State Mandated Notification of Drug Screening Results

Question:

Which states have laws requiring notification to applicants of pre-employment drug screening results?

Response & Analysis:

There are laws in a number of states that require employers to notify applicants and employees when their drug test results come back positive (or even negative in a few states). Employers in Connecticut, Idaho, Iowa, Maryland, North Carolina, and Vermont are required to notify applicants and employees when a drug test comes back positive. Mississippi also requires notification when a drug test comes back positive; however, this requirements only extends to employees, not applicants. In Maine, Minnesota and Montana, employers are required to notify applicants and employees when drug test results come back negative or positive; Arkansas has similar requirements in place, however, such requirements only exist upon written request. Some states—like Iowa and Maryland—require employers to send the notification via certified mail. Others may require the employer to include additional information with the notification, such as information on the applicant's rights to retesting or a copy of the employer's written policy on the use or abuse of controlled dangerous substances or alcohol.

Employers who fail to comply with these statutory requirements can be subject to various penalties, including fines ranging from $250 to $2,000. In Maryland, an employer who violates the statutory requirements is guilty of a misdemeanor, and upon conviction, is subject to a fine not exceeding $100 for the first offense and not exceeding $500 for each subsequent conviction. Similarly, in North Carolina, an employer can face a civil penalty of up to $250 per affected examinee (with a maximum of $1,000 per investigation).

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Additionally, some states also permit applicants and employees to collect attorney's fees, back pay and other punitive damages for the employer's misconduct.

In addition, when an applicant's drug test results are communicated to the employer by a consumer reporting agency (CRA), this reporting falls under the Fair Credit Reporting Act (FCRA) and is thus subject to the statute's pre-adverse and adverse action requirements. The Federal Trade Commission specifically addressed this issue in Islinger, FTC Staff Op. Letter (June 9, 1998), when it distinguished between drug results reported directly to employers by labs (which the FTC states are not "consumer reports") and drug results reported by intermediaries that are CRAs and regularly engage in assembling or evaluating information to furnish/sell to third parties.

> If a CRA is providing the results, the drug test report falls under the definition of a "consumer report" and would thus be subject to the FCRA's pre-adverse and adverse action requirements.

While the Medical Review Officer (MRO) process—whereby a licensed physician from the CRA reviews the laboratory results with the consumer prior to providing the consumer report to the employer—allows the consumer to dispute the drug test results, the FCRA's pre-adverse and adverse action notification requirements technically still apply to such results because the drug test report is a consumer report. Thus, although it may be redundant to provide written notification of the same information when the drug test results are communicated to the employer by a CRA, employers should still provide the results in writing and comply with the pre-adverse and adverse action requirements in order to avoid state statutory violations or violations of the FCRA.

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