

# The Legal Strategist

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## TEXAS ESOTERIC FACTS

Dallas' corner of Elm and Houston streets has a sordid history. The building completed there in November 1898 was struck by lightning and burned to the ground in May 1901. By the fall of 1901 it was rebuilt. In that same building 62 years later, Lee Harvey Oswald allegedly shot President Kennedy from the sixth floor.

In this issue of *The Legal Strategist*, the often litigated and hotly contested topic of Drug and Alcohol Testing is discussed. Every employer, no matter how small, should have a compliant Drug and Alcohol Testing Policy; not only to protect the business, but also protect the public at large. A well crafted Drug and Alcohol Testing Policy, along with a broad consent and indemnification will vastly protect the employer from potential litigation.

The Feature Topic is a cursory review. If you would like more information on this, or any other topic previously covered in our newsletter, which can be viewed on *The Legal Strategist* tab of our web site, please contact our office to set up a consultation.

Scott Barrett

## FEATURE TOPIC: DRUG AND ALCOHOL TESTING POLICIES

Under Texas and federal laws, there is almost no limitation at all on the right of private employers to adopt drug and alcohol testing policies for their workers.

Most policies start out by emphasizing in positive terms the need for safety in the workplace and adherence to job requirements and work quality, and go on to cite goals such as improving safety and productivity. The policy should address certain questions:

- ◆ What will be considered a violation? (necessary)
- ◆ Which employees will be covered? (necessary)
- ◆ What disciplinary measures will result from violations? (necessary)
- ◆ Will the company allow rehabilitation? (optional - not required by any Texas or federal law)

Like any policy, a drug and alcohol testing policy should be given in writing to all employees. Employees should sign a written acknowledgment that they have received a copy of the policy. Employers usually make signing such a policy a condition of being hired. While it is common for such a policy to be part of an overall policy manual, it is probably best to have each employee sign a separate form consenting specifically to the search and testing policy.

It would be legal to fire the employee for refusing to sign an acknowledgment of the policy, but that should not be done until and unless the employee has been warned, preferably in writing and witnessed by others, that discharge can result from refusal to sign.

It is legal to test some, but not all, employees, but an employer must be careful. The policy should cover all employees in specific job categories. For example, the company could make all workers who operate machinery or vehicles subject to drug testing, but not require testing of clerical staff. Some employers test only those employees whose jobs are inherently risky. Some companies face mandatory testing as required by law, such as the DOT drug testing regulations for long-haul truck drivers, oil and gas pipeline workers, and so on. Some contracts specify that workers coming into a client's facility will be subject to drug testing. If that happens, the contractor does not also have to test its other employees who do not go onto that client's premises. The main thing is to decide who will be covered, and then to enforce the policy in an even-handed way.

Most companies notify employees that testing positive for drugs or alcohol will result in immediate termination. Some companies allow a chance for rehabilitation and a return to work under probationary conditions, but this type of second chance is not required under Texas or federal law. If a worker is allowed to return to work after a positive test result, it is generally under a "last chance" agreement providing for monthly random tests, a year's probation, and immediate termination for any subsequent positive test result.

Test results should be considered absolutely confidential. Negligent release of test results could result in legal action over issues such as invasion of privacy, intentional infliction of emotional distress, and defamation. Due to the federal law (ADA), it is necessary to maintain such records in a separate, confidential medical file. As a practical matter, the HIPAA privacy rule can make it difficult for employers to obtain specific drug test results from the testing lab. For that reason and others, employers should have employees sign a properly-worded consent form allowing the testing lab to release such results to the employer, and allowing both the testing lab and the employer to release the results to TWC and to any other agency or court dealing with a claim or lawsuit arising from the test.

If you would like more information on how to set up a compliant drug and alcohol testing policy please contact [Scott Barrett](#) to set up a consultation.

\*[http://www.twc.state.tx.us/news/efte/drug\\_testing\\_in\\_the\\_workplace.html](http://www.twc.state.tx.us/news/efte/drug_testing_in_the_workplace.html)

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