

Impairment Testing from a Legal Viewpoint

Proactive Employers Can Increase their Labor Pool, Improve Safety, and Save Money

By Adele L. Abrams, Esq., CMSP

[WATCH VIDEO](#)

If you're in a hazardous profession, and most of the ones that I deal with are very hazardous, you have to be sure that everybody is at the top of their game, every day. And that really goes more to the cognitive and the behavioral impairment issues rather than hanging your hat on some abstract number. The drug test is simply the chemical measurement, what's in their system. It doesn't capture how they react to it. And somebody who is a regular medical cannabis user, may be micro dosing, they're going to be testing positive all the time, but they're not going to be impaired most of the time.

Impairment Testing Measures Cognitive Impairment and Situational Awareness

Impairment testing is an assessment method to capture whether the person is off their stride, period. It could be alcohol, it could be drugs, it could be fatigue, or it could be stress. And all of those are factors that can impact adversely workplace safety. They're not necessarily due to impairment from drugs or alcohol.

Impairment assessment or measurement is looking at the behavioral aspects. You're looking at cognitive impairment. You're looking at physical impairment, balanced reaction times, etc. You're looking at situational awareness. I have handled over 500 fatality cases at this point - in the mines, on construction sites, and in the factories. And very often, in 30% or so of cases where impairment may have been a factor at least autopsy showed alcohol or drugs were present in the person upon autopsy, what we find there a lot of times it is situational awareness. It's being oblivious to a danger that's around you.

Why Employers Are Enacting Impairment Testing Now

Impairment assessment is something that I recommend to my clients all the time because the stakes are very high. If something does go sideways, OSHA and MSHA, they're tough right now in this administration. But we there's also tort exposure, there's lots of reasons that you want to make sure the workplace is safe. So what I'm telling them why you would want to do this and get out ahead of this. You're onboarding a lot of people now. We're in a rehiring phase.

If you shift the focus from a drug test that's measuring urine or its measuring blood or hair and you go to the fitness for duty approach, it's going to broaden your labor pool. With the great resignation, the losses we've had a lot of entry or lower level employees. It's getting challenging to hire people and it's getting challenging to hire people who are especially are not using cannabis in the legal states. And I think the federal legislation is coming, but in the meantime, the proactive employers are really revisiting their programs now, making that shift to behavioral impairment recognition and not so much on catching somebody in a random test. Impairment testing is one of those things that is proactive, and proactive tools always end up saving you money.

How It Works on the Job

It's a tool that helps to keep not only that worker of is being tested safe, but everybody on that job site safe. Impairment assessment is an initial cut, it's an initial screening. But if the person doesn't have an explanation, like the crying baby or the dying parent, or the divorce, or some other type of illness, then,

the supervisor is getting face to face. Do they smell like they had breakfast with Jack Daniels? Did they carpool with Cheech and Chong? There may be other things using their own senses that the supervisor can pick up on that may give a hint as to what's going on. But if there is no satisfactory explanation, repeat the test. If it's still an outlier, at that point, then you could refer the person for the bonafide drug testing, which would have to be conducted within the parameters of that states law.