NATIONAL ACADEMY OF ARBITRATORS

2023 ANNUAL MEETING & EDUCATION CONFERENCE

May 3–6, 2023
Denver, CO

WORKPLACE SAFETY & FITNESS FOR DUTY: A BETTER APPROACH?

George H. Faulkner, Esq.
Faulkner, Hoffman & Phillips, LLC

Karl F. Kumli, Esq.
Jackson Lewis, PC

Dean Modecker
Secretary-Treasurer & Principal Officer
Teamsters Local Union No. 455

I. Traditional Approach to Fitness for Duty

a. What is fitness for duty?

1. Generally speaking, a fitness-for-duty exam is a medical examination of a current employee to determine whether the employee is physically or psychologically able to perform the job. Sometimes, fitness-for-duty exams are required when an employee is ready to return to work after taking time off for a serious illness or injury. For example, an employee with a serious back injury might have to take a fitness-for-duty exam before coming back to work, to make sure the employee is capable of meeting the physical requirements of the job. A fitness-for-duty exam might also be required of an employee whose conduct on the job gives the employer reason to believe that the employee is not able to perform the job safely. For example, if a forklift operator is found unconscious at the controls, the employer could

require the employee to get checked out, to make sure the employee does not pose a serious safety risk.[1]

A. Issues with Fitness for Duty Testing

i. Drug testing: Not always accurate, can be easy to elude (synthetic urine, masking products), see also timeline detections in III.

2. What a fitness for duty evaluator should know: The role of the evaluator when assessing fitness for duty is to identify any conditions or diagnoses that, in the context of the job, could result in a significant risk or harm to self or others, including the public. In addition, the evaluator's role is to provide an unbiased opinion. Before conducting the assessment, the evaluator should have the following information:

A. Knowledge of any established or verified diagnoses potentially affecting the individual's ability to function on the job
B. The essential physical requirements of the job
C. Knowledge of any possible regulatory requirements for the job
D. Knowledge of biomechanical factors related to any diagnoses (such as the impact of spinal compression on a person with a diagnosis of a ruptured disc when lifting)
E. Recognition of possible psychosocial factors affecting fitness for duty
F. Potential workplace accommodations available.[2]

b. Fitness for duty exams lean on the Americans with Disabilities Act for two primary guideposts:

1. Can the worker perform the essential functions of the job?[3]
2. Does the worker have a medical condition that poses a direct threat to their own safety and health of the worker or to the people around them?

c. Fitness for Duty and the Americans with Disabilities Act ("ADA")

1. The ADA has different standards for medical examinations of job applicants and employees and various rules for medical examinations of employees

[1] Lisa Guerin, J.D., *Can my employer require me to take a fitness-for-duty examination?*, NOLO https://www.nolo.com/legal-encyclopedia/can-employer-require-me-take-fitness-duty-examination.html (2023).

[2] Richard W. Bunch, PhD, PT, CBES, *Fitness for Duty: Legal Aspects of Fitness for Duty* Tests, AMERICAN COLLEGE OF OCCUPATIONAL AND ENVIRONMENTAL MEDICINE, https://ohguides.acoem.org/04-fitness-for-duty-legal-aspects-2/ (2019).

[3] It was not arbitrary, capricious or unreasonable for employer to send employee who had been off work due to knee injury to fitness for duty examination, where grievant's physician indicated in one note that there was to be ongoing physical therapy and grievant needed knee braces, and employer was made aware of degenerative issues with grievant's knees from doctor's notes provided prior to and after knee surgery. *Rock Tenn Co.*, 14/50782-6, 133 BNA LA 1182 (2014).

coming back from leave versus those who aren't performing well or might pose a safety risk.[4]

2. Under the ADA, an employer's ability to make disability-related inquiries or require medical examinations is analyzed in three stages: pre-offer, post-offer, and employment.

   A. At the first stage (prior to an offer of employment), the ADA prohibits all disability-related inquiries and medical examinations, even if they are related to the job. These include:

      i. vision tests conducted and analyzed by an ophthalmologist or optometrist;

      ii. blood, urine, and breath analyses to check for alcohol use;

      iii. blood, urine, saliva, and hair analyses to detect disease or genetic markers (e.g., for conditions such as sickle cell trait, breast cancer, Huntington's disease);

      iv. blood pressure screening and cholesterol testing;

      v. nerve conduction tests (i.e., tests that screen for possible nerve damage and susceptibility to injury, such as carpal tunnel syndrome);

      vi. range-of-motion tests that measure muscle strength and motor function;

      vii. pulmonary function tests (i.e., tests that measure the capacity of the lungs to hold air and to move air in and out);

      viii. psychological tests that are designed to identify a mental disorder or impairment; and,

      ix. diagnostic procedures such as x-rays, computerized axial tomography (CAT) scans, and magnetic resonance imaging (MRI).

   B. At the second stage (after an applicant is given a conditional job offer, but before s/he starts work), an employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category.

   C. At the third stage (after employment begins), an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity.

[4] Allen Smith, J.D., *Distinguish Between the ADA's Many Prohibitions on Medical Examinations*, SOCIETY FOR HUMAN RESOURCES MANAGEMENT, https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/distinguish-between-ada-prohibitions-medical-examinations.aspx (2021).

3. The following are **not** considered Medical Examinations

   A. asking generally about an employee's well-being (e.g., How are you?), asking an employee who looks tired or ill if s/he is feeling okay, asking an employee who is sneezing or coughing whether s/he has a cold or allergies, or asking how an employee is doing following the death of a loved one or the end of a marriage/relationship;

   B. asking an employee about nondisability-related impairments (e.g., How did you break your leg?)

   C. asking an employee whether he or she can perform job functions;

   D. asking an employee whether he or she has been drinking;

   E. asking an employee about his/her current illegal use of drugs;

   F. asking a pregnant employee how she is feeling or when her baby is due; and,

   G. asking an employee to provide the name and telephone number of a person to contact in case of a medical emergency.[5]

II. Types of Drug Testing for Fitness for Duty

a. Drug tests vary, depending on what types of drugs are being tested for and what types of specimens are being collected.

   1. Urine, hair, saliva (oral fluid), or sweat samples can be used as test specimens.[6]

   2. Tests are commonly used for five categories of drugs: Amphetamines; Cocaine; cannabis (marijuana); Opiates; and Phencyclidine (PCP). Additional categories may include barbiturates, Benzodiazepines, ethanol (alcohol), hydrocodone, MDMA, methadone, methaqualone, or propoxyphene.[7]

b. Drug testing may be used in the following set times or circumstances:

   1. Pre-employment: Employers can make passing a drug test a condition of employment. With this approach, all job candidates will receive drug testing prior to being hired.

   2. Annual Physical Tests: Employers can test employees for alcohol and other drug use as part of an annual physical examination.

---

[5] *Id.*

[6] *Drug Testing Resources*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, https://www.samhsa.gov/workplace/drug-testing-resources (February 17, 2023).

[7] *Id.*

3. For-cause and Reasonable Suspicion Tests: Employers may decide to test employees who show discernible signs of being unfit for duty (for-cause testing), or who have a documented pattern of unsafe work behavior (reasonable suspicion testing).[8]

4. Post-accident Tests: Employers may test employees who were involved in a workplace accident or unsafe practices can help determine whether alcohol or other drug use was a contributing factor to the incident.

    A. See OSHA FAQs at end of document.

    B. Post-accident drug test should *only* be carried out where there is a reasonable suspicion of employee drug or alcohol use at the time of the incident AND where the employee's actions or omissions were a contributing factor to the accident

    C. Post-accident tests for cannabis can pose problems because marijuana stays in a person's body for a long time after use. A person could consume cannabis where recreational use is legal (off duty), then come back to work, and get tested after an accident, and test positive.[9]

    D. When employers are seeking to test only for impairment, they should train managers and supervisors on ways to reasonably observe when someone is working under the influence. Testing based on reasonable suspicion could be prompted by the following observations[10]:

        i. Strong odors.

        ii. Questionable movements, twitching or staggering.

        iii. Dilated or watery eyes.

        iv. Flushed, confused or blank facial expressions.

        v. Slurred speech or an inability to verbalize.

        vi. Argumentative, irritable or drowsy behavior.

---

[8] Many collective bargaining agreements will contain fitness for duty provisions for for-cause and reasonable suspicion, for example:

> If there is reasonable suspicion based on supervisor observation that drug or alcohol use may have caused or contributed to the event, the employee will be required to submit to drug and alcohol testing as soon as practicable following the occurrence of an on-the-job accident or incident where an accident was narrowly avoided.

Labor Arbitration Decision, *Utility Workers of America*, 4667773-AAA, [Number redacted], 2019 BNA LA Supp. 4667773.

[9] Lisa Nagele-Piazza, J.D., SHRM-SCP, *Workplace Drug Testing: Can Employers Still Screen for Marijuana?*, SHRM, https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/can-employers-still-test-for-marijuana.aspx (January 1, 2020).

[10] *Id*.

vii. Sleeping, falling unconscious or otherwise being nonresponsive.

5. Random Tests: Tests using an unpredictable selection process are the most effective for deterring illicit drug use.[11]

III. Alternative Options for Fitness for Duty Determinations

a. Current Landscape

1. Drug Testing in the Workplace

A. Current employees are subjected to drug testing for a variety of reasons. Employers test current employees based on reasonable suspicion of impairment at work, as a follow up to rehabilitation, and employees indicating a possible substance abuse problem. Employers also test current employees involved in a workplace accident, suggesting a performance-related purpose.

Employer testing of applicants is more common than testing of current employees, with 10% testing for selected positions in 2011, a decrease from 17% in 2010. In contrast, 29% of employers indicated in 2011 that they did not test any applicants, compared to 21% of employers in 2010. Drug testing of applicants is more common among employers of more than 500 employees, suggesting that it may be used as an easy screening tool for larger numbers of applicants.

Expansion of drug testing while drug use among employees remains low suggests that employers are relying on drug testing as a relatively easy way of "distinguishing the reputable from the disreputable," particularly in larger organizations. Drug testing may be seen as a way to address immorality and restore the image of an employer's control, or even a broader form of social control. Hence, employers rely on testing to deter drug and alcohol use among their employees, or to discourage drug users from applying.[12]

2. "Legal" and "Illegal" Use of Cannabis

A. Cannabis is classified at the federal level as a Schedule I drug under the Controlled Substances Act, meaning that the government believes it to have no medical use and a high potential for abuse. Cultivating, distributing and possessing marijuana violates federal drug laws.

[11] *Id.*

[12] Stacy Hickox, *It's Time to Rein in Employer Drug Testing*, 11 Harv. L. & Pol'y Rev. 419, 422–23 (2017)

B. Currently, 21 states along with Washington D.C. have legalized recreational cannabis and 37 states have some form of legalized medicinal cannabis use[13].

C. Despite widespread legalization, all drug users continue to be at risk of losing employment or never getting hired based on their legal use of marijuana, because most legalization statutes fail to address employment rights. Some states regulate the process of drug testing, but very few place any limits on employers' decisions based on those test results. With little regulation, employers continue to drug test both applicants and employees on a regular basis.[14]

D. Recreational vs. Medicinal

   i. Currently, workplace drug tests do not measure whether someone is high at the time of the test, just whether they have used recently. And they say workplace drug testing is an equity issue, as tests are more common in blue-collar jobs and disproportionately affect non-White workers.[15]

   ii. COLORADO: Colorado law regarding workplace drug testing has effectively remained unchanged since passage of Amendment 64 in 2012, which allowed legalization of the recreational use of marijuana. That law specifically states, “Nothing in this section is intended to require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growing of marijuana in the workplace or to affect the ability of employers to have a drug testing policy restricting the use of marijuana by employees.” Colorado law also allows for reduction or denial of workers compensation or unemployment benefits for use of non-prescribed substances that cause impairment.[16]

   iii. The Colorado Supreme Court determined in 2015 that an employer may restrict employee use of cannabis even when prescribed for a documented medical condition. The court held that “an activity such as medical marijuana use that is unlawful under federal law is not a

---

[13] Claire Hansen, Horus Alas, & Elliott Davis Jr., *Where is Marijuana Legal: A Guide to Marijuana Legalization*, U.S. NEWS, https://www.usnews.com/news/best-states/articles/where-is-marijuana-legal-a-guide-to-marijuana-legalization (March 16, 2023).

[14] *Id.* at 420.

[15] *Workers Who Legally Use Cannabis Can Still Lose Their Jobs*, PEW, https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/02/28/workers-who-legally-use-cannabis-can-still-lose-their-jobs (March, 2022).

[16] Judy Malmon, J.D., *Drug Screening in the Era of Legalized Marijuana: Can my employer fire me for legal activities while not at work?*, SUPER LAWYERS, https://www.superlawyers.com/resources/employment-law-employee/colorado/drug-screening-in-the-era-of-legalized-marijuana/ (January 20, 2023).

"lawful" activity" under a lawful activities statute." *Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo., 2015).[17]

In that case, the firing of an employee of a cable company for his use of prescribed marijuana to treat a chronic pain condition was upheld when he failed a drug test. The court found that even though the drug's use in Colorado was legal, federal law still prohibits it and thus an employer may maintain zero-tolerance for even off-duty and medical use.[18]

Testing is reflecting this trend, as 10% of Colorado employers reported dropping cannabis from its pre-employment screenings in 2016. Additionally, while there are currently no Colorado laws restricting employers from firing positive-testing employees whose use is medically necessary, other states (Arizona, Delaware and Minnesota) have enacted such protections, and changes may be on the horizon.[19]

b. Department of Transportation and Federal Motor Carrier Safety Administration – Fitness for Duty[20]

1. FMCSA Regulation pertaining to Safety Fitness Standard

A. 49 C.F.R. § 385.5

i. The satisfactory safety rating is based on the degree of compliance with the safety fitness standard for motor carriers. For intrastate motor carriers subject to the hazardous materials safety permit requirements of subpart E of this part, the motor carrier must meet the equivalent State requirements. To meet the safety fitness standard, the motor carrier must demonstrate it has adequate safety management controls in place, which function effectively to ensure acceptable compliance with applicable safety requirements to reduce the risk associated with:

(a) Commercial driver's license standard violations (part 383 of this chapter),

---

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] While applicable through law, some employers and unions include these provisions directly into bargaining agreements or workplace policies:
"For employees covered under DOT regulations, conditions of employment may also include that the employee be subject to a pre-employment, fitness-for-duty, random, periodic, post-accident, reportable accident and return to duty drug testing." *International Brotherhood of Electrical Workers, AFL-CIO, Local 965*, 1994 BNA LA Supp. 114315.

(b) Inadequate levels of financial responsibility (part 387 of this chapter),
(c) The use of unqualified drivers (part 391 of this chapter),
(d) Improper use and driving of motor vehicles (part 392 of this chapter),
(e) Unsafe vehicles operating on the highways (part 393 of this chapter),
(f) Failure to maintain accident registers and copies of accident reports (part 390 of this chapter),
(g) The use of fatigued drivers (part 395 of this chapter),
(h) Inadequate inspection, repair, and maintenance of vehicles (part 396 of this chapter),
(i) Transportation of hazardous materials, driving and parking rule violations (part 397 of this chapter),
(j) Violation of hazardous materials regulations (parts 170–177 of this title), and
(k) Motor vehicle accidents and hazardous materials incidents.

2. DOT Drug and Alcohol Tests include the following[21]:

   A. Pre-employment – An employer must receive a negative drug test result before permitting a CDL driver to operate a CMV. (§382.301).

[21] FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, DEPARTMENT OF TRANSPORTATION https://www.fmcsa.dot.gov/regulations/drug-alcohol-testing/what-tests-are-required-and-when-does-testing-occur

B. Post-accident – Drug and alcohol tests may be required after crashes according to the following chart (§382.303) (First line of type of accident refers to an alcohol test, within 2 hours, while the second line refers to a controlled substance test, within 32 hours)

Type of Accident Involved	Citation Issued to the CMV Driver	Test Must Be Performed by Employer
Human Fatality	Yes	Yes
Human Fatality	No	Yes
Bodily Injury With Immediate Medical Treatment Away From the Scene	Yes	Yes
Bodily Injury With Immediate Medical Treatment Away From the Scene	No	No
Disabling Damage to Any Motor Vehicle Requiring Tow Away	Yes	Yes
Disabling Damage to Any Motor Vehicle Requiring Tow Away	No	No

C. Random – CDL drivers must be randomly tested throughout the year (§382.305); an employer who employs only himself/herself as a driver, who is not leased to a motor carrier, shall implement a random testing program of two or more covered employees in the random testing selection pool as a member of a consortium (see §382.305 interpretation 11)

D. Reasonable suspicion – Drivers who appear to be under the influence of drugs or alcohol can be immediately tested (§382.307). Employers must train CDL driver supervisors to detect the symptoms of driver impairment (§382.603).

E. Return-to-duty – Required for drivers who tested positive, refused, or otherwise violated the prohibitions of 49 CFR Part 382 Subpart B; and who have completed the return-to-duty process with a DOT-qualified substance abuse professional. This test is directly observed, and a negative result is required before resuming driving duties (§382.309 and §40.305).

F. Follow-up – Required for drivers who tested positive, refused, or otherwise violated the prohibitions of 49 CFR Part 382 Subpart B;

and who have completed the return-to-duty process with a DOT-qualified substance abuse professional, and have tested negative for a return-to-duty test. This testing is prescribed by the substance abuse professional for a minimum of 6directly observed tests in 12 months, but can be extended an additional four years (§382.311 and §40.307).

G. An employee handbook titled What Employees Need to Know about DOT Drug and Alcohol Testing is available on the US DOT Office of Drug and Alcohol Policy and Compliance (ODAPC) website. The employee handbook provides valuable information on how a urine test is administered and how an alcohol test is administered to ensure the validity of the testing as well as to protect the confidentiality of the employee's testing information.

H. Refusal to Test: A refusal to submit to a drug or alcohol test is generally equivalent to testing positive to a drug or alcohol test. The employee must immediately be removed from performing safety-sensitive functions (i.e., driving CMVs) until successful completion of the return-to-duty process with a DOT-qualified substance abuse professional. The DOT regulations outline refusals to test for drugs and alcohol. Some refusals are determined by medical review officers (49 CFR Part 40 Subpart G) and alcohol technicians (49 CFR Part 40 Subpart N). For others, the determination is the employer's responsibility. Refusals to submit to a drug or alcohol test are defined in §382.107. The employee handbook available on the ODAPC Web site provides examples of conduct that the regulations define as refusing a test (49 CFR Part 40 Subpart I and Subpart N) and what happens if you test positive, refuse a test, or violate FMCSA regulations. It is, therefore, critical to understand the specific circumstances that define a refusal, which can be found in §40.191, §40.261 and §382.107.

    a. A refusal to test includes: failing to appear for any test within a reasonable time; failing to remain at the testing site until the testing process is complete; failing to provide a urine specimen for any drug test; failing to permit the observation or monitoring of the driver's provision of a specimen; failing to provide a sufficient amount of urine when directed; failing to take a second test the employer or collector has directed the driver to take; failing to undergo a medical examination or evaluation; failing to cooperate with any part of the testing process (e.g., refuse to empty pockets when so directed by the collector, behave in a confrontational way that disrupts the collection process).

c. Recent Trends for Fitness for Duty

1. *Raziano, et al., v. Albertsons, LLC*

A. The Surface Transportation Assistance Act, 49 U.S.C. § 31105 (the "STAA"), provides employee protections for transport drivers, package handlers mechanics and other employees, and prohibits discrimination, discipline, or discharge of employees who engage in protected activities under the STAA.

B. In a recent August 11, 2022 ruling by the U.S. Department of Labor, a covered employer was found to have violated the STAA by issuing disciplinary "attendance points" to four drivers because they refused to operate commercial vehicles and missed work while impaired due to illness and fatigue.[22] In that case, the employer utilized its "no-fault" attendance policy where employees accumulated "points" which could lead to a suspension or a discharge of employment. The decision not only vacated the "attendance points" assessed against the four complainant employees, and all other similarly situated employees, but also awarded the employees damages, and found a sizable ($150,000) punitive award against the employer.

C. The STAA protects drivers of commercial motor vehicles, mechanics, freight handlers, and other individuals who directly affect commercial motor vehicle safety. In addition to a refusal to operate a commercial vehicle because of fatigue or illness, the STAA protects an employee who:

i. Refuses to operate a vehicle because the operation violates a regulation related to commercial motor vehicle safety, health or security; or if the employee refuses to operate a vehicle because that employee has a reasonable apprehension of serious injury to the employee or the public because of a vehicle's hazardous safety or security condition; or

ii. Complains or testifies about violations of vehicle safety requirements

d. Recent Trends for Cannabis

[22] The statute's regulations state, in relevant part, that "[n]o driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle." 49 C.F.R. § 392.3. The decision of the DOL Administrative Law Judge is captioned *Raziano, et al v. Albertsons, L.L.C.*, Case Nos. 2020-STA-00084, 2020-STA-00085, 2020-STA-00086, 2020-STA-00088. This case was not appealed by the employer and, therefore, is considered final.

1. Most states still allow employers to test and discipline employees for cannabis use, whether on or off duty, as long as the employer complies with any general drug testing laws.
2. While this is particularly true in those states that continue to criminalize cannabis use, several notable recreational use states also have not enacted any laws protecting lawful use or restricting employer testing for cannabis, including California, Colorado, Massachusetts, and Oregon.[23] A growing number of states, however, are enacting laws that restrict when employers can test employees for cannabis and the actions employers can take based on a positive result. These states fall along a spectrum.
    A. On one end of the spectrum are states that largely allow cannabis testing by employers. For example, Connecticut employers can fire or discipline employees for off-work cannabis use, but only if they have a written employment policy and have provided that policy to employees.[24]
    B. On the other end of the spectrum are many recreational use states, like New York and Rhode Island, which effectively restrict employer testing for cannabis use in most circumstances. Though many of these states do not directly prohibit employer testing, they do prohibit employers from taking adverse employment actions against employees for positive test results or other evidence of cannabis use. Employers may not fire, suspend, fail to promote, demote, refuse to hire or otherwise penalize employees or prospective employees based on their cannabis use outside of work.[25]
    C. While the number and type of exceptions vary between states, these laws generally do not apply to safety-sensitive positions. Employers can nearly uniformly test employees in safety-sensitive positions for cannabis use and discipline employees for positive test results.[26]

e. Prescription Drugs

[23] Foley & Lardner, LLP, *What New Cannabis Testing Restrictions Mean for Employers*, https://www.foley.com/en/insights/publications/2022/08/what-cannabis-testing-restrictions-mean-employers (August 3, 2022).

[24] *Id.*

[25] *Id.*

[26] *Id.*

1. Even prescription drugs can create questions of illegal use. A National Safety Council study found that 27.3% of chronic users received pills from prescriptions written for them, often for work-related injuries.[27]

2. Employers must not assume the use of certain medications *always* creates a safety risk; rather, employers must engage in the interactive process and direct threat analysis required under the ADA and comparable state laws. That process requires an individualized assessment, on a case-by-case basis, of the employee's job duties, the way the medication affects the individual employee, and whether there are any accommodations that could mitigate the risks.[28]

    A. A court case in Ohio illustrates the risks in making assumptions about an applicant's use of prescription medications. An applicant applied for a job as a forklift driver at a manufacturing company. He used prescription opioids for pain relief, along with four other medications, which he disclosed during his initial interview. The employer asked him to provide a doctor's note that the use of his medications would not create a safety concern. The applicant's doctor provided such a note.

    The applicant passed the pre-employment drug test, but the test result was marked "safety-sensitive." Subsequent disclosures showed that the applicant also used Adderall in addition to the five other medications previously disclosed (some of which typically are prescribed for depression, anxiety, and bipolar disorder). The applicant's doctor stated again that there was no safety concern. The employer ultimately did not hire the applicant because his medications were a "safety hazard."

    The applicant asserted claims under the ADA and Ohio state law. The employer argued that the applicant's opioid regimen rendered him a risk to the "health and safety" of others. Rejecting that argument, the court stated it was not clear whether the employer conducted an "individualized inquiry" concerning the applicant's ability to perform the job duties safely, and therefore, the case was set for trial, but settled in September 2022. [29]

---

[27] NAT'L SAFETY COUNCIL, THE PROACTIVE ROLE EMPLOYERS CAN TAKE: OPIOIDS IN THE WORKPLACE 2, 4 (2014); see also TRUST FOR AM.'S HEALTH, PRESCRIPTION DRUG ABUSE: STRATEGIES TO STOP THE EPIDEMIC 4, http://healthyamericans.org/assets/files/TFAH2013RxDrugAbuseRpt16.pdf (2013).

[28] Kathryn J. Russo, *Manufacturers Must Consider Employee Use of Prescription Medications on an Individualized Basis,* https://www.jacksonlewis.com/publication/manufacturers-must-consider-employee-use-prescription-medications-individualized-basis (March 7, 2022).

[29] *Hartmann v. Graham Packaging, L.P.*, No. 1:19-cv-488 (S.D. Ohio Jan. 25, 2022)

IV. Employee Concerns

a. Privacy, invasion of employer control of off-duty activities

b. ADA concerns as described above

c. Freedom to utilize legal medicinal and legal recreational substances

d. Overly-frequent testing or management abusing testing policies

e. Accuracy of testing and the timeframe that a test may capture, depending on the type of test

1. Not all tests capture an immediate timeframe.[30]

	Urine	Blood	Hair	Saliva
Marijuana – Single Use	1-7+ days	12-24 hrs	Doubtful	Not validated (0 -24 hours?)
Marijuana – Regular Use	7-100 days	2-7 days	Months	
Amphetamines	1-3 days	24 hours		
Cocaine	1-3 days	1-3 days		
Heroin, Opiates	1-4 days	1-3 days		
PCP	3-7 days	1-3 days		

[30] *Marijuana Drug Test Detection Times*, CALIFORNIA NORML, https://www.canorml.org/employment/marijuana-drug-test-detection-times/ (2023).

Q & As on OSHA's injury and illness recordkeeping requirements for employers.

Q: Employer required Employee X to take a drug test after Employee X reported work-related carpal tunnel syndrome. Employer had no reasonable basis for suspecting that drug use could have contributed to her condition, and it had no other reasonable basis for requiring her to take a drug test. Rather, Employer routinely subjects all employees who report work-related injuries to a drug test regardless of the circumstances surrounding the injury. The state workers' compensation program applicable to Employer did not address drug testing, and no other state or federal law requires Employer to drug test employees who sustain injuries at work. Did Employer violate section 1904.35(b)(1)(iv) by subjecting Employee X to a drug test simply because she reported a work-related injury?

A: Yes. Section 1904.35(b)(1)(iv) prohibits an employer from taking adverse action against employees simply because they report work-related injuries. Rather, employers must have a legitimate business reason for requiring a drug test, such as a reasonable belief that drug use contributed to the injury. If drug use could not reasonably have contributed to a particular injury and the employer has no other reasonable basis for requiring a drug test, section 1904.35(b)(1)(iv) prohibits the employer from drug testing employees simply because they report injuries unless the drug test is conducted pursuant to a state workers' compensation law or other state or federal law.

FAQ ID: 629

Q: Employee X was injured when he inadvertently drove a forklift into a piece of stationary equipment, and he reported the injury to Employer. Employer required Employee X to take a drug test. Did Employer violate section 1904.35(b)(1)(iv) for drug testing Employee X?

A: No. Because Employee X's conduct-the manner in which he operated the forklift-contributed to his injury, and because drug use can affect conduct, it was objectively reasonable to require Employee X to take a drug test after Employer learned of his injury. Drug testing an employee who engaged in conduct that caused an injury is objectively reasonable because conduct can be affected by drug use.

FAQ ID: 630

Q: Employer drug tests all employees who report work-related injuries to the employer to get a 5% reduction in its workers' compensation premiums under the state's voluntary Drug-Free Workplace program. Employer drug tests Employee X when she reports a work-related injury that could not reasonably have been caused by drug use, such as a

bee sting or carpal tunnel syndrome. Did Employer violate section 1904.35(b)(1)(iv) by drug testing Employee X?

A: No. Drug testing conducted pursuant to a state workers' compensation law, whether voluntary or mandatory, is not affected by section 1904.35(b)(1)(iv).

FAQ ID: 631

Q: Employer requires all employees who report lost-time injuries to take a drug test because the employer's private insurance carrier provides discounted rates to employers that implement such a drug-testing policy. The relevant rate discount provisions in the private policy are identical to those in the applicable state workers' compensation law. Employer drug tests Employee X when she reports a lost-time injury that could not reasonably have been caused by drug use, such as a bee sting or carpal tunnel syndrome. Would OSHA cite Employer for violating section 1904.35(b)(1)(iv) in these circumstances by drug testing Employee X to secure lower private insurance premiums?

A: No. To maintain consistency between public and private worker's compensation coverage in the same state, OSHA will not cite employers under section 1904.35(b)(1)(iv) who conduct post-accident drug testing under private party policies that mirror the applicable state workers' compensation law.

FAQ ID: 632

Q: Employer requires all employees who report lost-time injuries to take a drug test regardless of whether drug use could have contributed to the injury because the drug testing requirement is included in the collective bargaining agreement at the workplace. Employer drug tests Employee X (who is covered by the collective bargaining agreement) when she reports a lost-time injury that could not reasonably have been caused by drug use, such as a bee sting or carpal tunnel syndrome. The employer had no reasonable basis for suspecting that drug use could have contributed to her injury and had no other reasonable basis for requiring the test. Did Employer violate section 1904.35(b)(1)(iv) by drug testing Employee X pursuant to a collective bargaining agreement?

A: Yes. Section 1904.35(b)(1)(iv) prohibits an employer from taking adverse action against employees simply because they report work-related injuries absent a reasonable belief that drug use could have contributed to the injury or another reasonable basis for requiring a drug test. Although OSHA does not intend for section 1904.35(b)(1)(iv) to supersede other state or federal programs addressing post-injury drug testing of employees, collective bargaining agreements may not supersede section 1904.35(b)(1)(iv).

FAQ ID: 633