



# OSHA, Drugs, And Rock 'n' Roll: A Musical Soundtrack To The New Drug Testing Rule

Insights

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Significant changes in workplace safety law took effect on December 1 when the Occupational Safety and Health Administration's (OSHA's) new drug testing and anti-retaliation rule went into effect. The rule, which reemphasizes the protections for employees to report injuries and illnesses without fear of retaliation, also alters the circumstances under which you can require your employees to submit to a drug test.

When learning new information, it sometimes helps to retain the material if you associate the items with your favorite music. That's why we're providing you with a soundtrack of songs to help you remember and understand your new obligations.

## Key Provisions Of The New Rule

Before introducing the songs, it will be helpful to review the key provisions of the new rule. First, it's likely that OSHA will now consider any blanket post-accident drug testing policy to be illegal. Second, your internal procedures for reporting work-related injuries and illnesses must be reasonable and cannot deter or discourage employees from reporting. Finally, you may not award incentives based on the number of injuries or illnesses that are reported or occur during a certain period of time (e.g., a cash prize raffle if no recordable injuries take place) because OSHA believes such practices may deter the reporting of such incidents.

Perhaps more importantly, you can likely be cited for a violation of the new rule even while facing a retaliation complaint from a current or former employee. This development greatly increases your potential exposure if you are to be found in violation of the new safety rules, so the time to learn the details is now.

## Side One: The Basics

**Track One: "A Long December" – *Counting Crows*.** This 1996 hit reminds us that OSHA's new rule became effective on December 1, 2016.

**Track Two: "May We All" – *Florida Georgia Line/Tim McGraw*.** The rule applies to all employers in states where the federal government enforces the Occupational Safety and Health Act (OSH Act). State plan states will likely adopt the rule at some point during the next six months.

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**Track Three: “Crash Into Me” – Dave Matthews Band.** OSHA now believes a blanket post-accident drug testing policy would be illegal. Under the new rule, even mobile equipment accidents or crashes are not, alone, a sufficient basis to automatically conduct a drug test without running afoul of the new rule.

**Track Four: “Whiskey & You” – Chris Stapleton**

**Track Five: “Take Me Home Tonight” – Eddie Money**

**Track Six: “Unsteady” – X Ambassadors**

As one might imagine, there is no shortage of songs about drug or alcohol impairment. According to OSHA’s new rule, you may conduct drug testing only when you have a reasonable basis to believe that the incident or injury was likely to have been caused by the employee’s impairment, and that the drug test will determine whether the employee was impaired at the time of the incident or injury.

Although OSHA has stated that employers need not specifically suspect drug use before testing, it has also said that you should be aware of a “reasonable possibility” that drug use was a contributing factor in order to require testing. The agency also states that drug testing cannot be designed in a way that may be perceived as punitive or embarrassing to the employee, as that would likely deter injury reporting and run afoul of the rule.

In order to satisfy OSHA’s new requirement, you should adopt a reasonable suspicion test (or similar test) to determine if there was an impairment at the time of the incident or injury before sending an employee to be tested. This is especially appropriate if you already drug test your employees when you have a reasonable suspicion of alcohol or drug use which is not accident related.

**Track Seven: “Signs” – Tesla.** To perform reasonable suspicion testing, have your supervisors look for signs to determine if an employee appears to be under the influence of alcohol or drugs (including controlled substances and prescriptions). Your supervisor should observe the employee’s walking, standing, speech, demeanor, eyes, appearance, breath, and movements, among other behavior.

Where possible, have another supervisor or management representative also observe the employee. Make sure to document your findings and consider adjusting your post-incident forms to remind your managers to record this behavior. Finally, make sure to formally train your supervisors on identifying and documenting such behaviors.

Side Two: Getting Down Into The Details

**Track Eight: “I Will Wait” – Mumford & Sons**

**Track Nine: “Patience” – Guns N’ Roses**

## **Track Ten: “Shiftwork” – Kenny Chesney & George Strait**

Under the new rule, OSHA will not permit any policy that disciplines employees for failure to “immediately” report injuries or illnesses. Instead, you must have patience, wait, and give employees a reasonable amount of time (such as until the end of the shift or eight hours) to report such incidents.

## **Track Eleven: “Money” – Pink Floyd**

## **Track Twelve: “Moneytalks” – AC/DC**

OSHA will also prohibit safety incentive programs that, in the agency’s opinion, deter employees from reporting injuries. For example, withholding a cash prize drawing or other award to employees because of a reported injury or illness would violate OSHA’s new rule.

This practice has long been frowned upon by OSHA. A good alternative is to encourage and incentivize employees to participate in safety-related causes like a safety committee, or for reporting near-misses. See OSHA’s Recommended Practices for Safety and Health Programs.

## **Bonus Tracks! Lessons For Employers**

**Track Thirteen: “Battleships” – Daughtry.** Making the changes suggested by OSHA’s new rule may be difficult for some employers. Traditions, like the trajectory of battleships, are often difficult to alter. Take advantage of this opportunity to make changes that enhance workplace safety at your facilities. If workplace practices make employees feel safer, you may end up boosting morale. “We’ve always done it this way” are words of restraint and limitation, so remove them from your vocabulary when transitioning to life under the new rule.

**Track Fourteen: “Come Together” – The Beatles.** OSHA loves non-management participation in safety-related decisions, so incorporate ideas from your workers when revising your practices. As an added bonus, it is more difficult for OSHA to criticize an idea as retaliatory if it came from the non-management ranks.

**Track Fifteen: “Bad Company” – Bad Company.** As noted, the new rule likely allows OSHA to cite you for violating a rule even while an employee is maintaining a retaliation claim against you at the same time. Don’t be a “bad company” and ignore OSHA’s requirement. Instead, examine your policies to determine if a change is needed.

**Track Sixteen: “Calling Baton Rouge” – Garth Brooks.** OSHA is not likely to inspect your site solely to determine your compliance with the new rule. However, an employee may call OSHA’s local area office and report retaliatory practices under the new rule, which will likely prompt a visit. Once on site, investigators can quickly and easily review these policies – much like the way they review 300

logs and SDS sheets – leading to quick and easy citations. These can be avoided through minimal policy changes.

### <<Record Needle Scratch>> What About Trump And Puzder?

With Donald Trump's victory in November, and Andrew Puzder's nomination to oversee the Department of Labor, we believe the drug-testing and anti-retaliation rule may be altered at some point in the next several years. The highest-ranking officials in the new administration are not fans of employment regulations.

However, employers should not ignore OSHA's new requirements in the meantime. Although the writing may be on the wall for these rules to be scaled down or scrapped altogether in the future, you have a clear obligation to comply until that happens.

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*An earlier version of this article originally appeared in EHS Today and the Fisher Phillips Workplace and Safety Blog. For more information, contact the author at [TVance@fisherphillips.com](mailto:TVance@fisherphillips.com) or 704.778.4163.*

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