

OSHA States that Most Instances of Workplace Drug Testing are Permissible

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In a memorandum dated October 11, 2018, OSHA clarified its position on drug testing under 29 C.F.R. § 1904.35(b)(1)(iv). Under the previous guidance from OSHA, employers were limited to post-accident drug testing to situations where there was a “reasonable probability” that drugs or alcohol consumption contributed to the work-related injury. In the October 2018 memorandum, employers have no such restriction:

The purpose of this memorandum is to clarify the Department’s position that 29 C.F.R. § 1904.35(b)(1)(iv) does not prohibit . . . post-incident drug testing. The Department believes that many employers who implement safety incentive programs and/or conduct post-incident drug testing do so to promote workplace safety and health. In addition, evidence that the employer consistently enforces legitimate work rules (whether or not an injury or illness is reported) would demonstrate that the employer is serious about creating a culture of safety, not just the appearance of reducing rates. Action taken under a . . . post-incident drug testing policy would only violate 29 C.F.R. § 1904.35(b)(1)(iv) if the employer took the action to penalize an employee for reporting a work-related injury or illness rather than for the legitimate purpose of promoting workplace safety and health.

The memorandum provided a non-exhaustive list of circumstances where drug testing would not violate the standard:

- Random drug testing
- Drug testing unrelated to the reporting of a work-related injury or illness
- Drug testing under a state workers’ compensation law
- Drug testing under other federal law, such as a U.S. Department of Transportation rule
- Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees. If the employer chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries.

To prevent potential issues that could arise due to conflict between OSHA’s position in the October 2018 memorandum and its earlier position regarding drug testing policy, OSHA stated the October 2018 memorandum supersedes any OSHA interpretive documents that could be construed as inconsistent with the October 2018 memorandum.

In sum, the October 2018 memorandum indicates that drug testing will be viewed favorably by OSHA in most circumstances. Post-accident drug testing is permitted if employers test all employees whose conduct could have contributed to the incident. Employers may want to consider rewriting their drug policy to reflect this new guidance from OSHA.