

OSHA issues guidance memorandum on employer safety incentive programmes and post-incident drug testing

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2016 rule

2018 guidance memorandum

Comment

On 11 October 2018 the Occupational Safety and Health Administration (OSHA) issued a [guidance memorandum](#) to its regional administrators and state designees clarifying the agency's position on workplace safety incentive programmes and post-incident drug testing.

2016 rule

In May 2016, OSHA published a final rule amending 29 CFR § 1904.35 that, among other things, prohibits employers from retaliating against employees for reporting work-related injuries or illnesses. In the preamble to that rule and in other interpretive documents, OSHA explained that the prohibition against retaliation can apply to actions taken by employers in accordance with their workplace safety incentive programmes and post-incident drug testing policies. However, OSHA provided little guidance to employers regarding how to determine when such actions would violate the anti-retaliation provision.

2018 guidance memorandum

In response to a growing concern among employers regarding the May 2016 final rule, including what types of programmes are permissible, OSHA's recent guidance memorandum emphasises that the final rule "does not prohibit workplace safety incentive programs or post-incident drug testing". Rather:

[a]ction taken under a safety incentive program or post-incident drug testing policy would only violate 29 C.F.R. 1904.35(b)(1)(iv) if the employer took the action to penalize an employee for reporting a work-related injury or illness.

In addition, OSHA provided specific examples of lawful workplace safety incentive programmes and post-incident drug testing policies to assist employers in developing those programmes and policies. For example, the memorandum explained that, in the case of safety incentive programmes:

any inadvertent deterrent effect of a rate-based incentive program on employee reporting would likely be counterbalanced if the employer also implements elements such as: [a] an incentive program that rewards employees for identifying unsafe conditions in the workplace; [b] a training program for all employees to reinforce reporting rights and responsibilities and [that] emphasizes the employer's non-retaliation policy; [c] a mechanism for accurately evaluating employees' willingness to report injuries and illnesses.

Likewise, "most instances of workplace drug testing are permissible" under the rule, including

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- 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 laws; and
- drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees, so long as the testing covers "all employees whose conduct could have contributed to the incident, not just employees who reported injuries".

Comment

Although OSHA 29 CFR § 1904.35, as amended, does not prohibit safety incentive programmes or post-incident drug testing policies, employers should ensure that their programmes and policies do not discourage employees from reporting workplace injuries or illnesses. As OSHA explains, simply having a statement in a policy or programme that the employer will not retaliate against an employee for reporting an injury or illness may not be sufficient if the policy or programme otherwise deters employees from reporting. Accordingly, employers should review OSHA's guidance memorandum, including the specific examples of lawful policies and programmes, in evaluating whether their policies and programmes are likely to have a negative impact on employees reporting workplace injuries or illnesses.

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