

## Drug Testing by Potential Employers

Neil A. Diegelman

### Executive Summary

New York State should pass laws that regulate pre-employment drug testing in order to maximize fairness, accuracy, and efficiency while recognizing employers' needs to maintain a drug-free workplace. Drug testing, when done properly, is quite accurate and has standardized procedures to ensure fairness. A pre-employment drug test can be an effective way for an employer to check on factors influencing whether an applicant will be productive or continuously tardy or have attitude problems. While New York State already has strong laws regulating drug testing, additional laws should be passed to further the goal of maintaining a drug-free workplace and strengthen the efficiency of pre-employment drug testing.



### Why would an employer drug test a potential employee?

Using a pre-employment drug test to screen potential employees for drugs helps determine the on-the-job stability. Employers want to lessen the impact of drug abuse in the workplace, which could include tardiness, absenteeism, turnover, attitude problems, theft, decreased productivity, crime and workplace violence. It is estimated that drug abuse in the workplace costs employer \$75 to \$100 billion dollars annually in lost time, accidents, health care and workers compensation costs.<sup>i</sup>

### What are the different types of drug tests available and what types of drugs are tested for?

A five-panel (SAMHSA-5) screening test detects marijuana (THC), cocaine, phencyclidine (PCP), opiates (codeine, morphine, etc.), and amphetamines (methamphetamine, etc.).<sup>ii</sup> A typical eight-panel test also detects barbiturates (downers), benzodiazepines (tranquilizers), and methaqualone (quaaludes).<sup>iii</sup> A typical ten-panel test also detects methadone (used to treat heroin addiction) and propoxyphene (darvon compounds).<sup>iv</sup> The eight-panel drug screen is the most common because it

is less expensive than the ten-panel, but includes more commonly abused drugs than the five-panel.<sup>v</sup>

### **How do different illegal drugs effect job performance?**

Illegal drugs affect users in different ways – altering their mental and physical status. Heroin, for example, has a short-term effect that causes a surge of euphoria and clouded thought processes.<sup>vi</sup> Heroin can lead to forgetfulness and injury, along with a lack of productivity.

Marijuana, the most commonly used illegal drug in the United States,<sup>vii</sup> can cause euphoria, memory impairment, distorted perceptions and difficulty in thinking and solving problems.<sup>viii</sup>

Regardless of the illegal drug an applicant uses, there is the possibility that, if hired, the applicant will bring drugs and drug related problems to work. This can negatively impact job performance because the drug user would not be able to focus on the job and might spend time trying to “score” drugs, or use drugs on the job site. Studies have shown that substance-abusing employees function at about 67% of their capacity.<sup>ix</sup>

### **How do prescription drugs impact drug tests?**

If the applicant is taking prescription medication that is opioid based or a central nervous system depressant (such as Vicodin, Valium, Adderall), legally prescribed to them, it will show up on a drug test. The applicant should inform the drug test administer that they are currently taking the medication, and provide proof. A problem arises for the employer when the applicant is applying for a position that will require the use of heavy equipment, driving or other safety sensitive positions, and the applicant is legally taking medication that does alter their mental and physical state.

### **How much does a drug test cost an applicant?**

In New York State, it is illegal for an employer to require an applicant to pay the cost for a medical exam which a job is conditioned upon.<sup>x</sup> A drug test is considered a medical exam.

However, an applicant is not going to be compensated for the time spent completing the drug test. The drug testing process actually limits worker mobility by adding additional costs to the applicant, such as travel time and costs to get to the testing site and back, the time spent providing the specimen, and possibly paying for childcare.<sup>xi</sup> Another “cost” to the applicant is that they must continue to search for a job while waiting for the results of the drug test to come back to the employer who ordered it.



New York State law makers should require an employer who is requiring an applicant to submit to a drug test to compensate the applicant for the time that is spent to complete it.

### **Is the cost of drug testing worth the employers' money?**

The average cost to the employer for a drug test is \$60, which includes collection of the sample, analysis, services of the Medical Review Officer, and communication of the results to the employer.<sup>xii</sup>

In 1990, the federal government spent \$11.7 million to test 29,000 federal employees.<sup>xiii</sup> Out of the 29,000 employees tested, only 153 tested positive for illegal drugs.<sup>xiv</sup> Therefore, the cost of detecting one of the 153 drug users was \$77,000.<sup>xv</sup> Applying this logic to a small to medium sized employer, the cost of detecting one drug user out of a large applicant pool would likely be very costly. Thus, an employer should utilize other indicators to determine if the applicant would be a good hire, rather than spending money to find a single drug user.

However, pre-employment drug testing may still be worth the money spent by the employer. Hiring a drug user can cost the employer twice as much in medical claims – by increased accidents and injuries, and by drug seeking habits (such as going to a doctor to get prescription drugs).<sup>xvi</sup> If an employer can avoid hiring one drug user



through the use of pre-employment drug testing the employer will save more money than they would if the employer hired the drug user. The use of drug tests may also discourage active drug users from applying in the first place, thus saving the employer an amount of money that is hard to quantify but may be quite significant.

### **How are drug tests conducted and how accurate are they?**

A urine sample is the most common collection and testing method.<sup>xvii</sup> To prevent the applicant from tampering with the urine sample precautions are taken, such as adding blue dye to the toilet and shutting off the water.<sup>xviii</sup> These precautions also allow the applicant to complete the sample without direct visual observation by a laboratory technician.<sup>xix</sup>

Under the Substance Abuse and Mental Health Services Administration (SAMHSA) guidelines, certified laboratories must follow certain

procedures to ensure accuracy and validity of the test results. Some of the guidelines include proper chain of custody, initial screening, confirmation test, and a split sample.<sup>xx</sup>

Of course chemical urinalysis testing is susceptible to error, but urinalysis remains quite accurate, because of SAMHSA guidelines.<sup>xxi</sup> There is little data on the percentage of applicants who fail drug testing because there are various “cut-off levels” for each drug, and that cut-off level is determined by the employer’s need.<sup>xxii</sup>

### **How does New York State currently regulate drug tests to ensure accuracy?**



Regulation of drug testing laboratories is the best way to ensure accurate results. A drug testing laboratory is considered a clinical laboratory called a Forensic Toxicology Comprehensive/Initial Testing Only lab.<sup>xxiii</sup> It must comply with certain statutes and regulations and is limited to the initial screening of drug testing.<sup>xxiv</sup>

If the test reveals a presumptively positive result, the specimen must be referred to a Forensic Toxicology Comprehensive laboratory for confirmatory testing.<sup>xxv</sup> In sum, if the drug test is positive for drugs the specimen is retested before the results are reported to the employer.

The first level of current New York State regulation is that there are certain minimum qualifications for persons who are “responsible for administration of the technical and scientific operation of a clinical laboratory . . . .”<sup>xxvi</sup>

The second level of regulation is that the clinical laboratory must have a valid permit, from New York State Department of Health, to operate and accept specimens.<sup>xxvii</sup> The laboratory technologists must successfully complete all the required proficiency examinations for Forensic Toxicology Comprehensive/Initial Testing Only (drug testing) laboratories.<sup>xxviii</sup> Additionally, the laboratory technologist must have a bachelor’s degree in medical technology from an accredited university.<sup>xxix</sup>

To further ensure accuracy, all specimens must “be numbered or otherwise appropriately identified and listed in a . . . system acceptable to the department.”<sup>xxx</sup>

New York State has taken numerous steps to make sure that drug testing laboratories are regulated strictly, to ensure accuracy in the testing results. By having both the Forensic Toxicology Initial Testing Only laboratory and the Forensic Toxicology Comprehensive laboratory, the State is double-checking presumptively positive drug test results. As well as certifying the laboratory, regulating the director of the laboratory, setting minimum education requirements for the technologists who are handling the drug test, and requiring the proper handling of all specimens related to drug testing.

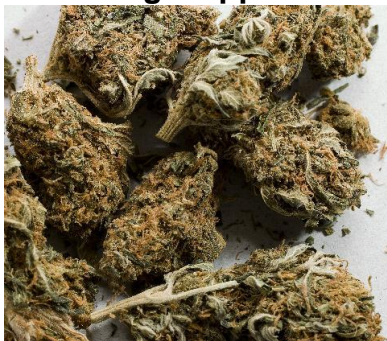
### **How can New York State regulate drug tests to maximize accuracy?**

New York State should require drug testing laboratories become certified under SAMHSA. Currently in New York, only one drug testing laboratory is SAMHSA certified (located in Rochester, NY).

New York State should pass legislation that has been previously introduced in Congress, which would have made it easier for applicants who were seeking to challenge an employers adverse employment decision based on tests that resulted in questionable accuracy.<sup>xxxix</sup>

The Quality Assurance in Drug Testing Act of 1995, a failed bill that was federally proposed legislation, would have set federal standards for accuracy and reliability of private sector drug testing by requiring that all drug testing be performed in a certified laboratory.<sup>xxxix</sup>

### **How fair might applicants feel pre-employment drug tests are?**



No drug test is 100% accurate, despite all of the regulation. Because of this, employers and New York State should be concerned with the applicant's perceptions of fairness.<sup>xxxix</sup> Thus, it is a dual task for the legislature to pass laws ensuring drug tests are actually fair and appear fair.<sup>xxxix</sup>

One way the New York State legislature is making sure that drug testing is actually fair is by requiring a presumptively positive test result to be re-tested. This reduces the possibility that the applicant be rejected on the basis of the false positive.

However, it is difficult to determine if ensuring that the drug test is actually fair increases the perceived fairness. Still, standardized procedures enhances the actual and perceived fairness.<sup>xxxix</sup>

### **How can New York regulate drug tests to maximize fairness?**

To increase the apparent fairness of a drug test, New York State legislature should require that the applicant get a written job offer before submitting to a drug test. Thus, if the job offer was later withdrawn it would be clear to the applicant why the job offer was withdrawn.

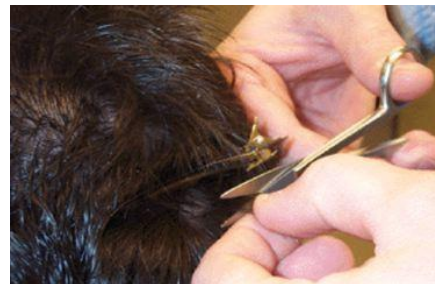
Another way to increase the apparent fairness of drug testing would be to allow the applicants who test positive the option to dispute the results through dispute resolution. Also, allow more control over the information considered during the dispute resolution meeting, such as other qualities and qualifications of the applicant. Disclosing more information to applicants about the drug testing procedure would also increase the apparent fairness.

### **How does New York State currently regulate drug testing efficiency and how can New York State improve drug tests to maximize efficiency?**

An employer's use of drug testing potential employees is efficient because it provides direct access to information on whether the applicant is using illegal drugs, while excluding irrelevant information. New York State should implement laws that will maximize the efficiency of pre-employment drug testing.

New York State should regulate what type of panel should be used (5-panel, 8-panel, or 10-panel). By regulating what type of panel is used it would help regulate the cost to employers.

There should be a restriction on the method of drug testing to one method. Currently, the most common method of drug testing is through urinalysis.<sup>xxxvi</sup> However, urinalysis is not the most efficient method because it only detects and measures illegal drugs that were used within the past few days.



Hair analysis drug testing is a more efficient method of drug testing. Analysis of hair allows for a large “testing window,” which gives a more complete history of illegal drug use.<sup>xxxvii</sup> Hair analysis drug testing can go back as far as 90 days.<sup>xxxviii</sup> Another benefit of using hair analysis drug testing over urinalysis is that hair analysis is the least invasive form of drug testing and thus decreases issues of privacy and the so called “stage fright” that might occur during a urine specimen collection. Therefore, the law should allow only hair analysis drug testing.

New York State should make it illegal to sell or possess products that are intended to alter the results of drug tests. There are numerous commercial products that claim to “detox” an applicant’s body, temporarily, from detection of illegal drugs.<sup>xxxix</sup> Products such as CleanP, can be purchased at GNC and other outlets.<sup>xi</sup> By banning the sale or possession of the detox products the drug test will be more efficient because it will be true information about the applicants history of illegal drug use.



### **What have other governments done regarding pre-employment drug testing?**

In the Netherlands, pre-employment drug testing of all applicants is prohibited by law.<sup>xli</sup> Only the testing of successful applicants is allowed in certain circumstances.<sup>xlii</sup> Similarly, in Finland, only successful job applicants may be subjected to drug testing.<sup>xliii</sup>

In contrast, in Norway an employer can demand a pre-employment drug test when the employer finds the test necessary to protect the life or health of existing employees or for jobs that are associated with a special risk.<sup>xliv</sup> Many other Western countries do not have laws that address pre-employment drug testing.<sup>xlv</sup>

Canada has some of the strongest protections against workplace drug testing in the world. The Canadian Human Rights Commission ruled that workplace drug testing was a violation of citizens’ civil rights except for impairment testing in safety-sensitive positions.<sup>xlvi</sup> The Canadian Human Rights Act does not allow an employer to discriminate on the basis of a disability, and citizens with a previous or existing dependence on alcohol or drugs are considered disabled.<sup>xlvii</sup> Thus, in Canada, an employer has no choice but to hire a qualified applicant even though the applicant could be a heavy drug user. This is the exact opposite position that the Americans with Disabilities Act takes regarding existing dependence on a drug.<sup>xlviii</sup>

---

<sup>i</sup>United States Department of Labor, Drug-Free Workplace Advisor, <http://www.dol.gov/elaws/asp/drugfree/benefits.htm>.

<sup>ii</sup>United States Department of Labor, Workplace Drug Testing, <http://www.dol.gov/asp/programs/drugs/workingpartners/dfworkplace/dt.asp#q2>.

<sup>iii</sup>United States Department of Labor, Workplace Drug Testing, <http://www.dol.gov/asp/programs/drugs/workingpartners/dfworkplace/dt.asp#q2>.

<sup>iv</sup>United States Department of Labor, Workplace Drug Testing, <http://www.dol.gov/asp/programs/drugs/workingpartners/dfworkplace/dt.asp#q2>.

- 
- <sup>v</sup>United States Department of Labor, Workplace Drug Testing, <http://www.dol.gov/asp/programs/drugs/workingpartners/dfworkplace/dt.asp#q2>.
- <sup>vi</sup> National Institute on Drug Abuse, Heroin, <http://www.drugabuse.gov/drugpages/heroin.html>.
- <sup>vii</sup> National Institute on Drug Abuse, Heroin, <http://www.drugabuse.gov/drugpages/heroin.html>.
- <sup>viii</sup> National Institute on Drug Abuse, Heroin, <http://www.drugabuse.gov/drugpages/heroin.html>.
- <sup>ix</sup> Nationwide Medical Review, Drug Free Workplace, <http://www.drugfreeworkplace.com/employees/americandrugproblem.htm>.
- <sup>x</sup> N. Y. Labor Law § 201-b (McKinney 2010).
- <sup>xi</sup> As an example, one applicant who was required to submit to a pre-employment drug test noted that the entire venture took an hour and forty minutes. Barbara Ehrenreich, Nickel and Dimed: On (Not) Getting By in America 135 (Metropolitan Books 2001).
- <sup>xii</sup> Pre-Employment Drug Testing, <http://www.employmentdrugtesting.com/screening.html>.
- <sup>xiii</sup> Barbara Ehrenreich, Nickel and Dimed: On (Not) Getting By in America 128 (Metropolitan Books 2001).
- <sup>xiv</sup> Barbara Ehrenreich, Nickel and Dimed: On (Not) Getting By in America 128 (Metropolitan Books 2001).
- <sup>xv</sup> Barbara Ehrenreich, Nickel and Dimed: On (Not) Getting By in America 128 (Metropolitan Books 2001).
- <sup>xvi</sup> United States Department of Health and Human Services, Drugs in the Workplace, [http://workplace.samhsa.gov/DrugTesting/Files\\_Drug\\_Testing/FactSheet/factsheet041906.aspx](http://workplace.samhsa.gov/DrugTesting/Files_Drug_Testing/FactSheet/factsheet041906.aspx).
- <sup>xvii</sup> United States Department of Labor, Workplace Drug Testing, <http://www.dol.gov/asp/programs/drugs/workingpartners/dfworkplace/dt.asp#q2>.
- <sup>xviii</sup> United States Department of Labor, Workplace Drug Testing, <http://www.dol.gov/asp/programs/drugs/workingpartners/dfworkplace/dt.asp#q2>.
- <sup>xix</sup> United States Department of Labor, Workplace Drug Testing, <http://www.dol.gov/asp/programs/drugs/workingpartners/dfworkplace/dt.asp#q2>.
- <sup>xx</sup> United States Department of Labor, Workplace Drug Testing, <http://www.dol.gov/asp/programs/drugs/workingpartners/dfworkplace/dt.asp#q2>.
- <sup>xxi</sup> Royer Cook, Alan Bernstein, and Christine Andrews, *Assessing Drug Use in the Workplace: A Comparison of Self-Report, Urinalysis, and Hair Analysis*. Available at [http://archives.drugabuse.gov/pdf/monographs/monograph167/247-272\\_Cook.pdf](http://archives.drugabuse.gov/pdf/monographs/monograph167/247-272_Cook.pdf).
- <sup>xxii</sup> United States Department of Labor, Workplace Drug Testing, <http://www.dol.gov/asp/programs/drugs/workingpartners/dfworkplace/dt.asp#q8>.
- <sup>xxiii</sup> New York State Department of Health, Wadsworth Center, Approved Laboratories, <http://www.wadsworth.org/labcert/clep/CategoryPermitLinks/CategoryListing.htm>.
- <sup>xxiv</sup> New York State Department of Health, Wadsworth Center, Approved Laboratories, <http://www.wadsworth.org/labcert/clep/CategoryPermitLinks/CategoryListing.htm>.
- <sup>xxv</sup> New York State Department of Health, Wadsworth Center, Approved Laboratories, <http://www.wadsworth.org/labcert/clep/CategoryPermitLinks/CategoryListing.htm>.
- <sup>xxvi</sup> N. Y. Public Health Law Chapter 45 Title V § 571.
- <sup>xxvii</sup> N. Y. Public Health Law Chapter 45 Title V § 574.
- <sup>xxviii</sup> 10 NYCRR § 58-1.1 (McKinney 2010).
- <sup>xxix</sup> 10 NYCRR § 58-1.5 (McKinney 2010).
- <sup>xxx</sup> 10 NYCRR § 58-1.10 (McKinney 2010).
- <sup>xxxi</sup> HR 1706, 104 Cong, 1st Sess (1995).
- <sup>xxxii</sup> HR 1706, 104 Cong, 1st Sess (1995).
- <sup>xxxiii</sup> Carol Kulik and Sue Campbell Clark, *Frustration Effects in Procedural Justice Research: The Case of Drug-Testing Legislation*, Social Justice Research, Vol. 6, No.3 (1993).



- 
- <sup>xxxiv</sup> Carol Kulik and Sue Campbell Clark, *Frustration Effects in Procedural Justice Research: The Case of Drug-Testing Legislation*, Social Justice Research, Vol. 6, No.3 (1993).
- <sup>xxxv</sup> Carol Kulik and Sue Campbell Clark, *Frustration Effects in Procedural Justice Research: The Case of Drug-Testing Legislation*, Social Justice Research, Vol. 6, No.3 (1993).
- <sup>xxxvi</sup> United States Department of Labor, Workplace Drug Testing, <http://www.dol.gov/asp/programs/drugs/workingpartners/dfworkplace/dt.asp#q2>.
- <sup>xxxvii</sup> United States Department of Labor, Workplace Drug Testing, <http://www.dol.gov/asp/programs/drugs/workingpartners/dfworkplace/dt.asp#q2>.
- <sup>xxxviii</sup> United States Department of Labor, Workplace Drug Testing, <http://www.dol.gov/asp/programs/drugs/workingpartners/dfworkplace/dt.asp#q2>.
- <sup>xxxix</sup> Example: <http://passyourdrugtest.com/>; <http://www.passyourtest.com/>; <http://www.passthetest.com/>; <http://www.ipassedmydrugtest.com/>; <http://www.passdrugtest.com/>; <http://www.howtopassyourdrugtest.com/>; <http://www.passusa.com/>
- <sup>xl</sup> Barbara Ehrenreich, *Nickel and Dimed: On (Not) Getting By in America* 128 (Metropolitan Books 2001).
- <sup>xli</sup> The Medical Examinations Act §4, Netherlands.
- <sup>xlii</sup> The Medical Examinations Act §4, Netherlands.
- <sup>xliii</sup> The Act on Workplace Drug Testing (759/2004)§§7-8, Finland.
- <sup>xliv</sup> The 2005 Act Relating to Working Environment, Working Hours and Employment Protection, No. 62 §9-4, Norway.
- <sup>xlv</sup> Example: Belgium; Czech Republic, Denmark, Germany, Estonia, Greece, Spain, Portugal, France, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Austria, Slovenia, Slovakia, and Sweden.
- <sup>xlvi</sup> Canadian Human Rights Commission, *Canadian Human Rights Commission Policy on Alcohol and Drug Testing*, June 2002.
- <sup>xlvii</sup> Canadian Human Rights Commission, *Canadian Human Rights Commission Policy on Alcohol and Drug Testing*, June 2002.
- <sup>xlviii</sup> Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §12101.