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Will Your Substance Abuse Program Manage the Risk and Defend Your Case?

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Introduction

For the past 22 years workplace drug and alcohol testing has evolved nationwide and is now an accepted risk management tool. However, the way some employers have implemented their programs may not provide the maximum protection such programs can provide nor allow the employer to take financial advantage of having the program in the first place.

This session will discuss the model practices of a workplace drug and alcohol testing program which, if followed, may allow your company to manage the risk of employee drug and alcohol use and prepare you to defend any related challenge.

Background

Today, approximately 40 million drug tests are conducted in workplaces around this country. How did we get there? In September 1986 President Ronald Reagan issued Executive Order 12564[1] which required all federal agency heads to establish a plan to attain a federal drug-free workplace, including drug testing.[2] The federal DOT recognized that drug testing is a useful safety tool and rolled out its own set of rules beginning in 1989. Portions of those rules were challenged and in 1989 the United States Supreme Court rendered its first opinion on workplace drug testing. The Court upheld the Federal Railroad Administration's drug testing rules as constitutional.[3]

Historical Quick Look

1986	**Executive Order federal drug tests begin.**
1989	**Federal DOT requires PRIVATE employers to test.**
1989	**US Supreme Court upholds drug testing.**
	12 state laws exist for private workplace testing.
1994	**DOT rules expand to intra-state drivers; adds alcohol.**
2001	**DOT re-writes regulations.**
2008	**Over 550 state laws exist affecting workplace drug testing.**

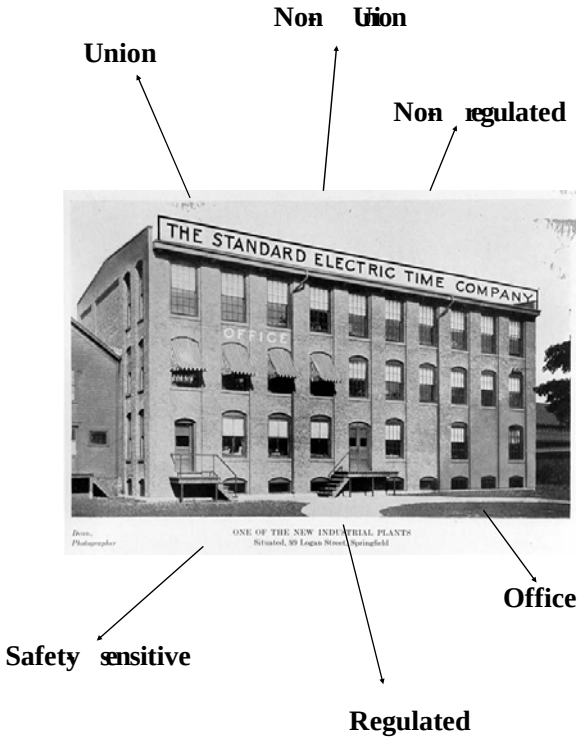
[1] 51 FR 32889, 3 CFR, 1986 Comp., p. 224
[2] 51 FR 32889, 3 CFR, 1986 Comp., p. 224, Sec. 3.
[3] *Skinner v. Railway Labor Executives' Assoc. et al*., (1989) 489 U.S. 602, 608-613, 103 L. Ed. 2d 639, 109 S. Ct.1402

In 1994 the federal DOT rules were expanded to include alcohol as a substance to be tested and included intra-state commercial drivers as well as inter-state drivers. This brought the number of those subject to federally regulated testing to more than 8 million. In 2001 these federal rules, along with all others, were re-written into a "question-answer" format pursuant to Executive Order. The federal DOT took this opportunity to incorporate many of the interpretations issued over the years. For the first time medical review officers and collection site personnel were required to demonstrate their qualification and training.

In 2008 there are now more than 550 state laws that impact workplace drug testing and more than 7,000 court cases on this subject. Multi-state employers and those who advise them must recognize the impact of these laws and court cases or they could fall into the trap that others have.

The Problem: *What Rules Apply?*

Too many employers and their advisors have not recognized that the law has evolved. Today the most critical question any employer or their advisor must ask is ***What Rules Apply?*** Every workplace has different work groups to which different rules may apply. There may be safety



workers and non-safety workers, union and non-union, regulated and non-regulated, workers in Michigan and workers in Minnesota, and so on. Legally, there may be different rules that apply to

each of these groups. So, to avoid litigation any multi-state employer and their advisors must be aware of what those rules are – or at least recognize that in each situation you must ask – ***What Rules Apply?***

In this sense, employers typically make three mistakes. First, employers when asked how they do drug testing proudly state that they "follow DOT rules." That may be the wrong answer. That is a fine answer for those employees that are regulated by DOT but not for the rest. The correct answer should be "we follow the rules that apply."

Next, employers mistakenly feel the best approach should be to "treat everyone the same." Again, the wrong answer because there may be state rules that require testing some workers but not others and may limit the type of test that may be applied, such as random, to only safety sensitive workers.

Finally, employers are frequently heard to say "we want to keep things simple." This usually means they want to test everyone using the "standard" urine method. But this ignores the state authorized methods that could save the employer money such as instant test devices or saliva. Here, simplicity could cost you.

The Nature of the State

Before a multi-state employer and advisors can determine *what rules apply* they must understand the nature of the states, from a drug test perspective. States can be described as fitting into one of five categories: **Voluntary**, **Mandatory**, **Required**, **Open** or **Hybrid**.

Voluntary State: There are today 17 "voluntary" states. A "voluntary" state is one that offers employers some incentive to establish a drug-free workplace. Incentives may include a Workers' Compensation premium discount or a presumptive denial of a Workers' Compensation benefit. To obtain the incentives the state's rules must be followed.

Mandatory State: There are 19 mandatory states today. These are states that require any employers, regardless of the reason for testing, to conduct testing in accordance with their rules.

Required States: There are now 27 "required" states. These are states with laws that require employers of certain job categories, such as folk-lift operators, state contractors, child-care workers, to have drug testing in place for those workers.

Open States: There are very few "open" states. These are states that have no laws limiting, requiring or otherwise specifying workplace drug testing.

Hybrid States: A hybrid state is one which has a combination of the categories above. For example, Florida and Ohio have "voluntary" drug-free workplace programs but they have laws that require state contractors to participate in those voluntary programs.

Considering the nature of a state can help in understanding *what rules apply*. If you don't know what rules apply you cannot obviously avoid the risk of litigation. So, for example, when considering using an instant test device (to save money) and the voluntary law in one of the states in which you operate limits test methods to lab testing, knowing it's a "voluntary" law means that

if you really wanted to use a different test method you could. You simply would not get the benefits of that voluntary drug-free workplace program in that state. You must determine what is in your best interest.

Policy Matters: *Don't take it lightly!*

Your company policy is the foundation of your drug or alcohol testing program. It must be written for you/by you to meet your goals. This document will become important if there is ever a challenge of a test result or of the discipline you may have imposed. It is also the best training tool for those who will implement and manage your program.

In simple terms you need to address the *who*, *what*, *where*, *when*, and *how* of testing. If each of these categories is addressed and adequately defined in light of what rules apply you will have a policy that works for you. But again, the key is to know what rules apply to each category.

POLICY DEVELOPMENT

WHO	to test
WHAT	to test for
WHERE	medical office?
WHEN	test events
HOW	test methods
WHY	safety, mandated

Who to test

Who to test starts with determining who you as an employer are. This means to ask, are we regulated by the DOT or some other federal or state agency with rules about testing? Do you have employees regulated by Unions? If so, you must negotiate with those Union representatives over the program itself or any significant expansion of that program.

Once that is determined you need to decide which employees to test. State law limits will play a key role in this decision. Some states may limit who you can test; other states may require that some of your employees must be tested.

What to Test for

Most employers limit testing to the five drugs designated by federal DOT along with alcohol. If you'd like to test beyond these five (marijuana, cocaine, amphetamines, opiates, and PCP) you must again look to the state laws to determine if there are any restrictions. Many states do permit testing for additional substances but you should first decide if you have a need for doing so and then consult with your laboratory representatives for their advice and the costs involved.

Where to Test

With advances in science and medicine new test methods have allowed for testing other than in a laboratory. Instant urine and saliva test devices have saved employers a great deal of money and convenience.

When to Test

Perhaps the most controversial of all the questions to address, when you will subject your employees to testing is critical. Most employers test before hire (but state law may limit it to post-offer), when there is reasonable suspicion and following an accident. Additionally employers may choose to randomly test and, if allowing an employee to return to work following a violation of the drug test policy, before returning to work and on a follow-up basis.

Many mandatory states address this issue. Severe restrictions of random testing exist. 24 states define post-accident testing and many states require training regarding reasonable suspicion.

Reasonable suspicion is one of the most misunderstood concepts in drug testing. This misunderstanding, however, leads to many potholes on the road to a beneficial drug testing program. The key to filling these potholes is education, education, education!

We will spend a significant amount of time on this concept from the legal perspective. Employers must understand what reasonable suspicion is because to ignore this concept is to invite disaster. An understanding of how the human brain is affected by the use of drugs, even occasional drug use, will help managers realize that the weekend users' brain comes with them to work on Monday morning. And that poses a safety problem for all of us.