

An Article by Peter H. Gunst

### **To Drug Test or Not to Drug Test . . .?**

Should an employer be worried if its employees are using drugs? The rote answer is of course yes, especially for employees that operate heavy equipment or machinery, or even simply drive company vehicles. In the event of a work-related accident, an employer must consider its liability due to an illicit drug-using employee who causes an injury to himself, other employees or the general public.

In lawyer speak, employers are vicariously liable for the physical injuries caused by the negligent conduct of employees who are acting within the scope of employment. An employer may also be liable for its own negligence in hiring or supervising the employee, especially so if the employer is aware or should have been aware of the drug use. So, if drug use contributes to work place accidents for which employers are liable, then it would seem prudent to have a drug free work place policy.

There are various types of drug testing including: pre-employment testing to screen potential new employees, random testing of existing employees, for-cause testing (i.e. there using an objective, factual, individualized reason for testing ), periodic announced testing, post accident testing, and rehabilitation testing.

An employee drug testing program is not a panacea, but comes with its own set of liability risks. Employers considering a drug testing policy must balance the risk of exposure to liability for harms caused by untested employees versus the exposure to liability by employees subject to a drug testing policy. Employees can and do sue their employers who subject them to drug testing. Such claims include invasion of privacy, defamation, wrongful discharge, infliction of emotional distress, and the list goes on. Employers can be held liable for invading employee privacy, especially if testing is done contrary to state law, so employers must check with their attorneys to see what federal, state local laws govern the particular circumstances. Many states have laws governing when, how and under what circumstances employees may be tested for drug use.

Also of critical importance is how a drug-testing program is implemented. First, any drug testing program should be in writing and be made available to each employee. Second, clearly identify under what circumstances employees will be tested and identify the consequences for failing a test. Third, the implemented policy must be applied consistently to avoid charges of discrimination or wrongful discharge. Fourth, employees should be given advance notice of the implementation of a new drug testing policy or a change in an existing testing program. Failure to do so could subject the employer to claims of invasion of employees' reasonable expectation of privacy. Fifth, keep employee test results confidential (i.e. only notify the affected employee of the test results).

At a minimum, employers should have a drug free workplace policy statement as part of a written employee handbook. If considering a drug-testing program, an employer should consult

with its employment law attorney to determine what state or federal laws govern in your particular circumstances.