

Drug Testing Employees

by Quenda Behler Story

Say you suspect that one of your employees may have a substance-abuse problem. You don't think he's drinking, but he's clumsy and glassy-eyed. Can you ask him to take a drug test? The answer depends on which state you are in and how much reason you have to suspect that he's using drugs. Maybe he just has the flu.

But why, you ask, would there be any problem with requesting a drug test? If he was drinking on the job site, you could fire him on the spot — what's so different about drugs? After all, drinking isn't even illegal.

Legal Protections

The problem is that there are a lot of laws about drug use, and some of them are conflicting. Because using illegal drugs can be considered a medical condition as well as a crime, drug users may be protected by federal antidiscrimination laws such as the Americans with Disabilities Act (ADA).

Legally, alcohol use is a much simpler problem than drug use. Most judges accept the idea that the average layman can tell when someone is drinking. Finding an open bottle, smelling liquor on a person's breath, or seeing someone stagger around may be all the proof you need. Short of catching him in the act, the only way to identify a drug taker is by testing.

Asking someone to take a drug test is like accusing him of a crime. The request may conflict with his privacy rights, or you may be asking him to incriminate himself.

Disability. Under ADA, a recovering addict who is not currently taking drugs may be considered disabled. If you fire him, you may find yourself in court. But the moment he takes drugs again, he loses his protected status

under ADA. You can ask any employee to take a drug test if you have reasonable grounds for suspicion that he is taking illegal drugs.

An employee who is under the care of a medical professional can sometimes legally take drugs such as methadone. If it's part of his treatment, you may not be able to fire him for it.

State law. Some states allow employers to test job applicants for drugs before they're hired. Other states and many cities have enacted protective legislation that restricts drug testing in the private workplace, and some jurisdictions have banned random or blanket testing of employees. In many cases, legislatures have also established standards for the labs that do the testing.

Those laws give employees some measure of protection against unfair and unreliable testing. However, even states that restrict testing allow you to require drug tests during the course of employment when there are reasonable grounds for suspicion of illegal drug use.

Liability

If you have reason to believe an employee is using drugs, you need to do everything the law allows to respond. If the employee hurts himself, he is entitled to worker's comp, even if the accident was caused by his drug use. If he hurts someone else, such as a sub or homeowner, you could be sued for negligence for not doing something about his drug problem.

Inaccurate test results. Another way you could be liable is if one of your employees submits to a drug test and it results in a false positive. The test says he's taking illegal drugs, but he isn't. This may sound far-fetched, but it hap-

pens all the time. Many things can cause false positives. Drug tests are sometimes fooled when the subject is taking legal over-the-counter drugs such as antihistamines. Some tests are more accurate than others. Most people test urine samples because that's cheaper and less invasive than more accurate tests that involve drawing blood or clipping hair. Some labs are more accurate than others, too — false positives are often the result of sloppy lab work.

You want to avoid false positives, because the courts don't like it when you punish an innocent person for abusing drugs. Drug residue stays in the body for a while, so a falsely accused person might be able to be exonerated by going to a second lab and taking another test. There's a chance that person could prevail against you in a suit for defamation or wrongful discharge. It might sound like that would be the lab's problem, but you could be liable for picking a bad lab or an unreliable test, or because your suspicion was not well founded. This is true even in the states that allow random drug testing.

So here is your rock and your hard place: If you don't check for drugs when you suspect them, you could be sued by someone your drug-addled employee injures; but if you do check, and that employee is damaged by an inaccurate drug test result, *he* could sue you.

Recommendations

I recommend drug testing when there is probable cause to suspect drug use. I recommend a drug test after any serious accident. And I strongly recommend that if you think you might be requiring a drug test at some point,


you state that in advance in your employee handbook.

In the handbook. Your employee handbook needs to be clear as to whether you're talking about random testing, pre-employment testing, or testing upon display of suspicious behavior — or some combination of those. In the handbook, state what happens if a drug test is positive. You may want to refer the employee to a rehab program, or you may want to terminate the employee on the spot. The language in your handbook should give you as much flexibility as the law allows regarding treatment and termination. If you do refer your employee to a treatment program, you want to retain the ability to terminate his employment if the program is not successful.

Finding a lab. You also need to make advance plans for how to handle testing. You don't want to flip through the phone book to find a drug testing lab. Ask the local construction trade council or rehab center where to get people tested. This is important, because if the employee sues you for wrongful discharge, the first thing his lawyer will do is attack your choice of labs. If the lab is wrong — and they often are — you could be liable for selecting the lab that produced the faulty result. You want to be able to show that you did your best to find a competent testing lab.

Subcontractors. Don't forget to think about a drug policy for all those subs on your job site. You can add a clause to your contract with your subs that requires them and their employees to

agree to your policies on drug use. You might be able to make the subcontractor take a drug test, but it's legally difficult to make his employees take one. You might want to include a clause in the subcontractor agreement that gives you the right to boot any of his employees off the job without saying why, because without being able to test, it's risky to accuse someone of being on drugs.

Don't try to write the drug policy or the various clauses in the subcontractor agreement yourself. Get help from an employment lawyer or a good human resources professional with experience in the construction field. 

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