

# Legal Alert: OSHA Reverses Itself on Post-Incident Drug Testing and Safety Incentive Programs

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OSHA released a Memorandum on October 16, 2018 revising its prior guidance on post-incident drug testing and safety incentive programs.

Last year, OSHA set conditions on drug testing employees who report injuries or illnesses. OSHA now says “most instances of workplace drug testing are permissible under 29 CFR 1904.35(b)(1)(iv),” including:

1. Random drug testing,
2. Drug testing unrelated to an injury or illness,
3. Drug testing under a state workers’ compensation law (the previous guidance said it had to be “required by” state law),
4. Drug testing under other federal law, such as a DOT rule, and
5. Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees. However, if an 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.

In addition, safety incentive programs are back on the table, and again allow what OSHA calls “rate-based” incentive programs, i.e., safety programs that reward employees with a prize or bonus at the end of an injury-free period of time, or reward a manager based on their work unit’s lack of injuries. Such programs are acceptable so long as they are not implemented in a manner that discourages reporting injuries or illnesses.

OSHA recommends that employers also implement programs that reward employees for reporting unsafe conditions, provide safety training programs for all employees, and implement “a mechanism for accurately evaluating employees’ willingness to report injuries and illnesses.” Under the new interpretation, employers still cannot withhold an incentive or perform post-incident drug testing in order “to penalize an employee for reporting a work-related injury or illness rather than for the legitimate purpose of promoting workplace safety and health.” OSHA’s current guidance confirms that anything in the prior guidance documents under the prior administration that can be construed as inconsistent with the current advisory is overridden by the current memorandum.

For more information, please visit the [OSHA website](#).

If you have questions, please contact one of MGC's [attorneys](#).

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