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TRANSPORTATION LAW UPDATE

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RANDOM DRUG TESTS: POTENTIAL LIABILITY

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Department of Transportation regulations deem random drug testing necessary to ensure that commercial motor vehicle operators perform their duties in the safest possible manner. However, the U.S. District Court for the Eastern District of New York (Brooklyn) recently issued a decision that clearly warns the trucking industry of potential liability arising from a company's failure to provide drivers with precise procedural instructions for random drug tests, and of the need to promptly inform United States Investigations Services (USIS) of any unfavorable test results. This article explains how a few simple, procedural clarifications and diligent reporting to USIS may help avoid unnecessary and costly liability in the event a company terminates a driver for failure or refusal of a random drug test.

Case Study

In New York, employees may sue their former employers for defamation when the former employer inaccurately informs potential employers that the employee refused or failed a drug test. In ***Machel Liverpool v. Con-Way, Inc.***, the U.S. District Court for the Eastern District of New York allowed Machel Liverpool, a former driver, to bring a defamation suit against Con-Way, Inc. because Con-Way informed potential employers that Liverpool refused or failed a drug test. ***Liverpool v. Con-Way, Inc., No. 08-CV-4076*** *(E.D.N.Y. Nov. 26, 2010).* Liverpool reported for work at Con-Way around 7:50 A.M., at which time he received a packet of information instructing him to report for a random drug test. The drug test packet provided no information about the time he was supposed to report for testing, or whether the driver needed to return to work after he submitted to the test. As such, the driver left Con-Way and visited his girlfriend before reporting to the testing site.

Liverpool arrived at the testing center around 10:00 or 10:30 A.M., and did not return to work after he was administered the drug test. Shortly thereafter, Liverpool's supervisor questioned him about his whereabouts before and after the test. Rather than tell his supervisor that he visited his girlfriend, Liverpool claimed that he ate breakfast at a Wendy's restaurant before the test, and returned home afterwards. After Liverpool's supervisor learned that Wendy's did not serve breakfast, Liverpool was terminated for lying and poor attendance, as demonstrated

by his failure to return after the drug test. Liverpool applied for several truck driver positions in the months that followed, but was repeatedly denied a job because Con-Way apparently informed each employer that Liverpool failed or refused a drug test. While it is unclear whether Liverpool passed the drug test, he undisputedly appeared at the testing center and was administered a drug test. As such, Con-Way erred in reporting that Liverpool had *refused* a drug test.

More than a year after Con-Way terminated Liverpool, he filed a lawsuit alleging that Con-Way's statements to potential employers about the failed or refused drug test were defamatory. In New York, the elements to establish defamation are "(1) a false statement; (2) publication without privilege or authorization to a third party, (3) by at least a negligence standard of fault and (4) the statement either causes special damages or constitutes defamation per se." ***Dillon v. City of New York,*** *261 A.D.2d 34, 38 (1st Dept. 1999).* A claim for defamation begins accruing on the first day the defamatory statement is published, and is subject to a one-year statute of limitations under CPLR §215(3). However, the statute of limitations begins to run again from the date of any subsequent publication of the defamatory material.

The Court permitted Liverpool to bring suit more than a year after Con-Way first informed a potential employer of his failed or refused test because each instance in which Con-Way notified another potential employer of Liverpool's conduct constituted a *re-publication* of defamatory material, thus tolling the one-year statute of limitations. This is of particular interest to trucking companies informing a terminated driver's potential employers of a failed or refused drug test.

Lessons Learned from the Con-Way Case:
Provide Drivers With Clear Procedural Instructions Before They Report for a Random Drug Test; Immediately Report Any Unfavorable Results to USIS.

Liverpool serves as a clear warning to trucking companies—provide your drivers with clearly written procedural guidelines before they take random drug tests. Make sure your instructions state the precise time and location of the driver's test, and whether he or she must return to work afterwards.

If a trucking company erroneously informs a driver's potential employers of a failed or refused test, each subsequent communication tolls the statute of limitations for a defamation claim. In order to minimize the time in which plaintiff might file a suit for defamation, make sure to immediately notify USIS and/or other national databases of the former employee's failed or refused test. While not all trucking companies utilize USIS to examine their potential hires' prior employment records, many do. As such, reporting to national databases like USIS minimizes a company's need to interact with all potential employers who subscribe to USIS. This substantially reduces the potential for miscommunication between companies as to a driver's history. Most importantly, however, reporting to USIS allows the driver's former employer to inform other companies about the driver's history while invoking the New York single publication rule, which starts the clock on the one year statute of limitations for defamation claims.

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