



Revised OSHA electronic reporting rules may affect post-injury drug testing in Oregon and Washington

By Nathan R. Goin and Sara K. Wong ■ September 22, 2016

Effective August 10, 2016 employers subject to the Occupational Health and Safety Act of 1970 (OSHA) are required to track and electronically submit recorded injury and illness data to OSHA. While at first blush the regulatory changes enacted by OSHA may appear relatively innocuous, their impact could prove to be far reaching.

Perhaps most concerning is OSHA's apparent conclusion that mandatory post-report of injury drug screenings constitute an unreasonable invasion of privacy that may unduly deter or discourage employees from reporting work related injuries.

The revised OSHA rule

- requires all OSHA-subject employers to inform employees of their right to report work-related injuries and illnesses free from retaliation;
- 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;
- incorporates the existing statutory prohibition on retaliating against employees for reporting work-related injuries or illnesses.¹

Under the revised rule, a procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness ² (Emphasis added).

While the revisions fail to explicitly prohibit post-report of injury drug testing, commentary to the rule change strongly suggests OSHA will categorize mandatory post-report of injury drug testing as unreasonable when testing is performed for injuries that would not have resulted from employee intoxication, or during a time when the worker's level of intoxication could not be measured, unless otherwise required by state or federal law.

In addition, OSHA examples referenced by the rule change include drug testing performed in relation to a worker's report of a repetitive motion injury, which is felt to be improper as unlawful drug use would not be expected to have any causal impact on the development of a non-acute condition.

OSHA will begin active enforcement of the regulatory changes January 1, 2017

Continued



**Reinisch
Wilson Weier PC**
LAW OFFICES

PORTLAND: 10260 SW Greenburg Rd., Suite 1250, Portland, OR 97223 • T 503-245-1846 / F 503-452-8066
SEATTLE: 159 South Jackson Street, Suite 300, Seattle, WA 98104 • T 206-622-7940 / F 206-622-5902
www.rwwcomplaw.com © 2016 Reinisch Wilson Weier PC. All rights reserved.



Nathan R. Goin is an attorney at Reinisch Wilson Weier PC. He may be reached at 503.452.7257 or NathanG@rwwcomplaw.com.



Sara K. Wong is an attorney at Reinisch Wilson Weier PC. She may be reached at 503.452.7282 or SaraW@rwwcomplaw.com.

Revised OSHA electronic reporting rules (continued)

The same approach is taken regarding injuries resulting from equipment malfunctions or other circumstances beyond the worker's control, such as would be the case for a bee sting. Under the revised approach, post-report of injury drug tests would only appear to be appropriate when the worker's intoxication likely contributed to the injurious incident. Even then, any testing performed should accurately identify impairment caused by the worker's use of an illegal substance at the time of injury rather than their general use of the prohibited substance at some point in the near past.

While some states may require the worker to submit to a mandatory drug test upon their application for workers compensation benefits, neither Oregon nor Washington impose any such requirements.

In limited situations when a Washington worker is prescribed narcotic pain medication due to an industrial incident, Washington State workers' compensation laws sometimes require post-prescription drug testing for monitoring purposes.³ However, this situation appears to be outside the scope of the revised rule. Oregon and Washington's respective workers' compensation acts would thus appear to offer little relief from OSHA's newly adopted reporting criteria.

OSHA will begin active enforcement of the regulatory changes January 1, 2017. Penalties for a violation of the revised OSHA reporting standard could be severe. Maximum penalties are now set at \$12,471.00 per violation.⁴ Willful or repeat violations likewise carry a maximum penalty of \$124,709.00. OSHA will likely place subject employers who persist in mandating across-the-board drug tests under increased scrutiny. Employers are thus well advised to further discuss this matter with labor counsel.

Navigating the quagmire of intersecting regulatory processes is never an easy task. If you have any questions regarding the impact of Oregon or Washington's workers' compensation laws on existing drug testing policies, the attorneys of Reinisch Wilson Weier PC are here to help. ■

¹ Improve Tracking of Workplace Injuries and Illnesses. 81 Fed. Reg. 29623, 29624 (May 12, 2016) (amending 29 CFR § 1904).

² 29 CFR § 1904. 35(b)(1)(i)

³ WAC 296-20-03040

⁴ Department of Labor Federal Civil Penalties Inflation Adjustment Act Catch-Up Adjustments, 81 Fed. Reg. 43429, 43439 (July 1, 2016) (amending 29 CFR § 1902, 1903).

Online and printed firm materials are for educational purposes only. Please consult your attorney for legal advice on a specific claim, case or issue.