

## Safety Incentive Programs and Post-Incident Drug Testing: OSHA Adopts a More Permissive Stance

On October 11, 2018, OSHA published a [Standard Interpretation Memorandum](#) to clarify that it "does not prohibit workplace safety incentive programs and post-incident drug [and alcohol] testing policies." This memorandum was necessary because of confusion created by OSHA's publication of a [final rule](#) in May 2016. The May 2016 rule established an employee's right to report work-related injuries and illnesses. The rule also prohibited employers from discriminating against employees for reporting work-related injuries or illnesses. But, the rule created unintended consequences.

### **The Problem that OSHA Created for Employers in 2016.**

The May 2016 rule also included language that, "A procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness[.]" 29 CFR §1904.35(b). Employers were left to guess whether their safety incentive programs or their post-accident drug testing programs were "reasonable." In prefatory comments to the rule it was suggested that drug testing after an accident was not always reasonable because it may "intimidate workers." Remarks also suggested that certain employer incentive programs can actively discourage employees from reporting accidents.

### **OSHA's Fix in 2018.**

Concluding that a fix was necessary, OSHA published its [Standard Interpretation Memorandum](#) in mid-October, 2018.

#### *Safety Incentive Programs*

The 2018 Memorandum acknowledges that safety incentive programs are effective tools for promoting workplace safety, and encourages employers to consider implementing programs that:

1. Reward workers for reporting near-misses or unsafe conditions.
2. Reward workers with a prize or bonus at the end of an injury-free month, if the program does not discourage employees from reporting workplace injuries or illnesses.

The Memorandum cautions that an employer's anti-retaliation statements may not be enough to encourage employees to report injuries and illnesses if an employee loses a significant incentive when reporting an accident. The Memorandum provides examples for employers of policies that counteract any deterrents to reporting injuries, such as:

1. Implementing a training program to reinforce reporting rights and responsibilities and emphasize the employer's non-retaliation policy.
2. Developing a mechanism for accurately evaluating employee willingness to report work-place injuries and illnesses.

#### *Post-incident Drug and Alcohol Testing*

OSHA provides five examples of permissible drug testing that prevent an employer from running afoul of its regulations in its memorandum:

- 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.

It is the fifth example that will prompt most questions. If you have any questions about whether your firm's safety incentive program or drug testing program follows OSHA regulations, please contact us.

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