

Hiring Practices - Controlled Substance Guidance

Hiring managers walk a difficult tightrope to obtain the information they need about prospective employees while ensuring they are following employment law, CMS regulation, and corporate guidelines:

- According to the Minnesota Department of Human Rights, prospective employees should have an opportunity for rehabilitation and employment — and an opportunity to explain previous events.
- Concurrently, previous actions may have consequences that affect future employment opportunities (i.e. A facility is not required to hire a prospective employee with a known history of diverting controlled substances.)
- In an effort to protect residents, CMS requires employers to complete reference checks on prospective employees.
- Often, in order to protect themselves from litigation, employers only allow their managers to confirm dates of employment for previous employees.

Job Descriptions and lists of Essential Job Functions

- Employers may list controlled substance administration, documentation, and waste according to policy and law as an essential job function in job descriptions and job postings.
- This can be used as a screening question on a job application. For instance, “Controlled substance administration, documentation, and destruction are an essential function of this position. Do you believe you would be able to do this successfully?”

Interviewing

- All candidates for the same position *must* be asked the same questions as a part of the interview process
- Employers are allowed to ask questions about controlled substance administration and security – Have you had any problems with this in a past position?
- Once a candidate has brought up a topic in an interview, the hiring manager *may* ask for additional details or ask the candidate to expand on their answer. In this case, the hiring manager does not need to be consistent in the interview.

Offers

- Can be contingent, as long as a prospective employee is informed of the contingency.
- Can be contingent on a clean background check
- Can be contingent on a clean drug screen (as long as policy is followed)
- Can be contingent on a 3rd party W-2 review (to ensure an employee is reporting their complete job history.)
- Employers may rescind an offer based on findings from background checks and drug screens, as long as this is done consistently and according to policy.

Action Items:

1. Review job descriptions to add controlled substance safety to the list of essential functions of the job.
2. Develop a consistent interview tool for each job class.
3. Train interviewers to ensure they follow regulation, the law, and human resource recommendations

Drug and Alcohol Testing Policy

Minnesota employers are permitted to test employees for drugs and alcohol but must follow the state's rules and regulation surrounding this issue.

In order to test for drugs or alcohol, the facility:

- MUST have a written & posted "Drug and Alcohol Testing Policy" (includes parameters for testing and consequences of refusing a test)
- MUST have employee sign a form prior to collection of sample
- MUST use a licensed, accredited, or certified laboratory
- Must foot the cost of the test
- MUST collect "A" and "B" samples – all positives then get confirmation
- MUST have an alternate laboratory available for employee to pay for confirmatory test at different laboratory if desired.
- CANNOT go straight to termination for first infraction. At the employee's own expense or pursuant to coverage under an employee benefit plan, employee can complete a drug or alcohol counseling or rehabilitation program.

Link to Minnesota Statutes:

<https://www.revisor.mn.gov/statutes/cite/181.951>