

OSHA Announces New Position On Post-Incident Drug Testing and Safety Incentive Programs

Related Professionals

David E. Dubberly
803.253.8281
ddubberly@nexsenpruet.com

Practices

Employment & Labor Law

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On Oct. 11, 2018, the Occupational Health and Safety Administration (OSHA) sent a Standard Interpretation Memorandum to its regional administrators and to state plan designees clarifying its position on post-incident drug tests and safety incentive programs. According to the memo, such tests and programs are permitted if properly written and implemented.

Background

Federal law and OSHA regulations prohibit retaliation against employees for reporting work-related injuries and illnesses. In May 2016, OSHA published a final rule interpreting the retaliation prohibition broadly. The rule stated that some post-incident drug testing and safety incentive programs may deter employees from reporting injuries and illnesses, thus resulting in unlawful retaliation. It left employers uncertain as to when implementing such testing and programs could result in citations by the agency for alleged retaliation.

The October 2018 memo sets out OSHA's new policy, stating that "[a]ction taken under a safety incentive program or post-incident drug testing policy would" not violate anti-retaliation requirements unless "the employer took the action to penalize the employee for reporting a work-related injury or illness rather than for the legitimate purpose of promoting workplace safety and health."

Post-Incident Drug Testing

OSHA's new memo specifically states that "most instances of workplace drug testing are permissible." According to the agency, examples of permissible drug testing include:

- "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.”

So employers may lawfully implement not only random drug testing programs, but also post-incident drug testing programs, as long as all employees whose conduct could have contributed to the incident – and not just the employees who were injured in the incident – are tested.

Safety Incentive Programs

OSHA’s new memo further notes that “[i]ncentive programs can be an important tool to promote workplace safety and health.” According to the agency, incentive programs that provide positive “rewards [to] workers for reporting near-misses or hazards” and encourage “involvement in a safety and health management system” are “always permissible.”

The memo also says “rate-based” programs that reward employees “with a prize or bonus at the end of an injury-free” period or evaluate managers “based on their work unit’s lack of injuries ... are permissible ... as long as they are not implemented in a manner that discourages reporting.” “[W]ithholding a prize or bonus because of a reported injury” is allowed “as long as the employer has implemented adequate precautions to ensure that employees feel free to report an injury or illness.” These precautions can include:

- “[A]n incentive program that rewards employees for identifying unsafe conditions in the workplace”;
- “[A] training program for all employees to reinforce reporting rights and responsibilities [that] emphasizes the employer’s non-retaliation policy”; and
- “[A] mechanism for accurately evaluating employees’ willingness to report injuries and illnesses.”

This means employers may lawfully implement safety incentive programs if steps are taken to ensure employees feel free to report injuries and illnesses.

Bottom Line

OSHA’s new memo recognizes the value of post-incident drug testing and safety incentive programs if applied in a consistent and non-retaliatory manner. Employers should review their drug testing procedures and incentive programs for compliance with the agency’s new guidance.

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