PRESENTATION

Top 10 Trends and Pitfalls in Workplace Drug Screening

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Trends

1. Evolving Federal Regulations
2. Medical & Recreational Marijuana
3. Alternate Testing Modalities
4. Expansion Testing Panels
5. Increase in Random Testing

Trend #1

1 Evolving Federal Regulations

- 2011 DTAB (Drug Testing Advisory Board) recommended:
  - Adding lab-based oral fluid drug testing as a specimen for federal drug free workplace programs governed by the DHHS Mandatory Guidelines
  - Expanding the drug testing panel to include Schedule II opiate/opioid drugs (e.g. hydrocodone, hydromorphone, oxycodone, oxymorphone)
- Electronic Chain of Custody Forms (CCFs) have been approved by DHHS and will soon be accepted by DOT

Trend #2

2 Medical & Recreational Marijuana

- 23 states, plus DC have legalized medical marijuana use
- Alaska, Arizona, California, Colorado, Connecticut, DC, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New York, New Mexico, Oregon, Rhode Island, Vermont and Washington

Trend #2

2 Medical & Recreational Marijuana

- Federal v. State Law
  - Federally the drug is still prohibited so federal / DOT testing is not affected
  - Multi-state employers typically defer to federal law and note in policy
  - *Gonzalez v. Raich* (US Supreme Court decision 2004)
- Safety Risks
  - Even with legalization, marijuana is undoubtedly a safety risk (like alcohol)
- Decriminalizing v. Protecting in Workplace
  - Typically states that have decriminalized marijuana have not protected it in the workplace (exception may be Arizona)
  - *Casias v. Wal-Mart* case – Sixth Circuit Court of Appeals
- ADA/Workers' Compensation Concerns
  - May be required to provide reasonable accommodation
  - Responsible for reimbursing an employee for costs associated with his medical marijuana use. *Vialpando v. Ben's Auto. Servs.*, No. 32,920, 2014 N.M. App. LEXIS 50 (N.M. Ct. App. May 19, 2014).

Trend #3

3 Alternate Testing Modalities

- Each testing modality (urine, hair, oral fluid) carry potential benefits and risks
- Due to the changing landscape of testing technology, more and more employers are integrating oral fluid and/or hair testing into their programs where appropriate
- We expect this trend to continue with the DOT's pending acceptance of oral fluid testing in certain testing situations

Trend #3: Urinalysis

3 **Alternate Testing Modalities**

Urinalysis as the "standard"

- Currently only testing modality permitted by federal government and all 50 states
- By far, the most commonly utilized testing modality in the US and abroad
- Testing at SAMHSA-certified labs / Collections by Professional Collectors / MRO Review
- Most legally defended testing method

Trend #3: Hair Samples

3 **Alternate Testing Modalities**

Benefits

- Longer Detection Window
- Less chance for adulteration
- Quick collection procedure (no long waits)

Potential Concerns

- Lack of Head Hair / ensuing privacy/collection issues
- Excludes most recent drug use (last 7-10 days)
- Potential discrimination concerns
- Expense (2x – 3x urinalysis)

Trend #3: Oral Fluid Swabs

3 **Alternate Testing Modalities**

Benefits

- Less Invasive
- Quick and Easy (no long waits)
- Less chance for adulteration
- Indicator of immediate (very recent) use

Potential Concerns

- Minimal detection window for marijuana (12-24 hrs)
- Restrictions on test panels
- Not necessarily allowed by all states

Trend #4

4 Expanded Testing Panels

- Standard “5 panel” includes: Marijuana, Cocaine, Amphetamine/Methamphetamine, PCP, and Opiates (Heroin, Codeine, Morphine
- “10 panel” has added: Benzodiazepines, Barbiturates, Methadone, Methaqualone, and Propoxyphene
  - Methaqualone is rare and Propoxyphene was taken off US market
  - More common to see a 7, 8, or 9 panel test
- Drugs like synthetic marijuana (K2, Spice) and bath salts are trending in the United States
  - Very expensive test (typically 2x – 3x standard urinalysis)
  - Utilization varies geographically – cost benefit is to limit testing (if required) to RS tests)

Trend #4: Synthetic Opiates

4 **Expanded Testing Panels**

- Opiates like Hydrocodone & Oxycodone are usually not included in a “standard” drug test

- More employees are testing positive for prescription opiates today than ever before
  - 40% increase in positives from 2005 to 2009
  - 71% increase in Lortab use from 2005
  - Hydrocodone is the most prescribed generic drug in the last 3 years

Trend #5

5 Increase in Random Testing

- Pre-employment testing often viewed as either an “Addictions” test or “IQ” test
- Random testing has three potential impacts:
  - On-going ability to identify substance abuse
  - On-going deterrence for substance abuse
  - Filters substance abusers from hiring/on-boarding process

“At first, it may not be surprising that in the safety-sensitive workforce random drug test positivity is nearly *18 percent lower* than pre-employment positivity.”

“Pre-employment drug testing is an important frontline filter to help ensure a drug-free workforce.”

“However, we see a more complex story when these rates are compared to the general workforce, where employees are far less likely to expect random drug testing. Here, the random urine test positivity rate is *47 percent higher* than the pre-employment urine test positivity rate.”

Data from Quest Diagnostics Drug Testing Index

Pitfalls

1. **The Vague Policy**
2. **Gap Between Policy and Instruction**
3. **Risky Shortcuts**
4. **The Exceptions to the Rule**
5. **The *Real* Issue with Alcohol**

Pitfall #1: The Vague Policy

The Issue:

- Policy does not distinguish between federal authority and company authority for Regulated employees
- Policy does not account for differences in state/local/DFWP requirements

Options:

- Separate policies for federal and non-federal testing (and potentially different federal agencies)
- Utilizing state-specific addenda to outline policy variations

Pitfall #2: Gap Between Policy & Instruction

The Issue:

- Policy distribution is **not** policy retention
- Supervisors and managers may read the policy (though many don't) but interpret implementation in different ways
- Testing is administered inconsistently or inaccurately

Options:

- Establish written protocols (by test type or scenario) that reinforce the Policy
- Make documents and instructions easily accessible
- Establish continuing/refresher education programs (short and effective)

Pitfall #3: Cutting Corners

The Issue:

- Always opting for cheapest testing option regardless of need
- Conducting quick tests when policy calls for lab-based testing
- Failing to test all random selections without documentation

Options:

- Clearly identify:
  - Testing modalities (preferred and acceptable)
  - Testing procedures
  - Policy consequences

Pitfall #4: Exceptions to the Rule

The Issue:

- Do we re-test someone with a negative dilute result?
- What constitutes a “refusal” to test?
- What if someone can’t give a sample (“shy bladder”)?

Options:

- Designate a primary Designated Employer Representative (DER)
- Consider committee comprised of HR/Risk Management/Safety/etc.
- Establish a more rigorous DER program (> supervisors/employees)
- Know when to contact testing administrator or legal counsel

Pitfall #5: The *Real* Issue with Alcohol

The Issue:

- Employers tend to think of potential alcohol issues as:
  - Based on same day alcohol consumption (drinking on the job)
  - Manifesting themselves in obvious physical signs/symptoms
  - No big deal altogether (hangovers)
- In reality, most alcohol issues are based on prior day consumption and the effects are cognitive rather than physical

Options:

- Address alcohol issues proactively through employee drug and alcohol awareness and education
- Develop clear reasonable suspicion protocols for supervisors and train them on signs, symptoms, and indicators

Pitfall #5: The *Real* Issue with Alcohol, *continued*

Hangover v. Intoxication

170 lb male eliminates .015 g/dL per hr.
2 drinks per hr. for 7 hrs.
Stops drinking at 1 AM

- 2 AM= .190 BAC; asleep
- 3 AM=.175 BAC
- 4 AM=.160 BAC
- 5 AM= .145 BAC
- 6 AM= .130 BAC; alarm goes off
- 7AM= .115 BAC; drives to work
- 8 AM= .100 BAC; starts work
- 12 PM = .040 BAC

So even at 12 pm, individual would still be under the influence; violation of most employer policies and safety (and federal standards for workplace)

Testing Best Practices: *Procedural Safeguards*

Testing Checks	Key Safeguards
Collections	• Established written protocols (49 CFR Part 40) • Certifications required for all collectors • Strict Chain-of-Custody procedures throughout process
Lab Analysis	• DHHS-certified laboratory (specialized labs only) • Strict QC procedures (including standards for rejecting testing) • Dual-level testing, including GC/MS confirmation • All lab reports reviewed and certified by lab scientist
MRO Review	• Enables identification of "legitimate" prescription use • Donor always has initial opportunity to speak with MRO • Split specimen appeal available • All non-negatives are reviewed and certified

Testing Best Practices: *State DFWP Compliance*

- Several DFWP (Drug-Free Workplace) programs recognize testing that follows DOT guidelines in 49 CFR Part 40
  - These DFWP programs can offer discounts (5% - 20%) on workers compensation premiums
  - DFWP compliance can also be a huge asset in legal protection by offering “rebuttable presumption” of impairment
  - Many states can disallow workers comp & unemployment compensation claims if positive test is from testing that follows federal/state guidelines

Questions?

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