

# A Drug Testing Review – Dealing with Disability Discrimination and the Testing of Prescription Drugs

## Labor & Employment Law Update

on September 17, 2014

The ADA does not protect employees who are under the influence of illegal drugs. However, the ADA provides conflicting messages when drug tests include the testing for prescription drugs and how to respond if an employee in a safety sensitive position tests positive. This is further complicated by the blurring of what is an illegal drug in many states, including Illinois, which have legalized medical marijuana.

The ADA prohibits employers from inquiring whether an individual has a disability or requiring an individual to take a medical exam that would disclose a disability, unless the medical exam is job-related or consistent with business necessity. 42 U.S.C.A. § 12112 (West). Drug tests used to determine the illegal use of drugs are not considered a medical exam under the ADA. 42 U.S.C.A. § 12114 (West). Still, while the illegality of use impacts whether an employer may invoke the drug-testing exception, the legality of a substance does not settle the medical-examination question. *Bates v. Dura Auto. Sys., Inc.*, 11-6088, 2014 WL 4192784 (6th Cir. Aug. 26, 2014). Indeed, many prescription drugs may result in a positive test for illegal drugs.

The potential exposure from a drug testing policy is seen in *Bates v. Dura Auto. Sys., Inc.*, where the employer terminated or placed on leave employees who tested positive for prescription drugs that would impact their ability to operate machinery. In *Bates*, the jury rejected the employer's job relatedness and business necessity defense, returning an \$870,000 verdict for six employees. *Id.* While the sixth circuit reversed the verdict, it did so only to order a new trial on whether the drug testing program was a medical exam or disability related inquiry under the ADA. *Id.* In doing so, the court focused on inconsistencies in the employer's written and actual drug-testing policies, including testimony that an employee was asked about prescription medications, another employee was allowed to return to work despite testing positive, and evidence that the employer's safety concerns were not legitimate.

Restricting an employee from working due to a positive drug test for a prescription drug is a difficult issue for employers who must balance maintaining a safe workplace with an employee's ADA rights and right to medical privacy. In order to limit exposure, employers can do the following:

1. Limit testing to specific illegal drugs that could pose a safety risk.
2. Be able to support the job relatedness and business necessity of a drug test for the position(s), including evidence of individualized risk determinations of the job and relation to the drugs being tested.
3. Consistently and equally enforce safety policies.
4. Treat employees who test positive consistently and equally.
5. Do not require employees to disclose prescription medications.
6. If an employee tests positive, allow the employee an opportunity to provide an explanation for the positive test result.
7. If an employee discloses a prescribed medication, do not ask the employee to disclose the underlying medical condition for which they are taking the medication.

While this is not an exhaustive list, following these will help limit an employer's exposure in the event an employee challenges your drug test or the use of the results.

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