Should We Eliminate Automatic Post-Accident Drug Testing Because of OSHA's New Rule?

Insights
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We continue to receive calls from employers who have heard that they must change their post-accident drug testing procedures because of anti-retaliation provisions in OSHA's new Electronic Recordkeeping Rule. OSHA set an August 1, 2016 effective date for these anti-retaliation provisions.

Business groups filed two lawsuits and OSHA decided to delay enforcement until November 1, 2016 in order to conduct more outreach and education efforts. The Judge then requested that OSHA move its effective date to December 1, and OSHA grudgingly agreed.

On October 19, OSHA quietly released a guidance Memoranda to its own Area Offices to use in evaluating and citing programs, and OSHA also revised its FAQs on the www.osha.gov site.

- With so much uncertainty, employers should not eliminate or meaningfully revise drug testing policies until we receive more definitive direction from the Courts and/or OSHA … hopefully by December 1.

What is OSHA's Position on Automatic Post-Accident Drug Testing?
Although the focus has been on automatic post-accident drug testing, OSHA actually announced positions on four areas of employer practices in its 260+ page Notice of the Rule, and a somewhat refined version in OSHA's October 19 Memoranda:

- Rules requiring Immediate Reporting of Workplace Injuries and Illnesses;
- Automatic Post-Accident Drug Testing;
- Safety Incentive Programs based on Injury and Illness data; and
- Safety-related Discipline generally.

OSHA's lengthy discussion accompanying the Rule articulated OSHA's specific interpretation of the new requirements, but the actual Rule language is brief and neither as expansive or detailed as OSHA's interpretations suggest:

Employers must establish 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;

From this reasonable statement, OSHA took the following position in the Notice about automatic post-accident drug testing:

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.

Employers 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 order for an employer to require drug testing. In addition, 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.

Even if OSHA's Rule Survives Legal Challenge, OSHA Will Have to Prove its Position On a Case-by-Case Basis.

While OSHA did not reverse its stated positions in its October 19 memoranda, it did concede that to make out an employer violation; OSHA must prove that the policy or procedure discouraged employees from reporting workplace injuries or illnesses following this analysis:

1. *The employee reported a work-related injury or illness;*
2. *The employer took adverse action against the employee (that is, action that would deter a reasonable employee from accurately reporting a work-related injury or illness); and*
3. *The employer took the adverse action because the employee reported a work-related injury or illness.*

OSHA states in their Memoranda that a post-accident drug test without *"objectively reasonable basis for testing"* would be a violation under this analysis:

…. the central inquiry will be whether the employer had a reasonable basis for believing that drug use by the reporting employee could have contributed to the injury or illness. …. When OSHA evaluates the reasonableness of drug testing a particular employee who has reported a work-related injury or illness, it will consider factors including "whether:"

- *the employer had a reasonable basis for concluding that drug use could have contributed to the injury or illness (and therefore the result of the drug test could provide insight into why the injury or illness occurred),*
- *other employees involved in the incident that caused the injury or illness were also tested or*
- *the employer only tested the employee who reported the injury or illness, and*
- *the employer has a heightened interest in determining if drug use could have contributed to the injury or illness due the hazardousness of the work being performed*

when the injury or illness occurred.

The general principle here is that drug testing may not be used by the employer as a form of discipline against employees who report an injury or illness, but may be used as a tool to evaluate the root causes of workplace injuries and illness in appropriate circumstances.

The important take away from OSHA's October 19 Memoranda is that OSHA has to prove its interpretation, and cannot simply say that all automatic post-accident drug testing policies are retaliatory and unlawful. Even under OSHA's position, an employer could arguably devise an automatic post-accident policy that would pass muster.

We'll see what the Court decides … hopefully by December 1.

What Should Employers Do to Prepare for the Rule, Should it Survive Challenge?

1. Determine if automatic post-accident drug testing is worth the effort. Some employers have reviewed years of results and determined that automatic post-accident testing is not needed at their operation.
2. Other employers have noted that positive drug tests increased in 2014 and 2015 for the first time in about 16 years, and that drug testing is increasing in importance, especially for abused pain medications and *"Black tar"* heroin.
3. Check to see if your state maintains a Drug-Free Workplace Program (DFWP) law, typically under state workers comp laws. These laws are usually voluntary and if an employer participates, they receive workers comp penalty reductions or other benefits or protections. Some of these programs require the employer to include automatic post-accident drug testing in these DFWPs.
4. Employers are also debating whether to add additional trigger events, such as a certain estimated amount of property damage and for employees involved in or who caused the incident, such as the operator of a forklift which struck an employee.

Don't wait until December 1 to consider these questions.

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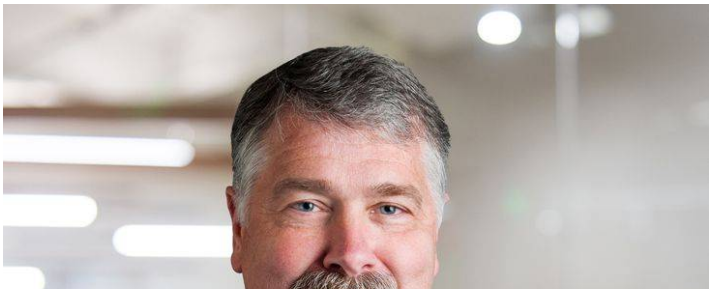

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