

Drug Testing Employees: An Employer's Guide

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As a [business owner](#), you want to make certain that you have the best employees. Sometimes, this may mean ensuring that they are drug-free. If you are planning to implement a drug-testing policy for current and/or prospective employees it may raise many sensitive issues.

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The determination of whether it is permissible is a fact sensitive issue depending on the type of employment (public or private), nature of employment and intrusiveness of testing. The extent to which New Jersey law permits drug and alcohol testing remains unsettled. However, given the appropriate circumstances as will be described below, the New Jersey Courts have accepted drug and alcohol testing.

Our Clients who want to implement this practice come into our office with many questions. Here are the answers to a few of them:

Can Public Employees be Tested for Drugs and Alcohol?

Yes. However, testing of public employees is subject to New Jersey State and Federal constitutional prohibitions against searches and seizures. Our courts have used a balancing test to weigh the public employer's interest against the privacy interests of the employee. Random testing will be allowed at times, especially in safety sensitive positions and highly regulated industries. Drug testing of public employees is fact sensitive. The nature of the public employment, the intrusiveness of the testing employed and the manner in which it is administered is paramount.

What is the law on Testing Private Employees?

Private employers have much more flexibility when determining if, how or when to drug test employees. Generally, private employers may refuse to hire prospective employees who test positive for drug use. Random drug testing of current employees is more limited. Our courts have weighed an employee's right to privacy with public safety. In order to support a claim for wrongful discharge, an employee must show that his or her individual right outweighed the public interest. Our courts have cautioned employees to minimize the intrusiveness of testing. For employers, urine tests are more likely to be supported than blood tests.

Can Employers Require Current or Prospective Employees to Pay for Drug Tests?

No. The only industry for which employers can require prospective employees to pay for the costs of drug tests are security personnel.

How Should Random Drug Tests be Administered?

Drug and alcohols testing should be administered through a formal written procedure. The following guidelines are recommended:

- 1) Notice of the program to employees with written procedures on selection and the manner of testing;
- 2) Testing procedures that are nonintrusive;
- 3) Consequences of testing positive;
- 4) Limitations of drug testing; and
- 5) Privacy

Are there Certain Guidelines That Must be Followed Regarding Drug Testing?

The manner in which samples are collected and tested are regulated. There are several federal and state regulations for drug testing. It is advisable that employers use an independent laboratory with scientifically accepted testing. Often, it is best to have at least two different scientific tests and multiple samples.

For What Drugs Can an Employer Test?

Employers can test for controlled substances, prescribed or otherwise illicit drugs. Frequently, drug screens test for amphetamines/methamphetamines, barbiturates, benzodiazepine, cannabinoids, cocaine, methadone, phencyclidine, opiates and illegal steroids. Since many prescription drugs fall into one of these drug classifications, employers will frequently learn of specific prescription drugs that their employees are taking. Employers cannot use this information to take adverse employment actions against employees. However, our courts have permitted an employer with a reasonable justification to make an employment decision based upon the presence of prescribed drugs, especially when it concerns safety.

Can Drug testing Result in Claims?

Yes. Drug testing that does not adhere to the policies of the employer or in circumstances where the privacy interest of the employee outweighs the employer's interest, can result in claims of wrongful discharge. Employers must be cautious with the information that they learn from the results of drug tests. Often, employers may learn of certain medications that an employee is taking. That information can open up employers to claims under the Law Against Discrimination for disability discrimination.

Before implementing a drug testing policy, it is important to work with counsel to develop and adhere to certain procures regarding drug testing. If your company has or seeks to begin a drug testing program or if you have any questions about drug and alcohol testing that have not been answered above, please contact me for a consultation