Drug testing and substance abuse prevention programs can pose substantial legal liability if they are not managed and administered properly. Employers can safely administer drug testing in three situations: before hire but after a conditional job offer; during a fitness-for-duty test; and after a preventable accident.

Here are some key legal issues you’ll need to address in your testing policy:

■ **Disability discrimination:** Drug tests for illegal substances aren’t considered medical exams under the ADA, so employers can conduct them at any time during the pre-employment stage. But because those tests can reveal the presence of legal drugs in an applicant’s system, this could tip you off to a person’s disability. In fact, to avoid liability, wait to test until you make a conditional job offer. Because applicants who test positive for illegal drugs aren’t covered by the ADA, you can withdraw a job offer based on those results.

■ **Fair warning:** Always inform applicants and employees of the specifics of your anti-drug policies, and obtain a signed, dated consent form before you administer any drug tests. Notify applicants on the application form that you will drug-test. That will turn away many drug users.

■ **Clear policy:** A well-written substance abuse policy will:

- Prohibit the use, possession or distribution of drugs or alcohol on the job.
- Explain how you’ll deal with employees who violate the policy, test positive or refuse to take a test.
- State your policy on drug testing, including when you will test and your business reasons. Include the right to retesting and verification of the results.

Consider these questions when weighing the need for a policy:

- Do workers handle hazardous materials or run complex equipment?
- How many company vehicles do you have on the road?
- Who would be harmed—and how seriously—if an employee made a mistake on the job or breached security because of substance abuse?
- Does your insurance cover incidents related to substance abuse?

Also, think about when you’ll do drug testing: The most common time for tests is during pre-employment screening, after a preventable accident and as part of an evaluation of employees with job performance problems.

Courts look more favorably on random drug testing in jobs where there is a safety or security concern. Absent a state law that restricts employee drug testing, employers often argue successfully that their right to terminate employees at will applies when a worker refuses a drug test.

**State laws:** If your organization decides to implement a drug testing program, first consult state law where the covered employees work. More than half the states have laws regulating drug testing, creating a legal quagmire. In nine states, for example, it’s illegal for an employer to make a job applicant or employee pay for a drug test. In 14 jurisdictions, testing is permitted only in safety-sensitive jobs or is forbidden altogether. In seven states, employers may be barred from imposing discipline after an employee’s first positive test. (A handful of cities and counties as well have their own drug testing ordinances.)

The DOL offers a state-by-state breakdown in the Laws and Regulations section of its website: [www.dol.gov](http://www.dol.gov).
**EEOC issues**

The ADA includes alcoholism on its list of covered disabilities as well as former illegal drug use and addiction. The EEOC has taken the position that pre-offer alcohol screening violates the ADA because it would reveal a covered disability. Also, you cannot ask about the use of prescription drugs because the answer may reveal a medical problem that requires the use of prescription (and therefore legal) controlled substances. You can, however, ask whether the candidate is currently taking illegal drugs.

It’s unclear whether employers may use past drug use as a legitimate reason for refusing to rehire a former employee. In 2003, the U.S. Supreme Court ruled that companies may have policies against rehiring workers who broke workplace rules; however, if those policies result in disparate treatment of disabled workers (i.e., recovering drug addicts), they’re illegal. *Raytheon v. Hernandez*, 540 U.S. 544

Under the ADA, an employer’s ability to make disability-related inquiries or require medical examinations is analyzed in three stages: pre-offer, post-offer and employment. At the first stage (prior to an offer of employment) the ADA prohibits all disability-related inquiries and medical exams, *even if* they are related to the job.

The EEOC specifically excludes testing for illegal drugs from the definition of medical examination, so that presumably it would be legal to screen for illegal drug use. The problem, however, is that some drugs that are illegal without a prescription (including many opiate derivatives such as codeine and drugs used to treat attention deficit disorder and narcolepsy) are available with a prescription to treat medical conditions that are disabilities. If your drug screening picks up these, you have revealed a potential disability.

The safest course of action is to withhold drug tests for illegal substances until after you make a conditional employment offer. Another reason for doing so is that drug screening is expensive; testing every applicant to whom you might make an offer probably isn’t cost-effective. If you do conduct pre-offer drug screens, try to limit the screening to drugs with no medical use, such as cocaine and heroin.

### PROTECT EMPLOYEES’ PRIVACY

Be sure your drug testing procedure passes legal muster. States often specify the labs and testing procedures you can use and the manner in which you must keep test records. If yours doesn’t, use a lab certified by the U.S. Department of Health and Human Services or accredited by the College of American Pathologists. You must make every effort to protect workers’ privacy and dignity. You must also confirm positive test results by means of a second test before using the results as the basis for any employment or disciplinary decision. In addition, you may want to allow employees to retest the same sample at their own expense if they dispute the results.

Finally, supervisors and managers should never discuss the results of a drug screen with anyone other than those who have a need to know. If an employee is terminated because of a positive test or refusal to submit to testing, others should merely be informed that the employee violated company rules.

➤ **Observation:** You cannot force applicants or employees to submit to drug tests, but you can refuse to hire the former and discipline or fire the latter if they refuse to be tested.

Drug testing should be only a small part of your company’s comprehensive substance abuse policy. For a policy to be effective, it must have management’s commitment. You should also form a drug education program and provide names of counselors whom employees may consult in strict confidence. Also guarantee to workers that tests will be administered in an impartial manner and that your policy contains adequate safeguards against abuse.

**Caution:** The Drug-Free Workplace Act of 1988 requires all organizations receiving procurement contract awards of $100,000 or more and all recipients of federal grants to provide a drug-free environment for their employees. (The law does not extend to subcontractors or subgrantees.)

### ACCOMMODATING LEGAL POT?

Currently, 23 states and the District of Columbia have legalized the use of medical marijuana: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan,

Whether employers in these states must accommodate legal medical marijuana use depends on how courts interpret state law. For example, the California State Supreme Court ruled that employees do not break the law if they use marijuana for medical reasons; state law does not require employers to accommodate that use.

The U.S. Supreme Court ruled in Gonzales v. Raich, 125 S. Ct. 2195 (2005) that state medical marijuana laws don’t protect individuals who wish to grow marijuana for personal use. That activity still violates the Controlled Substances Act. The decision stopped short of invalidating any state laws. So residents of the 23 states may legally use marijuana in accordance with their state’s law. However, any employer who drug tests as part of a federal program such as Drug Free Workplace programs for federal contractors or employers in safety sensitive industries such as transportation do not have to accommodate marijuana use.

➤ **Observation:** The ADA doesn’t require employers to accommodate current illegal drug use, and the Supreme Court decision would indicate that medical marijuana is still illegal under federal law. However, employers and their legal counsel should also look to their own state disability laws to determine their course of action.

**New laws legalizing marijuana for recreational use:** Voters in Colorado and Washington state in 2012 approved legalization of marijuana for recreational use. Alaska and Oregon legalized personal use of marijuana in 2014. But take note: Employers—even in those states—can still set strict drug-use policies for their employees and punish employees who fail drug tests. In fact, several large employers in Washington—including Boeing and Costco—have said they’ll continue to prohibit marijuana usage regardless of their state laws.

The Colorado law explicitly says, “Nothing in this (law) is intended to require an employer to permit or to accommodate (marijuana’s) use … or to affect the ability of employers to have policies restricting the use of marijuana by employees.”