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# Drugs in the Workplace: Getting Into the Weeds of State and Federal Drug Testing Laws

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# DRUGS IN THE WORKPLACE:
# GETTING INTO THE WEEDS OF STATE AND FEDERAL DRUG TESTING LAWS

## I. INTRODUCTION

In 1914, John Lee, the Head of Personnel at Ford Motor Co., attempted to combat the company's persistent employee turnover rates by doubling Ford's minimum wage for assembly line workers to $5.00 per hour. But Ford's benevolence came with a catch: "To qualify for his doubled salary, the worker had to be thrifty and content. He had to keep his home neat and his children healthy, and, if he were below the age of twenty-two, to be married."[1]

Modern-day employers are not so paternalistic regarding the well-being of their workers, but every business still has a vested interest in workplace harmony, safety, and productivity. Employers frequently express this interest via a workplace drug policy, but it may be difficult to determine the appropriate contours of such policies in the age of the opioid crisis, legalized marijuana, and fluctuating attitudes towards the moral and medical implications of drug use.

This paper offers tips for navigating the legal and practical issues pertaining to drug and alcohol testing in the workplace. As explained below, there are few, if any, federal or state laws regarding drug testing with respect to average employers and average employees. There are, however, a host of federal and state laws dealing with special circumstances: *e.g.*, federal contractors, commercial truck drivers, employees with disabilities, and individuals seeking unemployment benefits. This paper begins by addressing those laws and concludes by discussing a number of practical and philosophical concerns employers should consider when developing a drug and alcohol testing policy.

## II. DRUG TESTING UNDER FEDERAL LAW

### a. In General

At the federal level, laws concerning workplace drug testing fall generally into two categories: On one hand are laws governing professions in which drug or alcohol abuse may foreseeably and negatively impact public safety. On the other hand are laws designed to protect workers' civil rights. The former, which include the Drug-Free Workplace Act of 1988 (regarding federal contractors and grantees) and the commercial driver regulations promulgated by the Federal Motor Carrier Safety Administration ("FMCSA"), impose affirmative testing and reporting obligations on employers. The latter, which include the Americans with Disabilities Act and the Family Medical Leave Act ("FMLA"), limit the steps employers can take to discipline employee drug use.

[1] RICHARD SNOW, I INVENTED THE MODERN AGE: THE RISE OF HENRY FORD (2013), at 211-12. According to the Bureau of Labor Statistics inflation calculator, Ford's increased minimum wage ($5.00) had the same purchasing power as $126.00 would have today.

### b. The Drug-Free Workplace Act of 1988

The Drug Free Workplace Act of 1988 ("DFWA"), 41 U.S.C. § 8101, *et seq*., requires employers bidding for a federal procurement contract of more than $250,000.00[2] or seeking a federal grant of any size to:

- Provide employees a statement (1) prohibiting the unlawful manufacture, distribution, dispensation, possession, or use of drugs in the workplace; (2) specify the disciplinary consequences of violating this prohibition; and (3) require compliance with this prohibition as a condition of employment;
- establish a drug-free awareness program to inform employees about (1) the dangers of drug abuse in the workplace; (2) the employer's policy of maintaining a drug-free workplace; (3) available drug counseling, rehabilitation, and employee assistance programs; and (4) the penalties that may be imposed on employees for drug abuse violations; and
- require employees to report workplace-related drug convictions to the employer within five (5) days, and reporting these convictions to the contracting federal agency within ten (10) days.

41 U.S.C. §§ 8102(a)(1) & 8103(a). Failure to abide by these requirements may result in the suspension or termination of the employer's federal contract or grant. *Id.* §§ 8102(b) & 8103(b).

Notably, the DFWA does not require employers to adopt a particular drug testing policy. The Department of Labor has confirmed, however, that the DFWA does not preclude employers from adopting drug testing programs as required or authorized by other laws.[3]

### c. DOT/FMCSA Regulations

The FMCSA, an agency within the Department of Transportation, promulgates regulations applicable to every person and employer who 1) operates a commercial motor vehicle ("CMV") in any state and 2) is subject to the DOT's commercial driver's license requirements or the corresponding requirements under Mexican or Canadian law.[4] 49 C.F.R. § 382.103(a). The FMCSA's regulations preempt any conflicting state laws, but they do not affect employers' ability to impose their own alcohol or drug policies and procedures, including opportunities for rehabilitation. *Id*. §§ 382.109-111. A sampling of the most relevant regulations is below.

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[2] Congress recently increased the amount from $100,000. *See* P.L. 115-91 § 805 (2017).

[3] *See* Drug-Free Workplace Act of 1988 FAQs, https://webapps.dol.gov/elaws/asp/drugfree/screenfq.htm.

[4] The FMCSA is one of three major federal agencies that impose strict regulations regarding drug and alcohol use in "safety-sensitive" industries. The other two are the Department of Defense ("DOD") and the Nuclear Regulatory Commission ("NRC"), both of which require private contractors to abide by certain drug-free policies. *See* 42 C.F.R. § 223.5; 10 C.F.R. § 26.1, *et seq.* Compared to the number of employers affected by the FMCSA's provisions, the number of employers bound by the DOD and NRC's regulations is comparatively small; consequently, this paper does not substantively discuss these regulations.

*i. Commercial drivers are strictly prohibited from performing safety-sensitive functions if they are using or impaired by alcohol or certain drugs.*

The FMCSA is concerned primarily with so-called "safety-sensitive functions," which the agency broadly defines as "all time from the time a driver begins to work or is required to be in readiness to work until the time he/she is relieved from work and all responsibility for performing work." *Id*. § 382.107. The term specifically includes driving, inspecting and servicing equipment, loading and unloading cargo, and awaiting dispatch. *See id.* The regulations prohibit any driver from reporting for duty or remaining on duty if the driver:

- has an alcohol concentration of 0.04 or greater[5];
- uses alcohol while performing or within four hours before performing safety-sensitive functions;
- is using any Schedule I drug;[6]
- is using any non-Schedule I drug, unless the use accords with the instructions of a medical professional who knows the driver's medical history and has advised the driver that the drug will not adversely affect his ability to safely operate a CMV;
- tests positive for drug use (or adulterates or substitutes a test specimen); or
- refuses to submit to a drug or alcohol test required by the regulations.

*Id.* § 382.201-.215.

An employer who knows that a driver has engaged in any of these behaviors must remove the driver from duty. *Id.*; *accord id.* § 382.501. Moreover, the employer cannot let the driver return to duty unless a substance abuse professional ("SAP")[7] certifies that the driver has undergone an abuse or addiction evaluation and completed any prescribed education or treatment, and the driver produces a negative drug test result or an alcohol test result reflecting a concentration of less than 0.02. *Id.* §§ 382.501, 40.305.

Importantly, nothing in the regulations requires an employer to return the employee to duty. Instead, the regulations specifically contemplate an employer's ability to terminate the offending employee, subject to other legal requirements. *Id.* § 40.305 ("[Y]ou are not required to return an employee to safety-sensitive duties because the employee has met these conditions. That is a personnel decision that you have the discretion to make, subject to collective bargaining agreements or other legal requirements.").

[5] An employer must remove from duty any driver found to have an alcohol concentration of 0.02 or greater, but the regulations do not require any disciplinary action based on a concentration result less than 0.04. *Id.* § 382.505(a).

[6] These schedules are maintained by the Department of Justice at 29 C.F.R. Part 1308.

[7] SAPs are individuals with certain medical or counseling credentials who are trained in the diagnosis and treatment of alcohol and drug addiction and familiar with the FMCSA regulations. *See* 49 C.F.R. § 40.281.

*ii. The FMCSA regulations establish guidelines for drug and alcohol testing.*

Aside from the return-to-duty testing described above, the FMCSA regulations establish guidelines for drug and alcohol testing in four situations: pre-employment, post-accident, at random, and with reasonable suspicion. These guidelines are summarized in the table below:

| | **Regulations** |
|---|---|
| **Pre-Employment** | An employer **must** require a driver to provide a negative drug test prior to performing any safety-sensitive functions, subject to certain exceptions if the driver has recently participated in a drug testing program. *Id.* § 382.301(a)-(c).<br><br>An employer **may** require drivers conditionally hired to perform safety-sensitive functions to undergo pre-employment alcohol testing. *Id.* § 382.301(a)-(c). However, an employer cannot test some drivers and not others: it must treat all safety-sensitive employees the same. *Id.* § 382.301(d). An employer cannot let a driver perform safety-sensitive functions unless the driver's alcohol concentration is less than 0.04. *Id.* |
| **Post-Accident** | An employer **must** test a driver for drugs and alcohol following a CMV accident on a public road that results in a fatality, regardless of whether the driver receives a citation. *Id.* § 382.303.<br><br>If the driver receives a citation, the employer **must** test the driver for drugs and alcohol following a CMV accident on a public road that results in 1) bodily injury to any person requiring treatment away from the scene, or 2) disabling damage to any motor vehicle. *Id.* |
| **At Random** | Each year, an employer **must** perform random, unannounced drug and alcohol testing on the percentage of drivers established by the FMCSA, as reported in the Federal Register (never less than 10 percent of the covered workforce). *Id.* § 382.305. The selection must be scientifically random and the employer must test every driver selected. *Id.* Drug testing shall occur immediately after the individual is notified of his selection, but alcohol testing shall occur only while, just before, or just after the employee performs a safety-sensitive function. *Id.* |
| **With Reasonable Suspicion** | An employer **must** train each employee who supervises drivers on the physical, behavioral, speech, and performance indicators of probable alcohol misuse and drug use. *Id.* § 382.603. If these supervisors have reasonable suspicion to believe that a driver has violated the regulatory prohibitions on the use of drugs or alcohol, the employer **must** test that driver for drugs or alcohol use. *Id.* § 382.307.<br><br>In general, the employer **must** test for alcohol use within two hours, and in no event later than eight hours, after the determination of reasonable suspicion. *Id.* The supervisor must record the observations supporting the reasonable suspicion determination within 24 hours or before the test results are released, whichever is earlier. *Id.* |

An employer who administers any of the tests authorized above must inform the driver that the test is required by FMCSA regulations. *Id.* § 382.113. Moreover, the employer **must** share positive drug test results (including the particular drugs for which the employee tested positive) from a random, reasonable suspicion, or post-accident test with the subject employee. *Id.* § 382.405(a). The employer must also share pre-employment drug test results with job applicants who request them within 60 calendar days of receiving a job application decision. *Id.*

Finally, employers are also required to report certain information regarding drug and alcohol use to the FMCSA's Drug and Alcohol Clearinghouse within three (3) business days of obtaining the information.[8] *Id.* § 382.705(b). This information includes, but is not limited to:

- An alcohol confirmation test result with an alcohol concentration of 0.04 or greater;
- A negative return-to-duty test result;
- A refusal to take an alcohol test;
- A report that the driver has successfully completed all follow-up tests required under the return-to-work protocols;
- Actual knowledge of the employee's alcohol use while on duty, pre-duty, or after an accident;
- Actual knowledge of the employee's drug use.

*iii.* *The FMCSA regulations require employers to promulgate a policy on alcohol misuse and drug use.*

The FMCSA regulations require employers to maintain an informational policy regarding the procedures and requirements discussed above. *Id.* § 382.601. An employer must distribute this policy to each driver prior to subjecting the driver to drug and alcohol testing and must obtain a signed acknowledgment of receipt from each driver. *Id.* § 382.601(a) & (d). The policy must include, among other things,

- The categories of drivers who are subject to these regulations;
- A definition of safety-sensitive functions sufficient to allow employees to determine when they may be covered by these regulations;
- Specific information concerning prohibited driver conduct;
- The circumstances under which a driver may be required to undergo alcohol and drug testing, as well as the procedures to be used;
- Consequences for failing or refusing to take an alcohol or drug test;

[8] Employers are also required to query the Clearinghouse (with the driver's written or electronic consent) prior to hiring a driver and once a year afterwards. *Id.* § 382.701-.703.

- Information concerning the effects of alcohol and drugs use on an individual's health, work, and personal life; signs and symptoms of an alcohol or drug problem; and a brief description of available interventions; and
- The Clearinghouse reporting requirements identified above.

*Id.* § 382.601(b).

*iv. The FMCSA regulations establish confidentiality guidelines for the maintenance and use of drug and alcohol test results.*

The regulations impose significant recordkeeping and retention requirements on employers. They cover information on individual employee test results, testing equipment calibration documentation, training information, collection logs, information regarding the random selection process, return-to-work information, and a host of other records. *See id.* § 382.401. They also require an employer to prepare a calendar-year summary of tests and results when requested to do so by the DOT or any state regulators. *Id.* § 382.403(a).

Unsurprisingly, the regulations also impose strict confidentiality requirements. Parties authorized to access relevant records include drivers, the DOT or other state regulators, the National Transportation Safety Board, and subsequent employers or other third parties who present a written request from a driver. *Id.* § 382.405(a). Employers may also disclose information to the decision-maker in a lawsuit, grievance, or administrative proceeding initiated by or on behalf of the driver and arising from a positive DOT drug or alcohol test or a refusal to test. *See id.* The regulations specifically contemplate worker's compensation proceedings, unemployment compensation proceedings, or any other proceeding relating to a benefit sought by the driver. *See id.* §§ 40.321-.331, 382.405(a).

**d. The Americans with Disabilities Act**

The Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*, prohibits all employers with more than 15 employees from discriminating against a "qualified individual" on "the basis of disability." *Id.* § 12112(a).

*i. An individual "currently engaging" in the illegal use of drugs is not a qualified individual with a disability under the ADA.*

A "qualified individual" is "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8). The ADA also imposes an affirmative obligation on employers to "mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability[,]" absent a showing that such an accommodation would pose an "undue hardship." *Id.* § 12112(b)(5)(A).

At first glance, these general provisions seem susceptible to extensive gray-area interpretation: Is workplace drug or alcohol use a "disability" requiring some sort of "accommodation"? Can an employee confronted with a failed drug test seek protection under the ADA to avoid discipline? Fortunately, the ADA addresses the intersection between its anti-discrimination provisions and employee drug use by defining "qualified individual with a disability" to exclude "any employee or applicant who is ***currently engaging*** in the ***illegal use of drugs***, when the [employer] ***acts on the basis of such use***." *Id.* § 12114(a); 29 C.F.R. § 1630.3(a) (emphasis added).

The Fifth Circuit Court of Appeals has attempted to define the exclusion's scope:

- The term "illegal use of drugs" includes "not just . . . the use of illegal street drugs, but also . . . the illegal misuse of pain-killing drugs controlled by prescription." *Shirley v. Precision Castparts Corp.*, 726 F.3d 675, 678 (5th Cir. 2013).
- The term "currently" includes drug use "sufficiently recent to justify the employer's reasonable belief that the drug abuse remained an ongoing problem." *Id.* at 679 (citing *Zenor v. El Paso Healthcare Sys., Ltd.*, 176 F.3d 847, 856 (5th Cir. 1999)). It may include drug use weeks or even months before the challenged adverse employment action. *See id.*
- The term "acts on the basis of such use" simply confirms that the employee's drug use has to be the basis of the employer's challenged employment action in order for the exclusion to apply. *Id.* at 679 n.13. In other words, the employee may still be a "qualified individual with a disability" if the employee's drug use was not the actual reason for the employer's decision. *Id.*

These standards are hazy, at best, and their applicability is further limited by a "safe harbor" provision that protects an individual who:

- 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;
- is participating in a supervised rehabilitation program and is no longer engaging in such use; or
- is erroneously regarded as engaging in such use, but is not engaging in such use.

42 U.S.C. § 12114(b); 29 C.F.R. § 1630.3(b).

Like the original exclusion, this safe harbor provision raises its own set of questions: Is an employee protected simply by entering a rehabilitation program, regardless of how long it has been since the employee last used drugs? How long must an employee refrain from using drugs to fall under this provision?

In *Shirley v. Precision Castparts Corporation*, the Fifth Circuit attempted to clarify the safe harbor's contours with respect to an opioid-abusing plaintiff who was terminated after twice failing to complete a drug rehabilitation program. *Shirley*, 726 F.3d at 678. The plaintiff claimed safe harbor protection in part because he had not used opioids for 11 days before his termination. *Id.* at 680. The Fifth Circuit rejected his argument, noting that "the mere fact that an employee has entered a rehabilitation program does not automatically bring that employee within the safe harbor's protection." *Id.* (citing *Zenor*, 176 F.3d at 857). Instead, an employee wishing to invoke the safe harbor protections must be drug-free "for a ***significant*** period of time." *Id.*

While *Shirley* provides some clarity, the opinion candidly notes that "courts must determine eligibility for safe harbor 'on a case-by-case basis,'" asking whether "the circumstances of the plaintiff's drug use and recovery justify a reasonable belief that drug use is no longer a problem." *Id.* at 681 (citing *Mauerhan v. Wagner Corp.*, 649 F.3d 1180, 1187 (10th Cir. 2011)). While both employers and employees would prefer a bright-line rule, rather than a squishy, adjective-laden test, *Shirley* at least establishes that an individual may not be "qualified" under the ADA even if there is a reasonable lag between his most recent drug use and his termination.

*ii.* *An employee's alcoholism or addiction may be a disability under the ADA.*

The exclusion/safe harbor issue aside, an individual who suffers from addiction or alcoholism but is not "currently engaging in illegal use of drugs" may be "disabled" within the meaning of the statute, depending on the theory and facts presented. *See* 42 U.S.C. § 12102(1) (establishing the "actual," "regarded as," and "record of" definitions of disability).

The Fifth Circuit has not definitively addressed the issue since the 2008 Amendments to the ADA, which "broaden[ed] the definition and coverage of the term 'disability. . . .'" *Neely v. PSEG Texas, Ltd. P'ship*, 735 F.3d 242, 245 (5th Cir. 2013). But district courts within the Fifth Circuit have required plaintiffs claiming actual disability to prove their addiction or alcoholism "substantially limits a major life activity." *See Oxford House, Inc. v. Browning*, 266 F. Supp. 3d 896, 910 (M.D. La. 2017) (citations and internal quotation marks omitted) ("[T]here is no per se rule that categorizes recovering alcoholics and drug addicts as disabled or handicapped, and a case-by-case evaluation is necessary because mere status as an alcoholic or substance abuser does not necessarily imply [limitation of a major life activity]."); *Radick v. Union Pac. Corp.*, 4:14-CV-02075, 2016 WL 639126, at *5 (S.D. Tex. Jan. 25, 2016), *report and recommendation adopted*, CV H-14-2075, 2016 WL 632039 (S.D. Tex. Feb. 17, 2016) ("To prove that he is disabled, a specific plaintiff must provide evidence that his alcoholism substantially limits his ability to perform a major life activity, as compared to most people in the general population.").[9]

[9] This approach is the same as that taken by the Fifth Circuit prior to the 2008 Amendments. *See Burch v. Coca-Cola Co.*, 119 F.3d 305, 317 (5th Cir. 1997) (finding that a plaintiff who advanced an alcoholism-based disability claim could not show that he "ever suffered a substantial impairment of a major life activity . . . ."); *see also* 42 U.S.C. § 12102(1)(A) ("The term "disability" means, with respect to an individual . . . a physical or mental impairment that substantially limits one or more major life activities of such individual. . . ."); 29 C.F.R. § 1630.2(j)(vii) ("An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."). However, the ADA"s regulations emphasize that the term "substantially limits" is "not a

The determination of whether a particular individual is disabled under the ADA is important, since a disabled individual is generally entitled to reasonable accommodations. *See* 42 U.S.C. § 12112(b)(5)(A).[10] Anticipating the exact form and scope of potential accommodation requests is a Sisyphean task, but one can easily imagine requests to attend Alcoholic or Narcotics Anonymous meetings, breaks for therapeutic meditation, or even for extended time off to participate in a rehabilitation program. Under the right circumstances, employers would have to evaluate these requests just as they would any other request – by interactively engaging with the employee and performing an undue hardship analysis. *See* 29 C.F.R. §§ 1630.2(o)(3) & (p) (explaining the interactive process requirements and the undue hardship framework).

*iii. The ADA allows an employer to pursue a drug- and alcohol-free workplace.*

All this said, the ADA creates several bright-line rules regarding the policies employers can implement to maintain a drug- and alcohol-free workplace. Employers may, without violating the ADA:

- prohibit the illegal use of drugs and alcohol use at the workplace by all employees;
- require employees not to be under the influence of alcohol or engaged in the illegal use of drugs at the workplace;
- require employees to follow the restrictions and requirements of the Drug-Free Workplace Act of 1988, if applicable;
- hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee;
- test current employees and applicants to detect the illegal use of drugs;
- require employees to comply with applicable Department of Transportation regulatory standards and test employees covered by the FMCSA regulations for the illegal use of drugs or on-duty alcohol impairment.

42 U.S.C. § 12114(c)-(d); 29 C.F.R. § 1630.16.

In sum, the ADA attempts to strike a balance between allowing employers to maintain drug- and alcohol-free workplaces and safeguarding the legitimate medical needs of individuals afflicted by addiction or alcoholism. In Part IV, *infra*, this paper discusses how employers can reflect that balance in their own drug- and alcohol-testing policies.

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demanding standard" and "shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA." 29 C.F.R. § 1630.2(j)(1)(i).

[10] The "regarded as" definition of disability does not require an individual to show that his disability substantially limits a major life activity. 29 C.F.R. § 1630.2(g)(1)(iii). However, employers have no obligation to accommodate disabilities that only meet the "regarded as" definition. *Id.* § 1630.2(g)(3).

### e. The Family and Medical Leave Act

The Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601, *et seq.*, entitles eligible employees to 12 weeks of unpaid leave in any 12-month period for, among other things, a serious health condition that makes the employee unable to perform the essential functions of his position. 29 U.S.C. § 2612(a)(1)(D). These leave benefits include a right to reinstatement to the same or an equivalent position upon the employee's return from medical leave. *Id.* § 2614(a)(1).

Substance abuse may qualify as a serious health condition under the FMLA, provided the abuse results in a need for inpatient care or continuing treatment by a health care provider. 29 C.F.R. §§ 825.113-.119(a). Crucially, an employee may use FMLA leave to obtain treatment for substance abuse, but cannot use FMLA leave to excuse an absence caused by the employee's use of the substance. *Id.* § 825.119(a).

Moreover, an employee's use of FMLA leave does not protect the employee from termination under an established, non-discriminatory policy defining the circumstances under which an employee may be disciplined for substance abuse. *Id.* § 825.119(b) ("[I]f the employer has an established policy, applied in a non-discriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for substance abuse, pursuant to that policy the employee may be terminated whether or not the employee is presently taking FMLA leave."); *accord Shirley*, 726 F.3d at 681-82.

In sum, the FMLA loosely tracks the structure of the ADA by providing protections for individuals who may be suffering from addiction or alcoholism while allowing employers flexibility to enforce uniform, non-discriminatory drug-free workplace policies.

## III. THE LEGAL LANDSCAPE OF DRUG TESTING UNDER TEXAS LAW

### a. In General

Similar to federal law, Texas law imposes practically no limitations on a private employer's right to adopt drug and alcohol testing policies. However, various state agencies and departments have established requirements applicable to drug and alcohol testing, regardless of whether the tests are required in the first place. Moreover, Chapter 21 of the Texas Labor Code – the state non-discrimination statute – imposes restrictions and requirements similar to the ADA.

### b. The Texas Workers' Compensation Act

The Texas Workers' Compensation Act does not require an employer to test its employees for drug or alcohol use.[11] That said, the Texas Workers' Compensation Commission ("TWCC")

[11] Until 2005, the Texas Workers' Compensation Act required any subscribing employer with 15 or more employees to promulgate and distribute a drug-free workplace policy. *See* TEX. LAB. CODE § 411.091 (repealed 2005). This requirement is no longer in effect.

has determined that an employer who terminates an employee for a positive drug test result cannot prove "misconduct" under the Act unless the employer presents:

- A policy prohibiting a positive drug test result, receipt of which has been acknowledged by the employee;
- Evidence showing that the employee has consented to drug testing under the policy;
- Documentation establishing that the chain of custody of the employee's sample was maintained;
- Documentation from a drug testing laboratory to establish that any initial test was confirmed by the Gas Chromatography/Mass Spectrometry method; and
- Documentation of the test expressed in terms of a positive result above a stated test threshold.

*See* Texas Workforce Commission Appeal No. 97-003744-10-040997.[12]

In other words, while TWCC does not mandate drug or alcohol testing, it imposes a strict evidentiary and procedural standard when an employer relies on a positive drug test to defend against an employee's claim for benefits.

**c. The Texas Transportation Code and Department of Transportation Regulations**

The Texas Transportation Code establishes the regulatory consequences for drivers who operate a CMV while under the influence of alcohol or drugs. *See, e.g.* TEX. TRANSP. CODE § 522.081 (disqualifying a person from driving a CMV for various drug- and alcohol-related offenses). However, the Transportation Code does not affirmatively require employers to conduct drug or alcohol testing. It does, however, require employers to report to the Texas Department of Transportation ("TxDOT") a subset of the information it collects pursuant to the FMCSA regulations. TEX. TRANSP. CODE § 644.252(a) (requiring employers to report employees who return a positive alcohol or drug test, refuse to provide a specimen, or adulterate or substitute a specimen); *accord* 37 TEX. ADMIN. CODE § 4.21 (establishing the deadline and method for submitting the required report).

The information reported to TxDOT is confidential, and the Department will only release it to the driver, the driver's current employer, or a person acting on behalf of the employer if the driver has given specific written consent to do so. TEX. TRANSP. CODE § 644.252(c). These confidentiality provisions do not supersede those contained in the FMCSA regulations.

[12] Compliance with the DOT regulations regarding drug tests will satisfy the final three elements. *See* Texas Workforce Commission Appeal No. 1051204; *see also* 49 C.F.R. Part 40 (establishing uniform testing procedures).

### d. Chapter 21 of the Texas Labor Code

In general, the anti-discrimination provisions of Chapter 21 of the Texas Labor Code mirror those of its federal counterparts, including the ADA. *See* TEX. LAB. CODE § 21.001(3) (noting that one of the purposes of Chapter 21 was to "provide for the execution of the policies embodied in Title I of the [ADA] and its subsequent amendments"). Thus, Chapter 21, like the ADA, prohibits discrimination on the basis of disability. *Id.* § 21.051.

At first glance, however, Chapter 21 appears to take a harder line against drug and alcohol addiction than the ADA does, since it flatly excludes from its definition of "disability" not just the discrete use of alcohol or drugs, but "***a current condition of addiction*** to the use of alcohol, a drug, an illegal substance, or a federally controlled substance . . . ." *Id.* § 21.002(6)(A). This issue has never been squarely addressed by the Texas Supreme Court, but the Houston Court of Appeals concluded in 2013 that the Texas Labor Code's framework regarding alcoholism and addiction is effectively identical to the ADA's, despite the statute's distinct language. *See Melendez v. Houston Indep. Sch. Dist.*, 418 S.W.3d 701, 707 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (citing *Zenor*, 176 F.3d at 856) ("Guided by analogous federal precedent, we construe a 'current condition of addiction' as a condition of addiction that is sufficiently recent to justify the employer's reasonable belief that the addiction remained an ongoing problem."). *But see Lottinger v. Shell Oil Co.*, 143 F. Supp. 2d 743, 756, 761-62 (S.D. Tex. 2001) (holding that alcoholism is "not cognizable" under Chapter 21's definition of disability, but is assessed on a case-by-case basis under the ADA).

This potential disparity aside, Chapter 21 mimics the ADA by specifically allowing employers to adopt policies and procedures designed to foster a drug- and alcohol-free workplace, so long as those policies and procedures are non-discriminatory:

> (a) An employer does not commit an unlawful employment practice by adopting a policy prohibiting the employment of an individual who currently uses or possesses a controlled substance as defined in Schedules I and II of Section 202, Controlled Substances Act, and their subsequent amendments (21 U.S.C. § 801 *et seq.*), other than the use or possession of a drug taken under the supervision of a licensed health care professional or any other use or possession authorized by the Controlled Substances Act or any other federal or state law.
>
> (b) Subsection (a) does not apply to a policy adopted or applied with the intent to discriminate because of race, color, sex, national origin, religion, age, or disability.

TEX. LAB. CODE § 21.120.

Chapter 21 neither mandates nor prohibits workplace drug and alcohol testing. *See generally* TEX. LAB. CODE ch. 21.

## IV. IMPLEMENTING AND ENFORCING A GENERAL DRUG TESTING POLICY

As noted above, there are almost no limits whatsoever on a private employer's right to adopt a non-discriminatory drug and alcohol testing policy. Moreover, aside from the laws applicable to commercial truck drivers and federal contractors, there are basically no laws mandating workplace drug or alcohol testing, either. Consequently, an employer considering a drug and alcohol testing policy should carefully consider the necessity of such a policy, the nature of the employer's business, the culture of its workforce, and a host of other factors.

### a. Basic Legal and Logistical Considerations

Every drug and alcohol testing policy should have at least five basic elements: 1) a description of the category of employees to whom the policy applies; 2) a clear definition of what constitutes a violation; 3) an explanation of how the testing will be conducted; 4) a discussion of the disciplinary measures that will result from violations of the policy; and 5) a method of confirming an employee's receipt and acknowledgment of the policy.[13] A few notes on each of these elements:[14]

With respect to the categories of employees to whom the policy will apply, the employer should be mindful of its obligation to enforce all of its policies in a non-discriminatory manner. Even laws not typically implicated in the drug and alcohol context, like Title VII of the Civil Rights Act of 1964, may come into play if a testing policy is disproportionately enforced against racial and ethnic minorities, females, or older employees.

With respect to policy violations, employers should consider whether they wish to impose a "zero tolerance" policy (*i.e.*, disciplinary consequences for <u>any</u> detectable level of a drug or alcohol, even if the employee is not visibly impaired), or whether they prefer a policy based on actual impairment. The choice will likely depend on the nature of the employee's work and the employer's risk tolerance, but it is an important aspect to consider. Moreover, employers should avoid ambiguous language and set clear, objective criteria to the extent possible. While some standards (*e.g.*, "reasonable suspicion") are subject to some interpretation, others (*e.g.*, blood-alcohol content) are not. It is always good policy to set out clear, concise expectations for employees.

With respect to the administration of drug and alcohol testing, the FMSCA regulations provide a good example of the specificity employers should consider. Will the employer

[13] Moreover, aside from the five necessary policy elements, an employer may want to consider policy provisions unique to its management philosophy – for instance, an option for employees to be rehired if they demonstrate completion of a drug or alcohol rehabilitation program.

[14] With respect to workforces covered by the DFWA and FMCSA regulations, the baseline requirements for some of these elements are non-negotiable. But an employer is always free to adopt more stringent standards, or to expand the statutorily required testing standards to other individuals in its workforce, provided it does so in a non-discriminatory manner. *See, e.g.*, 49 C.F.R. § 382.111 ("Except as expressly provided in this part, nothing in this part shall be construed to affect the authority of employers . . . with respect to the use of alcohol, or the use of controlled substances, including authority and rights with respect to testing and rehabilitation.").

implement random testing? If so, what percentage of the workforce? How frequently? Will the employer require testing after workplace accidents? If so, under what circumstances? If the employer wishes to implement reasonable suspicion testing, who will make the determination as to whether reasonable suspicion exists? Employers should provide clear answers to these questions to avoid accusations that the policy has been implemented unfairly or without appropriate notice.

With respect to discipline and the consequences of a policy violation, employers should establish firm, objective guidelines and apply them uniformly, since inconsistent discipline is one of the most common factors contributing to employer liability.

Finally, an employer should develop a procedure for providing a copy of this policy to employees and obtaining a signed, written acknowledgment that the employee has received the policy and understands its contents. Not only is this crucial for various administrative and legal purposes (*e.g.*, the Texas Workers' Compensation Act issues addressed in Part II.b, above), it also ensures that the policy has been shared with every employee and allows the employer to quickly direct employees to the applicable standards.

### b. Special Issue: Prescription Drugs

As explained above, the general rule under both the ADA and Chapter 21 is that an employer may not consider an individual's disability in making employment decisions unless the disability prevents the employee from performing the essential functions of his position. *See* Parts II.d & III.d, *supra*. The ADA also prohibits employers from making "disability-related inquiries" of applicants and employees, unless the inquiry is job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4)(A).

Pursuant to these prohibitions, the Equal Employment Opportunity Commission ("EEOC") has taken the position that it is illegal for an employer to routinely ask employees about their prescription medication regimen, absent some indicia that the inquiry is job-related and consistent with business necessity. *See, e.g.*, ENFORCEMENT GUIDANCE: DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE ADA, NO. 915.002 (July 27, 2000).

At least two circuit courts have echoed the EEOC's position. *See Williams v. FedEx Corp. Services*, 849 F.3d 889, 901 (10th Cir. 2017) ("[W]e have recognized that requiring disclosure of prescription drugs may violate [the ADA]"); *Lee v. City of Columbus, Ohio*, 636 F.3d 245, 254 (6th Cir. 2011) ("Obviously, asking an employee whether he is taking prescription drugs or medication . . . trigger[s] the ADA's (and hence the Rehabilitation Act's) protections"). The Fifth Circuit has not definitely addressed the issue, but Texas employers should be wary of implementing a blanket policy requiring disclosure of any employee's prescription medications.

But while it is clear that an employee's misuse of prescription drugs falls outside the ADA's protections (*see* Part II.d, *supra*), there is no bright line rule governing the space between testing an employee who is obviously impaired at work (permissible) and routinely seeking information regarding all employees' prescription drug use (not permissible). Recently, employers

have attempted to toe the line by requiring employees to affirmatively disclose prescription medications with the potential to interfere with the essential functions of their jobs. But the EEOC has intervened in these cases, as well.

Recently, for instance, the EEOC filed suit in the Northern District of Texas against an employer that (according to the complaint) required every employee "to report the name and dosage of all prescription and non-prescription medications 'which could affect an employee's job performance' to their supervisor." *EEOC v. Oncor Elec. Delivery Co.*, No. 3:18-cv-01786-C, *4 (N.D. Tex. July 11, 2018). In a pre-trial subpoena filing, the EEOC articulated its position that "employers are prohibited from making . . . medical inquiries [into an employee's prescription drug regimen], ***unless and until the employee manifests a behavior or a symptom*** that puts the employer on notice that such a personal, medical inquiry is justifiable as a business necessity." *EEOC v. Oncor Elec. Delivery Co*., No. 3:17-MC-69-K-BN, 2017 WL 5500933, at *3 (N.D. Tex. Nov. 16, 2017) (emphasis added). Clearly, the adoption of any policy requiring employees to voluntarily disclose the names and side effects of their prescription medications risks drawing the EEOC's ire. Consequently, employers should tread lightly in this area.

### c. Special Issue: The Sticky Problem of Legalized Recreational Marijuana

In 2015, Texas passed the Compassionate Use Act, allowing physicians registered with the Department of Public Safety to prescribe "low-THC cannabis" to patients with "intractable epilepsy." TEX. HEALTH & SAFETY CODE § 487.001, *et seq.*; TEX. OCC. CODE §§ 169.002-.005. But the Act contains no specific guidance on drug testing in the workplace, and there are no published cases or industry reports discussing its impact on Texas employers. Indeed, the Act is so recent that no notable litigation has yet made it into the case reporters or published administrative guidance.

But even employers who have not yet dealt with issues arising under Texas law are already dealing with the robust medical and recreational marijuana laws cropping up in other states.[15] For example, Texas employers with operations in states with legalized marijuana may be feeling pressure to drop zero-tolerance policies, or they may even be having trouble enforcing such policies depending on the state's employment protections for marijuana users.

Employers contemplating changes to their drug use policy should first understand the legal restrictions and obligations of the jurisdictions in which they operate. Obviously, employers bound by federal regulations have no choice: they must enforce the conditions of their federal grants and contracts, regardless of marijuana's status under state law. *See* Part II, *supra*. But other employers should be wary of the various employment protections established by state law. Maine, for instance, prohibits employers from refusing to employ or otherwise penalizing an employee "solely for that person's consuming marijuana outside [the workplace]." 7 MRSA 417 § 2454(3). Colorado, on the other hand, does not. *See Coats v. Dish Network, LLC*, 2015 CO 44, ¶ 20, 350

[15] In October 2017, a Gallup poll reflected 64 percent approval for legalized recreational marijuana. Justin McCarthy, *Record-High Support for Legalizing Marijuana Use in U.S*. (October 26, 2017), *available at* https://news.gallup.com/poll/221018/record-high-support-legalizing-marijuana.aspx.

P.3d 849, 853 (Colo. 2015) (rejecting a medical marijuana user's wrongful termination claim because his off-duty use was still illegal under federal law). Thus, in some instances, an employer may effectively be prohibited from enforcing a uniform policy in every state in which it operates.

For Texas employers who are not bound by federal regulations and do not operate in other states, the marijuana issue may still pose problems of a more social nature. While it remains legally acceptable in Texas to enforce a no-tolerance policy in the workplace (subject to the ADA and Chapter 21 restrictions explored above), employers are increasingly likely to encounter situations in which an employee ingests marijuana legally while on vacation, then tests positive (even with no signs of impairment) days or even weeks later. From a legal perspective, there is no "right" approach to this scenario. Instead, an employer must evaluate its business's needs, its workplace culture, and whatever other intangible factors bear on the disciplinary decision.

Regardless of what policy an employer chooses, it should still 1) identify the employees to whom the policy applies; 2) define what constitutes a violation; 3) explain how violations will be detected; 4) articulate the disciplinary consequences, and 5) obtain employees' written acknowledgment of the policy. A clear, uniform policy will go a long way towards insulating an employer from the uncertain landscape of legalized marijuana.

## V. CONCLUSION

To put it bluntly, employment law is often a jumbled web of ambiguous statutes, confusing regulations, and conflicting court and administrative decisions. But even this uncharitable characterization becomes an understatement when federal and state criminal laws are thrown into the mix. Plainly, employers looking to create an appropriate drug and alcohol testing policy have many choices to make. As this paper demonstrates, however, employers have flexibility to craft a testing policy that comports with their business needs and management priorities, while also conforming to the law.