



Employment Law Update

Drug Testing Employees

Ironically, under the present state of the law in California employer's with at-will employees may be better off terminating employees based on a good faith belief that they are using drugs or are under the influence of controlled substances rather than testing them to prove the fact.

Employers are permitted to drug test applicants for employment if the test is conducted after the applicant has been offered a job contingent on passing the screening, and provided that the testing is done on a non-discriminatory bases, i.e., all applicants should be tested regardless of the position. For example, if applicant's for executive positions are not tested, and most of these applicants are non-minority, it could be argued that the testing of applicants for rank and file positions, where there are proportionately more employees in a protected class, is discriminatory. Finally, the testing must be conducted in a manner so as to minimize invasion of the applicant's privacy and the results must be kept confidential.

However, with respect to present employees the law in California is less clear. Random drug testing is generally prohibited unless the employee is in a position critical to public safety or the protection of life or property. Drug testing based on reasonable suspicion, i.e., where there are objective factors and reasonable inferences, is more problematical. Although courts have found that testing based on a reasonable suspicion may be justified, this conclusion is premised on the conclusion that the employer had a "reasonable suspicion," and this is the nub of the problem. Reasonable suspicion means that based on a factual foundation, such as physical appearance or behavior, drug or alcohol use, or some other form of impairment is a rational inference. If an employer relies on a "reasonable suspicion" tests an employee and then based on the results, terminates the employee, or terminates an employee who refuses to be tested, the employer is exposed to a lawsuit for wrongful termination if there was not in fact a reasonable suspicion, or the employee's privacy was not adequately protected.

This is a very substantial risk if supervisors are not trained in what constitutes sufficient grounds for a reasonable suspicion. The reality is that most supervisors are not trained and most employers will not invest in the training. In addition to issues with the initial determination of reasonable suspicion an employees right of privacy under the California Constitution will be violated of the testing process itself is too intrusive. Finally, if the test is inconclusive, or negative, and the employee has been unreasonably exposed to embarrassment or ridicule, the employee may also have a claim for intentional or negligent infliction of emotional distress.

Wrongful termination based on a violation of the employees Constitutional right of privacy or, a claim of intentional infliction of emotional distress, are both intentional torts and expose the employer to punitive damages.

Compare the above scenario to one where the supervisor observes the employee with blood shot eyes, slurred speech or other evidence of intoxication, and based on these observations concludes in good faith that the employee is intoxicated and terminates the employee. The employer has very little exposure. The employee is at-will, which means the employee can be terminated anytime, without notice and without cause for any non- discriminatory, lawful reason. The employer does not have to prove that the employee was under the influence. If the employee is not asked to take a drug test there is no risk that the employee can claim an invasion of privacy because there was no reasonable suspicion and there is no risk that the termination will be found to have been in violation of public policy. There is no risk that the employee will claim an invasion of privacy based on the conduct of the test.

Ezra | Brutzkus | Gubner LLP offers its clients advice and counsel in all areas of labor and employment law . **Richard L. Mann** has 30 years of experience representing employers around the nation in all aspects of labor and employment law including discrimination, wrongful termination and wage-hour disputes and traditional labor relations. Mr. Mann has represented employers in a variety of industries including apparel, hospitality, manufacturing, transportation, entertainment, packaging and various service industries.

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