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Client Alert Employment & Labor

OSHA's New Anti-retaliation Drug Testing Rule and New York's Legalization of Medical Marijuana May Leave Employers Dazed and Confused

The rapid shift in drug policy both federally and locally has created significant concern and confusion for many employers, employees, and job applicants about workplace drug testing in general and testing for marijuana specifically. This alert provides guidance on the implications of OSHA's new rule regarding post-accident drug testing, as well as New York's Compassionate Care Act, which legalized medical marijuana.

OSHA's New Controversial Rule on Post-Accident Drug Testing

In an effort to promote workplace safety, many employers implement post-accident drug and alcohol testing policies. However, the Occupational Safety and Health Administration (OSHA) has been making efforts to address underreporting of injuries and retaliation against employees who do report workplace injuries and illnesses. On May 11, 2016, OSHA published a final rule on electronic reporting of workplace injuries and illnesses, that has far reaching implications for employers. The new rule requires employers to establish "a reasonable procedure" for employees to report work-related injuries and illnesses promptly and accurately. A policy will not be considered to be reasonable if it would "deter or discourage" a reasonable employee from accurately reporting a workplace injury or illness. The new rule also prohibits any retaliation for reporting an injury or illness. The rule was originally scheduled to take effect on August 10, 2016 but OSHA extended the enforcement deadline to November 1 after employer groups filed a lawsuit in July seeking to block the rule. In mid-October the U.S. District Court for the

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Northern District of Texas requested another delay to allow additional time to consider a motion challenging the new controversial provisions. On November 28, 2016, the U.S. District Court for the Northern District of Texas denied a preliminary injunction filed against OSHA regarding the anti-retaliation provisions. As a result, enforcement of the new rule took effect December 1, 2016.

Specifically, the new Recordkeeping Rule makes three important changes that impact employers' obligations. The rule: (1) requires employers to "inform" employees of their right to report work-related injuries and illnesses free from retaliation; (2) clarifies the existing implicit requirement that employers' procedures for reporting work-related injuries and illnesses must be reasonable and must not deter or discourage employees from reporting; and (3) reiterates the existing prohibition to employers from retaliating against employees for reporting work-related injuries or illnesses. Under this new rule, regardless of whether any employee actually alleges that he or she was the victim of retaliation, employers may receive a regulatory citation for implementing a reporting policy that has a perceived retaliatory effect against employees for reporting workplace injuries. Such policies may include discipline for "late" injury reporting, discipline for violating a vague work rule (e.g. "work carefully" or "maintain situational awareness"), blanket post-incident drug testing, and certain types of safety incentive programs. Consequently, an employer's policy on its face can serve as the basis for a retaliation-based citation and civil penalty from OSHA.

Additionally, employer policies that request or require post-accident drug or alcohol testing may now face scrutiny by OSHA because such policies may be interpreted by the agency as discouraging injury reporting. Although the rule does not explicitly reference drug testing programs, OSHA commentary accompanying the new rule makes it clear that post-accident drug testing programs, while not prohibited, are highly suspect, and that blanket post-incident drug testing are prohibited unless required by some other law or the employer's workers' compensation insurer. According to OSHA, "[s]uch a policy is likely only to deter reporting without contributing to the employer's understanding of why the injury occurred, or in any other way contributing to workplace safety." OSHA's commentary, however, also acknowledges that narrowly tailored post-accident testing may be permitted where "drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use." If OSHA finds that an employer's policy deters the reporting of injuries and illnesses by employees, it may issue stiff penalties for each violation. At present, available penalties of over $12,000 per violation may be imposed or, for willful or repeat violations, of over $120,000. These penalties are expected to only increase because they will be adjusted based on future inflation.

New York Employers and Medical Marijuana

Many employers - especially those operating in states with new laws legalizing medical marijuana such as New York, have questioned how changes in the drug laws will affect their overall workplace drug testing policies and whether it's still possible to promote and maintain a drug-free workplace. Currently, 28 U.S. states have legalized medical marijuana, with Colorado and Washington voting to legalize recreational marijuana as well. In July 2014, Governor Andrew M. Cuomo and the New York State Legislature enacted the Compassionate Care Act to provide a comprehensive, safe and effective medical marijuana program that meets the needs of New Yorkers. On January 6, 2016, the Commissioner of Health of the State of New York certified that the medical marijuana program established by New York's Compassionate Care Act could be implemented in accordance with public health and safety interests. The very next day, the first dispensaries offering medical marijuana in New York opened. As of November 29, 2016, a total of 10,730 patients have already been certified by their doctors to legally obtain medical marijuana.

The program requires prospective patients to receive certifications from their physicians that they have a medical condition appropriate for medical marijuana, and thereafter apply for registration online with the Department of Health. The Act sets forth specific conditions under which a patient may obtain medical marijuana as a "certified patient:" (1) the patient must suffer from a "severe, debilitating or life threatening condition" that is accompanied by an associated or complicating condition." The Act specifically lists 10 qualifying conditions, such as cancer, AIDS, and Parkinson's disease, and five qualifying associated or complicating conditions, such as severe or chronic pain, severe nausea, or seizures; (2) the patient must be certified as having the required "condition" by a physician who is registered with the New York Department of Health to certify patients under the Act; and (3) a certified patient must obtain the medical marijuana from a licensed New York "medical marijuana dispensary."

Significantly for New York employers, the Compassionate Care Act establishes employment protections for medical marijuana use. The Act provides that certified patients shall not be subjected to "disciplinary action by a business" for exercising their rights to use medical marijuana. Additionally, pursuant to the non-discrimination provision of the Act, "Certified Patients" prescribed medical marijuana are deemed to have a disability under the New York State Human Rights Law (NYSHRL). As a result, employers in New York State with four or more employees are prohibited from firing or refusing to hire an individual, and from discriminating against an individual in compensation or in the terms and conditions of employment, based on the individual's status as a patient who is certified under state law to use medical marijuana. Further, businesses in New York with four or more employees must provide reasonable

accommodations to employees or prospective employees who are certified to use medical marijuana. Given the protections afforded to "certified patients," the Act has significant implications for New York employers, particularly with regard to potential discrimination claims, drug testing and workplace drug policies.

Notably, however, the nondiscrimination provision of the Act sets forth two exceptions: (1) it "shall not bar enforcement of a policy prohibiting an employee from performing his or her employment duties while impaired by a controlled substance;" and (2) it "shall not require any person or entity to do any act that would put the person or entity in violation of federal law or cause it to lose a federal contract or funding." Therefore, under these carve outs, New York employers will still be able to maintain a safe workplace by restricting employees from **performing their duties while *under the influence* of marijuana**. New York law does not require an employer to accommodate a medical marijuana user by allowing the user to carry marijuana onto work property or to use it on work premises. Accordingly, employers may still adopt and maintain reasonable policies or procedures – including drug testing – to ensure that an individual is not working while under the influence of a controlled substance (including marijuana) or engaging in the illegal use of drugs.

Takeaway for Employers:

Due to the growing complexities in drug laws and policies impacting the workplace, employers are encouraged to have employment counsel review their drug testing and substance abuse policies to ensure compliance with OSHA's new post-accident testing rule and New York's Compassionate Care Act. Substance abuse prevention policies should notify employees that the use of controlled substances (including medical marijuana) is prohibited during work hours and that disciplinary action will be taken against anyone who violates that policy. Employers should immediately contact counsel if an employee comes to work under the influence of drugs, or if employee performance declines and drug use is suspected to be at issue. It is also critical to educate managers and supervisors regarding their responsibilities and obligations under these rules and laws.

The following attorneys in our Employment and Labor Law Practice Group can assist employers regarding the issues raised in this alert or other employment and labor issues.

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