

EMPLOYMENT ALERT

EMPLOYERS FAVORED IN NEW OKLAHOMA DRUG AND ALCOHOL TESTING LAW AMENDMENT

On May 9, 2011, Governor Mary Fallin approved a bill that makes substantial changes to workplace drug and alcohol testing programs. The bill amends Oklahoma's Standards for Workplace Drug and Alcohol Testing Act and is effective November 1, 2011. The amendment provides clarification for some types of testing and removes several requirements that are in the current Act.

The Amendment Gives Employers More Latitude in Testing

- **For-Cause Testing:** "For-Cause" testing (formerly "Reasonable Suspicion" testing) is when an employer reasonably believes an employee may be under the influence of drugs or alcohol. The amendment provides clarification of circumstances which employers can rely on in forming a reasonable belief. Examples are negative performance patterns or excessive or unexplained absenteeism or tardiness.
- **Post-Accident Testing:** Employers will be allowed to test employees when company property, including equipment, has been damaged, regardless of the dollar value of the damage. The amendment removes the requirement that the damage must exceed \$500.00.
- **Random Testing:** The amendment removes the random selection mechanism. Instead, private employers will be able to require a single employee or all members of an employment classification or group to undergo random testing.
- **Hospital Employees:** Public hospitals, including any hospital owned or operated by a municipality, county, or public trust, will be able to require random and scheduled, periodic testing of their employees.
- **Testing of Independent Contractors:** Independent contractors, subcontractors, or employees of independent contractors may be tested if the contractual agreement allows for such testing, and the testing applies to other workers who are at the job site or who are in the same or similar job classification or group.
- **Other Testing:** The amendment provides that an employer may adopt a policy for testing by any method that is reasonably calculated to detect drugs or alcohol, including the use of a breathalyzer or a single-use testing device (known as an on-site or quick testing device).

The Amendment Removes Many Employer Requirements

- **Confirmation Tests Will Not Be Required:** An initial positive test result will no longer need to be confirmed by a subsequent confirmation test, except in the case of a positive breathalyzer test, which must be confirmed if the results are grounds for immediate termination. However, an applicant or employee will be able to request a confirmation test to challenge a positive test result within 24 hours of notice of the positive test. The applicant or employee must pay the cost of the confirmation test unless it reverses the positive test.

- **Employee Assistance Programs Will Not Be Required:** The amendment removes the requirement that employers must have an employee assistance program in order to test for drugs or alcohol.
- **Written Policy:** Employers will have more flexibility in the content of their written policy. For example, it will be sufficient to state that the substances tested will be drugs and alcohol, without naming the drugs or referring to the Act. The amendment also eliminates the requirement of posting the policy in the workplace. However, posting the policy and any amendments will accomplish the requirement to provide a copy of the policy to employees.
- **Implementing the Policy:** The amendment reduces the required notice period prior to implementing a new or revised policy from 30 to 10 days.

The Amendment Provides More Protection to Employers

- **Civil Actions:** The amendment reduces the time for an applicant or employee to file a civil action from two years to one year. Damages are also narrowed to lost wages and an additional equal amount as liquidated damages. An employer may be awarded reasonable costs and attorney fees if the employer is the prevailing party in the litigation.
- **Criminal Penalties:** The amendment removes criminal penalties for willfully and knowingly violating the Act.
- **Denial of Unemployment Benefits:** To prove misconduct for purposes of unemployment compensation benefits, the employer will only need to provide proof of a testing policy and either a refusal to take a drug or alcohol test or a positive test result.

What This Means for You as an Employer

While the changes in the law are generally favorable to employers, implementation will require revisions to current drug and alcohol testing policies. If your drug and alcohol testing policy was implemented under the current version of the Act, you will need to amend it and provide notice to your employees of the revised policy by October 21, 2011. Similarly, if you do not have a policy and plan to test applicants and employees, you will need to implement a policy that is consistent with the Act as amended. This Alert does not capture every change resulting from the amendment of the Act. Rather, it is designed to provide highlights of some of the more significant changes. We want you to be as informed as possible about these changes and what they mean for you as an employer. If you have any questions or would like assistance in complying with the changes in the Act, please do not hesitate to contact us.

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