



Presented below is a hypothetical fact pattern based on a compilation of questions related to hiring issues received by Associated Industries' In-house Counsel.

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Additionally, this material reflects the current state of the law at the time of development. Where specific legal issues arise, recipients or readers should seek private legal counsel.

THE DILEMMA – PART II *(continued from last month)*

John has successfully completed his pre-employment medical exam. Because the facility that the employer uses to process its drug tests is operating weeks behind schedule, the employer has decided to bring John to work in the interim until the results of his drug test are available.

On his second day on the job, John sustains a back injury while moving some boxes in the warehouse, and has now opened an L&I claim. A week later, John's drug test comes back "positive" for prohibited substances.

What can and should an employer do?

ISSUES AND CONCLUSIONS

John was offered a job contingent upon successfully passing the employer's pre-employment drug screen. Had John's test come back positive before he began work, the solution would have been simple; the employer simply withdraws the job offer and moves on to the next candidate.

Unfortunately, the employer allowed John to begin work before getting these results back.

The first issue for consideration is the terms of the employer's Substance Abuse Policy as it applies to employees. Assuming that John has received the written policy, and the testing performed followed the required procedures, the employer should review the consequences outlined by the policy. Most employer drug tests provide for termination from employment for a positive drug screen, and some allow for a "Last Chance Agreement" (either in certain circumstances or at the employer's discretion). The employer should follow its policy accordingly.

If the Substance Abuse Policy calls for termination from employment in every instance of a positive drug screen, then John's employment should be terminated. Allowing him to continue work in light of a zero tolerance policy negates the impact of your policy and may just be the first of many policy violations if employees sense you won't be consistent about following it. It may also create issues of discrimination if not evenly enforced.

If his employment is terminated, John may apply for unemployment compensation benefits, which may be denied as misconduct if the employer has proper documentation in place. The employer should ideally have an acknowledgement of the Substance Abuse Policy that is signed and dated by John and a copy of the positive test result. Even if unemployment benefits are denied, however, the employer has a much more complicated matter to address regarding John's L&I claim.

If John is unable to work for the employer, even if for reasons unrelated to his injury, it is far more likely that his claim will be more expensive and difficult to manage. If the employer has not been totally consistent with its policy enforcement, firing John may look like retaliation for his workers' compensation claim as well.

If the Substance Abuse Policy allows for employees to receive a "Last Chance Agreement" then the employer may consider whether this will be offered to John (or whether the policy requires it be offered).

Under the terms of such an agreement, John should not return to work until he can provide a clean drug test and an assessment from a Substance Abuse Professional indicating that he has gone through a substance abuse evaluation and is complying with the terms of any recommended treatment. John may continue to undergo follow up testing for a period of time after his return as well.

Under no circumstances should John return to work without a clean drug test. His job requires safety sensitive functions and could seriously injure himself, a co-worker, or a member of the public if he performs those duties under the influence of drugs.

The best practice dictates that individuals offered a job contingent on background testing and/or substance abuse testing should never be permitted to begin work until both have been successfully completed.

If an employer finds itself in a time crunch, it is preferable to attempt to work with the drug testing provider to determine whether an initial drug screen may be expedited to allow negative or clear results to be released in a timely fashion. If a result is non-negative, the employer must await confirmation before withdrawing the offer.

For assistance in developing and enforcing your own Substance Abuse Policy, please contact our In-house Counsel.