



Workers Compensation Self Insurance Fund

P.O. Box 241605, Montgomery, AL 36124-1605

ATA WORKERS COMPENSATION FUND ADVISORY

Please be advised that the OSHA Recordkeeping Final Rule 29 CFR 1904.35 went into effect on December 1, 2016, after a Federal Judge in Texas refused to stop its enforcement.

On October 19, 2016, OSHA Released Updated Guidance on the rule as follows:

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

One of the goals of this recordkeeping rule is to improve the completeness and accuracy of injury and illness data collected by employers and reported to OSHA. When workers are discouraged from reporting occupational injuries and illnesses, the information gathered and reported is incomplete and inaccurate.

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*
- (2) Employers must inform employees of their right to report work-related injuries and illnesses free from retaliation*
- (3) An employer may not retaliate against employees for reporting work-related injuries or illnesses*

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. The rule does not prohibit drug testing of employees, including drug testing pursuant to the Department of Transportation (DOT) 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.

A complete copy of the OSHA Final Rule can be found at:

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



Alabama Trucking Association Workers' Compensation Fund's Participation Agreement:

As a reminder, as per the Alabama Trucking Association Workers' Compensation Fund's Participation Agreement, you have agreed to comply with the Alabama Workers' Compensation Law and any other applicable provisions of the law, the provisions of the Fund's By-Laws and any other agreements or contracts entered into between the Employer and the Fund. You have also agreed to fully comply with, and conform to, the Fund's policies, procedures, programs and By-Laws, as may be established by the Board or the Fund Administrator. You further agree to comply with any requirements for claim notification, information gathering, post-accident drug testing, and to promptly submit any required paperwork in connection therewith.

The Alabama Trucking Association Workers' Compensation Fund's Board mandated post-accident drug testing as a requirement to participate in the Fund during the January 16, 1997 Board Meeting, and included this requirement in Section 28 of the Fund's Participation Agreement signed by each participating member.

Opinion of Outside Counsel: It is the opinion of our outside management labor and employment law counsel, Thomas M. Eden, III, Partner with the national firm of Constangy, Brooks, Smith & Prophete, LLP, that the mandated post-accident drug testing required by the Participation Agreement falls under the OSHA Act Section 4 Workers Compensation Exception as acknowledged by OSHA in Scenarios 3 and 4 of its October 19th guidance. Our Counsel is also of the opinion that because the Fund owes a fiduciary duty to its Fund members to investigate and disqualify any claimants who test positive for drug or alcohol under Code of Alabama, 1975, Section 25-5-51, the OSHA Act Section 4 Workers Compensation Exception takes a member's compliance with this mandated post-accident Participation Agreement requirement outside of OSHA's jurisdiction. In addition, all DOT required drug testing is outside of OSHA's jurisdiction.

The Fund continues to monitor the OSHA Final Rule and the ongoing Texas lawsuit against OSHA concerning this Final Rule. We will provide additional information and the final outcome of the Texas lawsuit as it becomes available.

A Word About Safety Incentives: At this point, the OSHA Final Rule does abolish safety incentives that deprives an employee of a "substantial award" or a "substantial cash prize" for reporting a work-related injury. Instead, OSHA advises that incentive programs should be designed to encourage safe work practices and should promote workers participation in safety-related activities.



If you have any questions regarding these changes, please contact your ATA Workers' Compensation Fund Loss Control Consultant – Don Anchors, Duane Calhoun, Michael Smith, or Victor Whatley.

Thank you and please let us know if you have any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Don Anchors', is positioned above the printed name.

Don Anchors
Director of Loss Control
ATA Workers' Compensation Fund

A handwritten signature in blue ink, appearing to read 'Todd Hager', is positioned above the printed name.

Todd Hager
Director of Claims
ATA Workers' Compensation Fund