

Post-accident drug screening—not your only option

IMPROVED TRACKING

In May of 2016, the Occupational Safety and Health Administration (OSHA) published a final rule that improved tracking of workplace injuries and illnesses. Contained within the final rule is a statement that prohibits employers from developing procedures that discourage employees from reporting work-related injury or illness. Examples of programs or procedures that would discourage employees from reporting work-related injury or illness include: incentive programs that pay an employee or reward the employee for not reporting an injury or illness, post-accident drug and alcohol testing and any other policy that would be perceived as retaliation for reporting the incident.

OSHA states on its website, “The rule does not prohibit drug testing of employees. It only prohibits employers from using drug testing, or the threat of drug testing, as a form of retaliation against employees who report injuries or illnesses. If an employer conducts drug testing to comply with the requirements of a state or federal law or regulation, the employer’s motive would not be retaliatory and this rule would not prohibit such testing.”¹

Based upon this statement, if an employer does conduct post-accident drug testing, the burden is placed on that employer to prove that the drug testing is not being used as a form of retaliation, deterrent or discouragement to keep an employee from reporting an injury or illness. Currently, the ability of an employer to conduct post-accident drug testing without fear of possible citation is being decided in court as several employer and business associations have filed suits to contest the final rule. Regardless of the court’s decision, Federal OSHA has indicated that it will begin enforcement of the final rule on November 1, 2016.

Whether the courts decide for or against the employer groups, it may be a good time to evaluate the existing drug and alcohol testing protocols being used by your business. If your goal is to provide a drug-free workplace, consider implementing or enhancing other types of drug testing:

- Pre-placement.
- Return-to-duty.
- Random.
- Periodic.
- For cause.
- Follow-up.

Pre-placement

Through pre-placement screening, you can test and eliminate employee candidates before they are hired. This is one of the first lines of defense in reducing and eliminating workplace accidents and injuries, as well as avoiding many other personnel- and performance-related issues. With the increasing number of employers performing pre-placement drug and alcohol testing, there are fewer employers who do not conduct this type of test. You do not want your business to be the last place in town that is hiring all of the workers who have not been screened. If you do implement pre-placement screening, your employment application should clearly state, “This is a drug-free workplace. Candidates considered for employment will be subject to drug and alcohol screening. Candidates who fail the drug and alcohol test will not be hired.”

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Return-to-duty

Employees who have experienced an extended absence from the workplace should be subject to testing before returning to work. Absences may be the result of personal leave, injury or illness recovery, periodic or seasonal lay-off and brief separation from the company. Each employer will need to determine the amount of time considered to be an extended absence from the workplace.

Random

Testing employees on a random basis is another acceptable form of drug and alcohol testing. The program should be entirely random, including the date of testing, frequency of testing and who is tested. It is often best to have a third party oversee the random testing schedule and number of employees tested. The Department of Transportation (DOT) requires random testing of all truck drivers at a frequency of 50% per year. It should be realistic and acceptable to test your employees at the same percentage rate. Some project owners and general contractors require random testing of all employees, sub-contractors, materials suppliers and even vendors who enter the site.

Periodic / Fitness for duty

Periodic testing is often overlooked as a method of substance abuse screening. An employer may require drug testing as a part of normal, periodic, medical screening. Once again, the DOT requires drug screening as part of the medical certification conducted every two years for all truck drivers. An employer may require certain employees, who are subject to fitness-for-duty exams, to submit to a drug and alcohol test. Periodic fitness-for-duty exams can include: pulmonary function testing for respirator use, annual hearing testing when exposed to excessive noise and biological testing or physical exam when an employee is exposed to specific, harmful substances.

For cause

For-cause testing typically requires training of supervisors and managers in the recognition of certain behavioral, personnel or work performance patterns. One source of those issues may be substance use or abuse. If these patterns are indicated, the employee should be tested as substance abuse may be a cause of their undesirable actions. An accident or incident at work may be one of the performance or behavioral patterns that should result in a for-cause test. For-cause testing should involve everyone directly involved in a workplace incident. Also, the incident does not have to involve bodily injury to require for-cause testing.

WHEN A POSITIVE TEST HAS BEEN VERIFIED

With the exception of pre-placement screening, you should be prepared to initiate your company's specific protocol when an employee tests positive. Some employers will immediately terminate any employee who tests positive. This is usually the easiest way to handle a positive test result but you may lose the time and resources invested in training and developing that employee. Be very careful in deciding upon a protocol to take after an employee tests positive. What you do for one employee, you must do for all of the others who

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follow, so decide upon a single protocol and make that a standard business practice for your organization. If you decide to retain employees following an initial positive test, your return-to-work protocol could include a provision requiring professional interaction or counseling. Some employee health insurance plans may cover basic substance abuse counseling expenses. Employees must be re-tested with a negative or “clean” result before they can return to work. Your business may wish to exercise termination of the employee after a second, positive test result.

FOLLOW UP

If you decided to retain an employee who tests positive, follow-up testing should be conducted for an extended period of time. If a commercial driver has tested positive, the DOT allows a carrier to test them, without notice, up to five years. A testing schedule—with frequent, unannounced tests immediately following the employee’s return to work—would help reinforce your commitment to a drug-free workplace. As time goes by, the frequency would be decreased.

WHO IS TO BE SCREENED?

Every employee in an organization, including owners, managers and supervisors, should be subject to drug and alcohol testing. Employers that develop a drug testing program should identify and post a listing of all jobs, tasks or positions that are safety or security sensitive. Any employee who performs physical or manual labor would be in a safety-sensitive position. Operating equipment or driving a truck would also be considered safety-sensitive jobs. Owners, managers, supervisors and office personnel who work with or have access to confidential business records such as financial statements, accounts receivable, accounts payable, project bids and quotes, employment and personnel records and those responsible for telephone and email communication, would be considered security-sensitive positions.

LEGAL COUNSEL

To protect your business, be sure to obtain legal counsel prior to implementing any policy or program of this nature. When employees are represented by a labor union, the changes you wish to make are most likely limited by the contract and may need to be added or adjusted during future negotiations.

¹https://www.osha.gov/recordkeeping/finalrule/finalrule_faq.html

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