

Workplace Drug Testing: Employer Has the Duty to Provide Information For Bargaining

Clara Oleson, University of Iowa Labor Center

Drug testing of private sector employees is a mandatory subject of bargaining¹. This gives the union the right to request from the employer information necessary to carry out its bargaining obligation. The failure to provide information constitutes a violation of the NLRA, Sec. 8(a)(5)²

“Unions have a broad right to information relevant to the negotiation and administration of the collective bargaining agreement. This obligation is based on the principle that the employer’s duty to bargain includes the duty to provide the union with the information it needs to engage in informed bargaining.”³

The following questions serve various direct and indirect purposes and may be used in various combinations at various times in the process of bargaining. Some questions are designed to disclose the nuts n’ bolts of a proposal, others to uncover the employers’ definition of the problem so the union can determine if the employer understands the problem and whether a drug testing policy will really solve it. Other questions may make the employer seriously consider the ramifications of a drug testing policy, including cost, implementation problems and impact on employee morale. Also, questions which have not been answered can delay.⁴ Distribution of the questions to members can educate them as to the complexity of the drug testing issue and the seriousness of the union’s efforts to safeguard their interests.

¹ See “Guideline Memorandum from the Office of the General Counsel of the NLRB on Drug and Alcohol Testing of Employees”, September 8, 1987.

² NLRB v. Acme Industrial Co., 385 U.S. 432, (1967)

³ Feldacker, Bruce, Labor Guide to Labor Law, Third Edition, Prentice Hall, p162

⁴ Impasse is not reached if there remain unanswered questions put forth by the union which are relevant to the mandatory subject of bargaining. The employer may only unilaterally implement its final offer after impasse. Feldacker, Bruce Labor Guide to Labor Law, Third Edition, Prentice Hall, p. 164

I. QUESTIONS ABOUT THE PURPOSE OF THE PROPOSED DRUG TESTING POLICY:⁵

General questions to determine the scope of the policy envisioned by the company, their perception of the problem of substance abuse in the workplace and the reasonableness of the policy.

The use of the word drug in any question includes alcohol and legal and illegal drugs, unless otherwise noted.

1. Have you conducted or have you caused to be conducted a needs assessment of the workplace to determine what, if any, substance abuse policy is needed?
2. Does the company feel it is condoning drug abuse if it does not have a workplace drug testing policy?
3. Please indicate if any of the reasons listed below are your reasons for doing drug testing?

	Yes	No
Reduce accidents at the workplace	_____	_____
Increase productivity at the workplace	_____	_____
Reduce the use of illicit drugs in the community at large	_____	_____
Reduce the use of the company health care plan	_____	_____
Reduce absenteeism	_____	_____
Deter illegal drug use	_____	_____
Symbolic evidence of corporate responsibility	_____	_____
Increase overall organizational effectiveness	_____	_____
Reduce damage to company property	_____	_____
Demonstrate the company's moral standards	_____	_____
Reduce Workers' Compensation costs	_____	_____
Stop sale of illegal drugs on company property	_____	_____
Stop possession of illegal drugs on company property	_____	_____
Stop distribution of illegal drugs on company property	_____	_____

For each of the reasons you have checked yes, please provide documentation that drug testing will ease or cure the problem.

⁵ Elkouri, Frank and Elkouri, Edna Asper, Resolving Drug Issues, Bureau of National Affairs, Inc., Washington, D.C., 1993, p.240. The existence of a drug problem in the workplace is one factor an arbitrator will consider in a drug testing arbitration case, but the rationale for the drug testing policy will, more importantly set the scope of the employer's authority to reach into off-duty conduct to protect the reputation of the employer or to bolster their position as a fighter in the "War on Drugs."

4. Does the company believe that a drug testing policy would cut down on lost time, sick days or tardiness? If yes, please provide the evidence upon which you rely for that belief, including but not limited to titles of books, articles, etc. and names and addresses of organizations, and/or consultants whose information created that belief.
- 4a. Do you know how many lost hours in the past twelve months, if any, were do to employee substance abuse?
If no, do you have any program in place or in the planning stage to make this determination?
If yes, how many of those lost hours came from employees in the bargaining unit?
If yes, how many different individual employees were involved in accumulating these lost hours?
If yes, what drugs were involved ?
5. Does the company believe that a drug testing policy would cut down on accidents? If yes, please provide the evidence upon which you rely for that belief, including but not limited to titles of books, articles, etc. and names and addresses of organizations, consultants whose information created that belief?
- 5a. Do you know how many accidents, if any, in the past twelve months, were due to employee substance abuse?
If no, do you have any program in place or in the planning stage to make this determination?
If yes, how many of those accidents came from employees in the bargaining unit?
If yes, how many different individual employees were involved in those accidents, please indicate whether they were victims or perpetrators of the accidents and what drugs were involved.
6. Does the company believe that a drug testing policy would increase productivity? If yes, please provide the evidence upon which you rely for that belief, including but not limited to titles of books, articles, etc. and names and addresses of organizations, consultants whose information created that belief.
If yes, please provide any documentation as to how you would measure the relationship between productivity and a drug testing policy?
7. What value, if any, does drug testing have to the company's image?
- 7a. Does the company belong to any organizations which engage in legislative lobbying on drug testing in the workplace?
- 7b. Have any corporate executives given talks, workshops or presentations about drug testing in the workplace?
- 7c. Has the company paid for any advertising in the last twelve months on the issue of drug use or drug testing?
- 7d. Has the company engaged in any community programming about drug use or drug testing in the last twelve months?

7e. Has the company attended any programs in the last 6 months about drug use or drug testing in the workplace?

8. What is the nature of the “drug problem” that your policy is attempting to address?
8a. What drugs are involved?
9. Please provide any evidence, excluding personally identifiable information, that drugs are being sold or transferred at the workplace or have been sold or transferred in the past twelve months.
10. Please provide any evidence, excluding personally identifiable information, that illegal drugs are being used at the workplace or have been used in the past twelve months.
11. Please provide any evidence, excluding personally identifiable information, that legal drugs are being used illegally at the workplace or have been used in the past twelve months.
12. Which of the following alternatives to workplace drug testing, if any, have you investigated?

Yes

- | | |
|--|-------|
| Training supervisors to detect performance problems that may affect safety | _____ |
| Performance testing, e.g., mechanical aptitude tests | _____ |
| Employee Assistance Programs | _____ |
| Health Promotion Programs | _____ |
| Educational Programs aimed at preventing or reducing drug use | _____ |
| Programs to reduce employee turnover | _____ |
| Programs to reduce employee theft | _____ |
| Programs to reduce employee stress | _____ |

II. QUESTIONS ABOUT THE ECONOMICS OF THE DRUG TESTING PROPOSAL

1. Will any state economic development monies, for example from the Iowa Industrial New Jobs Training Program, be used for paying for any part of the drug testing policy?
If yes, please identify the program, the amount of funds and the mission of the program.
2. Has the company signed a contract with any entity, e.g. hospital, medical laboratory, to devise a substance abuse policy, conduct and/or evaluate drug tests?
If yes, please provide a copy of the contract or agreement.
3. Has the company investigated any proposals from any entity, e.g. hospital, medical laboratory, medical supply outlet about drug testing in the workplace?
4. Has the company investigated any proposals from any entity, public or private, about educating employees of the bargaining unit about the use of drugs, signs of substance abuse, availability of substance abuse evaluation and treatment programs and/or drug testing in the workplace?
If yes, please identify the entity and give a general description of the program and its costs.
5. Are the costs of the drug testing program going to be paid from existing budget allocated to health and safety issues or is additional money going to be budgeted for the drug testing program?
6. What plans, if any, exist to evaluate the cost benefit of the drug testing policy in twelve months, i.e. do the monetary benefits outweigh the monetary costs?

III. QUESTIONS ABOUT THE RECORD KEEPING AND PRIVACY ASPECTS OF THE DRUG TESTING PROPOSAL.

1. Will information about the time, date and results of drug tests performed on bargaining unit employees be kept confidential?
If yes, how do you plan to maintain confidentiality of this information?
2. When, if ever, are the results of the drug tests destroyed? If they are stored in a computer, please provide the protocol by which they will be erased from back up systems? How are paper records destroyed, e.g., shredded, sent to land fill?
3. Does the company plan to share with any individuals outside the company, e.g., police, other employers, the results of drug tests performed on employees of the bargaining unit or former members of the bargaining unit?
4. Please identify all the means by which the results of the drug tests might be communicated to the company, e.g., telephone, e-mail, mail, fax and what the company plans are to keep these communications confidential?
 - 4a. Will any results of drug tests on bargaining unit employees be stored in a computer?
If yes, what computer security mechanisms will be employed to protect the confidentiality of the results so stored?
5. What penalties, if any, might a bargaining unit employee suffer if he/she disclose the results of a drug test, including their own?
6. As part of the company's drug testing policy, may searches of a bargaining unit employee's person, locker or car be undertaken?
If yes, please identify the type of search and the entities who will conduct the search, e.g., company security, outside contractors, police, sheriff.
7. As part of the company's drug testing policy, may video surveillance of a bargaining unit employee's work area, home, automobile or public space use be undertaken? Please explain.
8. As part of the company's drug testing policy, may law enforcement or private security firms to work as undercover informers in the workplace?
9. As part of the company's drug testing policy, will any law enforcement personnel or equipment be used? e.g. a breathalyzer machine at the local jail, off-duty police working as security personnel at the workplace.

10. Under what circumstances, if any, will the company allow the direct observation of the act of urination during the collection phase of urinalysis under the drug testing policy?
11. Under what circumstances, if any, will the company allow the direct observation of the act of urination by a member of a sex different than the donor?
12. Under what circumstances, if any, will the company allow the video taping of the donor's act of urination?
13. Please identify to what groups or individuals, if any, the results of the drug tests will be reported or communicated, e.g., the Governor's Substance Abuse Policy Institute. If this type of communication is done, what means will be used to protect the general reputation of the employees of the bargaining unit from the stigma of being considered drug abusers?
14. What training, if any, will be done as part of the drug testing program to educate employees as to the law of defamation and invasion of privacy for the disclosure of information about employee alleged drug test results?
15. What provisions, if any, will be in place to assure the dignity of the worker, from collection through notification of the results, who submits to a drug test?
16. What individuals, trained in the issues of drug testing in the workplace, will have access to the results of any drug tests performed on bargaining unit **employees**?
17. Which individuals, untrained in the issues of drug testing in the workplace, will have access to the results of any drug tests performed on bargaining unit employees?

IV. QUESTIONS ABOUT THE CIRCUMSTANCES WHICH PROMPT THE COMPANY TO ORDER AN INDIVIDUAL TO SUBMIT TO A DRUG TEST

1. Please identify any federal law, rule or regulation or any state law, rule or regulation which requires you conduct drug testing of bargaining unit employees. Further, please identify what jobs in the workplace come under this requirement.
2. Will the company, under any circumstances, rely on information supplied by unidentified informants to ask a bargaining unit employee to take a drug test, e.g. a telephone report from an unidentified individual about someone's state of impairment.
If yes, identify under what circumstances you would rely on unidentified informants and what procedures you would have in place to assure reliability of the information so received.
3. Will the company, under any circumstances, rely on information supplied by identifiable informants to ask a bargaining unit employee to take a drug test?
If yes, under what circumstances would the company be prepared to reveal the identity of the informant, e.g., grievance investigation?
4. Will supervisors be trained to detect substance abuse in the workplace, e.g., distinguishing between substance abuse problems and other medical conditions?
If yes, how many hours will the training involve, who will do the training and how often will it be done?
5. If an individual refuses to take a drug test because of religious reasons, is the test result reported as positive, negative or invalid? What disciplinary action, if any, might the individual expect?
6. If an individual refuses to take a drug test because of reasonable concerns about the accuracy and reliability of the drug tests, is the test result reported as positive, negative or invalid? What disciplinary action, if any, might the individual expect?
7. If an individual refuses to take a drug test because he/she believes he/she is being singled out because of union activity, is the test result reported as positive, negative or invalid? What disciplinary action, if any, might the individual expect?
8. If an individual refuses to take a drug test because he/she believes he/she is being singled out because of the personal animosity from a supervisor, is the test result reported as positive, negative or invalid? What disciplinary action, if any, might the individual expect?

9. What happens to an individual who refuses to take a drug test because he/she believes he/she is being singled out to take a drug test because of having exercised legal rights, e.g., filed a Workers' Compensation claim?
10. What happens to an individual who refuses to take a drug test because he/she has fears that the drug test will reveal their usage of legally prescribed medications, e.g. contraception pills?
11. Will a union representative be notified before any drug test is administered?
12. Will the donor have the right to have a union representative present at the collection sight of the drug test?
13. Under what circumstances, if any, might a bargaining unit employee be asked to take a drug test outside of his/her normally scheduled hours?
14. What accidents, if any, would prompt the company to order a bargaining unit employee to be drug tested?
15. Under what circumstances, if any, would a bargaining unit employee be asked to take a drug test if he/she were the victim of a workplace accident?
16. What records or documentation would a supervisor be required to create before he/she asks an employee to submit to a drug test?
17. What records or documentation would a supervisor be required to create after he/she asks an employee to submit to a drug test?
18. Under what circumstances, if any, could an employee require a supervisor to submit to a drug test?
If the answer is never, please describe what employees are supposed to do if they have a reasonable belief that their supervisor is impaired due to substance abuse.
19. Before an employee is required to submit to a drug test, will he/she be allowed to fully consult with a union representative educated in workplace drug testing?
20. Before post-accident drug testing is done, will you require evidence that the employee caused the accident?
21. Do you plan to base your decisions about violations of the drug testing policy, at least on some occasions, on direct observation of observable phenomena while at work? If yes, what training, if any, will the observers have in detecting drug abuse or misuse? If no, how will the observers distinguish between symptoms which might be related to diabetes, eye disorders, stress or chronic fatigue syndrome and those related to drug use or abuse?

V. QUESTIONS ABOUT THE TESTS TO BE USED AND THE THRESHOLD AMOUNTS OF DRUG METABOLITES TO BE USED AS DEFINING A POSITIVE TEST.

1. Please identify what drugs or drug metabolites will be tested for under the proposed drug testing policy.
2. For each drug identified in question 1 above, please indicate what screening and confirmatory test will be employed under the drug testing policy for each drug or its metabolite. Please identify whether the Food and Drug Administration has approved the identified testing mechanism, if you know.
3. For each drug identified in question 1 above, please indicate the cut off levels of drug or drug metabolite, the screening, confirmatory and reanalysis test will identify as a positive result.
4. For each of the drugs identified in question 1, please indicate what level of drug or its metabolite in the collected sample indicates drug use? Please provide evidence to support your opinion.
5. For each of the drugs identified in question 1, please indicate what level of drug in the collected sample indicates work impairment. Please provide evidence to support your opinion.
6. For each of the drugs identified in question 1, please indicate if you can make any assertion as to time of previous drug use. For example is the following a valid statement: 200 ng/ml of THC indicates marijuana use in the previous 8 hours.
7. If your policy is to treat as a positive test any evidence of drug in the collected specimen, i.e. a zero tolerance approach, will this be the same for illegal and legal drugs, e.g., marijuana and Tylenol with codeine?
8. The concentration of drug in a urine sample below which the assay (drug screening or confirmatory test) can no longer be considered reliable is the “sensitivity” limit. The “cutoff” point is the concentration limit that will actually be used to assay samples and below which tests will be considered negative. Please advise of the manufacturers cutoff and sensitivity limits of their assays for each drug or its metabolite identified in question 1.
9. What company policy, if any, will be used to eliminate false positives and false negatives in the screening and confirmatory tests?

10. What is the company understanding of the circumstances under which a false positive test result might occur?
11. Will the company provide brochures to all people required to take a drug test detailing the extent to which other drugs or substances cross react with the test under consideration?
12. Please detail the role, if any, of the Medical Review Officer (MRO), in the drug, testing program and include the identification and qualifications of the MRO, the physical location of his/her professional practice and the means, if any, by which a bargaining unit employee might have a face-to-face consultation with the MRO about the drug test to which he/she has been asked to submit.
13. Please indicate your understanding of the ethical obligation of the MRO to maintain confidentiality of information received from a bargaining unit employee in the course of a drug testing situation.
14. Does the company assert that the level of “intoxication” of an individual due to marijuana use be gauged by urinalysis? Can his/her “use pattern” be determined? If yes, please provide the documentation which is the basis for your belief.
15. Do you agree that the test systems used in the drug testing policy should be based on state-of-the-art methods and best-available-technology? If yes, what assurances can you make that such methods and technology will be used?
16. What procedure, in any, will be in place if the MRO does not speak the same language as the employee?
17. If an individual has drug or drug metabolite in their urine due to taking a prescription drug of a relative, e.g., mother or spouse, and the evidence supports this contention, will the test result be reported as positive, negative or invalid?
18. The 1998 Iowa Drug Testing Statute allows the Medical Review Officer (MRO) to be a chiropractor. Under what circumstances, if any, would you rely on a MRO who is not a licensed physician, as required by the federal DHHS Mandatory Drug Testing Guidelines?
19. What laboratory or laboratories or what company will set up the tests and who is the person we can contact to discuss the lab procedures and the quality assurance and performance testing programs?
20. Does the employee have to sign any forms as part of the testing procedure and is the signature of those forms a condition of employment? If any forms are used, please provide us with a copy.

- 21.** Is one of the requirements of your laboratory selection that the lab participate in a quality control plan/proficiency testing program from the American College of pathologists or the Joint Committee on the Accreditation of Hospitals? If no, indicate the methods which will be used to guarantee quality standards?
- 22.** Did the company consult with any experts or for-profit organizations in developing its policy? If yes, please give us their names and addresses and describe their qualifications.
- a.** How many drug tests, if any, has the company done in the last three years, and what have the results been, that is: the number of confirmed positives, and the number of negatives for each substance
 - b.** the action which triggered the testing
 - c.** action which was taken after the test results were known
 - d.** the rate of positive test results on the basis of sex and race
- 23.** Has the company contracted for or performed any internal research regarding drug levels in the body as those levels impair a person's ability to function on the job? If yes, please identify such firms and/or experts and provide the details of any contracts or working agreements with such firms and/or experts.
- 24.** If there is a written protocol/procedure manual or guidelines for the sample collection for drug test, please provide a copy to us.

VI. QUESTIONS ABOUT RANDOM DRUG TESTING

1. Do you plan to conduct unannounced drug testing allowed under the 1998 Iowa drug testing statute? If yes, please describe the “neutral and objective selection process” which will be used to select employees to be tested.
2. Please identify the entity “independent from the employer” who shall select the employees to be tested.
3. Please identify the software program, manufacturer, distributor’s name, address and telephone number which shall generate random numbers for the selection process
4. What percent of the bargaining unit shall be targeted for unannounced drug testing? Please provide the decision making criteria for that decision, including economic implications of various testing options. Please identify all sources you used to fix that percent.
5. In how many cycles per year will random testing be done?
6. For the percent and the frequency of cycles you have selected, what is your understanding of how many employees are likely to be selected to be tested more than once a year?
7. What quality assurance mechanisms shall be in place to assure the accurate running of the computer generated random number selector?
8. What security means will you employ to maintain the confidentiality of the identity of those employees selected for random testing?
9. Please identify what pools of employees you will set up for random testing. Generally describe the pools and indicate what jobs will be in which pools, including whether management employees will be in pools with bargaining unit employees, will be in their own pool, or will not be tested.
10. Do you plan to conduct drug tests of employees during drug or alcohol rehabilitation? If so, under what criteria will the decision to test be made? If yes, will a substance abuse counselor or a similarly trained professional make the decision to test employees during rehabilitation? Will that person advise management as to the results of any tests during rehabilitation? If a substance abuse counselor or a similarly trained professional will not make the decision, please advise of the job title of the person who will be making the decision.
11. Do you plan to conduct drug tests of employees after completion of drug or alcohol rehabilitation? If yes, under what criteria will the decision to test be made? If yes,

will a substance abuse counselor or a similarly trained professional make the decision to test employees after completion of drug or alcohol rehabilitation?

- 12.** How will you identify employees who have completed drug or alcohol rehabilitation? Will you ask employees to self-report their rehabilitation history?
- 13.** What implications, if any, does a decision to test during or after drug rehabilitation have in light of the Americans with Disabilities Act?
- 14.** Will employees who want to enter drug rehabilitation be able to use the Family and Medical Leave Act?
- 15.** Will employees who want to enter drug rehabilitation be able to use sick leave, vacation, unused personal leave or a general leave of absence?
- 16.** If you have an estimate of the number of bargaining unit employees who will be absent due to rehabilitation, on a yearly basis, please provide.
- 17.** To evaluate the pool into which bargaining unit employees may be placed, please advise if the following employees, under the 1998 Iowa drug testing statute, are “actively involved in the day-to-day operations of the business”:
all chief executive officers
 - a.** all vice-presidents
 - b.** all supervisors
 - c.** all managers
 - d.** any other officer of the employer
- 18.** If you have identified any of the persons in the previous questions as being actively involved in the day-to-day operations of the business, please advise of the reasons they will or will not be included in pools with bargaining unit workers.

VII. QUESTIONS ABOUT COLLECTION SITE PROCEDURES

1. Will you follow the collection site procedures of the Department of Health and Human Services, “Mandatory guidelines for Federal Workplace Drug Testing Programs,” as amended?
2. If no, what training, if any, shall the collection site person be required to have?
3. Shall the collection site person be in a pool to be randomly tested?
4. If the collection site person does not speak the same language as the employee to be tested, what arrangements, if any will be made to have a translator present?
5. What chain of custody form do you intend to use, starting at the collection site?
Please provide a sample of the form you intend to use.
6. How many collection sites will you have? Please give the address of each collection site you intend to use.
7. Please describe what materials, equipment and supervision you intend to have at each collection site?
8. For each collection site, please describe the temporary storage you will provide for collected samples, including time samples will be stored.
9. Please describe the procedure for packing and handling the collected samples for transportation to the drug testing laboratory.
10. What security procedures shall be in place for the collection site?
11. Will each collection site be dedicated solely to drug testing? If not, how will the portion of the facility dedicated to sample collection be secured?
12. Who will execute the chain of custody forms at the collection site?
13. Will handling and transportation of samples from one individual or place to another be accomplished through chain of custody procedures? If yes, please describe those procedures. If not, please explain why.
14. What effort, if any, will be made to minimize the number of persons handling specimens at the collection site?
15. Who will be permitted at the collection site when urine specimens are collected?

16. Will you allow direct observation of the sample urine collection if you have reason to believe that a particular donor may alter or substitute the specimen to be provided? If yes, what facts and evidence will you rely up to form a judgment that the specimen may be in danger of being altered or substituted?
17. What precautions shall be taken to ensure that specimen not be adulterated or diluted during the collection procedure?
18. What precautions shall be taken at the collection site to assure that the information on the collected specimen bottle or container can identify the donor from whom the specimen was collected.
19. The DHHS Mandatory Testing Guidelines sets out “minimum precautions” to assure that unadulterated specimens are obtained and correctly identified at the collection site. Will you follow these guidelines?
20. Shall the collection site be accessible to peoples with disabilities and meet the accessibility guidelines of the Americans with Disabilities Act?
21. How shall the collection site person handle the split specimen samples?
22. Will specimens be placed in containers designed to minimize the possibility of damage during shipment? If yes, please provide a sample.
23. Will the collection site person retain the chain of custody form or pack it in the package with the specimen going to the drug testing lab?

VIII. QUESTIONS ABOUT REHABILITATION

1. Under what circumstances, if any, would an employee with a positive drug test result be allowed to undergo substance abuse evaluation and treatment?
2. If an employee successfully completes rehabilitation, after a positive drug test, what monitoring, if any, would occur of the employee's work performance which would be different than if the employee had not been in a rehabilitation program?
3. If an employee is to have some opportunity for rehabilitation after a positive drug test, will the employee be able to choose the rehabilitation program? If not, please identify the rehabilitation program(s) the employee shall be expected to use.
4. If an employee is in rehabilitation, what information shall be provided to the employer during that treatment about the employee's progress?