

OSHA REGULATIONS AND POST-ACCIDENT DRUG TESTING OF EMPLOYEES

New Regulations

On May 12, 2016, the Occupational Safety and Health Administration of the U.S. Department of Labor issued new regulations and "Supplementary Information" pertaining to the reporting of workplace injuries and illnesses. <https://www.federalregister.gov/documents/2016/05/12/2016-10443/improve-tracking-of-workplace-injuries-and-illnesses>. The implementation of those regulations was delayed while a federal court in Texas considered an application for injunctive relief. The injunction was denied, and the regulations may now be enforced, unless they are rescinded by the new administration.

Prohibition on Post-Accident Drug Testing

Although the purported reason for the new regulations was to direct employers to submit their annual report regarding workplace injuries and illnesses electronically, the bulk of the new regulations focus on the post-accident drug testing of employees. The rationale for these new regulations is that employees should not be discriminated against or retaliated against for reporting injuries or illnesses, and that employees may be reluctant to report injuries or illnesses if they know they will be drug tested. Discriminating against an employee who reports a fatality, injury, or illness is a violation of section 11(c) (see 29 CFR 1904.36) has, for many years, been prohibited.

According to the new regulations, employers are only permitted to do post-accident drug testing if there is an "objectively reasonable basis" for concluding that drug or alcohol use is likely to have contributed to the accident or illness. In the Preamble to the new rules, OSHA states that "blanket post-injury drug testing policies deter proper reporting" of workplace injuries or illnesses. The regulations state, "Drug testing policies 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. 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."

Pursuant to the new regulations, OSHA will be focusing on the employer's motivation for using post-accident drug testing. If OSHA determines that the employer is using the testing to discourage the reporting of accidents, OSHA compliance officers will be empowered to issue sanctions against an employer, even if an

employee has not filed any complaint. It is OSHA's intent that employers evaluate each work-related injury or illness separately, and assess whether there is an objectively reasonable basis for drug testing. Of course, an employer who selects some employees for post-accident drug testing while exempting others invites a claim that the decision was made on the basis of age, race, sex, disability, or some other protected characteristic.

Exceptions to the New Regulations

If the employer is motivated by a reason other than impermissible retaliation, the post-accident drug testing should not run afoul of the regulations. The regulations state, "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 the final rule would not prohibit such testing. This is doubly true because Section 4(b)(4) of the Act prohibits OSHA from superseding or affecting workers' compensation laws. 29 U.S.C. 653(b)(4)."

For example, federal government contractors are subject to the Drug Free Workplace Act of 1988, which requires employers to have a policy prohibiting the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance in the workplace and specifying the actions that will be taken against employees who violate the policy. If the employer's motivation for post-accident drug testing is to ensure compliance with that statute, then it should not run afoul of the new regulations.

Similarly, if the employer's motivation for post-accident drug testing arises from a desire to reduce insurance premiums or defend against illegitimate workers' compensation claims, the testing is likely not going to violate the OSHA regulations. In Kansas, K.S.A. § 44-501(b)(1) creates a conclusive presumption of impairment if the levels of drugs or alcohol exceed the confirmatory tests cutoff levels. The statute also allows for forfeiture of benefits when an employee refuses to submit to a chemical test, if the employer's policy clearly authorizes post-injury testing. In addition, the statute allows for the drug test results to be admissible into evidence if the testing was done as a result of a written employer-mandated drug testing policy that was in place prior to the date of accident or injury.

What Should Employers Do?

Don't Abandon Post-Accident Drug Testing – If your post-accident drug testing program is motivated by a desire to defend against illegitimate workers' compensation claims, then you are probably not in violation of the new OSHA regulations when you do drug testing after a work-related accident. However, you

need to have a written drug testing policy in place in order to take advantage of the workers compensation statutory defenses.

Required Signage -- The new regulations require employers to post the enclosed sign in the workplace.

Eliminate Programs That Might Discourage Reporting Injuries -- Some employers utilize prizes or rewards for employees who do not have work-related injuries or illnesses. The new regulations discourage such programs, as employees might be disinclined to make appropriate reports, if they are excluded from the prize or reward program.

Prepare for Electronic Submission -- The new regulations require that employers electronically submit injury and illness data that they are already required to record on their onsite OSHA Injury and Illness forms. Employers with 250 or more employees in industries covered by the recordkeeping regulation must submit information from their 2016 Form 300A by July 1, 2017. These same employers will be required to submit information from all 2017 forms (300A, 300, and 301) by July 1, 2018. Beginning in 2019 and every year thereafter, the information must be submitted by March 2.

Employers with 20-249 employees in certain high-risk industries must submit information from their 2016 Form 300A by July 1, 2017, and their 2017 Form 300A by July 1, 2018. Beginning in 2019 and every year thereafter, the information must be submitted by March 2.

The OSHA website is not currently accepting electronic submissions, so employers should check www.osha.gov/recordkeeping periodically to determine when such submissions will be accepted. When the system is operational, OSHA intends to make injury and illness records available on a publicly-accessible website, without information that would identify individual employees.



U.S. Department of Labor



Job Safety and Health IT'S THE LAW!

All workers have the right to:

- A safe workplace.
- Raise a safety or health concern with your employer or OSHA, or report a work-related injury or illness, without being retaliated against.
- Receive information and training on job hazards, including all hazardous substances in your workplace.
- Request an OSHA inspection of your workplace if you believe there are unsafe or unhealthy conditions. OSHA will keep your name confidential. You have the right to have a representative contact OSHA on your behalf.
- Participate (or have your representative participate) in an OSHA inspection and speak in private to the inspector.
- File a complaint with OSHA within 30 days (by phone, online or by mail) if you have been retaliated against for using your rights.
- See any OSHA citations issued to your employer.
- Request copies of your medical records, tests that measure hazards in the workplace, and the workplace injury and illness log.

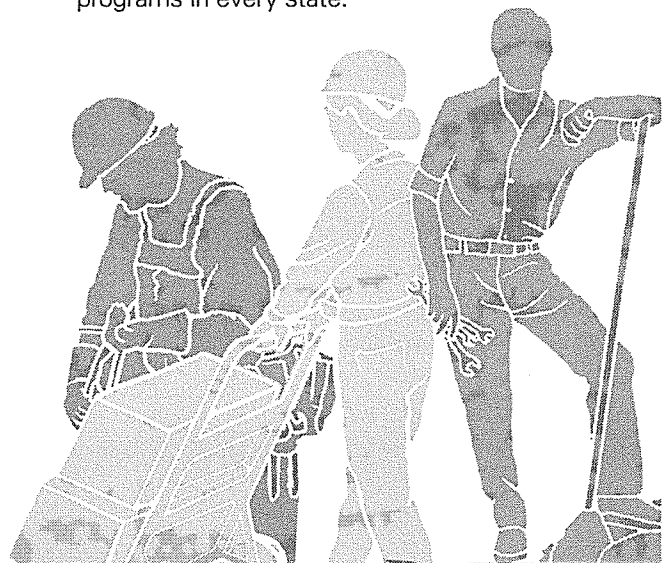
This poster is available free from OSHA.

Contact OSHA. We can help.

Employers must:

- Provide employees a workplace free from recognized hazards. It is illegal to retaliate against an employee for using any of their rights under the law, including raising a health and safety concern with you or with OSHA, or reporting a work-related injury or illness.
- Comply with all applicable OSHA standards.
- Report to OSHA all work-related fatalities within 8 hours, and all inpatient hospitalizations, amputations and losses of an eye within 24 hours.
- Provide required training to all workers in a language and vocabulary they can understand.
- Prominently display this poster in the workplace.
- Post OSHA citations at or near the place of the alleged violations.

FREE ASSISTANCE to identify and correct hazards is available to small and medium-sized employers, without citation or penalty, through OSHA-supported consultation programs in every state.



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