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The Discovery Process in Drug Use Testing Litigation

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ABSTRACT: The war on illegal drug use has spread to public as well as private employers. Employers have tightened terms and conditions of employment related to drug use; consequently, drug use testing has emerged as a primary means of determining whether an employee has used a drug or drugs prohibited by an employer. Litigation in this area has increased dramatically. This article focuses on the broad legal principles implicated by employer reliance on drug use testing and the role of discovery in litigation in this area. A discovery checklist highlights points that should be examined by the individual charged with the responsibility of evaluating a testing program, possible litigation exposure, or in preparing for discovery in litigation.

KEYWORDS: jurisprudence, workshop, drug use testing, litigation, discovery

Imagine a society in which all components of life's activities are governed by testing: tests to determine intellectual capability, career selection, compensation, promotion; tests to reveal criminal conduct or the propensity toward criminal behavior; and testing to establish moral and religious beliefs or value systems and to determine whether certain beliefs threaten national security or community values. Visualize an amendment of the U.S. Constitution to provide that persons are presumed guilty until proven innocent and to omit any consideration of the right of privacy or any protection from unreasonable search and seizure of individuals or their homes. Envision the quality of life in a community or nation that is governed by its technological ability to engage in surveillance and data collection—where governmental snooping becomes normal and accepted. Twenty-five years ago such concepts may have been described as Orwellian. In view of the current emphasis on drug testing as a purveyor of information related to a variety of societal ills and misdeeds, such descriptions sound hauntingly realistic.

It is apparent that the current "testing" technology may well exceed our ability to understand the significance or the meaning of the information that employers have collected. At a time when society has accepted the computer age, we appear to be willing to also accept guilt or innocence as assigned by the technological and scientific sons and daughters of the Age of Star Wars.

More and more issues are surfacing in the workplace related to drug screening and polygraph testing of employees. It is clear that legal guidelines for employer conduct in this sensitive area are not clearly defined. The issues for employers and employees alike include constitutional and employment law questions related to privacy in the workplace,

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protections against self-incrimination, the employer's right to control the workplace, and the rights of workers to be free from invasive testing. In addition, questions have surfaced related to the rights of workers to be free of employer regulation of their off-duty activities. Drug testing has emerged as a particularly troublesome issue for employees as well as employers.

Laboratories and their personnel have also come under scrutiny as drug testees, adversely affected by reported positive test results, have questioned laboratory procedures, quality control, personnel qualifications and experience, and other functional components of laboratory operation and procedure.

Moreover, laboratories have been increasingly drawn into the legal fray between employers and employees. The credentials of the laboratory and its recommendations to clients are subject to vigorous debate and dissection as attorneys, employees, and employee organizations examine the right to engage in drug use testing, the testing method used, and the likelihood that the tests yield results identifiable with particular individuals.

Discovery has long been relied upon by lawyers and by courts as the method of searching for the truth and is, in many respects, the most effective tool of the advocate. "Discovery" is defined in *Black's Law Dictionary* as ". . . the ascertainment of that which was previously unknown; the disclosure or coming to light of what was previously hidden; the acquisition of notice or knowledge of given acts or facts; . . . ." Litigation involving drug use testing has become increasingly complex and the use of effective discovery techniques is an indispensable ally in evaluating the propriety of testing, the reliability of test results, the expertise of the laboratory and its personnel, and the procedures relied upon in specimen collection and handling.

Any discussion of the information and material that is available through discovery would not be complete without a basic understanding of the legal theories which form the basis for drug use testing litigation. The first part of this paper will discuss these theories and provide a foundational review of some of the prominent cases and the developing law. This is an area in which imagination and creativity abound. Consequently, discovery is crucial in ascertaining the unique facts of the case and in the development of legal theories for either the prosecution or defense of a case. Discovery can be equally important in the investigatory stage of potential or threatened litigation and represents an indispensable tool in evaluating the risk or attendant gain involved in potential litigation.

Drug Testing: The Legal Battle Between the Rights of Employers and Rights of Employees

In recent years, the anti-drug campaign has been extended to include the public as well as the private sector. Drug screening programs, which were once the province of the military, are being conducted by a substantial number of industrial companies, private sector employers and many federal agencies. It is estimated that nearly eight million Americans underwent drug tests in 1987. Businesses tend to justify the new reliance on drug testing as the answer to many employer problems including theft, absenteeism, on-the-job accidents, poor workmanship, and increasing health care costs. Employees argue that the war on drugs is primarily waged by concentration on drug tests and little or no attention is focused on the societal problems which result in alcohol and drug abuse. Unions are frequently critical of drug testing because of its inability to solve the drug problem, its propensity for damaging the reputations of innocent people, and the tendency toward testing abuse.

Factors that have resulted in employer decisions to implement drug testing programs include: (1) evidence of a growing use of drugs in the workplace, (2) potentially higher

health care costs, (3) absenteeism, (4) safety concerns, and (5) its increasing popularity as a tool for weeding out unwanted employees.

Moreover, many employers look to drug use tests as the state-of-the-art method of determining on-the-job impairment. Testing is attractive because many employers falsely believe that testing eliminates the possibility of human error by providing a result which is clearly either positive or negative. These same employers believe that a positive test is proof of on-the-job impairment. In reality, the issues that result in legal challenges to drug use testing programs are much more intricate and involve completing considerations such as workplace safety and personal and professional privacy.

Drug Testing[2]

Objections to Testing

Constitutional questions arising in the context of drug testing include: (1) whether an employer needs probable cause or reasonable suspicion to impose tough substance abuse policies, (2) the applicability of search and seizure protections to employees while on the job, (3) how much background information an employer may gather from job applicants, and (4) whether testing constitutes an invasion of privacy. The Fourth Amendment to the United States Constitution provides: 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 warrant 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.

Taking of Urine—Recent case authority suggests that the taking of urine, as in a urinalysis, is a search (see, for example, *McDonnell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987); *Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987) [school bus attendant]; *Storms v. Coughlin*, 600 F. Supp. 1214, 1217–18 (S.D.N.Y. 1984) [prisoners]; *but see, Turner v. Fraternal Order of Police* No. 83-1213 (D.C. Ct. App. 13 Nov. 1985), 1985 D.L.R. 223:A-1 [concurring opinion]). Taking of blood is definitely a search (*Schmerber v. California*, 384 U.S. 757 [1966]).

Emerging case law indicates that urinalysis of public employees generally does not require a warrant, but does require at least individualized, reasonable suspicion based upon objective facts, thereby barring routine or random urine screening (*McDonnell, supra*). The McDonnell court would suggest three possible exceptions: (1) as part of a routine preemployment examination, (2) as part of a routine, periodic physical administered to all employees, or (3) on a periodic basis as a condition of employment "under a disciplinary disposition."

Moreover, in *Jones v. McKenzie*, (D.D.C. 1986), *rev'd. in part*, 833 F.2d 335, (D.C. Cir., 1987), the U.S. Court of Appeals, D.C. Circuit held that a school system can drug test some of its employees without probable cause where the safety of school children is at issue. This reversed the decision of the U.S. District Court. The court concluded that a search, such as the one undertaken in *Jones*, could be conducted without probable cause if the school district had a legitimate governmental interest in making the search, and the interest outweighed the privacy interests of employees. Moreover, the court

[2]In 1986, President Reagan launched an anti-drug campaign that incorporated mandatory as well as random testing (Executive Order 12564 dated 15 Sept. 1986). Federal agencies were already testing employees for drug abuse on a limited basis. In June of 1986, the House Post Office and Civil Service Subcommittee on the Civil Service reported that, of 76 agencies surveyed, 14 already administered drug tests to certain employees or applicants. Three other agencies told the subcommittee they had begun to develop such plans (24 Gov't Empl. Rel. Rep. [BNA] 898).

found that the search must be reasonably related to its objectives and not exceedingly intrusive.

Reasonable Suspicion Test—A policy barring random use, requiring individualized suspicion, is followed by many government agencies. See, for example, *Turner v. Fraternal Order of Police, supra; Capua v. The City of Plainfield,* 643 F. Supp. 1567 (D.W.J. 1986) wherein the United States District Court for the District of New Jersey held that a municipal government violated the constitutional rights of firefighters and police department employees by compelling them to submit to urine tests for drugs absent a reasonable, individualized suspicion that any particular employee was using unlawful drugs.

The Superior Court in New Jersey applied this reasoning to invalidate mandatory testing of all students (*Odenheim v. Carlstadt East Rutherford Regional School District,* No. C-4305-85E [Sup. Ct. New Jersey, Bergen City, December 9, 1985]).

A New York court has applied this reasoning to teachers (*Patchogue-Medford Congress of Teachers v. Board of Education of Patchogue-Bedford Union-free School District,* 70 N.Y. 2d 57, 517 N.Y. S.2d 456, 510 N.E.2d 325 [1987]). This case involved mandatory testing before tenure decisions. On appeal, the decision was affirmed with the Superior Court, Appellate Division, noting that ". . . blanket testing has so far been upheld only for employees in industries that by tradition have a special, 'pervasively regulated' status—horse racing, casino gambling, firearms, and liquor." The court also noted that among public servants, even those like police and firefighters, whose duties are more immediately perilous than those of teachers, the reasonable suspicion standard has generally been applied. According to the opinion, the same should hold for teachers. The Court states: "Since the Patchogue-Medford tests were ordered without even a scintilla of suspicion, much less reasonable suspicion, the whole idea was an act of pure bureaucratic caprice and rightly struck down." While the probable cause standard may be argued, (*Schmerber v. California, supra*) it is unlikely to be accepted if the test is imposed by the employer for employment purposes, courts will probably require only reasonable suspicion (compare, *Davis v. Mississippi,* 394 U.S. 721, 727-28 [lower standard where lesser privacy intrusion occurs]; *New Jersey v. TLO,* 469 U.S. 325, 83 L.Ed.2d 720, 105 S. Ct. 733 [1985] [examining searches of students]).

However, with respect to students, one court has found that urine screening is too inaccurate as well as too invasive, for use on students at all, therefore requiring impairment or possession (*Anable v. Ford,* 663 F. Supp. 149 [W.D. Ark. 1985]). A New York Police Department order subjecting a group of tenured officers to unannounced, universal drug testing was recently struck down as a violation of the Fourth Amendment. The New York Police Department already screens all applicants, trainees, and probationary officers for drug use and tests tenured officers on a reasonable suspicion basis. The union sued to block the random tests as an unreasonable search (*Caruso v. Ward,* 133 Misc.2d 544, 506 N.Y.S.2d 789 [1986]). Note, the same court appeared to leave open the question of the propriety of a universal drug test in the context of a regularly scheduled physical.

Waiver of Rights—Courts are generally reluctant to find a valid waiver of rights where consent is required as a condition of employment, since public employees cannot and should not be bound by unreasonable conditions of employment (*McDonnell v. Hunter,* 612 F. Supp. at 1131; cf. *Hester v. City of Milledgeville,* 777 F.2d 1492 [11th Cir., 1985]). In *Hester,* the court ruled that a city's requirement that firefighters sign one of four different forms related to a requirement that they submit to a polygraph examination violated the privilege against self-incrimination. In this regard, the California Supreme Court has said that however much public service constitutes a benefit and imposes a duty to uphold the public interest, a public sector employee, like any other citizen, is born with a constitutional right of privacy. A citizen cannot be said to have waived that right in return for the "privilege" of public employment, or any other public benefit, unless

the government demonstrates a compelling need. *Bagley v. Washington Township Hospital District,* 65 Cal.2d 499 (1983).

Safety-Sensitive Positions—Some courts have suggested that the Fourth Amendment might permit mandatory testing, or other testing without individualized suspicion, for particularly safety-sensitive positions. See, for example, *Jones v. McKenzie,* 628 F. Supp. 1500 (D.D.C. 1986), *rev'd. in part,* 833 F.2d 335 (D.C. Cir. 1987) (school bus attendant); *Fraternal Order of Police v. City of Newark,* 216 W.J. Super. 461 524 A.2d 430 (1987) (police). The reasoning is that the Fourth Amendment only prohibits unreasonable searches. In determining whether a search is reasonable, the court weighs the governmental interests against the expectation of privacy. Where the government's interest is particularly high, and policy requiring mandatory non-individualized suspicion tests is announced, the balance tips in favor of permitting tests, for example, *Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy,* 538 F.2d 1264, 1267 (7th Cir.) *cert. den.* 429 U.S. 1029 (1976). The Merit Systems Protection Board has applied a similar rule for the federal service. In *Kulling v. Department of Transportation,* 84 MSPB 5888, the Board affirmed the removal of an air traffic controller for use of a mind-altering drug off-duty. According to MSPB, public concern for the safety of the air traffic control system justified the removal even though the substance use was off-duty and there was no showing that performance was impaired. But a decision of the Ninth Circuit Court of Appeals suggested that "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. . . ." The ruling would, in effect, overturn Federal Railroad Administration regulations relied upon since February 1986 (*Railway Labor Executives, et al. v. James Burnley, Sec. of the Dept. of Transportation, et al.,* 839 F.2d 575 (9th Cir. 1988) cert. granted __U.S. __[1988]). However, in *National Treasury Employees Union v. Von Raab,* 816 F.2d 170 (5th Cir. 1987), *cert. granted,* __U.S. __, 108 S.Ct. 1072 (1988), the 5th Circuit Court held that "Use of controlled substances by employees of the Customs Service may seriously frustrate the agency's efforts to enforce the drug laws. . . ." The U.S. Supreme Court reviewed the constitutionality of the drug testing policy addressed in *Von Raab.*

In *National Treasury Employees Union v. Von Raab,* 109 S.Ct. 1384 (1989), the U.S. Supreme Court held that the customs service did not need a warrant to conduct a drug testing program. Moreover, the court decided that the customs service was not required to develop probable cause or even some level of individualized suspicion before it tested employees who applied for promotion to positions directly involving the interdiction of drugs or positions that required the employee to carry firearms. Similarly, in *Skinner v. Railway Labor Executives Assoc. et al.,* 109 S.Ct. 1402 (1989), the court concluded that regulations of the Federal Railroad Administration, permitting drug and alcohol tests, were reasonable under the Fourth Amendment even though there was no requirement of a warrant or a reasonable suspicion that any particular employee might be impaired. The decision was based on the compelling government interest served by the regulations, which outweighed employees rights to and interest in privacy.

State Constitutional or Statutory Provisions—State search and seizure guarantees may be interpreted more broadly than the Fourth Amendment. A decision of the Oklahoma Supreme Court, *Turner v. City of Lawton,* 733 P.2d 357, (Okl. 1986), addressed the issue of unreasonable search and seizure in the context of a public employee discharge case. The case involved the suspension and subsequent discharge of a Lawton firefighter. The adverse employment action was based upon evidence obtained by virtue of a search warrant held invalid. In discussing the distinction between the Fourth Amendment and art. 2, § 30 of the Oklahoma Constitution, the court stated:

> The Oklahoma constitutional prohibition is broader in scope than its federal counterpart, forbidding any unreasonable search or seizure and requiring that the place to be searched

> be described with greater particularity than does the federal constitution . . . Article 2, § 30 must be strictly construed, and unless it can clearly be shown that the officers making the search complied with the legal prerequisites necessary to constitute a lawful search, the evidence seized by an unreasonable search must be suppressed. The absolute security granted by Okla. Const. art 2, § 30 against unlawful search or seizure exists without reference to the guilt or innocence of the person whose property is searched and without consideration of whether the proceeding is civil or criminal in nature (*Id.* at 1907).

The Court spoke eloquently of the special right that is involved when the right to work or livelihood is in question: "One of mankind's most precious liberties is the right to earn a livelihood. It would appear to be wholly at odds with our heritage to allow the admission of evidence illegally seized by government agents in discharge proceedings" (*Id.* at 1908). See also, *Powell v. Zuckert,* 366 F.2d 634 (D.C. Cir. 1966).

A San Francisco (city) ordinance bars most employee drug testing (23 Gov't Empl. Rel. Rep. [BNA] 1748 [12/9/85]).

Labor Management Issues

Collective Bargaining Relationships—Unions have numerous difficulties with the drug testing issue. There are differing standards concerning what constitutes impaired performance because of substance abuse. Also, detection of drug products or trace elements in the body may not prove impairment or intoxication. Unions frequently take the position that testing violates constitutional protections against unreasonable search and seizure as well as common expectations of privacy. In this regard, unions contend that if a valid concern is safety, a better alternative is for supervisors to monitor employee performance. If deterrence is the goal, random testing merely serves to frighten employees and often reduces productivity because it is offensive and demoralizing.

Scope of Bargaining Considerations—Drug testing may be considered a mandatory subject of bargaining under a union contract; however, there are doubts that employers are required to bargain over preemployment drug screening. In many cases, it is difficult to determine whether employee rights must be asserted under the Federal Labor Relations Act, the Civil Service Reform Act, or some similar statutory scheme. In challenges to military drug testing programs, the government frequently argues that, with regard to some levels of personnel, policies are non-negotiable as a result of 5 U.S.C § 7106(a)(1) which provides in pertinent part: "Nothing in this chapter . . . shall affect the authority of . . . any agency—(1) to determine the missions, budget, organization, number of employees, and *internal security practices* of the agency . . ." (emphasis added). In this regard, the Department of Defense has argued that a drug testing program related to federal civilian employees in "critical" positions was not negotiable because internal security practices are committed to agency discretion. See, *NFFE v. Weinberger,* 818 F.2d 935 (D.C. Cir. 1987), wherein the U.S. District Court for the District of Columbia dismissed a case filed by the National Federation of Federal Employees (NFFE) seeking to enjoin the implementation of a drug abuse testing program by the Department of Defense. The court dismissed the case finding that the case was properly before the FLRA as a matter involving labor relations. However, the court observed: ". . . the drug testing program, on its face, raises substantial Fourth Amendment concerns. Furthermore, the fact that the field testing stage of the program requires observed urinalysis makes the Court question the reasonableness of the intrusion into possible privacy expectations."

Private Sector Testing—In the private sector, federal constitutional protections against unreasonable searches and seizures do not apply in the absence of some official state action such as a police narcotics raid. In the absence of state action, an employer in the private sector has considerable latitude to enforce a properly devised program to fight substance abuse unless the employer is operating under a collective bargaining agreement.

However, private employers who engage in testing may find that they face a host of private legal actions filed by employees who feel that their rights have been violated. These actions may include: invasion of privacy, intentional infliction of emotional distress, negligent infliction of emotional distress, defamation, and wrongful discharge, as well as others.

Private sector collective bargaining agreements which require negotiation of "terms and conditions" of employment may require the employer to bargain with the union concerning the establishment of a drug use policy, the procedures applicable to employee testing, and the disciplinary measures that may result from positive tests.

A drug screening program is considered a "working condition" and therefore a mandatory subject of bargaining. Consequently, employers may not implement drug screening unilaterally without giving the union the opportunity to bargain.

Screening Workers for Drugs—(M. A. Tothstein, "A Legal and Ethical Framework," *Employee Relations Law Journal,* Vol. 11, p. 430) Employees may waive their right to bargain with regard to testing. However, the waiver of the right to bargain concerning this issue must be "clear and unmistakable." See Memorandum of NLRB General Counsel GC 87-5.

Examples of areas implicated include:

(1) the establishment of a policy that shall be made known to employees;

(2) the designation of which employees will be required to undergo testing;

(3) the identification of circumstances which will result in the requirement or request that an employee submit to testing;

(4) the designation of drugs to be tested for;

(5) the establishment of detection limits or cutoff limits for the drugs in question;

(6) the selection of a capable and respected laboratory;

(7) the selection of tests which will be used by the laboratory[1];

(8) the establishment of a procedure which will be used to collect urine specimens;

(9) the establishment of an employee assistance program or a decision not to establish such a program;

(10) the decision concerning the treatment of the casual user as opposed to the chronic user;

(11) whether a progressive disciplinary system will be applied to an employee with a positive test or whether the penalty will be immediate termination;

(12) whether the employee's work record will be considered in determining appropriate discipline; and

(13) will the laboratory be required to store any remaining portions of original specimens for a specified period following testing.

Preemployment Testing—While drug testing may be a mandatory subject of bargaining under a union contract, it is doubtful that employers are required to bargain over preemployment drug screening. Some courts have approved testing at the application stage because it is consensual at that point, and a mere applicant has no protected interest in the job. However, a job candidate, disqualified from employment by screening results, could file suit over the decision.

[1]Urinalysis methods vary substantially in cost, accuracy, the number of different drugs detected, and the amount of expertise required to perform them. The most commonly used screening methods are thin-layer chromatography and two immunoassay techniques: enzyme immunoassay and radioimmunoassay. 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. This is because the screening tests occasionally produce false readings for a variety of reasons including cross-reactivity.

Objections to the Use of Test Results

Constitutional Objections—Discharge or discipline based upon unconstitutional urinalysis. This relates to whether there is reasonable suspicion or probable cause, whichever is applicable (*Jones v. McKenzie, supra*). The Maryland Attorney General has issued an opinion stating that mandatory drug testing of most categories of state employees would violate the Fourth Amendment prohibition against unreasonable searches and seizures. In this regard, the Attorney General states that testing of such employees is permissible only if based on particularized probable cause—which is the traditional prerequisite to a search or seizure. He also notes that termination of a state employee solely because the testing indicates current drug abuse would violate the Federal Rehabilitation Act of 1973. In addition, mandatory testing of employees whose work is directly related to public safety also is unconstitutional unless certain Fourth Amendment safeguards are followed (Md. Atty Gen; No. 86-055, 22 Oct. 1986).

Even where a policy is valid, there may be due process objections to imposition of discipline or other adverse action based upon the unreliability of test results. For example, inherent test limitations, see, for example, Morgan, "Problems of Mass Urine Screening for Misused Drugs," *Journal of Psychiatric Drugs*, Vol. 16, No. 4, 1984, p. 305; see also *Jones, supra*, where the court found that the termination of a bus attendant, based on a single unconfirmed EMIT test, was arbitrary and capricious.

False Positives

False positives (drug reading where no drugs present) occur at unacceptably high rates. They may be caused by lawful over-the-counter drugs such as Contact® or Sudafed®, by poppy seed cake or bagels, by melanine in skin, passive inhalation, or herbal teas. See, for example, Greenblatt, "The Admissibility of Positive EMIT Results as Scientific Evidence," *Journal of Clinical Psychopharmacology*, 1985, pp. 114–116; BNA, *Alcohol and Drugs in the Workplace*, 29 (1986). There is also evidence related to the occurrence of false negatives.

Unreliable Laboratory Handling—The Center for Disease Control has found lab accuracy ranges from 37 to 69%. (*JAMA*, Vol. 253, 26 April 1985 p. 2382). As of 1984, the Army was reported to have mishandled fifty-two thousand urine samples (BNA, *Alcohol and Drugs in the Workplace*, 68 [1986]), See also, *Banks v. FAA*, 587 F.2d 92 (5th Cir. 1982) (overturning discipline of air traffic controllers where samples destroyed and not available for verification).

Test Results Misinterpreted

Tests, even if reliable, may prove the presence of a drug—nothing more. Due process arguments also arise from the absence of a nexus between results of tests (which even if accurate tell only if drug has been ingested in preceding days or weeks) and job impairment. For collected cases on due process limits to public employer regulation of private conduct of employees, see *Whisenhunt v. Spradlin*, 464 U.S. 470, 965 (1983). Note: even confirmed positive urinalysis does not indicate present job impairment or intoxication. Recent authority holds that, especially for safety sensitive positions, present impairment or intoxication need not be shown; any confirmed use would be sufficient. *Division 241 Amalgamated Transit Union v. Suscy, supra.*

Defamation—See, *Houston, Belt and Terminal Railroad Company v. Wherry*, 548 S.W.2d 743 (Tex. Civ. App. 1977) (switchman awarded $150 000.00 compensatory damages and $50 000.00 punitive damages where employer relied on unconfirmed, erroneous drug report and then defamed plaintiff with results). Moreover, P.L. 100-71, 101 Stat. 471, provides that

> . . . the results of a drug test of a federal employee may not be disclosed without prior written consent of such employee, unless the disclosure would be—(1) to the employee's medical review official . . .; (2) to the administration of any employee assistance program in which the employee is receiving counseling or treatment or is otherwise participating; (3) to any supervisory or management official within the employee's agency having authority to take the adverse personnel action against such employee, or (4) pursuant to the order of a court of competent jurisdiction where required by the United States Government to defend against any challenge against any adverse personnel action.

Arbitration Proceedings

Use Versus Impairment in Arbitration Proceedings—Management may have difficulty in demonstrating a nexus between drug use and actual impairment. In *McClellan Air Force Base and American Federation of Government Employees Local 1857,* OPM/LAIRS No. 15885 (1984), an employee was charged with smoking marijuana off-duty. The union claimed there was no evidence of impairment, but an expert witness for the agency testified that the employee could have been impaired on duty and the agency had reason for concern given the critical nature of the employee's job (jet engine mechanic). The arbitrator ruled in favor of management on this ground. This approach has been used in several public sector drug/alcohol cases and suggests management may get around the difficulty of proving actual impairment by showing that mere use is enough to warrant discipline when a grievant's job is sufficiently sensitive. But see, *General Services Administration and American Federation of Government Employees Local 2061,* OPM/LAIRS No. 16733 (1985) wherein an arbitrator substantially reduced the number of days of suspension of two employees charged with drinking an alcoholic beverage while away from the work area. The arbitrator concluded that testimony was insufficient to establish impairment and reduced the suspension on the basis of a charge of unauthorized absence from the work area.

Arbitration of Employee Discharge Cases—Discharge for drug use or possession off company premises is more likely to receive close scrutiny by arbitrators and frequently involves a balancing test. In *State University of New York,* 74 L.A. 299 (1980), the arbitrator stated that the appropriate factors to be considered in such cases are: (1) whether possession or sale is involved, (2) the type of drug (marijuana versus hard drugs), (3) whether the conduct occurred on the premises of the employer, (4) the presence or absence of a drug problem at the workplace, (5) the impact of the drug entanglement on the reputation of the employer, and (6) the effect of the employee's behavior on the orderly operation of the employer's business.

Off-Duty Conduct—Some arbitrators have recognized that off-duty, drug-related conduct, especially where selling is involved may justify disciplinary action (*Martin-Marietta Aerospace, Baltimore Division,* 81 L.A. 695 [1983]). In contrast, some arbitrators have been reluctant to impose particularly severe disciplinary action. In this regard, it is suggested that an employee's arrest or conviction for off-duty possession or use of drugs may not be considered grounds for termination. Even felony convictions for the off-duty sale or distribution of drugs have been held, in some cases, to be an insufficient basis for termination (*Vulcan Asphalt Refining Company,* 78 L.A. 1311 [1982]).

Arbitrators are frequently unwilling to uphold an immediate discharge for workplace drug involvement in the absence of a contractual clause or work rule prohibition of such conduct. See, for example, *Abex Corporation,* 64 L.A. 721 (1975). Other arbitrators have, nevertheless, recognized an implied drug prohibition because of the criminal nature of most drug conduct. See, for example, *B. Green Company,* 65 L.A. 1233 (1975).

Applicable Standard of Proof—Arbitrators have varied in their approach to the proof standard required for an employer to establish an employee's guilt. Some arbitrators have applied a "beyond a reasonable doubt" standard while others have required the

employer's evidence to be "clear and convincing," as opposed to the normal standard of "preponderance of the evidence." See L. Denenberg, "How Arbitrators View Drug Abuse," *Arbitration Journal*, Vol. 31, 1976, p. 97. In *Metropolitan Edison Company*, AAA 14 300 093886, 9 Oct. 1986, an arbiter blocked implementation of a random drug and alcohol testing program among employees at Three Mile Island nuclear power station. The opinion upheld the company's fitness-for-duty policy which permitted drug testing for reasonable cause, but ruled that random testing is "an invasion of the person" that is "offensive" and not authorized by the contract. The arbiter stated:

> Most employers have an interest in eliminating drugs and alcohol in the workplace . . . but invading the privacy of the innocent in order to discover the guilty establishes so dangerous a precedent that the proposed policy must be held impermissible at least under the terms of this collective bargaining agreement. Moreover, the arbiter concluded that, "the employer does not have the right to conduct physical examinations or clinical tests of employees for the presence of alcohol or drugs as part of any routine company-required physical examination.

Arbitrator's View of Job Performance—Arbitrators have traditionally struggled with the difficulties in attributing abnormal behavior to the use and abuse of drugs and alcohol. In this regard, it has been argued that assessment of job performance—rather than the investigative measures—should be the chief method used to establish a workplace free of drug- and alcohol-related activities. See, for example, Williamson, "The Arbitration of Drug Abuse Cases: An Industrial Relations Perspective," in *Arbitration: Promises and Performance, Proceedings of the Thirty-Sixth Annual Meeting*, National Academy of Arbitrators, BNA Books, Washington, DC, 1984, pp. 120, 125.

Rehabilitation Programs—A parallel concern is the obligation, if any, of an employer to develop an effective employee assistance program to assist employees who are perceived as having substance abuse problems. Some employers have experimented with on-premises drug rehabilitation programs. These are frequently entitled Employee Assistance Programs (EAP). An employer who enters into an EAP may require the employees to enter into "last-chance" agreements under which the employee must participate in certain rehabilitation efforts before the employee is subject to termination. If the employee drops out of the treatment or is otherwise unsuccessful in addressing the problem, it is understood that employment will be terminated.

Where the employee violates a last-chance agreement, arbitrators will generally uphold the termination. In *Bakers Union Factory No. 326 v. ITT Continental Baking Company, Inc.*, 7049 F.2d 350 (6th Cir. 1984), a court reversed an arbitrator who had set aside the discharge of an alcoholic employee who had violated the terms of a "last-chance" rehabilitation agreement by failing to attend two out-patient treatment sessions.

A number of unions are negotiating with employers for drug and alcohol testing provisions in their contracts. A model program is the employee assistance plan negotiated between Local 689, Amalgamated Transit Union, AFL-CIO and the Washington Metropolitan Area Transit Authority. See paper by M. A. Rosen, Counsel for Local 689, Amalgamated Transit Union, delivered at a BNA seminar on "Drugs and Alcohol in the Work Place" in Washington, DC, November 1985. The basic theme of the EAP is the recognition of alcoholism and drug abuse as illnesses correctable by rehabilitation and the recognition of the fact that these problems cannot be handled solely by inflexible disciplinary standards. Components of the program include, among other elements, the following: stipulated minimum levels for alcohol, marijuana, and other drugs; when an employee is tested, the employer must use confirmed blood or blood serum tests or both for marijuana instead of the urine tests available; the parties have agreed that chain of custody of the specimens will be maintained; laboratories which do the testing are subject to quality control testing; and employees who test above the stipulated levels for intox-

ication or test positive for hard drugs will be discharged unless they agree to participation in the Employee Assistance Program.

Workers' Compensation Issues

Workers' Compensation Liability for Employee Alcohol and Drug Use—Although there is not much case law on the issue, there have been a few cases in which the courts have recognized that drug and alcohol dependency are "industrial" illnesses or by-products of compensable employment stress. This may indicate an increase in employer liability for workers' compensation benefits especially since it has been estimated that substance abusers file at least five times as many workers' compensation claims as other persons. See, for example, "Taking Drugs on the Job," *Newsweek*, 22 Aug. 1983, pp. 52–60 and "Managerial Responses to Alcohol and Drug Abuse Among Employees," *Personnel Administrator*, June 1984, pp. 134–39.

Benefits—In *California Microwave, Inc. and Pacific Indemnity Co. v. Workers' Compensation Appeals Board*, 45 Ca. Comp. C.A.S. 125 (1980), the California Workers' Compensation Appeals Board awarded benefits to an employee who claimed he was disabled as a result of a drinking problem that was caused or aggravated by stresses and strains of his job.

Under the same theory of drug and alcohol dependency as "industrial" illnesses, employees, who are absent for extended periods while seeking drug or alcohol treatment, may claim protection from termination under those state workers' compensation laws that forbid discrimination or retaliation against employees as a result of industrial injury or disability. See, for example, California Labor Code, § 132A, as interpreted by the California Supreme Court in *Judson Steel Corp. v. Workers' Compensation Appeals Board*, 586 P.2d 584, 150 Cal. Rptr. 250 (1978).

Rehabilitation Act of 1973 (29 U.S.C. 791)

Alcohol and drug abuse are handicapping conditions under the Act. Qualification for protection requires a demonstration that the individual is able to perform the work with or without reasonable accommodation. See 29 U.S.C. 706(7)(B) relating to direct threat to property or safety to others. The dilemma for employees, seeking protection, is to show that the individual is handicapped by dependency but not so handicapped as to be unqualified to perform employment responsibilities. See also: Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (42 U.S.C. 4541[b][4]) which applies to the federal government, government contractors, and recipients of federal financial assistance.

In *Hazlett v. Martin Chevrolet*, 496 N.E.2d 478 (1986), the Ohio Supreme Court ruled that alcohol or drug addiction or both are handicaps within the meaning of the state law banning handicap discrimination.

Discovery

Discovery is the general term applicable to a host of methods of obtaining information related to a cause of action. Generally speaking discovery involves interrogatories (Rule 33), documents produced for inspection (Rule 34), request for admission (Rule 36), and depositions. References are to the Federal Rules of Civil Procedure.

The value and purpose of interrogatories is to obtain the names of witnesses and to identify and commit parties to legal and factual contentions. Drug use screening cases, more often than not, involve numerous documents, many of which are highly technical. Interrogatories are neither a good nor appropriate device for obtaining identification of

documents or for ascertaining factual positions. They are not particularly useful in drug use testing litigation primarily because they do not permit the broad range of inquiry necessary to an understanding of the employer's motive in instituting a drug screening program.

Documents play a crucial role in drug use testing cases, making document production requests extremely useful. Much of the evidence which will be important in developing or defending litigation in this area will be based on the records maintained by the employer and the laboratory. Documents and records are useful for establishing credibility before a jury, in describing what was happening when the employer decided to institute a drug use testing program, as well as for impeaching witnesses in the event their testimony during depositions or trial is inconsistent with the documents.

Depositions are an equally useful discovery device. A deposition is an out-of-court examination, under oath, before a court reporter. The testimony is reduced to writing and is authenticated. Depositions are useful in developing factual evidence which can be used at trial, in identifying and understanding documents which have been produced, and for purposes of impeachment in the event of inconsistent statements made at or prior to trial. For depositions to be useful, they should be preceded by a comprehensive document request.

Discovery has a number of uses: to expose leads for evidence, for broad informational purposes, to impeach a witness who testifies at trial, and in lieu of live testimony if the witness is unavailable at the time of trial. The check list, which follows, has been prepared to provide the reader with an introduction to the type of information and materials which are useful in evaluating and understanding drug use testing cases. It is also helpful for employers, laboratories, and others involved in the drug use testing process to understand the information and documents with which employees and their representatives are concerned. This permits the lab as well as the concerned employer to understand fully drug use testing and its inherent limitations before inviting a conflict.

Representation of clients in matters that involve the use of drug screening tests offer new challenges to the experienced as well as the inexperienced litigator. As with any case, the lawyer must be willing to take the time necessary to understand the law with regard to permissible and impermissible testing. In addition, it is necessary to become knowledgeable regarding testing methodology and its numerous applications.

Testing may be legally permissible. However, if the employer uses test results in ways other than intended by any agreement, policy, or procedure which permits testing the result may be a lawsuit based upon wrongful use of test results. Moreover, if the employer makes certain representations regarding test results and later the test results are found to be in error, the employer runs the risk of a lawsuit based upon the failure to use due care in the use and dissemination of test results. Moreover, there is increasing concern related to the reliability of test results. Results may depend on many factors including the testing method chosen, the qualifications of the technician performing the tests and the care taken to ensure that specimens are not tainted or confused.

There are some facts that must be obtained to begin to make an evaluation of a case. For instance, it is critical to identify whether testing is random or mandatory, whether it involves public or private employees, and whether employees tested are in safety sensitive areas. Additionally, to evaluate the likelihood that testing is justified, it is necessary to ascertain the circumstances under which an individual is requested to undergo a drug screening test. These reasons may include explanations such as probable cause to believe that the individual is impaired on the job or reasonable suspicion that the person is impaired. The reason for testing may be as simple as the individual has applied for a job where an employer requires preemployment testing or it may be a knee-jerk reaction to the sheer popularity of drug use tests.

Additional areas of inquiry relate to the tests used by the employer and the procedures

which govern the acquisition and testing of the specimen. There is a need to identify the test or tests utilized, to understand the inherent reliability of the test(s), and to identify the laboratory and acquire information regarding the reputation of any laboratory involved in the testing. Moreover, attention should be directed to the qualifications of the individuals who are directly involved in the collection, transport, evaluation of tests, and the reporting of test results.

Discovery Checklist

I. Testing system
   A. Consent from individual
   B. Medication history
   C. Specimen acquisition
   D. Specimen transport
   E. Tests utilized
II. Specimen processing (chain of custody)
   A. Marking of specimen for purposes of identification
      1. Name
      2. Number, such as social security number or employee number
      3. Time and date of collection
      4. Identity of individual receiving the specimen
   B. Laboratory log
      1. Name of subject
      2. Identifying number
      3. Laboratory accession number
      4. Time and date received
      5. Condition of specimen
      6. Name of individual who logged in specimen
   C. Procedures related to preservation of records
   D. Procedures related to preservation of specimens
III. Sources of errors
   A. Errors of omission and commission
   B. Working conditions, rest periods, pattern of rotation of employees
   C. Number of tests analyzed in set period of time
   D. Automation—are automated steps monitored by effective quality control program
   E. Labeling errors
   F. Spelling errors
   G. Transposition of numbers assigned to specimen
   H. Faulty storage of specimen
   I. Errors of methodology
      1. Instrument malfunction
      2. Outdated reagents
      3. Measurement errors
      4. Calibration
IV. Tests
   A. Identification of tests used
      1. Screening
      2. Confirmatory
   B. Sensitivity of urinalysis test used

V. Quality control procedures
   A. Analytical methodology relied upon
   B. Quality assurance procedures
      1. Specimen procurement
      2. Specimen processing
      3. Specimen testing
      4. Reporting of test results
      5. Screening and confirmation tests
      6. Chain of custody
      7. Preservation of records and specimen(s)
   C. Use of control specimen
      (Users of lab results may desire to check or have control charts regularly checked to make sure that control specimen documentation is retained in case it is required if test results are challenged in court.)
   D. Proficiency testing
      1. Open
      2. Blind
      3. Nature of review process, that is, continual or sporadic
VI. Use of test results
   A. Discipline
   B. Decisions affecting employment
      1. Suspension
      2. Termination
      3. Reassignment
      4. Promotion
      5. Pay increments
   C. Reputation
   D. Imprisonment
   E. Jobless benefits
VII. Kits provided by laboratory for use by employer
   A. Instruction form
      1. Sample form
      2. Clear, concise directions for use
      3. Disclaimer
   B. Information regarding request that individual submit to test
   C. Consent form including individual's medical history
   D. Chain of custody form with sample indicating proper way of completing form
VIII. Documentation and records
   A. Individual consent forms
   B. Chain of custody form (including laboratory log)
   C. Contract, memoranda, or other informational materials exchanged by laboratory and employer
      1. All correspondence, contracts, agreements, proposed agreements, and similar materials provided to collective bargaining agent, professional organizations, or individuals related to drug use testing
      2. Sample forms related to chain of custody or other laboratory procedures supplied by laboratory to employer
      3. Kits: Sample or duplicate of any kit supplied by laboratory to employer or used by employer
      4. Package informational inserts prepared by test manufacturer which accompany tests used by laboratory or employer

D. Employer policies and procedures
   1. Employee contract (individual)
   2. Collective bargaining agreement
   3. Employee handbook
   4. Employer work rules (published or unpublished)
   5. Published notice of drug use testing policies and procedures
   6. If public employer—minutes of open meetings and copies of relevant materials discussed in meetings. If Federal employer—examine Freedom of Information Act
   7. Does the employer equate a positive test result with impairment[4]
   8. Is the employer's policy designed to punish on-the-job drug use or does it extend to off-duty use

E. Label attached to urine specimen container
   1. Affixed to urine container/lid
   2. Were labels preprinted for attachment to container

F. Invoice of samples transmitted to laboratory

G. Procedural manual used by lab personnel

IX. Laboratory and laboratory personnel

A. Laboratory
   1. Length of time in business; affiliation with other labs, hospitals, or health care providers
   2. Number of years engaged in drug use testing
   3. Number of clients which have retained laboratory for drug use testing
   4. Is the lab subject to regulation (state, federal, voluntary, involuntary)
   5. Has the lab been sued and was the suit related to testing procedures, qualifications of personnel, or any other reason which would offset the weight accorded the test results
   6. Has the lab been the subject of a federal or state inspection and, if so, what were the results and recommendations

B. Situs of Testing
   1. At lab
   2. At employee's work site
   3. At location designated by employer

C. Personnel
   1. Number of employees engaged in testing
   2. Background, education, and experience of each individual
   3. Assigned responsibilities including job description for each individual
   4. Employee reprimands, suspensions, or other adverse action
   5. Volume of tests run in set period of time
   6. Complaints filed by employees with employer concerning work load, quality control, or other circumstances which might affect test reliability

D. Laboratory director
   1. Background, training, experience
   2. Procedures for reviewing test results
   3. Method of communicating test results to employer
      a. oral

[4]Some employers equate a positive test for marijuana use with on-the-job impairment. The scientific literature indicates that, at present, there is no reliable scientific evidence and research that establishes or quantifies a correlation between blood concentrations and adverse effect or impairment (*JAMA*, Vol. 249, 18 Feb. 1983). See also, K. M. Dobowski, "Drug-Use Testing: Scientific Perspectives," *Nova Law Review*, Vol. II, Winter 1987.

b. written
c. both of above
4. Publications
5. Special research or research grants

X. Employees
A. Duration of employment
B. Employer
1. Public
2. Private
3. Other
C. Source of rights
1. Contract
2. Collective bargaining agreement
3. Employee handbook
4. Employee recruiting material
5. Employer policies and procedures
6. Administrative rules and regulations
7. State constitution and statutes
8. United States constitution and federal laws
9. State or federal administrative agency rules or regulations
10. State and federal decisional authority
D. Tests used to determine the presence or absence of certain drugs in the specimen

XI. Alternative explanations for positive test results
A. Accidental ingestion
B. Passive inhalation
C. Errors arising from screening test
D. Innocent positive (misidentification of specimen)
E. Explainable positive (medication, prescription drugs, cross-reactivity)

XII. Employers
A. Type of business of employer
B. Date of decision to engage in drug use testing
C. Notice to employees
1. Written
2. Oral
3. Both
D. Reason(s) for implementation of drug use testing program
E. Employees targeted for testing, that is, transportation employees, teachers, day crew, night crew, all employees
F. Types of tests selected by employer
1. Screening
2. Confirmatory
G. Laboratory selected by employer
1. Extent to which employer worked with laboratory in establishing drug use testing procedures
2. Extent to which employer deviated from recommendations of laboratory in establishment and administration of program

XIII. Transport of samples
A. Person responsible for transportation of samples
B. Does information regarding transport of samples appear in chain of custody records, laboratory log, or in other documents
C. Did any tampering occur during transit

D. What was time between pick-up and delivery of samples
E. Were there any irregularities that occurred in connection with pick-up, transport, or delivery
F. How were samples prepared for transport

XIV. Collection site procedures
A. Collection of specimen
1. Instructions to individuals being tested
2. Observation of person providing specimen
a. Direct observation
b. Indirect observation
3. Procedures designed to eliminate tampering with specimen
B. Use of chain of custody procedures
C. Labeling of specimen
D. Boxing of samples
E. Shipping of samples
F. Storage procedures used
1. Locked storage
2. Refrigeration
3. Duration of storage
G. Security procedures used
1. Access of specimen donors to boxes, specimens, labels, cups, storage area, and so on

Conclusion

There is little doubt that the area of drug testing has emerged as a battleground between employers and employees. The developing case law will continue to distinguish the rights that can be asserted by the employer and the expectation of privacy claimed by employees. To some, the notion of testing, like fingerprinting and traditional searches, represents a collision of values. Others contend that testing merely avoids the necessity of addressing problems of drug and alcohol abuse.

The next few years are sure to bring a stormy period of massive litigation, punctuated by legislative debate and legislative action on the state and national level. Testing, however, for many public and private employees appears to have taken its place with death and taxes—it is here to stay.

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