

OSHA Issues Memorandum Clarifying Position on Incentive Program Drug Testing

OSHA issued a memorandum clarifying the agency's position that its rule prohibiting employer retaliation against employees for reporting work-related injuries or illnesses does not prohibit workplace safety incentive programs or post-incident drug testing. 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. Action taken under a safety incentive program or post-incident drug testing policy would only violate OSHA's anti-retaliation rule 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 and health. To see the full memorandum, visit <https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11>.

Incentive programs can be an important tool to promote workplace safety and health. One type of incentive program rewards workers for reporting near misses or hazards, and encourages involvement in a safety and health management system. Positive action taken under this type of program is always permissible under 1904.35(b)(1)(iv). Another type of incentive program is rate-based and focuses on reducing the number of reported injuries and illnesses. This type of program typically rewards employees with a prize or bonus at the end of an injury-free month or evaluates managers based on their work unit's lack of injuries. Rate-based incentive programs are also permissible under § 1904.35(b)(1)(iv) **as long as they are not implemented in a manner that discourages reporting.** Thus, if an employer takes a negative action against an employee under a rate-based incentive program, such as withholding a prize or bonus because of a reported injury, OSHA would not cite the employer under § 1904.35(b)(1)(iv) **as long as the employer has implemented adequate precautions to ensure that employees feel free to report an injury or illness.**

A statement that employees are encouraged to report and will not face retaliation for reporting may not, by itself, be adequate to ensure that employees actually feel free to report, particularly when the consequence for reporting will be a lost opportunity to receive a substantial reward. An employer could avoid any inadvertent deterrent effects of a rate-based incentive program by taking positive steps to create a workplace culture that emphasizes safety, not just rates. For example, any inadvertent deterrent effect of a rate-based incentive program on employee reporting would likely be counterbalanced if the employer also implements elements such as:

- an incentive program that rewards employees for identifying unsafe conditions in the workplace;
- a training program for all employees to reinforce reporting rights and responsibilities and emphasizes the employer's non-retaliation policy;
- a mechanism for accurately evaluating employees' willingness to report injuries and illnesses.

In addition, most instances of workplace drug testing are permissible under 1904.35(b)(1)(iv). Examples of permissible drug testing include:

- Random drug testing.
- Drug testing unrelated to the reporting of a work-related injury or illness.
- Drug testing under a state workers' compensation law.
- Drug testing under other federal law, such as a U.S. Department of Transportation rule.
- Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees. If the employer chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries.



Monthly Toolbox Talk

Workplace Violence Awareness

Workplace violence is violence or the threat of violence against workers. It can occur in or outside the workplace and can range from threats and verbal abuse to physical assaults and homicide, one of the leading causes of job-related deaths. However it manifests itself, workplace violence is a growing concern for employers and employees nationwide.

Who is vulnerable?

Some 2 million American workers are victims of workplace violence each year. Workplace violence can strike anywhere, and no one is immune. Some workers, however, are at increased risk. Among them are workers who exchange money with the public; deliver passengers, goods, or services; or work alone or in small groups, during late night or early morning hours, in high-crime areas, or in community settings and homes where they have extensive contact with the public. This group includes health-care and social service workers such as visiting nurses, psychiatric evaluators, and probation officers; community workers such as gas and water utility employees, phone and cable TV installers, and letter carriers, retail workers, and taxi drivers.

What Can Employers Do to Help Protect Employees?

The best protection employers can offer is to establish a zero-tolerance policy toward workplace violence against or by their employees. The employer should establish a workplace violence prevention program or incorporate the information into an existing accident prevention program, employee handbook, or manual of standard operating procedures. It is critical to ensure that all employees know the policy and understand that all claims of workplace violence will be investigated and remedied promptly. In addition, employers can offer additional protections such as the following:

- Provide safety education for employees so they know what conduct is not acceptable, what to do if they witness or are subjected to workplace violence, and how to protect themselves.
- Secure the workplace. Where appropriate to the business, install video surveillance, extra lighting, and alarm systems and minimize access by outsiders through identification badges, electronic keys, and guards.
- Provide drop safes to limit the amount of cash on hand. Keep a minimal amount of cash in registers during evenings and late-night hours.
- Equip field staff with cellular phones and hand-held alarms or noise devices, and require them to prepare a daily work plan and keep a contact person informed of their location throughout the day. Keep employer-provided vehicles properly maintained.



- Instruct employees not to enter any location where they feel unsafe. Introduce a “buddy system” or provide an escort service or police assistance in potentially dangerous situations or at night.
- Develop policies and procedures covering visits by home health-care providers. Address the conduct of home visits, the presence of others in the home during visits, and the worker’s right to refuse to provide services in a clearly hazardous situation.

How can the employees protect themselves?

Nothing can guarantee that an employee will not become a victim of workplace violence. These steps, however, can help reduce the odds:

- Be aware of your surroundings.
- Learn how to recognize, avoid, or diffuse potentially violent situations by attending personal safety training programs.
- Alert supervisors to any concerns about safety or security and report all incidents immediately in writing.
- Avoid traveling alone into unfamiliar locations or situations whenever possible.
- Carry only minimal money and required identification into community settings.

What should employers do following an incident of workplace violence?

- Encourage employees to report and log all incidents and threats of workplace violence.
- Provide prompt medical evaluation and treatment after the incident.
- Report violent incidents to the local police promptly.
- Inform victims of their legal right to prosecute perpetrators.
- Discuss the circumstances of the incident with staff members. Encourage employees to share information about ways to avoid similar situations in the future.
- Offer stress debriefing sessions and post-traumatic counseling services to help workers recover from a violent incident.
- Investigate all violent incidents and threats, monitor trends in violent incidents by type or circumstance, and institute corrective actions.
- Discuss changes in the program during regular employee meetings.

Zero
Tolerance of
Workplace
Violence

