OSHA ISSUES NEW DRUG TESTING AND INCENTIVE PROGRAM GUIDANCE

Occupational Safety & Health Act Alert
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On October 11, 2018, OSHA's Acting Director of Enforcement Programs issued a new internal guidance Memorandum to Regional Administrators, providing updated direction on post-incident drug testing and incentive programs. As a historical refresher, amendments to 29 C.F.R. § 1904.35 went into effect in May 2016 under the Obama administration that prohibited employers from discriminating against employees for reporting workplace injuries. A subsequent guidance Memorandum issued on October 19, 2016, which interpreted the new regulation. That interpretation took aim at safety incentive programs and drug and alcohol testing as being potentially violative of the new regulation if, as implemented, they could have the effect of causing employees to underreport injuries. The guidance further suggested that employers must have an objectively reasonable basis for conducting a drug test. The 2016 Memorandum also described how incentive programs would violate the regulation if, as a result of an injury report, an incentive, prize or benefit is withheld because they encouraged underreporting of injuries.

While the 2016 guidance indicated that drug testing was not outrightly prohibited, the guidance engendered a great deal of confusion for employers, particularly in defining what constituted an "objectively reasonable" basis. The 2016 guidance expressly stated that the rule did not apply to drug testing unrelated to a work-related injury or illness, drug testing under a state workers' compensation law, or drug testing pursuant to other state or federal law. But employers were left confused as to the legality of long-standing employment policies requiring random drug testing and the import of the "objectively reasonable" test as pertained to post-accident drug testing. Moreover, such "rules" were not part of the regulation itself, but an interpretive memorandum of how OSHA intended to apply the regulation for enforcement purposes. The 2016 guidance became the subject of significant criticism by employers, as it failed to recognize that drug testing can promote safety when used appropriately, that safety reward-based safety incentive programs are not all intended as punitive or to discourage reporting, and that employers have many significant interests at stake that are served by these policies.

The new 2018 guidance is a significant step in addressing those criticisms. It expressly recites that "The Department believes that many employers who implement safety incentive programs and/or conduct post-incident drug testing do so to promote workplace safety and health." The 2018 Memorandum recognizes that

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while certain types of programs may potentially result in underreporting, such programs can nonetheless be legitimate ways to promote safety absent implementation in a way that discourages reporting. It goes on to state that such policies only violate section 1904.35(b)(1)(iv) "if the employer took the action to penalize an employee for reporting a work-related injury or illness rather than for the legitimate purpose of promoting workplace safety."

With respect to safety incentive programs, the 2018 guidance suggests that rate-based incentive programs, such as where employees receive a prize, reward, or bonus for an injury-free month or a work unit's lack of injuries, are permissible "as long as they are not implemented in a manner that discourages reporting." So if an employee is disqualified from receiving such a benefit because an injury occurred, no citation would issue "as long as the employer has implemented adequate precautions to ensure that employees feel free to report an injury or illness." The guidance explains, however, that simply having a policy that encourages employees to report, and stating there will be no retaliation for doing so, may not by itself be enough. The 2018 Memorandum suggests that inadvertent deterrent effects of such a safety incentive program "would likely be counterbalanced" if the employer's incentive program also implements other components, such as rewards for employees who identify unsafe conditions, a training program that reinforces the employees' reporting rights and the non-retaliation policy, and a mechanism to evaluate employees' willingness to report injuries and illnesses.

The 2018 drug testing guidance provides considerably more clarity for employers. Of particular note, the 2018 guidance states, with emphasis in bold, that "**most instances of workplace drug testing are permissible under § 1904.35(b)(1)(iv).**" The 2018 Memorandum adopts the exceptions set forth in the 2016 guidance, but recognizes the permissibility of two key drug testing policies that have been commonly used by employers: (1) random drug testing, and (2) drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees. The "objectively reasonable standard" appears to have been rejected, though the new guidance suggests that root cause drug testing should not be limited to those who are injured, but should encompass all individuals whose conduct could have contributed to the incident.

The 2018 Memorandum concludes by directing Regional Administrators to conduct enforcement activities consistent with the new guidance. And to the extent there is any inconsistency with previously issued documents, the 2018 guidance expressly supersedes the October 19, 2016 Memorandum and other identified investigation and enforcement procedures relating to section 1904.35 that issued in October and November of 2016.

While this latest guidance is significant news for employers, this is not likely the end of the story on drug testing. Enforcement practices relating to this particular regulation are influenced by political headwinds. And with more and more States (and now Canada) legalizing marijuana for both medical and recreational purposes, new thorny issues will surely arise. Employers will likely be grappling with the meaning of positive test results from random drug tests and post-accident testing in places where cannabis use is legal, and to some extent in border States where an employee could have legally imbibed over a weekend and still test positive days later in the home State. For now, however, the 2018 guidance is a step toward resolving ambiguity on the ability of employers to use drug testing and in returning certain tools to employers to promote workplace safety.

If you have any questions about this alert, you may reach out to Jason Markel, the Hodgson Russ OSHA Compliance Capabilities Practice Leader.