



Nov 08, 2016

Categories:

[Publications](#)

Authors:

[Tessa L. Castner](#)

[Kyle D. Johnson](#)

OSHA's Anti-Retaliation Regulation May Impact Your Workplace Policies

As we [previously reported](#), on May 12, 2016, the Occupational Safety and Health Administration (OSHA) announced new recordkeeping rules and revised regulations requiring covered employers (i.e., employers that are subject to OSHA's recordkeeping requirements) to implement procedures for employees to report work-related injuries and illnesses, and requiring certain covered employers to electronically submit injury and illness logs and related records starting in 2017. Notably, OSHA also announced a new regulation (29 C.F.R. § 1904.35(b)(1)(iv)) prohibiting employers from retaliating against employees who report work-related injuries or illnesses. In controversial commentary published with this new regulation, OSHA announced that it intends to employ the regulation to begin restricting covered employers' use of post-accident drug and alcohol testing policies and safety incentive programs.

In response to objections from employers and a lawsuit seeking to enjoin OSHA from implementing its planned enforcement policies, OSHA has twice delayed enforcement of the anti-retaliation regulation. The regulation is currently scheduled to go into effect on December 1, 2016.

OSHA has provided limited guidance to employers wishing to understand how OSHA will apply the regulation to drug and alcohol testing practices and incentive programs. When OSHA first agreed to delay enforcement of the regulation, it promised to publish additional guidance. Recently, OSHA quietly issued a [memorandum](#) providing some additional, albeit limited, instruction.

Post-Incident Drug and Alcohol Testing

Under OSHA's planned enforcement policy related to drug and alcohol testing, covered employers will be able to continue to test employees who report work-related injuries and illnesses, but in order to avoid liability for retaliation under 29 C.F.R. § 1904.35(b)(1)(iv), employers must be able to demonstrate an "objectively reasonable basis" for testing. OSHA considers blanket

post-injury drug testing policies a violation of the regulation. It will expect employers to instead determine – on a case-by-case basis – whether drug and alcohol testing is appropriate under the circumstances. And the “central inquiry” into whether testing is appropriate will be whether an employer had a reasonable basis for believing that drug use by the reporting employee **could have contributed** to the injury or illness.

In assessing whether a given decision to test an employee was permissible, OSHA will consider factors such as the following:

- Whether the employer had a reasonable basis for concluding that drug use could have contributed to the injury or illness (and therefore the result of the drug test could provide insight into why the injury or illness occurred.)
- Whether other employees involved in the incident that caused the injury or illness were also tested or whether the employer only tested the employee who reported the injury or illness.
- 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 when the injury or illness occurred.

OSHA has provided few examples of how it is likely to apply its enforcement policy. It previously indicated that it would probably not find testing to be “objectively reasonable” for an employee reporting a bee sting injury or a repetitive stress injury, such as carpal tunnel syndrome. In its recent memorandum, OSHA provided one example of when testing would be permitted. It explained that if several employees were injured as a result of a crane accident, OSHA would probably consider drug testing appropriate as long as the employer did not just test the injured workers, but also tested the crane operator and any other employees who were responsible for ensuring that the crane was in safe working condition.

On a related matter, OSHA clarified its position on the types of testing methods that employers will be permitted to use under its enforcement policy. OSHA previously indicated that it expected

employers to only use testing methods that were capable of testing for a current impairment, as opposed to testing methods that indicated whether an employee has used drugs at some time in the recent past. In its latest memorandum, however, OSHA tacitly acknowledged that while such testing methods exist for alcohol impairment, testing for current impairment from other drugs is not generally available. Accordingly, OSHA explained that at this time, it will only expect employers to test for current impairment related to alcohol consumption, but will not require “current impairment testing” for other drugs. Traditional testing methods for other drugs will still be permissible.

Safety Incentive Programs

OSHA also plans to use the anti-retaliation regulation to challenge covered employers’ safety incentive programs. OSHA will prohibit incentive programs that deny employees a benefit, such as a “cash prize drawing or other substantial award,” because an employee reports an injury or illness. For example, many employers provide bonuses to employees if there are no workplace injuries in a given period of time. OSHA believes that such policies deter employees from reporting work-related injuries and illnesses because employees know they will lose a benefit for reporting.

OSHA has previously recommended that employers consider implementing alternative programs that promote safety and safe practices at work, such as bonuses for following safety rules, making safety-related suggestions, or attending or completing safety training. In its recent memorandum, OSHA also indicated that employers can implement incentive programs tied to whether employees successfully avoid safety rule violations. OSHA explained that such a program, which focuses on employees’ compliance with safety rules as opposed to whether or not employees report injuries or illnesses, would not violate Section 1904.35(b)(1)(iv).

In light of OSHA’s new regulations and planned enforcement policies, you should take a moment to review your drug and alcohol testing policies and incentive programs. You should ensure that they are not designed or enforced in a manner that might discourage employees from reporting a workplace injury or illness.

Otherwise, you could face liability (i.e., citations and associated penalties) when the regulations go into effect on December 1, 2016.

Please contact any of Frost Brown Todd's OSHA specialists if you have questions about the new rule, your programs or policies, or any other matter related to OSHA compliance, inspections, or citations.

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.