

OSHA Issues Guidance Memo on Incentive, Disciplinary, and Drug-Testing Programs

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On October 19, 2016, OSHA published a memo advising the new provisions of Section 1904.35, which require employers to set up reasonable procedures for reporting workplace injuries/illnesses and prohibit employers from retaliating against employees who reported work place injuries/illnesses. The memo specifically addressed discipline, drug and alcohol testing and incentive programs and how they may be interpreted by OSHA under this new law.

Discipline

While the standard does not prohibit employers from disciplining employees who violate safety rules or reasonable reporting procedures, it prohibits disciplining employees "simply for reporting" workplace injuries/illnesses.

To determine whether the discipline is in violation of the standard, OSHA will look to determine whether the employer took the same adverse employment action against employees who violated the safety rules, but did not report a work related injury/illness. If the employer only disciplines employees who report injuries/illnesses, this will be viewed as a violation and could result in a citation.

Employers often have time, place, and manner requirements for reporting workplace injuries/illnesses. OSHA will consider whether these requirements are reasonable by assessing the following:

1. Reasonableness of the rule;
2. Whether the employee has a reasonable basis for the deviation;
3. Whether the employer has a substantial interest in the rule and its enforcement; and
4. Whether the discipline imposed appears proportionate to the employer's interest in the rule.

If OSHA concludes the real reason for the discipline was reporting an injury/illness, OSHA may issue a citation under this section as well.

Drug and Alcohol Testing

The new standard does not prohibit testing but requires that drug and alcohol testing of employees who report an injury/illness take place only when there is an "objectively reasonable basis" for testing.

In determining the "objective reasonableness" in testing an individual involved in an incident, OSHA will consider the following factors:

1. Whether the employer had a reasonable basis for concluding that drug use could have contributed to the injury or illness;
2. Whether other employees involved in the incident that caused the injury or illness were also tested or whether the employer only tested the employee who reported the injury or illness; and
3. Whether the employer has a heightened interest in determining if drug use could have contributed to the injury or illness due to the hazardous nature of the work being performed when the injury or illness occurred.

OSHA further makes clear that drug testing pursuant to state worker's compensation law or other state or federal law will not result in citations.

Incentives

Again, OSHA does not prohibit incentive programs with the new standards, but it prohibits adverse action against employees who report injuries/illnesses. OSHA recommends incentive programs that reward employees for participating in safety-related activities like: compliance with workplace safety rules, participating in safety-training, or identifying unsafe working conditions.

OSHA reiterates its disdain for incentive programs relating to recordables. OSHA offers the following example: an employer promises to raffle off \$500 gift cards at the end of each month in which no employee sustains a lost-time injury. If the employer cancels the raffle in a particular month simply because an employee reported a lost-time injury without regard to the circumstances of the injury, such cancellation would likely violate section 1904.35(b)(1)(iv) because it would constitute adverse action simply for reporting a work-related injury.

Now is the time to review your policies and ensure that your reporting requirements, drug and alcohol testing policies, and incentive programs are in compliance with the new standard and its interpretation.

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