

Bashful Bladders Bring Problems for Employers

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Bashful Bladders Bring Problems for Employers

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The ever-evolving [legal landscape](#) surrounding marijuana legalization has in recent years continued to cloud the waters with respect to workplace drug testing programs. However, beyond the complex issue of whether employers must provide accommodations for medical users in states where marijuana is legal, employers must also remain vigilant in evaluating whether their drug testing policies run afoul of various anti-discrimination laws, such as the Americans with Disabilities Act (ADA).

Workplace drug testing programs based on urinalysis are particularly rife for potential issues. Liability under either the ADA or the Age Discrimination in Employment Act (ADEA) may arise with respect to both new hires subject to pre-employment drug screening and existing employees subject to post-hire drug testing. A potentially problematic scenario involves an employee being asked to provide a urine sample as part of a workplace drug screening program. The employee may take several minutes longer than expected to provide that urine sample. The individual tasked with collecting that sample, after several minutes, checks in with the employee to see if he or she is having any trouble. The employee still does not come out of the

restroom. Eventually, the employee exits the restroom, having failed to provide a urine sample. In this hypothetical, the employee explains that he or she could not provide a urine sample due to a “shy bladder” or an undisclosed “medical condition.”

In this scenario, an employer very well may question whether the employee is trying to cover up drug usage. However, there are a number of reasons an individual may experience “bashful” or “shy bladder,” among them being a condition called [paruresis](#), and another condition called benign prostatic hyperplasia (BPH) (a common condition that affects men as they age). Paruresis is a social anxiety disorder that affects an individual’s ability to urinate if other people are nearby, and is believed to affect approximately 20 million Americans. BPH, in turn, can block or restrict a man’s ability to urinate, including on command for a drug screen. Depending on the specific facts in a given situation, and the size of the organization, individuals affected by paruresis and/or BPH may potentially be [covered by the ADA](#) and/or the ADEA with respect to pre- and post-employment drug screening.

If a new or existing employee being subjected to a urinalysis-based drug test mentions a medical condition, an employer should treat that scenario like it would any other request for a disability accommodation. If a medical condition claim seems plausible under the circumstances, the employer should carefully consider the availability of a feasible alternative, including blood, saliva, or hair testing. The employer should also consider whether different conditions can be created that would allow the

employee to provide a urine sample (*i.e.*, a private restroom, or a longer timeframe in which to provide a sample). Employers are also entitled to request a doctor's note providing support for the employee's inability to provide a urine sample under standard drug testing conditions. As with any accommodation scenario, the key for risk mitigation is the given employer's willingness to engage in the interactive process and be reasonably flexible.

Few courts have specifically addressed BPH or paruresis in the context of workplace drug testing, and there is no concrete guidance from the EEOC in this arena. With respect to paruresis in particular, several years ago the EEOC informally addressed whether the condition qualified as a disability for purposes of the 2009 Americans with Disabilities Amendments Act (ADAAA). The EEOC declined to reach a conclusion, but did note that bladder function is a "major life activity" under the ADAAA.

Because facts and circumstances vary widely, there is no one-size-fits-all approach to guaranteeing an employer is protected from ADA and/or ADEA claims with respect to its workplace drug screening program. In light of that fact, employers should consult regularly with experienced counsel to make sure they stay abreast of current legal developments and requirements, and to ensure that their workplace drug testing programs comply with applicable laws.

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