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**Drugs in the Workplace:
Getting Into the Weeds of State and
Federal Drug Testing Laws**

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DRUGS IN THE WORKPLACE:
GETTING INTO THE WEEDS OF STATE AND FEDERAL DRUG TESTING LAWS

I. INTRODUCTION

In 1914, John Lee, the Head of Personnel at Ford Motor Co., attempted to combat the company's persistent employee turnover rates by doubling Ford's minimum wage for assembly line workers to \$5.00 per hour. But Ford's benevolence came with a catch: "To qualify for his doubled salary, the worker had to be thrifty and content. He had to keep his home neat and his children healthy, and, if he were below the age of twenty-two, to be married."¹

Modern-day employers are not so paternalistic regarding the well-being of their workers, but every business still has a vested interest in workplace harmony, safety, and productivity. Employers frequently express this interest via a workplace drug policy, but it may be difficult to determine the appropriate contours of such policies in the age of the opioid crisis, legalized marijuana, and fluctuating attitudes towards the moral and medical implications of drug use.

This paper offers tips for navigating the legal and practical issues pertaining to drug and alcohol testing in the workplace. As explained below, there are few, if any, federal or state laws regarding drug testing with respect to average employers and average employees. There are, however, a host of federal and state laws dealing with special circumstances: *e.g.*, federal contractors, commercial truck drivers, employees with disabilities, and individuals seeking unemployment benefits. This paper begins by addressing those laws and concludes by discussing a number of practical and philosophical concerns employers should consider when developing a drug and alcohol testing policy.

II. DRUG TESTING UNDER FEDERAL LAW

a. In General

At the federal level, laws concerning workplace drug testing fall generally into two categories: On one hand are laws governing professions in which drug or alcohol abuse may foreseeably and negatively impact public safety. On the other hand are laws designed to protect workers' civil rights. The former, which include the Drug-Free Workplace Act of 1988 (regarding federal contractors and grantees) and the commercial driver regulations promulgated by the Federal Motor Carrier Safety Administration ("FMCSA"), impose affirmative testing and reporting obligations on employers. The latter, which include the Americans with Disabilities Act and the Family Medical Leave Act ("FMLA"), limit employers' ability to discipline employee drug use.

¹ RICHARD SNOW, *I INVENTED THE MODERN AGE: THE RISE OF HENRY FORD* (2013), at 211-12. According to the Bureau of Labor Statistics inflation calculator, Ford's increased minimum wage (\$5.00) had the same purchasing power as \$126.00 would have today.

b. The Drug-Free Workplace Act of 1988

The Drug Free Workplace Act of 1988 (“DFWA”), 41 U.S.C. § 8101, *et seq.*, requires employers bidding for a federal procurement contract of more than \$250,000.00² or seeking a federal grant of any size to:

- provide employees a statement (1) prohibiting the unlawful manufacture, distribution, dispensation, possession, or use of drugs in the workplace; (2) specify the disciplinary consequences of violating this prohibition; and (3) require compliance with this drug-free awareness program to inform employees about (a) the dangers of drug abuse in the workplace; (b) the employer’s policy of maintaining a drug-free workplace; (c) available drug counseling, rehabilitation, and employee assistance programs; and (d) the penalties that may be imposed on employees for drug abuse violations; and
- require employees to report workplace-related drug convictions to the employer within five (5) days, and report these convictions to the contracting federal agency within ten (10) days.

41 U.S.C. §§ 8102(a)(1) & 8103(a). Failure to abide by these requirements may result in the suspension or termination of the employer’s federal contract or grant. *Id.* §§ 8102(b) & 8103(b).

Notably, the DFWA does not require employers to adopt a particular drug testing policy. The Department of Labor has confirmed, however, that the DFWA does not preclude employers from adopting drug testing programs as required or authorized by other laws.³

c. DOT/FMCSA Regulations

The FMCSA, an agency within the Department of Transportation, promulgates regulations applicable to every person and employer who 1) operates a commercial motor vehicle (“CMV”) in any state and 2) is subject to the DOT’s commercial driver’s license requirements or the corresponding requirements under Mexican or Canadian law.⁴ 49 C.F.R. § 382.103(a). The FMCSA’s regulations preempt any conflicting state laws, but they do not affect employers’ ability to impose their own alcohol or drug policies and procedures, including opportunities for rehabilitation. *Id.* §§ 382.109-111. A sampling of the most relevant regulations is below.

² Congress recently increased the amount from \$100,000. *See* P.L. 115-91 § 805 (2017).

³ *See* Drug-Free Workplace Act of 1988 FAQs, <https://webapps.dol.gov/elaws/asp/drugfree/screenfq.htm>.

⁴ The FMCSA is one of three major federal agencies that impose strict regulations regarding drug and alcohol use in “safety-sensitive” industries. The other two are the Department of Defense (“DOD”) and the Nuclear Regulatory Commission (“NRC”), both of which require private contractors to abide by certain drug-free policies. *See* 42 C.F.R. § 223.5; 10 C.F.R. § 26.1, *et seq.* Compared to the number of employers affected by the FMCSA’s provisions, the number of employers bound by the DOD and NRC’s regulations is comparatively small; consequently, this paper does not substantively discuss these regulations.

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