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Legal Considerations in Drug Use Testing: Privacy Rights, Contracts, and Wrongful Use of Test Results

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ABSTRACT: Although there are many legal issues associated with substance abuse testing, this presentation deals with only three areas: privacy, employee contractual concerns, and wrongful use of test results. Privacy must be considered under the federal and state constitutional guarantees to public employees, or whether one is a private employee so as not to determine applicability. In addition, there are state and federal statutes to deal with along with private civil actions such as the tortious invasion of privacy. Under contractual relationships, courts have gone a long way from allowing termination-at-will to public policy exceptions of forensic and implied covenants and guarantees of requiring just cause before discharge. Union involvement may necessitate bargaining in the implementation of substance abuse testing. The wrongful use of test results most often leads to actions of defamation.

KEYWORDS: jurisprudence, workshop, drug use testing, privacy, defamation

The testing of employees and potential employees for substances of abuse has become an emotional issue on all sides. Regardless of the emotionalism involved, we must be aware of the many legal issues surrounding the acquisition of the urine specimen, the analysis, and the use of the results. These legal issues are important not only to the employee being testing and the employer requesting such testing, but also to the laboratory involved in testing. Because of the potential impact the results might have on a tested employee and their pivotal importance in a judicial proceeding, the test is of a forensic science nature. Because the laboratory is a key element in employee substance abuse testing, it should have enough understanding of the legal issues involved to know whether to enter a contractual relationship with an employer wishing this type of urine testing or whether additional information should be sought, or both. In this light, three issues will be addressed which cover employee privacy, contractual considerations between the employee/employer, and wrongful use of test results.

Privacy Issues in Drug Testing

The protection of one's privacy may be controlled by the U.S. Constitution, state constitution, statutes or Civil Law precedents evolved from our Common Law, or some

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combination of these. Whatever the controlling source, testing laboratories must insure the privacy of individuals and control the security of test results so as to give them only to those individuals with a defined need to know.

The Supreme Court has recognized an implicit guarantee to the right of privacy [1]. However; in the area of substance abuse testing, this implicit right would only be applicable with the testing of governmental employees or where the government required such testing on private employees [2]. Even concerning these individuals, this privacy interest is not absolute and must be balanced against a legitimate state interest. One court held that police officers have less expectation to privacy based on this reasoning [3]. And likewise, the Fifth Circuit Court of Appeals believe that the privacy right may be limited by countervailing state interests [4]. States have used this reasoning to investigate misconduct of public officials [5] by requiring urine drug tests. Privacy interests have also been outweighed when the state has an interest on safety grounds and the individuals tested are involved in an industry already highly regulated. Such was the case when jockeys tried to prevent urine drug tests by the New Jersey Racing Commission based on their privacy rights among others, but injunctive relief was denied [6]. This approach could also be used in the nuclear industry [7].

Several states have constitutional provisions which protect the privacy rights of their citizens (Alaska, Arizona, California, Florida, Hawaii, Illinois, and Montana) [8]. Each of these states may provide varying degrees of protection to their states' citizenry. Some provisions protect each citizen, as in California [9], and some protect only public officials, as in Illinois [10]. The Fourth (4th) Amendment [11] to the U.S. Constitution guarantees the "right of the people to be secure in their personal houses, papers and effects against unreasonable searches and seizures" except upon probable cause. The giving of a urine specimen has been construed as a search under the 4th Amendment [12]. The probable cause requirement has been the major problem when random testing has been instituted on federal employees; however, the federal appellate courts have been upholding cases where the employee being tested was in a position that might affect the health and safety of the public [13]. Some commentators believe that the 4th Amendment right would probably have to be violated before a court would find any violation to the Constitutional right of privacy [14]. Regardless of the protection, their right is usually considered along with the protection against unreasonable search and seizures. Again there must be a "compelling" state interest that can override the right to privacy [6].

Separate from constitutional provisions, statutes exist which also protect the right to privacy. A federal statute [15] could protect the urinalysis results of federal employee's unless consent is given or the release of information is "necessary in light of the need of purpose of the disclosure." This typically would mean that the results might be disclosed if a major crime has been committed or is about to be committed by the individual [16]. Note again that only those with a need to know should have access to the results.

Several states have statutes that provide some protection for the right of privacy (Connecticut, Delaware, Florida, Illinois, Iowa, Minnesota, Montana, New York, North Carolina, Oregon, Rhode Island, Vermont, and Wisconsin) [17]. Statutes vary drastically. Some protect only medical information which may have limited usefulness to industrial drug screening, and others explicitly recognize a right to privacy. There statutes may provide for misdemeanor actions or recognize the right to sue. Caution should be used by laboratories in providing employers information about drugs that an employee may be using which has no abuse potential and could be construed as an invasion of medical privacy.

The tortious invasion of privacy based on common law doctrine could be a basis for a legal action when there is public disclosure of a urine drug test [18]. Two legal elements which may protect one's privacy are: (1) publicizing private affairs which the public has

no legitimate interest or (2) wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities [19]. As individuals become more public such as movie stars, their right to privacy may be abridged by their own acts [6]. One privacy issue that has been rarely addressed is the collection process. Laboratories and others who might contract with industry to observe collections should be aware that courts have recognized that the "passing of urine" is a very personal and private activity [4] and that urine given under direct observation increases the level of intrusion into one's private matters [20].

Impact of Contractual Relationships

Originally private employees who are not under contract or protected by union agreement could be terminated at will. That is they could be released from employment without cause. Modern decisions are recognizing a public policy exception of fundamental fairness when dealing with employees. They are therefore implying a covenant of good faith and fair dealing before discharging an employee [21]. Other implied covenants and guarantees have been invoked by the courts to protect employees [22]. In addition, there may be actual contractual obligations between the employer and employee which may form a basis for legal action. One of these covenants may include a "just-cause" clause in the employment contract or in the employment handbook upon which the employee relies. This would be a reason in testing for only drugs that may affect job performance or impinge on the safety of fellow employees (note that our common law requires that we have a safe place to work).

Other exceptions to termination at will could be statutory as exemplified by handicap statutes. The Federal Rehabilitation Act [23] considers drug abuse as a protected handicap; however, in 1979 Congress amended the statute to remove this type of protection where one is unable to function in their job because of drug addiction. Most states have similar statutes which prohibit public and private employers from discriminating against the handicapped. One should be aware that the definition of a protected handicap varies from state to state. Other laws protect individuals from removal when they are in a rehabilitation program.

Employees covered under union agreements bring into play additional statutory requirements. The National Labor Relations Act (NLRA) may require collective bargaining on urine drug-testing policies and procedures. The NLRA requires that mandatory subjects for bargaining include issues dealing with terms and conditions of employment [24]. Since the results of drug testing could affect employment, this would be subject to the bargaining process. This is one reason that the bargaining unit should be initially brought in before drug policies are set up. Many of the constitutional and statutory issues previously mentioned may be negotiated in the bargaining process, and, therefore, those involved in the analysis should be aware of the union agreement.

There are numerous statutory requirements and privacy issues that have an impact on drug testing. Many states have statutory prohibitions against the release of employee personnel information [25]. If an employee is discharged for drug use, this may be protected by one of these statutes. Additional problems come into play when state agencies require reporting of drug abuse [26], and the results thereof may have an adverse impact on the ability of one to practice his/her profession. This usually only applies to licensed individuals since licensing is a state function. Note, however, that mandatory reporting requirements are not common. Some states have more discretionary statutes [27] and only state that some incapacity should be reported. When these issues come up, an employer should be aware of the conditions that limits their liability; otherwise, they may be subject to an employee claim of invasion of privacy or defamation.

Wrongful Use of Urine Drug-Test Results

As indicated earlier, urine drug test results should be released to only those with a need to know when there is no consent from the employee. Besides the privacy issue, defamation actions may arise. Defamation may be a result of assertions made by employers based on inaccurate results or not fully substantiated performance ratings [28]. These assertions must be made to third parties. Laboratories should be aware that they will become the defendant if inaccurate results are obtained or if they are negligent in not following proper established procedure. One Texas case involved reporting inaccurate test results to seven company officials and resulted in a \$200 000 settlement [28]. Here the screening tests showing methadone in the urine were released prematurely. The confirmation test indicated that the compound in the urine was not methadone. When the assertion is malicious, a claim for mental suffering can also ensue [29]. Even though an employer informs no one else about the supposed drug use of a discharged employee, a defamation suit could result based on recent theories accepted by courts. One case held that when a fired employee gave information to a potential employer when asked, a compelled self-declaration was made and equivalent to the past employer giving the information to a third party [30]. Note, however, that the truth is a complete defense to defamation. Internal investigations of company employees where the drug tests were negative have been held to be nondefamatory actions [31]. In this case, again, the internal communication concerning the drug screens were only to appropriate individuals with a need to know the results.

Summary

There are many other legal issues dealing with substance-abuse testing than those presented herein. The privacy issues are interrelated with many other legal concerns, including constitutional concerns of random testing when no probable cause is established. Even the three broad issues presented are interrelated and can result in real problems when information is inaccurate or incomplete and then given to individuals who do not have a need to know. The laboratory contemplating substance abuse testing which may affect one's livelihood should be aware of the many legal issues which could bring them directly into a legal suit or make them a third-party defendant. Employers seeking to establish a screening program are in need of information, since many have little knowledge about the many technical aspects of substance abuse testing.

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