



THE STERLING ADVANTAGE

industry leader

in web-based technology

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Jackson Lewis Help Line.....

Did you know that - as a Sterling customer - you have complimentary access to our Jackson Lewis Help Line to assist you with employment and labor issues and legal questions?

Jackson Lewis is the preeminent workplace law firm representing management in over 40 offices nationwide. The ability for our clients to have direct access to a legal specialist to help navigate employment and labor law matters is a key point of differentiation for Sterling customers.

Please click [here](#) to log in.....

Complimentary Webinars.....

Did you know that - as a Sterling customer - you can participate in complimentary online webinars offered throughout the year by our resident subject matter experts?

Here's our schedule through the end of June:

- ▶ *The Role of a Designated Employer Representative (DER)* – April 16, 2010
- ▶ *What to expect with a DOT Substance Abuse Testing Audit* - May 7, 2010
- ▶ *How Electronic Drug Testing Improves An Employers Program* – June 11, 2010
- ▶ *The Fair Credit Reporting Act and the Background Check Process* - June 25, 2010

Please click [here](#) to register.....

Sterling is also holding a series of webcasts presented by Jackson Lewis. This complimentary series, *"Top Ten Mistakes in Hiring"*, is designed to address topics of particular interest to employers and hiring professionals, including interviewing practices, background checks, FCRA compliance, wage law, etc. Each hour long webinar is followed by a half hour Q&A session, to address questions from attendees.

The first session was held on March 23, 2010, and addressed common mistakes employers make during the hiring process. Other webcasts in this quarterly series are scheduled for *June 17th*, *September 14th*, and *December 14th*. Note: Dates & topics are subject to change. Please check the [Upcoming Events](#) page of the Sterling Infosystems website for the latest webcast details.

The NAPBS.....

Sterling's compliance team recently attended the NAPBS 2010 Annual Conference in San Antonio, Texas from March 7th – 10th. Sterling and our recently acquired company - ABSO - are founding members of the NAPBS (National Association of Professional Background Screening Providers), a national organization whose membership meets to discuss industry issues and solutions.

Membership establishes a voice for developing best practices in the background screening industry, and Sterling's involvement provides clients the benefit of strong advocacy as a consumer with State agencies. The group looks to identify concerns, and the impact on providing an effective means of screening job applicants. NAPBS has historically lobbied in Washington against legislation that would restrict access to public records and other information vital for employers for making informed hiring decisions.

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Helpful Links.....

Fair Credit Reporting Act (FCRA)
Equal Employment Opportunity Commission (EEOC)
Federal Trade Commission (FTC)
Department of Labor (DOL)
Department of Transportation (DOT)
Department of Health and Human Services (DHHS)
Substance Abuse and Mental Health Services Administration (SAMHSA)
National Institute on Drug Abuse (NIDA)
Office of National Drug Control Policy
Drug & Alcohol Testing Industry Association (DATIA)
Substance Abuse Program Administrators Association (SAPAA)

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Background Screening Focus – Texas.....

Criminal History Reporting

A consumer reporting agency may not furnish information related to a record of arrest, indictment, or conviction of a crime in which the date of disposition, release or parole predates the consumer report by more than seven years. However, the time limit provision does not apply to the employment of any individual at an annual salary that equals, or that may reasonably be expected to equal \$75,000 or more.



General guidance concerning limitations on private sector employer inquiries and use regarding criminal background information by employers in Texas, and applicant obligation to respond:

- ▶▶ Employers may ask job applicants about arrests not leading to conviction
- ▶▶ Employers may consider arrests not leading to conviction
- ▶▶ Employers may consider non-pending arrests
- ▶▶ The State does not expressly prohibit private sector employers from considering any conviction records

Negligent Hiring/Retention.....

An employer owes a duty of care to those with whom its employees foreseeably interact as a consequence of their employment. This duty imposes an obligation on employers to hire and retain only safe and competent employees. Breach of this duty can give rise to a cause of action for negligent hiring or retention. In short, a cause of action for negligent hiring or retention accrues where: 1. an employer hires/retains an incompetent employee; 2. knows or should have known the employee was unfit to perform his/her job; 3. the employer acts or fails to act in a manner that is negligent; 4. the injury to plaintiff was foreseeable; and 5. the injury to plaintiff was proximately caused by the employer's negligence.

- ▶▶ An employee with a criminal record sexually abused a child. As a result, his employer was found liable for \$1.75 million for negligent hiring and retention. (Doe v. MCLO)
- ▶▶ A vacuum cleaner manufacturer was found liable because one of its distributors hired a door-to-door salesperson with a criminal record who raped a female customer in her home. The manufacturer should have required its distributors to conduct prehire screening of door-to-door salespersons to prevent hiring of persons with criminal histories. (McLean v. Kirby Co.)

DOT Drug Testing Revisions.....

The Department of Transportation (DOT) is proposing to amend provisions of its drug testing guidelines to align with new Department of Health and Human Services (DHHS) revisions to the *Mandatory Guidelines for Federal Workplace Drug Testing Programs* (published by SAMHSA - the Substance Abuse and Mental Health Services Administration).

The DHHS revisions take effect **May 1, 2010**, and the DOT is required under the Omnibus Transportation Employees Testing Act (OTETA) to follow DHHS testing procedures and protocol for testing specified under DOT regulations (49 CFR Part 40).

DHHS revisions include:

- ▶▶ Lower cut-off levels for cocaine testing. Initial screening is lowered to 150 ng/mL (from 300 ng/mL) and confirmation screening is lowered to 100 ng/mL (from 150 ng/mL).
- ▶▶ Lower cut-off levels for amphetamine testing. Initial screening is lowered to 500 ng/mL (from 1,000 ng/mL) and confirmation screening is lowered to 250 ng/mL (from 500 ng/mL).
- ▶▶ MDMA (Ecstasy) is being added to amphetamine testing.
- ▶▶ 6-acetylmorphine (6AM), which is a unique metabolite of heroin, is being mandated for opiate testing. Currently, testing for 6AM is only being conducted when morphine is detected at a concentration greater than or equal to 2,000 ng/mL
- ▶▶ Certification of Instrumented Initial Testing Facilities (IITF) to conduct initial screening of samples to provide negative and negative dilute results quicker to employers, and to inform of samples collected that are rejected for testing. Confirmation of all other results will still be required to be performed by a DHHS certified laboratory.



Other revisions to federal testing that were considered but not adopted include additional specimen sampling beyond just urine (e.g., hair, oral fluid, etc.), and additional drug testing methodologies, such as use of Point-Of-Collection-Testing (POCT) devices for drug screening.

Substance Abuse Testing Spotlight – Iowa.....

Employers operating in Iowa are not required to conduct substance abuse testing beyond that specified by federal regulations. However, if a private employer operating in Iowa chooses to test under its own authority, then state law must be followed. Some key points regarding substance abuse testing in Iowa:



- ▶ Employers must have a written substance abuse testing policy in place, which must be provided to each employee and job applicant. The policy must also be provided to the parent of a minor who would be covered by the policy (under age 18).
- ▶ Written policy must specify disciplinary procedures to be taken as a result of refusal to test and a verified positive test result, options for rehabilitation and employee assistance and, if alcohol testing is conducted, the cut-off level for a positive alcohol concentration (not less than 0.04).
- ▶ Employer policy must be posted in common employee areas, as well as instructions how to access an EAP. If an employer does not have an EAP, the employer must maintain a file of certified alcohol/drug abuse programs that can be shared with employees.
- ▶ Supervisors must attend substance abuse awareness training that initially includes a minimum of 2 hours on the symptoms and probable indicators of substance abuse, and a minimum of 1 hour training annually thereafter.
- ▶ All positive drug screening results must be confirmed by a laboratory certified by DHHS or under rules developed by the Iowa Department of Public Health.
- ▶ Alcohol testing must be conducted following DOT rules, and split-specimen collection is required for employee drug testing (not specified for job applicants).
- ▶ A Post-Accident drug and alcohol test is required following a serious injury, or, property damage reasonably estimated by supervision at the time of the accident to exceed one thousand dollars.
- ▶ Random testing is permitted when an employee is at work (excluding represented employees who are subject to testing pursuant to separate agreement, or, an employee not scheduled to be working at the time random testing is to be conducted). The pool of employees eligible for random selection must include either (1) all employees, or (2) all employees performing safety-sensitive work.
- ▶ A qualified MRO (Medical Review Officer) must review a non-negative test result before it is reported to the employer.
- ▶ Following a positive result, employers must provide written notice via certified mail (return receipt requested) to an employee with a list of rights including the availability to test a split sample (an employee may request such testing within seven days of the date the employer mails the test result). For a minor, the written notification must be directed to the parent of the minor.
- ▶ Employers must provide job applicants with a written notice of a test result, and how positive result records may be accessed.
- ▶ An employee may not be terminated following a first alcohol positive unless the employee refuses or fails to successfully complete prescribed rehabilitation.

Other Compliance-Based Products

- ▶ **Instructor-Led Training (Online and Onsite)**
 - Designated Employer Representative (DER)
 - Supervisory Substance Abuse Awareness (RST)
 - Employee Substance Abuse Awareness
 - ▶ **Substance Abuse Testing Policy Development/Review - DOT and Non-DOT**
 - ▶ **Mock Substance Abuse Testing Program Auditing**
- Please click [here](#) to learn more.....*

? ? ? ? ? Compliance Questions Of The Quarter ? ? ? ? ?

Question: Under what circumstances involving an accident must an employee performing safety-sensitive work be tested for drugs and alcohol as per DOT regulations?

Answer: Under DOT, covered employees involved in an accident must proceed immediately for post-accident drug and alcohol testing provided that the employee does not first require medical assistance. Circumstances requiring the employee to test under DOT authority include: (1) a fatality caused by the accident; (2) medical treatment required away from the scene by anyone involved; (3) any vehicle involved in the accident cannot be removed from the scene under its own power. Under FMCSA, except in instances involving a fatality, a citation must also have been issued to the driver by local law enforcement to qualify the drug and alcohol test under DOT authority.

Question: Can an employer deny employment to an individual who has a bankruptcy on their credit report?

Answer: No. As per the bankruptcy code, an employer cannot deny employment due to a bankruptcy.

Please click [here](#) to submit a question. All will be responded to and two will be selected for posting in the next issue.

There's absolutely no one better than our customers to help the Sterling Compliance Team prepare for the next quarterly publication of the ***Sterling Sentinel***.

Please email your thoughts and recommendations for future articles and content to:

sterlingsentinel@sterlinginfosystems.com



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