



ARE YOU UP TO THE TEST?

Builders should consider all the risks with drug and alcohol testing programs. BY VINCENT P. POZZUTO

Given the myriad of research over the last decade, it is now fair to say that drug and alcohol use in the construction industry is a significant issue to all involved: workers, unions, trade contractors, developers and owners. According to the National Survey on Drug Use and Health Report of Aug. 23, 2007, the highest rates of illicit drug use among full-time workers aged 18 to 64 were found in the accommodations and foodservice industries (16.9 percent) and the construction industry (13.7 percent). Based on these numbers, it is no surprise that many trade contractors, construction managers and developers have started implementing drug and alcohol testing programs. As with most newly administered business models and programs, the risk management implications are far reaching.

The potential consequences of drug and alcohol use in the construction industry are not hard to conjure. Accidents are obviously the first and foremost risk. A 2001 study published in *The Journal of Construction Engineering and Management* concluded that companies that test for drugs appear to have a lesser number of workplace accidents. However, it is plausible to suggest that accidents are not the sole consideration, as drug and alcohol use can lead to absenteeism, lack of productivity and business decline.

The risk management implications of drug and alcohol testing in the construction industry are heavily concentrated in the employment liability and civil litigation arenas. Regularly accepted testing methods include the use of urine, saliva, hair and blood testing. The permissibility of such testing under local union rules must be considered. Even when allowed, liability for false positives and litigation arising out of contested results present significant concerns to businesses and their insurers.

Drug and alcohol testing in the construction industry is generally broken into four potential phases, all of which raise risk management issues. The first phase, a pre-employment screening, involves a drug test issued before an employee is hired. As such, the hiring is generally conditioned upon an employee passing the test. Trade contractors and developers must ensure that testing is uniformly given to avoid claims of profiling or discrimination. Further, if an untested employee is involved in an accident resulting in injury to a person or property, the lack of a test where such tests were usually given for other employees could be very

damaging evidence in ensuing civil litigation.

"Random testing" is another phase that involves testing random employees at random intervals. There are employment law implications involved in making such testing a condition of employment. If this condition is agreed to, such testing must be conducted fairly and equally for all employees involved. Enforcement procedures for failed tests must be fair and equitable. On the civil litigation side, if such a random testing program is in effect, and employees become involved in accidents that result in injury to others or property damage, discovery may lead to relevant and potentially adverse evidence. Such evidence could lead to a claim by skilled lawyers that the random testing program and enforcement for failed tests implemented by the employer were too lenient.

The third potential phase of testing is "reasonable suspicion" testing, which involves testing those employees that the employer reasonably suspects may be abusing illegal drugs or alcohol. Trade contractors and property owners must unequivocally state in an employee handbook that reasonable suspicion testing can be given as a condition of employment, and most importantly, "reasonable suspicion" itself must be clearly defined.

There must be concise agreed upon remedies for an employee's intentional refusal to submit to testing. One potential solution would be for employers and employees to agree to an independent arbiter to resolve disputes arising out of reasonable suspicion testing. With respect to civil litigation arising out of property damage or personal injury attribut-



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able to an employee subject to reasonable suspicion testing, an adept civil litigator on the adverse side could possibly develop evidence that there was such reasonable suspicion based on the employer's own standards and that there was a failure to test. Civil juries react negatively to any supportable argument that a company failed to follow its own mandated procedures.

Finally, the last phase of potential testing is post-accident testing. The most important risk management implication arising from post-accident testing is the admissibility of such test results into evidence during subsequent civil litigation. Different jurisdictions will have different evidentiary rules on the admission of such test results. In addition, consideration must be given as to when a post-accident test will be given, how the test will be given and who will administer the test. The main goal is to have consistency in plan protocol and administration of the plan.

A quick war story illustrates how inconsistent post-accident testing can have risk management implications and impact civil litigation. This author once represented a site owner and construction manager in a case involving a steel collapse during steel erection. The accident resulted in three injured workers. A steel beam that was being lowered came into contact with a freestanding column, setting off a chain reaction steel collapse. The crane operator claimed that the beam merely "brushed" the column, and that the column fell because the concrete contractor improperly installed the anchor bolts.

However, the steel erection company's safety manual set forth that any employee involved in an accident that resulted in first aid being rendered was required to submit to a drug test. For some reason, the steel erection company did not produce the crane operator for a drug test. The failure to submit to the test when it was mandated by the steel erection company's own manual cast a pall over the testimony of the crane operator, and led to the argument that the steel erection company was hiding something. When the case subsequently settled, the steel erection company bore the majority of the settlement.

Due to the strong evidence that drug and alcohol testing in the construction industry will promote safer work environments and better productivity, it is easy to understand why many trade contractors and developers are instituting such programs. However, it is critical for employers to consider the risk management implications discussed above, and establish clearly written and defined protocols that are followed consistently in order to be able to administer the program effectively. ♦

