

THE RISK OF THE EMPLOYER REGARDING THE NARCOTICS TESTS ON THE EMPLOYEE

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Abstract

The employer is under the risk to violate the privacy of the employees when he/she requests narcotics test for them; the employee can legally defend the right to privacy under the new Romanian Criminal Code, in effect since February 1st, 2014.

Keywords: employer, narcotics, test, privacy, risk

The labor law rules the relationship between the employer - the beneficiary of the labor- and the employee - the performer of the labor.

According to the Labor Law, the employer is the individual that hires another individual to perform a certain activity as the employee. The employer can be either an individual or a juridical entity, private or public.

The employee is the individual, obligated by profession or charge, based on the individual labor contract to perform a certain activity for the employer, during a certain time frame.

The individual that requests to be employed must present at the moment of the closure of the labor contract certain documents that vouch the fulfillment of the legal requirements.

Article 63 line 2 of the Labor Code states that “*the future employee must submit to a medical exam in order to be established if the health is suited for the future duties*”.

According to the Labor Protection Law no.319/2006, “the leaders of the judicial person and the individual must employ only persons that have passed the medical and psycho-professional tests and is fitted for the future assignment”¹.

Also, art 33 of the National Labor Contract states that the employer must organize for the initial moment of employment and later, at least once a year, a medical exam of the employees for the purpose of learning if they are fitted for the future assignment or for the job they perform, or to prevent labor accidents.²

¹ Published in Official Gazette no. 646/26.07.2006

² Sanda Ghimpu, Alexandru Ticlea, “*Dreptul muncii, curs universitar*”, Ed. All Beck, Bucuresti, 2000, pag. 5.

For certain professional categories is required also a particular health requirement for employment. For magistrates, the candidate must fulfill the medical requirements in order to perform his/her duties, mandatory requirement also for medics and pharmacists

Labor medicine rules, approved by the Minister of Health order no.1957/1995¹ refers to two medical exams categories, one during employment and one periodically.

The results of the medical exams shall be logged onto a medical form and the final conclusions are the medical notice of approval, issued by the competent medical institution and communicate to the beneficiary.

The absence of such medical notice will void the individual labor contract since art. 63 line 2 of the Labor Code states that the medical exam for employment is an obligation that should be fulfilled by the employer and by the employee.

It's consider a contravention hiring an individual, for any assignment, without passing previously a successful medical examination suited for the features of the future assignment and that he/she doesn't represent a dangerous for the public health or the absence of the employees of any company or individual for the regular medical exams, stated by the regulations of the Ministry of Health and scheduled by the medical authority accordingly to the working environment, as stated by art. 29, letter b and art. 30 letter of Law no. 98/1994 regarding the contraventions and penalties related to public hygiene and health regulations².

The regular medical exam should be performed yearly, in respect of the assignment particulars and carried out during the performance of duties.

Can an employer ask for a mandatory drug test for hiring of periodically?

The issue raises some controversy since more and more employers require such test as mandatory for employment and the final decision will be based on the outcome of such exam³.

The controversy consists in the conflict of interests between the employer and the employee.

Future employees can be worried that such information obtained after a urine exam, such as the presence a certain disease, for example epilepsy.

Another worry could be a medical error, disfavourable to the employee. They could be listed as narcotics users, meaning disgrace in the working community and even dismissal from employment.

Such incidents can prove a violation to the private life, in particular if the individual had no involvement in a work related accident caused by drug abuse.

On the other hand, the employee motivates that such medical information are necessary, most drug abusers steal from work to support their addiction, and so the employer will have the opportunity to prevent and wrong doing of the employee.

The issue is not the information disclose after the medical exam, but the future interference with the working relationship of the employee.

¹ Published in Official Gazette no. 60 bis of march 26th, 1996

² Published in Official Gazette no. 317 of October 16th, 1994.

³ Eliodor Tanislav, "*Dreptul vietii intime*", Ed. Semne, Bucuresti, 1999, pag. 167.

The reasons why an employee uses narcotics off-duty should not concern in anyway the employer as long as this action doesn't produce dependence and affect his/her professional performance.

At the moment, the Romanian legislation doesn't incriminate as a crime the consumption of narcotics, but it can be sanctioned as a contravention, along with a complementary measure of forced medical cure or medical supervision¹.

The Law 143/2000 regarding the fight against narcotics trafficking and consumption doesn't incriminate the drug abuse, but states in art. 27 line 1 that the consumption of controlled substances, without a medical prescription is illegal in Romanian territory².

So, since the illegal consumption of narcotics is not directly incriminated as a felony and is not listed in the 11 crimes stated in the above mentioned legislation, its only a contravention according to the Counsel of Ministers Decision no.899/1970, still in use. This regulation states that the self-administration of narcotics without prescription is contravention³.

We conclude that the employee should have his/her right of privacy protected, without any repercussion, except in the case a public employee, whom dependency on narcotics can seriously effect of the performance and his/her official position must require such narcotics test, such as the case of firemen, policemen, paramedics, pilots, aviation safety personnel, locomotive driver, nuclear plants employee etc.

For these assignments is required a high degree of psychic and physical dependency, otherwise the results could be catastrophic.

In respect of the error medical results or irrelevant medical information about illnesses, it should be thoroughly analyzed the dangerous potential of a drug dependency.

In order to avoid the disclosure of an embarrassing or irrelevant medical information, the employer should take all measures to guaranty that only the information related to that drug test shall be logged in the medical chart of the employee⁴, and a second test is required in order to rule out any medical mall praxis.

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² Published in Official Gazette no. 362 of august 3rd, 2000, modified by Law no. 169/ 2002 Published in Official Gazette no 261 of April 18th, 2002

³ Traian Dima, idem., pag. 40.

⁴ EliodorTanislav, idem., pag. 168

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