like a reward for a certain period without accidents—may also be considered unlawful by OSHA.

PENALTY INCREASES

Beginning August 1, 2016, a new penalty structure will be implemented. New maximum penalties include:

- Serious and non-serious violations: $12,471 per violation;
- Repeat and/or willful violations: $124,709 per violation; and
- Failure to abate: $12,471 per day beyond abatement date.

Violation of the rules can be very costly, and many employers may now choose to contest the penalties assessed, along with the underlying alleged violation. iBi