Implementing a Drug & Alcohol Testing Program
by Jessie L. Harris

I. OVERVIEW

A number of surveys conducted over the last decade have illuminated the impacts of substance abuse on the workplace. It is generally known that the vast majority of adult illicit drug users in the United States are employed.\(^1\) Conservative estimates suggest that 6.5 percent of all full-time workers are illicit drug users.\(^2\) The health and safety implications are quite apparent when considering that 40 percent of all industrial fatalities can be linked to alcohol and alcoholism.\(^3\) The economic impact is also difficult to ignore. Drug and alcohol abuse has been estimated to cost American businesses roughly $81 billion in lost productivity each year.\(^4\) Other research has shown that drug and alcohol abusers are more likely than non-abusers to miss workdays, change employers frequently or make costly mistakes.\(^5\) Consider the financial and environmental costs associated with the Exxon Valdez catastrophe of 1989 where alcohol was believed to have played a role. That incident alone came at a cost of more than $2 billion.

The passage of the Drug-Free Workplace Act of 1988 ("the Act") brought with it the requirement that federal contractors and grant recipients implement standard drug abuse policies. The Act applies to employers with a federal contract of $100,000 or greater and all employers receiving federal grants of any amount\(^6\). The Act requires covered employers to:

1. Develop and publish a written drug policy and ensure that employees read and consent to the policy as a condition of employment;

2. Initiate an awareness program to educate employees about

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2 Id.


• the dangers of drug abuse in the workplace
• the company’s drug-free workplace policy
• available drug counseling, rehabilitation and assistance programs
• the penalties that may be imposed for drug abuse violations;

3. Require that employees provide notice of any workplace drug convictions;

4. Make an ongoing effort to maintain a drug-free workplace.⁷

While the Act requires covered employers to maintain a drug abuse policy, it does not require them to implement a drug testing program.

Recognizing the significant toll substance abuse can take on a workplace, many private employers have begun to implement drug and alcohol testing programs. A number of federal agencies have promulgated their own regulations that include mandatory drug testing for covered employees – Department of Transportation (DOT), Federal Aviation Administration (FAA), Department of Energy (DOE), Nuclear Regulatory Commission (NRC), etc. The DOT’s regulations are perhaps the most widely utilized and can serve as a useful tool for employers looking to adopt a drug testing program.⁸

II. STEPS TO CONSIDER WHEN IMPLEMENTING A TESTING PROGRAM

A. Determine Whether Testing is Permitted by a Collective Bargaining Agreement

Although private employers are permitted to conduct drug testing of employees, collective bargaining agreements may prohibit or impose limitations on testing of union employees. Employers should first discern what, if any, limitation are imposed under a collective bargaining agreement. If an agreement is silent on the issue of testing, employers may wish to advocate a drug testing policy during the negotiation process.

B. Define the Scope of Your Testing Policy

A testing program should be crafted with the context of your business in mind. As a general matter, employers choosing to implement a testing program should make sure the program is clearly outlined in a written policy and acknowledged by covered employees.

It is not uncommon for drug testing policies to be greeted with suspicion, paranoia or even resentment. Accordingly, your policy statement should include the goals and objectives of the

⁷ Id.
⁸ 49 CFR § 655 et seq.
program as well as privacy assurances. The policy itself should clearly delineate prohibited conduct and state the consequences of violations and noncompliance. More importantly it is critical that any policy be applied and enforced in a consistent and nondiscriminatory manner. This will likely require that management, supervisors or persons designated to enforce your testing program be properly trained. At the outset, employers should clearly define the scope of their program by determining: 1) who will be tested; 2) when testing will be conducted; 3) which drugs will be screened; and 4) how testing will be conducted.

1. **Who will be tested?**

   This determination should be based upon the context of your business and the objectives of your policy. Employers may elect to include all staff or limit testing to job applicants or employees with certain job functions. For example, the DOT regulations require testing for employees who perform “safety sensitive” functions, i.e., transit operators, employees required to hold a commercial drivers license, transit dispatchers, mechanics and armed security personnel. 49 CFR § 655.4. Private employers may wish to require testing for any motor vehicle operators, security personnel, heavy equipment or complex machinery operators, food and beverage handlers, or cashiers.

2. **When will testing be conducted?**

   - **Pre-Employment.** This type of testing is required as a condition of employment. It occurs after a conditional offer of employment has been extended. The applicant agrees to be tested as a condition of employment, understanding that the offer will be withdrawn if the test yields a positive result.

   - **Periodic.** The employer requires testing on a pre-determined periodic basis. Such tests often arise where an employee is also required to submit to an annual physical as a condition of employment. The drug test is usually administered in conjunction with the physical exam. The drawback to this type of testing is that the employee has advance notice and can prepare for the test by discontinuing his/her drug use beforehand.

   - **Random.** Involves indiscriminant and unannounced testing based on a computer generated selection process. Random testing can have a powerful deterrent effect, but is more likely to be met with resistance by employees.

   - **Post-Accident.** Where an incident or occurrence triggers mandatory testing. Usually arises in connection with a motor vehicle accident or an onsite injury. Employers should establish an objective criterion for incidents that will trigger testing. Triggering incidents may include: fatalities; injuries requiring
emergency medical treatment; and damage to vehicles or property above a threshold amount.

- **Reasonable Suspicion.** Sometimes referred to as “probable cause” testing, this occurs when a supervisor or manager documents observable signs or symptoms that lead them to reasonably believe an employee has used a prohibited drug/and or engaged in alcohol misuse. The observable signs or symptoms may be based on appearance, behavior, speech or body odors. Because judgment and discretion will come into play, it is important that supervisors be trained to detect signs of drug or alcohol use. 49 CFR § 655.43.

3. **Which drugs or substances will be screened?**

The National Institute for Drug Abuse has identified five “illegal” substances for purposes of federal drug testing programs. Sometimes referred to as the “NIDA-5,” those substances include:

- Amphetamines (speed, meth, ecstasy, crank)
- Cannabinoids (marijuana, hashish)
- Cocaine (crack)
- Opiates (heroin, morphine, opium, codeine)
- Phencyclidine (PCP)

The DOT has added alcohol to this list. The current DOT regulations prohibit employees with “safety sensitive” functions from having an alcohol concentration greater than 0.02. 49 CFR § 655.35.

4. **How will tests be conducted?**

In order to ensure the accuracy of testing for federal employees, the Department of Health and Human Services adopted the Mandatory Guidelines for Federal Workplace Drug Testing Programs (“Mandatory Guidelines”). The Mandatory Guidelines address topics ranging from specimen collection protocol to certification procedures for testing laboratories. While they are only applicable to federal agencies and covered entities, private employers may wish to utilize a testing laboratory that has been certified pursuant to Mandatory Guidelines.

Generally, drug testing may be performed by collecting urine, hair, saliva, sweat or blood. Urine testing is the most widely utilized method. It has a fairly long window of detection (2-3 days) and is less expensive than other forms of testing. The only drawback is that urine samples can be adulterated. Alcohol testing may be performed by blood, saliva, or breath analysis. While blood
is believed to be the most accurate form of alcohol testing, an evidentiary breath testing device (EBT) is method preferred by most employers.

C. Consider the Consequences: “Zero Tolerance” vs. “Second Chance”

An effective drug testing program must set forth consequences for noncompliance. Such consequences should be clearly articulated in a written policy and enforced by the employer in a consistent and nondiscriminatory manner. Otherwise, your efforts to develop a testing program may amount to an exercise in futility. Some employers may elect to take the “zero tolerance” approach of immediate termination. Other employers may implement a “second chance” policy that allows an employee to return upon the satisfactory completion of a substance abuse program. Employers choosing this approach tend to also require a second pre-return drug test (with a negative result) as a condition of the employee’s return.

Under the DOT regulations employees with positive test results must immediately cease performing any “safety sensitive” functions. Covered employers have the option of allowing employees to return to work; but only after completing an evaluation, substance abuse treatment program and submitting to “pre-return” testing. 49 CFR §§ 40.283 and 655 et seq. However, employees who refuse to submit to tests are simply precluded from resuming their job duties. 49 CFR § 655.49(a). For private employers, the nature and context of your business should be factored into discerning what consequences to incorporate into your drug testing policy. In any event, those consequences should be clearly outlined in your policy and enforced in a consistent manner.

D. Communication is Critical

Employers should not expect that all employees will greet their drug testing policy with enthusiasm. However, efforts should be made to introduce a new testing program to employees well in advance of implementation. This can be accomplished though staff meetings and small group settings. Employers should be prepared to respond to a variety of questions which may range from specimen collection procedures and testing accuracy to disciplinary measures and privacy concerns.

A new testing policy may also be introduced in conjunction with a substance abuse awareness or education program. This may also lower anxiety and misgivings among employees. In fact, there appears to be an increasing acceptance of drug testing among employees where safety is at issue. A 1995 Gallup survey revealed that a clear majority of employees favored drug testing for those employed in occupations that had a direct responsibility for the safety of others.9

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9 http://www.drugfreeworkplace.org/survey/page20.html
E. Other Resources

Although the federal drug testing regulations are not binding on all employers, they can serve as a useful guide for private employers. As noted, the DOT regulations are perhaps the most extensively utilized and can be viewed at: 49 CFR § 40 et seq. and 49 CFR § 655 et seq. The following is a list of online resources which may also prove useful:

http://www.drugfreeworkplace.org/survey.htm
http://www.dol.gov/workingpartners/welcome.html
http://law.enotes.com/everyday-law-encyclopedia/90012