

*2018 Upper Midwest Employment Law Institute*

# **DRUG AND ALCOHOL TESTING IN THE WORKPLACE – 12(+) TRAPS FOR EMPLOYERS**

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# National Opioid Crisis



# DRUG AND ALCOHOL TESTING LAWS

## OVERVIEW OF MAJOR LAWS ADDRESSING DRUG AND ALCOHOL USE IN THE WORKPLACE:

- Minnesota Drug & Alcohol Testing in the Workplace Act (“**DATWA**”)
- Minnesota Medical Cannabis Act (“**Medical Marijuana Act**”)
- Federal Drug-Free Workplace Act (“**DFWA**”)
- Federal Motor Carrier Safety Administration Drug/Alcohol Testing Regulations (“**FMCSA**”)
- Federal Americans with Disabilities Act (“**ADA**”)
- Minnesota Human Rights Act (“**MHRA**”)
- Minnesota Lawful Consumable Products Act (“**LCPA**”)
- Federal Family and Medical Leave Act (“**FMLA**”)

# DATWA



# DATWA

- Minnesota's Drug and Alcohol Testing in the Workplace Act ("DATWA") was enacted in 1987.
- It is codified at Minnesota Statutes, Sections 181.950 through 181.957.
- Includes requirements for policies, notice, signage, confidentiality, confirmatory re-testing, split samples, chain-of-custody, and treatment.

# Minn. Stat. §181.953

## **SUBD. 10**

**Limitations on  
Employee Discharge,  
Discipline or  
Discrimination**

A large, dark, billowing plume of smoke or steam rises from a pipe at the bottom left, filling the left side of the frame. The smoke is thick and textured, with lighter, wispy clouds visible in the background sky. The overall scene is set against a bright, hazy sky.

IS COMPLIANCE WITH  
MINNESOTA'S DRUG  
TESTING LAW A PIPE  
DREAM?

# Minn. Stat. §181.956

## **REMEDIES**

- **Lost Wages**
- **Emotional Distress**
- **Reinstatement**
- **Attorney's Fees**
- **Punitive Damages**

# Minnesota's Drug and Alcohol Testing in the Workplace Act ("DATWA")

"Are you saying that I have to pay my former employee \$35,000 even though he used illegal drugs and damaged our property??"

"How could this be possible?"



# COURT DECISIONS

## Minnesota Law Applies to Any Employer Doing Business in Minnesota



*Olson v. Push, Inc.*, No. 14-3160 (8<sup>th</sup> Cir. 2016)

# 12(+) Traps

1. Testing an employee or applicant without a compliant drug and alcohol testing policy.

# 12(+) Traps

2. Terminating an employee after a positive test result without allowing the employee to first seek and complete treatment.

# 12(+) Traps

An employer may not discharge an employee for whom a positive test result on a confirmatory test was the first such result for the employee on a drug or alcohol test requested by the employer unless:

- (1) the employer has first given the employee an opportunity to participate in, at the employee's own expense or pursuant to coverage under an employee benefit plan, either a drug or alcohol counseling or rehabilitation program, whichever is more appropriate, as determined by the employer after consultation with a certified chemical use counselor or a physician trained in the diagnosis and treatment of chemical dependency; and
- (2) the employee has either refused to participate in the counseling or rehabilitation program or has failed to successfully complete the program, as evidenced by withdrawal from the program before its completion or by a positive test result on a confirmatory test after completion of the program.

- Minn. Stat. § 181.953, subd. 10(b).

# 12(+) Traps

3. Testing an applicant and then allowing the applicant to start work before receiving the results.

# 12(+) Traps

4. Testing applicants before making the decision to hire and then not hiring the applicants although they passed the test.

*Belsky v. Worldwide Parts & Accessories Corp.*, No. 04-4702, 2006 U.S. Dist. LEXIS 14758 (D. Minn. Mar. 17, 2006)

# 12(+) Traps

5. Not sending notice of the test results by mail and instead allowing a Medical Review Officer to inform the employee by telephone.

Minn. Stat. § 181.953, Subd. 7 states:

Within three working days after receipt of a test result report from the testing laboratory, an **employer shall inform in writing** an employee or job applicant who has undergone drug or alcohol testing of (1) a negative test result on an initial screening test or of a negative or positive test result on a confirmatory test and (2) the right provided in subdivision 8. In the case of a positive test result on a confirmatory test, the employer shall also, at the time of this notice, inform the employee or job applicant in writing of the rights provided in subdivisions 6, paragraph (b), 9, and either subdivision 10 or 11, whichever applies.

**XYZ COMPANY  
POSITIVE TEST RESULTS NOTIFICATION FORM**

The Company will notify employees of a negative test result on an initial screening test or a negative or positive test result on a confirmatory test within three (3) working days after receipt of the test result from the testing laboratory.

**LOCATION:** \_\_\_\_\_  
(Street) (City) (State) (Zip)

**EMPLOYEE:** Name (*print*): \_\_\_\_\_

**TYPE OF TEST:**

- Job Applicant
- Post-Accident
- Reasonable Suspicion
- Random (safety-sensitive positions only)
- Routine Physical Examination
- Treatment Program

**DATE OF COLLECTION:** \_\_\_\_\_  
(Month) (Day) (Year)

**NOTICE OF POSITIVE TEST RESULT:** This notice is to inform you that your drug and/or alcohol test taken on the above date was confirmed positive for the following substance(s):

- Alcohol
- Amphetamines
- Cocaine
- Marijuana
- Opiates
- Phencyclidine (PCP)

**CONSEQUENCES:** In accordance with Company policy, if you are a job applicant, your conditional job offer is hereby withdrawn due to your test result. If you are a current employee, you may be subject to discipline up to and including immediate termination from employment.

**NOTIFICATION OF RIGHTS:** You have the following rights under Company policy and applicable law:

1. You have the right to request and receive from the Company a copy of the test result report on any drug or alcohol test.
2. The Company may not discharge, discipline, discriminate against, or request or require rehabilitation of you on the basis of medical history information revealed to the Company pursuant to the drug and alcohol testing process unless you are under an affirmative duty to provide the information before, upon, or after hire.
3. You have the right to request a confirmatory retest of the original blood or urine sample at your own expense after notice of a positive test result on a confirmatory retest. Within five (5) working days after notice of the confirmatory test result, you must notify the Company in writing of your intention to obtain a confirmatory retest. Within three (3) working days after receipt of the notice, the Company will notify the original testing laboratory that you have requested the laboratory to conduct the confirmatory retest or transfer the sample to another laboratory licensed to conduct the confirmatory retest. The original testing laboratory shall ensure that chain-of-custody procedures are followed during transfer of the sample to the other laboratory. The confirmatory retest will use the same drug or alcohol threshold detection levels as used in the original confirmatory test. In the case of job applicants, if the confirmatory retest does not confirm the original positive

test result, the Company's job offer will be reinstated. In the case of employees, if the confirmatory retest does not confirm the original positive test result, no adverse personnel action based on the original confirmatory test will be taken against the employee and the employee will be reinstated with any lost wages or salary for time lost pending the outcome of the confirmatory retest result.

4. Within three (3) working days after notice of a positive test result on a confirmatory test, you may submit information to the Company to explain the result. Pursuant to the Minnesota THC Therapeutic Research Act (Minn. Stat. Sections 152.21 *et. seq.*), you may present verification of enrollment in the patient registry program as part of your explanation of a positive test.
5. In the event of a positive job applicant test, the Company may not withdraw your job offer based on a positive test result from an initial screening test that has not been verified by a confirmatory test. This is to inform you that your test result has been so verified by a confirmatory test.
6. In the event of a positive drug or alcohol test for current employees, the Company may not discharge, discipline, discriminate against, or request or require rehabilitation of you on the basis of a positive test result from an initial screening test that has not been verified by a confirmatory test. This is to inform you that your test result has been so verified by a confirmatory test.
7. Notwithstanding paragraph 6, the Company may temporarily suspend you with or without pay or transfer you to another position at the same rate of pay pending the outcome of the confirmatory test and, if requested, the confirmatory retest, provided that the Company believes that it is reasonably necessary to protect the health or safety of you, co-employees, or the public. If you have been suspended without pay, you must be reinstated with back pay if the outcome of the confirmatory test or requested confirmatory retest is negative.
8. The Company will not discharge you for a positive test result on a confirmatory test if the positive result is your first such result on a drug or alcohol test requested by the Company unless the Company has independent grounds for doing so or the following conditions have been met:
  - (a) The Company has first given you an opportunity to participate in, at your own expense or pursuant to coverage under an employee benefit plan, either a drug or alcohol counseling or rehabilitation program, whichever is more appropriate, as determined by the Company after consultation with a certified chemical use counselor or a physician trained in the diagnosis and treatment of chemical dependency; and
  - (b) You have either refused to participate in the counseling or rehabilitation program or have failed to successfully complete the program, as evidenced by withdrawal from the program before its completion or by a positive test result on a confirmatory test after completion of the program.
9. You are entitled to access to information in the Company's personnel file relating to positive test result reports and other information acquired in the drug and alcohol testing process and conclusions drawn from and actions taken based on the reports or other acquired information.

**ACKNOWLEDGMENT:** I have received the above test results and understand my rights.

Date \_\_\_\_\_ Time \_\_\_\_\_  a.m.  p.m.

\_\_\_\_\_  
Employee's Signature

\_\_\_\_\_  
Supervisor's Signature

\_\_\_\_\_  
Employee's Name (*print*)

\_\_\_\_\_  
Supervisor's Name (*print*)



# 12(+) Traps

6. Testing an existing employee before sending the employee on a temporary assignment, project, or contract for a client or customer.

# 12(+) Traps

7. Disclosing the results of a drug or alcohol test to a third person without a need to know.

# 12(+) Traps

## 8. Not complying with the posting requirement under DATWA.

Under DATWA, employers must post a notice in an appropriate and conspicuous location on its premises that it has adopted a drug and alcohol testing policy, and that copies of the policy are available for inspection by employees and applicants at suitable locations, such as the employer's personnel office, during regular business hours. Minn. Stat. § 181.952, subd. 2.

# 12(+) Traps

9. Not setting parameters on treatment and return to work, or allowing an employee to return to work without confirmation that the employee has “completed” treatment.

# 12(+) Traps

## 10. Random testing all employees.

DATWA provides that an employer may request or require employees to undergo drug and alcohol testing on a random selection basis only if:

- (1) they are employed in safety-sensitive positions; or
- (2) they are employed as professional athletes if the professional athlete is subject to a collective bargaining agreement permitting random testing but only to the extent consistent with the collective bargaining agreement.

- Minn. Stat. § 181.951, subd. 4 (emphasis added).

# 12(+) Traps

11. Testing an employee in an arbitrary and capricious manner without reasonable suspicion.

## 12(+) Traps

12. Testing an employee or applicant without a signed acknowledgment of having seen a Minnesota-compliant drug and alcohol testing policy.

# 12(+) Traps

13. Using breath tests or performing testing on site.

## 12(+) Traps

14. Not carefully addressing “shy bladder,” “dilute” urine specimens, “adulterated” urine specimens, or “substituted” urine specimens.

# 12(+) Traps



## Denver Woman Wrecks 7-Eleven Microwave When Her Cup Of Urine Explodes

by [Tommy Gimler](#) May 7th, 2018

*Urine sample test for laboratory. Photo: themists (Getty)*

This has to be the best reason to wait until you get home to heat up your 89-cent frozen burrito.

According to [WTHR](#), a Denver woman recently walked into a [7-Eleven](#), put a cup of piss in the convenience store's microwave, watched as that cup of piss exploded and then walked out of the store without cleaning it up. Oh, and here's her picture so you can see that these freaks look just like us.

# 12(+) Traps

15. Testing an employee after admitted possession or use of illegal drugs instead of moving straight to termination.

# 12(+) Traps

16. Not complying with the law of another state (or city) where the employee is located.

# Jurisdictions with Unique Drug Testing Laws

- ✓ Minnesota
- ✓ Iowa
- ✓ Connecticut
- ✓ Rhode Island
- ✓ Maine
- ✓ Vermont
- ✓ Montana
- ✓ San Francisco, CA
- ✓ Boulder, CO



# 12(+) Traps

17. Not conducting mandatory drug and alcohol testing for commercial drivers.

# Federal Drug/Alcohol Regulations

<b>Covered Industry</b>	<b>Federal Agency</b>	<b>Federal Regulations</b>
<b>Commercial Drivers</b>	Federal Motor Carrier Safety Administration (FMCSA)	49 C.F.R. § 382 and 49 C.F.R. § 40
<b>Railroad Workers</b>	Federal Railroad Administration (FRA)	49 C.F.R. § 219, 49 C.F.R. § 240 and 49 C.F.R. § 40
<b>Transit Workers</b>	Federal Transit Administration (FTA)	49 C.F.R. § 655 and 49 C.F.R. § 40
<b>Airline Workers</b>	Federal Aviation Administration (FAA)	14 C.F.R. § 120 and 49 C.F.R. § 40
<b>Pipeline Workers</b>	Pipeline and Hazardous Materials Safety Administration (PHMSA)	49 C.F.R. § 199 and 49 C.F.R. § 40

# Federal Drug/Alcohol Regulations

<b>Covered Industry</b>	<b>Federal Agency</b>	<b>Federal Regulations</b>
<b>Commercial Vessel Workers</b>	U.S. Coast Guard (USCG)	46 C.F.R. § 4, 46 C.F.R. § 16, and 49 C.F.R. § 40
<b>Nuclear Power Plant Workers</b>	Nuclear Regulatory Commission (NRC)	10 C.F.R. § 26
<b>Energy Department Workers</b>	Department of Energy (DOE)	10 C.F.R. § 710
<b>Defense Contractor Workers</b>	Department of Defense (DOD)	48 C.F.R. § 252.223-7004

## 12(+) Traps

18. Applying federal drug testing requirements and procedures for commercial drivers to non-drivers, and vice-versa.

# Federal Preemption of DATWA

## EXEMPTION FROM MINNESOTA DRUG & ALCOHOL TESTING IN THE WORKPLACE ACT:

Minn. Stat. § 221.031, subd. 10:

**Subd. 10. Controlled substance and alcohol use and testing exemption.** The state of Minnesota, a political subdivision of the state, or any person required to comply with the alcohol and controlled substances testing requirements of the Code of Federal Regulations, title 49, part 219, 382, 653, or 654, **is exempt from sections 181.950 to 181.957** if the testing also **complies with the procedures** for transportation workplace drug and alcohol testing programs in Code of Federal Regulations, title 49, part 40.

# Federal Preemption of DATWA

## EXEMPTION FROM MINNESOTA DRUG & ALCOHOL TESTING IN THE WORKPLACE ACT:

Minn. Stat. § 221.605, subd. 1(b):

An interstate carrier or private carrier engaged in interstate commerce who complies with federal regulations governing testing for controlled substances and alcohol is exempt from the requirements of sections 181.950 to 181.957 unless the carrier's drug testing program provides for testing for controlled substances in addition to those listed in Code of Federal Regulations, title 49, section 40.85.

Persons subject to this section may test for drugs, in addition to those listed in Code of Federal Regulations, title 49, section 40.85, only in accordance with sections 181.950 to 181.957 and rules adopted under those sections.

# Federal Preemption of DATWA

## EXEMPTION FROM MINNESOTA DRUG & ALCOHOL TESTING IN THE WORKPLACE ACT:

- Common pitfalls that may destroy the exemption:
  - Failure to comply with federal standards
  - Testing for drugs not covered by DOT
  - Testing commercial drivers in Non-DOT situations (e.g., after minor accidents)
- Recommendations:
  - Adopt separate policies for DOT and Non-DOT employees
  - Update DOT policy to ensure strict compliance
  - Train HR staff and supervisors
  - Consult legal counsel

# COURT DECISIONS

NFL PLAYERS' MINNESOTA DRUG TESTING CLAIMS NOT PREEMPTED  
BY FEDERAL LABOR LAW



*Williams v. NFL*, 582 F.3d 863 (8<sup>th</sup> Cir. 2009)

# DATWA and Medical Marijuana



# DATWA and Medical Marijuana

## PROTECTIONS FOR REGISTRY PROGRAM PARTICIPATION:

Minn. Stat. § 152.32(d):

An employee who is required to undergo employer drug testing pursuant to [DATWA] may present verification of enrollment in the patient registry as part of the employee's explanation under [DATWA].

# DATWA and Medical Marijuana

## PROTECTIONS FOR REGISTRY PROGRAM PARTICIPATION:

Minn. Stat. § 152.32(c):

Unless a failure to do so would violate federal law or regulations or cause an employer to lose a monetary or licensing-related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize the person, if the discrimination is based upon either of the following:

- 1) the person's status as a patient enrolled in the registry program under the Act; or
- 2) a patient's positive drug test for cannabis components or metabolites, unless the patient used, possessed or was impaired by medical cannabis on the premises of the place of employment or during the hours of employment.

# DATWA and Medical Marijuana

## TAKEAWAYS FOR EMPLOYERS

- No established case law under the Medical Marijuana Act yet
- Based on a plain reading of the statute, an employer can:
  - Require a patient undergo lawful testing;
  - Allow the patient an opportunity to explain the results;
  - Terminate the employee for use, possession or impairment on the premises or during the hours of employment
- Based on a plain reading of the statute, an employer cannot:
  - Discriminate against an applicant or employee based on the person's enrollment status in the program; or
  - Discriminate against an applicant or employee based on a patient's positive drug test

# Drug-Free Workplace Act

## DRUG-FREE AWARENESS PROGRAM FOR ORGANIZATIONS:

- Notify employees that as a condition of employment on a federal contract or grant, the employee must (a) abide by the terms of the policy statement; and (b) **notify the employer, within five calendar days, if convicted of a criminal drug violation in the workplace**
- Notify the contracting or granting agency within 10 days after receiving notice that a covered employee has been convicted of a criminal drug violation in the workplace
- Impose a penalty on – or require satisfactory participation in a drug abuse assistance or rehabilitation program by – employee convicted of a reportable workplace drug conviction
- Make an ongoing, good faith effort to maintain a drug-free workplace by meeting the requirements of the Act

# Drug-Free Workplace Act

## COVERED EMPLOYERS:

- Direct recipients of federal grants
- Federal contracts that exceed \$100,000
- Requirements differ for “individuals” and “organizations”

# Drug-Free Workplace Act

## DRUG-FREE AWARENESS PROGRAM FOR ORGANIZATIONS:

- Publish and give a policy statement to all covered employees informing them that the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance is prohibited in the covered workplace and specifying the actions that will be taken against employees who violate the policy
- Establish a drug-free awareness program to make employees aware of (a) the dangers of drug abuse in the workplace; (b) the policy of maintaining a drug-free workplace; (c) any available drug counseling, rehabilitation, and employee assistance programs; and (d) the penalties for drug abuse violations

# Lawful Consumable Products Act



# Lawful Consumable Products Act

## PROHIBITS ADVERSE ACTION BASED ON:

- “Use or enjoyment of lawful consumable products”
- Off the employer’s premises
- During non-working hours

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