



AGC Efforts Help Move OSHA to Modify Controversial Drug Testing Position

Learn More on AGC WebED Oct. 31 from 2-3:00 p.m. ET

Following an AGC [meeting](#) with the head of the U.S. Occupational Safety and Health Administration (OSHA) and an AGC-backed [letter](#) from dozens of members of Congress, OSHA on October 19 published [new guidance](#) to clarify its injury and illness recordkeeping and reporting rule, which recalibrates the agency's position relating to post-incident drug testing in the context of employer discouragement of or retaliation for employee injury and illness reporting. [Register today](#) for AGC's complimentary webinar—(\$49 for non-members)—discussing this topic and the recordkeeping and reporting rule as a whole on Oct. 31.

Generally speaking, the new guidance is more likely than the agency's previous position to not overly restrict many construction companies' existing policies regarding employee post-incident drug testing. However, the agency notes that drug testing employees whose injury could not possibly have arisen from any particular incident, like muscular skeletal disorders (e.g., tendonitis), would likely violate the rule. Additionally, the agency [further clarifies](#) that OSHA will not issue citations under the rule for post-incident drug testing conducted in accordance with state workers' compensation laws—whether drug testing under the law is mandatory or voluntary.

To provide background, OSHA first published its intent to provide greater scrutiny of mandatory, post-incident drug testing programs buried within hundreds of pages of its response to comments to the injury and illness recordkeeping and reporting rule on May 12. There, the agency noted that employer "drug testing policies should limit post-incident drug testing to situations in which employee drug use is [likely to have contributed](#) to the incident." OSHA went on to state that "[e]mployers 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 for an employer to require drug testing." This approach deeply concerned AGC, as OSHA seemingly set two different, difficult to distinguish, and problematic to prove ("likely to have contributed" and "reasonable possibility") standards concerning when employers could execute post-incident drug tests in accordance with this rule.

In its new guidance, OSHA recalibrates those previous statements. Now, when an employer conducts post-incident drug testing in the confines of illness and injury reporting, OSHA will evaluate:

- Whether the employer had a [reasonable basis](#) for concluding that drug use could have contributed to the injury or illness;
- Whether other employees involved in the incident that caused the injury or illness were also tested; and
- 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.

Again, the agency also provides a bright line exception that drug testing for injuries that could not possibly have been caused by drug use—specifically noting "a receptive strain injury"—would likely violate the rule.

Lastly, OSHA provides [further clarity](#) to the extent to which [its rule does not apply when employers conduct drug tests in accordance with state workers' compensation laws](#). The agency notes in several examples that where an employer drug tests employees to receive a reduction in its workers compensation premiums under, for example, the state's voluntary Drug-Free Workplace program, that drug testing does not violate the OSHA injury and illness recordkeeping and reporting rule. The anti-retaliation provisions, which covers the drug testing issues within the rule,

go into effect on **December 1, 2016**. To register for AGC's webinar on this topic, [click here](#).

For more information on this rule and why AGC worked to modify it, listen to our podcast [here](#).

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