

OSHA Publishes Guidance For Conducting Post-Accident Drug And Alcohol Testing Without Violating The Electronic Recordkeeping Rule's Retaliation Provision

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The Occupational Safety and Health Administration [published a memorandum on October 19, 2016](#) that explains statements made about post-accident drug and alcohol testing in its commentary to the Electronic Recordkeeping Rule, *i.e.*, “*Improve Tracking of Workplace Injuries and Illnesses*,” which was published in May. Among other things, the rule prohibits retaliation against employees who report workplace injuries and illnesses.

As we discussed in a previous blog post, [“What OSHA’s Electronic Recordkeeping Rule Means for Workplace Post-Accident Drug and Alcohol Testing.”](#) OSHA stated in the commentary to its new rule that: “the final rule does prohibit employers from using drug testing (or the threat of drug testing) as a form of adverse action against employees who report injuries or illnesses.” Since the commentary was published in May, there has been much debate about whether any form of post-accident or post-injury drug and alcohol testing is permitted by employers.

In the October 19, 2016 memorandum, OSHA stated that it will not issue citations for drug testing conducted under federal or state laws, or under state workers’ compensation laws. This is good news for employers who conduct drug and alcohol testing required by federal law, or in accordance with state laws, including state workers’ compensation premium reduction laws.

Importantly, OSHA stated that “[t]he 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 Electronic Recordkeeping rule does not prohibit employers from drug testing employees “who report work-related injuries or illnesses so long as they have an objectively reasonable basis for testing, and the rule does not apply to drug testing employees for reasons other than injury-reporting.” The rule only prohibits drug testing employees for reporting work-related injuries or illnesses without an objectively reasonable basis for doing so. When evaluating whether an employer had a reasonable basis for drug testing an employee who reported a work-related injury or illness, OSHA’s 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. If so, it would be objectively reasonable to subject the employee to a drug test. 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), whether other employees involved in the incident that caused the injury or illness were also tested or 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 offered this example: A crane accident injures several employees working nearby but not the operator. The employer does not know the cause of the accident, but there is a reasonable possibility that it could have been caused by operator error or by mistakes made by other employees responsible for ensuring that the crane was in safe working condition. In this scenario, it would be reasonable to require all employees whose conduct could have contributed to the accident to take a drug test, whether or not they reported an injury or illness. Testing would be appropriate in these circumstances because there is a reasonable possibility that the results of drug testing could provide the employer

insight on the root causes of the incident. However, if the employer only tested the injured employees but did not test the operator and other employees whose conduct could have contributed to the incident, such disproportionate testing of reporting employees would likely violate the retaliation provision.

Conversely, OSHA stated that drug testing an employee whose injury could not possibly have been caused by drug use would likely violate the retaliation provision of the rule. For example, drug testing an employee for reporting a repetitive strain injury would likely not be objectively reasonable because drug use could not have contributed to the injury.

Finally, OSHA stated that it will only consider whether the drug test is capable of measuring impairment at the time the injury or illness occurred where such a test is available. Therefore, OSHA will only consider this factor for alcohol tests but not drug tests.

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