



STATE INITIATIVES:

Pitfalls and Priorities

D. Faye Caldwell

fcaldwell@caldwelleverson.com

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



Traditional Testing Initiatives

Traditional drug testing initiatives can be broken into three categories:

- Mandatory testing of certain classes of employees (e.g., state employees, industry-specific).
- Mandatory testing requirements for discretionary workplace testing.
- Voluntary testing requirements, which, if observed, confer benefits on Employer.



Recent Initiatives

- Post-accident testing.
- Pain management testing and regulation.
- State efforts to deal with ramifications of medical marijuana in workplace drug testing.
- Unemployment benefits testing.



Mandatory Employee Testing

- Typically, limited to state or public employees.
 - Florida
 - Maryland
- Some industry specific requirements.
 - Home health care employees
 - Professional athletes
 - Miners



Example – Florida State Employee Testing

- Florida has one of the most comprehensive workplace drug testing programs in the nation.
- Requirements include:
 - Lab licensure;
 - Collection site training requirements;
 - Mandatory cut-offs; and
 - Prohibitions on specimen types.



Mandatory Testing Requirements For Discretionary Testing

- Several states have mandatory requirements for Employers who choose to perform workplace drug testing.
- These mandatory requirements include:
 - Provisions related to the testing program itself and enforceable against the Employer;
 - Mandatory laboratory requirements enforceable against the laboratory performing the testing; and
 - Mandatory collection requirements.



Example – Connecticut

- Random drug testing is prohibited, unless employee is in a safety-sensitive position or enrolled in an EAP.
- MRO is required.
- Court decisions have held that urine specimens must be collected as split specimens.
- Observed collections are prohibited.



Mandatory Laboratory Requirements

- These statutes apply specifically to the laboratory performing the workplace drug testing and effectively limit the type of testing that may be performed on workers in that state.
- Many states also have laboratory statutes and regulations related to workplace drug testing.
 - Kansas
 - Maine
 - Maryland
 - Nevada



Example – Maine

- Test results must be reported in a way that prevents Employers from being able to differentiate between screen positive test results and confirmed positive test results.
- A Donor has the option of requesting a blood sample be drawn for testing if required to submit to testing for marijuana.
- Provides mandatory cut-off levels.
- Prohibits observed collections.
- 6-acetyl morphine, at a cut-off of 10 ng/mL, may only be reported if morphine is greater than 2,000 ng/mL.



Example – Nevada

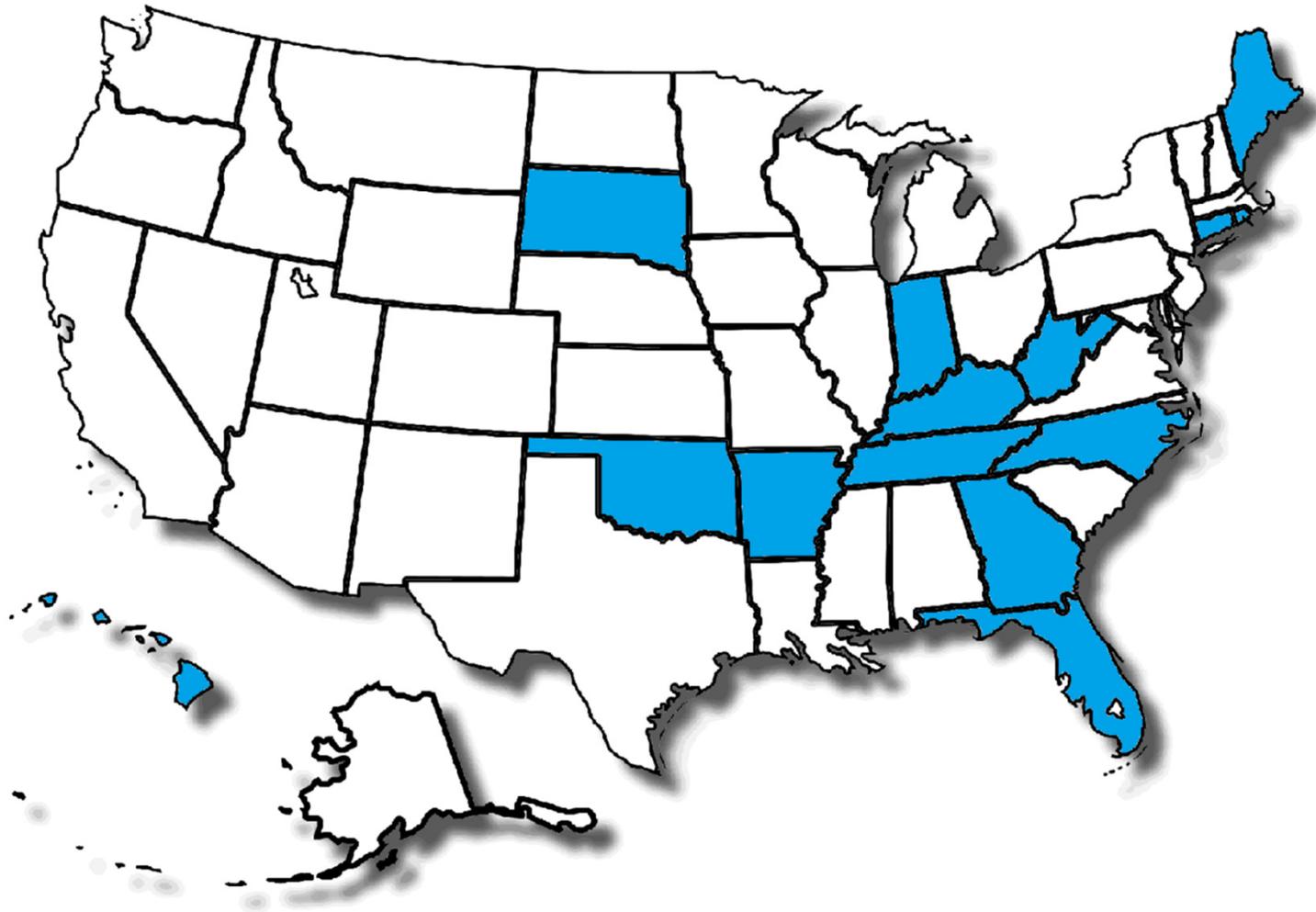
- Clinical statute that covers toxicological testing.
- Requirements of specific personnel qualifications, training and testing.
- Currently undergoing revisions to both statute and regulations that should be in effect January 1, 2014.



Mandatory Collection Requirements

- Example: Iowa
 - Split collection required.
 - The Donor must be given an opportunity to provide information on current medication or other relevant medical condition.

State Mandates related to Observed Collections





States that Prohibit Observed Collections

- Connecticut
- Maine
- Rhode Island

Also, Boulder CO prohibits observed urine specimen collections.



Variations in Federal Standard Adopted by State Scheme for Observed Collections

- Georgia – Public Employees
 - Adopts HHS collection procedures
- Indiana – Mining Industry
 - Adopts HHS collection procedures
- Tennessee – Workers' Compensation
 - Adopts DOT collection procedures



Who Decides When Observed Collections are Required?

- In addition to the actual procedure used, state laws may also specifically provide when and who may initiate an observed collection.
 - Collection site attendant
 - DER



Voluntary Workers' Compensation Testing

- Almost every state in the nation mandates that Employers have workers' compensation insurance coverage.
- Workers' compensation provides benefits to employees injured on the job.
 - Medical benefits and coverage
 - Wage replacement benefits
 - Lifetime disability benefits



Voluntary Workers' Compensation Testing: So Why do We Care?

- Positive post-accident drug tests—if performed in accordance with the statutory requirements—create certain presumptions regarding the cause of the injury.
- Many workers' compensation statutes include premium discount provisions for Employers who implement the statutory testing program.



What This Means for Participants

- Employers stand to benefit from adherence to these “voluntary” testing requirements.
 - Employers may incorrectly assume they are receiving testing that complies with such requirements.
- Participants may be unaware of program requirements.
 - e.g., written policy requirements, collection requirements, laboratory requirements.



Recent Initiatives

- Workers' Compensation Post-Accident Drug Testing
- Pain Management Testing
- Medical Marijuana in the Workplace
- Unemployment Benefits Testing



Workers' Compensation Post-Accident Drug Testing – Developing Field

How a presumption is important

- In some states, a positive drug test result can give rise to a “presumption” that impairment—or drug use—caused the accident or injury.
 - These presumptions vary drastically between states.
- Such a presumption reduces the evidentiary burden on Employers seeking to reduce benefits to an employee testing positive for controlled substances.



What Types of Presumptions are Available to Employers?

- **Rebuttable**

- A conclusion that a judge or jury must draw when certain evidence has been introduced and admitted as true.
- Can be overcome by employee if employee presents sufficient evidence to the contrary.

- **Conclusive**

- Employer no longer required to prove a fact – the issue is conclusively established.
- Employee cannot submit evidence to the contrary.



Rebuttable Presumptions

- **Presumption of Impairment**
 - Positive drug/alcohol test after accident provides presumption employee was impaired at time of accident.
 - No further proof from Employer required to establish impairment.
 - Puts the burden on the employee to prove not impaired.
- **Presumption That Impairment Was Cause of Accident**
 - Positive drug/alcohol test after accident presumes employee was impaired at time of accident.
 - That impairment was cause of accident.
 - Puts the burden on the employee to prove impairment was not cause of accident.



Conclusive Presumptions

- Not as common as rebuttable presumptions.
- Evidence of Impairment
 - Current laws only provide for conclusive presumption of impairment.
 - Employee cannot rebut being impaired at time of accident regardless of evidence.
- Employer may be required to prove impairment caused accident.

Example – Illinois

- 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.

Example – 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 – Florida

- Two different rebuttable presumptions
 - When employee, at time of the injury, has a positive drug/alcohol test, it is presumed that the injury caused primarily by intoxication.
 - If Employer has implemented drug-free workplace, presumption rebutted only by evidence that there is no reasonable hypothesis that the intoxication or drug influence contributed to the injury.
 - If Employer has not implemented drug-free workplace program, presumption may be rebutted by clear and convincing evidence that the intoxication or influence of drugs did not contribute to injury.



Example – Kansas

- In 2011, Kansas changed its WC statute:
 - Positive drug/alcohol test using designated cut-offs is conclusive presumption of impairment.
 - If impaired, rebuttable presumption that the injury was contributed to by impairment.
 - Employee may rebut presumption of contribution by clear and convincing evidence.
 - Many restrictions exist to get presumption, including written policy containing specific items, split specimen collection, collection by licensed health care professional, HHS certified or Kansas licensed testing laboratory.



Example – Alabama

- **Conclusive presumption of impairment.**
 - No compensation for accidents due to the employee being intoxicated from use of alcohol or being impaired by illegal drugs.
 - Positive drug test conducted and evaluated pursuant to DOT standards is conclusive presumption of impairment resulting from the use of illegal drugs.
 - This requires all standards that would be used in DOT test to be used in Alabama post-accident testing, e.g., split specimen urine collection, written policy, DOT cut-offs and testing protocols, MRO review.



Example – Nevada

- Rebuttable presumption.
- If employee has any amount of a controlled substance in his or her system at time of injury without a valid prescription, the controlled substance must be presumed to be the proximate cause unless rebutted by evidence to the contrary.
- Testing must comport with Nevada testing procedure and testing must be conducted at a laboratory licensed by Nevada.



Example – Wyoming

- Specific requirements.
- Must meet DOT requirements for collection and testing.
- HHS laboratory must be used.
- Specific testing cut-offs for alcohol and drugs.
- Specifics drugs provided.

Example – Wyoming cont'd

- Specific drug-free workplace program requirements include:
 - Written policy.
 - Statement providing for including all workers' compensation covered employees in testing program.
 - Statement of required types of substance abuse testing.
 - Statement of actions Employer may take on basis of positive test result.
 - Statement of consequences for refusal to submit to drug test.
 - Confidentiality statement.
 - Statement that employee may contest positive test result within 5 days after notification of test result.
 - Statement affording provision of 60 days notice to implementation of substance abuse testing.
 - Locations for posting of policy.



Pain Management Testing – Developing Field

- Pain management testing, considered by many to be clinical testing, is better considered “quasi-forensic” because these test results could lead to specific consequences, and may be challenged.
 - Donor could lose pain management treatment if he or she tests negative for an expected drug or positive for other controlled substances.
 - Donor could be physically removed from in-patient rehabilitation or addiction treatment center.
- There is an ongoing discussion regarding what constitutes “forensic defensibility” in these new non-employment applications.



Example – Tennessee

- Drug testing is required for pain management patients.
 - Medical Director of clinic must have a written drug screen policy and compliance plan for employees.
 - Urine test required for each new admission and once every six months.
 - Must keep urine drug screen results on file.

Example – Ohio

- Drug testing is discretionary.
 - Practitioner can obtain a drug screen based on evidence or behavioral indications of addiction or drug abuse.
 - Discretion to decide nature of screen and drugs to be screened.
 - If practitioner believes patient is suffering from addiction or drug abuse, must contact specialist immediately.
 - Patient might be placed in substance abuse treatment facility.



Medical Marijuana – Developing Field

- Medical marijuana is now legal in many states.
- Still illegal under federal law.
- Recent Trends
 - Almost half of the laws have been passed since 2010.
- Laws have specific requirements to obtain medical marijuana.
 - Registration.
 - Specific conditions.



Medical Marijuana and Workplace Drug Testing

- Developing area of law.
- Most Laws Only Protect Against Criminal Charges
 - So far, the laws do not accommodate marijuana use in workplace.
 - Oregon, California, Washington and Michigan
 - Cases explicitly finding employees not protected.
 - *Casias v. Walmart*: Wal-Mart employee tested positive while legally on medical marijuana, no wrongful termination.

Medical Marijuana, cont'd.

- Newer Laws Providing Protection for Employees
 - Rhode Island and Maine: cannot refuse to “employ” or “otherwise penalize” an employee.
 - Arizona and Delaware - Specifically address marijuana drug tests, not grounds for termination for medical marijuana usage.
- Legal Off-Duty Use Statutes
 - Separate from medical marijuana statutes.
 - Colorado and Nevada have broad off-duty use statutes - Employer cannot discriminate for legal use of product off-duty.
 - *Coats v. Dish Network, L.L.C.*, 303 P.3d 147 (Colo. Ct.App. April 25, 2013)
 - Appellate court split decision found that otherwise provided no defense to termination for marijuana use.
 - Appeal likely.

Medical Marijuana, cont'd.

- Recent Cases On Medical Marijuana
 - *Curry v. MillerCoors, Inc.*, (D. Colo. Aug. 21, 2013)
 - Dismissed employee's claim that he was terminated for lawful medical marijuana use.
 - Found Colorado's medical marijuana law provides no employee protection.
 - *James v. City of Costa Mesa* (9th Cir. 2012)
 - ADA does not protect medical marijuana users who claim to face discrimination on the basis of their marijuana use, since federal law defines marijuana as an illegal drug, state medical marijuana law immaterial under federal statute.



Unemployment Benefits Testing

- The Middle Class Tax Relief and Job Creation Act of 2012
 - Federal law amended the Social Security Act allowing states to drug test applicants for unemployment benefits in February 2012.
 - States can test claimants who are in an “occupation that regularly conducts drug testing.”
 - DOL to provide regulation listing permitted occupations, but has not yet done so.



Unemployment Benefits Testing

- Recent state initiatives to subject unemployment benefit recipients to drug testing.
- Also initiatives to test welfare recipients.
- Very recent developments in testing laws.
 - Testing standards not uniformly adopted.
 - States taking different approaches to testing requirements, if testing at all.



Example – Texas

- Law effective September 1, 2013, with first testing to occur on claimants on or after February 1, 2014.
 - Claimant must complete a drug assessment questionnaire.
 - If questionnaire indicates “reasonable likelihood” of substance abuse, individual must pass a drug test administered by workforce commission to obtain benefits.
 - Regulatory rules to be developed.



State Testing Initiatives: In Sum

- Numerous states provide for mandatory testing schemes, or in some instances, mandatory Laboratory testing requirements for testing of Donors in that state.
- Many states also provide voluntary workers' compensation programs, which only confer benefits if testing requirements are met.
- 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.

QUESTIONS



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