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### **OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA) - REASONABLE SUSPICION TESTING**

August 10, 2016 OSHA began enforcing its new regulation requiring employers (of all sizes):

- (1) to have a “reasonable procedure” for employees to report work-related injuries and illnesses, and
- (2) not to discriminate or retaliate against employees who report such injuries or illnesses.

If OSHA finds that an employers drug testing policy deters the reporting of injuries and illnesses by employees, it may issue steep penalties for each violation. At present, available penalties up to \$7,000 per violation may be imposed or, for willful violations, up to \$70,000. **However, those penalties will increase substantially in August 2016, when they are expected to increase to as much as \$12,471 and \$124,712, respectively.**<sup>1</sup>

Pursuant to the new rule, employers with post-incident or accident drug testing policies will be put to the task of justifying each decision to test based on the facts of each workplace incident or accident. To avoid conflict with OSHA, employers may no longer rely on blanket policies requiring tests following a report of an injury.

A blanket policy for post incident or accident testing may be hard to justify, since most employers test to non -Department of Transportation (DOT) standards which does measure impairment,

### **RECOMMENDED EMPLOYER IMMEDIATE ACTION**

Policies should be tightened to tie referrals for post-accident testing to situations where it appears an employee caused or contributed to the accident, or abandoning post-accident testing in favor of reasonable suspicion testing. Employers maintaining a blanket policy should be prepared to defend that decision through reference to workers’ compensation programs, safety considerations and other means which will establish the program does not deter reporting of injuries and does not constitute retaliation for reporting a specific injury.

Consider increasing your random testing so that you can prevent accidents before they happen.

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<sup>1</sup> Source Littler Employment updates <https://www.littler.com/publication-press/publication/osha%E2%80%99s-new-electronic-accident-reporting-rule-seeks-dramatically>