

# How to Create a Legally Enforceable Workplace Drugs & Alcohol Testing Policy



The 12 things every testing policy must include.

It's hard to enforce a [workplace drugs and alcohol policy](#) without a meaningful [testing](#) process. But testing is also a lightning rod for union grievances and lawsuits. Heading into litigation, unions also have some big legal advantages, including the fact that:

- Testing is highly privacy intrusive;
- Because drug and alcohol addiction (although not casual use) is a disability, employers might have to accommodate rather than discipline workers who test positive; and
- Employers have the burden of proving their testing policies are a legally justifiable safety measure.

The legality of a particular testing policy depends on who's being tested, what's being tested for and the basis for testing. While each case is different, based on decades of [litigation](#), we know that:

- Testing is generally justifiable only for safety-sensitive workers;
- Testing is easier to justify when it's for cause, for example, right [after a workplace incident](#) or in response to other reasonable suspicions of immediate impairment;

- Random alcohol testing is easier to justify than random drug testing because testing positive proves impairment at the time of testing; and
- Random drug testing is the hardest to justify and requires proving a history of safety problems at the site and evidence linking those problems to workers' drugs or use.

# The 12 Things to Include in Your Testing Policy

The anchor and starting point is to have a [testing policy](#) that includes the following 12 protections.

## 1. Policy Statement

Zero tolerance is better as a talking point than a policy principle. Legally, the basis of testing isn't rooted in morality, right and wrong or legality but the simple undisputed fact that being impaired at work is a danger that puts not only workers but also co-workers, customers, vendors, visitors, members of the public and others directly affected by the performance of the work at risk (Policy, Sec. 1).

## 2. Statement of Purpose

Acknowledge that testing is intrusive but state that it's essential to enforcing your workplace drugs and alcohol policy and the critical workplace safety objective it serves (Policy, Sec. 2).

## 3. Policy Scope

Although testing should generally be limited to safety-sensitive workers, it should also apply broadly to any and all of the individuals that perform those safety-sensitive jobs

regardless of their employment status, including employees of contractors and people applying for safety-sensitive jobs at your organization (Policy, Sec. 3).

## 4. Workers' Duties

If the testing policy is freestanding, you may want to restate or refer to workers' duties under the organization's drug and alcohol use policy, including coming to work sober and fit for duty and remaining in that state at all times while on duty (Policy, Sec. 5).

## 5. Bases for Testing

The meat of the policy are the rules for different bases of drug and alcohol testing, including:

- Pre-employment testing: Mandatory for applicants who receive offers for safety-sensitive jobs (Policy, Sec. 6.1);
- For-cause testing: Allowed when there's grounds for reasonable suspicion of impairment with such grounds specifically listed (Policy, Sec. 6.2);
- Post-incident testing: A form of for-cause testing allowed after safety incidents and near misses (Policy, Sec. 6.3);
- Random testing: Permitted only in narrow safety-driven circumstances (Policy, Sec. 6.4);
- Post-Rehabilitation Testing: May be required for workers that test positive who are offered the opportunity for rehab in lieu of termination (Policy, Sec. 6.5); and
- Scheduled Periodic Testing: May be required as part of a fitness for duty medical exam (Policy, Sec. 6.6).

## 6. Testing Procedures

There are 6 crucial procedural issues you need to address in your testing policy:

- How job applicants and workers give their [consent](#) to be tested (Policy, Sec. 7.1);
- How samples are collected and who can collect them (Policy, Sec. 7.2);
- The controls in place to ensure the integrity of the sample from collection to transporting to the lab and actual testing (Policy, Sec. 7.3);
- The methods used to confirm initial positive test results (Policy, Sec. 7.4);
- The criteria for a positive result, which should generally track the applicable regulatory limit for the substance tested for, e.g., BAC for alcohol (Policy, Sec. 7.5); and
- Procedures for retesting and appeals after positive results (Policy, Sec. 7.6).

## 7. Privacy of Test Results

Acknowledge that test results are privacy-protected information that you will keep secure and refrain from using or disclosing except as allowed or required by law. Also indicate that test records are organization property but that you'll make them available for inspection and copying as required by law (Policy, Sec. 8).

## 8. Violations

Explain that violations include not just testing positive but tampering or attempting to tamper with samples and/or refusing to submit to testing in the first place (Policy, Sec. 9).

## **9. Consequences of Violations**

Make it clear that workers who commit violations will be subject to discipline up to and including termination in accordance with your organization's disciplinary policies and procedures and that job applicants who commit violations will have their job offer revoked (or terminated if the violation is discovered after the applicant has started working) (Policy Sec. 10).

## **10. Rehab Rather than Termination**

Reserve your right to offer workers who test positive the opportunity to enter a last chance agreement in lieu of immediate discipline or termination. Typically, the worker is put on administrative leave and allowed to return to work provided they successfully complete a rehab program, which usually involves regular testing (Policy, Sec. 11).

## **11. Acknowledgment of Accommodation Rights**

To insulate against liability risks for discrimination, acknowledge that drug and alcohol addiction are disabilities under human rights laws and that you'll provide reasonable accommodations to workers with addictions up to the point of undue hardship (Policy, Sec. 12).

## **12. Attach Consent Form**

Last but not least, attach a copy of the form you require job applicants and workers to sign to consent to testing as an Exhibit to your policy (Policy, Exhibit A). (See APPENDIX D for a Model Consent Form.)