

Risk Monitor



Employee Drug Testing: Effective Tool Despite Legal Pitfalls

Drugs and the workplace are clearly a negative combination. Employers may not only be liable for the negligence of an employee under the influence of drugs but also for negligently hiring an employee with a history of abusing drugs. Lowered productivity and higher absenteeism are just a few more reasons employers want to keep drugs out of their workplace. Drug testing can be an effective way to do just that.

Drug testing can be a useful tool to prevent hiring substance abusers, deter employees from abusing drugs, provide early identification and treatment referral of employees with drug problems and provide a safe and productive workplace for all employees. While illicit drug users are not protected under the American with Disabilities Act (ADA) and the ADA specifically provides that employers may prohibit the use of drugs in the workplace, drug testing still is full of legal pitfalls.

First and foremost, employers should always consult with legal counsel before implementing any drug-testing program. Drug-testing restrictions are in place on federal and state levels and employers need to make sure they are in compliance. State constitutions and statutes vary. Some limit circumstances where drug testing is allowed and others have set requirements on pre-employment drug testing. In addition, some states impose specific testing procedures and specific tests for false positive results.

The Fourth Amendment of the United States constitution, which protects against unreasonable searches and seizures, protects most government but not private sector employees from drug testing. Federal government employees in "sensitive" positions or essentially those who operate commercial vehicles, carry a firearm or are in contact with sensitive information are

generally subject to drug testing. For unionized workforces, implementation of a drug testing program as well as the disciplinary consequences of testing positive for drugs must be negotiated.

It is important to know that testing for alcohol is subject to different restrictions. While a current illegal user of drugs is not protected by the ADA if an employer acts on the basis of such use, alcoholism is considered a disability and is protected by the ADA if the individual is qualified to perform essential functions of the job. Still, an employer may require that employees not be under the influence of alcohol on the job and has certain rights under certain circumstances to discipline, discharge or deny employment to an alcoholic. Again, the complicated ins and outs of ADA guidelines and state and federal legislation make it key to consult legal counsel for guidance when developing a testing program.

When developing a drug program, the following factors need to be considered: who will be tested (which positions); when will tests be conducted (pre-employment, upon reasonable suspicion); which drugs will be tested for; and how will tests be conducted. Employers should have written drug policies including the circumstances under which an employee or applicant will be denied employment. To minimize potential liabilities, results of drug tests must be kept confidential and employees should obtain a release from all employees or applicants being tested.

It is also extremely important that employers retain a reputable drug-testing laboratory. The Drug and Alcohol Testing Industry Association's website at www.data.org includes a searchable database of accredited members.

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Should Terrorism Coverage Disappear If Terrorism Hasn't?

The memory of the devastation of 9/11 is never far from our minds. We only have to look at pictures of the slowly recovering World Trade Center site or see the Homeland Security color-coded alert system to remember that we are always vulnerable.

At the end of 2005, another reminder of the devastation of that fateful day may pass from our midst; but it's one reminder that we may want to consider hanging on to. Congress passed the Terrorism Risk Insurance Act (TRIA) in late 2002. TRIA is meant to address a void in the commercial insurance industry, which in the years previous to 2001, considered terrorism a pretty low risk and didn't underwrite it to any significant measure.

After 9/11, insurers and re-insurers alike became aware of the potentially huge exposure. As re-insurers' money became increasingly scarce, direct insurers, to the extent that they could by law, began to exclude all terrorism risk in commercial property policies and commercial liability policies. Some states forbade this type of exclusion; while other states had a standard exclusion they would accept, but it was limited. The market was in even more turmoil because no one was certain how to quantify terrorism risk and how to price it. Congress recognized the dilemma had real future implications for the economy because commercial property lenders were trying to force the issue of having terrorism coverage even when it wasn't available in a particular location. The result was a moratorium on a number of new commercial projects. Thus, to eliminate the bottleneck and get things flowing again, they enacted TRIA.

The original concept behind TRIA was to enact temporary legislation that would give the market time to build capacity for terrorism risk and learn how to underwrite it. Underwriting terrorism catastrophes wasn't as easy a job. With other

catastrophic losses, historical data could be used to predict frequency and degree of loss. However, terrorism plays by a different set of rules, one of which is that there is no predicting because each attack is unique.

Now Congress is faced with the dilemma of TRIA being set to expire in December 2005 and the industry, while it may have developed some sophisticated models to quantify the risk, which permits more accurate pricing, still doesn't have an accurate way to forecast the frequency of that risk. If TRIA is allowed to expire, things will revert back to the pre-TRIA conditions. According to Joe Holahan, an attorney in the Insurance Practice Group at Morris, Manning & Martin LLP, TRIA needs to be extended. Holahan notes, "The market isn't ready to underwrite catastrophic losses. The government will be involved in covering them whether we have TRIA or not. Terrorism as a societal risk is similar to a war risk, which we don't look to the private market to underwrite."

What's the holdup with the extension? According to Holahan, some members of Congress see TRIA as corporate welfare for insurers. In the House of Representatives, the Financial Services Committee approved an extension last year, but House leadership kept it from the floor. Likewise, there is a body of TRIA opponents in the Senate. Senator Richard Shelby (R) Alabama, Chairman of the Banking, Housing & Urban Affairs Committee has been a vocal opponent in the past. He may be changing his viewpoint on extension but he will probably not endorse renewing the act in its current form. However, despite the presence of prominent protestors, bills have been introduced in both the Senate and the House to keep TRIA alive.

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reflected in the policy limit. Therefore, it is critical to keep your insurance agent informed so that your policy limits can be updated appropriately.

Another mistake is using the amount of the construction loan as the limit of insurance. The completed value of a project is almost always more than the construction loan. Here's an example: A developer funded a significant portion of a building project with cash, but did not include this amount when computing the completed value, and obtained insurance only for the financed amount. The policyholder learned a tough lesson when the insurer applied a 50% coinsurance penalty to a \$5.9 million loss.

Sometimes policyholders fail to include overhead and profit, usually figured at 10 percent each, in the completed value of a project. Since these items represent up to 20 percent of completed value, leaving them out could lead to a large coinsurance penalty.

On the other hand, some items should be excluded from the calculation of completed value. The largest of these is land value. Other items, such as excavations and underground work, should also be excluded. If you include them in your calculation of completed value, you incur extra cost with no benefit in the event of a loss since these items are excluded from most policy forms.

Helping Employees Make Their Comeback After a Work-Related Injury or Illness



The fallout from an extended injury or illness can devastate employees and their families financially, physically and mentally. Trying to live on decreased income from a Workers' Compensation claim, coupled with family members having to take on additional responsibilities the disabled person cannot perform, can put a real strain on relationships. As time passes, the additional problem of becoming increasingly isolated from their former life raises tension levels in an already highly charged situation.

This scenario occurs more often than you might think. According to the U.S. Bureau of Labor Statistics, in 2002, a total of 1.4 million injuries and illnesses in private industry required recuperation away from work beyond the day of the incident. What's even more surprising about the Bureau's findings is that injuries and illnesses to workers aged 20 to 44 accounted for 64 percent of all injured workers. Workers aged 65 and over accounted for only 1.7 percent of total injuries and illnesses. The fact that the majority of workers on extended leave are workers who will need to return to work clarifies how important setting the stage for their comeback really is.

Leslie Yerkes, an organizational behaviorist and president of Cleveland, Ohio-based Catalyst Consulting Group, Inc. notes, "Finding and keeping good people provides a competitive advantage for organizations. So, keeping the bond strong when employees are on family leave, working virtually or out on Workers' Compensation is critical to not losing that employee to a competitor and to facilitate a rapid and smooth transition back into the workplace." She recommends the following steps for maintain a strong connection and facilitating a smooth re-entry:

- Clarify expectations with the employee early on as to what they can and want to do. If job reassignment will be necessary upon their return, let them know that you are willing to explore possible options. Get a feel for the kinds of jobs they might be interested in and realistically explore how and where they can fit in.
- Assign a communication buddy to the individual who can commit to having a regular weekly update conversation with the absent employee. Make sure that the employee has a means to receive critical

information while absent from the organization.

- Include the absent employee via phone teleconferencing in key events that will affect them directly. This is critical when it comes to changes in company/departmental policies or revisions in work floor procedures. You don't want an employee to return to work only to be reprimanded the first day back for violating a policy change that they were unaware of. It increases the feeling that they have been left behind. Those negative feelings might continue to grow until the employee feels compelled to find another job.
- Encourage the work group to stay connected and communicate to the disabled employee that they care about their recovery. It's like Hallmark always says, "When you care enough to send the very best." Make sure an absent employee knows that they are truly missed by their co-workers. And most importantly, make sure the employee knows that their bosses are among those people!



The lesson to be learned from all of this is simple. Transitioning back into the workplace begins as soon as the employee starts their leave. If you plan for their re-entry from the outset, it will be as seamless as it should be.

Interpreting the Coinsurance Clause in a Builder's Risk Policy

As the name implies, the coinsurance clause—which is typically found in a builder's risk completed value policy—makes the policyholder a co-insurer of risk. Under certain conditions, when there is a coinsurance clause, the insurance company will not pay the full amount of a loss; part will be borne by the policyholder.

The advantage of buying insurance with a coinsurance clause is the policy's premium will generally be lower than a similar policy without the coinsurance clause. To avoid an unpleasant surprise in the event of a loss, it's important to understand what the coinsurance clause requires. Typically, the clause in a builder's risk completed value policy reads as follows:

“Need for Adequate Insurance. We will not pay a greater share of any loss than the proportion that the Limit of Insurance bears to the value on the date of completion of the building described in the Declarations.”

Policyholders are often confused by the relationship between the policy limit and the coinsurance clause. When a policy has a limit of \$100,000 and the amount of a loss is \$20,000, well below the policy limit, it would seem as though the insurer must pay the full amount of the loss. Due to the coinsurance clause, however, the insurer may or may not pay the full amount of the loss,

depending on whether the insured has maintained the amount of insurance necessary to avoid the coinsurance penalty.

Here's an example of how the coinsurance clause would be applied: You have a policy with a \$100,000 policy limit. A windstorm does \$20,000 worth of damage. At the time of the loss, it is determined that the completed value of the project will be \$120,000. The policy value of \$100,000 is 80% of \$120,000 (the actual value of the project). Therefore, the insurer will pay only 80 percent of the \$20,000 loss, or \$16,000.



Whenever the insured receives less than the full value of the claim due to the discrepancy between the policy limit and the completed value of the project, the insured is said to have experienced “a coinsurance penalty.”

One common mistake by policyholders, which often leads to a coinsurance penalty, is not reporting cost overruns. When there are cost overruns the increased completed value must be

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