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Drug-Free Workplace Act of 1988

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Historical Introduction

Narcotics were known in Iraq some 5,000 years before the birth of Christ. In the fourth century B.C., narcotics, in the form of white poppy juices, were recommended for a variety of illnesses by the great Greek physician, Hippocrates. Early Egyptians and other peoples of that era also recognized some of the medicinal uses of narcotics. By the time South America was colonized by the Spaniards, the natives were chewing the coca leaf containing cocaine for stimulation. The tradition of opium smoking was introduced from the East into the United States through San Francisco during the nineteenth century. Although some taxation measures were passed in an attempt to limit importation, these measures were unsuccessful and narcotics spread widely in the United States.

Several factors contributed to the growth of narcotics use in the United States including the introduction of the hypodermic needle during the American Civil War. Due to the widespread use of opiates and the syringe, drug addiction became known as the "Army disease." The use of opium by hypodermic needle continued after the Civil War.

The practices of the patent medicine producers aggravated the problem. A potent dose of some narcotics was typically found in most patent medicine cures. When the user became concerned over his "drug habits," a secret remedy or nostrum, typically more narcotics, was added to the patent medicine as a cure for the addiction.

The lack of concern by the American medical profession also contributed to the drug problem in the late nineteenth and early twentieth centuries. Medical teachers and textbook writers failed to address the danger of narcotics use and addiction. Indeed, some popular literature such as Conan Doyle's Sherlock Holmes series glamorized narcotics. The problem was compounded with the introduction of another drug called heroin from Germany. Many extolled its qualities of pain relief and alleged addiction-free. It was believed that heroin was a panacea.¹

Drug use in the United States spread via both legitimate medical channels and through illicit traffic. Eventually, the opium problem grew to such proportions that the Federal Government passed the 1914 Harrison Act. The House of Representatives² reported:

This enormous increase in the importation of and consumption of opium in the United States is startling and is directly due to the facility with which opium may be imported, manufactured into its various derivatives and preparations, and placed within the reach of the individual. There has been in this country an almost shameless traffic in these drugs. Criminal classes have been created, and

¹13 Am Jur Proof of Facts 391, Criminal Drug Addiction and Possession 1 et seq; Terry and Pellens, *The Opium Problem* 54 (1928); Maurer and Vogel, *Narcotics and Narcotic Addiction* 36-43 (1954).

²H. R. Report No. 23, 63d Congress, 1 Session 2 (1913).

the use of the drugs with much accompanying moral and economics degradation is widespread among the upper classes of society. We are an opium-consuming nation today.

The enactment of the Harrison Act was a new approach to the control of narcotics. By the early 1900's, attitudes had begun to change. There was improved understanding about the drug problem and its effect on society. Federal and state legislation, treatment policies, and public attitude reflected these changes.

However, as the twenty-first century approaches, the drug problem still has not been solved and is entwined into all aspects of American life, even in the workplace.

Drug Abuse in Late Twentieth Century America

The use of illegal drugs on the job has reached crisis proportion for American industry. No business nor profession is excepted. Drug abuse has moved into chemical plants, airline hangers, courtrooms, newsrooms, and nuclear plants. Drug use in the workplace is out of control.

A poll by the National Drug Abuse Treatment Referral and Information Service (NDA-TRIS), operated by the Fair Oaks Hospital of New Jersey, shows that 75 percent of 227 drug users admitted to using illegal drugs on the job.³

The poll also indicated that:

- . 64 percent believed that drugs hindered their job performance.
- . 44 percent admitted they had sold drugs to fellow employees.
- . 25 percent reported the daily use of drugs at work.
- . 18 percent admitted to a drug related accident.
- . 18 percent said they had stolen from their employer to support their habit.
- . 26 percent said they had been fired for previous drug use.
- . 39 percent said they feared a salary increase would increase their consumption.

Subtitle F of the Federal Anti-Drug Abuse Act of 1988⁴ is entitled Drug-Free America Policy and includes specific findings by Congress that:

- . Approximately 37 million americans used an illegal drug in the past year (1987) and more than 23 million Americans use illicit drugs monthly.
- . Half of all high school seniors have used illegal drugs at least once and over 25 percent use drugs at least monthly.
- . Illicit drug use adds enormously to the national cost of health care and rehabilitation.
- . Illegal drug use can result in a spectrum of serious health problems including heart disease, high blood pressure, bleeding and destruction of brain cells, infertility, impotency, immune system impairment, kidney failure, pulmonary damage, heart attack, stroke, and sudden death.

³O'Boyle, T. F., "More Firms Require Employee Drug Tests," Wall Street Journal, 8 August 1985, p. 6; Hoffer, William, "Business' War on Drugs," Nation's Business, October 1986, p. 19.

⁴Anti-Drug Abuse Act, *Public Law* 100-690, 5251 Subtitle F; 21 USC 1502.

. Approximately 25 percent of all AIDS victims acquired the disease through intravenous drug use.

. Over 30,000 people were admitted to emergency rooms in 1986 with drug-related health problems.

. There is a strong link between teenage suicide and the use of illegal drugs.

. 10 to 15 percent of all highway fatalities involve drug use.

. Illegal drug use is prevalent in the workplace and endangers workers, national security, public safety, company morale, and production.

. About 1 out of 10 American workers have their productivity impaired by substance abuse.

. Drug users are three times more likely to be involved in on-the-job accidents, are absent from work twice as often, and incur three times the average level of sickness costs as non-users.

. The total cost to the economy of drug use is over \$100 billion per year.

. The connection between drugs and crime is well-proven.

The above results of the NDATRIS poll and the Congressional findings are confirmed by other national polls and studies. The bottom line is that illegal drugs are entrenched in late twentieth century America and are in the American workplace.

Drug-Free Workplace Act of 1988

On the basis of cumulative statistical evidence from the above and other studies, Congress passed the Federal Drug-Free Workplace Act of 1988, herein after referred to as the Act, to become effective in 1989.⁵ The Act requires all contractors or individuals receiving Federal contracts of \$25,000 or more to certify to the contracting Federal agency that such contractor (employer) will provide a drug-free workplace. As defined and required by the Act, the certifying contractor⁶ must:

1. Publish a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited in the Contractor's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

2. Establish a drug-free awareness program to inform such employees about:

a. The dangers of drug abuse in the workplace;

b. The Contractor's policy of maintaining a drug-free workplace;

c. Any available drug counseling, rehabilitation, and employee assistance programs; and

d. The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

3. Notify such employees in the above required statements that as a condition of continued employment, the employee will:

a. Abide by the terms of the statement; and

⁵Ibid., 5151, Subtitle D; 41 USC 701.

⁶Ibid., 5152.

b. Notify the employer of criminal drug statute conviction for a violation occurring in the workplace no later than five days after such conviction;

4. Notify the contracting Federal agency within ten days after receiving a violation notice from an employee or otherwise receiving actual notice of such conviction; and

5. Within 30 days after receiving notice of a conviction, impose the following sanctions or remedial measures on any employee who is convicted on drug abuse violations occurring in the workplace:

a. Take appropriate personnel action against such employee, up to and including termination; or

b. Require such employee to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

6. Make a good faith effort to maintain a drug-free workplace through implementation of the above provisions.

The Act expressly provides penalties of suspension, termination, or debarment for any Contractor that:

1. Makes a false drug-free certification; and/or

2. Violates the certification by failing to carry out the above requirements of publishing a statement to employees, failing to timely notify the contracting Federal agency of any employee drug convictions, failing to impose sanctions or participation in a rehabilitation program, and/or failing to make a good faith effort to maintain a drug-free workplace.

Compliance with the Act appears to be satisfied if the contractor leaves the appropriate paper trail of defined certifications, notices, and announcements. However, the Act does introduce a "Catch-22" by authorizing the contracting Federal agency to determine the "good faith effort" of each contractor based on the number of his employees convicted for drug violations in the workplace. Thus, the contractor is held directly accountable for employee drug violations in the workplace. Furthermore, the Act broadly defines the "drug-free workplace" as any site for the performance of work under a specific Federal grant or contract. In other words, the "workplace" is not limited to the employer's facilities, but is extended to any off-site location where the employees are doing work on behalf of the employer.

Although the Act is too recent to determine its real effect on employers and employees, some firms are already interpreting the Act to implicitly require drug testing of employees. For example, Texas Instruments (TI) announced in June that it will commence random drug testing of all employees on January 2, 1990. TI will use urine testing.⁷

The Validity of Drug Testing

In theory, drug testing sounds like the answer to the drug problem and employee drug testing appears to be the sensible way to cut the billions of dollars in productivity lost to

⁷"TI Plans Random Drug Testing of Employees," *Electronic News*, 12 June 1989, p. 13.

drugs each year. However, employers are finding themselves increasingly more involved in court battles over the legality of drug testing.

The reason why drug testing is not universally accepted is that the tests are not 100% accurate 100% of the time. Accuracy problems are particularly associated with urine testing. Blood tests are more reliable, but employers are reluctant to use this means of testing since it requires the breaking of an employee's skin to draw blood, and this more clearly violates the rights of the employee. Urine testing may be less accurate, but it is also less "invasive." Blood testing is also very expensive relative to the cost of a standard urine test.

The most commonly used urine screening methods to determine employee drug use are the enzyme immunoassay and radio-immunoassay tests. Both test for the presence of marijuana, cocaine, barbituates, amphetamines, phencyclidine (PCP), opiates (including heroin), benzodiazepine, and metaqualone. The radio-immunoassay test must be conducted in a laboratory due to the use of radioactive materials, but the enzyme immunoassay can be performed almost anywhere - in the laboratory or in the workplace.

Simple urine drug screening tests as described above are typically quoted at about \$25 to \$75 per test. However, the more accurate sophisticated techniques such as gas chromatography, mass spectrometry, or complex chemical analyses are⁸ substantially more costly, i.e., up to \$300 or more.

The enzyme immunoassay and radio-immunoassay urine tests present questions of accuracy including:

- . False positives can be caused by seemingly harmless substances which have molecular structures similar to certain drugs. For example, painkillers containing ibuprofen (marijuana); cold, cough, and weight control medicines containing phenylpropanolamine (amphetamines); and some herbal teas (cocaine).

- . Traces of drugs can be found in urine after any use. Thus, marijuana can be detected in urine up to ten days after the smoking of one cigarette. For a regular smoker who stops cold, it can be detected for as long as 20 days.

- . Persons exposed to pot smoke can test positive for drug use. It is possible for a non-marijuana user to inhale enough marijuana smoke to test positive three days later.

- . Urinary drug testing can yield up to 50% false positives and/or false negatives. Simple "drug - no drug" results of urinary drug tests prove inaccurate as frequently as 10-20% of the time.

⁹ As a further complication of urine testing, drug-free urine samples are being purchased through the mail. One of America's best known urine salesmen is a Texan who sponsors an annual "Urine Ball" and features himself as the "Urine King."

Therefore, firms such as TI which initiated random drug testing of employees have a serious credibility problem if the test results are to be used to establish that the workplace is drug-free.

⁸ Roche Biomedical Laboratories, Toledo, Ohio, a subsidiary of Hoffman-LaRoche Inc., 1989 Professional Fees, Effective July 1989.

⁹ 25 J. Occup. Med. 57, 58 (1983); L. Dogoloff and R. Angarola, Urine Testing in the Workplace 11 (1985); *Wall Street Journal*, 1 April 1986, p. 22, col. 3.

Legal Issues

The primary legal challenges which employees might raise against employer sponsored drug screening are typically based on constitutional grounds, breach of contract, right of privacy, and/or discrimination.

Constitutional Challenges

The United States Constitution provides the first place where an employee may look to challenge the legality of a private employer drug screening program based on Federal and/or state statutory requirements. The employee may claim that a drug screening program violates the Bill of Rights under the 4th Amendment and 5th Amendment, and due process and equal protection under the 14th Amendment. The Bill of Rights and the 14th Amendment apply only to actions by the Federal and state governments and are not generally applicable to actions by a private employer. However, where the employer is acting per a Federal or state statute, it may be argued that the employer is an extension of the government and the private action is now government action.

The 4th Amendment provides:

“the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . .”

Under this protection the employee may argue that drug testing is an unreasonable search and seizure and prohibited under the 4th Amendment.

The 5th Amendment provides:

“ . . . nor shall (any person) be compelled in any criminal case to be a witness against himself. . .”

By raising this Amendment the employee may claim that drug testing violates his 5th amendment right against self-incrimination because the test results may be used against the employee, i.e., he is being forced to give evidence against himself.

The 14th Amendment provides:

“ . . . nor shall any state deprive any person of life, liberty or property, without due process, nor deny to any person within its jurisdiction the equal protection of the laws.”

The challenge which may be raised by the employee is that he is being denied due process of law since he is compelled to submit to the drug testing. Furthermore, the employee may claim that the drug screening test is discriminating against minority groups and denies such groups equal protection under the laws.

The above legal challenges are based on U.S. constitutional issues and are particularly applicable where any Federal or state statute (or regulation) directly or indirectly requires drug testing. This is regardless of whether such requirement is explicit or implicit as in the Federal Drug Free Workplace Act.

Contractual Challenges

The National Labor Relations Act (NLRA) provides for collective bargaining with recognized employee bargaining units or unions. Many unions have challenged employee testing including drug testing as being in violation of the union contract. In a 1987 decision, an arbitrator ruled that a Boise Cascade drug screening plan was in direct violation of the union workers' contract rights. The union represented over 18,000 members at paper industry mills in Washington, Oregon, and California. The arbitration action was initiated

after the company announced a program for conducting urine tests for drugs and breath tests for alcohol. Under the program, the testing would be required of any employee directly or indirectly involved in a serious on-the-job accident. When the union filed for a court injunction against the testing program, the company agreed to arbitration.¹⁰

Right of Privacy

In 1965, the United States Supreme Court held that the right of privacy is an inherent or "penumbra" right under the U.S. Constitution.¹¹ In spite of this ruling by the Supreme Court, there remains a continuing debate as to whether there is a constitutional right of privacy. The problem is that the words "right of privacy" are not clearly stated in the U.S. Constitution.

However, some state constitutions are much more definite. For example, the Illinois constitution states:¹²

"The people shall have the right to be secure in their persons, houses, papers, and other possessions against unreasonable searches, seizures, invasions of privacy"

Likewise, the California and Pennsylvania constitutions expressly guarantee citizens the right of privacy.¹³

At common law, the right of privacy was recognized. Invasion of privacy was a common law tort. Thus, a plaintiff could sue for invasion of privacy if his private correspondence was read or published without permission. This common law tort has been subsequently extended by courts and legislatures to meet twentieth century needs. This is particularly true in the area of employment where courts have acted to protect employees from invasions of privacy such as electronic surveillance including wiretaps, polygraph tests, and employer intrusions into the employee's private life.

In a 1984 Texas Court of Appeals decision, K-Mart had cut the lock off a female employee's locker and searched the locker and her purse. The employee sued for invasion of privacy and was awarded \$108,000.¹⁴

Many employees subjected to drug testing view urine tests as intolerable intrusions which violate one's right to privacy. A urine sample can supply an employer with much more information about the employee than simply whether he is a drug user. An employee relinquishes this additional information whether he wishes to or not, simply by urinating in a vial. A urine sample contains a wealth of personal information. In addition to detecting drugs ingested, it may reveal the individual's medical history by detecting medications for venereal disease, epilepsy, schizophrenia, and high blood pressure. Last night's sexual activity may also be detected in the urine. Furthermore, urination is generally considered to be a private affair. It may be argued that being supervised by another while urinating is humiliating and degrading. Opponents to drug testing contend that employees should not be subjected to such treatment.

¹⁰"Arbitrator rules out Boise Cascade's drug-test program," *The Oregonian*, 13 January 1987.

¹¹*Griswold v. Conn.*, 381 US 479 (1965).

¹²Illinois Constitution, 6.

¹³California Constitution, Article 1, 1; Pennsylvania Constitution

¹⁴*K-Mart v. Troth*, 677 SW2d 632, (Texas Appeals, 1984).

Another argument against urine drug testing is that the employer has the potential to control an employee's off-duty behavior. Many drugs can be detected in the urine several days after usage. Furthermore, as noted above, the employee's sex life and medical history may be readable in his urine. Therefore, the testing subjects the employee to "Big Brother" surveillance by his employer.

Discrimination

Although there is a concern about how many lawsuits may arise from drug testing, another real issue is what to do with the drug-using employee once he has been identified. Federal and State laws treat drug addiction as a disability and require that the employer make a reasonable effort to rehabilitate the employee. For example, the Vocational Rehabilitation Act was passed by Congress in 1973 and applies to the federal government, federal contractors/subcontractors, and recipients of federal finance assistance. This Act expressly prohibits discrimination in employment on the basis of handicap so long as the individual "meets all employment criteria except for the challenged discriminatory criteria and can perform the essential functions of the position in question without endangering the health and safety of the individuals or others." Drugs and alcohol addiction are considered "physical and mental impairments" within the meaning of the Act.¹⁵

Conclusion

The Drug-Free Workplace Act of 1988 became effective in March 1989 and requires certification of a drug-free workplace. Such certification is already causing employers to randomly test employees for drugs using unreliable urine tests. The random drug testing of employees appears to be implicit in the Act and will lead to legal challenges by employees on the basis of Constitutional grounds (4th, 5th, and 14th Amendments) and civil grounds arising in tort (invasion of privacy).

¹⁵Vocational Rehabilitation Act of 1973, 29 USC 701-796.