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Drug Testing in Law Enforcement

A Policy Research Project  
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## ABSTRACT

Public confidence and credibility of law enforcement has diminished in the past ten years as a result of the unacceptable personal conduct of a small percentage of officers. Two examples include the Dallas police officer accused of driving while under the influence of alcohol while on duty which resulted in an automobile accident and Detective Mark Thurman lying under oath during the O.J. Simpson trial. Law enforcement must make every effort to regain public faith and confidence.

The research in this paper will examine, evaluate and explore the benefits of adopting an employee drug testing program. The paper addresses legal issues, employee concerns, and statistics pertaining to the results of effective drug testing programs in the workplace. It will affirm that drug testing is a necessary tool in the fight against drugs and in the effort to restore public confidence, productivity and work quality to the police profession. This paper makes recommendations for the implementation of an effective drug testing program that will ensure a drug free workplace and regain public confidence in law enforcement.

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## Introduction

According to the 1996 NHSDA (National Household Survey on Drug Abuse), an estimated 6.1 million current illegal drug users were employed full-time (6.2 percent of the full-time labor force aged eighteen and older) in 1996, while 1.9 million worked part-time. Drug users are less dependable than other workers and decrease workplace productivity. They are more likely to have taken an unexcused absence in the past month; 12.1 percent did so compared to 6.1 percent of drug-free workers. Illegal drug users get fired more frequently (4.6 percent were terminated within the past year compared to 1.4 percent of non-users). Drug users also switch jobs more frequently; 32.1 percent worked for three or more employers in the past year, compared to 17.9 percent of drug-free workers. One quarter of drug users left a job voluntarily in the past year (Federal Register, 1998).

The abuse of illegal drugs, pharmaceutical drugs and alcohol among today's work force is at an all-time high. The National Institute on Drug Abuse estimates substance abuse is costing America's work force approximately 100 billion dollars in lost production annually (Walsh and Hawks, 1986). The law enforcement community has not been spared the problem of substance abuse in the workplace. Drug testing in law enforcement is a sign of the times. Law enforcement must set a precedent when dealing with employee substance abuse problems by having an effective policy and drug testing program. Public scrutiny of police personnel is also at an all-time high. The public perception is based on the observed decay of a small percentage of police officers' values, integrity and credibility. The law enforcement community must set a higher standard to meet the need and demand for public trust.

The purpose of this research project is to determine and evaluate effective employee drug testing programs. The audience will include the law enforcement community as well as the public. The benefits of drug testing will be evaluated through statistics gathered from proven sources such as books and other related publications. Legal issues will be taken into consideration when writing the policy, based on recent court rulings. Employee opinions will be measured through interviews as well as statistical information compiled by governmental research programs such as the National Criminal Justice Reference Service. This research project will evaluate the benefits of a drug testing policy and program that will be a positive factor in the law enforcement community by ensuring public confidence and officer safety. We must continue to send a message to the public that law enforcement is committed to the war against drug abuse.

### **Historical, Legal or Theoretical Context**

Legal issues behind drug testing in the workplace. Most people are divided into two camps on the issue of drug testing by employers. One group regards testing as a necessary tool in the fight against drugs and in the effort to restore productivity and work quality to the workplace. The other group considers drug testing an intrusion, an invasion of privacy, and just one more indication that individual rights are being eroded. Any case involving workplace drug and alcohol testing will unavoidably lead to a balancing of the rights of employees and employers, which mirrors the larger struggle between individual and group rights (Simmons, 1998).

Cases dealing with drug testing in the workplace. The courts and administrative agencies such as the Texas Employment Commission have been generally supportive of employers in the area of drug testing. The nation's highest court signaled in 1989 that drug testing is

constitutional when supported by goals such as promoting public safety and reliability of certain police officers. In *Skinner v. Railway Labor Executives Association* (1989), the U.S. Supreme Court ruled that the Department of Transportation could require the drug testing of railroad employees involved in certain "major accidents" or under other specified conditions. The ruling stated that the public's interest in safety was a "compelling interest" that outweighed the employees' privacy rights. Influential were the facts that the regulations narrowly restricted the conditions under which drug testing would be done in situations involving a high risk of injury to people and property and that employees in the highly-regulated railroad industry therefore have a "diminished" expectation of privacy (*Skinner V. Railway, 1989*).

Decided at the same time as *Skinner*, *National Treasury Employees Union v. Von Raab* (1989) held that the U.S. Customs Service could require applicants for positions involving drug interdiction and enforcement of related laws, or which required the employee to carry firearms, to pass a drug screening test. The Supreme Court reasoned that the public had a compelling interest in ensuring that its drug enforcement and other armed employees are not themselves involved with drugs (*Treasury Employees v. Von Rabb, 1989*).

Another 1989 case from the U.S. Court of Appeals for the Fifth Circuit, which includes Texas, involved a discrimination issue as well. In *Anderson v. Lewis Rail Service Co.*, two black employees alleged discrimination under Title VII of the Civil Rights Act of 1964 against their employer which had fired them after they tested positive for drug use and failed to rehire them as it did two white employees who had also failed a drug test. Both plaintiffs admitted drug use on their part and that they had refused to undergo recommended drug rehabilitation. The appeals court ruled that the employer was not guilty

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of illegal discrimination, since it could show that it rehired the two white employees only after they underwent the rehabilitation program and refused to rehire the black employees due to their unwillingness to participate in that program (*Simmons, 1998*).

Texas courts have also been supportive of employers with reasonable drug and alcohol policies. The 1988 ruling in *TWC v. Hughes Drilling Fluids* is probably the most useful case for Texas employers in this area of the law because it resolved not only an issue of drug testing, but also set an important precedent in unemployment compensation law. The ex-employee, the benefits claimant in this case, had worked for the employer for over two years by the time the employer introduced a drug testing policy, at which time the employee made it clear to his supervisor that he did not agree with the policy and would not comply with it. The supervisor let him know the policy applied to everyone. Nothing further happened until about two and a half months later, when the employer required the employee and others to undergo a random test. The claimant refused to take the test, even after being warned his job was in jeopardy for such refusal, and was fired.

The claimant filed an unemployment claim and was initially disqualified, but appealed to the Appeal Tribunal and won. The employer appealed to the Commission and lost, with a dissenting vote from the Commissioner representing employers. The employer then appealed to court and won a summary judgment. TWC appealed, and the Court of Appeals in Tyler affirmed in the employer's favor (*Simmons, 1998*).

The Court held that the policy itself was reasonable and that the claimant had, in effect, acquiesced to the policy by remaining with the employer after learning of the new requirements. It then ruled that the claimant committed disqualifying misconduct by refusing to abide by the policy and submit a urine sample for testing. The Court went on to state that

the policy did not constitute an unreasonable search in view of society's compelling interest in promoting workplace safety by discouraging substance abuse. The Supreme Court of Texas upheld the appeals court ruling. In a similar case decided in the following year, *Jennings v. Minco Technology Labs, Inc. (1989)*, the Court of Appeals in Austin ruled that an employer could legally require its employees to undergo drug testing as a condition of continued employment.

In general, employees have the right to feel reasonably secure in their jobs, to feel safe in the workplace, and to expect the employer to treat them with respect and uphold their right to privacy to an appropriate extent. Employers have the right to feel secure that the only risk to the business is from competition and other marketplace demands. They also have the right to expect workers to come to work fit for duty and able to work safely and productively.

#### **Review of Literature or Practice**

The results of the research done on Drug Testing of Employees Programs found the programs to be cost saving to employers, ensuring a safer work place and ensuring public confidence (1988). A study done by the Ohio Department of Alcohol and Drug Addiction Services is proof of effectiveness of a good drug-testing program. Ohio Department of Alcohol and Drug Addiction Services reported hundreds of Ohio companies are starting substance-abuse policies and drug testing of employees to reap savings in workers' compensation premiums. In July 1997, 383 companies began getting discounts ranging from 6 percent to 12 percent on the amounts they pay for workers' compensation coverage (Thomas, 1998). Discounts can go as high as 20 percent. The discount is given because the

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state believes that drug policies result in long-term savings both for companies and for workers' compensation claims.

According to the national Drugs Don't Work Partnership an estimated 74 percent of drug users are employed (Thomas, 1998). Drug users are three to four times more likely to be involved in workplace accidents, statistics show. They also work at 67 percent of their potential, costing an average of \$7,000 per abuser a year and are five times more likely to file workers' compensation claims, according to the addiction services department (Thomas, 1998). A drug-free policy will, in the long term, give a company savings in worker's compensation premiums in addition to the benefit of having more efficient employees. The discount varies with the level of drug testing, enforcement and treatment a company has. Level one, which brings a six percent savings, requires drug testing and telling employees about treatment options. Testing is done before someone gets a job, after an accident that caused property or bodily harm and as a follow-up after a positive test. Level two, a 12 percent discount, adds random testing of 25 percent of employees and mandatory referral to treatment. Level three, 15 percent, requires employers to have health insurance that covers drug counseling and treatment, as well as meet all the testing requirements (Thomas, 1998).

The Department of Transportation's (DOT) alcohol and drug testing rules went into effect on July 1, 1991. The purpose of this program is to reduce highway accidents that result from driver use of "drugs" alcohol and controlled substance, and as of today, cover over 7 million workers who perform 'safety sensitive' functions in the transportation industry (Drug Free Workplace, 1998). Mandated by the 1991 Omnibus Transportation Employee Testing Act, the new regulations impose alcohol testing for the first time and expand existing drug testing programs. Drug testing of employees are as follows: as part of

a pre-employment screening for use of drugs or alcohol; random testing of 50% of employees annually; reasonable suspicion testing; post accident (Vega, 1998).

A survey of numerous police agencies was conducted by this author in 1998 and the findings were: The Texas Narcotic Control Program, under mandatory requirements of the Drug Free Work Place Act, requires all of the 56 Texas multi-jurisdictional Task Forces to perform drug testing of all employees. The drug testing procedures include both new hire and random testing of 50% of existing employees annually. The Federal Drug Enforcement Administration (DEA) does drug testing, which includes new hire and random testing of current employees. The majority of County Sheriff Departments and City Police Departments have a drug testing programs incorporated with county and city employees and are similar in nature.

The research of the paper reveals that drug testing programs in the work place are an effective tool in ensuring quality employees. Employers that incorporate drug awareness educational programs for employees as well as substance abuse recognition training for supervisors appear to have less resistance from employees than employers that don't. Employers that educate employees on the overall effects of drug free work places create a more positive attitude towards such programs. This researcher feels the key to a positive employee drug testing program is educating employees about drug abuse and explaining the legal precedence set forth for such programs. This may make them appear less intrusive and more easily accepted by employees.

### **Discussion of Relevant Issues**

Employers have the right to expect workers to come to work fit for duty and able to work safely and productively. Some employers are forced to have drug-free workplace

policies; it has become clear that drug and alcohol policies need to contain certain kinds of provisions and safeguards in order to be both effective and legal. The policy should answer certain questions: What conduct is prohibited? To whom does the policy apply? What penalties are appropriate? Will the possibility of voluntary treatment exist? At a minimum, a policy should prohibit any use, possession, sale, or transfer of illegal drugs or alcohol in the workplace. Care must be taken to ensure that the policy is applied across the board in a fair manner. Failure to do that can lead to discrimination charges that can be extremely difficult to fight and can lead to losses in unemployment claims. Most policies notify employees that violations of the rules can be punished with discipline up to and including termination for the first offense. Some companies provide a chance for rehabilitation and a return to work under probationary conditions, but this type of "second chance" is not legally required.

The policy should be communicated in writing to all employees. Employees should sign a written acknowledgment that they have received a copy of the policy. For new hires, employers have the right to make signing such a form a condition of hire. Not all companies will have the same policy as to what will trigger a drug test. Some provide for "random" or periodic testing. Others provide only for testing "for cause" or at certain times, for example, when promotion is sought. Some companies provide for testing under both types of circumstances. The employer must decide whether it will prohibit any detectable amounts of drugs or alcohol in the systems of the employees, or whether it will take action only when the tests reveal concentrations above certain levels.

The company should "shop" for a reliable, preferably federally certified, drug testing lab which will be willing to work with the employer in helping to make the drug test results "stick". At a minimum, the lab should routinely provide the company with copies of the test

results, showing which tests were performed, what substances were found, and in what amounts. It should also furnish a copy of the complete chain of custody of the urine, hair, or blood sample showing who handled the sample at all pertinent times. By far, the preferred method for establishing drug use on an employee's part is to confirm the initial positive screen with the GC/MS test (gas chromatography/mass spectrometry). Test results should be handled with great care toward ensuring that only those with a need to know ever learn of them. Any employees connected with the test need to be trained to uphold the confidentiality of such records.

The courts and administrative agencies such as the Texas Employment Commission have been generally supportive of employers in the area of drug testing. In *Skinner v. Railway Labor Executives Association* (1989), the U.S. Supreme Court ruled that the Department of Transportation could require the drug testing of railroad employees involved in certain "major accidents" or under other specified conditions. Decided at the same time as *Skinner*, *National Treasury Employees Union v. Von Raab* (1989) held that the U.S. Customs Service could require applicants for positions involving drug interdiction and enforcement of related laws, or which required the employee to carry firearms, to pass a drug screening test.

The benefits analysis of the paper indicates that an effective employee drug-testing program may ensure a drug free workplace. The actual cost of the program is minimal when compared to the outcome. A drug free workplace ensures a quality employee that the public has come to expect. Employers can expect more production from employees, fewer worker's compensation claims, less accidents and less absenteeism. Implementation of a

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drug-testing program by the Texas Department of Public Safety will send a message to the Public that the DPS is committed to the War Against Drugs.

### **Conclusion/Recommendations**

The purpose of this research paper is to determine and evaluate the effectiveness of an employee drug testing program to be considered by the Texas Department of Public Safety. Law enforcement has not been spared the threat of substance abuse problems in the workplace. Drug testing in law enforcement is a sign of the times law enforcement must set a precedent when dealing with employee substance abuse problems by having an effective policy and drug testing program.

Public confidence and credibility of law enforcement has diminished in the past ten years, due to unacceptable personal conduct of a small percentage of officers. Examples: Dallas police officer accused of driving while under the influence of alcohol while on duty, which resulted in an automobile accident. Detective Mark Thurman lying under oath during the O.J. Simpson trial. Law enforcement must make every effort to regain public faith and confidence.

The research in this paper has examined, evaluated and explored the benefits of adopting an employee drug testing program. The paper addresses legal issues, employee concerns, and statistics pertaining to results of effective drug testing programs in the workplace. It indicates that drug testing is a necessary tool in the fight against drugs and in the effort to restore public confidence, productivity and work quality in the work place. The paper makes recommendations for the implementation of an effective drug testing program that will ensure a drug free workplace and regain public confidence in law enforcement.

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