Drug and Alcohol Testing – 12 Traps for Employers

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I. <u>INTRODUCTION</u>

Employers these days are concerned about drug use by employees, especially in light of the opioid crisis combined with increased legalization of marijuana. A 2017 study showed that 71 percent of employers reported being affected by prescription drug use by employees. *See* Burl Gilyard, "The Workforce's Hidden Addicts," *Twin Cities Business* (Sept. 29, 2017). As that article suggested, "[t]he nationwide opioid addiction epidemic is seeping into the workplace but hard to detect and deal with. Meanwhile, its potential impact on the labor force is staggering." *Id.*

But be careful if you think that testing employees is part of the solution. Minnesota has a uniquely complicated state statute governing drug and alcohol testing in the workplace, Minn. Stat. § 181.950-957, known as the Drug and Alcohol Testing in the Workplace Act or "DATWA." The statute is often a surprise for out-of-state employers with employees in Minnesota as well as for Minnesota-based companies. The mistakes set forth in these materials are almost all taken from real lawsuits in which the employer was sued and usually paid money to settle the case.

II. <u>LIABILITY EXPOSURE AND DAMAGES</u>

Non-compliance with DATWA can be expensive. Employees tested in violation of the statutory requirements can potentially seek damages for the following:

1. **Lost Wages**. *See* Minn. Stat. § 181.956, subd. 2.

2. **Reinstatement**. *See* Minn. Stat. § 181.956, subd. 4; *see also Follmer v. Duluth, Missabe & Iron Range Ry. Co.*, 585 N.W.2d 87, 95 (Minn. Ct. App. 1998) ("The court may, in its discretion, also grant any other equitable relief appropriate, including ordering reinstatement with back pay.")

3. **Emotional Distress**. *See Belsky v. Worldwide Parts & Accessories Corp.*, No. 04-4702, 2006 U.S. Dist. LEXIS 14758, at *9-10 (D. Minn. Mar. 17, 2006) (unpublished) (allowing claim for emotional distress damages under DATWA).

4. **Punitive Damages**. *See Welhage v. ING Bank, FSB*, No. 07-CV-1852 (PJS/RLE), 2008 U.S. Dist. LEXIS 90249, at *20 (D. Minn. Nov. 5, 2008) (unpublished) (holding that the employer's termination of the employee without consideration of the employee's rights under DATWA was sufficient to support a showing that the employer acted with "deliberate disregard" for the employee's rights, thereby entitling the employee to add a claim for punitive damages).

5. **Attorneys' Fees**. *See* Minn. Stat. § 181.956, subd. 2. (if a violation is found and damages awarded, the court may also award reasonable attorney's fees for a cause of action based on a violation of Minn. Stat. §§ 181.950 to 181.954 if the court finds that the employer *knowingly or recklessly* violated DATWA.)

III. COVERAGE

DATWA applies to all employers that conduct drug and alcohol testing of job applicants, employees, or independent contractors in the State of Minnesota. *See* Minn. Stat. § 181.951, subd. 1(a). Under DATWA, the term **"**employer**"** is defined broadly to include "any person or entity **located or doing business in this state** and having one or more employees and includes the state and all political or other governmental subdivisions of the state." Minn. Stat. § 181.950, subd. 7. (Emphasis added)

For purposes of DATWA, the term **"**employee**"** is defined to mean "a person, independent contractor, or person working for an independent contractor who performs services for compensation, in whatever form, for an employer." Minn. Stat. § 181.950, subd. 6.

Therefore, DATWA applies to employer drug and alcohol testing administered to both common law employees and independent contractors. The definition of "employee" also includes persons who perform services for an independent contractor. This provision of the statute could extend employer liability for DATWA violations to drug testing conducted by staffing agencies, temporary employment agencies, or professional employer organizations at the request of the employer.

DATWA also applies to **"**job applicants**"** defined as "a person, independent contractor, or person working for an independent contractor who applies to become an employee of an employer and includes a person who has received a job offer made contingent on the person passing drug or alcohol testing." Minn. Stat. § 181.950, subd. 9.

A recent decision by the Eighth Circuit Court of Appeals suggests that DATWA may be applied to certain circumstances outside of Minnesota. *Olson v. Push, Inc.*, 640 Fed. Appx. 567, No. 14-3160 (8th Cir. Feb. 22, 2016). In *Push*, the employer, a Wisconsin corporation, hired Olson, a Minnesota resident, for a job in West Virginia. Olson accepted the job and underwent a pre-employment drug test in Minnesota. He started working in West Virginia three days later. When the drug test result came back as "dilute" five days later, Push treated it as a positive result and terminated Olson's employment.

Olson filed suit in Minnesota, alleging violation of DATWA, which prohibits an employer from terminating an employee for a first-time positive drug test result. Because Olson had already started working, he was no longer an applicant. The District Court dismissed the complaint because it interpreted "doing business" under DATWA to mean "relevant business—namely, the employment for which [the entity] is conducting drug testing" and therefore DATWA did not apply. The Eight Circuit Court of Appeals reversed, finding that:

> DATWA contains no language limiting its application only to drug testing of those employees whose employment is directly related to an employer's Minnesota business activities; rather, the legislature drafted DATWA broadly to encompass all employers that are located in Minnesota, **and all employers that conduct business in Minnesota**. We also note that the Supreme Court of Minnesota would not read into a statute a requirement that the legislature has purposely or inadvertently omitted; thus, contrary to the district court's interpretation, we decline to read into DATWA's statutory definition of "employer" a requirement that there be a nexus between the drug testing and "relevant business."

The Court further explained that "a broad construction of 'employer' is compatible with DATWA's purpose, which is to provide employees additional protections regarding employer-requested drug and alcohol testing. In order for a state's substantive law to be constitutionally applied in a particular case, however, the court also noted that the state must have a significant contact or a significant aggregation of contacts with the parties or the underlying facts giving rise to the litigation, creating a state interest, such that the application of its law is neither arbitrary nor fundamentally unfair. In sum, the Court held that DATWA applied to that case because Push did business in Minnesota, hired a Minnesota resident and permitted the pre-employment drug test to be conducted in Minnesota. The *Push* decision certainly suggests that anyone tested in Minnesota may be subject to the statute, even if they are going to be assigned elsewhere. The extreme interpretation, that any company "doing business" in Minnesota must comply with DATWA when testing a non-Minnesota employee outside of Minnesota seems unreasonable but remains to be clarified.

IV. TWELVE (PLUS) TRAPS FOR EMPLOYERS

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

If an employer is unaware of the requirements of DATWA and does not have a written policy, or if it uses a generic policy that is not specifically compliant with DATWA, any testing

will almost certainly be considered unlawful. Although DATWA does not impose a legal duty to test, employers that wish to conduct drug or alcohol testing in the State of Minnesota must strictly comply with the requirements of DATWA. *See* Minn. Stat. § 181.951, subd. 1(a) ("An employer may not request or require an employee or job applicant to undergo drug and alcohol testing except as authorized in this section."). Among other things, an employer may not conduct drug or alcohol testing except pursuant to a written policy that complies with DATWA. Minn. Stat. § 181.951, subd. 1(b) ("**An employer may not request or require an employee or job applicant to undergo drug or alcohol testing unless the testing is done pursuant to a written drug and alcohol testing policy** that contains the minimum information required in section 181.952.")

Section 181.952 requires a written testing policy to contains the following elements:

(1) the employees or job applicants subject to testing under the policy;

(2) the circumstances under which drug or alcohol testing may be requested or required;

(3) the right of an employee or job applicant to refuse to undergo drug and alcohol testing and the consequences of refusal;

(4) any disciplinary or other adverse personnel action that may be taken based on a confirmatory test verifying a positive test result on an initial screening test;

(5) the right of an employee or job applicant to explain a positive test result on a confirmatory test or request and pay for a confirmatory retest; and

(6) any other appeal procedures available.

Minn. Stat. § 181.952, subd. 1.

Employers should include in their drug and alcohol testing policies the kind of "contract disclaimers" and statements of "at will employment" that typically appear in employee handbooks. Inclusion of such disclaimers may help the employer defeat breach of contract

claims by employees and job applicants if the employer deviates from its written policy. *See., e.g.*, *Audette v. Northeast State Bank of Minneapolis*, 436 N.W.2d 125, 127 (Minn. Ct. App. 1989) (recognizing effectiveness of legal disclaimer contained in employee handbook). This is especially important for employers who have the bulk of their employees in Minnesota but a few employees outside of Minnesota. These types of employers may choose to utilize a single DATWA-compliant policy for simplicity but would want to avoid exporting legal rights to out-state employees who would not otherwise be subject to the statute.

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

DATWA provides that the 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). *See e.g., Follmer v. Duluth, Missabe & Iron Range Ry. Co.*, 585 N.W.2d 87, 94-95 (Minn. Ct. App. 1998) (finding that railroad discharged rather than suspended employee in violation of DATWA based on a first-time positive drug test without offering the opportunity for treatment); *City of Minneapolis v. Johnson*, 450 N.W.2d 156, 160 (Minn. Ct. App. 1990) ("The requirements surrounding drug tests are clear. Subpart (b) prohibits discharge of an employee after the first test unless the employer has first provided the

opportunity for drug or alcohol counseling and rehabilitation and the employee has either refused to participate or has participated but has failed to successfully do so.").

In *Welhage v. ING Bank, FSB*, No. 07-CV-1852 (PJS/RLE), 2008 U.S. Dist. LEXIS 90249 (D. Minn. Nov. 5, 2008), a Minnesota federal district court held that DATWA prohibits an employer from terminating an employee who is undergoing chemical dependency treatment at the employer's request after a first positive drug test. The court reached this conclusion even though the employee had previously taken a leave of absence to undergo chemical dependency treatment because the first round of treatment was not pursuant to a drug test.

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

As discussed above, the first time an employee tests positive for drugs or alcohol he or she may not be terminated until he or she is allowed an opportunity to participate in and complete a treatment program. Applicants, on the other hand, may be denied a position without the right to attend treatment as the employer may withdraw the contingent offer based on the positive drug test. Employers, however, often rush a new employee on the job before receiving the results back from the laboratory. At that point, it is too late and the applicant, now an employee, is endowed with greater rights under the law. *See, e.g. Olson v. Push, Inc.*, *supra*.

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

Employers "may request or require a job applicant to undergo drug and alcohol testing provided a job offer has been made to the applicant and the same test is requested or required of all job applicants **conditionally offered employment for that position**." Minn. Stat. § 181.951, Subd. 2. (emphasis added) Minnesota employers can face liability, however, if they refuse to hire a job applicant who successfully passed the pre-employment drug test. *See Belsky v. Worldwide*

Parts & Accessories Corp., No. 04-4702, 2006 U.S. Dist. LEXIS 14758 at *7-10 (D. Minn. Mar. 17, 2006) (unpublished) (holding that job applicant who passed pre-employment drug test stated a claim for violations of DATWA after employer did not hire him).

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

Under well-established federal drug testing regulations applicable to commercial truck drivers and employees in certain other federally regulated industries, employees are informed of their drug test results by a medical doctor known as a "Medical Review Officer" or "MRO" who typically contacts the employee by telephone. Employers who rely on this procedure under state law, however, risk non-compliance with DATWA.

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

> **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.

(emphasis added). Thus, state law requires that notification (1) come from the employer, not from an MRO; (2) that notification be in writing, not over the phone; and (3) that notification occur within three working days.

DATWA does not require employers to utilize an MRO, nor does the law expressly prohibit the use of MROs. One former plaintiff-side attorney in Minnesota has argued that employers who utilize MROs have unlawfully disclosed their drug test results to a third party in violation of DATWA. *See* Minn. Stat. § 181.954, subd. 2. Because an MRO is an agent of the

employer, this interpretation seems far-fetched. But it is clear that providing notice by telephone will not satisfy the requirements of the law.

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

DATWA only allows drug and alcohol testing of employees and applicants in specific circumstances. *See* Minn. Stat. § 181.951 (stating, "[a]n employer may not request or require an employee or job applicant to undergo drug and alcohol testing except as authorized in this section.") The types of testing allowed for employees are (1) routine physical examination testing no more than once per year; (2) random testing for safety-sensitive employees only; (3) testing based on reasonable suspicion; and (4) testing during and following treatment. *Id.*

A problem arises, therefore, when a company wants to place an existing employee in a temporary assignment, project, or contract for a customer and the customer requires that the employee be drug tested. So-called assignment testing is not contemplated in DATWA and therefore potentially unlawful. This situation occurs quite frequently with staffing companies. It also occurs when clients want a technician or consultant to visit a certain facility or work on a long- term project. One possible work-around is to treat the employee as an "applicant" and to treat the potential assignment as a "job offer" under Minn. Stat. § 181.950. This is a gap in the law that would be best addressed by the Minnesota legislature, however, should it ever consider amendments to DATWA.

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

DATWA provides that test result reports and other information acquired in the drug or alcohol testing process are "private and confidential information" and may not be disclosed by an employer or laboratory to another employer or to a third-party individual, governmental agency,

or private organization without the written consent of the employee or job applicant tested. Minn. Stat. § 181.954, subd. 2. *See, e.g., Kise v. Prod. Design & Eng'g, Inc.,* 453 N.W.2d 561, 566 (Minn. Ct. App. 1990) (finding that drug and alcohol testing consent form presented to injured employee, which stated that employee consented to undergo testing and to release of information within company and outside company as provided in Minnesota law, did not conflict with statutory requirements of confidentiality under DATWA).

DATWA provides that, notwithstanding the limitations set forth above, evidence of a positive test result on a confirmatory test may be: (1) used in an arbitration proceeding pursuant to a collective bargaining agreement, an administrative hearing under chapter 43A or other applicable state or local law, or a judicial proceeding, provided that information is relevant to the hearing or proceeding; (2) disclosed to any federal agency or other unit of the United States government as required under federal law, regulation, or order, or in accordance with compliance requirements of a federal government contract; and (3) disclosed to a substance abuse treatment facility for the purpose of evaluation or treatment of the employee. Minn. Stat. § 181.954, subd. 3. *See also United States v. Prouse*, 945 F.2d 1017, 1024 (8th Cir. 1991) (holding that DATWA did not provide protection and prevent admission of blood test results in prosecution of flight crew for operating a commercial passenger vehicle under the influence of alcohol); *Kise v. Prod. Design & Eng'g, Inc.*, 453 N.W.2d 561, 566 (Minn. Ct. App. 1990) ("[E]vidence of a positive confirmed test may be used in judicial and other proceedings, may be disclosed as required by federal laws and may be disclosed to treatment facilities for evaluation of the employee.")

DATWA provides that positive test results from an employer drug or alcohol testing program may not be used as evidence in a criminal action against the employee or job applicant tested. Minn. Stat. § 181.954, subd. 4; s*ee also Kise v. Prod. Design & Eng'g, Inc.,* 453 N.W.2d

561, 566 (Minn. Ct. App. 1990) ("Positive test results may not be used as evidence in a criminal action.")

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. Knowledgeable plaintiff-side attorneys will assert failure to post notice as another violation of DATWA in lawsuits involving wrongful testing.

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.

As explained above, an employee with a first-time positive may not be terminated from employment 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). Employers should not simply ship the employee off to treatment, however, and assume that matters will take care of themselves. In *Welhage v. ING Bank, FSB*, *supra*, the treatment plan was open-ended, and the employee was in treatment for over six months. The employer, a bank, eventually assumed he was not coming back, sent him a long-term disability application, and removed his name from the roster of active employees. The

bank ended up having to settle a lawsuit brought by the employee for wrongful termination under DATWA. The bank could have avoided the problem by being more engaged on the front end. The statute allows the employer to have a role in determining the scope of the treatment program.

A similar problem results when an employee has completed in-patient treatment but is continuing to participate in out-patient counseling or after-hours meetings and wants to return to work. Until the employer receives written notice that the employee has "completed" treatment it should not allow the employee to return. If the employee returns to work before completing treatment, tests positive for a second time and is fired, he or she may argue that they were never allowed the chance to complete the treatment in the first place.

The correct procedure for an employer to follow was set forth in *Jones v. Green Bay Packaging*, No. A15-0017 (Minn. Ct. App. Aug. 10, 2015). The plaintiff in that case, Jones, tested positive for marijuana after a workplace accident. Green Bay Packaging presented Jones with a Conditional Reinstatement Agreement ("CRA"), which provided that Jones could retain his employment if he (1) immediately submitted to evaluation by a chemical dependency treatment center approved by Green Bay Packaging, and (2) successfully participated in treatment at that treatment center for the amount of time recommended by the center. The CRA listed treatment centers that Green Bay Packaging had already approved and stated that "additional facilities could be approved by the company."

Jones then asked that he be allowed to participate in evaluation and treatment at two facilities which were not listed in the CRA, one of which was Riverplace Counseling Centers. Green Bay Packaging approved both additional treatment centers. Jones visited Riverplace for a

chemical dependency assessment. After the assessment, Riverplace recommended that Jones receive outpatient chemical dependency treatment at its facility four times per week.

Jones signed the CRA on May 22, but informed Green Bay Packaging on May 24 that he wished to receive his treatment at another facility, Grace Counseling Services. He claimed that he could not afford the gas required to attend the program at Riverplace because it was a 30-minute commute from his home. He requested that Green Bay Packaging approve treatment at Grace because the facility was near his home and its program met only twice per week. Green Bay Packaging denied the request and told Jones that he would be fired if he did not participate in the recommended treatment program at Riverplace. Jones did not participate in the treatment program at Riverplace. Green Bay Packaging then terminated Jones' employment.

Jones sued Green Bay Packaging as a pro se plaintiff for wrongful discharge under DATWA. The district court dismissed the case on summary judgment and Jones appealed. The issue for the courts was a fairly straightforward matter of statutory interpretation, specifically the phrase "as determined by the employer." Affirming dismissal, the appellate court held that "[t]he plain language of this phrase provides that the employer must give the employee the opportunity to attend either a drug or alcohol counseling or rehabilitation program, whichever is more appropriate, indicating only that the employer is tasked with deciding whether counseling or rehabilitation is more appropriate for the employee." The result is that employees do not have the unfettered right to choose a treatment center or treatment program.

The decision highlights how critical employer engagement is when complying with this statute, including after an employee tests positive. Even if an employer has a compliant policy and conducts testing in a compliant manner, it must still interact with the employee who tests positive to work out and agree on a treatment program, and then continue to monitor the status

and ultimate completion of the program. This level of engagement may require time and commitment by Human Resources personnel but should not be overlooked.

The decision also highlights the usefulness of a written return to work agreement or, in this case, a "CRA." The DATWA statute does not require or even mention a CRA or return to work agreement, but employers in Minnesota typically rely on them to confirm that all parties understand their rights and obligations in this situation, and the Court's implicit endorsement in *Green Bay Packaging* makes this a best practice for all Minnesota employers.

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).

DATWA defines a "safety-sensitive position" as a job, including any supervisory or management position, in which an impairment caused by drug or alcohol usage would threaten the health or safety of any person. Minn. Stat. § 181.950, subd. 13. For clarity, the employer's written policy should explicitly identify which positions or employees are considered "safety-sensitive" for purposes of random testing. While DATWA grants employers considerable latitude in classifying "safety-sensitive" positions, employers should be prepared to defend their classifications. Improperly classifying an employee as "safety-sensitive" could result in a legal challenge to a positive test result or any adverse employment action taken based on the result. In one case, an employer whose business involved large machinery applied random testing to all

employees, including the office staff at headquarters, and an assistant accountant drew the lot. She tested positive for marijuana and challenged the propriety of the testing in court, ultimately resulting in a settlement.

Although there have been few reported decisions interpreting the phrase "safety-sensitive position" under DATWA, in *Law Enforcement Labor Services, Inc. v. Sherburne County* the court determined that the county's classification of jail personnel, patrol officers, investigators, the director of emergency management, and transport/court security deputies as "safety-sensitive positions" under DATWA was appropriate. 695 N.W.2d 630, 636 (Minn. Ct. App. 2005). In contrast, the Minnesota Court of Appeals has held that a particular journeyman pipefitter did not hold such a position. *See Newmech Cos. v. Youness*, No. C6-00-2162, 2001 Minn. App. LEXIS 1056 at *6-7 (Minn. Ct. App. Sep. 18, 2001) (unpublished) (employee had not engaged in employment misconduct by refusing to take test where he reasonably believed that he was not subject to testing under DATWA and was not disqualified from receiving unemployment benefits).

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

Drug and alcohol testing may not be conducted on an arbitrary and capricious basis. Minn. Stat. § 181.951, subd. 1(c) ("An employer may not request or require an employee or job applicant to undergo drug and alcohol testing on an arbitrary and capricious basis."). The Minnesota Court of Appeals has held that a decision to test is arbitrary and capricious "only where the decision lacks any rational basis." *Kise v. Product Design & Eng'g, Inc.*, 453 N.W.2d 561, 565 (Minn. Ct. App. 1990) (finding that employer's decision to require drug and alcohol testing only of employees who were injured and received medical treatment on same day was not arbitrary and capricious). "'[A]ny rational basis is a lower standard than 'specific facts and

rational inferences.'" *Lewis v. Ashland, Inc.*, 813 F. Supp. 2d 1113, 1118 (D. Minn. 2011) (finding that the employer's decision to drug test was not arbitrary and capricious because the employer had reasonable suspicion the employee was under the influence of marijuana). Despite the court's expansive interpretation of the phrase "arbitrary and capricious," employers should apply their policy uniformly and consistently in order to minimize claims under DATWA.

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

An employer must provide written notice of its drug and alcohol testing policy to all affected employees, to a previously nonaffected employee upon transfer to an affected position under the policy, and to a job applicant before any testing occurs if the job offer is contingent on passing a drug or alcohol test. Minn. Stat. § 181.952, subd. 2.

Some employers have interpreted the "written notice of its . . . policy" language to merely require the employer to provide an abbreviated notice that the employer has adopted the policy. A better practice is for the employer to provide a complete copy of its written drug and alcohol testing policy to each affected applicant and employee. This will avoid any argument as to whether the notice satisfies Minn. Stat. § 181.952, subd. 2.

Upon distribution of the policy and any revised policies, employers would be wise to obtain a signed written acknowledgment from each individual confirming that the individual has *seen a copy of*, and understands, the employer's policy. This is because DATWA requires employers, before requesting an employee or job applicant to undergo testing, to provide the employee or job applicant with a form, developed by the employer, on which to acknowledge that the employee or job applicant has "seen" the employer's drug and alcohol testing policy. *See* Minn. Stat. § 181.953, subd. 6. While it is recommended that employers provide such a form to the employee or job applicant *prior to every test*, some courts have allowed the

employee's initial acknowledgment form, signed upon hire or adoption of the policy, to satisfy this requirement. *McCoy v. Qwest Corp.*, 2009 U.S. Dist. LEXIS 88251, at *14 (D. Minn. Sept. 24, 2009) (unpublished).

13. Using breath tests or performing testing on site.

Breath testing for alcohol is commonly used by law enforcement and is required under federal regulations. Breath testing under DATWA, however, is generally considered non-compliant, for several reasons. First, DATWA requires employers to utilize the services of a certified laboratory for all alcohol testing. Minn. Stat. § 181.953, subd. 1(b). Because breathalyzers are not a testing laboratory, DATWA arguably does not permit them. DATWA also requires the employer to establish certain chain-of-custody procedures "to ensure proper record keeping, *handling*, *labeling*, and *identification* of the samples to be tested." Minn. Stat. § 181.953, subd. 5 (emphasis added). As a practical matter, it is impossible to "handle," "label," or "identify" breath samples. The chain-of-custody procedures mandated by DATWA also require that "*possession* of a sample *must be traceable* to the employee from whom the sample is collected, from the time the sample is collected through the time the sample is *delivered* to the laboratory." Minn. Stat. § 181.953, subd. 5(1) (emphasis added). It is difficult to imagine how breath specimens can be possessed or traced. Further, when breath testing devices are utilized, the breath sample is not retained and "delivered" to the laboratory. In fact, no laboratory is used at all.

Furthermore, the chain-of-custody procedures mandated by DATWA require that "the sample must always be *in the possession of*, must always be *in view of*, or must be *placed in a secured area* by a person authorized to handle the sample." Minn. Stat. § 181.953, subd. 5(2)

(emphasis added). These concepts are inconsistent with the way that breathalyzers actually work.

DATWA allows employees to obtain a "confirmatory retest" of the "original" sample. *See* Minn. Stat. § 181.953, subd. 9 ("An employee or job applicant may request a confirmatory retest of the *original sample* at the employee's or job applicant's own expense after notice of a positive test result on a confirmatory test.") (emphasis added). It is impossible to conduct a "confirmatory retest" on a breath sample because the "original sample" is not kept. Finally, DATWA requires testing laboratories to "retain" samples for six (6) months. *See* Minn. Stat. § 181.953, subd. 3 ("A laboratory shall retain and properly store for at least six months all samples that produced a positive test result."). These requirements are impossible in the case of breath alcohol testing because breath samples are not delivered to a laboratory.

DATWA's legislative history also shows that the Minnesota Legislature amended DATWA in 1991 (four years after its adoption) to repeal then-existing language that explicitly authorized breath alcohol testing. Prior to the 1991 amendment, Minn. Stat. § 181.953, subd. 1(a) provided:

> An employer who requests or requires an employee or job applicant to undergo drug or alcohol testing shall use the services of a testing laboratory licensed by the commissioner under this subdivision, except that, *a breath test as an initial screening test for alcohol may be performed by a medical clinic, hospital, or other medical facility not owned or operated by the employer that does not meet the licensing requirements of this section, provided that the breath test meets the standards or requirements adopted by rule under paragraph (b), except clause (1)*, and any confirmatory test is performed according to the requirements of sections 181.950 to 181.957 and the rules adopted thereunder.

Laws of Minnesota, Chapter 60, Senate File No. 550, 1991 Regular Session, *available at* https://www.revisor.mn.gov/laws/?doctype=Chapter&year=1991&type=0&id=60. For all of these reasons, breath alcohol testing under DATWA is not recommended.

DATWA provides that an employer may not conduct drug or alcohol testing of its own employees and job applicants using a testing laboratory owned and operated by the employer; except that, one agency of the state may test the employees of another agency of the state. Minn. Stat. § 181.953, subd. 4.

14. Not addressing "shy bladder," "dilute" urine specimens, "adulterated" urine specimens, or "substituted" urine specimens.

In many respects, DATWA has not kept up with the science of drug testing or cheating. At the federal level, for regulated drug and alcohol tests, the DOT and other federal agencies have adopted several important regulations regarding topics such as "shy bladder" (the inability to provide an adequate volume of urine for testing); "dilute" urine specimens; "adulterated" urine specimens; "substituted" urine specimens; and "validity testing."

For employers governed by state law, the absence of clear regulation (or at least guidance) at the state level has created uncertainty and confusion as to the proper handling of dilute, adulterated, and substituted specimens. DATWA does not explicitly authorize, prohibit, or restrict "monitored" or "direct observation" urine collection. In contrast, DOT regulations now require employers to monitor the collection of urine, or collect the urine under "direct observation," under some circumstances. Employers may wish to refrain from using these techniques given the possible liability for invasion of privacy claims. *See Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998) (recognizing a private cause of action for invasion of privacy); *see also, Wakely v. Knutson Construction Services, Inc.*, File No. EM 04-4172 at *15-16 (Minn. Dist. Ct. Jan. 3, 2005) (unpublished) (granting summary judgment to employee on an invasion of privacy claim when drug test was without proper basis under DATWA). *Cf. Pingatore v. Union Pac. R.R. Co.*, 2017 Ark. App. 459 (Ark. Ct. App. 2017) (finding that employees working in a highly regulated industry like the railroad have a lower

expectation of privacy during drug testing, especially when the employee fails to protest the conditions under which the testing occurred).

It may make sense, however, to address in a DATWA policy what procedures should be followed in the event of shy bladder, "dilute" urine specimens, specimens which are out of the temperature range and other situations suggesting adulterated or substituted urine specimens.

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

Human Resources professionals and advising counsel should bear in mind that the complicated repercussions of DATWA can be avoided in some situations, for example where an employee admits to the use or possession of illegal drugs in the workplace, before being tested. Unfortunately, it seems counter-intuitive that confirming the use of illegal drugs with a test makes the employer's position weaker, not stronger, but that can often be the case. DATWA governs and is triggered by a "test."

In certain circumstances, Minnesota Courts have even held that employers may lawfully discharge employees following a first positive drug or alcohol test result provided that the employer has independent grounds for the termination. In *In re Copeland*, 455 N.W.2d 503, 507 (Minn. Ct. App. 1990), the Minnesota Court of Appeals held that an employer could discharge an employee after a first positive test result if the termination is based on conduct which amounts to just cause for termination, even if the conduct is inextricably intertwined with the use of illegal drugs.

In *City of Minneapolis v. Johnson,* 450 N.W.2d 156 (Minn. Ct. App. 1990), the plaintiff, also a Minneapolis police officer, admitted using cocaine and failing to intervene or reporting suspected cocaine use at a party. *Id* at 157-58. The City of Minneapolis administered a drug test to the plaintiff, which yielded a positive test result. *Id.* at 158. The Minnesota Court of Appeals

held that DATWA does not bar the discharge of an employee for reasons independent of the test result, namely, the plaintiffs' admitted drug use and failure to take action in the face of suspected illegal activity. *Id.* at 161.

In *Hanson v. City of Hawley*, No. A05-1940, 2006 Minn. App. Unpub. LEXIS 435 (Minn. Ct. App. May 2, 2006) (unpublished), a city police chief was terminated under a "no tolerance" provision when, after a minor car accident, he tested positive for alcohol at a level of .024 blood alcohol content after ingesting cough medicine. *Id.* at *2. The chief police argued that the city violated DATWA by not performing the necessary confirmatory retest. *Id.* at *3. The Court of Appeals affirmed the dismissal and followed *Johnson* in holding that the city could terminate a police officer for reasons other than the positive drug test (namely, violation of the zero-tolerance policy) without incurring liability under DATWA. *Id.* at *5.

In *Lewis v. Ashland, Inc*., 813 F. Supp. 2d 1113, 1118 (D. Minn. 2011), an employer's termination of employee for continued insubordination during his drug testing was not violation of DATWA, where employer cancelled test due to employee's disruptive behavior, so there was no test result to form basis of termination.

One of the most common scenarios for invoking the exceptions recognized in *Copeland* and *Johnson* is where the employee has admitted to illegal drug use. A confession to using illegal drugs is not the same as a positive drug test, and each of these have different legal ramifications. If facing a scenario under which the employee has admitted to illegal drug use before the employer requests the drug test, the employer may wish to proceed immediately to terminating the employee without even requesting a drug test. At that point, obtaining a positive drug test result will only muddy the waters and give the employee legal ammunition under DATWA to challenge the termination.

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

Minnesota is not the only state with a unique law on the topic of employee drug testing. Companies with employees across the country must also comply with other state laws, and in some cases city ordinances. Jurisdictions with specific laws on drug or alcohol testing in the workplace include Connecticut; Iowa; Maine; Montana; Rhode Island; San Francisco, California; and Boulder, Colorado.

For illustration purposes only and not as a comprehensive summary of the law, in Iowa results must be sent by "certified" mail and supervisor training is required. Connecticut prohibits direct observation of the employee while providing the sample. In Maine, any employer drug testing program must be approved by the Maine Department of Labor before implementation. Drug testing in Montana is only allowed for applicants for and employees in positions which involve a hazardous work environment, a security position, public safety, public health, driving a motor vehicle or a fiduciary duty to the employer. And in San Francisco, drug testing for is only allowed if the employee presents a "clear and present danger."

In the past year, the issue of drug testing and medical marijuana accommodations in the workplace has also sparked litigation in state courts across the country. For example, in *Barbuto v. Advantage Sales and Mktg., LLC*, 477 Mass. 456, 78 N.E.3d 37 (Mass. 2017), the Massachusetts Supreme Court ruled that a medical marijuana user could assert a claim against her employer for disability discrimination, based in part on the Court's interpretation of the Massachusetts's medical marijuana statute.

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

Drug and alcohol testing of commercial truck drivers is not optional, it is mandatory. In 1991, Congress passed the Federal Omnibus Transportation Employee Testing Act of 1991 ("FOTETA"), which directed the Secretary of Transportation to prescribe revised regulations for the testing of employees for drugs and alcohol in four (4) sectors of the transportation industry. Pursuant to this direction, the Federal Aviation Administration ("FAA"), Federal Motor Carrier Safety Administration ("FMCSA"), Federal Railroad Administration ("FRA"), and Federal Transit Administration ("FTA") promulgated separate drug and alcohol testing rules for their respective industries. In general, these regulations require covered employers to adopt a written drug and alcohol testing policy, train supervisors, provide information to employees, and begin a comprehensive program of mandatory drug and alcohol testing for safety sensitive transportation workers.

The regulations adopted by the FMCSA governing commercial drivers affect the largest number of employers and employees. These regulations can be found in 49 C.F.R. § 382 (commonly referred to as "Part 382"). The regulations governing the procedures for transportation workplace drug and alcohol testing can be found in 49 C.F.R. § 40 (commonly referred to as "Part 40").

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

Employers that have both commercial drivers and employees who are not subject to federal regulations must be especially mindful when testing employees for drugs or alcohol. Employees subject to federal law are generally exempt from the requirements, and protections, of DATWA. *Belde v. Ferguson Enterprises, Inc.*, 460 F.3d 976 (8th Cir. 2006), *MN Airlines, Inc., d/b/a Sun Country Airlines v. Levander*, No 15-CV-2454 (PAM/BRT) (D. Minn. Aug. 28,

2015). Employers in this circumstance should have both a DATWA policy and a FMSCA and take care not to mix procedures, requirements, or policies between the two groups of employees.