

Alcohol and drug testing of employees and job applicants

In 1987 the Minnesota Legislature enacted legislation regulating drug and alcohol testing in the workplace. The legislation applies to all employers and their employees, independent contractors, or other persons performing services for compensation for an employer.

Under the legislation, an employer may not request or require drug or alcohol testing of an employee or a job applicant unless the employer has a written drug and alcohol testing policy. The policy must, at a minimum, describe which employees and job applicants are subject to testing under the policy, the circumstances under which they will be tested, the right to refuse testing and the consequences of refusal, the description of disciplinary or other adverse action which can be taken based upon a verified positive test result, the right of the employee or job applicant to explain a positive test result, and any appeal procedures available after testing.

The employer must give a one-time-written notice to affected employees and job applicants of the testing policy, and must post a notice of the drug testing policy.

Right to require testing

An employer may request or require an employee to undergo drug and alcohol testing only under the following circumstances:

1. **Job Applicant Testing.** A job applicant who has been offered a job may be required to submit to testing if the same test is requested or required of all job applicants for the position.
2. **Routine Physical Examination Testing.** The

employer can require drug testing of an employee as part of a routine physical examination so long as it occurs no more than once annually and there is two (2) weeks' prior written notice that the drug or alcohol test may be requested as part of the physical exam. This is the only method in which an employer can require drug testing of all employees.

3. **Random Testing.** An employer can require random testing only of employees in safety-sensitive positions. These positions are defined in the Act as jobs (including supervisory or management positions) where an impairment would threaten the health or safety of another person.
4. **Reasonable Suspicion Testing.** An employer can require drug testing of an employee if the employer reasonably suspects the employee is under the influence of drugs or alcohol; if the employee has violated written work rules regarding use, possession, sale, or transfer of drugs or alcohol while working, on premises, or operating employer equipment, so long as the work rules are in writing and include the written drug testing policy; if the employee has sustained an injury covered by workers' compensation or has caused another employee to suffer such an injury; or if the employee has caused a work-related accident or was operating machinery involved in a work-related accident.

An employer can require drug testing of an employee whom the employer has referred for chemical dependency treatment or evaluation, or who is a participant in such a program under an employee

benefit plan. In this case, the employee need not be given prior notice of a testing for a period of up to two (2) years after the completion of the program.

Testing standards

The employer must use a licensed, accredited, or certified testing laboratory. The 1991 amendments to the statute provide specific criteria that a testing laboratory must meet. For drug testing, the testing laboratory must meet one of the following criteria:

1. Certified by the National Institute on Drug Abuse as meeting the mandatory guidelines published at 54 Federal Register 11970 to 11989, April 11, 1988;
2. Accredited by the College of American Pathologists, 325 Waukegan Road, Northfield, Illinois 60093-2750, under the forensic urine drug testing laboratory program; or
3. Licensed to test for drugs by the State of New York, Department of Health, under Public Health Law, article 5, title V, and rules adopted under that law.

For alcohol testing, the testing laboratory must either be:

1. Licensed to test for drugs and alcohol by the State of New York, Department of Health, under Public Health Law, article 5, title V, and the rules adopted under that law; or
2. Accredited by the College of American Pathologists, 325 Waukegan Road, Northfield, Illinois 60093-2750, in the laboratory accreditation program.

A laboratory that is not certified by the National Institute on Drug Abuse according to subd. 1 must follow chain-of-custody procedures. The chain-of-custody procedures are specifically defined in the statute.

The laboratory is required to immediately conduct a confirmatory test on all samples that produce a positive test result on the initial screening test. The laboratory is required to keep positive samples for at least six (6) months. Time deadlines for reporting results to employers and employees are set out.

Cost of testing

The employer cannot charge an employee or job applicant for drug testing, except that an employer who notifies an employee or job applicant of a positive confirmatory test must report the results to the individual and notify the individual of his or her right to explain the results or request a confirmatory re-test of the original sample. The employee or job applicant can then be required to pay the cost of the confirmatory re-test.

Right to discipline

The employer's right to respond to a positive test result is limited: the employer cannot respond in any way on the basis of a positive test result from an initial screening test for which there has not been a verification by a confirmatory test, except to temporarily suspend or transfer until confirmatory test results are in. An employer also may not withdraw a conditional offer of employment based on the initial screening test. Further, an employer may not discharge an employee (although the employer may otherwise discipline) for a positive test on a confirmatory test which is the first such positive test result, unless the employer has given the employee an opportunity to participate in a drug or alcohol counseling or rehabilitation program (at the employee's own expense or under coverage of an employee benefit plan, if any), and the employee has refused to participate in the program, withdraws from the program, or has a positive test result after completion of the program.

An employer cannot discharge, discipline, or otherwise discriminate against an employee on the basis of medical prescription information that a job applicant may disclose to the employer prior to the drug testing.

Confidentiality

The legislation has extensive provisions for confidentiality of test results. The lab is only allowed to disclose results to the employer and an employer may not disclose the results to another employer, third-party individual, governmental agency, or private

organization without the written consent of the employee or job applicant tested. (Apparently, this would preclude employers from disclosing to the workers' compensation insurance carriers the results of drug testing after a workers' compensation injury on a routine basis.) However, positive test results can be used in arbitration proceedings, administrative hearings, including workers' compensation hearings, or judicial proceedings, if relevant, and for certain other limited uses. Employee releases in workers' compensation cases would make these results available to the workers' compensation insurance carrier.

Negotiated labor contracts can provide for more stringent drug testing requirements than provided by the statute.

Violation of the statute

Violation of the statute would potentially subject an employer or laboratory to liability for damages or injunctive relief, and other equitable relief, including reinstatement with back pay.

ADA/Americans with Disabilities Act

A test to determine the illegal use of drugs is not considered a medical examination and may be

administered to applicants or employees without violating the ADA. Interestingly, the ADA is completely silent on the question of testing for alcohol. The Technical Assistance Manual published by the U.S. Equal Employment Opportunity Commission (EEOC) states that a test to determine an individual's blood alcohol level would be a "medical examination" and could only be required in conformity with the ADA. Thus, employers should comply with all requirements set out in the Minnesota Drug Testing Law with respect to illegal drug testing and alcohol testing. Employers should make sure their tests of an individual's blood alcohol level also comply with the ADA's limits on medical examination of applicants and employees. The law in this area is unsettled. Because it is unclear, you are encouraged to consult with your corporate counsel or an attorney specializing in employment law.

The ADA also places limits on an employer's pre-offer inquiries regarding use of alcohol or the illegal use of drugs. If you have questions regarding your current procedures, it would be wise to consult with your corporate counsel or an attorney specializing in employment law.



The Work Comp Experts

3500 American Blvd. West, Suite 700
Bloomington, Minnesota 55431-4434

© 2006 SFMI
All rights reserved.

www.sfmic.com

0606E