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## **OSHA Once Again Permits Broad Post-Incident Drug Testing and Rate-Based Safety-Incentive Programs**

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In yet another example of the Trump administration reversing course on Obama-era guidance, the Occupational Safety and Health Administration issued a [“Clarification of OSHA’s Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under 29 C.F.R. § 1904.35\(b\)\(1\)\(iv\).”](#) in which it retreated from the significant restrictions the prior administration had placed on such activities.

**The Old Guidance:** In 2016, OSHA had published a final rule that, among other things, generally prohibited employers from retaliation for reporting work-related illnesses or injuries. Concurrent and subsequent guidance from OSHA addressed this prohibition in the context of post-incident drug testing and safety-incentive programs. In those documents, OSHA took the position that post-incident drug testing was only permitted “if there is a reasonable possibility that employee drug use could have contributed to the reported injury or illness.” If there is no such possibility, such testing would likely discourage reporting and therefore would be considered a violation of the Act, according to OSHA. At the time that OSHA issued the final rule, there was widespread discussion by legal commentators that employer policies requiring automatic testing after every incident were now prohibited by OSHA. Additionally, OSHA found that rate-based safety-incentive programs that denied bonuses or other prizes because of a reported injury discouraged reporting and thereby violated the Act.

**The New Guidance:** Now OSHA has retreated from those aggressive positions, stating that the prior documents have been superseded to the extent they are inconsistent with the new guidance. As to drug testing, OSHA asserts that “most instances of workplace drug testing are permissible” under the law. Specifically as to post-incident testing, OSHA now states that it is acceptable to conduct “[d]rug 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.” This language removes the “reasonable possibility that employee drug use contributed to the incident” requirement, which allows greater latitude to employers to conduct such testing where there is, in effect, any possibility that drug use could have had a role in the incident.

In addition, OSHA reiterates that the following types of drug testing are permissible (as they were previously):

- 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.

With regard to safety-incentive programs, OSHA reiterates that incentive programs rewarding reporting of near-misses or hazards and encouraging involvement in a safety and health management systems are always permissible. As to rate-based programs that reward employees at the end of an injury-free period or evaluate managers based on lack of injuries, OSHA now acknowledges that these may be permissible "as long as they are not implemented in a manner that discourages reporting." Specifically, an employer using such a program must "implement[] adequate precautions to ensure that employees feel free to report an injury or illness."

In explaining what constitute such adequate precautions, OSHA cautions that a statement alone that employees are encouraged to report and will not be subjected to retaliation for reporting is not sufficient. Rather, OSHA recommends that employers could take the following actions to avoid the inadvertent deterrent effect of rate-based programs:

- 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 memorandum directs various officials to revise the prior guidance to ensure consistency with the current position, so we can expect the reissuance of these documents in the future.