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Employee Drug Testing—Issues Facing Private Sector Employers

What do IBM, Boeing, General Motors, Ford Motor Company, Alcoa, Boise Cascade, Toyota, Greyhound Lines, and American Airlines have in common? Each of these companies currently uses drug testing to screen either current or potential employees, or both.¹ They are not alone. Approximately 25 percent of the Fortune 500 companies are now using drug tests on employees,² an increase of 250 percent in just three years.³ Dr. Michael Walsh of the National Institute on Drug Abuse predicts that number will double in the coming year.⁴ But as more and more companies implement drug testing programs, some lawyers are predicting that employers will encounter an increasing number of legal challenges.⁵ For example, San Francisco Supervisor Bill Maher, who co-sponsored that city's ordinance prohibiting drug screening except in cases of public safety, predicts that "[i]t's going to be a major [national] battle over privacy and what corporate America can do to employees."⁶

To understand why so many employers are turning to drug testing, one need look no further than the statistics on drug abuse in the United States. According to a survey by the National Institute on Drug Abuse, between ten and twenty-three percent of all workers use drugs at work.⁷ Ninety percent of people who use cocaine use it during work hours and approximately one-half actually buy and sell the drug while on the job.⁸ The report concluded: "[D]rug abuse is the most common health hazard in the American workplace."⁹ The results of on-the-job impairment can be staggering—and deadly. The costs to industry in lost productivity from employee drug and alcohol abuse is estimated at 100 billion dollars in 1986.¹⁰ Furthermore, over a nine-year period drug and alcohol use was implicated in thirty-seven deaths in the railroad industry.¹¹

For more and more employers the answer to the drug problem is drug testing, often by urinalysis, of current employees, applicants for employment, or both. The introduction of the EMIT test has made drug testing by means of urinalysis a simpler and less expensive process,¹² contributing to the growing

1. Englade, *Who's Hired and Who's Fired*, STUDENT LAW., Apr. 1986, at 20, 22.

2. Angarola, *Protect Safety, Not Drug Abuse*, A.B.A. J., Aug. 1, 1986, at 35, 35.

3. Englade, *supra* note 1, at 22.

4. Marcotte, *Drugs at Work*, A.B.A. J., Aug. 1, 1986, at 34, 34.

5. *Id.*

6. *Id.* at 35.

7. D. Copus, *Alcohol and Drugs in the Workplace 1* (Aug. 8, 1986) (unpublished manuscript available from the National Employment Law Institute).

8. *Id.* at 2.

9. *Id.* at 1 (quoting National Institute on Drug Abuse report).

10. *Id.* at 3.

11. *Id.* at 4.

12. The Syva Company of Palo Alto, California introduced the EMIT Cannabinoid Assay (the EMIT Test) in 1980. "Tests developed prior to Emit require a greater degree of technical sophistication than Emit, and are more expensive and less convenient to use on a large scale." Comment, *Your*

prevalence of drug screening in the employment context.¹³ This Note briefly discusses the differences between public sector (governmental unit) employment and employment in the private sector, where employers have far greater latitude in instituting and conducting drug testing. The remainder of the Note focuses on private sector employment issues and includes public sector cases only to the extent they raise concerns that may be relevant to private sector employers. The Note then considers the drug testing process step by step from the implementation decision to the problem of dealing with the employee who tests positive. The Note concludes by suggesting that employers should carefully consider their reasons for implementing a drug testing program. If they do not, employers may needlessly enter into a practice that risks liability and expensive litigation and that may serve only to chill the atmosphere of employer-employee relations.

Legal challenges to employee drug testing in general are grounded in five legal areas: the right to privacy, the right to be free from unreasonable searches, the right to due process, negligence law, and contract law.¹⁴ Because public sector employers are governmental entities, they are subject to constitutional constraints on their policies that do not restrict private employers.¹⁵ Thus, protections available to public sector employees may be available to a lesser extent in the private sector, if at all.

The challenge that critics of drug testing raise most often is that testing violates an employee's right to privacy. "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."¹⁶ As Justice Blackmun wrote in *Roe v. Wade*:¹⁷

The Constitution does not explicitly mention any right of privacy. . . . [T]he Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. . . . [O]nly personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" are included in this guarantee of personal privacy.¹⁸

Thus, the Supreme Court has recognized a constitutional right to privacy only in certain limited areas such as marriage and procreation.¹⁹ Even in these limited

Urine or Your Job: Is Private Employee Drug Urinalysis Constitutional in California?, 19 LOY. L.A.L. REV. 1451, 1455 n.26 (1986).

13. Comment, *supra* note 12, at 1456.

14. L. DOGOLOFF & R. ANGAROLA, URINE TESTING IN THE WORKPLACE 12 (1985) [hereinafter L. DOGOLOFF].

15. "Most of the protections for individual rights and liberties contained in the Constitution and its amendments apply only to the actions of governmental entities." J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 497 (2d ed. 1983). Similarly, the Bill of Rights "has been viewed only to limit the freedom of government when dealing with individuals" and the amendments to the Constitution that protect individual liberties "specifically address themselves to actions by the United States or a state." *Id.*

16. L. DOGOLOFF, *supra* note 14, at 13.

17. 410 U.S. 113 (1973).

18. *Id.* at 152 (citation omitted).

19. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (use of contraceptives). But cf.

areas the Constitution protects only against governmental intrusions and not against intrusions by private parties.²⁰ The Constitution's implicit privacy guarantees, therefore, do not protect private sector employees from drug testing, although privacy rights guaranteed by some state constitutions arguably may limit or bar drug testing in public and private employment.²¹

Parallel to the argument that drug testing is a violation of the right to privacy is the argument that drug testing, including both blood and urine testing, constitutes a search and seizure that, if unreasonable, is prohibited under the fourth amendment. In fact, the United States Supreme Court has held that taking a blood sample does constitute a search and seizure under the fourth amendment and is unreasonable absent probable cause.²² Other courts have determined that requiring a subject to give a urine sample also constitutes a search.²³ Again, however, the Constitution protects only against unreasonable search and seizure by the government, so a private sector employer's drug or alcohol testing program will not violate an employee's right to be free from unreasonable searches.²⁴

A third constitutional objection often raised by public employees involves the fifth and fourteenth amendment guarantees of due process. Employees argue that the tests are inaccurate and insufficiently related to performance and therefore are not sufficient grounds on which to deprive an employee of his or her job. Employees also argue that dismissal based on test results, without a hearing in which the employee can refute the charges, deprives the employee of his or her procedural rights.²⁵ Although the right to due process and other federal constitutional rights technically protect only government workers, private employers might take into consideration the standards placed on public employers in planning and conducting their own testing programs.²⁶ If a private employer's testing program is challenged, judges and arbitrators may be consciously or unconsciously swayed by constitutional considerations.

Beyond these constitutional bases for protesting drug screening, which gen-

Bowers v. Hardwick, 106 S. Ct. 2841 (1986) (Court refused to extend privacy protection to private consensual homosexual activity).

20. See *supra* note 15.

21. See Comment, *supra* note 12, at 1453-55. "The fourth amendment to the United States Constitution protects individuals from unreasonable intrusion by government. The California Constitution extends this protection by limiting intrusion by anyone, including business interests, to circumstances where there is a compelling public interest." *Id.* at 1454.

22. *Schmerber v. California*, 384 U.S. 757, 767-68 (1966) (involving taking of blood sample from a drunk driving suspect against the suspect's wishes).

23. See *McDonell v. Hunter*, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985); *Allen v. City of Marietta*, 601 F. Supp. 482, 489 (N.D. Ga. 1985); *Storms v. Coughlin*, 600 F. Supp. 1214, 1217 (S.D.N.Y. 1984); *Caruso v. Ward*, 133 Misc. 2d 544, 546-47, 506 N.Y.S.2d 789, 792 (N.Y. Sup. Ct. 1986).

24. L. DOGOLOFF, *supra* note 14, at 112-13. In *Brotherhood of Locomotive Eng'rs v. Burlington N. R.R.*, 117 L.R.R.M. (BNA) 2739, 2740 (D. Mont. 1984), the federal district court noted in dicta that "nothing prohibit[s] a private entity from requiring any person, including an employee, to submit to a 'search'" as a requisite to admission to the employer's premises.

25. L. DOGOLOFF, *supra* note 14, at 15.

26. For a case involving a public sector employer in which the court found a drug test to constitute an unreasonable search and seizure under the fourth amendment, see *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986).

erally do not inhibit private employers, employees may have challenges that apply equally to public sector and private sector employers based on claims of negligence and violation of contractual rights. Areas of particular concern for the private employer as well as specific cases will be considered below in the context of the testing process.

Because of the possible challenges to drug testing, before implementing a program an employer must consider the questions of who will be tested and in what manner. The employer might choose to test all applicants for employment or to limit testing to current employees only. For current employees, testing could be "retrospective," which means that employees are tested only after a supervisor or fellow employee reports abnormal behavior, or following an accident or other incident.²⁷ Some employers make testing part of periodic medical examinations, with or without the employee's knowledge; others test employees from time to time entirely at random.²⁸

The testing approach adopted depends in part on the employee and the nature of the job. In cases involving challenges to drug testing in the public sector, judicial approval is influenced by the determination of whether or not the particular job or jobs involved are "critical"—that is, jobs involving public safety or hazardous machinery or conditions.²⁹ In the private sector³⁰ the lawfulness of random testing (as opposed to retrospective testing) for noncritical jobs is being challenged in a case pending in California,³¹ although no court has yet ruled on the issue.³² At least one court, however, has criticized in dicta the use of random testing in noncritical jobs. In *IBEW, Local 900 v. Potomac Electric*³³ a federal district court judge described a proposed random blood and urine testing program for noncritical utility company employees as a "drastic" and "draconian" measure.³⁴ The judge continued:

I don't denigrate at all the importance [of the employer's business], but that does not mean that it's vital that these drastic measures must be impressed on everyone [through random testing of noncritical employees], including clerks and secretaries, or even on anyone. On the other

27. L. DOGOLOFF, *supra* note 14, at 30.

28. L. DOGOLOFF, *supra* note 14, at 30-31.

29. *Borsari v. Federal Aviation Admin.*, 699 F.2d 106, 111 (2d Cir.) (air traffic controllers), *cert. denied*, 464 U.S. 833 (1983); *Allen v. City of Marietta*, 601 F. Supp. 482, 491 (N.D. Ga. 1985) (high voltage power line workers).

30. To authorize a warrantless search of an employee in the public sector courts will require that the employer have a "sufficiently rational justification" to suspect the test subject and that the purpose of the search be connected to "the protection of public welfare and property." *Everett v. Napper*, 632 F. Supp. 1481, 1485 (N.D. Ga. 1986). Random searches of noncritical public employees arguably fail both requirements. "Random" indicates that an employee is tested without a "sufficiently rational justification," and the danger posed to "public welfare and property" by an alcohol- or drug-intoxicated employee in a noncritical job—one by definition not involving public safety or hazardous conditions—is small to nonexistent. One commentator concluded, "Public employers may not conduct random tests of employees in non-critical jobs." D. Copus, *supra* note 7, at 37.

31. *See* D. Copus, *supra* note 7, at 42 (discussing *Luck v. Southern Pac. Transp. Co.*, No. 843230 (San Fran. Super. Ct.)).

32. D. Copus, *supra* note 7, at 41.

33. 121 L.R.R.M. (BNA) 3071 (D.D.C. 1986).

34. *Id.* at 3072-73.

hand, it's clear that plaintiffs [employees] will be severely injured. Pending outcome of the arbitration they must undergo invasions of privacy which are almost unheard of in a free society or they will be summarily fired The drug menace is certainly a terrible menace as the court is well aware . . . but that does not mean that we must resort to hysterical measures. . . .³⁵

Another judge, however, later refused to grant a preliminary injunction enjoining the program pending arbitration.³⁶

The critical versus noncritical job distinction has been drawn by commentators as well.³⁷ "For certain job classifications it is prudent to err on the side of public safety, even at the expense of individual privacy,"³⁸ but "while a screening program for airline pilots or chemical plant operators might be justifiable, a program for clerical or retail employees would not."³⁹ Employers might thus seek to achieve a balance between electing to screen all employees regardless of job classification and choosing to abandon screening as an invasion of employee privacy.⁴⁰

For the private sector employer the decisions of who and when to test are mostly unfettered. Although some courts and commentators have questioned the justification for random testing of employees holding noncritical jobs, private employers are free to conduct such testing. Employers have even greater latitude in mandating testing for job applicants as opposed to current employees.⁴¹ For employers who have unionized workers, however, policy and planning is more restricted.

Sections 8(a)(5), 8(b)(3), and 8(d) of the National Labor Relations Act (NLRA)⁴² require that employers bargain in good faith with unions on issues involving wages, hours, and other conditions of employment. Although the National Labor Relations Board (NLRB) has not yet considered the issue, the implementation of a drug screening program arguably is a condition of employment and thus a mandatory subject of bargaining.⁴³ In a case involving provisions of the Railway Labor Act (RLA)⁴⁴ similar to those of the NLRA, a Montana federal district court ruled that the employer railroad could not unilaterally and without proper notice or negotiation impose a strict screening pro-

35. *Id.*

36. *IBEW, Local 1900 v. PEPSCO*, 634 F. Supp. 642 (D.D.C. 1986).

37. See, e.g., Rothstein, *Screening Workers for Drugs: A Legal and Ethical Framework*, 11 *EMPLOYEE REL. L.J.* 422 (1985-86).

38. *Id.* at 425.

39. *Id.*

40. *Id.* at 425-26.

41. D. Copus, *supra* note 7, at 33. Once a person is employed he or she has certain implicit or explicit rights (freedom from wrongful discharge) arising under the contract of employment and the employer is under certain implicit or explicit constraints (requirement of just cause for dismissal). See *infra* notes 93-112 and accompanying text. The applicant, without a contract, does not have these protections.

42. 29 U.S.C. §§ 158(a), (b)(3), (d) (1982).

43. D. Copus, *supra* note 7, at 82; see Rothstein, *supra* note 37, at 430-31.

44. 45 U.S.C. §§ 152, 156 (1982).

gram on union members.⁴⁵

In addition to any legal constraints imposed on an employer in designing a drug policy, the employer should carefully consider all aspects of such a policy before beginning drug testing. The policy should be well-planned, written, and available to employees and applicants in advance. Unfortunately, some employers have given scant consideration to these concerns in their haste to battle the drug problem. As a result, there is a pressing need for guidelines for employers presently planning, implementing, or conducting an employee drug screening program.⁴⁶

Once a drug testing policy has been designed and adopted, the employer must decide on a method of testing. With the introduction of cheaper and simpler urine tests, employee drug testing in its various forms has become a 100-million-dollar-a-year business.⁴⁷ Currently on the market, in addition to blood and urine tests, are tests for saliva and a machine that purports to scan brain waves.⁴⁸ Most testing, however, is conducted with blood and urine; urinalysis is by far the most popular testing method.⁴⁹

All of these tests share one important drawback. In contrast to the familiar breathalyzer test for alcohol, drug tests do not measure the level of impairment. Drug concentrations in urine or blood, as opposed to alcohol levels, cannot be correlated with the degree to which the test subject is impaired. In addition, no currently available test can accurately measure the recency of drug use.⁵⁰ This drawback has important implications for employee screening.⁵¹

The inability to ascertain recency of drug use or the degree of impairment means that a confirmed positive drug test cannot be used to establish that an employee used drugs while on the job, was under the influence of drugs while on the job, or was impaired by drugs while on the job. A confirmed positive drug test may mean only that the em-

45. *Brotherhood of Locomotive Eng'rs v. Burlington N. R.R.*, 620 F. Supp. 163 (D. Mont. 1985). Burlington Northern (BN) had a longstanding rule against on-the-job impairment due to use of alcohol or drugs. Until the implementation of the new enforcement procedure that gave rise to the case, the railroad had enforced the rule through supervisor observation. After a rise in the number of accidents, BN enacted a new policy of random searches by trained dogs and physical searches of any suspected employee. The court held that

[t]he mere absence of any reference in the collective bargaining agreement to a particular method of enforcement or detection, standing alone, does not establish that the method which may be utilized to detect violations is a matter within the prerogative of management. Rather, the conspicuous absence may simply reflect the fact that a particular method, satisfactorily tolerable to both sides, has existed over time.

Id. at 169 (citation omitted).

46. Rothstein, *supra* note 37, at 424.

47. Rothstein, *supra* note 37, at 424.

48. L. DOGOLOFF, *supra* note 14, at 25.

49. "Since its development in 1980, [the EMIT urine test] has become the most widely used drug test; it is the easiest to administer and least expensive (between \$4.00-\$22.00, depending on the number of drug classes tested for)." D. Copus, *supra* note 7, at 27. For an extensive discussion of the technical aspects of urinalysis and the resulting implications for reliability of and appropriate use of test results, see Comment, *Admissibility of Biochemical Urinalysis Testing Results for the Purpose of Detecting Marijuana Use*, 20 WAKE FOREST L. REV. 391 (1984).

50. D. Copus, *supra* note 7, at 25; see Rothstein, *supra* note 37, at 424.

51. See *infra* text accompanying notes 114-15.

ployee used drugs on his own private time away from work and suffered no impairment of his work from such drug use.⁵²

In light of these limitations, a positive test result can be safely relied on only to show that the test subject may have used, or in the case of marijuana, may have been in the presence of someone using,⁵³ the indicated drug in some unspecified recent time period. This assumes, however, that the test was performed correctly.

Recent studies cast doubt on the likelihood that testing has been performed correctly. The Centers for Disease Control of the Department of Health and Human Services recently completed a nine-year study of thirteen laboratories to determine the reliability of evidence of drug use and concluded that the testing showed remarkably high error rates.⁵⁴ Although the Centers for Disease Control study revealed high error rates in testing performed by trained technicians under laboratory conditions, availability of drug screen kits that allow on-site performance of testing, often by untrained personnel, suggests even greater potential for error. As one commentator wrote, "Equipped with a \$300 kit, Acme Company's deputy assistant personnel trainee can go into the restroom and attempt to become an instant toxicologist."⁵⁵ The most widely used urinalysis system, the EMIT Drug Detection System,⁵⁶ is an on-site testing system.⁵⁷ Although on-site testing often is less expensive and provides results more quickly,⁵⁸ confidentiality may be a problem, chemicals must be maintained, and the likelihood of operator error is increased.⁵⁹ Manufacturers recommend a second test by an *alternative* method for *all* positive test results even if the first test is performed under the more reliable conditions of a laboratory.⁶⁰ A more sophisticated, and therefore more expensive, technique for the second, or confir-

52. D. Copus, *supra* note 7, at 26. For an explanation of why testing procedures are limited in this respect, see Comment, *supra* note 12, at 1456-60.

53. There is some controversy whether passive exposure to marijuana smoke will cause a subject to test positive. See Rothstein, *supra* note 37, at 426 (indicating that passive exposure may lead to positive test results) (citing Zeidenberg, Bourdon, & Nahas, *Marijuana Intoxication by Passive Inhalation: Documentation by Detection of Urinary Metabolites*, 134 AM. J. PSYCHIATRY 76 (1977)). But see D. Copus, *supra* note 7, at 27-28 (indicating that positive test results are unlikely to result from passive exposure) (citing Centers for Disease Control, Dept. of Health & Human Servs., *Urine Testing for Detection of Marijuana: An Advisory*, 32 MORBIDITY AND MORTALITY WEEKLY REP. 467, 470 (1983)).

54. Rothstein, *supra* note 37, at 426-27 (citing Hansen, Caudill & Boone, *Crisis in Drug Testing*, 253 J. A.M.A. 2382 (1985)). In testing, a false positive is an incorrect report that the subject had used drugs when he or she was actually drug-free; a false negative occurs when the lab reports a negative result when the specimen in fact contained evidence of drug use. The study found a higher percentage of false negatives than of false positives. *Id.*

55. Rothstein, *supra* note 37, at 427.

56. See *supra* note 49 and accompanying text.

57. L. DOGOLOFF, *supra* note 14, at 21.

58. L. DOGOLOFF, *supra* note 14, at 21. On-site testing eliminates the time necessary for samples to be shipped to the lab and tested before obtaining the results.

59. L. DOGOLOFF, *supra* note 14, at 21.

60. L. DOGOLOFF, *supra* note 14, at 22; Comment, *supra* note 12, at 1460 (citing SYVA CO., MARIJUANA AND THE EMIT CANNABINOID ASSAY (1981)); see also *Storms v. Coughlin*, 600 F. Supp. 1214, 1221-22 (S.D.N.Y. 1984) (affirming a state court injunction against the use of EMIT test results for prison inmates " 'unless accompanied by evidence that the positive result was confirmed by an alternative method of analysis' ") (quoting *Kane v. Fair*, No. 136229, slip. op. at 9 (Super. Ct. Mass. Aug. 5, 1983)).

mation, test is preferred.⁶¹

A key component of any drug screening program is the laboratory that performs the testing, whether the lab performs both the initial and second tests or only the confirmation test.⁶² The employer should cooperate with the laboratory to establish a forensic protocol that includes a rigorous chain of custody to ensure that the identity and integrity of the body fluid sample is maintained throughout the collection, shipping, testing, and storage process.⁶³ One important part of establishing chain of custody is the formal record keeping necessary to track the sample throughout the process to ensure the identity of the sample; the second major factor in chain of custody is ensuring the integrity of the sample itself.⁶⁴

When testing is performed by blood sampling, ensuring sample integrity is relatively simple because qualified medical personnel are required to draw the blood. In fact, blood tests in general are more reliable and more accurate, providing better evidence of possible impairment than urinalysis.⁶⁵ In *Schmerber v. California*,⁶⁶ however, the United States Supreme Court characterized blood testing as a potential violation of "fundamental human interests" as it involves "intrusions beyond the body's surface."⁶⁷ The Court noted that a blood test subject could possibly be "one of the few who on grounds of fear, concern for health, or *religious scruple*" object to having a blood sample taken.⁶⁸ Thus, although blood testing has chain of custody advantages over urinalysis, it has several drawbacks in other areas.

Urinalysis presents chain of custody problems not encountered with blood testing. The only sure way to guarantee the integrity of the urine sample is to have a witness observe the subject while he or she provides the specimen. Otherwise, the subject could adulterate the specimen (with water or other substance that may or may not be detectable during testing) or actually substitute a specimen provided by another, presumably drug-free, person.⁶⁹ The need for such observation has prompted one court to note that "[a] compelling argument can be made that . . . urine testing . . . presents an even greater intrusion of privacy than does blood testing."⁷⁰ The possibility also exists that such an observer or other drug screening agent could act in an improper fashion (intentional or negligent tortious conduct) thus leading to employer liability. Coercion or force

61. L. DOGOLOFF, *supra* note 14, at 22.

62. L. DOGOLOFF, *supra* note 14, at 26.

63. D. Copus, *supra* note 7, at 33.

64. D. Copus, *supra* note 7, at 33.

65. L. DOGOLOFF, *supra* note 14, at 25.

66. 384 U.S. 757 (1966).

67. *Id.* at 769-70; see also *Shoemaker v. Handel*, 608 F. Supp. 1151, 1158 (D.N.J. 1985) (blood test more intrusive than urinalysis or breathalyzer), *aff'd*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 107 S. Ct. 577 (1986).

68. *Schmerber*, 384 U.S. at 771 (emphasis added). In *Schmerber* the Court found that defendant did not fall into one of these categories. *Id.*

69. L. DOGOLOFF, *supra* note 14, at 28.

70. *Caruso v. Ward*, 133 Misc. 2d 544, 549, 506 N.Y.S.2d 789, 793 (N.Y. Sup. Ct. 1986) ("Drawing blood is at most a benign procedure. No embarrassment is involved [as is involved with the providing of a urine sample in the presence of a witness].").

exercised by an employer's agent can lead to charges of assault and battery,⁷¹ false imprisonment,⁷² negligence,⁷³ or intentional infliction of emotional distress⁷⁴ against the employer under the doctrine of *respondeat superior*.

Whichever method or methods of screening an employer chooses, the laboratory should be selected carefully. An employer should have contact with the testing facility itself to the greatest degree possible to eliminate unnecessary steps in the chain of custody. In other words, employers should avoid persons or businesses that hold themselves out as intermediaries and should deal directly with the laboratory. Many organizations⁷⁵ and state agencies⁷⁶ have accreditation programs under which laboratories are evaluated; the Department of Defense reviews laboratories as part of its drug screening program.⁷⁷ Use of those labs may make the testing more reliable and, therefore, less vulnerable to challenge. Employers should recognize, however, the drawbacks associated with the various testing methods and understand the limitations inherent in all drug screening with current technology when reviewing claims made by various participants in the increasingly competitive drug test market.

After the employer has decided on a method of testing and has instituted the drug testing policy, it must determine a plan of action for handling positive test results. No action or report should be based on an initial positive test; a positive test indicates only the need for a second, confirmatory test.⁷⁸ Furthermore, test results should not be reported either orally or in writing to any person outside the company under any circumstances not explicitly required by law, and should be restricted internally on a stringent "need-to-know" basis.⁷⁹ The purpose behind a need-to-know rule is not only to protect the employee's job and reputation, but also to limit potential liability for the employer.

Especially in the context of disseminating drug test results, an employer may face liability for defamation or slander. In *Houston Belt & Terminal Railway Co. v. Wherry*⁸⁰ defendant Railroad received a preliminary report (from a first test) concerning plaintiff Wherry which stated that Wherry's urinalysis was

71. D. Copus, *supra* note 7, at 57; see also *State v. Hamilton*, No. H49547 (N.Y. Sup. Ct. August 20, 1985) (employer held liable for improper actions of polygraph examiner who fondled female applicants and asked questions of a sexual nature). Also, when blood testing is involved the possibility of injury to the employee during the drawing of the blood sample and thus possible liability on the part of the employer exists.

72. See, e.g., *Black v. Kroger Co.*, 527 S.W.2d 794 (Tex. Civ. App. 1975).

73. See, e.g., *Armstrong v. Morgan*, 545 S.W.2d 45, 46-47 (Tex. Civ. App. 1976).

74. See, e.g., *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 495-96, 340 S.E.2d 116, 123-24, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986). For a discussion of *Hogan*, see Note, *Hogan v. Forsyth Country Club Co.: Workers' Compensation and Mental Injuries*, 65 N.C.L. REV. 816 (1987).

75. The College of American Pathologists sponsors both a comprehensive Interlaboratory Comparison Program and a Laboratory Accreditation Program. D. Copus, *supra* note 7, at 32.

76. The California Department of Health Services sponsors a blind testing system for labs engaged in drug urinalysis. D. Copus, *supra* note 7, at 32.

77. Despite a rigorous review system, however, in 1984 the United States Army informed at least 60,000 soldiers who had been told originally that their tests were positive that their test results may have been wrong. D. Copus, *supra* note 7, at 32.

78. Rothstein, *supra* note 37, at 429; see *supra* text accompanying notes 60-61.

79. D. Copus, *supra* note 7, at 56.

80. 548 S.W.2d 743 (Tex. Civ. App. 1976), *appeal dismissed*, 434 U.S. 962 (1977).

"methadone positive, a trace" and that "methadone [is] used usually in treating heroin addicts."⁸¹ The doctor who delivered the report told the Railroad's agent "that a trace is a minute amount and that one test is not enough to indicate that Wherry was a drug user."⁸² Despite the doctor's warning and without ordering a second test, the Railroad's agent orally and in writing informed a number of company officials that Wherry's test showed that he was a drug addict and thus was in violation of the Railroad's rule prohibiting the use of alcohol and narcotics.⁸³ After learning of the report, Wherry had another test performed. The second test "revealed the presence of a compound whose characteristics resembled methadone, but . . . further analysis showed that the compound was not methadone or any of the commonly employed drugs of abuse."⁸⁴ The Railroad received the results of this second test but dismissed Wherry anyway.⁸⁵ The Railroad's agent later repeated the accusations of drug addiction to a United States Department of Labor employee.⁸⁶ In Wherry's defamation action the jury awarded him 150,000 dollars compensatory and 50,000 dollars exemplary damages.⁸⁷

The United States Court of Appeals for the First Circuit recently considered a defamation charge in the drug-testing context in *O'Brien v. Papa Gino's of America, Inc.*⁸⁸ In *O'Brien* plaintiff employee, a supervisor, alleged that due to a personal grudge defendant employer had forced him to take a polygraph test in an effort to uncover incriminating evidence of drug use as a cover for what would have been an otherwise invalid dismissal.⁸⁹ Giving plaintiff's failure of the polygraph test on the questions of drug use as the sole reason, defendant employer dismissed plaintiff.⁹⁰ The jury found that plaintiff's allegations of a personal grudge were in fact true, and that defendant's employees had made a defamatory statement when they reported that O'Brien had been dismissed solely for drug use when in fact another reason was involved.⁹¹ The Court of Appeals affirmed the award to plaintiff.⁹² *Wherry* and *O'Brien* illustrate that potential liability for defamation dictates careful handling of test results.

When the test results are positive and a second test confirms that the employee has used drugs, the employer must decide whether to discharge the employee or to take less drastic action. As is the case with the imposition of drug screening programs, private sector employers generally are free to exercise their own judgment in dealing with an employee whose test results are positive.

Employers have their greatest decisionmaking latitude with employees-at-

81. *Id.* at 746.

82. *Id.*

83. *Id.* at 746-47.

84. *Id.* at 746.

85. *Id.* at 746-47.

86. *Id.* at 747.

87. *Id.* at 743.

88. 780 F.2d 1067 (1st Cir. 1986).

89. *Id.* at 1070-72.

90. *Id.*

91. *Id.*

92. *Id.* at 1077.

will. Under common law "when a contract of employment does not fix a definite term the employment is terminable without cause at the will of either party."⁹³ North Carolina and other states, however, have limited the common-law at-will doctrine by recognizing a claim for wrongful discharge on the part of at-will employees who were discharged by their employers for reasons contrary to public policy.⁹⁴ In *Perkins v. Firestone Tire & Rubber Co.*,⁹⁵ for example, the United States Court of Appeals for the Third Circuit recognized a Pennsylvania statute limiting polygraph use by employers as a legislative statement of public policy and approved a wrongful discharge action by an employee who had been dismissed for refusing to submit to a polygraph examination. Thus, an employee discharged for having a positive drug test or for refusing to take a drug test might challenge the test as a violation of public policy. For example, the California Constitution contains an explicit privacy guarantee⁹⁶ that the California Court of Appeal has declared protects against business and other private sector intrusions as well as governmental intrusions.⁹⁷ A California employee could point to the privacy guarantee as an expression of public policy on which to challenge testing as a privacy violation.⁹⁸

Employees may be able to challenge an employer's policy of dismissing drug abusers generally as contrary to public policy. The Federal Rehabilitation Act of 1973⁹⁹ prohibits employment discrimination against handicapped individuals by the federal government, government contractors, and recipients of federal funds. The term "handicapped individual" means "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's *major life activities*, (ii) has a record of such an impairment, or

93. *Sides v. Duke Hospital*, 74 N.C. App. 331, 336, 328 S.E.2d 818, 823, *disc. review denied*, 314 N.C. 331, 335 S.E.2d 13 (1985). For a discussion of *Sides* see Note, *Sides v. Duke Hospital: A Public Policy Exception to the Employment-At-Will Rule*, 64 N.C.L. REV. 840 (1986).

94. In *Sides* the North Carolina Court of Appeals arguably approved a wrongful discharge cause of action for dismissals contrary to public policy. Plaintiff nurse in *Sides* alleged that she was dismissed by Duke Hospital for refusing to commit perjury in her testimony in a medical malpractice action involving the hospital. *Id.* at 335, 328 S.E.2d at 822. *But see* *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E.2d 116 (limiting *Sides*), *disc. review denied*, 317 N.C. 334, 346 S.E.2d 141 (1986).

California was the first jurisdiction to recognize a claim for wrongful discharge. *See* *Peterman v. International Bhd. of Teamsters, Local 396*, 166 Cal. App. 2d 766, 344 P.2d 25 (1959). Many other jurisdictions have since recognized this cause of action. *See, e.g.,* *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980) (quality control director discharged for insistence that employer comply with federal and state food, drug, and cosmetics laws); *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625 (1982) (employee discharged to prevent testimony before grand jury or any subsequent criminal trial); *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978) (employee discharged for efforts to make employer comply with state and federal consumer protection credit laws).

95. 611 F.2d 1363 (3d Cir. 1979).

96. Under Article I, section 1 of the California Constitution "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness, and privacy." CAL. CONST. art. 1, § 1 (emphasis added).

97. *Porten v. University of San Francisco*, 64 Cal. App. 3d 825, 829, 134 Cal. Rptr. 839, 842 (1976). "Privacy is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone." *Id.*

98. *See* Comment, *supra* note 12, at 1477-83.

99. 29 U.S.C. §§ 701-796 (1985).

(iii) is regarded as having such an impairment."¹⁰⁰ Specific language dealing with alcoholics and drug abusers was added in the 1978 amendments to the Act:

[The term "handicapped individual"] does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs *prevents such individual from performing the duties* of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.¹⁰¹

In a case decided under the law as it stood prior to the 1978 amendments, the United States Court of Appeals for the Seventh Circuit stated in dicta that "[i]ndividuals with current problems or histories of drug abuse qualify as 'handicapped individuals' under the definition unless their addiction or prior use can be shown to prevent successful performance of their jobs."¹⁰² Although the new language did not apply, the court continued: "[e]ven if we were to apply the new definition adopted in 1978, our conclusion would be the same for that definition. . . ."¹⁰³ The test, apparently, depends on showing that a person with a chemical dependency is limited in "one or more" of his or her "major life activities," but still able to "[perform] the duties of the job in question" and not be a threat to the "safety of others."¹⁰⁴ An occasional user might be unable to make the requisite showing of limitation of major life activities.¹⁰⁵ Aside from applicability of the Act to a particular plaintiff, the Act in general, or a similar state law,¹⁰⁶ arguably may be a persuasive statement of public policy on which to base a wrongful discharge claim.

A company's internal guarantees may, in some cases, be involved in a claim for wrongful discharge. In *Rulon-Miller v. IBM Corp.*¹⁰⁷ IBM discharged plaintiff for her romantic involvement with a competitor's employee.¹⁰⁸ The California Court of Appeal noted that "[i]t is clear that . . . company policy insures to the employee both the right of privacy and the right to hold a job even though 'off-the-job behavior' might not be approved of by the employee's manager."¹⁰⁹ The Court noted also that the internal policy was reinforced by the

100. *Id.* § 706(7)(b) (emphasis added).

101. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 122(a)(6), 92 Stat. 2955, 2984-85 (1978) (codified as amended at 29 U.S.C. § 706(7)(b) (1980)).

102. *Simpson v. Reynolds Metals Co., Inc.*, 629 F.2d 1226, 1231 n.8 (7th Cir. 1980) (dicta).

103. *Id.*

104. See *supra* notes 99-101 and accompanying text.

105. See *McCleod v. City of Detroit*, 39 Fair Empl. Prac. Cas. (BNA) 225 (E.D. Mich. 1985) (plaintiffs' Rehabilitation Act claim was dismissed because they failed to show that their use of marijuana impaired them in major life activities).

106. The North Carolina Handicapped Persons Act has the same language with regard to "major life activities" that is found in the federal statute. N.C. GEN. STAT. § 168A-3(4) (Supp. 1985). In place of the 1978 federal amendment language pertaining to substance abusers, however, the North Carolina statute specifically excludes from the definition of handicap "active alcoholism or drug addiction or abuse." *Id.* § 168A-3(4)a.

107. 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984).

108. *Id.* at 245-46, 208 Cal. Rptr. at 528.

109. *Id.* at 249, 208 Cal. Rptr. at 530.

California constitution's privacy guarantee.¹¹⁰ The court affirmed the jury's award of 100,000 dollars compensatory and 200,000 dollars punitive damages for wrongful discharge and intentional infliction of emotional distress.¹¹¹ Significantly, current drug tests cannot distinguish use that was off-the-job or that did not affect performance on-the-job.¹¹²

For employees who are covered by union contracts or contracts for a specific term of years (that is, not "at-will" employees), dismissals may be subject to arbitration for a determination of whether the employer had "just cause" for discharge. Such arbitration often is required by collective bargaining agreements. If there is no provision for arbitration, an employee may simply sue the employer for breach of contract. One arbitrator has noted that in recent years almost two-thirds of drug-related discharges have been set aside in arbitration.¹¹³ One commentator has noted:

In viewing the issue of workplace search and investigative measures as a whole, it appears that the employer obtains maximum legal protection if the employee and the appropriate bargaining representative have been given sufficient advance *notice* of the existence of investigative policies and practices. In the arbitration setting, those reviewing discipline or discharge grievances look to see that employees have been made aware of existing policies and if the policy is limited to those measures *reasonably necessary to ensure workplace safety*.¹¹⁴

In other words, employees should be aware of any rules against drug use and whether such rules cover drug use outside the workplace. Although a rule may on its face apply only to on-premises drug use, if drug testing is performed off-premises, off-hours use becomes a factor as well. Therefore, notice requirements include that employees be informed that they may or will be subject to testing to enforce drug policies. Employees should also be aware of and understand the penalties attached to positive testing; it is important that all employees receive notice and are treated equally.¹¹⁵

In addition to notice, the reasonableness of the rule proscribing conduct is a factor in a "just cause" determination. Generally, off-premises drug use is not just cause for discharge unless the employee's on-the-job performance is affected.¹¹⁶ Moreover, rules prohibiting drug use may be compared to the employer's policy concerning on-premises alcohol use and intoxication to challenge equality of treatment. Some arbitrators have sustained dismissals despite em-

110. *Id.* at 255, 208 Cal. Rptr. at 534. For a discussion of this guarantee, see *supra* notes 96-98 and accompanying text.

111. *Rulon-Miller*, 162 Cal. App. 3d at 241, 208 Cal. Rptr. at 524.

112. See *supra* text accompanying note 52.

113. *Mallinckrodt, Inc.*, 80 Lab. Arb. (BNA) 1261, 1265 (1983).

114. *Susser, Legal Issues Raised by Drugs in the Workplace*, 36 LABOR L. J. 42, 47 (1985) (emphasis added).

115. In one case involving alcohol use the arbitrator reversed the discharge of three employees because the rule prohibiting on-premises consumption or intoxication was known to some, but not to all employees. "[E]qual treatment under the rule means that everyone must know about the rule and the manner in which it will be enforced." *In re Western Paper Box*, 81 Lab. Arb. (BNA) 917, 921 (1983).

116. *D. Copus, supra* note 7, at 94.

ployer policies that treat persons using illegal substances differently from persons using alcohol merely on the grounds that using alcohol is legal and using drugs is not.¹¹⁷ Other arbitrators, however, question employers' justifications for meting out a "slap on the wrist" to employees reporting to work drunk, while summarily discharging those using illegal substances.¹¹⁸

In *Mallinckrodt, Inc.*¹¹⁹ three employees in arbitration challenged their discharge for their first offense of smoking marijuana on company property as an excessive penalty in relation to the penalty for the first offense of alcohol use or intoxication on company property.¹²⁰ The arbitrator noted, "If the case is to be viewed as concerned primarily [with] the Company's need to protect itself against impairment of performance at the work place, it seems no question that alcohol is at least on par with marijuana" ¹²¹ The arbitrator concluded that "[a]lcoholism in industry, and as a social problem, is far more debilitating, costly, and destructive than marijuana. There is no rational or reasonable basis to treat them as distinct. Therefore to treat alcohol abuse with progressive discipline and treat drug abuse with immediate discharge is improper."¹²² The employees were reinstated.¹²³

Immediate discharge is not the only avenue open to an employer when faced with an employee's positive drug test. Many experts argue that a drug-abusing employee should be given a chance for rehabilitation rather than punishment.¹²⁴ Presently, there are some 5,000 employee assistance programs (EAPs) in existence in the United States that provide help to employees who are referred by informed and alert supervisors, or who seek assistance voluntarily.¹²⁵ Some employers waive disciplinary action provided that the employee completes the EAP.¹²⁶ Illinois Bell reports "an estimated savings of \$459,000 in reduced absences, accidents, and medical and disability following rehabilitation. . . . Besides the cost savings, of course, are the human savings—the ability to rehabilitate and restore employees to a healthful and productive status."¹²⁷

A senior partner in a Chicago firm that advises corporations on drug policy tells a story about a small company employing thirty people as an example of the potential effects of employee drug use:

Unknown to company officials, the bookkeeper was a frequent user of methaqualone (Quaaludes), who apparently spent much of her day in a semi-trance. Checks were not deposited; invoices were not mailed, and

117. Mississippi River Grain Elevator, 62 Lab. Arb. (BNA) 200, 202 (1974).

118. Susser, *supra* note 114, at 45.

119. 80 Lab. Arb. (BNA) 1261 (1983).

120. The penalty for first offense alcohol intoxication was a one day to two week suspension. *Id.* at 1264.

121. *Id.* at 1266 (quoting Umpire Rolf Valtin in Umpire Decision N-69 in a case involving the U.A.W. and General Motors).

122. *Id.* at 1266.

123. *Id.* at 1267.

124. Rothstein, *supra* note 37, at 434.

125. Rothstein, *supra* note 37, at 434.

126. Rothstein, *supra* note 37, at 434.

127. Rothstein, *supra* note 37, at 434-45.

the books fell into terrible disarray. Even though the company was doing a healthy business, it almost went bankrupt before the bookkeeper's drug use was discovered.¹²⁸

Presumably either an applicant or a continuing-employee drug testing program would have alerted company officials to their bookkeeper's drug problem. It is equally likely, however, that careful supervision and performance review, important parts of the average company's personnel policies apart from the drug problem, would also have informed company officials that their bookkeeper spent her workdays in a "semi-trance."

Substance abuse is unquestionably a major problem in American society in general and in the American workplace in particular. Random drug testing of every employee from the company president to the janitor is not the solution, however. Before an employer launches a widespread drug screening program, it should consider the possibility of litigation and the potential effects on morale and mutual trust between employer and employee. The off-hours activities of employees traditionally have been private so long as job performance is not affected, but current drug tests cannot be limited to monitor only on-the-job use and impairment. Employers should balance the benefits they expect to receive from a drug-testing program with the degree of intrusion into the dignity and the private life of the employee. If an employer decides to proceed with drug screening, by exercising care and caution it can limit, but not eliminate, the potential for error and damage to an employee's reputation and the possibility of costly litigation. Otherwise, the now sparse case law in the field of private employer drug screening is likely to multiply.

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128. Englade, *supra* note 1, at 22.

APPENDIX

SUMMATION OF CONCERNS—A POLICY CHECKLIST FOR EMPLOYERS

1. *Formal Policy*: Plan a formal policy that deals not only with alcohol, controlled substance use, and intoxication on the job, but that also details the procedures by which the policy will be enforced. *All* employees should be aware of and understand the rules and the consequences of violation. Enforcement must be uniform and fair.
2. *When to Test*: Inform employees that they are subject to testing so that they can make their own decisions as to use of alcohol and controlled substances. If the job is more important than the "habit" then the employee can take steps to control or eliminate use, if not, the employee can resign and avoid having to carry the label "drug user" into his or her search for a new job.
3. *Who Should Be Tested*: Limit testing to "critical" jobs in which the safety of the public, of the employee and co-workers, or of property absolutely precludes drug use in any form. Proper supervision of noncritical employees and performance review should adequately deal with the problem of on-the-job drug and alcohol use or intoxication for other workers. An alternative approach would be to limit drug testing only to those situations in which there is probable cause to suspect that an employee is impaired.
4. *Collective Bargaining*: Develop a policy in cooperation with union representatives, when applicable, so that the union's support and cooperation can be counted on in enforcement.
5. *The Test Itself*: Recognize the limitations in current testing technology: levels of impairment and recency of use cannot be determined. *Always* obtain a confirmation on positive first tests, preferably by means of a more sophisticated technique. Consider that, whether the law recognizes privacy concerns or not, many people consider testing to be intrusive. Current testing technology limitations may place the employer in judgment of off-hours, off-premises activity that does not affect on-the-job performance.
6. *Chain of Custody*: Use a reputable laboratory, preferably one that is accredited and one that undergoes continuing review to limit false positives and false negatives. Coordinate procedures with the lab so that chain of custody is protected, and eliminate the "middle man" if possible. Recognize that a mix-up in the labelling or handling of test samples could have disastrous results for the employee and employer.
7. *Need-to-know Test*: Disseminate test results and conclusions on a need-to-know basis only. Be prepared to link a positive test result to documented breakdowns in performance.
8. *The Positive Test Result*: Deal with alcohol and drug abuse equally. Impairment on the job and the protection of persons and property should be the employer's first concern and not the legality or illegality of the substance that caused an employee's impairment. Consider the possibility of offering assistance to first offenders as opposed to discharge.

