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DRUG TESTING OF EMPLOYEES  
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As the practice of screening employees for possible drug abuse has increased, so has the controversy surrounding the issue. Employers in both the public and private sectors, from the Federal Government to professional sports, arguing that the abuse of drugs by employees is having a deleterious effect in the workplace, have advocated the use of various tests, including urinalysis, to detect the use of drugs in their employees.

On the other hand, many employee organizations challenge this practice as a violation of the employees' civil liberties and also question the validity of the drug tests. The enclosed materials review the issue and highlight the concerns of both employers and employees.

Additional information on this topic, primarily in periodicals and newspapers, may be found in a local library through the use of periodical indexes, such as Readers' Guide to Periodical Literature, and various newspaper indexes.

Members of Congress may call CRS at 287-5700 for additional information on this topic. We hope this information is helpful.

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# Battling the Enemy Within

*Companies fight to drive illegal drugs out of the workplace*

*The night shift at the General Motors plant in Wentzville, Mo., was busy putting together Buick Park Avenues and Oldsmobile Regency 98s when ten policemen quietly entered the factory. Making their way along the assembly line, the officers clapped handcuffs on twelve workers. They had allegedly sold cocaine, hashish, marijuana and LSD with an estimated street value of \$250,000 to two young undercover agents who had been hired by GM to pose as assembly-line workers.*

*Alarmed by reports of widespread drug and alcohol use at its Laughlin, Nev., generating station, the Southern California Edison Co. organized its own raid. Corporate managers and security officers cut the personal padlocks off 400 employee lockers to rummage through the contents. They searched cars in the parking lot and even frisked a few workers. Seven employees were fired for possessing drugs or alcohol at work in violation of company rules.*

*Twenty Unocal employees were startled when company cars and vans converged on their remote oil-pumping station in Piru, Calif., and discharged a cordon of private security officers and drug-sniffing dogs to search the grounds. No drugs were found, but six workers were later suspended when urine tests demanded by the company showed traces of marijuana. The six were reinstated only after they agreed to submit to urinalysis regularly in the future.*

In the old days, an oilworker might have decked his boss for asking him to supply a urine sample, and workplace raids by company vigilantes, let alone police, would have been unthinkable. But in the old days, it was rare for someone to come to work stoned on drugs or for managers to have to worry about coke-heads in the office. Not anymore, and not just in isolated instances either. Illegal drugs have become so pervasive in the U.S. workplace that they are used in almost every industry, the daily companions of blue- and white-collar workers alike. Their presence on the job is sapping the energy, honesty and reliability of the American labor force even as competition from foreign companies is growing ever tougher.

Now U.S. employers have decided to strike back at the drug plague. In high-rise office towers and sprawling factory complexes, in bustling retail stores and remote warehouses, companies are cracking

down on workers who get high on the job. Supervisors are watching closely for tell-tale signs and confronting workers who seem impaired. Employees caught with drugs are often fired on the spot, and suspected users are urged to enter rehabilitation clinics. Hundreds of companies are setting up programs to combat drugs, providing psychiatric counseling for employees, resorting to urinalysis to identify us-

ers, and in a few cases going so far as to install hidden video cameras or hire undercover agents.

A measure of the inroads drugs have made on the U.S. workplace came last week when the President's Commission on Organized Crime took the extraordinary step of asking all U.S. companies to test their employees for drug use. In an initial report based on a 32-month



study, the commission also urged the Government not only to test its own workers but to withhold federal contracts from private firms that refuse to do the same. "Drug trafficking is the most serious organized-crime problem in the world today," said the commission, which argued that the Government and private companies can play a vital role in curbing demand for drugs.

The recommendations immediately stirred a fire storm of controversy. Said Representative Peter Rodino, a New Jersey Democrat who chairs the House Judiciary Committee: "Wholesale testing is unwarranted and raises serious civil liberty concerns." Agreed Democratic Representative Charles Schumer of New York: "Trying to stop organized crime's multi-million-dollar drug business by creating a police state in federal office buildings would be virtually ineffective and would create one crime to stop another."

But many business leaders have con-



cluded that the threat posed by drugs on the job can be answered only with tough measures. Dr. Michael Walsh, chief of clinical and behavioral pharmacology at the National Institute on Drug Abuse, notes that the number of corporations that ask him for advice on how to get drugs out of the workplace has increased dramatically in the past few months. Says he: "The momentum is very, very strong at this point."

And with good reason. The costs of drug abuse on the job are staggering. The consequences range from accidents and injuries to theft, bad decisions and ruined lives. According to the Research Triangle Institute, a respected North Carolina business-sponsored research organization, drug abuse cost the U.S. economy \$60 billion in 1983, or nearly 30% more than the \$47 billion estimated for 1980. Other studies have found that employees who use drugs are far less productive than their co-workers and miss ten or more times as many workdays. Drug abusers are three times as likely as nonusers to injure themselves or someone else. Moreover, addicts with expensive habits are much more likely to steal cash from a company safe, products from a warehouse or equipment from a factory.

Concern is greatest, of course, in industries where mistakes can cost lives. Since 1975, about 50 train accidents have been attributed to drug- or alcohol-impaired workers. In those mishaps, 37 people were killed, 80 were injured, and more than \$34 million worth of property was destroyed. In 1979, for instance, a Conrail employee was high on marijuana at the controls of a locomotive when he missed a stop signal and crashed into the rear of another train at Royersford, Pa. The accident killed two people and caused damages amounting to \$467,500.

In the airline industry, the code of pride and honor that has kept most pilots and air-traffic controllers sober over the years may be seriously eroding. In September 1984 a pilot for a major international airline called 800-COCAINE, a New Jersey-based hot line that provides treatment referral and information. He said that he had been up for three days straight snorting cocaine and that he was scheduled to fly a passenger jet to Europe that night. He was feeling exhausted and paranoid, he confided, but was sure he could stay awake and alert if he just kept taking drugs. "Call in sick and get some sleep," urged the hot-line counselor. The counselor, who never found out what the pilot finally decided to do, says that such calls are not unusual.

The National Transportation Safety Board attributed a fatal 1983 air accident to illegal drug abuse. Two crewmen died when a cargo flight crash-landed at Newark airport. Autopsies showed that the pilot had been smoking marijuana, possibly while flying. In an incident last March, a New York-based air-traffic controller who had been injecting three grams of cocaine daily at work cut a DC-10 jumbo jet

At the last moment, the smaller aircraft made an emergency landing.

Even the space program has not been immune to the drug plague. Dr. Howard Frankel, who was medical director of Rockwell's space shuttle division from 1981 until 1983, says that he treated employees who were hallucinating on the job, collapsing from cocaine overdoses and using marijuana, PCP, heroin and numerous other drugs while they worked. Frankel estimates that 20% to 25% of the Rockwell workers at the Palmdale, Calif., plant, the final assembly point for the four space shuttles, were high on the job from drugs, alcohol or both. During the construction of the spacecraft, police raided Rockwell's shuttle assembly plant in Downey, Calif., several times after undercover agents bought cocaine, heroin, methamphetamines and marijuana from employees. Nine workers were fired.

**N**o evidence suggests that Rockwell's drug situation had anything to do with the *Challenger* tragedy. The solid rocket booster that is suspected of causing the explosion was made by Chicago-based Morton Thiokol, and no reports of drug use among its employees have surfaced. Nonetheless, any drug abuse among production workers in the space program or the defense industry carries grave risks. Says Frankel: "In this kind of ultra-high-tech work, the guy who makes the little adjustments, the screw-on of parts, the bolter of nuts, is just as important as the project's chief engineer."

Besides fearing that stoned employees may do shoddy work on missiles and planes, defense industry executives are concerned about security. They fear that addicts on the payroll might sell defense secrets to support their habits. Moreover, because criminal narcotics-possession charges could lead to the loss of security clearances necessary for many jobs in the defense industry, drug abusers are extremely vulnerable to blackmail. Says R. Richard Heppe, the president of Lockheed California: "We do a lot of highly classified work here, and people with these problems are much higher security risks."

No one knows precisely how pervasive drug use on the job is. But there is no doubt that during the past couple of decades, illegal drugs have become deeply ingrained in American life. Federal experts estimate that between 10% and 23% of all U.S. workers use dangerous drugs on the job. Other research indicates that people who take drugs regularly, some 25% of the population according to Government calculations, are likely to use them to work or at least sometimes be on a high when they arrive at the workplace. In a 1985 study conducted by the 800-COCAINE counselors, 75% of those calling the hot line reported that they sometimes took coke while on the job, and 69% said they regularly worked under the influence of cocaine. One-fourth said they used cocaine at work every day.

mon drug in the workplace, but cocaine may now have become No. 1. According to estimates by the National Institute on Drug Abuse, the number of Americans who take marijuana at least occasionally declined between 1979 and 1982, the most recent years for which statistics are available, from 22 million to 20 million. During the same period, the ranks of cocaine users increased from 15 million to 22 million. The problem seems to be most prevalent among young adults. NIDA estimated last week that nearly two-thirds of the people now entering the work force have used illegal drugs and 44% have taken them during the past year.

**C**ocaine is an increasingly popular drug to use at work, partly because the intense high it generates often gives users the false feeling that they can do their jobs better and faster. Moreover, cocaine is easy to hide. It is generally snorted rather than smoked, and does not give off an odor as marijuana does. Users have devised ingenious ways of taking the drug right in front of their co-workers without being detected. Some, for example, buy squeeze-bottle medications for sinus congestion, empty out the medicine and refill the bottles with cocaine. Cocaine vaporizes at temperatures above 80°, so merely carrying it in a pocket keeps the container close to normal body temperature of 98.6° and the coke ready for sniffing.

In many offices, drugs are as easy to obtain as paper clips from the stock room. Some dealers provide messenger services to deliver cocaine and marijuana right to their customers' desks. In other cases, users send unwitting company messengers on "business" errands to pick up packages that actually contain narcotics.

Dangerous drugs can be found at every level of industry, from the shop floor to the executive suite. Says Naomi Behrman, a counselor for AT&T/Bell Labs: "You can no longer assume that because a person wears a three-piece suit and a necktie, you can rule out drug abuse."

In fact, many managers are in an excellent position to hide drug habits because they can close their office doors and delegate work to others. Company officers also travel frequently, making it easier to use narcotics on the sly. Chief executives who order up internal investigations of drug problems are often shocked when the trail leads to some of their most trusted aides. Says Special Agent George Miller of the Drug Enforcement Administration "Companies never think of drug use on the executive level. They always think it's on the assembly line."

Sometimes the chief is the culprit. Chairman Terence Fox of Iroquois Brands, the Greenwich, Conn.-based maker of Champale malt liquor, was arrested in November after being discovered in a hotel room with \$8,000 worth of cocaine. Last year Miller Brewing filed a \$19 million civil suit against Robert Landau Associates, a New York City sports-promotion firm that had gone into bank-



ruptcy proceedings in 1984. The brewer, a former client of Landau Associates, charged that President Robert Landau spent \$2 million of Miller's promotional money on cocaine, racehorses and other personal expenses. Landau has denied the allegations.

Though drug abuse is most likely to make the headlines when it involves Hollywood celebrities and sports stars, the problem is also epidemic among doctors, lawyers and other professionals in high-pressure, fast-paced work environments. In the high-tech firms of California's Silicon Valley, sudden wealth has created a thirst for instant gratification and expensive highs. One former employee at a computer company tells of being the office cocaine pusher for three years. Says he: "It was made to order. I had an instant clientele—hundreds of people who worked with me."

In the heady bull markets of the past two years, more than a few hot young brokers on Wall Street have stoked up on drugs for frenetic trading sessions. Steve, a stockbroker and recovering addict, snorted cocaine in his office, in men's rooms, even in elevators. "It woke me up and gave me strength," he recalls. "It made me feel like J.P. Morgan."

Up and down Madison Avenue, cocaine has become almost a currency in advertising agencies. Coke for models,

photographers and artists is buried in budgets. Copywriters use cocaine to jump-start their creative juices. Independent producers supply it to agency representatives on location. In a survey of 300 advertising directors conducted by *Advertising Age* magazine in August, 45 reported cases in which cocaine had been used as under-the-counter compensation. Sometimes, ad agency employees hire production companies to make commercials only if the firms offer bribes of cocaine.

But drug abuse is not just a by-product of life in the fast lane. Drugs are also used by multitudes of blue-collar workers to relieve the deadening boredom of menial jobs. Says Miriam Ingebritson, clinical director for a St. Louis-based consulting firm that provides drug-therapy services for IBM, the Cincinnati Reds and the City of St. Louis: "Frequently we find that it is not the exhilarating high that people are looking for, but rather to escape from tedium."

GM, Ford and other manufacturers with large blue-collar work forces have discovered that drug dealers offer virtually an alternative cafeteria service in their plants. Instead of meat loaf, macaroni and apple pie, the choices are marijuana, hashish, cocaine and amphetamines. For Cherry Electrical Products, a semiconductor and electrical-equipment manu-



facturer near Chicago, the seamy side of company life came to light in October 1984, when two employees were arrested late one evening for selling marijuana to an undercover policeman. President Peter Cherry then discovered that drugs were being peddled in the company's stock room. One woman employee with an unmanageably expensive habit had allegedly become a parking-lot prostitute during breaks. Within three weeks, 20 workers who were accused of taking or selling drugs quit or were fired. Says Cherry: "It

was like Pandora's box was opened. We were stunned."

Some workers get so freaked out on drugs that they become a menace to everyone around them. A meter reader for a Washington utility became crazed after taking PCP and ran from one backyard to another. He hid behind bushes and jumped out and screamed at frightened neighborhood residents until police arrested him. In New Jersey a dentist who injected himself with three syringes of cocaine every morning as he drove down the turnpike to work began to complain that the fillings he was putting into patients' mouths were talking to him. His partners quickly forced the dentist to sell his share of the practice.

Many professionals have ridden their drug habits to bankruptcy and homelessness. Bob, a Wall Street trader, was so hooked on cocaine that he lost his job and wound up eating out of garbage cans and living on the streets. David, an attorney in New Jersey, spent \$60,000 on cocaine in 1983 and frequently free-based cocaine in his office. Fearing that invisible people were watching him at all hours, he nailed shut the windows in his house and covered them with sheets, but still believed they were coming through the walls. Both men now regularly attend meetings of Cocaine Anonymous, a national self-help group patterned on the principles of Alcoholics Anonymous. While David is back on the job, many of the people he used to get high with were not so fortunate. Says he: "A lot of my old friends are dead."

Until recently, many companies have been slow to respond to their growing drug dilemmas. They did not realize how widespread the abuse was and had no idea how to combat it. Managers were not sure how to recognize the signs of drug use and were often afraid to confront workers who appeared to be high. Many executives doubted that the problem was serious enough to warrant a crackdown that might generate bad publicity.

But the smoking, snorting and dealing on the job eventually became so blatant and the results so tragic that companies could no longer afford to ignore what was

going on. New York-based Capital Cities/ABC woke up to its drug troubles in 1984 after an employee collapsed at work, and subsequently died, from a cocaine overdose. Shortly thereafter, Capital Cities, which later acquired ABC, discovered organized drug dealing in one of its divisions. Last year, according to Dr. Robert Wick, corporate medical director for American Airlines, a computer operator who was high on marijuana failed to load a crucial tape into a major airline's computer reservations system. Result: the system was out of service for some eight hours, costing the company about \$19 million. Says Wick: "That was an awfully expensive joint by anybody's standards."

Such revelations have broken down corporate resistance to taking a strong stand against drugs. Psychiatrist Robert DuPont, a former director of the National Institute on Drug Abuse who now helps companies set up antidrug programs, says that employers "have gone through a mental barrier that was blocking them before. What was that barrier? The barrier was that it was a private matter. The barrier was that it was not very important. The barrier was that there was not anything to be done about it anyhow. The barrier was that it was a societal problem and not a work-related problem. There was a whole series of barriers that kept the companies from moving, and they are all falling down."

Employee attitudes toward drugs are slowly changing as well. Workers have long been reluctant to turn in their colleagues for drug use. They have been afraid of ruining their co-workers' careers and of being ostracized for snitching. In addition, they could not be sure that management would believe them or back them up. But more and more employees are becoming fed up with working alongside people who are stoned. Says a news correspondent for a major New York City TV station: "After all, you work for days sometimes to make a story the best you can, and then some drug-abusing idiot pushes the wrong button when you're on the air. Why should I put up with that?"

Once companies acknowledge and

## Telltale Hair

**D**o cokeheads have hot hair?

The answer to that question holds a potential way out for employers who wish to test workers or job applicants for drug use but are reluctant to face the delicate task of asking for urine or blood samples. Not surprisingly, executives and assembly-line workers often balk at the indignity of testing. But people might object less to losing just a snippet of hair, particularly if it meant a less demeaning and more accurate method of drug screening. The question is relevant because scientists have discovered that human hair holds a permanent record of all chemicals that a person has taken.

Los Angeles Chemist Werner Baumgartner has developed a new drug test that utilizes radiation. When performed

on human hair, it reveals what drugs have been taken and, unlike blood or urine tests, shows when the chemicals were consumed.

Baumgartner and his partner, Psychopharmacologist Ronald Siegel, claim that the hair test is more reliable than urinalysis. The San Diego-based Navy Drug Rehabilitation Center has been using the test on an experimental basis since last December. At the same time, Baumgartner and Siegel are training technicians so that the test can be tried on a broader scale.

A fascinating sidelight of the research is that the test can be used on preserved hair samples from long-dead famous figures. Among samples that Baumgartner and Siegel have analyzed are locks belonging to John Keats, the 19th century poet. The test confirmed scholars' suspicions that the author of *Ode on a Grecian Urn* was an opium user.

confront the drug threat, their first task is to establish a consistent policy that is both firm and fair. Typically, companies decide to dismiss workers caught taking or selling drugs on the job but also offer a helping hand to users who voluntarily admit their problem.

To help put impaired workers on the road to rehabilitation, about 30% of the FORTUNE 500 largest industrial corporations have established in-house employee-assistance programs, commonly known as EAPs. Many of these programs were set up during the 1970s for workers suffering from alcoholism, and have since been expanded to include drug abusers. The motivation behind the EAPs has been economic as well as humanitarian. Says Drug Consultant Ingebritson: "It's much easier to help a person who has been on the job for nine years than it is to hire and train someone to replace him."

Mobil's drug-treatment program is fairly typical. Employees with a problem can call or stop by the medical departments at any of the oil company's facilities around the world. Supervisors who spot unusual behavior that is affecting job performance can encourage workers to contact an employee-assistance counselor. After initial medical examinations and counseling sessions, patients are generally referred to a hospital or outpatient drug clinic for treatment, which may take from four to six weeks. During that period the employees are given sick leave with pay, and their status is kept confidential. Company health-insurance benefits pay all the treatment costs. Once employees return to the job, they are allowed to attend follow-up counseling sessions during work hours. Says Dr. Joseph M. Cannella, Mobil's medical director: "We like to identify people, get them treated and back to work." He claims that Mobil's rehabilitation efforts have been 70% to 75% successful.

Many companies, including Capital Cities/ABC, Xerox and Dean Witter, have made it easier for employees to seek help by setting up nationwide hot lines with toll-free 800 numbers that workers and their families can call to get advice on drug problems. The service offers a guarantee of privacy to employees who are reluctant to approach their bosses or stop by medical departments. Once the drug user is on the phone, the hot-line counselor can encourage him to get help through an EAP or local clinical program.

While helping current employees to quit taking drugs, many companies are working to make sure that they do not take on any additional drug users. More and more firms are requiring job applicants to submit to new, sophisticated laboratory tests that can detect traces of narcotics in urine samples, and before long, companies may also be testing hair (see box).

The list of corporations that ask all job applicants to undergo urinalysis is like a roll call of the largest and most presti-

gious firms in the U.S. Among them: Exxon, IBM, Lockheed, Shearson Lehman, Federal Express, United Airlines, TWA, Hoffmann-La Roche, the New York Times. On March 1, Du Pont became the newest name on the list. And this spring, AT&T, which already tests applicants at plants where volatile chemicals are handled, will start screening all potential employees at its manufacturing facilities for drug use. About one-fourth of the FORTUNE 500 companies now screen applicants for drugs, and an additional 20% are expected to begin doing so this year.

**A**n increasing number of firms are testing not only applicants but also certain classes of current employees. Rockwell, for example, makes test pilots give periodic urine samples. Dozens of companies, including the Los Angeles Times, Southern Pacific railroad and Georgia Power, an electric utility, now demand that employees take drug tests if their supervisors think they may be impaired. All the major U.S. oil companies have instituted such a policy for workers on drilling rigs. Since last month, a Federal Railroad Administration regulation has required some 100,000 employees who operate U.S. railroads to undergo urinalysis whenever their supervisors think they may be high. This week a new regulation takes effect requiring workers to take a test when they have been involved in a serious accident.

Drug testing of all employees is still

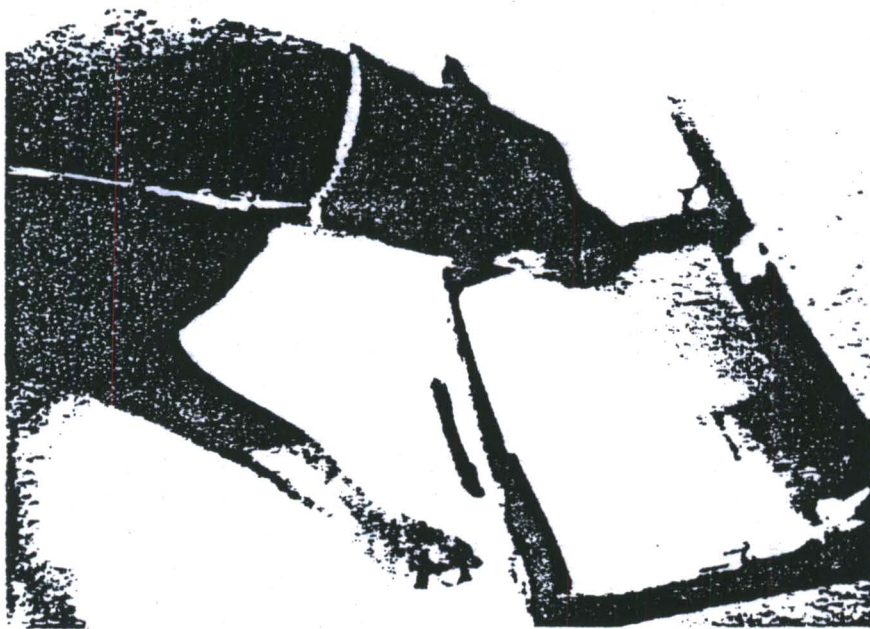
rare, but some organizations are considering that step, especially in professional sports. After the New England Patriots suffered the most humiliating Super Bowl defeat (46-10) in history last January, the team admitted that several of its key players had been using illegal drugs during the season. Coach Raymond Berry has asked all players to submit to random drug testing. Two weeks ago, Baseball Commissioner Peter Ueberroth suspended seven players for one year without pay for using and distributing drugs. To be reinstated, the players must give 10% of their 1986 salaries to drug-rehabilitation programs, contribute 100 hours of community service in each of the next two years and agree to drug testing on demand for the rest of their careers.

The largest employer to test all personnel is the U.S. military. Alarmed by rampant drug use among men and women in uniform, the Pentagon began widespread random testing in 1982, starting with the Army. At first, the program was developed so fast and handled so sloppily that it gave drug testing a bad name. Hundreds of soldiers claimed that they were falsely accused of being drug users because of inaccurate results.

In July 1984, the Army admitted that in tests of 60,000 soldiers, about half of the urine samples had been mishandled. In many cases, samples were mixed up in the lab, and service members received results from specimens that were not their own. Since then, the Pentagon has improved







procedures and extended the tests to all branches of the armed forces. It claims to have cut drug use by military personnel in half since 1980.

The most widely used new urine test, known as EMIT (for Enzyme Multiplied Immunoassay Test), is believed to be 97% accurate in the best of circumstances. But since laboratory workers often mishandle or accidentally contaminate the samples

during analysis, the rate of accuracy may be considerably less. Because of such doubts, few companies fire employees or refuse to hire applicants on the basis of only one test. If the first test indicates drug use, employers generally try to confirm that result with a second urinalysis using a different laboratory technique.

A few companies are waging a more active—and clandestine—war against

drugs. GM, for example, has used private undercover agents supervised by the police to make some 200 arrests at its plants within the past 18 months. In the sting operation at the Wentzville plant, the company was able to hire two young former narcotics agents unobtrusively when it added a second shift. Dressed in T shirts and jeans, they mingled easily with the assembly-line workers. During a six-month period they bought everything from cocaine to LSD from the plant's alleged pushers. Says Dr. Robert Wienck, GM's director of occupational safety and health: "We want any individual who is selling drugs in our plants to know that his days as a GM employee are numbered. We're not going to tolerate it." Last week Electronic Data Systems, a subsidiary of GM, began firing employees in the Detroit area who had failed drug-screening tests given to 104 security guards, clerks and secretaries in February.

Some firms are literally calling in the dogs. Canine detectives, trained to recognize the smell of marijuana and other drugs, have nosed around offshore oil platforms owned by Pennzoil, Mobil and Exxon. Atlanta's Alpha Academy of Dog Training supplies drug-sniffing German shepherds, springer spaniels and golden retrievers to corporate clients and law-enforcement agencies.

The corporate battle against drugs is a bonanza for dozens of small companies that provide the weapons. Private laboratories that perform drug tests, for example, are growing rapidly. So are security firms that supply undercover agents. Professional Law Enforcement, a five-year-old Dayton firm, has doubled its business in the past year. Says President William Taylor III: "Companies are starting to recognize that they have to attack the

## The Other Plague

As executives confront the scary phenomenon of drug use on the job, they cannot afford to forget about an older and even more prevalent problem: alcoholism among workers. Though drinking hard liquor is not as fashionable as it once was and Americans have cut their average consumption of alcohol by 4% since 1980, the number of people who are addicted to booze has increased by 8%, to 12 million, according to the National Institute on Alcohol Abuse and Alcoholism. More than any other ailment, alcoholism breeds absenteeism, high medical bills and reduced work quality. North Carolina's Research Triangle Institute estimates that alcoholism cost the U.S. economy \$117 billion in 1983, up 30% since 1980.

Today, though, physicians and counselors are increasingly encountering a different kind of alcoholic—one who uses both booze and drugs. Says Dr. Jules Trop, the administrator of the Addiction Treatment Center at Mount Sinai Medical Center in Miami Beach and himself a recovered cocaine addict: "A pure alcoholic is a rarity these days, just as a pure coke junkie is." Addicts who stick to alcohol alone are typically over 45, while younger people are more likely to use a combination of cocaine, marijuana and liquor. Dr. Joseph Pursch, medical director of CompCare, a chain of treatment

centers based in Irvine, Calif., points out that workers who are drunk on the job sometimes think that cocaine or some other stimulant will sober them up and help them perform better.

Many companies' employee-assistance programs combat alcoholism and drug abuse with similar methods of hospital care and psychiatric counseling. Says Peggy Carey, manager of New England Telephone's treatment program: "We treat addicts as addicts, no matter what the substance."

While alcoholism strikes janitors and corporate chiefs alike, executives can be the most difficult to deal with. They often wield such power in an organization that few people feel able or willing to challenge their performance. Says Dr. Gregory Collins, director of the alcohol and drug recovery program at the Cleveland Clinic: "Executives have very little accountability. They're very intimidating and don't come in [for treatment] until very late in the game."

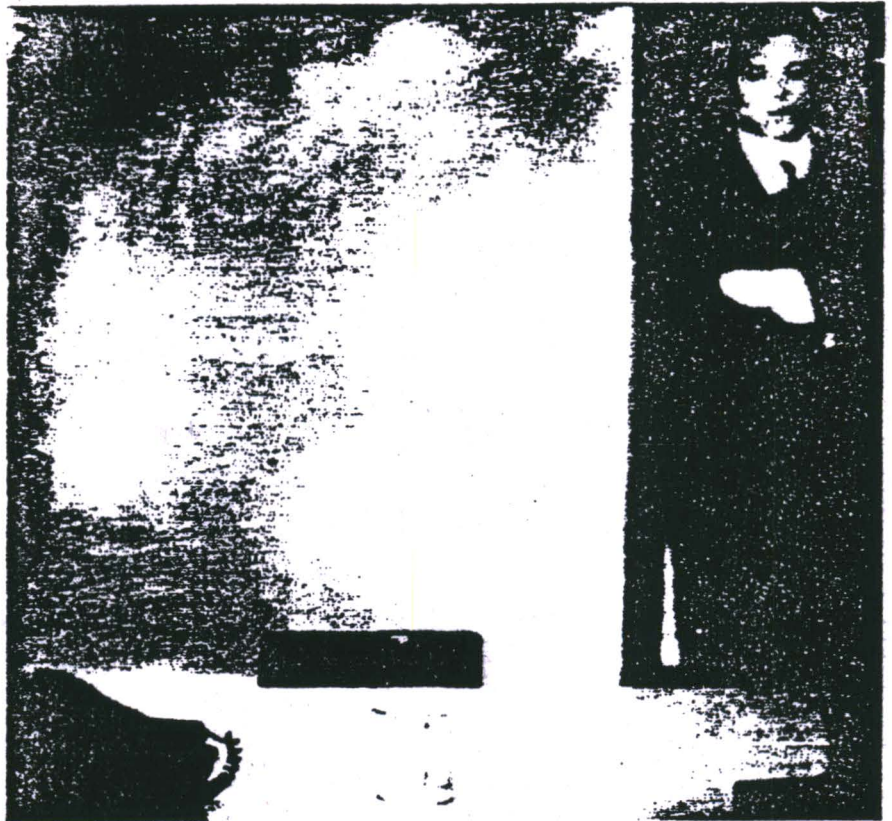
In contrast to drug use, drinking usually starts out as an innocent, relatively harmless social pastime. Only later, and not always, does it turn out to be a problem. While a certain stigma still attaches to drug use despite its wide popularity, society remains tolerant of drinking even after it has passed the moderate stage. Says J. Bennet Tate, director of Kaiser Aluminum's treatment program: "Alcohol is easy. It's acceptable. It's legal." That is why curbing alcoholism will never be a simple task.

problem in a different way. You can't send a standard security guard or a management person out there to handle a person dealing in drugs."

Because narcotics abuse spawns stealing, companies that specialize in investigating employee theft are much in demand. A Baltimore firm called Loss Management provides its clients with a national hot line and has solved cases with the help of office tipsters who report theft at their place of work. In one case, a clerk called the hot line when the invoices she was processing did not add up correctly. As it turned out, three top managers at the company were embezzling money to buy cocaine.

Though employee support for antidrug programs is growing, some workers feel that their companies are going too far. At the Kansas City *Star and Times*, two newspapers owned by Capital Cities/ABC, employees were stunned in January when management proposed to use narcotics-sniffing dogs as part of an experimental antidrug effort. Though newsroom wags passed around dog biscuits, most employees were in no mood to laugh. They felt that using the dogs would be an implicit accusation and an unwarranted and heavy-handed action. After heated staff protests, Capital Cities/ABC backed down and called off the experiment.

Much of the criticism of corporate antidrug efforts focuses on the growing use of urinalysis (see box). Opponents charge that urine tests are a particularly invasive and humiliating method of determining whether a worker has used drugs. Says Bus Driver Randy Kemp, whose employer, Seattle Metro, requires employees who appear to be impaired to submit blood and urine samples: "You've got to have a search warrant to search my



house. Well, my body is a lot more sacred than my home."

Some executives agree. Hewlett-Packard and McDonnell Douglas, for example, do not ask job applicants or employees to take drug tests. Says Hewlett-Packard Spokesman Gene Endicott: "It's an invasion of the employee's privacy."

Another objection to urinalysis is that companies are trying to control what

workers do in their private time as well as during working hours. Because the tests do not reveal when a drug was used, workers could be penalized or fired for what they do in the evening or at weekend parties. Workers' rights advocates maintain that corporate antidrug policies can be particularly unfair in the case of marijuana, which has been virtually decriminalized in some states and cities. Says Los

## Testing Testing

When it comes to broad-scale efforts to check out employee drug use, the toughest test of all may be the court test. Even some members of the President's Commission on Organized Crime were surprised at the commission's recommendation that tests be given to many employees of the U.S. and of private companies with federal contracts. Like the other 18 commissioners, Thomas McBride, associate dean of Stanford Law School, saw a draft of the report but not the staff-prepared final version. The language calling for broad testing was an effort to reconcile various suggestions from the commissioners. "I never would have approved it," McBride says.

Since the phenomenon of drug testing is relatively new, the legal limits are not yet clear. Public employees are protected by the Fourth and 14th Amendments' safeguards of privacy and due process. But, says Michigan Federal Judge Avern Cohn, if the tests are "job related or have something to do with job performance, then the courts are going to uphold them." As for private-sector employees, because the Constitution is concerned largely with dealings between citizens and government, its provisions do not apply to most relations between them and their employers. Even so, argues Berkeley Law School Dean Jesse Choper, it would be excessive "to invade the body, in mass testing, without any partic-

ular cause to believe that any particular individual is a user." Job seekers may be the least protected of all. Most authorities believe that companies may require pre-employment drug screening for every applicant.

Here and there rules on the leeway and limits are beginning to emerge for those on the job. Some union contracts define when workers may be tested or dismissed. A Greyhound mechanic in Detroit was twice fired after testing positive for marijuana, and twice reinstated by arbitrators—first because the procedure was error prone and not described to employees in advance, then because there was no indication that he was not doing his job adequately. In those cases that have come before them, courts have been looking closely at such issues as how reliable and how invasive a test is. For instance, to prevent cheating, witnesses sometimes must accompany those giving urine samples.

Several important cases are under way, notably a wrongful-dismissal suit brought against Southern Pacific by a computer-program designer. She was fired for refusing to submit to urinalysis ordered by the company last July for more than 200 randomly chosen employees in San Francisco. The uproar following that incident led the city to pass the nation's first ordinance barring employers from administering blood, urine or electroencephalogram tests at random. Legislation to restrict or regulate drug testing is being considered by Oregon, Maryland, Maine and California.

Angeles Labor Lawyer Glenn Rothner: "Termination for marijuana use, or worse, for simply having minute traces of marijuana in the body when tested is sentencing these employees to the equivalent of corporate capital punishment for an offense that would only merit a \$100 fine in California."

The reaction of organized labor to antidrug efforts has been mixed. Unions generally support corporate drug-rehabilitation programs, but opposition to urinalysis is growing. Says Douglas Maguire, director of the labor assistance program

middle of the factory. We're just asking people to be fit while they're on the job."

Because drug use by workers can result in shoddy, unsafe products and accidents in the workplace, executives argue, individual rights must be subordinated to the broader welfare of fellow employees and customers. "We're not on a witch hunt," says Personnel Manager John Hunt of Southern California Edison. "Our No. 1 concern here is safety. We also have a responsibility to our customers. Our meter readers go into people's homes." Independent experts share the executives'



for the Los Angeles County Federation of Labor, AFL-CIO: "Labor is not supporting testing in the workplace. As part of a physical exam for new employees, it is acceptable, but otherwise there are problems of violating civil rights." Some unions also fight against firings of workers with drug problems. Rockwell's Frankel quit as the company's medical director in 1983 partly because, he says, management repeatedly gave in to union demands that drug abusers be reinstated in their jobs.

Many executives are becoming increasingly impatient with the objections of labor leaders and civil libertarians. Says Peter Cherry of Cherry Electrical: "We have a right to say how you behave at the workplace. You don't bring a gun to work. You can't come to work naked. You're not allowed to yell 'Fire!' in the

concerns. Says Peter Bensinger, a former head of the Drug Enforcement Administration who is now a leading consultant on corporate drug problems: "Companies do have a right and responsibility to establish sound working conditions. We're talking about people and their safety, and our own individual rights to work in a safe environment." Company officials also point out that a strong stance against drugs is basically humanitarian because it ultimately benefits workers who use them as much as it does the firm.

Furthermore, the argument that what employees do in their own time is none of the company's business is being undermined by new evidence of the lingering effects of drug use. In November, researchers at the Stanford University School of Medicine and the Palo Alto Veterans Administration Medical Center

published the results of a study on how marijuana use affects the ability of pilots to land planes. The pilots in the experiment smoked marijuana and then tested their skills in flight simulators. A full day after taking the drug, long after any sensation of being high had passed, the pilots were still swerving dangerously upon landing. One "crashed" his plane beside the runway. The researchers, who are now expanding the study, concluded that marijuana users may have difficulty performing complex mechanical tasks or doing work that demands quick reactions for 24 hours after smoking the drug.

**W**hile it is still too early to measure the success of the corporate war against drugs, some companies can already cite impressive results. Commonwealth Edison, a Chicago-based electric utility, started an antidrug education and rehabilitation program in 1982, offering treatment to users who came forward and threatening to fire those caught with drugs at work. The company also gives urine tests to job applicants. Since the program started, absenteeism is down 25%, and medical claims, which had been rising steadily at an average rate of 23% annually, rose only 6% last year. Moreover, the company had fewer on-the-job accidents in 1983 than in any previous year. Says Vice President J. Patrick Sanders: "I don't think that all of the improvements are directly related to the drug program. But it's got to be more than coincidental."

The corporate campaign against drugs may do more, however, than create safer, more productive workplaces. It may also begin to stem the plague of drug use in America. As more companies require job applicants to prove that they are drug free, it will become increasingly difficult to use drugs and make a living. The economic deterrent may begin to succeed where the legal deterrent has failed. Says Walsh of the National Institute on Drug Abuse: "We feel that if Big Business continues as it has in the last year to develop more and more stringent kinds of policies, it eventually will reduce the demand for illicit substances. It may be very effective in changing the way people view drug taking in this country."

Many executives believe that they can make a difference far beyond the office doors or the factory gates by insisting that their employees stay away from drugs. Says Capital Cities/ABC President Daniel Burke: "I consider drugs damn dangerous. I believe that my responsibility is such that my position against drugs has to be clearly understood by everyone who works under my direction." If companies can help employees kick the drug habit, the effort will pay dividends to business—and society—that cannot be measured in dollars and cents.

—By Janice Castro.  
Reported by Jonathan Beatty/Los Angeles, Barbara Dolan/Chicago, and Jeanne McDowell/New York

# THE RUCKUS OVER MEDICAL TESTING

More companies than ever are screening present and prospective workers for drug use, and genetic tests are on the way. Civil libertarians are screaming, and some employees have sued. A question too often overlooked: Are the tests reliable? ■ *by Fern Schumer Chapman*

**E**VER SINCE the dawn of so-called scientific management, employers in pursuit of the ideal worker have subjected present and prospective employees to tests. In the past, most of these measures have attempted to get at an individual's psychology, broadly defined—pen-and-paper tests to ascertain intelligence or

attitude, handwriting samples to probe character, lie-detector tests to determine honesty. In contrast, a new and increasingly popular generation of tests focuses instead on the subject's body. While on their face these high-tech diagnostic procedures might seem more scientific, as it turns out they are just as mired in controversy as their predeces-

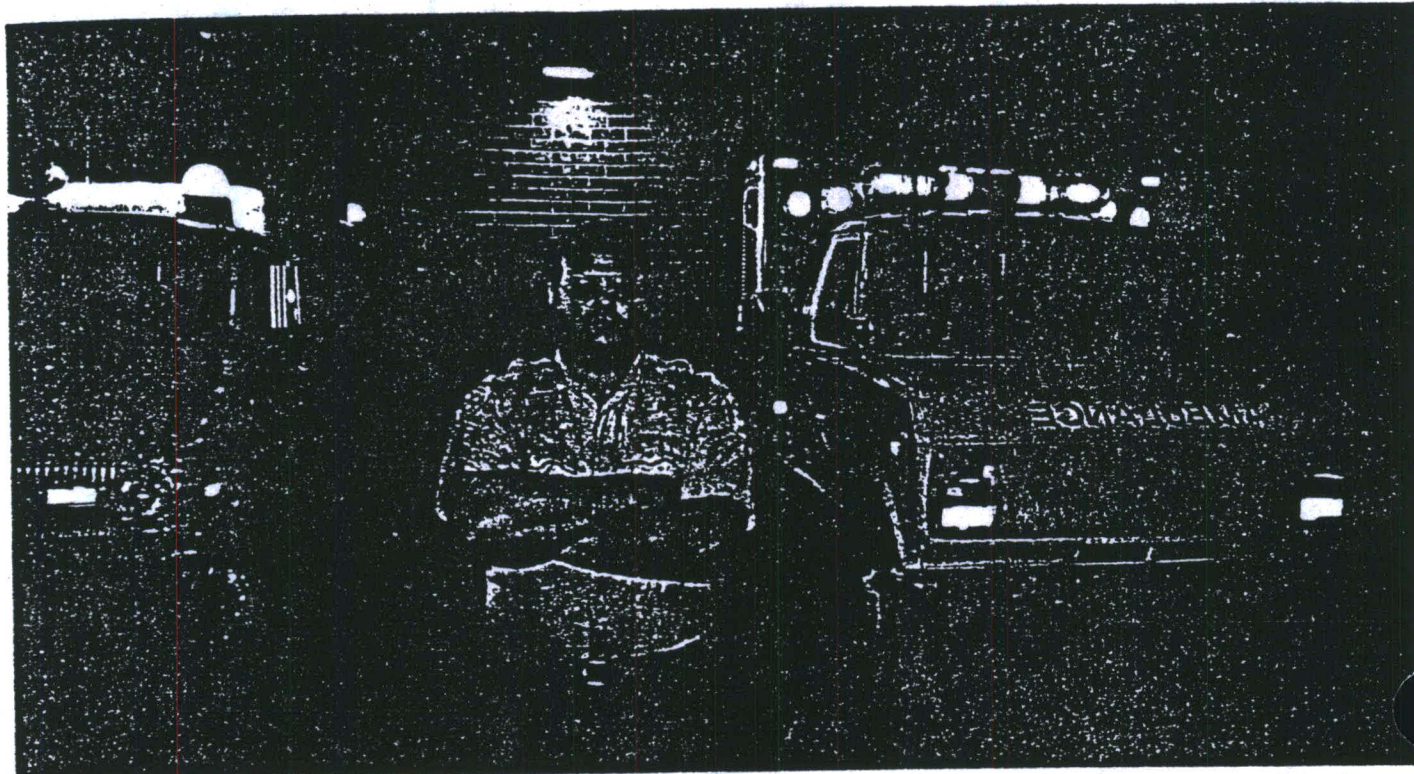
sors. A few of the questions being raised: Are the tests reliable? Are the results relevant to job performance? And—perhaps the knottiest issue—do they violate an individual's right to privacy?

The testing of a person's blood and urine reveals hundreds of details about his private life—his medical history, which diseases



Brave new world? A technician prepares a blood sample for genetic screening by Omnimax, a Philadelphia company pioneering new medical tests.

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**Casey Triblo**, who now works for a private ambulance company, lost his Detroit city job because of a drug test he claims was erroneous. He's suing.

he's susceptible to, what drugs he takes, even what he eats and drinks. From an ounce of blood, sophisticated screening techniques can determine, for example, whether someone has had venereal disease, epilepsy, or schizophrenia, and whether he is predisposed to heart attacks or sickle-cell anemia.

Testing for drug use presents the most obvious case of the collision between technology and privacy. Nearly 25% of the FORTUNE 500 corporations now do routine urinalysis on employees and job applicants to try to detect illegal drugs, vs. just 10% three years ago. The use of other tests like genetic screening, in which scientists analyze blood samples to identify genes linked to certain illnesses, is likely to increase as the technology improves. The extent to which corporate America adopts these new measures will be affected by the current debate on drug screening.

Today some companies conduct tests for drug use as part of the physical required for employment, but without telling applicants that they'll be screened for drugs. If the test is positive, most companies simply don't offer that candidate a job. Some corporations allow applicants to retest within a certain period of time. Still others randomly test employees, including those who have shown no

RESEARCH ASSOCIATE Susan Caminiti

signs of impairment in the workplace.

Many corporate leaders think the drug problem justifies vigorous preventive measures. Peter B. Bensinger, former head of the Federal Drug Enforcement Administration and now president of a firm that counsels companies on dealing with drug abuse, claims, "More than 15 million working Americans use marijuana and at least three million use cocaine." Concern about employee drug abuse has spurred IBM, American Airlines, Storer Communications, and many others to require all job applicants to pass a urinalysis test for marijuana and cocaine.

**D**R. WILLIAM HSIAO, professor at the Harvard School of Public Health, defends the practice. "Why should the social and economic burden of drug users be imposed on corporations?" he asks. "They must compete and make a profit. If one corporation screens out drug users, it will have a lower accident rate and greater productivity, while a company that doesn't screen will be out of business." Jerry Fields, director of safety and health at Boise Cascade, which screens its job applicants for drugs, observes, "We have a responsibility to stockholders and employees to provide the best and safest working environment. With someone using drugs, there is

less productivity, less creativity. I don't think we can legislate morality, but we can put together the best team possible."

To critics, though, putting together the best team possible can become a witch hunt. "I'm not a Communist," says Dr. Arthur McBay, head toxicologist in North Carolina's office of the chief medical examiner. "But I find it hard to criticize Communist countries or totalitarian states when I see the kinds of things going on here." The skeptics argue that employers are presuming applicants and employees guilty until proved innocent. "Mandatory urinalysis is an invasion of privacy that flies in the face of traditional U.S. values," says Norma Rollins, director of the privacy project for the New York Civil Liberties Union. "A fair program should focus on those individuals who exhibit symptoms of drug dependence on the job, rather than forcing tests on thousands of innocent people who will capitulate under the threat of imminent unemployment." Retorts Bensinger: "Employees give urine samples freely. No one is sticking a catheter in their bladder. This is not involuntary."

Civil libertarians may object, but the law generally allows employers to fire employees at any time for any reason unless the employment contract says otherwise, or unless specific statutes, such as civil rights laws, re-

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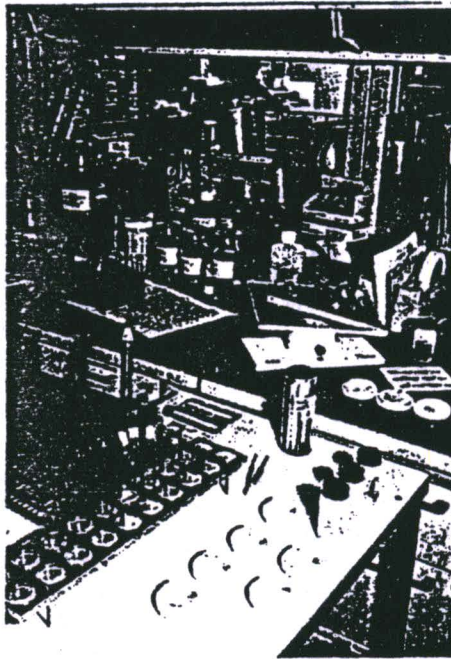
strict the prerogative. Similarly, the right to privacy as a legal doctrine usually constrains only government action, not corporate policies. "So the government can't take medical specimens," explains David Vaughn, a Washington lawyer who specializes in labor arbitration. "But that same protection doesn't extend to private-sector employees." The only legal protection a drug-dependent employee has is the Federal Rehabilitation Act and similar state laws that prohibit dismissal of workers for drug or alcohol addiction—unless their work is deficient. Not all states have such laws; the federal law affects only those companies that do business with the government.

Some aspects of the law seem to be changing in the employee's favor. John Larkin Thompson, president of Blue Shield of Massachusetts, fired 24 workers who were using drugs on the job last year, but decided not to initiate a screening program for applicants or employees. "Employers have a legitimate interest in determining which employees can perform their jobs," he says, "but you can't put an unreasonable requirement on employ-

ees unrelated to the nature of the job itself. The Xerox obesity case is a good example of that." In that case Catherine McDermott, a 67-year-old New York woman, sued Xerox Corp. for withdrawing a job offer when it learned that she was nearly 100 pounds overweight. New York State's highest court recently ruled in McDermott's favor, arguing that employers unwilling to hire seriously overweight people must show that those people are unable to perform assigned tasks.

What may be the most neglected question in the controversy is whether drug screening makes business sense—whether the costs and liabilities outweigh the benefits. Although Bensinger has cited numbers on the costs to industry of drug use—he estimates it runs over \$25 billion a year—those figures rely on a lot of guesswork. Pinning down the cost more precisely is almost impossible.

Applicants and employees who don't use drugs may resent the testing, even refusing to work for a company that screens. When Baseball Commissioner Peter Ueberroth recently announced his intention to test all the game's employees except players—their



From a urine sample, Syva Co.'s drug-testing apparatus can detect opiates, cocaine, marijuana, alcohol, and Valium.

contract forbids it—Boston Red Sox pitcher Bob Stanley told a reporter, "I don't take drugs, and I don't believe I have to piss in a bottle to prove I don't."

Identifying drug users also entails legal risks for a company. "If a corporation is going to label someone a drug user," says Roger Winthrop, director of the Alternative Resource Center, a public policy consulting firm in Lansing, Michigan, "it better be right. It better be able to prove it in court or it can face some hefty legal damages."

The root of the problem: the tests, at least the ones companies can currently afford to use in volume, are highly fallible. Dr. David Greenblatt, chief of clinical pharmacology at Tufts New England Medical Center, says "false positives"—which indicate a person is taking a drug when he really isn't—can exceed 25% for many types of tests. Chemicals in the body, like caffeine, cough syrup, or antiasthmatic medication, can throw off the findings. "The tests are unreliable," he says. Syva Co. of Palo Alto, California, a manufacturer of drug-testing apparatus, claims that its products are accurate at least 95% of the time, but stresses that it's important to confirm the tests with still more tests.

The Centers for Disease Control (CDC) discovered recently that companies often treat confirmation as a dispensable luxury. "It costs less than \$5 to do the initial screen and another \$20 to \$50 for the confirmation," explains Dr. Joe Boone, chief of the CDC's clinical chemistry and toxicology section. "A lot of labs just do the initial screen to save money." The CDC found that some labs testing for drugs had a false-positive error rate of up to 66%. Some labs gave false-negative results—indicating that a person is not taking a drug when he really is—100% of the time when testing for certain drugs. "If these labs would have dumped the samples down the sink or tossed a coin," Boone says, "they would have come up with the same reliability in their test results."

CASEY TRIBLO of Brighton, Michigan, claims to be one of the hundreds of victims of this erratic system. Triblo, 31, is suing the city of Detroit and Quality Clinical Laboratories for about \$3 million because he lost his job as an emergency medical technician with the city fire department in 1981 as the result of a series of drug tests. Triblo admits that he smoked marijuana before the city hired him. Two tests taken during his pre-employment physical came out positive for marijuana. But, he says, once he learned he was going to be hired, he stopped. He was warned that if he failed a third test, he would be discharged. The third test, performed after he got the job, was also positive and he was dismissed. Triblo claims he had not smoked for 45 days before the third test and had received a negative result on a test done at another lab. In his suit, which will be tried in Wayne County circuit court, he asserts that Quality Clinical Laboratories failed to confirm the test.

"When I got the negative results, I knew a mistake had been made," says Triblo. Since 1982 he has worked for a private ambulance company, now at \$3.70 an hour. If he worked for the city, he'd be getting over \$9 an hour. "I just want my job back," he laments.

As medical screening spreads beyond drug abuse, the courts are likely to see more cases that weigh the employer's right to know against the employee's right to privacy. Companies would probably welcome, for example, a reliable screen for acquired immune deficiency syndrome (AIDS), since the disease is so frightening and the cost of treatment—some of which the company might end up bearing—so high. Mark A. Rothstein

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in his book *Medical Screening of Workers* reports that without such a screen, corporations have dismissed homosexual men who had fever and weight loss because these symptoms often indicate AIDS.

The only mass-produced test available determines whether an individual has the antibodies to the AIDS virus—indicating only that he's been exposed to the disease, not that he has it. And that test, while reasonably priced, has a clearly unreliable false-positive rate of 67%. AIDS screening raises some of the same questions as drug screening. Since AIDS is largely a disease of homosexual men, some see it as a disease of choice similar to a drug habit. Dr. Herbert Sherman, at the Harvard School of Public Health, summarizes the dilemma by asking, "Should a corporation be responsible for self-destructive behavior?" But others argue that homosexuality is not a matter of choice but an innate characteristic and, therefore, that AIDS is not a self-inflicted disease comparable to a drug habit.

Genetic tests, which screen for physiological rather than behavioral aberrations, are

also extremely unreliable, and few companies use them. The most recent congressional survey of the nation's largest corporations, done in 1982, found that only 23 companies had tried genetic testing in the prior decade. But the market for genetic screening will expand. Omnimax Inc. of Philadelphia claims it is developing a more reliable test to determine an individual's general susceptibility to illness in the workplace. The screen, which could be available as early as 1987, will cost about \$150 per employee.

This should increase pressure on companies to use genetic tests. Such tests can in effect reveal a family history of, say, cancer—signaling that the individual is more likely to contract that disease than other workers. Companies fear that eventually they may be held negligent if they fail to conduct such tests and assign genetically unsuited employees to high-risk jobs. But they also worry that use of the tests could leave them open to charges of discrimination.

Since certain genetic traits are particular to race or sex, discrimination on the basis of test findings could result. For example, Du Pont claims that in 1972 it began administering tests for the sickle-cell trait at the request of black employees in Wilmington,

Delaware. But the *New York Times* subsequently reported that in interviewing Du Pont officials, it got conflicting accounts of the reason for the testing. One account implied the tests were used to make hiring decisions. The newspaper reported that individuals with the sickle-cell-anemia trait were not hired for certain jobs. In addition the tests were offered only to blacks, even though Mediterranean Caucasians, including Greeks and Italians, also can carry the sickle-cell-anemia gene. Du Pont, which still maintains it never used the test in hiring decisions, continues to offer the screening to black applicants who want it.

**J**OHN BAILAR, one of Hsiao's colleagues at the Harvard School of Public Health, argues that the inevitable outcome of genetic screening will be "the employment of the fittest," where only the most physically and mentally sound people will be able to find jobs. "That's scary," he says. Dr. Robert Wiencek, General Motors director of occupational safety and health, agrees: "It's up to the company to control what workers are exposed to in the workplace rather than hire people who can stand specific exposure levels. It's the employer's

## SCREENING FOR PROFIT

■ When big corporations think of screening for illegal drugs, they rightly think of the potential problems. When Diagnostic Dimensions Inc. or Psychiatric Diagnostic Laboratories of America (PDLA) think of screening, they think of profits. PDLA is owned by Chesebrough-Pond's; Diagnostic Dimensions is a joint venture of Hoffmann-La Roche and Development Dimensions International, a management-training company in Pittsburgh. The two New Jersey-based operations not only process urinalysis tests for corporations but also explain how to handle the personnel and legal aspects of drug screening. They are probably the largest players in an industry less than ten years old. "I have no doubt this is going to be big, big business," says Gerard A. Marini, president of Diagnostic Dimensions. J. Lloyd Johnson Associates, a consulting group in Chicago, projects that the demand for drug screening could reach 2.5 million tests this year. That would put annual revenues for the industry between \$50 million and \$100 million for tests alone.

Corporate counseling and education should generate impressive numbers as well: A specialist in the field, Washington lawyer Robert T. Angarola says flatly: "If a company gets into drug screening without any kind of assistance program, it is asking for trouble." When a corporation faces a lawsuit from a job applicant who challenges test results, PDLA and Diagnostic Dimensions will go into court with the client to back up test results. Many transportation, energy, and food companies have been sold on the value of such services. That roster can only grow, asserts Dr. Mark Gold, one of PDLA's founders, as corporations realize that "drug screening is not just collecting urine."

responsibility not to select out the genetically strong and let the person with certain genetic traits be unemployed."

Although no federal laws deal with genetic screening, several states are taking action. Screening for the sickle-cell trait in the hiring process is prohibited in Florida, Louisiana, and North Carolina. New Jersey forbids discrimination based on a person's "atypical" genetic traits.

Who then is to decide whether an employee with a high risk of susceptibility to illness in a workplace will work in that environment—the employee or the employer? "Some people will want to keep their job even if it will kill them," says Philip Lipetz, an Omnimax director. Adds Stephen Wear, professor at the Medical School of the State University of New York in Buffalo, "A candidate with some genetic condition might be told not to take a position for his own good. There the employer might be looked upon as being paternalistic, and the employee might then say he's being discriminated against." Concludes Frances Miller, professor of law at Boston University, "Companies are damned if they do and damned if they don't." That's not likely to change anytime soon. E

# Test employees for drug use?

Interview with Peter Bensinger, former head of the Drug Enforcement Administration

## PRO

**Q** Mr. Bensinger, the President's Commission on Organized Crime has suggested that employers should consider testing their employees for drug use. Why do you favor the idea?

They should do it in the interest of safety, in the interest of health and in the interest of increased productivity.

As a result of drug testing in American industry, the number of job-related accidents is beginning to go down. Absenteeism is decreasing. Productivity is rising, and company medical costs are leveling off. It's saving money. It's saving lives.

**Q** How does drug testing accomplish that?

Drug testing in and of itself is no magic wand. But it is a clear signal that the company is serious about addressing the hazards caused by drugs. Drug testing used for pre-employment purposes, for example, sends a message to applicants and existing employees that people who are already in violation of a company policy will not be hired.

**Q** Do employers have the right to do such testing?

Employers have a principal responsibility to have a safe work environment. Drug testing is a means to provide a safer workplace.

**Q** It's not an invasion of privacy?

No. Drug testing is a means by which employers can insure that certain conditions of work are met. If the employees or applicants don't want to take the drug test, they don't have to. By refusing, they remove themselves from assignment or employment.

**Q** Is it fair for employers to fire employees or reject job applicants for refusing to submit to the testing?

Yes, if employers make it clear from the outset just what their company's policy is on drugs. I don't think it's unreasonable at all.

**Q** Aren't these tests frequently unreliable?

Drug testing is accurate and reliable. The testing procedures in America are excellent. Reliability can be questioned if improper procedures or labs are selected. But companies are taking the time and the trouble to make sure they do have appropriate procedures—and double-check test results.

**Q** Shouldn't employees be judged solely on the basis of their performance, and not according to whether they took a drug two or three days ago when they weren't even at work?

Drugs affect people long after they're taken. People who take a drug on a Saturday or Sunday night and then go to work on a Monday and believe they're perfectly fine are operating under a delusion. They're going to bring the aftereffects of that drug to the workplace whether they think so or not. Employers should not have to wait until an accident happens.

**YES** - It should be done "in the interest of safety, health and increased productivity"



LEE SALZBERG FOR USNEWS

## CON

Interview with Ira Glasser, executive director, American Civil Liberties Union

**Q** Mr. Glasser, why do you oppose employers' testing job applicants and employees for drug use?

Because it is unfair to subject the innocent and the guilty alike to intrusive bodily searches in order to find those few who may be using chemical substances in a way that impairs job performance.

The tradition in America is that you don't hang them all to get the guilty. You can search people. You can subject them to invasions of their privacy, but only if you have some reason to believe a specific individual is committing an offense.

**Q** The President's Commission on Organized Crime argues that drug tests of workers are necessary to reduce the market for illicit drugs, which it sees as the lifeblood of organized crime. How do you respond?

Well, the notion that we are going to do something about organized crime by invading the rights of millions, maybe tens

of millions, of innocent workers who have never used drugs and are not even suspected of using drugs, is absurd. I think I share Congresswoman Pat Schroeder's view that if there were a prize given for the most idiotic recommendation by a presidential commission for the last decade, this one would surely be the winner.

**NO** - It's tradition in America that "you don't hang them all to get the guilty"



RENE PEREZ FOR USNEWS

**Q** Don't employers have a responsibility to make the workplace as safe as possible? Wouldn't drug testing be a valuable tool in accomplishing that?

Employers do have that responsibility but not the authority to regulate or survey what their employees are doing off the job. If there is evidence that a person is drinking on the job or using drugs on the job, that person can be legitimately fired. But such evidence is not going to be found through these drug tests. The tests are fairly unreliable, unspecific about what drugs were used and incapable of determining when they were used. They cannot determine things such as impairment of performance or impairment of ability or safety.

**Q** What about drug testing for workers whose jobs directly affect public safety, such as airline pilots, train crews, workers who have access to sensitive areas in nuclear-power plants? Shouldn't they be held to a different standard?

Yes. It is fair to say that people who hold the lives of others in their hands ought to be held to a stricter standard. Especially when you're dealing with dangerous occupations, a person can be legitimately subjected to various kinds of testing if there is probable cause to believe the person is using these sorts of substances. But if there is no objective evidence that an individual is performing the job badly or is behaving erratically or using substances in that way, it seems to me grossly unfair to be subjected to testing.



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DRUG TESTING AND URINALYSIS IN THE WORKPLACE: LEGAL ASPECTS

M. Maureen Murphy  
Vincent E. Treacy  
Legislative Attorneys  
American Law Division  
April 16, 1986

## DRUG TESTING AND URINALYSIS IN THE WORKPLACE: LEGAL ASPECTS

### I. INTRODUCTION

The sudden, increased attention to the problems of drug abuse in the workplace has given rise to numerous questions concerning the legality of employer screening programs for drug use among employees. The legal questions affect both public and private sector employees, and the applicable laws and court decisions have arisen at both the federal and state level. Because of the novelty and complexity of the legal issues involved, there has yet to emerge a consensus on the proper approach to be taken by employers, employees, and governmental officials. This report presents a brief overview of the general legal principles most likely to be applied in this developing area of the law.

### II. PUBLIC SECTOR EMPLOYEES

#### 1. Constitutional Rights

Because the federal constitution applies to governmental action, rather than purely private action, its protections are implicated in any urinalysis testing program of government employees, both federal and state.

##### a. Fourth Amendment

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures. The courts have ruled that extraction of bodily fluids involves a search within the meaning of this amendment.

Schmerber v. California, 384 U.S. 757 (1966) (blood); McDonnell v. Hunter, 612 F. Supp. 1122 (S.D. Io. 1985) (urine). Generally, when the government seeks to conduct a search, a warrant is required. There are, however, unusual circumstances that permit warrantless searches. One such situation involves consent; but for the search to be valid there must be a showing that the consent was voluntarily given and that the subject of the search was aware of the possible choices. Johnson v. United States, 333 U.S. 10 (1943); Schneekloth v. Bustamonte, 412 U.S. 218 (1973).

One court has held that a consent form signed by government employees authorizing urinalysis testing was inadequate to meet this standard. McDonnell v. Hunter, 612 F. Supp. 1122. Another exception permits warrantless searches of heavily regulated industries. Although one court has applied this test to uphold state mandated urinalysis testing of jockeys, Shoemaker v. Handel 608 F. Supp. 1151 (D.N.J. 1985), it is possible the Supreme Court would be unwilling to extend the heavily regulated industry exception to the warrant clause much beyond the industries already included in this exception; guns (United States v. Biswell, 406 U.S. 311 (1972) and liquor (Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970)).

There are, however, two lines of cases suggesting that requiring government employees to submit to urinalysis tests at the risk of disciplinary action might be upheld as comporting with the Constitution: the first line of cases upholding state laws that require drivers to submit to blood alcohol or breathalyzer tests if they are suspected of driving while under the influence of alcohol (see Mackey v. Montrym, 443 U.S. 1 (1979)) and the second line of cases permitting the government as employer to conduct searches of employee lockers and other personal areas for purposes related to job per-

formance. United States v. Collins, 349 F. 2d 863 (2d Cir. 1965), cert. denied, 383 U.S. 960 (1966) (custom officer's locker on suspicion of pilfering). One requirement of these cases is that the evidence sought must not be related to a suspicion of criminal activity or an intent to bring a criminal prosecution. United States v. Hagarty, 388 F. 2d 713 (7th Cir. 1968) (wiretap used in a perjury trial). If either of these two rationales are used, it is possible that the courts will require, as they have in these lines of cases, some measure of suspicion or cause focusing on an individual in order to justify the urinalysis requirement.

While there are presently too few cases from which to generalize, one might say that some justification amounting to reasonableness or reasonable suspicion seems to be the standard that the courts have used in validating urinalysis testing of government employees. In Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985), the court upheld a city's requiring sewer and electrical workers (whose jobs involved safety concerns) suspected of using drugs on the job to submit to testing under pain of dismissal. The decision was based on the line of cases permitting government to conduct warrantless searches of its employees for performance related investigations. In Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F. 2d 1264 (7th Cir. 1976), cert. denied, 429 U.S. 1029 (1976), the court upheld a transit company rule requiring bus drivers to submit to blood and urine tests after being involved in an accident or being suspected of being intoxicated or under the influence of drugs. According to the court, the test under the Fourth Amendment is reasonableness, and the city's "paramount" interest in protecting public

safety overrides whatever expectation of privacy employees in that situation have. Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F. 2d 1264, 1267. Although the court in McDonnell v. Hunter, 612 F. Supp. 1122, ruled against the state prison's program of requiring prison employees to sign consent forms permitting various kinds of warrantless searches including urinalysis screening for drugs, its reasoning would permit testing of employees upon whom reasonable suspicion drawn from specific facts focused. This case also rejected the state's argument resting on the consent forms signed by its employees, generally prior to being hired, finding that such a procedure was not sufficiently voluntary to waive a constitutional right.

Not only are there too few of these cases from which to draw meaningful generalizations concerning what tests the courts will require of government urinalysis testing programs of employees, none of the cases actually involved wide-scale random urinalysis testing <sup>1/</sup> as seems to be contemplated by the recommendations of the President's Commission on Organized Crime Final Report. The one instance of a government-mandated random drug testing program that has been upheld by the courts is that conducted by the Defense Department among the uniformed services as mandated by Pub. L. 92-129, 85 Stat. 348 (1971). The statute had required the Secretary of Defense to begin a program for drug dependent members of the Armed Forces. The program established under the law identified drug abusers, prescribed medical treatment and follow-up supervision, permitted discharge of those failing the rehabilitative program, and developed

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<sup>1/</sup> Although McDonnell v. Hunter, 612 F. Supp. 1122 (S.D. Ia. 1985), involved regulations that permitted random testing, there was evidence that random tests were not conducted and that as a practical matter tests were conducted only upon articulable suspicion of drug or alcohol impairment.

evidence that could be used in court martials. Nonetheless, the court upheld the program and its intrusion into Fourth Amendment areas on the basis of a reasonableness standard, drawing an analogy with administrative searches of closely regulated industries as approved by the Supreme Court in Camara v. Municipal Court, 387 U.S. 528 U.S. 523 (1976).

Whether a government-wide urinalysis program could meet this standard is problematic. There are considerable distinctions between the military and the civil service. Readiness and obedience are the canons of the military profession, as is the prospect of being called to duty anytime. Civilian employees are not subject to such rigors, nor are all of their tasks equally vital to the nation's security. On the other hand, the possibility that drug use is so great in the United States that drastic measures must be undertaken may provide weighty arguments toward eliminating any users from the government employ as inconsistent with the massive efforts against the drug epidemic. Congressional findings of this nature attached to a statute requiring drug testing might sway the courts into considering such random testing reasonable under the circumstances.

The cases involving the extraction of bodily fluids require that the tests be administered in a manner that comports with due process, or in a manner that does not excessively intrude upon the subject. Thus, in Schmerber v. California, 384 U.S. 757 (1966), the Court upheld a blood test administered to an unconscious suspect, by medical personnel in a hospital, at the request of the police. In Rochin v. California, 342 U.S. 165 (1952), evidence obtained by forcibly administering an emetic was held inadmissible as a process offending human dignity. In Winston v. Lee, 105 S. Ct. 1611 (1985), the Court found that extraction of a bullet under general anesthesia was in the nature of an intrusion so substantial to be impermissible as unreasonable under the Fourth

Amendment even if there were the likelihood that it would reveal evidence of a crime. Factors to be considered in authorizing surgical procedures are threat to safety of the individual and extent of intrusion on personal privacy and bodily integrity. It is, thus, possible that in addition to the question of whether the urinalysis test has been justified by some measure of suspicion focusing on an individual, the courts will scrutinize the testing itself. Some questions that may arise include: whether there need be an observer and who that observer must be, how situations in which no urine can be produced immediately be handled, and whether the tests be conducted by agency medical personnel, non-medical personnel, or medical personnel from outside the agency.

b. Fifth Amendment

The Fifth Amendment is concerned with the process by which the government proceeds against an individual. The cases have not sufficiently addressed the due process concerns that might arise in drug testing cases.

Among those sure to arise if government-wide testing is begun involve:

1. Whether positive tests will be retested.
2. Whether persons will be allowed some kind of hearing to offer evidence to dispute the results of tests.
3. Whether persons may be dismissed on the basis of the tests alone (without corroborating evidence of malperformance of duties).
4. What measures will be instituted to protect the specimens as to chemical requirements and as to linking them with the identity of those being tested, i.e., to protect the chain of custody.
5. Confidentiality.
6. Relationship with rehabilitation program.

## 2. Protections under the Rehabilitation Act of 1973.

The Rehabilitation Act of 1973 affords protection to handicapped individuals working for employers receiving federal financial assistance. Under section 504 of the Act, no otherwise handicapped individual shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program receiving federal financial assistance. 29 U.S.C. § 794. The term "handicapped individual" is defined by section 7(6) of the Act as any individual who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (ii) can reasonably be expected to benefit in terms of employability from vocational services provided under the Act. 29 U.S.C. § 706(7)(A). The definition, however, expressly excludes from the anti-discrimination provisions of the Act "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. 29 U.S.C. § 706(7)(B). The Act therefore limits the extent to which individuals who are alcohol or drug abusers may argue that their conditions constitute handicaps which may be protected against discrimination.

It has been observed that the exclusion of alcoholics and drug abusers was added to the Act by Congress in 1978 in order to make it clear that employers are not to be required to employ them if they cannot perform their jobs properly or if there is a present threat to property or safety: "Thus, the catch-22 for employees is that they must simultaneously prove that they are handicapped by their chemical dependency, but not so handicapped as to be unqualified to perform their job." Geidt, "Drug and Alcohol Abuse in the Work-



place: Balancing Employer and Employee Rights," 11 Employee Relations Law Journal 181, 184.

## II. GENERAL LEGAL CONSIDERATIONS

### 1. Reasonableness of Policy

For governmental employers, the Fourth Amendment mandates reasonableness criteria in the administration of the tests, both in singling out employees for tests and in the actual testing process, itself. See supra, I, 1, (a). While the Fourth Amendment may not dictate reasonableness in testing to non-government employers, tailoring a testing program to reasonableness criteria may help to avoid subsequent legal problems. Thus, testing only those employees for whom a cause exists, setting standards for when such tests would be conducted, requiring double tests for positive results on the first test, informing employees fully in advance of the motives and the possible consequences of the tests, securing the privacy of the results of the tests, testing the specimens only for drugs, and not for other conditions such as diabetes, pregnancy, and setting up safeguards to assure the confidentiality of the test results may all help to eliminate legal challenges to such program or to their results. Most helpful, would be providing time for rehabilitation before instituting disciplinary action. Attorneys advising management on these substance abuse testing programs advise them to

simultaneously engage in three difficult and delicate balancing acts. First, they must select investigative techniques that will be effective and reliable, yet will avoid the creation of a police-state atmosphere alienating to the work force or in violation of employees' privacy rights. Second, in deciding how to deal with identified abusers, they must walk the fine line between rehabilitation and discipline.

Finally, they must weigh the need for discipline against the risks of costly litigation or arbitration. 2/

## 2. Privacy

### a. Public Employees.

The mention of urinalysis testing in the workplace arouses cries of "invasion of privacy," and provokes people to conjur up images of an Orwellian state. Legal protection of privacy interests is, however, very limited.

a. The federal constitution protects privacy basically under the Fourth Amendment, as discussed supra, section I (1). The courts have never recognized a general right to privacy or implied such a right under the federal constitution except in certain narrow circumstances, none of which directly apply to drug testing programs. The leading case is Griswold v. Connecticut, 381 U.S. 479 (1965), in which the court held a state statute prohibiting the sale of contraceptives to be void as violative of a right to privacy emanating from the Bill of Rights but not tied to any specific right. That right to privacy has been confined to certain very basic human situations. Griswold involved marital privacy. Stanley v. Georgia, 394 U.S. 557 (1969), contains dictum speaking of a fundamental right

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2/ Geidt, Thomas E., "Drug and Alcohol Abuse in the Work Place: Balancing Employer and Employee Rights," 11 Employee Relations Law Journal 181, 182 (1985). Robert T. Angarola, in an undated paper entitled "Substance Abuse in the Workplace Legal Implications for Corporate Action," at 14 advises: To be most effective, urinalysis should be used as part of a comprehensive health and safety program aimed at detecting and preventing substance abuse . . . .

The testing and sampling procedures set out in the manufacturer's instructions must be closely followed . . . .

. . . I would support using outside advisors in setting up the urinalysis testing program . . . .

to privacy that might encompass freedom from governmental intrusion upon the films one watches in the privacy of one's home. None of the cases, however, suggests that a reasonable intrusion into one's privacy by a governmental employer seeking to investigate fitness for duty runs afoul of any constitutional right to privacy.

Another way privacy may be protected is by statute. The federal Right to Privacy Act, 5 U.S.C. § 552(a), is a limited statute that applies to systems of records, not to actions, by the federal government. Under it, nondisclosure is mandated for certain records maintained by the federal government or maintained at the behest of the federal government. Under its provisions, therefore, although there would be no protection for employees against urinalysis testing itself, there would be protection against indiscriminate dissemination of the results of such tests.

b. Private Employees.

Private employees may have legal protection for privacy interests in one of three ways: (A) state constitutional or statutory privacy provisions; (B) common law protection against the tort of invasion of privacy; and (C) common law protection against libel and slander.

A. State constitutional or statutory protection of privacy interests.

At least nine states -- Alaska (Alas. Const. Art. I, sec. 22), Arizona (Ariz. Const., Art. II, sec. 8), California (Cal. Const. Art. I, sec. 1) Hawaii (Ha. Const. Art. I, sec. 5), Illinois (Ill. Const., Art. I, sec. 12); Louisiana (La. Const., Art. 1, sec. 5); Montana (Mont. Const. Art. II, sec. 9); South Carolina (S.C. Const. Art. I, sec. 10), and Washington (Wash. Const. Art. I, sec. 7) -- have specific constitutional provisions that mention a right to privacy in addition to that protected by their constitutional clauses against unreasonable searches and seizures.

Most of these provisions are worded broadly: "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest." Ha. Const. Art. I sec. 6. They are, thus, subject to judicial interpretation. Since we could find no reported case discussing an employment urinalysis testing program vis a vis a state privacy statute it would be difficult to predict whether such clauses will in the future be held to provide greater individual protection for employees against such testing than search and seizure clauses provide. The same is true for state privacy statutes.

In the area of worker privacy, the general trend for the states has been to enact specific statutes protecting employees against particular practices of employers that are deemed intrusive. Types of procedures that have been the subject of such laws include employer use of polygraph tests. Cal. Labor Code. § 432.2(a); Conn. Gen. Stat. Ann. § 31-51g; Del. Code tit. 19 § 704; D.C. Code Ann. § 36-802(a); Ga. Code Ann. § 43-36-1; Ha. Rev. Stat. § 377-6 (10); Id. Code § 44-903; Io. Code Ann. § 730.4; Me. Rev. Stat. Ann. § 1320; Md. Code Ann. Art. 100 § 95(b); Ma. Stat. Ann. § c 149 § 19B; Mi. Laws Ann § 37.203; Minn. Stat. Ann. § 181.76; Mo. Code Ann. § 39-2-3-4; Neb. Rev. Stat. § 81-1932; N.J. Stat. Ann. § 2C:40A-1; N.Y. Labor Law § 737; Or. Rev. Stat. § 659.225(1); Pa. Sta. Ann. tit. 19 § 7507; R.I. Gen. Stat. § 28-6. 1-1; Utah Code Ann § 34-37-2(5), 34-37-16; Vt. Stat. Ann. § 494a(h); Wa. Rev. Code § 49.44.120; W.Va. Code § 21-5-5b; Wisc. Stat. Ann. § 111.37.

There are also state laws that limit the right of employers to gain information about the nonemployment activities of employees; some require advance approval by the employee. Ill. Rev. Stat. c 48 § 2009, for example,

prohibits employers from gathering information about employees' nonemployment activities without written authorization. It exempts, however, activities occurring on employer's premises or during working hours interfering with performance of duties and activities that constitute criminal conduct that may be expected to harm employer's property, business, or that could cause employer financial liability.

B. Common law protection against the tort of invasion of privacy.

Although individuals facing employment drug screening may initially recoil from the idea and invoke the protection of an abstract right of privacy, the law provides little protection in this situation for an invasion of privacy. If the employer tests an employee and makes public use of the test results, there may be a right of action in court for the tort of invasion of privacy by publicly disclosing private facts. There are strict limits to this action; the disclosure must be public, i.e., there must be publicity given to the private fact. Telling it to a few coworkers may not satisfy the publicity requirement. Eddy v. Brown, No. 62,086, Feb. 25, 1986 (Sup. Ct. Okla.) held that an employer's telling a limited number of coworkers that an employee was undergoing psychiatric treatment was insufficient to permit recovery on the basis of invasion of privacy.

On the other hand, in Bratt v. I.B.M., No. 85-1545 (1st Cir. March 6, 1986), under Massachusetts law, it was seen as possible to hold an employer-compensated private doctor liable for invasion of privacy for revealing the psychiatric diagnosis of a patient to various management officials of the employer. It is unclear whether publicizing urinalysis results could be successfully pursued as an invasion of privacy, but the

possibility should make employers careful about the dissemination of the records of such tests.

C. Libel and Slander. "Defamation is . . . that which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him."<sup>3/</sup> Labeling an employee a drug addict or user may raise the question of whether one form of libel per se, i.e., libel for which no special damages need be proven to recover, may be held to apply to the situation in which a person is accused of drug addiction: as an accusation that calls into question one's ability to conduct oneself in one's business or calling or profession. Since it is actionable to accuse a chauffeur of habitually drinking, Louisville Taxicab & Transfer Co. v. Ingle, 229 Ky. 518; 17 S.W. 2d 709 (Ky. 1929), accusing a bus driver or airline pilot of drug use might equally be actionable, forcing the employer to prove the truth of the accusation or pay damages.

### 3. ACCURACY OF THE TESTS

While there is some dispute about the accuracy of the tests,<sup>4/</sup> any of the tests is only as accurate as the procedures used in administering it.<sup>5/</sup> If some-

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<sup>3/</sup> Prosser, W., "Handbook of the Law of Torts," 756 (1964) (footnote omitted).

<sup>4/</sup> Dr. David Greenblatt, chief of clinical pharmacology at Tufts New England Medical Center, is quoted as saying that "'False positives can range up to 25 percent or higher,'" and calling the test "'essentially worthless,'" New York Times, p. 17, col. 1, sec. 3 (Feb. 24, 1985). The manufacturer of the test being discussed, SUVA Corporation of Palo Alto, California, claimed a 95 percent accuracy rate. Id.

<sup>5/</sup> In 1983, the United States Navy discovered that an Oakland laboratory was permitting a lax procedure in administration of the drug testing program. As a result of the discovery over 1800 disciplinary actions were reversed. In 1984, it was reported that the Army was reviewing tests conducted at Fort Meade, Maryland because "'inadequate, sloppy and poorly documented' records, an 'inadequate' attitude toward security in the test areas, and 'inadequate staffing' in the labs," resulted

one were to lose a job or fail to be hired for a position solely on the basis of test findings, there is a possibility that he or she could successfully bring a negligence action against the employer and the testing concern provided that he or she could convince a court that the test was inaccurate or the people conducting it were neglectful. If the government is called upon to prove that it had reasonable cause to dismiss an employee because of positive test results, it might have to convince a court of the accuracy of the test itself and the correlation between the test and the person's ability to perform the work in question.

Currently courts have accepted blood alcohol and breathalyzer tests for purposes of showing impairment or intoxication both by crediting expert testimony and by accepting state implied consent laws.<sup>6/</sup> To date there has not been the generalized acceptance of urinalysis testing for drugs that has been accorded to breathalyzer and blood testing for alcohol. There is also some indication that because of the magnitude of the testing, the possibility of error is much greater in testing urine for drugs than

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(continued): portable' in proving marijuana or hashish use." Atkinson, Ric., "Federal Report," the Washington Post, A 21 (April 27, 1984), quoting panel of experts ordered to review testing procedures.

<sup>6/</sup> These are laws that require motorists to submit to blood alcohol tests or breathalyzer tests to determine intoxication and that usually stipulate the amount of alcohol in the blood or breath sample that will be rebuttable proof of intoxication. See Cleary, E., McCormick on Evidence § 205 (1984).

in testing breath for alcohol. <sup>7/</sup> A recent article <sup>8/</sup> discusses some of these problems as follows:

Toxicologists say confirmation testing has been refined -- in particular through technology called gas chromatography/mass spectrometry -- to a point where error rates can be brought close to zero.

'The real room for error is not with the technology but with administrative error,' says Metpath's Dr. Bates. 'A human being has to pick up the sample and put it into the machine.' It may sound trivial but it's not. When the volume of work goes up, the error rate goes up. That's the scary part.

'My company makes millions of dollars doing drug testing, but I wouldn't want somebody taking my urine, he adds.' 'I think it's an invasion of privacy. I would always be afraid that somebody might . . . mix up samples. It may only happen in one out of 100,000 cases. But I always have that fear.'

The possibility of low error rates may not be as reassuring as it first seems. Since most of these tests, especially in pre-employment situations, are uncorroborated, a low error rate translates into possibly unacceptable numbers of false accusations:

Laboratories largely are unregulated, and the level of quality varies enormously. In various studies, error rates have generally fluctuated between 3 and 20 percent.

'With 4 million to 5 million people being tested a year, a 1 percent rate of inaccuracy means that 40,000 to 50,000 would be falsely accused,' says NORML's Mr. Zeese. <sup>9/</sup>

<sup>7/</sup> Generally, police test motorists one at a time and after having some cause, e.g., wavering auto, for testing. What is being considered in terms of drug testing seems to be wholesale testing on a random basis.

<sup>8/</sup> Stille, A., "Drug Testing:" The scene is set for a dramatic legal collision between the rights of employers and workers, "National Law Journal" 1, 24



UNIONIZED EMPLOYERS

Under the National Labor Relations Act, 29 U.S.C. §§ 151-69, it is an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees. 29 U.S.C. 158(a)(5). The Act defines the obligation to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. 158(d).

As a term or condition of employment, a drug screening program would be subject to the employer's obligation to bargain with the union under the Act. Moreover, it is a refusal to bargain for an employer to impose a change of working conditions unilaterally without bargaining with the union. A unionized employer would therefore violate the Act by requiring drug screening without notice to the union, and without bargaining over the scope and extent of the program.

Although the subject is relatively new to collective bargaining, some unions and employers have already negotiated comprehensive drug screening and rehabilitation arrangements. Professional basketball players, for example, have negotiated such a program under a collective bargaining agreement.

NON-UNION EMPLOYERS

It is difficult to generalize about the employment policies on non-union employers, since employee relations in such workplaces are completely subject to employer control, restricted only by the federal labor standards laws, concerning matters such as minimum wage, overtime, child labor, safety and health and pensions and benefits. The non-union employer is also subject to state laws, which vary substantially throughout the fifty states.

SUMMARY

Because the law is emerging and because there are so few cases, it is difficult to generalize or predict concerning the requirements the courts will impose on a program requiring testing for drugs in the workplace. Some public sector employees will surely raise challenges to such programs on the basis of the United States Constitution. Private sector employees seeking to challenge such programs, however, will be required to resort to state and federal statutes, labor contracts, and common law rights.

*M. Maureen Murphy*

M. Maureen Murphy

*Vincent E. Treacy*

Vincent E. Treacy  
Legislative Attorneys  
American Law Division  
April 16, 1986



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Sandra Shirley-Reynolds  
Senior Bibliographer,  
Education and Public Welfare  
Library Services Division