

# New OSHA Drug Testing in Workplace

Buried within OSHA's impending final rule on electronic reporting of workplace injuries and illnesses, is this little nugget. OSHA believes that you violate the law if you require an employee to take a post-accident drug test. Let me repeat, according to OSHA, you violate the law if you automatically drug test any employee after an on-the-job accident.

While this prohibition doesn't appear in the actual text of the final rule, it does prominently appear in OSHA's interpretation of the provision, which prohibits employers from retaliating against employees who reported a work-related injury or illness.

OSHA believes the evidence in the rulemaking record shows that blanket post-injury drug testing policies deter proper reporting. This final rule does not ban drug testing of employees. However, 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. 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.

"What about Workers' Compensation Laws," you say? "State law requires post-accident testing, so what gives?" OSHA hears your cries, and has an answer for you:

Several commenters have raised the concern that the final rule will conflict with drug testing requirements contained in Workers' Compensation Laws. This concern is unwarranted. If an employer conducts drug testing to comply with the requirements of a State or Federal Law, or Regulation, the employer's motive would not be retaliatory, and the final rule would not prohibit such testing. This is doubly true because the Act prohibits OSHA from superseding or affecting Workers' Compensation Laws.

This interpretation is huge for employers. As a result of this new reporting standard, employer policies that require post-accident drug testing will face scrutiny by OSHA, and OSHA will cite you for any policy that mandates post-accident testing without consideration of the specific facts, and circumstances of the injury. Further, OSHA will deem retaliatory any employer discipline for a failed or refused post-accident test unless the drug use is likely to have contributed to the accident, and for which the test can accurately identify pre-accident drug-related impairment. That's a high bar for employers to clear.

This rule was to take effect on August 10th, 2016, but OSHA has stated that it is delaying enforcement until November 1st. If you have a drug testing policy or otherwise engage post-accident testing in your workplace, now is the time to review your policies and practices with your employment counsel. This issue is very much on OSHA's radar, which means it must be on your radar as well.

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