

Health Care Provider Drug Abuse Study

Report Prepared by the
New Mexico Department of Health



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Table of Contents

Introduction.....	2
Process	2
Background Information.....	2
Review of Federal and Case Law	4
National Associations’ Positions	6
Other States’ Drug Testing Laws	7
New Mexico’s Boards’ Positions	12
New Mexico Health Care Association Survey Results	13
Areas for Consideration	16

Introduction

Senate Memorial 62 (SM62) requested that the Department of Health (DOH) study illicit and prescription drug and alcohol abuse and addiction among health care providers and provide recommendations to address patient safety concerns and provider illicit and prescription drug and alcohol abuse to the interim Legislative Health and Human Services Committee by October 1, 2010.

Process

Since the passage of SM62, the Department has conducted an extensive literature review both locally and nationally and has met with a variety of health care entities to obtain information needed to develop preliminary recommendations. These include the:

- New Mexico Board of Nursing;
- New Mexico Medical Board;
- New Mexico Health Care Association;
- National Institute on Drug Abuse;
- American Medical Association;
- American Nursing Association;
- Substance Abuse and Mental Health Services Administration (SAMHSA);
- The National Clearinghouse for Alcohol and Drug Information;
- National Institute of Drug Abuse and Addiction;
- Working Partners for an Alcohol and Drug Free Workplace;
- Review of other State Laws; and
- Review of federal and case law related to drug testing.

In addition, the Department worked with the New Mexico Hospital Association to conduct a voluntary survey of its membership and their current employee drug screening practices.

Background Information:

According to the Substance Abuse and Mental Health Services Administration (SAMHSA), use of illicit drugs, alcohol abuse, and misuse of prescription drugs can have negative effects on our daily lives and people with drug and alcohol problems are not likely to leave those problems behind when they come to work. Statistics show that:

- About three fourths of those 18 and older who use illegal drugs also work.ⁱ
- Non-medical use of prescription drugs is a national problem. According to the 2006 *National Survey on Drug Use and Health*, seven million Americans were current users of psychotherapeutic drugs taken non-medically.ⁱⁱ
- In a large study of illicit drug use in a highly educated workforce, 42% of the respondents reported using mood-altering prescription drugs.ⁱⁱⁱ
- Most binge drinkers and heavy alcohol users are employed. Of adult binge drinkers, 79.4% are employed either full or part time. Of adult heavy drinkers, 79.2% are employed.^{iv}
- Over 7% of American workers drink during the workday, mostly at lunch. Even more-9% have nursed a hangover in the workplace.^v
- In a 2002 survey of health-related behaviors among military personnel, over 17 percent reported loss of productivity attributable to alcohol.^{vi}
- Drinking does not have to occur on the job to affect the job. Hangovers account for many workplace productivity losses.^{vii}
- Workers in construction and mining, wholesale, and retail industries are 25% to 45% more likely to have a serious alcohol problem than the average U.S. worker.^{viii}
- Workplace alcohol use and impairment affect an estimated 15% of U.S. workers, or 19.2 million Americans.^{ix}
- On-the-job drug use can lead to an increased risk of accidents and injuries.^x It can also lead to lower levels of productivity and employee morale, not only among those with substance abuse problems but also among those working alongside them.^{xi}

ⁱ U.S. Department of Health and Human Services (DHHS), SAMHSA, Office of Applied Studies (OAS). 2007. *Results From the 2006 National Survey on Drug Use and Health: National Findings*. Rockville, Maryland, 27.

ⁱⁱ Ibid, 17.

ⁱⁱⁱ Robert A. Matano, Stanley F. Wanat, Darrah Westrup, Cheryl Koopman, Shelly D. Whitsell. 2002. "Prevalence of Alcohol and Drug Use in a Highly Educated Workforce." *Journal of Behavioral Health Services Research* 29(1):30-44.

^{iv} U.S. DHHS, SAMHSA, OAS. 2007. *Results From the 2006 National Survey on Drug Use and Health: National Findings*. Rockville, Maryland, 37.

^v Michael R. Frone. 2006. "Prevalence and Distribution of Alcohol Use and Impairment in the Workplace: A U.S. National Survey." *Journal of Studies of Alcohol* 76:147-56.

^{vi} Robert M. Bray, Laurel L. Hourani, Kristine L. Rae, Jill A. Dever, Janice M. Brown, Amy A. Vincus, Michael R. Pemberton, Mary Ellen Marsden, Dorothy L. Faulkner, and Russ Vandermaas-Peeler. 2002. *Highlights: Department of Defense Survey of Health Related Behaviors Among Military Personnel*. Available at <http://www.tricare.osd.mil/main/news/DoDSurvey.htm#pna/>.

^{vii} Roland S. Moore. 1998. "The Hangover: An Ambiguous Concept in Workplace Alcohol Policy." *Contemporary Drug Problems* 25(1):49-63.

^{viii} Jeremy Giller. 2005. *Construction and Mining, Wholesale, Retail Top List of Industries. Ensuring Solutions to Alcohol Problems*. Washington, D.C.: The George Washington University Medical Center.

^{ix} Michael R. Frone. 2006. "Prevalence and Distribution of Alcohol Use and Impairment in the Workplace: A U.S. National Survey." *Journal of Studies of Alcohol* 76:147-56.

^x M. Bernstein and J.J. Mahoney. 1989. "Management Perspectives on Alcoholism: The Employer's Stake in Alcoholism Treatment." *Occupational Medicine* 4(2):223-32 and Michael R. Frone. 1998. "Predictors of Work Injuries Among Employed Adolescents." *Journal of Applied Psychology* 83:565-79.

- The addictions of coworkers' family members may also affect the workplace. In a national survey of employees, more than one third said that at least one of their coworkers had been distracted, less productive, or absent from work because of alcohol or other drug addiction in their family.^{xii}

The risks and costs associated with drug/alcohol abuse in the workplace are well documented in the studies that we found. The National Clearinghouse for Alcohol and Drug Information (NCADI),^{xiii} was just one of many that stated "the loss to companies in the United States due to alcohol and drug-related abuse by employees totals \$100 billion a year." According to NCADI statistics alcohol and drug users are far less productive; use three times as many sick days; are more likely to injure themselves or someone else; and are five times more likely to file workers' compensation claims.

Review of Federal and Case Law^{xiv}:

Testing employees or job applicants for drug or alcohol use invokes a controversial area of policy and law that is still establishing its parameters. No one denies that employee drug and alcohol abuse costs employers billions of dollars each year in decreased productivity, increased liability exposure, and higher Workers' Compensation insurance premiums. Employers clearly have a substantial and vested interest in not only providing, but also ensuring, a drug-free workplace, for the safety and welfare of both employees and employers.

Controversy enters the picture when employers either ineptly or aggressively impose drug testing in a manner that may violate personal or constitutional rights, such as privacy rights or protections against unlawful searches and seizures. While drug testing is permitted in most states, it is not always mandated. For those employers who implement drug testing programs, it is imperative that the programs follow state and federal guidelines in order to ensure protection of employee rights.

Federal Law

The drug-testing movement began in 1986, when former President Ronald Reagan signed Executive Order 12564, requiring all federal employees to refrain from using illegal drugs, on or off-duty, as a condition of federal employment. Two years later, Congress passed the Drug-Free Workplace Act of 1988. That, in turn, spawned the creation of federal Mandatory Guidelines for Federal Workplace Drug Testing Programs (Section 503 of PUBLIC LAW 100-71). The mandatory guidelines apply to executive agencies of the federal government, the uniformed services (excepting certain members of the armed forces), and contractors or service providers under contract with the federal government

^{xi} Michael R. Frone. 1999. "Work Stress and Alcohol Use." *Alcohol Research and Health* 23(4):285-91.

^{xii} Hazelden. 2005. "Employees Report Coworkers Are Less Productive.

^{xiii} Retrieved from <http://alcoholism.about.com/library/weekly/aa012099.htm>

^{xiv} "Drug Testing." *Encyclopedia of Everyday Law*. Ed. Shirelle Phelps. Gale Cengage, 2003. [eNotes.com](http://www.enotes.com/everyday-law-encyclopedia/drug-testing-2). 2006. 16 Sep, 2010 <<http://www.enotes.com/everyday-law-encyclopedia/drug-testing-2>>

(excepting the postal service and employing units in the judicial and legislative branches).

Although the Act only applies to federal employees, many state and local governments followed suit and adopted similar programs under state laws and drug-free workplace programs.

Constitutional Protections

The U.S. Constitution does not prohibit drug testing of employees. However, in the U.S. Supreme Court case of *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989), the high court ruled that requiring employees to produce urine samples constituted a "search" within the meaning of the Fourth Amendment to the U.S. Constitution. Therefore, all such testing must meet the "reasonableness" requirement of the Fourth Amendment (which protects citizens against "unreasonable" searches and seizures). The Court also ruled that positive test results could not be used in subsequent criminal prosecutions without the employee's consent.

The other major constitutional issue in employee drug testing involves the Fifth Amendment (made applicable to the states by the Fourteenth Amendment), which prohibits denial of life, liberty, or property without "due process of law." Since the majority of private-sector employees in the United States (excepting mostly union employees) are considered "at-will employees," an employer need not articulate a reason for termination of employment. However, under certain circumstances, the denial of employment or the denial of continued employment based on drug test results may invoke "due process" considerations, such as the validity of the test results, the employee's right to respond, or any required notice to an employee.

Finally, under the same constitutional provisions, persons have a fundamental right to privacy of their person and property. Drug testing, although in itself deemed legal, may be subject to constitutional challenge if testing results are indiscriminately divulged, if procedures for obtaining personal specimens do not respect the privacy rights of the person, or if testing is unnecessarily or excessively imposed.

Special Considerations

Mandatory vs. Optional Testing

Under federal law, jobs that involve safety or security functions generally require mandatory drug testing of applicants or employees. The U.S. Department of Transportation adopted revised regulations in August 2001, and other agencies are free to adopt their own internal regulations. Likewise, many states expressly mandate drug testing for similar jobs, for example, jobs in the medical and health related fields, jobs requiring the use of machinery or vehicles, security positions, food handling jobs, or physically demanding jobs such as utilities cable line installation or climbing.

"For Cause" vs. "Random" Testing

Generally, employers are permitted to engage in "for cause" or reasonable-suspicion testing under drug-free workplace programs. State law may limit or prohibit random ("suspicionless") testing of employees unless the job position warrants such an intrusion, such as in "safety sensitive" positions. It is important to remember that private-sector employees do not always enjoy Fourth Amendment rights protecting them against unwarranted or unreasonable searches and seizures (only Fifth Amendment rights are extended to the states by the Fourteenth Amendment). Nevertheless, many state constitutions incorporate such rights into their own constitutions, so private sector employees may have the same protections.

Testing Union vs. Non-union Employees

Union employees are protected by the National Labor Relations Act (NLRA), which mandates that private sector employers must bargain collectively over terms and conditions of employment. The NLRA has ruled that drug testing of current employees (but not applicants) is a term or condition of employment. Unionized public sector employers may unilaterally decide to impose drug testing, but must negotiate the procedures (e.g., chain of custody of samples, notice to employees, confidentiality, consequence of positive results, etc.).

Testing Employees vs. Applicants

Since applicants are generally deemed to have a lesser expectation of privacy than current employees, employers enjoy greater freedom to test applicants, without the same concerns being invoked. However, to contain costs, many employers limit drug testing to those applicants whom they expect to offer a position to, as a condition of hire. While there is no requirement to notify an applicant in advance of a drug test, he or she is free to refuse to submit to it. Refusal to submit, of course, may be grounds to terminate the application process.

National Associations' Views:

The American Medical Association (AMA) and American Nursing Association (ANA) both oppose random drug testing and instead support drug and alcohol testing in situations where there is reasonable suspicion that an employee's performance is impaired. In addition, the AMA also supports pre-employment examinations of those persons whose job affect the health and safety of others. Both Associations stress proper restrictions for testing and urges employers to motivate those employees with a positive result to seek appropriate assistance with their drug or alcohol problems.

American Medical Association

According to the American Medical Association handbook,^{xv} the Association:

1. reaffirms its commitment to educate physicians and the public about the scientific issues of drug testing;
2. supports monitoring the evolving legal issues in drug testing of employee groups, especially the issues of positive drug tests as a measure of health status and potential employment discrimination resulting there from;
3. takes the position that urine drug and alcohol testing of employees should be limited to pre-employment examinations of those persons whose jobs affect the health and safety of others, situations in which there is reasonable suspicion that an employee's (or physician's) job performance is impaired by drug and/or alcohol use, monitoring as part of a comprehensive program of treatment and rehabilitation of alcohol and drug abuse or dependence; and urine drug and alcohol testing of all physicians and appropriate employees of health care institutions may be appropriate under these same conditions; and;
4. urges employers who choose to establish drug testing programs to use confirmed, positive test results with employees primarily to motivate those employees to seek appropriate assistance with their alcohol or drug problems, preferably through employee assistance programs. (CSA Rep A, A-87; Reaffirmed: Sub. Res. 39, A-90, CSA Rep. D I-90; Amended and Reaffirmed: BOT Rep. I, A-90; Modified and Reaffirmed by Amended CSA Rep. 2, I-95)

American Nursing Association (ANA)

According to ANA position statement on Drug Testing for Health Care Workers,^{xvi} ANA opposes random drug tests for healthcare workers. It gives qualified consent to testing where there is reason to believe drugs or alcohol is affecting the work of the employee and proper restrictions are applied.

Other States' Drug Testing Laws^{xvii}

Based on the Department's research, 20 states regulate drug testing procedures. Six states have enacted legislation requiring organizations receiving state grants to have a drug-free work environment.

^{xv} H-95.984 Issues in Employee Drug Testing, CSAPH Rep. 1-A-09 - page 7. Retrieved from: <http://www.ama-assn.org/ama1/pub/upload/mm/475/finalhandbook.pdf>

^{xvi} Position Statement: Drug Testing for Health Care Workers, 12/8/94, American Nursing Association. Retrieved from: <http://nursingworld.org/MainMenuCategories/HealthcareandPolicyIssues/ANAPositionStatements/drug.asp>

^{xvii} "Drug Testing." *Encyclopedia of Everyday Law*. Ed. Shirelle Phelps. Gale Cengage, 2003. eNotes.com. 2006. 16 Sep, 2010 <<http://www.enotes.com/everyday-law-encyclopedia/drug-testing-2>>

ALABAMA: Alabama's Drug-Free Workplace Program is codified under Ala. Code 25-5-330 et seq. Employers who implement a Drug-Free Workplace Program qualify for a 5 percent discount under the employer's workers' compensation policy.

ALASKA: Alaska's law for drug and alcohol testing of employees is codified at Alaska Stat. 23.10.600 et seq. Employers who comply with the statute are protected from civil liability if they take disciplinary action in good faith based on the results of positive tests. However, persons who are injured by a drug or alcohol-impaired employee may not sue the employer for failing to test for drugs or alcohol.

ARIZONA: Ariz. Rev. Stat. Ann. 23-493 et seq. requires employers to adopt a written policy distributed to every employee who is subject to testing or printed as part of a personnel handbook or manual.

ARKANSAS: Arkansas has not enacted any laws regarding the testing of employees for drugs or alcohol. The Arkansas Supreme Court has upheld dismissals of employees who violate an employer's substance abuse policy.

CALIFORNIA: Under California Drug-Free Workplace Act of 1990, Cal. Gov. Code 8350 et seq. (modeled after the federal act), only employers who are awarded contracts or grants from any state agency must certify to the contracting or granting agency that they will provide a drug-free workplace. The contractors must also have a written policy for their employees.

COLORADO: Colorado has not enacted any employment drug or alcohol testing laws. However, the Colorado Supreme Court has upheld testing if the employee's supervisor had a reasonable suspicion that the employee was either using or was under the influence of illegal drugs or alcohol.

CONNECTICUT: Connecticut's law, codified at Conn. Gen. Stat. 31-51 et seq., provides express language protecting the privacy of employee testing. Reasonable suspicion is required before an employer may compel testing, and the employer must show that the use was adversely affecting the employee's job performance.

DELAWARE: No specific laws have been enacted.

FLORIDA: Employee drug testing is voluntary in Florida. However, Fla. Stat. 440.101 et seq. gives incentives to employers that implement drug-free workplace policies. Florida law parallels federal law on the subject. If a governmental unit receives two or more equal bids for services or goods, preference is given to the business that has implemented a drug-free workplace program. The state also gives a worker's compensation premium discount to employers who have implemented a drug-free workplace.

GEORGIA: Georgia has a Drug-free Workplace Act, Ga. Code 50-24-1. All state contractors holding contracts of at least \$25,000 must certify that they will provide a

drug-free workplace. If a contractor fails to comply with the Act, the state may suspend payments or terminate the contract, so the contractor has an incentive to comply.

IDAHO: The Idaho Private Employer Alcohol and Drug-Free Workplace Act, Idaho Code 72-1701 et seq. provides voluntary drug and alcohol testing guidelines for private employers. If an employer follows the guidelines, employees testing positive for drugs or alcohol will be guilty of misconduct and will be denied unemployment benefits.

ILLINOIS: Illinois has not enacted its own legislation, but it allows private employers to require all employees to conform to the requirements of the federal Drug-free Workplace Act of 1988.

INDIANA: Indiana has not enacted its own legislation, but it allows private employers to require all employees to conform to the requirements of the federal Drug-free Workplace Act of 1988.

IOWA: Under Iowa Code 730.5 et seq., random testing is prohibited. An employer may require pre-employment drug tests for peace officers or state correctional officers. An employer may require a specific employee to submit to a drug test only if certain conditions are met, as outlined in the statute.

KANSAS: Kansas has not enacted any workplace drug and alcohol testing laws.

KENTUCKY: Kentucky has no legislation governing employment drug or alcohol testing. However, 702 Ky. Admin. Regs. 5:080 requires all school bus drivers working for any county school district in Kentucky to be drug-tested after an accident resulting in bodily injury or \$1,000 worth of property damage.

LOUISIANA: Under Louisiana Rev. Stat. 49:1001 et seq., private employers do not need a written policy to implement a drug testing policy, there need not be reasonable cause to test an employee, and employers need not offer rehabilitation to offenders prior to termination from employment. Same-gender direct observation is permitted in certain circumstances, as where there is reason to believe an employee may alter or substitute urine specimens, etc.

MAINE: Rev. Stat. 26 -681 et seq. protects the privacy rights of individual employees from undue invasion by employers but permits the use of tests when the employer has a compelling reason to administer them.

MARYLAND: Under Md. Code Ann., Health-Gen. 17-214, employers may test their employees for drugs and alcohol for any "legitimate business purpose." However, the statute outlines specific procedural requirements and employee rights in cases where positive results may be used for discipline.

MASSACHUSETTS: Massachusetts has no specific employment drug and alcohol testing laws.

MICHIGAN: No specific law, except that under Mich. Comp. Laws 37.1211(a civil rights law) established employment policies, programs, procedures or work rules regarding the use of alcoholic liquor or the illegal use of drugs will not be considered to violate an individual's civil rights.

MINNESOTA: Minnesota was one of the first states to enact employment drug and alcohol testing laws in the country, entitled "Authorized Drug and Alcohol Testing" and codified at Minn. Stat. 181.951 et seq. Employers may not conduct drug and alcohol tests without a written drug and alcohol testing policy. Employers may not require employees or job applicants to undergo drug and alcohol testing on an "arbitrary and capricious basis."

MISSISSIPPI: Under Miss. Code Ann. 71-7-1 et seq, all employers who participate in Mississippi's workers' compensation program are required to establish and implement a written drug and alcohol-testing program. That virtually covers all employers.

MISSOURI: Missouri's Drug-Free Public Work Force Act is codified at Mo. Rev. Stat.105.1100 et seq. Only state employees under the executive branch of the Missouri state government are subject to the Act. No provisions mandate compliance from private employers.

MONTANA: Mont. Code Ann. 39-2-205 et seq. ("Montana Workforce Drug and Alcohol Testing Act") requires that any testing of employees by private employers be done in accordance with written policies and procedures established by the employer.

NEBRASKA: Neb. Rev. Stat. 48-1901 et seq. states that no disciplinary or administrative action is allowed unless an initial positive test has been confirmed by gas chromatography/mass spectrometry technique. Attempts to alter the results of a drug or alcohol test are punishable as Class I criminal misdemeanors.

NEVADA: No state law regulates private employer drug or alcohol testing. State employees do not include members of the Nevada National Guard or employees of state penal, mental, and correctional institutions.

NEW HAMPSHIRE: New Hampshire has not enacted any employment drug or alcohol testing laws.

NEW JERSEY: New Jersey has no express law relating to employment drug or alcohol testing.

NEW MEXICO: New Mexico has no statutes regulating the testing of employees for drugs or alcohol.

NEW YORK: New York has no express employment drug or alcohol testing laws. Random drug and alcohol testing of city transit authority bus drivers, police officers and corrections officers has been upheld by courts.

NORTH CAROLINA: North Carolina has a "Controlled Substance EXAMINATION Regulation" codified at Gen. Stat. 95-230 et seq. The law purports to protect individuals from "unreliable and inadequate examinations and screening for controlled substances" and to preserve an individual's dignity to the extent practical, and focuses on chain-of-custody and laboratory testing procedures more than policy guidelines.

NORTH DAKOTA: No statute expressly addresses employment drug and alcohol testing in North Dakota, and there is little, if any, case law in the area.

OHIO: Ohio does not have any employment drug and alcohol testing laws.

OKLAHOMA: Oklahoma's "Standards for Workplace Drug and Alcohol Testing Act", Okla. Stat. 40-551, applies to both public and private employers. No un-usual provisions.

OREGON: No specific employment drug or alcohol testing laws.

PENNSYLVANIA: Pennsylvania has not enacted any employment drug and alcohol testing laws.

RHODE ISLAND: Rhode Island's "Urine and Blood Tests as a Condition of Employment" provision under R.I. Gen. Laws 28-6.5-1 and 28-6.5-2. prohibits the termination from employment of any person who tests positive for drugs or alcohol. Instead, the employee must be referred to a substance abuse professional for treatment or evaluation.

SOUTH CAROLINA: South Carolina's law, modeled after the federal law, affects those doing business with the State. Codified at S.C. Code Ann. 44107-10 et seq. offers a 5 percent reduction in worker's compensation premiums to participating employers (private employers are not required to implement such programs).

SOUTH DAKOTA: No employment drug and alcohol testing laws.

TENNESSEE: Tenn. Code Ann. 50-9-103 et. seq., gives a discount on workers' compensation premiums and shifts the burden of proof to employees in case of an accident.

TEXAS: Under Tex. Code Ann. 411.091, the "Policy for Elimination of Drugs in the Workplace," employers with fifteen or more employees with workers' compensation insurance coverage are required to adopt a policy of their own choosing but directed at the elimination of drug abuse and its effects in the workplace.

UTAH: Utah Code Ann. 34-38-1 et seq. employers may test employees or prospective employees as a condition of hire or continued employment. In a twist of the law, employers and management must submit to the testing themselves.

VERMONT: Vt. Stat. Ann. 21 § 511 et seq. prohibits random testing for drugs or the drug testing of employees as a condition of continued employment, promotion, or change in employee status.

VIRGINIA: No express law governs employment drug testing.

WASHINGTON: Washington Rev. Code 49.82.010 et seq. models the federal law. Private employers who adopt a drug-free workplace program will receive a 5 percent discount on their workers' compensation premiums.

WEST VIRGINIA: West Virginia has not enacted any employment drug or alcohol testing law, and in a 1990 case, the Supreme Court of West Virginia prohibited random testing by a private employer.

WISCONSIN: No express statute governs employment drug and alcohol testing.

WYOMING: Wyoming has no express statute that governs employment drug and alcohol testing.

New Mexico's Boards' Positions:

New Mexico has no statutes regulating the testing of employees for drugs or alcohol, so neither has taken a position on this issue at this time. Both of the Boards' do have the authority to restrict, revoke, or suspend a license if a health care provider (doctor or nurse) is found to have a drug or alcohol problem. Both Boards also have treatment programs for providers that either self-report or are required to attend.

NM Medical Board

61-7-12. Impaired Health Care Provider Treatment Program:

- The license, registration or certification of any health care provider to practice in this state shall be subject to restriction, suspension or revocation in case of inability of the healthcare provider to practice within reasonable skill or safety to patient by reason of one or more of the following:
 - Mental illness;
 - Physical illness, including but not limited to deterioration through the aging process or loss of motor skill; or
 - Habitual or excessive use or abuse of drugs, as defined in the Controlled Substances Act, or alcohol.
- If the board has reasonable cause to believe that a health care provider licensed, registered or certified to practice in this state is unable to practice with reasonable skill and safety to patients because of a condition described in Section 61-7-3, the board shall appoint an examining committee as described in Subsection B of this sections to examine the health care provider and shall, following the examination, take appropriate action within the provisions of the Impaired Health Care Provider Act.

NM Board of Nursing

61-3-1-29. Nurse Practice Act:

- The New Mexico Board of Nursing the board may deny, revoke or suspend any license held or applied for under the Nursing Practice Act NMSA 1978, reprimand or place a licensee on probation or deny, limit or revoke the multistate licensure privilege of a nurse desiring to practice or practicing professional registered nursing or licensed practical nursing as provided in the Nurse Licensure Compact. upon grounds that the licensee, applicant or nurse: (1) is guilty of fraud or deceit in procuring or attempting to procure a license or certificate of registration; (2) is convicted of a felony; (3) is unfit or incompetent; (4) is intemperate or is addicted to the use of habit-forming drugs; (5) is mentally incompetent; (6) is guilty of unprofessional conduct as defined by the rules and regulations adopted by the board pursuant to the Nursing Practice Act; (7) has willfully or repeatedly violated any provisions of the Nursing Practice Act, including any rule or regulation adopted by the board pursuant to that act; or (8) was licensed to practice nursing in any jurisdiction, territory or possession of the United States or another country and was the subject of disciplinary action as a licensee for acts similar to acts described in this subsection.
- The Diversion Program enacted in 1987 authorizes the Board of Nursing to create a program to rehabilitate nurses. It is a confidential, voluntary alternative to formal disciplinary action for nurses who may be chemically dependent because of the habitual or regular use of drugs and/or alcohol.

New Mexico Health Care Association Survey Results:

The New Mexico Hospital Association conducted a voluntary survey of its membership asking about their current employee drug screening practices. A total of 17 responses were received from both large and small health care facilities in all five regions of the state.

Based on the survey results, the most prevalent type of drug screening is pre-employment (15/17) and for-cause testing (16/17). Only nine of the 17 respondents conduct random testing or accident/incident testing.

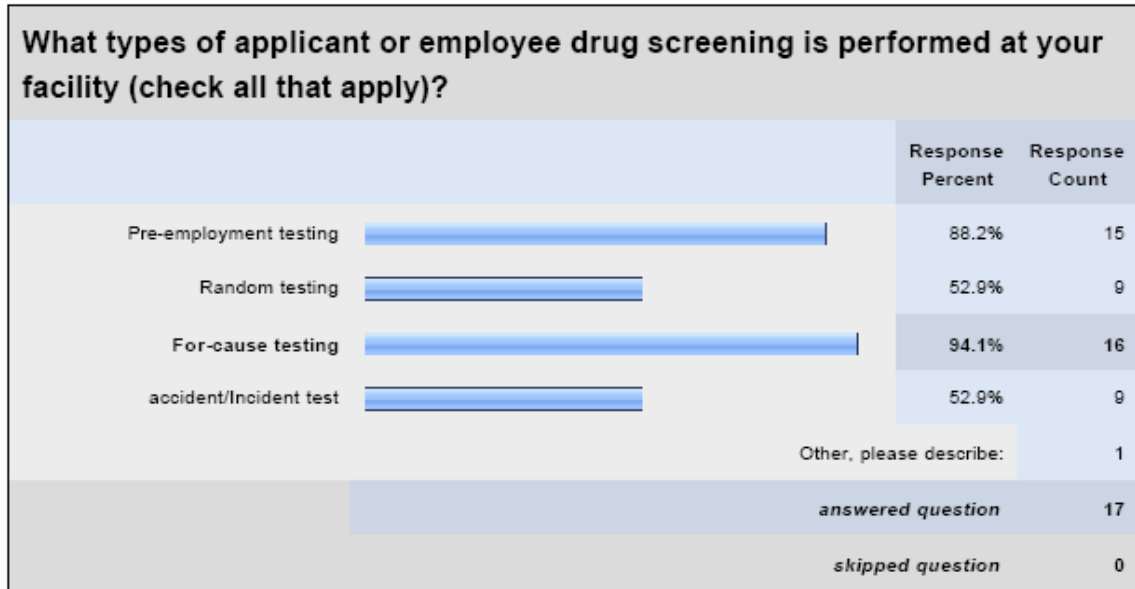
Although there were nine responses indicating that the facility conducted random testing, only seven of the nine responded to the question on the type of employee categories to which they apply this random screening. Of the seven responses, 100% randomly screened senior management and clinicians. Another 85.6% (6/7) screened employed physicians. The least likely category to be screened was the independent medical staff physicians (1/7).

When asked about who performs the actual testing on drug screening samples, a majority of the responders (12/16) stated that they use independent testing laboratories for their samples. Another 18.8% (3/16) used both in-house and independent laboratories.

When surveyed about follow-up actions on positive test results, 87.5% (14/16) stated that they provide counseling and/or required the employee to complete a drug treatment program. Only two responses indicated that positive test results ended in termination.

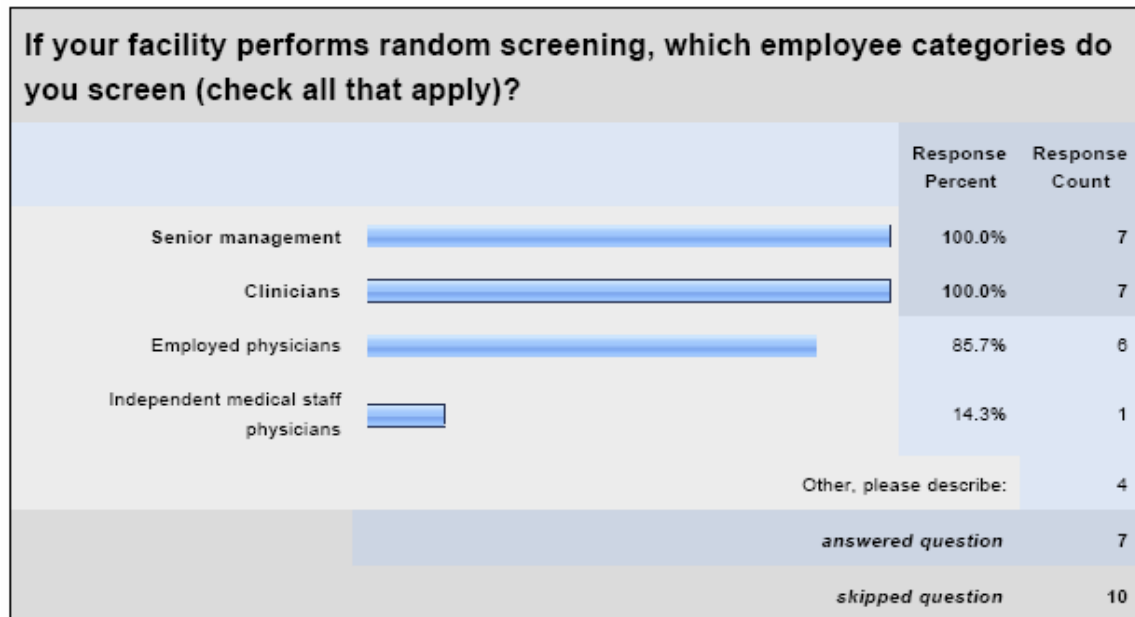
Below are the actual survey results:

NMHA Drug Screening Survey for SM 62



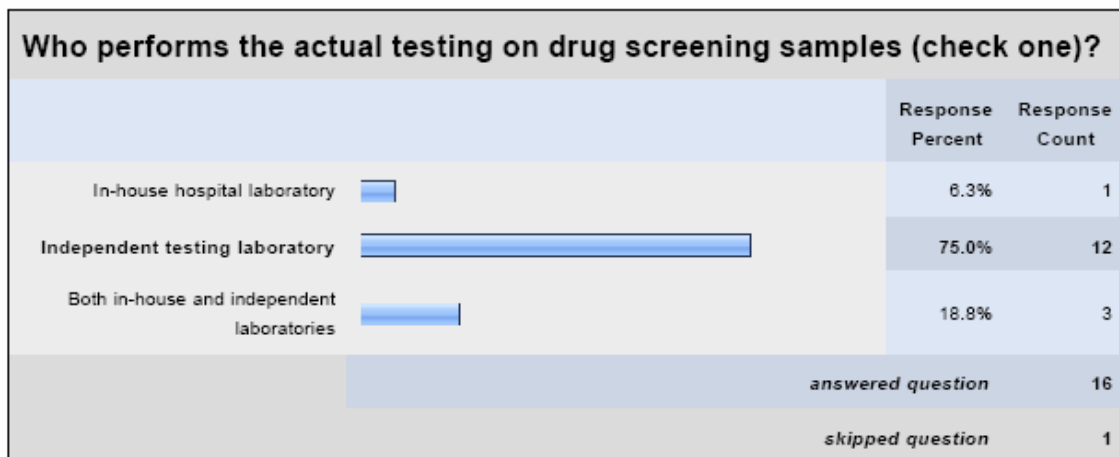
Other, please describe:		
1	Reasonable suspicion	May 13, 2010 10:18 PM

NMHA Drug Screening Survey for SM 62

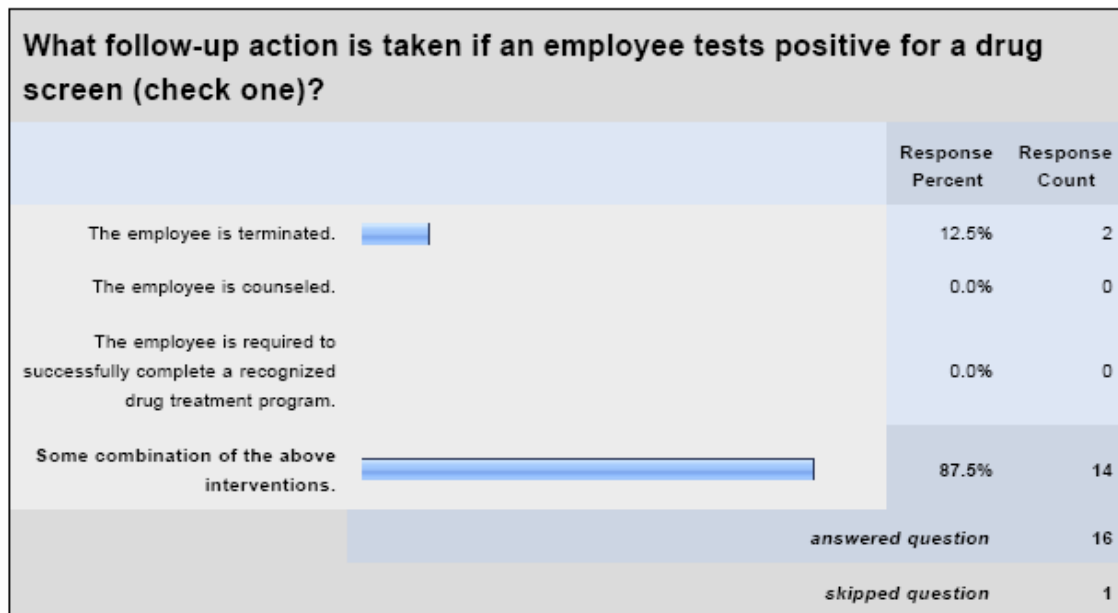


Other, please describe:		
1	All employed staff are subject to random drug screens.	May 10, 2010 10:19 PM
2	All hospital employees are included.	May 10, 2010 11:29 PM
3	Employees who drive hospital vehicles, security guards	May 11, 2010 1:59 PM
4	None	May 12, 2010 8:01 PM

NMHA Drug Screening Survey for SM 62



NMHA Drug Screening Survey for SM 62



Areas for Consideration:

The risks and costs associated with drug/alcohol abuse in the workplace are well documented. To combat these concerns, many health care organizations have used employee drug testing to prevent the hiring of individuals who use illicit drugs and to promote safety in the workplace. The question now becomes does the cost of an employee drug screening program outweigh the benefit.

Our research showed that both the American Medical Association and American Nursing Association oppose random drug/alcohol screening and that this type of screening is not widely done. Instead, the trend for most hospitals and corporate provider agencies is to require a pre-employment drug screening and to do screening on suspicion with reasonable cause and/or post accident and incident. However, many small providers do not conduct screening as the costs are often prohibitive and may compromise their viability.

Employers have three traditional options to test employees: a urine test, which typically cost \$40 per employee; oral fluid testing, for about the same cost as urine tests; and hair testing, which costs anywhere from \$65 to \$85, but detects drugs over a 90-day period, as opposed to the 72-hour window for urine and oral fluid testing. While the actual cost of the test may not be prohibitive to some organizations, the indirect costs associated with operating and administering drug testing programs add to these figures, as does the cost of having employees absent from their jobs temporarily. Grievances and lawsuits related to the testing program create an additional financial burden, and if treatment or other rehabilitative services are offered to drug-positive workers, the price tag of a drug testing

program increases further.^{xviii} According to an American Civil Liberties Union (ACLU) report, drug testing programs are expensive. In one year, 38 federal government agencies spent \$11.7 million on drug testing. Out of nearly 29,000 tests given that year, only 153 (.5%) were positive. The cost of finding a single drug user for these agencies was therefore estimated to be \$77,000.^{xix}

Also, some of the research is unclear as to whether a workplace drug testing program is effective over the long-term in reducing the risk of accidents in the workplace and the associated costs for employers. It also shows that the implementation of a workplace drug screening program may have an adverse effect on the morale and motivation of staff and may make it more difficult for employers to recruit new staff. In addition, privacy issues rank high as an employee concern as drug and alcohol testing can be a semi-invasive procedure, which some employees may find humiliating or degrading.

However, other research illustrates that if the employee drug testing program is undertaken in a fair manner with reasonable appeal systems and a voice for employees, the drug testing program could be accepted with limited effect on the morale and motivation of employees. In order to implement a workplace drug and alcohol testing program, employers should work with their employees, allowing them opportunities to voice their concerns.

Drug testing works best when implemented based on a clear, written policy that is shared with all employees, along with employee education about the dangers of alcohol and drug abuse, supervisor training on the signs and symptoms of alcohol and drug abuse, and an Employee Assistance Program to provide help for employees who may have an alcohol or drug problem. It's also imperative, experts say, to have a uniform policy for "What happens when ...?" situations, such as when an employee refuses to be tested or presents a tampered specimen.

Implications to moving forward

All of these issues outlined above will play an important role in the successful implementation of employee drug screening programs. More work needs to be done before New Mexico considers the passage of legislation regulating the testing of employees for drugs or alcohol. Potential things to consider are:

- Budget for direct costs (testing supplies and/or contract with an independent laboratory service) and indirect costs (administration of the program, legal and employee assistance/treatment costs) of drug screening.
- Regulatory and policy issues (i.e. privacy, employee rights, refusal or tampering with tests, corrective action for positive results either corrective or punitive, standardization of process across affect agencies or organizations, training and

^{xviii} Zimmer, Lynn, ACLU "Drug Testing a Bad Investment", 1999, Retrieved from http://www.aclu.org/files/images/asset_upload_file27_31386.pdf

^{xix} "Focus on Federal Drug Testing," 1991 *Individual Employment Rights*, BNA (April 9, 1991), p. 4.

educational components, etc.) that need to be addressed with the Governor's Office, State Personnel Office, the Unions, the Attorney General and other executive agencies or health care organizations that may be affected.

- Development of an evaluation component to be included in any drug screening program to determine cost and long-term effectiveness of the program.