

Tune Up Your Substance Abuse And Testing Policy

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Many employer substance abuse policies need a tune up from time to time, and recent scientific developments make it important to check policy language so that it reflects actual practices and allows for an employer response to popular ways employees try to beat those tests.

Make sure your language permits the use of enhancements in testing technology.

Oregon law requires that any employment related test for substances of abuse be confirmed before it is reported back to the employer. ORS 438.435 (7) and (8) provide that if the results of the test would be used to deprive or deny any person of any employment or benefit, ‘a confirmatory test shall be conducted in a licensed clinical laboratory.’ Similarly if Oregon employers use out of state labs they must show their testing procedures meet or exceed the testing standards Oregon has imposed. Those standards are set out by regulation in OAR 333-024-0345 and require that the confirmatory testing be done by a licensed certified clinical laboratory. Chemical analysis by chromatography, immunoassay, spectroscopy or mass spectrometry are approved under these regulations. The confirmatory testing must be done by an analytical method that differs from the initial screening test.

Many employers have written the confirmation requirement into their policies and some even specify the testing methodology that they will use. Because it has long been considered the “gold standard” those policies frequently identify gas chromatography-mass spectrometry (GC-MS) as the confirmation methodology.

The problem with being so specific in the policy is that narrow language does not allow for a laboratory that might use a different testing technology for confirmation testing, such as, for example, liquid chromatography. In a worst-case scenario, the test may be absolutely spot-on accurate, but cannot be used as proof because the test didn’t follow the requirements of the policy.

► *Check your policy.* If your policy is written in a way that specifically describes the testing technology, add some general language to make sure that the policy does not restrict laboratories in their choice of technology.¹ For example, a policy can simply state that any positive drug test result shall be confirmed, but not identify the type of test method that will be used for confirmation. If you identify the type of confirming test, add language that permits “any other testing technology that the laboratory considers appropriate.” That may seem very open ended and general, but that’s the point.

¹ Employers who operate in other jurisdictions need to check state law to make sure there are no specific requirements identifying testing technology.

Make sure your policy permits specimen validity testing.

Before actually testing the specimen for drugs, laboratories test the specimen to make sure it comes from a human and that it is otherwise suitable for testing. This is generally referred to as “specimen validity testing” and should identify whether the specimen is dilute, adulterated, substituted or “invalid.” Employers need to make sure their policy language is not inconsistent with the testing that laboratories are actually performing. In addition, specimen collectors should also be trained in observations to ensure that the specimen is suitable for testing.

► *Check your policy.* If your policy describes the collection process in any way, or identifies any testing done to the specimen to determine its suitability for testing, make sure that your language is broad enough to allow for the range of testing that may occur. For example, you can provide that persons involved in the collection of a specimen for testing, and laboratories testing the specimen, may apply such procedures or tests as they deem appropriate to determine the validity and suitability of the specimen for testing.

Make sure you don't inadvertently build in observed collection procedures.

Effective August 31, 2009, employers subject to DOT testing requirements are obligated to use direct observation collection procedures in certain circumstances. Employers testing under their own policies are neither required nor authorized to do observed collections. That doesn't mean that observed collections are illegal; statutes don't generally prohibit them (except in some states). However, the fact that observed collections are not prohibited is not the same thing as saying it's a good idea to use them in an employment setting. Many Medical Review Officers recommend a direct observed recollection under certain circumstances even when the testing is not being done under federal guidelines. But in general, employers testing under their own policies expose themselves to invasion of privacy claims by the employees being tested.

► *Check your policy.* If you set up your policy so that you adopt DOT testing procedures, that ‘adoption’ will build direct observation collections into your private policy. Employees probably won't complain if you decide just to forego this aspect, but if you are concerned about the possibility of privacy claims, it makes sense not to have the requirement in your policy in the first place and to make sure that collectors know they aren't supposed to be doing observed collections. In addition, make sure you and the Medical Review Officer discuss the issue of direct observation collection procedures. You can keep DOT procedures for the most part by stating that you will follow DOT procedures “to the extent practicable” or that you will do so “when appropriate.” That's a little open ended, but again, that's the point of it.

Make sure you identify policy violations properly.

Every new wave of efforts by imaginative employees to beat the test presents a challenge to policy language. Employers need to make sure that the laundry list of policy violations is broad enough to cover these attempts.

The use of synthetic urine is a good example of how this can be important. Some employees are using the internet as a source and buying a urine-colored brew containing chemicals that belong in urine. Put the brew into a small container, warm it up, and it may get past the collector. If the lab checks the specimen for validity, however, the report may come back with a report that this was an “invalid specimen,” or with a statement that the specimen was not consistent with human urine. If your policy language prohibits adulterating or substituting the specimen but doesn’t build in any wiggle room, you may not be able to call synthetic urine a policy violation, and you may not know how to distinguish normal hydration from dilution. The problem comes from defining violations too narrowly or imprecisely. A laboratory report (substantiated by the Medical Review Officer) specifically stating a sample was “substituted” or “adulterated” is a refusal to test and can carry the same or greater disciplinary consequences to the employee as a positive drug test.

Policy violations can include conduct like testing positive, refusing to test at all, adulteration, substitution, getting “lost” on the way to the collection site, “forgetting” to take photo ID, deliberate dilution, sudden claims of shy bladder syndrome, offering to assist with beating a test, and probably a dozen more things you haven’t thought of.

► *Check your policy.* Make sure your policy allows you to take disciplinary action for the kinds of conduct expected when employees try to avoid the rules. You can try to list all the possible ways employees will misbehave and try to subvert the policy (and keep your policy updated as you discover new tricks), or you can use broad language with a catchall that prohibits “any conduct that has the purpose or the effect of interfering with the enforcement of the policy or its collection and testing procedures.” By the way, remind employees that there is good dilution and bad dilution. You are interested only in bad dilution (overhydrating to mask a positive result) and that they need to avoid drinking a lot of water right before the test. Better yet, require the employee to report promptly to the collection site, on paid work time, to submit a specimen. And you can remind those employees who drink a lot of water on a regular basis for health and fitness reasons that it’s a nice habit, but they will need to provide an acceptable specimen from time to time.

Make sure you allow for employees who have legitimate medical conditions that interfere with testing.

There are invalid or unsuitable specimens that show up because the employee is trying to fool you, and there are invalid or unsuitable specimens that show up because the employee has a legitimate medical condition. The first is a disciplinary event. The second is probably an ADA event. Make sure that you don’t sweep up innocent employees in procedures designed only for the guilty. Policies need to be fair.

► *Check your policy.* Some employees cannot provide a valid or suitable urine specimen because of medication or legitimate medical conditions (such as real shy bladder syndrome). Add language that notifies employees that they can identify the need for alternate testing procedures as an ADA accommodation. Labs can test substances

other than urine, but you need some advance time to get a process in place. If an employee needs an accommodation to testing procedures, you can require the employee to notify you in advance of testing so you can plan for it. Work with the collectors and labs and consult a Medical Review Officer if you have one to make sure you have identified the process properly, and document what you've done. The policy language can simply state that "employees with medical conditions that interfere with their ability to provide a urine specimen for testing should notify [human resources?] so that an accommodation to testing procedures can be identified."

Define your process properly and completely.

Employers need to identify what will happen in the case of an employee providing a specimen unsuitable for testing.

In general, employers need their policies to be consistent with two objectives: getting a valid and suitable specimen for testing, and deciding whether there is a legitimate medical explanation before taking disciplinary action.

If a specimen problem shows up at collection, it's a simple matter for the collector to require re-collection on the spot. That is ideal for the employer because there is no delay and therefore no opportunity for the employee to go home and figure out how to beat the test a second time.

If a specimen problem shows up in a lab result, the employee may already have accomplished what he/she intended because some time has passed and the drugs may already be excreted. Getting a clean specimen does not help identify what was in the employee's system three days earlier. So employers may want to identify the consequences from a single unsuitable specimen. Before taking any disciplinary action, however, it is important to find out whether there is a valid medical explanation for the specimen problem. If there was, you can be pretty sure the employee was not trying to beat the test. If you are using a Medical Review Officer, he/she will speak to the employee and find that out. If not, consider how you will give the employee a chance to identify a medical reason for the results. If there is no explanation, decide what disciplinary action to take.

► *Check your policy.* Go through the policy and chart out what will happen in the case of an unacceptable specimen. If you can't tell, then you have some work to do. Make sure the policy does not restrict collectors from requiring a new specimen if a problem shows up upon collection. Language can be as simple as "if the collector determines that a specimen may be unsuitable for testing, the employee may be required to remain at the collection site until he/she provides a specimen that is suitable for testing." Consider whether to add a Medical Review Officer process if you do not already have one. If you decide not to use a Medical Review Officer, plan your process to allow employees time to provide a medical explanation for an invalid or unsuitable specimen before taking disciplinary action. "Employees will be notified of any results showing the specimen to

be invalid or unsuitable for testing and given an opportunity to provide a medical explanation.”

Use precise terminology.

Although your options under your policy need to be broad and general, your language should always be precise. It helps to have a set of defined terms so that every time you use that defined term in the policy it means the same thing. You identify them by capitalizing the term. So, Adulterant, when used in the policy, always means what you say in the definition. A Refusal To Test always means the same thing.

► *Check your policy.* Go through the policy and see if you are using the same word or phrase consistently throughout. If you use Invalid in one paragraph and Unsuitable for Testing in another, fix those inconsistencies. You don't need to use technical definitions from government sources, but there is a great benefit in borrowing those definitions from authoritative sources. So, for example, you can define “Refusal To Test” as: engaging in any conduct with the purpose or effect of interfering with collection or test processes, including but not limited to failure to report in a timely fashion to a collection site, submitting an adulterated specimen, substituting a specimen, providing a specimen that is unsuitable for testing, or refusing to provide a second specimen when requested by the collector.” Then when you define penalties for a Refusal To Test everyone will know the kind of conduct you mean. You can find some good definitions in the regulations that the Oregon Employment Department uses in its unemployment Drug and Alcohol Adjudication Policy at OAR 471-030-0125 if you want to keep things close to home.

Keep your procedures fair.

Employees who don't sail through the process with flying colors may be violating your policies or may be trying to beat the test. Or they may have legitimate medical conditions. Or you may have a collector glitch or a rare lab glitch. Make sure that you have enough room in your policy to protect innocent employees. A key is ensuring that tested employees have access to collection site and lab information. This is not top secret information. It should be made available to any employee wanting to know what happened during this important process. Don't put a lot of roadblocks in the employee's path.

► *Check your policy.* Make sure that you provide employees with notice that they are entitled, on request, to testing results and train your policy administrators on the importance of due process. Substance abuse policies work when employers use them fairly.

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