

EMPLOYMENT LAW UPDATE

2014

HOLLAND & HART^{LLP}



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Drugs in the Workplace

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Panelists

- **Cole Wist, Holland & Hart**
- **Emily Hobbs-Wright, Holland & Hart**
- **Jeanna Feldmann, Chematox Laboratory, Inc.**
- **Moderator: Brad Cave, Holland & Hart**



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Agenda

- An overview of the problem
 - Prescription drugs
 - Marijuana / illegal drugs
- Legal issues for employers
 - Safety and health
 - Disability, discrimination, privacy
 - Drug testing
- Scenarios: what employers should (and should not) do



Prescription Drug Abuse Definition

Prescription drug abuse - the intentional use of a prescribed medication:

- (1) without a prescription;
- (2) in a way other than prescribed; or
- (3) for the experience or feeling it causes.



Prescription Drug Crisis

- Epidemic and nation's fastest growing drug problem
 - Crosses broad spectrum: age, sex, ethnicity, economic status
- A perfect storm
 - Misperception of risk
 - Wide availability, legally and otherwise
 - Broad use and very addictive substances
 - Policy and law enforcement focus elsewhere
- Expensive



National Epidemic

- In 2007–2010, almost one-half of the U.S. population took at least one prescription drug in the preceding month and 1 in 10 reported taking five or more drugs
 - Adults: painkillers, anti-depressants
 - Youths: stimulants
- CDC: more people die every year from prescription painkillers than from heroin and cocaine combined



The Cost

- **Workplace insurers - estimated \$1.4 billion spent on narcotic painkillers annually**
- **Health insurers - up to \$72.5 billion in direct health care costs due to non-medical use of prescription drugs**



Illegal Drugs and Alcohol

- **Almost 25 million individuals over age 12 were current illicit drug users in 2013**
 - Illicit drugs includes marijuana, cocaine, inhalants, hallucinogens, heroin and prescription-type drugs (i.e., pain relievers, tranquilizers, stimulants, etc.)
- **Over 60 million reported being binge drinkers in the past month**
 - Binge drinking: five or more alcoholic drinks on a single occasion



Marijuana

- May prohibit marijuana use at work
- Off-duty use depends on the state
- Examples:
 - Colorado – Termination for testing positive for marijuana OK even with valid medical marijuana license (appeal before CO Supreme Court)
 - Nevada – Employers have obligation to reasonably accommodate medical marijuana use in certain circumstances



In the Workplace

- 1 in 12 full-time workers in the U.S. used illegal drugs in the past month
- Almost 75% of adult illegal drug users are employed
- 11% of workers have an alcohol problem



- *Source: Substance Abuse and Mental Health Services Administration and National Council on Alcoholism and Drug Dependence, Inc*



Effects on the Workplace

- Tardiness and absenteeism
- Less productivity
- Poor concentration and inconsistent work
- Safety issues, including increased workplace accidents
- Possible criminal activity at work, including buying and selling illegal drugs
- Increased health care costs
- Higher number of workers' comp claims filed

Source: National Council on Alcoholism and Drug Dependence



Drug Testing Statistics

- **Percentage of positive workplace drug tests has increased for first time in more than 10 years**
 - 3.7% positivity rate in 2013 (3.5% in 2012)
- **Marijuana – most commonly detected illicit drug**
 - 1.7% positivity rate in 2013 (1.6% in 2012)
- **Methamphetamine positives increased**
- **Oxycodone positives decreased**

Source: Quest Diagnostics Drug Testing Index™



Safety and Health Risks

- **Contributes to workplace accidents**
 - People who abuse drugs or alcohol are 3.5 times more likely to be involved in a workplace accident



Source: Substance Abuse and Mental Health Services Administration



OSHA Act

- **OSHA Act 5(a)(1) – The General Duty Clause**
 1. The employer failed to keep its workplace free of a hazard;
 2. The hazard was “recognized” either by the cited employer individually or by the employer’s industry generally;
 3. The recognized hazard was causing or was likely to cause death or serious physical harm; and
 4. There was a feasible means available that would eliminate or materially reduce the hazard.



Employment Concerns

- **Disability**
 - ADA and Rehabilitation Act of 1973 do NOT protect current users of illegal drugs
 - Alcoholism may be a disability under the ADA
- **Discrimination**
- **Union workforce**
 - Drug testing is mandatory subject of bargaining
- **Privacy**



Drug Testing Laws

- No comprehensive federal law regulates drug testing by private employers
- State and local statutes may restrict or regulate drug testing
- DOT testing may apply to some employers
- Drug-Free Workplace Act of 1988 applies to federal contractors



Toxicology – What to Test For

- **Hair follicles**
 - Chronic use, historical, no timeline/impairment, longest detection window*
- **Urine**
 - Historical, no impairment, detection window varies by drug
- **Oral Fluid**
 - New, not many labs do testing on this matrix, interpretation of levels complex
- **BLOOD**
 - Best option, impairment, directly related to what is in system



What Kind of Tests Performed . . .

- **Drug Screen**
 - Presumptive
 - Classes of drugs-not specific
 - Qualitative(positive/negative)
- **Drug Confirmation**
 - Follow up to screen
 - Specific drug identified
 - Quantitative (you get a number)
 - Sometimes qualitative only
 - Follow up to screen
 - Specific drug identified
 - Quantitative (you get a number)
 - Sometimes qualitative only



Common Pitfalls

- **Cross reactivity of screens**
 - Sudafed, Poppy Seeds
- **Appropriate sample for the situation**
- **Time of collection vs. time of incident**
- **Additional testing/sample retainment by lab**



How to Deal with Non-Zero Tolerance

- If impairment is the question, must have blood collected close to time of incident
 - Blood levels only way to determine impairment
- Medical history for interpretation of levels
 - Lack of presence of drug can be important also
- Impairment specific to activities...cannot set threshold level across the board



How to Get Blood

- Yes it is invasive, but no more than visiting the doctor
- Taken at health care facility by certified phlebotomist
- Thoughts on employee blood draws



Scenario One

George works at a construction company as a truck driver.

- **Slips and falls while at work injuring his back**
- **Treating doctor prescribes hydrocodone which he takes**
- **On first day back to work, George meets with HR prior to resuming his normal duties**



Question 1

Must George disclose his drug prescription to his employer?

- 1. YES**
- 2. NO**
- 3. DEPENDS ON COMPANY POLICY**
- 4. ONLY IF HE PLANS TO TAKE IT WHILE AT WORK**



Question 2

What may George's employer ask about prescription drugs?

1. NOTHING – PRIVACY LAWS PROHIBIT IT.
2. ONLY ABOUT DRUGS THAT RESULT IN IMPAIRMENT ON THE JOB
3. EVERYTHING – EMPLOYER IS ENTITLED TO KNOW



Question 3

May George's employer request that he participate in drug testing prior to resuming work?

1. YES
2. NO
3. ONLY IF HE CONSENTS IN WRITING
4. YES, IF PURSUANT TO COMPANY POLICY AND REQUIRED OF ALL EMPLOYEES



Question 4

Is the employer required to temporarily modify George's job duties while he is taking hydrocodone?

1. YES

2. NO

3. IT DEPENDS ON THE NATURE OF HIS JOB AND WHETHER HE CAN STILL PERFORM THE ESSENTIAL JOB FUNCTIONS



Additional Facts for George

- George returns to work as a truck driver
- Supervisor observes him taking a pill but says nothing
- After taking a Vicodin in the last 30 minutes of a shift, he is involved in an accident, resulting in the fatality of a fellow employee
- OSHA conducts investigation
- Company has drug-free workplace policy



Question 5

Can OSHA cite George's employer?

1. YES, IT'S STRICT LIABILITY
2. NO, THE NEGLIGENCE WAS GEORGE'S NOT HIS EMPLOYER'S



Question 6

What defenses are available to the employer if issued an OSHA citation?

1. THE COMPANY HAD AN APPLICABLE POLICY
2. THE COMPANY EFFECTIVELY TRAINED ON ITS POLICY
3. THE COMPANY EFFECTIVELY ENFORCED ITS POLICY
4. ALL OF THE ABOVE



Question 7

What is the potential exposure for the employer and/or George?

1. REGULATORY PENALTIES
2. CRIMINAL PENALTIES
3. TORT DAMAGES
4. ALL OF THE ABOVE



Scenario Two

- John drives a non-DOT vehicle on remote oilfield sites
- He hits another company vehicle while driving on frontage road near site, injuring two co-workers
- OSHA learns of accident through local press
- Per company policy, John is required to take a post-accident drug and alcohol test
- John informs his supervisor he is a registered medical marijuana patient and would fail test.



Question 1

Can John's employer require him to take the post-accident drug and alcohol test?

1. YES

2. NO, AS A REGISTERED MEDICAL MARIJUANA PATIENT, HE IS EXEMPT FROM TESTING



Question 2

If John's test comes back positive for marijuana, can his employer terminate him?

1. YES, BUT ONLY IF HE WAS IMPAIRED AT THE TIME OF THE ACCIDENT
2. YES, PURSUANT TO THE COMPANY'S DRUG POLICY
3. NO, HE IS A REGISTERED MEDICAL MARIJUANA PATIENT
4. IT DEPENDS ON THE LEVEL IN HIS SYSTEM



Question 3

If John's test is positive for alcohol but not marijuana, can his employer terminate him?

- 1. YES, IT DOESN'T MATTER WHAT THE POSITIVE SUBSTANCE IS**
- 2. YES, IF COMPANY POLICY PROHIBITS ALCOHOL**
- 3. NO, ALCOHOL IS A LEGAL SUBSTANCE**



Additional Facts for John

- John tells his supervisor that he uses marijuana to treat nausea caused by treatment for cancer
- John states he ingests marijuana about 3X/week
- John last took marijuana about 3 days before the accident
- John asks to be exempt from the drug test since he believes the company policy only prohibits impairment on the job and he was not impaired
- John is aware that others have been allowed to go through EAP process



Question 4

Should the company exempt John from the post-accident drug test?

1. YES, HE KNOWS HE WOULD TEST POSITIVE
2. YES, IT IS LEGAL IN COLORADO FOR HIM TO USE MARIJUANA
3. NO, COMPANY SHOULD FOLLOW ITS POLICY
4. MAYBE, DEPENDING ON HIS DOCTOR'S ORDERS REGARDING HIS MARIJUANA USE



Question 5

Assuming John tests positive for marijuana, is it risky to terminate him?

1. YES, IF THE EMPLOYER HAS TREATED OTHERS DIFFERENTLY IN SIMILAR CIRCUMSTANCES
2. YES, IF THE EMPLOYER'S DRUG TESTING POLICY ONLY REGULATES IMPAIRMENT WORK
3. YES, IF THE POLICY SAYS THAT EMPLOYEE WILL BE REFERRED TO EAP FOLLOWING POSITIVE SCREEN
4. ALL OF THE ABOVE



Additional Facts for John

- OSHA initiates an investigation of the accident and requests information regarding the company's drug-free workplace policy and its history of enforcement
- OSHA requests information on the company's response to positive drug tests over the prior 3 years



Question 6

Must John's employer provide OSHA all of the requested information?

1. YES, ALL OF IT
2. NO, NONE OF IT
3. SOME OF THE INFORMATION MUST BE PROVIDED



Thank You!

QUESTIONS?

