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# The Battle against Substance Abuse in the Workplace: A Survey of Current Regulatory Issues

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# THE BATTLE AGAINST SUBSTANCE ABUSE IN THE WORKPLACE: A SURVEY OF CURRENT REGULATORY ISSUES

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## I. INTRODUCTION

When a foreman at Chamberlain Contractors, Inc. allegedly caused a truck door to rip off in a collision in the paving company's Laurel, Maryland parking lot last July, he faced more than an angry boss. He also had to cope with a mandatory post-accident drug test.

The day after the accident, the worker reported to a doctor's office; but, the company says, he refused to produce a urine specimen as required by company policy. Refusing the test was worse than flunking it: The company says it fired the man.[1]

In recent years, such incidents have become increasingly typical as American employers find compelling need to implement stringent substance abuse policies

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1. *Small Companies Move to Increase Anti-Drug Programs*, Wall St. J., Nov. 6, 1990, § I, at B2.

and procedures.[2] Many argue that such policies are necessary in light of the striking number of employees who reportedly abuse drugs, and, through impaired ability to work, cause employers to absorb great economic detriment through higher injury rates, reduced productivity, absenteeism and escalated benefit costs.[3] The number of employees who actually use drugs on the job is equally staggering.[4] According to a recent survey, 24% of all full-time employees have either seen or heard about work time drug use by co-workers.[5] Of the full-time employees surveyed, 8% have been offered drugs while at work.[6] The employees reporting the greatest amount of workplace drug use and sales were those working for employers with one hundred or more employees, and those with a high number of blue collar, clerical, and unionized workers.[7]

The most frequently abused illicit drugs include marijuana, cocaine, heroine, and PCP.[8] However, many workers often abuse over-the-counter and noncontrolled substances as well. While alcohol continues to be one of the most extensively abused substances in the workplace,[9] the list is ever increasing. As one author has noted:

> The modern chemical gourmet frequents a veritable drug delicatessen. The shelves are lined not only with illegal drugs, such as cocaine and marijuana, but also widely abused prescription drugs, like tranquilizers and amphetamines, and even over-the-counter medicines. According to medical experts, much of the population comes to work each morning suffering the lingering effects of sleeping pills and cold remedies.[10]

The widespread abuse of both legal and illegal substances, and the issues raised by the effects of such abuse in the workplace, have received much attention in re-

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2. A 1989 survey of large employers in the Washington, D.C. area revealed that 69% of the employers responding had some form of workplace drug policy, and that 28% of those responding utilized some form of drug testing. *See* Daily Lab. Rep. (BNA) No. 29, at A-2 (Feb.14, 1989).

3. A 1985 Gallup poll found that 11% of all workers smoked marijuana, and another 2% used cocaine. Cook, *Drug Use Among Working Adults: Prevalence Rates and Estimation Methods*, in DRUGS IN THE WORK PLACE: RESEARCH AND EVALUATION DATA 18 (S. Gust & J.M. Walsh eds. 1989) [hereinafter Cook]. The survey showed that drug abuse is particularly high among full-time male employees, ages eighteen to thirty-four. *Id.* at 20.

4. *Id.* at 18.

5. *Id.*

6. *Id.*

7. Voss, *Patterns of Drug Use: Data from the 1985 National Household* (S. Gust & J.M. Walsh eds. 1989) [hereinafter Voss].

8. Voss, *supra* note 7, at 34. For purposes of this article, the issue of work-related impairment through substance abuse deals not only with illegal drugs, but also with over-the-counter medications, prescription, and other non-controlled substances, and alcohol. References to "drugs" and "drug testing" are not intended to connote only matters pertaining to illegal and controlled substances.

9. A 1985 survey showed that 14.6% of all full-time employees over 35 years old drink alcohol 20 days or more a month, while 6.0% of all full-time employees over 35 years old drink five or more drinks in one day at least five times per month. Furthermore, 10.3% of all full-time employees 18-34 years old drink alcohol 20 days or more, while 11.9% of all full-time employees drink five or more drinks in one day at least five times per month. Voss, *supra* note 7, at 44.

10. T.S. Denenberg & R.V. Denenberg, Alcohol & Drugs in the Work Place: Costs, Controls, and Controversies (BNA Special Report), at 1 (1986) [hereinafter Denenberg].

cent years. Both private and public employers have found it increasingly necessary to implement varying strategies to attack substance abuse by their employees, ranging from employee assistance programs ("EAP's"), to substance tests, to drug education and awareness programs, and to explicit policies regarding employee substance use.[11] Drug testing is the most popular method for combatting occupational substance abuse.[12] The most widely used form of drug testing is based upon reasonable suspicion that an employee may be under the influence of or impaired by substance ingestion.[13] Preemployment screening of job applicants is another prevalent form of testing.[14] Relatively few employers engage in periodic[15] or incident testing,[16] while even fewer utilize random testing.[17]

## II. The Evolution of Workplace Drug Testing

The battle against workplace substance abuse escalated from a skirmish to a war during the 1970's, when relatively inexpensive processes were developed and made readily available for detection of drugs in urine. Although first used by hospitals, laboratories, and drug therapy programs, by the early 1980's, the United States military and a small number of private employers had implemented drug testing programs. By 1985, drug testing had become a significant weapon in the battle against workplace substance abuse.[18]

### *A. Testing by Public Employers and Government Contractors*

Because substance abuse in the workplace has become a high profile concern to American employers, many are anxious for legal and practical advice about substance abuse policies, procedures, and permissible testing programs.[19] In an effort

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11. Denenberg, *supra* note 10, at 21-22.

12. Carey, *Employee Health and Safety Considerations: Recent Developments on the Rights of the Handicapped, Disabled, or Injured Worker*, 2 19TH ANN. INST. ON EMPLOYMENT L. 514 (1990) [hereinafter Carey].

13. Daily Lab. Rep. (BNA) No. 29, at A-2 (Feb. 14, 1989).

14. *Id.* Preemployment testing usually occurs during a preemployment physical examination. Companies often refuse, as a matter of policy, to hire applicants who are current drug users, or who test positive on a drug screen. Sometimes, rejected applicants are allowed to reapply following a defined waiting period. Successful reapplication sometimes results in hiring for a defined probationary period, and then conversion to regular employment. Employers should make clear to rejected applicants that employment is being denied primarily because of the applicant's apparent substance abuse problem. A potential employer should feel free to make suggestions regarding treatment, if necessary. J. Walsh, Ph.D. & S. Gust, Ph.D., National Institute on Drug Abuse ("NIDA"), Seminars in Occupational Medicine, Vol. I, No. 4, at 240 (Dec. 1986) [hereinafter "NIDA Seminar"].

15. Daily Lab. Rep. (BNA) No. 29, at A-2 (Feb. 14, 1988). Periodic, or scheduled testing is most commonly used in high-risk or safety-sensitive occupations. In such occupations, testing is often scheduled at regular intervals (e.g., quarterly), or is conducted at the time of annual physical examinations. NIDA Seminar, *supra* note 14, at 240.

16. *See* NIDA Seminar, *supra* note 14, at 240. Incident testing usually results from an employer's policy specifically defining "incidents" which will require testing. Examples of such incidents include accidents and fights. NIDA Seminar, *supra* note 14, at 240. *See, e.g.*, National Railroad Administration testing requirements, *infra* note 71 and accompanying text.

17. Daily Lab. Rep. (BNA) No. 29, at A-3 (Feb. 14, 1988). Random testing is normally more defensible for high risk or hazardous occupations affecting public safety. NIDA Seminar, *supra* note 14, at 240.

18. Denenberg, *supra* note 10, at 27.

19. Green, *Drug Testing Becomes Corporate Mine Field*, Wall St. J., Nov. 21, 1989, § 2, p. 5, col. 5.

to provide guidance, the federal government has become increasingly involved in workplace drug abuse issues affecting both federal employees and private government contractors.[20]

1. Drug-Free Workplace Act of 1988

In 1988, Congress attempted to assist private employers performing work under federal contracts by passing the Drug-Free Workplace Act of 1988 (the "Act").[21] The Act, passed by Congress as part of omnibus drug legislation, obligates government contractors and grantees of federal agencies to provide drug-free workplaces.[22] The penalty for noncompliance with the Act by a covered employer is debarment or suspension.[23] Contracts subject to the Act include "procurement contracts, including purchase orders, awarded pursuant to the provisions of the Federal Acquisition Regulation ("FAR")."[24] Only contracts "to be performed, in whole or in part, in the United States are subject to the Act."[25] The Act applies only to contractors or grantees[26] who have been awarded a contract for procurement of property or services valued at $25,000 or more, and does not apply to subcontractors or to subrecipients of grants.[27]

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20. Carey, *supra* note 12, at 515.

21. Pub. L. No. 100-690, 102 Stat. 4304 [hereinafter Drug-Free Workplace Act].

22. Governmentwide Implementation of the Drug-Free Workplace Act of 1988, 54 Fed. Reg. 4946 (1989) [hereinafter Governmentwide Implementation].

23. Governmentwide Implementation, *supra* note 22, at 4946. If a final decision is made to debar an employer, the contractor, individual, or grantee may not receive any federal contract or grant or participate in the federal procurement process for a period of up to five years. The contracting officer of the contracting agency must determine that cause for suspension of payments, contract termination, suspension, or debarment exists. The contracting officer must then initiate appropriate action in accordance with applicable agency procedures and the FAR. Employer sanctions may be waived if the suspension of payments, contract termination, or suspension and debarment of the contractor would seriously disrupt the contracting agency's operations to the detriment of the federal government or the general public. In addition, a waiver or suspension of grant payments, termination of the grant, or debarment of the grantee may occur if such action would be against the public interest. Drug-Free Workplace: Federal Requirements (BNA) at 58-59 (1990) [hereinafter "BNA"].

24. Governmentwide Implementation, *supra* note 22, at 4946 (Question and Answer 1). *See* Federal Acquisition Circular 84-57, Amending Federal Acquisition Regulation, 48 C.F.R. pts. 1, 9, 23, 42, and 52.

25. Governmentwide Implementation, *supra* note 22, at 4946.

26. The only guideline for implementing the Drug-Free Workplace Act among grantees is the final, government-wide grantee "common rule" issued on May 25, 1990. For text of the common rule, see Government-Wide Requirements for Drug-Free Workplace (Grants), 55 Fed. Reg. 21,681 (1990) [hereinafter Government-Wide Requirements]. Agencies may not impose upon grantees requirements in addition to those listed in the common rule. The common rule became effective July24, 1990, with the exception of the certification requirement for states and state agencies, which became effective June 25, 1991. Under the final grantee common rule, grantees other than individuals must certify to the federal grant agency that they will provide drug-free workplaces. Individual grantees must certify to the federal grant agency that, as a condition of the grant, they will not engage in the unlawful manufacture, distribution, dispensation, possession, or use of controlled substances while conducting any grant activity. *Id.* Almost all grantees of federal executive branch agencies are obligated to comply with the Drug-Free Workplace Act, regardless of the size of the grantee. Where application of the rule would be inconsistent with international obligations of the United States or with laws and regulations of a foreign government, an exemption is authorized. The determination for an exemption may be made only by an agency head or the designated representative of the agency head. *See id.*

27. Drug-Free Workplace Act, *supra* note 21, at 4304 and accompanying text. *See also* BNA *supra* note 23, at 55 (1990).

A contractor or grantee[28] meeting these criteria must certify to the contracting agency that it will take measures to provide a drug-free workplace.[29] Under this certification requirement, a government contractor must:

(1) publish a statement notifying employees that unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance[30] is prohibited in the employer's workplace. The policy must specify that specific disciplinary action will be taken against employees violating this policy;[31]
(2) establish a drug-free awareness program to inform employees of the dangers of drug abuse in the workplace, the contractor-employer's policy of maintaining a drug-free workplace, available drug counseling, rehabilitation and employee assistance programs, and the penalties the contractor-employer may impose upon employees for drug abuse violations;
(3) require that each employee engaged in the performance of a government contract covered by the Act be given a copy of the contractor-employer's policy statement;[32]
(4) notify employees in the required statement that the employee must, as a condition of employment, (a) abide by the terms of the statement; and (b) notify the employer of any criminal drug statute violation occurring in the workplace within five days of conviction;

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28. A federal agency that receives a grant from another federal agency is not a "grantee" contemplated by the Act. Government-Wide Requirements, *supra* note 26, at 21,682.

29. A "Drug-Free Workplace" is the site(s) for performance of work by the contractor in connection with a specific contract at which location employees are prohibited from engaging in unlawful manufacture, distribution, dispensation, possession, or use of controlled substances.

30. "Controlled substance" includes any controlled substance listed in Schedules I through V of the federal Controlled Substances Act of 1970, 21 U.S.C. § 812(b)-(c) (1976).

31. A sample policy statement might read as follows:

Sample Policy Statement

To: All Employees

From: [Company President]

Re: Policy on Drug-Free Workplace

This is to reiterate, and state in a more formal way, our policy regarding the work-related effects of drug use and the unlawful possession of controlled substances on company premises. Our policy is as follows:

Employees are expected and required to report to work on time and in appropriate mental and physical condition for work. It is our intent and obligation to provide a drug-free, healthful, safe and secure work environment.

The unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance on company premises or while conducting company business off company premises is absolutely prohibited. Violations of this policy will result in disciplinary action, up to and including termination, and may have legal consequences.

The company recognizes drug dependency as an illness and a major health problem. The company also recognizes drug abuse as a potential health, safety, and security problem. Employees needing help in dealing with such problems are encouraged to use our employee assistance program and health insurance plans, as appropriate. Conscientious efforts to seek such help will not jeopardize any employee's job, and will not be noted in any personal record.

Employees must, as a condition of employment, abide by the terms of the above policy and report any conviction under a criminal drug statute for violations occurring on or off company premises while conducting company business. A report of conviction must be made within five (5) days after the conviction.

(This requirement is mandated by the Drug-Free Workplace Act of 1988.)

BNA, *supra* note 23, at 57, 247:553.

32. *Id.* at § 5152(a)(1)(C).

(5) notify the contracting agency when an employee has been convicted of a drug offense;[33]
(6) discipline convicted employees or require that they participate in a drug rehabilitation program;[34] and
(7) make a good faith effort to continue to maintain a drug-free workplace.[35]

When a covered contractor or grantee receives notice from an employee that another employee has been convicted of a drug offense, the contractor or grantee must take "appropriate personnel action" against the convicted employee up to and including termination,[36] or require the employee to satisfactorily participate in a drug abuse assistance or rehabilitation program.[37] Interestingly, neither the Drug-Free Workplace Act nor the regulations promulgated pursuant to it[38] obligate an employer to perform drug testing.[39] The Drug-Free Workplace Act became effective March 18, 1989. Since that date, all government contracts covered by the Act must contain a contract clause requiring the contractor to meet its defined drug control provisions.[40]

The Act's implementing regulations also require covered employers to establish programs for drug testing of employees in "sensitive positions."[41] The regulations authorize contractors to implement drug testing programs when there is reasonable suspicion that employees may be using illegal drugs;[42] "when a[n] employee has been involved in an accident or unsafe practice;"[43] "as a follow-up to counseling or rehabilitation for illegal drug use;"[44] or as part of a program to test job applicants for illegal drug use.[45] Under these regulations, contractors must adopt appropriate procedures to deal with employees found to be using illegal drugs. Contractors may not allow an employee in a "sensitive position" who is found to be using drugs to return to duty until the contractor determines that the employee may properly perform in that position.[46]

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33. *Id.* at § 5152(a)(1)(E).

34. *Id.* at § 5152(a)(1)(F).

35. *Id.* at § 5152(a)(1)(G).

36. Section 5154(1); the employer must act within thirty (30) days after receiving notice of an employee's conviction. BNA, *supra* note 23, at 58.

37. Section 5154(2). The assistance or rehabilitation program must be approved by a federal, state, or local health, law enforcement, or other appropriate agency. *Id.* at § 5154(2).

38. *See* Government-Wide Implementation, *supra* note 22, at 4946.

39. Carey, *supra* note 12, at 536; BNA, *supra* note 23, at 58.

40. Drug-Free Work Force, 48 C.F.R. § 223.7504 (1990).

41. " 'Employee in a sensitive position,' as used in this subpart, means an employee who has been granted access to classified information; or employees in other positions that the contractor determines involve National Security, health or safety, or functions . . . requiring a high degree of trust and confidence." *Id.* at § 223.7502.

42. *Id.* at § 252.223-7500(c)(4)(ii)(A).

43. *Id.* at § 252.223-7500(c)(4)(ii)(A).

44. *Id.* at § 252.223-7500(c)(4)(ii)(C).

45. Drug-Free Work Force, 48 C.F.R. § 252.223-7500(c)(4)(ii)(D) (1990).

46. *Id.* at § 252.223-7500(d).

The provisions of the Act are inapplicable "to the extent they are inconsistent with state or local law."[47] Nor do they apply to the extent they conflict with an existing collective bargaining agreement, provided that the contractor agrees to negotiate those issues at the next collective bargaining session.[48]

2. Department of Defense Regulations

The Department of Defense ("DOD") interim rule on a drug-free work force for private defense contractors became effective on October 31, 1988.[49] The DOD regulations require covered contractors to institute the following programs, or appropriate alternatives:

(1) "Employee assistance programs emphasizing direction, education, counseling, rehabilitation, and coordination with available community resources;"[50]
(2) "Training of supervisors 'to assist in identifying and addressing illegal drug use' by employees of the contractor;"[51]
(3) Provision for self-referrals and "supervisory referrals to treatment with respect for . . . confidentiality consistent with safety and security issues;"[52] and
(4) "Provision[s] for identifying illegal drug users, including testing on a controlled and carefully monitored basis."[53]

Although the word "random" does not appear in the regulations,[54] the DOD contemplated that random testing would occur under its regulations.[55]

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47. *Id.* at § 252.223-7500(e). The Act and the rules which implement it are to coexist with state and local law, according to the Office of Management and Budget ("OMB"). Furthermore, the Act does not preempt international laws. BNA, *supra* note 23, at 59.

48. Drug-Free Work Force, 48 C.F.R. § 252.223-7500(e) (1990). "Labor and Management cannot, through the collective bargaining process, nullify a contract or grant based upon federal law." However, [w]here the regulations provide discretion about the mode of compliance with the regulations (as in deciding whether to discipline a convicted employee or refer the worker for rehabilitation), labor and management may, through collective bargaining, determine what that mode of compliance will be. BNA, *supra* note 23, at 59, citing the Office of Management and Budget.

49. *See generally* 53 Fed. Reg. 37,763-65 (1988) (codified at 48 C.F.R. § 223.7500-.7504). The interim rule governed all contracts involving access to classified information, and any other contract in which the contracting officer determined that coverage was necessary for the protection of national security, or "the health and safety of those using or affected by the product or performance of the contract." 53 Fed. Reg. 37,764 (1988) (codified at 48 C.F.R. § 223.7504).

50. Drug-Free Work Force, 48 C.F.R. § 252.223-7500(c)(1).

51. *Id.* at § 252.223-7500(c)(2).

52. *Id.* at § 252.223-7500(c)(3).

53. *Id.* at § 252.223-7500(c)(4). The testing programs must be established by taking account of the factors listed in Drug-Free Work Force, 48 C.F.R. § 252.223-7500(c)(4)(i)-(ii). No employee subject to the Department of Defense rule who is found to be using drugs may remain on duty until the employer determines that the employee is fit for duty. BNA, *supra* note 23, at 42.

54. Drug-Free Work Force, 48 C.F.R. § 252.223-7500(c)(4)(i) (1990).

55. D. COPUS, ALCOHOL AND DRUGS AT WORK: A MANUAL FOR FEDERAL CONTRACTORS AND GRANTEES, NAT'L EMPLOYMENT L. INST., Apr. 1989, at P-4.

3. Department of Transportation Regulations

The Department of Transportation ("DOT") was the first federal agency to institute drug testing requirements for its employees.[56] Pursuant to the DOT rules, both public and private transportation industry employees holding safety-sensitive or security-related jobs are subject to random testing.[57] These rules mandate that two categories of employees be tested, each having an impact on safety or security. The first category includes "[e]mployees whose positions bear a direct and immediate impact on public health and safety, the protection of life and property, law enforcement or national security."[58] These employees are subject to six forms of testing.[59] Two-thirds of the DOT employees in this category are air traffic controllers. Others include electronic technicians, commercial airline pilots, flight attendants, aviation safety inspectors, civil aviation security specialists, aircraft mechanics, and motor vehicle operators.[60]

All other DOT employees are subject to reasonable suspicion, accident or unsafe practice, and follow-up testing.[61] The DOT has promulgated other drug testing regulations independent of the Drug-Free Workplace Act of 1988. These regulations require that employers in six public and private sector transportation industries implement drug testing programs under specific regulations issued by the six agencies under DOT jurisdiction.[62]

Under the DOT regulations, employers must test employees for influence of marijuana, cocaine, opiates, amphetamines, and phencyclidine (PCP).[63] Although employers may test for other drugs, they may not do so without prior DOT approval, and they must conduct such testing in accordance with Department of Health and Human Services ("DHHS") requirements.[64] The DOT specifies nu-

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56. The testing program was implemented pursuant to Executive Order 12-564. Executive Order No. 12-564, 3 C.F.R. § 224 (1987). The DOT final testing rules became effective on December 1, 1989. *See* Procedures for Transportation Workplace Drug Testing Programs, 49 C.F.R. §§ 40.1-.39.

57. BNA, *supra* note 23, at 42.

58. American Fed'n of Gov't Employees v. Skinner, 885 F.2d 884, 887 (D.C. Cir.), *aff'd*, 109 S. Ct. 1402 (1989).

59. Covered employees are subjected to six types of testing: "(1) random; (2) periodic, if they are required to take periodic physical examinations; (3) reasonable suspicion; (4) accident or unsafe practice; . . . (5) follow up;" and (6) pre-appointment. *Skinner*, 885 F.2d at 887.

60. *Id.* at 887. Also included are drivers of vehicles designed to carry over 15 passengers, drivers of trucks weighing 26,000 pounds or more, drivers of trucks carrying hazardous materials (independent drivers are included); railroad engineers, conductors, signal maintenance; state and local mass transit employees; and certain members of the merchant marine.

61. *Id.* at 887. In all, four million DOT employees are subject to the various testing requirements. *See* 49 C.F.R. pt. 40 (1989).

62. The agencies covered include the United States Coast Guard, the Federal Aviation Administration, the Federal Railroad Administration, the Federal Highway Administration, the Urban Mass Transit Administration, and the Research and Special Programs Administration. 49 C.F.R. § 40.3 (1990) (codified at 49 C.F.R. § 40). Among covered employees are airline pilots, truck and bus drivers, railroad workers, merchant seamen, mass transit employees, and natural gas and other hazardous liquid pipeline operators.

63. 49 C.F.R. § 40.21(a) (1990).

64. *Id.* at § 40.21(b)-(c). Employers wishing to test for other substances are required to collect a second, separate sample. *See* 54 Fed. Reg. 49.854-55 (to be codified at 49 C.F.R. § 40).

merous procedures that must be followed by transportation employers when conducting drug testing pursuant to programs designed by various DOT agencies.

The DOT procedures also apply to transportation employers, the officers thereof, employees, agents, and contractors, to the extent that any of these are subject to DOT regulation.[65] The mechanics of drug testing under the DOT regulations are extremely specific in order to assure accuracy, maintain the privacy of employees, and establish a chain of custody to prevent accusations of tampering.[66] The regulations specify that employers may only use laboratories approved by the DHHS.[67]

The regulations protect individual privacy rights of affected employees in several important respects. First, the persons permitted to directly observe sample collection by the employee are restricted, to assure correct identification and unadulteration.[68] Next, test results are reviewed by a medical review officer not employed by the lab providing the test results. Before a positive test result is confirmed, the employee and the medical review officer must have the opportunity to discuss the test result in confidence. The medical review officer may not disclose medical information supplied by the employee unless the medical review officer has reason to believe that the employee might be medically unfit or pose a safety risk.[69] When a medical review officer believes an employee is medically unfit or poses a safety risk, the safety interests of the employer are deemed to outweigh the privacy interest of the employee. In those situations, the medical review officer may communicate, to third parties such as the employer, information regarding levels of tested substances found in the employee's test sample.[70]

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65. 54 Fed. Reg. 49,874 and 49,875 (codified at 49 C.F.R. § 40.1).
66. *Id.* at § 40.31(a).
67. *See* 54 Fed. Reg. 49,866 (1989).
68. *Id.* at § 40.25(l).
69. *Id.* at § 40.33(h).
70. *Id.*

4. Various Federal Agency Regulations

The Federal Highway Administration ("FHWA"),[71] the Federal Aviation Administration ("FAA"),[72] and the Federal Railroad Administration ("FRA")[73] have each promulgated substance abuse rules similar to those of the DOT. Like programs have also been implemented by the Urban Mass Transportation Administration ("UMTA"),[74] the United States Coast Guard ("Coast Guard"),[75] the Research and Special Programs Administration ("RSPA"),[76] and the Nuclear Regulatory Commission ("NRC").[77]

5. State Statutory Regulation of Employee Drug Testing

In addition to federal regulation, various states have recently enacted laws governing workplace drug testing. State laws generally regulate testing by public employers more heavily than testing by private employers.[78] The statutes differ in

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71. The FHWA regulations apply to motor carriers and individual drivers who operate commercial motor vehicles in interstate commerce. 49 C.F.R. § 391.83(a) (1990). Pursuant to FHWA rules, preemployment, periodic, reasonable cause, and random drug testing are utilized. *See id.* at § 389.99-.115. The rules apply to roughly three million FHWA workers, including independent truck drivers. Commercial motor vehicle truck drivers who have contracted with a motor vehicle carrier are also covered.

72. *See* FAA rules, 14 C.F.R. §§ 61.15-.16, 63.12-.12b, 65.12, 121.455-457, 135.249-.251 (1990). The FAA rules apply to employees in "sensitive" safety and security-related positions. The rules require employers to conduct the following: (1) pre-employment testing; (2) periodic testing; (3) random testing; (4) post-accident testing; (5) reasonable cause testing; and (6) return-to-duty testing.

73. *See* 49 C.F.R. § 219 (1990). The FRA regulations affect at least 250,000 workers. The Federal Railway Act became effective on October 2, 1989. Pursuant to FRA regulations, railroads may conduct breath and body fluid tests to detect the presence of alcohol or controlled substances. *Id.* Under these rules, a railroad administering breath or body fluid tests must provide the targeted employee with "clear and unequivocal" written notice that the test is mandated under FRA regulations. *Id.* at 219.23. Significantly, the rules provide for mandatory post-accident toxicological testing in the event of: (1) a major train accident; (2) an impact accident; (3) a fatal train incident; and (4) a passenger train accident. *Id.* at § 219.201. In each of these situations, railroads are required to collect blood and urine samples from every operating employee assigned as a crew member of any train involved. Additionally, railroads must test any operator, dispatcher, signal maintainer, or other covered employee that was directly involved in the events leading to the accident. *Id.* at § 219.203(a)(2).

74. The UMTA requires employers of mass transit workers to initiate drug enforcement programs as a condition of federal transit funding. *See* 49 C.F.R. § 653.7 (1990). *But see* Amalgamated Transit Union v. Skinner, 894 F.2d 1362, 1372 (D.C. Cir. 1990) (vacating UMTA's anti-drug program due to lack of direct regulatory authority over local transit authorities); *see also* 55 Fed. Reg. 2526 (1990) (suspension of 49 C.F.R. § 653).

75. The Coast Guard requires blood, breath, or urine testing of applicants, as well as periodic testing, post-accident testing, random testing, and reasonable suspicion testing of employees. *See* 46 C.F.R. §§ 16.105, 16.210-.250 (1990).

76. The RSPA regulations apply to those pipeline operators which transport natural gas or hazardous liquids. *See* 49 C.F.R. § 199.3 (1990). The regulations also apply to contractors hired by covered operators. *Id.* The RSPA regulations provide for random, reasonable cause, post-accident, return to duty, and applicant testing and preempt state and other rules governing testing of pipeline employees for substance abuse. *Id.* at § 199.11.

77. The NRC Fitness for Duty Rule governs licensees authorized to operate or build nuclear reactors. This Rule applies to persons with unescorted access to protected areas, and the employees of licensees, vendors, or contractors required to report to a "Technical Support Center" or an "Emergency Operations Facility" in accordance with emergency procedures. 10 C.F.R. § 26.2(a) (1990).

78. By contrast, statutory proscription in Utah applies only to private employers. *See* UTAH CODE ANN. § 34-38-2(3) (1988); *see also* notes 174-76 and accompanying text. Employers in Utah face few limits on their right to conduct workplace drug testing. *See Drug Testing Becomes Corporate Mine Field,* Wall St. J., Nov. 21, 1989, at B1, col. 5.

their approaches to periodic and random testing.[79] Following is a brief survey of state laws impacting upon employee drug testing.

*Alaska*

Alaska requires most employers[80] to provide coverage for treatment of alcoholism or drug abuse as part of group disability insurance policies and hospital or medical service group subscriber contracts entered into or renewed on or after January 1, 1989. Coverage must include benefits of at least $7,000 over two consecutive benefit years and lifetime benefits of at least $14,000.[81]

*Arkansas*

Arkansas law requires disqualification of the right to unemployment compensation benefits for employees discharged for misconduct relating to drinking at work or reporting for work under the influence of intoxicants.[82] A 1989 Arkansas Executive Order requires all state agencies to implement a drug-free workplace policy, whether or not they receive federal funds or contracts.[83]

*California*

California has enacted no law prohibiting private employers from testing employees or job applicants. The California Constitution, however, establishes an inalienable right of privacy for its citizens, which has been construed to protect

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79. L. LARSON, EMPLOYMENT SCREENING, § 4.05(2) (1988).

80. Employers of fewer than twenty (20) permanent, full-time employees for each work day during at least twenty (20) calendar work weeks in the current or preceding calendar year must offer these benefits as optional coverage. ALASKA STAT. § 21.42.365(d) (Supp. 1990).

81. *Id.* at § 21.42.365(a)(1)-(2).

82. ARK. STAT. ANN. § 11-10-514(b) (Supp. 1990). "Intoxicant" includes alcohol and controlled substances. *Id.* An employee discharged for these reasons is disqualified from the date he or she files an unemployment benefits claim "until he shall have ten (10) weeks of employment in each of which he shall have earned wages equal to at least his weekly benefit amount." *Id.*

83. Ark. Exec. Order 89-2 (Mar. 30, 1989). The Arkansas Attorney General issued an opinion in June of 1989, stating that private employers could initiate programs to test for substance abuse among applicants and current employees. Op. Att'y Gen. No. 89-060 (June 12, 1989). The opinion concluded that neither wrongful discharge actions nor actions for breach of the duty of good faith or bad faith dismissal would lie where the employer acts upon the results of such tests. *Id.* The Arkansas Attorney General stated that an employer who arbitrarily dismisses an employee would violate a public policy of termination for cause. However, the opinion found that the actions of an employer who dismissed an employee testing positive or refusing to submit to a drug test would not be considered arbitrary. *Id.* The Arkansas Attorney General has also defended the constitutionality of an acknowledgement form issued to state employees. Op. Att'y Gen. No. 89-178 (Aug. 7, 1989). The state developed the form as a method of compliance with the Drug-Free Workplace Act of 1988. By signing the form, a state employee acknowledges that the manufacture, sale, use or possession of controlled substances in the workplace is prohibited and that he or she may be discharged for violation. *Id.*

individuals from an employer's unwarranted intrusions into their private lives.[84] The California Insurance Code also provides three mandatory coverages for the treatment of alcohol abuse.[85] California state agencies must develop substance abuse testing policies.[86] The State Personnel Board regulates preemployment drug testing by state agencies and employee organizations.[87] Prospective state employees must be disqualified from the examination in which they are competing if they test positive.[88]

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84. CAL. CONST. art. I, § 1. California is one of several states which have not specifically enacted statutes governing private employers' rights to test employees for substance abuse. The California courts have, however, applied the privacy protections of article I, section 1 to private, as well as public employers. For example, in Semore v. Poole, 217 Cal. App. 3d 1087, 266 Cal. Rptr. 280 (Cal. Ct. App. 1990), an appellate court held that an employee's complaint about discharge for failure to submit to a drug test stated a cause of action in tort for wrongful discharge. *Id.* at 1098, 266 Cal. Rptr. at 286. The court recognized that the employee's allegation asserted a fundamental principle of public policy. *See id.* at 1092, 266 Cal. Rptr. at 282. The court balanced the employer's need to regulate employee conduct with the employee's right to refuse to submit to a drug test. *Id.* at 1096-97, 266 Cal. Rptr. at 285-86. *See also* Luck v. Southern Pacific Transp. Co., 218 Cal. App. 3d 1, 28, 267 Cal. Rptr. 618, 635 (Cal. Ct. App. 1990) (plaintiff stated no cause of action for wrongful discharge in violation of public policy where, at the time the employer required a drug test, the constitutional right of privacy had not been extended to this type of testing), *cert. denied*, 111 S. Ct. 344 (1990).

85. *See* CAL. HEALTH & SAFETY CODE, § 1367.2 (West 1989), which requires every group healthcare service plan covering hospital, medical, or surgical expenses to offer coverage for alcoholism treatment under terms and conditions agreed upon by the plan and by the group subscriber. *Id.* at § 1367.2(a). Section 10123.6 of the California Insurance Code provides that each insurer issuing group disability insurance must offer coverage for alcoholism treatment. The terms and conditions of coverage must be agreed upon by the group policy holder and the insurer. If the group's policy holder agrees to alcoholism coverage, or coverage for treatment of chemical dependency or nicotine use, state licensed facilities may be used to provide treatment. Nicotine use treatment may be subject to cost, and other limitations, as defined by the insurance policy. CAL. INS. CODE § 10123.6 (West 1990). Furthermore, self-insured employee welfare benefit plans may provide coverage for alcohol, substance, or nicotine abuse under terms and conditions agreed upon by the self-insured welfare benefit plan and the members. Treatment must take place in state-licensed facilities. CAL. INS. CODE § 10123.14 (West Supp. 1991). The California Insurance Code also requires group nonprofit hospital service plans to offer coverage for alcoholism treatment under terms agreed upon by the plan and the group contract holder. CAL. INS. CODE § 11512.14 (West Supp. 1991). Unless a former employer fails to furnish within ten (10) days of discharge, facts disclosing that an employee discharge was due to "irresistible compulsion to use or consume intoxicants," benefits paid to discharged workers who requalify for unemployment compensation by entering abuse treatment programs may not be charged to the former employer. CAL. UNEMP. INS. CODE § 1030 (West Supp. 1991).

86. Exec. Order No. D-58-86 (Sept. 24, 1986). The Order requires that testing policies provide for (1) identification of illegal drug users, including drug tests for employees in sensitive positions; (2) suspension or removal of drug users from sensitive positions; (3) treatment of workers with drug problems; and (4) confidentiality of drug test results. *Id.* at 2.

87. State civil service applicants may be tested, if the employer has properly documented the sensitivity of the position and the consequences of drug related behavior, and if drug testing has been shown to be job-related. Sensitivity is documented by showing that the duties of the job "involve a greater than normal level of trust for, responsibility for, or impact on the health and safety of others"; and that "errors in judgment and attentiveness, or diminished coordination, dexterity, or composure while performing the duties could clearly result in mistakes that would endanger the health and safety of others." In addition, it must be shown that the work is performed "with such independence that it cannot be safely assumed that mistakes such as those described could be prevented by a supervisor or another employee."

88. Positive-testing employees are ineligible to take a state civil service examination for a class in which drug testing is required until one year has passed from the date of the drug test. If possession of the drug constitutes a felony as defined in the Uniform Controlled Substances Act, CAL. HEALTH & SAFETY CODE §§ 11000-11595 (West 1989), the applicant is ineligible to take any state civil service examination for a peace officer class until ten (10) years have passed from the date of the drug test. *See* CAL. CODE REGS. tit. 2, § 213.5(b) (1991).

*Colorado*

A Colorado statute provides that an employee's participation in and completion of an alcohol or drug treatment program may be used to determine award of full benefits under the Colorado Employment Security Act.[89]

*Connecticut*

Under Connecticut law, any individual, corporation, partnership, or unincorporated association may discipline an employee for substance abuse occurring during work hours.[90] This provision does not apply to the state and its political subdivisions.[91] Even the private employers listed above may perform random testing only in the following specific circumstances: (1) when required by federal law; (2) where an employee occupies a high-risk or safety-sensitive position;[92] or (3) where an employee voluntarily submits to a urinalysis conducted as part of a company-sponsored employee assistance program.[93] Where employers have "reasonable suspicion" that employees may be under the influence of drugs or alcohol that adversely affect job performance, they may require urinalysis testing.[94]

*Florida*

Florida has enacted comprehensive legislation to insure fair and accurate drug testing procedures by state agencies.[95] The Florida law is similar to the federal Drug-Free Workplace Act in that it places no duty upon employers to conduct drug

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89. COLO. REV. STAT. §§ 8-73-108(4)(b)(iv)(B), (5)(e)(xxiv) (Supp. 1990).

90. CONN. GEN. STAT. § 31-51t(2) (Supp. 1990).

91. *Id.*

92. A "high-risk" or "safety-sensitive" position is defined as an occupation that (1) presents "a clearly significant life-threatening danger" to the employee, coworkers, or the general public and is "performed in a manner or place inherent with or inseparable from such danger"; (2) requires the "exercise of discriminating judgment" or a "high degree of care and caution"; and is "separate from the ability to discern impaired or enhanced performance by direct supervision and is not reasonably subject to other valid and available means of observation and evaluation which would preclude the necessity of random urinalysis." The state labor commissioner is charged with the duty of determining whether various positions fall within the definition. CONN. AGENCIES REGS. § 31-51x-1 (1987).

93. CONN. GEN. STAT. § 31-51x(b) (Supp. 1991).

94. *Id.* at § 31-51x(a). Connecticut employers are required to complete three steps before requiring urinalysis drug tests of job applicants. First, the employer must inform the applicant in writing at the time of the application of the employer's intent to test the applicant. Second, the employer must conduct the test in the same manner that incumbent employees are tested. Finally, the applicant must receive a copy of the test result, if positive. *Id.* at § 31-51v. The statutes also provide for privacy protections against the disclosure and storage of drug test results. *See id.* at §§ 31-128a to 31-128h (1987). CONN. GEN. STAT. ANN. §§ 31-128a to 31-128h (West 1987).

95. *See* Florida Drug-Free Workplace Act, FLA. STAT. § 112.0455 (1989). Other Florida rules regarding drug testing include State Board of Medicine Rules No. 21M-20.008, 009 (1990) (requiring licensees to submit to unannounced random blood and/or urine tests, on penalty of surrender of current license card); and Drug-Free Workplace Act Appeals Rule Chap. 38D-26.001-.011 (1990) (places burden upon employer to establish that discipline or refusal to hire was justified under state law).

testing.[96] The statute also provides stringent requirements concerning employer policies and notice obligations, conditions for testing, testing procedures and methods, confidentiality of test results, evaluation and treatment protocols, and employee rights to contest positive test results.[97]

*Georgia*

In 1990, the Georgia legislature promulgated several drug testing provisions which apply to full and part-time, temporary, and intermittent employees of state agencies, departments, authorities, bureaus, or instrumentalities.[98] The Georgia statute is intended to provide minimum sanctions for criminal and other offenses committed by public employees.[99] Georgia laws also include provisions governing applicant testing for state employment,[100] random testing of various state employees,[101] revocation of state licenses after conviction of a drug offense,[102] drug-free

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96. Although employers are authorized to conduct applicant drug testing, reasonable suspicion testing, routine fitness-for-duty testing, and follow-up testing, no form of testing is required. FLA. STAT. § 112.0455(7) (West Supp. 1991). Testing for these categories may be performed as follows: (1) applicants may be tested when they apply for "special risk" or "safety-sensitive" positions; (2) reasonable suspicion testing may be performed "based on a belief that an employee is using or has used drugs in violation of the employer's policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience"; (3) fitness-for-duty testing may be conducted routinely for specific groups of employees, or as part of an employer's established policy; (4) an employer may conduct follow-up testing of an employee who has previously entered an employee assistance program or an alcohol or drug rehabilitation program. *Id.*

97. *See id.* at § 112.0455(6), (8)-(12), (14), (15).

98. Drug-Free Public Work Force Act, GA. CODE ANN. §§ 45-23-1 to -9 (1990). The Act also covers employees of state-funded primary, secondary, and post-secondary educational institutions. *Id.* at § 45-23-3(5). The Act provides for suspension from public employment for no less than two (2) months following conviction of an offense involving a controlled substance, marijuana, or dangerous drugs. *Id. See generally* definition of "controlled substance" at GA. CODE ANN. § 16-13-21(4) (1988); definition of "marijuana" at GA. CODE ANN. § 16-13-21(16) (1990); definition of "dangerous drug" at GA. CODE ANN. § 16-13-71 (1988). The law provides further sanctions, including expulsion and ineligibility for future government employment. GA. CODE ANN. § 45-23-5 (1990).

99. GA. CODE ANN. § 45-23-6 (1990).

100. GA. CODE ANN. §§ 45-20-90 to -92 (1990). Applicants for state employment, including applicants for employment with county boards of education and independent school systems, must submit to established drug tests for the presence of illegal drugs. " 'Established drug test' means the collection and testing of bodily fluids administered in a manner equivalent to that required by the Mandatory Guidelines for Federal Workplace Drug Testing Programs (HSS Regulations 53 F. Reg. 11979, as amended) or other professionally valid procedures approved by the commissioner of human resources." GA. CODE ANN. § 45-20-90(2) (1990). "Illegal drugs" is defined at GA. CODE ANN. § 16-13-21(16) (1988).

101. This section applies to employees involved in high-risk work, defined as "those duties where inattention to duty or errors in judgment while on duty will have the potential for significant risk of harm to the employee, other employees, or the general public." GA. CODE ANN. § 45-20-90(2) (1990). Employees in such jobs who are found to use illegal drugs must be terminated. *Id.* at § 45-20-93.

102. GA. CODE ANN. §§ 16-13-110 to -114 (Supp. 1990). An individual licensed by the state or certain designated entities must notify the appropriate licensing authority within ten (10) days of any drug-related conviction. The licensing authority, upon notification, must suspend or revoke the license, based upon guidelines outlined in the statute. *Id.* at § 16-13-111.

workplace requirements for state agency contractors and subcontractors,[103] and testing of candidates for certain state offices.[104]

*Hawaii*

All individual and group accident and illness insurance policies, individual or group hospital or medical service plan contracts, and nonprofit mutual benefit association and health maintenance organization plan contracts issued in Hawaii must contain benefit provisions for treatment of alcohol and drug abuse.[105]

*Illinois*

Pursuant to the Illinois Regional Transportation Authority Act of 1989, the Metropolitan Transportation Authority must establish drug testing programs for employees of public mass transit systems.[106] Illinois school bus drivers must undergo annual medical physical examinations which include drug and alcohol tests.[107] The Illinois Department of Central Management Services must approve preemployment screening programs before implementation by state agencies.[108]

*Indiana*

Although Indiana has adopted no specific provisions governing employee drug testing, an income tax credit is provided to businesses that maintain drug and alcohol abuse prevention programs, including counseling, for their employees.[109] Such programs are subject to approval by the Division of Addiction Services, Indiana Department of Mental Health.

*Iowa*

An Iowa statute limits both public and private employers from conducting drug tests as a condition of preemployment or continued employment, and prohibits random testing altogether.[110] The statute allows probable cause testing if the em-

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103. GA. CODE ANN. §§ 50-24-1 to -6 (1990). The contract must require a state expenditure of at least $25,000. *Id.* at § 50-24-2(1).

104. GA. CODE ANN. § 21-2-140 (1990). Candidates affected include those for governor, lieutenant governor, secretary of state, attorney general, state school superintendent, commissioner of agriculture, commissioner of labor, justices of the supreme court, judges of the court of appeals, judges of the superior courts, district attorneys, members of the general assembly, and members of the Public Service Commission. *Id.* at § 21-2-140(a)(4). Testing is generally conducted at the expense of the candidate. *Id.* at § 21-2-140(c).

105. HAW. REV. STAT. § 202 (1988).

106. ILL. ANN. STAT. ch. 111 2/3, para. 347 (Smith-Hurd 1990).

107. *Id.* at ch. 95 1/2, para. 6-106.1(6).

108. ILL. ADMIN. CODE tit. 80, § 302.105 (1989).

109. IND. CODE § 6-3.1-12-7(a) (1989). The credit is equal to twenty-five percent (25%) multiplied by the lesser of (1) the amount the employer invests in the program; (2) the first $25,000 per year the employer invests, if the employer has over 1,000 employees; or (3) the first $15,000 per year the employer invests, if there are fewer than 1,000 workers. *Id.*

110. IOWA CODE § 730.5(2) (1989). An exception to this general provision applies to testing of state peace and correctional officers, testing required under federal regulations passed as of July 1, 1990, and testing conducted according to Nuclear Regulatory Commission requirements. *Id. See also* IOWA ADMIN. CODE r. 581-19.5(2)(b), .5(3) (1990) (procedures for testing of correctional officers under Nuclear Regulatory Commission Policy Statement).

ployer follows defined procedures.[111] This legislation prohibits employee discipline the first time a positive test result occurs, if the employee undergoes substance abuse evaluation and completes any recommended treatment.[112] A 1989 Iowa Attorney General Opinion noted that federal administrative rules governing drug testing may preempt more strict Iowa statutes.[113]

*Kansas*

Kansas has enacted several statutes regulating drug testing by public employers. The provisions generally apply to persons seeking or currently holding various offices in state government,[114] and employees applying for, or currently working in safety-sensitive government positions.[115] The state has also established requirements for conducting laboratory tests for controlled substances.[116]

*Louisiana*

Louisiana law provides that an employee who is discharged for using nonprescribed controlled substances, either on or off the job, shall be ineligible to receive unemployment compensation benefits.[117] The employer has the burden of proving by a preponderance of the evidence that the employee has committed a proscribed abuse of a controlled substance.[118]

*Maine*

Maine has enacted extensive legislation governing substance testing of both public and private sector employees.[119] No employer may conduct testing except in accordance with these provisions.[120] Moreover, the Maine statutes prohibit municipalities from passing ordinances regulating employee testing for abuse of con-

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111. (1) "The employer [must have] probable cause to believe that an employee's faculties are impaired on the job;" (2) the impairment must present a danger to the employee's safety or the safety of co-workers, the public, or the employer's property, or violate a known work rule; (3) the employee's test sample must be analyzed pursuant to required testing procedures; (4) the employee must be given a reasonable opportunity to rebut or defend the test result; and (5) the employer must provide for treatment and evaluation as required by law. IOWA CODE § 730.5(3)(a)-(f) (1989).

112. *Id.* at § 730.5(3)(f).

113. Op. Att'y Gen. No. 89-3-1 (Mar. 10, 1989).

114. KAN. STAT. ANN. § 75-4362 (Supp. 1990).

115. *Id.* An employer may not administer a preemployment drug test without first making a conditional offer of employment; i.e., the offer is contingent upon participation in the testing program. *Id. See generally* KAN. ADMIN. REGS. 1-6-32 (1990). A current employee receiving a confirmed positive test result is subject to dismissal. KAN. STAT. ANN. §§ 75-2949d to 2949f (1989). *See also* KAN. ADMIN. REGS. 1-10-8 (1990).

116. KAN. ADMIN. REGS. 28-33-12 (1989).

117. LA. REV. STAT. ANN. § 23:1601(10) (West Supp. 1987).

118. *Id.* The employer may not require an applicant to pay the cost of a drug test required as a condition of employment. *See* LA. REV. STAT. ANN. § 23:897 (West Supp. 1991).

119. ME. REV. STAT. ANN. tit. 26, §§ 681-690 (Supp. 1990).

120. *Id.* at tit. 26, § 681. An employer may test an applicant only if the employer has made a conditional offer of employment, or if the employer has offered the employee a position on the roster of candidates to be selected. *Id.* at tit. 26, § 684. The statute also provides for probable cause testing of incumbent employees. *Id.*

trolled substances.[121] These statutes require employers to develop detailed written testing policies.[122]

*Maryland*

Maryland law designates procedures employers must follow when testing employees for drug and alcohol abuse.[123] Maryland licensing agencies may require applicants for state licenses[124] to disclose whether the individual has ever been convicted of a drug-related offense. An agency may refuse to issue a license on that basis, or may impose terms and conditions upon the issuance of the license as the agency deems appropriate under the law.[125] A 1989 Maryland Executive Order also promulgated a substance abuse policy applicable to state employees.[126]

*Massachusetts*

Although Massachusetts has enacted no laws governing workplace substance abuse testing, the Massachusetts Constitution provides some protection through its guarantee of the right to privacy.[127]

*Michigan*

The Michigan legislature has enacted no laws governing testing of private or public sector employees. The Michigan Attorney General rendered an opinion in 1989 stating that the Michigan Occupational Health Standards Commission could not issue a standard pursuant to which employees could be tested for substance abuse.[128]

*Minnesota*

Minnesota law prohibits private and state employers from engaging in "arbitrary and capricious" drug testing.[129] Employers may only test in accordance with a written policy.[130] Random testing of employees in safety-sensitive positions is, however, allowed.[131] Furthermore, an employer may conduct random testing

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121. *Id.* at tit. 26, § 681.

122. *Id.* at tit. 26, §§ 683, 686.

123. MD. HEALTH-GEN. CODE ANN. § 17-214.1 (1990 & Supp. 1990).

124. "License" is defined to include a license, permit, certification, registration, or other legal authorization by a state licensing agency to engage in employment or in an occupation or profession. MD. ANN. CODE art. 41, §§ 1-403 to 1-409 (1988 & Supp. 1990).

125. *Id.* The statutes also include provisions requiring notification to licensing authorities when licensees are convicted of controlled substance offenses. The offenses must have been committed on or after January 1, 1991. *Id.*

126. Exec. Order No. 01.01.1989.05 (Apr. 7, 1989). The Order is consistent with the federal Drug-Free Workplace Act of 1988.

127. MASS. ANN. LAWS ch. 214, § 1B (Law. Co-op. 1986 & Supp. 1991). Massachusetts guarantees each person a "right against unreasonable, substantial or serious interference with his privacy." *Id.*

128. Op. Att'y Gen. No. 6580 (May 1, 1989) (such regulation would constitute improper regulation of personal behavior). *Id.*

129. MINN. STAT. ANN. § 181.951 (West Supp. 1991).

130. *Id. See also id.* at § 181.952.

131. *Id.* at § 181.951.

where there is reasonable suspicion that employees may be engaged in prohibited substance abuse.[132]

*Montana*

Montana law generally prohibits both public and private employers from conditioning employment or continued employment upon failure of an individual to submit to a blood or urine test.[133]

*Nebraska*

Nebraska law regulates both public and private employers who engage more than six full-time and part-time employees.[134] This legislation establishes testing procedures and governs employer use of drug test results, yet does not require drug or alcohol testing.[135] The law prescribes detailed procedures for testing, which are regulated by the Nebraska Department of Health.[136]

*Nevada*

Nevada law provides for termination of state or political subdivision employees, county, city, or township officers, and elected or appointed officers, who are convicted for unlawful sale of controlled substances.[137] The statute excludes court justices or judges from its proscriptions.[138] The statute is applicable to convictions under federal or state law prohibiting the sale of any controlled substance occurring on or after October 1, 1989.[139]

*New Hampshire*

The New Hampshire legislature has established a committee comprised of state legislators, a labor representative, a business representative, an attorney, and a member of the public, to study issues regarding workplace drug and alcohol testing, and to issue a report recommending legislation.[140] The drug-free workplace

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132. *Id.* The employer must have:

> [A] reasonable suspicion that the employee: (1) is under the influence of drugs or alcohol; (2) has violated the employer's written work rules prohibiting the use, possession, sale, or transfer of drugs or alcohol while the employee is on the employer's premises or operating the employer's vehicle, machinery, or equipment . . . ; (3) has sustained a personal injury . . . or has caused another employee to sustain a personal injury; or (4) has caused a work-related accident.

*Id.*

133. MONT. CODE ANN. § 39-2-304 (1989). An employer can, however, require an incumbent employee to submit to testing if "the employer has reason to believe that the employee's faculties are impaired on the job as a result of alcohol consumption or illegal drug use." *Id.* An employer may also require a job applicant for a position in a hazardous work environment, or a position primarily involving security, public safety, or fiduciary responsibility, to undergo testing. *Id.*

134. NEB. REV. STAT. § 48-1902(8) (1988).

135. *Id.* at §§ 48-1901 to -1910. The statute does not prescribe circumstances under which employers may perform drug tests. *Id.* at § 48-1901.

136. *Id.* at § 48-1903.

137. NEV. REV. STAT. ANN. § 193.105 (Michie Supp. 1989).

138. *Id.*

139. *Id.*

140. 1990 N.H. Laws 104.

rules adopted by the state Division of Personnel provide for dismissal of employees found using, possessing, distributing, or manufacturing a controlled substance in the workplace.[141]

*New Jersey*

Two executive orders, which became effective in 1989, constitute the only regulation of employer drug abuse policies in New Jersey. The first Executive Order became effective in March of 1989, and mirrors the Federal Drug-Free Workplace Act of 1988.[142] The second Executive Order established a Cabinet Task Force on Drug Testing in the Workplace in August of 1989.[143]

*North Carolina*

North Carolina has not yet enacted any state-wide law prohibiting substance abuse in the workplace. North Carolina statutes require group policies and group contracts of insurance that provide treatment benefits and total annual benefits for physical illnesses in excess of $8,000 to meet certain minimum benefit conditions.[144]

*North Dakota*

North Dakota law requires group health insurance plans to provide inpatient and partial hospitalization treatment as benefits for diagnosis, evaluation, and treatment of drug addiction and alcoholism.[145]

*Oklahoma*

Oklahoma's only substance abuse regulations apply to employees of nursing facilities, specialized facilities, or residential care homes,[146] as well as occupation licensees subject to regulation by the Horse Racing Commission.[147]

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141. The statute also provides for employee dismissal following a conviction for defined drug-related offenses, or if the employee fails to notify the employer within five (5) days of conviction for such offenses. N.H. CODE ADMIN. R. [Div. of Personnel] 308.03(c)(2)(g)-(i), 308.03(d) (1989).

142. Exec. Order No. 204 (Mar. 14, 1989). The Executive Order applies to the Office of the Governor, agencies, and principal executive departments of the state government. *Id.* at 1. The Executive Order prohibits unlawful manufacture, distribution, dispensing, possession, and use of illicit drugs in the workplace, on penalty of job loss or mandatory participation in an approved drug abuse treatment program. *Id.* at 2.

143. Exec. Order No. 191 (Aug. 11, 1989). The Task Force is to formulate a state-wide drug testing policy for state employees. The policy must balance employee rights against the state's interest in public safety and maintenance of a drug free work environment. The Task Force is, among other things, commissioned to draft drug testing guidelines for state employees. *Id.* at 1.

144. *See* N.C. GEN. STAT. §§ 58-51-50, 58-65-75, 58-67-70 (1989).

145. N.D. CENT. CODE § 26.1-36-08 (1989).

146. OKLA. STAT. ANN. tit. 63, § 1-1950.1G (West Supp. 1991) (addicted employee may not continue in employment until he or she produces evidence of successful completion of rehabilitation program).

147. OKLA. STAT. ANN. tit. 3A, § 204A(14)(a) (West Supp. 1991) (licensees may be required by the Commission to submit to testing upon probable belief by the Commission of the licensee's possession or use of a controlled substance).

*Oregon*

The Oregon legislature has established specific instructions governing laboratories that perform drug tests,[148] unemployment benefits,[149] and health insurance[150] in regard to work-related substance abuse matters. Oregon law also makes it illegal for employers to administer breathalizer tests to employees or applicants without their consent.[151]

*Pennsylvania*

Under Pennsylvania statutes, employees discharged for substance abuse must participate in state employee assistance programs or other approved rehabilitation programs to receive welfare benefits.[152] Group health, sickness, and accident insurance policies must provide benefits for inpatient detoxification, treatment in licensed nonhospital facilities, or nonhospital residential care facilities, and outpatient care and partial hospitalization.[153]

*Rhode Island*

Neither public nor private sector employers are allowed to conduct mandatory drug tests of employees or applicants in Rhode Island.[154] Testing of certain employees under specific conditions is permissible if the employer has reasonable suspicion based upon "specific objective facts" which indicate that an employee may be using a controlled substance.[155]

*South Dakota*

Pursuant to South Dakota law, the State Bureau of Personnel is mandated to formulate and implement a drug screening program for applicants in safety-sensitive government positions.[156] The statute provides for confidentiality of test results, and employee access to those results upon written request to the Bureau of Person-

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148. OR. REV. STAT. § 438.435 (1989) (laboratories performing drug testing must be state-licensed and staffed by qualified technical personnel).

149. *Id.* at § 657.176. Although a job applicant may be denied unemployment benefits for refusal to submit to drug testing by a prospective employer, and current employees may be discharged for refusal to take a drug test based upon the employer's reasonable suspicion, benefits may not be denied if an employee is discharged for refusing to submit to a random test. Glide Lumber Prods. Co. v. Employment Div., 87 Or. App. 152, 741 P.2d 904 (Or. Ct. App. 1987).

150. *See* OR. ADMIN. R. 836-52-230 (1991) (group health insurance policies entered, renewed, or extended on or after July 1, 1988, must provide coverage for alcohol and chemical dependency treatment).

151. OR. REV. STAT. §§ 659.225, 659.227(1), .227(2), .227(3)(b), .227(3)(c), .227(5) (1989).

152. PA. STAT. ANN. tit. 7, § 1690.109 (Purdon 1990).

153. PA. STAT. ANN. tit. 40, §§ 908-1 to -8 (Purdon Supp. 1990).

154. R.I. GEN. LAWS § 28-6.5-1 (1990).

155. *Id.* In such situations, testing must follow specific guidelines. *Id.* Where testing is mandated by federal law as a condition for entitlement to federal funds, testing of public utility and mass transportation employees is allowed. *Id.*

156. S.D. CODIFIED LAWS ANN. § 23-3-65 (1990). The South Dakota legislature has given the term "safety-sensitive position" a different definition than that utilized in most other states. The statute defines "safety-sensitive positions" as those of "any law enforcement officer authorized to carry firearms and custody staff employed by any agency responsible for the rehabilitation or treatment of any adjudicated adult or juvenile." *Id.* at § 23-3-64.

nel Commissioner.[157] Printed public advertisements seeking applicants for safety-sensitive positions as defined by the statute must include a statement of applicable drug screening requirements.[158] South Dakota's drug-free workplace policy became effective in November, 1989.

*Tennessee*

Tennessee law provides for reasonable suspicion testing of Department of Corrections security personnel in situations where "a clear and present danger to the physical safety" of workers, co-workers, or facility security is present.[159] The Tennessee statute requires that employees be given opportunity to explain their behavior before testing is conducted.[160] Any references in employee records to testing or rehabilitation must be deleted following completion of rehabilitation and two (2) years of successful reemployment.[161]

*Texas*

Texas Department of Highways and Public Transportation employees and applicants are subject to preemployment, reasonable cause, post-accident, and random testing.[162]

*Utah*

Utah career service and classified service personnel are subject to a state statute prohibiting the manufacture, dispensation, possession, use, distribution, and influence of controlled substances or alcohol during working hours, or while on state property.[163] The statute requires employees convicted of such offenses to report the fact of conviction within five days.[164] The statute outlines detailed procedures for testing, confidentiality, and enforcement, as promulgated by the Executive Director of the State Department of Human Resource Management.[165] Utah is unique in that it is one of the few states which has enacted detailed guidelines for drug and alcohol testing of applicants and employees in the private sector.[166]

The Act allows for testing applicants and employees of persons, firms, and corporations, including public utilities and transit districts, who employ one or more workers in the same establishment, with the condition that employers and man-

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157. *Id.*

158. *Id.* at § 23-3-66. *See also* Exec. Order No. 89-17 (Nov. 30, 1989) (prohibiting state employees from the unlawful manufacture, distribution, dispensation, possession, or use of any controlled substance in the workplace).

159. TENN. CODE ANN. § 41-1-122 (1990).

160. A "viable" explanation by the employee negates the testing requirement. *Id.*

161. *Id.*

162. TEX. HIGH. CODE ANN. §§ 1.100-.111 (Vernon 1989).

163. UTAH CODE ANN. § 67-19-33 (Supp. 1990).

164. *Id.* at § 67-19-35.

165. *Id.* at §§ 67-19-34, -36, -37, -38.

166. *See generally* UTAH CODE ANN. §§ 34-38-1 to -15 (1988).

agers must also periodically submit to testing.[167] The statute mandates that employers formulate written drug and alcohol testing policies.[168] The Act also contains detailed confidentiality, confirmation, and remedy provisions.[169] The Utah State Department of Public Safety has implemented rigorous testing protocols, including the requirement that job applicants be given no more than six hours notification prior to reporting for testing.[170] The Utah Department of Human Resources has also implemented drug-free workplace rules, in conformity with the federal Drug-Free Workplace Act.[171]

*Vermont*

Vermont's substance abuse testing laws apply to public and private sector applicants and employees of employment agencies, individuals, organizations, governmental bodies, partnerships, associations, trustees, estates, corporations, joint stock companies, insurance companies, trustees in bankruptcy, and common carriers operating in Vermont.[172] The statute prohibits random, company-wide, and applicant drug testing, except as required by federal law.[173] Testing may be conducted upon notice to a job applicant after a conditional offer of employment has been made, provided the test is part of a comprehensive physical examination, and conforms to the provisions of the statute.[174] The statute also provides for probable cause testing of employees under certain circumstances.[175]

*Virginia*

Virginia workers' compensation law provides that employers have no financial responsibility for injuries or illnesses attributable to employee intoxication. Virginia has adopted no law regarding substance abuse testing.[176]

*Washington*

Washington law requires that group disability insurance, group health service contracts, and group health maintenance organization agreements provide benefits for treatment of alcohol and drug abuse.[177] Washington has, to date, enacted

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167. UTAH CODE ANN. § 34-38-3 (1987). The time in which drug and alcohol testing occurs under these provisions are deemed work time for purposes of compensation and benefits. UTAH CODE ANN. § 34-38-5 (1987).

168. *Id.* at § 34-38-1. Testing may be performed under the following circumstances: (1) investigation of individual employee impairment; (2) investigation of workplace accidents or theft; (3) safety of employees or the public; and (4) maintenance of productivity, quality, or security. *Id.*

169. *Id.* at § 34-38-13.

170. Dep't of Pub. Safety Rule 700-100-1-5 (1987).

171. *See* Dep't of Human Resource Management Rule 468-15-1 to 468-15-4.

172. VT. STAT. ANN. tit. 21, § 511(6) (1990).

173. *Id.* at tit. 21, § 513(b).

174. *Id.* at tit. 21, § 513(b)(1)-(4).

175. *Id.* at tit. 21, § 513(c)(1).

176. The Virginia Attorney General has opined that the appropriateness of drug testing depends upon the circumstances of each individual case. *See* Op. Att'y Gen. (Feb. 27, 1987).

177. *See generally* WASH. ADMIN. CODE § 284-53-010 (1987).

no other legislation regarding employer policies or practices on substance abuse in the workplace.

*Wisconsin*

Wisconsin presently has not enacted any laws prohibiting employee testing.[178]

## III. Recent Federal and State Decisions Regarding Public Employees and Private Employees of Government Contractors

Although case law dealing with substance abuse in the workplace and employer drug testing represent a rapidly expanding concern to federal and state courts, little uniformity has yet resulted and there are few crystallized principles of law. Some of the more recent cases of note are discussed below to provide insight into current judicial concerns.

### *A. The Supreme Court and the Fourth Amendment*

The Supreme Court of the United States decided *Skinner v. Railway Labor Executives' Association* in March of 1989.[179] The *Skinner* decision resulted from a Federal Railroad Administration requirement that railroad employees be tested for drug abuse following accidents and when a reasonable suspicion existed as to the employee's use of a substance.[180] The rule required private railroads to test employees in safety-sensitive positions. Employees were subject to testing if there was reasonable suspicion that they were under the influence of alcohol.[181]

Federal Railroad Administration regulations mandated blood and urine tests of employees involved in train accidents.[182] The Federal Railroad Administration adopted regulations that authorized, but did not require that railroads administer breath and urine tests to employees who violated certain safety rules.[183]

In *Skinner,* the Court was called upon to decide whether the FRA regulations at issue violated the fourth amendment.[184] The Court first addressed whether the drug tests at issue were attributable to the government or to its agents, and whether

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178. The Wisconsin Attorney General has opined that municipalities must balance the need for preemployment drug tests against invasion of privacy concerns when such tests are administered. Cities should determine whether testing is reasonable by looking at the facts of each case in light of fourth amendment concerns. Op. Att'y Gen. No. 55-87 (Sept. 30, 1987).

179. 489 U.S. 602 (1989). At the same time, the Court handed down its opinion in National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989). *See infra* notes 211-17 and accompanying text.

180. *Skinner,* 489 U.S. at 606.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* The Supreme Court reversed the ruling of the Ninth Circuit Court of Appeals in Skinner v. Railway Labor Executives' Association, 839 F.2d 575 (9th Cir. 1988).

they were searches or seizures within the meaning of the fourth amendment.[185] The fourth amendment only applies when there is "state action."[186] Therefore, even an unreasonable search or seizure conducted by a private party on its own initiative is not unconstitutional.[187] However, the fourth amendment does protect against intrusions by a private party if that party acted as an agent or instrument of the government.[188]

The *Skinner* Court held that even though the FRA did not require testing by private railroads under the section of its regulations covering employees who violate safety rules, the actions of the railroad in complying with the regulations were governed by the fourth amendment.[189] The Court noted that the question of whether a private party should be deemed an agent or instrument of the government under the fourth amendment turns on the degree of government participation in the private party's actions.[190] The mere fact that the government did not compel a private party in a particular case to perform the search does not alone establish that the search is private.[191]

In *Skinner,* the Court found that the government's involvement in the underlying private conduct was more than passive.[192] Relying on precedents concerning the government's gathering of physical evidence from a person, the Court held that "any limitation on an employee's freedom of movement that is necessary to obtain the blood, urine, or breath samples contemplated by the regulations must be considered in assessing the intrusiveness of the searches effected by the Government's testing program."[193]

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185. *Id.* at 613-14. The fourth amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . . " U.S. CONST. amend. IV. "The Amendment guarantees the privacy, dignity and security of persons against arbitrary and invasive acts by officers of the Government or those acting at their direction." *Skinner,* 489 U.S. at 613-14 (citing Camara v. Municipal Court, 387 U.S. 523, 528 (1967)).

186. The principle is well settled that only the state can deny its citizens due process of law. Wright, *Litigating the State Action Issue in Preemptory Challenge Cases,* 13 AM. J. TRIAL ADVOC. 1, 2 (1989) (citing Edmonson v. Leesville Concrete Co., 895 F.2d 218 (5th Cir. 1990)).

187. *Skinner,* 489 U.S. at 614.

188. United States v. Jacobsen, 466 U.S. 109, 113-14 (1984); Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971); Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

189. *Skinner,* 489 U.S. 614.

190. *Id.* (citing *Coolidge,* 403 U.S. at 443).

191. *Skinner,* 489 U.S. at 615.

192. *Id.*

193. *Id.* at 618. In reaching this decision, the Court examined various fourth amendment holdings, including Schmerber v. California, 384 U.S. 757, 767-68 (1966) ("compelled intrusion into the body for blood to be analyzed for alcohol content" deemed a fourth amendment search). After *Schmerber,* courts have consistently recognized that mandatory urinalysis constitutes a search and seizure because it is an invasion of the subject's expectation of privacy. *See, e.g.,* Jenkins v. Jones, 109 S. Ct. 1622 (1989); Jones v. McKenzie, 833 F.2d 335 (D.C. Cir. 1987), *vacated and remanded* in light of *Skinner* and *Von Raab;* National Fed. of Federal Employees v. Weinberger, 818 F.2d 935 (D.C. Cir. 1987), *vacated in part,* National Fed. of Federal Employees v. Cheney, 884 F.2d 603 (D.C. Cir. 1989), *cert. denied,* 110 S. Ct. 864 (1990); Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985); Storms v. Coughlin, 600 F. Supp. 1214 (S.D. N.Y. 1984) (random testing of prisoners generally permissible at all times because suspicion is always reasonable). *See also* Winston v. Lee, 470 U.S. 753, 760 (1985); California v. Trombetta, 467 U.S. 479, 481 (1984) (breathalizer test requiring "deep lung" breath subject to fourth amendment); Terry v. Ohio, 392 U.S. 1, 9 (1968).

The second question considered by the Court was whether the searches and seizures prescribed by the FRA were unreasonable.[194] Thus, the Court was required to balance the intrusion of a particular practice on the individual's fourth amendment privacy interests against the promotion of legitimate governmental interests.[195]

The Court noted that although the balance is usually struck in favor of the procedures described by the warrant clause of the fourth amendment,[196] certain exceptions to the rule exist, "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirements impracticable.' "[197] The Court found that the government's interest in regulating railroad employees' conduct to insure safety presents "special needs" beyond normal law enforcement which justify departure from the usual warrant and probable cause requirements.[198]

The Court noted that because employees covered by the regulations were engaged in safety-sensitive tasks, the government's need to monitor compliance with the regulations justified the privacy intrusions in question without need for a warrant or individualized suspicion.[199] The Court pointed out that the government has a strong interest in dispensing with the warrant requirement when the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.[200] *Skinner* presented such a situation.[201] A warrant was, therefore, unnecessary to render the tests reasonable under the fourth amendment.[202]

The Court next discussed the fourth amendment probable cause requirement.[203] Generally, a search must be based upon the probable cause predicate that the per-

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194. *Skinner*, 489 U.S. at 619. Reasonableness "depends on all the circumstances surrounding the search or seizure and the nature of the search or seizure itself." United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985).

195. *See also* Delaware v. Prouse, 440 U.S. 648, 654 (1979); United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

196. *Skinner*, 489 U.S. at 619. A search or seizure is not reasonable unless performed pursuant to a judicial warrant issued upon probable cause, except in certain well-defined cases. *Id. See, e.g.*, Payton v. New York, 445 U.S. 573, 586 (1980); Mincey v. Arizona, 437 U.S. 385, 390 (1978).

197. Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

198. *Griffin*, 483 U.S. at 880 (search of probationer's home).

199. *Skinner*, 489 U.S. at 621.

200. *Id.* at 625. *See also* Donovan v. Dewey, 452 U.S. 594, 603 (1981); Camara v. Municipal Court, 387 U.S. 523, 533 (1967). Due to the rate at which alcohol and other drugs are eliminated from the bloodstream, tests to measure their presence must be obtained as quickly as possible. *Id.* at 623 (citing Schmerber v. California, 384 U.S. 757, 770-71 (1966)).

201. *Skinner*, 489 U.S. at 622. In dispensing with the warrant requirement, the *Skinner* Court stated:

> Both the circumstances justifying toxicological testing and the permissible limits of such intrusions are defined narrowly and specifically in the regulations that authorize them, and doubtless are well known to covered employees . . . . Indeed, in light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate.

*Id.*

202. *Id.* at 624.

203. *Id.*

son to be searched has violated the law.[204] The Court escaped the "individualized suspicion" requirement of the fourth amendment by holding that the privacy interest implicated by the search was minimal and that the important governmental interest advanced by the search would be put in jeopardy if the individualized suspicion requirement were imposed.[205] The blood, breath, and urine tests administered by the railroad were therefore constitutional in the manner in which they were applied. The Court noted that although a warrantless search normally requires individualized suspicion, such a requirement need not be satisfied if the privacy interest invaded was minimal and the search served an important governmental interest.[206] The Court found that the government had a compelling interest in preventing the potential for serious injury caused by drug-impaired employees.[207] The employee's expectations of privacy were reduced substantially under the facts of *Skinner* because the employee was employed in an industry which was heavily regulated by the government.

*National Treasury Employees' Union v. Von Raab*[208] was decided concurrently with *Skinner*. In *Von Raab*, a union of federal employees and a union official sued the United States Customs Service on behalf of agency employees seeking positions subject to newly implemented drug testing requirements.[209] In applying the same balancing test used in *Skinner*, the Court found that the government had a compelling interest in ensuring that drug intradiction officers were fit both physically and in regard to integrity in judgment.[210] The Court held that the government had a compelling safety interest in promoting pretransfer and prepromotion testing of employees seeking designated positions.[211] The Court once again balanced the

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204. *Id.* (citing New Jersey v. T.L.O., 469 U.S. 325, 340 (1985)).

205. *Skinner*, 489 U.S. at 624.

> Ordinarily, an employee consents to significant restrictions in his freedom of movement where necessary for his employment, and few are free to come and go as they please during working hours . . . . Any additional interference with a railroad employee's freedom of movement that occurs in the time it takes to procure a blood, breath, or urine sample for testing cannot, by itself, be said to infringe significant privacy interest.

*Id.* at 624-25.

206. *Id.* at 624-26. In reviewing the testing program, the Court balanced the employee's privacy interest against the government interest served by drug testing. The Court acknowledged that urine testing normally involved only minimal invasions of privacy, although blood testing and breath testing constituted more significant invasions. *Id.*

207. *Id.* at 678.

208. 489 U.S. 656.

209. *Id.* Drug tests were a condition precedent for placement or employment in positions with direct involvement in drug intradiction or enforcement, positions requiring the custom's officer to carry firearms, and positions in which the employee would handle "classified" material. *Id.* at 660-61.

210. *Id.* at 665-77.

211. *Id.*

government's compelling interests against the employee's diminished expectation of privacy.[212]

The Court noted that the testing procedures outlined by the Customs Service did not carry the grave potential for "arbitrary and oppressive interference with the privacy and personal security of individuals."[213] In regard to employees seeking positions which involved access to classified materials, the Court found a compelling governmental interest in safeguarding sensitive information.[214] The government's interest was to prevent access to "truly sensitive" information by persons who " 'under compulsion of circumstances or for other reasons, . . . might compromise [such] information.' "[215] Due to the parity of the record in the appellate court, the United States Supreme Court remanded this issue to the Court of Appeals for determination as to whether the positions for which the Customs Service authorized drug testing actually involved access to truly sensitive information.[216]

### *B. Varying Decisions Following* Skinner *and* Von Raab

In 1988, the Supreme Court decided *Railway Labor Executives' Ass'n v. Burnley,*[217] reversing the Ninth Circuit Court of Appeals, and holding that drug testing regulations which could not measure current levels of intoxication or impairment were not invalid.[218] The Court held that the tests provided, at a minimum, a basis for further investigation so that the employer could determine if drugs were used at relevant times.[219]

The federal courts have also reached varying conclusions regarding different types of government employees and employees of contractors. Generally, the courts have upheld reasonable suspicion and even random testing in circumstances

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212. *Id.* at 672.

> Unlike most private citizens or government employees in general, employees involved in drug intradiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms. Because successful performance of their duties depends uniquely on their judgment and exteriority, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness . . . . While reasonable tests designed to elicit this information doubtless infringe some privacy expectations, we do not believe these expectations outweigh the government's compelling interest in safety and in the integrity of our borders.

*Id.*

213. *Id.* (quoting United States v. Martinez, 428 U.S. 543, 554 (1976)).

214. *Id.*

215. *Von Raab,* 489 U.S. at 677 (quoting Department of the Navy v. Egan, 484 U.S. 518 (1988)); *see also* United States v. Robel, 389 U.S. 258, 267 (1967) ("We have recognized that, while the Constitution protects against invasions of individual rights, it does not withdraw from the Government the power to safeguard its vital interests . . . . The Government can deny access to its secrets to those who would use such information to harm the Nation.").

216. *Von Raab,* 489 U.S. at 678. The Supreme Court instructed the Court of Appeals on remand to consider pertinent information which would bear upon the employee's privacy expectations as well as the supervision to which the employees were already subject.

217. 839 F.2d 575 (9th Cir. 1988).

218. *Id.*

219. *Id.*

where a legitimate concern for public safety existed.[220] For example, courts have upheld random testing by the Army,[221] testing of policemen,[222] fire fighters,[223] and employees of nuclear facilities.[224]

Generally, federal cases allow for random testing by public employers when public safety is likely to be affected. In other circumstances, testing must be based on the employer's reasonable suspicion that employees may be abusing controlled substances.[225]

## IV. Recent Decisions Regarding Rights of Private Employees

In most situations where private employers conduct drug testing, they do not do so under color of state law. The lack of "state action" generally removes private employer testing from the ambit of the fourth amendment. Furthermore, an employer may test applicants with little worry if the employer gives adequate notice and maintains test results in confidence. Employers face the greatest likelihood of legal risk when testing current employees. Because the United States Constitution provides no protection for employees in the private sector, they are required to challenge testing by private employers on other grounds, most commonly in tort causes of action. Although employee challenges to substance abuse testing have embraced various theories, the most common is grounded upon invasion of the

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220. Bluestein v. Skinner, 908 F.2d 451 (9th Cir. 1990) (FAA random testing without advance notice or reasonable suspicion constitutional when performed upon flight crews, air traffic controllers, and maintenance workers); American Fed'n of Gov't Employees v. Skinner, 885 F.2d 884 (D.C. Cir. 1989) (Department of Transportation may constitutionally require random testing of railway safety inspectors, highway inspectors, aircraft mechanics, motor vehicle operators, and air traffic controllers); Transport Workers' Union of Philadelphia, Local 234 v. Southeastern Pennsylvania Transportation Authority, 863 F.2d 1110 (3d Cir. 1988), *vacated,* 109 S. Ct. 3208 (random urinalysis testing of public transit authority employees constitutional due to safety-sensitive nature of industry); Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.), *cert. denied,* 429 U.S. 1029 (1976) (post-accident and reasonable suspicion testing of drivers constitutional); Beazer v. New York City Transit Authority, 414 F. Supp. 277 (S.D. N.Y. 1976) (policy prohibiting employment of narcotics users as bus and subway drivers justified by concern for public safety). *But see* Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989), *cert. denied,* 488 U.S. 934 (1988) (Department of Transportation prohibited from random testing of integrity-sensitive employees and prosecutors).

221. National Fed'n of Fed. Employees v. Cheney, 884 F.2d 603 (D.C. Cir. 1989), *cert. denied,* 110 S. Ct. 864 (permitting random testing of civilians, air traffic controllers, guards, pilots, mechanics, and aircraft attendants, but prohibiting testing of secretaries, researchers, engineer technicians and animal caretakers).

222. Guiney v. Roache, 873 F.2d 1557 (1st Cir. 1989) (random testing of policemen carrying firearms and in drug intradiction reasonable); Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1989) (periodic testing of prison guards withstands fourth amendment scrutiny in absence of reasonable suspicion); Wrightsell v. Chicago, 678 F. Supp. 727 (N.D. Ill. 1988) (mandatory urine tests of policemen based upon reasonable suspicion constitutional); Caruso v. Ward, 534 N.Y.S.2d 142, 530 N.E.2d 850 (1988) (random urine test of policemen in narcotics and organized crime units valid because officers have minimal privacy interest).

223. Capua v. City of Plainfield, 643 F. Supp. 1507 (D. N.J. 1986) (drug tests conducted without notice to firefighters unconstitutional where city had formulated no policy, guidelines, or safeguards for testing procedures).

224. Rushton v. Nebraska Pub. Power Dist., 844 F.2d 562 (8th Cir. 1988) (nuclear power plant employee testing constitutional); Ensor v. Rust Engineering, 704 F. Supp. 808 (E.D. Tenn. 1989) (random testing of employees with access to nuclear weapons factory was constitutional due to safety and security considerations).

225. *See, e.g.,* Patchogue-Medford Congress of Teachers v. Bd. of Educ., 70 N.Y.2d 57, 517 N.Y.S.2d 456, 510 N.E.2d 325 (1987) (school board may not require probationary teachers to undergo testing absent a reasonable suspicion of drug abuse).

common law right to privacy. The majority of decisions hold that employees enjoy a diminished right of privacy outweighed by the employer's interest in maintaining a drug-free workplace.[226] In addition, employees often allege the torts of defama-

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226. *See* O'Brien v. Papa Gino's of Am., Inc., 780 F.2d 1067 (1st Cir. 1986) (employer use of polygraph test wrongful); Jevic v. Coca-Cola Bottling Co. of N.Y., 1990 WL 109851 (D. N.J. 1990) (job applicant consenting to testing may not later claim invasion of privacy); DiTomasso v. Electronic Data Systems Co., CIV.A.87-CV-60320AA, 1988 WL 156317, at *5 (E.D. Mich. 1988) (substance abuse testing of armed security guards does not constitute invasion of privacy); International Bd. of Elec. Workers, Local 1900 v. Potomac Elec. Power Co., 634 F. Supp. 642 (D. D.C. 1986) (random testing of current employees "hysterical" invasion of privacy); Satterfield v. Lockheed Missiles and Space Co., 617 F. Supp. 1359 (D. S.C. 1985) (employee's right of privacy not violated where results of drug test not publicly disclosed); Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123 (Alaska 1989) (employer's testing program not violative of Alaska Constitution provisions extending only to government violations of privacy); Wilkinson v. Times Mirror Corp., 215 Cal. App. 3d 1034, 264 Cal. Rptr. 194 (1989) (preemployment drug screening program providing safeguards of notice to job applicants not violative of California constitutional prohibitions against some non-governmental invasions of privacy); Loder v. City of Glendale, 216 Cal. App. 3d 777, 265 Cal. Rptr. 66 (1989) (absent showing of irreparable harm, preliminary injunction against preemployment and prepromotion drug testing program would not issue); Anapolis v. United Food and Commercial Workers Local 400, 317 Md. 544, 565 A.2d 672 (1990) (mandatory drug testing of police officers and fire fighters constitutional because some quantum of individualized suspicion existed and the governmental interest in maintaining a drug-free work place outweighed the employee's interest); Horsemen's Benevolent and Protective Ass'n v. State Racing Comm'n, 403 Mass. 692, 532 N.E.2d 644 (1989) (random testing of employees and the horseracing industry unconstitutionally vague and do not meet standard for probable cause); International Fed. of Professional and Technical Engineers, Local 194A v. Bridge Comm'n, 240 N.J. Super. 9, 572 A.2d 204 (1990) (concerns for public safety outweigh privacy interests of employees against periodic physical examinations including drug and alcohol testing conducted without prior notice); Seelig v. Koehler, 151 A.D.2d 53, 546 N.Y.S.2d 828 (1989) (due to drug abuse problems among corrections officers in prisons, random testing of officers constitutional and officers' privacy expectations diminished); Singleton v. Unemployment Comp. Bd. of Review, 558 A.2d 574 (Pa. 1989) (pre-reinstatement drug testing of bus drivers constitutional because of concern for public safety; employee consent to pre-reinstatement drug testing diminishes complaint by employee of violation of right to privacy); Jennings v. Minco Technology Labs, Inc., 765 S.W.2d 497 (Tex. App. 1989) (random testing by a private employer not violative of employee's right of privacy, and employee consents by remaining on job after notice of testing); K-Mart Corp. Store No. 7441 v. Trotti, 677 S.W.2d 632 (Tex. App. 1984) (reasonable suspicion required for employer search of employee locker upon which employee had placed her own lock). Employers should note that polygraph testing involves the greatest legal risk on the basis of invasion of privacy. Barnard, *Legal Implications of Drug Testing in the Private Sector*, 2 J. LAW & HEALTH 67, 80 (1987-88).

tion,[227] intentional infliction of emotional distress,[228] wrongful discharge,[229] and assault and battery.[230]

## V. CONCLUSION

As the preceding reflects, legislatures and courts, on both federal and state levels, are increasingly being called upon to address the myriad of problems associated with substance abuse in the workplace. Employers finding themselves compelled to consider and implement substance abuse programs must do so with careful attention to applicable regulatory requirements. However, in addition to compliance with such obligations, several general considerations are worthy of note.

First, the concepts of fairness and due process are major themes which should guide employer substance abuse policies. All substance abuse policies and programs should inform employees of their rights to "due process" to ensure that they will not be arbitrarily disciplined or adversely treated unless the employer can present substantial evidence of policy violation. Thus, employees should always be given the opportunity to explain their conduct before disciplinary action is

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227. *See* Norman v. General Motors Corp., 838 F.2d 1217 (9th Cir. 1990) (employer's fault for reckless allegations of drug abuse to police officers considered defamatory); Strachan v. Union Oil Co., 768 F.2d 703 (5th Cir. 1985) (no defamation results from employer's internal investigation of employee suspected of drug abuse when employee is subjected to testing and questioning); Houston Belt & Terminal Railway Co. v. Wherry, 548 S.W.2d 743 (Tex. App. 1976), *cert. denied and appeal dismissed,* 434 U.S. 962 (1977) (employer's false report of employee's drug use to Public Law Board defamatory); *but see* Rosemond v. Nat'l R.R. Passenger Corp., 1986 WL 10711 (S.D. N.Y. Sept. 19, 1986) (truth of employer's allegation is a defense to defamation suit).

228. Satterfield v. Lockheed Missiles and Space Co., 617 F. Supp. 1359 (D. S.C. 1985) (termination of employee after periodic annual physical reveals positive drug test result does not constitute intentional infliction of emotional distress); Luck v. Southern Pac. Transp. Co., 218 Cal. App. 3d 1, 267 Cal. Rptr. 618 (Cal. Ct. App. 1990) (employee fired for refusal to submit to drug test awarded damages for intentional infliction of emotional distress); Kelley v. Schlumberger Technology Corp., 849 F.2d 41 (1st Cir. 1988), *cert. denied,* 111 S. Ct. 344 (1990) (employee received jury award for infliction of emotional distress); Norman v. General Motors Corp., 838 F.2d 1217 (9th Cir. 1990); Kamrath v. Suburban Nat'l Bank, 363 N.W.2d 108 (Minn. Ct. App. 1985) (employer liable for intentional infliction of emotional distress caused by polygraph testing of employee).

229. Kinoshita v. Canadian Pac. Airlines, 803 F.2d 471 (9th Cir. 1986) (no violation for airline's dismissal of employees arrested for drug trafficking); Jevic v. Coca-Cola Bottling Company of N.Y., No. CIV.A.89-4431, 1990 WL 109851, at *6-7 (D. N.J. 1990) (public policy does not prevent refusal to hire drug users or wrongful discharged of at-will employees testing positive); Local 900, United Paperworkers Int'l Union v. Boise Cascade, Corp., 713 F. Supp. 26 (D. Me. 1989) (employer discipline of employees following post-accident testing not violative of public policy prohibiting retaliatory discipline after filing of workers' compensation claim); DiTomasso v. Electronic Data Systems, No. CIV.A.87-CV-60320AA, 1988 WL 156317, at *5 (E.D. Mich. 1988) (private employees testing positive have no claim for wrongful discharge based upon public policy under state constitution prohibiting unreasonable search and seizure); Greco v. Halliburton Co., 674 F. Supp. 1447 (D. Wyo. 1987) (employee's wrongful discharge claim invalid after employee's refusal to submit to testing on grounds of invasion of privacy); Semore v. Poole, 217 Cal. App. 3d 1087, 266 Cal. Rptr. 280 (1990) (claims for invasion of privacy fall within the public policy exception to at-will employment); Doe v. Roe, Inc., 160 A.D.2d 255, 553 N.Y.S.2d 364 (1990) (employer must show drug test can distinguish between presence of illicit drugs and presence of legal foods in the body to withstand applicant's claim for employment discrimination); Hershberger v. Jersey Shore Steel Co., 394 Pa. Super. 363, 575 A.2d 944 (1990) (at-will employees may be discharged even if initial drug tests are unconfirmed by follow-up tests).

230. Any touching without consent may constitute a battery. An employee must be competent to consent to drug testing. An intoxicated worker may not be competent to give consent to a drug test. See Hollerud v. Malamis, 20 Mich. App. 748, 174 N.W.2d 626 (1969).

taken, and testing protocols and procedures should always include safeguards to ensure accuracy and reliability of testing and results.

In addition, where drug testing programs result in positive test results for which disciplinary action may be taken, a procedure for contesting results should be available to employees. An employer's decision to take disciplinary action against an offending employee should always be based upon a complete written record of facts.

Finally, because substance abuse is currently a far more prevalent phenomenon, both within and without the workplace, than it has been in the past, employers should be sensitive to post-disciplinary litigation which may be stimulated by decisions to discipline or discharge offending employees. Of particular note are theories that employees have been subjected to negligent testing, have been defamed in regard to test results, or have not received benefits and protections provided by employment contracts prior to disciplinary action based upon alleged violation of substance abuse policies.

While a catalog of the causes of action spawned by employer drug testing and related substance abuse policies is beyond the scope of this article, employers are well advised to keep in mind that drug testing is universally viewed in a negative light by employees. Where actions by the employer in implementing such policies appear arbitrary, unreasonably intrusive, or beyond legitimate business concerns, the likelihood of post-disciplinary legal complications increases greatly. Conversely, where due process and fairness are made integral parts of such programs, the likelihood of legal dispute may be dramatically diminished. Given that the courts are in the early stages of developing principles of law which will define employer and employee rights in dealing with these difficult issues, it is apparent that implementation of substance abuse programs should only be undertaken with great care and thorough analysis of applicable regulatory requirements, the employer's legitimate business concerns, and the privacy and moral interests of employees.