



The Primerus Labor & Employment Practice Group Presents: Recent Updates on Drug Testing in the Workplace

THE WEBINAR WILL BEGIN SHORTLY

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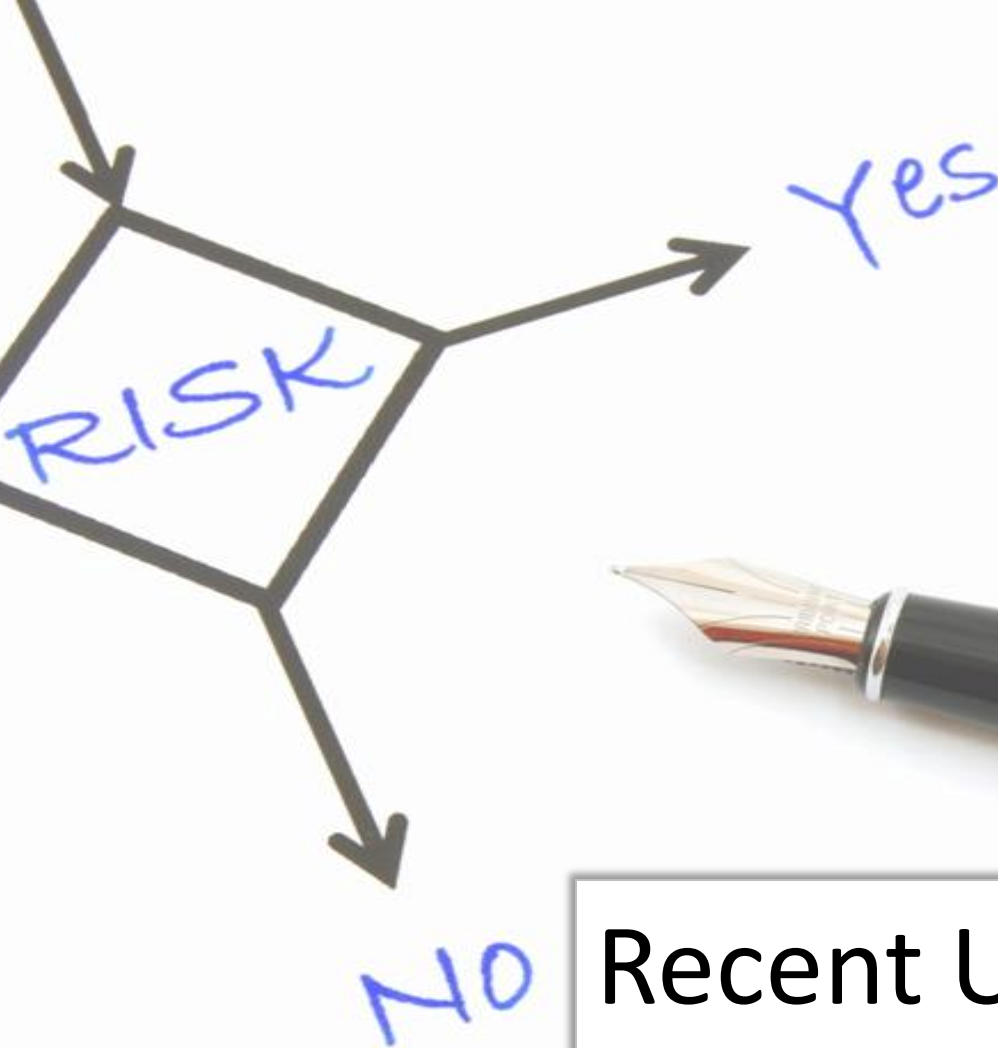
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Recent Updates to Drug
Testing in the Workplace

Policies & programs

THE VARIOUS TYPES OF EMPLOYER POLICIES

Policy / Program Types



DOT

Department of Transportation

- Federally Regulated
- Various Agencies
 - FMCSA
 - PHMSA
 - FTA
 - FRA
 - FAA
 - DHS (USCG)
- 5-Panel Test
- Federal CCF's
- Random program



Non-DOT

Corporate Policy

- Employer's choice
- Must comply with state & federal laws
- Several policy variables to choose from



Non-DOT Safety Sensitive

High Risk Workplace

- Employer's choice
- More flexibility within state & federal laws due to heightened risk & exposure
- Workplace presents a significant danger to employees, the environment, and the general public, and requires a high degree of care and caution.

Program Options

Non-DOT / Non-DOT Safety Sensitive

Testing Panel

- Methodology (Urine, Hair, Oral Fluid)
- Lab Based or Point of Collection (Quick Test)
- Additional Drugs

Type of Test

- Pre-Employment
- Random
- Reasonable Suspicion
- Post-Accident
- Wall-to-Wall
- Follow-Up

Random Program

- Frequency
- Percentage

Other Options

- Termination
- Rehab



Compliant DOT Program

Necessary Components

Appropriate Policy

- FAA
- FMCSA
- FRA
- FTA
- PHMSA
- USCG

Background Screens

- DOT Testing History
- FMCSA Safety Performance History

Substance Abuse Training

- Supervisor Awareness
- Employee Education

Compliance Assistance

- Regulatory Updates
- Audit Assistance

ADA Caution



Is addiction to illegal drugs a disability under the ADA?

**Drug Addicts/Current
Illegal Drug Users**

Not a Disability

**Drug Addicts/ Past Illegal
Drug Users**

Disability, if other standard
ADA requirements for
“disability” met

Must have been actual
addict, not casual user

The various components of a complex process

SUBSTANCE ABUSE TESTING OVERVIEW

Compliant Program Checklist



Written Policy



Designated Employer Reps (DER's)



Training - Supervisor and Employee



Proper Chain of Custody Process

What is a DER?

Person identified by the employer to:

- Receive communications and test results from service agents.
- Authorized to take immediate actions to remove employees from safety-sensitive duties.
- Authorized to make required decisions in the testing and evaluation processes.

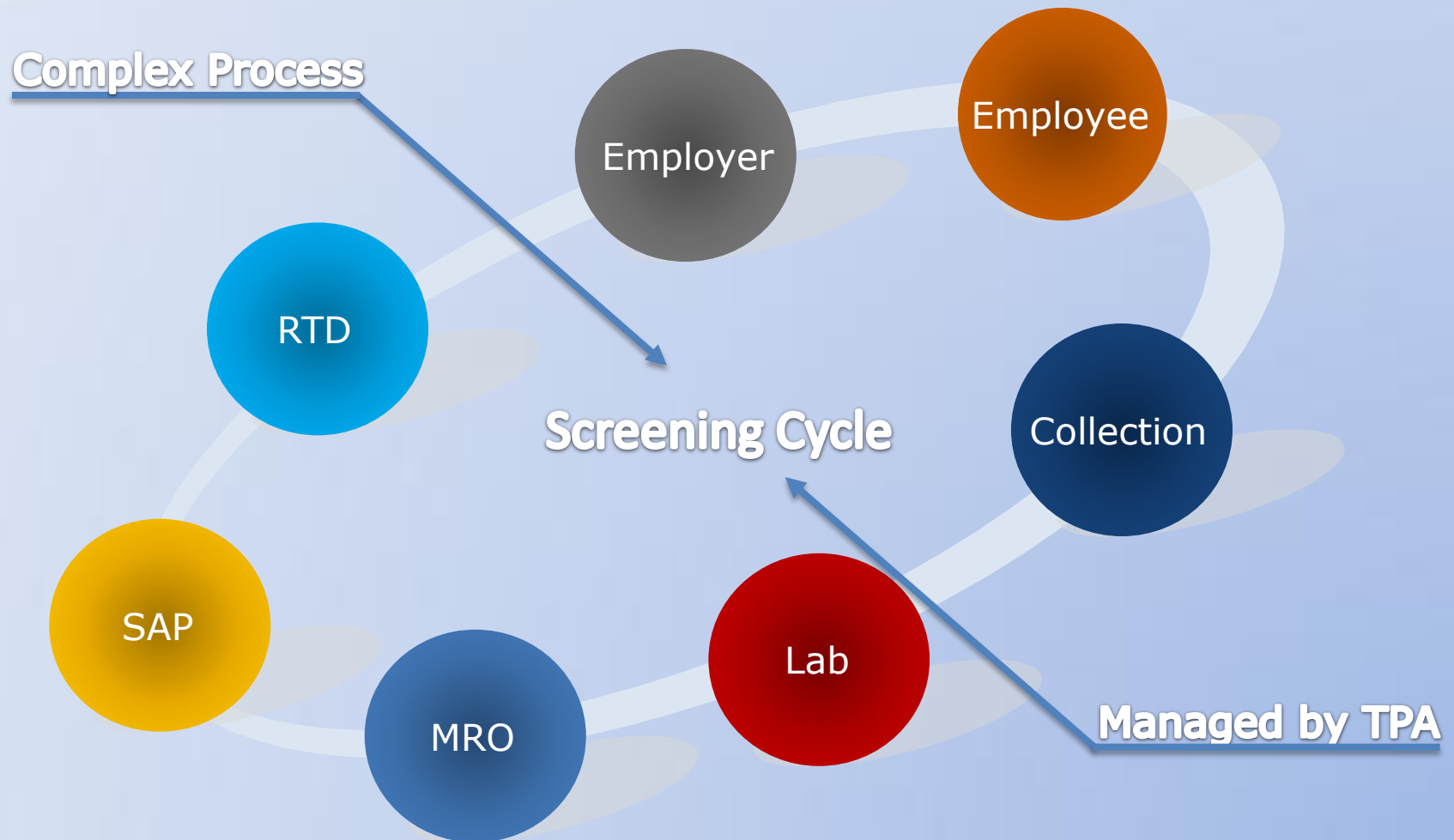
The individual must be an employee of the company.

Examples of DER Roles

- ✓ Know the difference between a covered and a non-covered employee.
- ✓ Be knowledgeable about the collection process .
- ✓ Know the percentage of testing required by the regulating federal agency.
- ✓ Burden of responsibility to ensure a return to duty or follow up test is *directly observed*.
- ✓ Know what is required of them should an employee have a shy bladder.
- ✓ Notifying the collection site of a fatal flaw in the collection process that would cause a test to be cancelled...*if they are not working through a service agent*.
- ✓ Define when a covered employee can also be tested under the company policy.

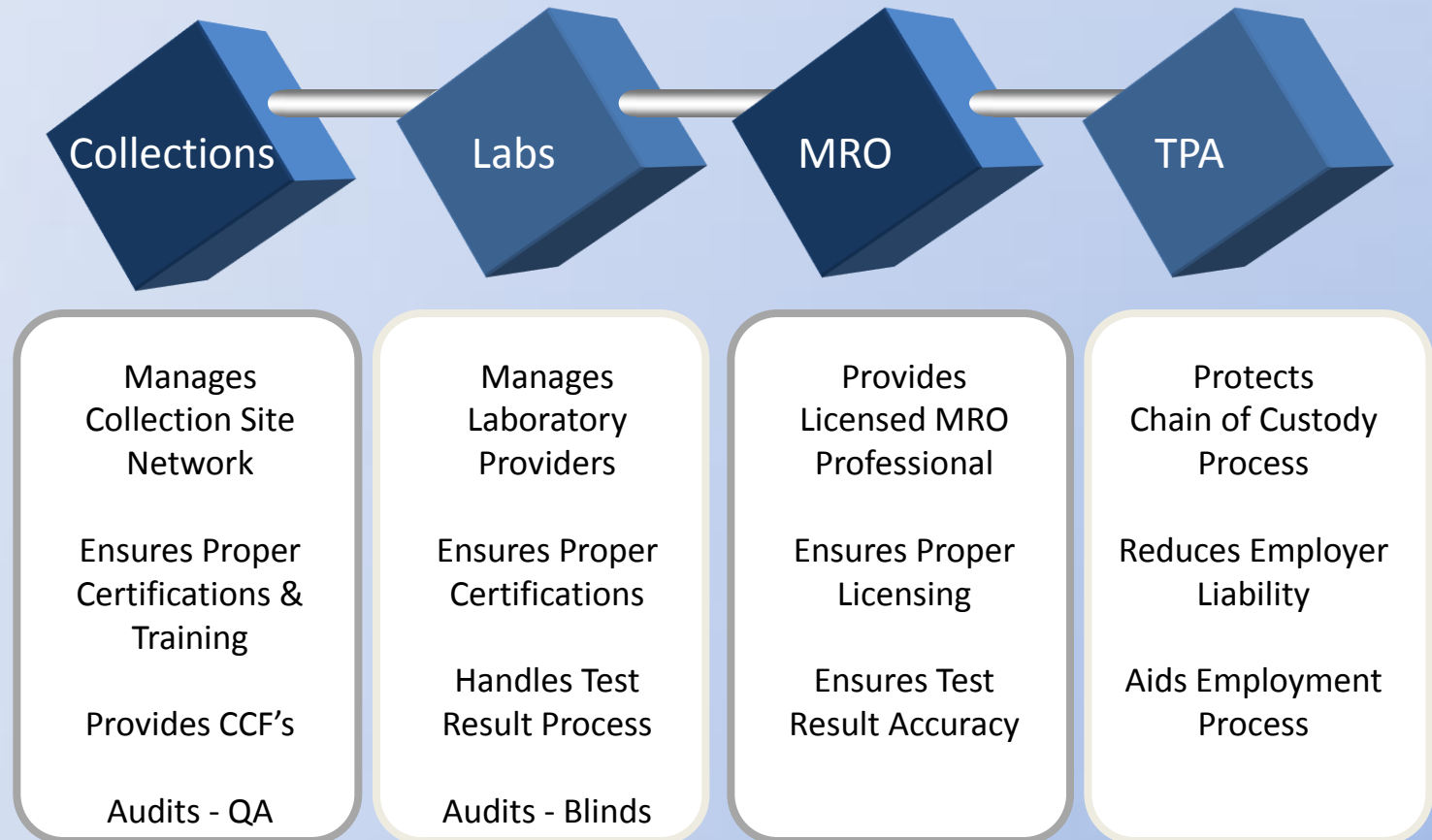
Chain of Custody

The most important part of a successful program



Roles & Responsibilities

What is a service agent and how can they assist?



ADA Caution



Positive drug test result

- Only constitutes a finding of “current use” *if* the test *correctly* indicates that the individual *is engaging in ... illegal use.* EEOC Technical Assistance Manual VIII-8.3
- Donor cannot avoid discipline or termination through immediate rehab and claiming they no longer use illegal drugs.

Discharge employees who *currently use illegal drugs*

- Even if the employee has a disability independent of their current drug use, his ADA protection extends only to that disability and his employer may still discipline or discharge him because of his use of drugs. EEOC Technical Assistance Manual VIII-8.3.
- Even if employee states he/she recently stopped illegal drug use.

Employers are not required to give an employee a chance to rehabilitate, but are encouraged to do so.

When and why to test

TESTING CATEGORIES & GUIDELINES

Various Reasons to Test

Testing Types

Pre-Employment / Pre-Access

Random

Reasonable suspicion

Post-accident

Wall-to-wall (employer initiated)

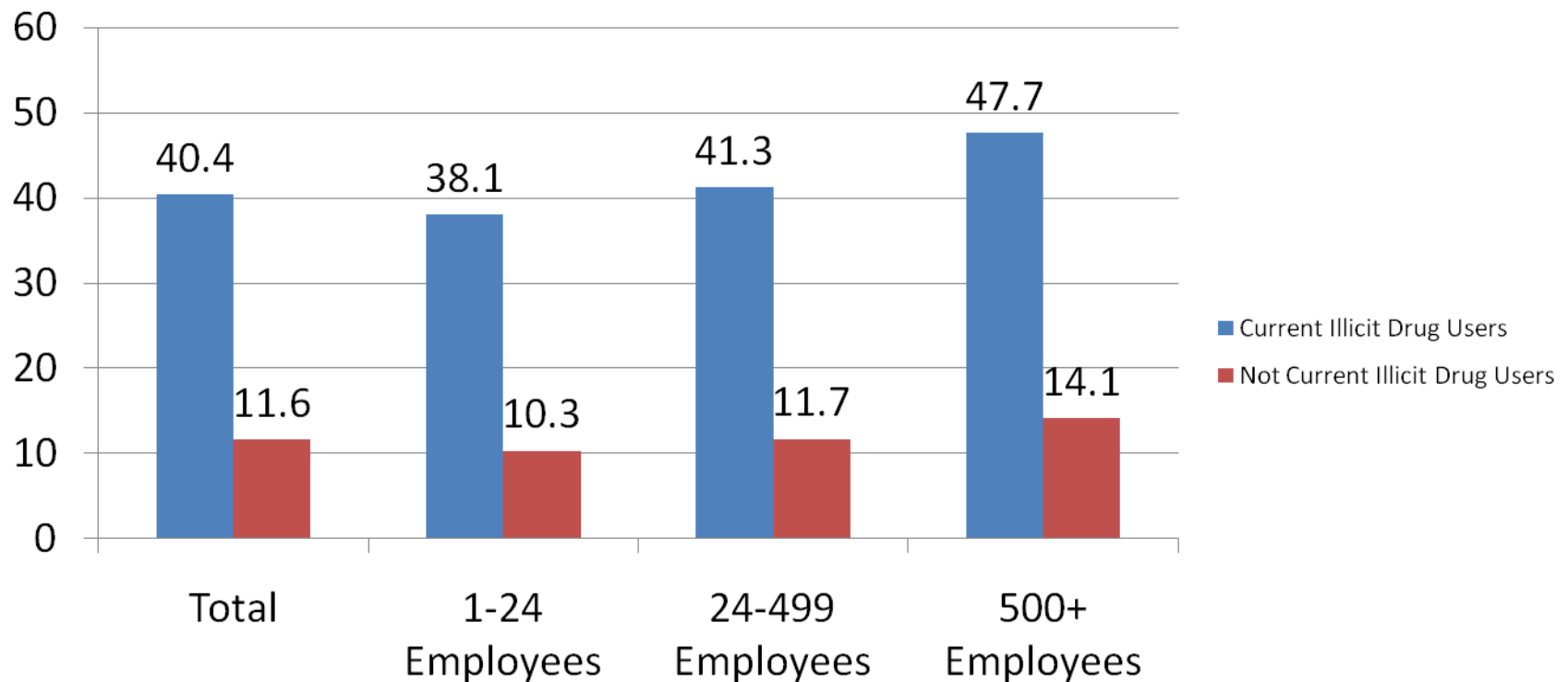
Return-to-duty

Follow-up



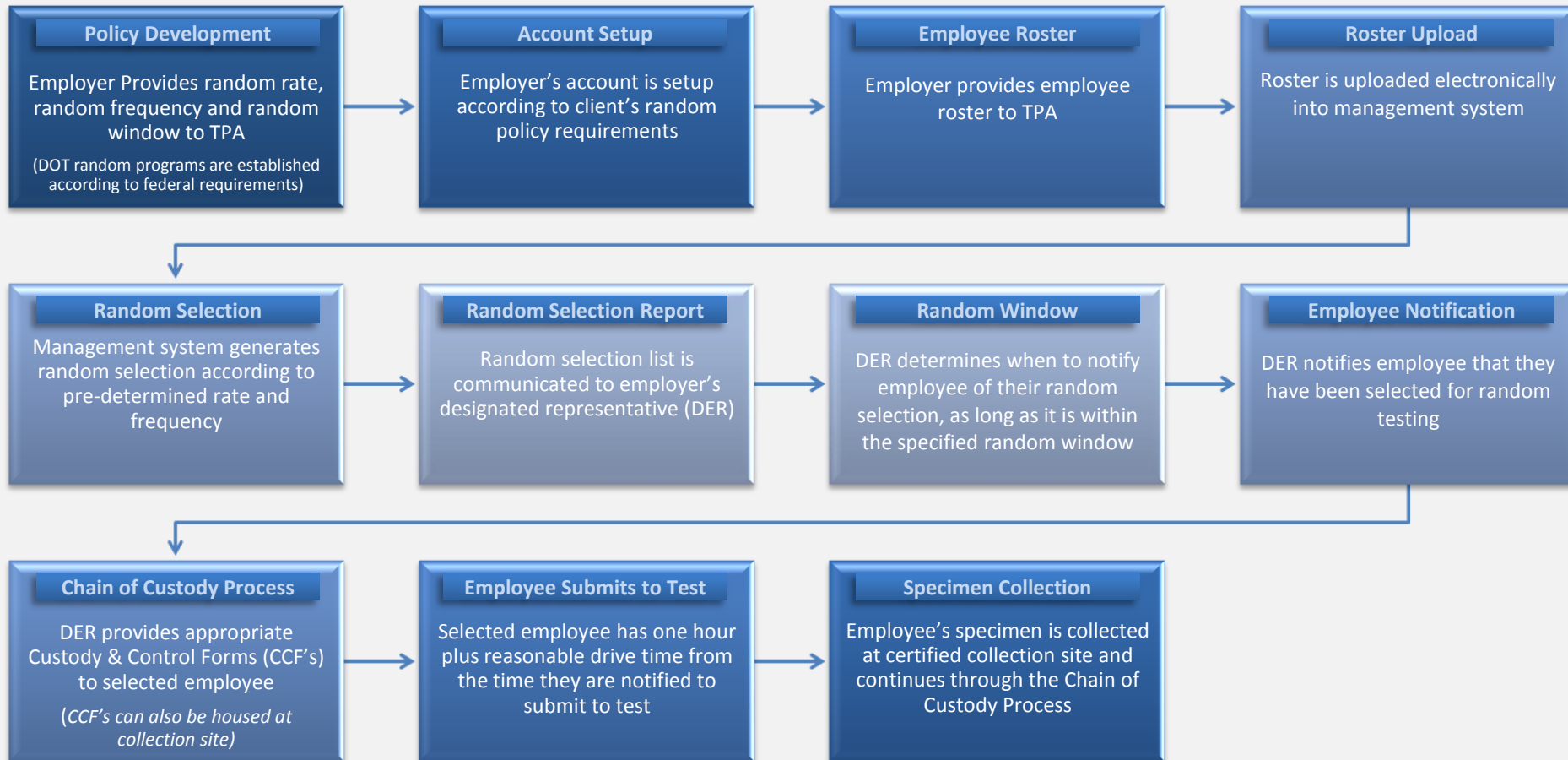
Random Testing

**Percent Less Likely to Work for Employer
Who Tests for Drugs Randomly**



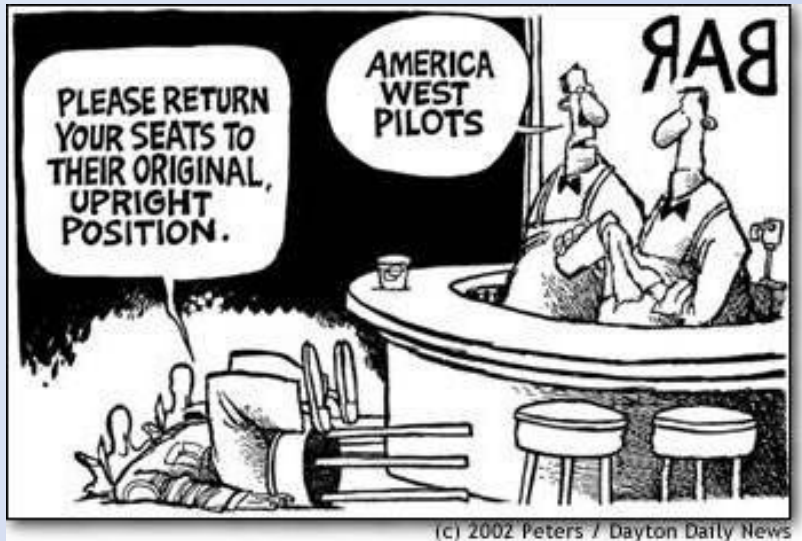
Source: National Household Survey On Drug Abuse 2009

Random Selection Process



Reasonable Suspicion Testing

There are valid reasons to do it... and some not so valid ones.



Reasonable Suspicion Testing

Things to remember



- You will not be judging or counseling the employee.
- You will document their behavior.
- Document tardiness, absenteeism, incidents, accidents, arguments, mishandled assignments, mood swings and violations of your company's drug free workplace policy.

So, what is expected of you?

Guidelines for Reasonable Cause

- ✓ Maintain proper Supervisor Awareness and Employee Education training
- ✓ Verify the reasonable cause decision
- ✓ Isolate & inform the employee
- ✓ Review findings
- ✓ Transport the employee
- ✓ Document the events
- ✓ Provide employee transportation home after collection
- ✓ Employee may not perform duties until receipt of negative result



ADA Caution

Illegal Drug Use



Testing to determine the illegal use of drugs is not considered a medical examination under the ADA

Employer may not discriminate against a former drug addict on account of his/her status or perceived status as a substance abuser.

ADA Caution

Alcohol Use



Alcohol testing is a medical examination under the ADA.

Employer may not discriminate against an alcoholic based on his/her status or perceived status as a substance abuser.

Alcoholics/Current Users of Alcohol

- Disability, if other standard ADA requirements for “disability” met

Alcoholics/Past Users of Alcohol

- Disability, if other standard ADA requirements for “disability” met

Cause and Affect

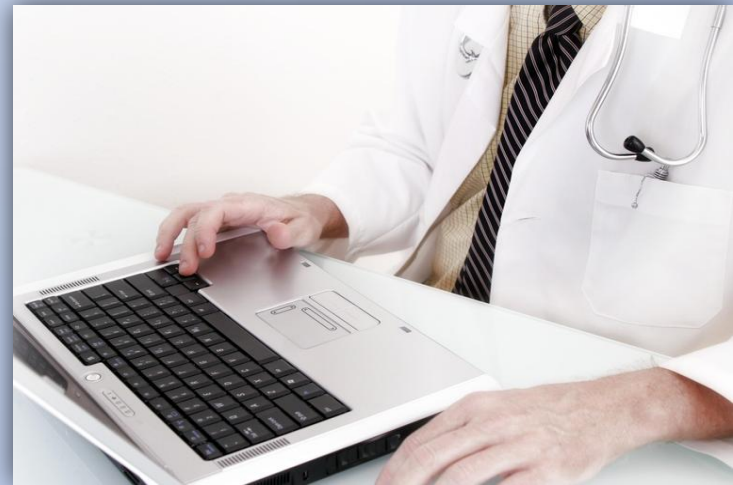
HOW THE EMPLOYER'S POLICY IS AFFECTED

Positive vs. Verified Positive

Laboratory



MRO



MRO Cautionary Statement

“Donor’s sample contained one of the substances at a level above the program threshold limit. However, the MRO process confirmed that the donor possesses a valid prescription. Certain medications may impair one’s ability to safely operate heavy equipment or perform other safety sensitive functions. Caution warnings on the prescription container or in the information supplied with the prescription should be followed.”

ADA Caution



Illegal drug use includes not only the use of unlawful drugs such as cocaine or heroin, but also the unlawful use of prescription drugs.



Drug & Alcohol Testing Trends

THE OUTLOOK FOR THE FUTURE

Synthetic & Alternative Drugs

Synthetic Cannabinoids

- K-2, Incense, Spice
- Estimated \$5 billion industry – U.S.
- Still legal in 37 states

Alternative Drugs

- Bath Salts
- Inhalants

Drug Testing

- Exists but is limited
- Labs continue to develop



Best practices for program success

PRACTICAL TIPS

Avoid Legal Liability

Consistently enforce your company policy

Act with full management support

Keep drug test results confidential

Protect written documentation in a locked file

Ensure test results are faxed or emailed to a secure location

Remember... managers & supervisors can have abuse problems too



Questions?

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