

# AN ADMINISTRATOR'S HIRING NIGHTMARE

MASSACHUSETTS ACHCA CONFERENCE

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March 25, 2015



# **BIG HEALTH CARE, INC.**

**HELP WANTED**



TO DRUG TEST OR NOT TO DRUG  
TEST, THAT IS THE QUESTION

# WHAT CAN YOU LEARN FROM DRUG TESTING?

# Testing Techniques

	Urine	Blood	Hair	Saliva/Sweat
<b>Marijuana</b>	<b>2 to 5 hours up to 45-90 days</b>	<b>1 hour to 7 days</b>	<b>7 days after use</b>	<b>Up to 72 hours (saliva)</b>
<b>Cocaine</b>	<b>2 to 10 days</b>	<b>1 to 3 days</b>	<b>90 days</b>	<b>2 to 19 hours for saliva and 4.5 to 24 hours for sweat</b>
<b>Heroin</b>	<b>2 to 4 days</b>	<b>1 to 3 days</b>	<b>90 days</b>	<b>1 to 4 days (saliva)</b>

# Pros and Cons

	Pros	Cons
Urine	<ul style="list-style-type: none"><li>• <b>Accurate and reliable</b></li><li>• <b>Time-proven and tested technique</b></li><li>• <b>Can test for many substances</b></li><li>• <b>Lab tests have longer detection windows</b></li><li>• <b>Low cost for on-site devices</b></li><li>• <b>Good for random drug testing</b></li></ul>	<ul style="list-style-type: none"><li>• <b>Inconvenient/shy bladder</b></li><li>• <b>Time consuming</b></li><li>• <b>Invasive</b></li><li>• <b>On-site devices have shorter detection windows</b></li><li>• <b>Higher cost for lab results</b></li><li>• <b>Easier to adulterate results</b></li><li>• <b>Need to have a bathroom</b></li></ul>



# Pros and Cons

## Saliva

- **Simple procedure –swab of inside of lip**
- **Non-invasive**
- **Easy to collect**
- **Difficult to adulterate**
- **Low cost**
- **Great for very recent drug use**
- **Obtained under direct supervision**
- **No need for lab**
- **Results can be obtained in minutes**
- **Limited detection window**
- **Not reliable for marijuana**
- **Low volume of specimen**
- **Can only detect drug use at most that occurred 4 days earlier**
- **Inconclusive results**

# Pros and Cons

## Sweat

- Donor friendly
- Non-invasive
- Easy to collect
- Accurate and easy to administer
- Hard to adulterate
- Cheap if don't use lab test
- Expensive if use lab
- Long detection window
- Expensive to administer
- Lab fees
- Long time to collect sample
- Open to environmental contamination
- Inconclusive results depending on sweat production
- Tests for limited number of drugs

# Pros and Cons

## Hair

- Easy to get sample
  - Donor friendly
  - Large detection window (90 days after use)
  - Difficult to adulterate
  - Dependable and accurate results
- Can take 7 days for the drug to appear in hair
  - Not good for detecting recent drug use
  - Takes more exposure to show up
  - Differing results based on color of hair
  - High cost
  - Need to use lab
  - Few extra days to get results

# Pros and Cons

## Blood

- **Good detector of recent use especially with marijuana because measure active ingredient**
- **Only way to test legal intoxication**
- **Invasive**
- **High cost**
- **Mainly used to detect hGH in athletes**
- **Longer time period to get results**
- **Difficult to administer**

# No Massachusetts Drug Testing Statute

- Need to look at the Massachusetts Privacy Statute, Mass. Ann. Laws c. 214, § 1B
- “A person shall have a right against unreasonable, substantial, or serious interference with his privacy...”

- In considering whether a drug testing program violates the Privacy Act, courts look at a variety of factors, including:
  - Whether the employer has a strong basis (private employer) or probable cause (public employer) to suspect its employees are using drugs
  - Whether there are sufficient procedural safeguards to ensure employee privacy
  - Whether the test is reasonable

# “Reasonableness” of a Drug Test

- Balance employer’s legitimate business interests in a drug free workplace with the applicant’s or employee’s interest in his or her privacy
- Factors to consider: the type of business the employer is managing, the job duties of the applicant or employee being tested and whether such duties entail a risk to health and safety

# But What If The Individual's Use Is Legal?





# Massachusetts Act for the Humanitarian Medical Use of Marijuana

- Became effective January 1, 2013
- Eliminates state criminal and civil penalties for the medical use of marijuana by patients diagnosed with a debilitating medical condition
- “Medical use of marijuana” includes the acquisition, cultivation and possession of marijuana for the purpose of treating a debilitating medical condition

## Debilitating Medical Condition – Includes:

- Cancer, glaucoma, HIV, AIDS, Hepatitis C, ALS, Parkinson's disease, Multiple Sclerosis, Crohn's disease and other debilitating conditions as determined in writing by a qualifying patient's certifying physician

## Qualifying Patient:

- A person who is 18 years or older, a resident of Massachusetts and has been diagnosed by a licensed physician as having a debilitating medical condition

# How Does this New Medical Marijuana Act Impact Ms. Big?

- Pre-employment drug testing of applicants
- Drug testing of current employees
- Employer's obligation to accommodate the use of medical marijuana

# Issue of Accommodating Medical Marijuana Use

- In the workplace:
  - Section 7, Paragraph D of the Massachusetts Medical Marijuana Act states: “Nothing in this law requires any accommodation of any on-site medical use of marijuana in any place of employment...”
- Outside the workplace:
  - This is a gray area of the law

# Take-Aways

- Review your drug testing policies so that applicants and employees are put on notice that they could be tested for marijuana use
- Update your drug testing policies so it is clear to applicants and employees that, under Massachusetts law, marijuana use and possession even for medical purposes is prohibited at work and during work hours



# PRE-EMPLOYMENT CRIMINAL AND CREDIT CHECKS

# MA Law Limits *When* Employers Can Ask Applicants About Criminal Records

- Most employers cannot ask at all about an applicant's criminal record in a written employment application
- But two exceptions apply here:
  - Where federal or state law or regulation creates a mandatory or presumptive disqualification for the position applicant seeks, based on a conviction for a type of criminal offense
  - Where employer is required by federal or state law or regulation not to employ persons in any position who have been convicted of a type of criminal offense



# MA Law Limits *What* Employers Can Ask Applicants About Criminal Records

- Employers cannot ask an applicant (or employee) at any time about the following:
  - Arrest or disposition that did not result in a conviction
  - First conviction for drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of peace
  - Conviction for other misdemeanor more than 5 years ago (unless convicted of another offense in last 5 years)
  - Sealed records and juvenile offenses

# Employers *Can* Ask Applicants About Certain Convictions at an Interview

- Felony convictions
- Misdemeanor convictions less than 5 years old (except for minor misdemeanors listed above)

# Employers *Can* Gather Information from Other Sources

- Two sources of information about an applicant's criminal offender record information (CORI)
  - iCORI (MA state database)
  - Consumer reporting agency (CRA) (private agency)
- Pros and cons

# Certain Employers *Must* Gather CORI

- Long term care, assisted living and continuing care facilities
  - Must gather MA CORI
  - MA ch. 6, sec. 172(a)(12) and 172E
  - Level 2 Required Access
- National Background Check Program

# MA CORI Reform Imposed Many More Requirements

- Written CORI policy if employer conducts 5 or more criminal background checks/year
- Detailed disclosures to applicants about
  - Potential use of CORI
  - CORI policy
  - Opportunity to dispute accuracy of CORI
  - Process for correcting CORI

# MA and Federal Agencies Caution on Use of Criminal Records

- Blanket exclusions can exclude qualified applicants
- Reliance on criminal records can be discriminatory
  - Disproportionate impact on minorities
- Need for “targeted screening program” and “individualized assessments”

# But Some Criminal Records Are Disqualifying

- Long term care facilities must not employ individuals who
  - Have been found guilty of abusing, neglecting or mistreating residents by a court of law, or
  - Have had a finding entered in the state nurse aide registry concerning abuse, neglect, or mistreatment of residents or misappropriation of their property

42 CFR 483.13(c)(1)(ii)

# What Does an Employer Have to Consider?

- Whether the offense is disqualifying
- The nature and gravity of the offense
- The nature of the position sought
- The facts and circumstances surrounding the offense
- The age of the offense



# Can an Employer Conduct Credit Checks?

- MA law does not prohibit
  - But would the information be related to qualification for the job?
  - Possible privacy issues
- Must comply with federal Fair Credit Reporting Act

# Considerations Under Federal Law

- Before obtaining consumer reports from a consumer reporting agency, an employer must:
  - Notify the job applicant/employee
  - Disclose consumer rights under FCRA
  - Obtain written consent

# Considerations When Using Consumer Reports

- An employer must:
  - Provide the applicant/employee with the report
  - Inform the applicant/employee of his/her right to respond within a reasonable amount of time
  - Again summarize FCRA rights

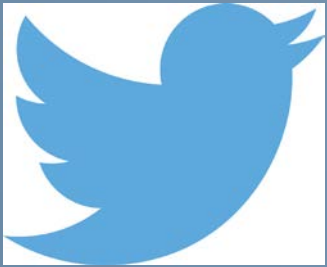
# Best Practices

- Confidentiality
  - Do not disclose this information to third parties
  - Keep these materials separate from personnel records
  - Use password-protected or locked files



# WHY NOT CHECK FACEBOOK? SOCIAL MEDIA AND RECRUITMENT

# What's Out There?



# You Can't Do That



- “Social Media Password Protection” legislation



# I Wish I Didn't Know That



# NLRA Issues

- Protected, Concerted Activity
- National Labor Relations Board Activity



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# ACCOMMODATING EMPLOYEES

# Religious Accommodations

- Federal and State laws protect religiously-related dress and grooming practices in the workplace
- Employee Patel's turban and beard are examples of religious dress/grooming practices

# How Can Mr. Patel Get a Religious Accommodation?

- Mr. Patel must communicate that he has a sincerely held religious belief that conflicts with a job requirement
- No “magic words”
- No requirement that this request be in writing

# Big Deal, Inc. Must Engage in an Interactive Dialogue

- Does Mr. Patel have a sincerely held religious belief?
- Can Ms. Big reasonably accommodate Mr. Patel?
- Is there an undue hardship to the business?

# Things to Think About When Evaluating Undue Hardship

- Financial costs
- Whether Mr. Patel's request poses a safety or health risk to himself or others
- The type of workplace
- The nature of Mr. Patel's job duties



# US Supreme Court Case



# Take-Aways

- Don't ignore an employee's request for a religious accommodation
- Train supervisors and managers
- Remember that a failure to accommodate could result in a discrimination and/or retaliation lawsuit

# Don't Forget About Disability Discrimination

- Undue hardship for disabilities is different
- Disability – expansive definition
- Under Massachusetts law, Mr. Patel's condition could constitute a "physical disability"

# Disability Accommodation

- Is Mr. Patel's requested accommodation reasonable?
- Can Mr. Patel perform the essential functions of his job with a turban and beard?
- This undue hardship test is tougher

- Religious accommodation – undue hardships can be financial and non-monetary costs, i.e.,
  - A health or safety risk
  - Violates a collective bargaining agreement
- Disability accommodation – need a significant difficulty or expense to the business

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