

Workplace Drug Testing and New OSHA Regulations

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Every employer has a drug testing policy – even if that policy is to not test its employees or prospects. Performing drug testing on current or prospective employees requires specific criteria, and proper handling of the testing, in order to avoid liability for discrimination, comply with the PA Workers' Compensation Act and (where applicable) avoid a violation of new OSHA regulations. Drug testing also carries with it additional, unique concerns as it exposes employers to liability for claims brought by prospective employees. With these many concerns, it is important to keep in mind some basic principles regarding drug testing.

When can an Employer drug test?

- **Pre-Employment** – most often after a conditional offer extended.
- **Reasonable Suspicion** – must be based on “probable cause” – generally, “documented” and objective/observable signs and symptoms –supervisors should be trained – and then supervisor must make call.
- **Post-Accident** – objective criteria, and contemporaneousness is critical.
- **Random** – computer generated, random test – to which all employees are subjected.
- **Periodic** – regularly scheduled in advance and uniformly administered (e.g., annual basis).
- **Return-to-Duty** – one-time, noticed test for employee returning to workforce after previous positive test and completion of treatment.

What sort of liability exposure is associated with the testing?

- **Disability discrimination.** ADA protects job applicants/employees who are taking prescription meds for disability.
- **Other discrimination claims.** Employer liable for singling out specific groups by age, race, or gender.
- **Invasion of privacy.** Addresses the manner in which the tests are administered.
- **Defamation or false light.** Employee or applicant could have actionable claim if a “false positive” is publicized – but only liable in the event the employer knew or should have known the result was incorrect.

How can a positive drug test, immediately after a work injury, be used to defend a Workers' Compensation claim?

Employers can use positive drug test results, for tests taken immediately after work injuries, as a method of denying or defending Workers' Compensation claims. The defense/denial of the claim would be based upon the argument that the positive drug test is an indication of an illegal activity, is a violation of employer policy, is an indication that the employee was “outside the scope” when the injury occurred – or all of the above. If the drug test is performed properly, and the results are handled properly, and the medical evidence to support the connection between the positive test and the injury is provided to the Workers' Compensation Judge, an employer's denial/defense should be valid, and the claim will be denied.

New OSHA Regulations (effective Aug. 10, 2016)

OSHA has enacted new regulations that are designed to curtail employee-intimidation via the threat of drug testing; the new regulations give OSHA compliance officers the authority to issue citations to employers for any retaliation or perceived retaliation that would deter reporting. Section 11(c) of the Occupational Safety and Health Act already prohibits any person from discharging or otherwise discriminating against an employee who reports a fatality, injury, or illness. However, OSHA may not act under that section unless an employee files a complaint with OSHA within 30 days of the retaliation.

In contrast, under the new rule, OSHA will now be able to cite an employer for retaliation even if the employee did not file a complaint, or if the employer has a program that deters or discourages reporting through the threat of retaliation. 81 Fed. Reg. 29624 OSHA intends to give its compliance officers, who have no formal training in employment discrimination law, the authority to issue citations to employers based on perceived retaliation in the workplace.

To be clear, the new OSHA regulations do not prohibit drug testing, and do not prohibit employers from using drug testing as a way to defend Workers' Compensation claims. The new OSHA regulations do prohibit employers from using drug testing, or the threat of drug testing, as a form of retaliation against employees who report injuries or illnesses.

In light of the Workers' Compensation Act, and new OSHA regulations – when ordering post-injury drug testing – what are some tips for employers who order testing?

- Cannot be too late with test – or else risk drugs being “out of the system;”
- Cannot be too arbitrary with who you decide to test and/or why;
- Cannot be careful enough with how test is performed and by whom; and
- Cannot be careful enough with how results are handled – chain of custody and correlation between use and injury must be established.

For every employer faced with the decision of whether to order a drug test post-injury, it is important to be aware of potential pitfalls in defending a Workers' Compensation claim, as well as the new OSHA regulations regarding retaliation.

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