

# **Navigating The Uneven Legal Terrain of Substance Abuse Testing Services**

Faye Caldwell  
fcaldwell@caldwelleverson.com

DATIA Annual Conference – April 11, 2013

**Caldwell Everson PLLC  
2777 Allen Parkway, Suite 950  
Houston, Texas 77019**



Legal Issues for Workplace Drug  
Testing Participants:

**Everyone *is not* Created  
Equal**

- 
- Testing must survive legal challenge because Donors may lose their jobs based upon a test result.
  - Workplace drug testing is therefore an adversarial process.
  - Testing is forensic because it must be legally defensible.
  - Testing roles are distinct to ensure the process is not unduly influenced by one Participant and to provide checks and balances.

## ***Why must Participants Care About the Legal Terrain?***

- Donors and their attorneys rarely understand the different roles and responsibilities of testing Participants.
- It is critical that counsel for service agents understand these relationships.
- Defining the roles and responsibilities of each Participant significantly reduces the breadth of a Donor's putative claims.

## ***Differentiating Testing Roles***

- 
- Under Department of Transportation testing regulations, Employers are ultimately liable for the conduct of their service agents.
  - Employers performing their own collections face additional risks.
  - For non-DOT testing, issues often arise for Employers when they choose not to use an MRO.

## ***Employers***

---

- The TPA will typically be the entity that has the direct services contracts with laboratories and collection sites.
  - Raises questions of contract duties.
  - Raises indemnification issues.
  - Cross-claims amongst Defendants may serve Donor's cause more than any Defendant.
- TPAs are often named simply because it is identified in the testing documents.
- TPAs, however, may also be directly targeted for its own conduct.
  - Particularly, if the TPA provides MRO services.

## ***Third-Party Administrators***

---

- MROs will typically be able to rely upon their medical judgment in defending decisions to verify test results.
- MROs should investigate all claims of legitimate medical explanations.
  - Burden will be on MRO for rejecting proffered explanations, *e.g.*, coca tea, as legitimate medical explanations.
- MROs may be required to consider conflicting contentions between Donors and collection site personnel.
  - Should review all documentation in such cases.
  - Some courts have looked to MROs to resolve collection issues.

## ***Medical Review Officers***

---

- Most Employers or TPAs typically use clinics to collect urine or hair specimens.
  - Collections performed by an Employer representative are permitted, however, many testing schemes require collector training, *e.g.*, DOT.
- If an Employer Representative is the collector, Employer creates additional risk to itself.
  - The collection site attendant's training is critical to positive external chain of custody.
  - Alleged inaccuracy of test results caused by irregularities at the collection site can be addressed only by the collection site.
  - Failure to properly document specimen collection allows Donors to fabricate problems with collection.
- Collector should always be DOT-trained.

## ***Collectors***

- Typically have no contact with Donor, and often have no direct relationship with the Employer.
- At least one state requires a Laboratory to provide training for collection site personnel, even if employed by a separate company.
- In addition to testing errors, Laboratories are often accused of not considering medical history information before reporting test results.
- Also face claims that the Laboratory should have rejected specimen for testing because of irregularities in specimen collections.

## ***Laboratories***

- 
- Claims against Consortia would typically be similar as to those brought against TPA.
  - Particularly, may be accused of improper use or disclosure of testing information.

***Consortia***

- Each Participant should immediately begin to define its role in the testing process upon notice of a claim.
- At the same time, each Participant must recognize its own obligations under its services contract and the obligations its own sub-contractor(s) may have to the Employer.
- Those obligations also vary under the different laws that may apply to testing.
- Each defense to a claim should be considered in light of these differences.

## **Rules and Responsibilities: Conclusion**



Applicable Standards and Laws:

**Beware the Unknown**

- Federal law
  - Department of Transportation regulations (49 CFR Part 40).
    - DOT testing is commonly referred to as “regulated drug testing.”
  - US Dept. Health and Human Services.
    - The HHS certifies laboratories to perform federally regulated drug testing and its regulations also apply to all federal service agents.
- State law
  - Many states have mandatory drug testing laws.
  - Also have voluntary drug testing laws, which may be adopted by an Employer in return for various benefits—the most notable being worker’s compensation insurance premium discounts.
  - Mandatory requirements for impairment presumptions under WC testing schemes.
  - Many states also have mandatory licensing statutes, typically for laboratories but also other entities such as collection sites.

## ***Different Laws are Applicable to Different Tests***

- Majority of federal specimens are DOT.
  - Regulated specimens, however, comprise a very small percentage of overall testing.
  - Not all “regulated specimens” are DOT.
- Participants spend an inordinate amount of time complying with federal licensing requirements.
  - There is overlap, but many state provisions differ from DOT or SAMHSA requirements.
- HHS-certified laboratories must report all federal/DOT specimens to an MRO.
  - Although many states require MRO-reporting, not all state schemes require this, or may require positive-only reporting.
- Strict limitations on release of testing information.
  - Compliance with DOT requirements, however, does not ensure compliance with a specific state law.

## ***Federally Regulated Testing***

- Courts have allowed Donors to recover from a DOT service agent or Employer for a violation of DOT regulations that injures the DOT Donor.
  - Regulations provide a road map (good and bad) for the standard of care.
  - Similarly, adherence to DOT requirements—and a confirmed re-test result, should provide a complete defense.
- DOT regulations prohibit DNA testing of DOT specimens.
- DOT regulations also prohibit the use of DOT test results for any other purpose.

## ***Claims for DOT Drug Testing***

---



# ***Types of State Laws Affecting Drug Testing***

- Mandatory drug testing laws.
  - Mandatory schemes refer to all testing in a state, including specifically private workforce employees.
- Voluntary drug testing laws.
  - Typically established as worker's compensation statute providing premium discount for Employers complying with program requirements.
- State employee or other state-regulated industry (also mandatory for covered employees).
- Laboratory licensure statutes (mandatory requirements).



# ***State Workplace Testing Laws***

- Limitations imposed by state law:
  - Some states provide specific cut-offs.
  - Some states prohibit certain types of testing.
    - Hair, oral, POCT.
  - Some states regulate the release of testing information.
    - Donor consent, not at all, or only with Agency approval
  - Some states require use of state “form” for testing or require split specimen collections:
    - *e.g.*, Florida, Iowa.

# ***Application of State Law Varies***

- Requirements under state law are dependent on a number of variables:
  - Mandatory or voluntary state scheme?
  - Is Employer taking WC premium discount?
- Location of Participant may effect requirements.
- Type of testing may effect whether MRO is required.
- Even if Employer is not receiving WC premium discount, is the test result being used to determine WC benefits?

# ***Different Requirements for Different Participants***

- Donors
  - Requirements may change depending upon state of residence versus state of employment.
- Employers
  - Often required to have written drug testing policy as part of state scheme.
  - May be required to actually list substances tested for in policy.
- Collection Sites
  - May be required to keep Donor log or offer Donor chance to provide medical history information.
- MROs
  - Some states require MROs report negative results in same time frame as positive results, e.g., require delay for verification process.



# ***Alternative Matrices, Cut-Offs, and POCT***

- Types of specimens may be limited by state law.
  - Urine, hair, oral fluid, blood in specific instances.
- Cut-offs
  - Many states provide cut-offs or even limit the analytes for which Employers may test.
- Point of collection testing is prohibited in many states.

## ***Example: Louisiana***

- Mandatory public employee drug testing scheme.
- Mandatory private employee drug testing scheme, *i.e.*, cut-offs, but only for NIDA 5-panel drugs.
  - Other drugs not subject to mandatory scheme.
  - Numerous exceptions to mandatory scheme based upon specific industry of Employer.
- Voluntary WC drug testing scheme.
  - Non-negative results must be reported to an MRO only for post-accident testing.

## ***Example: Oklahoma***

- In September 2010, the United States District Court in Northern Oklahoma held that an Employer *willfully* violated the Oklahoma Workplace Drug and Alcohol Testing Act when it terminated an employee for testing positive for Phenobarbital—a barbiturate that Employers across the United States commonly include in their workplace drug tests. *Creekmore v. Pomeroy IT Solutions, Inc.* (2010).
- The Court took the view, based upon Oklahoma regulations, that an Employer may only test for Schedule I, II, and III drugs. Since Phenobarbital is a Schedule IV drug, the Court found that the Employer willfully violated the Oklahoma Testing Act by testing for it.
- After this ruling, the Oklahoma legislature changed the law to remove the Oklahoma DOH's power to implement regulations related to drug testing standards.
- Oklahoma DOH, however, appears to still be enforcing its previous regulations.



## ***Example: Illinois***

- Prior to 2011, Illinois law did not contain specific requirements for worker's compensation drug testing.
- In 2011, Illinois revised its WC statute to require split specimen collections for WC post-accident testing.
  - Legislature also tasked WC Commission with promulgating additional testing regulations.
- Regulations published in November 2012 raise questions as to obligations of laboratories to report drug or metabolite concentrations below standard cut-off levels, an MROs interpretation of those results, and compliance.

# *Illinois cont'd*

The Illinois Regulations require:

- The use of a 7-part form, and specific certifications by collector and certifying scientist.
- Define a “positive” result and a specimen in which a controlled specimen is present.
  - No cut-offs provided by regulations.
  - Concentration in urine admissible in hearings to show impairment and intoxication.
- Regulations provide for different retention periods of specimens than HHS/DOT.
- Failure to comply with requirements results in loss of rebuttable presumption for Employer.

## ***Example: Maine***

- Maine has numerous provisions that are unique to the state:
  - Negative test results must be reported in a way that prevents Employers from determining true negatives from MRO-confirmed negatives.
  - 6-acetyl morphine, at a cut-off of 10 ng/mL, may only be reported if morphine is greater than 2000 ng/mL.
  - A Donor has the option of requesting a blood sample be drawn for testing if required to submit to testing for marijuana.

- Numerous states provide for mandatory testing schemes, or in some instances, mandatory Laboratory testing requirements for testing of Donors in that state.
- Participants must be aware of these different schemes in the states in which they operate.
- Legal obligations will vary depending on the type of testing, even within a state.
- State statutes typically provide attorney fees and allow recovery of damages for violations of mandatory testing provisions.

## ***State Testing: Conclusion***



Educating Donors as a Defense  
to Pre-Suit Claims:

**Science is Hard to Beat**

- 
- The TPA may not have been the entity that collected the Donor's specimen.
  - A Laboratory will be unable to respond to assertions that the Donor had a valid prescription.
  - The collection site is unable to change an Employer's decision regarding a cancelled test.
  - The MRO is not the testing entity.

## ***Educate a Donor about Your Organization's Function***



# ***Collateral Attacks on Tests***

- Donors have increasingly attempted to use negative hair test results as evidence disproving non-negative urine and oral fluid specimens.
  - Increases the cost of defending a claim when expert evidence is required.
  - Requires aggressive education of the court and Donor's counsel.
  - To the uneducated, appears to cast doubt on test results and the handling of a specimen.



# ***Collateral Attacks***

- Established body of science and evidence demonstrate that a subsequently collected specimen that tests negative is insufficient to disprove previous non-negative test result.
- Re-tests performed on newly-collected specimens are not only irrelevant, but in some cases Donor will choose panels that do not contain the analyte for which they were previously positive, or will have tests performed at higher cut-off levels.
- A re-test of original specimen is only legitimate evidence.

# ***Explaining the Way of Things: Conclusion***

- Many attorneys do not understand DOT testing regulations.
  - Donors often do not reveal they had the right to a re-test, or that a re-test already occurred and confirmed the result.
  - Attorneys think DNA testing will support their client's claim but not realize it is not permissible.
- Other tests are not evidence a collection or test was performed improperly.
  - Donor attorneys rarely understand excretion rates.
  - High cost of expert testimony.
- Many Donors, and their attorneys, assume one Participant is involved in all parts of the process.
- When educated as to the forensic testing process, many attorneys reconsider their client's claims.



Information Release:

**Even the Donor is not Always  
Entitled to the Records**

- Who is asking?
  - Third parties are not typically allowed to obtain records absent Donor consent.
- What are they asking for?
  - Are they requesting DOT records, clinical records, or even an actual specimen?
- Where is the Participant located?
  - Is there good subpoena power?

***Who, What, Where?***

# ***Individual State Laws Regarding Release of Testing Records***

- Records release:
  - Participants must comply with the laws in those states with mandatory drug testing laws.
  - Voluntary state laws must be complied with if the Employer accepts the benefits bestowed upon it by the state program.
    - If not known, Participants should assume the most stringent release requirements.
    - The law of the state of collection will apply.
  - Some states have peculiar provisions.
- Choose a standard consent form that incorporates all state law consent form requirements.

# ***Donor Requests for DOT Records***

- Donor Requests
  - Donor is entitled to all of his or her records.
  - Donor is not entitled to specimen for non-DOT retest or for DNA testing.
    - Such requests must be challenged.
  - If requested by a DOT Donor in writing made directly to the Laboratory, or made through the MRO, the Laboratory must provide Donor's DOT drug testing records within 10 business days of receiving the written request.

# ***DOT Employer Requests***

- A service agent must provide DOT-mandated drug testing records relating to the Donor's drug test to the Employer IF the Employer certifies that either:
  - Donor brought claim against Employer for non-negative result; or,
  - Employer ordered to produce the records in a lawsuit against it arising from Donor's performance of safety-sensitive duties.
- The regulations require that the Donor be notified of a release of the Donor's records to the Employer.



## ***MRO or Agency Requests for DOT Testing Records***

- If requested by the MRO, a service agent must provide the MRO with any records it has regarding a regulated or DOT-mandated drug test.
- If requested by a DOT agency representative, the service agent must provide access to its facilities and the requested information.
- If requested by another agency with authority over the service agent or the Donor, the service agent must provide the requested records.
- **ALL OTHER REQUESTS MUST BE DENIED.**

# ***Third-Party Subpoenas for DOT Testing Records***

- Cannot release testing information to a third party without employee's specific written consent.
- There is no provision allowing the release of DOT-mandated drug testing records outside of the limited circumstances described in 49 CFR part 40.
- Absent ODAPC or legal intervention, a Laboratory MAY NOT release testing records or a DOT specimen without challenge in response to any other request for DOT drug testing records, including subpoenas, court orders, and federal grand jury subpoenas.

- Improper release of DOT testing information subjects a service agent or Employer to DOT enforcement action.
- Improper release of state-regulated testing information subjects a Participant to civil, and in some states, criminal liability.
- Not all state schemes allow Donor access.
  - In Iowa, the test must be positive and there are limitations as to time for the request.

## ***Testing Information: Conclusion***



Responding to a Lawsuit:

# **Your Best Weapons**

- Identify specific claims of Donor:
  - What is alleged to have happened?
    - Collection Error?
    - Prescription Existed?
    - Testing Error?
    - Employer treated Donor differently based upon same result?
  - By Whom?
- Review the applicable laws and regulations and identify how you complied with its provisions.
- Educate the Donor on the law and your defined role in the testing process.
- Gather and maintain your documents.

***Aggressively Define the Claims***

# ***Defense Fundamentals***

- Good documentation of collection, testing, or interview process.
- Ensure retention of that documentation.
- Organized and complete training files, and good written procedures.
- Laboratory documentation packages, up to and through transfer to permanent storage, that document every step and action taken on the specimen.
- Knowledge of applicable law and testing provisions.
- Aggressive education of Donors.
- Review your services contract, if one exists.



2777 Allen Parkway, Suite 950  
Houston, Texas 77019  
tel: (713) 654-3000  
fax: (713) 654-3002  
[www.caldwelleverson.com](http://www.caldwelleverson.com)

# Questions?

©Caldwell Everson PLLC. All rights reserved.