

Drug Free Workplace and Substance Abuse Policies

As the laws and regulations surrounding employer drug and alcohol testing are constantly changing and vary so widely from state to state, it is critical that employers evaluate their policies for compliance and effectiveness. Failure to meet these requirements could result in penalties or lawsuits.

Introduction

Employers have the responsibility to provide their employees a workplace free from recognized hazards. It can be argued that ensuring that employees are fit for duty and not putting themselves and other employees in harm's way falls under that requirement, especially for high risk industries like construction, mining, transportation or manufacturing.

Many companies implement Drug and Alcohol policies in their organizations but are often found to be out of compliance with state and federal laws or improperly implemented within their organizations, exposing them to potential liabilities.

Organizations must navigate the complex maze of mandatory 650+ state drug testing laws, regularly evolving medical and recreational marijuana laws, workers' compensation rules, the Americans with Disabilities Act (ADA), Occupational Safety and Health Administration's (OSHA) anti-retaliation provisions and required unemployment procedures. Not to mention the more than 10,000+ related court decisions to keep up with. Staying current on these changing requirements can be a daunting process, particularly if you work in multiple states. Companies may not have the time or expertise to keep up with these changes.

This risk topic will help you and your organization identify many of the common pitfalls associated with substance abuse policies and gives a brief overview of some of the key considerations when developing and implementing a substance abuse/drug and alcohol policy.

Discussion

Impact of Substance Abuse

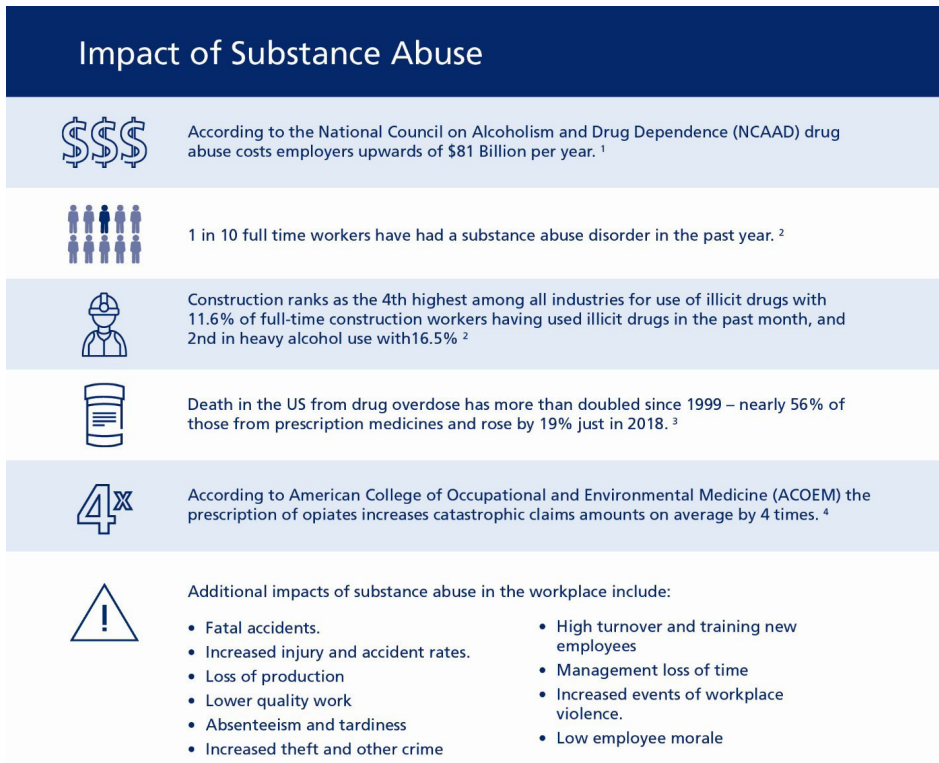


Figure 1 – Industry statistics on the impacts of substance abuse - Zurich

Guidance

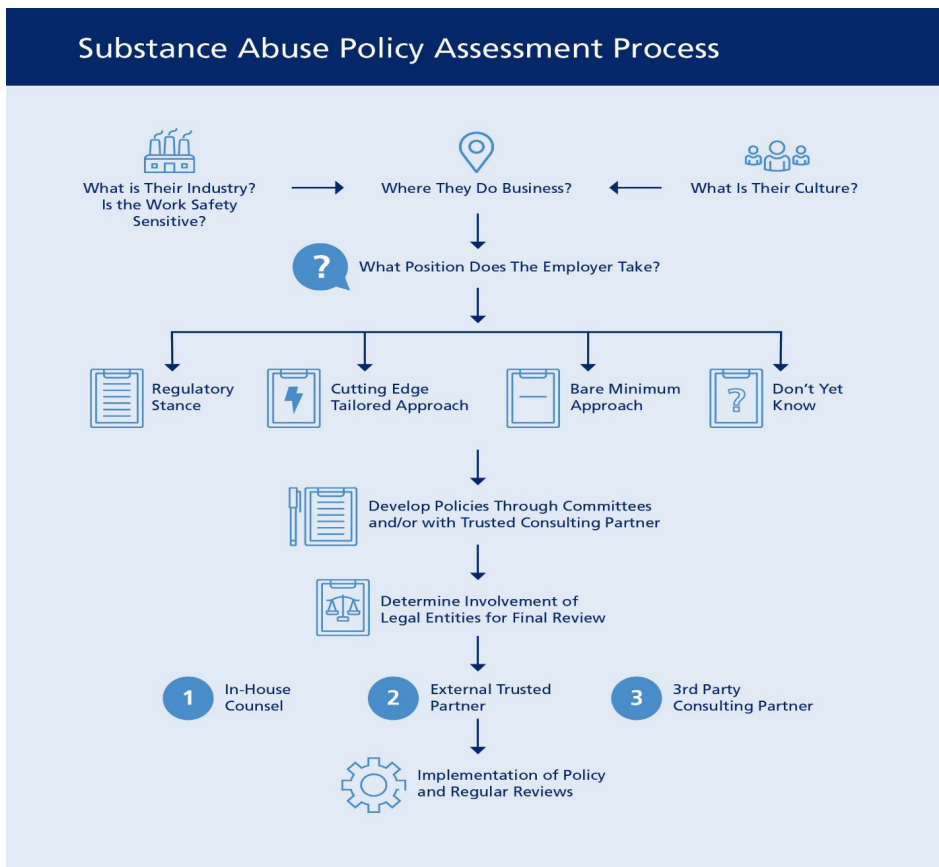


Figure 2 – Substance Abuse Policy Assessment Process courtesy of STC

Many company's drug testing policies are not fully compliant, vague and unclear, not being followed, or are inconsistently applied. All of these things put the employer at risk. Here are some things to be considered when developing a company drug and alcohol policy:

Objectives of drug and alcohol policy

What are the goals of the drug testing policies? What types of drug testing would help the organization accomplish these goals? Does the company perform safety sensitive tasks, such as operating heavy equipment, working with dangerous machinery, working at heights, or driving as part of the job?

Who is covered? (Scope)

Substance abuse policies should specify exactly who is covered by the policy and what sections of the policy applies to them. The policy may be stricter for safety sensitive positions or it could be equal across the board. Keep in mind that the impacts of substance abuse in the workplace are not just limited to safety and health.

Types of Drug Tests

Once you have identified why you want to drug test and who it applies to you need to identify the types of tests you will conduct. The most common types of drug tests would include; Pre-employment, Pre-assignment, reasonable suspicion, random, and post-accident. The regulations on these individual types of tests will vary depending on the states and cities in which your company operates.

- **Pre-employment drug testing** is largely permitted by all states and helps to weed out candidates who currently are abusing drugs. However, it should follow a conditional offer of employment. Pre-offer testing could potentially violate the ADA, as the ADA does not permit employers to gather medical information about applicants prior to an offer being made.⁶

If pre-employment drug testing is administered, applicants should not start work until after a test result is received. Once the employee starts working for a company, they are no longer applicants, they are employees. And in some states, employees' rights make it much more difficult to terminate employment if you get a positive test result.⁷

- **Pre-assignment testing** refers to when customers require you to drug-test employees before they're allowed access to their premises. This is illegal in some states and cities (Connecticut, Iowa, Minnesota, Montana, Oklahoma, Rhode Island, Vermont, San Francisco, and Boulder, Colorado) and may violate privacy rights certain states (California, Massachusetts, New Jersey, and West Virginia) unless there are compelling safety reasons to test.⁷
- **Reasonable suspicion testing** is the most common and is generally accepted in most states. However, many employers fail basic reasonable suspicion testing protocols. Reasonable suspicion testing must be objective observed facts relating to the individual being tested that would suggest they are under the influence. Supervisors should be trained in recognizing signs and symptoms of drug use. Observations of these signs and symptoms need to be documented. The timing of testing is critical as well. The tests should be conducted within eight hours for suspicion of alcohol and 32 hours for drugs.⁷
- **Random drug testing** is unpredictable and therefore highly effective. It's best to use a computer-generated random selection, otherwise questions could arise surrounding the "randomness" of the testing. Where companies fall under DOT regulations, drivers are required to be placed into a drug testing consortium or pool in which they are randomly selected for drug and alcohol screenings.
- **Post-incident and injury testing** should only focus on serious accidents and is typically reserved for employees working in safety sensitive positions. Additionally, OSHA recommends that drug testing be limited to cases in which drug or alcohol induced impairment could have been a contributing or causal factor in the incident.⁸

With post-injury testing, it is important that the employer test the individuals who caused the accident, which is not necessarily those who were injured. The injury may be the result of the actions of other individuals.

Additionally, employers may include drug testing for; new hire evaluation, probationary or introductory period, promotion to supervisor/manager, return after layoff drug testing and follow-up drug and/or alcohol testing. The types of tests to be utilized should be well defined within the policy.

Collection and testing procedures⁷

Employers should have, as part of their policy, and provide to their employees a written guide, on when and how they are going to be tested and for which substances. The policies should explain the circumstances for different tests and should identify the approved methods of testing to be utilized.

Drug tests are typically offered for urine, saliva, and hair. Urinalysis is the most common, but hair testing is most effective when testing for regular use of drugs, as drugs like cocaine, opiates, and methamphetamines. These drugs can become undetectable in the urine after three to four days.

Additionally, hair tests can test for and identify the frequency of drug usage for up to 90 days. Hair tests are not effective for post incident as they can't detect same day drug use, as the hair has yet to grow out. However, some states have laws against hair testing.¹⁵

There are many substances that may affect an employee's ability to do their job safely. However, most employers only conduct a standard five panel drug screen, as is the minimum requirement under the Federal Motor Carrier Safety Administration FMCSA.

Many employers feel that the basic five panel drug screen is not sufficient, and want to increase the panel to include more exotic drugs and prescription drugs. The pitfall of testing for prescription drugs is that employers will have to individually assess each positive result to see how the medication affects the individual and how it affects the performance of job duties. Using prescription drugs may indicate that the user has a disability, which may raise ADA concerns. The Equal Employment Opportunity Commission has gone after some employers for excluding employees who take prescription drugs without assessing their individual circumstances.

The following drugs are tested for in each of the different common drug screens¹⁴

- Substance abuse policies should outline specific protocols for drug and alcohol testing at authorized off-site testing facilities. Results from an authorized off-site testing facility may be more defensible in litigation.
- Companies should have an established relationship with the testing facilities used, and set protocols with them, even providing them with a copy of the organizations drug testing policies.
- When sending an employee for drug testing, especially for reasonable suspicion, it is critical that arrangements are made to transport the employee to the testing facility. If a worker who is under suspicion of being under the influence is sent to take a drug screen in their own vehicle, and has an accident, the employer may be held liable.

Consequences?

Policies should outline specific consequences for failing or refusing to take drug tests.

- Check with your local laws to ensure that you are not in violation by terminating an employee for a first-time offense.
- The employee may request a re-test. They should understand that the retest is performed on the original sample, not a new sample.
- Policies should state that the company may decline to hire them or terminate their employment
- The policy should include specific language for refusal to take a drug test, or an "Opt Out Policy." Usually, if an employee opts out of testing, they are subject to disciplinary actions up to and including termination as per the written company policy. This should be clearly stated in the policy to avoid conflict down the road.

Confidentiality¹¹

Generally, drug test results, like all medical information about employees, should be kept confidential. According to the Equal Employment Opportunity Commission (EEOC), "if the results of a drug test reveal the presence of a lawfully prescribed drug or other medical information, such information must be treated as a confidential medical record." All drug test results should be filed in a confidential medical file separate from the general employee file.

Figure 3 – Types of Drug Screens

5 Panel Drug-Screen	7 Panel Drug-Screen	10 Panel Drug-Screen	12 Panel Drug-Screen
Marijuana	Marijuana	Marijuana	Marijuana
Cocaine	Cocaine	Cocaine	Cocaine
Opiates	Opiates	Opiates	Opiates
Amphetamines	Amphetamines	Amphetamines	Amphetamines
Phencyclidine (PCP)	Phencyclidine (PCP)	Phencyclidine (PCP)	Phencyclidine (PCP)
	Benzodiazepines	Benzodiazepines	Benzodiazepines
	Barbiturates	Barbiturates	Barbiturates
		Methadone	Methadone
		Propoxyphene	Propoxyphene
		Quaaludes	Quaaludes
			Ecstasy/MDA
			Percocet

The department that receives drug test results should share results only on a need-to-know basis. For example, sharing drug test results with frontline managers is often unnecessary beyond stating whether the results are pass or fail.

State drug testing laws or privacy laws may apply to drug test results either specifically or generally as a matter of personal privacy. Also, the Americans with Disabilities Act (ADA) and the Health Insurance Portability and Accountability Act (HIPAA) may apply to drug test results depending on the facts involved. Employers should work with their attorneys to analyze relevance of these laws to drug test results.

Drug test results may also be critical in determining eligibility for state- and employer-sponsored benefits. Many laws recognize these situations. The U.S. Department of Transportation (DOT) regulations on testing procedures permit the release of DOT drug test results for investigatory proceedings and other matters of necessity as described under 49 C.F.R. §40.323.

Examples of other matters necessitating disclosure of test results include unemployment eligibility determination, workers' compensation claims and disability benefits. Depending on the applicable laws, consented release may not be required. However, a conservative approach, due to the various laws that may apply, would be to obtain written consent for release from

the applicant or employee when possible. When not possible, an employer should consult with an attorney before releasing information without signed authorization.

Help and intervention

Some states require that upon a first failed drug test employers provide employee assistance referring them to a Substance Abuse Professional (SAP) to be assessed for rehabilitation. However, in most states this is not a requirement. If an employee chooses this option, they may need to sign a rehabilitation agreement. The employee may need to pay for any testing or counseling over and above what is included as part of their benefit package. Employees who fail drug screens, refuse drug screens, or violate other elements of the drug and alcohol program may be subject to follow up or "Return to Duty" drug testing. While companies within the general U.S. workforce can set their own rules and guidelines for return-to-duty tests, the safety-sensitive, federally-mandated workforce is governed by specific regulations. Generally, after the return-to-duty test is completed, employees are subject to at least six unannounced follow-up tests in the first 12 months after returning to their positions – as mandated by the U.S. Department of Transportation (DOT). The employee's Substance Abuse Professional (SAP) usually establishes the number of follow-up drug tests required and are generally completed in addition to other drug tests, like random drug testing.^{12, 13}

Employers may choose to provide assistance to employees who voluntarily seek help for drug or alcohol problems before becoming subject to discipline or termination. Employees may use accrued time off or be placed on leaves of absence, referred to treatment providers or otherwise accommodated.

If an organization chooses to offer assistance programs, such programs should be available to all employees. Failure to do so may be viewed as discriminatory.

Training

Once a policy is developed the organization should communicate it to its employees and provide training for supervisors.

- Supervisor training:

Management should be made aware of and held accountable for enforcing the policy and its procedures. Effective training of your managers will help ensure that procedures are followed according to the law and that the testing is done efficiently. Partnering with lab providers may help you expedite the results of drug testing and save money on testing costs.

Managers should be trained on how to identify signs and symptoms of suspicious behavior. Additional training in how to identify and safely intervene when drug or alcohol use is apparent should also be covered in management training.

- Employee education and assistance

Employee education and assistance is a multi-pronged approach. Advising the employees of the testing policy is the best way to deter recreational substance abuse. Implementing and promoting wellness programs and support programs may also help to reduce the abuse of drugs and alcohol.

Employees should be trained on all the elements of the drug and alcohol policy, and sign acknowledgement of these policies, ensuring that employees cannot later state they were never made aware of these policies.

- Crisis management

Crisis management is an often-overlooked piece of substance abuse protocols but is critical when enacting testing for reasonable suspicion. The crisis management section of your policy may include but is not limited to:

- Protocols for how supervisors' approach those that may be intoxicated or suspected of drug abuse.

- Escorting the employee to a private area to inquire about his or her behavior;
 - If possible, calling in another supervisor or manager who can serve as a reliable witness;
 - Informing the employee of your concerns and get his or her explanation;
 - Notifying senior management;
 - Based upon the employee's response, placing the employee on suspension until a formal investigation takes place; and
 - Arranging for the employee to be escorted home.
- Having an emergency medical response plan at the workplace should be posted in work areas

Prohibited Behavior

In addition to rules regarding being under the influence of drugs and alcohol, substance abuse policies should outline other prohibited behaviors and requirements regarding drugs and alcohol such as:

- Possession of illicit drugs or drug paraphernalia while on company property or in company vehicles. When developing a company policy, consider whether employees are consenting to search and what defines employee's personal property.
- Buying, selling, manufacturing or dispensing of illicit drugs.
 - Possessing or consuming alcohol during working hours, on company property including company vehicles, or in personal vehicles while on company business.
 - Performing work duties while taking prescribed medication that adversely affect their ability to safely and effectively perform their job duties.

Laws to consider

Federal Laws

*Americans with Disabilities Act (ADA)*⁶

Title I of the Americans with Disabilities Act specifically permits employers to ensure that the workplace is free from the illegal use of drugs and the use of alcohol, and to comply with other federal laws and regulations regarding drug and alcohol use. At the same time, the ADA provides limited protection from discrimination for recovering drug abusers and for alcoholics. The employees with a history of illegal drug addiction and who have been "successfully rehabbed" or are receiving treatment for addiction to illegal drugs are protected.

However, employees who are casually using illegal drugs, but who are not addicted, are not protected under the ADA.

The following is an overview of the current ADA legal obligations for employers and employees:

- An individual who is currently engaging in the illegal use of drugs is not an "individual with a disability" when the employer acts on the basis of such use.
- An employer may not discriminate against a person who has a history of drug addiction but who is not currently using drugs and who has been rehabilitated.
- An employer may prohibit the illegal use of drugs and the use of alcohol at the workplace.
- It is not a violation of the ADA for an employer to give tests for the illegal use of drugs.
- An employer may discharge or deny employment to persons who currently engage in the illegal use of drugs.
- Though employees may be offered certain protections under the ADA, employees who use drugs or alcohol may be required to meet the same standards of performance and conduct that are set for other employees.

U.S. Department of Transportation (DOT)⁹

For those organizations who have DOT regulated drivers as part of their company, you must have a separate DOT policy. In addition to strict policies on controlled substances and alcohol misuse in the workplace, those employees may also be subject to the company drug free workplace policy, particularly if it is more stringent.

Per FMCSA regulations, all drivers who fall under these requirements shall be provided a copy of and sign an acknowledgement of these policies.

For more information on FMCSA requirements please see the (Zurich Risk topic "Commercial driver drug and alcohol testing").

OSHA – OSHA's Record Keeping Final Ruling⁸

On May 12, 2016, OSHA published a final rule that, among other things, amended 29 C.F.R. § 1904.35 to add a provision prohibiting employers from retaliating against employees for reporting work-related injuries or illnesses. In this final rule, the initial guidance given by OSHA was that post-accident drug testing and safety incentive programs would be considered as instances of unlawful retaliation. This left many employers uncertain about whether they could face potential citations for their existing safety programs and drug testing policies.

On October 11, 2018, OSHA released a letter of interpretation clarifying that 29 C.F.R. § 1904.35(b)(1)(iv) does not prohibit workplace safety incentive programs or post incident drug testing. The Interpretation explains that “evidence that the employer consistently enforces legitimate work rules (whether or not an injury or illness is reported) would demonstrate that the employer is serious about creating a culture of safety, not just the appearance of reducing rates.” Post-incident drug testing policies will be considered retaliatory and unlawful only where they seek “to penalize an employee for reporting a work-related injury or illness rather than for the legitimate purpose of promoting workplace safety and health”

Ultimately OSHA wants to prevent employers from discouraging or deterring workers from reporting workplace injuries or illnesses. OSHA has stated that post-incident drug testing should be limited to situations where drug or alcohol impairment likely contributed or could have contributed to the incident.

OSHA cites that one of the challenges with post incident drug testing is that current tests will only show if a drug is present in the person’s body, and not if the drug impaired the individual or prevented them from working safely. These tests are incapable of measuring drug impairment in the same way alcohol impairment can be measured.

State Laws⁷

There are no current comprehensive federal laws that regulate drug testing in the private sector, leaving it open to state regulation. It is critical that organizations know which laws apply to them because these laws vary so widely. For example, there are five states (Iowa-for alcohol only, Maine, Minnesota, Rhode Island and Vermont) where employers can’t fire an employee for a first positive drug-screen result without being given the opportunity to rehabilitate. States like Louisiana have very few restrictions on employers but requires that employers taking adverse action on employees based on a positive drug test use certified laboratories and very specific testing procedures. The state of Maine for example has the strictest laws for employers, including limits on when testing can be done, strict rules on policies, and notifying employees. Additionally, Maine requires that drug testing policies be submitted in writing and approved by the state labor department.

Employers should pay close attention to the limitations on types of testing (Pre-Employment, Reasonable Suspicion, Post Accident, Pre-Placement and Random Testing) as each state may differ drastically. Though pre-employment drug testing is generally permitted, some states may dictate when the testing must be done

and how job applicants are notified. Some states regulate testing methods as well. These states may prohibit hair follicle or saliva testing.

Familiarize yourself with the drug testing laws in the states that your business operates and ensure your program meets their requirements before implementing these standards. It may be beneficial to review have your program reviewed by professional and/or legal counsel.

Additional Concerns

Legalization of Marijuana

As of November 2018, 33 states have legalized medical marijuana, and 10 states have legalized its recreational use. This has and will continue to bring forward numerous challenges for employers with regards to drug testing, especially considering it is still illegal under federal law.¹⁰

Many employers have just chosen to not include marijuana as part of their drug testing as it becomes more culturally accepted. However, The Department of Transportation (DOT), which oversees the many ways people and goods are transported in the United States, has not wavered in its position regarding marijuana use of any kind — medical or recreational — since states began legalizing the drug.

Most states with laws legalizing some aspect of marijuana use do not preclude businesses from setting workplace drug policies, particularly in safety-sensitive positions. So far, court cases have supported this position for employers, but that could reasonably start to change in the near future.

For updated information on current state marijuana laws go to: <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>

Opioid Epidemic

As opioid use continues to climb at alarming rates, and the death toll continues to rise in its wake, employers are increasingly concerned and need to be prepared. There are a number of proactive measures that employers can do to help.

3 KEY ACTIONS YOU CAN TAKE TO HELP MITIGATE OPIOID USE AND ABUSE


Work with Human Resources and legal counsel to develop a detailed drug policy to meet the needs of your company and employees.

- Types of testing: pre-employment, during employment and post-accident
- Ascertain if testing is for all employees, or only those in certain jobs
- Prohibited substances and methods of testing (e.g., blood, saliva or urine)
- Consequences and availability of assistance for a positive test


Train managers to notice and document potential signs of opioid impairment in the event of employee injury and reasonable suspicion:

- Confusion
- Slurred speech
- Excessive sleepiness
- Pinpoint pupils
- Labored breathing
- Paleness or hints of blue around the lips and fingertips


Utilize healthcare and workers' compensation insurance programs and insights that can help proactively protect your employees and business alike:

- Ergonomics and safety
- Health and wellness
- Education and employee assistance
- Pharmacy management

Conclusion

Companies should schedule any substance abuse policies for frequent review, no less than annually, to ensure that they reflect changes due to revised guidelines provided by state and federal agencies, court decisions and other influencers affecting legalization in jurisdictions where they have operations. It is highly suggested that companies have their substance abuse policies reviewed by legal counsel prior to implementation. Once the substance abuse policies are in place, train employees and enforce them consistently.

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