Chapter Seven

SUBSTANCE ABUSE IN THE WORKPLACE

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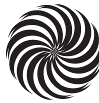

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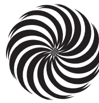

Chapter Seven

SUBSTANCE ABUSE IN THE WORKPLACE

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Chapter Editor

I. STATISTICS

Recently released reports by Substance Abuse and Mental Health Services Administration (SAMHSA), show that even though most employers have some type of program or policy addressing substance abuse disorders, many of the 10.8 million employees with these problems may not be receiving help. *See* Reports highlight the importance of workplace programs for addressing substance use disorders, SAMSHA News Release (Aug. 28, 2014), http://www.samhsa.gov/newsroom/advisories/1408273228.aspx. This article analyzes SAMSHA's report, Workplace Policies and Programs Concerning Alcohol and Drug Use, which is available at: http://samhsa.gov/data/2K14/NSDUH169/sr169-workplace-policies-2014.htm, and 10.8 Million Full-Time Workers Have a Substance Use Disorder, which is available at: http://samhsa.gov/data/spotlight/spot132-adult-workers-2014.pdf. The article notes that 9.5 percent of the nation's full-time workforce currently uses illicit substances. The report indicates that 81.4 percent of full-time workers aged 18-64 reported working for an employer with a written policy about alcohol and drug use. It also found that 59.5 percent of these full-time workers had access to employee assistance programs at work and that 44.7 percent had received educational materials about substance use from their employer. In order to engage individuals with risky or unhealthy substance use, SAMHSA promotes the use of screening, brief intervention, and referral to treatment (SBIRT) in a wide variety of clinical settings. Employee Assistance Programs, occupational health clinicians and clinics, and primary care programs can assist individuals who engage in high-risk substance use by employing appropriate SBIRT strategies. *Id.*

Employers are well aware that illicit drug use and alcohol abuse can be costly in the workplace. Drug-free workplace programs can be powerful tools in spreading prevention messages and intervening early with those who have already begun to use drugs. For many individuals, especially those who may deny that their use of drugs is problematic, workplace-based programs can be a critical step along the road to treatment and recovery. Every workforce is different, and drug-free workplace programs should be tailored to match a company's individual needs. Good programs generally include five elements:

- A written drug-free workplace policy that explains why the policy is enacted and provides a clear description of prohibited behaviors, as well as an explanation of the consequences for violating the policy.
- Supervisor training that ensures managers understand the workplace policy and provides information on how to recognize employees who have performance problems that may be related to substance abuse. It should also explain how to refer employees to professional help.
- Employee education programs that provide information on company policy, how to comply with the policy, the consequences of violations, and general information on the dangers of substance abuse.
- Employee assistance programs that help prevent, identify, and resolve issues relating to substance abuse. These programs can include counseling and referral to professional help, which can be an alternative to dismissal.
- Drug testing that deters and detects drug use and provides concrete evidence for intervention.

II. DRUG-FREE WORKPLACE REQUIREMENTS FOR FEDERAL CONTRACTORS

To be eligible for the award of a federal contract for the procurement of property or services at a value greater than the simplified acquisition threshold ($100,000) (other than a contract for the procurement

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of commercial items) an entity must agree to provide a drug-free workplace. *See* 41 U.S.C. § 8102. This law requires contractors to publish and provide to all employees a statement notifying employees that the manufacture, distribution, possession or use, etc., of a controlled substance is prohibited in the workplace and specifying the actions that will be taken against employees for violation of this prohibition. *Id.* This statement must also notify employees that as a condition of employment on the contract, the employee must abide by the terms of the statement and notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than five days after the conviction. Additionally, the contractor must establish a drug-free awareness program to inform employees about the dangers of drug abuse, the employer's drug-free workplace policy, available drug counseling, rehabilitation, and employee assistance programs, and the penalties that may be imposed on employees for drug abuse violations. The law further requires the contractor to notify the contracting agency within 10 days after receiving notice from an employee of a conviction of a criminal drug statute (as discussed above). Additionally, within 30 days after receiving notice from an employee of the conviction of a criminal drug statute, the employer must take an appropriate sanction against the employee (up to and including termination) or require the employee to satisfactorily participate in an approved drug abuse assistance or rehabilitation program. *See* 41 U.S.C. § 8104. The contractor also must make a good faith effort to continue to maintain a drug-free workplace through implementation of these requirements.

The contractor may be subject to suspension of payment, termination of the contract, or suspension or debarment from the federal procurement process if it fails to comply with these requirements or if the number of the contractor's employees who have been convicted of violations of criminal drug statutes for violations occurring in the workplace indicates that the contractor has failed to make a good faith effort to provide a drug-free workplace. 41 U.S.C. § 8102.

Drug-free workplace requirements for federal grant recipients are located at 41 U.S.C. § 8103.

While the requirements discussed above do not apply to private employers, such employers may be subject to state drug-testing laws or programs. Additionally, some municipalities and cities regulate drug testing. Employers should check the applicable state law and any municipal ordinances or administrative regulations.

III. DEPARTMENT OF TRANSPORTATION (DOT) REGULATIONS

The Omnibus Transportation Employee Testing Act of 1991 requires drug and alcohol testing of safety-sensitive transportation employees in aviation, trucking, railroads, mass transit, pipelines, and other transportation industries. 49 C.F.R. Part 40 ("Part 40") is a DOT-wide regulation that states how to conduct testing and how to return employees to safety-sensitive positions. Individual DOT agency regulations state who is subject to testing, as well as when and in what situations testing is required for a particular transportation industry. The DOT has a tool to help companies determine whether they are covered by the DOT drug testing rules. *See* "Am I Covered?" available at: http://www.dot.gov/ost/dapc/odapc/v3_slide0001.htm.

Part 40 covers all transportation employers, safety-sensitive transportation employees, and service agents. The DOT's Office of Drug & Alcohol Policy & Compliance (ODAPC) publishes, implements, and provides interpretations of the regulations. Information on the ODAPC and the DOT's drug and alcohol testing requirements is available at http://www.dot.gov/odapc/. An employer's guide to DOT drug and alcohol testing requirements is available at http://www.dot.gov/odapc/employer_handbook.

DOT regulations require employees be tested for five categories of drugs: (A) marijuana; (B) cocaine; (C) amphetamines (including methamphetamine and methylenedioxymethamphetamine (MDMA) (commonly known as "ecstasy"); (D) opiates (including codeine, morphine, and heroin); and (E) phencyclidine (PCP). The DOL has issued a "Medical" Marijuana Notice, stating that the DOT's Drug and Alcohol Testing Regulation, 49 C.F.R. Part 40, at 40.151(e), does not authorize "medical marijuana" under a state law to be a valid medical explanation for a transportation employee's positive drug test. "DOT Office of Drug

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and Alcohol Policy and Compliance Notice," http://www.dot.gov/odapc/medical-marijuana-notice (February 22, 2013). The Notice cites 49 C.F.R. § 40.151, which states that a Medical Review Officer (MRO) must not verify a test negative based on "information that a physician recommended that the employee use a drug listed in Schedule I of the Controlled Substances Act. (e.g., under a state law that purports to authorize such recommendations, such as the 'medical marijuana' laws that some states have adopted.)." Thus, the Notice states, "It remains unacceptable for any safety sensitive employee subject to drug testing under the Department of Transportation's drug testing regulations to use marijuana." The DOT also has issued a Notice stating that state initiatives authorizing recreational use of marijuana have no bearing on the DOT's regulated drug testing program. *See* "DOT 'Recreational' Marijuana Notice," http://www.dot.gov/odapc/dot-recreational-marijuana-notice (May 27, 2014).

DOT drug and alcohol tests must be kept completely separate from any non-DOT tests. 49 C.F.R. § 40.13. According to the DOT regulations, DOT tests must take priority over non-DOT tests and must be conducted and completed before any non-DOT test is begun. *Id.* The sample used for the DOT test must not be tested for anything other than what is permitted under the DOT drug and alcohol testing regulations, unless the testing is conducted as part of a physical examination required by DOT regulations. *Id.*

A. DOT-Mandated Background Checks. Employers subject to Part 40 must check an individual's DOT drug and alcohol testing history before hiring or transferring the person to a safety-sensitive position. 49 C.F.R. § 40.25. Generally, employers must check with any DOT-regulated company that employed the person during the prior two years. However, employers covered by the Federal Motor Carrier Safety Administration (FMCSA) regulations must conduct a three-year check for drivers. Employers seeking pilot information under the Pilot Records Improvement Act (PRIA) must seek records for the prior five years. Employers covered by the Federal Railroad Administration (FRA) must conduct a five-year check for locomotive engineers.

Employers must obtain the employee's written consent before conducting the background check. 49 C.F.R. § 40.25. The consent must be a specific release authorizing the new employer to receive testing information from a specific current or former employer about a specific employee. It cannot be a "blanket" release and cannot be part of another DOT requirement, such as motor vehicle check, credit history or criminal background check. *See* U.S. Department of Transportation, *What Employers Need to Know About DOT Drug and Alcohol Testing,* http://www.dot.gov/odapc/employer_handbook. If the employee refuses to provide written consent for the drug and alcohol testing check, the employer must not permit the employee to perform safety-sensitive functions. 49 C.F.R. § 40.25.

Employers must request the following information from the employee's prior DOT-regulated employers:

1. Alcohol tests with a result of 0.04 or higher alcohol concentration;
2. Verified positive drug tests;
3. Refusals to be tested (including verified adulterated or substituted drug test results);
4. Other violations of DOT agency drug and alcohol testing regulations;
5. Information from previous employers of a DOT drug and alcohol rule violation; and
6. With respect to any employee who violated a DOT drug and alcohol regulation, documentation of the employee's successful completion of DOT return-to-duty requirements (including follow-up tests). If the previous employer does not have information about the return-to-duty process (e.g., an employer who did not hire an employee who tested positive on a pre-employment test), the employer requesting the information must seek to obtain this information from the employee.

49 C.F.R. § 40.25. A sample form is available as Appendix E to the DOT guide, *What Employers Need to Know About DOT Drug and Alcohol Testing [Guidance and Best Practices],* http://www.dot.gov/odapc/employer_handbook.

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If feasible, the employer must obtain and review this information before the employee first performs safety-sensitive functions. If this is not feasible, the employer must obtain and review the information as soon as possible. However, the employee must not be permitted to perform safety-sensitive functions after 30 days from the date on which the employee first performed safety-sensitive functions, unless the employer has obtained, or made and documented a good faith effort to obtain, this information. *Id.* If the employer obtains information that the employee has violated a DOT agency drug and alcohol regulation, it must not use the employee to perform safety-sensitive functions unless it also obtains information that the employee has subsequently complied with the return-to-duty requirements of the DOT regulations.

The requesting employer must provide the written consent discussed above for the release of the information to the employer from whom the information is sought. *Id.* The previous employer must maintain a written record of the information released, including the date, the party to whom it was released, and a summary of the information provided. *Id.* Employers from whom this information is requested must, after reviewing the employee's specific written consent, immediately release the requested information to the employer making the inquiry. *Id.* The employer requesting the information must maintain a confidential written record of the information received or the good faith effort made to obtain the information. *Id.* The employer must retain this information for three years from the date of the employee's first performance of safety-sensitive duties. *Id.*

The employer must also ask the employee whether he or she has tested positive, or refused to test, on any pre-employment drug or alcohol test administered by an employer to which the employee applied for, but did not obtain, safety-sensitive transportation work covered by DOT agency drug and alcohol testing rules during the past two years. If the employee admits that he or she had a positive test or a refusal to test, the employer must not use the employee to perform safety-sensitive functions until and unless the employee documents successful completion of the return-to-duty process set forth in the DOT regulations. *Id.*

B. Drug Testing Record-Keeping. Employers must comply with Part 40 record-keeping requirements as well as applicable specific agency requirements. Under Part 40, employers must keep the following records for five years:

1. records of alcohol test results indicating an alcohol concentration of 0.02 or greater;

2. records of verified positive drug test results;

3. documentation of refusals to take required alcohol and/or drug tests (including substituted or adulterated drug test results);

4. substance abuse professional (SAP) reports; and

5. all follow-up tests and schedules for follow-up tests.

49 C.F.R. § 40.333. Aviation employers must keep commercial pilot positive, negative, and refusal to test records for five years because of the PRIA and must keep employee dispute records. As noted above, employers must keep records of information regarding employee drug and alcohol tests obtained from prior employers for three years. *Id.* Additionally, the employer must keep records of the inspection, maintenance, and calibration of Evidential Breath Testing devices (EBTs) and records related to the alcohol and drug collection process for two years. The employer must keep records of negative and cancelled drug test results and alcohol test results with a concentration of less than 0.02 for one year. 49 C.F.R. § 40.333. Specific DOT agencies may impose additional record-keeping requirements.

C. Education. Employers must provide employees who perform safety sensitive functions materials that explain DOT requirements and must document that they received this information. In addition, supervisors must receive two hours of training (one hour on alcohol abuse, one hour regarding controlled substances). Employers must also follow agency-specific rules for employee and supervisor education and training.

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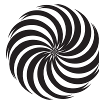

D. Waiver of Liability Prohibited. An employer must not require an employee to sign a waiver of liability, consent, release or indemnification agreement with respect to any part of the drug or alcohol testing process covered by Part 40 (including, but not limited to, collections, laboratory testing, MRO and SAP services). 49 C.F.R. § 40.27.

E. When Must Tests Be Performed? The various agencies under the DOT specify when testing must be conducted. Employers should consult the specific applicable agency regulation for more information.

F. Regulations Issued by Individual DOT Agencies. Each DOT agency has specific drug and alcohol testing regulations that state the agency's prohibitions on drug and alcohol use, who is subject to the regulations, what testing is authorized, when testing is authorized, and the consequences of non-compliance. The agencies require covered employers to have written policies that explain their drug and alcohol programs and must make these policies available to their employees. A list of the various DOT agencies' drug and alcohol testing related information is available at http://www.dot.gov/ost/dapc/oamanagers.html. The random drug and alcohol test rates for DOT agencies are also available on this web site.

1. **The Federal Aviation Administration (FAA)**. The Drug and Abatement Division of the FAA develops and implements regulations for DOT/FAA drug and alcohol testing. The FAA's regulations are located at 14 C.F.R. Part 120. As noted above, the DOT's regulations are located at 49 C.F.R. Part 40. Information on the FAA's drug and alcohol testing requirements is available at: http://www.faa.gov/about/office_org/headquarters_offices/avs/offices/aam/drug_alcohol/.

   Note that the FAA regulations require drug and alcohol testing of all covered employees (those in any of eight listed "safety sensitive" functions) of air carriers, including contractors and subcontractors at any tier (including noncertificated repair subcontractors). *See Aeronautical Repair Station Ass'n v. FAA,* 494 F.3d 161 (D.C. Cir. 2007) (upholding FAA regulations that include covered employees of contractors and subcontractors).

2. **The Federal Motor Carrier Safety Administration (FMCSA)**. FMCSA regulations apply to carriers and commercial drivers' license holders and are located at 49 C.F.R. Part 382. The agency's web site has more information on its drug and alcohol testing requirements at: http://www.fmcsa.dot.gov/rules-regulations/topics/drug/drug.htm.

3. **The Federal Railroad Administration (FRA)**. FRA regulations apply to all employers and employees working in the railroad industry and are located at 49 C.F.R. Part 219. The FRA's web site, http://www.fra.dot.gov/Page/P0345, has more information about the agency's drug and alcohol testing requirements.

4. **The Federal Transit Administration (FTA)**. FTA regulations apply to employers and employees working in the mass transit industry and are located at 49 C.F.R. Part 655. The FTA's web site has more information on the agency's drug and alcohol testing requirements at: http://transit-safety.volpe.dot.gov/DrugAndAlcohol/Default.aspx.

5. **The Pipeline and Hazardous Materials Safety Administration (PHMSA).** PHMSA conducts drug and alcohol testing of transporters of hazardous materials in order to deter and detect illegal drug use and alcohol misuse in the pipeline industry. PHMSA regulations, located at 49 C.F.R. Part 199, require operators to conduct drug and alcohol testing of covered employees who perform operation, maintenance, or emergency response functions regulated by 49 C.F.R. Parts 192, 193 or 195. The PHMSA web site provides more information about the agency's drug and alcohol testing requirements at: http://www.phmsa.dot.gov/drug.

6. **The U.S. Coast Guard (USCG) (Now Part of Homeland Security)**. USCG regulations cover employers and employees operating commercial vessels and are located at 46 C.F.R. Parts 4 and 16. Information on the Coast Guard's drug and alcohol testing requirements is available on the agency's web site at: http://homeport.uscg.mil/mycg/portal/ep/home.do (click on the "investigations" tab).

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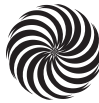

G. No Private Right of Action Under DOT Drug Testing Regulations. Courts have held that Congress did not give employees a private right of action under DOT drug testing regulations. *See, e.g., Brooks v. AAA Cooper Transp*., 781 F. Supp. 2d 472, 488 (S.D. Tex. 2011) (citing *Parry v. Mohawk Motors of Mich., Inc.*, 236 F.3d 299, 308 (6th Cir. 2000); *Mission Petroleum Carriers, Inc. v. Solomo*n, 106 S.W.3d 705, 713 (Tex. 2003)). In *Brooks*, the court noted, "courts have similarly refused to impose a common-law tort duty requiring an employer's agent to comply with DOT protocol when the agent collects samples for drug testing." *Id*. (*citing Solomon*, 106 S.W.3d at 712).

H. Federal Preemption of State and Local Laws. The DOT regulations take precedence and preempt state and local laws that are in conflict with them, with few exceptions. Preemption is necessary because federal law may impose testing requirements not permitted by state law. *See O'Brien v. Massachusetts Bay Transp. Auth.*, 162 F.3d 40 (1st Cir. 1998) (stating in a case where a local agency received a federal grant that required DOT drug and alcohol testing, "as long as a state receives federal funds for a particular purpose, its law, if contrary to conditions attached to the funds, must give way to federal law").

I. "Intrastate" Drivers Under State Laws. Some state statutes make the federal DOT drug and alcohol testing regulations applicable to intrastate drivers who drive vehicles with certain gross weight ratings within the state. Because these laws may exclude portions of the DOT requirements, they should be reviewed carefully.

IV. DRUG TESTING CONSIDERATIONS FOR THE UNIONIZED EMPLOYER: COLLECTIVE BARGAINING AGREEMENTS AND THE DUTY TO BARGAIN

A. No Violation of Public Policy to Reinstate Employees Who Fail Drug Tests. In *Eastern Associated Coal Corp. v. United Mine Workers of America, Dist. 17*, 531 U.S. 57 (2000), the U.S. Supreme Court held that public policy considerations do not require courts to refuse to enforce an arbitrator's award reinstating an employee who was discharged for testing positive for drugs. In *Eastern*, the employee was a truck driver who twice tested positive for marijuana and was reinstated by the arbitrator. The company sued to overturn the arbitrator's award on the grounds that it violated public policy against permitting employees who test positive for drugs to operate dangerous machinery. The Supreme Court held that the Transportation Employee Testing Act of 1991 and DOT's implementing regulations emphasize rehabilitation and that the arbitrator's award was consistent with DOT rules requiring completion of substance abuse treatment before returning to work and with the Act. *See also S. Cal. Gas Co. v. Util. Workers Union, Local 132,* 265 F.3d 787 (9th Cir. 2001) (affirming arbitrator's decision reinstating two employees who failed random drug tests because the MRO who reviewed the tests was not a physician as required by regulations mandating pipeline companies conduct drug testing; the court held that the arbitrator's decision drew its essence from the collective bargaining agreement because the CBA required that an employee fail a drug test given in accordance with DOT procedures in order to be subject to discipline. Additionally, the court held that there is no explicit and well-defined public policy prohibiting the reinstatement of two employees whose drug tests did not comport with DOT regulations.); *Matter of Local 333, United Marine Div., Int'l Longshoremans' Ass'n v. New York City Dept. of Transp.,* 35 A.D.3d 211, 826 N.Y.S.2d 225 (N.Y. App. Dec. 12, 2006) (arbitrator's award reinstating employee who was unable to produce a sufficient urine sample for a random drug test and was discharged for refusing to provide a sample did not violate public policy; employer's Zero Tolerance policy was not expressly embodied in constitutional, statutory or common law; instead, it was adopted as the employer's new internal policy shortly before the union member was tested. The court noted that the employee's job designation as safety-sensitive did not forbid his reinstatement by the arbitrator.).

B. Collective Bargaining Agreements (CBAs). CBAs frequently fail to sufficiently address drug testing and tend to limit employer action. The following should be considered:

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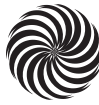

1. Employer's Discretion. Does the collective bargaining agreement adequately address grounds for termination? Does it clearly permit termination for a positive drug test?

2. Clear Statement of Policy. Prohibition of substance abuse (under the influence or intoxicated) is not sufficient. (Remember that the most commonly used drug screens show utilization, not state of intoxication or abuse.) The policy should prohibit illegal drug use both on and off the job. Note that state laws permitting the recreational or medical use of marijuana may impact an employer's ability to enforce such a provision; state law should be consulted.

3. Employee Assistance Program (EAP) Consideration. If an EAP is desired, it should be drafted properly so that "last chance" means "last chance."

C. Arbitration May Not Be the Exclusive Remedy.

1. Legal Action. Even though the collective bargaining agreement addresses final and binding arbitration, employees frequently attempt to evade that process by filing wrongful termination suits. In *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399 (1988), the U.S. Supreme Court held that state law actions for wrongful discharge are not preempted by federal law or "just cause" provisions in collective bargaining agreements. Thus, the manner in which rules are enforced, assignments are made, and discipline is imposed may create various causes of action outside the arbitration process.

2. CBA. Claims arising from an employer's drug-testing policy may not be preempted if they are independent of the CBA. *See, e.g.*, *Karnes v. Boeing Co.,* 335 F.3d 1189 (10th Cir. 2003); *Graham v. Contract Transportation, Inc.,* 220 F.3d 910 (8th Cir. 2000) (plaintiff's defamation claims based on employer's alleged false statements regarding the results of his drug test were not preempted by § 301).

D. Duty to Bargain.

1. Mandatory Subject. Implementation of a drug and alcohol-testing program for current employees is a mandatory subject of bargaining and may not be unilaterally imposed by the employer. *Star Tribune, Division of Cowles Media Co.*, 295 N.L.R.B. 543 (1989). As such, a number of courts have enjoined employers from implementing new drug-testing programs prior to arbitral decisions. *See*, *e.g.*, *Int'l Bhd. of Elec. Workers v. Potomac Elec. Power Co.*, 634 F. Supp. 642 (D.D.C. 1986). Employers are not required to bargain over the testing of job applicants, according to the NLRB. *See Johnson-Bateman Co.*, 295 N.L.R.B. 180 (1989).

2. Information Requested. Since drug testing of current employees is a mandatory subject of bargaining, the union is entitled to information regarding the employer's drug-testing policy upon request, to enable it to bargain about the policy's implementation. *See, e.g.*, *Johnson-Bateman Co.,* 295 N.L.R.B. 180 (1989).

3. Minor Dispute. A railroad's unilateral addition of a drug-testing component to employee physical examinations is a "minor dispute" subject to arbitration under the Railway Labor Act. *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299 (1989).

E. Union Cannot Challenge Applicant Testing. A union lacks standing to sue to stop mandatory drug testing of job applicants. *American Postal Workers Union v. Frank*, 968 F.2d 1373 (1st Cir. 1992).

V. LEGAL CONSIDERATIONS FOR ALL EMPLOYERS

A. Defamation. Revealing drug-test results, or simply revealing the basis for a suspicion of drug use, could be grounds for a claim of defamation. Policies should be designed to minimize the risk of defamation by: (1) strictly limiting access to any information to a "need to know" basis; (2) limiting statements to objective fact, without editorializing or making conclusions; (3) obtaining a release;

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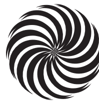

(4) requiring follow up confirmatory testing (GC/MS); (5) safeguarding the specimen and selecting a reliable lab; (6) restricting disclosure of test samples to guard against an invasion of privacy claim; and (7) using split samples so employees can have a sample tested at their own expense.

B. State and Local Statutory Restrictions. Many states limit employee drug testing – and more specifically, the circumstances in which an employee may be subject to drug testing – by statute or regulation. Examples of states that restrict drug testing in some circumstances include Hawaii, Minnesota, and Vermont. States and local governments that restrict employee drug testing may require employers to follow certain procedural requirements (including providing testing policies and/or notices to employees prior to testing) or prohibit employers from testing their employees without "probable cause." Employers should check the laws of the states and municipalities in which they have employees before implementing a drug testing policy.

C. Disability Discrimination.

1. The Americans with Disabilities Act (ADA). Although the ADA does not protect current illegal drug users, both alcoholism and drug addiction are protected disabilities. An employee who tests positive for drugs, or who reports to work under the influence of drugs or alcohol, may qualify as a "protected" individual even in the absence of alcoholism or addiction, if the employee can persuade the court or agency that he was "perceived" as addicted or otherwise disabled. *See Herman v. City of Allentown*, 985 F. Supp. 569 (E.D. Pa. 1997) (city discriminated against firefighter by failing to rehire him based on an erroneous belief he was abusing drugs); *Balistrieri v. Express Drug Screening, LLC*, 2008 WL 906236 (E.D. Wis. March 31, 2008) (plaintiff with "shy bladder" not disabled under the ADA; plaintiff provided no rationale for how being tagged as a substance abuser qualified him as disabled or how his failure to provide a urine sample was based on a disability). The ADA also prohibits discrimination against persons who are currently participating in supervised rehabilitation programs.

Requiring employees to report usage of all prescription drugs may violate the ADA. *See*, *e.g.*, *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221 (10th Cir. 1997). Additionally, failure to maintain the confidentiality of drug test results may violate the ADA. In *Giaccio v. City of New York,* 502 F. Supp. 2d 380, 386-87 (S.D.N.Y. 2007), *aff'd,* 308 F. App'x 470 (2d Cir. 2009), the court granted summary judgment on the plaintiff's ADA claim based on dissemination of his medical information (positive drug tests) because "a technical violation of section 12112 will not in and of itself give rise to damages liability." *See also Garrison v. Baker Hughes Oilfield Operations, Inc.,* 287 F.3d 955, 962 (10th Cir. 2002) ("An employer should not place any medical-related material in an employee's personnel file.") (quoting Equal Employment Opportunity Technical Assistance Manual § 6.5).

Employee misconduct caused by drug addiction is not protected by the ADA, however. *See Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003) (Supreme Court decision holding that an employer's no-rehire policy was a legitimate, nondiscriminatory reason for refusing to rehire a former employee who was a recovered drug addict). For a full discussion of these issues, *see* the *ADA* Chapter of the SourceBook.

2. Other laws. Additionally, alcoholism and drug addiction may be protected under state or municipal human rights laws.

3. Last-Chance Agreement Upheld. *See Golson-El v. Runyon*, 812 F. Supp. 558 (E.D. Pa. 1993) (holding that last-chance agreement was a reasonable attempt to accommodate the employee's alleged handicap and that failure to meet the requirements of the agreement was the reason for the termination – a reason not causally related to her alcoholism), *aff'd*, 8 F.3d 811 (3d Cir. 1993).

D. Workers' Compensation Retaliation. Many states have statutes prohibiting coercion of or discrimination against employees who have filed workers' compensation claims. Regardless of whether a claim is related to an employee's substance abuse, if a claim has been filed, the employer should use caution when taking action against that employee for any reason. *See Slane v. Mariah*

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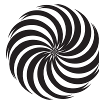

Boats, Inc., 164 F.3d 1065 (7th Cir. 1999) (upholding $225,000 jury verdict in favor of employee on workers' compensation retaliation claim (under Illinois state law) where employer allegedly terminated employee for failure to take a drug test although physician indicated employee was physically unable to take drug test).

E. Adverse Impact. If an employer's policy or practice, such as disciplining or terminating all employees testing positive for drugs, adversely affects the employment opportunities of a class of employees protected by statute (such as minorities), the policy or practice may be challenged as discriminatory. In *Chaney v. Southern Railway Co.*, 847 F.2d 718 (11th Cir. 1988), the court remanded a case for trial on the theory that the employer's reliance on a positive Enzyme Multiplied Immunoassay Technique (EMIT) test had a discriminatory impact on African-American employees.

F. Retaliation. In *Surrell v. Cal. Water Serv.,* 518 F.3d 1097 (9th Cir. 2008), the Ninth Circuit rejected an employee's claim that she was subjected to drug testing in retaliation for complaining about alleged discrimination. The court held that the employer had a legitimate, nondiscriminatory reason to require the testing – the employee appeared to be impaired and was slurring her speech. The court held that even if the employee was correct in arguing that the drug tests were flawed, she failed to rebut the employer's legitimate reason for requiring her to be tested – her impaired appearance.

G. Title VII. The Seventh Circuit has held that requiring an employee to submit to a drug test as a condition of employment may be an adverse employment action under Title VII if the drug test is not performed in a routine fashion following the regular and legitimate practices of the employer, but instead is conducted in a manner that harasses or humiliates employees. *See Stockett v. Muncie Ind. Transit Sys.,* 221 F.3d 997 (7th Cir. 2000) (noting that the Supreme Court has recognized that a suspicion-based drug test can be a "badge of shame" for those subjected to the test, citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995)); *but see Keys v. Foamex,* 2008 WL 370922 (7th Cir. Feb. 12, 2008) (unpublished decision) (rejecting the plaintiff's argument that the employer did not administer drug test in a routine fashion consonant with its policy because the decision maker relied on third-party reports of plaintiff's behavior to determine that drug testing was appropriate; employer's policy permitted testing any employee whose behavior indicated the influence of alcohol or drugs – there was no requirement of first-hand observation by the decision maker); *Sturdivant v. City of Salisbury*, 2011 WL 65970 (M.D.N.C. Jan. 10, 2011) ("Simply put, 'a drug test, … performed pursuant to an established company policy, does not rise to the level of an adverse employment action for which the anti-discrimination provision of Title VII … provides relief.'") (citations omitted), *adopted by,* 2011 WL 806381 (M.D.N.C. Mar. 1, 2011).

H. Invasions of Employee Privacy.

1. No Federal Right of Privacy. There is no federally created right of privacy for private sector employees. The federal prohibitions against illegal searches and seizures apply only to governmental action. The U.S. Supreme Court has declined to review a lower court ruling that private sector employees who were fired after they refused to take a suddenly announced drug test have no claim against their employer for invasion of privacy. *Baggs v. Eagle-Picher Indus., Inc.*, 506 U.S. 975 (1992) (lower court decision at 957 F.2d 268 (6th Cir. 1992)).

2. State Rights of Privacy. In addition to statutory restrictions in some jurisdictions, many states, such as New Jersey, Massachusetts and California, limit drug-testing methods or the circumstances under which an employee may be subject to drug testing based on an employee's "right to privacy." Additionally, in some states it is a violation of public policy to require employees to submit to random drug testing because such a test invades the individual's right to privacy. Employers should check the laws of the states in which they have employees before implementing a drug testing policy.

I. Negligent Testing. Both laboratories and employers may be subject to suits for negligent testing, and courts vary with regard to whether the claims are preempted by federal drug testing laws. While the Ninth Circuit has upheld a jury verdict in a negligence case against a laboratory based

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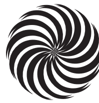

on the lab's analysis of her drug test, other courts have found some state-law claims preempted. *See, e.g., Frank v. Delta Airlines*, 314 F.3d 195 (5th Cir. 2002) (finding employee's state law claims of intentional infliction of emotional distress, negligence, and defamation arising from drug testing procedures were expressly preempted by federal law); *Sagraves v. Lab One, Inc.*, 2008 WL 162931 (6th Cir. Jan. 15, 2008) (unpublished decision) (economic loss rule precluded plaintiff from establishing a duty of care owed to him by the drug testing laboratory; even if laboratory owed plaintiff a duty of care, he failed to establish it violated this duty by failing to present expert testimony on this issue); *Drake v. Lab. Corp. of Am. Holdings*, 458 F.3d 48, 63 (2d Cir. 2006) ("We think that the [FAA] regulations call for a two-step analysis, then, for determining whether a state-law claim is preempted. First, state law is preempted if it 'cover[s] the subject matter' of the federal rule … When state law regulates conduct that is addressed by a specific provision of the FAA regulations, it is preempted. Second, state law is preempted if it 'cover[s] the subject matter of … drug testing of aviation personnel performing safety-sensitive functions.' *Id*. While some state laws may 'cover the subject matter' of the drug testing of aviation personnel even if they regulate issues not specifically addressed by the FAA regulations, they are not preempted unless their relationship to such drug testing is so substantial as to interfere with the consistency and uniformity of the federal regulatory scheme.").

J. Federal Standards. Reputable testing laboratories should be familiar with scientific and technical guidelines and standards for testing issued by the Department of Health and Human Services. The regulations were issued pursuant to Executive Order 12564, and call for testing of all federal government employees.

K. Searches. As a general proposition, private employers may engage in searches for drugs and alcohol, but employers should check state privacy laws to ensure such searches do not violate these laws.

1. No Federal Restrictions. While searches of private sector employees and their possessions, including lockers, raise certain privacy issues, they do not impinge upon federal constitutional rights, which apply only to government action.

2. State Common-Law Restrictions. Generally, private employers have the right to monitor employees and to conduct investigations for theft or misconduct. Nevertheless, searches of company property used by an employee or an employee's property brought onto company premises may result in legal liability for invasion of privacy or intentional infliction of emotional distress. The reasonableness of a search generally depends upon whether employees had a reasonable expectation of privacy in the property searched.

L. Polygraphs. The use of polygraph or lie detector tests as an adjunct to enforcement of company rules should be carefully evaluated. The Employee Polygraph Protection Act of 1988 substantially limits the use of polygraphs. The DOL regulations provide that the exemption that permits the use of polygraphs in connection with ongoing investigations into economic loss "does not permit the use of a polygraph test to learn whether an employee has used drugs or alcohol, even where such possible use may have contributed to an economic loss to the employer (e.g., an accident involving a company vehicle)." State law may also control the use of or prohibit such tests.

M. Third Party Claims. Persons injured by an intoxicated employee and families of victims involved in fatal accidents may sue an employer for negligence or wrongful death. Retaining an employee after knowledge of drug use may increase the employer's exposure to a jury award for compensatory or punitive damages, if the employee injures a third party.

N. Unemployment Compensation. Many states have laws or regulations establishing that a positive drug or alcohol test result creates a presumption of misconduct, thus disqualifying an employee from receiving benefits.

O. Falsifying or Tampering with Tests. Many state laws make it unlawful for any person to attempt to defraud any lawfully administered test designed to detect the presence of chemical substances or controlled substances. *See*, *e.g.*, *Frank v. Department of Transp., FAA*, 35 F.3d 1554 (Fed. Cir.

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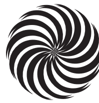

1994) (upholding termination of air traffic controller who was accused of tampering with a urine specimen, even though the testers violated collections and handling procedures and failed to give the controller the opportunity to request union representation).

P. Family and Medical Leave Act (FMLA). The FMLA regulations require covered employers to grant leave to an employee who requests leave for treatment of a serious health condition. A serious health condition may include substance abuse, but an absence due to the employee's use of the substance, rather than for treatment, is not protected. The DOL regulations provide that treatment for substance abuse does not prevent an employer from taking employment actions against an employee. The employer may not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment. However, if the employer has an established policy, applied in a non-discriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for substance abuse, pursuant to that policy the employee may be terminated regardless of whether the employee is presently taking FMLA leave. An employee may also take FMLA leave to care for a covered family member who is receiving treatment for substance abuse. The employer may not take action against an employee who is providing care for a covered family member receiving treatment for substance abuse. 29 C.F.R. § 825.119. *See* the *Employee Leaves* Chapter of the SourceBook for a more detailed discussion of employee absences.

Q. Fair Credit Reporting Act (FCRA). The FCRA, 15 U.S.C. §§ 1681, *et seq.*, restricts dissemination of consumer credit reports. In *Hodge v. Texaco, Inc.*, 975 F.2d 1093 (5th Cir. 1992), the court held that the FCRA may apply to drug test results in certain instances, but excluded the results at issue in the case under the "transactions or experiences" exclusion to the FCRA. *See also Martinets v. Corning Cable Systems, LLC,* 237 F. Supp. 717 (N.D. Tex. 2002) (holding that breathalyzer test report was not covered by the FCRA because it related solely to transactions or experiences between the employee and the testing agency); *Knox v. Quest Diagnostics, Inc.*, 2012 WL 400333 (D.V.I. Feb. 8, 2012) (drug test exempt under the "transactions and experiences" provision of the FCRA), *aff'd, 522* F. App'x 150 (3d Cir. June 11, 2013).

VI. DRUG- OR ALCOHOL-RELATED DISCIPLINE

A. Preliminary Considerations.

1. Disability Discrimination Statutes. Before an employer determines the nature of disciplinary action to be taken for a potential substance abuse problem, it should consider the current status of the disability discrimination laws. The ADA, the Vocational Rehabilitation Act of 1973, and state human rights or disability discrimination laws should be analyzed to determine employers' legal obligations in dealing with the discipline of an employee who may be disabled because of alcoholism or substance abuse.

2. Leave of Absence. The FMLA does not protect an employee from discipline for violation of employer policies. Under the FMLA, the ADA, or state law, however, an employer may be required to offer an alcoholic employee a leave of absence, with counseling, before disciplining the employee for excessive absenteeism. *Compare Rodgers v. Lehman*, 869 F.2d 253 (4th Cir. 1989) *with Fong v. United States Dep't of Treasury*, 705 F. Supp. 41 (D.D.C. 1989) (finding that there is no protection for employees who hide their alcoholism from the employer). Under the ADA, an employee who is an alcoholic or who is regarded as an alcoholic may be entitled to reasonable accommodation, including a leave of absence on account of his or her condition.

B. Implementing a Termination Decision. *See* the *Discipline and Discharge* Chapter of the SourceBook.

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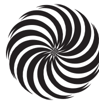

VII. CONSTITUTIONAL CONCERNS: PUBLIC EMPLOYERS AND PRIVATE EMPLOYERS CONDUCTING GOVERNMENT-MANDATED TESTING

Public sector employers are subject to a number of restrictions regarding development and implementation of substance abuse policies that do not generally affect private employers. Although the Fifth Amendment privilege against self-incrimination does not extend to drug testing, drug testing has been found to constitute a "search" within the Fourth Amendment's prohibition against unreasonable searches and seizures. Public employers are subject to constitutional restrictions limiting unreasonable invasions of privacy and deprivations of due process. *See Chandler v. Miller,* 520 U.S. 305 (1997) (drug testing implicates the constitutionally protected right to privacy and is a "search" that falls within the restrictions of the Fourth and Fourteenth Amendments); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) ("We think the Government's need to conduct the suspicionless searches required by the Customs program outweighs the privacy interests of employees engaged directly in drug interdiction, and of those who otherwise are required to carry firearms.") These constitutional restrictions substantially impact public employers' alcohol and substance abuse policies.

A. Established Constitutional Principles.

1. Mandatory Testing Programs Constitute Government Action. Government-mandated testing may require adherence to constitutional protections in private employment. *See Gilmore v. Enogex, Inc.*, 878 P.2d 360, 367 (Okla. 1994) (state action not present where the "[p]rogram was neither mandated nor conducted by any governmental agency"); *Parker v. Atlanta Gas Light Co.*, 818 F. Supp. 345 (S.D. Ga. 1993) (state action doctrine implicated by federally mandated drug testing programs). The Fourth Amendment, usually applicable only to government action, states that the right of the people to be secure in their persons and effects "against unreasonable searches and seizures" shall not be violated. In *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), the U.S. Supreme Court considered the validity of Federal Railroad Administration regulations that required private railroads to drug test train crews following serious accidents and authorized them to drug test based on "reasonable suspicion." The Court found that even though the drug testing was actually performed by the private railroads and their agents, the fact that the testing was required and encouraged by the government was enough to trigger the Fourth Amendment. The Court also held that urine testing, blood testing, and breathalyzer testing all constitute "searches" within the meaning of the Fourth Amendment.

A presumption in a state workers' compensation statute that an employee who refuses to submit to a drug test was intoxicated and the intoxication was the cause of the on the job injury may be considered suspicionless testing and unreasonable. *See State ex rel. Ohio AFL-CIO v. Ohio Bureau of Workers' Compensation,* 780 N.E.2d 981 (Ohio 2002) (striking provision in law that presumed employee who refused to submit to drug test following an on-the-job injury was intoxicated and that the intoxication was the likely cause of the injury, finding this to be suspicionless testing and an unreasonable search under the Fourth Amendment).

2. Searches Must be Reasonable. A "search" must be "reasonable" under the Fourth Amendment. The U.S. Supreme Court has found that such a determination requires a balancing of the individual intrusion against the extent that the practice of searches promotes legitimate governmental interests. *See Skinner*, 489 U.S. at 619. The Court noted that in many contexts, "probable cause" must be demonstrated in order to justify a search, and that in a smaller class of situations where "probable cause" is not present, there is usually required "some quantum of individualized suspicion" before a search would be determined to be reasonable. In limited circumstances, however, where the employee's privacy interests are minimal and an important governmental interest would be placed in jeopardy by requiring individualized suspicion, a search may be reasonable despite the absence of such individualized reasonable suspicion. *See Skinner*, 489 U.S. at 619. In *Skinner*, the Court held the government's compelling interest in ensuring public safety outweighed the employee's expectations of privacy. *See also National Treasury Employees Union*

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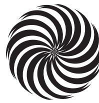

v. Von Raab, 489 U.S. 656 (1989) (upholding the regulations of the United States Customs Service, which require that Customs Service employees who seek promotion to certain sensitive positions be tested for drug use as a part of a scheduled physical examination required for the promotion; finding that the government regulations served a compelling interest); *National Treasury Employees Union v. United States Customs Serv.*, 27 F.3d 623 (D.C. Cir. 1994) (upholding expanded Customs Service regulations on the grounds that a drug trafficker in possession of the information contained in the Customs Service data bases can significantly improve his chances of successfully smuggling his next shipment of drugs into the United States); *but see Chandler v. Miller,* 520 U.S. 305 (1997) (Georgia's requirement that all candidates for designated state offices certify that they have taken a drug test and that the results were negative was not supported by "special needs, beyond the normal need for law enforcement" and thus was unconstitutional).

3. Public Sector Testing After Skinner and Von Raab. Many courts have held that the government must raise a compelling interest to justify mandatory drug testing based on anything other than an individualized, reasonable suspicion of drug use. Thus, nonsuspicion based testing, which would include pre-employment testing, random testing, routine fitness for duty testing, follow up testing, and mandatory post-accident testing under certain circumstances, raises serious constitutional questions when implemented by a public employer. *See, e.g., Lanier v. City of Woodburn*, 518 F.3d 1147 (9th Cir. 2008) (drug screening candidates of choice for city positions was unconstitutional because it was not supported by a "special need" as required by *Chandler*); *Beattie v. St. Petersburg Beach*, 733 F. Supp. 1455 (M.D. Fla. 1990) (finding that any mandatory drug testing of firefighters violated the Fourth Amendment, unless based upon some individualized, reasonable suspicion).

However, in *Lynch v. City of New York,* 737 F.3d 150 (2d Cir. 2013), *cert. denied,* 134 S. Ct. 2664 (2014), the Second Circuit upheld the New York Police Department's (NYPD) requirement that officers who fire their weapons in a shooting incident that results in death or personal injury undergo breathalyzer tests on the scene. The court held that the testing met the Fourth Amendment's reasonableness requirement under the "special needs" category of warrantless, suspicionless searches. The court found that the testing is conducted to determine an officer's sobriety at the time of the shooting and that sobriety is a fitness-for-duty condition of employment with the NYPD. Thus, the court found that a sobriety determination served a special need distinct from criminal law enforcement, specifically, personnel management of and maintaining public confidence in, the NYPD. The court also found that the NYPD's interest in these special needs was not compatible with the warrant requirement applicable to criminal investigations. The circumstances triggering the testing are narrow, the policy gives the official conducting the testing no discretion in determining whether to administer the test, and the vast majority of police officers are aware they are subject to the test. Thus, the court found that a warrant "would provide little or nothing in the way of additional protection of personal privacy" to NYPD officers and that there are virtually no facts for a neutral magistrate to evaluate. Additionally, the court found that the NYPD's interest in these special needs sufficiently outweighed the privacy interests of tested police officers as to render warrantless, suspicionless breathalyzer testing constitutionally reasonable. The court concluded, "the NYPD's special need to manage a force of officers authorized to carry firearms and to use deadly force, as well as its special need to maintain public confidence in the NYPD, outweigh the privacy interests of a police officer who has discharged his firearm so as to cause death or personal injury with respect to undergoing the negligible intrusion of breathalyzer testing." *Id.* at 166.

B. State Laws. State laws may require government employers to maintain drug-free workplace policies and may impose drug and/or alcohol testing for certain government employees. The employer should research the laws of the state(s) in which it is located to ensure it has complied with these laws.

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C. Public Sector Reasonable Suspicion Testing. The U.S. Supreme Court decisions in *Skinner* and *Von Raab*, discussed above, indicate that a public employer must have an individualized, reasonable suspicion of drug or alcohol use to justify testing absent a compelling governmental interest.

D. Periodic Testing as Part of a Routine Medical Examination. Performing a drug test as part of a broader medical examination may not interfere with an employee's privacy interests. Some courts have upheld drug urinalyses in the context of a broader physical examination, even without individualized suspicion. Virtually all of the cases that have upheld testing in the absence of reasonable suspicion, however, have done so on the basis of the public employer's heightened interest in safety based on the specific employment involved – such as bus or truck drivers, nuclear plant workers, railroad employees, customs officials, and police and fire employees. *See, e.g.*, *PBA of New Jersey, Local 318 v. Township of Washington*, 850 F.2d 133 (3d Cir. 1988) (finding that police are "highly regulated" and upholding drug testing that was administered as part of an annual medical examination).

E. Pre-employment Testing.

1. U.S. Supreme Court Decisions. In *Skinner* and *Von Raab*, the U.S. Supreme Court considered urinalysis to detect illicit substances. The Court did not, however, directly address urinalyses as a part of a physical or medical examination. The U.S. Supreme Court did not speak of particular tests being Fourth Amendment searches; but of urinalyses generally as a Fourth Amendment search.

2. State Laws. Several state laws governing drug testing by public employers authorize or mandate pre-employment testing. Employers should check applicable state laws.

F. Random Testing. The U.S. Supreme Court's 1989 decisions in *Skinner* and *Von Raab* leave the door open for possible random testing in some limited contexts. *See Nat'l Fedn. of Fed. Employees-IAM v. Vilsack,* 681 F.3d 483 (D.C. App. 2012) ("this court has upheld the random drug testing of employees in "safety-sensitive" positions, such as those responsible for maintaining and operating trains … airplanes … and motor vehicles … as well as those required to carry firearms in the performance of their duties …"; holding, however, that the Secretary of Agriculture failed to identify "special needs" rendering the Fourth Amendment requirement of individualized suspicion impractical in the context of Job Corps employment and, thus, rejecting the Secretary's designation of all Forest Service Job Corps Center employees for random drug testing).

G. Refusal to Submit to Drug Test. In a case in which the employer had reasonable suspicion that a firefighter was using drugs, the court ruled that the discharge of the individual for refusal to submit to a urinalysis did not violate the Fourth Amendment's prohibition against unreasonable search and seizure. *See Everett v. Napper*, 833 F.2d 1507 (11th Cir. 1987). Furthermore, the court held that the employer did not violate the firefighter's due process rights, where he was provided a predetermination hearing and an opportunity for a full appeal.

H. Drug Test Results as Public Records. Many state laws exempt public employees' medical records from disclosure under the public records acts. Employers should consult specific state laws governing this issue.

I. Searches. In *O'Connor v. Ortega*, 480 U.S. 709 (1987), the U.S. Supreme Court held that a public employer's search of an employee's office was constitutional because, although the employee had a legitimate expectation of privacy, the employer had an individualized suspicion of misconduct sufficient to justify the search. Notably, the Sixth Circuit Court of Appeals has held that employee "waivers" and the terms of a collective bargaining agreement may negate an employee's otherwise reasonable expectation of privacy with respect to employee lockers and bathrooms. *American Postal Workers Union v. United States Postal Service*, 871 F.2d 556 (6th Cir. 1989).

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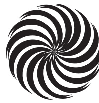

VIII. PRACTICAL CONSIDERATIONS IN ESTABLISHING A TESTING PROGRAM

A. Determine General Approach Regarding Substance Abuse. An employer must decide whether to treat substance abuse as an illness (which an employer might choose to accommodate and work with employees to overcome), as misconduct (which an employer might choose to treat as cause for discipline, including discharge), or as a combination of these philosophies. Employers should consider whether conduct will be treated on the basis of its legality or illegality, including the sale or use of illegal substances off the job, and on the basis of its possible impact on job performance or other work-related factors. Companies with drivers or other employees subject to federal drug regulation should decide whether they want to have a separate DOT/FMCSA program for drivers and a less restrictive program for employees not subject to federal regulation.

Many states encourage drug-free workplaces by offering protection from civil liability or a reduction in workers' compensation premiums for employers that adopt compliant drug testing policies and procedures. Other states prohibit employee drug testing or limit the manner and circumstances for which drug testing may be performed. Due to the variance of state and local laws concerning employee drug testing, it is critical that any decision to implement employee drug testing be reviewed to ensure that it is compliant with the laws of your jurisdiction.

B. Drug Tests as Part of the Applicant Screening Process.

1. **Pre-employment Testing.** Pre-employment testing is required for DOT-covered employers and employers with a drug-free workplace program designed to obtain a rate reduction under certain state workers' compensation laws. Some state statutes place restrictions on pre-employment testing. In other states, however, there are few legal impediments to adopting a pre-employment screening program in the private sector.

2. **Opportunity to Reapply.** Some employers allow rejected applicants to reapply under certain designated conditions, often after the lapse of a designated period of time.

3. **Confidentiality.** Test results should be kept as confidential as possible, and any communication of the results should be limited.

4. **ADA Implications.** Drug tests are not "medical examinations" under the ADA, and may be performed before an offer of employment is extended. Although drug testing is not a "medical examination" for ADA purposes, an essential part of the drug testing process is the inquiry into lawful medications being taken by the applicant that may result in a false positive. Therefore, an employer should consider postponing pre-employment testing until after a conditional offer of employment has been made. Furthermore, questions regarding medications should be postponed until after a confirmed, positive result has been reported to the employer. The questions should never be asked of employees or applicants who test negative. For more information, *see* the *ADA* Chapter of the SourceBook.

C. Periodic Testing. Testing as a part of an annual physical examination, or upon transfer to a sensitive position, or at other announced times, may be more a symbolic gesture than a real deterrent or detection mechanism. Testing before permitting an employee to perform a safety-sensitive position is, however, required for DOT testing programs.

D. Random Testing. "Random drug testing represents a greater threat to an employee's privacy interest than does mandatory testing because of the unsettling show of authority that may be associated with unexpected intrusions on privacy." *National Treasury Employees Union v. U.S. Customs Service*, 27 F.3d 623 (D.C. Cir. 1994). This is less of a problem if "everyone" is tested, and arguably, a policy of random testing is less intrusive or stigmatizing because it specifically avoids an implication of suspicion or accusation. However, random testing may expose an employer to legal liability where tests are not administered truly randomly but selectively, as a retaliatory tool, or to try to catch an employee suspected of drug or alcohol abuse. Moreover, many states prohibit or restrict random testing either by statute or case law.

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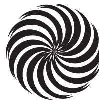

E. Post-Accident Testing. To simultaneously combat drug use and job-related accidents, some employers require drug tests whenever an employee is involved in an accident on the job. Caution should be exercised, however, if the employer is restricted to "reasonable suspicion" testing, since mere involvement in an accident may not amount to "reasonable suspicion." Preferably, post-accident testing is triggered not by involvement in an accident, but by employee carelessness or other circumstances, which suggest that substance abuse could have been a contributing factor.

F. "Reasonable Suspicion" Testing. A policy of drug testing based upon employer suspicion is flexible and relatively difficult to attack as having a disparate impact on any protected group – provided managers are trained to execute the policy on an even-handed, nondiscriminatory basis. If both physiological and behavioral signs associated with alcohol or drug use are observed, mandatory testing may not be necessary. Rather, as an option, the employee may be given an opportunity to establish that she or he has not violated any company rule by submitting to urinalysis or a blood test. If an employee refuses to submit to such testing, the employer may advise that disciplinary action will be taken based upon the observations made and the information available at that time. "Reasonable suspicion" testing is required for DOT and some state testing programs.

G. What Type of Testing Should be Utilized? Available testing methods include: blood and breath testing, several types of urine testing, other physical testing, and hair testing. Consideration must be given to what types of drugs are being tested for, how accurate the test is, and what conclusions about the employee's behavior or performance can be drawn from the results.

H. The Specimen Collection Process. DOT, some state laws, and other regulations affect collection procedures, and should be reviewed carefully if they are applicable. It is crucial to have employees execute consent forms; however, a consent or release may be found to be invalid, absent consideration. *See Johnson v. Delchamps*, 846 F.2d 1003 (5th Cir. 1988), *aff'd after remand*, 897 F.2d 808 (5th Cir. 1990).

I. Should an Employee Be Discharged Based on a Positive Test Result? When faced with a disciplinary decision concerning an employee who has tested positive for substance abuse, an employer has several options available, including verbal or written warnings, suspension, termination, referral to an EAP, and voluntary or mandatory rehabilitation. A number of employers in safety-sensitive industries have decided to permanently remove employees from the employment setting, not only as a deterrent but also to show a general intolerance for the use of drugs. Other employers take the view that an employee should be given at least one opportunity to reestablish her or himself as a productive employee in the workplace.

J. Rehabilitation. Many employers find that employee assistance programs rehabilitate formerly productive employees and save money.

K. Reporting Illegal Employee Drug Use to a Law Enforcement Agency. The disadvantages to this approach include a negative impact on employee morale and the potential for a lawsuit for abuse of process, defamation, or malicious prosecution. However, when all the circumstances suggest that an employee is selling drugs to other employees, or stealing from the employer to support a substance abuse habit, the involvement of law enforcement authorities may produce additional evidence helpful in defending the termination and identifying the scope of the problem. Additionally, the involvement of law enforcement to investigate a drug use situation may help avoid a retaliation claim. However, employers should make discharge decisions independently of the criminal justice system. Factors such as plea bargains and evidentiary issues affect a criminal prosecution but are not relevant to an employer's disciplinary decision.

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IX. IMPACT ON EMPLOYERS OF LAWS PERMITTING RECREATIONAL OR MEDICAL USE OF MARIJUANA

State laws permitting the medical or, more recently, the recreational, use of marijuana can complicate an employer's ability to enforce its drug-free workplace policy, especially pre-employment drug testing.

A. Federal Law. In *Gonzales v. Raich,* 545 U.S. 1 (2005), a nonemployment case, the U.S. Supreme Court upheld the constitutionality of the federal Controlled Substances Act, which means that state laws authorizing the medical or recreational use of marijuana do not insulate drug users from federal law making such behavior criminal. The *Gonzales* decision does not overturn state medical marijuana laws, which primarily direct state law enforcement not to prosecute those who use marijuana in accordance with state limits on medical use and cultivation.

B. State Medical Use Laws. As of November 2014, a total of 23 states, the District of Columbia and Guam had laws permitting comprehensive public medical marijuana and cannabis programs. *See State Medical Marijuana Laws,* http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx. Eleven states allow use of "low THC, high cannabidiol (CBD)" products for medical reasons in limited situations or as a legal defense**.** *Id.* States, in addition to the District of Columbia and Guam, that have enacted medical marijuana laws as of August 2014 are: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington. While the provisions of state medical marijuana laws vary, most of the state laws focus on protecting medical marijuana users and their physicians and/or caregivers from prosecution under state criminal laws and do not address the rights or responsibilities of employers. However, as discussed below, Minnesota's law specifically prohibits employers from discriminating against a person because of their medical use of marijuana. Thus, state courts have been called upon to determine the extent of an employer's obligation to accommodate employees using marijuana under the medical use laws. Generally, courts have found no such obligation.

1. Employers Not Required to Accommodate Medical Use of Marijuana. Both the California Supreme Court, *Ross v. RagingWire Telecommunications, Inc.*, 174 P.3d 200 (Cal. 2008), and the Oregon Supreme Court, *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.,* 230 P.3d 518 (Ore. 2010), have held that discrimination laws in those states do not require employers to accommodate an employee's use of marijuana under the states' medical marijuana use laws. Other state courts have held that their medical marijuana statutes do not regulate private employment. *See Johnson v. Columbia Falls Aluminum Co.*, 350 Mont. 562, 213 P.3d 789 (Mont. March 31, 2009) ("The [Medical Marijuana Act] MMA specifically provides that it cannot be construed to require employers 'to accommodate the medical use of marijuana in any workplace.'") (quoting MCA § 50-46-205(2)(b)); *Roe v. TeleTech Customer Care Mgmt.*, 257 P.3d 586 (Wash. 2011) ("[I]t is unlikely that voters intended to create such a sweeping change to current employment practices [under the Medical Use of Marijuana Act]."); and *Ross v. RagingWire Telecommunications, Inc.*, 174 P.3d 200 (Cal. 2008) ("Nothing in the text or history of the Compassionate Use Act [California's medical marijuana law] suggests the voters intended the measure to address the respective rights and duties of employers and employees").

2. Laws More Protective of Employees. Some state laws provide more protection for employees. For example, the laws in Connecticut, Rhode Island, and Maine prohibit employers from penalizing an individual merely because of the person's status as a medical marijuana user. However, the Rhode Island law specifically states that it does not require an employer to accommodate the medical use of marijuana in the workplace. Arizona's law protects medical marijuana cardholders (which may include patients as well as designated caregivers) from discrimination. The law also prohibits discrimination against a registered qualifying patient based on that person's positive test for marijuana unless the patient was impaired by marijuana on the employer's premises or during the hours of employment. While the law does not require an employer to per-

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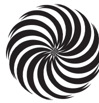

mit an employee to ingest marijuana at work or to work while under the influence of marijuana, it also states that a registered qualifying patient is not considered to be under the influence of marijuana solely because that person tests positive for marijuana metabolites in an amount that is insufficient to cause impairment.

Minnesota's law, which was enacted in May 2014, prohibits employers from discriminating against a person in hiring, termination, or any term or condition of employment, or otherwise penalizing a person, because of the person's status as a patient enrolled in the medical marijuana registry program or because of a patient's positive drug test for cannabis components or metabolites, "unless the patient used, possessed, or was impaired by medical cannabis on the premises of the place of employment or during the hours of employment," unless a failure to do so would violate federal law or regulations or cause an employer to lose a monetary or licensing-related benefit under federal law or regulations." Minn. Stat. Ann. § 152.32 (West).

3. Unemployment Compensation Benefits. A Colorado court has held that although the state's medical marijuana law prohibits the criminal prosecution of a covered individual for the medical use of marijuana, it "does not preclude [an individual] from being denied unemployment benefits based on a separation from employment for testing positive for marijuana in violation of an employer's express zero-tolerance drug policy." *See Beinor v. Indus. Claim Appeals Office of Colo. & Serv. Group, Inc.,* 262 P.3d 970 (Col. Ct. App. 2011). More information about medical marijuana laws is available at: http://www.mpp.org/site/c.glKZLeMQIsG/b.1086497/k.BF78/Home.htm.

C. Recreational Use of Marijuana. Colorado, Washington State, Alaska, and Oregon, as well as the District of Columbia have enacted laws legalizing the recreational use of marijuana. Initiative 502 in Washington and Amendment 64 in Colorado permit the recreational use, display, purchase, and transport of one ounce or less of marijuana within the state, but prohibit driving under the influence of marijuana, the sale of marijuana by unlicensed facilities, and the use of marijuana by persons under the age of 21. Colorado's Amendment 64 states, "[n]othing in this section is intended to require an employer to permit or accommodate the use … of marijuana in the workplace or to affect the ability of employers to have policies restricting the use of marijuana by employees." In the District of Columbia, voters have approved a measure that allows individuals over 21 to possess up to two ounces of marijuana for personal use and transfer (but not sell) one ounce to another person.

In *Coats v. Dish Network, L.L.C.,* 2013 COA 62, 303 P.3d 147 (Colo. Ct. App. 2013)., an appeals court in Colorado held that state licensed medical marijuana use is not "lawful activity" for the purposes of that state's law prohibiting employers from terminating employees for lawful activity that takes place away from the employer's premises during non-working hours. The court held that the plain and ordinary meaning of "lawful" is that which is permitted by law. Because activities conducted in Colorado are subject to both state and federal law, for an activity to be "lawful" in Colorado, it must be permitted by, and not contrary to, both state and federal law. Thus, the court held, that "applying the plain and ordinary meaning, the term 'lawful activity' in section 24-34-402.5, means that the activity — here, plaintiff's medical marijuana use — must comply with both state and federal law." The court found no legislative intent in the "lawful use" law to extend employment protection to those engaged in activities that violate federal law. Thus, because plaintiff's state-licensed medical marijuana use was, at the time of his termination, subject to and prohibited by federal law, the court held that it was not "lawful activity" for the purposes of section 24-34-402.5 of the Colorado Statutes. The Colorado Supreme Court has granted certiorari on the issues of: "Whether the Lawful Activities Statute, section 24-34-402.5, protects employees from discretionary discharge for lawful use of medical marijuana outside the job where the use does not affect job performance"; and "Whether the Medical Marijuana Amendment makes the use of medical marijuana 'lawful' and confers a right to use medical marijuana to persons lawfully registered with the state." 2014 WL 279960 (Jan. 27, 2014).

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