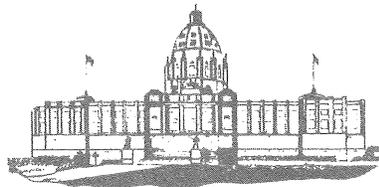


MINNESOTA SENATE

RESEARCH REPORT

DRUG TESTING
IN THE WORKPLACE



Senate Counsel & Research

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DRUG TESTING IN THE WORKPLACE

During the past few years, the workplace has become the focus for one of the nation's most serious domestic problems--the abuse of drugs and alcohol. Not long ago, controlling substance abuse was considered the responsibility of professional drug enforcement agents, the police, and rehabilitation counselors. It was a drama that took place largely outside the public view in hospitals, along borders, and in the criminal justice system. Today, however, the battle against substance abuse has moved into the workplace and is affecting the daily lives of millions of Americans.

As with most battles, this one has created a number of conflicts and legal questions that must eventually be settled by legislatures and courts around the country. Requirements by employers that employees submit to and pass tests that detect the presence of illegal drugs and/or alcohol have raised numerous questions regarding employee and employer rights. What rights do employers have to monitor the private lives of their employees? What rights do employers and co-workers have to a safe, drug-free working environment? And, what rights do individuals have to personal privacy?

At least five states are currently considering legislation aimed at restricting or regulating employment-related drug testing; many more, including Minnesota, may follow. The purpose of this report is to provide legislators and other interested parties with an overview of the issues of substance abuse and drug testing in the workplace. It considers the legal questions raised by these issues and presents policy options for addressing the drug testing concerns of employers and employees.

THE PROBLEM AND THE COSTS

Alcoholism and drug abuse are problems that have existed in the workplace for many years; within the past decade, however, these problems appear to have grown worse. Alcohol, marijuana, cocaine, and other mind-altering substances have become so pervasive in the U. S. workplace that they are found at every level of industry and in every kind of enterprise--from shop floor to executive suite, among high-status professionals, in the military, and in government.

According to the National Institute on Alcohol Abuse and Alcoholism, depending upon the type of job and gender of the workforce, between 5 and 15 percent of workers in any given occupation are dependent on alcohol, drugs, or a combination of substances. Many more workers are casual users who are not dependent upon drugs but who may occasionally show up for work either drunk or high. The National Institute on Drug Abuse estimates that 23 million Americans use marijuana more or less regularly and another 5 to 6 million use cocaine. This means that between 10 and 23 percent of U.S. workers probably have used dangerous drugs while on the job.

The costs to the American economy from substance abuse in the workplace are tremendous. Case studies of companies as diverse as midwestern railroads and Silicon Valley computer firms have linked substance abuse to dramatic increases in absenteeism, accidents, and thefts, as well as to increased health care costs, low productivity, erosion of product quality, and increased exposure to product liability lawsuits. Statistically derived cost estimates dramatize the magnitude of the substance abuse problem. Federal estimates place the current annual economic cost of drug and alcohol abuse at \$140 billion--nearly 4 percent of the Gross National Product and three times Minnesota's Gross State Product. Evidence suggests that this figure will rise. For example, a study by the Research Triangle Institute, a respected business-sponsored research firm in North Carolina, estimated that the costs to American business from drug abuse rose 30 percent between 1980 and 1983, from \$47 billion to \$60 billion.

WHY DRUG TESTING?

For a number of reasons--economic, legal, and technological --employment-related drug testing is viewed by many people in both government and business as one of the best ways to fight drug abuse in this country. Employers turned to testing after they became painfully aware of the economic effects of unchecked drug and alcohol abuse. Managers realized that in our highly competitive world economy, anything that hurts productivity affects the nation's economic future.

The federal government further encouraged employment-related drug testing by advocating a policy of drug-testing for federal employees, the military, and employees of private companies receiving federal contracts. In addition, the federal government now argues that one of the best ways to control drug abuse in this country is to reduce the demand for illegal substances. Most of the illegal drugs consumed in the United States are produced in other nations. Efforts to thwart production through economic sanctions on producer nations have done little to reduce the approximated 2,700 shipments of illegal drugs that enter the the country every day. Within the United States, the drug business generates about \$110 billion in gross sales per year --more than enough to ensure a steady stream of eager distributors. The federal government hopes that by imposing economic sanctions on drug users (i.e., making it difficult for drug users to find or keep employment) that the demand for illegal substances will be significantly reduced.

Finally, new technology produced a relatively reliable and inexpensive drug test that could be made easily available to employers. The EMIT (Enzyme Multiplied Immunoassay Test) test, which purports a 95 to 97 percent accuracy rate and is the test most commonly used in employment-related drug testing, costs a reasonable \$5 to \$15 per test. Once developed, the EMIT test found an eager and waiting market among American employers who wanted to be able to identify and discipline the drug users among their employees. As a result, the business of making, marketing, and analyzing the tests has quickly grown into a major industry with approximately \$300 million in annual revenues.

SCOPE OF DRUG TESTING

Employment-related drug testing now occurs widely in both the public and the private sectors. Employers generally conduct tests during pre-employment screening, on a random basis, on a periodic basis, and/or on a "for cause" basis. Pre-employment tests screen job applicants for evidence of drug use, typically for the purpose of eliminating drug users from consideration for a job. Random and periodic testing of existing employees is a method used by employers to discourage existing employees from using illegal substances and also as a means to locate drug problems that might not otherwise come to management's attention. "For cause" tests provide information on the cause of unacceptable job-related behavior.

The first groups of employees subjected to routine drug testing were those in public safety and public security positions, such as those in the military, in railroading, and in police and fire departments. More recently, however, the practice of requiring employees to submit to drug testing in order to obtain or keep jobs has spread to include many professional, clerical, and technical workers, as well as management and executives.

The largest employer requiring routine urinalysis for drug detection is the U.S. military which, in 1982, began testing all recruits and initiated random screening of enlisted personnel. Many other public employers also conduct limited drug testing of public health and safety officials, such as police and fire-fighters. Most public employers confine themselves to screening applicants, but, despite legal uncertainties, some require existing employees to submit to random testing.

In the private sector, more than 25 percent of Fortune 500 corporations and uncounted smaller companies require prospective and/or current employees to submit urine samples for drug testing. Despite the growing opposition to drug testing from labor groups and civil liberty advocates, evidence suggests that the number of companies and government organizations that require some form of employment-related drug testing will increase significantly.

ARGUMENTS FOR AND AGAINST DRUG TESTING

The issues surrounding drug testing can be divided into two basic groups: (1) those dealing with drug testing as either good or bad public policy; and (2) those dealing with the legality of drug testing under current federal and state law. This section provides a brief summary of the general policy arguments used by proponents and opponents of drug testing. The next section deals more fully with the outstanding legal issues.

I. Proponents' Arguments

Proponents of employment-related drug testing generally argue that employers and employees have a right to a drug-free workplace and that modern drug tests provide an accurate and minimally intrusive mechanism for ensuring that right. In defending their views, advocates generally cite the following reasons for supporting drug testing.

- A. Employers should not have to shoulder the costs of the nation's drug problem. As stated earlier, the cost to business from drug-related theft, absenteeism, health care costs, accidents, low productivity, poor quality products, and product liability are tremendous.
- B. Employees should not have their health and safety jeopardized by co-workers who abuse either drugs or alcohol. Employees have a right to the safest possible working environment, and employers have a responsibility to provide that environment. Drug testing is a means for achieving this end.
- C. The public should not be endangered by the shoddy workmanship or the unsafe products and services

produced by intoxicated workers. The potential for serious injury from railroad workers, air traffic controllers, public safety workers, and other employees in the public trust who are intoxicated while on the job is immense.

- D. The severity of the drug problem in the workplace justifies the minimal intrusion into workers' privacy necessitated by drug tests. Arguments that employers do not have an interest in what employees do during their leisure time are not valid because frequently what those employees do during their off hours affects their work performance. For example, Attorney General Edwin Meese has stated that he does not believe drug testing to be an unreasonable seizure because it is something that an employee consents to do as a condition of employment.
- E. In the long run, drug testing may benefit workers who abuse drugs by helping them overcome drug dependency and become drug free.
- F. Drug test are generally accurate and reliable. The most widely used test publicizes a 95 to 97 percent accuracy rate. Moreover, positive urine tests can easily be verified by highly accurate, but more expensive, tests.

II. Opponents' Arguments

Opponents to wide-spread drug testing believe that uncertain test accuracy and issues of workers' privacy and basic human dignity justify the severe limitation and regulation of employment-related drug testing. The following arguments are those most frequently cited by opponents of drug testing.

- A. Drug tests are notoriously inaccurate and unreliable. While the companies that manufacture the urine tests used to detect illegal drugs advertise reliability rates of 95 percent or better, in practice the tests yield a large percentage of false positives. According to the Center for Disease Control in Atlanta, false positives frequently exceed 25 percent and have been documented as high as 67 percent.
- B. The reliability of a drug test is heavily dependent upon the quality of the laboratory in which the tests are analyzed and the knowledge and skill of the individual technician processing the tests. Most drug testing errors are caused by laboratory workers mishandling, misidentifying, or accidentally contaminating the urine samples used in the tests.

- C. Some legal drugs such as ibuprofen, the aspirin substitute used in several over-the-counter pain killers, produce chemical by-products similar to the by-products produced by ingestion of illegal drugs. The tests most commonly used in employment-related drug testing do not differentiate between some of these legal and illegal substances.
- D. The cost of verifying a positive on an EMIT test is high enough (\$50 to \$100 per test) to discourage many employers from confirming positives on initial tests. As a result, job applicants might be denied the chance to compete for a position and existing employees might find themselves laid off on the basis of nonverified drug tests.
- E. The tests do not measure the level of drugs in a person's system, but rather the enzymes into which the drugs metabolize; because certain drugs metabolize faster than others, the effect of testing may be to punish casual users of less harmful drugs while more serious drug users and alcoholics go undetected.
- F. Drug tests do not necessarily reveal anything about an employee's work performance. A positive urine test for drugs doesn't tell when a drug was taken, to what degree the user was affected by it, or whether it impaired his or her job performance.
- G. Drug tests represent an unwarranted intrusion into a person's privacy that force an individual to prove his or her innocence. They are embarrassing and, as one federal official said, they erode our "sense of ourselves as individuals, human beings, souls, people with dignity."
- H. Drug testing allows employers to examine and attempt to regulate the leisure time of their employees. What an employee does outside of work should not concern the employer.

THE LEGAL STATUS OF DRUG TESTING

Drug testing as a legal issue is too new to have developed a definitive body of case law that establishes its constitutional and statutory limits. However, the courts have ruled in enough drug testing cases that the following trends are evident:

- Most public-sector employees have greater constitutional protections with respect to their employers than do private-sector employees.

- Alcohol- and drug-dependent employees are protected under federal and some state laws, whereas casual users are not.
- There is a large legal "grey area" concerning the rights and responsibilities of employers and the rights of employees.

I. Drug Testing of Public and Private Sector Employees

The ability of public employers to require public employees to submit to drug testing is constrained by the Fourth (search and seizure) and Fourteenth (due process) Amendments. With some specific exceptions, the courts have ruled that requirements by public employers who require prospective or existing employees to submit urine or blood samples as a condition of receiving or retaining employment are in violation of the "illegal search and seizure" clause of the Fourth Amendment. In general, courts have concluded that drug testing of public employees, except those employees in positions of public trust or those involving public safety and public security, may only be done "for cause"--e.g., where reasonable suspicion exists that an individual employee is under the influence of an illegal drug.

In contrast, the ability of private employers to require job applicants and existing employees to submit to drug testing as a condition of obtaining or receiving employment is not limited by the constitution; in some cases, however, it may be limited by state law, case law doctrines, or employment contracts. Job applicants, in particular, have very little recourse against drug testing. Apart from anti-discrimination laws that prohibit employers from refusing employment on the basis of sex, race, age, or disability, private employers may turn away job applicants "at will."

The legal status of existing employees of private employers with regard to drug testing is still somewhat foggy. Several legal theories are currently being used to challenge private employers' rights to conduct unregulated drug testing of their employees. Does a requirement to submit to a random drug test, for instance, constitute an unreasonable invasion of privacy? Other, more viable, theories involve the consequences of release of information to third parties or government agencies. For example, does the use of drug-testing results for the purposes of criminal investigation constitute "self-incrimination" by the employee? Can disclosure of test results to a third party be the basis for a defamation of character action? Because only a few drug testing cases have progressed to the appellate state court and because the rights of private employees vary from state to state, there is no definitive case law on these questions.

II. Legal Protections for People Dependent upon Drugs or Alcohol

The federal government and 48 states, including Minnesota, have enacted laws that provide some level of job protection to handicapped employees. The federal law, the Federal Rehabilitation Act of 1973, prohibits an employer from dismissing an employee because of a handicap unless the employer can prove that the handicap renders the person unable to perform his or her job or causes the employee to pose a threat to others. Alcohol and drug addiction are considered "handicaps" under the federal law and may be considered "handicaps" or "disabilities" under many of the state laws.

The Minnesota Human Rights Act, Chapter 363, provides that it is an unfair labor practice for an employer to refuse to maintain a system of employment which unreasonably excludes a disabled person. It also provides that an employer may not discharge a disabled person or discriminate against such a person with respect to his or her hire, tenure, compensation, terms, conditions, facilities, or privileges of employment. These provisions do not apply, however, if an employer can show that the disabled employee has a condition which, under the circumstances of employment and even with reasonable accommodation, will pose a serious threat to the health or safety of the disabled person or to others. The issue of whether or not the term "disabled person" includes a chemically or alcohol dependent person has not been conclusively settled by the Minnesota courts.

When considered in terms of employment-related drug testing, these legal protections for people dependent upon either drugs or alcohol have a paradoxical result. Employers who investigate the drug and alcohol habits of their employees through drug testing may use the results of the tests as the basis for summarily dismissing casual users of drugs or alcohol. They may not take the same action, however, against drug addicts or alcoholics. In these cases, some effort must be made to accommodate the employee.

POLICY OPTIONS

In considering the issue of employment-related drug testing, the Legislature has several possible options. One option, of course, is to do nothing and allow the courts to establish limits to drug testing that are appropriate under current law. Several other options also exist: the legislature can limit or prohibit the types of drug testing allowed and the conditions under which they can occur; it can regulate drug testing procedures and facilities; and/or it can specify the rights of employers and employees in relation to drug testing.

1. Limits to Drug Testing. Any or all of the four major types of employment-related drug testing--pre-employment screening, random testing, periodic testing, and

"for cause" testing--can be restricted or prohibited. The results of limiting the various forms of testing could be as follows:

- a. Pre-employment Screening. A restriction on pre-employment screening, the most common form of drug testing among private sector employers, would make it difficult for employers to identify drug users before offering them employment.
 - b. Random and Periodic Testing. Random and periodic testing of existing employees are the most controversial of all the forms of drug testing. Prohibiting these types of testing would eliminate many of the complaints regarding invasions of worker privacy and unjustified infringements of employee dignity. On the other hand, prohibition of random and periodic testing could hinder employer efforts to discourage drug use among their employees and to identify hidden drug abuse problems.
 - c. "For Cause" Testing. Eliminating "for cause" testing would protect workers with drug abuse problems but also make it difficult for employers to effectively identify the real cause of production, safety, absenteeism, or other employment problems, and to discipline and/or rehabilitate drug users.
2. Regulation of Procedures. Drug testing, if allowed in any or all of its forms, can be regulated at many junctures. The Legislature can specify certain procedures that employers must follow before they can institute drug testing; it can require drug-testing labs to be licensed by the state and follow specific sample handling procedures; it can require confirmation testing of all positive test results; it can regulate disclosure and use of test information; and it can require certain responses to positive test results such as mandatory rehabilitation or counseling.
 3. Protection of Rights. The Legislature can address questions of workers' right to privacy by making test results confidential and prohibiting the release of the information to anyone other than the employer and the employee.