

Oklahoma Drug Testing Standards

Recent activity in the Oklahoma Legislature has produced a substantial change to employer drug and alcohol testing practices under the Oklahoma Standards for Workplace Drug and Alcohol Testing Act (the “Act”).

Under the old version of the Act, employers that conducted on-site collection of employee samples for testing could conduct on-site pre-screening of samples for “negative” results. Where an employee tested “negative,” no further testing of the sample was conducted, while samples testing “positive” for a banned substance were forwarded to a licensed facility for testing and confirmatory testing. This practice allowed employers to submit substantially fewer samples to licensed facilities, resulting in materially



reduced testing costs.

In 2005, the Oklahoma Legislature twice amended the Act, in contradictory manners, leaving the status of on-site pre-screening in limbo. In May of this year, the Legislature finally clarified the discrepancy by amending the definition of “testing facility” in a manner that precludes the pre-screening process discussed above. The 2006 amendment to the Act

ends the employer practice of on-site sample analysis.

Although on-site collection of samples is still permissible in accordance with the Act, all tests of the sample for the presence of drugs or alcohol must now be performed by a “Testing Facility” as that term is defined in the Act, and pursuant to the applicable regulations.

Oklahoma Law Regarding Credit Reports

A recent opinion of the Oklahoma Attorney General indicates that Oklahoma currently imposes stricter obligations upon employers than the federal Fair Credit Reporting Act — at least with respect to the evaluation of the individual credit of an employee or a potential employee.

In 2001, Oklahoma adopted a credit reporting act modeled after the federal Fair Credit Reporting Act. In 2003, the federal act was amended to allow, in certain circumstances, an employer to secure credit reports regarding its employees without the employee’s knowledge or consent. Specifically, the amendment allowed such examinations in order to investigate certain



forms of employee misconduct, where credit history might be relevant. Oklahoma did not make the same amendment to its own act, and the Attorney General was asked if Oklahoma’s law was automatically amended to reflect the change in the model federal act.

According to the opinion issued in May of 2006, Oklahoma’s law has not been amended and remains in force as written. Thus, until further action by the Legislature, an Oklahoma employer may not procure a credit report regarding an employee without his or her knowledge and consent, even for a misconduct investigation.

Bad Faith Refusal to Pay a Workers' Compensation Award

Oklahoma law has long recognized a legal duty implied into all contracts for insurance that an insurer must act in “good faith” and “deal fairly” with its insured. One clear exception to this rule, however, has been a contract for workers’ compensation insurance. In the past, Oklahoma courts have routinely refused to hold a workers’ compensation insurer liable for “bad faith” dealing with a claimant for benefits under the policy.



In May of 2006, the Oklahoma Supreme Court reversed its course on this issue. In *Sizemore v. Continental Casualty Co.*, 2006 OK 36 (Okla. May 30, 2006), the Court held that Oklahoma law does recognize a tort cause of action for bad-faith refusal to pay workers’ compensation benefits. According to the Court, “[a]n insurer has an implied duty to deal fairly and act in good faith with its insured and ... the violation of this duty gives rise to an action in tort for which consequential and, in a proper case, punitive damages may be sought.”

The *Sizemore* holding applies only to the conduct of a carrier after an award by the Workers’ Compensation Court. A previous decision of the Oklahoma Supreme

Court, *Anderson v. U.S. Fid. & Guar. Co.*, 948 P.2d 1216 (Okla. 1997), still precludes a cause of action for pre-award conduct.

However, the most critical element of the *Sizemore* opinion is the Court’s express statement that it would apply the same standard to the conduct of a private, self-insured employer. Thus, despite the fact that self-insured employers are not insurance companies, and despite the fact that there is no

contract of insurance between the employee and the employer, self-insured companies now face the threat of punitive damages for the bad faith refusal to pay an employee’s workers’ compensation claim.

Sizemore has no effect on an employer’s obligation to refrain from retaliation against an employee that has been injured on-the-job or sought workers’ compensation benefits.

If you have questions concerning details of these or other employment-related issues, please contact any of McAfee & Taft’s Labor & Employment attorneys listed below.

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