DRUG AND ALCOHOL TESTING IN THE WORKPLACE

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BACKGROUND

Employee drug use may cause absenteeism, poor performance, accidents, injuries to drug-taking employees, injuries to other employees, injuries to the public or customers, low productivity, and more-costly use of medical benefits. Therefore, an employer often has a legitimate interest in ensuring that its employees do not bring illegal, controlled, or dangerous substances onto its property, either before or after ingestion by employees.

A drug or alcohol test involves a chemical test of an employee's or prospective employee's urine, breath, blood, saliva, sweat or hair. The particular chemical drug test used attempts to measure the presence of "metabolites" – the small molecules that result from the body's metabolism of the alcohol or drugs. Metabolites provide chemical markers of the kinds of substances ingested or injected over a period of time because the body metabolizes different drugs at different rates.

Employers commonly use urinalysis for drug and alcohol tests although blood tests tend to provide more accurate results. Urinalysis generally represents a less invasive and less costly alternative to blood tests. Hair analysis has several advantages over urine tests. Hair tests can reveal a history of drug use and particularly heavy or continuous drug use. On the other hand, hair analysis generally does not detect recent drug use because hair grows too slowly. Hair analysis provides reasonably accurate results, and obtaining hair samples involves a much less invasive and embarrassing process that urination into a laboratory cup.

WORKPLACE SEARCHES GENERALLY

Many statutory and common law sources generally support an employer's right to search its own property or premises. Those legal sources permit workplace searches based upon reasonable grounds for employers' suspicions when conducted in a proper manner. Federal, state and local laws apply this right to drug tests and define the "proper manner" in various ways for both public and private employees.

DRUG AND ALCOHOL TESTS BY PUBLIC EMPLOYERS

The major federal law governing the use of drugs and alcohol in the workplace is the Drug-Free

Workplace Act of 1988. This Act basically states that any employer who receives federal grants or contracts must be drug-free, or it risks losing the federal funding. The Act does not, however, contain any provisions that specifically allow for workplace drug testing.

Drug testing of public employees constitutes a search under the Fourth and Fourteenth Amendments of the United States Constitution. Therefore a public employer may not conduct such a test without individualized suspicion of wrongdoing. The Supreme Court has held that a public employee's expectation of privacy must balance against the public employer's right to conduct a reasonable search. The reasonableness of the search will depend on all of the circumstances on a case-by-case basis.

The Supreme Court's balancing analysis used a two-step test to evaluate whether the search was "justified at its inception" and "permissible in scope." A search becomes "justified at its inception" when reasonable grounds exist for suspecting that the search will uncover evidence that the employee engaged in work-related misconduct, or that the search becomes necessary for a non-investigative, work-related purpose such as to retrieve a needed file. The Court held that a search remains "permissible in scope" when "the measures adopted are reasonably related to the objective of the search and not excessively intrusive in light of the nature of the misconduct."

Suspicionless urinalysis drug-testing by the government or public employees has been upheld in numerous cases, and in many of those cases, courts have characterized the relevant government interests as "compelling." However, the Supreme Court has not held that only a "compelling" interest will suffice, and some courts have upheld suspicionless urinalysis drug-testing by the government of public employees without finding a compelling interest. Several courts have upheld suspicionless urinalysis drug-testing of public employees for:

- Army-employed civilian air traffic controllers, pilots, aviation mechanics, aircraft attendants, police, and guards;
- Civilian employees of a chemical weapons plant who "have access to areas …, in which experiments are performed with highly lethal chemical warfare agents[;]"
- Drivers, mechanics and attendants whose primary duty is the daily transportation of handicapped children on school buses;
- Bus or commercial truck drivers who operate "enormous" trucks such that "a single mistake in judgment or momentary lapse in attention can have devastating consequences for other travelers[;]"
- "Scrub techs" in public hospitals whose duties include bringing patients to the operating room, setting up the sterile field, laying out the proper instruments, and assisting during surgery;
- Employees holding top secret national security clearances;
- County correctional employees with regular access to prisoners or weapons; and
- Police officers who carry firearms or participate in drug interdiction efforts.

At the same time, several courts have found insufficient governmental interests to uphold suspicionless urinalysis drug-testing for:

- Intercollegiate student-athletes at a state university;
- Dog trainers licensed to own, lease, train and care for greyhounds involved in greyhound dog

racing with pari-mutuel wagering;
- High-school students who participate in extracurricular activities;
- United States Department of Justice employees who are prosecutors in criminal cases and other employees who have access to grand jury proceedings;
- County correctional employees who have no reasonable opportunity to smuggle narcotics to prisoners and no access to firearms;
- Civilian laboratory workers at the Army's forensic Drug Testing Laboratories;
- Civilian employees in the chain of custody process for biochemical testing at the Army's forensic Drug Testing Laboratories; and
- Water meter readers who must enter customers' homes in order to read the meters.

In addition, courts have questioned the propriety of suspicionless drug testing for:

- Secretaries, engineering technicians, research biologists, and animal caretakers who work at chemical and nuclear facilities;
- Police department personnel who do not carry firearms or participate in drug interdiction efforts;
- Heads of purchasing departments in hospitals who have "vital and important responsibility essential to the proper supply of medical materials[;]" and
- United States Customs Service employees who are required to handle classified material.

It certain situations, it may become necessary to conduct employee drug testing without a reasonable suspicion. In those circumstances, the presumption of unreasonableness may be overcome by the State allowing for a departure from the warrant and probable cause requirement. A warrantless search may be acceptable "in those exceptional circumstances in which special needs beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." In general, courts address drug testing of public employees on the basis of reasonableness under all the circumstances, as measured on a case-by-case basis, and by balancing public government and private interests.

A warrantless search of an individual is generally reasonable under the Fourth Amendment if the individual has voluntarily consented to it. A voluntary consent to a search is "a consent intelligently and freely given, without any duress, coercion or subtle promises or threats calculated to flaw the free and unconstrained nature of the decision." Whether consent to a search was voluntary "is a question of fact to be determined from all the circumstances…" An employee cannot consent voluntarily if the failure to give consent results in a denial of the governmental benefit.

DRUG AND ALCOHOL TESTING BY PRIVATE EMPLOYERS

The Colorado Court of Appeals has held that, for at-will private employees, "Colorado does not have a clearly expressed employee right to refuse drug testing." Indeed, Colorado has not enacted any statutes to regulate drug and alcohol testing by private employers. Moreover, a Colorado statute "provides that an employer shall not be charged for unemployment benefits when it has a previously established written drug policy and terminates an employee as the result of a drug test showing the presence of marijuana in the employee's system during working hours." Because this unemployment statute "plainly recognizes an employer's right to conduct drug testing," the Colorado Court of Appeals has rejected the "contention that there is a clearly expressed public

policy relating to an employee's right to refuse to participate in drug testing when the employer has a previously established written policy."

The Colorado Courts have upheld the application of statutory drug testing standards in many situations in which employees have claimed unemployment benefits after termination for cause because of drug use. Similarly, under Colorado workers' compensation statutes, injured employees lose their rights to certain benefits if alcohol or drug use is a proximate cause of their injuries. This workers' compensation statute apparently creates an implied right for employers to test employees for drug and alcohol abuse following any on-the-job injuries. Both employers and employees must comply with workers' compensation statutes as a condition of employment. Thus, employees impliedly consent to drug and alcohol testing because workers' compensation statutes control the availability of workers' compensation benefits following an on-the-job injury.

Whether a claimant's intoxication proximately caused an accident remains a question of fact for resolution a workers' compensation hearing. In other words, "the intoxication of claimant must be a proximate cause of the injury." The mere concurrence of an injury and an alleged cause does not require an inference of causation.

The workers' compensation statute requires "a forensic drug or alcohol test conducted by a medical facility or laboratory licensed or certified to conduct such tests." Because only a qualified facility may perform the test, a blood alcohol test result of 0.10 or above creates an evidentiary presumption that the claimant was intoxicated and that the industrial injury was caused by the intoxication. Yet, the statute provides the testing process must also include a second sample which "shall be preserved and made available to" the injured worker.

The preservation of a second sample is a condition precedent to the evidentiary presumption created by a 0.10 blood alcohol test from the first sample, which in turn is required to establish the workers' compensation penalty. These requirements protect the claimant from unwarranted reductions in compensation, and employers must establish these requirement before the presumption applies.

Consequently, Colorado law clearly recognizes an employer's right to conduct drug and alcohol testing on an at-will employee when the employer has previously adopted a written testing policy. The policy should include provisions about when the testing will take place and how it will be performed. More particularly, the policy should indicate that testing will occur at an appropriate facility (such as a hospital or other reputable lab), and should preserve a second sample for confirmatory testing. Employers should also establish the types of drugs for which testing will occur. Employers should also develop a written policy concerning what will happen to an applicant who tests positive for drug use.

Employers should carefully maintain the confidentiality of the investigative results of drug tests. Employers should maintain documentation concerning drug tests in separate and secure files and should strictly limit access to those separate files and the information they contain only to other employees having a legitimate need to know. Employers could become subject to lawsuits for defamation if news of an unsubstantiated investigation "leaked" to other employees.

OTHER CONSIDERATIONS

Substance abuse problems often raise issues under the Family & Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA). An employee seeking or receiving treatment for substance abuse may qualify for FMLA leave. After returning to work from FMLA leave, the ADA may provide employment protections for the employee. Treatment for substance abuse generally qualifies as a serious health condition under the FMLA. After an employee *completes* substance abuse treatment, the ADA protects an employee from discrimination due to current or past substance abuse treatment or a former substance abuse problem. The ADA prohibits an employer from inquiring of a job applicant about past use of illegal drugs. Current substance abuse, however, does not qualify as a disability under the ADA. Moreover, "a test to determine the illegal use of drugs shall not be considered a medical examination" under the ADA.

An employee may take FMLA leave to obtain substance abuse treatment. FMLA regulations permit an employer to terminate an employee for current substance abuse, regardless of FMLA leave, provided that the employer:

(1) has an established and written policy against substance abuse;
(2) has communicated that policy to all employees; and
(3) has applied that policy in a non-discriminatory manner.

Thus, an employer may fire an employee if a substance abuse problem makes the employee unable to perform essential job functions or the employee's job performance became deficient because of the substance abuse problem. Yet, an employer cannot fire an employee for exercising the right to take FMLA leave to get substance abuse treatment or for having obtained such treatment.

The ADA does not require an employer to "accommodate" substance abuse, either on or off the job. Thus, if the employee sought drug treatment only after being caught using drugs or under the influence of drugs on the job, the employer may terminate the employee for that behavior or for violation of the employer's written policies. The ADA simply precludes an employer from terminating an employee for past substance abuse.

Generally, an employer may require an employee to take a drug test after a work-related injury. Similarly, an employer may require a drug test if the employer has an established drug testing policy and the employer has good faith reason to believe that the employee is using or under the influence of drugs in the workplace.

Yet, some symptoms or behaviors that indicate substance abuse might arise from the lawful use of prescription medications or from a serious health condition. The lawful use of prescription medications or serious health conditions could trigger employment rights under both the FMLA and the ADA. Thus, employers should carefully approach decisions about whether and when to require drug tests. Whenever possible, employers should verify the veracity of evidence of a suspected drug problem before ordering a drug test. Employers should also verify that valid business-related or safety reasons exist for requiring the drug test, and that orders for drug tests are well-grounded in established employer policies.

The FMLA and the ADA require an employer to maintain the confidentiality of all applicant or

employee medical information. Both statutes require an employer to maintain health or medical information on separate forms and in separate medical files. Such information should not be included as part of an employee's regular personnel file. If an employer wants to put a document that contains medical information in an employee's personnel file, the employer must first redact or remove the medical information. Even after the employee has left the company, an employer must maintain medical information separate from application or personnel files.

Generally, an employer may disclose an applicant's or employee's health or medical information only on a "need to know" basis. Thus, an employer may disclose such information, if necessary to:

- Hiring decision-makers, supervisors or managers, safety or first aid personnel;
- Government officials investigating the employer's compliance with the ADA or FMLA;
- Upon request by an employee under a release;
- Workers' compensation agencies or insurers; and
- The employer's health insurance carriers.

Finally, a Colorado statute broadly protects employees from termination based on any lawful activity by the employee while off-duty and off the employer's premises. The Statute protects employees from termination for lawful activities that employers find distasteful as long as those duties do not legitimately relate to the employee's job duties. The Statute applies exclusively to employees and does not extend its protections to job applicants.