

Drug Testing in the Workplace

"TESTING: ONE, TWO, THREE"

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With the widespread increase in drug and alcohol use in society, the effects have, not surprising, made their way into the workplace. Drug-related health costs, crime, absenteeism, decreased productivity and high turnover cause personnel headaches and can impact a restaurant's bottom line. Workplace safety becomes a factor as all restaurant workers are exposed to sharp implements and high-degree cooking surfaces. Inattention caused by a "hangover" or a worker whose senses are dulled by recent drug/alcohol use can be dangerous to the worker himself/herself, co-workers and the public.

Drug testing can be an important tool in reducing health and workplace costs. Although it remains controversial, and often meets with employee resistance, businesses that use drug testing send a strong message to their staff. Approximately 20% of employed Americans have a drug testing policy in their workplaces. A survey by SmithKline Beecham, a laboratory which analyzes samples, reported that of the 4 million general workforce tests it analyzed in 1996, 5.8% were positive (equalling 232,000 employees or applicants). If these results seem small, consider that the existence of a drug testing policy will itself create a deterrent effect in the workplace.

The most common method of workplace drug testing is urine testing, but samples of workers' blood, hair and breath can also be tested for the alcohol or other drugs in the body. Urine tests will detect traces of cocaine for up to five days, marijuana for three weeks or more. Hair samples will typically retain detectable levels for up to three months. It is for this reason that many employees oppose drug testing - testing does not distinguish between on-the-job use and private consumption, perhaps months before.

For those considering a drug testing policy, legal counsel is essential. Employees have filed lawsuits against employers for invasion of privacy, wrongful discharge, defamation, negligence, assault and battery and discrimination under the Americans with Disabilities Act. Despite challenges, the right of an employer to conduct testing, whether pre-employment, for cause or random, has been

consistently upheld by the courts.

While it may be unlawful for a business to search an employee's home, or otherwise control an employee's off duty conduct, it is not unlawful for a company to require an employee to undergo, and pass a drug test as a condition of hire or continued employment. As a recent Dilbert cartoon quipped, "Although it would be illegal to search your car or home for illegal drugs. . . we have found no ethical problem sucking the blood out of your body." Employees can refuse to take drug tests, of course. But if they are fired for their refusal, they have little recourse.

It is important that any drug testing policy be enforced in a nondiscriminatory manner. Purely subjective decisions as to testing can result in allegations of unfairness or discrimination. A Minnesota court awarded nearly \$400,000 to a black airline baggage handler who was tested following a minor accident, when he was able to demonstrate that the company did not test white employees who were involved in more severe accidents.

Many states, such as Maryland (but not Virginia or D.C.), have laws regulating the procedures that must be followed when conducting employment-related testing. In Maryland, an employer must, among other things, give an employee written notice of his/her right to resubmit the same test sample to another laboratory of the employee's choosing. A Maryland employer who fails to follow the statutory requirements may be guilty of a misdemeanor, and the test results may not be used as a basis to disqualify the employee from state unemployment benefits.

As to unemployment, in most states an employee who tests positive for drugs or alcohol, or who refuses to submit to a test, will be disqualified for unemployment benefits. However, some states, including Maryland and California, have refused to disqualify an employee if his or her problem results from a "irresistible compulsion" and the employee has not deliberately refused to get treatment.

At a minimum, a drug testing program should have the following elements:

- Applicants/employees should be advised in advance of the screening requirement and should be required to sign a consent form.
- Applicants should be informed that employment is conditioned upon successfully passing a test.
- All applicants for the same type or classification of job should be tested.
- The business should have a grievance procedure, and a employee assistance or treatment referral program for employees who test positive.
- The company must have guidelines to ensure that a chain of custody and confidentiality of results are maintained.
- An employee should have the opportunity to independently confirm a positive test.