Will Post-Accident Drug Testing Still Be Allowed Under New OSHA Rules?

Insights
8.01.16

When the Occupational Safety and Health Administration (OSHA) announced its May 2016 Electronic Recordkeeping Rule, most employers focused on the Rule's increased reporting requirements and the imminent public posting of injury information to the agency's website. But the agency also indicated that, once the Rule becomes effective, it could be considered a violation of the law for employers to automatically conduct post-accident drug testing of injured employees.

Because many employers have mandatory post-accident drug-testing systems in place, this interpretation has resulted in a lot of speculation and justifiable criticism. While there is a chance that portions of the Rule might be shelved before its effective date, employers would be wise to prepare for a new reality which could come as early as later this year.

New OSHA Rule Garnered Significant Attention

The main thrust of OSHA's Electronic Recordkeeping Rule deals with a phased-in requirement that many employers electronically report their workplace injury data beginning in January 2017. However, the Rule also requires employers to establish a reasonable procedure for reporting work-related injuries and illnesses promptly and accurately, and notes that a procedure is not "reasonable" if it would "deter or discourage a reasonable employee from accurately reporting a workplace injury or illness."

Two Manageable Changes

OSHA interpreted this seemingly innocuous requirement to conclude that employers might violate the law if they take certain routine actions that are fairly typical in the modern workplace. For example, the agency said that establishing incentive programs which reward employees for experiencing no recordable workplace injuries and illnesses could violate the law.

Changes in practice to accommodate this new requirement should be fairly manageable. Studies show that incentives based solely on not getting injured have little effect on injury rates. In fact, you will get far more bang for your buck by incentivizing manager and employee actions that prevent injuries such as training, safety observations, self-audits, and employee participation in safety activities.

You should use this opportunity to discard most incentive programs based on injury data. Questions remain as to the acceptability of programs providing insignificant rewards, or whether you could

consider injury data as one of a number of factors when rewarding behavior.

The agency also warned employers that disciplining employees who do not immediately report workplace injuries could potentially violate the law. Even before the recent announcement, you should only have been disciplining employees for failure to promptly report injuries if you could clearly prove fraud or similar behavior.

OSHA's Unexpected Position On Post-Accident Drug Testing

Far less expected and less manageable was the OSHA announcement indicating that automatic post-injury testing could violate the law. The agency announced that employer 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."

OSHA stated that you 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 addition, the agency said that employers should avoid any type of drug testing that is designed in a way that may be perceived as "punitive or embarrassing" to the employee, as such a practice likely would deter injury reporting and violate the law.

OSHA's interpretation conflicts with 30 years of drug-testing practice. Since the inception of the Department of Transportation's mandated drug testing, it has been considered an employer best practice to automatically test after certain clearly defined incidents such as workplace accidents. The automatic process was considered fair and consistent because it prevented frontline supervisors from making arbitrary or discriminatory selections.

Proposal Is Troublesome

This interpretation is troubling in a number of respects. In the 1990s, many states enacted laws providing workers' compensation premium reductions or other employer benefits if the employer implemented Drug Free Workplace Programs (DFWPs), most of which required automatic post-injury or post-accident testing. OSHA's interpretation appears to exempt post-injury testing conducted pursuant to these DFWPs, but because many of these employer programs are voluntary and not mandatory, it is not currently clear whether you can escape liability by pointing to your participation in a DFWP.

Second,OSHA's interpretation appears to be scientifically unsound. While the agency announced that post-accident drug tests might only be permitted if they can accurately identify a drug impairment, most employers know that drug tests can only legally establish the presence of unlawful drugs but cannot establish "impairment."

Third, the agency has not yet clarified what an employer is supposed to do if a collectively bargained drug-test provision exists in a union contract. For now, employers should consider possible contract

changes. However, absent further guidance and the resolution of pending legal challenges, it seems unwise to open contracts to modify drug testing provisions.

What's Next?

The effective date of the Rule was supposed to be August 1, 2016. However, on July 8, a group of concerned employers filed suit against the Rule and subsequently requested an injunction blocking its implementation. The case is currently pending. On July 13, OSHA extended the Rule's effective date from August 1 to November 1, 2016.

We anticipate that even if the legal challenges succeed, some aspects of the new Rule will survive. Unfortunately, at this point, OSHA has not provided enough guidance to craft meaningful responses to the Rule changes. We await further guidance and clarification.

Proactive Steps You Can Take Now

Meanwhile, as we sit in this period of uncertainty, you should monitor the July 8 lawsuit to determine if OSHA clarifies its positions prior to November 1, 2016. One easy way to do so is to follow our Workplace Safety and Health Law Blog. We also suggest you answer the following questions in order to help assess your action plan:

- Do you conduct post-accident drug testing in order to comply with Department of Transportation or state DFWP requirements?
- Should you participate in workers' compensation DFWPs to gain protections?
- Should you only test after recordable injuries or after other events such as property damage, unsafe behavior, etc.?
- Should you add testing triggers, and if so, which triggers are simple enough that immediate supervision is competent to recognize them?
- Is it practical to implement a program following OSHA's "reasonable suspicion-light" standard with your frontline supervision?
- If so, what supervisor and HR training would be required?

Consider these questions before November 1 and be prepared to act in accordance with any legal developments and further OSHA clarification.

For more information, contact the author at HMavity@fisherphillips.com or 404.240.4204.

Related People

Howard A. Mavity
Partner
404.240.4204
Email

Service Focus

Counseling and Advice

Workplace Safety and Catastrophe Management