

Employee Drug Testing: Hair Testing May Create More Legal Problems than it Solves

The use of illegal drugs by employees can substantially disrupt an employer's business. Many employers, therefore, seek to reduce or eliminate drug use by their employees. One tool for this purpose is testing employees for illegal drug use. However, urinalysis drug tests – tests that analyze an individual's urine for metabolites of illegal drugs – are subject to some considerable regulation in Connecticut. In order to subject a current employee to a urinalysis drug test in Connecticut, the employer must either have prior approval or mandate from a state or federal agency or must have "reasonable suspicion" that the employee is currently under the influence of illegal drugs in a manner that may interfere with his/her work.

This "reasonable suspicion" standard is problematic because whether any particular circumstances rise to that level will often be a question of fact in a lawsuit that will need to be resolved by a jury after a full trial, which most employers would rather avoid. Because the Connecticut statute – unlike similar statutes in Maine, Rhode Island and Vermont – applies only to urinalysis drug tests, some employers have sought to avoid the legal restraints on such tests by analyzing hair samples for drug metabolites instead. However, a recent decision by a federal Appeals Court in Massachusetts demonstrates that such testing may create its own legal problems.

The federal case involved the Boston Police Department, which regularly conducted tests on hair samples of employees and applicants to determine whether there were signs of illegal drug use. A group of employees and applicants sued the Department, claiming that the hair test discriminated against African Americans. As an initial matter, the proportion of African Americans testing positive exceeded the proportion of other employees testing positive to a statistically significant extent. The First Circuit Court of Appeals held that that showing was enough to require further proceedings to decide whether the test was "consistent with business necessity" and whether there were less discriminatory alternatives that would satisfy the Department's needs as well.

While the case is not over, the litigation has proceeded for about five years, and will proceed even further, at significant expense to the employer. The evidence apparently showed that hair testing may well be a process that results in higher false positives for African Americans than for individuals of other races.

If you have any questions about the issues addressed here, or any other matters involving Labor and Employment issues, please feel free to contact:

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In addition, hair testing does not test for the characteristic in which the employer is most interested – evidence that the employee was under the influence of drugs at a particular time. Metabolites of illegal drugs are deposited in hair about a week after use, and then remain in the newly grown portion of hair until that hair is cut or falls out. Thus, an individual who is currently under the influence of drugs may test negative, while an individual who used drugs six months ago may test positive.

While following the “reasonable suspicion” standard can create legal problems, shifting to hair testing likely simply substitutes a different set of problems, while using a test that is less likely to answer the question the employer is asking. There are few situations where a drug test in response to behavior that may or may not indicate drugs is useful. Before proceeding to order such a test, employers should consult with both legal and medical advisors.

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