



QUARTERLY SPECIAL REPORT

## DRUG TESTS GONE WRONG

*How to avoid drug and  
alcohol testing mistakes*



HUMAN  
RESOURCES

### **SITUATION #1:**

A job applicant used medical marijuana and admitted to a potential employer that she wouldn't be able to pass a pre-employment drug test. The employer withdrew the job offer, was sued, and lost in court.

### **SITUATION #2:**

An employee was injured at work and was given a drug test under company policy. The employee tested positive for marijuana, was fired, and sued the company. The employee won the case.

### **SITUATION #3:**

Still another job applicant was offered a position at a retail store but could not provide a urine sample for the drug test. The company said the urine test was required and didn't hire the applicant. The Equal Employment Opportunity Commission (EEOC) filed a lawsuit against the employer.

What's going on? Drug and alcohol tests support a safe, productive work environment. They deter drug abuse and are an effective way to keep drug and alcohol use out of the workplace. Yet if they're done incorrectly, laws could be violated in surprising ways. Employers need to be aware of what could go wrong and how to lower the risk that a costly mistake will be made.

# THE RIGHT APPROACH

When conducting drug and alcohol tests, the needs of the workplace are balanced with the employee's right to privacy, reasonable accommodation, and freedom from discrimination. Safety, productivity, and employee rights are all considerations.

Drug and alcohol testing supports workplace safety and helps workers steer clear of substance abuse. In that respect, drug testing benefits workers, who have fewer concerns that a coworker who is inebriated or high will cause an accident or the need to cover for mistakes. A test also could, however, infringe on employee rights if the correct protocols are not followed. It could reveal personal medical information or be an unfair requirement for people with certain medical conditions. A marijuana test could violate a state law. When a test is positive for any drug, a state law might limit an employer's actions. That's why it's critical to keep several things in mind:

- ▶ Anti-discrimination laws offer employee protections that impact drug and alcohol testing,
- ▶ Safety and health laws may affect testing done after a workplace accident,
- ▶ State drug testing laws may place limits on the type of test that is done and the consequences of a positive test, and
- ▶ State marijuana and medical marijuana laws may include drug testing restrictions.

# DRUG AND ALCOHOL TESTING REGULATORY CONSIDERATIONS

*Be aware of state and federal laws that can make an impact on drug and alcohol testing.*

LAW	APPLIES TO	REQUIRES
Americans with Disabilities Act (ADA)	Employers with 15 or more employees	<ul style="list-style-type: none"> <li>Accommodations for pre-employment drug tests</li> <li>Restrictions on random alcohol tests</li> <li>Confidentiality of medical information</li> <li>Accommodations for employees in recovery</li> </ul>
Family and Medical Leave Act (FMLA)	Private employers with 50 or more employees, all public employers	Job-protected time off to attend a rehabilitation program
Fair Labor Standards Act (FLSA)	Employers with 1 or more employees	Paid time for required employee drug tests
Occupational Safety and Health Act (OSHA)	Employers with 1 or more employees	Additional considerations for post-accident drug tests involving an injury
State drug testing laws	Employers in states with drug testing laws	Consideration of: <ul style="list-style-type: none"> <li>Restrictions on random tests</li> <li>Required testing panels</li> <li>Prohibited consequences of a positive test</li> <li>Restrictions on hair testing or rapid tests</li> <li>Laboratory requirements</li> </ul>
State medical marijuana and marijuana laws	Employers in states where marijuana is legal for medical or recreational purposes	Consideration of: <ul style="list-style-type: none"> <li>Anti-discrimination protections</li> <li>Restrictions on marijuana testing</li> <li>Restrictions on actions taken because of a positive marijuana test</li> </ul>



The specific pitfalls that could impact a drug test will vary, depending on why a test is being conducted. In general, the reasons for drug tests fall into these categories:

- ▶ Pre-employment
- ▶ Reasonable suspicion
- ▶ Random
- ▶ Post-accident
- ▶ Follow-up

Understanding where each type of test can go awry can help an employer avoid practices that conflict with federal and state laws. Here's a look at what needs to be considered when testing in each situation:




# PRE-EMPLOYMENT TESTS

Pre-employment drug and alcohol tests are conducted before an individual starts work. Because an employer has not had the opportunity to observe any signs that the individual is under the influence while on the job, pre-employment tests are generally accepted as a way to tell if a job applicant is currently using alcohol or illegal drugs.

Applicants and new hires have rights when it comes to pre-employment testing, however. They are protected under laws that ban discrimination based on unfair treatment. To avoid stumbling over laws that protect employee rights:

**TEST APPLICANTS AT THE SAME TIME IN THE HIRING PROCESS.** Drug tests are generally given after an offer of employment has been made. Tests could be given at other times during the hiring process, but things get complicated if a test reveals that an individual is taking a legally prescribed medication. In addition, singling out certain people for a drug test before offering them a job is risky, as it may look like you are discriminating against individuals based on their age, sex, race, or religion.



*All applicants for the same position should be tested at the same time during the hiring process.*





**TEST ALL APPLICANTS FOR A POSITION EQUALLY.** If passing a drug test is a requirement for a position, make sure all new hires for that position are tested. Testing some but not others could bring a discrimination claim. Employers aren't required to test all applicants for all positions, but should be consistent about testing all new hires for a certain position or job category.

**TEST FOR ALCOHOL ONLY AFTER MAKING AN OFFER OF EMPLOYMENT.** While a drug test could be given at any time in the hiring process, there are limits on when a job applicant can be tested for alcohol. A test for alcohol is considered a medical exam under the ADA, and medical exams may be given only at certain times in the employment process. An alcohol test is prohibited before an offer of employment is made, but is allowed after a conditional job offer is made and before the employee starts work.

**CONSIDER A TESTING ACCOMMODATION IF ONE IS REQUESTED.** If urine tests are typically used, but an employee cannot provide a sample because of a medical condition, consider having the applicant take a different type of test (such as a hair or blood test) if allowed under state law. Not considering a request for an alternate test risks a discrimination claim under the ADA.



### **BE AWARE OF STATE MARIJUANA AND MEDICAL MARIJUANA LAWS.**

In some states, individuals with a medical marijuana card are protected from discrimination. In these states, an employer should not automatically disqualify an applicant from a position because the applicant has a medical marijuana card. A state may also prohibit an employer from rejecting an employee because of a positive pre-employment test for marijuana. The specifics of the situation should be taken into the account, including job duties and the impact of impairment at work. An accommodation may need to be considered, as it would for any other prescription medication. In a few states, employers are not allowed to test for marijuana at all. Employers should be familiar with recreational and medical marijuana laws in states where they are testing and use a testing panel that is in line with state law. In states with medical or recreational marijuana laws, employers must continue to follow any applicable federal drug testing laws (such as Department of Transportation requirements) and may take action based on a positive test for other illegal drugs. In addition, they may make applicants aware of a workplace drug and alcohol policy which prohibits employees from being under the influence of marijuana at work.

### **PAUSE BEFORE DENYING A JOB BASED ON A POSITIVE OPIOID TEST.**

Quickly refusing to hire an applicant because of a positive test for opioids is risky. Opioids can be used legally or illegally, and deciding to take a negative action before determining why the test is positive could bring a discrimination claim. The applicant should be given the opportunity to present information about lawful drug use that could have caused the positive test. If a Medical Review Officer (MRO) looks over drug test results for your company, the MRO will take this step for you and will only report the test as positive if the individual is taking opioids illegally.

**DON'T DISQUALIFY JOB CANDIDATES IN RECOVERY.** A job candidate should not automatically be disqualified from consideration for a job because the candidate is in recovery from a drug or alcohol addiction. You do not have to allow current use of illegal drugs or alcohol at work, but discriminating against someone in recovery would violate the ADA.



# WHAT TYPE OF ACCOMMODATIONS MAY BE NEEDED FOR JOB APPLICANTS OR EMPLOYEES WHO ARE IN RECOVERY?

If a job applicant or employee is in recovery from drug or alcohol addiction, consider accommodation requests that support sobriety. This might include:

- ▶ Rescheduling a job interview or making a schedule adjustment so the employee can attend a recovery group meeting,
- ▶ Allowing an employee to call an Alcohol Anonymous (AA) sponsor during the workday,
- ▶ Allowing an employee a leave of absence to attend a treatment program.

Drinking or illegal drug use never needs to be condoned at work, and an employee does not need to be allowed to miss work because of a hangover or issues related to illegal drug use. However, refusing to consider an accommodation that supports sobriety risks an ADA violation.

*Refusing to consider an accommodation that supports sobriety risks an ADA violation*





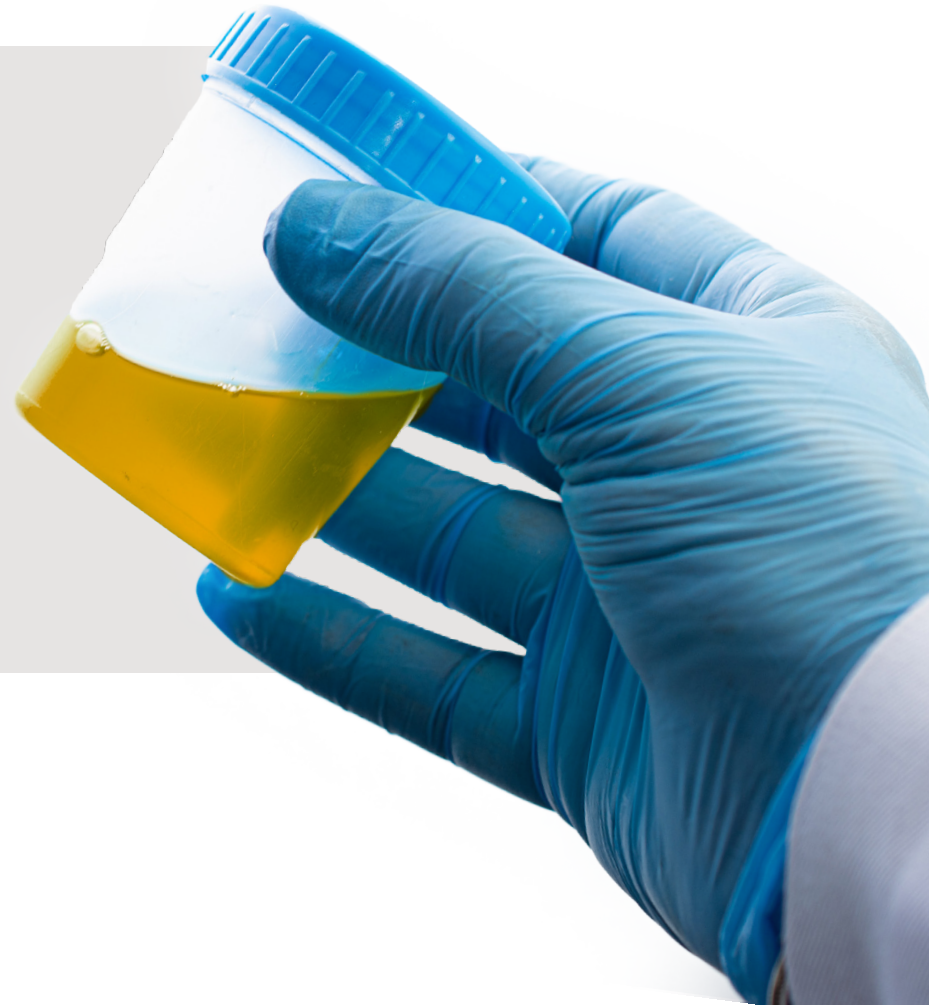
# REASONABLE SUSPICION TESTS

Reasonable suspicion tests are conducted when an employer observes signs that indicate an employee is under the influence of alcohol or an illegal drug. Observations may be based on appearance, behavior, speech, or odors. These signs might include:

- ▶ Impaired function and alertness
- ▶ Red or bloodshot eyes
- ▶ Delayed reaction time
- ▶ Poor coordination, stumbling, loss of balance
- ▶ Anxiety
- ▶ Dizziness
- ▶ Hallucinations
- ▶ Restlessness
- ▶ Inability to concentrate
- ▶ Drowsiness, sleepiness

To reduce the risk of running into problems with a reasonable suspicion drug test:

**CONFIRM THE SIGNS.** A supervisor or manager is likely going to be the person who initially sees the signs of illegal drug or alcohol use. If possible, another supervisor, manager, or human resources professional should also observe the employee and confirm that the signs are present.





**DOCUMENT THE SIGNS OF IMPAIRMENT.** Specific, objective signs should be documented. The documentation should be detailed rather than vague. For example, rather than saying, “I suspect this employee is using alcohol,” it could say:

- ▶ The employee has difficulty concentrating and is uncoordinated.
- ▶ The employee was weaving, stumbled, and dropped a stack of paperwork.
- ▶ The employee’s breath smells like beer.

**BE AWARE OF STATE MARIJUANA LAWS.**

Some state laws prohibit employers from taking a negative employment action based only on a positive test for marijuana. Documenting the signs of impairment is especially important in these states, as a negative employment action (such as suspension or termination) would need to be based on signs of impairment, not only a positive test result.

**PAY THE EMPLOYEE FOR TIME SPENT TAKING THE TEST.**

A test done at the employer’s request during the workday and on work time must be paid. Not doing so risks an FLSA or state law violation. The employee could be placed on unpaid leave pending the outcome of the test.

# CAN I DO A REASONABLE SUSPICION TEST BASED ON A RUMOR?

When there is a rumor that an employee is using drugs, the specifics of the situation need to be considered, including:

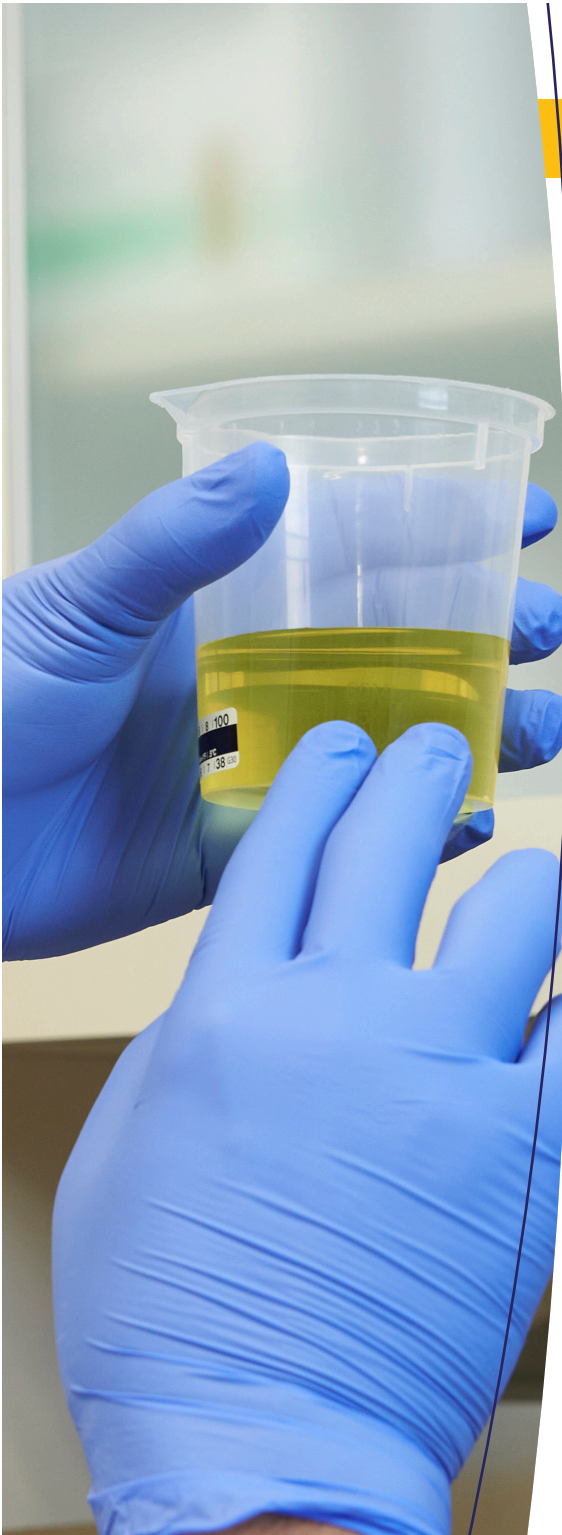
- ▶ The credibility of the source,
- ▶ Visible signs of impairment,
- ▶ Applicable state laws that restrict drug testing, and
- ▶ The employee's job duties and the risk to safety and health if the employee were to be impaired.

Every situation is different. When a rumor of drug use arises, investigate and do a drug test if one is warranted and allowed under state law.

*When you hear rumors of drug use, investigate the situation.*







# RANDOM TESTS

Random tests are unannounced tests that are given to a preselected group of employees. To avoid problems with random tests:

**MAKE SURE THEY ARE ALLOWED UNDER STATE LAW.** Random drug testing is prohibited or restricted in some states. Unless employees are covered by federal laws requiring random testing, such as the Department of Transportation (DOT) regulations, random tests should not be conducted in these states.

**MAKE SURE THE TEST IS TRULY RANDOM.** The selection process should give each employee in the testing pool an equal chance of being tested each time.

**BE CAREFUL WITH RANDOM ALCOHOL TESTS.** Random alcohol tests are typically not allowed under the Americans with Disabilities Act (ADA). An alcohol test is considered a medical exam under the ADA, and the law restricts when a medical exam can be conducted. After an employee begins work, an employer can require a medical exam only when there is a reasonable belief, based on objective evidence, that a particular employee cannot perform the job or poses a direct threat because of a condition. A random test does not target a specific employee or incident, so it would not be based on objective evidence or a direct threat. This restriction does not apply if the random test is required under federal law. Random alcohol tests may also be allowed when an employee in a safety-sensitive role is returning to work after attending a treatment program for alcohol use. In general, however, random alcohol tests risk a violation of the ADA and should not be conducted.



## WHAT IF A TEST IS POSITIVE?

If the drug or alcohol test for an employee or applicant is positive, an employer must:

**CONSIDER STATE REHABILITATION LAWS THAT APPLY.** State laws, such as those in Minnesota and Vermont, may require an employer to give an employee the option of attending a rehabilitation program the first time an employee tests positive.

**CONSIDER STATE MARIJUANA LAWS THAT APPLY.** If the employee has a medical marijuana card, the employer may be required to determine whether off-duty use of medical marijuana is a reasonable accommodation. In some states, a negative employment action cannot be taken if it's based only on a positive test for marijuana. In a few states, marijuana tests are prohibited.

**FOLLOW COMPANY POLICY.** The consequences of a positive test can include suspension, termination, or return to work based on successful completion of a rehabilitation program. Follow company policy, and treat all employees equally if they test positive.




# POST-ACCIDENT TESTS

Post-accident tests are done after a workplace accident or incident. To properly conduct post-accident tests:

## **CONSIDER THE NATURE OF THE ACCIDENT.**

Before testing, consider whether drug or alcohol use could have played a role in the accident. Unless the test is required under a federal or state law, a drug or alcohol test is likely not needed if there is no reason to suspect an individual's drug or alcohol use played a role in the accident. For example, this could be the case if:

- ▶ A ceiling tile falls on an employee.
- ▶ An employee is injured by a falling tree branch during a freak storm.
- ▶ A driver is injured by debris that falls from a highway overpass.
- ▶ A driver is injured when a bridge collapses.



***A POST-ACCIDENT DRUG OR ALCOHOL TEST IS LIKELY NOT NEEDED IF THERE IS NO REASON TO SUSPECT AN INDIVIDUAL'S DRUG OR ALCOHOL USE PLAYED A ROLE.***

If the accident involves an injury, testing without first considering what happened could cause problems with OSHA's anti-retaliation rule. The rule prohibits employers from retaliating against an employee for reporting a work-related illness or injury. If there is no way an employee's actions could have caused the accident, a drug test should not be given if the test could be construed to be penalizing an employee for reporting a work-related injury or illness.

**TEST ALL EMPLOYEES WHO MAY HAVE HAD A ROLE IN THE ACCIDENT.** If more than one person was involved in an accident that resulted in an injury, testing only the individual who was injured could raise red flags with OSHA.

**TAKE STATE LAWS INTO ACCOUNT.** A state law may restrict or prohibit post-accident tests or require testing to be done by qualified individuals. It could also require an employer to have a written drug and alcohol testing policy before conducting post-accident tests.



# IF AN EMPLOYEE REQUESTS TIME OFF FOR SUBSTANCE ABUSE TREATMENT, DO I NEED TO ALLOW THIS?

An employee's job may be protected by the Family and Medical Leave Act (FMLA) or Americans with Disabilities Act (ADA) when time off is requested to attend a treatment program.

If your company is covered by these laws, consider the employee's request. Begin the FMLA process by providing the employee with the required notices and requesting a certification from a health care provider. This should give you the information you need to determine whether leave under the FMLA must be provided.

The employee's treatment may be covered by the ADA even if the FMLA does not apply. Begin the ADA reasonable accommodation process by talking with the employee, considering the request, and determining whether it is something that your workplace could provide without undue hardship. If the initial request cannot be accommodated, you can continue the discussion by talking about other options that would work.





## FOLLOW-UP OR RETURN-TO-WORK TESTING

After an employee completes treatment for drug or alcohol addiction, follow-up tests may be required after the employee returns to work. These tests are given randomly, for a length of time determined by the rehabilitation provider. When conducting follow-up tests:

**TEST FOR A LIMITED TIME.** Random follow-up tests are generally allowed, but only for the amount of time recommended by the rehabilitation provider. Testing for an unlimited amount of time is risky under the ADA. After an employee repeatedly tests negative, the tests may no longer fit the ADA requirement of being job-related and consistent with business necessity.

*TESTING FOR AN UNLIMITED  
AMOUNT OF TIME IS RISKY  
UNDER THE ADA.*





**RESTRICT RANDOM ALCOHOL TESTS TO SAFETY-SENSITIVE POSITIONS.** Under the ADA, random alcohol tests are only allowed for employees who are returning to safety-sensitive positions. The definition of “safety-sensitive” varies under different laws, and the ADA takes a narrow view.

Before doing random alcohol tests, consider:

- ▶ Safety risks associated with the employee’s job,
- ▶ When rehabilitation was completed, and
- ▶ Whether the employee has previously relapsed.

For example, a bus driver who was with a company for only a few months before successfully completing an alcohol rehabilitation program may be tested periodically for alcohol after returning to work.





## AN EMPLOYEE IN RECOVERY CAME TO WORK INTOXICATED. DO I NEED TO ALLOW THIS?

No. An employee in recovery can be held to the same standards as other employees. If you do not allow employees to be intoxicated at work, an employee in a recovery program faces the same consequences as other employees for violating the policy.

An employee who is impaired at work because of the use of alcohol or illegal drugs is not protected by the ADA. An employer may take action based on an employee's impairment from alcohol or illegal drug use even when an individual is in a recovery program. If other employees are disciplined or fired for being intoxicated or impaired by illegal drug use at work, an employee in recovery may also be disciplined or fired for that reason.



## TESTING WITH CONFIDENCE

Drug and alcohol testing can deter workplace substance abuse and help employers provide a safe workplace. Testing must be carefully conducted and administered, however, to avoid conflicts with laws that protect privacy, freedom from discrimination, retaliation, and other employee rights.

Employers need to be mindful of the way drug and alcohol testing is done and the actions that are taken when a test is positive. Testing situations, the type of test that is given, and the consequences of a positive test may all be affected by state or federal laws. Your drug testing policy and procedures should take these laws into account. Make sure your policy is updated to reflect the latest federal and state laws that relate to drug and alcohol testing.

Having an awareness and understanding of federal and state laws that impact workplace drug and alcohol testing can help an employer effectively use testing to support workplace safety without compromising employee rights.



## ABOUT THE AUTHOR

### **Terri Dougherty, J. J. Keller & Associates, Inc.**

Terri joined the J. J. Keller team in 2011 and is an editor on the human resources publishing team. Her primary areas of focus are labor law posters, drug testing, marijuana legislation, and employee wellness. She is also a regional and national member of the Society for Human Resource Management (SHRM).

She watches for changes to drug testing and marijuana laws and is co-editor of the Everyday Drug & Alcohol Program Management manual. In addition, Terri provides healthy living tips and wellness best practices in the Employee Health and Wellness Training Advisor/LivingRight.



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