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Working Knowledge:
Employment Law Update



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April 20, 2016

Working Knowledge
Arthur Chapman Employment Law Update
Minnesota's Drug and Alcohol Testing Act:
The Potential Exposure Facing You

This quarter we offer a brief overview of Minnesota's Drug and Alcohol Testing in the Workplace Act (DATWA), codified at Minnesota Statutes 181.950-181.957. Whether you are an employer with a national basis or focused in Minnesota, you should be aware of the impact DATWA can have on your business.

DATWA Section 181.951, Subd. 1(b) states that "[a]n employer may not request or require an employee or job applicant to undergo drug or alcohol testing **unless** the testing is done pursuant to a **written** drug and alcohol testing policy that contains the minimum information required in section 181.952; **and**, is conducted by a **testing laboratory** which participates in one of the programs listed in section 181.953, subdivision 1." (emphasis added).

Consequently, unless you are an employer who falls under the limited federal preemption outlined in DATWA Section 181.957 (i.e. the specific work performed by your employees or job applicants requires that he/she be subject to drug and alcohol testing pursuant to a federal regulation, requirement, and/or contract), your written drug and alcohol testing policy must contain the following specific criteria set forth DATWA Section 181.952, Subd. 1:

1. The employees or job applicants subject to testing under the policy;
2. The circumstances under which drug or alcohol testing may be requested or required;
3. The right of an employee or job applicant to refuse to undergo drug and alcohol testing and the consequences of refusal;
4. Any disciplinary or other adverse personnel action that may be taken based on a confirmatory test verifying a positive test result on an initial screening test;
5. The right of an employee or job applicant to explain a positive test result on a confirmatory test or request and pay for a confirmatory retest; and
6. Any other appeal procedures available.

However, DATWA's requirements do not stop with a written testing policy. Under DATWA Section 181.952, Subd. 2, the employer must also provide written notice of the testing policy to all affected employees and job applicants upon hire; post the notice in an appropriate and conspicuous location on the employer's premises; **and** make copies of the policy available for inspection by employees or job applicants during regular business hours.

Under DATWA, employers have no legal duty to request or require an employee or job applicant to undergo testing. However, if an employer requests or requires any employee to undergo drug or alcohol testing, the employer may not do so in

an arbitrary and capricious way. DATWA places certain restrictions on an employer's ability to test its employees. Specifically, the drug and alcohol testing can only occur under the following circumstances:

1. If a **job applicant** has been extended an offer, *and* the same test is required of all job applicants conditionally offered employment for that position;
2. As part of a **routine physical examination** provided the test is **not required more than once annually**, *and* the employee has been given at least **two weeks' written notice**;
3. On a **random selection basis**, for employees in **safety-sensitive** positions or a **professional athlete** subject to a collective bargaining agreement;
4. If the employer has a **reasonable suspicion** that the employee: (a) is under the influence of drugs or alcohol; (b) violated the employer's written work rules prohibiting the use, possession, sale, or transfer of drugs or alcohol while the employee is working or while the employee is on the employer's premises or operating the employer's vehicle, machinery, or equipment, provided the work rules are in writing and contained in the employer's written drug and alcohol testing policy; (c) sustained a personal injury or caused another employee's injury; *or* (d) caused a work-related accident or was operating or helping to operate machinery, equipment, or vehicles involved in a work-related accident.
5. Following employer referral to chemical dependency treatment/evaluation or employee participation in employee benefit plan provided chemical dependency treatment program (no notice required for up to two years following completion of program).

See Minn. Stat. § 181.951, Subds. 2-6.

In addition, DATWA Section 181.953 sets forth several technical and complex requirements that could prove costly to unwary employers. For example:

1. *Before* an employer requests or requires an employee to undergo testing, the employee must be given a form, acknowledging the employee's review of the testing policy.
2. *Within three working days after receipt of a test result report from the testing laboratory*, an employer shall inform in writing an employee or job applicant of (1) a negative test result on an initial screening test or (2) of a negative or positive test result on a confirmatory test, and (3) the right of the employee/job applicant to request a copy of the test result report.
3. *After* an employee tests positive, an employer must give written notice of the right to explain the positive test to the employee (the employer may request notification of any over-the-counter or prescription medications taken by the employee).
4. *Within three working days after notice of a positive test result on a confirmatory test*, the employee/job applicant may submit additional information explaining the result or request a confirmatory retest of the original sample (at the expense of the employee/job applicant).
5. *Within five working days after notice of the confirmatory test result*, the employee or job applicant shall notify the employer in writing of the employee's or job applicant's intention to obtain a confirmatory retest; *within three working days after receipt of the notice*, the employer shall notify the original testing laboratory that the employee or job applicant has requested the confirmatory retest.

Even when the foregoing criteria have been satisfied and a confirmatory test is positive, an employer may not discharge an employee for whom this is the first positive drug/alcohol test result unless the employer has given the employee the opportunity to participate in a counseling or rehabilitation program and has either refused or has failed the program. Minn. Stat. § 181.953, Subd. 10.

Why are DATWA's strict and employee-friendly drug testing laws important to you? Because, an employer's failure to comply with DATWA not only exposes it to civil damages but also to the risk of paying an employee's reasonable attorney fees, if a court finds that the employer knowingly or recklessly violated DATWA. Furthermore, a court may also award equitable relief, including, but not limited to, reinstatement of the injured employee or job applicant with back pay.

In our experience, many businesses do not realize that Minnesota has such restrictive and complicated requirements for drug and alcohol testing in the workplace. So, take this time to review your employee handbook and other policies and procedures, and if you have any questions, please do not hesitate to contact any of the [Arthur Chapman Employment Law Practice Group](#) attorneys to discuss. Please also feel free to share this email with others who might find it helpful (use the "share" button above).

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