

New OSHA Rule May Impact Post-Accident Employee Drug Testing

Employers must be cautious about post-accident drug testing, to avoid potential OSHA sanctions for retaliating against employees who report accidents.



By [Helen Holden](#) and [Sharon Moyer](#)

[A new rule](#) issued by the Occupational Safety and Health Administration (OSHA) modifies a requirement that employers with more than 10 employees keep records of occupational injuries and illnesses. OSHA has concluded that such workplace incidents are dramatically under-reported, and the stated focus of the new rule, which went into effect August 10, 2016, is to encourage accurate reporting.

OSHA has also determined that some employers have discriminated and retaliated against employees who report workplace accidents and illnesses. To remedy this perceived issue, OSHA's new regulation requires employers to:

- ensure that the procedure for reporting illnesses and injuries is reasonable such that it not deter employees from reporting;
- refrain from retaliating against employees for reporting; and
- tell employees that they will not be retaliated against if they report an injury or illness.

While the anti-retaliation requirement is not new, OSHA has established a new mechanism to enforce it. Previously, OSHA could pursue these issues

only upon employee complaint; now, OSHA can pursue an employer for discrimination or retaliation *even if the employee does not complain*. Upon finding that an employer did discriminate or retaliate, OSHA may issue steep penalties of up to \$12,471 per violation or, for willful violations, up to \$124,712.

Post-Injury Drug Testing

One source of potential employer liability under this rule is post-injury drug testing. In its comments to this regulation, OSHA stated that a policy or practice of automatic testing after every accident is *per se* retaliatory. It is OSHA's position that blanket post-injury drug-testing policies deter proper reporting by employees and can be a form of adverse action against employees, and that 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.

OSHA does not require that employers specifically suspect drug use before testing, but there should be a reasonable possibility that drug or alcohol use by the reporting employee was a contributing factor to the reported injury or illness, if the employer will be testing.

Employer Takeaways

- Review your drug testing policy and ensure that it indicates that the employer "may" (not "must") test post-accident.
- Notify your employees that they may report injuries without retaliation.
- When a workplace accident occurs, before testing, determine whether there is a reasonable basis to believe that impairment could have contributed to the incident.
- Review your accident reporting requirements; if they are overly burdensome, revise them.

- To avoid the appearance of retaliation, be very cautious in disciplining employees for late reporting of an accident.