

OSHA'S NEW SAFETY INCENTIVE RULES

by

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I. OSHA'S NEW ACCIDENT REPORTING RULES

A. Overview of New Rule

Thousands of employers implement post-accident drug and alcohol testing policies to promote workplace safety. However, the legal landscape shifted on May 12, 2016, when the Occupational Safety and Health Administration published its **final rule** on electronic reporting of workplace injuries and illnesses.

Specifically, effective 90 days after publication of the rule, on August 10, 2016, employers must establish “**a reasonable procedure**” for employees to report work-related injuries and illnesses promptly and accurately. **The rule prohibits this procedure from deterring or discouraging a reasonable employee from accurately reporting a workplace injury or illness.**

The rule also prohibits any retaliation for reporting an injury or illness.

This new rule became effective **DECEMBER 1, 2016.**

The National Association of Manufacturers (NAM), along with other organizations, filed the challenge against OSHA's electronic record-keeping rule. The coalition has asked the court to declare that the rule is unlawful because it prohibits or otherwise limits incident-based employer safety incentive programs and/or routine mandatory post-accident drug testing programs.

More specifically, OSHA's new a final rule that amended 29 C.F.R. 1904.35 to add two new provisions:

- Section 1904.35(b)(1)(i) makes explicit the longstanding requirement for employers to have a reasonable procedure for employees to report work-related injuries and illnesses, and
- Section 1904.35 (b)(1)(iv) incorporates explicitly into Part 1904 the existing prohibition on retaliating against employees for reporting work-related injuries or illnesses under section 11(c) of the OSH Act, 29 U.S.C. § 660(c).

B. Safety Incentives

OSHA says Section 1904.35(b)(1)(iv) does not prohibit safety incentive programs.

Instead, according to OSHA, it does prohibit taking any adverse action against employees simply because they report work-related injuries or illness. Withholding a benefit, such as a cash prize drawing or any other substantial award, simply because an employee reported an 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 considering 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.

OSHA then gave the example of where an employer promises to raffle off a \$500.00 gift card at the end of each month if 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 also considering the circumstances of the injury, such as the cause of the accident, this would likely violate section 1904.35(b)(1)(iv) because it would constitute adverse action against an employee for reporting a work-related injury ... not for violating a safety rule.

However, OSHA says if an employer conditions the raffle on complying with legitimate safety rules or participating in safety-related activities for that month, that would not violate section 1904.35(b)(1)(iv).

In this previous example, suppose an employer raffles off a \$500.00 gift card each month if all of the employees have universally complied with legitimate workplace safety rules, such as using required hard hats, 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 other hand, 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 also considering the circumstances surrounding the injury or illness, OSHA may issue a citation under section 1904.35(b)(1)(iv).

WHAT DOES THIS MEAN TO HR?

Penalizing employees for not following safety rules or for not attending safety training or events is permissible under OSHA. However, penalizing employees for having an accident or for missing work due to an accident will most likely be an OSHA violation.

Notice: Legal Advice Disclaimer

The purpose of these materials is not to act as legal advice but is intended to provide human resource professionals and their managers with a general overview of some of the more important employment and labor laws affecting their departments. The facts of each instance vary to the point that such a brief overview could not possibly be used in place of the advice of legal counsel.

Also, every situation tends to be factually different depending on the circumstances involved, which requires a specific application of the law.

Additionally, employment and labor laws are in a constant state of change by way of either court decisions or the legislature.

Therefore, whenever such issues arise, the advice of an attorney should be sought.



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Business First's 20 People To Know In HR

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Scott Warrick combines the areas of law and human resources to assist organizations in **"Solving Employee Problems BEFORE They Happen."** Scott uses his unique background of **LAW** and **HUMAN RESOURCES** to help organizations get where they want to go, which includes coaching and training managers and employees in his own unique, practical, entertaining and humorous style.

[Scott Trains Managers and Employees ON-SITE in over 50 topics](#)

Scott's book,
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is a favorite among HR professionals and students.

Scott's academic background and awards include:

Capital University College of Law (Class Valedictorian (1st out of 233))

Master of Labor & Human Resources and B.A. in Organizational Communication:
The Ohio State University

The Human Resource Association of Central Ohio's Linda Kerns Award for Outstanding Creativity in the Field of Human Resource Management and the Ohio State Human Resource Council's David Prize for Creativity in Human Resource Management

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