

OSHA Issues Important Guidance for Employer Safety Incentive/Drug-Testing Programs and Forecasts Key Enforcement Targeting Initiative

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The Occupational Safety and Health Administration (“OSHA”) made important announcements this month regarding the electronic submission of injury and illness data. The first of these announcements took a big step back from prior OSHA guidance describing safety incentive program drug testing policies that OSHA considered to be in violation of the electronic reporting rule’s anti-retaliation provisions. The second explained how OSHA will prioritize enforcement resources based on the injury and illness data it has received.

OSHA issued a [new guidance document](#) on October 11, 2018 that clarifies the types of incentive programs and drug testing policies that are permissible under the electronic reporting rule’s anti-retaliation provisions. This guidance states that safety incentive programs and post-incident drug testing policies only violate OSHA’s anti-retaliation rules “if the employer took the action to penalize an employee for reporting a work-related injury or illness rather than for the legitimate purpose of promoting workplace safety and health.”

The guidance suggests that a broader range of safety incentive programs and drug testing policies are permissible than was indicated by OSHA’s preamble and prior guidance documents. For instance, under OSHA’s prior guidance, OSHA discouraged injury rate-based safety incentive programs and took the position that a safety incentive program where the employer holds a cash prize drawing or provides a bonus for each work group at the end of each injury-free month would likely give rise to a violation of the anti-retaliation provisions. Now, OSHA is taking the position that “if an employer takes a negative action against an employee under a rate-based incentive program, such as withholding a prize or bonus because of a reported injury, 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.” With regard to drug-testing, OSHA clarified that “most instances of workplace drug testing are permissible under § 1904.35(b)(1)(iv)” and that employers may engage in “drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees,” so long as the employer tests “all employees whose

conduct could have contributed to the incident, not just employees who reported injuries.” Employers should review their incentive programs and drug-testing policies with OSHA’s new guidance and the agency’s anti-retaliation provisions to ensure they are in compliance with OSHA requirements.

On October 17, 2018, OSHA announced that it is bringing back its Site-Specific Targeting Program. The [Site-Specific Targeting 2016 \(SST-16\)](#) Program will direct agency resources towards “high injury rate establishments” based on the injury and illness information electronically submitted by employers for calendar year 2016. OSHA will also be performing inspections at some low injury rate establishments to verify the accuracy of their reporting, and at randomly selected establishments that were required to but did not submit 2016 data in an effort to deter establishments from non-reporting.

Employers should review their compliance with OSHA’s electronic reporting requirements and prepare their facility managers and employees for OSHA inspections in the near future.

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