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ALCOHOL AND DRUG ABUSE

IN THE WORKPLACE

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I. INTRODUCTION

The use of alcohol, drugs or controlled substances is a significant economic and social problem affecting both public and private employers. A study performed by the Research Triangle Institute reported that the total cost of drug abuse to the American economy is $33 billion a year, manifesting itself in the form of lost productivity, absenteeism, sick leave, drug-related injuries and deaths.[1/] The Institute further estimated that alcohol abuse caused $65 billion in productivity losses in 1983. In March of 1986, the President's Commission on Organized Crime urged all public and private employers to "consider the appropriateness" of a drug testing program. According to the Commission's report, in a recent survey of Fortune 500 companies, two-thirds of those responding said they refused to hire job applicants who fail such tests; 41 percent require treatment for current employees who fail; and 25 percent said they fire drug-using employees.[2/]

This outline will survey the legal landscape with respect to employer efforts to control substance abuse in the workplace. Practical suggestions will then be offered regarding how employers should address this growing problem.

II. APPLICANTS FOR EMPLOYMENT

A. The Legal Landscape

1. The Rehabilitation Act of 1973 precludes federal government contractors and recipients of federal financial assistance from discriminating against employees or job applicants on the basis of their handicapped or perceived handicapped status. The Act defines a handicapped individual as "any person who (i) has a physical or mental impairment which substantially limits one or more of such persons' major life activities; (ii) has a record of such impairment; or (iii) is regarded as having any impairment." 29 U.S.C. § 706(7)(B). The 1978 amendments to the Act provide that although the term "handicap" encompasses drug abuse and alcoholism, an exception exists for those individuals 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 the property or safety of others." 29 U.S.C. § 706(7)(B).

a. In McCleod v. City of Detroit, 39 FEP Cases 225 (E.D. Mich. 1985), the court held that individuals who were rejected for firefighter jobs after drug screening tests detected recent use of marijuana were not handicapped within the meaning of the Rehabilitation Act. The court reasoned that even if the use of marijuana was an impairment, it did not constitute an impairment of a major life activity unless general employability, rather than the ability to perform a particular job, was limited by the impairment. Moreover, the court found that the use of marijuana can adversely

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1/ Bureau of National Affairs, Alcohol & Drugs in the Workplace 8 (1986).

2/ Daily Labor Report, March 5, 1986, p. A-12.

affect a firefighter's ability to do his job and that, consequently, the exclusion of the applicants based on the outcome of the drug tests was job-related and required by business necessity.

b. Similarly, in Heron v. McGuire, 803 F.2d 67 (2d Cir. 1986), the Second Circuit held that a New York City police officer who was addicted to heroin and who tested positively for current heroin use was lawfully terminated under the Rehabilitation Act. The court relied on the "current use" exception in the 1978 amendments to the Act, finding that the officer's current use rendered him unfit for duty and required him to break laws he was sworn to enforce.

c. The Maryland Attorney General has recently determined that drug testing of applicants for employment with the state does not violate the Rehabilitation Act when it can be demonstrated that current abuse would likely make the applicant unable to perform the duties of his or her job or would present a danger to the public or to property. Daily Labor Report, November 5, 1986, p. A-10.

d. However, where an applicant states on an employment application that he or she has a history of drug or alcohol abuse but is presently problem-free, the employer may violate the Rehabilitation Act if the only reason for not hiring the individual is his or her past alcohol or drug use. In Johnson v. Smith, 39 FEP Cases 1106 (D. Minn. 1985), the court refused to hold as a matter of law that a former drug addict who had applied for a job as a correctional officer had failed to establish a prima facie violation of the Act. The court reasoned that the plaintiff had presented evidence that his application for employment was rejected because of his prior addiction, thereby raising a material question of fact as to the employer's motivation in not hiring him. Consequently, the court denied the employer's motion for summary judgment. The court noted, however, that the employer would have an opportunity at trial to rebut the plaintiff's prima facie case. The employer could meet this burden by showing that the plaintiff's handicap was relevant to the qualifications of the job for which he applied. The plaintiff would then have to demonstrate that he was as well qualified as other applicants chosen.

2. The Supreme Court has held that Title VII of the Civil Rights Act of 1964 was not violated where an employer's refusal to hire methadone users adversely impacted on protected groups of blacks and Hispanics. New York Transit Authority v. Beazer, 440 U.S. 568 (1979). See also Drayton v. City of St. Petersburg, 477 F. Supp. 846 (N.D. Fla. 1979)(policy prohibiting hiring of applicants who had used marijuana did not violate Title VII).

3. Many state and municipal laws similarly prohibit discrimination on the basis of handicapped status and have been interpreted as including drug abuse and alcoholism. See, e.g., Hazlett v. Martin Chevrolet Inc., 25 Ohio St. 3d 279, 496 N.E. 2d 478 (1986) (drug addiction and alcoholism are handicaps under Ohio anti-discrimination law); Consolidated Freightways, Inc. v. Cedar Rapids Civil Rights Commission, 366 N.W.2d 522 (Iowa S. Ct. 1985) (alcoholism is a handicap within meaning of Iowa handicap statute). Like the Rehabilitation Act of 1973, these laws generally apply to current employees as well as job applicants. See infra p. 12-13. Some state handicap statutes, however, explicitly exclude alcoholism or drug abuse from coverage. See North Carolina Handicapped Persons Protection Act, N.C. Gen. Stat. § 168A-3(4)a (excluding active

alcoholism, drug abuse and drug addiction from coverage); Texas Human Rights Commission Act, Tex. Rev. Civ. Stat. Ann. art. 5221(k) (excluding drug or alcohol addiction).

B. Practical Suggestions

1. An employer may generally require drug/alcohol screening before considering an applicant for employment to determine whether the employee is currently abusing these substances.

2. It might be advisable to have the prospective employee sign a consent form stating that he or she voluntarily consents to the test, that it will be used for screening and that the results of the test may preclude his employment.

3. To reduce testing costs, it is advisable to test only those applicants who successfully progress to the final stages of the selection process.

4. Open publication of pre-employment drug/alcohol screening procedures may discourage drug and alcohol abusers from applying for job openings.

5. One may want to consider giving applicants an opportunity to challenge an EMIT screen with a confirmatory gas chromatography/mass spectrometry test.

III. CURRENT EMPLOYEES

A. Union or Nonunion.

1. Whether or not an employer's workforce is organized clearly affects the legal issue of whether an employer may unilaterally introduce drug and alcohol testing to the workplace. Unionized employers are required by the National Labor Relations Act to bargain collectively over "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). The National Labor Relations Board has not addressed the issue of whether a drug and alcohol testing program is a "term" or "condition" of employment. However in an analogous situation, the Board has held that requiring employees to submit to polygraph testing as a condition of continued employment is a mandatory subject of bargaining. Medicenter, Mid-South Hospital, 221 NLRB 670 (1978). See also LeRoy Machine Co., Inc., 147 NLRB 1431 (1964) (requirement that employees with bad absentee records submit to physical examination by physician of their choice at employer's expense, subject to disciplinary action if they refuse, is mandatory subject of bargaining).

Similarly, in Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co., 620 F. Supp. 173 (D. Mont. 1985), the district court suggested that a dispute over the implementation of a policy that requires employees to randomly submit urine samples to be analyzed for the presence of drugs is a "major dispute," the counterpart of a mandatory subject of bargaining under the Railway Labor Act.

The duty of a public employer to bargain with its unions regarding the implementation of a drug/alcohol testing program depends largely on the nature of the statute granting collective bargaining rights to public employees. Compare Local 346 International Brotherhood of Police v. Labor Relations Commission, 391 Mass. 429, 462 N.E.2d 96 (1984) (no duty to bargain) with Fraternal Order of Police, Lodge 20 v. City of Miami (Fla. PERC 1985) (duty to bargain), appeal pending, No. 85-2863 (Fla. Dist. Ct. App.)

In view of these rulings, employers would be well-advised to negotiate with their unions before implementing a drug/alcohol testing policy, absent some evidence of waiver by the unions.

2. Even if there is a bargaining obligation, a union may have waived its right to bargain over the implementation of such a policy by contract or past practice. For example, a broad management rights clause that retains in management the right to implement work rules or disciplinary procedures could arguably encompass introduction of drug and alcohol testing procedures. See, e.g., LeRoy Machine Co., Inc., supra (language in management rights clause reserving in management the right to determine the qualifications of employees gave employer the authority to unilaterally require employees to submit to physical examinations). A determination of whether a union has waived its right to bargain requires examination of the collective bargaining agreement, existing work rules, the company's past practice and arbitration precedent. The bargaining duty issue may be raised either in arbitration or before the NLRB in a charge against the employer alleging a refusal to bargain.

3. Waivers have also been found in similar circumstances under the Railway Labor Act. In Brotherhood of Maintenance of Way Employees, et al. v. Burlington Northern Railroad Company, 802 F.2d 1016 (8th Cir. 1986), the court found that a dispute over a railroad's unilateral implementation of a urine testing policy did not amount to a "major" dispute under the Railway Labor Act and that, consequently, the employer was not required to bargain with the union prior to implementation. The policy required all employees who are involved in accidents or other incidents in which human error may have been a factor to undergo urinalysis. In addition, a drug screen was added to the standard urinalysis required of all employees during their periodic medical examinations. In reaching its decision, the court relied on the fact that employees had, for many years, been governed by a safety rule known as Rule G, which provided:

> The use of alcoholic beverages, intoxicants, narcotics, marijuana, or other controlled substances by employees subject to duty, or their possession or use while on duty or on company property is prohibited. Employees must not report for duty under the influence of any marijuana, or other controlled substances, or medication, including those prescribed by a doctor, that may in any way adversely affect their alertness, coordination, reaction, response or safety.

The court concluded from the existence of Rule G that the parties had acquiesced in certain detective and investigative methods, and that requiring employees involved in accidents or similar incidents to undergo urine testing amounted to nothing

more than a refinement of these methods. The court similarly found that since the railroad had long required employees to undergo periodic medical examinations to ensure fitness for duty, without opposition from the union, the addition of a drug screen to the examination was arguably justified by past practice.

4. A union may seek to enjoin unilateral implementation of drug and alcohol rules pending contract arbitration. The enforceability of a unilateral substance abuse policy pending an arbitrator's ruling on its validity, has turned on the court's assessment of the danger to employees or public safety in delaying enforcement relative to the injury employees would suffer if subjected to the policy prior to arbitral decision. A federal judge in Washington, D.C. refused to issue a preliminary injunction against the Potomac Electric Power Company, following the issuance of a temporary restraining order ordering the company to delay implementing a drug and alcohol testing program pending arbitration. The court reasoned that the testing program would not expose employees to any "new" injuries that they were not already experiencing under the company's prior drug and alcohol rules, and that injunctive relief was therefore inappropriate. International Brotherhood of Electrical Workers, Local 1900 v. Potomac Electric Power Co., 634 F. Supp. 642 (D.D.C. 1986). However, in International Brotherhood of Electrical Workers Local System Council U-9 v. Metopolitian Edison, No.86-4426, slip op. (E.D. Pa. August 6, 1986), a temporary restraining order was issued, blocking random drug and alcohol testing of 1600 employees at the Three Mile Island Nuclear Station pending arbitration.

B. Public or Private

Public and private employers are subject to differing legal constraints on the nature of the drug and alcohol testing program that they may impose upon their employees. Private sector employees generally do not have constitutional protection under the United States Constitution from their employers' actions. Therefore, a private employer's testing of employees and applicants for employment does not violate individual constitutional rights. Public employers, however, must abide by federal constitutional principles in employment-related matters.

1. Constitutional Protections

a. The United States Supreme Court has, on occasion, recognized a constitutionally guaranteed "right of privacy" founded on the Fourteenth Amendment's concept of personal liberty in the context of individual protection from state action. See Roe v. Wade, 410 U.S. 113 (1973). To date, very few courts have struck down drug/alcohol testing programs on federal constitutional privacy grounds. See, e.g., National Treasury Employees Union v. Van Raab, No. 86-3522, slip. op. (E.D. La. Nov. 14, 1986) (U.S. Customs Service drug testing plan requiring employees seeking promotions into certain "covered positions" to submit urine specimens violates employees' constitutional right to privacy).

b. The constitutions of several states also have provisions specifically protecting the privacy of citizens from invasion. While private employers are generally free from federal constitutional requirements, they may be subject to state constitutional restrictions on their ability to implement drug and alcohol testing programs. In Porten v. University of San Francisco, 64 Cal. App. 3d 825, 134 Cal. Rptr.

839 (1976), a California constitutional provision was held to protect citizens from invasion of privacy even where state action is absent. Application of this principle in the drug testing context is currently awaiting decision. A California employee who was terminated for refusing to provide a urine sample for drug testing has relied, in part, on this constitutional protection in a wrongful discharge suit filed against her employer. See Luck v. Southern Pacific Transportation Co., No. C-84-3-230 (Calif. Super. Ct., filed August, 1985). See also International Association of Machinists, District Lodge 120 v. General Dynamics Corp., No. 86-2244 (C.D. Calif., filed April 9, 1986) (challenging defense contractor's drug testing program as contrary to California's constitutional right to privacy).

c. The Fourth Amendment of the Constitution also protects individuals from unreasonable searches and seizures conducted by the state. While courts have refused to impose a "probable cause" standard upon governmental employers in conducting drug and alcohol testing of their employees, they have generally required at least same showing of "reasonable suspicion" before testing can be conducted. See, e.g., National Federation of Federal Employees v. Weinberger, 640 F.Supp. 642 (D.D.C. 1986) (random testing of civilian employees of Army in "critical" job categories); Shoemaker v. Handel, 797 F.2d 1136 (3d Cir. 1986); cert. denied, __ U.S. __ (1986) (rule of New Jersey Racing Commission requiring jockeys to submit to random drug and alcohol testing).

Thus, in City of Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985), the city established a policy requiring its police officers and fire fighters to give urine specimens at random and unspecified times for the purpose of determining whether they were under the influence of "drugs or intoxicating substances." No showing of probable cause or reasonable suspicion was required. While recognizing the public's interest in ensuring that their police and fire fighters are not intoxicated, the court refused to find that this interest justified requiring these individuals to submit to urine testing "without a scintilla of suspicion directed toward them..." Id. at 1325. Consequently, the court held that such testing could only be conducted upon a showing of reasonable suspicion.

In Railway Labor Executive Association v. Dole, No. C-85-7958-CAL (N.D. Cal. November 26, 1985), the court rejected an attempt to preclude the Department of Transportation ("DOT") from implementing new alcohol and drug regulations covering some 200,000 railroad workers. The regulations, issued by the Federal Railroad Administration in July of 1985, provide that employers may conduct breath or urine testing if:

1. A supervisor has a "reasonable suspicion", based on factual observations, that a worker is under the influence of alcohol or alcohol combined with drugs;

2. A worker is suspected of contributing to a railroad accident;

3. A worker has been directly involved in any of a variety of rule violations, including exceeding the speed limit by ten miles per hour, passing through a stop signal, or failing to secure a hand break.

The court granted the DOT's motion for summary judgment, concluding that the government's interest in protecting the safety of both the public and railroad employees outweighed the privacy interests of those who were to be tested. The court was persuaded by the fact that the railroad industry is heavily regulated and that the newly issued regulations placed limits on the scope and number of tests permitted. The court rejected the plaintiff's contention that blood tests may be required only if there is probable cause to suspect employee performance is impaired by use of drugs or alcohol. Though the Ninth Circuit subsequently stayed implementation of the program while it considered the union's appeal, the Supreme Court granted a request by the Reagan Administration to vacate the stay. Dole v. Railway Labor Execs. Assoc., __ U.S. __, 106 S.Ct. 876 (1986). Consequently, the regulations have been implemented and will remain in effect pending the Ninth Circuit's decision on the constitutionality of the program.

In Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. App. 1985), the court concluded that a departmental order requiring police officers to submit urine samples if suspected of drug use did not violate the officer's Fourth Amendment rights. The order also provided that any officer who refused to undergo such testing or whose test results revealed the presence of illegal drugs would be subject to termination proceedings. The court recognized that requiring such testing in cases of "suspected" drug use fell short of the probable cause requirements of the Fourth Amendment, but concluded that this standard was reasonable in light of the lessened expectations of privacy of uniformed police officers and the nature of an officer's job in protecting the public.

In Sanders v. Washington Metropolitan Transit Authority, No. 84-3072, slip op. (D.D.C. January 9, 1986), the court rejected the claims of Washington Metropolitan Transit Authority ("WMATA") employees that the employer's policy of requiring them to undergo blood and urine tests following an accident or upon return to work from any period of sick leave violated their constitutional rights. Specifically, the employees asserted that such testing invaded their right to privacy and was in violation of the Fourth and Fourteenth Amendments of the Constitution. They also claimed that the policy was unlawful under the Rehabilitation Act of 1973 and the Civil Rights Act of 1871. The court found that the WMATA was equivalent to an arm of state government and was consequently immune from the employees' statutory claims under the Eleventh Amendment. Moreover, it held that WMATA's actions were constitutionally permissible, relying on Turner v. Fraternal Order of Police, supra.

However, the scope of Turner is not boundless. In Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986), the court granted summary judgment on the Fourth Amendment claims of an employee discharged because of a positive drug test. The employer had embarked on a policy of testing all its employees without any particularized probable cause or even the "reasonable suspicion" found to be constitutional in Turner. The court did not enunciate any rules that would provide guidance in this area. It stated that the employee was a school bus attendant, not a mechanic or driver and could not have expected to be exposed to such testing. In addition, the court held that public safety considerations did not require testing of a school bus attendant under conditions that were more stringent than those found permissible for police in Turner.

Similarly, in Caruso v. Ward, 506 N.Y.S. 2d 789, (N.Y. Super. Ct. 1986), a New York Police Department order requiring tenured police officers to undergo a random drug testing was found to be in violation of the Fourteenth Amendment. The court stated that the Department had "failed to demonstrate or to document that drug use presents a discernible problem or danger sufficient to warrant the constitutional intrusion occasioned by standardless drug testing." See also Capua v. City of Plainfield, 643 F.Supp. 1507 (D.N.J. 1986) (city violated Fourth Amendment rights of firefighters and police officers by requiring them to undergo urine tests for drugs without any reasonable, individualized suspicion that any particular individual was using drugs); Lovorn v. City of Chattanooga, Nos. 1-86-389 and 1-86-417, slip op. (E.D. Tenn. Nov. 13, 1986) (same); McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985) (urine, blood or breath testing or searching of state correctional facility employees for drugs can only be required upon showing of reasonable suspicion).

Finally, in National Treasury Employees Union v. Von Raab, supra, the court held that a United States Customs Service drug testing program requiring all employees who are seeking promotions into certain "covered positions" to submit urine specimens violated the Fourth Amendment. Relying on many of the above-cited cases, the court reasoned that because Customs workers have a reasonable expectation of privacy in their urine, testing can only be required upon a showing of reasonable suspicion. The court also rejected the Customs Service's argument that employees had voluntarily consented to the testing, holding that consent is not voluntary when the price of not consenting is the loss of a government benefit. The court was apparently referring to the fact that employees who refused to be tested were denied the opportunity to be promoted into "covered positions".

d. A discharge of a public employee on the basis of a positive test for drug use may also raise procedural due process issues. In Jones v. McKenzie, supra, the court held that some adversary hearing must be granted to establish that the discharged employee was in fact the subject of the positive test and that the test was confirmed. However, the court noted that the requirement of such a hearing did not necessarily preclude temporary reassignment or suspension pending confirmation of a positive test and a hearing. See also Capua v. City of Plainfield, supra (city violated Fourteenth Amendment due process clause by suspending employees who tested positive for drugs without a hearing or an opportunity to examine the laboratory reports). The court in National Treasury Employees Union v. Von Raab, supra, went even further, branding the Customs Service's drug testing procedures as so inherently unreliable as to violate due process of law. The court's decision is somewhat troubling in light of the fact that the Customs Service used the most reliable of all drug testing methods, gas chromatography/mass spectrometry, to analyze urine specimens.

2. Statutory Protection

As stated previously, see supra p. 3, the Rehabilitation Act of 1973 and state anti-discrimination laws preclude discrimination against both job applicants and current employees on the basis of their handicapped status.

a. In Whitlock v. Donovan, 598 F. Supp. 126 (D.D.C. 1984), the court found that the Rehabilitation Act of 1973 and the Comprehensive Alcohol Abuse and Alcohol Prevention, Treatment, and Rehabilitation Act of 1970 imposed an

"affirmative duty" on federal agencies to make "reasonable accommodations" for employees handicapped by alcoholism, and held that the Labor Department, when it failed to give an employee a "firm choice" between discipline and treatment when his alcoholism became apparent, failed to "reasonably accommodate" his handicap by denying him the option of leave without pay for intensive in-patient treatment. However, in Richardson v. United States Postal Service, 613 F.Supp. 1213 (D.D.C. 1985), the same court found that a postal employee who was discharged after being convicted of assault had no claim under the Rehabilitation Act of 1973 because there was no connection between his alcoholism and the loss of his job. The court noted that even if the employee had demonstrated that alcoholism was a substantial cause of his criminal conduct, the discharge would still have been lawful. "The Rehabilitation Act only protects against removal 'solely because of alcohol abuse'. It does not prohibit an employer from discharging an employee for improper off-duty conduct when the reason for the discharge is the conduct itself, and not any handicap to which the conduct may be related." Id. at 1215-16.

b. In response to the recent publicity and the dramatic increase in the number of employers utilizing drug and alcohol testing, several states, including New York, Oregon, Maryland, Maine, California and Massachusetts, have considered or are considering legislation which would restrict an employer's ability to test its employees for drug or alcohol use. Subsequent to the filing of the Luck suit (see supra p. 7-8), an ordinance was enacted in San Francisco prohibiting random employee drug tests. The law permits testing only in those cases where "there are reasonable grounds to believe" an employee's faculties are impaired and that the impairment "presents a clear and present danger to the safety of the employee, another employee, or to a member of the general public."

3. Protections Under the Common Law

a. Most states have recognized a common law right to personal privacy, such that the unreasonable intrusion into another person's seclusion or into his private affairs may give rise to a cause of action for compensatory and punitive damages. The intrusion must be intentional and of such a nature as to be offensive to a reasonable person. See, e.g., Gretencond v. Ford Motor Co., 538 F. Supp. 331 (D. Kan. 1982); Cangelosi v. Schwegmann Bros. Giant Supermarkets, 379 So.2d 836 (La. App. 1980), aff'd, 390 So.2d 196 (La. 1980).

A suit for invasion of privacy may be prompted by an employer's accumulation of "private" information through searches of employees' lockers or other personal belongings. Love v. Southern Bell Tel. Co., 263 So.2d 460 (La. App. 1972), cert. denied, 266 So.2d 429 (1972). The search must be sufficiently extreme to constitute an invasion of privacy. Valencia v. Duval Corp., 645 P.2d 1262 (Ariz. 1982). Employers may defend against such suits by showing that the employee consented to the alleged invasion of privacy or has waived his right to privacy. Jeffers v. City of Seattle, 597 P.2d 899 (Wash. 1979). Another defense available to the employer is that the employer's "reasonable need to know" the information being accumulated outweighs the employee's reasonable expectation of privacy. See, e.g., Simmons v. Southwestern Bell Tel. Co., 452 F. Supp. 392 (W.D. Okla. 1978), aff'd, 611 F.2d 342 (10th Cir. 1979).

b. Other common law tort actions, such as defamation, battery, false imprisonment and intentional infliction of emotional distress have also been the bases of challenges to drug and alcohol testing. For example, in Houston Belt & Terminal Ry. Co. v. Wherry, 548 S.W.2d 743 (Tex. Civ. App. 1976), a former railroad switchman successfully sued his employer for defamation where the employer had falsely published that the switchman was a methadone user based on the results of an unconfirmed drug test. Similarly, in O'Brien v. Papa Gino's of America, 780 F.2d 1067 (1st Cir. 1986), the First Circuit upheld a jury verdict awarding $448,200 in damages to a fast food restaurant supervisor who was purportedly terminated for cocaine use. The superviser, who was fired after he failed a polygraph examination in which he was questioned about his use of drugs, brought claims for defamation, invasion of privacy and wrongful discharge. The jury rejected the wrongful discharge claim, finding that there was no state public policy protecting an employee for lying on a polygraph test. However, the jury ruled in favor of the plaintiff on the defamation and invasion of privacy claims. The jury concluded that some of the employer's statements to co-workers about the plaintiff's drug use were false and that the manner in which the investigation was conducted was an unreasonable intrusion upon the plaintiff's privacy.

At least one court, however, has ruled that such actions, if brought by unionized employees, are preempted by the National Labor Relations Act. In Strachan v. Union Oil Company, 768 F.2d 703 (5th Cir. 1985), two employees who were suspended for suspected drug use were reinstated when medical tests showed no trace of drugs in their systems. The plaintiffs were employed in a bargaining unit whose employees were represented by the Oil, Chemical and Atomic Workers Union. The plaintiffs sued Union Oil under state law on a variety of tort theories, including false imprisonment and defamation. The district court dismissed their claims, concluding that they were preempted by the NLRA. The Fifth Circuit agreed. The court noted:

> These various claims by the appellants demonstrate clearly an attempt to create major state court claims out of matters which are all part of a company claim of right under a collective bargaining agreement, and the employee's right to challenge such claims through grievance procedure ending in binding arbitration. To hold otherwise in this case would subject thousands of grievance procedures involving disciplinary actions including such matters as careless destruction of production, chronic tardiness, drinking on duty, insubordination, to law suits asserting state court claims.

Id. at 705. The court also rejected the plaintiffs' argument that the suspension and disciplinary investigation themselves constituted tortious conduct under state law.

Similarly, in Association of Western Pulp and Paper Workers v. Boise Cascade Corp., 644 F.Supp. 183 (D. Ore. 1986), the union attempted to enjoin the unilateral implementation of a drug testing policy by the employer, including among its claims that the policy violated the common law privacy rights of employees. The court rejected the union's arguments, concluding that the privacy claims were preempted by federal labor law. The judge relied, in part, on the fact that the collective bargaining

agreement allowed the company to institute reasonable work rules and that the union could challenge these rules through the grievance procedure.

C. Practical Suggestions

1. Use of Employee Assistance Programs ("EAP")

a. The purpose of the EAP is to isolate and provide guidance to employees who are having problems at work. Most EAPs are voluntary or may be used in conjunction with workplace rules or discipline.

b. An EAP can be used as the structure to promote counseling, therapy and guide employees with substance abuse problems, and could serve the employer as a way in which to monitor employees with problems.

c. Effective use of EAPs can improve employee morale, work to minimize employee problems and demonstrate an employer's commitment to help employees with their substance abuse problems.

d. EAPs are not, however, meant to be "safe havens" for employees who violate an employer's drug and alcohol rules. Thus, employees who are successfully rehabilitated through an EAP may be required to submit to periodic, unannounced testing with stringent disciplinary consequences established for second offenses.

2. Employer/Union jointly established drug and alcohol policies may reduce employee resistance to such policies and may reduce some of the inevitable problems that result from implementation (i.e., grievances filed and arbitrated over discipline for substance abuse).

3. Employers should develop specific policy statements to inform employees of when they may be subject to drug/alcohol testing and the disciplinary consequences of certain types of behavior (e.g. selling drugs on company property is grounds for immediate dismissal).

4. Testing

a. Specimens should be taken by company medical personnel or a local hospital or clinic.

b. Analysis of specimens should be conducted by a professional laboratory.

c. All initial positive test results should be confirmed by an accurate and reliable testing method, such as gas chromatography/mass spectrometry.

d. The chain of custody of the specimen should be documented.

e. All results must be kept strictly confidential.

D. Checklist for Implementing Drug and Alcohol Policy

1. Develop Drug and Alcohol Policy (in conjunction with union if organized) that clearly articulates under what circumstances testing will be conducted, the discipline that will be imposed for violations of the policy and the consequences of refusing to submit to drug or alcohol tests.

2. Revise employee handbooks and other policy statements so that they are consistent with Drug and Alcohol Policy.

3. Revise employment application to include a statement informing applicants that they will be tested for drugs and alcohol and that the outcome of such testing will be considered in deciding whether or not to extend an offer of employment.

4. Contact local drug/alcohol rehabilitation centers to discuss establishment of Employee Assistance Program.

5. Contact local laboratories to determine which are qualified and best-suited for performing drug/alcohol testing and analyses of specimens. Particular attention should be given to:

a. Whether they perform confirmatory testing (gas chromatography/mass spectrometry) of specimens when initial screening indicates positive results.

b. Whether they have procedures for documenting chain of custody.

c. Whether they provide assistance in collecting and handling specimens (e.g. urine collection bottles, chain of custody forms, etc.).

d. How long it takes to analyze a specimen and report results.

e. Whether their services are available at a competitive price.

6. Establish procedures for taking blood/urine specimens.

a. Should be taken by company medical personnel or local hospital or clinic.

b. Employee should be present for entire procedure procedure prior to sending specimen to laboratory.

c. Container in which specimen is collected should be sealed in employee's presence and the employee's initials should be written across seal.

d. Chain of custody should be documented thereafter.

7. Develop supervisory report form for drug/alcohol incidents.

8. Establish filing system for all drug and alcohol testing information and incident reports. All testing results and incident reports should be kept in a confidential file, separate from the employee's regular personnel file.

9. Contact local police department for instruction on what to do with any drugs or drug paraphernalia that are confiscated in the workplace.

10. Notify and train supervision.

11. Notify employees of Drug and Alcohol Policy.

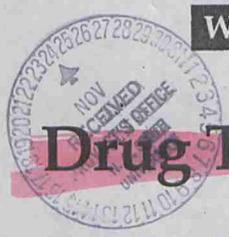
a. Distribute policy by hand or include a copy with each employee paycheck.

b. Include cover letter from upper level management stating the date on which the policy will become effective (one week's notice is sufficient) and scheduling a date for a Drug and Alcohol Policy Orientation.

c. Post policy on bulletin boards and publish it in an edition of the company newsletter.

12. Organize a Drug and Alcohol Policy Orientation for all employees to be held after the policy is distributed, and thereafter as a part of the orientation for new employees. The program should include a presentation by a doctor on the dangers of drug and alcohol abuse and rehabilitation, as well as an explanation of how specimens are tested by a laboratory representative. The Drug and Alcohol Policy and Employee Assistance Program will then be explained and any employee questions addressed.

13. Notify all contractors and other service providers that any of their employees who are found to be in violation of the Drug and Alcohol Policy will be ejected from the company's premises and denied entrance in the future.



WHAT ACLU HAS TO SAY ABOUT...

Drug Testing in the Workplace

On March 3, 1986, the President's Commission on Organized Crime proposed that all employees of the federal government, as well as all employees of private companies that contract with the federal government, be regularly subjected to urine tests for drugs as a condition of employment. Although this proposal has been widely criticized, and several members of the Commission have disavowed it, it symbolizes a trend toward forcing employees to submit to urine tests or else lose their jobs. Indeed, 25 percent of major American companies have now instituted such programs, presumably to remedy impaired job performance that results from drug abuse.

The American Civil Liberties Union opposes indiscriminate urine testing because we believe it is unfair and unreasonable to force millions of American workers who are not even suspected of using drugs, and whose job performance is satisfactory, to submit to degrading and intrusive urine tests on a regular basis. It is unfair to treat the innocent and the guilty alike.

Here are some frequent questions posed by members of the public about our stand on drug testing:

Don't employers have the right to expect their employees not to be high on drugs on the job?

Of course they do. Employers have the right to expect their employees not to be high, or stoned, or drunk, or sound asleep. Job performance is the bottom line; if you can't do the work, you get fired. But urine tests don't measure job performance. Nor do they measure current impairment or intoxication. The only thing such tests are capable of detecting are the metabolites of various substances ingested some time in the past.

Can urine tests determine when a particular drug was used?

No. Urinalysis cannot determine *when* a particular drug was ingested, and the metabolites of some drugs will show up in urine weeks after ingestion. An employee who smokes a marijuana joint on a Saturday night may test positive the following Wednesday, long after the drug has ceased to have any effect. Why is what happened Saturday the employer's business? And how does it differ from employees who have a drink over the weekend or in the evening? What has that to do with their fitness to work? While employers do have the right to regulate their employees' activities during the workday, they do not and should not have the right to regulate their employees' off-the-job recreational activities. Millions of executives regularly have a drink or two at lunch, and it has never been deemed necessary to test them. Why test workers for their activities on weekends or on vacation?

If you don't use drugs, you have nothing to hide. Why object to testing?

Innocent people do have something to hide: their privacy. This "right to be left alone" is, in the words of the eminent Supreme Court Justice Louis Brandeis, "the most comprehensive of rights and the right most valued by civilized men." Urine tests are an unprecedented invasion of privacy. In addition to evidence of illegal drug use, the tests can disclose numerous other details about one's private life. Urinalysis can tell a company whether an employee or job applicant is being treated for a heart condition, depression, epilepsy, diabetes or schizophrenia. It can also reveal whether an employee is pregnant.

Innocent people also have reason to be concerned because the method of urinalysis most commonly used in drug testing (the "EMIT kit") is inherently unreliable. The EMIT kit gives a false positive result at least 10 percent and possibly as much as 30 percent of the time. Experts understand the test's unreliability. At a recent conference, 120 forensic scientists were asked, "Is there anybody who would submit urine for cannabinoid [marijuana] testing if his career, reputation, freedom or livelihood depended on it?" Not a single hand went up.

The EMIT test confuses substances. For example, over-the-counter cough medicines can show up as heroin. Certain antibiotics show up as cocaine; as many as eleven different legal substances may show up as marijuana. It is universally advised by doctors and toxicologists that the EMIT kit should *never* be used as definitive evidence that a person has or has not taken a particular drug.

Companies that manufacture EMIT kits warn employers to follow up any positive result with additional, more sophisticated confirmatory tests. But such confirmatory tests are expensive, and in practice many employers do not use them. Millions of people across the country risk not being hired or losing their jobs and their reputations because of the EMIT kit test.

Still, isn't indiscriminate testing the best way to catch the users?

It may be the easiest way to identify drug users, but it is also by far the most un-American. There is a long tradition in the United States that general searches of innocent people are unfair. This tradition began in colonial America, when King George's soldiers searched everyone indiscriminately in order to uncover those few who were committing offenses against the Crown. These general searches were deeply hated by the early Americans, and were a leading cause of the Revolution. After the Revolution, and fresh from the experience of the unfairness of indiscriminate searches, the Fourth Amendment was passed. It says that you cannot search everyone, innocent and guilty alike, to find the few who are guilty. You must have good reason to suspect a particular person before subjecting him or her to intrusive and degrading body searches.

But mandatory, general drug testing programs threaten to turn these traditional principles upside down. Compulsory blood and urine tests are bodily searches, according to the U.S. Supreme Court. The lower courts have already struck down mandatory testing programs in several government workplaces as violative of the Fourth Amendment because they were not based on particularized suspicion. And although the Fourth Amendment doesn't legally limit the power of private employers, the same principles of fairness ought to apply. Tests should be limited to those workers who are reasonably suspected of using drugs (including alcohol) in a way that impairs job performance.

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Aren't there exceptions to the rule? Shouldn't workers such as airline pilots, who can endanger the lives of others if they aren't functioning properly, be subject to drug testing?

Obviously people who hold the lives of other people in their hands should be held to a higher standard of job performance. But urine testing won't do that. Urinalysis cannot measure current impairment or intoxication. It would be far more meaningful to require all airline pilots to undergo a brief neurological exam for impaired visual acuity or motor coordination before stepping into the cockpit. No one could object to that. But urine testing is simply irrelevant to the issue of job impairment, and people in high risk occupations should be subjected to urinalysis on the same basis as anyone else—only to confirm a reasonable suspicion, based on observation, that a particular individual is job impaired because of drug abuse.

What about the high economic costs to industry of drug use? Shouldn't employers be permitted to institute drug testing as a way to protect their investment?

The economic costs to industry of drug use are cited to justify mass drug testing in the workplace. Billions of dollars, we are told, are lost through low productivity and absenteeism. Some experts question these estimates as extrapolations and projections that have no convincing data base. Moreover, the economic costs of alcoholism and heavy cigarette smoking are without doubt higher, since so many more people use alcohol and smoke. But no one has yet suggested tests to discover the extent to which workers are drinking or smoking in the evenings or on weekends.

The people who most often cite the high economic costs to industry caused by drug use are the same people who are reaping huge profits from urine testing—manufacturers of the urine test, chemical laboratories and professional drug abuse consultants. Their pronouncements ought to be viewed with skepticism.

If urine testing is out, is there anything left that can be done about the drug "epidemic"?

Urine testing doesn't prevent drug use, or cure addiction. Education and voluntary rehabilitation are the only approaches that do. A well-funded, well-coordinated public education effort, such as the anti-smoking campaign, would do more to bring drug use under control than the most massive program of testing. Such efforts work. Since 1965, the proportion of Americans who habitually smoke cigarettes has gone down from 43 percent to 32 percent. Those who have studied this decline attribute it to public education. Certainly, it cannot be attributed to forced testing or employer sanctions.

In a number of schools, drug education courses have succeeded in teaching teenagers that it is all right to say "no" to drugs. We cannot stop everyone from using drugs, but we can encourage people to be more intelligent and prudent in their attitudes and behavior toward drugs, just as we do with alcohol and cigarettes.

Have any courts ruled that mandatory urine testing of government employees is a violation of the Constitution?

Virtually every court that has heard a constitutional challenge to testing by government agencies and employers has found that some degree of individual suspicion is necessary. These courts have prohibited programs that included "random" or "blanket" drug testing. A state court judge in New York ruled that a local board of education could not subject all teachers being considered for tenure to urinalysis because "an invasive bodily search may be constitutionally made only when based upon reasonable suspicion based on supportable objective facts." A federal judge in Iowa ruled that random tests of prison guards were unconstitutional unless conducted on the basis of "reasonable suspicion."

But if the Constitution doesn't apply to private employees, how can the privacy rights of private employees be protected?

Only by special federal or state laws or by union contracts. At this time employees of private companies have virtually no protection against the mandatory drug testing programs that have now been adopted by 25 percent of the Fortune 500 companies. The ACLU believes it is grossly unfair that government workers are protected in their right to privacy while their counterparts in private industry are not. Labor unions should push to include a ban on blanket testing in collective bargaining agreements, and the rights of non-union employees can only be protected by pressing for the passage of federal, state or local legislation.

Because of the efforts of the ACLU and other concerned organizations, the City of San Francisco, for example, has enacted a model law which protects workers in private industry from indiscriminate drug testing. The new law says that no employer doing business in San Francisco "may demand, require, or request employees to submit to, to take or to undergo any blood, urine, or encephalographic test in the body as a condition of continued employment" unless three conditions are met:

1. the employer has reason to believe the employee's faculties are impaired on the job;
2. the employee's impairment presents a clear and present danger to his own safety or the safety of others;
3. the employer gives the employee the opportunity, at the employer's expense, to have the sample tested by an independent laboratory and gives the employee an opportunity to rebut or explain the results.

This law strikes the delicate balance between an employee's fundamental right to privacy, and the legitimate business needs of the employer.

The American Civil Liberties Union, founded in 1920, is the nation's only organization working full-time to defend the entire Bill of Rights. For information on how to join the ACLU, or to learn more about the ACLU's positions on other issues, contact the national ACLU or your local affiliate.

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