CAPLAW FAQ

A series of common legal questions and answers for the CAA network

Workplace Safety: Drug Testing Policies Under OSHA

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Community action agencies (CAAs) often have mandatory drug testing policies that require employees to automatically submit to drug testing if they are involved in a workplace accident or suffer a workplace injury. In a revised rule that took effect on December 1, 2016, however, the federal Occupational Safety and Health Administration (OSHA) indicated that such policies may directly conflict with OSHA recordkeeping rules. This FAQ is intended to help CAAs subject to OSHA requirements understand the revised rule and provide options for compliance with it. The information in this FAQ cites to and is based on the revised rule (29 C.F.R. § 1904.35(b)(1)(i) and (iv)); the preamble (92 Fed. Reg. 29624-29694) to the revised rule; guidance from the OSHA website titled Injury Tracking and Use of Disciplinary, Incentive or Drug Testing Programs; and on an OSHA Memorandum (October 19, 2016) setting forth OSHA's interpretation of the revised rule.

1 Does the revised OSHA rule specifically prohibit drug testing?

No. The revisions do not directly address drug testing, but require employers to "establish a reasonable procedure for employees to report work-related injuries and illnesses promptly and accurately" and state that "[a] procedure is not reasonable if it would deter or discourage a reasonable employee from

accurately reporting a workplace injury or illness…"[1] OSHA's interpretation of this rule is that "blanket post-injury drug-testing policies" deter employees from promptly and accurately reporting injuries.[2] To support its concerns, OSHA cited studies indicating that many workplace injuries and illnesses happen as a result of issues unrelated to drug use, but automatic post-accident drug testing has led to a substantial reduction in the number of injury claims. OSHA reasoned that employees may be hesitant to report workplace injuries if they know they will be subject to drug testing, particularly if the tests do not specifically identify impairment at the time of the accident, but only identify recent drug use.[3]

2 Under what circumstances may a CAA conduct post-accident drug testing?

A CAA may conduct drug testing if it has a reasonable basis for concluding that drug or alcohol use was likely to have contributed to an incident, and if the drug test can determine whether the impairment existed at the time of the accident or injury (if such a test is available).[4] While OSHA does not define what it considers a "reasonable" basis to conduct testing, it gives a number of examples of when it would **not** be reasonable to drug-test an employee, such as when an employee reports a bee sting, a repetitive strain injury, or an injury caused by a lack of machine guarding or a machine or tool malfunction.[5] In these examples, OSHA explains that since drug use could not reasonably have contributed to the particular injury, the employer has no reasonable basis for requiring a drug test.

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Factors OSHA will consider to determine reasonableness, include: (1) whether other employees involved in the incident that caused the injury or illness were also tested or whether the employer only tested the employee who reported the injury or illness; and (2) whether the employer has a heightened interest in determining if drug use could have contributed to the injury or illness due to the hazardousness of the work being performed when the injury or illness occurred.[6] For example, if the cause of an accident is unknown and only the injured employee is tested when multiple employees were potentially involved, such disproportionate testing could likely violate the revised rule.[7]

OSHA has published a number of drug testing scenarios and explains how the new rule applies in each at: https://www.osha.gov/recordkeeping/modernization_guidance.html (under "Drug Testing Programs" scenario).

3 Is a CAA required to use a specific type of drug test?

OSHA has indicated that post-accident drug testing should be limited to situations where the drug test can accurately identify impairment caused by drug use.[8] This initially prompted concerns that employers would not be allowed to conduct any drug test unless the test method was sensitive enough to distinguish between impairment at the time of the accident and recent drug use. However, OSHA itself has acknowledged that it would be difficult for employers to have access to this type of sophisticated test. It subsequently issued guidance stating that it will only consider whether the drug test is capable of measuring impairment at the time of the injury **if** such a test is available.[9] Currently, OSHA will only consider this factor for tests that measure alcohol use, but not for tests that measure the use of other drugs.[10]

4 What if a CAA's state workers' compensation insurance program allows or requires drug testing after every accident?

A CAA may continue to conduct automatic post-accident drug testing to comply with state law, including state workers' compensation law, as the new rule does not prohibit drug testing of employees pursuant to a federal or state law.[11] Thus, if the CAA's state workers' compensation insurance program allows or mandates post-accident drug testing, the CAA may continue to require automatic drug testing. For example, Louisiana has a state statute which says that "the employer has the right to administer drug and alcohol testing or demand that the employee submit himself to drug and alcohol testing immediately after the alleged job accident." La. Stat. Ann. § 23:1081(7)(a).

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Similarly, certain recipients of U.S. Department of Transportation (USDOT) funding may be required to conduct drug and alcohol testing. Under these circumstances, CAAs may continue to automatically drug test employees after each workplace accident to comply with USDOT rules, without having to establish a reasonable basis for doing so. CAAs should check their funding source rules for any other drug testing requirements, as well as any state laws requiring or permitting automatic drug testing.

5 What if a state workers' compensation insurance plan offers employers a discount on premiums if they have a policy that requires drug testing after every accident?

A CAA may continue to conduct automatic post-accident drug testing, even if participating in the state's drug-free workplace program is voluntary.[12] Some states have workers' compensation laws that allow insurance plans to offer benefits (e.g., a reduction of workers' compensation premiums) if the employer implements a drug-free workplace program that meets certain criteria. In some cases, the insurer may require the program to provide for automatic drug-testing following a workplace accident. For example, Virginia has a state statute which says that "every insurer providing coverage pursuant to [the Virginia workers' compensation law] shall provide a premium discount of up to five percent to every employer instituting and maintaining a drug-free workplace program satisfying such criteria as each insurer may establish." Va. Code Ann. § 65.2-813.2.

6 Does OSHA's revised rule apply to other situations where a CAA might require drug testing?

The revised rule specifically addresses post-accident drug testing. It does not apply to pre-employment, random, return-to-duty, or follow-up testing.[13] The revised rule also does not affect compliance with the Drug-Free Workplace Act of 1988 which applies to all federal grants. It is important to note that the Drug-Free Workplace Act does not require or authorize drug testing. For more information about the Act, see the U.S. Department of Labor's Drug-Free Workplace Advisor.

7 Does the revised rule prevent the CAA from disciplining employees who violate safety rules?

No. Employers may continue to discipline employees who violate reasonable reporting procedures or legitimate safety rules, such as a rule prohibiting employees from being under the influence of alcohol or illegal drugs while in the workplace. Rather, the revised rule prohibits employers from retaliating against employees for reporting work-related injuries or illnesses.[14] OSHA will look primarily at whether the employer treated other employees who violated the same rule in the same way, regardless of whether the employee makes an accident or injury report.[15]

> ...the revised rule prohibits employers from retaliating against employees for reporting work-related injuries or illnesses.

OSHA will also evaluate whether the employer had a legitimate business interest for the discipline, or whether the rule was used as a pretext for disciplining an employee who submits an injury report.[16] A **pretexual disciplinary action** is especially likely to occur when an employer disciplines an employee for violating a vague rule (such as "work carefully" or "maintain situational awareness") because such rules fail to require or prohibit specific conduct. When an employer enforces a vague rule against an employee who reports a work-related injury or illness, the employer's real reason for the discipline is often the reported injury, not the actual rule violation. Moreover, using a vague work rule to discipline employees who report injuries or illnesses, but ignoring similar conduct by employees who do not report, would violate the rule.[17]

OSHA has published a number of disciplinary scenarios and explains how the new rule applies in each at: https://www.osha.gov/recordkeeping/modernization_guidance.html (under "Disciplinary Programs").

8 Does the revised rule affect other workplace safety practices that CAAs may use?

Yes. Two other notable practices discussed in the OSHA guidance that are affected by the revised rule are reporting timeframes and incentive programs.

Generally, a rigid, prompt reporting requirement (requiring employees to report an injury "immediately") will violate the revised rule because it fails to account for injuries that build up over time. However, OSHA recognizes that employers have a legitimate business interest in learning about employee injuries close in time to when they occur or when an employee becomes aware of them. Employers may therefore require employees to report work-related injuries or illnesses "as soon as practicable" after they realize they have a work-related injury serious enough to report.

As to incentive programs, OSHA views withholding a benefit (such as a cash prize or other substantial award) for reporting a work-related injury as taking adverse action against an employee.[18] For example, awarding a monthly prize to all employees who have no reportable injuries that month, or conducting a drawing for a $500 gift card at the end of each month in which no employee misses work because of an injury are activities that will likely violate OSHA rules.[19] However, awarding incentives or bonuses based on compliance with legitimate safety rules or participation in safety-related activities is permitted. For example, a drawing for a $500 gift card at the end of each month in which employees universally complied with a legitimate safety rule (such as using required hard hats) would likely be permissible. Similarly, offering rewards to employees who complete safety trainings or who identify unsafe working conditions would also be allowable.[20] OSHA has published a number of incentive program scenarios and explains how the new rule applies in each at: https://www.osha.gov/recordkeeping/modernization_guidance.html (under "Incentive Programs").

9 What actions can a CAA take to manage compliance with the revised rule?

General Reporting Procedures

Review general reporting procedures for elements that might deter or discourage employees from making prompt reports. Factors to consider include:[21]

- Whether the procedures account for work-related injuries and illnesses that build up over time, have latency periods (i.e., time between exposure and appearance of symptoms), or do not initially appear serious enough to the employee to require reporting to the employer. A procedure that requires immediate reporting without accounting for these circumstances would not be reasonable.
- Whether the procedure makes reporting so difficult or complicated that a reasonable employee would be discouraged from reporting an injury or illness. For example, if an employee must travel a significant distance to report or must report the same injury or illness multiple times to multiple levels of management, the procedure would not be reasonable.

Drug Testing Programs

Review post-accident drug testing policies to ensure that they comply with the revised OSHA rule and consider the following:

- Updating the CAA's drug-testing policy so that testing occurs only when there is a reasonable basis to conclude that drug or alcohol use likely contributed to an accident or injury.
- Checking state laws and grant awards to determine if they permit and/or require automatic drug testing, or offer incentives to employers to implement a drug-free workplace program that requires automatic drug testing. OSHA will not find a violation of the new rule when employers conduct post-accident testing in compliance with these laws.
- Training supervisors and managers on establishing "reasonable suspicion" to conduct post-accident drug testing. Some factors that may help guide this determination include: observations by a supervisor; reports or complaints from coworkers; the employee's demeanor or appearance; documented performance decline or attendance or behavioral changes; erratic behavior by the employee (such as involvement in an accident resulting in significant property damage); involvement in a work-related accident that could have reasonably resulted from employee impairment due to drug or alcohol use. Include instruction on documenting findings and avoiding selective or discriminatory decisions to drug-test employees.

Disciplinary Programs

Review reporting procedures to ensure that the CAA does not use disciplinary action, or the threat of disciplinary action, to retaliate against an employee for reporting an injury or illness. Since pretextual disciplinary actions are most likely to occur when a CAA disciplines an employee for violating a vague work rule, check that work rules proscribe or regulate defined conduct.

Incentive Programs

Ensure incentive programs encourage safe work practices and promote employee participation in safety-related activities and do **not** penalize employees (or deny them a benefit as part of an incentive program) for reporting work-related injuries or illnesses.

End Notes

[1] 29 C.F.R. § 1904.35(b)(1)(i)

[2] 92 Fed. Reg. 29624, 29672-73 (May 12, 2016); U.S. Dept. of Labor, Occupational Safety and Health Administration (OSHA) Memorandum re: Interpretation of 1904.35(b)(1)(i) and (iv) (Oct. 19, 2016).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] OSHA Memorandum re: Interpretation of 1904.35(b)(1)(i) and (iv) (Oct. 19, 2016).

[7] *Id.*

[8] 92 Fed. Reg. 29624, 29673 (May 12, 2016).

[9] OSHA Memorandum re: Interpretation of 1904.35(b)(1)(i) and (iv) (Oct. 19, 2016).

[10] *Id.*

[11] 92 Fed. Reg. 29624, 29673 (May 12, 2016) (responding to some commenters' concerns that the final rule would conflict with drug testing requirements contained in workers' compensation laws, OSHA notes, "This concern is unwarranted. If an employer conducts drug testing to comply with the requirements of a state or federal law or regulation, the employer's motive would not be retaliatory and the final rule would not prohibit such testing. This is doubly true because Section 4(b)(4) of the Act prohibits OSHA from superseding or affecting workers' compensation laws. 29 U.S.C. § 653(b)(4).")

[12] U.S. Dept. of Labor, Occupational Safety and Health Administration Guidance, "Injury Tracking and Use of Disciplinary, Incentive or Drug Testing Programs."

[13] *Id.*

[14] 29 C.F.R. § 1904.35(b)(1)(iv).

[15] 92 Fed. Reg. 29624, 29672 (May 12, 2016).

[16] OSHA Memorandum re: Interpretation of 1904.35(b)(1)(i) and (iv) (Oct. 19, 2016).

[17] OSHA Guidance, "Injury Tracking and Use of Disciplinary, Incentive or Drug Testing Programs."

[18] See 29 C.F.R. § 1904.35(b)(1)(iv); OSHA Memorandum re: Interpretation of 1904.35(b)(1)(i) and (iv) (Oct. 19, 2016).

[19] *Id.*

[20] *Id.*

[21] *Id.*

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