



DELAWARE

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REPORTING REQUIREMENTS

New OSHA rule threatens Delaware employers' drug- testing programs

by William Bowser

Many employers have drug-testing programs. Indeed, some drug testing is required by law. For example, the U.S. Department of Transportation (DOT) requires that CDL drivers be subject to testing in a variety of situations. Other testing is done by employers in support of a "drug-free" workplace. During the last year or so, however, legislation and regulations have begun to place limits on drug testing. A new reporting rule from the Occupational Safety and Health Administration (OSHA) that took effect on August 10 is the latest development in that trend.

Workplace (un)safety

OSHA's new rule provides that employers must have a "reasonable" procedure for reporting work injuries and that the procedure must not dissuade an employee from reporting an injury. What does the rule have to do with drug testing? In its commentary to the new rule, OSHA makes clear its belief that "blanket post-injury drug[-]testing policies deter proper reporting."

OSHA recognizes that drug testing can support a safe workplace. However, the agency states that postincident testing should be limited "to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use."

The rule, which applies only to private-sector employers, may have a real impact on drug-testing programs. There are no standards for measuring impairment caused by narcotics, hallucinogens, or prescription drugs. We generally assume that the presence of an illegal substance is "impairment," but that may not be the case.

The rule clearly affects tests for marijuana use because commonly used urine tests for marijuana cannot identify impairment. The active ingredient in marijuana is delta-9-tetrahydrocannabinol, better known as THC. THC is quickly converted or metabolized into other compounds, including delta-9-tetrahydrocannabinol-9-carboxylic acid, or THC-COOH. A marijuana urine test looks for THC-COOH, but the compound does not cause impairment.

Double trouble for Delaware

The validity of urine tests for marijuana is already suspect in Delaware. Under the Delaware Medical Marijuana Act (DMMA), a medical marijuana cardholder cannot be disciplined for having marijuana in her system unless impairment is demonstrated and the urine test can help show impairment. Delaware still has not issued regulations defining what "impairment" means for purposes of workplace safety.

Bottom line

Employers should review their drug-testing policies to ensure compliance with OSHA's new rule and the DMMA. Regarding the DMMA, we generally recommend including disclaimer language that indicates your drug-testing policy will be enforced in a manner that is wholly consistent with Delaware law. However, that is likely not enough to satisfy OSHA. Under OSHA's new regulation, blanket

postaccident drug testing is now suspect. Instead, employers are well-advised to define a more limited scope of testing that provides for a reasonable, articulable suspicion of drug use *in addition to involvement in an accident* before testing takes place. As for what constitutes impairment, that is anyone's guess, and we may have to await additional regulations or litigation before we have solid guidance on that front.

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