




2017 FISHER PHILLIPS ANNUAL LABOR AND EMPLOYMENT LAW SUMMIT
APRIL 20 | FORT LAUDERDALE

Drug and Alcohol Programs

What's Legal, What's Not, What's Hot?


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Statistics on Drug/Alcohol Use




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Employee Substance Abuse



- Employees with alcohol problems are 2.7 times more likely to have injury-related absences.
- A hospital emergency room study showed that 35 percent of patients with an occupational injury were at-risk drinkers.
- Breathalyzer tests detected alcohol in 16% of emergency room patients injured at work.
- Large federal survey reflects that 24% of workers report drinking during the workday at least once in the past year.

Source: National Council on Alcoholism and Drug Dependence <https://ncadd.org/learn-about-alcohol/workplace>

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Employee Substance Abuse



- Drug-using employees are:
 - 2.2 times more likely to request early dismissal or time off,
 - 2.5 times more likely to have absences of eight days or more,
 - 3 times more likely to be late for work,
 - 3.6 times more likely to be involved in a workplace accident, and
 - 5 times more likely to file a workers' compensation claim

<http://www.dol.gov/eiaws/asp/drugfree/benefits.htm>

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Legal Issues



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Employee Drug Testing



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Legality of Employee Drug Testing



- There are no federal laws that prohibit a private employer from having a drug/alcohol testing policy. State laws vary but most are very permissive in permitting drug/alcohol testing by private employers.
- Generally, the law permits employers to drug test new hires and existing employees for reasonable suspicion, random, and post-accident purposes.
- Many states, including Florida, have Drug Free Workplace Acts which provide workers compensation premium reductions if the employer maintains a drug free workplace program that complies with the state law.

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OSHA and Post-Accident Drug Testing



- OSHA's new reporting rules states that post-accident testing, when not accompanied by reasonable suspicion, may not be legal as such policy may deter reporting of work-related accidents.
 - These rules went into effect on December 1, 2016.



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PADDLES UP



- You identify an employee for possible drug or alcohol use at work and tell the employee to go with the HR Manager to the laboratory for a test.
- The employee tearfully admits that he has a substance abuse problem and was going to talk to HR today about enrolling in a substance abuse program.

Can you still send the individual for a drug test?

What is the concern?

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Drug/Alcohol Issues and the ADA



- Drug and alcohol **addictions** are considered **disabilities** under the ADA.
- A rehabilitated drug or alcohol addict is protected under the ADA.
- Leave of absence for rehabilitation may be considered a reasonable accommodation (before violation of policy).
- A **current user** of **drugs** is **not** protected under the ADA.
- A current user of **alcohol** is protected under the ADA, but **may be disciplined or terminated** for violating a Company policy or work rule.

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ADA Issues – “Current Use”



- The EEOC has stated that “current” means “recently enough” to justify the employer’s reasonable belief that drug use is an ongoing problem.
- Courts have indicated that “currently engaging” is not limited to “the day of” or even within a matter of days or even weeks before the employment act (i.e. workplace accident) took place.
- It is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual **is actively engaged in illegal drug use**.

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ADA and Drug/Alcohol Policies



- The ADA specifically permits employers to prohibit the use of alcohol or drugs in the workplace and to discipline employees for such use.
- Alcohol tests v. drug tests:
 - Alcohol test is a medical examination
 - Drug test is not
- Because an alcohol test is a medical examination, the employer must have both reasonable suspicion and evidence of impact on performance.
- What does this mean?

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FMLA and Drug/Alcohol Issues



- The FMLA provides twelve weeks of leave and reinstatement for an employee with a "serious health condition."
- In most cases, drug or alcohol addiction will be considered a "serious health condition."
- An employee's time off for entering/participating in a substance abuse program will count as FMLA leave.

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Answer to Polling Question

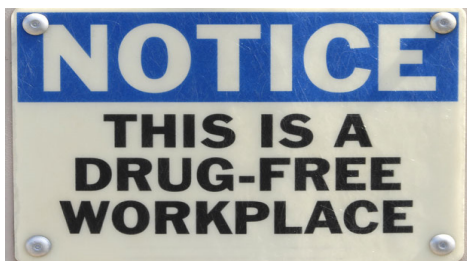


- If the employee **has already been told to go for a drug test** and the employee then confesses to being addicted to drugs:
- You can still send the individual for a drug test to determine if he is a "current user." If the test is positive, you can terminate for violation of your policy or place on a last chance agreement (with enrollment in rehabilitation as a condition) if your policy contains that option.
- You can also get the confession in writing and apply your policy (terminate or place on last chance agreement).

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What Are Employers Doing?




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- How many companies in the room have drug and alcohol testing policies?
- How many companies engage in **pre-employment** drug/alcohol testing?
- How many engage in **post-employment** testing?
- How many engage in **reasonable suspicion** testing?
- How many engage in **random** testing?
- How many use **urine** testing as their primary or only method?
- How many use **hair** testing?

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What Are Employers Doing? 

- 71% of US employers drug test **applicants**.
- 58% test **post-employment**; 62% if the company has over 4,000 employees.
- Most common testing: **post-accident, random, and reasonable suspicion**.
- Of those that test, 95% use urine testing. Breath alcohol tests (23%), hair (9%), saliva (8%), and blood testing (6%) were also conducted, but much less frequently.

http://www.drugwarfacts.org/cms/Drug_Testing_Employee#sthash.YB7xDnLR.dpuf

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Implementing a Drug/Alcohol Program 



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Considerations



- Determine the need for testing and the impact on your workforce.
- In some professions (manufacturing), drug testing is common.
- In others (professional services), it is not.
- Will your workforce be offended by testing? Enough to seek other employment or otherwise be disgruntled?
- Would only pre-employment and reasonable suspicion testing work better for your industry?

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Implementing Drug Testing



- If the employer chooses to move forward with drug testing, it should work with counsel to draft a policy that will address the various issues to be covered, including:
 - Expectations and behaviors that violate the policy
 - Types of testing and detection
 - Substances tested for
 - Inspection issues
 - Consequences for a positive test
 - Consequences for refusal to test

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Expectations/Behaviors for the Policy



- The policy should outline the expectations (that individuals will report to work without **mind-altering substances in their system**).
 - Note: This is better than saying that the individual cannot be **under the influence** of drugs or alcohol. It is a more objective standard.
 - You should list examples of various types of mind-altering substances, such as **illegal drugs, unlawfully used legal drugs, alcohol, salts, or any other mind-altering substance that is put into an individual's body.**
 - [Note: the requirements are greater under the Drug Free Workplace Act, to be discussed].

What are “unlawfully used legal drugs”?

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Expectations/Behaviors for the Policy



- The policy should outline that other behavior, such as possession of drugs/alcohol is also a violation of the policy.
- The policy should require that any person who may be taking prescription medication that may impair the individual and potentially create a safety risk should report same to Human Resources before beginning the day.
- Some policies state that off-duty related drug or alcohol abuse is a violation of the company's policy and will be dealt with accordingly.

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Types of Testing



- Most drug and alcohol policies provide for the following types of testing:
 - Pre-hire
 - Reasonable suspicion
 - Random
 - Post-accident
 - Periodic

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What Constitutes "Reasonable Suspicion"



- Reasonable suspicion is typically established when the employer has received reliable information or evidence that an employee has reported to or is at work with drugs or alcohol in his/her system.
- The information may come from a credible report from third parties (co-workers, spouse/child) or may come from observation by management/administration.
- We recommend that more than one person in a supervisory position confirm the reasonable suspicion.
- The evidence of reasonable suspicion should be written down in detail.

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Observations that May Show Reasonable Suspicion



- Bloodshot or watery eyes or very large or very small pupils
- Slurred speech
- Unsteady walk
- Excessive perspiration
- Wearing of sunglasses indoors and in all weather
- The odor of alcohol/marijuana
- Unusual poor, careless, modified, or unacceptable work performance
- Erratic or unusual behavior on the job
- Irritability or unpredictable responses to ordinary requests
- Mood swings or changes, including inappropriate gaiety or lethargic behavior

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What is Random Testing?



- Random testing must be purely random.
- Names are generated through a computer system.
- Some people will be tested several times over 5 years; some people will never be tested.



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What is Periodic Testing?



- Periodic testing is when you test an entire group, department, or identifiable portion of the workforce at the same time.
- **Example:** You select the entire Business Office for testing. Or the entire maintenance group.
 - **Note:** be careful that the group you are selecting is not overwhelmingly a particular race, color, gender, etc.
- Periodic testing may be helpful when you have rumors or concerns that a particular group is using drugs but you don't have evidence of any particular person having drugs in his/her system at work.

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Methods of Testing - Urine



- Urine testing is very accurate and can evidence whether the substance is in the sample **at the time the sample was given**. This is the most widely used type of test. Most drugs move out of a subject's system, however, within 72 hours, so the timeframe is limited.



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Polling Question



How long after use can **marijuana** be detected by a urine test?

- 24 hours?
- 5 days?
- 13 days?
- 45 days?



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Types of Testing



- The drugs to be tested for is usually negotiated with your provider. Five to eight panel screens are typical.
- The more things you test for, the more the test costs. Typical tests range from \$20 to \$50.
- The lab does the first test and then a second test on the same sample to confirm the accuracy of the first test.
- A medical review officer (MRO) reviews the results. If there is a positive result, the MRO communicates with the individual providing the sample to see if the result may be able to be explained by a prescription or food ingested. After this process, the result is sent to the employer.

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Question for Audience



What does it mean if the result reads “indeterminate” or “diluted”?

What are your options for moving forward at that time?

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Indeterminate Result



- If a urine test result is “indeterminate” or “diluted,” it usually means the individual drank or took something to try to dilute the result.
- In that case, the employer should advise the individual that the result was indeterminate and that the individual will be sent for another test at the time **of the employer's choosing**.
- This could be the next week, the day after a holiday weekend, or a random day in several weeks.

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Methods of Testing - Hair






- Some employers use hair testing. Hair testing cannot tell you whether the individual whose hair was tested had drugs in his/her system **at the time the person was selected to give a sample**.
- The hair shows that the individual used drugs at some point in time over the last few months. Usually up to 90 days for 1.5" of hair cut close to the scalp.

Note: there have been some religious accommodation issues with hair testing.

- Hair testing usually provides analysis for marijuana, opiates, cocaine, methamphetamine, and PCP.

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Who uses hair testing?
Why do you use hair testing?

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The Growth of Medical Marijuana Laws 

- Many states (23) have now legalized medical marijuana for certain conditions. The laws vary in their requirements.
- Eight states (Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, and Washington) have legalized recreational marijuana.
- Nine states (Arizona, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, Pennsylvania, and Rhode Island) have various types of provisions protecting workers from being fired or denied employment if they have a valid prescription for medical marijuana.

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The Growth of Medical Marijuana 

- The laws in most states (including Florida) is silent on the issue of whether an employee or applicant with a prescription for marijuana can be refused employment or terminated if they test positive for marijuana. Courts have generally held that **because marijuana is illegal under federal law**, having any amount of marijuana in one's system at work **whenever ingested** is a violation of the employer's drug policy.
- Some employers try to take a more middle ground and only terminate for a positive test when the employee who has a prescription for medical marijuana (1) appears impaired at work; (2) is using/taking the marijuana at work; or (3) works in a safety-sensitive position, including driving or use of machinery.

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Inspection Issues



- The company should have a comprehensive inspection policy in its employee handbook. This policy should give the company the right:
 - To inspect any place on property.
 - To inspect any item brought onto property (including electronics). **Be careful with inspecting employee's internet postings behind privacy barriers.**
 - To inspect any vehicle on property.
 - To inspect any item brought to a company-sponsored event.

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Consequences for Violation of the Policy



- The policy should indicate the consequences for violation of the policy:
 - Discipline, up to and including termination.
 - Possible last chance agreement with requirement to enter into drug rehabilitation program (with specified conditions).
 - If you have a rehabilitation provision, you should be clear how many times the employee can elect rehabilitation.

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Last Chance Agreements



- Typically, most companies use last chance agreements only when there is evidence of impairment; not possession.
- The agreement outlines the conditions:
 - Entry into and compliance with a drug/alcohol program
 - Immediate termination for failure to comply or for violation of other important company policies.
 - Drug/alcohol testing by employer at times determined **in the company's sole discretion** for one or two years.

Is this the same as random?

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What Do You Think? **Is this the same as random?**



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Consequences for Refusal to Test

- The drug/alcohol policy should make clear that once an individual is selected for testing, any refusal by the employee will be treated the same as a positive test. Or, will result in automatic termination.
- The policy should also provide that the employee will cooperate fully in the completion of any forms required by the drug testing laboratory.
- The policy should also make clear that the employee consents to the drug testing laboratory releasing the results of the test to the employer.

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Florida Drug Free Workplace Act



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Benefits



- Reduction on workers' compensation insurance premium costs.
- The Act provides that no workers' compensation benefits will be paid to an injured employee if the injury was, among other things, occasioned primarily by the intoxication of the employee.
- If the employee has a positive drug test result **and** if the employer has a policy that complies with the statute, it will be presumed that the injury was occasioned primarily by the intoxication of the employee.
- There are many requirements of the Act. We have a kit that contains the information and procedures for compliance.

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Notice Requirements



- The Act requires that employer give 60 days notice prior to testing if the company has not had an employee drug/alcohol policy in the past.
- The notice and procedural requirements under the Act are comprehensive.

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Required Testing



- The Act **requires** that the employer conduct the following types of tests:
 - Reasonable suspicion testing.
 - Routine fitness-for-duty testing if the employer has a policy that requires routine fitness-for-duty evaluations of all or classes of employees.
 - Follow up testing if the employee entered a drug rehabilitation program due to a positive test (but not if the employee voluntarily entered).

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Additional Recommended Testing



- The Act does not preclude additional types of testing. We recommend:
 - Random
 - Periodic
 - Post-accident (in accordance with the new OSHA requirements).



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Additional Requirements



- The Act contains guidelines for the collection, testing, and confirmation of the testing.
- It requires that the employer detail the evidence of reasonable suspicion and give such information to the employee if requested.
- The Act does not require, but does permit, the employer to have a provision for employees to enter into rehabilitation programs for a positive test. If the employer does so, there are some guidelines in the Act. If you choose to do so, your agreement with the employee would be similar to the Last Chance Agreement discussed.

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Other Methods of Detection




- Some companies include **canine inspections** in their policies.
- Some companies use law enforcement for canine searches; others use private agencies.
- If you use law enforcement, a finding of drugs could lead to criminal action. You have more flexibility with private agencies to dispose and take disciplinary action.

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Final Questions

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THANK YOU

FOR THIS OPPORTUNITY

Suzanne Bogdan
sbogdan@fisherphillips.com
(954) 847-4705

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