

Drug and Alcohol Testing – Do It Legally

Substance abuse has become an unfortunate fact of life. Beyond the effect on one's personal life, drug and alcohol abuse has significant monetary impact on companies, related to absenteeism, job accidents, increased workers' compensation and health insurance costs, and loss of productivity. Research shows that forty percent of industrial fatalities and 47 percent of industrial injuries can be traced to alcohol abuse and three to seven percent of workers use some illicit drug on a daily basis. In the last 15 years, drug testing in the workplace has gone from zero to widespread universal acceptance. Today, approximately 49 percent of full-time workers are subject to some form of drug testing, according to the Substance Abuse and Mental Health Administration.

You have the right to demand a drug-free workplace, but employees also have a reasonable right to privacy. If you do not have a written policy it is strongly advisable to not do testing. A company's drug and alcohol policy provides a framework for maintaining standards of performance and productivity in a safe work environment.

The Law

There have been many new laws and government regulations mandating drug-control policies, as well as the rapidly developing case law on the effect of drug and alcohol testing policies on individual rights. Several variables dictate whether an employer should develop a workforce drug and alcohol control program and policy. (1) Is the employer a private employer? (2) Is the employer a federal contractor? If so, with what agency? (3) Does the employer have employees covered by the Department of

Transportation (DOT)? (5) Is the workforce covered by a collective bargaining agreement?

The Drug-free Workplace Act of 1988 requires that all federal contractors with contracts valued at \$100,000 or more ensure a drug-free workplace but does not specifically require implementing a drug-testing program. In contrast the DOT has very specific regulations (Federal Motor Carrier Safety Administration – 49 CFR Part 382) that require drug and alcohol testing, random testing, reasonable suspicion testing, and post accident testing. Employers regulated by the DOT are required to draft and distribute a very specific drug and alcohol policy and train supervisors in how to implement it. Supervisors must also be trained in reasonable suspicion determination. Random testing must be done throughout the year using a mathematical formula or computer program. Records of positive alcohol or drug tests must be retained for 5 years. (49 CFT Part 40 & 49 CFR Part 382) Drug testing cannot be unilaterally implemented at facilities under a Collective Bargaining Agreement and must be a point of negotiation with the union.

In general, an employer is typically safe to administer drug tests post-offer as a condition of employment and post-accident. It is advisable to check your state and local rules and regulations regarding drug and alcohol testing before you begin any testing program.

The Americans with Disabilities Act

The ADA defines alcoholism as a disability and therefore those individuals are granted protection under the law. What does this

protection mean to employers? You do not have to tolerate poor performance or allow employees to have alcohol in their system while at work. Employees may be disciplined for poor performance and attendance problems related to alcohol use. It does mean that an employer must provide reasonable accommodation allowing that employee time off to seek intensive treatment or intermittent time off for outpatient care when requested. The ADA also specifically excludes current drug users and addicts from protection. An individual who is "rehabilitated" from drug use becomes protected in regards to discrimination in hiring.

Policy Development

Once you have determined the necessity for a drug and alcohol policy you can begin the framework of your policy. (1) State the purpose. This could contain a statement addressing your company's commitment to an alcohol and drug-free workplace and to promote the safety and well-being of your employees and customers affected by the conduct of your employees during the course of their employment. (2) Address the scope or basis for testing: such as, post-offer, reasonable suspicion, post accident, return to duty/follow-up, or random. (3) State what is prohibited. Refer to the Controlled Substances Act (21 U.S.C. 812). (4) State the consequences for violation of the policy, test positive, or refusal to submit to testing.

Minimize your legal risk

Develop your policy with the aid of legal counsel. Once developed and reviewed implement the policy making sure that all

employees read, understand and sign the policy. Inform applicants of the policy before administering any drug test. Train supervisors how to recognize behavioral or physical signs that may indicate substance abuse and what actions they should or should not take. Information related to drug and alcohol testing and results is highly confidential and should be released with the utmost of care. In addition this information should have controlled access within the company.

Resources

Substance Abuse and Mental Health Services Administration (SAMHSA)
<http://www.samhsa.gov>

US Department of Transportation – Drug and Alcohol Regulations
<http://www.dot.gov>

The National Clearinghouse for Drug and Alcohol Information
<http://www.health.org>

Drug & Alcohol Testing Industry Association
<http://www.datia.org>

US Department of Labor
<http://said.dol.gov> "State and Territory Laws"