Client Alert: OSHA 180°? Agency Clarifies its Position on Workplace Safety Incentive Programs and Drug Testing Policies

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The U.S. Occupational Health and Safety Administration ("OSHA") recently issued a Standard Interpretation memorandum (the "New Guidance") to clarify the agency's position on whether workplace safety incentive programs and post-incident drug testing policies violate the OSHA rule prohibiting retaliation against employees for reporting work-related injuries or illnesses (29 C.F.R. § 1904.35(b)(1)(iv), the "Anti-Retaliation Rule").

The New Guidance significantly departs from OSHA's prior policy under the Obama Administration. While previous OSHA guidance and interim enforcement procedures discouraged many workplace safety incentive programs (including all "rate-based" programs tying bonuses to the number of recordable illnesses or injuries) and blanket post-incident drug testing policies, the New Guidance clarifies that OSHA views such programs and policies as generally permitted under the Anti-Retaliation Rule so long as they are properly established and enforced.

OSHA's new position on workplace safety incentive programs and drug testing policies is set forth below.

WORKPLACE SAFETY INCENTIVE PROGRAMS

In the New Guidance, OSHA acknowledges that safety incentive programs can be a valuable tool for promoting a safe workplace, and provides examples of programs that OSHA now views as legally permissible under the Anti-Retaliation Rule. Permissible programs include:

- Incentive programs that reward workers for reporting near-misses or hazards, and encourage involvement in a safety and health management system. According to the New Guidance, "positive action" taken under these programs will "always [be] permissible" under the Anti-Retaliation Rule.
- "Rate-based" incentive programs designed to reward employees for reducing the number of reportable incidents of work-related injury and illness. These programs — which typically 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 — are permissible under the Anti-Retaliation Rule even if "negative action" is taken (such as 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."

Thankfully, OSHA has provided some guidance regarding the employer's obligation to implement such "adequate precautions." The New Guidance states that a simple statement from an employer that employees are "encouraged to report [work-related injuries] and will not face retaliation for reporting," may not, by itself, be adequate to ensure that employees subject to a rate-based incentive program will feel free to report. OSHA suggests that, in addition to publishing that statement to employees, employers implementing a rate-based incentive program should also "tak[e]

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positive steps to create a workplace culture that emphasizes safety, not just rates." Examples of these types of positive steps include:

- 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; and
- A mechanism for accurately evaluating employees' willingness to report injuries and illnesses.

In sum, while employers now need not avoid implementing rate-based safety incentive programs for fear of noncompliance with OSHA regulations, there should be a focus on fostering a culture where employees feel free to report work-related illness or injury.

DRUG TESTING

Previous OSHA guidance was subject to criticism from some employers for failing to provide a clear standard to assess the legality of random drug testing and post-accident drug testing policies under the Anti-Retaliation Rule. In a substantial departure from that previous guidance, the New Guidance clarifies that most workplace drug testing is compliant with OSHA's Anti-Retaliation Rule, including:

- 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, *provided* that 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.

The last example is the most important, since testing only the reporting employee could easily be interpreted as discriminating against that employee for reporting the injury, in violation of the Anti-Retaliation Rule. If all employees involved in the incident are tested, however, that problem is avoided. Employers should ensure that their post-incident drug testing policy complies with this specific OSHA instruction, and should also ensure that all employees are aware of and have access to any post-incident drug testing policy.

SUMMARY AND CLOSING COMMENTS

In a significant departure from prior OSHA policy, the New Guidance clarifies that certain workplace safety incentive programs and drug testing policies will not be considered violations of OSHA's rule prohibiting retaliation for reporting work-related injuries or illnesses, as long as those programs and policies are properly established and enforced in accordance with the standards discussed above.

Employers should be mindful that OSHA's position set forth in the New Guidance is subject to change and may be rolled back or reversed by future OSHA guidance, including guidance issued under future presidential administrations.

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