



Safety Update

Issue Date: October 28, 2016

AGC OF OHIO SAFETY MEETING

December 2, 9:30-noon, AGC office; [RSVP Attendance](#)

The next AGC of Ohio Safety Meeting is scheduled for Friday, December 2 from 9:30 a.m. to noon at the AGC office in Columbus (1755 Northwest Blvd, 43212). The agenda for the meeting will include:

9:30 a.m. Corey Crognale, partner, Ice Miller: Corey will address the potential impact of new state and national safety and health regulations on employers.

10:30 a.m. Jim Blazer, Southeast regional business development manager, Ohio BWC: Jim will discuss various BWC employer initiatives, how the agency is handling medical marijuana, other states coverage, and other workers' comp matters of interest to contractors.

11:15 a.m. Working Lunch: Address other regular agenda items, including OSHA enforcement around the state, AGC safety efforts, and a roundtable discussion on safety and health matters of interest.

The meetings are very open, and participants are encouraged to bring up any safety-and-health items of interest. RSVP and direct questions to Andrea Ashley at AGC of Ohio: andrea@agcoho.com or (614) 486-6446. Be sure to let her know of any additional agenda items you would like discussed.

CONSTRUCTION SAFETY EXCELLENCE AWARDS APPLICATIONS AVAILABLE

[Enter Today!](#) Entry Deadline: December 19

Construction Safety Excellence Awards (CSEA) recognize AGC members for their overall safety programs, and AGC of Ohio members can enter both the national and Ohio CSEA by filling out one application.

CSEA examines companies' commitment to safety and occupational health management and risk control, considering management's commitment, active employee participation, safety training, work site hazard identification and control, and safety program innovation. The award entry categories include:

- **National:** Building (GC Only), Highway, Federal and Heavy, Utility Infrastructure, Specialty Contractor, Vendor and Supplier, Construction Insurance Carrier, and Construction Management.
- **Ohio:** Building (GC Only), Heavy, Specialty Contractor, and Construction Management

Entry instructions and a link to the application are available [here](#). The entry deadline is December 19. Contact Andrea Ashley at (614) 486-6446 or andrea@agcoho.com with any questions or for more information.

AGC Efforts Help Move OSHA to Modify Controversial Drug Testing Position

Learn More on AGC WebED Oct. 31 from 2-3:00 p.m.

In the wake of an AGC [meeting](#) with the head of OSHA and an AGC-backed [letter](#) from dozens of members of Congress, OSHA on October 19 published [new guidance](#) to clarify its injury and illness recordkeeping and reporting rule. The guidance recalibrates the agency's position relating to post-incident drug testing in the context of employer discouragement of or retaliation for employee injury and illness reporting. [Register today](#) for AGC of America's complimentary webinar (\$49 for non-members) discussing this topic and the recordkeeping and reporting rule as a whole on October 31.

Generally speaking, the new guidance is more likely than the agency's previous position to not overly restrict many construction companies' existing policies regarding employee post-incident drug testing. However, the agency notes that drug testing employees whose injury could not possibly have arisen from any particular incident, like muscular skeletal disorders (e.g., tendonitis), would likely violate the rule. Additionally, the agency [further clarifies](#) that OSHA will not issue citations under the rule for post-incident drug testing conducted in accordance with state workers' compensation laws—whether drug testing under the law is mandatory or voluntary.

To provide background, OSHA first published its intent to provide greater scrutiny of mandatory, post-incident drug testing programs buried within hundreds of pages of its response to comments to the injury and illness recordkeeping and reporting rule on May 12. There, the agency noted that employer "drug testing policies should limit post-incident drug testing to situations in which employee drug use is likely to have contributed to the incident." OSHA went on to state that "[e]mployers 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 for an employer to require drug testing." This approach deeply concerned AGC, as OSHA seemingly set two different, difficult to distinguish, and problematic to prove ("likely to have contributed" and "reasonable possibility") standards concerning when employers could execute post-incident drug tests in accordance with this rule.

In its new guidance, OSHA recalibrates those previous statements. Now, when an employer conducts post-incident drug testing in the confines of illness and injury reporting, OSHA will evaluate:

- Whether the employer had a reasonable basis for concluding that drug use could have contributed to the injury or illness;
- Whether other employees involved in the incident that caused the injury or illness were also tested; 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.

Again, the agency also provides a bright line exception that drug testing for injuries that could not possibly have been caused by drug use—specifically noting "a receptive strain injury"—would likely violate the rule.

Lastly, OSHA provides [further clarity](#) to the extent to which its rule does not apply when employers conduct drug tests in accordance with state workers' compensation laws. The agency notes in several examples that where an employer drug tests employees to receive a reduction in its workers' compensation premiums under, for example, the state's voluntary Drug-Free Workplace program, that drug testing does not violate the OSHA injury and illness recordkeeping and reporting rule. The anti-retaliation provisions, which cover the drug testing issues within the rule, go into effect on [December 1, 2016](#). To register for AGC's webinar on this topic, [click here](#).

For more information on this rule and why AGC worked to modify it, listen to AGC of America's podcast [here](#).

UNDERGROUND DAMAGE PREVENTION REGISTRATION & ENFORCEMENT

Legislation, SB 378, passed during the last General Assembly that provided some teeth to Ohio's underground damage prevention laws. Tied to the enforcement component is mandatory registration.

Registration:

Any excavator, developer, designer or utility operator conducting business in Ohio that participates in (or is required to participate in) the One-Call system must register and pay a registration fee not to exceed \$50. (This year's fee is \$25.) Failure to register may result in a fine of up to \$2,500.

Currently, the PUCO has obtained a list of registrants from the Ohio Utilities Protection Service and the Oil and Gas Producers Utilities Protection Service, which the PUCO uses to send invoices with instructions that include the amount to pay and where to send the payment. Invoices should have been sent in April.

Be aware that some of the definitions in the law are broad and pick up contractors who may not actually call 811. For example, "designer" is defined as an engineer, architect, landscape architect, contractor, surveyor, or other person who develops plans or designs for real property improvement or any other activity that will involve excavation. "Excavation" means the use of hand tools, powered equipment, or explosives to move earth, rock, or other materials in order to penetrate or bore or drill into the earth, or to demolish any structure whether or not it is intended that the demolition will disturb the earth.

According to the PUCO, if your company has not received a registration invoice and would like to register, you can send an e-mail to DamagePrevention@puc.state.oh.us requesting registration information and to be invoiced the \$25 registration fee.

Enforcement:

Enforcement of underground damage prevention laws are handled by the Public Utilities Commission of Ohio (PUCO). An Underground Technical Committee (UTC) of industry professionals was created to review and recommend the appropriate consequence (to date, the recommendations have been to train employees on damage prevention laws). No UTC decision can be approved without at least one excavator vote.

Beginning this year, aggrieved parties can report compliance failures to the PUCO to be investigated. Enforcement provisions apply not only to excavators, but also to utility owners and marking companies (i.e. positive response). Complaints can be filed [here](#).

The following sections of the Ohio Revised Code will be enforced:

- 153.64 – The protection of underground facilities during public improvement projects.
- 3781.26 (A) – Requires all utilities who own and operate underground facilities to register with a protection service.
- 3781.26 (B) – Requires protection services, utilities, excavators, equipment dealers, PUCO, etc. to publicize the importance of contacting a protection service prior to excavation.
- 3781.27 – Developer or designer notifying protection service of intended excavation.
- 3781.28 – Excavator notifying protection service.
- 3781.29 – Marking location of facilities or give indication of no facilities at site.
- 3781.30 – Duties of excavator.
- 3781.31 – Notifying of commencement of excavation or of removal of markings.
- 3781.32 – Corrections or tie-ins within right-of-way.
- 4913 – Rules surrounding enforcement process.

Liability:

Contractors should make certain excavation and one call responsibilities are clear in your contracts.

Learn more at about the underground damage prevention registration and enforcement at:
www.puco.ohio.gov/puco/index.cfm/industry-information/industry-topics/damage-prevention/