OSHA Regulations

“Impact on Post Accident/Incident Drug Testing?”
Tomo Drug Testing

- Tomo Drug Testing is driven by a passion for customer service and outstanding client relationships. We call this creating RAVING FANS.

- At Tomo, drug testing is not an add-on service, afterthought or necessary evil. It’s ALL WE DO. As a result, our clients won’t experience frustrations from poor turnaround time, disappointment in the professionalism, qualifications or availability of collection providers, or concerns regarding the logistics and compliance of testing processes.

- We are not always the right provider for all companies. But when a business or entity values industry expertise and customized testing solutions delivered by a friendly and professional staff, they are pleased to know they can enjoy a RAVING FAN experience at Tomo Drug Testing.

- Their services include:
  - Department of Transportation
  - Drug Free Workplace Programs
  - Random Student Drug Testing
  - Judicial/Court-Ordered Testing
  - Compliance and program administration
  - Mobile and onsite testing availability
  - 24/7 nationwide post-accident network
  - Supervisor Reasonable Suspicion Training
Tomo’s Team

Tomo Drug Testing

Mickey Moore
President/CEO

Alex Haldiman
Senior Vice President

Megann Barker
VP, Operations

Liz Marler
Marketing Assistant

Shana Hamilton
Sales and Account Manager

Sara Armstrong
Business Growth Assistant

John Throckmorton
Senior Training and Account Manager
Current Consulting Group’s Mission

CCG partners with our clients to increase their access to quality information, expand their knowledge of products & services, and improve their performance allowing them to optimize their profitability and their clients’ return on investment.
The CCG Team

- Bill Current: President & Founding Partner
- Nina French: Managing Partner
- Jessica Polk: Communication Director
- Andrew Current: Compliance Director
- Randy Godard: Business Consultant
- Yvette Farnsworth: Legal Analyst
- Dennis Kerns: Senior Consultant
- Joe Plaia: Sales & Marketing
- Sharon Bottcher: Compliance Manager
- Nina French: Managing Partner
- Jessica Polk: Communication Director
- Andrew Current: Compliance Director
- Yvette Farnsworth: Legal Analyst
• Managing Partner of the Current Consulting Group with over 24 years of experience in employee screening.

• Specializes in product and business development, occupational health and wellness operations, and drug testing marketing and sales.

• Consults on all aspects of drug testing and employee screening operations including SAP and compliance monitoring.

• Consulting emphasis is on helping employee screening providers streamline operations, launch products, increase revenue, and retain existing clients.
Agenda

- Key Points
- OSHA Rational
- Impact on Policy
- Impairment
- Exemptions
- What to Expect
- Action Items
Key Points in New OSHA Regulations

✓ August 10\textsuperscript{th} 2016 OSHA will begin enforcement – Now delayed to November 1, 2016

✓ Requires a “reasonable procedure” for employees to report work related injuries and illnesses

✓ Not to discriminate or retaliate against the employee who reports such injury or illness
OSHA Rationale

“Employees should not be discouraged or punished in any way for exercising their right under the Act to report a work-related injury or illness. Any adverse action that is taken because an employee exercises this right to report is viewed by OSHA as a violation of 11(c) of the OSH Act, and as of August 10, of §1904.35(b)(1)(iv) as well.”
Employee Complaints May Trigger Enforcement

- Employee complaints brought under §11(c) of the Act must be raised by the aggrieved employee within 30 days of the adverse action.
- Under §1904.35(b)(1)(iv), OSHA could issue citations within six months of the adverse action.
- The employer would not only be issued a citation with proposed penalties, but also could be ordered to make the employee whole, including reinstatement with full back pay for an employee terminated as a result of a *positive drug test*. 

*Positive drug test*.
Employer Motivations

For the first time, OSHA will be determining what motivated the employer to issue discipline:

- Enforcement of a safety rule
- Following an injury reporting system
- Compliance with a DFWP
- Retaliatory
Injured Employee May Become Protected Class

• The injured employees by OSHA regulations now become a member of the “protected class.”

• The question then becomes were they treated differently than employees who were not injured.

• Through this regulation, employees will now have a new way to litigate OSHA retaliation cases.

• OSHA may issue a citation requiring the employer to purge the employee’s personnel file, reinstate the employee, and pay back-pay; and

• Employee may elect to complain to OSHA about a retaliatory action

• (post-accident drug testing & discharge for positive result).
OSHA’s View of Unreasonable Procedures

• Under the new regulation, §1904.35(b)(1)(i), a procedure is not reasonable:
  • “if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness.”

• Unreasonable if, for example, an injured or ill employee were required to report the injury or condition within only one hour of its occurrence or were required to report the injury or condition to so many different managers that it would be a deterrent to reporting.
OSHA’s Examples of Unreasonable

- Drug testing of the following may be considered unreasonable:
  - Repetitive motion injuries
  - Cumulative trauma musculoskeletal conditions such as tendinitis or back strain
  - Bee sting
In announcing this interpretation of the new regulation, OSHA explained that the Agency was not attempting to ban all post-accident drug testing, but would instead allow such testing if an employer conducts the testing to comply with the requirements of a state or federal law or regulation.

OSHA also stated that post-accident drug would be permitted if there was a “reasonable possibility” that drug use was a contributing factor in the injury or illness.

Agency has not yet provided any useful formal guidance on how it will evaluate employers’ post-accident drug testing policies.
Exemptions to the OSHA Rule

• DOT covered employees with modal accident definitions requiring drug testing.
• Drug free workplace policies with no blanket accident/incident wording.
• States workers’ compensation laws incentive laws including Worker’s Compensation Premium discount laws, WC Denial laws and Unemployment Denial laws.
• Insurance company incentives for post accident/incident testing procedures.
For the drug testing procedure not to be viewed as discriminatory or retaliatory, the drug testing methodology should accurately identify that the employee was impaired at the time of incident or accident as opposed to simply having evidence of a drug in the employee’s system.
The Issue of Impairment

Preamble statement is an issue because there are presently no drug test methods that determine current drug impairment, even though current alcohol impairment can be determined.
What To Expect

- It is believed that the Agency will be providing formal guidance on its interpretation of §1904.35(b)(1)(iv) in either upcoming Frequently Asked Questions, a Compliance Directive, or an enforcement memo to the Regional Administrators that will be published before the August 10 enforcement deadline - DELAYED November 1, 2016

- A number of employers and employer groups — including the National Association of Manufacturers and Associated Builders and Contractors, Inc. filed suit last week in a federal court in Texas seeking to block parts of the new OSHA rule set to take effect in August.
  - The lawsuit contends that the parts of the rule dealing with discrimination and retaliation — and, most notably, the part limiting post-accident drug testing — exceeds the Agency’s authority, interferes with state workers’ compensation laws, and is arbitrary and capricious.
Action Items

✓ Review post accident/incident definitions - post-accident policies should be reviewed and updated to ensure the language cannot be construed as “blanket” and therefore be presumed to be retaliatory and instead to deter or discourage reporting.

✓ Tomo has partnered with CCG to provide their clients with customized DOT and non-DOT policy services that are compliant in all 50 states and with OSHA requirements

✓ Pricing varies by policy type and state

✓ Draft in 7-10 days, final based on policy size and complexity
Actions Items

✓ Review accident reporting procedures – streamline and make easy for employees to follow. Consider a post-accident checklist as part of the accident investigation.

✓ Make drug testing a component of the overall accident investigation and ALWAYS conduct a post-accident investigation prior to testing.

✓ Drug test when impairment by drug or alcohol could be a contributing factor.

✓ Use some form of decision tree for performing post accident/incident drug testing and document.
Action Items

✓ Create parameters for post accident/incident test such as the 8 – 32 rule used in DOT required post accident testing.

✓ Contact Tomo to perform reasonable suspicion training for all supervisors involved with post accident investigations.

✓ Document reasonable suspicion findings – erratic or unusual behavior that could be contributed to drug or alcohol use.
Action Items

✓ Review your state laws – we know state laws can be a part of an employer policy and that the enforcement of post-accident or post-injury. Many states have laws that apply to employers in that state.

✓ Adherence to state Drug Free Workplace and state worker’s compensation laws will not change and OSHA will not find a violation of 1904.35 (b)(1)(iv) when post-accident testing is performed in compliance with these laws.

✓ Missouri has no mandatory drug testing laws but:
  ✓ Voluntary Workers Compensation Denial Law – Missouri Rev Stat 287.120(6)

✓ Resources like Current Compliance – StateDrugTestingLaws.com
  ✓ Relaunching in Fall, 2016 for single state membership
Action Items

✓ Consider implementing a random drug testing program as an additional deterrent to existing employees. Many states allow random drug testing and the OSHA regulations do not apply. The cost of randomly drug testing a small percent of current employees can easily be offset by the burdensome costs of drug use on the job.

✓ Tomo can administer your random drug testing program including selection, notification, testing and onsite collection services.

✓ Use a last chance agreement after a post-accident test so that if an employee is dismissed, he or she cannot claim retaliation for the accident.
Consider Laboratory based oral fluid drug testing. Laboratory based oral fluid drug testing provides an affordable, legally defensible solution for aligning post-accident drug testing policy and procedures with the new OSHA regulations.

- Laboratory based oral fluid drug testing detects drugs immediately after use unlike urine where the detection can be delayed several hours after use. Because the window of detection starts immediately and last for 24-48 hours, it can be linked to near-term use.
- Lab-based oral fluid testing is legal in all but three states (Maine, Hawaii and Vermont).
Action Items

• Keep abreast of the issues and keep your eye on the lawsuit.
  • Do not delay action but be mindful that adjustments will likely have to be made
Key Points

• Effective August 10, 2016, delayed until November 1, 2016
• Non-retaliatory
• No blanket policy statements
• Does not impact:
  • DOT employees
  • Mandatory state laws
  • Voluntary state laws
  • Drug Free Workplace
• Reasonable Suspicion Training
Questions?
Thank You

For Employer and Supervisor Training, Policy or any other testing needs contact Tomo:

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