



Drug Testing in the Workplace

I. Required Testing – When Must You Test Your Employees?

- a. Department of Defense. Contractors with the DOD must make a drug free policy statement and specify criteria to maintain that policy, including drug testing of employees in sensitive positions, and supervisory training to identify drug use.
- b. Department of Transportation. Employees of transportation industry companies or jobs with safety/security functions are required to perform drug testing. This applies to employers in industries regulated by the FHA, FAA, FRA, FTA, etc. To see if you are covered go to <https://www.transportation.gov/odapc/am-i-covered>
- c. The Project Owner Requires It/Other Contractual Requirement.

II. Drug Testing is Different than Drug Free Workplace.

Federal contractors or individuals contracting with the federal government are required to ensure a drug free workplace by preparing and distributing an anti- drug policy statement prohibiting drug activity in the workplace. They must also specify the consequences for violators of the policy.

III. Practical Considerations in Whether or Not to Test Employees.

Pros	Cons
Promotes a healthy and safe workplace	Violates employee privacy
Prevents workplace accidents – this could reduce the legal liability of employers	Cost

Helps employees who have drug problems	Can lead to unfair termination suits if based upon drug use/testing procedures
Reduces new hiring and recruitment costs	Inaccurate results
Boosts company reputation	
Increases productivity	
Reduces worker's compensation cost by preventing accidents	
Reduces health insurance costs	
Reduces employee theft	

IV. Drug Testing Policies

IF YOU DRUG TEST IN MINNESOTA YOU MUST HAVE A WRITTEN DRUG TESTING POLICY.

- a. The Minnesota Drug and Alcohol Testing in the Workplace Act (DATWA).
 - 1. Applies to Minnesota employees.
 - 2. Can apply to Minnesota-based employers working in other states whenever there are “significant contacts” between the state and the parties.
 - 3. Does NOT impose a duty to test. Just requirements if you choose to.
 - 4. Notice Requirements.
 - 5. Policy Requirements:
 - Define the employees subject to testing
 - When is testing requested or required
 - The right to refuse testing and the consequences of refusal
 - Any action that may be taken based on a confirmatory test verifying a positive result.
 - The right to explain a positive result and pay for a confirmatory retest.
 - Any other appeal procedures.

V. When Can You Drug Test Your Employees? (per DATWA)

- a. Job Applicant – after a conditional job offer. All applicants for the same position must be tested.
- b. Routine Physical Examination. Once per year and at least two weeks' written notice.
- c. Random Testing. ONLY if the employee is:
 - in a safety sensitive position (a job, including any supervisory or management position, in which an impairment caused by drug or alcohol usage would threaten the health or safety of any person)
 - a professional athlete and subject to a CBA permitting random testing
- d. Reasonable Suspicion Testing.
- e. Treatment Program Testing

DATWA prohibits “arbitrary and capricious” testing.

You can only test AFTER you have given the individual a form where the employee/applicant acknowledges that it has seen the testing policy.

VI. Best Practices relating to Drug Testing Employees.

- a. Have a compliant drug testing policy and all related forms/checklists for every state you do business in.
- b. Have a separate policy for federally regulated (DOT) employees.
- c. Drug Tests are Medical Records – store in a medical file. Train your managers/HR on handling employee medical records.
- d. Be aware of legalized marijuana. Differs by state, but states that allow it typically prohibit adverse employment action because of use. Also, know if you are a recreational or medical marijuana state.
- e. Testing results could trigger disability issues under the Americans with Disabilities Act.
- f. Be aware of new OSHA requirements regarding testing.

Nancy Johnson comes in for a job interview. She interviews very well, but at the end of the interview, as you are walking her to the front door, you see that her car has a marijuana leaf sticker on it. You are surprised, and while you want to hire her, you want to drug test her first. Can you drug test her?

Ryan works on a construction site. While walking on the site, headed for his lunch break, an employee from another company, drops a tool from the roof. The tool strikes Ryan in the head, causing a workplace injury. Can you drug test Ryan?

What if you employed the worker who dropped the tool? Could you drug test him?

Bob gets chosen for random testing. His test comes back positive for marijuana. Can you fire him?

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