



OSHA, Drugs, and Rock 'n' Roll: A Musical Soundtrack to OSHA's New Drug Testing and Anti-Retaliation Rule

Insights

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It's the first of December. Significant changes in workplace safety law take effect today.

OSHA's new drug testing and anti-retaliation rule, which alters the circumstances when drug testing can be conducted and reemphasizes the protections for employees to report injury and illnesses without fear of retaliation, is now in effect. The final rule, which has likely led to more calls to our firm than any other change we've seen this year, contains three key provisions of which employers should be aware.

The New Rule's Key Provisions

First, a blanket post-accident drug testing policy would likely be considered illegal by OSHA under the new rule.

Second, an employer's *internal* procedures for reporting work-related injuries and illnesses must be reasonable and not deter or discourage employees from reporting.

Finally, an employer 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 such practices may deter the reporting of such incidents.

Perhaps even more importantly, however, employers can likely be cited for violation of the new rule and, at the same time, face a retaliation complaint filed by a current or former employee. This development greatly enhances the potential liability to an employer for any discipline issued for violation of safety rules.

Grasping the New Rule and Implementing its Provisions at Your Workplace

Completely grasping new requirements and implementing them in your workplace, especially those like the landscape-altering provisions of OSHA's new rule, may often be difficult. Sometimes grouping or associating new items with our favorite music helps us to retain complicated information.

In order to ensure compliance with OSHA's new rule, consider using the following soundtrack to help remember and understand its new obligations.

"SIDE ONE" PROHIBITION ON BLANKET POST-ACCIDENT DRUG TESTING POLICIES

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Track One- “A Long December” – *Counting Crows*

This hit from 1996 reminds us that OSHA’s new rule is effective December 1, 2016.

Track Two- “May We All”- *Florida Georgia Line/Tim McGraw*

The new rule applies to *all* employers in states where the Federal government enforces the OSH Act- <https://www.osha.gov/dcsp/osp/>. State plan states likely will adopt the rule at some point during the next six months.

Track Three- “Crash Into Me” - *Dave Matthews Band*

OSHA now believes a blanket post-accident drug testing policy would be a violation. Under the new rule, even mobile equipment accidents or “crashes” are not, alone, a sufficient basis to conduct a drug test. An employer must also establish an objectively reasonable basis that an impairment due to drugs or alcohol likely led to the accident.

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

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

Track Six - “Unsteady” – *X Ambassadors*

As one may imagine, there is no shortage of songs regarding impairment caused by drug or alcohol use.

According to OSHA’s new rule, an employer may likely conduct drug testing ***after December 1, 2016 only when:*** (1) the employer has a reasonable basis that the incident or injury was likely to have been caused by the employee’s impairment; and (2) the drug test used will determine whether the employee was impaired at the time of the incident or injury.

Specifically, OSHA has provided the following guidance on this portion of the new rule:

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.

In order to satisfy OSHA's new requirement, we recommend that employers adopt a reasonable suspicion test (or similar test) to determine if there was an impairment at the time of the incident or injury. This is especially appropriate for employers who already drug test when they have a reasonable suspicion (non-accident related) of alcohol or drug use. Likewise, increasing random drug testing may prove valuable to employers, especially in light of OSHA's new requirement that the post incident/injury drug testing selected by the employer actually determine impairment at the time of the incident/injury versus mere historical drug use (which may be costly or unavailable to employers).

Track Seven- "Signs" – Tesla

In doing so, have your supervisors attempt to determine if an employee "appears" to be under the influence of an alcoholic beverage, drugs (including controlled substances and prescriptions) or both, and that such impairment led to his or her accident or injury. In making this determination, your supervisor should observe, among other behavior, the employee's walking, standing, speech, demeanor, eyes, appearance, breath, and movements. Where possible, get another supervisor or management representative to also observe the employee. Make sure to document your findings and consider adjusting your post incident/injury forms to remind those individuals to document this behavior (if observed) and/or hold formal training on identifying and documenting such observations as this could be critical during an OSHA investigation.

"SIDE TWO"- REPORTING INJURIES/ACCIDENTS & SAFETY-RELATED INCENTIVE PROGRAMS

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 prohibits any reporting policy that disciplines employees for failure to "immediately" report injuries or illnesses. Instead, employers must "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 finally will also prohibit safety incentive programs that deter (in OSHA's mind) the reporting of 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 the agency. A good alternative is to encourage and incentivize employees to participate in other safety related causes, like a safety committee or 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 “battleships,” are often difficult to alter. Take advantage of this opportunity to make changes that enhance workplace safety at your facilities. Creativity and changes that make employees feel safer may boost morale. “We’ve always done it this way” are words of restraint and limitation. Also, remember that OSHA loves non-management participation in these decisions and it is more difficult for OSHA to criticize an idea as retaliatory that came from the non-management ranks.

Track Fourteen- “Bad Company” – *Bad Company*

Track Fifteen- “Calling Baton Rouge” – *Garth Brooks*

As noted, the new rule likely allows OSHA to cite an employer for violation of the rule, in addition to any retaliation claim that an employee may file. Don’t be a “bad company” and ignore OSHA’s requirement; examine your policies to determine if a change is needed. OSHA likely will not inspect your site solely for the reason to ascertain 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 likely will prompt a visit. Additionally, reviewing these policies during an inspection, much like reviewing 300 logs and SDS sheets, is easy and can lead to potential quick citations that can be avoided with minimal policy changes.

With Donald Trump’s victory in November, we believe that the drug-testing and anti-retaliation rule may be altered at some point in the first or second year of the Trump Administration. However, employers should not ignore OSHA’s new requirements in the meantime.

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