

It Is Time for Nevada Employers to Re-Examine Drug Testing in Order to Maximize Benefits & Minimize Liability

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Many things have changed in our culture over the last 20 years that impact labor and employment law – more than many of us care to admit. One of these changes is in drug use. When Kamer Zucker Abbott (“KZA”) advocated drug testing for all applicants 20 years ago, we were seeking a non-discriminatory mechanism for screening new hires. The goal was to avoid the applicants who were using cocaine or heroin, so as to protect workplaces from a criminal element and all that such a hire could entail. In implementing drug testing for applicants and employees, we sought to increase safety and decrease loss and liability. Now, however, drug testing too often reveals an applicant’s or employee’s medical conditions by showing which prescription drugs he is taking. This is information that can create liability for an employer under several labor and employment laws, including the Americans With Disabilities Act.

In addition, Nevada has legalized medical marijuana and requires most employers to accommodate an employee’s use of medical marijuana.² With these new laws – and prescription drug use (and abuse) seeming to dominate the landscape of drug testing today – it is time to take a hard look at drug testing for applicants and employees and determine whether and when it still makes sense for your business.

Let’s look at where we were, what has changed, and where to go now. Our goal is to get you thinking about this issue and start the dialogue. We are not advocating a cessation of all drug testing. Instead, we want employers to realize that drug testing can *create* liability – now more than ever. Because of this, it is wise to assess your company’s substance abuse policy to determine what kind of testing you truly need to keep your employees, customers, and business safe and sound.

I. The Past.

Drug testing dramatically increased among employers in the mid-1980s in response to the “war on drugs.” After a 1986 Executive Order mandated that all federal

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² See Nev. Rev. Stat. § 453A.800.

agencies be drug-free, Congress passed the Drug-Free Workplace Act in 1988.³ This act requires federal grantees and recipients of federal contracts of \$100,000 or more to maintain a drug-free workplace. Then, in 1991, the Omnibus Transportation Employee Testing Act was passed, which requires that certain employees in safety-sensitive transportation industries (aviation, trucking, railroad, mass transit, merchant mariner, and pipeline) be tested for alcohol and drug use.⁴

As testing methods improved, the belief that drug testing was financially beneficial to employers produced a huge increase in drug testing in many industries and for all types of employees. Employers sought increased productivity and reductions in absenteeism, medical benefit costs, accidents, workers' compensation claims, and turnover. Locally, for example, the Nevada Test Site's requirement that all workers be drug tested was a major impetus to the adoption of drug testing for many employers. In many cases, contractors were concerned that applicants who could not pass the Test Site's drug test would instead seek work with local companies who did not drug test. This concern then spilled over into Las Vegas' hotels and casinos.

Nevada law has historically protected an employee's ability to use lawful products such as cigarettes and alcohol. Nevada Revised Statutes 613.333 makes it unlawful for an employer to refuse to hire an applicant or discriminate against any employee because of their lawful use of any product outside the premises of the employer during nonworking hours provided that the use does not adversely affect the employee's ability to perform his job or the safety of others.

When it comes to the current use of illegal drugs, however, labor and employment laws are not protective. In particular, the Americans with Disabilities Act ("ADA") does not protect current drug users from discrimination.⁵ Moreover, the ADA specifically permits an employer to prohibit the illegal use of drugs and alcohol at the workplace and to prohibit employees from being under the influence of alcohol or engaging in the illegal use of drugs at the workplace.⁶ While employers are

³ Pub. L. No. 100-690 (HR 5210), 102 Stat. 4181 (Nov. 18, 1988).

⁴Department Of Transportation And Related Agencies Appropriations Act, Pub. L. No. 102-143, 105 Stat. 917 (1992).

⁵ 42 U.S.C. § 12114(a). However, an employee or applicant is protected by the ADA if he: "(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or (3) is erroneously regarded as engaging in such use, but is not engaging in such use." 42 U.S.C. § 12114(b).

⁶ 42 U.S.C. § 12114(c).

restricted as to when they can require an employee/applicant medical examination, the ADA provides that “a test to determine the illegal use of drugs shall not be considered a medical examination.”⁷

Additionally, federal and state administrative agencies, such as the Occupational Safety and Health Administration (“OSHA”) and its Nevada counterpart, have generally supported drug testing.⁸ While the federal and state occupational safety and health laws do not have a defined safety standard related to employee drug and alcohol use, there is a “general duty clause” that requires an employer to provide a workplace free from recognized safety and health hazards.⁹

Against this backdrop, we labor and employment lawyers drafted broad substance abuse policies for our employer clients to use. The most aggressive of these policies (such as the one KZA uses) prohibited employees, while on working time or while on company property or in company vehicles, from having present in their bodies, during working hours, detectable levels of controlled substances, illegal drugs, other intoxicants, alcohol and/or their metabolites. Our policies also prohibited employees from unlawfully manufacturing, distributing, dispensing, possessing, or using alcohol or controlled substances, misusing or abusing prescribed or over-the-counter drugs, or violating any federal or state law relating to drugs or alcohol. We required pre-employment hair testing to determine whether an applicant had ingested illicit drugs within the 90-day period prior to his application. We also required random testing and probable cause testing (which includes reasonable suspicion and post-accident testing) – generally accomplished through urinalysis. In the absence of an acceptable explanation, a positive result to a drug or alcohol test resulted in termination and/or a refusal to hire.

This type of substance abuse policy and the efforts of Nevada employers to test employees and applicants received approval in 1996 when the Nevada Supreme

⁷ 42 U.S.C. § 12114(d)(1).

⁸ As we will discuss, this is changing. *See infra* Sections II(C), (D). For example, OSHA has recently declared a stance against blanket post-accident drug testing. *See infra* Section II(D).

⁹ In relevant part, section 618.375 of the Nevada Revised Statutes (“NRS”) requires that every employer shall “[f]urnish employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his or her employees; [f]urnish and use such safety devices and safeguards, and adopt and use such practices, means, methods, operations and processes as are reasonably adequate to render such employment and places of employment safe and comply with all orders issued by the Division; . . . [and d]o every other thing reasonably necessary to protect the lives, safety and health of employees.”

Court found that “employers have compelling reasons, both economic and social, to test their employees for drugs.”¹⁰ In *Nevada Employment Security Department v. Holmes*, in which KZA represented the Hotel San Remo, the court approved radioimmunoassay hair analysis (“RIA”) coupled with a confirmatory gas chromatography/mass spectrometry (“GC/MS”) test as “an accepted and reliable scientific methodology for detecting illicit drug use.”¹¹ The court then determined that a former slot hostess’ ingestion of cocaine in violation of her employer’s substance abuse policy constituted misconduct rendering her ineligible for unemployment benefits.¹²

Rulings by courts and arbitrators both before and after *Holmes* generally supported the policy behind drug testing, especially for safety-sensitive or cash-handling positions, and often upheld discipline and termination decisions. That is not to say that legal challenges to testing always failed. Arbitrators have reinstated employees when employers have misapplied their policies, when employees have undergone rehabilitation or sought the employer’s assistance with a drug problem before testing, and when the arbitrator believed termination was too severe a penalty.¹³ Juries have likewise ruled against employers on a variety of drug testing issues, including invasion of privacy, false positive results, misapplication of a substance abuse policy, and termination for refusal to take a drug test.¹⁴

¹⁰ Nev. Emp’t Sec. Dep’t v. Holmes, 112 Nev. 275, 284, 914 P.2d 611, 617 (1996).

¹¹ *Id.* at 282, 914 P.2d at 615.

¹² *Id.* at 285, 914 P.2d at 617.

¹³ See, e.g., Interstate Brands Co., 32 LAIS 570 (2004) (Gregory, Arb.) (reinstating driver with “long, violation-free record” because the company’s policy called for progressive discipline); Sierra Pac. Power Co., 2001 WL 36586197 (2001) (Silver, Arb.) (reinstating employee due to five-day delay in post-accident drug test); Coca-Cola Bottling Co. of N.Y., Inc., 25 LAIS 3446 (1998) (Nadelbach, Arb.) (failure to inform the employee of his right to a re-test constituted a due process violation); Cincinnati Metro. Hous. Auth., 25 LAIS 3108 (1997) (Sergent, Arb.) (delay in ordering drug test weakened contention that grievant was impaired and discharge for refusing to take test was too severe of a penalty); Houston Lighting & Power Co., 25 LAIS 3387 (1997) (Howell, Arb.) (employer did not have probable cause to test the employee); Anne Arundel Cnty., 1996 WL 34673164 (1996) (Wahl, Arb.) (reinstating employee with exemplary work record who had committed to full and permanent rehabilitation).

¹⁴ See, e.g., Kelley v. Schlumberger Tech. Corp., 849 F.2d 41 (1st Cir. 1988) (affirming jury verdict of \$125,000 for violation of privacy and negligent infliction of emotional distress claims premised upon employer’s policy of requiring observation during the collection of urine samples); Smith v. Fresno Irrigation Dist., JVR No. 199955, 1997 WL 372097 (Cal. Sup. Ct. May 1997) (jury awarded \$240,000 to an employee

II. The Present.

Drug testing is currently a prevalent practice among Nevada employers. Is it working? Is it providing the benefits we hoped for? Unfortunately, apart from studies performed by drug testing companies, there is not much data to rely upon.

The National Institute on Drug Abuse represents that drug-testing programs have improved employee morale and productivity, decreased absenteeism, accidents, downtime, turnover, and theft, decreased the use of medical benefits, and qualified employers for incentives, such as decreased costs for workers' compensation and other kinds of insurance.¹⁵ A 2011 pilot study reported that 19% of the employers surveyed experienced an increase in employee productivity after implementing a drug-testing program.¹⁶ This study also found that employers with high absenteeism rates and high workers' compensation incidence rates reported a decrease in those statistics after implementing a drug-testing policy.¹⁷ Finally, the employers surveyed in this study reported a 16% decrease in employee turnover.¹⁸

whose random drug test was positive and resulted in his discharge after employee argued that he was improperly tested because he did not hold a safety-sensitive position); *Stegman v. Hunter Health Clinic, Inc.*, JVR No. 223845, 1997 WL 914426 (Kan. Dist. Ct. Jan. 1997) (verdict of \$102,172 in favor of an employee who was terminated for refusing to submit to a drug test after cooperating with an FBI investigation of the employer); *Anderson v. Exxon Coal U.S.A., Inc.*, JVR No. 170093, 1995 WL 796705 (Wyo. Oct. 1995) (sixteen-year employee was awarded \$416,800 after being discharged for a positive drug test where a subsequent test taken the following day was reported as negative); *Luck v. S. Pac. Transp. Co.*, 38 Trials Digest (TD) 10101, 1987 WL 957553 (Cal. Sup. Ct. Oct. 1987) (employee terminated for refusing a random drug test awarded \$485,042; employee argued that the safety of the railroad as a compelling interest for drug testing did not apply to her job).

¹⁵ National Institute on Drug Abuse, DRUG TESTING, *Drug Testing and Workplace Issues*, <http://www.drugabuse.gov/related-topics/drug-testing> (last updated Sept. 2014).

¹⁶ Neil A. Fortner, et. al, *Employee Drug Testing: Study Shows Improved Productivity and Attendance and Decreased Workers' Compensation and Turnover*, J. GLOBAL DRUG POL'Y & PRAC., Winter 2011, at 9, <http://www.globaldrugpolicy.org/Issues/Vol%205%20Issue%204/Vol%205%20Issue%204%20Journal%20sm.pdf>.

¹⁷ *Id.* at 10-11.

¹⁸ *Id.* at 13.

There is also some support for the idea that drug testing deters employee drug use. Several studies from the 1990s found a significant negative relationship between workplace testing and drug use.¹⁹ Moreover, a 2007 study by the Health Services Research using data from 2000 and 2001 concluded that “[i]ndividuals whose employers perform drug tests are significantly less likely to report past month marijuana use, even after controlling for a wide array of worker and job characteristics.”²⁰ This study also reported that “[f]requent testing and severe penalties reduce the likelihood that workers use marijuana.”²¹

Nearly all studies conclude that more research is needed. What have your experiences been? What are you spending on drug testing? What benefits do you see from it? As we will discuss below, drug testing today is messy. Thus, it is a good time to take a hard look at these questions and determine whether, where and under what circumstances testing works for your company.

The time is especially right as some states, like Nevada, have enacted laws to legalize medical marijuana, while the federal government still classifies it as illegal. Lawmakers crafting medical marijuana laws are in uncharted waters; as such, the statutes being adopted by many states, including Nevada, are still being refined, making everyone uncertain. The legalization of medical marijuana, combined with Nevada’s lawful use statute, increases the importance of determining whether an employee is under the influence, but drug-testing technology cannot conclusively prove impairment. Moreover, employers are facing increased liability as federal agencies, such as OSHA and the Equal Employment Opportunity Commission (“EEOC”), are becoming increasingly hostile to blanket drug testing policies. Let’s look at each of these present challenges.

¹⁹ See Christopher S. Carpenter, *Workplace Drug Testing and Worker Drug Use*, HEALTH SERVICES RESEARCH, at *Previous Literature* (2007), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1955359/#> (last visited June 20, 2016) (explaining prior studies, including M. French, M. Roebuck, P. Alexandre, *To Test or Not to Test: Do Workplace Drug Testing Programs Discourage Employee Drug Use?*, SOCIAL SCIENCE RESEARCH, Mar. 2004, at 45-63 and J. Hoffmann and C. Larison, *Worker Drug Use and Workplace Drug-Testing Programs: Results from the 1994 National Household Survey on Drug Abuse*, CONTEMPORARY DRUG PROBLEMS, 1999, at 331).

²⁰ *Id.* at Principal Findings.

²¹ *Id.*

A. Nevada's Legalization of Marijuana.

In 2000, Nevada voters approved a ballot initiative adding the right to access medical marijuana to the Nevada Constitution.²² Thus, Article 4, Section 38 of the Nevada Constitution now provides the following:

Use of plant of genus Cannabis for medical purposes.

1. The legislature shall provide by law for:

(a) The use by a patient, upon the advice of his physician, of a plant of the genus Cannabis for the treatment or alleviation of cancer, glaucoma, acquired immunodeficiency syndrome; severe, persistent nausea of cachexia resulting from these or other chronic or debilitating medical conditions; epilepsy and other disorders characterized by seizure; multiple sclerosis and other disorders characterized by muscular spasticity; or other conditions approved pursuant to law for such treatment.

(b) Restriction of the medical use of the plant by a minor to require diagnosis and written authorization by a physician, parental consent, and parental control of the acquisition and use of the plant.

(c) Protection of the plant and property related to its use from forfeiture except upon conviction or plea of guilty or nolo contendere for possession or use not authorized by or pursuant to this section.

(d) A registry of patients, and their attendants, who are authorized to use the plant for a medical purpose, to which law enforcement officers may resort to verify a claim of authorization and which is otherwise confidential.

(e) Authorization of appropriate methods for supply of the plant to patients authorized to use it.

2. This section does not:

(a) Authorize the use or possession of the plant for a purpose other than medical or use for a medical purpose in public.

(b) Require reimbursement by an insurer for medical use of the plant or accommodation of medical use in a place of employment.²³

²² A question regarding the legalization of recreational marijuana use in Nevada will be on the November 8, 2016 ballot.

The 2001 Nevada Legislature implemented this constitutional amendment by enacting Nevada Revised Statutes (“NRS”) Chapter 453A - “Medical Use of Marijuana.” This chapter provides certain exemptions from prosecution for a person who holds a valid registry identification card allowing them to use medical marijuana.²⁴ It sets forth who can obtain a registry identification card, the process for applying for such a card, and how such a card can be revoked; it further imposes certain requirements upon a holder of a registry identification card.²⁵

Originally, one portion of this new law, section 453A.800 of the NRS, expressly provided that an employer was *not* required to accommodate an employee’s medical use of marijuana.²⁶ This was consistent with the constitutional amendment.²⁷ In 2013, however, the statute was amended to provide that while an employer does not have to permit an employee to use marijuana in the workplace, it is now required to accommodate an employee’s need for medical marijuana. The amended statute provides as follows:

The provisions of this chapter [Chapter 453A – Medical Use of Marijuana] do not:

1. Require an insurer, organization for managed care or any person or entity who provides coverage for a medical or health care service to pay for or reimburse a person for costs associated with the medical use of marijuana.
2. Require any employer to allow the medical use of marijuana in the workplace.
3. [R]equire an employer to modify the job or working conditions of a person who engages in the medical use of marijuana that are

²³ NEV. CONST., art. 4, § 38.

²⁴ Nev. Rev. Stat. § 453A.200.

²⁵ Nev. Rev. Stat. § 453A.210–.250.

²⁶ See Nev. Rev. Stat. § 453A.800 (2001) (amended in 2013).

²⁷ The original form of the statute was also consistent with the decision of the Ninth Circuit Court of Appeals in *James v. City of Costa Mesa*, where the court ruled that because the use of medical marijuana remains illegal under federal law, the ADA does not protect against discrimination on the basis of medical marijuana use, even if that use is in accordance with state laws. 700 F.3d 394, 397 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2396 (2013).

based upon the reasonable business purposes of the employer but the employer must attempt to make reasonable accommodations for the medical needs of an employee who engages in the medical use of marijuana if the employee holds a valid registry identification card, provided that such reasonable accommodation would not:

- (a) Pose a threat of harm or danger to persons or property or impose an undue hardship on the employer; or
- (b) Prohibit the employee from fulfilling any and all of his or her job responsibilities.²⁸

This amendment is wrought with problems. First, the revised statute does not define the term “employee” so employers cannot be sure whether it applies to only current employees or whether it also applies to applicants. Second, there is no enforcement mechanism for the statute, leaving an employer unable to predict liability and an employee without a way to challenge an employer’s failure to meet the statute’s requirements. Third, in requiring an employer to accommodate the need for medical marijuana, the statute ventured well beyond any mandate imposed by Article 4, Section 38 of the Nevada Constitution, which means it is subject to serious challenges by employers. Fourth, the statute provides two different accommodation standards by first stating that an employer does not need to modify those “job or working conditions” that are “based upon the reasonable business purposes of the employer,” and then stating that an accommodation is not reasonable if it would prohibit an employee from fulfilling any and all job responsibilities.

Eventually either the legislature or the courts will work out these problems. In the meantime, however, employers are left to make decisions about their substance abuse policies. So far, Nevada’s administrative agencies, such as the Nevada Occupational Safety and Health Administration and the Gaming Control Board, have not taken a position on employees’ use of medical marijuana as it pertains to an employer’s workplace safety or gaming obligations.

²⁸ Nev. Rev. Stat. § 453A.800. Section 453A.800 of the NRS was also amended in 2015 to provide that law enforcement agencies are not prohibited from adopting policies or procedures precluding employees from engaging in the medical use of marijuana. The term “law enforcement agency” includes: (a) the Office of the Attorney General, the office of a district attorney within Nevada, the Nevada Gaming Control Board and any attorney, investigator, special investigator or employee who is acting in his or her professional or occupational capacity for such an office or the Nevada Gaming Control Board; as well as (b) any other law enforcement agency within Nevada and any peace officer or employee who is acting in his or her professional or occupational capacity for such an agency.

At a minimum, if they have not already done so, employers must revise their substance abuse policies to address the legalization of medical marijuana. Prohibiting “controlled substances” from being present in an employee’s system is now problematic under state law. Moreover, given the complexity of issues involved with legalized marijuana, employers may want to fully address the subject of medical marijuana head on in their substance abuse policies.

B. Current Drug Testing Technology.

The second issue to consider is that most drug testing does not determine impairment. Instead it determines a specific amount of a drug or its metabolite in the sample provided. This is especially problematic for lawful substances such as medical marijuana, alcohol, or prescription drugs because a Nevada employer cannot take adverse action without evidence of actual impairment.²⁹

The window of time in which marijuana use will produce a positive test result can vary depending on the type of test used, the drug dose and its route of entry, the individual’s duration and frequency of use, the individual’s metabolism rate, the test sensitivity, and the test specificity.³⁰ For example, users that smoke cannabis products can start feeling the effects within minutes, reaching the full effect within ten to thirty minutes.³¹ In contrast, users who orally ingest cannabinoids may not feel its full effect until up to ninety minutes after ingestion.³²

Additional issues arise depending on the type of test administered. A urine test can only show prior THC exposure, well past the “window of intoxication and impairment” because the triggering marijuana metabolite can take up to four hours post-use to appear in a high enough concentration to produce a positive test result.³³ While a positive urinalysis test generally indicates the marijuana was used

²⁹ See *supra* Section I at 2.

³⁰ See Paul L. Cary, *The Marijuana Detection Window: Determining the Length of Time Cannabinoids Will Remain Detectable in Urine Following Smoking*, NAT’L DRUG CT. INST., Apr. 2006, at 4, http://www.ndci.org/sites/default/files/ndci/THC_Detection_Window_0.pdf.

³¹ *Drugs and Human Performance FACT SHEETS - Cannabis/Marijuana*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., <http://www.nhtsa.gov/people/injury/research/job185drugs/cannabis.htm> (last visited June 1, 2016).

³² See Stacy Hickox, *Drug Testing of Medical Marijuana Users in the Workplace: An Inaccurate Test of Impairment*, 29 Hofstra Lab. & Emp. L.J. 273, 288 (Spring 2012).

³³ See NAT’L HIGHWAY TRAFFIC SAFETY ADMIN, *supra* note 31.

within the past one to three days, “heavy, chronic, use” could extend that timeframe to more than one month before.³⁴ With regard to blood tests, the National Highway Traffic Safety Administration has stated that:

[i]t is difficult to establish a relationship between a person’s THC blood or plasma concentration and performance impairing effects. Concentrations of parent drug and metabolite are very dependent on pattern of use as well as dose. . . . It is possible for a person to be affected by marijuana use with concentrations of THC in their blood below the limit of the detection method.³⁵

While hair testing can show use of marijuana or other drugs within the last 90 days, it will certainly not show current impairment and cannot be used to detect alcohol. The federal government is proposing to add saliva or oral fluids to its testing procedures.³⁶ Oral fluids are easy to collect with a swab of the inner cheek, are harder to adulterate or substitute, allow collection to occur more quickly than urinalysis, and may be better at detecting specific substances, including marijuana.³⁷ According to the government, because “[d]rugs do not remain in oral fluids as long as they do in urine, this method shows promise in determining current use and impairment.”³⁸

Finally, there is also little consensus in the scientific community as to what limit should be used to identify marijuana impairment. For example, some experts will testify that any amount of “active” marijuana will result in impairment while other

³⁴ *Id.*

³⁵ *Id.*

³⁶ On May 15, 2015, the Substance Abuse and Mental Health Services Administration (SAMHSA) proposed “to establish scientific and technical guidelines for the inclusion of oral fluid specimens in the Mandatory Guidelines for Federal Workplace Drug Testing Programs (Guidelines).” See *Mandatory Guidelines for Federal Workplace Drug Testing Programs*, FEDERAL REGISTER <https://www.federalregister.gov/articles/2015/05/15/2015-11523/mandatory-guidelines-for-federal-workplace-drug-testing-programs#h-8> (last visited June 1, 2016).

³⁷ *Workplace Drug Testing*, DATIA, <http://www.datia.org/datia-resources/27-credentialing/cpc-and-cpct/931-workplace-drug-testing.html> (last visited October 10, 2016).

³⁸ *Id.*

experts argue that impairment does not begin until an individual tests at 5-7 ng/100 ml of blood.³⁹

All of this means that it is time to take a hard look at how you are testing to determine the most efficient way of obtaining the information you need to make employment decisions. It is also now extremely important to train your supervisors and managers how to detect impairment. Without credible documentation of valid signs of impairment, employers will likely be unable to take adverse action against an employee or applicant who tests positive for a lawful substance.

C. Americans with Disabilities Act.

The ADA does not protect illegal drug users and still authorizes an employer to test for illegal drugs. Indeed, in 2012, the Ninth Circuit Court of Appeals, which has jurisdiction over Nevada federal cases, ruled that because the use of medical marijuana remains illegal under federal law, the ADA does not protect against discrimination on the basis of medical marijuana use, even if that use was lawful under state law.⁴⁰

However, the reality is that in Nevada, medical marijuana is legal as are the prescription drugs your employees and applicants are using. So the first question under the ADA should be whether you are, and want to be, using a drug test that screens for prescription drugs. Remember that in most cases, the reason an employee is using medical marijuana or a prescription drug is because they have a medical or psychological condition that constitutes a disability under the ADA and Nevada law. As such, an employer that simply applies its drug-testing policy to discharge or refuse to hire an individual because of a positive test result could still face liability based upon an argument that the employer really made its decision because of the underlying medical or psychological condition.⁴¹

³⁹ See Jared D. Adams, *New Issues In Driving Under the Influence of Cannabis Cases*, ASPATORE, at *3, 2013 WL 5757943 (Nov. 2013).

⁴⁰ James v. City of Costa Mesa, 700 F.3d 394, 405 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2396 (2013).

⁴¹ See, e.g., EEOC Press Release, EEOC Sues Owners of Happy Jack's Casino For Disability Discrimination (Sept. 15, 2016), <https://www.eeoc.gov/eeoc/newsroom/release/9-15-16.cfm> (alleging casino violated the ADA by refusing to hire an applicant when her drug test showed that she was taking legal prescription drugs for her disability); EEOC Press Release, EEOC Sues Randstad for Disability Discrimination (Nov. 3, 2015), <https://www.eeoc.gov/eeoc/newsroom/release/11-3-15a.cfm> (challenging as discriminatory employer's refusal to hire a recovering heroin addict due to her use of the prescription methadone as part of her treatment); EEOC Press Release, Pioneer Place Assisted Living Settles EEOC Disability Discrimination Suit (May 24,

Moreover, an employer cannot ask an employee what types of prescription drugs he is using.⁴² This would constitute a disability-related inquiry prohibited by the ADA.⁴³ In limited circumstances, however, “certain employers may be able to demonstrate that [such an inquiry] is job-related and consistent with business necessity.”⁴⁴ For example, a “police department could require armed officers to report when they are taking medications that may affect their ability to use a firearm or to perform other essential job functions.”⁴⁵ Similarly, an “airline could require its pilots to report when they are taking any medications that may impair their ability to fly.”⁴⁶

Despite the limited inquiry allowed under the ADA, many employers are testing for more than the standard five illicit drugs required by the federal government: amphetamines (meth, speed, crank, ecstasy); THC (cannabinoids, marijuana, hash); cocaine (coke, crack); opiates (heroin, opium, codeine, morphine); and phencyclidine (PCP, angel dust).⁴⁷ Your company may be using a “typical 8-Panel Test” which will also test for: barbiturates (phenobarbital, butalbital, secobarbital, downers); benzodiazepines (tranquilizers like Valium, Librium, Xanax); and methaqualone (Quaaludes).⁴⁸ Or you may be using a “typical 10-Panel Test” which

2012), <https://www.eeoc.gov/eeoc/newsroom/release/5-24-12.cfm> (\$80,000 settlement reached over employer’s refusal to hire applicant after her epilepsy medication showed up on her drug test results).

⁴² EEOC, *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)* at B8 (July 27, 2000), <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>.

⁴³ See, e.g., EEOC Press Release, *Dura Automotive Systems to Pay \$750,000 To Settle EEOC ADA Lawsuit* (Sept. 5, 2012), <https://www.eeoc.gov/eeoc/newsroom/release/9-5-12.cfm> (\$750,000 settlement reached over employer’s decision to test all employees for 12 substances, including certain legally prescribed drugs, and requirement that those employees who tested positive disclose the medical conditions for which they were taking prescription medications and conditioning continued employment on the employees’ cessation of taking those medications).

⁴⁴ See *supra* note 42.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See DATIA, *supra* note 37.

⁴⁸ *Id.*

will also test for: methadone (often used to treat heroin addiction) and propoxyphene (Darvon compounds).⁴⁹ Testing can also be done for: hallucinogens (LSD, mushrooms, mescaline, peyote); inhalants (paint, glue, hairspray); anabolic steroids (synthesized, muscle-building hormones); hydrocodone (prescription medication known as Lortab, Vicodin, Oxycodone); and MDMA (commonly known as Ecstasy).⁵⁰

While a significant presence of prescription drugs, such as Oxycodone, in an employee's system combined with objective evidence of impairment may certainly be relevant and important to an employer, we urge employers to consider how often a routine drug test is evidencing an employee's or applicant's medical or psychological condition – information you do not want to obtain. The reality is many of your applicants and employees are using prescription drugs for medical or psychological conditions that are considered disabilities under the ADA. As such, your drug test results are likely creating liability by providing you with knowledge of a disability you can then be charged with discriminating against.⁵¹

Indeed, the EEOC has found discriminatory employers' adverse actions against users of prescription drugs, including methadone. The commission is finding the underlying reason for the prescription medication to be a protected disability. Accordingly, the employer's adverse action in response to a positive drug test has been attributed to either a desire to discriminate against that disability or a failure to accommodate the disability.⁵² Moreover, the EEOC is presently focusing its

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *See supra* note 41.

⁵² *Id.*; *see also* EEOC Press Release, New Hanover Regional Medical Center to Pay \$146K to Settle EEOC Disability Discrimination Suit (Oct. 3, 2012), <https://www.eeoc.gov/eeoc/newsroom/release/10-3-12c.cfm> (\$146,000 settlement reached over employer's prohibition against employees working while taking legally prescribed narcotic medications); EEOC Press Release, Product Fabricators to Pay \$40,000 to Settle Disability Discrimination Suit (Feb. 15, 2012), <https://www.eeoc.gov/eeoc/newsroom/release/2-15-12a.cfm> (\$40,000 settlement reached over employer's termination of an employee taking a prescribed narcotic for back pain and employer's purported practice of requiring all employees to disclose prescription medications); EEOC Press Release, Hussey Copper To Pay \$85,000 To Settle EEOC Disability Discrimination Lawsuit (Feb. 11, 2011), <https://www.eeoc.gov/eeoc/newsroom/release/2-11-11.cfm> (\$85,000 settlement reached over employer's withdrawal of job offer after discovering that applicant was taking methadone; EEOC argued that as a former addict, and not a current illegal drug user, the employee was protected under the ADA).

investigative resources on hiring practices for their unlawful effect on protected classes, such as individuals with disabilities.⁵³ As such, it has challenged the application of drug-testing policies when they have been applied in a manner to exclude an applicant on the basis of his disability, especially when the policy has been applied in a blanket, one-size-fits-all approach.⁵⁴

In light of the EEOC's stance on these issues, employers can no longer apply blanket, zero-tolerance drug testing policies to all employees and applicants without incurring some liability. Instead, it is becoming increasingly necessary for employers to take a different approach in deciding when to test and how to respond to a positive test result.

D. OSHA's New Position.

In 2016, OSHA issued a new rule requiring employers to begin electronically reporting injury and illness data.⁵⁵ This recordkeeping rule also seeks to "ensure that the injury data on OSHA logs are accurate and complete" by strengthening worker's compensation laws against retaliation towards employees who report injuries and illnesses.⁵⁶ Thus, the new rule "prohibits employers from discouraging

⁵³ The EEOC'S Strategic Enforcement Plan for Fiscal Years 2013-2016 specifically identifies a decision to "target class-based intentional recruitment and hiring discrimination and facially neutral recruitment and hiring practices that adversely impact particular groups" such as "[r]acial, ethnic, and religious groups, older workers, women, and people with disabilities [who] continue to confront discriminatory policies and practices at the recruitment and hiring stages." See EEOC, *Strategic Enforcement Plan FY 2013-2016* at 9 (Dec. 18, 2012), <https://www.eeoc.gov/eeoc/plan/upload/sep.pdf>.

⁵⁴ See, e.g., EEOC Press Release, Kmart Will Pay \$102,048 to Settle EEOC Disability Discrimination Lawsuit (Jan. 27, 2015), <http://www.eeoc.gov/eeoc/newsroom/release/1-27-15b.cfm> (describing a \$102,048 settlement with Kmart which denied an alternative testing method to an applicant with kidney disease); EEOC Press Release, Fort Worth Center of Rehabilitation to Pay \$30,000 to Settle Disability Discrimination Lawsuit (June 26, 2014), <http://www.eeoc.gov/eeoc/newsroom/release/6-26-14.cfm> (describing a \$30,000 settlement with a Texas health care facility which denied accommodation for an applicant who could not produce concentrated urine).

⁵⁵ Improve Tracking of Workplace Injuries and Illnesses, 81 Fed. Reg. 29623 (May 12, 2016) (to be codified at 29 C.F.R. 1902 and 29 C.F.R. 1904).

⁵⁶ 29 U.S.C. § 660(c)(1)) currently provides that "[n]o person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to

workers from reporting an injury or illness" by: (1) requiring employers to inform employees of their right to report work-related injuries and illnesses free from retaliation; (2) clarifying the existing implicit requirement that an employer's procedure for reporting work-related injuries and illnesses must be reasonable and not deter or discourage employees from reporting; and (3) incorporating the existing statutory prohibition on retaliating against employees for reporting work-related injuries or illnesses.⁵⁷

It is the third prong of this requirement that creates a new and difficult problem for employers. In seeking to "target[] employer programs and policies that . . . have the effect of discouraging workers from reporting injuries and, in turn leading to incomplete or inaccurate records of workplace hazards," OSHA has determined that blanket post-accident drug testing policies will now be considered retaliatory. Despite the decades in which employers have relied on post-accident testing to improve safety, OSHA now categorizes this form of testing as only "nominally promoting safety."

OSHA clarifies that it will not penalize employers who conduct post-accident testing pursuant to state or federal laws that apply to their industry or certain types of employees. The agency also maintains that its new rule does not ban all drug testing and explains its position as follows:

Although drug testing of employees may be a reasonable workplace policy in some situations, it is often perceived as an invasion of privacy, so if an injury or illness is very unlikely to have been caused by employee drug use, or if the method of drug testing does not identify impairment but only use at some time in the recent past, requiring the employee to be drug tested may inappropriately deter reporting. . . . To strike the appropriate balance here, drug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and

this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter." Under this provision, an employee who believes he has been discriminated against for reporting a workplace injury or illness or for filing a worker's compensation claim may file a complaint with OSHA. After an investigation, OSHA can then file a lawsuit against the employer in federal court seeking "all appropriate relief," including reinstatement and back pay. 29 U.S.C. § 660(c)(2).

⁵⁷ Improve Tracking of Workplace Injuries and Illnesses, 81 Fed. Reg. at 29669. The anti-retaliation provisions of the new OSHA rule became effective on August 10, 2016. However, enforcement has been delayed until at least December 1, 2016, in part because a lawsuit has been filed to challenge the new rule. *See infra* note 59.

for which the drug test can accurately identify impairment caused by drug use. For example, it would likely not be reasonable to drug-test an employee who reports a bee sting, a repetitive strain injury, or an injury caused by a lack of machine guarding or a machine or tool malfunction. Such a policy is likely only to deter reporting without contributing to the employer's understanding of why the injury occurred, or in any other way contributing to workplace safety. Employers need not specifically suspect drug use before testing, but there should be a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness in order for an employer to require drug testing. In addition, drug testing that is designed in a way that may be perceived as punitive or embarrassing to the employee is likely to deter injury reporting.⁵⁸

OSHA is asking employers to make an individualized inquiry before requiring a post-accident drug test. Yet this individualized inquiry subjects an employee to potential discrimination from supervisors and puts employers at risk for claims of discrimination. Many commentators and employers disagree with OSHA's stance on post-accident testing, and a lawsuit has been filed in a Texas federal court challenging OSHA's new rule.⁵⁹ If this challenge is unsuccessful, however, employers will soon face civil liability under the worker's compensation statute for continuing to use blanket post-accident drug testing policies.

III. Where to Go Now?

Before we look at the options available to Nevada employers, let's take a quick look at the statistics on drug use and abuse. The 2012 National Survey on Drug Use and Health: Summary of National Findings by the Substance Abuse and Mental Health Services Administration provides the following data:

- In 2012, an estimated 23.9 million Americans aged 12 or older (9.2% of the population) were current illicit drug users, meaning they had used an illicit drug during the month prior to the survey interview. This is an increase from 8.1% in 2008.
- Marijuana was the most commonly used illicit drug. In 2012, there were 18.9 million current users. Between 2007 and 2012, the rate of current use increased from 5.8 to 7.3%, and the number of users increased from 14.5 million to 18.9 million.

⁵⁸ *Id.* at 29672-73.

⁵⁹ TEXO ABC/AGC, Inc. v. Perez, No. 3:16-cv-1998 (D. Tex. 2016).

- Daily or almost daily use of marijuana (used on 20 or more days in the past month) increased from 5.1 million people in 2007 to 7.6 million people in 2012.
- In 2012, an estimated 22.2 million people aged 12 or older (8.5% of the population) were classified with substance dependence or abuse in the past year based on criteria specified in the *Diagnostic and Statistical Manual of Mental Disorders*, 4th edition (DSM-IV). Of these, 2.8 million were classified with dependence or abuse of both alcohol and illicit drugs, 4.5 million had dependence or abuse of illicit drugs but not alcohol, and 14.9 million had dependence or abuse of alcohol but not illicit drugs.
- The specific illicit drugs with the largest numbers of people with past year dependence or abuse in 2012 were marijuana (4.3 million people), pain relievers (2.1 million people), and cocaine (1.1 million people). The number of people with marijuana dependence or abuse did not change between 2002 and 2012. Between 2004 and 2012, the number with pain reliever dependence or abuse increased from 1.4 million to 2.1 million, and between 2006 and 2012, the number with cocaine dependence or abuse declined from 1.7 million to 1.1 million. Conversely, the number of people with heroin dependence or abuse in 2012 (467,000) was approximately twice the number in 2002 (214,000).
- 67.9% of all adult illegal drug users are employed full or part time, as are most binge and heavy alcohol users.⁶⁰

Clearly, drug and alcohol abuse is still an issue of significant concern in our country and testing remains a necessary component of a Nevada employer's policies and practices. What has changed is the way applicants and employees are using drugs, the types of drugs being used, and some of the laws impacting such use.

In the past, employers had more leeway in prohibiting the use of illegal drugs. As such, many substance abuse policies prohibited employees from reporting to work with detectable levels of illegal drugs in their systems and provided that any positive test result for illegal drugs will result in a refusal to hire and/or termination. Now, however, Nevada employers must wrestle with legalized medical marijuana and prescription drugs. A zero tolerance approach to a positive test result is no longer the answer. Employers must instead be able to determine

⁶⁰ Substance Abuse and Mental Health Services Administration, *Results from the 2012 National Survey on Drug Use and Health: Summary of National Findings*, 2013, <http://www.samhsa.gov/data/NSDUH/2012SummNatFindDetTables/NationalFindings/NSDUHresults2012.htm#ch2.10> (last visited on June 1, 2016).

whether an employee is impaired at work or whether an applicant's positive drug test should result in a refusal to hire.

We urge employers to consider the following questions. What was your original goal in implementing testing? Why do you test pre-employment, post-accident, based upon probable cause, or randomly? If testing has been ongoing for some time, examine the rate of positive tests versus negative tests. What is the evidence that drug users or drug abusers have been eliminated from the workforce? Is there evidence that workers' compensation costs, or those related to employee accidents causing personal injury or property damage, have diminished since the implementation of pre-employment or post-accident testing? Is there evidence of increased productivity or decreased absenteeism since the implementation of testing? What has been the cost to the employer of this testing, from out-of-pocket costs paid to testing laboratories to the effect upon employee morale? Have the benefits of employee drug testing to the company exceeded the costs, or vice versa?

In some workplaces, the full complement of testing must continue. If you are a federal contractor or employ individuals in safety-sensitive or cash-handling positions, you may not have much flexibility in terms of who and how you test. If this is the case, we urge you to use a medical review officer as the only recipient of test results who can maintain confidentiality and shield decision makers (supervisors and managers) from information they do not need (such as which prescription drugs the applicant or employee is taking).

Other employers have the flexibility, however, to decide to alter their approach to substance abuse – a decision that may save money and reduce liability, while still protecting your workplace. In short, we recommend that you become less reliant on testing and more proficient at recognizing impairment. Specifically, we offer the following recommendations:

1. Revise your substance abuse policies to address medical marijuana and to create objective standards for drug and alcohol impairment.
2. Continue to monitor the status of OSHA's rule against blanket post-accident testing. Consider revising your substance abuse policies to provide for post-accident testing only when there is a reasonable possibility that drug or alcohol use was a contributing factor in the accident.
3. Invest in training your supervisors and managers on how to recognize impairment, how to apply your objective impairment standards, how to determine if post-accident testing should be conducted, and how to document their decisions.
4. Limit non-probable cause testing (pre-employment and random) to a panel that screens for the five illicit drugs discussed above. For probable cause testing (post-accident and reasonable suspicion), continue to test for all substances. If an employee is bold enough to report for work under the influence of alcohol or a substance, he is putting others and himself at risk. Moreover, he likely has a problem you want to know about. Nevada recently

amended its workers' compensation law to provide that an employee will not receive benefits for an injury that occurred while the employee is intoxicated or under the influence of a controlled or prohibited substance (unless the employee proves by clear and convincing evidence that his intoxication was not the cause of the injury).⁶¹

5. Work with your drug-testing vendor to determine which method of testing gives you the best evidence of impairment and can be carried out as quickly as possible. Nevada law now provides that an employee is "intoxicated or under the influence of a controlled or prohibited substance" whenever the employee exceeds the limits set forth in Nevada's driving under the influence laws.⁶²
6. Work with any unions representing your employees to adjust the substance abuse testing provided for in your collective bargaining agreements.

⁶¹ See Nev. Rev. Stat. § 616C.230.

⁶² Nev. Rev. Stat. § 616C.230(1)(c), (d).