



IS YOUR COMPANY'S DRUG TESTING POLICY COMPLIANT WITH OSHA'S NEW RULES?

Prepared by:
Scott D. Cahalan
Smith, Gambrell & Russell, LLP

LORMAN[®]

Published on www.lorman.com - May 2017

Is your Company's Drug Testing Policy compliant with OSHA's New Rules? ©2017 Lorman Education Services. All Rights Reserved.

INTRODUCING

Lorman's New Approach to Continuing Education

ALL-ACCESS PASS

The All-Access Pass grants you **UNLIMITED** access to Lorman's ever-growing library of training resources:

- ☑ Unlimited Live Webinars - 120 live webinars added every month
- ☑ Unlimited OnDemand and MP3 Downloads - Over 1,500 courses available
- ☑ Videos - More than 700 available
- ☑ Slide Decks - More than 1700 available
- ☑ White Papers
- ☑ Reports
- ☑ Articles
- ☑ ... and much more!

Join the thousands of other pass-holders that have already trusted us for their professional development by choosing the All-Access Pass.



Get Your All-Access Pass Today!

SAVE 20%

Learn more: www.lorman.com/pass/?s=special20

Use Discount Code Q7014393 and Priority Code 18536 to receive the 20% AAP discount.

*Discount cannot be combined with any other discounts.

Is your Company's Drug Testing Policy compliant with OSHA's New Rules?

Authored by [Darren Rowles](#) and [Scott Cahalan](#)

Occupational Safety & Health Administration ("OSHA") requires that employers inform employees about how to report occupational injuries and illnesses.[\[1\]](#) OSHA recently updated its rules to clarify that the reporting method required by employers must include (1) a "reasonable procedure" for employees to report work-related injuries and illnesses, and (2) not discriminate or retaliate against employees who report such injuries or illnesses.[\[2\]](#) A procedure is unreasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness.[\[3\]](#)

OSHA's rationale for the new rules is to encourage employees to report work-related injuries. If OSHA determines that a post-accident policy has the effect of deterring or discouraging employees from reporting work-related injuries, then OSHA is likely to issue a citation and an order for the employer to stop using such a policy.

Employers who do not comply with the new rules could face serious and expensive penalties. OSHA recently increased its penalty limits to permit maximum penalties of \$12,675 per violation and over \$126,749 for willful or repeat violations.[\[4\]](#)

The new rules have been controversial because OSHA's comments dated May 12, 2016, state that OSHA considers an employer policy of requiring automatic post-accident drug testing of all injured employees to deter or discourage employees from reporting work-related

injuries.[\[5\]](#) In other words, the comments presume that a reasonable employee might not report a work-related injury if that employee knows that he or she will be automatically tested for drugs.

The comments do not pertain to random drug testing. But this should not be interpreted to mean that a policy of random post-accident drug testing would pass muster with OSHA because, arguably, a reasonable employee's concern about random drug testing could still have the effect of deterring or discouraging that employee from reporting a work-related injury.

The pertinent OSHA commentary states that, "[a]lthough 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."[\[6\]](#)

OSHA further states that, "[t]o 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."[\[7\]](#) Employers do not need to specifically suspect drug use before testing, but there must 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.[\[8\]](#)

OSHA's new rule gives little guidance as to when it can be reasonably determined that an employee's drug use is likely to have contributed

to an incident beyond the singular statement that “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.”[\[9\]](#) Apparently, OSHA presumes that these injuries would have occurred irrespective of whether the worker was under the influence of drugs.

Post-accident blanket drug testing policies will not be considered retaliatory by OSHA if it is required by other Federal or state laws, such as workers’ compensation statutes.[\[10\]](#) In Georgia and several other states, employers who decide to establish a drug free workplace program certified by the state Board of Workers’ Compensation, qualify for a discount on workers’ compensation insurance premiums. Employers are not required to implement such a program.[\[11\]](#) But if they do, employers must comply with the regulations of the statute.

Under the terms of Georgia’s drug free workplace statute, if an employee has caused or contributed to an on the job injury resulting in a “loss of work time,” the employer must require the employee to submit to a substance abuse test.[\[12\]](#) In the drug free workplace context, an employee incurs a “loss of work time” when, as a result of the injury, an employee’s normal work is interrupted. Thus, in states with drug free workplace statutes, such as Georgia, many work related injuries will require post-accident drug testing for employers enrolled in a drug free workplace program. These employers are not likely to be found in violation of the new OSHA rules because, according to OSHA’s commentary, conducting testing in those circumstances would not be considered retaliatory.

Regardless of whether an employer is enrolled in a drug-free workplace program, many employers require mandatory post-accident drug-testing for all employees involved in an accident. Indeed, the federal Department of Transportation has mandated drug testing since its inception, and it has been considered an employer best practice to automatically test after workplace accidents. The automatic process has been considered fair, consistent, and easy to apply because it prevents supervisors from singling out individuals in a way that may be seen as arbitrary, and even discriminatory.

Not surprisingly, employer groups are not happy with the new rule. The new accident reporting rule was originally supposed to be in place by August 10, 2016. However, OSHA delayed enforcement of the rule until December 1, 2016, as a result of a lawsuit brought by the Associated Builders and Contractors, Inc., the National Association of Manufacturers, and other similar groups[\[13\]](#) against OSHA in Texas federal court on July 11, 2016.[\[14\]](#) The suit alleges that OSHA's proposed treatment of post-accident drug and alcohol testing unlawfully limits an employer's ability to investigate accidents, and accuses OSHA, among other things, of exceeding its statutory authority, interfering with state workers' compensation laws, and creating a rule that is arbitrary and capricious in violation of the Administrative Procedure Act.

The plaintiffs allege "[t]here is no reliable evidence to support OSHA's assertion that any category of safety incentive programs or post-accident drug testing programs lead to materially inaccurate reporting or underreporting of workplace injuries and illnesses," and that "OSHA failed to consider how an OSHA rule prohibiting or otherwise limiting

these longstanding types of safety programs would impact workplace safety and health.”^[15]

The plaintiffs also allege that OSHA has created a rule that is impossible to follow because it provides for post-incident testing if an employer sees a “reasonable possibility” that drug use was involved, but does not define what that means. This creates great uncertainty for employers who don’t want to be accused of singling out individuals in a way that may be seen as arbitrary or discriminatory.^[16]

While the lawsuit is still pending and there is a possibility the rule could change as a result of its outcome, as of December 1, 2016, OSHA’s new accident reporting rule is in place. Accordingly, OSHA can now issue citations and penalties to make an employee whole for violations of the new accident reporting rules.

Now is a good time to consult your attorney about revising your company’s policies if your company currently has a blanket policy of automatically requiring employees to submit to mandatory drug testing after an accident or injury, regardless of the cause of the accident, the amount of damage, or the significance of the injury.

^[1] 29 CFR 1904.35(a).

^[2] 29 CFR § 1904.35(b)(1).

^[3] *Id.*

^[4] See <https://www.osha.gov/penalties/> (last visited 1/24/2017); Department of Labor Federal Civil Penalties Inflation Adjustment Act Catch-up Adjustments, 81 Fed. Reg. 127 (July 1, 2016).

^[5] See <https://www.federalregister.gov/documents/2016/05/12/2016-10443/improve-tracking-of-workplace-injuries-and-illnesses> (last visited 1/24/2017); Improve Tracking of Workplace Injuries and Illnesses, 81 Fed. Reg. 92 (May 12, 2016).

^[6] *Id.* at 29672-29673.

^[7] *Id.* at 29673.

^[8] *Id.*

^[9] *Id.*

^[10] “A few commenters also raised concerns 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 Section 4(b)(4) of the Act prohibits OSHA from superseding or affecting workers' compensation laws. 29 U.S.C. 653(b)(4)." Id.

[11] In Georgia, workers' compensation laws provide that "an employer shall not have a legal duty under this article to request an employee or job applicant undergo testing." O.C.G.A. § 34-9-415(a).

[12] O.C.G.A. § 34-9-415(b)(5).

[13] Additional plaintiffs include American Fuel & Petrochemical Manufacturers, Atlantic Precast Concrete, Inc., Great American Insurance Company, Owen Steel Company and Oxford Property Management, LLC.

[14] The case is Texo ABC/AGC Inc. et al. v. Perez et al., case no. 3:16-cv-01998, in the U.S. District Court for the Northern District of Texas.

[15] Id.

[16] Id.

The material appearing in this website is for informational purposes only and is not legal advice. Transmission of this information is not intended to create, and receipt does not constitute, an attorney-client relationship. The information provided herein is intended only as general information which may or may not reflect the most current developments. Although these materials may be prepared by professionals, they should not be used as a substitute for professional services. If legal or other professional advice is required, the services of a professional should be sought.

The opinions or viewpoints expressed herein do not necessarily reflect those of Lorman Education Services. All materials and content were prepared by persons and/or entities other than Lorman Education Services, and said other persons and/or entities are solely responsible for their content.

Any links to other websites are not intended to be referrals or endorsements of these sites. The links provided are maintained by the respective organizations, and they are solely responsible for the content of their own sites.