

Random drug test sans notice legal in Ariz.

My son works for a restaurant that recently changed ownership. Last week, his new employer asked him to take a drug test. When he was hired, they did not inform him about random drug testing. The employee manual does not mention random drug testing. It does say that if a person takes drugs and it affects his or her work, that person can be terminated. Is this legal?

Lori A. Higuera
Fennemore Craig

Whether it is legal for an employer to randomly drug test an employee in the absence of a written policy typically hinges upon whether the occasion arises in the public sector or the private sector.

Generally speaking, in Arizona random drug testing by a private non-unionized employer is

permissible regardless of the existence of a policy. Testing by a public employer is limited by constitutional protections such as privacy rights, due process rights and search-and-seizure protections.

Because your son works for a restaurant, I assume that he works for a private employer. If the restaurant is unionized, then the employer likely must bargain with the union before establishing a random drug-testing program. If the restaurant is non-unionized, then there is no federal or Arizona law restricting the employer from requiring an employee to submit to random drug testing despite the absence of a policy.

That being said, even random drug testing that is generally permissible must indeed be random. If your son perceives he was targeted for the random



Lori A. Higuera



Don Johnsen

drug test based on some non-random reason, such as discrimination based on a protected characteristic, retaliation for engaging in protected activity or some other reason that is unlawful or against public policy, he should discuss his concern with the human resources department immediately.

Don Johnsen
Gallagher & Kennedy

Employees naturally can view random drug testing as a

wrongful invasion of privacy. Under Arizona law, however, random testing would not be an invasion of privacy if the employer uses reasonable methods for specimen collection, such as a clean, secure environment, and strictly limits the disclosure of test results.

In fact, Arizona law offers various legal incentives to employers who conduct testing, as long as they follow certain statutory protocols. Those protocols are designed to promote the integrity and accuracy of the testing process and they include advance written notice to workers of the possibility of testing. But those protocols are voluntary. Employers in Arizona are not required to follow them.

It's reasonable for the worker to be concerned about the fact that the employer did not mention testing before now.

Certainly it would be good management to have a written policy in place and give everyone clear advance notice before actually conducting any testing. However, an employer is not legally obligated to have a written policy or give anyone advance notice. And under Arizona law, workers who are employed at will are subject to discipline or termination if they refuse to undergo testing, even without advance notice.

It can be important to distinguish between what might seem fair and what is legal. Some people might think it's unfair to require a drug test without advance notice, and employers who hold that view won't do it. But in Arizona, it's legal.

— *Compiled by Georgann Yara*

Send your questions to
asktheexperts1@gmail.com.