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OSHA Rule Demands Review of Policies

Many of our occupational medicine clients rely on our clinics to conduct post-accident drug and alcohol testing, sometimes in isolation and sometimes as part of injury care being offered to their employees. In light of a recently published OSHA rule, such policies are in need of a comprehensive review to ensure your company is not adversely affected by a potentially problematic policy. Read on for an excellent overview of how the new OSHA rule can affect post-accident testing.

As seen online at www.littler.com (full source details follow article):

OSHA's New Electronic Accident Reporting Rule Seeks to Dramatically Impair Post-Accident Drug and Alcohol Testing

Published May 13, 2016, by *Dale L. Deitchler, Nancy N. Delogu, and Jennifer L. Mora*

Many thousands of employers implement post-accident drug and alcohol testing policies to promote workplace safety, as part of accident investigation efforts and in the hope of reducing workplace accidents and workers' compensation claims. For those employers, the legal landscape may have shifted on May 12, 2016, when the Occupational Safety and Health Administration published its final rule on electronic reporting of workplace injuries and illnesses.[1] The new rule enhances an employer's obligation to ensure that employees report work-related injuries and illnesses. Specifically, effective 90 days after publication of the rule, on August 10, 2016, employers must establish "a reasonable procedure" for employees to report work-related injuries and illnesses promptly and accurately. The rule prohibits this procedure from deterring or discouraging a reasonable employee from accurately reporting a workplace injury or illness. The rule also prohibits any retaliation for reporting an injury or illness. Under this new reporting standard, employer policies that request or require post- accident drug or alcohol testing will now face scrutiny by OSHA because, the agency claims, post-incident testing deters injury reporting.

Employers Conducting Post-Accident Testing Will Face Penalties Unless Substance Abuse Likely Contributed to the Accident and the Test Identifies Impairment

Although no provision in the final rule refers to drug testing, OSHA commentary accompanying the final rule plainly previews its enforcement position on post-accident testing policies. According to the agency:

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. (emphasis added).

OSHA then concludes that only narrowly tailored post-accident testing – testing where drug use likely contributed to the accident and that accurately tests for impairment – will be immune from enforcement action under the new rule:

. . .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 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. (emphasis added).

Implications for Employers with Post-Accident Drug Testing Policies

Blanket Post-Accident Testing Policies Should Be Reviewed

Pursuant to the new rule, employers with post-incident or accident drug testing policies will be put to the task of justifying each decision to test based on the facts of each workplace incident or accident. To avoid conflict with OSHA, employers may no longer rely on blanket policies requiring tests following a report of an injury. Policies should be tightened to tie referrals for post-accident testing to situations where it appears an employee caused or contributed to the accident, or abandoning post-accident testing in favor of reasonable suspicion testing. Employers maintaining a blanket policy should be prepared to defend that decision through reference to workers' compensation programs, safety considerations and other means which will establish the program does not deter reporting of injuries and does not constitute retaliation for reporting a specific injury.

The Challenge of Showing Impairment by Drugs

Although there is general agreement that reliable tests exist to measure alcohol-related impairment, most testing providers acknowledge that drug tests measure only recent drug use. Although the presence of illegal drugs in an individual's system may very well reflect impairment, employment drug tests are not designed to measure impairment. Therefore, even if an employer carefully adopts a program that calls for a post-accident drug test only where it appears that an employee's acts, or failure to act, has caused or contributed to an accident, it may be more difficult to show that the individual was impaired by the drug.

As a result, employer post-accident drug testing programs may be challenged, even if they focus on investigating only those accidents which appear to have been caused by an employee's error. Employers may wish to utilize tests that measure only very recent drug use. Apart from revising their post-accident testing programs, employers may seek to compensate for OSHA's approach by increasing their random drug testing programs in order to attempt to detect and deter illegal drug users before accidents occur.

Continue to Comply with Federal Law

OSHA concedes, in its comments, that an employer which conducts drug testing to comply with the requirements of a federal or state law or regulation will not be considered in violation of the rule, because its motive in conducting testing is not retaliatory. Therefore, employers who must conduct post-accident testing – pursuant to U.S. Department of Transportation regulations, for example – should continue to do so, despite the fact that the DOT's testing program mandates the use of urine drug tests, which do not measure impairment.

If OSHA finds that an employer drug testing policy deters the reporting of injuries and illnesses by employees, it may issue steep penalties for each violation. At present, available penalties up to $7,000 per violation may be imposed or, for willful violations, up to $70,000. However, those penalties will increase substantially in August 2016, when they are expected to increase to as much as $12,471 and $124,712, respectively.

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[1] For a discussion of the broader requirements of new rule, *see* Thomas Benjamin Huggett, Littler Insight *OSHA's Final Rule on Electronic Tracking of Workplace Injuries and Illnesses* (May 12, 2016).

Source article full text: http://www.littler.com/publication-press/publication/oshas-final-rule-electronic-tracking-workplace-injuries-and-illnesses

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