

SAFRAN LAW OFFICES

CONTROLLED SUBSTANCE AND ALCOHOL TESTING

ESTABLISHING A DRUG FREE WORKPLACE

- **Employers should inform employees about:**
 - the dangers of drug abuse in the workplace
 - the employers policy of maintaining a drug free workplace
 - any available drug counseling, rehabilitation, and employee assistance programs
 - the penalties that may be imposed upon employees for drug abuse violations occurring in the workplace

EMPLOYER BEST PRACTICES

- **Have a Written Drug and Alcohol Policy**
 - Must be Signed by Employee
 - Defines Testing Procedures
 - Defines Reasonable Suspicion for Testing
 - Reasonable suspicion is based on employee's failure to perform essential function of job and business necessity
 - Provides an Appeal Mechanism
 - i.e., confirmation test paid for by employee
 - Explains the Disciplinary Procedures or Adverse Employment Actions if Positive Test
 - Refers Employees to the State Law Regulating Drug and Alcohol Testing
 - NC - Controlled Substance Examination Regulation Act , N.C. Gen. Stat. Chapter 95, Article 20
 - SC - Drug and Alcohol Testing, S.C. Code Ann. §44-107-10, et seq.
- **Maintain Confidentiality**
 - Keep Drug and Alcohol Testing Records in a Separate File
 - Restrict Access to Files (e.g., HR Manager)

NORTH CAROLINA PRIVATE EMPLOYERS

- Private employers **may require** employees to submit to a single use drug test as an application condition for employment
- Testing must be performed under reasonable, sanitary conditions that respect **“individual dignity”**
- The test must be performed by an **approved laboratory**
- Applicants and employees have a right to confirm a positive test with a retest **at their own expense**

EMPLOYERS ON FEDERAL PROJECTS

- Drug testing requirements and conditions are controlled by the **Drug Free Workplace Act, Americans with Disabilities Act, and Substance Abuse and Mental Health Services Administration Regulations**
- The **Drug Free Workplace Act** **does not** require drug testing **nor** automatic termination upon a positive test
- **Federal agencies** may require testing and negative results under the terms of a construction contract
- **Safety-Sensitive** duties for DOT, DOD, U.S. Coast Guard, FAA, etc. require a negative test, and contractors may not refuse a test

PRE-EMPLOYMENT TESTING

- Employers may require applicants to submit to a single use drug test as a condition of their employment

CURRENT EMPLOYEE TESTING

- Random or Unannounced Test
 - Commonly used in safety-conscious industries, like construction
 - Truly randomized testing should be performed or **ALL EMPLOYEES**, including managers, should be subject to unannounced testing at the same time
- Periodic Testing
 - Testing occurs on a **regular basis**, i.e. once a year, bi-annually, etc.
- Post-Accident Test
 - **May be required** by insurance provider or under the terms of a contract
 - Drug test may be required after an on-the-job accident
- Rehabilitation Testing
 - Useful for employers whose employee(s) previously tested positive
 - May be a condition of continued employment
- Reasonable Cause or Reasonable Suspicion Test
 - Conducted when supervisors/managers **observe** signs or symptoms leading to a suspicion that the drug-use policy has been violated
 - Suspicion should be **corroborated** by another supervisor, manager, or other employees
 - The workplace policy should have a clear, consistent definition of what behavior justifies “reasonable suspicion” testing
 - Supervisors and Managers should be **trained** to observe the signs of impairment and initiate testing
 - Document reasonable suspicion in writing

- **Common Signs of Impairment:**
 - Delayed Decision-Making Abilities
 - Erratic Cognitive Functions
 - Diminished Concentration
 - Distortion in Time
 - Visual Distance Tracking
 - Impaired Memory
 - Paranoia
 - Drowsiness

POTENTIAL CLAIMS AGAINST EMPLOYERS

- Personal Injury, Property Damage, or Negligence claims for not properly reporting or testing employees
- Anti-Discrimination suit under Americans with Disabilities Act - individuals cannot be singled out for testing based on race, religion, age, or gender
- Invasion of Privacy - usually based on conditions or circumstances of the initial test
- Defamation - claim based on publicizing test results if the result was positive, false, and employer knew of the error

MEDICAL MARIJUANA

- Medical marijuana has **not** been legalized in North Carolina, South Carolina, Virginia, Tennessee, Georgia, Kentucky, or West Virginia
- The use of medical marijuana is **not permitted** on federal construction projects
- State medical marijuana laws, where applicable, are intended to decriminalize the use of medical marijuana, **not regulate private employers** or prevent private employers from taking action against employees who violate employers' drug policies
 - Casias v. Wal-Mart Stores, Inc., 695 F.3d 428 (6th Cir. 2012)
 - Johnson v. Columbia Falls Aluminum Co., 350 Mont. 562 (Mont. 2009)
 - Roe v. Teletech Customer Care Mgmt., 216 P.3d 1055, 1059 (Wash. Ct. App. 2009)
 - Ross v. RagingWire Telecommunications, Inc., 174 P.3d 200 (Cal. 2008)

ADDITIONAL RESOURCES

- NC Dept. of Labor,
 - <http://www.nclabor.com/wh/faqs.pdf>
 - http://www.nclabor.com/wh/Controlled_Substance_Examination_Regulation_Act_Packet.pdf

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