

THE FUTURE OF OCCUPATIONAL DRUG TESTING

How to maintain an effective drug-free workplace program

By Randall Elkan and Betsy Uliss, SPHR

Many clubs and hotels are participating in Drug-Free Workplace Programs (DFWP), but may not fully understand all the ramifications of cumbersome state and federal laws. To make the program effective, it is important to understand the legal perspective and how to tackle drug testing issues.

Federal Drug Testing Programs

Occupational drug testing was initiated in the mid-'60s by the military, which recognized the need for testing Vietnam veterans who were purportedly addicted to LSD. By identifying vets who had a problem, the military was able to get them rehabilitation prior to sending soldiers back to the U.S.

The federal government initiated their Drug-Free Workplace law in 1988, following a head-on train crash in the northeast corridor. The engineer of one of the trains involved was purportedly found to have cocaine in his system. This law mandates a written program for all federal contractors, but does not include a mandatory testing program.

Separate and apart from the general federal program, the Department of Transportation (DOT) includes six distinct agencies, including the Federal Aviation Administration (FAA), the Federal Motor Carrier Safety Administration (FMCSA), the Federal Railroad Administration (FRA), the Federal Transit Administration (FTA), the United States Coast Guard (USCG), and the Pipeline and Hazardous Materials Safety Administration (PHMSA). Each of these DOT agencies also has their own drug testing rules, including differing random testing rates. Violations of DOT drug testing rules could cause an employer to be fined \$5,000 for each violation. Only organizations that have employees in positions whom "possess a Class A or B driver's license AND drive a vehicle that weighs over 26,000 lbs." (FMCSA); or "drive a bus that seats 14 or more passengers" (FTA), must comply with these federal statutes.

State Programs

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Randall Elkan is the president of Mobile Medical Solutions, a third party administrator of drug testing programs. Betsy Uliss, SPHR, is the president of Betsy Uliss Consulting, Inc., a full-service human resources consulting firm.

Program in 1992. This statute (440.101, 440.102) mandates that employers:

1. Give incumbent employees a 60-day notice prior to beginning testing;
2. Have a written DFWP program;
3. Comply with the pre-employment and post-accident testing requirement and;
4. Use the DFWP acronym in any employment advertising.

Employers who comply with these requirements are eligible for a 5 percent annual reduction in their workers' compensation premiums. Additionally, the statute allows for insurance companies to deny workers' compensation claims when the injured employee tests positive for drugs/alcohol on a post-accident test.

There are seven other states that have similar premium reduction statutes, including Georgia, Alabama, Idaho, Ohio, South Carolina, Tennessee and Virginia. However, since each state program has nuances, a Drug-Free Workplace consultant will reference and implement the particular statutes in the state in which the client operates and will include it in the Drug-Free Workplace documentation and protocol. These program differences relate to initial notice, types of testing required, laboratory/MRO reporting, and employee and supervisory training. Several states have statutes allowing for the denial of claims after a positive drug/alcohol test.

Ins and Outs of Testing

The two types of specimens allowed in several other states are urine and hair sampling, both of which have advantages and drawbacks. Urinalysis had been used for over 40 years and has been proven to be 99.9 percent effective in identifying substance abuse. Negative results are traditionally attainable within 24 – 48 hours and the cost of testing is reasonably priced between \$25 – \$45. Drawbacks to urinalysis include possible dilution or adulteration of the specimen.

Hair testing has been used for approximately 20 years, and is somewhat

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less reliable than urine. The principle advantage of hair testing is the ability of the lab to go back 90 days to ascertain positive samples. This type of testing is generally used for pre-employment.

When processing the hair sample, collectors take between 60 – 90 strands of hair from the crown. For this reason, hair testing is much more invasive than urinalysis. Since the hair is cut from the donor and it takes a couple of days for the hair to grow beyond the scalp line to determine recent drug use, this type of specimen cannot be used for post-accident/reasonable suspicion tests. Purportedly, hair testing can be compromised by the use of over-the-counter dyes/rinses, which could remove evidence of the drugs of abuse. Lastly, the price for hair testing is over \$100 and takes five – seven days to receive results.

The majority of occupational drug testing is conducted by two large laboratories with numerous collection sites. Candidates who have applied for employment, or employees who have been involved in an accident, go to the collection site and provide a sample that is processed and couriered to the laboratory for analysis. There are two tests conducted on every positive specimen to preclude the possibility of false positives. The results are then communicated confidentially to a Medical Review Officer (MRO) who reads the results. The MRO acts as a check and balance, as there is a possibility that prescription drugs could cause the ini-

tial positive test. The MRO is charged with deciding whether any prescription or over-the-counter drugs could have caused the positive test. The laboratory should not communicate results directly to employees to avoid any possible ADA claims.

Florida, North Carolina and Georgia have amended their DFWP statute to allow for the use of rapid drug tests as an initial screening tool. These on-site tests are generally conducted by employers or Third Party Administrators (TPA), who are able to get initial drug test results within five minutes. Tests that are initially positive are sent to a certified laboratory for confirmation testing. Thus, employers do not make adverse employment decisions using the rapid test cup process, but rather have laboratory/MRO backup prior to making these decisions. Benefits of rapid test technology include screening out 85 percent of the negative tests, allowing employers to make faster employment decisions. Additionally, the cost of these tests is roughly 50 percent of the cost of standard laboratory testing, substantially reducing the testing expense.

Depending on the type of rapid test used (strip, blotter, cup); the only drawback is commonly referred to as “the Yuk Factor.” Members of the organization's management team may not want to handle the specimen (even with gloves). There are several rapid test products on the market, including one type where the test is self-contained, and precludes the distinct possibility of

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an individual coming into contact with the specimen.

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Many state statutes and the DOT require that written DFWP programs contain verbiage involving Employee Assistance Programs (EAP), Sub-

stance Abuse Professionals (SAP) and employee/supervisory training. Most of the state DFWP and the DOT mandate that if an employee voluntarily comes forward with their substance abuse admission, the company must make appropriate treatment referrals without taking any punitive company actions (i.e. termination).

The DOT mandates in the event of a positive test:

- The employee must be seen by an SAP, who evaluates the donor and makes treatment recommendations;

- A donor must take a “Return to Duty” test, with negative results; and
- The company is required to “follow-up” test this employee six times annually, for two years.

The benefit of using an SAP is that this professional is the DOT authority allowed to review the quantitative levels of the positive results. This review is necessary to determine whether an individuals’ drug use is decreasing over time, which the SAP validates.

When implementing a state sanctioned DFWP or to establish a DFWP policy, organizations should consider using a TPA. The TPA researches the state and federal regulations for the specific locale and makes recommendations to save the company time and money. TPA services vary, and can include on/off site collections, mobile services, documentation and random selection services, DOT compliance, and employee/supervisory training. ■

Questions and Answers: Maintaining a Drug-Free Workplace

Q: I am a country club that has landscaping personnel using heavy equipment. I am concerned with the safety of my employees since they are only tested before they begin employment. Are there any options under Drug-free Workplace to help in this situation?

A: If the company has DOT covered employees, random testing is required. Many state statutes allow for the use of random testing, in addition to pre-employment and post-accident tests. Use of a TPA is recommended to take the onus off employers in determining random selection. The use of a random selection computer program is used to have a valid process of generating employee selections. Typically employers provide a list of employees in the random pool, which are entered in the computer program. The program is commanded to make primary and alternate selections,

which are to be used in the event that a primary selection is unavailable due to vacation, illness, shift schedule, et.al. Using random testing keeps employees on their toes, knowing they could be randomly selected at any time. A general rule is that the higher the worker’s compensation premium, the greater the need is for random testing.

Q: How do I detect if someone is “under the influence”?

A: Most of the state laws and the DOT allow employers to conduct a “reasonable suspicion” test, if the employee is exhibiting physical or mental signs of impairment. Employers should consistently use a multi-step procedure, where at least two supervisors concur with the initial determination. Immediate supervisors should document these signs of impairment, prior to the decision to conduct a “reasonable suspicion” test.

A supervisor should accompany the donor to the collection site to take a reasonable suspicion test, minimizing risk exposure and the possibility of the employee getting hurt en route.

Q: What happens if one of my current long-term high performers tests positive in a post-accident testing situation? Do I have to terminate that employee or may I give him a second chance?

A: Neither the DOT nor most states mandate that employers terminate an employee following a positive drug/alcohol test. Employers contemplating a “second chance program” should consider several factors, including length of service, position, quality and quantity of work, etc. when making a decision to retain the employee. Note that establishing a “second chance program” may set a precedent for similar situations going forward.