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OKLAHOMA LEGISLATURE PASSES NEW DRUG AND ALCOHOL TESTING ACT

Since the original adoption of Oklahoma's Standards for Workplace Drug and Alcohol Testing, OKLA. STAT. tit. 40, § 551, *et seq.* ("Testing Act") in 1993, an employer's power to enforce a policy promoting an alcohol- and drug-free workplace has been significantly curtailed by administrative burdens and the threat of hefty sanctions on employers who violated the Testing Act.

The inequities of the Testing Act were exposed when a terminated employee challenged a positive drug test in the U.S. District Court for the Northern District of Oklahoma. In that case, the employer discharged an employee following a positive test for a Phenobarbital, a schedule IV drug. However, the Oklahoma Board of Health, which had regulatory authority under the Testing Act, had not approved testing of schedule IV drugs. Because, as the court determined, the employer was responsible to know its limitations under the Testing Act, including regulations promulgated by the Board of Health, the court found as a matter of law that the employer willfully violated the Testing Act and was liable for the employee's damages. *Creekmore v. Pomeroy IT Solutions, Inc.*, No. 10-CV-0091-CVE-PJC, 2010 U.S. Dist. LEXIS 97296 (N.D. Okla. 2010).

This legislative session, Representative Dan Sullivan sponsored HB 2033, a bill significantly scaling back the restrictions on employers wishing to enforce an alcohol- and drug-free workplace policy and creating a more equitable solution for those wishing to challenge an employer's enforcement actions. HB 2033 passed both houses unanimously, was signed into law by Governor Mary Fallin on May 9, 2011, and will take effect November 1, 2011. Some of the most significant changes made to the Testing Act include:

1. Reasonable suspicion testing has been replaced with "for-cause" testing, which substantially expands the grounds for testing to include, for example, negative performance patterns or excessive or unexplained absences. § 554(2) (as amended).
2. A post-accident test may now be administered on an employee who damages an employer's property regardless of the value of the property. § 554(3) (as amended).
3. An employee's refusal to undergo a post-accident drug and alcohol test is now sufficient to bar the employee's right to workers' compensation benefits. Further, an employee who tests positive or refuses to take a drug test is no longer entitled to show the drug or alcohol use was not the proximate cause of the injury or accident in claiming workers' compensation benefits. In other words, the positive test bars the employee from benefits regardless of the circumstances of any injury. § 554(3) (as amended).
4. While an employer must pay the costs of the initial drug or alcohol test, an employee requesting a confirmation test must generally pay all costs of the confirmation test, subject to reimbursement if the confirmation test reverses the finding of the initial test. § 556 (as amended).
5. The State Board of Health has lost its power to dictate how the drug or alcohol tests can be performed and what drugs may be tested for, but retains the power to regulate Oklahoma testing facilities. § 557(A) (as amended).

6. An employer may now adopt a policy which allows testing for drugs or alcohol by other methods which are reasonably calculated to detect the presence of drugs or alcohol including on-site testing devices and breathalyzer tests. § 557(B) (as amended).
7. An employer is no longer required to provide an employee assistance program before testing can be performed. § 561 (repealed).
8. The statute of limitations for bringing an action against an employer for willful violation has been reduced from 2 years to 1 year and “willful violation” has been defined to require a showing of specific intent to violate the Testing Act. An applicant or employee’s remedy is now limited to monetary damages, subject to the employee’s duty to mitigate damages by, for example, finding alternate employment. Finally, the prevailing party, specifically including an employer, may be awarded reasonable costs and attorney fees. § 563 (as amended).
9. Section 565 of the Testing Act, which imposed criminal penalties for violations of the Testing Act, has been repealed.
10. The implementation or amendment of a policy only requires only 10 days notice to employees before the policy can be effective (reduced from 30 days). Notice may now be delivered by e-mail, posting it on an employer’s website, or posting it in a prominent employee access area. § 555(B) (as amended).

With the adoption of HB 2033, the legislature has taken a common-sense approach to balancing the privacy rights of employees with the interest of employers who wish to keep drugs and alcohol out of the workplace. For Oklahoma employers, now is the time to begin reviewing your current drug and alcohol testing practices and take advantage of the amendments for implementation of a revised policy on November 1, 2011.

For many employers, the amendment removes restrictions that had acted as a barrier to enforcement of an effective alcohol and drug-free workplace policy. Failure to implement and enforce an alcohol and drug-free workplace policy exposes such employers to potential liability to customers or other third parties who may come in contact with their employees. Those employers should consider this the perfect opportunity to develop a written policy to minimize the use of alcohol and drugs in the workplace and reduce liability exposure.

Should you have any questions regarding the information contained in this article, please do not hesitate to contact Kirk Turner at (918) 587-0101, or by email at kturner@newtonoconnor.com.

W. Kirk Turner, Vice President, Legislative Affairs for TAHRA, is honored to have been intimately involved in the development, drafting, negotiation and passage of HB 2033.