

FAILING DRUG TEST MAY DISQUALIFY EMPLOYEES FROM UNEMPLOYMENT BENEFITS

New South Carolina Legislation Requires Specific Drug Testing Procedures

Under 2005 amendments to the South Carolina Employment Security Law, employers that terminate an employee for failing a drug test must comply with specific drug testing procedures before the Employment Security Commission will disqualify the employee from receiving unemployment benefits.

The amendments provide that as long as an employer has communicated a policy that prohibits the illegal use of drugs and states that violating the policy may result in termination, an employee may be ineligible for unemployment compensation if he or she was terminated for:

- Failing or refusing to provide a specimen for a drug test;
- Providing an adulterated specimen; or
- Testing positive for illegal drugs or legal drugs used without a prescription, if certain conditions are met.

For the disqualification to apply in the case of a positive test, employers must be able to show that:

- The sample was collected and labeled by a licensed healthcare professional or other authorized individual;
- The test was performed by a laboratory certified by the National Institute on Drug Abuse (“NIDA”), the College of American Pathologists, or the South Carolina Law Enforcement Division; and
- The initial positive test was confirmed using an accurate scientifically accepted method approved by NIDA.

Information an employer receives through its drug-testing program—including interviews, reports, and test results—may be used as evidence in administrative and judicial proceedings. However, the amendments provide an exception for voluntary admissions of prohibited drug use. This exception applies if:

- The employer’s drug abuse policy provides protection from immediate termination for employees who make voluntary admissions; and
- The employee admits prohibited drug use pursuant to the policy before the employer asks him or her to submit to drug testing.

If these criteria are met, the employee’s admission of drug use cannot be used as evidence.

North Carolina Law Requires Similar Procedures

North Carolina employers must also comply with specific drug testing procedures in order for employees who fail tests to be disqualified from receiving unemployment benefits. For the disqualification to apply, the employer must present evidence that the drug test result was positive, that the testing

procedures complied with the North Carolina Controlled Substances Examination Regulation ("NCCSER"), and that certain chain of custody standards were met.

The NCCSER contains detailed notice and procedural requirements for administering tests to employees and applicants. For example:

- The employer must use an approved laboratory to perform the initial screen on current employees;
- The laboratory must perform a confirmation test on any initial screen that tests positive, at the employer's expense; and
- The employee has the right to request a retest of a sample that has been confirmed as positive, at the employee's expense.

Failure to follow the NCCSER procedures will invalidate test results for purposes of an unemployment hearing and may subject the employer to fines from the North Carolina Department of Labor.

Bottom Line

Employers in both Carolinas will want to review their drug testing procedures to ensure compliance with statutory requirements for disqualifying employees who fail drug tests from receiving unemployment benefits.

This Employment Law Update is published as a service to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation.

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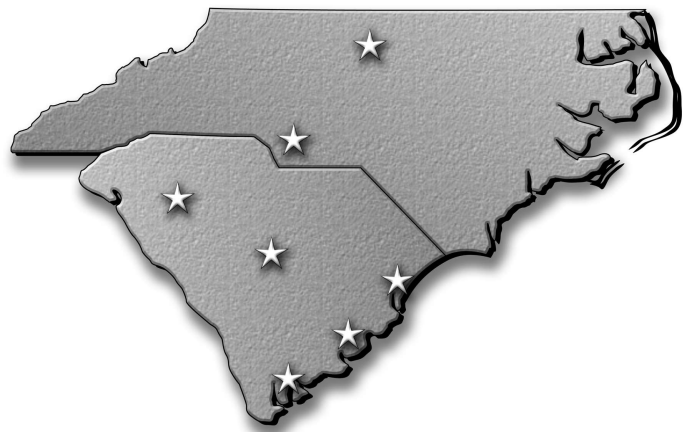
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