

This will be a series of articles that will highlight actual mistakes that occur during the process of workplace drug & alcohol testing.

The intent of these articles is to alert folks as to the importance of taking the time to manage and perform drug and alcohol testing programs correctly and flawlessly. In the last issue of *DATIA focus* the article highlighted mistakes made at the point of collection, the collector and the collection process; generally considered the “weakest links” in the process. This article will focus on mistakes made by the employer or Designated Employer Representative (DER). Many DERs and employers do a great job with their drug and alcohol testing programs, but some don’t. Listed below are examples of common mistakes made by DERs. Please review each carefully and educate your clients or DERs on proper procedures.

Employers who do drug testing must be careful to do it properly. Let’s review mistakes employers make in the overall drug testing process, including DOT regulated drug testing and non-regulated drug testing. Remember, in DOT regulated drug testing programs the person in charge of the drug-testing program is typically referred to as the Designated Employer Representative (DER); so the term DER will be used for any employer representative running any drug-testing program.

One big issue with many employers is the lack of a drug testing policy; a crucial mistake. Employers who take the position that drug testing is an invasion of the

employee’s privacy pay for their political correctness. A pre-hire drug testing policy, combined with random drug testing and drug testing of all employees who are injured on the job, will reduce the number of injuries and identify the employees whose injuries are the result of their drug use. In addition, the policy is critical to the success of an employer attempting to deny an unemployment or workers’ compensation claim.

Training is a key issue for DERs and employers that do drug testing. There is a lack of information and training, and at times some employers will make up their rules and policies as they go. Listed below are some of the common mistakes that could be avoided with proper training:

- The DER calls the drug testing provider and says that Bill is “acting funny”, and that there is suspicion that Bill is under the influence of illegal drugs or alcohol. The DER replies, “Can you come down and conduct a **random drug test** on Bill?” Obviously, there is nothing random about this event. This DER and the supervisors at this company need supervisor training in order to be able to correctly identify and order a reasonable suspicion test on an employee when appropriate.
- The DER calls and states that Cathy tested positive for cocaine and that she is a good employee who has been with the company for ten years. “I know Cathy and her family, she doesn’t do drugs” says the DER. Cathy explained that there is no way she could have tested positive and convinces the DER to allow Cathy to go for another test. This second collection is taken a week after the initial collection. Over the years, I have seen this happen often. There is no going back for another specimen collection and a new test at a later date. Cathy’s option was to have the original specimen retested at another laboratory—just like the Medical Review Officer explained to her.

Her specimen at the time of the first collection was in fact positive and has nothing to do with what happens with a new specimen tested at a later date. Safety has been compromised, this employer now has dangerous exposure to liability with this employee and with the company’s overall drug testing program. In addition, if it is a DOT test, this will lead to a violation of the DOT rules.

- Use of rapid onsite drug-testing kits when state law or the state law program specifically prohibits such use is another issue. Employers/DERs need to know the laws and rules that apply to them and be aware that if the company operates in multiple states, there may be various rules to follow in each area of operation.
- Another issue that I have heard of involves both the employer and sometimes the drug testing provider/collector. With the use of rapid onsite tests, some companies when presented with a non-negative result on the rapid test will ask the employee if they would like to resign rather than have the specimen sent to the laboratory for confirmation and MRO review. This sometimes happens with pre-employment testing also where the applicant is asked to not take the job rather than having the specimen sent to the laboratory for confirmation and MRO review. As I am not an attorney, I cannot give a legal opinion on this situation, but in my mind these employers are treading on dangerous ground with this situation and it could lead to huge liability exposure. Employers should be cautious in making rash decisions, and should contact legal counsel when developing their policies to ensure that their actions are legally defensible.

There is an opportunity for service agents (drug and alcohol testing providers) to provide valuable assistance to DERs/Employers who manage drug-testing programs. But these same DERs/Employers need to take responsibility and

obtain the proper knowledge to maintain their programs in a way that keeps them in compliance with the rules that apply and also limits the company's exposure to liability.

Why is all of this important? Mistakes in the drug testing process can lead to issues with DOT regulators and the employer might be out of compliance, facing fines and other sanctions. What about the donor, the employee who might have an erroneous test result reported due to an error? On the legal front, you certainly want the drug/alcohol testing program to be conducted properly and consistently—if not, you might face issues from a plaintiff's attorney on a challenge or lawsuit. Avoid all of these issues, do it right the first time—the key is training and refresher training and keeping up to date with state

laws and Federal regulations regarding drug testing. Look to DATIA for a great resource for regulatory updates, training, and promotion of the highest possible standards for the industry. ■



Joe Reilly entered the world of drug testing in 1993, he is well known throughout the industry and considered an expert on workplace drug testing issues. Joe served for nine years on the DATIA Board of Directors and served as Chairman of the Board from 2004–2008. Joe is currently a Regional Certified Professional Collector Trainer (RCPCT) for DATIA and is available for DATIA CPC training in all areas of Florida. He is also active in assisting buyers and sellers in the drug testing industry work through the merger and/or acquisition process.

Some Common DER Pitfalls

- Lack of training
- Wrong forms used
- Post Accident Testing conducted too late or not done at all
- Accurate information not updated to TPA and/or collector
- Confusion on dilute specimens and specimen validity testing
- Improper action taken on positive results and on refusals to test
- Utilization of unqualified service providers
- Confidentiality not maintained
- Inconsistent HR policies

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