OSHA'S new rule on Post-Injury Drug Testing

PAST, PRESENT, FUTURE, AND WHAT IT MEANS TO YOUR BUSINESS

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PAST

On October 19, 2016, the Occupational Safety and Health Administration ("OSHA") published a final rule, which, in part, amended 29 C.F.R. 1904.35, significantly redefining its stance regarding two matters of importance to employers: (i) policies requiring mandatory post-injury drug testing, and (ii) employee safety incentives. Implementation of this rule was briefly delayed, allowing a lawsuit on the matter to work its way through the courts (Civil Action 3:16-cv-1998 in the Northern District of Texas, Dallas Division). However, as of December 1, 2016, the new rules are in effect.

The new rule makes three changes to the former Section 1904.35[1]. First, paragraphs (a)(2) and (b)(1)(iii) are amended to require employers to inform employees of their right to report work-related injuries and illnesses free of retaliation[2]. Second, paragraph (b)(1)(i) clarifies that the reporting method already implicitly required by this section must be reasonable and not deter or discourage employees from reporting.[3]

But it is clearly the third change imposed in the October 19, 2016 final rule, which adds paragraph (iv) (below) with which the business community is most concerned, and which is being called the New Post-Incident Drug Testing Rule.

> **(iv) You must not discharge or in any manner discriminate against any employee for reporting a work-related injury or illness. 29 CFR 1904.35(B)(1)(iv)[4].**

PRESENT

It is not uncommon in government rule-making that a very small number of words have a very large impact. And, that is also the case with regard to this new rule. However, in the words of author Douglas Adams: "*Don't Panic.*"

The key question an employer must answer is: "How does a mandatory, yet uniformly-applied, post-injury drug testing policy discriminate against an employee?" You will be able to answer that question, and prepare yourself to work toward your business's compliance with the new rule, after you understand two simple things.

First, you must understand the terminology used by OSHA.

In the relevant provision of the OSH Act, "discriminate" means "termination, reduction in pay, reassignment to a less desirable position or any other adverse action that 'could well dissuade a reasonable employee from reporting a work-related injury or illness.'"[5] "Adverse Action" in federal employment law generally means any action taken by an employer in retaliation for an employee exercising a right created by, or protected by, statute.

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1 Improve Tracking of Workplace Injuries and Illnesses; Final Rule, 81 Fed. Reg. 29669 (May 12, 2016)
2 *Id.*
3 *Id.*
4 "You" means "an employer" as defined in §3 of the OSH Act. "Injury or illness" means those abnormal conditions or disorders listed at 29 C.F.R. § 1904.26, and with which you are likely familiar.
5 Improve Tracking of Workplace Injuries and Illnesses; Final Rule, 81 Fed. Reg. 29672 (May 12, 2016)

Second, you must understand how OSHA will apply the language of the new paragraph (iv).

In practice, you don't need to "discriminate" or take "adverse action," as those words are normally defined and used, in order to be in violation of the new rule. Under the new rule, you could be cited merely for having a non-compliant policy. Also, under the new rule, OSHA may now issue a citation to an employer for taking adverse action against an employee, even if the employee does not first file a complaint.[6] Note that the prior rule under §11(c) still exists, and remains unchanged, valid, and enforceable. OSHA (supported by some court cases) finds that its remedial remedies under §11(c) is not an exclusive remedy, and that OSHA may proscribe conduct under either section.[7] Finally, keep in mind that OSHA is exploring the possibility of deeming retaliatory any policy that requires immediate reporting of an injury, because it believes that such a rule would result in reduced reporting of chronic, or slow-developing injuries (e.g.: musculoskeletal, repetitive stress).

With those two things under our belt, we can turn our attention back to answering the key question of how a mandatory post-injury drug testing policy can be considered a discriminatory, adverse employment action, subjecting the employer to fines and penalties. Simply put, OSHA believes it is an adverse action to subject employees to mandatory post-injury testing, based on a number of studies it cited to justify the new rule. However, its justification can be summarized in OSHA's belief that employers subject workers to intimidation when they require mandatory post-injury drug testing, irrespective of any potential role intoxication may have played in the incident.[8] Further, OSHA will deem that the very presence of such a policy is, in itself, a disincentive to employees reporting of workplace injuries.

OSHA GUIDANCE

OSHA does provides some guidance on the matter by stating that employers 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.

In a perfect world, OSHA would have also provided guidance to help an employer know how and when drug use is likely to have contributed to an incident, or how an employer is to know when a drug test can accurately identify impairment caused by drug use. One could also hope for an explanation for the shift away from the statutory language of "*injury*" to the enforcement language, of "*incident*." Consider yourself warned that when OSHA says "broadly interpret," it really means "broad"; and don't be surprised if OSHA structures enforcement actions with a preference for the broader enforcement language, over the statutory language. This shift in language may also signal that OSHA wants to exercise the new authority it granted itself to enforce the provisions of 29 U.S.C. § 1904.35(b)(1)(iv) even in the absence of a complaint.

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6 29 CFR § 1904.35(b)(1)(iv); 81 Fed. Reg. 29627 (May 12, 2016)

7 *Id.*

8 *Id.*, at 29673

OSHA did give us some examples to supplement its guidance, when it informed that 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 tool malfunction.[9] OSHA feels that 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."[10] However, this guidance remains unclear, because one can easily imagine a bee stinging an employee who disturbed a hive resultant from impairment, or a worker who removes machine guarding as a result of his impairment, or a "tool malfunction" which is really operator error on the part of an impaired worker. At some point, OSHA, and/or a court may sort all that out, but that is a long, expensive process in which you might not want to participate; so see below for some ideas on how to move forward.

Finally, OSHA guidance also informs that employers need not specifically suspect drug use before testing, but there should be a reasonable possibility that the drug use by the reporting employee was contributing factor to the incident. In addition, OSHA states that any drug testing must be designed and implemented in a way that may not be perceived as punitive or embarrassing to the employee (an adverse employment action).

WELL, WHAT *CAN* I DO?

First things first, take a hard look at your current post-*incident* drug-testing policy, and make sure that you amend it such that it no longer requires blanket testing of every employee after every incident.

Make changes which work with the new reality. Keep in mind that you may have to answer to OSHA for any post-incident drug test you require, particularly in the near term, when enforcement is sure to be vigorous. So answer those questions now, proactively, and incorporate them into your policy. For example, if you demand a post-incident drug test, you already know that, under the new rule, OSHA will ask "why did you think drug use is likely to have contributed to this incident, and why did you think a drug test would accurately identify the impairment?" So train your key people now to ask and answer that question in a fair and reasonable manner *before* the OSHA "informal." An observation of dilated pupils, slurred speech, lack of motor control, and/or inability to focus, may support a reasonable belief that a worker's drug use contributed to an incident. But they may also be signs of a serious medical condition having nothing to do with alcohol or drugs. Conversely, those symptoms, coupled with the presence of the smell of alcohol on the breath, or the presence of drug paraphernalia may tell another story.

Keep in mind that the law requires only a reasonable belief that impairment likely contributed to the incident, *and* that a drug test can accurately identify the impairment. It does not require absolute proof, or belief beyond a reasonable doubt, nor does it require that every site supervisor become a medical expert. But, don't be the company that artificially manufactures "reasonable suspicion" in an attempt to de facto re-create the former rule. OSHA will be on the lookout for what it will call "mere pretext."

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9 *Id.*
10 *Id.*

Consider visiting with your legal counsel about modifying your post-incident drug testing policy with the above in mind; and also with regard to incorporating other changes which might potentially include: (i) training key people to proactively be on the lookout for signs of drug or alcohol impairment, keeping in mind that many symptoms of impairment are also symptoms of other conditions; (ii) reasonably interpreting any such signs with an open mind, and with an eye toward avoiding incidents, rather than seeking opportunities to discipline employees; (iii) potentially requiring escalation of the decision to require a drug test above the level of field personnel; and (iv) training your key people on a systematic method of investigating workplace incidents, providing them with the technology to accurately record and transmit their findings in real-time, and ensuring that they are empowered to make reasoned decisions, or that they have access to a person with such authority, preferably with redundancies to account for sick time, vacations, etc.

Additionally, keep in mind that OSHA's enforcement culture prefers solutions developed with non-management participation. So consider the potential benefits of implementing a policy created with input from employees. Finally, when you are done, visit with your legal counsel about an appropriate rollout and re-training, and publication and distribution of the new policy in all appropriate languages.

Finally, (and this is definitely a matter on which to seek legal counsel) the OSH Act does not prohibit testing under a mandatory state law, a voluntary drug free workplace law, or under another federally-regulated law or program.

Bottom Line: The new rule *does not prohibit* post-incident drug testing, but it does change the equation. Formerly, Accident = Drug Test. Under the new rule, Incident + Reasonable Suspicion = Drug Test. If your reasonable suspicion is the product of a fair, systematic investigation and analysis, then you have put your company in the best position to obtain a favorable outcome from an OSHA investigation.

HEY! WASN'T THERE A LAWSUIT?

Yes. In fact, there were two.

In *Texo ABC/AGC v. Perez*, N.D. Tex., No. 16-1998, Judge Sam Lindsay refused to grant Plaintiffs' request for an injunction which would have delayed implementation of the new rule, pending the outcome of the lawsuit. Judge Lindsay found that "Plaintiffs have not demonstrated a likelihood of irreparable harm necessary for the issuance of a preliminary injunction . . . [their] evidence is based almost entirely on unsupported beliefs, unfound fear, and speculation . . . ."[11]

Denying the request for the injunction was not fatal to the lawsuit. Still, the language of the Judge's Order was not encouraging from the Plaintiffs' perspective. However, Donald Trump was elected President of the United States of America during the pendency of the *Texo* case. As a result, on June 29, 2017, OSHA filed an Unopposed Motion to Stay Proceedings, because the new Labor

[11] *Id.*, Memorandum Opinion and Order, Doc. 39, at 8 (11/28/2016).

Secretary, R. Alexander Acosta, evaluated the new rule, and decided to propose additional rule making That could mean a broad range of possible outcomes regarding the new rule. The takeaway here is that the only thing certain at the moment, and for the reasonably foreseeable future, is that the new rule is in effect, and you should act accordingly.

The second case is *National Association of Home Builders of the United States, et al. v. Perez et al.,* WD Okla., No. 5:17-cv-0009, in which Plaintiffs sued OSHA to prevent implementation of the new injury and illness electronic reporting rule, arguing that OSHA's new, proposed, online database violates employers' First and Fifth amendment rights, that its implementation exceeds OSHA's authority, and that it is otherwise unlawful.

On July 7, 2017, Defendant OSHA filed an Unopposed Motion to Stay Proceedings, very similar that filed in the *Texo* case, in which OSHA stated that the Notice of Proposed Rulemaking which resulted in the Stay in both cases, also proposes to extend the deadline, to December 1, 2017, for employers to submit the initial batch of electronic data previously required by the new rule.

SO, CAN I STILL HAVE SAFETY INCENTIVES?

In a nutshell, the new rule applies largely the same reasoning to Employee Safety Incentive programs as it does to post-incident drug testing.

If your incentive program rewards employees solely for not having workplace injuries, then you should visit with counsel to determine if updates are likely; because there is a good chance you are not in compliance. OSHA will deem that such a rule is a dis-incentive to employee reporting of workplace injuries, because it will find that employees fear reporting injuries if they believe that by doing so, they will forfeit an incentive, or disqualify their co-workers. As with other parts of the new rules, OSHA compliance officers will be allowed to issue citations, even in the absence of an employee complaint under Section 11(c).

And, just as with the Post-Incident Drug Testing Rule, this rule governing incentive programs is currently in effect. However, it is also subject to same the Notice of Proposed Rulemaking that effectively stayed the two lawsuits discussed above. Thus, while it might not be here to stay, it is here now, so be guided accordingly.

If safety incentives are important to your culture, work with your legal counsel to devise ways to reward your employees, while not running afoul of the new rule. Instead of rewarding only the outcome (e.g.: one year accident free); consider rewarding those positive actions which lead to the outcome. For example, provide incentives for attending safety meetings, developing and presenting topics at those meetings, consider rewarding successful completion of courses and certifications, such as OSHA 10, CPR, portable defibrillator, and/or first aid training.

There are more possibilities than you might think, and nothing in the rule precludes rewarding a positive outcome (e.g.: no injuries for a certain period of time). Under the new rule, however, your reward system cannot be based on rewarding *only* the positive outcome. And, as always, OSHA culture will offer greater support to such a plan developed with employee input.

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