Drug & Alcohol Testing and OSHA – New Rules Announced

8/11/16

Accidents happen and many employers have policies which mandate drug and alcohol testing when these workplace accidents do occur. Under OSHA's newly announced rules, that went into effect 8/10/2016, some employers' commonly used policies may now be considered unlawful if they are not drafted in accordance with these new rules.

Peter J. Smith, Esquire of the PA based law firm Semanoff Ormsby Greenberg & Torchia, LLC recently released the following in regards to OSHA's New Electronic Accident Reporting Rule.

Applicability of Rule and Reporting

Post-Accident Drug and Alcohol Testing is a standard policy with many employers to promote workplace safety and a reduction of workplace accidents and workers' compensation claims. If you are an employer that has a policy for Post-Accident Drug and Alcohol Testing ("**Post-Accident Testing**"), you should know that the Occupational Safety and Health Administration ("OSHA") published a Final Rule ("**Rule**") on electronic reporting of workplace injuries and illnesses. As part of the electronic reporting Rule, OSHA *prohibits* using Post-Accident Testing to deter or discourage a reasonable employee from accurately reporting a workplace injury or illness. This Client Alert summarizes OSHA's Rule on electronic reporting of workplace injuries and illnesses and how it is going to impact your Post-Accident Testing Policy.

The Rule takes effect on August 10, 2016. The electronic submission of injury information applies to "Establishments" (defined as "a single physical location where business is conducted or where services or industrial operations are performed"). The reporting is based on the size of the establishment, not the company. All workers count toward the numerical requirements in the Rule (part time, full time, seasonal and temps).

- Establishments with 250 or more employees in industries covered by the recordkeeping regulation must electronically submit OSHA injury and illness information from OSHA Forms 300, 300A and 301. Form 300A is required by July 1, 2017, information from all Forms by July 1, 2018. Beginning in 2019 and thereafter, the information must be submitted by March 2.

- Establishments with 20-249 employees in certain "high-risk" industries must electronically submit information from only OSHA Form 300A by July 1, 2017 and again by July 1, 2018. Beginning in 2019 and thereafter, the information must be submitted by March 2.

• Establishments with fewer than 20 employees at all times during the year do not have to routinely submit information electronically to OSHA.

Testing Policies

By 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 and any retaliation for such reporting. Under this new standard, employer policies that require Post-Accident Testing will face close scrutiny by OSHA because of the claim that Post-Accident Testing deters the reporting of injuries.

No provision in the Rule specifically refers to drug testing, but OSHA's Commentary on the Rule states: "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."

The Commentary references that only *narrowly tailored policies* on Post-Accident Testing (presumably testing where drug use contributed to the accident and that accurately tests for impairment) will avoid any enforcement steps taken by OSHA: "[T]he 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 an appropriate balance here, drug testing policies should limit post-accident 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."

What This Means For You

Blanket Post-Accident Testing policies will not pass muster under this Rule. Employers must either revise policies to reflect a "reasonable procedure" or just require reasonable suspicion testing and/or institute random drug and alcohol testing to promote workplace safety. The urine drug test favored by employers will not measure "impairment" but only the recent use of drugs or alcohol (unlike a breath-alcohol test where the results are given as a number, known as a Blood Alcohol Concentration (BAC) which shows the level of alcohol in the blood at the time the test was taken. BAC levels have been correlated with impairment, and the legal limit of 0.08 for driving has been adopted in all states). Therefore, even revising the language of your Post-Accident Testing policy, arguably, will not remedy the situation to comply with the Rule if a urine test is used.

OSHA states in its comments that if an employer is required by Federal or State law to conduct drug testing (for example, DOT regulations) it does not violate the Rule, presumably because the employer's motive for post-accident testing is not considered retaliatory. Penalties under the Rule, if OSHA finds that an employer's Post-Accident Testing deters the reporting of injuries and illnesses by employees, will be increased to $12,471 per violation and, if a willful violation, up to $124,712 (present fines are $7,000 and up to $70,000).

Recommendations
Immediately review your drug policies and determine whether they include testing after accidents. If so, make certain the policy and the practices conform with the new OSHA Rule.

When you have questions about regulatory or other changes that may affect your company and your policies, contact McCloskey Partners and we will be sure to assist you or make sure you are directed to the appropriate industry experts.

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