



News & Trending

PUBLICATIONS & ALERTS

OSHA'S ELECTRONIC REPORTING RULE AND ITS HEIGHTENED FOCUS ON NON-RETALIATION

08.30.2016

By Stephen Parascandola and Patrick Lawler

On November 1, 2016, the Occupational Safety and Health Administration (OSHA) will begin enforcement of a new final rule on electronic reporting of workplace injuries. The rule increases employers' obligations to make sure that employees report work-related injuries and illnesses. Employers will be required to establish specific procedures for employees to report injuries and are forbidden from discriminating or retaliating against employees for reporting injuries.

In commentary to the rule, OSHA explains that this non-retaliation provision of the rule will be enforced broadly. For instance, "incentive programs" that reward employees for going a set length of time with no reported workplace injuries may unlawfully "discourage reporting of work-related injuries and illnesses without improving workplace safety." These incentive programs, therefore, violate the rule. Only those incentive programs that reward employees who "correctly follow legitimate safety rules rather than whether they reported any injuries or illnesses" would not violate the anti-retaliation provision of the rule.

Implications for Post-Accident Drug Testing Policies

Of particular importance to many employers is OSHA's discussion in the commentary on post-accident or post-incident drug testing. Many employers, especially in safety-sensitive industries, maintain blanket post-accident or post-incident drug testing policies. Under these policies, employers automatically drug test employees involved in workplace accidents to determine whether banned substances played a role in causing the accident.

OSHA takes the position that blanket post-incident drug testing policies deter proper reporting. OSHA cited studies showing that a significant portion of employees subject to mandatory post-incident drug tests suffered injuries that could not have been caused by drug use, but were instead the result of physical workload, work intensification, or ergonomic problems, for instance. OSHA also reported evidence showing that blanket post-incident drug tests may affect an employee's willingness to report injuries.

To comply with the new rule, employers must have a "reasonable belief" that the accident or incident was caused by illegal drug use before testing the involved employee for drug use. Employers must "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."

OSHA stresses that, while post-incident drug testing is reasonable in some situations, there are many accidents which are “unlikely to have been caused by employee drug use.” For example, it is unreasonable for an employer to drug test an employee who reports a “bee sting, a repetitive strain injury, . . . an injury caused by a lack of machine guarding or a machine or tool malfunction” because these injuries are unlikely to be caused by drug use. Requiring these employees to undergo drug testing could be considered a retaliatory “invasion of privacy.”

OSHA also highlights the distinction between “drug use” and “impairment.” Most drug tests available today measure only recent drug *use* and not whether an employee is currently *impaired* by illicit substances. OSHA considers these tests conducted in the wake of a workplace accident to be potentially retaliatory because the tests will shed no light on whether the employee was impaired at the time of the accident – only that the employee used the drug at some point in the recent past.

Employers who conduct post-accident drug testing in order to comply with other laws or regulations are permitted to continue to do so. In these cases, it is clear that the employer’s “motive would not be retaliatory and the final rule would not prohibit such testing.” Thus, employers who maintain blanket post-accident drug testing policies in order to comply with U.S. Department of Transportation regulations, for example, may continue to do so.

Employers Must Reassess Their Post-Accident Drug Testing Policies and Procedures

Going forward, employers should take note of OSHA’s position and restructure their post-accident or post-incident testing procedures accordingly. OSHA has indicated it will increase its enforcement efforts to ensure compliance with the new rule’s non-retaliation provision, so employers must be able to defend each decision to drug test employees involved in workplace accidents. Only when there is a reasonable possibility that illicit drug use contributed to a workplace incident should employers drug test the involved employee. Factors such as the type and nature of the incident, any prior concerns about the employee’s possible drug use, witness statements, and contemporaneous, articulable observations of the employee’s appearance and behavior may be used to justify the decision to drug test.

Employers should no longer utilize a blanket policy of automatically drug testing employees involved in each and every workplace accident or incident. Strict adherence to such a blanket policy would almost certainly run afoul of the rule’s non-retaliation provision. To offset this, employers may wish to ramp up their random drug testing efforts. Frequent random drug tests can serve as an effective deterrence to employee drug use, and, as long as the selection methods are in fact random, this method will not violate the non-retaliation provision of the new rule.

The drug testing restrictions of the final rule were originally set to take effect on August 10, 2016. Industry groups and employers challenged the provision in federal court shortly after the rule was published, and OSHA pushed back the enforcement date to [November 1, 2016](#). Failure to comply with the rule can result in fines ranging from \$12,471 to up to \$124,709 if the violation was willful or repeated.

PROFESSIONALS

Stephen T. Parascandola

PRACTICE AREAS

Construction & Infrastructure

Employment, Labor and Human Resources

OSHA and Workplace Safety

Real Estate Development

