



DRUG TESTING

Gene R. La Suer
Davis Brown Law Firm
215 Walnut, Suite 1300
Des Moines, Iowa 50309
515-288-2500

Genelasuer@davisbrownlaw.com

Because of time limitations and the nature of the program, please understand that printed materials and oral presentation of the speaker are not intended to be a definitive analysis of the subject discussed. Readers are cautioned that fact situations involving employment questions vary in each individual circumstances. Materials contained herein or presented by the speaker must not be considered as a substitute for sound legal advice on your own independent situations.

A. Drug and Alcohol Testing - The Iowa Statute

Section 730.5 applies solely to private sector employees. Public employees continue to be governed by the pre-existing mix of federal and other regulations, as well as collective bargaining agreements under Chapter 20, Code of Iowa. However, due to the complexity in this area, and the lack of clear guidance, public employers would be well served to understand the somewhat stringent restrictions of § 730.5. The statute governs testing whether it be pre-employment, reasonable suspicion or random.

Employers may also conduct drug and alcohol testing under § 730.5(8):

- (b) during and after the completion of rehabilitation;

- (c) upon reasonable employer suspicion;
- (d) test prospective employees;
- (e) or as required “by federal law or regulation or by law enforcement”; or
- (f) to conduct drug or alcohol testing during the investigation of accidents in the workplace where there has been an reportable injury to a person or damage to property exceeding \$1,000.

The statute clearly defines “reasonable suspicion” drug or alcohol testing. In Section (1)(h), “reasonable suspicion” testing is defined as:

[D]rug or alcohol testing based upon evidence that an employee is using or has used alcohol or other drugs in violation of the employer’s written policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. For purposes of this paragraph, facts and inferences may be based upon, but not limited to, any of the following:

- (1) Observable phenomena while at work such as direct observation of alcohol or drug use or abuse or of the physical symptoms or manifestations of being impaired due to alcohol or other drug use.
- (2) Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance.
- (3) A report of alcohol or other drug use provided by a reliable and credible source.
- (4) Evidence that an individual has tampered with any drug or alcohol test during the individual’s employment with the current employer.
- (5) Evidence that an employee has caused an accident while at work which resulted in an injury to a person for which injury, if suffered by an employee, a record or report could be required under Chapter 88, or resulted in damage to property, including to equipment, in an amount reasonably estimated at the time of the accident to exceed one thousand dollars.
- (6) Evidence that an employee has manufactured, sold, distributed, solicited, possessed, used, or transferred drugs while working or while on the employer’s premises or while operating the employer’s vehicle, machinery, or equipment.

This statute allows unannounced and random substance screening of employees who are selected from a general pool of employees. There are specific requirements for determining what is and is not random selection. Further, the employer must contract with an outside entity to administer the random process for selection. 730.5(k). The pool may include the following:

- (1) The entire employee population of a particular work site except for employees who are not scheduled to be at work at the time of testing or are on approved leave;
- (2) The entire “full-time” active employee population at a particular work site except for employees who are not scheduled to be at work at the time of testing or who are on approved leave; or
- (3) All employees at a particular work site who are in a pool of employees in safety-sensitive positions who are scheduled to be at work at the time of testing or who are not on approved leave.

B. Education and Rehabilitation

It is important to note that drug testing may be carried out **only pursuant to the written policies of the employer**. Chapter 730.5(a) requires that a written policy exist and that the policy “has been provided to every employee subject to testing, and is available for review by employees and prospective employees.” For prospective employees this may require notification in advertising and the attachment of the policy to your application or posting of the policy in interview rooms. The statute also requires that the policy provide uniform requirements for disciplinary or rehabilitative actions which will be taken by the employer as a result of drug testing.

Employers who test are also required to establish a drug and alcohol awareness program to inform employees of the dangers of the use of drugs and alcohol in a workplace. While this is similar to the Federal Drug-Free Workplace Act requirements, Chapter 730.5(9)(c) imposes additional specific requirements on the employer:

- (1) If an employer has an employee assistance program, the employer must inform the employee of the benefits and services of the employee assistance program. An employer shall post notice of the employee assistance program in conspicuous places and explore alternative routine and reinforcing means of publicizing such services. In addition, the employer must provide the employee with notice of the policies and procedures regarding access to and utilization of the program.
- (2) If an employer does not have an employee assistance program, the employer must maintain a resource file of employee assistance services providers, alcohol and other drug abuse programs certified by the Iowa Department of Public Health, mental health providers, and other persons, entities, or organizations available to assist employees with personal or behavioral problems. The employer shall provide all employees information about the existence of the resource file and a summary of the information contained within the resource file. . . . [T]he employer shall post in conspicuous places a listing of multiple employee assistance providers in the area.

Chapter 730.5(9)(g) provides that upon receipt of a confirmed positive test, the employer may take certain actions. Rehabilitation for alcohol use is required if the employer has:

- (1) at least 50 employees,
- (2) if the employee at issue has been employed by the employer for at least 12 of the preceding 18 months,
- (3) the employee is willing to undergo rehabilitation, and
- (4) the employee has not previously violated the written substance abuse prevention policy.

Any costs not covered by insurance or if there is no insurance on the employee shall be divided equally between the employee and employer. However, the employer cannot be required to contribute more than \$2,000 toward uncovered costs.

C. Adverse Employment Action

If the employee fails to comply with the terms and requirements of rehabilitation the employer may then take adverse employment action. This component will have some far reaching repercussions in that the nature and structure of rehabilitation plans vary considerably

from program to program and in each individual circumstance. Certainly, rehabilitation plans exist where family counseling and other broad based requirements are built into the plan. Further, practitioners are frequently unwilling to provide an employer with a full assessment of whether or not all portions of the rehabilitation plan are being met by the individual employee. This section may therefore impose additional burdens on those persons providing rehabilitation to communicate more specifically and clearly with employers.

Section 10 provides for specific disciplinary procedures which may be utilized if there is a confirmed positive test or the employee refuses a valid request for testing, including rehabilitation, possible suspension of the employee with or without pay, termination, refusal to hire and any other adverse employment action which conforms with the employer's written policies and procedures. An employee suspended from work pending the final results of testing, is entitled to back pay with interest compounded at 18% per annum, if the test result are negative and if he/she was suspended without pay.

D. Testing and Notification Procedures

The law does set forth extremely stringent requirements for how samples are to be collected, testing conducted and the maintenance of two testing samples in order to provide two tests for confirmation purposes.

In an expansion of the right granted by the former statute which allowed the employee “a reasonable opportunity to rebut or explain the results of a drug test”, § 730.5(7)(c)(2) provides:

- (2) An employer/prospective employee shall be provided an opportunity to provide any information which may be considered relevant to the test, including identification of prescription or nonprescription drugs currently or recently used, or other relevant medical information. To assist the employee or prospective employee in providing the information described in this subparagraph, the employer shall provide an employee or prospective employee with a list of the drugs to be tested. (emphasis added)

The provisions of § 730.5(7) contain detailed and specific requirements for confirmation of positive test results, and notification of employees or prospective employees. Under § 730.5(7)(f) initial positive test results for drugs must be confirmed with a second test, using a different chemical testing process than used in the initial screen. Prior to reporting testing results to an employer, a medical review officer is required to review and interpret any positive test results under § 730.5(7)(g).

NOTE: Alcohol testing under the current statute is substantially different than testing for drug exposure.

At the time that § 730.5 was first enacted in 1998 the legislature did not provide for specific guidelines relating to the differences between testing for alcohol and testing for drugs. As we know medically, the standard urine sample is ineffective for alcohol testing and will not be accepted by MROs. The Department of Public Health has since issued regulations which indicate that blood and hair are unacceptable methodologies for testing. Both breath and salvia may be utilized for alcohol testing. The statute was eventually amended to include § 730.5(7)(f)(2) to relate specifically to alcohol testing. This section refers the employer to 49 C.F.R. 40.1-40.413 (2005) for the requirements of alcohol testing. Under these regulations alcohol testing may be conducted by the use of an Alcohol Screening Device (ASD) and/or an Evidential Breath Testing Device (EBT). ASDs can only be used for the initial alcohol test while an EBT could be used for both the initial and secondary test. Alcohol tests, utilizing breath, must be administered either by a Breath Alcohol Technician (BAT) or Screening Test Technician (STT). In order to perform confirmatory screenings, the test must be conducted by a BAT. BATs may use the EBT test. STTs can only use the ASD. See 49 C.F.R. 40.3.

Alcohol testing is not required to be carried out at a certified lab and can be administered by a law enforcement officer if he/she has the appropriate certification. A Medical Review Officer is not required to review or interpret a confirmed positive alcohol result. The test confirmation for alcohol is not the utilization of a split sample as it is with urine analysis, but is the administration of a second breath test after a short waiting period. While saliva testing is allowed under the federal statute it is uncommon.

Confirmed positive drug or alcohol test results for a current employee require the employer to notify the employee in writing by certified mail, return receipt requested, of the results of the tests and the employee's right to request a confirmatory test of a second sample, under § 730.5(7)(i)(1). For drug testing the employee must reimburse an employer for the expenses of the second test, which may be conducted at an approved laboratory of the employee's choice. The employee must, however, request the second test within seven (7) days from the mailing notice by the employer, pay the appropriate fee, and identify a laboratory. If the results of the second test do not confirm the initial and confirmatory tests “the employer shall reimburse the employee for the fee paid by the employee for the second test and the initial confirmatory test shall not be considered a confirmed positive drug or alcohol test for purposes of taking disciplinary action pursuant to subsection 10.”

Prospective employees are treated differently, and do not have the right to a second confirmatory test. Under § 730.5(7)(i)(2), prospective employees are to be notified in writing of the results of the test, the name and address of the medical review officer who made the report to the employer, and the right to request records of the testing.

There are some interesting components to the law which are a clear attempt to give guidance in the applicability of other federal statutes. The definition section under § 730.5(1)(i)

seeks to define the nature of a safety sensitive position as a job “wherein an accident could cause loss of human life, serious bodily injury or significant property or environmental damage including a job with duties that include immediate supervision of a person in a job that meets the requirements of this paragraph”. Section 730.5(2) states that this section does not apply to tests conducted on employees which are required pursuant to federal statutes, regulations or orders issued pursuant to federal law. These both appear to be an effort to bring the Iowa Code into a tandem position with the definitions and requirements of the federal laws including the regulations propounded by the Department of Transportation for drivers. In the past there had been some legal confusion as to how the laws and regulations worked together. There are also provisions regarding the treatment of testing including a statement that time required for testing is to be considered as time worked for the purposes of computing payroll. This should forestall any issues about leave time or other matters relating to test requirements.

E. Immunity and Confidentiality

In accordance with the legislative intent that drug and alcohol testing be at the option of an employer, § 730.5(3) specifically provides that an employer cannot be liable for refusing or failure to implement a drug testing program.

If such program is implemented, § 730.5(11) provides immunity from a cause of action against an employer who establishes a policy and initiates a testing program in accordance with the provisions of the statute.

Employers should be cautioned, however, that under § 730.5(12), a cause of action may arise if an employer takes adverse action based upon a “false positive” test result which the employer new or clearly should have known was in error and ignored the correct test results because of “reckless, malicious, or negligent disregard for the truth, or the willful intent to

deceive or be deceived.” Similarly, a cause of action for defamation, libel, slander, or damage to reputation shall not arise as the result of a drug testing program, unless unauthorized disclosure of the test results occurred, which disclosure communicates incorrectly the presence of alcohol or drugs.

Drug testing information is considered confidential under § 730.5(13) and “shall not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceeding, except as otherwise authorized by this section.” Section 13(a) exceptions include written requests for test results by an employee or a prospective employee. Additionally, under § 730.5(13)(d), an employer may use and disclose the information of drug or alcohol tests under the following circumstances:

- (1) In an arbitration proceeding pursuant to a collective bargaining agreement, or an administrative agency proceeding or a judicial proceeding under worker’s compensation laws or under common or statutory laws where action taken by the employer based on the test is relevant or challenged.
- (2) To any federal agency or other unit of the federal government as required by federal law, regulatory order or in accordance with compliance requirements of a federal government contract.
- (3) To any agency of the state authorized to license individuals if the employee tested is licensed by that agency and the rules of that agency require disclosure.
- (4) To a union representing the employee if such disclosure would be required by federal labor laws.
- (5) To a substance abuse evaluation or treatment facility or professional for the purpose of evaluation or treatment of the employee.

However, positive test results from an employer, drug or alcohol testing program shall not be used as evidence in any criminal action against the employee or prospective employee tested.

F. Civil Penalties

Section 730.5(14) provides civil penalties of \$1,000 per violation against laboratories or medical review officers who violate the disclosure provisions of the statute.

Section 730.5(15) also allows a private civil action to be instituted by an employee against any person who violates the statute or aids in the violation of the statute, for affirmative relief, including reinstatement or hiring, back pay, equitable relief including attorney's fees and court costs. The employee, the county attorney, or the attorney general may also seek to enjoin violations of the statute through actions brought in district court.

QUESTIONS TO ANSWER

1. **Why Am I Drug Testing?**

- Contract requirements
- License requirements
- Personnel administration

2. **Am I Prepared For The Costs?**

- Testing costs
- Payment wages (FLSA) for test time and waiting time
- Rehabilitation costs (up to \$2,000)
- Educational costs (supervisor's and employees)
- Administrative costs
- ADA accommodation
- FMLA

3. **What Other Laws Do I Need To Consider?**

- CDL/DOT
- ADA
- Work comp
- Licensure
- FMLA

4. **When Am I Going To Test?**

- Prospective employees
 - Notice (ads, applications, etc.)
- Random
 - Outside party randomizers
- Reasonable suspicion
 - Training/discrimination
- Post accident
 - How to define for your setting.
 - “Reportable injury to a person” or
 - “Damage to property exceeding \$1,000”
- Post treatment
 - Treatment follow up/HIPAA issues/general confidentiality
- Entire employee based or “pool”
 - Notice of 30 days

5. **What Is The Role Of The MRO?**

6. **Hot Spots**

- Rehabilitation
 - Have we defined as alcohol only?
 - How does this fit within your PTO/sick leave policies?
 - Have you clearly defined alcohol limits? (.02 level vs. .04 level)
- What are we testing?
 - Urine - drugs (EBT device evidential breath testing)

NO BLOOD! NO HAIR!

7. **Other Questions**

What about the ADA?

Reporting to the board. (Your board and licensure)

Problem samples and sample handling/chain of custody.

Employee education.

The role of the MRO

THE DRUG-FREE WORKPLACE ACT

The Drug-Free Workplace Act of 1988, 41 USC §§701-707, is aimed at helping businesses establish and maintain an alcohol and drug-free workplace. According to the Department of Labor, 73 percent of drug users are employed. These 8.1 million workers cost businesses billions of dollars in lost productivity and increased health care costs.

Who Must Comply With The Drug-Free Workplace Act?

- The act requires contractors and grantees of federal agencies to agree to provide drug-free workplaces as a condition of receiving a contract or grant from the federal government.
- In addition, **Section 5.6 of the new Iowa Medicaid Provider Agreement** requires Medicaid providers to “provide a drug free workplace in accordance with the Drug Free Workplace Act of 1988 and all applicable regulations.”

What Are The Requirements Of The Drug-Free Workplace Act?

The Drug-Free Workplace Act requires employers to:

1. **Publish a policy statement** informing employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the workplace and specifying actions that will be taken against employees who violate the policy.
2. **Provide employees** with a copy of this policy statement.
3. **Establish a drug-free awareness program** to inform employees about (a) the dangers of drug abuse in the workplace; (b) the policy of maintaining a drug-free workplace; (c) available drug counseling, rehabilitation, and employee assistance programs; (d) the penalties that may be imposed on employees for drug abuse violations.
4. **Notify employees** that as a condition of employment the employee must (a) abide by the terms of the policy statement; (b) notify the employer, within five days, if he or she is convicted of a criminal drug violation in the workplace. (Note that you may want a broader policy).
5. **Notify the contracting agency** within ten days after learning of an employee’s drug-related conviction.
6. **Impose a penalty or require participation in a drug abuse or rehabilitation program** for any employee who is convicted of a workplace drug violation.

7. **Make a good-faith effort** to maintain a drug-free workplace through implementing the above requirements.
8. **EMPLOYERS ARE NOT REQUIRED TO IMPLEMENT DRUG TESTING.**

An Employer Will Be Subject To Penalties If It:

- Fails to meet the seven steps required above.
- Employs a number of individuals convicted of drug violations, indicating that the employer has not made a good faith effort to provide a drug-free workplace.

What Are The Penalties?

- Payments under the contract or grant may be suspended.
- Contract or grant may be suspended or terminated.
- Employer may be prohibited from receiving a federal contract or grant for up to five years.

If An Employee Is Convicted For A Drug Offense An Employer Must:

- Notify the contracting agency within ten days after learning of an employee's conviction; and
- Within thirty days of receiving notice, take appropriate personnel action up to and including termination; or
- Require the employee to participate in an approved drug abuse assistance or rehabilitation program.

How Does The Federal Drug-Free Workforce Act Compare With Iowa State Law Requirements?

- Unlike federal law, the Iowa Drug-Free Workplace Act, Iowa Code §730.5, focuses primarily on employee drug testing procedures.
- The Iowa statute makes drug testing **optional**; private employers are not required to test employees.

Neither statute requires testing. The Federal Drug Free Workplace Act requires employee education and resources regardless of whether or not you test. The Iowa statute only requires education if you test.

What Are The Requirements For Iowa Employers Who Want To Test Employees Or Prospective Hires?

An employer who wants to drug test employees must:

- **Distribute a written policy** explaining the disciplinary or rehabilitative actions an employer will take if an employee tests positive for drugs or alcohol.
- **Provide the employee with a list of drugs** it will test for and allow employees to identify any prescription or nonprescription drugs they currently or recently used.
- **Establish an awareness program** to inform employees of the dangers of drug and alcohol use in the workplace. To meet this requirement employers may create an employee assistance program or maintain an updated file with information on alcohol or drug abuse programs.
- **Train supervisors** to (a) recognize evidence of employee alcohol and drug abuse and (b) refer employees who abuse alcohol or other drugs to the employee assistance program.

What If An Employee Tests Positive?

Under Iowa law, when an employee tests positive, in violation of the employer's written policy, or refuses to provide a testing sample an employer may:

- Require the employee to enroll in an approved rehabilitation program.
- Suspend the employee, with or without pay.
- Terminate the employee.
- Refuse to hire a prospective employee.
- In conformance with the employer's written policy, enact other adverse employment actions.

These are very basic requirements. You must have a facility specific policy.