DRUG TESTING AND EMPLOYEE RIGHTS

by

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Drug and alcohol abuse are serious problems confronting our society. These problems may impact on the workplace resulting in impaired work performance. Over the past year, employers, encouraged by pharmaceutical laboratories promoting drug testing services, have embraced drug testing and screening as the solution to many poor work performance problems.

Most of the popular drug testing methods can not, however, determine impaired work performance. These tests can only be used to determine past use of medication and controlled substances. Drug tests, particularly the less expensive types of urinalysis, are inaccurate and provide a high percentage of false positive readings. In addition, the employer can ascertain additional, unauthorized information about the medical condition of the employee, from the blood or urine sample taken for the drug test. A drug test opens a chemical window through which the employer may peer into the private lives of individuals.

Employers have a valid concern regarding drug or alcohol impaired work performance; however, the appropriate and proven method for identifying poor or impaired work performance is careful observation by attentive supervisors.

Alcohol and substance abuse are treatable diseases and any employee suffering from these conditions should be offered the opportunity for rehabilitation through a reputable program with the full support and encouragement of the employer.

ACCURACY OF DRUG TESTS

Opposition to drug testing is rooted in scientific, as well as legal and philosophic grounds. Independent scientific studies have proved beyond any doubt that many of the commonly used testing methods produce a high percentage of "false positive" readings.

THE "EMIT" TEST (ENZYME MULTIPLIED IMMUNOASSAY TEST)

The EMIT test for drug use, manufactured by Syva Co. is relatively inexpensive and widely used by employers. It is also one of the least accurate tests. Despite the manufacturers claims of reliability, independent scientific studies have shown the tests to have a "false positive" rate of 25% to 65%. Some number of these false positives occur from improper technical procedures, poorly trained technicians, and just plain sloppy handling of materials. In many instances, the inaccuracies are a result of improper readings of perfectly legitimate and unharmful chemicals in the employee's system. (This will be discussed in more detail in the next paragraph.) A disciplinary action based solely on the result of this particular test should, almost certainly, be overturned. Some employers, recognizing the inaccuracy problems of this test will confirm it with a second test.

If the inaccuracy of the first test was caused by a false chemical reading, that same reading will certainly be repeated in a second EMIT test. The RIA (Radioimmunoassay) test has many of the same problems and should never be allowed as a "back up" to the EMIT (or vice versa).

The most reliable test of urine for drugs is a gas chromatography/mass spectrometry, this is an expensive test and rarely used by employers.

FALSE POSITIVES

Over-the-counter and prescription drugs can trigger false positive responses. Even such commonly used drugs as Advil and Nuprin can show up as illegal drugs in some tests.

Codeine, a commonly prescribed pain reliever can "look" like heroin in urinalysis. Heroin is indicated by the appearance of morphine in the urine, but codeine will also metabolize into morphine in the urine.

Quinine is a common adulterant in street heroin, but it is also commonly used in tonic and soft drinks and over the counter medications. The appearance of morphine and quinine is a very strong indicator (to the drug testing lab) of heroin usage, so that the perfectly innocent ingestion of codeine and quinine "looks" like heroin usage.

Cocaine is a rapidly metabolized drug, so that the technicians look for procaine (a common adulterant) to indicate cocaine usage. However, a positive procaine could be due also to the use of procaine penicillin, a prescription drug.

Some tests for marijuana usage are so sensitive that an individual who has had passive exposure to the smoke (e.g. was in an enclosed area with someone smoking marijuana) may test positive even though they, themselves, did not smoke.

According to Pharmchem, a prominent laboratory in the field of drug testing:

"It is important to remember that urinalysis results do not necessarily provide conclusive information about what drugs a patient has taken. This is because of variations in a drug's metabolism. The urinalysis results indicate which substance are present in the urine after the drugs used have undergone conversion in the body. The metabolic end products present in the urine can come from a variety of sources, both legal (prescription and over-the-counter drugs)and illicit (street)..."

FALSE POSITIVE BECAUSE OF SKIN COLOR

The use of urinalysis is currently being challenged in the courts because it seems to have a disparate negative impact on minorities. Melanin, the substance responsible for skin color is present in the urine and it appears to trigger false positive responses for marijuana use. The more melanin in the skin the more likely the test will give a false positive. A suit is currently pending against the Cleveland police department because the urinalysis they relied upon failed 50% of the black recruits, while showing a 9% failure rate among the white cadets.

DRUG TESTS DO NOT MEASURE IMPAIRMENT

A urinalysis can not indicate whether an individual is under the influence of a drug or whether work performance is impaired. Urinalysis tests for past, not current use. Detection time of the drug in the urine varies with the individual, depending on fluid intake, metabolic rate, kidney function, food intake, amount of drug ingested and other factors. However, the following indicates approximate detection times for certain drugs:

Alcohol	12 hours
Heroin	24 hours
Barbiturates	900 hours (or about 38 days)
Cocaine	18-144 hours
Marijuana	120-720 hours

INVASION OF PRIVACY

A blood or urine sample can yield information about an individual beyond questions of drug use. An employer can determine pregnancy through a urine sample, and exposure to AIDS virus though a blood sample. An employer can determine genetic predisposition to a wide variety of diseases. It is unlawful for an employer to seek this kind of information without the express written consent of the employee. However, it is within the realm of possibility that an unscrupulous employer might be tempted to test for this kind of information.

CONSTITUTIONAL PROTECTIONS FOR PUBLIC EMPLOYEES

Public employees have special constitutional protections as workers that are not available to private sector workers. The constitution protects citizens from certain actions of the government and since the "government" is the employer, public sector workers are entitled to these protections.

Under both the federal and state constitution, public employees are protected from "unreasonable search and seizure". The taking of a urine or blood sample is generally considered a form of search and seizure. Generally, "blanket" or random drug screening of public sector employees is unconstitutional. However, the government can engage in "reasonable search and seizure". Therefore, these sections of the state and federal constitution do not necessarily protect against testing of an individual appearing to be under the influence, neither does it protect individual rights when there is a valid security concern, for example at a nuclear power plant. In this case, the employer may do blanket screening. Generally this must be in a two step process, such as a field sobriety test first and then the drug testing of those who fail the field test.

Under both the federal and state constitution public employees are protected against self-incrimination. These protections apply to questioning (but not necessarily to testing).

PROTECTIONS UNDER THE CALIFORNIA CONSTITUTION

California employees have special rights of privacy under Article 1, Section 1 of the California Constitution. This section specifically forbids an employer

from collecting or using information which does not directly relate to the job. This would seem to mean that it forbids collection or use of data about off-the-job behavior which does not affect your job performance. Therefore, random screening or any punishment for drug byproducts found as a results of off-the-job drug use would seem to be illegal. This protection applies to both private and public sector workers (but does not limit federally mandated programs.)

STATUTORY RESTRICTIONS RELATED TO DRUG SCREENING & USE

1. Under the Confidentiality of Medical Information act, you cannot be disciplined in any way for a) refusing to sign an authorization for release of drug test information, b) or canceling such an authorization. A cancellation is effective as soon as it reaches the person in possession of the information: this cancellation must be in writing. Civil Code sections 56.20(a) and 56.24.

2. Legally, only licensed clinical laboratories may analyze blood or urine for drugs. Business and Professions Code sections 1205, 1206, 1242.

3. Legally, a clinical laboratory may give drug test results only to a physician or other health care professional (even if the employee signs a waiver). Business and Professions Code section 1288.

4. A health care professional is bound by confidentiality rules even though she works for the employer. Even a company doctor requires a release of medical information signed by the employee to give the results to the employer, and the worker may cancel the release at any time. Civil Code section 56.20.

5. An employee may sue any laboratory or health care professional that negligently conducts or interprets a drug test.

6. Any lab or facility which receives any federal funding cannot release drug use information except under extremely strict conditions (even with a medical release). Title 42 Code of Federal Regulations section 2.38.

7. Any employer who receives a substantial federal grant or contract is forbidden by federal law from disciplining a worker in any way for a history of drug or alcohol abuse which does not pose a current risk at work. Such an employer may not impose discipline relying upon drug (or alcohol) related absences which occurred prior to entry in a rehabilitation program. Title 42 U.S. Code sections 706(7) and 791-795.

8. Reasonable accommodation. State and federal law requires that the employer take all reasonable steps needed to accommodate employee drug or alcohol problems. For example the employer may have the obligation to: give time off for a residential or out-patient treatment program; reduce aggravating job stresses (as by changing assignment or supervisor); adjust scheduling; etc).

The right to rehabilitation applies even if the first attempts at rehabilitation fail.

In order to preserve the employee's right to reasonable accommodation, s/he must: admit to the drug or alcohol abuse problem; agree to work with management

and the union in efforts to solve it and not report to work under the influence. Title 42 U.S. Code sections 706(7) and 791-795; Labor Code sections 1025-1028.

SAMPLE COUNTER-PROPOSALS

In almost all cases a union's position will be a flat no to any agreement on drug testing. Most workers should never, under any circumstances, be subjected to drug testing. For the most part our members are engaged in work where there is no possibility of them proving to be a danger to the public or themselves. These is no justification for requiring drug testing for most employees.

However, some employees do work with potentially dangerous equipment or drive potentially dangerous vehicles, or carry weapons. Even in these cases the union's initial position should be that observation is the proper way to determine impaired behavior and that drug testing is not necessary. In no circumstances should the union agree to blanket drug screening or random sampling. (This kind of an agreement is probably a violation of constitutional rights). The union should not agree to testing for drug use which is not related directly to work performance. Any discipline should require proof of an actual impairment of work performance. The union should not agree to any employee assistance program which requires or allows drug test results to be reported to the employer. The union should not agree to any treatment program which if unsuccessful will result in disciplinary action. Drug and alcohol problems, like all health problems, often require several treatment to be tried before a successful approach is discovered.

The union cannot legally agree to any policy which allows:

a) discipline for refusing to authorize the release of drug test results;

b) release of drug test results directly from the lab to the employer;

c) taking of urine or blood samples without the employee's written consent;

d) taking of blood or urine samples which the employer may test for any medical condition other then that specifically authorized.

SAMPLE #1 (No drug test)

Article X - Involuntary Medical Leave

Section 1

If a supervisor has objective, verifiable facts indicating that a safety-position worker may be incapable of safely performing his/her job, that supervisor shall:

a) immediately inform the worker of his/her suspicions;

b) inform the worker of his/her right to Union representation;

c) offer the worker the immediate option of going on medical leave of absence.

If the worker refuses to go on leave, then the supervisor must ask for a second opinion from another management official. If that official agrees that there are objective verifiable facts indicating a possible safety hazard, then the worker may be involuntarily placed on a medical leave of absence. The employee and the Union shall be given a written statement from each management observer specifying the specific behavior leading to the action. No disciplinary action shall be taken against an employee placed on medical leave.

Section 2

To return to work from an involuntary medical leave, the employee must present a return-to work slip from a physician or other health care professional.

Section 3

On the second occasion of an employee being placed on involuntary medical leave in a 12 month period, that employee shall be offered the opportunity to enter an EAP or other appropriate rehabilitation program. No disciplinary action for substance or alcohol abuse may be taken against an individual participating in rehabilitation program.

Section 4

All provisions of Article X are subject to the grievance procedure.

SAMPLE #2

Article Y--Section 1

The provisions of this article apply only to those positions agreed designated by the employer and the union to be "safety-related".

Section 2

If an employee in a safety-related position is suspected by his/her supervisor of being incapable of safely performing the duties of the job because of the influence of drugs or alcohol, the supervisor must:

a) immediately inform the worker of his/her suspicions;

b) inform the worker of his/her right to union representation;

c) offer the worker the immediate option of going home on medical leave of absence. The employee may be required to submit a return-to-work clearance from a health care professional.

On the second occasion in a 12 month period that an employee is placed on involuntary medical leave for suspected drug or alcohol related impairment, the employee will be offered the opportunity to participate in a rehabilitation program in lieu of disciplinary action. The employer shall bear the full cost of the rehabilitation program.

Section 3

If the employee refuses to go on leave, then the supervisor must ask for a second opinion from another supervisor or appropriate management person. If the second supervisor agrees that there is objective evidence that the employee presents a possible safety hazard, the employee shall again be given the option to go on medical leave.

Section 4

If the employee disagrees with the findings of the two supervisors, s/he shall be offered the option of drug or alcohol testing:

a) The drug or alcohol test must take place at a laboratory licensed to conduct such testing.

b) The test must measure actual impairment rather than past drug or alcohol use.

The results of the test will be made available to both the employee and to a physician, designated by the union and employer, with extensive experience in determining drug and alcohol impairment.

The physician will report the test as positive only if drug or alcohol in the system is of a level which indicates current impairment. If the drug or alcohol level is below that which indicates current impairment, the physician will report the results as negative. No other information may be reported to the employer.

The employer will properly preserve 50% of any sample taken. The employee will be allowed to have it tested by his/her own physician.

Section 5

The employer shall observe all laws and regulations protecting the confidentiality of medical information.

Section 6

She employer shall indemnify the union and and hold it harmless from any liability or costs resulting from the drug or alcohol test, the test results, any subsequent discipline, or any violation of law or rights relating to the provisions of this article.

Section 7

An employee whose test results indicate current impairment shall be offered the opportunity to be counselled and rehabilitated in a program approved by an appropriate health care professional and agreed to by the union and the employer. The employer shall bear the full cost of counselling and rehabilitation.

Section 8

Refusal to submit to a test may not be used as evidence of current impairment. Discipline may be based only on documented evidence, including observation of inappropriate and potentially dangerous behavior. The employee shall be offered the opportunity to obtain other evidence, including observations by co-workers and union officials.

Section 9

All provisions of the Article are subject to the grievance procedure.