

**Validation of the Mandatory Guidelines for the American Federal Workplace Drug
Testing Program Within the Context of the South African Constitution**

by

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**Submitted in partial fulfilment of the requirements for the degree
(MPhil)**

**In the Faculty of Law
University of Pretoria**

January 2017

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Summary

This study assessed the USA Mandatory Guidelines for the American Federal Workplace Drug and Alcohol-free Workplace, as a proposed framework for drug and alcohol testing in the South African workplace.

The use of mind-altering substances like cocaine and opium has been part of humankind for millennia. Alcohol is an excellent example of a euphoric substance that is legal and socially acceptable. Sufficient evidence exists that the use of these substances by workers is a health and safety risk in the workplace due to their effects on the human brain. A drug and alcohol-free workplace program needs to be established subject to certain constraints.

The main constraint is the fact that the privacy of an employee has to be respected, as required by the Constitution of South Africa, and this includes private drug use. Therefore, a balance should be struck between the privacy of an employee and the risk imposed on his own health and safety and that of others due to his drug use (licit and illicit). A workplace drug and alcohol-free program, which is ethically sound, legally correct and scientifically accurate will minimize the risk to all parties involved in the workplace if it is applied correctly and consistently. Testing of employees can be regarded as the apex of such a program since incorrect test results can harm not only an individual, but can also be detrimental to his own safety and that of others if he is allowed on site in a state of intoxication.

There are no regulatory mandatory guidelines in South Africa as there are in the United States of America (US), but there is sufficient legislation that allows for the testing of employees within a drug and alcohol-free workplace program. An overview of the US legal

framework and Department of Health and Human Services Mandatory Guidelines for the American Federal Drug and Alcohol-free Workplace Program (HHS Mandatory Guidelines) will be provided and compared for compliance against South African legislation. Suggestions will be made in accordance with international best practice in the case of non-compliance with the US guidelines within the South African context. Current practice in South Africa will be highlighted and evaluated against international best practice.

The medico-legal questions raised in this study will be portrayed at an integrative level, with reference to a multi-layered approach, founded in the applicable supreme provisions of the Constitution of South Africa, the applicable principles of common law, relevant legislation (often articulated in terms of the Constitution), professional policy guidelines, interpretative case law, and considerations of medical ethics.

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CHAPTER 1

INTRODUCTION

1.1 General

The use of euphoric or mind-altering substances has been part of humankind for the past few millennia, of which ethyl alcohol (ethanol) is number one on the list of modern society.¹ It is claimed to have been used intentionally by the early Egyptians, Hebrews, Chinese, Greeks and Romans² as a mind-altering substance, since the Neolithic period (10 000 B.C.³), in the form of wine since 6 400 B.C.⁴ It was also recommended and praised by prominent philosophers like Plato and Hippocrates⁵. The legalization of alcohol has an embattled history, especially in the early 1900s, when its deleterious effects on humans and larger society were recognized.⁶ It was legalized in America in 1933.⁷ Marijuana, which is believed to be one of the oldest psychoactive plants and has been cultivated for its fibre since 8 000 B.C., was prescribed by a Chinese Emperor 4 700 years ago for ailments such as gout, malaria and rheumatism.⁸ Narcotics, the earliest of which were derived from opium poppy (*papaver somniferum*), have been in use for 6 000 years⁹ and cocaine was found in Egyptian mummies as long as 3 000 years ago.¹⁰

¹ Goldberg *Drugs Across the Spectrum* 6th ed (2010) 3.

² Hanson *Preventing Alcohol Abuse* (1995) 1.

³ Hanson *Preventing Alcohol Abuse* (1995) 1.

⁴ Kinney *Losing the grip: A Handbook of Alcohol Information* (2007) 1.

⁵ Goldberg *supra* n1 p4.

⁶ Lewis "Cultural Norms and Political Mobilization: Accounting for Local and State Level Liquor Laws" 2007 *Journal of Cultural Geography* 31.

⁷ Goldberg *supra* n1 p5.

⁸ Guterman "The dope on medical marijuana" (2000) A21 *Chronical of Higher Education*.

⁹ Goldberg *supra* n1 p7.

¹⁰ Erickson *et al The Steel drug: Cocaine and Crack in Perspective* (1994).

Technology has increased the potency of euphoric substances and horticulture techniques have increased the content of marijuana from ca 7% to 15% tetrahydrocannabinol (THC). Non-natural substances, like PCP, LSD and MDMA can be synthesized *de novo*. Cocaine, traditionally extracted from the Coca plant (*erythroxylum coca*), can be modified to produce “freebase” and “crack” cocaine.

A large number of these substances are prohibited by law¹¹ (cannabis, heroin, cocaine, Mandrax, amphetamines, LSD, etc.); however, there are also other sources through which employees can gain access to mind-altering substances. These include:

*Legal prescriptions*¹² for central nervous system depressants by unsuspecting or ignorant doctors. The central nervous system suppressants can be classified into: sedative/hypnotic drugs (mostly Benzodiazepines¹³ and Barbiturates¹⁴) and narcotic analgesics¹⁵.

Legal, over-the-counter products containing: Codeine from pharmacies, “lifestyle” drugs like synthetic cannabinoids (Spice) from adult shops and herbal teas like Coca tea containing dried leaves of the coca plant from health shops selling herbal products.

Internet purchasing: A large number of new designer drugs became available over the past few years,¹⁶ which can also be purchased on the internet illegally.^{17,18}

The number of psychoactive substances classified as designer drugs has increased over the last decade due to the ease of access to their synthetic procedures over the internet. More

¹¹ Drugs and Drug Trafficking Act 140 of 1992.

¹² Medicines and Related Substances Act 101 of 1965 Schedule 5.

¹³ *Ibid*: For example: Valium™, Serepax™, Urbanol™.

¹⁴ *Ibid*: For example: Amytal™, Seconal™ and Pentothal™.

¹⁵ Medicines and Related Substances Schedule 6: For example: Wellconal™, Morphine.

¹⁶ Medicines and Related Substances Schedule 7.

¹⁷ https://en.wikipedia.org/wiki/Synthetic_cannabinoids (Accessed 2017-01-09).

¹⁸ <http://www.theofficialk2incense.com/buy-k2-incense/> (Accessed 2017-01-09).

effective international distribution has also contributed to the drug-abuse problem in South Africa and abroad.

1.2 Effect of drugs on a worker's ability to perform a safety-sensitive task

Alcohol is also a euphoric or mind-altering substance, which is sometimes overlooked because its use is legal and socially acceptable.¹⁹ Alcohol should be regarded as a legal "drug" and included in the testing repertoire of an organization. If the ongoing debate over the legalization of cannabis is successful, this will contribute to the complexity of the test result interpretation. An interesting question is whether an employer can terminate the services of an employee after testing positive for marijuana and claiming it was used for medical purposes. The California State Supreme Court ruled that employers do have the right to terminate the services of an employee who tests positive for marijuana.²⁰

Psychoactive substances are known to have an effect on a worker's ability to perform safety-sensitive tasks in the workplace, resulting in hazards that pose a risk to the safety of colleagues, the public as well as the interests of the company.^{21,22} The role of drugs and alcohol as a cause of occupational accidents is well summarized in literature.^{23,24}

¹⁹ Siegman *Alcohol Nation* (2011) 9.

²⁰ McKinley *Ruling Puts Workplace Limits on California Marijuana Law* (2008) 16.

²¹ Liska *Drugs and the Human Body with Implications for Society* (2009) 286: The following conclusion was presented: Marijuana impairs motor coordination and driving ability, even after ordinary social use. Evidence for this is based on laboratory simulator results, test course performance, street driving and national studies involving impaired drivers. Its effects may last up to ten hours after smoking one joint. Drug interaction between marijuana and alcohol has also been recorded.

²² Garriott *Medico-Legal Aspects of Alcohol* 4th ed (2003) 29.

²³ Wickizer *et al* "Do drug-free workplace programs prevent Occupational injuries?" 2004 *Health Services Research* 91.

²⁴ Spicer & Miller "Impact of workplace peer-focused substance abuse prevention and early intervention program" 2005 *Alcoholism: Clinical and Experimental Research* 609.

A direct relationship between alcohol use and accidents has been proven and driving while under the influence is prohibited by law²⁵ due to the inhibiting effect of alcohol on the human neurophysiological system,²⁶ such as: decreased eye-hand coordination, poor precision in manipulation, poor vision and slowing down reaction time. Cognitive processing of information is also impaired, which results in reduced concentration or poor judgements and increased risk-taking. The aforementioned effects can have devastating consequences for everybody in the workplace.

1.3 Risk-benefit analysis of a drug and alcohol-free workplace program

Employee: An employee in a state of intoxication may injure not only himself/herself, but is also a risk to colleagues and the public. Impaired behaviour may sometimes lead to loss of life, especially when employed in a safety-sensitive position. Frequent and continued use of drugs could lead to drug dependency with dire consequences in his/her private life.

An unreliable and unethical drug and alcohol-free program could harm an employee by making false accusations and could compromise his privacy. Furthermore, the employee is at risk of discrimination and unfair labelling, which could result from an unreliable test result or from unprofessional conduct of the individuals involved in the administration of the test and the communication thereof.

Employer: The organization may be liable for injuries to the employee and to a third party (other workers / the public) or for damage that resulted from the impaired behaviour of an intoxicated employee. The organization may also suffer damage due to loss of production,

²⁵ S 65 of the National Road Traffic Act 93 of 1969.

Blood levels for professional drivers: 0.02 g per 100 mL of blood and 0.05 g per 100 mL of blood for the public. Breath alcohol cut-off levels are 0.24 mg per liter of breath for professional drivers and 0.10 mg per liter for public.

²⁶ McCann *et al Alcohol, Drugs and Employment* 2nd ed (2011) 83.

breakdowns, down time and decreased production. It should be kept in mind that employees with decision-making and/or financial responsibilities, who are under the influence of an intoxicating substance, also pose a risk to the organization.

The employer is also at risk by becoming liable when a drug-free program is not managed in an ethically sound, legally correct and scientifically accurate manner. The employees and their families may hold the organization liable for losses.

Environment: The environment is also at risk if the intoxicated employee's actions result in an environmental disaster.²⁷ Negative publicity caused by this and other drug-related incidents will impact negatively on a company's image, which may deter investors/shareholders from engaging with the organization.

1.4 A workplace drug and alcohol-free program

A workplace drug and alcohol-free program that is ethically sound, legally correct and scientifically accurate will minimize the risk to all parties involved in the workplace if it is applied correctly and consistently. Furthermore, a well-designed and functioning drug and alcohol-free program sources from disciplines such as law (medical and labour law), ethics (medical ethics) and chemistry (analytical forensic chemistry), pharmacology (pharmacokinetics and toxicology) and physiology, amongst others.

Drug testing is meant to be conducted as a deterrent to drug abuse, but with society urging the protection of an individual's rights, great effort has to be made to prevent harm to a person through false accusations.

²⁷ "Exxon Valdez Oil Spill Trustee Council: https://en.wikipedia.org/wiki/Exxon_Valdez_oil_spill (Accessed 2017-01-09): The company had a policy for alcohol, but it was not applied correctly.

It is not the function of the employer's drug and alcohol-free workplace program to take over the functions of the state related to illicit compound use by the employee. Therefore, the purpose of a drug and alcohol-free workplace program is not to "police" the workforce, but to minimize risk to all and to assist the worker if he/she has a drug-abuse problem. The private/after-hour drug use of a worker has to be respected, whether it is legal or illegal drug use. It goes without saying that if illicit drugs are used/sold on the premises of the organization, it should be reported to the authorities without hesitation.

Selection of the employees to undergo a drug test should be done in a non-discriminatory way with the aim of minimizing risk in the workplace.

Biological specimen collection should be performed in such a way that the integrity of the specimen is guaranteed up to the point of confirmatory laboratory analysis and reporting. Workers sometimes use creative ways to influence the outcome of a urine drug test, for instance, by consuming excessive volumes of water prior to the test, which dilutes his/her urine, substituting the specimen with water from a toilet bowl or even "spiking" the specimen with detergent hidden under his/her nails.

There are numerous ethical concerns around drug and alcohol-free workplace programs, which will be highlighted and discussed in detail in chapter 3. One such potential problem is that the medical condition of an employee may be revealed to the employer based on the presence of certain medications in the biological specimen. Genetic predispositions may also be observed by the presence of some biomarkers for certain conditions such as cancer, heart disease, etc.

Drug testing should follow the philosophy of first performing a rapid on-site preliminary assay. If the result is negative, the worker should be allowed to continue with his/her duties. If the outcome of the preliminary test is “non-negative”, the urine specimen should be submitted for confirmatory analysis by a forensic laboratory. During this period, the employee is prohibited from entering his workplace until the confirmation result becomes available.

The reason why a confirmatory assay has to be done is that there are two potential problematic scenarios that could result from the use of preliminary assay technology, namely “false positive” and “false negative” results.

- “False positive” refers to when a person is tested and the result is positive even though the drug is not present in his/her system.
- “False negative” refers to when a person is tested and the result is negative, but the drug is indeed present in his/her system.

Confirmatory analysis should be performed on **all** non-negative specimens by an accredited forensic facility with a forensically relevant technique and analytical method able to withstand legal scrutiny in a court of law. Drug testing should be performed by a forensic laboratory, taking extra precautions to maintain the chain of custody and to obtain accurate and reliable results. It should also be remembered that, for drug testing in the medical setting, the test result is only one part of the diagnostic paradigm, which also involves the patient’s medical history and physical examination. In workplace drug testing, there is no diagnostic paradigm. The result must stand alone and is evaluated by a medical review officer (MRO) in the context of the person only after the test result became available.

The MRO may find mitigating circumstances in favour of the employee. If the confirmation result is “negative”, there are no consequences for the employee; however, most organizations have a “zero-tolerance” approach towards a confirmed positive result with no legitimate explanation.

Employee assistance programs: Some organizations make use of employee assistance programs (EAPs) designed to help employees. These assist an employee with problems that affect work performance, of which drug abuse might be one. Some EAPs are offered on a voluntary basis while others are compulsory. Most workers benefit from an EAP, especially when they are given the choice of attending the program or being terminated. An organization may also benefit from an EAP in terms of absenteeism, productivity, employee morale and other work-related problems.

1.5 Drug and alcohol-free workplace programs in the United States of America

Workplace drug testing is standard practice in the USA with a twenty-year history.²⁸ It began in the 1980s and evolved from a start in the US Military, in a non-standardized and unregulated fashion. It spread to the private sector, together with the new immunoassay-based drug-testing technology. Testing was done with no regulations, no certified laboratories and no standardized procedures. The immunoassay devices that were used for testing were also not cleared by the US Food and Drug Administration (FDA). This posed numerous scientific challenges to the employers regarding the accuracy and reliability of the technology, mostly related to cross-reactivity of the tests. This was also the basis of lengthy litigation by workers opposing the drug testing results. With no minimum standards and recognized procedures, lawsuits and arbitration were common. There were reports of

²⁸ Karch (ed) Walch “Development and scope of regulated testing” 1998 *Drug abuse handbook* 729.

erroneous results and ethical misjudgements, which necessitated regulation of the drug and alcohol-free workplace program industry.

Regulated testing was initiated in 1983 by the National Transportation Safety board (NTSB), which requested the Secretary of Transportation to take action in the railroad industry due to the high incidence of alcohol- and drug-related incidents. The Federal Railroad Agency (FRA), in collaboration with the National Institute on Drug Abuse (NIDA), developed the first Department of Transportation (DoT) regulations in 1983.

After this, many companies in the oil, chemical, transportation and nuclear industry started to employ drug-testing programs.

The legality of drug testing in America was debated and decided in the following two cases before the US Supreme Court. In the first case,²⁹ the court recognized the need to protect the rights of the individuals who underwent the testing, but the safety considerations of certain jobs overrode those rights. It was concluded that impairment of a railway worker posed a considerable threat to the public. In the second case³⁰ involving applicants for a position in the American Customs Service, the court reasoned that the testing program was

²⁹ Glantz "A nation of suspects: Drug Testing and the Fourth Amendment" 1989 *American Journal of Public Health* 1427.

Skinner v Railway Labour Executive Association: This case dealt with the constitutionality of random drug testing on employees and applicants on private railways. After numerous accidents (21) involving fatalities between 1972 and 1983, the Federal Railroad Administration (FRA) adopted regulations that prohibited employees from performing work under the influence of alcohol or controlled substances. The FRA's intention to perform random drug testing was upheld by a 7-2 vote by the US Supreme Court.

³⁰ James "National Treasury Employees Union v Von Raab 1988 *American University Law Review* 109: This case was heard in the supreme court and dealt with whether applicants for the US Customs Service must pass a drug test. They did not have to hand the reports over for prosecution since the purpose was to prevent the individuals from getting the job in the first place. The Customs Service reasoned that an employee who abuses drugs in this occupation would be subject to bribery and blackmail, may be unsympathetic to their task of interdicting narcotics and may be impaired when carrying a firearm. The supreme court upheld the drug testing of applicants by the US Customs Service by a vote of 5-4.

legal since it was designed to prevent drug abuse and to uphold the integrity of the customs service, with emphasis on the fact that the successful applicants will be employees who carry a firearm and may be subject to bribery and blackmailing.

The federal government became involved in 1986, after President Reagan's commission on organized crime issued a report.^{31,32} NIDA convened a conference the same year with the aim of achieving consensus on drug-testing issues. The following critical requirements for drug and alcohol-free workplace program were agreed upon:

1. All individuals must be "informed" before testing commences – (Ethical)
2. All positive preliminary results have to be confirmed through the use of an alternate methodology – (Technical)
3. The confidentiality of test results must be assured – (Ethical)
4. Under certain circumstances, random testing for drugs of abuse under a well-defined program is appropriate and legally defensible – (Legal)

The abovementioned points impacted on the technical, legal and ethical aspects of a drug and alcohol-free workplace program as indicated in parenthesis.

The Secretary of Health and Human Services (HHS) had the responsibility of developing suitable guidelines for a drug and alcohol-free workplace program, which was delegated to

³¹ Karch *Workplace drug testing* (2008) 3. One of the recommendations of the commission was that: "The president should order all federal agencies to formulate a clear policy statement, with implementing guidelines, including suitable drug testing programs, expressing the utter unacceptability of drug abuse by Federal employees. States and government agencies and leaders in the private sector should all support a similar policy that all use of drugs is unacceptable. Government contracts should not be awarded to companies that fail to implement drug-testing programs, including suitable drug testing. Government and private sector employers who do not already require drug testing of job applicants and current employees should consider the appropriateness of such a testing program".

³² Exec Order 12564 Drug-Free Federal Workplace Federal Register (FR) 51(180) 32889 1986-09-15
<http://workplace.samhsa.gov>.

NIDA. A set of technical and scientific guidelines was generated for federal drug-testing programs.³³ This was accepted by Congress, which passed a new law that set the stage for widespread regulation of drug and alcohol-free workplace programs.³⁴ This permitted the Drug-Free Federal Workplace Program to go ahead on the basis of certain administrative prerequisites, one of which was to include standards for laboratory certification. NIDA developed a laboratory certification scheme, which was published in the Federal Register.

After comments and revision, the guidelines developed by NIDA were published in the Federal Register (FR) as the "Mandatory Guidelines for Federal Drug and Alcohol-Free Workplace Programs".³⁵ A national laboratory certification program was implemented by the HHS/NIDA in July 1988³⁶.

In December 1988, the US Department of Transport (DOT) published an interim rule, and a final rule³⁷ in January 1990, establishing drug-testing procedures for six DOT regulations and standardizing the procedures across the transportation industry. The following administrations were involved: Federal Aviation Administration (FAA), Federal Highway Administration (FHA), Federal Railroad Administration, US Coast Guard, Urban Mass Transportation Administration and Research, and Special Program Administration.

³³ The guidelines included procedures for urine specimen collection, transmitting of specimens to the testing laboratories, testing procedures, evaluation of test results, quality control measures, record keeping and reporting requirements, as well as standards and procedures for HHS certification of drug testing laboratories. The intent of the guidelines was to safeguard the accuracy and integrity of test results as well as the privacy of the individuals who are tested.

³⁴ Public Law 100-71 s 503 enacted 1987-07-07.

³⁵ FR Mandatory Guidelines for Workplace Drug Testing 1988-04-11.

³⁶ SAMHSA website list of certified laboratories <https://www.samhsa.gov/sites/default/files/workplace/certified-labs-list-january-2017.pdf>. (Accessed 2017-01-09).

³⁷ US Department of Transport (DOT) Procedures Title 49 Code of Federal Regulations (CFR) Part 40, which followed the HHS regulations on Mandatory Guidelines on Workplace Drug Testing closely.

The DOT was also prompted by the new law to cover interstate transportation and to expand the program to include testing for alcohol.³⁸ These requirements were published in the FR in 1994 for implementation in 1995

The Congress later passed the Omnibus Transportation Employee Drug Testing Act of 1991. The DOT covers more than 1.2 million transportation workers in the US.³⁹

Drug testing in the workplace has evolved tremendously over the last twenty years, imposing stringent testing procedures on urine testing as matrix only, which improved reliability and accuracy. The strict regulations may have over-extended itself by becoming too rigid and excluding some of the recent scientific advantages as far as testing methodology and biological matrices are concerned. The Substance Abuse and Mental Health Services Administration (SAMHSA), responsible for overseeing workplace drug testing in 1992, has proposed changes in testing methodology to enable inclusion of other biological matrices like oral fluid, sweat and hair.⁴⁰

1.6 Drug and alcohol-free workplace programs in South Africa

South Africa does not currently have mandatory guidelines for drug and alcohol-free workplace programs like the United States of America⁴¹ and some European Countries have.⁴² There are some pieces of legislation⁴³ that have an indirect influence on workplace drug testing in industry, but there is no legislation ordering “mandatory workplace drug

³⁸ Public Law 100-71 s 503 enacted 1987-07-07

³⁹ Karch *supra* n33 4.

⁴⁰ <https://www.federalregister.gov/documents/2004/04/13/04-7984/proposed-revisions-to-mandatory-guidelines-for-federal-workplace-drug-testing-programs> (Accessed 17 January 2017).

⁴¹ Exec Order 12564 Drug-Free Federal Workplace FR 32889-32893 1986-09-15 <http://workplace.samhsa.gov>.

⁴² International Labour Organization (ILO) Appendix V: Guiding principles on drug and alcohol testing in *Management of Alcohol-Drug-related Issues in the Workplace* 1996.

⁴³ Please refer to ch 2 for a discussion of the relevant legislation in South Africa.

testing” per se; not even in the occupations with the highest risk like the transport industry, the chemical industry, the steel manufacturing industry, mining industries, South African Police Service or military forces.

The South African labour community is in desperate need for guidance on legally defensible drug and alcohol-free workplace program guidelines and legislation that will comply with the Constitution of South Africa (CSA), legislation, common law and ethical guidelines.

South African guidelines will have to be in harmony with the CSA, which is the supreme law of the country.⁴⁴ However, the Bill of Rights is subject to the limitations contained or referred to in section 36 of the Bill.⁴⁵ This section in the Bill of Rights applies to all legislation, and binds a natural or a juristic person.⁴⁶

Subsections 9, 10, 11, 12, 14, 23, 32, 36 (limitation clause) and 39 (interpretation clause) find specific application in a drug and alcohol-free workplace program and will be covered in more detail in chapter 4 of this work.

It is the opinion of the author that many of the organizations take a calculated risk by turning the proverbial blind eye while some are simply afraid/reluctant to engage in workplace drug testing due to the insufficient knowledge on the scientific, legal and ethical issues.

⁴⁴ Constitution of the Republic of South Africa (CSA), ch 1 subs 2: “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.

⁴⁵ CSA ch 2 subs 8(1).

⁴⁶ CSA ch 2, subs 7(3).

1.7 Methodology and approach of this study

“The medico-legal questions raised in this study will be portrayed on an integrative level, with reference to a multi-layered approach, founded in the applicable supreme provisions of the Constitution; the applicable principles of common law; relevant legislation (often articulated in terms of the Constitution); professional policy guidelines, interpretative case law, and considerations of medical ethics”, as stated by Carstens.⁴⁷

The mandatory guidelines for the American Federal Workplace Drug Testing will be studied and compared to South African legislation. The principle that the legal rule follows the medical ethical value originates from the fact that the most important ethical values (life, bodily integrity, dignity, privacy and equality), as incorporated into and articulated in medical ethical codes/instruments, have been elevated to legal *rights* in the South African legal system and the CSA or human rights legislation.⁴⁸

1.8 Aim of the study

The aim of this study is, firstly, to make an assessment of the compliance of the American Federal Mandatory Workplace Drug and Alcohol Free Workplace Program with the CSA, relevant legislation, case law and considerations of medical ethics. The shortfalls of the US guidelines will be identified and discussed in terms of South African legislation.

Secondly, suggestions are made in accordance with international best practice if the US some of the guidelines cannot be applied within the South African context.

⁴⁷ Carstens & Pearmain *Foundational Principles of South African Medical Law* (2007) 7.

⁴⁸ Ethical and Professional Rules of the Health Professions Council of South Africa: GG R717/2006 Health Professions Act 56 of 1974 (HPA).

Thirdly, current practice in South Africa will be highlighted and evaluated against international best practice.

CHAPTER 2

OVERVIEW OF THE USA LEGAL FRAMEWORK AND MANDATORY GUIDELINES FOR THE AMERICAN FEDERAL DRUG AND ALCOHOL FREE WORKPLACE PROGRAM

2.1 United States of America Regulatory Framework for a Drug and Alcohol-Free Workplace

2.1.1 Regulated testing: Mandatory Guidelines for the American Federal Drug and Alcohol-Free Workplace Program

The USA Federal Drug-Free Workplace Program was launched in 1986⁴⁹ on an executive order of President Reagan in an effort to offer drug abusers a helping hand. The authority for overseeing this program resided with the SAMHSA in the Centre for Substance Abuse prevention (CSAP). The Substance abuse and Mental Health Services Administration (SAMHSA) administers the National Laboratory Certification Program (NLCP), which certifies laboratories to perform drug testing according to the Mandatory Guidelines for Federal Drug and Alcohol-Free Workplace Programs. These guidelines were first published in the FR in 1988⁵⁰ and again in 1994.⁵¹ Revised versions of the guidelines were published in 1998⁵² and 2004⁵³. The intention of these guidelines is to ensure accuracy, reliability, compliance at a forensic standard and to protect the privacy of individuals who are tested.

⁴⁹ Exec Order 12564 Drug-Free Federal Workplace FR 32889-32893, 1986-09-15 <http://workplace.samhsa.gov> (Accessed 17 January 2017).

⁵⁰ Mandatory Guidelines for Federal Workplace Drug-Testing Programs FR 53(69) 11970-11989 1988-04-11 <http://workplace.samhsa.gov>. (Accessed 17 January 2017)

⁵¹ Mandatory Guidelines for Federal Workplace Drug-Testing Programs FR 59(110) 29908-29931 1994-06-09 <http://workplace.samhsa.gov>. (Accessed 17 January 2017)

⁵² Mandatory guidelines for Federal Workplace Drug-Testing Programs FR 63(219) 63483-63484 1998-11-14 <http://workplace.samhsa.gov>. (Accessed 17 January 2017)

⁵³ Mandatory Guidelines and Proposed Revisions to Mandatory Guidelines for Federal Workplace Drug-Testing Programs FR 69(71) 19644-19673 2004—04-13 <http://workplace.samhsa.gov>. (Accessed 17 January 2017)

The guidelines refer to some of the requirements for a drug-free program, including:

- a formal written policy that prohibits the consumption of mind-altering drugs by workers
- employees should be educated about the dangers of drug use
- supervisor training regarding their responsibilities in a drug-free program
- employee assistance programs (EAPs)
- provisions to identify employees abusing drugs. This should include drug testing on a controlled and carefully monitored basis
- several types of tests performed for security-critical and safety-sensitive positions in the federal environment, including: pre-employment, post-incident, reasonable suspicion, rehabilitation follow-up, random and voluntary drug testing.

Drug testing started in the 1970s in the US military environment and evolved to what is known as the HHS Mandatory Guidelines administered by SAMHSA. The DOT drug-testing rule is captured in the commonly referred to "Part 40"⁵⁴ and its procedures.⁵⁵ Six federal agencies have to comply with the DOT Procedures.⁵⁶ The Omnibus Transportation Employee Testing Act of 1991 also added mandatory alcohol testing. The Department of Defence, Energy, and Nuclear Regulatory Commission all have to comply with the guidelines, with minor deviations to fit their specific needs.

⁵⁴ DOT Drug Testing Rule Title 49 CFR Part 40 Commonly referred to as "Part 40".

⁵⁵ Procedures for Transportation Workplace Drug-Testing Programs FR 54 49855.

⁵⁶ Commercial motor carriers (Federal Motor Carrier Safety Administration, FMCSA); Aviation (Federal Aviation Administration, FAA); Railroad (Federal Railroad Administration, FRA); Public Transportation (Federal Transit Administration, FTA); Pipeline (Pipeline and Hazardous Materials Safety Administration, PHMSA); Maritime (United States Coast Guard, USCG).

2.1.2 State drug and alcohol testing laws⁵⁷

Some states have laws that affect all employees, while others offer incentives for employers who comply with the laws, like discount on worker's compensation insurance premiums.

Some of the common aspects in the state laws are:

Test types: Limited random testing is allowed, sometimes for specific groups only. However, some states do not allow random testing. Post-incident testing can take place only if the employer has established a possible causal link based on reasonable suspicion or a probable cause. If the employee voluntarily sought help for his drug problem, then no return-to-duty test is performed. Pre-employment testing can only take place if a job offer has already been made and that the offer is subject to a negative drug test result.

Procedures and policies: Employers have to carry the costs for testing and testing may be performed by HHS-certified laboratories only. Directly observed specimen collection is prohibited and only certain bio-matrices may be collected like, urine, saliva or hair. Tests must be reviewed by an MRO and employees must have access to all test results. Employers must offer rehabilitation and may not fire an employee after the first positive test.

Denial of worker's compensation benefits: In most states, an employee forfeits his/her worker's compensation benefits in the case of an injury due to intoxication or being "under the influence". A positive drug test is sometimes accepted as rebuttable evidence of the cause of injury.

Denial of unemployment benefits: Unemployment benefits may be denied in the case of termination of services (or refusal to hire) due to a positive test result.

⁵⁷ Swotinsky & Smith *The Medical Review Officer's Manual*, 4th ed (2010) 84.

Criminalize test subversion: The manufacture, sale or distribution of adulterants or substitution products is illegal in some states.

2.1.3 Overlap between State and federal laws

If there is a conflict between laws, the federal laws trump state and city laws.

2.1.4 Non-regulated testing

The term “non-regulated” should not be interpreted as “no rules apply”. Non-regulated drug-testing programs in the US are also subject to state and city laws. The Americans with Disabilities Act (ADA) indirectly affects a drug and alcohol-free workplace program, even though it does not focus directly on this.⁵⁸ Furthermore, an individual currently using illegal drugs is not protected by the ADA. The mandatory federal guidelines act as a golden standard to the whole industry and many companies choose to obey the SAMHSA guidelines for the regulated federal industries. Non-regulated testing programs sometimes differ in terms of the type of drugs tested, as well as the type of tests, cut-off concentrations, use of other bio-matrices, and collection of prescription medication information at the time of specimen collection. Some also allow for the immediate removal of the employee from duty awaiting the MRO report, although this is not in agreement with the stand-down policy of the mandatory guidelines, as discussed in section 2.11 below.

Policies and collective bargaining agreements establish the rules for drug and alcohol testing in the workplace in the non-regulated environment (and are sometimes the only rules).

These are the rules that apply to the workers in the organization. Collective bargaining

⁵⁸ Title 29 CFR part 126: Labor.

agreements regarding drug and alcohol-free workplace programs are common in unionized environments.

2.1.5 American Acts that influence workplace drug-free programs are as follows:

***Americans with Disabilities Act*^{59,60}**

The ADA protects individuals who are qualified to perform a task from discrimination in the employment environment. A disabled person is someone who “has a physical or mental impairment that substantially limits one or more life activities”, including working disability, and “has a record of impairment, or is regarded as having such an impairment”. A person *currently* using illicit drugs does not qualify as having a disability, since it cannot be claimed that the *current* drug use is an ongoing problem (i.e. the employee does not have a dependency problem). Therefore, the use of controlled substances without a valid prescription is not protected under the ADA.

Enquiring about a candidate’s drug use is acceptable only **after** a firm job offer has been made. The offer may be made with the prerequisite of passing a post-offer drug test.

An employer may refuse to hire a person who has a history of drug abuse. It must be shown, however, that refusal is based on company policy and is related to the requirements of the job and that the employee poses a direct threat to safety, for example, a police officer. The ADA permits an employer to discipline or dismiss an employee for current illegal use of drugs and alcohol if the employee is performing a safety-sensitive task while under the influence of such illegal drug or alcohol. It also dictates that a person using legal prescription

⁵⁹ Title 29 CFR part 1630.

⁶⁰ Liska *supra* n23 406

drugs that can influence his/her performance may not be discriminated against. However, the employer is allowed to remove such an employee from the safety-sensitive environment.

Drug tests are not considered medical tests and, therefore, are not restricted under the ADA,⁶¹ also not in the pre-employment setting. On the other hand, alcohol testing is considered a medical test and, therefore, is not allowed as a pre-offer test. Alcohol tests may be requested by the employer as a post-offer test if it is a requirement for the job.

Clinical Laboratory Improvement Amendments (CLIA)⁶²

The CLIA was established for clinical testing and considers workplace drug tests to be forensic tests, which are not covered by this act. The preliminary tests performed in workplace testing are also waived because of its inherent simplicity.⁶³

Emergency Medical Treatment and Active Labour Act (EMTALA)⁶⁴

The EMTALA covers emergency medical treatment and requires that the medical facility perform adequate screening to assess the patient's medical condition. This may include drug and alcohol tests.

Food and Drug Administration Regulations (FDA)

The FDA regulates point-of-collection drug testing (POCT) kits as diagnostic medical devices. A manufacturer may not sell his POCT device unless it is cleared by the FDA. Clearance involves performance and labelling. The performance data is reviewed to ensure that the

⁶¹ Title 42 USC ch 126, subch I, par 12114(d): Illegal use of drugs and alcohol.

⁶² Clinical Laboratory Improvement Amendments of 1988 (CLIA).

⁶³ Title 42 CFR ch IV subch G part 493 par 3(b)(3): Laboratory requirements

⁶⁴ Emergency Medical Treatment and Labor Act (EMTALA) of 1986; Title 42 USC par 1395dd: Examination and treatment for emergency medical conditions and woman in labor.

assay meets standards for accuracy and reliability when used as intended.⁶⁵ The labelling is reviewed to ensure that the instructions of use are clear and that important information is conveyed (NB: such as the requirement for confirmatory testing after a non-negative result has been obtained).

Health Insurance Portability and Accountability Act⁶⁶

The Health Insurance Portability and Accountability Act (HIPAA) determines that the privacy of individuals should be protected by health care providers in the way that health information is treated and to prevent improper access to health care information/medical records. It allows for the disclosure of information without written consent, of which the HHS Guidelines and the DOT Procedures are two examples, to mandate the release of certain information.

It is not clear if the HIPAA covers non-regulated drug test information since drug tests are also performed as part of patient evaluation and treatment. The HHS recommends that written consent be obtained by the collector from all donors, regardless of the purpose of the drug test (medical surveillance or workplace drug test). This consent will inform the donor that the result will be released to the employer. This becomes important if an MRO requests medication information from health care providers who may refuse disclosure if they do not have consent from the donor.

⁶⁵ US Food and Drug Administration (FDA) Draft guidance for industry and FDA staff: Premarket submission and labelling recommendations for drugs of abuse screening tests (2003) 2.

⁶⁶ Health Insurance Portability and Accountability Act (HIPAA) CFR Title 45 part 164 subtitle A subch C part 164: Security and Privacy.

2.2 Elements of a drug and alcohol-free program as suggested by SAMHSA⁶⁷

A drug and alcohol-free workplace program should primarily be aimed at reducing risks of employees in safety-sensitive positions (testing of designated positions). The guidelines were published by the HHS from 1988 to 2004.^{68,69,70,71,72} with the aim of ensuring reliability and accuracy at a forensically acceptable standard that will withstand legal scrutiny in a court of law. A drug-free workplace model is outlined in the guidelines and should include:

- a policy that highlights the organization's stance against the abuse of drugs and the consequences should an employee perform work in an intoxicated state
- employee training on the dangers of drug abuse
- supervisor training on their responsibilities in a drug-free program
- an employee assistance program (EAP) should be available in the case where an employee has a drug problem, which should be regarded as a "helping hand"
- strategies to identify employees who consume drugs, including drug testing on a controlled basis.

A drug and alcohol-free workplace program should apply to everybody in the organization and should be applied consistently. It should be non-discriminatory in terms of race, religion,

⁶⁷ SAMHSA: Substance Abuse and Mental Health Services.

⁶⁸ Mandatory Guidelines for Federal Workplace Drug-Testing Programs FR 53(69) pars 11970-11989 1988-04-11 <http://workplace.samhsa.gov>.

⁶⁹ Mandatory guidelines for Federal Workplace Drug-Testing Programs FR 59(110) pars 29908-29931 1994-06-09 <http://workplace.samhsa.gov>.

⁷⁰ Mandatory guidelines for Federal Workplace Drug-Testing Programs FR 59(110) pars 29908-29931 1994-06-09 <http://workplace.samhsa.gov>.

⁷¹ Mandatory guidelines for Federal Workplace Drug-Testing Programs FR 63(219) pars 63483-63484 1998-11-14 <http://workplace.samhsa.gov>.

⁷² Mandatory Guidelines and Proposed Revisions to Mandatory Guidelines for Federal Workplace Drug-Testing Programs FR 69(71) pars 19644-19673 2004-04-13 <http://workplace.samhsa.gov>.

ethnic group, sex, day shift and night shift, and should have no regard for the position of the employee in the organization.

2.3 Workplace drug testing flow chart as suggested by SAMHSA

<p>1. Employer</p> <ul style="list-style-type: none"> - Initial request is made for a specific reason.
<p>2. Specimen collection</p> <ul style="list-style-type: none"> - Donor reports to the collection site. - Donor has his/her urine specimen collected and sealed with a unique seal number. - Urine temperature and other preliminary/validity tests are performed. - Chain of custody form is completed. - Urine specimen is shipped to the certified confirmation laboratory.⁷³
<p>3. Laboratory receipt</p> <ul style="list-style-type: none"> - Receipt of the specimen and chain of custody is observed. - Unique internal laboratory identification number is assigned to the specimen after registering the specimen on a Laboratory Information Management System. - Specimen is aliquoted (poured off, "no dip sampling") for analysis and the rest is frozen.
<p>4. Laboratory analysis</p> <p>4.1 Initial preliminary testing/screening is performed with immunoassay.</p> <ul style="list-style-type: none"> - Validity testing is performed (creatinine, pH, specific gravity, adulterants, nitrites, oxidants, etc.)

⁷³ The specimen is to be kept in a secured environment for temporary storage at the collection facility until it is shipped to the confirmation laboratory.

- If the results are “negative” for all the preliminary immunoassay tests and normal for the validity tests with no adulteration, the testing process ends and the result is reported as “negative”.
- Urine specimens that screen non-negative or have abnormal validity results are subjected to further testing.⁷⁴

4.2 Confirmatory testing:

- Extraction by a method that is validated for the specific drug class that presented non-negative by immunoassay analysis.
- Confirmation of the presence of the drug and the quantity/concentration of the drug is confirmed by a qualified analyst and a certifying scientist.

4.3 Confirmatory testing:

- Specimens that failed the validity testing, implying possible adulteration, like dilution (abnormal pH and creatinine), is also subjected to confirmatory testing as explained above.

5. Laboratory reporting

- All results are reported to and verified by a certifying scientist.
- The final report is then sent to the designated MRO (not to the employer or employee/donor) in a secure fashion (fax, email, mail, courier).
- Results may not be reported by telephone.

6. Medical Review Officer (MRO) and Blood Alcohol Technician (BAT)

- The MRO will review the drug test result if it is **not negative** and will report the final result back to the employer.

⁷⁴ The term “presumptive positive” is sometimes used synonymous to “non-negative”. It is the opinion of the author that the use of the former may indicate subjectivity by the confirmatory Laboratory. The mainstay of science is objectivity and it should not be compromised by any means.

- The role of the MRO is to ensure that the donor has not abused a drug prohibited by the policy or that the donor was not dishonest by obscuring the result through manipulation of the urine during the collection process.
- The MRO may report a drug test result as “negative” even if a concentration of the drug above the cut-off limit was confirmed to be present, if there is a legitimate explanation for the drug being present in the employee’s body.
- The BAT is responsible for obtaining an accurate and reliable alcohol testing result in compliance with forensic standards.

7. Employer

- Decisive action may follow for confirmed positive results with no legitimate explanation. No decisive action on preliminary assay results.

Table 2.1: Workplace drug testing flow chart as suggested by SAMHSA

2.4 Drug and alcohol-free workplace policy^{75,76}

A drug and alcohol-free workplace program should address the following points:

- It should have a statement of need and purpose.
- *The employer’s responsibilities*

The employer is the custodian of the policy, which entails that the testing should be ethically and legally correct and scientifically accurate. The test results should be kept confidential and the employer must guarantee that the test results are accurate by:

- taking responsibility that the correct specimen collection protocols are followed

⁷⁵ See DOT SAMHSA website at <http://workplace.samhsa.gov> for a model policy.

⁷⁶ Swotinsky & Smith *supra* n58.

- guaranteeing the integrity of the specimen and uniquely linking the results to the employee beyond any doubt
- contracting and obtaining professional services that will deliver a suitable and fit-for-purpose service
- purchasing the correct and suitable collection and preliminary testing supplies.

- *The employee's responsibilities*

The employee's responsibilities entail mainly that the employee should obey the policy in terms of his/her drug use by not using substances that are prohibited by the policy and by not obstructing the drug testing in any means by being honest. In-vivo or in-vitro tampering with a specimen should not take place. The drug concentration levels should be kept below the cut-off concentration levels in the bio-specimens as specified in the policy. The employee should also present himself/herself for a drug test at the venue specified by the employer in a timely manner.

- *Employee training*

Employees should be trained in all aspects of the drug-free workplace program.

- Contact details of person/s who can answer questions regarding the drug-free program.
- Duties of the employees that are subjected to the program and conduct that is prohibited by the program regulations.
- The requirement for drug and alcohol testing of employees.
- When and under what circumstances employees would be tested as well as the testing procedures that would be employed.

- An explanation of what constitutes a refusal to test and the consequences thereof.

(Please see below.)

- Signs and symptoms of drug and alcohol misuse.
- How to treat non-prescription self-medication and the consequences of borrowing prescription medicine.
- Contact details of a person that can provide counselling and access to treatment programs.

- *Supervisor training*

The supervisors should be trained in how to recognize a person that has consumed drugs, and initiate the drug-testing process. They are directly involved with the employees on a daily basis and are responsible for applying the substance abuse program.

- *Recordkeeping* of test results, administration of the process, administration of the return-to-duty process, training of employees and supervisors.

- *Appointment of a Designated Employer Representative (DER)* for the drug and alcohol program that performs functions such as:

- receiving the results from the MRO and BAT and relaying this to the Department of Human Resources
- communicating/instructing the removal of a worker from a safety-sensitive position
- being familiar with all testing protocols and procedures
- knowing what to do regarding cases of non-compliance during urine specimen donation and breath alcohol testing, like refusal to test, insufficient urine specimens donated, adulteration, etc.
- deciding if a post-accident or reasonable suspicion test should be done

- receiving the report from a substance abuse professional (SAP) after completing treatment following a test violation.
- *Self-referrals and voluntary drug testing:*⁷⁷
 - Since it is expected of the employee to behave responsibly and give his full cooperation as far as safety is concerned, he/she should be allowed the opportunity to subject himself to a voluntary test. This will avoid him from entering the testing process that may have consequences.
 - He/she should be allowed the opportunity to test himself on an alcohol breathalyser, for instance, before he enters the premises.
 - He can also voluntarily submit himself to a urine drug test should he suspect that he has taken a drug that is not allowed by the policy.
- *Who will be tested, when will they be tested and how will they be tested.*
 - The “testing designated positions” in the organization have to be defined. Testing of employees in safety-/risk-sensitive positions should be a key factor, as the drug-testing program should be driven from a risk and safety management perspective. The testing of employees should be motivated as such.
 - The reason for testing: pre-employment, periodic medical, random testing, reasonable cause or suspicion, post-accident/incident, return-to-duty, follow-up testing or other possible reasons that may depend on the specific industry.
 - What bio-matrices will be used for testing (urine, oral fluid, sweat, hair, blood)?
 - Which drugs will be tested for?

⁷⁷ If an employee voluntarily submits himself frequently, it should be followed up since this option may be misused to avoid the consequences of an “over-the-limit” test result.

- How will the testing be performed (analytical techniques for preliminary and confirmatory testing)?
- What cut-off concentrations will be used to decide an adverse finding for the preliminary assay as well as the confirmatory assay?
- *Employer actions after receiving test results:*

Removal from a safety-sensitive position when notification is received of a violation of the policy after:

 - a non-negative preliminary drug test result or a confirmed positive drug test result (“positive dilute” results as well)
 - preliminary breath test result if the cut-off concentration limit is exceeded⁷⁸
 - confirmed positive alcohol test result
 - alcohol & drug use on duty
 - using alcohol within two hours after an incident if the employee knows that a drug and alcohol test will be required.
- The consequences for these violations should be addressed.⁷⁹
- The contact details of a SAP have to be provided to a donor with a drug test violation, regardless of whether he will remain in service or be fired. The SAP will provide feedback to the employer with a report.
- *The role of the MRO.*

⁷⁸ The SAMHSA guidelines define the limit for alcohol as 0.04. If the test result is between 0.02 and 0.039, the employee is removed from safety-sensitive duties for a defined period or until retested below 0.02. If the test result is confirmed to be above 0.04, he/she is not reinstated to a safety-sensitive duty until he has met with return-to-duty requirements.

⁷⁹ It is the prerogative of the employer to decide the fate of an employee after a drug test violation in terms of company policy. Some employers fire the employee after a first violation, others after a second violation or by treating the decision on a case-by-case basis. However, the latter exposes the employer to the risk of being discriminatory. Some employers respond by sending the employee for a second test, which will typically be negative due to the extra time the body had to metabolize and break down the ethanol or drug. This practice should be prohibited since it undermines the foundations of a workplace drug-free program.

As per the table in section 2.2 above.

- *The role of the BAT.*

As per the table in section 2.2 above.

- *The role of an EAP:* The drug-testing program should be aimed at the rehabilitation and assistance of employees who have a drug-abuse problem. (Please see the discussion below.)

- *A written stand-down policy*

Please see the discussion below.

- *Disciplinary action:*

- This should be the very last resort and will also to act as a deterrent. Disciplinary or decisive action should follow **only** if there is no legitimate explanation for the confirmed positive test result and in terms of the organization's policy.
- Consequences for refusal-to-test result. (Please see definition of refusal to test below).

2.5 Background checks^{80,81}

An applicant's background has to be verified before assigning him to a safety-sensitive position to ensure that he/she does not have past drug and alcohol violations for which the return-to-duty process has not been completed. The background check also applies for re-employments.

Please find a copy of a Background History Check form enclosed in Appendix 3, which a previous, regulated employer has to complete. The applicant has to provide permission to

⁸⁰ Title 49 CFR part 40: Procedures for Transportation Workplace Drug and Alcohol Testing Programs (DOT Procedures).

⁸¹ Title 49 CFR part 40 par 391.23: DOT Procedures.

the prospective employer to enable background checks, to contact previous regulated employers the applicant has worked for the past two years. If the prospective employee does not want to give permission for the release of the form, he/she may not be employed in a safety sensitive position. If the prospective employer receives confirmation from a previous employer that the return-to-duty process has not been completed for a drug test violation, the individual may not be employed in a safety-sensitive position. If the applicant admits to a previous drug test violation at a regulated employer, then he/she has to provide proof of completing the return-to-duty process. The prospective employer may contact the SAP directly, with permission from the applicant. An applicant may not perform a safety-sensitive task for more than 30 days, awaiting background check clearance within which the employer should clear the applicant or has made an honest effort of obtaining the information from previous employers.⁸²

2.6 Release and Consent Form⁸³

Consent forms are normally used to document that a person has provided permission to undergo the test, who may have access to the information and results and that he/she understands the consequences of the test. Please find a copy of a Release and Consent form enclosed in Appendix 2, which the employee is requested to complete. The use of such forms became prevalent after the HIPAA was promulgated.⁸⁴ However, the HIPAA does not cover urine workplace drug testing since this is not regarded as medical tests.⁸⁵

The HIPAA allows for the use of consent forms under certain conditions, but:

⁸² Records of this process has to be kept for up to three years.

⁸³ Swotinsky & Smith *supra* n58 66.

⁸⁴ HIPAA *supra* n67, Department of Health and Human Services, Title 45 CFR part 164: Security and Privacy.

⁸⁵ US Title 49 CFR part 40 par 123(d): DOT Procedures.

- the donor cannot be forced to sign them and disclosure of results may take place **without** the consent of the donor
- the donor's consent is **implied** by signing the CCF form
- once the specimen is submitted, it is part of the employer's testing program and cannot be withdrawn or the result prevented from being reported to the employer.
- consent forms **cannot** be used to:
 - ask the donor for indemnification, for instance to agree not to sue the collector, employer or service agents
 - obtain blanket release of test results to a certain category of individuals. The request for consent must be specific in terms of to whom the results will be released and for how long the permission remains valid
 - obtain a list of medications the donor took and the collector may also not ask the donor which medications he took prior to the specimen collection. Enquiring about medication is regarded as a medical enquiry and, therefore, is prohibited under the ADA.⁸⁶
- Part 40 states that drug test results may not be released to third parties without the donor's written consent.^{87,88} Drug test result information may be released in certain legal proceedings such as lawsuits (wrongful discharge action), grievance, and administrative proceedings (e.g. an unemployment compensation hearing resulting from a positive test or a refusal-to-test result). Furthermore, the drug test result information may also be released in the case of criminal and civil actions in which a competent court determines

⁸⁶ Americans with Disabilities Act (ADA): Title 42 CFR part 126.12114(d)(1): Illegal use of drugs and alcohol.

⁸⁷ Title 49 CFR Part 40:DOT Procedures.

⁸⁸ A third party is any person or organization that the rule (Part 40) does not explicitly authorize.

that the information related to a drug test result is relevant to the case. The court will then issue an order directing the employer to produce the information.

- the DOT instructs the employer and service agents to inform the employee in writing of any information released without his/her written consent
- Please see the section on the role of the MRO below where release of test results is discussed.

2.7 Testing of minors in the workplace

“Mature minors” (age 12-15) may consent to a medical procedure with an inherently low risk and with the corresponding right to confidentiality. With a workplace drug test not being viewed as a medical test, a minor may consent to a federally mandated drug test without parenteral consent. The law does not specifically address the matter of parenteral consent outside the regulated setting and therefore it should be considered carefully.^{89,90}

2.8 Specimen collection⁹¹

2.8.1 Drug testing

A urine specimen collection protocol should be devised with the intention of respecting the employee and to guarantee specimen integrity. The employee should be allowed to donate his urine specimen in privacy in terms of the specific protocol designed to prevent possible tampering. Because the main objectives are to ensure sound identification of the specimen and the donor, deter adulteration or substitution of the specimen and secure

⁸⁹ Alerting the parent when a drug test can be advantageous, especially if the minor has a confirmed positive test result since he/she may not have information on the medication that the minor took prior to collection of the specimen. This may result in a dilemma for the MRO if the parent demands that the MRO reveal the child’s test result, which may then be viewed as a breach of confidentiality.

⁹⁰ School-imposed drug tests in the USA does require parenteral consent.

⁹¹ Urine Specimen Collection Handbook for Federal Workplace Drug Testing Programs (Urine Specimen Handbook) <http://workplace.samhsa.gov>.

the specimen to maintain the chain of custody throughout the whole process, the fact that an individual may donate the specimen in privacy complicates matters. The main objectives mentioned can be achieved fairly easily by following the correct protocol for a legally defensible urine specimen collection. The release and consent form should also be completed. Some precautions that can be taken as part of a legally defensible specimen collection are:

- dilution of the specimen can be deterred by placing a blueing agent in the toilet bowl to prevent dilution with water from the toilet bowl/system
- ensuring that the donor is identified with photographic identification to make sure that someone else does not donate the urine specimen on the donor's behalf
- ensuring that the donor empties his pockets and proof to the collector that these are empty⁹²
- ensuring that the donor has to wash his hands before he/she donates the specimen to prevent tampering with chemicals hidden under his/her finger nails
- the collector remaining close to the donor to deter possible tampering by the donor
- completing a standardized Federal Drug Testing Custody and Control Form (CCF) stepwise as part of the collection process. Please see Appendix 1 for a copy of the CCF form.

Step 1: The unique specimen identification number on the form is matched with the tamper-evident seal and label and the correct detail is recorded by the collector.

⁹² Typically, he/she should wash his/her hands before entering the donation cubicle and he should not wear unnecessary garments or take bags into the donation cubicle. This is to prevent persons from hiding adulteration agents.

Should the donor refuse to provide his detail, the collector must make a note of this in the space reserved for remarks below step 2 on the form.

Step 2: The collector then hands the specimen collection container⁹³ to the donor to provide a urine specimen. The temperature of the urine specimen needs to be noted within 4 minutes from collection and recorded on the form. The rest of step 2 requiring information on whether the specimen is a single/split of observed specimen should then be completed.⁹⁴ The collector must make a note in the remarks section if the temperature of the specimen is outside the normal range.

Step 3: The collector then transfers the specimen from the collection container into the specimen bottle while the donor is witnessing.⁹⁵ After capping the bottle, the tamper-evident seal is affixed to the specimen bottle, dated and initialized by the collector. The donor also initials the specimen bottle label (only after the seal has been fixed on the specimen bottle). The collector then completes step 5a on the MRO copy (copy 2) by recording the result of the preliminary assay and request the donor to sign and date the primary result recorded in step 5a. This information is then automatically transferred to copies 2 to 5.

The results of the preliminary assay will not be recorded on the original (copy 1), which stays with the specimen until delivery in the confirmatory laboratory that may

⁹³ The specimen collection container should be a certified clean and sterile, sealed container. It must also be possible to obtain the certificate of analysis, certifying the batch as clean from the supplier.

⁹⁴ No direct contact tests are allowed due to the possibility of contamination like: submerging of a thermometer, “dip-stick” immunoassay preliminary tests. Contact thermometers are a better alternative for temperature measurements.

⁹⁵ A part specimen should be retained in the specimen collection container after emptying the bulk into a specimen bottle. This will nullify any claims of contamination while preliminary/validity testing is performed, since the bulk specimen has then been secured for confirmatory testing should the preliminary assay result come out “non-negative”.

perform a second preliminary assay and record the results in step 5b. They will not have insight into the first preliminary assay.

If the donor refuses to sign the preliminary test results, the collector should make a note of this on copy 1 in the space reserved for remarks below step 2 on the form.

This will be indicated automatically on copies 1 to 5.

Step 4: The collector then completes the information required for step 4 (signature, name, date and time of the collection and name of the delivery service) as well as copy 1 of the CCF, inserts it in a leak-proof plastic bag and hands the specimen package to the delivery service. A five-page carbonless document is completed and the copies of the CCF are distributed as follows:

- The original copy stays with the specimen in transit until the confirmatory laboratory takes possession of the urine specimen. All the information recorded during the collection will be indicated on the original, except the results of the preliminary assay obtained performed on site.
- Copy 2 is sent directly to the MRO.
- Copy 3 is the collector's copy.
- Copy 4 is sent to the organization's representative (DER).
- Copy 5 is given to the donor after the specimen collection procedure is completed.

2.8.2 Alcohol breath testing collection protocol

Please see the discussion below.

2.9 Refusal to test⁹⁶

The regulatory definition of “refusal to test” includes the following events that may happen at the collection/alcohol testing site if the donor fails to:

- appear at the collection site on time after instructed by the DER.⁹⁷ Typically, within two hours of the instructed time (not applicable for a pre-employment test)
- remain at the collection site after the collection commenced
- permit an observed/monitored specimen collection⁹⁸
- cooperate with the drug-testing process
- refuse to donate a second specimen at the instruction of the collector or employer.
- provide an adequate specimen with no legitimate excuse as decided by the MRO after a medical evaluation or refuse to undergo a medical evaluation as requested by the MRO.

Submitting an adulterated specimen is also viewed as a refusal to test.

2.10 Specimen testing and reporting

2.10.1 Drug testing in urine

In terms of the SAMHSA guidelines, the minimum analytical testing requirements are an initial preliminary test for each class of drugs and specimen validity testing (SVT) for creatinine, pH and oxidizing adulterants. If any of the initial tests are “non-negative” or specimen validity tests are out of the normal range, a second test with a different technique on a forensically acceptable level is employed to confirm the presence/absence of the

⁹⁶ Swotinsky & Smith *supra* n58.

⁹⁷ A person selected to perform a test may delay arriving at the collection/alcohol testing site in order to take precautionary steps to avoid a positive test result. As is the case with consuming large volumes of fluid, delays may also cause drug and alcohol concentrations in the body to be lowered due to the metabolism eliminating the drug/alcohol.

⁹⁸ An observed specimen collection takes place after a donor was found guilty of tampering and adulteration during a previous drug test or collection.

suspected drug in a different aliquot from the original specimen that was collected. The laboratories should use people certified by SAMHSA.

After receiving the specimen, the confirmatory laboratory should first inspect the tamperproof seal and confirm that it is intact before it is opened. This is an important aspect to guarantee the chain of evidence.

Table 2.2: Summary of the type of tests required for drugs and alcohol for preliminary- and confirmatory testing

	Compounds	Initial tests	Confirmatory tests
Drugs	Drugs as per the CCF form in Appendix A	Immunoassay	Gas Chromatography-Mass Spectrometry (GC-MS)
SVT⁹⁹	Creatinine	Colorimetric testing	Multi-wave spectrophotometer
	pH	Colorimetric testing	pH meter
	Strong oxidizing chemicals	Colorimetric testing	ICP-MS ¹⁰⁰ , AAS ¹⁰¹ , capillary electrophoresis

⁹⁹ Specimen validity testing (SVT) is performed on markers that will indicate in-vivo and in-vitro tampering with the specimen during and before the collection of the specimen. There are numerous ways in which tampering can take place, for example consumption of excessive amounts of fluid, changing of the urine pH by taking lemon juice or vinegar; taking a diuretic will dilute the drug concentration to below the cut-off concentration limit; strong oxidants like swimming pool chlorine under the donor's nail will destroy a drug if he/she dips his finger in the specimen; condoms with "clean" urine from another person are sometimes used unnoticed, pretending that the person urinates.

¹⁰⁰ Inductively Coupled Plasma Mass Spectrometry (ICP-MS).

¹⁰¹ Atomic-Absorption Spectrophotometry.

	Alcohol	Preliminary breathalyser, colorimetric test, flashing light, etc.	Evidentiary breathalysers with two independent detection techniques ¹⁰²
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Table 2.2 summarizes the type of tests and techniques to be employed. The techniques employed for confirmation are generally a few steps higher in technology to act on a forensically accepted standard. The initial tests can be performed in a primary laboratory (on site) or by a secondary laboratory, typically in the facility where confirmatory analysis is performed.

The preliminary assay cut-off concentrations are summarized in the table below:¹⁰³

Table 2.3: Summary of the initial preliminary assay cut-off concentrations for drugs and alcohol

Drug class	Preliminary Cut-off concentration limit (ng/mL)
Marijuana metabolites	50
Cocaine metabolites	300
Opiate metabolites	2000
Phencyclidine	25
Amphetamines	1000

¹⁰² Problem in SA with two preliminary breathalysing tests being viewed as a confirmation, a preliminary breathalyser with a result printout is not viewed as confirmatory. A second concern in SA are that all breathalysers and drug testing kits are not the same across the organization, which could lead to discrimination towards an employee.

¹⁰³ Mandatory Guidelines for Federal Workplace Drug-Testing Programs FR 53(69) par 119701 1988-04-11 <http://workplace.samhsa.gov>.

Alcohol	0.10 mg per liter of breath
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It is important to keep in mind that the preliminary testing device technology can only be employed to raise “objective reasonable suspicion”. These devices are not selective enough to unequivocally confirm the presence of a drug residue in the urine specimen. All non-negative results should be referred for confirmatory testing. Specimens suspected of being tampered with should also be shipped to a confirmatory laboratory.

The confirmatory cut-off concentrations are as follows:

Table 2.4: Summary of the confirmatory analysis cut-off concentrations

Drug	Confirmation cut-off concentration limit (ng/mL)
Marijuana metabolite (delta-9-THC-9-COOH)	15
Cocaine metabolite (benzoylecgonine)	150
Opiates	
Morphine	2000
Codeine	2000
6-Acetyl morphine (tested when the morphine concentration is greater than 2000 ng/mL)	10
Phencyclidine	25
Amphetamines	
Amphetamine	500

Methamphetamine (Specimen must also contain 200 ng/mL amphetamine)	500
Breath alcohol	0.10 mg per liter of breath

A complete guideline for SVT can be obtained in the guidelines.¹⁰⁴

The confirmatory laboratory also takes part in an **extensive quality assurance program** at **three levels**, namely:

- Internal open and blind specimens constituting 10% of the daily, routine specimen workload (these are constructed by the laboratory as part of their daily testing protocols).
- External open performance testing specimens, which are distributed quarterly (these are prepared by the government or a sub-contractor).
- Double-blind QC specimens, which constitute 1% of the total number of specimens submitted to the laboratory for analysis, not to exceed 100 per three months; 80% of these specimens are negative for drugs.
- Federal agencies are required to obtain these from reputable accredited suppliers.

2.10.2 Breath alcohol testing

Breathalysing tests can also be viewed in two categories, namely preliminary and evidentiary (confirmatory) tests. The preliminary test is normally not as accurate the confirmatory breathalyser and is also not subjected to as stringent quality control as the confirmatory test. Preliminary breathalyser technology is normally based on colour changes and fuel cells and

¹⁰⁴ Urine Specimen Collection Handbook *supra* n92.

can be performed in breath or saliva. The proposed breath alcohol testing protocol is indicated below.

Table 2.5: Summary of the breath alcohol testing protocol

<p>Step 1: Donor is identified with photographic identification and personal details are recorded.</p> <p>Step 2: The donor is then subjected to a fifteen-minute observation period during which he is actively observed by the BAT¹⁰⁵.</p> <p>Step 3: An air blank analysis is performed first.</p> <p>Step 4: The donor provides a breath specimen by blowing into the confirmatory breathalyser to register the first alcohol test result.</p> <p>Step 5: A second air blank analysis is performed.</p> <p>Step 6: The donor provides a second breath specimen to register a second alcohol test result. The mean of the two alcohol results is calculated.</p> <p>Step 7: A second air blank analysis is performed.</p> <p>Step 8: A control gas specimen with a certified alcohol concentration is analysed.</p>

It is of vital importance that the first step is performed promptly and accurately, as this is the link between the result and the donor. The observation period is part of the protocol to counter all claims of residual alcohol in the buccal cavity (cough syrup, mouth wash, etc.). Air blanks are performed between each alcohol test to ensure that there is no chance of carry-over from the previous analysis. The first air blank provides proof that the air in the room

¹⁰⁵ The donor may not smoke or consume any fluids during the observation period. The BAT must also be on the lookout for strange behaviour like regurgitation and belching.

does not contain alcohol. Two breath alcohol test results are recorded and the mean value reported.

The quality control process is extremely important (besides the high standard of training required for the BAT). Firstly, the two individual test results may also not differ by more than a certain percentage. Secondly, the control test result must provide proof that the evidentiary breathalyser provided a result within the tolerance of the certified control gas control specimen. Proof that the instrument was functioning at the specific time the testing took place is required and not only the usual periodic calibration by a calibration laboratory.

An evidentiary breathalyser operates on the principle of a simultaneous measurement by two independent techniques. This can be either fuel cell or infra-red techniques, which will have sufficient selectivity to prevent interference of metabolic substances that occur in the breath naturally.

2.11 Medical review of test results

2.11.1 Drug testing

After the analysis is completed by a SAMHSA-accredited laboratory, the guidelines prescribe that the results be reported to an agency's MRO. An MRO is a licensed physician who reviews the test result. If the result is confirmed to be negative, no further action takes place and the employee is reinstated in his daily task with no further consequences. If the result is a confirmed positive test result, the MRO has to assess whether it could have been caused by prescription medication, diet, herbal products, or even self-medication without legal prescription or by borrowed prescription medicine. The MRO should contact the donor to give him/her the opportunity to discuss the results before making a final decision on the result. The donor may also request a second test on the split specimen retained in the

confirmatory laboratory. This is then normally performed by a second certified laboratory. If there is a legitimate explanation for the presence of the drug in the donor's specimen, the MRO may report the result to the employer as negative. If there is no alternative explanation, the MRO reports the result to the employer as positive.

2.11.2 Alcohol testing

An alcohol testing result generally requires no medical review since the result can stand on its own. An exception to this would be in the case of a "shy lung" when the donor could not supply a sufficient volume of breath and the MRO has to confirm the medical condition.

2.11.3 MRO report

The MRO communicates the information of the outcome to the employer representative or the DER in the specific agency in a secure manner after verification/review of the test result. The comments limit the information to protect the individual. Copy 1, received from the confirmatory laboratory, is not sent to the employer as the information indicated on this may allow the employer to gain access to information like laboratory positive/adulterated/substituted results that the MRO has changed to negative or cancelled. (Please refer to Appendix 4 for an example of a urine drug test report).

The possible verification outcomes that may be indicated in the MRO report are the following:

- *Negative*: if the test result is negative or if changed to negative by the MRO.

- *Positive*: if the laboratory result is confirmed positive with no legitimate excuse.
Drugs/metabolites information is included with no reference to drug concentration levels.¹⁰⁶
- *Refusal to test*: The result is reported as “refusal to test” and a reason is provided. Please refer to section 2.9 above for the definition of refusal to test.
- *Cancelled*: if the test is cancelled with a reason.
- **Dilute**: The following two options may be encountered
 - *Positive dilute*: The employer should treat this as a positive.
 - *Negative dilute*: Creatinine concentration will direct the MRO on what to do next.¹⁰⁷
- *Retest*: for instance, because of a problematic collection.
- *Safety risk or medical disqualification*: If the MRO identified a safety risk or medical disqualification concern, it can be indicated as “safety risk”. The details can then be communicated to the occupational health doctor or health care professional making the determination of fitness for duty.

2.12 “Standing down” an employee

“Standing down” refers to the removal of an employee from a safety-sensitive position for the period from the suspected drug violation test until after the MRO has reviewed the test result and has informed the DER. Standing down an employee before receipt of the MRO report may compromise confidentiality and is not in line with the function and purpose of the MRO. A balance has to be struck between the employee’s rights and safety since he/she

¹⁰⁶ The drug concentration levels can be reported later if the test is challenged or as part of an administrative process.

¹⁰⁷ Creatinine 2-5 mg/L: MRO informs the DER to retest immediately under direct observation. If negative again and found to be negative, the test is accepted as negative. If creatinine is higher than 5 mg/L, the employer is informed that the employee may be retested once, but not under direct supervision.

may also be a risk to himself, colleagues and the public, and all regulated employers have to apply for permission from the DOT to stand down an employee.

A written stand-down policy is required and should involve the following:

- Equal treatment for all employees in a particular job category
- Confidentiality of the pending result
- Continued pay and benefits for the employee during the stand-down period to a maximum of five days, unless the MRO requires more time to come to a conclusion.
- Removal of all records of positive, adultered/tampered, substituted results as well as laboratory results if the MRO verifies the result as negative.

2.13 Employee Assistance Program¹⁰⁸

An EAP provides confidential assistance concerning problem identification, counselling, referral to treatment, support and guidance through treatment and rehabilitation. The EAP also assists with the training and education related to drug dependency matters.

2.14 Service agents

The employer may use third-party administrators to handle all the administrative processes for an employer. These services include specimen collection, laboratory testing, random selections, background checks, supervisor/employee training, MRO review, record maintenance and assistance with audits by the government.

The employer is ultimately held responsible for all aspects of the program and the employer may be subject to civil penalties from the government agency. The employer may also become involved in litigation due to the termination of an employee's service, based on a

¹⁰⁸ Swotinsky (ed) *The Medical Review Officer's Guide to Drug Testing* (1992) 10, 47, 141.

non-compliant drug testing service, with serious implications for the organization's drug-free program. The service providers are also liable in terms of the Public Interest Exclusion Act (PIEA) whereby a service provider can be barred from providing services to any government agency.¹⁰⁹

¹⁰⁹ Title 49 CFR part 29 Government-wide Debarment and Suspension (Non-procurement) and Government-wide Requirements for Drug-free Workplace (grants).

CHAPTER 3

MEDICO-LEGAL ASSESSMENT OF THE USA MANDATORY GUIDELINES AS A PROPOSED FRAMEWORK FOR A DRUG AND ALCOHOL-FREE WORKPLACE IN SOUTH AFRICA

3.1 Republic of South Africa's legal framework

The legal framework for a drug and alcohol-free program in South Africa will be discussed in terms of the CSA, common law, statutory law and policies and guidelines.

3.1.1 Constitution of South Africa

In the founding provisions of the CSA it is stated that: "the Constitution is the supreme law of the Republic and law or conduct inconsistent with it is invalid and the obligations imposed must be fulfilled."¹¹⁰ The CSA finds application in many aspects of a drug and alcohol-free workplace program.¹¹¹ The HHS Guidelines for a drug and alcohol-free workplace program (as discussed in Chapter 2 of this work) will be tested against the Bill of Rights¹¹² and discussed in this chapter.

- Section 8: The Bill of Rights binds not only legislature, the executive, the judiciary and all organs of state, but also natural and juristic persons to the extent that the right is applicable with cognisance of the right and the duty imposed by the right.
- Section 9: Equality – Everyone is equal before the law"¹¹³ and no unfair discrimination is allowed.¹¹⁴

¹¹⁰ CSA ch 1 s 2.

¹¹¹ CSA ch 2 s 8(3).

¹¹² CSA ch 2.

¹¹³ CSA ch 2 s 9(1): "Everyone is equal before the law and has the right to equal protection and benefit of the Law".

¹¹⁴ CSA ch 2 s 9(3).

- Section 10: Human dignity – Everyone has inherent dignity and the right to have their dignity respected and protected.¹¹⁵
- Section 12: Freedom and security of the person – Everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body and not to be subjected to medical or scientific experiments without their informed consent.¹¹⁶
- Section 14: Privacy – Everyone has the right to privacy.¹¹⁷
- Section 23: Labour relations – Everyone has the right to fair labour practices.¹¹⁸
- Section 24: Environment – Everyone has the right to an environment that is not harmful to their health or wellbeing.¹¹⁹
- Section 32: Access to information – Everyone has the right of access to any information that is held by another person and that is required for the exercise or protection of any rights”.¹²⁰
- Section 35:
 - (1) Just administration: Everybody has the right to administrative action that is lawful, reasonable and procedurally fair.
 - (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

¹¹⁵ CSA ch 2 s 10: “Everyone has inherent dignity and the right to have their dignity respected and protected”.

¹¹⁶ CSA ch 2, subs 12(2) (b & c): “Everyone has the right to bodily and psychological integrity, which includes the right: to security in and control over their body and not to be subjected to medical or scientific experiments without their informed consent.”

¹¹⁷ CSA ch 2 s 14: “Everyone has the right to privacy”.

¹¹⁸ CSA ch 2 s 23(1): “Everyone has the right to fair labour practices”.

¹¹⁹ CSA ch 2 s 24(a): “Everyone has the right to an environment that is not harmful that is not harmful to their health and wellbeing”.

¹²⁰ CSA ch 2 s 32(b): “Everyone has the right of access to any information that is held by another person and that is required for the exercise or protection of any rights”.

- The abovementioned rights are not absolute and may be limited by section 37 (Limitation clause) in the context of section 39 (Interpretation clause).
- The CSA provides for the recognition of international law to a substantial extent in the Bill of Rights¹²¹ and section 232 of the CSA provides that “Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”.¹²²

3.1.2 Common Law criteria related a drug and alcohol free workplace

Employee: The employee is obliged to perform his/her duties effectively and efficiently according to his/her contract. If the employee does not comply with this, the employer may terminate the contract of employment on the basis of misconduct/incapacity or may claim damages contractually. By reporting for duty in an impaired/intoxicated state, the employee is in breach of his contract with the employer and the employee may be send him home without payment since he/she could not perform as expected. The employer may assess the matter in terms of incapacity and misconduct. If the employer finds that the latter prevails, disciplinary action can be taken and the services of the employee may be terminated. Damages can also be claimed by the employer if harm was caused by the employee not performing his duty in a competent manner, as per the contract.

Employer: The employer also has a contractual responsibility towards its employees, contractors (and their employees) and the public. There is a duty on employers to establish safe working conditions for their employees.¹²³ If the employer has a reasonable suspicion

¹²¹ S 39(1)(b) and (c) of the CSA requires the consideration of foreign and international law in the process of interpretation of the Bill of Rights.

¹²² S 232 of the CSA.

¹²³ Van Niekerk *et al Law @ Work* (3rd ed) (2015) 93.

that the employee may be harmed/injured, he may ask the employee to undergo tests, to such an extent that he is convinced that the employee is not under the influence of drugs or alcohol. If the employee is found to be under the influence of an intoxicating substance, he/she should not be allowed to enter the workplace.

The CSA also imposed a reciprocal common law contractual duty on both employees and employers to treat each other with respect and dignity. The employer also has to treat the employee with respect in terms of the contract and not conduct itself in a manner that destroys the relationship of trust and confidence with the employee.^{124,125} This duty extends not only to the provision of safe machinery and safety clothing/equipment, but also to ensuring that the employees are not under the influence of an intoxicating substance and cause harm to fellow employees (the public). It has its origin in either law of contract or law of delict. If the employer does not comply with these criteria and an employee is harmed, it can be viewed as a breach of contract and the employee may claim for damages from the employer. If the employer was negligent, the employee will have a claim of delict. However, if the employer did not provide safety clothing as agreed per contract, it may initiate a contractual claim.

It is advisable for the organization to include the fact that the employee will have to respect the drug and alcohol-free workplace program as part of the contract of employment. It should also bring the fact that drug and alcohol testing will be conducted in the interest of health and safety to the attention of the prospective employee.

¹²⁴ Bosch "The implied term of trust and confidence in South African Labour Law" 2006 *International Law Journal* 27.

¹²⁵ Van Niekerk *et al supra* n124 94.

3.1.3 Statutes related a drug and alcohol free workplace

Statutory recognition and incorporation of International Labour Organization

standards

The International Labour Organization's (ILO) support for a drug and alcohol-free workplace program with testing finds expression in the European Guidelines for Workplace Drug Testing.^{126,127} The ILO code includes alcohol and drug abuse as one of the conducts justifying dismissal.¹²⁸ A distinction has to be made between incapacity and misconduct of the employee. The former will have a more sympathetic approach; however, the latter will warrant severe disciplinary action, including dismissal.

The Labour Relations Act (LRA)¹²⁹ specifically recognizes the international law obligations of South Africa by virtue of its membership of the ILO.¹³⁰ A similar provision is also made in the Employment Equity Act (EEA) with reference to the ILO convention.¹³¹

- ***The LRA***¹³² is the principle statute regulating collective and individual rights and providing protection to individual employees against unfair dismissal and labour practices. It also regulates trade unions and provides for dispute resolution agencies like the CCMA and labour courts. The LRA¹³³ specifies potential reasons for unfair dismissal in

¹²⁶ Protection of Personal Information Act 4 of 2013 (POPI Act).

¹²⁷ European Guidelines for Workplace Drug Testing in Urine/Saliva and Hair, www.ewdts.org (Accessed 2017-01-02).

¹²⁸ Van Niekerk *et al supra* n124 276.

¹²⁹ Labour Relations Act 66 of 1995 (LRA).

¹³⁰ S 1(b) and s 3(a), (b) and (c) of the LRA.

¹³¹ Employment Equity Act 55 of 1998 (EEA) s 3: Interpretation of the Act.

¹³² LRA.

¹³³ S 188 of the LRA.

section 188, which is in accordance with the ILO requirements.¹³⁴ This includes misconduct/capacity within the operational requirement of the establishment and also that he/she will not be terminated unless he/she was given an opportunity to defend himself/herself against the allegations made.

- **The EEA**¹³⁵ prohibits unfair discrimination, which is also applicable to policies and procedures. It is also applicable to access to employment with reference to pre-employment drug and alcohol testing.

The Acts that regulate health and safety in the workplace and establish compensatory schemes for occupational diseases and injuries are:

- **The Occupational Health and Safety Act (OHSA)**¹³⁶

Obligations of the employee: Every employee should take reasonable care for the health and safety of himself and of others who may be affected by his acts or omissions.¹³⁷ He/she should furthermore carry out any lawful order given to him, and obey the health and safety rules and procedures laid down by the employer in the interest of health and safety.¹³⁸ An unsafe or unhealthy situation should be reported as soon as practically possible to the employer or health and safety representative who shall report it to the employer.¹³⁹ The employee should also report all incidents which may affect his health or which have caused

¹³⁴ International Labour Organization Convention on the Termination of Employment at the initiative of the employer 158 of 1982. Article 4 states that: a worker shall not be terminated unless there is a valid reason related to capacity/conduct of the worker or based on the operational requirements of the undertaking.

¹³⁵ EEA.

¹³⁶ Occupational Health and Safety Act 85 of 1993 (OHSA).

¹³⁷ S 14(a) of the OHSA.

¹³⁸ S 1(4)(b)(c) of the OHSA.

¹³⁹ S 14(d) of the OHSA.

injury himself or to his employer or health and safety representative as soon as is practically possible.

Obligations of the employer: An employer should provide and maintain a working environment that is safe and without risk to the health of his employees¹⁴⁰ and take all necessary measures to ensure that the requirements of the Act are complied with by every person in his employment or on his premises under his control where plant or machinery is used.¹⁴¹ These measures should be enforced to the extent that is required in the interest of health and safety.¹⁴²

Section 2A of the “The General Safety Regulations”¹⁴³ of the OHSA specifically provides for the prohibition of access to the workplace by any person who is (or appears to be) under the influence of intoxicating liquor or drugs.¹⁴⁴ It is furthermore specified that no person may be under the influence in the workplace or have intoxicating substances in his possession or offer intoxicating substances to another person, or take part in offering.¹⁴⁵ An employer may not allow an employee to perform duties in the workplace if the side effects of medication that is taken by the employee constitute a threat to the health or safety of the employee or other persons in the workplace.¹⁴⁶

- **General Safety Regulations of the Machinery and Occupational Safety Act 6 of 1983 (MOSA).**¹⁴⁷ (This Act has been repealed but its regulations are still applicable).

¹⁴⁰ S 8(1) of the OHSA.

¹⁴¹ S 8(2)(b) of the OHSA.

¹⁴² S 8(2)(h) of the OHSA.

¹⁴³ GN R1031 GG 10252 of 1986-05-30 s 2A.

¹⁴⁴ *Ibid* s 2A (1).

¹⁴⁵ *Ibid* s 2A (2).

¹⁴⁶ *Ibid* s 2A (3).

¹⁴⁷ General Safety Regulations of the Machinery and Occupational Safety Act 6 of 1983 (MOSA).

Regulation 12(2) of the MOSA states:

"At a workplace or on premises where machinery is used, no person shall have in his possession or partake of or offer any other person intoxicating liquor or drugs, except with the express permission of the employer..."

Regulation 6 of the General Administrative Regulations of the MOSA states that:

"...every employee shall:

- (a) carry out any lawful order given to him and shall obey the safety rules and procedures laid down by his employer or by anyone authorised thereto by his employer, in accordance with or for the proper observance of the provisions of the Act or the regulations or in the interest of safety; and*
- (b) where a situation which is unsafe at or near his workplace comes to his attention, as soon as possible report such situation to a safety representative or to his employer"*

The regulation in the MOSA dealing specifically with intoxication states the following:

"An employer shall not permit any person who is or who appears to be drunk or under the influence of drugs, to enter or remain at a workplace or on the premises where machinery is used if such person's presence constitutes a threat to the safety of himself or other persons at such workplace or on such premises".

- ***The Compensation for Occupational Injuries and Diseases Act (COIDA)***¹⁴⁸

The COIDA classifies intoxication as a "serious and wilful misconduct" and that no compensation will be provided if the employee behaved in such a manner. Section 35(1) of the COIDA provides immunity to employers against certain claims of delict. The Act initiated

¹⁴⁸ The Compensation for Occupational Injuries and Diseases Act (COIDA) 130 of 1993.

the establishment of a statutory insurance scheme directing that employees must claim compensation for occupational injuries and diseases from the commissioner instead of their employer.¹⁴⁹ It should be noted that harm caused to an employee due to drug abuse is outside the course of the employee's employment and therefore the employer is liable in terms of breach of his common law contractual relationship with the injured employee.¹⁵⁰

Acts, guidelines and policies related to specimen collection, laboratory analysis and the verification of test results in a drug and alcohol-free workplace:

- ***The National Health Act of South Africa (NHA):***¹⁵¹ Section 18 of the NHA dictates that "informed consent" must be obtained from a user.
- ***Protection of Personal Information Act (POPI):***¹⁵² The purpose of the POPI is to ensure that all South African institutions conduct themselves in a responsible manner when collecting, processing, storing and sharing another entity's personal information by holding them accountable should they abuse or compromise personal information in any way. The POPI legislation considers an individual's personal information to be private and therefore aims to provide the individual certain rights of protection and the ability to exercise control over when and how to allow sharing of information by providing consent.
- ***Health Professions Act (HPA):***¹⁵³ Ethical Rules of Conduct for Registered Health Professionals provide prescriptive guidelines for obtaining consent from a person.

¹⁴⁹ COIDA does not cover all harms that may be caused in the workplace.

¹⁵⁰ *Media24 Ltd and another v Grobler* [2005] 7 BLLR 649 (SCA).

¹⁵¹ S 18(2)(f) of the National Health Act 61 of 2003 (NHA).

¹⁵² POPI Act.

¹⁵³ HPA Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act (Ethical rules).

- **The National Health Act (NHA):**¹⁵⁴ The NHA states that all patients have a right to confidentiality and this is consistent with the right to privacy in the CSA.
- **Medical Protection Society of South Africa Guide** to Consent for Medical Treatment in South Africa.¹⁵⁵
- **Health Professions Council of South Africa (HPCSA):** Guidelines for Good Practice in the Healthcare Professions of South Africa, seeking patients' informed consent: The ethical considerations (Booklet 9) and Health Professions Council of South Africa (HPCSA): Guidelines for Good Practice in the Healthcare Professions of South Africa, Confidentiality: Protecting and Providing Information, Booklet 10, May 2008, Pretoria.¹⁵⁶
- **Registration categories for test laboratory personnel:** Medical testing HPCSA and South African Council for Natural Scientific Professions (SACNASP)
- **Certification categories for Laboratories:** ISO17025.

3.2 Validation of the HHS Mandatory Guidelines within the South African Legal framework

3.2.1 Background

South Africa does not have mandatory guidelines to enable a drug and alcohol-free workplace. Implementing a workplace drug and alcohol-free program which is legally

¹⁵⁴ National Health Act 61 of 2003.

¹⁵⁵ www.medicalprotection.org/southafrica (Accessed 2017-01-07)

¹⁵⁶ Being registered under the HPA gives health care practitioners certain rights and privileges. In return, they have the duty to meet the standards of competence, care and conduct set by the Health Professions Council of South Africa and its professional boards. Health care practitioners hold information about patients that is private and sensitive. The NHA provides that this information must not be given to others, unless the patient consents or the health care practitioner can justify the disclosure. Practitioners are responsible for ensuring that clerks, receptionists and other staff respect confidentiality in their performance of their duties.

defensible, scientifically accurate and ethically sound involves a number of critical stages where legal tension may arise:

- The *policy* of a drug and alcohol-free workplace should respect private illegal/legal drug use by setting cut-off concentration levels that will prevent workers from coming on site in a state of intoxication.
- The *specimen collection* stage where a bio-matrix specimen (urine, saliva, hair, blood, etc.) is obtained from an employee with his/her voluntary informed consent.
- The *analytical testing* of the specimen for the presence of an intoxicating substance (licit or illicit).
- *Reporting and interpretation* of the result, respecting the employees' privacy by treating the test result confidentially.
- *Actions that follow* from the confirmed presence of an intoxicating substance.

Typical legal, scientific and ethical concerns are the following:

- The invasiveness of drug and alcohol testing due to a compromise in privacy, dignity and body integrity.
- Testing may give rise to discrimination and false accusations due to incorrect testing protocols and procedures. Discrimination may arise as a result of labelling of an employee or in the process of deciding who should be tested.
- Testing may reveal information regarding private drug use of the individual (legitimate/prescription as well as illegitimate use).
- Drug test results cannot be employed as an indicator of impairment utilizing some bio-matrices like urine, saliva and hair.
- Doctor-patient relationship of trust may be compromised.

- The reliability of the technology employed for immunoassay and laboratory confirmatory assays is of essence in producing accurate results.
- The type of information the doctor will communicate to the employer.
- A prospective employee's access to his/her test results.

3.3 Key stages of a drug and alcohol-free workplace program

The HHS Mandatory Guidelines of a workplace drug and alcohol-testing program can be evaluated by grouping the different stages of the testing regime into a pre-testing, testing and post-testing phase. Each of these requires careful consideration for the implementation of the guidelines in the South African setting with legal, scientific and ethical compliance in mind.

3.3.1 Pre-testing phase: Policy, specimen collection and onsite preliminary analytical testing

Summary of HHS Mandatory Guidelines.¹⁵⁷

Policy: The policy should list the employer's/employee's responsibilities and accommodate workforce training and education of supervisors and employees. The policy should take a rehabilitative stance as opposed to a punitive one and policing of the workers. Disciplinary action for a verified positive test result as well as for a refusal to test should be detailed to act as a deterrent, but it should be the very last option/solution. The policy should accommodate self-referrals, voluntary testing and an EAP.

The policy should discuss the type of tests (and frequency) as well as the type of specimen (matrices) that will be collected for drug and alcohol testing. The concentration cut-off levels

¹⁵⁷ S 2.4 of this document.

that will be used to prevent a worker from entering the site to perform safety- and risk-sensitive duties should be agreed upon. The detail of the procedures and protocols of specimen collection, transport and laboratory testing should be covered. The test result reporting process and the eventual communication thereof in the case of a non-compliant test result should also be included. The procedures and requirements for a stand-down should also be detailed. The policy should entail an EAP to assist an employee with a drug-abuse problem.

The next step in the pre-testing phase involves the specimen collection and the preliminary on-site analytical testing.

Specimen collection: A specimen needs to be collected in a fashion that guarantees the specimen integrity with due respect for human dignity and privacy. This can be achieved by obtaining the person's voluntary informed consent and the provision of suitable privacy during the donation process.

HHS Mandatory Guidelines on policies, specimen collection and onsite preliminary analytical testing within the South African framework:

An organization may implement a workplace drug and alcohol-free program on authority of the CSA, common law and statute within the guidelines of good scientific practice and ethics. Therefore, a workplace drug and alcohol-free program policy introduced in the interest of health and safety should be tested for compliance against these criteria.

Policy: The South African scenario to a large extent can be compared to the US non-regulated setting. Drafting of a drug and alcohol-free workplace policy in the South African setting should involve the inputs of the workers (or their representatives in a unionized

environment), management, health and safety officials and should include inputs from the security and human resources departments. The policy will then have to be accepted by all involved after a collective bargaining process, and will establish the rules of a drug and alcohol-free workplace program. Scrutiny and acceptance of the policy will enhance cooperation of the workforce, which is one of the goals of a drug and alcohol-free workplace program.

Constitutional perspective: From a constitutional perspective, the rights as specified in the Constitution are intertwined in a workplace drug and alcohol-free program – defiance of one may trigger downstream response with a simultaneous effect on others.

A documented policy will have to be accepted and understood by, and must be accessible for everybody who have to comply with it. It must be available in all eleven official languages of South Africa. The policy needs to be documented as required by section 32 of the CSA, which states that everybody has the right to access any information that is required to protect his/her rights.¹⁵⁸ The acceptance of the policy will ensure that everybody is assured that the policy will pay due respect to dignity, privacy, bodily integrity and also bears relation to section 23 on the right to fair labour practice.

The accommodation of self-referrals and voluntary testing as well as an EAP can be motivated in the same light by referring to section 23.

A rehabilitative approach as opposed to a punitive one will encourage workers to come forward if they have a problem and will encourage co-workers to inform management of a

¹⁵⁸ *President of the Republic of South Africa and others v M &G Media Ltd* 2012 2 SA 50 (CC): Ngcobo CJ said “everyone has the right to access to any information held by the state. It gives effect to accountability, responsiveness and openness as founding values of our constitutional democracy. It is impossible to hold accountable a government that operates in secrecy...”

possible substance abuse problem of a colleague. This will promote the right to an environment that is not harmful and to the health and wellbeing of the workforce as stipulated in section 24 of the CSA.

Employee and supervisor training accords with section 32 in terms of access to information regarding prohibited substances and medications that are not to be taken in terms of the policy, as a preventative measure for the possibility of their rights being compromised.

The reasons for testing (pre-employment, periodic, random, etc.) and selection of employees must be motivated from a risk- or safety-sensitive point of view *without discrimination* against anyone (race religion, day shift/night shift, site, position in the organization, etc.) as per section 9 of the CSA.

Post-incident testing requires some consideration in a non-regulated setting like South Africa. A distinction has to be made between the type of tests in terms of the workplace drug and alcohol-free policy. In terms of outcome and liability, post-accident/-incident testing may have an element of criminal liability and negligence associated with it. The other type of tests may be viewed as preventative tests to maintain the drug and alcohol-free workplace¹⁵⁹. If a drug or alcohol test of an employee were verified to be positive in the case of an incident, there would be an obligation on the employer to inform the authorities so as to not to be criminally liable himself. However, he should inform the employee that the information will be disclosed to the authorities. This will be a defence for intervention without consent of the employee.

¹⁵⁹ S 2.4 of this document: pre-employment testing, periodic medical testing, random testing, return-to-duty testing and follow-up testing.

The type of specimen selected (urine, breath, blood, hair, saliva) has to respect the *dignity, privacy and bodily integrity* of the employee and must serve the purpose of the testing.

Section 35 requires *just administration that is lawful, reasonable and procedurally fair*. It is therefore of the utmost importance to ensure that the information sought from a specific test result is in line with the purpose of the test to ensure that the drug and alcohol testing process is reasonable and procedurally fair. If the intention is to prevent employees from performing a safety-/risk-sensitive task in the workplace, tests have to be conducted to ensure that they do not perform these tasks in an intoxicated state.

Judging a person's degree of intoxication can range from a "clear-cut observation" to a "not so obvious" observation. It can be difficult (and carries a risk of subjectivity) to identify a person who is intoxicated¹⁶⁰ and sometimes it requires extensive medical observations.¹⁶¹

The selection of a worker on the basis of a reasonable suspicion of intoxication will not go unchallenged. A preliminary test for both alcohol and drugs therefore may be regarded as an "objective means" of obtaining a reasonable suspicion to have the "real" test performed, namely the confirmatory assay.

The concept of preventing a person from performing a safety-/risk-sensitive task is also applicable in the choice of the type of bio-matrix that is selected for the drug and alcohol test. The bio-matrices available in the human body for drug and alcohol testing are: blood, saliva, urine, sweat and hair. The HHS guidelines initially recommended the use of urine only; however, saliva and hair testing is now also included in the mandatory guidelines. To obtain information on a person's "current intoxication" status, blood will be of the most value. Saliva

¹⁶⁰ The term of "intoxication" is used regularly to refer a person who is drunk or under the influence of drugs.

¹⁶¹ In the industrial environment where workers work shifts, it is difficult to perform these observations within the limited time available as they enter the premises.

will also provide more “recent” information regarding drug consumption since it mimics blood concentrations up to typically three hours. Drug detection times increase for urine and varies from hours to weeks for a frequent user. Detection times of drugs in hair may be up to years, depending on the length of the person’s hair, but it is the weakest indicator of current intoxication status.

The choice of specimen matrix should also be considered from a forensic perspective. Blood, urine and hair may provide proof that the drug was part of the internal environment of the body. The buccal cavity, however, is not considered to be part of the internal environment of the human body physiologically and, therefore, may be subjected to external contamination, resulting in inaccurate conclusions in terms of intoxication status.

The decision on the specimen matrix that will be obtained for drug testing, will have to be a negotiated one, striking a balance between the information required, invasion of privacy, respect for dignity and scientific accuracy.¹⁶²

By setting cut-off concentration levels in a specific matrix, private drug use (licit and illicit) will be respected as long as the test result concentration does not exceed the cut-off concentration agreed upon in the policy. This will be the zero-tolerance levels above which a stance of zero tolerance will be initiated and action should be taken.¹⁶³ The SAMHSA cut-off concentrations are set at a level that ensures that the employee is not near a state of

¹⁶² It is the opinion of the author that urine is the matrix of choice since it strikes a balance between sampling privacy and scientific viability.

¹⁶³ It is important to note that the zero-tolerance approach should not be confused with one of zero-concentration levels. The first is a stance or approach that “action will be taken” if the cut-off concentration is exceeded. The latter refers to the total absence of drugs and alcohol in the human body, which is impossible from a scientific point of view.

intoxication, but that also accommodates private use within a sufficiently long time delay before the employee enters the organization's premises.¹⁶⁴

Employing a urine matrix as opposed to saliva may impose more restrictions on the private life of the individual, but this may also allow the company to manage its risk more effectively. This may be regarded as paternalistic, which emphasises the need for a negotiated decision regarding the bio-matrix specimen selection for drug testing.

Blood may be regarded as more invasive with a concomitant risk of infection to the worker. Hair specimen analysis may yield information on the worker's past which he/she may regard as private. Breath as a matrix for alcohol testing will provide an indication of the current intoxication status since breath mimics blood alcohol concentrations reliably. Blood as a matrix may be regarded as too invasive since the body has to be penetrated to obtain a blood specimen (by another person).

In the non-regulated environment in South Africa, section 35 is also extremely positive towards the employer supplying consumables for specimen collection. This can also be extended to the purchasing of reliable testing equipment for preliminary drug and alcohol tests as well as alcohol preliminary and confirmatory testing equipment. The employer also has a responsibility in terms of section 35 to ensure the contracting of competent professional drug-testing services, collection officers, medical review officers and external service providers.

The HHS Mandatory Guidelines also prescribe *background checks* for new employees who had been employed in the regulated system previously. In South Africa this would have to be

¹⁶⁴ Please refer to Title 49 CFR part 40: DOT Procedures for the SAMHSA preliminary and confirmation cut-off concentration levels.

done against the backdrop of section 14 requiring consent from a person in order to respect his privacy and in accordance with the POPI Act protecting the privacy of the individual.

Common law perspective: From a South African common law perspective, acceptance of the policy is a contract that binds both the employee and the employer to obey the rules for a drug and alcohol-free workplace. The employer may request the employee to submit himself/herself to a drug or alcohol test on a reasonable suspicion that he/she may harm himself/herself and other employees. The employee may not present at the workplace in a state of intoxication.

Statutory perspective: From a statutory perspective, the LRA allows for collective rights of individuals in the workplace as far as the drug and alcohol-free program is concerned. The LRA distinguishes between misconduct and incapacity within the operational requirements of the organization. The worker's behaviour will be regarded as misconduct if he/she presents at work and does not have a history of drug dependency. His/her conduct will be treated as incapacity if the opposite situation prevails and the employee will then be referred for treatment and has to give his full cooperation.

The LRA also stipulates that the services of the employee may not be terminated without the employee having the opportunity to defend himself. This is in line with the MRO review process, providing the employee a fair chance to mitigate his confirmed positive test result by motivating the positive result with the use of legal prescription medication.¹⁶⁵

¹⁶⁵ In the South African context, this requires extra caution since the use of herbal medication, laced with western medication is a phenomenon that occurs often.

The EEA prohibits unfair discrimination to an employee with regard to policies and procedures placing a high premium on a legally correct, scientifically accurate and ethically sound drug and alcohol-free workplace policy.

The OHSA also allows for a workplace drug and alcohol-free program by enforcing obligations upon the employer and the employee. The obligations bear relation to the health and safety in the workplace with an obligation on the employee to report an unhealthy/unsafe workplace. This implies that he/she has to report a colleague who is under the influence of intoxicating substances. The employer should maintain safe working conditions and therefore may perform workplace drug and alcohol testing in the interest of health and safety.

Section 2A of the “The General Safety Regulations”¹⁶⁶ of the OHSA specifically provides for the prohibition of access to the workplace for any person who is (or appears to be) under the influence of intoxication liquor or drugs.¹⁶⁷ It is also specified that no person may be under the influence in the workplace or have intoxicating substances in his possession or offer intoxicating substances to another person, or take part in offering.¹⁶⁸ An employer may not allow an employee to perform duties in the workplace if the side effects of medication that is taken by the employee constitutes a threat to health or safety to the employee or other persons in the workplace.¹⁶⁹

Statutory requirements for specimen collection

¹⁶⁶ GN R1031 GG 10252 1986-05-30 s 2A.

¹⁶⁷ *Ibid* s 2A(1).

¹⁶⁸ *Ibid* s 2A(2).

¹⁶⁹ *Ibid* s 2A(3).

The POPI Act:¹⁷⁰ The purpose of the POPI Act is to ensure that all South African institutions conduct themselves in a responsible manner when collecting, processing, storing and sharing another entity's personal information by holding them accountable should they abuse or compromise your personal information in any way.

HPA:¹⁷¹ Health Professions Ethical Rules of Conduct for Registered Health Professionals provide prescriptive guidelines for obtaining consent from a person.

The NHA:¹⁷² The NHA states that all patients have a right to confidentiality, which is consistent with the right to privacy in the CSA.

The NHA¹⁷³ Regulations (Regulation No. 375) relating to Health Care Waste Management in Health Establishments require safe disposal of human waste.

Ethical guidelines related to obtaining voluntary informed consent before specimen collection

The Medical Protection Society of South Africa's guide to *Consent to medical treatment in South Africa*¹⁷⁴

The HPCSA: *Guidelines for good practice in the health care Professions, Seeking patients' informed consent: The ethical considerations, Booklet 9*

The HPCSA: *Guidelines for good practice in the health care professions, Confidentiality: Protecting and providing information, Booklet 10*¹⁷⁵

¹⁷⁰ POPI Act.

¹⁷¹ Ethical Rules *supra* n154.

¹⁷² NHA.

¹⁷³ *Ibid.*

¹⁷⁴ www.medicalprotection.org/southafrica (Accessed 2017-01-07).

¹⁷⁵ Being registered under the HPA gives health care practitioners certain rights and privileges. In return, they have the duty to meet the standards of competence, care and conduct set by the HPCSA and its professional boards. Health care practitioners hold information about patients that is private and sensitive. The NHA provides

Urine specimen collection for drug testing

The collection protocol of bio-specimens (urine, hair or saliva) should be considered against the backdrop of the CSA. Common law, applicable legislation, professional policy/guidelines and case law and should be performed by a trained person.

In the US, a collector has to be a qualified and certified professional, but it is unsure whether a collector in South Africa should be registered with the HPCSA and under what scope of practice. A strong case can be made for registration when blood specimens are to be collected, due to the inherent invasiveness of venepuncture. This should be performed by a trained phlebotomist with HPCSA registration under the scope of “medical technologist”, at a minimum. One should perhaps also consider the reason for the test. If the test is performed for medical or diagnostic purposes, the specimen collector requires professional registration in South Africa.¹⁷⁶ Collecting a urine/saliva specimen in the interest of safety and security may not be regarded as a medical test collection. This may grant the collector exemption from HPCSA registration as required for medical/pathological tests. Urine donation is also performed by the donor himself with no intervention by the collector. The collector will certainly require training, which must include instruction on:

- the collection process
- chain of custody procedures
- processes involved with problem collections (“shy bladder” and out of range temperature observations)

that this information must not be given to others, unless the patient consents or the health care practitioner can justify the disclosure. Practitioners are responsible for ensuring that clerks, receptionists and other staff respect confidentiality in their performance of their duties.

¹⁷⁶ HPA.

- the responsibility of the collector for maintaining donor privacy, confidentiality of information and specimen integrity
- defending the collection protocol in a disciplinary hearing or a court of law.

It is also recommended that the collector, after having received training, be evaluated to verify his understanding of the issues and to perform mock collections to assess his/her proficiency.

It is also recommended that if HPCSA registration is not required for specimen collection, the points as mentioned above should be included in the job description of a specimen collector, providing some leverage that he/she should obey the ethical guidelines that would have been set by the HPCSA on how to obtain consent and how to respect dignity and privacy.

Constitutional requirements for specimen collection

Section 12: According to section 12 of the CSA “everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body”.

The concept of “physiological integrity” can be considered from a pure physiological/medical point of view that the physiological integrity of a human is disturbed if homeostatic mechanisms are disrupted. A wound or penetration of the body (drawing blood) can be seen a disruption of homeostasis. Collecting a urine/saliva specimen, where an employee is not even touched by the collector, would be difficult to define as a compromise to bodily integrity from a physiological point of view. Hair specimen collection is performed by physically touching the donor’s body hair. Therefore, the collection process can be graded as “physiological invasiveness”; with blood collection being the most invasive.

Psychological integrity is also covered by section 12, as this also belongs to the person and resides within the human body. The specimen collection and employee selection process may impose psychological invasion on a person.

Section 10 of the CSA also applies to the collection of a bio-specimen, since it may strike at the “dignity” clause whereby human dignity may be disrespected by urine donation, especially in the case of an observed specimen collection. This is also applicable to the selection process whereby the employer selects/nominates employees to undergo a drug or alcohol test. If the approach is not sensitive towards the person, he/she may feel offended or even labelled. It should be kept in mind that the bulk of the workforce are honest and hardworking citizens.

Section 14 of the CSA may also be invoked during the collection process if an employee is not allowed the required privacy to donate the specimen or if the collector is not of the same gender.

The doctrine of “consent” is a paradigm shift away from medical paternalism towards autonomy of the person, which accords with the Bill of Rights.^{177,178} “Patient autonomy” is a concept that was referred to in 1923 already in the case of *Stoffberg v Elliott*¹⁷⁹ where the judge stated that:

“ In the eyes of the law every person has absolute rights which the law protects. They are not dependent on statute or contract, but they are rights to be respected, and one of the rights is absolute security to the person... any bodily interference or restraint of man’s person which is not justified in law, or excused in law or consented to is a wrong, and for that wrong the person

¹⁷⁷ Carstens & Pearmain *supra* n48 877.

¹⁷⁸ CSA s 12: Freedom and security of the person.

¹⁷⁹ *Stoffberg v Elliott* 1923 CP 148.

whose body has been interfered with has the right to claim such damages as he can prove he has suffered owing to that inference".¹⁸⁰

Consent must be informed^{181,182,183,184} and it is the prerogative of the patient to permit or refuse¹⁸⁵ the procedure. Below is a summary of the requirements for voluntary, free, informed consent:

- Consent should be voluntary and free.
- Submission for the test does not imply consent.
- Consent should be explained to the worker in his native language, which involves eleven official languages in the South African context.¹⁸⁶
- The person should be informed what the nature of the test is.
- The type of tests that will be carried out should be explained and it should be procedure specific.¹⁸⁷
- What the consequences of a positive test result would be.
- What the results would be used for.
- Consent should be given in writing.
- Consent can be withdrawn at any stage of the process, from specimen collection stage to the test result reporting to management.
- Refusal of consent should not be seen as an acknowledgement of guilt, but should rather be treated as a refusal to test, with its accompanying consequences.

¹⁸⁰ Carstens & Pearmain *supra* n48 879.

¹⁸¹ Howard & Bogle *Medical Law and Ethics* (2004) 25.

¹⁸² Beauchamp & Childress *Principles of Biomedical Ethics* (3013) 120.

¹⁸³ Moodley (Ed) *Medical Ethics, Law and Human Rights* (2014) 43.

¹⁸⁴ Herring *Medical Law and Ethics* (2014) 155.

¹⁸⁵ NHA.

¹⁸⁶ In *Lymbery v Jefferies* 1925 AD 236 Wessels referred to the fact that there is a distinction between what the patient should have understood as opposed to what he really understood.

¹⁸⁷ Carstens & Pearmain *supra* n48 876.

- The donor does not have to declare the use of any medication.

Voluntary informed consent is a golden thread throughout the testing process. Consent must be obtained at different stages and levels since consent is a continuous process, which may be withdrawn at any stage, namely:

- At the acceptance of the policy by the worker
- Before sampling and testing can proceed
- Before results are released by the laboratory
- Before releasing any result to human resources/management

In the South African setting, voluntary informed consent is of prime importance before commencement of the specimen collection procedure and it is the duty of the collection officer to obtain consent from the employee.

Referring to the Consent and Release Form (CRF) in Appendix 2 and the CCF form, the following comments and observations with regard to the South African setting is applicable.

The consent aspect in the regulated US setting falls short in the following ways:

CCF

The mere observation by the donor of the collector completing the CCF and signing his/her initials on the seals and labels after the collection, cannot be viewed as voluntary informed consent since submission to a test is not regarded as consent. Furthermore, no provision is made for a consent section of the CCF form.

CRF¹⁸⁸

There is no indication that consent is provided voluntarily and free. The consent is not procedure specific and is not specific as to whom he/she will allow to receive test result.

Consent to release is requested in an “umbrella” and generic fashion with no specific person named, for example: to the MRO, DER, the appropriate state agencies, etc. There is also no opportunity for the employee to designate himself or an indication of what the results will be used for and the consequences of a positive test result.

The fact that consent cannot be withdrawn once the specimen is submitted because the sample is then regarded as “part of the mandatory process”, is also not in line with the principles of voluntary consent. It can therefore be deduced that the level of consent in the US Mandatory Guidelines is not sufficient to comply with the South African legislative framework.

It should be noted that refusing to submit for a drug or alcohol test should **not** be regarded as an admission of guilt and should **not** be treated the same as a verified positive test result.

It should rather be addressed as non-compliance in terms of the contract of employment which may have the same end result as a verified positive test result would have had.

On-site preliminary testing

The collection officer usually performs the urine validity testing as well as the preliminary drug test with an integrated split cup configuration, which functions on the principle of immunoassay. The same reasoning as above applies to the collection officer regarding the HPCSA registration requirement to allow him/her to perform a preliminary urine test. If the

¹⁸⁸ *Casstell v de Greef* 1994 4 SA 408 (CC).

test is not a medical or pathological test, the collector may be exempted from professional registration. The collection officer, however, should be trained in the use of these testing devices, even though they are fairly simple. If there is any doubt in the outcome of preliminary test, the protocol should direct him/her to forward the specimen to the confirmatory laboratory, which will perform the test on a forensically acceptable standard.

The preliminary test should be triggered in the presence of the donor and the test result recorded. If the result is non-negative and all indications were that no adulteration took place, the test result should be recorded as negative, with no further action required. If there is a suspicion of adulteration, the collector may ask the donor to submit a second specimen.

If there is any suspicion by the specimen collector that the donor is under the influence of some substance not covered by the normal array of immunoassay tests in the split cup, the specimen should be referred for confirmatory testing.

If the preliminary assay test result is non-negative, the sealed urine specimen should be referred for further testing, which will involve confirmatory testing.^{189,190}

In terms of section 23 of the CSA it is the right of the donor to have access to his preliminary test result. A positive test result should not be used to exclude a prospective employee from being employed. Drug testing should be part of a post-offer testing regime, with the prerequisite that the person must pass the drug test. If the test result is non-negative, the

¹⁸⁹ It is important to submit all non-negative specimens for confirmation, even if the donor confesses that he/she used drugs. It is important to refer to the correct terminology of "non-negative" and no reference should be made to positive test results at this stage.

¹⁹⁰ It is important not to take any decisive action at this stage since the preliminary assay can be employed to raise objective reasonable suspicion only.

specimen should also be referred to the confirmatory laboratory for further testing, similar to that of an employee.¹⁹¹

An often forgotten aspect of urine preliminary assay is the safe disposal of urine specimens where the collector has an obligation to dispose of the urine specimen in a safe manner, as prescribed in the specific regulation of the NHA.¹⁹²

3.3.2 Drug testing and reporting phase

Laboratories in South Africa are not obliged to have accreditation, as is the case in the US where the testing laboratories have to have SAMHSA accreditation. There are no regulations/law prescribing/dictating the certification of a confirmatory laboratory in South Africa; however, laboratories can comply voluntarily with the ISO 17025 international guidelines, which includes being certified by the South African National Accreditation Service (SANAS) with regular inspections to observe maintenance of the quality system implemented by the laboratory.

The ISO17025¹⁹³ guidelines require well-trained personnel who may perform the analyses and who should be certified as “technical signatories” by SANAS as an indication of their competence. All test methods have to be validated and it is a requirement that an ISO17025-accredited laboratory take part in external quality control programs besides its normal internal quality control procedures.

¹⁹¹ In the experience of the author, most organizations fall short in the way in which pre-employment drug testing is performed.

¹⁹² Reg 375 of the NHA relating to Health Care Waste Management in Health Establishments requires safe disposal of human waste.

¹⁹³ South African National Standard ISO/IEC 17025:2005: General requirements for the competence of testing and calibration laboratories.

The scientists have to be registered with their professional bodies, which, in this case, is the HPCSA or the South African Council for Natural and Associated Professions (SACNASP).

The specimen validation tests may be performed again in the laboratory as described in chapter 2 of this document. All confirmatory drug tests are performed by a certified scientist by means of a forensically acceptable technique and verified by a senior colleague called a “verifying scientist”.

After the drug test results became available, the report is sent to the designated person as indicated by the donor on the voluntary informed consent form. If someone, other than the company representative, is designated by the donor, the employer should be contacted and informed that the result has become available, but the test result should not be referred to. The employee will then be contacted by the employer to present him with the test result. This procedure will preserve the privacy of the employee and he will still have the choice to withdraw consent before submitting the test result to the company representative.

3.3.3 Alcohol testing and reporting phase

South Africa does not have a formal profession of Breath Alcohol Technician (BAT) like in the US and there are no formal training programmes either. The same issue on HPCSA registration is applicable for collecting and analysing a breath specimen for alcohol. If it is regarded as a non-medical test, exemption from HPCSA registration may be provided to the collector, especially considering the non-invasiveness of the test. The collector, however, will certainly require training, which must include instruction on:

- the collection process
- chain of Custody procedures

- processes involved with problem collections (“shy lung”, etc.)
- the responsibility of the collector for obtaining informed consent and maintaining donor privacy, confidentiality of information and specimen integrity
- the scientific principles of the breathalyser instrumentation and the collection protocol to enable the BAT to explain this to the level of satisfaction that will be required in a disciplinary hearing or a court.

Breath alcohol testing is performed on a regular basis in South African organizations since alcohol is the most abused drug in South Africa. Preliminary breath alcohol testing is performed mostly, and confirmatory or evidentiary testing to a lesser extent. The requirement for privacy is similar to that of drug testing for both the preliminary and confirmatory tests in terms of the CSA. Section 35 applies also for breath testing, requiring just administration, and that should be reasonable and procedurally fair and it is of essence to prevent infringement of the donor’s dignity and privacy.¹⁹⁴

The breathalyser test equipment has to be calibrated regularly and must be proven to operate within tolerance at the specific time a confirmatory breath test is performed. This should be done with an internal quality control. The breathalysing facility should also take part in external quality control procedures. In principle, the breathalysing facility should follow the ISO 17025 guideline for testing laboratories¹⁹⁵ and, in the opinion of the author, most, if not all, breath testing facilities in South Africa fall short on this.

¹⁹⁴ From the experience of the author, the South African industry falls short regarding the provision of privacy during alcohol testing. Most South African organizations do not provide any privacy, implying disrespect for human dignity and privacy.

¹⁹⁵ It is the opinion of the author that most (if not all) organizations in South Africa falls short with the aspect of accurate and reliable breath alcohol testing. The reasons being that periodic calibration of a breathalyser does not guarantee correct results between calibrations, since all electronic equipment is subject to drift that will not be noticed with periodic calibrations by a certified calibration laboratory. Secondly, of great concern is: What if the breathalyser had to be adjusted by the calibration facility during its periodic calibration? How would the

After a breath testing result was obtained in duplicate, the result should then be communicated to the DER who will communicate the non-compliant breath alcohol test results to management in a confidential manner since a breath alcohol testing results does not require medical review.

It is again recommended that if HPCSA registration is not required for the BAT however, the points as mentioned above should be included in the job description, ensuring that he/she obeys the ethical guidelines that would have been set out by the HPCSA.

Many organizations in South Africa take decisive action on a preliminary breathalyser test result, and sometimes confirm the result with a second preliminary breathalyser test. This practice is incorrect since the preliminary result has been confirmed with an evidentiary breathalyser as part of a validated test method. The ISO17025 guidelines for testing laboratories should be applied and an evidentiary breath testing facility should be managed as such.

3.3.4 Drugs post-testing phase

Once the drug testing result becomes available it should be submitted to a knowledgeable and professionally trained person (MRO) to verify the result (NOT a member of the Human Resource Department). If there is no legitimate reason, resulting in mitigation, the positive drug test result the information has to be relayed to the DER who will communicate the result to management.

employees who suffered unfair and unrepairable damage to their reputation be traced? It is therefore unacceptable practice that does not comply with section 35 and 23 of the CSA.

In South Africa, the occupation of a professionally qualified MRO does not exist as it does in the US. The results are usually reviewed by the on-site occupational health clinician who attend to the health and safety of the workers. This practice has a number of pitfalls, namely:

- A clinician acting as an MRO is subject to conflict of interest since he/she has an ethical duty-of-care and trust relationship with the patient. Therefore, it is recommended that the company contract an independent service provider to perform the task of MRO.
- It is advisable that the MRO should not be employed by the company for which he/she reviews the positive test result since this may also result in a conflict of interest.
- If the MRO is employed by an external service provider administrating the drug-testing program, the MRO should not have any business interests in the particular company.

Current practice in many South African Organizations requires the employee to be cleared by the on-site occupational health clinician after a non-negative preliminary test result to be "not intoxicated". This practice will override and undermine the policy and create presidents. The cut-off concentration levels should be obeyed as part of the contract between the employee and the organization.

Many organizations in South Africa currently make use of the preliminary immunoassay testing technique only for testing. Decisive disciplinary action is then based on the result of a preliminary test. The first preliminary test is confirmed by a second immunoassay test on site or at a pathology laboratory. This is an incorrect approach, since neither of these tests was based on a result obtained by a forensically acceptable analytical technique.

The employee (prospective employee) should have access to his/her testing results on the basis of the Promotion of Access to Information Act (PAIA).¹⁹⁶

¹⁹⁶ S 9 of the Promotion of Access to Information Act (PAIA) 2 of 2000.

CHAPTER 4

CONCLUSIONS

The US Mandatory Guidelines are a finely worked out system, enacted by law and regulations, as opposed to the non-regulated setting in South Africa. In the US, the government is the architect of the legal framework for a drug and alcohol-free workplace program. The danger of a regulated, paternalistic setting is that the freedom, privacy, dignity and bodily integrity of a person may be compromised without his/her voluntary consent. This can be mitigated by reasoning that the limitation of human rights in this instance is in the interest of the health and safety of others.

South Africa does have the legal framework for a drug and alcohol-free workplace program, but not the mandatory guidelines empowering employers (and employees) to enforce a drug and alcohol-free workplace program. It is therefore the responsibility of the organization to ensure that the program accords with the CSA, common law, statutes, and policies and guidelines.

From a South African perspective, the US mandatory guidelines fall short on many aspects of consent that has to be provided by the employee, especially since the employee cannot withdraw his consent after the sample has been donated. With changes to the aspect of consent, the HSS Mandatory Guidelines could be applicable to South Africa and comply mostly with South African legislation.

South Africa, on the other hand, requires some formal certification programs for the positions of specimen collector, BAT and DER, which are not currently in place.

The profession of the MRO is also not suitably established in South Africa. This function is currently mostly fulfilled by the on-site occupational health doctors, but there are potential sources of conflict of interest in this practice. Being in a position of having an obligation to provide health care to the workforce, places him/her in a relationship of trust with the patients, which may be compromised if the doctor becomes involved in punitive action against the employee. This also applies to other health care workers within the organization.

A possible solution to the ethical problem of breaching the doctor-patient relationship of trust is the contracting of an external service provider to ensure objectivity and independent administration of the drug and alcohol-free workplace program.

The testing procedures in many South African organizations need to be reconsidered since many organizations take decisive action based on preliminary assay results for drugs if a “non-negative” result is obtained. This practice is unacceptable, as the preliminary assay result should be confirmed by another technique on a forensic standard. The same applies for alcohol testing in breath whereby the test result has to be confirmed with a confirmatory/evidentiary breathalyser technique employed as part of a validated test method.

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APPENDIX 1 - Federal Drug Testing Custody and Control Form (CCF).¹⁹⁷

FEDERAL DRUG TESTING CUSTODY AND CONTROL FORM



SPECIMEN ID NO. **0000001**

ACCESSION NO. _____

STEP 1: COMPLETED BY COLLECTOR OR EMPLOYER REPRESENTATIVE

A. Employer Name, Address, I.D. No. _____ B. MRO Name, Address, Phone No. and Fax No. _____

C. Donor SSN or Employee I.D. No. _____

D. Specify Testing Authority: HHS NRC DOT - Specify DOT Agency: FMCSA FAA FRA FTA PHMSA USCG

E. Reason for Test: Pre-employment Random Reasonable Suspicion/Cause Post Accident Return to Duty Follow-up Other (specify) _____

F. Drug Tests to be Performed: THC, COC, PCP, OPI, AMP THC & COC Only Other (specify) _____

G. Collection Site Address: _____ Collector Phone No. _____ Collector Fax No. _____

STEP 2: COMPLETED BY COLLECTOR (make remarks when appropriate) Collector reads specimen temperature within 4 minutes.

Temperature between 90° and 100° F? Yes No, Enter Remark _____ Collection: Split Single None Provided, Enter Remark _____ Observed, Enter Remark _____

REMARKS _____

STEP 3: Collector affixes bottle seal(s) to bottle(s). Collector dates seal(s). Donor initials seal(s). Donor completes STEP 5 on Copy 2 (MRO Copy)

STEP 4: CHAIN OF CUSTODY - INITIATED BY COLLECTOR AND COMPLETED BY TEST FACILITY

I certify that the specimen given to me by the donor identified in the certification section on Copy 2 of this form was collected, labeled, sealed and released to the Delivery Service noted in accordance with applicable Federal requirements.

Signature of Collector _____ AM _____ PM _____
(PRINT) Collector's Name (First, MI, Last) _____ Date (Mo/Day/Yr) _____ Time of Collection _____

SPECIMEN BOTTLE(S) RELEASED TO: _____ Name of Delivery Service _____

RECEIVED AT LAB OR IITF:

Signature of Accessioner _____
(PRINT) Accessioner's Name (First, MI, Last) _____ Date (Mo/Day/Yr) _____

Primary Specimen Bottle Seal Intact YES NO
If NO, Enter remark in Step 5A.

STEP 5A: PRIMARY SPECIMEN REPORT - COMPLETED BY TEST FACILITY

NEGATIVE DILUTE POSITIVE for: Marijuana Metabolite (Δ9-THCA) 6-Acetylmorphine Methamphetamine MDMA MDA MDEA
 Cocaine Metabolite (BZE) Morphinine Amphetamine Codeine

PCP Codeine

REJECTED FOR TESTING ADULTERATED SUBSTITUTED INVALID RESULT

REMARKS: _____

Test Facility (if different from above): _____
I certify that the specimen identified on this form was examined upon receipt, handled using chain of custody procedures, analyzed, and reported in accordance with applicable Federal requirements.



Signature of Certifying Technician/Scientist _____ (PRINT) Certifying Technician/Scientist's Name (First, MI, Last) _____ Date (Mo/Day/Yr) _____

STEP 5b: COMPLETED BY SPLIT TESTING LABORATORY

RECONFIRMED FAILED TO RECONFIRM - REASON _____
I certify that the split specimen identified on this form was examined upon receipt, handled using chain of custody procedures, analyzed, and reported in accordance with applicable Federal requirements.

Signature of Certifying Scientist _____ (PRINT) Certifying Scientist's Name (First, MI, Last) _____ Date (Mo/Day/Yr) _____

Laboratory Name _____
Laboratory Address _____

 0000001 SPECIMEN ID NO.	A	PLACE OVER CAP	0000001 SPECIMEN BOTTLE SEAL	_____ Date (Mo/Day/Yr) _____ Donor's Initials
 0000001 SPECIMEN ID NO.	B (SPLIT)	PLACE OVER CAP	0000001 SPECIMEN BOTTLE SEAL	_____ Date (Mo/Day/Yr) _____ Donor's Initials

COPY 1 - TEST FACILITY COPY

Version C 14/May/2010

OMB No. 0930-0156

PRESS HARD - YOU ARE MAKING MULTIPLE COPIES

8010

¹⁹⁷ Available at <http://workplace.samhsa.gov>.

APPENDIX 2 – Release and Consent Form.¹⁹⁸

Figure 6-1. Release and Consent Form ■

NAME _____ APPT TIME, IF APPLICABLE _____

_____ EMPLOYER _____

HOME ADDRESS _____

SOCIAL SECURITY NUMBER _____

In accordance with and subject to the terms and safeguards of the above-referenced employer’s substance abuse prevention policy, I hereby consent to give specimen(s) to the employer’s service agents, including any medical facility or laboratory, for testing for the presence of alcohol and/or prohibited drugs. I further consent and agree that the testing facility or laboratory will provide the results of any tests performed on such specimens to the employer’s designated medical review officer, to the designated employer representative, and, where required by regulations or public safety concerns, to the appropriate federal and state agencies. I also authorize the release of this information to any health care provider needing it to determine my physical qualification in accordance with applicable federal regulations. This authorization will remain valid for 12 months from the signature date.

I understand that the employer’s agents will hold the test results confidential and not release them except in accordance with this release form and the employer’s substance abuse prevention policy.

_____ DONOR’S SIGNATURE

¹⁹⁸ Swotinsky & Smith *supra* n58 66.

APPENDIX 3 - Background History Check form.¹⁹⁹

Figure 4-1. Background History Verification Form ■

Section I. To be completed by the new employer, signed by the employee, and transmitted to the previous employer:

Employee: _____ (printed or typed name) _____ (SS or ID number)

I authorize release of information from my Department of Transportation regulated drug and alcohol testing records by my previous employer, listed below, to my current employer, also listed below. This release is in accordance with DOT Regulation 49 CFR Part §40.25. I understand that information to be released in Section II by my previous employer, is limited to the following:

1. Alcohol tests with a result of 0.04 or higher;
2. Verified positive drug tests;
3. Refusals to be tested;
4. Other violations of DOT agency drug and alcohol testing regulations;
5. Information obtained from previous employers of a drug and alcohol rule violation;
6. Documentation, if any, of completion of the return-to-duty process following a rule violation.

Employee Signature: _____ Date: _____

	NEW EMPLOYER	PREVIOUS EMPLOYER
Designated Rep.	_____	_____
Company:	_____	_____
Address:	_____	_____
City/State/Zip:	_____	_____
Phone #:	_____	_____
Fax #:	_____	_____

Section II. To be completed by the previous employer and transmitted by mail or fax to the new employer:

In the two years before the date of the employee's signature (in Section I), for DOT-regulated testing:

		Yes	No
1. Did the employee have alcohol tests with a result of 0.04 or higher?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. Did the employee have verified positive drug tests?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3. Did the employee refuse to be tested?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4. Did the employee have other violations of DOT agency drug and alcohol testing regulations?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5. Did a previous employer report a drug and alcohol rule violation to you?	<input type="checkbox"/>	^a <input type="checkbox"/>	<input type="checkbox"/>
6. If you answered "yes" to any of the above items, did the employee complete the return-to-duty process?	<input type="checkbox"/>	^b <input type="checkbox"/>	<input type="checkbox"/> (N/A)

^a Please provide the previous employer's report.
^b Please provide the corresponding return-to-duty documents (e.g., SAP report(s), follow-up testing record).

Name of person providing information in *Section II*: _____

Title: _____ Ph #: _____ Date: _____

¹⁹⁹ Swotinsky & Smith *supra* n58 38.



APPENDIX 4 - Example of a urine drug test report.²⁰⁰

Figure 10-6. Urine Drug Test Report ■

Employee's Name: _____ SSN or Emp. ID: _____
 Employer's Name: _____ Specimen ID: _____

Reason for Test: Pre-employment Random Post-accident
 Return-to-duty Periodic Reasonable suspicion Unspecified

Test Type: DOT (five-drug) test Non-DOT five-drug test Other: _____

Collection: Date: _____ Time: _____ Check if donor did not appear at collection site

Date of MRO's receipt of CCF Copy 2: ___/___/___

Verification decision: Negative If dilute-negative, check and check one of the following:
 employer must immediately retest under direct observation
 employer may retest once, direct observation not required

Positive for:
 amphetamines
 cocaine
 marijuana
 opiates
 phencyclidine
 other: _____

Refusal to test:
 specimen substituted
 specimen adulterated with: _____
 shy bladder with no medical explanation
 other: _____

Cancelled: fatal or uncorrected flaw (describe: _____)
 or invalid result with explanation (nonobserved retest if a negative result is needed)
 or invalid result without explanation (need immediate, directly observed retest)
 or shy bladder with medical explanation

MRO's name (print): _____
 MRO's signature: _____
 MRO's address: _____
 Report date: _____

To: _____
 Secure fax no.: _____
 Initials: _____ Date: ___/___/___

Report positives on same or next day as verification

If this transmission is incomplete or illegible, please call us at 800-676-3784. This communication is of a confidential nature. If it has been misdirected to you, or if your fax machine is not in a secure access area, please contact us immediately.

Distribution: (1) Fax or mail original to employer, (2) Keep copy w/drug test record

²⁰⁰ Swotinsky & Smith *supra* n58 181.