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OSHA Clarifies Limits on Post-Accident Drug Testing and Safety Incentive Programs

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The Occupational Safety and Health Administration (OSHA) recently released a memorandum explaining "in more detail" two provisions added to the recordkeeping regulation: Section 1904.35(b)(1)(i) requiring "employers to have a reasonable procedure for employees to report work-related injuries and illnesses"; and Section 1904.35(b)(1)(iv) prohibiting retaliation for reporting work-related injuries and illnesses.

The Occupational Safety and Health Administration (OSHA) recently released a memorandum explaining "in more detail" two provisions added to the recordkeeping regulation: Section 1904.35(b)(1)(i) requiring "employers to have a reasonable procedure for employees to report work-related injuries and illnesses"; and Section 1904.35(b)(1)(iv) prohibiting retaliation for reporting work-related injuries and illnesses. As we have previously reported, OSHA identified post-accident drug testing and safety incentive plans as programs that may result in impermissible retaliation against employees who report injuries when the amendments to the recordkeeping regulation were issued on May 12, 2016.

Section 1904.35(b)(1)(i)—"Reasonable" System for Reporting

Section 1904.35(b)(1)(i) requires employers to implement a "reasonable" system for employees to use in reporting work-related injuries and illnesses. The guidance adds little to the explanation included when OSHA issued the original amendments to the recordkeeping regulation. OSHA reiterates that employers must give employees a "reasonable timeframe after the employee has realized that he or she has suffered a recordable work-related injury or illness and in a reasonable manner." A procedure requiring employees to report "as soon as practicable after realizing" they are injured is "reasonable," but it would not be "reasonable" to discipline employees for "failing to report before they realize they have a work-related injury" or "for failing to report 'immediately' when they are incapacitated because of the injury or illness."

Section 1904.35(b)(1)(iv)—Retaliation

When it issued the final amendments to the regulation, OSHA identified three policies that "can be used to retaliate against workers for reporting work-related injuries or illnesses and therefore discourage or deter accurate recordkeeping: disciplinary policies, post-accident drug testing policies, and employee incentive programs." Section 1904.35(b)(1)(iv) is not "prohibiting these kinds of policies categorically" and "does not impose any new obligations or restrictions on employers." Instead, the provision simply "gives OSHA another mechanism to address conduct that has always been unlawful" under Section 11(c) (the whistleblower provision) of the Occupational Safety and Health Act (OSH Act): "retaliating against employees for reporting work-related injuries or illnesses."

To prove a violation of Section 1904.35(b)(1)(iv), OSHA must show:

- "The employee reported a work-related injury or illness";
- "The employer took adverse action"— "action that would deter a reasonable employee from accurately reporting a work-related injury or illness"; and
- "The employer took the adverse action because the employee reported a work-related injury or illness."

"OSHA's ultimate burden is to prove that the employer took the adverse action because the employee reported a work-related injury or illness, not for a legitimate business reason," which will be a "fact-specific inquiry."

When Will Post-Accident Drug Testing Be Deemed Retaliatory?

Post-accident drug and alcohol testing is not prohibited. Rather, Section 1904.35(b)(1)(iv) prohibits post-accident testing only when the employee reports an injury and a test is conducted "without an objectively reasonable basis." The "central inquiry will be whether the employer had a reasonable basis for believing that drug use by the reporting employee could have contributed." The factors OSHA will consider include whether "other [non-injured] employees involved in the incident" are tested and whether the employer "has a heightened interest in determining if drug use could have contributed to the injury or illness due [to] the hazardousness of the work being performed."

OSHA provides an example: A crane accident injures several employees working nearby but not the operator. Given the facts, "there is a reasonable possibility that it could have been caused by operator error or by mistakes made by other employees responsible for ensuring that the crane was in safe working condition." Testing all of the involved employees is "appropriate," while testing only the injured employees "would likely violate section 1904.35(b)(1)(iv)." Testing an employee "whose injury could not possibly have been caused by drug use"—such as a repetitive motion strain—"would likely not be objectively reasonable.

Finally, OSHA clarifies a troubling issue regarding the type and timing of the test. OSHA originally stated that the test must measure impairment at the time of the injury. OSHA now says it "will only consider whether the drug test is capable of measuring impairment at the time the injury or illness occurred where such a test is

available." "OSHA will consider this factor for tests that measure alcohol use, but not for tests that measure the use of any other drugs." In light of this language, employers can discipline employees based on positive drug tests for marijuana and other drugs where the test is not capable of measuring the level of impairment at the time of the injury.

When Will Safety Incentive Programs Be Deemed Retaliatory?

Safety incentive programs only violate Section 1904.35(b)(1)(iv) to the extent a benefit—"such as a cash prize drawing or other substantial award"—is taken away because an employee reported an injury or illness. "Penalizing an employee simply because the employee reported a work-related injury or illness without regard to the circumstances surrounding the injury or illness is not objectively reasonable and therefore not a legitimate business reason for taking adverse action against the employee."

OSHA offers the following example of a program that would likely violate Section 1904.35(b)(1)(iv): A raffle for a $500 gift card at the end of "each month in which no employee sustains an injury that requires the employee to miss work." If the raffle is cancelled "simply because an employee reported a lost-time injury without regard to the circumstances of the injury, such a cancellation would likely violate section 1904.35(b)(1)(iv) because it would constitute adverse action against an employee simply for reporting a work-related injury."

What Does It Mean For Employers?

The guidance offers several key takeaways for employers. First, although OSHA does not say it specifically, the guidance seems to confirm that safety incentive programs and post-accident drug testing policies potentially violate the anti-retaliation provision (Section 1904.35(b)(1)(iv)) rather than the "reasonable" reporting provision (Section 1904.35(b)(1)(i)). This means that the mere existence of a program is not enough to violate the regulation even though it may deter employees from reporting. Instead, OSHA must show a specific instance of retaliation against an employee.

For example, an employer may maintain a post-accident drug testing policy that requires drug testing whenever an employee requires medical treatment. Although an employee may decide not to report an injury for fear of a drug test, the program—in a vacuum—does not violate the regulation. Rather, a violation exists if OSHA can show that an employee: 1) reported an injury; 2) was drug-tested with no reasonable basis, such as following a report of a repetitive motion strain; and 3) the employer had no legitimate business reason for conducting the test and administered it solely because the employee reported the injury. Thus, employers may maintain their post-accident testing policies, but may have to exercise discretion in administering them. The same analysis would apply to a safety incentive program that takes away a benefit when too many injuries occur—the program is permissible as long as it is administered so that it does not retaliate against individual employees who report work-related injuries or illnesses.

Second, OSHA did not specifically address the types of safety incentive programs described in the August 14, 2014 memorandum concerning companies in the Voluntary Protection Program (VPP). The VPP memorandum describes "blended" programs that include a component based on meeting injury and illness rate goals. Given that OSHA did not address these types of programs, the assumption is that they do not violate the anti-retaliation provisions in Section 1904.35(b)(1)(iv).

Third, OSHA provides no guidance on when withholding a particular benefit constitutes adverse action. Employers may schedule events when a facility or team of employees meets a certain injury and illness rate goal. OSHA clearly believes that withholding the opportunity to win $500 in a raffle is significant enough to constitute adverse action but declines to address celebrations of safety milestones through pizza parties and the like.

Finally, OSHA did not address—at least not explicitly—programs based on more significant injuries and illnesses. A safety incentive program based upon avoiding fatal injuries for some period of time does not violate the anti-retaliation provisions because an employee does not "report" a fatality. The same may be said for certain types of significant injuries. An employee who breaks his or her leg and leaves the facility in an ambulance has not reported the injury—the injury is evident. In contrast, an employee who contracts tuberculosis from an exposure at work or a repetitive motion strain that requires surgery could elect to take time off and receive treatment without reporting the injury or illness as work-related. If the employee chooses to report the injury or illness and loses a benefit, such as the opportunity to win $500 in the raffle, then the employer has potentially violated Section 1904.35(b)(1)(iv). The adverse action must be based on an employee "report" of an injury. Programs based on injuries or illnesses resulting in lost time may or may not pass muster depending upon whether the employee actually "reports" the injury that leads to the loss of a benefit.

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