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Legal challenges in international drug testing: A service agent's perspective*

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Introduction and a Service Agent's Perspective

This perspective reviews the key legal and programme administration considerations for the global expansion of workplace drug testing from the perspective of a third-party administrator (Consortium/Third-Party Administrator/C/TPA) service agent providing workplace drug and alcohol testing service support, background screening, and recruiting and hiring solutions internationally. This perspective was shared with delegates attending the 2010 International Forum for Drug and Alcohol Testing (IFDAT) Conference, held in Barcelona, Spain in April.

The key considerations in the emerging global workplace drug testing marketplace include (1) recognition that the global substance abuse testing marketplace continues to be an emerging marketplace; (2) legal/compliance understanding and logistical solutions will help expand the global marketplace; and (3) an understanding of international country by country unique cultural considerations will be critically important to substance abuse testing programme success. The author's ongoing research on 200 countries has revealed that only 50 countries have addressed workplace drug and/or alcohol testing in their country's legislation. A number of countries also have privacy and human rights legislation that impacts workplace drug testing programme administration and testing.

Policy/Legal/Compliance Considerations

Legal authority to test is critically important when conducting workplace substance abuse testing globally. All local and country-specific laws that impact testing must be considered. These include any workplace substance abuse testing laws as well as any applicable (1) national laws, (2) labour codes/employment and labour laws; (3) contract agreements and union agreements; (4) privacy requirements, including confidentiality requirements which in many countries make it more legally defensible to conduct all programme administration within the particular country; (5) data security requirements, (6) civil/human rights laws; and (7) workplace, health, safety, and security risk rules and laws.

The overall justification or reasons for testing internationally focus on mitigating health, safety, and security risks, as they do in the United States. There are requirements for the aviation and other transportation industries in some countries. The testing panels (substances to be tested) and the testing cut-off/threshold levels vary widely from country to country. Specific authority for the type of testing to be conducted must also be considered (e.g. pre-access or pre-employment, reasonable cause, random, post-accident, return to duty, follow up/monitoring testing). As an example, pre-access versus pre-employment testing is the least risky type of applicant testing in Canada. Reasonable suspicion justification internationally generally focuses on whether it is necessary, proportionate (to the identified risk), justified, and whether there is reasonable suspicion of substance abuse. As in the United States, the definition of reasonable cause/suspicion, post-accident and the other types of testing may vary from country to country and even from local area to local area. Cultural issues (including local customs and practices), practical, logistical testing service support issues (including test administration and shipping), and currency issues must also be given careful attention.

Best industry knowledge indicates that some US-based companies conduct drug testing of deployed US citizens and expatriates (expatriates are individuals that have withdrawn their allegiance from their native country and are living in a different country) according to authority and, in some cases, regulations initiating from the USA. Drug testing of native workers (native to the country where the company is conducting business) should be conducted in accordance with all applicable local laws.

International testing initiatives to date are at least 10, possibly 15 years behind the USA with respect to workplace substance abuse testing and programme administration; in other words, it is basically in its infancy.

Specimen Type/Methodology Considerations

Point of collection (POC) testing

To some extent, POC screening testing devices/products (sometimes referred to as 'instant' or 'rapid' tests), that use either urine or oral fluids are being used for workplace testing internationally and are being marketed aggressively. However, no information

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on the authority to conduct POC testing whether by urine or oral fluids was found in our research to date other than in the USA where either or both types of testing are permitted in some states. It is important to note that some countries refer specifically to laboratory-based testing in available information on workplace drug testing. There may, therefore, be additional legal risk to employers if they elect to conduct POC testing in such countries. Laboratory confirmatory testing of non-negative POC screening test results and the use of a Medical Review Officer (MRO) is highly recommended; this is a drug and alcohol testing industry best practice and may mitigate some of the legal risk from using POC screening tests in countries that specifically reference laboratory-testing methodology. POC testing of both urine and oral fluids may be acceptable if an organization elects not to follow EU guidelines because these guidelines are not mandatory. Nonetheless, it is important to review all current applicable local and national laws and regulations when choosing a drug-testing method for workplace drug testing.

Oral fluids and hair laboratory-based testing

There are currently several lab-based oral fluid drug tests in the marketplace. The devices serve as a collection appliance. Once collected, the sample is then sent to a laboratory for analysis. They are not onsite, instant-result tests. As such, they are not restricted when a local law limits drug testing to laboratory analysis. Hair testing is available in a limited numbers of countries with some logistical support offered.

Education and Training, Intervention, and Rehabilitation Considerations

Education and training, intervention, and rehabilitation considerations for international workplace drug testing programmes include (1) training for employers and their designated employer representative or contact responsible for administering the organization's drug workplace testing programme; (2) training for employees; (3) training for supervisors; (4) drug test technician training; (5) alcohol test technician training; and (6) Medical Review Office and Medical Review Officer Assistant/support staff training. Intervention strategies and an approach to rehabilitation of individuals identified by testing or self-identifying with substance abuse or alcohol misuse issues are very important to a programme's success.

International Collections and Laboratory Considerations

International collections and laboratory considerations were most succinctly addressed in a White Paper prepared by members of the Substance Abuse Program Administrator's Association's (SAPAA's) International Committee and published on SAPAA's website as follows:

The most important aspect to remember when organizing a collection outside of the United States is patience. Workplace drug testing is so common in the U.S.; many employers expect next day service. This is not the case in many countries across the globe, but the situation is changing. As U.S. Multinational companies seek to implement standard drug and alcohol polices across all of their facilities, the network of collection sites around the world grows. In addition to the U.S. companies implementing policies, more European countries are enacting drug testing legislation under Health and Safety regulations. These new laws and regulations are in response to the growing drugs of abuse problem being seen in many countries. But even as the drugs abuse problem grows, there are still some countries where it is almost impossible to arrange for a drug screen collection.

Hurdles to surmount when organizing a collection include:

- *Type of collection - (urine specimens are recommended)*
- *Cultural differences*
- *Time differences and seasonal and holiday variations*
- *Language*
- *Laws and guidelines*
- *Lack of familiarity (no one did it before)*
- *Logistics – laboratories, collections (sites, mobile collectors), transport, test results*
- *Cost of the collection*
- *Payment to collection sites - sites will only accept payment in local currency*
- *Donors signing of chain of custody documentation – (if the donor cannot read English, they may not be comfortable signing a document they don't understand)*

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Role of the Medical Review Officer in International Testing

Although the role of the Medical Review Officer (MRO) is well established in US workplace drug testing programmes, such is not the case internationally. This perspective will summarize the information that is generally or currently known or available in the drug and alcohol testing industry on the role of the MRO internationally. It is important to note that the acceptance of the role of the MRO in workplace drug testing programmes is not addressed or acknowledged in many countries.

In a review of 200 countries, a drug and alcohol industry research team found information on the role of the MRO in only 36 countries or 18% of the countries researched. The information available through accepted legal research practices is insufficient due to the need for practical in-country information. Although the authors acknowledge that more detailed information is needed from legal counsel in each country in the global community in order to truly understand and monitor the evolution of the role of the MRO, the following is meant to start the discussion.

In Austria, Belgium, Finland, France, and Germany there appears to be a role for the occupational health physician in the review of workplace drug testing. Under Finland's Occupational Health Care Act, only a health-care professional can determine whether a test is needed. Authorization to test from an occupational health physician is also required in France, Lithuania, the Netherlands, Norway, Slovakia, Slovenia, and possibly Ireland. By contrast, in the United Kingdom, occupational health physicians are discouraged from being involved in workplace drug testing, including test review, because it is believed that the occupational health

physician's role will damage the trust of the workforce. In Germany, a company's physician should not conduct the test or provide MRO review because medical secrecy restrictions limit the use of the information.

The occupational health physician's role in the foregoing countries is a little different from the role of the MRO in the United States because the objective of the occupational health physician's test review is to report on the fitness for duty of the donor. The purpose of the fitness-for-duty review arises from a concern for balancing two objectives fairly: first, workplace security, and secondly, the protection of personal information.

Although currently undergoing revision, in 2002 the Laboratory Committee of EA (European co-operation for Accreditation) approved a document prepared by the European Workplace Drug Testing Society (EWDTS) entitled *European Laboratory Guidelines for Legally Defensible Workplace Drug Testing*. The guidelines contained therein are based on the UK guidelines drawn up by a steering group consisting of several UK analytical laboratories.

The stated purpose of the European Guidelines is to establish 'best practice' procedures for the:

1. collection of urine samples;
2. laboratory analysis; and
3. subsequent interpretation of the results.

However, the guidelines are clear that, while they suggest best practices, they are not intended to be binding regulations for all testing situations and circumstances: 'The European Guidelines are designed to establish best practice procedures whilst allowing individual countries to operate within the requirements of national customs and legislation.' Therefore, the detail within the appendices to the guidelines may vary from country to country.

The guidelines are based on the 'general principles that have been established internationally. They are designed to ensure that the entire drug testing process is conducted to give accurate and reliable information about a donor's drug use'. Though some of the terminology may be different, much of what is found in the guidelines will look familiar with those found in US federal drug testing guidelines and regulations, as well as in individual state laws.

For example, the guidelines discuss chain-of-custody protocols during the collection process, ensuring the integrity of a sample received at a laboratory (including validity testing), screening and confirmation testing (GC/MS, LC/MS), and result interpretation via a lab toxicologist and a qualified 'medical practitioner' or MRO. They also cover results reporting, long-term specimen storage, and record keeping.

In Canada, the role of the MRO is very similar to that in the United States. Brazil has also taken an approach to MRO practice similar to that in the United States and Canada. In Brazil, however, the MRO seems to play an expanded role relative to involvement with the employers conducting testing, their unions, and the larger community.

No information was found on the role of the MRO in the remaining countries. Further, no information on the current status of workplace drug testing was available for a large number of the countries researched.

Conclusion

Based on the foregoing perspective, 10 key questions arise for a service agent about to support a client internationally.

1. What do clients really want when they say they want to conduct drug testing internationally?
2. If the client is US based, does the client want to administer its programme from its global locations or from its US location or vice versa?
3. Is substance abuse testing permitted or being conducted in a particular country and is it a consideration if the applicant or employee to be tested is a deployed US citizen, an expatriate of the USA or of another country, or a native of the country in which you intend to test.
4. Legal authority to test – are there restricting statute(s) and/or is legal authority available or known?
5. What testing methodology(s) is permitted (e.g. specimen type – urine, hair, blood, sweat as applicable) and which reasons for/types of testing are permitted (e.g. pre-employment, reasonable cause).
6. Who are the laboratory service providers for each country?
7. Are there test ordering, test review/verification/MRO requirements or data transfer or management/privacy security/confidentiality considerations in the country in which you intend to test?
8. What are the specimen collection or screening test requirements?
9. Are there issues or requirements relative to donor identification?
10. Are there cultural considerations to be taken into account?

The author respectfully submits that answers to the foregoing questions, along with careful consideration of the programme administration management strategy preferred by the organization (de-centralized versus centralized) are the key to success for both the employer and its service agents. If fully considered and addressed, these answers will result in a service agent's ability to provide the support required and expected for an organization that has decided to test internationally. Finally, and of utmost importance to global workplace testing success, both the employer and its service agent(s) should recognize and accept that in an emerging area such as international workplace testing, a trusting partnership of both parties is the essential.

Author's experience, background and expertise

Josephine Elizabeth Kenney is the Senior Vice President of Compliance for First Advantage Corporation's Employment Screening Services Division and is responsible for legal and regulatory compliance. Josephine produces a large number of workplace testing related compliance support materials for First Advantage, contributes to the First Advantage Quarterly E-Newsletter, is widely published on the subjects of drug testing and drug testing law and is a frequent speaker at conferences sponsored by organizations such as the Substance Abuse Administrator's Association (SAPAA), the Drug and Alcohol Testing Industry Association (DATIA), and the American Association of Medical Review Officers (AAMRO). Josephine is a recognized expert in Federal Motor Carrier Safety Regulations and in federal and state drug testing law including matters of privacy and compliance. Josephine is on SAPAA's Board of Directors, is SAPAA's President Elect, chairs its International Committee, and Co-Chairs its Governmental Affairs Committee.