

## Collision at the Corner of Intoxicants and Drug Testing in the Workplace

Article By:

Kaitlin L. Robidoux

---

Let's say that one of your employees gets in an accident at work while performing his or her usual job duties. The employee is injured, and you want to know whether to test the employee for intoxicants. After all, you have a substance use policy, and don't want to face a lawsuit or administrative claim alleging that you are responsible for the accident. Can you require the employee to be tested for intoxication?

In short, the answer depends. To begin with, it depends on what state we're talking about, since drug testing laws and regulations vary significantly from jurisdiction to jurisdiction. Let's assume for purposes of our example that the employer is in West Virginia and the accident occurred there. What then are the other issues? Well, there are several.

First, is the employer testing because it wants to rely on the defense of intoxication to a lawsuit or an administrative claim for benefits – or is it testing to enforce its policy? If the employer is testing to rely on the defense of intoxication (i.e., to put the blame on the employee for getting injured while impaired), then before testing, the employer must have a reasonable and good faith objective suspicion that the employee is intoxicated. If it has that suspicion, then the employee may be required to take a blood test solely to determine whether he or she is intoxicated. Note that it must be a blood test – another type of test (for example, a urine test) won't do. Additionally, the blood test must be administered within two hours of the accident.

If the test reveals that the employee had more than five hundredths of one percent by weight of alcohol in his or her blood or used a non-prescribed controlled substance, then the employee is deemed to be intoxicated, and the intoxication is the proximate cause of the employee's injury.

Because it's easy to trip up in this area, here are those requirements again:

1. The employee is injured in the course of and resulting from the employee's employment;
2. The employer has a reasonable and good faith objective suspicion that the employee is intoxicated;
3. The employer may test only for the purpose of determining whether the employee is

intoxicated;

4. The test must be a blood test; and
5. The test must be administered within two hours of the accident.

If the employer isn't just trying to rely on the defense of intoxication by putting the blame on the employee, and also wants to know whether the employee violated the substance use policy, things change. At this point, unfortunately, the water is a little muddy in West Virginia, but there is one main principle which governs.

Employees whose jobs involve public safety or the safety of others may normally be drug tested. The conventional wisdom is to make such testing random in order to avoid a claim of discrimination or retaliation, but this is a "best practice," not etched into law. Therefore, if the employee is in a safety-sensitive position, he or she can be tested after an accident, just as he or she could be tested at any time. If the employee is not in such a position, the employer again is back in the territory of needing to have a reasonable and good faith objective suspicion of intoxication before testing.

Drug testing is so fundamental to all employers, but can be a tricky area – and one which changes. For instance, the West Virginia legislature was very close to passing a much broader drug testing bill in its latest legislative session. The proposed law would have given employers much more freedom to conduct testing in the workplace for a variety of reasons. The bill did not pass, but it's illustrative of how things can change. There also can be landmines in determining exactly what position qualifies as "safety sensitive." Some jobs are obvious, but many are not.

If you are confronted with a drug testing issue in your workplace, consider consulting competent counsel for guidance, rather than make assumptions. Remember, what action you *should* be able to take in this area is often different than the action you *can* lawfully take.

© Steptoe & Johnson PLLC. All Rights Reserved.

---

National Law Review, Volume VI, Number 194

Source URL: <https://natlawreview.com/article/collision-corner-intoxicants-and-drug-testing-workplace>