

Randisi & Associates, Inc.

April 2009 Newsletter

Helping Employers Protect their Workforce, Clients and Reputation Through
Employment Screening, Drug Testing and Skills Testing

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Quotes to Inspire

The actions you take in the first hour of your day will determine your fate for the rest of it. Every one of you has said I'm having a bad day. But none of you has ever completed the sentence, I am having a bad day , and I created it for myself. MY ADVICE: Have a good day. Have a great day. And take responsibility for that. From Jeffrey Gitomer's SUCCESS GitBit

Common Employer Mistake in Employment Screening Not having a random drug testing program in your firm Quest Diagnostics regularly issues an analysis of the over 8 million drug tests they perform annually. Their recent report shows that while drug testing on a pre-

This month we present the following articles for your consideration:

1. The Value of random drug testing
2. If a Position is eliminated, is there a certain amount of time we must wait before we hire again?
3. Motivating Employees in an Uncertain Economy

Information in this newsletter is not intended as legal advice. Please consult legal counsel before taking any actions.

I hope you find this month's newsletter beneficial.

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Value of Workplace Random Drug Testing

Summary of an article By: Josephine Elizabeth Kenney, J.D. Senior Vice President of Compliance Occupational Health Group Employer Services First Advantage January 2009

The Case for Random Testing

Most state laws permit random testing. Of all the workplace test types available, random testing is best suited to maintaining the quality of an organization's workforce and assisting in the

employment basis reveals a 3.5% positive rate, random drug testing results in a 5.7% positive rate. That means random drug testing is more than 60% more effective at identifying illegal drug users. This month's first article discusses the value of a random drug testing program in the workplace.

prevention and deterrence of substance abuse. Notably, a 2007 Substance Abuse and Mental Health Services Administration Office of Applied Studies (SAMHSA) Study *Workplace Substance Abuse and Workplace Policies and Programs* found as follows:

An estimated 29.1 percent of workers with past illicit drug use reported that they would be less likely to work for employers who conduct drug testing randomly, while only 6.9 percent of workers who did not report past month illicit drug use selected this response category.

Goals of Random Testing Deterrence and Prevention

The primary and critically important purpose of Random Testing in a Drug and Alcohol Testing

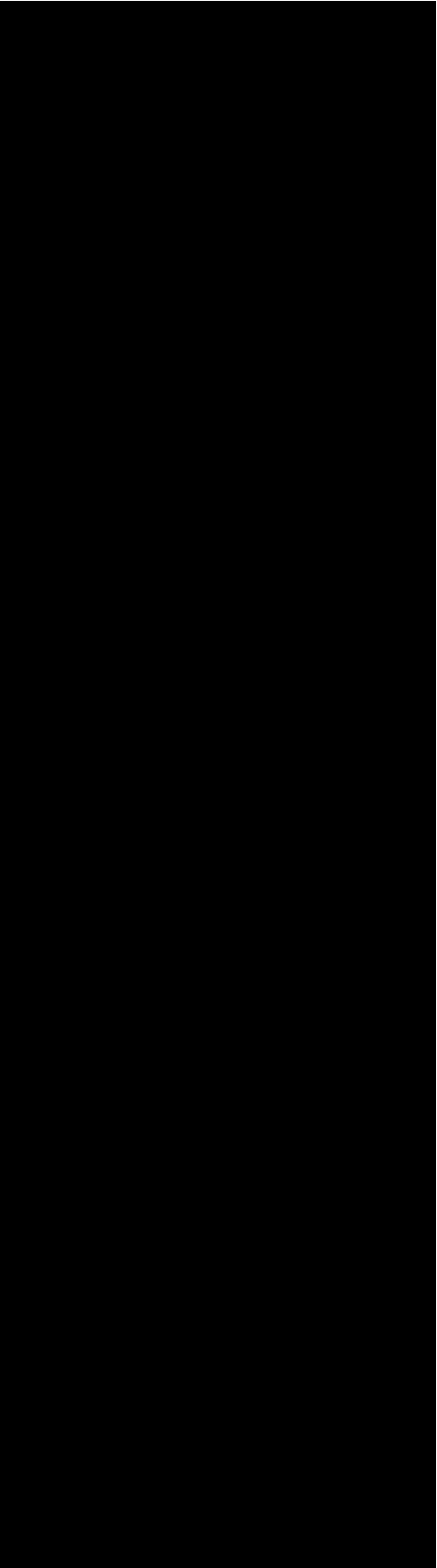
Education and Training programs designed to help co-workers and supervisors identify and support a co-worker's possible or developing substance abuse or alcohol misuse problem without enabling their co-worker by ignoring the issue in an attempt to be helpful also helps.

Thirty-Nine states permit Non-DOT random testing either by a specific state statute, by case law interpretation, or by their failure to comment on the subject. In a Union work environment, random testing is subject to collective bargaining. Beyond the foregoing basic requirement, fourteen states, two cities, and Puerto Rico limit, prohibit or mandate that certain conditions or requirements be met in order to conduct Non-DOT/Regulated/Non-Mandated/Drug Free Workplace testing in their state. West Virginia has case law which makes random testing controversial and therefore somewhat legally risky. United States Department of Transportation mandated testing is not restricted by these state or city legal requirements.

Following is a list of the states and cities that restrict, limit, prohibit, or have special requirements for conducting workplace random drug testing:

States:

- **California**
- **Connecticut**
- **Hawaii**
- **Iowa**
- **Maine**
- **Massachusetts**
- **Minnesota**
- **Montana**
- **New Jersey**
- **New York**
- **North Carolina**

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- Oklahoma
 - Rhode Island
 - Vermont
 - Puerto Rico

Cities:

- San Francisco, California
- Boulder, Colorado

Basic best practices for random testing include the following:

- Unless prohibited by any applicable Federal or State Law, employees may be subjected to unannounced random drug and/or alcohol testing during any working hours and will be included in the pool for selection.
- The selection of the employees to be tested will be done by an independent testing facility or other entity outside a company's control.
- Random selection procedures **MUST** ensure that all employees are treated fairly and equally. The testing should occur on a periodic basis reasonably spread throughout the selection period. Companies reserve the right to determine and also change the percentage of employees to be randomly selected.
- Random testing **MUST** be done using a scientifically valid random number selection method and **everyone in the pool must have an equal chance of being selected in each selection period.**

Important Note: This means that any employee in the pool that has been selected and tested remains in the pool and has a possibility of being tested

multiple times.

- If selecting under U.S. DOT Agency Regulations, the pool may only include safety-sensitive employees but multiple pools are permitted.
- The random pool **MUST** be updated regularly and at a minimum prior to each selection.
- If selecting under U.S. DOT Agency Regulations, an employer must **immediately** place a covered employee in the random pool when hired. This is also a best practice for Non-DOT random testing.
- Random testing **MUST** be spread out over a year and over all work shifts, including holidays.
- Employer **MUST** test each employee selected for random testing during the testing period unless the employee is unavailable for testing for a legitimate reason at any time during the testing period.
- Unlike drug testing, if selecting under U.S. DOT Agency Regulations, alcohol testing may be done only just before, during, or just after the performance of a safety-sensitive job function. For Non-DOT testing the foregoing would be a program administrative decision.
- Random testing **MUST** be unannounced.
- The selected employee **MUST** proceed immediately to the collection site after notification of testing and the notification must be just enough to give the selected employee time to report to the collection site.
- Random testing requires confidentiality so that the selected employees are not given advance warning of testing and the integrity of the process is thereby protected.
- Random testing requires that the employer document and maintain records on its random selection program, including,

current and historical employee pool lists, the random selection process (should be provided upon request by Consortium/Third Party Administrator), the actual random lists, notification time, details of collection, and information on why a selected employee was not tested.

- The U.S. Department of Transportation Secretary of Transportation Office of Drug and Alcohol Policy and Compliance published Best Practices for DOT Random Drug and Alcohol Testing in 2007.

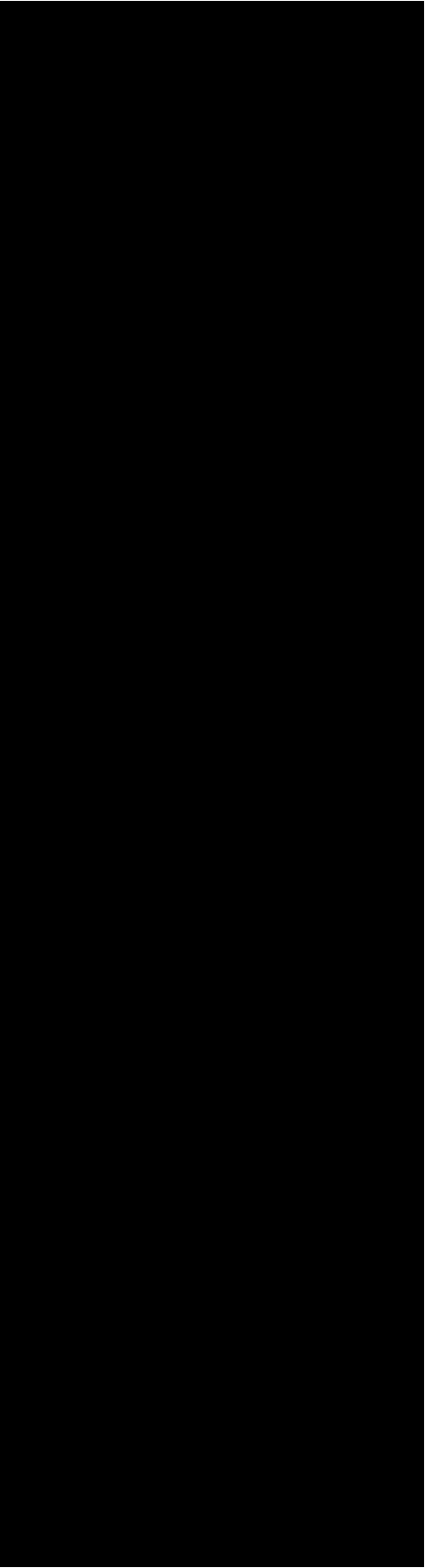
Random Drug Testing Methodology

Best practice is the use of a statistically sound computer based methodology to achieve the selections. Computerized scientifically valid random selections are generally generated by placing individual names with individual identifiers in a pool which is updated just prior to random selection list generation for a particular testing period.

**If a position is eliminated,
is there a certain amount
of time we must wait
before we can hire for it
again?**

Summary of an article in the March 2009 SHRM magazine regarding employment management issues.

While there are no laws that dictate this, there are



reasons an employer should be careful when eliminating a position and then rehiring for it within a short period of time. The main concern: the employer used the elimination as a pretext for what would otherwise be an unlawful termination, and the employee attached to the eliminated position sues for wrongful discharge.

As with all negative employment actions, that reasons for elimination are lawful and justifiable. Therefore, if there truly is no longer a need for the position, and the employer can show the business need for the elimination, it would be accurate to terminate employment for this reason. It would also be reasonable for an outsider to believe this to be a permanent elimination, and not expect the employer to rehire for the position within a short time frame.

However, if the employer does try to rehire and then cannot show the business need for the elimination, it may find itself in legal trouble. In short, if it's the employee that's lacking, do not attempt to use position elimination as a quick fix for a sub par employee, even in stressful economic times.

Does this mean then that you should just always say layoff and not position elimination was the reason for termination? No. You, as a manager, should guide your organization in truthful terminations for both legal and ethical reasons.

Follow your normal progressive discipline process for performance issues, and educate managers on unlawful discrimination concerns, and stop potentially unlawful terminations before they occur.

Motivating Employees in an Uncertain Economy

Summary of an article by Joanne Sammer, SHRM Magazine *January 2009*

In an uncertain economy, many companies are facing hard choices when it comes to rewarding employees. Salary budgets are being cut, and incentive pools are drying up.

Yet especially in difficult economic times, companies need to manage rewards carefully. The biggest concern for companies is losing top talent, says Tom McMullen, U.S. rewards practice leader for The Hay Group in Chicago . Good performers can land a new job no matter what is going on in the broader economy.

Get More Bang for the Compensation Buck

For many companies, spending compensation dollars wisely means focusing incentives and salary increases on key talent in the most important jobs. But focusing on rewarding top achievers gives rise to challenges such as:

- To ensure appropriate rewards for key employees and high performers, companies must take the time to identify properly which employees fit into that category
- The need to reward and motivate high performers could impact incentive pools and salary budgets to the point where little is left for the remaining employees.
- Methods for managing employee performance must be effective. Effective performance management helps to ensure that the company is rewarding the right people and that employees understand pay and incentive decisions by linking them clearly to business performance.

Identify Top Talent

Some companies spotlight those holding the key jobs in the organization, while others favor employees that they have determined to be high performers or high-potential individuals.

Gen-Probe, a biotechnology company with about 1,000 employees based in San Diego, identifies high performers by defining clear goals and metrics, and then communicating to employees exactly what they are expected to do.

No matter what parameters or criteria a company uses to select the employees eligible for special rewards, incentives or salary increases, it must apply them consistently. Lack of clarity or confusion about what is required to achieve high-performer status is likely to lead only to frustration and anger among employees.


Look Beyond Pay

No matter how companies manage their rewards programs, they should keep one thing in mind, adds McMullen. It's important to align reward opportunities with the intrinsic needs of the individual.

Companies can garner a great deal of good will with their top performers by talking to them about what they want to be doing in their jobs and careers, and how that might fit with the company's needs.

However, whenever a promise regarding the careers of these individuals is made, it's essential that the company be able to deliver.

It's easy to overlook the motivational and positive psychological benefits of nonfinancial rewards. It costs very little to invite a group of high performers to have lunch with the CEO to discuss the company's future, but the motivational benefits and cache attached to that invitation can be considerable



Joanne Sammer is a New Jersey-based business and financial writer.