

By Randi Klein Hyatt, Esq.

Drug Testing and the Construction Industry: Can the Two Ever Mix?

Substance abuse is a huge problem in the United States. The most recently published National Survey on Drug Use & Health, conducted in 2003, revealed that there are 16.7 million current illicit drug users age 18 or older, of which 12.4 million—nearly 75 percent—were employed.¹ Further, of the 19.4 million adults classified with illicit drug dependence or abuse, nearly 77 percent of such adults were employed full- or part-time.

Of the 51.1 million adult binge drinkers, 40 million (79.5 percent) held full- or part-time positions, and 12 million (79.9 percent) of the 15.5 million adult heavy drinkers were also employed full- or part-time.²

The figures are worse for the construction industry. The most recent data from 2000 and 2001 reveals that more than 13 percent of male construction workers over the age of 17 admitted to using an illicit drug within the past month. More than 63 percent admitted to alcohol use within the last month—43 percent of those persons admitted to “binge” alcohol use. There is little difference in drug or alcohol use among construction laborers and their supervisors. These statistics were derived from people who felt comfortable revealing the information—the true numbers are higher, no doubt.

Why Adopt a Drug Testing Policy?

In 1986, President Reagan declared in an executive order, “Drug use is having serious adverse effects upon a significant proportion of the national workforce and results in billions of dollars of lost productivity each year.” Substance abuse costs American businesses billions of dollars annually in accidents, absenteeism, theft, medical claims, turnover and lack of productivity.³

Safety in the construction industry is crucial because workers abusing drugs endanger themselves, their coworkers and the public. The American Council on Drug Education estimates that drug abusers are:

- 10 times more likely to be absent from work;
- 3.6 times more likely to be involved in accidents on the job;
- 5 times more likely to file workers’ compensation claims; and
- 33 percent less productive than their sober counterparts.

Construction employers are often concerned that adopting a drug-free workplace program will eradicate a large portion of their workforce or potential workforce. Eliminating substance abuse testing from the program, however, is not the solution. Word about which employers use drug tests (and which do not) quickly circulates. No employer wants to be known as

“the employer of choice for substance abusers.”⁴ A better solution is a policy that does not automatically fire an employee who tests positive.



More construction companies are now implementing drug-free workplace programs because the rewards of a testing policy outweigh the risks. Studies confirm that an effective drug testing program will increase safety, productivity and morale, while decreasing accidents, health insurance costs, theft, violence, absenteeism, worker’s compensation claims, unemployment insurance costs and employee turnover. Further, there are several states that offer discounted workers’ compensation premiums to companies with drug-free workplaces.

Some contractors are required to perform drug tests according to federal law, such as Department of Transportation regulations, Department of Defense regulations or the Drug-Free Workplace Act of 1988. Whatever the reason, drug testing is a common part of the employment process and is here to stay. Legal challenges to the rights of employers to perform drug testing seem to be a thing of the past. The next hurdle undoubtedly remains legal challenges to the testing process and resulting discipline.

Developing an Effective Program

Preliminary Considerations. When adopting a substance abuse screening program, a company must comply with any state law restrictions placed upon job-related drug testing. Supervisors must administer the program in a fair and nondiscriminatory manner. Employees who feel that they are singled out for testing or disciplined more harshly are likely to challenge the testing selection or discipline as arbitrary and/or discriminatory. A clearly outlined drug-free workplace program with objective and workable components will be more easily implemented and less likely to be challenged. Using a nationally certified laboratory to perform drug screens can prevent challenges to the integrity of the testing process and the accuracy of the results.⁵ Union contractors should also consult their labor relations director and/or their labor lawyer to ensure compliance with any requirements imposed by a collective bargaining agreement or by the National Labor Relations Act.

Zero-Tolerance Policies. Zero-tolerance policies typically translate into “one strike, and you’re out.” While such policies have their place in certain industries, they may not be ideal for the construction industry, where a high percentage of the workforce is statistically shown to use drugs. Termination of otherwise valuable workers who have failed or refused a drug test can lead to stalled

projects or missed deadlines. Companies can face potential delay claims, increased overtime costs and a scramble to replace the depleted workforce.

Even if a company is subject to the federal laws or regulations that mandate drug testing, such laws do not require termination. For example, the Drug-Free Workplace Act of 1988 requires an employer to take appropriate disciplinary action up to and including discharge, or to require the employee to participate in a drug abuse assistance or rehabilitation program.⁶ DOT regulations mandate the suspension, but not termination, of drivers who have driven a commercial vehicle while under the influence of drugs.⁷

Without doubt, screening employees is an effective technique for combating substance abuse in the workplace. Pre-employment drug testing coupled with random drug tests are the two most effective components of a program. Testing alone, however, does not work to correct and eliminate the problem.

Beyond Testing. Quest Diagnostics, the nation’s largest employer drug-testing service provider, reports that drug use in the general U.S. workforce increased during 2004, due again to the continued increased use of amphetamines (a type of stimulant). Of the more than six million tests Quest performed during 2004 for the general U.S. workforce, 4.1

percent of pre-employment drug tests came up positive, while 7.1 percent of random screens came up positive.⁸ Employers must do more than use drug-screening tests to eliminate employee substance abuse.

In order to tackle the widespread substance abuse problem in the construction industry, employers must adopt a program to work with employees who desire to obtain treatment. Not only will this permit employers to effectively remain in control of the workforce (via testing, discipline and, if necessary, discharge), employees will have the opportunity to get the help. Ignoring the problem with a “don’t ask, don’t tell” policy only contributes to increased company risk and societal harm.

Several components comprise an effective drug-free workplace program:

- A well-written policy;
- A fairly implemented policy;
- A proper testing program;
- An option for employee treatment and support; and
- Management support and supervision.

Companies that implement testing and impose discipline (particularly discharge) for positive test results tend to have better morale if employees are encouraged to come forward. If the company offers rehabilitation or an

employee assistance program, employees will more likely face their problem, rather than running from it and down the street to an employer who does not test for drugs. In the end, a testing program, if properly implemented, should be seen as a benefit to the company and the workforce. ■

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References

1. This survey is conducted by the Office of Applied Studies (OAS) in the Substance Abuse and Mental Health Services Administration (SAMHSA) of the Department of Health and Human Services (HHS). SAMHSA's survey on drug abuse is the primary source of information on drug and alcohol use and abuse in the general U.S. population.
2. Binge alcohol use is defined as drinking five or more drinks on the same occasion at least once in the past 30 days. Heavy alcohol use is defined as drinking five or more drinks on the same occasion on each of five or more days in the past 30 days. See National Survey on Drug Use & Health, 2003.
3. U.S. Department of Labor, Bull. No. 2369, Alcohol and Drug Abuse Provision in Major Collective Bargaining Agreements in Selected Industries, 1 (1990).
4. Jane Easter Bahls, Drugs in the Workplace, *HR Magazine* (February 1998).
5. SAMHSA certifies labs to ensure proper chain of custody procedures for specimen handling and requires a Medical Review Officer to review test results per federal agency drug testing requirements. SAMHSA's website contains a list of all currently certified laboratories listed by state at <http://workplace.samhsa.gov/ResourceCenter>.
6. 41 U.S.C. § 703(1).
7. 49 U.S.C. §31310(b)(1)(A).
8. Drug Testing Index, accessed at www.questdiagnostics.com/employersolutions/DTI_05_2005/dti_index.html.