OSHA’s Revised Recordkeeping Rule, and Post-Incident Drug Test Issue

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Overview OSHA Recordkeeping Standards, Policies, Drug Testing

OSHA Recordkeeping Revisions

Revisions

Revisions
Public Law 91-596
91st Congress, S. 2193
December 29, 1970
As amended by Public Law 101-552, §5101, November 5, 1990

An Act

To assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act; by assisting and encouraging the States in their efforts to assure safe and healthful working conditions; by providing for research, information, education, and training in the field of occupational safety and health; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Occupational Safety and Health Act of 1970."

CONGRESSIONAL FINDINGS AND PURPOSE

SEC. (2) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—

(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

(2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

(3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under the Act;

(4) by building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;

(5) by providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;

(6) by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;

(7) by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

(8) by providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;
Law, 91-596, OSH Act (in the United States Code)

Standards/Regulations

Policy: Instruction/Notice
(CPL 02-00-159 Effective Date: October 1, 2015, Subject: Field Operations Manual (FOM))

Letters of Interpretation, Memorandums, Guidance, …
Recordkeeping

2 Sections of the Occupational Safety and Health Act

Section 8 Inspections, Investigations, and Recordkeeping

Section 24 Statistics
(c)(1) Each employer shall make, keep and preserve, and make available to the Secretary or the Secretary of Health and Human Services, such records regarding his activities relating to this Act ..., may prescribe by regulation as necessary or appropriate for the enforcement of this Act or for developing information regarding the causes and prevention of occupational accidents and illnesses...
29 CFR 1904 is a regulation
(c)(1) ... The Secretary shall also issue regulations requiring that employers, through posting of notices or other appropriate means, keep their employees informed of their protections and obligations under this Act, including the provisions of applicable standards ...
(a) In order to further the purposes of this Act, the Secretary, in consultation with the Secretary of Health and Human Services, shall develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics.
(a) ... The Secretary shall compile **accurate** statistics on work injuries and illnesses which shall include all **disabling**, **serious**, or **significant** injuries and illnesses, whether or not involving loss of time from work, other than minor injuries requiring only **first aid treatment** and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job. ...
(e) On the basis of the records made and kept pursuant to section 8(c) of this Act, employers shall file such reports with the Secretary as he shall prescribe by regulation, as necessary to carry out his functions under this Act.
29 CFR 1904

Subpart C
Recordkeeping Forms and Recording Criteria

36 FR 12612  July 2  1971
29 CFR 1904

January 19, 2001
Effective January 1, 2002

Standard is written in Question and Answer Format
### NPRM  Notice of Public Rule Making

#### 2015 Fall Semi-annual Regulatory Agenda

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From January 19, 2001
to
May 20, 2016
Improve Tracking of Workplace Injuries and Illness Clarification of Employer's Continuing Obligation To Make and Maintain an Accurate Record of Each Recordable Injury and Illness

Occupational Injury and Illness Recording and Reporting Requirements

Modernization of OSHA’s Injury and Illness Data Collection Process

Supplemental Notice Of Proposed Rulemaking
Improve Tracking of Workplace Injuries and Illnesses

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Final Rule

Effective on January 1, 2017, except 1904.35 and 1904.36, which become effective on August 10, 2016
Federal Register Vol. 81, No. 98
May 20, 2016
ACTION: Final Rule; CORRECTION

Occupational Safety and Health Administration
29 CFR Parts 1902; 1904
[Docket No. OSHA–2013–0023]
RIN 1218–AC49

Improve Tracking of Workplace Injuries and Illnesses

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.
Need for Correction

Inadvertently **1904.35(b)(2)**

Was designated as reserved.

This document reinserts that paragraph
1904.35(b)(2) Do I have to give my employees and their representatives access to the OSHA injury and illness records? Yes, your employees, former employees, their personal representatives, and their authorized employee representatives have the right to access the OSHA injury and illness records, with some limitations, as discussed below.

(i) Who is an authorized employee representative? An authorized employee representative is an authorized collective bargaining agent of employees.

(ii) Who is a "personal representative" of an employee or former employee? A personal representative is:
(A) Any person that the employee or former employee designates as such, in writing; or
(B) The legal representative of a deceased or legally incapacitated employee or former employee.

(iii) If an employee or representative asks for access to the OSHA 300 Log, when do I have to provide it? When an employee, former employee, personal representative, or authorized employee representative asks for copies of your current or stored OSHA 300 Log(s) for an establishment the employee or former employee has worked in, you must give the requester a copy of the relevant OSHA 300 Log(s) by the end of the next business day.

(iv) May I remove the names of the employees or any other information from the OSHA 300 Log before I give copies to an employee, former employee, or employee representative? No, you must leave the names on the 300 Log. However, to protect the privacy of injured and ill employees, you may not record the employee’s name on the OSHA 300 Log for certain "privacy concern cases," as specified in Sec. 1904.29(b)(6) through (9).

(v) If an employee or representative asks for access to the OSHA 301 Incident Report, when do I have to provide it? (A) When an employee, former employee, or personal representative asks for a copy of the OSHA 301 Incident Report describing an injury or illness to that employee or former employee, you must give the requester a copy of the OSHA 301 Incident Report containing that information by the end of the next business day.

(B) When an authorized employee representative asks for copies of the OSHA 301 Incident Reports for an establishment where the agent represents employees under a collective bargaining agreement, you must give copies of those forms to the authorized employee representative within 7 calendar days. You are only required to give the authorized employee representative information from the OSHA 301 Incident Report section titled "Tell us about the case." You must remove all other information from the copy of the OSHA 301 Incident Report or the equivalent substitute form that you give to the authorized employee representative.

(vi) May I charge for the copies? No, you may not charge for these copies the first time they are provided. However, if one of the designated persons asks for additional copies, you may assess a reasonable charge for retrieving and copying the records.
1904.35(b)(2) Do I have to give my employees and their representatives access to the OSHA injury and illness records?
Yes, your employees, former employees, their personal representatives, and their authorized employee representatives have the right to access the OSHA injury and illness records, with some limitations, …
ACTION: Final Rule;

Clarification of Employer's Continuing Obligation To Make and Maintain an Accurate Record of Each Recordable Injury and Illness Effective January 18, 2017

Revised Sections
1904.0, 4, 29, 32, 33, 34, 35, 40
ACTION: Final Rule; Clarification of Employer's Continuing Obligation To Make and Maintain an Accurate Record of Each Recordable Injury and Illness Effective January 18, 2017

REVISED

1904.0 Purpose.
1904.4 Recording criteria.
1904.29(b)(3) Forms
1904.32 Year-end review and annual summary
1904.33 Retention and maintenance of accurate records
1904.34 Change in business ownership.
1904.35 Employee involvement.
1904.40 Providing accurate records to government representatives
ACTION: Final Rule;
Clarification of Employer's Continuing Obligation To Make and Maintain an Accurate Record of Each Recordable Injury and Illness Effective January 18, 2017

Need

... to clarify that the duty to make and maintain accurate records of work-related injuries and illnesses is an ongoing obligation...
REVISED
1904.0  The purpose of this rule (part 1904) is to require employers to make and maintain accurate records of and report work-related fatalities, injuries, and illnesses, and to make such records available to the Government and to employees and their representatives so that they can be used to secure safe and healthful working conditions. For purposes of this part, accurate records are records of each and every recordable injury and illness that are made and maintained in accordance with the requirements of this part.
REVISED

1904.0 The purpose of this rule (part 1904) is to require employers to make and maintain accurate records of and report work-related fatalities, injuries, and illnesses, and to make such records available to the Government and to employees and their representatives so that they can be used to secure safe and healthful working conditions. For purposes of this part, accurate records are records of each and every recordable injury and illness that are made and maintained in accordance with the requirements of this part.
(a) Basic requirement. Each employer required by this part to keep records of fatalities, injuries, and illnesses must record each fatality, injury, and illness that:

(1) Is work-related; and
(2) Is a new case; and
(3) Meets one or more of the general recording criteria of §1904.7 or the application to specific cases of §1904.8 through §1904.12
1904.35(b)(2) Do I have to give my employees and their representatives access to the OSHA injury and illness records?
Yes, your employees, former employees, their personal representatives, and their authorized employee representatives have the right to access **accurate** OSHA injury and illness records, with some limitations, as discussed below.
Supplemental Notice of Proposed Rulemaking

Improve Tracking of Workplace Injuries and Illnesses

Of the 18 questions 5 main questions address Adverse action or discipline that may discourage an employee from reporting and injury or illness.

In this group is the mention of drug testing.
The drug testing discussion lead-in is:

Adverse actions mentioned by participants in the public meeting (January 09–10, 2014) included … requiring employees who reported an injury to undergo drug testing where there was no reason to suspect drug use, …
A question in this "adverse action" group is:

Are you aware of employer practices or policies to take adverse action against persons who report injuries or illnesses? Please describe them?
Are you aware of any particular situations where an employee decided not to report an injury or illness to his or her employer because of a fear that the employer would take adverse action against the employee? If so, please describe the situation, including the nature of the injury or illness and the reasons the employee had for believing he or she would be retaliated against.
A question in this "adverse action" group is:

What kinds of adverse actions might lead an employee to decide not to report an injury or illness? Are there other employer actions that would not dissuade a reasonable employee from reporting an injury or illness?
A question in this "adverse action" group is: OSHA encourages employers to enforce safety rules as part of a well-functioning workplace safety program. Are there any employer practices that OSHA should explicitly exclude under this provision to ensure that employers are able to run an effective workplace safety program?
A question in this "adverse action" group is:

OSHA encourages employers to enforce safety rules as part of a well-functioning workplace safety program. Are there any employer practices that OSHA should explicitly exclude under this provision to ensure that employers are able to run an effective workplace safety program?
A question in this "adverse action" group is:

What other actions can OSHA take to address the issue of employers who discourage employees from reporting injuries and illnesses?
OSHA received a number of comments expressing concern that this section of the final rule will have a chilling effect on employers disciplining employees who violate safety rules, thereby contributing to a less safe work environment. It is important to note that the final rule prohibits employers only from taking adverse action against an employee because the employee reported an injury or illness.
Effective on January 1, 2017, Except 1904.35 and 1904.36, which become effective on August 10, 2016

It is important to note that the final rule prohibits employers only from taking adverse action against an employee because the employee reported an injury or illness. Nothing in the final rule prohibits employers from disciplining employees for violating legitimate safety rules, even if the same employee who violated a safety rule also was injured as a result of that violation and reported that injury or illness (provided that employees who violate the same work rule are treated similarly without regard to whether they also reported a work-related illness or injury).
Nothing in the final rule prohibits employers from disciplining employees for violating legitimate safety rules, even if the same employee who violated a safety rule also was injured as a result of that violation and reported that injury or illness (provided that employees who violate the same work rule are treated similarly without regard to whether they also reported a work-related illness or injury)…
... Nothing in the final rule prohibits employers from disciplining employees for violating legitimate safety rules, even if the same employee who violated a safety rule also was injured as a result of that violation and reported that injury or illness (provided that employees who violate the same work rule are treated similarly without regard to whether they also reported a work-related illness or injury)…
Commenter's also pointed to policies mandating automatic post-injury drug testing as a form of adverse action that can discourage reporting. See, … Exs 1675, 1695. Although drug testing of employees may be a reasonable workplace policy in some situations, it is often perceived as an invasion of privacy, so if an injury or illness is very unlikely to have been caused by employee drug use, or if the method of drug testing does not identify impairment but only use at some time in the recent past, requiring the employee to be drug tested may inappropriately deter reporting.
Commenter’s also pointed to policies mandating automatic post-injury drug testing as a form of adverse action that can discourage reporting. See, e.g., Exs. 1675, 1695. Although drug testing of employees may be a reasonable workplace policy in some situations, it is often perceived as an invasion of privacy, so if an injury or illness is very unlikely to have been caused by employee drug use, or if the method of drug testing does not identify impairment but only use at some time in the recent past, requiring the employee to be drug tested may inappropriately deter reporting …
so if an injury or illness is very unlikely to have been caused by employee drug use, or if the method of drug testing does not identify impairment but only use at some time in the recent past, requiring the employee to be drug tested may inappropriately deter reporting...
Some commenter's stated their belief that drug testing of employees is important for a safe workplace;
...Post-accident drug testing is a critical part of any satisfactory company safety and health program.

... purpose of protecting all workers on the jobsite, not just the would-be users.

[sic Also], being found under the influence of a drug following post-accident testing is often all it takes to prompt an affected employee to seek help through an employee assistance program or some other source...
... some [sic Commenter's] expressed concern that OSHA planned a wholesale ban on drug testing (Exs. 1667, 1674) ...
... To the contrary, this final rule does not ban drug testing of employees...
OSHA believes the evidence in the rulemaking record shows that blanket post-injury drug testing policies deter proper reporting ...
... this final rule does not ban drug testing of employees ...
However, the final rule does prohibit employers from using drug testing (or the threat of drug testing) as a form of adverse action against employees who report injuries or illnesses.
... Employers need not specifically suspect drug use before testing, but there should be a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness in order for an employer to require drug testing...
… An employee was operating a powered industrial truck (a "walkie"). Her foot became jammed between the walkie and a pallet and her steel toed shoe bent and cut the top of her toe. She received four stitches for the laceration. At the time of the incident, the employee was taking prescription medication for a non-work related condition…
... Section 1904.5(a) states, [the employer] must consider an injury or illness to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition ...
The injury described in your scenario resulted from operation of workplace equipment. ...
... Under Section 1904.5(b)(2)(ii), ... an event or exposure in the work environment can play no part in the injury. The facts of your scenario do not meet this exception because the injury described resulted from operation of workplace equipment ...
... the exemption to work relatedness under Section 1904.5(b)(2)(vi) would not apply for the same reason. Under Section 1904.5(b)(2)(vi) you are not required to record an injury or illness if the injury or illness is solely the result of self-medication for a non-work-related condition...

[sic HAS TO BE RECORDED]
... At the time of the incident, the employee was taking prescription medication for a non-work related condition...

HAS TO BE RECORDED
1904.5(b)(2)  Exceptions to 'Work-Related'

Are there situations where an injury or illness occurs in the work environment and is not considered work-related?

Yes, an injury or illness occurring in the work environment that falls under one of the following exceptions is not work-related, and therefore is not recordable.
(ii) The injury or illness involves signs or symptoms that surface at work but result solely from a non-work-related event or exposure that occurs outside the work environment.

(vi) The injury or illness is solely the result of personal grooming, self medication for a non-work-related condition, or is intentionally self-inflicted.
...his hand was caught between two objects. After receiving treatment for the injury, the employee was immediately given a post-accident drug test. The results of the drug test indicated the employee was intoxicated from alcohol ...

Letter of Interpretation  March 21, 2016

…OSHA's Office of Occupational Medicine and Nursing … concluded that the intake of alcohol does not treat the disorder of alcoholism. Instead, drinking alcohol is a manifestation of the disorder. Accordingly, the injury described in the scenario above does not meet the exception in Section 1904.5(b)(2)(vi) for self-medication.
...drinking alcohol is a manifestation of the disorder. Accordingly, the injury described in the scenario above does not meet the exception [sic for work related] in 1904.5(b)(2)(vi) for self-medication.

Has to Be Recorded

Letter of Interpretation  March 21, 2016
278

Letters of Interpretation from October 29, 2001 to September 12, 2016
...commenter's also raised the concern that the final rule will conflict with drug testing requirements contained in workers' compensation laws ... If an employer conducts drug testing to comply with the requirements of a state or federal law or regulation, the employer's motive would not be retaliatory and the final rule would not prohibit such testing ... Section 4(b)(4) of the Act prohibits OSHA from superseding or affecting workers' compensation laws...
...If an employer conducts drug testing to comply with the requirements of a state or federal law or regulation, the employer's motive would not be retaliatory and the final rule would not prohibit such testing ...

Section 4(b)(4) of the Act prohibits OSHA from superseding or affecting workers' compensation laws...
... However, the final rule does prohibit employers from using drug testing (or the threat of drug testing) as a form of adverse action against employees who report injuries or illnesses ...
Section 11 Judicial Review

Paragraph (c)

11c
SEC. 11c Judicial Review
(c) (1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act ...
SEC. 11c Judicial Review

(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.
(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. …
January 2001 1904.36
Prohibition against discrimination.

Section 11(c) of the Act prohibits you from discriminating against an employee for reporting a work-related fatality, injury or illness. That provision of the Act also protects the employee who files a safety and health complaint, asks for access to the Part 1904 records, or otherwise exercises any rights afforded by the OSH Act.

May 12, 2016 1904.36
Prohibition against discrimination.

In addition to §1904.35, section 11(c) of the OSH Act also prohibits you from discriminating against an employee for reporting a work-related fatality, injury, or illness. That provision of the Act also protects the employee who files a safety and health complaint, asks for access to the part 1904 records, or otherwise exercises any rights afforded by the OSH Act.
(a) Basic requirement. Your employees and their representatives must be involved in the recordkeeping system in several ways.

(a)(1) You must inform each employee of how he or she is to report a work-related injury or illness to you.

(a)(2) You must provide limited access to your injury and illness records for your employees and their representatives.

(a)(1) You must inform each employee of how he or she is to report a work-related injury or illness to you.

(a)(2) You must provide employees with the information described in paragraph (b)(1)(iii) of this section.
(a)(2) You must provide limited access to your injury and illness records for your employees and their representatives.

(a)(3) You must provide access to your injury and illness records for your employees and their representatives as described in paragraph (b)(2) of this section.

(a)(2) You must provide employees with the information described in paragraph (b)(1)(iii) of this section.
You must establish a reasonable procedure for employees to report work-related injuries and illnesses promptly and accurately. A procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness;
(b)(1)(ii) You must inform each employee of your procedure for reporting work-related injuries and illnesses;

(b)(1)(iii) You must inform each employee that:

(b)(1)(iii) (A) Employees have the right to report work-related injuries and illnesses; and ...
How to Inform
Federal Register Vol. 81, No. 92, May 12, 2016, Final Rule
Preamble p 29688
...inform...employees of their right to report injuries and illnesses.
This requirement can be met by posting a recently-revised version of the OSHA Poster...

May 12, 2016  1904.35
(b)(1)(ii) You must inform each employee of your procedure for reporting work-related injuries and illnesses;
(b)(1)(iii) You must inform each employee that:
(b)(1)(iii) (A) Employees have the right to report work-related injuries and illnesses; and ...
All workers have the right to:

- A safe workplace.
- Raise a safety or health concern with your employer or OSHA, or report a work-related injury or illness, without being retaliated against.
- Receive information and training on job hazards, including all hazardous substances in your workplace.
- Request an OSHA inspection of your workplace if you believe there are unsafe or unhealthy conditions. OSHA will keep your name confidential. You have the right to have a representative contact OSHA on your behalf.
- Participate (or have your representative participate) in an OSHA inspection and speak in private to the inspector.
- File a complaint with OSHA within 30 days (by phone, online or by mail) if you have been retaliated against for using your rights.
- See any OSHA citations issued to your employer.
- Request copies of your medical records, tests that measure hazards in the workplace, and the workplace injury and illness log.

This poster is available free from OSHA.

Employers must:

- Provide employees a workplace free from recognized hazards. It is illegal to retaliate against an employee for using any of their rights under the law, including raising a health and safety concern with you or with OSHA, or reporting a work-related injury or illness.
- Comply with all applicable OSHA standards.
- Report to OSHA all work-related fatalities within 8 hours, and all inpatient hospitalizations, amputations and losses of an eye within 24 hours.
- Provide required training to all workers in a language and vocabulary they can understand.
- Prominently display this poster in the workplace.
- Post OSHA citations at or near the place of the alleged violations.

FREE ASSISTANCE to identify and correct hazards is available to small and medium-sized employers, without citation or penalty, through OSHA-supported consultation programs in every state.
if OSHA determines that the employer has not posted the poster and has not otherwise informed employees… CSHO will provide the employer a copy of the poster. If the employer posts the poster, immediate abatement is accomplished and no citation will be issued. If the employer does not post the poster, a citation may be issued.
(b)(1)(iii) (B) Employers are prohibited from discharging or in any manner discriminating against employees for reporting work-related injuries or illnesses; and

(b)(1)(iv) You must not discharge or in any manner discriminate against any employee for reporting a work-related injury or illness.
OSHA's Recordkeeping Rule [sic 1904] gives employees the right to report work-related illnesses such as CBD or other beryllium-related health effects, and Section 1904.35(b)(1)(iv) of that rule prohibits retaliation against employees for reporting these health effects...
new provision 1904.35(b)(1)(iv) is that it provides OSHA with additional enforcement tools to promote the accuracy and integrity of the injury and illness records employers are required to keep under part 1904. For example, under section 11(c), OSHA may not act against an employer unless an employee files a complaint...
… [sic New]1904.35(b)(1)(iv)…
OSHA will be able to cite an employer for taking adverse action against an employee for reporting an injury or illness, even if the employee did not file a complaint [sic 11c complaint] …
… [sic New] 1904.35(b)(1)(iv)… citations can result in orders requiring employers to abate violations, which may be a more efficient tool to correct employer policies and practices than the remedies authorized under section 11(c), which are often employee-specific…
11c
(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.
... [sic New] 1904.35(b)(1)(iv)...
citations can result in orders requiring employers to abate violations, which may be a more efficient tool to correct employer policies and practices than the remedies authorized under section 11(c), which are often employee-specific...
1910.1020
Access to Employee Exposure and Medical Records

1910.1020 (c)(6)(i)(F)
Employee medical complaints
If an employee is medically removed under the medical surveillance requirements of an OSHA standard, you must record the case on the OSHA 300 Log…
1910.1020 Access to Employee Exposure and Medical Records

(c)(6)(ii) “Employee medical record” does not include medical information in the form of:

1020 (c)(6)(ii)(D) Records concerning voluntary employee assistance programs (alcohol, drug abuse, or personal counseling programs) if maintained separately from the employer's medical program and its records...
POLICY

OSHA Instruction CPL 02-00-160
Effective Date: August 2, 2016
Subject: Field Operations Manual (FOM)

No mention of Drug Testing

Policymaking

OSHA Instruction CPL 02-00-160
Effective Date: August 2, 2016
Subject: Field Operations Manual (FOM)

Chapter 3 Inspection Procedures

VI. Review Of Records

Chapter 4 Violations
Chapter 9 Complaint and Referral Processing
Chapter 10 section II-Construction (Reserved)

Chapter 3 INSPECTIONS III. B. 2. CSHOs shall use established written guidelines and criteria, such as Agency directives and LEPs, in conjunction with information gathered during the records or program review and walkthrough inspection, to determine whether expanding the scope of an inspection is warranted.
September 30, 2015

SUBJECT: Enforcement Weighting System (EWS)

...The values in the Enforcement Weighting System are calculated using reports of time and resources devoted to inspection or investigation activity...

...inspection resources on more complex, strategic, and impactful enforcement activity...
POLICY

September 30, 2015

SUBJECT: Enforcement Weighting System (EWS)

...inspection resources on more complex, strategic, and impactful enforcement activity...

- 8 EUs-Significant Cases
- 7 EUs-Process Safety Management Inspections
- 5 EUs-Ergonomic Hazard Inspections
- 4 EUs-Heat Hazard Inspections
- 3 EUs-Non-PEL Exposure Hazard Inspections
- 3 EUs-Workplace Violence Hazard Inspections
- 3 EUs-Fatality / Catastrophe Inspections
- 2 EUs-Personal Sampling Inspections
- 2 EUs-Federal Agency Inspections
- 2 EUs-Combustible Dust Inspections
- 1/9 EUs-Non-formal Complaint Investigations
- 1/9 EUs-Rapid Response Investigations
Chapter 4 VIOLATIONS. B. 4. c. 
All relevant documents (e.g., autopsy reports, police reports, job specifications, site plans, OSHA-300/301, equipment manuals, employer work rules, employer sampling results, employer safety and health programs, and employer disciplinary policies).

...Vague work rules are particularly subject to abuse by the employer ...

...vague work rules such as work carefully or maintain situational awareness ...

...
other Vague Phrases could be:

… avoid hazards or maintain interest in safety …
...Vague work rules are particularly subject to abuse by the employer... such as work carefully or maintain situational awareness...

...legitimate workplace safety rule should require or prohibit specific conduct related to employee safety or health so it can be applied fairly and not used as a pretext for retaliation...
Don't Operate Machinery Unless Guards Are In Place
(a) At the start of each inspection, the CSHO shall review the employer’s injury and illness records for five prior calendar years, record the information on a copy of the OSHA-300 screen, and enter the employer’s data using the OIS Application on the NCR (micro). This shall be done for all general industry, construction, maritime, and agriculture inspections and investigations.
Improve Tracking of Workplace Injuries and Illnesses

…OSHA is proposing to amend its recordkeeping regulations to add requirements for the electronic submission of injury and illness information employers are already required to keep under OSHA’s regulations for recording and reporting occupational injuries and illnesses.
Of the 18 main questions one asked Will the fact that employer injury and illness statistics will be publically available on the internet cause some employers to discourage their employees from reporting injuries and illnesses? Why or why not? If so, what practices or policies do you expect such employers to adopt?
Statement of Need:
The collection of establishment specific injury and illness data in electronic format on a timely basis is needed to help OSHA, employers, employees, researchers, and the public more effectively prevent workplace injuries and illnesses, as well as support President Obama's Open Government Initiative to increase the ability of the public to easily find, download, and use the resulting dataset generated and held by the Federal Government.
There is little or no expectation of privacy in records that are required by the government to be kept and made available. The requirement serves a substantial government interest in the health and safety of workers, has a strong statutory basis, and rests on reasonable, objective criteria for determining which employers must report information to OSHA.
Final Rule

1904.41
Electronic Submission
of Injury And Illness Records to
OSHA
VI. A. 5. Construction.
For construction inspections/investigations, only the OSHA-300 information for the prime/general contractor needs to be recorded (where such records exist and are maintained).

It will be left to the discretion of the Area Director or the CSHO as to whether OSHA-300 data should also be recorded for any of the subcontractors.
VIII. Closing Conference.
B. 3. CSHOs shall discuss the strengths and weaknesses of the employer’s occupational safety and health system and any other applicable programs, and advise the employer of the benefits of an effective program and provide information, such as OSHA’s website, describing program elements.
X. Penalty and Citation Policy for Parts 1903 and 1904 Regulatory Requirements

D. Injury and Illness Records and Reporting under Part 1904

1. Part 1904 violations are always other-than-serious

<table>
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<tr>
<th>Maximum Amount</th>
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<td>Other-Than-Serious</td>
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<td>$12,471 per violation</td>
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Expected Penalty for 1904.35(i)to(iv)$5345

OSHA MEMORANDUM Regional Administrators
State Designees **November 10, 2016** "Interim Enforcement Procedures for New Recordkeeping Requirements Under 29 CFR 1904.35"
Department of Labor Federal Civil Penalties Inflation Adjustment Act
Annual Adjustments for 2017

Other-Than-Serious

From 12,471 to 12,675
(c) If recordkeeping deficiencies or unsound employer safety incentive policies are discovered, the CSHO and the Area Director (or designee) may request assistance from the Regional Recordkeeping Coordinator. See Richard E. Fairfax Memo, Employer Safety Incentive and Disincentive Policies and Practices (March 12, 2012) at: http://www.osha.gov/as/opa/whistleblowermemo.html.
OSHA Memorandum for Regional Administrators, Whistleblower Program Managers

March 12, 2012

Employer Safety Incentive and Disincentive Policies and Practices

https://www.osha.gov/as/opa/whistleblowermemo.html
… In investigating such cases, factors such as the following may be considered: whether the employee's deviation from the procedure was minor or extensive, inadvertent or deliberate, whether the employee had a reasonable basis for acting as he or she did, whether the employer can show a substantial interest in the rule and its enforcement, and whether the discipline imposed appears disproportionate to the asserted interest. Again, where the employer's reporting requirements are unreasonable, unduly burdensome, or enforced with unjustifiably harsh sanctions, they may result in inaccurate injury records, …
In investigating such cases, factors such as the following may be considered: whether the employee's deviation from the procedure was minor or extensive, inadvertent or deliberate, whether the employee had a reasonable basis for acting as he or she did, whether the employer can show a substantial interest in the rule and its enforcement, and whether the discipline imposed appears disproportionate to the asserted interest. Again, where the employer's reporting requirements are unreasonable, unduly burdensome, or enforced with unjustifiably harsh sanctions, they may result in inaccurate injury records, ...
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... Incentive programs that discourage employees from reporting their injuries are problematic because, under section 11(c), an employer may not "in any manner discriminate" against an employee because the employee exercises a protected right, such as the right to report an injury...
... If an employee of a firm with a safety incentive program reports an injury, the employee, or the employee's entire work group, will be disqualified from receiving the incentive, which could be considered unlawful discrimination. ...
... if the incentive is great enough that its loss dissuades reasonable workers from reporting injuries, the program would result in the employer's failure to record injuries that it is required to record under Part 1904......a referral for a recordkeeping investigation should be made ...
If OSHA determines that the real reason for the discipline was the report of an injury or illness, OSHA may issue a citation under section 1904.35(b)(1)(iv)
... OSHA will need to show that the real reason for the discipline was the reported injury or illness and not the rule violation ...
To issue a citation under section 1904.35(b)(1)(iv), OSHA must have reasonable cause … that an employer retaliated against an employee for reporting a work-related injury or illness. …

established elements of retaliation …

-The employee reported a work-related injury or illness;

-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

-The employer took the adverse action because the employee reported a work-related 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 violate section 1904.35(b)(1)(iv) ...
Evidence that the employer consistently applied the rule when employees violated it regardless of whether the employees also reported a work-related injury or illness is evidence that the real reason for the discipline was the work rule violation, not the injury or illness report …
Where's the Guard?
... the rule does not apply to drug testing employees for reasons other than injury-reporting ...
Interpretation of 1904.35(b)(1)(i) and (iv)

https://www.osha.gov/recordkeeping/finalrule/interp_recordkeeping_101816.html

... [sic OSHA] inquiry will be whether the employer had a reasonable basis for believing that drug use by the reporting employee could have contributed to the injury or illness...
… [sic OSHA inquiry]

...the drug test could provide insight into why the injury or illness occurred...
POLICY

Interpretation of 1904.35(b)(1)(i) and (iv)

https://www.osha.gov/recordkeeping/finalrule/interp_recordkeeping_101816.html

… [sic OSHA inquiry]

… 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 …
OSHA Memorandum for Regional Administrators, October 19, 2016
Interpretation of 1904.35(b)(1)(i) and (iv)
https://www.osha.gov/recordkeeping/finalrule/interp_recordkeeping_101816.html

... 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 ...
OSHA Memorandum for Regional Administrators, October 19, 2016

Interpretation of 1904.35(b)(1)(i) and (iv)

https://www.osha.gov/recordkeeping/finalrule/interp_recordkeeping_101816.html

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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 ...
... if the employer only tested the injured employees but did not test ... 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) ...
drug testing an employee whose injury could not possibly have been caused by drug use would likely violate section 1904.35(b)(1)(iv) ...
... However, the final rule does prohibit employers from using drug testing (or the threat of drug testing) as a form of adverse action against employees who report injuries or illnesses...
... 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 ...
OSHA Memorandum for Regional Administrators, October 19, 2016

Interpretation of 1904.35(b)(1)(i) and (iv)
https://www.osha.gov/recordkeeping/finalrule/interp_recordkeeping_101816.html

... 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 ... rewarding employees for participating in safety training or identifying unsafe working conditions would not violate the rule...
1904.32 Annual summary.

... no later than February 1 of the year following the year covered by the records and keep the posting in place until April 30...
1904.41
Electronic submission of injury and illness records to OSHA
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<th>Year</th>
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<th>Records to OSHA only if OSHA notifies you to do so for an individual data collection</th>
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<tr>
<td>By March 2</td>
<td>employees</td>
<td></td>
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OSHA Injury and Illness Recordkeeping and Reporting Requirements

Recordkeeping Requirements

Many employers with more than 10 employees are required to keep a record of serious work-related injuries and illnesses. (Certain low-risk industries are exempted.) Minor injuries requiring first aid only do not need to be recorded.

* How does OSHA define a recordable injury or illness?
* How does OSHA define first aid?

This information helps employers, workers, and OSHA evaluate the safety of a workplace, understand industry hazards, and implement worker protections to reduce and eliminate hazards—preventing future workplace injuries and illnesses.

Maintaining and Posting Records
https://www.osha.gov/recordkeeping/modernization_guidance.html

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

Injury Tracking and Use of Disciplinary, Incentive or Drug Testing Programs

The rule does not ban appropriate disciplinary, incentive, or drug-testing programs as described below.

However, it allows OSHA to issue citations for retaliatory actions against workers when these programs are used to discourage workers from exercising their right to report workplace injuries and illnesses. Employers should review their reporting procedures, programs, and policies for elements that may result in retaliatory actions against an employee for reporting an injury or illness.

Disciplinary Programs
Incentive Programs
Drug Testing Programs

A 10/19/2016 memorandum provides further guidance on the basic principles of these requirements.
http://www.ecfr.gov
Current to within a few days with links to current Federal Registers Revisions

29 CFR
Find the number for Recordkeeping in the range 1900-1910
Part 1904 is in this range
- New OSHA Poster informs employees of right to report injuries and illness
- Change phrases such as: "work carefully" or "maintain situational awareness" to Specific Rules
- Accurate Records
- Incentive Programs Not Linked to Reporting of Injuries or Illness
- Final rule does not ban drug testing
- Size Matters for Electronic Reporting
This standard does not apply to materials containing less than 0.1% beryllium by weight where the employer has objective data demonstrating that employee exposure to beryllium will remain below the action level as an 8-hour TWA under any foreseeable conditions.
Federal Register Vol. 81, No. 92  May 12, 2016, Final Rule Preamble p 29673

... there should be a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness in order for an employer to require drug testing ...

OSHA Memorandum for Regional Administrators, October 19, 2016   POLICY

Interpretation of 1904.35(b)(1)(i) and (iv)
https://www.osha.gov/recordkeeping/finalrule/interp_recordkeeping_101816.html

... the rule does not apply to drug testing employees for reasons other than injury-reporting ...

... if the employer only tested the injured employees but did not test ... 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)

Letter of Interpretation  August 23, 2016   POLICY

... An employee was operating a powered industrial truck (a "walkie"). Her foot became jammed between the walkie and a pallet and her steel toed shoe bent and cut the top of her toe. She received four stitches for the laceration. ...At the time of the incident, the employee was taking prescription medication for a non-work-related condition... Under Section 1904.5(b)(2)(ii), ... an event or exposure in the work environment can play no part in the injury...The facts of your scenario do not meet this exception because the injury described resulted from operation of workplace equipment ... 

... the exemption to work relatedness under Section 1904.5(b)(2)(vi) would not apply for the same reason. Under Section 1904.5(b)(2)(vi) you are not required to record an injury or illness if the injury or illness is solely the result of self-medication for a non-work-related condition...

Has to Be Recorded

Letter of Interpretation  March 21, 2016   POLICY

...his hand was caught between two objects. After receiving treatment for the injury, the employee was immediately given a post-accident drug test. The results of the drug test indicated the employee was intoxicated from alcohol...drinking alcohol is a manifestation of the disorder. Accordingly, the injury described in the scenario above does not meet the exception [sic for work related] in 1904.5(b)(2)(vi) for self-medication...

Has to Be Recorded

OSHA Memorandum for Regional Administrators, October 19, 2016   POLICY

Interpretation of 1904.35(b)(1)(i) and (iv)
https://www.osha.gov/recordkeeping/finalrule/interp_recordkeeping_101816.html

... 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 ... rewarding employees for participating in safety training or identifying unsafe working conditions would not violate the rule...
### POLICY

<table>
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<tr>
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<th>250 employees or more</th>
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**Rules/Standards/Regulations:**

http://www.ecfr.gov  For current entire standards  (all Federal Register changes within a few days via links).

**Policies, some:** https://www.osha.gov/recordkeeping/index.html

https://www.osha.gov/recordkeeping/modernization_guidance.html


https://www.osha.gov/dep/leps/leps.html

https://www.osha.gov/dep/neps/nep-programs.html

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- Final rule does not ban drug testing; OSHA will inspect for punitive drug testing
- Post new OSHA Poster informs employees of right to report injuries and illness
- Do Not Link Incentive Programs to Reporting of Injuries or Illness
- Change phrases such as: "work carefully" or "maintain situational awareness" or "avoid hazards" or "maintain interest in safety" to "Specific Rules"
- Records to be accurate