



New OSHA rule may require modifications to post-accident and post-injury drug testing policies

The Occupational Safety and Health Administration (“OSHA”) has recently enacted a new reporting Rule, effective Dec. 1, 2016,¹ that requires employers to establish “reasonable procedures” for employees to promptly and accurately report work-related injuries and illnesses. In order for such procedures to be considered “reasonable” under the new Rule, they cannot deter or discourage a reasonable employee from accurately reporting a workplace injury or illness.

The Rule refers to an existing statutory prohibition on retaliation, and now further requires employers to proactively inform employees that they will not be retaliated against for reporting work-related injuries and illnesses.

“Although the final Rule does not specifically mention drug-testing policies, OSHA commentary makes clear that such

policies will now face scrutiny because, according to OSHA, post-injury/accident testing has the potential to deter injury reporting.”² Employers do not have to specifically suspect drug use before testing, however, post-accident and post-injury drug testing will likely only be considered reasonable if it is limited to circumstances where there is a reasonable possibility that drug use was a contributing factor to the reported injury or illness and if testing methods are designed to identify impairment during the incident (as opposed to identifying general prior drug use).³

Specifically, OSHA stated:

“Although drug testing of employees may be a reasonable workplace policy in some situations, it is often perceived as an invasion of privacy, so if an injury or illness is very unlikely to have been caused by employee drug use, or if the method of drug testing does not identify impairment but only use at some time in the recent past, requiring the employee to be drug tested may inappropriately deter

¹ OSHA, Delay of Enforcement of the employee rights provisions under 29 CFR 1904.35 (July 13, 2016), available at <https://www.osha.gov/recordkeeping/finalrule/TrackingEnforcementMemo.pdf>.

² Marilyn Clark, Rebecca Bernhard & Jack Sullivan, *New OSHA Rule Effective Next Month – Are Your Drug-Testing Policies Placing You At Risk?*, DORSEY & WHITNEY LLP (July 13, 2016), <https://www.dorsey.com/newsresources/publications/client-alerts/2016/07/new-osh-rule-effective-next-month>

³ OSHA, Improve Tracking of Workplace Injuries and Illnesses, 81 Fed. Reg. 29623 -29694, 29673 (May 12, 2016), available at https://www.osha.gov/FedReg_osh.pdf/FED20160512.pdf.



reporting.⁴

“[T]he 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. 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. For example, it would likely not be reasonable to drug-test an employee who reports a bee sting, a repetitive strain injury, or an injury caused by a lack of machine guarding or a machine or tool malfunction. Such a policy is likely only to deter reporting without contributing to the employer’s understanding of why the injury occurred, or in any other way contributing to workplace safety.”⁵

In light of this new Rule, employers should review their current post-accident and post-injury drug testing policies with counsel and modify such policies as necessary to ensure compliance and to avoid enforcement actions.

⁴Id.

⁵Id.