

Gavel to Gavel: OSHA Rule Impacts Drug, Alcohol Testing

by Lauren Oldham Guest Columnist

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An Occupational Safety and Health Administration (OSHA) rule in effect as of December, should prompt employers to re-evaluate their post-accident drug and alcohol testing policies and practices.

The rule allows employers to be cited for retaliation against employees subjected to post-accident drug and alcohol testing when there is no reason to believe impairment contributed to the accident or injury. Issued before President

Trump's administration assumed office, the rule may not be as stringently enforced as first envisioned. However, employers are still at risk if engaging in mandatory post-accident testing because employees could bring their own retaliation claims.

The rule stops short of requiring "reasonable suspicion." Rather, it instructs employers to "strike the appropriate balance" and "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." If not, employers face stiff penalties for violations – \$12,000 per violation and \$120,000 for willful or repeat violations.

Some examples of unreasonable or questionable testing would be a repetitive strain injury, such as tendinitis or a back injury, or an injury caused by a lack of machine guarding or a machine or tool malfunction. In these cases, there is no reasonable possibility that the injury occurred because the employee was impaired from drugs and/or alcohol.

However, an example of reasonable testing would be a crane accident that injures several employees but not the operator. The employer may not know the cause, but there is a reasonable possibility 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, OSHA considers it reasonable to require all employees whose

conduct could have contributed to the accident to take a drug and alcohol test, whether or not they reported an injury or illness.

While OSHA gives some examples like these in the rule, much interpretation is still required. Employers should ensure their policies effectively address the gamut of potential situations and pose no liability to their organizations while maintaining a commitment to workplace safety.

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