



# Trends in Drug Testing

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# Navigating the “Ups and Downs” and Curves of Drug Testing

- Laws
- Policies
  - Pre-Employment
  - During Employment
- Testing Trends and New Technologies
- Drug Trends

# Lots of Regulations and Laws...

- Federal Motor Safety Carrier Act (FMSCA)
- Substance Abuse and Mental Health Services Administration (SAMHSA)
- Texas Department of Public Safety
- Worker's Compensation
- Department of Justice
- ADA, HIPAA, Title VII
- Case law interpreting various scenarios on employment

# Drug Testing Statistics

- Positivity for post-accident urine testing jumped more than 51 percent year-over-year
  - 3.1% in 2017
  - 4.7% in 2018
  - 81% between 2014 and 2018
- 2018 jump was largely driven by the addition of prescription opiates

# Drug Testing Statistics

- Positivity for post-accident semi-synthetic opiates (hydrocodone and/or hydromorphone) and for oxycodones (oxycodone and/or oxymorphones) was 1.1 % and 0.77% respectively.
- Post-accident positivity in the general U.S. workforce climbed 9% year-over-year
  - 7.7% in 2017
  - 8.4% in 2018
  - 29% over five years
- Post-accident positivity has risen annually since 2011 in the general U.S. workforce and since 2010 in the federally mandated, safety-sensitive workforce.

# Drug Testing Statistics

**Syracuse, NJ, April 11, 2019** – The rate of workforce drug positivity hit a fourteen-year high in 2018, according to a new analysis released today by Quest Diagnostics (NYSE: DGX), the world's leading provider of diagnostic information services.

Positivity rates in the combined U.S. workforce increased nearly five percent in urine drug tests (4.2% in 2017 versus 4.4% in 2018), climbing to the highest level since 2004 (4.5%) and are now more than 25 percent higher than the thirty-year low of 3.5 percent recorded between 2010 and 2012.

# Quest Diagnostics Statistics In General: 2018

Positivity Rates by Testing Reason – Urine Drug Tests (For General U.S. Workforce) (More than 6.5 million tests from January to December 2018)

| <b>Testing Reason</b> | <b>2014</b> | <b>2015</b> | <b>2016</b> | <b>2017</b> | <b>2018</b> |
|-----------------------|-------------|-------------|-------------|-------------|-------------|
| Follow-Up             | 7.1%        | 8.6%        | 8.9%        | 7.8%        | 8.4%        |
| For Cause             | 27.7%       | 31.9%       | 32.9%       | 33.0%       | 33.7%       |
| Periodic              | 1.6%        | 1.6%        | 1.5%        | 1.6%        | 1.6%        |
| Post-Accident         | 6.5%        | 6.9%        | 7.4%        | 7.7%        | 8.4%        |
| Pre-Employment        | 4.0%        | 4.2%        | 4.4%        | 4.6%        | 4.7%        |
| Random                | 5.7%        | 5.5%        | 5.5%        | 5.6%        | 5.7%        |
| Return to Duty        | 6.4%        | 6.3%        | 6.3%        | 6.4%        | 6.4%        |

# Quest Diagnostics Statistics By Drug Type: 2018

| Drug Category                          | 2014   | 2015   | 2016   | 2017   | 2018   |
|--|--------|--------|--------|--------|--------|
| 6-AM                                   | 0.031% | 0.037% | 0.037% | 0.033% | 0.031% |
| Amphetamines                           | 1.0%   | 1.1%   | 1.2%   | 1.2%   | 1.2%   |
| Barbiturates                           | 0.22%  | 0.22%  | 0.22%  | 0.25%  | 0.22%  |
| Benzodiazepines                        | 0.71%  | 0.68%  | 0.66%  | 0.61%  | 0.52%  |
| Cocaine                                | 0.24%  | 0.25%  | 0.28%  | 0.30%  | 0.28%  |
| Marijuana                              | 2.4%   | 2.4%   | 2.5%   | 2.6%   | 2.8%   |
| MDMA                                   | 0.003% | 0.005% | 0.004% | 0.005% | 0.006% |
| Methadone                              | 0.18%  | 0.18%  | 0.18%  | 0.18%  | 0.18%  |
| Opiates                                | 0.47%  | 0.49%  | 0.47%  | 0.39%  | 0.31%  |
| Opiates<br>(Hydrocodone/Hydromorphone) | 0.88%  | 0.68%  | 0.63%  | 0.51%  | 0.50%  |
| Oxycodones<br>(Oxycodone/Oxymorphone)  | 0.80%  | 0.75%  | 0.69%  | 0.61%  | 0.43%  |
| PCP                                    | 0.02%  | 0.02%  | 0.01%  | 0.01%  | 0.01%  |
| Propoxyphene                           | 0.01%  | 0.00%  | 0.00%  | 0.00%  | 0.00%  |



# Everyone Should Know We Have a Drug Testing Policy

- What is the Policy of your City Council – Drug Free Workplace or Drug Free Workforce?
- Part of Personnel Policy Manual
- Outline Specific Expectations
  - Purpose of Policy
  - Purpose of Drug Testing
- Tell Them what the Expectations are of Your Policy
- Tell Them what the Expectations are of Them

# We Want to Test Everyone Once a Month!

- When can you test?
  - Pre-employment
    - Safety Sensitive Positions
    - Conditional Offer of Employment
  - During employment
    - Drug Dependency
    - Post-accident/On the Job Injury
    - Random
    - Reasonable Suspicion
    - On Call
    - Return to Duty
    - Fitness for Duty
    - Safety Sensitive Positions

# We Want to Test Everyone Once a Month!

- Does Timing of a Test Matter?
  - When?
    - How long can we wait?
    - What happens if we don't do it in time?
    - What timeframe of use is it testing?
  - What do we do while waiting for results?
    - Discipline – suspension, probation, termination, do nothing
  - They did it while off duty, so it must be ok.

# Don't Take my Blood or Smell my Breath!

- Breathalyzer or blood
  - Alcohol
- Blood
- Urine
- Saliva
- Hair
- Splitting Samples
- Taking Two Samples

# But it's Legal in Colorado and there are CBD Oil Stores Everywhere!!

- Department of Transportation – NO Exceptions
- CBD Leaves Traces of THC [Tetrahydrocannabinol] AKA Marijuana
  - If not prescribed
  - If it is not disclosed
  - Different types with different levels
    - Cumulative effects
- Tests/Laboratories DO NOT differentiate between hemp and cannabis
- Getting Marijuana where its Legal
  - What do you want your policy to say?
    - How do you know they are telling the truth?
- Opiates

# What's Happening in Texas?

- What is legal/illegal in Texas now?
  - Exceptions
  - Cannabidoil – CBD Oil
    - Texas Compassionate Use Act
- HB 63 Reducing Marijuana Possession Penalties Passed...But...





# DRUGS

Doing nothing has never been so amazing.

# Positivity = Not Automatic Termination

- EEOC Recent Suits and Enforcement
  - Doctor's Orders
  - Prescribed medications
  - Disclosure
    - Advise drug testing companies
- Other Legal Issues
  - Procedural or technical failure in application of policies don't equal liability
  - DEFINE your policy
  - NOT responsible for procurement or levels of non-prescribed medications



# Someone Tested Positive – Let's Terminate Them!

From the Texas Workforce Commission, Appeal No. 97-003744-10-040997, we learn that to properly document a termination for violating a drug-testing policy, an employer must present:

1. A policy prohibiting a positive drug test result, receipt of which has been acknowledged by the claimant;
2. Evidence to establish that the claimant has consented to drug testing under the policy;
3. Documentation to establish that the chain of custody of the claimant's sample was maintained;

# Someone Tested Positive – Let's Terminate Them!

4. Documentation from a drug testing laboratory to establish that an initial test was confirmed by the Gas Chromatography/Mass Spectrometry method; and
5. Documentation of the test expressed in terms of a positive result above a stated test threshold.

Evidence of these five elements is what TWC states is needed to overcome a claimant's sworn denial of drug use.

# EEOC: Aggressive Approach

- EEOC Enforcement Guidelines
- Americans with Disabilities Act Considerations
  - Interactive Process
  - Qualified Individual
  - “Current Drug User”
  - Reasonable Accommodations
    - Rehabilitation
    - Alcoholics Anonymous/Narcotics Anonymous
  - Direct Threat Issues
- FMLA
- Title VII

# Let's Terminate! Police and Fire Are Different!

- Police and Fire
  - Government Code 614 Notice [614.021-614.023]
    - Complaint- in writing and signed by complainant
      - Can be citizen, Chief, Lieutenant, etc
    - Copy given to officer/employee
    - Reasonable time after complaint filed
    - No disciplinary action taken unless copy of signed complaint given to officer/employee
    - No indefinite suspension or termination- **unless**
      - Complaint Investigation
      - Evidence to prove misconduct
  - Civil Service/143 or Meet and Confer

# 10 Steps for Avoiding Legal Problems In Drug Testing Situations

- 1. Consult an [employment] attorney:** Consult with your attorney whenever you alter your drug-free workplace policy, or if you're launching a new one.
- 2. Set clear penalties:** Clearly stipulate the penalties for policy violations. If your policy includes a drug-testing program, state who will be tested, when they will be tested, and what will happen to employees with a violation.

# 10 Steps for Avoiding Legal Problems

- 3. Put it in writing:** Every employee should receive and sign a written copy of your drug-free workplace policy. Verbal agreements and unsigned agreements have little legal standing.
- 4. Provide training:** Ensure that all supervisors are trained on how to detect and respond to workplace drug and alcohol misuse. Maintain attendance logs of all trainings.
- 5. Document employee performance:** Maintain detailed and objective records on the performance of all employees. A documented performance issue often provides a basis for referring workers to employee assistance programs (EAPs).

# 10 Steps for Avoiding Legal Problems

- 6. Don't rush to judgment:** Do not take disciplinary action against a worker or accuse a worker of a policy violation simply because the employee's behavior seems impaired. Instead, try to clarify the reasons for the employee's impairment. If drug testing is a part of your workplace policy, obtain a verified test result before taking any action.
- 7. Protect privacy:** Hold discussions with employees about potential violations in private. Have another manager present to serve as a witness. Never accuse or confront an employee in front of his or her coworkers.
- 8. Be consistent:** No individual employee or group of employees should receive special treatment. Inconsistencies in enforcement could be considered discrimination.

# 10 Steps for Avoiding Legal Problems

9. **Know your employees:** Getting to know your employees can make it easier to identify problems early on.
10. **Involve employees:** Workers at all levels of your organization should be involved with developing and implementing your drug-free workplace policy. This will reduce misunderstandings about the reasons for having a drug-free workplace program and help ensure that your policies and procedures are fair to everyone.

Substance Abuse and Mental Health Services Administration (SAMHSA)

<https://www.samhsa.gov/workplace/legal/avoiding-problems>



# Questions

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