

The rule includes **three** provisions that are intended to address this issue:

**(1) An employer's procedure for reporting work-related injuries and illnesses must be reasonable and must not deter or discourage employees from reporting**

The previous version of the rule at 29 CFR 1904.35(b)(1) already required employers to establish a way for employees to report work-related injuries and illnesses promptly, and OSHA has always required that "way" to be reasonable. This rule adds additional clarifying language (at 29 CFR 1904.35(b)(1)(i)) and explains that a procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness.

This rule does not prescribe specific procedures that employers must establish. Rather, employers are free to establish their own procedures. Employers should review their reporting procedures for elements that might deter or discourage a reasonable employee from accurately reporting a workplace injury or illness. Considerations include:

Does the procedure account for work-related injuries and illnesses that build up over time, have latency periods (i.e., time between exposure and appearance of symptoms), or do not initially appear serious enough to the employee to require reporting to the employer? A procedure that requires immediate reporting without accounting for these circumstances would not be reasonable.

Does the procedure make reporting so difficult or complicated that a reasonable employee would be discouraged from reporting an injury or illness? For example, if an employee must travel a significant distance to report or must report the same injury or illness multiple times to multiple levels of management the procedure would not be reasonable.

**(2) Employers must inform employees of their right to report work-related injuries and illnesses free from retaliation**

This rule requires employers to inform employees that they have a right to report work-related injuries and illnesses free from retaliation by their employer (at 29 CFR 1904.35(b)(1)(iii)). The purpose of this requirement is to improve employee and employer understanding of their rights and responsibilities related to the reporting of occupational injuries and illnesses.

Employers can meet this requirement by posting the current version of the OSHA poster or by otherwise informing their employees of their right to report work-related injuries and illnesses free from retaliation. For example, employers could also meet this requirement by providing a written or e-mail notice to each employee.

The OSHA Poster states: All workers have the right to: Raise a safety or health concern with your employer or OSHA, or report a work-related injury or illness, without being retaliated against.

**(3) An employer may not retaliate against employees for reporting work-related injuries or illnesses**

Section 11(c) of the OSH Act already prohibits employers from retaliating against employees for reporting work-related injuries or illnesses. This rule explicitly incorporates the prohibition against retaliation into Section 1904.35 of the recordkeeping rule with respect to retaliation against employees for reporting work-related injuries or illnesses (at 29 CFR 1904.35(b)(1)(iv)). The purpose of this provision is to improve the completeness and accuracy of injury and illness data by allowing OSHA to issue citations to employers who retaliate against their employees for reporting an injury or illness and thereby discourage or deter accurate reporting of work-related injuries or illnesses.

### **Why does OSHA address retaliation in this rule? Isn't it already against the law to retaliate against an employee for reporting a workplace injury or illness?**

Significant concerns were raised during the comment period that the new electronic reporting requirements in the final rule could lead to increased incentives to take retaliatory action that would discourage workers from reporting their work-related injuries or illnesses. OSHA acknowledges these concerns. Although section 11(c) of the OSH Act already prohibits any person from discharging or otherwise discriminating against an employee who reports a fatality, injury, or illness, OSHA may not act under section 11(c) unless an employee files a complaint with OSHA within 30 days of the retaliation. In contrast, under the final rule, if OSHA finds evidence that an employee has been retaliated against for reporting an injury or illness, OSHA will be able to cite an employer for retaliation even if the employee did not file a timely 11(c) complaint. Often the point of retaliating against an employee who reports an injury or illness is to intimidate both the employee and other workers from reporting. This new rule gives OSHA an important new tool to ensure that employers maintain accurate injury and illness records because it gives OSHA the ability to protect workers who have been subject to retaliation for reporting work-related injuries or illnesses, even when they cannot or will not speak up for themselves by filing an 11(c) complaint.

### **What forms of "retaliation" does this rule prohibit?**

The rule prohibits employers from taking adverse action against employees for reporting work-related injuries or illnesses. Adverse action is action taken by the employer that would discourage a reasonable employee from reporting a work-related illness or injury accurately. Examples of adverse action include:

- Discharge, demotion, or denying a substantial bonus or other significant benefit
- Assigning the employee "points" that could lead to future consequences
- Demeaning or embarrassing the employee (for example, requiring an employee who reports an illness or injury to wear a fluorescent orange vest for a week)
- Threatening to penalize or otherwise discipline an employee for reporting
- Requiring employees to take a drug test for reporting without a legitimate business reason for doing so

See Chapter 3 of the Whistleblower Investigations Manual, CPL 02-03-007 (01/28/2016), for additional examples of adverse action

**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**

The rule does not prohibit disciplinary programs. However, employers must not use disciplinary action, or the threat of disciplinary action, to retaliate against an employee for reporting an injury or illness.

The rule prohibits disciplining employees simply because they report work-related injuries or illnesses without regard to the circumstances of the injuries or illnesses, such as automatically suspending workers who report an injury or assigning them points that have future employment consequences. The rule also prohibits disciplining an employee who reports a work-related injury or illness under the pretext that the employee violated a work rule if the real reason for the discipline was the injury or illness report. An example of pretextual discipline is when an employer disciplines an employee who reported a work-related injury for violating a work rule, but fails to enforce the work rule against other employees who violate the same rule but do not report an injury or illness. This kind of disproportionate enforcement against reporting employees indicates that the real reason for the discipline was the reported injury, not the rule violation.

This scenario is especially likely to occur when an employer disciplines an employee who reported an injury or illness for violating a vague rule such as "work carefully" or "maintain situational awareness." Under such vague work rules, the reported injury or illness is often the only basis for disciplining the employee under the rule; if the employee had not reported the injury or illness the employer would likely not have disciplined the employee. Using such a vague work rule to discipline employees who report injuries or illnesses, but ignoring similar conduct by employees who do not report, would violate section 1904.35(b)(1)(iv).

In contrast, a legitimate workplace safety program should treat all workers who violate rules in an equivalent manner, regardless of whether or not the violation resulted in the worker reporting an injury or illness.

**Below are example scenarios of disciplinary programs and how the new rule may be interpreted to apply:**

**Scenario 1:** Employee X is injured when he is stung by a bee at work, and he reports the injury to Employer. Employer disciplines Employee X for violating a work rule requiring employees to "maintain situational awareness." Employer only enforces the rule when employees get hurt.

Question: Did Employer violate 1904.35(b)(1)(iv) by disciplining Employee X for reporting a bee stinging injury?

Answer: Yes. This is an example of a pretextual disciplinary action, which is prohibited. In this case, although Employer ostensibly disciplined Employee X for violating a work rule, Employer only enforced the work rule after a work-related injury or illness report, which indicates that the real reason for the discipline was the reported injury, not the rule violation. Such vague work rules are particularly susceptible to being enforced disproportionately against employees who report work-related injuries or illnesses because they do not require or proscribe specific conduct.

**Scenario 2:** Employee X reports a hand injury that she sustained while operating a saw after bypassing the guard on the saw, contrary to the employer's work rule. Employee X's hand injury required her to miss work for two days. Employer disciplined Employee X for bypassing the guard contrary to its instructions. Employer regularly monitors its workforce for safety rule violations and disciplines employees who bypass machine guards regardless of whether they report injuries.

Question: Did Employer violate 1904.35(b)(1)(iv) when it disciplined Employee X?

Answer: No. Section 1904.35(b)(1)(iv) does not prohibit employers from disciplining employees who violate legitimate workplace safety rules as long as the rules are not used as a pretext for retaliating against employees who report work-related injuries or illnesses. On the contrary, OSHA encourages employers to implement workplace safety rules, train employees on those rules, and take consistent, appropriate action when employees violate them regardless of whether the employees violating the rules reported injuries.

**Scenario 3:** Employee X twists his ankle at work but does not immediately realize that he is injured because his ankle is not sore or swollen, and therefore he does not report the injury to Employer. The next morning, Employee X's ankle is sore and swollen, and he realizes he has the kind of injury he is required to report to Employer. He reports the injury to the employer that day. Employer disciplines Employee X for failing to report his injury "immediately" as required by Employer's X's injury reporting rules.

Question: Did Employer violate 1904.35(b)(1)(iv) by disciplining Employee X for failing to report his injury immediately even though Employee X did not immediately realize he was injured?

Answer: Yes. Employer's rigid prompt reporting requirement would violate section 1904.35(b)(1)(i) because it fails to account for injuries that build up over time. In addition, taking adverse action against an employee under such a policy as described in this example would also constitute a pretextual disciplinary action, which is prohibited under section 1904.35(b)(1)(iv). In this case, although Employer ostensibly took the adverse action because Employee X violated a work rule, the work rule was not reasonable and therefore does not constitute a legitimate business reason for taking adverse action against an employee who reports a work-related injury or illness. Although employers may require employees to report

as soon as practicable after realizing they have a work-related injury or illness, it is not practicable for an employee to report an injury that has not yet manifested.

**Scenario 4:** Employee X twists her ankle at work but does not immediately realize that she is injured because her ankle is not painful or swollen, and therefore she does not report the injury to Employer. The next morning, Employee X's ankle is painful and swollen and she realizes it is the kind of injury she is required to report to Employer as soon as practicable. However, Employee X does not report the injury after this realization, although she easily could have, and instead reports it several weeks later. Employer disciplines Employee X for failing to report her injury as soon as practicable after realizing she has the kind of injury she is required to report.

Question: Did Employer violate 1904.35(b)(1)(iv) by disciplining Employee X for failing to report a work-related injury or illness as soon as practicable after realizing she had a work-related injury?

Answer: No. OSHA recognizes that employers have a legitimate business interest in learning about employee injuries close in time to when they occur or become manifest. Employers may require employees to report work-related injuries or illnesses as soon as practicable after they realize they have a work-related injury serious enough to report. Note: a reporting procedure that requires employees to report as soon as practicable after they realize they have the kind of injury or illness they are required to report is reasonable and therefore would also not violate section 1904.35(b)(1)(i).

## **Incentive Programs**

This rule does not prohibit incentive programs. However, employers must not use incentive programs in a way that penalizes workers for reporting work-related injuries or illnesses. If an employee reports an injury or illness, and is subsequently denied a benefit as part of an incentive program, this may constitute retaliatory action against the employee for exercising his or her right to report an injury or illness.

Incentive programs should encourage safe work practices and promote worker participation in safety-related activities. Employers should consider programs that reward:

- Worker participation in safety program activities and evaluations;
- Worker completion of safety and health training;
- Reporting and responding to hazards and close calls/near misses;
- Safety walkthroughs and identification of hazards during safety walkthroughs/inspections;
- Conformance to planned preventive maintenance schedules;
- Compliance with legitimate workplace safety rules.

**Below are example scenarios of incentive programs and how the new rule may be interpreted to apply:**

**Scenario 1:** Employer informs its employees that it will hold a substantial cash prize drawing for each work group at the end of each month in which no employee in the work group sustains a

lost-time injury. Employee X reports an injury that she sustained while operating a mechanical power press. Employee X did not violate any employer safety rules when she sustained her injury. Employee X's injury requires her to miss work for two days. Employer cancels the cash prize drawing for that month for Employee X's work group because of Employee X's lost-time injury.

Question: Did Employer violate 1904.35(b)(1)(iv) when it cancelled the cash prize drawing for Employee X's work group because of a lost-time injury that was sustained while Employee X was following the employer's work rules?

Answer: Yes. Cancelling a substantial cash prize drawing solely because an employee was injured and reported the injury, without regard to the circumstances surrounding the injury, would likely violate section 1904.35(b)(1)(iv). In this case, the employer retaliated against the employee (by cancelling a substantial cash prize drawing) because the employee engaged in protected activity (reporting her injury to the employer). This type of activity may also discourage reporting because a worker may feel pressure from coworkers not to cancel the drawing, or may be reluctant to report out of loyalty to those coworkers.

**Scenario 2:** Employer informs its employees that it will hold a substantial cash prize drawing for each work group at the end of each month in which all members of the work group comply with applicable safety rules, such as wearing required fall protection. Employee X sustains a lost-time injury when he falls from a platform while not wearing required fall protection, and he reports the injury to Employer. Employer cancels the cash prize drawing for Employee X's work group that month because Employee X failed to wear required fall protection. Employer actively monitors its workforce for compliance with applicable work rules and cancels the cash prize drawings when it discovers work rule violations regardless of whether the employee who violated the work rule also reported an injury.

Question: Did Employer violate 1904.35(b)(1)(iv) when it cancelled the cash prize drawing for Employee X's work group because Employee X failed to wear required fall protection?

Answer: No. In this case, Employer cancelled the cash prize drawing because Employee X violated a legitimate work rule, not because he reported a work-related injury. OSHA encourages employers to enforce legitimate workplace safety rules by monitoring for compliance with those rules and taking consistent, appropriate corrective action when violations occur whether or not the employee who violated the rule also reported an injury.

**Scenario 3:** Employer informs its employees that it will hold a substantial cash prize drawing for each work group at the end of each month in which all members of the work group comply with applicable safety rules, such as wearing required fall protection. Employee X sustains a lost-time injury when he falls from a platform while not wearing required fall protection. Employer cancels the cash prize drawing for Employee X's work group that month ostensibly because Employee X failed to wear required fall protection. However, Employer's employees routinely fail to wear required fall protection but the only time Employer cancels the cash prize drawing is when an employee reports an injury.

Question: Did Employer violate 1904.35(b)(1)(iv) when it cancelled the cash prize drawing for Employee X's work group because Employee X failed to wear required fall protection?

Answer: Yes. This is an example of a pretextual disciplinary action, which is prohibited. Although Employer ostensibly took the adverse action because Employee X violated a legitimate work rule, Employer failed to take the same action when other employees violated the same work rule without reporting an injury. Employer treated employees who engaged in the same unsafe conduct differently based on whether they reported an injury to the employer, which indicates that the real reason Employer took the adverse action against Employee X was because of the injury report, not because of the work rule violation.

**Scenario 4:** Employer holds a party for all employees who complete a safety training course. Employee X failed to attend the training because she was absent from work due to a work-related injury that she reported. Employer excluded Employee X from the training-completion party because she did not complete the training. Employer consistently excluded all employees who failed to complete a training course from the training-completion party regardless of why they failed to complete the training, including those who were on vacation or absent because of a non-work-related injury or illness.

Question: Did Employer violate 1904.35(b)(1)(iv) by excluding Employee X from the party?

Answer: No. In this case Employer excluded Employee X from the party because Employee X did not complete the safety training, not simply because Employee X reported a work-related injury. OSHA encourages employers to celebrate workplace safety achievements such as completing safety training and complying with legitimate workplace safety rules.

## **Drug Testing Programs**

The rule does not prohibit drug testing of employees, including drug testing pursuant to the Department of Transportation rules or any other federal or state law. It only prohibits employers from using drug testing, or the threat of drug testing, to retaliate against an employee for reporting an injury or illness.

Employers may conduct post-incident drug testing pursuant to a state or federal law, including Workers' Compensation Drug Free Workplace policies, because section 1904.35(b)(1)(iv) does not apply to drug testing under state workers' compensation law or other state or federal law. Random drug testing and pre-employment drug testing are also not subject to section 1904.35(b)(1)(iv).

Employers may conduct post-incident drug testing if there is a reasonable possibility that employee drug use could have contributed to the reported injury or illness. However, if employee drug use could not have contributed to the injury or illness, post-incident drug testing would likely only discourage reporting without contributing to the employer's understanding of why the injury occurred. Drug testing under these conditions could constitute prohibited retaliation.

For example, if an employee reports a repetitive strain injury or is injured as an innocent bystander and the employer requires post-incident drug testing, then that testing could violate section 1904.35(b)(1)(iv) because it is unlikely that such injuries would be related to drug use by the reporting employee. In contrast, it would be reasonable for an employer to require post-incident drug testing for a worker who reported an injury experienced while operating a crane or a forklift if the employee's conduct contributed to the injury. Employers need not specifically suspect drug use before post-incident testing, but there should be a reasonable possibility that drug use by the reporting employee could have contributed to the reported injury or illness.

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 to the hazardousness of the work being performed when the injury or illness occurred.

For substances other than alcohol, currently available tests are generally unable to establish a relationship between impairment and drug use. Employers should be aware that post-incident drug testing will not necessarily indicate whether drug use played a direct role in the incident. When evaluating the reasonableness of drug testing a particular employee, OSHA will 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 may consider this factor for tests that measure alcohol use, but not for tests that measure the use of any other drugs. For information on various drugs' effects on human performance, see National Highway Traffic Safety Administration - Drug Human Performance Factsheet

**Below are examples of drug testing programs and how the new rule may be interpreted to apply:**

**Scenario 1:** Employer required Employee X to take a drug test after Employee X reported work-related carpal tunnel syndrome. Employer had no reasonable basis for suspecting that drug use could have contributed to her condition, and it had no other reasonable basis for requiring her to take a drug test. Rather, Employer routinely subjects all employees who report work-related injuries to a drug test regardless of the circumstances surrounding the injury. The state workers' compensation program applicable to Employer did not address drug testing, and no other state or federal law requires Employer to drug test employees who sustain injuries at work.

Question: Did Employer violate section 1904.35(b)(1)(iv) by subjecting Employee X to a drug test simply because she reported a work-related injury?

Answer: Yes. Section 1904.35(b)(1)(iv) prohibits an employer from taking adverse action against employees simply because they report work-related injuries. Rather, employers must have a legitimate business reason for requiring a drug test, such as a reasonable belief that drug use



contributed to the injury. If drug use could not reasonably have contributed to a particular injury and the employer has no other reasonable basis for requiring a drug test, section 1904.35(b)(1)(iv) prohibits the employer from drug testing employees simply because they report injuries unless the drug test is conducted pursuant to a state workers' compensation law or other state or federal law.

**Scenario 2:** Employee X was injured when he inadvertently drove a forklift into a piece of stationary equipment, and he reported the injury to Employer. Employer required Employee X to take a drug test.

Question: Did Employer violate section 1904.35(b)(1)(iv) for drug testing Employee X?

Answer: No. Because Employee X's conduct—the manner in which he operated the forklift—contributed to his injury, and because drug use can affect conduct, it was objectively reasonable to require Employee X to take a drug test after Employer learned of his injury. Drug testing an employee who engaged in conduct that caused an injury is objectively reasonable because conduct can be affected by drug use.

**Scenario 3:** Employer drug tests all employees who report work-related injuries to the employer to get a 5% reduction in its workers' compensation premiums under the state's voluntary Drug-Free Workplace program. Employer drug tests Employee X when she reports a work-related injury that could not reasonably have been caused by drug use, such as a bee sting or carpal tunnel syndrome.

Question: Did Employer violate section 1904.35(b)(1)(iv) by drug testing Employee X?

Answer: No. Drug testing conducted pursuant to a state workers' compensation law, whether voluntary or mandatory, is not affected by section 1904.35(b)(1)(iv).

**Scenario 4:** Employer requires all employees who report lost-time injuries to take a drug test because the employer's private insurance carrier provides discounted rates to employers that implement such a drug-testing policy. The relevant rate discount provisions in the private policy are identical to those in the applicable state workers' compensation law. Employer drug tests Employee X when she reports a lost-time injury that could not reasonably have been caused by drug use, such as a bee sting or carpal tunnel syndrome.

Question: Would OSHA cite Employer for violating section 1904.35(b)(1)(iv) in these circumstances by drug testing Employee X to secure lower private insurance premiums?

Answer: No. To maintain consistency between public and private worker's compensation coverage in the same state, OSHA will not cite employers under section 1904.35(b)(1)(iv) who conduct post-accident drug testing under private party policies that mirror the applicable state workers' compensation law.

**Scenario 5:** Employer requires all employees who report lost-time injuries to take a drug test regardless of whether drug use could have contributed to the injury because the drug testing requirement is included in the collective bargaining agreement at the workplace. Employer drug tests Employee X (who is covered by the collective bargaining agreement) when she reports a

lost-time injury that could not reasonably have been caused by drug use, such as a bee sting or carpal tunnel syndrome. The employer had no reasonable basis for suspecting that drug use could have contributed to her injury and had no other reasonable basis for requiring the test.

Question: Did Employer violate section 1904.35(b)(1)(iv) by drug testing Employee X pursuant to a collective bargaining agreement?

Answer: Yes. Section 1904.35(b)(1)(iv) prohibits an employer from taking adverse action against employees simply because they report work-related injuries absent a reasonable belief that drug use could have contributed to the injury or another reasonable basis for requiring a drug test. Although OSHA does not intend for section 1904.35(b)(1)(iv) to supersede other state or federal programs addressing post-injury drug testing of employees, collective bargaining agreements may not supersede section 1904.35(b)(1)(iv).

**A 10/19/2016 memorandum provides further guidance on the basic principles of these requirements.**