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OSHA RECONSIDERS POST-ACCIDENT DRUG TESTING: PROCEED, BUT STILL USE CAUTION

**By: Stephen E. Trimboli, Esq.
Trimboli & Prusinowski, LLC**

On May 12, 2016, the Occupational Safety and Health Administration of the United States Department of Labor shook up the employment community by suggesting that post-accident drug testing could no longer be lawful. The Occupational Safety and Health Administration had that day released an amended rule pertaining to the reporting and tracking of workplace injuries and illnesses. The amendment included a prohibition against employers discharging or in any manner discriminating against employees for reporting work-related injuries or illnesses. Although the amended rule itself did not mention post-accident drug testing in any way, the sixty-seven pages of "Supplementary Information" that accompanied the amended rule suggested that automatic post-injury drug testing could be considered "a form of adverse action that can discourage reporting" of work-related injuries and illnesses. Although drug testing was deemed "a reasonable workplace policy in some situations, it is often perceived as an invasion of privacy." Testing employees for drugs or alcohol after every incident or injury was being used "to intimidate workers." It was suggested that employers could be found liable for retaliation

if drug testing was imposed after an illness or injury that is “very unlikely to have been caused by employee drug use, or if the method of drug testing does not identify impairment but only use at some time in the recent past.”

Needless to say, this attack against post-accident drug testing caused shock among employers. The Occupational Safety and Health Administration had historically supported “reasonable programs of drug testing within the comprehensive workplace program for certain workplace environments, such as those involving safety-sensitive duties like operating machinery.” Now the same Occupational Safety and Health Administration was asserting that post-accident testing was potentially retaliatory and unlawful. Particularly disturbing was the comment questioning the legitimacy testing that “does not identify impairment but only use at some time in the recent past.” Because certain controlled substances remain in a person’s body for days or weeks after use, this warning seem to suggest that common forms of drug testing currently in use would no longer be permissible. Many commentators questioned whether any form of post-accident drug testing remained lawful in light of this position taken by the Occupational Safety and Health Administration.

These concerns appear now to have been overstated. The Occupational Safety and Health Administration has slowly but consistently retreated from the position taken in the May 12, 2016, “Supplemental Information.” Most notably, the Administration has retreated from its suggestion that drug testing that identifies “only use at some time is the recent past” would be unlawful.

On October 19, 2016, then-Deputy Assistant Secretary Dorothy Dougherty issued an interpretive memorandum which addressed post-accident drug and alcohol testing. She advised that OSHA rules do not prohibit employers from drug testing employees who report work-related injuries or illnesses “so long as [the employers] have an objectively reasonable basis for testing.” She affirmed that the OSHA rule on reporting of injuries “does not apply to drug testing employees for reasons other than injury-reporting.” She further advised that when evaluating whether an employer had a reasonable basis for drug testing an employee who had reported a work-related injury or illness, “the central inquiry will be whether the employer had a reasonable basis for believing that drug use by the reporting employee could have contributed to the injury or illness. If so, it would

be objectively reasonable to subject the employee to a drug test.” She listed the following factors to be considered in determining whether the employer had a reasonable basis for concluding that drug use could have contributed to an injury or illness:

- Whether other employees involved in the incident that caused the injury or illness are also tested, or whether the employer tested only the employee who reported the injury or illness.
- Whether the employer has a heightened interest in determining that drug use could have contributed to the injury or illness due to the hazardness of the work being performed when the injury or illness occurred.
- Whether the employer administered the drug test in an unnecessarily punitive manner.

With respect to drug testing measuring current impairment as opposed to “use at some time in the recent past,” Deputy Assistant Secretary Dougherty stated that this would be considered as a factor only for tests that measure alcohol use. It would be considered as a factor in drug testing only when tests that measure current impairment (as opposed to recent use) become available. She concluded, “The general principle here is that drug testing may not be used by the employer as a form of discipline against employees who report an injury or illness, but may be used as a tool to evaluate the root causes of workplace injuries and illness in appropriate circumstances.” The principles announced in the October 19, 2016, Dougherty memorandum were repeated on a Guidance Document posted on the OSHA website simultaneously with the release of Dougherty memorandum.

The Occupational Safety and Health Administration retreated further still from its attack against post-accident drug testing on October 11, 2018. On that day, Kim Stille, Acting Director, OSHA Enforcement Programs, issued a document titled, “Clarification of OSHA’s Position on Workplace Safety and Sensitive Programs and Post-Incident Drug Testing Under 29 C.F.R. Section 1904.35(b)(1)(iv).” The purpose of the memorandum was “to clarify the Department [of Labor’s] position that [the OSHA rule prohibiting retaliation against employees who report workplace injuries and illness] does not prohibit ... are post-incident drug testing.” Many employers who have implemented such programs “do so to promote workplace safety and health.” Such programs demonstrate that the employer is “serious about creating a culture of safety, not just the appearance of reducing rates” of injury. Emphasizing that “most instances of workplace drug testing

are permissible,” the memorandum enumerated the following examples of permissible drug testing:

- Random drug testing
- Drug testing unrelated to the reporting of work-related injury or illness
- Drug testing under a state workers’ compensation law
- Drug testing under other federal law, such as a U.S. Department of Transportation Ruel mandating drug testing.
- Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees. If the employer chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just those employees who reported injuries.

All previous OSHA interpretive documents pertaining to workplace drug testing that “could be construed as inconsistent with the interpretive position articulated here” were superseded.

The Occupational Safety and Health Administration therefore appears to have retreated from its suggestion that post-accident drug testing had become a tool of retaliation to intimidate employees. The current position appears to be that as long as an employer does not single out for drug testing only those employees who reported injuries, but instead tests all employees whose conduct could have caused a workplace accident that resulted in injuries, post-accident drug testing remains acceptable. The Administration also appears to have retreated from its earlier suggestion that a drug test that cannot accurately measure current impairment (as opposed to drug use in the recent past) is *per se* retaliatory.

How should an employer proceed in light of these developments? First and foremost, any employer engaging in post-accident drug or alcohol testing mandated by state or federal law should continue engaging in the mandatory post-accident testing. Second, when post-accident testing is not mandated by state or federal law, post-accident testing should be invoked in circumstances in which employee negligence or impairment could conceivably have been a contributing factor to the accident or injury. A policy requiring drug or alcohol testing after any reported injury whatsoever, including injuries that could not have been caused by employee negligence or impairment, could be deemed to a form of retaliation designed to discourage employees from reporting work related injuries and illnesses. Third, all employees whose conduct could have contributed

to a workplace accident should be subjected to drug testing. Testing only those who reported the injuries constitutes a red flag even under the Occupational Safety and Health Administration's revised position on the matter. Fourth, employers should adopt and follow drug testing procedures that respect employees' privacy and dignity. Finally, employers should select drug testing professionals who keep current with developments in the field of drug testing and who utilize the most current drug testing technology. To the extent that improvements in testing science allow for drug tests that more accurately determine current states of impairment, those improved tests should be utilized.

Employers should consult with qualified attorneys with respect to the drafting of any post-accident testing policies to ensure compliance with OSHA requirements, and should also seek advice of counsel when determining whether post-accident testing is permissible in specific cases.

About the Author: Stephen E. Trimboli, Esq. founding partner at Trimboli & Prusinowski, LLC has been recognized for his expertise by numerous organizations, including the National Council on Alcoholism and Drug Dependence, the National Public Employer Labor Relations Association and the NJ Association of Counties. We at PDFNJ are proud to present Stephen with the *Drugs Don't Work in NJ!* 2019 Founder's Award for his work with us and his dedication in assisting the NJ business community in maintaining a drug-free workplace.

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