

Safety & Health

OSHA Clarifies When Drug Testing, Incentives Merit Whistle-Blower Citations

New guidance from OSHA aims to answer employers' questions on whether the agency will cite workplaces for their drug testing, safety incentive and injury reporting policies.

The memorandum from Dorothy Dougherty, the deputy administrator with oversight of the Occupational Safety and Health Administration's enforcement actions, follows up on the final electronic recordkeeping rule issued May 12 (81 Fed. Reg. 29,624). The rule includes provisions for OSHA to penalize employers whose policies deter workers from notifying supervisors of on-the-job injuries, illnesses and accidents.

Employers have clamored for OSHA to clarify the rule's requirements. OSHA originally intended to begin enforcement on Aug. 10. However a federal court challenge to the rule pushed the enforcement start date to no earlier than Dec. 1, pending a judge's decision.

The guidance is helpful, said Kathryn Russo, an attorney whose practice includes drug testing at Jackson Lewis PC's Long Island, N.Y., office.

"When the rule came out in May, it was causing a lot of concerns; employers didn't know what to do," Russo told Bloomberg BNA Oct. 25.

Many employers read the rule and concluded only cases where there was "reasonable suspicion" of drug use contributing to accident would be allowed by OSHA, Russo said. The memorandum clarifies that reasonable suspicion isn't the lone factor.

Evaluate, Not Discipline. Dougherty's memorandum says the general principle is that drug testing "may not be used by the employer as a form of discipline against employees who report an injury or illness, but may be used as a tool to evaluate the root causes of workplace injuries and illness in appropriate circumstances."

Drug testing an employee whose injury couldn't have been caused by drug use would likely violate the rule, the memorandum says. As an example, the memo mentions testing an employee for reporting a repetitive strain injury would likely not be reasonable because drug use couldn't have contributed to the injury.

As an example of a case where drug testing would be permissible, OSHA pointed to testing a crane operator following an accident.

While the employer doesn't know the causes of the accident, there is a reasonable possibility that it could have been caused by operator error, the memorandum says. Drug testing would be appropriate because there is a reasonable possibility that the results could provide insight on the root causes.

The memo also clarifies OSHA will not issue citations for drug testing conducted under a state workers' compensation law or other state or federal law. Many state programs mandate drug testing or offer premium discounts to employers with programs.

Incentive to Obey. The memorandum also covers incentive programs and disciplinary procedures.

The incentive program guidance largely reinforces OSHA's concern that incentives tied to low injury and illness rates may lead to workers not notifying supervisors of cases. Instead, the agency promotes incentives

rewarding workers for participating in safety training and other pro-active activities.

"If OSHA determines that an employer withheld a benefit from an employee simply because the employee reported a work-related injury or illness without regard to the circumstances surrounding the injury or illness, OSHA may issue a citation," the memorandum says.

The interpretation says in order for the agency to issue a citation for retaliating against a worker reporting an injury or illness, OSHA must show:

- the worker reported a work-related injury or illness,
 - the employer took action against the worker 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
- The agency can't issue a citation if the worker's sanction was for a "legitimate business reason," the memorandum said.

By BRUCE ROLFSEN

To contact the reporter on this story: Bruce Rolfsen in Washington at BRolfsen@bna.com

To contact the editor responsible for this story: Larry Pearl at lpearl@bna.com

The memorandum is available at <http://src.bna.com/jCD>.

The rule is available at <https://www.gpo.gov/fdsys/pkg/FR-2016-05-12/pdf/2016-10443.pdf>.

Safety & Health

OSHA Aims Safety/Health Program Guide at Small, Medium-Size Employers

The Occupational Safety and Health Administration's new guidance for how employers can set up safety and health programs should appeal to middle- and small-sized companies, agency administrator David Michaels said Oct. 18.

OSHA agreed with recommendations that the initial version of the guidelines presented earlier this year used technical language that wouldn't be easily understood by employers who didn't have safety specialists already on staff.

Out went references to "safety management systems," Michaels told a forum at the National Safety Council Congress in Anaheim, Calif. In went easy-to-understand terminology and encouragement for employers to take a step-by-step approach.

Construction Next. The agency also agreed with comments saying the construction industry should have its own guidance, Michaels said. The construction guidance should be issued no later than January.

The primary difference between the guidance issued Oct. 18 and the construction guidance will be the construction advice taking into account the predominance of multi-employer worksites in construction and the how hazards at construction sites are constantly changing, OSHA officials said.

Safety Saves Money. To sell businesses on the program, OSHA is appealing to employers' concerns about their bottom line.