

SOLUTIONS

Practical Approaches to Loss Control

Substance Abuse in the Workplace

Although the Drug Free Workplace Act (1988) applies only to federal contractors, its passage created a climate favorable to addressing substance and its affect on the American workplace. Drug and alcohol abuse is a significant social and economic problem. Experts estimate that it costs American companies between \$39 and \$100 billion annually. They arrived at these figures by measuring things like:

- ♦ lost productivity
- ♦ poor attendance. In 1988, the DEA estimated that drug abusers lose three times as much time from work than non-abusers. In addition, they have four times as many accidents.
- ♦ lost inventory as a result of theft to support an alcohol or drug habit
- ♦ reduced product quality

To stem the problem, many states have enacted laws requiring drug testing in the workplace. Others neither require nor prohibit it. Various cases have tested the constitutionality of drug testing. The result has been that the United States Supreme Court ruled that drug testing is not unreasonable "search and seizure" if employers have reasonable suspicions about an employee. Employers must base their suspicions on objective observation of employees' conduct and performance on the job.

Drug testing can be an effective tool in maintaining a safe workplace. However, before you institute a drug testing program, check that state and local laws permit it. Some states permit testing but individual communities within the state do not. California, for example, allows testing on "reasonable grounds" only if the employee's conduct has "direct and actual impact" on the employee's job function. The City of Berkeley, by contrast, prohibits the testing of applicants within the city limits as a violation of the individual's right to privacy.

GUIDELINES

The following guidelines can help you to develop a legal substance abuse testing program. However, we recommend that you have legal counsel review your policy and procedures before implementing them.

1. **Develop a Drug and Alcohol Policy** that clearly defines the circumstances under which you will conduct testing. The policy should clearly state what corrective action you will take if an employee tests positive. Consistently follow your stated policy and procedures to avoid charges of unfairness or discrimination.
 2. **Revise your application** to include a statement that passing a drug and alcohol test is a condition of hire.
 3. **Revise your employee handbook and other policy statements** so they are consistent with your drug and alcohol policy.
 4. **Establish an Employee Assistance Program (EAP).** Talk to local drug and rehabilitation centers. Include full details of the EAP in your drug policy.
 5. **Contract with a reputable, certified laboratory** to ensure you get valid results. In particular, ask if they conduct additional tests to confirm all "positives." Confirm all initial positive test results.
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6. **Establish procedures for collecting blood or urine samples.** A local clinic or hospital should take the specimens. Seal specimens in the presence of the employee. The employee should be present for the entire procedure before sending the sample to the laboratory. Ensure chain of custody and document it.
7. **Develop and use a supervisory report form** for drug and alcohol incidents.
8. **Notify and train supervisors and managers on the policy and procedures.** Emphasize that they must protect the rights of the employee and handle any incidents with extreme care. Document the training. Give refresher annually.
9. **Notify and train ALL employees on your drug and alcohol policy and procedure.** Notify in writing and state the date on which the policy becomes effective. Give at least one week. After you send out the notice, schedule employees for training. The training should explain the policy, outline what managers will do if there is reasonable cause to suspect substance abuse, and inform employee of their options for contesting test results or lodging complaints.
10. Post the policy wherever employees congregate and in the company newsletter.
11. Implement the policy.

OTHER CONSIDERATIONS

Types of Drug Tests.

There are three types of tests:

Cause-based tests are those given when there is "reasonable suspicion."

Fitness-for-duty tests are those given either as part of the selection process or when employee returns to work after treatment for drug or alcohol abuse. These are fairly common when the employer has job classes that are safety-sensitive, such as drivers.

Random tests are those which routinely test randomly selected employees without cause. While random tests may be acceptable for safety-sensitive positions, they create a confrontational situation and the possibility of legal action by the employee.

In most cases, cause-based testing is preferable.

Employee Rights

You must be sensitive to employees' feelings. Refrain from labeling (or name calling). When you talk with an employee or document a drug or alcohol incident, you should use objective description: "The employee had a blood alcohol level of X amount," not "the employee was drunk."

Keep all information about drug and alcohol incidents confidential. Talking about an incident or the results of an employee's test violates that employee's right to privacy. Any discussion should only be on a "need to know" basis to make an employment decision.

Co-Worker Liability

An employer who ignores the threat to safety a substance abuser poses is responsible for injuries the impaired employee causes to others. Co-workers or others may sue the employer for negligent hiring or retention.

You should encourage employees to report suspicions of substance abuse. Provide training so that employees know they have the right and duty to do this. Create an atmosphere that encourages employees to come forward.



Solutions -- Substance Abuse

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Disability Laws

The Americans with Disabilities Act (ADA) does not protect current drug users. However, the Act prohibits discrimination against drug users who have successfully completed or are undergoing a drug rehabilitation program.

The ADA protects alcoholics if they possess the qualifications to perform the essential functions of their jobs. However, employers may take corrective action or fire an employee who cannot perform at the same level as all other employees, even if their poor performance results from their alcoholism.

Other disability laws have similar conditions. Check state laws.

Employee Assistance Plans (EAP's)

EAP's provide employers with a way of encouraging employees to come forward and acknowledge their substance abuse problem. EAP's also send a message to all employees that the employer will not tolerate abuse in the workplace but is willing to provide help to employees who want it.

When you offer the EAP to an employee with a substance abuse problem, both you and the employee should sign a "last chance agreement." The agreement states that the you will terminate the employee if he or she does not complete the program successfully or returns to drug or alcohol abuse after completing the EAP.