HK School Law Monthly Newsletter

Dear Richard
Thank you for your interest in the HK School Law Monthly Newsletter. Our firm is growing, and we are now Hansberger & Klein, LLP. We look forward to hearing from you soon!

Share Share Share Share

September 2014 | Issue 13CSDC!

VISIT US AT CSDC!

Come visit Hansberger & Klein, LLP at the upcoming Charter Schools Development Center's 2014 Charter Schools Leadership Update Conference!

WHERE: Hotel Irvine Jamboree Center

WHEN: November 3-4, 2014

LEARN MORE

IN THE NEWS

The Productivity of Public Charter Schools

A new study suggests that charter schools offer better "ROI" for taxpayers - both in terms of lower operating costs as compared to traditional public schools and greater long-term income generation for graduates of charter schools.

California Charter Schools Association Political Action Center

We encourage our readers to review the California Charter Schools Association Political Action Center. Two very important pieces of legislation, SB 1263 and AB 913, which could dramatically impact the facilities options and governing structure of charter schools are moving quickly to the Governor's desk.

DRUG TESTING IN THE WORKPLACE

An employer can discipline, discharge, or deny employment to persons whose use of alcohol or drugs adversely affects job performance or conduct, and an employer can prohibit the use of alcohol or drugs in the workplace and require that employees not be under the influence of alcohol or drugs at the workplace. Recently, however, we are receiving more questions from our clients about mandatory drug testing for charter school employees. In deciding controversies over drug testing, whether before or during employment, the courts balance the employer's legitimate business interests against the applicant's or employee's reasonable expectations of privacy. We strongly encourage charter schools to seek legal advice before implementing any type of drug testing policy.

TYPES OF TESTING

Generally speaking, there are three types of drug testing polices that a charter school may implement: (1) pre-employment testing, (2) reasonable-suspicion testing, and (3) random testing.

PRE-EMPLOYMENT

California law allows an employer to require a "suspicionless" drug test as a condition of employment after a job offer is tendered but before the employee goes on the payroll. Pre-employment testing applies to all employees and would be required prior to employment every year. Generally, the reasoning is that a job applicant has a reduced expectation of privacy during the application process and expects to be subjected to inquiries to determine eligibility. Thus, the applicant can be tested for drug use if the testing is part of a broader pre-employment medical examination that is required of every applicant. An employment offer can be conditioned on the successful completion of a drug or alcohol test by means of, e.g., urinalysis, so long as the test is a routine part of a medical examination.

If an applicant accepts a job offer contingent on passing a drug test, but doesn't take the test until after beginning work because of the applicant's own request for a delay, and then fails the test, the applicant is not considered an "employee" and may be terminated. Further, you as the employer must always be able to show that the need for the testing is job-related. In order to withstand constitutional scrutiny, you must be able to articulate why there is a special need to screen a prospective employee for drugs without suspicion based upon their specific potential job duties. Thus, we strongly encourage that you seek legal advice before implementing a pre-employment drug screening policy.

AFTER HIRING - REASONABLE SUSPICION TESTING

A number of charter schools implement a so-called "reasonable suspicion" drug/alcohol testing policy. As an employer, you have a right to demand a drug test whenever you have a "reasonable suspicion" of drug/alcohol abuse on the job. The courts have generally been supportive of requiring alcohol or drug testing based on specific objective facts and rational inferences drawn from those facts that indicate drug or alcohol abuse, although these facts and inferences may fall short of clear probable cause.

Courts have found that an employer's "reasonable suspicion" can be based on one or more of the following:

- Observable phenomena, such as direct observation of drug use or possession or the physical symptoms of being under the influence of a drug
- A pattern of abnormal conduct or erratic behavior
- Arrest or conviction for a drug related offense, or the identification of an employee as

the focus of a criminal investigation into illegal drug possession, use or trafficking/distribution
• Information either provided by reliable and credible sources or independently corroborated
• Evidence that the employee had tampered with a previous drug test

Employers can best protect their right to conduct such testing if, in advance of any incident, the employee receives notice that it is the employer's policy to test based on reasonable suspicion and if such testing is uniformly and consistently done.
It is important for employers to understand what facts lead to "reasonable suspicion," so as to avoid an employee's claim that the testing was based on some discriminatory motive, such as a person's race, color, gender, religion, etc.

Also, given the ongoing changes to laws regulating the use and distribution of marijuana both in California and nationally, it is important to note that current California law prohibits an employer from inquiring about marijuana convictions that are more than 2 years old. However, courts have previously ruled against unsuccessful job applicants who sued their employers for illegally inquiring into marijuana convictions that were more than 2 years old when the applicants had no marijuana-related convictions and were not injured or damaged by the inquiry, even though the initial inquiry was unlawful.

AFTER HIRING - RANDOM TESTING

Random drug testing, while technically a third option, is fraught with legal pitfalls and is generally not recommended. Employers may only require employees to submit to random drug testing under certain narrowly defined circumstances.

Current employees may be subject to random drug testing if they hold safety-sensitive or security-sensitive positions. Current employees may also be subject to testing (at least as part of an annual physical) if they work in a hazardous work environment. Otherwise, random drug testing may violate an employee's state constitutional right to privacy.

The following factors should be considered in analyzing the constitutionality of random drug testing:
• The employer's business and whether the job involves safety-sensitive or security-sensitive work
• The employee's reasonable expectations of privacy, if any
• Whether the employee was given notice, impliedly or expressly, that he or she might be subjected to random testing
• Whether the method of testing was a reasonable intrusion into the employee's privacy
• Whether the results of the testing were adequately kept confidential

When an employee handbook states that employees may be asked to submit to drug testing on a reasonable cause basis, employees may reasonably infer that random testing will not occur.

POTENTIAL AREAS OF LIABILITY

Drug and alcohol tests can expose employers to significant liability. The most likely suit arising from a drug test is one that alleges that the employee plaintiff was the victim of an unconstitutional search or invasion of privacy. Other potential claims that may be asserted against an employer for wrongful testing include:
• Intentional infliction of emotional distress
• Defamation
• Violation of the Fair Employment and Housing Act (FEHA) (Govt C §§12900–12996) or the Americans with Disabilities Act (ADA) (42 USC §§12101–12213)

• Wrongful termination in violation of public policy if the employee is discharged as a result of the test

Even if an employer implements a constitutionally valid reasonable-suspicion drug-testing program, an employee may contend that the employer did not have reasonable suspicion for a particular test and may sue the employer for violation of the employee's privacy rights. In Kraslawsky v Upper Deck Co. (1997) 56 CA4th 179, an executive secretary sued for wrongful termination and invasion of her constitutional privacy rights when her employer fired her for refusing to submit to a drug test. The court found that although the testing policy was constitutionally drafted, there was a jury question whether there were sufficient facts to justify the requirement for the test. The plaintiff raised a factual issue about whether she had exhibited physical signs of intoxication that gave her employer a reasonable basis for requiring a drug test. The court held that if a reasonable suspicion does not exist, the drug test becomes a random drug test that violates an individual's right to privacy.

The handling of a test sample may be a critical element where the test results lead to termination of employment based on a positive test result. In Edgerton v State Personnel Bd. (Dep't of Transp.) (2000) 83 CA4th 1350, for example, the court found that the testing laboratory had not observed federal regulations governing how the chain of custody of a test sample must be documented and verified. Thus, the test results were inadmissible and could not support a Personnel Board's decision to terminate the employee. Chain-of-custody documentation under the transportation regulations was required at both the collection site and at the testing laboratory, where specimens are vulnerable to tampering.

As a counterpoint to this case, in Carroll v Federal Express Corp. (9th Cir 1997) 113 F3d 163, the court upheld summary judgment in favor of Federal Express on claims of breach of contract and breach of the covenant of good faith and fair dealing because Federal Express had terminated an employee after he tested positive for cocaine use. The employee claimed that the drug test, administered by an independent contractor, was flawed. In California, however, the employer generally is not liable for the tortious acts of an independent contractor.

ADA/FEHA PROTECTIONS

Although a current user of illegal drugs is not protected by the ADA or FEHA, individuals with past addictions or those "regarded as" addicts are protected under both statutes. One difficulty with drug and alcohol testing is that it sometimes identifies past usage. Generally, employers have no legitimate interest in discontinued habits and inquiry into such habits may be unreasonable.

The ADA bars employers from requiring current employees to submit to medical examinations or inquiries regarding disability unless the examination or inquiry is related to the employee's ability to perform the essential functions of the job and is consistent with business necessity. Any medical information obtained should be maintained in a separate medical file, as discussed below. EEOC Guidance states that blood, urine, and breath analyses to check for alcohol are "medical examinations" under the ADA and such examinations may only be required of employees if they are "job-related and consistent with business necessity."

Alcoholics may be considered persons with a disability under the ADA and FEHA if they are qualified to perform the essential functions of the job. According to the EEOC, individuals who are disabled by alcoholism are entitled to the same protections accorded other individuals with disabilities under the ADA. However, an employer can discipline, discharge, or deny employment to an alcoholic whose use of alcohol adversely affects job performance or conduct, and an employer may prohibit the use of alcohol in the workplace and require that employees not be under the influence of alcohol at the workplace.

Smoking (i.e., addiction to nicotine) might be also considered a disability if the employee is in a treatment program; sensitivity to smoke may also be a disability under the ADA.

SERIOUS HEALTH CONDITIONS UNDER FMLA

The Family Medical Leave Act (FMLA) and its state counterpart, the California Family Rights Act (CFRA), provide protection for employees' leave due to a "serious health condition" that makes the employee unable to perform the functions of the position. The employee must provide a copy of a certification of the medical condition issued by a health care provider. That certification must identify the date on which the serious health condition began; the probable duration of the condition; and the appropriate medical facts within the knowledge of the health care provider as to the condition.

Because employers are allowed to inquire about "serious health conditions" regarding an employee's request for FMLA/CFRA leave, tension exists between an employer's entitlement under those Acts and the ADA restrictions on inquiries of existing employees. Thus, if an employee's "serious health condition" is also considered a "disability," the inquiry may technically violate the ADA.

It is important for employers to consider whether an employee's negative or unpredictable on-the-job performance could be caused by a course of medication taken for a serious health condition, rather than the use of illegal drugs or alcohol.

The U.S. Department of Labor has created Form WH-380 to assist employers in obtaining medical information related to FMLA leave. While not mandatory, Form WH-380 can assist employers with the process of asking questions about why an employer is taking time off so that the questions concern job-related issues and are consistent with the "business necessity" exception of the ADA.

COMPASSIONATE USE ACT

California's passage of the Compassionate Use Act of 1996 (CUA) (Health & S C §11362.5) does not provide protection from the effects of federal drug policy. The CUA permits people to use marijuana to treat chronic pain and other ailments, yet the use of marijuana remains completely illegal under federal law. The California Supreme Court has held that an employer could not be liable for violating California's Fair Employment and Housing Act (FEHA) for terminating an employee who used marijuana to treat chronic pain.

The employee alleged that the company violated FEHA by discharging him because of his marijuana use, and by failing to make a reasonable accommodation for his disability. In holding that the employer did not violate FEHA, the court explained that CUA does not give marijuana the same status as other legal prescription drugs, and no state law can completely legalize marijuana because the drug remains illegal under federal law. Furthermore, the court noted that there is nothing in the text or history of CUA that suggests that the Act was intended to address the rights and obligations of employers and employees, and FEHA does not require employers to accommodate the use of illegal drugs.

FEHA does not require employers to accommodate the use of illegal drugs, including medically supervised marijuana, which remains illegal under federal law.

WHAT YOU SHOULD DO

If your school is considering the implementation of a drug testing policy of any kind, it is important to:

- Establish a written policy that is disseminated to all employees, implanted uniformly according to the terms of the policy
- The policy should explain why testing may occur. For example, common reasons for a drug testing policy include ensuring a safe workplace, avoiding adverse effects on employee health and employer health costs, or to preserve a positive company image
- Verify that the written policy mirrors any requirements already outlined in your current employee and student handbooks, as well as your charter bylaws and charter petition, and is written to conform to current law, including the Fair Employment and Housing Act and Americans with Disabilities Act
- Seek legal advice on such matters such as limiting discretion in choosing who will be tested, limiting the intrusiveness of the testing, giving employees the employee the option of being retested based on a positive test result, the type of report generated by the independent agency administering the test, the confidentiality of the test results, and the actions that will be taken in the event of particular test results, among many other items

We recommend you always first contact your attorney prior to requesting your employee be tested, as well as prior to making any change of employment, so as to confirm the facts support the requisite factors required.

QUESTIONS?

As always, if you have questions about this newsletter or any other matter, please call us at any time for guidance.