



# Arkansas Association of Defense Counsel

December 5, 2016

## **New OSHA Regulations Could Impact Your Client's Post-Injury Drug Testing Policies**

Recently, OSHA proposed a new regulation with a goal "to Improve Tracking of Workplace Injuries and Illnesses." Tucked away in the regulation is a retaliation provision that states that an employer "must not discharge or in any manner discriminate against any employee for reporting a work-related injury or illness." 29 C.F.R. § 1904.35(b)(1)(iv). Although this language seems rather benign and in fact in line with other Federal employment laws, the commentary issued along with the regulation suggests that it could have a profound effect on the practice of drug testing employees who report work injuries.

### *OSHA's Position*

As stated in the Federal Register commentary promulgating the proposed final rule, OSHA's position is "blanket post-injury drug testing policies deter proper reporting." OSHA notes that the "final rule does not ban drug testing of employees," but "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." OSHA goes on to suggest a form that post-accident drug test policies should take:

To 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, 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. Employers need not specifically suspect drug use before testing, but there should be a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness in order for an employer to require drug testing. In addition, drug testing that is designed in a way that may be perceived as punitive or embarrassing to the employee is likely to deter injury reporting.

In sum, it appears that it is OSHA's position that some form of investigation as to the cause of the injury needs to take place before drug testing can even be implemented or contemplated.

### *Is this actually a change in the law?*

Yes and No. As OSHA points out on its website, discrimination and retaliation against persons reporting dangerous working conditions were already prohibited under the act. However, the commentary specifically targeting drug testing as a form of retaliation is a new position. Further, in addition to broadening the interpretation, the

new regulation also broadens the remedy available to OSHA. Whereas before retaliation could only be investigated and litigated if a specific employee filed a claim or complaint with OSHA after an adverse action, under the new regulations OSHA has the right to take action and issue fines and citations without the need of a specific claim or complaint by an employee.

#### *Interplay with State Workers' Compensation*

OSHA's commentary makes clear that where its rule conflicts with drug testing under state workers' compensation law, state workers' compensation law controls. In fact, by law OSHA is prohibited from superseding or affecting workers' compensation laws. See 29 U.S.C. 653(b)(4). The commentary further explicitly states that "[i]f 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." A classic example of a required drug testing regulation is the motor carrier regulations issued by the Department of Transportation.

#### *Employer Drug Testing in Arkansas*

Given OSHA's position, the question is ultimately are post-accident drug tests mandatory under Arkansas law. Drug testing is addressed in three areas of the Arkansas Code and Rules:

- 1) Ark. Code Ann. § 11-9-102(4)(B)(iv)(c) provides that: "[e]very employee is deemed by his or her performance of services to have impliedly consented to reasonable and responsible testing by properly trained medical or law enforcement personnel for the presence of any of the aforementioned substances in the employee's body." The

surrounding sections note that a positive drug test creates a rebuttable presumption that the work injury was "substantially occasioned" by the use of drugs and therefore is not a compensable injury. See Ark. Code Ann. § 11-9-102(4)(B)(iv)

- 2) The Arkansas "Voluntary Program for Drug-Free Workplaces" Act passed in 2001 allows employers to implement, if they so choose, a drug-free work-place program with the stated statutory goal that "drug and alcohol abuse be discouraged and that employees who choose to engage in drug or alcohol abuse face the risk of unemployment and the forfeiture of workers' compensation benefits." See Ark. Code Ann. § 11-14-101 *et. seq.* Employers who choose to implement such a program have procedural requirements to comply with regarding notice of the program. If an employer implements the program, the program has "required testing" and a required procedure for testing. One such required test is a post-accident drug test. The statute provides that "[a]fter an accident that results in an injury, the covered employer shall require the employee to submit to a drug or alcohol test in accordance with the provisions of this chapter." See Ark. Code Ann. § 11-14-106(a)(5).
- 3) Finally, in an effort to match the statute, the Workers' Compensation Commission issued Rule 099.36 titled "A Voluntary Program for Drug-Free Workplaces" which matches the above referenced statute in every material respect.

Based on these statutes there is a real question as to whether or not Arkansas falls under OSHA's exception for employers who test post-injury to comply with state or federal regulations. First, under the Arkansas program there is nothing that actually mandates or requires drug testing by

the employer under the Comp Act. Rather, there is a mandate of consent by the employee. Second, the Workers' Compensation Act calls for "reasonable and responsible testing" a phrase that has never been interpreted. It is possible that "reasonable and responsible testing" could be interpreted in a manner that is consistent with the OSHA guidance. Third, even when testing is mandatory under the other two sections cited above it is only mandatory: (1) in the context of a voluntary program, and (2) Post-accident which would exclude injuries not occasioned by an accident like the "repetitive strain injury" noted in OSHA's commentary.

### *The Take Away*

Even with the concerns noted above about the lack of explicit "mandatory" nature post-accident/post-injury drug testing in Arkansas, viewed as a whole there is a strong purpose and policy in Arkansas law supporting mandatory post-accident/injury drug testing. There is a clear contemplation that a drug test should take place after an accident and that benefits can be lost if the employee tests positive. The Workers' Compensation Act even goes so far as to require and presume consent to testing by an employee as a result of the employee's simple act of going to work.

Further, even though OSHA has taken this hard line position, it cannot be presumed that a Court will follow the position. Federal Agencies have been ignored by Courts in the area of drug and alcohol testing in the past. For example, the EEOC's position that random alcohol testing violates the ADA has already been rejected by at least one Federal District Court. See, e.g., E.E.O.C. v. U.S. Steel Corp., No. CIV.A. 10-1284, 2013 WL 625315 (W.D. Pa. Feb. 20,

2013) (noting that random alcohol testing did not violate the ADA when it was implemented as a safety measure in the dangerous working environment of a steel mill).

In the end, a middle course with regard to post-injury drug testing may be warranted. OSHA's position that an employee injured as a result of a bee sting should not be required to submit to a drug test is certainly well taken. However, an employer should not have to investigate whether an accident was a result of equipment failure or operator error or negligence before requiring an employee to submit to a drug test as OSHA's commentary suggests. When there is an injury caused by a specific accident, testing is likely appropriate, but could become a target of OSHA. The case of alleged repetitive stress injuries is an interesting one. Ultimately, out of caution testing in these incidents may not be appropriate and should be avoided to avoid potential repercussions from OSHA. However, where there is a question as to the possibility of a singular traumatic event as the cause of the injury, testing may well be appropriate.

The flaw with the middle course is that it injects discretion into the drug testing process. Whenever a decision becomes discretionary, a company opens itself up to claims of discrimination on other grounds such as age, race, gender, etc. Ultimately, when it comes to drafting drug testing policies in handbooks, in light of OSHA's position, the best approach is to use the generic "may" rather than the mandatory "shall" when listing potential employee drug testing situations, particularly with regard to post-injury testing.

**The thanks of the AADC go out to  
Rebecca Hattabaugh of Ledbetter Cogbill  
Arnold & Harrison, LLP for writing this  
article.**



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