

Addicted but Competent: What Private-Sector Security Directors Need to Know About Pre-Employment Drug Testing

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The legal aspects of private-sector drug testing in New York State is not only an important issue for security directors to be familiar with, but it also illustrates how the legal system works.

To begin, this issue has fundamental differences in the private and public sectors. "A search by a private person or a nongovernmental entity does not violate constitutional rights," declared the Court of Appeals of New York in 1980. This judgment reflects the clear view that constitutional rights such as the Fourth Amendment's prohibition against unreasonable searches do not apply to the private sector. A government employee may have a claim against the government for an improper drug test based on a constitutional violation, but such a claim is irrelevant in the private sector.

The focus on drugs in the workplace began in 1986 when President Ronald Reagan signed Executive Order 12564, which ordered federal employees to "refrain from the use of illegal drugs" and executive agencies to "develop a plan for achieving the objective of

a drug-free workplace." The move spawned the following legislation:

- In 1988, Congress passed the Drug Free Workplace Act, requiring federal grant recipients and contractors to certify that they are a drug-free workplace.
- In 1991, Congress again passed the Omnibus Transportation Employee Testing Act, which required drug testing of "safety-sensitive" employees in various transportation industries, including aviation, trucking, railroads, mass transit and pipelines.

Since federal law applies everywhere in the United States, New York employees employed under a federal contract or in the transportation industry are bound by these statutes.

What about the remainder of the workforce, the overwhelming majority of New York State employees who are not in these two categories? What law applies to them?

New York Statutes

Unlike some other states, New York does not have a statute that regulates drug testing. Therefore—at least in theory—in an "at will" jurisdiction, a New York employer can terminate employment for any reason, including drug use or the refusal to undergo a drug test. ("At will" employees can be terminated "for good cause, for no cause, or even for cause morally wrong," wrote the Tennessee Supreme Court in 1884).

The analysis continues, however,

as New York State Mental Hygiene Law (Section 1.03) defines "mental disability" to include substance and chemical dependence, along with mental illness and mental retardation. Furthermore, New York Human Rights Law (Section 296) makes it an "unlawful discriminatory practice" for an employer "to refuse to hire or employ or to bar or to discharge from employment... or to discriminate against" an individual because of a disability.

Of significance, Section 292 of the Human Rights Law states "that in all provisions of this article dealing with employment, the term [disability] shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held."

Doe v. Roe

The seminal case of *Doe v. Roe* (1989) shows the interplay between the need for drug testing and New York State law. The plaintiff failed a drug test he took as part of the pre-employment screening process for the defendant, an investment bank. Though a second test confirmed the presence of opiates in the plaintiff's urine, the plaintiff claimed this was due to his eating bread with poppy seeds; he offered scientific literature to support his claim and offered to undergo a physical exam to prove he did not abuse drugs. Roe rejected these offers and denied Doe employment.

Doe sued based on the New York statutes cited above, claiming that Roe unlawfully discriminated against him based on "a perceived 'disability' of drug addiction and without regard to [plaintiff's] ability to perform the functions of a financial analyst." Roe asked the court to dismiss the case, claiming that Doe did not state a legally actionable claim.

In its analysis, the court stated that this issue "involves a sensitive balancing of

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the employer's need to hire employees unimpaired by drug or other substance abuse problems, which will adversely affect the employee's job performance and which may pose substantial and unwarranted risks of harm to the employee, his co-workers or the public, as against the employee's (applicant's) need to be protected from discriminatory employment procedures and unnecessary intrusions upon his privacy."

Based on these concerns, the New York statutes, a ruling of New York's Division of Human Rights and an opinion of its General Counsel, the court concluded that, under New York law, an employer is "required to evaluate [the] disabled applicant or employee on his merits, hiring or discharging him only if he can or cannot in fact perform his duties of the job in question" and that the "central concern is the capacity of the individual."



The court also noted that, in amending federal legislation, Congress expressly stated—regarding employment discrimination—that "handicapped individual" does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others." In other words, this legal protection applies only to the addicted drug user who seeks rehabilitation and not to the casual drug user.

Roe appealed, and the following year the court's Appellate Division affirmed the lower court's decision. The court stated that the employer must show that the test must bear "a rational relationship to and is a valid predictor of employee job performance, and that it does not create

an arbitrary, artificial and unnecessary barrier to employment which operates invidiously to discriminate on the basis of an impermissible classification," and that New York's Human Rights Law "forbids discrimination against disabled persons, including drug abusers, who are able to perform their jobs. It also protects persons who are erroneously believed to be drug abusers—as may happen when someone is labeled a drug abuser based upon a false test result."

Other New York Cases

In 1992 a New York appeals court (in a case called "In the Matter of the Claim of Joyce M. Atkinson, Appellant, and B.C.C. Associates and the Commissioner of Labor, Respondents") affirmed the dismissal of an employee of a money-counting services business for failing a drug test. The employee counted approximately \$10,000 a day, which the court characterized as "an extremely security-sensitive position." As a result, the employee's use of cocaine "sufficiently reflected on her integrity so as to constitute misconduct, irrespective of where the drug was imbibed." The court therefore held that the "termination of [employee's] employment was based on the adverse effect on claimant's integrity brought about by even casual cocaine use."

Then, in 1993 New York's Commissioner of the Division of Human Rights upheld a complainant's denial of employment based on a failed drug test for marijuana performed during a pre-employment exam. The commissioner ruled that "the Division has never regarded the mere use of alcohol or drugs as a 'disability' within the meaning of the Human Rights Law. The Division has ruled that although the protection of the Human Rights Law as regards to disability applies to those persons who are or have been addicted to drugs, a social or casual user of drugs, whether the drug of choice is alcohol or marijuana or cocaine, is not disabled within the meaning of the Human Rights Law."

Practical Lessons

These cases offer the following lessons:

- First, New York law on this topic was formulated in the years following the

enactment of federal drug legislation. A paucity of significant litigation since the above-cited cases leave these three examples as the starting point for legal analysis.



- Second, while New York has no statute prohibiting or regulating drug testing, disability and human rights laws are drawn into question and therefore must be considered.
- Third, in principle New York companies can use drug testing, but to deny or terminate employment based on positive results, the company must show that, because of his drug use, the individual was either (a) unable to perform his duties in a reasonable manner or (b) threatens the property or safety of others.
- Finally, the company must be able to distinguish between a casual drug user and an addict, as only the latter may qualify for legal disability protection.

In applying these lessons, security directors share an important role with other corporate decision-makers—in particular, a company's counsel and human resources director—as the decision of how and when to require drug testing and/or to deny employment based on a positive test result requires their input as well. It is a decision with the potential of having serious implications for both the individual involved and the company. ■

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