



## *OSHA Issues Clarification on Incentive Programs and Drug Testing*

Released October 11, 2018

The Federal Occupational Safety & Health Administration (OSHA) has released a clarification of their position on workplace safety incentive programs and post-incident drug testing. While the letter still leaves us with some questions, it does provide a clearer picture of what OSHA is looking at when deciding if a program is citable. We have provided a very brief summary of OSHA's thoughts on these subjects for you to review. If you wish to read the entire memo, please follow the link provided at the end of this SafeALERT.

### **Incentive Programs**

As ORCIG has often preached, one of the critical items that OSHA will look for with incentive program is evidence that the company was consistent in the enforcement of workplace safety rules. This means that the company does not get to pick who they enforce rules on and who they do not. Position within the company should not keep someone free from enforcement. OSHA states that this would demonstrate that the employer is serious about creating a culture of safety.


OSHA states that they would only take enforcement if the employer took action against an employee for reporting a work-related injury or illness as opposed to taking action to promote workplace safety. As you can tell, this would be an area that is subject to interpretation by the OSHA inspector and the employer. Consistency in the enforcement of workplace safety rules and drug testing procedures would at least improve the employer's chances of avoiding a citation.

OSHA also states that incentive programs that provide rewards for reporting near-misses and encourages employee involvement in workplace safety and health programs are always permissible. Where OSHA is still not as clear is with programs **that provide rewards for not having injuries, or what OSHA calls "rate based programs."**

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OSHA does clearly state that “rate-based” programs are permissible; however, they must be implemented in a manner that does not discourage reporting. If an employer takes adverse action against an employee, such as withholding a bonus or prize, OSHA will not issue a citation as long as the employer has implemented adequate precautions to ensure that employees feel free to report injuries or illnesses. A general statement that employees will not face retaliation would likely not suffice. OSHA may not issue a citation for this type of program if the employer has other programs in place, such as:

- Incentives for reporting unsafe conditions
- Training programs that reinforce the employer’s non-retaliation policy and reinforces reporting rights
- Mechanisms that evaluate employees’ willingness to reporting injuries and illnesses.

As can be seen, much of this will be left up to the interpretation of the OSHA inspector. If you have a “rate-based” program and feel that you cannot meet the provisions OSHA has laid out for you, you should re-evaluate your program and may wish to implement a new one. ORCIG has always encouraged proactive incentive programs, such as near-miss reporting and safety awareness program, as opposed to reactive programs that provide incentives for not getting hurt.

## **Drug Testing**

OSHA states that most instances of workplace drug testing are admissible. The clarification OSHA released is much less clear about drug testing and provides little in the way of assistance for those concerned about citations for drug testing. The clarification letter does state that random drug tests, drug tests unrelated to injuries or illness, drug testing conduct to comply with workers’ compensation laws, federal laws and Department of Transportation laws are all permissible.

Where OSHA is not as clear is when drug testing is used to evaluate the root cause of a workplace incident. OSHA does issue a statement that if this method is used, then all employees whose conduct could have contributed to the incident should be tested. Only testing the injured person may not be permissible. If you have a post-incident drug testing policy, you should ensure that anyone involved in any way with an accident or incident is also drug tested. If you feel that this is not manageable, then you should re-evaluate your program. Again, something like this would be very susceptible to the OSHA inspectors interpretations.

We strongly recommend that you read the complete memorandum by clicking the link provided below. As always, contact your Safety Specialist with any questions.

<https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11>

