

# American Wire Producers Association Operations Managers Meeting

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Indianapolis, IN

# OSHA's Injury Reporting and Retaliatory Drug Testing Rule

Made Even More Confusing with New Medical/Recreational Marijuana  
State Laws



# OSHA's Post-Accident Drug Testing

- In the past, if there was an accident, tested everyone for drugs
- Then OSHA issued new rule (May 2016) to Injury Reporting and Tracking Rule
  - Post-Accident Drug testing not actually prohibited in rule
  - Preamble though muddies the waters
  - “Blanket drug testing” now illegal
  - Can test if drug use “likely caused” the accident
  - Effective December 2016

# Preamble Language

“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.”



# Compliance with Federal Laws

- Federally mandated drug testing programs – Transportation Regs
  - Covers 8 million private sector workers in transportation work
  - Prohibits drug abuse and alcohol misuse
  - Requires drug & alcohol testing
  - Cannot use ANY marijuana
- Drug Free Workplace
  - Random and for-cause drug testing still permitted
  - Must be fairly and consistently applied



# Marijuana Laws Making Things Muddier

- Still illegal at federal level
- Half the states and DC legalized marijuana for medical or recreational use
  - All their laws are different
    - Some states even now prohibit post-accident drug testing
  - State legislators seeking to protect medical marijuana users from adverse employment action
  - Employees pursuing disability and discrimination claims
  - And the courts start getting involved



# The Courts

- Courts in six states said federal law set precedent
  - CA, CO, MI, MT, OR, and WA
- MA rules the other way
  - Medical marijuana users are disabled
  - Protected class
  - Waives federal preemption argument
  - Americans with Disabilities Act (ADA) kicks in

# Massachusetts Decision

“Where, in the opinion of the employee’s physician, medical marijuana is the most effective medication for the employee’s debilitating medical condition, and where any alternative medication whose use would be permitted by the employer’s drug policy would be less effective, an exception to an employer’s drug policy to permit its use is a reasonable accommodation.”





# States with Statutory Protections for Workers Using Medical Marijuana

- Arkansas
- Arizona
- Connecticut
- Delaware
- Illinois
- Maine
- Minnesota
- Nevada
- New York
- Pennsylvania
- West Virginia (2019)



# What's Next?

- Pending lawsuits in Texas and Oklahoma
- Trump Administration reconsidering parts of Reporting Rule
  - Notice of Proposed Rulemaking issued in July
  - Unfortunately failed to adequately address the drug testing confusion

# NAM Comments

- NAM submitted comments to NPRM on Drug Testing
  - By putting language in preamble, public deprived of opportunity to comment
  - Automatic post-accident drug testing policies are clear cut
  - OSHA language recommended use of amorphous standard, but no useable framework
  - Provided no evidence that post-accident drug testing discouraged reporting
  - Final rule should simply rescind the language
  - OSHA should issue a separate new rule on drug testing
    - Industry and stakeholders could comment



# What's Next?

- Final rule will have to answer questions
  - What happens state law is in conflict with federal law
  - Is state law preempted by federal law in these states
  - How can I comply with both state and federal law
- Revised Rule needs to state once and for all
  - How do you know drugs caused the accident if you don't test for drugs
  - What makes a credible "suspicion standard"
- If not, two lawsuits will kick back into high gear



# In the Meantime...

- Stay on top of changes in state laws
- Stay flexible
- Prioritize safety
- Remove “blanket testing” from post-accident testing policy documents
- Schedule regular post-accident “reasonable suspicion” training for managers and supervisors
- Train workers on your policy

# Speaking of Policy...

- Does your policy require observed urine collections?
- Does your policy offer alternative test methods for individuals suffering from “shy bladder” conditions?
- Does your policy prohibit the use of “Controlled substances” – even those prescribed lawfully?
- Have you acknowledged the fact that some medical marijuana use may need to be accommodated in your policy?
  - If your policy says anyone found using marijuana will be fired, that needs to be updated



# The Latest Info

- OSHA issued memo on Oct. 11 clarifying some drug testing policies
- Stressed
  - Policy does not prohibit post-incident drug testing
  - Post-incident testing would violate OSHA policy only if employer took the action to penalize employee for reporting an injury or illness
- Clarified drug testing is permissible in these circumstances
  - Random drug testing
  - Drug testing unrelated to reporting of work-related illness or injury
  - Drug testing under a state workers' compensation law
  - Drug testing under other federally mandated laws (i.e., Dept. of Transportation)
  - Drug testing to evaluate the root cause of a workplace incidence, in certain circumstances



# OSHA NPRM – Other Reporting Issues

- NPRM published in September – Other Issues
- Electronic filing of Forms 300 and 301
  - End requirement that employers electronically submit these forms
  - Will not enforce the July 1, 2018 deadline
- Public disclosure
  - OSHA is proposing to rescind requirement that info in Form 300A be publicly disclosed
  - Could be used to indirectly identify individuals
  - Public will draw faulty conclusions about companies



CLEAR AS MUD....

