

Texas Business Today

Joe Esparza
Commissioner Representing Employers

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Texas Employers,

Happy New Year and welcome to the January issue of *Texas Business Today*. Even though the year has just begun, Texas has started off strong with some new accolades. Texas has been named [Business Facilities' 2023 State of the Year](#), marking the fifth time the state has received this top honor from the magazine. Also, for the third year in a row, [U-Haul trends](#) have crowned Texas as the top state for one-way movers in 2023!

In addition, the [Texas labor market](#) has continued to thrive month after month and continues to lead the nation in many categories. As we head into 2024, the future looks bright for Texas employers across the state seeking to expand their business and tap into the state's growing workforce.

Don't forget our 2024 Texas Conference for Employer schedule is up and open for registration. We will continue to add more dates and locations throughout the year, so please check back periodically. To check out the current list of cities and dates, please visit: [Texas Conference for Employers - Texas Workforce Commission](#)

Also, remember that our Texas Employer Hotline (1-800-832-9394) is available to all Texas employers. The attorneys answer this hotline and provide guidance on employment law questions Monday-Friday, 8am-5pm. They answer anything from the simplest to the most complex questions. Please do not hesitate to contact us for assistance.

I look forward to meeting you in your communities and serving as your Commissioner Representing Employers. Each employer, large and small, contributes to Texas' success, and makes Texas the best state in the country in which to do business.



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Commissioner Representing Employers
Texas Workforce Commission



Drug Testing & Unemployment Claims

By: Jikku John

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While many employers have drug-free workplace policies, they are often shocked to learn that even with a drug testing policy, and a positive test result, they can still lose an unemployment claim based on the claimant's sworn denial of drug use. So, how does an employer overcome this? A well-established precedent case explains that to overcome a sworn denial of drug use, an employer must meet five factors. See: Appeal No. 97-003744-10-040997 (MC 485.46) [Unemployment Benefits - Appeals Policy & Precedent Manual - Texas Workforce Commission.](#)

Factor 1: A policy prohibiting a positive drug test result, receipt of which has been acknowledged by the claimant.

Employers should implement drug policies specifying that the company will conduct drug testing and/or alcohol testing under certain circumstances, such as pre-employment, at random, post-accident, etc. For the purpose of complying with this first factor, an employer's drug-free workplace policy should also prohibit a positive test result. Please see a sample drug and alcohol policy; https://efte.twc.texas.gov/drug_free_workplace_policy.html. Similarly, employers should notify employees that violation of the policy could subject them to disciplinary action, including termination of employment.

Employers should have employees acknowledge receipt or review of the policy. If employees are not aware of the policy, then violation of the policy will not be misconduct connected with the work.

Factor 2: Evidence to establish that the claimant has consented to drug testing under the policy.

In addition to a drug-free workplace policy, employers should also have employees sign a consent for drug testing which explains that the employee agrees to submit to a drug or alcohol test and to furnish a sample for analysis upon request. Please see a sample consent form; https://efte.twc.texas.gov/drug_and_or_alcohol_testing_consent_form.html.

Factor 3: Documentation to establish that the chain of custody of the claimant's sample was maintained.



This element is essential for maintaining the integrity of the claimant's sample. While most drug testing labs have policies and procedures on-site for employers to meet this element, an employer's failure to comply could lead to the employer losing an unemployment claim. An example is an employer who takes samples from its employees at the jobsite and stores them on the employer's premises until the employer can transport them to the drug testing facility. If

employers do not have a strict chain of custody procedure in place, claimants can attack the integrity of an employer's drug testing procedure and can overcome a positive drug test result through their sworn denial.

Factor 4: Documentation from a drug testing laboratory to establish that the test was confirmed by the Gas Chromatography/ Mass Spectrometry (GC/MS) method.

The GC/MS method uses gas chromatography and mass spectrometry to detect the presence of drugs in a person's system. Often known as the gold standard for

confirmatory testing, this method can detect trace quantities of a substance, and can confirm the presence of a specific drug in a person's system. If the employer is using a positive drug test as the reason for a discharge, the employer should ensure that the drug testing lab it chooses will confirm the results using the GC/MS method. For exceptions relating to DOT-related cases, please see. Case No. 1051204 [Unemployment Benefits - Appeals Policy & Precedent Manual - Texas Workforce Commission](#)

Factor 5: Documentation of the test expressed in terms of a positive result above a stated threshold.

Employers should maintain clear documentation to show not only that the claimant tested positive, but also that the claimant exceeded a threshold amount of the substance for a positive result. Compliance with this element not only strengthens the test results, but also helps overcome assertions from the claimant that they were not under the influence of that substance while at work.

Conclusion

Through the fulfillment of these five elements in support of a positive drug test, an employer is likely to overcome a claimant's sworn denial of drug use. Conversely, an employer who fails to follow the elements risks losing an otherwise winnable unemployment claim.



TEXAS EMPLOYER HOTLINE
1-800-832-9394

Hiring Issues · Medical Leave-Related Laws · Personnel Policies and Handbooks · Independent Contractors and Unemployment Tax Issues · The Unemployment Claims and Appeals Process · Texas and Federal Wage and Hour Laws



Employer Hotline Hours: M-F, 8am-5pm
Information provided by employment law attorneys in the Office of the Commissioner Representing Employers at the Texas Workforce Commission

Texas Business Today is provided to employers free of charge

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