

Pre-Hire Oral Fluid Drug Screening: A Viable Alternative

S. Charles Archuleta, Shareholder and Justin Breen, summer associate

Keleher & McLeod, P.A.
P.O. Box AA
Albuquerque, NM 87103
(505) 346-4646
sca@keleher-law.com

References: Kadehjian, Leo. *Legal Issues in Oral Drug Testing*; Forensic Science International, 2005 v150, i2-3 p.151 (June 2005).

Questions Presented:

1. Is oral fluid ("saliva") testing for drug use generally accepted and will it withstand judicial scrutiny?
2. Does use of medical review officers (MRO) in oral drug testing increase in importance or become less important?

Introduction:

Many employer-clients have an existing drug policy using urinalysis to test for the presence of drug use in non-Department of Transportation pre-hires. One alternative method involves testing an oral sample taken from the donor with a swab. The advantage in using an oral swab test is (1) convenience; (2) cost and (3) minimized intrusion on a potential-hires privacy. A follow-up issue whether is not using a Medical Review Officer ("MRO"), again as a cost saving, would expose an employer to increased potential liability, under this new method of testing.

Summary Conclusion:

Using swab specimen testing may increase exposure to liability because, although on the rise, this method has not been judicially scrutinized. Although there is a wealth of science behind the technique, we have found no legal authority definitively accepting the validity or admission of the use of saliva as a specimen for drug testing in humans. Nor is there any authority rejecting such use. Ultimately, saliva swab testing appears a reasonable alternative in pre-hire testing, but all employers should be aware that such testing is open to challenge, as is any newer, alternative testing procedure.

Because there is no judicial authority accepting this method, the use of an MRO is not any less important. Using saliva specimens may be a good way to filter out negative results. For positive test results, non-saliva confirmation tests and an MRO shall likely be recommended.

Discussion:

1. **Is use of saliva as a specimen for testing drug use generally accepted and reliable, and will it withstand judicial scrutiny?**

A. State approaches to the use of saliva as a specimen.

Some states have statutes governing the testing of employees for drug use. Although New Mexico does not have a statute governing employer drug screening policies, an examination of states that do provides insight into whether use of saliva is an acceptable specimen to determine whether an employee has illegal drugs in his or her system.

Arizona's employer drug testing statute defines as a "sample" for use in drug testing, "urine, breath, saliva, hair or other substances." A.R.S. § 23-493(7) (2006). The statute requires that testing of the sample comply with "scientifically accepted analytical methods", but does not indicate what "scientifically accepted" means. A.R.S. § 23-493.03(4). The statute provides that the sample must be tested by a laboratory approved or certified by the U.S. Department of Health and Human Services, or college of American pathologists. A.R.S. § 23-493(7). Further, the statute requires confirmation of positives by use of a different chemical process than that used in the initial drug screen. A.R.S. § 23-493.03(5). There is no requirement that an MRO be made available.

Louisiana's drug screening statute also defines as a "sample" to be used in drug screening "urine, blood, saliva or hair." La. Rev. Stat. § 49:1001 (2005). The Louisiana statute is favorable to the employer. For positive pre-employment testing, the statute says that the employer can offer the applicant the opportunity to pay for a confirmation of the test and for a review by an MRO. § 49:1007.

These statutes both authorize the use of saliva as a specimen for drug testing. Although they cannot be used as controlling authority in New Mexico, one may conclude that the legislatures recognized the use of saliva as an alternative method for testing. There are, however, provisions built into the statutes that prohibit complete reliance on that method. Arizona, regardless of which method is used, requires that the confirmation test use a different chemical technique. Louisiana permits employers to offer the opportunity for MRO review, but that provision only applies to applicants, not employees.

B. Daubert and saliva specimens.

New Mexico has accepted the Daubert analysis as to the admissibility of scientific evidence. State v. Alberico, 116 NM 156, 168, 861 P.2d 192, 203-204 (1993). Some of the factors that the Daubert rule examines are the general acceptance of the technique, whether the technique has been tested, whether it has been subject to peer review and publication, and what the known or potential error rate is. Although the use of saliva as a specimen for drug testing is on the rise, and appears to be accepted in the scientific community, we have not found judicial authority subjecting the use of the specimen to a Daubert analysis.

C. Other considerations.

One consideration in analyzing the effective use of saliva testing is that it has not been accepted by the Department of Transportation as a means to test for drug use. There are established procedures for alcohol testing in oral fluids under the DOT regulations.

2. Does use of medical review officers (MRO) in oral drug testing increase in importance or become less important?

Because use of saliva in drug screening is not as well defined as urine testing, and because even using urinalysis, a reliable and accepted method, requires review by an MRO under the DOT regulations, use of the MRO should be strongly considered. It is important to review this on a “cost versus risk” analysis. The safer route is to use an MRO. Since the screening discussed is limited to post-offer, pre-employment screening, the risk factor is lower than when testing current employees.

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