

Responding to Positive Tests: Employer Considerations, Options and Cautions

Drug testing is a critical element in any drug-free workplace program. It plays an important role in objectifying a sometimes emotional issue by scientifically determining if an employee is under the influence of a substance prohibited by your alcohol/drug policy. Drug testing can also help *prevent* substance misuse, as employees might think twice about using if they know they could be tested. It's important.

But what's equally important is a written plan for how you'll *respond* to a positive drug test – a plan that meets multiple business objectives like

- maintaining a safe and productive workplace
- minimizing risks and liabilities associated with substance misuse
- having enough workers to get the job done
- maintaining the health and well-being of the core of your company – your employees

So, should you terminate an employee or refuse to hire a candidate who tests positive? Give them a chance to get the drugs out of their system and let them try again? Mandate counseling? Before deciding how you'll respond, it's important to have a solid understanding of several impacting issues.

First, what could be behind that positive test?

Assuming you're conducting best practice drug testing, including the use of a Medical Review Officer (MRO), a positive drug test result is pretty straightforward. Your job candidate or employee has a prohibited amount of a drug(s) in their system without a verifiable medical explanation (i.e., a legitimate prescription).

However, the *reason* your employee tested positive, the root of the problem, is anything but straightforward. The employee might have accidentally taken an outdated prescription, made an impulsive decision while socializing with friends, or simply used the drug to get high. They might also be addicted to the substance and have a medical condition called substance use disorder (SUD). In that case, their use was likely more about their disease than seeking a high. Keep in mind it's not the *test result* that's the problem; it's what *caused* the result that needs correcting.

Granted, you probably won't initially know whether the drug use was associated with "casual" use or SUD. (And unless you're a trained counselor, you're not qualified to make that determination.) But it's helpful to understand the human variables to identify a policy approach that's right for your company and your employees. If it was a one-time slip-up, what might be a suitable consequence? What if the positive test was signaling a medical issue (i.e., addiction)? Like other behavior-related medical conditions, e.g., type II diabetes and heart disease, SUD is preventable and treatable. How you choose to respond to a positive test, especially in situations where SUD is involved, can have a lasting impact on your employee's life and health.

What do I base my decision on?

In addition to the human variables behind a positive test, your organization must also weigh business values and priorities when determining how to respond. Some prioritize productivity and workforce issues to guide their decision. Are you struggling to find workers – especially for highly specialized roles?

If yes, your organization may be more willing to institute a second chance system instead of defaulting to termination. On the other hand, employers performing highly safety-sensitive work might lean toward termination. Your overall bottom line also needs to be considered. According to the Society for Human Resource Management (SHRM), it can cost between 25-200% of annual compensation to replace that employee. And that doesn't include the loss in company knowledge or productivity when the employee leaves. It's expensive to terminate, rehire and retrain an employee.

Organizations must also consider any relevant authorities or mandates (e.g., federal government mandates [Department of Transportation], state guidelines for workers' compensation premium discounts, professional licensing authorities) that stipulate whether a second chance *must* or *cannot* be offered to an employee misusing a substance. And if SUD is the reason for the positive test, the Americans with Disabilities Act could come into play, as it offers protection to employees currently in a treatment program, those who have successfully *completed* treatment and those in recovery.

Options and cautions

Considering all these variables, it may be tempting to institute an "up to and include termination" approach to a positive drug test. But applying a case-by-case approach can lead to inconsistencies in policy enforcement and expose your organization to liability. Instead, your policy should have well-thought-out consequences and procedural guidelines for a positive test – adhering to any laws and authorities to which you are subject.

Bottom line? You'll either terminate an employee who tests positive, or you won't. But there are operational considerations within those two options that need careful consideration.

- If you choose to terminate
 - Will you terminate everyone who tests positive or only those in certain positions (e.g., safety-sensitive) or who have been with you for a certain amount of time? If you will be making any exceptions based on objective criteria – like position or tenure – be consistent in your application of such criteria.
 - Can they reapply later? If so, be sure to address any requirements around a re-hire. For example, you might be inviting a repeat performance if you only require them to test negative before reapplying, versus assuring they've received help for a potential problem.
 - And if you're tempted to institute a policy that says you'd *never* hire someone back after a positive test, talk to your attorney to be sure there aren't ADA violations at play since the employee could now be in recovery.
- If you choose to retain the employee
 - A negative test may not be enough to put them back on the job. A best-practice second-chance policy includes referring the employee for a drug and alcohol assessment and then to any needed services. If the employee refuses to complete an assessment or the counselor's recommendations or has tested positive in the past, many employers terminate.
 - Have the employee sign a formal assistance agreement detailing your expectations and consequences for violating the agreement, along with other responsibilities and directives. It can help keep the employee on track and provide you a structure for managing the referral for assistance and return-to-work process.



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- Refer the employee to a provider that has demonstrated experience working with employers. They should be high quality, timely, willing to monitor attendance and willing to provide progress reports and return-to-duty recommendations.
- Offer support. Positive treatment outcomes increase when a person feels safe; has support from family, friends and co-workers; is held accountable for their behavior and has accessible and accommodating resources to help.

An ounce of prevention

Granted, you need a plan for responding to a positive test. But it's equally important to have a plan to prevent that from happening! In addition to testing, an effective drug-responsible approach – one that helps prevent and respond to alcohol/drug problems – includes a written alcohol/drug policy and procedures, annual employee education and supervisor training and a plan to assist employees who need it. All these elements of a drug-free workplace program work together and send the message that you not only care about maintaining a safe and productive work environment but that you're committed to retaining a healthy workforce.

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