

New OSHA Rule Could Affect Employers' Drug Testing and Safety Incentives

July 5, 2016

The Occupational Safety and Health Administration (OSHA) intends to enhance its enforcement efforts against employers who OSHA believes are using drug testing and safety incentives to improperly reduce recordable work-related employee injuries and illnesses. The new requirements take effect Aug. 10, 2016.

The administration recently issued an amendment to the OSHA workplace employee injuries and illnesses recordkeeping standard. The most prominent provision of the amendment requires employers to electronically submit their employee work-related injury and illness information to OSHA for electronic publication. (Please see Miller Canfield's May 11, 2016, alert: "*OSHA Issues Rule Requiring Employers to Publish Workplace Injuries.*")

However, another part of OSHA's amendment addresses what it believes is a threat to the accuracy of the employee injury and illness information received from employers. OSHA believes that certain employer drug testing programs and safety incentive programs could discourage employees from reporting workplace injuries and illnesses.

Drug Testing

OSHA's new rule does not seek to prohibit employers from conducting employee drug testing. OSHA however, believes that blanket drug testing of all employees who report any injury and illness could potentially be retaliatory and discourage employees from reporting injuries and illnesses. OSHA will attempt to determine if an employer's use of drug testing has a "retaliatory" motive against an employee who reports a work-related injury or illness.

Drug Testing Programs in Compliance with Workers Compensation or Other Laws

It should first be made clear that OSHA has indicated that it will not find a retaliatory motive if an employer's drug testing program is being performed in compliance with workers compensation laws. Likewise, OSHA would not find an employer to be acting with a "retaliatory" motive if an employer is acting in compliance with other laws, such as U.S. Department of Transportation post-accident testing requirements.

Drug Testing Programs Not Based On Workers Compensation or Other Laws' Requirements

If an employer's drug testing program is not being performed in compliance with workers compensation requirements and/or other governmental laws or regulations, then OSHA will scrutinize the employer's drug testing program to determine if it is *reasonable* under the circumstances.

In the preamble to the amended rule, OSHA states:

"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 reporting."

OSHA further explains:

"... 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

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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."

Safety Incentives

It should be noted that OSHA is also targeting employer safety incentives in OSHA's effort to address the perceived problem of underreporting employee injuries and illnesses. In the preamble to the amended rule, OSHA states:

"[D]epending on how an incentive program is structured, reluctance to lose the bonus or peer pressure from other crew members whose prizes are also threatened reduces the reporting of injuries and illnesses in the job, rather than reducing the actual number of workplace injuries and illnesses ...

"OSHA does not intend the final rule to categorically ban all incentive programs. However, programs must be structured in such a way as to encourage safety in the workplace without discouraging the reporting of injuries and illnesses."

OSHA clearly disfavors employee incentives based on minimizing recordable injuries and illnesses. Rather, OSHA favors employee incentives for employees completing safety activities such as safety inspections, pre-job briefs, tool-box talks, etc.

Conclusion

OSHA will be scrutinizing employers' drug testing and safety incentives to determine if they unreasonably discourage or deter employee injury and illness reporting. Employers should review their drug testing and safety incentives to assure that they are reasonable and do not act to discourage or deter employee injury and illness reporting.

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