

West Virginia Enacts Law Permitting Broad Employment-Related Drug And Alcohol Testing

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Workplace drug and alcohol testing in *West Virginia* traditionally has been scrutinized by the courts and has been available to employers in limited circumstances. That will change dramatically this summer when the state's new drug and alcohol testing law, the ***West Virginia Safer Workplace Act***, takes effect. Passed by the state legislature on April 8, 2017 and signed by the Governor on April 26, 2017, the Safer Workplace Act will significantly broaden the circumstances under which employers may conduct workplace drug and alcohol testing. The law takes effect on July 7, 2017.

There are many key provisions that are beneficial to employers; however, employers must comply with all of the requirements of the statute in order to take advantage of its benefits.

First and foremost, employers who plan to test employees for drugs or alcohol are obligated to have a written policy that must be distributed to every employee subject to testing. With a compliant written policy, employers are permitted to conduct drug and alcohol testing for a wide variety of legitimate employment-related reasons including: deterrence and/or detection of possible illegal drug use, on or off the job, or the abuse of alcohol or prescription drugs; investigation of possible impairment; investigation of accidents or employee misconduct; maintenance of safety; and, maintenance of productivity.

The Act mandates that any testing of employees must occur during, or immediately before or after, a regular work period. Under the new law, drug and alcohol testing "is worked time for the purposes of compensation and benefits for current employees." Additionally, employers are required to "pay all actual costs for drug and/or alcohol testing" of both current and prospective employees. If the required tests are conducted at a location away from the employee's normal work site, the employer must also "provide transportation or . . . pay reasonable transportation costs to current employees."

The Act also provides West Virginia employers with specific guidelines to be used during the testing process (including, for example, the use of a certified or approved laboratory; confirmatory testing by gas chromatography/mass spectrometry or another comparably reliable technique; allowing the tested individual to provide information that may be relevant to a positive test result; offering the tested individual the right to have a split specimen test at a different laboratory at his/her expense; among other things).

If a tested individual receives a confirmed positive drug or alcohol test result, or if a tested individual refuses to provide a specimen, the Act permits employers to take disciplinary and/or rehabilitative actions, such as: (1) a requirement that the employee enroll in an employer-provided or approved rehabilitation, treatment and/or counseling program; (2) suspension of the employee, with or without pay, for a designated period of time; (3) termination of employment; (4) refusal to hire a prospective employee; and/or, (5) other adverse employment action in conformance with the employer's written policy and procedures, including any relevant collective bargaining agreement provisions.

Significantly, the Act permits employers to take action against "sensitive" employees who test positive. A "sensitive" position is one in which an accident could cause loss of human life, serious bodily injury, or significant property or environmental damage. If such an employee tests positive for drugs or alcohol, an employer is permitted to permanently remove the employee from the sensitive position and transfer or reassign the employee to an available non-sensitive position with comparable pay and benefits, or may take any other action, including termination or other adverse employment action, consistent with the employer's policy (provided there are no applicable contractual provisions that would prohibit such actions).

If a West Virginia employer establishes a policy and program in accordance with the requirements of the statute, there are additional benefits, including:

- no cause of action by an applicant or employee who has been subjected to an adverse employment action as a result of a positive test result or a refusal to test (unless he/she can show the employer's action was based on a false positive test result and the employer had knowledge that the result was in error but disregarded the truth);
- an employee who tests positive may be terminated and forfeits his or her eligibility for unemployment compensation benefits and, if injured at the time of the intoxication, indemnity benefits under the Worker Compensation Laws. The employer's policy must expressly notify employees of these provisions in order for an employer to utilize them.

It is imperative for West Virginia employers to have a written policy that complies with the requirements of the Safer Workplace Act in order to take advantage of the law's many benefits. Employers with operations in West Virginia should review their drug and alcohol policies and consult with counsel to make their policies compliant.

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