

Alert | OSHA



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OSHA Clarifies Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing

On Oct. 11, 2018, the Occupational Safety and Health Administration (OSHA) issued a [memorandum](#) (the Memorandum) clarifying its position that 29 C.F.R. § 1904.35(b)(1)(iv) does not prohibit employers from instituting workplace safety incentive programs or post-incident drug testing. OSHA stated that to the extent any of their other OSHA interpretive documents conflicted with the Memorandum, the Memorandum would govern.

Section 1904.35(b)(1)(iv) prohibits employers from retaliating against employees for reporting work-related injuries or illnesses. In the Preamble to the final rule for Section 1904.35(b)(1)(iv), which was published May 12, 2016, and in post-promulgation interpretation documents, OSHA discussed the rule's application to action taken under workplace safety incentive programs and post-incident drug testing policies. However, the Memorandum clarifies that while an employer could be cited for such programs and policies, it does not necessarily mean they will be cited. The Memorandum emphasizes that action taken under a safety incentive program or post-incident drug testing policy would violate Section 1904.35(b)(1)(iv) if the employer took the action to penalize an employee for reporting a work-related injury or illness rather than for the legitimate purpose of promoting workplace safety and health. For example, if an employer takes a negative action against an employee under a rate-based incentive program, such as withholding a prize or bonus because of a reported injury, OSHA would not cite the

employer under Section 1904.35(b)(1)(iv) *as long as* the employer has implemented adequate precautions to ensure that employees feel free to report an injury or illness. The Memorandum does not provide any express guidance as to what constitutes “adequate precautions.” However, the Memorandum does state that any inadvertent deterrent effects of a rate-based incentive program on employee reporting would likely be counterbalanced if the employer implements additional elements, 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; and/or a mechanism for accurately evaluating employees’ willingness to report injuries and illnesses.

Employers must be cognizant of the guidance in the Memorandum to make sure that any negative actions taken regarding their safety incentive program or post-incident drug testing contain adequate precautions to ensure their employees feel free to report an injury or illness. OSHA has indicated that they will likely consider the counterbalancing effects of the following: (1) an incentive program with rewards for reporting unsafe conditions; (2) a training program for all employees to reinforce reporting rights and responsibilities while emphasizing the employer’s non-retaliation policy; (3) a mechanism for evaluating employees’ willingness to report injuries and illnesses. Greenberg Traurig’s OSHA team has significant experience in helping employers implement workplace safety incentive programs and post-incident drug testing policies consistent with OSHA regulations and interpretations.

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