



Michigan Public Employer Relations Association Developments in Drug Testing in the Workplace

Clifford L. Hammond
Foster, Swift, Collins & Smith, P.C.

chammond@fosterswift.com

FOSTERSWIFT.COM

Overview



Developments in Drug Testing in the Public Sector

2

© 2018, Foster Swift Collins & Smith PC

Overview

The concept of drug testing may seem simple.

Overview

The concept of drug testing may seem simple.

But there are a lot of issues.

Let's talk about what a lot of people associate with a standard drug test.

Overview

Standard 5 Panel Test (DOT Test)

- Tests are commonly used for five categories of drugs:
- Amphetamines
- Cocaine
- Marijuana
- Opiates
- Phencyclidine (PCP)

An employer can always add more.

Overview

Standard 5 Panel Test (DOT Test)

- But are the drugs you are adding legal to add?
- What schedule are they?
- Do you have to do more than just test and fire?
- Is there a requirement that the person be under the influence or just have it in their system?
- Can I take away one of the drugs on the panel if I want to?
- What happens if I remove one of those drugs and replace with a different drug?
- Do I actually need a policy?
- Is there such thing as past practice with respect to drug testing?

Overview

Let's start with the discussion of marijuana in drug testing and the workplace.

Overview

Marijuana legalization has had a significant impact on drug testing.

37 states, plus the District of Columbia, Guam, and Puerto Rico, now have medical marijuana programs under which qualifying use of medical marijuana is legal.

18 states, including Michigan have recreational legalization laws.

40% of Americans live in areas it is legal.

68% of Americans say they favor legalization. (Gallup Poll, 11/4/21)

Michigan is among the majority of states allowing and regulating medical marijuana.

Overview

Michigan voters approved Proposal 1 in 2008, permitting the use and cultivation of medical marijuana. Proposal 1 received majority support in every Michigan county and was approved by 63% of voters statewide. Proposal 1 became the Michigan Medical Marihuana Act (“MMMA”), MCL 333.26421 et seq. (the “Act”). Michigan Marijuana Legalization Initiative (2018) was approved by the Board of Canvassers and will appear on the ballot for the election on November 6, 2018.

Protections under the MMMA

A qualifying patient with an ID card and a lawful quantity of marijuana “shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau[.]”

Same for caregiver with ID card.

Affirmative Defense

The medical use of marijuana is an affirmative defense to a prosecution involving marijuana if:

- Physician issued written certification;
- Quantity was not more than “reasonably necessary” to ensure availability; and
- Medical use was involved.

The MMMA does not regulate private employment.

Rather, it only provides a potential defense to criminal prosecution or other adverse action by the state. *Casius v. Wal-Mart Stores, Inc.*

Although reported court cases only address private sector employment, it appears public sector employers are covered as well.

Limitations of the Act

Even with an ID card, can not possess or use:

- On a school bus;
- On the grounds of any preschool or primary or secondary school;
- In any correctional facility.

Limitations of the Act

Cannot smoke marijuana in any public place or on any form of public transportation.

Cannot operate, navigate, or be in actual physical control of any motor vehicle, aircraft, or motorboat while under the influence of marijuana.

Limitations of the Act

- The Michigan Regulation and Taxation of Marihuana Act ("MRTMA") was approved by voters on November 6, 2018 and went into effect December 8, 2018.
- The statute enacts certain rights and decriminalizes certain Michigan state regulations on marijuana.
- However, MCL 333.27954(3) states:
- This act does not require an employer to permit or accommodate conduct otherwise allowed by this act in any workplace or on the employer's property. This act does not prohibit an employer from disciplining an employee for violation of a workplace drug policy or for working while under the influence of marihuana. This act does not prevent an employer from refusing to hire, discharging, disciplining, or otherwise taking an adverse employment action against a person with respect to hire, tenure, terms, conditions, or privileges of employment because of that person's violation of a workplace drug policy or because that person was working while under the influence of marihuana.

Limitations of the Act

The language of Michigan's statute is interesting because of a case that was issued in New Hampshire in January.

There an employee was fired for testing positive for marijuana.

The Supreme Court of New Hampshire studied their marijuana statute.

The employee suffered PTSD and stated the reason he tested positive was because he was prescribed marijuana by his doctor.

He stated his employer should have accommodated him.

They agreed and reversed a lower court decision dismissing his claim.

They found that there was nothing specifically stating excluding the use of medical marijuana as an accommodation.

They said the decision whether to accommodate should be made on a case-by-case basis depending on the facts.

Federal Law

Federal Laws regarding Marijuana

Federal Law

Trump Administration indicated it may enforce federal drug laws even where state law permits marijuana use.

However, under the Biden Administration, the Attorney General has stated that marijuana use is not a Justice Department priority in states that have legalized its use.

Federal Law

- Keep in mind: marijuana use, even for medical purposes, is still **illegal** under federal law.
- Schedule I drug classification under federal Controlled Substances Act.
- Supremacy Clause: Federal law trumps conflicting state law.
- In recent years, federal law enforcement has not heavily enforced prohibition if use is legal under state law.

Federal Law

The proposed Marijuana Opportunity Reinvestment and Expungement (MORE) Act. (H.R. 3617)

Would decriminalize marijuana under federal law.

Remove marijuana as a scheduled drug.

Addresses taxes, federal public benefits for use, protections for cannabis business.

Passed by the U.S. House of Representatives on April 1, 2022.

Could present major changes to all employers.

(NOTE: It has been passed by the House before and died in the Senate)

Legal Considerations

Legal and Workplace Issues

Legal Considerations

Americans with Disabilities Act (“ADA”) and corresponding state laws

Family and Medical Leave Act (“FMLA”)

Duty to provide a safe workplace

Occupational Safety and Health Administration (“OSHA”) and Michigan Occupational Safety and Health Administration (“MIOSHA”)

Legal Considerations

Is Drug Testing an Easy Common Sense Decision?

Should you test?

What drugs do you test under your policy?

Legal Considerations

Testing decisions really have three components:

- Compliance with the law.
- Attract and retain employees.
- Ensure a safe work environment.

Legal Considerations



Legal Considerations

The Great Resignation.

In 2021, 47.4 million workers voluntarily left their jobs.

2022 is on the same pace.

You have to follow the law at a minimum.

But how you construct and implement your program to comply with the law, keep the workplace safe and still keep and attract workers is a balancing act.

Legal Considerations

Some cities and local jurisdictions have actually banned pre-employment marijuana testing, except for certain job classifications:

- New York;
- Kansas City;
- Philadelphia;
- St. Louis County, Missouri

Americans with Disabilities Act ("ADA")

Individuals "currently engaging in the illegal use of drugs" – including Schedule I marijuana – are not protected under the ADA.

- Exception: "Illegal use of drugs" does not include the use of a Schedule I drug taken under supervision by a licensed health care professional.
- But, no accommodation requirement exists under the ADA, even if the employee has a valid patient identification card from a physician.

Employers may adopt reasonable policies/procedures to ensure that employees are not engaging in the "illegal use of drugs".

Americans with Disabilities Act ("ADA")

If the MORE Act passes, the entire issue of ADA accommodation completely changes.

Then you will be required to provide a reasonable accommodation under the ADA.

This could be major issue.

Americans with Disabilities Act ("ADA")

Former/recovering addicts must be accommodated under the ADA.

- Allowing employees to use illegal drugs or immunity from drug testing are not accommodations under the ADA.

Drug addicts may suffer from a disability under the ADA, provided that they are not currently using drugs/marijuana.

Americans with Disabilities Act ("ADA")

There are risks with accommodating/not accommodating employees.

Accommodating:

- impaired individuals may compromise safety;
- liability concerns to third parties;
- risk of dealing with law enforcement activity.

Not Accommodating: discrimination lawsuits;
bad press.

Family and Medical Leave Act ("FMLA")

Treatment for substance abuse (including marijuana abuse) may be considered a "serious health condition" under the FMLA, provided that conditions for inpatient care and/or continuing treatment are met and the individual is no longer using drugs.

Drugs change schedule status. Methadone for instance, is no longer a Schedule I drug.

Employee use of medical marijuana while on leave does not affect FMLA leave rights.

Employers can enforce a "zero tolerance" drug free workplace policy.

But, an employee may be able to bring a retaliation or interference claim.

Workers' Compensation

Workers' Compensation:

- General disqualification for injury caused by employee's own improper drug use or intoxication.
- Injury caused by another's use of marijuana likely covered.

Prevent Termination:

- If discharged in retaliation for making a workers' compensation claim.

Section 301(13) provides, "A person shall not discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or caused to be instituted a proceeding under this act or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act."

Workers' Compensation

An action under Section 301(13) should be filed in circuit court. If the plaintiff can prove he or she was discharged for making a workers' compensation claim, he or she can recover damages for lost wages, future wages, and mental or emotional distress.

However, an employer can terminate an employee if the termination is not done in retaliation for filing a workers' compensation claim.

- For instance, the court found in favor of an employer who terminated an employee because he was missing so much work as a result of the injury, not because he had brought a workers' compensation claim. *Clifford v Cactus Drilling Corp.*

Workers' Compensation

Termination of wage loss benefits:

- In *Adkins v Asama Coldwater Mfg, Inc*, the appellate commission denied wage loss benefits to an employee who was terminated from his employment for testing positive on the post injury drug screen. The appellate commission based its decision on the fact the employee's wage loss was related to the failed drug test which resulted in his termination, and not the work injury.

Section 301(4)(c) also now requires proof of wage loss which is defined as a connection between the disability and reduced wages in order for an employee to collect wage loss benefits. Since the wage loss is related to the termination for using drugs and not the injury, no wage loss benefits are owed.

Workers' Compensation

The company policy subjecting employees to termination for using drugs must be strictly enforced to entitle company to terminate employee's weekly wage loss benefits without increasing exposure.

- In *Adkins*, the representatives from the employer testified the drug policy was strictly enforced and that they were not aware of anyone receiving a penalty less than termination for a positive drug screen. They further testified this was clearly set forth in the handbook which they provided and reviewed with the plaintiff. The plaintiff conceded the same.

Employers are not required to pay for medical marihuana as a result of Section 315a of the Worker's Disability Compensation Act which states, "an employer is not required to reimburse or cause to be reimbursed charges for medical marihuana treatment."

- Prior to the enactment of Section 315a, employers and carriers were still not required to pay for medical marihuana treatment because Section 315(1) exempts them from payment of services performed by a professional that was not licensed or registered by the laws of Michigan on or before January 1, 1998. This exemption includes medical marihuana since it was not used for medical purposes before January 1, 1998.

Occupational Safety and Health Administration ("OSHA") Rule

29 U.S.C. 1904.35(b)(1)(iv) prohibits an employer from discharging or discriminating against an employee for reporting a work-related injury or illness.

This includes any adverse action that could dissuade a reasonable employee from reporting a work-related injury or illness.

Occupational Safety and Health Administration (“OSHA”) Rule

This rule applies to any “blanket post-injury drug testing policies” that deter proper reporting.

Post-accident drug testing must be limited to situations in which:

- Employee drug use is likely to have contributed to the incident, and
- For which the drug test can accurately identify impairment caused by drug use.

Occupational Safety and Health Administration (“OSHA”) Rule



Of course, which side of the scale you should be on may change depending on who is in office and what the issues is.

Under Trump, the DOL, said, well, we know we said under the last guy, don't do that, but what we meant to say was most of these types of programs are generally just fine:

Occupational Safety and Health Administration (“OSHA”) Rule

Random drug testing.

Drug testing unrelated to the reporting of a work-related injury or illness.

Drug testing under a state workers' compensation law.

Drug testing under other federal law, such as a U.S. Department of Transportation rule.

Drug testing that is conducted to evaluate the root cause of a workplace incident that "harmed or could have harmed employees" is allowed if the employer tests all workers who could have contributed to the incident, rather than just the employees who reported injuries.

Occupational Safety and Health Administration (“OSHA”) Rule

It is more likely the current Administration will be more likely to look at whether the policy is interfering with a workers' compensation claim.

So we need to be mindful of how we draft and implement safety policies to ensure they are not drafted to penalize an employee for reporting an injury or illness rather than for a legitimate purpose.

Department of Transportation

Drug testing, including mandatory post-accident drug testing is required for some employees under Department of Transportation rules (“DOT”)
The common example is a CDL driver.

Safety Sensitive Positions

Some employees have positions that are directly responsible for their own safety or the safety of others, or where an impairment such as drug or alcohol use can place the employee or others at a risk of harm.

Examples could include equipment operators or others covered by the DOT and designated as safety sensitive.

You may be mandated by contract, DOT or other agency requirements to ensure you have drug testing policies and procedures in place.

You also have a general duty of providing a safe work environment as well.

Unemployment Compensation

Under the Michigan Employment Security Act (“MESA”), claimants who test positive for marijuana ordinarily have been disqualified for unemployment benefits.

The unemployment statute disqualifies claimants if:

- The claimant illegally ingested, injected, inhaled or possessed a controlled substance on the premises of the employer;
- Refused to submit to a fairly administered drug test;
- Tested positive on a drug test, if the test was administered in a nondiscriminatory manner.

Unemployment Compensation

But, where the positive drug test is solely the result of the use of medical marijuana, the claimant may be eligible for benefits.

- The result would be different, and the employee would be denied benefits, if there was evidence that the employee was under the influence of marijuana at the time of the accident.

That puts the MMMA and the MESA in conflict.

- The Michigan courts that have addressed this issue have ruled that denial of benefits constitutes an improper penalty for the medical use of marijuana under Michigan’s MMMA. *Braska v. Challenge Manufacturing Company*; *Kemp v. Hayes Green Beach Memorial Hospital*; and *Kudzia v. Avasi Services, Inc.*, 307 Mich. App. 340, 861 N.W. 2d 289 (10/23/2014)

Big Questions Linger

Braska was a Michigan case that allowed unemployment because the denial of unemployment was seen as a “penalty” by the state for using medical marijuana in violation of the MMMA.

Casias v. Wal-Mart stated that the MMMA does not cover or restrict private employment decisions. California, Montana, and Washington have similarly found that their states’ medical marijuana laws do not govern employment actions.

Several other States and Federal courts have found contrary to the Wal-Mart case, but mostly because of the specific language of their statute.

Braska did not involve a claim of discrimination.

Michigan has a statute separate from the ADA, the Elliot-Larsen Civil Rights Act as well as the Michigan Persons with Disabilities Civil Rights Act.

The Supreme Court of Michigan is not required to follow the federal court when applying State law.

As stated above New Hampshire and other states including Arizona have different laws that have found a duty to accommodate did exist.

There is a criminal case *People v. Feezel*, in which the court overturned a criminal conviction for driving under the influence of marijuana because the test showed a by-product associated with a schedule 1 drug.

The court stated, “individuals who use marijuana for medicinal purposes will be prohibited from driving long after the person is no longer impaired.

So at some point we will have another case to decide this.

So we should be cautious.

Drug Free Workplace Policies (“DFWP”)

Applies to federal contractors with \$150,000+ contracts and federal grant money of any amount.

Requires employer to publish a DFWP policy that prohibits, among other things, use or possession in the workplace.

Requires employers to report drug-related crimes occurring in the workplace.

If employers do not comply, their contracts and/or grant money are at risk.

ADA states that an employer may require employees to behave in a manner that meets federal Drug-Free Workplace Act requirements.

- The unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in person’s workplace; and
- The employee must abide by the terms of that statement.

Drug Free Workplace Policies ("DFWP")

The DFWP is a fairly significant statute for many public employers. Employers who receive grants or contracts need to ensure they not only have a policy, but are in compliance by establishing a drug-free awareness program that:

- Educates employees on dangers of drug abuse in the workplace;
- The employer's policy on a drug free workplace;
- The availability of drug counseling, rehabilitation, and employee assistance programs; and
- The penalties that may be imposed on employees for drug abuse violations.
- You even have to tell employees that as a condition of employment they notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than 5 days after the conviction.

Drug Free Workplace Policies ("DFWP")

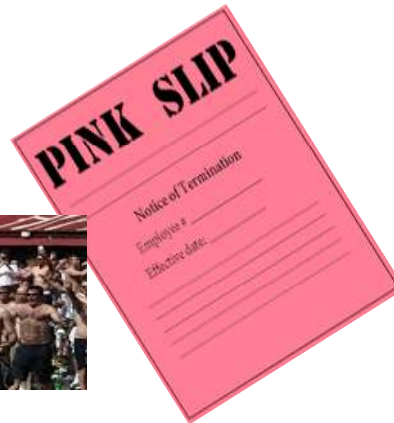
You have to impose sanctions on or require participation in a drug abuse assistance or rehabilitation program for any employee convicted of certain workplace drug crimes.

If you fail to take a good faith effort to continue to maintain a drug free workplace...

Drug Free Workplace Policies (“DFWP”)

You could be subject to
debarment, or
suspension from a
federal contract.

People may get angry!



Workplace Policies

Michigan does not limit an employer’s right to enforce a zero-tolerance marijuana policy.

- However, other states such as Rhode Island, Massachusetts, and Connecticut have an anti-discrimination provision within their medical marijuana statutes.
 - In *Callaghan v Darlington Fabrics Corp*, the court granted summary judgment in favor of the plaintiff and held that refusing to hire someone because she could not pass a drug test due to medical marijuana use outside of the workplace violated the Rhode Island medical marijuana law (which contains an explicit anti-discrimination provision).

Michigan’s medical marijuana laws do not contain anti-discrimination or reasonable accommodation provisions.

Drug Testing

Michigan law does not put limits or restrictions on workplace drug testing.

- But, for unionized employers drug testing is a mandatory subject of bargaining.

So, drug testing is not prohibited or restricted, unless it violates other legal provisions, such as discrimination.

- But, if an employer singles out certain groups of employees – for example, by race, age or gender – for drug testing, the employee may have a valid claim of discrimination.

Employees may also be able to sue for defamation, if it publicizes a false positive result, acts in bad faith, or knew or should have known that the result was incorrect.

Drug Testing

Include drug testing policy in an employee handbook.

- There is no legal requirement to have an employee handbook.
- But, the company must have in place a drug testing policy that is uniformly enforced.
- Handbooks are valuable in showing what policies are in place and that employees are **aware** of the drug policy.

If the employer cannot establish that it had a policy or practice of drug testing employees who are involved in workplace accidents, the employee may be able to prove discrimination by showing that other employees without medical issues were not drug tested, or that the requirement for a drug test was a pretext for discrimination because of medical problems.

Opioids

Cost of Opioid Abuse in the Workplace

Opioid abuse costs employers approximately \$10 billion from absenteeism and presenteeism.

Opioid abusers cost employers about twice as much (\$19,450) in healthcare costs as non-abusers.

The cost of opioid misuse to the U.S. economy is approximately \$56 billion.

Employer Issues with Opioids

Drug testing laws (including DOT)
Government contractor requirements (DFWPA and state laws)
ADA
FMLA
Worker's compensation
Unemployment compensation
OSHA
NLRA

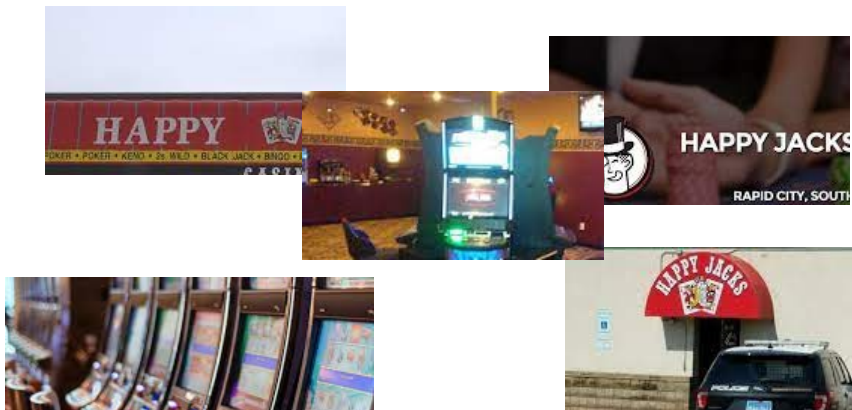
Employer Issues with Opioids

Many of the same federal and state policies apply.
Increased awareness and stricter controls for opioid misuse/abuse.
Employers consistent and formal policies and practices are key!

Misuse of Prescriptions

Misuse of prescribed medications could constitute “illegal use” in some circumstances. 29 C.F.R. § 1630.3, App. “Illegal use of drugs refers both to the use of unlawful drugs, such as cocaine, and to the unlawful use of prescription drugs.”

Prescription Drug Cases



Prescription Drug Cases

The EEOC reported a settlement in a case involving Happy Jack's Casino. Happy Jack's Casino.

Happy Jack's withdrew a job offer for a cashier position in the casino after the applicant tested positive for prescription medication.

Even after the applicant tried to explain the positive result was due to legally prescribed pain medication, the casino refused to view supporting documentation and did not hire her.

In its complaint, the EEOC pointed out that the employer's policy of requiring *all* employees to report if they were taking prescription or nonprescription medication was unlawful.

Additionally, the EEOC believed both the policy and the withdrawal of the job offer violated the ADA. The case was reportedly settled for \$45,000, and the company was required to change its policies to prevent future hiring issues under the ADA.

The casino now only requires employees to report prescription medications if the employee has a "reasonable suspicion" that the medication may affect performance.

EEOC v. M.G. Oil Company d/b/a Happy Jack's, 4:16-cv-04131-KES (D. S.D.)

Prescription Drug Cases



Prescription Drug Cases

The EEOC accused Volvo of violating the ADA when it allegedly rejected an applicant because he was a recovering drug addict enrolled in a medication-assisted treatment program.

The qualified applicant received a conditional job offer for an hourly manufacturing position.

As part of his post-offer physical exam, he explained that he was taking Suboxone as part of a supervised treatment program as a recovering addict.

When he reported the first day for work, he was told he could not be hired because of his Suboxone use.

Instead of automatically rejecting the applicant based on his use of the medication, Volvo should have conducted an individualized assessment to determine what effect, if any, the Suboxone had on his ability to perform his job effectively and safely.

Had Volvo done such an individualized assessment, the EEOC contends Volvo would have learned the applicant had been enrolled in the program since 2010 and was undergoing monthly counseling and urine testing to prevent relapse.

Since 2010, he had worked as a dockworker and as a sanitation worker without incident.

To settle the matter, Volvo paid \$70,000 to the applicant and agreed to amend its policy on post-offer medical and drug evaluations to assess whether an employee's or applicant's lawful use of prescription medication poses a direct threat as defined by the ADA, including providing a reasonable accommodation as required by the ADA.

(EEOC v. Volvo Group North America, LLC, Civil Action No. 1:17-cv-02889)

Misuse of Prescriptions

Think this is complicated?

Misuse of Prescriptions

Think this is
complicated?



Misuse of Prescriptions

Our friends in British Columbia have decided to decriminalize ***possession*** of small amounts of cocaine.

So if that were to occur here...?

Final Issues To Consider

Drug Tests

Pre-employment drug testing really began in the 1980s when it was mandated under the Reagan administration for federal employees.

By 1987, around 20% of employers had pre-employment drug testing.

By 1996, 66% of employers had pre-employment drug testing.

The number has now dropped to 58%.

Some polls have found that employer requests to drop marijuana from the screening went from 5% to over 9% between 2020 and 2021.

42% of those polled said it was due to a concern of potential litigation.

Drug Tests

You can require a pre-employment drug test as part of the employment hiring process.

You generally offer a job contingent upon the applicant passing the test.

That is when you go through the interactive process required under the ADA.

Drug Tests

Pre-employment Drug Test

For Cause Drug Test

- What does that mean and how do we actually create a proper policy and practice.
- Discrimination?

Random Drug Test

- What is random?
- How do you choose?

Post-Accident Drug Test

- Beware interference with work comp. claims or MIOSHA issues.
- Sound reasonable policies

Drug Tests

Interestingly, Attorney General Nessel stated in briefing related to unemployment benefits that a marijuana test is not a “drug test” under state law’s definition of the term because marijuana is not an illegal drug in Michigan.

The question will be when or if this issue will be further addressed by the State, agency rulings/guidance or Congress in the context of discipline in the workplace.

Drug Tests

Ideas in drafting for cause drug tests:

- Reasonable person’s standard that the individual may be under the influence of drugs or alcohol;
- Training on how to identify the issues;
- Have a program requiring two managers to review and observe the individual before making the decision;

Drug Tests

Examples of signs you can incorporate into your policy:

- Bloodshot eyes/dilated pupils;
- Slurred speech;
- Unsteady walk;
- Shakes or tremors;
- Unexplained sweating or shivering;
- Fidgeting;
- Deterioration in appearance;
- Unusual body or breath odor;
- Sleeping at work or difficulty staying awake;
- Unexplained change in personality or attitude;
- Sudden mood change, irritability, angry outburst;

Drug Tests

Random, means random.

3rd Party.

Drug Tests

Issues HR Should Consider:

- Termination for just cause employees.
- Employment agreement definition.
- Handbook and policy processes.
- Collective Bargaining Agreements.

Drug Tests

Union grievance matters.

An example was an arbitration between Kerry, Inc. and the United Food and Commercial Workers, Local Union No. 88.

The Grievant came to work and cut his finger in on a straight blade knife in the locker room.

The employee looked for a first aid kit and the superintendent asked what was the problem.

He said he cut his finger and he was sent to the clinic.

There was a policy that said permitting employees to be sent to the clinic post-accident.

Drug Tests

The employee went to the clinic and was given a post accident drug test.

He tested positive and was fired for violation of the drug policy.

The Union grieved and said, the employee would not have gone to the hospital himself, nor would he even have took his grandchild to the doctor if they had a similar cut.

Drug Tests

The Union argued the cut did not occur because the employee was impaired and the testing did not show he was impaired, only that he tested positive.

The Employer said, the policy was clear, it was enacted and followed and discharge was for just cause.

Drug Tests

The Arbitrator agreed with the employer the policy was clear and allowed for the post accident test.

However, he found there was not just cause to terminate the employee because he could not find, “any rational relationship between incident triggering the test and the possibility of drug use as a factor.”

He further stated the administration of the drug test was, “unreasonable and uncalled for under all the relevant circumstances.”

Drug Tests

The Arbitrator ordered backpay and reinstatement.

Drug Tests

Caution, you should still administer your policy and procedures, but this case demonstrates that there are potential issues in the collective bargaining and grievance process.

This is one arbitrator and unlike courts they are not binding on everyone.

We should address how we negotiate and resolve grievances.

Drug Tests

Policies should consider the opportunity for treatment.

Some employers provide paid leave or programs.

Others have a zero tolerance.

These are options.

Drug Tests

Finally, be consistent with application of the policy.

Providing second chances or opportunities for rehabilitation are great opportunities.

But providing them to some employees, but not others can bring claims of discrimination or retaliation.

Drug Tests

Clear as mud?

No.

But we can take some time to make sure we:

- Have a policy;
- Think through our policy;
- Determine how we want to test.
- Determine what we have to test for and what we believe we should test for.
- Adopt trainings for managers and employees on how to implement our policy.
- Engage in the interactive process for those who may need an accommodation.
- Understand the current regulations and the current rules and risks.
- Understand the opportunity to provide assistance versus discipline.
- Make educated and thoughtful decisions.



Questions

Clifford L. Hammond

chammond@fosterswift.com

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC ■ ATTORNEYS

Developments in Drug Testing in the Public Sector

83

© 2018, Foster Swift Collins & Smith PC

Presentation Terms of Use

Foster Swift Collins & Smith, PC presentations are intended for our clients and friends. This presentation highlights specific areas of the law. This communication is not legal advice. The information provided is current as of the date of the presentation. Those viewing the presentation should consult an attorney to determine how the information applies to any specific situation.

Copyright © 2022 Foster Swift Collins & Smith, PC

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC ■ ATTORNEYS

Developments in Drug Testing in the Public Sector

84

© 2018, Foster Swift Collins & Smith PC