

OSHA, CDL's and Drug Testing (Oh My!)

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Outline

- What's the big deal?
- What's the law(s)?
- What to do?
- What did we learn?
- Questions





Drug Testing:
What's the Big
Deal?



Drug Testing: What's the big deal?

- In Oregon, public employers may only perform post offer pre-employment drug tests for 'safety-sensitive' positions
- For governmental employers, the test is considered a "search" implicating the Fourth Amendment
 - Intrudes upon expectations of privacy
 - But this type of invasion may be reasonable
 - Allowed under the right circumstances



Well then, what need is special enough?



Safety!!!

- Of employee(s)
- Of co-workers
- Of public
- Of environment



Cutting Through the Legalese

- Practically, what does it mean?
 - For public employers
 - For suspicionless testing
- **RULE:** Testing is only allowed if employer can show that the particular job in question is "safety sensitive."

Let's discuss - *Lanier v. City of Woodburn*





What is a Safety-Sensitive Position?



What is a safety-sensitive position (SSP)?

No specific list of what an SSP is – that would be too easy!



Safety-Sensitive Assessment (say that three times fast)

- Would negligent action in the position create a potential for grave harm to people or property?
- Consider the immediacy of the threat.
- Threat to:
 - Employee
 - Co-workers
 - Public health
 - Environment



Examples

- Railway car operator
- Nuclear power facility workers
- Law enforcement officers
- Firefighters
- Pilots
- Health care professionals
- Positions requiring a CDL
- Positions that operate heavy/dangerous equipment
- Positions that work primarily with “vulnerable populations”



Common Question – Driving Employees

- Driving to carry out their primary duties
- Driving on an occasional basis—courts have said no
 - For example, when a deadline makes dropping something off more efficient than mailing it
- Look at the role that driving plays in the performance of their duties



Let's Test Your Knowledge



Time for a Test

What about a 911 dispatcher?

- Responsible for relaying directions and other crucial information to first responders
- Actions impact safety of first responders AND the public
- Requires instantaneous decision-making
- Mistake could result in a delay that costs people their lives



Time for a Test

What about a human resource manager?

- Has access to confidential and sensitive personnel information (e.g. health information and payroll data)
- Has authority to make instantaneous decisions that impact every facet of the workplace
- Mistakes could result in significant financial risk to the entity and employees being subject to illegal workplace conduct or loss of income





CDL Drug/Alcohol
Testing



If You Have CDL Employees

Think Public Works: big trucks, snowplows, waste haulers

Requirements

- Have a drug/alcohol testing policy and program
- Educate employees and supervisors
- Report positive test and refusals to test to Oregon DMV
- Follow your policy, due process and CBA (if applicable)



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Required Training

- All – components of policy/program
- Employees – required testing, results of positive/refusal, steps
- Supervisors – recognizing effects of abuse
 - Physical
 - Speech
 - Behavioral
 - Performance indicators



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Required Testing

- Post offer, pre-employment
- Random
- Post Accident
 - Fatality
 - Citation AND medical care away from scene
 - Citation AND vehicle towed



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Required Testing

- What substances are tested?

- Alcohol (BAC)
- Marijuana
- Cocaine
- Opioids
- Amphetamine/Methamphetamine
- Phencyclidine (PCP)



Enhanced Testing

- Since 2006, DOT drug test positive has increased 77%

- Hydrocodone (Vicodin)
- Oxycodone (Oxycontin)
- Hydromorphone (Dilaudid)
- Oxymorphone (Opana)

- Medical Review Officer (MRO) will also determine therapeutic dosage



Positive Test Requirements (DOT)

- Alcohol level of 0.02 to 0.039
 - 24-hour mandatory stand down
- Alcohol level of 0.04 and drug test positive
 - Immediately removed from safety sensitive service
 - Referred to Substance Abuse Professional (SAP)
 - Medical review officer (MRO) reports results to DMV, Salem
 - Follow-up form report from employer
 - Employee only returned to duty when SAP states program completed
 - Return-to-Duty testing
 - Follow-up random testing 12-60 months (SAP recommendation)



What does Bend Public Works do?

- Process description
- Meeting with employee
- Referral
- Return-to-Service
- LCA



What does Bend Public Works do?



- Examples
- Tales from the trenches





OSHA Post-Accident Drug Testing Rule



New OSHA Rules regarding Drug Testing



OSHA:

- “Blanket post-injury drug testing policies deter proper reporting.”
- Drug testing alone constitutes an “adverse employment action.”



New OSHA Rules regarding Drug Testing

- Therefore, employers must “limit post-incident testing to situations in which employee **drug use is likely to have contributed to the incident**, and for which the drug test can accurately identify impairment caused by drug use.”
- “[I]t would not likely be reasonable to drug test an employee who reports a bee sting, a repetitive strain injury, or an injury caused by a lack of machine guarding or a machine or tool malfunction.”



New OSHA Rules: Employer Responses

- What does your policy state about post-accident testing?
 - Is it mandatory in all cases?
 - Does it warn employees that testing will occur where there is a reasonable basis to believe alcohol/drug use contributed to the accident?
- What federal or Oregon laws provide for drug testing and do we follow those laws?

Policy



New OSHA Rules: Employer Responses



- Tales from the trenches
- Examples



Drug Testing Policy & Procedures



Develop a Drug Testing Policy

You MUST!!

- Public employers must set clear drug testing policies that notify employees:
 - when testing is required,
 - how testing is conducted,
 - the confidentiality of drug test results, and
 - the consequences of failing to test or getting a positive result.



Give Fair Warning to Applicants

- Notify applicants about drug test
 - Use the job posting and the application form
 - State the consequences of a positive drug test, refusal to submit to a test, or failure to complete a test
- Consider obtaining a signed, dated consent form before you administer any drug tests
- Notifications “weed” out the drug users



Time it Correctly

- Wait to test until you make a conditional job offer
 - Don't test all applicants just to save time
 - Applicants who test positive for illegal drugs aren't covered by the ADA, you can withdraw a job offer based on those results
 - Don't wait until after work has started – this doesn't help prevent safety risks





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