

BACKGROUND PAPER 91-2

DRUG TESTING IN THE WORKPLACE

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# Drug Testing in the Workplace

## Table of Contents

	<u>Page</u>
I. Introduction.....	1
II. Overview of the Issue.....	1
Employer Rights and Positions.....	2
Employee/Applicant Rights and Positions.....	4
III. Drug Testing Technology and Procedures.....	5
Drug Testing Technology.....	6
Drug Testing Procedures.....	8
IV. Activities at the Federal Level.....	9
Constitutional Provisions and Court Decisions.....	9
Executive Order.....	10
Federal Laws and Policies.....	11
V. The Issue In Nevada.....	12
State Court Decisions.....	12
Policy Recommendations.....	13
VI. Drug Testing Laws in Other States.....	13
Montana.....	14
Utah.....	14
Maine.....	15
Florida.....	15
Selected State Drug Testing Requirements.....	16
Nebraska.....	17
Other Selected States.....	17

	<u>Page</u>
VII. Conclusion.....	17
VIII. Bibliography.....	19
IX. Appendices.....	23
Appendix A	
President Ronald W. Reagan,	
Executive Order No. 12564, 1986.....	25
Appendix B	
Drug Free Workplace Act,	
41 U.S. Code 701, 1988.....	33
Appendix C	
Recommendations from <i>Beating Drugs:</i>	
<i>A Workable Plan for Nevada,</i>	
Commission on Substance Abuse	
Education, Prevention, Enforcement	
and Treatment, September 1990.....	43
Appendix D	
<i>Kim Koch, et al. v. Harrah's Club,</i>	
Case No. 23740 (Ninth Judicial	
District Court of the State of	
Nevada).....	49

## DRUG TESTING IN THE WORKPLACE

### I

#### INTRODUCTION

The National Institute on Drug Abuse estimates that nearly 66 percent of people currently entering the work force have, at some time in their lives, used an illegal drug. It also estimates that 44 percent have used an illegal drug in the past 12 months. Nationally, 10 to 23 percent of employed individuals experience an alcohol or drug abuse problem.

According to the Governor's Commission on Substance Abuse Education, Prevention, Enforcement and Treatment, Nevada industry loses over \$200 million annually due to alcohol related problems of individuals employed in the state. Nevada workplace losses attributed to the use of drugs other than alcohol represent an additional \$96 million.

Some companies are reluctant to implement drug-testing policies. Drug testing is viewed by some business owners as an infringement of rights not unlike pre-employment polygraph testing, which recently was banned by the Federal Government (1988 Public Law No. 100-347). Other companies have instituted pre-employment screening of applicants and various methods of testing current employees.

This paper provides background information on the controversy surrounding drug testing in the workplace. It includes an introduction to the issue, information on drug testing technology and procedures, and a summary of activities at the Federal and State levels.

### II

#### OVERVIEW OF THE ISSUE

Nationally, in 1987, alcohol-related workplace losses totaled \$54.7 billion. Drugs other than alcohol represented

an additional \$26 billion. Therefore, substance abuse in the workplace cost businesses over \$80 billion in 1987.

In 1986, the United States spent \$458 billion on health care, which equals \$1,837 per person. Over 52 percent of that expense, or \$959 per person, is attributable to substance abuse.

### Employer Rights and Positions

American industry has a long history of evaluating employees to determine their fitness to perform jobs. Through occupational medicine programs, personnel and job applicants are medically examined to ensure that they do not have medical conditions that would interfere with safe, efficient job performance. The corporate health promotion and wellness programs developed in recent years have added nutrition, drug abuse and hypertension to the factors screened in the medical evaluation.

During the 1970's, many companies developed pre-employment and in-service drug screenings to ensure job safety and productivity. The programs allowed for early identification and treatment referral of drug abusing employees. Comprehensive programs, including employee assistance, rehabilitation, treatment and education, are an outgrowth of these early screening programs.

Paraphrasing President Ronald W. Reagan's 1986 Executive Order No. 12564 (see Appendix A), employees who use illegal drugs, on or off duty, tend to be less productive, less reliable, and prone to greater absenteeism than their fellow employees who do not use drugs. The use of illegal drugs impairs the efficiency of agencies, undermines public confidence, and makes it more difficult for other employees who do not use illegal drugs to perform their jobs effectively.

Many companies which instituted pre-employment drug testing programs are getting the results they wanted--a decline in the number of applicants testing positive for drugs. Other

companies which began testing for employee drug abuse have witnessed an improvement in job safety and productivity.

Employers may decide to conduct pre-employment screening or implement various procedures for current employee drug testing. When testing current employees, employers generally establish clear, written guidelines regarding how and when drug screening will be used. If the purpose of conducting drug tests is to deter and rehabilitate employees from using drugs and testing is done in conjunction with employee assistance programs, the Federal Government has found that random tests are probably the most effective method.

Generally, both management and employees favor the adoption of employee-assistance programs. Companies usually agree to assist employees who have a substance abuse problem. Assistance can include granting sick leave and paying for a rehabilitation program teamed with a promise that there will be no retribution against the employee. Most policies state that, upon discovery of drug use by an employee, action will be taken which may include termination. It is possible that the cost of employee-assistance programs, in monetary and human terms, can be far less than the cost and risks associated with allowing an employee with a drug problem to continue working without any intervention.

A number of employers require that, in order to avoid termination, an employee with a substance abuse problem must come forth and ask for help. "This requirement is unrealistic," according to Dr. Richard Taylor, Medical Director, Broad River Psychiatric and Rehabilitation Services. "The nature of chemical dependence is that denial is so strong that dependent individuals will not come forth on their own."

In his role as a medical review officer (MRO) for the U.S. Department of Transportation, Dr. Taylor has found that employee morale is not adversely affected by random drug testing. The keys, according to Dr. Taylor, seem to be the understanding that (1) all employees, including some MROs, are subject to the random drug tests and (2) that

rehabilitation, not termination, results from positive drug tests. His experience has shown that dependent individuals can be rehabilitated and can return to the workplace as valuable assets.

Employers who are willing to bear the cost of drug testing and employee-assistance programs should be able to protect themselves from possible liability of defective workmanship or safety issues by removing employees who actively abuse substances from their workforces. According to Peter B. Bensinger, president of a consulting firm which deals with drug and alcohol abuse in the workplace, employers who refuse to test prospective and current employees will become the "employers of last resort" for people who use drugs.

#### Employee/Applicant Rights and Positions

In 1987, a computer programmer, fired for refusing to take a random urinalysis test demanded by his employer, was awarded \$485,000 by a San Francisco, California, jury (*Luck v. Southern Pacific Transportation Co.*, No. 843230, slip op. [Cal Super. Ct. Oct. 30, 1987]). In another 1987 action, a Boston, Massachusetts, jury awarded \$125,000 for negligent infliction of emotional distress to an oil rig worker who proved he was deeply upset at being forced to provide a urine sample in front of four co-workers (*Kelley v. Schlumberger Technology Corp.*, No. 85-4793-Z, slip op. [D. Mass. Sept. 9, 1987]).

One perspective regarding drug testing in the workplace maintains that attempting to determine drug use through testing without some standard of probable or just cause can become a means of harassment to non-drug using workers. An alternative lies in testing only under those circumstances where there is a reasonable, articulable suspicion of the impaired ability to perform normal duties. This method can help to ensure that innocent workers are not subject to unnecessary drug testing.

Others contend that by waiting until substance abuse is obvious or an employee's ability to work is impaired, it may be more damaging to workplace safety and the employee's



opportunity for rehabilitation than having a method to identify and address the problem before it gets to that point. Employees can benefit from random drug testing and aggressive employee assistance programs. In addition, a sense of community and pride often can evolve from the knowledge that their safety and reputation is maintained.

Employee-assistance programs designed to meet the unique needs of specific businesses and employees can serve as a functional, integrated part of the workplace. According to Mark B. Cohen, a Pennsylvania legislator, "If employers intend to test for drug use, they should be adequately prepared for the results of such tests and use those results in a socially responsible manner. Failing the employers' initiative to do so, legislatures have the responsibility to regulate this practice to guarantee the proper use of such testing and the availability of counseling and treatment programs for those who need them."

In the coming years, courts and legislatures face the task of finding a balance between employee rights and employer needs. While the issue will continue to be defined by the courts, general questions regarding workplace drug testing have now moved to the legislatures--both State and Federal.

### III

#### DRUG TESTING TECHNOLOGY AND PROCEDURES

Currently, most drug-tests are designed to identify the presence of five categories of drugs: methamphetamine, PCP, cocaine, marijuana and opiates. Two widely used testing methods for drug use exist--urinalysis and hair testing.

## Drug Testing Technology

An understanding of the following terms is necessary to discuss the topic:

RIA      Radioimmunoassay (drug screening test)

RIA-H    Radioimmunoassay of Hair (drug screening test)

GC/MS    Gas Chromotography/Mass Spectrometry  
(drug confirmation test)

### Urinalysis

Urinalysis is a fairly accurate drug-testing method, at approximately \$30 for the initial screening (RIA) and \$65 for a confirmation test (GC/MS). The cost of confirmation testing is potentially high, because separate tests must be conducted for each drug category to be identified. Urine testing provides information on the amount, in nanograms, of a substance present. Random testing can be an asset, since most substances are voided within 3 to 5 days of use, although marijuana metabolites can remain in the body for up to 3 weeks.

Urine samples are often tested for validity. Urine samples have been contaminated, diluted, and tampered with in a variety of ways by employees. The supervision of an employee providing a urine sample has been questioned as being intrusive to the individual's privacy, and is often unnecessary due to the laboratory's ability to detect adulterated urine.

### Hair Testing

Hair testing has become a popular drug screening method, due to the relatively low "intrusion" level of the sample collection process. The cost of the RIA-H screen is approximately \$60 per drug category for which a hair is to be tested. A GC/MS confirmation test averages \$65 for each substance detected in the screening process. The hair

confirmation testing procedure is as accurate as that used in urinalysis.

Hair analysis is one of the only current drug-testing methods which measures drug use over time. A hair sample contains a chronological history of substance use which does not diminish as the hair grows.

The Federal Food and Drug Administration has issued a compliance guide regarding RIA-H screening tests. The guide states that such tests are "unreliable and not generally recognized by qualified experts as effective."

Although RIA-H has not yet been determined to be a valid method of drug testing, it is currently being used by some employers in spite of the lack of scientific verification. The Society of Forensic Toxicologists reports that RIA-H may be, at the least, a useful method for testing in the absence of blood, urine or body fluids (i.e., corpses), among other applications.

Regardless of the screening method or type of sample used, confirmation testing using GC/MS is necessary to maintain the credibility and low error rate of drug testing.

#### Laboratory Regulation

Another area of legislative concern is the establishment of laboratory regulations and certification standards. Laboratories are the main contributors to test-result error. Although laboratories are not required to be certified, the U.S. Department of Health and Human Services, the College of American Pathologists and the National Institute on Drug Abuse are among the agencies which offer inspection, certification and external quality control assurances to drug testing laboratories.

Until such certification standards are set, private employers and government agencies are not guaranteed that the laboratories they use for urinalysis participate in proficiency testing programs. These testing programs are generally conducted by independent objective organizations.

As an interim measure, employers could be required to perform confirmation tests before any disciplinary action is taken against an employee whose first test result is positive.

#### Drug-testing Procedures

Blood, urine and hair samples contain a vast amount of personal information to which an individual has a legitimate expectation of privacy. In addition to detecting drugs, a specimen may reveal an employee's medical history as well as susceptibility to diseases. Employers could possess a great potential to "weed out" employees unjustly on the basis of health risks completely disassociated with job duties.

Generally, the medical review officer's role is to protect the employee as well as the employer. The procedure for the chain of custody of a sample and the tests authorized to be performed are supervised by the MRO. Again, proper regulation by the MRO can ensure that tests other than those authorized do not occur.

From an employee's perspective, today's technology does not provide the information employers need: the establishment or verification of worker impairment.

#### Federal Aviation Administration - An Example

Drug testing by the Federal Aviation Administration follows a strict procedure. A supervised collection of a urine sample is tested using RIA. If the test is negative, the sample is discarded. If the results are positive, a confirmation test is conducted from the same sample using GC/MS. All test results are reported to an independent MRO - not the employer.

At this stage in the process, the MRO reviews all test results and investigates any confirmed positive reports. He or she conducts an interview with the employee and attempts to determine why the test result was positive. The MRO contacts the employee to discuss whether drugs had been legally prescribed or dispensed, an error was made in the

chain of custody of the sample, or if the laboratory analysis was erroneous. The employee is offered an opportunity to explain the positive result, and is given the benefit of the doubt until no other explanation is possible except illegal drug use. The employee may even request a re-test of the original sample as a "safety net" measure. The MRO may not report any test result--positive or negative--to the employer until the process is complete.

#### IV

#### ACTIVITIES AT THE FEDERAL LEVEL

##### Constitutional Provisions and Court Decisions

Activities at the Federal level relating to drug testing in the workplace include court determinations, a Presidential Executive Order, and new laws and policies.

The Fourth and Fourteenth Amendments to the *Constitution of the United States* offer some insight into the issue of drug testing. The Fourth Amendment protects against unreasonable searches and seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (Emphasis added.)

The Fourteenth Amendment states in Section 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny any person within its jurisdiction the equal protection of the laws. (Emphasis added.)

These sections of the *U.S. Constitution*, among other laws, have been used to argue both for and against drug testing in the Federal, State and private workplace.

Federal courts have established relatively broad parameters for workplace drug testing by upholding pre-employment screening, "reasonable suspicion" testing and random drug testing for certain Federal employees provided that specific procedural safeguards exist. These "certain Federal employees" include those in safety-related positions and in extensively regulated industries. (*Skinner v. Railway Labor Executives' Assn.*, 109 S. Ct. 1402 [1989] and *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 [1989]).

#### Executive Order

On September 15, 1986, President Reagan issued Executive Order No. 12564 mandating that all Federal agencies work toward a drug-free workforce (see Appendix A). The order required all agency heads to:

1. Develop a stated policy regarding illegal drug use;
2. Establish employee assistance programs emphasizing education, counseling, referral to rehabilitation and coordination with community resources;
3. Train supervisors to identify and address employee drug use;
4. Set procedures for individuals to seek rehabilitation services and for supervisors to make such referrals which protect personal privacy; and
5. Create procedures for identifying illegal drug users.

The Executive Order approved the use of urinalysis for selected employees of all agencies and a government-wide

drug detection program. It also authorized the use of drug testing as a diagnostic tool to identify drug use in specific circumstances and among certain employees. Random or uniform tests must be given to employees in sensitive positions. Additionally, testing may be ordered when there is a reasonable suspicion of drug use, in the course of a safety investigation, to screen job applicants, or as a followup to a rehabilitation program. Additionally, measures to be taken against illegal drug users and methods to protect employees are also found in the order.

### Federal Laws and Policies

President Reagan also sent to the U.S. Congress the "Drug Free American Act of 1986" which included, as Title I, the "Drug-Free Federal Workplace Act of 1986." The 100th Congress passed this legislation requiring mandatory drug and alcohol testing of rail, aviation and motor carrier industry employees. The measure directed the U.S. Secretary of Transportation to establish a drug and alcohol testing program to include five types of tests, including: random, pre-employment, post-accident, periodic recurring, and "with reasonable suspicion."

In March 1989, a new "Drug-Free Workplace Act" (41 U.S. Code 701, 1988), became effective requiring all Federal contractors and grant recipients awarded contracts or grants of \$25,000 or more to certify that they will provide a drug-free workplace. The policy applies to agencies and departments in all states, many of which rely heavily on Federal money to fund a variety of projects and programs.

In September 1989, national "Drug Czar" William Bennett, through the "National Drug Control Strategy," stated a priority to develop drug-free workplace policies in the private sector and state and local governments including providing clear penalties for drug use and conducting drug testing where appropriate.

THE ISSUE IN NEVADA

In Nevada, in 1987, alcohol-related workplace losses totaled \$200 million. Drugs other than alcohol represented an additional \$96 million. Therefore, Nevada businesses lost almost \$300 million in 1987 due to substance abuse in the workplace.

In 1988, Nevada's Bureau of Alcohol and Drug Abuse in the Department of Human Resources spent \$4,538,969 for alcohol and drug abuse prevention and treatment.

References to employee drug testing are found in the *Nevada Administrative Code* (NAC). Commercial driver's license applicants and licensees (NAC 706.247) and boxers (NAC 567.850) must submit to drug testing under certain circumstances. No other references allowing or prohibiting drug testing of employees are provided in NAC or *Nevada Revised Statutes*.

State Court Decisions

As a "right to work" state, Nevada's at-will employment status essentially removes employees' rights to privacy, according to Judge David R. Gamble, Department 1, Ninth Judicial District, Minden, Nevada. Judge Gamble presided over a number of cases regarding drug testing in the workplace by the gaming industry in Lake Tahoe. If the employer wishes to "invade the privacy" of an employee, the employee has two choices - submit to the "invasion," or leave the employment.

In September 1990, Judge Gamble issued an Order and Judgement of Declaratory Relief regarding a case between Harrah's Club and certain employees (see Appendix D). The employees contended that Harrah's mandatory drug testing of current and prospective employees was unlawful and constituted an invasion of privacy. Harrah's stated that it had a vital interest in maintaining a safe, healthful and efficient working environment.



Harrah's policy, adopted in April 1990, provides that any employee who refuses to submit to substance abuse testing or is found to be in violation of the policy is subject to disciplinary action up to and including termination.

The following excerpt summarizes Judge Gamble's determination. "The Court finds that a private employer has a legitimate employment interest in seeking a drug-free environment. The Court also finds that requiring drug testing to determine illegal drug use by employees is appropriate and lawful so long as the testing methods are reliable."

#### Policy Recommendations

The Governor's Commission on Substance Abuse Education, Prevention, Enforcement and Treatment recently compiled a comprehensive list of recommendations to combat drugs in the state. The September 1, 1990, report, "Beating Drugs: A Workable Plan for Nevada," contains several recommendations which involve drug testing in the workplace. They include pre-employment and "for-cause" drug screening for all State employees, conducting random drug testing of peace officers, and requiring all providers receiving State money to develop and implement drug-free workplace policies, among other recommendations (see Appendix C).

## VI

### DRUG TESTING LAWS IN OTHER STATES

In 1987, drug testing in the workplace legislation was considered by 31 states. Many of the bills proposed to limit employee drug testing by creating new rights for employees or by placing restrictions on testing by employers. A bill passed in California made employers "reasonably accommodate" employees seeking drug rehabilitation, while measures in Connecticut, Hawaii, Iowa and Vermont largely prohibited employers from testing at all.

In other states, legislators have acted to safeguard the rights of employers to test employees for drug use. Some states permit drug testing in various forms, or limit the rights of employees found to be "under the influence." Many of the measures contain provisions regarding testing in both the private and public sectors.

Copies of the state laws cited in this section are available through the Research Library of the Legislative Counsel Bureau.

### Montana

In April 1987, Montana became the first state to significantly limit the right of employers to test employees for drug abuse. Montana law prohibits blood or urine testing unless the employee: works under hazardous conditions, is in a position involving the public safety, or has specific fiduciary responsibilities. The legislation also mandates new procedural standards for drug testing, including requirements that employers have written policies for testing and definite standards for privacy. Employers must perform confirmation tests on the original sample and are prohibited from releasing the results. (*Montana Code Annotated* 39-2-304)

### Utah

In March 1987, the Utah Legislature passed a bill specifically permitting employers to test current or prospective employees under the following conditions (*Utah Code Annotated* 34-38-1, et seq.):

- Reasonable and sanitary conditions for sample collection.
- Guarantee of the right to privacy of the individual.
- Documentation of the sample collection.

- Precautions to prevent sample contamination or adulteration.
- Use of scientifically accepted analytical methods and procedures.

### Maine

Maine's Governor John R. McKernan, Jr., upheld the right of employers to test employees by vetoing a bill banning random drug testing in 1987. The veto was sustained by the Senate. The Governor indicated he would approve of legislation allowing random testing of employees in sensitive areas but opposed the section of the bill mandating that employers bear the cost of employee rehabilitation.

A more recent Maine law applies to both private and public sector employees. Drug testing of applicants offered employment and current employees for probable cause or while undergoing treatment in a substance abuse rehabilitation program is permitted. The law allows random or arbitrary testing if a provision is included in collective bargaining agreements and for all employees in positions possibly affecting the health or safety of the public or co-workers. Testing procedures, employee protections, and required notifications are specified in the law. (*Maine Revised Statutes Annotated* 26-682, et seq.)

### Florida

Comprehensive drug-testing legislation was recently enacted in Florida. The Florida statute only applies to agencies of State Government, and permits drug testing of applicants offered employment and current employees for probable cause or while undergoing treatment in a substance abuse rehabilitation program. It also allows drug testing as a part of a routinely scheduled medical examination. Testing procedures, employee protections, and required notifications are specified in the law. (*Florida Statutes Annotated* 112.0455 and 817.565)

## SELECTED STATE DRUG TESTING REQUIREMENTS

	CA	IA	ME	MT	NE	OR	RI	UT
TEST RESTRICTIONS								
Strict ban			X					
Probable Cause		X						
Reasonable Grounds							X	
Safety Related Jobs				X				
Permits Random	X				X	X		X
Prohibits Random		X		X			X	
Pre-Employment Regs.		X	X	X				X
PROCEDURAL REQ'TS.								
Written Policy			X	X				
Confirmation Testing		X	X	X	X	X	X	X
Lab Certification	X		X		X	X		
Testing in Private			X	X	X	X	X	
Chain of Custody		X	X	X	X			X
Confidential Results		X	X	X	X			X
Employee Asst. Prog.		X	X				X	

## Nebraska

A new Nebraska law applies only to employers of six or more persons and permits drug testing with few restrictions. A positive test in Nebraska may subject an employee to termination or other adverse actions. Testing and retesting procedures are specified. (*Revised Statutes of Nebraska* 48-1901, et seq.)

## Other Selected States

In the past 2 years, drug-testing laws with limited occupational applications were enacted in Illinois, Iowa and Kansas. A prior Rhode Island law prohibiting testing of private and public sector employees except for probable cause was amended to permit testing in the public utility/mass transportation industry if required by Federal regulation or law as a condition of receiving Federal funds. (*Illinois Annotated Statutes* 702.24, *Iowa Code Annotated* 730.5 and 99F.4, *Kansas Statutes Annotated* 75.4362, and *General Laws of Rhode Island* 28-6.5-1)

## VII

### CONCLUSION

Controversy regarding drug testing in the workplace is likely to continue as is drug use in the United States. In 1990, more than 100 measures designed to reduce alcohol and drug abuse in the workplace were introduced in state legislatures reflecting the concern of state lawmakers and executives. Drug testing bills represent a variety of perspectives including: screening of public and/or private employees; employee education and awareness programs; restrictions on random testing of employees; employee assistance programs; and reduction or elimination of worker's compensation or unemployment benefits when illegal drug use is involved.

Drug abuse in the workplace is a problem in search of a solution. Drug testing may or may not be the answer.



## VIII

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IX

APPENDICES

	<u>Page</u>
Appendix A - President Ronald W. Reagan, Executive Order No. 12564, 1986.....	25
Appendix B - Drug Free Workplace Act, 41 U.S. Code 701, 1988.....	33
Appendix C - Recommendations from <i>Beating Drugs: A Workable Plan For Nevada</i> , Commission on Substance Abuse Education, Prevention, Enforcement and Treatment, September 1990....	43
Appendix D - <i>Kim Koch, et al. v. Harrah's Club</i> , Case No. 23740 (Ninth Judicial District Court of the State of Nevada.....	49



**APPENDIX A**

**President Ronald W. Reagan  
Executive Order No. 12565, 1986**



# code of federal regulations

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The President

**3**

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1986 COMPILATION

AND

PARTS 100 AND 101

Revised as of January 1, 1987

**DO NOT DISCARD THIS VOLUME**

**Note:** Because Title 3 of the CFR is an annual compilation, this volume should be retained as a permanent reference source.



Executive Order 12564 of September 15, 1986

## Drug-Free Federal Workplace

I, RONALD REAGAN, President of the United States of America, find that:

Drug use is having serious adverse effects upon a significant proportion of the national work force and results in billions of dollars of lost productivity each year;

The Federal government, as an employer, is concerned with the well-being of its employees, the successful accomplishment of agency missions, and the need to maintain employee productivity;

The Federal government, as the largest employer in the Nation, can and should show the way towards achieving drug-free workplaces through a program designed to offer drug users a helping hand and, at the same time, demonstrating to drug users and potential drug users that drugs will not be tolerated in the Federal workplace;

The profits from illegal drugs provide the single greatest source of income for organized crime, fuel violent street crime, and otherwise contribute to the breakdown of our society;

The use of illegal drugs, on or off duty, by Federal employees is inconsistent not only with the law-abiding behavior expected of all citizens, but also with the special trust placed in such employees as servants of the public;

Federal employees who use illegal drugs, on or off duty, tend to be less productive, less reliable, and prone to greater absenteeism than their fellow employees who do not use illegal drugs;

The use of illegal drugs, on or off duty, by Federal employees impairs the efficiency of Federal departments and agencies, undermines public confidence in them, and makes it more difficult for other employees who do not use illegal drugs to perform their jobs effectively. The use of illegal drugs, on or off duty, by Federal employees also can pose a serious health and safety threat to members of the public and to other Federal employees;

The use of illegal drugs, on or off duty, by Federal employees in certain positions evidences less than the complete reliability, stability, and good judgment that is consistent with access to sensitive information and creates the possibility of coercion, influence, and irresponsible action under pressure that may pose a serious risk to national security, the public safety, and the effective enforcement of the law; and

Federal employees who use illegal drugs must themselves be primarily responsible for changing their behavior and, if necessary, begin the process of rehabilitating themselves.

By the authority vested in me as President by the Constitution and laws of the United States of America, including section 3301(2) of Title 5 of the United States Code, section 7301 of Title 5 of the United States Code, section 290ee-1 of Title 42 of the United States Code, deeming such action in the best interests of national security, public health and safety, law enforcement and the efficiency of the Federal service, and in order to establish standards and procedures to ensure fairness in achieving a drug-free Federal workplace and to protect the privacy of Federal employees, it is hereby ordered as follows:

### Section 1. *Drug-Free Workplace.*

- (a) Federal employees are required to refrain from the use of illegal drugs.
- (b) The use of illegal drugs by Federal employees, whether on duty or off duty, is contrary to the efficiency of the service.
- (c) Persons who use illegal drugs are not suitable for Federal employment.



## *Sec. 2. Agency Responsibilities.*

(a) The head of each Executive agency shall develop a plan for achieving the objective of a drug-free workplace with due consideration of the rights of the government, the employee, and the general public.

(b) Each agency plan shall include:

(1) A statement of policy setting forth the agency's expectations regarding drug use and the action to be anticipated in response to identified drug use;

(2) Employee Assistance Programs emphasizing high level direction, education, counseling, referral to rehabilitation, and coordination with available community resources;

(3) Supervisory training to assist in identifying and addressing illegal drug use by agency employees;

(4) Provision for self-referrals as well as supervisory referrals to treatment with maximum respect for individual confidentiality consistent with safety and security issues; and

(5) Provision for identifying illegal drug users, including testing on a controlled and carefully monitored basis in accordance with this Order.

## *Sec. 3. Drug Testing Programs.*

(a) The head of each Executive agency shall establish a program to test for the use of illegal drugs by employees in sensitive positions. The extent to which such employees are tested and the criteria for such testing shall be determined by the head of each agency, based upon the nature of the agency's mission and its employees' duties, the efficient use of agency resources, and the danger to the public health and safety or national security that could result from the failure of an employee adequately to discharge his or her position.

(b) The head of each Executive agency shall establish a program for voluntary employee drug testing.

(c) In addition to the testing authorized in subsections (a) and (b) of this section, the head of each Executive agency is authorized to test an employee for illegal drug use under the following circumstances:

(1) When there is a reasonable suspicion that any employee uses illegal drugs;

(2) In an examination authorized by the agency regarding an accident or unsafe practice; or

(3) As part of or as a follow-up to counseling or rehabilitation for illegal drug use through an Employee Assistance Program.

(d) The head of each Executive agency is authorized to test any applicant for illegal drug use.

## *Sec. 4. Drug Testing Procedures.*

(a) Sixty days prior to the implementation of a drug testing program pursuant to this Order, agencies shall notify employees that testing for use of illegal drugs is to be conducted and that they may seek counseling and rehabilitation and inform them of the procedures for obtaining such assistance through the agency's Employee Assistance Program. Agency drug testing programs already ongoing are exempted from the 60-day notice requirement. Agencies may take action under section 3(c) of this Order without reference to the 60-day notice period.

(b) Before conducting a drug test, the agency shall inform the employee to be tested of the opportunity to submit medical documentation that may support a legitimate use for a specific drug.

(c) Drug testing programs shall contain procedures for timely submission of requests for retention of records and specimens; procedures for retesting; and procedures, consistent with applicable law, to protect the confidentiality of test results and related medical and rehabilitation records. Procedures for providing urine specimens must allow individual privacy, unless

the agency has reason to believe that a particular individual may alter or substitute the specimen to be provided.

(d) The Secretary of Health and Human Services is authorized to promulgate scientific and technical guidelines for drug testing programs, and agencies shall conduct their drug testing programs in accordance with these guidelines once promulgated.

*Sec. 5. Personnel Actions.*

(a) Agencies shall, in addition to any appropriate personnel actions, refer any employee who is found to use illegal drugs to an Employee Assistance Program for assessment, counseling, and referral for treatment or rehabilitation as appropriate.

(b) Agencies shall initiate action to discipline any employee who is found to use illegal drugs, *provided that* such action is not required for an employee who:

(1) Voluntarily identifies himself as a user of illegal drugs or who volunteers for drug testing pursuant to section 3(b) of this Order, prior to being identified through other means;

(2) Obtains counseling or rehabilitation through an Employee Assistance Program; and

(3) Thereafter refrains from using illegal drugs.

(c) Agencies shall not allow any employee to remain on duty in a sensitive position who is found to use illegal drugs, prior to successful completion of rehabilitation through an Employee Assistance Program. However, as part of a rehabilitation or counseling program, the head of an Executive agency may, in his or her discretion, allow an employee to return to duty in a sensitive position if it is determined that this action would not pose a danger to public health or safety or the national security.

(d) Agencies shall initiate action to remove from the service any employee who is found to use illegal drugs and:

(1) Refuses to obtain counseling or rehabilitation through an Employee Assistance Program; or

(2) Does not thereafter refrain from using illegal drugs.

(e) The results of a drug test and information developed by the agency in the course of the drug testing of the employee may be considered in processing any adverse action against the employee or for other administrative purposes. Preliminary test results may not be used in an administrative proceeding unless they are confirmed by a second analysis of the same sample or unless the employee confirms the accuracy of the initial test by admitting the use of illegal drugs.

(f) The determination of an agency that an employee uses illegal drugs can be made on the basis of any appropriate evidence, including direct observation, a criminal conviction, administrative inquiry, or the results of an authorized testing program. Positive drug test results may be rebutted by other evidence that an employee has not used illegal drugs.

(g) Any action to discipline an employee who is using illegal drugs (including removal from the service, if appropriate) shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act.

(h) Drug testing shall not be conducted pursuant to this Order for the purpose of gathering evidence for use in criminal proceedings. Agencies are not required to report to the Attorney General for investigation or prosecution any information, allegation, or evidence relating to violations of Title 21 of the United States Code received as a result of the operation of drug testing programs established pursuant to this Order.

**Sec. 6. Coordination of Agency Programs.**

(a) The Director of the Office of Personnel Management shall:

- (1) Issue government-wide guidance to agencies on the implementation of the terms of this Order;
- (2) Ensure that appropriate coverage for drug abuse is maintained for employees and their families under the Federal Employees Health Benefits Program;
- (3) Develop a model Employee Assistance Program for Federal agencies and assist the agencies in putting programs in place;
- (4) In consultation with the Secretary of Health and Human Services, develop and improve training programs for Federal supervisors and managers on illegal drug use; and
- (5) In cooperation with the Secretary of Health and Human Services and heads of Executive agencies, mount an intensive drug awareness campaign throughout the Federal work force.

(b) The Attorney General shall render legal advice regarding the implementation of this Order and shall be consulted with regard to all guidelines, regulations, and policies proposed to be adopted pursuant to this Order.

(c) Nothing in this Order shall be deemed to limit the authorities of the Director of Central Intelligence under the National Security Act of 1947, as amended, or the statutory authorities of the National Security Agency or the Defense Intelligence Agency. Implementation of this Order within the Intelligence Community, as defined in Executive Order No. 12333, shall be subject to the approval of the head of the affected agency.

**Sec. 7. Definitions.**

(a) This Order applies to all agencies of the Executive Branch.

(b) For purposes of this Order, the term "agency" means an Executive agency, as defined in 5 U.S.C. 105; the Uniformed Services, as defined in 5 U.S.C. 2101(3) (but excluding the armed forces as defined by 5 U.S.C. 2101(2)); or any other employing unit or authority of the Federal government, except the United States Postal Service, the Postal Rate Commission, and employing units or authorities in the Judicial and Legislative Branches.

(c) For purposes of this Order, the term "illegal drugs" means a controlled substance included in Schedule I or II, as defined by section 802(6) of Title 21 of the United States Code, the possession of which is unlawful under chapter 13 of that Title. The term "illegal drugs" does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by law.

(d) For purposes of this Order, the term "employee in a sensitive position" refers to:

(1) An employee in a position that an agency head designates Special Sensitive, Critical-Sensitive, or Noncritical-Sensitive under Chapter 731 of the Federal Personnel Manual or an employee in a position that an agency head designates as sensitive in accordance with Executive Order No. 10450, as amended;

(2) An employee who has been granted access to classified information or may be granted access to classified information pursuant to a determination of trustworthiness by an agency head under Section 4 of Executive Order No. 12356;

(3) Individuals serving under Presidential appointments;

(4) Law enforcement officers as defined in 5 U.S.C. 8331(20); and

(5) Other positions that the agency head determines involve law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence.

e. For purposes of this Order, the term "employee" means all persons appointed in the Civil Service as described in 5 U.S.C. 2105 (but excluding persons appointed in the armed services as defined in 5 U.S.C. 2102(2)).

(f) For purposes of this Order, the term "Employee Assistance Program" means agency-based counseling programs that offer assessment, short-term counseling, and referral services to employees for a wide range of drug, alcohol, and mental health programs that affect employee job performance. Employee Assistance Programs are responsible for referring drug-using employees for rehabilitation and for monitoring employees' progress while in treatment.

**Sec. 8. *Effective Date.*** This Order is effective immediately.

RONALD REAGAN

THE WHITE HOUSE,

*September 15, 1986.*

**Editorial note:** For the President's remarks of September 15 on signing Executive Order 12564 and the text of a message to Congress transmitting proposed legislation, also dated Sept. 15, 1986, see the *Weekly Compilation of Presidential Documents* (vol. 22, pp. 1188 and 1192).

## **APPENDIX B**

**Drug Free Workplace Act  
41 U.S. Code 701, 1988**



# UNITED STATES CODE ANNOTATED

**Title 41**

**Public Contracts**

*Supreme Court Library*

APR 24 1990

1990 *Supreme Court Library*

**Cumulative Annual Pocket Part**

Replacing 1989 pocket part in back of 1987 bound volume

Includes the Laws of the  
101st CONGRESS, FIRST SESSION (1989)

For close of Notes of Decisions  
See page III

For Later Laws and Cases  
Consult  
USCA  
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WEST PUBLISHING CO.

## CHAPTER 10—DRUG FREE WORKPLACE

<p>Sec. 701. Drug-free workplace requirements for Federal contractors.     (a) Drug-free workplace requirements.     (b) Suspension, termination, or debarment of the contractor.</p> <p>702. Drug-free workplace requirements for Federal grant recipients.     (a) Drug-free workplace requirement.</p>	<p>Sec. 702. Drug-free workplace requirements for Federal grant recipients.     (b) Suspension, termination, or debarment of the grantee.</p> <p>703. Employee sanctions and remedies.</p> <p>704. Waiver.     (a) In general.     (b) Exclusive authority.</p> <p>705. Regulations.</p> <p>706. Definitions.</p> <p>707. Construction of chapter.</p>
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### § 701. Drug-free workplace requirements for Federal contractors

#### (a) Drug-free workplace requirement

##### (1) Requirement for persons other than individuals

No person, other than an individual, shall be considered a responsible source, under the meaning of such term as defined in section 403(8) of this title, for the purposes of being awarded a contract for the procurement of any property or services of a value of \$25,000 or more from any Federal agency unless such person has certified to the contracting agency that it will provide a drug-free workplace by—

(A) publishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the person's workplace and specifying the actions that will be taken against employees for violations of such prohibition;

(B) establishing a drug-free awareness program to inform employees about—

- (i) the dangers of drug abuse in the workplace;
- (ii) the person's policy of maintaining a drug-free workplace;
- (iii) any available drug counseling, rehabilitation, and employee assistance programs; and
- (iv) the penalties that may be imposed upon employees for drug abuse violations;

(C) making it a requirement that each employee to be engaged in the performance of such contract be given a copy of the statement required by subparagraph (A);

(D) notifying the employee in the statement required by subparagraph (A), that as a condition of employment on such contract, the employee will—

- (i) abide by the terms of the statement; and
- (ii) notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than 5 days after such conviction;

(E) notifying the contracting agency within 10 days after receiving notice under subparagraph (D)(ii) from an employee or otherwise receiving actual notice of such conviction;

(F) imposing a sanction on, or requiring the satisfactory participation in a drug abuse assistance or rehabilitation program by, any employee who is so convicted, as required by section 703 of this title; and



(G) making a good faith effort to continue to maintain a drug-free workplace through implementation of subparagraphs (A), (B), (C), (D), (E), and (F).

(2) Requirement for individuals

No Federal agency shall enter into a contract with an individual unless such contract includes a certification by the individual that the individual will not engage in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in the performance of the contract.

(b) Suspension, termination, or debarment of the contractor

(1) Grounds for suspension, termination, or debarment

Each contract awarded by a Federal agency shall be subject to suspension of payments under the contract or termination of the contract, or both, and the contractor thereunder or the individual who entered the contract with the Federal agency, as applicable, shall be subject to suspension or debarment in accordance with the requirements of this section if the head of the agency determines that—

(A) the contractor or individual has made a false certification under subsection (a) of this section;

(B) the contractor violates such certification by failing to carry out the requirements of subparagraph (A), (B), (C), (D), (E), or (F) of subsection (a)(1) of this section; or

(C) such a number of employees of such contractor have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace as required by subsection (a) of this section.

(2) Conduct of suspension, termination, and debarment proceedings

(A) If a contracting officer determines, in writing, that cause for suspension of payments, termination, or suspension or debarment exists, an appropriate action shall be initiated by a contracting officer of the agency, to be conducted by the agency concerned in accordance with the Federal Acquisition Regulation and applicable agency procedures.

(B) The Federal Acquisition Regulation shall be revised to include rules for conducting suspension and debarment proceedings under this subsection, including rules providing notice, opportunity to respond in writing or in person, and such other procedures as may be necessary to provide a full and fair proceeding to a contractor or individual in such proceeding.

(3) Effect of debarment

Upon issuance of any final decision under this subsection requiring debarment of a contractor or individual, such contractor or individual shall be ineligible for award of any contract by any Federal agency, and for participation in any future procurement by any Federal agency, for a period specified in the decision, not to exceed 5 years.

(Pub.L. 100-690, Title V, § 5152, Nov. 18, 1988, 102 Stat. 4304.)

# HISTORICAL AND STATUTORY NOTES

## Effective Dates

1988 Act. Section 5160 of Pub.L. 100-690 provided that: "Sections 5152 [this section] and 5153 [section 702 of this title] shall be effective 120 days after the date of the enactment of this subtitle [Nov. 18, 1988]."

## Short Title

1988 Act. This subtitle [Subtitle D of Title V, §§ 5151 to 5160, of Pub.L. 100-690, enacting this chapter and enacting a provision set out as a note

under this section] may be cited as the "Drug-Free Workplace Act of 1988."

## Consistency of Regulations With International Obligations of United States; Extraterritorial Application

Section 4804 of Pub.L. 100-690 provided that:

"(a) In prescribing regulations under subtitle D of title V of this Act [this chapter], the head of the appropriate agency—

"(1) shall only establish requirements that are consistent with the international obligations of the United States, and

"(2) shall take into consideration any applicable laws and regulations of foreign countries.  
 "(b) Section 5152 [this section] shall not be construed as conferring extraterritorial application of the provisions of such section."

### LIBRARY REFERENCES

#### Law Reviews

Drug-free workplaces: The new requirements for federal grantees and contractors. James A. Kahl, 63 Fla.B.J. 38 (July/August 1989).

#### American Digest System

Preferences, conditions and restrictions on bidders, see United States ¶64.15.

Regulations as to drugs and narcotics, see Drugs and Narcotics ¶¶41 to 50.

#### Encyclopedias

Proposals and bids, see C.J.S. United States § 87.

Regulations as to drugs and narcotics, see C.J.S. Drugs and Narcotics §§ 100, 101.

#### WESTLAW ELECTRONIC RESEARCH

Drugs and narcotics cases: 138k[add key number].

United States cases: 393k[add key number].

### § 702. Drug-free workplace requirements for Federal grant recipients

#### (a) Drug-free workplace requirement

##### (1) Persons other than individuals

No person, other than an individual, shall receive a grant from any Federal agency unless such person has certified to the granting agency that it will provide a drug-free workplace by—

(A) publishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violations of such prohibition;

(B) establishing a drug-free awareness program to inform employees about—

- (i) the dangers of drug abuse in the workplace;
- (ii) the grantee's policy of maintaining a drug-free workplace;
- (iii) any available drug counseling, rehabilitation, and employee assistance programs; and
- (iv) the penalties that may be imposed upon employees for drug abuse violations;

(C) making it a requirement that each employee to be engaged in the performance of such grant be given a copy of the statement required by subparagraph (A);

(D) notifying the employee in the statement required by subparagraph (A), that as a condition of employment in such grant, the employee will—

- (i) abide by the terms of the statement; and
- (ii) notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than 5 days after such conviction;

(E) notifying the granting agency within 10 days after receiving notice of a conviction under subparagraph (D)(ii) from an employee or otherwise receiving actual notice of such conviction;

(F) imposing a sanction on, or requiring the satisfactory participation in a drug abuse assistance or rehabilitation program by, any employee who is so convicted, as required by section 703 of this title; and

(G) making a good faith effort to continue to maintain a drug-free workplace through implementation of subparagraphs (A), (B), (C), (D), (E), and (F).

##### (2) Individuals

No Federal agency shall make a grant to any individual unless such individual certifies to the agency as a condition of such grant that the individual will not engage in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in conducting any activity with such grant.

**(b) Suspension, termination, or debarment of the grantee****(1) Grounds for suspension, termination, or debarment**

Each grant awarded by a Federal agency shall be subject to suspension of payments under the grant or termination of the grant, or both, and the grantee thereunder shall be subject to suspension or debarment, in accordance with the requirements of this section if the agency head of the granting agency or his official designee determines, in writing, that—

(A) the grantee has made a false certification under subsection (a) of this section;

(B) the grantee violates such certification by failing to carry out the requirements of subparagraph (A), (B), (C), (D), (E), (F), or (G) of subsection (a)(1) of this section; or

(C) such a number of employees of such grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the grantee has failed to make a good faith effort to provide a drug-free workplace as required by subsection (a)(1) of this section.

**(2) Conduct of suspension, termination, and debarment proceedings**

A suspension of payments, termination, or suspension or debarment proceeding subject to this subsection shall be conducted in accordance with applicable law, including Executive Order 12549 or any superseding Executive order and any regulations promulgated to implement such law or Executive order.

**(3) Effect of debarment**

Upon issuance of any final decision under this subsection requiring debarment of a grantee, such grantee shall be ineligible for award of any grant from any Federal agency and for participation in any future grant from any Federal agency for a period specified in the decision, not to exceed 5 years.

(Pub.L. 100-690, Title V, § 5153, Nov. 18, 1988, 102 Stat. 4306.)

### HISTORICAL AND STATUTORY NOTES

**References in Text**

Executive Order 12549, referred to in subsec. (b)(2), is Ex. Ord. No. 12549, Feb. 19, 1986, 51

F.R. 6370, which is set out as a note under section 6101 of Title 31, Money and Finance.

**Effective Dates**

Section effective 120 days after Nov. 18, 1988, see section 5160 of Pub.L. 100-690, set out as a note under section 701 of this title.

**§ 703. Employee sanctions and remedies**

A grantee or contractor shall, within 30 days after receiving notice from an employee of a conviction pursuant to section 701(a)(1)(D)(ii) or 702(a)(1)(D)(ii) of this title—

(1) take appropriate personnel action against such employee up to and including termination; or

(2) 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.

(Pub.L. 100-690, Title V, § 5154, Nov. 18, 1988, 102 Stat. 4307.)

**§ 704. Waiver****(a) In general**

A termination, suspension of payments, or suspension or debarment under this chapter may be waived by the head of an agency with respect to a particular contract or grant if—

(1) in the case of a waiver with respect to a contract, the head of the agency determines under section 701(b)(1) of this title, after the issuance of a final determination under such section, that suspension of payments, or termination of the contract, or suspension or debarment of the contractor, or refusal to permit a person to be treated as a responsible source for a contract, as the case

may be, would severely disrupt the operation of such agency to the detriment of the Federal Government or the general public; or

(2) in the case of a waiver with respect to a grant, the head of the agency determines that suspension of payments, termination of the grant, or suspension or debarment of the grantee would not be in the public interest.

(b) **Exclusive authority**

The authority of the head of an agency under this section to waive a termination, suspension, or debarment shall not be delegated.

(Pub.L. 100-690, Title V, § 5155, Nov. 18, 1988, 102 Stat. 4307.)

§ 705. **Regulations**

Not later than 90 days after November 18, 1988, the governmentwide regulations governing actions under this chapter shall be issued pursuant to the Office of Federal Procurement Policy Act. (41 U.S.C. 401 et seq.).

(Pub.L. 100-690, Title V, § 5156, Nov. 18, 1988, 102 Stat. 4308.)

**HISTORICAL AND  
STATUTORY NOTES**

**References in Text**

The Office of Federal Procurement Policy Act, referred to in text, is Pub.L. 93-400, Aug. 30,

1974, 88 Stat. 796, as amended, which is classified principally to chapter 7 (section 401 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 401 of this title and Tables volume.

§ 706. **Definitions**

For purposes of this chapter—

(1) the term “drug-free workplace” means a site for the performance of work done in connection with a specific grant or contract described in section 701 or 702 of this title of an entity at which employees of such entity are prohibited from engaging in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in accordance with the requirements of this Act;

(2) the term “employee” means the employee of a grantee or contractor directly engaged in the performance of work pursuant to the provisions of the grant or contract described in section 701 or 702 of this title;

(3) the term “controlled substance” means a controlled substance in schedules I through V of section 812 of Title 21;

(4) the term “conviction” means a finding of guilt (including a plea of *nolo contendere*) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

(5) the term “criminal drug statute” means a criminal statute involving manufacture, distribution, dispensation, use, or possession of any controlled substance;

(6) the term “grantee” means the department, division, or other unit of a person responsible for the performance under the grant;

(7) the term “contractor” means the department, division, or other unit of a person responsible for the performance under the contract; and

(8) the term “Federal agency” means an agency as that term is defined in section 552(f) of Title 5.

(Pub.L. 100-690, Title V, § 5157, Nov. 18, 1988, 102 Stat. 4308.)

**HISTORICAL AND  
STATUTORY NOTES**

**References in Text**

This Act, referred to in par. (1), is Pub.L. 100-690, Nov. 18, 1988, 102 Stat. 4181, known as the Anti-Drug Abuse Act of 1988. For complete classification of this Act to the Code, see Short Title note set out under section 1501 of Title 21, Food and Drugs, and Tables volume.

**LIBRARY REFERENCES**

**American Digest System**

Place for work, see Labor Relations ¶10 to 13.

Regulations as to drugs and narcotics, see Drugs and Narcotics ¶41 to 50.

United States aid to state and local agencies, see United States ¶62(2).

## **PUBLIC CONTRACTS**

**41 § 707**

### **Encyclopedias**

Disbursement of United States funds, see C.J.S.  
United States § 122.  
Place for work, see C.J.S. Labor Relations § 12.  
Regulations as to drugs and narcotics, see C.J.S.  
Drugs and Narcotics §§ 100, 101.

### **WESTLAW ELECTRONIC RESEARCH**

Drugs and narcotics cases: 138k[add key number].  
Labor relations cases: 232k[add key number].  
United States cases: 393k[add key number].

### **§ 707. Construction of chapter**

Nothing in this chapter shall be construed to require law enforcement agencies, if the head of the agency determines it would be inappropriate in connection with the agency's undercover operations, to comply with the provisions of this chapter.  
(Pub.L. 100-690, Title V, § 5158, Nov. 18, 1988, 102 Stat. 4308.)

## **INDEX**

### **CONSULT GENERAL INDEX**

†



## **APPENDIX C**

**Recommendations From:**

***Beating Drugs:  
A Workable Plan for Nevada***





# **BEATING DRUGS.**

## **A WORKABLE PLAN FOR NEVADA**

**Commission on  
Substance Abuse  
Education, Prevention,  
Enforcement, and Treatment**

---

**September 1, 1990**

**Bob Miller  
Governor**

## Workplace Prevention Strategies

### Recommendation 11:

Emphasize and encourage employee assistance programs that address drug and alcohol abuse problems.

#### *Justification:*

*Bureau of Alcohol and Drug Abuse (BADA) currently has one staff devoted to employee assistance program development. However, Nevada industry loses \$296 million due to drug and alcohol abuse. Employee assistance programs are a vital component of a drug-free workplace.*

#### Estimated New Costs:

First Year

\$57,000

Second Year

\$57,000

#### Lead Agency:

Bureau of Alcohol and Drug Abuse

#### Required Action:

Add 1.0 Full Time Equivalent Occupational Program Consultant position to the existing occupational program.

### Recommendation 12:

Enact legislation requiring a Drug-Free Workplace Program for all State agencies to include at a minimum pre-employment and "for cause" drug screening for all State employees, including random drug testing for peace officers, and with enhancement and increased capacity of the Employee Assistance Program.

#### *Justification:*

*The State should take the lead in promoting a drug-free workplace.*

#### Estimated New Costs:

First Year

\$194,000

Second Year

\$194,000

#### Joint Agencies:

Personnel Division, Bureau of Alcohol and Drug Abuse, all other State Agencies

#### Required Action:

Hire 2.0 Full Time Equivalent Employee Assistance Counselor positions (\$57,000) for Personnel Division and amend State Personnel Policy and Procedures to require pre-employment and "for cause" drug testing. Peace officers should be required to submit to random drug testing. Policy and program development should be approved by staff from the Personnel Division. The Personnel Division, in cooperation with the Bureau of Alcohol and Drug Abuse, will develop a model for public and private sector application, including an employee assistance component. Funds are estimated at \$80,000 for 4,000 tests per year at a cost of \$20 (\$10 test, \$10 associated administration cost).

---

**Recommendation 13:**

Enact legislation which requires that all providers receiving state or federal money through a state agency develop and implement a drug-free workplace policy which meets minimum standards developed by the Bureau of Alcohol and Drug Abuse.

***Justification:***

*Federal drug-free workplace requirements do not apply to programs funded by state monies. This recommendation would implement drug-free workplace requirements for state funded providers.*

**Estimated New Costs:**

None

**Lead Agencies:**

Nevada Legislature and the Bureau of Alcohol and Drug Abuse

**Required Action:**

Enact legislation to require drug-free workplace policies for providers receiving state monies.

**Recommendation 14:**

Increase industrial insurance cash contribution by one percent for private sector businesses which fail to implement a drug free workplace policy and associated Employee Assistance Program (EAP) and decrease by one percent industrial insurance contribution for those who comply.

***Justification:***

*Decrease \$296 million loss to Nevada industry due to substance abuse. Employee substance abuse leads to on-the-job injuries and accidents.*

**Estimated New Costs:**

**First Year**

\$2,000,000

**Second Year**

Disincentive Only — Revenue Unknown

**Responsible Agency:**

Nevada Department of Taxation

**Required Action:**

Enact legislation for industrial insurance incentive. Development of minimum standards for drug-free workplace policy shall be conducted by the Bureau of Alcohol and Drug Abuse.

**Substance Abuse In The Workplace**

**National**

- Alcohol abuse in the workplace accounts for losses of \$54.7 billion per year nationwide.<sup>40</sup>
- Annual workplace losses attributed to the use of drugs other than alcohol are estimated at \$26 billion.<sup>40</sup>
- Between 10-23 percent of all U.S. workers use dangerous drugs on the job.<sup>41</sup>

**Nevada**

- Nevada industries lose over \$200 million annually because of alcohol related problems of individuals employed in the state.<sup>42</sup>
- Nevada workplace losses attributed to the use of drugs other than alcohol cost the state an additional \$96 million.<sup>40</sup>
- Nevada has 524,200 employed individuals of which an estimated 37,742 experience an alcohol and/or drug abuse problem.<sup>43</sup>



**APPENDIX D**

**Case No. 23740**

***Kim Koch, et al v. Harrah's Club***



1 Case No. 23740

2 Dept. No. 1

3  
4 M. CHAPPEL

5  
6 IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7 IN AND FOR THE COUNTY OF DOUGLAS

8 KIM KOCH, MERIDITH MUNZIKER, TISH  
9 BURNS, LARRY GEORGE, and other  
10 similarly situated employees  
HARRAH'S CLUB, a Nevada corporation  
OWEN KING, Individually,

ORDER AND JUDGMENT OF  
DECLARATORY RELIEF

11 Plaintiffs,

12 vs.

13 HARRAH'S CLUB, a Nevada  
14 corporation,

15 Defendant.

16  
17 Plaintiffs filed a Complaint for the issuance of a  
18 preliminary and permanent injunction and for the declaration of  
19 the rights of Plaintiffs and Defendant as to Harrah's substance  
20 abuse policy. The Court held a hearing on September 3 and 6,  
21 1990.

22 Plaintiffs KIM KOCH, TISH BURNS, LARRY GEORGE and MERIDITH  
23 MUNZIKER<sup>1</sup> are daily rated employees of Harrah's Tahoe. These  
24 Plaintiffs assert claims on their own behalf and on behalf of a  
25

26  
27 <sup>1</sup>Plaintiff Hunziker was no longer employed at Harrah's at the  
28 time of the hearing and the parties have stipulated that the  
action may be dismissed with prejudice as to Plaintiff Hunziker.  
The claim of Hunziker is hereby dismissed with prejudice.

1 class of similarly situated employees.' Plaintiff OWEN KING is  
2 a salaried employee of Harrah's who asserts a claim on his own  
3 behalf. Plaintiffs contend the policy is unlawful and  
4 constitutes an invasion of their right of privacy.

5 The Defendant contends the policy and procedure is valid  
6 and lawful and does not constitute an unlawful invasion of  
7 privacy. In the policy adopted April 1, 1990, Harrah's states  
8 it has a vital interest in maintaining a safe, healthful and  
9 efficient working environment. The drug testing policy is  
10 mandatory for all current employees and applicants for  
11 employment. As to current employees, the substance abuse policy  
12 provides that any employee found to be in violation of the  
13 policy or who refuses to submit to substance abuse testing will  
14 be subject to disciplinary action up to and including  
15 termination.

16 The Court finds that a private employer has a legitimate  
17 employment interest in seeking a drug-free work environment.  
18 The Court also finds that requiring drug testing to determine  
19 illegal drug use by employees is appropriate and lawful so long  
20 as the testing methods are reliable.

21 The Court declares that the Harrah's Substance Abuse Policy  
22 Statement is valid, reasonable, fair and lawful, and not  
23 violative of any constitutionally protected right. Testing of  
24

25 'These Plaintiffs filed suit in the form of a class action.  
26 To avoid the problems associated with certifying the class  
27 actions, Harrah's has stipulated it will apply any judgment  
28 rendered to all daily rated current employees of Harrah's. The  
class action is hereby dismissed. The court declares that this  
order and judgment applies to all daily rated current employees of  
Harrah's and to the Plaintiffs in this action.



1 Harrah's employees in accordance with the Policy Statement does  
2 not constitute an unlawful invasion of privacy.

3 Harrah's has adopted Substance Abuse Testing Procedures.  
4 The procedures provide that current employees will be tested  
5 with a Radioimmunoassay-hair screen test. If the results are  
6 positive, the test results automatically will be confirmed by  
7 gas chromatographic/mass spectrometry (GC/MS). If the employee  
8 tests positive and the employee does not admit drug use, the  
9 employee will be required to participate in an unannounced urine  
10 testing program spanning sixty (60) days. Urine samples will be  
11 collected at least two (2) times over that sixty (60) day  
12 period.

13 Positive urine test results of any employee automatically  
14 will be confirmed by GC/MS tests. If all test results are  
15 negative, no further action as to that employee will be taken.  
16 If any confirmed test result is positive, the employee will be  
17 terminated for violation of company policy.

18 The Court finds that the RIAH screen test alone has not, at  
19 this stage, developed sufficiently to form a basis for  
20 termination of current employees. Under Harrah's existing  
21 policy, current employees are not terminated based on RIAH  
22 alone.

23 Harrah's has stipulated, and the Court accepts as a  
24 statement of fact, that daily rated current employees, and the  
25 Plaintiffs in this action, will have the option to either submit  
26 to a RIAH hair screen test or to urine screen tests when

27 ----

28 ----

1 scheduled for mandatory drug testing.<sup>1</sup> If the employee opts  
2 for urine screen testing in lieu of RIAH, the employee will be  
3 required to submit to unannounced urine testing over a sixty  
4 (60) day period. Urine samples may be collected as often as  
5 twice a week during that period. Urine screen test results  
6 automatically will be confirmed by the GC/MS test.

7 The Court declares that Harrah's Substance Abuse Testing  
8 Procedures, together with the provision set forth above relative  
9 to the employee's option to submit to urine screen testing in  
10 lieu of RIAH, are reasonable, valid and lawful and do not  
11 constitute an unlawful invasion of privacy.

12 Harrah's Testing procedures require the employee's consent  
13 to submit to drug testing. The employees are required to sign a  
14 Harrah's consent form. Refusal to sign the Harrah's consent  
15 form will be cause for disciplinary action up to and including  
16 termination. The Court finds the Harrah's consent form to be  
17 valid and enforceable.

18 The employee electing the RIAH test is also required to  
19 sign the consent form entitled "Consent and Release Form"  
20 (Exhibit 10) provided by Readicare, the agency which collects  
21 the specimen samples. Refusal to sign the Readicare consent  
22 form may be cause for disciplinary action up to and including  
23 termination. The Court finds the third paragraph of the  
24 Readicare Consent form to be void and unenforceable. Readicare  
25 has modified the consent form by deleting the third paragraph.  
26 The modification is acceptable to the Court and is valid and  
27

28 <sup>1</sup>This option is not applicable to applicants for employment  
or employees who volunteer to be tested.

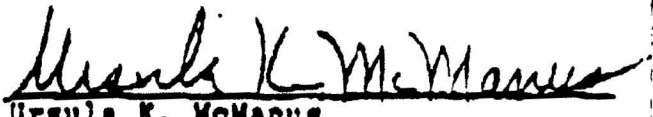
1 enforceable.

2 IT IS FURTHER ORDERED that this is a final judgment. NRCF  
3 65(a)(2).

4 Dated this 12 day of September, 1990.

5  
6   
7 DAVID R. GAMBLE  
8 District Judge

9  
10 Copies served by mail this 12<sup>th</sup> day of September, 1990, to:  
11 Thomas E. Drendel, Esq., P. O. Box 1987, Reno, NV 89505; Albert  
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