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DON'T SPILL THIS CUP!: **POST-ACCIDENT AND REASONABLE** **SUSPICION DRUG TESTING**

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INTRODUCTION

As we discussed in our recent article, *Weed and Weapons: Workplace Challenges Based on New Laws*, recent state legislative enactments have expanded the scope of marijuana use for medicinal and recreational purposes. As a result, we can all expect the use of marijuana will greatly increase across the country. These legislative developments have also led to increased uncertainty over whether and when an employer can test an employee for suspected marijuana use. Further, despite the fact that marijuana remains illegal under Federal law, employers are subject to the whims of each individual state's marijuana laws.

This article addresses an employer's ability to conduct two forms of drug testing: (1) post-accident testing; and (2) reasonable suspicion testing. We address these two forms of testing, because while employers are generally permitted to conduct pre-employment drug screens for illegal drugs, an employer's uncertainty generally arises when a current employee has been involved in an accident or exhibits behavior that indicates impairment.

PRIOR TO TESTING

It is advisable that employers implement some form of a drug testing policy providing for pre-employment, post-accident, and reasonable suspicion drug and alcohol testing. However, if an employer wishes to conduct drug and alcohol testing, the employer should first develop and

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distribute copies of its drug testing policy to all employees in advance to its employees to allow them to adjust their behavior, including use of marijuana, prior to the effective date to avoid a positive drug test. If the workplace is subject to a labor agreement the employer will most likely have to bargain with the union over the terms and condition of the policy. To withstand potential challenges, the testing policy should:

- Identify the types of testing: *i.e.*, pre-employment, for cause, and post-accident;
- Identify that the testing is limited to the presence of specific drugs;
- Use a scientifically valid testing method, which involves private specimen collection and chain of custody procedures to ensure proper identification, labeling, recordkeeping, handling and testing of specimens;
- Notify employees of the consequences that follow from a positive drug test;
- Reinforce the employer's commitment to maintaining the testing's confidentiality; and
- Consider providing sources for help for drug abuse or alcohol misuse problems.

STATE SPECIFIC STATUTORY RESTRICTIONS

As we have briefly touched upon above, many states (and municipalities) have drug testing restrictions specific for that jurisdiction. Thus, employers must analyze the laws of their local states and municipalities to determine whether they:

- Impose written policy and notice requirements;
- Regulate the specimen collection and testing process;
- Impose rehabilitation requirements;
- Restrict employers' disciplinary actions against employees who test positive; and
- Mandate appeal procedures.

Certainly, no employer would want an employee to cause an accident because (s)he is under the influence, but be prohibited from taking corrective or disciplinary action because its policy did not comply with local requirements.

POST-ACCIDENT TESTING

Post-accident testing occurs, as you can imagine, after an accident has occurred in the workplace. Post-accident testing is often encouraged by an employer's workers' compensation carrier, which either specifically mandates the testing or offers reduced premiums for conducting such testing. The employer may also be able to successfully defend against an OSHA citation

issued as a result of the accident on the basis of the employee's impairment which was unknown to the employer.

Though most states freely permit employers to conduct post-accident drug tests, a few states impose limitations on when post-accident testing can occur. For instance, some jurisdictions such as Boulder, Colorado, Connecticut, Maine, Rhode Island, San Francisco, and Vermont permit post-accident testing only if the employer has reasonable suspicion to believe that the employee was impaired at the time of the accident. Further, some states, such as California, Iowa, and Montana require that the accident reach certain threshold levels for the extent of personal injury or property damage before an employee can be tested. Thus, employers must check applicable state laws to confirm such requirements.

REASONABLE SUSPICION TESTING

Under most state laws, an employer is required to provide an employee a safe place to work. In addition, the Occupational Safety and Health Act requires that employers provide their employees safe and healthy places of employment which means that the employer must identify and address potential hazards. As such, employers must ensure that employees operating equipment, driving vehicles, or performing potentially hazardous work are not under the influence of drugs or alcohol which can create hazardous conditions to any employee who may be impaired or to co-employees who may be injured because of the impaired employee's actions. One component of ensuring safe operations is reasonable suspicion drug testing. Under most jurisdictions, an employer is permitted to require a drug test when it has a reasonable suspicion, based upon specific, contemporaneous objective and articulable facts concerning an employer's appearance, behavior, speech or body odors, that an employee is under the influence.

One of the biggest concerns regarding reasonable suspicion testing is whether the employer's suspicion was objectively reasonable under the circumstances. To avoid this issue, it is advisable that employer's define reasonable suspicion in its drug testing policy and identify specific behaviors that may trigger such suspicion. To develop this definition, employers should look to their state and municipal jurisdictions, which may specifically define reasonable suspicion, "cause," or "probable cause." For example, the Illinois Compassionate Use of Medical Cannabis Pilot Program Act, which became effective on January 1, 2014, defines impairment as follows:

"An employer may consider a registered qualifying patient to be impaired when he or she manifests specific, articulable symptoms while working that decrease or lessen his or her performance of the duties or tasks of the employee's job position, including symptoms of the employee's speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, negligence or carelessness in operating equipment or machinery, disregard for the safety of the employee or others, or involvement in an accident that results in any injury to the employee or others. If an employer elects to discipline a qualifying patient under this subsection, it must afford the employee a reasonable opportunity to contest the basis of the determination."

It is also advisable that an employer implement a written “Reasonable Suspicion Checklist” for a supervisor to document incidents involving reasonable suspicion of impairment. The employer should complete the checklist within twenty-four hours of the observed appearance that led to the reasonable suspicion. The employer should also document all of the indications that led to the reasonable suspicion, such as:

- Breath/clothes smell like alcohol
- Breath/hair/hands/clothes smell like marijuana
- Breath smells like mouthwash, mints, or gum
- Physical appearance disheveled/unkept
- Eyes bloodshot
- Eyelids droopy or puffy
- Eyes glassy
- Eyes watery
- Pupils dilated
- Pinpoint pupils
- Involuntary eye movements
- Wearing sunglasses
- Face flushed
- Face pale
- Sudden, marked mood swings, particularly after breaks
- Sudden, marked changes in activity level
- Unusually argumentative, irritable or hostile
- Paranoid
- Sniffles
- Sleepy/drowsy
- Unusual sweating
- Speech slurred
- Speech incoherent
- Speech rambling
- Will not stop talking
- Will not talk
- Voice unusually loud or soft
- Stumbles, staggers or falls when walking
- Sways, sags or leans on support when standing
- Movements jerky or uncoordinated
- Acts hyperactive
- Moves very slowly
- Trembles/shakes
- Nausea or vomiting
- Sweating
- Erratic or violent actions
- Depressed
- Confused/disoriented
- Unusually anxious

The checklist should be signed and dated by the supervisor who made the observation on the same day as the observation. If possible, it should be countersigned and dated by another supervisor on the same day as the observation to corroborate the observation.

IMPOSE DISCIPLINE

Once an employer has determined, through a timely investigation and documented positive drug test results, that there has been a violation of its drug testing policy, the employer must impose discipline in a uniform fashion in accordance with its policy, including:

- Written warning
- Suspension
- Termination

- Participation in a “second chance” agreement in lieu of immediate termination, requiring an employee who has tested positive to participate in a drug rehabilitation program for a specified period of time and thereafter to remain drug free. In the event of a future violation of the policy, the employee will be subject to immediate termination for violation of the policy and agreement.

CONCLUSION

All employers should consider developing and implementing a drug testing policy to create a safer work environment. The authors are aware of numerous tragic workplace accidents that are the result of employee use of marijuana (and other drugs). It is important that employers review their local laws to ensure their testing policies do not inadvertently violate such laws. If the foregoing actions are taken, the employer can substantially limit its potential legal liabilities arising out of illegal drug usage which results in employee impairment.