



Rise in Drug Test Positives Poses Problems for Business

News

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Howard Mavity was quoted in the *Corporate Counsel* article “Rise in Drug Test Positives Poses Problems for Business,” featured on October 10, 2014.

Howard was quoted on the potential causes for the increase of positive urine drug tests in the workplace and rising concerns of employers due to the legal issues associated with employees who come to work while under the influence of drugs, and the limitations on what employers can do about it.

“The most common drug by a long shot is still marijuana and changing attitudes toward the legalization of marijuana are affecting usage,” said Howard. “But there’s also a very substantial pick up of amphetamine, both methamphetamines and misused prescription drugs.”

With all of these rather startling changes, employers need to tread carefully. If the employer has pretty good evidence that an employee is using unlawful drugs at work, they are within their rights to order a drug test. “In that case I would usually cut to the chase and test, and I’d call it reasonable cause,” said Howard. “An employer later appears dishonest if they call the testing ‘random’ in an effort not to appear to accuse anyone.”

Howard explained that while the ADA does not cover illegal drug use, it does protect drug use related to a disability condition, and almost definitely applies when an employee is taking medication for a chronic condition. He suggested that employers approach the employee about potential drug related problems by focusing on an employee’s performance first. “Build a legitimate record of their performance failings and when you address these performance issues with them, if they raise the condition or admit drug abuse, you’ve already established legitimate performance issues,” Howard said. “This gives you more flexibility.” Then, if there is reasonable cause, the employer can continue on by requiring a job-related medical exam or drug testing—or by initiating an interactive process under the ADA to determine what accommodations might be made for a disability.

In these situations, it’s important not to jump the gun. One company, Howard said, asked employees to take leaves of absence if they were taking any kind of over the counter or prescription medication, without ever taking employees through an interactive process to see why they were doing so and if any reasonable disability accommodations might be possible. “The policy might have been lawful if they went through the individualized interactive process,” he noted. “But they didn’t—they acted on the basis of generalizations.”

For example, Howard explained the U.S. Department of Transportation has physical qualifications for commercial drivers that prevent drivers with many health conditions from obtaining approval to drive, and that trump ADA requirements. But operators of other pieces of heavy machinery, like forklifts and loader trucks, are not under the same standards, and can still claim ADA coverage, which can pose a problem.

“The DOT standards only apply to drivers with the commercial driver’s license or other specific duties,” said Howard. “However, there may be occasions where the employer chooses to take the ADA risk rather than the civil exposure because damages are so much greater if members of the public are harmed in a vehicle accident. They’re choosing their poison.”

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