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The Present and Future of Drug and Alcohol Testing—What Employers Should Know About the Iowa Supreme Court's Recent Decisions

Legal Update
07.08.2021

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Iowa's statute governing drug and alcohol testing—Code Section 730.5—has long plagued Iowa employers. Even the most well-meaning employers, who are truly just trying to do the right thing and make every effort to comply with the statute's strict requirements, can face a lawsuit based on a technical violation that has not actually caused an employee harm. While the Iowa Supreme Court recently granted some relief, reform of the statute is still desperately needed.

What should employers know about the recent decisions?

Iowa employers who conduct drug and alcohol testing of any part of their workforce know how incredibly cumbersome and burdensome it is to comply with section 730.5. Recently, the Iowa Supreme Court provided employers some much-needed guidance—not to mention relief—in the form of written opinions in two cases: *Dix v. Casey's General Stores, Inc.* and *Woods v. Charles Gabus Ford*.

While impossible to describe the full context in this brief article, the *Casey's* case focused largely on random/unannounced testing and an employer's ability to designate "safety-sensitive" positions within its workforce that may be subject to such testing. At a high level, Casey's conducted unannounced testing on all employees in a particular warehouse, taking the position that all jobs within the warehouse were "safety-sensitive," and a group of employees who were fired as a result of positive tests alleged multiple violations of the testing statute.

Fortunately for employers, the Court specifically declined to hold that strict compliance with section 730.5 was required, finding that substantial compliance is sufficient. Whether an employer's conduct substantially complies with the statute will depend on the particular provision at issue, as well as its purpose. As long as the challenged conduct complies with "the substance essential to every reasonable objective" of the provision at issue, employers will not be held liable in the way they could have been before the *Casey's* decision. In a detailed analysis, the majority held that Casey's designation of safety-sensitive positions did *not* substantially comply with the statute, but Justice McDermott's dissenting opinion illustrates the need for

employers—who are in the best position to know and determine which position(s) are safety-sensitive—should have discretion in making these decisions.

The Court in *Woods* gave employers another immediate example of what does and does *not* constitute substantial compliance with the testing statute. The former employee in that case, who had tested positive for methamphetamine and was fired as a result, alleged two violations of section 730.5: (1) that his former employer did not send the required notice by certified mail-return receipt requested and (2) that the notice he received did not specify the cost of a confirmatory retest that he could request and pay for.

In short, the Court held that sending the notice by certified mail (even without a return receipt requested) *did* substantially comply with the statute because this method still conveys the importance of the message being conveyed. However, because the notice failed to inform the employee about the cost he would have to pay to obtain a confirmatory retest—impacting his decision whether to request the retest and potentially save his job—the employer did *not* substantially comply with the statute.

While employers should still make every effort to comply with section 730.5, they can now conduct testing while taking some comfort knowing that there is some grace for certain mistakes as long as their conduct still substantially meets the purposes of the statute.

Why is reform of the testing statute still needed, and what can employers do about it?

This reform of sorts through case law, however, is not enough. In my experience, Iowa's testing statute is one of, if not *the*, strictest testing statutes in the country in many ways. While settlements of pending litigation are generally confidential, tracking cases filed under section 730.5 over the past few years indicates that they rarely go to trial and frequently settle (presumably, at least, from what we can assume from public court records) well short of trial.

The Legislature still needs to act to relieve employers who face lawsuits from employees who sue for, but have not actually been harmed by, technical violations of the statute—especially when employers are already experiencing a war for talent but legitimately need to conduct drug and alcohol testing to control for other risks within their workplaces.

Even when held to a substantial compliance standard, employers may still face lawsuits from employees alleging violations of the statute unless or until a causation standard is specified in the statute. As currently written, the statute contains no causation standard other than providing that an "aggrieved" person can bring a civil claim. Employers are required to prove compliance with testing requirements, while

employees have *no* burden to prove that any particular violation actually caused them harm. Quite simply, this needs to change. Key elements of nearly every other cause of action include a plaintiff establishing a harm that was caused by the challenged conduct at issue. Plaintiffs bringing claims under section 730.5 should not be exempt from meeting this burden.

To the extent they have not already done so, Iowa employers conducting workplace testing should consult legal counsel to implement a compliant policy and testing practices—buoyed by the knowledge that substantial compliance with the statute will avoid ultimate liability for any violation. They should also contact their state legislators, however, to describe the need for reform of Code section 730.5 to better balance the needs of Iowa employers and employees, focusing on the issues of causation and designation of safety-sensitive positions left open by the Court's recent decisions.