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Risk Management Bulletin

October 2018

OSHA Update

Happy New Year from our friends at OSHA. It's that time of year when the new fiscal year starts for the Federal Government and with that, the tabulations for fines and citations are compiled for the past year.

Some highlights from the annual "Top 10 List" of leading citations from enforcement officers across the country. Fall related issues continue to be a major focus for OSHA. In fact, 7 of the top 10 citations for the past year are related to falls: Residential fall protection (1926.501 (b)(13); Training on fall hazards 1926.503(a)(1); Unprotected edges with fall exposure greater than 6 feet 1926.501(b)(1); Not being tied off on a lift 1926.453(b)(2)(v); No fall protection on scaffolding over 10 feet 1926.451.(g)(1); and No fall protection on low and steep sloped roofs 1926.501(b)(10)&(11). These fall related violations alone account for $50MM of the total fines in the past year.

Frequent inspections to detect hazards 1926.20(b)(2), Training on workplace hazards 1926.21(b)(2) and Failure to have a written safety program 1926.20(b)(1) are new to the list this year. These new entries to the top 10 indicate a bit of a shift in focus from OSHA toward addressing more administrative standards. This is an indicator that employers need to continue to address physical hazards, but also need to have the policies and procedures in place to provide the framework for a safe workplace.

There was also an added bonus this month. OSHA published a memo outlining their position on post-accident drug testing and incentive programs that helped clarify confusion created when the "Improve Tracking of Workplace Injuries and Illnesses" rule was published in 2016. Below are the key components to the memo. In general, this is good news for those conducting post-accident drug testing and with incentive programs.

OSHA MEMORANDUM:
Clarification of OSHA's Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under 29 C.F.R. § 1904.35(b)(1)(iv)

The purpose of this memorandum is to clarify the Department's position that 29 C.F.R. § 1904.35(b)(1)(iv) 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. In addition, evidence that the employer consistently enforces legitimate work rules (whether or not an injury or illness is reported) would demonstrate that the employer is serious about creating a culture of safety, not just the appearance of reducing rates. Action taken under a safety incentive program or post-incident drug testing policy would only violate 29 C.F.R. § 1904.35(b)(1)(iv) 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.

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.

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.

If you have questions about OSHA or other risk management issue, please drop me a note or call and I will be glad to assist.

THANKS

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