

OSHA Issues Guidance on Controversial Rule Regarding Drug-Testing and Safety Incentive Policies

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PRACTICES OSHA, Labor and Employment

On November 28, 2016, the United States District Court for the Northern District of Texas refused to preliminarily enjoin implementation of the part of OSHA's new recordkeeping rule regarding post-accident drug testing and safety incentive programs. This part of the rule went into effect on December 1, 2016, as stated in our recent [OSHA alert](#).

OSHA has published [guidance](#) explaining these aspects of the rule. In the guidance, OSHA states that the language in the preamble of the recordkeeping rule that discusses disciplinary programs, mandatory drug testing policies, and safety incentive programs will not create new obligations on the employer. The guidance reminds employers that OSHA would still have to prove the elements of retaliation to show that any of these policies are unlawful. These three elements are: (1) the employee reported a work-related injury or illness; (2) the employer took adverse action against the employee (that is, action that would deter a reasonable employee from accurately reporting a work-related injury or illness); and (3) the employer took the adverse action because the employee reported a work-related injury or illness.

However, the guidance goes on to explain the scenarios in which a mandatory drug and alcohol testing policy or safety incentive program could present evidence of retaliation. For safety incentive programs, a benefit lost by the employee as the result of recording an injury or illness can be considered an adverse action if the "failure to receive the benefit could well dissuade a reasonable employee from reporting a work-related injury or illness." Thus, the elements of retaliation may not be particularly difficult to prove when a safety incentive program that rewards a low injury and illness rating is in place. Regarding drug and alcohol testing, OSHA explains that employers must have a rationale for drug testing beyond the occurrence of an accident or injury. Employers should document that rationale so as to prevent OSHA from arguing that an adverse action resulting from a positive drug test was a form of retaliation. The guidance also clarifies that state or federal law could require employers to drug test and those laws should still be followed. While the guidance states that these clarifications regarding enforcement of anti-retaliation provisions will not create new obligations on employers, employers are tasked with reviewing their policies to ensure compliance. It will ultimately be up to the Court to determine whether new obligations have been created, in which case these aspects of the rule would likely be enjoined.