



OSHA OKs Drug Testing and Incentive Programs ... Sort of

Insights

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OSHA Rolls Back Enforcement of Anti-Retaliation Provisions!

Today, the U.S. Occupational Health and Safety Administration (“OSHA”) issued a standard interpretation clarifying its position on the new recordkeeping rule’s anti-retaliation provisions. OSHA’s memorandum essentially “rolls back” its enforcement of the anti-retaliation provisions, particularly concerning safety incentive programs and post-accident drug testing. Why is this important? Mainly because many employers struggled to understand the anti-retaliation provisions since they were published, in guidance materials accompanying the new regulations, in May 2016. Indeed, OSHA has gone to great lengths to explain the anti-retaliation provisions in the new rule’s preamble, with OSHA guidance and several memorandums. To be blunt, OSHA’s explanations have been extremely vague and confusing. But alas, the struggle to understand the anti-retaliation provisions is over ... hopefully. Today’s interpretation states supersedes all the prior guidance on this topic.

OSHA’s New Guidance on Incentive Programs and Post-Incident Drug Testing Policies.

In its recent interpretation, OSHA clarifies that it does not prohibit workplace safety incentive programs or post-incident drug testing. OSHA provides that incentive programs can be an important tool to promote workplace safety and health and encourages programs that reward workers for reporting near-misses or hazards and involvement in a safety and health management system. OSHA also provides that rate-based incentive programs are permissible under the rule as long as they are not implemented in a manner that discourages reporting. Thus, if an employer takes a negative action against an employee under a rate-based incentive program, such as withholding a prize or bonus, or a slice of pizza, because of a reported injury, OSHA will not cite the employer under the anti-retaliation provisions as long as the employer has implemented adequate precautions to ensure that employees feel free to report an injury or illness. OSHA also hints that the more “substantial” the reward, then the more the employer may need to do to reassure employees they are free to report without retaliation. In other words, pizza parties are back.

In addition, OSHA provides that most instances of workplace drug testing are permissible. 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.
- 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.

What Should Employers Do Now?

Employers should keep in mind that the regulations do not mention safety incentive programs or drug testing policies. The discussions about prohibitions on drug testing and incentive programs were included in prior guidance given by OSHA, as is today's interpretation rolling back that position. Thus, this position could change with the next election. For now, employers have some more certainty that the current OSHA is not going to pursue these types of retaliation claims unless there is some strong indications that the employer took action to discourage reporting.

That said, employers need to remember that the key aspect for determining whether their incentive programs are OSHA "compliant" is to treat all employees in a consistent manner and ensure that employees feel free to report an injury or illness. Regarding employer drug testing programs, to strike the appropriate balance, drug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use.

For additional information, see OSHA's memorandum entitled, "Clarification of OSHA's Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under 29 C.F.R. § 1904.35(b)(1)(iv)" located at <https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11>.

Related People



Todd B. Logsdon
Partner
502.561.3971

Email



Chantell C. Foley

Partner

502.561.3969

Email