

UPDATE



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OSHA and Post-Accident Drug Testing: Proceed with Caution

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On May 12, 2016, the Occupational Safety and Health Administration of the United States Department of Labor released amended regulations under the Occupational Safety and Health Act (OSHA) pertaining to the reporting and tracking of workplace injuries and illnesses. Employers are required to “establish a reasonable procedure for employees to report work-related injuries and illnesses promptly and accurately.” A procedure is considered not reasonable “if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness.” Employees must be notified that they have the right to report work-related injuries and illnesses. Employers “must not discharge or in any manner discriminate against any employee for reporting a work-related injury or illness,” and employees must be informed that their employers are prohibited from discharging or discriminating against them for reporting a work-related injury or illness.

The new OSHA regulations, which take up barely three pages of the Federal Register, do not themselves reference post-accident drug testing in any way. However, in the sixty-seven pages of “Supplementary Information” that accompanied the amended regulations, the Occupational Safety and Health Administration specifically identified “automatic post-injury drug testing” as a form of adverse action that could discourage reporting and thereby violate the anti-discrimination regulations it had just adopted. Such commentary is not considered binding law. However, courts give substantial difference to an administrative agency’s informal interpretation of its own regulations. The Administration’s comments pertaining to post-injury drug testing therefore need to be taken seriously. Indeed, many commentators have questioned whether post-accident drug testing remains lawful in light of this commentary.

Careful review of the Administration’s comments reveals that the Department did not intend to prohibit all post-accident drug testing. However, any employer that engages in post-accident drug testing will need to proceed with caution. Employers will need to demonstrate that their post-accident testing program was truly designed and implemented to further the interest of workplace safety and not to discourage the legitimate reporting of workplace injuries and accidents.

The Occupational Safety and Health Administration has never adopted a standard expressly requiring drug testing in the workplace. However, it has historically expressed support for reasonable drug testing programs. For example, in a 1998 informal opinion letter, the Director of OSHA Enforcement Programs stated that the Occupational Safety and Health Administration “strongly supports measures that contribute to a drug-free environment and reasonable programs of drug testing within a comprehensive workplace program for certain workplace environments, such as those involving safety-sensitive duties like operating

machinery.” The Director also noted that OSHA’s “general duty” clause requires employers to maintain workplaces free of known safety hazards even in the absence of a specific OSHA standard pertaining to that hazard. So what caused the Occupational Safety and Health Administration to apparently change its mind?

The Administration still considers drug testing to be “a reasonable workplace policy in some situations.” However, because drug testing “is often perceived as an invasion of privacy ... if an illness or injury 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 past, requiring the employee to be drug tested may inappropriately deter reporting.” The Administration cited a report of the U.S. House of Representatives Committee on Education and Labor, which suggested that testing employees for drugs or alcohol after every incident or injury “irrespective of any potential role of drug intoxication in the incident” could be used “to intimidate workers.” The House Committee cited a survey that reported that 32% of Las Vegas hotel workers who reported work-related pain were allegedly forced to take drug tests even though such pain is often caused by physical workload, work intensification, and ergonomic problems unrelated to drug use. The Administration also cited a statement by the American National Standards Institute (ANSI) that drug testing programs needed to be “carefully designed and implemented to ensure employees are not discouraged from effective participation” in injury and illness reporting programs.

The Occupational Safety and Health Administration concluded that “blanket post-injury drug testing policies deter proper reporting.” The Administration cited a study conducted on a large retail chain that allegedly “found that post-accident drug testing caused a substantial reduction in injury claims,” and “that at least part of the reduction was due to the reduced willingness of employees to report accidents.” Another study described “privacy concerns and other individual factors” that affected employee willingness to participate in drug testing programs and to report accidents, as well as statements from workers that “post-injury drug testing programs deterred reporting.”

Of course, it is also possible that drug-testing programs deter accident reporting *because* employees do not want to report accidents caused by their drug use or alcohol abuse. It is also equally possible that post-accident testing reduces the number of injuries by preventing drug and alcohol abuse from occurring in the workplace. The Occupational Safety and Health Administration apparently chose not to consider these possibilities.

However, the Administration expressly disclaimed any intention to ban all post-injury drug testing. Rather, the Administration stated that its amended rule on reporting would only “prohibit employers from using drug testing (or the threat of drug testing) as a form of adverse action against employees who report injuries or illnesses. ***To strike the appropriate balance here, drug testing policies should 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.***” By way of example, the Administration suggested that “it would likely not be reasonable to drug-test an employee who reports a bee sting, a repetitive strain injury, or an injury caused by a lack of machine guarding or machine or tool malfunction.” Testing in such cases “is likely only to deter reporting without contributing to the employer’s understanding of why the injury occurred, or in any other way contributing to workplace safety.”

The Administration stated that employers “need not specifically suspect drug use before testing” in a post-accident context. However, “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 any employer to require drug testing.” Further, “drug testing that is designed in a way that may be perceived as punitive or embarrassing to the employee is likely to deter injury reporting.”

Finally, if an employer “conducts drug testing to comply with the requirements of a state or federal law or regulation, the employer’s motive would not be retaliatory,” and the amended regulations “would not prohibit such testing.” Drug testing requirements contained in state workers’ compensation laws would also be unaffected.

How should an employer proceed in light of the concerns expressed by the Occupational Safety and Health Administration? First and foremost, any employer engaging in post-accident drug or alcohol testing mandated by state or federal law should continue engaging in the mandatory post-accident testing. For example, the United States Department of Transportation, Federal Motor Carrier Safety Administration, requires post-accident testing of commercial drivers license (CDL) drivers whenever an accident involves a human fatality, and whenever the CDL driver is issued a citation following an accident that involves either a bodily injury requiring immediate medical treatment away from the scene or disabling damage to any motor vehicle requiring the vehicle to be towed. The amended OSHA regulations do not prohibit testing conducted in accordance with these Department of Transportation requirements.

Second, for employers not mandated by state or federal law to conduct post-accident testing, a careful distinction must be drawn between post-*accident* and post-*injury* testing. A policy of post-accident testing limited to instances in which employee negligence or impairment could conceivably have been a contributing factor would likely pass muster under the amended OSHA regulations. However, a policy requiring drug or alcohol testing after any reported injury whatsoever, including injuries that could not have been caused by employee negligence or impairment, would likely be deemed overbroad and therefore in violation of the amended OSHA regulations.

Third, as always, employers should adopt and follow drug-testing procedures that respect employee privacy and dignity.

Fourth, employers should consult with qualified attorneys with respect to the drafting of any post-accident testing policy to ensure compliance with OSHA requirements, and should also seek advice of counsel in determining whether post-accident testing is permissible in any specific case.

Finally, it must be remembered that the Occupational Safety and Health Administration’s limitations on drug and alcohol testing apply only to post-accident and post-injury testing. The amended OSHA regulations in no way affect an employer’s ability to engage in random drug testing in cases in which random testing is otherwise permitted by law. Nor do the amended OSHA regulations in any way affect an employer’s ability to engage in drug or alcohol testing based upon the employer’s reasonable suspicion that an employee is engaging in drug or alcohol related activity on duty. Thus, employers who use random and reasonable suspicion testing as means of achieving an impairment-free workplace should continue to do so. Bear in mind that OSHA continues to require employers to maintain workplaces free of known hazards. Impaired employees clearly constitute a known hazard.

It is unfortunate that the Occupational Safety and Health Administration appears to view post-accident testing more as a form of retaliation than a useful tool in assuring a safe and healthy workplaces for employees and the public alike. Nonetheless, with a carefully drafted policy and judicious use, post-accident testing can remain a useful tool for employers.

For NJ Addictions Hotline Dial 211

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