



Supervisor Newsletter

Investigating Drug Use at Work

Conducting an investigation into a possible substance abuse policy violation is an important part of a supervisor's job.

Numerous circumstances could lead to suspicion of a substance abuse policy violation: an anonymous tip, a complaint from a credible source, physical manifestations of impairment, performance problems, etc.

The employee being investigated has rights that if violated could result in a lawsuit against the company, and the way the investigation is conducted could become the object of legal challenges and possibly even personal liability for the supervisor in charge of the investigation.

It is important, then, for supervisors to be knowledgeable about state and federal employment laws, and to understand the legal and practical steps required for conducting a substance abuse policy violation investigation before the need arises. To be prepared, supervisors should have a written plan in place detailing how to carry out an investigation, including how to conduct interviews if necessary and how to document findings.

Legal due process must be followed and confidentiality maintained while avoiding charges of discrimination, defamation, and preferential treatment. These are risks and responsibilities that supervisors must be aware of in order to investigate substance abuse policy violations adequately while keeping the workplace as safe as possible.

Comprehensive Documentation

Documentation of the investigative process should clearly show that the supervisor in charge is fair and impartial. If there is a concern regarding

the supervisor being "too close" to the employee being investigated, an outsider such as a Human Resource consultant or attorney should be brought in for consultation. In fact, the investigating supervisor should not hesitate to consult with experts such as outside legal counsel throughout the investigation and not take any adverse employment action against a worker without consulting with an attorney first. For assistance at any time from the Drugs Don't Work attorney on retainer, contact the Council on Alcohol and Drugs.

When investigating a complaint that an employee has violated the company substance abuse policy by using drugs at work or being impaired while at work, a supervisor should document the interview of everyone who might have information about the incident. This includes the person making the complaint, the employee against whom the complaint was lodged, and anyone else identified as a possible witness by either the complainant, the accused, or any of the eyewitnesses. This documentation should be kept on file for a minimum of three years after the investigation is complete.

Supervisors must also be careful to differentiate in all reports whether a statement is a verified fact or someone's opinion, and keep in mind throughout the investigation that hearsay testimony is rarely allowed in a court of law. Sworn testimony of witnesses can be important in court, but physical evidence—e.g., security camera tapes, emails discussing drug use or sales, productivity reports documenting poor performance, physical observation checklists, etc.—is difficult to disprove.

Adherence to All Company Policies and Confidentiality Requirements

Throughout the investigation supervisors should continually review the company substance abuse policy and all other

company policies to ensure that the investigation is in line with what all applicable policies and procedures require.

Confidentiality must also be maintained as most substance abuse policies specifically require this. For example, the Drugs Don't Work sample substance abuse policy contains this section: "The confidentiality of any information received by the company through a substance abuse testing program shall be maintained, except as otherwise provided by law." Supervisors should only release information relating to an employee's violation of the substance abuse policy on a need-to-know basis, or if a law requires the release of the information. All information requests concerning employees should go through a central information release person or office.

Workplace Searches

Generally, employees have a right to privacy in their personal belongings and their workstations, and unless the company has specifically issued a statement or policy notifying employees that certain areas are subject to search without notice, searching of an employee's "person, places, or things" should be avoided. For example, if a supervisor receives a complaint that an employee is storing illegal drugs in his or her locker at work, the company would need to have notified all employees that company lockers would be subject to search at any time at the discretion of the company in order for the supervisor to have a legal right to open the locker. In a case like this, it would probably be best to notify law enforcement and let a police officer determine if legal

probable cause exists to obtain a search warrant.

Drug Testing

Drug tests are, of course, an important investigative tool in determining if a company substance abuse policy violation has occurred. In the private sector, employers may perform drug testing under a wide variety of circumstances, such as pre-employment testing, reasonable suspicion testing, post-accident testing, and random testing.

With any type of drug testing, however, the employer must keep the results absolutely confidential, and the documentation should be kept in the same confidential medical file that is used for Americans with Disabilities Act (ADA) purposes. There are many legal issues to keep in mind, and it is essential to have a clear written policy letting employees know about the types of testing that may be done and what will happen if a drug test turns out positive.

Summary and Conclusion

Remember that while conducting any type of substance abuse investigation on an employee, it is important to uphold the privacy rights of that worker and others, to conduct a thorough investigation (without letting it drag on *too* long), to be objective, and to keep the focus on the ultimate goal of determining if substance abuse is occurring—so that a possibly addicted individual can get help and the workplace can be protected.

If a supervisor does this part of his or her job well, the company will have a solid basis for taking action and defending itself against claims of inaction and unfair treatment.

To help us combat substance abuse, go to www.LiveDrugFree.org and click on "Donate!"