



“New OSHA Regulation Impacts Drug & Alcohol Testing”

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A new rule issued by the Occupational Safety and Health Administration (“OSHA”) necessitates that employers reevaluate their post-accident drug and alcohol testing policies and practices. On May 12, 2016, OSHA released its final rule amending 29 C.F.R. § 1904.35 and emphasizing that employers could 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.

HOW DOES THE RULE IMPACT DRUG TESTING?

The rule actually does not mention mandatory post-accident drug and alcohol testing. But the pre-Trump OSHA leadership declared it will view mandatory post-accident testing as deterring the reporting of workplace safety incidents and thus retaliatory. The pre-Trump OSHA warned that employers who operate under such policies will face enforcement scrutiny and penalties. OSHA advised that post-incident testing is not retaliatory when there is “a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness.” The rule appears to stop short of requiring “reasonable suspicion,” explaining that employers “need not specifically suspect drug use before testing.” Employers must “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.” Otherwise, employers face serious penalties for each violation, especially since OSHA has implemented increases that permit maximum penalties to over \$12,000 per violation and over \$120,000 for willful or repeat violations. It is likely, however, that the Trump-era OSHA will not enforce the new rule as stringently, if at all, but employees could potentially bring their own retaliation claims (assuming the rule survives pending legal attacks highlighted below).

WHEN DOES IT GO INTO EFFECT?

The rule took effect August 10, 2016, but OSHA delayed enforcement until December 1, 2016.

WHY THE CHANGE?

The rule prohibits retaliation against employees for reporting work-related injuries or illnesses. OSHA believes mandatory drug and alcohol testing can be retaliatory to the extent it tends to deter employees from reporting accidents and injuries.

HOW TO COMPLY WITH THE RULE

Pre-Trump OSHA recommends that “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 or alcohol use or impairment before testing, but there should be a reasonable possibility that use by the reporting employee was a contributing factor.

Examples of Unreasonable Testing

OSHA provided examples of what it considers unreasonable testing, such as where an employee reports a bee sting, 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.

Examples of Reasonable Testing

OSHA also provided examples when post-accident testing is reasonable, such as a crane accident that injures several employees but not the operator. The employer does 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. Testing would be appropriate because there is a reasonable possibility that the test results could provide insight on the root causes of the incident. However, if the employer only tested the injured employees but not the operator and other employees whose conduct could have contributed to the incident, then testing only the reporting employees would be considered retaliatory.

Testing Required By State or Federal Law

Employers required to conduct post-accident testing under state or federal law, such as U.S. Department of Transportation regulations or state workers’ compensation laws, may continue to test and it will not be considered retaliatory.

CHALLENGES TO THE RULE

Two actions have been filed to block the rule. In *TEXO ABC/AGG, Inc. v. Perez*, Case No. 3:16-CV-1998-L (N.D. Tex., Nov. 28, 2016), industry groups seek to block OSHA from enforcing the anti-retaliation provisions of the Rule. The Texas court declined to grant a preliminary injunction, but it has not yet finally resolved the issues. In *National Association of Home Builders of the United States et al v. Perez et al*, No. CIV-17-000009-M., 2017 WL 75736 (W.D. Okla. Jan. 4, 2017), the Home Builders Association is challenging the rule’s requirement that employers electronically submit injury and illness data to OSHA for public posting on the Internet. The electronic submission requirement took effect January 1, 2017 and will be phased in through 2019.

If you would like help evaluating your post-accident drug and alcohol testing policies and practices, please contact one of our attorneys in the Labor and Employment Law Practice Group.

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