Updates: Post-Incident Drug Testing, Workplace Safety Incentive Programs, California Proposition 65

OSHA's Memorandum on Post-Incident Drug Testing and Safety Incentive Programs
On October 11, 2018, the Occupational Safety and Health Administration issued a memorandum clarifying its position on post-incident drug testing and workplace safety incentive programs. I have already seen several interpretations of this new guidance from OSHA, and after having reviewed them, I am concerned that some people are interpreting this new guidance too liberally. I know that many National Frame Building Association members rely on post-accident drug testing as part of their accident investigation procedure, so it is important for them to understand the contents of the interpretative memorandum issued by OSHA.

The new interpretive memorandum by OSHA announces a partial lifting of the prohibition of mandatory post-accident drug testing and also a partial lifting of the prohibition of rate-based safety incentive programs. I say "partial" because I feel that OSHA's new interpretation has some strings attached.

Rate-based incentive programs (which focus on reducing the number of reported injuries and illnesses) involve employees' receiving a reward from the employer when they avoid either lost time or OSHA recordable injuries for a given period of time. In its October 11, 2018, memorandum, OSHA stated that such programs are not prohibited. However, employers may maintain such programs only if they also implement one or more of the following:

- an incentive program that rewards employees for identifying unsafe conditions
- a training program for all employees that reinforces their right to report injuries free of retaliation
- a mechanism for evaluating employees' willingness to report injuries.

If a company chooses to use a rate-based incentive program, it still may risk an allegation of retaliation for reporting on safety issues, even if one of the steps above is implemented. Personally, I am still troubled by rate-based incentive systems and recommend that if you use one, you focus on safety compliance, not recordable injuries or lost time.

The second part of the clarification, on mandatory post-accident drug testing, is probably of greater interest. Here OSHA backed off from the position it took on December 1, 2016, as it interpreted the new record keeping rule. Although some people are interpreting OSHA's October 11 memorandum as permitting virtually uncontrolled mandatory drug testing, I do not agree.

The new guideline does not explicitly support post-accident drug testing of *all* injured workers regardless of the reason for their injuries. If you know that the root cause for an accident was not drug use or alcohol intoxication, you are still not permitted to require a drug or alcohol test. The interesting point about this statement is that, in most cases, by the time the employer is able to estimate the "root cause" of the accident, it is too late to obtain a blood or urine sample to do a drug/alcohol intoxication test. Let us look at a simple example. Going back to an earlier example used by OSHA, if an employee mowing the grass outside your office is stung by a bee and has an

allergic reaction, it will be difficult for you to argue that you believe that he/she was under the influence of drugs or alcohol and therefore a drug/alcohol test is necessary as part of your accident investigation.
You must, however, require that drug or alcohol testing be done when the root cause of the accident is in question and drugs or alcohol *could have been* a contributing factor. In this case, if you are going to have the injured employee take a drug and alcohol test, you must also test all employees who were in any way connected to the accident and injury. You cannot use this testing as a way to focus on one troublesome employee with the goal of being able to terminate that employee. And if others besides the injured worker test positive, you will have to take the same disciplinary action against all the employees who tested positive.

In both situations it is up to the employer to show that the program is not being administered in a way that would deter employees from reporting injuries and illnesses. You will also have to show that you consistently enforce all legitimate work rules. This is part of OSHA's emphasis on requiring a solid safety culture in every company; giving lip service to safety is not sufficient. Companies must be able to demonstrate that they *consistently* enforce their safety rules and make a genuine effort to ensure that their employees are fully trained regarding the company's safety program (which must comply with OSHA standards). This means monitoring employees' safety compliance and retraining them as necessary.

California Proposition 65
The first issue that arises when we talk about hazardous materials is OSHA's Hazard Communication Standard. The HCS is concerned with preventing employees' exposure to hazardous materials and making information about hazardous materials to which they may be exposed in the workplace available to them. The HCS requires the employer to properly label all hazardous materials in the workplace, to have Safety Data Sheets (SDS) for each hazardous material, and to train employees on reading the SDS and labels. In addition, they are required to inform employees about their rights to review the SDS on any hazardous material to which they may be exposed.

But the HCS does not cover *articles,* which OSHA defines as items that are formed to a specific shape or design during manufacture, have an end use or function dependent in whole or in part to their shape or design, and do not release (or otherwise result in exposure to) a hazardous chemical under normal conditions. A violation of this standard will typically be judged a *serious* violation subjecting the employer to a penalty of approximately $12,900.

But California Proposition 65 is very different from the HCS. First, the proposition is not enforced by California's Division of Occupational Safety and Health (better known as Cal/OSHA); it is in fact an addition to Cal/OSHA's regulations. It is a labeling requirement that is enforced by the Office of Environmental Health and Hazard Assessment, which falls under the California Environmental Protection Association. The list of materials covered by Cal Prop 65 can be accessed at the OEHHA website (www.P65Warnings.ca.gov). The list contains the names of approximately 1,000 materials. Given the length of the list, the chance that an article contains a listed hazardous (carcinogenic) material is very high. For example, about 10 types of nickel are listed.

Cal Prop 65 does not exclude articles. The reasoning is that if an article contains listed materials that could be released when the article is drilled, cut, sawn, sanded, or abraded, the public must be warned about the article's content. The attention is not limited to workers but includes anyone who might come in contact with one or more of the materials in the article.

The new labeling requirement, the major part of Cal Prop 65, became effective August 30, 2018. Any entity that manufactures, distributes, sells, or uses (such as in construction) any article that contains a listed material must label the material or article. For example, nickel is an element used in several metal alloys. The manufacturer and seller of a metal article containing a nickel alloy must label the product with the required warning. A builder who uses that metal article in a building must ensure that the article is properly labeled. If lumber used in a building was treated with one of the listed chemicals, that lumber must be properly labeled. This law requires labeling, if appropriate, of any article or material manufactured outside of California that is brought into the state for sale or use.

Cal Prop 65 requires businesses to give a "clear and reasonable warning" so that people are aware of the chemicals to which they are being exposed and the risks they are taking. The warnings can be given in several ways: by labeling a consumer product, posting signs at the workplace, distributing warning notices at a housing complex, or publishing notices in a newspaper. The warning is required 1 year after a material is added to the list. The required warning label bears a yellow triangle with an exclamation point in it and the following language: "This product can expose you to chemicals including *(name of the chemical or chemicals)*, which is known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov."

Some "safe harbor" provisions allow businesses not to provide a warning if certain chemicals do not reach a listed threshold amount, but not all chemicals are given this protection. Cal Prop 65 is far-reaching and covers a vast number of products. You should consider labeling all products that have the potential of being distributed in California and that potentially contain one of the 1,000 listed chemicals or materials.

The risk of not following the labeling requirement is a penalty of up to $2,500/day, calculated from the date the product was manufactured in California or entered California. Any end user of the product who has not provided the proper warning is subject to the fine from the day the product was first used and potentially exposed a member of the public.