

Dealing With Drugs... Keep It Legal

By Jane Easter Bahls

As companies nationwide have felt the impact of drugs in the workplace, an increasing number are battling the problem through drug-free workplace policies, employee education, drug testing, employee assistance programs and even undercover drug busts. If your company has joined the war against drugs, make sure you understand the legal issues involved—especially if you're deciding whether to hire and fire based on drug tests. Make a wrong move and you can land in court, defending your company against charges of negligence, violation of privacy, defamation, or violating the Americans with Disabilities Act (ADA) or Title VII of the Civil Rights Act. Here are some areas of potential liability.

Passing the tests on testing

"The rights of employers in testing are becoming more clear," says Philadelphia employment lawyer Jonathan Segal of Wolf, Block, Schorr & Solis-Cohen. A rash of lawsuits in the 1980s challenged the right of employers to conduct drug tests, but by now that issue has been resolved: Private employers may screen employees with pre-employment testing, investigate accidents by testing those involved and conduct random drug tests. Recent litigation has focused not on whether an employer may test but on how the test is done.

For preemployment screening, the ADA requires that medical exams not be done before the applicant has received a conditional offer of employment, but it specifically excludes drug tests. However, many companies hoping to avoid defamation suits retain a medical review officer to examine test results and possibly talk with the person concerned, to see if there's an innocent explanation for a positive test result. In some interpretations, that turns a drug test into a medical exam. "Prudence dictates extending a conditional offer," Segal says. "So does common sense. There is no reason to incur the cost and concomitant risk of a test if the applicant is not otherwise qualified."

Segal advises employers to conduct the test immediately after making the conditional offer, so the applicant doesn't have enough time to eliminate drugs from his system. Then wait to begin employment until you receive the negative report. "It's easier to keep an applicant out of the workplace than it is to remove an employee from it."

In unionized companies, management is required to subject drug testing of employees—but not applicants—to collective bargaining. Management may not unilaterally establish a random-testing program without notifying the union and bargaining if asked. "Unions bitterly oppose random testing," Segal says, noting that most will grudgingly accept testing on reasonable suspicion.

About a fifth of the states have enacted laws restricting employers from using certain kinds of tests or testing under certain circumstances. If you're doing business in several states, it can be difficult to keep track of what's legal and what's not in each state. The Institute for a Drug-Free Workplace has compiled a 600-page 1997-98 Guide to State and Federal Drug-Testing Laws. (See the [HRMagazine](#) section of SHRM Online, <http://www.shrm.org>, for ordering information.)

Respecting workers' privacy

Almost every state allows lawsuits over invasion of privacy. To prevail, the applicant or employee has to show that the employer intruded upon his or her privacy in a way that a reasonable person would find highly offensive. Quite a few cases have addressed this issue with respect to drug testing, given the intrusive nature of requiring urine samples. "By and large, courts are upholding the drug testing," says Mark de Bernardo, executive director of the Institute for a Drug-Free Workplace in Washington, D.C. "When you do it right, courts apply a balancing test between individual privacy and the safety of other

workers"—and they generally side with employers trying to eliminate drug use to protect the safety of other workers, he says.

The key is avoiding unnecessary intrusion. Sending a job applicant or employee into the bathroom with a cup is one thing; watching while he provides a sample is another. If you have reason to think the person is cheating, that's likely a good enough reason to watch, says Lewis Maltby, director of the ACLU's National Task Force on Civil Liberties in the Workplace. Otherwise, back off. "Don't watch unless you really have to," Maltby says. "What would you say if a judge asked, 'Why did you subject this person to a virtual strip search?'"

Likewise, inappropriate inquiries into the use of valid prescription drugs might count as an invasion of privacy.

If your drug-testing policy includes testing employees based on "reasonable cause," be sure your managers have been adequately trained in recognizing drug and alcohol abuse. In a California case decided last year, a manager at a baseball card publisher suspected that an employee had been drinking and asked her to take a drug test. When she refused, she was fired. The employee sued, claiming violation of privacy. A California appellate court agreed, asserting that the manager exercised poor judgment in demanding the test. (*Craslawsky v. The Upper Deck Company*, 97 CDOS 5317, California Appellate Court, 1997) In most cases, Segal says, you can discipline an employee suspected of being under the influence based on performance, without inquiring into the cause. Declining productivity, erratic behavior, excessive absenteeism, carelessness—all these "signs" can form the basis for progressive discipline with no need for a "reasonable suspicion" drug test—and risk of a privacy suit.

Guarding against negligence

If you're making employment decisions based on drug tests, be sure to use a reputable lab. Otherwise, you could be held liable for false positive results. Maltby notes that so far, in cases of sloppy chain-of-custody or shoddy testing procedures, liability has fallen not on the employer but on the on the drug testing lab issuing the false report. "These were well-established labs that used slipshod procedures," Maltby says. But if an employee could convince a court that the employer should have known the lab was disreputable, the employer could be liable for negligence.

Staying out of trouble here is easy. The National Institute on Drug Abuse (NIDA) has established standards for drug testing labs; be sure to use only NIDA-certified labs. "If the employer uses a federally certified lab, the chance of liability is next to none," Maltby says. Besides, it's in your company's interest to avoid erroneous test results. Consider the cost if you fire a good employee over a false-positive drug test. Beware of defamation

While the risks of liability for negligence or invasion of privacy are fairly small, lawsuits over defamation pose a very real threat. The issue here concerns whom you tell about an applicant or employee's test results and whether you have, in effect, broadcast someone's drug abuse (or perceived abuse). A jury ruling that an employer has defamed someone can tack on damages for pain and suffering.

Maltby notes that truth is not necessarily a defense. Even if the information is true, you can be held liable for telling others "with malice." Accordingly, think carefully about whether the people you're passing information to really need to know. "If they don't need to know in order to do their job, don't tell them," he says. While an employee's immediate supervisor should know about test results and options explored, chances are that other co-workers should not.

Protecting ADA rights

Recognizing that the definition of disability found in the Americans With Disabilities Act would apply to drug and alcohol addiction, Congress carved out an exception. You can discharge an employee for disorderly conduct, even if the employee blames it on alcoholism. You can fire or refuse to hire someone with a history of drug or alcohol abuse if you can show that the individual poses a "direct threat" to others.

You can administer drug tests to rehabilitated employees to make sure they're no longer abusing drugs or alcohol.

The exception, though, includes only those currently addicted, not those formerly addicted or those perceived to be addicted. If you refuse to hire someone because she used to be addicted, or because you falsely perceive that she's addicted, you can be subject to a lawsuit under the ADA.

For instance, suppose someone who never abuses drugs fails a drug test because of an error at the lab and loses a job opportunity because of it. In effect, the employer is discriminating against the applicant because of a perception of disability—an ADA offense. "We actually filed this claim on behalf of a woman who wouldn't know a joint if you stuck it in her hand," Maltby says. The employer eventually prevailed, but only on a technicality. "The EEOC accepted our legal theory," Maltby says.

In a recently decided case in the 8th U.S. Circuit Court of Appeals, an employee violated a company policy against driving a company vehicle after drinking alcohol. The employer gave her an ultimatum: Either attend an alcoholism treatment program or be fired. But not everyone who drinks alcohol, even inappropriately, is an alcoholic. The employee sued under the ADA, claiming that the basis for the ultimatum and her eventual termination was a perception of disability. While her violation of company policy wasn't protected, the ultimatum showed that the real reason for termination was the belief that she was an alcoholic. The lesson? Base employment decisions on the person's performance or violation of company rules, and don't assume that every abuser is an addict. (*Miners v. Cargill Communications Inc.*, 113 F.3rd. 820, 1997)

That doesn't mean you have to fire everyone caught drinking on the job, Segal says. The problem lies in jumping to conclusions. If you want to give the employee a break, he says, arrange to have him or her examined by a professional to assess the employee's fitness for duty. "Explain that if the professional says he's fit for duty, he can come back. If not, require rehabilitation," Segal says. "But don't you make that judgment."

If an employee acknowledges an addiction and asks for accommodation under the ADA, that's another story. "If an employee says after you discipline him, 'I'm an addict,' that doesn't relieve him or her of the discipline," Segal says. "But if it's prior to discipline, you have an obligation to accommodate." Ask what the employee needs. You don't have to accommodate drinking or drug abuse, but you could allow time off or flexibility in the work schedule to attend recovery meetings.

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We suspect that an employee in the warehouse is under the influence of drugs. May we send him for drug testing even though we do not currently have a drug-testing policy?

No. It is unwise to drug test employees without having a written policy on drug testing. When you single an employee out for drug testing and you do not have a policy, your action violates many state provisions and can be perceived as a discriminatory practice. Furthermore, the employer should not accuse an employee of substance abuse. An employer should focus instead on the employee's performance problems. Substance abusers quite often have problems with attendance, high accident rates, and overall low productivity and accuracy. Start by addressing such performance issues through the company's regular disciplinary provisions or its performance management program.

The employee may admit to the substance-abuse problem during this process. The employer should then adhere to the company policy on substance abuse. If the company does not have a policy, management should decide how it wishes to address the issue now and in the future. Quite often companies will refer their employees to an Employee Assistance Program at this stage. The employer should also make the employee aware of what benefits, if any, are provided by the medical insurance plan, as well as inform the employee of his or her rights for time off under the Family and Medical Leave Act, if the employee and employer meet all the eligibility requirements.

Many employers have a concern about how the Americans with Disabilities Act (ADA) relates to employees with substance-abuse problems. The ADA covers only those individuals who have been or are currently in rehabilitation and are no longer substance abusers. The ADA does not offer coverage to employees who are current abusers, who come to work under the influence of drugs or alcohol, or both, even if they are currently in rehabilitation. An employer cannot discriminate against an individual because he or she is in rehabilitation.

In cases where an employee admits to a substance-abuse problem but fails to get assistance, the employer should continue to discipline the individual for any performance-related problems. In safety-sensitive environments, such as when operating machinery or driving vehicles, we strongly recommend that the company put a for cause or postaccident drug-testing policy in place. Otherwise, it is very difficult to address the substance-abuse problem if you do not have a way to confirm the suspicion.

Our company's president would like to implement a drug-testing program. What are some guidelines?

Employers adopt drug-use and drug-testing policies to comply with state and federal laws and to combat the high costs and risks associated with workplace drug abuse.

Many employers adopt policies that not only cover drug use but also cover substance abuse issues such as the abuse of alcohol and both illegal and legal drugs. Employers adopt such policies because abuse of alcohol or legally prescribed drugs poses the same risks to workplace safety and employee productivity as does the abuse of illegal drugs. Testing an employee for illegal drug use without screening for alcohol is of little value in determining whether the employee is fit to work.

An employer establishing a drug- and alcohol-abuse policy must (a) take the ADA into account, (b) be aware of federal antidrug initiatives that affect contractors and employers in safety-sensitive industries, and (c) be familiar with applicable state law.

The ADA does not prevent an employer from taking steps to combat the use of drugs and alcohol in the workplace. It specifically provides for an employer to prohibit the use of drugs and alcohol in the workplace and to prohibit employees from being under the influence of drugs or alcohol in the workplace. An employer can discharge or deny employment to current users of illegal drugs without fear of being held liable for disability discrimination.

Current users of illegal drugs are not protected under the ADA. However, people who are addicted to drugs but who are no longer using drugs illegally and who are receiving treatment for drug addiction or who have been rehabilitated successfully are protected from discrimination under the ADA. Individuals who are not illegally using drugs are also protected under the ADA.

The ADA sets limits on employment-related medical examinations. An employer is prohibited from requiring a job applicant to undergo medical testing before the employer has made a conditional offer of employment. However, drug testing is not considered a medical test. Therefore, an employer can require applicants to take pre-employment drug tests and can require employees to take drug tests whether or not the tests are job related.

Under the ADA, employers are required to keep the results of medical tests strictly confidential. Although drug tests are not confidential medical records under the ADA, there are several reasons for an employer to safeguard the confidentiality of all drug test results:

- Drug tests can reveal information about lawfully prescribed drugs, which are subject to the ADA's confidentiality protections.
- Drug tests can reveal information about a disability, which is subject to ADA's confidentiality provisions.
- Some states have medical record confidentiality provisions that are more protective than the ADA.
- Inadvertent disclosures of drug test results can lead to liability for defamation, invasion of privacy, or negligence.

An employer setting up a drug-testing program should be aware of federal antidrug initiatives. The Drug-Free Workplace Act covers federal government agencies, federal contractors with contracts or purchase orders totaling \$25,000 or more, recipients of federal grants, and any individuals awarded federal contracts. Under the Act, employers must (a) establish an employee drug awareness and education program, (b) publish and provide workers with an antidrug policy statement, and (c) meet other requirements. The DOT's Drug Testing Rules cover employers in the air, rail, trucking, and mass transit industries and employers with operations otherwise covered by DOT. Those rules require the testing of employees in safety-sensitive positions for alcohol and illegal drug use.

Most states have laws that address workplace drug use and drug testing. Many states specifically authorize or regulate employee drug testing. For instance, some states require employers to put their testing program in writing. Other states prohibit disciplinary actions against employees who test positive without a second confirming test, or they require that testing be performed only in state-approved labs. Because states have their own approach to drug-testing issues, employers should carefully review the law in the states in which they operate before they adopt a drug-testing policy.

HEALTH, SAFETY AND SECURITY

What are the warning signs for workplace violence?

An employee exhibiting the following indicators is not necessarily an individual who is prone to violence, however violence is always a possibility when these warning signs are evident:

- excessive tardiness or absences
- increased need for supervision
- reduced productivity
- inconsistency
- strained workplace relationships
- inability to concentrate
- violation of safety procedures
- changes in health or hygiene
- unusual behavior
- fascination with weapons
- substance abuse
- stress
- excuses and blaming

Members seeking additional information and/or resources related to workplace violence should avail themselves of the resources on the SHRM website, particularly the [White Papers](#) section or [contact](#) the Information Center for further assistance.

What should an HR professional do when he or she suspects an employee may be potentially violent? Perhaps the most important step is to establish a workplace violence policy before a problem ever exists. The policy should express the company's efforts to provide a safe environment for its employees. A list of prohibited conduct (not to be all inclusive) should establish the basic activities that will not be tolerated. The policy should include a discussion of the process and of the need to report dangerous situations, along with a description of how problems will be addressed. An excellent example of such a policy exists at our web site in the white papers section under the heading "Health/Safety/Security."

Although disciplinary action and the possibility of termination are viable options, the primary goal is to get the employee back on track. When an employee begins to act erratically, you want to have the ability to maintain the safety of your workers. It will be important to reserve the right to disarm a security guard or to restrict the activities of an employee who handles potentially dangerous equipment.

Before an event occurs, the HR staff members should have prepared a list of sources for help. The list should include referral to the Employee Assistance Program (EAP) and a referral to your own medical plan (most health plans have some counseling or psychological aid). You should look into aid that is available for various problems, and is generally free of charge, within your city, county, and state.

When an employer suspects that a problematic situation may develop, it is time to intervene in a uniform and fair manner. The employer should carefully prepare for the confrontation. Each situation is different and demands different actions. Common sense generally dictates the most appropriate course of action. Remove any obvious safety threats to include any weapons or objects that can be used as weapons. Remain calm and use an even tone of voice. Assess whether the individual can be reasoned with, and then decide how you will proceed. Have help available in the event of an altercation or violent response by the employee. Some situations will lend themselves to discussion while others will require possible assistance and support from outside authorities. You should be prepared with completed paperwork to document the decision, and you should anticipate likely questions.

The very best preparation is rehearsal with a previously selected intervention team. A great deal of comfort and confidence can be acquired through repetition and role-playing. The comfort and confidence aids the intervention team's ability to discharge a potentially volatile situation.

For further information, several white papers that address violence in the workplace are available under "Health/Safety/Security" on the SHRM web site.

Related Sources

- [For Serious Problems, Employers Go Undercover](#)
- [Drugs in the Workplace](#). Part of One of this two-part series.
- Web Link: [Institute for a Drug Free Workplace](#). Coalition of businesses, business organizations, and individuals dedicated to preserving the rights of employers and employees in drug-abuse prevention programs.
- Web Link: [Making Your Workplace Drug Free](#). A kit for employers from the National Clearinghouse for Alcohol and Drug Information.

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