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## Guide for Redrafting Local Government Policies on Alcohol or Substance Abuse

- 1) Identify whether you have a policy against substance abuse/illegal use or a procedure for identifying and testing groups of employees. or both a policy and procedure. You need both to test, and the procedure must meet many requirements.
- 2) Separate out the FTA/DOT testing groups per the regulations. Those processes and levels are mandated for DOT licensed employees anyway and provide a first line statutory defense for the employer.
- 3) Identify each class of jobs that is defensibly safety sensitive either by past case law or evidentiary fact finding based on evidence.
- 4) Identify what substances will be tested for and what cutoff levels will be used. Rely only on levels that have been scientifically proven to impair job performance at that level. Make sure that case law or reliable scientific data exist and are in your files to support this.
- 5) Publish a procedure for all categories of testing (post-accident, reasonable suspicion, post-job offer, pre-employment, etc). The procedure must allow the employee an opportunity for two scientifically reliable tests—a screen test using accepted methodologies, and a “confirmation test” using the same technologies or additional technologies, depending on the circumstances.
- 6) In the case of drugs, this may be a split sample if handled correctly.
- 7) DOT rules currently allow two breathalyzers to be done on the same machine, less than twenty minutes apart, and use the second to confirm the first for purposes of taking an employee off the road. However this method should not be used for a final termination decision until an attorney reviews the methodology and determines that the test results and procedures used are defensible under the circumstances and meet due process for terminations under applicable case law.
- 8) In the case of alcohol tests where both the screening and confirmation tests are administered by the same technician, and the same machine (even an evidentiary breath machine certified under circumstances approved by FTA/DOT and operated by a certified BAT) , CTSI recommends that the employee should be given notice and an opportunity at the employee’s choice, to have an alternative test at the employee’s cost, in order to forestall possible due process, technician, or equipment failure challenges.
- 9) Publish a procedure for confidentially transmitting test results to a neutral MRO and for evaluating the test results and conducting an evaluation process for drug/alcohol treatment recommendations.
- 10) Publish an internal procedure for evaluating positives, and medical treatment recommendations for an employee, for discipline, leave or terminations. Specify that no decisions will be in violation of any EEO laws including disability laws and age laws. If the policy is “zero tolerance” (i.e., no exceptions for any positive test over the published lab levels), then make sure that all confirmed positive tests are terminated, no exceptions.
- 11) Get legal review of any procedures and any contracts with outside entities to carry out these duties, so that the contracting agent is obligated to indemnify the county from any mishandling of drug or alcohol specimens under the contractors duties, including indemnifications for wrongful terminations or other liabilities resulting from the contractor’s actions.