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Update 108

Fall 2023

What's All the Buzz About Oral Fluids Testing?

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Concerns about drug-impaired workers have certainly evolved over the last few years, with New Jersey adopting employment protections for workers who engage in off-work marijuana use, and overdose deaths claiming more than 109,000 American lives in 2022. Opioids such as fentanyl have accounted for many of those deaths.

The federal government continues to debate how marijuana should be treated, and has considered, but not acted on, legislation that would legalize some marijuana uses or limit pre-hire marijuana testing for federal employees. Ultimately, the use and possession of marijuana and marijuana products remains unlawful and federal workers and workers subject to federal regulation, such as drivers who must obtain medical certification to operate commercial motor vehicles put their careers at risk when they use marijuana.

Earlier this year, the U.S. Department of Transportation (DOT) announced that the use of oral fluid tests would soon be not only permitted, but in some cases required for federally mandated testing. The move follows federal government's adoption of oral fluids testing for federal workers in January 2020. But the use of oral fluids for testing is gaining popularity in the private sector as well and may soon become the dominant drug test specimen in jurisdictions such as California.

If you are an employer with a drug-free workplace program that includes a drug testing component, you may have had a urine drug testing program in place for decades. Those tests have worked well and continue to serve as a reliable means for determining which workers have recently engaged in the use of drugs. As our drug testing goals have changed, however, oral fluid drug tests are beginning to look more attractive. Why all the buzz about this form of testing?

To begin with, oral fluids are easy to collect. The process requires a few steps to ensure that a tested individual has not concealed anything in the mouth or throat that might interfere with the test and to make sure that the individual does not tamper with the test specimen by diluting, adulterating, or substituting the specimen. Every oral fluid collection is an observed collection. Contrast urine tests, which either cannot be directly observed or may be observed only in the presence of a same-gender collector, depending on jurisdiction.

Oral fluid test collections are also speedy. There is no reason to wait several hours for an individual to be able to soak a swab sufficiently for a test. Although some individuals may have medical conditions preventing them from completing the test collection, this is quite uncommon. In the DOT oral fluids testing scheme, the oral fluids sample is forwarded to a certified laboratory for initial and, if necessary, confirmatory testing.

Oral fluid tests are accurate, according to the U.S. Department of Health and Human Services, which considered oral fluid as a specimen in 2004, concluding in 2019, the “use of oral fluid as an alternative specimen for drug testing has now been broadly established and the advances in the use of oral fluid in detecting drugs have made it possible for this alternative specimen to be used in federal programs with the same level of confidence that has been applied to the use of urine.”¹

Oral fluid tests can detect the five major categories of commonly abused drugs for which federally regulated employers must test – amphetamines, cocaine, marijuana, opiates/opioids, and phencyclidine (PCP). Some tests are available only for some of those drugs, and others may test for a broader range of drugs, to include barbiturates or even benzodiazepines. As with urine tests, however, the drugs for which a particular vendor may test its oral fluids samples do vary.

As far as the DOT is concerned, employers will be able to choose whether to administer urine drug tests or oral fluids drug tests. This change to the regulations should provide welcome flexibility for both employers and employees. For example, if an employee cannot produce a sufficient urine specimen and a recollection is needed, an oral fluid test can be administered more expeditiously than a second urine collection, which may take up to three hours to complete under existing regulation. Obtaining an alternative specimen may also obviate the need for an employee who fails to produce a specimen in a timely manner to obtain a medical evaluation or be deemed to have refused the test. Third-party administrators and collector representatives are urging employers to work with

¹ Federal Register, Vol. 84, No. 207, Friday, October 25, 2019.

their drug testing vendors to ensure that their preferred approaches are communicated to their account managers.

Oral fluids tests will be *mandatory* for DOT tests, however, whenever an observed collection is required and the individual being tested is transgender. This step eliminates the need to provide a same-gender observer to monitor the production of a urine specimen, and the concomitant potential for disagreement regarding who qualifies as a same-gender observer. The regulations became law in June 2023, and all that is needed for oral fluid testing to “go live” is government approval of at least two laboratories to perform the tests (one to test the sample, another available in the event the individual seeks a re-test at an independent laboratory, which federal regulations permit). Industry representatives anticipate approvals will occur early in 2024.

Do oral fluids tests have downsides? Maybe. Typically, the drug detection window for an oral fluid test is quite short – different manufacturers’ estimates vary, but “less than” 24 hours seems to be the most common response. In contrast to urine drug tests, which can detect most drugs for up to 72 hours after last use, the oral fluids test has a very short detection window. This is a concern for many employers, particularly in jurisdictions where marijuana is not authorized for lawful use and where the employer is anxious about hiring marijuana users into safety-sensitive roles.

On the other hand, this short detection window may be just what employers in jurisdictions that have legalized marijuana for adult use need. A test that can show only very recent use is helpful to an employer that is primarily concerned about marijuana use that could cause impairment at work. And, to the extent that an oral fluid test measures *active* forms of tetrahydrocannabinol (the psychoactive compounds found in marijuana) in the individual’s sample, the test may be very useful in helping confirm not only that an individual is a very recent marijuana user but also that the intoxicant is present and active in their system at the time of the test.

California recently enacted a statute that will prohibit employers from taking adverse employment action against an individual solely because that individual uses marijuana (including marijuana products) away from work, or based on a positive marijuana drug test that reveals only that non-psychoactive THC compounds are present in the sample. The goal, according to the California legislature, is for employer-administered tests to measure the likelihood of current impairment. In other words, employers will be permitted to act on evidence that individuals are working while THC is active in their bodies, but may not rely upon recent use without active THC to impose employment consequences.

The law becomes effective on January 1, 2024. Employers who are concerned about the impact of marijuana use in their workplace have been working diligently to update their policies to either eliminate testing for marijuana or shift to oral fluid tests, which *can* detect active marijuana. A few months ago, Washington adopted a similar law with respect to pre-hire marijuana testing, prohibiting pre-hire marijuana tests for roles that are not safety-sensitive unless the tests measure active THC in the sample submitted; here too, employers must comply by January 2024.

If your drug testing policy has not been reviewed for some time, and you are curious about oral fluid tests, perhaps consider whether they might add a welcome tool to your drug-free workplace testing kit. Of course, oral fluid test capabilities vary, so you should confirm with the seller whether a particular product measures only active THC in an individual's test specimen and how sensitive the test may be. If you are a DOT-regulated employer, definitely review and update your policy so that it is current and ready to implement oral fluids testing as soon as laboratory approvals are announced.

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Nancy Delogu is an attorney and expert on substance abuse in the workplace. Working with employment-law leader Littler Mendelson, P.C., Ms. Delogu specializes in advising employers on developing, implementing, and administering substance abuse prevention programs that comply with the myriad federal and state laws that affect such programs, including Department of Transportation (DOT) mandated programs. She also maintains an active litigation practice defending employers on a range of employment matters. Ms. Delogu is admitted to the bar in the District of Columbia, Virginia, and Massachusetts.

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