

Electronic Alert

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OSHA's New Rule Affects Post-Accident Drug Testing Policies By Sean Ray and Nicole Elgin

Last month, the Occupational Safety and Health Administration (“OSHA”) issued its final rule to “Improve Tracking of Workplace Injuries and Illnesses” and to deter retaliation against workers who report injuries. Although the new rule does not specifically address drug testing, the agency’s [commentary](#) associated with the rule warns employers that mandatory post-accident testing programs may violate the new rule if they are pretext for retaliation against employees who report injuries.

OSHA warns that, although post-accident testing may be reasonable in some circumstances, mandatory drug testing after every accident is a form of intimidation that discourages employees from reporting workplace injuries, citing evidence from the U.S. House of Representatives Committee on Education and Labor. OSHA explained that post-accident employee drug testing and incentive programs are still possible under the new rule and that employers do not need to specifically suspect drug use before testing; however, employers should only require drug testing if there is a reasonable possibility that drug use by the employee who reported the accident contributed to the injury. Additionally, if the method of drug testing only indicates recent use of the drug, but not actual impairment, it may also deter reporting.

OSHA provides some examples of injuries where it may not be reasonable to test employees post-incident, such as “a bee sting, a repetitive strain injury, or an injury caused by a lack of machine guarding, or a machine or tool malfunction,” since drug use would not likely contribute to the injury or accident. Therefore, with these types of incidents, OSHA takes the position that drug testing is likely unreasonable, and employer policies that automatically require drug testing after all accidents, including such injuries, only deter reporting and do not help employers understand why the injury occurred.

Employers should take OSHA’s commentary into account in revising handbooks and policy language regarding post-accident drug testing requirements, as well as in the administration of post-accident drug testing policies, where applicable. However, OSHA acknowledges that some state and federal laws, such as the Department of Transportation regulations, require testing for employees after each accident, and employers who are required to comply with those statutes should continue to do so, as the motive for conducting those drug tests (compliance with federal law) would not be a discriminatory one. Policies that mandate drug testing after each accident or injury, without consideration of the type of accident or injury, should be revised unless the employer is bound to follow federal or state regulations requiring testing after each accident.

The anti-retaliation provisions of this new rule take effect on August 10, 2016, when OSHA may begin citing employers whose policies deter reporting. Additionally, states with OSHA-approved [State Plans](#), such as Oregon and Washington, will have to adopt substantially identical requirements to those in OSHA’s final rule within the next five months.