

# Do Your Employees Have the Right to a Union Rep During a Drug Test?

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On August 27, 2015, a three-member panel of the National Labor Relations Board (NLRB) issued *Manhattan Beer Distributors, LLC and Joe Garcia Diaz*, (29-CA-115694) finding that an employer had unlawfully denied an employee his right to the physical presence of a union representative during a reasonable suspicion drug test. This case has implications for all employers conducting drug tests in a unionized setting.

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In the case, a manager found that a route driver “reeked of the smell of marijuana” and had glassy, bloodshot eyes. The manager ordered the employee to take a reasonable suspicion drug test, and the employee requested the presence of a union shop steward. The employee was able to reach a union shop steward by phone but was unable to find anyone immediately available to accompany him to the test. The employer required that the employee immediately submit to the test anyway. When the employee refused, the employer discharged him for “refusal to submit to substance abuse testing based on reasonable suspicion.”

The NLRB has previously found that employees have the right to union representation during drug tests (*Ralphs Grocery Co.*, 361 NLRB No. 9 (2014)) and that employers must provide employees with a reasonable time to obtain such representation (*Consolidated Freightways Corp. of Delaware*, 264 NLRB No. 76, 541, 542 (1982)). The *Manhattan Beer Distributors* case breaks new ground in that it makes clear that the physical presence of a union representative is required to actively assist the employee in a drug testing situation.

This case is important for employers seeking to ensure that the safety and efficacy of their workplaces are not compromised by alcohol and drug use. The NLRB's decision—by allowing employees to delay drug and alcohol tests while waiting for a union representative—is all the more important because alcohol and drugs can dissipate quickly from the body and employees may be able to dilute their drug and alcohol testing samples to levels that are below laboratory cutoffs by consuming water. If an employer is forced to wait while an employee secures the physical presence of a union representative for the employee's reasonable suspicion drug or alcohol test, the employer should ensure that the employee is kept under observation and that his or her water or adulterant consumption is monitored.

In the *Manhattan Beer Distributors* case, the employer allowed the employee to leave the office to contact his union representative and offered to allow the employee to drive himself to the drug testing lab. Both decisions allowed the potentially intoxicated employee an opportunity to drink water or defraud the drug test. Of course, allowing a potentially intoxicated employee to drive to a drug lab also creates a safety concern.

Note that if an employer cannot secure a union representative or cannot reasonably and lawfully prevent the employee from access to water, the employer is free to take disciplinary action without a drug or alcohol test. As the NLRB stated,

where an employee requests union representation before participating in a disciplinary investigation [such as a drug or alcohol test], the employer has three clearly established options: (1) grant the employee's request; (2) give the employee the option of proceeding without representation; or (3) discontinue the interview and make a disciplinary decision based on the information it has available.

In this case, the employer would have been better off either allowing the employee a reasonable time to secure union representation (while preventing him from diluting or adulterating his sample) or taking action against the employee for his signs of intoxication alone rather than requiring the employee submit to the drug test without union representation.

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