



Employee Drug Testing

Who, What, Why . . .

Who does it apply to: Drug testing is only required in certain industries, but any employer may choose to institute a policy to protect themselves against unauthorized employee use.

Why would I want a policy: You never know when you might begin to suspect that one of your valued employees has begun smoking marijuana to relax or taking methamphetamines to gain a little extra pep. If the employee is taking drugs, it will eventually impact their work product, and perhaps even your customer relationships. A written and instituted drug testing policy gives you the freedom to quell your fears and will help keep your employees honest – even if you never use it.

When can I start testing: After instituting a policy – but there are several steps involved in preparing an appropriate policy and protecting against violating employee privacy rights. You cannot simply walk into the office one day and say we now have a drug testing policy and Joe Salesman will be the first person tested. You will need to work with your lawyer to prepare a legally valid policy, employee consent form, and notice to applicants.

What types of testing policies are allowed:

- Random Testing – just what it sounds like, but it is enforceable because the employees have been warned;
- “For Cause” Testing – if you suspect someone is under the influence of alcohol or drugs or has an addiction you can send them to the lab; and
- Post-Accident Testing – After a wreck or other accident you can test offending employee and any employee who is a victim.

What if I fire an employee who tests positive and they seek unemployment: The Texas Workforce Commission will accept verified test results from an accredited drug testing company to deny an unemployment compensation claim.

How can I handle an employee who refuses to be tested or won't sign the consent: Call in a witness. If the employee refuses again, you may be left with no alternative except termination. Do not ever physically force an employee to take a test.

What if I want to keep an employee who tests positive: You must be careful. If the employee returns to drugs or alcohol and causes an accident, you were on notice. Give them one chance – in writing – with zero tolerance and weekly testing that the employee agrees to pay for as a condition of avoiding termination.

Common Situations:

Employee Car Wreck: An employee sent out on a work errand is involved in an accident. The police suspect that the employee was high on cocaine at the time of the accident and test his blood. He comes back positive for cocaine use. This will be exhibit number one at the trial of the personal injury case against your business. If you had an employee drug testing policy, the offender might have been too afraid to use or caught before the accident.

Signs of Use Before or While At Work: One morning, an employee arrives with a smell you recognize but have not encountered since college. With a drug testing policy you can ask the employee to visit the lab and learn of a potential issue before more serious problems arise. Without one, you will be hard pressed to justify sending the employee for testing. By the time you put a policy in place, it might be too late.

Workplace Accident Victim: A warehouse employee rams a forklift into a pallet of expensive electronics without any rational explanation and injuring himself in the process. With a drug testing policy you are in a position to find out whether drugs were a portion of the cause of the incident.

Signs of an Addiction: A normally even-keeled employee becomes increasingly belligerent with other employees. You question the employee about problems in their personal life, but nothing comes of the discussion. Perhaps drugs are involved. With a drug testing policy you can find out for certain.

What should I do:

Good: Implement a drug testing policy for existing employees and obtain their signature on a written consent at any time before testing.

Better: Implement a drug testing policy, have all employees sign off on a notice that they have been made aware of the policy, use a consent form any time the policy will be utilized, and place a disclaimer in your employment applications indicating that you utilize employee drug testing.

Best: Follow the advice above and make sure to locate a lab in advance that confirms initial results using the GC/MS method. Initiate random testing of at least one person each year to reinforce the policy is used and followed.



Michael Kelsheimer focuses his practice on the employment law needs of Texas businesses and executive employees. He recognizes that the cost and expense of litigation make resolving employment disputes challenging. To help avoid these concerns, he utilizes his experience in and out of the courtroom to prevent or quickly resolve employment disputes through proactive employer planning and timely advice. When a dispute cannot be avoided, Michael relies upon his prior experience as a briefing attorney for the United States District Court and his extensive experience in employment and commercial lawsuits to secure favorable resolutions for his clients.

This guide is one in a series. For more information, or to receive the entire collection contact Michael Kelsheimer by email at mkelsheimer@grayreed.com or by phone at **469.320.6063**