

New OSHA Guidance: Certain Safety Incentive Programs, Post-Accident Drug Tests Permissible

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October 16, 2018

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Most safety incentive programs and post-incident drug testing policies will not be considered retaliatory and unlawful under a new [Standard Interpretation](#) from the Occupational Safety and Health Administration (OSHA).

OSHA's "Clarification of OSHA's Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under 29 C.F.R. § 1904.35(b)(1)(iv)" was released on October 11, 2018. The regulation, 29 C.F.R. § 1904.35(b)(1)(iv), prohibits employers from discharging or discriminating against an employee for reporting a work-related injury or illness.

The agency stated in previous guidance that in some circumstances, safety incentive policies could deter employees from reporting work-related injuries and illnesses and post-accident drug and alcohol testing could be a retaliatory practice.

The new guidance clarifies that safety incentive programs are retaliatory and unlawful only if they seek "to penalize an employee for reporting a work-related injury or illness rather than for the legitimate purpose of promoting workplace safety and health." It also states that "most instances of workplace drug testing are permissible."

The new guidance supersedes any other interpretive documents to the extent they could be construed as inconsistent with the new guidance's position. It also instructs agency officials to consult with OSHA's Directorate of Enforcement Programs before issuing citations under § 1904.35(b)(1)(iv) relating to safety incentive and drug testing policies.

Safety Incentive Programs

OSHA acknowledges that some safety incentive programs promote workplace safety and health. The guidance states that not only are safety incentive programs that reward employees for reporting near-misses or hazards or encourage involvement in a safety and health management system permissible, but so are rate-based safety incentive programs, which focus on reducing the number of reported work-related injuries and illnesses.

According to OSHA, "Rate-based incentive programs are also permissible under § 1904.35(b)(1)(iv) as long as they are not implemented in a manner that discourages reporting OSHA would not cite the employer under § 1904.35(b)(1)(iv) as long as the employer has implemented adequate precautions to ensure that employees feel free to report an injury or illness."

OSHA explains that employers could implement adequate precautions that would avoid the unintentional deterrent effect of a rate-based safety incentive program or policy. Examples of permissible measures from the agency include:

- An incentive program that rewards employees for identifying unsafe conditions in the workplace;
- A training program for all employees to reinforce reporting rights and responsibilities

and emphasizes the employer's non-retaliation policy; and

- A mechanism for accurately evaluating employees' willingness to report injuries and illnesses.

Accordingly, where an employer ties a portion of a supervisor or manager bonus to the number of recordable work-related injuries or illnesses is not prohibited per se under the new guidance.

Post-Accident Drug Testing

According to the new guidance, the following are permissible types of drug tests:

- Random drug testing;
- Drug testing unrelated to the reporting of a work-related injury or illness;
- Drug testing under a state workers' compensation law;
- Drug testing under other federal law, such as a U.S. Department of Transportation rule; and
- Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees. If the employer chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries.

OSHA makes clear that employers need not analyze whether there was a "reasonable possibility" that drugs or alcohol could have contributed to an accident. Instead, broad post-accident drug and alcohol testing is permitted (subject to applicable laws that may impose specific requirements or restrictions) as long as all employees whose conduct could have contributed to the accident are tested.

Employers should review and update their safety incentive programs and drug testing policies to ensure compliance with the new OSHA guidance. Please contact Jackson Lewis with any questions.

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