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The Vermont Legislative Research Shop

Drug-Free Workplace Laws

The Constitutionality of Drug Testing in the Workplace

Court opinions on drug testing in the workplace have been based primarily upon the employee-at-will doctrine. The court considers the employee-at-will doctrine to be a necessary, but informal social contract, which assumes that the employee is there on personal will (ACLU 2002). The employment-at-will doctrine avows that, when an employee does not have a written employment contract and the term of employment is of indefinite duration, the employer can terminate the employee for good cause, bad cause, or no cause at all (Bureau of Labor Statistics, January 2001). Therefore, the court has ruled that the employment-at-will doctrine outweighs employees' privacy rights (ACLU 2002).

In the majority of cases heard by the courts, an employer's right to terminate an employee who failed a drug test has been upheld. There have only been a few cases won by private sector employees who contested the results of a drug test. The courts granted certiorari, based on outcomes of the drug test, which were inaccurate. Overall, employees who have contested their employer's right to administer drug test based on privacy grounds have had their case dismissed. These results are due to the importance of the employee-at-will doctrine (ACLU 2002).

An exception has been made in the state of California. California's highest state court as ruled that the right to privacy printed in the *state constitution* has often protected private sector employees. However, there are no federal constitutional barriers concerning mandatory drug testing in the work place (ACLU 2002).

Current Legislation

What the U.S. Congress Has Done

The Federal Government has taken steps to promote drug-free workplaces through the 1998 Drug Free Workplace Program.

The 1998 Drug-Free Workplace Program appropriated \$4 million for a demonstration program through the 1999-2000 fiscal year to aid small business in the establishment of drug-free workplace programs. The monies were distributed through the Small Business Administration (SBA). The logic behind giving money exclusively to small businesses, according to SBA

director Hector Barreto, was that “[m]ost large businesses have drug-free workplace policies and programs... but small businesses have fewer resources and staff to implement such programs” (SBA 2001).

The 1998 Program authorized the SBA to award grants to intermediaries with experience in drug-free workplace programs. The intermediaries would then work to establish drug-free workplace programs for use by small businesses. These programs would be intended to encourage employers to offer and use a variety of strategies of employee assistance, training and intervention to reduce abuse problems (Congressional Record 1998).

The SBA has distributed the grants to 21 SBA Small Business Development Centers (SBDC’s) and state-level private organizations, such as drug-testing firms and employee assistance programs (SBA 2001). An SBDC provides management assistance to current and prospective small business owners by offering assistance to small businesses through providing a “wide variety of information and guidance in central and easily accessible branch locations.” The aim of the SBDCs that received the grants was to provide assistance and information on drug-free workplace programs. Vermont’s sole SBDC is located at Vermont Technical College in Randolph Center, it is not among the recipients of one of the grants (SBA 2001).

The SBA administered the program in cooperation with the White House Office of National Drug Control Policy, the Department of Health and Human Services, and the Department of Labor. Through the program, more than 2,000 small businesses implemented full or partial drug-free workplace programs (SBA, 10/30/2001).

Since the initial appropriation of \$4 million, the U.S. Congress has continued to appropriate money for the program including \$3.5 million for FY 2000 and FY 2001, and \$3 million for FY 2002 (SBA 2001). The Small Business Act, of which the Drug-Free Workplace Program is a part, has appropriated \$5 million for the program for the 2001 through 2003 fiscal years (15 U.S.C. 654(g)(1)). On February 15 2001, United States Senator Tim Hutchinson introduced the Drug-Free Workplace Program Extension Act of 2001, which would amend the Small Business Act to extend the Drug-Free Workplace Program into FY 2004 and FY 2005. The bill was referred to the Senate Committee on Small Business where it remains to date.

What the Vermont Legislature Has Done

Vermont, in fact, has quite stringent regulations limiting when drug testing is permissible. VSA Title 21, Chapter 5, Subchapter 11, § 511-520 regulates employment drug testing. Briefly, pre-employment testing is permitted if 10 days notice is given and is conducted with a physical examination. For cause testing is permitted if the employer has probable cause to believe an employee is under the influence of drugs while on the job. An employee testing positive must be given the opportunity to participate in an Employee Assistance Program, or E.A.P (NCSL 2000, see appendix).

Actions of Other States

States have taken action to promote drug-free workplaces, as well as to deny benefits to employees who are injured or terminated because of alcohol or drug use. Most states, including, Connecticut, Virginia, Utah and New Jersey, allow an employer to deny or reduce workers’

compensation payments if alcohol or drugs are found to be the proximate cause of the employee's injury. Most states also allow an employer to deny or reduce workers' compensation payments if alcohol or drugs are found to be the proximate cause of the employee's injury. More recently, however, some states, such as Alabama, Arkansas, Florida, and Georgia, have taken action to promote drug-free workplace programs by offering a premium reduction for all employers who comply with the regulations. The regulations typically require companies to have a written substance abuse policy that is distributed to all employees, conduct drug and alcohol testing, and provide employee assistance programs for those testing positive (Figure 1) (NCSL 2000). For example, In Arkansas, Act 1552 authorizes the Director of the Workers' Health and Safety Division of the Workers' Compensation Commission to adopt rules to establish a voluntary program for drug free workplaces. The act sets standards and procedures for employers to use in testing employees for certain drugs. The act authorizes employers who enroll in and follow the procedures of the voluntary program to terminate employees who test positive for the use of certain drugs (Arkansas State Legislature 1999).

States are also combating this widespread problem through what have been coined drug-free workplace programs for state contractors. These laws require any individual or company receiving a grant from the state to have a drug-free workplace program. Only six states have enacted such legislation-California, Florida, Georgia, Illinois and South Carolina (NCSL 2000).

Although only a handful of states have implemented drug-free workplace programs for state contractors, 20 states, including Vermont (see above), regulate drug testing procedures to ensure that employees' rights are not violated (Figure 2) (NCSL 2000).

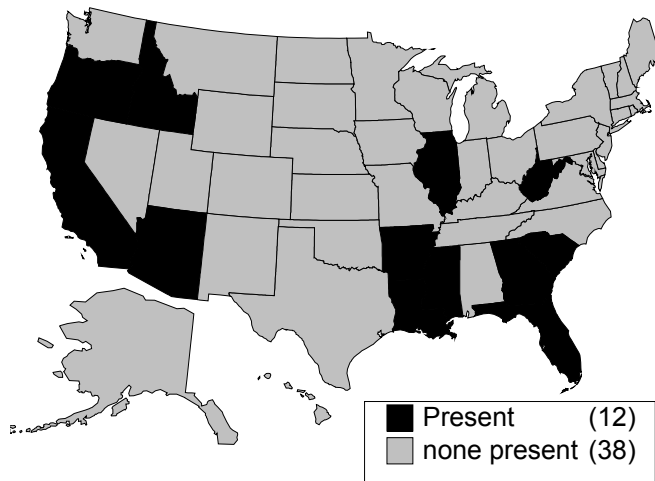


Figure 1: Drug Free Workplace Policies in the States. (States shaded in black have policies that encourage drug-free workplace programs for private companies.)

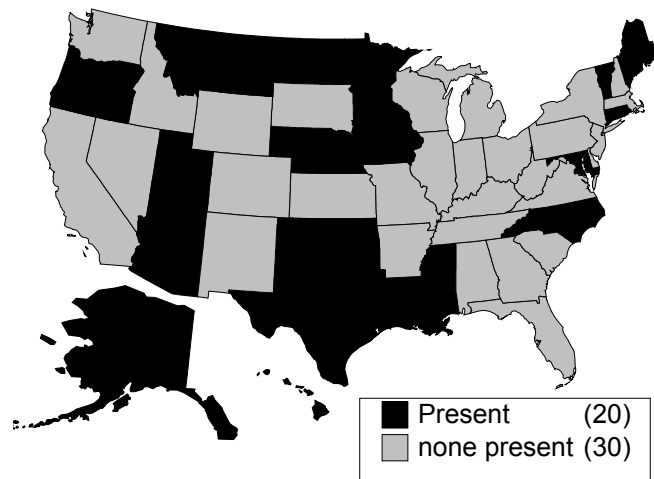


Figure 2: Drug Testing Regulations in the States. (States shaded in black have regulated drug-testing procedures to protect employee's rights).

References

American Civil Liberties Union (ACLU). January 23, 2002. "Workplace Rights Drug Testing". <http://www.aclu.org/issues/worker/legkit3.html>

Arkansas State Legislature. Act 1552 approved April 15, 1999. <http://www.arkleg.state.ar.us/ftp/acts/1999/htm/act1552.htm>

Bureau of Labor Statistics. *Monthly Review of Labor Online*. January 2001, Vol.124, No.1. "The Employee-at-will doctrine: Three major exceptions". <http://stats.bls.gov/opub/mlr/2001/01/art1exc.htm>

Congressional Record. Title IX, October 19, 1998, pp. H11235. "Drug-Free Workplace Act of 1998."

Library of Congress. February 4, 2002. "Bill Summary & Status for the 107th Congress." S. 348. <http://thomas.loc.gov>

National Council of State Legislatures (NCSL). December 15, 2000. "State Statute Chart on Drug Testing in the Workplace". <http://www.ncsl.org/programs/employ/drugtest.htm>

U.S. Small Business Administration (SBA). January 24, 2001. "SBDC Mission and Overview". <http://www.sba.gov/sbdc/mission.html>

U.S. Small Business Administration (SBA). October 30, 2001. "Organizations Picked to Help Small Businesses Eliminate Workplace Drug and Alcohol Abuse."
<http://www.sba.gov/news/drugfree/nr01-52.html>

U.S. Small Business Administration (SBA). January 11, 2002. "Report to Congress: U.S. Small Business Administration's Drug-Free Workplace Demonstration Program."
<http://www.sba.gov/news/drugfree/dfwpreport.html>

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Appendix: Information Gathered by the National Council of State Legislatures.

For the purposes of this table, a “Drug-Free Workplace Policy” is when a state encourages workplace drug testing; the means of doing this are listed in the table. “Drug Testing Regulations” are when a state has legislated to restrict or regulate certain aspects of drug testing in the workplace; the methods by which this is done are also listed in the table.

STATE	DRUG FREE WORKPLACE POLICY	DRUG TESTING REGULATIONS
Alabama Alaska	<ul style="list-style-type: none"> • No Statutory Provision No Statutory Provision	No Statutory Provision §23.10600-23.10.699 (1997)
Arizona	§23-493 (1999) Department of Corrections employees and job applicants subject to testing	§23-493 (1994) Private-Sector Drug Testing and Alcohol Impairment Act. A voluntary law that provides legal protection to employers for acting in good faith based on the results of a positive drug or alcohol test, provided the program meets the requirements of the act.
Arkansas	§11-14-101 (1999) Establishes voluntary drug free workforce program.	
California	Government Code § 8350-8356 (1993) Requires all state contractors and grantees to implement a drug free workplace policy and establish an employee drug awareness education program.	No Statutory Provision
Colorado Connecticut		§31-51t (1992) Prohibits certain types and testing. In general, testing is limited to employee's in high risk positions or where reasonable suspicion exists.
Delaware Florida	§112.0455 (1996) The Drug Free Workplace Act provides that any state agency may test certain employees and job applicants for the use of drugs. Does not require resting but mandates that any agency choosing to do so must comply with methods and procedures outlined. §287.087 Provides that in situation where two or more bids of equal merit are submitted the business certifying it has implemented a	

Georgia	<p>Drug-Free Workplace program will be given preference in being awarded the contract.</p> <p>§50-24-1 (1993) Contractors who receive state contracts in the amount of \$25,000 or more must certify they have implemented a substance abuse prevention program.</p>	
Hawaii	<p>§45-20-90 Public employees in high-risk jobs may be subject to random drug testing. Refusal to submit to a random test or testing positive results in termination from employment.</p>	<p>§329B-1 (1993) Procedural guidelines regarding workplace substance abuse testing. Most regulations apply to the laboratory but the employer is required to use a laboratory that is certified by the Hawaii Dept. Of Health or the Substance Abuse and Mental Services Admin. Of the USDHHS.</p>
Idaho	<p>§72-1701-1715 (1997) "Private Employer Alcohol and Drug-Free Workplace Act." Voluntary law that permits employers to test employees and applicants for drugs and alcohol. Provides requirements for collection and testing. Limits employer liability for establishing a testing program in compliance with the act. Establishes that an employee who is discharged for a confirmed positive drug or alcohol test, refusing to be tested, adulterated or attempting to adulterate a test sample would be discharged for misconduct for purposes of unemployment insurance.</p>	
Illinois	<p>§132.211 (1993) Drug-Free Workplace Act. Provides that employers who are awarded a state contract or grant must adopt an anti-drug policy and program, and provide a comply of its policy. Does not specifically address drug testing.</p>	
Indiana Iowa		<p>§730.5 (1998) Authorizes most types of drug and alcohol testing provided that specific procedural and policy requirements are met. Employers who develop, implement and maintain programs in accordance with the provisions of the act are provided with immunity against any causes of action arising against the employer for actions taken pursuant to the program.</p>

<p>Kansas Kentucky Louisiana</p>	<p>Executive Order §9838 (1998) Provides for mandatory testing of all prospective state employees.</p>	<p>§49:1001 (1993) Restricts the types of testing but does not place specific requirements on drug testing procedures. Provides protection to employers who establish and maintain a drug and alcohol testing program in compliance with the law. §23:879 (1997) Prohibits an employer from requiring an employee or applicant to pay for a drug test. Payment may be withheld if an applicant resigns within 90 days. §47:6010 Employers may be eligible for a tax credit against their state income tax in the amount of five percent of the "qualified treatment expenses" incurred by the employer for substance abuse treatment services.</p>
<p>Maine</p>	<p></p>	<p>Title 26 §681 (1993) Places restrictions on types of testing and places specific requirements that must be met for drug testing procedures. Maine Department of Labor must approve all programs.</p>
<p>Maryland</p>	<p></p>	<p>§17-214 (1997) Requires specific technical procedures must be followed with regard to drug testing. The laboratory must be certified by the MD Dept. of Health and Mental Hygiene. Hair testing is permitted for pre-employment testing only.</p>
<p>Massachusetts Minnesota</p>	<p></p>	<p>§181.950 (1997) Places restrictions on the types of testing that may be conducted and places requirements on drug testing procedures. An employee may not be discharged solely on the basis of a first time positive drug test. Rehabilitation must be offered. Employers may only inquire about prescription medications after a positive drug test.</p>
<p>Mississippi</p>	<p></p>	<p>§71-71 (1993) Compliance with state drug testing law is voluntary. Employers are protected from vicil liability with regard to their drug and alcohol program and testing. Permits all types of testing and includes specific requirements with regard to testing procedures.</p>
<p>Missouri</p>	<p></p>	<p></p>

Montana	<p>§39-2-304 (1997) Drug testing with restriction, is permitted of employees "engaged in the performance, supervision, or management of work in a hazardous work environment, security position, position affecting public safety, or fiduciary position." Testing must be in accordance with 49 CFR part 40 of the DOT's regulations.</p>
Nebraska	<p>§48-1901 (1993) Permits drug and alcohol testing provided certain technical procedures are followed. Positive test, refusal to be testing, tampering with specimen are all grounds for dismissal.</p>
Nevada	
New Hampshire	
New Jersey	
New Mexico	
New York	
North Carolina	<p>§95-230 (1993) Does not restrict the types of testing that may be conducted but requires certain procedures be followed as to the process.</p>
North Dakota	<p>§34-01-15 (1999) Requires employers pay for applicant and employee drug or alcohol screening.</p>
Ohio	
Oklahoma	<p>§40 551-565 (1994) Permits most types of drug testing provided certain conditions are met. An employee assistance program must be made available to employees prior to conducting a test. The employer must establish comprehensive policy that explains all aspects of the program as well testing procedures that must be followed.</p>

Oregon	<p>§279.312 (1999) Requires that all public contracts include a condition that the contractor demonstrate an employee drug-testing program.</p>	<p>§438.435 (1993) Permits all types of drug testing but does request all tests be analyzed at state approved laboratories. Alcohol testing is only allowed if there is reasonable suspicion the employee is under the influence or if the employee consents. §802.200 (1999), §803.370 (1999), § 825.955 (1999) Requires motor carriers have drug testing programs, specifies penalties for failure to establish program. Specifies that positive test results be entered into employee driving record.</p>
Pennsylvania Rhode Island		<p>§28-6.5-2 (1996) Permits pre-employment testing, for cause testing, post accident testing, post rehabilitation testing and safety sensitive random testing if the employer has an employee assistance program available. Employer must adopt a comprehensive drug abuse prevention policy and adhere to testing procedures.</p>
South Carolina	<p>§44-107-10 (1991) Drug Free Workplace Act. Requires every individual or business receiving a state grant or contract for \$50,000 or more must implement a drug free workplace program in accordance with the Act. Requirements include establishing distributing a written substance abuse policy and establishing an employee drug education awareness program.</p>	
Tennessee Texas		<p>§481.133 (1994) It is illegal to manufacture, deliver, own or use a substance or device designed to falsify drug test results.</p>
Utah		<p>§34-38-1 (1993) No cause of action may be brought against any employer who establishes a drug and alcohol testing program in compliance with the act. Employers may conduct any type of testing in order to maintain the safety of employees and the public or to maintain productivity and quality of services and products. All management personnel must also be subject to testing if a program is implemented. Specific requirements must be met with regard to testing procedures.</p>

Vermont		§511-520 (1993) Pre-employment testing is permitted if 10 days notice is given and is conducted with a physical examination. For cause testing is permitted if the employer has probable cause to believe an employee is under the influence of drugs while on the job. An employee testing positive must be given the opportunity to participate in an EAP.
Virginia		
Washington		
West Virginia	§25-1-11 (1999) Departments of Corrections employees and job applicants subject to testing.	
Wisconsin		
Wyoming		

Source: *National Conference of State Legislatures*. <http://204.131.235.67/programs/employ/drugtest.htm>