

CALIFORNIA AUTO DEALER®

A Gray • Duffy LLP Newsletter

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Pre-Employment Drug Testing – A Thing of the Past?

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Pre-employment physicals and drug testing have been done by auto dealers for years. Now some are concluding that pre-employment drug tests must be abandoned for fear that employers will be held liable for hiring a person who tests positive for marijuana use. That should never be an issue if you are properly handling the pre-employment drug testing. The employer has no right to know the reason an employee failed a drug screen or physical, unless the employee tells them or authorizes the doctor's office to tell them. All the employer needs to know is whether the employee passed or failed. Most physicians know this and will not provide additional information. It is up to the employee to provide the employer with the reason for any failure. This protects both the employer and the employee. You can also choose not to drug test certain categories of employees, who don't serve in safety-sensitive positions or other positions that involve high levels of responsibility, such as management positions or positions involving the financial well-being of the company.

If a prospective employee fails the test, it is up to the employee to come forward and provide additional information. If the additional information is that they used marijuana, you can allow them to wait and retake the test, or hire them only for a position that is not safety sensitive. If they come back and test clean, you can hire them. Tests can sometimes get confused at the lab or mixed up. If they did fail the test the first time, you will need to know the reason to determine whether occasional follow-up testing is warranted, but only they can volunteer that information. If the doctor who tested them obtained a consent from them to release test results to the employer, make sure you get a copy. If an employee fails a test the employer can allow a potential employee to reapply at a later time.

The truth is, marijuana use should be treated like alcohol use for purposes of job interviews and drug testing. The big difference is, marijuana stays in the system much longer than alcohol, so it could show up on a drug screen even if a person has not used it in weeks, depending on the frequency of their use. The fact that it is illegal at the federal level complicates the issue further. Here are a few things to consider when deciding whether to abandon, or just modify, your pre-employment drug testing practice:

1. Does your drug testing policy test all employees or only employees in a safety-related position? If it tests all employees, consider limiting the employees who will be tested to certain positions.
2. Does your policy preserve the privacy of employees unless they want to disclose information? If the doctor is reporting results rather than pass or fail, modify the way the doctor reports so you get only a pass or fail, or make sure you are getting a copy of the employee consent to release information.
3. Check with your insurance company to find out if your insurance has any restrictions on coverage that involve drug use. If your broker tells you no, get it in writing. If so, find out how they determine marijuana use and what level, if any, of marijuana in a person's system precludes coverage. Consider tailoring your policy to consider what your insurance provides.
4. Does your drug testing policy require testing for impairment or only for illegal controlled substances? Discuss with the doctor's office the job requirements so the office can give you a pass fail.
5. If an employee consents to disclosing information or discloses information and an accommodation can be made for the employee, make sure you are offering required accommodations. If you don't know what those are, contact your attorney for legal advice.
6. Is the employee getting a copy of the drug test results? If not, make sure they do so that if they fail, they know why. Provide each person tested with a written explanation of how to appeal the test results.

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