

UNDERSTANDING DRUG ABUSE & IMPAIRMENT

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Even employees with a valid prescription that is used as directed may be unable to perform their job functions while taking the prescribed medication.

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While testing for illegal drug use is the backbone of an effective workplace drug testing policy, policies that go no farther than identifying illegal drug use can still fail in their goal. With the widespread prevalence of the opioid epidemic, prescription drug abuse, and the legalization of marijuana, workplace drug testing policies need to address the abuse of legally obtained substances and impairment on the job to be truly effective.

Use Versus Abuse

Differentiating between drug use and drug abuse is critical with legal substances such as prescription medications and alcohol. Many prescription drugs are highly addictive and use that began as a medical necessity can quickly turn to addiction. As well, use of other substances, such as alcohol, may be acceptable in certain circumstances but can escalate to abuse that affects the safety of the workplace and the well-being of an employee. These abuses lead to an increased risk of problems and an inability to control use.

There are several steps to identifying substance abuse by employees. The first is through drug screening and use of a Medical Review Officer (MRO) to confirm valid prescriptions. Keep in mind that even employees with a valid prescription that is used as directed may be unable to perform their job functions while taking the prescribed medication. As well, employees can be abusing the drugs they are prescribed. An employee may use their prescription medication at times or in quantities that make them unfit to perform their job effectively and safely. This is especially dangerous for safety-sensitive positions, which can include not only DOT safety-sensitive roles but other employees who handle sensitive data, stock shelves, travel for work, etc.

On the other hand, disability law requires employers to allow prescription drug use by employees that is in appropriate, prescribed quantities that does not affect safety or their ability to perform the functions of their position. Employers cannot lawfully ban prescription medications or require that all medications be reported to management. There is a balance required by law between maintaining the safety and effectiveness of the workplace and upholding the rights of employees with medical needs.

Employers should craft workplace policies and implement processes to identify drug abuse and to differentiate between appropriate use and abuse. Employers can work closely with professionals in workplace drug testing, law, and human resources to follow applicable disability law(s) while also establishing policies and practices that address drug abusing employees in the workplace.

Impairment

Like drug abuse, drug impairment is another tricky line to identify. In what circumstances can a person have used an intoxicating substance but not be impaired by it? The easiest way to understand this difference is by looking at the history of alcohol testing.

Science has told us for over a century that alcohol use affects the functioning of the brain and body and can cause people to engage in risky behaviors. As early as the 1910's, tests were used to identify alcohol metabolites in an individual's system and indicate when they had consumed alcohol. However, these metabolites could be identified in a person's system even after the intoxicating effects of alcohol had worn off.

Oral fluid testing is currently the most suitable drug test for capturing recent use of marijuana.

As time went on, the scientific community was able to identify what level of blood or breath alcohol concentration (BAC) has an impairing effect. By 2004, all 50 states had established BAC limits of 0.08% for driving. If a person tests at or above 0.08%, they are impaired by alcohol. If they test above zero but less than 0.08%, they have ingested alcohol but were not definitively impaired by alcohol at the time of the testing. Since 2004, some states have adjusted their BAC minimums, but the highest threshold for determining impairment remains 0.08.

To prove impairment for purposes of Driving Under the Influence (DUI) crimes, law enforcement has two methods. The first is to prove that a person tested over the "per se" impairment level of .08% BAC by using a bodily fluids test. The second is to prove that the person was impaired. This is generally done by observing the person's behavior or appearance, be it driving pattern, performance of roadside tasks, bloodshot eyes, etc. When law enforcement cannot use a bodily fluids test, perhaps because the person refused to take the test or equipment was not available in a timely manner, they use evidence of impairment.

In the workplace, knowing the signs of impairment can be extremely useful and can help an employer:

- SHOW that an employee is using a lawful substance, such as a prescription medication, in a manner that makes them unfit for the job.
- DETERMINE probable cause to drug test an employee.
- IDENTIFY performance issues when faced with drugs such as marijuana, which stay in the system for a long time after use.

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ASK THE EXPERTS:

WHAT DO I DO?

Post-Employment Marijuana Confirmed Positive Decision Tree

Dealing with a positive test result can lead to many questions. Here is a handy guideline* for handling a tricky situation.



*This is a general guideline, consult applicable laws and case law in your state(s) of operation before taking action based on a marijuana confirmed positive drug test result.

CONFIRMED MARIJUANA POSITIVE



Marijuana

Testing for marijuana is becoming problematic with widespread marijuana legalization. Marijuana is a drug whose metabolites stay in a person's system for days to weeks after impairment has worn off. Additionally, the scientific community has not reached a consensus about a marijuana cut-off level that conclusively indicates impairment. For most drug tests, it is extremely difficult to know if marijuana use is abuse and/or demonstrates impairment.

Although there is no test that can measure impairment from marijuana, oral fluid testing is currently the most suitable drug test for capturing recent use of marijuana. Oral fluid does not retain marijuana metabolites like other bodily samples do, and so a positive marijuana test in oral fluid evidences recent marijuana use, meaning an employer can positively say that an applicant/employee has ingested marijuana in the past 18 to 24 hours.

In the past, it was not necessary to prove marijuana impairment instead of marijuana use because marijuana was an illegal drug and any use at any time was grounds for

workplace discipline. However, with marijuana legalization on the rise, several states now prohibit an employer from disciplining an employee based on solely a positive marijuana test if the employee using medical marijuana legally. Employers in some states must prove additional factors before disciplining an employee for testing positive, such as impairment on the job, use at work, a safety-sensitive position, or lack of a medical marijuana card. This makes an understanding of use versus abuse and use versus impairment vital, particularly as marijuana use increases nationwide.

Action Items

There are several important steps that employers can take to combat drug abuse among employees. Employers should regularly review their workplace drug testing policies. Workplace policies can address not only illegal drug use but prescription drug abuse. An MRO can assist with identifying false prescriptions, outdated prescriptions, or use of another person's prescription. Policies can also utilize signs of impairment at work. Employers should take care to understand the laws surrounding marijuana in their state(s) and to be sure that

their policies conform to the requirements of their state(s) laws .

Additionally, employers should consider what testing methods are most appropriate for their workplace. Capturing recent use is best done through oral fluid or blood testing. Using a variety of testing methods often allows employers to meet the varied needs determined by different circumstances. But again, employers need to know the state laws surrounding workplace drug testing for the states in which they operate, as not all testing methods are permitted in all states.

Above all, employers need to be sure they are addressing the very real risk of drug abuse and impairment in the workplace. Physical safety of employees and the public, safety of sensitive data, legal liability, and productivity are all placed in jeopardy when drug abuse is not curbed or monitored in the workplace.

➔ To review state laws pertaining to oral fluid testing, please visit the following page:

<http://www.currentcompliance.org/wp-content/uploads/2018/12/State-by-State-Oral-Fluid-Guide.pdf>

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