



**#316 – How to create a
substance abuse policy for
your workplace**

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***Moving From Tactical
To Strategic HR:
Drafting A Proper Substance
Abuse Policy***

by

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**TACTICAL
vs.
STRATEGIC**

What Is Tactical?

“PAVING THE ROAD”

***Reserving The Employer’s
Rights So You Can THEN
Be STRATEGIC.***

What Is Strategic?

***“Tell me what you
want to do...
and I will tell you
how to do it...”***

What Is Tactical?

“PAVING THE ROAD”

***CONTRACTS
v.
POLICIES***

**STATEMENT
OF
POLICY**

**New Mandatory Guidelines
&
Cutoff Levels for
Federal Workplace
Drug Testing Programs**

**“VOLUNTARY
ABANDONMENT”
POLICY CAN SAVE YOU
WORKERS’ COMPENSATION
CLAIMS**

TYPES OF TESTING

Pre-Employment Drug Testing

Reasonable Suspicion Testing

Post-Accident Testing

TYPES OF TESTING

**Follow Up Testing After
Return To Work From Assessment
Or Treatment**

TYPES OF TESTING

Random Drug Testing

Transfers or Promotions

Annual or Biennial Testing

TYPES OF TESTING

Safety-Sensitive-Position Testing

Customer-Required Substance Abuse Testing

Other Testing Programs

TAMPERING WITH A SPECIMEN OR FAILURE TO PROVIDE A SAMPLE

ODOR OF ALCOHOL

NOTICE TO EMPLOYER OF ILLEGAL ACTIVITY

SEARCHES



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I. “STRATEGIC” vs. “TACTICAL” HUMAN RESOURCES?

- A. **TACTICAL:** “Reserving The Employer’s Rights So You Can *THEN* Be “STRATEGIC” (i.e., “Voluntary Abandonment & Workers’ Compensation,” Limiting Employees’ Statute of Limitations To 6 Months, Confidentiality and Security Agreements, etc.)
- B. **STRATEGIC:** “Tell me what you want to do ... and I’ll tell you how to do it.” In other words, get the organization to where it wants to go.

II. “TACTICAL” HUMAN RESOURCES?

- A. **“CONTRACTS” v. “POLICIES”**
- B. **“CONTRACTS”** = Contracts survive the employment relationship and are enforceable in court.
- C. **“POLICIES”** = Tell employees how the organization intends to function. Policies should never be written to tell employees what their rights are. Policies should be written to reserve rights for the employer.

III. STATEMENT OF POLICY

ABC COMPANY, Inc. (hereinafter referred to as the "Company") believes that it is very important to provide a safe workplace for all of its employees. The Company is therefore addressing the problem of substance abuse because it negatively affects every workplace where it exists. The Company is concerned with the health and well being of its employees, and it cannot condone and will not tolerate behaviors on the part of employees that relate to substance abuse, such as:

1. Use of illegal drugs.
2. Misuse of legal drugs (prescription or over-the-counter medications).
3. Misuse of alcohol.
4. Sale, purchase, transfer, use or possession of any illegal drugs, or prescription drugs obtained illegally.
5. Reporting to work under the influence of any drug (legal or illegal) or alcohol to the extent that job performance is affected.

IV. DRUG AND ALCOHOL TESTING CUTOFF LEVELS

Effective October 1, 2010, the Department of Health and Human Services (HHS) implemented changes to its Mandatory Guidelines for the Federal Workplace Drug Testing Programs. These changes included new mandatory guidelines regarding the collection and testing of urine specimens, as well as the role of and standards for collectors.

Participants in federal and federally regulated workplace drug-testing programs are required to implement these revisions by October 1, 2010. Although these Guidelines apply to federal employer drug testing, many private sector employers opt to follow the Guidelines' procedures for how testing is conducted and for the cutoff levels.

Cutoff concentration levels have decreased in certain drug categories and two new drugs have been adopted for additional testing: Ecstasy and Heroin.

Testing for drug and/or alcohol use is intended to detect problems, deter usage and take corrective action as appropriate. In addition to alcohol, although the Company may decide to test for additional substances, the five drugs that employees are to be tested for at a minimum include:

DRUG	SCREENING TEST CUT OFF LEVELS	CONFIRMATION TEST (GC/MS) CUT OFF LEVELS
1. Amphetamines (uppers, speed)	500 ng/ml of urine	250 ng/ml of urine
➤ Methamphetamines		250 ng/ml of urine
2. Cocaine (including Crack)	150 ng/ml of urine	100 ng/ml of urine
3. Cannabinoids (Marijuana)	50 ng/ml of urine	15 ng/ml of urine
4. Opiates (Codeine, Morphine)	2000 ng/ml of urine	2000 ng/ml of urine
* 6-Acetylmorphine (Heroin)	10 ng/ml of urine	10 ng/ml of urine
5. Phencyclidine (PCP, "angle dust")	25 ng/ml of urine	25 ng/ml of urine
6. MDMA (Ecstasy)	500 ng/ml of urine	250 ng/ml of urine

NOTE: The BWC's Drug-Free Safety Program requires employers to use the minimum six-panel drug test with the addition of "Ecstasy" as the sixth drug added to the list. Basic and Advanced levels will both use the 0.04 BAC as the cut-off level for a positive test for alcohol.

NOTE: Always check with your testing facility for the most recent cut-off levels under DOT and/or BWC, since these levels may change from time to time. Also, be sure to check with your MRO and/or collection facility to determine which substances you should include in your testing program. Still, you might also want to test for the following substances.

7. Barbiturates	300 ng/ml of urine	200 ng/ml of urine
8. Benzodiazepines	300 ng/ml of urine	200 ng/ml of urine
9. Methadone	300 ng/ml of urine	200 ng/ml of urine
10. Propoxyphene	300 ng/ml of urine	200 ng/ml of urine

Alcohol tests will follow the same cut-off levels as described under O.R.C. Section 4511.19 (A)(2) to (7). (Ohio H.B. 223) or as outlined under applicable state law.

V. “VOLUNTARY ABANDONMENT” POLICY CAN SAVE YOU WORKERS’ COMPENSATION CLAIMS

In Saunders v. Cornerstone Foundation Systems, Inc., 123 Ohio St.3d 40, 2009-Ohio-4083, Harold Saunders injured his knee at work on April 13, 2005. He returned to work two days later.

On May 13, 2005, however, Saunders refused his supervisor’s order, Walt Sberna, to run a bulldozer. Saunders claimed that he refused this order because of medical restrictions that prohibited his use of foot pedals. However, that limitation was not contained in any of the restrictions ordered by his attending physician. Saunders also alleged that he had a written agreement with Sberna that excused him from operating heavy machinery. However, Saunders was never able to produce that written agreement.

Cornerstone fired Saunders for insubordination when he refused to operate the bulldozer. When his subsequent knee surgery generated a request for temporary total disability compensation, Saunders’ request was denied his Workers’ Compensation claim after a staff hearing officer at the Ohio Industrial Commission ruled that Saunders’ refusal to follow orders constituted a voluntary abandonment of his former position of employment within the meaning of Louisiana-Pacific, 72 Ohio St.3d 401, 650 N.E.2d 469.

Specifically, the staff hearing officer found:

“The employer presented evidence that [the] injured worker signed for an Employee Handbook on 1/22/2004. Within the Handbook, the employer indicates violation of any of the work rules may lead to termination. One of the work rules is listed as follows: ‘Insubordination (refusal to follow any order given by an employee’s supervisor or management, or the refusal or failure to perform work assigned.)’”

“Therefore, this Staff Hearing Officer finds that the injured worker was terminated for violation of a known, written, work rule, that clearly indicated termination could result.”

Saunders’ request for a further appeal with the Ohio Industrial Commission was refused. So, Saunders filed a lawsuit with the Court of Appeals for Franklin County, alleging that the commission had abused its discretion by:

1. Finding that his termination constituted a voluntary abandonment of his job under the Ohio supreme Court’s previous decision in Louisiana-Pacific and
2. Denying his temporary total disability compensation.

However, the court of appeals disagreed with Saunders and held for the employer and the OIC.

Saunders appealed to the Ohio Supreme Court.

The court first reasoned that it has long been the law in Ohio that an employee's voluntary abandonment of his or her former position can bar any recovery for temporary total disability compensation. State ex rel. Watts v. Schottenstein Stores Corp. (1993), 68 Ohio St.3d 118, 121, 623 N.E.2d 1202. Therefore, terminating an employee "for cause" can qualify as a voluntary abandonment of the employee's job because an individual "may be presumed to tacitly accept the consequences of his voluntary acts." State ex rel. Ashcraft v. Indus. Comm. (1987), 34 Ohio St.3d 42, January Term, 2009 5 44, 517 N.E.2d 533.

However, in order for this legal principle to apply, it must be shown that the employee knew, or should have known:

1. That the conduct that prompted the termination was proscribed by the employer and
2. What consequences would follow.

(Louisiana- Pacific, 72 Ohio St.3d at 403, 650 N.E.2d 469; State ex rel. Liposchak v. Indus. Comm. (1995), 73 Ohio St.3d 194, 196, 652 N.E.2d 753.)

The court reasoned that the Ohio Industrial Commission based its decision in favor of the employer on the January 2004 Employee Acknowledgement Form that Saunders signed. The OIC saw this as evidence that Saunders knew, or should have known, that insubordination was:

1. A violation of work rules and
2. A dischargeable offense.

However, the court held that the Ohio Industrial Commission erred in assuming that Cornerstone's "insubordination rule" was contained in the January handbook. It was not. It was added to Cornerstone's employment policy in June 2004. Consequently, Saunders' signature on a January 2004 form is not evidence that he knew, or should have known, of the rule. In other words, Saunders was never put on notice of this "insubordination rule."

Further, the court also reasoned that this appears to have been a first-time violation of this offense by Saunders. Since such an offense as "insubordination" is listed as an immediately "dischargeable offense," Saunders did not have any prior experiences with this rule.

The court then reasoned that there is a “great potential for abuse in allowing a simple allegation of misconduct to preclude temporary total disability compensation.” State ex rel. Smith v. Superior’s Brand Meats, Inc. (1996), 76 Ohio St.3d 408, 411, 667 N.E.2d 1217. For that reason, Louisiana-Pacific demands a clear, written articulation of workplace rules and the penalties for their violation. In this case, the only employment manual/handbook that Saunders apparently ever received ***did not*** include a rule addressing insubordination and its consequences. He could not, therefore, have known that he was violating any rule or that the violation would lead to dismissal.

As a result, the criteria of Louisiana-Pacific were not met in this case, and the commission abused its discretion in finding that Saunders’ discharge was a voluntary abandonment of his former position of employment.

The Ohio Supreme Court therefore awarded Saunders his Workers’ Compensation claim.

Employers should take notice! Your documentation should be specific and thorough. Vague warnings that do not list the specifics of the employee’s offense or the people who witnessed the offense might end up being worthless.

VI. TYPES OF TESTING

As a general rule, due to the 5th Amendment’s “Unreasonable Search and Seizure” provision, public sector employers are not permitted to test their employees for substance abuse without also having a reasonable suspicion of such abuse. Therefore, for public sector employers, all types of testing for employees must be accompanied by “Reasonable Suspicion Testing,” which means someone in the organization must complete the “Reasonable Suspicion Checklist Form” before testing employees. Therefore, as a general rule, public sector employers are not permitted to conduct “Random Test,” “Annual Testing,” “Promotion or Transfer Testing” or Customer Required Testing.”

However, if a public sector employer wants to conduct “Post Accident” testing, it should also be accompanied by “Reasonable Suspicion” testing.

Also, conducting “Follow Up Testing After Return To Work From Assessment Or Treatment” is permitted for public sector employers because this type of testing is based upon “reasonable suspicion.” Since people subject to this type of testing have already tested positive on a substance abuse test, or they have voluntarily come forward and admitted a substance abuse problem, there is a reasonable basis for testing the person.

Public sector employers are allowed to conduct “Safety-Sensitive-Position Testing” in certain instances. Under this type of testing, positions that are classified as being “Safety Sensitive” are typically tested at random on a regular

basis without any showing of a “reasonable basis” for the testing.

However, unlike private sector employers who can pick and choose whatever positions they want to classify as being “Safety Sensitive,” the public sector has very strict restrictions on which positions can be classified as “Safety Sensitive.” In the public sector, “Safety Sensitive” positions must directly relate to “public safety,” such as police officers, firefighters, life guards, and so on. Before a public sector employer classifies any position as being “Safety Sensitive,” it would want to research the position to see if a court has classified the position as being “Safety Sensitive.”

Public sector employers can conduct “Pre-Employment Testing” because the person is not an employee yet, so they do not enjoy these same protections.

Individuals or employees will be tested for the presence of drugs and/or alcohol under any and/or all of the conditions outlined as follows:

- A. Pre-Employment Drug Testing**
- B. Reasonable Suspicion Testing**
- C. Post-Accident Testing**

Post-accident testing will be conducted whenever an accident occurs as defined below:

1. A fatality of anyone involved in a workplace accident,
2. Anyone involved in a vehicular accident causing damage in apparent excess of \$750, as determined by the Company, (You may decide on this amount) or
3. Anyone involved in a non-vehicular accident causing damage in apparent excess of \$500, as determined by the Company, (You may decide on this amount) or
4. Anyone involved in reportable work-related accident wherein someone is injured and management believes off-site medical attention is required.

When any such accidents occur, any employee the Company believes may have contributed to the accident will also be tested for drugs or alcohol use or both.

The employee must undergo a qualifying alcohol test administered within eight hours of the documented suspicion and/or a qualifying chemical test must be administered within thirty-two hours of the documented suspicion. (Required under H.B. 223)

Testing levels for alcohol and drug testing will be the same as previously described in this policy.

Any employee who is seriously injured and cannot provide a specimen at the time of the accident shall provide the necessary authorization for obtaining hospital records and other documents that would indicate whether there were any drugs and/or alcohol in the employee's system.

If the employee is involved in an employment-related accident **that is not covered by DOT**, it is a condition of employment that the employee herein expressly grants unto the Company, its officers and management, the right to request that attending medical personnel obtain appropriate specimens (breath, blood and/or urine) for the purpose of conducting alcohol and/or drug testing.

- D. Follow Up Testing After Return To Work From Assessment Or Treatment**
- E. Random Drug Testing**
- F. Transfers or Promotions**
- G. Annual or Biennial Testing**
- H. Safety-Sensitive-Position Testing**

DOT Safety Sensitive Positions: An individual who engages in any of the following functions will also be considered "engaging in a safety sensitive" position:

- Waiting to be dispatched at a terminal or other property, unless the individual has been relieved from duty by a motor carrier,
- Performing pre-trip inspections or servicing vehicles,
- Driving a motor vehicle,
- Riding on the vehicle, except when resting in the sleeper berth,
- Loading or unloading the vehicle, supervising the loading or unloading the vehicle, giving receipts for the load or remaining ready to operate the vehicle,
- Performing any duties or services at an accident scene or
- Repairing, obtaining assistance for or remaining in attendance for a disabled vehicle.

I. Customer-Required Substance Abuse Testing

J. Other Testing Programs

VII. TAMPERING WITH A SPECIMEN OR FAILURE TO PROVIDE A SAMPLE

VIII. ODOR OF ALCOHOL

Employees are not to come to work smelling of alcohol, regardless of whether they test positive on a required test. The odor of alcohol on employees can greatly damage not only the credibility of the employee, but it could also cause irreparable harm to the company's image and reputation. Should a Company supervisor or employee smell alcohol on an employee, which is confirmed by at least one other Company employee, the employee will be subjected to the disciplinary provision of this Policy.

IX. NOTICE TO EMPLOYER OF ILLEGAL ACTIVITY

If any employee is arrested for any type of alleged drug and/or alcohol offense, or if any employee becomes the subject of an investigation by authorities relating to alcohol or substance abuse, the employee must report these incidents to the Company's Human Resource Department and/or to his/her supervisor on the next business day after such incidents occur.

Failure to comply with this policy may result in the employee's immediate termination of employment.

X. SEARCHES



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- Master of Labor & Human Resources and B.A. in Organizational Communication: The Ohio State University
- The Human Resource Association of Central Ohio's Linda Kerns Award for Outstanding Creativity in the Field of Human Resource Management and the Ohio State Human Resource Council's David Prize for Creativity in Human Resource Management

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