

Employment Drug Testing

The issue of drug-free workplace policies and drug testing is at the forefront of many employers' minds now that so many states have made the recreational use of marijuana legal. Complicating the matter for employers is that many States have privacy laws protecting the rights of employees which can be violated by workplace drug testing. Employers must be very cautious about drug testing so as not to run afoul of that right.

Your ability to conduct drug tests varies depending on whether you test in the pre-employment stage or during employment.

Pre-Employment Drug Testing

Employers can conduct pre-employment drug testing and require applicants to successfully pass a pre-employment drug test.

Pre-employment drug tests should be conducted pursuant to a drug-free workplace policy. If you require pre-employment drug tests, communicate that requirement to applicants during the interview process. Also obtain the applicant's consent to the pre-employment drug test. You should not conduct pre-employment drug testing until after you make a job offer to an applicant. Provide the applicant with a clearly drafted offer letter that explains that if the applicant doesn't pass the drug test, the job offer will be withdrawn.

If you use pre-employment drug testing, be consistent in who you test. Do not test some applicants and not others. Doing so could expose you to a claim that you are selecting applicants for testing based on discriminatory reasons, such as race or ethnicity.

Testing During Employment

Your ability to conduct drug testing changes once someone starts working for you, and you should conduct drug tests only if you have a reasonable suspicion that the employee is impaired.

What constitutes "reasonable suspicion" depends on the circumstances. Generally, you should have specific, objective evidence that the employee is impaired. Possible signs of impairment could include an employee slurring his words or having trouble walking or performing job duties, smelling like alcohol or marijuana, or showing other physical signs of impairment. Reasonable suspicion is more than just a belief that someone may be using drugs or hearing from another employee that someone may be using.

Certain industries, such as transportation and certain safety or security positions, may have different rules allowing random testing.

Common Questions about Drug Testing

My company uses pre-employment drug tests, and an applicant is refusing to take a drug test. What can I do?

If you require pre-employment drug tests and you informed the applicant that the job offer was contingent on passing a drug test, you can withdraw the offer because the applicant refused to take the test.

An applicant's drug test came back positive. Now what?

If a pre-employment drug test comes back positive, you can withdraw the applicant's job offer.

An applicant is scheduled to start working tomorrow, but I haven't received her drug test results yet. Can I let her start working while I wait for the results?

Allowing an applicant to start work before you receive drug test results could put you in a difficult situation if the results come back positive. If you let the applicant start working, she is now your employee. If the drug result comes back positive, you can no longer simply withdraw the job offer — you have to terminate her.

An employee showed up at work visibly intoxicated. We required him to take a drug test, which came back positive. What are our next steps?

Your drug- and alcohol-free workplace policy should state the consequences for violating the policy. Follow your policy. If you have a zero-tolerance policy, you may terminate the employee. If your policy provides for other forms of discipline prior to termination, determine the appropriate disciplinary action for the situation.

I've heard that marijuana stays in your system for weeks. What if an applicant smoked pot three weeks ago, but it's showing up on a drug test now? Can I still deny employment?

Marijuana does stay in your system longer than other drugs, so it is possible that a person can test positive for the drug even though the person hasn't used it for days or weeks. However, for purposes of pre-employment drug testing, it doesn't matter when an applicant used drugs. If the applicant tests positive for drugs, the applicant failed the drug test and you can deny employment.

An applicant tested positive for marijuana but said she has a medical marijuana card. Does that mean I can't withdraw her offer?

In most states across the U.S., most regulations (such as California's Compassionate Use Act (CUA) or Proposition 64 which made the recreational use of marijuana legal) excuse an applicant's marijuana use for the purposes of workplace drug testing. You can still deny employment to an applicant who tests positive for marijuana, even if the applicant has a medical marijuana card. (In California this was confirmed by the California Supreme Court in *Ross v. RagingWire Telecommunications, Inc.*, 42 Cal. 4th 920, 2008.)

My company conducts its own drug tests of applicants and employees using a cheek swab kit. Are there any issues with doing that?

Self-administered drug tests can create problems for employers. There may be questions about the accuracy of the tests and whether the employee conducting the testing is properly trained. If the testing is not done correctly or the testing sample is compromised, the results could be called into question. It's better to use an independent, licensed testing facility. Select a facility with properly trained personnel and written protocols for collecting samples.

Best Practices: Drug-and Alcohol-Free Workplace Policies

- If you already have a drug-free workplace policy in place, you may want to recirculate it to employees with a reminder that marijuana use is still prohibited in the workplace.
- Your policy should explain that you prohibit drug and alcohol use by employees while working, discuss the consequences of not complying with the policy and explain the requirements of your drug testing policy.
- If you don't have a drug- and alcohol-free workplace policy, consider whether such a policy may be appropriate for your workplace. Work with legal counsel to prepare a policy and then distribute it to all existing employees and new hires.
- Train supervisors about your policy, including how to identify signs of drug or alcohol impairment.

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