

Employers Should Review Their Drug Testing Policies To Avoid Possible OSHA Penalties

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Effective November 1, 2016, employers now face several new requirements from OSHA relating to injury and illness reporting. Among other requirements that went into effect, employers should now post OSHA's "It's the Law" poster to satisfy their obligation to notify employees of their right to report work-related injuries free of retaliation.

One issue that should not get lost in the shuffle is the question of how employers may conduct post-accident drug testing without running afoul of OSHA. OSHA has made it clear that it considers mandatory post-accident drug testing to be a deterrent to injury reporting. In particular, OSHA has questioned whether there is a safety-related reason for requiring post-injury drug tests when employees report injuries along the lines of an insect bite or sting.

More importantly, OSHA has also stated that employers conducting injury-related drug testing need to use tests that identify whether an employee was impaired at the time of the accident. This is not always easy, as, unlike alcohol, many drugs can be detected well after an individual is impaired, meaning that a positive result will not necessarily equate with impairment at the time of the injury.

To reduce the risk of liability, employers with drug testing policies should take a close look at not only when they are testing employees, but also at how the tests are being performed. In particular, employers should consult with a Medical Review Officer at their testing provider to make sure that

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drug tests are being conducted in a manner that will establish that the employee was impaired at the time of an injury.

If the testing lab cannot provide this type of analysis, the drug testing program may not pass muster with OSHA. Employers should also confirm possible state law drug testing requirements if and when they review and/or make changes to their policies.