



Post-incident drug and alcohol testing

OAR 437 Division 1

Oregon OSHA's rules on recording workplace injuries and illnesses include explicit language that requires employers to have a reasonable procedure for employees to report work-related injuries and illnesses. The rule also prohibits retaliating against employees for reporting work-related injuries or illnesses.

These retaliation prohibitions can affect how employers use drug testing policies. This fact sheet will clarify some of those issues.

Alcohol and Drug Testing

Oregon OSHA does not prohibit employers from drug testing employees who report work-related injuries or illnesses as long as they have an "objectively reasonable" basis for testing.

The rule does not apply to drug testing employees for reasons other than injury reporting. Also, Oregon OSHA will not issue citations for drug testing conducted under a state workers' compensation law or other state or federal law. Drug testing under state or federal law does not violate the rule. The rule only prohibits drug testing employees for reporting work-related injuries or illnesses without an objectively reasonable basis for doing so.

When Oregon OSHA evaluates the reasonableness of drug testing a particular employee who has reported a work-related injury or illness, we will consider certain factors, including:

- Does the employer have a reasonable basis for concluding that drug use could have contributed to the injury or illness (and therefore the result of the drug test could provide insight into why the injury or illness occurred)?
- Were other employees involved in the incident that caused the injury or illness and were they also tested or did the employer test only the employee who reported the injury or illness?
- Does the employer have 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?

Alcohol is the only substance that has a test that will indicate actual impairment. If the employer relies on a less comprehensive test that does not measure impairment, then Oregon OSHA may decide that the focus of the employer's test is not to understand what happened. Oregon OSHA will consider this factor only when evaluating an employer's approach to alcohol use in the workplace, and not when evaluating other drug-testing activities.



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The general principle is that drug testing may not be used by the employer as a form of discipline against employees who report an injury or illness. However, drug testing may be used as a tool to evaluate the root causes of workplace injuries and illnesses in appropriate circumstances. This does not prohibit employers from having a zero-tolerance drug policy, nor would it prohibit pre-hire, random, or for-cause drug tests. Some federal OSHA discussions leave the impression that drug testing is not allowed unless it measures impairment; that is not Oregon OSHA's approach (nor does Oregon OSHA believe it accurately reflects the federal position).



Workplace example: Crane accident

A crane accident injures several employees working nearby, but the crane operator is not injured. The employer does not know the causes of the accident. Yet, there is a reasonable possibility that it could have been caused by operator error or by mistakes made by other employees responsible for ensuring that the crane was in safe working condition.

Result

In this scenario, it would be reasonable to require all employees whose conduct could have contributed to the accident to take a drug test, even if they did not report an injury or illness. Testing would be appropriate in these circumstances because there is a reasonable possibility that drug test results could provide the employer insight on the root causes of the incident. If the employer tested only the injured employees, but did not test the operator and other employees whose conduct could have contributed to the incident, such disproportionate testing of reporting employees would likely be a violation.

Drug testing an employee whose injury could not possibly have been caused by drug use would likely be a violation. For example, drug testing an employee for reporting a repetitive strain injury would not be reasonable because drug use could not have contributed to the repetitive injury.

