



# **Managing within the Law: Drug Testing Programs**

**Nancy N. Delogu, Esq.**

**[nndelogu@littler.com](mailto:nndelogu@littler.com)**

**NSRP Workers'**

**Compensation/Safety Meeting**

**Littler**

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# *Struggling with Substance Abuse*

- 1 in 12 American workers report having used an illegal drug in the past 30 days
- Rate of substance abuse is highest in restaurant, food service, and construction industries – as many as one in 5

# *Struggling with Substance Abuse*

➤ None of them work for you

# *Struggling with Substance Abuse*

## ➤ Drug abusers...

- Are more likely to have multiple employers in a year than non-users
- Are absent more often
- Are involved in 30% plus over-the-road accidents and significant workplace accidents
- Are more likely to be impaired at work
- May engage in illegal activity at work

# *Struggling with Substance Abuse*

➤ None of them work for you

# *Creating the Drug-Free Workplace*

- What is a drug-free workplace?
  1. Take a stand against illegal drug use.

# *Creating the Drug-Free Workplace*

- What is a drug-free workplace?
  1. Take a stand against illegal drug use.
    - Adopt a policy
    - Get senior management buy-in
    - Put it in writing
    - Distribute widely

# *Benefits of a Written Policy*

- Drug abusers seek out employers that don't have a drug-free workplace program

- Policy is more likely to be applied consistently
- Employees understand what is expected of them

# *Benefits of a Written Policy*

- It's required by law in many locations!
- Arguably: California, Boulder (Colorado), Connecticut, Hawaii, Iowa, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, New Jersey, Oklahoma, Puerto Rico, Rhode Island, Vermont, West Virginia

# *Creating the Drug-Free Workplace*

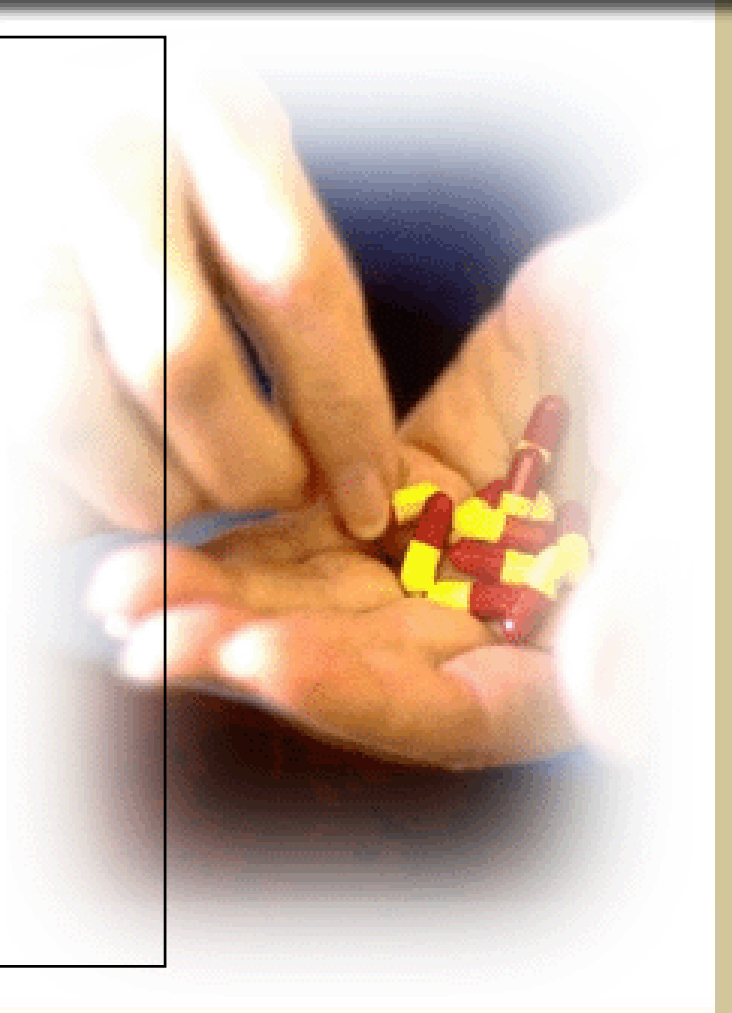
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# *Senior Management Commitment*


- What are the goals to be accomplished?
- What is the organization's culture?
- No use having a policy you can't or won't enforce

# *Employee Substance Abuse— Basic Employer Rights*

- Employer can regulate employee behavior to maintain workplace safety
- Employer can require that employees perform at acceptable levels
- Employer can bar illegal activity



# *Employer Policies Implicated*

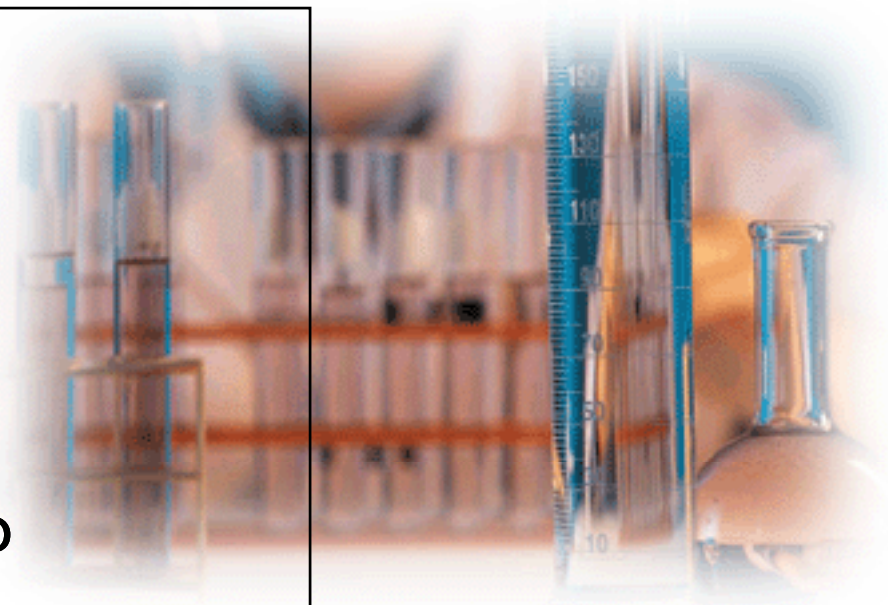
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- Misconduct/  
Discipline Policy
  - Drug/Alcohol  
Prohibition Policy
  - Testing Policy
  - EAP

# *Creating the Drug-Free Workplace*

- What is a drug-free workplace?
  2. How will the policy be enforced?

# *Employer Tools for Addressing Substance Abuse*

- Observation
- Drug Testing
- Education
- Rehabilitation/EAP
- Searches
- Undercover Operations



# *Drug and Alcohol Trends*

*Society for Human Resources Management*

Human Resources Professionals report:

- 84 percent conduct pre-employment drug tests
- 39 percent conduct random drug tests
- 73 percent conduct reasonable suspicion drug testing
- 58 percent conduct post-accident tests
- 14 percent used scheduled drug testing

# *Drug Testing*

- Pre-hire – most likely to be free from legal challenge
- Reasonable suspicion – a tool for unusual situations
- Post-accident – to discover root causes of accidents
- Random – to deter drug use and discover abuse
- Periodic – to establish a baseline or satisfy customers

# *Drug Testing*

- Pre-hire – to deter applicants who use drugs  
NOT to eliminate substance abuse in the workplace
- Reasonable suspicion – a tool for unusual situations (responsive, NOT proactive)
- Post-accident – to discover root causes of accidents  
NOT to reduce workers' compensation costs

# *Drug Testing*

- Random – to deter drug use and discover abuse

NOT where restricted by law

- Periodic – to establish a baseline or satisfy customers

NOT very useful as either deterrent or detection method

Limited by law in many jurisdictions

# *Testing Procedures*

- Spell them out... Required by law!
- Keep it flexible
- Ensure legal compliance (DOT procedures are not legal everywhere!)
- Use of an MRO is NOT optional... Anywhere
- Respect employee and applicant privacy rights

# *Testing Procedures*

- Consider use of methods other than urine for drug tests
- Hair, oral fluids have costs/benefits
- Ensure compliance with state law
- Avoid blood tests for alcohol

# *Creating the Drug-Free Workplace*

- What is a drug-free workplace?
  3. Follow through, consistently

# *Disability & Substance Abuse*

Recurring issues:

- Some substance abusers may suffer from medical disabilities
- Be prepared to address substance abuse through application of conduct and performance policies

# *Disability & Substance Abuse*

Q: When is a drug test *not* a drug test?

A: When it is an alcohol test

# *Disability & Substance Abuse*

- Under the Americans with Disabilities Act, an employer may conduct a drug test at any time
- Medical examinations, in contrast, may be conducted
  - 1) Only post-offer; and
  - 2) Only if the results are to be used for purposes that are both job-related and consistent with business necessity.

# *Disability & Substance Abuse*

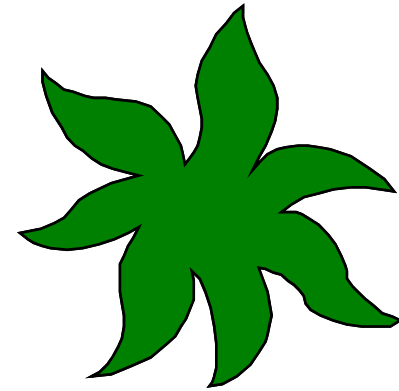
- An alcohol test is considered a medical examination under the ADA.
- An alcohol test may be conducted
  - only after all prerequisites to employment have been met, and
  - only when it can be justified as consistent with business necessity

# *Disability and Drug Testing*

- Requiring donors to list medications they have used violates disability law bar on medical inquiries
- Only can request this information if “job-related and consistent with business necessity,” i.e., positive test, or donor volunteers

# *Remember This?*

- **Gonzales v. Raich,**  
June 6, 2005 (U.S.)
- Does the federal government have the authority to regulate the cultivation and possession of marijuana by individuals who use it only for medical reasons?



# *Gonzalez v. Raich*

YES!

# *Medical Marijuana*

- Is illegal under federal law
- But 11 states have adopted “medical marijuana” legislation making some use not criminal under state law
- May trigger an obligation on the part of the employer to accommodate the user... But NOT the use
- Oregon, California litigation

# *Common Employer Mistakes*

- Refusing to consider for hire those who test positive... ever
- Refusing to consider for rehire those who have tested positive
- Pre-employment or suspicionless alcohol tests for all employees
- Post-accident tests for anyone who reports a workers' compensation claim

# *Common Employer Mistakes*



- Failing to segregate drug-testing records from personnel files
- Requiring employees to report all prescription drug use
- Requiring employees to list drugs used before test
- Failing to get written agreement for follow-up alcohol testing
- Focusing on the condition, rather than the behavior

# *Common Employer Mistakes*

## **Failing to Recognize**

### **Family and Medical Leave Act Triggers**

- Requiring employees to return to work after 30 days leave
- Placing conditions on return to work
- Requiring employee to complete a treatment program YOU prescribe

... when the employee has not violated your policy

# *Employee Assistance*

- Every employer can afford it
  - Resources are everywhere
- Mandatory in certain states, and sometimes when employees self-refer
- Best chance to get an employee back “in working order”

## *Where can I learn more?*

- Department of Labor's "Working Partners" web site
- National Clearinghouse on Drug & Alcohol Information
- [www.littler.com](http://www.littler.com)

**THANK YOU!!**

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