

Drug Testing – 50 States

Background

Testing employees or job applicants for drug or alcohol use invokes a controversial area of policy and law that is still establishing its parameters. No one denies that employee drug and alcohol abuse costs employers billions of dollars each year in decreased productivity, increased liability exposure, and higher WORKERS' Compensation insurance premiums. Employers clearly have a substantial and vested interest in not only providing, but also ensuring, a drug-free workplace, for the safety and welfare of both employees and employers.

Controversy enters the picture when employers either ineptly or aggressively impose drug testing in a manner that may violate personal or constitutional rights, such as privacy rights or protections against unlawful searches and seizures. While drug testing is permitted in most states, it is not always mandated. For those employers who implement drug testing programs, it is imperative that the programs follow state and federal guidelines in order to ensure protection of employee rights.

Federal Law

The drug-testing movement began in 1986, when former President Ronald Reagan signed Executive Order 12564, requiring all federal employees to refrain from using illegal drugs, on or off-duty, as a condition of federal employment. Two years later, Congress passed the Drug-Free Workplace Act of 1988. That, in turn, spawned the creation of federal Mandatory Guidelines for Federal Workplace Drug Testing Programs (Section 503 of PUBLIC LAW 100-71). The mandatory guidelines apply to executive agencies of the federal government, the uniformed services (excepting certain members of the armed forces), and contractors or service providers under contract with the federal government (excepting the postal service and employing units in the judicial and legislative branches).

Although the Act only applies to federal employees, many state and local governments followed suit and adopted similar programs under state laws and drug-free workplace programs.

Constitutional Protections

The U.S. Constitution does not prohibit drug testing of employees. However, in the U.S. Supreme Court case of *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989), the high court ruled that requiring employees to produce urine samples constituted a "search" within the meaning of the Fourth Amendment to the U.S. Constitution. Therefore, all such testing must meet the "reasonableness" requirement of the Fourth Amendment (which protects citizens against

"unreasonable" searches and seizures). The Court also ruled that positive test results could not be used in subsequent criminal prosecutions without the employee's consent.

The other major constitutional issue in employee drug testing involves the Fifth Amendment (made applicable to the states by the Fourteenth Amendment), which prohibits denial of life, liberty, or property without "due process of law." Since the majority of private-sector employees in the United States (excepting mostly union employees) are considered "at-will employees," an employer need not articulate a reason for termination of employment. However, under certain circumstances, the denial of employment or the denial of continued employment based on drug test results may invoke "due process" considerations, such as the validity of the test results, the employee's right to respond, or any required notice to an employee.

Finally, under the same constitutional provisions, persons have a fundamental right to privacy of their person and property. Drug testing, although in itself deemed legal, may be subject to constitutional challenge if testing results are indiscriminately divulged, if procedures for obtaining personal specimens do not respect the privacy rights of the person, or if testing is unnecessarily or excessively imposed.

Key Provisions

Under state and federal drug-free work place programs include the following:

- Both employees and applicants may be tested.
- Tests may be conducted pre-employment, "upon reasonable suspicion" or "for cause," at random, routinely, and/or post treatment or rehabilitation. Random testing involves unannounced, "suspicionless," and/or non-routine testing that may be indiscriminately applied to some, but not all, employees.
- Basic tests screen for amphetamines (speed, meth, ecstasy, crank, etc.), cannabinoids (marijuana, hashish), cocaine (coke or crack), opiates (heroin, morphine, opium, codeine), or phencyclidine (PCP).
- Extended tests might screen for barbiturates, benzodiazepines, ethanol, hallucinogens, inhalants, or anabolic steroids.
- Tests may involve urine samples, saliva tests, hair samples, sweat patches, breathalyzers, or blood tests.

Special Considerations

Mandatory vs. Optional Testing

Under federal law, jobs that involve safety or security functions generally require mandatory drug testing of applicants or employees. The U.S. Department of

Transportation adopted revised regulations in August 2001, and other agencies are free to adopt their own internal regulations. Likewise, many states expressly mandate drug testing for similar jobs, for example, jobs in the medical and health related fields, jobs requiring the use of machinery or vehicles, security positions, food handling jobs, or physically demanding jobs such as utilities cable line installation or climbing.

"For Cause" vs. "Random" Testing

Generally, employers are permitted to engage in "for cause" or reasonable-suspicion testing under drug-free workplace programs. State law may limit or prohibit random ("suspicionless") testing of employees unless the job position warrants such an intrusion, such as in "safety sensitive" positions. It is important to remember that private-sector employees do not always enjoy Fourth Amendment rights protecting them against unwarranted or unreasonable searches and seizures (only Fifth amendment rights are extended to the states by the Fourteenth Amendment). Nevertheless, many state constitutions incorporate such rights into their own constitutions, so private sector employees may have the same protections.

Testing Union vs. Non-union Employees

Union employees are protected by the National Labor Relations Act (NLRA), which mandates that private sector employers must bargain collectively over terms and conditions of employment. The NLRA has ruled that drug testing of current employees (but not applicants) is a term or condition of employment. Unionized public sector employers may unilaterally decide to impose drug testing, but must negotiate the procedures (e.g., chain of CUSTODY of samples, notice to employees, confidentiality, consequence of positive results, etc.).

Testing Employees vs. Applicants

Since applicants are generally deemed to have a lesser expectation of privacy than current employees, employers enjoy greater freedom to test applicants, without the same concerns being invoked. However, to contain costs, many employers limit drug testing to those applicants whom they expect to offer a position to, as a condition of hire. While there is no requirement to notify an applicant in advance of a drug test, he or she is free to refuse to submit to it. Refusal to submit, of course, may be grounds to terminate the application process.

Select State Laws

ALABAMA: Alabama's Drug-Free Workplace Program is codified under Ala. Code 25-5-330 et seq. Employers who implement a Drug-Free Workplace

Program qualify for a 5 percent discount under the employer's workers' compensation policy.

ALASKA: Alaska's law for drug and alcohol testing of employees is codified at Alaska Stat. 23.10.600 et seq. Employers who comply with the statute are protected from civil liability if they take disciplinary action in good faith based on the results of positive tests. However, persons who are injured by a drug or alcohol-impaired employee may not sue the employer for failing to test for drugs or alcohol.

ARIZONA: Ariz. Rev. Stat. Ann. 23-493 et seq. requires employers to adopt a written policy distributed to every employee who is subject to testing or printed as part of a personnel handbook or manual.

ARKANSAS: Arkansas has not enacted any laws regarding the testing of employees for drugs or alcohol. The Arkansas Supreme Court has upheld dismissals of employees who violate an employer's substance abuse policy.

CALIFORNIA: Under California Drug-Free Workplace Act of 1990, Cal. Gov. Code 8350 et seq. (modeled after the federal act), only employers who are awarded contracts or grants from any state agency must certify to the contracting or granting agency that they will provide a drug-free workplace. The contractors must also have a written policy for their employees.

COLORADO: Colorado has not enacted any employment drug or alcohol testing laws. However, the Colorado Supreme Court has upheld testing if the employee's supervisor had a reasonable suspicion that the employee was either using or was under the influence of illegal drugs or alcohol.

CONNECTICUT: Connecticut's law, codified at Conn. Gen. Stat. 31-51 et seq., provides express language protecting the privacy of employee testing. Reasonable suspicion is required before an employer may compel testing, and the employer must show that the use was adversely affecting the employee's job performance.

DELAWARE: No specific laws have been enacted.

FLORIDA: Employee drug testing is voluntary in Florida. However, Fla. Stat. 440.101 et seq. gives incentives to employers that implement drug-free workplace policies. Florida law parallels federal law on the subject. If a governmental unit receives two or more equal bids for services or goods, preference is given to the business that has implemented a drug-free workplace program. The state also gives a worker's compensation premium discount to employers who have implemented a drug-free workplace.

GEORGIA: Georgia has a Drug-free Workplace Act, Ga. Code 50-24-1. All state contractors holding contracts of at least \$25,000 must certify that they will provide a drug-free workplace. If a contractor fails to comply with the Act, the state may suspend payments or terminate the contract, so the contractor has an incentive to comply.

IDAHO: The Idaho Private Employer Alcohol and Drug-Free Workplace Act, Idaho Code 72-1701 et seq. provides voluntary drug and alcohol testing guidelines for private employers. If an employer follows the guidelines, employees testing positive for drugs or alcohol will be guilty of misconduct and will be denied unemployment benefits.

ILLINOIS: Illinois has not enacted its own legislation, but it allows private employers to require all employees to conform to the requirements of the federal Drug-free Workplace Act of 1988.

INDIANA: Indiana has not enacted its own legislation, but it allows private employers to require all employees to conform to the requirements of the federal Drug-free Workplace Act of 1988.

IOWA: Under Iowa Code 730.5 et seq., random testing is prohibited. An employer may require pre-employment drug tests for peace officers or state correctional officers. An employer may require a specific employee to submit to a drug test only if certain conditions are met, as outlined in the statute.

KANSAS: Kansas has not enacted any workplace drug and alcohol testing laws.

KENTUCKY: Kentucky has no legislation governing employment drug or alcohol testing. However, 702 Ky. Admin. Regs. 5:080 requires all school bus drivers working for any county school district in Kentucky to be drug-tested after an accident resulting in bodily injury or \$1,000 worth of property damage.

LOUISIANA: Under Louisiana Rev. Stat. 49:1001 et seq., private employers do not need a written policy to implement a drug testing policy, there need not be reasonable cause to test an employee, and employers need not offer rehabilitation to offenders prior to termination from employment. Same-gender direct observation is permitted in certain circumstances, as where there is reason to believe an employee may alter or substitute urine specimens, etc.

MAINE: Rev. Stat. 26 -681 et seq., protects the privacy rights of individual employees from undue invasion by employers but permits the use of tests when the employer has a compelling reason to administer them.

MARYLAND: Under Md. Code Ann., Health-Gen. 17-214, employers may test their employees for drugs and alcohol for any "legitimate business purpose."

However, the statute outlines specific procedural requirements and employee rights in cases where positive results may be used for discipline.

MASSACHUSETTS: Massachusetts has no specific employment drug and alcohol testing laws.

MICHIGAN: No specific law, except that under Mich. Comp. Laws 37.1211(a civil rights law) established employment policies, programs, procedures or work rules regarding the use of alcoholic liquor or the illegal use of drugs will not be considered to violate an individual's civil rights.

MINNESOTA: Minnesota was one of the first states to enact employment drug and alcohol testing laws in the country, entitled "Authorized Drug and Alcohol Testing" and codified at Minn. Stat. 181.951 et seq. Employers may not conduct drug and alcohol tests without a written drug and alcohol testing policy. Employers may not require employees or job applicants to undergo drug and alcohol testing on an "arbitrary and capricious basis."

MISSISSIPPI: Under Miss. Code Ann. 71-7-1 et seq, all employers who participate in Mississippi's workers' compensation program are required to establish and implement a written drug and alcohol-testing program. That virtually covers all employers.

MISSOURI: Missouri's Drug-Free Public Work Force Act is codified at Mo. Rev. Stat.105.1100 et seq. Only state employees under the Executive Branch of the Missouri state government are subject to the Act. No provisions mandate compliance from private employers.

MONTANA: Mont. Code Ann. 39-2-205 et seq. ("Montana Workforce Drug and Alcohol Testing Act") requires that any testing of employees by private employers be done in accordance with written policies and procedures established by the employer.

NEBRASKA: Neb. Rev. Stat. 48-1901 et seq. states that no disciplinary or administrative action is allowed unless an initial positive test has been confirmed by gas chromatography/mass spectrometry technique. Attempts to alter the results of a drug or alcohol test are punishable as Class I criminal misdemeanors.

NEVADA: No state law regulates private employer drug or alcohol testing. State employees do not include members of the Nevada National Guard or employees of state penal, mental, and correctional institutions.

NEW HAMPSHIRE: New Hampshire has not enacted any employment drug or alcohol testing laws.

NEW JERSEY: New Jersey has no express law relating to employment drug or alcohol testing.

NEW MEXICO: New Mexico has no statutes regulating the testing of employees for drugs or alcohol.

NEW YORK: New York has no express employment drug or alcohol testing laws. Random drug and alcohol testing of city transit authority bus drivers, police officers and corrections officers has been upheld by courts.

NORTH CAROLINA: North Carolina has a "Controlled Substance EXAMINATION Regulation" codified at Gen. Stat. 95-230 et seq. The law purports to protect individuals from "unreliable and inadequate examinations and screening for controlled substances" and to preserve an individual's dignity to the extent practical, and focuses on chain-of-custody and laboratory testing procedures more than policy guidelines.

NORTH DAKOTA: No statute expressly addresses employment drug and alcohol testing in North Dakota, and there is little, if any, case law in the area.

OHIO: Ohio does not have any employment drug and alcohol testing laws.

OKLAHOMA: Oklahoma's "Standards for Workplace Drug and Alcohol Testing Act", Okla. Stat. 40-551, applies to both public and private employers. No unusual provisions.

OREGON: No specific employment drug or alcohol testing laws.

PENNSYLVANIA: Pennsylvania has not enacted any employment drug and alcohol testing laws.

RHODE ISLAND: Rhode Island's "Urine and Blood Tests as a Condition of Employment" provision under R.I. Gen. Laws 28-6.5-1 and 28-6.5-2. prohibits the termination from employment of any person who tests positive for drugs or alcohol. Instead, the employee must be referred to a substance abuse professional for treatment or evaluation.

SOUTH CAROLINA: South Carolina's law, modeled after the federal law, affects those doing business with the State. Codified at S.C. Code Ann. 44107-10 et seq. offers a 5 percent reduction in worker's compensation premiums to participating employers (private employers are not required to implement such programs).

SOUTH DAKOTA: No employment drug and alcohol testing laws.

TENNESSEE: Tenn. Code Ann. 50-9-103 et. seq., gives a discount on workers' compensation premiums and shifts the burden of proof to employees in case of an accident.

TEXAS: Under Tex. Code Ann. 411.091, the "Policy for Elimination of Drugs in the Workplace," employers with fifteen or more employees with workers' compensation insurance coverage are required to adopt a policy of their own choosing but directed at the elimination of drug abuse and its effects in the workplace.

UTAH: Utah Code Ann. 34-38-1 et seq. employers may test employees or prospective employees as a condition of hire or continued employment. In a twist of the law, employers and management must submit to the testing themselves.

VERMONT: Vt. Stat. Ann. 21 § 511 et seq. prohibits random testing for drugs or the drug testing of employees as a condition of continued employment, promotion, or change in employee status.

VIRGINIA: No express law governs employment drug testing.

WASHINGTON: Washington Rev. Code 49.82.010 et seq. models the federal law. Private employers who adopt a drug-free workplace program will receive a 5 percent discount on their workers' compensation premiums.

WEST VIRGINIA: West Virginia has not enacted any employment drug or alcohol testing law, and in a 1990 case, the Supreme Court of West Virginia prohibited random testing by a private employer.

WISCONSIN: No express statute governs employment drug and alcohol testing.

WYOMING: Wyoming has no express statute governs employment drug and alcohol testing.