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Labor and Employment Alert: West Virginia's Safer Workplace Act Dramatically Revises the State's Drug Testing Policies

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West Virginia recently enacted the Safer Workplace Act to advance “the confidence of West Virginia workers that they are in safe workplaces ... by recognizing the right of West Virginia’s employers to require mandatory drug testing.” The act is a significant departure from prior law that had strictly limited drug testing of current employees. The act, which is effective July 7, 2017, expands employers’ ability to drug/alcohol test applicants and employees. Now, “it is lawful for an employer to test applicants or employees for drugs or alcohol as a condition of continued employment or hiring.” There is an important caveat to this. “In order to qualify for a bar from being subjected to legal claims for acting in good faith on the results of a drug or alcohol test, employers must adhere to the accuracy and fairness safeguards outlined in [the act].”

Drug Testing

Drug/alcohol testing must be carried out under “a written policy which has been distributed to every employee subject to testing, and is available for review by prospective employees.” The policy may require testing for “legitimate drug abuse prevention and/or treatment purposes,” such as deterrence and detection of drug/alcohol use; investigation of employee impairment, workplace accidents, theft, or other misconduct; or maintaining safety, productivity, quality, or security. Testing is not limited to circumstances where there are indications of individual, job-related impairment.

Drug/alcohol testing of employees must occur during, or immediately before or after, a regular work period, and is deemed worked time for the purposes of compensation and benefits. The employer must provide transportation if the testing occurs beyond the normal worksite, and must also pay for any required testing for employees and applicants. The act sets out additional testing procedures employers must follow.

An employer may use a positive test or refusal to test as a valid basis for disciplinary and/or rehabilitative actions. Such actions may include referral to a rehabilitation program (which may be a condition of continued employment); suspension; termination; refusal to hire; or other adverse employment action “in conformance with the employer’s written policy and procedures.”

Employer’s Protections from Liability

Employers who adopt compliant testing policies enjoy broad protections against liability. Under the act, there is no cause of action against an employer based on the results of a confirmed positive test or the refusal to submit to a test; for failure to test for drugs/alcohol; for failure to test for or detect any specific drug or medical condition; or for ending a substance abuse prevention or testing program.

There is also no cause of action when the employer takes action based on a false positive test result, unless employer had actual knowledge that the result was in error, and ignored the true test result because of disregard for the truth and/or the willful intent to deceive. The act creates a rebuttable presumption that the test result was valid if the employer had compliant testing procedures; the employer is not liable for monetary damages if its reliance on a false positive result was reasonable and in good faith. And there is no liability for any action taken related to a false negative drug/alcohol test.

Finally, there is no cause of action for defamation, libel, slander, or damage to reputation unless (1) the test results were disclosed to a person other than the employer, the tested employee, or the tested applicant; and (2) all elements of that cause of action are satisfied.

Drug-Free Workplace Programs

If an employer has a drug-free workplace program, an employee who tests positive may be terminated, forfeits eligibility for unemployment benefits, and forfeits workers’ compensation benefits if injured at the time. For this forfeiture to occur, the program must notify employees that it is a condition of employment to refrain from reporting to work or working with the presence of drugs or alcohol in his body; and state that an injured employee who refuses to submit to the forfeits those benefits.

Conclusion

Employers in West Virginia with current drug/alcohol policies, as well as those considering implementing them, must ensure they comply with the Safer Workplace Act’s requirements. In addition, employers must consider how West Virginia’s [new medical marijuana law](#) may impact how such policies are applied in the workplace. Contact your Vorys lawyer if you have questions about the new act, medical marijuana, or the interaction between the two.