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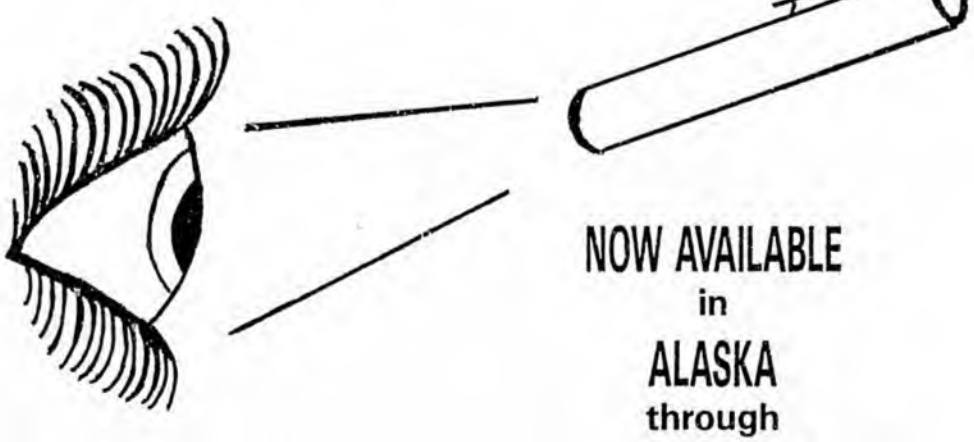

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Phone 225-5144
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November 5, 1987

Representative John Sund
2504 Second Avenue
Ketchikan, Alaska 99901

Dear John:

Enclosed please find a copy of an article on drug testing from the October 16th issue of the Journal of the American Medical Association. The article is a report from the council on scientific affairs of the AMA that was adopted as policy at the annual meeting in Chicago last June.

The nub of the article is in the third recommendation on the last page, namely that the AMA adopts the position that urine drug and alcohol testing of employees should be limited to a) pre-employment examinations of those persons whose jobs affect the health and safety of others, b) situations in which there is reasonable suspicion that an employees job performance is impaired by drug and alcohol use and c) monitoring as part of a comprehensive program of treatment in rehabilitation in alcohol and drug abuse or dependents.

Further, in recommendation four the AMA urges employers to continue to establish drug testing programs to use confirmed positive test results in employees primarily to motivate those employees to seek appropriate assistance with their alcohol or drug problems, preferably through employee assistance programs.

I hope that the considerable list of references and the article may be useful to you. If you have any questions regarding the article, or wish any more information, I would, of course, be glad to respond as best I can.

Thank you for being willing to take on this difficult issue.

Yours truly,

David E Johnson, MD

DEJ:ts

Enclosures

Issues in Employee Drug Testing

Council on Scientific Affairs

RESOLUTION 84 (A-86) asks the American Medical Association to develop criteria for mandatory drug screening that address scientific and administrative standards as well as constitutional safeguards. Resolution 106 (A-86) calls for the AMA to study the problem of testing specific groups of individuals to determine the most effective methods for defining and attacking the problem. Both resolutions were referred to the Board of Trustees.

In partial response to these resolutions, the House of Delegates adopted Council on Scientific Affairs Report J (I-86), which dealt with the scientific issues in drug testing but did not address the legal and constitutional issues.

At the 1986 Interim Meeting, Resolutions 16 and 60 were referred to the Board. Resolution 16 (I-86) asks that the AMA urge all physicians in the United States to agree to undergo voluntary drug testing. Resolution 60 (I-86) asks that the AMA urge employers and unions to agree to random on-the-job testing for the use of drugs by employees engaged in occupations in which such use may affect the safety of other persons.

This report responds to the issues raised by the four resolutions that were not addressed in Report J.

Drug and alcohol abuse is a national problem of immense proportions. One of the most controversial methods of identifying individuals who use drugs is urine testing. This report analyzes many of the legal issues raised by testing for drugs in the workplace.

It is important to note the limited scope of the report. It does not address the use of urine testing beyond the civilian workplace, such as in schools, prisons, the military, and other sectors. It does not address the legality of employer discipline for off-work drug use detected by arrest, observation, or other means. It does not discuss issues of criminal law arising from the sale, possession, or use of drugs at work. It also does not focus on the potential liability of employers for harm caused by impaired employees.

Even excluding these areas, this report addresses many constitutional, statutory, regulatory, and common law principles. In a number of respects, however, the law is still evolving; it is difficult to predict and is likely to change over time.

CONSTITUTIONAL LAW

"Nearly all of the Constitution's self-executing, and thus judicially enforceable, guarantees of individual rights shield individuals only from government action."[1] In the context of occupational drug testing, this means that federal constitutional protections are limited to public employees and private employees where drug testing is mandated by federal, state, or local governments. Specifically because of these constitutional protections, the first wave of legal challenges to workplace drug testing has consisted largely of claims by public employees.

Search and Seizure

The Fourth Amendment to the Constitution states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The first question to address is whether employee drug testing amounts to an unreasonable search and seizure.

In *Schmerber v California*,[2] the Supreme Court held that taking a blood sample from a criminal defendant to determine

From the Council on Scientific Affairs, American Medical Association, Chicago.

Report A of the Council on Scientific Affairs, adopted by the House of Delegates of the American Medical Association at the 1987 Annual Meeting.

This report is not intended to be construed or to serve as a standard of medical care. Standards of medical care are determined on the basis of all the facts and circumstances involved in an individual case and are subject to change as scientific knowledge and technology advance and patterns of practice evolve. This report reflects the views of the scientific literature as of February 1987.

Reprint requests to Council on Scientific Affairs, American Medical Association, 535 N Dearborn St, Chicago, IL 60610 (William R. Hendee, PhD)

whether he was intoxicated was a search within the meaning of the Fourth Amendment. Lower court decisions after *Schmerber* have recognized that requiring a urine sample is far less intrusive than extracting blood but have nonetheless concluded that these also are searches according to the Fourth Amendment.[3] The limited nature of the intrusion, however, may be important in determining the validity of the search.

The Fourth Amendment does not bar all searches, only unreasonable ones. Therefore, it must be determined whether the drug test is unreasonable. This in turn often depends on the nature of the search: Who is searched? Why and when is the search made? How is it made? What is done with the results? Courts balance the degree of intrusion of the search on the person's Fourth Amendment right of privacy against the need for the search to promote some legitimate government interest.[4]

One essential factor is whether the individual has a reasonable expectation of privacy relative to the circumstances of the search. Government employees have a reasonable expectation of privacy at work and "do not surrender their Fourth Amendment rights merely because they go to work for the government."[5] However, government employers maintain rights in conducting warrantless searches "for the proprietary purpose of preventing further damage to the agency's ability to discharge effectively its statutory responsibilities."[5]

Three distinct privacy interests have been identified in urinalysis. First is the expectation of privacy as to the urine itself. According to one court, "an individual cannot retain a privacy interest in a waste product that, once released, is flushed down the drain."[6] Another court, however, has observed that "[t]he urine excreted for a drug test . . . is not expected to be a waste product, flushed down the toilet. Indeed, precautions are taken in the test procedure to prevent the sample from being disposed of."[7] Second is the expectation of privacy regarding the information contained in the urine.

> Obviously, one does not expect that he will be made to discharge urine so that it can be analyzed in order to discover the personal physiological secrets it may hold. Thus, as with blood, there is an expectation of privacy concerning the 'information' body fluids may hold.[8]

Third is the expectation of privacy in the process of urination. "[T]he act of urination is a private one and, if interfered with, protected by the Fourth Amendment."[6] Therefore, policies requiring observation of an individual urinating are difficult to sustain.

Invasion of Privacy

A related but distinct constitutional protection has been established for the "right of privacy." Although this right is not explicit in the Constitution, the Supreme Court has found that it includes the individual's interest in avoiding disclosure of personal matters and protects independence in making certain kinds of important decisions, such as those concerning marriage, procreation, and family relationships.[9] This privacy interest, however, is not absolute and must be balanced against legitimate governmental interests in disclosure. For example, in *Shoemaker v Handel*,[10] the Court upheld a New Jersey regulation requiring licensed jockeys to list all illnesses requiring treatment by a prescription drug because of concerns for safety and integrity.

Due Process

The Fifth and Fourteenth amendments prohibit the federal government and state governments from denying any person "due process of law." In the context of drug testing, due process may be used to challenge testing procedures or employee termination procedures. It has been held that termination of employment on the basis of an unconfirmed, enzyme-multiplied immunoassay test violated due process[11] and that the destruction of voluntarily submitted urine samples before they could be sent out for independent testing also violated due process.[12] Even the addition of confirmatory testing may not satisfy due process concerns about the proper handling of the specimen and cleaning and calibration of test equipment. The termination of an individual's employment may be preceded by notice and opportunity for a hearing appropriate to the nature of the case, although a full hearing before discharge may not necessarily be required.[13]

A number of other federal constitutional protections have been invoked to challenge workplace drug testing. These protections include substantive due process, equal protection, and avoidance of self-incrimination. To date, to our knowledge, none of these theories have been the basis of a successful challenge.

State Constitutional Law

Unlike the US Constitution, certain state constitutions are not limited in their applicability to governmental action. Thus, it is possible for state constitutional law to extend coverage to employees in the private sector and to proscribe practices not currently prohibited by federal constitutional law. These principles have not been widely applied in drug testing cases, although the theory already has been used to challenge drug testing in California.[14]

STATUTES

Handicap Discrimination

The Rehabilitation Act of 1973[15] is the primary federal law prohibiting employment discrimination against handicapped individuals. This law applies to the federal government, government contractors, and recipients of federal financial assistance. The 1978 amendment to the act explicitly recognizes that the denial of employment opportunities on the basis of alcohol or drug use is justified only under limited circumstances. As the act states, "[The term handicapped individual] does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drug abuse would constitute a direct threat to property or the safety of others."[16] The purpose of the amendment is to prohibit discrimination against individuals who are able to perform a job.[17] Therefore, drug addicts and alcoholics currently under control are certainly subject to the act's protection.[18]

The 1978 amendment applies only to federal contractors (Section 503) and recipients of federal financial assistance (Section 504). It does not apply to federal agency employers (Section 501). Because the amendment sought to correct a perceived "flaw" in the law, whereby affirmative action plans would seemingly mandate the employment of "active" alcoholics and drug abusers, the fact that Section 501 was not included in the amendment should not be interpreted to mean that alcoholics and drug abusers are not protected under Section 501.[19] Although there have been no reported Section

501 drug cases, discrimination against alcoholics under Section 501 has been held to violate the Rehabilitation Act.[20]

All 50 states and the District of Columbia have laws prohibiting discrimination in employment on the basis of handicap. Some of the laws specifically include alcoholics and drug abusers; others specifically exclude them from coverage. Some other states have resolved the issue through case law.

Abuse vs Use

Coverage under the Rehabilitation Act is extended to individuals who are "drug abusers." The question thus arises whether drug abusers includes "drug users" or is limited to drug addicts. The legislative history is silent on this point, but it is possible that the word *abuse* will be construed broadly to mean improper use, in which case anyone who used a controlled substance for a nonmedical purpose would be a substance abuser.

Individuals are excluded from coverage if their current use of alcohol or drugs "would constitute a direct threat to property or the safety of others."[21] It is not clear how broadly "direct threat" will be interpreted. Executive Order 12 564, issued by President Reagan on Sept 15, 1986, authorized drug testing of federal employees in "sensitive positions," defined as those handling classified information; those serving as presidential appointees; those in positions related to national security; law enforcement officers; those charged with the protection of life, property, and public health and safety; and those in jobs requiring a high degree of trust and confidence.

In *National Treasury Employees Union v Von Raab*,[22] a divided panel of the Fifth Circuit held that the drug testing program of the Customs Service was constitutional. The program requires urinalysis of all employees seeking promotions. Because the case involved the testing of customs officers, who are law enforcement officers specifically charged with intercepting illegal drugs, it is not clear that this case endorses broad drug testing. The constitutionality of the governmentwide testing program is being challenged in a separate lawsuit.

With such a broad directive, it is apparent that President Reagan is requiring testing of some individuals who are *not* in direct threat positions and therefore are not excluded from coverage under the Rehabilitation Act. Is this legal?

Regulations implementing Section 501 of the Rehabilitation Act (applicable to federal agencies) prohibit the use of any employment test or selection criterion that screens out or tends to screen out handicapped persons unless the test or criterion is shown to be job related.[23] Similar regulations apply to recipients of federal financial assistance[24] and federal contractors.[25] Although individuals who test positively may or may not be "screened out," they are certainly subject to different treatment. Therefore at least for some federal employees, it is arguable that drug testing is not job related. The Civil Service Reform Act also prohibits the consideration of an individual's off-work activities in employment matters. Because most tests only measure prior exposure and not impairment or intoxication, drug testing arguably invades the off-work lives of employees.

Some state handicap discrimination laws also could be used to prohibit drug testing. For example, regulations implementing California's Fair Employment Practice Law[26] specifically limit preemployment inquiries, medical examinations, and selection practices to job-related criteria.

Reasonable Accommodation

After a positive drug test, the Rehabilitation Act and other handicap discrimination laws may prohibit summary discharge or other adverse treatment. The federal law and many state laws require "reasonable accommodation." It is not settled what accommodations may be required in the case of a drug abuser. There are, however, several cases involving alcoholics in which reasonable accommodation was required when the employee was willing to undergo treatment.[27] The Alcoholism Rehabilitation Act requires federal agencies to have alcoholism treatment programs for employees.[28]

Title VII of the Civil Rights Act of 1964

Title VII[29] prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. If an employer were to adopt a drug screening program that had a disparate impact along lines proscribed by Title VII, the employer would have to prove that the screening program was compelled by business necessity and was the least onerous means of achieving those ends.

In *New York City Transit Authority v Beazer*,[30] the New York City Transit Authority (TA) had a policy of not hiring drug users, including individuals receiving methadone maintenance treatment for heroin addiction. The plaintiffs attempted to prove this rule's discriminatory effect by showing that 81% of employees referred to the TA's medical consultant for suspected drug violations were black or Hispanic and that between 62% and 65% of all persons receiving methadone treatment in New York City are black or Hispanic. The US Supreme Court rejected the plaintiffs' Title VII claim and held that, even if the statistics established a prima facie case of discrimination, "it is assuredly rebutted by TA's demonstration that its narcotics rule . . . is 'job related'."[31] The Court also rejected a challenge to the rule based on the equal protection clause of the Fourteenth Amendment. The Court said,

> No matter how unwise it may be for TA to refuse employment to individual car cleaners, track repairmen, or bus drivers simply because they are receiving methadone treatment, the Constitution does not authorize a federal court to interfere in that policy decision.[32]

In *Toledo v Nobel-Sysco Inc*,[33] a restaurant supply company refused to hire as a truck driver a member of the Native American Church because he used peyote during religious ceremonies. The employer was held to have violated Title VII. According to the court, the company could have accommodated the applicant's religious beliefs simply by ensuring that he not drive while under the influence of peyote.

National Labor Relations Act

Sections 8(a)(5), 8(b)(3), and 8(d) of the National Labor Relations Act[34] require that the employer and the union bargain in good faith with respect to wages, hours, and other terms and conditions of employment. A drug screening program would be considered a "working condition" and therefore a mandatory subject of bargaining. Hence, employers may not implement drug screening unilaterally without giving the union an opportunity to bargain.[35] An increasing number of collective bargaining agreements contain specific provisions relating to drug possession, use, detection, discipline, and rehabilitation. In some instances the provisions are vaguely worded, and arbitrators have to interpret terms such

as *intoxicated* or *under the influence*.[36] The arbitrator may even see fit to add conditions to a drug screening rule. For example, in *Griffin Pipe Products Co*,[37] the company adopted a rule requiring a drug screening urine test of all employees reporting for medical treatment. The purpose of the rule was to reduce accidents. The arbitrator upheld the rule but added two conditions. First, employees suspended under the rule because of a test later found to be negative were to be reimbursed for lost wages. Second, employees taking prescription medication were not subject to discipline. Arbitrators also have upheld discharges based on the failure to submit to a drug test.[38] In one case, an arbitrator found discharge appropriate only if the employees were on duty at the time.[39]

Many arbitrators require a higher standard of proof in cases involving drugs than in other discharge cases. This standard is often "clear and convincing evidence" rather than simply a "preponderance" of evidence.[40] The main reasons for this higher standard are that possession of a controlled substance is a crime and that discharge for a drug offense makes it very difficult for the employee to obtain another job.[41]

In meeting this burden of proof, the employer often has to prove the test's accuracy, the chain of custody of the specimen, corroboration of impairment, and other matters specifically applicable to drugs. As a general rule, arbitrators often consider the following to be prerequisites for valid employer discipline: (1) The employee must have had notice of the rules. (2) The rules must have been applied fairly. (3) Management must have investigated the charges and given the employee a reasonable chance to answer them. (4) The punishment must fit the crime.[42] In drug cases, arbitrators also frequently look at whether the use of drugs affected job performance, safety, or customer relations.[43] As a result of these limitations, employers have a difficult time sustaining drug-based discharges in subsequent arbitration proceedings.[44]

The Supreme Court is currently considering the legality of an arbitrator's award directing the reinstatement of an employee who was found in a car on company premises with marijuana and marijuana smoke in the car.[45]

Specific Drug Testing Legislation

With federal constitutional protections inapplicable to private sector employees and uncertain even for public sector employees, opponents of drug testing have turned to the legislatures. Bills to limit or prohibit drug testing have been introduced at the local, state, and national levels, and several laws have been enacted. Proponents of drug testing have countered with bills to require or permit drug testing, although such efforts have been less successful.

The most important municipal drug testing law yet enacted is San Francisco's ordinance,[46] which applies to any person working in San Francisco except uniformed police, firefighters, police dispatchers, and emergency vehicle operators. The ordinance prohibits employee drug testing unless

> the employer has reasonable grounds to believe that an employee's faculties are impaired on the job; and . . . the employee is in a position where such an impairment represents a clear and present danger to the physical safety of the employee, another employee or to a member of the public.

The ordinance, which took effect on Dec 29, 1985, became law without the signature of Mayor Feinstein. She refused to sign the ordinance because she considered the measure too stringent. In her view, "clear and present danger" is too difficult to satisfy and gives protected status to being under the influence of drugs.[47]

The ordinance also may be questioned because the key provisions are written in the conjunctive. This means that, to be tested, an individual must be in a job related to safety *and* the employer must have a reasonable belief that the employee is impaired. For an employee who works alone, such as a truck driver, this latter requirement would be very difficult to establish.

At least seven states have enacted drug testing laws, and many new laws are likely to be enacted in the next few years.[48] The laws passed in Connecticut,[49] Iowa,[50] Minnesota,[51] Montana,[52] Rhode Island,[53] and Vermont[54] are similar in the following respects: (1) All of the laws seek to limit drug testing but do not prohibit testing completely. (2) All of the laws permit the preemployment testing of applicants, and some permit the periodic testing of employees if advance notice is given. (3) Exceptions are often made for public safety officers and employees in safety-sensitive jobs. (4) "For cause" testing is generally allowed if there is "probable cause," "reasonable cause," or "reasonable suspicion" that an employee is impaired. (5) Most of the laws require that the sample collection be performed in private. (6) All of the laws require confirmatory testing. (7) Most of the laws specifically require that drug testing records be kept confidential.

Utah's Drug and Alcohol Testing Act[55] differs significantly from the other laws. The Utah law permits drug testing as a condition of hiring or continued employment so long as employers and managers also submit to testing periodically. In encouraging drug testing, the statute requires that employers performing drug testing have a written testing policy and that confirmatory tests be used. If an employer satisfies these requirements, the law protects the employer from liability for defamation or other torts based on drug testing. It also prohibits any action based on the failure to conduct a drug test.

Not surprisingly, bills introduced into Congress have reflected a wide range of opinion on the efficacy of drug testing for federal employees. Some bills would require testing, others would restrict or prohibit it. The only measure actually enacted dealing with drug testing so far has been a supplemental appropriations bill that permitted the testing contemplated by Executive Order 12564.[56] The Anti–Drug Abuse Act of 1986[57] makes it a crime to operate a common carrier, such as a train or bus, while under the influence of alcohol or drugs, but the law does not mandate the use of drug tests.

The most important piece of legislation considered by Congress, the Transportation Employee Safety and Rehabilitation Act of 1987,[58] would establish drug testing (before employment, periodic, random, for reasonable suspicion, and after an accident) for persons in safety-sensitive positions in the aviation, rail, and motor carrier industries. The legislation would cover 2.5 million truck and bus drivers, 300 000 railroad workers, and 200 000 aviation workers.[59]

REGULATIONS

Some employee drug testing programs have been imposed by federal and state regulations. At the federal level, one of the most important sets of regulations, that of the Federal Railroad Administration,[60] took effect in 1986. Preemployment drug tests are used to test for alcohol, opiates, cocaine,

barbiturates, amphetamines, cannabinoids, hallucinogens, and other drugs in frequent use in the locality. Drug tests also are required after serious accidents and on "reasonable cause." Governmentwide drug testing guidelines also were issued in February 1987.[61]

In December 1986, the Federal Aviation Administration (FAA) announced its intention to propose rules that would require pilots and flight instructors, flight engineers and navigators, other noncrew airmen (air traffic controllers, aircraft dispatchers, mechanics and repairmen, parachute riggers, and ground instructors), and flight attendants to undergo mandatory drug and alcohol testing using both random and scheduled tests, preemployment tests, and tests for "reasonable suspicion."[62] The Federal Highway Administration promulgated rules that prohibit use of Schedule 1 drugs (defined by the Drug Enforcement Administration) by foreign and interstate commercial motor carrier drivers.[63] At the same time the Federal Highway Administration asked for comments on whether drug screening should be mandated as well.[64]

COMMON LAW

Under common law, employees working without an express contract, either written or oral, are "at will" employees. This means that they may be fired at will for almost any reason by the employer at any time. In recent years, three main exceptions to the at-will doctrine have emerged to lessen the often harsh effects of this rule: (1) Contractual limitations on employer prerogatives may be inferred from provisions in employee handbooks or personnel manuals.[65] (2) Discharges in violation of public policy, such as for serving on jury duty, are prohibited.[66] (3) Arbitrary and bad-faith discharges may violate an employer's duty of good faith and fair dealing.[67]

The exceptions to the at-will doctrine are a newly emerging area of law that vary greatly by jurisdiction. Where one or more exceptions are recognized, they operate only after a discharge has taken place to provide a remedy in tort or contract. Therefore, in the context of drug testing, at best, employees who were discharged because of a refusal to undergo a test or because of a positive test may have a legal action. Regarding the public policy exception, the most widely recognized of the three exceptions, an action is most plausible when the employer requires that the act of urination be observed. Arguably, this invasion of privacy contravenes public policy.[68] No cases have been decided, however.

Records of drug testing results are extremely sensitive, and the wrongful disclosure of this information could lead to common law tort liability. Although employers are protected against liability for defamation by a limited privilege to disclose employee personnel records,[69] the privilege is lost if the disclosure is made with reckless disregard for the truthfulness of the disclosure or if there is excessive publication of the defamatory information. In *O'Brien v Papa Gino's of America Inc*,[70] a former employee was awarded damages for defamation after the employer falsely stated that the individual was discharged for using cocaine.

In *Houston Belt & Terminal Railway v Wherry*,[71] a railroad employee was tested for drugs after fainting following an accident on the job. The initial test result showed a "trace" of methadone, but a follow-up test showed the presence of a normal compound whose characteristics resemble methadone. The employee was later discharged for failure to report his accident in a timely manner. The railroad wrote a letter to the Department of Labor stating that the employee "passed out and fell" and that "traces of methadone" were present in his system. The Texas Court of Civil Appeals affirmed an award of $150 000 in compensatory damages and $50 000 in punitive damages based on this and other statements. The court stated, "We think the jury was entitled to conclude from the evidence that they made false statements in writing that he was a narcotics user when they knew better."[72]

Determining the Reasonableness of Drug Testing

Although the specific legal criteria vary with the source of the legal protection, essentially the courts seek to determine whether the challenged drug testing program is reasonable. This determination often centers on the following four questions: Who is being tested? When are they being tested? How is the test performed? What action is taken on the basis of test results?

The starting point for determining whether any particular drug testing is reasonable is to look at the individual being tested. In other words, the job description and responsibilities of the person tested are very important.

The courts have been more willing to sanction the use of drug testing when employees and coworkers may be endangered by drug impairment. Thus, drug testing has been upheld for employees of a municipal utility working around high-voltage power lines[73] and jockeys.[74] Employees with public safety and health responsibility, such as police and firefighters[75] and bus drivers,[76] also may be subjected to drug testing.

Drug testing in other job classifications is less likely to be upheld. For example, a discharge based on a positive drug test of a school bus attendant, whose only responsibility was to assist students on the bus, was struck down.[77] Similarly, in *Patchogue-Medford Congress of Teachers v Patchogue-Medford Union Free School District*,[78] the Appellate Division of the New York Supreme Court struck down a rule that all probationary teachers, as a condition of receiving tenure, must submit to a drug test:

> [T]he need of public employers to conduct urine tests to ascertain illegal drug usage in the teaching profession, important as it may be, is not as crucial as in other governmental positions, such as that of police officer, firefighter, bus driver, or train engineer, where, given the nature of the work, the use of controlled substances would ordinarily pose situations fraught with imminent and grave consequences to public safety.[79]

Drug testing may be conducted at a variety of stages during the employment relationship, ie, before employment, on a periodic basis, on return to work following a leave of absence, after an accident, on suspicion of drug use, and randomly. The timing or circumstances of the testing often affect its legality.

To our knowledge, there are no reported cases dealing with preemployment testing. Periodic testing, especially when used as part of an overall medical evaluation of fitness, is likely to be upheld.[80] For other types of testing without a particularized or individualized need for testing, the courts are inclined to find that testing is unnecessary and therefore unreasonable. Thus, random testing of correctional officers[81] and police officers in an organized crime control unit[82] has been held to be illegal. Similarly, the "surprise, roundup" testing of 126 police officers and civilians and 99 firefighters of Plainfield, NJ, was held to be unconstitutional.[83]

If there is specific evidence of the need to test, the courts are inclined to uphold the testing. Drug testing of certain employees who were identified in reports as drug users has been upheld.[73,84] In *Division 241, Amalgamated Transit Union v Suscy*,[76] the Seventh Circuit upheld the Chicago Transit Authority's rule mandating drug testing for bus drivers involved in a serious accident or suspected of being intoxicated.

The courts have not required "probable cause" before upholding an individual drug test. "Reasonable suspicion," a lesser standard, has been widely adopted[85]:

> The 'reasonable suspicion' test requires that to justify this intrusion, officials must point to specific, objective facts and rational inferences that they are entitled to draw from these facts in the light of their experience.[86]

Reasonable suspicion pertains to individual drug testing. An unresolved issue is whether evidence of widespread drug abuse in a community or a problem within a group of workers is needed to justify wider testing:

> Thus, without any direct or even circumstantial proof that any problem exists in OCCB [Organized Crime Control Branch], it is difficult to justify random testing as a deterrent when there is little indication that there is any significant drug use to deter.[87]

In *Lovvorn v City of Chattanooga*,[88] the city was enjoined from conducting mass urine testing of all firefighters and police. According to the court, the city failed to establish that there was a drug abuse problem generally or with respect to specific personnel.

The testing procedures used may affect the legality of the testing. In *Jones v McKenzie*,[77] the court held that the use of an unconfirmed enzyme-multiplied immunoassay test, which violated a specific regulation mandating confirmation, was arbitrary and capricious.[89] Confirmatory testing, such as the use of gas chromatography/mass spectrometry to confirm an initial immunoassay, increases the accuracy of the test and, thus, the likelihood of legality.

It is also important to safeguard the chain of custody of the specimen to eliminate the possibility of confusion, mishandling, or sabotage. In addition, it may be necessary to retain the sample to allow for independent confirmation of the results. In *Banks v FAA*,[90] the discharges of air traffic controllers were set aside because the urine samples had been destroyed before they could be retested by an independent laboratory.

A final issue relates to sample collection. In *Caruso v Ward*,[82] police officers were required to urinate in the presence of a superior officer of the same sex to ensure the regularity of the sample. The court found this process especially troublesome:

> [T]he subject officer would be required to perform before another person what is an otherwise very private bodily function which necessarily includes exposing one's private parts, an experience which even if courteously supervised can be humiliating and degrading.[91]

Having the observer stand behind a shoulder-level screen, however, has been deemed not to be an invasion of privacy by one court.[92]

Occupational drug testing programs are more likely to be upheld if individuals who test positively are rehabilitated rather than discharged.[93] This often relates closely with the duty to make reasonable accommodation to handicapped workers. For example, in *Hazlett v Martin Chevrolet Inc*,[94] an employer was found to have violated Ohio's handicapped discrimination law by discharging an employee suffering from drug and alcohol addiction and refusing to grant a one-month disability or sick leave so the employee could obtain treatment. Other employees with other illnesses previously had been given leaves.

SUMMARY

To establish what legal principles pertain to any case of drug testing, it is necessary to make the following inquiries: (1) Is the individual tested a public employee or is the test mandated by the government (thus raising constitutional issues)? (2) Is the individual covered under the terms of a collective bargaining agreement? (3) Is the individual working under an express written or oral contract or subject to provisions in an employee handbook or personnel manual? (4) Does the individual work for an employer that is a government contractor or a recipient of federal financial assistance (and therefore covered under the federal Rehabilitation Act)? (5) Does the individual work in a state that includes drug abuse within the definition of handicap? (6) Is the purpose or effect of the drug testing to discriminate on the basis or race, color, religion, sex, or national origin (this violates Title VII of the Civil Rights Act)? (7) Did the employer act in a manner that violated public policy or that constituted a breach of good faith and fair dealing? (8) Is there any other legal basis for challenging the drug testing?

PRIOR AMA ACTION

In August 1984, the AMA submitted comments to the Federal Railroad Administration in response to a proposed rule, "Control of Alcohol and Drug Abuse in Railroad Operations." The final rule, which affects railroad employees who perform services covered by the Hours of Service Act (such as train crew members), was promulgated on July 29, 1985. The rule contains the following provisions: (1) It prohibits on-the-job use and possession of or impairment by alcohol or any controlled substance. (2) It mandates toxicologic testing after an accident. (3) It authorizes railroads to require breath and urine tests for reasonable cause. (4) It requires railroads to adopt policies to aid in the identification of troubled employees. (5) It provides for preemployment drug screening. (6) It requires more complete reporting of alcohol and drug involvement in train accidents. The AMA supported the requirements for drug testing after accidents, before employment, and for reasonable cause. In addition, the AMA supported the establishment of employee assistance programs to treat employees who have a drug or alcohol problem. The Federal Railroad Administration did not propose, and therefore the AMA did not comment on, random drug testing of presently employed persons, even though some of these employees hold positions that affect the public safety.

In March 1986, the AMA submitted a study of the medical standards and the medical certification process for civilian airmen to the FAA.[95] A committee comprising eight psychiatrists and one neuropsychologist reviewed mental and behavioral issues and recommended that the FAA incorporate into its routine medical examination a mini-mental-status examination that would detect diminished cognitive function. The committee also provided guidance to the aviation medical examiners on the detection of clinical signs of alcohol and drug

8. *Caruso v Ward*, 133 Misc 2d 544, 506 NYS2d 789, 792 (Sup Ct 1986).
9. *Whalen v Roe*, 429 US 589, 599 (1977).
10. 619 F Supp 1089 (DNJ 1985), *aff'd*, 795 F2d 1136 (3d Cir 1986).
11. *Jones v McKenzie*, 628 F Supp 1500, 1507 (DDC 1986).
12. *Banks v FAA*, 687 F2d 92 (5th Cir 1982).
13. *Cleveland Board of Education v Loudermill*, 470 US 532 (1985).
14. *Price v Pacific Refining Co*, No. 292000 (Contra Costa, Cal Super Ct, Feb 10, 1987); *see generally note, Your Urine or Your Job: Is Private Employee Drug Urinalysis Constitutional in California?* 19 Loy LAL Rev 1461 (1986).
15. 29 USC §§ 701-796 (1984).
16. 29 USC § 706(7)(B).
17. *See* 124 Cong Rec S 19.002 (daily ed Oct 14, 1978) (remarks of Sen Williams).
18. *See Davis v Bucher*, 451 F Supp 791 (ED Pa 1978).
19. *See* 124 Cong Rec 14.507 (daily ed May 18, 1978) (remarks of Rep Hyde).
20. *See, eg, Whitlock v Donovan*, 598 F Supp 126 (DDC 1984), *aff'd*, 790 F2d 964 (DC Cir 1986); *Walker v Weinberger*, 600 F Supp 757 (DDC 1985).
21. *See Heron v McGuire*, 803 F2d 67 (92d Cir 1986).
22. 816 F2d 170 (5th Cir 1987).
23. 29 CFR §§ 1613.705-1613.706 (1986).
24. 45 CFR § 84.13(a) (1986).
25. 41 CFR § 60.741.6 (1986).
26. Cal Admin Code §§ 729.5-7294.2 (1985).
27. *See Whitlock v Donovan*, 598 F Supp 126 (DDC 1984), *aff'd*, 790 F2d 964 (DC Cir 1986); *Walker v Weinberger*, 600 F Supp 757 (DDC 1985).
28. 42 USC § 290dd(a) (1984).
29. 42 USC § 2000e (1984).
30. 440 US 568 (1978).
31. *Id* at 587.
32. *Id* at 594.
33. 41 FEP Cas 282 (DNM 1986).
34. 29 USC §§ 158(a)(5), 158(b)(3), 158(d) (1984).
35. *See, eg, IBEW Local 1900 v Potomac Electric Power Co*, 634 F Supp 642 (DDC 1986); *Brotherhood of Locomotive Engineers v Burlington Northern Railroad*, 117 LRRM 2739 (D Mont 1984).
36. Denenberg TS, Denenberg RD: *Alcohol and Drugs: Issues in the Workplace*, Washington, DC, BNA Books, 1983.
37. 8202 Arb ¶ 8616 (1982) (Daly, Arb).
38. Wabco Division of American Standard, 77 LA 1085 (1981) (Katz, Arb).
39. Texas Utility Generating Co, 84-1 Arb ¶ 1025 (1984) (Edes, Arb).
40. *See, eg*, Bell Helicopter Co, 69-2 Arb ¶ 8608 (1969) (Abernethy, Arb).
41. Levin E, Denenberg TS, *How Arbitrators View Drug Abuse*, 31 Arb J 97 (1976).
42. Wollett DH, *What an Arbitrator Looks for from Management in Discharge Cases*, 9 Employee Rel LJ 525 (1983-1984).
43. *See* Wynns P, *Arbitration Standards in Drug Discharge Cases*, 34 Arb J 19 (1979).
44. *See* Dufek RA. Underhill DM, *Arbitration Can Thwart Employer No-Drug Policy*, Legal Times, March 18, 1985, p 21; Geidt T, *Drug and Alcohol Abuse in the Work Place: Balancing Employer and Employee Rights*, 11 Employee Rel LJ 181 (1985).
45. *Misco Inc v United Paperworkers International Union*, 768 F2d 739 (5th Cir 1985), *cert granted*, 107 S Ct 871 (1987).
46. San Francisco Police Code, art 33a, §§ 3300A.1-3300A.11 (1985).
47. Daily Lab Rptr, Dec 4, 1985, at A-2.
48. McGovern TL, *Employee Drug Testing Legislation: Redrawing the Battlelines in the War on Drugs*, 39 Stan L Rev 1453 (1987).
49. Conn Pub Act 87-551 (1987).
50. Iowa HF 469 (1987).
51. Minn Stat Ann §§ 181.93-181.995 (1987).
52. Mont Code Ann § 39-2-304 (1987).
53. RI Gen Laws §§ 28-6.5-1 to 28 6.5-1-2 (1987).
54. Vt Stat Ann tit 21, ch 5, §§ 511-520 (1987).
55. Utah Code Ann §§ 34-38-1 to 34-38-15 (1987).
56. HR 1[illegible]7, 100th Cong, 1st Sess, 1987.
57. Pub L 99-570 (to be codified at 21 USC § 801).
58. S 1041, 100th Cong, 1st Sess (1987).
59. McGinley L, *Senate Panel Approves Bill Requiring Drug Tests on Transportation Workers*, Wall St J, March 11, 1987, at 8, col 1.
60. 49 CFR, pts 212, 217-219, 225 (1986); 50 Fed Reg 31 508-31 579 (1985).
61. Alcohol, Drug Abuse, and Mental Health Administration, Department of Health and Human Services, Scientific and Technical Guidelines for Drug Testing Programs, 52 Fed Reg 30 638 (1987).
62. 51 Fed Reg 44 432-44 436 (1986).
63. 49 CFR § 391.41(b)(12) (1987).
64. 51 Fed Reg 17 572 (1986).
65. *See, eg, Wagner v City of Globe*, 722 P2d 250 (Ariz 1986); *Pine River State Bank v Mettille*, 333 NW2d 622 (Minn 1983).
66. *See, eg, Nees v Hocks*, 272 Or 210, 536 P2d 512 (1975).
67. *See, eg, Fortune v National Cash Register Co*, 373 Mass 96, 364 NE2d 1251 (1977).
68. *Cf Wagenseller v Scottsdale Memorial Hospital*, 147 Ariz 370, 710 P2d 1025 (1985) (nurse discharged for refusing to perform in a skit that called for "mooning" the audience).
69. *See Sindorf v Jacron Sales Co*, 27 Md App 53, 341 A2d 856 (1975), *aff'd*, 276 Md 580, 350 A2d 688 (1976); *Harrison v Arrow Metal Products Corp*, 20 Mich App 570, 174 NW2d 875 (1969); *see generally comment, Qualified Privilege to Defame Employees and Credit Applicants*, 12 Harv CR-CL L Rev 143 (1977).
70. 780 F2d 1067 (1st Cir 1986).
71. 548 SW2d 743 (Tex Civ App 1977), *appeal dismissed*, 434 US 962 (1978).
72. 548 SW2d at 752.
73. *Allen v City of Marietta*, 601 F Supp 482 (ND Ga 1985).
74. *Shoemaker v Handel*, 619 F Supp 1089 (DNJ 1985), *aff'd*, 795 F2d 1136 (3d Cir 1986).
75. *City of Palm Bay v Bauman*, 475 So 2d 1322 (Fla App 1985).
76. *Division 241, Amalgamated Transit Union v Suscy*, 538 F2d 1264 (7th Cir), *cert denied*, 429 US 1029 (1976).
77. *Jones v McKenzie*, 628 F Supp 1500 (DDC 1986).
78. 119 AD2d 35, 505 NYS2d 888 (App Div 1986), *aff'd*, 70 NY2d 57, 510 NE2d 25, 517 NYS2d 456 (1987).
79. 505 NYS2d at 891 (1986).
80. *See Curry v New York Transit Authority*, 86 AD2d 857, 450 NYS2d 399 (App Div), *aff'd*, 56 NY2d 798, 437 NE2d 1158, 452 NYS2d 401 (1982).
81. *McDonnell v Hunter*, 612 F Supp 1122 (SD Iowa 1985), *modified*, 809 F2d 1302 (8th Cir 1987) ("systematic" random selection permissible).
82. *Caruso v Ward*, 133 Misc 2d 544, 506 NYS2d 789 (Sup Ct 1986).
83. *Capua v City of Plainfield*, 643 F Supp 1507 (DNJ 1986).
84. *Turner v Fraternal Order of Police*, 500 A2d 1005 (DC 1985); *King v McMickens*, 120 AD2d 351, 501 NYS2d 679 (1986).
85. *See eg, McDonnell v Hunter*, 809 F2d 1302 (8th Cir 1987); *City of Palm Bay v Bauman*, 475 So 2d 1322 (Fla App 1985); *Patchogue-Medford Congress of Teachers v Patchogue-Medford Union Free School District*, 70 NY2d 57, 510 NE2d 325, 517 NYS2d 456 (1987). *Caruso v Ward*, 133 Misc 2d 544, 506 NYS2d 789, 799 (Sup Ct 1986).
86. *City of Palm Bay v Bauman*, 475 So 2d 1322, 1326 (Fla App 1985).
87. *Caruso v Ward*, 133 Misc 2d 544, 506 NYS2d 789, 795 (Sup Ct 1986).
88. 647 F Supp 875 (ED Tenn 1986), *appeal docketed*, No. 86-6280 (6th Cir Dec 16, 1986).
89. *But see Turner v Fraternal Order of Police*, 500 A2d 1005 (DC 1985).
90. 687 F2d 92 (5th Cir 1982).
91. 506 NYS2d at 793.
92. *National Treasury Employees Union v Von Raab*, 816 F2d 170 (5th Cir 1987).
93. *See* Exec Order 12 574, 51 Fed Reg 32.889 (1986).
94. 25 Ohio St 3d 279, 497 NE2d 478 (1986).
95. Engelberg AL, Gibbons HL, Doege TC: A review of the medical standards for civilian airmen: Results of a two-year study. *JAMA* 1986;255:1589-1599.
96. Council on Scientific Affairs: Scientific issues in drug testing. *JAMA* 1987;257:3110-3114.

use. The issue of urine testing for drug use was considered at great length, but such testing was not recommended. Instead, the AMA recommended to the FAA a method of detecting mental and physical impairments that may result from alcohol and drug abuse or dependence rather than a chemical method of detecting alcohol or drug use.

At the 1986 Annual Meeting, the House of Delegates adopted Report K of the Council of Medical Service, "Employers' Violation of Patient Privacy With Group Medical Insurance Claim Forms." This report opposed employment discrimination due to any health condition not related to the requirements of a job and suggested that the AMA develop model federal and state legislation that would prohibit such discrimination.

At the 1986 Interim Meeting, the House of Delegates adopted Council on Scientific Affairs Report J, "Scientific Issues in Drug Testing." The report discussed the strengths and limitations of screening and confirmatory testing techniques and the importance of forensic testing procedures and quality controls. It concluded that drug testing does not provide any information about mental or physical impairments that may be due to drug use or about patterns of use. A high-quality drug testing program can provide accurate evidence of previous exposure to drugs. The report urges that physicians be aware of the objectives of any drug testing program in which they participate.

URINE SCREENING OF PHYSICIANS

At the 1972 Clinical Convention, the AMA adopted Board of Trustees Report T, "Physicians With Psychiatric Disorders, Including Alcoholism and Drug Dependence." This landmark report not only addressed the problems of alcoholism, drug dependence, and psychiatric illness among physicians and medical students but also outlined a series of concrete steps that various members of the medical profession could use to get help for an impaired colleague. The report further proclaimed that it is an unimpaired physician's ethical responsibility to take affirmative action to assist an impaired physician who is unable to seek treatment or rehabilitation by himself or herself.

Since that time, programs to help impaired physicians have been developed by every state medical society. Similarly, most medical licensing bodies now are governed by legislation that addresses the many aspects of this complex problem; much of this legislation allows a physician to seek help and specifies the conditions under which the physician may return to practice after treatment. The AMA model state legislation, "The Impaired Physicians Treatment Act," encourages collaboration between the state medical society and the licensing board and suggests a variety of model provisions by which effective relationships can be developed. These programs recognize the value of constructive intervention to assist an impaired medical colleague. Intervention that is based on realistic and documented concern and referral for diagnosis and treatment is a positive step and an appropriate response.

Urine screening for drug and alcohol use has been recognized by state medical societies and licensing boards as *one* component of a comprehensive treatment plan for chemical dependence. In recent years, as more state societies have devoted increasing resources to impairment programs and have continued to hire full-time medical staff to assure implementation of a comprehensive program, they have been better able to act as a physician's advocate by monitoring his or her recovery as the physician returns to practice. Written agreements between the physician and the program often specify the use of urine screening as an accepted method of assuring recovery when it is used in conjunction with other methods of assurance.

CONCLUSION

The case law concerning drug testing of employees is developing very rapidly, and for the most part, no discernible trends have evolved. Previous action by the AMA has tended to support cautious application of drug testing: (1) The AMA supported drug testing of railroad crews under limited circumstances, such as after accidents and for reasonable cause, and urged that the railroads establish employee assistance programs to treat employees with drug or alcohol use problems. (2) The AMA did not recommend urine drug testing of civilian airmen as part of the FAA's medical standards and medical certification process. (3) The AMA opposed employment discrimination based on health status. (4) The AMA delineated the strengths and limitations of drug testing based on scientific concerns, including that high-quality drug testing procedures can provide accurate information about previous exposure to a drug but cannot establish patterns of use or mental or physical impairments resulting from that use. (5) The AMA recognized the appropriate use of urine drug screening in monitoring physician recovery from an impairing problem of alcohol or drug use.

The Council on Scientific Affairs recommends:

1. That the AMA reaffirm its commitment to educate physicians and the public about the scientific issues of drug testing as presented in Report J (I-86).[56]

2. That the AMA monitor the evolving legal issues in drug testing of employee groups, especially the issues of positive drug tests as a measure of health status and potential employment discrimination resulting therefrom.

3. That the AMA take the position that urine drug and alcohol testing of employees should be limited to: (a) preemployment examinations of those persons whose jobs affect the health and safety of others, (b) situations in which there is reasonable suspicion that an employee's job performance is impaired by drug and alcohol use, and (c) monitoring as part of a comprehensive program of treatment and rehabilitation of alcohol and drug abuse or dependence.

4. That the AMA urge employers who choose to establish drug testing programs to use confirmed positive test results in employees primarily to motivate those employees to seek appropriate assistance with their alcohol or drug problems, preferably through employee assistance programs.

5. That this report be adopted in lieu of Resolutions 84 (A-86), 106 (A-86), 16 (I-86), and 60 (I-86).

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1. Tribe LH: *American Constitutional Law*. Mineola, NY, The Foundation Press Inc, 1978, p 1147.
2. 384 US 757 (1966).
3. *See, eg, Division 241, Amalgamated Transit Union v Suscy*, 538 F2d 1264 (7th Cir), *cert denied*, 429 US 1029 (1976); *Allen v City of Marietta*, 601 F Supp 482 (ND Ga 1985); *Ewing v State*, 160 Ind App 138, 310 NE2d 571 (1974).
4. *Katz v United States*, 389 US 347, 351 (1967).
5. *Allen v City of Marietta*, 601 F Supp 482, 491 (ND Ga 1985).
6. *Turner v Fraternal Order of Police*, 500 A2d 1005, 1011 (DC 1985).
7. *National Treasury Employees Union v Von Raab*, 816 F2d 170, 175 (5th Cir 1987).

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LAW REVIEW ARTICLES

Gitlow, Compulsory Urinalysis of Public School Students: An Unconstitutional Search and Seizure, 18 Colum. Hum. Rts. L. Rev. 111 (1986-1987). Columbia Human Rights Law Review

Development in the Law, Jar Wars: Drug Testing in the Workplace, 23 Willamette L. Rev. 529 (1987): Introduction, at 529; The Constitutional Issues of Drug Testing in the Workplace, at 553, Statutory and Other Limitations to Drug Testing, at 573; Other Considerations: Workers' Compensation, Unemployment Compensation, and Chain of Custody, at 585; and Drug Testing Employees: The Employer's Perspective, at 597.

ducted out of the public eye. The search becomes unreasonable because it is contradictory.

Third, sex acts are inherently private. They work to exclude the world from their participants' perceptions and conversely, in order to work, require such exclusion. They create sanctuary and require sanctuary. Any right to substantive privacy that protects repose and sanctuary will protect the inherent privacy of sex.

Fourth, even if the perimeter of what counts as a self-affecting action is fuzzy, the role of sexual behavior in a person's life clearly gives sex *a* central place among self-affecting activities. As the fulfillment of need, as an access to ecstasy and as a necessary substrate for matrimonial love, sexual pleasure is set apart from casual pleasure and assumes a role more central in the configuration of human emotions than even friendships have. Any right that protects central self-affecting values, then, will also protect the right to consensual sex.

Finally, because a person's body is a necessary source for all free actions and for any action that instills value in his world, if there are any areas of life in which an individual's plans and projects take precedence over those of society, then the individual must be able to act reflexively on his own body to make it as he wills it and to instill value in it. Moreover, because of the moral priority of the body to an agent's actions in the world, the state's prohibition of and interference in a person's reflexive actions on his own body is an offense on a moral par with a direct violation of a person's body by the state. To be raped by a policeman and to be prevented by the police from having consensual sex are moral equivalents. Therefore, if there are any substantive rights to act in the world, the right to do *to* one's body as one will is necessarily protected. Only when one's control of one's body is protected, does one have a right to bodily integrity, and only when one has bodily integrity is one a person at all. Any moral systems in which persons are a locus of value—systems of humans, not systems of angels or animals—will be obligated to protect from government those persons' acts of consensual sex.

Compulsory Urinalysis of Public School Students: An Unconstitutional Search and Seizure*

by
Paul L. Gillow**

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."•••

I. Introduction

Urinalysis to detect drug and/or alcohol use, made relatively inexpensive by recent technological developments, has spread rapidly to many areas of American life. Its use has been approved in prisons,[1] the military,[2] public[3] and private[4] employment, and sports.[5] Recently, a school district in Bergen County, New Jersey sought to add public schools to the list.

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* The fourth amendment to the United States Constitution states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

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••• Shelton v. Tucker, 364 U.S. 479, 487 (1960).

1. Storms v. Coughlin, 600 F. Supp. 1214 (S.D.N.Y. 1984); Tucker v. Dickey, 613 F Supp. 1124 (W.D. Wis. 1985).

2. *See infra* note 51.

3. *See infra* notes 84-85 and accompanying text.

4. Approximately one quarter of Fortune 500 companies currently require drug screening of applicants. Hanley, *The Validity of Student Drug Testing*, N.Y. Times, Dec. 10, 1985, at B2, col. 1. The President's Commission on Organized Crime has recommended routine testing of all American workers for drug use. Lindsey, *Worker Drug Test Provoking Debate*, N.Y. Times, May 3, 1986, at 1, col. 3.

Private employers are not bound by the fourth amendment because there is no state action. *See infra* note 15. Drug testing by private employers could be limited, however, by state constitutions, legislation, or collective bargaining agreements. *See* Schwanenberg, *Inconsistencies plague laws, rules on drug testing in workplace*, Newark Star-Ledger, July 27, 1986, § 1 at 1, col. 1.

5. Sports organizations are usually private employers who are not bound by the fourth amendment. *See supra* note 4. *But see* Shoemaker v. Handel, 608 F. Supp. 1151 (D.N.J. 1985), *aff'd*, 795 F.2d 1136 (3d Cir. 1986) (compulsory urinalysis of licensed jockeys upheld under the administrative search standard for closely regulated industries).

In June 1985, the Carlstadt-East Rutherford Regional Board of Education approved compulsory urinalysis of all students at the Henry P. Becton Regional High School to screen for drug and/or alcohol use as part of comprehensive medical examinations. A group of five students and their parents filed suit, and a temporary restraining order against the drug screening aspect of the examinations was issued by the New Jersey Superior Court in August 1985. In *Odenheim v. Carlstadt-East Rutherford Regional School District*,[6] which was decided in December 1985, the Superior Court ruled the urinalysis proposal an unconstitutional violation of the plaintiffs' rights to be free from unreasonable searches and seizures, the plaintiffs' due process rights, and the plaintiffs' legitimate expectations of privacy. In May 1986, the defendant school district decided to drop its appeal.

While the New Jersey case has been resolved, the issue of compulsory urinalysis of public school students cannot be regarded as settled by the courts,[7] and the increasing drug problem in American schools makes it quite likely that the issue will be raised again.[8] The object of this Note is to show that, although the fourth amendment affords public high school students limited protection, compulsory urinalysis is unprecedented and should be considered unconstitutional because of the highly intrusive nature of the test and the failure to comply with a standard of individualized suspicion. The Becton High School drug screening proposal and litigation provide the basis for discussion, but the analysis in this Note is equally applicable to any compulsory urinalysis program. First, the Note describes the Becton High School drug screening proposal and addresses the school district's claim that the proposal was a medical procedure. Then, fourth amendment analysis is applied to the proposal, in order to show that the procedure was a search and seizure, and

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Attempts to impose compulsory urinalysis programs in professional baseball and football have been opposed by players' unions, which argue that unilateral imposition of such programs by the commissioner and insertion of drug test clauses in players' contracts violate collective bargaining agreements. *See* Molotsky, *N.F.L. Postpones Its New Drug Plan*, N.Y. Times, July 12, 1986, at 45, col. 1; Goodwin, *Ueberroth Changes Tactics, Gets His Way on Drug Issue*, N.Y. Times, March 3, 1986, at C2, col. 4.

6. 211 N.J. Super. 54, 510 A.2d 709 (Ch. Div. 1985).

7. *Odenheim* is a trial court opinion, and therefore of low value as precedent. One federal district court has reached the issue of compulsory urinalysis of students, but that case did not involve blanket testing of a student population. Anable v. Ford, No. 84-6033, slip op. (July 15, 1985), *modified*, slip op. (W.D. Ark. Sept. 5, 1985). *See infra* text accompanying notes 99-105.

8. Recently, Secretary of Education William J. Bennett suggested to Congress that federal funds be withheld from schools that do not demonstrate a serious commitment to combatting drug use, N.Y. Times, May 21, 1986, at A20, col. 6, and one school board adopted a policy that permitted strip searches of elementary school students for drugs. *See* Friendly, *Schools Ease Curbs on Drug and Weapon Checks*, N.Y. Times, June 17, 1986, at B2, col. 1. Both public and private schools are struggling with the question of how far they can go to fight drug use. *See* Friendly, *Board Studies Strip Search for Students*, N.Y. Times, June 8, 1986, § 23, at 1, col. 4; *Boarding Schools' Hard Line Angering on Drug Tests*, N.Y. Times, June 8, 1986, § 1, at 54, col. 3.

therefore subject to the standard for school searches recently set forth by the United States Supreme Court in *New Jersey v. T.L.O.*[9] The focus of this Note is on the failure of the proposal to satisfy that standard, since it was neither justified at its inception nor reasonable in its scope. Finally, the Note considers the due process issues raised by the proposal.[10]

II. The Drug Screening Proposal

The Becton High School drug screening proposal was set forth in a board of education policy[11] that required physical examinations of all students enrolled or to be enrolled in the high school.[12] The examinations were to be conducted annually at the beginning of the school year and to consist generally of on-premises examinations by the school medical examiner.[13] The purpose of the

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9. 469 U.S. 325 (1985).

10. There appears to be no claim under the fifth amendment privilege against self-incrimination because of the rule that the privilege applies only to evidence of a testimonial or communicative nature. Schmerber v. California, 384 U.S. 757 (1966). *But see* National Treasury Employees Union v. Von Raab, 649 F. Supp. 380, 388 (E.D. La. 1986) (holding that a urinalysis plan violated the fifth amendment privilege against self-incrimination because urine testing is more intrusive than the procedure involved in *Schmerber* and because the plan required a subject to fill out a written form stating medications taken and any circumstances in which the subject may have been in contact with illegal substances).

Urinalysis may implicate a right of privacy to the nondisclosure of personal medical information. *See* Capua v. City of Plainfield, 643 F. Supp. 1507, 1515 (D.N.J. 1986) (holding that a urinalysis program violated the plaintiffs' right of privacy in medical information because of inadequate safeguards to insure confidentiality). *See also Von Raab*, 649 F. Supp. at 389 ("[t]he Court finds that the [urinalysis plan] unconstitutionally interferes with the penumbral rights of privacy held by Customs workers"). This Note accepts the provisions of the Becton High School proposal at face value and assumes the adequacy of its confidentiality guarantees. *See infra* text accompanying notes 25-26. The privacy concerns raised by the proposal are addressed directly by the fourth amendment. On students' legitimate claim of privacy, *see infra* notes 49-52 and accompanying text, and on the intrusion of urinalysis into students' activities outside of school, *see infra* text accompanying notes 99-104.

Reliance on the right of privacy is more problematic. The United States Supreme Court has not established a right of privacy to the nondisclosure of personal medical information. *See* Whalen v. Roe, 429 U.S. 589 (1977) (upholding a statute that required physicians to report the names and addresses of all patients who obtained prescriptions for "dangerous" drugs; the Court largely relied on the confidentiality provisions in the statute). Moreover, the current Court seems less than eager to expand the "fundamental rights" that are protected by the right of privacy. *See* Bowers v. Hardwick, 106 S. Ct. 2841 (1986) (the Constitution does not confer a fundamental right to engage in homosexual sodomy). However, the right of privacy has been extended to school children. *See* Merriken v. Cressman, 364 F. Supp. 913 (E.D. Pa. 1973) (struck down on privacy grounds a school questionnaire designed to identify "potential drug users" among eighth grade students).

11. Carlstadt-E. Rutherford Regional Bd. of Educ., Policy No. 5141.3, "Comprehensive Medical Examination" (1985), *reprinted in* Odenheim v. Carlstadt-E. Rutherford Regional School Dist., 211 N.J. Super. 54 app., 510 A.2d 709 app. (Ch. Div. 1985) [hereinafter Policy].

12. Policy at 62-63, 510 A.2d at 714.

13. *Id.* at 63, 510 A.2d at 714.

examinations was "to identify the existence of any physical defects, illnesses or communicable diseases, as well as, but not limited to, the pupil's fitness to participate in any school sponsored health, safety, sport, and/or physical education courses as required by law."[14] To that end, the examinations included a drug screening test.[15] The proposal asserted that identification of drug use was not for a punitive,[16] but a rehabilitative, purpose.[17]

According to the procedural guidelines issued by the school district, a urine sample would be taken during the medical examination for the performance of various tests, including the drug screening test.[18] Failure of a student to complete any portion of the medical examination would result in the student's exclusion from school.[19] If a student tested positive for drug and/or alcohol use, the school physician was to notify immediately the school superintendent and the parents or legal guardian of the student or the student himself, if over age 18.[20] The school physician would also decide whether to exclude the student from school.[21] The school superintendent, the school physician, the parents or legal guardian of the student, and the student would meet "to discuss the results of the test, the nature of the problem and the course of action to be taken."[22] The superintendent, with the advice of the

14. *Id.*

15. "The Board of Education has concern for the health of the entire school population and hereby resolves to identify and isolate any and all health problems which presently exist. These complete physical examinations will help to identify any drug and alcohol use by the pupils. The detection of drug and/or alcohol use will enable the Board of Education to enter the pupil into an appropriate rehabilitation program designed to help the student recognize the danger and to remedy any problem that exists." *Id.*

16. *Id.*

17. "If any illness or health problem is identified through this testing, then the Board will take the necessary steps to correct any such problem. Included in these corrective measures would be counseling and other rehabilitative procedures to treat the illness caused by drug and alcohol abuse." *Id.* at 64, 510 A.2d at 717.

18. Carlstadt-E. Rutherford Regional Bd. of Educ., Policy No. 5141.3, "Administrative Procedures for Policy 5141.3," § 2, ¶ C (1985), *reprinted in Odenheim*, 211 N.J. Super. at app., 510 A.2d at app. [hereinafter Administrative Procedures], provides:

> In the same manner and environment as above indicated, the medical examiner shall ask each pupil for a urine sample, to be obtained in a medically appropriate method. The sample shall be obtained for the purpose of discerning the level of protein, sugar, specific gravity, blood and the existence or non-existence of controlled dangerous substances, non-authorized prescription drugs as defined in the introductory statement and alcohol.

A "controlled dangerous substance" is defined as "a narcotic or non-narcotic substance as listed under N.J.S.A. 24:21-4, N.J.A.C. 8:65-10.1, and any prescription drug not prescribed or authorized by a medical physician." Policy, *supra* note 11, at 63, 510 A.2d at 717.

19. Administrative Procedures, *supra* note 18, § 4.

20. *Id.* § 5, ¶ B.

21. "The school physician will ... determine if, in his opinion, the pupil is able to continue classroom study. Except as hereinafter provided, the decision of the school physician shall be final." *Id.*

22. *Id.* § 5, ¶ C(2).

school physician, would then "make any recommendations necessary to facilitate the effective rehabilitation of the pupil."[23] Possible recommendations included periodic conferences with the parents or legal guardian concerning the problem, referral to the school district's alcohol or drug supervision program, and referral of the case to the county office of the State Division of Youth and Family Services.[24] A separate confidential medical file would be kept for test results[25] and all information concerning any action taken under the policy.[26]

III. The Position of the School District

At trial, the position of the school district was that alcoholism and drug abuse are diseases. Accordingly, screening for alcohol and drug use is an appropriate part of a comprehensive medical examination required of all students pursuant to the board of education's statutory obligation to examine all students for physical defects.[27] The trial judge wrote in his opinion, "[t]he linchpin of defendants' argument is that drug use and/or abuse is an illness and/or a departure from normal health and therefore beyond the parameters of the law of search and seizure."[28]

The school district emphasized that a urine sample would not be taken solely to screen for drugs but would also be tested for other signs of physical defects. A urine sample was, in fact, part of the annual physical in previous years.[29] The school district claimed that its purpose was rehabilitative, noting that no civil or criminal sanctions were to be imposed under the proposal in the event of a positive test. In light of these considerations, the school district contended that no intrusive deprivation of privacy would occur when a urine sample was examined for the presence of drugs or alcohol.[30]

As stipulated by the parties at trial, during the 1984-85 school year, 28 students out of a student population of 520[31] (or about 5%) "either made inquiry or were referred to the student assistant counselor"[32] concerning drug or alcohol use. The number for the 1985-86 school year, as of the November 12 trial date, was 11 out of a student population of 516.[33] These statistics included "students who denied any involvement in either alcohol or drugs

23. *Id.* § 5, ¶ C(4).

24. *Id.* § 5, ¶ C(4)(a)-(c).

25. *Id.* § 5, ¶ C(1).

26. *Id.* § 5, ¶ C(4)(e).

27. *See* N.J. Stat. Ann. § 18A:40-4 (West Supp. 1986).

28. Odenheim v. Carlstadt-E. Rutherford Regional School Dist., 211 N.J. Super. 54, 58, 510 A.2d 709, 711 (Ch. Div. 1985).

29. Hanley, *supra* note 4.

30. *Odenheim*, 211 N.J. Super. at 57, 510 A.2d at 710-11.

31. *Id.*

32. *Id.*

33. *Id.*

and others who received follow-up referral service."[34] Counsel for the defendants contended at trial that these statistics were only the "tip of the iceberg,"[35] but did not argue that the school district had anything but a "normal" drug problem.

IV. Drug Screening Is Not a Medical Procedure

The school district attempted to avoid the issue of intrusion on students' privacy by classifying drug screening as a medical procedure. While the medical profession may consider alcoholism and drug abuse to be diseases,[36] it is by no means clear that use of alcohol or drugs is a medical problem.[37] A positive test result on a urine sample does not distinguish between use and abuse.

Unlike other diseases for which students may be excluded from school,[38] drug use and abuse are not contagious, at least not literally. Drug users will not infect the "healthy" student population. There may be concern for the health of the drug user, but that does not make clear the need for urinalysis. New Jersey state law already provides procedures to identify and, if necessary, exclude students who are under the influence of alcohol or drugs.[39]

While use of drugs is clearly illegal[40] and in violation of school rules, the school district supported its assertion that the proposal would not cause an

34. *Id.*

35. Hanley, *supra* note 4.

36. American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 164-176 (3d ed. 1980).

37. A study by the Stanford Center for Research in Disease Prevention reports a lower incidence of heart disease among moderate drinkers of alcoholic beverages than non-drinkers. Camargo, Williams, Vranizan, Albers & Wood, *The Effect of Moderate Alcohol Intake on Serum Apolipoproteins A-I and A-II: A Controlled Study*, 253 J. A.M.A. 2854 (1985).

38. N.J. Stat. Ann. § 18A:40-10 (West 1981) provides:

> No teacher or pupil who is a member of a household in which a person is ill with smallpox, diphtheria, scarlet fever, whooping cough, yellow fever, typhus fever, cholera, measles, or such other contagious or infectious disease as may be designated by the board of education, or of a household exposed to contagions as aforesaid, shall attend any public school during such illness, nor until the board of education has been furnished with a certificate from the board of health, or from the physician attending such person, or from a medical inspector, certifying that all danger of communicating the disease by the teacher or pupil has passed.

See also N.J. Stat. Ann. § 18A:40-11 (West Supp. 1986) (providing for the exclusion of any student with communicable tuberculosis).

39. *See infra* notes 97-98 and accompanying text.

40. The New Jersey Controlled Dangerous Substances Act, N.J. Stat. Ann. §§ 24:21-1 *et seq.* (West Supp. 1986), defines a disorderly person as anyone who uses or is under the influence of any controlled dangerous substance. *Id.* § 24:21-20 (b). The term "controlled dangerous substance" does not include alcohol. *Id.* § 24:21-2.

The New Jersey Act is a variation of the Uniform Controlled Substances Act, 9 U.L.A. 187 (1970), which has been adopted in some form by most states.

intrusive deprivation of privacy by claiming that no civil or criminal[41] sanctions would be imposed in the event of a positive test result for drug use and that the school district's purpose was not punitive or disciplinarian but rehabilitative. The school district adopted this rather awkward position in order to defeat the fourth amendment protection afforded students. As the trial judge wrote: "Defendants' policy is an attempt to control student discipline under the guise of a medical procedure."[42]

The school district's position is further undermined by a provision in the proposal itself that allowed the school physician to certify the "health" of a student who has the "disease" of drug or alcohol use.[43] It is either irresponsible or dishonest to classify as healthy a person who has an illness. Obviously, the provision was designed to give school officials more flexibility in dealing with students who are identified as drug users, but the discretion granted school officials under the proposal is worrisome. It is not hard to envision the drug use of an above average, well-behaved student being glossed over with a few parent conferences, and the equal drug use of a "problem" student resulting in exclusion from school. Both students in this hypothetical have the same "medical" problem, but the prescriptions are quite different. Such discriminatory treatment is abhorrent to the medical profession, but a foreseeable outcome of the proposal.

School districts have an undeniable interest in combatting drug and alcohol use by students. They should not, however, be permitted to avoid compliance with the Constitution by describing urinalysis as a medical procedure. As the trial judge wrote, "the spectrum of items that could be approached simply by defining them as medical is limitless. To accept defendants' position suggests that medical testing is without limits."[44] Rejection of the "medical procedure" argument did not defeat the proposal, however; it simply meant that the proposal was not exempt from the requirements of the fourth amendment.[45]

41. At trial, the judge pointed out that this may not be entirely true. The State Division of Youth and Family Services could be given test results under the proposal. This agency is required to give evidence of criminal acts to county law enforcement agencies. Rozanski, *Judge hears precedent-setting case of testing students for drug abuse*, Newark Star-Ledger, Nov. 13, 1985, § 1 at 1, col. 1.

A positive test result might constitute evidence of criminal acts, but an attempt to impose criminal sanctions on the basis of a positive test result alone would run afoul of Robinson v. California, 370 U.S. 660 (1962), which struck down a state law that made it a crime to "be addicted to the use of narcotics."

42. Odenheim v. Carlstadt-E. Rutherford Regional School Dist., 211 N.J. Super. 54, 62, 510 A.2d 709, 713 (Ch. Div. 1985).

43. "Even with the existence of a drug or alcohol problem, the physician may certify to the pupil's health or condition, so long as the aforementioned Superintendent's recommendations are complied [sic] with." Administrative Procedures, *supra* note 18, § 5, ¶ (2)-3.

44. *Odenheim*, 211 N.J. Super. at 62, 510 A.2d at 713.

45. The fourth amendment is enforceable against the states through the due process clause of the fourteenth amendment. Mapp v. Ohio, 367 U.S. 643 (1961). Action by a state board of

V. Urinalysis Constitutes a Search and Seizure

The threshold question in fourth amendment analysis is whether the action at issue constitutes a search and seizure. Courts have unanimously held that the taking of a urine specimen for urinalysis testing is a search and seizure within the meaning of the fourth amendment.[46] These courts based their conclusions on precedent holding that compulsory extractions of "bodily fluids" is a search and seizure within the meaning of the fourth amendment.[47] Courts have also considered the taking of a urine specimen to be a highly intrusive search.[48]

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education is state action subject to the fourteenth amendment. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

46. National Treasury Employees Union v. Von Raab, 649 F. Supp. 380, 386 (E.D. La. 1986); Capua v. City of Plainfield, 643 F. Supp. 1507, 1513 (D.N.J. 1986); Jones v. McKenzie, 628 F. Supp. 1500, 1508 (D.D.C. 1986); McDonell v. Hunter, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985); Allen v. City of Marietta, 601 F. Supp. 482, 488-89 (N.D. Ga. 1985); Patchogue-Medford Congress of Teachers v. Board of Educ., 119 A.D.2d 35, 37-38, 505 N.Y.S.2d 888, 890 (1986); Caruso v. Ward, 133 Misc. 2d 544, 546-47, 506 N.Y.S.2d 789, 792 (Sup. Ct. 1986); City of Palm Bay v. Bauman, 475 So. 2d 1322, 1325 (Fla. Dist. Ct. App. 1985). *See also* Lovvorn v. City of Chattanooga, 647 F. Supp. 875, 879 (E.D. Tenn. 1986) (the proposition "seems clear" and the parties did not disagree); Tucker v. Dickey, 613 F. Supp. 1124, 1127 (W.D. Wis. 1985) (defendants "seem to concede" the proposition) Storms v. Coughlin, 600 F. Supp. 1214, 1217-18 (S.D.N.Y. 1984) (the parties agreed on the proposition). Two courts of appeals cases, by analyzing the constitutionality of urinalysis under the fourth amendment, implicitly lend support to the proposition. *See* Shoemaker v. Handel, 608 F. Supp. 1151 (D.N.J. 1985), *aff'd*, 795 F.2d 1136 (3d Cir. 1986); Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976).

47. Schmerber v. California, 384 U.S. 757 (1966) (blood); United States v. Mosquera-Ramirez, 729 F.2d 1352 (11th Cir. 1984) (bowel movement).

48. *See Capua*, 643 F. Supp. at 1514 (footnote omitted):

> [D]efendants' mass urine testing program subjected plaintiffs to a relatively high degree of bodily intrusion. As stated earlier, while urine is routinely discharged from the body, it is generally discharged and disposed of under circumstances that warrant a legitimate expectation of privacy. The act itself, totally apart from what it may reveal, is traditionally private. Facilities both at home and in places of public accommodation recognize this privacy tradition. In addition, society has generally condemned and prohibited the act in public . . . . The requirement of surveillance during urine collection forces those tested to expose parts of their anatomy to the testing official in a manner akin to strip search exposure. Body surveillance is considered essential and standard operating procedure in the administration of urine drug tests, . . . thus heightening the intrusiveness of these searches. A urine test done under close surveillance of a government representative, regardless of how professionally or courteously conducted, is likely to be a very embarassing and humiliating experience.

See also Storms, 600 F. Supp. at 1220 (quoting *Schmerber*, 384 U.S. at 771):

> Urinalyses are entitled to the same level of scrutiny accorded body cavity searches. It may, perhaps, be debated whether one type of search offends "human dignity and privacy" more than the other, but the difference is a matter of degree, not kind. Both are degrading. It is this basic offense to human dignity, rather than any particular style of causing offense, which sets this type of search apart from traditional types.

See also id. at 1218. In *McDonell*, 612 F. Supp. at 1127, the court wrote:

> Urine, unlike blood, is routinely discharged from the body, so no governmental intrusion into the body is required to seize urine. However, urine is discharged and disposed of under circumstances where the person certainly has a reasonable and legitimate expectation of privacy. One does not reasonably expect to discharge urine under circumstances making it available to others to collect and analyze in order to discover the personal physiological secrets it holds, except as a part of a medical examination. It is significant that both blood and urine can be analyzed in a medical laboratory to discover numerous physiological facts about the person from whom it came, including but hardly limited to recent ingestion of alcohol or drugs. One clearly has a reasonable and legitimate expectation of privacy in such personal information contained in his body fluids.

See also Von Raab, 649 F. Supp. at 386 (urinalysis is a "full-scale search" and "even more intrusive than a search of a home"); *Tucker*, 613 F. Supp. at 1129-30 (following *Storms*).

But in Shoemaker v. Handel, 608 F. Supp. 1151 (D.N.J. 1985), *aff'd*, 795 F.2d 1136 (3d Cir. 1986), the district court wrote:

> [W]hile the Supreme Court has refrained from drawing bright lines among searches, breathalyzer tests and urinalyses are considered less intrusive than body cavity and strip searches and those searches which have been identified as intruding upon the "integrity of the body" . . . . While breathalyzer and urine tests require the individual involved to "give up" something, the intrusion is less than the involuntary securing of a blood sample or other searches into which an intrusion into the body is required.

608 F. Supp. at 1158 (citation omitted). This distinction seems somewhat unconvincing in light of Yanez v. Romero, 619 F.2d 851 (10th Cir.), *cert. denied*, 449 U.S. 876 (1980) (petitioner gave urine sample after being threatened with forced catheterization). In *Capua*, 643 F. Supp. at 1514 n.2, the court declined to follow *Shoemaker* on the ground that, in *Shoemaker*, the urine samples were collected privately, without surveillance. In any event, *Shoemaker* differs with other decisions only as to the degree of intrusiveness of urinalysis. *See also* Turner v. Fraternal Order of Police, 500 A.2d 1005, 1009 (D.C. 1985) (urinalysis is "not an extreme body invasion"); *Lovvorn*, 647 F. Supp. at 880 ("the degree of intrusion engendered by a urine test will vary greatly depending upon the individual"). For the purpose of this Note, it is not necessary to establish the precise location of urinalysis on the spectrum of intrusiveness. *See infra* note 74.

49. Rakas v. Illinois, 439 U.S. 128, 143 (1978).

50. New Jersey v. T.L.O., 469 U.S. 325, 337 (1985) (footnote omitted).

51. *Id.* at 338-39. In certain contexts, courts have ruled that the subjective expectation of privacy is unreasonable or not legitimate. *See* Hudson v. Palmer, 468 U.S. 517, 525-26 (1984) (prisoner retains no legitimate expectation of privacy in a cell). Cases upholding compulsory urinalysis programs in the military have emphasized the overriding state interest in a ready, effective military and the reduced expectation of privacy in military as opposed to civilian life. Murray v. Haldeman, 16 M.J. 74, 81 (C.M.A. 1983); Committee for G.I. Rights v. Callaway, 518 F.2d 466, 476-7 (D.C. Cir. 1975). Two cases upholding compulsory urinalysis of public

The fourth amendment protects the individual's "legitimate expectation of privacy."[49] The United States Supreme Court recognized students' expectations of privacy in *New Jersey v. T.L.O.*: "A search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy."[50] *T.L.O.* went on to establish the legitimacy of students' expectation of privacy in personal property brought into school.[51]

Because it is well-established that the fourth amendment applies with its greatest force to searches of persons,[52] *a fortiori* students also have a legitimate expectation of privacy in their persons. Thus, the legitimate privacy interest that was implicated in the Becton High School proposal is indistinguishable from the interest which courts have held to be infringed in other urinalysis cases.

Finally, it is insignificant that the school district required a urine sample as part of the annual physical in previous years. Once part of the school district's purpose for taking the sample is to screen for drugs, the character of the action has changed. It would be absurd if one or more legitimate tests of a urine sample exposed a subject to other tests which, standing alone, could not legitimately be performed.[53] To decide otherwise would be to invite attempts to circumvent constitutional protections.

VI. The *New Jersey v. T.L.O.* Reasonableness Standard for School Searches

The next question in fourth amendment analysis is whether the search and seizure is constitutional. The Supreme Court has ruled that, at a minimum,

employees have in part relied on the reduced expectation of privacy rationale. Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1267 (bus drivers' subjective expectation of privacy in regard to urinalysis unreasonable in light of public safety interest); Turner v. Fraternal Order of Police, 500 A.2d 1005, 1008 (D.C. 1985) (following *Suscy* analysis in context of police, which court described as "para-military"). *See also* King v. McMickens, 120 A.D.2d 351, 353, 501 N.Y.S.2d 679, 681 (1986) (dismissal of correction officers for failure to submit to urinalysis upheld; the court wrote of the reduced expectation of privacy in a "para-military discipline"). It would be difficult for the school district to follow *Suscy* and *Turner* in this respect in light of the *T.L.O.* holding that students do have a legitimate expectation of privacy in the schools, and the fact that the safety interests in *Suscy* and *Turner* were more compelling. *See infra* note 85 and accompanying text. Any analogy between the schools and the military seems quite remote.

52. Katz v. United States, 389 U.S. 347 (1967).

53. An analogy can be made to the "plain view" doctrine, which holds generally that a search for certain objects otherwise valid does not become invalid merely because a police officer seizes other objects which the officer is in a position to see during the course of the search. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971) ("the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges"); Chimel v. California, 395 U.S. 752 (1969) (search incident to arrest unreasonable in scope and extent beyond arrestee's person and area within arrestee's control); Harris v. United States, 390 U.S. 234 (1968) (officer, taking measures to protect a car in police custody, observed and permissibly seized a registration slip which lay face up on the metal stripping over which the car door closes).

By analogy, if the taking of a urine sample for valid purposes incidentally revealed signs of drug use, the discovery of those signs would not require a separate justification under the fourth amendment. But where the purpose is to search for signs of drug use, and to administer a drug screening test to the urine sample, the search for signs of drug use does require a separate justification.

the fourth amendment requires that a search be reasonable.[54] Normally, a search may not be conducted without issuance of a warrant upon probable cause;[55] warrantless searches are per se unreasonable "subject only to a few specifically established and well-delineated exceptions."[56] In *T.L.O.*, the Supreme Court held that searches of students conducted by school officials must meet a reasonableness standard.[57]

T.L.O. involved the search of a public high school student's personal property by a school official.[58] The Supreme Court rejected the state's argument

54. *See generally* Terry v. Ohio, 392 U.S. 1 (1967); Elkins v. United States, 364 U.S. 206 (1959).

55. *See* Chambers v. Maroney, 399 U.S. 42, 51 (1970); *see generally Coolidge*, 403 U.S. 443; *Terry*, 392 U.S. 1; Schmerber v. California, 384 U.S. 757 (1966).

56. *Katz*, 389 U.S. at 357. In *Coolidge*, 403 U.S. at 445, after quoting this language from *Katz*, the Court wrote:

> The exceptions are "jealously and carefully drawn," [Jones v. United States, 357 U.S. 493, 499 (1958),] and there must be "a showing by those who seek exemption ... that the exigencies of the situation made that course imperative." [McDonald v. United States, 335 U.S. 451, 456 (1948).] "[T]he burden is on those seeking the exemption to show the need for it." [United States v. Jeffers, 342 U.S. 48, 51 (1951).]

The major categories of exceptions are:

1) searches with probable cause conducted under exigent circumstances such that taking the time to obtain a warrant would frustrate the purpose of the search, *Schmerber*, 384 U.S. 757.

2) searches conducted with the valid consent of the person being searched, Schneckloth v. Bustamonte, 412 U.S. 218 (1973); *see* N.Y. Educ. Law § 912-a (McKinney Supp. 1987) (permits school authorities of each school district to subject all students in the district in grades seven through twelve at public and private schools to urinalysis for the detection of "dangerous drugs," with the consent of each student's parent or guardian);

3) searches conducted incident to a lawful arrest or for the safety of an arresting officer, *Chimel*, 395 U.S. 752; *Terry*, 392 U.S. 1; and

4) searches conducted in a unique setting which warrants relaxing typical fourth amendment protections, such as border, United States v. Villamonte-Marquez, 462 U.S. 579 (1983), and administrative searches, Camara v. Municipal Court, 387 U.S. 523 (1967); *see also* text accompanying notes 73-80, *infra*. *See generally* 68 Am. Jur. 2d, *Searches and Seizures* §§ 37-59 (1973).

57. Before *T.L.O.*, the courts were split on the applicability of the fourth amendment in public schools, holdings ranged from inapplicability of the fourth amendment to applicability with a full probable cause standard. *See T.L.O.*, 469 U.S. at 332 n.2.

58. The respondent T.L.O. was a 14-year-old student in a public high school who was caught smoking cigarettes with a companion in the lavatory in violation of a school rule. T.L.O. and her companion were taken to the principal's office, where Assistant Vice Principal Theodore Choplick met with them. T.L.O.'s companion admitted she had violated the school rule, but T.L.O. denied smoking in the lavatory and claimed she did not smoke at all. Mr. Choplick asked T.L.O. to come into his office and demanded to see her purse. He opened the purse and found a pack of cigarettes, which he removed from the purse and held before T.L.O. as he accused her of lying. When he reached into the purse for the cigarettes, Mr. Choplick also noticed a package of cigarette rolling papers, which in his experience were closely associated with the use of marijuana. Mr. Choplick proceeded to search the purse thoroughly, suspecting there might be further evidence of drug use. He discovered a small amount of marijuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed T.L.O. money, and two letters implicating T.L.O.

that the fourth amendment applies only to searches conducted by law enforcement officials. Citing *Camara v. Municipal Court*,[59] the Court noted the fourth amendment has been held applicable to civil as well as criminal authorities. The Court also rejected the *in loco parentis* doctrine, which views school officials not as representatives of the state but as parental surrogates who may claim parental immunity from the fourth amendment.

Noting that what constitutes a reasonable search depends upon the context of the search, the Court wrote that the standard of reasonableness requires a balancing of the individual's legitimate expectations of privacy and the government's need for effective methods to deal with breaches of public order. The Court rejected the state's argument that students have no legitimate expectation of privacy in personal property "unnecessarily" carried into school:

> Although this court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the school may claim no legitimate expectations of privacy. We have recently recognized that the need to maintain order in a prison is such that prisoners retain no legitimate expectations of privacy in their cells . . . . We are not yet ready to hold that the school and the prisons need be equated for purposes of the Fourth Amendment.[60]

On the state's side, the Court wrote of the strong interest in "maintaining discipline in the classroom and on school grounds."[61] The Court noted that drug use and violent crime in the schools threaten the maintenance of order in the classroom.

In balancing these legitimate interests, the Court dismissed a requirement that school authorities obtain a warrant before searching a student. The Court also held that the requisite level of suspicion of illicit activity to justify a search in a school setting does not rise to the level of probable cause. The Court wrote, "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."[62] To determine the reasonableness of a school search, the Court adopted a twofold test based on that set forth in *Terry v. Ohio*.[63] First, the search must be "justified at its inception."[64] "Under ordinary circumstances, a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student had violated or is violating either the law or the rules of the school."[65] Second, the search, as actually conducted, must be "reasonably related in scope to the circumstances which justified the interference in the first place."[66] In the Court's words: "[A] search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[67] Under this standard, the Court held the search at issue was reasonable.

in dealing marijuana. This evidence was turned over to the police, and T.L.O. was brought to police headquarters, where she confessed to dealing marijuana. Delinquency charges were brought against T.L.O. by the state in the Juvenile and Domestic Relations Court of Middlesex County. T.L.O. contended that Mr. Choplick's search of her purse violated the fourth amendment and moved to suppress the evidence found in her purse and the confession, which she argued was tainted by the search.

59. 387 U.S. 523 (1967).
60. *T.L.O.*, 469 U.S. at 338-39.
61. *Id.* at 339.
62. *Id.* at 341.
63. 392 U.S. 1, 20 (1967).

VII. Compulsory Urinalysis of Public School Students Violates the *New Jersey v. T.L.O.* Reasonableness Standard

A. Compulsory Urinalysis Is Not Justified at Its Inception

The Becton High School proposal was not based on individualized suspicion of particular students but on a generalized suspicion that some students were using drugs and/or alcohol. Although some of the language in *T.L.O.* seems to contemplate that individualized suspicion is part of the reasonableness standard,[68] the Court did not decide the question since there was individualized suspicion of the student involved. In a footnote, the Court wrote:

> We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities. In other contexts, however, we have held that although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] . . . the Fourth Amendment imposes no irreducible requirement of such suspicion." Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where "other safeguards" are available "to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'"[69]

In *Odenheim*, the school district argued that no individualized suspicion was required because all students would be tested under the proposal without

64. *T.L.O.*, 469 U.S. at 341.
65. *Id.* at 341-42 (footnote omitted).
66. *Id.* at 341 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1967)).
67. 469 U.S. at 342.
68. *See supra* text accompanying note 65.
69. 469 U.S. at 342 n.8 (citation omitted).

discretion vested in any school official.[70] The proposal avoided the problem of discretionary testing, however, not by instituting safeguards, but by subjecting all students to the test. A blanket search, which presents serious constitutional problems,[71] can hardly be characterized as a safeguard against potential abuse of discretion.

The Fourth Amendment in Unique Settings

Since the proposal did not follow a standard of individualized suspicion, the highly intrusive nature of urinalysis[72] proved constitutionally fatal. In fourth amendment cases where a reasonableness standard has been applied because of the unique setting of the search,[73] courts have frequently upheld searches despite the lack of individualized suspicion where there was *both* a strong state interest and a low degree of intrusiveness.[74] In *United States v. Villamonte-Marquez*,[75] for instance, the Supreme Court held that customs officers could board offshore boats without reasonable suspicion, given the government's interest in deterring and apprehending smugglers and provided that the intrusion is limited to a "brief detention where officials come on board, visit public areas of the vessel, and inspect documents,"[76] and where neither the vessel nor its occupants are searched. In *United States v. Martinez-Fuerte*,[77]

70. Odenheim v. Carlstadt-E. Rutherford Regional School Dist., 211 N.J. Super. 54, 59, 510 A.2d 709, 711 (1985).

71. *See* Ybarra v. Illinois, 444 U.S. 85 (1979); Davis v. Mississippi, 394 U.S. 721 (1969).

72. *See supra* note 48 and accompanying text.

73. *See supra* note 56. The other major exceptions to the warrant requirement provide no guidance because of the factual differences. The Boston High School drug screening proposal was not to be conducted under exigent circumstances with probable cause, nor conducted with the valid consent of the students, nor conducted incident to a lawful arrest.

74. United States v. Villamonte-Marquez, 462 U.S. 579 (1983); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Albarado, 495 F.2d 799 (2d Cir. 1974).

Even if the dicta in *Shoemaker*, *see supra* note 48, were accepted as to the lower degree of intrusiveness of urinalysis compared to body cavity and strip searches and searches where an actual intrusion beyond the body's surface occurs, these cases would not provide support for the constitutionality of compulsory urinalysis. The degree of intrusiveness in these cases was lower than urinalysis even under the *Shoemaker* view. In *Villamonte-Marquez* and *Martinez-Fuerte*, there was no search of the person. *Albarado* did involve a search of the person, but the degree of intrusiveness was lower than that of urinalysis.

> While the magnetometer may be "inefficient" in that it searches every passenger, balanced against this is the absolutely minimal invasion of privacy involved. There is no detention at all; there is no "probing into an individual's private life and thoughts . . . ." The passing through a magnetometer has none of the indignities involved in finger printing, paring of a person's fingernails or a frisk. The use of the device does not annoy, frighten or humiliate those who pass through it. Not even the activation of the alarm is cause for concern because such a large number of persons may activate it in so many ways. No stigma or suspicion is cast on one merely through the possession of some small metallic object.

Albarado, 495 F.2d at 806 (citations omitted) (quoting Davis v. Mississippi, 394 U.S. 721 (1969)).

75. 462 U.S. 579 (1983).

76. *Id.* at 592.

77. 428 U.S. 543 (1976).

the Supreme Court held that fixed border control checkpoints need not be based on reasonable suspicion nor on any individualized suspicion that a vehicle contains illegal aliens, since visual inspection is not very intrusive and the need to make routine checkpoints is great. In *United States v. Albarado*,[78] the Second Circuit held reasonable the use of magnetometers at airports without any individualized suspicion, given the absolutely minimal intrusion and the great threat of hijacking.

Where there is no individualized suspicion and a high degree of intrusiveness, however, courts have held searches unreasonable despite the existence of a government interest. In *United States v. Brignoni-Ponce*,[79] the Supreme Court held random stops of vehicles in border areas unreasonable, on the grounds that they are more intrusive and discretionary than fixed checkpoint stops. In *Hunter v. Auger*,[80] the Eighth Circuit held unconstitutional strip searches of prison visitors based on unsubstantiated, anonymous tips.

The Fourth Amendment in Prisons

The only precedent that may be found for a search that is highly intrusive and without individualized suspicion is in the case of prisoners.[81] In *T.L.O.*, the Supreme Court expressly stated that it would not equate students and prisoners for constitutional purposes.[82] There is a legitimate state interest in maintaining order in both schools and prisons, but the analogy stops there. In a prison, security is a paramount concern, and little or no effort is directed toward creating a learning environment. Prisoners are stripped of many constitutional protections after being accorded due process of law. Surely, even the most pessimistic observer of the state of American schools would not advocate that school authorities regularly subject students to body cavity searches, as prison authorities may prisoners.[83]

78. 495 F.2d 799 (2d Cir. 1974).

79. 422 U.S. 873 (1975).

80. 672 F.2d 668 (8th Cir. 1982).

81. Bell v. Wolfish, 441 U.S. 520 (1979), held reasonable body cavity searches of prisoners conducted after every contact visit with a person from outside the institution. Justice Rehnquist wrote for the Court that "wide ranging deference" should be accorded policies that prison authorities deem necessary for security purposes. While he acknowledged that prisoners do retain some constitutional rights, he noted that security considerations may require "limitation or retraction" of those rights. Balancing the security interests of the prison against the diminished privacy interests of the prisoners, the Court held the body cavity searches could be conducted on a standard below probable cause. The Court did not determine what standard of suspicion the body cavity searches did meet, but it is at least arguable that, if not individualized suspicion, there were reasonable grounds to suspicion. Given the well-known problem of contraband smuggled into prisons, the mere fact that a prisoner has had contact with an outsider could be viewed as a security risk. Further, the body cavity searches were not compulsory. A prisoner could avoid the searches by not receiving visitors. Realistically, few prisoners could be expected to make such a choice, but with compulsory urinalysis even the possibility of avoiding the search without official sanctions is not present.

82. *See supra* text accompanying note 60.

83. *Bell*, 441 U.S. 520.

Urinalysis in Public Employment

In the public employment context, compulsory urinalysis has been held unconstitutional in the absence of individualized suspicion.[84] While these cases may be distinguished from *Odenheim* on the obvious ground that adults were involved, striking down the proposal does not imply that students and adults are on equal constitutional footing. Indeed, the concerns addressed by compulsory urinalysis for public employees are quite different from those embodied in the Becton High School proposal. In the cases where urinalysis of public employees has been upheld, in addition to individualized suspicion based upon objective fact, there was also an immediate, direct safety concern.[85] Such concern is far more attenuated in the case of students.

Sniffing Dog Cases

Finally, pre-*T.L.O.* cases involving the use of sniffing dogs by school authorities to detect drugs provide a precedent for the unconstitutionality of the drug screening proposal. In *Horton v. Goose Creek Independent School District*,[86] the Fifth Circuit held canine inspection of students' persons a search under the fourth amendment, which is not justified by a need to prevent abuse of drugs and alcohol when there is no individualized suspicion.[87] The court saw the school as a special situation under the fourth amendment and applied a reasonableness

84. National Treasury Employees Union v. Von Raab, 649 F. Supp. 380 (E.D. La. 1986) (federal customs workers); Lovvorn v. City of Chattanooga, 647 F. Supp. 875 (E.D. Tenn. 1986) (fire fighters); Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986) (police officers and fire fighters); Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986) (school bus attendant); McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985) (prison employees); Patchogue-Medford Congress of Teachers v. Board of Educ., 119 A.D.2d 35, 505 N.Y.S.2d 843 (1986) (teachers); Caruso v. Ward, 133 Misc. 2d 544, 506 N.Y.S.2d 789 (Sup. Ct. 1986) (organized crime bureau officers); City of Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985) (police officers and fire fighters).

85. Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985) (employees who worked in hazardous high voltage area observed using drugs by undercover agent and statement; correlation between those employees and "unexplained" accidents); Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976) (public bus drivers required to submit to blood or urine tests following involvement in a serious accident or when suspected of being intoxicated or under the influence of drugs); Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. 1985) (regulation that required police to submit to urinalysis when "suspected of drug use" held facially constitutional).

The regulation in *Turner* also required police to submit to urinalysis at the discretion of a member of the Board of Police and Fire Surgeons. This part of the regulation was not at issue in the case, but the court wrote that it was not inconsistent with the court's view that the regulation contemplated reasonable, objective suspicion.

Cases upholding the dismissal of public employees for refusal to submit to urinalysis also involved both individualized suspicion and strong safety concerns. Everett v. Napper, 592 F. Supp. 1491 (N.D. Ga. 1984) (fire fighter implicated in department investigation of drug use); King v. McMickens, 120 A.D.2d 351, 501 N.Y.S.2d 679 (1986) (corrections officers frequented known drug location).

86. 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 464 U.S. 1007 (1983).

87. *Accord* Jones v. Latexo Indep. School Dist., 499 F. Supp. 223 (E.D. Tex. 1980)

standard to the search. Following New York precedent,[88] the court held that the lack of individualized suspicion made the search unreasonable and unconstitutional.

Doe v. Renfrow[89] held that canine inspection of students' persons is not a search. This decision has been widely criticized.[90] The court relied on the *in loco parentis* doctrine, which *T.L.O.* explicitly rejected,[91] and on precedent holding that canine inspection of *property* is not a search.[92] In any event, *Renfrow* does not provide support for the constitutionality of urinalysis because the cases uniformly hold that taking a urine sample is a search. The *Horton* rationale, on the other hand, applies with equal force to urinalysis. Whether a sniffing dog, a urine test, or some other means is employed, students should not be subject to a highly intrusive procedure without individualized suspicion on the ground that schools have an interest in combatting a general drug problem.

B. Compulsory Urinalysis Is Not Reasonable in Its Scope

The scope of a search is not a completely separate consideration from the initial justification for it. As discussed above, courts will uphold a search that lacks individualized suspicion where the search is not highly intrusive (or, in other words, is limited in scope). Leaving aside the issue of individualized suspicion, a search is reasonable in its scope under the *T.L.O.* standard when the measures adopted are 1) "reasonably related to the objectives of the search,"[93] and 2) "not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[94]

88. Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977) (strip search of entire class of fifth graders to find allegedly stolen $3 held unreasonable).

89. 475 F. Supp. 1012 (N.D. Ind. 1979), *rev'd in part*, 631 F.2d 91 (7th Cir. 1980) (per curiam), *cert. denied*, 451 U.S. 1022 (1981).

90. *E.g.*, Justice Brennan's dissent from the denial of certiorari in *Renfrow*, 451 U.S. 1022; Note, *The Constitutionality of Canine Searches in the Classroom*, 71 J. Crim. L. & Criminology 39 (1980); Comment, *Search and Seizure in Public Schools: Are Our Children's Rights Going to the Dogs?* 24 St. Louis U.L.J. 119 (1979).

In Horton v. Goose Creek Indep. School Dist., 690 F.2d 470, 477-78 (5th Cir. 1982) *cert. denied*, 464 U.S. 1207 (1983), the court offered the possible distinction that in *Renfrow* there was no evidence the dogs actually touched the students, which could explain why the *Renfrow* court considered dog sniffing a minimal intrusion. A rationale of "public smell," analogous to the "plain view" doctrine (*see supra* note 53), could also explain the *Renfrow* result. *See Horton*, 690 F.2d at 477. Neither explanation, however, could apply to urinalysis.

91. *See supra* text following note 59.

92. The majority view is that dog sniffing of objects is not a search, *see Horton*, 690 F.2d at 476, but *Renfrow* is the only case to hold dog sniffing of people is not a search. This reflects the greater protection afforded by the fourth amendment to persons rather than things. *See supra* text accompanying note 52.

93. 469 U.S. at 342.

94. *Id.*

In *Odenheim*, the trial judge found that the Becton High School proposal was not reasonably related in scope to the circumstances offered to justify it.[95] Like other courts,[96] the judge suggested alternative measures more reasonably related in scope to the school district's objectives. For instance, a New Jersey statute already permits school officials to examine students suspected of drug use.[97] This law requires all school personnel to report any student who appears to be intoxicated or under the influence of drugs, and school personnel are shielded from any resulting civil liability.[98] Based on statistics indicating that only 5% of students sought counseling or information about drugs last year,

95. 211 N.J. Super. at 61, 510 A.2d at 713.

96. *See, e.g.*, Hunter v. Auger, 672 F.2d 668, 676 (8th Cir. 1982); Delaware v. Prouse, 440 U.S. 648, 663 (1979).

97. N.J. STAT. ANN. § 18A:40-4.1 (West Supp. 1986) provides:

> Whenever it shall appear to any teaching staff member, school nurse or other educational personnel of any public school in this State that a pupil may be under the influence of a controlled dangerous substance as defined in P.L. 1970, chapter 226, section 2 (C. 24:21-2) or any chemical or chemical compound which releases vapor or fumes causing a condition of intoxication, inebriation, excitement, stupefaction, or dulling of the brain or nervous system including but not limited to glue containing a solvent having the property of releasing toxic vapors or fumes, as defined in P.L. 1965, chapter 41, section 1, (C. 2A:170-25.9) taken for purposes other than the treatment of sickness or injury as prescribed or administered by a person duly authorized by law to treat the sick and injured human beings, such as teaching staff member, school nurse or other educational personnel shall report the matter as soon as possible to the school nurse or medical inspector, as the case may be and to the principal or, in his absence, to his designee. The principal or his designee, shall immediately notify the parent or guardian and the superintendent of schools, if there be one, or the administrative principal and arrange for an immediate examination of the pupil by a doctor selected by the parent or guardian, or if such doctor is not immediately available, by the medical inspector, if he is available. If such doctor or medical inspector is not immediately available, the pupil shall be taken to the emergency room of the nearest hospital for examination accompanied by a member of the school staff designated by the principal and a parent or guardian of the pupil if available. The pupil shall be examined as soon as possible for the purpose of diagnosing whether or not the pupil is under such influence. A written report of said examination shall be furnished within 24 hours by the examining physician to the parent or guardian of the pupil and to the superintendent of schools or administrative principal. If such diagnosis is positive, the pupil shall be returned to his home as soon as possible and appropriate data shall be furnished to the Department of Health pursuant to the "Controlled Dangerous Substances Registry Act of 1970", P.L. 1970, chapter 227 (C. 26:2G-17, et seq.). The pupil shall not resume attendance at school until he submits to the principal a written report certifying that he is physically and mentally able to return thereto, which report shall be prepared by his personal physician, the medical inspector or the physician who examined him pursuant to the provisions of this act.

98. N.J. STAT. ANN. § 18A:40-4.2 (West Supp. 1986). In addition, Wood v. Strickland, 420 U.S. 308 (1975), held that school officials are entitled to good faith immunity from civil liability

it appears more reasonable to examine select students rather than the entire student population.

In *Anable v. Ford*,[99] the first prong of the *T.L.O.* test was satisfied because there was individualized suspicion of the public high school student who was required to undergo urinalysis.[100] The measure failed, however, to satisfy the second prong of *T.L.O.* for two reasons. First, the court found that the objective of the search was to determine whether the student had used marijuana *while at school*.[101] The court wrote that the school's interest as described in *T.L.O.*[102] did not permit regulation of off-campus student conduct unrelated to the maintenance of discipline in the classroom.[103] Since urinalysis does not determine when a substance was used, the measure adopted was not reasonably related to the objective of the search.[104] Second, the court found that requiring a student to disrobe from the waist down while an adult official watched the student urinate into a tube was excessively intrusive.[105]

Like the measure at issue in *Anable*, the Becton High School proposal failed to satisfy the second prong of *T.L.O.* and, on that ground alone, was unconstitutional. At first blush, it may seem that the second prong posed less of an obstacle to the proposal than the first; after all, the taking of a urine sample need not be as intrusive as it was in *Anable*.[106] It is also possible that another court could take a broader view of the objective of a search for evidence of drug use than did the *Anable* court, so that urinalysis would appear

99. No. 84-6033, slip op. (July 12, 1985), *modified*, slip op. (W.D. Ark. Sept. 5, 1985).

100. There was circumstantial and testimonial evidence that the student plaintiff had smoked marijuana in the girls' room.

101. *Anable*, slip op. at 41 (July 12, 1985).

102. *See supra* text accompanying note 61.

103. *Anable*, slip op. at 40-41 (July 12, 1985).

104. [T]he court concludes that use of the test is not reasonably related to the maintenance of order and security in the schools nor to the preservation of the educational environment and processes. To the extent that the test and policy attempts [sic] to regulate out of school conduct in no way affecting the school setting or the learning process, the test and policy are improper.

> This is not to imply that such an objective is not laudable. Certainly it would be beneficial to the vast majority of students who do not use drugs or alcohol, even at home or on the streets, to segregate users from the halls of education . . . . Nonetheless, such conduct is within the realm of parents and law enforcement officials, not teachers and educational administrators.
>
> Suffice it to say that use of the Emit immunoassay test, however noble its purpose, reaches beyond the permissible boundaries of authority of school officials.

Id. at 41.

105. *Id.* at 41-42.

106. The test taker may be caught in a catch-22. Less supervision of the taking of the urine sample increases the opportunity for the subject to provide a "clean" sample, which obviously compromises the reliability of the test result. *See supra* note 117 and accompanying text. For example, in Lowcrow v. City of Chattanooga, 647 F. Supp. 875, 877 (E.D. Tenn. 1986), the fire department claimed that pat down searches of fire fighters were justified because some allegedly carried clean urine samples in balloons in their pants.

a reasonable measure. It is arguable, for instance, that student drug use off-as well as on-campus affects the learning environment in the classroom. However, even without the close supervision that occurred in *Anable*, it seems impossible to characterize the taking of a urine sample as "not excessively intrusive," considering the court decisions holding urinalysis to be highly intrusive and the availability of less intrusive measures. Moreover, courts may well be receptive to a concern for the psychological effects of urinalysis on impressionable adolescents, given the Supreme Court's recognition of the importance of protecting the rights of students.[107] Certainly drug use is a serious infraction, but where the possibility of discovering a violation is highly speculative, it does not seem worth subjecting all students to the indignity of urinalysis in order to discover the drug users.

VIII. Due Process

The *Odenheim* judge ruled on the basis of state law that the Becton High School proposal violated due process.[108] However, the students' due process claim is also meritorious under federal law.

The first step in a due process case is to determine whether the state has deprived the claimant of a constitutionally protected liberty or property interest.[109] In *Goss v. Lopez*,[110] the Supreme Court held that suspensions of ten days or less entitle students to due process because such suspensions deprive students of their state-created property interest in public education and their liberty interest in reputation. Since the Becton High School proposal permitted exclusions of indefinite duration, there is an even stronger claim that protected property and liberty interests were implicated.[111]

107. *See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 511 (1969); Shelton v. Tucker, 364 U.S. 479, 487 (1960); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

108. Odenheim v. Carlstadt-E. Rutherford Regional School Dist., 211 N.J. Super. 54, 61-62, 510 A.2d 709, 713 (Ch. Div. 1985).

109. The fourteenth amendment provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, § 1.

110. 419 U.S. 565 (1975).

111. It could be argued that the confidentiality provisions in the proposal, *see supra* text accompanying notes 25-26, prevented any damage to a student's reputation. In *Goss*, 419 U.S. at 574-75 (footnote omitted), the Court wrote:

> School authorities here suspended appellees from school for periods of up to 10 days based on charges of misconduct. If sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment. It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution.

However, an indefinite exclusion from school, by itself, is far more likely to cause a student reputational damage than is a 10 day suspension. A long gap in a student's education is quite difficult to hide. *See also* Ingraham v. Wright, 430 U.S. 651 (1977) (holding that the use of corporal punishment in public schools implicates a protected liberty interest, but that due process does not require notice and an opportunity to be heard prior to the punishment).

The next step in a due process case is to determine "what process is due."[112] In *Goss*, the Court held that due process entitled the students to written notice of the charges against them and the opportunity to participate in an informal hearing, but added: "Longer suspensions or expulsions for the remainder of the school term or permanently, may require more formal procedures."[113] In a later case involving dismissal of a student for academic (as opposed to disciplinary) reasons,[114] the Supreme Court held that no hearing was required because a decision to dismiss for academic reasons is more subjective than a decision to dismiss for disciplinary reasons, where a hearing may help to resolve disputed facts. Regardless of whether exclusion of a student on the basis of a positive test result is characterized as a medical or as a disciplinary measure (discussed in Parts III and IV), some type of hearing is appropriate because whether a student is using drugs is a factual issue. The Becton High School proposal did provide notice and an opportunity to participate in an informal hearing to students who tested positive, so the issue becomes whether more was required.

In *Mathews v. Eldridge*,[115] the Supreme Court articulated an approach for determining what procedural safeguards are required in a particular setting. Three factors are to be considered: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[116]

Consideration of the *Mathews* factors supports the need for a more formal hearing than that allowed by the Becton High School proposal, so that students or their representatives may introduce evidence and call witnesses as to the inaccuracy of the test, extraneous factors that may have influenced the result, the student's non-involvement with drugs, and other relevant information. The interest affected by a student's indefinite exclusion from school is a strong one, as the Supreme Court recognized in *Goss*. The risk of an erroneous deprivation of that interest is significant because of the real possibility of an inaccurate test result when, as under the proposal, no confirmatory test is

112. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

113. 419 U.S. at 584.

114. Board of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978) (respondent dismissed from medical school because of her poor performance in the clinical program).

115. 424 U.S. 319 (1976) (evidentiary hearing held not to be required before termination of disability benefits).

116. *Id.* at 335.

performed.[117] A more formal hearing is likely to present a more accurate

117. Although the technology of urinalysis is beyond the scope of this Note, some background on the common tests for marijuana use is useful. The major methods of urinalysis for the detection of marijuana are the enzyme immunoassay technique (EMIT), radioimmunoassay, and gas chromatography/mass spectrometry. *See* Schwartz & Hawks, *Laboratory Detection of Marijuana Use*, 254 J. A.M.A. 788, 789-90 (1985). The EMIT test is most widely used because of its relatively low cost and simplicity. The manufacturer considers the EMIT test 97-99% accurate, *see* Syva Co., "Facts About EMIT Assays for Drug Testing" (undated), but some studies have found a lower accuracy rate, *see, e.g.*, O'Connor & Rejent, *EMIT Cannabinoid Assay: Confirmation by RIA and GC/MS*, 5 J. ANALYTICAL TOXICOLOGY 168, 171-72 (1981) (reporting an 83% confirmation rate of positive EMIT results). A test could produce a false positive because of a mix-up in the urine samples (the chain of custody problem), improper performance of the test, passive inhalation of marijuana smoke, *see* Schwartz & Hawks, *supra*, at 790, 791, or cross-reactivity to a legal substance (i.e. certain foods, over-the-counter medications, and prescription drugs), *see* Whiting & Manders, *Confirmation of a Tetrahydrocannabinol Metabolite in Urine by Gas Chromatography*, 6 J. ANALYTICAL TOXICOLOGY, 49, 51 (1982). The problem of false negatives, though less interesting from a legal perspective, also raises concern for the accuracy of urinalysis. *See* Hansen, Caudill & Boone, *Crisis in Drug Testing: Results of CDC Blind Study*, 253 J. A.M.A. 2382 (1985) (reporting a high false negative error rate that calls into question the quality of service provided by drug testing laboratories). The consensus of the scientific community is that a positive result on an immunoassay test should be confirmed by an alternate technique, particularly the more expensive and time-consuming gas chromatography/mass spectrometry method. *See* Hansen, Caudill *supra*, at 790; Whiting & Manders, *supra*, at 49, 51 (offering a new confirmation method). Even the manufacturer of the EMIT test recommends confirmation by the gas chromatography/mass spectrometry method. *See* Syva Co., "Urine Drug Tests Reference Chart" (undated). This position reflects the concern of the scientific community that an individual not face disciplinary action on the basis of a single test result, notwithstanding the overall reliability of the test:

> Dismissal, denial of employment, or any adversary or punitive action against a person should not be based solely on a urine specimen positive for cannabinoids by a presumptive screening method, such as the EMIT or radioimmunoassay methods. Confirmation of the presumptive positive by a well-documented reference method such as gas chromatography/mass spectrometry is mandatory in such instances . . . . This is not to imply that the EMIT and radioimmunoassay test results are unreliable, but that any technical process such as a chemical assay and its interpretation should be dealt with by well-trained personnel. False-positive EMIT or radioimmunoassay test results are rare *when* properly trained personnel perform the assays under properly controlled situations, but the consequences of a false-positive can be considerable and maximum certainty of accuracy in analysis and interpretation of results are of paramount importance in such cases.

Schwartz & Hawks, *supra*, at 791 (quotation omitted).

Most courts are in accord with the scientific community that an unconfirmed positive result on an immunoassay test is insufficient proof of drug use, and therefore should not be the basis for disciplinary measures. *See* Jones v. McKenzie, 628 F. Supp. 1500, 1505-07 (D.D.C. 1986) (termination of school bus attendant on the basis of an unconfirmed EMIT test held arbitrary); Wykoff v. Resig, 613 F. Supp. 1504, 1509-11 (N.D. Ind. 1985) (chronicling caselaw in the context of prisons); Higgs v. Wilson, 616 F. Supp. 226, 230-32 (W.D. Ky. 1985) (inmates granted preliminary injunction against urinalysis program that permitted disciplinary action on the basis of an unconfirmed EMIT test). *But see* Jensen v. Lick, 589 F. Supp. 35 (D.N.D. 1984) (upholding prison program that only used the EMIT test). Urinalysis programs that include confirmatory tests have been upheld, even where the confirmation is not done by an alternate technique. *See Wykoff*, 613 F. Supp. at 1512 (confirmation of EMIT test by thin layer chromatography method held sufficient to support discipline of prisoner, but all future tests ordered to be confirmed by a second EMIT test or its equivalent); Perazno v. Coughlin, 608 F. Supp. 1504 (S.D.N.Y. 1985) (double EMIT testing found reliable enough to defeat prisoners' motion for preliminary injunction against use of test result in disciplinary proceedings). *But see* National Treasury Employees Union v. Von Raab, 649 F. Supp. 380, 389-90 (E.D. La. 1986) (plan to test federal customs workers by immunoassay *and* gas chromatography/mass spectrometry held so unreliable as to violate due process); Storms v. Coughlin, 600 F. Supp. 1214 (S.D.N.Y. 1984) (the court found it "troublesome" that any sample which tested positive was simply retested with the same apparatus, refused to grant a preliminary injunction against the testing, but held that an issue of substance was raised as to the test's reliability). Courts would do better to stick more closely to the scientific approach. Confirmation should be by an alternate method. At the same time, 100% accuracy (which the *Von Raab* court apparently demanded) should not be required. A positive result by itself is not reliable, but it may become so when accompanied by a confirmatory test and/or a basis for suspicion:

> [D]efendants are not prohibited from testing for drugs with the EMIT test. They need only confirm the test with other evidence—either another alternate method test, testimony that the accused was seen with contraband, testimony of symptoms of a person who has used contraband, evidence that drugs were found in his cell, or other demonstrable or circumstantial evidence that the accused inmate used the drug.

Higgs, 616 F. Supp. at 232; *see also* 28 C.F.R. § 550.42(c) (1986) (federal Bureau of Prisons requirement that each positive urine test be "validated to substantiate the positive result"); Comment, *Admissibility of Biochemical Urinalysis Testing Results for the Purpose of Detecting Marijuana Use*, 29 WAKE FOREST L. REV. 391, 412 (author concludes "urinalysis drug testing programs should use the more expensive mass spectrometer test").

118. 419 U.S. at 579.

119. *Id.* at 582.

120. *See, e.g.*, Gardenshire v. Chalmers, 326 F. Supp. 1200, 1204-05, *dismissed*, 429 F. Supp. 1 (D. Kan. 1971) (presence of firearm in connection with events leading to criminal charges of attempted murder); Buck v. Carter, 308 F. Supp. 1236, 1240 (W.D. Wis. 1970) (arrested

picture of the student's involvement with drugs. On the state's side of the equation, certainly the school has a great interest in providing a drug-free learning environment and preparing students to lead productive lives. To some degree, however, the interests of the student and the school district are coincident. As the Supreme Court wrote in *Goss*: "[I]t disserves both [the student's] interest and the interest of the State if his suspension is in fact unwarranted."[118] No doubt the requirement of a more formal hearing would be more expensive and cumbersome for the school. On balance, however, the devastating consequences of an erroneous exclusion from school for an indefinite period seem to outweigh the cost to the school of proceeding more carefully with the imposition of such a serious measure.

An additional problem with the Becton High School proposal was that it permitted exclusion of a student *before* the student was afforded an opportunity to be heard. In *Goss*, the Supreme Court held that a hearing must occur before the student's removal from school, except where the school must take immediate action to prevent physical danger or extreme disruption.[119] Consistent with pre-*Goss* caselaw,[120] this "emergency" exception has been narrowly

applied,[121] and a positive test result on a urine sample, without more, can hardly be seen as an emergency.[122] This defect could easily be cured by providing a pre-exclusion hearing, just as the risk of erroneously excluding a student could be reduced to a minimum by requiring a confirmatory test and more formal hearing procedures. The cumulative effect of these problems, however, raises doubt as to whether any compulsory urinalysis program could satisfy the requirements of due process and still be financially and administratively feasible. A far simpler way to confront the problem of drugs in schools is to urge school teachers and administrators to be alert for signs of drug or alcohol use and to report any students who appear to be under the influence of drugs or alcohol.

IX. Summary and Conclusion

Compulsory urinalysis of the student body of a public school cannot survive constitutional scrutiny. The characterization of urinalysis as a medical procedure is a disingenuous attempt to avoid compliance with the fourth amendment. It is clear that urinalysis is a search and seizure within the meaning of the fourth amendment, and therefore must be reasonable. Compulsory urinalysis of public school students does not meet the reasonableness standard for school searches set by the United States Supreme Court in *New Jersey v. T.L.O.*.

Compulsory urinalysis of public school students fails to satisfy the first prong of *T.L.O.*, that a search be justified at its inception. While *T.L.O.* left open the question of whether school searches must comply with a standard of individualized suspicion, compulsory urinalysis is unprecedented because it is a highly intrusive blanket measure. In sensitive areas such as borders and airports, searches that have not been held to a standard of individualized suspicion involved minimal intrusion on the privacy interest of the persons searched. Although courts have differed on whether urinalysis is more or less intrusive than body cavity searches or searches that penetrate beneath the body's surface, no court has considered urinalysis to be a minimal intrusion.

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attack and firing of gun); Stricklin v. Regents of Univ. of Wis., 297 F. Supp. 416, 420 (W.D. Wis. 1969), *appeal dismissed as moot*, 420 F.2d 1257 (7th Cir. 1970) (violence and strong indication that it would be repeated).

121 Picozzi v. Sandalow, 623 F. Supp. 1571, 1578 (E.D. Mich. 1986) (law students suspected by police of setting dormitory room on fire).

122 In White v. Salisbury Township School Dist., 588 F. Supp. 608, 613 (E.D. Pa. 1984) (hearing conducted one day after suspension became effective held permissible where delay was attributable to school district and all parties agreed on postponement), the court wrote in dictum that under *Goss* the school district could have immediately removed the student plaintiffs who were arrested by the police on school grounds for drug use and possession, after receiving the official police report. Since this scenario involves a law enforcement action based upon objective evidence, it is readily distinguishable from the situation where a student is suspected solely on the basis of a urine test.

Only in the case of prisoners has a search been upheld that is both highly intrusive and without individualized suspicion, but the *T.L.O.* Court expressly stated it was not willing to equate prisoners and students. Nor does court approval of urinalysis programs in the public employment context imply that compulsory urinalysis of students, who enjoy less protection under the fourth amendment than adults, is acceptable. Urinalysis of public employees has been upheld when there is both individualized suspicion and an immediate safety concern. Finally, cases involving the use of sniffing dogs in public schools provide precedent for the unconstitutionality of compulsory urinalysis of public school students.

Compulsory urinalysis of public school students also fails to satisfy the second prong of *T.L.O.*, that a search be reasonable in its scope. As one court has found, school officials are properly concerned with students' activities while at school, but urinalysis cannot be so limited. Moreover, if school officials may conduct a blanket search of students' bodily fluids to determine which students use drugs, it is difficult to imagine what meaning could be attached to the *T.L.O.* requirement that a search not be "excessively intrusive in light of the age and sex of the student and the nature of the infraction."

Due process does not pose an insuperable obstacle to compulsory urinalysis of public school students. However, if a student may be excluded from school for a non-trivial period of time on the basis of a single positive test result, there is a significant risk that the student may be erroneously deprived of protected property and liberty interests. The procedural safeguards that would then be appropriate could pose heavy financial and administrative burdens on a school.

While the Becton High School controversy has been resolved, the problem of how to fight drug use in public schools is likely to be around for quite some time. No matter what courses of action are decided upon, they must comport with the Constitution. It is easy to teach students that they have constitutional rights, but more important to demonstrate to them that their rights operate in everyday life and may not be suspended in order to reach easy solutions to social problems.

DEVELOPMENT IN THE LAW

WILLAMETTE LAW REVIEW

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JAR WARS: DRUG TESTING IN THE WORKPLACE

INTRODUCTION

I. MAGNITUDE OF THE PROBLEM

Use and abuse of drugs and alcohol[1] now touches every sphere of American life.[2] A large proportion of American adults use marijuana, cocaine, or some other illegal drug.[3] Substantially larger numbers abuse alcohol.[4] Inevitably, the substance abuse crisis has reached the American workplace, generating intense concern among both employers and employees.[5]

In 1962, less than four percent of Americans had used an ille-

1 For the sake of clarity in this discussion, the term "substance" encompasses illegal drugs, non-prescribed legal drugs, and alcohol. The term "drug" excludes reference to alcohol.

2 McBee & Peterson, *How Drugs Sap the Nation's Strength*, U.S. NEWS & WORLD REP., May 16, 1983, at 55. The distinction between use and abuse of drugs and alcohol is not clear. Many employers would define abuse in terms of impaired work ability. Such a definition is not completely accurate, however, because some drugs, including cocaine, may initially enhance work performance. Abuse cannot be defined in terms of illegality, either, because there is wide abuse of legally obtained prescription drugs and alcohol. For purposes of this discussion, abuse will be considered use of drugs or alcohol that impairs health, work, or behavior. *Alcohol and Drugs in the Workplace*, Lab. Special Projects (BNA) 1, 1, 16-17 (1986) [hereinafter BNA].

3 Susser, *Legal Issues Raised by Drugs in the Workplace*, 36 LAB. L.J. 42, 43 (citing N.Y. Times, Mar. 21, 1983, at A1, col. 2-3).

4 BNA, *supra* note 2, at 13.

5 McBee & Peterson, *supra* note 2, at 56.

A third approach to the substance abuse problem combines elements of discipline and rehabilitation. There are two reasons why an employer might choose this option. First, many drug counselors now view disciplinary consequences as an important, perhaps essential incentive for the employee to reject drug use permanently.[202] Second, some employers have expressed concern that a few employees now are permitted to overuse EAPs or other health care services, undergoing treatment repeatedly without ever truly solving their drug or alcohol problems.[203] Obviously, the employer usually cannot recover the large economic investment the company has made in these employees.

In summary, employers increasingly have sought to develop comprehensive company policies for combatting the use of drugs and alcohol in the workplace.[204] These policies typically combine many different strategies. For example, the Associated Builders and Contractors, a national affiliation of contracting companies, has developed a manual to help its members attack the substance abuse problem.[205] Among the options discussed in this manual are the various methods for detecting drug abuse, pre-employment drug screening, and EAPs. The manual also stresses that it is important for companies to clearly enunciate company policies regarding substance abuse.[206]

Substance abuse in the workplace has become a problem of sufficient magnitude that few businesses can afford to ignore it. What remains to be seen is which responses to employee substance abuse problems are most appropriate under a given set of circumstances. Legal, practical, and ethical considerations associated with

202. Geidt, *supra* note 54, at 181.

203. BNA, *supra* note 2, at 49-50. Company officials at Hughes Aircraft Company decided that unlimited coverage for drug and alcohol abuse treatment enabled substance abusers to continue their habits indefinitely. The manager of the company's employee counseling service said that "[a] very small number of people were eating us alive on claims." The company responded to the problem by placing a once-a-lifetime cap on treatment coverage. *Id.*

Other employers' responses to employees who suffer relapses after EAP treatment vary depending on the severity of the relapse, the stipulations in union contracts, stated disciplinary mandates, and the terms of the EAP itself. Many employers have instituted "last chance" policies, in which the employees at some point are given an early ultimatum that they must rehabilitate themselves or face termination. *Id.* at 45.

204. *Id.* at 22.

205. *Id.* at 25.

206. *Id.*

substance abuse have combined to create a delicate and complicated problem in employee relations.

KAYE MCDONALD SUNDERLAND
CONI S. RATHBONE

THE CONSTITUTIONAL ISSUES OF DRUG TESTING IN THE WORKPLACE

With the recent deluge of litigation over drug testing, courts are deciding the constitutionality of such testing under a variety of constitutional challenges. Plaintiffs are challenging employer drug testing schemes under the fourth amendment's protection against unreasonable search and seizure,[207] which encompasses the employee's expectation of privacy interest,[208] and the fifth amendment's express protection against self-incrimination.[209] Employees also are asserting rights to due process[210] under both the fifth and fourteenth amendments.[211] The constitutionality of drug testing schemes must be discussed in accordance with the sector of employment involved: private, public, or military.[212]

207. U.S. CONST. amend. IV provides, in part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. . . ."

208. The expectation of privacy interest encompassed in the fourth amendment should be distinguished from the Constitutional right of privacy. The right to privacy is a penumbral right that arises from a combination of rights expressly provided for by the Constitution. Generally, the first, third, fourth, fifth, and ninth amendments have been held to imply the right to privacy. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965). A majority of the first ten amendments to the Constitution are applied to the states by the incorporation of the Bill of Rights into the fourteenth amendment. *See infra* text accompanying notes 224-48 for discussion of the constitutional right to privacy.

209. U.S. CONST. amend. V provides, in part, "nor shall any person . . . be compelled in any criminal case to be a witness against himself."

210. U.S. CONST. amend. V provides, in part, "nor be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1, provides, in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

211. Other constitutional challenges raised, but not included in the body of this discussion, include the fifth amendment's protection from unlawful takings, the fourteenth amendment's equal protection clause, and the privilege and immunities clause found in the fourteenth amendment. These constitutional provisions have not specifically been determined to be individually available to the employee, public or private, where drug testing constitutionality is in question.

212. The treatment of constitutional challenges brought by military personnel differs in comparison to the same challenges brought by all other employees. The areas of search

cally, "the tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."[326] It should be noted that although *when* there is a property right that requires due process is determined by state or local law, *Loudermill* enforces the theory that *what* constitutes due process is conferred by constitutional guarantee, "not by legislative grace. . . . While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without procedural safeguards."[327]

In *Allen v. City of Marietta*, the court addressed the question of whether notice and hearing are always required *prior* to termination. The defendants in *Allen* did not receive any notice or opportunity to be heard prior to their termination. An employment policy specifically stated that employees were subject to "immediate dismissal" for certain conduct.[328] The court interpreted the policy to mean that a pre-termination hearing was not required.[329] It was only after dismissal that the city provided the defendants with notice of the charges and the opportunity to be heard in order to clear their names. Nevertheless, the court held that such post-termination dismissal procedures satisfied the dismissed employees' due process guarantees.[330]

The *Allen* decision exemplifies the exceptional situation where the employment policies specifically allow for dismissal, followed by due process guarantees.[331] The *Allen* decision thus represents an exception to *Loudermill*'s general rule that some kind of hearing is required prior to termination where the employee has shown a property interest. More generally, however, the type of due process guarantees required depend on the nature of the employment contract and the existence of a property interest in continued employment.

If, on the other hand, the terms of employment are other than

326. *Id.*; *see also* Arnett v. Kennedy, 416 U.S. 134, 170-71 (1974).
327. *Loudermill*, 470 U.S. at 541.
328. *Allen*, 601 F. Supp. at 493.
329. *Id.*
330. *Id.*
331. It should be noted that the employees each were given the policies. Had the defendants read the policies, they might have gleaned that such denial of due process "prior" to dismissal was available to the employer.

that the employee can be dismissed only for cause, the employee would probably not be held to possess a property interest in continued employment. When the employee does not validly retain a property interest in his or her employment it is questionable whether the employee would be guaranteed the due process rights of notice and opportunity to be heard. Thus, the due process guarantees of notice and a hearing would not necessarily be available to contesting employees where no property right was found to exist in the employee's job.

CONCLUSION

The constitutionality of any drug testing scheme depends on several factors. First, one must consider whether the employee is public, private, or military. The rights guaranteed to the public employee are much broader than those guaranteed to the private employee. Second, one must consider what type of constitutional deprivation he or she wishes to assert. Then, based on the specific right asserted, additional tests must be made to determine whether the particular employee will be guaranteed that specific right. The determination whether an employee may assert constitutional guarantees involves complex analysis and should be completed with careful evaluation.

SALLY ANNE COOPER

STATUTORY AND OTHER LIMITATIONS TO DRUG TESTING

Absent constitutional protections, other sources of law may protect employees. This section discusses possible statutory and common law limitations on drug testing. The discussion includes an examination of federal statutory provisions, state constitutional provisions, state and local laws, and common law tort remedies. The section concludes with an examination of collective bargaining agreements.

I. FEDERAL STATUTORY PROVISIONS

A. *Vocational Rehabilitation Act of 1973*

The Vocational Rehabilitation Act of 1973 (hereinafter the Act) prohibits discrimination against handicapped persons solely

statutory right or privilege. It should be noted, however, that some jurisdictions may already have rejected the validity of the public policy theory because they reject it in regard to polygraphs.[400]

E. Negligence

Perhaps the broadest area of remedy for employees under the common law is an action in negligence. Here, an employee could allege that an employer breached the duty of reasonable care owed him or her by negligently administering a drug test. Of course, the plaintiff also would have to show that the breach caused a resulting injury, such as suspension or termination.[401]

Plaintiffs have successfully used negligence theories in suits alleging negligent administration of polygraph examinations. In New York, a plaintiff was discharged after undergoing two polygraph examinations during a theft investigation conducted by his employer.[402] The plaintiff alleged that the polygraph tests were negligently administered and resulted in the plaintiff's damages. The court held that the plaintiff had stated a cause of action because the defendant breached its duty of care to properly administer the tests, and that it was reasonably foreseeable that the negligence would result in plaintiff's discharge.[403] Presumably, an employee who could establish the existence of the same elements in a drug testing situation would stand a good chance of prevailing.

V. Collective Bargaining Agreements

A final important source of protection for employees opposed to drug testing may be found in the employee's collective bargaining agreement. The National Labor Relations Act requires an employer to bargain with employees concerning conditions of employment. It also prohibits the employer from making unilateral changes to a subsequent agreement.[404] It is likely that, because of their similarity to polygraph examinations, drug tests would also be classified as mandatory bargaining subjects.[405] Thus, before establishing a drug testing program, an employer would be required to bargain with the employee's union in contract negotiations.

Perhaps the most publicized use of drug testing clauses in collective bargaining agreements has occurred in the area of professional sports. Recently, an arbitrator decided that the National Football League could not require drug testing beyond that agreed to in the collective bargaining agreement with the National Football League Players Association. The award set aside the fines imposed upon about two hundred players who had refused to submit to additional testing.[406]

VI. Conclusion

If an employee cannot find adequate remedies against mandatory drug testing in the Constitution, other remedies may be available. The employee, for example, may be protected by the Federal Vocational Rehabilitation Act or by Title VII. In some states, the employee may be protected by the state constitution's privacy clause, or by a state statute or local ordinance. The employee may also find remedies in the common law. Finally, if he or she is employed under a collective bargaining agreement, the employee may be able to require that the employer negotiate before a drug testing program can be imposed.

Bryan D. Lane

Other Considerations: Workers' Compensation, Unemployment Compensation, and Chain of Custody

I. Workers' Compensation

Controlled substance abuse in the work place raises two serious issues regarding workers' compensation. The first issue is whether an employee who suffers a work-related injury while under the influence of a controlled substance is entitled to worker's compensation benefits. The second issue is whether an employee who turns to substance abuse as a result of work-related stress is entitled

400. *See* Montgomery v. Big B, Inc., 460 So.2d 1286 (Ala. 1984); Gibson v. Hummel, 688 S.W.2d 4 (Mo. Ct. App. 1985).

401. *See generally* W. Keeton, *supra* note 383, § 28.

402. Zamparotti v. United Parcel Serv., 125 Misc. 2d 405, 479 N.Y.S.2d 470 (N.Y. Sup. Ct. 1984).

403. *Id.* at 409, 479 N.Y.S.2d at 474.

404. 29 U.S.C. §§ 151-69 (1982 & Supp. II 1984).

405. *See* Medicenter, Mid-south Hosp., 221 N.L.R.B. 670, 675 (1975).

406. Portland Oregonian, Oct. 4, 1986, at C-3, col. 2.

person involved in the sample collection procedure should be a collection observer who is of the same gender as the employee providing the sample. Before a sample is collected, the administrator and the observer must verify the identity of the employee who will provide the sample. The administrator should note the verification and the identity of any prescription medication currently being taken by the employee in the sample ledger.[468]

After the proper information has been recorded in the sample ledger, including the employee's name and corresponding identification number, the administrator should issue two sample containers to the observer in the presence of the employee. The observer should then escort the employee to the collection site and provide the employee with the containers. The observer must watch the employee urinate into both containers and watch the employee secure each container with a lid. The observer should then accompany the employee back to the administrator.[469]

The administrator should take both sample containers from the employee, insure that the lids are tightly closed, and place a tamper-proof seal on each container. One numbered label, corresponding to the employee's number in the sample ledger book, shall be placed on each container. A numbered label should also be attached to two chain of custody sheets, one for each sample taken. The administrator, observer, and employee should all sign the sample ledger and the chain of custody forms. The administrator should then seal each sample in an envelope with a chain of custody sheet. One envelope should be immediately prepared and sent to the laboratory for testing, the second retained by the administrator in a secured location.[470]

Upon receipt of the sealed envelope, laboratory personnel should check the tamper-proof seal and compare the numbered label on the sample container to the number on the chain of custody sheet. If the seal is broken, or the numbers do not match, the sample should not be tested. Laboratory personnel should sign and date the chain of custody sheet if custody is transferred between persons. If possible, the same laboratory employee that opened the sealed envelope should conduct the appropriate tests on the sample. Any test results should be noted on the chain of custody sheet.

468. *Id.*
469. *Id.*
470. *Id.*

Samples that test positive should be retained in the laboratory in a frozen state until any action contemplated against the employee has been taken. Test reports for all samples must be returned to the employer as soon as possible. All samples testing positive should be reported to the employer by a copy of the chain of custody sheet which indicates that proper custody was maintained and that the sample tested positive.[471]

A proper chain of custody is essential to any employee drug testing program. The employer must protect itself and its employees by maintaining a chain of custody that is accurate and secure from the time the sample is collected until the sample is tested. Only if the employer and the employees are sure that there is no danger of samples being mixed up and that the results attributed to a particular person are indeed based on that person's sample will the drug testing program be accepted.[472]

KERRY M. L. SMITH

DRUG TESTING EMPLOYEES: THE EMPLOYER'S PERSPECTIVE

Employers have reacted aggressively to drug use and abuse among employees. A desire to identify drug-using employees has caused the current trend toward individual testing for the chemical presence of illegal or controlled substances. Employees are resisting this perceived threat to their employment and personal freedom and are resorting to legal avenues of relief, including post-termination actions for wrongful discharge.

The wrongful discharge cause of action evolved as a public policy limitation on the doctrine of employment at will.[473] Where

471. *Id.*
472. *Id.*
473. In any employment relationship where the procedure for discharge of the employee and the duration of employment are not specifically defined, the employee is considered an "at will" employee. *See* Vlasaty v. Pacific Club, 4 Haw. App. 556, 670 P.2d 827 (1983); Roberts v. Atlantic Richfield Co., 88 Wash. 2d 887, 568 P.2d 764 (1977). That is, the employee continues to work at the will of the employer, and the employer continues to receive the employee's services at the will of the employee. The doctrine of employment at will is court-developed, originating from a 19th century treatise on the subject of master and servant. *See* H. WOOD, MASTER & SERVANT 134 (2d ed. 1886). The general rule regarding employment at will is that either the employer or the employee may terminate the relationship at any time for any reason. *See* Delaney v. Taco Time Int'l, Inc., 297 Or. 10, 681 P.2d 114 (1984). However, where a valid employment contract specifies the dura-

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 seven 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.

over

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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WHY DRUG TESTING IS A BAD IDEA

BY LEWIS L. MALTBY

SILVERFAIR

Lewis L. Maltby is vice-president and general counsel at Drexelbrook Engineering Co., a 300-employee, closely held company based in Horsham, Pa.

The call keeps going out for mandatory drug testing of people in jobs ranging from truck driver to basketball player to investment banker. And nowhere is the call heard more often than in industries whose products or services affect the public's safety. My business, Drexelbrook Engineering Co., is one such compa·

For 25 years we have designed and manufactured electronic systems that measure and control the levels of hazardous chemicals, and our equipment is installed in plants all over the world. If it doesn't work properly, toxic-chemical tanks can overflow—and people die. The tragedy in Bhopal, India, is an example of what can happen when this type of equipment malfunctions. A single Drexelbrook employee working under the influence of drugs could cause such a disaster.

But we don't do drug testing, and we're not going to. When our top management considered the idea, we concluded that drug testing was not in the best interests of the company, would not make the products any safer, and would actually hurt our performance and profits.

To our way of thinking, drug testing is not a serious workplace safety program. A sound program for dealing with the hazards posed by impaired workers would confront the most serious problem—alcohol abuse. Yet no one proposes that all employees be subjected to breathalyzer tests to keep their jobs.

Drug testing also suffers from accuracy problems. The most common type of testing, immunoassay, has been shown to have false positive results: "clean" samples are mistakenly labeled as "dirty" 20% to 30% of the time. While more accurate and more expensive tests are available, they don't solve the problem either. It's difficult to pin down estimates of the number of drug-impaired workers in an average company, but 5% is a generally accepted figure. Say you have 100 employees, and 5 are drug abusers. Even with a test that's 99% accurate, 6 people could be fired for drug abuse, one of whom is innocent. A serious program cannot afford to be wrong that often, especially when someone's job is at stake.

But the fundamental flaw with drug testing is that it tests for the wrong thing. A realistic program to detect workers whose condition puts the company or other people at risk would test for the condition that actually creates the danger. The reason drunk or stoned airline pilots and truck drivers are dangerous is their reflexes, coordination, and timing are deficient. This impairment could come from many situations—drugs, alcohol, emotional problems—the list is almost endless. A serious program would recognize that the real problem is workers' impairment, and test for that. Pilots can be tested in flight simulators. People in other jobs can be tested by a trained technician in about 20 minutes—at the job site.

Instead of testing for what really matters—impairment—drug testing looks for the presence of drug metabolites in the employee's urine, which remain in the body for up to two months. So an employee who fails a drug test may not be impaired at all. Firing good, sober employees for something they might have done last

A single Drexelbrook employee working under the influence of drugs could cause a disaster as tragic as occurred in Bhopal. But we don't do drug testing.

Saturday night does not increase safety.

Drug testing may even *decrease* safety. Any experienced manager knows that a safe quality product and a safe work environment do not come from a demoralized, unhappy work force. But this is exactly what drug testing produces.

To begin with, it's an act of distrust on the part of management. It requires the vast majority of employees to prove their innocence when there's no reason to suspect they've done anything wrong. It also violates their rights by reaching out from the employer's legitimate sphere of control at the workplace and telling employees what they can and can't do on their own time in their own homes.

Beyond this, experience has shown that the only way to prevent cheating on the tests is to make employees strip from the waist down and have someone watch at close range while they urinate into bottles. Drug-abusing employees who are not watched can substitute clean urine samples for their own, conceal small catheters of urine on their bodies, and dilute urine with tap water (to reduce drug concentration to below the cutoff point). The ultimate dodge, which no one knows how to prevent, is to slip a small amount of soap or salt into the sample. As Dr. William F. Hushion, medical director of Philadelphia Electric Co., put it after years of testing

experience, "Any drug-testing program that doesn't include close observation is a joke."

The effect of all this on employee morale is obvious. How would you feel about being subjected to a strip search to prove your innocence—even at home—and being fired if you objected? Would you want your life resting on the performance of an employee who felt that way?

The failure of drug testing can be seen in its rejection by those whose profession is helping addicted workers. I have spoken at numerous conferences on drug testing, and a representative from an employee-assistance program is always included among the speakers. These people have been helping employees with substance-abuse problems for years—and have done so very effectively. And many of them actively oppose testing. Some go so far as to refuse to accept referrals from testing programs. What kind of program is drug testing when it is opposed by those whose profession is helping abusing employees?

At this point, you may be saying, "I didn't realize there were all these problems with drug testing, but we have to do something." That's right, you do have to do something. Our company doesn't tolerate drug abuse, and I'm certainly not advocating that others tolerate it, either. Let me tell you about our program to combat workplace drug abuse.

We practice good management. We always say that people are our most important asset, and at Drexelbrook, we try to put that idea into practice.

We begin by trying to create a positive atmosphere. We want every employee to give us 100% every day. And we want each of them to make every decision with the best interests of the company at heart. By and large, we get that. But that kind of commitment doesn't come easily. We have to earn it.

One way we earn it is by treating our employees as adults. We trust them to do their jobs right and don't subject them to a lot of unnecessary rules. We trust our employees to know what working hours and style of dress are required for them to get their jobs done. Another way we earn that commitment is by respecting their rights. We scrupulously avoid prying into our employees' private lives. Finally, we care about them.

When they have problems at work or outside the workplace, we try to help. Sometimes we help by having our financial people arrange a personal loan at our bank. Sometimes we help by having our legal department straighten out a problem with an employee's landlord. Mostly we help just by listening and caring.

This approach to employee relations is not philanthropy—it's good business. Our employees routinely go above and beyond the call of duty to help our customers. Our service manager, for example, installed a ship-to-shore radio in his sailboat at his own expense, so he could keep in touch with the company—and any problems—while he was on his vacation.

We are also very selective in our hiring. Even with applicants for entry-level jobs, we conduct at least two in-depth interviews with different interviewers. We check references—thoroughly. And often not with the personnel department—all they ever give us is name, rank, and serial number—but with the candidate's previous supervisors. And we try to screen out the drug abusers. Not by anyone telling us directly, of course, but by learning about which applicants had chronic absenteeism, inconsistent quality, and bad work habits at their former jobs. And we find out with much more accuracy than we could with a hit-or-miss drug test.

Ultimately, drug testing is a seductive gimmick that promises instant relief from the awesome responsibilities of management.

After we hire people, we tell them what performance we expect from them—and then pay attention to their results. Most of our supervisors have taken a 36-week, intensive management-training course to help them in this. If an employee's performance consistently falls short of our expectations, then the supervisor sits down with him or her and discusses the problem. When employees are open with supervisors—as is often the case—and the problem is drugs or alcohol, we help get them into a treatment program.

That's our program—and it works. By doing good interviewing and reference checking, we almost never hire an employee with a drug or alcohol problem. We have had employees who developed such problems, but our supervisors noticed their declining job performance, confronted them, and got them into treatment.

Overall, I estimate the rate of abuse at our company to be only about 1%. We have installed more than a quarter of a million systems around the world, handling some of the most hazardous materials known, and have never been involved in an industrial accident.

Our experience is confirmed by a recent American Management Association survey of 1,000 companies that found the most effective program to fight workplace drug abuse combines employee education with trained supervisors who know how to identify and constructively confront employees who fail to meet performance standards.

The fact is, most companies don't do drug testing. And, according to the American Management Association study, a third of those who do think there is no value in it.

Why, then, is there so much talk about drug testing? The answer, I believe, lies largely in politics and the power of the media. Despite the fact that workplace drug abuse is far less prevalent than alcohol abuse—which industry has survived, if not solved, for years—the media have portrayed it as an epidemic that is sweeping the country and will destroy our economy unless immediate emergency measures are taken. In this emotional climate, is it any wonder that a manager who is already beleaguered, as we all are, can be convinced by a good salesperson who promises instant solutions with a simple, inexpensive test?

The truth, of course, is that managing people is never easy. Experienced managers for years have recognized that handling people is the most challenging part of their jobs, and that there are no shortcuts. And this, ultimately, is what drug testing is—a seductive gimmick that promises instant relief from the awesome responsibilities of management. The testing itself becomes a drug.

This is the choice managers face. They can fight workplace drug abuse with drug testing. It's easy, it's simple, and it's cheap. But it just doesn't work. Drug testing provides inaccurate and irrelevant information and alienates the vast majority of good employees, who resent being subjected to a strip search to keep their jobs. Or, they can fight substance abuse by choosing their people carefully, watching their performance, and getting involved when performance starts to slip. It's difficult, it's time-consuming, and it's expensive. But it does work. And not just in preventing workplace drug abuse, but in creating a safe and productive workplace.

TAYLOR LABORATORIES, INC.

CHEMICAL TESTING & MARKETING
724A SIGINAKA WAY SITKA, ALASKA 99835
(907) 747-6364

John Hartle
c/o John Sund
P.O. Box V
Juneau, Alaska 99811

October 11, 1987

Dear Mr. Hartle:

Thank you for your office's request for my credentials. I have attached a short resume. One local reference for you is Chuck Fry, with the Department of Corrections, Juneau: 465-3376. If you would like other references, please let me know.

I look forward to testifying telephonically on October 24th on the accuracy of drugs of abuse testing.

To let you know a little bit about our laboratory services, our tests are run under the supervision of a degreed chemist, or by a Medical Technologist or Medical Laboratory Technician certified by the American Society of Clinical Pathologists. Positive results are rerun to insure result validity. Controversial results are confirmed with a second laboratory technique in our own laboratories. I believe we are the only laboratory in the state offering confirmation tests for drugs of abuse urinalyses. Our results have been accepted upon challenge in Alaska Superior Court. We participate in the URINE TOXICOLOGY PROFICIENCY TESTING SERVICE of the American Association of Bioanalysts.

Sincerely,

Lawrence Taylor, Jr., President

enclosure

RESUME October 11, 1987

Lawrence Taylor, Jr.
P.O. Box 336
Sitka, Alaska 99835

Company Name: Taylor Laboratories, Inc., Sitka, Alaska
Dates of Employment: May 11, 1985 - present
Titles Held: President
Accomplishments:

1. Founded Taylor Laboratories May 11, 1985.

2. Incorporated Laboratories December 30, 1986.

3. Accepted as expert witness for cannabinoid and cocaine determinations upon challenge in Alaska Superior Court June 20, 1986.

4. Started Asbestos Analysis Division October, 1986. Participant in AIHA-PAT Program for fiber counting and the EPA Bulk Analysis Quality Assurance Progra..

5. Started Food and Water Quality Division, a consultation service, February, 1987.

The following employment was coincident with the above occupation from May 11, 1985 - present

Company Name: Alaska Pulp Corporation, Sitka, Alaska
Dates of Employment: May 22, 1974 - present
Annual Sales Volume: 188,000 tons ($75.2 million)
Titles Held: analytical chemist, process engineer (acid plant & digesters), tour foreman, process engineer (bleach plant, power house, and acid plant), process engineer (mill wide)
Education:

University of Alaska, Fairbanks, Alaska	1974 BS	Chemistry
University of Alaska, Fairbanks, ALaska	1974 BS	Biology
Haverford College, Haverford, Pennsylvania	1969 BA	Sociology

DAVID G. EVANS
ATTORNEY AT LAW
35 COLD SOIL ROAD
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ALASKA HOUSE JUDICIARY COMMITTEE

HEARING ON DRUG TESTING

OCTOBER 24, 1987

TESTIMONY OF DAVID G. EVANS, ESQ.

Mr. Chairman and members of the Committee, in the last seventeen years my experience has included studying, teaching, and writing on the legal aspects of alcohol and drug problems. Two books of mine have been published on these subjects and I have held faculty positions at Rutgers University and John Jay College of Criminal Justice teaching courses on the legal and criminal justice aspects of substance abuse. Since 1981, I have been the Chairman of the Alcoholism and Drug Law Reform Committee of the Individual Rights and Responsibilities Section of the American Bar Association.

In my academic and legal practice experience working on these issues, no issue has been as controversial as drug testing, nor has one spawned so much litigation.

My task today is to see if there is a middle ground to this controversy. How can the concerns of people of good will on both sides be brought together?

First of all, should there be a middle ground? Why don't we just ban drug testing? The opponents of drug testing argue that it is an invasion of privacy, testing is inaccurate, that asking someone to undergo testing presumes guilt, testing doesn't measure work performance, adulteration of test specimens is easy to do, and there are problems with due process, equal protection, and other fundamental rights. If they agree with testing at all, it is only for grounds such as "reasonable suspicion." In addition, some

opponents argue that drug use is a personal matter, it should be legalized, and it should only be an employer's concern when the employee has impaired work performance.

The proponents of testing argue that drug abuse is a major health and economic problem and that testing is a valuable tool to help dry up the demand for drugs. They claim that most American workers do not use drugs and want a drug-free workplace. The proponents claim an equal concern about individual rights, but they assert that a properly planned and administered drug testing program can protect privacy, insure due process, and provide equal protection. They argue that the testing technology is highly accurate, especially when initial screening tests are confirmed, and that the tests provide objective, scientific evidence of drug use.

In studying this controversy by following the press reports, and reading the state and federal court cases and legislation, and having written three articles on the subject, my conclusion is that drug testing is here to stay, however, for its ultimate success, drug testing must be protective of individual rights. All testing programs, public and private, should be established in a manner that protects test accuracy, due process, equal protection, confidentiality, and offers a chance of rehabilitation for the drug and alcohol abusing employee. Testing should be used to protect and

help people. It is not a device for "witch hunting" or for pursuing prejudice. Drug testing should provide freedom from fear and not add to it.

Is there a middle ground? Let me discuss some of the major legal issues that must be considered, and then provide drug testing guidelines that are protective of individual rights and seek this middle ground.

The Fourth Amendment - Search and Seizure - Privacy

Most lawsuits resulting from drug testing are based in whole, or in part, on an alleged violation of an employee's Fourth Amendment right to be free from unreasonable searches. Drug tests are generally regarded as searches, however, this is still being litigated.

These situations usually only apply to governmental employment or action. A private employer's drug testing program usually cannot violate an employee's constitutional right to be free from unreasonable searches unless the government is involved in some respect.

Courts generally hold that only public or government regulated industry employees have rights to a "reasonable" search by the employer. What is considered reasonable? First of all, absent justifying circumstances such as a substantial safety hazard, some incident or "individual suspicion" is usually necessary.

The employer must have some reason to suspect an employee has used or is under the influence of alcohol or drugs. This suspicion should be based on specific objective facts and "reasonable" inferences drawn from those facts. This "reasonable suspicion" must be supported by circumstances strong enough to warrant a belief that the employee has, more likely than not, been using drugs at work or has been impaired by off-the-job use. If an employee is to be selected for testing on the basis of some reasonable suspicion, the standards for this suspicion should be fair and reasonable. Ideally, supervisors should be trained to identify work performance problems or other signs of drug use and to document these observations.

What are some criteria for establishing "reasonable suspicion."

1. A pattern of absenteeism, lateness, unusual or erratic actions, or deteriorated work performance.
2. Appearance of being under the influence - slurred speech, staggering, odor of alcohol, etc.
3. Arrest, conviction, or investigation concerning a drug related criminal offense.
4. Reliable information supplied by company personnel or others.

Freedom from all searches and seizures is not absolute. It must be subjected to a balancing test of reasonableness. The reasonableness of a search must be evaluated in the context of the place and nature of the employment and the employee's reasonable

expectation of privacy. For example, there may be compelling reasons to test that override the need for individualized suspicion. Public safety, and other important public or employer interests, may permit random searches or employee testing even in the public sector. Such searches must be logically and factually justified and administered neutrally, with appropriate procedural safeguards.

Private industry is generally not as constrained by the Fourth Amendment, however, if private employer searches are unreasonably intrusive or clearly unfair, an employee may be able to sue under tort, contract, or state privacy law. The law may balance the employee's right to privacy and/or contract rights against the right of the employer to conduct business and enforce work performance standards.

Government and private employers should establish drug testing programs with protection of employee privacy in mind. Unless there is a safety, security or similar need, drug testing should be conducted on a "reasonable suspicion" basis. Drug tests can, thus, be used to enforce legitimate work performance standards and work rules.

A privacy issue that often arises concerns whether specimen donation must be observed to insure it is not adulterated. Observation may not be necessary. There are some methods of avoiding

adulteration of a urine specimen without having to observe the urine donation.

1. Use a secure rest room for the specimen donation.
2. Put a coloring agent in the toilet water.
3. Disconnect the hot water faucet.
4. The donor should remove outer clothes and personal possessions not necessary.
5. Measure the specimen's temperature, PH, and specific gravity.
6. Follow proper chain of custody procedures.

Due Process

The U.S. Constitution requires the government to provide a person with "due process" before depriving him/her of "life, liberty, or property." Due process means that the government must provide a fair decision-making process before taking measures that affect these rights. While enforcement of this constitutional right is meant to protect against governmental interference, the concept of "due process" is so firmly rooted in our country by custom and contract that even private employers should strive to use fair procedures at all times in dealing with employees.

When employees claim that drug testing violates due process, they usually argue that the test are inaccurate, not related to work performance, or that the employees were not given a chance to contest the test results or ensuing discipline.

When looking at accuracy arguments, it is important to note that courts have consistently upheld the accuracy of drug tests that are properly performed, especially when they are confirmed.

On the issue of work performance, employees may argue that drug tests show only that an employee has ingested a substance at some time and do not show current impairment, therefore, the test cannot be used as proof of impaired work performance. These employees argue that it would be unfair to discipline someone unless she/he is impaired on the job. This argument, however, breaks down if one uses the reasonable suspicion standard, or a job-relevant work rule that forbids employees from using drugs. If an employee exhibits poor work performance or appears to be under the influence of alcohol or other drugs, the test can be used as further evidence that work is affected. Most testing programs are based on such work performance standards.

The first step in addressing due process is to ensure that a testing policy should include advance notice to employees of the consequences of a positive test result. This can best be achieved by developing a company policy which is given widespread publicity within the company thrcugh printed notices and training. The company drug testing policy must be clearly written and consistently enforced.

If an employee has a confirmed positive test result, she/he should be allowed to discuss this with his/her superiors or, if appropriate, have a hearing before any possible disciplinary action is taken. Employers should examine the employee's explanation or evidence to determine if it is legitimate.

Equal Protection

In some instances, public employers have singled out one group of employees for testing. These employees can raise the issue of "equal protection"; i.e., that it is unfair to be singled out. Such procedures on the part of an employer are acceptable providing there is a good reason, and providing there is no focus on legally protected classes of people, such as women, minorities, or handicapped persons. To avoid problems, both public and private employers should base the selection of certain groups of employees on business needs, or specific evidence of work-related problems among a designated group of employees.

Self Incrimination

The Fifth Amendment to the U.S. Constitution prohibits the government from forcing a person to provide testimony which will tend to incriminate him/her. In a notable case, the court held that blood tests are not protected under the Fifth Amendment because they are not "testimony." Testimony requires communication via speech, writing or other means. This same principle applies to breath and urine tests in that providing a specimen is not generally regarded as self incrimination.

Pre-employment

Pre-employment screening tests are generally acceptable. However, all pre-employment testing should be done in a consistent, nondiscriminatory manner; i.e., given to all who apply or given to justified selected job categories.

If the test is positive, the employer should notify the applicant and given him/her a chance to contest the results.

The employer should have a written policy on pre-employment testing, and it should explicitly include procedures for confidentiality. If an employee is rejected for a positive test result, the result should be kept confidential.

Can one legally reject a drug user from employment? Isn't this discrimination under laws protecting the handicapped? An employer can reasonably require that potential employees not be drug users, as long as this policy has a legitimate business purpose and is enforced against all similarly situated applicants.

Off-the-Job or Off-Duty Problems

How should one deal with employees who use drugs on their own time, test positive, but are not intoxicated or "under the influence" at the time of the test? For example, depending on the level of use, the presence of marijuana can be detected in the body for days or weeks. Even in such cases, the nature of the job may allow some

action against the employee, if there are sound business reasons why particular employees should never use drugs. For example, the U.S. military, which performs extensive testing of its personnel, has a compelling national security reason prohibiting any drug use at any time by personnel.

In some private companies where there are safety or security concerns, it might be reasonable to require employees to never use any illegal drug because of the potential threat of accidents, blackmail, or corruption. In the case of public employees, however, you may need to have reasonable suspicion to ask the employee to take the test, unless there was prior agreement or some compelling reason that such tests were necessary.

An employer may have a right to take action for off-job or off-duty behavior if the behavior would demonstrably damage the company's reputation, affect the employee's attendance at work or subsequent job performance, or lead to the refusal or reluctance or inability of fellow employees to work with the employee.

Confirmation of Tests

Confirmation of test results is recommended. This avoids the time-consuming and expensive process of having to prove that the initial screening test was accurate. A policy of confirming tests leads to a level of fairness and certainty that reinforces decisions in discipline or termination.

It is recommended that initial positive results be confirmed by an alternative scientific method of equal or greater sensitivity. This ensures that the result is correct and can also detect any procedural errors.

Sometimes, an employee requests that the sample be sent to another laboratory for retesting. Since laboratories may differ in their procedures, it is important that the second laboratory uses a method with equal or greater sensitivity. Otherwise, the second laboratory may report a negative result, which will destroy the value of the initial test..

Random Tests

Due to the nature of a business or a particular job group, an employer may think it necessary to test employees on a random basis and not wait for individual suspicion to develop. Such random testing is subject to careful scrutiny by courts and arbitrators. In some cases, random testing for public employees has been allowed. Public and private employers would be well advised to justify the need for such random tests on the basis of specific workplace circumstances rather than a general concern about societal drug use.

If a public sector employee's job directly involves public safety, a random drug testing requirement may be upheld. In

these cases, the benefit of doubt may go to the concern for safety, because lives should not depend on advance subjective detection of the often subtle effects of alcohol and other drugs.

Random testing should not be used as a means for selecting employees arbitrarily for testing. The only fair method of selection for random testing is when each employee has an equal chance of being selected for testing. Use of some neutral selection method will assure that some degree of statistical randomness is achieved.

The purposes of random testing are early detection and deterrence. Employees who know they will be tested at random are expected to be more likely to avoid behavior which will compromise their jobs. Nevertheless, this selection method engenders more employee resistance or opposition than the other test methods. Thus, employers should not resort to random testing until other methods have been explored or exhausted.

Intoxication and Impairment

Testing has been attacked because it may only prove that an employee at some time ingested drugs. Impairment, intoxication, or time of last use cannot usually be determined from a drug test. This determination may not be necessary. If a testing program is based on reasonable suspicion it means there is other evidence of impairment. The test merely provides scientific proof to backup the other evidence. In addition, testing can determine a pattern

of drug use. If a person tests positive and is referred to counseling, additional tests will allow a better understanding of past and current use patterns. For example, in the case of marijuana, a positive test indicates that the person used marijuana in the past--which could be hours, days, or weeks depending on the specific use pattern and the cut-off level or sensitivity of the test. An infrequent user should be completely negative in a few days. Repeated positive analyses over a period of more than two weeks indicate either continuing use or previous heavy chronic use. In addition, on a pre-employment test, impairment is not an issue.

How can a testing program be established that is protective of employee rights? Programs should be developed following a process similar to the one described below.

The Process of Establishing a Drug Testing Program

1. Document the need for testing

Why have a testing program? Is it necessary to enforce work performance standards, or for employee and/or public safety, security, or public trust? Do you have illegal drug sales on company premises? Consider also pre-employment tests and employee assistance program treatment and monitoring.

2. Steps in developing a testing policy

- Involve representatives from the sections of the organization

likely to be involved in the program. Include labor, affirmative action, personnel, EAP, legal, security, medical, occupational health and safety, risk management, etc.

- Develop a policy which includes:
  a. statement of need for the program
  b. work performance standards
  c. rules regarding alcohol and drug use on and off duty and company premises
  d. confidentiality of test results
  e. method of testing - pre-employment, random, reasonable suspicion
  f. consequences of refusal to take a test
  g. consequences of positive tests as they relate to rehabilitation, discipline, discharge, job assignment or other actions
  h. opportunities for rehabilitation
  i. rights of employees to due process and to be free from discrimination
  j. EAP and/or treatment monitoring procedures
  k. company responsibility to be fair and provide dignified testing
  l. procedures for confirmation of positive test results.

Implementation of the Policy

- The cost of the program must be considered, including insurance and treatment costs.
- Develop procedures to include test administration, specimen collection and storage, chain of custody, and confidentiality. Establishment of chain of custody procedures is very important. Chain of custody is the term applied to the safeguarding of a test specimen to ensure that the specimen collected is the same one that is tested. The chain of custody is important for your program's integrity and in case the test result becomes part of a legal dispute.
- Testing procedures must be implemented that do not humiliate or harass employees.
- Consent to test must not be obtained by fraud, misrepresentation, or threats.
- Scientific and test manufacturer's procedures must be followed.
- All testing equipment should function properly and be subjected to documented maintenance and examination.
- Tests must be administered and specimens stored in accordance with state law.
- Change any labor-management agreements to comply with the policy if necessary.
- Inform all employees of the policy in writing and train employees and supervisors on the policy.

- If you choose to use on-site testing equipment, get proper training for your staff on the equipment and procedures.
- If you choose an outside laboratory, choose a well qualified laboratory that adheres to good quality control and state and federal law.
- Create a committee of relevant company representatives to oversee the program on a continuing basis.
- Have your program evaluated every few years by an outside consultant.

The New Jersey "Pre-Employment and Employment Drug Testing Standards Act"

New Jersey currently has a bill before its legislature that incorporates adequate protections for employees. It provides uniform standards for public and private employee drug testing and limits random testing to safety and security needs or other compelling interests. It requires employers to have written policy statements 30 days prior to implementing a program, and provides employees with the right to get tests confirmed and to contest the test results. Rehabilitation is called for and there are strict confidentiality protection. The bill also authorizes an aggrieved employee to file a civil suit in appropriate circumstances for lost wages, benefits, employment rights,as well as costs and attorney's fees.

Finally, the bill creates an Advisory Committee on Employee Drug Testing, which would solicit information and make recommendations regarding guidelines and regulations. The Advisory Committee will have 12 members including government health and labor officials, organized labor, a physician, and a representative from the American Civil Liberties Union.

In closing, please know that it is gratifying to see that you have taken on this important issue. We are well on our way to resolving it successfully. Drug testing has its place, as long as individual rights are protected and the public health and safety benefit.

Drug Testing, Work Performance, And EAPs: Recent Legal Guidelines

by David G. Evans, Esq.

Drug testing in industry is here to stay. Although there are currently a number of legal battles under way, the basic question of the legality of drug testing has been decided in favor of testing. No court has decided that testing is per se illegal. What the courts have decided is that some testing programs or policies are proper or not. In doing so, the courts have provided guidelines on how a proper program should be implemented. This article will explore these guidelines and how they relate to work performance and EAPs.

Some EAP professionals have mixed feelings about testing. Some feel it conflicts with the goals of an EAP. Others feel that it undermines the need to enforce employee job performance standards. In addition, there are concerns about test accuracy and potential discrimination against employees. In looking at recent court cases and legislative proposals, it appears that EAPs have little to fear from testing and everything to gain. The recent cases and legislation reinforce the idea of testing "for cause," i.e. to enforce proper work performance standards. They also call for testing programs to be accurate, confidential, and aimed at rehabilitation. Let's explore these issues and see what guidelines have been developed.

In private and public industry, a "for cause" testing policy is usually best.[1] Under such a policy, a test may be requested if "reasonable suspicion" exists such as specific objective facts and reasonable inferences on the job that suggest an employee is using drugs or alcohol. These observable facts could include accidents, carelessness, erratic behaviors, or other job performance problems. These may be the same criteria for an EAP referral.

In addition there may be other work related reasons to test, such as public safety or security.[2] In some private companies, such as financial institutions where there are security concerns, it might be reasonable to require employees to never use any illegal addictive drug because of the potential threat of corruption. In some cases, where public confidence in employees is important, testing of employees for drug use on or off the job may be justified.[3]

WORK PERFORMANCE STANDARDS

Testing has been criticized because it may not be able to show the level of drug impairment in the same way a breath-

ABOUT THE AUTHOR —David G. Evans, Esq., specializes in the legal aspects of drug testing and other areas of substance abuse. He has authored two books on legal issues published by Hazelden, and has made a number of presentations at national and regional ALMACA conferences. Mr. Evans practices in Lawrenceville, New Jersey.

alyzer can determine the level of alcohol impairment. This determination may not be necessary. If you base your testing program on work performance standards, it means there is other evidence of impairment. The test merely provides scientific proof to back up the other evidence. In addition, testing *can* determine a pattern of drug use. If a person tests positive and is referred to counseling, additional tests will allow a better understanding of past and current use patterns. For example, in the case of marijuana, an infrequent user should be completely negative in a few days. If you test the person again and there is another positive test, this can indicate continuing use or previous heavy chronic use.

Testing for legitimate business purposes does not appear to violate discrimination laws protecting alcoholics and drug addicts. If an alcoholic's or addict's current use of drugs makes him unable to perform a job, or would pose a threat to the safety of persons or property, the discrimination laws may not apply.[4]

When employee assistance programs (EAPs) are established by companies to help employees with personal and work performance problems, a test can be used to generate a referral to an EAP. It is best not to have the EAP do the testing because this undermines the rehabilitative nature of the EAP. Once a drug user is sent to an EAP, the company could require random urine drug tests during and after treatment to ensure that the employee refrains from drug use. Some counselors like to use drug abuse testing as part of the treatment process to overcome any denial of a drug abuse problem or to reinforce abstinence.

If the employee does not respond to treatment, the company can use urine testing to justify disciplining or discharging the employee. In the long run, this is more fair to the employee because the decision is based on scientific evidence instead of subjective allegations.

Recent court cases and legislation provide general guidelines on how to set a testing policy which reinforces job performance standards and EAPs.

Most of the court cases involving testing result from testing programs for government employees, or in industries regulated by the government.[5] When the government is involved, there is a greater concern about constitutional rights because many of our constitutional protections were designed to restrict the government. These cases set a stricter constitutional standard than may be required in private employment. However, if a company develops its program according to these stricter standards, it will stand a better chance of holding up under any legal scrutiny.

RIGHTS AND PUBLIC EMPLOYMENT

What are the rights that have been developed in the public employment cases? First of all, employees must have notice that testing is a possibility and how it will be conducted. Testing in most cases should be on the basis of reasonable suspicion. Employees have due process rights to a fair hearing before sanctions are applied as a result of a positive test. Testing must be conducted fairly and according to proper scientific procedures. All positive tests should be confirmed by another scientific method of equal sensitivity, or at least a repeat of the test. This will guarantee test accuracy, although in fact, the tests are extremely accurate. They meet strict legal proof requirements as long as they are properly performed.[6] If you follow the manufacturer's instructions and are properly trained, the test will be accurate. Confirming the test, however, is the best policy. It guarantees fairness to the employee. In addition to confirmation, the recent cases call for rehabilitation and confidentiality.

One leading case, Shoemaker v. Handel,[7] upholds the above standards, and is beginning to bridge the gap between public and private employment. The plaintiffs are jockeys who brought an action challenging the New Jersey Racing Commission regulations providing for administration of breathalyzer tests and random urinalysis tests to jockeys at the race track. The regulations were established to protect the jockeys from accidents and to deter corruption. The lower and appellate federal courts upheld the testing program. The case was appealed to the U.S. Supreme Court by the jockeys and the court refused to hear the appeal.

In the testing program, oral and written notice is provided to all persons affected by the testing. The test results are kept confidential. If a jockey tests positive for alcohol or drugs, the tests are used to monitor the jockey, and if there is a repeated offense, to send the jockey to rehabilitation. For a third violation, punishment may result, such as fines and expulsion from racing in New Jersey. The jockeys have a right to a hearing before being disciplined.

What are the principles the case upholds?

1. Testing must be related to a legitimate business or public purpose.
2. Due process and notice must be provided.
3. Rehabilitation is desirable before punishment or discharge.
4. Confidentiality is a requirement.

In another leading case, Railway Labor Executive's Association v. Dole,[8] the U.S. Department of Transportation began to implement a nationwide drug and alcohol testing program for railroad employees. The program requires preemployment drug testing, and post accident alcohol and drug testing of employees involved in major accidents, authorizes toxocological testing when there is reason to suspect impairment, as well as tests based on reasonable suspicion. In addition, each carrier must adopt a policy to aid in the identification of troubled employees prone to alcohol or drug use.

The federal trial court found that the program was proper, thus upholding job related work performance standards and employee rehabilitation.

In addition to these cases, various legislative proposals have established the legality of testing and have established guidelines. The proposed bill in New Jersey is a prime example.[9] This bill provides that employees who test positive can be offered rehabilitation. EAPs are mentioned in the bill for this purpose. The bill also provides notice requirements and strict confidentiality rules, and that the tests must be properly performed and positive tests must be confirmed.

With these cases and laws in mind, how can a testing program be established that incorporates these principles and works well with an EAP?

Guidelines for Establishing a Drug Testing Program

- *Document the need for a testing program.* Is it necessary for enforcement of work performance standards, the detection of illegal drug possession, pre-employment appraisal, or EAP monitoring?

- *Develop a testing policy.* Include unions, management, personnel, occupational health and safety, affirmative action, risk management, security, legal department, and the EAP. The policy should deal with the following issues:
  - Need for the policy.
  - Use of drugs or alcohol on company premises and on or off duty.
  - Need for company-wide awareness of work performance standards.
  - Possible consequences of positive test results as they relate to discharge, discipline or other sanctions.
  - Policy on rehabititation opportunities if an employee tests positive.
  - Need for compliance with state and federal discrimination laws.
  - Procedures for referral to the EAP.
  - Responsibility of employees to seek treatment.
  - Confidentiality of test results and treatment.
  - Circumstances in which testing will be required; i.e., pre-employment, random, for-cause, post-accident, etc.
  - Consequences of refusal to take required drug tests.
  - Company responsibilities for fair and dignified testing procedures.
  - Due process procedures for employees who test positive.
  - Procedures for confirmation of positive tests.

- *Implementation of the Policy*
  - Modify collective bargaining agreements to comply with the policy.
  - Inform, in writing, all job applicants, employees, and supervisors of the policy. All employees and supervisors should receive training on the policy and work performance standards, and on how the EAP operates.
  - A procedures manual should be developed for test procedures. It should include specimen collection, chain of custody, storage, confidentiality and procedures for on-site testing.
  - If specimens are sent to a laboratory, choose a laboratory that is responsible, and in compliance with state and federal laboratory laws.
  - Have the program evaluated periodically by an outside consultant.
  - Establish an ongoing program improvement committee composed of company representatives directly affected by the program and legal counsel.

Establishment of chain of custody procedures is very important. Chain of custody is the term applied to the safeguarding of a test specimen to ensure that the specimen collected is the same one that is tested. The chain of custody is important for your program's integrity and in case the test result becomes part of a legal dispute.

Your chain of custody procedures should be established with your attorney's advice. In general they should include issues such as proper identification of the specimen, protecting specimen containers, transportation, and quality control.

By using proper procedures, a testing program can be used to reinforce work performance standards and your EAP. Confidentiality, rehabilitation, fairness, and enforcement of work performance standards are the keys to the proper connections between a testing program, an EAP, and to meeting the requirements of the law. □

FOOTNOTES

[1] *Division 241 A.T.U. vs. Suscy* 538 F2d 1264 (1976); *Allen vs. City of Marietta* 601 F Supp. 482 (1985)

[2] *Najera vs. Southern Pacific Co.* 13 Cal. Rptr. 146 (1961); 29 USCA 651

[3] *Masino vs. U.S.* 589 F2d 1048 (1978); *McDowell vs. Goldschmidt* 498 F Supp. 598 (1980)

[4] 29 USCA 706(7)(b); *McLeod vs. City of Detroit* 39 FEP Cases 225 (1985)

[5] *McDonnell vs. Hunter* 612 F Supp. 1122 (1985); *Capua vs. Plainfield* No. 86-2992 (D.N.J. opinion 9/18/86)

[6] *Jensen vs. Lick* 589 F Supp. 35 (1984); *Peranzo vs. Coughlin* 608 F Supp. 1504 (1985); *Wykoff vs. Resig* 613 F Supp. 1504 (1985)

[7] *Shoemaker vs. Handel* 608 F Supp. 1151 (1985), affirmed step opinion filed July 10, 1986, 3rd Circuit No. 85-5655

[8] *R.L.E.A. vs. Dole* ND Cal C-85-7958, see also 120 LRRM 3082 and 54 LW 3498

[9] N.J. Assembly Bill 2850, still in committee as of 10/28/86

Frequently Asked Questions About Syva and Drug Abuse Testing

Syva/a Syntex company worldwide

Table of Contents

I. TESTING AND RESULTS

A. What is an immunoassay?

An immunoassay is a test that uses antibodies to detect the presence of drugs and other substances in urine or blood. Each immunoassay uses antibodies that react only with that particular drug* for which the sample is being tested. In the test mixture, these antibodies attach themselves to the drug if it is present in the sample. Each drug is detected by various means, depending on the type of immunoassay.

B. Who uses immunoassays manufactured by Syva and why?

Emit® urine assays are used to detect the drugs most commonly abused in our society today. These assays range from simple tests done on a small, portable unit to multi-step tests run on a large clinical laboratory analyzer. Major users of Emit® urine assays for drugs of abuse include hospital laboratories and emergency departments, drug and alcohol treatment programs, parole and probation agencies, prisons, work release programs, the U.S. military, and medical or security departments of public institutions and private industry.

Emit® assays are also used in hospitals, medical laboratories, and doctors' offices. More than 30 Emit® assays are available to measure serum or plasma levels of prescribed drugs, such as those used to treat heart conditions, asthma, and epilepsy, to aid physicians in adjusting drug dosages for safe and effective treatment.

*Or drug metabolites, which are compounds resulting from the breakdown of drug by the body.

C. How does an Emit® urine drug test work?

Step-by-step, an Emit® test works as follows:

1. An Emit® test contains antibodies that attach themselves to drug in a person's urine sample.
2. All the antibodies that have not become attached to drug in the sample attach themselves to chemically tagged drug from the Emit® test reagent.
3. Chemically tagged drug without any attached antibody produces a chemical reaction that changes the light-absorbing properties of the test mixture. Tagged drug that has attached antibody is inhibited from producing the chemical reaction.
4. Emit® test instruments measure changes in the amount of light the sample absorbs, which is related to the amount of drug the sample contains. The more drug present in the person's urine, the greater the response produced. On the other hand, if there is no drug present in the sample, the response is minimal.
5. To determine the presence or absence of detectable drug, the sample's response is compared to the response of a calibrator which contains a known amount of drug. If the sample's response is less than that of the calibrator, the sample is considered to be negative. Conversely, if the sample's response is higher than or equal to the calibrator's, the sample is considered to be positive for the drug.

D. Does an Emit® urine drug test measure the amount of drug present in the urine?

Concentrations of compounds in urine may vary widely because of individualized excretion patterns, fluid intake, diet, and the effect of physiological and psychological stresses on kidney function. Therefore, Emit® st™ urine assays are not designed to measure the amount of drug present in urine samples. They provide either positive or negative results, indicating the presence or absence of detectable drug. The Emit® st™ urine assays also can be run on the Syva Ost™ System to yield positive or negative results.

Emit® d.a.u.™ urine assays can give, in addition to positive-negative results, data that can be used to estimate the approximate concentrations of drug and drug metabolites present.

E. What do the test results mean?

A positive result means that drug is present in the urine sample at a detectable level. It does not necessarily mean that the individual is intoxicated, since there is no established relationship between amount of drug in urine and intoxication.

A negative result means that either there is no drug present in the urine sample or the level is so low that it is undetectable by the test.

F. How long after taking a drug can it be detected in the urine by Emit® tests?

Drugs vary considerably in how quickly they pass through the body. This variation depends on the drug, the individual's metabolism, the frequency of drug use, and the amount of drug ingested.

Depending on the above, most drugs can be detected in the urine for up to three days after being taken. Some drugs, such as methaqualone and phenobarbital, however, may be detected for as long as two to three weeks. Other drugs, such as some amphetamines and secobarbital, pass through the body so quickly that a negative result may be obtained from someone who has recently used the drug. Recent studies have shown that due to highly individualized excretory patterns of cannabinoids, consistently negative results may not be seen for several days to more than a month after marijuana use, particularly in the case of heavy use (1).

G. Can Emit® urine drug tests determine the mode of administration?

No, the Emit® urine assays detect only the presence of drug in the sample.

II. TEST RELIABILITY

A. How accurate are Emit® urine drug tests?

Emit® urine drug tests have been shown to be among the most consistently accurate drug testing methods in current use.

Syva has abstracted recent studies comparing Emit® assays with other commonly used methods including radioimmunoassay (RIA), thin-layer chromatography (TLC), gas chromatography/mass spectrometry (GC/MS), gas-liquid chromatography (GLC), high-performance liquid chromatography (HPLC), bonded phase adsorption (BPA), and gas chromatography with flame ionization detector (GC/FID) (2). Researchers cited the ease of use, speed of performance and excellent sensitivity of Emit® assays. One of these studies (Frederick et al.) yielded a 97-98% confirmation of the Emit® assays (3). Another (Jones et al.) resulted in a 96% confirmation by a less sensitive method, then a 100% confirmation by GC/MS (4). Kogan et al.,reported a 100% confirmation of 100 samples analyzed by Emit® d.a.u.™ (5); a follow-up by Verebey et al., in 1986, resulted in a 100% confirmation of Emit® assays by using BPA/TLC, RIA, and GC/MS (6).

B. Are there any medications that can cause false positive test results?

In general, no. However, medications with very similar chemical structures may sometimes produce positive results in certain tests. The levels at which tested medications may interfere are listed in the product literature accompanying each test or in notifications mailed directly to Syva customers.

For more detailed information, customers are invited to call Technical Consultation toll free at (800) 227-9994; those in California may call (800) 982-6006.

C. **Is it necessary to confirm a positive result? How should this be done?**

No test method can consistently provide 100% accuracy. Therefore, for maximum confidence in results, Syva recommends confirmation of positive results by an alternative scientific method.

The most scientifically valid means of confirming a positive result is to test the sample by a method based on a scientific principle different from the Emit® urine drug test. The confirmation method must be at least as sensitive as the Emit® tests. The specific confirmation method used will vary depending on the drug in question. Well-recognized confirmation methods include gas chromatography (GC), either alone or followed by mass spectrometry (GC/MS); thin-layer chromatography (TLC); and high-performance liquid chromatography (HPLC).

In certain environments, repeating the test or obtaining verbal corroboration of drug use from the individual may satisfy the need for verification. If objective verification of greater accuracy is required, Syva recommends confirmation by an alternative scientific method of at least equal sensitivity.

III. CANNABINOID (MARIJUANA) TEST

A. **Can a nonsmoker in close contact with others who are smoking marijuana give a positive result in a Syva test?**
Research conducted to study the effects of passive inhalation of marijuana varies widely in experimental conditions. Variants include ventilation, enclosure size, length and frequency of exposure, and concentrations of THC (delta-9-tetrahydrocannabinol).

While a few positive results were obtained using the more sensitive Emit® d.a.u.™ Cannabinoid 20 Assay, not a single urine specimen from a passive "smoker" produced a positive result at the Emit® d.a.u.™ 100 ng/mL cut-off level (7). Peak urine concentrations were generally found in either the first or the second urination after exposure, and these lower-level positives tended to revert quickly to negative, usually within twelve hours.

It is important to keep in mind that all of these studies investigated the effects of passive inhalation under rather extreme conditions. So far, no study has simulated the exposure conditions found in real-life situations, such as passive exposure at a public concert or private party. However, it would obviously be difficult to encounter such extreme passive inhalation exposure levels in a real-life situation without at least the tacit consent of the person exposed (8).

B. **How long after smoking marijuana can drug be detected in the urine?**
In general, due to highly individualized excretory patterns, consistenly negative test results may not be seen for several days to several weeks after ingesting or inhaling marijuana. Heavy, chronic use will extend that period (1).

As seen in recent studies, the Emit® 100 ng/mL assay will detect drugs in light users for 2 to 3 days and in heavy users for 6 to 19 days (1,7).

C. If a person gives a negative result one day and a positive result the next day, does it mean he has smoked marijuana again?
Not necessarily. Marijuana is stored in the body and is broken down into compounds which are released in an erratic pattern over a period of days or weeks. Thus, a person could give a negative result several days after discontinuing smoking, followed the next day by a positive result. Depending on the person's prior frequency of marijuana use, it may take days to weeks before test results become consistently negative.

D. How can a test for marijuana work when there are so many different types of marijuana?
Although there are many different types of marijuana, all contain the same active ingredient, delta-9-tetrahydrocannabinol (THC), which is thought to be responsible for the "high." This substance is broken down in the body to form a number of compounds, or metabolites. These breakdown compounds are excreted in the urine and are detectable by the tests. Because all types of marijuana are broken down to the same metabolites, they are all detected by our tests.

E. Can the Syva cannabinoid urine test be used to determine intoxication?
No, nor can any urine test for marijuana use. No clinical or legal definition of marijuana intoxication has been established.

IV. USE OF EMIT® URINE DRUG TEST RESULTS IN COURT

A. **Can Emit® urine drug tests be used as evidence in court?**
Emit® urine drug test results can and have been admitted as evidence in a variety of legal proceedings (9). The Emit® method is well recognized by experts as a valid method of testing for drugs of abuse.

B. **In what types of court proceedings have Emit® urine drug tests been used as evidence?**
Emit® urine drug test results have been used as evidence in the revocation of parole and probation privileges, in prison disciplinary action, and in sanctions against employees. In many such cases, Emit® test results have been used in conjunction with other evidentiary information.

Note: For the most current information concerning legal issues and questions, consult Syva Company.

For those involved in drug testing who may have to testify in court, an informative monograph entitled "Instructions for Witnesses" is available from Syva (10).

V. REFERENCES

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*Available on request from Syva.

WP: 2138K

Update: 8/87

Provided by ABA

DRUG TESTING IN THE WORKPLACE

Summary of State Actions

HOUSE LABOR RELATIONS COMMITTEE
Eric S. Fillman, Research Analyst
(717) 787-3085

OVERVIEW

The search and seizure provisions of the Fourth Amendment to the U.S. Constitution apply to drug testing of government employees. This means that testing may occur only when there is at least reasonable suspicion to believe that a drug problem exists. Therefore, random drug testing is unconstitutional except in exceptional situations.

Courts agree that requiring an individual to undergo a urinalysis constitutes a Fourth Amendment search or seizure. They require, at a minimum, reasonable suspicion before any drug testing may be imposed on any specific employee. Mass round-up of employees violates their constitutional rights, it has been held.

The administrative search exception to the requirement of individualized suspicion has been approved only in limited situations.

Employees who are compelled to submit to urinalysis as a precondition to obtaining a promotion may not be held to have waived their constitutional rights voluntarily.

The reliability of drug tests is a major issue. A number of courts have pointed out that drug testing is not an infallible process and that errors can occur at numerous points. False positive readings can occur when the employee who is being tested has ingested prescription and over-the-counter drugs, when the sample is stored or handled improperly, or when the results are misinterpreted.

The extent to which cases involving drug testing by governments apply to private sector employees is not yet known. Traditionally, constitutional considerations have not been applied directly to such employers. It is possible, however, that through arbitration, wrongful discharge actions, and other common law and statutory proceedings, concepts applied to government could also govern private employers.

STATE & LOCAL LAWS

CALIFORNIA - (San Francisco)

Ordinance states that all citizens of the City and County of San Francisco enjoy the full benefit of the right of privacy in the workplace guaranteed to them by the California Constitution. The purpose of which is "to protect employees against unreasonable inquiry and investigation into off-the-job conduct, associations, and activities not directly related to the actual performance of job responsibilities."

Employees other than police, sheriff, fire department, and emergency service vehicles operator employees are covered under this ordinance. Employers of those other than specified are prohibited from demanding, requiring or requesting employees to submit to any blood, urine, or encephalographic tests as a condition of continued employment. Tests are allowed if:

(a) The employer has reasonable grounds to believe than an employee's faculties are impaired on the job; and

(b) the employee is in a position where such impairment presents a clear and present danger to the physical safety of the employee, another employee or to a member of the public; and

(c) the employer provides the employee, at the employer's expense, the opportunity to have the sample tested or evaluated by State licensed independent laboratory/ testing facility and provides the employee with a reasonable opportunity to rebut or explain the results.

CONNECTICUT

No employer may determine an employee's eligibility for promotion, additional compensation, transfer, termination, disciplinary or other adverse personnel action solely on the basis of a positive urinalysis drug test result unless (1) the employer has given the employee a urinalysis drug test, utilizing a reliable methodology, which produced a positive result, (2) such result was confirmed by a second test which was separable and independent from the initial test, utilizing a reliable methodology, and (3) such positive result was confirmed by a third test which was separate and independent from the initial test, utilizing GC/MS methodology or a methodology which has been determined by the commissioner of health services to be as or more reliable.

No employer may require a prospective employee to submit to a test as part of the application procedure before employment unless (1) he is informed in writing at the time of application of the employer's intent to conduct such a test, (2) such test is

CONNECTICUT (cont.)

conducted in accordance with this act, and (3) the prospective employee is given a copy of any positive test result. The results of any such test shall be confidential and shall not be disclosed by the employer or its employees to any person other than any such employee to whom disclosure is necessary.

No employer or employer representative, agent or designee engaged in a urinalysis drug testing program shall directly observe an employee or prospective employee in the process of producing the urine specimen.

Test results shall be maintained along with other employee medical records and shall be subject to the privacy protections of the general statutes. Such results shall be inadmissible in any criminal proceeding.

No employer may require an employee to submit to a test unless the employer has reasonable suspicion that the employee is under the influence of drugs or alcohol which adversely affects or could adversely affect such employee's job performance.

Nothing in this act shall prevent an employer from conducting medical screenings, with the express written consent of the employees, to monitor toxic or other unhealthy substances in the workplace. Any such screenings shall be limited to the specific substances expressly identified in the employee consent form.

Nothing in this act shall restrict or prevent a urinalysis drug test program conducted under the supervision of the division of special revenue within the department of revenue services relative to jai alai players, jai alai court judges, jockeys, harness drivers or stewards participating in activities upon which pari-mutuel wagering is authorized under Chapter 226 of the general statutes.

FLORIDA - (Related law)

No person may be compelled to identify or provide identifying characteristics which, if disclosed, would identify any individual who receives or has received a serologic test. Any person who discloses the serologic test result to another person, unless the disclosure is to the person receiving the test, is guilty of a misdemeanor of the first degree.

The result of a serologic test conducted under declaration of the Secretary of the Department of Health and Human Services shall not be used to determine if a person may be insured for disability, health, or life insurance or to screen or determine suitability for, or to discharge a person from employment. Any person who violates the provisions of this subsection is guilty of a misdemeanor of the first degree.

IOWA

A used in this section, "drug test" means any blood, urine, saliva, chemical, or skin tissue test conducted for the purpose of detecting the presence of a chemical substance in an individual.

Except as provided in subsection 7 (testing allowed as part of a routine physical exam), an employer shall not require or request employees or applicants for employment to submit to a drug test as a condition of employment, preemployment, promotion, or change in status of employment. An employer shall not request, require, or conduct random or blanket drug testing of employees. (This section does not apply to preemployment drug tests authorized for peace officers or correction officers of the state, or to drug tests required under federal statutes....

This section does not prohibit an employer from requiring a specific employee to submit to a drug test if all of the following conditions are met:

a. The employer has probable cause to believe an employee's faculties are impaired on the job;
b. The employee is in a position where such impairment presents a danger to the safety of the employee, another employee, a member of the public, or the property of the employer, or where impairment is a violation of a known rule of the employer;
c. The test sample withdrawn from the employee is analyzed by an approved laboratory by the department of health;
d. If a test is conducted and the results indicate the employee is under the influence, a second test using an alternative method of analysis shall be conducted (on the same sample, if possible);
e. An employee shall be accorded a reasonable opportunity to rebut or explain the results of a drug test;
f. The employer shall provide substance abuse evaluation, and treatment if recommended by the evaluation, with costs apportioned as provided under the employee benefit plan or at employer expense, the first time a test indicates the presence of alcohol or a controlled substance. An employer shall take no disciplinary action against an employee due to the employee's drug involvement if the employee successfully completes treatment. However, if an employee fails to undergo substance abuse evaluation when required, or fails to successfully complete treatment when recommended, the employee may be disciplined up to and including discharge.

Medical screening to monitor exposure to toxic or other unhealthy substances is not prohibited.

A drug test conducted as part of a physical exam is only permissible under the following circumstances:

IOWA (cont.)

a. For a preemployment physical, the employer shall include notice that a drug test will be a part of the exam in any notice or advertisement soliciting applicants, or in the application, and an applicant shall be personally informed of the requirement at the first interview.

b. For a regularly scheduled physical, the employer shall give notice at least thirty days prior to the date the physical is scheduled.

An employer shall protect the confidentiality of the results of any drug test conducted on an employee. If an employee successfully completes treatment, the employee's personnel records shall be expunged of any reference to the test or its results when the employee leaves employment.

MINNESOTA

An employer may not request or require an employee or job applicant to undergo drug and alcohol testing unless the testing is done pursuant to a written drug and alcohol testing policy, and is conducted by a testing laboratory licensed by this act, or by an unlicensed laboratory transitionally allowed under this act.

An employer may not request or require an employee or job applicant to undergo drug or alcohol testing on an arbitrary and capricious basis.

An employer may request or require a job applicant to undergo testing provided a job offer has been made to the applicant and the same test is requested or required of all job applicants conditionally offered employment for that position.

An employer may request or require an employee to undergo testing as part of a routine physical examination, provided the drug or alcohol testing is given no more than once annually, and the employee has been given two weeks' written notice.

An employer may request or require only employees in safety-sensitive positions to undergo testing on a random selection basis. An employer may test an employee if the employer has a reasonable suspicion that the employee:

1. is under the influence of drugs or alcohol;
2. has violated the employer's written work rules prohibiting use, possession, sale, or transfer of drugs or alcohol while the employee is working, on the premises, operating the employer's vehicle, machinery, or equipment, provided that the work rules are in writing and contained in the employer's written testing policy;

MINNESOTA (cont.)

3. has sustained a personal injury, or caused another employee to sustain a personal injury; or
4. has caused a work-related accident.

An employer may test an employee participating in a chemical dependency treatment plan, and may test that employee without prior notice during the evaluation or treatment period and for a period of up to two years following completion of prescribed treatment.

The Commissioner of Health shall adopt rules by Jan 1, 1988, which govern the following:

a. Standards for licensing, suspension and revocation of laboratories;
b. Body component samples that are appropriate for testing;
c. Procedures for taking samples that ensure privacy to employees and job applicants;
d. Methods of analysis to ensure reliability, including standards for initial screening tests and confirmation tests;
e. Threshold detection levels for drugs, alcohol, or their metabolites for determining positive results;
f. Chain of custody procedures; and
g. Retention and storage procedures.

Provides for granting licenses and requiring annual fees. Sets standards for laboratory directors, and makes provisions for methods of analysis (IA technology), chain of custody procedures, certification of testing procedures, and operations reporting.

Requires mandatory confirmation tests on all positives. Provides for submission of information which may be relevant to test results (allowed within three days after test results). Provides for results to be given to employees/applicants.

An employee or job applicant may request a confirmation retest of the original sample at his own expense after notice of a confirmed positive test result. (sets up procedures)

An employer may not discharge, discipline, discriminate against, or request or require rehabilitation of an employee on the basis of an initial, unconfirmed positive result. In addition, an employer may not discharge on the basis of a first-time confirmed positive, unless the following conditions are met:

1. The employee has been given the opportunity to participate in rehabilitation (either by his own expense, or through a health plan; and
2. The employee has either refused to participate in counseling or rehab, or failed to successfully complete the program.

MINNESOTA (cont.)

If a job applicant has been given an offer contingent upon taking a drug test, the offer may not be withdrawn on the basis of an initial screening test result.

Labs may only disclose to the employer test result data regarding the presence or absence of drugs, alcohol, or their metabolites in a sample tested. All test results are private and confidential. They may be used in arbitration or collective bargaining proceedings.

Positive test results may not be used as evidence in a criminal action against the employee or job applicant tested.

Remedial actions include: filing suit only after exhausting internal grievance procedures applicable; civil damages allowable by law; injunctive relief; and reinstatement with back pay.

UTAH

Employers may test employees or prospective employees for the presence of drugs or alcohol as a condition of hiring or continued employment. However, employers and management in general must submit to the testing themselves on a periodic basis.

Employers may require samples from employees and prospective employees, and may require presentation of reliable identification to the person collecting the samples. The employer may designate the type of sample to be used for testing.

An employer shall pay all costs of testing for drugs or alcohol required by the employer, including the cost of transportation if the testing of a current employee is conducted at a place other than the workplace.

The collection of samples shall be performed under reasonable and sanitary conditions Samples shall be collected and tested with due regard to the privacy of the individual being tested, and in a manner reasonably calculated to prevent substitutions. Documentation of sample collection shall include labeling and an opportunity for employees to disclose any pertinent information which may affect the test. Sample testing shall conform to scientifically accepted analytical methods and procedures.

Employers shall develop and distribute a written policy, in which the employer may require tests for the following purposes:

a. investigation of possible individual employee impairment;

UTAH (cont.)

b. investigation of accidents in the workplace or incidents of workplace theft;
c. maintenance of safety for employees of the general public; or
d. maintenance of productivity, quality of products or services, or security of property of information.

An employer may use a verified or confirmed positive test result, or refusal to take a test, as a basis for disciplinary or rehabilitative actions, which may include:

a. Requirement of counseling or treatment;
b. suspension without pay;
c. termination;
d. refusal to hire; or
e. other disciplinary measures in conformance with the employer's usual procedures, including any collective bargaining agreement.

All information, interviews, reports, statements, memoranda, or test results received by the employer through his drug or alcohol testing program are confidential communications and may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceeding, except in a proceeding relating to an action taken by an employer (i.e. action based on a confirmed positive result) or in an action of defamation, slander, or damage of reputation, as provided by this act.

A physician-patient relationship is not created between an employee or prospective employee, and the employer or any person performing the test, solely by the establishment of a drug or alcohol testing program in the workplace.

VERMONT

Except as provided below, an employer or an employment agency shall not, as a condition of employment, do any of the following:

1. Request or require that an applicant for employment take or submit to a drug test.
2. Administer or attempt to administer a drug test to an applicant for employment.
3. Request or require that an applicant consent, directly or indirectly, to a practice prohibited under this subchapter.

Exception to the above: An employer may require an applicant to submit to a drug test only if all of the following conditions are met:

1. The applicant has been given an offer conditioned on a

VERMONT (cont.)

negative test result. A conditional offer shall not be necessary if the applicant resides more than 200 air miles from the place the applicant is to be tested.

2. The test is given not less than ten days from the date the applicant received written notice. The notice shall list the drugs to be tested. The notice shall also state that therapeutic levels of prescription drugs tested will not be reported.

3. The drug test is given as part of or in conjunction with a comprehensive physical exam, but the test and exam need not be taken or administered at the same time.

4. The drug test is administered according to this act.

Employees are subject to virtually the same conditions as above, with the following changes. The employer cannot, as a condition of employment, promotion or change of status of employment, or as an expressed or implied condition of a benefit or privilege of employment, test, attempt to test, or request or require that an employee consent, directly or indirectly.

An employer may require a drug test of an employee if the following conditions are met:

1. The employer has probable cause to believe the employee is using or under the influence of a drug on the job.

2. The employer has available a bona fide rehabilitation program.

3. The employee may not be terminated if the test result id positive and the employee agrees to participate in, and then successfully completes the employee assistance program. (The employee may be suspended only for the period of time necessary to complete the program, but no longer than three months.) The employee may be terminated if, after completing the EAP, the employer subsequently administers a drug test upon another instance of probable cause, and the test result is positive.

Testing requires a written policy on the part of the employer. Blood tests are prohibited. The employer shall use a laboratory designated by the department of health. Chain of custody must be ensured. If urinalysis is performed, GC/MS must be used to confirm.

An employer shall provide an employee or applicant to be retested at an independent laboratory at the expense of the employee/applicant, and shall consider the results of the retest.

RECENT DEVELOPMENTS

CALIFORNIA

Legislation to allow employers to conduct drug testing of employees based on "reasonable suspicion" of drug or alcohol impairment was stalled May 21 by the California Senate's Industrial Relations Committee but will be reconsidered in 1988, according to a spokeswoman for the sponsor, Sen. John Seymour (R). The bill defines "reasonable suspicion" as "a belief based on facts sufficient to lead a reasonable person to suspect that the employee is under the influence of drugs or alcohol." SB 1611 provides for confidentiality of test results, independent confirmation of the tests, and guidelines for assuring the quality of the testing procedure. Seymour's bill, if passed, would supersede all local drug testing laws, such as San Francisco's controversial ordinance. A second Seymour bill (SB 1610), which deals with random testing in safety-sensitive jobs, also will be reconsidered in 1988.

A companion bill by Assemblyman John Klehs (AB 330) cleared the Assembly Labor and Employment Committee May 20, 1987. The bill would establish a state licensing procedure for laboratories that analyze drug test samples for employers. The Ways and Means Committee is next to consider the bill. Similar to a measure vetoed in 1986 by Gov. George Deukmejian, AB 330 also would require confidentiality of test results, give employees the right to copies of results, allow for voluntary participation in drug rehabilitation programs, raise licensing fees, and provide for the retention of samples for at least 90 days.

KANSAS

Attorney General's Opinion, issued March 19, 1987, rules that mandatory drug tests without regard to job performance violates the Fourth Amendment prohibition against "unreasonable searches and seizures." However, there is no constitutional bar to testing county employees when the employer has a reasonable, objective basis to suspect illicit drug use. Further, while mandatory tests of job applicants without regard to job requirements violates the Fourth Amendment, testing is permissible if done to learn whether an applicant is physically capable of performing the duties of a particular job, including testing of all applicants for public safety positions.

MARYLAND

Indiscriminate urine testing of state employees for drug use would be an unconstitutional search and seizure, according to an opinion issued October 22, 1986 by then-Attorney General Stephen H. Sachs.

VIRGINIA (cont.)

drug screening for public safety occupations is legal. In an opinion requested by a state legislator, Terry said that the legality of testing public employees depends largely upon the circumstances and that her responses were therefore general in nature. But on the question of random mandatory testing for state and local employees whose jobs are related to public safety, Terry said, "It is clear that the balance of interests in most work situations requires that drug testing be conducted only on the basis of at least 'reasonable suspicion.' Therefore, it is my opinion that random drug testing is not permissible in most work settings, including public safety occupations."

WASHINGTON

A bill that would allow an employer to conduct drug testing of employees only when there are "reasonable grounds" to believe an employee's job performance has been affected by drugs is under consideration by the Legislature. HB 1063, which passed the House Commerce and Labor Committee March 6, 1987, requires a prior written statement setting forth the grounds for conducting the test.

FEDERAL DEVELOPMENTS

Language requiring uniformity in federal agency drug testing plans for their employees and the publication of guidelines with a two-month public comment period are included in a massive supplemental appropriations bill signed into law by the President on July 11, 1987 (PL 100-71).

The provision was offered by Rep. Steny Hoyer (D-Md) as an amendment to the conference report adopted 343-77 on June 30, 1987. The $9.4 billion fiscal 1987 supplemental spending bill (HR 1827) itself passed the House that day by a vote of 309-114 and the Senate on July 1, 1987 by a voice vote. Hoyer, who had originally sponsored an amendment that would have put off testing until at least the end of the fiscal year, said he believes ultimately "this issue must be decided in the courts, not on procedural grounds, but on constitutional grounds, and I think that will be done."

The legislation would prohibit agencies from spending any funds, under the supplemental appropriation or any future money bill, to implement the President's September 1986 drug testing order until certain conditions are met. Among these are that the Department of Health and Human Services must publish procedures for testing on a government-wide basis to ensure that the best available technology is used and that there are strict procedures for chain of custody of specimens. These are in addition to the scientific and technical guidelines HHS issued last February. The Secretary of HHS also must submit to Congress agency-by-agency analyses detailing criteria that will be used to select employees for testing, position titles designated for random testing, and the nature and frequency of the testing.

The bill also assures employee access to test results and limits disclosure of results.

Altogether, about 200,000 employees the Administration believes are critical to law enforcement and safety are exempt from the bill's provisions.

NEW STATE LAWS REGULATING WORKPLACE DRUG TESTING

CONNECTICUT: "An Act Concerning Drug Testing in the Workplace" enacted 6/87

What it does:

1. restricts random testing;

2. requires reasonable suspicion before most employees can be tested; and

3. prohibits direct observation of urine specimen collection.

Applicants:

1. Prohibits testing of job applicants unless the following conditions are met:

a) applicant has been given written notice of employer's intention to test;

b) gas chromatography/mass spectometry* is utilized; and

c) all positive results are confirmed by two different urinalysis methodologies;

d) applicant is given a copy of any positive test result.

Employees:

1. No employer can require an employee to submit to a test unless employer "has reasonable suspicion that the employee is under the influence of drugs or alcohol which adversely affects...such employee's job performance."

2. Prohibits random testing except if:

a) authorized under federal law;
b) employee serves in "high-risk or safety-sensitive occupation";
c) it is part of employee assistance program.

3. Requires GC/MS plus two confirmatory tests as above.

---

* GC/MS is generally recognized as the most accurate, and the most expensive, urine test currently available.

Penalties:

Aggrieved employee may sue for general and special civil damages, plus costs and attorneys' fees, or for an injunction against any violation of the law's provisions.

IOWA: "An Act to Regulate the Circumstance and Procedure Under Which an Employer May Request a Drug Test of An Employee or an Applicant for Employment and Providing a Penalty", enacted 6/5/87.

What it does:

1. prohibits random or blanket testing of employees;
2. requires probable cause before employee may be tested;
3. regulates applicant testing; and
4. requires employer to provide substance abuse evaluation and treatment.

Applicants:

1. prohibits applicant testing unless test is given as part of pre-employment physical examination;
2. employer must use services of state approved lab;
3. confirmatory test for all positive results required;
4. applicant must have "reasonable opportunity to rebut or explain the results."

Employees:

1. prohibits random or blanket testing;
2. permits testing if:
   a) employer has probable cause to believe that an employee's faculties are impaired on the job;
   b) impairment presents danger to safety of employee, other employees, public or property;
   c) employer uses state approved lab, confirmatory testing, employee has right to rebut, as above;
   d) if result is confirmed positive, employer must provide evaluation and treatment, with costs apportioned under employee benefit plan, or at employer's expense. No disciplinary action may be taken against first offender if treatment is successfully completed.

3. permits testing as part of regularly scheduled physical exam if employer gives 30 days notice.

Penalties:

1. Aggrieved employee may sue for damages, affirmative relief such as reinstatement and back pay, or an injunction.

2. Violation of law may be punished as simple misdemeanor.

MINNESOTA: "An Act Relating to Employment; Regulating Drug and Alcohol Testing of Employees and Job Applicants", enacted 6/3/87.

What it does:

1. restricts random testing;

2. requires reasonable suspicion before most employees can be tested; and

3. regulates applicant testing.

Applicants:

1. Only those applicants to whom job offer has been made can be tested;

2. use of lab licensed by state required;

3. confirmation of positive screen by GC/MS required;

4. applicant has right to explain or rebut positive result and may request further confirmation of original sample at own expense.

Employees:

1. Permits testing as part of regular physical exam as long as two weeks notice has been given;

2. permits random testing of employees in "safety-sensitive" positions;

3. permits testing on basis of reasonable suspicion, including post-accident;

4. requires use of licensed lab, confirmation by GC/MS and right of rebuttal and retest as above;

5. may not be discharged on basis of first confirmed positive unless given opportunity at own expense or under employee benefit plan to attend counseling

or rehabilitation program and employee has refused or failed successfully to complete program.

Penalties:

1. Aggrieved employee or applicant may sue for civil damages including attorneys fees.

2. Aggrieved party may seek injunctive relief against employer or laboratory.

MONTANA: "An Act Regulating the Testing of Blood and Urine of Employees and Prospective Employees," enacted 4/87.

What it does:

1. Prohibits random testing;

2. Requires reasonable belief of impairment before employee may be tested;

3. Restricts applicant testing.

Applicants:

1. job applicants may not be tested except for occupations in "hazardous work environments or jobs the primary responsibility of which is security, public safety or fiduciary responsibility;

2. requires "verification" of test results by two or more different testing proceudres;

3. applicant my submit sample for further confirmation at an "independent laboratory" and has right to rebut or explain results of tests.

Employees:

1. cannot be tested unless employer "has reason to believe that the employee's faculties are impaired on the job as a result of alcohol consumption or illegal drug use";

2. have right to verification, confirmation at lab or choice and rebuttal, as above.

Penalty: Violation is misdemeanor.

RHODE ISLAND: "An Act Relating to Unfair Employment Practices Prohibiting of Mandatory Drug Testing", enacted 6/87.

What it does:

1. prohibits random testing;
2. prohibits direct observation of urine specimen collection;
3. requires reasonable grounds before employee may be tested.

Applicants:

The Act does not apply to applicants.

Employees:

1. may not be tested unless employer has "reasonable grounds to believe based on specific objective facts, that the employee's use of controlled substances is impairing his ability to perform his job";
2. may not be observed while providing sample;
3. testing must be conducted in conjunction with "bona fide rehabilitation program";
4. requires confirmation by GC/MS;
5. employee has right to retest at employer's expense and right to rebut or explain results.

Penalties:

1. violation of Act is misdemeanor;
2. aggrieved party may bring civil action and judge may award punitive damages, attorneys' fees and costs and afford injunctive relief

UTAH: "Drug and Alcohol Tests; Employer Liability", enacted 4/87.

What it does:

1. legalizes drug testing in private sector on any basis for any reason so long as policy is estab-

lished and distributed in writing;

2. defines "drugs" as: "any substance recognized as a drug in the United States Pharmacopeia, the National Formulary, the Homeopathic Pharmacopeia, or other drug compendia, or supplement to any of those compendia."

3. exempts employers from legal liability for most causes of action if requirement that a policy be established is followed.

Applicants and employees:

1. may be tested as a condition of employment for the following purposes:

   a. investigation of individual impairment;

   b. investigation of accidents or theft;

   c. maintenance of safety; or

   d. maintenance of productivity, quality of services, or security of property or information.

2. requires confirmation by GC/MS before action may be taken;

3. "employers and management in general must submit to the testing themselves on a periodic basis."

Penalties:

Employers are not liable for causes of action including negligence (action based on false test result is not actionable if employer's reliance on result was reasonable and in good faith), defamation, or under the Utah Anti-Discrimination Act.

VERMONT: "An Act Relating to Employee Drug Tests", enacted May 22, 1987.

What it does:

1. prohibits random testing;

2. requires probable cause before employees can be tested;

3. restricts applicant testing.

Applicants:

1. only those who have received job offer may be tested;

2. must be given ten days written notice of test;

3. positive results must be confirmed by GC/MS by state approved labs;

4. have right to retest at own expense.

Employees:

1. can't be tested unless employer has probable cause to believe employee is using drugs or is under influence of a drug on the job;

2. no testing unless employer has established an employee assistance program;

3. may not be discharged on basis of confirmed positive result if agrees to complete EAP;

4. have right to confirmation by GC/MS in state approved lab, retest, as above.

Penalties:

1. Aggrieved applicant or employee may bring civil action for damages, injunctive relief, costs and attorneys' fees;

2. Violator of law subject to civil penalty of $500 - $2,000.

3. Violation of law is a misdemeanor.

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE REFERENCE LIBRARY

May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

H. JUD. 10-24-87 9:00 a.m. KETCHIKAN CITY COUNCIL CHAMBERS

JOHN SUND, REPRESENTATIVE
2504 2nd Avenue
Ketchikan, Alaska 99901
(907) 225-5552

While in Juneau
P. O. Box V
Juneau, Alaska 99811
(907) 465-4919

October 24, 1987

MEMORANDUM

TO: Members, House Judiciary Committee

FROM: Rep. John Sund

SUBJECT: House Bill 283 - Prohibiting certain employers from testing employees for drugs or other substances consumed by employees.

I introduced HB 283 to get this issue on the table for discussion. Drug testing has become a nationwide controversy as exhibited by the many lawsuits surrounding its use -- including several in Alaska. Seven states have adopted workplace drug testing legislation to date.

While certain drug testing is justified, clear guidelines and procedural safeguards are needed to protect workers from false accusations and employers from expensive lawsuits.

House Bill 283 attempts to protect Alaskans' privacy rights by prohibiting <u>random</u> drug testing as a condition of employment. Drug testing is still a new science and is far from accurate. Different labs use different tests and while one may test positive, another may turn up negative. False positive rates as high as 30% are not unheard of. Meanwhile, an employee may suffer losing an income and being "blacklisted" in the community. Our small communities would be particularly sensitive to this.

Drug testing also may not give the employer sufficient information to justify the intrusion into employees' privacy and the accompanying loss of morale. It will not measure on-the-job impairment which is the prime focus of drug testing. The bill includes exemptions for those responsible for the safety of the public, such as aircraft pilots, peace officers and firefighters.

Introduced: 4/17/87
Referred: Labor & Commerce
and Judiciary

IN THE HOUSE

BY SUND, ADAMS, KOPONEN, WALLIS AND BROWN

HOUSE BILL NO. 283

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act prohibiting certain employers from testing employees for drugs or other substances consumed by employees."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. POLICY. (a) The legislature declares that it is the public policy of the state that all citizens enjoy the full benefits of the rights to privacy and due process of law, and the protection against unreasonable searches and seizures guaranteed by art. I, secs. 7, 14, and 22, Constitution of the State of Alaska.

(b) It is the purpose of this Act to protect employees against unreasonable inquiry and investigation into conduct and activities that happen outside of work and that are not directly related to the actual performance of job responsibilities.

* Sec. 2. AS 23.10 is amended by adding a new section to article 1 to read:

Sec. 23.10.038. TESTS FOR CONSUMED SUBSTANCES. (a) An employer may not request, require, or conduct random or company-wide blood, urine, or encephalographic testing. An employer may not suggest or require that an employee or an applicant for employment submit to a blood, urine, or encephalographic test that tests for the presence of drugs or other consumed substances as a condition of employment. However, an employer may require a specific employee to submit to blood or urine testing if

(1) the employer has reasonable grounds to believe that the

employee's faculties are impaired by a drug or other consumed substance on the job;

(2) the employee is in a position in which an impairment would present a clear danger to the physical safety of the employee or another person;

(3) the employer preserves an adequate sample or portion of a sample so that the employee may conduct an independent test to verify or refute the employer's results; and

(4) the employer provides the employee an opportunity to rebut or explain the test results.

(b) In conducting tests permitted under this section, the employer shall limit the tests to the extent feasible so that only information regarding chemical substances in the body that are likely to affect the employee's ability to work safely is taken or recorded.

(c) In an action alleging that an employer violated this section, the employer has the burden of proving that the requirements of (a) of this section have been satisfied.

(d) This section does not prevent an employer from conducting medical screening to monitor exposure to toxic or other unhealthy substances found in the workplace or encountered in the performance of the employees' job duties if the employer has the express written consent of the employees. The screenings or tests must be limited to the specific substances expressly identified in the employee consent form.

(e) This section does not prohibit an employer from prohibiting the use of intoxicating substances or tobacco during work hours or from disciplining employees for using tobacco or being under the influence of intoxicating substances during work hours.

(f) This section does not apply to

(1) the state or a political subdivision of the state when dealing with peace officers or firefighters in its employ or persons applying to be employed as peace officers or firefighters; or

(2) an employer as to an employee operating emergency service vehicles for the state or a political subdivision of the state.

(g) A person who violates or assists in a violation of this section is liable to the person aggrieved for special and general damages, together with attorney's fees and the costs of the action as provided in the Alaska Rules of Court.

(h) A person who violates or proposes to violate this section may be enjoined by a court of competent jurisdiction. An aggrieved person, the attorney general, or a person or entity that will fairly and adequately represent the interest of the protected class may bring an action for injunctive relief.

(i) In this section

(1) "employer" means a person who retains by personal services contract or employs at least one other person and includes the state and a political subdivision of the state;

(2) "peace officer" means a public servant vested by law with a duty to maintain public order or to make arrests, whether the duty extends to all offenses or is limited to a specific class of offenses or offenders.

Proposed Amendment

to House Bill 283

by the Department of Labor

Amend lines 21-24 on page 2 to read:

the employees' job duties. The screenings or tests must be limited to the specific substances to which the employee may be exposed.

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version : HB 283
Publish Date :

Revision Date:
Title :"An Act prohibiting certain employers from testing employees for drugs..."
Sponsor : Representative Sund
Requestor : House Labor & Commerce

Agency Affected : Department of Law
BRU : Legal Services

Components : Operations

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME		-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Please see attached analysis.

Richard I. Pegues

Prepared by : Richard I. Pegues, Director
Phone : 465-3672
Division : Administrative Services Division,
Date : May 11, 1987

Richard I. Pegues /FOR/
Approved by Commissioner : Grace Berg Schaible, Atty. Gen.
Date : May 11, 1987
Agency : Department of Law

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)
Senate Secretary

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 283

This bill amends AS 23.10 by adding a new section that prohibits certain employers from testing employees for drugs or other substances consumed by employees. This testing prohibition would also extend to applicants for employment. The bill would permit an employer to require a specific employee to submit to testing, if the employer had reasonable grounds to believe the employee's faculties are impaired by a drug or other consumed substance on the job. The new section does not apply to the state or a political subdivision of the state when dealing with peace officers or firefighters in its employ, or persons applying to be employed as peace officers or firefighters.

The bill provides that a person who violates the new section may be enjoined be a court of competent jurisdiction. And it further provides that a person who violates or assists in the violation of the section is liable to the aggreived person for special and general damages, together with attorney's fees and costs. An aggrieved person, the attorney general, or a person or entity that will fairly and adequately represent the interest of the protected class may bring an action for injunctive relief. It is not anticipated that the attorney general will often become involved in seeking injunctive relief, because of the private right of action that the bill provides to individuals, including an individual's right to seek damages against violators.

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSHB 283 (L&C)
PUBLISH DATE:

FISCAL NOTE

REQUEST

Revision Date:
Title: "An Act prohibiting certain employers from testing employees . . "
Sponsor: Judiciary Committee
Requestor: House Judiciary

Agency Affected: Public Safety
BRU: Alaska State Troopers
Components: Detachments and C.I.B.

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY88	FY89	FY90	FY91	FY92	FY93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUNDS						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact is anticipated.

JNR 2/11/88

Prepared by: Francis C. Allan G.C.G.
Division: Alaska State Troopers
Phone: 269-5691
Date: 2/7/88

Approved by Commissioner: Arthur English
Agency: Public Safety
Date: 2/7/88

Distribution: (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: HB 240
PUBLISH DATE:

FISCAL NOTE

REQUEST

Revision Date:
Title: "An Act relating to illegally controlled enterprises . . "
Sponsor: Donley and Gruenberg
Requestor: House Judiciary

Agency Affected: Public Safety
BRU: Alaska State Troopers
Components: Detachments and C.I.B.

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY88	FY89	FY90	FY91	FY92	FY93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUNDS						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact is anticipated.

JNR 2.11.88

Prepared by: Francis C. Allan F.C.A.
Division: Alaska State Troopers
Phone: 269-5691
Date: 2/6/88

Approved by Commissioner: Arthur English D.A.H.
Agency: Public Safety
Date: 2/6/88

Distribution: (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: SB 153
PUBLISH DATE:

FISCAL NOTE

REQUEST

Revision Date:
Title: "An Act relating to the penalty imposed for certain traffic offenses."
Sponsor: Sen. Fahrenkamp
Requestor: House Judiciary

Agency Affected: Public Safety
BRU: Alaska State Troopers
Components: Detachments

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY88	FY89	FY90	FY91	FY92	FY93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUNDS						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact is anticipated.

JNR 2/11/88

Prepared by: Francis C. Allan F.C.A.
Division: Alaska State Troopers
Phone: 269-5691
Date: 2/6/88

Approved by Commissioner: Arthur English
Agency: Public Safety
Date: 2/6/88

Distribution: (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION : CSHB 283 (L&C)
PUBLISH DATE : _____

FISCAL NOTE

REQUEST:

Revision Date: January 19, 1988
Title : "An Act prohibiting certain employers from testing employees for drugs..."
Sponsor : House Labor & Commerce
Requestor : House Judiciary

Agency Affected : Department of Law
BRU : Legal Services

Components : Operations

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Please see attached analysis.

Richard L. Pegues

Prepared by : Richard I. Pegues, Director
Division : Administrative Services Division
Phone : 465-3672
Date : January 19, 1988

Grace Berg Schaible

Approved by Commissioner : Attorney General
Agency : Department of Law
Date : January 19, 1988

Distribution (by preparer) :
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSHB 283 (L&C)

This bill amends AS 23.10 by adding a new section that prohibits certain employers from testing employees for drugs or other substances consumed by employees. This testing prohibition would also extend to applicants for employment. The bill would permit an employer to require a specific employee to submit to testing, if the employer had reasonable grounds to believe the employee's faculties are impaired by a drug or other consumed substance on the job. The new section does not apply to the state or a political subdivision of the state when dealing with aircraft pilots, peace officers or firefighters in its employ, or persons applying to be employed as aircraft pilots, peace officers or firefighters.

The bill provides that a person who violates the new section may be enjoined be a court of competent jurisdiction. And it further provides that a person who violates or assists in the violations of the section is liable to the aggreived person for special and general damages, together with attorney's fees and costs. An aggrieved person, the attorney general, or a person or entity that will fairly and adequately represent the interest of the protected class may bring an action for injunctive relief. It is not anticipated that the attorney general will often become involved in seeking injunctive relief, because of the private right of action that the bill provides to individuals, including an individual's right to seek damages against violators.

Drug testing

Temporary restraining order granted; athletes join suit

Stanford has been granted a temporary restrain order against the National Collegiate Athletic Association's drug testing program.

While the order is in effect, student athletes wil be required to sign forms consenting to drug testi a condition for participating in intercollegiate spor

Santa Clara County Superior Court Judge Conr Rushing issued the temporary restraining order A 26.

A hearing on the request by the University and student athletes for a preliminary injunction again drug testing program was set to begin Oct. 13 bef Judge Rushing.

In arguing for the temporary restraining order, University attorney Debra Zumwalt said that Stan as an institution, would "irreparably damage" its relationship with its students if it forced them to si consent forms, since a previous court ruling found the NCAA drug testing program is probably unconstitutional.

On March 13, Santa Clara Superior Court Judge Peter Stone called the program "overbroad" and s that NCAA cannot require an athlete to give up th "very valuable constitutional right of privacy."

At that time, Stone granted a preliminary restrai order allowing diver Simone LeVant to compete without submitting to drug testing.

LeVant graduated in June. The case is being continued by two other Stanford athletes, Jennifer Hill, co-captain of the women's soccer team, and J. Barry McKeever, a linebacker on the football team They are being represented by the San Francisco la firm of Keker and Brockett, acting for the America Civil Liberties Union.

The two athletes believe strongly that their priva being invaded and that the NCAA's program is unconstitutional.

Hill, a senior from Watsonville, Calif., is studyin engineering and has designed her own major, huma engineering. McKeever, a junior from Escondido, Calif., is a political science major.

The NCAA demands that all college athletes sign forms at the beginning of their season, consenting t be tested for drugs if their teams reach a post-seaso game.

"I feel this to be an incredible invasion of my privacy," says Hill. "The NCAA has no right to coe me into doing something that is against the Constitution, at least in California."

McKeever says, "It is irresponsible on NCAA's p not to put together a program to help students; inste NCAA punishes those who test positive. I feel there must be better ways to go about solving the problem if in fact there is such a problem."

"The NCAA," says Hill, "has no reason to believ that I, as an individual or athlete, have been using drugs, particularly as a soccer player. They are assuming I'm guilty until I prove myself innocent. I don't like being looked at as a criminal or a person who has done something wrong, when in fact I'm no And then there's the pure embarrassment of the way testing is done." (Athletes must urinate into a bottle front of an NCAA official.)

Letter

Drug testing

EDITOR, Daily News:

Paul Apfelbeck's article on the recent hearings of the House Judiciary Committee missed a few points and had a few errors that need to be corrected.

John Sund has not, as of this date (Nov. 20), co-sponsored HB 55 to modernize our state's marijuana law, nor has he said he will support the bill.

Robin Taylor is a co-sponsor of the bill and has indicated his support of the legislation. Sen. Lloyd Jones is also in support of the bill. Rep. Navarre has said that his constituents support the bill but he did not state how he would vote.

The article indicated that in the Ravin decision the Court noted that marijuana used in 1975 was 1 percent THC when, in fact, the Court noted that the THC was less than 1 percent.

The actual test on a 1987 sample of Ketchikan-grown marijuana done at the School of Pharmacy at the University of Mississippi was 4.38 percent THC, while the average test done in their lab is about 2.5 percent THC. This sample certainly was not from one of Ketchikan's finest gardens, either.

John Holst, Kayhi principal, testified in support of HB 55 as did about a dozen other citizens.

Dan Anslinger, Chief of Police, when testifying regarding the drug testing bill spoke about Ketchikan's drug problem among youth and adults.

We would like to see the names used of those who spoke and what they said.

The most blatant error that we saw in the article was when Dr. Forrest Tennant was quoted as saying, "I understand why the Legislature would want to make rules on urine testing. I like the bill you proposed."

Dr. Tennant's remarks were taken out of context. He actually said, "I looked at the legislative bill that Alaska had proposed, where they were going to, for example, ban pre-employment urine testing. I mean, to me, that would be the height of lunacy. If employers can't do pre-employment drug testing, we might as well turn the country over to the drug dealers, the drug growers, and the drug takers because we have no other way to keep those people out of the workplace."

He then stated, "Other than the one thing you had on pre-employment drug testing, I liked the bill you had proposed, and my other thought was if someone has a real concern about pre-employment urine testing, write into the bill that the person has the right to retake the test. In other words, the idea is to have clean workers."

Sincerely yours,
Alaskans for Drug Free Youth
BETTY J. WILSON
LYNDA ADAMS
MARSHA HILLEY
FRANCES YOUNG
Ketchikan

KETCHIKAN Daily News 11/28

Capital Comments

11/30/87

Tough action on drugs is needed

By STATE REP. ROBIN TAYLOR
District One

There is an enemy within Alaska that is insidiously eating at our moral, economic, and social structures as quietly and effectively as termites will undermine the foundations of a building. This enemy is the extensive use and abuse of drugs within our communities. This issue is one that I feel strongly about, and my concern has prompted me to take legislative action.

As a result of my investigation and the concerns expressed by numerous citizens, I am currently drafting legislation which will change the law and require the judiciary to more carefully examine the case of anyone accused of dealing drugs prior to setting bail and certainly prior to the release of that individual. The courts would have to make special findings in these cases which would assure that the accused was of no risk to the community prior to their release, and release without bail on a persons own recognizance would be dramatically reduced to only the minor offender.

In fact, my concerns on this issue go much further. I am personally disturbed by the current law, release without bail for drug dealers. Another problem is that the district attorney's office often fails to insist on cash bail and states no objection to the defendant's request for release on ther own recognizance. In fact, this happened last spring in Wrangell. As I promised concerned members of this community, I have investigated these practices and I am drafting appropriate legislation which will rectify this problem. I also intend to ask Senator Lloyd Jones to introduce this same legislation in the Senate.

This is not the only action that I have to report on the issue of drug use, however. Many may not realize that I am the co-sponsor on the recent bill that would recriminalize the use of marijuana. I have also requested legislation that would enable police officers to perform a drug test for those persons thought to be driving while under the influence of drugs. Such a test is currently in use in other states.

Finally, I have been drafting legislation which would encourage employers to screen employees for drugs prior to their hire as well as during the term of their employment. Ketchikan Pulp Co., Long Island Development and other large employers across the State had taken the leadership in removing drugs from the workplace by using such tests. We should, by legislation, be encouraging other employers to follow this example. Unfortunately, the only bill presently pending on this subject, HB 283, would have the opposite effect. The workplace is no place for the drug user. He injures not only himself, but often the non-drug-user who, by necessity, must work with him.

We are all well aware of the cost to our community that extensive drug use has created. It is no longer a problem we can dismiss lightly as a problem that only affects big cities. We are all aware that drugs have disabled some of the people around us, and that they threaten the future of our children, our most precious natural resource. My legislative efforts are being made with the hope of making drug use less desirable and the penalties for their use more severe. If you wish to express your concerns and/or support, please call me at my office at 874-2316, or write to me at Box 1441, Wrangell, AK 99929.

Tom Nitko Kopman

(415) 556-8011

FEB 29 1988

Appeals Court Rejects Mandatory Tests Of Rail Workers for Drugs and Alcohol

12 Feb 88

By PETER WALDMAN
Staff Reporter of THE WALL STREET JOURNAL

SAN FRANCISCO – A U.S. appeals court here struck down mandatory drug and alcohol testing of railroad workers involved in accidents or rule violations. The decision clouds a Reagan administration order for mandatory drug testing of certain workers employed or regulated by the federal government.

In a 2-to-1 ruling, the Ninth Circuit Court of Appeals reversed a lower-court decision and ruled that railroad companies may not require employees to submit to a drug or alcohol test without a warrant. The court based its reasoning on a decision by the U.S. Supreme Court in which a mandatory blood test in a criminal investigation was found to violate constitutional protections against unreasonable searches.

The Supreme Court has yet to rule on the issue of mandatory drug testing, and the issue remains unresolved by conflicting appeals court decisions.

"Because people have reasonable expectations of privacy in the personal information body fluids contain," the ninth circuit appeals court's majority opinion said, "the governmental taking of a urine specimen constitutes a search and seizure within the meaning of the Fourth Amendment" and therefore subject to a warrant.

In 1986, the Reagan administration issued an executive order requiring all federal agencies to prepare plans for mandatory drug testing of selected workers with sensitive jobs. Last spring, the Fifth Circuit Court of Appeals in New Orleans upheld required drug testing by the U.S. Customs Service of its prospective border agents, ruling that a urinalysis "is not as intrusive as an invasion of bodily integrity or of the home."

The National Treasury Employees Union appealed that decision to the Supreme Court in September, but the court hasn't decided yet whether to hear the case. The same union is also challenging President Reagan's blanket executive order in New Orleans district court, where a decision is expected soon.

In Washington, Transportation Secretary James Burnley said the department would appeal the decision. "Other appeals courts have upheld mandatory drug testing programs for customs officials, prison guards, bus drivers and jockeys," he said. "We are convinced of the constitutionality of the FRA (Federal Railroad Administration) drug and alcohol testing program."

James Burnett, chairman of the National Transportation Safety Board, an independent agency that investigates transportation accidents, said that post-accident drug and alcohol testing of all employees in safety-sensitive railroad jobs is critical to accident investigations and "remains justified." He said the safety board "has been concerned for many years about the threat to transportation safety posed by alcohol and drug-impaired individuals in the rail industry."

Last month, the safety board found that marijuana use by a Consolidated Rail Corp. engineer was a prime factor in the 1987 collision of an Amtrak passenger train and a string of Conrail locomotives near Baltimore, Md. Sixteen people were killed.

In the Ninth Circuit case, four railway unions sued the Transportation Department to invalidate the government's requirement that railroads administer mandatory drug and alcohol tests to employees involved in major accidents or safety violations. In addition to the requirement of a warrant, the court's ruling also struck down the department's drug-testing program on the ground that the tests themselves don't reliably measure intoxication at a particular time before their administration.

"The state of the art of drug tests currently used can discover only the metabolites of various drugs, which are not evidence of current intoxication and may remain in the body for days or weeks after ingestion of the drug," the majority opinion said.

The Ninth Circuit ruling deals the sharpest legal blow to date to the government's drug-testing plans. The court, however, often takes aggressive stands that are overruled by the Supreme Court.

Docket #85 2891

Feb 11

$2 - PO Box 547
SF 94101

Railway Labor Executives' Ass'n v. Burnley (C.A. 9 Cal) Federal Reporter

Drug Testing: A Constitutional Question

Proposals to test employees for drug use, although excluded from the new federal anti-drug abuse law, are gaining momentum nationwide. But such plans pose a serious challenge to the Fourth Amendment prohibition against unreasonable search and seizure.

By Jon Felde

While drug testing is absent from the government's major new legislative assault on drug abuse, it remains a controversial weapon in the crusade against drug abuse.

Drug testing—used widely in the private sector—proved too controversial to be included in the federal Anti-Drug Abuse Act of 1986, signed into law by President Reagan last October. The new law sets up stiffer penalties for drug offenses, creates new methods of attacking money laundering, intensifies interdiction programs and adds funds for law enforcement, education and treatment. But it avoids the issue of drug testing.

The private sector, however, pushes ahead with employee drug testing programs over the objections of some unions and civil libertarians. The Reagan administration continues to seek, under an executive order, the testing of nearly half of the 2.7 million federal civil employees, while congressional opponents have introduced legislation barring expenditures to implement that order.

Congress renewed its interest in employee drug testing when urine tests on Conrail crew members involved in the fatal train accident near Baltimore earlier this year showed evidence of marijuana use. On March 10, the Senate Commerce Committee approved a bill that would authorize the Department of Transportation to initiate mandatory testing in the transportation industry.

Drug abuse is a problem of national proportions. At least 30 percent of the Fortune 500 companies cite drug abuse as a serious and costly problem. Some researchers estimate that drug use in 1986 cost the U.S. economy $70 billion to $100 billion in lost productivity. New York Mayor Edward Koch said his city's police department "made more than 100,000 drug arrests over the past two years." And even small towns confront serious problems of illegal use of controlled substances. In Franklin, Ky., a town of 8,000, for instance, the problem was perceived to be so destructive that the school board introduced a plan for voluntary testing of athletes and cheerleaders last fall.

Nearly half of the state legislatures have introduced bills relating to drug tests. Some of those measures would support testing, others would limit testing.

But is drug testing constitutional? Does drug testing violate the Fourth Amendment rights of the people "to be secure in their persons, houses, papers and effects, against unreasonable searches?"

"There is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all," wrote Justice Antonin Scalia in his March 5, 1987 opinion in *Arizona vs. Hicks,* interpreting the Fourth Amendment to the Constitution. This idea now faces a serious challenge in an era when urine sampling is seen as a powerful weapon to control illegal drug use.

"There may be constitutional questions," says Kansas state Senator Ross Doyen, who heads the NCSL Task Force on Drug Abuse, "and perhaps the only way to get around them is to limit the blanket testing to areas of public safety."

But, he adds, "drug testing might prove a useful tool, because it could serve as a deterrent."

Yet even as testing programs are proposed, they are challenged. Government employees can make constitutional challenges because the Fourth Amendment limits unreasonable searches and seizures by the government as an employer. Although the rule does not apply to searches conducted by private employers, a legislative commission report in Maine cautioned that testing by private employers for illegal use of controlled substances, in effect, "deputized" employers to "use their economic leverage to force compliance with laws through methods unavailable to proper law enforcement agencies under the Constitution."

The Maine Commission concluded that "the use of substance abuse tests in the workplace essentially reversed the venerable rule of Anglo-American

Jon Felde is a senior staff associate in NCSL's Fiscal and Governmental Affairs program.

jurisprudence that an accused is presumed innocent until proven guilty. Testing programs require the accused employee to 'prove' that he is actually innocent by passing a substance abuse test."

Another argument that the tests are constitutionally unsound is based on questions of whether the likelihood of error in the tests undercuts the reasonableness of the search. John Grabowski and Louis Lasagna note in a recent issue of *Issues in Science and Technology* that while existing tests can be scientifically reliable, the implementation of the tests can result in frequent errors, particularly when companies are competing for business. A study of drug testing laboratories by the Centers for Disease Control uncovered an error rate for detecting some drugs as high as 100 percent by some commercial companies.

Most courts considering the question have ruled that mandatory testing is unconstitutional based upon a reasonable expectation of privacy, unless the demand for the test is based upon a reasonable suspicion. In finding drug testing of U.S. Treasury employees unconstitutional, the federal district court in New Orleans noted that urination was normally a private act and, in fact, under many municipal ordinances "urination in public is unlawful."

Elaine Kaplan, an attorney representing the National Treasury Employees Union in its challenge to random testing, stated that the accuracy and validity of a urine test depended on direct observation of the act of urination and that the "high degree of intrusiveness" meant that the employer would need to have a particular reason to be suspicious of an individual before requiring a test. "Going into the body of a person to discover what they've been doing is a tremendous invasion of privacy," Kaplan said.

In an effort to overcome objections to the invasion of privacy, the Department of Health and Human Services spent five months drafting regulations specifying how the test should be administered by the government. Blue dye would be placed in the toilet bowl to insure that the sample would not be diluted with water, and the sample would have to be presented within a specified period of time. The urine would have to be near body temperature to assure that it had not been altered. Monitors would be stationed outside toilet stalls to ensure accuracy of the tests.

"Physical examinations have become commonplace and expected when one is seeking insurance and applying for most jobs," according to the minority on the Maine Commission. "To argue that it is appropriate to examine individuals for diseases of the heart and eyes, for example, and neglect the equally tragic diseases of alcoholism and drug addiction is an irresponsible position for Maine to take."

More important than the privacy of the act of urination is the question of whether the information revealed by urinalysis is subject to the expectation of privacy; information about private behavior can be determined by chemical traces in the urine. Ira Glasser of the American Civil Liberties Union argues that smoking a marijuana joint is not the employer's business if job performance is not affected. But, he adds, every employer "has the right to expect his employees not to be drunk or stoned or high on the job." Glasser argues that such a right does not allow employers to monitor conduct off the job.

Others argue that what one does off-duty can affect the work place and job performance and therefore becomes the interest of the employer. Assistant U.S. Attorney General Richard Willard represents the government in challenges to the administration's drug testing initiative. Speaking to business leaders last fall, he reminded them that on the average, compared to their non-addicted counterparts, "substance abusers consume three times the medical benefits, are five times as likely to file workers' compensation claims, experience seven times as many garnishments and are repeatedly involved in grievance procedures."

According to Willard, both public and private employers should be con-

KLUKWAN, INC.

P.O. Box 2077, Juneau, Alaska 99803 (907) 789-7361

May 11, 1987

Representative, Dave Donley, Chairman
Labor & Commerce Committee
P.O. Box V
Juneau, Alaska 99811

RE: HB-283 An Act Prohibiting Drug Testing

Dear Chairman Donley and Members of the Committee:

During the past twelve months, Klukwan, Inc. and its subsidiaries have instituted a drug and alcohol policy that we feel has been very successful. The spirit of the policy is set forth in the following two paragraphs, an excerpt from our Employee Handbook.

"To help insure a safe, healthy and productive work environment for the employees of Klukwan, Inc. and its subsidiaries,(hereinafter refer to collectively as "Company") and others on Company property, to protect Company property and assets, and to assure efficient operations, the Company has adopted a Policy on drugs and alcohol."

"It is the Policy of the Company to maintain its property and provide a working environment that is both safe for our employees, including others having business with the Company or on Company property, and is conducive to high and productive work standards. This policy restricts certain items and substances from being brought on or being present on Company property, and prohibits Company employees from having in there systems detectable levels or identifiable traces of certain drug or other substances."

Part of our policy is to require a drug screen urinalysis as part of the pre-employment procedure. If an applicant should fail the test a second test may be taken after thirty days.

Another area that requires a drug screen test and a blood alcohol test is if an employee is injured on the job to the extent that medical attention is required or

in the event that an accident results in the destruction or loss of company property.

Klukwan, Inc. and its subsidiaries has nearly five hundred employees in Southeast Alaska. Our employees have accepted the drug and alcohol Policy. The work they perform can be hazardous and each employee is entitled to the safest working conditions that can be provided.

For over a year industry has made significant progress to eradicate drugs from the work place. House Bill-283 is a substantial step backwards. Legislation that prohibits drug testing will significantly impair industries fight against illegal drugs, and makes it more difficult to provide our employees with safe working conditions. We ask that this proposed legislation not be approved.

Very truly yours,

Thomas P. Blanton
Vice President,
General Counsel

TPB:skl

GREATER SITKA
Chamber of Commerce, Inc.

DATE: May 7, 1987

TO: [redacted]
House Labor & Commerce Committee
Alaska State Legislature

Committee Members:
Koponen
Boucher
Davidson
Ellis
Furnace
Menard

RE: HB 283 -- Employee Drug Testing

FROM: Roger L. Hames, President
Greater Sitka Chamber of Commerce

The Greater Sitka Chamber of Commerce Board of Directors opposes HB 283 and urges you to drop this bill from consideration. Due to the excessive costs to the employer from lost production (from physical and functional absenteeism and premature mortality from accidents at the workplace, particularly in industrial operations) and due to the skyrocketing costs of employee medical, we believe the employer has the right to exercise prehire physical testing which includes screening for alcohol and drug abuse. Many of the companies in business today have contractual or moral obligations to provide employees with rehabilitation for alcohol and drug abuse. Because of this significant cost, both in dollars for insurance fees and lost time, we believe the employer has the right to protect himself from these excessive costs by requiring prehire physical testing if he so desires.

We also believe that it is an employee's right to be assured that individuals working alongside of him are in good health and of clear mind.

cc: Senator Dick Eliason
Representative Ben Grussendorf

POST OFFICE BOX 638 • SITKA, ALASKA 99835
(907) 747-8604

ALASKANS for Drug-Free Youth

DRUG-FREE YOUTH

WILL MAKE
A STRONG AMERICA

VOL. 1 NO. 1 Newsletter November 1987

First Lady Nancy Reagan hugs Lynda Adams, our Alaska State Networker, after her address at the National Federation of Parents for Drug-Free Youth Conference Oct. 10-14, 1982 in Washington D. C.. To our First Lady we extend our continued "thanks" and appreciation!

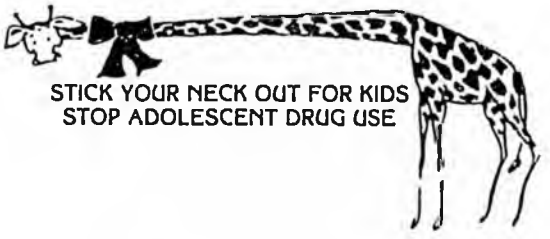
With a grant from Action, ALASKANS FOR DRUG-FREE YOUTH rented an office, hired a secretary, obtained an 800 phone number and opened for business on September 1.

The goal of ALASKANS FOR DRUG-FREE YOUTH is to form a network of parents and other caring people across Alaska who are willing to work together through every facet of their community to send a clear message to our youth of No drug use, including alcohol, and to be appropriate role models for this goal.

The office will provide current information on drugs in the form of books, pamphlets, videos and tapes; work with schools to update the education of children concerning drugs; provide assistance with updating libraries statewide with current drug information; provide important contacts on National and State level for information, and help provide local referral support for parents whose children are involved with drugs.

The pleasant voice on our end of the phone is Judy Crellin, our able secretary. Judy is our only paid employee, but she has quickly joined after hours in volunteering her time and talents. We really do appreciate her especially since she is the only person in our office to master our computer!

Anyone interested in volunteering for the center, or in learning more about ALASKANS FOR DRUG-FREE YOUTH may call 247-CARE in Ketchikan, or toll-free 800-478-CARE from anywhere in Alaska; or may write in C/O P.O. Box 8515 Ketchikan, Alaska 99901.



Dear Concerned Alaskans,

For the past six years, Ketchikan Families in Action has been in existence as a group of volunteer parents who endorse and encourage drug-free youth through community awareness and education. We are non-profit, tax-exempt volunteer parent group organization under the umbrella of the National Federation of Parents for Drug-Free Youth.

We are currently the recipient of a grant from ACTION, the National Volunteer Agency to develop other volunteer drug education and awareness parent groups in the state of Alaska and to form a network of concerned parents for drug-free youth across the state.

We have established a statewide office called "Alaskans for Drug-Free Youth which is located in Ketchikan and is serving all Alaskans through an 800 statewide toll-free number. Parents with concerns for drug-free youth and those wishing to form a community group such as ours may call us toll-free within the state of Alaska at 800-478-CARE (2273). We are able to send you a packet of information and will also be able to do training workshops for those wishing to form a parent volunteer community groups. In the Ketchikan area only, our phone number is 247-CARE (2273). Our office is open from 10:00 AM to 4:00 PM Monday through Friday. Our phone line will be operable 24 hours a day manned by volunteers.

With this grant we will be producing a quarterly newsletter sharing the latest information as well as events and ideas happening in other Alaskan communities. Our office is developing a library of resource information which will consist of books, pamphlets, videos and audio tapes. Information on National initiatives can also be obtained through our office on such programs as Safe Homes, Operation Prom/Graduation, Just Say No Clubs, Youth to Youth, NFP Reach Training, and the Red Ribbon Campaign.

Parents are a vital part of the prevention process. Please contact our office for more information either at 800-478-CARE or by writing to Alaskans for Drug-Free Youth at P.O. Box 8515, Ketchikan, Alaska 99901. Let us know if you would like to receive our newsletter. We are anxious to work with you for our Alaskan youth.

Sincerely,

Lynda Adams
Executive Director
Alaskans for Drug-Free Youth

If you like our newsletter send in your membership soon to get the next issue.

ALASKANS FOR DRUG-FREE YOUTH
Box 8515
Ketchikan, Alaska 99901

A tax exempt non-profit organization
We welcome contributions in any amount

Name_____

Phone_____

Address_____

City_____ State_____ Zip_____

Dues (per year) INDIVIDUAL $20 FAMILY $25 GROUP $35 SENIOR CITIZEN/YOUTH $7.50

When you join AFDFY by sending in your membership/donation, you are supporting the work we are doing to promote drug-free ideals for our youth. With your membership, AFDFY can offer you: newsletters, networking information, legislation updates, resource materials, speakers, and our 24 hour toll-free help line.

Parents From Across the Country Meet in Nation's Capitol to Fight Drugs

Washington, D.C. - Parent Group Leaders from all 50 states and Guam recently came together for a three and a half day training seminar sponsored by the National Federation of Parents for Drug-Free Youth (NFP) in Washington, D. C. Attendees included the NFP's State Networkers, Legislative Liaisons and Youth Board. Key officials from the Office of Substance Abuse Prevention, the U.S. Department of Education, the Drug Enforcement Administration, ACTION, Congress and numerous state groups presented workshops for the participants. The workshops provided valuable information on a wide range of topics including lobbying, legislation, networking, fundraising and communications.

A coalition luncheon brought together over twenty organizations in the field of drug abuse prevention. Dr. Donald Ian Macdonald, Special Assistant to President Reagan for Drug Abuse Policy, gave the lunchtime address.

A highlight of the seminar was the performance by the group Randy James and Northwind of their song "You Don't Have to Get High in America to Get By in America." The song has been adopted as the anthem of the NFP.

Founded in 1980, the NFP is a non-profit organization committed to raising a generation of drug-free youth. Its principal objective is to assist in the formation and support of parent and youth groups in communities across America to eliminate drug and alcohol use among children and adolescents. First Lady Nancy Reagan serves as its National Honorary Chairman.

Attending from Alaska were:

Lynda Adams (Ketchikan), Alaska Networker for NFP, and Bobi Trani (Juneau), Legislative Liaison for the NFP. Important contacts were made at this training session by Lynda and Bobi to aid in the networking and legislative efforts. They also had important separate meetings with Nancy Murkowski, head of Congressional Families for Drug Free Youth and with Catherine Stevens, wife of Senator Ted Stevens.

CONFERENCES HELD

Don't just try it one time for the fun of it. Some have died because they thought Cocaine was a "safe" drug.

Lynda Adams and Bobi Trani represented us November 8-11 in Los Angeles at the White House Conference for a Drug Free America. This conference represented an opportunity for citizens to share their ideas and experiences in order to more vigorously and directly attack drug abuse at all levels - local, state, federal and international. The primary purpose of the Conference is to gain a more thorough understanding of the nature and extent of this problem, and by working together to develop the most effective national strategies to help make America drug free. After six regional meetings, the national conference will be held in Washington D. C. and the insights learned from both the regional and national conferences will be incorporated into a final report to the President and Congress.

Also, attending the White House Conference from Ketchikan were Dick Callentine, Private Counselor and Don Pennington, Vice Principal of Ketchikan High School. Following the conference all four representatives attended Dr. Forest Tennant's Fitness for Duty and Rapid Eye Test Training. Look forward to more information on this in the next newsletter!

WHO IS RESPONSIBLE FOR THE FUTURE OF OUR COMMUNITY?

media persons from television, radio and print
juvenile court probation officer
youth-serving agency personnel
parent organization leaders
medical service providers
social service providers
school administrators
school counselors
business people
senior citizens
city officials
volunteers
ministers
teachers
parents
police
youth
YOU!

"JUST SAY NO" - Bobby Heard comes to S. E.

Juneau schools were the scene of a week long anti-drug blitz recently, culminating in a public "Just Say No" rally.

Bobby Heard, a University of Texas student, and nationally known "Just Say No" trainer was the keynote speaker. "Just Say No" pledges collected from students during the week were turned in to Mayor Polley of Juneau, who mailed them to First Lady Nancy Reagan.

The pledge is simple: "I pledge to lead a drug-free life. I want to be healthy and happy. I will not use alcohol. I will not use tobacco. I will say No to illegal drugs. I will help my friends say No. I pledge to stand up for what I know is right."

Bobby also spoke to three secondary schools and conducted an anti-drug workshop for Teens. He started this movement in Texas and has traveled around the Nation helping establish "Just Say No: clubs.

In Ketchikan, Bobby Heard spoke to the three secondary schools and gave a "Just Say No" Workshop for 100 Teens. The training session dealt with how older students can effectively go into the elementary schools and talk to the students about being Drug Free. The younger students are very impressed to think that the "older" students care about them.

We know that together, they can make a positive difference. Dr. Donald Ian Macdonald, White House Drug Consultant declares: "The importance of this new movement of young people cannot be overestimated. No other generation has had to cope with so much peer pressure at so young an age. But those kids who do learn to handle peer pressure and think for themselves may well be the strongest, most responsible, finest youngsters that we have seen in this Nation."

N.F.L. ADVISOR PRESENTS WORKSHOP

Dr. Forest Tennant was in Ketchikan September 8 and 9 for a series of talks to teachers, parents, youth, physicians, employees and police.

Dr. Tennant is Executive Director of Community Health Projects, Inc., a drug abuse treatment center. He is also Associate Professor, UCLA School of Public Health, Drug Advisor for the NFL, Drug Abuse Consultant for the Los Angeles Dodgers, California Highway Patrol and the California Department of Justice.

The main theme of his talks was how drugs can alter brain chemistry and ruin lives. He explained that the brain produces chemicals called neurotransmitters. These chemicals may be replaced by drugs such as cocaine, marijuana, alcohol and nicotine. When use of these drugs is discontinued the brain may not be able to return to producing neurotransmitters at the former level. This will cause the person to function below par. The replacement of the neurotransmitters by drugs is part of the addiction process.

Drugs in the workplace workshop was the subject of Dr. Tennant's talk to employers. He discussed the need for pre-hire urine testing and mentioned that random testing was not a good idea. He urged businesses to help the impaired employee get treatment with the option of returning to his job when clean.

Dr. Tennant described the Alaska legal ruling that marijuana can be used in the privacy of one's own home as archaic. "It was passed out of ignorance and has harmed a lot of people," he said.

Dr. Tennant stated that a community response to drug use should be multifaceted, including drug education, testing before hiring, early identification, prevention, caring treatment, and some hard discipline.

VISITORS TO OUR OFFICE

NANCY MURKOWSKI, head of Congressional Families for Drug Free Youth, took time when she was in Ketchikan recently with Senator Murkowski, to stop by and see our new office in the Prospector Mall.

BOBBY HEARD, "Just Say No" Sophomore from the University of Texas, visited with us while he was here for his training sessions on how to form "Just Say No" Clubs.

REP. ALICE HANLEY (Anchorage), stopped by while she was in Ketchikan. She attended Dr. Forest Tennant's workshops, as did Walt Furnace (Rep. - Anchorage).

BRIAN KELLY, associated with Milam's in Juneau, took a few minutes during his busy travel schedule to stop in. He brought us copies of UNDER THE INFLUENCE by James R. Milam & Kathryn Ketcham. Our "thanks" to you Brian!

RESPONSIBLE DRINKING . . . AN IRRESPONSIBLE CONCEPT

by Corporal Ed Moses,
Missouri State Highway Patrol

According to the U.S. Surgeon General's 1980 survey, every age group is enjoying better health . . . except for those between 16 and 24. In fact, the death rate for this age group has increased significantly in the last 10 years!

The single biggest killer of our 16-to-20 year-olds is accidents. And the biggest cause of accidents is alcohol.

Some law enforcement agencies in an effort to address the problem, have endorsed or promoted "responsible drinking groups." On the surface they may sound good, but problems exist with the philosophy behind the responsible drinking concep.

Our young drivers frequently violate the speed limit; however, never has there been any department conducting or endorsing programs that encourage safe driving techniques at higher speeds. Another defect in the philosophy is with the term itself . . . responsible drinking. How does one teach a teenager to break the law responsibly? All drinkers believe they drink responsibly already; it is always the "other guy" who causes the problems.

A case in point was a 16-year-old girl who defensively told a teacher she was a responsible drinker; she only drank between six and 12 beers at the weekly parties. The shocker is that the majority of the junior class nodded their head in agreement to her definition of responsible drinking.

Some specific problems with the responsible drinking concept are:

1. Prior to age 20-22, a person can become an alcoholic 10 times as quickly as he would had he waited until that age to drink. This fact, plus the current drinking trend of our young, helps explain that a third of our 10-million alcoholics are teenagers.

2. The threshold of impairment is estimated between 0.03% and 0.05% (one to three beers, depending on size), with everyone being impaired by 0.05%. The attention has been on drunk drivers, yet one to three beers means the driver is two to six times more likely to be involved in an accident.

3. We tell teens when they have had too much to drink (0.03% to 0.05%), and then tell them to use good judgment in driving, riding with impaired drivers, making social decisions, etc. The problem is this: dexterity is the second area of the brain affected by drinking; the first areas to be affected are inhibitions and judgment. So, what we have is a relatively new driver, drinker, socializer, trying to make good decisions with an inexperienced impaired brain.

4. Some adults believe if we accept the fact that teens are going to drink anyway, and cater to that belief, we have helped to avoid other problems such as accidents, use of other drugs, etc. Some organized groups propose signing a contract with children. But, this only lulls the parent into a false sense of security that a signed piece of paper in a dresser drawer will have more pressure on a teen than his peers in a party atmosphere. Look at the contract from the teens' perspective. Their parents, in writing, just told them it is OK to drink . . . just don't drive or ride with someone under the influence.

One such parent thought he had guaranteed a safe party by making the teens promise "no drugs and no drunkenness" before buying them the keg. The parent even supervised the party. A teen leaving the party had an accident, which seriously injured him and killed two of his friends. One of the dead was carrying nearly $1,000 in cash, reportedly money from drug sales at the party.

We in law enforcement must also be careful in how teens read our signals. Surveys of police officers in DWI schools reflected that most officers will ticket teen drivers for doing 10 miles per hour over the speed limit. However, very few officers will ticket minors for possession of alcohol. Most say they make them pour out the alcoholic beverage, talk to them, and then send them on home. By doing this we are telling teens, and society, that 10 miles over is much more serious than drinking, which statistics indicate is not true.

5. "Responsible use" promoters tend to zero in on drunk driving, misunderstanding or ignoring the other problems drinking imposes on teens . . . alcoholism, murder, suicide (a 300% increase in the last 10 years), increased sexual disease, unwanted pregnancies, etc.

The bottom line is this: The parent loves his child in such a way that the biggest concern is if the child will be hurt or killed, not how. Those with less commitment to the individual child attack the problem with an idea (responsible drinking) that will only magnify a problem in another area.

While some efforts are well intended, let us not "kill our kids with kindness." Instead, as actress Carol Burnett said, "Sometimes you have to love your children enough to let them hate you." They will love you later for it.

Ed Moses is a Sergeant with the Missouri Highway Patrol. He is a member of the Board of Directors for Drug Alcohol Tobacco Education the educational arm of Christian Civic Foundation of Missouri, and he is a past Chairman of the Board of Missouri Federation of Parents (MFP). This article is reprinted with grateful acknowledgement to MFP.

WE NEED YOUR HELP!

Please indicate any of the following areas in which you are willing to assist.

- ___ Join/help organize a parent group in your neighborhood
- ___ Speakers Bureau
- ___ Fund-raising
- ___ Clerical Assistance
- ___ Legislative Support
  - ___ Testimony
  - ___ Letter Writing
  - ___ Phone Campaign
- ___ Youth Development Activities
- ___ Drug Education
- ___ Public Relations
- ___ Graphic Arts
- ___ Media
- ___ Review Literature
- ___ Telephone Tree
- ___ Report "Do Drug" Messages (T.V., Radio, Movies, Music)
- ___ Liaison with organizations and/or agencies
- ___ Contact Churches
- ___ Newsletter Mailing
- ___ Journalist
- ___ Photographer
- ___ Printing
- ___ Courtwatch

COMMUNITY PARTICIPATION

Prevention of drug abuse before it becomes a problem for an individual is the best solution. The individual, the family, the educational system, and government and community agencies all have a role in drug abuse prevention.

Families and educators can help individuals develop the abilities and attitudes needed for a healthy lifestyle. These include self-confidence, self-esteem, social skills, trust, and the ability to develop and achieve realistic goals.

Individuals and community groups need to educate others about drug abuse and promote positive action on the local level.

Government agencies have the responsibility to develop policies and programs that promote healthy attitudes toward drugs. They can fund research into the causes of abuse and give special assistance to disadvantaged groups. Community agencies are able to provide help to individuals on the local level.

JOIN THE RED RIBBON CAMPAIGN

sponsored by the National Federation of Parents for Drug-Free Youth annually, Pick a week - buy lots of red ribbon & pins - give them to everyone to wear for DRUG FREE YOUTH. People really notice and it doesn't cost much.

Bored...and Drug-Free?

Start a Youth to Youth organization. Youth to Youth is a positive peer pressure organization. It started out in Columbus, Ohio and has spread out all over the Nation including Ketchikan, Alaska. Here, in Ketchikan, we have done a large variety of things. We raised money and attended the National Youth to Youth Conference; put on our own mini-conference and have lots of fun incuding lock-ins, dances, movies, and our own PSA's over the radio. So, if you're bored, drug-free, and want to have lots of fun, start a" Youth to Youth," or a drug-free fun organization.

Katherine McGee
Ketchikan Teen

OPERATION PROM GRADUATION - a guide to having a fun, drug-free evening. Order from National Federation of Parents for Drug-Free Youth, 8730 Georglia Ave., Suite 200, Silver Spring, Maryland 20910

Members: $4.00 Non-Members $5.00

VOLUNTARY DRUG TESTING

The Sitka School Board voted, without objection, to continue and expand the voluntary drug testing program, which was started last year for the wrestling and basketball teams. The program will now include boy's and girl's basketball, volleyball, wrestling and track and field.

The program allows athletes to voluntarily sign up for random urine testing to check for drug and alcohol use. Proponents say it gives young athletes an excuse to resist peer pressure and refuse drugs.

School Superintendent Art Woodhouse said he wanted to give new teacher advisors and coaches a chance to study the plan before expanding to more activities.

Ketchikan Community Health Fair

On September 26th. & 27th. Ketchikan participated in a "well person clinic". People could get their vital signs checked, along with vision and hearing testing. In one area breast exams were done, with training to help detect cancer.

Families in Action had a table with informative pamphlets, books, bumper stickers, buttons and red ribbons. There was also a display wall with a decision tree and large posters to educate about the hazards of drug use.

This year four local groups coordinated an educational viewpoint directed towards Youth. Ketchikan Youth Services, Ketchikan Teen Pregnancy Coalition, Life is For Everyone, and Ketchikan Families in Action set up a room with movies addressing how just saying "NO" could help young people in a variety of situations to stay healthy. Free popcorn was given out. We displayed a decision tree that shows the effects of adverse behavior on a person as opposed to just saying "NO". The adverse effects side of the tree is weighted down and unhealthy looking.

We are excited that so many groups of interested people can agree on the importance of teaching our young people about high self esteem and the idea that saying "NO" can be the best answer.

We encourage you to be visible with our message wherever large groups of people gather. Set up your table and listen to the questions...

SAFE HOMES - *A Pledge for Parents*

This is a program to encourage "Peer Pressure and Communication Among Parents". The pledge parents sign states: I will not allow:

1. Parties in my home when I an not there.
2. Youth to consume alcohol in my home.
3. Use of illegal drugs in my home.

The list of names of the pledge signers are mailed to Safe Homes members and is published in the newspaper so that parents may know who has a safe home.

In Ketchikan, the High School and Junior High include the pledge in their mailing at the beginning of the year to parents.

The Ketchikan Lions Club donates the cost of the printing. Samples of the pledge are available from our ALASKANS FOR DRUG FREE YOUTH office.

We encourage all parents with school-age children to participate. If you would like to start this program in your community contact us for more information.

HUGS & KISSES

We feel so good when we think of how much help many of our local fraternal organizations and local businesses have given us through the years.

SEAMART - a local grocery store is using their grocery bags to help spread the message about where to get help for drug abuse. Printed on their grocery bags are the phone numbers of places for information, Youth and Adult Programs, Activities, Treatment and Counseling. We appreciate their contribution in the fight against drug abuse in their Ketchikan and Sitka communities.

Our local ELKS CLUB 1429 has been such a bunch of good guys...they recently contributed $200 for printing of stationary & flyers and they have also paid for bumper stickers.

ALASKA AIRLINES have helped us many times in transporting our speakers, and with special allowances with tickets to our Alaskan Networkers.

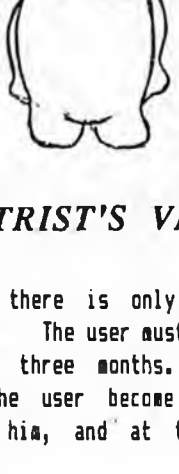
Our local LIONS CLUB have underwritten the cost of our Safe Homes pamphlets and the SCHOOL DISTRICT paid for their mailing to all our Junior and Senior High School parents.

MCDONALDS was great, as usual, when we had our "Just Say No" Day. They had agreed to provide lunch & drinks for 75 participants. When we had a larger than expected group, on short notice, with one phone call just before lunch, they came through with 110 lunches!

MADISON HARDWARE has been great to us for so long and we really appreciate them. They now have an abundance of copy paper for their machine and their phones ring again with "Hardware" business, since we have our office open. Thanks Bob!

A big "THANK YOU" from ALASKANS FOR DRUG-FREE YOUTH to Everyone!!

FOOD FOR THOUGHT: According to the American Association of School Administrators, in the June 15, 1987 issue of Leadership News, the USA has highest rate of teen drug use of any industrialized nation.



HUGS NOT DRUGS!

A PSYCHIATRIST'S VIEW ON MARIJUANA

In my experience there is only one certain way to be cured from marijuana smoking. The user must be totally isolated from the drug for a minimum of three months. Only after a period of sustained abstinence will the user become aware of the profound effects the drug has had on him, and at the same time, become free of it's addictive effects.

The inability of the user to perceive himself or gain insight into what has happened to him over time is one of the truly pernicious and remarkable aspects of the effects of the drug. Talking rarely works; forthright decisive action by someone willing and able to take responsibility for the fate of the user is necessary. The chronic and heavy, and probably even moderate user, cannot take responsibility for himself.

How the person or persons exercise their responsibility to the user depends on the age of the user, his life circumstances, the severity of the retrogressive changes and deterioration of the user, and so on. I recommend sparing no effort whatsoever in achieving this objective. Searches are in order, use of police to back up parental authority if necessary, hiring a companion for the user, confinement to the home and hospitalization are all methods that I have recommended and have seen used.

Someone who cares must intervene, totally, consistantly and with unrelenting perseverance. Efforts short of an all-out effort generally fail.

In summary, I believe chronic marijuana use affects judgment, motivation, perception, cognition, and will. In addition, the drug causes an overall deterioration of personality; it leads to an estrangement from the mainstream of life; it lowers performance in all areas and it leads to a social phenomenon in which users bond together into both loose and tightly bound subsocial groups. The effects on the user's family life is frequently devastating.

By Harold M. Voth, M.D., Senior Psychiatrist and Psychoanalyst, The Menninger Foundation, Topeka, Kansas; Associate Chief of Psychiatry for Education, Topeka Veterans Administration Medical Center, Topeka, Kansas; Clinical Professor of Psychiatry, School of Medicine, University of Kansas, Kansas City, Kansas; Rear Admiral, Medical Corps, United States Naval Reserve. Reprinted with permission.

LEGISLATIVE UPDATE JUNEAU

By Bobi Trani

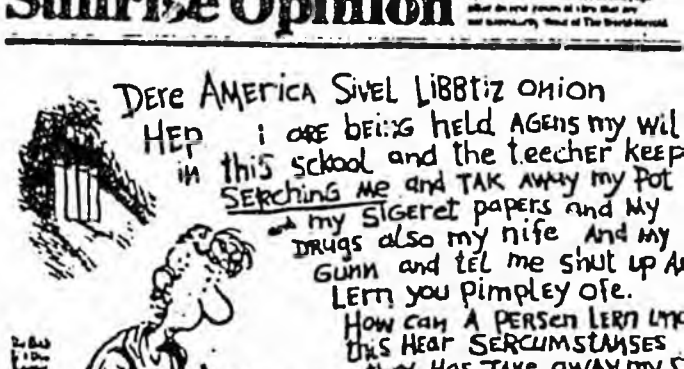
As the Legislative Liaison for Alaska representing Alaskans For Drug Free Youth and the National Federation of Parents for Drug-Free Youth, the focus for this year is modernizing or re-aligning our marijuana possession law to conform with the rest of the United States.

As an educational and informative update on the new medical and scientific information on marijuana, Sandy Spargo and I write a weekly "Line on Pot" to all legislators, newspaper editors, key commissioners and the Governor. We have met with varied reactions, which was expected. On the positive side, Representative Bill Hudson has agreed to send the "Lines on Pot" to all legislators under his cover letter. Senator Jan Faiks has asked that all legislators and committee representatives receive a copy. Senator Jim Duncan of Juneau has written stating that he will vote to recriminalize marijuana when it reaches the floor. Also, adding their names to the House Bill 55 are Representative Fran Ulmer and Representative Bill Hudson.

Other legislators have written to respond to specific materials included in the "Lines on Pot", and have thanked us for writing, but have not committed themselves as of yet. We are feeling like we are making a difference, and will continue to personally contact as many legislators as possible this winter.

Sandy and I are planning to have breakfast viewings of the videos Marijuana: Myths and Misconceptions, and "America Hurts" for legislators when the session begins.

Sunrise Opinion



Omaha World Herald, January 22, 1

MARIJUANA BILLS HEARINGS HELD

The Alaska House Judiciary Committee held S.E. Teleconference hearings that began October 23 in Ketchikan on H.B. 283 and H.B. 55.

House Bill 283 "An act prohibiting certain employees from testing employees for drugs and other substances" would prohibit any pre-hire drug testing of any employees except peace officers, fire fighters or operators of emergency vehicles.

The insurance company for Alaska Loggers Association testified to the importance of drug testing for their companies and of their concern about seven fatalities this year. Long Island Logging Company and Louisiana Pacific Co. both testified that they use pre-hire drug testing, and have greatly improved their safety record as well as their productivity.

Ketchikan Families in Action testified against the bill. They believe pre-hire drug testing should be required for those who may injure others if impaired by drugs, ie. heavy equipment operators, school and public bus drivers, airplane pilots, and taxi drivers etc.

Dr. Forest Tennant testified as an expert witness. He said that pre-hire testing and testing for probable cause during employment is necessary for safe business and has been legally upheld across the Nation. There should be an opportunity for the employee to recover his job when he is drug-free.

Larry Taylor, of Taylor Labs in Sitka, testified as to the accuracy of most reputable labs now. It took a few years for the good labs to come forth and the bad labs to disappear.

Three people testified for the bill as an invasion of privacy; a union representative, a teacher, and the Alaska President of the American Civil Liberties Union.

HOUSE BILL 55 - making it illegal to possess any amount of marijuana in your home.

Ketchikan High School Principal, John Holst, Police Chief Dan Anslinger, concerned parents, a Petersburg Minister and Ketchikan Families in Action all testified in support of this bill.

Their concerns were that the right of privacy transends the home influencing the children, spouse, friends, schools and the community. Although enforcement will be difficult and not a priority, it is the message that the law will give. Potency of the drug has increased greatly and research has now documented the many harmful effects and the reasons for them.

House Bill 283 - was further examined when Rep. John Sund spoke to the Alaska Timber Insurance Exchange, a group made up mostly of Logging Companies in S.E. Alaska, and associated services.

The group expressed their concern with the bill stating that it really would prevent them from maintaining a safe environment for their employees and lowering Workmans Compensation Rates. What they need is help from the state to set adequate guidelines for testing and to certify laboratories to do the urine tests.

There was testimony that many employees want drug testing done to provide a safe place for them to work. A banker spoke of the problems caused by an employee using drugs in a bank, who is working with thousands of dollars.

Rep. Sund concluded the meeting by saying that he would modify the bill and is interested in all testimony. He believes that pre-hire testing can and should be done by the logging industry if it is done as Long Island Log and Louisiana Pacific Pulp Mill are now doing it.

If you have input on this bill send it to the House Judiciary Committee.

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This item appeared in the Fairbanks News-Miner the week the House Judiciary Committee held hearings in Ketchikan on recriminalizing marijuana.

"It hasn't been easy for some state employees to abide by the new rule prohibiting smoking in the state courthouse.

"One frustrated smoker made this ironic observation:

"'This is the only state I know where it's legal to smoke pot in your house, but illegal to smoke cigarettes in the courthouse.'"

COMMUNICATE - *your opinion counts!*

Yes, <u>your</u> opinion does count. If all of us in Alaska who care about Drug Free Youth would get in touch with our legislators, we could turn things around.

Personally written letters are rated most impressive - make them clear, brief and to the point. Include personal knowledge and examples, and include the number of the bill you are concerned with.

In Alaska we often have the opportunity to speak to our legislators in person. If you can make an appointment and state the piece of legislation you will speak about, your legislator can be prepared to talk with you.

There is a rule of thumb among legislators that for every person who calls, there are ten who feel the same way, and for every person who bothers to write a letter or visit, there are twenty who hold the same opinion. Very often, your contact will alert legislators to a piece of legislation, and the information, insight, and opinion you offer will stick in their minds.

Do not overlook the <u>power</u> of <u>public opinion</u>. THE PUBLIC IS YOU!

Public opinion messages of 50 words or less can be sent free to your state Legislators from legislative affairs offices across the state. They must be signed and written neatly. Please offer your opinions for support or opposition and give bill number.

Underage cigarette buyers

From the American Lung Association of Alaska

On Monday, August 10th, the American Lung Association of Alaska completed an important test. The test was conducted with two school-age girls: a 9th. grader, 14 year old Shelly Klingbell, and a 5th grader, 10 year old Heather Timmerman. Neither were old enough to legally purchase cigarettes. In the first experiment, the 14 years old was instructed to try to purchase cigarettes from a clerk or store attendant. In the second part, the 10 year old was instructed to enter various establishments and attempt to buy cigarettes from a vending machine.

Shelly, age 14, attempted to purchase cigarettes at 49 different stores; she succeeded at 47 of those. Not only regular cashiers, but also assistant managers sold her cigarettes. Surprisingly, out of 49 stores, only 4 of them asked her to produce ID, when she stated that she left her ID at home, 2 of those stores still sold to her.

Heather, age 10, attempted to buy cigarettes from vending machines at 20 establishments, and succeeded 19 times. At only one restaurant did a waitress tell her she could not buy the cigarettes. Heather stated, at first she was nervous, but later in the test, she said, "It is so easy, I don't even think about it anymore, and a lot of the machines are supervised. Heather was surprised, that three of the machines sold not only cigarettes but also candy.

"I was appalled when I found out that many establishments sold cigarettes to minors!" stated an astonished Deborah Williams, Executive Director of the American Lung Association of Alaska. "Something has to be done, this is totally unacceptable," she notes.

"This test proves that the current laws regarding tobacco and minors are inadequate and unacceptable. New legislation must be adopted, which will prohibit the sale of tobacco in vending machines and which will raise the age at which a minor can purchase tobacco to 19," stated Paul Wrzesinske, Public Relations Director of the Lung Association. The current age to legally purchase cigarettes in Alaska is 16.

"Prior to this test we had only anecdotal evidence about how easy it was for people under 16 to purchase tobacco. We wanted to do a more comprehensive test. Originally, we were planning on doing 50 vending machines and 50 over-the-counter sales. We only did 20 of the vending machines because it got to the point where it was so easy for the 10 year old to purchase the cigarettes that we were just wasting money," noted Deborah Williams. "We have definitely proved an important point, and we hope that all Alaskans will join us in improving the laws on this matter." Cigarettes are the #1 preventable cause of premature death and disability in the U.S., and 90% of all smokers become addicted by the time they are 19 years old. Sixty per cent of all smokers start by age 14, studies show. The younger a person starts to smoke, the more likely one is to remain a smoker, smoke more heavily an dies prematurely. "The time to stop the improper flow of cigarettes to children under 16 is now."

NORMAL and the Drug Paraphernalia Industry

Playing on the nation's concern about imprisoning students and veterans for smoking a few joints, the pot-smoking constituency established its own lobby in 1971, the National Organization for the Reform of Marijuana Laws with the purposefully-contrived acronym of "NORML" to advance its then hidden agenda--legal pot. (At NORML's 1978 Annual Conference, Keith Stroup, then-executive director of the organization, said "It's time we finally took the honest step to declare to the world: we want legal marijuana.")

Throughout its history, NORML'S literature has minimized, distorted, falsified, and ridiculed emerging evidence from the research community on the harmful effects of this drug.

Although NORML states in its "Official Policy" that marijuana should not be used by children or while driving, the sincerity of this message is at best questionable when one realizes that a substantial amount of NORML's annual budget comes from the multi-million dollar drug paraphernalia industry--producers of an entire line of "kiddie" products (imitation "Frisbee" pot pipes, Practice Grass Kits, Candy Quaaludes, Cocaine Comics, etc.) as well as dashboard pot pipes with plastic tube attached for "no hands" use while driving. NORML's funding is augmented by **High Times**, the bible of the drug culture which, according to its editor, NORMAL Advisory Board member, Andy Kowl, was established in 1974 to market drug paraphernalia products to a mass audience.

BOOKS TO BE AWARE OF:

CHOCOLATE TO MORPHINE
by Andrew Weil (Published in 1983)

Dr. Weil is a long time advisory Board member of NORML.

The book's first sentence indicates it is written for teenagers. The publisher says it's also quite popular with school counselors and professionals.

One quote, "Question your parents about the drugs they use. If you can convince them that your drug use is responsible, you may be able to allay their anxiety. Drugs are fascinating because they can change our awareness. Occasional snorting of cocaine in social situations is probably not harmful."

Is **High Times** magazine still being sold in your community? Current articles can teach your child How to grow Marijuana, and through High Times magazine drug paraphernalia can be ordered by mail.

Ketchikan has a paraphernalia ordinance. However, as long as this magazine and others like it abound, our children can order it all by mail.

Please check your local magazine stands and express your concern to the owners if you find High Times magazine on display.

SUPPORT FOR "JUST SAY NO" CLUBS

McDonalds donated 110 free hamburgers, fries & soft drinks at the "Just Say No" training session that Bobby Heard put on for the youth in our community. A big "THANK YOU" from Alaskans for Drug-Free Youth!!

The brain knows the rules
The ♥ knows the score
The brain knows alot
But the ♥ knows more

RESOLUTION
No "Responsible Use"

WHEREAS, the National Federation of Parents for Drug-Free Youth acknowledges and accepts alcohol as a drug, and

WHEREAS, alcohol is an illegal drug for minors, and

WHEREAS, adolescents and young adults are the only age group in the United States whose death rate is increasing, and

WHEREAS, the most prevalent causes of death among this age group are accidents, suicides, and homicides, most of which are drug- and alcohol-related, and

WHEREAS, the use of all illicit drugs including alcohol (which is an illegal drug for young people), may seriously impair the healthy development of children and adolescents, and

WHEREAS, our young people are continuously bombarded with messages to "use drugs," and

WHEREAS, parents, due to lack of knowledge, often provide alcohol to young people at teenage parties in violation of the law,

THEREFORE BE IT RESOLVED that the National Federation of Parents for Drug Free Youth resoundly rejects any educational, prevention, or treatment program which advocates or condones the "responsible use" of illicit drugs including the use of alcohol by minors and further rejects our tax dollars supporting a "responsible use" message.

Adopted October 1982

MEMBERSHIP APPLICATION

I, too, believe America's children should be drug-free. I also believe the best way to achieve drug-free youth is by educating parents, children, teachers, legislators, and others in a *nonblaming* way. I want to join this effort. Please enroll me as:

[ ] Individual Member-$15 per year ($20 outside USA)*
[ ] Two-year Individual Member-$25 per year ($35 outside USA)*
**All checks must be drawn on American banks.*

[ ] Group Member-$35 per year ($40 outside USA)*
[ ] Grandparent Patron-$12 ($18 outside USA)*
[ ] Contribution-$_____

Individual or Group Name _____

Title _____

Address _____

City _____ State _____ Zip _____

Group Contact Person _____

Home Telephone _____ Office Telephone _____

Amount Enclosed $_____ Note: Your donation to NFP is tax deductible.

[ ] Visa [ ] MasterCard Card No.

Expiration Date _____ Signature _____

NATIONAL FEDERATION OF PARENTS FOR DRUG-FREE YOUTH
8730 Georgia Avenue Suite 200 • Silver Spring, MD 20910 • (301) 585-5437
Newsletters included with membership

GOOD GROUPS TO JOIN AND/OR OBTAIN MATERI

National Federation of Parents for Drug Free Youth
8730 Georgia Avenue, Suite 200
Silver Spring, Maryland 20910 ($15 per year)

Committees of Correspondence
P.O. Box 232
Topsfield, Massachusetts 01983 ($10 per year)

American Council for Drug Education
204 Monroe Street
Rockville, Maryland 20850 ($25 per year)

PRIDE
100 Edgewood Avenue, Suite 1002
Atlanta, Georgia 30303 ($12 per year)

All have catalogs with prices available on request. Committees of Correspondence headed by Otto and Connie Moulton is a great source of information. The Moultons came to Ketchikan about 4 years ago to help us in our efforts toward drug free youth. We love them both and appreciate them for all their help.

DRUG-FREE YOUTH
WILL MAKE A STRONG AMERICA

ALASKANS FOR
DRUG-FREE YOUTH
P O BOX 8515
KETCHIKAN, ALASKA 99901
PHONE 247-CARE
In Alaska, Call Toll Free:
(800) 478-CARE

FILM PREVIEW

The following videos we have available in our Library.

AMERICA HURTS: THE DRUG EPIDEMIC (35 min.) Hig School/Adults A powerful documentary tha examines the frightening, crippling menance o our society's drug use, the ramifications o which create an ever-expanding circle o drug-related death and destruction o international proportions.

Dr. Forest Tennant's NFL Drug Educational Series

1. "My Brain Doesn't Work Like It Used To"
2. "Don't Drop The Ball Again"
3. "Insults And Injuries:
4. "Docter, I Can't Quit"

MARIJUANA: MYTHS AND MISCONCEPTION (90 min. High School/Adults Robert C. Gilkeson, M.D reviews the latest findings in drug & brai research, taking the viewer step by step from th chemicals in drugs - alcohol, cocaine amphetamines, LSD, and herion - to thei alternation of brain cells to the result of thos brain cell changes on personality, learning an performance.

John & DeDe Sung
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"USERS AREN'T
THE ONLY LOSE

H. Edward Babbush, Director, Career Development Center, California State University, Long Beach

VIEWPOINT

BUSINESSES AND UNIVERSITIES MUST TEAM TO STOP DRUG ABUSE

Recent court decisions have ruled against intrusive, random drug testing of employees. At the same time, however, many employers are expanding their testing of job applicants.

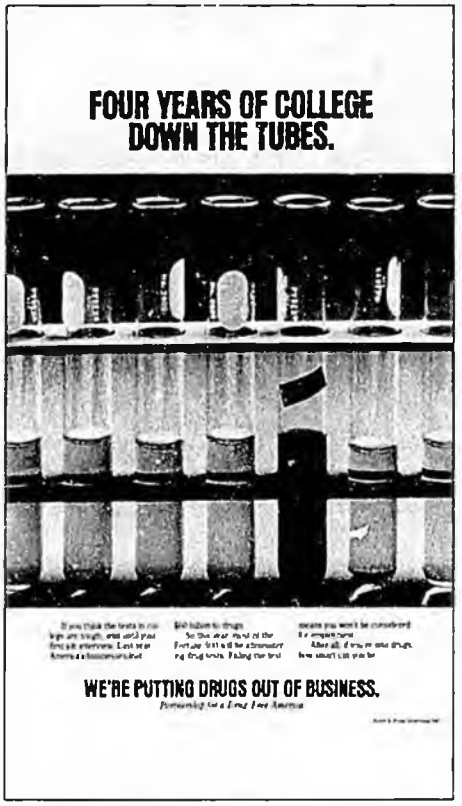
Have these companies finally recognized their social responsibilities? Are they concerned about the billions of dollars spent on illicit drugs? Are they concerned about the impact an individual's drug abuse has on the family, our social structure and future generations?

Maybe. But in all likelihood, the driving force behind the latest concerns of employers in reducing substance abuse among its employees is the bottom line, money.

Alcohol and drug abuse in the workplace is costing American industry more than $100 billion annually in personal injuries, property damage and lost productivity. Twenty-six to 33 billion of these lost dollars are attributed to drug abuse.

Alcohol and drug abuse in the workplace is often believed to be the real cause of poor performance and quality of services, frequent absenteeism and tardiness, insubordination, threats, poor quality control and product reliability, industrial accidents and other security infractions.

Consequently, while many companies are expanding their Employee Assistance Programs (EAP) and emphasizing preventive and rehabilitative services, nearly 30% of businesses are currently screening job applicants for drugs to lessen the chance that employees will be bringing their problems to the job. Almost half of all businesses — 47.2% — will be conducting screening within two years, and more than 90% of Fortune 500 companies are considering implementing such programs.



But should and can American business have additional responsibilities and take a more active stance against drug abuse? Does it have a responsibility to inform students and other applicants of drug testing for new hires and to subtly attempt to discourage drug abuse?

The answer lies in a series of new public service advertisements endorsed by business.

The impetus for this program came about in June 1986. Northrop Corporation's director of college relations, Jim McNeely, sought to determine how best to inform colleges and students that the company would test all applicants for drug abuse. McNeely contacted the career development center director at California State University, Long Beach (CSULB), for input on the issue.

Two days later, 20 employer and university representatives gathered to discuss substance abuse problems and new applicant testing. Attendees represented such companies as Xerox Corp., Rockwell International, Martin Marietta and Hughes Aircraft.

After sharing ideas, problems and established policies and procedures for three hours, the group was unable to define the difference between "abuse" and "use." While they concluded this eventually would be decided in the courts, three concerns required immediate action:

- The acquisition of current, broad-based statistical information regarding drug testing program implementation.
- A means to provide drug abuse testing information to high school and college students.
- A series of public service ads to communicate the drug testing message to students and applicants.

A subcommittee met early in July and developed a questionnaire to determine the extent of drug testing, and present and future directions. They used the College Placement Council's mailing list to contact personnel responsible for college relations and recruiting in 1,200 council-member organizations. It also sought the placement council's statistical services to tabulate and publish the results.[1]

Larger Companies Are More Likely to Test for Drugs

According to the survey results, 28.2% of respondents said drug screening, usually including urinalysis, was required of potential employees. Another 20% had plans to adopt the practice within the next two years.

Finer interpretation of the data, however, indicated a large variation between respondents from various industrial classifications. For example, 70% of

the utilities, including transportation, were already testing, with this figure projected to increase to 86.5% within two years.

In the aerospace industry, which had a 42.9% testing rate, 22 of 28 companies responding (78.6%) indicated that they would be testing within two years. Glass, paper and packaging companies' 40% testing rate would jump to 70%, and building material manufacturers' and construction companies' 38.5% figure was projected to increase to 76.9% (see Figures 1 and 2).

The survey also said the larger the company, the more likely it is to have a testing program. Many companies are testing not only full-time employment applicants but also potential interns and part-time and temporary employees.

In most cases, employers are informing applicants that a urinalysis is required as part of a physical; 88.6% of survey respondents said they would not hire college-trained applicants who failed the drug test.

Most employers recognize that alcohol is the major problem in American society today, but it is difficult to test for it. Consequently, marijuana and cocaine were the substances of abuse in most disqualifications (see Figure 3). It is usually personnel or human resources officials who must inform applicants when they have been disqualified (see Figure 4).

The University of California at Los Angeles and CSULB developed bro-

FIGURE 1

RESPONDENTS WITH DRUG SCREENING PROGRAMS BY INDUSTRIAL CLASSIFICATION

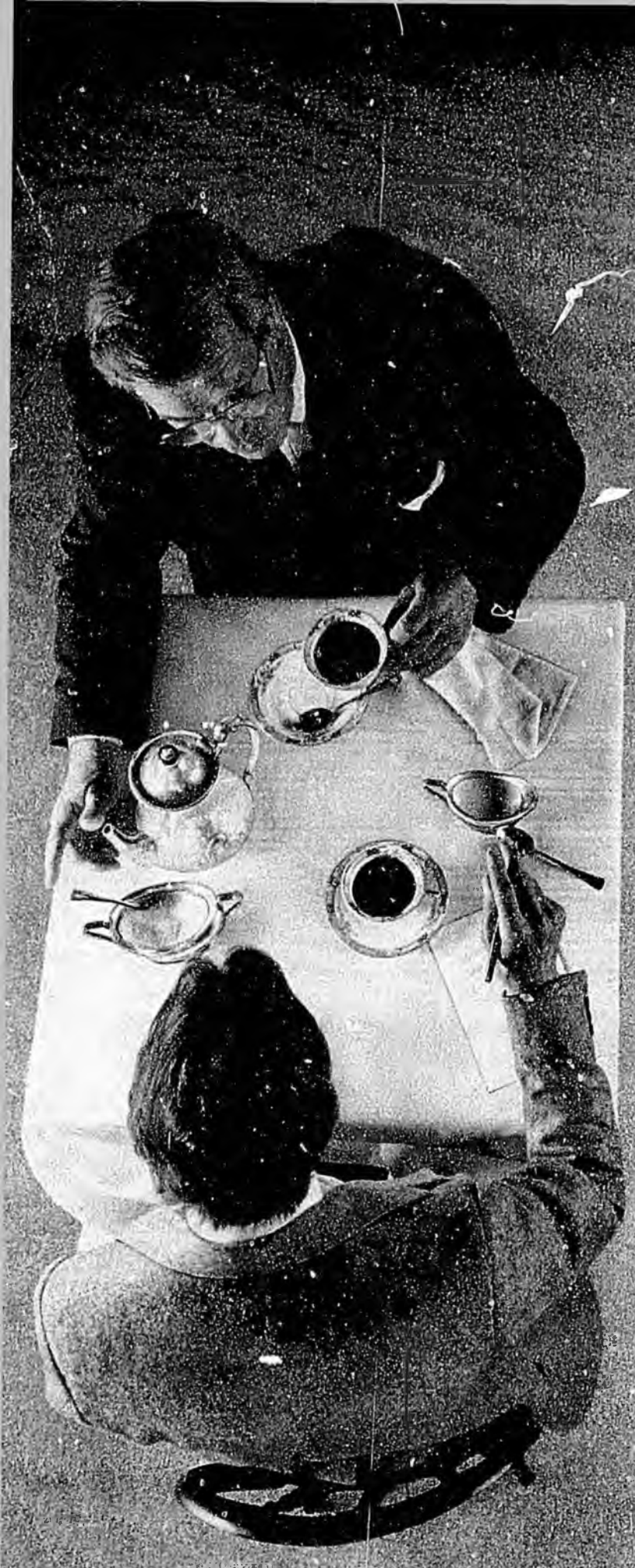
Type of Industry	Respondents Number		%	
	Total	Positive	% Total	% By Type
Utilities—public (incl. transporation)	74	52	37.1	70.3
Chemicals, drugs, & allied products	35	13	9.3	37.1
Aerospace	28	12	8.6	42.9
Petroleum & allied products (incl. nat. gas)	25	11	7.9	44.0
Glass, paper, packaging, and allied products	20	08	5.7	40.0
Research and/or consulting organizations	38	08	5.7	21.1
Metals and metal products	19	06	4.3	31.6
Building materials manufacturers and construction	13	05	3.6	38.5
Electrical and electronic machine and equipment	51	05	3.6	9.8
Banking, finance, and insurance	56	04	2.9	7.1
Merchandising (retail and wholesale) and services	43	04	2.9	9.3
Automotive and mechanical equipment	15	03	2.1	20.0
Computers and business machines	23	02	1.4	8.7
Federal government	11	02	1.4	18.2
Local/state government	05	01	0.7	20.0
Accounting	09	—	—	.0
Nonprofit organizations and educational institutions	11	—	—	.0
Did not respond to classification	21	04	2.9	19.0
*Rounded to nearest one-tenth of 1%	497	140	100.1*	28.2

FIGURE 2

CURRENTLY TESTING AND IMPLEMENTING TESTING BY 1988*

Industry	Now Testing	New Testing Two Years	% Testing Two Years
Utilities—public (incl. transportation)	52	12	86.5
Chemicals, drugs, & allied products	13	09	62.9
Aerospace	12	10	78.6
Petroleum & allied products (incl. nat. gas)	11	06	68.0
Glass, paper, packaging and allied products	08	06	70.0
Research and/or consulting organizations	08	06	36.8
Metals and metal products	06	02	42.1
Building materials manufacturers and construction	05	05	76.9
Electrical and electronic machine and equipment	05	11	31.4
Banking, finance, and insurance	04	08	25.0
Merchandising (retail and wholesale) and services	04	05	20.9
Automotive and mechanical equipment	03	02	33.3
Computers and business machines	02	02	17.4
Federal government	02	02	36.4
Local/state government	01	01	40.0
Accounting	—	01	11.1
Nonprofit organizations and educational institutions	—	03	27.3
Did not respond to classification	04	06	47.6

*Rounded to nearest one-tenth of 1%



Mr. Parker planned to fire Dave today. He took him to lunch instead.

Dave was sure this was his farewell lunch. And it was . . . until Mr. Parker took a second look at Dave's record. Great attitude, extra hours, no sick time—and a real way with people.

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chures to publicize employer testing and campus counseling programs to students. These brochures tell students what companies are doing and why. In addition, they indicate the consequences to students testing positive and campus assistance programs for those with problems. Brochures were mailed to other universities to encourage them to provide similar information to their students.[2]

With students more aware of employer drug testing, the hope is fewer will abuse drugs, and addicted applicants will not apply to companies with testing programs.

The Ad Campaign Is Not Designed to Tackle the Entire Problem

Al Kidd, vice president of Knoth & Meads advertising company in San Diego, California, volunteered his creative staff's services to prepare a series of public service ads regarding testing programs. Consequently, a brainstorming meeting was held with Kidd and his vice president for creative art, Tony Durkett.

The pair decided ads should be geared specifically toward high school and college students who would soon enter the labor market. The ad campaign would not take on the entire problem of drug and alcohol abuse, but would zero in on a small part of it. The ads would treat the students like the mature employees they would soon become.

The Knoth & Meads staff soon produced a series of ads telling students they should stop abusing alcohol and drugs lest they severely inhibit their chances of employment in their chosen careers.

Then came the glue to bind the ad campaign together, the slogan: "We're putting drugs out of business."

The black and white ads are stark, hard hitting and graphic. They tell it like it is, yet they remain light and readable to command attention and communicate the message to high school and college students.

The ads began appearing in periodicals and newspapers in April of this

FIGURE 3

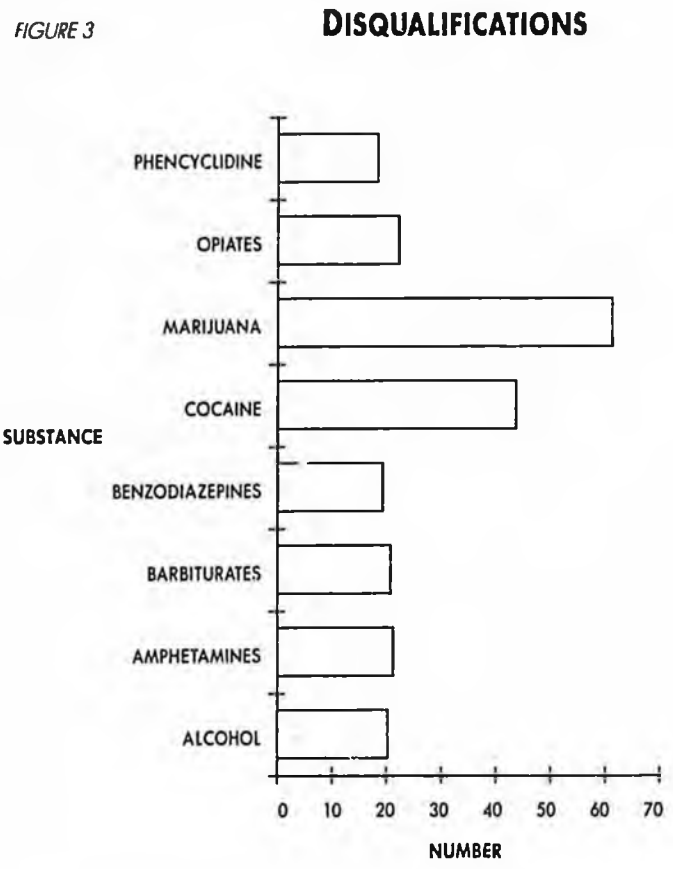
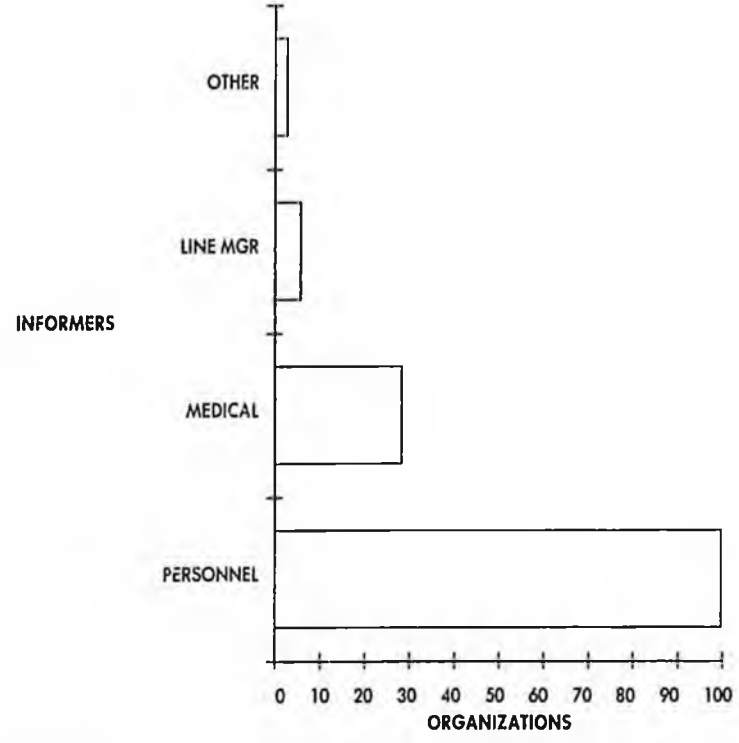


FIGURE 4



year. The targeted publications ranged from McGraw-Hill Publications and *Graduate Engineer* to *Computer World* and PERSONNEL JOURNAL.

The campaign has received the endorsements of the College Placement Council, the American Management Association and the Employment Managers Association. Thus, the committee anticipates expanding the campaign to radio and television spots as appropriate.

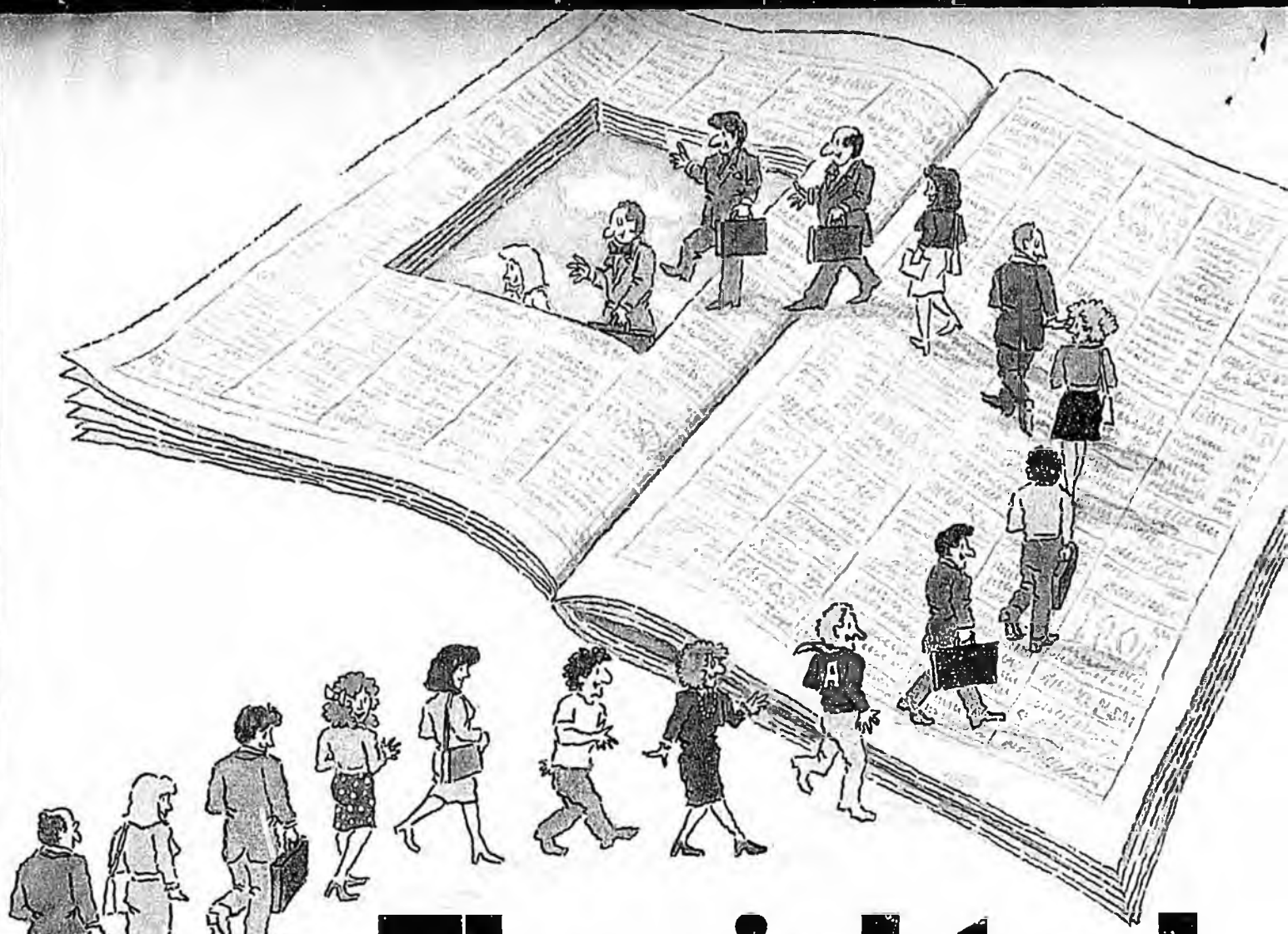
The committee members recognize the campaign may not actually eliminate drug use. Yet they believe it is worth the effort to emphasize that alcohol and drug screening is a part of today's employment picture. Abusers may have good academic and social skills, and may have spent a great amount of time and money preparing for their career, yet they may be unable to obtain a job in their chosen career. ■

Author's note: If you desire more information or wish to help with this campaign, contact: WCPA We're Putting Drugs Out of Business Campaign, c/o H. Edward Babbush, Director, Career Development Center, California State University, Long Beach, 1250 Bellflower Blvd., Long Beach, CA 90840, (Tel.) 213/498-5551 or Alan R. Kidd, Vice President, Recruitment Services, Knoth & Meads Co., 401 W. A St., San Diego, CA 92101, (Tel.) 619/236-6001.

Footnotes

1. The College Placement Council published the survey results in a report entitled, *Pre-Employment Drug Screening: A Survey of Practices among National Employers of College Graduates*. The report is available for $25 from the College Placement Council, 62 Highland Ave., Bethlehem, PA 18017.
2. The Western College Placement Association's (WCPA) Public Relations Committee has published a generic version of the CSULB brochure. The publication, entitled *Alcohol, Drugs and Your Career*, may be obtained free of charge by contacting Joe Borillo, Unisys, 3519 W. Warner Ave., Santa Ana, CA 92704, 714/957-8427.

***H. Edward Babbush** is also vice president of college relations for the College Placement Council. He has served as a consultant for numerous educational institutions and employers.*



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FALL 1987

Drug Abuse Programs in the Workplace: The Need for a Comprehensive Approach

Overview of the Drug Abuse Problem

The nation's attention in recent months has been focused dramatically on the tragic results of drug abuse. The news media's detailed reporting of the drug-related deaths of college basketball star Len Bias and professional football player Don Rogers and the use of cocaine by baseball star Dwight Gooden, coupled with mounting safety concerns resulting from drug abuse by airline and train crews and air traffic controllers, has demonstrated the growth of the problem.

Business Insurance magazine reports that drug and alcohol abuse are now the nation's third largest health problem, estimated to cost between $60 and $120 billion a year in lost productivity, increased job accidents and injuries, higher medical and insurance costs, absenteeism and worker theft to support drug habits. The Federal Railroad Administration found that train accidents caused by substance abuse killed 37 people and injured 80 during a nine-year period ending in 1984. These numbers will, of course, increase greatly if it is shown that the recent Amtrak/Conrail tragedy in Maryland was drug-related.

Increasingly, the focus is on the jobsite as the place to confront drug abuse with well-conceived, proven programs of prevention, education and rehabilitation. Initially, at least, employers' responses to the growing drug abuse problem varied widely—from heavy-handed actions such as surprise drug testing followed by no-recourse firing for unconfirmed positive results to benign neglect by firms wary of legal, labor and employee morale problems.

Media attention to drug abuse by public figures, and the resulting public awareness, has resulted in a dramatic increase in governmental and private action. These efforts include First Lady Nancy Reagan's nationwide education campaign against drug abuse; the expansion of counseling, assistance and rehabilitation programs; the establishment of information hotlines and support groups; and, more recently, the creation by employers of programs for the workplace that reflect a broad understanding of drug abuse, its prevention and its treatment.

Methods of Preventing Drug Abuse in the Workplace

Many employers, including Federal and state officials, are implementing *comprehensive* drug abuse programs aimed not just at the detection of substance abuse but, more importantly, at education, prevention and treatment. These programs, which almost always are based on a written policy, address the needs not only of the employer but of individual employees, fellow workers and the public at large. They are designed to maintain high standards of safety, quality and productivity, and they include the education, rehabilitation and treatment of those employees found to have substance abuse problems.

Historically, employers relied primarily on observation to identify drug abuse. Later, the sensitive nature of certain jobs and the growing awareness of the potential for workplace drug abuse prompted some companies to institute searches of employees' briefcases, lunchboxes, lockers and work areas. Now, a greater number of employers are using some form of employee drug testing, as part of a comprehensive program, to help spot problems before they become a greater danger to the worker and to others.

In the early 1970s, the military began the first large-scale drug abuse program. The Department of Defense now requires mandatory testing of all service personnel and performs more than three million tests a year. The primary test used by the military is the Abuscreen® System, a highly accurate urinalysis using the Radioimmunoassay (RIA) technique. The use of random urinalysis is the linchpin of the military's program, with approximately three million urine specimens being tested annually. Drug abuse in the armed forces has dropped to the lowest point since the program's inception in the early 1970s, and officers in all four services credit this to the deterrent of "pervasive testing through urinalysis," as *The New York Times* reported in April of 1987. Military officers said that in 1986 less than 3 percent of those tested were found to have used illicit drugs, compared to the 27 percent of those surveyed confidentially in 1980 who admitted to using drugs

Prepared by Pracon Incorporated, Reston, Virginia, under a grant from Hoffmann-La Roche Inc.

before military testing began. The military's program places great emphasis on informing its personnel of the dangers of drug abuse and helping them overcome it.

The results of the military's program have encouraged other government agencies and private enterprises to implement similar programs. Many of these programs use testing to identify abusers, who are then offered assistance.

Who Should Be Tested?

Employers make crucial decisions in determining the frequency and nature of testing once they decide to develop an employee drug abuse prevention program. Several levels of testing are in use:

1. pre-employment testing,
2. "for-cause" testing based on observable evidence of drug abuse,
3. testing is part of periodic physical examinations, and
4. random testing.

The most frequent testing use is pre-employment screening, where hiring depends on a favorable outcome. Usually, applicants failing the test are told why they did not get the job and are allowed to reapply at a later date. Many companies also require employees, once hired, to be tested "for cause" if drug abuse is suspected from certain types of continuing behavior, erratic conduct, loss of productivity or safety problems. Random testing, because of its unexpected nature, is said to be the most effective. But random testing is controversial and more likely to be challenged by employees, unions or civil rights groups. Some employers have decided to require random testing only in cases where public safety is a factor, such as for airline or railroad crews.

Only 3 percent of the Fortune 500 companies screened job applicants for drug abuse in 1983; but by 1986 some 40 percent were doing so, according to the National Institute on Drug Abuse. Very soon, at least 50 percent of these major corporations are expected to have some type of employee drug abuse prevention program involving testing. Companies have identified the following advantages of setting up a comprehensive drug abuse prevention and testing program:

1. a safer and healthier work environment,
2. improved safety and product or service quality,
3. increased worker productivity,
4. fewer work days lost,
5. less need for more disruptive actions such as searches and police referrals,
6. reduced security costs, and
7. reduced health, accident and disability benefit costs.

Accuracy and Reliability

Drug testing must be a two-step process, involving an initial test and then a confirmatory test for those samples that tested positive. Three screening techniques are primarily used: Enzyme Immunoassay (EIA), Radioimmunoassay (RIA) and Thin-Layer Chromatography (TLC). The Defense Department has selected an RIA screening test that is extremely accurate and cost-effective for the detection of THC (marijuana), cocaine, morphine, barbiturates, amphetamines, PCP, methaqualone and LSD. For those members of the armed forces testing positive in the initial assay, the second, confirmatory test—a gas chromatograph/mass spectroscopy (GC/MS) test—is required. This dual testing procedure assures maximum accuracy and is strongly recommended for all employers with worksite drug abuse programs.

Drug testing results can be extremely reliable. The Department of Defense has a continuing proficiency verification program for the nine military and two civilian laboratories conducting its drug tests. In scientific (double-blind) weekly checks of all 11 labs, test results are examined for "false-positive" reports, in which evidence of drug abuse is erroneously reported. The acceptable rate of false positives is 0 percent; to date, not a single false-positive result has been reported. Should any lab report a false positive, it will be closed and decertified, under military policy.

Testing Policies

Knowledgeable employers provide rehabilitation services as part of their health benefit plans and view these services as the keystone of a "comprehensive" program approach to drug abuse prevention. These companies recognize that their most important asset is a safe and healthy workforce. They base their drug abuse program on a written policy defining the consequences of illicit drug use. Management then strives to make the policy clear to all employees, implement the policy fairly, provide education and treatment resources and train supervisors in all aspects of the program. There should be rigid safeguards to keep

employees' names and test results confidential and, by monitoring the "chain of custody," to maintain the integrity and identity of urine samples.

Courts generally have upheld such workplace drug abuse testing policies when they are part of a comprehensive program that addresses the needs not only of the employer but of the employee and the general public. Many court challenges are to *random* testing—that is, testing imposed without suspicion on a mandatory basis. In June, the New York State Court of Appeals, the first state supreme court to examine the issue, ruled unanimously that random tests to identify drug abuse by probationary school teachers violated constitutional guarantees against unreasonable search and seizure. But U.S. appeals courts have upheld random tests for certain U.S. Customs Service workers, Iowa prison guards and New Jersey racetrack jockeys. A number of other challenges to workplace drug testing are now before state and Federal courts, based on Fourth Amendment search questions brought by public employees.

Federal Government Response

The Federal government is approaching workplace drug abuse on a number of fronts, both for its own employees and for certain private-sector employees. A rule established by the U.S. Department of Transportation in February of 1986 requires post-accident drug testing of railroad workers involved in major train accidents and authorizes testing when there is evidence of impairment. It also requires pre-employment screening and preventive education. A unique "bypass" feature of the rule allows drug- or alcohol-dependent rail employees to step forward and obtain treatment confidentially, through employee assistance programs. Workers are not disciplined for admitting to abuse problems.

This comprehensive approach involving education, rehabilitation and assurance of the reliability of testing, is also the thrust of President Ronald Reagan's September 15, 1986, executive order on drug abuse affecting all Federal agencies. The order calls for a number of preventive and educational actions, including drug testing of certain Federal employees in "sensitive" jobs. These include jobs that demand a high degree of public trust and confidence, such as agents of the Drug Enforcement Administration, the Customs Service and the FBI who fight illicit drug trafficking and related crimes.

In the 100th Congress, at least six bills have been introduced concerning drug abuse and testing (HR 280, HR 691, HR 693, S 352, S 356 and S 1041). Prompting the introduction of at least one of the bills was the January 4, 1987, Amtrak/Conrail railroad accident in Maryland. Post-accident urinalysis revealed the presence of marijuana residue in two train engineers. Dr. Robert L. DuPont, former head of the National Institute on Drug Abuse, concluded that the accident "is a very compelling argument for random [drug] testing of any [person in a] safety position." Transportation Secretary Elizabeth Dole has proposed a program that would require testing of many transportation industry employees. The Senate Commerce Committee, by a vote of 19-1, has approved a bill (S 1041) along these lines that calls for testing in five categories—random, pre-employment, post-accident, "reasonable suspicion" and "periodic recurrent"—for airline pilots, train crews, air traffic controllers, long-haul bus and truck drivers and others. The measure, now awaiting Senate action, would require rehabilitation programs for all affected government and private-sector employees.

State and Local Government Activities

In the first half of 1987, more than 50 bills related to workplace drug abuse or testing were introduced in various state legislatures. Montana, Vermont and Connecticut adopted laws that prohibit the testing of most workers without at least "reasonable suspicion" of drug abuse. Iowa banned random testing, requiring "probable cause" before employees can be tested for drug abuse. These new laws place fewer restrictions on testing job applicants than on testing employees. The Vermont and Iowa laws prohibit the firing of employees who successfully complete drug rehabilitation programs. Other legislatures are still considering various measures to regulate or authorize workplace drug abuse testing.

At the local level, a number of city and county governments have considered similar proposals. To date, San Francisco is the only major city that has enacted a measure to prohibit mandatory workplace drug testing.

Private Sector Initiatives

Long before regulatory laws were proposed widely, some private companies were implementing drug testing programs for humanistic reasons and to contain costs, including the expense of hiring and training replacement employees. Many firms can now document the savings resulting from comprehensive drug programs. In a survey commissioned by United Technologies, General Motors reported a 60 to 65 percent recovery rate for employees testing positive for drugs. In treating cocaine users, GM reported saving three dollars for every dollar spent. United Airlines said it spent from $5,000 to $10,000 treating each case of cocaine abuse, but reported a 4-1 return on the investment by returning rehabilitated employees to their jobs.

Evidence of reduced accidents and absenteeism and improved health and productivity was related by the Mid-Cal Corporation, an oil well service company of Taft, California. Less than two years after instituting an employee drug program, Mid-Cal reported that the percentage of employees testing positive for drugs plunged from 60 percent to 3 percent. Accidents resulting in time lost from work dropped from 30 to 0 and Worker's Compensation payments dropped from $156,276 to $25,116.

The sports industry has been actively involved in drug testing programs as well. The National Football League, several major league baseball teams and most National Collegiate Athletic Association (NCAA) member colleges perform drug tests on athletes.

The well-documented success of drug abuse programs in large corporations has prompted smaller firms to introduce their own programs and has also encouraged professional and collegiate sports groups to undertake or endorse such comprehensive programs.

Conclusion

Already, a broad range of government and private-sector policymakers are establishing workplace drug abuse programs, with the military and large national corporations setting the pace. While much attention has been focused on drug testing, successful corporate programs consider testing to be only one part of a comprehensive approach that includes education, detection, treatment and rehabilitation. The public, too, seems to support employee drug testing, at least in a public safety context. In a Gallup poll conducted for *Hospitals* magazine, 66 percent of over 1000 Americans surveyed agreed that employees in public safety occupations should be tested.

Drug testing in the workplace is expected to continue to expand. It is increasingly apparent that a workplace drug program combining education, testing and employee assistance efforts is both an effective and an appropriate response to the cost and tragedy of drug abuse.

> *If carefully designed and carried out, employer-required programs for the screening of employees and applicants for drugs, including alcohol, can serve to protect and improve employee health and safety in an ethically acceptable manner.*
>
> —Council on Social Issues
> American Occupational Medical Association

For more information on comprehensive employee substance abuse programs, write to:

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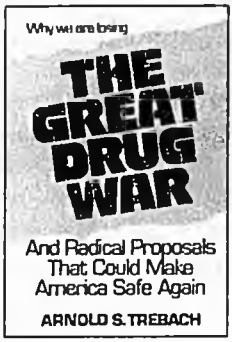
BY ANDREW HACKER

IS THE WAR ON DRUGS

A critic of the war says we're d
But he ignores the cost of not fi



"Stop talking about winning drug wars. In the broadest sense, there is no way to win because we cannot make the drugs or their abusers go away. They will always be with us. We have never run a successful drug war and never will."

■ The campaign Americans are waging against drugs does more damage to the country than the narcotics themselves. Or so says Arnold Trebach, founder of the Institute on Drugs, Crime, and Justice and a professor in the School of Justice at American University. In *The Great Drug War* (Macmillan, $22.50) he argues that the U.S. would be better off if we stopped viewing cocaine and heroin as unmitigated evils and accepted that they are here to stay. Presumably not many citizens are ready to adopt this relaxed perspective. I suspect, however, that most of them will be troubled by some details Trebach cites in the course of arguing that present policy is a disaster. Among his vignettes from the war on drugs:

▶ Strip-searching of high school students, after reports of sales in the school building.

▶ The emergence of "tough love" treatment centers, featuring brutal discipline, where troubled teenagers are often sent by their parents—sometimes for months on end.

▶ California's "bud buster" raids on homegrown marijuana, in which paramilitary police operations, with air support, located 398 sites and uprooted 158,493 plants in 1985.

▶ The discharge of some 9,000 Army personnel for failing drug tests, half of which were later found to have been flawed. (Some widely prescribed medicines register as marijuana in the tests.)

▶ Sending U.S. troops to Bolivia to help run helicopter strikes against cocaine processing plants.

The author, whom you may have caught on various TV talk shows in recent years, makes a number of persuasive points. One of them concerns the link between illegal narcotics and massive corruption of the American police. And not only the uniformed police: In 1983-85 some 300 government law enforcement officials at higher levels were publicly implicated in drug-related corruption. Drug arrests—there were 700,000 last year—place endless demands on law enforcement resources. Convictions of drug dealers are a major reason the country is running out of prison space.

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TOM WOLFF

been declining: Thus, among children age 12 to 17, the proportion who had recently used marijuana was down to 12% in 1985 (from 17% in 1979). Among young adults (18 to 25), cocaine use fell in the same period from 9% to 8%.

For those who will still find those numbers dismaying, he minimizes the deleterious effects of drugs. Heroin, for example, is "physically benign," since it causes no "organic damage." Heroin deaths should be attributed not to routine use of the drug itself, but to huge overdoses, adulterated merchandise, and infected needles. Furthermore, many drugs have major positive effects, even aside from the "highs" experienced by users. Speaking as a professor, he informs us that many students report they "would never have made it through school without the regular use of marijuana or other chemicals to calm the enormous anxieties attendant upon the educational process." More than that, "drugs probably prevent as many youth suicides as they cause." All told, the author finds no reason to oppose the "moderate use of drugs by minors."

DOES THIS MEAN that Trebach is a latter-day Timothy Leary, celebrating the joys of drugs for escape and recreation? At times it's hard to be sure, since his argument is often wobbly and anecdotal. But in the end—possibly confusing readers who had bought his views about the relative harmlessness of heroin—he shrinks from proposing a complete legalization of drugs. He would make marijuana freely available to adults, believes that heroin should be available only by prescription (and prescribed only as a painkiller), and would allow the states a wide range of choices (including complete legalization) on cocaine. Meanwhile, he wants more controls over alcohol and tobacco. At times it almost seems as though Trebach's main objective is equal rights for the narcotics that are now illegal—to make his readers see that these are really no more evil than alcohol and tobacco.

The Great Drug War is a patchwork of a book, confused and confusing about its basic thesis. Few if any distinctions are drawn between the different kinds of drugs, and Trebach has virtually nothing at all to say about such entries as amphetamines and diet prescriptions, or more exotic offerings like angel dust and LSD. The author does not

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explore the conditions under which harmless use may turn into abuse and addiction, nor does he try to distinguish between the mental states connoted by "addiction" to heroin and tobacco.

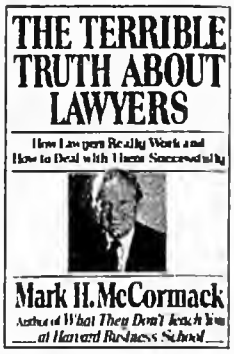
His ultimate reason for proposing an end to the drug war is pragmatic: Drugs, he insists, are so entrenched in our culture that any war against them will be unwinnable. ("We have never run a successful drug war and never will.") He cites surveys showing that more than 60 million Americans have smoked marijuana "at least once in their lives," while almost six million people were recently (1985) using cocaine. He wants us to admit—just as we were forced to admit about Prohibition—that we just don't know how to solve the problem. "Whenever there is a demand for an illicit opiate . . . in time a supply appears," Trebach writes, "and when one source of supply is cut off, another soon replaces it in sufficient volume to satisfy the demand." Taiwan and Singapore may be able to halt drug imports, he acknowledges, but the loose structure of a free society allows a greater measure of illegal activity. He does not consider the possibility that the hated drug war might be entitled to some credit for the recent declines in usage among young people.

WHILE TREBACH views the demand for drugs as natural and irresistible, he seems not to understand why so many think it natural to wage war on drugs. Surveys show that less than one-quarter of college students want marijuana legalized. Last year Oregon, a relatively liberal state, had on its ballot a proposal to allow adults to possess or grow marijuana for their personal use. It was overwhelmingly voted down.

Ultimately missing from Trebach's presentation is any sense that the debate about drugs might involve larger issues. One reason so many Americans are determined to fight drugs is that they are focusing on the kind of people they think we ought to be. They fear that the U.S. is becoming a nation of lotus eaters, being drugged into oblivion. They worry about the connection between drugs and various bits of evidence of declining mental sharpness. In this view, anything that legitimizes narcotics would sap even more of the country's strength, bringing a once-proud nation closer to social suicide. I fear that Arnold Trebach hasn't the faintest understanding of this concern.

Putting Lawyers in Their Place

BY WALTER KIECHEL III



■ Rumor has it that the original working title for *The Terrible Truth About Lawyers* (Beech Tree/Morrow, $17.95) was *What They Don't Teach You at the Yale Law School*, which would have not only reflected where author Mark H. McCormack got his legal education but capitalized on the success of his awesomely best-selling *What They Don't Teach You at the Harvard Business School.* More accurate than either would have been something like *Let's Make a Deal*, with the subtitle *And How, Too Often, Lawyers Screw Them Up.*

Alas, McCormack's truth about the lawyerly mind-set and *modus operandi* will seem not terrible, just terribly familiar. Yes, members of the bar are a clannish lot, sometimes more concerned with observing the punctilio of the profession than with ministering to the needs of the client. And, uh-huh, you should scrutinize the bill carefully. If you have foolishly let your lawyer take you to lunch, you may find the tab billed back to you, along with a healthy markup for his time.

Where the author does add value, or at least color, is in his advice on deals: how to negotiate them, why they sometimes fall apart. As the book modestly notes, McCormack is "founder and chairman of International Management Group, the world's leading sports management and marketing organization." In other words, he is an agent for broadcasters and professional athletes and puts together such TV spectaculars as *The World's Strongest Man.* If you are interested in how the law treats the injuries allegedly sustained by a contestant attempting to run with a 400-pound refrigerator on his back, this could be the book you've been waiting for. While even here McCormack's advice seems a trifle unoriginal (know who is making the decisions on the other side, don't bring the lawyers in too early, leave a little something on the table), the examples make it pungent and the reading fun. ■

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The American Council for Drug Education is a non-profit membership organization dedicated to public education about the health hazards of various psychoactive substances. ACDE promotes research, organizes conferences, reviews scientific findings, and educates the public about current knowledge of the effects of drug use.

Since its founding in 1977, ACDE has been dedicated to the principle that an informed public is the nation's best defense against drug abuse. While knowledge alone will not solve the drug problem, there is now abundant evidence that it will help to reduce drug experimentation and even drug use among people of all ages—including teenagers. Furthermore, public understanding of the health consequences of drug use is the necessary precondition to a wide range of family, community, religious, cultural, legal and other efforts to deal with drug abuse problems. In the absence of clear, reliable and objective information about the health effects of drugs, the prevention of drug abuse in our society is all but impossible.

Urine Testing in the Workplace

by Lee I. Dogoloff
and Robert T. Angarola
Susan C. Price, Editor

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Editor, Susan C. Price has a B.S. in journalism from Ohio University and a Masters in international affairs from the same institution. A former clinical services account executive and current consultant for CompuChem Laboratories, Ms. Price has a detailed knowledge about urine testing.

Table of Contents

I. Urine Testing: One Tool for Drug Abuse Prevention

Lee I. Dogoloff

Urine testing has become an emotionally loaded term for many, triggering visions that range from a police state to a drug-free paradise, depending on one's perspective. These reactions are unfortunate and can be damaging because, in the heated arguments over invasion of privacy, social responsibility and liability, the purpose and appropriate use of drug testing in the workplace is often obscured.

"To test or not to test" is never the opening question nor the primary issue. It is rather one method among many that may be used to address drug abuse prevention, treatment and control. The decision to use urine testing or any other technique should come only after a thoughtful consideration of the nature and extent of drug use in a particular office or plant; the impact employee drug use has on productivity, safety, quality control, and profits; the alternatives available to confront the problem; and any constraints those methods may pose. Examples of these alternatives might include an Employee Assistance Program or other personnel or medical services. Constraints might include pre-existing labor contracts or available financial support for rehabilitative services.

Depending on the circumstances, urine testing can be an effective option if it is used properly. Following is a brief summary of the nature and dimensions of the drug problem within the U.S. work force and a description of some principles that may be useful in structuring a corporate response to the problem. The approach described is relatively simple and is not intended to address all the complex issues involved in designing an adequate policy — that would require another book. Rather, this approach is included for illustrative purpose only to give some ideas on the elements of a corporate policy and the context in which urine testing should be used.

Dimensions of the Problem

The Alcohol Drug Abuse and Mental Health Administration, an agency of the Federal Government, estimates that reduced productivity due to alcohol and drug abuse cost the U.S. nearly $99 billion in 1983 (Research Triangle Institute, 1984).

In characterizing the findings from its 1982 survey on Wall Street, researchers from the New York State Division

of Substance Abuse Services concluded that "Drugs were dealt as freely as stocks and bonds." Marijuana was purchased most frequently followed by cocaine, pills (e.g. uppers, downers), and heroin. The buyers were equally divided between men and women and, in contrast to the stereotyped image of the urban drug abuser as an unemployed street person or criminal, 40 percent of the men held middle-management positions, while 95 percent of the women were employed as clerical workers.

According to the most recent household survey of "Drug Use in America," sponsored by the National Institute On Drug Abuse, 20 million Americans reported using marijuana in 1982, 9 million of whom were 18 to 25 years old. The survey also revealed that more than 2.3 million Americans in the 18- to 25-year-age group reported using cocaine in 1982. Since then, cocaine use has escalated substantially. The national cocaine helpline, an ongoing telephone treatment/referral and information service, has been averaging over 1,000 calls a day since its inception in the summer of 1983. Their average caller is a white, 30 year-old *employed* male earning more than $25,000 a year, who has an average of 14 years of education. He has typically used cocaine for almost five years and, in almost 50 percent of the cases, has been using it every day. The callers admit spending an average of $637 for cocaine in the week prior to calling the helpline and say they remain employed for two primary reasons: (1) work gives them some of the money they need to support their cocaine habit (which almost invariably exceeds their income) and (2) the workplace offers them a convenient environment for the drug dealing many engage in as another means of supporting their habit.

While these statistics help to show how pervasive the problem is, one must also understand the impact that drug abuse can have on the workplace, including "the bottom line." Drug abuse leads to increased absenteeism, higher turnover, and decreased productivity. Drug abusers can suffer from impaired memory, lethargy, and reduced coordination, which may be, in turn, responsible for performance problems. Marijuana and alcohol, for example, interfere with driving ability and negatively affect other skills needed to operate equipment safely and effectively. Drugs have been implicated in railway collisions and derailments, bus and heavy equipment accidents, and poor product assembly.

Professionals recovering from cocaine dependency report instances of irresponsible conduct while they were using the drug, including inadequate preparation of cases and presentations, inattention to tasks, and failure to complete assignments or to provide needed follow-up services. In some

cases, these lapses endangered public safety and opened employers to liability actions.

In addition to performance problems, drug-using employees can experience a number of changes in heart, brain and lung function and often develop medical problems as a result of their drug use. These can result in increased use of sick benefits and, ultimately, higher health insurance premiums. Other costs derive from the fact that a drug habit is expensive. Security problems, including employee theft of tools and products, embezzlement of company funds, and selling of trade secrets, can often be traced to drug-dependent employees who need money to buy drugs.

A final cost, although one which cannot be quantified, concerns the negative impact on non-using employees. Co-workers often find themselves in the position of covering-up for drug users who do not do their share or whose behavior poses a safety risk. Drug dealing may be observed at the workplace, but go unreported because reprisals are feared or because co-workers believe they must protect the individuals involved. The resentment and confusion this breeds can undermine morale and ultimately affect the non-users' participation in the work force.

Understanding the Condition

While the consequences of drug abuse provide the rationale for a corporate response to the problem, an understanding of how the condition of chemical dependency develops is essential in order to structure a response.

Chemical dependence is a progressive disease — when left alone it does not get better or just go away, it tends to get worse. Denial is the critical element that perpetuates and feeds it. Drug abusers (including those who abuse alcohol) usually do not see themselves as such, and cannot self-diagnose their condition, call a halt to their destructive behavior, or present themselves voluntarily for treatment.

Not only do chemically dependent individuals practice denial, but just as tragically, so do those around them. Parents, spouses, friends, supervisors, and co-workers want to believe there is no problem. They tend to "overlook" the behavior and to avoid the discomfort of confrontation. This "sin of omission" earns these people the title of "enablers" — they allow the destructive behavior to continue by not intervening.

It is important to recognize that virtually all drug use is contagious. The most likely way a person is introduced to drugs is "by a friend or loved one" and this is as true of tobacco

smokers as it is of heroin addicts, cocaine users, marijuana smokers and alcohol abusers. That principle has important implicatiions for employers because the workplace offers a natural setting in which the contagion can occur.

Based on these principles of chemical dependence, several features of an occupational approach to the problem emerge. First, understanding that chemical dependence is a progressive disease underlines the importance of early identification and intervention. The earlier the intervention, the more positive and less costly the outcome. Depending on how an office or company is organized, ways should be found to identify the drug user both through specific attention to poor work performance and work habits (e.g. absenteeism, tardiness) and through sensitivity to increases in accidents and other unacceptable incidents on the job.

Second, the denial aspect means it is ineffective for a company merely to wait for people to admit their problem and voluntarily seek treatment. By understanding the enabling role that those around the dependent person play, the stage can be set for an aggressive effort to break the cycle of denial and cover-up, and to help the enablers become part of the solution rather than contributors to the problem. In short, this means confronting the poor work performance and referring the employee to professional help. In the work force, as in the family, "enablers" may be the single most important element in beginning a successful intervention.

Lastly, the contagious nature of drug abuse means that if a company fails to identify individuals who are experiencing the problem, then the workplace inadvertently becomes an environment for spreading the condition to others.

Understanding chemical dependence leads inevitably to the conclusion that prevention, intervention, and supported recovery must be the foundation of any occupationally based program to deal with the drug abuse problem. The next step is to devise a framework for an employer to follow in developing such a program. While specific elements in each program will differ depending on the nature of the business, employee characteristics, size, number of work sites and managerial style, some generalizations can be made about essential features.

1. The company should formulate a policy about drug abuse that spells out why it is unacceptable and how it will be addressed;
2. It should communicate that policy to employees;
3. It should encourage and support supervisors in the active identification and referral of problem workers — this is the bedrock of any successful program;
4. It should locate treatment and rehabilitation resources for its employees;
5. It should institute follow-up procedures to ensure that the condition is being treated and that, insofar as possible, the workplace supports the recovery process;
6. It should define enforceable and appropriate alternatives (e.g. reassignment, early retirement, termination, disability) for those employees who are unwilling or unable to successfully return to full functioning.

Within this framework, urine testing can be an important tool for identifying drug abusers or confirming suspected drug use at various stages in the employment process. For example, urine testing can be one element in a preemployment screening process. Companies using this procedure report that it helps protect them from problems later on by weeding out many prospective employees who use drugs. In addition, urine testing gives job candidates and current employees a clear message about the organization's position on employee drug use. Urine testing also can be used on a random basis with selected employees who hold sensitive jobs involving public safety or public trust. The purpose here is not only to prevent drug abuse but to identify users as early as possible so the public is not jeopardized because of drug-related impairment.

Urine testing also can be used when job performance problems have been observed or accidents/incidents occur which result in a supervisor referring an employee to Employee Assistance, medical or safety/security personnel for evaluation. In these cases, the urine test can be an important diagnostic tool in uncovering the source of the employee's problem and indicating the direction referral should take.

If an organization carefully considers the circumstances in which urine testing will be instituted and the use that will be made of the results, such testing can be immensely helpful in identifying users, facilitating interventions, supporting the recovery process, and ensuring the safety and security of the workplace.

The ensuing chapters discuss the legal issues surrounding urine testing, what testing can and cannot do, the technology currently available to perform the tests, and what to look for when selecting a laboratory to perform urinalysis.

II. The Legal Issues of Urine Testing

Robert T. Angarola, Esq.

When considering a urine screening program, many employers immediately ask "Is it legal?" While this is an obvious concern, it is actually the wrong place to start.

Employers should first answer the question "Why do I want to test?" Are the employees handling heavy equipment; are they running a nuclear power plant; are they bus drivers with responsibility for public safety; do they have access to large amounts of money? If the employer knows at the outset *why* he wants to screen for drugs, he is much more likely to have a legally sound program.

The next question is "What do I do when someone tests positive?" Should the individual be fired on the spot? Offered treatment and rehabilitative services? Reported to the police? An employer must plan beforehand how to deal with employees who are using drugs, and then structure policies and programs accordingly.

After the employer answers these two crucial questions, he or she is in a position to draft a formal written company policy on substance abuse. This policy must be clearly communicated to and understood by all prospective and current employees. It must be uniformly applied and consistently enforced. Once an employer does this, the probability of legal challenge to a drug screening program is substantially reduced.

There is much a company can do to protect its workers and itself from the dangers of drug abuse in the workplace — and it can do it in a fully legal way. Nevertheless, workers have brought lawsuits in this area and will continue to do so in the future. The following chapter attempts to describe the types of challenges being filed and — more importantly — ways to avoid them.

Legal challenges to urine testing have centered in five areas: the right to privacy, the right to be free from unreasonable searches, the right to due process, negligence law, and contract law.

Right to Privacy

Private employees who argue that urine testing violates their constitutional right to privacy are confused about our system of law for two reasons. First, the U.S. Supreme Court has found that the right to privacy implied in the Constitution protects only against *governmental* intrusions.* A private employer's actions, therefore, cannot violate an employee's constitutional right to privacy. Second, the constitutional right to privacy protects a very narrow range of activities. An individual's *personal* belief concerning those aspects of his life which are private and which should not be subjected involuntarily to intrusion by others creates a much larger zone than that which the Constitution *legally* protects. The constitutional right to privacy has been held to protect individual decisions on matters such as marriage, procreation, childrearing and family. But the courts have specifically held that the constitutional right to privacy does *not* apply to the use or possession of illicit substances, even in one's own home. Thus, a government agency's drug testing program for its employees cannot violate their constitutional right to privacy.

Freedom from Unreasonable Searches

Most lawsuits claiming that urine testing is an invasion of privacy have actually been based on the fourth amendment's prohibition against unreasonable searches and seizures. Plaintiffs assert that urine testing intrudes so far into an employee's sense of privacy that it constitutes an unreasonable search in violation of the Constitution.

Once again, this constitutional provision applies only to searches conducted by the government. A private employer's urine screening program cannot violate an employee's right to be free from unreasonable searches and seizures.

Because the fourth amendment does not constrain private employers, they have more freedom to conduct searches in an effort to detect and deal with substance abuse in the company. For example, when investigations linked several tragic Burlington Northern train accidents to employee alcohol or drug abuse, the railroad unilaterally implemented a surveillance and search program, using dogs trained to detect drugs, in order to stop on-the-job alcohol and drug use. The union protested, arguing that the dog surveillance program was an unconstitutional search.

A federal court held that the search was not unconstitutional because the railroad, a private company, was not bound by the fourth amendment. The court stated that there was "nothing prohibiting a private entity from requiring any person, including an employee, to submit to a 'search' by such a

*As used here, the term "government" includes federal, state and local government.

dog as a condition of entering the entity's premises, or refusing entry to any person believed to be in possession of an illicit substance."

Indeed, government employer's urine testing programs nearly always withstand challenges that they violate the fourth amendment. In a case decided in federal court this year, city employees who regularly worked around high voltage electric wires were terminated because their urine tests were positive. The terminated employees argued that the tests violated the fourth amendment protection against unreasonable search. The court agreed that the testing was a search. However, since the employees in question were engaged in hazardous work, the court found that the testing program did not violate the constitution because the search was not unreasonable — in this case, the employer had a legitimate need to know that employees were using drugs.

Due Process

The fifth and fourteenth amendments of the Constitution require the government to provide a person with due process before depriving him "of life, liberty, or property." This means that the government must engage in a fair decision-making process before taking measures that affect an individual's basic rights. While private employers are, again, not bound by the constitutional guarantee of due process, wise private employers take into consideration the standards of fairness courts have demanded of government employers.

Due process arguments made against government urine testing programs generally claim that the tests are inaccurate, that the results are insufficiently related to work performance, or that the employee was punished without being afforded an opportunity to contest positive test results.

• Accuracy and Reliability

Courts have consistently upheld the accuracy and reliability of urine tests. In a case decided in federal court last year, city fire fighters and police officers argued that both urine testing and polygraph examinations (lie-detector tests) were unconstitutionally unreliable. The court agreed that, despite the city's need to maintain safe police and fire services, polygraph testing was unconstitutionally unreliable. But the court held that urine tests were so accurate that these city employees had no basis to challenge their constitutionality.

Relationship to Work Performance

The relationship between test results and work performance presents a more difficult legal question than does the accuracy of the test itself. At present, positive urine test results prove that an individual has ingested a substance, but they cannot prove that he or she is impaired by that substance at the time the specimen is given. Opponents of the tests argue that it is unfair to discipline employees on the basis of positive test results unless their employer can prove that they were actually impaired on-the-job. But the fact that the courts are upholding urine testing shows that judges and juries recognize that urine testing is probably the best tool we have today to spot drug abuse — despite its inability to prove impairment.

Opportunity to Contest Results

The due process guarantee of fair decision-making also means that government employers must provide workers with a reasonable opportunity to contest charges against them before they are punished. While an employer can safely rely upon statistics and court cases proving the accuracy of urine testing as an indicator of drug use, this third area is one in which an employee can prevail against a government employer who has not been careful to weigh employee rights before imposing discipline. (Note again that we are discussing the *government* employer. Private employers, as noted previously, have greater latitude in this area also.) For example, a federal court held that the Federal Aviation Administration violated due process by disposing of the urine samples the agency had used to justify firing several air traffic controllers for drug use. The court reasoned that the agency easily could have stored the samples. This would have afforded the tested employees a chance to have an independent analysis by a second laboratory. In failing to preserve the samples, the agency violated the workers' due process rights.

On the other hand, a Chicago bus driver argued in another federal court that the city transit authority had denied him due process by failing to give him a hearing to contest positive urine test results before removing him from behind the wheel. This court held that the employee's due process rights were not denied. The bus drivers' rights had to be balanced against the public safety. The court held that a hearing provided after the employee was removed from his driving responsibilities would satisfy due process.

Each of these two courts balanced all of the factors involved in the case before determining what action was appropriate. The same considerations should precede a private

employer's decision to discipline an employee based upon positive test results. Good personnel practices, good public relations, and most labor contracts require that a private employee be given some notice of the reason for any disciplinary action and some opportunity to discuss that action with a superior.

Negligence Law

Unlike the constitutional claims discussed above, negligence claims can be brought against the private employer as well as the government. Negligence actions are generally of three types. First, an employer may be liable for negligence in hiring a substance abuser who harms another person while performing his job. Second, an employer may be liable for negligence if he fails to conduct the drug screening procedure with due care. Third, an employer who maliciously spreads untrue reports of positive test results could be sued for libel and slander.

• Negligent Hiring

A negligent hiring case decided in a state court last year involved a boy who was sexually assaulted by an intoxicated hotel employee. The employee had previously been fired from his job as a dishwasher because of drinking. The hotel later rehired him, even though other hotel employees knew that he continued to drink on the job.

The appellate court found that there was enough evidence for a jury to decide whether the hotel should have foreseen, and therefore should be held responsible for, the employee's behavior. It reversed the trial judge's holding in favor of the hotel and ordered the case sent back to trial so that a jury could decide whether the hotel was responsible, and, if so, the sum the hotel was to pay the boy in damages. In lieu of a second trial, however, the hotel agreed to a settlement.

This case illustrates the importance of controlling substance abuse in the workplace. Employers have a duty to foresee the dangers presented by an impaired employee, and they can be held liable for substantial damages if they fail to do so.

Companies with a well-publicized, consistently enforced policy and program against employee substance abuse not only will deter such abuse, but also will be better able to identify and deal with the substance-abusing employee *before* he causes injuries that bring his employer into court. These companies will also be less likely to be held responsible for injuries caused by the employee who, without detection, violates the company's rules on substance abuse.

Negligent Testing

Employers should be sure that the laboratories they hire or the technicians they use to perform the tests are well-qualified and meet high quality control standards. The contrasting outcomes of two negligent testing cases, both filed by unsuccessful job applicants and both filed in the same federal court, demonstrate the importance of following manufacturers' instructions when performing a drug test.

In the first case, two job applicants who were refused employment on the basis of positive urine test results sued the laboratory that performed the tests. Because the applicants had proof that the laboratory failed to follow the test manufacturer's instructions to confirm all positive test results, the laboratory agreed to a settlement. In the second case, the test results had been confirmed by a second test as recommended by the manufacturer. The court dismissed these job applicants' testing claims before the case even reached trial.

To avoid charges of negligent testing, employers must be certain that the laboratories they use perform the tests correctly. If on-site testing is done using company employees as technicians, then the employer must ensure that these employees have been properly trained in test administration and know how to protect the chain of custody over urine samples. They must understand what confidentiality means and they must be able to maintain a storage system that protects samples from tampering, switching or misidentification.

Libel and Slander

An employer who spreads information about positive test results that later prove to be false probably will not be found to have committed libel or slander if his actions were accidental or merely careless. Most state laws recognize that an employer needs some degree of freedom to discuss employee matters in order to run a company. Therefore, a successful libel or slander suit generally requires a showing that the employer acted with reckless disregard for the truth or with actual malice toward the employee.

As the following case shows, however, it would be a foolish company that relied on the protections provided by such laws as an excuse for dealing with test results in an unacceptable manner. Employers should make sure that positive test results are confirmed and that they are not publicized beyond those people who absolutely need to know.

A railroad switchman sued his employer for libel and slander after being accused of having methadone in his urine. Although the company physician who administered the test

had explained to the company that the presence of methadone was tentative and that further lab work would be required before he could draw any definite conclusions about drug use, the company, nevertheless, commenced disciplinary actions immediately based on that tentative test result.

The employee then arranged for a second urine test, which indicated that there was a compound in his urine which had the characteristics of methadone, but was not in fact methadone or any other commonly abused drug. In spite of this, the company circulated a statement that the employee had been fired for using methadone. The switchman collected $150,000 for damage to his reputation, and an additional $50,000 in punitive damages, from the railroad.

Contract Law

An employer who plans to institute a drug screening program should determine whether the plan complies with employment or union contracts, and renegotiate those contracts if it does not. Recall the case, discussed earlier, in which the Burlington Northern Railroad unilaterally implemented a detector-dog surveillance program. The railroad had a safety rule prohibiting on-the-job use or possession of drugs or alcohol; employees were well aware of the rule. The railroad argued that use of a detector-dog search program was within its managerial discretion to enforce the no-alcohol, no-drugs rule.

While the court found that the railroad had not violated the U.S. Constitution, it still halted the program. The surveillance program illegally changed the employment contract because it was not the result of collective bargaining involving both management and the union. Even though there was already a no-drugs, no-alcohol rule, a program to enforce that rule required a revision of the contract jointly agreed upon by employer and employee.

The principles that an employer should follow in establishing a drug testing program have remained consistent since urine testing was first perfected a decade ago, and they have generally been sustained in court. A company that observes the following in implementing its substance abuse policy and program will in all probability avoid successful legal challenge:

- Demonstrate the need for drug testing in the company; document a relationship between job performance and substance abuse.
- Develop a specific substance abuse policy and program in consultation with all parts of the company that may be affected. Union representatives, occupational health and safety personnel, security staff, personnel managers, legal advisors, and most importantly, top management must be involved. Outside consultants can often help a company identify problems and adopt a workable policy.
- If necessary, modify employment contracts and union contracts to reflect the company's substance abuse policy.
- Notify employees of the policy. Tell them in advance the penalties that will be imposed for specified violations.
- Follow through. Do not let a substance abuse program become a "paper" policy.
- Test for substance abuse carefully. Make sure that persons who administer the tests and perform laboratory analyses are qualified to do so and that good analytical and chain of custody procedures are followed.
- Notify employees of positive test results and provide them with an opportunity to appeal disciplinary actions taken on the basis of those results.
- Keep test results confidential. Do not release positive test results until their accuracy has been verified by a confirmatory test and, if possible, by corroborating evidence of substance abuse. Do not let anyone who does not need to know have the results.
- Consider setting up an employee assistance program for those employees found to have substance abuse problems.

Judges and arbitrators increasingly are recognizing the costs of substance abuse in the workplace to employers, workers, and the economy. They will uphold measures to deal with the problem, including urine testing, when these are instituted in a reasonable manner. Employers who follow the above guidelines and have answered the questions "Why do I want to test?" and "What do I do when someone tests positive?" should be able to use urine testing effectively and legally.

III. Analytical Methods for Testing

Urinalysis methods vary substantially in cost, accuracy, the number of different drugs detected and the amount of expertise required to perform them. Understanding the relative advantages and disadvantages of each method will help employers decide which kind makes sense for their organization and who should perform the tests.

No matter which method is used to *screen* applicants or employees for drugs, it is generally agreed that a positive result should be *confirmed* at the laboratory by a second test, using a different and preferably a more sensitive and specific method to achieve accuracy. This is an especially critical step when testing for drugs at the workplace because a person's livelihood and the company's legal liability may be at stake.

Three major types of screening methods are currently available and, depending on which type is selected, testing can be performed on-site at the workplace or off-site at the laboratory.

Screening Methods

The most commonly used *screening* methods are *thin layer chromatography* and the two immunoassay techniques: *enzyme immunoassay* and *radioimmunoassay.*

Thin layer chromatography (TLC) is the least expensive method of drug urinalysis and it must be performed in a laboratory. Although TLC can detect a few prescription drugs that the immunoassay tests do not identify, it is not as sensitive; that is, it won't always detect as minute a quantity of drug as the immunoassay tests. Moreover, the result is more subjective, requiring more judgment by the technician performing the test.

The TLC method involves reading a plate on which a drop of urine has been chemically treated to separate its various compounds. Drugs are identified when a dye solution is sprayed onto the plate causing colors to appear. The location of the color spots are then compared to known standards. Reading the plate requires a high degree of technical expertise. Furthermore, the dye often fades in minutes, so there is no permanent record of the test unless a photograph is taken.

The enzyme immunoassay (EIA) and the radioimmunoassay (RIA) methods are slightly more expensive than TLC. They are designed to detect the eight major abused

drugs or drug classes — amphetamine, barbiturates, benzodiazepine, cannabinoids (marijuana), cocaine, methaqualone, opiates (including heroin), and phencyclidine (PCP) — but will not identify some of the prescription drugs picked up by the TLC test. However, they are slightly more sensitive and give a more definitive test result.

The immunoassays use antibodies to detect drugs. In the test mixture (reagent) designed to detect a certain drug, antibodies attach themselves to that drug if it is present in the urine. In the enzyme immunoassay method the reaction causes a color change which can be measured by a device called a spectrophotometer. In the radioimmunoassay method, a low level of radiation is given off which is measured by a gamma counter. The RIA cannot be used outside of a laboratory setting because the radioactive materials require specially trained technicians and a licensed facility. The EIA, however, can be used either in the laboratory or at the workplace.

On-site, the enzyme immunoassay method is most commonly performed using the desk-top sized Emit Drug Detection System manufactured by the SYVA Company, Palo Alto, California. The manufacturer recommends that all positive results be confirmed by another method, so an outside laboratory is still required to perform confirmation testing.

On-site testing offers several advantages:

- Results are available very quickly for samples which test negative because they don't have to be sent to a laboratory;
- Non-technical people can be trained to operate the equipment;
- On-site testing may be less expensive than laboratory screening.

There are also disadvantages to consider:

- Confidentiality may be harder to protect if testing is done in-house. There is also a greater threat of sample-tampering;
- The employer must maintain the equipment, keep a supply of chemical mixtures in cold storage, provide a secured area for the urine samples, etc.;
- The chance of error in results is greater than in a lab where the staff has more training, and where stringent quality control measures are in use.

Confirmation

Although each of the screening methods described can detect small amounts of drugs with a fairly high degree of accuracy, the manufacturers recommend a second test by an

alternative method for all positive test results in order to assure the validity of the results. This is because the screening tests occasionally produce false readings for a variety of reasons including cross reactivity, that is, similarity of compounds which the screening test can misread as being an abused drug. For example, some over-the-counter cold and diet medications may produce a positive amphetamine test result. Confirming all screened positives, as described below, will eliminate this problem. However, common urinary metabolites (e.g. Melanin and others) have been shown not to cause fake readings.

Although some laboratories will confirm one type of screening method with another (for example, TLC followed by EIA or RIA), it is better — and more acceptable legally — to use a more sophisticated technique such as gas chromatography or gas chromatography/mass spectrometry (GC/MS).

Gas chromatography (GC — sometimes called gas/liquid chromatography or GLC) involves heating and vaporizing a liquid sample while it moves through a column of absorbent material. Individual compounds are separated on this column according to their chemical and physical properties. These separated compounds appear as peaks on a graph and can be identified.

Although GC is sometimes used alone to perform confirmation tests, the best method combines it with a *mass spectrometer*. The two instruments together are more powerful than either instrument alone. The GC/MS further breaks down the compound molecules into electrically charged ion fragments. Different compounds break down into different fragments and like fingerprints, no two fragment patterns are alike. Because the GC/MS can match up these patterns to the known patterns of abused drugs, positive identification can be made. Quantification is possible with GC or GC/MS.

Although the GC/MS test is the state-of-the-art drug testing method currently available, it is not practical to use as a screening method because it is too expensive, requires very sophisticated equipment and must be performed by highly trained technicians. Therefore, it is best to use a screening method first to eliminate the negatives and then use the more definitive tests only on the positives.

Test Results Only Show Presence

It is important to understand that urine tests for drugs only determine whether a person has used the drug recently or frequently. They cannot tell with certainty just how recently nor the degree of impairment, if any, at the time the sample was taken. The amount of time a drug is detectable in

body fluids depends on the drug used, the amount and purity of it, how often the person uses it, and the user's age, weight and metabolism. For example marijuana constituents can show up in a urine test many days after the last use particularly in frequent or chronic users, whereas cocaine is usually undetectable within two days.

False Positive and Negative Results

No matter how accurate a testing method is, there will always be a certain small number of incorrect test results. These fall into two categories: false positives (urine specimens which are actually drug free), and false negatives (samples which do contain a drug). Good laboratories build checks and balances into their systems to catch such analytical errors before the results are reported.

A false positive is more undesirable because it can result in unjustified action against an individual. The possibility of false positive results from laboratory or technical error is greatly reduced, however, by the confirming of all positives with an alternate method which is more sensitive and specific. A good laboratory also strives to avoid false negatives, however, because they can allow drug users to go undetected, posing threats to themselves and others.

False results are not only caused by problems with the urinalysis itself. They may also occur if specimens are accidentally switched at the collection point or in the laboratory, or if the sample is tampered with. Errors in reporting results may also occur. The laboratory and the employer must give attention to those potential problems in order to insure accuracy in the urine testing program.

Passive Inhalation

In the case of marijuana, the question of "passive inhalation" is sometimes raised. A person who tests positive for marijuana will sometimes claim he inhaled smoke from other users at a party or a rock concert. Recent studies suggest that positive test results from passive inhalation can be obtained only if the nonsmoker is confined with several smokers in very small quarters such as a closed car. However, the minute quantity inhaled by a nonsmoker is unlikely to generate a level which would exceed the "cutoff" of the analytical methods currently in use.

Cutoffs

Cutoffs can be a confusing aspect of drug testing to the nontechnical purchaser of laboratory services. Laboratories will talk about their cutoffs or detection limits usually in

billionths of a gram (a nanogram). The detection limit is the lowest amount of the drug which can be reliably detected by the analytical methods used by the laboratory. Below this level, although there may be small quantities of drug present, the test will be reported as negative because the technical limitations of the laboratory's procedures make a positive result uncertain. Cutoffs vary from one laboratory to another, based on their technical capabilities and the methodologies used. An example of screening cutoffs is provided in the table below:

	RIA	EIA	(NG/ML)
Amphetamines	1000	300	
Barbiturates	200	300	
Benzodiazepines	Not Available	300	
Cannabinoids (THC)	100	20 or 100*	
Cocaine	300	300	
Methaqualone	750	300	
Opiates	300	300	
PCP	25	75	

*Two choices of test kits are available.

There is no standard list of cutoffs for confirmation testing to which an employer can refer since each laboratory must establish its own. But the levels used by the military laboratories provide a good example. Their *confirmation cutoffs* (by GC/MS) are:

THC metabolite (Marijuana)	20 ng (nanograms)
Cocaine metabolite (Benzolecgonine)	300 ng
Amphetamines	500 ng
Barbiturates	200 ng
Opiates	300 ng
PCP	25 ng

Note: The military uses the RIA test for screening at the manufacturer-recommended cutoffs. (Abuscreen®, Roche Diagnostic Systems, Nutley, N.J.)

Some laboratories will offer an employer a quantified test report (i.e., how much of the drug was found in the urine tested) rather than just a positive or negative result. Quantified results may be useful in providing insight into the conditions of use. The employer should be cautioned, however, against drawing any definite conclusions about a drug user based on quantity. For example, an employee found to have 100 ng of the major metabolite of THC, the active ingredient of marijuana in his urine has not necessarily used more of the drug or used it more recently than someone with a reading of 50 ng. It is even possible in rare cases for a result to be higher in quantity in the afternoon than in the morning with no drug use in between. This is because the intake of body fluids can change the concentration of the marijuana metabolites as they are gradually secreted from the body.

Drug Detection Methods Other Than Urinalysis

Scientists are developing other drug detection methods to give a better sense of the relationship between test results and impairment. Currently, blood analysis and saliva tests are the most promising.

Although it is often used in hospitals, *blood analysis* currently is not used as frequently as urine for routine screening in an industrial setting because samples are harder to collect. A licensed technician is needed to draw blood. Furthermore, a blood test is a more invasive procedure, making cooperation by employees or applicants more difficult to obtain.

Blood tests often are used for post-accident testing. For example, recently issued federal regulations will require train crews involved in serious accidents to submit to blood tests as soon as possible after the incident. However, toxicologists have not yet fully agreed on standard blood levels indicating impairment for abused drugs. Although such levels have been set for alcohol as it affects driving, even those levels vary from state to state. Therefore, as an indicator of impairment for various job functions, blood testing has its limitations but can provide better evidence for possible impairment than urine.

Testing the saliva of a marijuana user may eventually be useful in determining recent past use of that drug because the active ingredients in marijuana remain in saliva for only a few hours after the drug is smoked. However, the greatest impairment from marijuana probably occurs during the first two to three hours after smoking.

Saliva screening tests have been developed, including a commercial kit using an RIA procedure, but they are not widely used, and confirmation is usually not possible because of the low volume of fluid. Saliva tests involve swabbing the mouth or expectorating into a collection cup. The drawbacks, however, are that collecting a sufficient volume of saliva for testing can be difficult, and laboratories find saliva a more difficult body fluid to deal with than urine.

Some employers have heard about a new method of drug detection involving the recording of brainwave patterns. The reliability of this method has not been established, however.

IV. Selecting a Laboratory

A key component of any sound drug detection program is the laboratory performing the urinalysis. This is true even if the employer decides to do on-site testing since positive samples must be sent to a laboratory for confirmation.

Due to the critical importance of accurate results, both to the company and to the employee, this is not the sort of service which should simply be allocated to the lowest bidder. Therefore, although price will certainly be a consideration, there are many other more critical questions to be determined first. The following are some of the key questions to be asked:

What is the laboratory's testing volume and experience?

Many laboratories do not routinely perform drug tests or do not do them in very large volumes. The most accurate results most likely come from a laboratory specifically set up to do drugs of abuse testing. Properly performed drug urinalysis requires a high degree of training (especially in the confirmation technologies) and these skills must be maintained through constant application. Furthermore, by having a relatively high volume (some experts suggest 300 or more tests per week) an employer can be sure the laboratory has the proper equipment required for testing and is not making do with equipment intended and/or used for other procedures. It is also good to check any certifications and licenses the laboratory holds and also to find out the laboratory director's qualifications and those of the laboratory staff.

What methods of screening and confirmation does the laboratory use?

As discussed in the previous chapter, a positive screening test should be followed by a confirmation test using a different, and preferably more sensitive, analytical method. It is not acceptable to perform the same test twice, although some laboratories do this. Many will use two different screening techniques such as a TLC test followed by EIA or RIA. For the greatest accuracy, however, choose a laboratory which confirms by GC or, even better, by GC/MS. Results from all forms of immunoassay plus the GC/MS have been admissible in court, however GC/MS confirmation is now required by such

organizations as the Department of Defense for tests of military personnel.

Which drugs can the laboratory's analysis detect?

Because of economic considerations, an employer would not test for all possible drugs but rather for the most prevalent drugs of abuse. These can actually vary depending upon the particular region of the country in which the employer is located. The most common list used for employment screening includes cannabinoids (marijuana), cocaine, benzodiazepines (e.g. diazepam), opiates (e.g. heroin), barbiturates, phencyclidine (PCP), amphetamines, and methaqualone (Quaaludes). Of these, barbiturates, benzodiazepines, and codeine (an opiate), are legitimate therapeutic drugs. Therefore, a test subject should be asked about any medications he or she may have taken recently.

What kind of quality control program does the laboratory have, and is it participating in any outside proficiency programs?

The laboratory's internal quality control program should include blind samples. Blind urine samples are prepared in advance and either contain a specific amount of one or more of the drugs being screened or are known to be drug-free. These samples are sent through the system along with real samples to check for both equipment and operator error. As an added precaution, the employer may want to send the laboratory blind samples as well. These can be all negative urines, or a single urine divided in two and given a false name to see if the same result comes back on both. If the laboratory participates in outside quality control programs, either state or federal, this provides additional assurance of quality testing.

What chain of custody procedures and/or documentation does the laboratory have?

Without proper handling of a specimen so that the sample results can be traced back to the proper individual, the tests will be worthless. It is necessary to examine what methods the laboratory employs for keeping samples from getting mixed up during the various analytical procedures and the final result reporting. Also, the laboratory should provide chain-of-custody documentation if the company is going to use the test results to take action (such as dismissal of an employee) which could end up in litigation. The documentation shows a paper trail of the custody of the sample at all times. If

the results are used only for referring employees to treatment programs, such documentation may not be necessary.

It is important to remember that chain of custody actually begins at the point where the urine is voided. While nothing short of witnessing the urine can guarantee the integrity of the sample, there are some steps that can be taken to minimize opportunities for falsifying or tampering with the urine sample. For example, employees should be asked to remove bulky clothing such as jackets or coats prior to voiding because they might conceal a urine sample that has been prepared in advance. As an added precaution, samples should be checked after voiding to make sure they are warm. Adulterated urines or samples where shampoo or other substances have been substituted for urine will be detected by the laboratory in most cases.

What kind of sample handling assistance does the laboratory provide?

Some laboratories furnish the company with urine collection bottles, seals, shipping containers, etc. and chain-of-custody forms which are filled out at the collection point. Employers should ask how the samples are to be shipped and who pays for this. Some laboratories provide their own courier service. Others use commercial carriers such as Federal Express, UPS, etc. (Samples need not be refrigerated en route, but should be shipped as soon as possible after collection to prevent sample deterioration.)

What provisions does the laboratory have for sample retention?

Because of the potential for legal challenge of test results, the laboratory should have the capacity to store frozen urine specimens for a considerable period of time. Only a small portion of each urine sample is used for the drug analysis, but the rest should be retained in its original container until the results have been determined. Negative samples need not be stored very long, but some experts suggest positive urines be kept six months to a year to allow time for retests if litigation is pursued.

What kind of support can the laboratory provide if legal action is brought against the employer?

Although a company's urine testing program should be designed to avoid the potential for litigation, there is still the possibility of lawsuits, or union grievances being filed. If test results are challenged, the laboratory should be willing to

provide an expert witness to discuss the custody and analysis of that sample. It is a good idea to ask also about the laboratory's past experience in this area, for example, how often its experts have testified and in what types of legal proceedings.

What is the laboratory's turnaround time?

Since a company's actions will be determined by the test results, the longer it takes to get them, the more costly the inability to take action becomes. For example, sometimes after an incident where drug use is suspected, an employee is given paid leave until test results are obtained. In such cases, rapid turnaround time can be critical. It may be less so in drug tests performed on applicants. Generally, a laboratory can report negative results quickly, in 24-48 hours. The important question to ask is how long it takes for confirmed positive results. It would not be unreasonable to expect such results within three or four days.

How does the laboratory report results?

It is a good policy to avoid telephone reports. Some laboratories give phone results and follow up with hard copy reports mailed later. The problem with this system is the potential for inaccurate verbal reports, especially on large numbers of samples, as well as the risk of endangering confidentiality. The ideal system is to use a speedy method such as telex, telefax or electronic mail to provide hard copies in the first place.

How good is the laboratory's security?

The employer will want to make sure that urine samples are protected from tampering. Therefore, it is wise to check on the laboratory's security procedures and methods of controlling access. Alarm systems to protect against intruders, and sprinkler systems to minimize fire damage to samples or records are also important features.

What does the laboratory charge?

The key factor affecting price will be which analytical methods the laboratory uses for screening and confirmation. The more sophisticated the method, the more expensive it will be. The employer should also understand if the per-sample price includes both screening and confirmation or if these tests are priced separately. The number of drugs detected will also affect the price. The employer should also ask about any additional charges, for example, the cost of expert testimony if a drug test results in litigation.

V. Other Considerations

Urinalysis can be used prospectively to identify drug users before job impairment occurs and retrospectively to link poor work performance to probable cause. In thinking about when urine tests are given, employers should consider which results are most appropriate for their particular organization.

Prospective Testing

The work performed by some organizations — the Armed Forces, air traffic control, mass transit — requires their employees to be in a constant state of readiness or functioning at peak level throughout the work shift. For reasons of public safety and security, the critical skills of some employees cannot be compromised. In these cases, employers may need to know about sources of potential employee impairment before they are manifested in performance decrements.

The most effective way to identify drug use before a work problem develops is to give urine tests randomly and without prior announcement. Employees should be told about the random testing policy in advance and should know what the consequences of a confirmed, positive test are.

The United States Navy provides a dramatic example of how effective prospective testing can be as a deterrent to drug abuse. In 1980, a Defense Department Survey showed that 48 percent of junior enlisted sailors used drugs. After extensive random testing, the number dropped to 21 percent in 1982. Today, the estimate is below 10 percent.

Retrospective Testing

Many organizations with less sensitive missions prefer to use urine tests retrospectively, after an accident or incident on-the-job to establish probable cause. Similarly, if an employee's job performance declines, or if patterns of absences, tardiness, or excessive use of sick leave are noted, retrospective urine tests are used to refute or confirm drug use as a possible explanation for the behavior. Depending on the test outcome, it also can provide the impetus for a treatment referral and involvement of a company's Employee Assistance Program, if one is available.

In some organizations, urine tests for drugs are given routinely during annual physicals, or as part of a position auditing or promotion process, shift reinstatement or job application procedures. Although some drug users will escape detection because the urine test schedule is known in advance and they can plan to abstain during that period, others will be identified and subsequently confronted with the action prescribed by the organization. Again, depending on the organization's policy, an employee may have to receive treatment or to face termination, may be temporarily reassigned until recovery is stabilized, or may lose the position. Here again, the major objective is deterrence.

Employees know they will be tested for drugs on a regular basis and will face specified consequences if drugs are detected. They have to determine whether their drug use is worth the risk. Results from the large-scale military programs mentioned earlier indicate that the majority will decide it is not.

Urinalysis can be a valuable asset in coping with the problem of drug use in the workplace. But to make it work effectively, organizations should carefully investigate the options available to ensure that the method selected fits a company's particular style of operation. Just as important, any organization opting for urinalysis likewise should ensure that policies and procedures for handling testing have been completely developed and communicated to employees prior to beginning the program.

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Cocaine: The Bottom Line. Cohen, S. $2.50.

Getting Tough on Gateway Drugs: A Guide for the Family. DuPont, R. L. $6.50.

A School Answers Back: Responding to Student Drug Use. Hawley, R. A. $5.00.

Marijuana Today: A Compilation of Medical Findings for the Layman. Russell, G. K. $3.00.

Marijuana Smoking and Its Effects on the Lungs. Tashkin, D. P. and Cohen, S. $2.50.

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Special Report

Peter B. Bensinger

Drugs in the workplace

If you have a drug abuse problem at your workplace, don't sweep it under the rug; if you think you haven't, you had better make sure

When men began wearing longer hair on the streets it was only a short time before neck-length locks appeared on the factory floor. The same phenomenon is true for drugs. Here an expert on the subject describes the rise in drug use in the nation, the inevitable rise in use that followed in the workplace, and its effects. He lists steps that a concerned management can take to deal with the drug problem, from establishing and enforcing a strong company policy to maintaining a good relationship with the local police. The most important part of the program, however, is attitude. Management needs to see the drug abuse problem not only as dangerous and illegal, but as something it must address.

Mr. Bensinger served as administrator of the U.S. Drug Enforcement Administration from 1976 to 1981. Before that he was director of Corrections for the State of Illinois and executive director of the Chicago Crime Commission. He is president of Bensinger, Dupont & Associates, a consulting firm in Chicago.

☐ In Louisiana, trained dogs sniff at an oil company's helicopter pads.

☐ In California's Silicon Valley, cocaine dries in computer plants' microwave ovens.

☐ In the Chicago Board of Trade Building, brokers sell cocaine.

☐ At a Virginia nuclear power plant, security officers are dismissed for off-duty use of marijuana.

☐ In the Department of Justice mailroom, employees are arrested for the use and sale of illicit drugs.

These are not research projects for the Department of Commerce nor are they scripts for a TV Sunday night special. These events actually took place, and they are not uncommon. From the mailroom of the Justice Department to auto assembly plants, the community problems have found their way into the workplace. The use of drugs in the workplace is a serious and growing problem reflecting a national trend; but it is one that business generally ignores. The problem's total dimensions are difficult to quantify, but one aspect of it – cost to business – has been estimated. In 1981, drug use among a civilian work force of some 108 million may have cost employers $16.4 billion.[1]

But management's concern with drugs in the workplace should not begin and end with profit-and-loss statements. Other major responsibilities also are at stake: because each business is part of a larger community that does not tolerate drug abuse, its support of community standards is critically necessary. Moreover, in our complex society, the operation of practically any enterprise – from the small dry cleaning establishment on a street corner to the largest multinational of the *Fortune* "500" – affects public health and safety in some way. Some managers might argue that drug abuse is a matter for law enforcement not management. They would be wrong. Transportation systems and hospitals are stringently regulated, yet abuse occurs. And while law enforcement may help ensure health and safety in communities and business operations, it cannot guarantee it. Law enforcers are only the public's agent; they cannot and should not set the standards. This responsibility lies in part with business managers.

Drug abuse by the operator of a public motor vehicle or by a surgeon would have obvious bad consequences, and instances of such drug use that have caused serious trouble have been documented. But transportation systems and hospitals are not the only workplaces where drug abuses occur.

The use of drugs in the workplace is not a remote or isolated phenomenon. Rather, it reflects national drug use patterns and trends. In this article the most recent statistics and projections of U.S. drug use generally set the stage for a look at drug use in the workplace and some policies business can adopt to deal with it.

How bad is it?

During recent years the amount of heroin available in the United States has decreased, as have

Editor's note: All footnotes are listed at the end of the article.

he number of addicts, emergency oom episodes, and overdose deaths. This positive development is a consequence of determined domestic enforcement efforts, rehabilitation programs, and successful diplomatic negotiations to limit the supply of heroin at its sources, primarily in Mexico and Turkey.

This successful effort in egard to heroin has not been matched with similar success where other drugs, mainly marijuana and cocaine, are concerned. The available supply of these two drugs has increased dramatically. Marijuana is grown in every state it's one of California's biggest crops) and in one overseas area alone, the Guajira Peninsula of Colombia, 100,000 acres of marijuana are under cultivation Cocaine, made from coca leaves grown in Bolivia, Colombia, and Peru, floods the United States; an illegal retail market operates here with annual revenues of over $30 billion.[1]

Heroin, marijuana, and cocaine are not the only problem substances. Within any 30-day period, some 7 million people abuse stimulants (amphetamines), barbiturates (phenobarbitol, seconal), or tranquilizers (Valium, Librium). Even when prescribed, such substances can easily be abused.

Surveys such as those commissioned by the National Institute for Drug Abuse tell us that high school seniors are not using as much marijuana as they did once.[2] Still, one out of two graduating seniors admits to some use, while one out of three acknowledges use within the previous 30 days.

In 1979, 35% of young adults surveyed between the ages of 18 and 25 had used marijuana within the previous 30 days In 1976, the number was 25%. The use of cocaine among the same group was alarmingly higher – 9.3% had used it within the previous 30 days, compared with 2% in 1976.[3]

More than 25 million Americans use marijuana, some 50% of users are between the ages of 18 and 25. Therefore a large proportion of the population segment that makes up much of America's work force has an incidence of regular illegal drug use – which accounts in part for the doubling of referrals by industry to federal drug programs between 1977 and 1979. How can corporate executives deal with this problem?

Controlling drugs at work

Reliance only on law enforcement to control drug traffic is not a realistic option. Indeed, in terms of personnel resources, in 1982 the federal government has 10% fewer customs, FBI, and drug enforcement agents than it did in 1975, and further manpower reduction is likely

The prospect at local levels is much the same. Thus the burden of dealing with workplace drug use, on the increase, falls more and more on the affected enterprises themselves. Here are some suggestions for controlling drug use at work that are based on experiences of companies that have started to tackle the problem.

Establish and communicate a clear policy on drug use. A company must do more than merely state that it does not condone drug use, and that an employee possessing or taking an illegal drug may be dismissed, disciplined, or turned over to law enforcement authorities. Management should see that employees understand the health and safety risks caused by drugs and the danger posed in the workplace by drug abuse. It has to explain that it is determined to obey the law, and that in so doing it may take internal disciplinary action as well as call on law enforcement agencies. It needs to spell out the company drug policy clearly and specifically so that employees know exactly where they stand.

Does management forbid drug use only on the job, and possession and sale only on company property? What about parking lots? What about off-the-job drug use? What if an employee is arrested for a drug offense off the job? If the company decides to take action, does it do so on the basis of the arrest or does it wait until there has been a trial disposition? What if the case is dropped, even though there is clear evidence of drug possession or use? A number of companies issue press statements concerning drug abuse and send letters to all employees detailing their policies Commonwealth Edison Company went even further and launched a comprehensive drug awareness program providing health and safety information on drugs at meetings where the company drug policy was explained. Special training was provided to supervisors focusing on job performance, changes in employee behavior, and fitness for duty. If they found reasons to question an employee's fitness to work, they could require a medical examination, including a urine test. Law enforcement liaison was increased as well. The Commonwealth Edison policy is worth noting:

"1 The illegal use, sale, or possession of narcotics, drugs, or controlled substances while on the job or on company property is a dischargeable offense. Any illegal substances will be turned over to the appropriate law enforcement agency and may result in criminal prosecution.

"2 Off-the-job illegal drug use which could adversely affect an employee's job performance or which could jeopardize the safety of other employees, the public, or company equipment is proper cause for administrative or disciplinary action up to, and including, termination of employment.

"3 Employees who are arrested for off-the-job drug activity may be considered to be in violation of this policy. In deciding what action to take, management will take into consideration the nature of the charges, the employee's present job assignment, the employee's record with the company, and other factors relative to the impact of the employee's arrest upon the conduct of company business.

"4 Some of the drugs which are illegal under federal, state, or local laws include, among others, marijuana, heroin, hashish, cocaine, hallucinogens, and depressants and stimulants not prescribed for current personal treatment by an accredited physician.

"5 Employees undergoing prescribed medical treatment with a controlled substance should report this treatment to their supervisor or the company medical department. The use of controlled substances as part of a prescribed medical treatment program is naturally not grounds for disciplinary action, although it is important for the company to know such use is occurring."

An important legal question is relevant here. Can a company or public agency refuse to employ drug users, even though they may be in a bona fide treatment program? The answer is it can.* The U.S. Supreme Court has upheld the New York City Transit Authority's workplace drug policy which excludes from employment anyone using narcotics, even though he or she may be in a rehabilitation program such as methadone maintenance. The Supreme Court ruled that such exclusion is constitutional – that the federal courts cannot intervene in a policy decision by an employer to refuse to hire someone whose drug problem may impair performance or threaten safety or property.*

Be sure to reinforce the policy. Will the company stick by its policy, or will supervisors who enforce it find they are in disfavor with top management because their actions result in employee grievances and unfavorable employee relations and publicity?

These are not easy matters to deal with. Establishing a policy is one thing, enforcing it is another. Internal reaction may actually discourage policy enforcement. Some managers let it be understood in subtle ways that they would prefer to avoid the problem, they do not look kindly on personnel actions and grievances or want industrial relations and security people involved in the operation of their departments.

A company cannot have a credible drug policy and apply it consistently if its higher echelons do not back supervisors or if they try to avoid administrative entanglements. The true test of a company's drug use policy occurs in this area. If it is unwilling to cope with grievances and some disgruntled employees, if it refuses to involve law enforcement and other agencies in drug abuse problems, its policy will fail to be consistent and prevention-oriented.

Shell Oil has a variety of installations – refineries, drilling and production rigs, and distribution operations – and operates a number of offshore drilling and production platforms in the Gulf of Mexico. Crews who are helicoptered or ferried by boat to these rigs from several jump-off locations spend 7 to 14 days on the platforms before returning to the mainland. With only facilities such as mess halls, sleeping accommodations, and other service areas on the platforms, time spent on them is a Spartan existence in confined quarters. Obviously, there is no family or active social life.

Shell Oil supervisors suspected that workers were bringing marijuana out to the rigs and smoking it there. Richard LaFaver, the company's staff security supervisor in Houston, spelled out the company's drug policy to employees and put them on notice that compliance was a condition of employment on the offshore rigs. If an employee objected to either the rule or its enforcement, the company kept him or her off the rig. The company determined that using illegal drugs would be cause for dismissal, and stated that policy in published workplace rules posted both on the drilling rigs and at the jump-off locations: firearms, illegal drugs, and intoxicating beverages are not permitted on company property; possession or use of them will result in disciplinary action that can include dismissal. Further, employees and vehicles en route to the rigs are liable to search.

The measures Shell Oil takes to enforce its policy are extensive. For one thing, it conducts random searches of employees on the days crews from the rigs go on and off duty. At booths at the jump-off locations, a security representative, an employee relations representative, and an operating officer from the offshore rig conduct the searches. Workers are asked to empty their pockets and to allow their suitcases to be examined. Shell Oil also conducts spot searches on the rigs themselves. These inspections are made by private security agencies which use canine units. Other procedures that Shell Oil employs include placing undercover people in the work force to discover and obtain evidence of on-the-job use.

It is understandable that Shell Oil goes to such lengths to enforce its workplace rules. The company wants to make sure employees and contractors realize that the work on the rigs is too important to be taken for granted. These searches exceed what may be required in most industrial settings.

But companies must inspect their premises. The purpose of inspections is not merely to discover and seize contraband, but to show that company policies have teeth and that management is willing to invest time and money to ensure that they are enforced. A company can also reinforce its drug policy by stressing it in initial employee interviews, orientation sessions for new employees, safety manual and workplace rules, industrial relations manuals and personnel brochures, and during in-service training programs and seminars for existing personnel.

Finally, company drug use policies should be consistent with other company practices. Where, for instance, termination for drug abuse is not listed under "Terminations" in a personnel manual, but is mentioned under "Drugs," employees may be unclear as to management's intentions.*

Provide education and accurate information about drugs. As part of employee orientation, management should offer awareness programs that deal with the legal, physical, psychological, and symptomatic consequences of drug use. How do drugs affect behavior and coordination? What are the legal penalties for possession and use? How will using a drug affect workplace performance on an assembly line, driving a forklift truck, or dealing with a customer?

Companies should stress the importance to first-line supervisors of ensuring that their employees are fit for duty. To understand their company's drug policy and enforce it, supervisors must believe in the policy and understand the seriousness of drug abuse. Their job is not to diagnose drug dependency, but to spot changes in behavior and to be aware of the warning signs of absenteeism, accidents, operational errors, and emotional outbursts. Rather than dealing with the problem abstractly or tentatively, management needs to confront the reality that some employees are abusing drugs.

Ford Motor Company's corporate coordinator for employee health services, Thomas E. McGraff, describes the company's efforts to educate its employees as an investment in the future. Their purpose is to promote early identification as well as provide appropriate treatment. Ford and UAW

[Continued on page 54]

have local management-union recovery committees. Ford publicizes its assistance program by mailing information to all employees and by distributing posters throughout plants. Ford also puts out a detailed brochure advising employees that requests for diagnosis and treatment will not jeopardize their job security and promotional opportunities and that medical records will be kept confidential. The company provides treatment facilities, including detoxification units and access to outpatient clinics, hospitals, and group therapy sessions.

But Ford, like most manufacturers, can go only so far with respect to rehabilitative services. Drug-caused performance inadequacy or disruptive behavior continues to be grounds for transfer, reassignment, and even discharge.

Many young employees routinely use marijuana and believe that "recreational" use of the drug on their own time is a purely personal matter. A company may have rules discouraging such use, but employees often scorn the reasons for them. They believe that such rules exist only for cosmetic public relations, to appease stockholders and old-line management. Young employees also archly observe that the rule makers often consume alcohol and thus are in no position to lay down rules about drug use.

This young employee group must grasp the different off-duty risks of using drugs versus those of using alcohol:

- Marijuana's THC remains in the bloodstream for several days, even weeks, while alcohol is usually eliminated within 12 hours.
- Neither alcohol nor drugs are acceptable workplace substances. Alcohol is legal, however, while possession of any amount of marijuana violates both federal and state laws.
- Alcoholic beverages contain far fewer dangerous chemicals than marijuana, which contains 400 – some of these have only immediate and transitory effects but others have long-lasting consequences.

Any educative program should present in detail the National Highway Safety Commission's findings relating vehicle accidents to drug and alcohol use. Briefly, the commission found the correlation to drug use to be quite high, higher than users are generally aware of or will readily admit. However, emphasis on the hazards of drugs should not downgrade the problem of alcohol. Both substances are killers on and off the job. Drug awareness and enforcement should not reduce the company's concern with respect to alcohol abuse.

An employee drug awareness program should end with a completely candid question and answer period, in which employees can freely ask questions and offer their opinions, and management can discuss any misconceptions.

Anticipate the problem, do not be surprised by it. Drug problems too often catch managers by surprise, and public relations officers – and occasionally chief executive officers – can find themselves scrambling for answers to probing questions from the media. One way managers can prepare themselves is to search for drugs on the premises before they are found by others. Where are drugs most likely to be used? Where are they most likely to be sold? What security steps can reduce these threats?

Unions generally look to management to prevent drugs from coming into the plant, but traditionally, management is reluctant to undertake the expense of surveillance equipment, extra guard services, and protective procedures such as video cameras and security people in the work force. As we've seen, signs and threats mean little unless they are followed up.

The procedures commonly used in international airports serve as one reference for managers wondering how to detect drugs in their offices and factories. Signs inform the public that bringing in contraband, narcotics, or firearms is a federal offense, punishable by imprisonment. Customs officials inspect baggage, and passengers are put on notice that they and their baggage are subject to search. Of equal importance, inspectors are trained in what to look for in terms of behavior. While the same procedures may not be possible or appropriate at many workplace settings, it is important to convey the impression that inspection is not only possible but also happens.

Typical factory problem areas include:

- Locker and changing rooms.
- Parking lots.
- Shipping, receiving, and mailroom areas.
- Nearby taverns where employees often discuss company gossip, including the use of drugs, and where exchange or use of drugs may take place.

Many companies, such as Virginia Electric & Power Company, require that all new employees sign a statement to the effect that they understand the company's policy on drugs and accept it as a condition of employment. If a company articulates its policy, enforces it, and has good relationships with both employees and local security and law enforcement agencies, it makes clear that it is dealing with a serious problem in a competent, professional way. Thus the company and its employees are less likely to be faced with a sudden, embarrassing surprise.

Maintain a good relationship with the police. What kind of liaison with the law should a company seek? How much can and will local police do? What won't they do? Now that most local law enforcement agencies have fallen on lean times and may have too few officers to visit plants, conduct seminars, or respond to drug use and sale situations, where can a company turn for help?

At Compugraphic Corporation, a manufacturer of phototypesetting equipment in Wilmington, Massachusetts, supervisors noticed evidence of drugs. The company then hired an outside security firm to make an undercover investigation which confirmed that drugs were being consumed and sold in the plants. Compugraphic then went to the local police department which arranged for police officers to be brought in on an off-duty basis. The company provided money for the undercover agents' drug purchases, travel expenses, and overtime pay. The Compugraphic case is noteworthy for three reasons: (1) supervisors observed the symptoms of drug

use, (2) management did not hesitate to get outside help to learn the extent of the problem, and (3) the company brought in the local police and paid overtime costs and other expenses.

Shrinking of their budgets has made police departments reluctant to assign officers for long periods of undercover work in private situations for which they have to pay overtime costs as well as other expenses.

Although companies should look first to their own security offices for guidance, generally these offices' resources are limited, their staffs lack training, and they can hardly work anonymously. Increasingly managers look outside for undercover investigations as well as for assistance and training, professional seminars, and workplace analysis.

Company management should go out of its way to maintain contact with law enforcement agencies and should make sure that relations with local police are strong. Too often, managers want to avoid the publicity of an arrest, which they think will place them in an unfavorable light in the community. For this reason and for fear that police involvement means admitting that a serious problem exists, company officers are sometimes reluctant to bring in local police even when illegal drugs are found on company property.

Regardless of its fears, however, management cannot ignore the law or risk covering up criminal activity. For one thing, a cover-up constitutes an obstruction of justice. Also, drug rings in plants or offices do not remain secret long.

Word travels fast among informants, dealers, undercover agents, and users. When a drug operation is broken and becomes news, the company involved is in a much better position if published accounts refer to a joint investigation in which the company played an important part. Good police-company liaison is essential to such an outcome.

Finally, and I cannot stress this point too heavily, having an employee unfit for duty is potentially dangerous around machinery and obviously should be avoided, but keeping an employee who has brought drugs to the job is not merely troublesome. Such people are involved in illegal

[Continued on page 60]

activity: anyone trafficking in drugs – from production, to distribution, to retail sales, and to use – risks discovery and legal consequences at each step. A well-advised company plays it safe, making absolutely certain that at no point does it condone or even *appear* to condone this illegal activity.

Don't attempt to deal with the problem on your own; seek experienced professional advice. Traditionally, detective and guard firms have provided undercover services to companies for a variety of purposes, including assigning undercover agents to determine the extent of workplace drug use.

The *Lipman Report*, a protective security agency newsletter, recently described an instructive case. The management of a community hospital suspected that employees were stealing and selling hospital supplies and equipment, as well as selling and using drugs on hospital premises. A security firm was hired and two of its undercover agents discovered that supplies ranging from toilet articles to doctors' scrub suits were being stolen. They also discovered that the hospital pharmacy was an easy mark for on-the-job drug users and sellers, that hospital security guards were lax, and that patient care was suffering. Within weeks, hospital management had determined the extent of the problems and begun to correct them.

Managers may think they can handle a drug problem themselves, but there are important reasons for using outside resources.

1. Most organizations lack good undercover investigation capability.
2. Outside investigators are anonymous.
3. Trained detectives can more skillfully assemble evidence of findings.
4. Investigation costs and assignments can be restricted to "need to know" organization officials.
5. Outside operatives can be assigned immediately without disrupting ongoing company security coverage needs.

Off-duty police officers available through local law enforcement agencies often can handle such assignments professionally and with generally excellent results.

Nipping the bud

What else can organizations do to cope with the growing problem of workplace drug use? For one thing, they can build on and draw from the experience of others. Security, industrial relations, and medical directors should meet often to discuss problems, compare techniques, and urge that their respective professional associations schedule workshops on drug abuse when they set meeting agendas.

Although discussions at professional association meetings now deal with drug abuse, chemical dependency, and alcoholism much more than in the past, corporate managers as well as technical experts need to hear about these problems.

Management and unions should focus on the drug problem in their negotiations to ensure that company drug policy and workplace rules are not arbitrarily drawn up but reflect the common interests of the company and employees. Both Shell Oil and members of the automobile industry, including GM and Ford, worked closely with labor representatives when they set up drug policies and enforcement procedures.

Companies should offer help to those employees with drug problems who are willing to seek assistance. This is not only good employee relations, it is also good for business – retraining, hiring, and arbitration costs are avoided and it helps the company's image. A review of company-provided group health insurance coverage is worthwhile. Does it provide, or can it be extended to provide, payments for treating drug-related problems? What community health agencies may be able to assist in treatment situations?

Most of all, companies must realize that dealing with drug problems involves risks and costs, and that the risks generally are not avoidable. By taking action, managers risk employee illwill, and perhaps temporary misinterpretation by the public image. But doing nothing is even more risky.

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DRUG TESTING IN THE WORKPLACE

INTRODUCTION

The Pervasive Influence of Drugs

Drug abuse is a present and growing threat to American society -- its families, communities, and economy. Twenty years ago, 96% of Americans had never used any illegal drug and drug use on the job was virtually unheard of.1/ By contrast, today in the age group currently entering the workforce, the numbers are staggering -- a 1985 survey revealed that 65% of 18 to 25 year-olds had used illicit drugs, and 42% had used illicit drugs within the previous month. Overall, 70.4 million Americans age 12 and over (37% of the population) have used marijuana, cocaine or other illicit drugs at least once in their lifetime; 36.8 million (19% of the population) were users at least once in the past year. Between 1964 and 1984 marijuana use alone has increased thirty fold. In the workplace today, one in six Americans is using marijuana monthly and one in twenty is using cocaine monthly./2

Powerfully addictive drugs have never been more accessible to such a cross section of American society than they are today. While the national infatuation with drugs seems to have waned since the 1960s, drug experts warn that "exposure to addictive substances now begins earlier in life and cuts across a more diverse slice of the population than ever before."/3 A 1986 study by Straight, Inc. showed that almost half of the nation's teen drug abusers got involved before the age of 12. As Edward Kayfman, Chairman of the American Psychiatric Association's drug abuse panel said, "[t]he kid who used to have to spend $250 for a gram of coke can now buy a vial of crack for 10 bucks. Two kids can go to the movie or they can split a vial of crack." Since NIDA began monitoring marijuana potency in 1975, the potency of THC, the psychoactive ingredient in marijuana, has increased, on average, 900%. Sensimilla, a type of marijuana, is ten times more potent than marijuana was just ten years ago.4/

The Costs of Drug Abuse to American Business

Drug abuse has an enormous cost to American business. Conservative estimates are that drug use costs at least $50 billion a year.5/ Other estimates set the average cost at $1,000 per worker (including non-users) per year.6/ This cost amounts to a "chemical dependence" tax, which, in net effect, destroys future jobs, raises inflation, and diverts more money away from capital growth.

The Conference Board, Inc. recently published updated estimates of the total economic burden of drug abuse on society for the year 1983. The report estimates that alcohol and drug abuse in 1983 were responsible for $176.4 billion in costs associated with treatment, research and prevention programs; treatment of related health problems; crime; motor vehicle accidents; and reduced productivity and lost employment. These figures compare to an estimated $136.4 billion in economic costs for substance abuse in 1980 and $65.8 billion in 1977./7

Drug abuse expert, Dr. Edward C. Seanay warns employers of the significant impact substance abuse can have on worker performance: "Even low levels of use of some of the materials can have measurable effects on coordination, morale and alertness. These changes translate directly into increased job-safety risk and reduced attention to work habits."/8 There is substantial evidence showing that alcohol and certain drugs negatively influence a person's ability to perform a job with regard to judgment, interpersonal relationships, manual dexterity and the utilization of skills.

Addressing a group of small businessmen, Assistant U.S. Attorney General Richard Willard recently observed: "Illegal drug use drains our nation's productivity, strangles the economy and hinders our ability to compete internationally against an ever more disciplined foreign workforce ... Drug users in the workforce are three times more likely to be involved in on-the-job accidents, are absent from work twice as often, incur three times the average level of sickness costs, and are only two thirds as productive ... On average, compared with their non-addicted counterparts, substance abusers consume three times the medical benefits, are five times as likely to file workers' compensation claims, experience seven times as many garnishments and are repeatedly involved in grievance procedures."/9

The private sector is becoming rapidly educated about the costs of drug abuse. Many corporations are now introducing drug testing programs of their own. Thirty percent of all Fortune 500 companies have testing programs, and (20%) more are expected to have programs in place by late 1987./10 Companies such as Lockheed, Exxon, IBM, Shearson Lehman Brothers, Federal Express, United Airlines, TWA, AT&T and The New York Times require testing of applicants. Others, such as the Wall Street firms of Kidder, Peabody & Company and Smith Barney, Harris Upham & Company are testing employees, in addition to applicants.11/ Rockwell International screens its test pilots for drug use. The Los Angeles Times, Southern Pacific Railroad, and Georgia Power are among companies that test workers if supervisors have reasonable suspicion to believe they may be impaired. A similar policy is in effect for drilling rig workers of all major U.S. oil companies, 12/ and some 200,000 employees of U.S. railroads must undergo drug testing under the Federal Railroad Administration's mandatory testing program.13/

Explaining this trend toward workplace drug testing, Charles R. Schuster, Director of the National Institute on Drug Abuse (NIDA) noted, "In the past, private industry has been somewhat reluctant to discuss drug problems or policies . . . {feeling} that having a drug policy and/or discussing drug issues was an open admission that their

businesses had a problem . . . Within the last year a major transition has taken place in the business world. Progressive companies have begun to adopt the position that society has a drug abuse problem. It is becoming evident that drug abuse is not unique to a particular business, but rather a phenomenon of society-at-large, and since you must draw your workforce from society, you must develop policies and programs to deal with this problem."/14

WORKPLACE DRUG TESTING

No segment of the American workplace is immune from the problem of drug abuse. Illicit drugs are more common and more readily available than ever before. The losses in productivity are evident, and there is no question that employers will be dealing with substance abuse for years to come.

Many corporations view drug testing as an antidote to many ailments: employee theft, absenteeism, rising health care costs, accidents, shoddy workmanship and low productivity. With increased social awareness of the problem of substance abuse, the corporate world is viewing drug testing as a necessary condition for employment.

Companies such as IBM, Union Oil and The New York Times require job applicants to submit to a urinalysis test to detect drug use as part of the medical examination given at the time of hiring./15 Courts have found drug testing reasonable and constitutional as part of a pre-employment physical examination./16

More complex legal issues arise, however, when drug screening programs are expanded to those already on the job. There are two categories of on-the-job testing for drug abuse -- "reasonable suspicion" testing and "random" testing. Random on-the-job drug testing is the most controversial type of drug testing program currently in use and entails the periodic, random selection of workers for drug testing.

The History of Workplace Drug Testing

American industry has a long history of evaluating employees to determine their fitness to perform their jobs. Through occupational medicine programs, personnel and job applicants are medically examined to ensure that they did not have medical conditions that would interfere with safe, efficient job performance. The corporate health promotion and wellness programs developed in recent years have added nutrition, drug abuse and hypertension to the factors screened in the medical evaluation./17

During the 1970s, many companies developed pre-employment and in-service drug screenings to ensure job safety and productivity. These programs allowed for early identification and referral for treatment of drug abusing employees. Comprehensive programs, including employee assistance, rehabilitation, treatment and education, are an outgrowth of these early screening programs.

Successes of Workplace Drug Testing

Many of the companies which have instituted drug screening or testing programs are getting the results they wanted. These companies have observed a decline in the number of job applicants testing positive for drugs: Lockheed: 21% to 15%; Southern California Edison: 28% to 15%; PG&E: 11% to 9%; and, The Los Angeles Times: 13% to 9%.

Other companies which have begun testing for employee drug abuse have witnessed an improvement in job safety and productivity. For example, Southern Pacific Railroad announced that human-factor accidents have gone down as much as 69% since testing was implemented for its employees in 1983. 18/ And a study conducted for General Motors by University of Michigan Researchers found that employees who entered the company's Employee Assistance Program had 40% to 60% reductions in absenteeism, sickness and accident benefit use and occupational injuries. The researchers estimated that for every dollar GM spent on such treatment, the company would save more than two dollars within three years.19/

Challenges to Workplace Drug Testing

Despite these successes, drug testing has received much negative criticism, principally by such groups as the American Civil Liberties Union and various employee unions. Testifying before the House Select Committee on Narcotics Abuse and Control, NIDA Director Schuster, identified two primary concerns with drug testing:

* The need to balance an individual's reasonable expectation of privacy and confidentiality with the principles of public safety, efficient performance, and optimal productivity; and

* The accuracy of testing, specifically the reliability of urinalysis methods.20/

Privacy & Due Process

Critics of workplace drug testing focus much of their work toward limiting or eliminating on-the-job drug testing. They object to the "dragnet" quality of testing conducted when there is no individualized evidence of drug abuse. Opponents argue that drug testing through urinalysis reveals a great deal about the private life of the person tested, including pregnancy, asthma, heart disease, manic-depression, epilepsy, diabetes and a host of other physical and mental conditions which an individual may not want revealed to a third party./21

Critics argue that such testing is therefore violative of employees' "right of privacy" guaranteed by the U.S. Constitution. There are two kinds of privacy rights referred to in the context of drug testing. One is the so-called Constitutional right of privacy that arises under the "penumbra" of the Bill of Rights and is applied to the states via the substance due process clause of the Fourteenth amendment. This right to privacy, while not explicitly recognized in the U.S. Constitution, has been recognized in a stream of United States Supreme Court and lower court decisions./22

The second kind of privacy right referred to in the context of the drug testing debate is a common law right of privacy that works its way into Constitutional analysis under the Fourth Amendment's prohibition against unreasonable searches and seizures whereby a search is judged reasonable on the basis of whether it invades an individual's "reasonable expectation of privacy." The U.S. Supreme Court has ruled that extracting bodily fluids constitutes a search within the meaning of the Fourth Amendment. /23

Despite these strong constitutional challenges, drug testing has withstood every single federal appeals court challenge. The federal appeals courts in five Circuits have held that testing of public or private sector employees without individualized suspicion (random drug testing) is constitutional. These courts include the Third, Fifth, Seventh, Eighth and District of Columbia Circuits. Moreover, the Supreme Court unanimously vacated a Ninth Circuit injunction that would have halted the Federal Railway Administration's post accident testing program. As a result of that order, Conrail was able to obtain urine tests of the brakeman and engineer in the recent Maryland train wreck which killed 16 people from employee drug use.

In addition to random testing, reasonable suspicion testing has been upheld by appeals courts for the following job classifications: employees who carry firearms, employees who have access to classified information, and employees who are involved in law enforcement (5th Cir.); bus drivers (7th Cir.); prison guards (8th Cir.); military personnel (D.C. Cir.); and race jockeys (3rd Cir.).

The Circuit Courts have been particularly forceful in upholding the right of private employers to authorize drug testing. In Amalgamated Transit v. Suscy, 538 F.2d 1264 (7th Cir. 1976), cert. denied, 429 U.S. 1029 (1976), a union challenged the constitutionality of the Chicago Transit Authority's requirement that bus operators submit to blood or urine tests following accidents. The 7th Circuit held that the "paramount" interest in protecting the public by insuring that bus drivers are fit to perform their jobs, is so great that bus drivers have no reasonable expectation of privacy. This reasoning was followed in Brotherhood v. Burlington Northern Railroad, 802 F.2d 1016 (8th Cir. 1986), which held that both accident drug testing and periodic drug testing unilaterally imposed as a condition of employment without collective bargaining did not violate the collective bargaining agreement. The court ruled that it is the insidious nature of illegal substances that "too often a user's faculties are impaired and the damage done through a serious error on his part before he realizes that he is impaired and without any outward sign of his impairment that could lead a supervisor or other person to intervene."

The record in the federal district courts is less clear-cut. A great deal of media attention has been given to district court decisions, which, of course, do not establish national precedent. The U.S. Justice Department's current tally indicates this breakdown: of 576 federal district courts, only 17 have ruled in drug testing; of those 17, ten have upheld drug testing and seven have struck it down; of the latter group, two have since been overturned on appeal.

Of those district courts which have ruled against drug testing, most seem to have objected to the means of implementing the program, not that drug testing programs are at all times, and in all circumstances invalid. For instance, in Capua v. City of Plainfield, (D.N.J. 1986), the court struck down random urinalysis to protect against arbitrary abuse. Not surprisingly, the court found that the absence of notice and the absence of written standards violated the Fourth Amendments protections against unreasonable searches and seizures. In language that hinted at a legitimate drug testing program, the court stated that, "{A}ssuming a program of drug testing is warranted, before it may be implemented, its existence must be made known, its methods clearly enunciated, and its procedural and confidentiality safeguards adequately provided."

Although some earlier district court decisions ruled against drug testing, particularly for procedural flaws in drug testing programs, more recent cases have since upheld drug testing in safety-related occupations involving nuclear power plant operators, helicopter mechanics, and air traffic controllers.

Test Reliability

Central to the growth of workplace drug abuse testing in the U.S. has been the development of reliable, inexpensive screening technology. However, the accuracy and reliability of drug testing procedures are among the most frequently criticized parts of most drug testing programs.

The most commonly used urinalysis methods to screen for illegal drugs are immunoassays and chromatography. These technologies can identify, with a high level of confidence, whether someone has used drugs like marijuana, cocaine, PCP, amphetamines, barbiturates and heroin in the past three or four days.

Unlike a breathalyzer test for alcohol urinalysis cannot determine present drug intoxication. Urinalysis testing will determine only the presence of a drug metabolite in the system, and not whether the individual is currently under the influence of an illicit substance. Therefore this test is used primarily as a deterrent.

Urinalysis technology is not without its problems. A person's body weight, fluids and foods consumed prior to the test and over-the-counter medications can cause false positive readings in some tests. Improper handling and faulty chain of custody procedures can cause samples to deteriorate or to become contaminated and affect the test results. However, when appropriate methods are used, good laboratory procedures followed and adequately trained personnel employed, there is little controversy among experts about the reliability of urinalysis for drug screening.

The false accusation of being a drug abuser could ruin a person's career or life. Therefore, the use of a second, confirming test is almost universally recommended before any disciplinary action is taken based on positive results of a first screening. Imputations of drug use, especially in the case of a false positive result, will follow an employee for the remainder of his career. The federal courts have therefore ruled that employers must take the proper precautions to

avoid such irreparable damage. The courts have found that employees cannot be dismissed based on a single unconfirmed drug test; a confirming test by an alternative method is required to avoid the determination that the firing was arbitrary and capricious. In addition, procedural due process requires that a government employee be provided notice and an opportunity for a hearing before being fired./24

STATE ACTIVITY

Federal courts have established relatively broad parameters for workplace drug testing by upholding pre-employment screening, "reasonable suspicion" testing and random drug testing for employees in safety-related positions and for employees in extensively regulated industries, provided that certain procedural safeguards exist. While exact parameters will continue to be defined by the courts, the overall questions regarding the propriety of workplace drug testing have now moved to the legislatures -- both state and federal.

This year alone, workplace drug testing legislation has been considered by thirty-one states. Many of the bills introduced during 1987 would limit employee drug testing by creating new rights for employees or by placing new restrictions on testing by employers. For example, a bill introduced in California would make employers "reasonably accommodate" employees seeking drug rehabilitation, while bills in Connecticut, Hawaii, Iowa and Vermont would largely prohibit employers from testing at all.

In early April, Montana Governor Ted Schwinden signed the first state legislation to significantly limit the right of employers to test employees for drug abuse. Montana Chapter 482 prohibits blood or urine testing unless the employee works under hazardous conditions, is in a position involving the public safety, or has specific fiduciary responsibilities. Moreover, the legislation mandates new drug testing procedural standards including requirements that employers have a written policy for testing and definite safeguards for privacy. Employers must make use of two testing procedures and are prohibited from releasing the results.

In other states, legislators are acting to safeguard the right of employers to test employees for drug use. Bills, such as those introduced in Utah, Texas, and Minnesota would permit drug testing in various forms, or limit the rights of employees found to be "under the influence." Many of the bills contain provisions regarding testing in both the private and public sectors.

On March 17, 1987 Utah Governor Norman Bangerter signed legislation specifically permitting employers to test current or prospective employees under the following conditions:

1) Reasonable and sanitary conditions for the collecting of samples.
2) Guarantee of the right to privacy of the individual.
3) Documentation of sample collection.
4) Appropriate precautions to preclude the contamination or adulteration of samples.

Continued

5) Conformance to scientifically accepted analytical methods and procedures.

Maine Governor John R. McKernan, Jr., upheld the right of Maine employers to test employees by vetoing a bill banning random drug testing. The veto was sustained by the Senate. Governor McKernan is opposed to a ban on employee drug testing, but has stated that he will accept a bill of limited nature. The Governor would approve of legislation allowing random drug testing of employees in sensitive areas. Additionally, the Governor opposed the section of the legislation mandating that employers bear the cost of employee rehabilitation.

FEDERAL ACTIVITY

On September 15, 1986, President Reagan issued an Executive Order mandating that all agencies work toward a drug-free federal workplace. The order requires all federal agency heads: (1) to develop a stated policy regarding illegal drug use; (2) to establish Employee Assistance Programs emphasizing education, counseling, referral to rehabilitation and coordination with community resources; (3) to train supervisors to identify and address employee drug abuse; (4) to set procedures for individuals to seek rehabilitation services and for supervisors to make such referrals which protect personal privacy; and (5) to set procedures for identifying illegal drug users. The order includes use of urinalysis for detecting drug abuse for selected employees of all agencies and a government-wide drug detection program./25 The order has met with some resistance from Administration officials and Members of Congress who are opposed to drug testing in the workplace.

The Executive Order authorizes the use of drug testing programs as a diagnostic tool to identify drug use in specific circumstances and among certain employees. Random or uniform tests must be given to employees in sensitive positions. Additionally, testing may be ordered for job applicants, when there is reasonable suspicion of drug use, in the course of a safety investigation, or as follow-up to a rehabilitation program. Measures to be taken against illegal drug users and measures to protect employees are also included in the order.

President Reagan also sent to Congress the "Drug-Free American Act of 1986" which included as Title I the "Drug-Free Federal Workplace Act of 1986." Title I amends the Rehabilitation Act and the Civil Service Reform Act to clarify that they do not bar personnel actions to achieve drug-free workplaces. The Anti-Drug Abuse Act of 1986 passed the 99th Congress and was signed into law in late 1986.

Attorney General Edwin Meese announced on February 3, 1987 that President Reagan had placed the responsibility for all federal anti-drug programs into one Cabinet-level board. The new National Drug Policy Board will continue to serve as the National Drug Enforcement Policy Board, created by statute in 1984, to review and develop strategy for all federal law enforcement agencies. "This important step will provide policy coordination for the enhanced

government efforts to substantially cut the demand for drugs while maintaining and strengthening our long-range drive to reduce the supply of drugs," Attorney General Meese said.

Under consideration in the 100th Congress is Senate Bill 1041 which would require mandatory drug and alcohol testing of rail, aviation, and motor carrier industry employees. The legislation requires the Secretary of Transportation to undertake a rulemaking process within 12 months of enactment to establish a drug and alcohol testing program that would require five types of testing, including random, pre-employment, post-accident, periodic recurring, and with reasonable suspicion. According to Senator Ernest F. Hollings (D-SC), co-sponsor of the bill along with Senator John Danforth (R-MO), "This is only the beginning of a long process to ensure that transportation employees will not use drugs or alcohol on the job." Action on this legislation is expected late in 1987.

The Human Resources Subcommittee of the House Committee on the Post Office and Civil Service recently held hearings on the subject of drug testing of federal employees. The Committee is investigating the scientific aspects of testing, including accuracy and laboratory accreditation. No significant action is expected before early fall 1987.

CONCLUSION

In March 1986, NIDA sponsored the national forum, "Interdisciplinary Approaches to the Problem of Drug Abuse in the Workplace." The program brought together representatives from business, industry and labor to discuss the growing problem of drug abuse, its impact on American business, and ways of addressing the problem within the workplace environment. As part of the forum, consensus statements on various issues were developed.

On the ethics of workplace drug testing, there was consensus that protecting the privacy of workers' activities in their off-duty hours is an important consideration in establishing fair and equitable drug abuse testing programs. "However, other concerns must be weighed in addition to an employee's right to privacy. These include the employer's obligation to provide a safe environment for the employees and the public, to provide a safe and high quality product or service for the customer, and to protect shareholders from unnecessary financial loss due to drug abuse among employees ... A balancing of the ethical concerns created by drug use in the workplace will, in many cases, result in a need for employer action to screen prospective and current employees for the presence of drugs of abuse."/26

How should a workplace drug program be structured? NIDA's Richard Hawks presents a concise, comprehensive picture: "Many considerations are important to developing a sound drug program in an organization. It cannot be overemphasized that the documentation of well thought out policies, developed with input from all organizational elements, is at the top of the list. An effective program to discourage drug abuse in an organization must have clearly defined rationales, goals, and rules. The consequences of a positive urinalysis result must be clearly stated and not open to arbitrary

responses by management. The rights and sensitivities of the individual should be protected as much as possible. Results of urine drug assays should be kept confidential. The individual should be accorded the benefit of the doubt, if necessary. The program should be designed, in other words, for prevention, and rehabilitation rather than for law enforcement."/27

An area of immediate legislative/regulatory concern is to set laboratory regulations and certification standards. Until such standards are established, private employers and government agencies must insist that the laboratories they use for urinalysis participate in proficiency testing programs such as those provided by the College of American Pathologists or the American Association of Bionanalysts. Recognizing the limits of urinalysis technology, confirming tests should always be conducted before any disciplinary action is taken in cases where first test results are positive.

As Charles Schuster observed, "the workplace provides an excellent forum for dealing with drug abuse through education, prevention, early intervention, and referral for treatment."/28 A drug testing plan, if thoughtfully conceived and carefully executed, can be a very useful component in an overall drug abuse prevention program.

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The State Factor is published by the American Legislative Exchange Council for educational purposes only and was written by Carolyn Peterson of Peterson Public Relations in Vienna, Virginia, and by Michael Fletcher, Director of ALEC's State Legislator Task Force and Private Sector Coordinating Council on Labor. The views expressed herein do not necessarily reflect those of the American Legislative Exchange Council, its officers or members.

HB 283

TAYLOR LABORATORIES, INC.

CHEMICAL TESTING & MARKETING
724A SIGINAKA WAY SITKA, ALASKA 99835
(907) 747-6364

SUBJECT: LABORATORY REPORT, NOVEMBER 1987 - A continuing review of information to increase the effectiveness of our subscribers in serving the public

DRUGS OF ABUSE LABORATORY

COCAINE-NOVOCAIN?

"Doesn't novocain test positive for cocaine? They're both 'aines' aren't they?"

This question was recently asked of us in court. To a chemist, the answer is "no" because the chemicals are different. But the relationship is interesting. Novocain is a trademark for procaine hydrochloride. Because cocaine (cocain) is addictive, procaine hydrochloride was developed to take its place [pro-(in place of) + (co)cain].

Thus, the "trivial" similarity in the names is because Novocain replaced cocaine. The scientific names of the chemicals reveal no real similarity.

Cocaine: [1R-(exo,exo)]-3-(Benzoyloxy)-8-methyl-8-azabicyclo[3.2.1]octane-2-carboxylic acid methyl ester.

Novocain: 4-Aminobenzoic acid 2-(diethylamino)ethyl ester hydrochloride.

Their size and shape are significantly different, so they will not give the same results. Also, cocaine spontaneously loses one water molecule in body fluids, and is therefore tested mostly as benzoylecgonine, which cannot be derived from Novocain.

Drug abusers, however, typically believe such excuses, and it is difficult to argue against belief. But, if there is some question, do another urinalysis, when Novocain can no longer be an excuse.

HB 283: RESTRICTING SOME EMPLOYERS FROM TESTING FOR DRUGS OF ABUSE

The House Judiciary Committee has scheduled hearings on HB 283 in Anchorage and by teleconference on November 14. Contact: John Hartle, 465-4919.

This year, work place drug testing legislation has been considered in thirty one states. A California bill would make employers "reasonably accommodate" employees seeking drug rehabilitation, while bills in Connecticut, Hawaii, Iowa, and Vermont would mostly prohibit employee testing. The first state legislation to limit the right of employers to test for drugs is that of Montana, where, to be tested, an employee must work under hazardous conditions, affect public safety, or have fiduciary responsibilities.

In Utah, Texas, and Minnesota, legislators are acting to safeguard the rights of employers to test employees. In March, Utah Governor Norman Bangerter signed legislation permitting testing of current or prospective employees, given specific conditions of reasonable collection provisions, right to privacy, documentation, precautions for adulteration, and conformance to acceptable scientific methods.

Maine Governor John R. McKernan, Jr., upheld the right of Maine employers to test employees by vetoing a bill banning random drug testing. The veto was sustained by the Senate.

Alaska Governor Steve Cowper has written to our Laboratory: "I will bear your comments in mind as we try to sort through the conflicts between the right of privacy and the necessity to establish a drug-free work place." We are sure Governor Cowper and committee members working on HB 283 would appreciate your thoughts on this controversial issue.

ASBESTOS LABORATORY

The Alaska Department of Labor will be holding a workshop on proposed changes to its asbestos regulations this month. Participants representing a crossection of interests will discuss whether the hazard of working with asbestos warrants reducing the allowed exposure limit for workers to ten times less than current Federal and Alaska State limits.

SUBSTANCE ABUSE IN THE WORKPLACE

No cost for the seminar $7.00 - Lunch Open to the Public

9:00 - 11:50 a.m.

Welcome ..... Clyde Johnson
Industrial Relations Manager
Ketchikan Pulp Company
and
Member, Job Service Employer Committee

"What ARCO is doing to curb drug abuse at the worksite". ..... Mike Collar
Employee Relations Director
ARCO Alaska, Inc.
Kuparuk Oil Field

Employer Drug Testing Policy in Relation to Unemployment Insurance ..... Stan Burrows
Unemployment Insurance Program Coordinator
Department of Labor, Juneau

Break

Methods of Drug Testing ..... Fern Jarrett
Laboratory Director
Ketchikan General Hospital

Alaska Labor Law and Substance Abuse at the Workplace ..... James Sanwick
Wage & Hour Regional Supervisor
Department of Labor, Juneau

12:00 - 1:00 p.m. Chamber of Commerce Luncheon
(Members & Non-Members)
Featured Luncheon Speaker
Employee Assistance Programs ..... Richard Callentine, M.A.
Family Counseling Services
Ketchikan
and
Southeast Alaska Employee Assistance Association

Limited Seating:
RSVP: 225-3181
OR: 225-3184

Other Seminars about Substance Abuse in the Workplace
Interim Seminar, Spring, 1987
Final Seminar, September 9, 1987 ..... Dr. Forest Tennant, M.D., Dr. P.H.
Executive Director, Community Health Projects, Inc., West Covina, Ca.

SUBSTANCE ABUSE IN THE WORKPLACE – II

No Cost for the seminar | $5.00 - Lunch | Open to the Public

9:15 a.m.-1:00 p.m.

Facilitator ..... Carroll Fader

"Aspects of Drug Testing" ..... Lawrence Taylor, Jr.
President
Taylor Laboratories, Inc.
Sitka, Alaska

"Workers' Compensation in Relation to Substance Abuse at the Worksite" ..... Betty Sexton
Workers' Compensation Officer
Department of Labor
Juneau, Alaska

Break

"Wrongful Termination" ..... John Peterson, Attorney
Ziegler, Cloudy, King & Peterson,
Attorneys at Law
Ketchikan, Alaska

"Health in the Workplace" ..... Russell Huffman, Jr., M.D.,
Psychiatrist
Ketchikan, Alaska

Questions, Answers and Discussion Combined with Lunch (Sandwich Buffet) .... Speakers Panel with Audience Participation

RSVP:
225-3184 — C of C
225-3181 — KJS

Final Seminar about Substance Abuse in the workplace, Sept. 9, 1987 ..... Dr. Forest Tennant, M.D., Dr. P.H.
Executive Director,
Community Health Projects, Inc.,
West Covina, Ca.

SUBSTANCE ABUSE IN THE WORKPLACE—III

No cost for the seminar $7.00 — lunch Open to the public

September 9 9:30-11:30 (Adjourn for chamber luncheon)

Welcome ..... Grant Smith, Chairman
Job Service Employer Committee

Drugs in the Workplace ..... Dr. Forest S. Tennant, Jr., M.D. Dr. P.H.
Executive Director, Community Health Projects, Inc.
Associate Professor, UCLA School of Public Health
Drug Advisor for National Football League
Drug Abuse Consultant, Los Angeles Dodgers.
California Highway Patrol and California Department of Justice

— Break —

Questions and Answers

12:00-1:00 — Chamber of Commerce Luncheon ..... The Landing
(Members and non-members)

Limited Seating
R.S.V.P. — 225-3181 or 225-3184

Ketchikan Itinerary — Dr. Forest Tennant, Jr.

Tuesday, September 8

Breakfast — Ketchikan Families in Action parent group
10:00 — Radio interview — KRBD
11:10 — First City Forum — KTKN
Noon — Rotary Lunch
1:30-3:30 — Department Heads-Ketchikan General Hospital
4:00-5:00 — Drugs identification training — Teachers, school nurses, counselors, social services, WISH.
Forum room — Ketchikan Community College
7:30-9:30 — Public presentation for parents & community — Forum Room-Ketchikan Community College

Wednesday, September 9

7:30 — Doctors staff at Ketchikan General Hospital
9:30 — Drugs in the Workplace (see above)
Noon — Chamber of Commerce luncheon meeting
2:00-4:00 — Police training (Police Headquarters) City Police, State Troopers, Coast Guard, Dept. of Corrections, Immigration Service, Alaska Peace Officers, Juvenile Probation Officer.

DRUG ABUSE LOSS PROJECTION WORKSHEET

Present Drug Abuse Financial Conditions in your Business

A. With _____ full time employees and a total annual payroll of _____ dollars, a typical worker's (excluding talent) wage/salary package at your business amounts to $_____ (total compensation divided by # of employees). And, according to the most conservative national averages, your business has at least _____ (10% of payroll) blue and white collar workers with impaired job performance due to on-the-job chemical abuse. (Another ten to twenty percent use drugs off the job to such an extent that they show impaired performance at work).

B. For your business this means that the annual ECONOMIC IMPACT of drug abuse is at least $_____ (25% of payroll x 10% of total workforce), potential profit that is needlessly squandered on drug related, job performance deficiencies each year. This conclusion is derived from an Arizona State University Study as well as information from the National Institute on Drug Abuse (NIDA) which reports American firms spend 25% of the chemically troubled employee's wages responding to their performance problems.

C. Individually, your business wastes $_____ (typical worker's compensation divided by 4) on each of the _____ (10% of workforce) chemically dependent employees on the payroll. Of that, according to actuaries from Metropolitan and Kemper Insurance Companies, $_____ (20% of your insurance payments) is consumed on health and accident compensation for employees and their families resulting from drug abuse.

D. Other studies reflect between 0.5% and 1.0% of gross revenues being allotted to the total employee chemical abuse problem. At your business this would range between _____ dollars to _____ dollars per year. Regardless of how the losses are figured, "Drugs-on-the-Job" is a serious economic problem for your business, but one that can be readily solved.

SUMMARY

EAP Costs:

Employees x Monthly Rate x 12 months =
Supervisors x Monthly Training Rate x 12 months =
Annual Membership Fee =
Total Annual Cost =

Total Annual Cost / Number of Employees = Annual Cost per employee

EXAMPLE:
10 person business
8 employees x 4 x 12 = 384.
2 supervisors x 15 x 12 = 360.
Annual fee = 75.

819 / 10 = 81.90 annual cost per employee

* Possible reduced cost of benefits
* Reduced employee turnover and absenteeism

Estimate Your Current Costs:

Estimate of between 10 - 20% of your work force.
% of abusers x # employees x $7,447 = Total loss/savings/year.
_____% x _____ x $7,447* = $_____

* Average additional cost per alcohol/drug abusing employee

Cost of care are greatly reduced by early effective intervention!

EXAMPLE OF LATE INTERVENTION:

Late intervention of substance abuse problem.

Pay rate $8.50/hour	
30-day resident program cost	1,200.
*Work Loss (40 hrs x 8.50 x 4)	1,360.
Cost of replacement	1,360.
Training supervision expense for replacement	
10 hours supervisor @ $12./hour	120.
10 hours employee @ $8.50/hour	85.
Total Expense	$4,125.

* Does not include loss of productivity due to employee experience

BENEFITS ARE NOT ALWAYS DOLLAR MEASURABLE!!

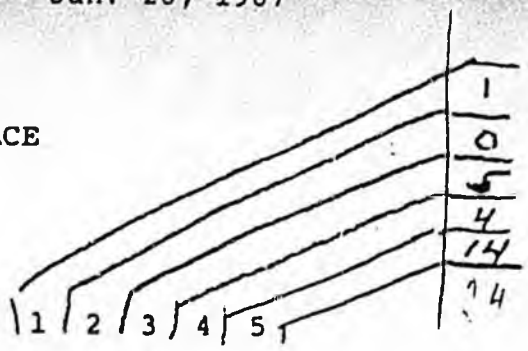
1. Increased safety and reduced job problems.
2. Resource for dealing with drug, alcohol and personal problems affecting the workplace.
3. Increased job satisfaction, reduced job stress.
4. Increased employee and supervisor productivity.
5. Increased customer satisfaction.
6. A professional resource for acquiring effective services for employees and their families.
7. A non-intrusive way of caring about your employees.
8. Better trained supervisors.

EAP's are a cost savings way of caring about employees.

Seminar Survey Jan. 28, 1987

SUBSTANCE ABUSE IN THE WORKPLACE

1. On a scale of one (low) to five (high) of what concern to you is substance abuse in the workplace?



2. Are you an employee? No 7 Yes 18
   If you are an employee, do you have job responsibility to deal with substance abuse in your place of work? No 0 Yes 17

3. Are you an employer, or have responsibility to your employer, to employ people in your place of work? No 5 Yes 19

   Do you have a substance abuse screening process? No 16 Yes 5

   Do you plan to have a substance abuse program? Now: No 10 Yes 6
   Future: No 3 Yes 4 ? 111

4. In your place of work estimate the number of employees. Circle one: 1-10 (7) 11-20 (11) 21-50 (7) 51 & up (9)

5. Did you gain insight on methods of dealing with substance abuse in the workplace? No 0 Yes 25

6. Would you like further information about the legal implications of dealing with substance abuse in the workplace? No 1 Yes 21

   Do you have a suggestion on what further information would be most helpful? _____

   _____

   _____

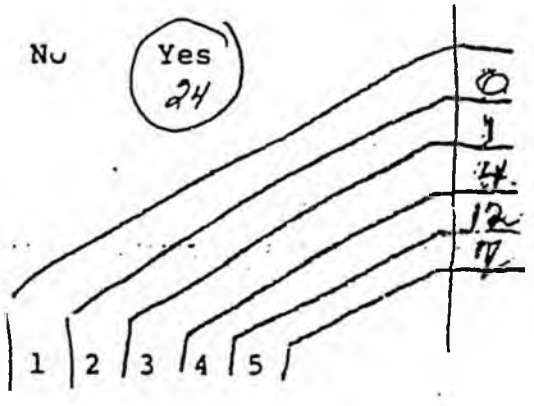
7. Do you agree that substance abuse in the workplace must be dealt with? No Yes 24

8. We welcome any comments about this seminar or the issue that would be helpful in planning subsequent seminars:

   _____

   _____

9. On a scale of one (low) to five (high) overall how do you rate this seminar?



Women In Safe Homes

A Safe Alternative to Family Violence

P.O. Box 6552
Ketchikan, Alaska 99901
(907) 225-9474

October 26, 1987

House Judiciary Committee
Alaska State Legislature

Dear Committee Members:

I want to formally thank you for having a committee meeting in Ketchikan. Often we feel left out of the business of the Legislature as such local meetings are rare. Despite the fact that our Legislators are very open to citizen input, it really helps to have contact with others from the Legislature.

I felt Representative Sund did an excellent job of running the meetings despite a number of handicapps. The subject matter of two bills was very tense, so it took solid leadership to pull the meeting off.

Thank you again and I sincerely hope we will see other committee's meeting in Ketchikan.

Sincerely,

Floyd H. Richmond
Executive Director

HOUSE BILL 283 - DRUG TESTING

Correspondence

* denotes District One

* Bob Watt — opposes
Route 2, Box 178
Ketchikan 99901

* Don Finney — opposes
Alaska Loggers Association
111 Stedman Street, suite 200
Ketchikan 99901

* Marcia Hilley — opposes
Box 7483
Ketchikan 99901

* Donald Mellison — opposes
Long Island Development
Box 5960
Ketchikan 99901

✓ NEA-Alaska — supports
Robert Manners
105 Municipal Way Suite 302
Juneau 99801

Greater Sitka Chamber of Commerce — opposes
Box 638
Sitka 99835

Klukwan, Inc. — opposes
Box 2077
Juneau 99803
Thomas Blanton

Alaska Pulp Corporation — opposes
Box 1050
Sitka 99835

Alaska State Legislature

Please enter into the record my testimony to the 10/24/87 3:35 PM
committee name

committee on 284 , dated .
bill/subject

Answer to Bob Garza testimony. Tongass Timber and Alaska Timber Insurance are two separate entities TTT is a health & welfare non profit company and KPC purchases premiums for the mill employees. ATIE is a licensed W/C insurance company and must conform to our statutes, etc. KPC does not use ATIE to insure the mill employees. They are a self insured group and ATIE only acts as an intermediary processing claims. This brings an income of 40.000^00 to ATIE which is certainly not the largest support means to ATIE 13.000,000^00 premium income annually. The form Mr Garza referred to is an ATIE form and only an employee filing a claim against W/C is asked to sign. If they object to any part they are used on an independent basis they may cross out that portion. However if they do so any used information is later required. They will be responsible for obtaining this information at their expense if need by the Board in case of a hearing.

Signed:
Testifier

Dana MacLeod

Representing (Optional)

Alaska Timber Ins

Address 225-9451

111 Stedman Suite 201

Phone No. Ktn AK 99901

CONSENT

TO WHOM IT MAY CONCERN:

I, Donald L. Borders, do hereby give the insurance company of Alaska Timber Insurance Exchange, or their designees, the power to obtain exact copies and the right to inspect the originals of any and all hospital and medical records concerning me relating to the injuries arising from the accident on August 13, 1987, or any other accident, injury disability, or illness suffered by me either before or after the incident of August 13, 1987, which records are or may be in the hands of or in the control of any hospital, medical clinic, pharmaceutical store, or doctor's office, and

Further, any and all physicians are hereby authorized to disclose the nature of their examination, care and treatment of said injuries sustained by me.

The above consent shall include, but shall not be limited to, the obtaining of all x-rays, doctor's reports (including pharmaceutical), patient charts, and hospital records concerning myself.

I also authorize the release of any and all records maintained by the United States Government or any of its agencies, including, but not limited to, the Civil Service Commission, Veterans Administration, Bureau of Employees' Compensation, National Personnel Records Center, General Services Administration, and Internal Revenue Service, relating to veteran's benefits, all employment records, retirement benefits, including annuities, disability benefits, military records, personnel records and federal tax returns regarding myself.

I further authorize the release of any and all records maintained by the State of Alaska, or any other State, or any of its agencies, including, but not limited to, the Department of Health and Social Services, Department of Education, Division of Vocational Rehabilitation, relating to rehabilitation services, or any other services or benefits of any kind accorded to me or my immediate family, the records of the Department of Public Safety, or any other department of the State relating to criminal prosecutions, convictions, or probation, and the records of the Department of Revenue relating to State tax returns and the Department of Labor, Division of Employment Security regarding any and all applications for unemployment insurance regarding myself. Further, such agencies are authorized to discuss the substance of their records with a representative of Alaska Timber Insurance Exchange.

It is further agreed that the insurance company of Alaska Timber Insurance Exchange, or their designees, may obtain any and all personnel records from any place of employment relating to my employment history. A xerox copy of this form shall in all ways be as valid as the original.

Alaska State Legislature

Please enter into the record my testimony to the House Judiciary committee name committee on Drug Testing bill/subject, dated Oct. 24, 1987.

Drug testing must be allowed. Industry must lead the fight against the drug problem because schools, police and government have not been able to control this exploding problem

Drug testing is needed to reduce accidents on the job. Often in the Forest Products Industry accidents are bloody and devastating ... devastating to the injured employee's family, the co-workers, and the employers. Job skills require alertness, co-ordination, and dependence on co-workers. Industry must be able to protect those co-workers from harm caused by another workers use of drugs.

Signed: Nancy Bell
Testifier

Alaska Timber Insurance Exchange
Representing (Optional)

111 Stedman, Suite 201 Ketchikan
Address

907-225-9451
Phone No.

Alaska State Legislature

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Signed: Thomas Bell
Testifier

Alaska Timber Insurance Exchange
Representing (Optional)

44 Stedman, Suite 201 Ketchikan
Address

907-225-9451
Phone No.

Alaska State Legislature

Please enter into the record my testimony to the House Judiciary Cmte
committee name

committee on HB283 , dated 10/24/87 .
bill/subject

As an operator in the woods industry, I feel strongly that drug testing must be done for the safety of all people employed in the timber industry.

We would like to have the opportunity to discuss with you, in person, the many problems we are facing in our industry that are direct result of drug use and abuse.

Signed: Jerry Larrabee
Testifier

LARRABEE LOGGING Co.
Representing (Optional)

P.O. Box 139 Sitka, Ak. 99835
Address

907-966-2661 or 788-3531
Phone No.

Alaska State Legislature

Please enter into the record my testimony to the House Judiciary Comte
committee name

committee on HB 283 , dated 10/24/87 .
bill/subject

Employers need rights too. We have very little control over drugs on the job. Testing is one effective way to give us a handle on this situation. these people work in life threatening situations. the Employer is the responsible party. their safety is our concern.

Signed: Michael T. Valentine
Testifier

R.H. Valentine Logging Co.
Representing (Optional) ALASKA Loggers Board of Directors.

111 Stedman Suite 101 Ktn AK.
Address

225-6114
Phone No.

Alaska State Legislature

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Signed: Jerry Lawhead
Testifier

LARRABEE LOGGING
Representing (Optional)

P.O. Box 139, Sitka, Ak. 99835
Address

907-966-2661 or 788-3531
Phone No.

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Signed: Michael T. Valentine
Testifier

R.T. Valentine Logging Co.
Representing (Optional) ALASKA Loggers Board of Directors.

111 Stedman Suite 101 Ktn AK.
Address

225-6114
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Signed: Jerry Larrabee
Testifier

LARRABEE LOGGING Co.
Representing (Optional)

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Testifier

R.T. Valentine Logging Co.
Representing (Optional) ALASKA Loggers Board of Directors.

111 Stedman Suite 101 Ktn Ak.
Address

225-6114
Phone No.

Alaska State Legislature

Please enter into the record my testimony to the House Judiciary Cmte
committee name

committee on HB28 , dated 10/24/87 .
bill/subject

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We would like to have the opportunity to discuss with you in person the many problems we are facing in our industry that are direct result of drug use and abuse.

Signed: Jerry Larabee
Testifier

LARRABEE LOGGING Co.
Representing (Optional)

P.O. Box 139 Sitka, Ak. 99835
Address

907-966-2661 or 788-3531
Phone No.

Alaska State Legislature

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committee on HB 283 . dated 10/24/87 .
bill/subject

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Signed: Michael T. Valentine
Testifier

R.H. Valentine Logging Co.
Representing (Optional) ALASKA Loggers BOARD of Directors.

111 Stedman Suite 101 KTN AK.
Address

225-6114
Phone No.

Alaska State Legislature

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committee on HB283 , dated 10/24/87 .
bill/subject

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Signed: Jean Lamb
Testifier

LARRABEE LOGGING Co.
Representing (Optional)

P.O. Box 139 Sitka, Ak. 99835
Address

907-966-2661 or 788-3531
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Signed: Michael T. Valentine
Testifier

R.H. Valentine Logging Co.
Representing (Optional) ALASKA Loggers Board of Directors.

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Signed: Jerry Larrabee
Testifier

LARRABEE LOGGING Co.
Representing (Optional)

P.O. Box 139 Sitka, Ak. 99835
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Signed: Michael T. Valentine
Testifier

R+M Valentine Logging Co.
Representing (Optional) ~~ALASKA~~ Loggers Board of Directors.

111 Stedman Suite 101 Ktn AK
Address

225-6114
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Signed: Jerry Lavatta
Testifier

LARRABEE LOGGING Co.
Representing (Optional)

P.O. Box 139, Sitka, Ak. 99835
Address

907-966-2661 or 788-3531
Phone No.

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Signed: Michael T. Valentine
Testifier

R-H Valentine Logging Co.
Representing (Optional) ALASKA Loggers Board of Directors.

111 Stedman Suite 101 Ktn AK.
Address

225-6114
Phone No.

HB 283

Leonard J. Karpinski
3936 Tom White Circle
Anchorage, Alaska 99504-4752
(907) 337-3231
14 October 1987

Rep. John Sund
Pouch V, State Capitol
Juneau, Alaska 99811

Dear Rep. Sund:

I commend you for your introduction of a bill prohibiting drug testing (as noted in the Anchorage Times of 12 October). This testing is reefer madness at its most dangerous and has no place in a truly free society.

I would like to attend the hearings of your committee on this subject on 13 and 14 November in Anchorage. Please send information ASAP regarding times and locations of these hearings.

Thanks,

Leonard J. Karpinski

Leonard J. Karpinski

Ostlund v. Bobb, 825 F.2d 1371, 1374 (9th Cir.1987), quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The appellants acted outside that shield.

AFFIRMED.

RAILWAY LABOR EXECUTIVES' ASSOCIATION; United Transportation Union General Committee of Adjustment, the Southern Pacific Company; Brotherhood of Locomotive Engineers General Committee of Adjustment, the Southern Pacific Company; and Brotherhood of Railroad Signalmen, Plaintiffs–Appellants,

v.

James H. BURNLEY *, Secretary, Department of Transportation; John R. Riley, Administrator, Federal Railroad Administration, Defendants–Appellees.

No. 85-2891.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted July 8, 1986.

Decided Feb. 11, 1988.

Railway labor organizations brought action challenging constitutionality of Federal Railroad Administration regulations mandating blood and urine tests of employees after certain train accidents, fatal incidents, and rule violations. The United States District Court for the Northern District of California, Charles A. Legge, J., upheld constitutionality of regulations, and labor organizations appealed. The Court of Appeals, Tang, Circuit Judge, held that: (1) regulations which mandated testing of railroad employees without requiring individualized suspicion violated employees' Fourth Amendment rights; (2) regulations did not violate Rehabilitation Act by unlawfully discriminating against handicapped by causing dismissal of employees who could perform their jobs despite drug or alcohol use; and (3) statute did not violate equal protection provisions of Fifth Amendment by targeting for testing employees covered by Hours of Service Act and employees performing same services.

Reversed.

Alarcon, Circuit Judge, dissented and filed opinion.

1. Searches and Seizures ⇐78

Fourth Amendment's prohibition of unreasonable searches and seizures applied to drug tests conducted at instigation of railroads pursuant to regulations adopted by Federal Railroad Administration. U.S.C.A. Const.Amend. 4.

2. Searches and Seizures ⇐14

Governmental taking of urine specimen constitutes "search and seizure" within meaning of Fourth Amendment. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

3. Searches and Seizures ⇐24

Although warrant is generally required to make search reasonable, it is not sine qua non of reasonableness. U.S.C.A. Const.Amend. 4.

4. Searches and Seizures ⇐45

Exigencies of testing for presence of alcohol and drugs in blood, urine, or breath require prompt action which precludes obtaining of warrant. U.S.C.A. Const. Amend. 4.

5. Searches and Seizures ⇐79

Warrantless inspection of commercial premises of pervasively regulated business will be deemed to be reasonable only if substantial government interest informs

* James H. Burnley is substituted for defendant Elizabeth Dole pursuant to F.R.App.P. 43(c)(1).

regulatory scheme, warrantless inspections are necessary to fulfill regulatory scheme, and inspection program, in terms of certainty and regularity of its application, provides constitutionally adequate substitute for warrant. U.S.C.A. Const.Amend. 4.

6. Searches and Seizures ⇐79

As substitute for warrant, regulatory statute must advise owner of premises that search is made pursuant to law and has properly defined scope, and it must limit discretion of inspecting officers. U.S.C.A. Const.Amend. 4.

7. Searches and Seizures ⇐78, 79

Administrative inspection exception—which allowed warrantless searches of premise of pervasively regulated industries—was not applicable to support constitutionality of Federal Railroad Administration regulations mandating blood and urine tests of railroad employees after certain train accidents and fatal incidents, and rule violations. U.S.C.A. Const.Amend. 4; Railway Labor Act, § 1 et seq., 45 U.S.C.A. § 151 et seq.; Rehabilitation Act of 1973, § 2 et seq., 29 U.S.C.A. § 701 et seq.; Federal Railroad Safety Act of 1970, § 101 et seq., as amended, 45 U.S.C.A. § 421 et seq.

8. Searches and Seizures ⇐79

Administrative inspection standard—which allows warrantless searches of premises of pervasively regulated industries—is not applicable to searches of persons even when they are employed in those industries, unless employees are principal concern of industry regulation. U.S.C.A. Const.Amend. 4.

9. Searches and Seizures ⇐23

Accommodation of railroad employees' privacy interest with significant safety concerns of government did not require adherence to probable cause requirement. U.S.C.A. Const.Amend. 4.

10. Searches and Seizures ⇐23

Finding search justified at its inception requires determination that there are reasonable grounds for suspecting that search will turn up evidence sought. U.S.C.A. Const.Amend. 4.

11. Searches and Seizures ⇐78

Federal Railroad Administration regulations mandating blood and urine tests of railroad employees after certain train accidents, fatal incidents, and rule violations without finding of particularized suspicion that employees worked while under influence of alcohol or drugs violated railroad employees' Fourth Amendment rights. U.S.C.A. Const.Amend. 4.

12. Searches and Seizures ⇐78

Testing of railroad employees for alcohol and drug use following certain train accidents, fatal incidents, and rule violations was permissible only when there was individualized suspicion, because only combination of observable symptoms of impairment with positive result on drug test would provide sound basis for appropriate disciplinary action. U.S.C.A. Const.Amend. 4.

13. Administrative Law and Procedure ⇐322

United States ⇐40

Secretary of Transportation could delegate testing of railroad employees for drugs and alcohol to railroads. Federal Railroad Safety Act of 1970, § 208(a), as amended, 45 U.S.C.A. § 437(a).

14. Civil Rights ⇐9.16

Federal Railroad Administration regulations mandating blood and urine tests of railroad employees after certain train accidents, fatal incidents, and rule violations did not violate Rehabilitation Act by unlawfully discriminating against handicapped by causing dismissal of employees who could perform their jobs despite drug or alcohol use; disciplinary action was left up to individual employers and was subject for collective bargaining between unions and railroads. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794.

15. Searches and Seizures ⇐78

Federal Railroad Administration regulations mandating blood and urine tests of railroad employees after certain train accidents, fatal incidents, and rule violations did not unconstitutionally discriminate by targeting for testing employees covered by Hours of Service Act and employees per-

forming same services as covered employees, as supervisory personnel were already subject to testing at discretion of railroads. Hours of Service Act, § 1(b)(2), as amended, 45 U.S.C.A. § 61(b)(2); U.S.C.A. Const. Amend. 4.

Lawrence M. Mann, Washington, D.C., for plaintiffs-appellants.

Marc Richman, Daniel Carey Smith, Washington, D.C., for defendants-appellees.

Alan L. Schlosser, San Francisco, Cal., for amicus curiae.

Appeal from the United States District Court for the Northern District of California.

Before TANG, PREGERSON and ALARCON, Circuit Judges.

TANG, Circuit Judge:

The Railway Labor Executives' Association [1] and various railway labor organizations which are constituent members (collectively "RLEA") appeal the district court's grant of summary judgment for the government. RLEA challenges the constitutionality of Federal Railroad Administration (FRA) regulations mandating blood and urine tests of employees after certain train accidents and fatal incidents, and authorizing breath and urine tests after certain accidents, incidents and rule violations. RLEA also argues that the regulations violate provisions of the Railway Labor Act, the Federal Rehabilitation Act and the Federal Railroad Safety Act. We reverse.

1. The RLEA is an unincorporated association representing all crafts of railroad workers in the country.

2. A reportable injury is one which must be reported under Part 225. 49 C.F.R. § 219.5(s). According to 49 C.F.R. § 225.19(d)(4), a reportable injury is one that requires medical treatment or results in restriction of work or motion for one or more work days, one or more lost work days, termination of employment, transfer to another job or loss of consciousness.

BACKGROUND

The regulations at issue are codified in 49 C.F.R. Part 219 (1986). They were issued by the FRA after a two-year rulemaking process on August 2, 1985 and scheduled to become effective November 1, 1985. RLEA was a party to the administrative proceedings and filed a petition for reconsideration which the Secretary denied on October 28, 1985. It then filed suit in federal district court on October 31, 1985, and received a temporary restraining order prohibiting implementation of the regulations. The TRO remained in effect until the district court granted summary judgment for the government on December 9, 1985. RLEA sought and obtained a stay pending appeal from this court on January 3, 1986 but the Supreme Court vacated the stay on January 27, 1986. *Dole v. RLEA*, 474 U.S. 1099, 106 S.Ct. 876, 88 L.Ed.2d 914 (1986). The regulations thus went into effect February 10, 1986 with mandatory post-accident testing beginning March 10.

The portions of the new regulation which are the subject of this challenge are Subpart C, which requires post-accident testing, and Subpart D, which authorizes testing for "cause." The key provisions are summarized below, and set out in full in the margin.

The provisions of Subpart C mandate alcohol and drug testing for all covered employees involved in various events, including: major train accidents (involving a fatality, release of hazardous material with either evacuation or injury, or $500,000 damage to railroad property); impact accidents (involving a reportable injury [2] or damage to railroad property of $50,000); and fatal incidents (involving fatality of an on-duty railroad employee). 49 C.F.R. § 219.201.[3] The regulations require that

3. § 219.201 Events for which testing is required.

(a) *List of events.* On and after March 10, 1986, except as provided in paragraph (b) of this section, post-accident toxicological tests shall be conducted after any event that involves one or more of the circumstances described in paragraph (a)(1) through (3) of this section:

(1) *Major train accident.* Any train accident that involves one or more of the following:

(i) A fatality;

blood and urine samples be taken from all crew members of a train involved in such an accident or incident as soon as possible afterwards. Blood samples are to be taken at independent medical facilities by qualified medical professionals or technicians. 49 C.F.R. § 219.203.[4] Refusal to provide a sample results in a 9 month period of disqualification. 49 C.F.R. § 219.213.[5]

The provisions of Subpart D authorize railroads to require covered employees to submit to breath or urine tests when a supervisor has a reasonable suspicion that an employee is under the influence or impaired by alcohol or drugs. To require a urine test, two supervisors must have reasonable suspicion, and if drug use is suspected, one of them must have been trained in spotting drug use. 49 C.F.R. § 219.301(b)(1),[6] (c)(2)[7]. The railroads may also require testing when an employee is involved in an accident or incident which must be reported under Part 225 and a supervisor has reasonable suspicion that his acts or omissions contributed to the accident. 49 C.F.R. § 219.301(b)(2).[8] The

(ii) Release of a hazardous material accompanied by—

(A) An evaculation; or

(B) A reportable injury resulting from the hazardous material release (*e.g.*, from fire, explosion, inhalation, or skin contact with the material); or

(iii) Damage to railroad property of $500,000 or more.

(2) *Impact accident.* An impact accident resulting in—

(i) A reportable injury; or

(ii) Damage to railroad property of $50,000 or more.

(3) *Fatal train incident.* Any train incident that involves a fatality to any on-duty railroad employee.

4. § 219.203 Responsibilities of railroads and employees.

(a) *Employees tested.* (1) Following each accident and incident described in § 219.201, the railroad (or railroads) shall take all practicable steps to assure that all covered employees of the railroad directly involved in the accident or incident provide blood and urine samples for toxicological testing by FRA.

. . . . . .

(b) *Timely sample collection.* (1) The railroad shall make every reasonable effort to assure that samples are provided as soon as possible after the accident or incident.

. . . . . .

(c) *Place of sample collection.* (1) Employees shall be transported to an independent medical facility where the samples shall be obtained. In all cases blood shall be drawn only by a qualified medical professional or by a qualified technician subject to the supervision of a qualified medical professional.

5. § 219.213 Unlawful refusals; consequences.

(a) *Disqualification.* (1) An employee who refuses to cooperate in providing a blood or urine sample following an accident or incident specified in this section shall be withdrawn from covered service and shall be deemed disqualified for covered service for a period of nine (9) months.

6. § 219.301 Testing for reasonable cause.

. . . . . .

(b) *Reasonable cause for breath tests.* The following circumstances constitute reasonable cause for the administration of breath tests under this section:

(1) *Reasonable suspicion.* A supervisory employee of the railroad has a reasonable suspicion that the employee is currently under the influence of or impaired by alcohol, or alcohol in combination with a controlled substance, based upon specific, personal observations that the supervisory employee can articulate concerning the appearance, behavior, speech or body odors of the employee.

7. (c) *Reasonable cause for urine test—*

. . . . . .

(2) *Reasonable suspicion.* Reasonable cause also exists where a supervisory employee of the railroad has a reasonable suspicion that the employee is currently under the influence of or impaired by alcohol or a controlled substance, based upon specific, personal observations that the supervisory employee can articulate concerning the appearance, behavior, speech, or body odors of the employee, subject to the following limitations:

(i) An employee may be required to submit to urine testing for reasonable suspicion only if the determination is made by at least two supervisory employees; and

(ii) If the determination to require urine testing is based upon suspicion that the employee is under the influence of or impaired by a controlled substance at least one supervisory employee responsible for the decision to require urine testing must have received at least three (3) hours of training in the signs of drug intoxication consistent with a program of instruction on file with FRA under Part 217 of this title. Such program shall, at a minimum, provide information concerning the acute behavioral and apparent physiological effects of the major drug groups on the controlled substances list (narcotics, depressants, stimulants, hallucinogens, and marijuana).

8. § 219.301 Testing for reasonable cause.

(b) *Reasonable cause for breath tests.*

railroads may also require testing when an employee violates a railroad operating rule listed in 49 C.F.R. § 219.301(b)(3).[9]

There are no factual disputes in this case except as to the extent of alcohol and drug abuse in the railroad industry and the number of accidents involving either. The record shows that, between 1975 and 1984, of 791 fatalities caused by railroad employees, 37 resulted from accidents or incidents involving alcohol or drug use, or 4.7 percent. The FRA contends the problem is more serious than the 4.7 percent figure would indicate because of underreporting by the railroad industry of alcohol and drug involvement, because of the increased dangers involved in railroad transport of hazardous materials, and because drug and alcohol use has grown more pervasive in recent years.

The district court assumed the seriousness of the problem, and the RLEA concedes that alcohol and drug use are serious hazards to railroad safety. Thus, although there is some difference of opinion about just how pervasive the problem is, the central dispute in this case is not a factual one. Rather, the case involves disputes as to the statutory authority for the rule and its constitutionality.

ANALYSIS

We review a grant of summary judgment de novo. *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir.1986). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir.1986). We review questions of law de novo. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984).

I. FOURTH AMENDMENT

[1] To decide whether the drug tests mandated or authorized by the regulations violate the fourth amendment, we must first determine whether the amendment's prohibition of unreasonable searches and seizures applies to drug tests conducted at the instigation of the railroads pursuant to regulations adopted by the FRA. We hold that it does, both because the tests in question constitute searches within the meaning of the fourth amendment and because the federal government's role in promulgating the regulations in question is sufficient government action to subject the tests to the limitations of the fourth amendment.

A. Drug and Alcohol Tests are Searches

The fourth amendment protects the "right of the people to be secure in their

(1) *Reasonable suspicion* (see note 5)

. . . . .

(2) *Accident/incident.* The employee has been involved in an accident or incident reportable under Part 225 of this title, and a supervisory employee of the railroad has a reasonable suspicion that the employee's acts or omissions contributed to the occurrence or severity of the accident or incident; or

9. (3) *Rule violation.* The employee has been directly involved in one of the following operating rule violations or errors:

(i) Noncompliance with a train order, track warrant, timetable, signal indication, special instruction or other director with respect to movement of a train that involves—

(A) Occupancy of a block or other segment of track to which entry was not authorized;

(B) Failure to clear a track to permit opposing or following movement to pass;

(C) Moving across a railroad crossing at grade without authorization; or

(D) Passing an absolute restrictive signal or passing a restrictive signal without stopping (if required);

(ii) Failure to protect a train as required by a rule consist with § 218.37 of this title;

(iii) Operation of a train at a speed that exceeds the maximum authorized speed by at least ten (10) miles per hour or by fifty percent (50%) of such maximum authorized speed, whichever is less;

(iv) Alignment of a switch in violation of a railroad rule or operation of a switch under a train;

(v) Failure to apply or stop short of derail as required;

(vi) Failure to secure a hand brake or failure to secure sufficient hand brakes; or

(vii) In the case of a person performing a dispatching function or block operator function, issuance of a train order or establishment of a route that fails to provide proper protection for a train.

persons, houses, papers, and effects, against unreasonable searches and seizures...." These rights are implicated only if the conduct at issue infringes " 'an expectation of privacy that society is prepared to consider reasonable.' " *O'Connor v. Ortega*, — U.S. —, 107 S.Ct. 1492, 1497, 94 L.Ed.2d 714 (1987) (plurality opinion) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984)). The question we must first consider is whether a railroad employee has a reasonable expectation of privacy in the personal information contained in his body fluids.

It has long been clearly settled that blood tests such as those mandated by 49 C.F.R. § 219.203 are searches within the meaning of the fourth amendment. *Schmerber v. California*, 384 U.S. 757, 767, 86 S.Ct. 1826, 1834, 16 L.Ed.2d 908 (1966).

[2] Every court that has considered the matter has similarly concluded that urine tests, such as those mandated by 49 C.F.R. § 219.203 and authorized by 49 C.F.R. § 219.301, are searches for fourth amendment purposes. *See, e.g., Everett v. Napper*, 833 F.2d 1507, 1509 (11th Cir.1987); *Jones v. McKenzie*, 833 F.2d 335, 338 (D.C. Cir.1987); *National Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935, 942 (D.C.Cir.1987); *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 176 (5th Cir.1987); *McDonell v. Hunter*, 809 F.2d 1302, 1307 (8th Cir.1987); *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1266–67 (7th Cir.), *cert. denied*, 429 U.S. 1029, 97 S.Ct. 653, 50 L.Ed.2d 632 (1976); *Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency*, 663 F.Supp. 1560, 1566 (C.D.Cal. 1987); *Feliciano v. City of Cleveland*, 661 F.Supp. 578, 586 (N.D.Ohio 1987); *Lovvorn v. City of Chattanooga*, 647 F.Supp. 875, 879 (E.D.Tenn.1986); *Capua v. City of Plainfield*, 643 F.Supp. 1507, 1513 (D.N.J. 1986); *Allen v. City of Marietta*, 601 F.Supp. 482, 488–89 (N.D.Ga.1985); *Storms v. Coughlin*, 600 F.Supp. 1214, 1217–18 (S.D.N.Y.1984); *Smith v. City of East Point*, 183 Ga.App. 659, 359 S.E.2d 692 (1987). The usual rationale is that urine testing is similar to blood testing because even though urine is routinely discharged from the body it is "normally discharged and disposed of under circumstances that merit protection from arbitrary interference." *Capua*, 643 F.Supp. at 1513. Because people have reasonable expectations of privacy in the personal information body fluids contain, the governmental taking of a urine specimen constitutes a search and seizure within the meaning of the fourth amendment. *Id.*

It has also been held, with less discussion of the rationale, that breath tests are searches within the meaning of the fourth amendment. *See, e.g., Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1449 (9th Cir.1986); *Shoemaker v. Handel*, 795 F.2d 1136, 1141 (3d Cir.) (applying fourth amendment administrative search exception to urine and breath testing without explicitly deciding the testing constitutes a search), *cert. denied*, — U.S. —, 107 S.Ct. 577, 93 L.Ed.2d 580 (1986).

B. Government Action Requirement

The second question we must consider is whether the federal government's role in promulgating this regulatory scheme is sufficient to subject the tests carried out in accordance with these provisions to the limitations of the fourth amendment. FRA argues that Subpart D merely authorizes private railroads to carry out tests under certain circumstances and that there is no government action involved.

The district court rejected this argument, and FRA did not cross-appeal after prevailing in the district court. FRA may nevertheless raise the argument on appeal because it does not seek to expand the relief granted by that court. *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n. 8, 98 S.Ct. 364, 369 n. 8, 54 L.Ed.2d 376 (1977). It is well settled that a prevailing party, "though he files no cross-appeal or cross-petition, may offer in support of his judgment any argument that is supported by the record, whether it was ignored by the court below or flatly rejected." 9

Moore's Federal Practice ¶ 204.11[1] (2d ed. 1985) (footnote omitted).

On the merits, the district court was correct in finding government action in the authorized testing provisions relying on the authority of *United States v. Davis*, 482 F.2d 893, 896–904 (9th Cir.1973). In *Davis* we considered the applicability of the fourth amendment to airport security searches conducted by private airline employees. We began our inquiry with the observation that the fourth amendment applies to a search whenever the government participates in any significant way in a total course of conduct leading to a search. *Id.* at 897. We pointed out that the determining factor "'is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means.'" *Id.* (quoting *Lustig v. United States*, 338 U.S. 74, 79, 69 S.Ct. 1372, 1374, 93 L.Ed. 1819 (1949)). After reviewing the history of concern with hijacking and the development of a nationwide anti-hijacking program conceived, directed, and implemented by federal officials in cooperation with air carriers, we concluded that the government's role in the airport search program had been a dominant one. *Davis*, 482 F.2d at 897–904. We said that even if it could be characterized accurately as mere encouragement or, in the language of *United States v. Guest*, 383 U.S. 745, 755–56, 86 S.Ct. 1170, 1176–77, 16 L.Ed.2d 239 (1966), as "peripheral, or ... one of several cooperative forces leading to the [alleged] constitutional violation," it was still significant for fourth amendment purposes. *Davis*, 482 F.2d at 904. We expressly noted that it made no difference that the search was conducted by a private airline employee because the search was part of the overall, nationwide anti-hijacking effort and thus constituted "state action" for fourth amendment purposes. *Id.* It also made no difference that the search was conducted prior to the issuance of formal regulations mandating pre-boarding searches. *Id.* at 902–04.

In this case, the government's involvement in developing the rule and in regulating its implementation clearly amounts to significant involvement for fourth amendment purposes. FRA's regulation was issued under the authority of the Federal Railroad Safety Act of 1970, 45 U.S.C. §§ 421–444, and the Accident Reports Act of 1910, 45 U.S.C. §§ 38–43. The Safety Act invests the Secretary of Transportation with authority to regulate "all areas of railroad safety," 45 U.S.C. § 431, and empowers him to conduct investigations, issue subpoenas, require production of documents, and delegate to qualified persons functions concerning the examination, inspecting, and testing of railroad equipment, operations, and persons, 45 U.S.C. § 437. Authority to administer the Act has been delegated to the Administrator of the FRA. 49 C.F.R. § 1.49(m).

The Accident Reports Act provides that railroads must make monthly reports to the Secretary of Transportation of all collisions, derailments or other accidents resulting in death, injury or property damage. The Secretary is authorized to investigate all railroad accidents resulting in serious injury or property damage, and, to that end, is granted certain appropriate powers, including the power to require the production of evidence and, when deemed to be in the public interest, to make reports of such investigations stating the cause of the accident. 45 U.S.C. §§ 38–40. That statute also authorizes the issuance of "such rules ... as are necessary." 45 U.S.C. § 42. The Secretary's authority under this Act too has been delegated to the Administrator of the FRA. 49 C.F.R. § 1.49(c)(11). The FRA has issued detailed accident reporting regulations, found at 49 C.F.R. Part 225.

FRA safety inspectors conduct investigations across the national rail system on a daily basis to promote compliance with safety regulations. As necessary, the FRA may require cooperation of the railroad company to facilitate the examination of facilities or pertinent records. *See United States v. Missouri Pacific R.R.*, 553 F.2d 1156 (8th Cir.1977).

FRA developed the regulations at issue here through a process initiated on June 30, 1983 and concluded August 2, 1985. FRA undertook this rulemaking process in

response to a perception that drug and alcohol abuse is a serious problem in the railroad industry posing unacceptable risks to public and employee safety. The general concern with drug and alcohol abuse and the national goal of eradicating that abuse is a matter of common knowledge. For example, the President's Commission on Organized Crime proposed that to reduce the demand for drugs "[t]he President should direct the heads of all Federal agencies to formulate immediately clear policy statements, with implementing guidelines, including suitable drug testing programs." President's Commission on Organized Crime, America's Habit: Drug Abuse, Drug Trafficking, and Organized Crime at 483 (1986). In response, the President, on September 15, 1986, issued an Executive Order for a "Drug-Free Federal Workplace." Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986). These expressions of national concern are mirrored in FRA's effort to develop a workable program of drug testing for the railroad industry. We cannot view the testing provisions, even those which authorize testing by private railroads, as anything less than part of an overall, nationwide anti-drug campaign. *Cf. Davis*, 482 F.2d at 897. Thus the government's role in the railroad drug testing program has been a dominant one, sufficiently significant for fourth amendment purposes.

C. Fourth Amendment Standard

Having found that the fourth amendment applies to drug and alcohol tests conducted pursuant to federal regulatory authority " 'is only to begin the inquiry into the standards governing such searches.... [W]hat is reasonable depends on the context within which a search takes place.' " *O'Connor*, 107 S.Ct. at 1499 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 337, 105 S.Ct. 733, 740, 83 L.Ed.2d 720 (1985)). It is generally settled that " 'except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.' " *O'Connor*, 107 S.Ct. at 1499 (quoting *Mancusi v. DeForte*, 392 U.S. 364, 370, 88 S.Ct. 2120, 2125, 20 L.Ed.2d 1154 (1968)).

1. *Warrant Requirement*

[3] It appears clear that this is a case in which a warrant is not required. Although a warrant is generally required to make a search reasonable, it is not the *sine qua non* of reasonableness. For example, a warrantless inspection of commercial enterprises in a closely regulated industry is reasonable within the meaning of the fourth amendment if the inspection meets certain criteria. *New York v. Burger*, — U.S. —, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987). In another context the Court has held that public employer intrusions on the constitutionally protected privacy interests of government employees for work-related purposes and for investigations of work-related misconduct should be judged by the standard of reasonableness under all circumstances. *O'Connor*, 107 S.Ct. at 1502. The Court has also held that the warrant requirement is unsuited to the school environment because it would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools. *New Jersey v. T.L.O.*, 469 U.S. 325, 340, 105 S.Ct. 733, 742, 83 L.Ed.2d 720 (1985). In general the Court has indicated that the warrant requirement is dispensed with when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Camara v. Municipal Court*, 387 U.S. 523, 533, 87 S.Ct. 1727, 1733, 18 L.Ed.2d 930 (1967). Such an exception is carved out only when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *T.L.O.*, 469 U.S. at 351, 105 S.Ct. at 747 (Blackmun, J., concurring).

In the seminal case on body fluid testing, the Court held that compelled blood tests in a drunk driving case are constitutionally permissible without a search warrant. *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). The Court stated that even though the warrant requirement could be dispensed with, there still had to be probable cause to initiate such a test. It said

[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear.

Id. at 769–770, 86 S.Ct. at 1835. The *Schmerber* Court found the blood test reasonable without a warrant because the same facts which gave probable cause for the arrest also suggested the relevance of the blood test, and because the blood test was a reasonable test with little risk, trauma or pain and was conducted in a reasonable manner. *Id.* at 770–771, 86 S.Ct. at 1835–36. RLEA concedes that a warrant is not necessary to legitimate body fluid testing under the regulations but argues that the *Schmerber* requirement for something like probable cause [10] must exist to justify the testing of any particular individual.

[4] We can agree that the exigencies of testing for the presence of alcohol and drugs in blood, urine or breath require prompt action which precludes obtaining a warrant. *Schmerber*, 384 U.S. at 770, 86 S.Ct. at 1835. *Compare T.L.O.*, 496 U.S. at 340, 105 S.Ct. at 742 (to require a teacher to obtain a warrant before a search when she suspects an infraction of school rules would unduly interfere with the maintenance of discipline in the schools).

2. *Exceptions to Warrant Requirement*

Although we agree that drug and alcohol testing can be conducted without a warrant, we do not believe the case fits within one of the "carefully defined classes of cases," *Mancusi*, 392 U.S. at 370, 88 S.Ct. at 2125, previously identified by the Supreme Court as reasonable without a warrant.[11] The most relevant prior exception which is applicable in the eyes of FRA and the district court, is the administrative search. The district court specifically found that these regulations should be evaluated under the standards applicable to administrative inspections of pervasively regulated industries. *See New York v. Burger*, — U.S. —, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987) (automobile junkyard); *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981) (mines); *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1978) (firearms); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970) (liquor).

The administrative search doctrine applied to closely regulated industries has undergone significant alterations over the years. In the first such case, the Court approved the reasonableness of warrantless searches and seizures in the liquor industry because of the long history of Congressional regulation of the industry.

10. Recently the Supreme Court has explained that the "clear indication" specified in *Schmerber* was not a third standard between probable cause and reasonable suspicion, but was simply another way of stating that police must have a particularized suspicion that the evidence sought might be found within the body of the individual. *United States v. Montoya de Hernandez*, 473 U.S. 531, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985).

11. Such well-defined exceptions include: (1) searches incident to a lawful arrest, *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); (2) the "automobile exception," *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); (3) hot pursuit, *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967); (4) stop and frisk, *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); (5) plain view, *Collidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); (6) border searches, *United States v. Montoya de Hernandez*, 473 U.S. 531, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985); (7) administrative searches of closely regulated industries, *New York v. Burger*, — U.S. —, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987); *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981); *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970); (8) inventory searches, *Illinois v. LaFayette*, 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983); (9) searches of schoolchildren's possessions at school, *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985); (10) consent, *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). *See* Bookspan, *Behind Open Doors: Constitutional Implications of Government Employee Testing*, 11 Nova L.Rev. 307, 331 n. 117 (citing cases).

Colonnade Catering, 397 U.S. at 75–77, 90 S.Ct. at 776–77. In *Biswell*, 406 U.S. at 315–16, 92 S.Ct. at 1596, the Court approved of warrantless searches conducted pursuant to the Gun Control Act not because of a deeply rooted history of federal regulation, but because of the need for flexibility and because the prerequisite of a warrant would frustrate the goals of inspection. The Court found that owners of businesses know they are subject to inspection from the time they choose to engage in a pervasively regulated business, thus there is only a limited threat to expectations of privacy. *Id.* at 316, 92 S.Ct. at 1596. The Court has further explained, in a case treating inspection of mines, that a congressionally established regulatory scheme and a comprehensive and defined federal regulatory presence lets the owner of commercial property know that his property will be periodically inspected. *Dewey*, 452 U.S. at 603, 101 S.Ct. at 2540. Such an inspection program, in terms of certainty and regularity of application provides a constitutionally adequate substitute for a warrant. *Id.* In that case, rather than leaving the frequency and purpose of inspections to the unchecked discretion of government officers, the Act established a predictable and guided federal regulatory presence. *Id.* at 604, 101 S.Ct at 2541. When no such regulatory plan is built into the legislation regulating a specific industry, the Court has required a warrant as a condition of a reasonable search. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978) (OSHA inspections not directed at a specific regulated industry; warrant necessary to demonstrate an inspection conforms to an established administrative plan).

[5, 6] The most recent articulation of this exception to the warrant requirement emphasizes that warrant and probable cause requirements which fulfill the traditional fourth amendment standard of reasonableness have lessened application in the context of a closely regulated industry because the owner or operator of commercial premises in such an industry has a reduced expectation of privacy. *Burger*, 107 S.Ct. at 2643. A warrantless inspection of the commercial premises of a pervasively regulated business will be deemed to be reasonable only if three criteria are met: (1) a "substantial" government interest informs the regulatory scheme; (2) warrantless inspections must be necessary to fulfill the regulatory scheme; and (3) the inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant. *Id.* at 2643–44. As a substitute for a warrant the regulatory statute must perform the two functions of a warrant: it must advise the owner of the premises that the search is made pursuant to law and has a properly defined scope and it must limit the discretion of inspecting officers. *Id.* at 2644.

[7] We do not believe the administrative inspection exception is applicable to the regulatory scheme before us. All of the decisions in this line of cases have upheld warrantless searches of property, not of persons, and we decline to make such an extension in this case. The Court, in reviewing the closely regulated industry cases, has stressed that no reasonable expectation of privacy could exist "for a *proprietor* over the *stock* of such an enterprise." *Burger*, 107 S.Ct. at 2642 (quoting *Marshall*, 436 U.S. at 313, 98 S.Ct. at 1821) (emphasis added); *accord United States v. Munoz*, 701 F.2d 1293, 1299 (9th Cir.1983). *See, also, Rush v. Obledo*, 756 F.2d 713 (9th Cir.1985) (approving inspections of family day care homes in the areas where and when business is being conducted because day care centers fall within the pervasively regulated business exception); *Balelo v. Baldrige*, 724 F.2d 753, 767 (9th Cir.) (en banc) (approving government inspection of fishing vessels for violations of the Marine Mammal Protection Act, but noting that the regulation does not authorize searches of the persons, personal effects, or living quarters of the Captains and their crews, and that such searches would have to be justified independently under the fourth amendment), *cert. denied*, 467 U.S. 1252, 104 S.Ct. 2536, 82 L.Ed.2d 841 (1984); *United States v. Raub*, 637 F.2d 1205 (9th Cir.1980) (warrantless boarding of vessels

approved as authorized by statute and aspect of historical and pervasive regulation of salmon-fishing industry).

There is no question that the railroad industry has experienced a long history of close regulation. *See supra* at 581. This regulation has diminished the *owners'* and *managers'* expectations of privacy in railroad premises, but we do not believe it has diminished the individual railroad *employee's* expectation of privacy in his person or his body fluids. Although some railroad safety regulations are directed at employees, such as the hazardous materials transportation laws, 49 U.S.C. §§ 1801–1812, the vast bulk of safety legislation is directed at owners and managers of railroads, not their employees. By this we mean that the inspections and investigations to assure compliance with the regulations are directed at the premises, equipment, rolling stock and books and records of the owners and managers, not at their employees. 45 U.S.C. § 437(b). Further, the duty to comply with the regulations and the sanctions and penalties for violations of the regulations fall on the owners and managers, not their employees.[12]

We emphasize this point to distinguish the case before us from the Third Circuit's decision in *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir.), *cert. denied*, — U.S. —, 107 S.Ct. 577, 93 L.Ed.2d 580 (1986), which held the administrative search exception applies to warrantless breath and urine testing of jockeys in the heavily regulated horse-racing industry. Critical to the *Shoemaker* court's analysis was the fact that jockeys, as the persons engaged in the regulated activity, are the principal regulatory concern. *Id.* The regulation of horse racing in New Jersey is designed to protect the wagering public and its confidence in the integrity of the industry, and to those ends has always been geared to assuring the integrity of racetrack employees through licensing provisions and restrictions on employing persons convicted of a crime involving moral turpitude. *Id.* at 1141–42. In contrast, the extensive regulation of the railroad industry is designed to guarantee the safety of employees and the public and to that end has always been geared to assuring the safety and proper maintenance of equipment and facilities. Railroad employees are not licensed, nor is their employment conditioned upon the absence of a prior criminal record. The Secretary of Transportation is expressly precluded from setting standards for qualifications of railroad employees, 45 U.S.C. § 431(a), while the New Jersey Racing Commission has always had the authority to prescribe the conditions under which licenses may be issued or revoked. *Shoemaker*, 795 F.2d at 1141. Railroad safety regulations have not put railroad employees on notice that their participation in the industry reduces their legitimate expectations of privacy in the integrity of their bodies. Certainly there are industry requirements of health and fitness, but these have been matters of private negotiation between railroads and employees not matters of federal regulation. *See, e.g., Brotherhood of Locomotive Eng'rs v. Burlington N.R.R. Co.*, 838 F.2d 1087 (9th Cir. 1988).

[8] Thus we conclude that the administrative inspection standard, which allows warrantless searches of the premises of pervasively regulated industries, is not applicable to searches of persons even when they are employed in those industries, unless the employees are the principal concern of the industry regulation.

We note that FRA actually argues for an extension of a broader administrative search doctrine than that developed in the pervasively regulated industry cases. FRA relies principally on *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), which required a warrant based on administrative probable cause to

12. *See, e.g.*, 45 U.S.C. § 438 (penalties for violation of the Federal Railroad Safety Act fall on railroads); 45 U.S.C. § 64a(a)(1) (penalties for violation of the Hours of Service Act fall on railroads); 45 U.S.C. § 13 (penalties for violation of the Safety Appliance Act fall on railroads); 45 U.S.C. § 34 (penalties for violation of the Boiler Inspection Act fall on railroads); 45 U.S.C. § 39 (penalties for violation of the Accident Reports Act fall on railroads); 49 U.S.C. § 26 (penalties for violating the Interstate Commerce Act fall on railroads).

inspect premises to assure compliance with fire, health and safety codes. The Court held that area code-enforcement inspections of municipal housing are reasonable because: (1) such programs have a long history of judicial and public acceptance; (2) there is no other canvassing technique which would achieve acceptable results; and (3) the inspections are neither personal in nature nor aimed at discovery of crime. *Id.* at 537, 87 S.Ct. at 1735. We think the animating principles of this case have little application to the drug testing at issue here. *Camara*, in common with the closely regulated industry cases, only approved inspections of property which are not personal in nature. *Id.*

FRA also argues that the Supreme Court and the Ninth Circuit have frequently approved of searches of persons conducted without probable cause or individualized suspicion. It cites *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (upheld brief vehicle stops at fixed checkpoints to question occupants without individual suspicion); *United States v. Des Jardins*, 747 F.2d 499, 505–06 (9th Cir.1984) (upheld pat-down search of person at border based only on minimal showing of suspicion), *partially vacated*, 772 F.2d 578 (9th Cir.1985); *McMorris v. Alioto*, 567 F.2d 897 (9th Cir.1978) (approved routine metal detector and pat-down searches of attorneys entering courthouse); *Davis*, 482 F.2d at 910–11 (approved preboarding searches of airline passengers).

We do not consider these cases to be in point. Stops for questioning, pat-down searches and magnetometer searches do not approach the degree of intrusiveness involved in toxicological testing of body fluids. The consistent rationale of the cases is that a vital governmental interest in, for example, national self-protection, *Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116, in the safety of judicial officers, *McMorris*, 567 F.2d 897, or in combatting terrorism and hijacking, *Davis*, 482 F.2d at 897, may justify a minimal intrusion. We do not consider breath, blood or urine testing to be similarly minimal intrusions. *See Storms*, 600 F.Supp. at 1220 (urinalysis entitled to same level of scrutiny accorded body cavity searches because both offend human dignity and privacy and both are degrading); *McDonell v. Hunter*, 612 F.Supp. 1122, 1127 (D.Iowa 1985) ("[U]rine is discharged and disposed of under circumstances where the person has a reasonable and legitimate expectation of privacy." Court also found significant the interest in maintaining privacy in personal information contained in body fluids.), *aff'd as modified*, 809 F.2d 1302 (8th Cir.1987); *Tucker v. Dickey*, 613 F.Supp. 1124 (W.D.Wis.1985) (urinalyses and body cavity searches equally degrading).

We still must decide what standard governs inquiry into the reasonableness of such a drug testing program. The Supreme Court has provided some guidance for determining the applicable standard of reasonableness although it has expressly declined to address the proper standard for analyzing employee drug and alcohol testing. *O'Connor*, 107 S.Ct. at 1504 n. **.

3. *Reasonableness*

The Supreme Court has said that determining the "standard of reasonableness applicable to a particular class of searches requires 'balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *O'Connor*, 107 S.Ct. at 1499 (quoting *United States v. Place*, 462 U.S. 696, 703, 103 S.Ct. 2637, 2642, 77 L.Ed.2d 110 (1983)); *National Fed'n of Fed. Employees*, 818 F.2d at 942.

In this case, on one side of the balance are the railroad employees' reasonable expectations of privacy, *T.L.O.*, 469 U.S. at 338, 105 S.Ct. at 741, *O'Connor*, 107 S.Ct. at 1497–99, and on the other side is the governmental interest in the safe and efficient operation of the railroads for the benefit of railroad employees and the public affected by that operation. *See O'Connor*, 107 S.Ct. at 1501 (government interest in efficient and proper operation of the workplace justifies search of employee's desk and files); *National Fed'n of Fed. Employees*, 818 F.2d at 942 (government inter-

est in efficient operation of the workplace offered as justification for drug testing of federal employees); *McDonell*, 809 F.2d at 1308 (government interest in determining whether prison personnel are using or abusing drugs which would affect their ability to safely perform their work may support the reasonableness determination).

[9] We believe that accommodation of railroad employees' privacy interest with the significant safety concerns of the government does not require adherence to a probable cause requirement. *Cf. T.L.O.*, 469 U.S. at 341, 105 S.Ct. at 742. In this case, as in *T.L.O.*, the legality of the search for evidence of drug or alcohol impairment depends on the reasonableness, under all the circumstances of the search. To be reasonable, the search must satisfy both prongs of a two-prong test. First, we must determine "whether the [search] was justified at its inception," *T.L.O.*, 469 U.S. at 341, 105 S.Ct. at 743 (quoting *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968)). Second, we must determine "whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place,'" *T.L.O.*, 469 U.S. at 341, 105 S.Ct. at 743 (quoting *Terry*, 392 U.S. at 20, 88 S.Ct. at 1879).

a. Justified at Inception

[10] Finding a search justified at its inception requires a determination that there are reasonable grounds for suspecting that the search will turn up the evidence sought. In *O'Connor* this standard meant there had to be reasonable grounds for suspecting the search of an employee's office would turn up evidence that he was guilty of work-related misconduct. 107 S.Ct. at 1503. In *T.L.O.* this standard meant there had to be reasonable grounds for suspecting that the search of a student's purse would turn up evidence that the student had violated or was violating the law or school rules. 469 U.S. at 342, 105 S.Ct. at 743. In our case, this standard means there must be reasonable grounds for suspecting the search will turn up evidence the employee has violated the industry rule and federal regulation, 49 C.F.R. § 219.101, prohibiting possession or use of alcohol and controlled substances on the job and prohibiting working while under the influence of alcohol or drugs.

The Supreme Court has not determined whether "reasonable grounds for suspecting" necessarily means that there must be individualized or particularized suspicion. *O'Connor*, 107 S.Ct. at 1503; *T.L.O.*, 469 U.S. at 342 n. 8, 105 S.Ct. at 743 n. 8. These cases both involved searches of property,[13] not persons, and in both cases individualized suspicion did exist, but the Court refused to say that it was an irreducible minimum of a reasonable search. *O'Connor*, 107 S.Ct. at 1503; *T.L.O.*, 469 U.S. at 342 n. 8, 105 S.Ct. at 743 n. 8.

[11] We hold that particularized suspicion is essential to finding toxicological testing of railroad employees justified at its inception. Accidents, incidents or rule violations, by themselves, do not create reasonable grounds for suspecting that tests will demonstrate alcohol or drug impairment in any one railroad employee, much less an entire train crew. Broad based testing, without particularized suspicion, such as that mandated by the new regulations, 49 C.F.R. §§ 219.301, 219.301(b)(2) and (3), has been frequently disapproved. *See, e.g., Amalgamated Transit Union*, 663 F.Supp. at 1568 (random testing of bus drivers unreasonable with less than reasonable suspicion); *Feliciano*, 661 F.Supp. at 589 ("a reasonable individualized suspicion that a police officer is using illicit drugs must be required for urinalysis to be reasonable"); *American Fed'n Gov't Employees v. Weinberger*, 651 F.Supp. 726 (S.D. Ga.1986) (federal police officers cannot be tested without reasonable suspicion); *Lovvorn*, 647 F.Supp. 875 (firefighters cannot

13. The holding of *T.L.O.* appears to be broader than the facts required, in that the Court said "[W]e hold today that school officials need not obtain a warrant before searching a student who is under their authority." 469 U.S. at 340, 105 S.Ct. at 742. As we have discussed, dispensing with the warrant requirement does not end the inquiry into the reasonableness of a search, which requires different degrees of suspicion to warrant different degrees of intrusion.

be tested without individualized suspicion); *Capua*, 643 F.Supp. 1507 (random testing of firemen and policemen unconstitutional); *Patchogue-Medford Congress of Teachers v. Board of Education*, 70 N.Y.2d 57, 517 N.Y.S.2d 456, 510 N.E.2d 325 (1987) (teachers cannot be tested without particularized suspicion). *But see National Treasury Employees Union*, 816 F.2d 170 (customs officials may be required to take test when they apply for certain sensitive jobs); *McDonell*, 809 F.2d 1302 (prison guards may be subjected to uniform or systematic random urine testing); *Shoemaker*, 795 F.2d 1136 (jockeys may be subjected to random urinalysis and uniform breathalyzer tests).

We think when testing is undertaken to detect drug or alcohol abuse as a means of improving the safe operation of a railroad, it poses no insuperable burden on the government to require individualized suspicion. The reasonable suspicion standard currently codified at 49 C.F.R. §§ 219.301(b)(1) and (c)(2) is adequate to safeguard the privacy expectations of railroad employees, and we believe it should be incorporated into the mandatory testing provisions set out in 49 C.F.R. § 219.201 and the other authorized testing provisions set out in 49 C.F.R. § 219.301(b)(2) and (3).

Requiring particularized suspicion before testing for drug or alcohol impairment comports with the great weight of authority holding that a warrantless search of a person is unconstitutional without a degree of specific suspicion. "Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal...." *T.L.O.*, 469 U.S. at 342 n. 8, 105 S.Ct. at 743 n. 8. *See e.g. McMorris v. Alioto*, 567 F.2d 897 (9th Cir.1978) (patdown search of visitor to courthouse more intrusive than magnetometer search and can be performed only with suspicion caused by activation of magnetometer); *Thorne v. Jones*, 765 F.2d 1270, 1277 (5th Cir.1985) (reasonable suspicion standard governs strip searches of visitors to prison), *cert. denied*, 475 U.S. 1016, 106 S.Ct. 1198, 1199, 89 L.Ed.2d 313 (1986); *Hunter v. Auger*, 672 F.2d 668 (8th Cir.1982) (same); *Security & Law Enforcement Employees v. Carey*, 737 F.2d 187, 204–05 (2d Cir.1984) (reasonable suspicion standard governs strip searches of correction officers); *United States v. Ogberaha*, 771 F.2d 655, 658 (2d Cir.1985) (reasonable suspicion governs strip searches at the border), *cert. denied*, 474 U.S. 1103, 106 S.Ct. 887, 88 L.Ed.2d 922 (1986); *Henderson v. United States*, 390 F.2d 805 (9th Cir.1967) (same).

Although we hold that the testing provisions in 49 C.F.R. §§ 219.201 and 219.301(b)(2) and (3) are constitutionally infirm because they do not meet the first prong of the reasonableness test, we turn to a consideration of the second prong.

b. Related in Scope

The second prong of the reasonableness test is whether the search is reasonably related in scope to the circumstances which justified the interference in the first place. *T.L.O.*, 469 U.S. at 341, 105 S.Ct. at 742. In *T.L.O.* the Court indicated that a search of a school child which was justified at its inception would also be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction. *Id.* at 342, 105 S.Ct. at 743. We apply this standard to the regulations as they would stand with particularized suspicion incorporated as a necessary predicate to all testing.

[12] The professed purpose of the testing program is to detect current drug intoxication and impairment and thereby to improve rail safety through the deterrent effect of the testing. We see one flaw in the reasonableness of this approach to the problem. Blood and urine tests intended to establish drug use other than alcohol are not reasonably related to the stated purpose of the tests because the tests cannot measure current drug intoxication or degree of impairment. *See Jones v. McKenzie*, 833 F.2d 335, 339 (D.C.Cir.1987); Dubowski, Dr., *Drug-Use Testing: Scientific Perspectives*, 11 Nova L.Rev. 415, 526–29

(1987); Hudner, *Urine Testing for Drugs*, 11 Nova L.Rev. 553, 556–57 (1987); Joseph, *Fourth Amendment Implications of Public Sector Work Place Drug Testing*, 11 Nova L.Rev. 605, 632 (1987). Rather, the state of the art drug tests currently used can discover only the metabolites of various drugs, which are not evidence of current intoxication and may remain in the body for days or weeks after the ingestion of the drug. Joseph, *supra* at 632. For this reason we think it imperative that drug testing be undertaken only when there is individualized suspicion because the combination of observable symptoms of impairment with a positive result on a drug test would provide a sound basis for appropriate disciplinary action. The literature on drug testing is replete with references to the unreliability of results. *See Testing for Drug Use in the American Workplace: A Symposium*, 11 Nova L.Rev. (1987) *passim*. Requiring individualized suspicion would help to alleviate some of the harsh consequences of exclusive reliance on test results.

If individualized suspicion becomes a predicate for all testing the regulations should withstand scrutiny under the scope prong of the reasonableness standard. Although body fluid testing is highly intrusive, if it were occasioned only by individualized suspicion, the intrusion would not be excessive in light of the nature of the suspected rule violation. *Cf. T.L.O.*, 469 U.S. at 342, 105 S.Ct. at 743.

The manner of conducting the tests is generally reasonable in that they are performed in medical facilities. 49 C.F.R. § 219.203(c). The intrusiveness of the process of urine testing has been reduced as much as is practicable in that only personnel of the medical facility may supervise the sample collection. 49 C.F.R. § 219.305(a).

The implied consent provision, 49 C.F.R. § 219.11 [14] adds little to the reasonableness of the testing program although it does put employees on notice that they may be required to submit to such tests. *See National Treasury Employees Union*, 816 F.2d at 178. The consent feature does not add to the reasonableness in our case as it did in *National Treasury Employees Union* because there an employee could totally forego drug screening with no adverse inferences if he withdrew his application for a job transfer. *Id.* Railroad employees do not have that option.

If individualized suspicion is included in the preconditions for testing, we would conclude that the least intrusive means have been selected to meet the legitimate governmental objectives of the tests. *See id.* at 180. We are less convinced of the effectiveness of the tests in detecting drug impairment, *id.*, but think the program will serve reasonably well as a deterrence to on-the-job use of drugs and alcohol.

D. Consent

FRA argues the rule satisfies the fourth amendment even under the stricter standard of reasonable suspicion because of the implied consent provision in 49 C.F.R. § 219.11. It is clear that valid consent to a search eliminates the need for a warrant of probable cause. *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed. 2d 497 (1980); *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). However, when a search has been determined to be constitutionally unreasonable, the consent feature cannot save it. *National Fed'n of Fed. Employees*, 818 F.2d at 943. As one court expressed it, "advance consent to future *unreasonable* searches is not a reasonable condition of employment." *McDonell*, 612 F.Supp. at 1131 (emphasis in original).

E. Conflicting Authority

We are mindful that our decision may be seen as conflicting with decisions of other circuits. *E.g. National Treasury Employees Union*, 816 F.2d 170; *McDonell*, 809 F.2d 1302; *Shoemaker*, 795 F.2d 1136; *Division 241 Amalgamated Transit Union*

14. § 219.11(a) provides "Any employee who performs covered service for a railroad on or after February 10, 1986, shall be deemed to have consented to testing as required in Subpart C and D of this part; and consent is implied by performance of such service.

v. Suscy, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029, 97 S.Ct. 653, 50 L.Ed.2d 632 (1976).

In *National Treasury Employees Union*, the Fifth Circuit considered a plan for testing customs officials seeking transfer to jobs which involve interdiction of illicit drugs, require carrying of a firearm or involve access to classified information. 816 F.2d at 173. As a voluntary screening test for those applying for transfers, this program is similar to FRA rules for pre-employment drug screens codified at 49 C.F.R. Part 219, Subpart F. These rules are not before us, and of course we express no opinion as to their constitutionality. We do not think the factors the Fifth Circuit considered in analyzing the reasonableness of the testing program, 816 F.2d at 177–82, are precisely the factors we consider relevant, because the court did not consider the crucial question which is the foundation of the reasonableness test, i.e., whether the search is justified at its inception, *O'Connor*, 107 S.Ct. at 1503; *T.L.O.*, 469 U.S. at 341, 105 S.Ct. at 742.

Likewise, the *McDonell* court did not pose this question in analyzing and upholding the reasonableness of uniform or systematic random testing of prison guards. 809 F.2d at 1308. Rather the court simply weighed the strong interest in prison security against the urinalyses which it held to be relatively less intrusive than body searches and found the intrusion into the guards' expectation of privacy to be reasonable. *Id.* We do not agree that urine testing is a lesser intrusion than body searches.

We have already indicated that *Shoemaker* is distinguishable because the Third Circuit adopted the pervasively regulated industry rationale to uphold testing of jockeys and we do not consider that rationale applicable to the employees in our case. 795 F.2d at 1141–42.

Finally, we do not consider the analysis of the *Suscy* court to be particularly persuasive, even though the case, because it involves bus drivers, is factually similar to the case before us. 538 F.2d 1264. The Seventh Circuit held, without very thorough analysis, that bus operators have no reasonable expectation of privacy and that even if they did, the tests given were reasonable because they were given only to operating employees directly involved in serious accidents or suspected by two supervisory employees of being under the influence. *Id.* at 1267. *See* Bible, *Screening Workers for Drugs: The Constitutional Implications of Urine Testing in Public Employment*, 24 Am. Business L.J. 309, 324–25 (1986) (criticizing *Suscy* reasoning). Our evaluation of the reasonableness of the tests at issue in this case is that they fail to meet the requirement of being justified at their inception by an expectation the tests will reveal the sought after information. Because the *Suscy* court did not apply that test, its conclusions do not influence the outcome in our case.

II. STATUTORY ARGUMENTS

[13] RLEA raises a number of statutory objections to the regulations which we find unpersuasive.[15] RLEA suggests that the regulations violate the Federal Railroad Safety Act in that the FRA lacks the statutory authority to delegate testing under Subpart D to the railroads, and to permit them to conduct it without particularized suspicion. This argument is without merit. 45 U.S.C. § 437(a) authorizes the Secretary to delegate to any qualified persons functions respecting examination, inspection and testing of persons as necessary to carry out the provisions of that subchapter. Thus, because the Secretary has the power to perform the searches in question here, he has the power to delegate that authority to other qualified persons.

The RLEA argues from *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), which addressed warrantless inspections to enforce OSHA, that any statutory scheme mandating warrantless searches is constitutionally infirm.

15. The district court did not reach any of these questions but because they are legal issues we need not remand for further consideration.

Marshall does not go so far. The Court specifically stated it was concerned only with OSHA, and that the "reasonableness of a warrantless search ... will depend upon the specific enforcement needs and privacy guarantees of each statute." *Id.* at 321, 98 S.Ct. at 1825. Thus, the scheme at issue in this case need only pass constitutional muster on its own terms.

[14] RLEA also argues that the regulations violate the Federal Rehabilitation Act by unlawfully discriminating against the handicapped by causing dismissal of employees who can perform their jobs despite drug or alcohol use. The Federal Rehabilitation Act prohibits discrimination against otherwise qualified handicapped individuals by any program receiving federal financial assistance. 29 U.S.C. § 794 (1982). Assuming the Act applies to railroads, since they generally receive federal assistance or have federal contracts, it is clear the testing regulations are not violative of the Rehabilitation Act.

The regulations do not mandate any discriminatory treatment of those who are handicapped, or even of those who "flunk" the drug or alcohol tests. Any disciplinary action is left up to the individual employers and is a subject for collective bargaining between the unions and railroads.

Furthermore, the Rehabilitation Act does not cover alcoholics or drug abusers whose employment, by reason of current alcohol or drug abuse, would constitute a threat to property or safety. 29 U.S.C. § 706(7)(B). It appears from the plain language of the statute that only alcoholics or drug abusers whose problems are under control are protected from discriminatory treatment.

Finally, RLEA argues that the regulations violate protections of the Railway Labor Act by denying employees the right to have union representation at the testing procedures. This argument has no merit. It derives the right to have a representative present from the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975). In *Weingarten*, the Court held that an employer's refusal of an employee's request that her union representative be present at an investigatory interview which the employee reasonably believed might result in disciplinary action constituted an unfair labor practice in violation of § 8(a)(1) of the N.L.R.A., 29 U.S.C. § 158(a)(1), because it interfered with § 7 rights to engage in concerted activity. 29 U.S.C. § 157. 420 U.S. at 252–53, 95 S.Ct. at 961.

Weingarten does not control this case. The Court specified that the right to union representation arises only upon the employee's request. *Id.* at 257, 95 S.Ct. at 963. Here, the regulations are silent as to a person's right to have representation, and the situation has not yet arisen in which an employee has asked for and been refused such representation. Thus, the question is not ripe for review.

III. OTHER CONSTITUTIONAL OBJECTIONS

RLEA contends that, in addition to its constitutional infirmity under the fourth amendment, the rule also impermissibly impinges on the fundamental right of privacy. *See Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). The privacy interest protected by *Roe v. Wade* and its progeny has not been fully delineated, *see Carey v. Population Servs. Int'l*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977), but thus far has been extended to include interests in autonomous decision making in the areas of family planning and contraception, *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), marriage, *Zablocki v. Redhail*, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), and family living arrangements. *Moore v. City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). Any right to personal autonomy in choosing to use alcohol or drugs has not yet been protected, although there is a parallel right to keep certain information about drug use private. *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). In *Whalen* the Court found the gathering and storage of data pertaining to prescription drug use did not pose a grievous threat to the privacy interest in avoiding disclosure of personal mat-

ters or the privacy interest in independent decision making.

The Third Circuit held that one aspect of the reasonableness of the jockey testing program was the guarantee of confidentiality incorporated in the statutory scheme. *Shoemaker*, 795 F.2d at 1144. The regulations before us lack this safeguard, but we believe the time to litigate the question is after some inappropriate breach of confidentiality.

[15] RLEA's final constitutional argument is that the regulations are underinclusive and thus offend due process by arbitrarily discriminating among similarly situated classes of persons. Of course the equal protection provisions of the fourteenth amendment have been made applicable to the federal government through the due process clause of the fifth amendment. *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). But equal protection requires only that there be a rational relationship between a classification scheme and a legitimate government objective. *Plyler v. Doe*, 457 U.S. 202, 216–18, 102 S.Ct. 2382, 2394–95, 72 L.Ed.2d 786 (1982). The objective of railway safety is unquestionably legitimate. The targeting for testing of employees covered by the Hours of Service Act, 45 U.S.C. §§ 61–64b, and employees performing the same services as covered employees, 49 C.F.R. § 219.5(d), is reasonably related to the goals of the testing program. The Hours of Service employees are "individual[s] actually engaged in or connected with the movement of any train." 45 U.S.C. § 61(b)(2). Congress enacted this legislation to enhance railroad safety by regulating the hours of employees most involved in the operation and therefore most responsible for the safe operation of trains. It makes sense to mandate drug and alcohol testing of the same group for the same reasons.

But RLEA argues this does not permit testing of supervisory employees who may also be responsible for railway accidents. However, as FRA points out, supervisory personnel are already subject to testing at the discretion of the railroads, and if they perform any "covered service" they will be subject to testing under the new rule too. Thus, the rule does not offend the equal protection clause.

CONCLUSION

Because the district court applied the wrong legal standard in evaluating the fourth amendment issue in this case, it erroneously granted summary judgment for FRA. Applying the test of reasonableness we conclude that intrusive drug and alcohol testing may be required or authorized only when specific articulable facts give rise to a reasonable suspicion that a test will reveal evidence of current drug or alcohol impairment. The judgment of the district court is REVERSED.

ALARCON, Circuit Judge, dissenting:

I respectfully dissent.

The primary issue before this court is whether the district court correctly determined that the Federal Railroad Administration's regulations requiring restraints to conduct blood or urine tests of crew members after serious accidents or incidents and authorizing the conduct of breath or urine tests, upon reasonable suspicion or upon an indication of a deficiency in an employee's safety sensitive functions as a result of an employee's involvement in certain accidents, incidents or rule violations, do not violate the fourth amendment. The district court concluded that, because railroads and railway employees are closely regulated by the government to promote public safety, the balance between this valid governmental interest and the right of an individual to be free from an invasion of privacy must be struck in favor of the regulatory scheme. I would affirm the district court's judgment.

I

The majority has concluded that, notwithstanding that railroads are closely regulated industries, the exception to the requirement of a warrant and probable cause for searches involving closely regulated industries does not apply to the search of the

employees of such enterprises. The majority's decision is in direct conflict with the Third Circuit's opinion in *Shoemaker v. Handel*, 795 F.2d 1136 (3rd Cir.1986), *cert. denied*, — U.S. —, 107 S.Ct. 577, 93 L.Ed.2d 580. In *Shoemaker*, the court held that warrantless breathalyzer and urine tests of voluntary participants in the highly regulated horse racing industry are reasonable under the fourth amendment. The majority in the instant matter attempt to distinguish *Shoemaker* on the ground that in the regulation of horse racing, jockeys are "the principal regulatory concern." Majority op. at 585. In further support of its refusal to follow *Shoemaker*, the majority states, "[i]n contrast, the extensive regulation of the railroad industry is designed to guarantee the safety of employees and the public and to that end has always been geared to assuring the safety and proper maintenance of equipment and facilities." *Id.*

Contrary to the majority's argument, the government has a long tradition of regulating the conduct of railway personnel to promote public safety. The reason is obvious. An idle locomotive, sitting in the roundhouse, is harmless. It becomes lethal when operated negligently by persons who are under the influence of alcohol or drugs. As early as 1907, for example, Congress set limits on the number of working hours industry personnel may undertake per day. 45 U.S.C. § 62(a)(1) (1982). This legislation:

> was induced by reason of the many casualties in railroad transportation which resulted from requiring the discharge of arduous duties by tired and exhausted men whose power of service and energy had been so weakened by overwork as to render them inattentive to duty or incapable of discharging the responsible labors of their positions.

Atchison, T. & S.F. Ry. Co. v. United States, 244 U.S. 336, 342, 37 S.Ct. 635, 637, 61 L.Ed. 1175 (1917).

The government has promulgated a number of regulations which mandate safe working practices by railroad personnel. *See e.g.*, 49 C.F.R. §§ 218.1–218.30 (1986) (requiring that workers follow certain prescribed safety procedures when co-workers are engaged on rail tracks); 49 C.F.R. § 218.37 (1986) (requiring that workers follow certain prescribed safety procedures when trains are running at reduced speeds); 49 C.F.R. § 220.61 (1986) (requiring certain prescribed safety procedures be followed when transmitting or receiving orders). Additionally, Congress has declared that railroad personnel can be held criminally liable for violating certain safety rules. *See* 49 U.S.C. § 1801 (1982) (providing criminal penalties from the knowing transportation of hazardous materials); *see also* 45 U.S.C. § 438 (1982) (criminal penalties for false entries in accident reports).

The majority also reasons that railroad workers, unlike jockeys, do not have diminished expectations of privacy with respect to their use of drugs or alcohol. Majority op. at 585. This argument ignores the fact that railway employees were subject to safety rules such as the one denominated as Rule G in the companion cases to this matter *Brotherhood of Locomotive Eng'rs v. Burlington N. R.R. Co.*, 838 F.2d 1087 (9th Cir.1988) which, for a substantial period of time, have prohibited the use of alcohol and controlled substances by employees subject to duty or while on duty and required railway personnel suspected of use to submit to a blood or urine test to clear themselves of suspicion. *See Brotherhood of Locomotive Eng'rs v. Burlington N. R.R. Co.*, 620 F.Supp. 163, 169–172 (D.Mont.1985).

Because the activities of railway *personnel* are closely regulated to promote safety, I would adopt the well-reasoned opinion in *Shoemaker*, and hold that the closely regulated industry exception to the requirement of a warrant and probable cause applies to blood, breath, and urine tests of railway employees under the specific circumstances prescribed in the regulations challenged in this action.

II

A search of a closely-regulated industry "will be deemed to be reasonable," *New York v. Burger*, — U.S. —, 107 S.Ct.

2636, 2643, 96 L.Ed.2d 601 (1987), if it meets the following three criteria:

> First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made
>
> ....
>
> Second, the warrantless inspections must be "necessary to further [the] regulatory scheme."
>
> ....
>
> Finally, "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant."

Id. 107 S.Ct. at 2644 (quoting *Donovan v. Dewey*, 452 U.S. 594, 601–03, 101 S.Ct. 2534, 2539–40, 69 L.Ed.2d 262 (1981); *see Balelo v. Baldrige*, 724 F.2d 753, 764–65 (9th Cir.1984) (en banc), *cert. denied*, 467 U.S. 1252, 104 S.Ct. 3536, 82 L.Ed.2d 841. The searches mandated by 49 C.F.R. § 219.201 satisfy this three-pronged test.

The government has a "substantial" interest in requiring that tests be conducted to assure that railroad employees avoid drug or alcohol use which might affect their ability to perform their jobs safely. Drug usage among railroad personnel has been implicated as a potential cause of numerous train accidents which resulted in injury and death. Two such accidents are noted in the companion cases to this matter, *Brotherhood of Locomotive Eng'rs v. Burlington N. R.R. Co.*, 838 F.2d 1087. These accidents caused seven deaths and over $3 million in property damage. These tragic events were not isolated incidents. They are two examples of a long line of alcohol or drug-related tragedies. *See generally* T. Manello & F. Seaman, *Prevalence, Costs and Handling of Drinking Problems on Seven Railroads* (Department of Transportation Report No. DOT-TSC-1375, 1979). The threat posed by alcohol and drug-related railroad accidents is particularly dangerous in light of the fact that extremely hazardous materials are often transported by rail. *See generally* National Transportation Safety Board, Pub. No. NTSB/RAR/83/05, *Railroad Accident Report—Derailment of Illinois Central Gulf Railroad Freight Train Extra 9629 East (GS-2-28) and Release of Hazardous Materials at Livingston, Louisiana, September 28, 1982* (1983) (describing an alcohol- implicated train wreck which resulted in a chemical spill requiring the evacuation of a community of 3000 persons for a period of two weeks).

Second, warrantless inspections are "necessary to further [the] regulatory scheme." *Burger*, 107 S.Ct. at 2644 (quoting *Donovan*, 452 U.S at 600, 101 S.Ct. at 2539). As the majority recognizes, "the exigencies of testing for the presence of alcohol and drugs in blood, urine or breath require prompt action which precludes obtaining a warrant." *Cf. Schmerber v. California*, 384 U.S. 757, 770, 86 S.Ct. 1826, 1835, 16 L.Ed.2d 908 (1966) (sanctioning warrantless blood testing in drunk driving cases).

Finally, the testing procedures set out in the regulatory scheme " 'provid[e] ... constitutionally adequate substitute[s] for a warrant.' " *Burger*, 107 S.Ct. at 2648 (quoting *Donovan*, 452 U.S. at 603, 101 S.Ct. at 2540). 29 C.F.R. 219.201 *mandates* testing upon the occurrence of an accident or rule violation. Thus, railroad employees know "that the inspections to which ... [they are] subject do not constitute discretionary acts by ... official[s] but are conducted pursuant to ..." regulation. *Burger*, 107 S.Ct. at 2648.

The " 'time, place, and scope' of the inspection[s]", *id.* (quoting *United States v. Biswell*, 406 U.S. 311, 315, 92 S.Ct. 1593, 1596, 32 L.Ed.2d 87 (1972)), are brought within reasonable bounds by other provisions of the regulatory scheme. Under 49 C.F.R. § 219.205(b), testing must take place "as soon as possible" after the occurrence of an event specified in section 219.201. Under 49 C.F.R. §§ 219.205(c) and 215.305(a), tests must be conducted by qualified independent medical personnel at independent medical facilities. Finally, regulations such as 49 C.F.R. § 219.307(2)(b) limit the scope of testing to determining whether drugs or alcohol are present in the subject's blood or urine.

The blood and urine testing program clearly satisfies the three-pronged test established in *Donovan* and *Burger*. Accordingly, I would hold that the contested regulations do not violate the fourth amendment.

III

Reliance on the closely regulated industry exception to the fourth amendment requirement of a warrant and probable cause is *not* necessary to uphold the government's regulations requiring blood and urine tests under carefully prescribed circumstances.

To survive traditional fourth amendment scrutiny, a search must be "reasonable." *O'Connor v. Ortega*, — U.S. —, 107 S.Ct. 1492, 1502–03, 94 L.Ed.2d 714.

> "Determining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the ... action was justified at its inception,' ...; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place,'...."

Id. 107 S.Ct. at 1503 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341, 105 S.Ct. 733, 742–43, 83 L.Ed.2d 720 (1985), and *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968)). The majority's opinion in this matter is also in conflict with decisions of the Fifth Circuit, the Seventh Circuit, the Eighth Circuit, and the District of Columbia Circuit holding that government-compelled drug-testing programs were reasonable under the fourth amendment.

Whether a search is "justified at its inception," involves a careful "'balancing [of] the need to search ... against the invasion which the search ... entails.'" *Terry*, 392 U.S. at 21, 88 S.Ct. at 1879 (1968) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 534–35, 87 S.Ct. 1727, 1733–34, 18 L.Ed.2d 930 (1967)). This balancing test was applied by the Fifth, Seventh, Eighth and District of Columbia Circuits to determine the reasonableness of toxicological drug testing programs in *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir.1987), *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987), and *Jones v. McKenzie*, 833 F.2d 335 (D.C.Cir.1987), and *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.1976), *cert. denied*, 429 U.S. 1029, 97 S.Ct. 653, 50 L.Ed.2d 632.

In *Von Raab*, a union representing employees of the Customs Service mounted a fourth amendment challenge to "a program adopted by the Customs Service requiring employees seeking transfer to certain sensitive jobs to submit to urine testing for drug use." 816 F.2d at 172. The Service initiated the program because its employees "are routinely exposed to the vast network of organized crime that is inextricably tied to illegal drug use ... as well as [to] illegal substances themselves." *Id.* at 173. Applying the balancing test, the Fifth Circuit determined that the urine tests were intrusive and undertaken without individualized suspicion, and considered these two factors weighed against finding the program reasonable. *Id.* at 175–77. The court held, however, that these factors were more than outweighed by: (1) the Service's compelling need to assure that its employees maintained integrity, *id.* at 177–78; and (2) the diminished privacy expectations of Service employees, who know from the very nature of their profession "that inquiry may be made concerning their off-the-job use of drugs," *id.* at 180. Persons involved in operating trains should also be presumed to know that inquiry concerning their off-duty drug and alcohol use is likely because of the danger to others that would flow from operating a train while under the influence of such substances.

In *McDonell*, the Iowa Department of Corrections required correctional officers to submit to urine, blood and breath testing at the request of Department officials. 809 F.2d at 1304. The Department initiated the testing program "to maintain security and intercept contraband." *Id.* at 1306. Applying the balancing test, the Eighth Circuit noted that prison employees "expectations of privacy are diminished while they are within the confines of the prison." *Id.* It found that the Department

had a compelling need to determine "whether corrections employees are using or abusing drugs which would affect their ability to safely perform their work within the prison." *Id.* at 1308. The court found this necessity outweighed the correctional officers' diminished privacy interests:

> Because the institutional interest in prison security is a central one, because urinalyses are not nearly so intrusive as body searches, ... and because this limited intrusion into the guards' expectation of privacy is, we believe, one which society will accept as reasonable, we ... hold that urinalyses may be performed uniformly or by systematic random selection of those employees who have regular contact with the prisoners on a day-to-day basis in medium or maximum security prisons.

Id. at 1308. Similarly, the government had a compelling need to ensure that railway employees be free of alcohol or controlled substances in propelling locomotives across this nation.

In *Jones*, a transportation worker employed by the District of Columbia school system challenged the District's mandatory urine testing program. The program was initiated in response to "repeated incidents of bizarre or dangerous drug-related behavior by drivers and attendants while on duty." At 336. Applying the balancing test, the District of Columbia Circuit held that urine tests intrude heavily upon the employees' privacy interests and thus "can be outweighed only by strong governmental concerns." *Id.* at 340. The court held, however, that the government's safety concerns were sufficiently compelling to tip the balance against these interests. *Id.* Thus, it held that the tests were justified at the inception:

> There can be no doubt whatsoever that the School System's mission of safeiy transporting ... children to and from school cannot be ensured if employees ... are allowed to work under the influence of illicit drugs. Any suggestion to the contrary would be preposterous.... [T]he danger to a young ... child, should she be dropped by an attendant or ignored while crossing the street, is obvious. In light of these safety concerns, we find that the School System acted pursuant to a significant and compelling governmental interest in requiring drug testing for Transportation Branch employees as a part of routine employment-related medical examinations.

Id. at 340 (footnote omitted). The need to prevent injury or death to pedestrians or motorists in the path of a locomotive operated by substance and alcohol abusers is equally compelling.

In *Suscy*, a bus drivers union challenged a Chicago Transit Authority requirement that "bus operators ... submit ... blood and urine tests when they are involved in 'any serious accident.'" 538 F.2d at 1266. Applying the balancing test, the Seventh Circuit held that the clash of interests weighed in favor of holding the tests constitutional: "Certainly the public interest in the safety of mass transit riders outweighs any individual interest in refusing to disclose physical evidence of intoxication or drug abuse." *Id.* at 1267.

I would adopt the analysis set forth in these cases to the matter at hand, and hold that the urine and blood examinations mandated by 49 C.F.R. § 219.201 are justified at the inception. I would also recognize that the blood and urine tests required by the regulation are intrusive and hold, nevertheless, that they can be performed in the absence of individualized suspicion. I would hold that the government's compelling need to assure railroad safety by controlling drug use among railway personnel outweighs the need to protect privacy interests. As recent history attests, locomotives in the hands of drug or alcohol-impaired employees are the substantial equivalents of time-bombs endangering the lives of thousands. The threat posed by drug or alcohol impaired railroad workers transporting hazardous materials across this nation is *far* graver than the potential danger presented by the customs officers in *Von Rabb*, the prison guards in *McDonell* or the transportation workers in *Jones* and *Suscy*.

The Supreme Court has instructed us to "'balanc[e] the need to search ... against

the invasion which the search ... entails' " in determining whether a search is justified at the inception. *Terry*, 392 U.S. at 21, 88 S.Ct. at 1879 (emphasis added) (quoting *Camara*, 387 U.S. at 534–35, 87 S.Ct. at 1733–34). The majority in the instant matter has failed to engage in the balancing of interests required by the Court. Instead, the majority focuses solely on the degree of impairment of the workers' privacy interests. Finding that the blood and urine tests are intrusive, the majority quickly proceeds to the conclusion that the tests are not justified at the inception because they are not initiated as the result of individualized suspicion of drug or alcohol use. Majority op. at 587–588.

The second inquiry under the "reasonableness" test is whether the search is " 'reasonably related in scope to the circumstances which justified the interference in the first place.' " *O'Connor*, 107 S.Ct. at 1503 (quoting *T.L.O.*, 469 U.S. at 341, 105 S.Ct. at 743). "[A] search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive...." *T.L.O.*, 469 U.S. at 342, 105 S.Ct. at 743.

As discussed above in relation to the closely-regulated industry test, the searches mandated by 49 C.F.R. § 219.201 are not excessively intrusive. The regulatory scheme provides safeguards which bring the time and place of the testing within reasonable bounds.

The question remains whether the tests "are reasonably related to the objectives of the search." *T.L.O.*, 469 U.S. at 342, 105 S.Ct. at 743. The majority concludes that the urine tests bear no reasonable relationship to the program objective of discovering on-the-job drug or alcohol use because they are overbroad: "[T]he tests cannot measure current drug intoxication or degree of impairment. Rather, the state of the art drug tests currently used can discover only the metabolites of various drugs, which are not evidence of current intoxication and may remain in the body for days or weeks after the ingestion of the drug." Majority op. at 588–589 (citations omitted).

The regulatory scheme contains adequate safeguards to counter the problem of overbreadth. 49 C.F.R. § 219.309 (1986) requires the railroads to inform their workers of the overbreadth problem presented by urine tests, and to counsel them to take a blood test if they have ingested drugs anytime within the previous sixty days. Section 219.309(b)(2) requires that railroads provide their workers with the following notice:

> Under Federal Railroad Administration (FRA) safety regulations, you may be required to provide a urine sample after certain accidents and incidents or at any time the company reasonably suspects that you are under the influence of, or impaired by, drugs while on duty. *Because of its sensitivity, the urine test may reveal whether or not you have used certain drugs within the recent past (in a rare case, up to sixty days before the sample is collected).* As a general matter, the test cannot distinguish between recent use off the job and current impairment. However, the Federal regulations provide that if only the urine test is available, a positive finding on that test will support a presumption that you were impaired at the time the sample was taken.
>
> You can avoid this presumption of impairment by demanding to provide a blood sample at the same time the urine sample is collected. *The blood test will provide information pertinent to current impairment.* Regardless of the outcome of the blood test, if you provide a blood sample there will be no presumption of impairment from a positive urine test.
>
> *If you have used any drug off the job (other than a medication that you possessed lawfully) in the prior sixty days, it may be in your interest to provide a blood sample.* If you have not made unauthorized use of any drug in the prior sixty days, you can expect that the urine test will be negative; and you may not wish to provide a blood sample.

49 C.F.R. § 219.309(b)(2) (1986) (emphasis added).

The warning required by section 219.309 protects employees from any mistake that might result from the "sensitivity" of the urine testing procedure. The searches mandated by 49 C.F.R. § 219.201 are reasonably related to the objective of determining whether railroad workers are intoxicated on the job.

CONCLUSION

I would affirm the judgment of the district court. The railroad industry is closely regulated because of the serious danger presented by the negligent operation of trains across this nation by alcohol or drug-impaired railway employees. Railroad industry employees have long been restricted by safety rules from ingesting alcohol or controlled substances prior to or during the operation of trains. The government has also imposed safety laws and regulations aimed at protecting the safety of the public and co-workers. Thus, railway employees have a diminished expectation of privacy concerning the detection of their alcohol or drug use.

The closely regulated industry exception to the requirements of the fourth amendment should be applied to these employers who operate the nation's railroads because of the incalculable risk to public safety posed by alcohol or drug impaired train crews. In balancing the intrusion engendered by blood and urine tests against the risk to lives and property posed by intoxicated train crews, we should hold that such searches are reasonable and consistent with the requirements of the fourth amendment.

UNITED STATES of America, Plaintiff-Appellee,

v.

Daniel Michael DALY, Defendant-Appellant.

No. 86-6697.

United States Court of Appeals, Ninth Circuit.

Submitted Dec. 7, 1987 *.

Decided Feb. 12, 1988.

Defendant filed motion to vacate, set aside, or correct his sentence, on grounds that misconduct occurred prior to commencement of probationary period and that his reincarceration extinguished district court's jurisdiction. The United States District Court for the Central District of California, Manuel L. Real, Chief Judge, denied motion, and defendant appealed. The Court of Appeals, Samuel P. King, District Judge, sitting by designation, held that: (1) district court had jurisdiction to revoke probation for preprobation offense, and (2) district court did not lose authority to revoke probation once defendant began serving period of incarceration.

Affirmed.

1. Criminal Law ⇐982.9(1)

District court had jurisdiction to revoke probation for crime committed subsequent to sentencing but prior to commencement of probationary period. 18 U.S.C.(1982 Ed.) § 3653.

2. Criminal Law ⇐982.9(3)

District court had jurisdiction to revoke probation for crime committed subsequent to sentencing but prior to commencement of probation, even though defendant had begun to serve period of incarceration. 18 U.S.C.(1982 Ed.) § 3653.

Daniel Michael Daly, in pro per.

* The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed.R.App.P. 34(a).

Introduced: 4/17/87
Referred: Labor & Commerce
and Judiciary

IN THE HOUSE

BY SUND, ADAMS, KOPONEN,
WALLIS AND BROWN

HOUSE BILL NO. 283

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act prohibiting certain employers from testing employees for drugs or other substances consumed by employees."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. POLICY. (a) The legislature declares that it is the public policy of the state that all citizens enjoy the full benefits of the rights to privacy and due process of law, and the protection against unreasonable searches and seizures guaranteed by art. I, secs. 7, 14, and 22, Constitution of the State of Alaska.

(b) It is the purpose of this Act to protect employees against unreasonable inquiry and investigation into conduct and activities that happen outside of work and that are not directly related to the actual performance of job responsibilities.

* Sec. 2. AS 23.10 is amended by adding a new section to article 1 to read:

Sec. 23.10.038. TESTS FOR CONSUMED SUBSTANCES. (a) An employer may not request, require, or conduct random or company-wide blood, urine, or encephalographic testing. An employer may not suggest or require that an employee or an applicant for employment submit to a blood, urine, or encephalographic test that tests for the presence of drugs or other consumed substances as a condition of employment. However, an employer may require a specific employee to submit to blood or urine testing if

(1) the employer has reasonable grounds to believe that the

employee's faculties are impaired by a drug or other consumed substance on the job;

(2) the employee is in a position in which an impairment would present a clear danger to the physical safety of the employee or another person;

(3) the employer preserves an adequate sample or portion of a sample so that the employee may conduct an independent test to verify or refute the employer's results; and

(4) the employer provides the employee an opportunity to rebut or explain the test results.

(b) In conducting tests permitted under this section, the employer shall limit the tests to the extent feasible so that only information regarding chemical substances in the body that are likely to affect the employee's ability to work safely is taken or recorded.

(c) In an action alleging that an employer violated this section, the employer has the burden of proving that the requirements of (a) of this section have been satisfied.

(d) This section does not prevent an employer from conducting medical screening to monitor exposure to toxic or other unhealthy substances found in the workplace or encountered in the performance of the employees' job duties if the employer has the express written consent of the employees. The screenings or tests must be limited to the specific substances expressly identified in the employee consent form.

(e) This section does not prohibit an employer from prohibiting the use of intoxicating substances or tobacco during work hours or from disciplining employees for using tobacco or being under the influence of intoxicating substances during work hours.

(f) This section does not apply to

(1) the state or a political subdivision of the state when dealing with peace officers or firefighters in its employ or persons applying to be employed as peace officers or firefighters; or

(2) an employer as to an employee operating emergency service vehicles for the state or a political subdivision of the state.

(g) A person who violates or assists in a violation of this section is liable to the person aggrieved for special and general damages, together with attorney's fees and the costs of the action as provided in the Alaska Rules of Court.

(h) A person who violates or proposes to violate this section may be enjoined by a court of competent jurisdiction. An aggrieved person, the attorney general, or a person or entity that will fairly and adequately represent the interest of the protected class may bring an action for injunctive relief.

(i) In this section

(1) "employer" means a person who retains by personal services contract or employs at least one other person and includes the state and a political subdivision of the state;

(2) "peace officer" means a public servant vested by law with a duty to maintain public order or to make arrests, whether the duty extends to all offenses or is limited to a specific class of offenses or offenders.

(7)

HOUSE COMMITTEE REPORT

Date referred: 4/17/87 FURTHER REFERRALS: Judiciary

DATE: 5/13/87

The Labor & Commerce Committee has considered HB 283

"An Act prohibiting certain employers from testing employees for drugs or other substances consumed by employees."

RECOMMENDS:

[ ] replace with CS HB283 (L+C) [ ] the same title

[ ] attached amendment(s) [ ] a new title

[ ] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] additional referral to the _____ Committee

ADOPTS: [ ] _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact

[ ] zero fiscal note

[ ] zero with analysis

[ ] same as previous fiscal note published _____

[ ] same as previous zero fiscal note published _____

SIGNING DO PASS:

J. Ellis

Chris Davidson

Nick Kopan

SIGNING OTHER RECOMMENDATIONS:

Scott Manning NO RE

David Dudley NOKE

Chairman's signature

POSITION PAPER
HB 283

House Bill 283 insures that Alaska employers, including the State of Alaska, cannot conduct random testing for the use of drugs or other substances. Policy guidelines are outlined in Section 1 of the legislation. It also stipulates in Section 2 that testing can only be conducted for cause and lists those various circumstances.

The issue of drug testing in the workplace has gained national attention. There is little question of the serious nature of substance abuse in this country. The problems of the health and safety of the public, decreased productivity, and increased medical costs resulting from that abuse are real, both in the workplace and in society as a whole. Balancing out these concerns is the concern that employers, both public and private, conduct themselves in a business-like manner in relationship to their employees, with full regard for the individual and constitutional rights of those individuals. For many employers, the process of finding an approach that is both effective and legally defensible has been difficult without clear guidelines. Employers who have instituted drug testing programs without considering both aspects of the issue have frequently found themselves the object of lawsuits filed by employees who believe that their constitutional rights to privacy had been violated.

During the past year, the courts have been providing some guidance as more employers have been sued by employee groups subjected to drug testing procedures. It is becoming clear that an acceptable basis for a drug testing plan is that it be "job related" or "for cause." Recent court decisions have favored individual rights over employers' rights to institute drug testing carte blanche. In the case of Murray v. Brooklyn Gas Co., 122LRRM 2057 (N.Y. Sup Ct, 1986), the company's decision to implement a urinalysis testing program for all of its employees was successfully challenged. In its decision the court stated, ". . . to arbitrarily test without reason whatsoever; . . . is an impingement on the rights of individuals." However, the court further held that its ruling did not preclude testing for cause.

In the case of Amalgamated Transit Union v. Suscy (538 Fed Rprt 2d 1264), the Seventh Court of Appeals supported the Chicago Transit Authority's drug and alcohol testing plan for bus drivers who were involved in a serious accident or who exhibited suspicious behavior. The court held that such testing does not invade the privacy or violate the rights of these types of employees. Furthermore, the court held that even without specific situations that indicate a reasonable suspicion, a public employer may require its employees to undergo medical tests to determine fitness for work, and to discipline employees based upon the results of the test. In this situation, "bus drivers" can be seen to be directly responsible for the safety of others.

The legislature may wish to clarify the definition of "peace officer" in Sec 23.10.038(i)(2). As currently written it may exclude positions in such classes as Correctional Officer, Court Services Officer, and Fish and Wildlife Enforcement Officer.

POSITION PAPER
HB 283

It is clear that drug and alcohol abuse can negatively affect an employee's work performance and behavior. Work and performance problems that are related to substance abuse must be confronted and combated in the work place, but it must be done in such a way that individual rights are protected. Again, it appears this legislation meets these concerns and is consistent with recent court rulings on this matter. The Department of Administration supports HB 283.

Diana DeSimone

Diana DeSimone, Director
Division of Personnel

5/5/87
Date

Garrey Peska

Commissioner Garrey Peska
Department of Administration

5/8/87
Date

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: HB 283
REQUEST
Publish Date:

Revision Date:
Agency Affected: All
Title: An act prohibiting certain employers from testing employees for drugs or other other substances consumed by employees.
BRU: All
Components: All
Sponsor: Suna, Adams, Koponen, Wallis and Brown
Requestor:

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
OPERATING						
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0
POSITIONS:	0	0	0	0	0	0
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: Attach a separate page if necessary

There will be no fiscal impact to the Division of Personnel

Prepared By: Diana DeSimone
Phone: 465-4430
Division: Personnel
Date: 5/5/87

Approved by Commissioner: Garrey Peska
Date: 5/8/87
Agency: Department of Administration

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Rev. 9/16/86

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version: HB 283
Publish Date:

Revision Date:
Title: "An Act prohibiting certain employers from testing employees for drugs..."
Sponsor: Representative Sund
Requestor: House Labor & Commerce

Agency Affected: Department of Law
BRU: Legal Services
Components: Operations

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME		-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Please see attached analysis.

Richard I. Pegues

Prepared by: Richard I. Pegues, Director
Phone: 465-3672
Division: Administrative Services Division
Date: May 11, 1987

Richard I. Pegues /FOR/

Approved by Commissioner: Grace Berg Schaible, Atty. Gen.
Date: May 11, 1987
Agency: Department of Law

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 283

This bill amends AS 23.10 by adding a new section that prohibits certain employers from testing employees for drugs or other substances consumed by employees. This testing prohibition would also extend to applicants for employment. The bill would permit an employer to require a specific employee to submit to testing, if the employer had reasonable grounds to believe the employee's faculties are impaired by a drug or other consumed substance on the job. The new section does not apply to the state or a political subdivision of the state when dealing with peace officers or firefighters in its employ, or persons applying to be employed as peace officers or firefighters.

The bill provides that a person who violates the new section may be enjoined be a court of competent jurisdiction. And it further provides that a person who violates or assists in the violation of the section is liable to the aggreived person for special and general damages, together with attorney's fees and costs. An aggrieved person, the attorney general, or a person or entity that will fairly and adequately represent the interest of the protected class may bring an action for injunctive relief. It is not anticipated that the attorney general will often become involved in seeking injunctive relief, because of the private right of action that the bill provides to individuals, including an individual's right to seek damages against violators.

BILL NO: HB 283

DATE: May 6, 1987

TITLE: "An Act prohibiting certain employers from testing employees for drugs or other substances..."

CONTACT: Maj. Walter J. Gilmour
Acting Director
Alaska State Troopers

DEPARTMENT OF PUBLIC SAFETY

To protect the right of privacy and unreasonable search and seizure of employees by employers.

This proposed legislation would protect employees from random or company-wide testing for drugs, or other substances consumed, without just cause. The legislation excepts peace officers, firefighters, or applicants thereof, or persons who operate emergency services vehicles.

Perhaps consideration should be given to include aircraft pilots who fall under the jurisdiction of the state.

The Department of Public Safety is neutral on this legislation.

ARTHUR ENGLISH
Commissioner

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: HB 283
Publish Date:

REQUEST
Revision Date:
Title: "An Act prohibiting certain employers from testing employees..."
Sponsor: Judicial Committee
Requestor: House Labor & Commerce

Agency Affected: Public Safety
BRU: Alaska State Troopers
Components: Detachments & CIB

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING:: (Thousands of Dollars)

GENERAL FUNDS		0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME		0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact is anticipated.

JAH 5/8/87

Prepared by: Francis C. Allan S.C.A. Phone: 269-5691
Division: Alaska State Troopers Date: 5/6/87

Approved by Commissioner: Arthur English Date: 5/3/87
Agency: Public Safety

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

page ____ of ____

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: HB 283
Publish Date:

REQUEST:

Revision Date:
Title: "An Act prohibiting...testing employees for drugs..."
Sponsor: Sund, et al
Requestor: House Labor and Commerce

Agency Affected: Labor
BRU: Labor Standards and Safety
Components: Wage and Hour

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

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Division: Labor Standards and Safety
Date: 5/11/87

Approved by Commissioner: Jim Sampson
Date: 5/11/87
Agency: Labor

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