

Can the Employer “Just Say No” to Drugs?

By:
Karen L. Gabler

A drug and alcohol-free workplace can enhance employee and customer safety, promote workplace productivity and avoid unlawful conduct that may lead to civil or criminal liability. Before implementing a “Drug and Alcohol-Free Workplace” program, however, employers should consider the following guidelines:

Drug and Alcohol Testing. Random drug testing is typically prohibited. Drug and alcohol testing may be conducted by employers only in certain circumstances: (1) after an offer of employment has been extended (subject to passing a drug and alcohol test) but before the employee begins work; (2) when the company has “reasonable suspicion” to believe that the employee is under the influence of drugs or alcohol while at work (this must be more than mere rumors in the workplace – it must be specific, noticeable signs of impairment); (3) post-accident when the employee to be tested is suspected of being a potential cause of the accident; and (4) randomly for those employees working in a safety-sensitive position, such as drivers regulated by the DOT or employees operating heavy or dangerous equipment.

Rehabilitation Leave. Employers with 25 or more employees must “reasonably accommodate” an employee’s request for an unpaid leave of absence to attend a

drug or alcohol rehabilitation program at the employee’s own cost. The employee is entitled to reinstatement after the program. Whether the request for leave is “reasonable” depends upon a number of factors, including the employer’s ability to cover the employee’s work while he is absent, the employer’s ability to reinstate the employee after an extended period of time and the costs involved in accommodating the leave. Employers can deny the leave if it would cause an “undue hardship” to the business.

The request for leave may be denied if the employee has not voluntarily come forward to request the leave prior to violating the employer’s policies (as long as it is specified in the policy). If the employee is subject to termination for poor performance, or tests positive for the presence of drugs after a workplace accident, the employer may terminate the employee (even if he then requests a rehabilitation leave). The leave provision is designed to protect employees who voluntarily seek help for an addiction issue, not those employees who are already subject to termination for their prior misconduct.

Drug and Alcohol Policies. Every employer should have a “no tolerance” drug and alcohol policy in the employee handbook or separate document. The policy should also be conspicuously

posted in the workplace, and employees should be trained on the existence and application of the policy.

The policy should include a prohibition against any use of drugs or alcohol in the workplace and against working under the influence of drugs and alcohol (including prescription drugs that may impair the employee’s ability to function). It should include standards on when drug and alcohol testing will be conducted, the right to rehabilitation leave (if applicable), and the expectation of disciplinary action up to and including termination if the employee violates any portion of the policy.



Karen L. Gabler is a partner in the Employment Law Group at Nordman Cormany Hair & Compton LLP in Ventura County. She specializes in the representation of management clients in all aspects of advice and counsel and litigation matters. 