Drug Testing Municipal Employees — OMAG

omag.org/news/2016/5/24/drug-testing-municipal-employees-1

Suzanne Paulson May 23, 2016

Is your Municipality drug testing employees? If so, are you complying with State and Federal laws? Although employers are not required to drug test employees, the Oklahoma Standards for Workplace Drug and Alcohol Testing Act[i] ("Act") allows employers to drug test applicants[ii] and employees[iii] under certain conditions.

If your municipality chooses to drug test applicants and/or employees, the following must be in place before any testing occurs:

1. A written, detailed policy, as prescribed in the Act[iv];
2. Provide thirty (30) days' notice to employees of implementation or changes to the policy;
3. An agreement with a testing facility (lab) licensed by the Oklahoma Department of Health to process drug and alcohol tests; and
4. An Employee Assistance Program (EAP) that, at a minimum, provides drug and alcohol dependency evaluation and referral services for substance abuse counseling, treatment or rehabilitation.

The written detailed policy must state which employees will be subjected to testing. The Act only allows testing under the following circumstances:

1. Applicants for employment or an employee who is transferred or reassigned to a different position or job;

2. Employees involved in a workplace accident causing injury or property damage;

3. Employees subject to a routine fitness-for-duty exam;

4. Employees subject to a follow-up to a rehabilitation program;

5. For cause (reasonable suspicion) if the employer has a reasonable belief that the employee is under the influence of drugs at work (based on, for example, seeing the employee with drugs, an unexplained pattern of absences or tardiness, or employee behavior that suggests impairment); and

6. Random testing (only applies to "employees" in "safety sensitive positions" as defined by the Act)[v]

The Act also sets for a strict set of standards for administration, collection and processing of test samples. In order for the test to be valid, the testing facility (and its employees) must be recognized by the State Board of Health as a facility that is licensed to perform drug and alcohol tests.[vi] If the facility is not licensed it can be fined up to $500 each time a test is performed and the tests will likely be deemed invalid.

Failure to follow State and Federal law when drug testing employees can have negative legal consequences. Drug testing opens the municipality, as well as elected officials and supervisors, up to claims involving the Americans with Disabilities Act; Title VII discrimination; invasion of privacy; defamation; and the Fourth Amendment.

The Fourth Amendment to the U.S. Constitution protects government employees from unreasonable searches and seizures. In order to be legal, drug and alcohol testing must be "reasonable." The reasonableness of the drug and alcohol testing depends on the type of test performed, the job classification for the individual being tested, and whether the municipality followed the procedures outline in the Act.

Random testing is the most legally scrutinized. Courts have held that random testing of a public employee is constitutional only when the employee works in a "safety-sensitive" position.

According to the Act, "safety-sensitive" employees are (a) police or peace officers, (b) who have drug interdiction responsibilities, (c) are authorized to carry firearms, (d) are engaged in activities which directly affect the safety of others, (e) are working for a public hospital including any hospital owned or operated by a municipality, county, or public trust, or (f) work in direct contact with inmates in the custody of the Department of Corrections or work in direct contact with juvenile delinquents or children in need of supervision in the custody of the Department of Human Services.

A safety-sensitive position is one in which the duties involve "such a great risk of injury to others that even a momentary lapse of attention can have disastrous consequences."[vii]

Courts have determined that armed law enforcement officers, as well as, firefighters, emergency medical technicians, heath care professionals responsible for direct patient care, people who operate, repair, and maintain passenger-carrying motor vehicles, drivers of sanitation trucks are clearly safety-sensitive positions.

On the other hand, janitors, clerks, receptionists, general office staff, accountants, attorneys typically do not fall into the category of safety-sensitive.

Identifying safety-sensitive positions is not always easy though. What about a 911 dispatcher? If this position is responsible for relaying directions and other preparatory information to first responders, a mistake could result in a delay that costs people their lives. So the position would likely be considered safety-sensitive. A bus dispatcher, then? Although a bus dispatcher whose performance is impaired might give incorrect information to a driver, possibly leading to a delay, in the ordinary course of events, an immediate threat to public safety is unlikely.

Determining which employees may legitimately be deemed safety-sensitive is the most critical part of developing a comprehensive drug and alcohol testing policy. Municipalities that randomly test individuals who do not hold safety-sensitive positions can be liable for violations of State and/or Federal law.

If an employee sues and is successful, the Act allows the employee to recover lost wages, liquidated damages, and attorney's fees and costs.

Whether your municipality has a drug testing program or is contemplating a program, you should consult with your City Attorney to be sure that State and Federal law are being followed.

If you have questions or need a sample drug testing policy, you can contact Suzie Paulson, Associate General Counsel (spaulson@omag.org) or Matt Love, Associate General Counsel (mlove@omag.org) or you can call 405-657-1400.

Disclaimer: The information in this bulletin is intended solely for general informational purposes and should not be construed as or used as a substitute for legal advice or legal opinion with respect to specific situations, since such advice requires an evaluation of precise factual circumstances by an attorney.

[i] 40 O.S. §§ 551-563

[ii] "Applicant" is defined as a person who has applied for a position with an employer and received a conditional offer of employment. 40 O.S. § 552(2)

[iii] "Employee" is defined as any person who supplies labor for remuneration to his or her employer in this state and shall not include an independent contractor, subcontractor or employees of an independent contractor unless subject to contractual terms that may require contractors to be drug

tested. 40 O.S. § 552(8)

[iv] 40 O.S. § 555

[v] 40 O.S. § 554

[vi] 40 O.S. § 557-558

[vii] Skinner v. Railway Labor Executives Association, 489 U.S. 602, 628 (1989)