



DAILY NEWS

Acosta Waivers On Employee Drug Tests As OSHA Looks To Limit Rule

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Faced with labor shortages that are preventing many jobs from being filled, Labor Secretary Alexander Acosta signaled a “step back” in the Trump administration’s strict zero tolerance approach on drug use in the workplace, opening the door to a possible softening in OSHA’s plans to roll back an Obama-era rule that precludes company policies, such as drug testing, if they deter injury reporting.

[During an April 17 congressional hearing](#) exploring the so-called jobs gap, Acosta said that while “sometimes there are very valid health and safety reasons why an individual who cannot pass a drug test shouldn’t hold a certain job” that at times employers “make the assumptions because there’s a negative result on the test, they would not be a good employee or they would pose a risk.”

He added that while “companies certainly have the right to say you can’t work in that job, at the same time, whether it’s in this or other areas, job creators are not well informed about individual skills.”

Acosta’s comments contrast with current efforts at OSHA to roll back anti-retaliation provisions included in the Obama OSHA’s May 2016 final rule updating the agency’s worker injury and illness reporting rule.

The Obama OSHA indicated that the agency did not view current drug testing methods as an effective way of determining whether drugs were related to a workplace accident, and included provisions in the 2016 update to prevent employers from using drug testing as a way to retaliate against employees for raising safety and health concerns.

But employers have long opposed the Obama OSHA’s final rule, arguing in federal lawsuits in Texas and Oklahoma, and directly to the Trump administration that the rule would curtail employer programs that improve safety. Subsequently, the Trump OSHA [announced last year that](#) it plans to remove or revise parts of the rule and observers [expect those anti-retaliation provisions to be stripped](#).

Opponents of the rule have argued that confusing language in the anti-retaliation provisions deter employers from using tools like drug testing, to encourage a drug-free workplace.

“Employers also have complained that this post-accident testing standard first appeared in the preamble to an electronic recordkeeping rule, and that there is no formal OSHA regulation addressing drug testing that employers were permitted to comment on prior to the rule taking effect,” argued Kathryn J. Russo, an attorney that manages the Drug Testing and Substance Abuse Management Practice Group at the Jackson Lewis law firm [during a February congressional hearing](#) addressing the opioid crisis.

Russo explained that guidance issued by OSHA made employers believe that they had to have “individualized reasonable suspicion” to conduct post-accident drug tests or stopped testing at all out of fear of receiving a citation.

“Random drug testing is a particularly useful tool for employers because it is unannounced and unexpected. Post-accident testing also is a very useful tool for employers to help rule out whether an employee had drugs or alcohol in his system at the time of the accident,” Russo added.

Lack of Reliable Tests

But during the hearing Acosta suggested taking a “step back” and ask whether “we are aligning our drug policies and our drug testing policies with what’s right for the workforce.”

The conversation of employee drug testing has amplified as opioid overdose rates in the United States have hit record highs.

President Donald Trump declared the epidemic a public health emergency last year.

In addition, Loren Sweatt, deputy assistant secretary for OSHA, vowed to “work with public and private stakeholders to help eradicate the opioid crisis as a deadly and growing workplace issue,” after a Bureau of Labor Statistics report found a 32 percent annual increase in workplace fatalities from overdoses in 2016.

Acosta’s comments during the hearing were prompted by questions from Rep. Earl Blumenauer (D-OR), who argued that a growing opioid epidemic limited large parts of the population’s ability to compete for jobs because they can’t pass a drug test and that marijuana legalization in some states, including his, further complicates the issue.

“In some cases there are problems using substances that are actually legal in the states dealing with marijuana that show up in trace amounts that are disqualifying, even if it doesn’t speak to actually being impaired,” Blumenauer said.

Currently [30 states and the District of Columbia](#) have laws legalizing marijuana use in some form, however these laws do not restrict employers from prohibiting the use of intoxicating substances during work hours or on a worksite.

But laws regarding employer testing for the drug can differ by state. [Language proposed to amend the marijuana laws](#) in California would go as far to prevent employers from refusing to hire or discharge employees solely on the basis of their use recreationally or as a patient.

[But in Pennsylvania](#), employers are allowed to prohibit medical marijuana patients who are employees from performing any task that the employer deems “life-threatening, to either the employee or any of the employees of the employer, while under the influence of medical marijuana” or “could result in a public health or safety risk.”

However, the issue is further compounded by lack of a reliable drug test for measuring marijuana intoxication. Unlike alcohol, THC, the main chemical that produces the drug's psychoactive effects, dissolves in fat, meaning that the amount of time the drug remains in the body can differ from person to person, regardless of when or how much was consumed.

[A July 2017 report](#) from the National Highway Traffic Safety Administration concluded that "the consistent finding is that the level of THC in the blood and the degree of impairment do not appear to be closely related," as usually measured in traditional testing, like for alcohol.

"Peak THC level can occur when low impairment is measured, and high impairment can be measured when THC level is low. Thus, in contrast to the situation with alcohol, someone can show little or no impairment at a THC level at which someone else may show a greater degree of impairment."

The Obama OSHA noted this issue in a guidance accompanying the record-keeping rule.

"For substances other than alcohol, currently available tests are generally unable to establish a relationship between impairment and drug use. . . When evaluating the reasonableness of drug testing a particular employee, OSHA will consider whether the drug test is capable of measuring impairment at the time the injury or illness occurred where such a test is available," [OSHA's guidance on the recordkeeping update rule says](#).

"Therefore, at this time, OSHA may consider this factor for tests that measure alcohol use, but not for tests that measure the use of any other drugs."

On that issue, Acosta agreed to work with Blumenauer to "be more artful and specific" in evaluating methods to judge impairment. -- *Rebecca Rainey* (rrainey@iwpnews.com)

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