

ALCOHOL & DRUGS: DOT COMPLIANCE MANUAL

COMMUNICATIONS SURROUNDING DRUG AND ALCOHOL TESTING PROGRAMS

Once an employer has its testing program up and running and in full compliance with the FMCSA regulations, its potential liability does not end.

Although the regulations require that drug and alcohol test results be kept confidential, substantial liability can flow from improper communications regarding test results or other information. For example, false representations that express or imply that an individual is a drug user can trigger liability for defamation and truthful assertions about test results or participation in a drug treatment program can trigger liability for invasion of privacy.

Concern about legal liability for the improper disclosure of test results is even more significant given the background check requirements contained in the new regulations. Under the new regulations, employers must inquire about, and disclose, information about a former employee's drug or alcohol test results dating back three years, albeit only with that individual's written consent. (49 CFR §§391.23, 382.413, and 40.25)

Defamation

Liability for defamation of character can occur when a statement is made about an individual to a third party and the statement is false and defamatory.

This can occur if, for example, a supervisor tells other employees that "Charlie is a pot-head" or responds to an employment inquiry with information known to be false, such as an unconfirmed or unreliable test result (e.g., a broken chain-of-possession, a valid explanation, an invalid breathalyzer result, etc.). Remember — your potential for defamation liability is thus greatest when an error is discovered in the collection, laboratory or testing process and a subsequent representation is made based upon information that you knew or should have known was untrue and defamatory.

The form of a defamatory communication will determine whether it is labeled as libel or slander, although this distinction is becoming increasingly ambiguous. (*Brown and Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 267 (7th Cir. 1983)) Libel is a written form of defamation, while slander is oral. In order to recover on a claim for defamation, an individual must prove the following elements:

1. A false statement;
2. Communicated by speech, conduct or in writing to someone other than the person defamed; and
3. The communication is unprivileged and defamatory. (*Restatement (Second) of Torts* §558)