

## What's In a Policy – Does Your Drug-Free Workplace Policy Work?

by Nancy N. Delogu, Esq.

Last year, *Drugs Don't Work New Jersey* undertook a survey of in-state employers, to gauge their drug-free workplace policies and practices. We learned that although some smaller responding employers still do not have a written drug-free workplace policy, written policies are just about universal for employers with 100 or more workers. As you might expect, most written policies start by setting out the employer's rules on substance abuse. What is interesting, however, is that although more than 90 percent of those surveyed reported that their policies address the employer's expectations regarding the use of both alcohol and drugs, less than half of the employer policies address off-the-job substance abuse. In other words, most New Jersey employers prohibit drug abuse at work, but don't specifically warn individuals that off-the-job illegal drug activity may also get them into trouble at work. In my view, this is a mistake.

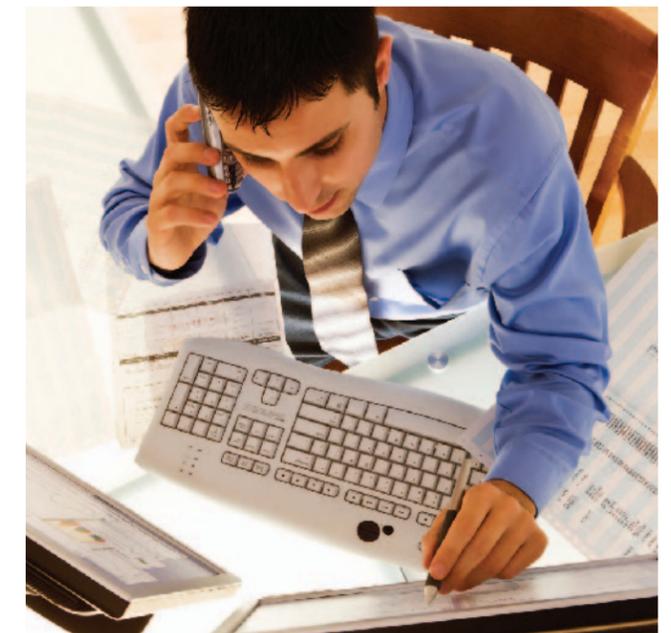
Let's take a look at what most drug-free workplace policies do say about drug and alcohol use and abuse. First, most written policies specifically address the use of alcohol on the job. Most specifically prohibit the use and possession of illegal substances at work or while working. And, in a shift that shows that employers are well aware that prescription medications are being abused in record amounts, four-fifths of the policies now also address the abuse of prescription and over-the-counter medications at work.

Only three in ten drug-free workplace policies address the illegal use of drugs off the job, however. Why is that?

The answer, I think, is that most employers are not all that interested in monitoring employee off-work activities. They'd rather not know, perhaps. They may believe that they have no right to know that their employees are abusing drugs away from work. The fact is, employers can expect their workers to refrain from engaging in illegal activity, and they can take disciplinary action against those who admittedly engage in illegal behavior during their tenure with that employer.

Adopting a policy that makes it clear that the employer does not condone and will not ignore illegal drug-related conduct makes sense from a policy administration perspective – even for employers that have no desire to pry into their workers' activities away from the workplace. Why? There are two reasons. First, most drug tests don't reveal whether the drugs were used at work. Second, at times the employer is confronted with evidence of off-work activity that calls into question that employee's ability to represent his employer as it wishes to be represented.

As we've discussed before, drug testing alone does not a drug-free workplace policy make. For the most part, workplace drug tests are not designed to measure employee impairment. Urine drug tests, for example, measure the



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## Drug-Free Workplace Kit

A revised Drug-Free Workplace Kit was created in January, 2012, updating information based on new policies and procedures established by government agencies and recent court decisions.

The revised Drug-Free Workplace Kit is available for download free of charge to all Members of Drugs Don't Work in NJ!

All five sections can be saved to your local hard drive for easy reference:

[www.DrugFreeNJ.org/DrugFreeWorkplaceKit2011](http://www.DrugFreeNJ.org/DrugFreeWorkplaceKit2011)

### Sections available to download:

#### Introduction

Guidelines for Establishing a Drug-Free Workplace Policy

List of Contents for the Drug-Free Workplace Kit

Acknowledgement of Contributors to the Drug-Free Workplace Kit

#### Policy Development

Action Steps for Establishing/Updating a Drug-Free Workplace Policy

PDFNJ Model Drug-Free Workplace Policies and Procedures

#### Employee Education & Training for Supervisors

Action Steps for Employee Education and Training for Supervisors

Guidelines for Employee Education and Supervisory Training

Program Information on the Free "15-Minute Child Break" Presentation

#### Employee Assistance

Action Steps for Establishing an Employee Assistance Program

Guidelines for an Employee Assistance Program

#### Drug-Testing

Action Steps for Implementing Drug-Testing

Guidelines for Drug-Testing in the Workplace

Contact information, brochures and collection sites from LabCorp of America and Quest Diagnostics Inc.

metabolites of illegal drugs as they are excreted. That means, of course, that the drug has been "processed" and is being broken down into constituent chemicals, some of which are present in urine.

Metabolites of drugs in urine show that a drug has been recently used, but do not show how much drug may remain in the body. For that reason, workplace drug testing typically focuses on establishing that the sample contains evidence of recent drug use at a level that precludes the possibility of passive exposure. In other words, all a positive urine drug

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test demonstrates is that the tested individual recently used a prohibited drug. We can't know whether the use was at work, on the commute to work, at a lunch break, or two days ago at the weekend. Fortunately, because the use is illegal, the employer doesn't need to care.

By prohibiting all illegal activity involving drugs, the employer makes its policy perfectly clear. By being clear, it further avoids debates with employees about when the drugs were used and whether the drug use actually caused the accident that led to the test. It is sufficient that the illegal use occurred.

Years ago, I worked with a large multinational employer that did not specifically prohibit off-the-job illegal drug activity. In-house counsel called to say that a mid-level manager had been arrested for some pretty outrageous behavior in a public place. He was also charged with possession of an illegal drug. The employee's name, and that of his employer, was all over the local news. However, because the employer's policy did not even mention illegal drug activity, and because the employee had merely been arrested, not convicted, the employer was limited in its options to address its concerns. Absent clear language in its policy, the employer's drug-free workplace policy did not authorize the employer to conduct a reasonable suspicion test.

From a legal perspective, there is a significant difference between prohibiting illegal behavior and limiting the use of lawful substances such as alcohol and lawful medications.

Many states affirmatively protect individuals from adverse employment action based upon their lawful use of legal substances. For that reason, employers must treat drug and alcohol use separately under their policies. Rules on alcohol use, then, should focus on when (and if) the employer will permit the use of alcohol, and any expectation that employees not to come to work under the influence of alcohol or with alcohol sufficient affect performance in their systems.

Similarly, rules on the use of prescribed and over-the-counter medications should focus on ensuring that employ-

ees are able to work safely. The Americans with Disabilities Act limits employers from requiring employees to report their legal use of legal medications, unless the employer needs that information for a business purpose and acts on it only to the extent it is both job-related and consistent with business necessity. On the other hand, the use of prescription medication not prescribed for the individual using it is illegal, and employers can test for such use and take adverse employment action on that basis of that use.

Employers can, of course, continue to focus only on drug abuse that actually occurs at work, and this is a valid policy decision. Employers should ensure that their policy has been developed with an understanding of the options available to them and the consequences of their choice.

### About the Author

#### Nancy Delogu

Nancy Delogu is the managing shareholder in Littler Mendelson, P.C.'s Washington, D.C. office. In addition to counseling employers on substance abuse prevention and disability discrimination laws, she helps them with strategic counsel and defense of employment law disputes.

*Notice: This article reflects the opinion of the author and does not necessarily reflect the opinion of Partnership for a Drug-Free New Jersey (PDFNJ). This information should not be construed as legal advice from the author or PDFNJ. Please consult your own attorney before making any legal decisions.*

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DRUGS DON'T WORK IN NJ!**

# 14th Annual Legal Issues of a Drug-Free Workplace

## MEMBER SEMINAR

**FEATURED SPEAKER: Nancy N. Delogu, Esq.**

#### Biography

Ms. Delogu is a recognized authority on federal and state drug-free workplace and drug-testing issues and has drafted dozens of substance-abuse prevention policies, including, Department of Transportation (DOT) mandated programs. She also assists DOT regulated employers to comply with regulations addressing workplace safety compliance and medical certification requirements.

#### Lectures & Presentations

Ms. Delogu is a frequent presenter and trainer on harassment avoidance, conducting lawful investigations and issues relating to drug and alcohol testing. She has testified before the United States Commission of Civil Rights regarding the Americans with Disabilities Act (ADA) and substance abuse. For several years, she has co-taught an introductory course on traditional labor law as an Adjunct Professor at the College of William & Mary's Marshall-Wythe School of Law.

### Hot Topics to be Discussed:

- The impact of prescription drug abuse in the workplace
- Trends in drug use
- Medical marijuana
- The evolution of testing protocols
- Substance abuse and disability claims
- Substance abuse and medical examinations.

**Seminar 8:30 am - 12 pm.**

**Continental Breakfast will be served.**

**Please register by Friday, May 25, 2012 [www.DrugFreeNJ.org/DDW2012Registration](http://www.DrugFreeNJ.org/DDW2012Registration)**

**Limited seating available, first come, first served.**

**If you have any questions or comments please contact:**

**Chris Barton at 973-467-2100, Ext 11 or [Chris@DrugFreeNJ.org](mailto:Chris@DrugFreeNJ.org)**

*This seminar is provided free-of-charge to all  
Drugs Don't Work in NJ! members.*



**Partnership for a Drug-Free New Jersey**  
in Cooperation with the Governor's Council on Alcoholism and Drug Abuse  
and the NJ Dept. of Human Services