



FOR UNION EMPLOYERS

The Bargaining Rule Most Union Employers Miss Before Drug Testing

Introducing or changing a drug testing program in a unionized workplace triggers a federal bargaining obligation most employers do not see coming. This guide lays out what the law actually requires, in plain terms, with the controlling sources cited.

SIX THINGS TO KNOW BEFORE YOU ROLL OUT A POLICY

- ✓ **Bargaining comes first.**
Testing current employees is a mandatory subject of bargaining under the NLRA (Johnson-Bateman Co., 295 NLRB 180, 1989).
- ✓ **A federal testing mandate does not remove this duty.**
Even DOT-required programs still require bargaining over timing, procedure, and consequences (SAMHSA, Federal Laws and Regulations).
- ✓ **A generic management-rights clause is usually not enough.**
The NLRB requires a clear and unmistakable waiver of bargaining rights, not a broad catch-all clause.
- ✓ **Skipping this step risks an unfair labor practice charge.**
A successful charge can force rescission of the policy and a formal notice to your workforce.
- ✓ **Applicant testing works differently.**
Pre-employment testing is not a mandatory bargaining subject (Minneapolis Star Tribune, 295 NLRB No. 63, 1989).
- ✓ **Weingarten rights apply to related interviews.**
Employees can request union representation in any meeting they reasonably believe could lead to discipline (NLRB v. J. Weingarten, Inc., 420 U.S. 251, 1975).



The Specifics

Does a unionized employer have to bargain before starting a drug testing program?

Yes, in nearly all cases. The National Labor Relations Board ruled in Johnson-Bateman Co., 295 NLRB 180 (1989) that drug and alcohol testing of current employees is a mandatory subject of bargaining, because it materially changes the terms and conditions of employment. The employer must give notice, provide information the union requests, and bargain in good faith before implementation.

Does this still apply if the testing is required by federal DOT regulation?

Yes, for how the program is carried out. SAMHSA confirms that even when testing is required by a separate federal mandate, such as the Omnibus Transportation Employee Testing Act, the employer must still negotiate the timing of testing and the consequences of a positive result.

Can a management-rights clause let us skip bargaining?

Almost never on its own. In Johnson-Bateman, the Board held that a broad management-rights or zipper clause does not establish the clear and unmistakable waiver required before a union is found to have given up bargaining rights over a specific subject like drug testing.

What happens if we implement the policy without bargaining first?

It exposes the company to an unfair labor practice charge. A successful charge can result in an order to rescind the policy, bargain in good faith, and post a notice to employees describing the violation.

Does the bargaining requirement apply to job applicants?

No. In Minneapolis Star Tribune, 295 NLRB No. 63 (1989), decided the same day as Johnson-Bateman, the Board held pre-employment testing is not a mandatory bargaining subject, since applicants are not yet employees under the Act.

Do employees have a right to representation during a testing-related interview?

Yes, if the meeting could reasonably lead to discipline. Under NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975), an employee may request union representation during an investigatory interview reasonably believed to lead to discipline.

This guide explains how federal labor law generally applies to unionized employers considering workplace drug testing. It is general information, not legal advice, and is not a substitute for reviewing your specific collective bargaining agreement with a labor attorney before proposing or implementing any new testing policy.