

WITH GROWTH COMES ADDITIONAL RISK



The Changing Landscape of Drug & Alcohol Testing Facilities

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It's Monday morning and your phone rings. It is a new request for drug screening services at your facility. Your immediate thought is that it is employment related—maybe a precursor to someone obtaining a job, a random drug screening, or potentially a post-accident screening for individuals in the transportation industry. These are common reasons for drug and alcohol testing services to be requested, and they pose familiar liability concerns. However, there are also many areas where drug testing is becoming more commonly used, and, while these areas present new growth opportunities, they also present new liability concerns.

Traditional liability concerns that may lead to malpractice claims for drug and alcohol testing facilities include failure to maintain chain of custody, false positives, vicarious liability for a Medical Review Officer, sexual misconduct, and products liability, to name a few. Emerging areas of concern include family testing, testing in substance abuse programs, medical marijuana, pharmacogenetics, and drug testing prior to surgeries. This article provides examples of both traditional and emerging liability concerns that can lead to lawsuits, and also identifies other factors to consider that can impact the outcome of lawsuits.

Traditional Liability Concerns

Example #1: Chain of Custody

Chain of custody issues arise out of allegations of samples that are improperly handled, or when samples are mixed up. For example, let's say ABC Company sends Sam and Doug to be drug tested. Sam has not been using drugs, but Doug often comes to work while under the influence of drugs. Sam's and Doug's specimens are mixed up because they came to complete their drug tests at the same time. Due to the mix-up, Sam, who was not using drugs, is terminated by ABC Company. Doug remains employed, continues to work, and is involved in an accident at work injuring another employee. Sam files a lawsuit against his employer for wrongful termination and against the laboratory for improperly administering the drug test that resulted in his termination. While investigating Doug's workplace accident, ABC Company finds that he was under the influence of drugs and that the test results the laboratory provided were incorrect. Had ABC Company received the correct results, it would have terminated Doug and avoided the workplace accident entirely. ABC Company also files suit against the laboratory.

Example #2: False Positive

XYZ Company employs Dan, who drives the same route every day. Dan is involved in an accident and the post-accident drug test comes back positive for amphetamines. XYZ Company terminates Dan on the basis of the positive test. Dan explains that he was not on amphetamines, but that he does take a doctor-prescribed medication known to produce a false positive for the presence of amphetamines. Dan files suit against his employer and against the laboratory for the inaccurate test results that lead to his termination.

Example #3: Vicarious Liability for a Medical Review Officer

John Doe's Drug Testing, Inc., is a small drug and alcohol testing company. All of its testing services are handled by employees, but it uses an independently contracted Medical Review Officer (MRO) as needed. John Doe's Drug Testing, Inc., performs a drug test for Jane Smith, and the results are reviewed by the contracted MRO. Jane does not dispute the positive test result for drugs, but she states that the positive test result arises out of prescribed medications. The MRO disagrees and Jane is terminated by her employer. Jane files suit against the contracted MRO and John Doe's Drug Testing, Inc., alleging that John Doe's Drug Testing, Inc., is vicariously liable for the incorrect actions of the MRO.

Example #4: Sexual Misconduct

Sharon works for ABC Company. ABC Company requires random drug testing of all employees. A male employee of the laboratory administers the drug test to Sharon. The drug test is negative and Sharon returns to work with no apparent issues or concerns stated. A month later the laboratory receives a lawsuit alleging sexual misconduct by the laboratory employee administering the drug test to Sharon.

Example #5: Products Liability

Nancy's Drug Testing, LLC, buys all of their phlebotomy equipment from ABC

Manufacturing. ABC Manufacturing makes new equipment, but also sterilizes equipment that can then be reused. On December 1, Nancy's Drug Testing, LLC, receives an order for testing and proceeds to use the new equipment for ten patients who require phlebotomy services in the month of December. On January 15, Nancy's Drug Testing, LLC, is notified by ABC Manufacturing that it is recalling the phlebotomy equipment sent to Nancy's Drug Testing, LLC, because needles in that batch were potentially contaminated due to improper sterilization. Three out of the ten patients become sick and sue Nancy's Drug Testing, LLC, and ABC Manufacturing.

Emerging Areas of Concern

Example #1: Family Testing

Jessica and Billy are divorced and share custody of their fifteen-year-old son, Jason. Jessica alleges that Billy is aware that Jason is using illegal substances when he stays with Billy and that Billy has taken no steps to prevent Jason from using drugs. Billy claims Jason is drug-free. Kay's Drug Testing Company administers a court-ordered drug test to Jason; it comes back positive for drugs. Jessica wins full custody of Jason based on the positive drug test results. Billy files suit, alleging the drug test results are incorrect, and sues for infliction of emotional distress, trauma for the loss of custody of his son, and attorney's fees.

Example #2: Testing within Substance Abuse Programs

Susie has battled addiction for years and is currently enrolled in an outpatient methadone program that requires her to be regularly tested for other narcotics. Susie's drug test comes back clean and she ingests the methadone prescribed for her. Susie is found dead the next day from an overdose of narcotics, including methadone and other illegal narcotics. Her family sues the methadone clinic, the prescribing physician,

and the laboratory that administered the drug test for the outpatient program.

Example #3: Medical Marijuana

Chip lives in a state that recently legalized medical marijuana and he has obtained a marijuana prescription from his physician. The courts in Chip's state have not decided the legality of terminating employees who are using prescribed medical marijuana. Chip is involved in a workplace accident and is tested by Scott's Drug Testing Company, LLC. Chip admits to using medical marijuana, but claims he was not under the influence of marijuana at the time the accident occurred. The post-accident drug test indicates that Chip recently used marijuana. Chip is fired by his employer, a national company with a zero-tolerance drug policy. His employer argues it has a right to terminate Chip's employment because

marijuana is illegal under federal law. Chip sues his employer and Scott's Drug Testing Company, LLC, claiming that medical marijuana is legal in the state where he resides and that the test results were incorrect.

Example #4: Pharmacogenetics

Ten-year-old Clint has been diagnosed with cancer. Due to the type of cancer, his oncologist recommends that his family consider pharmacogenetics testing to see which cancer drugs will be most effective in treating his cancer. Brenda's Medical Laboratory, Inc., administers the test and mixes Clint's results up with those of another patient. Clint's oncologist uses the incorrect results to structure a treatment regimen that should shrink his cancer enough to allow for surgical removal. Three weeks into the treatment, Clint's oncologist

notes that the tumor is not shrinking as expected. The oncologist orders another test and receives the correct results which indicate the current treatment plan is entirely wrong for Clint. The treatment is stopped and the correct treatment is started weeks later, but the cancer has spread and additional rounds of treatment are required before surgery is an option. Clint's family sues Brenda's Medical Laboratory, Inc., for the unnecessary treatments and the pain and suffering that they and Clint endured as a result of the incorrect test results.

Example #5: Drug Testing Prior to Surgeries

Lisa is scheduled to have surgery on Tuesday. Her surgeon has obtained a full medical history, but she is concerned that Lisa may not have disclosed substance

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If the employer has immunity from a lawsuit, that can make the drug and alcohol testing laboratory the only entity left to sue, which may increase the likelihood of a suit and the amount of damages against the laboratory.

abuse issues that could negatively impact the outcome of her surgery and her ability to recover from the surgery. The surgeon orders a drug test from Drug & Alcohol Testing, Inc., to confirm that she has no illegal drugs in her system. The drug test comes back clean and the surgery proceeds as planned. During the surgery, Lisa has a reaction to the anesthesia, slips into a coma, and dies. The autopsy reveals that she had illegal drugs in her system and that the drug test was incorrect. Lisa's family sues Drug & Alcohol Testing, Inc., for wrongful death including loss of consortium, lost wages and punitive damages.

The examples above are meant to provide an idea of the type of lawsuits and liability concerns that drug and alcohol testing laboratories face. The frequency (number of claims) and severity (amount of damages paid out in the claims) of claims against drug and alcohol testing laboratories will be impacted by the regions and states in which they operate, the customers they provide services to, and other factors that are unique to their business and operations. Additional factors to consider include possible immunities available to the laboratories' clients and the limits of liability that the other defendants named in the lawsuit maintain.

Other Factors to Consider Immunity

Governmental employers, including federal, state and city employers, may have immunity from lawsuits depending on the nature of the lawsuits. If the employer has immunity from a lawsuit, that can make the drug and alcohol testing laboratory the only entity left to sue, which may increase the likelihood of a suit and the amount of damages against the laboratory.

Limits of Liability

Many laboratories contract out MRO services and testing services to other

laboratories. This can lower the liability that a drug and alcohol testing laboratory faces if they are not conducting the actual tests or providing MRO services. But what happens when the MRO has lower limits or no malpractice insurance? Or the laboratory to which services are contracted out accidentally lets their malpractice insurance lapse? These situations can lead to your business being the only available avenue to pursue for damages.

Operating a drug and alcohol testing laboratory requires owners to take on many roles, from human resources to specimen collector, bookkeeper to risk manager. Being aware of the risks your business faces and possible allegations and lawsuits that can arise in the normal course of business will better prepare you to mitigate possible risks, whether they arise from traditional liability concerns, emerging areas, or other factors that impact your business. ■

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