

A-Rod v. Employee Drug Testing?

(as of March 2009)

You are in your office before the day starts reading an article in the paper about Alex Rodriguez' impressive baseball career when your assistant bursts in announces that an employee you sent out to run an errand has caused a major wreck and tested positive for drugs. Much like A-Rod's record will always be tainted by steroids, a Texas jury will be tainted against you and your company because you didn't have a drug testing policy that would have caught the employee before they turned someone into a quadriplegic.

With pro and high school sports instituting drug testing policies, it is worth considering whether you should have a drug testing policy at your office. It is legal, but an employer cannot simply decide to start testing employees one day without warning. This is America and privacy is important to everyone, but with a little planning, an employer can institute a policy that will be there when that lawsuit comes along.

In Texas, employers may institute three types of drug testing: (1) Random Testing – just what it sounds like, but it is enforceable because the employees have been warned; (2) "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; (3) Post-Accident Testing – (after the wreck described above or an accident at work) you can test offending employee and any employee who is a victim before that lawsuit starts.

Okay, you think, I can do this, but what if . . .

I fire the employee 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.

The employee refuses to be tested or won't sign the consent?

Call in a witness. If the employee refuses again, you may fire him or her without reprisal. Do not ever physically force an employee to take a test.

He or she is a good employee and I want to give them a chance?

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.

Won't it be hard to implement?

No. Seek the advice of someone with experience to prepare: (1) a written drug testing policy; (2) consents forms to testing which must be signed by all employees; and (3) disclosure language for your employment application. Then, find a lab that confirms initial results using the GC/MS method. Post the policy or add it to the employee handbook you smartly

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drafted years ago. Finally, make sure all employees sign the consent and then, most importantly, follow the policy.

Having a written statement is critical so that employees understand exactly what penalties may befall them if they violate the policy. Gaining employee consent avoids complaints that you have violated privacy rights. Stating your policy to applicants avoids potential problem employees in the future.

Keep in mind though, that much like baseball you cannot simply implement a policy if you have unionized employees. It would have to be made part of a collective bargaining agreement.



Looper Reed & McGraw would like to recognize attorney Michael Kelsheimer for his contributions to this Alert.

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