Alcohol Testing of Bus Drivers

Question

I run a small, non-union bus company. Am I allowed to test my drivers for alcohol?

– Name withheld

Answer:

To provide the simplest possible answer to what is really a very complicated question, the answer is probably YES if testing meets the standards I'll describe below.

Explanation:

Why is alcohol testing of drivers even an issue?

To any normal person who isn't a lawyer, it's a complete no-brainer. And once you cut through all the legal rigamarole, the normal person is probably right and testing *is* justifiable. But alcohol testing does raise big-time legal issues you need to contend with because:

1. Alcoholism is considered a disability under human rights laws. Translation: You can't discriminate against employees *because* they have alcoholism and you must make accommodations for such employees to the point of undue hardship. AND
2. Testing for alcohol may be an infringement of privacy.

Drug and alcohol testing may also be a violation of employee rights under a collective agreement. But since your employees aren't unionized, that's not an issue in this case.

Some Interests Are More Important than Nondiscrimination & Privacy

Although discrimination and privacy rights are a big deal, they might have to give way to more important interests. The question you need to answer:

Is alcohol testing of your drivers one of those interests that justifies what otherwise might be considered discrimination and privacy-infringing?

The answer is YES if you can prove that testing meets all 4 of the following conditions.

1. The Purpose of Testing Is to Protect Safety

Alcohol testing of drivers clearly serves a safety purpose. And safety *is*, in fact, one of those interests that take precedence over discrimination and privacy. But that only begins and doesn't end the inquiry.

2. You Really Believe that Testing Is Necessary for Safety

You must be able to demonstrate that you honestly believe that alcohol testing is needed to promote the safety purpose. Here again, you win—or, more precisely, you don't lose. Unless you're up to something devious, I'll assume that as any one of us would, that alcohol testing of employees who drive really is essential to safety. But you need to keep going.

3. Testing Is Reasonably Necessary to Meet the Safety Purpose

Now it starts to get tricky. For a unilaterally imposed alcohol testing policy to be "reasonably necessary" it must no more restrictive than it has to be to accomplish the safety purpose. You need to consider 3 sets of factors in evaluating the reasonable necessity of testing:

a. Employees To Be Tested: The more safety-sensitive the position, the more leeway you have to test. Driving buses is certainly safety-sensitive. But based on recent cases, you may also need to show that you have actually experienced problems with your employees' doing their jobs under the influence of alcohol.

b. Basis for Testing: Testing is much easier to justify when it's done in response to an actual safety incident or where there's other reasonable cause to suspect the employee is impaired. Random testing, on the other hand, is harder to justify.

c. What You Test for: Employers have a little more room to test for alcohol than drugs. The first reason for this is that the actual methods of alcohol testing tend to be less privacy intrusive. The second reason is physiological. Employees who test positive for alcohol are impaired at the time of the test; employees who test positive for drugs may or may not be impaired at the time of testing since the effects of drugs linger in the body after the "high" is gone.

4.Your Testing Policy Accommodates Employees

TODAY'S EXPERT

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When the basis of the challenge is disability discrimination, there's a fourth prong

to the test: The testing policy must accommodate the employee to the point of undue hardship. In the context of alcohol testing, courts demand that testing policies take into account the individual circumstances of each employee—in terms both of whether the employee must submit to tests and the consequences they incur if they fail. Thus, blanket policies, such as automatic termination for any employee that tests positive for alchol, is inconsistent with your duty to accommodate.

Conclusion

Hey, I told you this stuff was complicated. Hopefully, running through these 4 criteria will give you a basis for making a sound judgment about the legality of your testing policy.