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Authors:



Christopher E. Engler
(860) 251-5143
cengler@goodwin.com



Peter J. Murphy
(860) 251-5950
pjmurphy@goodwin.com



Henry J. Zaccardi
(860) 251-5737
hzaccardi@goodwin.com

New OSHA Rule Restricts Post-Accident Drug Testing— Enforcement Begins November 1, 2016

Federal law has traditionally imposed very few limitations or requirements on drug testing of employees. That changes on August 10, 2016, when a new reporting rule issued by the Occupational Safety and Health Administration (“OSHA”) becomes effective. Under OSHA’s new rule, which is available at <https://www.federalregister.gov/articles/2016/05/12/2016-10443/improve-tracking-of-workplace-injuries-and-illnesses>, employers must have a “reasonable” procedure for reporting work-related injuries and illnesses, and that procedure must not deter or discourage employees from reporting any such injury or illness. In addition, the rule prohibits any retaliation against employees who make such a report.

Although the new rule itself does not address drug testing, OSHA’s commentary to the rule [<https://www.federalregister.gov/articles/2016/05/12/2016-10443/improve-tracking-of-workplace-injuries-and-illnesses#h-22>] makes clear that OSHA believes “that blanket post-injury drug testing policies deter proper reporting” and therefore would undermine the rule’s purpose. At the same time, OSHA recognizes that drug testing can still be necessary in some situations. Therefore, “to strike the appropriate balance,” OSHA’s commentary advises employers that “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.”

Federal OSHA and its regulations only apply to the private sector. Nevertheless, this new rule serves as an important refresher for all Connecticut employers, both public and private. This is because Connecticut, unlike the federal government, has for many years had a drug testing statute which provides that no employer may conduct a reasonable suspicion urinalysis drug test (the only type of testing implicated by OSHA’s rule) “unless the employer has reasonable suspicion that the employee is under the influence of drugs or alcohol which adversely affects or could adversely affect such employee’s job performance.” Back in 1994, a federal judge ruled that an employer’s blanket post-injury drug testing policy violated Connecticut law because it did not require the individualized suspicion required by statute. Consequently, although OSHA’s new prohibition of blanket post-injury testing policies may have a large impact in some states, the impact to employers in Connecticut will be limited.

One area of concern for employers in Connecticut, however, relates to OSHA’s commentary on what type of drug testing would be appropriate in cases where there is reasonable suspicion to test. OSHA pointed out that the current tests for many substances cannot detect present impairment but only use at some point in the recent past. In a brief but strongly worded discussion, OSHA cautioned employers that requiring employees to be tested using a method that does not identify present impairment may inappropriately deter reporting and therefore be unlawful.

As a practical matter, OSHA is effectively warning employers against testing for most drugs because, in contrast to alcohol, there are no widely accepted tests for narcotics, hallucinogens,



or prescription drugs that accurately measure impairment. In light of OSHA's commentary, employers should continue to balance the results of a positive drug test against other factors such as the employee's presentation at the time of injury, prior concerns or disciplinary incidents, and statements from witnesses before taking any adverse employment action against that employee.

OSHA's commentary also provides some additional exceptions to its prohibition of blanket post-injury policies. For example, such a policy would be permissible if it is required to comply with a state or federal law or regulation, such as a state worker's compensation system or a Department of Transportation regulation.

Although the new rule becomes effective on August 10, 2016, OSHA has indicated that it will not conduct any enforcement activities until November 1, 2016. During this period of time, employers should review their drug testing policies to ensure compliance with both OSHA's rule and the Connecticut statutory prohibitions, and develop a plan for moving forward with appropriate drug testing when necessary.

Questions or Assistance:

If you have questions about the new reporting rule, please contact Christopher Engler at (860) 251-5143 or cengler@goodwin.com, Peter Murphy at (860) 251-5950 or pjmurphy@goodwin.com or Henry Zaccardi at (860) 251-5737 or hzaccardi@goodwin.com.

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289 Greenwich Avenue
Greenwich, CT 06830-6595
203-869-5600

One Constitution Plaza
Hartford, CT 06103-1919
860-251-5000

265 Church Street - Suite 1207
New Haven, CT 06510-7013
203-836-2801

400 Park Avenue - Fifth Floor
New York, NY 10022-4406
212-376-3010

300 Atlantic Street
Stamford, CT 06901-3522
203-324-8100

1875 K St., NW - Suite 600
Washington, DC 20006-1251
202-469-7750

www.shipmangoodwin.com