

Implementing Employee Drug and Alcohol Testing: Implications for Hotel Managers

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Abuse of drugs and alcohol in the workplace has reached epidemic proportions in the hotel industry. The authors review considerations for drug testing and discuss drug and alcohol testing methods and the manner in which an effective policy should be developed.

Are you experiencing a loss of productivity, poor employee morale, increased tardiness and absenteeism, strained relations between co-workers, excessive use of medical benefits, employee theft, property damage, or more accidents and workers' compensation claims than normal? A combination of these problems may be evidence of a drug or alcohol problem in your hotel.

If the hotel does not have a problem with employee drug and alcohol abuse, a clearly articulated and well publicized drug and alcohol policy, which is followed consistently, is probably sufficient. On the other hand, if there is a problem, or if employees are voicing their concern about the problem to management, you may have an affirmative obligation to identify employee drug and alcohol abusers through the use of accurate testing procedures.

The decision to test should come only after consideration of the nature and extent of drug use in the hotel, the impact of the problem on productivity, employee safety, and alternatives available to correct the problem.

Testing programs reduce the problems and costs associated with drug and alcohol abuse, enhance the safety of the workplace and, if properly implemented, may increase employee motivation. The cost of drug and alcohol abuse in reduced productivity is extensive. Abusers tend to suffer from impaired memory, lethargy, and reduced coordination. Reliable studies indicate that employees who use drugs regularly are approximately 20 percent less productive and are absent four to eight times as often as non-abusers.

In addition to its impact upon performance, the excessive use of

alcohol and illicit drugs often results in medical problems. Employees with drug and alcohol problems use nearly two times more health benefits, which ultimately results in higher insurance premiums. They are involved in two to three times as many accidents and file five times as many workers' compensation claims than non-users.

Moreover, the cost of addiction results in employee theft of tools, embezzlement of company funds, and petty thefts from fellow employees, the latter of which results in lowered morale. Simply stated, employee drug and alcohol abuse adversely affects the hotel's bottom line profitability. Where such problems are taking their toll, an effective testing program will pay for itself by increasing efficiency and reducing the costs of this abuse.

In addition, employees with drug or alcohol problems significantly increase an employer's exposure to liability. The Occupational Safety and Health Act (OSHA) and related state laws require an employer to provide a safe workplace for employees, including those under the influence of alcohol or drugs and those who may be injured by intoxicated co-workers. An employer is almost defenseless when he or she knows of an unsafe condition in the workplace and fails to take reasonable steps to correct it.

Drug testing may serve as a powerful deterrent to stop drug and alcohol use for casual users who realize they may be tested at any time. For people particularly susceptible to peer pressure, the threat of testing may appear to be an acceptable reason to say no.

Tests Must Be Accurate

Several types of screening tests have been developed to test for the presence of drugs in a person's system. The hotel must consider the varying costs, accuracy, and ease of testing to determine which test or series of tests is optimal. If a decision about employing an applicant or disciplining an employee is to be based substantially on a test result, it is essential that the test is accurate.

Laboratories can use urine, blood, saliva, breath, hair, and brain waves to test for the presence of drugs and alcohol. Urine tests are the most commonly used to detect employee drug use, mainly because they are relatively inexpensive and more accurate than other types of tests if properly handled.

The immunoassay technique is the common urine testing technique which can detect the use of most illicit drugs, including cocaine, amphetamines, barbituates, heroin, marijuana, and PCP. This technique indicates only the use of the drug; it does not indicate or measure intoxication. Cost is approximately \$6-\$15 per test and accuracy ranges from 80 to 95 percent. Experts caution that the immunoassay technique should be used as a rapid primary test, but any positive result should be confirmed by an alternate technique.

Confirmatory methods include Thin Layer Chromatography (LTIC), Gas Chromatography (GC), and Gas Chromatography/Mass Spectrometry (GC/MS). GC/MS is the state-of-the-art technique for screening urine for drugs and is the most frequently recommended way to con-

firm samples that are positive after the initial screening. The amounts of the drug found in the urine may be quantified. Cost ranges from \$30-\$65 per sample and, if properly performed, the margin of error is low.

The primary reason for false positive in urine screening is human error in performing lab work. Since inaccurate testing may result in liability for an employer acting upon the test results, any hotel which decides to implement a screening program must thoroughly research the laboratory it plans to use. A hotel representative should tour the lab, check laboratory technicians' credentials, review the testing procedure, and check internal quality control records. The hotel must also go to great lengths to develop "chain of custody" procedures; the hotel must make sure the test samples that may be processed during the day are not mixed up so that positive results are attributed to the wrong person.

The most common test for alcohol is a breathalyzer test. Information on blood alcohol tests can also be relatively easily obtained, but are more expensive. Moreover, ability tests, such as walking a straight line, can indicate current impairment but are too subjective to recommend.

Legal Liability Raises Concerns

When making the difficult decision of whether a hotel should implement a drug testing program, management needs to weigh the benefits of testing against mixed reactions from employees and legal concerns. Although employees who have observed co-workers under the influence of alcohol or drugs or selling drugs may be appreciative of a drug and alcohol testing policy, a large number of employees will be up in arms over this apparent invasion of their privacy.

Considerations for employee testing are significantly different depending on whether the hotel is unionized and on local and state restrictions. Since preemployment testing poses far fewer employee and legal concerns, many hotels may choose to limit testing to job applicants. Preemployment screens will, hopefully, keep drug users from becoming part of the workforce or cause them to cease using drugs before they apply.

Unfair labor charge liability: For hotels which are organized, management must remember that the requirement that an employee submit to drug testing or searches is a "term or condition of employment" and, therefore, a mandatory subject of bargaining. This does not mean that management may not implement a program if the union refuses to agree to it; it merely means that management must negotiate in good faith and come to impasse before requiring its employees to submit to testing. Implementation at impasse should only be done with advice from counsel. A hotel which unilaterally implements mandatory employee drug screening runs the risk of an unfair labor practice charge.

Viewing the requirement to negotiate optimistically, negotiations give management the opportunity to come to agreement with the union on such issues as the mutual need for testing, proper testing protocol, and disciplinary consequences to those employees testing positively. This may preclude later disputes by the union about proper testing procedures and disciplinary action. Testing may also be viewed by employees as a

joint union-management practice which is for their benefit.

Although many unions oppose drug testing at any time, several, including the International Brotherhood of Teamsters, have agreed to testing under limited circumstances such as after accidents, upon suspicion of substance abuse, and within 30 days advance notice during annual physicals. Union demands in negotiation tend to focus on the placement of limits on random testing, testing procedures, and the disciplinary action taken upon obtaining positive test results.

When an employee tests positively on both the initial and confirmatory tests, management's disciplinary approach also varies according to whether the employee is a member of a collective bargaining unit. Members of the bargaining unit who are summoned to investigatory interviews that could reasonably lead to discipline have the right to the presence of a union representative upon request.

In addition, management can be confident that any termination based on a positive drug test will result in arbitration. It is thus particularly essential in a union context to make sure that the "chain of custody" is unbroken, confirmatory tests have been run, and a policy has been well articulated to all employees and has been followed to the letter. In evaluating whether an employee's termination was for "just cause," the arbitrator will consider such factors as whether the employee was sufficiently informed of the policy, whether the discipline was reasonable under the circumstances, whether the hotel's proof was sufficient, whether the policy has been applied in the same manner to all other employees, and whether the employee has a good work record.

Non-union employee relations concerns: Employers in the non-union setting must balance the benefits of testing with the risk that implementation of a testing policy will lower morale and severely impair the atmosphere of trust which hotel management has taken great pains to foster. Management must also be prepared for the fact that there is a substantial likelihood that many of its "good" employees, including parts of top management, may test positively. Even where positive results do not lead to immediate discharge, the employee may become so embarrassed that he or she resigns. Non-users may consider testing to constitute an intolerable invasion of privacy and refuse to take the test.

The adverse impact of drug and alcohol testing on employee morale can be greatly curtailed by effective communication and education. Employees need to realize that drug and alcohol abuse, by themselves or their co-workers, is a serious problem which affects their health and safety, as well as the hotel's productivity. A new testing policy will be best accepted if it is perceived as an extension of the hotel's emphasis on workplace safety or as part of an overall wellness program.

Privacy rights: There are presently no federal restrictions on an employer's ability to require its applicants or employees to submit to drug or alcohol testing. Only a few states and local ordinances require "just cause" to believe that an employee is under the influence of drugs or alcohol before requiring him to submit to testing. However, compulsory drug and alcohol screening, as well as other efforts to limit workplace

substance abuse, such as searches and investigations, raise questions of employee privacy rights. This is of significant concern to government employers who are prohibited from violating their employees' Fourth Amendment right to protection against unreasonable searches and seizures.

As a general rule in most areas, private employees have no privacy rights. Nonetheless, it is still advisable to obtain written employee consent before obtaining blood or urine samples or conducting a body search. Moreover, a well articulated policy which gives employees ample warning about impending testing, as well as searches of purses, lockers, and desks, decreases the employees' reasonable expectations of privacy.

Hotels should also be aware that in recent years several states, such as California and Illinois, and several localities have enacted legislation protecting privacy interests. The best approach is to determine whether your area has any limiting ordinances or statutes before implementing a program.

False imprisonment and intentional infliction of emotional distress: Several false imprisonment lawsuits have been filed in recent years by employees claiming that they were subjected to unlawful physical restraint by their employers during drug searches in which the employee was restrained from leaving the area. Accordingly, except for substantiated safety reasons, hotels should never restrain an employee from leaving the premises, but should articulate that any employee who leaves the hotel will be subject to discipline, including discharge.

The hotel may also be liable for intentional infliction of emotional distress if it conducts unreasonable searches. This is another reason why it is important to give advance warning of testing and searches. It is also important to obtain written consent. The hotel should conduct non-routine searches with all possible privacy and confidentiality.

Defamation: The tort of defamation is a potential cause of action against employers who mishandle testing results. Defamation occurs when an employer discloses to a third party false information that tends to injure an employee's reputation.

The hotel has a qualified privilege for company records concerning poor performance and drug/alcohol test results as long as they are seen and used in proper personnel and medical channels. However, drug or alcohol test results should be kept in the medical department and personnel files should be limited to performance records. Access to medical records should be only on a "need to know" basis. Publication to others of the fact that a particular employee is an alcohol or drug abuser can lead to defamation liability.

Handicap discrimination: One of the most significant legal concerns about testing is that job applicants who are refused employment or who are discharged because of a positive drug or alcohol test result may claim illegal discrimination under the Federal Rehabilitation Act of 1973 or a analogous state handicap discrimination law. The Rehabilitation Act prohibits federal contractors from discriminating against handicapped individuals, including drug and alcohol abusers, obligates covered

employers to take affirmative action to employ and advance in employment "qualified handicapped individuals," and requires them to make "reasonable accommodations" for such handicapped individuals. The definition of "handicapped individual" does not include any individual who is an alcohol or drug abuser whose current use of alcohol or drugs prevents the individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others. Similar requirements are made for certain non-federal contractors by state statutes. This means that hotels governed by these laws may not discharge, refuse to hire, or otherwise discriminate against persons because of alcohol or drug dependency if, after reasonable accommodation is made for their condition, the employee is qualified to perform the job.

The duty of a hotel to make reasonable accommodation for an alcohol or drug abusing employee is not clear. The Rehabilitation Act does not define reasonable accommodation and there is very little case law to shed light on the subject. Several authorities reason that the duty of reasonable accommodation requires employers to give employees who are willing to acknowledge a chemical dependency an adequate opportunity to rehabilitate themselves through employee assistance programs or community resources, unless the granting of such an opportunity would impose an undue hardship on the employer. While this is perhaps not required, it is the safest approach and recommended.

Wrongful discharge: In those states which recognize an implied covenant of good faith and fair dealing between an employer and an employee, hotels may be subject to claims of wrongful discharge by employees whose employment is terminated due to erroneously failed drug tests. This is one reason why it is essential to perform confirmatory tests. Documentation of the discharge decision should focus on the failure to comply with hotel policy and the employee's poor work performance. However, if drug testing is performed in an accurate manner and the employee has been offered employee assistance, there would appear to be minimal exposure for wrongful discharge liability.

Employee Retirement Income Security Act: Finally, the hotel must consider possible liability for breach of fiduciary duty pursuant to the Employee Retirement Income Security Act (ERISA) if it terminates an employee so that it will not have to offer health benefits. Most health benefit plans are ERISA welfare plans. Employers have the duty to administer them for the benefit of the plan participants. Employers breach their fiduciary duty when they terminate a participant in order to preclude him or her from receiving a welfare benefit. Employers terminating employees for poor performance or safety reasons, rather than so that they do not use health benefits, do not breach their ERISA fiduciary duty to plan participants.

Everyone in the hotel industry is all too aware that non-union hotels are ripe for an organizational campaign. A hastily implemented program may be just the focus of a union effort to convince the workforce that

they need a union. For hotels that are already organized, the union is probably looking for a chance to show its members that they need a union and will be ready to scream "unfair labor practice" if they have the opportunity. In either the union or the non-union setting, the message is the same. You can implement a program and have it be an extremely beneficial decision, but, if you are going to implement one, you have got to do it correctly, beginning with thinking it through well in advance.

The first thing a hotel must do is put together a task force to establish a policy. Where possible, it should be comprised of representatives from personnel, safety and security, the medical department, top management, and legal counsel. This task force, and all top management, must make a strong commitment to eliminate drug abuse in the workforce. The task force should document reasons for the policy which are tailored to the circumstances of the particular hotel. If there is excessive absenteeism, employee concerns or fears about their co-workers' drug use, or noticeable problems with productivity, it should be noted.

Next, the task force must articulate the policy to explicitly state which behavior is not acceptable. Are employees merely prohibited from coming to work while under the influence, or are they not allowed to have illicit substances or alcohol in their body? Are they prohibited from selling, distributing, or merely possessing illicit drugs? Are employees prohibited from keeping drugs in their cars while in the hotel parking lot? Does the prohibition extend to prescription drugs? Drinking at lunch?

The task force must also consider who will be in charge of implementing the policy and how the policy will be enforced. Will the hotel conduct searches of persons, lockers, purses, and lunch boxes? Which laboratory should conduct the testing?

If the hotel decides that drug testing is in order, it has many decisions to make before implementing the program. First, it must decide whether it will limit testing to job applicants. If the hotel decides to test current employees, testing should include top management. Across the board testing is necessary if the program is going to be perceived as fair. The hotel must decide whether testing will be under limited circumstances, such as when there is a reasonable suspicion of drug use or whether employees will be subject to random testing. Thirty to 60 days advance warning is recommended so that casual users may choose to become drug free before they are subjected to a test.

A drug test program should not be initiated until a decision has been reached about what action will be taken if an individual's test is positive. The hotel must determine whether a positive test demonstrates that the individual is unsuited for hiring or continued employment. The hotel must articulate the disciplinary consequences for violations of its drug policy. Will employees be subject to progressive discipline? Will discipline be suspended pending participation in an employee assistance program (EAP) and improvement in job performance? What are the consequences of a positive test after participation in an EAP?

An educational component is essential to the success of a drug policy. Supervisors should be told exactly what the policy is and the importance of following it to the letter. They should be taught to watch for symp-

toms of drug and alcohol abuse and should be trained in the manner in which such evidence should be documented. The manner in which an employee is to be confronted should be discussed, and supervisors must be schooled in methods for providing assistance to employees with problems. Supervisory training can be conducted by the personnel department or outside professionals and may include films and group discussions.

Employees should be notified of the hotel policy and the consequences of violating the policy. If the hotel has an employee handbook, this policy should be placed in it. An employee should never have the excuse that he didn't know the hotel's policy. At the same time, the reasons for the policy should be clearly communicated to employees.

The hotel may wish to consider implementing an employee assistance program to assist employees and their families in overcoming drug and alcohol problems. Employees may also be given information on the impact of drugs and alcohol on family health and the workplace and sources of help for the employee and his or her family through payroll stuffers, films, and training sessions. Educational materials from many agencies are available for the asking.