ILA-USMX JOINT SAFETY COMMITTEE

OSH ALERT 2018-05 [16 October 2018]

OSHA Interprets the Meaning of Recordkeeping Regulations Impacting Safety Incentive Programs; Drug/Alcohol Testing

On 11 October, OSHA issued an interpretation to the agency's latest injury/illness reporting regulations that pretty much reverse the original stated intention of those rules as they apply to employee safety incentive programs and post-accident drug/alcohol testing. For your convenience, we attach a copy of that interpretation to this OSH Alert.

In sum, the regulations at issue were designed to require an encourage employers and employees to report all workplace-related injuries and illnesses. Moreover, those regulations strictly prohibit an employer from retaliating against any employee on the basis of simply reporting either an injury or an illness.

OSHA's original interpretations considered implicit threats to withhold incentives to one or more employees if a worker reported an injury/illness as a form of retaliation; likewise stated that the threat of blanket post accident drug & alcohol testing (given that such a threat could dissuade workers from reporting an accident) could be considered a form of retaliation.

Both or those original positions have been greatly modified by the 11 October interpretation, and we encourage our labor and management constituency to review it carefully.

Should any questions arise about any aspect of these OSHA requirements, the JSC stands ready to assist all ILA and USMX Members and Local Labor Unions.

Got an OSH-related question? Write to the JSC at: blueoceana@optonline.net

Working Together For The Benefit Of All

Occupational Safety and Health Administration

October 11, 2018

MEMORANDUM FOR: REGIONAL ADMINISTRATORS
STATE DESIGNEES

THROUGH: AMANDA EDENS Director
Technical Support and Emergency Management

FRANCES YEBES Acting Director
Whistleblower Protection Programs

FROM: KIM STILLE Acting Director
Enforcement Programs

SUBJECT: Clarification of OSHA's Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under 29 C.F.R. § 1904.35(b)(1)(iv)

On May 12, 2016, OSHA published a final rule that, among other things, amended 29 C.F.R. § 1904.35 to add a provision prohibiting employers from retaliating against employees for reporting work-related injuries or illnesses. *See* 29 C.F.R. § 1904.35(b)(1)(iv). In the preamble to the final rule and post-promulgation interpretive documents, OSHA discussed how the final rule could apply to action taken under workplace safety incentive programs and post-incident drug testing policies.

The purpose of this memorandum is to clarify the Department's position that 29 C.F.R. § 1904.35(b)(1)(iv) 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. In addition, 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. Action 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 rather than for the legitimate purpose of promoting workplace safety and health.

Incentive programs can be an important tool to promote workplace safety and health. One type of incentive program rewards workers for reporting near-misses or hazards, and encourages involvement in a safety and health management system. Positive action taken under this type of program is always permissible under § 1904.35(b)(1)(iv).

Another type of incentive program is rate-based and focuses on reducing the number of reported injuries and illnesses. This type of program typically rewards employees with a prize or bonus at the end of an injury-free month or evaluates managers based on their work unit's lack of injuries. Rate-based incentive programs are also permissible under § 1904.35(b)(1)(iv) as long as they are not implemented in a manner that discourages reporting. Thus, 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 § 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.

A statement that employees are encouraged to report and will not face retaliation for reporting may not, by itself, be adequate to ensure that employees actually feel free to report, particularly when the consequence for reporting will be a lost opportunity to receive a substantial reward. An employer could avoid any inadvertent deterrent effects of a rate-based incentive program by taking positive steps to create a workplace culture that emphasizes safety, not just rates. For example, 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:

- 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.

In addition, most instances of workplace drug testing are permissible under § 1904.35(b)(1)(iv). Examples of permissible drug testing 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.
- 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.

To the extent any other OSHA interpretive documents could be construed as inconsistent with the interpretive position articulated here, this memorandum supersedes them. This includes:

- A Memorandum from Dorothy Dougherty to the OSHA Regional Administrators entitled "Interpretation of 1904.35(b)(1)(i) and (iv)" (October 19, 2016) (Appendix A);
- Guidance on OSHA's website, available at https://www.osha.gov/recordkeeping/modernization_guidance.html (issued October 19, 2016) (Appendix B);

- A Memorandum from Dorothy Dougherty to the OSHA Regional Administrators and State Designees entitled “Interim Enforcement Procedures for New Recordkeeping Requirements Under 29 CFR 1904.35” (November 10, 2016) (Appendix C); and
- A Memorandum from Dorothy Dougherty to the OSHA Regional Administrators and State Designees entitled “Interim Investigation Procedures for Section 29 C.F.R. 1904.35(b)(1)(iv)” (November 10, 2016) (Appendix D).

Staff in the Directorate of Enforcement Programs (DEP), the Directorate of Whistleblower Protection Programs, and the Directorate of Technical Support and Emergency Management shall take appropriate action with respect to the above-listed documents to ensure that they are consistent with this memorandum.

Regional Administrators shall enforce 29 C.F.R. § 1904.35(b)(1)(iv) in a manner consistent with this memorandum and shall consult DEP before issuing any citations under this provision related to workplace safety incentive programs or post-incident drug testing.