

OSHA

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Incentive programs, post-incident drug testing not prohibited under electronic recordkeeping rule: OSHA

Post-incident drug testing and safety incentive programs are not prohibited under the anti-retaliation provisions in OSHA's electronic recordkeeping rule, the agency clarified in an Oct. 11 memorandum sent to regional administrators and state designers.

As part of its Improve Tracking of Workplace Injuries and Illnesses final rule issued in May 2016, OSHA states in 29 CFR 1904.35(b)

(1)(iv) that employers "must not discharge or in any manner discriminate against any employee for reporting a work-related injury or illness."

In an October 2016 memo, OSHA explains that drug testing employees who report injuries or illnesses is prohibited unless an employer has an "objectively reasonable basis." In addition, the agency will "only consider whether the drug test is capable of measuring impairment at the time the injury or illness occurred,"



and will "consider this factor for tests that measure alcohol use," but not tests for drug use.

According to the 2016 regulation's preamble, "evidence in the rulemaking record shows that blanket post-incident drug testing policies deter proper reporting," and indicates employers might run afoul of the rule's anti-retaliation provisions with such actions.

The most recent memo outlines five examples of acceptable drug testing,

including the evaluation of "the root cause of a workplace incident that harmed or could have harmed employees." Under this circumstance, employers who choose to test for drugs should test "all employees whose conduct could have contributed to the incident, not just employees who reported injuries."

Other examples include random drug testing, testing unrelated to reporting an occupational injury or illness, testing

under state workers' compensation laws, and testing under other federal laws such as a Department of Transportation rule.

Incentives

Regarding incentive programs, the 2016 final rule cautions that such programs "might be well-intentioned efforts by employers to encourage their workers to use safe practices. However, if the programs are not structured carefully,

— article continues on p. 4

Fall Protection tops OSHA's annual 'Top 10' list of most frequently cited violations

Fall Protection – General Requirements is OSHA's most frequently cited standard for the eighth consecutive year, the agency and *Safety+Health* magazine announced Oct. 23 at the 2018 National Safety Council Congress & Expo in Houston.

Patrick Kapust, deputy director of OSHA's Directorate of Enforcement Programs, presented preliminary data for OSHA's Top 10 most-cited violations for fiscal year 2018, which ended Sept. 30. Kevin Druley, associate editor for *S+H*, moderated the session.

The top five violations remained unchanged for the fourth straight year, with Hazard Communication, Scaffolding, Respiratory Protection and

Lockout/Tagout following Fall Protection, respectively.

Eye and Face Protection emerged as a newcomer, ranking 10th.

"The Top 10 represents the most frequently cited standards, and they are a good place to start for the employer in identifying hazards in their own workplace," Kapust said during the presentation.

The full list:

1. Fall Protection – General Requirements (1926.501): 7,270 violations
2. Hazard Communication (1910.1200): 4,552
3. Scaffolding (1926.451): 3,336
4. Respiratory Protection (1910.134): 3,118
5. Lockout/Tagout (1910.147): 2,944

6. Ladders (1926.1053): 2,812
7. Powered Industrial Trucks (1910.178): 2,294
8. Fall Protection – Training Requirements (1926.503): 1,982
9. Machine Guarding (1910.212): 1,972
10. Eye and Face Protection (1926.102): 1,536

"Knowing how workers are hurt can go a long way toward keeping them safe," NSC President and CEO Deborah A.P. Hersman said in an Oct. 23 press release. "The OSHA Top 10 list calls out areas that require increased vigilance to ensure everyone goes home safely each day."

Look for updated data and exclusive content in the December issue of *S+H*.

OSHA ALLIANCES

The OSHA Alliance Program fosters collaborative relationships with groups committed to worker safety and health. Alliance partners help OSHA reach targeted audiences and give them better access to workplace safety and health tools and information. For more on OSHA alliances, go to osha.gov/dcspl/alliances/index.html.

Society for Maintenance and Reliability Professionals

Date of alliance: Oct. 11, 2018

OSHA and the Society for Maintenance and Reliability Professionals will work together to provide SMRP members and the public with information, guidance and access to outreach and training resources to help protect workers by reducing and preventing exposure to safety and health hazards in the maintenance, reliability and physical asset management profession, as well as promote an understanding of the rights of workers and the responsibilities of employers under the Occupational Safety and Health Act (OSH Act).

The goals of the alliance include:

Raising awareness of OSHA's rule-making and enforcement initiatives:

- Share information on OSHA's national initiatives (e.g., emphasis programs, regulatory agenda, outreach) and opportunities to participate in initiatives and the rulemaking process.
- Share information on occupational safety and health laws and standards, and guidance resources, including the rights and responsibilities of workers and employers.
- Speak, exhibit or appear at OSHA and SMRP conferences, local meetings, or other events, including SMRP's annual conference.
- Convene or participate in forums, roundtable discussions or stakeholder

meetings to help forge innovative solutions in the workplace or provide input on safety and health issues.

- Share information among OSHA personnel and industry safety and health professionals regarding the association's good practices or effective approaches through training programs, workshops, seminars and lectures (or any other applicable forum) developed by the participants.
- Collaborate with other alliance participants on specific issues and projects that reduce and prevent exposure to safety and health hazards in the maintenance, reliability and physical asset management profession.

More information on this alliance can be found at osha.gov/dcspl/alliances/smrp/smrp.html.



In Other News...

OSHA seeking nominations for NACOSH

OSHA is accepting nominations for its National Advisory Committee on Occupational Safety and Health.

According to a notice published in the Oct. 23 *Federal Register*, the 12-member committee advises, consults with and makes recommendations to the secretaries of labor and health and human services on matters relating to occupational safety and health. All members are appointed by the secretary of labor.

Because the terms for half of the committee members have expired and the others expire at the end of this year, OSHA is seeking nominations for all positions.

Committee members serve staggered terms. Accordingly, half of the appointees will be given two-year terms and the other half will serve three-year terms.

Nominations are due Dec. 24.

OSHA unveils new look for State Plans webpage

OSHA has redesigned its State Plans webpage to help simplify access to contact and jurisdictional information for each state, the agency announced Oct. 16 in its "Quick Takes" newsletter.

The revised page features a new color-coded, interactive U.S. map and numerous resource links, including one for safety and health standards and regulations.

Visitors can click on any state or territory to see whether it has a State Plan or is under federal jurisdiction. By clicking on a State Plan state, visitors activate a pop-up box that offers a brief overview on which workers are covered under the plan, contact information for the state office and a link to the full text of the plan.

The webpage is available at osha.gov/dcsp/osp.

OSHA STANDARD INTERPRETATIONS

OSHA requirements are set by statute, standards and regulations. Interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. Enforcement guidance may be affected by changes to OSHA rules.

Clarification of whether the handling of propane tanks is considered construction

Date of response: June 27, 2016

Standards: 1926.1400(c)(17)

Question 1: Section 1926.1400(c)(17)(i) states that when articulating/knuckle-boom truck cranes (truck cranes) are used to transfer materials from the truck crane to the ground, without arranging the materials in a particular sequence for hoisting, this activity would not be considered construction and therefore requirements of 29 CFR Part 1926 do not apply. Does this exemption include the delivery of propane containers?

Answer: Yes, OSHA included this exemption in the regulatory text of the cranes standard to clarify that OSHA's enforcement policy for materials delivered from articulating/knuckle-boom truck cranes is consistent with a broader enforcement policy that applies to materials delivered only to the ground at construction sites using any kind of equipment.

Question 2: When propane containers are delivered by truck cranes to newly constructed structures, particularly containers of 2,000 gallons or less in liquid capacity, they are lifted to only a height that is sufficient to clear the bed of the crane, set on the container's steel legs on the ground or a concrete pad, and are not hoisted again. In addition, the truck crane operator does not connect the containers to any system nor hold the container in place in support of any further activity, including connecting the containers to a structure (including the concrete pad on which the tanks are set). Is this handling of propane tanks an activity covered by the exclusion described in Question 1?

Answer: No. In a prior letter of interpretation, OSHA clarified that the positioning of burial vaults in an excavation (grave) is not a construction activity because the vaults are not part of, nor will be connected to, a system or structure being constructed/installed. Therefore, positioning the vault within the excavation is not essential to facilitate any construction work. In contrast, as you described, truck cranes are used to position propane containers in a particular area and orientation on an active construction site to facilitate the initial connection of the containers by another employer to newly constructed/installed propane systems. This activity is similar to positioning precast components in a particular place and orientation within excavations to facilitate connection to, and the construction of, a septic, sewer or water drainage system by another employer. Subsequently, initially placing propane containers on pads at a construction site as you describe is considered construction, and when truck cranes are used for this purpose, employers must comply with requirements of the crane standard. Please note that consideration of whether a work activity is covered by 29 CFR 1910 (OSHA's general industry standards) or 29 CFR 1926 (OSHA's construction standards) is based on a case-specific factual analysis.

Jeffrey A. Erskine, acting director
Directorate of Construction

Excerpted from osha.gov/laws-regs/standardinterpretations/2016-06-27.

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they have the potential to discourage reporting.”

Incentive programs that seek reductions in the number of injuries and illnesses reported, or rate-based programs, are permissible if they do not discourage reporting, OSHA states in the memo, adding that employers who withhold a prize because of an injury report are not in violation “as long as the employer has implemented adequate precautions to ensure that employees feel free to report an injury or illness.”

Further, “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.” Examples provided in the memo include:

- Incentive programs rewarding employees for identifying unsafe workplace conditions.
- Employee training programs that reinforce reporting rights and responsibilities and emphasize an organization's anti-retaliation policy.

- Taking steps to accurately evaluate workers' willingness to report injuries and illnesses.

In a post on his “Confined Space” blog, former OSHA Deputy Assistant Secretary Jordan Barab questioned how that would work, providing a possible scenario.

“A worker suffers a serious cut on his hand while working on an unguarded machine the day before the lottery for a new riding mower ends,” Barab wrote. “Fearing that his co-workers will hate him for causing them to lose a chance for the prize, he sticks his bloody hand in his pocket and heads to the local urgent care to have it sewed up, telling them that he did it while working on his car.”

“Even if OSHA finds out that the incentive program caused the worker to hide the injury, the employer is now home free if there was also a program that rewarded workers for attending safety meetings that identify unsafe conditions in the workplace.”

Read the Oct. 11 memo at [osha.gov/laws-regs/standardinterpretations/2018-10-11](https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11).

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