OSHA UPDATE

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Don't Panic! Employers should be able to continue most post-accident drug tests under OSHA's new "reasonable reporting procedure" rule

As we reported in our May 13, 2016, *OSHA Update*, on August 10, the Occupational Safety and Health Administration will begin enforcing its new regulation requiring employers (1) to have a "reasonable procedure" for employees to report work-related injuries and illnesses, and (2) not to discriminate or retaliate against employees who report such injuries or illnesses. The rationale for these new requirements is that employees should not be discouraged or punished in any way for exercising their right under the Occupational Safety and Health Act to report a work-related injury or illness. Any adverse action that is taken because an employee exercises this right to report is viewed by OSHA as a violation of §11(c) of the OSH Act, and as of August 10, of §1904.35(b)(1)(iv) as well. Although complaints brought under §11(c) of the Act must be raised by the aggrieved employee within 30 days of the adverse action, under §1904.35(b)(1)(iv), OSHA could issue citations within six months of the adverse action, and the employer would not only be issued a citation with proposed penalties, but also could be ordered to make the employee whole, including reinstatement with full back pay for an employee terminated as a result of a positive drug test.

Under the new regulation, §1904.35(b)(1)(i), a procedure is not reasonable "if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness." A reporting procedure is likely to be determined by OSHA to be unreasonable if, for example, an injured or ill employee were required to report the injury or condition within only one hour of its occurrence or were required to report the injury or condition to so many different managers that it would be a deterrent to reporting. Section 1904.35(b)(1)(iv) separately provides that an employer may not discriminate against an employee who reports an injury or illness. Although §1904.35(b)(1)(iv) itself does not mention drug testing, the Agency made clear in the Preamble to the new rule that it believes "blanket post-injury drug testing policies deter proper reporting" and would thus be subject to OSHA citation. In announcing this interpretation of the new regulation, OSHA explained that the Agency was not attempting to ban all post-accident drug testing, but would instead allow such testing if an employer conducts the testing to comply with the requirements of a state or federal law or regulation. OSHA also stated that post-accident drug testing would be permitted if there was a "reasonable possibility" that drug use was a contributing factor in the injury or illness.

OSHA's interpretation of its new reporting regulation is generating confusion among employers who are concerned that they will be prohibited from conducting *any* post-accident drug tests. And, unfortunately, with an August 10 enforcement date looming, the Agency has not yet provided any useful formal guidance on how it will evaluate employers' post-accident drug testing policies.

Into the fray we leap in an attempt to give you our best advice on how to proceed. The good news is that it appears that the effect of the new regulation may not be as onerous as it initially appeared.

No "blanket" post-accident testing

The starting point in addressing the "no discrimination or retaliation" provision is that OSHA will be focusing on an employer's motivation in implementing its *post-accident* drug testing policy. The new regulation, therefore, has no effect on *random* drug testing.

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But if OSHA determines that the intent of an employer's post-accident policy is to deter or discourage the reporting of work-related injuries or illnesses, then OSHA is likely to issue a citation seeking to eliminate an employer's continued use of such a policy. As OSHA has explained, a "blanket" or "automatic" post-accident or post-injury drug testing policy will, in effect, be presumed to be retaliatory and intended to deter or discourage reporting. For example, OSHA would view as suspect the required drug testing of an employee who is reporting a repetitive motion or cumulative trauma musculoskeletal condition, such as tendinitis or a back strain, or who reports that he has been stung by a bee. Or, equally suspect in OSHA's eyes would be the drug testing of an employee who is injured through no fault of his own when he is struck by another employee operating a forklift. In these types of cases, absent unusual circumstances, there is no "reasonable possibility" to believe that the employee's injury or condition arose because the employee was in any way drug-impaired. Although "reasonable possibility" would seem to be so vague a term that its meaning is whatever OSHA interprets it to be in a given scenario, OSHA has established some parameters by its reference in the Preamble discussions to bee stings and musculoskeletal disorders. In OSHA's view, when a bee stings an employee or an employee develops a musculoskeletal disorder, the employee is in no way contributing to the injury or condition. If an employee has not contributed in any way to an injury or illness, then there can be no "reasonable possibility" that drugs were involved. In the absence of such a "reasonable possibility" of drug-related impairment or of a causal link between the employee's action and the resulting injury or illness, OSHA would view the required testing as primarily intended to discourage the reporting of the injury or condition or as a form of punishment for being involved in the accident or in developing the condition.

If an employer's motivation for having post-accident drug testing is for some valid reason other than discouraging employees from reporting injuries and illnesses, we believe the policy will not run afoul of §1904.35(b)(1)(iv). There are generally three categories that constitute valid reasons for post-accident or -injury drug testing: Drug-Free Workplace policies and state workers' compensation laws, which are intended to discourage drug use, reasonable suspicion of drug impairment, and "reasonable possibility" situations.

Drug-Free Workplace policies and other state workers' compensation laws designed to discourage drug use

Many states have Drug Free Workplace statutes that offer employers a reduction in their insurance premiums if they adopt such policies. Although employers are not required to implement such policies, if they choose to do so to reduce their insurance premiums, they must comply with the regulations of those statutes. Not every state's DFWP statute has identical provisions. However, under the terms of a typical DFWP statute, to establish a legal presumption of causation by alcohol or drugs, an employee *must* be drug tested within 3-8 hours if the employee has "caused or contributed to an on-the-job injury which resulted in loss of work time." Loss of work time is defined differently under a DFWP statute than under OSHA recordkeeping regulations. In the DFWP context, an employee incurs a "loss of work time" when, as a result of the injury, an employee's normal work is interrupted, as opposed to under OSHA recordkeeping regulations where an employee must miss an entire day from work on any day after the injury. Thus, in states with such DFWP statutory language, most work-related injuries will result in a post-accident drug test.

It would appear that if an employer conducts post-accident drug tests consistent with the requirements of a state's DFWP statute, OSHA will not find a violation of §1904.35(b)(1)(iv). Less clear is what happens if an employer decides to go beyond what is literally required by a state DFWP statute. Although OSHA would no doubt approach these situations on a case-by-case basis, employers would seem to have a good defense because typically workers' compensation benefits can be denied if an employee tests positive for drugs. Thus, an employer's motivation in requiring drug testing beyond what is literally required by the state DFWP statute could legitimately be to avoid having to pay workers' compensation benefits as a result of positive drug test results, not to retaliate against the employee for reporting the injury.

In sum, adopting a DFWP policy in order to reduce insurance premiums is not retaliatory and therefore seems permissible under §1904.35(b)(1)(iv), even though employers are not literally *required* by state or federal law or regulation to implement drug-free workplaces. Because the motivation to take advantage of state DFWP statutes is to reduce insurance premiums or workers' compensation losses, such policies are likely to be viewed by OSHA as compliant.

In those states that do not have a DFWP statute, we believe that an employer will still be free to adopt such post-accident drug testing if the employer's insurance carrier or state law offers a premium reduction or other benefit for implementing the

policy. Again, even though not *required* by state or federal statute or regulation, the employer's motivation for adopting such a policy is to reduce insurance premiums or workers' compensation claims, neither of which is premised on an unlawful motivation. For those employers who are simply accepting an insurance carrier's offer in the absence of a state DFWP statute, we recommend that the arrangement be captured in writing.

Although OSHA has not formally endorsed the above interpretations of the use of post-accident drug testing under a DFWP statute or by agreement with an insurance carrier, we believe that this is a reasonable interpretation of the Agency's intent. As we understand it, the Agency will be providing formal guidance on its interpretation of §1904.35(b)(1)(iv) in either upcoming Frequently Asked Questions, a Compliance Directive, or an enforcement memo to the Regional Administrators that will be published before the August 10 enforcement deadline. Having offered the above best-available-information-at-this-point advice, it is also clear that the Agency is still involved in internal discussions and debate to determine how it will interpret and enforce the new regulation.

Post-accident or -injury "reasonable suspicion" testing

Even in the absence of a Drug Free Workplace post-accident or -injury policy or workers' compensation benefit for the employer, we believe it would still be permissible to conduct post-accident drug testing if, as OSHA states, employee drug use is "likely to have contributed to the incident." This is an acknowledgment by the Agency that even if post-accident or -injury drug testing could conceptually have some chilling effect on an employee's reporting of an injury, it will be permitted under §1904.35(b)(1)(iv) if the employer has a reasonable suspicion that drug use contributed to the incident. OSHA does not presently have expertise in making reasonable suspicion determinations, or more accurately, second-guessing employers' reasonable suspicion determinations. In typical OSHA inspections, an employer's compliance with OSHA requirements is based on whether its equipment or practices are compliant with OSHA Standards, and employee impairment is not typically at issue. As a consequence, absent any significant institutional knowledge or expertise on the issue, the Agency is likely to defer to the longstanding criteria and procedures that have been developed over the years under other statutes as interpreted and enforced by other agencies, such as the Department of Transportation or the Federal Railway Administration.

It is not the intent of this *OSHA Update* to address these criteria or procedures in detail, but only to suggest that OSHA will no doubt look to these same criteria – such as erratic or abnormal behavior consistent with the use of drugs or alcohol – and to whether the employer has a process that ensures a reasoned assessment of the injured employee's behavior or conduct by, for example, requiring that the behavior or conduct be observed by at least two members of management either immediately before, during, or immediately after the accident or incident and the basis for the reasonable suspicion be documented.

In addition, OSHA is also stating in the explanation of its new reporting procedures regulation that, for the drug testing procedure not to be viewed as discriminatory or retaliatory, the drug testing methodology must accurately identify that the employee was impaired at the time of incident or accident as opposed to simply having evidence of a drug in the employee's system. This Preamble statement is problematic because it is not clear that there are presently any test methods that determine *current drug* impairment, even though current alcohol impairment can be determined. We assume that the Agency will try to reconcile its interpretation in light of the limits of existing drug testing capabilities.

"Reasonable possibility" testing

Apart from testing under a Drug-Free Workplace statute or arrangement with an insurance carrier to implement a Drug-Free Workplace policy, or when there is reasonable suspicion to believe that the reporting employee was impaired, there are other situations in which the Agency will allow post-accident drug testing. As noted above, when an employee is simply stung by a bee through no fault of his own or develops tendinitis from performing repetitive work tasks, OSHA's position is that post-accident drug testing under those circumstances would probably violate §1904.35(b)(1)(iv). But OSHA offers a few examples in which the Agency states that post-accident drug testing would be allowed even in the absence of reasonable suspicion. For example, if an employee is injured as a result of failing to lock out equipment that is being serviced or an employee drives a forklift into a wall, post-accident drug testing for such cases may be allowed. Unlike a bee sting or cumulative trauma disorder where there is seemingly no connection between the injury or illness and drug impairment, impairment could be a reason that the employee failed to lock out or drove the forklift into the wall. In the absence of any bright line test, it appears that any employee action that leads or contributes to an injury – such as tripping and falling, hitting

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your thumb with a hammer, or cutting your finger with a knife – would all be considered as having a "reasonable possibility" of occurring as a result of drug impairment and thus permitting drug testing. Again, the Agency's focus seems to be on prohibiting post-accident drug tests only when, like the bee sting scenario, there is *no possibility*, or at least *not a* "*reasonable possibility*," that an employee's actions led or contributed to the resulting injury. Similarly, if an employer conducts drug tests after all failures to lock out or all forklift collisions, regardless of whether an injury results, then the employer is not retaliating against the employee for reporting an injury.

In sum, OSHA will soon be providing some guidance, and we believe those guidance documents will allow post-accident drug testing under a Drug-Free Workplace policy, state laws that provide a workers' compensation benefit for the employer, or by agreement with an insurance carrier to implement such a policy. If your company does not have a Drug-Free Workplace policy, then you should still be able to conduct post-accident drug testing as long as you apply and support a reasonable suspicion approach, or if the injury or illness is not like a bee sting or cumulative trauma disorder that on its face would seemingly have no possible connection to an employee's being drug-impaired.

If you have any questions, feel free to contact **Bill Principe**, **Steve Simko**, **David Smith, Pat Tyson**, or **Neil Wasser**.

In addition, our **Workplace Drug & Alcohol Testing practice group** can help you develop a Drug-Free Workplace policy or review your existing policy. For assistance, please contact **Tommy Eden**.

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