

Drugs in the Workplace

December 5, 2018



NFIB Small Business Legal Center

- We are the voice for small business in the courts and the legal resource for small business owners nationwide.
- While the information provided in this presentation is intended to be accurate, it should not be considered legal advice. The Legal Center cannot be held responsible for any errors or omissions.



Agenda



- State of affairs – the opioid crisis and marijuana legalization.
- Handling suspicion of drug use and managing an employee who is using drugs.
- 5 steps to help prevent drug abuse in the workplace.

What are opioids?

Opioids are a class of drugs that include the illegal drug [heroin](#), synthetic opioids such as [fentanyl](#), and [pain relievers](#) available legally by prescription, such as oxycodone (OxyContin[®]), hydrocodone (Vicodin[®]), codeine, morphine, and many others. These drugs are chemically related and interact with opioid receptors on nerve cells in the body and brain.

THE OPIOID EPIDEMIC BY THE NUMBERS

2016 and 2017 Data



130+

People died every day from
opioid-related drug overdoses³
(estimated)



11.4 m

People misused
prescription opioids¹



42,249

People died from
overdosing on opioids²



2.1 million

People had an opioid use
disorder¹



886,000

People used heroin¹



81,000

People used heroin
for the first time¹



2 million

People misused prescription
opioids for the first time¹



17,087

Deaths attributed to
overdosing on commonly
prescribed opioids²



15,469

Deaths attributed to
overdosing on heroin²



19,413

Deaths attributed to
overdosing on synthetic
opioids other than
methadone²

SOURCES

1. 2017 National Survey on Drug Use and Health, Mortality in the United States, 2016
2. NCHS Data Brief No. 293, December 2017
3. NCHS, National Vital Statistics System. Estimates for 2017 and 2018 are based on provisional data.

Public Health Emergency

- “Since 1999, the number of drug overdose deaths has more than quadrupled.”
- “West Virginia again led the nation with 57.8 deaths per 100,000 people, followed by Ohio, Pennsylvania and the District of Columbia.”
- “Drug overdoses set another annual record in 2017, cresting at 70,237—up from 63,632 the year before...”

-Washington Post, November 29, 2018



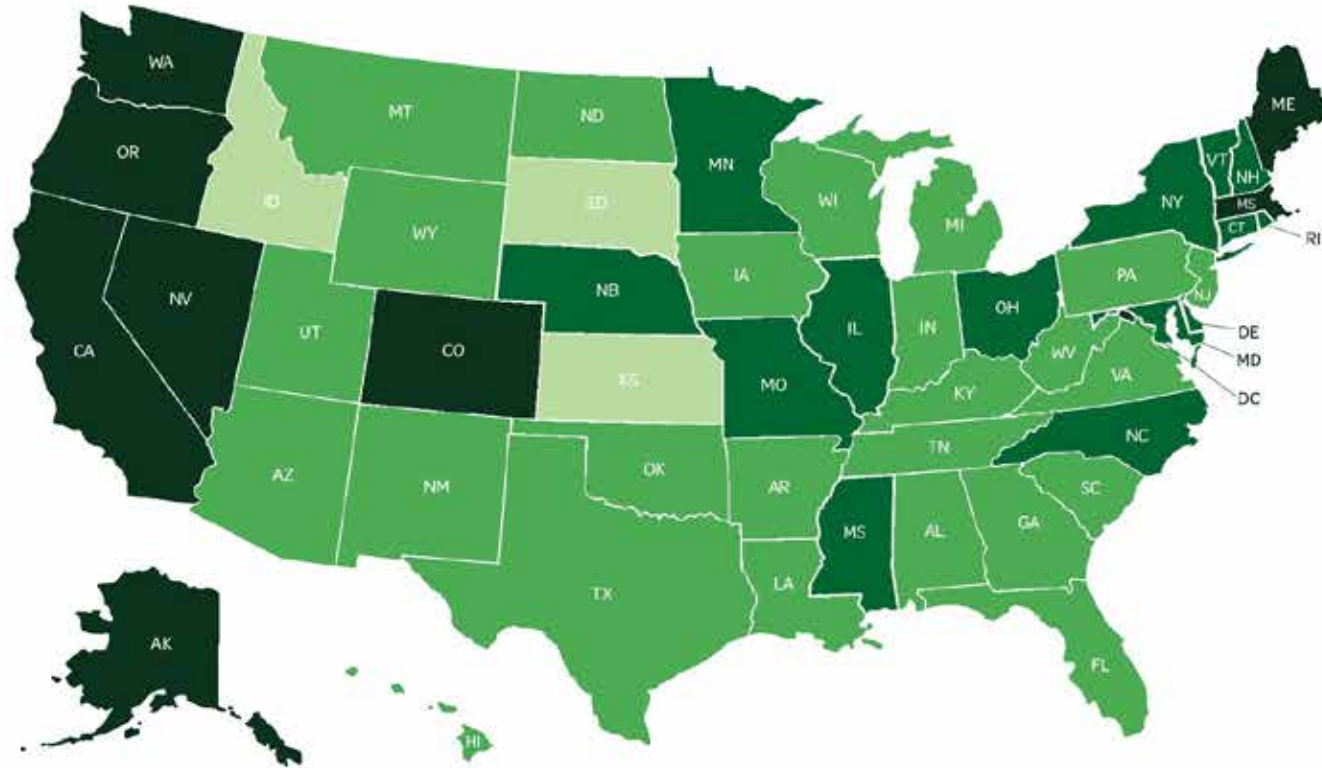
Public Health Emergency

- At the direction of President Trump, the U.S. Department of Health & Human Services declared the opioid crisis a nationwide emergency on October 26, 2017.
- In Fiscal Year 2017, HHS invested almost \$900 million in opioid-specific funding.
- HHS is urging an increased focus on improving access to prevention, treatment, and recovery support services.

Changing Public Policy on Marijuana

- Against this backdrop we are seeing a trend in the states toward decriminalization of marijuana—and public debate about whether legalization helps or hurts the opioid epidemic.
- Marijuana is still prohibited as a matter of federal law.
- Local municipalities may also prohibit cultivation and use of marijuana, even in states that have legalized.

MARIJUANA LAWS BY STATE



Legalized

Adults can purchase, possess and cultivate marijuana for personal use, whether medical or recreational.



Decriminalized

Typically means no arrest, prison time, or criminal record for the first-time possession of a small amount of marijuana for personal use. All of these states, excluding Nebraska, also allow medical marijuana and/or CBD use.



Medical/CBD Use Only

No state-level criminal penalties on the use of medical marijuana. Some of these states have CBD-specific laws, singling out the non-psychoactive component of marijuana.



Illegal

No active laws legalizing the use of marijuana.

SOURCE: WWW.NORML.COM

Changing Public Policy on Marijuana

- **Recreational Use Legalized:** (1) Colorado; (2) Washington; (3) Oregon; (4) California; (5) Nevada; (6) Alaska; (7) Michigan; (8) Vermont; (9) Massachusetts; (10) Maine.
- But legalization does not mean use in public spaces is permissible. For example, California law still prohibits use of marijuana in any place of business—except as may be authorized by special license.

Changing Public Policy on Marijuana

- **Medicinal Marijuana Legalized:** (11) New Hampshire; (12) Rhode Island; (13) Connecticut; (14) New York; (15) New Jersey; (16) Pennsylvania; (17) Delaware; (18) Maryland; (19) West Virginia; (20) Ohio; (21) Florida; (22) Illinois; (23) Missouri; (24) Louisiana; (25) Arkansas; (26) Oklahoma; (27) Minnesota; (28) North Dakota; (29) Montana; (30) Utah; (31) New Mexico; and (32) Arizona.

New Challenges for Employers?

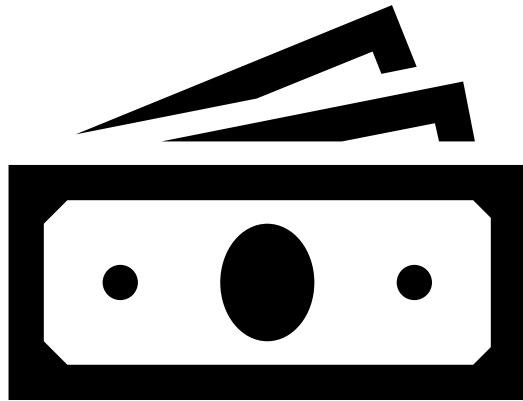
- Medical marijuana laws vary greatly—with some states imposing significant restrictions.
 - Some authorize only for specified illness;
 - Some authorize only infused products, such as oils or pills.
- Only Massachusetts requires employers to accommodate (off-duty) medical marijuana use.

New Challenges for Employers?

- No way to confirm whether an employee is using marijuana only during his or her personal time.
- The effects of marijuana use can continue well after consumption and it is not always apparent when someone is under the influence.
- But employers face major liabilities for workplace accidents, among other risks.

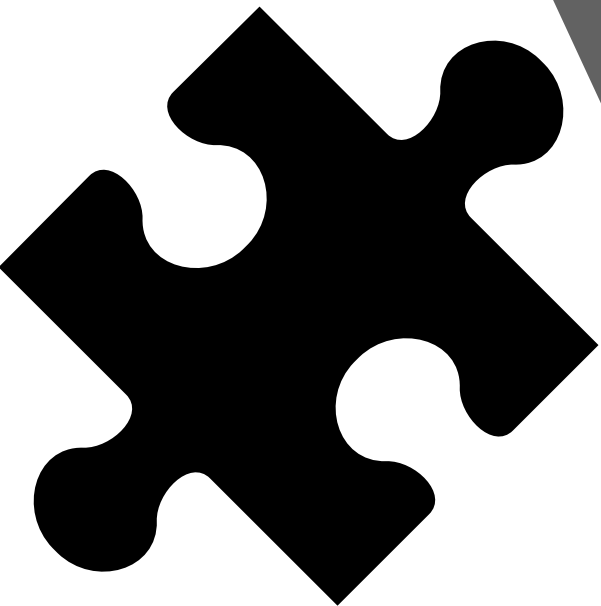


The Economics of Addiction



- Drug abuse is [estimated to cost](#) employers \$81 billion annually, including approximately \$10 billion from absenteeism.
- Cost factors: Lost productivity, absenteeism, injuries, fatalities, theft, low employee morale, and both increased health care (2x as non-abusers) and workers' compensation costs.

Getting into the Legal Issues



Legal Considerations

- Workplace privacy
- Drug Testing Laws – Drug Free Workplace and Department of Transportation requirements
- Americans with Disabilities Act
- Family Medical Leave Act
- Workers Compensation and Unemployment Insurance
- Occupational Safety and Health Act

Americans with Disabilities Act (ADA)



- Employers are required to reasonably accommodate qualified applicants and employees with disabilities unless it imposes an undue hardship on the business.

ADA Basics: Who is Covered?



- The ADA applies to companies with 15 or more employees.
- Many states impose their own ADA requirements on smaller companies.

ADA Basics: Prohibition on Discrimination



- Prohibits discrimination for all employment actions beginning in the hiring process.
- EEOC warns that an employer cannot inquire about a disability.

ADA Basics: Reasonable Accommodations



- After hire an employer must provide reasonable accommodations as necessary to enable a disabled person to continue working.
- This is an interactive process—with the goal of finding a way to accommodate.

ADA Basics: Major Life Activities



- The ADA defines a covered disability as a physical or mental impairment that substantially limits one or more “major life activities.”

ADA and Drug Use



- ADA protects **recovering** alcoholics and **recovering** drug addicts.
- Recovering drug addicts and recovering alcoholics are persons who no longer use illegal drugs and have successfully completed or are in a supervised drug rehabilitation program.

ADA and Drug Use



- ADA does not require employers to accommodate the use of illicit drugs in the workplace.
- ADA does not consider drug testing to be a medical examination but there are limits on when and how testing can be conducted.

ADA and Drug Use

- **Misuse of prescribed medications** could constitute “illegal use” in some circumstances.
- *Toscano v. NBC*, 2000 U.S. Dist. LEXIS 17030 (S.D.N.Y. Nov. 28, 2000). Involved illegal misuse of prescribed pain-killing drugs; employee was taking valium for stress, opiates for a back injury, and painkillers and tranquilizers prescribed by a psychiatrist.
- *Pierce v. Highland Falls-Fort Montgomery Cent. Sch. Dist.*, 2011 U.S. Dist. LEXIS 111534 (S.D.N.Y. Sept. 28, 2011). Employee admitted to obtaining several prescriptions from various doctors who were unaware that he was getting other prescriptions for them from other people at the same time.

ADA and Drug Use

- Tests for **legal** drugs and alcohol can be performed only in limited circumstances:
 - Cannot be performed prior to “conditional offer of employment.”
 - After conditional offer of employment, can only perform if required of all persons entering same or similar job category.
 - Tests (both pre-employment and during employment) must be job related and consistent with business necessity.
 - Time off for rehabilitation might be a reasonable accommodation under the ADA.

ADA and Drug Use

- Tests and inquiries about **illegal** drugs:
 - Pre-conditional offer questions about the applicant's past treatment for illegal drug use is prohibited.
 - Testing for illegal drugs is ok prior to making a conditional offer of employment.
 - Should only perform if required of all persons entering same or similar job category.
 - Time off for rehabilitation might be a reasonable accommodation under the ADA.

Dealing with Excessive Absences



- According to the National Council on Alcoholism and Drug Dependence Inc., workers who have had 2-3 jobs in the past five years are twice as likely to be current or past users.
- One common problem is that employees with dependencies issues are more likely to have attendance issues.

Dealing with Excessive Absences



- Discipline employees who are late or who miss shifts without notice.
- But it is much more tricky dealing with an employee who continuously requests leave of absence.
- Tread carefully before terminating.

Dealing with Excessive Absences



- Remember the ADA requires reasonable accommodations for employees with disabilities.
- This may mean modifying an employee's work schedule so that they might attend therapy.
- It may also mean allowing them (unpaid) time-off for rehabilitation.

Dealing with Excessive Absences



- Federal Medical Leave Act (FMLA) allows qualifying employees to take job protected leave when attending to certain medical issues for themselves or their immediate family (children, spouses or parents).
- Applies to companies with 50+ employees.
- Employee must have worked over 1,250 hours in the preceding year.

Dealing with Excessive Absences



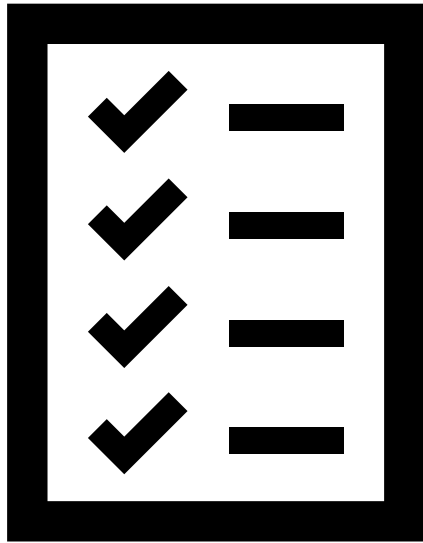
- Employees may be entitled by state or local law to take limited paid time off when sick, or when caring for a sick child, spouse, or parent.
- Employees are also entitled to take any vacation time that they have accrued under an established PTO policy.

Other problems in the workplace?



- Address performance issues in real time as problems arise.
- Watch out for erratic or aggressive behavior, as this raises safety concerns.
- Employees under the influence of drugs or alcohol may be more prone to workplace accidents.

Five Steps Employers Should Take



1. A clear, written drug-free workplace policy.
2. Employee education.
3. Supervisor training.
4. An employee assistance program.
5. Drug testing.

Drug Free Workplace

- Ok to prohibit use of illegal drugs in workplace.
- Ok to require that employees not be under the influence of illegal drugs at work.
- Ok to require that employees not be under the influence of legal drugs at work if it interferes with ability to safely or effectively perform essential functions of the job.



Employee Education



- Consider an employee training session that provides information about how opioid medications could affect health, job performance and safety.
- Include discussion on company drug-free workplace policy.

Supervisor Training

- Supervisors should understand the company's drug policy and have up-to-date knowledge on opioids.
- Supervisors should be trained on steps to take if they suspect problematic drug use.



Suspicion of Drug Use in the Workplace

- Fourth and Fifth Amendments not applicable to private sector employers.
- Consent is a defense to invasion of privacy claims.
- Employers should not use testing or search methods that are more intrusive than necessary to protect employer's legitimate business interests in maintaining safe workplace.
- Employer policies should provide that employer has right to monitor workplace and conduct inspections including vehicles in company parking lot, desks and personal bags and belongings if there is reasonable suspicion.

Suspicion of Drug Use in the Workplace

- Employers can report evidence of illegal drug use to law enforcement.
- Employer can consent to searches of areas over which it has common or sole authority.
- Video surveillance is okay if you have a business reason (i.e., productivity) and does not go beyond what is reasonable and is not unduly intrusive (i.e., no cameras permitted in bathrooms or changing areas – locker rooms).

When to terminate?

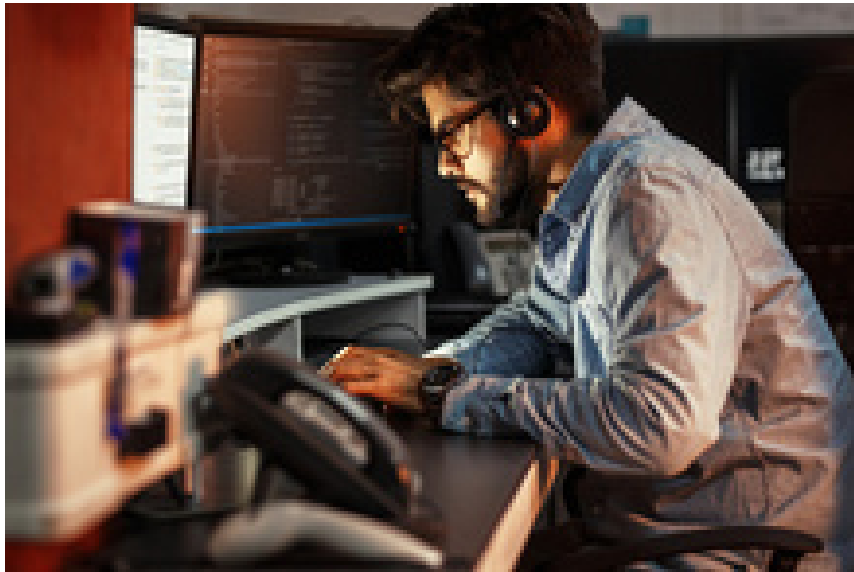
- Things to consider – risk factors:
 - Negligent Hiring
 - Negligent Retention
- Remember tests for legal drugs and alcohol can be performed only in limited circumstances.
- Consistent application of rules and policies – enforce the rules.
- Consider last chance agreement conditioning continued employment on rehabilitation and sobriety.

Employee Assistance Program

- Provides employees the option to access services for mental health and other personal concerns privately.
- EAP programs cost money, but might be worth the investment for your company.
- If EAP is available, make sure employees know what an EAP is and how to use it for support.



Drug Testing



- Drug and alcohol testing can be a smart business decision.
- Drug and alcohol testing are legal. Although some legal limits on how and when.

Drug Testing



- Drug testing may be performed either at random or based on reasonable suspicion.
- Some employers are required to perform random drug tests as federal contractors.

Drug Testing



- Unless an employer is required by the federal government, random testing may only be advisable for safety-sensitive positions.
- Must avoid any inference of discrimination.

Drug Testing



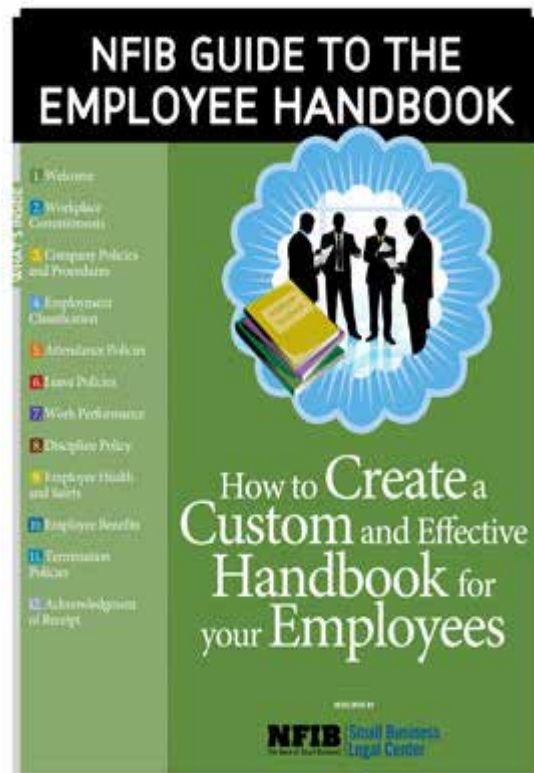
- Be mindful that state or even local law may require employers to comply with certain requirements.
- For example, San Francisco prohibits random blood, urine or encephalographic testing.

Drug Testing



- What if the employee refuses to consent to a drug test?
- Is termination always the answer when an employee tests positive?

Free Help is Available



- NFIB Model Employee Handbook for Small Business
- FREE www.nfib.com/legal-center

Free Help is Available

The screenshot shows a web browser window displaying the "elaws - Drug-Free Workplace Advisor" page. The browser's address bar shows the URL "http://www.dol.gov/elaws/drugfree.htm". The page header features the "UNITED STATES DEPARTMENT OF LABOR" logo and a search bar. Below the header, the page is titled "Office of the Assistant Secretary for Policy" and "DOL Home > elaws Advisors > Drug-Free Workplace Advisor". The main content area includes the "elaws® - Drug-Free Workplace Advisor" title, a welcome message, and a description of the advisor's purpose. A prominent red button labeled "Begin Drug-Free Workplace Advisor Now" is visible. At the bottom, there are links for "Disclaimer", "elaws Home Page", and "U.S. Department of Labor". The footer contains a red bar with links for "Freedom of Information Act", "Privacy & Security Statement", "Disclaimers", "Important Web Site Notices", and "Plug-ins Used by DOL". Below this, the U.S. Department of Labor's address and contact information are provided.

http://www.dol.gov/elaws/drugfree.htm

elaws - Drug-Free Workplace...

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Office of the Assistant Secretary for Policy

DOL Home > elaws Advisors > Drug-Free Workplace Advisor

elaws® - Drug-Free Workplace Advisor

Welcome to the Drug-Free Workplace Advisor

This Advisor assists users to build tailored drug-free workplace policies and provides guidance on how to develop comprehensive drug-free workplace programs. It also provides information about coverage and requirements of the Drug-Free Workplace Act of 1988.

The Drug-Free Workplace Advisor is one of a series of elaws (Employment Laws Assistance for Workers and Small Businesses) Advisors developed by the U.S. Department of Labor (DOL) to help employers and employees understand their rights and responsibilities under federal employment laws. To view the entire list of elaws Advisors please visit the [elaws website](#).

Begin Drug-Free Workplace Advisor Now

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Find on page: service animals | No results | Options

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DRUG-FREE WORKPLACE POLICY

XYZ Corporation, Inc. (the Company) intends to help provide a safe and drug-free work environment for our clients and our employees. With this goal in mind and because of the serious drug abuse problem in today's workplace, we are establishing the following policy for existing and future employees of XYZ Corporation, Inc.

The Company explicitly prohibits:

- The use, possession, solicitation for, or sale of narcotics or other illegal drugs, alcohol, or prescription medication without a prescription on Company or customer premises or while performing an assignment.
- Being impaired or under the influence of legal or illegal drugs or alcohol away from the Company or customer premises, if such impairment or influence adversely affects the employee's work performance, the safety of the employee or of others, or puts at risk the Company's reputation.
- Possession, use, solicitation for, or sale of legal or illegal drugs or alcohol away from the Company or customer premises, if such possession, use, solicitation for, or sale adversely affects the employee's work performance, the safety of the employee or of others, or puts at risk the Company's reputation.
- The presence of any detectable amount of prohibited substances in the employee's system while at work on company business. "Prohibited substances" include illegal drugs, alcohol, or prescription drugs not taken in accordance with a prescription given to the employee.

The Company will conduct drug and/or alcohol testing under any of the following circumstances:

- RANDOM TESTING: Employees may be selected at random for drug and/or alcohol testing at any time.
- FOR-CAUSE TESTING: The Company may ask an employee to submit to a drug and/or alcohol test if there is evidence of drugs or alcohol on or about the employee's person or in the employee's vicinity, unusual conduct or tardiness.
- POST-ACCIDENT TESTING: Any employee involved in an on-the-job accident or injury under circumstances where the employee was operating a vehicle or machinery, or where the employee was involved in an on-the-job accident or injury means not only the one who was or could have been injured but also any other employee who was or could have been involved in the accident or injury event may be asked to submit to a drug and/or alcohol test.

If an employee is tested for drugs or alcohol outside of the employment context and the results indicate a violation of this policy, the employee may be subject to appropriate disciplinary action, up to and possibly including discharge from employment. In such a case, the employee will be given an opportunity to explain the results.

(For an example of what a [drug/alcohol testing consent form](#) might look like, see the following page.)

See also: [Drug Testing in the Workplace](#)

[Return to Businesses & Employers](#)
[Return to TWC Home](#)



Type here to search | Taskbar icons: File Explorer, Mail, Calendar, Microsoft Edge, Word, PowerPoint | System tray: Network, Volume, Date/Time (1:58 PM 12/4/2018), Notifications



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Thank you!

