

NEWS & INSIGHTS

Update on OSHA Post-Accident Testing Rules

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As many employers may already be aware, in December 2016, the Occupational Safety and Health Administration (OSHA) issued a revised rule regarding an employer's ability to drug test following an incident in the workplace. Many employers currently have policies and procedures that mandate drug and alcohol testing in the wake of a workplace accident, regardless of whether there is any suspicion that the employee involved was impaired. This type of policy now is an OSHA violation. However, for those entities who are required to test pursuant to requirements of state or federal law, employers are still permitted to maintain an automatic testing policy, despite the new rule.

OSHA included a memorandum accompanying the new rule setting forth its interpretation of its new requirements (the actual language of the rule is extremely brief). Specifically, OSHA's position is that employers must establish a "reasonable procedure" for employees to report work-related injuries and illnesses promptly and accurately. Pursuant to OSHA, a procedure is not "reasonable" if it deters or discourages an employee from accurately reporting a workplace injury.

OSHA's commentary with regard to drug testing notes that, "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." Accordingly, OSHA has taken the position that automatic post-accident drug testing would reasonably deter an employee from reporting an incident.

OSHA provides in its Memorandum that a post-accident drug test without "objectively reasonable basis for testing" would be a violation of the new Rule. It states that "the central 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." In other words, 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. OSHA provided simplistic examples of what it considers to be unreasonable testing: where an employee reports a bee sting, a repetitive strain injury, or an injury caused by a lack of machine guarding or a machine or tool malfunction.

Based on OSHA's new mandates, employers need to undertake a review of their practices and policies with respect to post-incident drug testing. Failure to adhere to these new requirements may result in a citation from OSHA and/or an employee whistleblower complaint.

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