SEBRIS BUSTO JAMES Employment Law Note August 2016

OSHA Takes Aim at Workplace Drug & Alcohol Testing

By Nate Bailey

Many employers seek to protect their workers and themselves by taking reasonable steps to ensure that employees are not under the influence of drugs or alcohol while at work. Some, for instance, require drug and alcohol testing whenever there is a workplace injury. These policies can help detect whether drugs or alcohol might have played a role in a workplace injury even where a connection is not immediately apparent.

In what has become a theme of 2016, the Obama Administration has been busy using administrative rulemaking procedures to alter the legal landscape where it has been unsuccessful effecting change in Congress. This time, the agency at issue is the Occupational Safety and Health Administration ("OSHA"), which recently issued a new rule that may limit the circumstances in which an employer may require drug testing after a workplace injury. Initially set to take effect in August, OSHA has decided to delay enforcement of the new rule until November 1, 2016 because employer groups have challenged it in court. The delay in implementation will give OSHA more time to defend its rule.

Automatic Drug Testing. OSHA's new rule requires employers to "establish a reasonable procedure for employees to report work-related injuries" that will not "deter or discourage a reasonable employee from accurately reporting a workplace injury." Significantly, OSHA opined in its accompanying commentary that "automatic post-injury drug testing [i]s a form of adverse action that can discourage reporting."

OSHA acknowledged that drug testing employees may be a reasonable policy in some situations but determined that policies mandating automatic drug testing would likely deter employees from reporting injuries because "[drug testing] is often perceived as an invasion of privacy." OSHA warned that if an injury or illness is unlikely to have been caused by drug or alcohol use, drug testing may unlawfully deter reporting. For instance, OSHA specifically mentioned injuries such as those caused by repetitive motions, machine malfunctions, or bee stings, as being unlikely to be caused by drugs or alcohol; thus automatic testing in those instances could deter a reasonable employee from reporting the injury. OSHA also stated that drug tests measuring only past drug *use*, and not actual *impairment*, are more likely to inappropriately deter drug testing. OSHA's logic is questionable, given that most employees are unlikely to know whether a given drug test measures impairment or just use.

OSHA will allow employers to maintain targeted drug testing policies. It advised that "[t]o strike the appropriate balance here, drug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident." Employers need not "specifically suspect" employee drug use to justify testing, but there should be a "reasonable possibility" that drug use was a contributing factor to the injury. In some cases, it may be difficult to determine whether there is a "reasonable possibility" that drug use contributed to an injury. For example a machine malfunction, which OSHA used as an example where drug testing is likely inappropriate, might be precipitated by operator error, thus giving rise to a "reasonable possibility" of drug use.

Other Deterrents. OSHA indicated that even *rewarding* employees for avoiding injury is likely to deter them from reporting injuries. If reward programs are not structured carefully, OSHA said, "they have the potential to discourage reporting of work-related injuries and illnesses without improving workplace safety." This is especially so where an employee's injury report might cause an entire group of employees to miss out on a reward.

Mandatory Testing Laws. Some employers are required by law to conduct mandatory drug testing after a workplace injury or accident. OSHA's commentary clarifies that where employers conduct drug testing to comply with the requirements of a state or federal law or regulation, such testing does not run afoul of the new rule.

Enhanced Enforcement. The new rule also expands OSHA's authority for penalizing retaliation against employees for reporting workplace injuries. While OSHA has always been authorized to investigate employee complaints, the new rule allows OSHA to also issue citations where no employee has filed a complaint. Combined with OSHA's new position that drug testing constitutes an adverse action, this could significantly increase the number of citations that OSHA issues.

In addition, OSHA recently increased the amount of its potential fines significantly to account for inflation. On August 2nd, OSHA increased the maximum per-violation fine from $7,000 to $12,471 for non-willful violations. It also increased the maximum fine for *willful* or *repeat* violations from $70,000 to $12,471. When the new rule takes effect in November, OSHA will be able to fine employers more often *and* for greater amounts.

Take-Away for Employers. Although the new rule is under attack from employer organizations, Employers should prepare for it to become effective in November. Employers should review their workplace drug testing policies to determine whether those policies comply with OSHA's new rule. If they do not, employers should consider revising them to allow targeted drug testing only where the employer has a reasonable belief that alcohol *could have* played a role in the accident or where testing is required by other law. Additionally, decision makers should consider making a record of their reasons for believing that drugs or alcohol may have contributed to a workplace injury or illness. Please contact us if you have questions about your policy or how to comply with OSHA's new rule.

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