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# IMPLEMENTING AND MAINTIANING A REASONABLE SUSPICION DRUG TESTING POLICY



## Why is it important?

- ▶ Up to 60% of people with addiction issues are full-time employees (according to the State of Colorado)
- ▶ 65% of workplace accidents involve drugs or alcohol (according to the U.S. Dept. of Labor)
- ▶ A Harvard Health Study estimates an annual decrease in production of \$81 billion due to substance abuse



# Why is it important?

- ▼ Industries with high addiction rates:
  - ▼ Mining and Oilfield (17.5%)
  - ▼ Construction (16.5%)
  - ▼ Restaurant/Food Service (12%)
  - ▼ Healthcare (14%)



# Why is it important?

## ▼ Other troubling numbers:

- ▼ The positive rate for marijuana in employee drug tests in Colorado was 2.7% in 2020
- ▼ The national rate for opiates hovers around .30%
- ▼ An American Addiction Center study found that 14.7% of at-home workers admit to being impaired on the job every week
- ▼ The number for other workers is 3.3%



# What is a “reasonable suspicion” drug testing policy?

- ▶ A drug testing policy that is enforced depending on an employee’s behavior or on other identifiable factors (such as observation, smell, etc.)
- ▶ Differs from pre-employment or random testing in that it targets a specific employee or employees
- ▶ Differs slightly from post-accident testing in that post-accident testing is based on a result, not behavior





# What companies should have such a policy?

- ▼ Construction
- ▼ Oil and Gas
- ▼ Manufacturing
- ▼ Healthcare
- ▼ Education/childcare



# What companies should have such a policy?

- ▶ Service Industries?
- ▶ Office workers?
- ▶ Any industry where there is a customer-facing role?
- ▶ IT/Tech (security issues)



# What is reasonable suspicion?

- ▶ Loosely defined: Evidence of obvious impairment, whether based upon personal observation or other *objective* factors
- ▶ Examples: Slurred speech, imbalance, disorientation, scent of alcohol



# What is reasonable suspicion?

## ▼ Closer cases:

- ▼ Mental fogginess (we've all been there?)
- ▼ Physical illness seemingly (potentially) alcohol/drug related
- ▼ Random comments (“Dude, I’m still drunk from last night!”)



# Reasonable Suspicion?



# Reasonable Suspicion?



# What is reasonable suspicion?

- ▶ Never base reasonable suspicion on behavior that solely has taken place outside of work:
  - ▶ Reputation of a hard-living lifestyle
  - ▶ Random comments unrelated to work (“Dude, I got so high last weekend”)
  - ▶ History of *past* substance abuse



# Implementation

- Document the basis upon which the test is sought
  - Statements, CCTV, etc.
  - If there is an immediacy, discretely remove the suspected employee while such evidence is obtained
    - Always err on the side of employee safety
  - Never take employee off the clock while evidence is being obtained





# Implementation

- ▼ Protect employee privacy:
  - ▼ Discreet removal from the site
  - ▼ Do not inform other employees about what is happening



# But marijuana is legal, right?

- ❖ Don't fall for it
- ❖ But be careful not to force a test where no immediate reasonable suspicion exists



# Potential pitfalls of poor implementation

- ▼ Causes of action:
  - ▼ Defamation
  - ▼ Invasion of privacy
  - ▼ Violation of ADA
  - ▼ FMLA issues
  - ▼ Off-duty work protections



# Potential pitfalls of poor implementation

- ▼ Causes of action:

- ▼ Title VII issues

- ▼ Inconsistent enforcement based upon protected characteristics
- ▼ Potential disparate impact claims



# Potential pitfalls of *not* implementing of reasonable suspicion policy

- ▼ Negligent retention
- ▼ Willful OSHA violation
- ▼ Workers' compensation exposure (not getting the 50% reduction)



# OSHA Issues

- ❖ Incidents caused by impaired employees are still recordable on an employer's 300 logs
- ❖ Employees who allege unsafe conditions (even if they arguably cause them) are protected under Section 11(c) of the Act



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**Q&A**