

CHECKLIST | CREATING A WORKPLACE DRUG TESTING POLICY

Presented by Ollis/Akers/Arney Human Resources Consulting

Creating a compliant drug testing policy involves thorough research, collaboration with legal professionals, and a focus on employee privacy and well-being. By following the steps outlined in this checklist, organizations can better develop a comprehensive drug testing policy that promotes workplace safety while respecting employees' rights and satisfying employer obligations.

This checklist is divided into four distinct sections:

1. **Section 1** addresses how to determine which federal and state laws regarding drug testing, if any, may apply to a company.
2. **Section 2** discusses steps for establishing a policy on drug testing.
3. **Section 3** outlines steps for complying with content requirements for the written policy.
4. **Section 4** discusses requirements and best practices for regularly reviewing and updating the policy.

While each section is distinct, employers are encouraged to complete all sections to ensure they comply with all applicable requirements.

The information contained in this checklist comes from various laws. The checklist is intended to be used as a guide. Not all of the following steps may be necessary to create a workplace drug testing policy. Therefore, the steps in this list should be modified to meet an organization's unique needs and situation. Employers are encouraged to seek legal counsel to address specific issues and concerns.

Section 1: Identify Applicable Requirements

Before drafting a workplace drug testing policy, it is important to understand the legal framework that applies to the organization. In general, there are no federal requirements for most employers to conduct drug testing or have a drug-free workplace policy. However, there are exceptions for certain types of employers, as described in the checklist below. In addition, certain employers must consider their obligations under federal fair employment laws and any similar state laws that may apply.

Keep in mind that other laws, privacy regulations and specific industry standards may have implications for employer drug testing policies as well. Follow the steps below to help identify and refine the legal framework that applies to your company.

Is Your Company Subject to Any Federal Drug Testing Laws or Regulations?	Yes	No
Select "Yes" if your company: <ul style="list-style-type: none">• Either has a federal contract of \$100,000 or more or has received a federal grant in any amount and is therefore subject to the Drug-free Workplace Act;• Has employees involved in the operation of commercial motor vehicles for business and is therefore subject to the U.S. Department of Transportation regulations for transportation workplace drug and alcohol testing programs;• Has unionized employees and is therefore subject to the National Labor Relations Act; or• Is subject to any other federal industry-specific drug testing requirements. <p><i>If "No," proceed to the next question below.</i></p>	<input type="checkbox"/>	<input type="checkbox"/>

Is Your Company Subject to Any Federal Drug Testing Laws or Regulations?	Yes	No
<p>Select "Yes" if your company has 15 or more employees and is therefore subject to:</p> <ul style="list-style-type: none"> • The Americans with Disabilities Act, which requires reasonable accommodations for individuals with disabilities but specifically excludes addiction to drugs that are illegal under federal law from its definition of a disability. Former addicts may be protected, as well as individuals who have been successfully rehabilitated, are participating in a rehabilitation program or are erroneously regarded as using illegal drug; and • Title VII of the Civil Rights Act, which allows employer policies against employing any individuals who currently and knowingly possess or use certain controlled substances but only if these policies are not adopted or applied with the intent to discriminate based on race, color, religion, national origin or sex. <p><i>If "No," proceed to the "Identify All Applicable State Laws" checklist below.</i></p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>Select "Yes" if your company has 50 or more employees and is therefore subject to:</p> <ul style="list-style-type: none"> • The Family and Medical Leave Act, which provides up to 12 weeks of unpaid leave for a serious health condition and allows for drug testing as part of a "fitness for duty" test upon an employee's return from a period of leave but only if an employer has a uniformly applied policy or practice that requires the same from all similarly situated employees who take leave for their own serious health conditions. <p><i>If "No," proceed to the "Identify All Applicable State Laws" checklist below.</i></p>	<input type="checkbox"/>	<input type="checkbox"/>

Identify All Applicable State Laws	Yes	No
<p>Is your company subject to any industry-specific state drug testing laws?</p> <p>Some states have drug testing requirements for companies in certain industries. For example, California has industry-specific laws that apply to contractors on public improvement projects.</p> <p>Research your state's relevant industry resources and obtain legal counsel to help determine whether any state laws of this type apply to your company. If so, select "Yes," closely follow the applicable industry-specific prohibitions and requirements, and proceed to the next question below for information about general best practices and considerations for developing workplace drug testing policies for most employers.</p> <p><i>If "No," proceed to the next question below.</i></p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>Is your company subject to any general but mandatory state drug testing laws?</p> <p>Some states have laws that employers must follow if they choose to conduct drug testing in those states. These laws do not require employers to conduct drug testing, but they do require compliance if an employer conducts drug testing. For example, employers in Minnesota may not conduct drug testing unless they do so in compliance with the Minnesota Drug & Alcohol Testing in the Workplace Act.</p>	<input type="checkbox"/>	<input type="checkbox"/>

Identify All Applicable State Laws	Yes	No
<p>Research your state’s relevant provisions and obtain legal counsel to help determine whether any state laws of this type apply to your company. If so, select “Yes,” closely follow the applicable prohibitions and requirements, and proceed to the next question below for information about general best practices and considerations for developing workplace drug testing policies for most employers.</p> <p><i>If “No,” proceed to the next question below.</i></p>		
<p>Is your company subject to any general but voluntary state drug testing laws?</p> <p>Some states have laws that offer protections against certain lawsuits and other liability risks to employers that choose to conduct drug testing and comply with all requirements in the law. For example, the Alaska Drug Testing Law allows employers that choose to conduct testing to avoid liability for certain claims if they comply.</p> <p>Research your state’s relevant provisions and obtain legal counsel to help determine whether any state laws of this type apply to your company. If so, select “Yes,” closely follow the applicable prohibitions and requirements, and proceed to the next question below for information about general best practices and considerations for developing workplace drug testing policies for most employers.</p> <p><i>If “No,” proceed to the next question below.</i></p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>Is your company subject to any state legalized marijuana or related laws that protect employees and applicants from adverse employment actions based solely on positive tests for marijuana?</p> <p>Some states have laws that protect employees and applicants from adverse employment actions based on positive marijuana tests. For example, California has a law that prohibits employers from discriminating against an individual in the initial hiring process based on off-duty marijuana use or the positive results of any employer-required screening test for marijuana.</p> <p>Research your state’s relevant provisions and obtain legal counsel to help determine whether any state laws of this type apply to your company. If so, select “Yes,” closely follow the applicable prohibitions and requirements, and proceed to the next question below for information about general best practices and considerations for developing workplace drug testing policies for most employers.</p> <p><i>If “No,” proceed to the next section below.</i></p>	<input type="checkbox"/>	<input type="checkbox"/>

Section 2: Create a Workplace Drug Testing Policy

Most state laws on drug testing require employers to establish a written workplace drug testing policy. Even if no such requirement applies, it is typically best practice for any employer that performs drug testing to establish a written policy. Consider the following steps when creating a workplace drug testing policy:

Create Workplace Drug Testing Policy	Complete
<p>Identify the primary purpose of the policy.</p> <p>Clearly articulate the objective of implementing a drug testing policy. Common reasons include maintaining workplace safety, reducing potential liabilities, and promoting a drug-free environment. Identifying the primary purpose will help guide the development of appropriate procedures and protocols.</p>	<input type="checkbox"/>
<p>Determine who will be subject to the policy.</p> <p>For example, the policy may apply to all employees or specific job roles or in certain situations (such as preemployment, reasonable suspicion and post-accident). Ensure that this scope aligns with legal requirements and is justified by legitimate business needs.</p>	<input type="checkbox"/>
<p>Determine how and when to provide notice to applicants and employees who will be subject to the policy.</p>	<input type="checkbox"/>
<p>Decide whether, how and when to obtain written consent (for adhering to the policy, random testing, preemployment testing and other details) from employees or applicants.</p>	<input type="checkbox"/>
<p>Select a testing site and develop clear testing procedures.</p> <p>Determine where you will conduct testing and create comprehensive procedures that encompass various aspects of drug testing, such as the following and others:</p> <ul style="list-style-type: none"> • Specimen collection; • Specimen and chain-of-custody tracking; • Testing methodologies; • Laboratory protocols; • Confidentiality of test results; and • Consequences for policy violations. <p>Clearly define the testing process from start to finish.</p>	<input type="checkbox"/>
<p>Protect employee privacy.</p> <p>Carefully consider and address employee privacy concerns. Determine procedures to safeguard the collected data, ensure confidentiality and restrict access to authorized personnel only. Comply with applicable privacy laws, including obtaining informed consent from employees when required.</p>	<input type="checkbox"/>

Create Workplace Drug Testing Policy	Complete
<p>Decide on testing methods to be used.</p> <p>There are several drug testing methods, including urine, blood, hair or saliva. Consider the reliability, accuracy and legality of each method under relevant laws and industry standards. Ensure the chosen method aligns with the policy’s objectives and employee privacy rights.</p>	<input type="checkbox"/>
<p>Determine which drugs and/or substances will be tested.</p> <p>Consider all applicable requirements and restrictions under applicable federal and state laws, along with your company’s specific safety needs and risk factors, to determine which drugs and substances to include in a testing panel. The following types of drugs are most commonly tested for:</p> <ul style="list-style-type: none"> • Amphetamines; • Cocaine; • Marijuana; • Opiates; and • Phencyclidine, or PCP. <p>Additional categories may include barbiturates, Benzodiazepines, ethanol (alcohol), hydrocodone, MDMA, methadone, methaqualone or propoxyphene.</p> <p>Employers in states with legalized marijuana should consider excluding marijuana from tests of individuals in non-safety-sensitive positions.</p>	<input type="checkbox"/>
<p>Determine how positive initial results of testing will be communicated and develop procedures for confirmatory testing.</p> <p>Decide how individuals will be notified of any initial positive results and consider allowing for opportunities for individuals to explain positive results. Also, consider medical reviews and confirmatory tests that verify the results of a positive initial sample and determine how these will be carried out. Describe what a tested individual can expect while waiting for the results of a confirmatory test.</p>	<input type="checkbox"/>
<p>Determine how any final/confirmatory negative results of testing will be shared with applicants or employees.</p>	
<p>Establish consequences and support mechanisms.</p> <p>Decide on any consequences, such as termination or suspension, that you will impose for positive results. Consider incorporating rehabilitation options or support programs for employees struggling with drug dependency. This approach can help promote a healthy work environment and encourage employees to seek assistance when needed.</p>	<input type="checkbox"/>
<p>Develop language to incorporate all applicable provisions from federal and state laws.</p>	<input type="checkbox"/>

Create Workplace Drug Testing Policy	Complete
<p>Develop policies and a training program for HR personnel and management to ensure consistent, nondiscriminatory application of the policy.</p> <p>Follow all applicable federal and state nondiscrimination laws and regulations. Establish a training cadence and review policies regularly.</p>	<input type="checkbox"/>

The next step in the process is to draft a written policy that clearly articulates all requirements and restrictions. This should be written in a manner that is easily understood by your specific company’s particular employees. Consider the following when drafting a drug testing policy:

Draft Written Policy	Complete
State the objective of implementing the drug testing policy.	<input type="checkbox"/>
Specify the employees or applicants who are subject to testing.	<input type="checkbox"/>
Describe the circumstances under which testing may be required.	<input type="checkbox"/>
Explain employees’ or applicants’ rights to refuse testing.	<input type="checkbox"/>
Explain the consequences of a refusal to undergo testing.	<input type="checkbox"/>
Describe testing procedures and methods.	<input type="checkbox"/>
Describe the medical review process for confirming an initial positive result.	<input type="checkbox"/>
Describe disciplinary actions that may be taken if a confirmatory test verifying an initial positive test is positive.	<input type="checkbox"/>
Describe disciplinary actions that may be taken in cases of employee fraud or attempts to beat a drug test.	<input type="checkbox"/>
Include information about rights to explain a positive confirmatory test or pay for a retest and any available procedures for employees or applicants to appeal or contest a positive test result.	<input type="checkbox"/>
Describe any rehabilitation options or support programs offered, along with any reapplication/rehire opportunities following an employee’s rehabilitation from drug dependency.	<input type="checkbox"/>
Include provisions reflecting all applicable federal and state law requirements and restrictions.	<input type="checkbox"/>

Section 3: Provide Notice of the Policy

Employers should effectively communicate their drug testing policy to all employees and applicants. This may include conducting training sessions to ensure individuals understand the policy’s scope, procedures and consequences, as well as providing employees with an opportunity to ask questions, clarify doubts, and address any concerns they may have. Employers can take the following actions to help ensure their employees have notice of any drug testing policy:

Distribute Written Drug Testing Policy	Complete
<p>Provide copies of the drug testing policy to each employee at various times, such as:</p> <ul style="list-style-type: none"> • When the policy is adopted; • At the time an employee is hired; • At the time an employee becomes affected by the policy because of a position transfer; • When an applicant is to receive a job offer contingent on passing drug testing; • Before an employee is to be tested for drugs under the policy; and • Other appropriate times, including any that are required under federal or state law. <p>Have employees and applicants acknowledge they have received and understand the policy.</p>	<input type="checkbox"/>
<p>Display the drug testing policy conspicuously in the workplace.</p> <p>Most state laws require employers to post notices in appropriate and conspicuous locations on their premises to inform employees and applicants that:</p> <ul style="list-style-type: none"> • The employer has adopted a drug testing policy; • Copies of the policy are available for inspection during regular business hours in the employer’s personnel office or another suitable location; or • Other details about how to learn more about the policy are available. 	<input type="checkbox"/>

Section 4: Perform Regular Reviews and Updates

In addition to the above requirements, employers that perform workplace drug testing should ensure their written policy is reviewed at least annually and updated for any changes in the interim. Use the following to help ensure an organization’s drug testing policy is regularly and thoroughly reviewed at least once per year.

Review and Update Written Policy	Complete
<p>Check all applicable federal laws and update the policy for any changes since the last review.</p>	<input type="checkbox"/>
<p>Check all applicable state laws and update the policy for any changes since the last review.</p>	<input type="checkbox"/>
<p>Consider seeking employee input on safety issues and any other concerns related to drug testing and incorporating changes based on responses.</p>	<input type="checkbox"/>
<p>Determine and incorporate any adjustments necessary due to company changes made since the last review.</p>	<input type="checkbox"/>

As laws and regulations change, it is important to regularly review and update your drug testing policy to ensure ongoing compliance. Employers can stay informed about legal developments and industry best practices to maintain an effective and legally compliant drug testing program.

Use this checklist as a guide when crafting a drug testing policy. For assistance, contact Ollis/Akers/Arney Insurance & Business Advisors.

