COMPARING EUROPEAN DRUG TESTING GUIDELINES TO STATE AND FEDERAL U.S. DRUG TESTING LAWS & REGULATIONS:
AN OVERVIEW

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This report was written in November 2011. U.S. state and federal drug testing laws, as well as European guidelines, are subject to change. Some information found herein may not be accurate after November 2011 as laws, regulations and guidelines are amended, modified, replaced and/or eliminated. Consult with a competent expert in the field of drug testing laws and regulations before implementing or changing a drug testing program.

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About the Author

Bill Current is the president and founder of WFC & Associates, a national consulting firm based in the United States that specializes in drug testing policy development and providing accurate and up-to-date information on United States and international drug testing laws.

Mr. Current has been reviewing and writing corporate drug testing policies for more than 20 years. Because no two companies are exactly alike, no two drug testing policies should be exactly alike. For this reason every policy written by WFC & Associates is customized to reflect each company's specific drug testing objectives and the legal requirements for each applicable state or federal law and/or national regulation. Since the company was founded in 1999, WFC & Associates has provided policy services to drug testing and background screen providers, as well as directly to some of the nation's largest corporations and to countless small and medium sized firms in oil & gas, transportation, finance, retail, hospitality, manufacturing and many other industries.

Mr. Current has authored or co-authored 10 books on substance abuse issues, including Why Drug Testing? He also edits and publishes The On-Line Ultimate Guide to State Drug Testing Laws, an Internet-based subscription service available to employers and providers of employee screening services.

(For more information visit: StateDrugTestingLaws.com)

Mr. Current is the former Executive Director of the American Council for Drug Education and Director of the Institute for a Drug-Free Workplace at the U.S. Chamber of Commerce. He served as Vice President of Consulting for a national third-party administrator of drug testing and background screening services.

He is a popular speaker at conferences and webinars.
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A number of European-based organizations maintain very informative website, that were helpful in the writing of the European section of this report. In particular, I wish to acknowledge the European Workplace Drug Testing Society (EWDTS) and the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), both of which are excellent sources of information.

You can learn more about the EWDTS at the following link: http://ewdts.org

You can learn more about the EMCDDA at the following link: http://www.emcdda.europa.eu
Introduction

Workplace drug testing has been in place in the United States for more than 40 years, dating back to the late 1960s and more so in the 1970s. However, it wasn't until the 1980s that the thought of screening workers and applicants for drugs of abuse began to spread widely throughout the business community. The United States government, the U.S. military, the U.S. Department of Transportation and other federal agencies originally led the way with the private sector close behind in implementing drug testing programs. Today the vast majority of Fortune 500 companies conduct drug testing, as do countless thousands of small and medium sized firms from virtually every industry and in all 50 states.

Drug testing in countries outside the United States do not have the same track record in terms of time and scope. While the U.S. drug testing market is highly regulated at nearly every possible level, the same cannot be said for markets in Europe, Australia, South America and Asia. Though some nations do mandate workplace drug testing for certain occupations, many do not. Additionally, some countries have detailed drug testing guidelines applicable to laboratory and point-of-collection drug testing, but these guidelines tend to be voluntary for the most part. Yet, just like in the United States other countries have labor agreements, privacy laws and health regulations that affect how drug testing is conducted as well as when and of whom.

The following report provides a brief overview of the various drug testing guidelines that have been developed in Europe. It will also provide an overview and explanation of how state laws and federal regulations apply to workplace drug testing in the United States.

Please consider this report to be no more than an overview of these expansive and complex issues. Avoid the temptation to rely on this report as a legal guide for it is not intended to serve that purpose; this information is provided for educational purposes only. Consultation with a competent expert in drug testing laws and policy development is always advised.

While I have gone to great lengths to seek the input of others while writing this report, especially regarding the European section, differences of opinion will no doubt arise. I take full responsibility for the conclusions presented herein and welcome feedback from others in an effort to broaden our collective knowledge and accurate interpretation of a constantly expanding are within the drug testing field.
European Drug Testing Guidelines

In 2007 I participated in a research project to identify the legal landscape for drug testing in more than 60 nations other than the United States. It was the most ambitious project of its kind that had probably ever been attempted. There were reports available on this country or that country but nothing beyond a dozen or so nations. Our target list included most of the European Union countries as well as some from Africa and Asia. We discovered the following:

1) Most countries did not have drug testing laws comparable to those found throughout the United States.
2) Drug testing in countries other than the United States was primarily governed, if at all, by labor agreements, health regulations and privacy laws.
3) Efforts were underway in Europe to identify and promote best practices for the collection, analysis and interpretation of drug tests. Though the guidelines being discussed at the time were in many ways not unlike U.S. regulations, they were just in their infancy compared to where they are today.

Today
The European Workplace Drug Testing Society (EWDTS) has developed three sets of guidelines:

- Guidelines for Legally Defensible Workplace Drug Testing (Adopted)
- Drug and Alcohol Testing in Hair, Collection and Analysis (Adopted)
- Guidelines for Oral Fluid (Out for public comment)

Additionally, drug testing programs in Europe are significantly influenced by other regulations and policies, including:

- European Convention on Human Rights (1950)
- European Directive 89/391/EEC (relative to improvements in the safety & health of workers)
- EU directive 95/46/EC (relative to data protection such as the health status of workers)
- Charter of Fundamental Rights of the European Union of December 2000 (Article 7: right to private life and Article 8: right to the protection of personal data)

There are national drug testing laws that may or may not reflect or require compliance with the drug testing guidelines mentioned above. Examples of national laws include: Finland and Ireland, which require compliance with the EWDTS guidelines, and Norway, Italy and others. (Later in this section this report will provide an example of a national drug testing law.)

Finally, employers must consider the interpretation of Labor Codes, privacy laws, data protection laws, and health and safety requirements at work before finalizing corporate drug testing policies. It is worth noting that unions in some European countries can be
very influential in how workplace drug testing is conducted, though there could be exception such as at nuclear power plants in Sweden or in safety-sensitive work environments in Italy.

In 2002 the Laboratory Committee of EA (European co-operation for Accreditation) approved a document prepared by the EWDTS entitled “European Laboratory Guidelines for Legally Defensible Workplace Drug Testing.” The guidelines, which deal with urine laboratory testing, may be read in their entirety at the following link:

http://www.aebm.org/documentos/drogas.pdf

The establishment of the European Guidelines broke new ground for drug testing in the EU nations and represented order in a fast-growing marketplace. The stated purpose of the guidelines was to establish “best practice” procedures for the:

1. collection of urine samples,
2. laboratory analysis, and
3. subsequent interpretation of the results.

However, the guidelines clearly state that, while they outline best practices, they are not intended to be binding regulations for all testing situations and circumstances. According to the report: “The European Guidelines are designed to establish best practice procedures whilst allowing individual countries to operate within the requirements of national customs and legislation.” Therefore, the detail within the appendices to the Guidelines may vary from country to country.

Yet, a laboratory that desires an accreditation for workplace drug testing must fulfill the requirements in ISO/IEC 17025 and also implement what is stated in the Guidelines for Workplace Drug Testing. Alternatively to ISO/IEC 17025, the standard ISO 15189 or both can be used.

It is important to note that the Guidelines focus on urine drug testing, which as it states “is the usual specimen for analysis.” They may not apply to screening for alcohol.

Equally important to note is that the Guidelines specifically apply to workplace drug testing within Europe. They may not be applicable in other markets such as roadside or criminal justice drug and alcohol testing. Also, they may not apply in countries in other parts of the world. Yet, countries outside of Europe may subscribe to these European Guidelines, especially if they are attempting to be part of the European Union.

The Guidelines are based on the “general principles that have been established internationally. They are designed to ensure that the entire drug testing process is conducted to give accurate and reliable information about a donor's drug use.” Though some of the terminology may be different, much of what is found in the Guidelines will resemble U.S. federal drug testing guidelines and regulations, as well as individual state laws.
For example, the Guidelines discuss chain-of-custody protocols during the collection process, ensuring the integrity of a sample received at a laboratory (including validity testing), screening and confirmation testing (GC/MS, LC/MS), and result interpretation via a lab toxicologist and a qualified “medical practitioner” or Medical Review Officer. The Guidelines also cover results reporting, long-term specimen storage, and record keeping.

There are seven appendices that provide more specific detail to the general language of the Guidelines. There also is a Definitions Section, which is very similar to something commonly found in a U.S.-based drug testing document. Among the appendices are cut-off levels for both screen and confirmation tests for 12 drugs.

**What the Guidelines Do Not Cover**

Because there is no mandatory drug testing law that is applied throughout Europe (all countries prefer to keep their laws separate), the European Guidelines do not mandate or regulate when testing can or should take place. For instance, they do not regulate who can be tested (job applicants versus employees). They do not cover drug testing circumstances such as pre-employment screen or reasonable suspicion testing.

They do not provide guidelines for random testing, mandated frequency rates, or random selection processes. Nor do they suggest or regulate consequences for violations of a company’s drug-free workplace policy.

However, the Guidelines do encourage sellers to explain to any purchaser of a laboratory drug testing service that drug testing should “form part of an overall drug policy to which the purchaser has agreed with his employees and should have in place before testing is initiated.” Other than that, no direction is given for what such an “overall” policy could or should include.

**Drug and Alcohol Testing in Hair, Collection and Analysis**

In August of 2010 the EWDTS published final guidelines for hair testing. Like the laboratory urine guidelines, these hair testing guidelines are not mandatory. However, the fact they exist gives the European market a leg up on the United States, which has yet to establish any type of national standards for hair testing.

The stated objectives of the EWDTS hair testing guidelines include:

- "To provide a common framework for European providers of workplace drug testing services in Europe within which Workplace Drug Testing (WDT) in hair should be performed.
- To provide guidance to European laboratories interested in the determination of drugs of abuse in hair, in order to provide reliable results for the purpose of WDT.
- To help promote and harmonize efforts by providing guidelines which are
accepted at the European level.

- To ensure that the processes undertaken are capable of legal scrutiny.
- To provide safeguards to protect the specimen donors.
- To define for laboratories common quality assurance and quality control criteria that are capable of being accredited by an external body."

Use the link below to read the guidelines in their entirety:


The hair testing guidelines are very extensive and not unlike what a typical hair testing program might look like at a U.S.-based company. The guidelines include collection procedures, collector qualifications, custody and control protocols, cut-off levels for opiates, cocaine, amphetamines, cannabinoids, and benzodiazepines as well as alcohol. Additionally, the guidelines provide information on interpretation of results and results reporting procedures.

Guidelines for Oral Fluid

The EWDTS has developed guidelines for lab-based oral fluid testing, which are not finalized. Currently the EWDTS is seeking comments on the guidelines before they are finalized.

Quoting from the introduction to the proposed guidelines: "These guidelines represent an overview of the best practice for European laboratories providing oral fluid workplace drug testing services. They are designed to ensure that the entire drug testing process is conducted to give accurate and reliable information about a donor's drug use. These guidelines represent the best practice to maintain the legal defensibility of a drug test when tested by either an employment tribunal or a court of law."

Use the following link to read the proposed guidelines in their entirety:


One Example from Europe

It is not possible to give a detailed analysis in this report of the legal status of drug testing in each European nation. For our purposes we will look at the requirements for the country of Finland. Though Finland may not necessarily be indicative of all European nations, it will provide an idea of the issues with which to be concerned.

According to the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), the Finland Act on Workplace Drug Testing (759/2004) ss.7-8 permits workplace drug testing, paid for by the employer, in certain defined circumstances (i.e.,
where intoxication or addiction may endanger life, health, national or traffic safety, security of information in the public interest, or business or professional confidentiality. Further, the EMCDDA informs that "The Act on Patients Rights (785/1992); s.5 requires the "informed consent" of the patient, thus an employee has the right to refuse testing."

That's good information but it's just a start. Is it not possible to review all the requirements in one single Act or Legislation in Finland; there are several laws that apply. There are two important Finnish Acts and a government decree that deal with, among other things, drug testing. They are:

- The Act on the Protection of Privacy in Working Life,
- The Occupational Health Care Act, Section 19, and
- Decree on workplace drug testing (218/2005)

Additionally, employers wishing to conduct drug testing in Finland must be familiar with the Act on Cooperation Within Undertakings and the Narcotics Act.

According to the Act on the Protection of Privacy in Working Life, "The employer may only process information on the drug use testing of the employee which is contained in the drug test certificate supplied to the employer by the person concerned."

So what is a drug test certificate? The Act provides a definition: "A drug test certificate means a certificate issued by a health care professional and laboratory designated by the employer stating that the employee has been tested for the use of a drug referred to in section 2 of the Narcotics Act (1289/1993) and containing a report based on the test stating whether the employee has used drugs for non-medicinal purposes in a manner that has impaired his/her working capacity or functional capacity."

The Act further states: "Drug tests and the certificates of such tests are subject to the provisions of section 19 of the Occupational Health Care Act."

And what does section 19 say?

"A positive test result from the narcotics test performed on a jobseeker or employee must be confirmed in a quality controlled laboratory. Notwithstanding what is provided elsewhere in the law, the tested person is always entitled to obtain the test result in writing. Provisions on the content of the certificate on a narcotics test are laid down in the Act on the Protection of Privacy in Working Life (759/2004). The certificate must be given to the tested person who shall forward it to the employer..."

From this one example we can follow the trail through three different Acts to learn that:

a) Employers must obtain a drug test certificate
b) Which is issued by a professional health care provider or laboratory
c) Which the employer designates
d) To test only for drugs that are listed in section 2 of the Narcotics Act
e) That a positive result must indicate a judgment of possible impairment
f) Positive results must first be confirmed before they can be documented
g) At a laboratory with quality controls
h) Employees and jobseekers are entitled to a written copy of the test result
i) And it the test person who delivers the drug test certificate to the employer

Wow! And that is just one aspect of the drug test process in just one country. And if you think that's complex, wait until you read the U.S. section.

**Conclusion: European Guidelines**
Each country’s drug testing laws should be examined in order to ensure accurate and legally defensible drug testing programs. The “European Laboratory Guidelines for Legally Defensible Workplace Drug Testing” and the "Drug and Alcohol Testing in Hair, Collection and Analysis" guidelines are just what they purport to be, guidelines for laboratories. They are similar to laboratory drug testing guidelines used in the United States at both the federal and state levels... but they are also unique in their own ways.

That said, many countries may regulate who can be drug tested and when, but might otherwise defer to the European Guidelines for lab-based testing procedures. Many countries do not have drug testing laws per se, but will regulate drug testing indirectly through a variety of privacy and labor-related safety regulations. In these cases, unless local law states otherwise, the European Guidelines provide safe and legally defensible processes for laboratory analysis of urine and hair specimens... and soon for oral fluids.

**United States Drug Testing Laws & Regulations**
Drug testing in the United States is infinitely and more overtly regulated than it is in Europe. U.S. employers must contend with a host of federal laws and regulations as well as numerous state and municipal laws. Some industries are mandated to conduct drug testing by a variety of federal agencies while others may be mandated to conduct drug testing by state law. However, the majority of all workplace drug tests conducted are not mandated by federal or state law, but are actually conducted by company choice.

Drug testing in the United States has been thoroughly examined, legally challenged, and scientifically probed in virtually every possible way and countless thousands of employers have come to the conclusion that drug testing works, both as a powerful deterrent to drug use and as an effective way to identify individuals who need help.

Drug testing in the United States is conducted or required by employers, schools (of students as well as instructors and administrators), amateur and professional sports organizations, prison, probation and parole systems, drug and family courts, professional licensing associations, law enforcement agencies (of both officers and officials as well as the general public), treatment providers, and a dozen or so other markets and submarkets. And in virtually every instance there is a law, a regulation or case law decisions that govern how drug testing must be conducted, as well as who can be tested and when.
Without providing a detailed history of drug testing in the United States and the landmark legal decisions that have shaped drug testing in the U.S. workplace, this report will focus first on federal drug testing guidelines and regulations and then state and local laws.

Federal Drug Testing Regulations

The federal government has established drug testing regulations. They are not voluntary guidelines; they are mandatory for whomever they apply... which could be government agencies and private-sector employers. Following is a brief list of federal drug-free workplace and drug testing regulations:

- **The Drug-Free Workplace Act of 1988** — Does not actually require drug testing but does require certain federal contractors and all federal grantees to maintain drug-free workplaces as a condition of receiving a contract or grant from a federal agency.

- **Mandatory Guidelines for Federal Workplace Drug Testing Programs** — Sometimes simply referred to as the "Mandatory Guidelines"... use of the term "guidelines" is preceded by the word "mandatory" perhaps to eliminate any possible confusion about the need for compliance... failure to do so can result in serious and negative consequences.

- **The Omnibus Transportation Employee Testing Act of 1991** — The granddaddy of all federal drug testing regulations, it is simply referred to as the DOT regulations. These regulations require drug and alcohol testing of safety-sensitive transportation employees in aviation, trucking, railroads, mass transit, pipelines, and other transportation industries. From the agency's website: "DOT publishes rules on who must conduct drug and alcohol tests, how to conduct those tests, and what procedures to use when testing. These regulations cover all transportation employers, safety-sensitive transportation employees, and service agents – roughly 10 million people." Encompassed in 49 Code of Federal Regulations (CFR) Part 40, the Office of Drug & Alcohol Policy & Compliance (ODAPC) publishes, implements, and provides authoritative interpretations of these rules.) (Learn more at the following link: [http://www.dot.gov/odapc/](http://www.dot.gov/odapc/))

- **Procedures for Transportation Workplace Drug and Alcohol Testing Programs** (49 CFR part 40) — 49 CFR part 40 forms the epicenter for virtually all workplace drug testing mandated by the federal government... and most notably the U.S. Department of Transportation. Part 40 explains how drug and alcohol testing will be conducted by employers who fall under the authority of a federal drug testing regulation.
  - Each DOT agency (FMCSA, FRA, FAA, FTA, and PHMSA as well as USCG) has its own drug and alcohol testing regulations but they comply with part 40, as do many states, which will be covered later in this report.
  - Learn more at the following link: [http://www.dot.gov/odapc/NEW_DOCS/part40.html](http://www.dot.gov/odapc/NEW_DOCS/part40.html)
Additional agencies have their own drug and alcohol testing regulations such as the Department of Defense, the Department of Energy, and the Nuclear Regulatory Commission among others.

Other federal agencies play a role in regulating drug and alcohol testing, including among others:
- Food and Drug Administration (FDA) which reviews and provides clearance for, among other things, POCT drug testing devices.
- National Highway Traffic Safety Administration (NHTSA) which reviews and clears alcohol testing devices. Alcohol testing devices that meet NHTSA standards appear on what is known as the Conforming Products List (CPL) and only those devices may be used in compliance with DOT-mandated alcohol testing programs.
- Substance Abuse and Mental Health Services Administration (SAMHSA) a division of the Department of Health & Human Services (DHHS), which regulates certified laboratories among other drug testing related functions.

Other federal laws and regulations also can have a direct impact on drug testing procedures and practices, including among others:
- Americans with Disabilities Act (ADA) which protects individuals with certain disabilities, such as alcohol dependence, from discrimination in the workplace.
- Health Insurance Portability and Accountability Act (HIPAA) which, for drug-free workplace purposes, protects the privacy of individuals' health information and much more.
- And not least of all, the U.S. Constitution which, among many other important features, protects U.S. citizens from unreasonable search and seizure by the government.

Gold Standard?
The procedures mandated by the DOT drug testing regulations have become the most commonly used procedures for workplace drug testing. The process includes collection of a urine specimen by a professional (and hopefully certified) technician, transporting of the specimen to a laboratory certified by SAMHSA, an initial screen of the specimen to determine the presence of a prohibited substance, confirmation via gas chromatography/mass spectrometry (GC/MS) if the initial screen was non-negative, and verification of a confirmed positive result by a certified Medical Review Officer (MRO). This process in its various iterations involving these steps and these trained professionals has been in use by tens of thousands of employers, mandated and non-mandated, for two-plus decades. The science and protocols have withstood countless legal challenges, always emerging victorious when it can be demonstrated that these procedures have been faithfully observed. For this reason the DOT regulations (or, if you prefer, the Mandatory Guidelines or 49 CFR part 40) have become known as the "gold standard" of drug testing. But is it the only accurate, legally defensible and effective way to conduct workplace drug testing?
Today, in addition to the procedures described above, there are other new and exciting drug testing technologies that are proving to be as accurate, as legally defensible and as effective as the tried-and-true gold standard. Employers who conduct drug and alcohol testing in order to comply with federal mandates (and some state laws) must adhere to 49 CFR part 40 in one fashion or another. At one time 70 percent of all workplace drug tests conducted in the Unites States were in compliance with DOT regulations. But today the vast majority of all workplace drug tests conducted are done outside of the federal mandate. Which means that, for the many thousands of employers who conduct drug testing by company choice rather than government mandate, there are many legitimate options available.

No longer are employers left only with the choice of lab-based urine testing (though it remains the number one method used for workplace drug testing). When done right employers can rely on point-of-collection (POCT) urine testing utilizing devices that yield near instant, on-site results. They can also choose to test oral fluid or hair samples rather than urine. Lab-based oral fluid and hair testing have proven to be highly effective and offer advantages much different than those of urine testing.

While it may still be said of the DOT regulations that they represent a gold standard for drug testing, it is perhaps no longer the only gold standard. The federal regulations do not currently permit the use of alternative specimens (though lab-based oral fluid testing is on a fast track, relatively speaking, toward approval). And employers with non-mandated programs must still concern themselves with the legal status of these alternative testing methods within the states in which they do business. While the vast majority of states permit the use of these alternative matrices and technologies, certain "best practices" are highly advisable. For instance, a non-negative result from a POCT urine device should be confirmed at a laboratory certified to conduct such tests. And a confirmed positive result should be verified by a certified Medical Review Officer. These and other practices have helped many companies take advantage of new drug testing methods while still maintaining the highest level of integrity in their drug testing programs.

State Drug Testing Laws

Regarding state drug testing laws, here's the good news: workplace drug testing is legal in all 50 states. There is no state that prohibits drug testing. However, each state has either a law (or multiple laws) or case law or both that impact how drug testing is conducted and under what circumstances. While a small handful of states tightly regulate drug testing, most do not. In fact, some states actually encourage workplace drug testing by offering employers certain financial or legal incentives if they will follow specific guidelines issued by the state.

Within workplace drug testing there are two general categories when it comes to state drug and alcohol testing statutes: public sector drug testing laws, which may be regulated by the state government or by a municipal government; and private sector laws.

For the private sector, states fall into one or more of three general categories:
1. States with no laws
2. States with mandatory laws
3. States with voluntary laws

As this report will illustrate, there are states with both mandatory and voluntary drug testing laws, states with no general drug testing laws but with workers’ or unemployment compensation laws that impact drug testing, and states with mandatory laws that only apply to certain industries. And within all of these states, employers must also be aware of federal laws and regulations that may also apply in addition to state laws and regulations.

Also, on a state-by-state basis there are non-workplace markets for drug testing which are regulated by other laws. These include: law enforcement, including roadside testing; drug treatment; and criminal justice, including drug courts, family courts, probation & parole, prisons, schools and athletics (both professional and amateur sports).

Even in the most drug testing-friendly states, such as Texas which doesn't have a drug testing statute per se, employers must consider the following when developing their policies and procedures:

- Case law
- State constitutions and privacy laws
- Workers’ compensation laws
- Unemployment compensation laws
- Drug test cheating laws
- Medical marijuana laws
- Collective bargaining agreements
- Insurance requirements
- State Drug-Free Workplace Acts

Concern for all of the above applies everywhere, but is particularly important in states with very restrictive approaches to drug testing such as California or Massachusetts, which I affectionately refer to as "twin sons of different mothers." Yet, even in these two states, which many experts would consider unfriendly environments for employee screening, drug testing is legal and commonly practiced.

In the following sections I will explain the difference between states with mandatory laws and voluntary laws and provide some examples.

**Mandatory State Laws**

Mandatory laws apply to all employers that choose to conduct drug testing within a particular state. Some states with mandatory laws are employer-friendly such as Iowa and Maryland, while others can be very restrictive such as Maine and Minnesota.

Some states with mandatory laws, such as Maryland, regulate the drug testing process (the “how” of drug testing) but are generally silent on who can be tested and under what circumstances. Other mandatory laws, such as in Minnesota, regulate virtually every
aspect of workplace drug testing, dictating who may be subject to testing and when tests may be required. As well as how drug testing can be conducted, Maine even requires employers to submit their drug testing policies to the state department of labor for approval prior to implementing programs.

However, the intent of most states with mandatory laws is not to prohibit drug testing but to ensure that everyone's rights, including those of employers, are protected. A good example of this would be Louisiana. This state does not restrict when an individual can be tested (post-accident, reasonable suspicion, random, etc., are permitted) or who can be tested (job applicants and any type of employee). It requires employers to adhere to federal drug testing standards but also permits the use of alternative testing matrices (hair and oral fluid) and point-of-collection testing devices (which must be an FDA cleared device). Louisiana's law also includes exempts any “person, firm or corporation engaged or employed in the exploration, drilling, and/or production of oil or gas in Louisiana or its territorial waters” from mandatory compliance.

An example of a state with a very restrictive drug testing law is Vermont, which requires employers to give job applicants advance notice of drug tests, does not permit the use of POCT devices, requires employers to have a "bona fide" rehabilitation program for employees who test positive, does not permit companies to terminate those who have a first-time positive, and prohibits random testing all together.

Of course, there are many states without general workplace drug testing statutes such as Indiana, Washington, Colorado, and Texas.

**Voluntary State Laws**
There are two types of voluntary laws relative to drug testing:

1. States that offer workers’ compensation discounts to employers who meet drug testing standards established by the state, and
2. States that offer limited protection from liability when the employer acts in good faith based on the result of a drug test.

No two states with voluntary laws are exactly the same. Florida, the first state to adopt a workers' compensation premium discount drug testing law, offers a 5% discount. Ohio recently revised its program to include two tiers: one at 4% and the other at 7%, each with different requirements.

The following states, with some minor exceptions, require employers to either work through the state workers' compensation agency or directly through an insurance provider in order to qualify to receive certain financial incentives for conducting drug tests. Here are the states with workers' compensation discount programs available to employers that meet state-issued drug testing standards:

- Alabama (5% discount)
- Arkansas (5% discount)
- Florida (5% discount)
- Georgia (7.5% discount)
- Idaho (Both: discount unspecified & limited protections)
- Kentucky (Mandatory for mining industry; 5% discount)
- Mississippi (Both: 5% discount & limited legal protections)
- Ohio (Two levels: 4% or 7% discount available)
- So. Carolina (5% discount)
- Tennessee (5% discount)
- Virginia (5% discount)
- Wyoming (5% discount)

Here is a list of the states that offer limited legal protection to employers with drug testing programs that meet state-issued standards:
- Alaska
- Arizona
- Idaho (also offers a workers' compensation discount program)
- Iowa
- Mississippi (also offers a workers' compensation discount program)
- Utah

**One Example of a State’s Law**

At the risk of appearing opportunistic, I am going to include in this report a sample state law chart from my website, StateDrugTestingLaws.com. I do this to illustrate the many issues that must be considered when implementing a workplace drug testing program in the United States. The main body of the chart will show the key issues of a drug testing program along the left column. The center column will indicate whether a requirement or restriction applies to that particular practice according to the state's law. And the right column will show additional comments to provide an educational base of understanding.

**IOWA**

(Revised February 2012)

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**HEADS UP:** Iowa is a drug testing friendly state though some restriction apply.

**KEY ISSUES AT A GLANCE:**

- **Drug Testing Circumstances:** PRE-EMPLOYMENT AND EMPLOYEE TESTING PERMITTED, INCLUDING RANDOM
- **Specimes Permitted:** URINE, BLOOD, BREATH AND ORAL FLUID PERMITTED
- **Instant Testing:** PERMITTED; LAB CONFIRMATION REQUIRED FOR INITIAL SCREEN POSITIVES
- **SAMHSA Guidelines Required:** NOT SPECIFICALLY MENTIONED
- **Workers' Comp Discount:** NO
- **Workers' Comp Reduction:** YES
- **Unemployment Denial:** NO

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<table>
<thead>
<tr>
<th>POLICY ISSUES</th>
<th>Status</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>WRITTEN POLICY</td>
<td>Required</td>
<td>Many conditions apply; must ensure applicants and employees have a chance to see it... also parents of minors who are employees. See Notes</td>
</tr>
<tr>
<td>NOTICE OF POLICY</td>
<td>Required</td>
<td>To both employees and job applicants</td>
</tr>
<tr>
<td>TESTING PERMITTED</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Applicant</td>
<td>Permitted</td>
<td>No restrictions</td>
</tr>
<tr>
<td>Reasonable suspicion (for cause)</td>
<td>Permitted</td>
<td>See definition in the Notes Section</td>
</tr>
<tr>
<td>Post-accident</td>
<td>Permitted</td>
<td>Accidents involving injuries that result in certain kinds of claims being filed; property damage of $1000 or more. See Notes Section under Reasonable Suspicion #5</td>
</tr>
<tr>
<td>Periodic exam</td>
<td>Not Mentioned</td>
<td></td>
</tr>
<tr>
<td>Return-to-duty</td>
<td>Not Mentioned</td>
<td></td>
</tr>
<tr>
<td>Random</td>
<td>Permitted</td>
<td>Except for workers not subject to test pursuant to a collective bargaining agreement. See Notes Section.</td>
</tr>
<tr>
<td>Follow Up</td>
<td>Permitted</td>
<td>As follow up to rehabilitation</td>
</tr>
<tr>
<td>Other</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ALCOHOL TESTING</td>
<td>Permitted</td>
<td>Conducted per SAMHSA/DOT regs; Some conditions apply; 0.04 minimum for positive; may not terminate employee for first-time positive alcohol test unless he refuses rehab or fails to complete it</td>
</tr>
<tr>
<td>TRAINING REQUIRED</td>
<td>Required</td>
<td>Education for all employees; supervisors must have 2 hours initially and 1 hour annual follow up training</td>
</tr>
<tr>
<td>EMPLOYEE ASSISTANCE PROGRAM</td>
<td>Mentioned</td>
<td>Employees must be made aware of EAP services if provided; at minimum employer must provide information about local service available</td>
</tr>
<tr>
<td>DRUG TESTING PRACTICES &amp; PROCEDURES</td>
<td>Status</td>
<td>Comments</td>
</tr>
<tr>
<td>SPECIMEN SPECIFIED</td>
<td>Mentioned</td>
<td>Only urine, saliva, breath or blood; a blood test may only be conducted for post-accident when admin. by person providing treatment and not at the request of employer. See Notes.</td>
</tr>
<tr>
<td>DRUG PANEL</td>
<td>Defined</td>
<td>See Notes for definition of “Drug”</td>
</tr>
<tr>
<td>ON-SITE TESTING PERMITTED</td>
<td>Permitted</td>
<td>Screen only; lab confirmation of positives required</td>
</tr>
<tr>
<td>COLLECTION PROCEDURES</td>
<td>Required</td>
<td>See Testing Procedures in the Notes Section</td>
</tr>
<tr>
<td>DIRECT OBSERVATION</td>
<td>Required</td>
<td>See Testing Procedures in the Notes Section</td>
</tr>
<tr>
<td>OPPORTUNITY TO PROVIDE INFORMATION BEFORE TEST</td>
<td>Required</td>
<td>Must inform of substances to be tested for</td>
</tr>
<tr>
<td>CHAIN OF CUSTODY PROTOCOLS</td>
<td>Required</td>
<td>See Testing Procedures in the Notes Section</td>
</tr>
<tr>
<td>CERTIFIED LABORATORY</td>
<td>Required</td>
<td>SAMHSA-cert. lab for confirmation testing mentioned</td>
</tr>
<tr>
<td>SPLIT SPECIMEN REQUIRED</td>
<td>Required</td>
<td>See Testing Procedures in the Notes Section</td>
</tr>
<tr>
<td>CUT-OFF LEVELS SPECIFIED</td>
<td>Not Mentioned</td>
<td></td>
</tr>
<tr>
<td>CONFIRMATORY TEST REQUIRED</td>
<td>Required</td>
<td>At a certified laboratory</td>
</tr>
<tr>
<td>MEDICAL REVIEW OFFICER</td>
<td>Required</td>
<td></td>
</tr>
<tr>
<td>COST FOR DRUG TESTING PAID BY EMPLOYER</td>
<td>Required</td>
<td>Borne by employer for all drug tests required by employer; individual pays for confirmatory retest, which is reimbursed by employer if second test is negative. Amount paid by employee must be consistent with cost employer would pay for a drug test</td>
</tr>
<tr>
<td>TESTING TIME CONSIDERED WORK</td>
<td>Mentioned</td>
<td>All testing time is considered work time</td>
</tr>
<tr>
<td>SPECIMEN, STORAGE BY LAB REQUIRED</td>
<td>Required</td>
<td>See statute for details</td>
</tr>
<tr>
<td>CONFIDENTIALITY</td>
<td>Required</td>
<td>Specific section contained in the statute</td>
</tr>
<tr>
<td>OUTCOMES</td>
<td>Status</td>
<td>Comments</td>
</tr>
<tr>
<td>NOTIFICATION OF TEST RESULT IN WRITING</td>
<td>Required</td>
<td>To employees by certified mail/return receipt requested with info. on retest opportunity; to applicants in writing with MRO contact information. State Supreme Court ruled this is a critical matter that requires attention and should be stated as so in the written notification to the donor.</td>
</tr>
<tr>
<td>NO ADVERSE ACTION UNLESS CONFIRMED</td>
<td>Required</td>
<td>Only for a confirmed positive result</td>
</tr>
<tr>
<td>DISCIPLINARY PROCEDURES</td>
<td>Mentioned</td>
<td>See “Disciplinary Procedures” in Notes</td>
</tr>
<tr>
<td>EMPLOYEE MAY REQUEST COPY OF TEST RESULT</td>
<td>Mentioned</td>
<td>Upon written request within 7 working days</td>
</tr>
<tr>
<td>OPPORTUNITY TO REBUT/EXPLAIN</td>
<td>Required</td>
<td>It is implied in the statute</td>
</tr>
</tbody>
</table>
OPPORTUNITY TO RETEST | Required | For employee positive results; paid by employee, if negative reimbursed by employer; must be reviewed by MRO
---|---|---
REHABILITATION FOR FIRST-TIME POSITIVE | Not Required | Implied but not required
COST OF REHABILITATION EMPLOYER | Not Required | Mentioned but not required. See Notes Section for rehabilitation requirements for alcohol test positives.

INCENTIVES AND PENALTIES

<table>
<thead>
<tr>
<th>Status</th>
<th>Comments</th>
</tr>
</thead>
</table>
PROTECTION AGAINST LAWSUITS | No | Limited protections provided. See statute for details. |
WORKERS’ COMPENSATION PREMIUM DISCOUNT | Yes | Separate law. Iowa Code Ann §85.16. See Notes |
WORKERS’ COMPENSATION REDUCTION/DENIAL | No | |
UNEMPLOYMENT COMPENSATION DENIAL | No | |
FOR CAUSE TERMINATION FOR A POSITIVE RESULT | Mentioned | Mentions termination, suspension, rehab. and non hire; see Alcohol Testing above for more information |
CIVIL ACTIONS, IF VIOLATION | Yes | Employer may be held liable; labs and MROs specifically mentioned for administrative civil remedies |
CRIMINAL ACTIONS, IF VIOLATION | Not Mentioned | |

NOTES & STATUTORY LANGUAGE

Case Law
Sims vs. NCI Holding Corporation underscores the importance with strict compliance with the statute in Iowa. Specifically addressed written notification of a drug test result and the donor’s right to request a retest at his or her own expense.

Continued...

As you can see from the chart there are many issues to be aware of when maintaining a typical drug testing program in a typical state. Add to this the impact of federal laws such as the Americans with Disabilities Act, which limits under what circumstances an alcohol test can occur or case law decisions such as the one shown at the bottom of the chart, which underscores the importance of complying with this state's very specific requirement to notify donors in writing of the result of a drug test.

With all of this and more to consider it is no wonder that drug testing providers and employers continually have many questions.

Frequently Asked Questions

On the surface it might appear to some that drug testing in the United States is like a legal minefield. However, in reality drug testing is legal in all 50 states and when done in careful compliance with applicable state laws, federal regulations and case law (as well as all applicable related laws and collective bargaining agreements) employers may conduct drug testing with confidence.

Q. What if a company is located in multiple states? Which state law applies?
A. The simple answer is all of them. If you have operations in multiple states with employees who live permanently and work in those states you must comply with the drug testing laws of each of those states. For example, let's say your company is headquartered in Iowa and your policy reflects the Iowa law. But you also have employees who work out of an office (even a home office) in Oklahoma. You must comply with the Oklahoma law when conducting drug testing of workers in that state. Let's say you also have operations in Illinois, which does not have a general drug testing statute. Those workers could fall under the company's base policy, which reflects the Iowa law.

Q. If a company is mandated to drug test under the DOT regulations does it still have to be concerned about state laws?
A. Yes. However, it is critical to understand that federal drug testing regulations always pre-empt state drug testing laws and even case law. However, there still may be some aspects of a state law that apply even when a company is drug testing in compliance with federal regulations. It is always wise to be aware of a state's drug testing law (as well as other related laws and case law decisions) regardless of the applicability of federal regulations.

Q. Can a company conduct hair testing for pre-employment screens and lab-based oral fluid testing for post-accident and reasonable suspicion testing?
A. Yes, but only if applicable state law permits hair and oral fluid testing. Combining drug testing matrices in a single program is becoming more common as employers look for ways to get the most out of drug testing. It is critical to check the state laws that apply to ensure complete compliance.

Q. When SAMHSA adopts lab-based oral fluid testing will all states permit it? Will DOT permit it?
A. The vast majority of states already permit lab-based oral fluid testing in most circumstances. Interest in lab-based oral fluid testing is growing as the Drug Testing Advisory Board (DTAB) progresses toward the development of recommended guidelines. Employers who drug test outside of federal drug testing regulations such as DOT are already free to use lab-based oral fluid testing and many do. It is very common in the grocery industry, for instance.

As far as DOT is concerned it is hard to predict when it will permit the use of lab-based oral fluid testing even after the Mandatory Guidelines are revised to include oral fluids.

**Conclusion**
Drug testing has been around for 30-plus years and all indications are that it is here to stay in the United States and throughout the world. I base this bold prediction on four key points:

1. **Drug abuse is once again on the rise.** New substances and variations on old substances are making their way to the list of most commonly abused drugs. At the same
time, employers are fighting economic trends that threaten their financial viability if not their very existence. Simultaneously, the cost of substance abuse in the workplace can be frightening, especially in safety-sensitive industries. Employers have an obligation to their workforce, their customers and their investors to do everything possible to ensure that their employees are as productive and safe as possible, thus controlling the skyrocketing costs of workplace drug and alcohol abuse makes good business sense.

2. **More and more providers of drug testing services are coming into an already crowded industry** of third-party administrators, laboratories, collectors and medical review officers. Other industries, such as insurance providers, background screening companies and occupational health firms, among others, are aggressively adding drug testing to their lineup of service offerings.

3. **Workplace drug testing is expanding throughout the world** as a global industry continues to take shape.

4. **Alternative testing methods are making drug testing more accessible than ever before**. No longer are employers restricted to the traditional (and tried & true) lab-based urine testing process. Point-of-collection urine, as well as lab-based hair and oral fluid testing, have made it possible for previously reluctant employers to implement workplace drug testing programs and begin to realize the significant benefits of drug testing.

This report only analyzed European and United States drug testing laws, regulations and guidelines, and only a few examples at that. However, laws, regulations and guidelines impact workplace drug testing in Australia and New Zealand, Mexico and Central and South America, as well as in Africa and Asia. It would not be possible in such a brief report to provide in depth information for every nation. In the future WFC & Associates will post international drug testing information on its websites:

- [StateDrugTestingLaws.com](http://StateDrugTestingLaws.com)
- [InternationalDrugTestingLaws.com](http://InternationalDrugTestingLaws.com) (Under Construction)

Please feel free to contact the author with your questions. Also, please call (954-255-8650) or email (bill@billcurrent.com) to share any type of international drug testing law information and/or workplace substance abuse statistics or drug testing trends data you may have. Thank you.

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The information provided in this report is presented for educational purposes only and should not be relied upon as legal counsel. The reader retains full responsibility for compliance with applicable drug testing laws, regulations and guidelines in the United States and throughout the world.

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