

Congress of the United States
Washington, DC 20515

October 17, 2016

The Honorable David Michaels
Assistant Secretary of Occupational Safety and Health
U.S. Department of Labor
200 Constitution Avenue
Washington, D.C. 20210

Dear Assistant Secretary Michaels:

On May 12, 2016, the Occupational Safety and Health Administration (OSHA) published the “Improve Tracking of Workplace Injuries and Illnesses” final rule.¹ We understand OSHA’s position on post-accident drug testing has created confusion within the safety community.

The preamble to the final regulation expresses OSHA’s opposition to mandatory post-accident drug testing. However, the text of the final rule is silent about the permissibility of post-accident drug testing. Instead, OSHA relies on nebulous and open-ended terms such as “reasonable policy” and “reasonable employee” to convey the agency’s view that many currently used employer safety policies would be unacceptable.

In addition to creating problems with current, permissible, drug testing policies, the procedure for developing the final regulation was fundamentally flawed. The actual final regulatory text was never made available for comment. Accordingly, employers were never informed how their drug testing policies might not be acceptable and commenters had no opportunity to provide meaningful input to OSHA regarding the existing contractual requirements related to drug testing.

Labor unions and employers across the country routinely include provisions for post-accident drug testing in their collective bargaining agreements to promote safe working environments. Impaired workers endanger not only themselves but also fellow employees and, in certain circumstances, the public. Employers have expressed concern that OSHA’s position will require companies to abandon post-accident drug and alcohol testing programs, potentially creating the appearance that drug and alcohol usage among the workforce is acceptable.

It appears OSHA would require the employer to conduct a case-by-case assessment to determine if post-accident drug or alcohol testing is warranted. Eliminating uniform, mandatory testing, while requiring the employer to determine after the fact whether post-accident drug testing is warranted, could expose employers to charges of discrimination or favoritism, while jeopardizing workplace safety.

¹ 81 Fed. Reg. 29624 (May 12, 2016).

OSHA suggests drug and alcohol testing is an invasion of employee privacy.² Further, OSHA remains concerned about any action an employee may perceive as deterring the reporting of a work-related injury or illness.³ OSHA's concern undermines, through the improper use of drugs and alcohol, the goal of avoiding injuries and illnesses, especially in high hazard industries.

At an October 2015 hearing before the Subcommittee on Workforce Protections, you testified that the Federal Register notice from which this new interpretation clearly stems had not undergone Office of Management and Budget review.⁴ This admission highlights only one of the procedural flaws of this regulation. As noted, the August 2014 proposal did not provide regulatory text, but instead listed a series of questions for commenters to respond to without any context. OSHA has provided no robust data or documentation to justify the elimination of post-accident drug testing.

We share the goal of ensuring a safe and healthy workplace for every American. Unfortunately, we disagree with OSHA's position in this instance. We urge you to reconsider the unsupported and procedurally unjustified position OSHA has taken and revoke the language related to post-accident drug testing.

Sincerely,



David P. Roe, M.D.
Member of Congress



John Kline
Member of Congress

² Id. at 29672-29673 ("Although drug testing of employees may be a reasonable workplace policy in some situations, it is often perceived as an invasion of privacy, so if an injury or illness is very unlikely to have been caused by employee drug use, or if the method of drug testing does not identify impairment but only use at some time in the recent past, requiring the employee to be drug tested may inappropriately deter reporting.").

³ Id. at 29673 ("OSHA believes the evidence in the rulemaking record shows that blanket post-injury drug testing policies deter proper reporting.").

⁴ Protecting America's Workers: An Enforcement Update from the Occupational Safety and Health Administration: Hearing Before the House Subcomm. on Workforce Protections, Comm. on Educ. and the Workforce, 114th Cong. (Oct. 7, 2015) (hearing testimony):

Chairman WALBERG. Did the August 2014 Injury and Illness Regulatory Proposal undergo OMB review?

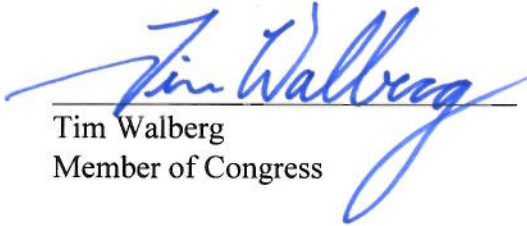
Mr. MICHAELS. It will.

Chairman WALBERG. It has not yet?...

Mr. MICHAELS. Yeah. That one will undergo OMB review.

Chairman WALBERG. But it has not yet?

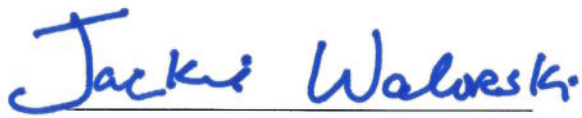
Mr. MICHAELS. It has just been sent to OMB. We expect it will undergo it in the near future.


Tim Walberg
Member of Congress

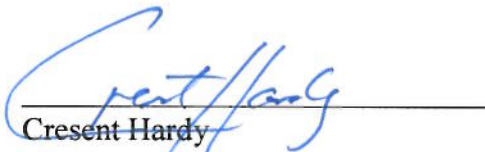

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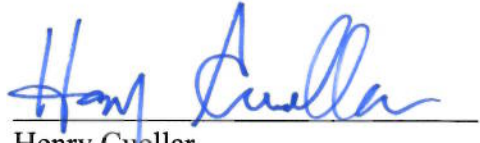

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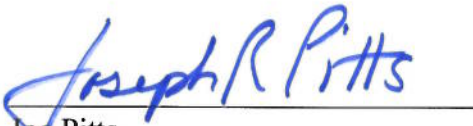

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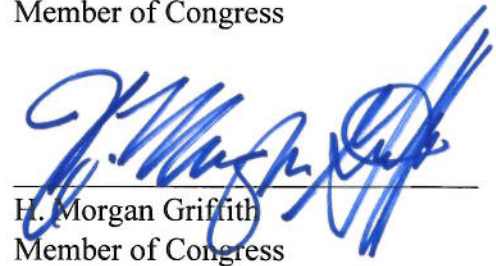

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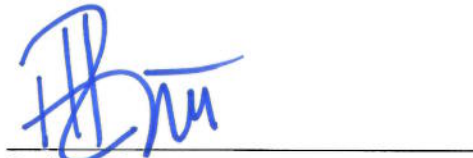

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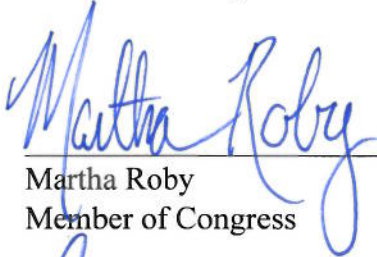
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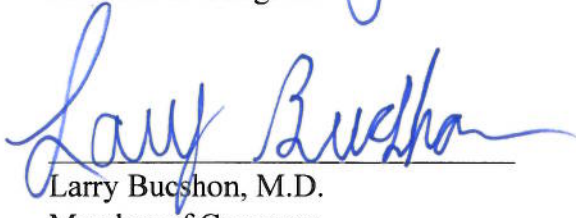
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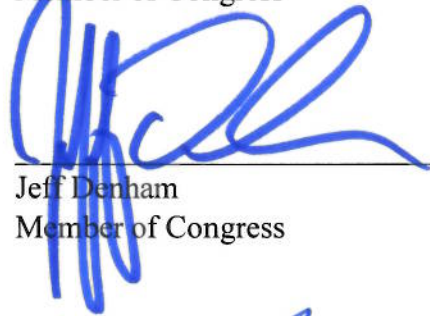
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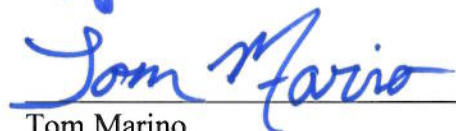
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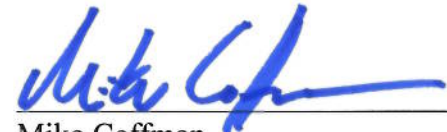
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