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OSHA Update: The 411 and Will Trump Thump OSHA?

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Agenda Topics

- Trump Administration Changes Made to OSHA Regulations and Enforcement
- Anticipated Future Changes by the New Administration
- Legal Issues Arising from OSHA Inspections
- State Criminal Prosecutions Following Workplace Fatalities and Injuries
- Update on Recordkeeping Reporting Requirements and Anti-retaliation Including an Overview of:
  - Post-accident Drug Testing
  - Accident Reporting Requirements
  - The Use of Safety Incentive Programs

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" MAKE OSHA GREAT AGAIN!"

Trump Administration Changes to OSHA Regulations and Enforcement

The “Name and Shame” Initiative is Over!

The Trump administration quietly ended OSHA’s “name and shame” program.

- Under the Obama administration, OSHA increased the number of negative press releases concerning high-profile or high-penalty enforcement cases as a result of its Severe Violator Enforcement Program (SVEP).
- The so-called “name and shame” initiative was met with indignation by many employers.

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OSHA's Recordkeeping "Continuing Obligations" Rule (*Volks I and II*)

Volks I

In *Volks I*, the federal OSH Review Commission confirmed an employer's failure to make a required OSHA record is a "continuing violation" until correction or expiration of the five-year retention period.

D.C. Circuit

In 2012, the D.C. Circuit Court ***reversed*** the OSHRC and applied the six- month statute of limitations provided in the OSHA statute.

OSHA's Recordkeeping "Continuing Obligations" Rule (*Volks I*)

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Volks II

On December 16, 2016, in response to the D.C. Circuit Court decision, OSHA implemented *Volks II*—OSHA is permitted to cite employers for recordkeeping violations up to five years old, rather than the six-month look back applicable to other violations.

On April 4, 2017, President Trump signed a Congressional resolution revoking *Volks II*.

The New Federal Contractor "Blacklisting" Rule

What is It?

- Requires federal contractors bidding on contracts over $500,000.00 to disclose labor law violations (confirmed and alleged) they have had during the last three (3) years.
- Requires guidance for contracting agencies on how to factor in labor violations when awarding federal contracts and subcontracts valued at more than $500,000.
- Pervasive, prolonged, willful, or serious violations can be used to block a company's bid.

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The New Federal Contractor "Blacklisting" Rule

- On October 25, 2016, the final regulations were set to begin staggered implementation in phases. On October 26, 2016, a federal court temporarily blocked two (2) of the three (3) rules: the labor law violation reporting requirement; and (2) the prohibition of mandatory arbitration agreements covering Title VII claims.

- On March 27, 2017, President Trump signed into law a Congressional Joint Resolution of Disapproval revoking the "Blacklisting Rule."

Note: On January 1, 2017 the "paycheck transparency" and independent contractor notification provisions took effect. Requires contractors to provide wage statements and notice of any independent contractor relationship to their covered workers.

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OSHA's Union Walk-around Policy On Hold

In 2013, OSHA issued an interpretation letter dated February 21, 2013 ("The Fairfax Letter"), stating workers at a non-union work site may designate a non-employee affiliated with a union or a community organization to act as their authorized representative for purposes of the OSHA "walk-around" inspection.

- The National Federation of Independent Business challenged the Fairfax Letter in 2016.
- On February 13, 2017, OSHA filed a motion with a federal judge requesting a 30-day delay to allow incoming Trump administration leadership adequate time to review the policy. *Nat'l Fed' of Indep. Bus. v. Dougherty,* N.D. Tex., 16-2568 (Feb. 13, 2017).

OSHA Delays Enforcing Silica Standard

OSHA announced a delay in enforcement of the crystalline silica standard that applies to the construction industry to conduct additional outreach and provide educational materials and guidance for employers.

- The agency has determined that additional guidance is necessary due to the unique nature of the requirements in the construction standard.
- Originally scheduled to begin June 23, 2017, enforcement is now set to begin on September 23, 2017.

Anticipated Future Changes by the New Administration

Anticipated Future Changes by the New Administration

Earlier this year, the U.S. House of Representatives approved the Midnight Rules Relief Act (MRRA).

- The MRRA would amend the Congressional Review Act (CRA) and allow Congress to overturn federal regulations enacted during the final year of a president's term.
- While Congress is already empowered with the ability to review and invalidate rules issued by agencies via the CRA, the MRRA would amend the CRA by allowing Congress to introduce a joint resolution of disapproval covering multiple rules.
- The MRRA would allow Congress to introduce a resolution for any rule submitted within the final year of a president's term compared with the CRA's current window of 60 legislative days.

If the MRRA becomes law, Congress could issue a joint resolution of disapproval of several regulations issued during Obama's final term.

Anticipated Future Changes by the New Administration

- OSHA will likely move away from an enforcement-based strategy and toward compliance assistance and cooperative programs for employers.
- Likely to reverse course on OSHA's penalty increases (which are likely illegal).
- Elimination of the electronic reporting rule.

Anticipated Future Changes by the New Administration

- Less recordkeeping audits.
- Scale back the federal whistleblower oversight of OSHA.
- Changes may not be too dramatic.
  - Trump's election win was partly due to his pro-employee stance, therefore he will not want to alienate blue-collar workers by aggressively decreasing OSHA enforcement

Anticipated Future Changes by the New Administration

OSHA's position on Transgender restrooms may change.

- **In 2015, OSHA issued "Best Practices: A Guide to Restroom Access for Transgender Workers."**
  - OSHA already requires employers to provide employees reasonable access to restroom facilities. *See* 29 CFR § 1910.141(c)(1)(i).
  - *"The core belief underlying these policies is that all employees should be permitted to use the facilities that correspond with their gender identity."*
- **OSHA provides "model practices" for employers:**
  - **Allow employees to use the restroom that corresponds to their gender identity.**
  - **Do not require employees to use a separate restroom, apart from other employees, because of gender identity.**
  - **Do not ask employees to provide medical or legal documentation of their gender identity.**
- Employers may offer:
  - Single occupancy gender neutral (unisex) facilities; and/or
  - Multiple occupant, gender neutral restroom facilities with lockable single-occupant stalls.

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Anticipated Future Changes by the New Administration

- The Trump administration recently revoked former President Obama's federal guidelines for transgender student restroom use in public schools.

- While the Trump administration has not directly addressed this issue in the workplace, it appears OSHA's stated position is on a collision course with the new administration's position on this issue.

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LEGAL ISSUES ARISING FROM OSHA INSPECTIONS

WHY OSHA MATTERS

- Broad impact beyond employee safety and health – workers' compensation, ADA, union issues
- Employers and their supervisors must consider the potential for liability, including tort and criminal liability
- Increasing coordination among agencies and with organized labor

Elements of an OSHA Inspection

The Knock at the Door

The Opening Conference

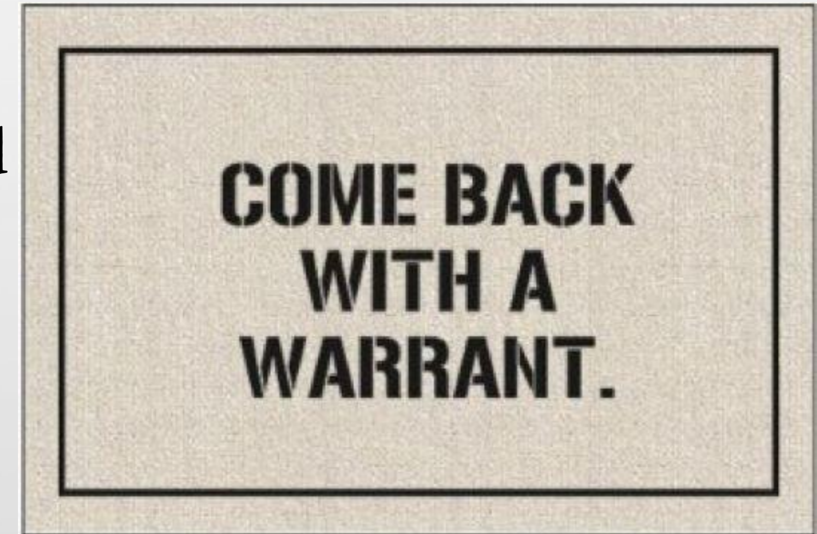
The Walk-Around

The Closing Conference

Inspection Warrant

29 CFR § 1903.3(a) states:

"Compliance Safety and Health Officers…are authorized to enter without delay…to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any place of employment, and all pertinent conditions therein…"



NOTE: OSHA Field Operations Manual, CPL 02-00-160, Chapter 15 (III), sets uniform policy and procedures for state plans and federal OSHA for obtaining warrants

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Inspection Warrants

The U.S. Supreme Court case **Marshall v. Barlow's Inc.,** 436 U.S. 307, 320 (1978), held OSHA's warrantless searches of a business to ensure compliance with workplace safety rules were unconstitutional.

- The OSHA Area Director can seek to obtain "compulsory process," including a warrant, if an employer refuses entry.
  - The Kentucky Occupational Safety and Health Program ("KOSH") and Indiana Occupational Safety and Health Administration ("IOSHA") are also required to obtain a warrant for a nonconsensual inspection, which can be ex parte.
- OSHA can seek a **pre-inspection** warrant if there is evidence of being denied entry in previous inspections, or awareness that a job will only last a short time or that job processes will be changing rapidly.
- An employer may challenge an inspection warrant before or after it has been executed.

Inspection Warrants

What About Expanded Warrants?

Scope—

In the Matter of the Establishment Inspection of Mar-Jac Poultry, Inc. (N.D. Ga. 2016):

- OSHA obtained a warrant to inspect an entire plant after a worker was injured by an electrical panel, based on a Regional Emphasis Program ("REP") for poultry plants.
- In August 2016, a federal magistrate judge recommended the warrant be quashed because the inspection was overbroad.
- On November 2, 2016, the federal district court judge agreed based on Fourth Amendment considerations, and quashed the warrant saying OSHA could not inspect the entire operation, just the area surrounding the electrical panel where the accident occurred.

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Inspection Warrants

Limiting an OSHA Inspection

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If an OSHA inspector knocks on your door…

(1) Restrict admittance until management personnel are onsite.

(2) Determine the reason for the inspection (i.e., complaint, fatality, targeted, random, etc.)

(3) Obtain a copy of the complaint

(4) Distinguish whether the inspection is related to safety or industrial hygiene.

(5) Designate an employee representative.

(6) Limit the scope of an inspection.

- ✓ Take the inspector on a pre-staged route, if appropriate
- ✓ Have a "team" go ahead of the inspector to identify and fix obvious problems (hopefully these issues are minor and corrected already)
- ✓ Have a "team" trail behind the inspector to immediately abate identified problems (demonstrate good faith)

NOTE: On multi-employer worksites, valid consent can be granted by the owner, or another co-occupier of the space, for site entry.

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OSHA's Feb. 21, 2013 Interpretation Letter

The "Fairfax Letter" asserts:

- "[A] person affiliated with a union without a collective bargaining agreement or with a community representative can act on behalf of employees as a walkaround representative **so long as the individual has been authorized by the employees to serve as their representative.**"
- 29 CFR 1903.8 "explicitly allows walkaround participation by an employee representative who is not an employee of the employer when, in the judgment of the OSHA compliance officer, such a representative is 'reasonably necessary to conduct an effective and thorough physical inspection.'"
- "Reasonably necessary" is when the representatives will "make a positive contribution to a thorough and effective inspection."
    - For example, when employee's want a trusted representative of their choosing or where non-English speaking employees want a representative fluent in their own language and English.

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NFIB v. Dougherty

- National Federation of Independent Business ("NFIB") filed a complaint in U.S. District Court for the Northern District of Texas alleging that the Fairfax Letter is a legislative rule that was promulgated without an opportunity for notice and comment. *NFIB v. Dougherty et al.*, Case No. 3:16-cv-025688 (September 8, 2016).
- NFIB also alleged that the Fairfax Letter exceeded OSHA's authority under 29 USC §657(e).
- OSHA move to dismiss for lack of subject matter jurisdiction and failure to state a claim, among other reasons.
- On February 3, 2017, the district court granted the motion in part and denied it in part.

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NFIB v. Dougherty

- In concluding that NFIB stated a claim upon which relief can be granted, the Court stated:

  "The Letter flatly contradicts a prior legislative rule as to whether the employee representative must himself be an employee…. Even if OSHA can show that union representatives should be permitted on walkarounds, §1903.8(c) is clear that such a person cannot be designated as an employee's representative unless the person is employed by the employer."

- The Court dismissed with prejudice NFIB's claim that the Letter exceeds OSHA's authority under the Act.

UPDATE: With the union attempting to intervene in this matter, it remains to be seen whether OSHA will pursue the case under the Trump Administration.

NFIB v. Dougherty

- In February 2017, OSHA filed a motion with a federal judge requesting a 30-day delay to allow incoming Trump administration leadership adequate time to review the policy.

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Inspection Warrants

Non-Employee Union Walk-Around Representative?

<u>In re Establishment of Nissan N. Am.</u> (S.D. Miss. 2016):

- Nissan, which is non-union, objected to union advocates accompanying OSHA on an inspection.
- On September 1, 2016, OSHA received an inspection warrant from a federal judge approving the inspection and participation of the union advocates.
- On November 14, 2016, the parties settled to allow the inspection to go forward.

<u>NOTE</u>: It remains to be seen whether OSHA will pursue the <u>NFIB v. Dougherty</u> case under the Trump Administration.

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Inspection and Pre-Citation Discovery

OSHA routinely requests:

- Names of first-aid trained and designated responders;
- Copy of Emergency Action Plan;
- First aid and blood borne pathogen training records;
- Location and content of first aid supplies;
- Required personal protective equipment;
- OSHA 300 logs and Form 301s; and
- Other relevant safety policies

<u>**NOTE**</u>: If inspectors request **trade secret/confidential information**, ask that they treat it as confidential.

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Inspection and Pre-Citation Discovery

Employers should insist on written requests from OSHA for non-routine documents:

- ✓ Allows for analysis of possible objections
- ✓ Assists in keeping track of produced documents
- ✓ Allows for clear assertion of privileges (e.g., attorney-client privilege, work product privilege, etc.)

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Inspection and Pre-Citation Discovery

Inspection Interviews and Depositions

Right of employer representative to be present (Management vs. Non-management)

- Management—Employer has a right to be present, including its attorney
- Non-Management:
  - OSHA usually demands privacy for hourly employee interviews.
  - OSHA usually allows a union representative to be present.
  - Employee may request management or attorney presence.
  - Employee can refuse to sit for the interview with OSHA, but OSHA can subpoena the employee

Inspection and Pre-Citation Discovery

Inspection Procedure

What to expect?

- ❑Purpose – observe the workplace for possible violations
- ❑Scope – may last several hours or months, depending on the type of inspection
  - ▪Complaint-based inspections → only areas indicated in the complaint
  - ▪Programmed inspections → entire site may be inspected
- ❑Inspector may take photos and perform tests
  - ▪Request side-by-side monitoring or testing

State Criminal Prosecutions Following Workplace Fatalities and Injuries

OSH Act Criminal Penalties
29 USC § 666(e)-(g)

- Willful violation causing worker's death
  Max Penalty: $10,000 and/or 6 months in jail

- Giving advance notice of inspection
  Max Penalty: $1,000 fine and/or 6 months in jail

- Knowingly making false statement, representation, or certification
  Max Penalty: $10,000 fine and/or 6 months in jail

- Assaulting, interfering with, intimidating a CSHO while performing their duties
  Max Penalty: $5,000 fine and/or 3 years in jail

- Willful violation of the OSH Act causing worker's death
  Max Penalty: $250,000 for individuals and $5000,000 for organizations(18 U.S.C. Sec. 3574(b)(4)) and/or 6 months in jail

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Overview: Increased Criminal Prosecution

In 2015, Former Deputy Attorney General Sally Yates issued two (2) memoranda:

- The **September 9, 2015** memorandum reiterated the focus on individual accountability in corporate criminal investigations.
- The **December 17, 2015** memorandum (1) provided that the DOJ would seek to use criminal provisions (and substantially greater penalties) under the environmental statutes when reviewing workplace endangerment cases; and (2) directed U.S. Attorneys to more aggressively consider criminal referrals from the DOL and to make greater use of criminal charges for:
    - Obstruction of justice;
    - Conspiracy;
    - False statements to compliance officers; and
    - Witness tampering.

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Criminal Prosecutions Under the Trump Administration?

- It is likely that federal criminal prosecutions under the Trump Administration will decrease.

- States, however, have been prosecuting employers for fatalities or injuries from OSHA violations under state criminal laws for some time and will likely continue.

State Criminal Prosecutions

State-plan OSHA agencies can use their own state criminal codes to prosecute in both fatal and nonfatal cases, under theories including:

- Negligent homicide;
- Involuntary manslaughter;
- Reckless endangerment; and
- Assault or battery.

NOTE: The OSH Act does not preempt prosecution under state criminal laws.

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Active State Criminal Prosecutions

Active Cases:

California: Disney Construction (2 workers killed in fall from crane)

Massachusetts: Atlantic Drain Services Inc. (2 workers killed in trench collapse)

New York: Park Family Farm (1 child laborer killed when pinned under hydraulic lift)

Ohio: Environmental Enterprises Inc. (1 worker killed in hazardous waste fire)

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Active State Criminal Prosecutions

In <u>State of Ohio v. Environmental Enterprises, Inc.</u>, employee Zach Henzerling died from burns stemming from an explosion at Environmental Enterprises, a hazardous waste management firm in Spring Grove Village, Ohio in December 2012. As a result of this incident, OSHA issued 16 "serious" and 4 "willful" violations of the OSHA standards in June 2013.

- Ohio Revised Code 2745.01protects employers from civil liability in worker death cases
- The Ohio Attorney General indicted the company managers, Kyle Duffens and Gerald Nocks, and the company itself on counts of involuntary manslaughter and tampering with evidence.

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OSHA'S New Recordkeeping Regulation and Retaliation Requirements: It's the Law for Now, So Are You In Compliance?

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Electronic Filing and Whistleblower/Retaliation Requirements

Published – May 11, 2016

Effective dates:

- Initially August 10, 2016, delayed to November 1, 2016 then to December 1, 2016 – Whistleblower provision (1904.36) and Injury and Illness reporting procedure (1904.35)

- January 1, 2017 – Phase in of electronic filing requirements (1904.41) – will publish data on OSHA's public website (www.OSHA.gov). Was due to go online February 28, 2017 but has not.

- State OSHA plans, such as Kentucky OSHA (KOSH) and Indiana OSHA (IOSHA), must adopt a "substantially similar" rule within six (6) months (November 11, 2016).
  - Kentucky's rule became effective January 1, 2017. Indiana's rule changes took effect on March 1, 2017, and the anti-retaliation provisions took effect on February 1, 2017.

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New Electronic Filing Requirements

- **By July 1, 2017** – Employers (not exempt) with 250 employees or more at an establishment must have filed OSHA 300A Summary.
- **By July 1, 2018** – Employers (not exempt) with 250 employees or more at an establishment must have filed OSHA 300, 301 and 300A.
- **By July 1, 2017** – Employers with 20 to 249 employees in one of the 67 specified industries must have filed OSHA 300A summaries. Beginning in 2019, submission deadline changes from July 1 to March 2.

NOTE: The July 1, 2017 deadline is still the law, even though OSHA does not appear to be ready for enforcement.

New Injury and Illness Reporting Requirements (1904.35)

1. Inform employees of right to report work-related injuries and illness free from retaliation.
2. Procedures for reporting work-related injuries and illnesses must be reasonable and not "discourage" employees from reporting.
3. Employer cannot retaliate against employees for reporting work-related injuries and illnesses.

<u>**NOTE**</u>: Potential impact on safety incentive programs and drug testing.

REASONABLE REPORTING SYSTEM

- Prohibits employers from adopting "unreasonable" reporting procedures
- What makes a system "unreasonable"?
- TEST: Whether the action would deter a "reasonable employee" from reporting a work-related injury or illness?

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ADVERSE ACTION: Disciplinary Policies

- Disciplining an employee who reports an injury or illness regardless of whether the employee violated a safety rule.
- Disqualifying an employee who reports an injury or illness from promotion or bonus.
- Pre-textual discipline based on a violation of the safety rules (i.e., not maintaining "situational awareness").

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ADVERSE ACTION: Safety Incentive Programs

- OSHA encourages incentive programs that promote worker participation in safety-related activities, "such as identifying hazards or participating in investigations or injuries, incidents, or near misses."
- OSHA considers it a violation for an employer to use an incentive program to take adverse action, including denying a benefit, because an employee reports. (e.g., depriving an employee of a bonus, a gift card, or slice of pizza).

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ADVERSE ACTION: Drug Testing

OSHA's October 2016 Guidance Memo indicates OSHA does not ban drug testing of employees, but…

- OSHA believes blanket post-injury drug testing policies deter proper reporting.
- OSHA previously stated that drug testing must be limited to incidents in which "employee drug use is likely to have contributed to the incident" and where testing "can accurately identify impairment caused by drug use." (OSHA has backed off of this for drug testing "if the drug test could provide insight into why the injury or illness occurred.")
- Drug testing conducted under a state's workers compensation law or other state or federal law does **not** violate the new rule.
- OSHA has provided that drug testing required by a workers' compensation insurance policy, in order to obtain a premium discount that is essentially the same as the voluntary workers' compensation law that provides a discount, will also **not** be considered a violation.

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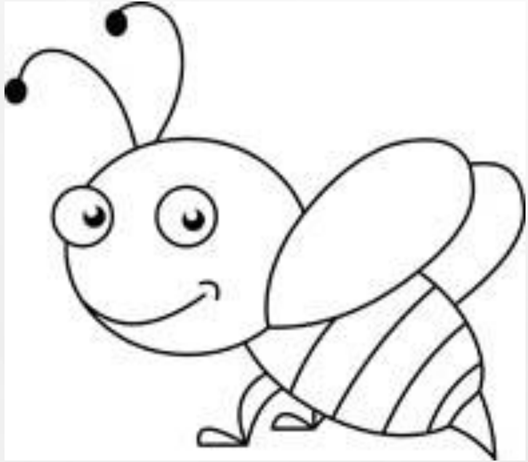
ADVERSE ACTION: Drug Testing



- Examples where drug testing is **<u>unreasonable</u>**:
  - Bee sting
  - Repetitive motion strain
  - Injury caused by lack of machine guarding or a machine or tool malfunction
- Employers need not specifically suspect drug use before testing, but there should be a reasonable possibility that drug use was a factor. (See OSHA October 2016 Guidance Memo).

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SCENARIOS

An employer wants to celebrate the achievements of a particular crew that has gone six (6) months without a lost-time injury. The employer throws a pizza party for the successful crew.

Violation?

SCENARIOS

An employee hurts his back and is disciplined for failing to "lift" carefully. Uninjured employees are not disciplined or counseled.

Violation?

SCENARIOS

To promote workplace safety, an employer establishes a system of reward by allowing entry into a Safety Bingo for employees who do not have a recordable injury.

Violation?

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SCENARIOS

An employer provides bonuses for managers/supervisors who have particularly safe stretches of work.

Violation?

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SCENARIOS

Based on OSHA's statements, incentive programs will be found to be "unreasonable" if they:

(1) Exclude workers from prizes or awards if they report an injury;

(2) Provide rewards or parties to workers or crews for remaining injury free;

(3) Deny certain benefits or bonuses to employees based on reported injuries or tied to the recordable injury rate; or

(4) Provide bonuses for managers linked to lower reported injury rates.

Whistleblower Actions Without Whistleblowers?

OSHA could use all Section 11(c) whistleblower complaints as an employee complaint/referral to permit an on-site OSHA inspection of an employer. OSHA inspectors could ask:

- to review an employer's injury/illness reporting policy
- whether the employer has a Safety and Health Incentive Program or Drug and Alcohol Testing Program

Final Questions

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Thank You

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