Post-injury drug testing under fire

OSHA rule may stifle employer efforts

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Employers are going to have to take a hard look at their post-incident drug testing policies in light of the U.S. Occupational Safety and Health Administration's stance against blanket mandates of such tests.

OSHA's Improve Tracking of Workplace Injuries and Illnesses rule does not ban drug testing of employees, but it does prohibit employers from using drug testing or the threat of it as a form of adverse action against employees who report injuries or illnesses, according to the final rule, published in May and taking full effect Jan. 1, 2017.

The rule is the latest and firmest sign that the agency will frown upon mandatory post-accident drug testing without a compelling reason, experts say.

It is unclear what will happen to employers who enforce post-incident drug testing policies that OSHA deems unreasonable, although several experts say they expect the agency will attempt to cite employers.

“We will look carefully at every allegation of that and determine whether that is actually what's going on,” said David Michaels, assistant secretary of Labor for Occupational Safety and Health.

OSHA telegraphed its stance in an interpretation letter on recording of injuries involving intoxicated workers in March, and the agency's proposed safety and health management guidelines, which specifically call out mandatory drug testing as an example of a program that can discourage injury and illness reporting, in November.

Post-incident drug and alcohol testing policies are common or required in certain industries, with a 2012 study by the U.S. Government Accountability Office finding that 56% of U.S. manufacturers had such policies and
that they may discourage workers from reporting injuries and illnesses.

OSHA's stance becomes problematic in states where workers compensation laws require such testing, and within the federal government, including the military, which also requires post-accident drug testing to ensure employee safety, said Tressi Cordaro, a shareholder with Jackson Lewis P.C. based in Reston, Virginia.

More important, she said, is the lack of data to support OSHA's position.

“And certainly the concern of employees working and operating under the influence and endangering the safety of the public, themselves and other employees outweighs any concerns of post-accident drug testing discouraging employees from reporting injuries and illnesses,” Ms. Cordaro said. “Additionally, for an employee who is under the influence of drugs or alcohol at work, I'm not sure that the post-accident drug test itself would actually be the discouraging factor to report an injury or illness.”

OSHA dismissed concerns that its stance would conflict with drug-testing requirements in state workers comp laws, partly because the Occupational Safety and Health Act prohibits the agency from superseding or affecting these laws.

“If an employer conducts drug testing to comply with the requirements of a state or federal law or regulation, the employer's motive, by definition, is not retaliatory and this rule wouldn't prohibit that sort of testing,” Mr. Michaels, said during a stakeholder call last month.

However, the way the rule is written implies that if an employer cannot cite a regulation or statute requiring testing, such as U.S. Department of Transportation requirements, for example, that employer must have a “smoking gun reason” for compelling employees to submit to the testing, said Valerie Butera, a Washington-based member of the labor and employment practice of Epstein Becker & Green P.C.

“It's going to be very difficult for employers to prove to OSHA that it was 'reasonable' for them to do any kind of post-incident testing on someone who has reported the incident without having another law to point to,” she said.

To strike the appropriate balance, OSHA says in the rule that employer 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, according to the final rule. For example, OSHA said, 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.

No blanket policy

Employers do not have to specifically suspect drug use before testing, but there should be a reasonable possibility that drug use by the reporting employee contributed to the reported injury or illness for the employer to mandate the testing, according to the rule.
“If there is going to be some kind of drug testing policy, it should not be a blanket policy that identifies workers who report injuries and illnesses or workers who have injuries that require medical care,” said Nancy Lessin, senior staff for strategic initiatives at the United Steelworkers' Tony Mazzocchi Center for Health, Safety and Environmental Education in Pittsburgh. “The probable cause for a drug test would need to be based on observation and a good-faith belief that an employee is under the influence of drugs and alcohol.”

Such observations should be made by two people trained to spot such impairments and should be documented in writing, she added.

For some employees, the humiliation and fear involved with being drug-tested, particularly with the possibility of false positives and the adverse consequences associated with them, can deter them from reporting an injury or illness, Ms. Lessin said.

“This is not related to people being afraid that they’re going to be caught,” she said. “This is related to the experience of the drug test.”

“The drug testing is not necessarily a bad thing,” said Wes Scott, director of consulting services at the National Safety Council in Itasca, Illinois. “I think we should be more open to doing that, but we also have to be sensitive to how we do that so that we’re not calling employees out unnecessarily, so that we’re not embarrassing them. If the test is made and it's negative, let's acknowledge that and move on.”

A “very critical” step for risk managers is to examine the employer's potential goal for doing post-accident drug testing, said Robert Cartwright Jr., Exton, Pennsylvania-based safety and health manager for Bridgestone Retail Operations L.L.C. and treasurer of the Risk & Insurance Management Society Inc.

“What most employers need to start looking at is what kind of policy do they have in place, how is that policy communicated to their employees, and what kind of 180-(degree) feedback do they have when these things are put into place,” he said. “Everything really just needs to be reviewed.”