Insight

IN-DEPTH DISCUSSION

March 1, 2016

Eighth Circuit Rules Minnesota's Drug and Alcohol Testing in the Workplace Act Has Multi-State Reach

BY DALE L. DEITCHLER AND NANCY N. DELOGU

The U.S. Court of Appeals for the Eighth Circuit recently expanded the reach of the Minnesota Drug and Alcohol Testing in the Workplace Act[1] ("DATWA" or "the Act") by ruling that the Act can apply to the employees of Minnesota-based employers working in other states whenever there are "significant contacts" between the state and the parties or the facts giving rise to the claim. In *Olson v. Push, Inc.*,[2] the Eighth Circuit ruled that Minnesota's drug testing rules applied to a Minnesota applicant for a West Virginia job because the employer did business in Minnesota, hired a Minnesota resident, and permitted a pre-employment drug test to be conducted in Minnesota. Because Minnesota's DATWA imposes some of the most significant restrictions on workplace drug and alcohol testing in the country, the Push case requires prudent Minnesota employers to consider whether the Act applies to individuals employed in out-of-state positions and to adjust their testing protocols.

Minnesota Applicant for West Virginia Job Tested in Minnesota by Employer Doing Business in Minnesota

While living in Minnesota, the plaintiff job applicant was recruited by a Push representative and eventually offered a job in West Virginia, which he accepted. The applicant underwent a pre-employment drug test at a clinic in Minnesota, and started working for Push in West Virginia three days later. When the drug test was reported as "diluted" five days later, Push treated it as a positive result, and terminated the plaintiff's employment.

---

1 Minn. Stat. §§ 181.950 – 181.957.

2 2016 WL 690844 (8th Cir. Feb. 22, 2016).

Littler

©2016 Littler Mendelson, P.C. All rights reserved.

Because the Employer did Business in Minnesota and Minnesota had Significant Contacts with the Employee and the Underlying Testing Process, DATWA Applied

The employee sued, alleging his termination violated DATWA's requirement that he be offered rehabilitation after a first positive test result in lieu of termination.[3] The U.S. District Court for the District of Minnesota[4] dismissed the claim, finding that the company failed to meet the Act's definition of "employer":

> a person or entity located or doing business in [Minnesota] and having one or more employees.[5]

The court concluded "doing business in Minnesota" included only "relevant" business, further explaining that "relevant" business is "the employment for which [the entity] is conducting drug testing."[6]

The Eighth Circuit reversed, finding DATWA to be remedial in nature and warranting a liberal construction in favor of the remedies the Act provides, reasoning:

> DATWA's broad definition of "employer" clearly and unambiguously includes all entities "doing business in" Minnesota, and that Push, which conceded that it does business in Minnesota, falls within that definition… DATWA contains no language limiting its application only to drug testing of those employees whose employment is directly related to an employer's Minnesota business activities; rather, the legislature drafted DATWA broadly to encompass all employers that are located in Minnesota, and all employers that conduct business in Minnesota.[7]

Most significant, the Eighth Circuit found no constitutional due process issues with applying DATWA to the plaintiff's case. In order for a "state's substantive law to be constitutionally applied in a particular case," observed the court, "the state must have a significant contact or a significant aggregation of contacts with the parties or the underlying facts giving rise to the litigation, creating a state interest, such that the application of its law is neither arbitrary nor fundamentally unfair."[8] The court had little difficulty in finding significant contacts in the plaintiff's case, concluding:

> DATWA can be applied to the facts of this case consistently with due process concerns: Push did business in Minnesota, hired a Minnesota resident, and permitted that Minnesota resident's pre-employment drug test to be conducted in Minnesota.[9]

Next Steps Under DATWA for Employers Doing Business in Minnesota with Multi-State Operations

Employers doing business in Minnesota with multi-state operations generally seek to avoid applying Minnesota's drug-testing law to their out-of-state operations because of the Act's rigid requirements, including the obligation to offer rehabilitation after a first-time positive test result. The *Push* decision calls

---

3 § 181.953, Subd. 10.

4 The plaintiff filed his lawsuit in Minnesota state court and the case was removed to federal court on the basis of diversity jurisdiction.

5 Minn. Stat. § 181.950, Subd. 7.

6 2014 WL 4097040 (Aug. 19, 2014) at * 3.

7 2016 WL 690844 at *2 (underlining added). The court also found that when the Minnesota legislature intends state employment law legislation to apply solely within Minnesota, it has expressly limited application to Minnesota operations/employees. Id., discussing Minn. Stat. § 181.960 Subd. 2 (MN personnel records statute applies to services predominantly performed within MN), Minn. Stat. § 181.974, Subd. 1 (MN Genetic Testing in Employment Act applied to services performed "in" MN); Minn. Stat. § 363A.03 Subd. 15 (MN Human Rights Act applies to employees who reside or work in Minnesota).

8 2016 WL 690844 at *3.

9 *Id.*

Insight is published by Littler Mendelson in order to review the latest developments in employment law. Insight is designed to provide accurate and informative information and should not be considered legal advice.

into question their ability to limit the application of the law. According to the court's reasoning in Push, when substantial Minnesota connections exist, Minnesota's drug testing law will apply.

For Minnesota employers, two key variables tilted the decision toward DATWA coverage in the *Push* case. First, the plaintiff was a Minnesota resident. Second, Push conducted the plaintiff's drug test in Minnesota. If both of these factors had been different (e.g., the plaintiff had been a Wisconsin resident and the pre-employment drug test had been conducted in West Virginia) the outcome in the case likely would have been different, as the only "contact" would have been the company "doing business" in Minnesota. If, in contrast, the company had hired a West Virginia resident to work in Minnesota, it is likely that DATWA would apply. If the new hire did not live in Minnesota, was not hired to work there and was not tested there, however, it seems likely that a reviewing court would not find that "the parties" had significant contacts with Minnesota, although the broad language of the decision does not make that a forgone conclusion.

While the *Push* case at first blush seems expansive and its full compliance implications are unknown at this time,[10] it reflects the maxim common among lawyers that "bad facts make bad decisions." Stated otherwise, Push can largely be limited to its facts, but cannot be ignored. In any workplace drug/alcohol testing circumstance where there are both Minnesota and other state contacts, employers doing business in Minnesota cannot assume DATWA will not apply.

So, when employment is transitory in either direction – *e.g.,* a Minnesota resident, like the plaintiff in this case, seeks employment in another state, or a resident of another state seeks employment in Minnesota – employers should assume DATWA may apply, regardless of where the test is performed. Employers should assume DATWA will certainly apply if—as in the instant case—the test is performed in Minnesota of a Minnesota resident. Hard questions arise where, e.g., management staff in one state report to executive staff of a Minnesota-headquartered company. Of course, litigation could have been avoided in this case if the job applicant did not begin work until after the results of his pre-hire test were received, since a positive pre-hire test would have permitted the company to decline to hire the applicant even under DATWA.

Employers doing business in Minnesota with multi-state operations should, therefore, assess whether DATWA applies when those operations are implicated. If there are multiple Minnesota contacts, DATWA compliance is essential. On the other hand, where Minnesota contacts are minimal, employers can increase the likelihood DATWA will not apply by the simple act of ensuring that testing does not take place in Minnesota.

10 For example, should notice of testing routinely be, as required by DATWA, posted in operations in states outside of Minnesota?

Insight is published by Littler Mendelson in order to review the latest developments in employment law. Insight is designed to provide accurate and informative information and should not be considered legal advice.