DO YOU POST-ACCIDENT DRUG-TEST?

THEN YOU NEED TO READ THIS NOTICE

The Occupational Safety and Health Administration ("OSHA") joined the several other divisions of the Department of Labor in publishing regulations that prohibit or severely restrict employment policies that have been in place - and legal - for years. In May 2016, OSHA published a new rule addressing retaliatory conduct and electronic reporting of occupational injuries and illnesses. Business groups challenged the new rule and sought an injunction barring enforcement while the full challenge plays out in the courts. Unlike the overtime exemption rules, the federal judge declined to enjoin enforcement and the rule will become **effective on January 1, 2017.**

RETALIATION

The most significant aspect of the new rule impacts the Occupational Safety and Health Act's ("the Act") prohibition of retaliation. The Act has long prohibited employers from discharging or discriminating against an employee who reports a work-related injury or illness. Through regulatory interpretation of the Act's injury reporting obligations, OSHA has expanded the breadth of prohibition against retaliation to staggering dimensions, including safety incentive programs[1] and alcohol and drug testing.

A. Alcohol / Drug Screening:

It must first be noted that the new rule addresses only post-accident alcohol / drug testing. New hire, reasonable suspicion and random testing are unaffected. However, the impact of the new rule on post-accident testing is substantial.

1. OSHA's new standard for post-accident testing

The new rule allows post-accident drug-testing only **IF** an employer has an "objectively reasonable basis" for doing so. When is it "objectively reasonable for an employer to require post-accident drug-testing? According to OSHA:

> drug testing policies should limit post-accident testing to situations in which: (1) employee drug use is likely to have contributed to the incident; **AND** (2) for which the drug test can accurately identify impairment caused by drug use.

[1] Safety incentive program restrictions are not discussed here. If you wish additional information regarding the impact of the new rule on safety incentive programs, fell free to call.

(emphasis and numbering added). The first element requires the employer to reach three determinations:

- Is there objectively reasonable evidence that the actions of the employee to be tested contributed to cause the accident? If an employee is injured by a dropped tool, why test the injured employee instead of the employee who dropped the tool?

- Is there objectively reasonable evidence that the employee to be tested was impaired by alcohol or drugs at the time of the accident? Has the employer applied the reasonable suspicion checklist?

- Is there objectively reasonable evidence that the alcohol or drug impairment contributed to cause the accident? Did the drink forklift driver hit the other employee or did the other employee jump in front of the drunk forklift driver?

All of these determinations require a factual investigation of fault before an employee is sent for testing. Thus, automatic testing of the injured employee is prohibited.

The second element, a test capable of "accurately identify impairment caused by drug use," virtually eliminates testing for controlled substances. OSHA's guidance states:

> OSHA will only consider whether the drug test is capable of measuring impairment at the time the injury or illness occurred where such a test is available. **Therefore, at this time, OSHA will consider this factor for tests that measure alcohol use, but not for tests that measure the use of any other drugs.**

According to OSHA, while current tests can detect the presence of a controlled substance, there is no test that can accurately measure if impairment from the use of a controlled substance existed at the time of the accident. OSHA does not explain why it chose to ignore the fact that the U.S. Department of Transportation has established cut-off concentrations for controlled substances in determining if a test is positive or negative, and requires employers to immediately remove the employee testing positive from performing safety-sensitive functions following a positive test.

2. Exemption of post-accident testing under workers' compensation laws

Significantly, OSHA guidance states that post-accident screens "conducted under a state's workers' compensation laws or federal law" are not prohibited. This guidance is not so cut and dry. No state's workers' compensation act *requires* an employer to screen the injured employee following a work-related injury. The workers' compensation laws of many states have full or partial benefit disqualifications if alcohol or drug impairment caused or contributed to cause an accident. A screen is not required, but is clearly contemplated, by such a provision. Several states have laws that provide for discounts on workers' compensation insurance premiums if an employer has a compliant drug-free workplace policy ("DFW policy"). Having a

DFW policy to obtain the discount is voluntary, but the DFW laws of many states require or expressly allow post-accident screening. Is a non-mandated screen for purposes of benefit disqualification, or to obtain a premium discount, testing "under a workers' compensation law?" We believe the answer is "yes" or the exclusion would be a fiction.[2]

The existence of state law disqualification / premium discount provisions does not end the inquiry. An employer has to determine if state law authorizes **automatic** testing of an injured employee. Under Alabama law, a compliant DFW policy requires post-accident testing of the employee who "caused or contributed to cause an on-the-job injury which resulted in lost time." Note that the statute requires testing of the employee who caused the accident, and not the injured. While in many instances the injured employee did cause or contribute to cause the accident and injury, it is not always the case. Also, multiple employees may have contributed to cause an accident. To comply with Alabama's workers' compensation law, the employer would need to test more employees than just the injured employee. Several states that allow post-accident testing have similar "cause or contribute to" provisions. See Exhibit A. Thus, to comply with a state's workers' compensation law may not *require* automatic testing of the *injured* employee.

B. Investigations:

In perhaps the most troubling aspect of the new rule, OSHA has given itself new powers. Prior to the new rule, OSHA could not investigate whether an employer retaliated against an employee unless an employee filed a complaint with OSHA within 30 days of the adverse action. The new rule authorizes OSHA to investigate and cite employers for retaliatory actions *without* an employee complaint. OSHA guidance indicates that it will search for direct policies threatening disciplinary action for reports of accidents and occupational illnesses, and circumstantial evidence in the form of disparate application of disciplinary policies among employees who have made protected reports and those who have not.

OSHA conducts unannounced visits to businesses regularly. A business can refuse immediate access but it is foolish to do so. During such visits, OSHA investigators may demand review of a variety of documents. Non-managerial employees are likely to be interviewed on the spot as well. With OSHA now able to investigate retaliation violations without a specific complaint, the possibility of fishing expeditions into employment practices increases greatly. In addition to safety-related documents, employers can expect OSHA investigators to demand personnel policies, personnel files, and documents related to any drug-testing program. We suspect the number of employees interviewed without prior notice will also greatly increase.

[2] Alabama's workers' compensation act has both benefit disqualification and premium discount provisions. For companies with operations outside of Alabama, Exhibit A is a chart showing states with benefit disqualification and/or premium reduction laws. Exhibit A is for reference only and identifies states with or without benefit disqualification . premium discount laws. It is not a thorough or exhaustive analysis of those laws. If you have operations in states other than Alabama, we recommend you seek legal advice regarding the laws of those states.

TAKE-AWAY:

As with all recent expansive rule-making out of the Department of Labor, no one knows if OSHA's new rule will survive legal challenge, or be withdrawn under the new Secretary of Labor. Regardless of future legal or political decisions, the new rule is set to take effect on January 1, 2017, and employers must comply.

Under OSHA's new rule, automatic post-accident testing of an injured employee is effectively forbidden and employers should consider discontinuing or suspending any policy that calls for automatic testing. Further, UNLESS a state workers' compensation statute or drug-free workplace act mentions post-accident testing, an employer is wise to consider discontinuing all testing based solely on the fact that a workplace accident and injury occurred. Employers are not left without protection. OSHA's new rule does not govern testing on other bases such as reasonable suspicion. If an employer has a reasonable suspicion testing policy, and if an accident falls within the policy's parameters, a post-accident alcohol or drug screen can be performed without running afoul of OSHA's new rule. An employer should be mindful, however, that not all accidents and injuries give rise to reasonable suspicion and it should not be used as a blanket reason to test all injured employees. If the employer wishes to send an injured employee for reasonable suspicion testing, the objective facts creating the suspicion should be carefully documented.

David B. Walston
Jon W. Macklem
CHRISTIAN & SMALL, LLP
505 20th Street North, Suite 1800
Birmingham, AL 35203
dbwalston@csattorneys.com
jwmacklem@csattorneys.com