



## OSHA RE-CONFIRMS THEIR SUPPORT FOR POST-ACCIDENT DRUG TESTING

ON OCTOBER 11, 2018, IN THE MIDST OF CONFUSION AND OUTRAGE FROM BUSINESS GROUPS, OSHA CLARIFIED ITS POSITION IN **SUPPORT OF SUBSTANCE ABUSE TESTING PROGRAMS.**

In 2017, employers initially feared they would lose their ability to continue their substance abuse testing as a part of an impactful safety program. This was based in part on OSHA's comments warning employers that Post-Accident Drug Testing could be seen as retaliatory and would be prosecuted under *29 CFR 1904.35*.

However, that position has been walked back and clarified in a recent press release where OSHA states " ... most instances of workplace drug testing are permissible under *§ 1904.35(b)(1)(iv)*."



### Per OSHA's 10/18/18 Memo, examples of permissible drug testing include:

- Random drug testing
- Drug testing unrelated to the reporting of a work-related injury or illness
- Drug testing under a state workers' compensation law
- Drug testing under other federal law, such as a U.S. Department of Transportation rule
- Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees. If the employer chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries.

### Critical Take-aways for Employers who wish to continue Post-Accident Drug Testing:

1. Post-Accident Drug Testing of injured employees is allowed as directed by state workers' compensation law and allowed if State WC laws offer credits for Drug Free Work Place. Contact your IMA Claims Advocate for a summary of your rights in the state in which you operate and [read a legal opinion here](#).
2. If your company has a contract with the government that requires Post-Accident Drug Testing or you have DOT drivers, as an employer in these situations you have every right to conduct Post- Accident Drug Testing.
3. Post-Accident Drug Testing should only proceed when an employer has a reasonable basis to believe that the incident or injury was likely to have been caused by the employee's impairment; and *the drug test used will determine whether the employee was impaired at the time of the incident or injury*. – Fisher & Phillips, LLP - [Access "Reasonable Suspicion" training via IMA's account with Aurora Pictures here](#).
4. Blanket Post-Accident Drug Testing is not advisable, especially in low risk jobs or in response to repetitive motion injuries for which it would be difficult to show causality and may be deemed "retaliatory" or "unreasonable search". [Read IRMI's opinion here](#).

[Read the full press release »](#) Contact your IMA Risk Control Representative for additional guidance.