

Public Sector Workforce Drug Testing Policy

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In recent years, the widespread abuse of drugs and alcohol in the United States has become a growing concern. According to the U.S. Department of Labor, “statistics show that one in every 12 employees uses illegal drugs and one in 10 has an alcohol problem. 71% of all drug users are over age 18 and employed either part time or full time.”¹ Both public and private organizations bear the direct and indirect costs – absenteeism, tardiness, and workplace accidents – often associated with low performing substance abusers. The drug testing issue brings a number competing interests: Employers seek ways to combat the use abuse of substance by their employees. At the same time, employees and their unions seek to limit overly intrusive or unfair methods of testing. The courts have also increasingly been major players in drug testing policy, determining the conditions under which drug testing in permissible in the public sector.

A public sector organization must consider a number of questions when researching and developing a drug testing policy. Why a policy is needed should be the first issue determined. Next, the employer must consider who from their workforce should be tested and what the criteria for identifying those folks are. The type of drug test must be selected as well how often to test employees. Employers must also consider what type of action to pursue in light of a positive test result by an employee. Finally, employers must prepare for battle with unions and be prepared to defend their method of testing in court.

Why Test?

Drug testing procedures ideally weed out individuals who might jeopardize the safety of others, engage in negative workplace behaviors, or simply perform at

¹ Gillian, Joseph B. “Effective Hiring Practices.” Professional Safety. Park Ridge: Nov. 2002. Vol.47, Iss. 11.

unacceptably low levels due to drug and alcohol abuse.² In addition, perceived advantages of drug testing for employers are that it: discourages drug abusing applicants; detects and leads to dismissing or rehabilitating drug abusing workers; reduces accidents and injuries and increases job performance (decrease in absenteeism, turnover, co-worker conflicts); reduces employer's risks for lawsuits; ensures public safety; enhances the employer's public image and promotes public trust; leads to decrease in medical insurance premium costs; decreases drug abuse in society.³

Organizations can also enjoy a great symbolic value to implementing drug testing in the public sector. A drug testing program can help top officials appear decisive and on top of things, that they can solve the pressing problems of the day.⁴ "Drug testing can also be seen as a symbolic effort to reaffirm the administrative integrity of the civil service, that public administrators are morally sound and incorruptible."⁵

Drug Test Methods

In an attempt to establish drug free work environments, an increasing number of public and private organizations are using some form of drug test. Most often, these include testing procedures such as blood, hair, urine or saliva analyses. "Drug testing is based on three fundamental processes: sample collection, preliminary screening, and

² Terpstra, David E., Kethely, "The Nature of Litigation Surrounding Five Screening Devices." Public Personnel Management. Washington: Spring 2000. Vol.29, Iss. 1.

³ Griffin, Stephen O., et al. "Developing a Drug Testing Policy at a Public University: Participant Perspectives." Public Personnel Management. Washington: Winter 2001. Vol.30, Iss. 4.

⁴ Thompson, Frank J., Riccucci, Norma M., Ban, Carolyn. "Drug Testing in the Federal Workplace: An Instrumental and Symbolic Assessment." Public Administration Review. Washington: Nov/Dec 1991. Vol.51, Iss. 6.

⁵ Ibid.

confirmation testing.”⁶ All of these methods are by their nature intrusive. The most common method is urinalysis, which shall be the basis for most of the discussion in this paper.

However, in recent years, the chemical analysis of hair samples has emerged as an alternative. Hair analysis is more effective than urinalysis in identifying long-term drug use, and is less intrusive than the testing of bodily fluids. “But there are disadvantages associated with hair testing: it is expensive and cannot detect immediate impairment from drug use or recent drug use.”⁷ Hair analysis has also registered a higher amount of false positives, “possibly to exposure to drug particles in the environment.”⁸

Who Gets Tested and Why

Identifying the organizational strategy for drug testing is a critical step towards implementing a drug testing program. Who gets tested, when they get tested, and why, are all questions that come together as drug testing policy is formed. Other factors to consider are the validity and utility of the test, sophistication and cost, degree of intrusiveness, and acceptance by applicants and current employees. The following paragraphs describe the most common drug testing strategies.

Applicant/Pre-Employment

One effective way to avoid hiring drug users is to incorporate post-offer drug testing into an organization’s hiring process. Pre-employment testing is the most frequently implemented drug testing strategy among employers. It discourages drug

⁶ Uhrich, Mark D., “Are You Positive the Test is Positive?” HR Magazine. Alexandria: April 1992. Vol.37, Iss. 4.

⁷ Stevenson, Jerry G., Williamson, Roger. “Testing for Drugs: Bathrooms or Barbershops?” Public Personnel Management. Washington: Winter 1995. Vol.24, Iss. 4.

⁸ Thompson, 1991.

abusers from applying the first place. “It also has been mostly favored by court decisions in the face of legal challenges – the court reasoning that applicants have less invested in the job than current employees, less expectation of privacy, and urinalysis is often routine as part of a physical exam for most new hires.”⁹

The obvious disadvantage of the pre-employment strategy is that, with advance knowledge of the policy, an applicant can simply discontinue use until they are hired, and then resume. However, even though most applicants have come to expect an initial drug screen, this type of testing remains effective. Besides weeding out folks who are foolish enough to use drugs immediately prior to a test, a pre-employment drug test will further eliminate folks who don’t even care enough to figure out how long they need to remain clean in order to test negative.¹⁰ Equally important, it will knock out those who are so dependent on illegal drugs that they cannot remain clean long enough to test negative.

Reasonable Suspicion

For-cause drug testing is usually triggered by suspicion based upon employee behavior or documented poor employee work performance. Employees are held to the standard of “reasonable suspicion” which is a lesser standard than “probable cause.”¹¹ “In most cases of employee testing under the reasonable suspicion standard, they are tested because of inappropriate conduct or performance deficiencies such as poor or declining productivity; erratic behavior, excessive tardiness or absenteeism, decrease in willingness to cooperate with co-workers, and carelessness, negligence, or disinterest.”¹²

⁹ Griffin, 2001.

¹⁰ Segal, Jonathan A. “Urine or You’re Out.” HR Magazine. Alexandria: Dec. 1994. Vol.39, Iss. 12.

¹¹ Griffin, 2001.

¹² Segal, 1994.

One advantage of testing based on observation is simply, that in order to trigger a test, evidence should be substantial enough to withstand a legal challenge. Another advantage is that “with early detection, employees can be rehabilitated and retained.”¹³

However, the hard part of for-cause testing is determining when reasonable suspicion exists. Employers should be aware that often times other factors may be contributing to the problems in performance outside of drug/alcohol.¹⁴ In fact, testing employees who show these behaviors might even be considered unnecessary. A good employer should be responding to the problems of its employees “through progressive discipline or corrective counseling without even inquiring about the cause. It should not matter whether the cause is a drug, family, marital, or financial problem.”¹⁵

Post-Accident

Post-accident drug testing requires drug tests of all employees involved in a workplace accident. These tests do not discriminate based on any criteria other than participation in the accident, and courts are supportive of the employer’s right to investigate all accidents to secure a safe working environment.¹⁶ A disadvantage is that “even if an employee tests positive, employers may not be able to demonstrate that the accident was the result of drug impairment.”¹⁷ However, the cost savings that can be realized with post-accident drug testing can be substantial. “In many states, an employee

¹³ Griffin, 2001.

¹⁴ Segal, 1994.

¹⁵ Ibid.

¹⁶ Griffin, 2001.

¹⁷ Ibid.

can be denied workers compensation if he or she tests positive after an industrial accident.”¹⁸

Periodic

Periodic drug testing is not very controversial in that it usually means that urine is taken at a regularly scheduled physical exam. Courts and employee advocates are less resistant because of the advance notice given and because of the routine nature of the testing.¹⁹ For these same reasons however, the testing is less likely to be successful for detection or deterrence, because employees can schedule their drug use around the test.

Random

Most of the public controversy about drug and alcohol testing has emphasized the constitutionality of random testing programs on the public sector workforce. With this type of testing, employees are randomly assigned to be screened at a given time, usually without notice. Random testing does not mean that a supervisor can randomly select an employee for testing. Done properly, there is no supervisory discretion. Names or number should be selected by a computer.²⁰

Random testing stands on shaky legal grounds because it is not based on any suspicion – reasonable or otherwise. It is however, intrusive and unexpected, and has also been identified as a significant morale deflator in the workplace.²¹

While random testing’s incidence of catching casual to light drug users is low, that may be evidence that is particularly effective, specifically as a deterrent. Meanwhile, “studies

¹⁸ Segal, 1994.

¹⁹ Griffin, 2001.

²⁰ Segal, 1994.

²¹ Griffin, 2001.

have suggested that random testing is in fact more effective at catching and deterring serious abusers.”²²

What to Test For?

What drugs are detectable? Most workplace drug testing involves targeted drug analysis. That means a laboratory will test for a specific set of drugs. Drugs present in the urine but outside the targeted list will not be detected. “The National Institute on Drug Abuse (NIDA) focuses federal testing on five drug classes including marijuana, cocaine, opiates, amphetamines.”²³ Based on criteria, including where employees are located, the instance of drug use in those areas, and the nature of the work they do, employers may want to specify drugs for targeted testing, or accept lower levels as positive results.²⁴

Employee Perspective

Employees tend to be cautious about accepting drug testing. Employees want to know the manager cares about safety, but are also concerned about personal privacy issues. Most employees will respect officials for their sensitivity to safety issues. In fact, David Bell, writing for Public Management, claims that “random drug testing is supported by most employees even when unions have resisted drug testing.”²⁵ A drug testing program is more likely going to be perceived as fair by employees if there is:

- (a) a precipitating event, such as accident, as a trigger
- (b) a job where the cost of mistakes is high and can impact public safety
- (c) test results are kept confidential
- (d) post-positive test response by the employer is rehabilitative versus punitive

²² Ibid.

²³ Uhrich, 1992.

²⁴ Ibid.

²⁵ Bell, David. “Organizational Communication Techniques for Managers.” PM. Public Management. Washington: July 1997. Vol.79, Iss. 7.

- (e) there is an opportunity to appeal a positive result
- (f) the program was designed with union participation²⁶

Concern for workplace safety is balanced for employees by their concern for privacy. Not only does privacy cover concern for intrusive tests such as blood or urine, but is also extends to proprietary privacy and a need for “personal space.” These claims may be tied to the 4th Amendment protecting against unreasonable search and seizure. “This right has been extended by claimants to protection against bodily intrusions in involuntary administration of drug tests and to protection from employer intrusion into personal effects brought to the workplace.”²⁷

The Role of Unions

Labor relations are another relevant issue. Drug and alcohol testing of employees (vs. applicants) is a mandatory bargaining subject in a number of states. Such topics were previously considered management rights.²⁸ Employers with unions, such as governments, cannot implement such tests unilaterally; ordinarily, they must provide the union with notice and bargain upon request. While most unions will begrudgingly accept reasonable suspicion testing, unions bitterly oppose random testing.²⁹ Employers who begin a random-testing program will likely find a strong foe in organized labor. For example, “The American Federation of State, County and Municipal Employees Union (AFSCME) feels so strongly concerning the issue of random drug testing in the public

²⁶ Arthur, Winfred Jr., Doverspike, Dennis. “Employee-Related Drug Testing: Idiosyncratic Characteristics and Issues.” *Public Personnel Management*. Washington: Spring 1997. Vol.26, Iss. 1.

²⁷ Cozzetto, Don A., Pedeliski, Theodore B. “Privacy and the Workplace: Technology and Public Employment.” *Review of Public Personnel Administration*. Columbia: Winter 1997. Vol.26, Iss. 4.

²⁸ Pyne, Joan. “What Public Employee Relation Boards and the Courts are Deciding.” *Review of Public Personnel Administration*. Columbia: Summer 1993. Vol.14, Iss. 3.

²⁹ Segal, 1994.

sector that it emphasizes the issue at its conferences and repeatedly lobbies its opposition to random drug testing.”³⁰ Unions have also attempted to influence the legislative processes, “having lobbied legislatures at every level of government to limit the use of drug testing.”³¹

Role of the Courts

Employee and applicant drug testing tends to rest in that gray area of legal issues. Without question, drug testing is a search. The process of extracting bodily fluids from an individual for the purpose of examining their contents for illegal substances constitutes a search, “which invokes the 4th Amendment’s protection against unwilling search and seizure.”³² Historically, the courts have permitted incursions into the 4th Amendment rights of public employees if the intrusions reasonable, if the employer has a compelling interest, and if the offenses are job-related.³³

In addition, the courts have also examined the legality of drug testing under the 5th and 14th Amendments’ due process provisions. “Some courts have ruled that due process is violated if employees are not given prior notice to drug testing, if employees are not informed of procedural guidelines for drug testing, or if employees are not granted a formal hearing if a positive test results in a termination.”³⁴

³⁰ Fine, Cory R., et al. “Employee Drug Testing: Are Cities Complying with the Courts?” Public Administration Review. Washington: Jan/Feb 1996. Vol.56, Iss. 1.

³¹ Thompson, 1991.

³² Riccucci, Norma M., Knowles, Eddie. “Drug Testing in the Public Sector: An Interpretation Grounded in Rosenbloom’s Competing-Perspectives Model.” Washington: Jul/Aug 2001. Vol.61, Iss. 4.

³³ Cozzetto, 1997.

³⁴ Thompson, 1991.

The U.S. Supreme court has addressed the drug test issues in a few landmark cases. In *Skinner v. Railway Labor Executives* (489 U.S. 602 [1989]), “the Court upheld the drug testing of workers by the Federal Railroad Administration on the grounds that safety concerns in the railway industry outweighed employees right to privacy.”³⁵ Similarly, in “*National Treasury Employees Union et al v. Von Raab* (1989), the Supreme Court allowed the U.S. Customs Service to implement a urinalysis drug screening program, reasoning that the magnitude of the risk of drugs at the workplace was too great upon public safety.”³⁶

Disagreements

It is important to keep in mind that there are many criticisms about the implementation of workforce drug testing programs. Questions about its effectiveness and cost remain. First, it is hard to determine the severity of drug use in the workforce. How do you know that you should be testing? Second, drug testing is costly, and requires complex procedures to ensure integrity. While few would doubt that drug use generates some cost for employers, the size of this price tag is open to dispute. “Moreover, any assessment of the positive effects of drug testing need to be balanced against the costs of implementing the program. Estimates per test range an average between \$40 to \$60 for the federal government. These costs do not include program costs and legal costs defending agencies against suits.”³⁷ Third, little evidence supports contentions that drug testing improves workplace efficiency, nor is there clear support for

³⁵ Ibid.

³⁶ Fine, 1996.

³⁷ Thompson, 1991.

arguments that [drug testing] promotes public health or reduces crime.”³⁸ Fourth, there are clearly issues with reaching into employee privacy. And finally, but perhaps most relevant, “drug use does not always correlate with a decrease in job performance.”³⁹

While drug tests appear to be valid predictors of accidents, absenteeism and counterproductive work behaviors, is it unknown whether they are accurate predictors of job performance.⁴⁰

Suggestions

It became evident to me through my research that drug testing in the workforce is a tremendously contentious issue. At the bargaining table and in the courts, we will continue to see this issue battled in public. However, drug use in America is similarly a perpetually hot topic and cannot be ignored. Poor job performance due to drug use equally cannot be ignored nor tolerated.

If I were a public administrator, and provided I had the resources to do so, I would choose to implement a drug testing program. To begin, I would develop a clear written policy for reference in case of any dispute, which would be distributed and posted. For the drug testing program itself, I would screen new applicants with urinalysis drug test, and reserve the right to test for reasonable suspicion. I would not choose to do random testing because of the expense of testing and the increased potential for suit. I would make sure that my supervisors were trained to identify potential drug habit behaviors and make sure that know to provide other resources including meetings or counseling before

³⁸ Ibid.

³⁹ Klingner, Donald, et al. “The Miami Coalition Surveys of Employee Drug Use and Attitudes: A Five Year Retrospective (1989-1993).” *Public Personnel Management*. Washington: Summer 1998. Vol.27, Iss. 2.

⁴⁰ Terpstra, 2000.

drug testing even comes into play. Finally, I would make sure that Employee Assistance Programs (EAPs) can be set up to provide easy, confidential access for employees or family members seeking intervention, counseling, or related assistance and services. It is not a perfect system, but so far there is no universally agreed upon way to drug test.

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