Drug Testing in the Workplace and Implications on Workers’ Compensation

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Drug Testing Laws

• Drug Testing in the workplace has become more common since the 1980’s

• State specific laws need to be complied with.
  – i.e. Minnesota Statutes 181.951, et seq.
  – South Dakota does not have any state specific laws regarding drug testing in the workplace
Key Legal Issues in Developing the Program

• Policies and Procedures
  – Comprehensive programs
  – Administrative oversight responsibilities – contracting partner
  – Confidentiality
  – Due Process, if provided
    • Full investigations and opportunities for employees to be heard
Policies of Drug Testing

• Implicates the Americans with Disabilities Act, discrimination laws, and other employment related laws

• Pre-Employment
  – Generally, post-job offer

• Employment Periodic Drug Testing
  – Individualized Suspicion
  – Random
  – After accidents or incidents

• Consent:
  – Pre-employment – have forms where applicant agrees to testing, procedure, and employment dependent upon result
  – Employment – outline in employment manual and attain consent at time of start of employment

• Do not alter employment relationship
Procedure

• Outside testing procedure in policy and practical review through how it is done
• Hire or contract with qualified testing company
• Maintain diligent records
• Be consistent
Drug Test Results

• Pre-employment – (1) provide notice of result; (2) withdraw offer of employment
• Employment – (1) provide notice of result; (2) handle according to HR policies
• An employee can be fired for testing positive for substance abuse
• Employer can handle differently, at its discretion
Due Process: Contesting Drug Test Results

• Pre-Employment

• Employment
  – Employer policies may allow for formal hearing process and ability to contest results
  – An employee who believes they had a false positive test can sometimes seek to have an additional drug test administered
  – Depending on the invasiveness of the test, there may be privacy concerns for the employee
  – Union and federal employees have rights to contest, South Dakota employees do not

• Liability
  – No legal requirement to provide due process, but the lack of due process could open employer up to general discrimination claims
Marijuana Use

• Federal law prohibits marijuana use
• Some states (not SD) have now legalized recreational use
• Issue: Can an employee be fired for testing positive for marijuana use?
  – Question not settled
  – Colorado Supreme Court just heard case
    • At-will employment
    • Federal preemption
      – Federal law prohibits marijuana use
    • Express statutory prohibition from discharging employee
Marijuana in SD

- Currently illegal in SD—can terminate for positive drug test
- SDCL 60-4-11 prohibits employers from discriminating based on off-duty tobacco use
  - If South Dakota legalized marijuana, may need some type of express prohibition similar to the tobacco-use statute to trump the at-will employment status of employees.
New Rules Regarding the Medical Use of Marijuana Impacting Work Place

1. Recreational Use
2. Medical Use
3. Federal Law
4. Impact on Employment Screenings
Recreational Use

Recreational use of marijuana is legal in four states:

1. Colorado
2. Oregon
3. Washington
4. Alaska
## Medical Use

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Federal Law: Controlled Substances Act

Schedule 1

reserved for drugs with a "high potential for abuse", "no currently accepted medical use" and a "lack of accepted safety"
Federal Government Response: 

Confusion

• Department of Justice

• Treasury Department

• Department of Transportation
Federal Contractors: Drug Testing

• Currently, the Department of Labor still says that hospitals accepting Medicare are not subject to the Drug-Free Workplace Act;

• Case law is ruling differently
Impact of Recreational Use Law

• Can an employer still discipline an employee for legal recreational use?
  – Colorado: *Croats v. DishNetwork*

• The employee argued that he was illegally fired for an “otherwise lawful activity”

• Decided by Colorado Supreme Court in June, 2015
Impact of Recreational Use Law

- Colorado’s ruling in *Croats*: marijuana is not yet an “otherwise lawful substance” because it is deemed unlawful under the Controlled Substances Act.

- The *Croats* case was a huge relief for employers, but it was based upon the recreational use laws and the ADA issues were not raised or litigated.
Reevaluation of Mandatory Testing: because you can still test, should you?

- Tied to the need for the job?
- State law specific and evolving
General risk management practices for the use of legally prescribed medications, possibly including marijuana:

– *Blanket prohibitions are illegal.* The ADA imposes on employer an obligation to make individualized inquiries about implications such as reasonable accommodations and direct threats. A blanket prohibition against on-the-job use of prescriptions medications violates this obligation.

– *Drug testing.* Drug testing programs can include legally prescribed drugs but employees should have opportunity to be able to explain positive results. Remember that knowledge, however, creates ADA risk.
Risk Management, continued

– Drug-free workplace policies. It is permissible to include prescription drugs in drug-free workplace policies. These policies can require employees to disclose prescription drugs that may adversely affect judgment, coordination, or the ability to perform job duties. After disclosure, an employer must, on a case-by-case basis determine whether it can make a reasonable accommodation that will enable the individual to remain employed.

– Post-disclosure handling. After an employer learns that an employee is taking a prescription drug that may affect job performance, it should request a medical certification regarding the effect of the medication on the ability safely to perform essential job functions and evaluate reasonable accommodations.
Reasonable Suspicion Testing

- SD Employers are not prohibited from testing applicants or employees for current illegal drug use or from making employment decisions based on verifiable test results.
- No SD Statute codifying the “reasonable suspicion” standard for employee drug testing.
- Other states do have this standard and require employers to notify employees in writing of their intent to test.
Reasonable Suspicion Testing

• Employers in states where there are no specific statutes on drug testing for private employers may follow and distribute a drug testing policy, including an express notification that failing to consent to a drug test may be grounds for discipline, up to and including termination.
HIPAA & Employee Drug Testing

- Results of an employee’s drug test can be classified as protected health information under HIPAA
  - Medical provider that performs the test cannot release the results to the employer without a signed authorization by an employee 45 CFR 160.103 (defines “protected health information.”)
  - If the employee refuses to sign an authorization of disclosure, an employer cannot force the employee to submit to a drug test
  - Employers can condition employment on the signing of appropriate authorization form.
  - Keep drug test results strictly confidential.
South Dakota

- Employers have discretion to implement drug-testing programs, including a “reasonable suspicion” policy for drug testing.
- SD law requires certain state agencies to administer drug tests to applicants for “safety sensitive” positions, such as law enforcement officers.
- Reasonable suspicion means the employer has a legitimate reason based on logic and facts to believe the employee has been taking drugs.
Examples of reasonable suspicion

1. Direct observation of drug use;
2. Physical symptoms of drug use (slurred speech, uncoordinated movements);
3. Conduct or behavior that is out of the ordinary for the individual, or erratic behavior or deterioration in work performance;
4. A report from an independent, reasonable source the employee is using drugs;
5. Evidence that the employee has used drugs at work, or possessed, sold or solicited drugs at the workplace.
Post-Accident Testing

• Prescription Drug Use
  – Depending upon the type of testing conducted, prescription drug use may not show up in the analysis
  – If it does show up and the employee provides a prescription from the doctor, the testing agency may also report a negative test result to the employer.
  – Be sure to have written policies documenting post-accident testing procedures.
  – Certain industries also have regulations on banned substances such as trucking or other high-risk industries
Prescription Drug Abuse

• Drug overdoses from opioid painkillers now exceed car crashes as the leading cause of unintentional death in the US

• According to a survey conducted by the National Safety Council, “eighty percent of 200 Indiana employers surveyed in 2015 said they have been affected by prescription drug abuse in their workplaces, yet only 53 percent said they have a written policy on using these types of medications at work.”
Prescription Drugs & Workers Compensation

• Driving up health care AND workers’ compensation costs
  – According to the National Safety Council, “Employees who are prescribed even one opioid have average total workers’ compensation claim costs four times greater than those who are not prescribed such medication.”
State Court Decisions

• Recent state court decisions have found employers and workers’ comp insurers financially responsible when workers have been injured on the job fatally overdose on prescribed painkillers.

  – James Heffernan, Dec’d v. J.D. Landscaping 2010 WL 3379125
By the Numbers…

- Opioids make up one-quarter of all workers’ compensation prescription drug costs.

- “Workers who take opioids for longer than three months usually do not return to work because they have become dependent on the drugs and suffer multiple related illnesses and side affects when taking them.” — Keith E. Rosenblum

- Prescription painkiller abuse is costing employers an estimated $25.5 Billion a year in missed workdays and lost productivity.
CDC

• “There is little evidence that long-term opioid treatment improves chronic pain and quality of life.”

• CDC website has provided a checklist for primary care providers to use when prescribing opioids for chronic pain
  – Considerations
  – Return visits every 3 months
  – Reassessment
Resources

• National Safety Council
  – Prescription Dug Employer Kit
    • www.nsc.org/rxpainkillers
South Dakota Work Comp Case Law

- Goebel v. Warner Transportation 2000 SD 79
- Van Steenwyk v. Baumgartner Trees and Landscaping 2007 SD 36
- Klinkner v. Lamont Company, Inc. HF No. 31, 2013/14
- Trusty v. Peska Construction HF No. 197, 2003/04
Goebel v. Warner Transportation
2000 SD 79

• Claimant’s truck drifted off the road and crashed.
• Claimant’s drug test came back positive for methamphetamine and marijuana.
• Department of Labor found that employer proved claimant’s illegal use of Schedule I drugs was a substantial factor in the cause of the accident and benefits were denied.
• SD Supreme Court upheld DOL’s decision.
Van Steenwyk v. Baumgartner Trees and Landscaping 2007 SD 36

- Claimant was injured while attaching a bucket to the front of a skid loader.
- Employer claimed Claimant’s off-duty marijuana use impaired his ability to attach the bucket safely.
- Employer had not trained employees or enforced proper safety procedures for attachment of the bucket to the skid loader.
- DOL found the Claimant’s off-duty marijuana use was not a proximate cause of the injury.
- SD Supreme Court affirmed the Department’s determination that Employer failed to show by a preponderance of the evidence that Claimant’s injury was “due to” his willful misconduct.
Klinkner v. Lamont Company, Inc.  
HF No. 31, 2013/14  

• Issues:  
  – Whether claimant had recovered from injury of April 4, 2012, such that the injury is no longer a contributing cause of any treatment needed by him  
  – Whether claimant was entitled to payment of Permanent Partial Disability benefits
Trusty v. Peska Construction HF No. 197, 2003/04

• Issue:
  – Whether Employer and Insurer are responsible for medical expenses other than those related to the treatment provided by the approved physician per the settlement agreement
Questions

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