Keeping Pace with Drug-use Trends

Medical Marijuana, Legal Positives, and Other Challenges for Drug-free Workplace Programs

FEATURE
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Editor's note: The information in this article does not constitute legal advice. It should not be used as a substitute for obtaining legal advice and consultation prior to making decisions regarding individual circumstances.

Over the past ten years, fourteen additional states have legalized medical marijuana, bringing the national total to twenty-three states and the District of Columbia, according to the website ProCon.org. In addition, two states, Colorado and Washington, have legalized recreational use of marijuana. These considerable changes in regulatory compliance present new challenges for employers that operate alcohol and drug prevention (ADP) programs.

Beyond marijuana, abuse of illegal street drugs and legal prescriptions is also high, translating to increased risk in the workplace. How should employers respond? Unfortunately, many employers assume that no problem exists because they already have an ADP program.

As part of a research project conducted by the Department of Safety Sciences at Indiana University of Pennsylvania, we investigated changes in the U.S. drug industry over the last ten years to determine whether workplace ADP programs are keeping pace with pro-drug innovations. Medical marijuana, cannabidiol, legal prescriptions, synthetic drugs, and advancements in adulteration have created new challenges employers should address in their ADP programs. An examination of academic studies, government publications, legal decisions, and media articles related to innovations by the pro-drug industry and employers' control efforts—as well as practical experience consulting with employers on safety matters—identified five actions employers can take to help their ADP program succeed:

1. Revise position evaluations to include the terms *safety sensitive* and *direct threat*.

2. Document training requiring employees to self-report any medication that could cause impairment.

3. Inform medical research officers (MROs) which employees perform safety-sensitive tasks.

4. Ensure healthcare facilities and laboratories are conducting *quantitative* drug tests and not simply *qualitative*.

5. Include point-of-collection examination in alcohol and drug screening.

Employer ADP Programs

Industrial hygienists make exposure assessments that assume a toxin-free baseline physiology. The issue of impaired employees creates multiple chemical toxicity concerns. Research can't address all possible toxic interactions between workplace chemicals, pharmaceuticals, and recreational drugs on employee physiology and cognition. Effective ADP programs are essential to support exposure assessments and maintain safe and healthy work environments.

Most employer ADP programs maintain a list of safety-sensitive positions, require employees to present new prescriptions for consideration of possible impact to job duties, and include initial, random, and post-incident drug screening. These programs are based on several assumptions. For instance, employers assume that their safety-sensitive positions will not undergo significant scrutiny from outside the organization, such as in court. Also, many organizations assume employees will present their prescription medications for consideration before continuing work. Finally, employers often assume traditional drug screening will catch offenders and serve as a basis for disciplinary actions. These assumptions may be faulty; consider, for example, the implications of the Americans with Disabilities Act (ADA) on the safety-sensitive position list.

The ADA protects recovering and recovered alcoholics or drug addicts from discrimination. However, as explained in a 2012 article published in *Lexology*, the ADA also gives employers significant rights to ensure an alcohol- and drug-free workplace by testing employees for illegal drug and alcohol use under certain conditions. Federal employers have been mandated to follow drug-free workplace requirements since 1986 when President Reagan issued an executive order authorizing the Department of Health and Human Services (HHS) to develop testing guidelines.

The terms *safety sensitive* and *direct threat* should be included in employer ADP programs for performing individualized assessments. These terms have regained importance as employers are determining their right to decline employment for individuals claiming to be protected by the ADA *and* applying for certain positions. A 2010 article in the *British Columbia Medical Journal* defined a *safety-sensitive* position as one where impaired performance, for whatever reason, could result in a significant incident affecting the health or safety of employees, customers, customers' employees, the public, property, or the environment. *Direct threat* is an employer defense under the ADA when dealing with issues of substance abuse; it is defined in the Act as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." The ADA permits employer work rules requiring an individual not pose a direct threat to the health or safety of other individuals in the workplace. Documented employee training should include the requirement to notify Human Resources if an employee performing safety sensitive tasks has been issued a valid prescription that could cause drowsiness or impairment while at work. Such impairment could be exacerbated by other workplace exposures, which would invalidate previous assessments.

Recent Court Decisions

How would your workplace react if an employee applying to be an iron-worker, nurse, or forklift driver presents a valid prescription for Vicodin or medical marijuana, or is a recovering addict on methadone?

In today's hiring environment, such questions need to be evaluated on an individual basis. Employers should avoid overly broad application of safety-sensitive designations, particularly without knowing the candidate's potential level of impairment or the accommodation required for the candidate to perform work functions.

Employers have been on the winning and losing sides of recent court decisions concerning these kinds of employment situations. In the 2010 case *Equal Employment Opportunity Commission (EEOC) v. Hussey Copper Ltd.*, the court held that the employer failed to make an adequate individualized assessment and failed to establish that the individual posed a "direct threat" to others due to his methadone use. Three years later, in EEOC v. U.S. Steel Corp., a different court ruled in favor of an employer's right to randomly test probationary employees for alcohol while working at a safety-sensitive facility. (For more information about these decisions, see the articles "Required Individualized Assessment under ADA Must Be Adequate" on the Jackson Lewis website and "EEOC v. U.S. Steel Gives New Hope to Employers" from *Law360*). The way an employer approaches its determination can be critical if that decision is questioned by an outside agency like the EEOC.

MRO Evaluations and Valid Prescriptions

An article in the May 2011 issue of *Professional Safety* described some of the challenges employers face when trying to balance their social responsibility to provide safe working environments for employees and customers against the risk of an employment lawsuit. A particularly problematic scenario is when an MRO approves an employee who has tested above impairment levels as a legal positive because the employee shows a valid prescription. Sarah Trotto, writing last year in *Safety+Health* magazine, recommended that employers include a written explanation of the safety-sensitive justification as part of their position assessment supplied to the MRO. The issuing physician would sign a fit-for-duty release to ensure an employee using the prescription would maintain cognitive function to safely perform work without injury to

themselves or others. In practice, issuing physicians tend to be reluctant to sign releases for potentially impaired workers.

In addition, some laboratories have switched analysis from quantitative to the less expensive qualitative screening without informing their employer clients. The qualitative tests cannot be used to demonstrate that impairment contributed to an incident—a critical element in workers' compensation lawsuits.

Gaps in Testing

The marketing of products and techniques intended for drug users to adulterate tests continues to grow. A 2008 paper published in *Forensic Science International* identified specimen substitution and adulteration as major problems for management, laboratories, and MROs. The availability of additives and adulteration products underscores the importance of an employer's efforts to innovate their ADP programs.

Synthetic marijuana (also known as Spice, K2, and fake weed) has five active chemicals the Drug Enforcement Agency (DEA) lists as Schedule I controlled substances. But manufacturers have found a way to evade legal restriction by substituting alternate chemical combinations, according to the National Institute on Drug Abuse. A 2014 article in *Time* described how, as the DEA updates its list of banned cannabinoids, manufacturers are innovating new compounds. This cat-and-mouse scenario creates a difficult challenge for employers.

The Department of Transportation (DOT) has recognized the deluge of adulterants available to drug users. DOT's definition of a *safety-sensitive* function is broader than the ADA's and covers all time from when drivers are required to be in readiness to work until they are relieved of all work responsibility. DOT also has mandatory testing guidelines.

One way to counter urinalysis loopholes is through "point-of-collection" testing, which can prevent some adulteration methods from succeeding. The Federal Motor Carrier Safety Administration's (FMCSA) controversial "direct observation" sample collection practices require a same-gender observer to "watch the urine go from the employee's body into the collection container." In 2008, FMCSA revised the procedure and required direct observation for all employees who fail or refuse to take a drug test as a condition of employment for safety-sensitive duties. The regulation confronts common adulteration practices by requiring employees to first raise their shirts above the waist, move their lower clothing to expose their genitals, and allow observers to verify the absence of cheating devices. This ruling was upheld as constitutional by the United States Court of Appeals for the District of Columbia in 2009. As part of its defense, DOT provided evidence of the increasing availability of products designed to defeat drug tests and a Government Accountability Office report indicating drug testing protocols were inadequate to prevent cheating.

Despite an increase in hair follicle testing, studies show urinary analysis by laboratories continues to be the most common drug test used by construction employers, as reported in *Construction Management and Economics*. However, a study in the *Journal of Health Care Compliance* suggests that testing laboratories may be headed for changes resulting from negative attention following confirmed cases of overbilling, consequences from false-positives/negatives, and the expanded use of "designer drugs" (synthetics) specifically formulated to go undetected by many tests. If existing programs are not revised, impaired employees who would otherwise have been identified and removed from service might pass traditional drug tests.

Forward Path

Given the trends toward legalizing marijuana and increasing acceptance of drug use among the public, employers would be well served to ensure their ADP programs are sufficient to protect the health and safety of employees—and to withstand scrutiny from courts and governmental agencies. Employers should also carefully consider how they will respond to employees with valid prescriptions who apply for safety-sensitive positions.

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RESOURCES

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