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Law Enforcement Action Forum NEWSLETTER



"Reasonable Suspicion" Drug & Alcohol Testing

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It Doesn't Need to be Complicated

This issue of the LEAF Newsletter explores an area of personnel management that has generated a significant number of inquiries over the past six months from law enforcement executives and municipal officials who are members of the MML Pool and Fund. They want to know what they can do if they suspect that a member of the department is under the influence of drugs or alcohol.

Internet sources as well as private and governmental agencies provide a great deal of information that can guide a municipality in establishing a drug and alcohol-testing program. For example, Department of Transportation drug testing requirements have affected almost every municipality, so most departments already have a program in place. However, governmental employers must consider two very important issues in developing a plan or evaluating an existing one. First, they must be aware of the Fourth Amendment concerns relative to search and seizure. Second, they must be careful to protect the confidentiality of the medical information they receive because of the testing. This newsletter offers a brief overview of these as well as other issues that surround testing employees for drugs and alcohol.

An Effective Program Starts With Rules

The following are excerpts from the *Manual for Law Enforcement Risk Control*, Chapter 11, "Sample Rules for Law Enforcement Operations". You can find the Manual on the web at mml-leaf.org.

- 4:2 Requirements for Compliance: All personnel of the Department shall be responsible for all written directives. Failure to comply with any applicable directive may be cause for disciplinary action.
- 4:3 Violation of Rules / Reporting Violations:
- A. Personnel shall not commit any act that constitutes a violation of the written directives of the department.
 - B. All personnel are required to report any observation or information received which constitutes a violation of the written directives of the department.
- 4:14 Alcoholic Beverages and Controlled Substance in [Township, City, County, etc.] Installations: Personnel shall not store or bring into any [Township, City, County, etc.] facility or vehicle, alcoholic beverages, controlled substances or narcotics except such alcoholic beverages, controlled substances, or narcotics which are held as evidence or pharmaceuticals that have been prescribed by a licensed medical professional.

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4:15 Possession and Use of Controlled Substance/Narcotics Personnel shall not possess or use any controlled substances or narcotics, except when prescribed in the treatment of an employee by a physician or dentist. When controlled substances or narcotics are prescribed for personnel while on duty, a supervisory officer shall be notified.

4:16 Use of Alcohol, Drugs, Narcotics or Over the Counter Medications on Duty or in Uniform:

- A. Personnel shall not consume intoxicating beverages while in uniform or on duty except in the performance of duty and while acting under proper and specific orders from a supervisory officer.
- B. Personnel shall not appear for duty, or be on duty, while under the influence of intoxicants, drugs, narcotics or medications to any degree whatsoever, or with an odor of intoxicants on their breath.

4:45 Medical Examinations, Photographs and Line-Ups: Upon the order of the [Chief of Police, Sheriff, Director of Public Safety] or his designee, personnel shall submit to any medical, ballistics, chemical or other tests, photographs, or line-ups. All procedures carried out under this subsection shall be specifically directed and related to a specific internal investigation being conducted by the Department.

These rules were originally published in 1994. However, the process of enforcing them has evolved since passage of the federal Drug-Free Workplace Act during the Reagan administration (1988). The Act provides that federal grant recipients must certify that they will provide a drug free workplace. There are several education and training provisions that employers must meet, including notification of convictions of employees for drug offenses in the workplace. The Act's provisions do not apply to law enforcement if the head of the agency determines that compliance would interfere with the agency's undercover operations. Considering the many federal grants that departments are getting today for schools, officers and Homeland Security, it would be difficult for most to invoke the exemption.

The NO and YES of Mandatory Bargaining

The most frequently asked question about drug and alcohol testing was whether a department has to negotiate the ability to test if they have reasonable suspicion to believe

that an employee is under the influence of alcohol or drugs. The short answer is no. You do not have to negotiate the ability to test an employee if you have reasonable suspicion as long as you have existing rules that prohibit the behavior. Having said that, the long answer is yes. You should negotiate the type of testing that you will use and come to agreement on how you will interpret and apply the results.

As with the development of reasonable suspicion in any criminal case, the employer must be able to articulate the specific irregular or inconsistent behavior that affects the employee's performance. In order to articulate a behavior as being irregular or inconsistent, employers must also establish that their staff responsible for such decisions has been trained to identify this type of behavior. In past LEAF Newsletters we have discussed the importance of providing staff training in the areas of identifying substance abusers and the mentally ill in public. The same scenario applies here. It is important that the person responsible for identifying the behavior also understand what the protocol for handling the situation is and what questions should be asked.

The National Labor Relations Act, Section 8(d) requires the collective bargaining of wages, hours and other terms and conditions of employment. As far back as 1987 the General Counsel of the NLRB concluded that drug and alcohol testing is a subject of mandatory bargaining. This pretty much limits the ability of an employer to establish a random drug and alcohol program without union representatives having the opportunity to offer their opinions. It is not very difficult to understand why this ruling has been in place for many years. Testing for drugs or alcohol usually involves an invasive process to obtain breath or body fluids from the employee. The courts have long held that these types of processes fall within the realm of the Fourth Amendment protection against unreasonable search and seizure. By coming to an agreement on the procedure an agency will use for drug and alcohol testing, all sides ensure that their best interests are preserved and documented.

LEAF has provided sample rules that require an officer to submit to testing. These rules are enforceable under the proper circumstances. What most departments do not have but need to establish before they can take action is a procedure that specifically addresses the details of how the agency will perform and analyze drug and alcohol tests. This is of the utmost importance if the action is going to affect the job rights of an employee.

If a department disciplines an employee and the disciplinary action goes to arbitration, the arbitrator will look for:

1. The existence of a rule that regulates employee behavior when it comes to the use of drugs and alcohol as well as documentation about the specific behavior that violated that rule,
2. Evidence that the department applies its rule fairly and consistently,
3. Proof that the rights of the employee are protected,
4. Proof that the process the department's uses to determine the presence of drugs or alcohol in the employee's system meets current industry standards for integrity and analysis,
5. Proof that the department bargained its procedure as a term and condition of employment with union representatives.

The Investigation

This is where the waters get cloudy. Most departments have a rule similar to the following one from Chapter 11, Sample Rules for Law Enforcement Operations:

- 4:20 Violation of an Order: Personnel shall promptly obey any lawful orders of a Department supervisor. This will include orders relayed from a supervisor by an employee of the same or lesser rank.
- 4:44 Truthfulness: All personnel shall be truthful in all respects, in their conduct or actions, related to their employment and operations of the Department.

Some individuals would argue that once you ask an employee if he or she has consumed any alcohol or a drug an internal investigation has begun. It is important that the person conducting the inquiry follow the steps outlined in the department's internal investigation policy and any steps outlined in an applicable labor agreement. Departments must adhere strictly to procedure and maintain the terms of the labor agreement because there is a high probability that the employee is going to be compelled to answer questions and may be subject to disciplinary action. Many labor agreements require that employees have an opportunity to have a representative with them during questioning.

Have a Procedure in Place

Departments must document alcohol and drug testing in a procedure. This ensures that everyone understands what the department is going to do if a situation should arise. It also demonstrates to an arbitrator that the Department is doing the right thing. The procedure should contain the following:

- A restatement of departmental rules that pertain to drug and alcohol use.
- A firm statement that refusing to submit to a test or positive tests are grounds for discipline up to and including dismissal.
- A definition of what "reasonable suspicion" means.
- Identification of the methods that the department may use to test an employee (breath, blood, urine).
- A statement indicating that testing will include alcohol and the specific drugs listed in the procedure.
- Identification of the medical facility that will collect the sample.
- Instructions on how the department will collect samples and will preserve them using standards of evidence.

The U.S. Department of Transportation and 49 CFR Part 40 are good sources to follow for collection and testing facility criteria.

- Instructions that samples drawn should be of sufficient quantity to allow for independent testing at the employee's expense.
- Identification of the Medical Review Officer who will receive and interpret the test results. The MRO is also responsible for evaluation of claims that a medical condition or over the counter and prescription drug caused false positives. Departments without a designated MRO should establish this position.
- Include provisions for the confidentiality of the information obtained through testing.
- Allow for due process and, if applicable, Employee Assistance Program intervention.

It is extremely important for a department to involve municipal legal counsel as it develops the rules and procedures. To assure the best defense of any action taken under the procedure, any individuals who may be involved in administering the procedure must receive training specific to it. In addition — as always — departments must provide updated training annually and document it.

The alcohol and drug testing process is not very complicated. Nevertheless, like the rules of evidence, it does have some areas that must be precise. Once the initial procedure is developed, the affected labor organizations need to receive a copy for their review and input. The negotiation process in establishing a reasonable suspicion testing process is more a matter of protecting the employee's civil rights than it is an issue of job function. Reasonable suspicion alcohol and drug testing affects employees very differently than random drug testing does. It is based on observable behavior that can be defined. It is much less invasive than randomly choosing someone to provide breath or body fluids.

Significant information on drug and alcohol testing practices and policies can be found on the Web at the US Department of Transportation's site (<http://www.dot.gov/ost/dapc/>) and at the Substance and Mental Health Services Administration's site (<http://workplace.samhsa.gov/>) as well as other sites on the Internet. Any municipality owning vehicles that require the operators to have a Commercial Drivers License should already have a policy in place or be involved with a consortium such as the one through the Michigan Municipal League. Do not reinvent the wheel when developing rules and procedure for reasonable suspicion. Keep it simple and specific to the technical testing criterion that is needed.

While compliance with the loss prevention techniques suggested herein might reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our readers are encouraged to consult with their attorneys for specific legal advice.

The LEAF Committee of the Michigan Municipal League Liability and Property Pool and Workers' Compensation Fund continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. **The Manual of Law Enforcement Risk Control can be found on the Web at mml-leaf.org.**

Do not hesitate to contact the Michigan Municipal League's Risk Management Services at 734-669-6344 or MML Loss Control Services at 800-482-2726, for your risk reduction needs.

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