

POST-ACCIDENT DRUG & ALCOHOL TESTING: A VIOLATION OF OSHA???

Labor & Employment Law Update

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As we previously reported, the **August 10, 2016** effective date for OSHA's final electronic reporting rule is quickly approaching. The requirement to electronically submit data does not begin until 2017, but an important part of this rulemaking that goes into effect August 10, 2016 is the requirement for employers to implement a reasonable procedure to ensure accurate reporting of illnesses and injuries. The concern about possible underreporting was highlighted during the rulemaking process and post-accident drug and alcohol testing was specifically targeted as an area which could deter accurate reporting of injuries. The preamble to OSHA's final rule on electronic reporting states that blanket post-accident drug and alcohol testing policies deter accurate reporting and may constitute retaliation for reporting an injury.

Ironically, employers have a long-standing practice of implementing post-accident drug and alcohol testing policies to promote safety and reduce workplace accidents. Now, OSHA suggests that post-accident testing policies might lead to OSHA violations. OSHA's current stance is that blanket post-incident drug testing policies deter proper reporting. OSHA advises that drug testing policies should be revised to only require post-incident testing to situations in which employee drug or alcohol use is likely to have contributed to the incident and for which the test can accurately identify impairment. To muddy the waters further, OSHA explained that employers do not need to 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 before requiring the employee to test. OSHA then added that drug testing that may be perceived as punitive or embarrassing to the employee is likely to deter injury reporting.

The only certain guidance OSHA provided on post-incident testing is that if the employer is required to test to comply with state or federal law, the testing policy is not prohibited by its final rule. However, if post-accident testing is not required by state or federal law, employers should expect that use of such testing will now be open to challenge and possibly subject to an OSHA violation. OSHA penalties are set to increase August 1, 2016, so this seemingly minor change to enforcement practices might result in significant penalties to employers.