



COMPLIANCE BULLETIN

OSHA Clarifies Drug Testing and Incentive Program Rules

OVERVIEW

The Occupational Safety and Health Administration (OSHA) has issued a [memorandum](#) that reinterprets how its [2016 anti-retaliation rule](#) applies to workplace safety incentive programs and drug testing policies.

Issued on Oct. 11, 2018, the memorandum eases some of the restrictions in OSHA's previous enforcement guidance on the final rule. In that guidance, OSHA indicated that certain types of programs and policies would likely be considered violations if they involved specified circumstances.

The new memorandum takes a more permissive approach. It indicates that most types of workplace safety incentive programs and drug testing policies are allowable, as long as employers ensure that they do not discourage or penalize employees for reporting.

ACTION STEPS

Employers should become familiar with OSHA's new memorandum and review their safety incentive programs and drug testing policies to ensure compliance.

HIGHLIGHTS

- OSHA's 2016 final rule does **not** prohibit workplace safety incentive programs or post-incident drug testing.
- Incentive and testing programs must not discourage employees from reporting work-related injuries.
- Employers should consistently enforce legitimate work rules regardless of any injury reports.

IMPORTANT DATES

May 12, 2016

OSHA issued a final rule that prohibits retaliation for injury reporting.

October 19, 2016

OSHA issued guidance on the final rule's retaliation provisions.

October 11, 2018

OSHA replaced its 2016 guidance.

Provided By:

Hierl Insurance Inc.



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Background

On May 12, 2016, OSHA issued a [final rule](#) that prohibits employers from retaliating against employees for reporting work-related injuries or illnesses. OSHA's 2016 [enforcement guidance](#) indicated that employers must have an "objectively reasonable basis" for any adverse actions they take against employees who report work-related injuries or illnesses. The guidance also stated that certain employer actions, such as the following, would likely constitute violations of the final rule:

- ✘ Drug testing employees who report work-related injuries or illnesses without a reasonable basis for believing that drug use by the reporting employee could have contributed to the injury or illness; and
- ✘ Withholding a benefit from employees simply because of a reported injury or illness without regard to the circumstances surrounding the injury or illness (such as under an incentive program that offers rewards for time periods without any reported injuries).

2018 Memorandum

On Oct. 11, 2018, OSHA issued a [memorandum](#) that replaces any portions of the 2016 guidance that are inconsistent with it. In the 2018 memorandum, OSHA:

- ✓ Recognizes that many workplace safety incentive programs and instances of post-incident drug testing are intended to promote workplace safety and health;
- ✓ Advises employers that offer incentive programs that they may avoid violations by consistently enforcing legitimate work rules regardless of whether an injury or illness is reported; and
- ✓ Establishes that an action taken under a safety incentive program or post-incident drug testing policy does **not** violate the final rule **unless** an employer takes the action to penalize an employee for reporting a work-related injury or illness rather than to promote workplace safety and health.

Workplace Safety and Health Incentive Programs

OSHA directly addresses two types of workplace safety incentive programs in the 2018 memorandum.

The first type of program is one that rewards employees for reporting near misses or hazards, or encourages them to get involved in a safety and health management system. According to OSHA, positive action taken under this type of program is always permissible under the final rule.

The other type of incentive program is one that is rate-based and focuses on reducing the number of reported injuries and illnesses. This includes programs that reward employees with a prize or bonus at the end of an injury-free month or evaluate managers based on their work unit's lack of injuries.

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According to OSHA, rate-based incentive programs are also permissible under the final rule as long as they are not implemented in a manner that discourages reporting. More specifically, an employer may avoid violating the final rule through a rate-based incentive program by:

- ✓ Taking positive steps to create a workplace culture that emphasizes safety, not just rates; and
- ✓ Implementing adequate precautions to ensure that employees feel free to report an injury or illness.

In addition, an employer may counterbalance any unintentional deterrent effect of a rate-based incentive program on employee reporting by including elements such as:

- ✓ Rewards for identifying unsafe conditions in the workplace;
- ✓ An employee training program that reinforces reporting rights and responsibilities, and emphasizes the employer's policy against retaliation; and
- ✓ A mechanism for accurately evaluating employees' willingness to report injuries and illnesses.

Workplace Drug Testing Policies

The 2018 memorandum states that most instances of post-incident drug testing are permissible under the final rule and includes examples of allowable testing. Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees is one of the examples. This is significant because OSHA's previous guidance indicated that a drug testing policy would have violated the final rule if it included automatic drug testing of an employee who reports a work-related injury or illness.

The new memorandum clarifies that if an employer chooses to use drug testing to investigate an incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries.

Other examples of permissible drug testing that OSHA lists in the memorandum 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; and
- ✓ Drug testing under other federal law, such as a U.S. Department of Transportation rule.

More Information

Contact Hierl Insurance Inc. or visit OSHA's [website](#) for more information regarding safety incentive and post-incident drug testing programs.