

OSHA's Big Pivot: How the New Rule Impacts Injury Reporting, Prevention and Drug Testing Programs

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Nudging Employers to Compliance

"Our new rule will 'nudge' employers to prevent work injuries to show investors, job seekers, customers and the public they operate safe and well-managed facilities. Access to injury data will also help OSHA better target compliance assistance and enforcement resources, and enable 'big data' researchers to apply their skills to making workplaces safer."

-Dr. David Michaels, Assistant Secretary of Labor for
Occupational Safety and Health

OSHA's Electronic Recordkeeping Final Rule

- ◆ Electronic submission:
 - **Employers with 250 or more** (includes part-time, seasonal, and/or temporary workers) in each establishment to electronically submit their **300, 300A, and 301 forms to OSHA annually**.
 - **Employers with 20 or more but less than 250** employees in certain identified industries to electronically **submit their 300A form annually**.
 - Employers who receive notification from OSHA to electronically submit their 300, 300A, and 301 forms to OSHA.
- ◆ OSHA will post the data from employer submissions on a publically accessible website – not to include information that could be used to identify individual employees.

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OSHA's Electronic Recordkeeping Final Rule

- ◆ Employers required to develop employee injury and illness reporting requirements – employers **must inform** employees of the following:
 - **Procedures for reporting** work-related injuries and illnesses promptly and accurately.
 - Employees must not be deterred or discouraged from reporting injuries and illnesses.
 - Reasonable reporting procedures are required.
 - **Employees have the right to report** work-related injuries and illnesses.
 - **Employers are prohibited from discharging or in any manner discriminating against employees for reporting** work-related injuries and illnesses.

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OSHA's Electronic Recordkeeping Final Rule

- ◆ Final rule allows OSHA to issue citations to employers for retaliating against employees for reporting work-related injuries and illnesses.
 - I.e., disciplining employees who report injuries late or disciplining for violations of vague work rules such as “work carefully” or “maintain situational awareness.”
- ◆ Abatement even if no 11(c) complaint has been filed:
 - Reinstatement.
 - Back-pay.

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- ◆ Incentive programs:
 - Be careful that program doesn't incentivize underreporting – e.g. bonus for team of employees if no one is injured over defined period of time vs. bonus for employees participating in safety committee.
 - Programs based on lagging as opposed to leading indicators potentially problematic.
 - OSHA indicates determinations will be made on a case-by-case basis.
 - OSHA provides little guidance on what would be acceptable, particularly for programs that combine lagging and leading indicators.

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IMPACT OF OSHA'S ELECTRONIC RECORDKEEPING RULE ON WORKPLACE POST-ACCIDENT DRUG AND ALCOHOL TESTING

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Impact of OSHA's Electronic Recordkeeping Rule on Workplace Post-Accident Drug Testing

OSHA's premise: Poorly designed and implemented post-accident/post-injury drug testing policies inhibit employees from reporting workplace injuries, or punish them for doing so. This causes under-recording of occupational injuries and illnesses on OSHA records, in violation of the Agency's recordkeeping rule, and creates a misleading profile of the company's injuries and illnesses.

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What if My Company is Required to Conduct Post-Accident Drug Testing?

- ◆ The OSHA rule has no impact on post-accident testing mandated by federal regulations or, permitted by state workers' compensation laws (e.g., premium reduction laws).
- ◆ However, the rule 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.”
- ◆ Post-accident drug and alcohol testing is unregulated in many states.

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Impact of OSHA’s Electronic Recordkeeping Rule on Workplace Post-Accident Drug Testing

- ◆ OSHA states that “the final rule prohibit[s] employers from using drug testing (or the threat of drug testing) as a form of adverse action against employees who report injuries or illnesses” *and*
- ◆ “Blanket post-injury drug testing policies deter proper reporting.”

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Impact of OSHA's Electronic Recordkeeping Rule on Workplace Post-Accident Drug Testing

- ◆ “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.”

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Impact of OSHA's Electronic Recordkeeping Rule on Workplace Post-Accident Drug Testing

- ◆ Best practices:
 - Do not tie drug and alcohol testing to:
 - Injuries alone, particularly injuries that have no plausible connection to drug or alcohol abuse, such as, for example: allergic reactions, animal or insect bites, back or muscle strains caused by overexertion, carpal tunnel syndrome and other repetitive strain injuries, diabetic episodes, etc.
 - The employee’s filing of a workers’ compensation claim.
 - An OSHA recordable injury or illness.
 - Before conducting post-accident testing, investigate to see whether a condition attributable to the employer was involved (especially an OSHA violation).

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Is Reasonable Suspicion Now Required For Workplace Post-Accident Drug Testing?

- ◆ OSHA states: “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.”
- ◆ It is unclear what this means. Perhaps: do not test after injuries that could not possibly be related to drug or alcohol abuse.
- ◆ May also mean that evidence of unusual behavior immediately preceding injury, including failure to follow safety rules, instructions and customary procedures, is relevant to refute inference of retaliation for reporting the injury.

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Impact of OSHA’s Electronic Recordkeeping Rule on Workplace Post-Accident Drug Testing

- ◆ OSHA states: “To strike the appropriate balance here, drug testing policies should limit post-incident testing to situations . . . for which the drug test can accurately identify impairment caused by drug use.”
- ◆ In general, urine drug tests detect whether an individual has used drugs in the last 2 to 4 days. Hair tests should not be used for post-accident testing because of the 90-day look-back. But there are no drug tests that will tell an employer whether an employee was “impaired” by drugs at the exact time of the accident!
- ◆ Best practice: use test methods that are recognized as valid and reliable, and that detect drugs used only shortly before the accident occurred.

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Impact of OSHA's Electronic Recordkeeping Rule on Workplace Post-Accident Drug Testing

- ◆ OSHA states that drug testing “that is designed in a way that may be perceived as punitive” may deter reporting of injuries.
- ◆ But how can an employer determine in advance the subjective perception of an employee to a particular drug test, and is this a valid standard in any case? Further, it may invite abuse to frustrate lawful testing: employees who know they are going to test positive may object to a post-accident drug test as “punitive” even if it is part of a well-designed drug and alcohol testing program that is intended to promote workplace safety.

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Impact of OSHA's Electronic Recordkeeping Rule on Workplace Post-Accident Drug Testing

- ◆ Final thoughts and best practices:
 - Make accidents the trigger, not injuries.
 - Avoid testing everyone “involved” in an accident; we suggest a “caused or contributed” component.
 - Test after property damage or other non-injury triggering events (e.g., impact indicators on forklifts).
 - Don't forget about reasonable suspicion testing if your policy so provides.
 - Make sure supervisors are trained and that they consult with HR, legal counsel, occupational safety, before ordering a post-accident drug test.

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Effective Dates in the Final Rule

◆ August 10, 2016:

- Provisions regarding employee injury reporting policies.
- Specifically, requirements to inform employees they have a right to report a work-related injury.
- Prohibition from discharging or otherwise discriminating against employees for reporting work-related injuries or illnesses.

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Effective Dates in the Final Rule

◆ January 1, 2017:

- Requirements relating to the electronic submission of Part 1904 recordkeeping forms.
- Establishments with ≥ 250 employees must submit information from their 2016 form 300A by July 1, 2017.
- Establishments with ≥ 20 employees but < 250 employees in designated industries must submit information from their 2016 form 300A by July 1, 2017.

◆ January 1, 2018:

- Establishments with ≥ 250 employees must submit from all 2017 forms (300A, 300, and 301) by July 1, 2018.
 - Establishments with ≥ 20 employees but < 250 employees in designated industries must submit their 2017 form 300A by July 1, 2018.

◆ Beginning in 2019 and every year thereafter:

- Information must be submitted annually by March 2.

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Questions



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