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New OSHA Rule Limits Permissible Post-Accident Drug Testing

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Employers, it may be time to check your drug-testing policies again. Generally speaking, this signifies employers must bring policies into conformance with state and local law changes as federal law has traditionally imposed little requirements on the drug test of employees. However, the latest regulation affecting employee drug-testing is brought to you by the **U.S. Department of Labor's Occupational Safety & Health Administration ("OSHA")** and specifically addresses post-accident drug testing.

OSHA's [new final rule](#) became effective August 10, 2016, amending requirements set forth in 29 C.F.R. § 1904.35. One of the state goals of the final rule is to promote "accurate recording of work-related injuries and illnesses by preventing the under-recording that arises when workers are discouraged from reporting these occurrences." Accordingly, the rule requires employers to:

"[E]stablish a reasonable procedure for employees to report work-related injuries and illnesses promptly and accurately. A procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness..."

Moreover, the rule requires that in addition to informing employees of its established reasonable procedure(s) for reporting injuries or illnesses, employers must also explain to employees (i) they have a right to report work-related injuries and illnesses; and (ii) that employers are prohibited from discharging or in any manner discriminating against employees making such reports.

So what does any of this have to do with employee drug-testing?

Excellent question.

While the text of the final rule does not expressly address drug-testing, the comments extensively discuss the topic, explaining that "*blanket* post-injury drug testing policies deter proper reporting."^[1] According to OSHA, a number of studies, as well as recordkeeping data support the idea that many workers were deterred from reporting injuries to their employer's post-injury drug testing policies and programs. As a result, the comments explain that in order for an employer to require post-incident drug testing, there must be "a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness." However, the final rule appears to stop short of requiring the familiar "reasonable suspicion" standard adopted by many states, as the comments explain employers "need not specifically suspect drug use before testing."

OSHA makes clear that the intent behind the final rule is not to ban all post-accident drug testing of employees. Rather, the final rule requires employers to "strike the appropriate balance" and utilize drug testing policies that "limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use."

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The comments further explain that the revisions to § 1904.35 brought about by the final rule are not intended to change the substantive obligations of employers, but rather to provide an enforcement tool to OSHA by allowing it to issue citations to employers retaliating against employees for reporting work-related injuries or otherwise violating the rule. OSHA is cognizant that the final rule may have a chilling effect on employers' enforcement of safety rules following a workplace incident. As a result, the comments make clear that "the final rule prohibits employers only from taking adverse action against an employee *because the employee reported* an injury or illness,"^[2] not against employers enforcing health & safety policies.

Although the new rule became effective August 10, 2015, OSHA has indicated it will not conduct enforcement activities until November 1, 2016, giving employers time to bring their practices and policies in conformance with the new rule. Employers should review their drug testing policies to ensure compliance with OSHA's new rule, as well as applicable state law.

[1] Emphasis added.

[2] Original emphasis.

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