Drug Testing In The Workplace
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Under Texas and federal laws, there is almost no limitation at all on the right of private employers to adopt drug and alcohol testing policies for their workers.

Government employers are not so free, due mainly to court decisions holding that testing employees without showing some kind of compelling justification violates government employees’ rights to be safe from unreasonable searches and seizures. Drug testing is not for everyone. A company should do it only after careful consideration of many factors, including applicable statutes and regulations, contract or insurance requirements, and combating some perceived problem with substance abuse among the workers. Drug testing, for example, may be mandated for some types of employees, as is the case with workers subject to U.S. Department of Transportation mandatory testing guidelines. Some federal contracts and grants may require employers to adopt drug-free workplace policies and possibly even to provide for drug-testing of employees. Other employers may be under no legal obligation to do testing, but feel it is needed due to reports that some employees may be unsafe due to being under the influence of drugs or alcohol. Regardless of the reason for testing, it is essential to carefully draft the policy and consider the various legal issues.

What is a good, basic drug testing policy?

Most policies start out by emphasizing in positive terms the need for safety in the workplace and adherence to job requirements and work quality, and go on to cite goals such as improving safety and productivity. The policy should address certain questions:

• What will be considered a violation? (necessary)
• Which employees will be covered? (necessary)
• What disciplinary measures will result from violations? (necessary)
• Will the company allow rehabilitation? (optional -not required by any Texas or federal law)

For an example of such a policy, see the drug testing policy section of "The A to Z of Personnel Policies" in the book Especially for Texas Employers (online at www.texasworkforce.org/news/efte/tocmain.html).

Like any policy, a drug and alcohol policy should be given in writing to all employees. Employees should sign a written acknowledgment that they have received a copy of the policy. Employers usually make signing such a policy a condition of being hired. While it is common for such a policy to be part of an overall policy manual, it is probably best to have each employee sign a separate form consenting specifically to the search and testing policy.

What if an employee refuses to sign the policy?

It would be legal to fire the employee for refusing to sign an acknowledgment of the policy, but that should not be done until and unless the employee has been warned, preferably in writing and witnessed by others, that discharge can result from refusal to sign. An alternative to such a hard-line approach would be to hold a mandatory staff meeting, publish an agenda for the meeting showing as one of the items “distribution of new drug-testing policy”, have all employees sign an attendance roster or else face discipline for an unexcused absence, discuss and distribute the policy in front of witnesses, have employees sign an acknowledgment of receipt, have a witness sign “employee refused to sign” on the acknowledgment form if an employee refuses to sign, and note in the minutes of the meeting that the policy was distributed to everyone in attendance. In such a case, an employee would look pretty ridiculous trying to claim that they were not given a copy of the policy or that they were unaware of what the policy required.
Can a company test some, but not all, employees?

It is legal to test some, but not all, employees, but an employer must be careful. The policy should cover all employees in specific job categories. For example, the company could make all workers who operate machinery or vehicles subject to drug testing, but not require testing of clerical staff. Some employers test only those employees whose jobs are inherently risky. Some companies would not even do drug testing were it not for certain laws, such as the DOT drug testing regulations for long-haul truck drivers, oil and gas pipeline workers, and so on. Some contracts specify that workers coming into a client’s facility will be subject to drug testing. If that happens, the contractor does not also have to test its other employees who do not go onto that client’s premises. The main thing is to decide who will be covered, and then to enforce the policy in an even-handed way.

What about discipline for employees who test positive?

Most companies notify employees that testing positive for drugs or alcohol will result in immediate termination. Some companies allow a chance for rehabilitation and a return to work under probationary conditions, but this type of second chance is not required under Texas or federal law. If a worker is allowed to return to work after a positive test result, it is generally under a “last chance” agreement providing for monthly random tests, a year’s probation, and immediate termination for any subsequent positive test result.

How about searches?

Many companies incorporate a search policy into their drug testing policies. After all, a drug test is a type of search. For an example of such a provision, see the book Especially for Texas Employers.

What if an employee refuses to cooperate?

An employer should never physically force an employee to submit to a search, due to the risk of civil and criminal complaints involving assault, battery, false imprisonment, invasion of privacy, and intentional infliction of emotional distress. However, employers may provide in the policy that employees who refuse to submit to a reasonable search under the policy, or who refuse to undergo a drug test, will be subject to immediate termination. In case of such refusal, termination should not occur until the employee has been reminded of the policy and of the risk of termination for non-compliance.

Under what circumstances should testing take place?

A typical policy will provide maximum flexibility for the employer. A company is allowed to do both random and “for cause” testing. Both circumstances should be spelled out to let employees know under what circumstances they can be called upon to submit to a test. For example, a “random” test might involve periodically testing all covered employees twice a year at intervals specified by the company. The company might send two employees each week for testing, but any given employee would only be sent twice in a year. “For cause” circumstances might include such things as reasonable suspicion by a supervisor that an employee may be in violation of the policy, reports from any witnesses, bizarre, unsafe, or threatening behavior on the employee’s part, or involvement in a work-related accident (“involvement” means either being hurt or causing or contributing to the accident). Other things could be included as well; the term “for cause” is up to the employer to define. Terms used in the policy should be either readily understandable, i.e., with plain and unmistakable meanings, or else should be carefully defined. It is extremely important that
the policy be understood by everyone who might be affected by it: company officials, lower-level supervisors, employees, the employer’s insurance company, and government agencies, including courts, who might have to decide cases arising out of a drug test.

Regarding workers’ compensation laws

Former Section 411.091 of the Texas Workers’ Compensation Act (repealed in 2005) required any employer that is covered under a workers’ compensation policy and that has 15 or more employees to have a drug-free workplace policy and to distribute the policy to all employees. Although the law did not require such companies to provide for drug testing, TWCC rules 169.1 and 169.2 state that if drug testing is done, the policy should be given in writing to all employees and should specify what penalties may be imposed in case of positive drug test results. While the statutory basis for those two rules may be in doubt, the intent behind the rules remains a good practice, i.e., any important policy should be in writing and should be specific as to requirements and penalties.

Clarity is essential

It should be very clear what is prohibited under the policy. While “use, possession, sale, or transfer” may be easy to understand, the concept of how the drug or alcohol test will reveal a violation is not so straightforward. It is very important to define exactly what will be considered as a violation in this regard. Some employers are concerned only if the test shows drug or alcohol levels above a certain “cutoff” point. Other employers take a more hard-line or “zero tolerance” approach, stating that the policy is violated if a test detects any amount of prohibited substances in an employee’s system. Whatever the employer regards as important, it should be clearly spelled out.

Find a good drug-testing lab prior to enforcing the policy

No company should begin drug testing until it has found and engaged a reliable drug-testing lab that will be willing to cooperate with the employer in the event that a lawsuit or claim arises from the test. No lab should be used unless it agrees in writing to routinely provide the company with copies of the test results, showing which tests were performed, what substances were found, and in what amounts (either specific concentrations or an indication of what the cut-off levels for a positive result were). It should also furnish a copy of the complete chain of custody of the urine, hair, or blood sample showing who handled the sample at various times in the testing process. Employers that fail to present those types of documentation in response to an unemployment claim will lose the UI claim.

What type of testing should be done?

Initial tests or screens vary, but in order to have the best chance of protecting the company against an unemployment claim, the employer should always have the lab confirm the initial positive result with a confirmation test using the GC/MS method (gas chromatography/mass spectrometry). The GC/MS test is more expensive than the initial screen, but TWC expects to see the results of both tests before it will disqualify a claimant from UI benefits.

What about confidentiality?

Test results should be considered absolutely confidential. Negligent release of test results could result in legal action over issues such as invasion of privacy, intentional infliction of emotional distress, and defamation. Due to the federal law (ADA), it is necessary to maintain such records in a separate, confidential medical file. As a practical matter, the HIPAA privacy rule can make it difficult for employers to obtain specific drug test results from the testing lab. For that reason and others, employers should have employees sign a properly-worded consent form allowing the testing lab to release such results to the employer, and allowing both the testing lab and the employer to release the results to TWC and to any other agency or court dealing with a claim or lawsuit arising from the test.
Does it violate other confidentiality laws to release the test results to TWC?

No. Many employers misunderstand the laws in this regard. Even highly-regulated and otherwise restrictive DOT testing procedures allow employers to release the results to courts, government agencies, or arbitrators dealing with claims arising from the drug test, and drug testing labs are required to release the results to employers upon request in such situations (see DOT regulation 49 C.F.R. 40.323). There is simply no substitute for the specific drug test results in an unemployment claim. Employers with lingering doubts on this issue should call the employer commissioner’s office at TWC at 1-800-832-9394.

What special concerns are there in DOT drug testing cases?

U.S. Department of Transportation rules provide for drug testing via urinalysis of safety-sensitive employees in a variety of circumstances and for relieving such employees of duty in the event of a verified positive result or a test refusal. The DOT rules provide detailed procedural safeguards to ensure valid testing, valid results, and confidentiality. The rules are not meant to be a substitute for a good drug and alcohol policy, no rare they a limit on what employers are allowed to do in order to discourage and respond to drug and alcohol use on the job. With regard to how the DOT rules interact with a TWC unemployment claim, current agency precedent cases do not make any allowance for the in-depth safeguards and rigorous standards provided by DOT testing procedures. Unfortunately, while employers with multi-state operations may be able to defend against UI claims in some states using only the bottom-line results from the DOT testing, i.e., proof that a medical review officer confirmed a positive test result, TWC requires much more documentation, as explained in the section below.

Finally, what kind of documentation is needed in a TWC unemployment claim?

A TWC precedent case, Appeal No. 97-003744-10040997, sets out some fairly clear guidelines regarding the kind of documentation an employer needs to respond to an unemployment claim involving an ex-employee whose termination resulted from failing a drug test. To establish that a claimant’s positive drug test result constitutes misconduct, an employer must present:
1. A policy prohibiting a positive drug test result, receipt of which has been acknowledged by the claimant;
2. Evidence to establish that the claimant has consented to drug testing under the policy;
3. Documentation to establish that the chain of custody of the claimant’s sample was maintained;
4. Documentation from a drug testing laboratory to establish that an initial test was confirmed by the Gas Chromatography/Mass Spectrometry method; and
5. Documentation of the test expressed in terms of a positive result above a stated test threshold. Evidence of these five elements is what TWC states is needed to overcome a claimant’s sworn denial of drug use, even in DOT drug testing cases in which a medical review officer has certified the drug test results and that the only reasonable explanation for the positive finding is that the claimant consumed a specific controlled substance. That is why it is so important to have each employee sign a consent form allowing complete disclosure of all test documentation by both the testing lab and the employer for the purpose of responding to claims and lawsuits.

Summing up

All in all, common sense will help more than anything else. If a company has a clear written policy, ensures that all employees know about it, conducts tests according to the policy, and insists on the testing lab furnishing the appropriate documentation, it will be in a favorable position in any unemployment case or lawsuit arising from the test.

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Information contained in this report can be found in the Texas Workforce Commission’s book, Especially for Texas Employers.