



## Keeping Employees Safe: Drug and Alcohol Testing in the Workplace

by James B. Yates and Holly L. Papalia

Substance use and abuse is a major concern for employers. The leading report on alcohol and illicit drug use among the population, the 2008 *National Survey on Drug Use and Health: National Findings* (NSDUH), showed the overall level of current illicit drug users among the population has remained level at about 8% (an estimated 19.9 million Americans). According to the NSDUH, approximately 75% of current illicit drug users are employed. Generally, nearly 7% of adults employed full-time and 9% of adults employed part-time use illegal drugs.

Substance use and abuse is not limited to after work hours. The NSDUH estimates 3.1% of employed adults actually used illicit drugs before reporting to work or during work hours at least once in the past year, with about 2.9% working while under the influence of an illicit drug. Additionally, almost 2% of employed adults consumed alcohol before coming to work, 7.1% drank alcohol during the workday and 9.2% worked with a hangover in the past year.

Small to mid-size employers particularly may be disadvantaged by worker substance use and abuse because those employers are less likely to have programs in place to combat the problem, yet they are more likely to be the employer-of-choice for illicit drug users. Simply put, individuals who are unwilling or

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unable to work in a drug-free workplace seek employment with employers who do not have or enforce substance free policies. As many employers without drug and alcohol testing programs discovered, the financial and human cost of just one error caused by an impaired employee can devastate a small or medium-sized employer.

## **Workplace Drug and Alcohol Testing**

Employers implement drug and alcohol testing programs to protect the health and well-being of employees and avert business risks associated with impaired judgments. The implementation of drug and alcohol free workplace programs has reduced significantly drug and alcohol use and abuse in worker populations subject to testing. According to the 2008 Quest Diagnostics Drug Testing Index, 3.6% of the combined U.S. workforce tested positive for illicit drug use in a urine drug test, down from 3.8% in 2007. Experts widely credit effective drug testing programs with positively influencing worker behavior and decreasing drug use across the workforce.

An effective workplace drug and alcohol testing program is essential for a safe workplace. Currently, about 84% of employers have drug free workplace programs in place. Many of these programs also prohibit and test for use of alcohol during working hours or on company business. These programs provide benefits for both employers and employees. Employees benefit from safer workplaces, higher morale and an enhanced sense of well-being and feeling their employer cares for their personal health, while employers may experience an increase in employee motivation, increased customer satisfaction and retention, a decrease in employee errors and a decrease in the need for disciplinary action. Additionally, an effective drug and alcohol free workplace program can result in savings for employers in workers' compensation costs.

### **Drug and Alcohol Free Workplace Programs and the Workers' Compensation Claim: The Rebuttable Presumption**

When an employee sustains an injury at work, many employers require a post-accident drug or alcohol test. If the test is positive, the employer legally may terminate the employee based upon a violation of its written policy prohibiting drug or alcohol use in the workplace. However, the employee still can file a claim for workers' compensation benefits as a result of the workplace injury – regardless of the positive test. Ohio has specific statutory provisions governing the evidentiary weight specific drug or alcohol tests will be given by a hearing officer. The law provides employers with a "rebuttable presumption" that an employee's alcohol intoxication or use of a controlled substance actually caused the workplace injury and the injury is, therefore, not compensable. Employers must meet several statutory prerequisites to obtain this presumption which include: specific written postings at the workplace, testing requested within specific timeframes (i.e., eight hours for alcohol, 32 hours for drugs) and positive test results in excess of specific cutoff levels. Most significantly, employers only may obtain the rebuttable presumption in "for cause" testing and tests independently requested by a police officer or licensed physician. Thus, as a practical matter, an employer will not receive the rebuttable presumption for post-accident drug testing unless it can be argued the testing also was for cause.

### **Challenging the Claim Allowance Without the Rebuttable Presumption**

Despite being unable to obtain the rebuttable presumption in most post-accident drug testing cases, it still is possible to obtain a denial of a workers' compensation claim involving drug or alcohol use. In order to do so, employers must prove that the alcohol or drug use was the proximate cause of the injury. To do this, the employer must present strong evidence that the claimant was impaired significantly prior to the injury. Such evidence could include: 1) an extremely high level of the illicit substance found in the employee's system immediately after the injury; 2) the opinion of a physician that the level of the controlled substance found in the employee's system after the injury would have caused a substantial impairment at the time of the injury; and 3) statements of coworkers that the employee was acting erratically or exhibited signs of drug or alcohol intoxication at or before the time of the injury.

## Challenging Temporary Total Disability Compensation

Even if the claim is allowed, employers still may be successful in getting any subsequent requests for temporary total disability (TTD) compensation denied. As a matter of law, the allowance of the underlying claim and the issue of TTD compensation are two distinct issues. TTD compensation can have a significant impact on driving up claim reserves for state fund employers and is obviously paid dollar-for-dollar by self-insuring employers. Thus, it is important to vigorously defend any requests for TTD compensation where a claimant has been terminated as a result of a positive drug or alcohol test.

A claimant will not be entitled to TTD compensation if he or she is determined to have voluntarily abandoned his or her employment. The Ohio Supreme Court has decided that an employee engaging in specific conduct leading to his or her termination will be deemed to have voluntarily abandoned his or her employment if the employer maintains a written policy that: (1) clearly defines the prohibited conduct, (2) has been previously identified by the employer as a dischargeable offense, and (3) is known or should have been known to the employee. Thus, even if the underlying claim is allowed, it is still possible to defeat any request for TTD compensation by asserting voluntary abandonment of employment if the employer can show its drug free workplace policy met these three criteria. The employer will not have to show that the drug use caused the injury. Of course, a prerequisite for defending these types of claims is a well-crafted drug and alcohol testing policy and related procedures.

A complex legal issue arises where the claimant asserts he or she was temporarily and totally disabled at the time of his or her termination. The Ohio Supreme Court has held that a claimant can voluntarily remove himself or herself from the workforce only if he or she has the physical capacity for employment at the time of the abandonment or removal. While the Court has yet to specifically apply this holding to drug testing cases, a few lower courts have recently done so and held that, despite a positive post-accident drug screen, a claimant still will be entitled to future payment of TTD compensation if he or she was disabled from his or her employment at the time of his or her termination for violation of the employer's drug free workplace policy. Those courts considered it irrelevant that the conduct for which the employee was terminated, i.e. illegal drug use, occurred prior to the injury. Therefore, until the Supreme Court decides the issue, it is unclear whether employers will continue to prevail under the voluntary abandonment defense where a claimant is terminated for violation of a drug and alcohol free workplace policy after an industrial injury. As a practical matter, though, workers' compensation claims involving drugs or alcohol are so significant in terms of financial and human resources ramifications that employers should continue to vigorously challenge these types of claims.



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