

PERSPECTIVES

Winter 2008/2009

A periodic newsletter from the Labor & Employment Law Group at Dickinson Mackaman Tyler & Hagen, P.C.

"Instant" Drug Tests

by RUSSELL L. SAMSON

In recent weeks, employment attorneys at the firm have received an increasing number of inquiries on the use of "instant" drug tests. As those attending the 2008 Employment Law Client Seminar heard from a representative of Iowa Workforce Development, during the period from January 1, 2008, to October 8, 2008, the agency awarded unemployment compensation benefits to employees who had tested positive for drugs / alcohol in 36 out of 69 cases. Logic would suggest that an individual whose employment was terminated as the result of a "positive" drug or alcohol test would be prevented from receiving unemployment benefits under the "misconduct" disqualification. Logic does not always hold sway in this particular arena. The Iowa drug testing statute – Iowa Code Section 730.5(15)(b) – provides in part that in an action where it is alleged that the employer requested or required a drug test in violation of the statute's provisions, the employer has the burden of proving that the requirements of this section were met. The Iowa Supreme Court has instructed that the statute's requirements are to be strictly construed against the employer. And the Iowa Supreme Court held that an employer could not base a "misconduct" discharge on an illegal test. It is under those standards that employees with positive drug tests are being awarded unemployment compensation benefits.

The Iowa statute has several mandates which are included primarily for the protection of the individual. One example which has been specifically addressed by the Supreme Court is the requirement that notice of test results be given to an employee "in writing, by certified mail return receipt requested." Even if an employee has actual knowledge, failure to meet the statutory mailing requirement may render the testing out of compliance.

An employer considering the use of an "instant" drug test should assure that it will be able to demonstrate compliance with all of the provisions of the law.

Initially, one should examine protocols and requirements to assure that when a specimen is initially collected, there is **nothing** done which might lead to a claim that there was a breach of the requirement that the collection be done "so as to reasonably preclude the possibility of sample contamination, adulteration, or misidentification." If one puts something in the specimen – from a pipette to some litmus paper or other substance – there may be an argument that the specimen was "contaminated."

Given the requirement that if the specimen is urine, the specimen be divided into two components at the time of collection in front of the donor, one could obtain the specimen in a collection cup, immediately fill the two jars in front of the donor, and then run the "instant" test on so much of the specimen as remains. If the instant test is negative, there is no need for additional testing and the two jars with the split specimen can be disposed of properly. This would also appear to meet the chain of custody requirements generally, noting that those requirements begin at the time of initial collection.

The Iowa statute specifically recognizes the possibility of two different specimens for a single testing for alcohol. The first test may be an "instant" saliva alcohol screening device; the second confirmatory test must be a "breath as specimen" test using a federally-approved evidential breath testing device. There is no court decision that answers the question of whether an employer can use one type of specimen for an "instant" test for drugs, and, if a confirmatory test is needed, direct an employee to submit a different sample. (For example, running an "instant" saliva test, and, if it is positive, directing the employee to provide a urine specimen.)

While the requirements of a number of other states require that all drug testing be done in an "approved" laboratory, Iowa's statute does not impose that requirement for the initial screening test for drugs. It does require that if there is an initial positive test — the

results of the "instant" test, for example – the results be confirmed by an "approved laboratory" using (except for breath alcohol testing) GC/MS or some other "comparably reliable analytical method." The Iowa statute also permits an employee to designate a laboratory of her or his own choosing to run a test on the second portion of the "split sample." The specimen / collection system an employer is using must have such a degree of acceptability that any and every laboratory on the Substance Abuse and Mental Health Services Administration's ("SAMHSA's") "approved" list will run confirmatory testing. If not, there is potentially a huge hole: The employee with a "confirmed positive" test result need only designate an "approved lab" that declines to test the sample. An employer could then be unable to meet the requirements of the statute. The discharged employee will at a minimum get unemployment compensation benefits, and the "employer" will potentially face a wrongful discharge action, with exposure for back pay, attorney fees, and possible reinstatement.

The lesson should be clear. If an employer is considering using any testing other than the traditional urine testing for drugs and the traditional breath testing for alcohol, it needs to pmake certain it can demonstrate compliance with each and every "technical" requirement of the statute.

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