

## Mining's Patchwork Quilt of Drug-Free Laws

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It's the rare coal company that has not encountered illicit drug use among its employees. SAMSHA (Substance Abuse and Mental Health Services Administration) reported in 2003 that more than 12% of miners reported illicit drug use and 15.7% reported heavy alcohol use, with 10% of all miners saying they were dependent on alcohol. More than one mining accident has been suspected of being related to drug or alcohol use, even if it was not determined to be the "cause" of the accident. As a result, in 2005, the Mine Safety and Health Administration (MSHA) announced it was working on a drug-free workplace rule.

Several unions, including the Operating Engineers and the Boilermakers, partnered with MSHA during this time to achieve drug-free workplaces and created television ads explaining that "a union workforce is a drug-free workforce." However, the dominant coal industry union, the United Mine Workers of America (UMWA), adamantly and philosophically opposed mandatory random drug testing of coal miners.

Meanwhile, in 2007 and 2008, Kentucky and Virginia, working with the coal industry, created drug-free workplace laws for coal mines. These required random drug testing and impacted a miner's certification which prevented drug abusers from job hopping. Meanwhile, coal companies, which were implementing drug-free workplace policies, were required to follow the uniquely different laws of each state where mines were located. For example, some states restrict random drug testing.

For a brief time in the Fall of 2009 it looked like MSHA might bring some uniformity to drug testing issues in the coal fields by creating a uniform minimum standard rule that required alcohol and drug-free coal mine workplaces and random drug testing of mines. (proposed as 30 C.F.R. Parts 56, 57 and 66). The mining industry applauded MSHA for trying to "*eliminate the gaps that exist across the patchwork of state programs regulating substance abuse at our nations mines.*" (See remarks of Bruce Watzman, Vice President of Safety, Health & Human Resources for National Mine Association at MSHA's public hearings).

However, MSHA's proposed rule contained serious flaws: 1) it did not cover all employees working in and around a mine site, who clearly could be hurt by being under the influence of drugs or alcohol while on the mine site; 2) it incorporated the Department of Transportation's testing methods, without any consideration for its documented problems or for the advances in testing methodologies; and 3) it required mandatory reinstatement of first time positive violators, a result that conflicted with many successful zero tolerance programs in place at coal mines and the zero tolerance state licensing laws, such as those passed in Kentucky and Virginia. Not surprising, the industry criticized MSHA for interfering in the discipline scheme of employers. (*Some companies operate with zero tolerance; some offer employee assistance if employees request before being selected for a drug test; others offer a one-time rehabilitation opportunity, following a positive test with or without a formal last chance agreement*).

Not surprisingly, the UMWA also opposed MSHA's proposed rule. UMWA-represented miners came out in record numbers in Alabama; attending public hearings to show their displeasure with MSHA's proposed rule.

With so much opposition to its proposed rule, MSHA did not issue a final rule before the end of the Bush administration. This author believes that MSHA, under the new administration, is unlikely to pursue a mandatory drug test rule in the near future, unless a drug-related accident changes the political will to try again.

Thus, without an MSHA-required drug-free workplace rule, coal companies wishing to implement or maintain such programs must continue to know the unique requirements of each state's law. Two things remain certain: there is little uniformity among the states and each year another state considers implementing or changing its drug-testing laws for employers operating in that state.

As noted earlier, Kentucky and Virginia have instituted mandatory substance abuse testing laws for all coal miners. To guard against "job hopping" by substance abusers, a miner's certification is revoked for a period of time, until the miner can show he or she is drug free. Mining employers can call licensing agencies in Kentucky or Virginia to find out whether a miner's certificate has been revoked.

In West Virginia, employers, if they choose to do so, can drug screen all applicants, after making job offers and test persons for reasonable cause. By case law, companies can also random test but only those persons in "safety sensitive positions."

In Arizona, there is a private sector workplace drug testing and alcohol impairment law which protects employers who take adverse employment actions for good faith reliance on a positive test, so long as the tests are performed according to the parameters of that law.

In Maryland, drug-free workplaces are not mandatory, but if the employer creates a policy it must comply with Maryland's statute regarding the types of tests which can be administered. In Pennsylvania and Virginia, it is a misdemeanor to alter one's specimen to evade a drug test. Not so in West Virginia. Meanwhile, Maryland and Colorado protect medical marijuana use.

Despite this patchwork quilt of uniquely different drug testing laws, mine operators have seen the benefits of creating drug-free workplace programs. Most large sized companies have implemented such programs. Even UMWA-represented mines have introduced programs, relying on Article III(g) of the Coal Wage Agreement, following the procedures required by the contract and labor law. Meanwhile, in Kentucky, since implementing its coal mine drug-testing law in July 2006, it has experienced the lowest number of mining fatalities in Kentucky history.

Employers who create zero tolerance programs have seen a reduction in both accidents and absenteeism, although many have lamented the loss of some very skilled people who failed a test along the way. More importantly, these drug free programs have resulted in those skilled and valuable employees who had a drug or alcohol problem voluntarily entering into rehabilitation programs before one is selected for random drug testing. This has also resulted in more successful outcomes long term.

Anecdotally, drug-free workplace programs seem to be slowly changing cultural norms -- miners no longer accept a "drug culture atmosphere" in the coal fields. When a coal miner says no to illegal drugs as a recreational activity, their spouse is likely to say no as well. When a miner and their spouse avoid social gatherings where illicit drugs are used, the drug-free entertainment preference has its own ripple effect in the community. Recreational illicit drug use is simply not an acceptable form of social entertainment.

In the end, it is indisputable that drug-free workplace programs promote safer workplaces. If your company does not have a program, it should consider one and ensure that the program complies with applicable state laws. If your company does have a program, make sure your Human Resource and Safety personnel are keeping informed about the proposed changes in state and federal laws each year. Recreational drug use and alcoholism are not conducive to safe mining. Additionally, creating drug free workplaces may also create

long-term benefits to mining communities, just as surely as a company being involved with a local school or community program.