



Post-Accident Drug Testing Under OSHA's New Rule

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Published on www.lorman.com - May 2018

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*By Ashley L. Toth, Esq.**

Key Points:

- OSHA's "new rule," effective January 1, 2017, requires employers to electronically submit injury and illness data to OSHA.
- The anti-retaliation provision of the "new rule" prohibits post-accident drug testing policies.
- Employers may still drug test employees under certain circumstances.

On January 1, 2017, OSHA's "new rule" took effect, which requires employers to electronically submit injury and illness data to OSHA. Along with the electronic submissions, the new rule also contains an anti-retaliation provision. This provision prohibits employers from retaliating against employees for reporting work-related injuries or illnesses. More specifically, the section prohibits: (1) disciplinary policies for reporting injuries or illnesses; (2) post-accident drug testing policies ("blanket policies"); and (3) employee incentive programs.

In attempting to conform with OSHA's new rules, the question arises as to when employers may drug test employees? First and foremost, random drug testing and/or pre-employment drug testing are not

subject to OSHA's new regulations and, therefore, are not prohibited. Second, an employer may require an employee to submit to a drug test following an accident/incident if there is a "reasonable" possibility or suspicion of impairment from drugs or alcohol. This is a case-by-case analysis of whether the circumstances of each accident gives rise to a "reasonable suspicion" supporting drug testing. Importantly, however, OSHA warns that "bee stings" and "carpal tunnel" claims do not rise to the level of "reasonable suspicion." Third, employers are permitted to drug test an employee after an accident if the drug test is required by some other federal or state law. For example, there are specific and detailed Department of Transportation regulations (49 CFR Part 382) pertaining to drug and alcohol testing for certain truck drivers. Finally, there is one small exception that permits employers to drug test employees after an accident. That is, if the drug test is completed under the Workers' Compensation Drug Free Workplace policy.

Under the Workers' Compensation Drug Free Workplace policy, an employer is specifically permitted to conduct post-accident drug tests if the employer is receiving a rate reduction on workers' compensation premiums for operating a "Drug Free Work Place" in accordance with the state's Drug Free Work Place Act ("DFWPA"). Therefore, to determine whether an employer can legally perform mandatory post-accident drug testing, one must first look to the state's DFWPA. For example, under New Jersey's DFWPA, an employer may drug test an employee only if they "*caused or contributed* to an accident arising out and in the course of employment which results in an injury or death" Accordingly, in New Jersey if an employer is participating in the

workers' compensation rate reduction policy AND the employee "caused or contributed" to an accident that resulted in injury or death, the employer is permitted to drug test that employee under this limited exception.

Although OSHA's "new rule" took effect on January 1, 2017, the electronic upload portal is not yet operational. At this time, employers are still required to keep a written record of all workplace accidents or injuries until the portal is available. With regards to enforcement of the anti-retaliation provisions, only time will tell how the Trump Administration will handle enforcement of the "new rule."

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