



A Good Employer's GuideSM

Write Your Own Drug & Alcohol Policy

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I. PRELIMINARY CONSIDERATIONS.

A. Do you really need to have a policy?

Any employer who hopes to prevent work-related drug and alcohol problems, or who must comply with government regulations, should have a written policy. Here are some reasons:

- Policies tell your employees how you feel. If you want them to meet your requirements, you need to be clear about what those requirements are.
- Issuing a written policy helps you achieve consistency in the way you treat people. Inconsistent treatment of employees can cause legal problems for you, and will always make your employees believe you are unfair.
- Policies help your supervisors know what to do and help them avoid the kind of “knee jerk” reactions that sometimes lead to wrong decisions.
- A policy may be needed before you can get relief from industrial insurance or workers compensation charges for accidents which are drug or alcohol related. A policy is also necessary to challenge unemployment compensation applications by employees terminated for drug or alcohol related conduct.
- A policy sets the “reasonable expectation of privacy” of an employee. That is an important fact any time an employee wants to claim his/her privacy has been violated, since courts always look at what the employee’s “reasonable expectations” were. If your policy says you are going to conduct random drug tests, an employee's reasonable expectation would be that he/she would be tested. If you don't have a policy, you may be unable to establish what your expectations were.

B. Who should write the policy?

There is no magic answer to this question; it really depends on how you run your organization.

Some companies work best when senior managers prepare and implement policies (“top down”); others work best when there is a lot of employee participation (“bottom up”).

You should select the method that works best for you, with this one word of caution. If you want employee participation, make certain that your employees support having a policy in the first place. It will harm your credibility if you have to change from a “bottom up” to a “top down” approach; you are better off starting with a “top down” approach.

C. Are there any tricks to picking an implementation date?

Always remember the cardinal rule of policy implementation: policies apply to the future. You should not even think about trying to write a retroactive policy that changes the rules for the past. That would be unfair to employees. It is also a good idea to give employees advance notice of a policy. That gives the dissenters a change to “vote with their feet.”

That rule, that policies always apply to the future, is easy to follow. However, you should be particularly careful if you are going to start drug testing for the first time. Here is why:

Many of the drugs that show up in drug testing stay in the body for some time. For example, cocaine is usually out of the system in 2-4 days, amphetamines in 1-2 days, and LSD in 2-5 days. But other drugs can remain much longer. Habitual marijuana users may test positive for marijuana as long as 60 days after their last use of the drug (although 30 days is more common).

Drug retention periods can create a “retroactivity” problem with your policy. Assume you have an employee who has used marijuana regularly in the past. On January 1 you introduce your new drug and alcohol policy. Your employee decides to comply with the policy and stops using marijuana on December 31. That employee will still test positive for marijuana until about January 31. If you test for drugs in January, you will have to decide what to do about the employee who has complied with the policy, but still tests positive for drugs.

The most common solution is to introduce a policy but delay drug testing for 30 days in order to let employees excrete whatever might be in their systems.

If you don't feel comfortable delaying the testing, go ahead and test. But when you have a positive result, make certain you obtain expert advice (for example from a medical review officer or other drug treatment professional) whether the positive test resulted from pre-policy use, or whether that is just an employee's excuse.

One caution is important here: don't delay doing either “cause” testing or government required testing just because you are a little late in introducing your policy. Cause testing usually happens when you have evidence the employee is impaired. You don't want impaired employees working without doing something about it. And it probably doesn't need saying that you should not delay testing where the government requires it.

D. Do I need employee consents?

It depends on what you mean by “consent.” You certainly want “consent” but the real question is what form it must take. Make sure that you have met any special requirements in government regulations. Otherwise, an employee is normally considered to have consented if he/she has advance notice and decides to remain on the job.

While we’re on the subject of consents, you don’t normally need to prepare elaborate employee consent forms. What you really need is to show notice to your employees:

- Have employees sign a tear off sheet stating that they have received a copy of the policy. Keep the signed sheet in the employee’s personnel file.
- Introduce the policy at mandatory employee meetings at which you pass around a sign-up sheet.
- Post the policy where employees will see it. Check frequently to make certain it is still posted.
- Discuss the policy in employee meetings.
- Mail or hand out copies (for example, with payroll).

For any testing you may be doing, the laboratory will have its own forms to authorize the test and the report back to you.

There are two exceptions you should think about:

- (1) You can’t use the trick of “deemed consent” if you already have a different agreement with the employee. In that case, you would need the employee to consent formally to the new policy.
- (2) If you employ minors, get a parent or guardian to sign off on a consent form.

II. COMPONENTS OF A DRUG AND ALCOHOL POLICY.

A. Overview

A good drug and alcohol policy (for that matter, a good employment policy of any kind) should contain the following blocks:

- A designation of the employees covered by the policy.
- A description or list of the types of conduct prohibited by the policy.
- Notification of penalties for violating the policy.

There are a few additional general guidelines that are always worth remembering in drafting any policy, but particularly a drug and alcohol policy.

- Keep it simple. Remember that your employees are the audience, and you want to be certain that they understand it.
- Do not be too technical. Not only will technical details make your policy difficult to understand, too many details could limit its “shelf life” because you might lock yourself into a particular way of doing things, and miss out on a technological change.
- Give yourself some elbow room. The situations you will confront will often be complicated. If your policy provides only one way of handling a matter, you may be locked in too tightly. Give yourself some discretion.

B. Who is covered by the policy?

The general rule is simple: anybody you want, as long as you spell it out. The guiding principle you must keep in mind is this: an employee who is covered should know it.

Drug and alcohol policies seem to generate a lot of questions about coverage of employees (more so than other types of employer policies). These are the most common:

May I cover only portions of the work force? You may have a policy that applies to selected groups as long as there is a rational reason for doing so. Many employer choose to introduce a policy at a particular facility, in one state but not another, or apply the drug and alcohol policy only to employees working in safety sensitive positions. As long as there is a rational business reason, you can apply it to whichever portions of the work force you choose. But remember when you have a policy that applies only to groups, you might have employee morale problems, and you might have trouble defending your need to control drug and alcohol use on the job if you don't apply the policy to everyone.

Does the policy have to cover the owners or executives? No, but you will have morale and enforcement problems if it does not. If top management does not agree with the policy, spend some time up front educating them until they do.

Can I do anything different with applicants? Yes. You can have different rules for applicants. In fact, many employers start their drug testing policies by introducing applicant testing first.

What about contractors? Many employers engage contractors to work alongside their employees. Examples include temporary services, guards, free-lancers and janitors. You can require contractors to abide by your policy. You merely need to advise the contracting agency (such as the temporary employment service) that it is a condition of working for you. It is usually a good idea to require contractors to abide by the same policies, particularly where there are safety concerns that the policies address.

C. What types of conduct are prohibited?

You must tell your employee what conduct is prohibited. That is not as easy a task as you think. Use this as a checklist.

- Decide whether you want a drug policy, alcohol policy, or both. Scientifically, alcohol is a drug. But since your employees may not always understand that. If it covers alcohol, say so.
- How do you want to define “drugs”? You can use a “legal/illegal” distinction. But (and this is a big “but”) don’t forget that a significant percentage of employee abuse of drugs is in the improper use of prescription drugs. Use terms like these: “illegal drugs (including the improper use of prescription drugs)”; “substances controlled under federal or state law.”
- Designate the types of acts that you prohibit. This is a good time for a laundry list; you don’t want to be too limited because if your policy prohibits only “use,” you may have trouble disciplining somebody who “sells.” Think in terms of the activities you don’t want on the job: “use,” “possess,” “sell,” “trade,” “manufacture,” “give.” But don’t forget to add the conditions you don’t want on the job, such as “reporting to work having consumed alcohol or controlled substances so that the employee may be impaired.”
- Do not use the phrase “under the influence” to refer to drug impairment. While “under the influence” is a phrase that has meaning where alcohol is concerned, it is meaningless where drugs are concerned. Do not use it unless your policy also has a definition. Most employers use this one:
“Under the influence” means any detectable level of alcohol or drugs in an employee's blood or urine or any

noticeable or perceptible impairment of the employee's mental or physical faculties.

Remember to tell your employees when their conduct is prohibited. You can legitimately control their actions and conditions when employees are working, on work time (for example, breaks), on your premises, or while representing you (for example, as a sales representative). You can also add in a catch-all that covers "any other time your actions are connected with work."

D. Can I require notification of prescription medication?

Sometimes you don't want to know too much about your employees, and this is an example. Your concern as an employer is whether your employee can perform the work safely and to your standards, without endangering himself/herself or others. You do not need to know (and probably don't want to know) the details of any condition or even the name of prescribed medication.

Your policy can address this issue by requiring employees to ascertain if their prescriptions will prevent the safe performance of their jobs. If so, you can require them to notify the human resources manager or the person who is authorized in your organization to keep medical records. You should not require much information beyond the fact that the employee is taking medication, and what effects it has on his/her ability to work. Avoid the temptation to ask a lot of questions about what drug, which doctor, what condition. Just focus on the job. The reason for these concerns is that prescription medication is "medical information" as it is defined under the Americans with Disabilities Act, and that law provides some significant restrictions on the right of an employer to inquire into medical conditions and treatment.

E. Drug testing

For many employers, a drug and alcohol policy is synonymous with testing. You should get into the habit of thinking of drug testing as a tool rather than the most important part of the policy. The proper function of testing is twofold: (a) it provides evidence that corroborates suspicions about whether or not an employee is impaired; and (b) it can deter the use of illegal drugs.

Drug testing can be categorized in various ways; the categories are not always mutually exclusive. You can think about testing in terms of three questions. Which employees will be tested? When will they be tested? And why will they be tested?

The following describes employee categories that you should consider for your policy:

Applicants. Most employers who have some form of drug testing test applicants. Applicant testing need not be set out in your policies, which are normally distributed just to existing employees rather than applicants. Applicant testing sets a tone for employment, even though the impact of the testing may be over once the employee is hired. Applicants will know that you disapprove of illegal use of drugs. Make sure applicants have advance notice that they will be

tested. Mention testing in any ads you run. Place a notice in the window or on the door of the location an applicant must pick up application forms, and make certain that the application form itself notifies applicants that all offers of employment are subject to satisfactory results on a drug and/or alcohol test. (Of course any alcohol test will be conducted later in the process because alcohol testing is medical).

Present employees. If you plan to do drug testing for present employees, you need to consider the remaining questions, when and why you are going to be testing.

Contractors. If they will be tested, cover that in your policy and the contracts.

There are certain descriptive names given to types of drug testing that you will probably have heard over time. They are as follows:

Random testing. Random testing is valuable as a deterrent, since employees do not know in advance if or when they will be tested. It might be detrimental to morale, and you should consider that issue in deciding whether to do random testing. Remember that random testing must be “random,” that is you must select employees for testing in a scientific fashion where there is no opportunity for discrediting selection. Do not ever use a random testing program as a way to “catch” somebody who has not yet given you cause to test under other aspects of the policy. If your definition of “cause” is too strict, amend your policy.

Cause testing. “Cause” testing is so-called because the employer must have a reason or “cause” to trigger the test. Your policy can authorize “probable cause,” which is a criminal standard and requires a high level of suspicion; “for reasonable cause” or “for good cause,” a somewhat lesser standard than “probable cause,” or “reasonable suspicion” which does not require substantial evidence of “cause.” You should choose an option that gives you the maximum flexibility in making your testing determinations. Make sure you include language which provides that you retain the right to determine if and when cause for testing exists.

Post-accident testing. Most employers do some form of testing after an on-the-job accident. In many cases, testing is necessary to obtain some relief from charges for workers’ compensation or industrial insurance. If you plan to have post-accident testing, you should define the type of incident that will trigger testing. Some employers use a dollar amount of damage. Others require testing for injuries which result in the need for off-site medical attention. Make it clear to your supervisors when they should, and should not, require an employee to be tested. Post-accident testing is not much of a deterrent; in fact, it is only triggered after the damage is already done.

Return from leave of absence. Many employers test when employees return from a leave of absence of a specified length. If you wish to test upon a return from leave of absence, you should specify how long a leave triggers the testing requirement. Three to five days is probably too short; 12 months may be long.

Other events. Some employers test upon the occurrence of other events such as promotions, transfers, or reassignments. If you intend to do this, you need to specify clearly which type of events will trigger testing so that both employees and supervisors know.

Government-mandated testing. If you operate in an industry in which some or all of your employees are subject to testing as a result of government regulation, you should reference that fact in your policy. The language can be simple: “We will also conduct any testing that is necessary or recommended pursuant to state or federal regulations.”

F. Should my policy list the drugs and techniques?

Some employers draft policies which specify the drugs they will test for. Unless you must do so to satisfy government regulations, it is a better idea to leave your language broad. That way, if you find that your employees are suddenly using a new designer drug, you will not be prevented from testing.

Similarly, you need not specify the type of testing technique you intend to use. While on the one hand specifying a testing technique is likely to be of interest and educational for your employees, the fact that you specify a technique means that your policy is more rigid than it needs to be. You would have to rewrite the policy and reissue it any time a new testing technique was approved.

It is usually a good idea to let your employees have access to the regulations under which you test. That way you do not have to write long involved policies just to restate the regulations.

G. Should my policy include the right to search?

A limited right to search an employee or an employee's belongings might be an important discovery tool. For example, if you see an employee put a bag full of a green leafy substance into his or her locker, you would want to have the right to require the employee to open the locker. If you want to have that right, and if you want to make it clear to your employees that they do not have a reasonable expectation of privacy while on your premises, you should say so. In addition, it is helpful to have a search policy even if you use it infrequently. That way you have one when you need it.

If you want to conduct searches, you should consider what you might want to search. Suggestions include employee lockers, outer clothing, lunch boxes, purses, desks or work areas, automobiles parked in company lots, and the employees themselves. You need to consider how intrusive you want to be, and draft your policy accordingly. Bear in mind that if you are likely to experience union activity, the National Labor Relations Act imposes certain restrictions on your right to conduct surveillance. If your surveillance may interfere with protected union activity, you will want to make certain you can demonstrate that it was for a lawful business purpose.

III. WHAT ARE THE RISKS OF HAVING A DRUG AND ALCOHOL POLICY?

The principal risks an employer faces in having a drug and alcohol policy arise out of two areas: procedures and discipline.

A. Procedures.

Some states which have passed laws defining the circumstances under which an employer can test. Before introducing a policy into your workplace, you must check to see what your local state's statutes are and ensure that you comply. Aside from complying with state and local requirements, there are certain "due process" rights that courts are beginning to recognize. The following issues are the most important in this area:

- Make sure random testing is always conducted scientifically. Some employers have pretended to test an employee under a random testing policy, when in fact the employee has been targeted for individualized testing.
- If you are testing on "cause" or "suspicion," make sure you meet the standards of your own policy. When supervisors require an employee to be tested, they should be able to explain the specific observations which led them to conclude testing was appropriate. Work with your supervisors so that they rely more on their analytical abilities and less on their "gut feel." This does not mean that you cannot ever use feelings, concerns, or even anonymous complaints. However, the decision to test is much cleaner if it is backed up with specific observations.
- Obtain a second opinion if appropriate. Many policies require a second opinion before testing an employee. If you do not have to include this in your policy, you will be much more flexible if you don't. Sometimes there just isn't another manager around to give you a second opinion. But even if it isn't in your policy, it's a good idea to train your supervisors to try to confirm their observations with another individual in a supervisory position. It's the old rule that there is safety in numbers.
- Teach your employees about how specimens will be collected. Many results have been overturned because there was something deficient in the collection process, but it was not brought to the employer's attention. In cases like this, you can gain much value by telling your employees everything that will happen at a collection site, and requiring them to report any aberrations directly to you within 24 hours. If a report is not made within 24 hours, you can refuse to consider it.
- Split samples or second tests. Your policy can permit the original specimen to be split and frozen for later re-testing in the event the employee challenges the accuracy of the results. Your policy should address whether a second test will be at your expense or the employee's, and whether you have a veto right over the lab the employee chooses.

B. Discipline.

Any time an employee violates your policy you have the right to take whatever disciplinary action is authorized by the policy or by your other policies or labor agreements. Keep the following in mind:

- Make certain that you are in full possession of the facts.
- Consider how you have treated other similarly situated employees in the past.
- Is the action you hope to take authorized by your policy?
- Is the action you hope to take consistent with your labor agreement, if any?
- Have you considered whether you have any responsibilities under the Americans with Disabilities Act or other statutes preventing discrimination and requiring accommodation of people with disabilities?

Your policy should provide broad authorization to take disciplinary action. Make certain that you retain the right to discipline not just for strict violations of the policy, but also where employees attempt to subvert the policy by either refusing to be tested or searched, attempting to switch urine specimens, refusing to report to a testing site as ordered, drinking too much liquid so that a sample will not be tested, adulterating a specimen so that the lab reports inconclusive results. The list of subversive efforts is endless.

IV. WHAT RESPONSIBILITIES DO I HAVE UNDER THE DISCRIMINATION LAWS?

State and federal discrimination laws require you not to discriminate on the basis of a protected classification. Where employees have a disability or a record of a disability or are perceived to have a disability, they have additional rights. Addiction is a disability. There are certain key points to keep in mind:

- The illegal use of drugs is not a protected act; accordingly, employees who use illegal drugs are generally not protected.
- Misconduct which may have been caused by a disability is not protected.
- An appropriate accommodation for an employee with a substance abuse disorder is sufficient time off to obtain treatment. The Family and Medical Leave Act will permit employees to take protected leave as long as the condition is a serious health condition under that law.
- Under the Americans with Disabilities Act, use of alcohol is protected (alcohol is a legal substance). Accordingly, any action taken against an employee for an alcohol-related disorder should be based on job-related needs.
- Employees in recovery are protected. This is true even for employees who used illegal substances in the past. These individuals “have a record of a disability.”

V. CONFIDENTIALITY

Because substance abuse disorders are medical, you should treat information as confidentially as you treat other employee medical information. Maintain separate files, to which only limited access is granted, and avoid gossip or discussion around the workplace.

With that in mind, however, be cautious how much confidentiality you promise your employees. Many employers have encouraged employees to come forward by providing that “all reports will be treated in the strictest confidence.” That promise is nearly impossible to keep. Suppose an employee came forward, reported a cocaine addiction, and then refused to go into treatment. If you terminated the employee and the employee filed a lawsuit, you would need to use this discussion to explain why you made the decision to terminate. You would have promised not to do that if your policy promised “strictest confidence.”

However, some expression of confidentiality is important for your policy to work. Consider using the following language: “All information voluntarily supplied by the employee will be treated as confidential as is appropriate under the circumstances;” or, “we will try to keep all information of this nature as confidential as possible.”

VI. WHAT DO I PAY FOR?

You are responsible for many of the hard costs associated with a drug and alcohol and testing program. That includes the cost of testing, education, any MRO, any employee assistance program. You may, however, require the employee to pay the cost of any treatment.

It is an open question whether you can make an employee pay for pre-employment testing or follow-up testing. Some states have passed laws that require employers to pay the cost of any medical test required of employees (alcohol tests are clearly “medical” under the Americans with Disabilities Act, and drug tests may also be medical under some circumstances). The prudent course is to assume you will have to pay for all testing except any re-test an employee may want to challenge a positive result.

You are required to pay for time an employee spends getting tested. There are ways to minimize that cost:

- Arrange for a collection site close by;
- Do a number of trial runs at different times to provide a good estimate of the amount of time it takes;
- Do spot checks of employees to make sure they go straight to the collection site and return to work right away.
- Accompany the employee to the collection site.

VII. SAMPLE LANGUAGE FOR A DRUG AND ALCOHOL POLICY (these are just suggestions; all policies need to be tailored for the specific employer, location, and should be reviewed by company attorneys)

We believe that we all have a responsibility to our employees, to those who use or come into contact with our products and services, and to the general public to ensure safe operating and working conditions. To satisfy these responsibilities, we must establish a work environment where employees are free from the effects of drugs, alcohol, or other impairing substances. Accordingly we have adopted this drug and alcohol policy.

The following conditions and activities are expressly prohibited:

The manufacture, or sale, or use or possession of alcohol, any controlled or illegal substance (except strictly in accordance with medical authorization) or any other substances which impair job performance or pose a hazard, when use or possession occurs on our premises or property, or during work time, or while representing us in any work-related fashion.

Reporting for work having consumed alcohol or used illegal drugs or controlled substances at a time, or in such quantities, or in a manner that may impair work performance. For purposes of this policy, having any detectable level of an illegal or controlled drug in one's system while covered by this policy will be considered to be a violation.

Employees who are medically authorized to use drugs or other substances which impair job performance are responsible to determine from the physician whether or not the substance can impair job performance. If it can, the employee must report the fact of such impairment to a designated individual in the human resources department and provide proper written medical authorization from a physician to work while using such authorized drugs.

[use the next paragraph to authorize testing on "reasonable suspicion"]

Where we have a reasonable suspicion that an employee is in violation of this policy, the employee will be required to submit to testing to determine the presence or use or any involvement with alcohol or drugs. We reserve the right to determine whether reasonable suspicion exists.

[use the next paragraph to authorize post-accident testing]

Any employee involved in a job-related accident resulting in property damage in excess of \$__ or physical injury requiring off-site medical attention will be required to submit to testing to determine the presence or use or any involvement with alcohol or drugs unless the company determines in its discretion that the accident could not have been caused by alcohol or drug use.

[use the next paragraph to authorize testing based upon certain events]

Employees will be subject to testing upon their return to work from a leave of absence of any kind which has lasted longer than 45 days and upon the transfer or promotion to another position.

[use the next paragraph to authorize random or unannounced testing]

Employees may be required to submit to testing to determine the presence or use or any involvement with alcohol or drugs on a random or unannounced basis. This may include testing by random selection, testing of an entire department or work unit, or testing of specific identified categories of employees as a group.

[use the next paragraph if you need to test under government regulations]

We will also conduct testing as required or recommended under the provisions of any state or federal government regulations. Any employee who is within a regulated group requiring testing will be required to abide by the company's policy **as well as** any government programs.

[use the next paragraph to provide a right to a retest in the event of a positive test result]

Employees may request that any sample be split into two parts, with one part tested and the other retained by the testing laboratory for future re-testing in the event of a positive test result. If an employee requests a retest, such retest will be at the employee's expense and must be conducted by a laboratory which is acceptable to the company. A list of approved laboratories will be provided upon request.

[use the next paragraph to require employees to report problems with the collection process]

Any employee who believes that his/her specimen was not collected in accordance with established procedures must report any deficiencies within 24 hours of the collection. Deficiencies reported after 24 hours have expired will not be considered.

[use the next paragraph to reserve a right to conduct limited searches]

We reserve the right to inspect and/or search any employee's personal property on our premises if we reasonably believe that this policy has been violated. Refusal to submit to any such inspection or refusal to cooperate in any investigation will result in disciplinary action which could include termination.

[use the next paragraph if you have an Employee Assistance Program]

Any employee who voluntarily requests assistance in dealing with a personal drug and/or alcohol problem may do so through the Employee Assistance Program without jeopardizing his or her employment as long as this assistance is sought before work performance has deteriorated or disciplinary problems have begun. Other treatment programs for drug and alcohol problems may be available through our health insurance coverage.

[use the next paragraph to describe the level of discipline you intend to impose]

Any employee who is found to be in violation of this policy, or who refuses to submit to testing as required, or who refuses to cooperate or attempts to subvert the testing process will be subject to disciplinary action which could include immediate termination of employment. The company also reserves the right to involve law enforcement officials for any conduct which it believes might be in violation of state or federal law.

As a result of disciplinary action arising from a drug or alcohol problem, an employee may be required to participate in a drug or alcohol treatment program. An employee who is so required will normally be evaluated for drug and alcohol use by a professional in this field. Where such

an evaluation is scheduled, we will pay the cost. An employee may also be required to participate in follow-up care as part of a comprehensive alcohol and drug treatment program. Depending upon the nature of the conduct which led to the employee's mandated participation in an alcohol and drug treatment program, the employee may be required to submit to random or unannounced screening for alcohol and/or drugs for a specified period of time and to meet various performance standards which are imposed as a condition of continuing employment.

[use the next section to define terms that are important in your policy]

Reasonable suspicion is specific articulable observations concerning such circumstances as the work performance, appearance (including, for example, noticeable odor of an alcoholic beverage), behavior, or speech of the employee, or as being involved in an accident on company premises which results in physical injury or property damage.

Under the influence is defined as any detectable level of alcohol or drugs in an employee's blood or urine or any noticeable or perceptible impairment of the employee's mental or physical faculties.

Controlled substances are defined as all forms of narcotics, depressants, stimulants, hallucinogens, and cannabis, whose sale, purchase, transfer, use or possession is prohibited or restricted by law.

Over-the-counter drugs are those which are generally available without a prescription from a medical doctor and are limited to those drugs which are capable of impairing the judgment of an employee to safely perform his or her duties.

Prescription drugs are defined as those drugs which are used in the course of medical treatment and have been prescribed and authorized for use by a licensed practitioner/physician or dentist.

Note to employers using this sample policy:

(1) While you can use this language to draft your organization's policy, you should plan on running your final version past your own attorney or a labor relations specialist. Drug and alcohol laws change very frequently, and are different from one state to another.

(2) Do not introduce a drug and alcohol policy into a unionized work force without first bargaining with the union.

VIII. MEDICAL MARIJUANA COMPLIANCE ROADMAP: RECOMMENDATIONS TO AVOID OREGON LEGAL PROBLEMS

1. Policy considerations.
 - A. Federally mandated testing programs
 - (1) No change is permissible
 - (2) All federal testing programs require marijuana to be prohibited
 - B. General company policy
 - (1) Review current (or proposed) policy statements
 - (2) Identify all provisions affecting marijuana users
 - (3) Address any language that prohibits or arguably allows marijuana use?
 - (4) Prepare new provisions
 - a. Notice to employees of how marijuana use will be treated
 - b. Identifying need to have current and valid state authorization
 - (5) Reminding employee of statutory prohibitions
 - a. No use on the premises
 - b. No use during work
 - c. No driving under the influence of marijuana
 - d. No use in public view
 - (6) Identify processes
 - a. Should you require advance notice of use
 - b. What verification do you want
 - C. General caveats
 - (1) Consider treating marijuana same as prescription medication
 - (2) Consider whether to make policy changes on interim basis pending court review of recent cases
 - (3) A comment about language: "Prescribed" is a term of art; marijuana cannot be "prescribed" but it can be "authorized"
2. Is there a disability?
 - A. Evaluate whether employee has a disability
 - B. Borrow from BOLI:
http://www.boli.state.or.us/BOLI/TA/T_FAQ_Disability.shtml
 - C. Borrow from the EEOC: <http://www.eeoc.gov/policy/docs/902cm.html>
 - D. User who does not have a disability is not protected by disability statute except to the extent he/she may be "regarded as" or have a record of a disability.
3. Is a reasonable accommodation available that does not require marijuana use?
Consider requiring medical opinion about other available medications

4. Is the employee a direct threat?
 - A. Individualized assessment
 - B. Present ability to perform essential functions safely
 - C. Based on objective reasonable medical judgment
 - D. Considering
 - (1) The duration of risk;
 - (2) The nature and severity of potential harm;
 - (3) The likelihood that potential harm will occur; and
 - (4) The imminence of potential harm.
5. Is an accommodation possible?
 - A. In the incumbent job?
 - B. In a different job?
 - C. Borrow from the EEOC: <http://www.eeoc.gov/policy/docs/accommodation.html>
6. Is the accommodation unreasonable?
7. Initiate and carry out an interactive process with employee.
 - A. Identify necessary verification
 - (1) The Oregon program is confidential
 - (2) You cannot call and check on the status of your employee
 - (3) You can require the employee to provide authorization to verify the card
 - (4) Make sure you understand Oregon's program
<http://www.dhs.state.or.us/publichealth/mm/index.cfm>
8. Document your processes and decision making.

This roadmap is intended to be used only as an analytical tool by employers who are attempting to navigate the difficult legal issues present by state laws authorizing medical marijuana.

ABOUT BARRAN LIEBMAN

Barran Liebman LLP is an Oregon partnership dedicated to representing employers and finding solutions for their labor management and employment law needs. Our office is located in Portland, Oregon, although half of our attorneys are also licensed in Washington. Our attorneys specialize in four areas: employment advice, employment litigation, labor relations and employee benefits.