

New OSHA Post-Accident Drug Testing Rule

Many employers, as part of a post-accident policy, perform drug testing. As of December 1, 2016, a new rule will be enforced triggering employers to update their policies regarding post-accident drug testing.

The employer will still be required to post the "OSHA Job Safety and Health: It's the Law" poster which discusses the right of employees to report injuries and illnesses. The updated rule was changed to improve tracking of workplace injuries and illnesses, however is also contains anti-retaliation protections prohibiting employers from discouraging workers from reporting an injury or illness. The new rule does not prohibit drug testing of employees following a workplace incident. Rather, it attempts to correct procedures for reporting work-related injuries and illnesses that may deter or discourage employees from reporting. The rule 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. Therefore, an employer must look at each work accident on a case-by-case basis before automatically testing. It is important to train those responsible which situations are permissible for drug tests.

An example often given is when you have an employee who is driving a forklift and strikes another employee, causing both employees injury. Under the new rules, only the forklift driver can be drug tested, while the other employee cannot. The employee who was hurt, but not driving, had no culpability in the accident and a positive drug test has no impact on why the incident occurred. If the struck employee were to be tested, that action would be considered retaliatory. Clearly, the driver of the forklift may be tested for drugs or alcohol since the cause of accident could have been a result of impairment due to the use of drugs and/or alcohol.

Since this rule will be enforced effective December 1, 2016, it is imperative that you review your post-accident policies and update accordingly to ensure they are compliance with the rule. Should you have any questions or need you policies reviewed, please feel free to reach out to us to discuss how we can be of assistance.

For more information or for the "OSHA Job Safety and Health: It's the Law" poster contact Jennifer Laver at jlaver@wglaw.com or 856.382.1008

Disclaimer: The contents of this post are for informational purposes only, are not legal advice and do not create an attorney-client relationship.