certiphi screening

white paper

THE CHANGING FACE OF EMPLOYMENT DRUG SCREENING

Recent trends and developments that may require you to re-evaluate your drug screening practices

Due to the changing nature of employment and labor law, diligent employers are continuously monitoring the legal environment for changes and, if necessary, subsequently modifying their practices in order to remain fully compliant with legal and regulatory requirements. Employment drug screening practices are no different.

Lawmakers across the nation are increasingly falling in line with the current trend to provide job applicants and employees with additional rights and protections. Additionally, there are some common misconceptions when it comes to testing for some drugs that have grown in popularity in recent years. Employers must remain vigilant of these trends and potential issues—recognizing that this could require noteworthy changes to employment practices, including drug screening policies.

This white paper will explore a number of issues and recent developments surrounding employment drug screening. First, we will discuss two of the most common recent challenges to employment drug screening practices under the Americans with Disabilities Act. Next, we will summarize some of the often-overlooked legal requirements that may apply when conducting employment drug screening, including notification requirements under the Fair Credit Reporting Act as well as under various state notification laws. We will then discuss a growing concern for employers—medical marijuana in the employment context—and will summarize why the laws in 10 specific states may be most problematic for employers. Finally, we will wrap up by addressing some issues and common misconceptions that arise when employers seek to test for heroin or newly developed “designer” drugs.

1. THE AMERICANS WITH DISABILITIES ACT (ADA)

One law that often comes into play when an employer's drug screening practices are challenged is the Americans with Disabilities Act (ADA).[1] There are two recent developments in ADA case law that employers should be aware of: (1) drug screening is likely not a prohibited pre-offer medical inquiry; and (2) employers must provide reasonable accommodations in the testing process for individuals with disabilities.

First, some applicants and employees have brought actions against employers, alleging that pre-employment drug screening is a prohibited "pre-offer medical inquiry" under the ADA. Guidance from the Equal Employment Opportunity Commission (EEOC) states that employers may test applicants for illegal drug use, and if the applicant tests positive for illegal drugs, the employer may validate the test results by asking about lawful drug use or possible explanations for the positive result other than the illegal use of drugs.[2]

Courts have similarly held that drug screening for illegal substances is not a prohibited "pre-offer medical inquiry" under the ADA. In EEOC v. Grane Healthcare Co. et al,[3] a Pennsylvania federal court reached this conclusion, stating that in order for a drug test to be considered a medical inquiry under the ADA, a claimant must show that (1) the drug test in question was not administered to determine the illegal use of drugs, and (2) that the drug test did not, in fact, return a positive result for the illegal use of drugs. The employer in this case was able to present credible testimony at trial showing that its only intent in performing pre-offer drug testing was to determine whether applicants were using illicit drugs.

It is important to highlight that the above challenges only exist when drug testing is conducted at the "pre-offer" stage. Thus, employers would be well-advised to conduct pre-employment drug screening post-offer in order to avoid the aforementioned ADA issue.

Second, employers must ensure that their employment drug screening process provides reasonable accommodations for applicants and employees with disabilities. In a case filed against Kmart by the Equal Employment Opportunity Commission (EEOC),[4] Kmart agreed to pay roughly $100,000 to a disabled applicant who alleged that the company refused to employ him after he was unable to provide a urine sample for drug testing. The applicant claimed he couldn't provide the sample due to his kidney disease and dialysis. In addition to the payment, Kmart also agreed to revise its drug-free workplace and pre-employment drug testing policy to include a description of its obligation to provide reasonable accommodations to employees or applicants in the testing processes.

In a similar case filed against Wal-Mart,[5] the national retailer agreed to pay $72,500 to settle a case alleging that one of its stores refused to provide a job applicant with end-stage renal disease with an alternative to a urinalysis drug test. The lawsuit alleged that the applicant went to the drug testing facility to ask for an alternative test to be performed and when the facility agreed that an alternative was possible, the applicant took that information to the store manager for

1 See 42 U.S.C. §§ 12111–12117.
2 EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, http://www.eeoc.gov/policy/docs/preemp.html.
3 CV No. 3:10-250 (W.D. Pa. Sept. 15, 2015).
4 EEOC v. Kmart Corp.; Sears Holdings Mgmt. Corp., Civil Action No. 13-cv-02576 (D. Md. Jan. 21, 2015).
5 EEOC v. Wal-Mart Stores, Inc., Civil Action No. 14-cv-50145 (N.D. Ill. July 1, 2014).

consideration. Nonetheless, the manager refused to accommodate the alternative test and the plaintiff's application was rejected for failing to take the urinalysis test.

Thus, employers should review their drug screening policies and practices to ensure that they allow for accommodations to be made for applicants or employees who are unable to comply with standard drug testing procedures due to a disability.

2. THE FAIR CREDIT REPORTING ACT

Enacted by Congress in 1970 and subsequently amended a number of times, the Fair Credit Reporting Act ("FCRA")[6] governs the collection, compilation and use of consumer report information. While most people associate the FCRA with the regulation of credit reports used to apply for home mortgages, credit cards and car leases, the FCRA has evolved into much more and is now the primary law detailing the procedures that must be followed when consumer reports—which include credit reports, criminal background checks and sometimes even drug testing results—are used for employment purposes.

When an applicant's drug test results are communicated to the employer by a consumer reporting agency (CRA), this reporting falls under the FCRA and is thus subject to all of the statute's requirements. The Federal Trade Commission (FTC) specifically addressed this issue in Islinger, FTC Staff Op. Letter (June 9, 1998), when it distinguished between drug test results reported directly to employers by labs (which the FTC states are not "consumer reports") and drug test results reported by intermediaries that are CRAs and regularly engage in assembling or evaluating consumer information to furnish/sell to third parties.

Thus, if a CRA is providing the results, the drug test report falls under the definition of a "consumer report" and would be subject to all FCRA requirements. One such requirement is Sec. 604(b)(3)'s pre-adverse action notification, requiring employers to provide the applicant with a copy of the report and a summary of consumer's rights under the FCRA before the employer can take an adverse action based in whole or in part on a consumer report. In the case of a contemplated adverse employment action based on the results of a drug screen, the employer should provide the applicant with a copy of the results, a notice that the employer is contemplating taking an adverse employment action based on the results, a summary of rights under the FCRA and contact information for the applicant to dispute the results. The general rule is that the employer should provide the applicant with a minimum of five business days to dispute the report before the employer takes a final adverse action and sends the final adverse action notice required by Sec. 615 of the FCRA.

6 Pub. L. 90-321, Title VI, codified at 15 U.S.C. 1681 et seq.

3. STATE-MANDATED DRUG TEST RESULT NOTIFICATION LETTERS

In addition to any FCRA notification requirements, there are laws in a number of states that require employers to notify applicants and employees when their drug test results come back positive (or even negative in a few states).

Employers in Connecticut, Iowa, Maryland, North Carolina and Vermont are required to notify applicants and employees when a drug test comes back positive. In Maine, Minnesota and Montana, employers are required to notify applicants and employees of the results of their drug tests, regardless of whether they come back negative or positive.

The specific details of the notification requirements will vary by state. For example, some states—like Iowa and Maryland—require employers to send the notification via certified mail. Others may require the employer to include additional information with the notification, such as information on the applicant's rights to retesting or a copy of the employer's written policy on the use or abuse of controlled dangerous substances or alcohol.

Employers who fail to comply with these statutory requirements can be subject to various penalties, including fines ranging from $250 to $2,000. In Maryland, an employer who violates the statutory requirements is guilty of a misdemeanor, and upon conviction, is subject to a fine not exceeding $100 for the first offense and not exceeding $500 for each subsequent conviction. Similarly, in North Carolina, an employer can face a civil penalty of up to $250 per affected examinee (with a maximum of $1,000 per investigation). In Vermont, a violation can result in a civil penalty between $500 and $2,000, as well as a criminal penalty for a person who knowingly violates the statute. Additionally, some states also permit applicants and employees to collect attorney's fees, back pay and other punitive damages for the employer's misconduct.

Again, it is important to note that these state drug test result notification requirements are separate from and in addition to any applicable FCRA notification requirements. Employers operating in these states must ensure that they are complying with these state notification laws regardless of whether the FCRA's notification requirements apply.

4. MEDICAL MARIJUANA

A recent surge in state laws allowing patients to legally access marijuana for medicinal purposes has resulted in a growing area of concern and uncertainty for human resources departments—determining whether a company can discharge an applicant or employee who tests positive for marijuana but provides the company with a valid medical marijuana prescription has become increasingly challenging for employers given the fragmented legal landscape.

Given the current legal landscape, the answer to this question will depend on several factors, the first of which is whether the employer or position is federally regulated. The Drug Free Workplace Act (DFWA) requires federal contractors to prohibit the "unlawful … use of a controlled substance" by employees in their workplace as a condition of employment.[7] These restrictions also apply to federal grant recipients.[8] Marijuana is currently listed as a Schedule I controlled substance under the Controlled Substances Act,[9] and therefore any use of it is strictly prohibited by the DFWA. Thus, federal contractors and federal grantees subject to the DFWA are legally required to maintain a drug-free workplace with no exceptions for employees' use of medical marijuana.

Furthermore, there are certain positions that are regulated by federal agencies and must abide by the safety standards imposed by such agencies (e.g. the U.S. Department of Transportation).[10] These federal guidelines do not allow regulated employees, such as those in safety-sensitive positions, to use marijuana even if it is pursuant to a valid prescription under state law. Thus, employers subject to federal regulations that require testing for marijuana use should continue to follow those federal regulations and may do so without violating state law.

Second, employers must determine whether a given state has adopted a medical marijuana law that explicitly protects employees who lawfully use medical marijuana. The issue is easily resolved when the state at issue does not have a medical marijuana program in place. As previously mentioned, marijuana is a Schedule I controlled substance that is illegal under federal law. Following from

7 See 41 U.S.C. § 8102(a).
8 Id. at § 8103(a).
9 21 U.S.C. § 812(b)(1).
10 See e.g., DOT 'Medical' Marijuana Notice, U.S. DEPT. OF TRANSP. (Nov. 19, 2015), https://www .transportation.gov/odapc/medical-marijuana-notice.

this, employers operating in states that have not legalized medical marijuana are likely free to strictly enforce zero-tolerance drug-free workplace policies, terminating any applicant or employee who tests positive for marijuana or any other prohibited substance under the federal Controlled Substances Act.

On the other hand, there are currently 30 jurisdictions with statutes creating medical marijuana programs. Generally, employers in most of these states can continue to discharge applicants or employees for testing positive for marijuana even if the individual has a valid medical marijuana prescription. Several court cases have supported this notion and have upheld this right of an employer to enforce a drug-free workplace policy and terminate an applicant or employee for a positive drug test even though the applicant or employee produced a valid medical marijuana prescription. However, what makes this issue a little challenging for employers is that these cases are generally concentrated in states with medical marijuana statutes that explicitly state that employers have no duty to accommodate medical marijuana users or are otherwise silent on the issue.[11]

Thus, an employer's rights and obligations under state law likely turn on whether the state's medical marijuana law contains language that provides users with some protection in the employment context, either through anti-discrimination or reasonable accommodation provisions. If the state's law contains no such language, then employers in that state are likely free to strictly enforce drug-free workplace policies, making no exceptions for medical marijuana users. However, if the state's law does include language protecting medical marijuana users in the employment context, then employers in that state will have to determine whether their employment drug testing policies are lawful under such laws.

11 See Roe v. TeleTech Customer Care Mgmt. LLC, 257 P.3d 586 (Wash. June 9, 2011); Swaw v. Safeway, Inc., No. C15-939 (W.D. Wash. Nov. 20, 2015); Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 230 P.3d 518 (Or. Apr. 15, 2010); Johnson v. Columbia Falls Aluminum, 213 P.3d 789 (Mont. Mar. 31, 2009); Casias v. Wal-Mart Stores, Inc., 695 F.3d 428 (6th Cir. 2012).

There are currently 10 states that include anti-discrimination or reasonable accommodation provisions within their medical marijuana statutes: Arkansas, Arizona, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New York, Pennsylvania, Rhode Island and West Viginia. The laws in these states generally include language that requires employers to make reasonable accommodations for medical marijuana users or that makes it unlawful for an employer to not hire or otherwise discriminate against an applicant or employee based on his or her use of medical marijuana. Employers operating in these states must be cautious with employment drug screening practices, ensuring that such practices are fully vetted on a regular basis by legal counsel, and may need to modify their drug screening policies and practices in order to remain compliant with such laws.

Despite the laws in the above 12 states, employers operating in most other states are likely free to continue to discharge applicants or employees who test positive for marijuana even if a valid medical marijuana prescription is provided. However, in order to do so, employers should ensure that they have a detailed zero-tolerance drug-free workplace policy in place that is applied evenly across the board and does not discriminate against any group of individuals. This policy should prohibit all unlawful drug use and should not be limited to drug use that occurs during work hours or on work premises. If an employer is going to discharge a medical marijuana user for testing positive, the employer should ensure that the adverse employment decision is strictly grounded in the positive drug test and not based on the applicant's underlying medical condition or another reason that may be unlawful under state or federal law.

Additionally, all employers should continue to remain vigilant and attentive to developing case law surrounding this issue and keep an eye out for potential legislative action in other states that may create similar protections for medical marijuana users.

5. COMPLICATIONS WITH TESTING FOR HEROIN

With its use continuing to increase at alarming rates across the nation, heroin has quickly emerged as one of the most troubling and dangerous drug epidemics in U.S. history.

According to a recent report from the Centers for Disease Control (CDC), heroin use in the United States has jumped 63 percent between 2002 and 2013, with increases seen across virtually all demographic groups.[12] Over the same period, the number of heroin-related overdose deaths has nearly doubled.[13]

In light of this unfortunate trend, employers are prioritizing heroin as one of the critical drugs that must be screened for. Many of these employers use a standard five-panel urine-based drug test that includes testing for opiates, and often assume that this test will detect any heroin use,

12 Christopher M. Jones, Vital Signs: Demographic and Substance Use Trends Among Heroin Users — United States, 2002–2013, CENTERS FOR DISEASE CONTROL AND PREVENTION (July 7, 2015), http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6426a3.htm?s_cid=mm6426a3_w.
13 Id.

but this is not always the case. Heroin, along with several other legal and illegal substances, falls under the "opiate" drug classification.[14] The standard five-panel urine test will test for opiate use but cannot tell the employer which specific drug is responsible for the positive result. This uncertainty could potentially allow applicants or employees to mask heroin use with other legally prescribed or obtained opiates. Furthermore, a person may use heroin but still test negative for opiates due to the cut-off level used by laboratories, which is typically set at 2,000 ng/mL.

The first issue for employers is that a positive opiate result using the standard five-panel drug test still does not allow an employer to definitively confirm that heroin was used. Because heroin is quickly metabolized and not excreted in urine to any appreciable extent, tests to identify heroin use typically look for one of its metabolites—morphine or 6-acetylmorphine (6-AM).[15] The standard five-panel urine test will only detect the first metabolite—morphine—which may be problematic for employers because morphine is also a metabolite of a number of other legal and illegal drugs. Because of this, a positive result for morphine will not necessarily allow an employer to confirm heroin use.

It may be important for the employer to differentiate between those individuals who test positive due to heroin use and those individuals who test positive due to some other legally prescribed or over-the-counter opiate because heroin is classified as a Schedule I drug in the United States with no legitimate medical use.

This leads to the second potential issue when using the standard five-panel drug test to screen for heroin—heroin users may be able to explain a positive opiate result by providing a valid opiate prescription, thus leaving the heroin use undetected. If morphine is detected in a specimen provided by an applicant or employee, that individual could produce a valid codeine or morphine prescription to explain the positive result. Thus, if the individual is using heroin, this use would go undetected since the morphine prescription is an acceptable explanation for the positive result and can, therefore, be used to mask any heroin use.

The final issue with using the standard five-panel test to screen for heroin is that the applicant or employee's heroin use may not be significant enough to clear the typical confirmation cut-off level of 2,000 ng/mL for opiates, producing a false-negative result. When testing specimens for potential drug use, labs use "cut-off

14 Please note, the standard five-panel drug screen only tests for "natural opiates" and does not test for synthetic and semisynthetic opiates—such as hydrocodone (e.g. Vicodin), hydromorphone (e.g. Dilaudid), oxycodone (e.g. OxyContin, Percocet), and oxymorphone—because they do not metabolize to codeine, morphine, or 6-AM. However, employers can add on additional testing for these specific synthetic and semisynthetic drugs. See Robert B. Swotinsky, M.D., M.P.H., The Medical Review Officer's Manual 253 (5th ed. 2015).
15 Id.

levels" to determine whether the concentration is significant enough to report a positive result. Ideally, the chosen cut-off level will optimize drug detection and minimize the number of false positive results. Federally mandated screening and confirmation cut-off levels for opiates were recently increased from 300 ng/mL to 2,000 ng/mL. While this increase makes it less likely that specimens will produce false positives due to things like poppy seed ingestion, it also makes it more likely that some heroin use will not be significant enough to clear the higher cut-off level, thus producing a false-negative result for heroin.

In order to address these issues, employers are starting to follow U.S. Department of Transportation (DOT) guidelines by adding a 6-AM test to the standard five-panel urine-based drug test. 6-AM is a metabolite that is unique to heroin and is only produced by the body after heroin use. Recognizing the benefits of testing for this unique metabolite, the DOT adopted a rule in October 2010 that made 6-AM testing a required part of the standard initial DOT drug screen.

6-AM is rapidly created in the body following heroin use and then is either metabolized into morphine or excreted in the urine. Since 6-AM is a unique metabolite to heroin, its presence in the urine confirms that heroin was the opiate used (or at least one of the opiates used), and thus allows the laboratory to verify the result as positive for heroin, even if the donor has an opiate prescription or another plausible explanation for a positive opiate result.[16] Thus, by testing for 6-AM, employers can make it more difficult for applicants to mask heroin use with other legally prescribed opiates.

Another benefit to screening for 6-AM is the previously discussed issue of heroin use not being significant enough to clear the typical confirmation cut-off level

16 Id. at 257.

of 2,000 ng/mL for morphine, resulting in a false negative on a standard five-panel drug screen. According to the DOT, data shows that 6-AM positive tests almost always have morphine levels that are above this confirmation cut-off or the laboratory's level of detection, however, there are cases where a specimen is positive for 6-AM but no morphine is detected.[17] Thus, testing for 6-AM may allow employers to confirm an applicant's heroin use even if the applicant tests negative for opiates.

However, please note that the absence of 6-AM does not rule out heroin use because trace amounts of 6-AM are only excreted for approximately 2 to 8 hours following heroin use (or slightly longer for heavy or chronic usage),[18] requiring a urine specimen to be collected soon after the last heroin use in order for it to be detected. Thus, it is a best practice for employers to continue to use the standard five-panel urine-based drug test—which includes screening for opiate use—but to also add a 6-AM metabolite test to more specifically screen for heroin.

6. ISSUES WITH TESTING FOR THE LATEST "DESIGNER" DRUG

Traditionally, employers have chosen to test for those drugs that are most commonly abused by the population at-large. However, the recent growth in popularity of "designer" or synthetic drugs is causing some employers to question whether their traditional drug screening practices need to be expanded to include newly developed substances.

Extensive media coverage on the dangers of "designer" drugs is raising concerns within some HR departments and some companies are quick to request that employees be screened for the latest designer drug without considering whether such testing is advisable or even possible.

"Designer" drugs are typically made using chemical formulas that are designed to mimic or provide similar effects as illicit drugs. In most cases, these drugs are not covered by existing drug laws or regulations due to their varying and unspecified chemical structures. Some of the more recent designer drugs include synthetic cathinones (the psychoactive ingredients in "bath salts") and "spice" which refers to a wide variety of herbal mixtures that are sprayed with chemicals to produce experiences similar to marijuana.

More often than not, there are no tests available to screen for the latest designer drug you hear about on television or read about in the newspaper. These drugs are made

17 6-AM CG/MS analysis has a 10 ng/mL cutoff level, significantly lower than for morphine, making it a very sensitive and specific test to detect heroin use. See Id.
18 Id. at 255.

using a non-uniform combination of chemicals and are typically designed to avert detection through drug screening. Moreover, even if testing is available, employers must determine whether potential abuse is widespread enough and the risk to safety is significant enough to justify the investment of additional resources.

CONCLUSION

To summarize, drug screening is likely not a prohibited pre-offer medical inquiry under the ADA, however, employers must provide reasonable accommodations in the drug testing process for individuals with disabilities. When an applicant's drug test results are communicated to the employer by a consumer reporting agency, this reporting falls under the FCRA and is thus subject to all of the statute's requirements, including the pre-adverse and adverse action notification requirements. In addition to FCRA notification requirements, employers may also be required to notify applicants of drug screen results under various state laws.

A growing number of states are enacting statutes allowing patients to use medical marijuana for certain medical conditions. Employers operating in most of these states are likely free to continue to discharge applicants or employees who test positive for marijuana even if a valid medical marijuana prescription is provided. However, anti-discrimination or reasonable accommodation provisions in 12 states' medical marijuana statutes may be problematic for employers. These states include: Arkansas, Arizona, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New York, Pennsylvania, Rhode Island and West Viginia. Employers operating in these 12 states should have the statutory language reviewed by legal counsel and may need to modify their drug screening policies and practices in order to remain compliant with such laws.

In light of the growing heroin epidemic across the country, employers would be well-advised to add 6-AM metabolite testing to their standard five-panel drug screen to more specifically screen for heroin.

Finally, while designer drugs such as "bath salts" and "spice" are becoming more prevalent, tests for such substances may not be available. Even if testing is available, employers should evaluate whether the potential abuse is widespread enough and the risk to safety is significant enough to justify the investment of additional resources.