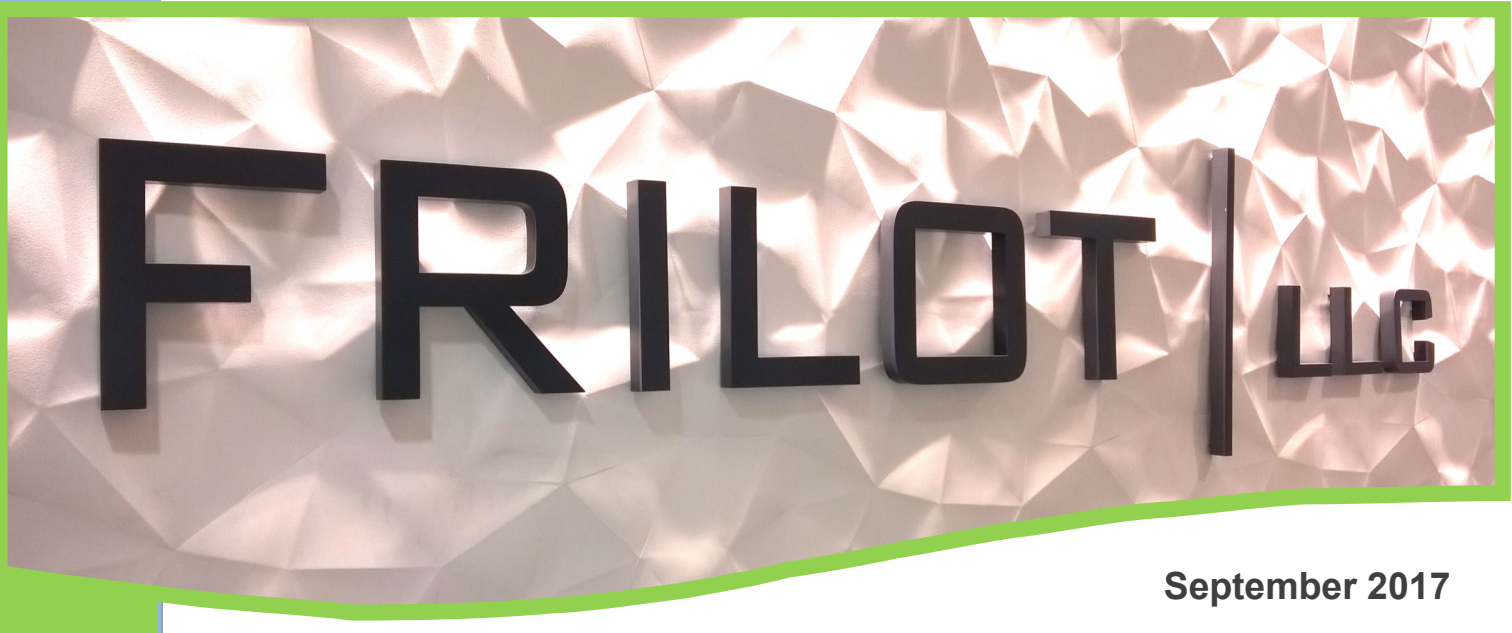

September 2017

Clarifying OSHA Regulations Impacting Post-Accident Drug Testing

What the Rule Says

OSHA released its final rule amending 29 C.F.R. 1904.35 on May 12, 2016. In addition to incorporating the existing statutory prohibition on retaliating against employees for reporting work-related injuries or illnesses, the rule clarifies that an employer's procedure for reporting work-related injuries and illnesses must be reasonable and not deter or discourage employees from reporting. Although the rule itself does not address alcohol and drug testing, the preamble notes that, in some circumstances, post-accident drug testing may be retaliatory under the rule.

When the Rule Became Effective

The anti-retaliation provisions became effective August 10, 2016, but OSHA delayed enforcement until December 1, 2016.

How the Rule Impacts Post-Accident Drug and Alcohol Testing

While the rule does not actually mention mandatory post-accident drug and alcohol testing, OSHA's interpretations indicate it has a significant impact on post-accident drug testing. According to OSHA's website:

> Employers may conduct post-incident drug testing pursuant to a state or federal law, including Workers' Compensation Drug Free Workplace policies, because section 1904.35 (b)(1)(iv) does not apply to drug testing under state workers' compensation law or other state or federal law. Random drug testing and pre-employment drug testing are also not subject to section 1904.35(b)(1)-(iv).
>
> *Employers may conduct post-incident drug testing if there is a reasonable possibility that employee drug use could have contributed to the reported injury or illness*. However, if employee drug use could not have contributed to the injury or illness, post-incident drug testing would likely only discourage reporting without contributing to the employer's understanding of why the injury occurred. Drug testing under these conditions could constitute prohibited retaliation.

What the Rule Means for Drug and Alcohol Testing Policies

OSHA will likely take the position that employers' drug testing policies and practices must comply with its interpretation of the rule. Therefore, any such policy should state post-accident drug testing will be conducted only in the following situations (remember, pre-employment, reasonable suspicion, and random testing are not impacted by the new rule):

- Where there is a "reasonable possibility that employee drug use could have contributed to the reported injury or illness."

  -OR-
- Where the drug testing is conducted pursuant to state workers' compensation law or other state or federal law.

Something Important to Note About Drug Testing Versus Alcohol Testing

When evaluating whether an employer has satisfied the "reasonable possibility" standard, OSHA says it will consider "whether the result of a drug test could provide insight into why the injury or illness occurred." For substances other than alcohol, currently available tests are generally unable to establish a relationship between impairment and drug use (because drug tests show drugs were consumed at some point during a period of time but do not narrow down the time of consumption to the time of the test/ accident). Therefore, "OSHA will consider whether the drug test is capable of measuring impairment at the time the injury or illness occurred where such a test is available."

These statements seem to suggest post-accident drug tests (as opposed to alcohol tests) are never permissible. However, in an example OSHA provides on its website, a post-accident drug test of an employee who drove a forklift into a piece of stationary equipment was permissible. OSHA's position leaves some ambiguity. Courts are not necessarily tied to OSHA's interpretation of its rule. Courts have held that an agency's interpretations of regulations stated in policy statements, agency manuals, and enforcement guidelines (including websites) do not warrant *Chevron* deference, meaning instead, such interpretations "are entitled to respect, but only to the extent that they have the power to persuade" (otherwise known as *Skidmore* deference). *Christensen v. Harris Co*., 529 U.S. 576, 587, 120 S.Ct. 1655, 1662-1663, 146 L.Ed.2d 621 (2000). However, if an agency has interpreted its own regulation on a specific question as to which the regulation is ambiguous, a court will defer to that interpretation unless it is "plainly erroneous or inconsistent with the regulation." *See Id. (citing Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997)).

Examples of Post-Accident Drug Testing That Complies/Does Not Comply With New Regulation

OSHA's website offers the following examples of situations in which post-accident drug testing would/would not violate the new rule:

Scenario 1: Employee X was injured when he inadvertently drove a forklift into a piece of stationary equipment, and he reported the injury to Employer. Employer required Employee X to take a drug test.

> **Question:** Did Employer violate section 1904.35(b)(1)(iv) for drug testing Employee X?
>
> **Answer:** No. Because Employee X's conduct—the manner in which he operated the forklift—contributed to his injury, and because drug use can affect conduct, it was objectively reasonable to require Employee X to take a drug test after Employer learned of his injury. Drug testing an employee who engaged in conduct that caused an injury is objectively reasonable because conduct can be affected by drug use.
>
> [NOTE: This example seems to conflict with OSHA's comment that drug testing is only permissible if it can measure impairment at the time of the injury, and for substances other than alcohol, currently available tests are generally unable to establish a relationship between impairment and drug use – See Discussion Above]

Scenario 2: Employer drug tests all employees who report work-related injuries to the employer to get a five percent reduction in its workers' compensation premiums under the state's voluntary Drug-Free Workplace program. Employer drug tests Employee X when she reports a work-related injury that could not reasonably have been caused by drug use, such as a bee sting or carpal tunnel syndrome.

> **Question:** Did Employer violate section 1904.35(b)(1)(iv) by drug testing Employee X?
>
> **Answer:** No. Drug testing conducted pursuant to a state workers' compensation law, whether voluntary or mandatory, is not affected by section 1904.35(b)(1)(iv).
>
> [NOTE: Louisiana law does not provide discount employer workers' compensation premiums for employers who report work-related injuries under a Drug-Free Workplace program]

Scenario 3: Employer requires all employees who report lost-time injuries to take a drug test because the employer's private insurance carrier provides discounted rates to employers that implement such a drug-testing policy. The relevant rate discount provisions in the private policy are identical to those in the applicable state workers' compensation law. Employer drug tests Employee X when she reports a lost-time injury that could not reasonably have been caused by drug use, such as a bee sting or carpal tunnel syndrome.

> **Question:** Would OSHA cite Employer for violating section 1904.35(b)(1)(iv) in these circumstances by drug testing Employee X to secure lower private insurance premiums?
>
> **Answer:** No. To maintain consistency between public and private worker's compensation coverage in the same state, OSHA will not cite employers under section 1904.35(b)(1)(iv) who conduct post-accident drug testing under private party policies that mirror the applicable state workers' compensation law.

Scenario 4: Employer requires all employees who report lost-time injuries to take a drug test regardless of whether drug use could have contributed to the injury because the drug testing requirement is included in the collective bargaining agreement at the workplace. Employer drug tests Employee X (who is covered by the collective bargaining agreement) when she reports a lost-time injury that could not reasonably have been caused by drug use, such as a bee sting or carpal tunnel syndrome. The employer had no reasonable basis for suspecting that drug use could have contributed to her injury and had no other reasonable basis for requiring the test.

> **Question:** Did Employer violate section 1904.35(b)(1)(iv) by drug testing Employee X pursuant to a collective bargaining agreement?
>
> **Answer:** Yes. Section 1904.35(b)(1)(iv) prohibits an employer from taking adverse action against employees simply because they report work-related injuries absent a reasonable belief that drug use could have contributed to the injury or another reasonable basis for requiring a drug test. Although OSHA does not intend for section 1904.35(b)(1)(iv) to supersede other state or federal programs addressing post-injury drug testing of employees, collective bargaining agreements may not supersede section 1904.35(b)(1)(iv).

Benjamin Castoriano
1100 Poydras Street
Suite 3700
New Orleans, LA 70163
Phone: (504) 599-8225
Email: bcastoriano@frilot.com

FRILOT | LLC
ATTORNEYS AT LAW