

## Testing The Waters

By Sebris Busto James

While the “three martini lunch” may be an anomaly for employees working in the Pacific Northwest, alcohol and drug abuse continues to gouge away at every employer’s bottom line. One nationwide study estimated that employees’ alcohol and drug abuse cost employers \$200 billion each year. Another study concluded that 70 percent of all illegal drug users were employed either full- or part-time. To employers, this means high costs associated with absenteeism, lower productivity, high turnover of personnel, diverted supervisory or managerial time in addition to an increase in workers’ compensation claims and other related health costs.

If an employer thinks these statistics are staggering, so are the various state and federal laws that govern how an employer responds to an employee’s real or suspected substance abuse. But, employers can and should create an effective policy about substance abuse because it lowers costs and also because it sends an important message to present and future employees about where the employer stands on this difficult issue. This note will focus on the role of drug testing as part of an effective workplace substance abuse program.

**Before You Start.** In Washington, private sector employers can test their employees for drug use without restrictions; public sector employers face constitutional restrictions and are generally limited to testing employees in “safety sensitive” positions, absent reasonable suspicion that the employee is under the influence. Unionized employers may have to bargain over drug testing before implementation. Before promulgating an effective policy for testing against substance abuse, employers need to consider whether they will test for the presence of alcohol (which is the nation’s most widely abused substance), what behaviors they will consider as a basis for testing, how they will conduct a test, and how they will effectively communicate the result to the employee, among other issues.

Despite the choices afforded by these issues, there are several essential items to a substance abuse testing policy. First, the policy should include a statement that an employee will be required to give a blood test, urinalysis or similar examination if the employer has reason to believe that the employee is using or affected by illegally used drugs or alcohol while at work. Second, the policy should state that an employee’s refusal to take the test is grounds for discipline or termination. Finally, an employer must insure that employees have adequate notice of the drug testing policy.

**The Test Itself.** If an employer has effectively distributed a policy and suspects an employee is under the influence of alcohol or illegally used drugs while working, it can ask the employee to submit to a test. Prior to giving an employee the test, the employer should give the employee an opportunity to list any drugs he or she has taken within the last thirty days.

The employer should contract with a reputable independent laboratory to conduct the testing. The laboratory should be accredited and maintain the “chain of custody” of the employee’s specimen. If the employee’s test returns “positive,” the employer should ask the employee to participate in a second test. Employers should rely on the results of the second test if it differs from the first. An employee also should have the opportunity to explain any positive test result.

**Labor Union Considerations.** Prior to implementing a workplace substance abuse program, employers should notify members of the union’s bargaining unit and attempt to negotiate, in good faith, the terms of the program and how it will be implemented. The field offices of the National Labor Relations Board will issue an unfair labor practice complaint against an employer if it fails to negotiate with the employees’ union on this issue. If the parties reach an impasse, the employer can implement the program.

The Washington Public Employment Relations Commission (PERC) also has ruled that drug and alcohol testing, as a condition of employment, is a mandatory subject of bargaining. Unlike private sector employers, however, state law precludes the employer’s unilateral implementation of the program for one year when public employers and their unions negotiate to impasse on substance abuse testing.

**Moving Beyond Drug Testing.** While substance abuse testing allows employers to quickly and “objectively” identify a problem, it may not always be the solution as well. An effective substance abuse program also should include the distribution of written information about the costs and signs of substance abuse to employees and their supervisors. Many employers also provide their employees with access to an Employee Assistance Program. Finally, any substance abuse policy should be consistently and fairly implemented.

This Employment Law Note is written to inform our clients and friends of developments in labor and employment relations law. It is not intended nor should it be used as a substitute for specific legal advice or opinions since legal counsel may be given only in response to inquiries regarding particular factual situations.



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