Workplace Injuries and Illnesses – Employee's right to report injuries and illnesses free from retaliation

On May 12, 2016, OSHA published a final rule that, among other things, makes explicit the longstanding requirement for employers to have a reasonable procedure for employees to report work-related injuries and illnesses, and incorporates explicitly, the existing prohibition on retaliating against employees for reporting work-related injuries.

The employer must establish a reasonable procedure for employees to report work-related injuries and illnesses. An employer's reporting procedure is reasonable if it is not unduly burdensome and would not deter a reasonable employee from reporting.

For example, it would be reasonable to require employees to report a work-related injury or illness as soon as practicable after realizing they have the kind of injury or illness they are required to report to the employer, such as the same or next business day when possible. However, it would not be reasonable to discipline employees for failing to report before they realize they have a work-related injury they are required to report or for failing to report "immediately" when they are incapacitated because of the injury or illness. A rigid prompt-reporting requirement that results in employee discipline for late reporting even when the employee could not reasonably have reported the injury or illness earlier would not be acceptable.

It would also be reasonable to require employees to report to a supervisor through reasonable means, such as by phone, email, or in person. However, it would not be reasonable to require ill or injured employees to report in person if they are unable to do so. Likewise, it would not be reasonable to require employees to take unnecessarily cumbersome steps or an excessive number of steps to report.

While employers have an interest in maintaining accurate records and ensuring that employees are reporting work-related injuries and illnesses in a reasonably prompt manner, these interests must be balanced with the importance of accurate injury reporting and therefore employers' reporting policies must be designed so as not to discourage employees from reporting. For a reporting procedure to be reasonable, and not unduly burdensome, it must allow for reporting of work-related injuries and illnesses within a reasonable timeframe after the employee has realized that he or she has suffered a recordable work-related injury or illness and in a reasonable manner.

To issue a citation under section 1904.35(b)(1)(iv), OSHA must have reasonable cause to believe that a violation occurred—in other words, that an employer retaliated against an employee for reporting a work-related injury or illness. To make this showing, OSHA must demonstrate the well-established elements of retaliation. In this context, those elements include:

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.

A. Discipline.

OSHA does not prohibit employers from disciplining employees who violate legitimate safety rules or reasonable reporting procedures. Rather, it prohibits disciplining employees simply because they report a work-related injury or illness.

OSHA will evaluate whether the employer had a legitimate business reason for the discipline or whether the rule was used as a pretext for disciplining the employee for reporting a work-related injury or illness. OSHA will consider factors such as the reasonableness of the rule; whether the employee had a reasonable basis for the deviation; whether the employer has a substantial interest in the rule and its enforcement; and whether the discipline imposed appears proportionate to the employer's interest in the rule.

B. Drug and Alcohol Testing.

OSHA does not prohibit employers from drug testing employees who report work-related injuries or illnesses so long as they have an objectively reasonable basis for testing, and the rule does not apply to drug testing employees for reasons other than injury-reporting. Moreover, OSHA will not issue citations for drug testing conducted under a state workers' compensation law or other state or federal law. Drug testing under state or federal law is acceptable. OSHA only prohibits drug testing employees for reporting work-related injuries or illnesses without an objectively reasonable basis for doing so. And, as in all cases, OSHA will need to establish the three elements of retaliation to prove a violation: a protected report of an injury or illness; adverse action; and causation.

When determining whether an employer has a reasonable basis for drug testing an employee who reported a work-related injury or illness**, the central question is whether the employer had a reasonable basis for believing that drug use by the reporting employee could have contributed to the injury or illness**. If so, it would be objectively reasonable to subject the employee to a drug test. **When OSHA evaluates the reasonableness of drug testing a particular employee who has reported a work-related injury or illness, it will consider factors including 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, and whether the employer has a heightened interest in determining if drug use could have contributed to the injury or illness due the hazardousness of the work being performed when the injury or illness occurred.

OSHA will only consider whether the drug test is capable of measuring impairment at the time the injury or illness occurred where such a test is available. Therefore, at this time, OSHA will consider this factor for tests that measure alcohol use, but not for tests that measure the use of any other drugs. The general principle here is that drug testing may not be used by the employer as a form of discipline against employees who report an injury or illness, but may be used as a tool to evaluate the root causes of workplace injuries and illness in appropriate circumstances.

Consider the example of a crane accident that injures several employees working nearby but not the operator. The employer does not know the causes of the accident, but there is a reasonable possibility that it could have been caused by operator error or by mistakes made by other employees responsible for ensuring that the crane was in safe working condition. In this scenario, it would be reasonable to require all employees whose conduct could have contributed to the accident to take a drug test, whether or not they reported an injury or illness. Testing would be appropriate in these circumstances because there is a reasonable possibility that the results of drug testing could provide

the employer insight on the root causes of the incident. However, if the employer only tested the injured employees but did not test the operator and other employees whose conduct could have contributed to the incident, such disproportionate testing of reporting employees would likely violate section 1904.35(b)(1)(iv).

Furthermore, drug testing an employee whose injury could not possibly have been caused by drug use would likely violate section 1904.35(b)(1)(iv). For example, drug testing an employee for reporting a repetitive strain injury would likely not be objectively reasonable because drug use could not have contributed to the injury. And, section 1904.35(b)(1)(iv) prohibits employers from administering a drug test in an unnecessarily punitive manner regardless of whether the employer had a reasonable basis for requiring the test.

C. Incentives.

OSHA does not prohibit safety incentive programs. Rather, it prohibits taking adverse action against employees simply because they report work-related injuries or illness. Withholding a benefit—such as a cash prize drawing or other substantial award—simply because of a reported injury or illness would likely violate section 1904.35(b)(1)(iv) regardless of whether such an adverse action is taken pursuant to an incentive program. Penalizing an employee simply because the employee reported a work-related injury or illness without regard to the circumstances surrounding the injury or illness is not objectively reasonable and therefore not a legitimate business reason for taking adverse action against the employee.

Consider the example of an employer promise to raffle off a $500 gift card at the end of each month in which no employee sustains an injury that requires the employee to miss work. If the employer cancels the raffle in a particular month simply because an employee reported a lost-time injury without regard to the circumstances of the injury, such a cancellation would likely violate section 1904.35(b)(1)(iv) because it would constitute adverse action against an employee simply for reporting a work-related injury.

However, conditioning a benefit on compliance with legitimate safety rules or participation in safety-related activities would not violate section 1904.35(b)(1)(iv). For example, raffling off a $500 gift card each month in which employees universally complied with legitimate workplace safety rules—such as using required hard hats and fall protection and following lockout-tagout procedures—would not violate the rule. Likewise, rewarding employees for participating in safety training or identifying unsafe working conditions would not violate the rule. On the contrary, OSHA encourages employers to find creative ways to incentivize safe work practices and accident-prevention measures that do not disproportionately penalize workers who report work-related injuries or illnesses. If OSHA determines that an employer withheld a benefit from an employee simply because the employee reported a work-related injury or illness without regard to the circumstances surrounding the injury or illness, OSHA may issue a citation under section 1904.35(b)(1)(iv).

Excerpts from: October 19, 2016 Memorandum for OSHA Regional Adminstrators

Interpretation of 1904.35(b)(1)(i) and (iv) Improve Tracking of Workplace Injuries and Illnesses – Employee's right to report injuries and illnesses free from retaliation and Injury Tracking and Use of Disciplinary, Incentive or Drug Testing Programs – J Wirth, Risk’Control360