

PRIMAtalk Digest

DUI and Driving – August 2008

Our current county policy states that an individual shall not be allowed to drive on county business for 60 months in the event of a driving under the influence conviction. An argument is being presented that this requirement is excessive. We have covered this topic previously but I will appreciate your current thoughts.

Additionally, the argument is being presented that the job description requires a valid drivers license but driving is not an essential job function. Driving is an incidental requirement (going to meetings etc). Because of the incidental nature of the driving, the 60 month driving suspension should not apply. I will appreciate your thoughts.

We are currently self insured for auto liability. I will appreciate current insurance company underwriting requirements for these types of situations.

Mick McBride, Risk Manager
Sedgwick County, Kansas

Response 1

Greenville's policy is for any major violation or suspension not just DUI.

The employee is required to report the violation the next working day prior to starting work. Failure to do so is a serious offense. Driving privilege is suspended until the case is resolved.

If convicted of the violation in order to get driving privileges back the employee must meet minimum standards on policy and is not able to drive for City business until ALL the following occur: 3 year MVR cleared on the violation, and Drivers License is valid/reinstated, and Employee satisfactorily completed driver improvement and any other additionally required training program, and The Department Head, HR Director and Risk Manager concur with reinstatement.

In addition, if the violation is DUI, the employee is required to undergo training as required by The South Carolina Alcohol and Drug Safety Action Program (ADSAP). This is a statewide education and treatment program for individuals who are convicted of driving under the influence (DUI) among other things.

If driving is an essential function of the job, they will be placed in another job or administratively terminated. If driving is not an essential function, the employee must make other arrangements (taxi, bus, ride with someone, etc.) at his expense to get to meetings, functions, training, etc that might otherwise require their driving.

Response 2

If a judge gives the employee driving privileges for work, why are you restricting them? Even insurance points come off after 3 years. I can understand the draconian policy for multiple offenses, but most of us make at least one mistake at some point. We make sure they get EAP or court ordered counseling and complete it successfully and if they are granted driving privileges for work they can drive after a first offense. In NC, multiple offenses take their license and we can let them go because they can't perform their job if driving is an essential job function. One offense should not cause an otherwise good employee to lose their job.

Response 3

So what do you do with an employee for 60 months who can't drive on county business? Do they report to the rubber gun squad in the sheriff's office? I'm surprised that an employment rights lawyer hasn't filed a law suit against your entity claiming that your policy confiscates the employee's right to future job advancement. In other words the employee has a constitutional property right to future job advancement, that you have violated.

Having been the risk manager for an organization that took a driver safety standard all the way to the US Supreme Court, that said organization took the matter pretty seriously. If driving was an essential function of the job description, the department had one of two options: Termination or transfer to a non-driving position. Some departments had the luxury of moving the employee to the same job description/position that was rated as non driving. For those departments that didn't have the depth in positions, the employee was terminated. Our policy at the time was one DUI conviction per 18 month period. So in theory an employee could recycle into a position in 18 to 24 months. But in all honesty, one DUI conviction meant that they had gotten away with driving under the influence about 30 times before getting caught and convicted. Job attendance and job performance usually culled these problem children long before we had to worry about the DUI conviction on their record.

I would encourage your organization to review your state law and court cases to determine exactly what precedence you can base your program decisions. In Texas it was easy because some other employer stepped into the DUI problem with their employee, who arrive at work drunk, was sent home from work and on the way home, in his own car, was involved in a fatal car accident which killed a third party. After that case, the state law was changed to make every employer responsible for the driving history of their employees, including should have know or could have known issues.

Any driver safety program should promote the safety and welfare of your employees and the general public. Prolonged punishment of an employee is counterproductive.

Response 4

Every entity struggles with this topic, and equal application usually becomes a problem. The real question though, is the goal of your response. Is it punitive or is it to take measures to ensure that the employee will not do the same thing while driving on business?

We have several categories of employees:

Licensed with a great driving record (good risk) Licensed with little driving record (risk still unknown)
Licensed with questionable driving record (risk questionable) Licensed with bad driving record (poor risk)
Restricted license with bad driving record (poor risk) Unlicensed (bad risk if driving on business)

The problem is identifying which category each employee will fall into.

Some just require valid driver licenses. Some put together their version of a point count. Some have supervisors ride with employees.

Some go with whatever the Court requires (restricted licenses).

The goal is to have a reasonable program of training and evaluation, and to not become responsible for the actions of bad drivers. There are certain community expectations, and our programs should avoid situations where juries will wonder what we could have been thinking. Therefore, our programs should:

1. Screen out drivers who are bad risk.
2. Identify drivers who are questionable or poor risk.
3. Provide credible training and evaluation programs.
4. Remediate the questionable or poor driving habits of employees.

People tend to drive on business the way that they driving their own vehicles. If they normally speed, they will speed while driving your vehicles. If they run red lights and stop signs in their cars, follow too closely, or cut people off, nothing will change just because they are doing it for you. The one possible difference is DUI. Some people only drink lightly to moderately and only in the evening - probably not a high risk of still being under the influence when they are driving for you. Unfortunately, they are probably the minority, and it can be very difficult to tell who is who. You would be amazed at how many employees drank fairly heavily and well into the wee hours of the morning, and are still well under the influence when they come to work. Others find ways to have a liquid lunch or just a nip here and there just so they can "function" and can carry the risk though their work day.

Instead of a pure 60 month "suspension," you may want to follow the concepts in the Commercial Motor Vehicle (CDL) rules. Referral to a SAP (Substance Abuse Professional) who will then determine if random alcohol testing is necessary, how frequently, and for how long, would be an alternative that should be viewed and reasonable and "fair."

On your second question, your personnel policies will determine just how specific your class spec or job description needs to be. Ours are fairly general but would have to include a notice where all or most employees in the class are required to have a driver license. Our language follows:

"Class specifications are descriptive and explanatory and are not restrictive. The language of class specifications is not all inclusive and shall not be construed as limiting or modifying the ability which Appointing Authorities have to add or delete duties and responsibilities, so long as such changes fall within the general guidelines of the classification involved. Changes in the duties and responsibilities of an employee which are not within the general guidelines of the classification must be reported to Human Resources by the Appointing Authority."

Further, in regard to this comment:

<snip>

I would go on to say that this person would still be suspended from driving county vehicles though and would have to use their personal auto and be covered under their personal auto insurance with the exception of workers' comp if the driving was under the course and scope of work.

I disagree, if this comment is related to driving on business. I concur if it referring to simple commuting where the employee will not be driving on business.

The only difference between an employee driving a government vehicle or a personal vehicle on business is whose insurance will come first.

Response 5

I have to say I agree with you Mick, the 60 month driving suspension should not apply if driving is not an essential job function.

I would go on to say that this person would still be suspended from driving county vehicles though and would have to use their personal auto and be covered under their personal auto insurance with the exception of workers' comp if the driving was under the course and scope of work.

Whew, that was a long sentence. We really cannot dictate someone driving with a valid driver license using their own vehicle that they cannot do this unless you make some other type of accommodation. At least I wouldn't want to be a test case in court over this issue.

We are fully insured for auto and our carrier has allowed us to bring back employees into driving after three years from their DUI conviction. The carrier would have preferred 5 years but provided coverage after three.

Response 6

I disagree, and our legal staff concurs. If you have a policy defining a good driving record and the actions you will take if an employee's driving record doesn't meet the definition, and you apply the policy consistently, then you can and should prohibit that employee from driving on County business.

Weigh the ramifications of an employee, with multiple traffic or DUI violations, being responsible for a serious accident and injuring citizens - against the employee who brings a wrongful termination claim, and I'll take the fallout from a termination claim any day.

Our structure is point based so it doesn't focus on DUI specifically - although a DUI conviction always charges enough points against a license that it is, in effect, the same thing.

First, determine if driving is an essential function. For many, it will be. Our policy states that you must have a DL in good standing - if driving is a requirement for the job - if you lose your license you may lose your job. I say may because if the department can accommodate the employee in another position until their driving privileges are restored, the department has that option. In 11 years of enforcing the policy, only one employee qualified under this option and that employee lost his license for excessive points, not DUI. We have terminated one employee who lost their license for excessive points because of a DUI conviction.

If an employee's license is revoked and driving isn't a requirement of the job, the department/division director is notified that the employee cannot drive on County business of ANY type. If the employee was an occasional driver - errands, meetings, etc. then the department has to find the alternative transportation or alternative methods to accomplish the same goal. Excessive points count here, for two years, DUI is 5 years.

Response 7

Mick, ours is job description driven. For an individual who has to have a valid driver license, we don't have a set policy on not allowing operation of a city vehicle. 60 months is excessive to me. If a person loses a license due to DUI, we don't let them drive until they get their license back, not even a work permit. Now that being said, if driving is an everyday occurrence and requirement, then the employee may get reassigned, demoted or terminated. If the driving is incidental, they just don't get to drive until they get their license. Then I also take into consideration driver history. If it's a first time isolated event, I follow the city's disciplinary procedures -- worst than first time on a case by case basis. We maintain very high SIRs on vehicle and liability but bottom line is case by case based on specific facts and circumstances, job performance, criticality of the license requirement to job function, et al. CDL is a whole different story. Again 60 months is excessive in any case. That puts far too much of a burden on the employing department to work around that 60 months.

Response 8

Our employment law attorney's have weighed in on this issue and taken the position that if an individual has a valid drivers license you can not prohibit him from driving. It would violate his property interest in his job.

Any action taken would be considered discipline and addressed as indicated in our driving policy below:

A. Existing Employees:

Upon notification that an employee has been convicted of a traffic-related offense within the State of Colorado or another jurisdiction, the department or agency must first consider at least the following factors: the nature and gravity of the conviction, the possible relationship of the criminal behavior to the position

the employee holds in the City and County of Denver, the number of convictions, and any evidence that the individual has been rehabilitated.

No department or agency shall discipline an employee solely on the basis of a criminal conviction to a traffic-related offense without first considering the factors listed above.

i. Criminal Charges:

Upon notification that an employee has been charged with a traffic-related offense within the State of Colorado or another jurisdiction, the department or agency, before imposing discipline, must determine there is a preponderance of evidence demonstrating that the employee engaged in the conduct which forms the factual basis for the crime with which the employee is charged. The department or agency must also consider: the nature and type of the conduct which supports the charge; the nature of the position the employee holds in the City and the relationship of the position to the facts underlying the charge; and the impact of the facts on the employee's ability to perform the position.

If the department or agency, after considering these factors, believes that discipline is appropriate, it shall proceed with discipline in accordance with the applicable rules, if any.

No department or agency shall discipline an employee solely on the basis of a criminal charge to a traffic-related offense without first considering the factors listed above.