

OSHA Softens on Post-Incident Drug Testing

[In May 2016, the Occupational Safety and Health Administration amended 29 CFR §1904.35 to prohibit employers from retaliating against employees for reporting work-related injuries or illnesses.](#) This revision to the recordkeeping regulations became immediately controversial when OSHA interpreted it to limit employers' use of safety incentive policies and post-incident drug testing. On October 11, OSHA issued a [Memorandum to Regional Administrators](#), which the Agency represents is a clarification of its position on safety incentive policies and post-incident drug testing.

Safety Incentive Policies

OSHA's May 2016 amendment made it clear that employee safety incentive policies premised on OSHA-recordable cases were suspect because they could have the effect, whether intended or not, of discouraging or deterring employees from reporting work-related injuries or illnesses. OSHA acknowledged at the time that such policies could be well-intended efforts by employers to encourage employees to work safely but stated that there were better ways to accomplish that goal. Rather than tying safety incentives to recordable cases, OSHA suggested rewarding employees who participate in safety-related activities, such as identifying hazards or participating in accident investigations.

In the new Memorandum, OSHA again acknowledges that such policies may be motivated by an employer's good faith intent to promote safety and health. OSHA emphasizes that rewarding employees for their participation in these types of proactive safety efforts will not violate § 1904.35(b)(1). According to the Memorandum, a safety incentive policy premised on OSHA recordables is not by itself prohibited. Rather, such policies will be considered violations only if they penalize employees for reporting work-related injuries or illnesses, or are implemented in a way that discourages reporting.

Post-Incident Drug Testing

When OSHA amended § 1904.35 in May 2016, some employers had mistakenly believed that the Agency intended to prohibit post-accident drug testing. Although OSHA's initial guidance raised doubts about what type of drug testing would be permissible, it became clear that OSHA never intended to prohibit post-accident or random drug testing.

To clarify its position, OSHA lists the following permissible drug testing:

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 U.S. Department of Transportation regulations.
- 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.

However, in the [OSHA guidance issued on October 19 to the general public](#), OSHA included this warning: “drug testing an employee whose injury could not possibly have been caused by drug use would likely violate section 1904.35(b)(1)(iv). For example, drug testing an employee for reporting a repetitive strain injury would likely not be objectively reasonable because drug use could not have contributed to the injury. And, section 1904.35(b)(1)(iv) prohibits employers from administering a drug test in an unnecessarily punitive manner regardless of whether the employer had a reasonable basis for requiring the test.”



Common Sense Counsel: Employers can continue to base safety incentive policies on OSHA recordables, but the rewards should be of relatively nominal value, such as pizza parties, tee shirts, or hats. Employers should avoid offering expensive gifts that an OSHA inspector would view as a “substantial” reward that would encourage employees not to report.

As to drug testing, OSHA has provided a list of permissible testing. As a general rule, post-incident drug testing will be viewed favorably by OSHA if it either is specifically permitted by some federal or state legal requirement or provision, or if it is limited to testing individuals whose conduct could have contributed to the incident. Good time to have your policy updated to stay in OSHA compliance.

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