



Cross-Border Employers Must Take Care Before Implementing Drug-and-Alcohol-Testing Policies at Non-U.S. Operations

Insights

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Many U.S.-based employers perform pre-employment, post-accident, or random drug testing, and with some exceptions, are generally permitted wide latitude in deciding when to conduct such tests. The U.S. attitude toward drug testing does not necessarily translate to other countries, however, where there may be different attitudes toward employee privacy, in particular. U.S.-based employers can run into trouble when attempting to impose those same testing requirements on a foreign division or subsidiary.

In this article, the first in a series addressing employer considerations when beginning or acquiring cross-border operations, we'll look at drug testing requirements in foreign jurisdictions and what employers need to know before attempting to replicate a U.S.-based drug-testing protocol outside of the U.S.

We're not in Kansas anymore.

As we'll discuss in this article and others in upcoming months, employers face a much different landscape once leaving U.S. borders. What works here may not necessarily work there, and in fact, could result in sanctions or legal action. Before beginning international operations, employers should consider that other countries may have a different perspective on the employment relationship itself.

In many other countries, for example, it is assumed that employers have a disproportionate share of the power and leverage in the employment relationship, necessitating that employees be provided with certain legal protections we do not find in the U.S. This assumption creates some fundamental differences in the ways that other countries approach the employment relationship. Let's start with the fact that the United States is virtually alone in the developed world in permitting employment-at-will. What this means is that in most other countries, employers may terminate for cause only, or risk penalties and even lawsuits. Consider that in much of the rest of the developed world employment agreements are not only commonly used, they may even be desirable for employers. These two concepts alone can be a big surprise for employers who previously have not operated outside of U.S. borders.

Before we discuss drug-testing outside of the U.S., allow me to set the scene by describing what I have observed with clients just beginning to expand internationally. It is not uncommon for

employers just beginning cross-border operations to import wholesale their U.S. policies and practices, including employee handbooks, EEO policies (including citing U.S. law!), hiring, firing, and leave policies.

In some ways, this makes sense. It saves money to use policies and procedures already in place, and using the same policies across divisions or among subsidiaries ensures consistency and perhaps easier administration. When it comes to drug-testing policies, however, employers should carefully consider the legal landscape of the countries in which they operate prior to implementing U.S.-based policies.

Random drug and alcohol testing may not be permissible in other jurisdictions.

Although our neighbor to the north, Canada, may appear to be very similar to the U.S., the Supreme Court of Canada recently held that the implementation of random alcohol testing for employees in safety-sensitive positions was an invasion of privacy and an invalid exercise of management rights. The Court held that without "evidence of enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace," such testing was an "unjustified affront to the dignity and privacy of employees," and therefore impermissible. In other words, just because the workplace might be inherently dangerous due to the nature of the work (for example, manufacturing or construction), this fact alone does not justify random testing. While "reasonable suspicion" testing may be permissible under certain circumstances, employers should be sure to carefully document unsafe behavior and verifiable examples of drug or alcohol-related incidents.

Drug and alcohol testing in Europe can also be tricky, where employees generally have greater privacy rights than in the U.S., and drug and alcohol testing may be seen as a violation of the employee's basic right to privacy. Although employers and employees can generally set out the parameters of acceptable drug and alcohol testing through employment contracts, some countries, such as Belgium and Finland, prohibit the contracting away of basic privacy rights and may hold such contractual provisions to be invalid. In Poland and the Czech Republic drug and alcohol testing is generally prohibited.

Pre-employment screening is permissible in some countries (the United Kingdom), but is strictly limited in others. In France, for example, pre-employment drug-screening is generally prohibited unless an occupational physician recognizes and recommends such testing. In fact, drug and alcohol testing is strictly limited in most European countries, as well as many other countries around the world, including countries as diverse as Chile, Colombia, and South Africa. In other countries, such as India and China, drug and alcohol testing is generally not done, either because many of the substances that might be prohibited in the U.S. are widely and legally available, and/or substance abuse counselors and rehabilitation programs are scarce or non-existent.

Unjustified testing can result in fines, and even criminal sanctions in several European countries. In general, employers should always check the law in each particular jurisdiction in which they

operate. Although drug and alcohol testing requirements vary by country, there are some common-sense protections for all employers to consider implementing:

- Know the law in the country in which you plan to operate - do not assume that U.S. policies can be implemented in other jurisdictions;
- Have written policies that set out testing parameters. Set out types of testing that will be conducted (where permitted), and levels of discipline associated with positive tests. Include information regarding prevention, counseling and treatment where appropriate;
- Ensure that employees' privacy is being respected and that all privacy controls are firmly in place;
- Carefully consider drug and alcohol testing policies, and use only where necessary. Broadly applied testing may run afoul of many other countries' privacy laws;
- Ensure that the least-intrusive means of testing are being used;
- Limit testing to those substances that are reasonably believed to have an effect on workplace safety;
- Consider applicable disability discrimination laws prior to implementing policies or taking any disciplinary action. Keep in mind that unlike in the U.S., some countries consider current drug users to be protected under disability discrimination laws.

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