Insights, News & Events

OSHA'S POST-ACCIDENT DRUG TESTING RULE DELAYED UNTIL DECEMBER 1

What Employers Need To Know To Comply

Insights
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Employers continue to question whether they must change their post-accident drug testing procedures because of the anti-retaliation provisions in OSHA's new Electronic Recordkeeping Rule announced in May, and if so, whether compliance is immediately necessary. Although OSHA set an August 1, 2016 effective date for the anti-retaliation provisions, the agency initially delayed enforcement until November 1, 2016 in order to conduct more outreach and education efforts in response to several lawsuits filed by business groups.

The good news for employers is that the agency further delayed the effective date of the Rule upon request by the judge hearing the cases. On October 12, OSHA announced that it would further delay enforcement of the anti-retaliation provisions until December 1, 2016. This delay provides you with a good opportunity to become educated about our current understanding of these impending obligations. With so much uncertainty, however, you should not eliminate or meaningfully revise your drug testing policies until the courts or OSHA provide more definitive direction – hopefully by December 1.

What Is OSHA's Position On Automatic Post-Accident Drug Testing?
OSHA's lengthy discussion accompanying the Rule pronounced 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:

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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.

OSHA Will Still Have To Prove Its Position On A Case-By-Case Basis, Even If The Rule Survives

On October 19, OSHA quietly released a guidance Memorandum to its own Area Offices to use in evaluating and citing programs, and also revised its FAQs on the www.osha.gov site. While OSHA did not reverse its stated positions in this Memorandum, it did concede that it would have to prove that the employer's policy or procedure discouraged employees from reporting workplace injuries or illnesses in order to make out an employer violation.

The Memorandum then described the following analysis that would need to be carried out:

1. The employee reports a work-related injury or illness;

2. The employer takes adverse action against the employee (that is, an action that would deter a reasonable employee from accurately reporting a work-related injury or illness); and

3. The employer's adverse action was taken because the employee reported a work-related injury or illness.

OSHA states in its Memorandum that a post-accident drug test without "objectively reasonable basis for testing" would be a violation of the new Rule. It states that "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."

Therefore, if the Rule survives the pending legal challenges and goes into effect on December 1 (or sometime thereafter), the agency will have to consider the following factors when evaluating the reasonableness of a drug test required of an employee who reported a work-related injury or illness:

- 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);
- whether other employees involved in the incident that caused the injury or illness were also tested;
- whether the employer only tested the employee who reported the injury or illness; and
- whether 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.

OSHA makes clear that the general principle guiding this new Rule is that drug testing may not be used as a form of discipline against employees who report an injury or illness, but may only be used as "a tool to evaluate the root causes of workplace injuries and illness in appropriate circumstances."

The important takeaway from OSHA's October 19 Memorandum is that the agency has to prove its interpretation, and cannot simply pronounce 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.

What Should Employers Do To Prepare For The Rule?
Assuming that the Rule survives its legal challenge and goes

into effect on December 1, we recommend that you take the following steps in order to achieve compliance.

First, 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. Other employers have noted that positive drug tests decreased for 16 years until a spike in 2014 and 2015. These employers have concluded that drug testing is increasingly important, especially for abused pain medications and "black tar" heroin.

Next, check to see if your state maintains a Drug Free Workplace Program (DFWP) law, typically under state workers' compensation laws. These laws are usually voluntary and if an employer participates, you will receive workers' compensation penalty reductions or other benefits or protections. Some of these programs require you to include automatic post-accident drug testing in these DFWPs.

Finally, consider whether to add additional factors that would trigger an automatic test, such as a certain estimated amount of property damage; in a related sense, consider whether you want to limit testing to those who caused an incident, such as the operator of a forklift which struck an employee, instead of mandating testing for all employees involved, including the employee injured by the forklift.

For more information, visit our website at www.fisherphillips.com or contact any member of our Workplace Safety and Catastrophe Management Practice Group or your regular Fisher Phillips attorney.

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