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Drugs and Alcohol in the Workplace¹

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I. Introduction

During the last two years, there have been a number of significant developments regarding drug and alcohol testing (hereinafter “drug testing”). The Supreme Court has led the way by issuing two opinions upholding the suspicionless testing of railway workers and some Customs Service employees. Although neither of these opinions addresses the issue of *random* testing, they are the Court’s first statements on the constitutionality of employee drug testing generally. The Court also recently held that the unilateral implementation of drug-testing programs by railroad employers does not constitute a “major dispute” under the Railway Labor Act, so that railroad employers are not required to bargain with unions representing affected employees before instituting such programs.

Since these Supreme Court decisions, the NLRB and several U.S. Courts of Appeals and District Courts have followed up with further explication of the extent to which employers may legally test their employees for drug use. Moreover, both Congress, the Department of Defense (DOD) and the Department of Transportation (DOT) have taken important action related to drug testing. On October 21, 1988, Congress passed the Drug-Free Workplace Act of 1988. Effective March 18, 1989, the Act requires federal grantees and most federal contractors to implement drug-free workplace policies. It does not require testing of employees, however. Interim Department of Defense Regulations, on the other hand, effective October 31, 1988, require that government defense contractors test employees holding “sensitive positions.” Also, DOT has issued various drug-free regulations that require covered employers to put in place certain aspects of a drug-testing program in place by December 21, 1989. Finally, state courts (and legislatures)² are beginning to

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2 For example, Maryland has amended its drug-testing law, effective July 1, 1990, to require employers to satisfy certain standards and procedures for drug and alcohol testing of employees and applicants for employment (e.g., requiring that specimens be tested at state certified laboratories). Also effective January 1, 1991, Maryland licensing authorities will be permitted to sanction state-licensed professionals convicted of controlled dangerous substance violations. In the District of Columbia, a drug-testing bill entitled the “Employee Substance Testing Act of 1989 is under consideration in the Committee on Housing and Economic Development.

address the issues raised by drug testing under both state constitutional and common law tort theories.

All of these various developments, Supreme Court, federal and state, are summarized below.

II. Supreme Court Decides Major Drug-testing Issues

A. Skinner Case

In *Skinner v. Railway Labor Executives Association*, 109 S.Ct. 1402 (1989) (decided March 21, 1989), the Supreme Court upheld against a Fourth Amendment challenge Federal Railway Administration regulations that mandate the testing of railroad employees involved in major train accidents, even where there is no individualized suspicion of drug or alcohol use, and permit testing of railroad employees for other incidents or rule violations in the absence of suspicion of on-duty impairment.

In so holding, the Court made several significant preliminary determinations. First, the Court concluded that because the testing was mandated or permitted by the government, which took more than a “passive” approach to and sought to share the fruits of the testing, Fourth Amendment standards were applicable to the testing procedures even though the regulations were implemented by private sector employers. Second, the Court found that collecting of blood and urine for testing, as well as administering breath tests to detect the presence of alcohol, are searches under the Fourth Amendment. Third, the Court held that neither a warrant nor probable cause was required to permit testing of the employees in question. Instead, said the Court, the testing requirements of the regulations would pass constitutional muster if they met the less restrictive Fourth Amendment standard of reasonableness under the circumstances, which requires a balancing of the employee’s privacy interests against promotion of legitimate governmental interests.

In concluding that the testing procedures met this test, the Court held that the government had a compelling interest in regulating the conduct of railway employees engaged in safety sensitive tasks to ensure the safety of both the employees and the traveling public. Thus, while drug testing in some contexts could result in serious intrusions into the privacy expectations of employees, the governmental interests outweighed employee privacy interests in this case.

Although the plaintiffs had argued that individualized suspicion of drug or alcohol abuse prior to testing is essential to its constitutional validity, the Court rejected this argument, citing several reasons. First, the intrusions permitted by the regulations were “minimal”

because the testing procedures used are recognized by society as not unduly intrusive and the regulations contain safeguards to protect against unnecessary intrusions, including establishment of collection procedures similar to those encountered during regular physical examinations. Second, and more importantly, railroad employees have a diminished expectation of privacy because they work in an industry pervasively regulated to ensure safety, a goal dependent on the health and the fitness of the employee. Third, the governmental interest in testing without a showing of individualized suspicion was compelling because an employee will seldom display any outward signs of impairment prior to an accident and evidence of individualized suspicion would be extremely difficult to obtain at the chaotic scene of a major accident after it occurred. Fourth, testing without individualized suspicion will serve to act as a deterrent against illegal substance abuse because an employee cannot predict when he or she will be involved in an accident or incident which would subject the employee to testing.

Finally, the Court rejected the notion that because the test could not determine whether an individual was intoxicated by drugs at the time of testing or the degree of impairment, it was unreasonable. The Court found this argument “flawed” because, even if the test showed only recent drug use, this information could form the basis for further investigation into whether the employee was using drugs at the relevant time. Moreover, this contention did not consider the regulations’ goal of deterring as well as detecting drug use.

B. Von Raab Case

In *National Treasury Employees Union, et al. v. Von Raab*, 109 S.Ct. 1384 (1989) (decided March 21, 1989), a case decided the same day as *Skinner*, the Court upheld a Custom Service plan requiring suspicionless urine testing of individuals seeking transfers to or employment in positions directly involved with drug interdiction or enforcement of related laws and positions where the employee would be required to carry a firearm. It remanded for further consideration, however, a provision requiring the testing of those who handled classified material.

As in *Skinner*, the Court found that collection of urine samples for drug testing was a Fourth Amendment search. It also concluded that neither a warrant nor probable cause was required to test employees. The testing provisions were required to meet only the standard of reasonableness under the circumstances.

The Court concluded that testing of individuals seeking positions directly involving drug interdiction or carrying firearms was reasonable even in the absence of a suspicion that the individual was using drugs. The government, said the Court, has a compelling interest in

assuring that its front interdiction personnel are physically fit and maintain unimpeachable integrity and judgment. It also has a compelling interest in assuring that those capable of using deadly force do not suffer from impaired perception and judgment which could be caused by illegal substance abuse. These interests outweigh the privacy interests of affected employees, which the Court found to be diminished by the fact that affected employees should reasonably expect that the Service will make effective inquiry into their "fitness and probity" because of the nature of their work.

The Court rejected the contention that the plan was unconstitutional because it was not premised on a belief that the testing would reveal drug use by the affected employees. The Court found that while the testing program was not motivated by a perceived drug problem among employees to be tested, it was nevertheless justified by strong safety and national security interests in ensuring that drug abusers are not promoted to the covered positions. The Court also rejected the argument that the fact that users can avoid detection by temporary abstinence or alteration of samples, rendered the plan unconstitutional, concluding that attempts to abstain to cleanse one's system are unpredictable at best and adequate safeguards against sample tampering were included in the program.

Finally, the Court found that the record did not provide enough information to determine whether the testing program was constitutional as it related to testing of those applying for positions where they would have access to classified information. This portion of the case was remanded for further development of what materials are deemed to be classified and what privacy expectations existed in those who would have access to such material.

C. Conrail Case

In *Consolidated Rail Corporation ("Conrail") v. Railway Labor Executives' Association*, 109 S.Ct. 2477 (1989), the Supreme Court issued its first drug-testing ruling concerning a private employer. The Conrail case involved Conrail's unilateral decision to include drug testing as part of all periodic and return-from-leave physical examinations. This inclusion of drug testing, which broadened the scope of Conrail's prior drug testing, resulted from a serious drug-related Conrail accident that occurred in the Baltimore/Washington area in January, 1987. The Court had to decide whether Conrail's unilateral implementation of the drug-testing program was a "major" or "minor" dispute under the Railway Labor Act ("Act"). If the dispute were classified as "major," Conrail would be required to bargain to impasse with its employee unions before implementing the testing program.

The Supreme Court held that Conrail's implementation decision created a "minor" dispute, which did not necessitate bargaining prior to implementation. The Court also held the Union had to contest Conrail's decision by submitting it to compulsory and binding arbitration before the National Railroad Adjustment Board. In support of its decision, the Court reasoned that Conrail's admitted implied contractual authority to conduct physical exams and to determine fitness-for-duty standards arguably provided it with the flexibility to add drug testing to all periodic and return-from-leave physical examinations. Yet, the Court was careful to state that it was not addressing the merits of Conrail's action or minimizing the Union's arguments against the action.

D. Other Recent Developments

In other recent developments, the Court declined to consider, and thus let stand, rulings in the following cases: *Copeland v. Philadelphia Police Dept.*, 840 F.2d 1139, 2 BNA IER Cases 1825 (3d Cir. 1988), cert. denied, 109 S.Ct. 1636 (April 3, 1989) (reasonable suspicion existed to test police officer for drugs where test was requested two months after girlfriend informed the police department that the officer used drugs, even though girlfriend recanted accusation prior to request to take test and police investigation failed to corroborate claim of drug use); *Policemen's Benevolent Assoc. of New Jersey v. Township of Washington*, 850 F.2d 133, 3 BNA IER Cases 699 (3d Cir. 1988), cert. denied, 109 S.Ct. 1637 (April 3, 1989) (random testing and testing as part of physical examination of police officers falls within administrative search exception to Fourth Amendment warrant requirement).

Additionally, in light of the Court's decision in *Skinner v. RLEA*, the D.C. Court of Appeals replaced an earlier opinion vacated by the Supreme Court. *Jones v. McKenzie*, 833 F.2d 335, 2 BNA IER Cases 1121 (D.C. Cir. 1987), vacated sub nom *Jenkins v. Jones*, 109 S.Ct. 1633 (April 3, 1989, replaced *Jones v. Jenkins*, 878 F.2d 1476 (D.C. Cir. June 27, 1989)). The D.C. Circuit's original opinion held that drug screening as part of routine physical was permissible, but that use of the EMIT test was inappropriate because it did not measure current impairment and thus did not bear a nexus to the legitimate concern for on-duty impairment. On remand, the court replaced its original opinion by substituting language that stated the D.C. Public School System's drug-testing program was supported by compelling interests that outweighed employee privacy concerns. *Id.* at 1476-77.

Finally, the Fifth Circuit Court of Appeals in New Orleans recently upheld the constitutionality, at least on its face, of President Reagan's 1986 Executive Order authorizing random testing of federal employees in sensitive positions and reasonable suspicion (of drug use)

testing of all federal employees. *National Treasury Employees Union v. Bush*, 891 F.2d 99 (5th Cir. 1989). And, even more recently, a federal court in San Francisco enjoined numerous aspects of the United States Navy's *civilian* testing program due to the overbreadth of the testing categories. *American Federation of Government Employees v. Cheney*, C88-3823-DLJ (D.C. NCalif. March 15, 1990). The court enjoined post-accident testing involving motor vehicles or equipment; testing of employees in jobs involving the maintenance of transportation or mechanical equipment; testing of many "national security" labeled employees; testing of employees working in drug/alcohol rehabilitation jobs; and testing of employees in nearly all jobs labeled "protection of life and property jobs." The court found these categories to be overinclusive to an excessive degree.

III. Random Testing of Federal Employees After *Skinner* and *Von Raab* Decisions

Since the *Skinner* and *Von Raab* decisions, there has been a trend among lower federal courts to permit limited random testing based on the Supreme Court's reasoning in *Skinner* and *Von Raab*. Rather than focusing on the random nature of the testing, these courts have generally focused on the type of employees to be tested and the strength of the governmental interest supporting the testing. As a result, consistent with *Skinner* and *Von Raab*, these courts have upheld random drug testing that has involved important and immediate public safety and national security interests.

In *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), the court lifted an injunction on the Department of Justice's ("DOJ") random drug-testing program as it applied to employees holding top secret security clearances, but maintained the injunction as to federal prosecutors and employees with access to grand jury proceedings.

DOJ's program subjected five categories of employees to random testing. Three of these categories—those having access to top secret classified information, those having access to grand jury proceedings and those having to prosecute criminal cases—filed suit to enjoin the random testing. The two other categories of employees, presidential appointees and employees responsible for handling and safeguarding controlled substances, did not file suit.

Stating that its decision was largely controlled by *Skinner* and *Von Raab*, the court initially considered whether the random nature of the DOJ testing required a fundamentally different analysis than that used by the Supreme Court for non-random testing. While the court stated that the random nature of the DOJ testing was a "relevant consideration" and

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possibly a determinative one in a close case, the court further stated: “We do not believe, however, that this aspect of the program requires us to undertake a fundamentally different analysis from that pursued by the Supreme Court in *Von Raab*.” Thus, the court proceeded to weigh individual privacy interests against the following governmental interests advanced by DOJ: integrity of the workforce, public safety, and protection of sensitive information.

As to the workforce integrity interest, the court found that this did not support random testing of employees in the broadly defined categories of employees who prosecute criminal cases, employees with access to grand jury proceedings and employees with access to classified information. The court noted, however, that the need for workforce integrity might support the random testing of employees in these categories if there was a direct nexus between the employees’ job duties and drug enforcement.

Similarly, with regard to the public safety interest, the court found that the employee categories were too broadly defined to justify random testing on this basis. Because the categories did not specifically pinpoint those employees who posed a direct or immediate threat to public safety, the court held that random testing of employees in each of the categories was not supported by a public safety rationale.

The court did find that the government’s interest in protecting confidential information supported the random testing of employees in all three categories requiring top secret security clearances. The court defined “truly sensitive” information as that which merits a “top secret” classification. Because top secret information relates to national security interests, the court held that the random testing of employees holding top secret clearances was constitutional. However, the court noted that the mere access by employees to confidential information in grand jury proceedings or in the prosecution of criminal cases did not support random testing. Again, the court noted that more precise definition was required to support the random testing of employees who either had access to confidential information in grand jury proceedings or in federal prosecutions.

In lifting the injunction as to employees with top secret security clearances, but in maintaining it as to those with access to confidential information and as to federal prosecutors, the court specifically refrained from redefining the employee categories in DOJ’s testing program. Rather, the court concluded it was best to allow DOJ the opportunity to redefine its program, if it chose to do so.

More recently, in *American Federation of Government Employees (AFGE) v. Skinner*, 885 F.2d 884 (D.C. Cir. 1989), the court upheld the Department of Transportation’s (“DOT”) drug-testing program which

included the random testing of air traffic controllers and certain other safety and security-related employees.

DOT classified employees into two groups for purposes of drug testing. Category I employees are those who bear "a direct and immediate impact on public health and safety, the protection of life and property, law enforcement, or national security." Employees in Category I include, *inter alia*, air traffic controllers, aviation safety inspectors, motor vehicle operators, hazardous material inspectors and aircraft mechanics. Category I employees are made subject to pre-appointment testing as well as to the following five types of additional testing: (1) random; (2) periodic "if they are required to take periodic physical examinations," (3) reasonable suspicion; (4) accident or unsafe practice; and (5) follow-up. Category II employees are made subject to reasonable suspicion, accident or unsafe practice and follow-up. The AFGE and the Category I employees, which make up nearly half of DOT's 62,000 employees, filed suit to enjoin the random testing aspect of DOT's program. Specifically, appellants challenged the random testing of motor vehicle operators, hazardous material inspectors and aircraft mechanics.

In upholding the random testing, the court initially determined that DOT's overall program met "needs other than law enforcement" and thus, did not necessarily have to be "supported by any level of particularized suspicion." The court then proceeded to balance the government's interests in transportation safety against the privacy interests of the Category I employees. The court found that the "extraordinary safety sensitivity" of the bulk of the Category I positions was compelling. Also persuasive to the court was the fact that most of the Category I employees worked in non-traditional settings, making the detection of drug use more difficult. Thus, the court held that the random testing of Category I employees was not an unreasonable means of ensuring transportation safety. Recently, the Supreme Court declined to review the D.C. court's decision to uphold the DOT policy. *American Federation of Government Employees v. Skinner*, No. 89-1272 (U.S. April 30, 1990).

A number of other federal courts have also recently upheld limited random testing.³ Based on all of these decisions, there seems to be a

3 *Government Employees v. Cavazos*, 721 F. Supp. 1361 (D.D.C. 1989) (court upheld Department of Education's random testing program for motor vehicle drivers and employees with top secret clearance, but struck down random testing as to certain data processors); *NFFE v. Cheney*, 884 F.2d 603 (D.C. Cir. 1989) (court upheld portions of U.S. Army's civilian employee drug-testing plan, some of which included random drug testing) *cert. denied*, 110 S.Ct. 864 (1990); *Thomson v. Marsh*, 884 F.2d 113 (4th Cir. 1989) (court upheld random drug testing of U.S. Army civilian employees having access to dangerous chemicals at chemical weapons plant); *Guiney v. Roache*, 873 F.2d 1557 (1st Cir. 1989) (court upheld random drug testing of sworn Boston police officers) *cert. denied*, 110 S.Ct. 404 (1989); *Brown v. City of Detroit*, 715 F.Supp.(E.D. Mich. 1989) (courts upheld random drug testing of sworn Detroit police officers). *But see* *Transportation Institute v. United States Coast Guard*, 727 F.Supp. 648 (D.D.C. Dec. 18, 1989) (court struck down Coast Guard regulations

clearly developing trend that random testing is permissible if consistent with the Supreme Court's analysis in *Skinner* and *Von Raab*.

IV. NLRB Issues Decisions On Duty to Bargain Over Drug Testing

The National Labor Relations Board ("NLRB") recently issued two decisions, which clarify the scope of a unionized employer's duty to bargain over drug and alcohol testing programs. In *Johnson-Bateman Co.*, 295 NLRB No. 26 (1989), the NLRB held that drug testing of current employees is a mandatory subject of bargaining. In *Minneapolis Star Tribune*, 295 NLRB No. 63 (1989), however, the NLRB held that drug and alcohol testing of *applicants* for employment is not a mandatory subject of bargaining. Thus, based on these two decisions, a private employer in a union setting must bargain about drug and alcohol testing of current employees, but does not have to bargain about such testing for applicants.

V. Federal Drug-Free Regulations Requiring Drug-Testing Programs

A. Drug-Free Workplace Act

The Drug-Free Workplace Act applies to government contracts valued at more than \$25,000 and to government grants of any value. HR 5210, §§ 5151-5160. The Act requires that employers do the following:

- (1) Publish a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession or use of controlled substances is prohibited at the workplace. The statement must specify the range of disciplinary actions that may be taken against an employee for violation of this policy.
- (2) Establish a drug-free awareness program to inform employees about:
 - (a) The dangers of drug abuse in the workplace;
 - (b) The employer's policy of maintaining a drug-free workplace;
 - (c) Any available drug counseling, rehabilitation and employee assistance program; and

requiring random testing of nearly all employees aboard commercial vessels).

- (d) The penalties that may be imposed upon employees for drug abuse violations.
- (3) Provide employees with a copy of the drug policy, which requires them to agree to abide by the policy and to notify the employer within five days of any criminal drug statute conviction occurring in the workplace.
- (4) Notify the contracting government office of any employee drug conviction within ten days of being notified thereof.
- (5) Require the convicted employee to undergo drug rehabilitation or discipline, which may include termination.
- (6) Make a good-faith effort to maintain a drug-free workplace.

The Act does not address the issue of drug-testing programs, nor does it specify the type of discipline or sanction to be imposed on offending employees, leaving these matters to the discretion of the employer.

The penalty for noncompliance is the possible loss of government contracts/grants for up to five years. Noncompliance occurs if there is:

- (1) False certification that a drug-free workplace program is in effect;
- (2) Failure to comply with the drug-free workplace certification; or
- (3) The occurrence of a number of employee drug convictions in the workplace sufficient to indicate noncompliance with the certification.

The government recently issued final rules to implement the Drug-Free Workplace Act. The rules, 55 Fed. Reg. 21,706 (to be codified at 48 C.F.R. §§ 1, 9, 23, 42 and 52), apply to all federal agencies and go into effect July 24, 1990. In order to abide by the Act, contractors working on contracts over \$25,000 are required to publish a statement notifying employees that drug abuse in the workplace is prohibited, create an ongoing drug program, require employees to report drug violations, impose sanctions for drug abuse, and comply in good faith with all of the requirements. The regulations do not apply to subcontractors. 102 DLR A-15-17, May 25, 1990.

B. Department of Defense Regulations

The Department of Defense's interim regulations, 53 FR 37763, contain both mandatory and discretionary requirements. With regard to the mandatory requirements, the regulations require a Department of Defense contractor to institute and maintain a program designed to achieve a drug-free workforce. The contractor is free to design its own program, but the regulations suggest the following elements:

- (1) Employee assistance programs emphasizing education, counseling, rehabilitation and coordination with available community resources;
- (2) Supervisory training to identify and address employee drug abuse;
- (3) Provision for self and supervisory referrals for drug abuse problems;
- (4) Testing for employees in "sensitive" positions, which are defined as those employees:
 - (a) In positions having access to classified information;
 - (b) In positions involving national security, health or safety;
 - (c) In positions requiring a high degree of trust or confidence.

Although the Department of Defense regulations do not explicitly require random drug testing, DOD has stated that random testing is required to implement its regulations. 67 DLR A-9-11, April 10, 1989. Because neither the *Skinner* nor the *Von Raab* cases address the issue of random testing, it is unclear whether it is constitutional.

The DOD regulations suggest that an employer decide who to test by considering the following:

- (1) The nature of the work being performed under the contract;
- (2) The employee's duties;
- (3) The efficient use of contractor resources; and
- (4) The risk to public safety and security if the employee fails to perform his or her position because of drug use.

The regulations also suggest discretionary drug testing in the following circumstances:

- (1) When there is a reasonable suspicion that an employee uses illegal drugs;
- (2) When an employee has been involved in an accident or unsafe practice;
- (3) When it is part of or is a follow-up to counseling or rehabilitation for illegal drug use; and
- (4) As part of a voluntary employee drug-testing problem.

The regulations also indicate that an employer may establish a pre-employment testing program for applicants.

In addition to these basic substantive requirements, the Department of Defense regulations require a contractor to "adopt appropriate personnel procedures to deal with employees who are found to be using drugs illegally." If a sensitive position employee tests positive for drug use, then the regulations require the contractor to remove the employee from his position and prohibit him from returning to duty until the employee shows his/her ability to perform in a sensitive position according to the contractor's procedures.

The regulations do not apply to the extent they are inconsistent with state or local law or with an existing collective bargaining agreement. However, the contractor must agree to make the conflicting drug-testing provision the subject of negotiation at the next collective bargaining session. Further, the regulations do not apply to subcontracts.

Finally, the regulations require the Department of Defense contracting officer to insert a clause containing the regulation's requirements in all solicitations and contracts involving access to classified information or any other contract where the contracting officer determines that inclusion is necessary for national security reasons or for health or safety reasons.

The contracting officer is not required to insert this clause in a commercial contract or a contract that is to be performed outside of the United States, its territories and possessions.

C. Department of Transportation Requirements

1. Applicability

DOT has issued regulations requiring all motor carriers which operate commercial motor vehicles in interstate commerce to implement a drug-free program that includes various types of drug testing.⁴ More specifically,

⁴ DOT has also issued drug-free regulations for the aviation, rail, mass transit, maritime and pipeline industries. Also, there is legislation pending in Congress that would broaden

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the regulations apply only to motor carriers operating commercial vehicles that (1) have a g.v.w. or g.c.w. of 26,001 or more pounds; or (2) are designed to carry more than 15 persons; or (3) are transporting hazardous materials that require placarding. Motor carriers with *50 or more drivers* subject to testing must have a testing program in place by December 21, 1989. Similarly, motor carriers with *less than 50 drivers* subject to testing are required to implement a program by December 21, 1990.

2. General Requirements

Generally, the motor carrier (i.e., employer) is required to develop and implement a drug-testing program for its employee drivers and for its contract drivers under contract for 90 days or more in any 365-day period. This includes developing an Employee Assistance Program, informing drivers, training supervisors, completing and maintaining records, and either employing personnel who can collect urine specimens or contracting with an agency to perform collections. Regardless of whether the motor carrier collects urine samples or contracts with another entity to do the collections, the motor carrier is responsible for ensuring that federal regulations regarding collection are complied with.

3. Employee Assistance Program ("EAP")

The EAP requirement consists merely of education and training. Basically, all supervisors and drivers must receive training on the following:

- (a) the effects and consequences of controlled substance use on personal health, safety, and the work environment; and
- (b) the manifestations and behavioral causes that may indicate controlled substance use or abuse.

The EAP training must be "effective" and be at least 60 minutes long. Also, the motor carrier must maintain documentation of training given to drivers and supervisory personnel.

4. Testing Requirements

the testing of workers in the rail, aviation and trucking industries. See (HR 1208) and (S 561). However, this outline does not discuss these additional regulations or this pending legislation.

The regulations require testing in the following five situations: (1) prior to employment; (2) during the first medical examination of the driver after implementation of the program; (3) when a supervisor has “reasonable cause” to believe that the actions or appearance or conduct of a driver “on duty” (as defined in 49 CFR § 395.2) are indicative of drug use; (4) no later than 32 hours after a reportable accident; and (5) on a random basis in which 50 percent of the motor carrier’s drivers are tested over a 12-month period.

a. **Pre-employment Testing**

Pre-employment testing applies to drivers a motor carrier intends to *use* or to *hire*. The driver must submit to testing as a pre-qualification, but before the testing, the driver must be informed that a urine sample will be taken and tested for the presence of drugs. Also, if the driver-applicant requests the results of the drug test within 60 days of the date he was notified of the disposition of his application, he must be told the results of his test.

There are two exceptions to pre-employment testing. They are as follows:

- (1) If the driver is a regularly employed driver of another motor carrier and the other motor carrier certifies that he is fully qualified to drive a motor vehicle in accordance with 49 CFR § 391.65;
- (2) A driver can be “used” (*i.e.*, not employed) without testing if he participates in a testing program that meets the requirements of the regulations and the motor carrier contacts the testing program to determine (a) the name and address of the program, (b) verification that the driver participates in the program, (c) verification that the program comports with federal regulations, (d) the date that the driver was last tested, and (e) verification that the driver is qualified (drug-free) under these regulations. This information must be kept

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separate from the motor carrier's own drug-testing program.

If the motor carrier intends to take advantage of these exceptions, the information obtained pursuant to them must be kept in the driver's qualification file.

b. Reasonable Cause Testing

Testing is required when motor carriers have reasonable cause to believe that the actions or appearance or conduct of a driver on duty are indicative of drug use. Reasonable cause must be based on conduct that is witnessed by at least two supervisors, if feasible. However, one supervisor will suffice if there is no other supervisor available. The witnesses must have received training in the detection of probable drug use by observing a person's behavior. The witnesses must document the driver's conduct either within 24 hours of the observed behavior, or before the results of the tests are released, whichever is earlier. The suspected driver must be transported "immediately" to the place where the urine sample will be taken. The motor carrier is responsible for ensuring that the procedures used for taking the urine sample comport with federal regulations, and the motor carrier must notify the driver of the results.

c. Post-Accident Testing

Post-Accident testing means the *driver* must provide a urine specimen for testing no later than 32 hours after a reportable accident, which is one involving death, injury requiring immediate treatment, or total property damage exceeding \$4,400. If the driver is seriously injured and cannot provide a specimen, he must authorize the release of those medical records which would indicate whether there were any drugs in his system. The *driver* must ensure that the specimen is forwarded and processed in accord with federal regulations.

If the driver is involved in a fatal accident and he refuses drug testing, or he tests positive, he will be disqualified for a period of one year.

In filling out the accident report forms required by federal regulations, the motor carrier must note any drug testing, if performed, and the results of such testing. Also, the motor carrier is responsible for ensuring that the driver is notified of the results, including what drug was discovered, if the results were positive.

d. **Random testing**⁵

Random testing means that the tests are unannounced and that 50 percent of the drivers subject to testing are tested annually. Special rules for the first 12 months of random testing apply as follows:

- (1) the testing must be spread reasonably throughout the 12-month period;
- (2) the last test collection during the year is to be conducted at an annualized rate of 50 percent; and
- (3) the total number of drivers tested during the 12 months is to be equal to 25 percent of the drivers subject to the testing.

The driver must be notified of the results, including what drug was found, if the results were positive.

5. **Consequences to Driver for Positive Test**

A driver who uses drugs, or who tests positive for drugs, may not be "on duty" as defined in 49 CFR § 395.2. A driver who has tested positive for drugs is medically unqualified to operate a commercial vehicle, and thus cannot return to work until such time as he no longer uses drugs, tests

⁵ On November 6, 1989, DOT announced that it was deferring until further notice the December 21, 1989 implementation date of its random and certain mandatory post-accident drug testing for motor carriers. Reported in 214 Daily Labor Report at F-1-2, Nov. 7, 1989. This action was prompted by a federal court injunction that bars DOT from imposing its random and post-accident testing rules and by six pending lawsuits that challenge these portions of the regulations. However, DOT will enhance its December 21, 1989 implementation deadline for its pre-employment, periodic, reasonable cause and unenjoined post-accident testing rules.

negative for drugs, and is medically recertified. A driver who refuses to be tested will be treated the same as one who tests positive. If the driver tests positive, he may rebut the medical disqualification by showing by clear and convincing evidence that the drug was prescribed by a physician who is familiar with the driver's medical history and assigned duties. The motor carrier may require the driver to disclose the use of prescription medication.

6. **Record-Keeping Requirements**

(a) **Duration**

Individual negative test results must be kept at least 12 months. All other records related to the administration and results of the drug-testing program must be maintained at least five years.

(b) **Location**

The Medical Review Officer must be the sole custodian of individuals' test results. The driver's qualification file will contain only the following information: (a) that the driver submitted to drug testing; (b) the date of the test; (c) the location of the test; (d) the identity of the person or entity performing the test; and (e) whether the result was positive or negative.

(c) **Content**

The motor carrier must also maintain a summary, by calendar year, of the records related to the administration and results of the drug-testing program that reflects at least the following eight items:

- (1) the total number of tests administered;
- (2) the number of tests administered by category (random, reasonable cause, etc.);
- (3) the total number of individuals who failed;

- (4) the total number of individuals who failed broken down by categories (*i.e.*, random, reasonable cause, etc.);
 - (5) the consequences to each individual who failed, broken down by testing category;
 - (6) the total number of times the laboratory found sufficient indication of the presence of drugs to warrant a confirmatory test;
 - (7) the total number of times the laboratory found in a confirmatory test a sufficient presence of drugs to warrant a report of a finding of positive to the Medical Review Officer; and
 - (8) the number reflected in 7 above, broken down by substance category (*i.e.*, marijuana, cocaine, etc.).
- d. **Confidentiality and Production to DOT**

Neither the motor carrier nor the Medical Review Officer can release information about a driver without the written authorization of the driver. Also, the motor carrier must produce upon demand and permit DOT personnel to examine all records related to the administration and results of drug testing.

VI. Federal Statutory Constraints On Drug Testing

A. Rehabilitation Act of 1973

An employer's ability to test employees for drugs and alcohol is constrained by the federal handicap discrimination law. The federal Rehabilitation Act of 1973 and numerous states and local jurisdictions prohibit discrimination against "handicapped individuals" who are "otherwise qualified" for employment, and the federal and some state laws require employers to make reasonable accommodations for handicapped workers. Thus, if substance abusers are covered under these statutes, an

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employer cannot base adverse employment decisions on information gained from drug testing, unless the test results show the person is unable to do the job, or the employer can show that a drug-free lifestyle is a job-related requirement and that the employer cannot accommodate the drug user without imposing an “undue hardship” on the employer’s business.

The Rehabilitation Act of 1973 excludes from the definition of handicapped persons “any individual who is an alcoholic or drug abuser whose *current* use . . . prevents such individual from performing the duties of the job . . . or whose employment . . . would constitute a direct threat to the property or safety of others.” 29 U.S.C. § 706(7)(B).

Former alcohol and drug users and abusers who are performing adequately and *do not* pose a safety threat despite their substance use/abuse have been held to be protected by the federal handicap discrimination law. *See, e.g., Whitlock v. Donovan*, 598 F. Supp. 126 (D.D.C. 1984), *aff’d* 790, F.2d 964 (D.C. Cir. 1986) (alcoholic not currently addicted to alcohol covered by the Rehabilitation Act); *Wallace v. Veterans Administration*, 683 F. Supp. 758 (D. Kan. 1988) (former drug addict who had not taken drugs in nine months covered by Act).

Recently, a government lawyer who was rehabilitating in a detoxification program at the time of his discharge was held to be protected under the Rehabilitation Act. *Nisperos v. Acting Commissioner of Immigration and Naturalization Service*, 720 F. Supp. 1424 (N.D. Cal. 1989).

However, “casual” or “recreational” drug users may not be covered by the Rehabilitation Act if their usage is not substantial enough to create an “impairment.” *See, e.g., McCleod v. City of Detroit*, 39 BNA FEP Cases 225, 228 (E.D. Mich. 1985) (persons whose drug use does not affect ability to perform a major life activity not handicapped).

Even if a drug or alcohol abuser is “handicapped,” he or she must be “qualified” in order to be protected by the federal Rehabilitation Act. Thus, a drug or alcohol user who is not excluded from the definition of “handicapped” persons by § 706(7)(B) may be qualified for the job if he or she is capable of performing the essential functions of the job with “reasonable accommodations” to his or her handicap.

Reasonable accommodations may include time off to attend rehabilitation or detoxification programs. *Whitlock v. Donovan*, 598, F. Supp. 126 (D.D.C. 1984), *aff’d* 790 F.2d 964 (D.C. Cir. 1986) (employer failed to reasonably accommodate employee where it did not offer leave without pay for second treatment in rehabilitation program); *but see Copeland v. Philadelphia Police Dept.*, 840 F.2d 1139 (3d Cir. 1988) (police officer who tested positive for illegal drugs not entitled to

the accommodation of participating in rehabilitation program because his use of marijuana violated laws he had sworn to uphold) *cert. denied*, 109 S.Ct. 1636 (1989).

VII. Challenges to Drug-testing Programs Brought Under State Constitutional and Tort Law Theories

A number of recent cases have considered plaintiffs' challenges to drug-testing plans under state constitutional and tort law claims. Generally, they have been unsuccessful.

For example, in *DiTomaso v. Electronic Data Systems*, 3 BNA IER Cases 1700 (E.D. Mich. 1988) the court held that security guards who were employed by a private sector employer and terminated after random testing revealed evidence of marijuana use could not bring claims for wrongful discharge based on the Michigan constitution, common law invasion of privacy or other torts.

The court rejected plaintiff's wrongful discharge claim because it was based on the violation of a public policy against unreasonable searches and seizures found in the state constitution, which like the Federal constitution, was not applicable to the acts of private sector employers. The court also refused to consider plaintiff's state common law claim of invasion of privacy, rejecting the notion that off-duty illegal drug use is by right a private matter unless the employer can show that it affects work performance. The court found that the right to be free from intrusion is not absolute and that the employer had a legitimate interest in ensuring that its security officers were free from drug use prior to the formation of any reasonable suspicion. Moreover, the court found that the circumstances under which the tests were administered would not be considered objectionable to a reasonable person. Thus, there was no common law invasion of privacy. The court further rejected claims of breach of covenant of good faith and fair dealing, negligence, intentional infliction of emotional distress, race discrimination and violation of the Michigan Handicapped Civil Rights Act.

Similarly, in *Luedtke v. the Nabors Alaska Drilling, Inc.*, 4 BNA IER Cases 129, (Alaska Sup. Ct. 1989) the Alaska Supreme Court rejected a claim by workers on an oil rig that refusal to take a drug test violated a specific provision in the Alaska Constitution prohibiting infringement on the people's right to privacy, as well as claims of wrongful termination and common law invasion of privacy. The court concluded that the state constitutional right to privacy was only applicable to state action and did not apply to the private employer in question. With respect to the wrongful termination claim, the court concluded that while there is a public policy

supporting the protection of employee privacy, and a violation of this policy might rise to the level of a breach of implied covenant of good faith and fair dealing suggesting a wrongful termination, the competing public concern for employee safety in the hazardous occupation in question compelled a conclusion that the covenant was not breached. Finally, the court found no common law invasion of privacy because it concluded that the employer had a right to test employees for drug use. Additionally, the drug tests in question and use of the results thereof were consented to by the plaintiffs.

In contrast to the cases above, the *Massachusetts Supreme Judicial Court in Horsemen's Benevolent and Protective Ass'n. v. Massachusetts Racing Commission*, 4 BNA IER Cases 147 (1989) struck down random and reasonable suspicion testing of owners, trainers, jockeys and other employees licensed by the state to engage in the horse racing industry in Massachusetts as violations of the state constitution. The court rejected the contention that the testing was permissible as an administrative search as set forth in *Shoemaker v. Handle*, 749 F.2d 1136, *cert. denied*, 479 U.S. 986 (3rd Cir. 1986), (upholding testing of jockeys) stating that few courts had followed *Shoemaker*. It declined to consider the issue under the Fourth Amendment to the United States Constitution because it concluded that Article 14 of the Massachusetts Constitution afforded the plaintiffs more substantive protection than the Fourth Amendment. The court stated that under the state constitution, random drug testing cannot be justified solely by, or hinge upon, the extent to which an industry is heavily regulated. Nor can it be justified by the interest in deterring use of illegal drugs at Massachusetts race tracks or protecting the integrity of the industry. Finally, the court also struck down the reasonable suspicion drug testing because the regulation "merely requires a belief based on report, information, observation, or even 'reasonable circumstances'" to justify testing.

In the collective bargaining context, the First Circuit held in *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111, (1st Cir. 1988) *cert. denied*, 109 S.Ct. 3158 (1989) that a union member could not challenge his dismissal for failing a drug test on state constitutional and common law privacy grounds because such claims involved interpretation of the labor agreement and thus were preempted by § 301 of the Labor Management Relations Act (LMRA). In so holding, the court noted that neither the Massachusetts Constitution or its statutory scheme nor the federal Constitution prohibited drug testing. Thus, there is no absolute right to be free from drug testing as the law currently existed in the Commonwealth (this conclusion is subject to debate in light of the holding in *Horsemen's Benevolent and Protective Ass'n.*, *supra*). Additionally, the court stated that it could not conclude as a categorical matter that an employee's drug use, to the extent that it might have an impact on an employee's work, was "no business of the employer."

Finally, the court concluded that as a union member, plaintiff was obligated to grieve his termination under the collective bargaining agreement rather than sue because Massachusetts law would look to the terms of the collective bargaining agreement to discern the scope of the privacy right which plaintiff was attempting to assert. Thus, because plaintiff's claim involved interpretation of the collective bargaining agreement, his suit was preempted by § 301 of the LMRA under the Supreme Court decisions in *Lingle v. Norge Division of Magic Chef, Inc.*, 109 S.Ct. 1877 (1988) and *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985).

VIII. Conclusion

The array of new laws and government regulations mandating drug control policies for government contractors and grant recipients, as well as the Supreme Court's interest in deciding whether such laws violate individual rights show that the law in this area is unsettled but developing rapidly.

In this legal environment, whether and in what manner an employer should develop a workforce drug control program depends on a number of variables: Is the employer a private or public employer? Is it a federal contractor, and if so, with what federal agency? Is the workforce covered by a collective bargaining agreement? As a practical matter, is a drug control policy needed and what impact will it have on both operational efficiency and employee morale?

While no uniform policy or program can fit all employers, we offer the following guidelines for individual tailoring:

- (1) Determine whether your company is legally required to adopt a drug control program and, if so, with what provisions.
- (2) Determine whether there are any legal restrictions on your adoption of a drug control program, such as under a collective bargaining agreement or under state and local law.
- (3) Establish an employee assistance program for employees to voluntarily obtain rehabilitation for drug abuse and further establish a means for self-referral or referral by supervisors to the program.
- (4) Prepare a written statement that expresses the company's policy prohibiting the manufacture, distribution, possession or use of illegal drugs at work or working under the influence of illegal drugs.

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- (5) Determine the type of discipline which will occur for violating the company's policy.
- (6) Determine the means which will be used to monitor and control drug abuse at the workplace, including the circumstances under which the employer will require an employee to submit to a drug test, e.g., reasonable suspicion of drug use or part of a comprehensive "fitness for duty" medical examination, and avoid, where possible, any policy or practice of indiscriminate drug testing of employees.
- (7) Assure that any drug testing procedures are conducted in a controlled and confidential manner, comply with applicable legal requirements, and are sensitive to considerations of privacy.
- (8) Question applicants about drug use and treatment only in the context of a pre-employment physical examination performed by a physician and not during the ordinary interview process by personnel or other members of management.
- (9) Promulgate the company's policy to all employees and applicants for employment through an employee handbook and by other means; obtain from all incumbent employees a signed statement acknowledging the company's drug policy, recognizing that compliance with the policy is a condition of employment, and consenting to any drug testing and other means for assuring that the workplace is free of drugs; and obtain a statement from all applicants for employment consenting to any drug testing as part of the pre-employment physical.
- (10) Assure that the drug policy is disseminated to employees in a manner which does not create any contractually binding obligation and preserves management prerogatives under the employment at will doctrine to terminate the employment relationship at any time.

All of these matters should be carefully considered by management, with the advice of competent legal counsel, prior to implementing any drug-testing policy.

