



# OSHA Reporting Rules Discourage Use of Mandatory Post-Accident Drug Testing

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On May 12, 2016, OSHA published the final version of new reporting rules intended to “Improve Tracking of Workplace Injuries and Illnesses.” See [81 Fed. Reg. 29623 – 29694](#) (to be codified as 29 C.F.R. Parts 1902 and 1904). Among other changes, the rules clarify “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.” As discussed in further detail below, company drug testing policies may violate OSHA’s interpretation of this rule if they are not properly drafted. Therefore, employers should consider reviewing their drug testing policy prior to the time the final reporting rules become effective on August 10, 2016.

In the final rule, OSHA cites to studies which suggest that “blanket” post-accident drug-testing policies (i.e. policies that require drug testing after every reported workplace accident or injury regardless of the circumstances) tend to discourage the reporting of workplace accidents/injuries and are viewed by employees as an invasion of privacy. To strike the appropriate balance between the duty to maintain a safe workplace, satisfy regulatory reporting requirements and respect employee privacy, OSHA advises that company “drug testing policies should limit post-incident testing 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.”

This rule will not apply to government entities and it yields to an employer’s obligation to comply with other state or federal laws and regulations which may require post-accident drug testing (e.g. Department of Transportation regulations and state workers compensation laws).

## Key Takeaways:

- OSHA believes that, unless otherwise required by law, private employers should **not** maintain blanket drug testing policies that require drug testing after every reported workplace injury or accident. For example, it would likely not be reasonable to drug test an employee who reports a bee sting, a repetitive strain injury, or an injury caused by a lack of machine guarding or tool malfunction.
- OSHA advises that post-accident and/or post-injury drug testing should be limited to situations where the facts indicate that drug use likely contributed to the incident.
- If drug tests accurately detecting actual impairment are available, they should be used over tests that only indicate past drug use.

In addition to modifying blanket post-accident testing policies, employers may also wish to consider different approaches. For example, where permitted, employers may want to require testing following employee safety infractions that could have been caused by drug use, whether or not an injury occurred. Another alternative, particularly where drug use is suspected, would be to increase the frequency and scope of random drug testing where permitted.

This post was drafted by [Brian Peterson](#), an associate in the Spencer Fane LLP Kansas City, MO office. For more information, visit [spencerfane.com](#).

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