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NEW DRUG TESTING LEGISLATION ENACTED FOR PUBLIC WORKS CONTRACTORS

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On March 22, 2006, Wisconsin enacted legislation mandating that any employer who performs work on a public works contract must have implemented a written drug and alcohol testing program for employees. (Wis. Stat. § 103.05) The statute takes effect on April 1, 2007. Although the new statute is intended to give employers flexibility in implementing a suitable drug and alcohol prevention program, the program must contain the following:

- a. A policy providing that no employee shall “use, possess, attempt to possess, distribute, deliver, or be under the influence of a drug...or alcohol” while performing work on a public works contract.
- b. A requirement that all employees performing work on the public works project submit to “random, reasonable suspicion, and post-accident drug and alcohol testing and to drug and alcohol testing before commencing work on a project, except that testing of an employee before commencing work on a project is not required if the employee has been participating in a random testing program during the 90 days preceding the date on which the employee commenced work on the project.”
- c. A procedure for notifying an employee who (1) violates the required policy, (2) tests positive for the presence of a drug, or (3) refuses to submit to testing, that the employee is prohibited from working on the project.

The new statute provides that an employer must immediately remove an employee from the public works project if the employee violates the policy, tests positive for drug or alcohol use, refuses to submit to testing, or if an officer of the state contracting agency has a “reasonable suspicion” that the employee violated the policy and requests that the employer immediately remove the employee from the project. Any employee who is removed from the project may recommence work on the project if the employer provides documentation showing that (1) the employee has tested negative for the presence of drugs and is not under the influence of alcohol, and (2) the employee has been approved to recommence work on the project in accordance with the employer’s substance abuse prevention program.

Testing for the presence of drugs or alcohol in an employee’s system and the handling of the test specimens must comply with the federal Department of Health and Human Services Mandatory Guidelines for Federal Workplace Drug Testing Programs. Each employer is responsible for the cost of developing, implementing, and enforcing its substance abuse prevention program, including the cost of drug and alcohol testing of its employees.

If employees on a public works project are governed by a collective bargaining agreement (“CBA”) that contains drug and alcohol provisions inconsistent with the statute, the provisions of the CBA control until the CBA expires or is extended, modified, or renewed—whichever occurs first. In other words, employees subject to a different drug and alcohol testing program under a CBA will be subject to the requirements of the Wisconsin statute *after* the CBA expires. To the extent any local governments in Wisconsin have enacted or will enact ordinances regulating substance abuse, the ordinance must, at a minimum, strictly conform to the standards of the state statute.

Although the requirements of the new statute appear to be clear, drafting and implementing a drug and alcohol policy can be a complicated task with legal ramifications for employers. For example, under the Americans with Disability Act (“ADA”) it is illegal for an employer to discriminate against any employee on the basis of past drug-related problems or to test a prospective employee without first making a conditional offer of employment. In addition, courts across the county have ruled that over-invasive drug and alcohol policies can violate an employee’s right to privacy. Employers also must take care to ensure that all test results remain confidential and that third-party test administrators comply with state and federal laws.

If you have any questions about the issues raised by this e-alert, please feel free to contact Ann Martin at (414) 273-3910 or by e-mail at amartin@lindner-marsack.com

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