The Primerus Labor & Employment Practice Group Presents:

**Recent Updates on Drug Testing in the Workplace**

THE WEBINAR WILL BEGIN SHORTLY

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Recent Updates to Drug Testing in the Workplace
THE VARIOUS TYPES OF EMPLOYER POLICIES
Policy / Program Types

**Department of Transportation (DOT)**
- Federally Regulated
- Various Agencies
  - FMCSA
  - PHMSA
  - FTA
  - FRA
  - FAA
  - DHS (USCG)
- 5-Panel Test
- Federal CCF’s
- Random program

**Corporate Policy**
- Employer’s choice
- Must comply with state & federal laws
- Several policy variables to choose from

**Non-DOT**
- 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.

**Non-DOT Safety Sensitive**
- 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

<table>
<thead>
<tr>
<th>Testing Panel</th>
<th>Type of Test</th>
<th>Random Program</th>
<th>Other Options</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Methodology (Urine, Hair, Oral Fluid)</td>
<td>• Pre-Employment</td>
<td>• Frequency</td>
<td>• Termination</td>
</tr>
<tr>
<td>• Lab Based or Point of Collection (Quick Test)</td>
<td>• Random</td>
<td>• Percentage</td>
<td>• Rehab</td>
</tr>
<tr>
<td>• Additional Drugs</td>
<td>• Reasonable Suspicion</td>
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<td></td>
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<td>• Post-Accident</td>
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<td></td>
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<td>• Wall-to-Wall</td>
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<td>• Follow-Up</td>
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</tbody>
</table>
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
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?

Collections
- Manages Collection Site Network
- Ensures Proper Certifications & Training
- Provides CCF’s
- Audits - QA

Labs
- Manages Laboratory Providers
- Ensures Proper Certifications
- Handles Test Result Process
- Audits - Blinds

MRO
- Provides Licensed MRO Professional
- Ensures Proper Licensing
- Ensures Test Result Accuracy

TPA
- Protects Chain of Custody Process
- Reduces Employer Liability
- Aids Employment Process
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

<table>
<thead>
<tr>
<th>Testing Types</th>
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</thead>
<tbody>
<tr>
<td>Pre-Employment / Pre-Access</td>
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<tr>
<td>Random</td>
</tr>
<tr>
<td>Reasonable suspicion</td>
</tr>
<tr>
<td>Post-accident</td>
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<tr>
<td>Wall-to-wall (employer initiated)</td>
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<tr>
<td>Return-to-duty</td>
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<tr>
<td>Follow-up</td>
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</table>
Random Testing

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

<table>
<thead>
<tr>
<th>Category</th>
<th>Current Illicit Drug Users</th>
<th>Not Current Illicit Drug Users</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>40.4</td>
<td>11.6</td>
</tr>
<tr>
<td>1-24 Employees</td>
<td>38.1</td>
<td>10.3</td>
</tr>
<tr>
<td>24-499 Employees</td>
<td>41.3</td>
<td>11.7</td>
</tr>
<tr>
<td>500+ Employees</td>
<td>47.7</td>
<td>14.1</td>
</tr>
</tbody>
</table>

Source: National Household Survey On Drug Abuse 2009
Random Selection Process

**Policy Development**
Employer Provides random rate, random frequency and random window to TPA
(DOT random programs are established according to federal requirements)

**Account Setup**
Employer’s account is set up according to client’s random policy requirements

**Employee Roster**
Employer provides employee roster to TPA

**Roster Upload**
Roster is uploaded electronically into management system

**Random Selection**
Management system generates random selection according to pre-determined rate and frequency

**Random Selection Report**
Random selection list is communicated to employer’s designated representative (DER)

**Random Window**
DER determines when to notify employee of their random selection, as long as it is within the specified random window

**Employee Notification**
DER notifies employee that they have been selected for random testing

**Chain of Custody Process**
DER provides appropriate Custody & Control Forms (CCF’s) to selected employee
(CCF’s can also be housed at collection site)

**Employee Submits to Test**
Selected employee has one hour plus reasonable drive time from the time they are notified to submit to test

**Specimen Collection**
Employee’s specimen is collected at certified collection site and continues through the Chain of Custody 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
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
“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.”
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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