What’s Legal?:
Drug Testing Employees and Students

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Today’s Topics

1. Update regarding drug laws in Washington State
2. What do drug tests tell us?
3. When should we require a drug test?
4. If the results are positive, what can we do?
5. Takeaway points

Drug Laws in Washington State
A changing landscape
<table>
<thead>
<tr>
<th>Marijuana Legalization</th>
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<tbody>
<tr>
<td>Recreational and medical marijuana is now regulated and taxed by the state</td>
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<td>Medical marijuana system is evolving, becoming more regulated (see SSSB 5052)</td>
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<td>Attitudes about marijuana consumption by adults are changing both in Washington and nationwide</td>
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<th>Washington State Medical Use of Marijuana Act</th>
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<td>&quot;Nothing in this chapter requires any accommodation of any on-site medical use of cannabis in any place of employment, in any school bus or on school grounds . . . .&quot; RCW 69.51A.060(4)</td>
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<tr>
<td>&quot;Employers may establish drug-free work policies. Nothing in this chapter requires an accommodation for the medical use of cannabis if an employer has a drug-free work place.&quot; RCW 69.51A.060(6).</td>
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<td>Changes beginning on July 1, 2016 (SSSB 5052):</td>
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<td>Health care professionals may authorize the medical use of marijuana for qualifying patients under the age of 18 with terminal or debilitating conditions.</td>
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<tr>
<td>&quot;Nothing in this chapter requires any accommodation of any on-site medical use of marijuana in any place of employment, in any school bus or on school grounds . . . However, a school may permit a minor who meets the requirements of section 20 of this act to consume marijuana on school grounds. Such use must be in accordance with school policy relating to medication use on school grounds.&quot; RCW 69.51A.060(4).</td>
</tr>
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Drug-free Workplace Act
41 U.S.C. § 8103

- Recipients of federal grants must prohibit employees from “the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance” in the workplace.
- Marijuana remains a Schedule 1 controlled substance under federal law.
- This statute conflicts with facilitating consumption of marijuana on school grounds, which will be allowed under state law.

Americans with Disabilities Act
42 U.S.C. § 12114

- Does not require employers to accommodate the use of illegal drugs listed in the Controlled Substances Act. 42 U.S.C. § 12114(a); 29 C.F.R. § 1630.3(a).
- Employee currently using an illegal controlled substance is excluded from definition of a “qualified individual with a disability” 29 C.F.R. § 1630.3(a).
- Does not prohibit employers from adopting policies and procedures related to drug testing. 42 U.S.C. § 12114(c); 29 C.F.R. § 1630.3(c).

Drug Tests
What do they tell us?
Urine Test

- Does not necessarily show current impairment/under-the-influence; only indicates recent consumption
- For many drugs, a urine test may be used to determine use in the last few days
- In the case of marijuana, tests may reveal the presence of THC metabolites for a month or more after use
- Not used to determine impairment/under-the-influence for drivers in Washington

Urine Test: Detection Time for Various Drugs

<table>
<thead>
<tr>
<th>Drug</th>
<th>Detection Time (approx.)</th>
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<tbody>
<tr>
<td>Marijuana</td>
<td>2-7 days (single use), 30 days or more (chronic use)</td>
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<tr>
<td>Cocaine</td>
<td>2-4 days</td>
</tr>
<tr>
<td>Methamphetamine</td>
<td>1-2 days</td>
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<tr>
<td>Amphetamine (speed)</td>
<td>1-2 days</td>
</tr>
<tr>
<td>MDMA (ecstasy)</td>
<td>1-2 days</td>
</tr>
<tr>
<td>Phencyclidine (PCP)</td>
<td>14 days</td>
</tr>
<tr>
<td>Heroin, Morphine, Codeine</td>
<td>2 days</td>
</tr>
<tr>
<td>Barbiturates</td>
<td>2 days (short acting), 1-3 weeks (long acting)</td>
</tr>
<tr>
<td>Phenylpropionazepines (Valium, Xanax)</td>
<td>3 days (one dose), 4-6 weeks (extended dosage)</td>
</tr>
<tr>
<td>Alcohol</td>
<td>1-12 hours</td>
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</tbody>
</table>

Urine Test: Commercial Driver’s License

- Tests for the following substances:
  - Marijuana Metabolite
  - Cocaine Metabolite
  - Opiates
    - Codeine
    - Morphine
    - 6-AM (heroin)
  - Phencyclidine (PCP)
  - Amphetamines
    - Amphetamines (speed)
    - Methamphetamine
    - MDMA (ecstasy)
    - MDA (similar to ecstasy)
    - MDEA (similar to ecstasy)
Marijuana:
Blood Test

- Tests for active THC in blood
- Questions over how well shows impairment, however is a much better measure than a urine test
- 5 ng/mL standard for drivers in Washington
- Arguably a more invasive test than urinalysis

Breathalyzer:
Testing for Alcohol

- Much better understanding of what levels indicate impairment
- Alcohol is eliminated from body quicker than most other drugs
- Breathalyzer is a much less invasive test
- Impairment levels and proximity to consumption is well-established and tested in the courts
Drug testing constitutes a search under both state and federal law.

Fourth Amendment of U.S. Constitution

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

Fourth Amendment: Balancing Test

- Government’s interests (e.g., law enforcement; employment-related; school/student-related) versus the individual’s interests (privacy, bodily integrity)
- The relative strength of the government’s legitimate interest/need versus the relative intrusiveness of the search. 
## Article 1, Section 7 of the WA Constitution

- A search without a warrant is unconstitutional unless it fits within one of the “jealously and carefully drawn exceptions” to the warrant requirement. *York v. Wahkiakum Sch. Dist.*, 163 Wn.2d 297, 316 (Wash. 2008).
- Those exceptions are found in the common law. They include exigent circumstances, consent, searches incident to a valid arrest, items that are in plain view, Terry investigative stops, administrative searches, border patrols, and prisoners and probationers. *Id.* at 315–16.

## Suspicionless Testing Generally Prohibited

- However, the court allowed preemployment drug testing for “applicants who will carry firearms or whose duties may otherwise jeopardize public safety.” *Id.* at 827.
- Examples: police officers and firefighters

## Suspicionless Testing: Safety-Sensitive Positions

- Employees performing “safety-sensitive” functions—may be subject to suspicionless testing.
  - CDL holders must be subjected to suspicionless pre-employment, random, post-accident and return to duty testing (as well as reasonable suspicion testing).
  - Other government employees in certain safety-sensitive positions, including: railroad workers, customs/drug interdiction employees, law enforcement/weapon-toting employees—also subject to suspicionless testing (presumably including pre-employment and random testing).
Reasonable Suspicion Testing: Employees

- Courts have found that suspicion-based testing is an appropriate means to insure the safety and welfare of students.
- A search will be justified when there are reasonable grounds for suspecting that the search will uncover evidence that the employee is guilty of work-related misconduct.

Student Drug Testing

- Individualized, reasonable suspicion that the search will turn up evidence the student has violated or is violating school rules or the law is generally required, at a minimum, under the Fourth Amendment. New Jersey v. T.L.O., 469 U.S. 325, 341–42 (1985); see also RCW 28A.600.230.
- Random, suspicionless drug testing has been permitted under the Fourth Amendment as a condition of participation in sports or other extra-curricular activities. Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995); Board of Educ. of J.S.D. No. 92 of Pattawatomie Cnty. v. Earls, 536 U.S. 822 (2002).
- However, the Washington Constitution does not allow suspicionless drug testing of students participating in sports. York v. Wakiakum Sch. Dist., 163 Wn.2d 297, 314–16 (Wash. 2008).

Should a test be administered?

Thinking critically about the circumstances
Developing Reasonable, Individualized Suspicion

- Training
  - Required by federal law for CDL supervisors on effects of both alcohol and drugs
  - Recommended for other supervisors (at least HR)
- Individualized suspicion should be based on specific, contemporaneous, articulable observations of conduct, behavior, appearance, or odors
- Second, corroborating observation of the person could be valuable in supporting reasonable suspicion

Developing Reasonable, Individualized Suspicion

- Signs to look for
  - Slurred speech
  - Erratic behavior
  - Sudden mood swings
  - Body and other odors
  - Bloodshot eyes
  - Paranoia
  - Dilated pupils
- Rely on objective measures and observations
- Focus on performance issues
- Remember to document observations

How Will the Test Results be Used?

- What do we hope to establish by testing?
  - For employees: will the test uncover evidence of work-related misconduct?
    - What do the district’s policies prohibit?
  - For students: will the test uncover evidence of a violation of school rules?
What Kind of Test: Breath, Urine, or Blood?

- Breath tests are the least invasive, but limited
- Urine tests may only indicate recent use
- Blood tests are much more invasive than urine tests
  - Because of invasive nature, more likely to be considered unconstitutional without a warrant under both state and federal law

Positive Test: Now What?

Employee Discipline: Just or Sufficient Cause

- "Just cause" is required for discipline of most unionized employees under their CBAs, both classified and certificated. Requires, in part, the showing of a violation of a reasonable work-related rule or expectation.
- Statutory "sufficient cause" is required for termination of certificated employees. RCW 28A.405.300; RCW 28A.405.310.
- "Nexus" is required under either standard between the conduct in question and the employer's reasonable interests/expectations.
### Nexus: Off Duty Drug Use

- Employees may be disciplined “for off-duty conduct if there is a nexus between the conduct and the employer’s legitimate business interests.” Elkouri & Elkouri, How Arbitration Works 15-11 (Kenneth May ed., 7th ed. 2012).
- Even if off the job misconduct involves the possession or use of drugs, the effect on the employer’s business must be established. Elkouri, supra, at 15-12; Wheatland Tube Co., 119 LA 897, 900-01 (Franckiewicz, 2004).

### Nexus: Certificated Staff

- Hoagland decision’s requirement that to establish sufficient cause, the teacher’s conduct must be shown to materially and substantially affect the teacher’s performance or effectiveness. Hoagland v. Mount Vernon Sch. Dist., No. 320, 95 Wn.2d 424, 428–31 (1981).
- Hoagland factors to determine if conduct affects teaching performance:
  - The age and maturity of the students
  - The likelihood the teacher’s conduct will have adversely affected students or other teachers
  - The degree of anticipated adversity
  - The proximity or remoteness in time of the conduct
  - The extenuating or aggravating circumstances surrounding the conduct
  - The likelihood that the conduct may be repeated
  - Whether the discipline will have a chilling effect on the rights of teachers

### Disciplinary Action for Employee Drug Use

- Arbitration just cause requirements
  - The rule must be reasonably related to the orderly, efficient, and safe operation of the district.
  - There must be substantial evidence or proof that the employee violated the rule.
  - The degree of discipline must be reasonably related to the seriousness of the proven offense and the employee’s record of service.
- Last chance agreement: evaluation and treatment
In context of “unprofessional conduct” that may be used to disqualify a teacher from his or her certificate, unprofessional conduct includes:

1. Being under the influence of alcohol, marijuana, or a controlled substance, as defined in chapter 69.50 RCW, on school premises or at a school-sponsored activity involving students, following:
   a. Notification to the education practitioner by his or her employer of concern regarding alcohol or substance abuse affecting job performance;
   b. A recommendation by the employer that the education practitioner seek counseling or other appropriate and available assistance; and
   c. The education practitioner has had a reasonable opportunity to obtain such assistance.

2. The possession, use, or consumption on school premises or at a school sponsored activity of a Schedule 1 controlled substance, as defined by the state board of pharmacy, or a Schedule 2 controlled substance, as defined by the state board of pharmacy, without a prescription authorizing such use . . . .

CDL Holders:
Mandatory Actions for Positive Drug Test

- Employee must be immediately removed from performing safety-sensitive functions upon receipt of initial report.
  - Do not wait for written report or verifying split specimen test.
- Must also immediately remove if receive initial report that sample was adulterated or substituted, or if test is refused.
- Same standard applies for alcohol result of 0.04 or higher.
- Employee may not be returned to safety-sensitive position until employee completes return-to-duty evaluation, referral, and treatment process.

Unprofessional Conduct
WAC 181-87-055

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2. The possession, use, or consumption on school premises or at a school sponsored activity of a Schedule 1 controlled substance, as defined by the state board of pharmacy, or a Schedule 2 controlled substance, as defined by the state board of pharmacy, without a prescription authorizing such use . . . .

3. The possession or marijuana or marijuana-infused product on school premises or at a school sponsored activity involving students if such possession violates Washington law or is contrary to written policy of the school district or school building.

4. The use or consumption of marijuana or marijuana-infused product on school premises or at a school sponsored activity.
CDL Holders: Discipline and Discharge

- Must still establish nexus for discipline or discharge
  - Drivers occupy safety-sensitive positions
  - District is immediately impacted because of the driver’s inability to perform functions of job
  - Federal regulations essentially prohibit off-duty use

Disciplinary Action for Student Drug Use

- Follow student discipline rules
  - Neither short nor long term suspension may be imposed for first offense unless for exceptional misconduct as stated in district rules
  - Emergency expulsion may only be imposed if the student poses an immediate and continuing danger to other students/staff or substantial disruption of the educational process
  - Expulsion may not be imposed for first offense unless there is a good reason to believe that other options may fail
  - Extracurricular activities may implement policy denying participation for a positive test
  - Consider alternatives to exclusion

Takeaway Points: Employees

- Clarify policy if necessary
- Prohibition on use away from work may not be upheld outside of CDL setting
- Obtain training for supervisors
- Use drug and alcohol testing to address reasonable suspicion of impairment at work
- Do not unduly focus on the results of urinalysis
Takeaway Points: Students

- No random, suspicionless testing
- Only test if have developed reasonable, individualized suspicion
- Consider whether testing will lead to evidence that the student violated a school rule
- Prohibition on use away from school: possibly tie to participation in extracurricular activities

What’s Legal?: Drug Testing Employees and Students