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DRUG & ALCOHOL TESTING UNDER IDAHO LAW Just Say No to Drugs & Alcohol in the Workplace

by Dylan A. Eaton

Some assert that employee drug and alcohol abuse costs employers billions of dollars each year in decreased productivity, increased liability exposure, and higher workers' compensation insurance premiums. It is important for employers to provide a drug-free workplace to keep costs down and preserve a safe work environment for employers, employees and customers.

One tool an employer has to tackle drug and alcohol use and abuse in the workplace is to institute a drug and alcohol testing program. Notice to employees that such a program exists at a business can act as a deterrent and potentially reduce the use of such substances in the workplace. Additionally, implementing such testing can help an employer identify employees who have alcohol and drug problems so they can address the issues.

Idaho has enacted a law that provides employers with guidelines on alcohol and drug testing. While the law does not make drug or alcohol testing mandatory, compliance with the law is mandatory if an employer wants to benefit from its provisions and protections. This article will discuss Idaho's drug and alcohol testing law.

Purpose of the Idaho Employer Alcohol and Drug-Free Workplace Act

Idaho's law on drug and alcohol testing is known as the Employer Alcohol and Drug-Free Workplace Act ("Act"). Under this statute, it is lawful for a private-sector employer to test employees or prospective employees for the presence of drugs or alcohol as a condition of hiring or continued employment. Public-sector employers may also complete testing under this law, but have additional considerations and constraints, as will be covered later in this article. Employers must consider compliance with other laws, including but not limited to the Americans with Disabilities Act. The Act allows employers to use the results of a drug or alcohol test conducted by a third party, such as law enforcement agencies or hospitals, as a basis for determining whether an employee has committed misconduct. The Act also does not change the at-will status of any employee.

In general, the Act was established because the Idaho legislature wanted to promote alcohol and drug-free workplaces so that employers could enhance workplace safety, increase and maximize the levels of business productivity, enhance businesses competitive positions in the marketplace, and so that business could reach their desired levels of success without experiencing the cost delays and tragedies associated with work-related accidents resulting from substance abuse of employees. Additionally, one of the main purposes of the Act was to "establish voluntary drug and alcohol testing guidelines for employer that, when complied with, will find an employee who tests positive for drugs or alcohol at fault, and will constitute misconduct under the employment security law ... thus resulting in the denial of unemployment benefits." When an employer discharges an employee, the worker is entitled to unemployment benefits if "unemployment is not due to the fact that he left his employment voluntarily without good cause connected with his employment, or that he was discharged for misconduct in connection with is employment." The Idaho Supreme Court has defined misconduct as "a willful, intentional disregard of the employer's interests; a deliberate violation of the employer's rules; or a disregard of

the standards of behavior which the employer has a right to expect of its employees.” The Act expands on this definition and provides that if the employer follows its testing guidelines, employees testing positive for drugs or alcohol are automatically deemed guilty of misconduct and will be denied unemployment benefits.

Idaho’s Act has not been heavily litigated. In 2006, however, the Idaho Supreme Court addressed drug testing in a case, *Desilet v. Glass Doctor*, which involved an employee who tested positive for marijuana and as a result of failing the drug test, was discharged from the company. One issue in this case was whether an employee is automatically entitled to unemployment benefits if the employer fails to comply with the drug testing guidelines in the Act. The Idaho Supreme Court answered this question with a no. Failure to comply with the Act does not mean that the employee is automatically entitled to unemployment benefits. The Court began its analysis by reiterating that compliance with the Act’s drug and alcohol testing guidelines is “voluntary.” The Court stated that the benefit to the employer is that if the Act’s testing guidelines are followed and an employee is discharged for failing a drug test, then there is a presumption that the employee committed misconduct and is not entitled to unemployment benefits. The Court further held that if an employer does not comply with the Act’s testing guidelines, then an employer simply does not get the benefit of this legal presumption. The Court went on to state that an employer who does not comply with the Act’s guidelines may still be able to establish misconduct for purposes of determining whether an employee is entitled to unemployment benefits. Practically, however, proving misconduct in this situation is much easier when an employer is in compliance with the Act.

For employers that comply with the Act, the law identifies specific instances that constitute misconduct for purposes of denying unemployment benefits. It is deemed misconduct when an employer shows that: (1) the employee had a positive alcohol test not less than .02 blood alcohol content, but greater than the level specified in the employer’s substance abuse policy, (2) the employee refused to provide a sample for testing, (3) the employee altered or attempted to alter a test sample by adding a foreign substance for the purpose of making the sample more difficult to analyze, or (4) the employee submitted a sample not their own.

An employer may require or take various actions under the Act, including rehabilitation, treatment or counseling programs as a condition of continued employment, suspension of the employee with or without pay for a period of time, or termination of the employee.

The Requirement of a Written Policy

If an employer chooses to implement a drug and/or alcohol testing program in compliance with the Act, a written testing policy is required. The policy must include a statement that violation of the policy may result in termination due to misconduct. Testing must be carried out consistent with the policy. Also, the employer must list the types of tests an employee may be subject to in their written policy, such as baseline, pre-employment, post-accident, random, return to duty, follow-up, and reasonable suspicion tests. Employees and prospective employees must be provided with a copy of the policy. As a practical matter, the employer should obtain from every employee or prospective employee a signed and dated document acknowledging that they received, read and understood the policy.

Drug and alcohol testing guidelines in the Act do not necessarily have to be followed, however, when an employer is subject to a collective bargaining agreement. Those employers will still receive the full benefits of the Act, even if its drug and alcohol testing policy does not conform to all of the statutory provisions, if it follows a drug or alcohol testing policy that was negotiated with its employees’ collective bargaining representative or that is consistent with the terms of the collective bargaining agreement.

Costs of Drug Tests and Provisions for Retesting

Idaho’s Act provides that all costs of drug and alcohol testing for current or prospective employees shall be paid by the employer. An employee or prospective employee who has a positive test result may request that the sample be retested by a mutually agreed upon laboratory. A request for retest must be made within seven (7)

working days from the date of the first confirmed positive test notification and may be paid for by the employee or prospective employee requesting the test. If the retest results in a negative test outcome, the employer must reimburse the costs of the retest, compensate the employee for their time if suspended without pay, or reinstate the employee with back pay if terminated solely because of the positive test.

What Happens When Tests are Positive

If the employer implements a drug and alcohol policy under the Act, any employee or prospective employee who tests positive for drugs or alcohol must be given written notice of that test result, including the type of substance involved, by the employer. The employee must be given an opportunity to discuss and explain the positive test result with a medical review officer or other qualified person. These notice provisions have practical considerations. For example, a physician may have prescribed moderate doses of prescription medications that could create a false positive test. An employer should not jump to conclusions and make reasonable efforts, such as those required by the Act, to fully investigate the circumstances surround the positive drug or alcohol test.

What Testing Guidelines are Required Under the Act?

Employers, or the agent hired by the employer, should be very familiar with the testing condition required under the Act, which are implemented in large part in an attempt to avoid false positives or skewed test results. The employer or employer's agent who is responsible for collecting the sample must be instructed as to the proper methods of collection. The collection of samples must be performed under reasonable and sanitary conditions. Samples shall be collected and tested, with due regard to the privacy of the individual being tested, and in a manner reasonably calculated to prevent substitutions or interference with the collection or testing of reliable samples. Sample collection shall be documented with labels to avoid misidentification and in accordance with reasonable chain-of-custody and confidentiality procedures. The test samples shall be collected, stored and transported in a manner to reasonably preclude sample contamination or adulteration. Sample testing shall conform to scientifically accepted analytical methods and procedures. Drug testing shall include a confirmatory test before the result of any test can be used as a basis for denying unemployment benefits under Idaho's workers' compensation laws. A confirmatory test refers to the mandatory second or additional test of the same sample that is conducted by a laboratory utilizing a chromatographic technique such as gas chromatography-mass spectrometry or another comparable reliable analytical method. Positive alcohol tests resulting from the use of an initial screen saliva test must include a confirmatory test that utilizes a different testing methodology meant to demonstrate a higher degree of reliability. Positive alcohol tests resulting from the use of a breath test must include a confirmatory breath test conducted no earlier than fifteen (15) minutes after the initial test; or the use of any other confirmatory test meant to demonstrate a higher degree of reliability.

Although the Act is not heavily litigated, it is worth noting that in May 2009, a lawsuit was filed in Blaine County, Idaho, involving the termination of an employee due to an alleged false positive drug test. Among other things, the lawsuit seeks reinstatement of the employee and back pay under the Act. The case is currently pending, but is a good reminder that an employer should be careful with its testing procedures.

Limitations on Employer Liability

There was concern that by passing the Act, it may create new types of lawsuit that could be filed against the employer. Therefore, the Act specifically limits legal actions related to the Act. In particular, the Act itself does not create a right to sue an employer based on its policy of drug or alcohol testing in accordance with this law. Additionally, an employer may not be sued if: (1) the employer fails to test for drugs or alcohol or for a specific drug or other substance, (2) the employer fails to test for, or if tested, failed to detect any specific drug or other physical abnormality, problem or defect of any kind, or (3) the employer terminates or suspends a drug or alcohol testing program or policy.

In any lawsuit where it is alleged that an employer's action was based on a false positive test result, the Act provides that there is a rebuttable presumption in the law that the test result was valid if the employer complied with the conditions of testing required by the Act. The Act provides that the employer is not liable for monetary damages if its reliance on a false test result was reasonable and in good faith. Additionally, there is no employer liability for any action taken related to a "false negative" drug or alcohol test.

Confidentiality of Information

Any information received through the substance abuse testing program is to be kept confidential and is intended to be used only for an employer's internal business use. Employers may maintain this confidentiality by storing test results in confidential health files separate from the personnel file.

Reduction in Workers' Compensation Insurance

Another benefit and incentive to Idaho employers who comply with this Act is a reduction in premiums associated with workers' compensation. For each policy of worker's compensation insurance issued or renewed in Idaho on or after July 1, 1999, a reduction in the premium for the policy may be granted if the insurer determines the employer has established and maintains an alcohol and drug-free workplace program that complies with the Act.

Mandatory versus Voluntary Testing

While the Act addresses voluntary drug and alcohol testing, there is one mandatory provision under the Act for Idaho employers. In Idaho, a business is only eligible for the award of any state contract for the construction or improvement of any public property or publicly owned buildings if the business or its subcontractors have implemented a drug-free workplace program that complies with the Act.

Employers should be separately aware that there is a federal Drug-Free Workplace Act that imposes mandatory requirements in certain cases. The Drug-Free Workplace Act requires some Federal contractors and all Federal grantees to agree that they will provide drug-free workplaces as a condition of receiving a contract or grant from a Federal agency. The Act does not apply to those who do not have, nor intend to apply for, contracts/grants from the Federal government. The Act also does not apply to subcontractors or subgrantees. In general, the Act requires contractors and grantees to publish a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited and specifying the actions that will be taken against employees for violations of such prohibition and requiring the contractors and grantees to establish and notify employees of a drug-free awareness program. Drug testing is neither required nor precluded under the federal Act. Alcohol and nonprescription drug abuse programs are not required by this federal Act. A contractor or grantee who fails to carry out the requirements of the Drug-Free Workplace Act can be penalized in various ways, including suspension or termination of the federal contract or grant, suspension of payments for contract or grant activities, prohibition from being awarded future federal contract or grants. Compliance with these requirements are reviewed as part of a normal Federal contract and grant administration and auditing procedures.

Idaho's Act and Public Sector Employers

Although the focus of Idaho's Employer Alcohol and Drug-Free Workplace Act is on the private sector, a public sector employer may also conduct drug and alcohol testing of employees pursuant to the Act. These public sector employers must also consider constitutional issues, however, that may be raised by the implementation of drug and alcohol testing programs. For example, a public sector employer needs to make sure it is not violating "due process" or privacy rights under the U.S. Constitution's Fifth Amendment and take care to avoid unlawful searches under the Fourth Amendment. A public sector employer implementing a drug or alcohol testing program should first seek advice from an attorney regarding these additional complexities.

Bottom Line

Idaho employers who require drug and alcohol testing should carefully consider the guidelines set out in the Employer Alcohol and Drug-Free Workplace Act. These guidelines were established by the Idaho legislature and have been scrutinized with approval by the courts. Compliance has both practical and monetary benefits beyond the cost and safety controls associated with drug testing. Employees who violate the policy are likely to be found ineligible for unemployment benefits. Additionally, employers can obtain a reduction in their workers' compensation premiums if they create and institute a drug-free workplace program consistent with the Act. Finally, employers are better protected to defend against and in some cases are completely shielded from lawsuits associated with testing if they comply with the Act.