

# LABOR AND EMPLOYMENT LAW UPDATE



## FREQUENTLY ASKED QUESTIONS REGARDING EMPLOYEE DRUG ABUSE

A survey released in July 2007 by the Substance Abuse and Mental Health Administration revealed some sobering statistics: About 8% of all full-time U.S. workers surveyed acknowledged the use of illicit drugs in the previous month. An even higher percentage – 19% - of workers under the age of 26 admitted to the use of illegal drugs in the past month.

Drug abuse by employees can cause myriad problems for employers including low productivity and morale, absenteeism, tardiness, theft, accidents, violence and potential legal liability to the public and other employees. In light of the alarming new statistics, all employers would do well to review the sufficiency of their drug policies.

**IS THERE A LEGAL REQUIREMENT THAT A PRIVATE EMPLOYER HAVE A DRUG ABUSE POLICY?** Many states, including Texas, have statutes or regulations which require the adoption of an employee drug abuse policy. In Texas, a regulation of the Workers' Compensation Division of the Texas Department of Insurance requires that each employer with workers' compensation insurance and 15 or more employees adopt a written drug abuse policy which contains certain essential elements.

At the federal level, a written drug policy is required by the Drug-Free Workplace Act of 1988, which applies to federal contractors, and DOT regulations, which govern transportation workers.

**DOES A PRIVATE EMPLOYER HAVE A LEGAL DUTY TO INVESTIGATE POTENTIAL DRUG ABUSE?** The Drug-Free Workplace Act of 1988 requires that federal contractors make a "good faith effort" to maintain a drug free workplace. Some states have similar laws applicable to state contractors. DOT regulations require drug testing.

A duty to investigate potential drug abuse may also be implicit in other more general duties. Under the laws of many states, an employer has a general duty to provide a safe workplace for its employees. For certain occupations, an employer has a general duty to hire and retain only fit employees, the breach of which can spark a claim of negligent hiring, supervision or retention.

**MAY A PRIVATE EMPLOYER IMPLEMENT A DRUG TESTING PROGRAM?** Virtually every state allows some drug testing of applicants and employees, but the laws vary widely as to the circumstances and manner in which such testing is permitted. Drug testing may also be prohibited or limited by a collective bargaining agreement.

Even a lawful drug test performed in a prescribed manner may expose an employer to claims of assault, battery, invasion of privacy and negligence if certain precautions are not followed by the employer. No drug testing program should be implemented without input from legal counsel.

**MAY AN EMPLOYMENT DECISION BE BASED UPON A REFUSAL TO SUBMIT TO A LAWFUL DRUG TEST?** An employer may make submission to a lawful drug test a condition of hiring. Denying employment based upon the absence of a drug test, therefore, is generally considered to be lawful.

Unless handcuffed by a collective bargaining agreement, an employer may generally adopt a rule mandating employee cooperation with investigations of potential violations of a drug abuse policy, including lawful drug testing. The ability of an employer to discipline or terminate an employee who withholds consent to a lawful drug test necessarily varies from state to state. A collective bargaining agreement may also limit an employer's options.

**MAY A PRIVATE EMPLOYER BASE EMPLOYMENT DECISIONS UPON PAST ILLEGAL DRUG USE?** Not likely Under the Americans with Disabilities Act (“ADA”), which applies to employers with 15 or more employees, as well as the laws of many states, it is unlawful to discriminate against a person who:

1. has successfully completed a supervised drug rehabilitation program, or has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of drugs, or
2. is participating in a supervised rehabilitation and is no longer engaging in such use.

A few states, most notably Wisconsin, also restrict the ability of an employer to make employment decisions based upon past conviction records which are not substantially related to the job in question.

**MAY A PRIVATE EMPLOYER BASE EMPLOYMENT DECISIONS ON MERE SUSPICION OF ILLEGAL DRUG USE?** Such decisions are risky. The ADA and many state laws protect from discrimination any applicant or employee who is erroneously regarded as engaging in illegal drug use, but is not engaging in such use. If an employer’s suspicion is wrong, liability can ensue.

Again, a few states restrict the ability of employers to base an employment decision upon an arrest or pending criminal matter.

**MAY A PRIVATE EMPLOYER BASE EMPLOYMENT DECISIONS UPON CURRENT ILLEGAL DRUG USE WHICH IS SUBSTANTIATED?** The ADA provides a limited exclusion from its protection to applicants and employees who are currently engaging in the illegal use of drugs.

Generally, an employer may refuse to hire an applicant who is an illegal drug user. Under the laws of some states, however, the ability of an employer to terminate a drug user may be more limited than in other states. For example, in California, a first-time offender of an employer’s drug policy must first be offered an opportunity for rehabilitation before he or she can be terminated. A common provision of collective bargaining agreements is the allowance of a second or even a third strike for violations of an employer’s drug abuse policy.

**ADDITIONAL QUESTIONS?** If you have any questions about employee drug abuse please contact Robert Chadwick at Campbell & LeBoeuf, P.C.

## CALENDAR

On October 5, 2007 Campbell & LeBoeuf, along with AIG and Apex Global Partners, will be presenting a seminar at Prestonwood Country Club entitled: “Are you an ERISA Fiduciary & Do you Understand What You Have Gotten Yourself Into?”

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