Mississippi Drug and Alcohol Testing of Employees Act[1]

In today's environment, employers must be ever-mindful of their employees, and their employees' interaction with the public. Illegal drug use by employees or potential employees constitutes a risk to everyone. Further, according to the Small Business Administration, the average employer loses approximately $7,000 per year for every employee that abuses drugs or alcohol. Many employers take a proactive approach towards limiting these potential risks and losses by establishing drug and alcohol testing policies.

The State of Mississippi enacted the Mississippi Drug and Alcohol Testing of Employees Act ("Act") to protect employers that establish drug and alcohol testing policies. However, the Act requires strict compliance in order to receive its protections. The information provided below is general in nature, and should not be considered to be legal advice regarding any specific issue that might arise. To the extent that you are an employer covered by the Americans with Disabilities Act ("ADA"), there are additional rules that must be complied with. Compliance with the Act does not insure that you are complying with the ADA.

Following are some basic provisions to keep in mind as you consider establishing a drug testing policy. Governmental employers may be treated in a slightly different manner.

1. All employees that may be required to submit to a drug and alcohol test must be provided (at least thirty (30) days prior to the implementation of the testing program) with a written policy statement. The policy should be posted in a conspicuous, appropriate location on site, and copies of the policy must be made available for inspection. The policy should contain a general statement of the employer's policy on employee drug use, including the grounds on which the employee may be required to submit to a test, as well as the actions that the employer may take against the employee on the basis of a positive confirmed test result, or other violation of the employer's policy.

   The policy statement must also contain the following information:

   - the existence of the Act,
   - that the policy is being implemented pursuant to the Act,
   - a general statement regarding confidentiality,
   - procedures for how the employee can confidentially report the use of prescription or non-prescription medications prior to being tested,
   - circumstances under which testing may occur,
   - a description of job positions subject to testing on a reasonable suspicion, neutral

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selection, or other basis,

- the consequences of refusing to submit to a test,
- information on opportunities for assessment and rehabilitation where a positive drug test occurs and the employer decides not to discipline or discharge,
- a statement that an employee who receives a positive confirmed test may contest or explain the result,
- a list of drugs for which the employer might test, and
- a statement regarding any applicable collective bargaining agreement or contract.

2. Employers that conduct job applicant drug testing must notify the applicant in writing upon application and prior to the collection of the test specimen that the applicant may be tested.

3. An employee or job applicant required to submit to a test may be requested to sign a statement indicating that he or she has read and understands the policy. An employee or job applicant's refusal to sign such a statement does not invalidate the test, nor bar the employer from conducting the test or taking appropriate disciplinary action.

4. Employers can require job applicants to submit to a drug test for illegal drugs as a condition of the employment application and may use a refusal to submit to a test or positive, confirmed test result as a basis for refusing to hire the applicant. A caveat here -- the ADA does not allow pre-employment tests to determine how much alcohol an individual has consumed, evidently on the basis that these are considered medical exams.

5. Employers can require all employees to submit to reasonable suspicion drug and alcohol testing. Reasonable suspicion tests must be based on objective and articulable facts and reasonable inferences, such as direct observations of use, abnormal conduct, or information that an employee caused or contributed to an accident while at work.

6. Employers can require all employees to submit to neutral selection drug and alcohol testing, subject to the testing requirements of the Act. Tests that are part of a routinely scheduled fitness for duty medical exam may be conducted subject to an established drug testing policy.

7. Employers that discharge employees based on a positive, confirmed drug and alcohol test shall be considered to have discharged the employee for cause. Employees discharged on this basis shall be considered to have been discharged for willful misconduct.

8. All information obtained by the employer pursuant to its testing program is confidential and should not be disclosed except under specific circumstances proscribed by the Act.

9. Employers who comply with the provisions of the Act are immune from lawsuits arising from any drug and alcohol testing done in compliance with the Act. Additionally, the Act requires that any such lawsuit be brought within one (1) year of the alleged violation. Obviously, the Act does not apply to lawsuits based on federal acts, such as the ADA.

Your decision to implement a drug and alcohol testing policy is a serious matter. Complying with the Act so that you can obtain the specific applicable protections can be difficult. Finally, if you are an ADA covered employer, you may have to take additional steps to insure that your testing policies are ADA compliant. The attorneys at Nichols, Crowell, Gillis, Cooper & Amos would welcome the opportunity to assist you with any of the above issues, or in drafting a general employment policy handbook or a drug testing policy.