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# Supervisor Newsletter

### Establishing/Documenting Reasonable Suspicion

Reasonable suspicion testing, sometimes referred to as "probable-cause" testing, is conducted when supervisors document observable signs and symptoms that lead them to suspect drug use or a drug free workplace policy violation. The purpose of documentation is to detail the rationale, facts, and circumstances behind a decision to request reasonable suspicion testing. All reasonable suspicion forms completed must be maintained by the company as confidential documents.

Before requiring a reasonable suspicion drug test of any employee who may be acting in an unusual or erratic manner, reasonable suspicion must first be firmly established. It is extremely important to have clear, consistent documentation of what behavior justifies drug and alcohol testing, and any suspicion should be corroborated by another supervisor or manager. Because this type of testing is at the discretion of management, it requires careful, comprehensive documentation.

### Clear Communication

Supervisors should also be very careful to not give confusing directives or to be vague or ambiguous regarding the company's position on drug and alcohol use in the workplace. Saying "it's probably not a good idea to use drugs or drink alcohol on your break" is not a clear enough mandate. Supervisors must clearly inform employees that substance abuse that impacts safety and work performance will not be tolerated by the company.

One way to ensure that employees are aware that the company is serious about drug and alcohol policy violations is to make it clear to everyone that poor work performance is being documented. Supervisor documentation of work performance is important for many reasons—not the least of which is that it establishes expectations for the workforce.

### Proper Documentation = Legal Protection

Documentation is a powerful tool that can be used to validate an employer's actions, and supervisors must clearly understand when and how to accurately document employee substance abuse policy violations. Documentation is the key to proving a legitimate, non-discriminatory, non-retaliatory reason for conducting a reasonable suspicion drug test, but

properly documenting drug and alcohol policy violations first requires a fair and complete investigation of the violation.

If a drug or alcohol related situation results in suspension or termination of an employee, and if the employee files a lawsuit against the company, supervisor documentation will later become "Exhibit One" and will go a long way towards determining an employer's potential liability. If the lawsuit is filed a few years after the termination, the supervisor who originally completed the documentation might no longer be with the company; at which point a well-documented file detailing the reason(s) for the termination will be invaluable.

### Accurate Content of Documentation Forms

Improper or missing documentation creates liability, but even the best-prepared documentation can include mistakes. Documentation must describe, in detail, the rationale for requesting testing, including observed facts and circumstances, any sources of information, date and time of observation or accident, other witnesses, actions taken, etc.

Minimizing problems within the documentation process often involves advance preparation and understanding of what should or shouldn't be included. When completing documentation, list all your observations. Be as specific as possible, including names of employees/witnesses, when and where you observed these behaviors occurring, what the employee was doing at the time, and any witnesses of these events. Include any observations of changes in appearance, smell, speech, movement, or actions of the employee. Some signs of impairment may include slurred speech, difficulty walking, clumsiness, dilated pupils, and watery and/or red eyes.

Once the observations are documented, the involved supervisor(s) should immediately meet with HR or upper management and make a decision as soon as possible on whether to send the employee for reasonable suspicion testing to rule out the possibility that he or she may be under the influence of drugs or alcohol at work. The decision should be made and handled in accordance with the company substance abuse policy.

### Common Documentation Errors

There are some common errors that supervisors often make when preparing documentation for a workplace drug or alcohol violation

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investigation. Certain errors relate to understanding what needs to be documented and what does not, or neglecting to document follow-up interviews with the employee, coworkers, or other witnesses. Some errors relate to defamation of character and how to minimize the risks associated with retaliation claims—all the way to the failure to preserve evidence, and everything in between.

Understanding the common errors of drug and alcohol policy violation documentation will help to reduce an employer's potential liability and will take supervisors a long way towards proper, legally valid documentation.

The biggest mistake a supervisor could make would be to conduct a reasonable suspicion drug test without first documenting the reasons for the test. Supervisors are busy, and they often say they don't have the time necessary to properly conduct an investigation into drug or alcohol violations. But conducting a drug test without legally justifiable reasons could result in expensive litigation for the company.

Also remember that consistency is the key. If you are going to require a drug test of an employee as a result of certain unacceptable behaviors, you must also require a drug test of *all* employees who exhibit the same behaviors.

Supervisors must be careful to accurately document work performance in all employee evaluations. All too often a supervisor, out of a desire to avoid confrontation, will give an employee a glowing evaluation when a good rating is not deserved.

### **Intervention and Testing Procedures**

Before taking an employee in for a drug and alcohol test, make sure that the employee has been given a copy of the Substance Abuse Policy and has signed the Notification and Consent form. Do not allow an employee to drive or operate a company vehicle where reasonable suspicion has been established, or let that employee drive home. Depending on company policy, it may be necessary to place the employee on investigatory leave until test results are received,

especially if the employee is in a safety-sensitive position. Once the employee has been detained, the supervisor is responsible to not let the employee be out of sight. Moreover, do not allow the employee to eat, get a drink, go to the bathroom, go to a locker, use tobacco, change clothing, take medications, or leave your presence for any reason—as the employee may try to do something that will hinder or decrease the company's ability of getting a valid sample once the drug and alcohol test is administered.

Quietly remove the employee from the work environment to a private location. Do not accuse the employee of drug or alcohol use. Inform the employee that in your opinion he/she is not able to safely perform his/her job at this time. Before and during the intervention, observe and document everything you see, hear, smell, and touch. Items to look for and document include: sweating, speech patterns (slurred, difficulty in speaking clearly), eyes (bloodshot, glassy), ability to walk, appearing to have a dry mouth, and an odor of alcohol or other substance.

All documentation should be based on observable and factual events, and should not include opinions and feelings. Do not say "the employee appeared drunk" or "the employee seemed high." All documentation must be retained regardless of whether the employee takes or refuses to take a drug or alcohol test.

### **After the Test**

If the company policy allows an employee to test positive for drugs and then return to work after completing treatment and signing a return-to-work agreement, a performance improvement plan must be implemented. Performance improvement plans are not only designed to help the employee improve, but a good plan will be clearly written with achievable goals, realistic deadlines, and steps that will help the employee remain drug and alcohol free. Follow-up drug and/or alcohol testing should be a part of the plan, and supervisors must document any violations of the return-to-work agreement or performance improvement plan.