



Workplace Drug Testing, Practical Considerations and Use in Litigation

Christopher Crawford

309.674.1133

ccrawford@quinnjohnston.com

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OSHA Regulations

- In 2016 OSHA published new final rules on discrimination and injury and illness reporting
- OSHA's aim was to prevent employers from discouraging or deterring workers from reporting workplace injuries and illnesses
- Reluctant to report injuries if going to be drug tested.



OSHA Regulations

- **Establishments with 250 or more employees** that are subject to OSHA's recordkeeping regulation must electronically submit to OSHA some of the information from the Log of Work-Related Injuries and Illnesses (OSHA Form 300), the Summary of Work-Related Injuries and Illnesses (OSHA Form 300A), and the Injury and Illness Incident Report (OSHA Form 301).
- **Establishments with 20-249 employees** in certain high-risk industries must electronically submit to OSHA some of the information from the Summary of Work-Related Injuries and Illnesses (OSHA Form 300A).
- **Establishments with fewer than 20 employees** at all times during the year do not have to routinely submit information electronically to OSHA.



OSHA Regulation- 29 CFR 1904

- The final rule revises OSHA's regulation on Recording and Reporting Occupational Injuries and Illnesses (29 CFR 1904). The new rule requires certain employers to electronically submit injury and illness data to OSHA that they are already required to keep under OSHA regulations. The content of these establishment-specific submissions depends on the size and industry of the employer.
- In order to ensure the completeness and accuracy of injury and illness data collected by employers and reported to OSHA, the final rule also:
 1. requires employers to inform employees of their right to report work-related injuries and illnesses free from retaliation;
 2. clarifies the existing implicit requirement that an employer's procedure for reporting work-related injuries and illnesses must be reasonable and not deter or discourage employees from reporting; and
 3. incorporates the existing statutory prohibition on retaliating against employees for reporting work-related injuries or illnesses.



OSHA Guidance

Guidance provides that post accident drug testing should be limited to those situations where drug or alcohol use likely caused or contributed to the incident and drug test can accurately show impairment.

It will be viewed as suspicious in those situations where a drug test is ordered after every accident.

There must be a reasonable possibility that drug use was a causal factor in the incident.



Takeaways from OSHA Regulations

- Make sure Written Substance Abuse Policy or the Workplace Drug & Alcohol Testing Policy defines circumstances under which the post-accident testing will be conducted.
- Replace general testing provisions with a list of specific criteria.
- All post-accident policies should be reviewed and updated to ensure that the language is not retaliatory and does not deter or discourage the reporting of illnesses or injuries.



Takeaways from OSHA Regulation

- Review Your Policy Based on the State Laws: State laws need to be adhered to when an employer drafts his/her company's policies, especially those related to enforcement of post-accident or post-injury drug testing.
- Laws for a drug-free workplace and worker's compensation will remain unchanged.
- Companies won't be accused of violating OSHA rules if post-accident testing is conducted after reasonable suspicion.



OSHA Takeaways

Supervisors need to be inducted into the revised rules announced by the OSHA. These training programs need to include aspects like building reasonable suspicion drug testing post workplace accidents.



ADA Considerations

- A test for illegal drugs is not considered a medical examination under the ADA
- ADA does not encourage, prohibit or authorize drug tests
- Still may conduct five point screening test.



ADA Considerations

- Individuals who currently engage in the illegal use of drugs are specifically excluded from the definition of a “qualified individuals with a disability” protected by the ADA when an action is taken on the basis of their drug use.



EEOC Guidelines on Drug Testing

- EEOC litigation designed to be in harmony with and enforce provisions of ADA.
- Testing for and taking action on illegal drugs is o.k.
- Testing for prescription drugs and taking action raises questions.
- Timely given growing concerns about opiate abuse and its affect in employment setting.



EEOC Litigation and Drug Testing

- The Equal Employment Opportunity Commission (EEOC) filed suit against a car dealership alleging that its drug testing policy did not contain exceptions for qualified persons with disabilities. The EEOC alleges the employer made a job offer to an applicant contingent upon a successful drug test. Applicant tested positive for use of prohibited substance. EEOC said it was a legal prescription drug.
- <https://www.eeoc.gov/eeoc/newsroom/release/8-26-16.cfm>



EEOC Litigation and Drug Testing

- On September 14, 2016, the EEOC filed suit against Happy Jack's Casino challenging the implementation of its drug testing policy. Happy Jack's withdrew its offer of employment to applicant after she failed a pre-employment drug test due to her use of lawfully prescribed hydrocodone for neck and back pain.
- Cited Happy Jack's failure to provide a medical review of the drug test results, failure to allow applicant to present evidence of her prescription drug use, and failure to allow her to present evidence of her underlying impairment. The EEOC also took issue with Happy Jack's policy that required all employees (safety-sensitive and non-safety-sensitive) to disclose all prescription and non-prescription drug use.
- <https://www.eeoc.gov/eeoc/newsroom/release/9-15-16.cfm>



EEOC Litigation and Drug Testing

- On September 28, 2016, the EEOC Hospitalists Group in the U.S. District Court for the Northern District of Georgia after the defendants fired physician for his use of narcotic pain medication to treat chronic pain. Dr. Hunt was regarded as disabled by defendants as there was no indication that the prescription medication impacted Dr. Hunt's ability to do the job or maintain his medical license. No conversation with physician prior to termination about nature of prescription drug use and its relationship to his employment.
- EEOC vs. Georgia Hospitalists Assn. N.D. Georgia



EEOC Litigation and Drug Testing

- EEOC filed suit against an employer who refused to hire a recovering drug addict using methadone, alleging violations of the Americans with Disabilities Act.
- *EEOC v. Randstad, US, LP, 1:15-cv-03354 (D. MD. Nov. 3, 2015).*
- Several examples of EEOC filing suit against employers who refuse to hire recovering drug addicts
- Must always consider whether applicant can perform essential functions of job.
- Case by case analysis is important.



EEOC, ADA and the Safety Sensitive Position

- Using designation of Safety Sensitive Position as a layer of protection against criticism of drug testing policy.
- An employer must be able to demonstrate that the employee's inability or impaired ability to perform job-related tasks could result in a direct threat to their safety and/or the safety of others.
- EEOC at one time said municipal bus drivers did not hold a "safety sensitive" position.



Safety Sensitive Position

- Designating a position as a safety sensitive position allows for more flexibility in testing for prescriptions medications that could affect and employees performance to safely perform the position.
- Illinois' consideration for safety sensitive position.



Safety Sensitive Position- ADA

- ADA and pre-offer, post-offer and employment stages
- Pre-offer- Employers cannot administer disability related inquiries and medical examinations.
- Post Offer- Employers can make disability related inquiries and conduct medical examinations regardless of whether they are related to job so long as such inquiries are made for each prospective hire in same job category.
- Employment- During employment can make disability related inquiries and medical examinations so long as they are job related and consistent with business necessity.



Safety Sensitive Position- ADA

- Sometimes job related inquiries or medical examinations are warranted considering observations about an employee's behavior or performance at work.
- Information may also be provided by credible third party.
- Inquiries about prescription drugs within this framework may be permissible.



Interpreting Drug Test Results

- Testing for alcohol and whether a person is intoxicated is well established.
- Difficulties arise with other illegal substances such as marijuana.
- How do we measure intoxication based upon positive drug test for illegal substances.



Employee Handbooks:

Why You Should Have One, Policies You Need
and Mistakes To Avoid

Paige M. Blumenshine

309.674.1133

pblumenshine@quinnjohnston.com