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EXECUTIVE ORDER 12,564:
TOWARD A DRUG-FREE FEDERAL WORKFORCE

Robert M. Kruger*

I appreciate this opportunity to speak to you today about an issue of the highest priority to the Reagan Administration: the national campaign against drug abuse.

Our country faces a drug abuse problem of epidemic proportions. That problem has grown dramatically in the last ten or twenty years, both in terms of pervasiveness and destructive capacity. It is projected that 5,000 Americans will use cocaine for the first time today, adding to the 20,000,000 plus Americans who have already experimented with this dangerous drug. According to the National Institute on Drug Abuse, the marijuana available today is over four times more potent than that available only a few years ago. And "crack," a powerfully addictive and extremely destructive form of cocaine, has now come upon the scene.

We now know better than ever that the harmful effects of these drugs are not confined to their users. Profits from illegal drugs, totaling billions of dollars annually, provide the single greatest source of income for organized crime and fuel violent street crime.¹ Protecting Americans from drug-related crime diverts billions of dollars and tremendous resources from meeting other societal needs.² The recent tragic drug-induced deaths of two promising athletes remind us of the devastating toll drug abuse takes on our families and young people.

It is the President's strongly-held view that a solution to the drug problem will require all Americans to work together to eliminate drugs from all areas of our daily life. The initiatives that the Administration has put forth reflect this call for a total commitment: working towards drug-free schools and drug-free workplaces, expanding drug abuse treatment and research, improving international cooperation, strengthening law enforcement and increasing public awareness and prevention.

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¹PRESIDENT'S COMM'N ON ORGANIZED CRIME, AMERICA'S HABIT: DRUG ABUSE, DRUG TRAFFICKING, AND ORGANIZED CRIME (1986).

²ALCOHOL, DRUG ABUSE AND MENTAL HEALTH ADMIN., ECONOMIC COSTS TO SOCIETY OF ALCOHOL AND DRUG ABUSE AND MENTAL ILLNESS - 1977, RESEARCH TRIANGLE INST., OFFICE OF PROGRAM PLANNING AND COORDINATION (updated through 1983).

Today we discuss the use of drug tests to identify drug users in the work force. In so doing, it is important to keep in mind that we are looking at only one device helpful in achieving but one of the President's goals.

I say this to offer perspective, not to minimize the critical importance for our society of ensuring that our workplaces are free of drugs. The costs of alcohol and substance abuse among employees are, in themselves, staggering. According to some estimates, drug abuse costs the economy as much as sixty billion dollars annually in lost productivity. Studies have shown that employees who are involved in alcohol or substance abuse have greater health care needs and costs than other employees, are absent more often, are more likely to be involved in work-related accidents, and are more likely to require disciplinary action. Drug use by employees exposes employers to liability for employee actions and increases insurance costs by presenting a health and safety threat to the public and to other employees. Drug use also contributes to reduced employee morale and loss of good will.³

These problems are not confined to any one segment of the work force. Drug abuse cuts across corporate lines. Its adverse effects are felt in the board room as well as on the assembly line.

The federal government, as the nation's largest employer, shares these concerns. Although the President has the utmost regard for civil servants, sadly, there is no reason to believe that the federal work force is insulated from a drug abuse problem which pervades society at large. The federal government is concerned, as all employers must be, with the well-being of its employees, with the successful accomplishment of its agencies' missions, and with the need to maintain employee productivity. In some ways, the use of illegal drugs by federal employees presents a more compelling scenario for action than that which has already mobilized the private sector. Not only is drug abuse inconsistent with the law-abiding behavior expected of all citizens, but also with the special trust placed in government employees as servants of the public. The use of drugs by federal employees affects the ability of federal departments and agencies to protect our borders, our resources, our security, our economy, and our general welfare. The use of illegal drugs by federal employees can pose a serious health and safety threat to members of the public. The use of illegal drugs by federal employees in certain positions evidences less than the complete reliability, stability, and good judgment that is consistent with access to sensitive information. This situation creates the possibility for coercion, influence, and irresponsible action under pressure that may pose a serious risk to national security, the public safety, and the effective enforcement of the law.

³M. GOLD, P. BENSINGER, A. WASHTON & L. CHILNICK, *DRUGS IN THE WORKPLACE, FACTS V. MYTHS* (1986).

For all of these reasons, the President issued an Executive Order on September 15, 1986, designed to achieve a drug-free federal workplace.⁴ Consistent with the President's views, it focuses on helping, not punishing, drug users. Time does not permit me to go into each of the Order's provisions in great detail. I would, however, like to offer an overview of the major provisions of the Order. In deference to the occasion, I will concentrate on the provisions of the Order which authorize the use of drug testing to achieve that objective.

The Executive Order calls upon "agency heads," the chief executive officers of our government, to develop five-point plans for achieving the objective of a drug-free federal workplace. Under the Order each plan is to include:

First, a statement of policy setting forth the agency's expectations regarding drug use and the action to be anticipated in response to identified drug use by an employee.

Second, an employee assistance program emphasizing high level direction, education, counseling, referral to rehabilitation, and coordination with available community resources. The availability of treatment for those with drug problems is a centerpiece of the Executive Order.

Third, each plan is to provide for supervisory training to assist in identifying and addressing illegal drug use by agency employees.

Fourth, there must be provision for self-referrals as well as supervisory referrals for treatment with maximum respect for individual confidentiality.

Finally, each plan must provide for identifying illegal drug users, including identification through the use of drug testing on a carefully monitored basis.

Essentially, the agency plans will make known the fact that federal employees are required to refrain from the use of illegal drugs. The plans will open the door to treatment and assistance for those who cannot stop using drugs on their own and will provide for identification and referral of those employees who use drugs but who do not voluntarily avail themselves of treatment opportunities. The President hopes that a clear statement of the federal government's expectations regarding drug abuse will provide sufficient incentive for those employees who are able to discontinue their use

⁴Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986). A copy of Executive Order 12,564 is contained in the appendix to this article.

of illegal drugs to do so voluntarily and that those employees who need help breaking a drug habit will take advantage of treatment and assistance programs. However, because there will undoubtedly be employees who, for whatever reason, do not voluntarily stop using drugs or take advantage of employee assistance programs, the Executive Order calls upon supervisors to assist in identifying employees who use drugs and to refer them to treatment.

In many instances, properly trained supervisors will be able to identify drug-using employees through direct observation and without the necessity for diagnostic testing. The risks and costs of undetected drug use being as extensive as they are, however, the Executive Order enlists the assistance of drug testing programs to help ensure that drug use by certain employees and in certain situations does not go unidentified. Agency heads must establish a testing program for employee's who occupy what the Order calls "sensitive" positions. The sensitivity of a position is based on the agency's mission, the employee's duties, and the potential consequences of employee drug use to public health and safety or to national security. The head of an agency may also order the testing of any employee (1) when there is a reasonable suspicion that the employee uses illegal drugs, (2) as part of an investigation of an accident or unsafe practice, and (3) as part of or as a follow-up to counseling or rehabilitation through an employee assistance program. Each agency is also to permit employees in nonsensitive positions to volunteer for drug testing. Finally, applicants may be tested at the discretion of the hiring agency.

Contrary to widespread reports, the Executive Order does not purport to require that all or any number of federal employees be subject to mandatory drug tests. Rather it vests in the agency heads the authority to determine which employees occupy sensitive positions and to determine the extent to which such employees are to be tested and the criteria for such testing. Agency heads are to make the determination of sensitive employment status by reference to the criteria set out in the Executive Order. Generally, a sensitive employee (1) occupies a position that has been previously designated "sensitive" for security reasons, (2) has access to classified information pursuant to a determination of trustworthiness, (3) is serving under a Presidential appointment, (4) is a law enforcement officer, or (5) occupies a position that the agency head determines involves law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence.

Where a drug testing program is established, the Executive Order provides for standards and procedures to ensure fairness and to protect the privacy of federal employees. Testing procedures must provide notification to included employees sixty days prior to the start of a drug testing program. Employees must be given an opportunity to submit documentation to support legitimate medical use of drugs. Programs must contain procedures to

protect the confidentiality of test results and medical records. Testing procedures must allow for individual privacy in the production of a specimen unless the agency has reason to believe that a particular individual may alter or substitute the specimen. All testing under the Executive Order will be done in accordance with technical and scientific guidelines soon to be issued by the Department of Health and Human Services. Unconfirmed test results will not be used as a basis to discipline any employee. An employee will be able to challenge any finding that he or she uses illegal drugs, including the results of any underlying drug test.

Drug testing is but one means of identifying drug use among employees. The consequence of drug use does not vary depending upon the means of determination, whether through a confirmed positive drug test or learning through another source that an employee uses drugs. As I have said, and as the President has repeatedly emphasized, the goal is for drug users to discontinue their use, whether voluntarily or with the help of employee assistance programs. Under the Executive Order, agencies shall refer any employee who is found to use illegal drugs to an employee assistance program for assessment, counseling, and referral for treatment or rehabilitation. But having put employees on notice that drug use is unacceptable and having provided opportunities for treatment, the Executive Order holds drug users ultimately accountable for their actions. The Executive Order allows for personnel actions based on identified drug use. Employees in sensitive positions who are found to use illegal drugs will not be permitted to remain on duty prior to successful completion of rehabilitation through an employee assistance program. Any employee who uses illegal drugs and refuses counseling or rehabilitation or returns to using illegal drugs after a rehabilitation effort will be removed from the federal service.

Two additional points relating to the consequences of identification as a drug user should be mentioned. The Executive Order provides that disciplinary actions must be in compliance with laws governing the personnel practices of the federal government. Second, the Executive Order provides that drug testing shall not be conducted pursuant to the Order for the purpose of gathering evidence for use in criminal proceedings. Agencies are not required to report to the Attorney General for investigation or prosecution any information, allegation, or evidence relating to violations of drug laws as a result of drug testing programs established pursuant to the Order. I think a careful reading and full understanding of the Executive Order affirms that it is a studied, compassionate, and legally sound approach to the problem of drug abuse in the work force.

In view of recently publicized cases involving government drug testing programs, I would like to make a few points clear. No court has considered a challenge to the legality of a drug testing program promulgated pursuant to the Executive Order. Challenges to other government testing programs have

produced divergent rulings. Last week, a district court judge in New Orleans enjoined, on constitutional grounds, a drug testing program implemented by the United States Customs Service.⁵ Similar rulings have recently issued from district courts in New Jersey and Tennessee concerning drug testing programs for municipal police and firefighters.⁶ On the other hand, courts of appeals in three different circuits have upheld aspects of public employee drug testing programs against various legal challenges,⁷ and a fourth court of appeals has upheld the dismissal of governmental employees for off-duty trafficking in drugs.⁸ Clearly, questions await final resolution, perhaps ultimately by the Supreme Court; but the Executive Order, with its compelling justification for drug testing, its carefully tailored use of this diagnostic tool, its respect for the confidentiality and privacy rights of employees, and its emphasis on procedures to ensure accuracy and fairness, should survive a well-reasoned analysis.

⁵National Treasury Employees Union v. Von Raab, 649 F. Supp. 380 (E.D. La. 1986). Note that the constitutional considerations which formed the basis for this ruling and those cited in *infra* note 6 do not apply to drug testing programs implemented in the private sector.

⁶Penny v. Kennedy, 648 F. Supp. 815 (E.D. Tenn. 1986); Lovvorn v. City of Chattanooga, 647 F. Supp. 875 (E.D. Tenn. 1986); Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986).

⁷Shoemaker v. Handel, 795 F.2d 1136 (3d Cir. 1986); Brotherhood of Maintenance of Way Employees v. Burlington N. R.R. Co., 802 F.2d 1016 (8th Cir. 1986); Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976), *cert. denied*, 429 U.S. 1029 (1976).

⁸Sanders v. United States Postal Service, 801 F.2d 1328 (Fed. Cir. 1986).

APPENDIX
Executive Order 12,564

September 17, 1986
Federal Register Vol. 51, No. 180, 32,889

DRUG-FREE FEDERAL WORKPLACE

I, RONALD REAGAN, President of the United States of America, find that:

Drug use is having serious adverse effects upon a significant proportion of the national work force and results in billions of dollars of lost productivity each year;

The Federal government, as an employer, is concerned with the well-being of its employees, the successful accomplishment of agency missions, and the need to maintain employee productivity;

The Federal government, as the largest employer in the Nation, can and should show the way towards achieving drug-free workplaces through a program designed to offer drug users a helping hand and, at the same time, demonstrating to drug users and potential drug users that drugs will not be tolerated in the Federal workplace;

The profits from illegal drugs provide the single greatest source of income for organized crime, fuel violent street crime, and otherwise contribute to the breakdown of our society;

The use of illegal drugs, on or off duty, by Federal employees is inconsistent not only with the law-abiding behavior expected of all citizens, but also with the special trust placed in such employees as servants of the public;

Federal employees who use illegal drugs, on or off duty, tend to be less productive, less reliable, and prone to greater absenteeism than their fellow employees who do not use illegal drugs;

The use of illegal drugs, on or off duty, by Federal employees impairs the efficiency of Federal departments and agencies, undermines public confidence in them, and makes it more difficult for other employees who do not use illegal drugs to perform their jobs effectively. The use of illegal drugs, on or off duty, by Federal employees also can pose a serious health and safety threat to members of the public and to other Federal employees;

The use of illegal drugs, on or off duty, by Federal employees in certain positions evidences less than the complete reliability, stability, and good judgment that is consistent with access to sensitive information and creates the possibility of coercion, influence, and irresponsible action under pressure that may pose a serious risk to national security, the public safety, and the effective enforcement of the law; and

Federal employees who use illegal drugs must themselves be primarily responsible for changing their behavior and, if necessary, begin the process of rehabilitating themselves.

By the authority vested in me as President by the Constitution and laws of the United States of America, including section 3301(2) of Title 5 of the United States Code, section 7301 of Title 5 of the United States Code, section 290ee-1 of Title 42 of the United States Code, deeming such action in the best interests of national security, public health and safety, law enforcement and the efficiency of the Federal service, and in order to establish standards and procedures to ensure fairness in achieving a drug-free Federal workplace and to protect the privacy of Federal employees, it is hereby ordered as follows:

Section 1. Drug-Free Workplace.

- (a) Federal employees are required to refrain from the use of illegal drugs.
- (b) The use of illegal drugs by Federal employees, whether on duty or off duty, is contrary to the efficiency of the service.
- (c) Persons who use illegal drugs are not suitable for Federal employment.

Section 2. Agency Responsibilities.

- (a) The head of each Executive agency shall develop a plan for achieving the objective of a drug-free workplace with due consideration of the rights of the government, the employee, and the general public.
- (b) Each agency plan shall include:
 - (1) A statement of policy setting forth the agency's expectations regarding drug use and the action to be anticipated in response to identified drug use;
 - (2) Employee Assistance Programs emphasizing high level direction, education, counseling, referral to rehabilitation, and coordination with available community resources;
 - (3) Supervisory training to assist in identifying and addressing illegal drug use by agency employees;
 - (4) Provision for self-referrals as well as supervisory referrals to treatment with maximum respect for individual confidentiality consistent with safety and security issues; and
 - (5) Provision for identifying illegal drug users, including testing on a controlled and carefully monitored basis in accordance with this Order.

Section 3. Drug Testing Programs.

- (a) The head of each Executive agency shall establish a program to test for the use of illegal drugs by employees in sensitive positions. The extent to which such employees are tested and the criteria for such testing shall be determined by the head of each agency, based upon the nature of the agency's mission and its employees' duties, the efficient use of agency resources, and the danger to the public health and safety or national security that could result from the failure of an employee adequately to discharge his or her position.
- (b) The head of each Executive agency shall establish a program for voluntary employee drug testing.
- (c) In addition to the testing authorized in subsections (a) and (b) of this section, the head of each Executive agency is authorized to test an employee for illegal drug use under the following circumstances:

- (1) When there is a reasonable suspicion that any employee uses illegal drugs;
 - (2) In an examination authorized by the agency regarding an accident or unsafe practice; or
 - (3) As part of or as a follow-up to counseling or rehabilitation for illegal drug use through an Employee Assistance Program.
- (d) The head of each Executive agency is authorized to test any applicant for illegal drug use.

Section 4. Drug Testing Procedures.

- (a) Sixty days prior to the implementation of a drug testing program pursuant to this Order, agencies shall notify employees that testing for use of illegal drugs is to be conducted and that they may seek counseling and rehabilitation and inform them of the procedures for obtaining such assistance through the agency's Employee Assistance Program. Agency drug testing programs already ongoing are exempted from the 60-day notice requirement. Agencies may take action under section 3(c) of this Order without reference to the 60-day notice period.
- (b) Before conducting a drug test, the agency shall inform the employee to be tested of the opportunity to submit medical documentation that may support a legitimate use for a specific drug.
- (c) Drug testing programs shall contain procedures for timely submission of requests for retention of records and specimens; procedures for retesting; and procedures, consistent with applicable law, to protect the confidentiality of test results and related medical and rehabilitation records. Procedures for providing urine specimens must allow individual privacy, unless the agency has reason to believe that a particular individual may alter or substitute the specimen to be provided.
- (d) The Secretary of Health and Human Services is authorized to promulgate scientific and technical guidelines for drug testing programs, and agencies shall conduct their drug testing programs in accordance with these guidelines once promulgated.

Section 5. Personnel Actions.

- (a) Agencies shall, in addition to any appropriate personnel actions, refer any employee who is found to use illegal drugs to an Employee Assistance Program for assessment, counseling, and referral for treatment or rehabilitation as appropriate.
- (b) Agencies shall initiate action to discipline any employee who is found to use illegal drugs, *provided that* such action is not required for an employee who:
 - (1) Voluntarily identifies himself as a user of illegal drugs or who volunteers for drug testing pursuant to section 3(b) of this Order, prior to being identified through other means;
 - (2) Obtains counseling or rehabilitation through an Employee Assistance Program; and
 - (3) Thereafter refrains from using illegal drugs.
- (c) Agencies shall not allow any employee to remain on duty in a sensitive position who is found to use illegal drugs, prior to successful

completion of rehabilitation through an Employee Assistance Program. However, as part of a rehabilitation or counseling program, the head of an Executive agency may, in his or her discretion, allow an employee to return to duty in a sensitive position if it is determined that this action would not pose a danger to public health or safety or the national security.

- (d) Agencies shall initiate action to remove from the service any employee who is found to use illegal drugs and:
 - (1) Refuses to obtain counseling or rehabilitation through an Employee Assistance Program; or
 - (2) Does not thereafter refrain from using illegal drugs.
- (e) The results of a drug test and information developed by the agency in the course of the drug testing of the employee may be considered in processing any adverse action against the employee or for other administrative purposes. Preliminary test results may not be used in an administrative proceeding unless they are confirmed by a second analysis of the same sample or unless the employee confirms the accuracy of the initial test by admitting the use of illegal drugs.
- (f) The determination of an agency that an employee uses illegal drugs can be made on the basis of any appropriate evidence, including direct observation, a criminal conviction, administrative inquiry, or the results of an authorized testing program. Positive drug test results may be rebutted by other evidence that an employee has not used illegal drugs.
- (g) Any action to discipline an employee who is using illegal drugs (including removal from the service, if appropriate) shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act.
- (h) Drug testing shall not be conducted pursuant to this Order for the purpose of gathering evidence for use in criminal proceedings. Agencies are not required to report to the Attorney General for investigation or prosecution any information, allegation, or evidence relating to violations of Title 21 of the United States Code received as a result of the operation of drug testing programs established pursuant to this Order.

Section 6. Coordination of Agency Programs.

- (a) The Director of the Office of Personnel Management shall:
 - (1) Issue government-wide guidance to agencies on the implementation of the terms of this Order;
 - (2) Ensure that appropriate coverage for drug abuse is maintained for employees and their families under the Federal Employees Health Benefits Program;
 - (3) Develop a model Employee Assistance Program for Federal agencies and assist the agencies in putting programs in place;
 - (4) In consultation with the Secretary of Health and Human Services, develop and improve training programs for Federal supervisors and managers on illegal drug use; and
 - (5) In cooperation with the Secretary of Health and Human Services and heads of Executive agencies, mount an intensive drug awareness campaign throughout the Federal work force.

- (b) The Attorney General shall render legal advice regarding the implementation of this Order and shall be consulted with regard to all guidelines, regulations, and policies proposed to be adopted pursuant to this Order.
- (c) Nothing in this Order shall be deemed to limit the authorities of the Director of Central Intelligence under the National Security Act of 1947, as amended, or the statutory authorities of the National Security Agency or the Defense Intelligence Agency. Implementation of this Order within the Intelligence Community, as defined in Executive Order No. 12333, shall be subject to the approval of the head of the affected agency.

Section 7. Definitions.

- (a) This Order applies to all agencies of the Executive Branch.
- (b) For purposes of this Order, the term "agency" means an Executive agency, as defined in 5 U.S.C. 105; the Uniformed Services, as defined in 5 U.S.C. 2101(3) (but excluding the armed forces as defined by 5 U.S.C. 2101(2)); or any other employing unit or authority of the Federal government, except the United States Postal Service, the Postal Rate Commission, and employing units or authorities in the Judicial and Legislative Branches.
- (c) For purposes of this Order, the term "illegal drugs" means a controlled substance included in Schedule I or II, as defined by section 802(6) of Title 21 of the United States Code, the possession of which is unlawful under chapter 13 of that Title. The term "illegal drugs" does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by law.
- (d) For purposes of this Order, the term "employee in a sensitive position" refers to:
 - (1) An employee in a position that an agency head designates Special-Sensitive, Critical-Sensitive, or Noncritical-Sensitive under Chapter 731 of the Federal Personnel Manual or an employee in a position that an agency head designates as sensitive in accordance with Executive Order No. 10450, as amended;
 - (2) An employee who has been granted access to classified information or may be granted access to classified information pursuant to a determination of trustworthiness by an agency head under Section 4 of Executive Order No. 12356;
 - (3) Individuals serving under Presidential appointments;
 - (4) Law enforcement officers as defined in 5 U.S.C. 8331(20); and
 - (5) Other positions that the agency head determines involve law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence.
- (e) For purposes of this Order, the term "employee" means all persons appointed in the Civil Service as described in 5 U.S.C. 2105 (but excluding persons appointed in the armed services as defined in 5 U.S.C. 2102(2)).
- (f) For purposes of this Order, the term "Employee Assistance Program" means agency-based counseling programs that offer assessment, short-term counseling, and referral services to employees for a

wide range of drug, alcohol, and mental health programs that affect employee job performance. Employee Assistance Programs are responsible for referring drug-using employees for rehabilitation and for monitoring employees' progress while in treatment.

Section 8. Effective Date.

This Order is effective immediately.