

OSHA Clarifies Its Position On Drug Testing And Safety Incentive Policies

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In a Memorandum to Regional Administrators dated October 11, 2018, OSHA provided further guidance on whether certain drug testing policies or safety incentive programs would violate OSHA's anti-retaliation standard. In its October 11 Memo, OSHA clarified that most forms of post-accident drug testing remained permissible, so long as the employer can demonstrate that the testing was unrelated to an employee's report of an injury. In addition, OSHA will consider evidence that the employer consistently enforces legitimate work rules (whether or not an injury or illness is reported) as a basis to find that the employer is serious about creating a culture of safety, not just the appearance of reducing injury rates.

With respect to safety incentives, OSHA previously raised a concern about bonuses that are tied to injury rates, out of a concern that such programs may discourage employees from reporting injuries. OSHA has now clarified that bonuses tied to injury rates are not always prohibited, so long as the employer can demonstrate that it took adequate steps to encourage injury reporting. Accordingly, employers that use bonus programs that are tied to injury rates should ensure that their written policies and handbooks contain strong anti-retaliation provisions.

While this recent memorandum from OSHA suggests that employers may have more latitude on these issues, employers should recognize that OSHA still retains discretion when it comes to deciding whether a policy or practice has the effect of discouraging employees from reporting injuries.

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Laner Muchin will be providing a breakfast briefing covering the latest issues involving employee drug testing and workplace violence concerns on November 7, 2018. For more information, please register here for the event.