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Labor and Employment Alert: OSHA Clarifies That Safety Incentives and Post-Incident Drug Testing Are Permitted

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In May 2016, OSHA published a final rule that prohibited employers from retaliating against their employees for reporting work-related injuries or illnesses. OSHA interpreted this provision (found at 29 C.F.R. § 1904.35(b)(1)(iv)) to apply to action taken under workplace safety incentive programs and post-incident drug testing policies. For the past two years there has been considerable uncertainty as to whether OSHA would deem such programs and drug testing to be retaliatory. That is no longer the case.

On October 11, 2018, OSHA issued a memorandum clarifying its position that the regulation “does not prohibit workplace safety incentive programs or post-incident drug testing.” OSHA recognized that “many employers who implement safety incentive programs and/or conduct post-incident drug testing do so to promote workplace safety and health.” Consequently, an employer who 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. OSHA concludes that action taken under a safety incentive program or post-incident drug testing policy would only violate the law’s anti-retaliation provision “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.”

Safety incentive programs

OSHA further recognized that “incentive programs can be an important tool to promote workplace safety and health.” There are various types of incentive programs. One type rewards employees 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.”

Another type of incentive program is rate-based, which focuses on reducing the number of reported injuries and illnesses by rewarding 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 as long as they are not implemented in a manner that discourages reporting. OSHA would not cite an employer if it takes a negative action against an employee by withholding a prize or bonus because of a reported injury "as long as the employer has implemented adequate precautions to ensure that employees feel free to report an injury or illness."

According to OSHA, "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 should take "positive steps to create a workplace culture that emphasizes safety, not just rates" by implementing (1) an incentive program that rewards employees for identifying unsafe conditions in the workplace; (2) a training program for all employees to reinforce reporting rights and responsibilities and emphasizes the employer's non-retaliation policy; and (3) a mechanism for accurately evaluating employees' willingness to report injuries and illnesses.

Post-incident drug testing

Finally, OSHA recognized that "most instances of workplace drug testing are permissible." Permissible drug testing includes: 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; and drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees. With respect to post-incident testing, OSHA suggests that the employer test all employees whose conduct could have contributed to the incident, not just employees who reported injuries.

In its clarification memorandum, OSHA explicitly states that any other OSHA interpretive documents that are inconsistent with the interpretive position described here are superseded. OSHA has further directed its Regional Administrators to enforce the anti-retaliation provisions in a manner consistent with this memorandum and to consult OSHA's Directorate of Enforcement Programs before issuing any citations related to workplace safety incentive programs or post-incident drug testing. Contact your Vorys lawyer if you have questions about OSHA compliance and workplace safety.