

OSHA: Changing Landscape of Post- Accident Drug Testing

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Overview

- o Provide background of the OSHA regulation and overview of the current status of the new OSHA rule and guidance regarding post-accident drug testing
- o Identify the critical elements of the new rule and OSHA's interpretation
- o Provide strategies for complying with the new provisions

OSHA Recording and Reporting Occupational Injuries and Illnesses Regulation

- 29 C.F.R. part 1904: requires employers with more than 10 employees to keep records of occupational injuries and illnesses at their establishment
 - The purpose of the rule “is to require employers to record and report work-related fatalities, injuries and illnesses” (29 C.F.R. § 1904.0)
- Employers covered by rule required to report each injury/illness, compile logs of the reports, and provide annual summaries
 - Pre- 2016, OSHA had limited access to the reports- could only obtain data through onsite inspections or surveys

OSHA Recording and Reporting Occupational Injuries and Illnesses Regulation

- o November 8, 2013: proposed rule to amend regulations to require electronic submission of reports; explained intent to make data public
 - Raised concern that electronic submission and public data could cause employers to underreport injuries;
 - Also comments that some employers discourage reporting by disciplining employees/taking adverse action against employees who report
- o August 14, 2014: supplemental notice to proposed rule seeking comments on whether to amend and prohibit employers from taking adverse action against reporting employees
 - No explicit mention of drug testing in supplemental notice

May 12, 2016: OSHA Issues Final Rule

- In addition to amending recordkeeping requirements to require electronic reporting, rule also included 3 additional changes (“anti-retaliation provisions”):
 - (1) Procedure for reporting must be reasonable and not deter reporting (29 C.F.R. § 1904.35(b)(1)(i))
 - (2) Requires employers to inform employees of right to report work-related injuries and illnesses free from retaliation (29 C.F.R. § 1904.35(b)(1)(iii))
 - (3) Expressly prohibits employer from retaliating against employee for reporting injury/illness (29 C.F.R. § 1904.35(b)(1)(iv))

Anti-retaliation 1904.35(b)(1)(iv)

- o Discrimination/retaliation already prohibited by statute
 - Under OSH Act, employers prohibited from discriminating/retaliating against employee for reporting injury (29 U.S.C. § 660(c))
- o But final rule establishes new enforcement mechanism and increases potential liability for employers
 - Under OSH Act, OSHA cannot take action against employer unless employee files complaint within 30 days
 - Now, under final rule, OSHA can take action on its own regardless of whether employee files a complaint, and can do so within 6 months (increase from 30 days to 6 months)
 - Citation can also result in orders requiring employers to abate, requiring reinstatement and back pay

OSHA Increase in Civil Penalties

- o Effective August 2, 2016: OSHA increases civil penalties
- o OSHA citations issued on or after August 2, 2016 subject to the increased penalties if violation occurred after November 2, 2015
 - Other than serious violation: \$12,471 per violation (increased from \$7,000)
 - Serious violation: \$12,471 per violation (increased from \$7,000)
 - Posting requirement violation: \$12,471 per violation (increased from \$7,000)
 - Failure to Abate violation: \$12,471 per day beyond abatement date (increased from \$7,000)
 - Willful or repeated violations: \$124,709 per violation (increased from \$70,000)

OSHA Final Rule: Preamble

- o While Rule itself did not mention post-accident drug testing, language in preamble explaining and interpreting Rule did
- o Preamble identified 3 types of policies that can be used to retaliate for reporting and thus discourage/deter accurate recordkeeping:
 - Disciplinary policies
 - Post-accident drug testing policies, and
 - Employee incentive programs

OSHA Final Rule Preamble: Post Accident Drug Testing

- o “blanket post-injury drug testing policies deter proper reporting”
- o “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/illness”
- o “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”
 - o Example: Likely not reasonable to drug test employee reporting a bee sting, repetitive strain injury, or injury caused by lack of machine guarding or a machine or tool malfunction

OSHA Final Rule Preamble: Post-Accident Drug Testing

- o “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/illness in order for an employer to require drug testing”
 - What is a “reasonable possibility”?
- o “In addition, drug testing that is designed in a way that may be perceived as punitive or embarrassing to the employee is likely to deter injury reporting”
- o If employer conducts drug testing to comply with requirements of state/federal law or regulation, the employer’s motive would not be retaliatory and final rule would not prohibit testing

What is the Purpose?

- o It appears it is OSHA's position that drug testing creates a disincentive for employees to report injuries
- o Intent to target employer drug testing policies?
 - “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 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.” (Preamble)
 - “Under the final rule, OSHA will be able to cite an employer for retaliation even if employee did not file complaint, or if the employer has a program that deters or discourages reporting through the threat of retaliation”
 - Noting its new enforcement mechanism resulting in possible abatement “may be a more efficient tool to correct employer policies and practices than the remedies authorized under section 11(c) , which are often employee-specific”

OSHA Anti-retaliation Provisions and Post-Accident Testing

- o Originally effective August 1, 2016
- o July 8, 2016: lawsuit filed challenging provisions *TEXO ABC/AGC v. Perez*, No. 16-1998 (N.D. Tex. July 8, 2016)
 - Industry groups and employers seeking injunction to block enforcement of anti-retaliation provision
 - Arguing rule unlawful to extent it prohibits/limits incident-based employer safety incentive programs and/or routine mandatory post-accident drug testing programs
- o July 13, 2016: OSHA announced 3 month delay in effective date from August 1, 2016 to November 1, 2016
- o OSHA answer filed August 19, 2016



OSHA Anti-retaliation provisions and Post-Accident Testing

- o October 14, 2016: Court asked for additional briefing on ability to enter nationwide injunction
- o October 18, 2016: OSHA announced delay in effective date until December 1, 2016 after request from the Court
- o Parties filed additional briefing on injunction issue
- o Outcome uncertain?



OSHA Issues Guidance

- o October 19, 2016 OSHA issues guidance: memo on Interpretation and Q&A
 - Appears to soften some statements made in the preamble
 - E.g., testing for impairment clarified to be for alcohol only
 - Gives some examples, fact specific scenarios on considerations for drug testing



Guidance: Reasonable Procedure that does not deter reporting

- Must have reasonable procedure for employees report work-related injuries/illnesses; not reasonable if deters reporting
- To show violation: OSHA must show employer lacked procedure for reporting or has unreasonable procedure (Memo)
 - Reasonable if not unduly burdensome and would not deter a reasonable employee from reporting
 - Must allow reporting of work related injury/illness within reasonable time after employee realized recordable injury/ and in reasonable manner (Memo)

Anti-retaliation 1904.35(b)(1)(iv)

- o Expressly prohibits employers from retaliating against employee for reporting work related injury/illness
 - In Q&A, OSHA notes the rule prohibits employers from taking adverse action against an employee for reporting injury
 - “Adverse action” defined as as “action taken by the employer that would discourage a reasonable employee from reporting a work-related illness or injury accurately” and includes “requiring employees to take a drug test for reporting without a legitimate business reason for doing so”

OSHA Anti-retaliation Guidance: Questions and Answers

- May an employer require post-incident drug testing for an employee who reports a workplace injury or illness?
 - “The rule does not prohibit drug testing of employees. It only prohibits employers from using drug testing, or the threat of drug testing, as a form of retaliation against employees who report injuries or illnesses. 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 this rule would not prohibit such testing.”

Guidance: Anti-retaliation

1904.35(b)(1)(iv)

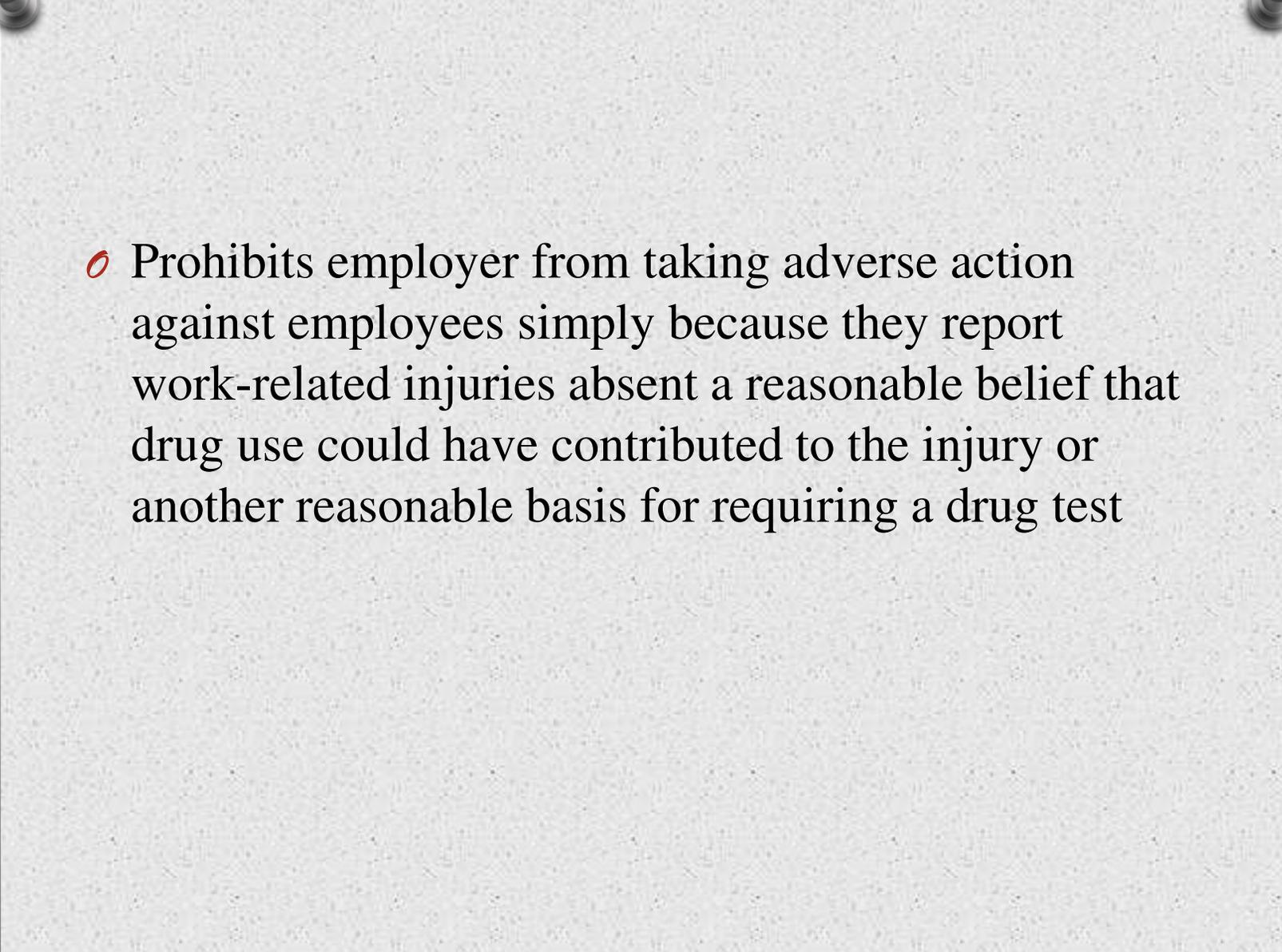
- o To issue citation, OSHA must have reasonable cause to believe employer retaliated against employee for reporting injury/illness;
- o OSHA has ultimate burden to prove: employer took adverse action because the employee reported injury/illness, not for a legitimate business reason
- o OSHA must prove:
 - (1) employee reported work related injury/illness;
 - (2) employer took adverse action against employee (action that would deter reasonable employee from accurately reporting injury); and
 - (3) employer took adverse action because employee reported injury
- o Determining whether a violation occurred or if enough evidence to support violation- fact specific inquiry

Guidance: What Testing is NOT Covered?

- Post-accident testing pursuant to a state's Drug-Free Workplace or workers' compensation statutes (voluntary or mandatory), or federal law (DOT)
 - Testing pursuant to private party insurance policies to secure lower private insurance premiums that mirror the applicable state Workers' comp law
- Drug testing for reasons other than injury-reporting (random, pre-employment, and reasonable suspicion)

What Does It Cover?

- Post-accident testing when not covered by state/federal law
 - “collective bargaining agreements may not supersede section 1904.35(b)(1)(iv)”

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- o Prohibits employer from taking adverse action against employees simply because they report work-related injuries absent a reasonable belief that drug use could have contributed to the injury or another reasonable basis for requiring a drug test

- o Must have either reasonable basis for suspecting drug use could have contributed to injury/condition or other reasonable basis for requiring drug test
- o Must have legitimate business reason for requiring drug test
- o Blanket post-injury testing not permissible absent state or federal law
 - o Must consider circumstances surrounding injury to determine whether testing appropriate

Who Can be Liable?

- o Only employer or agents of employer?
 - Citations only against employer

Guidance on Post-Accident Testing: What does the rule prohibit?

“Section 1904.35(b)(1)(iv) does not prohibit employers from drug testing employees who report work-related injuries or illnesses so long as they have an objectively reasonable basis for testing”

It only prohibits drug testing employees for reporting injuries “without an objectively reasonable basis for doing so”

What is an “objectively reasonable basis”?

- According to OSHA: central inquiry is whether employer had reasonable basis for believing drug use by reporting employee could have contributed to the injury
- Testing may not be used as form of discipline against reporting employees but may be used as tool “to evaluate the root causes of workplace injuries and illnesses in appropriate circumstances”
- Vague, fact specific, and subject to OSHA determination

What is an “objectively reasonable basis”?

o OSHA considerations of reasonableness:

- (1) whether reasonable basis for concluding drug use could have contributed to injury (thus result could provide insight into why injury occurred)
- (2) whether other employees involved in incident also tested or whether only tested reporting employee
- (3) whether employer has heightened interest in determining if drug use could have contributed to injury due to hazardousness of work being performed when injury/illness occurred
- (4) whether drug test is capable of measuring impairment at the time of the injury where such a test is available (OSHA softened from Preamble and noted it will consider this factor for tests that measure alcohol use, not tests that measure use of other drugs)

What is an “objectively reasonable basis”?

- o Do not have to specifically suspect drug use before testing but should be a reasonable possibility that drug use by reporting employee could have contributed to reported injury/illness
- o Guidance cites National Highway Traffic Safety Administration- Drug Human Performance Factsheet

What is an “objectively reasonable basis”?

- o According to OSHA it is objectively reasonable to drug test an employee if employee engages in conduct that caused an injury
- o Examples OSHA finds reasonable:
 - Employee inadvertently drives forklift into stationary equipment
 - May drug test employee; the manner in which he operated forklift contributed to his injury and since drug use can affect conduct, it is objectively reasonable to require drug
 - Employee drives crane into bystanders and injures them; driver not injured; employer does not know what caused accident
 - Reasonable to drug test driver and employees responsible for maintenance of crane because conduct could have contributed to accident
 - Not reasonable to drug test injured bystanders but not uninjured driver

No reasonable basis

Employee conduct (and thus drug use) could not have contributed to the injury/illness or accident

o Some OSHA examples:

- Employee reporting a repetitive strain injury or carpal tunnel syndrome
- Bee Sting
- Employee injured as an “innocent bystander”

Other

Guidance also says that “section 1904.35(b)(1)(iv) prohibits employers from administering a drug test in an unnecessarily punitive manner regardless of whether the employer had a reasonable basis for requiring the test”

- o No additional guidance or explanation

Strategies for Complying with New Provisions

- o Stay tuned:
 - Lawsuit challenging provisions-implementation and enforcement not definitive
- o Guidance gives some examples but each will be fact intensive inquiry subject to determination
- o Be prepared to defend yourself
 - Burden is on OSHA to show retaliation, but fact specific inquiry

Strategies for Complying with New Provisions

Review and Revise policies

- o Have no blanket post-accident drug and alcohol testing policy unless mandated by federal or state law
 - Review requirements of state Drug free workplace/workers compensation laws and make sure compliant

Strategies for Complying with New Provisions

Have non-exhaustive list of objective criteria to trigger post accident testing

- o Must have individualized reasonable basis for testing

Strategies for Complying with New Provisions

Train supervisors and managers

- Post-accident drug testing is time sensitive; decision whether to test must be made quickly
 - Train supervisors how to determine whether to drug test
 - Document objective criteria for drug testing determination

Strategies for Complying with New Provisions

Enforcement

- o Make sure post-accident drug and alcohol testing is conducted in compliance with applicable state/federal laws
- o Be consistent in enforcement of safety rules
 - Be specific in safety rules

Questions?



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