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Ethical issues in workplace drug testing

in Europe

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Introduction

Workplace drug testing remains a sensitive issue because of the difficulty of balancing safety and productivity requirements against the essential need to prevent the invasion of privacy and discrimination. The contentiousness of workplace drug testing (WDT) arises out of the collision between workers' and employers' interests. Definitions of personal liberty and dignity clash with questions of social responsibility and economic productivity. In addition there are data protection issues and strict requirements for the assurance of reliable test quality.

In this paper drug testing is defined as 'the process of obtaining samples of body fluids or tissues (e.g. urine, blood, hair, breath) from job applicants and employees and conducting laboratory analyses to detect the presence of certain drugs, including alcohol, and their metabolites' (Hanson 1993: 5).

The range of testing carried out in the workplace includes the following:

- Pre-employment testing;
- Probable cause testing;
- Reasonable suspicion testing;
- Periodic testing;
- Random testing;
- Testing on return from treatment;
- Testing related to transfer or promotion; and
- Voluntary testing (Mørland 1993).

While all these forms of drug testing raise issues of concern, it is random testing that is the most controversial and is accompanied by vehement arguments for and against. For this reason, this paper focuses mainly on random testing in the workplace.

To guide employers and workers through the dilemmas surrounding the issue of WDT, in 1993 the ILO instituted a tripartite meeting of experts which resulted in the creation of the ILO Guiding Principles on

Drug and Alcohol Testing in the Workplace. They were published as an annex to the ILO Code of Practice on the management of alcohol- and drug-related issues in the workplace.

Despite the controversies surrounding WDT, laboratories carrying out tests, for example in Ireland, the Netherlands, Norway and the United Kingdom report ever increasing demands for their services. Given the wide range of sensitive issues involved, WDT is handled in a variety of ways in European countries. This paper will give an overview of the ethical questions concerning WDT and related arguments for and against testing. It will include some impressions of the current extent of WDT in different European countries and how the level and frequency of testing is connected with the ethical stance. The paper will also summarize the outcomes and pose certain questions on the more controversial aspects for discussion in the workshop.

Safety

The most frequently used argument for WDT and one of the least controversial is to ensure safety. Workers in “safety-sensitive” positions should not be under the influence of drugs¹ because of the danger to themselves, their colleagues and third parties. There is however no universally accepted definition of what constitutes a safety-sensitive job. As a result, the employer has some leeway in deciding which workers should be subjected to tests for safety reasons. This leeway is open to interpretation in different European countries and in various branches of industry. In a case in Denmark, and in the transport industry where safety concerns are paramount, the labour court agreed with a ferry company’s definition of “safety-sensitive” covering the entire crew of their ships and rejected the unions’ complaint. In Switzerland on the other hand, the Data Protection Commission ordered a major pharmaceutical company to end their testing programme for trainees because of a lack of safety interest, although work with chemicals is often seen as typically safety-sensitive.

The safety argument has been extended from the traditional question of health-related safety to “business-related safety”. It is argued that inappropriate use of drugs and alcohol can create “business-critical” situations, in which poor decisions could cost the company large amounts of money. However this argument is not accepted in all European countries, which is reflected in the varying extent of testing and the legal restrictions on testing. For example in France, Norway and the Netherlands, only workers in “traditional” safety-sensitive positions are subjected to testing in any form. Accordingly there is less testing and there are more legal restrictions in these countries. In the Netherlands pre-employment testing is illegal, and in France only the occupational physician may decide to conduct drug tests, not the employer. On the other hand in British and Swedish companies where testing takes place WDT is often applied to workers in all types of jobs in order to ensure “business-safety”.

The legal liability for health and safety is the basis for a further argument for the introduction of testing programmes. The legal responsibility for ensuring occupational safety and health lies in the majority of European countries with the employer, who has a “duty of care” to exercise “due diligence” to make

¹ For ease of reference in this paper the term “drugs” will be used to refer to both alcohol and illegal drugs such as cannabis, cocaine and heroine, unless otherwise specified.

sure that the workplace is safe.² Any tightening of corporate liability could increase testing prevalence. For example in the United Kingdom for the past two years the government has been trying to introduce a “corporate manslaughter” bill which would make company directors personally liable for preventable occupational accidents (Bright 2002). If passed, this bill could lead to an increase in the number of testing programmes.³

The Moral Argument

A further motivation for WDT comes from quite a different angle. Some proponents of WDT take a moral stance based in part on the illegal status of some of the drugs and in part on a value judgement that drug use of any sort is morally reprehensible. In such cases the employer assumes a social responsibility to influence the values of the workers. Employers often maintain that testing is the only way to tell if a worker is using drugs. This argument reveals that the moral argument differs considerably from the safety, business and prosecution arguments in that it is not related to performance. In the words of a director of a human resources department quoted in the British journal *Personnel Today*:

“A main reason why drug abuse is difficult to spot is that it can contradict the myth of deteriorating performance. Some abusers can perform consistently well over long periods” (*Personnel Today* 2001)

In moral arguments usually no distinction is made between drug use and abuse. Whilst this may be appropriate for the moral point of view, the consequences for the worker of a positive drug test should be relevant to the drug use pattern of the individual.

The question of who should be tested has already been touched on concerning the business-critical argument for WDT. For business-critical and morally based testing programmes to be plausible everybody working in the company or organization should be tested. Every employee’s work is relevant to the productivity of the company and moral concerns apply to every human being. For this reason testing programmes which only apply to trainees are open to the accusation of being discriminatory to youth.

As an alternative to testing all people working in an organization, a policy can be introduced of only testing in case of suspicion of drug use. Many union organizations, for example in the Deutscher Gewerkschaftsbund (DGB) in Germany, the Österreichischer Gewerkschaftsbund (ÖGB) in Austria and the Confédération Générale de Travail (CGT) in France favour this approach, which is compatible with performance-based reasons for testing i.e. for safety, for business and for fear of prosecution. However in Sweden, where testing is more widespread, a test case concerning the issue of suspicion failed to convince the labour court. A member of the cleaning staff in a nuclear power plant objected to being tested because there was no suspicion against her and she was not in a safety-sensitive position. The labour court ruled that she was compelled to comply with the written company policy to test all staff, which had been formulated with the agreement of both trade unions represented in the plant.

² This principle is also espoused in ILO Convention 155 on Occupational Safety and Health.

³ It should be noted that there are alternatives to WDT, such as other clinical tests, better trained supervisors, etc. for managers wishing to ensure safety at the workplace.

Deterrence

Increasingly the aim of introducing a testing programme is deterrence from drug use of any kind. This contrasts with the attitude in the late 1980's when drug testing was perceived as a tool to detect and dismiss drug-abusing workers. Deterrence as the aim of a WDT programme is compatible with both performance-based reasons and the moral motivation to test outlined above, because of its inherent preventive component. The current stance of many employers' organizations, for example in the Schweizerischer Gewerkschaftsbund (SGB) in Switzerland, Svenskt Näringsliv in Sweden and the London Chamber of Commerce in the United Kingdom, is to recommend adopting a deterrence programme (i.e. including sanctions) but to frame it in a package of assistance for those with drug problems.

Reliable evidence that the deterrent approach works is difficult to produce but there are some indications that a WDT programme is an effective deterrent to drug use. For example the European Workplace Drug Testing Society (EWDTS, a pro-testing group) reports rather cautiously that where testing has been introduced, the percentage of positives "seems to decrease with the years following the introduction of WDT" (Verstraete and Pierce 2001: 2).⁴

Privacy

A major ethical consideration put forth by opponents of drug testing is that the process amounts to an unwarranted invasion of privacy. WDT impacts on privacy in relation to the right to personal i.e. bodily integrity. National legislation on this matter is often the same as that for searches, which requires the consent of the person concerned to be lawful. The question of consent is, however, a thorny one. Most guidelines for WDT (such as the ILO Guiding Principles on Drug and Alcohol Testing, 1996) require that informed consent be obtained before testing. Opponents of WDT, such as the German DGB and the Swiss Data Protection Commissioner, contend however that because workers are dependent on their employers, free consent to WDT is not possible. Consequently signing a contract containing a testing clause cannot constitute a free and informed decision by the person concerned. On the other hand, in the United Kingdom failure to comply with drug testing which is included in the employment agreement can be interpreted as a disciplinary offence (Alcohol Concern 2002). Some European constitutions, for example in Belgium and Finland, hold that fundamental rights such as the right to privacy are indivisible and that the individual cannot consent to waive such rights. In order to make WDT legal in Finland, a new law had to be introduced.⁵

An extension of the privacy debate is related to whether employers have the right to dictate employees' conduct during off-duty periods. One situation in which WDT is held to impact on privacy is when performance-based arguments for testing are used. Employers contend that if the workers' free-time

⁴ This article also reviews the data on which this statement is based.

⁵ In June 2001 the Finnish parliament passed the Act on the Protection of Privacy in Working Life

activities have a negative influence on their work performance, the employer is justified in controlling this. The moral argument for testing in any case assumes the employers' right to influence the workers' private sphere as part of the employers' responsibility to society. Proponents of WDT argue consistently that privacy issues are less significant than the gains for the individual, the company and for society resulting from reduced drug use (see for example Cabrero and Luna 1999 or Dixon 1998).

The counterargument asserts that employers who control what employees do in their own time are overstepping the mark of their social responsibility (e.g. Trades Union Congress 1996). Opponents of WDT point to articles guaranteeing the right to a private life in most international charters of human rights, such as of Universal Declaration of Human Rights (article 12) and the European Convention on the Protection of Human Rights (article 8). Such rights are however open to interpretation, and may be subject to limitations. For example the European Convention on the Protection of Human Rights guarantees the right to privacy, except:

“in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder and crime, for the protection of health and morals, or for the protection of the rights and freedoms of others” (Article 8)

This leaves openings for employers to argue for testing for health and safety reasons, for business productivity and also for moral reasons. Nevertheless, in 2002⁶ the first test case in the United Kingdom referring to article 8 of the European Convention on the Protection of Human Rights to oppose dismissal on a drugs charge found in favour of the complainant. An employee at a sports centre was sacked for having marijuana in his pocket on the company car park. The British employment tribunal ruled that the dismissal was unfair and an inadmissible intrusion into his private life according to article 8 quoted above. Labour courts are sometimes however misused by governments who wish to avoid the thorny issue of drug testing. Instead of legislating for or against testing, they refer employers to the courts. However labour courts frequently do not have the technical expertise to judge on the complex issue of testing. They are reliant on expert witnesses, who may well be pursuing their own agendas, and in some cases the labour court may not in fact have the power to call expert witnesses.

Data protection

The privacy issue links WDT to the question of data protection. WDT involves collecting sensitive data both on use of drugs, sometimes illegal drugs and also information on medication taken which might influence the test result. Legislation pertaining to WDT has often been concerned with the data protection issue. The collecting and holding of such information is therefore not only subject to strict controls in many European countries but also the subject of international agreements such as European Union Guidelines 95/46 and 97/66 on data protection and the ILO Code of Practice on the Protection of Workers' Personal Data (1996)⁷. In some European countries this issue is resolved by strengthening the role of the occupational physician. In Finland, France, Belgium, Germany and Austria the result of the test is communicated to the occupational doctor, not to the employer. The doctor is only allowed to

⁶ The European Convention was signed in 1950, but British legislation explicitly based on the Convention was not introduced until October 2000. The case mentioned refers to the British adoption of European law.

⁷ See in particular paragraph 6.13.

inform the employer whether the person is fit for work or not, but not what the result of the drug test was.⁸

In terms of rights, there is a further argument which particularly applies to any kind of systematic testing programme (as opposed to testing only on suspicion). Arguably one of the greatest achievements of Western European culture is that legal systems are based on the assumption “innocent until proven guilty”. However if someone refuses to take a drugs test, they are largely assumed to “have something to hide”. Thus the method to prove someone’s innocence is turned on its head and believed to prove their guilt.

Pre-employment testing

A further rights-based controversy in WDT is the question of pre-employment testing. Around 80 per cent of WDT conducted in the world is carried out as part of the recruitment process, i.e. before an employment relationship exists between worker and employer. Legally in many countries the protection which is afforded to workers does not apply to job applicants. Opponents of WDT however claim that a job candidate is even more precariously placed vis-à-vis the employer, because their only alternative to taking the test is effectively to withdraw from the job competition. It is also argued that human rights apply equally to all people, regardless of employment status.

Discrimination

Concerns pertaining to WDT are often aimed at the moral arguments for testing which can potentially be discriminatory. The moral stance can lead to discrimination of people with drug dependencies⁹, but the current policy emphasis on aid programmes is intended to counter this bias. The moral argument can also lead to discrimination of people with a certain lifestyle rather than a health problem, because it does not distinguish between use and abuse. Unions are also concerned that WDT can be misused as a convenient method for getting rid of unwanted workers. A recent case of unfair dismissal in the United Kingdom illustrates the point. A rail worker received much publicity after (correctly) fining the wife of a very high-ranking government official for travelling without a ticket. He soon found himself mistreated by colleagues and was subsequently moved to a desk job. He was sacked after allegedly failing a routine drug test and refusing to take a second one. The worker claimed that the company was afraid of bad publicity and therefore sacked him. The company claimed that the dismissal was unrelated to the fine, but the employment tribunal found in favour of the worker.

⁸ The confidentiality of test results is an integral part of international recommendations in other areas, for example guidelines on HIV/AIDS. See the ILO code of practice on HIV/AIDS. See ILO 2001, paragraphs 4.7, 5.2(g) and 5.3(j).

⁹ If drug dependency is defined as a health problem, then discrimination on these grounds can contravene national legislation and internationally agreed principles. The ILO General Survey on Convention 111 on Employment Discrimination conducted in 1996 notes that while the original Convention (1958) does not specifically mention health as an inappropriate reason for discrimination, there is a tendency by a growing number of states to legislate against discrimination on health grounds (paragraph 239).

The moral argument interacts very closely with a further criticism of WDT. Urine analysis, like the moral stance, does not distinguish between users and abusers as it does not give any indication of impairment. It only shows that drugs have been consumed, but not what effect they may have on a worker's performance. In view of this drug and alcohol policies should be very carefully worded to ensure that the aim of the testing programme can be achieved by the methods used.

Testing in the transportation sector

One area in which testing is much less controversial is the transportation sector. There are strict regulations concerning drug use by pilots including a mandatory eight hour period of abstinence before flying. All European Union countries have a legal limit for alcohol for drivers, and Spain and the United Kingdom even have lower limits for commercial drivers than for private individuals. Even in countries where workplace drug testing is conducted with difficulty, testing of drivers is carried out routinely. For example, Dutch, French and Belgian legislation is very restrictive concerning WDT, but all three countries permit and frequently use random roadside testing.¹⁰ By contrast in the United Kingdom, where WDT meets with more support, random roadside testing is illegal. A police officer must have grounds for suspicion before a driver can be tested for alcohol use. There are however significant differences between alcohol testing and testing for other drugs. The breath test for alcohol (and subsequent blood tests) is accepted as a measure of impairment, and from this it is possible to set a limit under which it is considered less dangerous to drive. There is also a significant public safety aspect to testing drivers, and alcohol is consumed more frequently and by more people than illegal drugs. As far as driving and drugs other than alcohol is concerned, there have been several inquiries in recent years (both national ones, for example in the United Kingdom and Austria, and also the European Union project ROSITA) on the possibility of introducing a limit for drug use similar to the one for alcohol. Experts universally conclude that for drugs other than alcohol there is insufficient evidence relating drug test results to impairment. The recommendations are therefore either not to test drivers for drugs other than alcohol, or to establish a zero drug limit for drivers, as is already the case in Germany.

Quality

Finally, many reservations about WDT are based on doubts about the quality of tests and testing procedures. The danger of "false positives" is a real one. Consuming large amounts of poppy seeds may lead to a positive test for heroin, or taking ibuprofen can result in a positive test for cannabis. It is generally agreed that the initial immunoassay technique of urinalysis must be confirmed by a more reliable test such as gas chromatography, which can only be done in a properly equipped laboratory. In addition to this, a positive test result should only count as such after a Medical Review Officer has considered all the medical information relative to the individual case and ruled out any other possible source of the test

¹⁰ Concerns about the legal principle of "innocent until proven guilty" are in this case deemed secondary to public interest.

result. There are various guidelines for reliable testing which aim to eliminate any doubts about procedural and technical difficulties.¹¹

Conclusions

To sum up, workplace drug testing is an issue beset with technical, legal and ethical controversies. WDT policies may be unclear about the motivation for testing, which however determines what type of testing programme should be used. The most serious challenges to testing are based on privacy and data protection arguments. Employers however face a legal responsibility to provide a safe workplace and meet obligations to their shareholders which may not be possible if drug use is rife. How far should they go to meet these obligations? Do such obligations represent adequate grounds for employers to determine what employees do in their free time? What kind of sanctions should be in place and how should these relate to health care initiatives which may also be part of a drugs and alcohol policy? Should employers' policies distinguish clearly between the consequences for the use of different drugs? Should policies distinguish more clearly between users, abusers and people with chemical dependencies?

These are just some of the controversial questions surrounding the issue of workplace drug testing. In the course of the workshop on WDT we hope to make some headway in the discussion of these matters and to be able to present to the other participants in the seminar some reasoned conclusions.

¹¹ The ILO Guiding Principles on Alcohol and Drug Testing in the Workplace (1996) address issues relevant to the introduction of testing programmes and give guidance on policy and implementation. For detailed implementation advice as well as more technical laboratory information, see the European Laboratory Guidelines for Legally Defensible Workplace Drug Testing (EWDTS) or the Drugs of Abuse Testing Guidelines by AGSA, the Swiss Working Group for the Analysis of Drugs of Abuse.

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