Employee Drug Testing: Effective Tool Despite Legal Pitfalls

Drugs and the workplace are clearly a negative combination. Employers may not only be liable for the negligence of an employee under the influence of drugs but also for negligently hiring an employee with a history of abusing drugs. Lowered productivity and higher absenteeism are just a few more reasons employers want to keep drugs out of their workplace. Drug testing can be an effective way to do just that.

Drug testing can be a useful tool to prevent hiring substance abusers, deter employees from abusing drugs, provide early identification and treatment referral of employees with drug problems and provide a safe and productive workplace for all employees. While illicit drug users are not protected under the American with Disabilities Act (ADA) and the ADA specifically provides that employers may prohibit the use of drugs in the workplace, drug testing still is full of legal pitfalls.

First and foremost, employers should always consult with legal counsel before implementing any drug-testing program. Drug-testing restrictions are in place on federal and state levels and employers need to make sure they are in compliance. State constitutions and statutes vary. Some limit circumstances where drug testing is allowed and others have set requirements on pre-employment drug testing. In addition, some states impose specific testing procedures and specific tests for false positive results.

The Fourth Amendment of the United States constitution, which protects against unreasonable searches and seizures, protects most government but not private sector employees from drug testing. Federal government employees in "sensitive" positions or essentially those who operate commercial vehicles, carry a firearm or are in contact with sensitive information are generally subject to drug testing. For unionized workforces, implementation of a drug testing program as well as the disciplinary consequences of testing positive for drugs must be negotiated.

It is important to know that testing for alcohol is subject to different restrictions. While a current illegal user of drugs is not protected by the ADA if an employer acts on the basis of such use, alcoholism is considered a disability and is protected by the ADA if the individual is qualified to perform essential functions of the job. Still, an employer may require that employees not be under the influence of alcohol on the job and has certain rights under certain circumstances to discipline, discharge or deny employment to an alcoholic. Again, the complicated ins and outs of ADA guidelines and state and federal legislation make it key to consult legal counsel for guidance when developing a testing program.

When developing a drug program, the following factors need to be considered: who will be tested (which positions); when will tests be conducted (pre-employment, upon reasonable suspicion); which drugs will be tested for; and how will tests be conducted. Employers should have written drug policies including the circumstances under which an employee or applicant will be denied employment. To minimize potential liabilities, results of drug tests must be kept confidential and employees should obtain a release from all employees or applicants being tested.

It is also extremely important that employers retain a reputable drug-testing laboratory. The Drug and Alcohol Testing Industry Association's website at www.datia.org includes a searchable database of accredited members.