

SUBSTANCE ABUSE MODEL POLICY

LUCAS R. AUBREY
SHERMAN DUNN, P.C.
WASHINGTON, D.C.
AUBREY@SHERMANDUNN.COM

electrical training
IBEW - NECA ALLIANCE

OVERVIEW

- Why test?
- Is testing legal?
 - Federal law
 - State law
- Model Substance Abuse Policy and Program.
- Legalization of Medical and Recreational Marijuana.



WHY TEST

- Substance Abuse and Mental Health Services Administration (SAMHSA) regularly conducts surveys concerning drug and alcohol abuse.
- In 2015, SAMHSA released a report on drug and alcohol use by industry.
- Construction had:
 - Second highest number of heavy drinkers;
 - Fifth highest number of drug users.

ALCOHOL USE

- SAMHSA defines heavy alcohol use as drinking five or more drinks on the same occasion (i.e., at the same time or within a couple of hours of each other) on 5 or more days in the past 30 days.

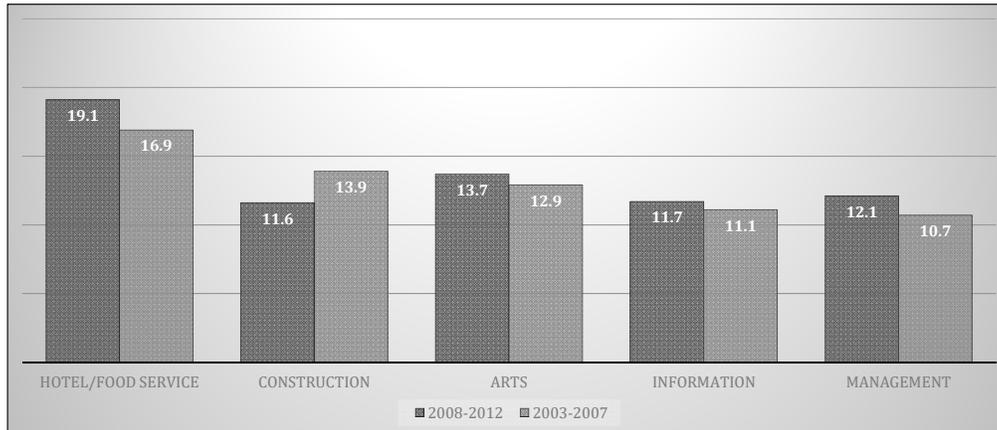
PAST MONTH HEAVY ALCOHOL USE AMONG ADULTS 18-64 EMPLOYED FULL-TIME



DRUG USE

- SAMHSA defines illicit drugs as marijuana, cocaine (including crack), inhalants, hallucinogens, heroin, or prescription-type drugs used nonmedically.

PAST MONTH ILLICIT DRUG USE AMONG ADULTS 18-64 EMPLOYED FULL TIME



WHY TEST?

- Opioid abuse is becoming a major issue in the U.S., including in the construction industry.
- The *2016 National Survey on Drug Use and Health* conducted by SAMHSA reported that **10,933,000** people 18 or older had misused opioids, including heroin and prescription drugs, within the past year.
- Prescription claims data from an insurance broker found that the construction industry's total prescription opioid spend was 20% from 2009 to 2013. That figure is **5-10% higher** than any other industry represented in the study.

WHY TEST?

1. Workplace Safety
2. Enhance Jobsite and Classroom Learning
3. Assure Quality Work
4. Protect Property
5. Establish Clear Expectations for the Trade

WHY TEST?

- How many of your JATCs have drug testing programs?
- How many use the ALLIANCE'S Model program?
- How many developed your own program?
- How many use the results of employer testing?
- Why do you Test?

LEGAL ISSUES – OVERVIEW

LEGAL ISSUES – FEDERAL LAW

- No federal requirements applicable to all private-sector employers:
 - (1) requiring employers to drug test; or
 - (2) placing specific requirements on testing programs.

LEGAL ISSUES – FEDERAL LAW

Several Federal Laws Can Impact Drug and Alcohol Testing

- Drug-Free Workplace Act
 - Requires some federal contractors and all federal grantees to ensure a drug-free workplace.

LEGAL ISSUES – FEDERAL LAW

- Omnibus Transportation Employee Testing Act of 1991
 - Requires drug and alcohol testing for **safety-sensitive** transportation employees in aviation, trucking, railroads, mass transit, pipelines, and other transportation industries.
- Family and Medical Leave Act
 - Covered, eligible employees can use FMLA leave to address substance or alcohol abuse.

LEGAL ISSUES – FEDERAL LAW

- Americans with Disabilities Act
 - Makes it unlawful for employers to discriminate against recovering alcoholics or drug users who have sought treatment.
 - Cannot make adverse employment decision merely because an individual has a history of alcoholism or substance abuse or is currently enrolled in treatment;
 - Protects current and recovering alcoholics (distinct from illegal drug use because alcohol use is legal);
 - Protects employee information about the use of legal prescription drugs.

LEGAL ISSUES – FEDERAL LAW

- ADA Does Not:
 - Prohibit drug testing in any way (drug tests for illegal drugs are not considered ADA medical examinations);
 - Protect employees who are currently using illegal drugs.

LEGAL ISSUES – FEDERAL LAW

- Under ADA, JATC conducting drug and alcohol tests **MUST**:
 - Keep drug-testing results confidential;
 - Treat alcohol dependence (current or former) as a disability;
 - May consider whether person can perform the essential functions, with reasonable accommodations (not including impairment at work);
 - Segregate drug and alcohol testing results from other apprentice files.
- JATCs **MUST NOT**:
 - Terminate, refuse entry, or refuse to promote an apprentice because of a past history of drug or alcohol abuse.

LEGAL ISSUES – STATE LAWS

- Many states have their own laws governing drug and alcohol testing, including laws that:
 - Require testing for state and local government contractors;
 - Restrict the manner in which employees can be tested;
 - Provide workers' compensation premium reductions for employers that implement testing programs that meet certain requirements;
 - Provide employers with liability defense; or
 - Limit or deny unemployment benefits to individuals who are fired because of a positive drug test.

LEGAL ISSUES – STATE LAWS

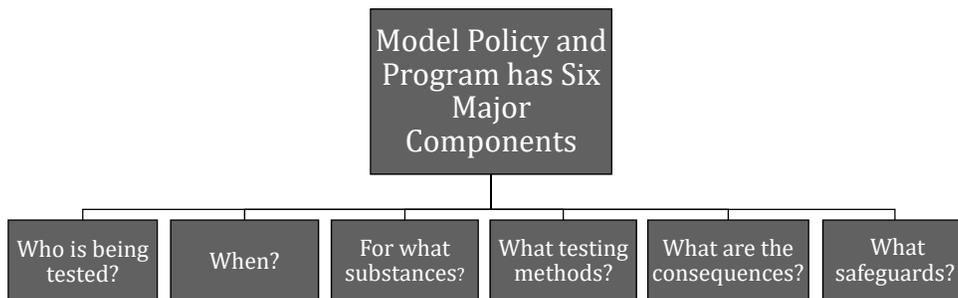
- Other state law issues that must be considered:
 - State privacy Laws;
 - Testing requirements for public works projects; and
 - Defamation laws.
- Talk to an attorney in your state if you decide to implement a drug-testing program.

ELECTRICAL TRAINING ALLIANCE MODEL SUBSTANCE ABUSE POLICY AND PROGRAM FOR JATCS

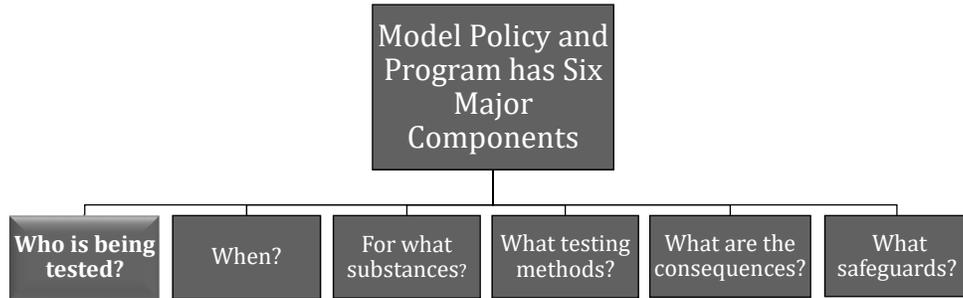
MODEL POLICY AND PROGRAM

- *Alliance* has developed Model Drug and Alcohol Testing Policy and Program to be used by Local JATCs.
- Intended to balance need for testing with appropriate protections for applicants and apprentices.
- Compliant with federal law and most state laws.
 - CAUTION: Because state and local laws differ, your JATC should consult with counsel before adopting the program.
- In addition to complying with the law, must ensure that program complies with your JATC policies.

MODEL POLICY AND PROGRAM



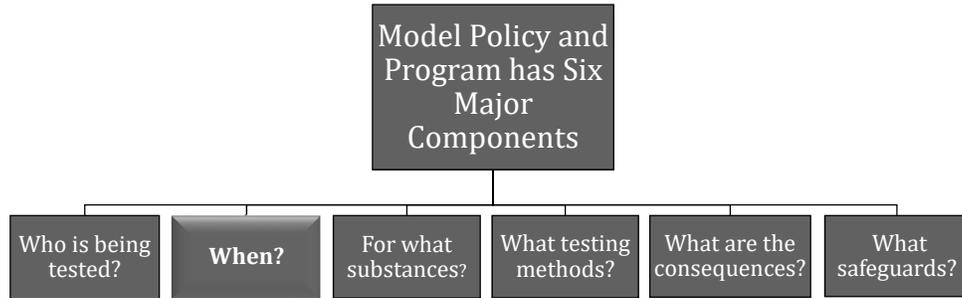
MODEL POLICY AND PROGRAM



MODEL POLICY AND PROGRAM – WHO?

- Applicants
- Apprentices

MODEL POLICY AND PROGRAM



MODEL POLICY AND PROGRAM – WHEN?

Applicant Drug Testing

- Testing occurs between offer and admittance to apprenticeship program.
- Although ADA does not restrict drug testing, model program provides **ONLY** for post-offer drug testing.
 - Added safety measure for JATCs.
 - Ensures that information concerning medical conditions that are covered by ADA are not accidentally disclosed pre-offer.
- Make sure to inform applicants up front that final acceptance into the program is dependent on negative drug and alcohol test.

MODEL POLICY AND PROGRAM

Applicant Alcohol Testing

- ADA does apply to alcoholism.
- Tests to determine whether and/or how much alcohol an individual has consumed are medical examinations that should only be given post-offer, pre-acceptance.

MODEL POLICY AND PROGRAM – WHEN?

Apprentice drug and alcohol testing

- JATC may test apprentice only if:
 - 1. JATC determines there is **reasonable cause** to believe that use of illegal drugs, or impairment from alcohol exists; and
 - 2. The apprentice denies use or impairment.

MODEL POLICY AND PROGRAM – WHEN?

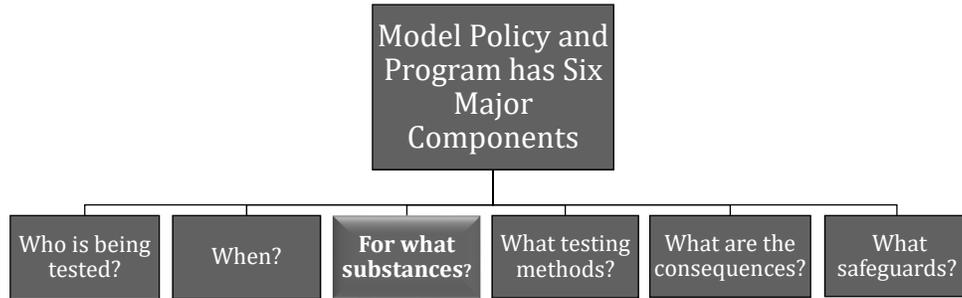
REASONABLE CAUSE INCLUDES

- Results of employer drug test or apprentice failure to provide results of employer test upon request;
- Information from reliable sources;
- Evidence that apprentice tampered with prior test;
- Changes in work or classroom performance;
- Unexplained or frequent rejection for employment;
- Repeated failure to follow instructions;
- Violation of safety practices;
- Near accidents;
- Odor of alcohol or drugs;
- Unexplained or frequent absenteeism;
- Unexplained behavior;
- Arrest or conviction for violation of criminal drug laws.

MODEL POLICY AND PROGRAM – WHEN?

- Document Reasonable Cause:
 - Train staff; and
 - Put observations in writing.
- Model policy does not provide for:
 - Periodic testing;
 - Random;
 - Return-to-Duty;
 - Etc.

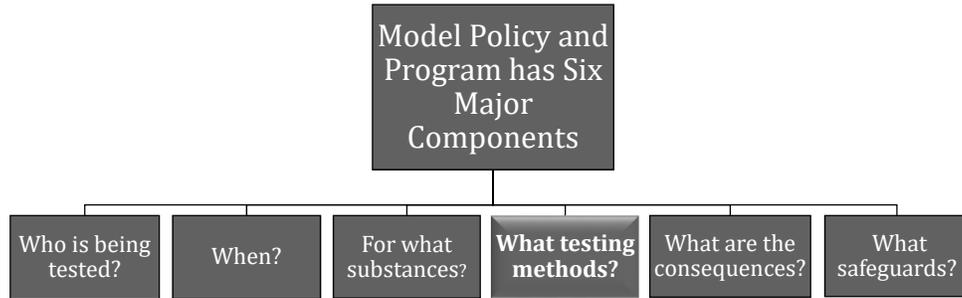
MODEL POLICY AND PROGRAM



MODEL POLICY AND PROGRAM – WHAT?

- Drug testing under the policy is performed in accordance with the Mandatory Guidelines for Federal Workplace Drug Testing Programs published by HHS.
- Under the guidelines, JATCs adopting the model policy would test for:
 - Marijuana
 - Cocaine
 - Opiates (e.g., codeine, morphine, and heroin)
 - PCP
 - Amphetamines (e.g., meth, speed, crank, ecstasy)
 - Opioids (Oxycodone, Oxymorphone, Hydrocodone, and Hydromorphone)

MODEL POLICY AND PROGRAM



MODEL POLICY AND PROGRAM – HOW?

Drug Testing

Policy incorporates procedures in the Mandatory Guidelines for Federal Workplace Drug Testing Programs.

- Testing must occur at lab certified by HHS.
- Drug testing must be by urinalysis. Exception: If donor cannot produce sufficient urine, then may use oral fluid testing.
- Sample must be separated into two containers. Container A used for initial and confirmation testing; Container B kept safe and only used for independent testing.
- Initial positive must be retested using more rigorous standards.

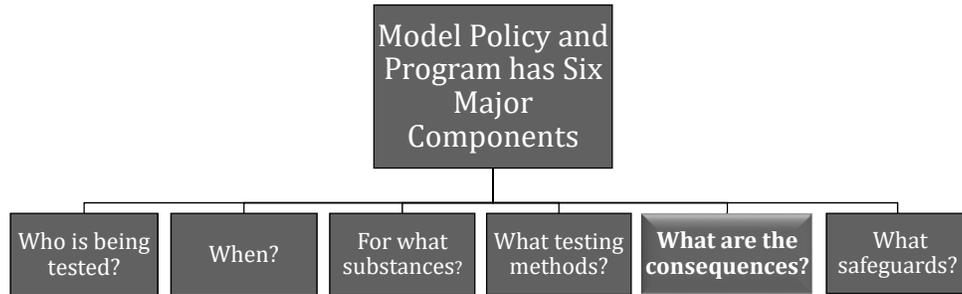
MODEL POLICY AND PROGRAM – HOW?

- Process must be supervised by a Medical Review Officers
 - MRO is a doctor with knowledge of substance abuse disorders;
 - MRO must protect applicant and apprentice confidentiality;
 - MRO bound by the HHS Medical Review Officer Manual.

MODEL POLICY AND PROGRAM – HOW?

- Alcohol Testing
 - Initial Test – May be conducted by breathalyzer or oral fluids.
 - If negative, no other testing.
 - If positive, must be confirmed by more rigorous testing. Test must be performed on a breath sample.
- No review by MRO.

MODEL POLICY AND PROGRAM



MODEL POLICY AND PROGRAM – CONSEQUENCES

- If test is negative, no consequences and no information beyond fact that test was negative is communicated to the JATC.
- If drug test is positive on both initial and confirmation testing, MRO:
 - Reviews drug test results, and then contacts applicant/apprentice:
 - Advises applicant/apprentice of right to have preserved half of sample tested at own expense; or
 - Provide alternate explanation to MRO.
 - Ex. Provide a valid prescription for an opioid.

MODEL POLICY AND PROGRAM – CONSEQUENCES

- If MRO is satisfied with explanation, or test on preserved sample is negative, then treated as a negative and that's the end of the story.
- If MRO concludes that positive test is valid, MRO notifies JATC.

MODEL POLICY AND PROGRAM – CONSEQUENCES

Equivalent Positive Results

- Possession on the jobsite or in the classroom;
- Refusal to take the test;
- AWOL after testing:
 - Won't respond to MRO or to JATC

MODEL POLICY AND PROGRAM – CONSEQUENCES

Applicant Consequences

- Upon confirmed positive drug or alcohol test, conditional offer of employment is withdrawn.

MODEL POLICY AND PROGRAM – CONSEQUENCES

Apprentice Consequences

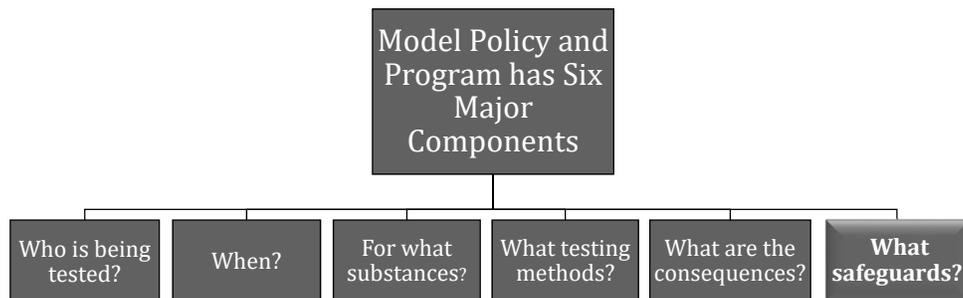
- Upon first confirmed positive drug or alcohol test, apprentice offered the chance to enter rehabilitation.
- If apprentice complies:
 - OJT suspended without pay until completion of rehab program;
 - JATC must try to accommodate continued classroom training;
 - Apprentice status not affected.

MODEL POLICY AND PROGRAM – CONSEQUENCES

Apprentice Consequences

- Upon second confirmed positive drug or alcohol test?
- Model policy is silent:
 - Consequence must be consistent with JATC policies and applied consistently to all apprentices.
 - Could try rehab one more time, or could place before committee for decision.

MODEL POLICY AND PROGRAM



MODEL POLICY AND PROGRAM – SAFEGUARDS

- Many safeguards are built into program:
 - Review by MRO;
 - Opportunity for apprentice/applicant to have sample retested or to explain positive result; and
 - Use of certified labs.

MODEL POLICY AND PROGRAM – SAFEGUARDS

- Using a Third Party to Implement Program
 - Handles specimen collection;
 - Hires MRO;
 - Sends samples to certified labs;
 - Ensures chain of custody for all samples.

MODEL POLICY AND PROGRAM – SAFEGUARDS

- Confidentiality
 - JATC must keep all information regarding drug and alcohol testing confidential.
 - Maintain information in separate files as a confidential medical record.
 - Communicate results on a need-to-know basis only, with applicant/apprentice's consent.

MODEL POLICY AND PROGRAM – SAFEGUARDS

- Notice
 - Applicants/Apprentices provided with copy of Policy;
 - Policy does not apply to conduct prior to Policy's effective date;
 - Changes made only after 30-day's written notice of modifications/revisions.

MODEL POLICY AND PROGRAM – SAFEGUARDS

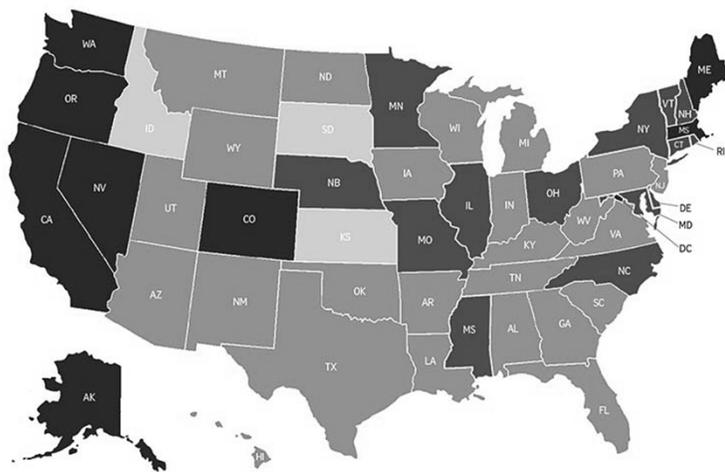
- Consent Form - All applicants/apprentices should review and sign consent form:
 - Acknowledges consent to the policy as a condition of apprenticeship;
 - Authorizes release of employer test results;
 - Authorizes discussion of Policy compliance by JATC and care providers; and
 - Recognizes JATC's authority to amend the policy.

MODEL POLICY AND PROGRAM – SAFEGUARDS

- JATC's Role:
 - Hire and Oversee Third Party Administrator;
 - Make sure notice provided to applicants/apprentices;
 - Keep all information confidential;
 - Implement the policy in accordance with its terms;
 - Enforce the consequences of a positive test consistently and fairly.

LEGALIZATION OF MEDICAL AND RECREATIONAL MARIJUANA

MARIJUANA LAWS BY STATE



Legalized
Adults can purchase, possess and cultivate marijuana for personal use, whether medical or recreational.



Decriminalized
Typically means no arrest, prison time, or criminal record for the first-time possession of a small amount of marijuana for personal use. All of these states, excluding Nebraska, also allow medical marijuana and/or CBD use.



Medical/CBD Use Only
No state-level criminal penalties on the use of medical marijuana. Some of these states have CBD-specific laws, singling out the non-psychoactive component of marijuana.



Illegal
No active laws legalizing the use of marijuana.

SOURCE: WWW.NORML.COM

MEDICAL AND RECREATIONAL MARIJUANA



MEDICAL AND RECREATIONAL MARIJUANA

- Recent Updates:
 - In January 2018, Vermont legalized marijuana legislatively. The law took effect July 1.
 - On June 26, Oklahoma voters expanded medical marijuana access.
 - In November, Michigan voters will consider a ballot initiative to legalize and regulate marijuana for adult use.
 - Also in November, Utah voters will vote a medical marijuana ballot measure.

MEDICAL AND RECREATIONAL MARIJUANA

What impact does state-level legalization have on drug testing?

Medical Marijuana

- No states protect use, possession, or impairment in the workplace.
- Several states prohibit employers from making employment decisions based solely on fact that applicant/employee holds medical marijuana card.
- Arizona and Delaware prohibit employers from discriminating against or terminating a qualified patient for a “positive drug test for marijuana,” unless the employee used, possessed, or was impaired by marijuana in the workplace.

MEDICAL AND RECREATIONAL MARIJUANA

- Some state courts have recognized possible claims by medical marijuana users against employers that fail to provide a reasonable accommodation for a medical marijuana user’s underlying disability.
 - Developing area of the law with no clear answers.

MEDICAL AND RECREATIONAL MARIJUANA

Recreational Marijuana

- No states have employment protections for users of recreational marijuana.

RECAP

- JATC deciding to implement a testing policy should:
 - Consult with counsel regarding state and local laws;
 - Give clear notice of obligations to applicants/apprentices;
 - Get signature acknowledging obligations;
 - Follow well-recognized, respected protocols;
 - Follow the JATC's established policies and procedures; and
 - Be consistent and even-handed in application of testing.

QUESTIONS?

**NATIONAL TRAINING
INSTITUTE
ANN ARBOR, MICHIGAN
JULY 30, 2018**

LUCAS R. AUBREY
SHERMAN DUNN, P.C.
Aubrey@shermardunn.com