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EMPLOYER GUIDANCE UPDATE ON POST-ACCIDENT DRUG TESTING AND WORKER SAFETY INCENTIVE PROGRAMS

On October 11, 2018, OSHA rolled out new guidance that changes its stance on post-accident drug testing and the use of worker safety programs.

The guidance removes the requirement that there be a reasonable basis to believe that drugs or alcohol are a factor in an accident before you can administer a post-accident drug test. The guidance permits post-accident drug testing with the sole restriction being that you may not order a post-accident drug test to penalize an employee for reporting an injury. We advise that you announce a policy that mandates drug testing for all employees involved in or whose conduct could have contributed to an accident and/or injury, not just the person reporting the same. Such a policy would reduce claims that a drug test was retaliation for reporting an injury and comport with this guidance. A policy that mandates blanket post-accident drug testing will also remove the discretion of managers and other company employees tasked with enforcing post-accident drug testing policies, and will ensure compliance with post-accident testing requirements imposed by worker's compensation and other insurance entities.

In addition to amending post-accident drug testing, the new interpretation reiterates that the following are other acceptable instances of drug testing: (1) random drug testing, (2) drug testing unrelated to the reporting of a work-related injury or illness, (3) drug testing under a state workers' compensation law, (4) drug testing under other federal law, and (5) drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees.

Also, this guidance removes barriers to the implementation of worker safety initiative programs. OSHA views these programs as beneficial to the promotion of workplace safety and health. OSHA offers guidance on two worker safety programs. One program incentivizes the reporting of near-misses or hazards, and encourages involvement in a safety and health management program. The other program is a rate-based program that rewards employees with a prize or bonus at the end of an injury-free period or evaluates managers based on a lack of injuries. For now, both programs are acceptable under the guidance.

However, OSHA warns employers not to take any adverse action under a worker safety program against an employee who reports an injury or dangerous condition. OSHA also warns against rate-based programs that have a deterrent effect on reporting. OSHA remains vigilant in its insistence that employees feel free to report incidents. As such, a mere statement that encourages reporting may not be enough. As a solution, OSHA suggests that an inadvertent deterrent effect can be counterbalanced by the combination of the rate-based program with the program that incentivizes reporting of dangerous conditions and near-misses. Training programs that reinforce reporting rights and responsibilities also evens out inadvertent deterrence as does the adoption of methods that accurately evaluate an employee's willingness to report injuries and illnesses.