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Keeping Costs Down and Productivity Up

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AT ISSUE

OSHA clarifies its position on lawful post-incident drug testing and reverses course on safety programs. Are you keeping up, and do you understand the new positions?

The Changing Positions of OSHA

By Mark A. Lies II and Adam R. Young

HR Fact:

History of OSHA

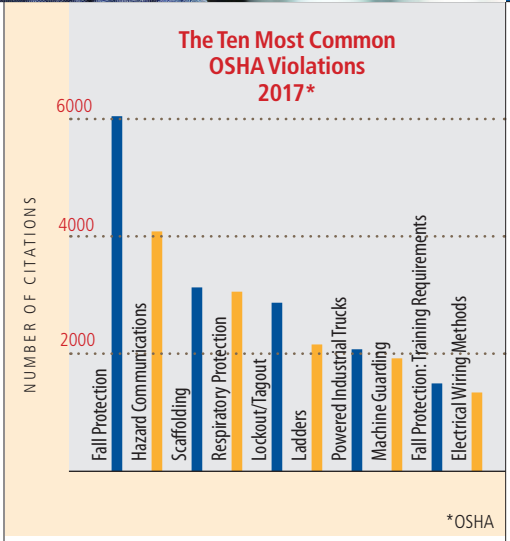
1970 / OSHA Signed Into Law In response to dangerous working conditions across the the nation, the bipartisan Williams-Steiger Occupational Safety and Health Act of 1970 was signed into law by President Richard M. Nixon.

1972 / First Occupational Standard Issued OSHA's first standard was issued for limiting workplace exposure to asbestos fibers to protect workers from lung cancer and mesothelioma. Since this standard was issued, asbestos exposure is now rare in American workplaces.

We have closely monitored the federal OSHA's 2016 retaliation regulation, 29 CFR 1904.35(b)(1)(iv), and associated guidance, which had explained examples of post-accident drug testing and safety incentives as instances of unlawful retaliation. OSHA's 2016 retaliation rule left employers uncertain about what programs were permissible and whether they would face citations for long-standing safety programs aimed at encouraging safe behaviors and reducing injury rates. On Oct. 11, 2018, OSHA issued a new Standard Interpretation, which clarifies the agency's position.

OSHA'S Revised Perspective Is Apparent in the New Standard Interpretation

OSHA's new Standard Interpretation intends to "to clarify the Department's position that [the rule] does not prohibit workplace safety incentive programs or post-incident drug testing. The Department believes that many employers who implement safety incentive programs and/or conduct post-incident drug testing do so to promote workplace safety and health." The Interpretation explains that "evidence that the employer consistently enforces legitimate work rules (whether or not an injury or illness is reported) would demonstrate that the employer is serious about creating a culture of safety, not just the appearance of reducing rates."



Post-incident drug testing policies and safety incentive programs will be considered retaliatory and unlawful only where they seek "to penalize an employee for reporting a work-related injury or illness rather than for the legitimate purpose of promoting workplace safety and health." Properly formulated and lawful post-incident drug testing policies and safety incentive programs will be permitted and will not result in OSHA citations.

OSHA Permits Consistent Post-Incident Drug Testing Policies

For years, OSHA's position on post-incident drug testing confounded employers, and employers faced complicated questions in the hours following workplace

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safety incidents. The Standard Interpretation clarifies that "most instances of workplace drug testing are permissible," including:

- "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."

Accordingly, employers may lawfully implement random drug testing programs, DOT drug testing programs, drug testing programs under a collective bargaining agreement, and post-incident (also "post-accident") drug testing programs. Post-incident drug testing should be conducted consistently on any employee whose conduct may have contributed to the accident, and not merely the employee who was injured in an accident. OSHA reiterates that employers may not use a post-injury drug testing program, which the agency views as retaliatory and also exposes employers to workers' compensation retaliation tort claims.

For example, if a forklift operator collides with a pedestrian and the operator is injured as well as the pedestrian, the accident may have been the result of either employee's conduct and potential drug impairment. Both the operator and pedestrian probably should be drug-tested. Of course, the employer may choose to drug-test the operator even if he does not suffer an injury. In another example, an employee bypasses a guard and puts his hand into a machine that has not been locked out, suffering a finger laceration. That employee's misconduct may have been consistent with drug impairment, and the employee should also be drug-tested.

OSHA Permits Safety Incentive Programs

The Standard Interpretation reverses course on the 2016 retaliation regulation's prohibition of safety incentive programs. With limited adjustments, OSHA now permits employers to bring back injury and illness reporting-based safety programs, which the Standard Interpretation lauds as an "important tool to promote workplace safety and health." The Standard Interpretation permits a program that offers a prize or bonus at the end of an injury-free month. OSHA's new position thus permits employers to bring back such incentives as cash bonuses or the much-maligned monthly pizza party. The Standard Interpretation also permits programs that evaluate managers based on their work unit's lack of injuries or illnesses.

However, to lawfully implement such a safety program, the employer must implement "adequate precautions" to ensure that employees feel free to report an injury or illness and are not discouraged from reporting. According to OSHA, a mere statement that employees are encouraged to report and will not face retaliation is insufficient. Employers need to undertake their choice of additional "adequate precautions," such as:

- "An incentive program that rewards employees for identifying unsafe conditions in the workplace.
- "A training program for all employees to reinforce reporting rights and responsibilities and emphasizes the employer's non-retaliation policy.
- "A mechanism for accurately evaluating employees' willingness to report injuries and illnesses."

The Standard Interpretation thus permits and encourages safety incentive programs that reward employees for identifying unsafe conditions in the workplace. A second precaution, a brief training on reporting illnesses and injuries, would be simple for employers to conduct and add to onboarding for new hires. The "mechanism for accurately evaluating employees' willingness to report" could be a regularly scheduled, random questionnaire on employee willingness to report injuries and illnesses. Accordingly, if employers adopt these low-burden precautionary measures, they may bring back or now adopt safety programs that are popular and effective at reducing workplace injury rates.

For related information on drug testing requirements, we have blogged on the recent Department of Transportation final rule amending its drug testing program for DOT-regulated employers.

Conclusion

This Standard Interpretation appears to return the processes for post-accident drug testing and safety incentive programs to a more common-sense approach that is in the best interest of employee safety and health. Employers should carefully review their existing post-accident drug testing programs, as well as safety incentive programs, to ensure that they are consistent with this new Standard Interpretation. ne

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