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New OSHA Rule Might Make Automatic Post-Accident Testing Illegal: Electronic Reporting Regulations Are “Online” - Part 2

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On May 11, 2016, the Occupational Safety and Health Administration (OSHA) published the long-awaited final rule revising its Recording and Reporting of Occupational Injuries and Illnesses regulations.

This is the second in a six-part series of alerts on the new rule. This alert will address the impact of the new rule on drug testing policies. Subsequent alerts will address policies regarding injury reporting and incentive plans, as well as the impact of the reporting rule on company branding, the likely rise in whistleblower claims (retaliation) related to denial of worker’s compensation benefits and OSHA requirements for policy changes and posting of rules about reporting of injury claims.

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New Rule Might Make Automatic Post-Accident Testing Illegal

Under the new “Improve Tracking of Workplace Injuries and Illnesses” rule, OSHA has virtually outlawed post-accident drug testing, making it a violation of the anti-relation provisions that consider post-accident testing to have a chilling effect on injury reporting. OSHA’s preamble to rule says this about post-accident testing:

“the 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 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.”

OSHA’s comments appear to deviate from the legal precedent that ushered in drug testing in the late 1980s and early 1990s following several horrific railroad accidents. The U.S. Supreme Court upheld government mandated drug testing and specifically held that the deterrent impact of post-accident testing had an acceptable purpose.

“A substance-impaired railroad employee in a safety-sensitive job can cause great human loss before any signs of the impairment become noticeable, and the regulations supply an effective means of deterring such employees from using drugs or alcohol by putting them on notice that they are likely to be discovered if an accident occurs.”*Skinner v. Railway Labor Executives' Association*, 489 US 602 (1989)

OSHA’s position fails to acknowledge that post-accident testing also serves as a deterrent against drug use, not as a means to deter injury reporting. This aspect of the OSHA regulation is likely to be subject to court challenge, but because this part of the rule takes effect on August 10, 2016, employers may be exposed to citation by OSHA for post-accident drug and alcohol policies before any court challenge can be mounted. Legal counsel should be consulted regarding the impact of this rule on drug policies or in the event OSHA requests a copy of an

employer’s policy during an inspection.

Click here for Part 1: OSHA Electronic Reporting Regulations are "Online" Part 1: Final Rule

Click here for Part 3: OSHA Pushes Back Effective Date of Anti-Retaliation Provisions of Final Rule

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