

Substance Abuse

In General

Drug and alcohol abuse is a very serious problem to business.

- Abusers are about 1/3 less productive; have three times the plan costs as non-abuser; have more on-the-job accidents and have a poor attendance and tardiness record.
- Employers are trying to cope with these increased costs in various ways.

Drug Testing of Public Employees

In considering work-place drug testing the reader must contrast private v. public employees.

Public employees come under the United States Constitution's Fourth Amendment relative unreasonable search and seizure. This restriction applies to drug testing. This restriction also extends to private employers when acting as an agent of the federal government.

Public employee drug testing is legal if it is reasonable. Several instances where drug testing has been held to be reasonable are these:

After an Accident. This was the instance where a crewman was tested after a train accident.

Custom Service Policy. The U.S. Custom Service requires urinalysis drug testing for their employees who have a direct involvement in drug interdiction or enforcement of related laws and for employees who carry firearms.

Public Safety. Sometimes the employee's job performance affects public safety. In these instances random drug testing is acceptable. An example would be random drug testing for air traffic controllers.

Federal Laws and Rulings

Drug-Free Workplace Act of 1988. With this law certain employers are required to take certain steps to ensure a drug-free workplace. These certain employers are federal government contractors and recipients of federal grants. These employers must do certain things.

- Publish an anti-drug policy statement.
- Give workers a copy of such statement.
- Establish a drug awareness and education program.
- Workers must agree to abide by drug policy and report any violations to the employer.

- Federal authorities must be notified of any employee drug connections.
- Employer must take personnel actions against drug abusers.
- Employer must make a good faith effort to comply with federal law and regulations.

Violators will lose government grants and/or contracts.

Defense Department Contract Rules. Employers serving as defense contractors must abide by the Department's rules relative a drug-free workplace. There are certain employees to whom the requirements apply:

- Those with access to classified information
- Those in sensitive positions involving trust or confidence.

As part of the program, the employer must agree to provide employee assistance, education, counseling, rehabilitation, supervisory training to detect abuse, referral of abuse and on-site drug testing. Such drug testing is waived if in violation of state laws or collective bargaining agreements. Once an abuser is found, such abuser must be removed until rehabilitated and deemed fit for duty.

Transportation Department Regulations. These regulations mandate drug testing as a policy of public safety. Employees of the transportation industry are covered: airlines, rail, bus, etc. Also, employees of private transportation employers (truck companies, e.g.) are also covered if jobs involve interstate commerce and workers are in safety-sensitive or security-related jobs. Such workers must be tested for marijuana, cocaine, opiates, amphetamines and PCP. Certain rules must be followed in the testing:

- There must be well documented procedures for collection, security and analysis of the specimens.
- Workers must be given written instructions as to the manner of testing.
- Test must be reviewed and confirmed if positive.

Random testing under these regulations is being contested in Court; no challenge is being made to drug testing as a result of reasonable grounds, pre-employment or biannual testing.

Drug Testing In Private Sector

Employers in the private sector have more latitude in drug testing because the federal constitutional restrictions do not apply. Even so there are many restrictions which must be followed:

- State and local laws
- Union contract requirements.

Collective Bargaining

Union employees may object to drug testing and seek relief through grievance and arbitration procedures.

Duty to Bargain. The National Labor Relations Board recently ruled that employer must bargain under the Taft-Hartley Act prior to establishing a program of drug testing.

When to Test. There are three bases for determining when a drug test may be made:

- Pre-employment
No problem here because such person is not yet an employee.
- Random
Usual requirement is that there must be some reasonable suspicion of drug use before a test is so-ordered. Where safety is an obvious factor, such random testing will likely not be questioned.
- Cause
This is where there is a reasonable suspicion that such person is actually using a drug.
- Post Accident Testing
This use of testing is appropriate where there is reasonable suspicion that drug use was a factor in the accident.

Other Arbitration Decisions. Refusal to submit to a drug test may be actionable to the employee. To require employees to report all of the prescription drugs which they use as an aid to testing is not an invasion of privacy. The employer must treat all positive drug results in a consistent and prompt manner in order for action against the employee to be taken.

Miscellaneous

Some states have enacted legislation which regulates how drug tests may be made.

- California
- Nebraska
- North Carolina
- Oregon
- Rhode Island
- Tennessee
- Utah
- Vermont
- Virginia
- Wisconsin.

At least one state court held that drug testing was an act of unreasonable search and seizure.

State laws are evolving at this time.

Methods of Testing

There are numerous ways of performing a drug test.

Urine. Waste of a drug shows up as metabolites in a person's urine indicating a drug was used sometime in the past.

EMIT (Enzyme Multiple Immunoassay Test). This is an inexpensive urine test which is sensitive and good to establish that a drug metabolite is not present. It confuses other chemicals (aspirin, e.g.) with drugs, however.

GC/MS (Gas Chromatography/Mass Spectrometry). The GC/MS test is used to confirm the EMIT test and rule out the false-positive. The combination EMIT and GC/MS tests accuracy is very high. The GC/MS is rather expensive.

RIA-H (Radioimmunoassay Analysis of Hair). Past drug use can leave its mark on the human hair. An analysis of a strand of hair will show the past history of cocaine and other drug use for many months. The procedure is costly and is claimed by some to be experimental.

Blood Tests. Presence of psychoactive drugs show up in the blood.

Brain Wave Test. These tests measure the pattern and intensity of electrical current between the person's brain and eyes to detect drug use. This is not a common test and held by many to be unreliable.

Legal Implications of Drug Testing

Privacy. If a test is positive, how the information is treated is legally significant. To be careless could result in a charge of invasion of privacy and defamation. The need for confidentiality is great. Before the drug results are used, it is best to get an employee authorization statement.

Handicap Discrimination. A handicap does include a person with a drug or alcoholic problem according to federal standards. Such conditions may also be a handicap under the particular state law.

Race Discrimination. If certain tests show more false positive among black than whites, care should be taken to see that blacks are not unfairly treated.

Employees with Drug Positive Results

Employers may either terminate or attempt rehabilitation of employees who show up positive on drug tests.

Termination. It may well be most cost efficient to merely terminate such employee as opposed to rehabilitation.

Rehabilitation. The majority practice is to attempt treatment and rehabilitation. The vehicle is the EAP (Employee Assistance Program).