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EMPLOYMENT BULLETIN

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New OSHA Injury Reporting Rule Will Preclude Automatic Post-Incident Drug Screens

Many employers have implemented policies mandating employees involved in an accident at the workplace to undergo drug and alcohol screening. Effective August 10, 2016 such blanket, automatic policies will likely run afoul of the injury reporting requirements of the Occupational Safety and Health Act (Act).

On May 12, 2016, the Occupational Safety and Health Administration (OSHA) issued its Final Rule amending employers' obligations to report and record injuries, and clarifying its interpretation of the injury reporting requirements of the Act. 29 CFR §1904.35(b)(1)(i) requires the employer to establish a "reasonable procedure for employees to report work-related injuries and illnesses …." OSHA "clarified" this requirement by adding the following: "A procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness …"

In the comments accompanying the Final Rule, OSHA noted that many commenters to the proposed rule complained that employer policies requiring automatic post-injury drug and alcohol testing were a form of adverse action that discouraged reporting. The comments state that:

> Although drug testing of employees may be a reasonable workplace policy in some situations, it is often perceived as an invasion of privacy, so if an injury or illness is very unlikely to have been caused by employee drug use, or if the method of drug testing does not identify impairment but only use at some time in the recent past, requiring the employee to be drug tested may inappropriately deter reporting.

OSHA concluded that "the evidence in the rulemaking record shows that blanket post-injury drug testing policies deter proper reporting." OSHA did not ban all post-incident reporting, but the comments set forth the agency's view that it should be severely limited:

> [T]his final rule does not ban drug testing of employees. However, the final rule does prohibit employers from using drug testing (or the threat of drug testing) as a form of adverse action against employees who report injuries or illnesses. To strike the appropriate balance here, **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.** 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 a machine or tool malfunction. Such a policy is likely only to deter reporting without contributing to the employer's understanding of why the injury occurred, or in any other way contributing to workplace safety. **Employers need not specifically suspect drug use before testing, but there should be a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness in order for an employer to require drug**

testing. In addition, drug testing that is designed in a way that may be perceived as punitive or embarrassing to the employee is likely to deter injury reporting.

Post-incident drug testing may still be done to comply with the requirements of other state and federal laws, e.g., Department of Transportation requirements for post-accident testing of commercially licensed truck drivers.

As a consequence of this regulatory change, employers should modify their post-incident drug testing policies to conform to the newly restrictive interpretation announced by OSHA.

Babst Calland's Employment and Labor Group will continue to keep employers apprised of further developments related to this and other employment and labor topics. If you have any questions or need assistance in addressing the above-mentioned area of concern, please contact John A. McCreary, Jr. at (412) 394-6695 or jmccreary@babstcalland.com.