

OSHA Weighs in on Retaliation and Drug Testing

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QUESTION: We conduct drug testing whenever an employee is injured at work or in involved in an accident. I recently read that this may violate OSHA's anti-retaliation rule. How can that be? I would think OSHA would want employers to drug test to keep workplaces drug-free and safe.

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Short Answer:



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Drug testing raises complex issues, which the law addresses in complex ways. Although safe workplaces are in everyone's interest, drug testing also implicates privacy concerns and, specifically in the case of OSHA, concerns that employees might conceal important health and safety concerns in order to avoid a drug test. As a further complication, workplace drug testing implicates both state and federal law, and multiple state and federal agencies regulate it. You can still test your employees under appropriate circumstances, but you will need to be careful to comply with all applicable laws.

Detailed Answer:

Before addressing your specific question about the Occupational Safety and Health Administration ("OSHA"), we need to emphasize that multiple statutes and regulations govern drug testing in the workplace. As an example, in Minnesota workplace drug

testing is governed by Minn. Stat. §§181.950-957, which impose detailed requirements on workplace drug testing. Various federal agencies, including the Department of Transportation, the Department of Defense and others, have their own drug testing requirements. The details of these programs are beyond the scope of this post, but you will need to conform your drug-testing program to all applicable legal requirements.

OSHA does require employers to provide safe workplaces for its employees but it does not require employers to drug-test. Your question was likely prompted by reading about OSHA's new electronic reporting Rule, which takes effect on January 1, 2017. As part of this new rule, OSHA also prohibits employers from discouraging workers from reporting an injury or illness. This anti-retaliation provision of the new rule took effect on August 10, 2016, but OSHA has delayed enforcement until November 1, 2016, to allow it time to provide outreach to employers.

The new Rule provides that employers must, among other obligations, establish a "reasonable procedure" for employees to promptly and accurately report work-related injuries and illnesses. The Rule prohibits this procedure from "deterring or discouraging" a reasonable employee from accurately reporting a workplace injury or illness, and it also requires employers to proactively advise employees that they will not suffer any retaliation for such reporting.

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. The Administration has indicated that such testing will pass muster only if (1) it is limited to circumstances where employee drug use likely contributed to the underlying incident; and (2) testing methods are tailored to identify impairment during the incident (as opposed to identifying general prior drug use). It is important to note, however, that when it announced the new Rule, OSHA emphasized that drug testing performed by employers to comply with federal or state laws or regulations does not run afoul of OSHA regulations

See our earlier article for an overview of the relevant Rule provisions and more complete discussions of the practical implications of the same in order to help employers prepare for their pending new, and somewhat ambiguous, obligations:

<https://www.dorsey.com/newsresources/publications/client-alerts/2016/07/new-oshare-rule-effective-next-month> .

Employers who wish to continue testing employees for drug use following an accident or workplace injury should consider reviewing their drug-testing policies to confirm that their post-accident/post-injury testing will conform to OSHA's guidance. In accordance with applicable state law, employers could fold their post-accident/injury testing into their reasonable-suspicion testing, with language clarifying that post-injury/accident testing will take place only where circumstances suggest the employee's conduct has caused the accident or injury in question. In addition, employers should consider adding policy language clarifying that—at least for post-accident/injury testing—they will utilize tests that measure only very recent drug use.

The foregoing measures arguably should, as required under the new Rule: (1) reasonably tailor testing to those workplace incidents where there is reason to suspect drugs and/or alcohol may have played a role; and (2) ensure related testing methods are designed to show whether the employee was in fact impaired at the time. More specifically, by limiting testing to those circumstances where there is reason to believe the employee's conduct was responsible for an accident or injury, employers are precluded from testing in any circumstance where it is clear the incident was caused by factors unrelated to employee conduct (e.g., faulty equipment, force majeure, etc.). By further tailoring testing methods to measure only very recent use, employers may demonstrate that they are not testing with any over-reaching motive to "catch" employee drug use that is remote in time and thus unrelated to the incident in question.

Finally, employers should confirm that their reporting procedures contain the required provisions of informing employees of their right to report work-related injuries and illnesses free from retaliation.