January 1986

Drugs and Alcohol in the Workplace: Technology, Law and Policy

William F. Adams
Cynthia L. Remmers

Follow this and additional works at: http://digitalcommons.law.scu.edu/chtlj
Part of the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.scu.edu/chtlj/vol2/iss2/5
DRUGS AND ALCOHOL IN THE WORKPLACE:
TECHNOLOGY, LAW AND POLICY

William F. Adams and Cynthia L. Remmers*

I. INTRODUCTION

The workplace today is rapidly becoming a haven for illegal drug use, sale and possession. Many employees are using and selling drugs on the job and are often using pilfered company property as the "currency" with which to buy drugs. Meanwhile, alcohol abuse remains an important, unresolved problem that employers

---

* William F. Adams is an attorney with the San Jose office of Orrick, Herrington & Sutcliffe. He was a senior attorney for Hewlett-Packard Company in Palo Alto, California. He received his B.A. from the University of California, Santa Barbara in 1972 and his J.D. from the U.C.L.A. School of Law in 1975.

Cynthia L. Remmers is an attorney with the San Francisco office of Orrick, Herrington & Sutcliffe. She received her J.D. from the Boalt Hall School of Law, University of California at Berkeley in 1980. She was a law clerk to Judge Thomas Tang of the United States Court of Appeals for the Ninth Circuit and a judicial extern to the late Justice Mathew O. Tobriner of the Supreme Court of California. Both authors specialize in labor and employment law and have written and lectured extensively on the issue of drugs in the workplace and on other employment related topics.

The authors acknowledge the assistance of James Chapman who provided invaluable research and editorial support for this Article. Mr. Chapman is a third year student in a combined J.D.-M.B.A. program at the University of Santa Clara and is a Comments Editor for Volume 2 of this Journal.

1. See generally Bureau of National Affairs, BNA SPECIAL REPORT, ALCOHOL & DRUGS IN THE WORKPLACE: COSTS, CONTROLS AND CONTROVERSIES (1986) (examining the "staggering financial and human costs of drug and alcohol abuse in the workplace") (hereinafter cited as "BNA SPECIAL REPORT, ALCOHOL & DRUGS"); see Bensinger, Drugs in the Workplace, HARV. BUS. REV., Nov-Dec. 1982, at 48. The use of drugs in the workplace is not remote or isolated but reflects national drug use patterns and trends. See Schrein, A Survey of Drug Abuse in Organizations, PERSONNEL J. 478-79 (June 1983) ("Well over 80% of the organizations that responded to the survey reported that since 1975 they have had to deal directly with drug problems.") Nor is drug use confined to one occupation or type of employment, e.g. unskilled or blue collar workers. And the public is finally recognizing that drug use is an occupational hazard for health care workers (e.g., physicians, nurses, dentists and pharmacists). See Smith & Wesson, Substance Abuse in Industry: Identification, Intervention, Treatment and Prevention, in SUBSTANCE ABUSE IN THE WORKPLACE (D. Smith, D. Wesson, F. Zerkin & J. Novey eds., 1985) (hereinafter referred to as SMITH & WESSON).

2. SMITH & WESSON, supra note 1, at 6. See also, M. MALONE, THE BIG SCORE, THE BILLION DOLLAR STORY OF SILICON VALLEY (1985). (Doug Southard, a Santa Clara County district attorney, estimates that Silicon Valley loses $20 million in electronics parts and equipment each year. Much of that amount is presumably used directly or indirectly to purchase drugs).
must address. Employees who work while intoxicated by drugs or alcohol present a grave safety hazard to themselves, their co-workers and the general public. If their behavior is not checked or challenged, these employees can literally destroy a business enterprise. Moreover, apart from theft and safety problems, drug or alcohol-impaired employees are singularly unproductive, error prone and unreliable.

Employers have begun to recognize the serious problem created by drug and alcohol abuse and have begun to fight back.

3. BNA SPECIAL REPORT, ALCOHOL & DRUGS, supra note 1, at 12-13 (arguing that despite the media’s attention on drugs, alcohol remains the most important substance abuse problem for American workplaces). Alcohol is technically a drug, but for clarity the term “alcohol” may be referred to separately in this Article.


Even marijuana, previously thought by many to be harmless, is considered by experts today to be a potent drug. This is due to the increased concentration of THC, marijuana’s psychoactive ingredient, in forms of that drug now available on the street:

Since 1975, the concentration of delta 9 - THC in seized contraband has tripled and currently averages 3.6% delta 9 - THC. Much “street pot” in the United States is now at least as potent as hashish. Sinsemilla, a highly potent type of marijuana that is produced by harvesting only high quality, unpollinated, pistillate (female) plants contains between 6% and 7% delta 9 - THC. All daily smokers of marijuana in our study preferentially used sinsemilla.


5. BNA SPECIAL REPORT, ALCOHOL & DRUGS, supra note 1, at 7-9 (cost of drug abuse estimated at $500 to $1000 per employee); see also Bensinger, supra note 1, at 48 (pointing out that the problems and dimensions are difficult to quantify, but in 1981 the cost to businesses of employee drug use was estimated to be $16.4 billion).

6. BNA SPECIAL REPORT, ALCOHOL & DRUGS, supra, note 1, at 7 (“Substance abusers are absent from work two and one-half times as often as other workers and their average productivity as measured by verbal, written, psychological and physical testing is 25 to 33 percent lower than what it would be otherwise. They end up costing their employers money, time and safety in the form of medical benefits, absenteeism, accidents and injuries.”) See also Clayton, Extent and Consequences of Drug Abuse, 14 PHARMCHEM NEWSLETTER, No. 2, Mar.-Apr., 1985; Diegelman, Substance Abuse: The Business Approach, in SMITH & WEISSON, supra note 1, at 51 (1985).

7. Employer anti-drug efforts serve many of the same public policy ends as the well-publicized efforts of law enforcement, school and health officials. See Report to the President, Commission on Organized Crime, America’s Habit: Drug Abuse, Drug Trafficking and Organized Crime, (1986). The report recommends applicant drug screening and employee drug
Although employers across the country are beginning to respond, the high-technology companies in California's Santa Clara Valley, known as "Silicon Valley," are widely recognized as the front line of the recently intensified battle. The Silicon Valley effort has been a direct response to drug and alcohol problems perceived among electronics and high-technology workers. 8

Many of the procedures developed by employers to control increasing substance abuse have been plagued by legal uncertainty and general misunderstanding, and for good reason. Typically, employers and employees alike lack the understanding of drug and alcohol detection technology and methods necessary to assure their proper and effective use. Moreover, the potential governing law involves an amalgam of newly emerging doctrine and well-established but complex constitutional, statutory and common law principles.

This Article is intended to assist the employee relations community to develop and/or implement reasonable drug and alcohol policies with the least possible legal risk. The Article focuses on California and federal law, but includes significant developments in other jurisdictions as well. In particular, California decisional authority and proposed legislation provide rich examples of the developing legal and public controversy that may reflect likely developments in other states.

The Article is divided into four sections: (1) the use of and legal issues concerning testing methodologies, including emerging rights of privacy; (2) the use of and legal issues concerning other investigatory methods, including electronic surveillance, polygraph tests, undercover agents, review of medical and arrest records and searches of employee possessions; (3) legal issues concerning use of information learned in the investigatory phase, including civil rights laws, handicap discrimination and common law tort doctrines; and (4) practical advice for disciplining employees suspected of substance abuse.

The basic premise of this Article is that knowledgeable em-

---

8. See M. MALONE, supra note 2, at 409. The number of workers on Silicon Valley manufacturing lines who are heavy drug users is uncertain. "Companies say no more than a small percentage . . . . [Drug users] claim that in some departments and on some shifts the number may be as high as 90 percent. The truth probably lies somewhere in between." Id. Interestingly, many of these Silicon Valley firms have developed the technology and equipment now employed to detect drug and alcohol use.
Employers can, lawfully yet decisively, take steps to rid their workplaces of drugs and alcohol. That is not to say that a drug or alcohol testing program is appropriate for every employer. In addition to the complex legal issues raised by testing, employers must weigh the employee relations impact and expense against the anticipated benefits before deciding whether to implement a testing program. Indeed, all employers should consider less problematic alternatives before resorting to chemical detection methods.

If an employer determines such a testing program is warranted, however, it can minimize legal risks while still taking effective action if armed with some basic principles that are discussed below.

Employers may rightly presume that efforts to reduce or eliminate drug or alcohol use in the workplace are generally job-related, no matter what job an individual employee may hold. Nevertheless, the testing or investigation methods an employer selects have varying degrees of job relatedness and intrusiveness that can affect both employee acceptance and legal risk. An employer's ability to minimize these risks appears directly linked to the degree to which an anti-drug or alcohol program is tailored to each particular workplace. The more an employer focuses on preserving employee dignity and enlisting employee cooperation in a combined effort to eradicate the ill effects of drug and alcohol use, the less the legal risk.

II. TESTING FOR DRUG AND ALCOHOL USE: EMERGING EMPLOYEE LEGAL RIGHTS

In recent years, concerned employers have supplemented or replaced subjective, observational approaches to identifying drug or alcohol impaired employees with a number of highly sophisticated methods that use instruments and techniques from the fields of analytical chemistry, immunochemistry and toxicology. Usually

---

9. Subjective or observational methods include: (1) observation of "physiological signs associated with drug use (e.g., pupil size, tremor) or evidence of recent drug use (e.g., fresh needle marks)" and (2) "behavioral observations (e.g., slurred speech, unsteady gait, mood changes, irritability)." Smith & Wesson, supra note 1, at 12. A detailed list of behavioral or observational attributes designed for use by supervisors to identify impaired employees is contained in Human Resources Division, Edison Electric Institute, EEI Guide to Effective Drug and Alcohol/Fitness for Duty Policy Development 11-17 (1985).

10. A recent survey by the Bureau of Business Practices, a division of Simon and Schuster, Inc., indicates that 25% of Fortune 500 companies presently test their employees or applicants for drug use and an additional 11% are considering such tests. S.F. Examiner, October 17, 1985, at C-1, col. 5. Recently, for example, the Federal Railroad Administration enacted regulations calling for mandatory drug and alcohol testing of railway operating em-
these methods analyze urine samples supplied by employees at the employer's request. Some of the detection techniques include immunoassays, thin-layer chromatography, gas chromatography, high performance liquid chromatography and gas chromatography/mass spectrometry (GC/MS).\textsuperscript{11}

These test methods are presently lawful in all states,\textsuperscript{12} but their use to test employees or applicants raises both privacy questions and employee relations issues. In order to understand how those concerns arise, it is necessary to explore the various testing methods currently in use.

\section*{A. Employer Drug Testing Practices}

1. Pre-Employment Screening

It is axiomatic that to avoid charges of discriminatory treatment, an employer should administer pre-employment drug tests on a non-discriminatory basis. Employers need not administer them to all applicants, however; an employer might choose the more economical option of testing only those applicants who have advanced beyond an initial interview stage.\textsuperscript{13} It presently appears that em-

\textsuperscript{11} See generally Schwartz & Hawks, Laboratory Detection of Marijuana Use, J. A.M.A., August 9, 1985, at 788; NATIONAL INSTITUTE OF DRUG ABUSE, RESEARCH MONOGRAPH No. 42, The Analysis of Cannabinoids in Biological Fluids (1982); Smith & Wesson, supra note 1.

\textsuperscript{12} Employers in each particular state should consult local law to determine if there are special privacy or other restrictions applicable to the use of any particular device or method. In addition, employees should closely monitor pending legislation in this fast developing area since some employee and civil liberties advocacy and labor groups have expressed concern over unrestricted testing by employers. In response to such concerns, for example, the City and County of San Francisco enacted a restrictive municipal ordinance that bars most blood, urine or encephalographic tests as a condition of employment. S.F. MUNICIPAL (POLICE) CODE § 3300 A et seq. See Appendix A.

An Oregon law forbids use of breath analyzer-type tests unless there are reasonable grounds to believe the person is under the influence of "intoxicating liquor." Or. Rev. Stat. § 659.225.

\textsuperscript{13} A good strategy might be to test before final employment decisions have been made and while there are still multiple eligible candidates. If any candidates fail, there may remain others who can be selected. In this way the test results can be used as a factor in the final decision without necessarily being the only factor. This method of decision-making reduces the likelihood of a successful challenge based upon Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2003-I et seq. (West 1983); see Connecticut v. Teal, 457 U.S. 440 (1982). Title VII protection applies both to applicants and existing employees.
Employers are free to lawfully reject any applicant who fails a properly administered test or refuses to take one.

Employers hope that the existence of the drug testing program will deter most drug users from applying as well as detect those who do apply. Somewhat ironically, the deterrence of drug-using applicants is probably more valuable than the detection of drug use after an application has been made. Many potential applicants who use drugs may assume that the test will detect any past or current drug use and will not apply for employment.

In fact, the tests for nearly all drugs of abuse have pre-set cut-off values\textsuperscript{14} or low detection limits.\textsuperscript{15} In most cases a laboratory will be unable to detect or will not report the presence of drugs taken more than a few days prior to the test.\textsuperscript{16} To avoid detection, a drug user generally need only abstain from most drugs, including marijuana, for a week or less.\textsuperscript{17} Chronic daily marijuana users, on the other hand, may need to abstain for up to three to four weeks to avoid detection, depending on the individual's previous level of use and the sensitivity of the test.\textsuperscript{18} Thus, apart from its \textit{in terrorem} effect, pre-employment testing should be expected to eliminate only a few of the actual drug users who take the test. And, in addition to ignoring the potential for pre-test abstinence by drug users, pre-employment testing fails to identify those employees who begin using drugs after being hired.

Nonetheless, pre-employment testing has at least one advantage over other testing practices; employee consent for the testing is easier to obtain when it is made part of the application process. Individuals seeking employment are not likely to balk at signing a written consent form.\textsuperscript{19} In turn, the existence of an appropriate

\textsuperscript{14} A "cut-off value" refers to the concentration of a drug that will be reported by a laboratory as a positive indication that the drug or its metabolites are present in a sample. \textit{See Smith} & \textit{Wesson, supra} note 1, at 14.

\textsuperscript{15} The "low detection limit" of a test procedure refers to the concentration level below which a particular drug is undetectable by that method. \textit{Id.} at 16.

\textsuperscript{16} \textit{Id.} at 15; \textit{see also} Sedgewick, \textit{Cannabinoid Analysis: Problems and Interpretation}, 14 \textit{PharmChem Newsletter}, No. 1, Jan.-Feb., 1975, at 6-7. Use of a higher cut-off value will shorten the length of time in which the presence of a particular drug will be reported as positive. A higher cut-off value also will have the effect of reducing the number of unconfirmed positive results when immunoassay tests are used at their lower detection limits (e.g. 20 nanograms per milliliter for marijuana), while the confirmatory test is less sensitive. \textit{See} Fodey, J. \textit{A.M.A.}, Dec. 27, 1985, at 3425 (reply of Schwartz and Hawks to letter to editor).

\textsuperscript{17} \textit{Id.} at 15; \textit{see also} Sedgewick, \textit{Cannabinoid Analysis: Problems and Interpretation}, 14 \textit{PharmChem Newsletter}, No. 1, Jan.-Feb., 1975, at 6-7. Use of a higher cut-off value will shorten the length of time in which the presence of a particular drug will be reported as positive. A higher cut-off value also will have the effect of reducing the number of unconfirmed positive results when immunoassay tests are used at their lower detection limits (e.g. 20 nanograms per milliliter for marijuana), while the confirmatory test is less sensitive. \textit{See} Fodey, J. \textit{A.M.A.}, Dec. 27, 1985, at 3425 (reply of Schwartz and Hawks to letter to editor).

\textsuperscript{18} \textit{Id.} at 15; \textit{see also} Sedgewick, \textit{Cannabinoid Analysis: Problems and Interpretation}, 14 \textit{PharmChem Newsletter}, No. 1, Jan.-Feb., 1975, at 6-7. Use of a higher cut-off value will shorten the length of time in which the presence of a particular drug will be reported as positive. A higher cut-off value also will have the effect of reducing the number of unconfirmed positive results when immunoassay tests are used at their lower detection limits (e.g. 20 nanograms per milliliter for marijuana), while the confirmatory test is less sensitive. \textit{See} Fodey, J. \textit{A.M.A.}, Dec. 27, 1985, at 3425 (reply of Schwartz and Hawks to letter to editor).

\textsuperscript{19} For an example of such a form, \textit{see Human Resources Division, Edison Electric Institute, EEI Guide to Effective Drug and Alcohol/Fitness for Duty Policy Development}, 30
consent form increases the likelihood that the testing will not be considered a violation of the applicant's privacy interests. After an individual has entered the workforce the employer's seemingly un-fettered discretion is narrowed by the array of rights and privileges that state and federal laws afford employees.

2. Testing Current Employees “For Cause”

An employer may wish to test “for cause” when an employee exhibits possible symptoms or behavioral signs of drug or alcohol use or is thought to be a user. Most employer policies require that the degree of “cause” or suspicion regarding an employee’s possible drug use be more than a mere hunch or rumor. Of course, absent an admission on the employee’s part, an employer probably will have no certainty that drug use is involved until a test is performed. Thus, “for cause” testing policies typically rely upon some degree of reasonable suspicion before testing is triggered.

An employer can best bolster the case for testing a particular employee by supplementing suspicion with on-the-job observations. By carefully watching behavioral patterns, physical manifestations and/or gathering other circumstantial evidence (such as drug paraphernalia), an employer can more likely select those employees who exhibit present impairments or specific behavior patterns signalling possible drug abuse. This type of informed “for cause” selection method is certainly the most job-related and supportable.

“For cause” selection methods that rely in part upon observations and other evidence place the ensuing tests in a better light. For example, in the absence of testing, an employer normally will discipline an employee (or refer him or her for rehabilitation) on the basis of observations that indicate impairment. Adding a drug detection test, then, may be in an employee’s interest. The test will either confirm the observations or demonstrate to a significant degree of certainty that the individual was wrongly identified. And, the employee is probably no worse off for having submitted to testing than if the employer had simply relied upon the observations and taken what it believed to be appropriate disciplinary action on that basis.

Another “for cause” method calls for drug testing following certain types of on-the-job accidents or incidents. The occurrence of a specific incident or type of incident triggers the testing, but may not in itself suggest anything about the condition of the employee in

(1985). In California such consent forms must comply with the textual and print size requirements of CAL. CIV. CODE § 56 et seq.
question. On the other hand, the type of incident used for selection may actually be among the observational indicia of possible drug impairment (e.g., repeated accidents). In the latter case, an employer's testing request becomes more reasonable and supportable. In any event, supervisors who administer detection programs should be trained to document their own observations at the time of the testing.

3. Random, Periodic and "Fitness for Duty" Testing

Unlike "for cause" testing, where employees are selected for testing on the basis of observed information, random or periodic testing selection policies do not rely upon evidence of specific employee impairment. Random testing is considered to be more objectionable to employees, particularly when an arbitrary selection method is used. Random testing also faces the greatest uncertainty in the courts because job relatedness is more difficult to demonstrate. Consequently, random or periodic test methods are probably justified only when use of drugs or alcohol on the job would involve significant safety, health or economic impacts.

Since testing takes time, it is not always suitable in a pre-work "fitness-for-duty" context. Usually the samples must be delivered or mailed to a commercial laboratory for processing, and the results are not available immediately. Moreover, periodic testing (such as in conjunction with annual employee physicals) may lose effectiveness if individuals are given too much advance notice of the date of the testing. An individual may defeat the purpose of the tests by abstaining from drug use until after the test. One approach that may avoid this problem would be to provide notice of a range of dates upon which testing could occur. The uncertain date and the expanded window for testing may make it more difficult for employees to abstain.

4. Post-Identification Monitoring

Many employers provide identified drug users with an opportunity to remain employed subject to periodic monitoring. Such a policy typically provides that the employer and employee agree on the consequences of a subsequent positive test result and on the length of the monitoring period.

An employee assistance program (EAP)\(^\text{21}\) can provide the nec-
necessary post-identification monitoring on a confidential basis, if an employer has one. The employer need only set the standard for the monitoring program. The employee assistance program itself can be arranged so that employee participation is anonymous, thereby encouraging self-referrals. As a matter of policy, an employer probably should halt post-identification monitoring when it is reasonable to conclude that the employee has been drug free for some significant period of time (e.g., for several months to a year).

Post-identification monitoring may raise most directly the question whether employee consent to such monitoring is valid since continued employment may be conditioned upon the consent. Indeed, all testing policies generally rely upon some form of explicit or implied consent on the part of employees.

The argument in support of the validity of such consents is that an employer's ability to regulate work-related behavior is fundamental to the employer-employee relationship. Discipline for failure to take drug tests can be analogized to discipline for the breaking of any other announced workplace rule. If the required tests are otherwise supportable, then, it is unlikely (although not impossible) that courts would conclude employee consents are invalid simply because discipline or discharge is the consequence for failure to comply.

B. Uses and Limitations of Drug Testing Technology

As testing of employees or applicants increases, so does the need for managers to understand the uses and limitations of testing technology. Generally, test methods that are appropriate for workplace testing should be sufficiently precise and exacting to support the employer's disciplinary action required by a positive result.

Commercial laboratories use a variety of procedures. Urine tests are the most common. Sophisticated analytical equipment, including gas chromatograph/mass spectrometers, can detect even minute amounts of drugs in a urine sample up to several days after

(“EAPs”) are work-based programs designed to maintain or improve employee efficiency through assessment, diagnosis or referrals in connection with personal problems affecting employee performance. Among the range of problems that EAP providers seek to identify or address are drug or alcohol abuse problems that may be affecting work performance. See Proposed Changes in the Regulations of the Commissioner of Corporations under the Knox-Keene Health Care Service Plan Act of 1975 Pursuant to Notice of Proposed Changes, California Dept. of Corps., Document OP 30/85-B, April 1, 1986. See also Duff & Hisayasu, What EAPs Should Know About Proper Drug Monitoring, THE ALMACAN, Dec., 1985, at 28-29.

ingestion. Other tests, such as blood tests, are also available. The time factors for detectability depend on the type of test, the drug, the amount ingested, and a number of other factors. For example, certain test methods are so sensitive that a single human hair could be used to detect chronic cocaine or heroin use.

No single test procedure or analytical instrument is ideal for all needs. Test methods vary substantially in their cost, accuracy, time required for analysis, selectivity and sensitivity. For example, a highly selective procedure may make fine distinctions among specimens having similar chemical formulae, but it may be relatively costly and slow for mass screening programs. For these reasons, a variety of approaches has evolved.

1. Drug Testing Methodologies

At present, laboratories usually first employ a relatively low cost screening procedure backed up by a more expensive but selective and accurate technique to confirm any positive results. Two of the most popular initial screening methods are thin layer chromatography (TLC) and immunochemical tests called "immunoassays."

a. Thin Layer Chromatography

TLC is a commonly used and relatively inexpensive urine drug screening method. The TLC method takes advantage of the fact that various drugs interact differently with solvents that are drawn upward by capillary action through a concentrated sample on a prepared test plate. The plate is then treated with other chemicals that react with the drugs to create color complexes that can be compared to laboratory reference standards. These standards can be constantly updated as new drugs are formulated. By using addi-

23. SMITH & WESSON, supra note 1, at 15. See also Sedgewick, supra note 16, at 15.
25. Id.
26. Id.
27. Id. at 3.
28. Id. at 3-4. The confirmation of a THC sample by gas chromatograph/mass spectrometry costs a minimum of $50 per sample. The cost of immunoassays which can also cover a wide range of drugs is only a few dollars per sample. See also O'Connor & Rejent, EMIT Cannabinoid Assay: Confirmation by RIA and GC/MS, 5 J. ANALYTICAL TOXICOLOGY 168, 172 (1981).
29. See generally Allen, supra note 20.
30. See SMITH & WESSON, supra note 1, at 14.
32. Id. at 1-2.
tional solvents on the same plate, a laboratory chemist can screen for additional drugs or distinguish between similar drugs.

TLC is used most often in drug detoxification clinics, methadone maintenance programs, testing of parolees and prison inmates and other large-scale screening programs, including industrial screening. TLC results must be interpreted by a skilled technician and, if used alone, can produce false positives. Therefore, a confirmatory test is required.

b. Immunoassay Tests

A second initial screening technique, immunoassay systems, such as the Syva Enzyme Multiplied Immunoassay Technique (EMIT), is very common in employee testing and other large scale programs. This technique uses antibodies that are created by the immune systems of laboratory animals in response to an injection of prepared forms of a drug.

Immunoassay tests are not problem-free. They rapidly screen for a variety of drugs, including marijuana and cocaine, and are typically used together with a second, confirmatory test. Drug-

33. Id. at 2.
34. SMITH \& WESSON, supra note 1, at 14. False positives are initial screening results that are not confirmed by a subsequent test. It is possible that newer formulations on the market using TLC methods will eliminate or reduce the number of false positives. False positives are rare using the EMIT immunoassay system “if the technologist performing the test is experienced and proper procedures of laboratory quality control are followed.” Schwartz \& Hawks, supra note 11, at 788.
35. This particular method is marketed by Syva Company, Palo Alto, California.
36. For example, the United States Navy began using immunoassay tests in the wake of some highly publicized accidents that were potentially drug related. Morgan, Problems of Mass Urine Screening for Misused Drugs, in SMITH \& WESSON, supra note 1, at 21.
37. See generally Allen, supra note 20. A chart comparing the sensitivity levels of various urine analysis methods appears in SMITH \& WESSON, supra note 1, at 14.
38. Obvious human variation factors that reduce quantitative accuracy include body weight, kidney function, urinary acidity, diet, stress and physical activity levels.

The EMIT-s.t. (single test) formulation is relatively inexpensive (approximately $3,500 per kit complete with a compact spectrophotometer) and it is designed for small laboratories and physicians’ offices. Schwartz \& Hawks, supra note 11, at 788. For marijuana, the EMIT-s.t. method has a 100 ng/ml sensitivity and is designed to detect 200 ng/ml of 11-nor-delta 9 -THC-9-carboxylic acid (9-carboxy-THC) with 95% sensitivity. Syva Company, Clinical Summary Addendum: EMIT d.a.u. and EMIT-s.t. Urine Cannabinoid Assays (1982); see also Schwartz, Hayden \& Riddle, supra note 4, at 1093. The authors, who studied 70 adolescent and young adult marijuana users, concluded that the EMIT-s.t. method had excellent specificity for detecting recent marijuana use. Urinary cannabinoids could be detected in subjects with a history of chronic, heavy use for an average of thirteen days after cessation of use. The detection period fell to forty-eight hours for two subjects who had a history of infrequent use. Id.

The EMIT d.a.u. (drugs of abuse in urine) test is a larger system designed for higher volume laboratories. It is capable of detecting concentrations of 50 ng/ml at a 95%
specific immunoassays can discriminate only between the presence or absence of the expected drug or drugs. They are at best semi-quantitative, that is, able to yield only an estimate of the quantity of a drug in an individual's system.\textsuperscript{39}

Moreover, some cannabinoid assay tests may be too sensitive for employee testing since they can react positively to a sample from a person who has been passively exposed to marijuana smoke, particularly when results are reported at low cut-off levels such as 20 nanograms/milliliter.\textsuperscript{40} Thus, it is important that the sensitivity of the initial screening test be regulated. For example, use of a 100 nanogram/milliliter cut-off value in an EMIT test provides reasonable sensitivity that is unlikely to result in reporting of false positive results.\textsuperscript{41} A negative finding in such a test sample is strong evidence that THC is not present in the system of the tested individual in excess of the detection limit. At the 100 nanogram/milliliter cut-off, most marijuana use at low to moderate levels will be undetectable beyond 24-72 hours, although chronic use may be detected for a longer period.\textsuperscript{42} Use of this higher cut-off value, then, increases the job-relatedness of the test.

It should be recognized that the test cannot measure the degree of employee impairment directly. Indeed, little is known about the length of time impairment persists after marijuana use. But one preliminary Stanford University study of experienced aircraft pilots indicates that seriously impairing effects of a single marijuana cigarette persist for at least twenty-four hours.\textsuperscript{43} The study documented that pilots under the influence of marijuana committed serious errors on calibrated flight simulators. The impairment persisted long after the individuals in the study ceased to have a subjective sense of intoxication.\textsuperscript{44} The authors concluded that marijuana's persistent impairing effects can lead to serious errors, this, at least for complex behavioral and cognitive tasks such as that involved in operating

\textsuperscript{39} Allen, \textit{supra} note 20, at 4.
\textsuperscript{40} Sedgewick, \textit{supra} note 16, at 5.
\textsuperscript{41} Schwartz, Hayden & Riddile, \textit{supra} note 4.
\textsuperscript{42} See \textit{supra} note 37; Sedgewick, \textit{supra} note 16, at 6.
\textsuperscript{43} Yesavage, Leirer, Denari & Hollister, \textit{Carry-Over Effects of Marijuana Intoxication on Aircraft Pilot Performance: A Preliminary Report, AM. J. PSYCHIATRY, Nov., 1985, at 1325.} The marijuana cigarettes contained 19 milligrams of THC, the equivalent of a strong social dose. \textit{Id.} at 1326. The authors documented errors of the kind that may have had disastrous consequences had they taken place in a real aircraft.
\textsuperscript{44} \textit{Id.}
Although these findings clearly indicate the need for further research on the effects of marijuana in the workplace, they do suggest that employee testing that detects recent off-hours marijuana use cannot be considered presumptively non-job-related since the effects of use may persist into work hours. It is possible that the effects of moderate to heavy marijuana use may persist for a longer period than the twenty-four hour period that was measured in the Stanford University study, which involved test subjects who smoked only a single marijuana cigarette.

Most other abused drugs have much shorter detection periods in urine than does marijuana. These laboratory detection periods are sufficiently brief to be considered strongly job-related: Since objective drug tests supplement or supplant far less accurate subjective impressions of possible employee drug use, employers should not be faulted so long as detection limits of these objective tests bear a rational relationship to the persistence of impairment.

c. Gas Chromatograph/Mass Spectrometer Tests

Gas chromatograph/mass spectrometers (GC/MS) are fast becoming the most accepted means of verifying initial positive findings of drug use, although a battery of other instruments may be substituted in special situations. GC/MS devices are widely used in forensic, pharmaceutical, clinical and industrial service laboratories and provide state-of-the-art accuracy.

The principle behind gas chromatography is similar to that of TLC, except that GC/MS equipment is capable of performing several different kinds of chemical analyses on vaporized samples. Liquid chromatography also can be used for samples not suitable for vaporization.

Gas chromatographs are typically fitted with one or more detectors that identify various chemical properties by means of thermal conductivity, flame ionization, electron capture or nitrogen/phosphorus analysis. When one of the detectors is a mass spectrometer or a mass selective detector the characteristic mass spectra

45. Id. at 1338.

46. SMITH & WESSON, supra note 1, at 15.

47. SMITH & WESSON, supra note 1, at 14 ("Gas chromatography with a mass spectrometry detector (GC/MS) is the most sensitive and specific test procedure commonly used for drug identification and is used primarily for confirmatory testing").

48. Allen, supra note 20, at 3.

49. SMITH & WESSON, supra note 1, at 17.

of the ions of the compounds under examination can be directly monitored and recorded. Computerized data bases can then be searched to find a positive spectral match.

C. Current Legal and Practical Restraints on the Use of Drug and Alcohol Testing

The dominant legal concern for employers who wish to implement a drug or alcohol testing program is the possibility that the program may invade an employee's privacy. To date, however, no court has made a significant attempt to articulate the nature of the employee privacy interest that is at stake when an employer requests employees to undergo such testing. Nor has any court expressly balanced employee privacy rights against the array of societal, employer and co-worker interests that are advanced by drug or alcohol testing. At this point, employers are left to guess at how courts might handle drug testing issues based upon a handful of decisions, many involving only analogous privacy interests.

Federal law and the laws of many states provide some form of privacy right. Although the United States Constitution does not expressly provide a right of privacy, the Supreme Court has held that the Bill of Rights implicitly guarantees such a right. The California Constitution, on the other hand, expressly provides two independent bases for an individual's right to privacy. Under Article I, section 1, an individual has a general right of privacy.

51. Id.
52. Id.
53. As a legal issue, privacy is exceedingly difficult to define. See generally Tomkovicz, Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment's Privacy Province, 36 Hastings L.J. 645 (1985). Professor Tomkovicz argues persuasively that the courts have not been at all successful in formulating a coherent approach to the privacy concept.
54. Most court decisions concerning privacy have arisen in the criminal context, although a few recent civil cases have involved drug investigations by public employers. None of these cases provide definitive answers for private sector employers, but collectively they offer some guidelines. See infra notes 59-101 and accompanying text.
56. In addition to California, at least six other states provide constitutional privacy guarantees: Alaska, Arizona, Florida, Massachusetts, Montana and Rhode Island. In states that lack statutory or constitutional privacy protection, courts may fashion protection as a matter of common law by expanding various tort theories now developing in the employment field.
57. CAL. CONST. art. I, § 1, provides: "All people are by nature free and independent, and have certain inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness,
and Article I, section 13\textsuperscript{58} protects individuals against unreasonable searches and seizures.

These two bases of liability for violations of privacy rights are discussed in general below, followed by more specific comments about their application to drug and alcohol testing. The discussion is concluded with practical advice.

1. Drug and Alcohol Testing: An Employee’s General Right to Privacy

No California courts have thoroughly addressed the question of whether constitutionally protected employee privacy interests are infringed upon by employer investigations into drug use.\textsuperscript{59} Therefore, no court has had the corresponding opportunity to enunciate...
whether and to what degree an employer's interest or public policy factors counteracts individual employee privacy concerns. To gain insight into the possible outcome of future drug test privacy cases, then, it is necessary to explore the basic elements of the constitutional privacy interest. These basic tenets can be applied to the specific concern created by such testing.

**a. The Constitutional Right to Privacy**

The leading California case interpreting this general privacy right is *White v. Davis.*60 In *White* the California Supreme Court stated that the California right to privacy operates to prevent government and business interests from secret gathering of personal information, form overbroad collection and retention of unnecessary personal information and from improper use or disclosure of personal information properly gathered. The *White* Court set forth these prohibitions in a list of "mischiefs" that the right to privacy was intended to correct.61

The court cautioned that the right to privacy does not bar all incursions into individual privacy, but stated that any such incursion must be justified by a "compelling interest."62 The court also made clear that the constitutional provision creates a civil right to privacy enforceable by an individual.63

---

60. 13 Cal. 3d 757, 533 P.2d. 222, 120 Cal. Rptr. 94 (1975).
61. These "mischiefs" are: (a) "Government snooping" and the secret gathering of personal information; (b) The overbroad collection and retention of unnecessary personal information by government and business interests; (c) The improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party; and (d) The lack of a reasonable check on the accuracy of existing records. *Id.* at 775. The "mischiefs" were not derived from any searching analysis of the concept of privacy, but rather by adopting statements of purpose drafted by the proponents of the initiative measure for the election campaign.
62. *Id.*
63. *See also* Porten v. Univ. of San Francisco, 64 Cal. App. 3d 825, 829, 134 Cal. Rptr. 839, 843 (1976), *quoted with approval,* Jones v. Superior Court, 119 Cal. App. 3d 534, 550, 174 Cal. Rptr. 148 (1981) (stating that the elevation of the right to be free from invasions of privacy to constitutional stature was apparently intended to be an expansion of the privacy right); see generally, *California Constitutional Right to Privacy: The Development of the Protection of Private Life,* 9 HASTINGS CONST. L.Q. 385 (1982).

Employers should be aware that in certain circumstances the privacy rights of their employees may conflict with the privacy rights of other individuals. For example, in Board of Trustees of Leland Stanford Junior Univ. v. Superior Court, 119 Cal. App. 3d 516, 174 Cal. Rptr. 160 (1981), a university professor made demand upon the university for his own personnel, tenure and promotion files. Included in the files were letters of reference and peer evaluations that were covered by an explicit policy guaranteeing confidentiality to the writers.

When the University refused to turn over the evaluations, the plaintiff brought a motion
b. The Right to Privacy Applied to Drug and Alcohol Testing

Applying the *White* "mischiefs" to employee drug testing yields no clear guidance.\(^{64}\) The *White* decision focuses on secret or overbroad information gathering and improper disclosure of subjects that do not correspond closely to any privacy interest implicated by drug testing. On the other hand, California privacy decisions subsequent to *White* have clarified that the right to privacy is not absolute; it must be balanced against other competing interests.\(^{65}\)

With respect to the use of illegal drugs, at least one California Court has held that an individual has no constitutional privacy right in the use or possession of cocaine at home.\(^{66}\) Similarly, there is no California constitutional right to use or possess marijuana, even in one's own home.\(^{67}\) It follows that in the far more public workplace, no *per se* constitutional protection exists for use or possession of illegal drugs. Thus, employers can be expected to have considerable freedom to test identified or strongly suspected drug users. But not all employees are drug users and not all testing is triggered by obviously exhibited manifestations of drug use. Courts must now begin to address whether employers may require testing because of generally perceived drug use problems in the particular workplace or whether such programs may be adopted in light of statistics indicating that worker drug use is prevalent in society or in a particular industry.

Courts also must balance the relative importance of the articulated interests of the employer, co-employees and society against those of the employee being asked to participate in a testing program.\(^{68}\) The typical employer interests in drug or alcohol testing

\(^{64}\) Employee drug testing programs that operate without disclosing that samples will be tested for drug content might conceivably fall within the *White* prohibitions. Also, testing that unnecessarily focuses on off-duty conduct may be more susceptible to a privacy challenge than testing that is tailored to the extent practicable to reflect drug use that could affect work performance.

\(^{65}\) See infra note 68.


\(^{68}\) See supra notes 1-6 and accompanying text. Courts have traditionally applied a
include: (1) decreasing costs associated with lost productivity and stolen or damaged property; (2) increasing employee health and rehabilitation; and (3) improving safety and reducing dangers to other workers and the public.69

An employee's interest centers on generalized notions that forced participation in a drug testing program violates a right to be free from indignities and bodily intrusions. The most prevalent arguments focus on an employee's right 1) to freedom from workplace intrusions during off hours; and 2) to maintain lifestyle privacy, including what he or she has ingested or otherwise absorbed.70

The concern that an employer's drug or alcohol testing program may infringe on off-duty activity is a serious one. Such tests certainly can identify drug use that took place during an employee's off duty hours. Most courts will recognize that an employer has a substantially lessened interest in an employee's personal matters or off-hours behavior, unless it can be shown that an employee's acts (including drug usage) in some way affect the workplace.71

balancing test by determining the importance of the privacy interest and weighing it against the intrusion. See Board of Trustees of Leland Stanford Junior Univ. v. Superior Court, 119 Cal. App. 3d 516, 174 Cal. Rptr. 160 (1981) (balancing test used for conflicting rights of privacy and further balancing required to reconcile the privacy right with the "strong public policy in favor of discovery in civil litigation"); Britt v. Superior Court, 20 Cal. 3d 844, 574 P.2d 766, 143 Cal. Rptr. 695 (1978) (balancing state interest in facilitating the ascertainment of truth in connection with legal proceedings against the right of privacy that inheres in private associational affiliations and activities).

69. See Lehr & Middlebrooks, Work-Place Privacy Issues and Screening Policies, 11 EMP. REL. L.J. 407 (1985). The authors list several factors that are cited by employers for instituting drug screening policies and thereby "risking conflict with employee dignity interests." Among the factors are increased health costs, absenteeism, work-related accidents and discipline that are associated with drug use. An additional justification for drug testing programs includes the employer's attempt to reduce the risk of lawsuits for negligent hiring or supervision of drug or alcohol impaired employees. Another motivating factor is the need to reduce security risks from theft of company property, theft and disclosure of company confidential information and trade secrets. Id. at 407-08 (citations omitted).

70. See Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. Ct. App. 1985) (the court brushed aside the element of invasiveness as minimal for urine testing since it involves only normal bodily function); but cf. Local 1900, Int'l Bhd. of Elec. Workers v. Potomac Elec. Power Co., No. CA 86-717 (D.D.C. Mar. 18, 1986), 55 DAILY LAB. REP'T D-1 (Mar. 21 1986) (BNA) (granting TRO to stop employer from implementing new testing policy because "pending arbitration, employees must undergo invasions of privacy which are almost unheard of in a free society or they will be summarily fired."); motion for preliminary injunction denied, 634 F. Supp 642 (D.D.C. 1986) (dispute held to be arbitrable since integrity of arbitration process not threatened).

71. See, e.g., Rulon-Miller v. Int'l Business Mach. Corp., 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984). In Rulon-Miller, the appellate court upheld a jury award of $300,000 in compensatory and punitive damages for an employer's actions in removing an employee from a sales manager position based on the employee's romantic involvement with an employee of a competitor company. The jury and the reviewing court rejected the employer's argument that the employee's personal romantic life was impinging on her ability to ade-
Nevertheless, the employee with residual traces of drugs in his or her system during working hours may be in violation of the employer's anti-drug rules, particularly if the rules require that employees be drug free at all times. And even if the employee is not "impaired" at the time of testing, there is a reasonable probability that he or she will be impaired at some future time, based upon test results that indicate very recent past use. Indeed, the propensity of employees to use drugs may itself be a form of impairment or hazard that an employer is entitled to address. Thus, the private use of drugs away from work would appear to be a much weaker privacy interest than other personal matters that do not concern the workplace.

The same conclusion can be reached by analyzing workplace testing for alcohol. Alcohol use or intoxication at work is prohibited by most employer policies, while its use is legal and its off-the-job use is typically permitted. The common tests for alcohol use have very short detection limits and the correlation between the results of laboratory urine tests and actual blood alcohol concentrations is reasonably well understood. Thus, the tests are minimally intrusive on off-hours use. Further, tests revealing the presence of alcohol in an individual's system are susceptible to reliable interpretation. A very low level may be consistent with off-hours use and might lead to no disciplinary measures.

The court noted that the employer had a written policy insuring employees that the company would not inquire into or interfere with personal activities not related to work. The court's analysis of the privacy issue was minimal, but it appears possible under the bare rationale of Rulon-Miller that an employer may have to justify drug testing or inquiries into the private drug usage of an employee. See also Thorne v. El Segundo, 726 F.2d 459 (9th Cir. 1983) (off-duty sexual conduct protected by privacy interest); Fults v. Superior Court, 88 Cal. App. 3d 899, 152 Cal. Rptr. 210 (1979) (in a paternity suit, plaintiff did not have to disclose names of all persons with whom she had been romantically involved; it was sufficient that she stated that she had had no sexual relations with any person other than defendant during six month period surrounding likely date of conception); Morales v. Superior Court, 99 Cal. App. 3d 283, 160 Cal. Rptr. 194 (1979).

The Alaska Supreme Court has observed that the right of privacy:

must yield when it interferes in a serious manner with the health, safety, rights and privileges of others or with the public welfare. No one has an absolute right to do things in the privacy of his own home which will affect himself or others adversely. Indeed one aspect of a private matter is that it is private, that is that it does not affect persons beyond the actor, and hence is none of their business. When a matter does affect the public, directly or indirectly, it loses its wholly private character, and can be made to yield when an appropriate public need is demonstrated.


These limits generally do not exceed several hours. Smith & Wesson, supra, note 1, at 15. See Williams, Peat, Crouch, Wells & Finkle, supra note 4, at 19.
The related concern for the privacy of an employee's lifestyle raised by drug testing is caused, perhaps paradoxically, by the very accuracy or the perceived accuracy of these tests. An employee might explain away an observational finding (e.g., unsteady gait or dilated pupils). But when a test affords the laboratory technician a full spectral display uniquely identifying the drugs in one's urine or identifying the characteristic mass ions of each drug compound or both (as GC/MS tests do), there is little or no room for argument.

Employees may well analogize the privacy intrusion posed by drug testing to the intrusion caused by wiretapping or eavesdropping. In Ribas v. Clark, a California court discussed the different levels of intrusion one experiences when a confidant repeats a private conversation to a third party. If only the second hand recollection is repeated to third parties, the sense of betrayal experienced is at least tempered by the "privilege" of denying the accuracy, context or even the fact of utterance of the repeated remark. But when one later learns that the remark was secretly tape recorded or surreptitiously overheard by other persons, the privilege is lost. As the Ribas court observed: "... such secret monitoring denies the speaker an important aspect of privacy of communication — the right to control the nature and extent of the first hand dissemination of his statements."

The exactitude of drug test results, like the exactitude of one's tape recorded words, affords an employee only a few avenues of argument or cavil regarding the fact of drug ingestion. Certainly a reported positive test result creates a presumption of drug use that can be overcome only when the employee can effectively challenge or explain the test results. Moreover, the intrusion, like eavesdropping, may occur without a trespass or a particularly invasive act.

---

73. See McBay, Problems in Testing for Abused Drugs, J. A.M.A., January 3, 1986, at 39-40 (letter to editor); Smith & Wesson, have described GC/MS analysis as follows:

The sample is first separated into components by gas chromatography and the mass spectrometer is used to identify the substances emerging from the gas chromatograph. The mass spectrometer subjects the compounds to an electron beam that breaks them into fragments and accelerates them through a magnetic field. Because a molecule of a drug always breaks into the same fragments, which is known as its mass spectrum, the mass spectrum is like a fingerprint that is compared to known compounds. The mass spectrum is unique for each drug and, therefore, the detection by GC/MS is highly specific.

Smith & Wesson, supra note 1, at 14.


76. Testing performed with urine samples requires no physical invasion. As one court
although like eavesdropping, the amount of personal information that can be gleaned from drug testing might be found to intrude upon some personal secrecy or dignity interest.\(^{77}\) One commentator has referred to this interest as the "privacy of sanctuary," which "means prohibiting other persons from seeing, hearing, and knowing."\(^{78}\)

In sum, the concern over the intrusiveness of drug testing draws its legitimacy from the intrusion, however slight on this personal secrecy or dignity interest. In what circumstances courts will recognize this concern as the foundation for a valid legal theory is still unclear. The answer may lie in testing this privacy concern against analogous criminal search and seizure standards, which are discussed below.

---

\(^{77}\) Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. Ct. App. 1985). The U.S. Supreme Court has previously ruled that blood tests, which require an extraction of blood samples for testing, constitute a search within the meaning of the fourth amendment. Schmerber v. California, 384 U.S. 757, 767 (1966). The court did not regard blood tests as particularly invasive, however. In permitting warrantless blood tests to be performed as an incident to an arrest for driving while intoxicated the court stated:

> Such tests are a commonplace [sic] in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma or pain.  

_id. at 771._ The court quoted with approval the following passage from Breithaupt v. Abram, 352 U.S. 432 (1957):

> The blood test procedure has become routine in our everyday life. It is a ritual for those going into military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors.

_id. at 771, n.13 (quoting 352 U.S. at 436). Thus, if the invasiveness of blood tests did not particularly alarm the court, certainly urine tests, which require no body invasion, cannot be considered invasive. The only privacy concern over urine tests is the personal intrusion they may cause, a matter expressly not addressed in Schmerber since the arrestee refused a non-invasive breathalyzer test. _Id._ at 771.

\(^{78}\) See, e.g., Porten v. Univ. of San Francisco, 64 Cal. App. 3d 825, 134 Cal. Rptr. 839 (1976) (defendant University violated plaintiff's right to privacy when it sent a copy of his transcript to the State Scholarship Loan Commission without his authorization and contrary to its assurances of confidentiality); Payton v. Santa Clara, 132 Cal. App. 3d 152, 154-155, 183 Cal. Rptr. 17, 17-18 (1982) (prima facie violation of right to privacy where memorandum outlining grounds for termination of employment was improperly posted in common work area); H & M Assoc. v. El Centro, 109 Cal. App. 3d 399, 411, 167 Cal. Rptr. 392, 400 (1980) (complaint stated cause of action where information obtained by employer for accounting purposes was divulged to lending institutions).

Comment, _A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision_, 64 CAL. L. REV. 1447 (1976) (noting that this sanctuary is expressed in its most concrete and traditional form in the fourth amendment and also includes "intangible matters such as sight, smells and information.")
2. Drug and Alcohol Testing: An Employee’s Right to be Free from Unreasonable Searches and Seizures

Federal and state constitutions protect all citizens from unreasonable searches and seizures of person and property. In general, however, the federal protection applies only when the challenged action is taken by government officials, i.e. when "state action" is present. Indeed, private employers often use the state action requirement as a defense to constitutional challenges of their drug policies. On the other hand, a private employer may be held to a constitutional standard when police or other government officials are involved in the search and the employer can be said to act as the "agent" of the state. Moreover, an individual state's constitution or tort law may explicitly or implicitly apply search and seizure doctrine more broadly to include purely private actions. Thus,


82. See, e.g., Shoemaker v. Handel, 619 F. Supp. 1089 (D. N.J. 1985). See also Burdeau v. McDowell, 256 U.S. 465 (1921); Coolidge v. New Hampshire, 403 U.S. 443, 447 (1971); United States v. Miller, 688 F.2d 652 (9th Cir. 1982) (search held not subject to Fourth amendment where police acquiesced in search of premises by private citizen and accompanied the citizen to the premises for protective purposes but did not encourage the search or plant the idea of the search; the critical factors in the instrument or agent analysis are: (1) whether the government knew of and acquiesced in the private conduct and (2) whether the party performing the search intended to assist law enforcement efforts or further his own ends); United States v. McGreevy, 652 F.2d 849 (9th Cir. 1981) (private citizen acting at direction or encouragement of government officials); United States v. Gumerlock, 590 F.2d 794 (9th Cir.) (en banc), cert. denied, sub nom, Fannon v. United States, 441 U.S. 948 (1979) (Fourth amendment not implicated in search by private citizen motivated by unilateral desire to aid in enforcement of law where government neither participated in nor encouraged the search); U.S. v. Walther, 652 F.2d 788 (9th Cir. 1981).

83. See generally 24 Op. ATT’Y GEN. 95 (Cal. 1954). See also Utility Workers of America, AFL-CIO, Local 246 v. So. California Edison Co., L.A. Super. Ct., No. CA000888 (filed Sept. 28, 1984) (utility employees' challenge to random drug searches by relying on Gay Law Students Ass'n v. Fac. Tel. & Tel. Co., 24 Cal. 3d 458, 156 Cal. Rptr. 14 (1979), which held equal protection clause of the California Constitution prohibits public utility from discriminating against homosexual employees). Additionally, warrantless government searches, where they are found permissible, would seem to set a minimum standard that could be applied to random or unannounced employer searches. Arguably, if the government can lawfully intrude, the employer should have available an analogous justification for searches on employer premises, even absent any form of employee consent. Employers may have greater freedom to act than does the government. But presumably employers have no less freedom, particularly on their own premises.
employers should be familiar with and prepared to follow constitutional standards.

a. General Search and Seizure Concerns

Whether a search is unreasonable under the fourth amendment depends on whether the area searched is one in which there is a reasonable expectation of privacy. Under general fourth amendment standards, the employee privacy interest in avoiding drug tests would appear relatively weak. First, a preannounced workplace drug testing policy that is clearly communicated to employees should remove any objective expectation of privacy among employees as to testing conducted pursuant to the policy. Second, in most businesses employees are exposed to the public at large or at least to other employees, which correspondingly lessens the employees’ privacy interest.

Third, the degree of intrusion of reasonably conducted tests should not violate constitutional search and seizure standards. Drug testing requires the employee to provide a urine specimen. Production of the sample itself may offend some individuals, particularly if witnessed by a technician or some other person. On the other hand, the informational content of the test itself is highly specific, much like the olfactory information gathered by drug-sniffing dogs used to detect contraband in luggage at airports. Such use of dogs has been held not to constitute a search under fourth amend-


85. Such an employer policy may possess some of the attributes of administrative inspections. For example, warrantless searches by police involving drivers stopped at sobriety checkpoints have been analyzed under the standards applied to administrative searches. See Ingersoll v. Palmer, 175 Cal. App. 3d 1028, 221 Cal. Rptr. 659 (1985), rev. granted, ___ Cal. 3d. ___ 715 P.2d 680, 224 Cal. Rptr. 719 (Cal., April 3, 1986) (police inspection guidelines involving advance notice, minimal intrusion, restrictions on discretion of field officers together with time and place restrictions found to be reasonable under both fourth amendment and California Constitution); but cf. State v. Koppel, 499 A.2d 977 (N.H. 1985) (checkpoint unconstitutional under New Hampshire Constitution).


87. See, e.g., id.; United States v. Jacobsen, 466 U.S. 109, 104 S.Ct. 1652, 1662 n.24 (1984) (since canine intrusion could gather only limited information regarding presence of drugs, there was less risk of an intrusion on legitimate privacy interests).
ment standards. Moreover, to some individuals the intrusion from obtaining the urine sample may be less offensive than subjective testing requiring him or her to walk a line, touch the nose, recite the alphabet or perform other tasks that may indicate intoxication.

Finally, some fourth amendment cases have indicated that the need for law enforcement may be considered when weighing the reasonableness of any search. If this factor is analogized to the workplace, drug testing should be more likely to be held constitutional because use of objective, analytical methods is more effective and accurate than other subjective forms of employee monitoring and testing. Moreover, if the drug tests are properly performed, the chances are lessened that a mistaken adverse action will be taken against an employee.

b. Drug Testing: Search and Seizure Case Law

The early cases in which courts have addressed employer drug testing policies in the fourth amendment context generally indicate that some forms of testing are lawful, even when ordered by the government. The rationale supporting these judgments is not uniform, however. In *Turner v. Fraternal Order of Police*, the plaintiff argued that requiring members of the police force to undergo warrantless urine drug testing constituted an unreasonable search and seizure in violation of the fourth amendment. Police regulation provided that a “confirmed finding of an illicit narcotic or controlled substance,” or refusal by any individual to undergo testing would result in a proposal for termination. The rule also permitted the Police to compel testing in the event of “suspected drug use” or “at the discretion” of the Board of Police and Fire Surgeons. The

---

88. *Id.*


90. Professor Tomkovicz has advocated a Fourth amendment “legitimate privacy needs” analysis to supplant the traditional fourth amendment analysis. Tomkovicz, *supra* note 53, at 700. Under this analysis the critical factor in privacy analysis becomes whether individuals in the claimant’s situation have legitimate needs for privacy having a “basis in the laws, principles, traditions, or customs of the American social order . . . .” *Id.* The basic issue becomes whether societal values and interests are promoted by a guaranteed secrecy medium. *Id.* at 701. Even under this basic privacy analysis, an employee’s legitimate need for privacy would appear to be relatively low, given the important societal benefits gained from preventing and deterring drug and alcohol use and abuse.


92. *Id.* at 1007.
plaintiff employee challenged the regulation because it provided no clear guideline for when testing could be ordered.

Citing current widespread drug use in all segments of the population, the court held that the Department was justified in promulgating the rule in an effort to prevent the illicit use of narcotics by members of the police force. The court qualified the "suspected drug use" standard by requiring a "reasonable, objective basis for medical investigation through urinalysis." Additionally, it concluded that urinalysis was not an extreme body invasion. Since the test required only "a normal bodily function" for the purpose of testing, it was not an unreasonable search or seizure.

A federal court has applied the federal constitutional right of privacy and the federal search and seizure standards to testing of thoroughbred race horse jockeys by state race officials. In Shoemaker v. Handel, the racetrack procedures required all jockeys to take a daily breathalyzer test and three to five jockeys to take a urinalysis test. The jockeys were selected for the urinalysis by random name drawing system, which allowed each jockey an equal chance of being selected to give a sample on a particular evening. In addition, the policy provided confidentiality protections to guard against unauthorized disclosure of findings.

The court held that jockeys did not have a sufficient expectation of privacy in the regulated horse racing industry to preclude warrantless daily breathalyzer tests to detect alcohol use or "random" urinalysis to detect controlled substances. In the court's view, the procedural safeguards in the administration of the tests obviated the need for individualized suspicion of drug use for triggering the test. The court distinguished the race-track's random selection method from arbitrary methods that might otherwise be used for indiscriminate testing.

This decision is helpful to employers since it sets forth at least one apparently permissible policy that may be effectively used in employee drug screening programs. The rationale of Shoemaker comfortably supports a non-arbitrary random screening program combined with some form of "for cause" testing. It is too early to

93. Id. at 1008.
94. Id. at 1009.
95. Id.
97. Id. at 1103, 1105-07.
98. Id.
tell, however, whether other courts will endorse this approach or will limit the holding to the highly regulated racetrack industry.

The problem of suspected drug use and concomitant safety concerns also arose in *Div. 241 Amalgamated Transit Union (AFL-CIO) v. Suscy.* In *Suscy,* a transit authority required that employees be tested for drugs and alcohol following "any serious accident" or if the employee was "suspected of being under the influence" of intoxicating liquor or narcotics. The court held that blood and urine testing of municipal bus drivers was facially permissible under the fourth amendment, citing the valid public interest in protecting the public. This decision reinforces the notion that employers should be able to test employees if public safety is an overriding concern. In addition, it suggests that testing is appropriate after accidents when drug usage may have been a factor.

3. Privacy Rights and Employee Testing: Practical Advice

Obviously, there are precious few court decisions determining the legal consequences of drug and alcohol testing programs in the workplace. Nonetheless, a number of general principles emerge from analogous case law and common sense.

a. Choosing the Test Method

Automated laboratory equipment can handle up to 99 samples, taking only a few minutes to analyze each sample. However, such equipment is still very expensive. Moreover, the best equipment and methods are only as reliable as the laboratory itself. The quality and reliability of the results depend upon the rigor of the

99. Cf. McDonell v. Hunter, 746 F.2d 785 (8th Cir. 1985) (upholding as not an abuse of discretion grant of preliminary injunction by district court barring strip searches, blood tests and urinalysis tests of prison guards absent a showing of probable cause); Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. App. 1985) (affirming lower court grant of injunction that forbade random testing of police officers and firefighters absent a showing of probable cause, but permitting testing during periodic regularly scheduled physical examinations).

100. 538 F.2d 1264 (7th Cir. 1976).

101. Id. at 1267. The individual plaintiff who was tested had been selected because two supervisory employees believed he was under the influence. See also Burka v. New York City Transit Auth., No. 85 Civ. 5751 (GLG) (S.D.N.Y. June 16, 1986) (available on WESTLAW July 25, 1986, Allfeds library) (motion for class certification denied without prejudice in case challenging drug test policy of transit authority).

102. Hanson, Caudill & Boone, *Crisis in Drug Testing, Results of CDC Blind Study,* J. A.M.A., April 26, 1985, at 2382. This study, conducted at intervals between 1972-1981, evaluated 13 laboratories serving government-sponsored methadone treatment facilities for their proficiency in accurately testing drug samples. The laboratories were not necessarily ones that also performed employee testing, which was quite rare when data were collected for
laboratory procedures and the skill of the chemists, toxicologists and other personnel who handle and analyze the samples.103

Given a reliable laboratory, modern analytical techniques can provide almost unerring exactitude in drug identification and quantitation. A modern commercial laboratory today can promise accurate test results better than 99% of the time, although errors such as mishandling of samples and other gaps in the "chain of custody" of samples can affect the overall accuracy.104 Employers should insist that laboratories confirm the results of a positive finding by a second test, preferably using a different analytical method.105 This rule is particularly important with TLC testing, but is routine practice for immunoassay testing as well.

Employers should pay particular attention when interpreting test results indicating marijuana use. THC metabolites do not immediately appear in urine specimens and they may persist for days or weeks, depending upon the sensitivity of the test and the use pattern of the individual. Hence, it is not possible to distinguish a re-

103. Allen, supra note 20, at 3.

104. Id. at 2. The "chain of custody" refers to the documentation that is performed for each sample to ensure that the identity of each sample donor can be matched to the correct sample. Commonly, each individual who handles the sample is required to record a notation on a label that is attached to or accompanies the sample.

105. See supra note 34 and accompanying text. See also Sedgewick, supra note 16, at 5.
b. Applying a Test Policy

In general, drug testing should be only as extensive as is reasonably justified by the specific employer's legitimate need for safety, security and employee productivity. If "for cause" testing is selected, an employer must be prepared to justify its suspicion that a particular employee is under the influence. The greater the documentation, the less legal risk. If an employer can justify a random selection method, an employer should apply it in a wholly objective and nondiscriminatory manner. Employers also should choose test methods and cut-off values having short detection periods in order to minimize intrusion into off-hours, nonemployment-related activity.

Employers should never require involuntary administration of these tests, although in the employment context the concept of "voluntary administration" presupposes that employees who refuse to take the test may be permitted to resign instead or be subjected to some predetermined discipline in lieu of taking the test. Employer policies should link the severity of discipline for such a refusal to the nature of the job or the needs of the particular workplace. On the other hand, employers might offer an employee who refused a test the option of undergoing rehabilitation in lieu of discipline. Another approach might be to bar such employees from working in particular job categories, e.g., vehicle or equipment operation, until they have taken and passed the test.

The employer policy may call for termination of employees who refuse to undergo drug testing. Of course, the more severe the discipline meted out for drug use, the greater the risks of lawsuits from aggrieved employees. Thus, employers whose policies call for termination upon detection of drug use should be prepared to justify the severity of the result in light of specific workplace requirements. From the outset, whatever procedures are to be formally adopted by an employer, they must be carefully explained to and understood by the employees if they are to be successfully implemented.

Unfortunately, the law is too little developed to give firm legal guidance on the legality of all drug and alcohol tests and methods of administration in California or in any other state. In states without constitutional privacy protection, and where invasion of privacy

tort suits are not a threat, drug tests may not face any substantial legal challenge. Nevertheless, even in states where all forms of testing might be fully permitted, employer assaults on employee dignity interests may find revengeful expression in some other form of tort or contract suit brought by a disgruntled employee. Preserving employee dignity and instilling confidence in the integrity and accuracy of the test results, then, may go a long way toward lessening all forms of legal risk from any drug testing program.

4. Proposed California Legislation

Given the national concern over the drug testing, it is important to examine current legislative activity and its potential effect on employee drug testing programs. The California legislature recently passed Assembly Bill (A.B.) 4242 (Klehs and Hauser, introduced February 21, 1986), a modest proposal which endorses the general concept of employee drug testing, but does not affirmatively protect employers from lawsuits arising from drug testing. A.B. 4242 was vetoed by California Governor Deukmejian on July 24, 1986.

Unlike the Assembly and Senate bills that it superseded, A.B. 4242 failed to address any of the issues that arise from either the method of test administration or the means of employee selection for testing. Instead, A.B. 4242 was substantively confined to (1) requiring written disclosure by employers to employees of their drug testing policies; (2) providing employees with the right to request a copy of the results of tests performed; (3) prescribing the use of licensed clinical or public health laboratories; and (4) imposing an obligation upon employers, employees and laboratories to keep samples and test results confidential.

A.B. 4242 would have been generally helpful to employers. The text contained a clear legislative finding that "[r]educing illicit drug use in the workplace will improve the safety, health and productivity of all Californians" and that licensure of laboratories used

107. The text of A.B. 4242 is reproduced in Appendix C infra. The bill would have amended Chapter 5 (commencing with section 11997) of Cal. Health and Safety Code. The bill also provided for increases in the license fees charged to certain types of laboratories, including those that perform employee testing. A.B. 4242 would have applied to both private employers and to state and local entities of government.

108. Id at § 2. The confidentiality requirement would have adopted the California Information Practices Act of 1977 by reference. This Act applies only to government entities and is largely inapposite to private employers. See text accompanying notes 161-65. Further, the bill would have required compliance with the California Public Records Act, which creates a right for individuals to inspect and copy public records. See Cal. Gov't Code § 6250 et seq. (West 1986).
for employee testing "would balance the rights of employees with adequate protections for the public." These findings would have bolstered employer claims that California public policy supports employee testing. But the bill provided no assurance that any particular employer testing policy would be upheld. Moreover, in California, which has a constitutional right of privacy, no legislation could have overridden any constitutional protections that may apply to employee drug testing.

A.B. 4242 also would have amended California Labor Code sections 1025 to 1028 to add drug rehabilitation to the "reasonable accommodation" requirements that currently apply only to alcohol rehabilitation. This accommodation requirement would have permitted drug using employees to voluntarily enter treatment programs without adverse employment consequences unless it imposed an undue hardship on the employer. A.B. 4242 would have required an employer to inform employees and job applicants, in writing, of its drug testing policies prior to conducting any such test. This requirement would have increased the likelihood that employees who are properly informed about an employer's drug policy would be held to have impliedly consented to the terms of the policy.

A.B. 4242 was an amalgam of an earlier version and Senate Bill (S.B.) 2175 (Seymour). As originally introduced, A.B. 4242 would have also (1) regulated employee drug testing; (2) required licensing of state toxicology laboratories; and (3) prescribed certain laboratory testing procedures. The previous version also aimed to improve the accuracy of drug testing results, as well as the overall quality of laboratory testing. It would have authorized the State Department of Health Services to monitor the adequacy of laboratories through proficiency testing, quarterly blind testing and annual inspections. This mandated program presumably would have

109. Id.
110. Id. at § 4.
111. A.B. 1482 was A.B. 4242's predecessor bill. The text of A.B. 1482 is reproduced in Appendix B infra. This bill, introduced in the 1985 legislative session, failed in an Assembly vote in June, 1985, but was still pending in the Assembly at the time the legislature passed A.B. 4242.

A.B. 1482 contained several provisions in addition to its information and notice requirements. The bill would have allowed the employee to select the physician or laboratory that would perform the drug tests, as well as permit the employee to delay up to 48 hours before submitting a drug sample to the chosen physician or laboratory. These provisions were impractical and subject to unnecessary manipulation by the employee. The 48 hour delay would permit sufficient time for many abused substances to fall to undetectable levels in urine or blood samples.
either replaced or supplemented the voluntary blind testing programs that many laboratories currently use. Laboratories would have been required to follow agreed upon "chain of custody" procedures\(^{112}\) for tracking samples and to consult with employers on appropriate detection or threshold levels for various drugs.\(^{113}\)

The original version of A.B. 4242 also required that employer drug testing policies (1) apply to all employees in similar classes of employment, thus eliminating opportunities to "single out" particular employees; (2) contain a double check of any positive results by at least one "fundamentally different" testing method; (3) preserve any positive sample for at least six months, presumably to allow employees time to seek a retest; and (4) provide a disciplinary or appeals process.\(^{114}\)

Overall, the original version of the bill had some positive attributes, but may have proven too vague and costly to employers and laboratories. For example, smaller employers may perform confirmatory tests (which may cost more than $50.00 each) only if requested by the employee. If they withhold discipline until the tests are confirmed, no apparent harm is done to the employee unless the employee is wrongly accused prior to the confirmation. A disciplinary appeals process appears to be particularly unnecessary. If the test results confirm a positive finding, an employer need only implement already existing disciplinary policies. Adding an institutionalized forum in which the laboratory results can be challenged in some adversary process would have been unnecessary, burdensome and probably unworkable. If inaccurate laboratory results became a problem, the proper approach would be to legislatively restrict the use of demonstrably inadequate test methods or procedures, without limiting further innovations in the process.

In distinct contrast to the original version of A.B. 4242, S.B. 2175 would have permitted employers to require employees to submit to blood, urine, breath or other chemical tests under specified conditions\(^{115}\) based upon "reasonable suspicion" that an employee is "impaired or affected" by controlled substances or alcohol. Tests

---

112. See supra note 104 and accompanying text.
113. This requirement may have been problematical. Laboratory personnel are not trained necessarily to translate analytical data into information that employers can act upon. Employers should instead rely upon experts in the fields of substance abuse, employee rehabilitation and occupational medicine to interpret laboratory data.
114. The original version of A.B. 4242 was introduced on February 21, 1986 and amended five times prior to passage.
115. See infra Appendix D for text of S.B. 2175. Section 5 of the bill would have preempted contrary laws or ordinances of other political subdivisions. Presumably this would have invalidated the San Francisco anti-testing ordinance, discussed infra.
would also have been permitted if an employer had a reasonable suspicion that controlled substances were present "in an employee's bodily system" in violation of published employer rules. This latter provision was somewhat curious since it would be unusual for an employer to develop a reasonable suspicion that an individual had taken drugs in the absence of evidence of impairment or some other indication that the employee was affected by drugs or alcohol.

Testing was also permitted under S.B. 2175 following a work-related accident involving bodily injury or property damage. Other "for cause" bases for testing included employer specified occurrences such as declining performance or absenteeism, provided that advance notice of the testing policy is provided to employees. The advance notice requirement also applied to regular or periodic physical examinations. S.B. 2175 permitted testing of applicants and employees who are in a rehabilitation or employee assistance program or who have tested positive for drugs or alcohol in the preceding twelve months.

In addition to the various specified causes for testing, S.B. 2175 permitted random, "on-the-spot" or company-wide testing for all employees once per year. Employees whose impairment would present a safety hazard (and those who work in specified occupations) could be tested up to three times per year. The bill required that all such testing take place pursuant to a pre-announced policy. The narrow focus on safety issues for the expanded random testing privilege did nothing for employers who need to maintain quality or productivity standards but cannot demonstrate any particular safety hazards that might result from employee impairment.

S.B. 2175 would have assisted in clearing away some of the employer uncertainty over the legality of employee drug testing. It would have established a clear public policy in favor of testing. However, it would not have specifically protected employers who discipline, discharge or attempt to rehabilitate employees on the basis of test results. This protection ought to be the principal goal of any legislation that seeks to foster reasonable employee drug testing. In order to provide this protection, a drug-testing bill should specifically bar any cause of action brought by an employee against an employer to the extent that such a cause of action is based upon the fact that the employer relied upon the results of a drug test that was administered in conformance with the requirements of the statute. This suggested legislation would support an employer policy calling for a "drug-free" workplace. Such policies are designed to permit discipline or referral for rehabilitation whenever test results indicate
any drug traces, even if not indicative of impairment at the time of testing.

The vetoed version of A.B. 4242 fell short of accomplishing the goal of fully supporting employer drug testing policies. It failed to protect employers from suits arising from drug testing. Moreover, it should have prescribed procedures for random testing in a manner even more thorough than those contained in S.B. 2175. The most important procedure that ought to be in place before an employer requires random testing is a method to ensure that employees may not be arbitrarily selected for such testing. Employers ought to be permitted to use any randomized selection process in which all employees subject to the testing policy have an equal chance of being selected. As an alternative, testing of all employees in a functional or departmental unit should be permitted, since the group selection minimizes the risk of arbitrary selection. Instead, because no California law addresses them, these difficult issues may be resolved in court rather than in the legislature.

5. The San Francisco Ordinance Prohibiting Employee Drug Testing

The City and County of San Francisco enacted the first drug testing prohibition in the nation on November 18, 1985. The ordinance, which became effective on December 2, 1985, bans testing of private and public sector employees for drug or alcohol use unless, inter alia, there is a "clear and present danger to the physical safety of the employee, another employee or to a member of the public." The ordinance forbids "random or company-wide" testing of existing employees, but places no restriction on pre-employment testing. Consequently, a San Francisco employer may still screen applicants for drug use without violating the ordinance.

The San Francisco ordinance presents a number of problems. First, while it exempts from the definition of "employee" uniformed city police, fire and sheriff's personnel, police communication dispatchers and emergency service vehicle operators, the ordinance, however, ignores safety concerns presented by other occupational groups. Presumably, the San Francisco Board of Supervisors,

116. See Appendix A.
117. Id. at § 3300A.5. The employer must also have reasonable grounds to believe that the employee's faculties are impaired while on the job, but this requirement would in every conceivable case be subsumed in the "clear and present danger" standard.
118. The ordinance applies only to existing employees and its prohibitions apply only to tests that are made a condition of continued employment.
119. Id. at § 3300A.2.(1).
which approved the measure, recognized the inherent threat to public safety that would be posed if testing of police and safety officers were forbidden. But, it prohibits testing of other municipal employees such as bus, subway or cable car operators.\textsuperscript{120} Further, the ordinance effectively prevents testing of private employees such as truck drivers, fork lift operators, and heavy construction workers, whose jobs also could endanger public safety on a daily basis.

Second, the ordinance fails altogether to accommodate legitimate employer interests other than safety, such as the need to preserve productivity, reduce theft and maintain product quality.

Third, the ordinance bans drug testing, but does not prohibit use of any other means of identifying impaired employees\textsuperscript{121} or restrain employers from maintaining policies that prohibit use of intoxicating substances during work hours.\textsuperscript{122} This ban, then, will require employers to use detection methods that are less reliable and more subjective and arbitrary than laboratory screening. In turn, employees more often will be disciplined or dismissed on the basis of less reliable subjective evidence. Ironically, the need to rely on observational data will tend to heighten employer scrutiny of employee work performance and behavior, with an attendant decrease in employee privacy.

Fourth, many employers sponsor employee assistance and/or rehabilitation programs for drug or alcohol impaired employees. These programs typically require ongoing tests to determine that the employee remains drug or alcohol free. On its face, the San Francisco ordinance is a blow to employee assistance programs that use post-identification monitoring. It would either prohibit employers from mandating participation in such a program as a condition of continued employment or require the program to drop its testing component, a decision that should best be left to experts in the rehabilitation field.

Finally, and perhaps fatally, the ordinance clashes with existing state policy to promote the use of effective test procedures and therefore may be preempted. California Health and Safety Code section 11554 provides:

\begin{quote}
The rehabilitation of persons addicted to controlled substances and the prevention of continued addiction to controlled
\end{quote

\textsuperscript{120} As one pundit has said, San Francisco's municipal railway could become the place where "little cable cars climb halfway to the stars," possibly along with some of their operators (who will not have the benefit of drug testing).

\textsuperscript{121} \textit{Id.} at § 3300A.7.

\textsuperscript{122} \textit{Id.}
substances is a matter of statewide concern. It is the policy of the state to encourage each city and county to make use, whenever applicable, of testing procedures to determine addiction to controlled substances or the absence thereof, and to foster research in means of detecting the existence of addiction to controlled substances and in medical methods and procedures for that purpose.\(^1\)

In short, this hastily contrived ordinance presents too many serious problems for it to be considered a model for legislation in other locales. It achieves some unarticulated anti-technology aim at the expense of many legitimate employer and societal interests. Furthermore, it may have the effect of reducing employee privacy and increasing the risk of arbitrary employment decisions contrary to its intent.

The current status of legislative activity in California indicates that workplace drug problems and testing programs are not well understood by lawmakers. Lawmakers would do well to attain a reasonable level of knowledge concerning the area of drug testing before they draft further legislation.

III. THE LEGAL AND PRACTICAL CONSIDERATIONS WHEN INVESTIGATING DRUG AND ALCOHOL ABUSE USING TECHNIQUES OTHER THAN SPECIMEN TESTING

Testing employees for drug and alcohol use is the most direct and, in some cases, the most effective means of identifying and deterring abuse. For some employers, however, testing may be undesirable for employee relations reasons. For others, testing alone may be deemed insufficient to guarantee a drug and alcohol-free workplace. Employers, then, commonly consider and use other techniques to identify potential or current abuse, and the use of these techniques should be preceded by an analysis of the potential legal consequences.

A. **Electronic Surveillance**

In recent years, employers have begun to use a variety of surveillance techniques to monitor employee activity in the workplace, including both electronic surveillance, such as video cameras, and undercover agents. Those methods remain fully lawful but there

---

are substantial restrictions on audio and telephone monitoring as well as on other forms of eavesdropping.

1. Federal Wiretap Restrictions

If an employer desires to monitor an employee’s telephone calls to detect drug use and/or sales, it must be aware of the substantial federal and state restrictions placed upon such activity. Generally, federal law prohibits the interception of wire or oral communications but does not preempt more strict state standards.\textsuperscript{124}

The lawfulness of any interception of wire communication depends on whether the interception falls within one of the express exceptions to the general prohibition. The most important exception allows interception when one party to the communication is the interceptor or when one party has given prior consent to the interception.\textsuperscript{125} Therefore, before implementing a monitoring policy an employer should have employees sign written statements consenting to the employer’s policy of monitoring telephone calls. Such a consent form will give the employer significant latitude in conducting investigations.

In addition to the consent exception, there are two other exceptions to the general prohibition. First, courts have created an implied exception for “private communication systems.”\textsuperscript{126} In United States v. Christman,\textsuperscript{127} a criminal case, a district court held that a department store security manager did not violate federal wiretap laws when he surreptitiously recorded employee telephone calls on an in-house telephone system. Although it was possible to make calls into the public network, such calls were forbidden by store regulations and required placement through the switchboard operators. This limited exception has been created because the definition of “wire communication” is limited to communications made in whole or part through the use of telephones or facilities furnished or operated by a common carrier.\textsuperscript{128} The exception, however, is of


\textsuperscript{125} 18 U.S.C. § 2511(2)(L) (West 1983); Smith v. Cincinnati Post & Times Star, 475 F.2d 740 (6th Cir. 1973); United States v. Turk, 526 F.2d 654 (5th Cir.), cert. denied, 429 U.S. 823 (1976); Jandak v. Brookfield, 520 F. Supp. 815 (N.D. Ill. 1981) (holding that consent could not be implied merely because the party should have known of the interception). See also Watkins v. L.M. Berry & Co., 704 F.2d 577 (11th Cir. 1983) (employee’s knowledge of employer’s capability of monitoring her private telephone conversations, by itself, could not be considered implied consent to such monitoring).


\textsuperscript{127} Id.

\textsuperscript{128} 18 U.S.C. § 2510(1) (West 1983).
limited use by most employers preparing an investigation because most telephones are directly linked to the public switched network and therefore not exempted.129

A second exception exists for "extension telephones" used "in the ordinary course of business."130 This exception derives from the definition of "electronic, mechanical or other device."131 In Briggs v. American Filter Co., Inc.,132 one court applied this exception when an employee's supervisor had particular suspicions about confidential information being disclosed to a business competitor, had warned the employee not to disclose such information and knew that a particular telephone call was with an agent of the competitor. The court held that, on those facts, the supervisor's listening on an extension phone was within the ordinary course of business. As a result, the employer had not violated federal wiretap laws.133

An employer's investigation of drug use may be analogous. In order to come within the Briggs exception, however, an employer must have strong suspicions of drug use or sales, warn employees about the consequences of such use or sale on the job and have cause to believe the particular employee's telephone call is drug-related.

Not all courts will treat the use of an extension telephone in the same way. In Watkins v. L.M. Berry & Co.,134 the court analyzed the phrase "in the ordinary course of business" to hold that a personal call may not be intercepted except to the extent necessary to guard against unauthorized use of the telephone or to determine whether the call is personal.135 Consequently, the contents of a personal call may not be recorded or intercepted in any manner.

Under the Watkins decision, if a supervisor listened on an extension telephone and learned immediately that the call concerned illegal drug use or sale, he/she must hang up. Nonetheless, such information could be used as evidence in the investigation and might provide probable cause for a search warrant.

In summary, federal requirements are best met when employees have notice of monitoring and have given either express or implied consent. Otherwise, monitoring must be limited to business communications, using conventional telephone equipment. In the

129. Id.
131. Id.
132. 630 F.2d 414 (1980).
133. Id.
134. 704 F.2d 577 (11th Cir. 1983).
135. Id. at 584.
event a private conversation is overheard, the listener must cease monitoring. And, even if an employer's use of audio monitoring meets all federal standards, it must also meet those imposed by state law.

2. California Wiretap Restrictions

Since federal wiretapping law sets minimum standards for states, it does not preempt state legislation.\(^{136}\) States are thus free to supplement federal law with more stringent requirements. California "wiretap" law has done precisely that by not recognizing the federal exceptions discussed above.\(^{137}\)

Under California law, employers may not monitor employee telephone calls or use amplifying or recording devices to listen in on "confidential communications" without the consent of all parties to the communication.\(^{138}\) And the use of extension telephones for eavesdropping on confidential communications does not fall within an exception.\(^{139}\) The only exceptions are relative to the need to gather evidence reasonably believed to relate to commission of a violent felony or extortion, kidnapping or bribery.\(^{140}\)

The California approach obviously limits an employer's use of telephone monitoring to detect or deter drug use or sales in the workplace. If federal jurisdiction exists employers should seek the assistance of federal authorities to obtain a court order approving of the wiretap procedures to be used to monitor employee conversations in all but the most obvious cases of potential violent felony, extortion, kidnap or bribery.\(^{141}\) Even then, caution is warranted as the consequence for violation of this statute is a fine and/or prison term.\(^{142}\)


\(^{137}\) CAL. PENAL CODE § 631-32 (West 1982).

\(^{138}\) Ribas v. Clark, 38 Cal. 3d 355, 696 P.2d 637, 212 Cal. Rptr. 143 (1985). In Ribas, the court held that People v. Soles, 68 Cal. App. 3d 418, 136 Cal. Rptr. 328 (1977), was erroneous to the extent it viewed section 631 as merely encompassing the use of electronic amplifying devices. The court observed in dicta that any use of a telephone extension is proscribed unless furnished and used pursuant to the tariffs of a public utility in the business of providing communications services. The court alluded to current Pacific Bell tariffs that purport to bar the overhearing of telephone conversations by non-parties without notice to all parties. See Pac. Bell Schedule Cal. P.U.C. No. 36-T, 5th Rev. Sheet 79, eff. July 8, 1984. It is a dubious proposition that a particular telephone company's tariff determines the legality of telephone monitoring. The court apparently misunderstood the statutory exception for public utility-furnished equipment.

\(^{139}\) Id.

\(^{140}\) CAL. PENAL CODE § 6335 (West 1982).

\(^{141}\) Id. at § 633.

\(^{142}\) Id. at § 631(a).
3. Use of Undercover Agents

Use of undercover agents posing as employees or customers is another means of lawfully monitoring drug activity. Such an agent can be a party to conversations that cannot be monitored lawfully by amplifying or recording devices. This method also places agents with some expertise at identifying drugs, drug paraphernalia and drug transactions at the scene of suspected drug activity. The use of a non-employee agent also avoids the problem of being forced to rely upon fellow employees to "turn in" their co-workers and later having to ask them to testify against their peers and friends.\(^{143}\)

As with every other employer activity, established procedures should be followed in surveillance and investigation so that the process will not offend a reasonable, neutral observer (such as a judge who might review the matter as a consequence of an employee suit). The key to avoiding lawsuits is to preserve the dignity and privacy of the employees who are under investigation.

B. Use of Polygraphs and Similar Devices

Twenty-two states regulate the use of polygraphs (lie detectors), voice stress analyzers or similar devices in initial employment interviews or as a condition of employment or continued employment.\(^ {144}\) Some states prohibit polygraph testing in the private sector, but allow testing in the public sector.\(^ {145}\) California, for example, forbids involuntary polygraph testing of workers in private industry. And a statutory exception that allows testing of all public employees except police officers has been held unconstitutional as an intrusion upon a constitutionally protected zone of individual privacy and the court found no compelling state interest to

---

\(^{143}\) Employers should note, however, that California Labor Code § 2930(a) provides that if a retail shopping investigator (who is a licensed private investigator) issues a report that is to be used for disciplinary purposes, the employee must be provided with a copy of the report during the course of any disciplinary interview. The law has no apparent applicability to reports made by other employers, unlicensed investigators or non-retail service or commercial establishments such as factories or warehouses. CAL. LAB. CODE § 2930(a) (West Supp. 1986).

Section 2390(a) appears intended to provide an opportunity for employees to be confronted with the "evidence" against them and to rebut or deny the accusations. It is a good idea to provide this type of information to employees regardless of the applicability of this law. Employer representatives should always listen to and document the statements made by employees who are attempting to exonerate themselves or who believe that they have been treated unfairly in some way during the course of the investigation. Also, if, during the course of such an interview the employee raises issues or claims that should be investigated prior to meting out discipline, further investigation should be undertaken promptly.

\(^ {144}\) See BNA SPECIAL REPORT, POLYGROPHS AND EMPLOYMENT 24-25 (1985).

\(^ {145}\) Id.
justify the statutory scheme protecting private employees but not public employees.146 Additionally, many labor agreements ban the use of polygraphs, and arbitrators seldom place much weight on test results as proof of lying.147 Outside of the union context, voluntary submission to an examination usually is permissible even in states with restrictions. It is unlawful in California and numerous other states, however, to discipline or discharge employees for refusing to submit to a polygraph examination.148 California also requires that an employee be advised in writing of the option to refuse to take a polygraph or voice stress test.149

Polygraph testing appeals to many employers as a direct no-nonsense way to determine veracity. The method, however, is not without several serious shortcomings. First, opinions vary widely

146. Long Beach City Employees Ass'n v. City of Long Beach, 41 Cal.3d 937, 719 P.2d 660, 227 Cal. Rptr. 90 (1986). See CAL. LAB. CODE § 432.2(a) (West 1981):

   No employer shall demand or require any applicant for employment or prospective employment or any similar test or examination as a condition of employment or continued employment. The prohibition of this section does not apply to the federal government or any agency thereof or the state government or any agency or local subdivision thereof, including but not limited to counties, cities and counties, cities, districts authorities, and agency.

CAL. GOV'T CODE § 3307 (West 1980):

   No public safety officer shall be compelled to submit to a polygraph examination against his will. No disciplinary action or other reprimand shall be taken against a public safety officer refusing to submit to a polygraph examination, nor shall any comment be entered anywhere in the investigator's notes or anywhere else that the public safety officer refused to take a polygraph examination, nor shall any testimony or evidence be admissible at a subsequent hearing, trial, or proceeding, judicial or administrative, to the effect that the public safety officer refused to take a polygraph examination.

CAL. PENAL CODE § 637.3 (West Supp. 1986):

   (Further, no entity in California, private or public, may) use any system which examines or records in any manner voice prints or other voice stress patterns of another person to determine the truth or falsity of statements made by such other person without his or her express written consent given in advance of the examination or recordation.


147. See Amalgamated Meat Cutters and Butcher Workmen, Local 540 v. Neuhoff Bros. Packers, Inc., 481 F.2d 817 (5th Cir. 1973). National Labor Relations Board cases involving polygraphs usually center on an employee's claim that he or she was disciplined for union activity, not for having failed the exam or having refused to take it. Compare, Restaurant Management Services, Inc., 266 NLRB 779, 113 L.R.R.M. (BNA) 1044 (1983), with Consolidated Casinos Corp., enforced without opinion, 729 F.2d 780 (11th Cir. 1984).

148. See supra note 146.

149. CAL. LAB. CODE § 432.2(b) (West 1981) ("No employer shall request any person to take such a test, or administer such a test, without first advising the person in writing at the time the test is to be administered of the rights guaranteed by this section").
as to the accuracy of polygraph and voice stress devices. According to critics, when administered to employees charged with serious offenses, the test itself may create enough anxiety to render the results unreliable.150 Second, although polygraph examinations can be a tool to exonerate suspected but innocent employees who volunteer to take the test, they cannot provide strong support against a challenge to a disciplinary action in light of the apparently widespread legislative and scientific disapproval.151 In pre-employment testing, use of the polygraph invites abuses that include overly broad intrusions into an individual’s personal life and habits.152 Third, even if the exam is conducted properly, a jury might decide an applicant or employee’s privacy rights had been violated.

In one recent case, an employee was fired when the polygraph examiner determined that the employee’s denial of cocaine use was untruthful.153 The employer requested the polygraph examination because a supervisor had heard rumors that an employee of a fast food chain was using drugs outside of work. The jury award of $450,000 was upheld by the federal appellate court.154

Finally, if an employee chooses not to take the test, the employer may still rely on other available evidence of wrongful employee conduct to take warranted action. But in states such as California where an employer may not condition employment on taking the exam, an employer may have great difficulty proving that

150. See, e.g., BNA Special Report, Polygraphs and Employment 46-50 (1985) (Professor Lykken notes: "The polygraph cannot distinguish real from irrational guilt, nor guilt from fear, nor fear from righteous indignation").
151. See, e.g., Mioniodes v. Cook, 64 Md. App. 1, 494 A.2d 212 (1985) (former employee awarded damages after refusing to submit to a polygraph examination; jury found that the employee had been "constructively discharged" because her working conditions had become intolerable); People of New York v. Hamilton, N.Y. Super. Ct., No. H49547, 1985 (employer held liable for sexual harassment of female job applicants by polygraph examiner who not only touched them on different parts of their bodies, but asked them questions about venereal disease, abortion, and intimate personal relationships); Kamrath v. Suburban Nat'l Bank, 363 N.W. 2d 108 (Minn. 1985) (judgment against employer for inflicting emotional distress on an employee through the polygraph examination, when examiner pressured employee to reveal any acts of dishonesty in her life). But cf. Brown v. State of Tennessee, 693 F.2d 600 (6th Cir. 1982) (no sex discrimination when employer's failure to promote plaintiff was a result of his failure to take requested polygraph exam which, in Tennessee, was a "lawful method for determining employment related questions").
154. Id. Of that figure, $398,000 was for invasion of privacy, and $50,000 for defamation. See infra note 146 and accompanying text.
an employee’s refusal to take the exam had nothing to do with any subsequent adverse action against that employee.

In all cases, the use of polygraphs should be tempered by a concern for the adversarial employment relationship that such use may foster, the employee privacy interests that may be disrupted and the employee dignity that may be demeaned. And, considering the hostility juries and legislatures have expressed recently, an employer’s most prudent course would be to restrict all involuntary polygraph use, even in states where such use is lawful.

C. Use of Medical Records

Employers investigating drug or alcohol abuse in the workplace may wish to obtain an employee’s medical records to determine if such a history exists. The employer may also wish to cooperate with third parties conducting such an investigation by releasing medical records already collected. Most states set a high premium on an individual’s right of privacy in his or her medical history, however, and access to and release of such information is highly regulated.

1. Employers Must Protect Medical Information

In California, for example, an employee has a constitutional right of privacy in his or her medical records. As one appellate court stated:

A person’s medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected. . . . The individual’s right to privacy encompasses not only the state of his mind, but also his viscera, detailed complaints of physical ills, and their emotional overtones. The state of a person’s gastrointestinal tract is as much entitled to privacy from unauthorized public or bureaucratic snooping as is that person’s bank account, the contents of his library or his membership in the NAACP. We conclude the specie of privacy here sought to be invaded falls squarely within the protected ambit and the expressed objectives of Article I, Section 1.155

In addition to the Constitutional protection afforded medical records, California has a tough statutory provision entitled the Con-

---

fidentiality of Medical Information Act. That act sets forth the specific circumstances in which medical information can and cannot be disclosed and identifies the parties to whom the information can be provided. An employer can obtain medical information only if the employee "authorizes" the release of the information pursuant to a rigid set of guidelines. The guidelines contain exceptions (e.g. lawfully issued search warrant), but those exceptions do not cover an employer engaged in general information gathering. Moreover, the statute forbids any retaliation against an employee who refuses to release records, and provides a full range of damages for the improper release of confidential employee information including punitive damages and attorneys' fees.

2. Employers have Restricted Access to Employee Information Collected by the Government.

Both Congress and the California legislature have recognized the need to protect private citizens from unwarranted disclosure of personal information gathered by government agencies. Thus, Congress enacted the Federal Privacy Act of 1974, and in 1977, California enacted The Information Practices Act. The California Act, which is patterned after the Federal Privacy Act, requires that each agency "notify" the public that the agency maintains personal and confidential information, describe the type of information collected and indicate the purposes for which it is collected. The Act also requires that the information be disclosed to the individual concerned when so requested and prevents its disclosure to third parties.

As a practical matter, the federal and state privacy acts represent major hurdles to an employer seeking any type of information contained in a government file about an employee. The type of information an employer would like to view, such as information containing medical, psychiatric or psychological material, is classified as "confidential information" and simply cannot be obtained without the prior written voluntary consent of the individual to whom

156. CAL. CIV. CODE § 56 et seq. (West 1983).
157. Id. at §§ 56.10-56.11.
158. Id.
159. Id. at § 56.20(b).
160. Id. at §§ 56.35-56.36.
163. Id. at § 1798.10.
164. Id. at § 1798.24.
the record pertains.\textsuperscript{165}

An employer's simplest approach to obtaining medical records and information, then, is to request that all employees authorize the release of information when reasonably necessary to further an investigation. The likelihood of gaining a more specific and voluntary authorization, however, may be dim if the employee is the focus of the investigation.

In short, an employer's use of medical records as an investigative tool to determine drug use is not a particularly viable option. The law sets a high premium on an individual's right of privacy in his medical history, and requires that an employer obtain the voluntary consent of the employee to gain access to the information. This requirement forces the employer to make the employee immediately aware that he or she is under investigation, which in turn provides an employee the opportunity to temporarily stop using drugs or otherwise cover up drug activities. Additionally, if the records contain any information about which the employee is concerned, whether drug related or not, it is probable that the employee will not authorize the release. And, even if medical records are obtained, they may be considered of limited relevance if they simply refer to past alcohol or drug use. Indeed, more often than not, such records would be helpful only to test the veracity of any individual confronted with suspected present abuse. Thus, alternative information sources may serve the employer's investigatory needs in a less intrusive and more relevant manner.

D. Arrest Records

Statutory curbs on access to and use of arrest records for employment purposes exist in at least 12 states.\textsuperscript{166} Most statutory restrictions apply to pre-employment inquiries only, but the possibility of adverse racial impact effectively restricts the use of arrest records for most other purposes as well. Courts commonly recognize that members of minority racial groups are arrested more often than non-minorities.\textsuperscript{167} Some of these arrests are believed to be discriminatory and, therefore, courts routinely strike down an

\textsuperscript{165} Id. at §§ 1798.3 and 1798.24.

\textsuperscript{166} See generally LAB. REL. REP. vol. 8.

absolute bar on hiring or retaining arrestees.\textsuperscript{168} California law permits no interview questions or use of information concerning arrests that did not result in convictions, unless the applicant is still awaiting trial.\textsuperscript{169} Convictions are usually treated differently. Generally an employer may screen employees for past criminal convictions. The difference rests on the notion that a judicial determination of guilt in a criminal case, with the attendant constitutional safeguards, is far less likely than an arrest to be the product of arbitrary action. An automatic exclusion of all persons convicted of any crimes, however, may violate Title VII if there is a sufficient discriminatory impact.\textsuperscript{170} Thus, an employer who bases an adverse decision upon a criminal conviction must be prepared to justify the action as a business necessity. An employer must be able to demonstrate how the conviction is job-related, a difficult task if the conviction is remote in time or the job in question does not expose the company to risks similar to the crime for which the individual was convicted.\textsuperscript{171}

\section*{E. Searches of Employee Property and Possessions}

When an employee is suspected of possessing, using or selling illegal drugs or alcohol, an employer may want to search the employee or the employee’s locker, work area or possessions. Such searches can be lawful and effective. On the other hand, an employer risks serious liability if a search is inconsistent with state and federal legal principles and reasonable business practices.\textsuperscript{172}

\subsection*{1. Searching the Person and Personal Effects}

The likelihood of a successful challenge to an employer search will be minimized if the employer had “reasonable cause” to believe

\begin{flushright}
\textsuperscript{169} \textsc{Cal. Lab. Code} § 432.7(a) (West 1977).
\textsuperscript{170} Green v. Missouri Pac. R.R. Co., 523 F.2d 1290 (8th Cir. 1975).
\textsuperscript{171} See generally \textsc{Richardson v. Hotel Corp. of America}, 332 F. Supp. 519 (E.D. La. 1971), aff’d mem., 468 F.2d 951 (5th Cir. 1972) (bellman’s discharge for pre-employment theft conviction justified as job related). The State of Washington bars employment inquiries regarding convictions for which the date of the conviction or prison release (whichever is more recent) occurred more than seven years prior to the date of the inquiry. \textsc{Wash. Admin. Code} § 162-16-060 (1982). California’s Fair Employment and Housing Commission also has proposed regulations to limit employer questioning regarding past convictions, but has not acted on this proposal. In California, however, employees may not be discharged for a pre-1976 conviction for possession of marijuana in an amount that would not be illegal after the 1976 reform legislation. See \textsc{Cal. Lab. Code} § 432.8 (West 1976).
\textsuperscript{172} For a discussion of the general principles of search and seizure law see \textit{supra} notes 79-83 and accompanying text.
\end{flushright}
the employee possessed prohibited drugs or alcohol and the affected employee had no reasonable expectation of privacy in the areas or items searched. In turn, whether such cause or expectation is reasonable will depend on all of the facts and circumstances surrounding the individual case.

Absent a voluntary, noncoerced consent or the existence of a pre-announced search policy to which employees may be deemed to have consented, an employer may not conduct a general search of an employee's property and person, even when the employer has probable cause to believe the employee possesses illegal drugs or impermissible alcohol. Rather, an employer must confine the search to items in "plain view," which will be held to contain no reasonable expectation of privacy.

Suspect items do not necessarily lose their "plain view" status when placed in boxes, shopping bags or similar packages in which there is no reasonable expectation of privacy. For example, in People v. Carter, a security officer's seizure and search of a box containing stolen merchandise was held not to violate the "plain view" requirement. Similarly, in People v. Patel, the court upheld the seizure and search of a bag containing an electronic game on which the price tag had been switched. "The fact that the game was enclosed in a paper bag provided by the store did not cause the game to be lost from plain view. It merely had a different cover over it than before."

Both Carter and Patel point out that since the containers were provided by the store, the defendants had no "reasonable expectation of privacy" by using them. The Carter court implied that "a private container... such as a purse, in which the suspects had any reasonable expectation of privacy," could not be examined under the "plain-view" privilege. The Patel court stated that "the situ-

173. The law surrounding searches of employee possessions has developed in the criminal context. Thus most of the decisions discussed in this section involve criminal conduct. Nonetheless, the reasoning applies equally in the civil, employment context, at least to uncon- sented searches. See supra notes 96-99 and accompanying text.


175. 117 Cal. App. 3d 735, 172 Cal. Rptr. 863 (1981). In the Carter case, a department store security officer observed the defendants placing merchandise inside a large cardboard box. The defendants then taped a receipt from a previous purchase onto the sealed box with a store security strip and left the store.


177. Id. at 23.

178. 117 Cal. App. 3d at 738.
ation presented to us here is entirely different from the search of a person’s handbag or other container intended for numerous personal effects.”179 If an item is not visible, then, the search will be held reasonable only if the affected employee can be said to have had no reasonable expectation of privacy. To avoid such factual determinations, an employer should in most circumstances take the conservative approach by limiting all unauthorized searches to items in plain view.

2. Searching Personal Effects in Company Facility

A different situation arises when the object of the search is not the employee’s person or personal property, but property supplied by the employer for work-related use. Several cases have held that there is no reasonable expectation of privacy in an employer-owned locker when an established policy of unconsented locker inspection exists.180

In Williams v. Collins,181 for example, an employee’s supervisors searched his desk and office, including a locked desk drawer, without a warrant. The supervisors also seized personal items in the desk for safekeeping. The court held that whether it was part of

179. 121 Cal. App. 3d at 23. Following the Zelinski, Carter and Patel cases, California Penal Code § 490.5(e) was amended to allow merchants and library personnel to search “packages, shopping bags, handbags or other property in the immediate possession of the person detained . . .” CAL. PENAL CODE § 490.5(e)(4) (West Supp. 1986). Thus, it appears the scope of a personal search under the common law interpretation of “plain view” may be more restricted than that allowed to merchants and librarians. While an employer might argue that § 490.5(e)(4) should apply by analogy to the workplace, the stronger argument would be that the legislature meant to exempt only merchants and librarians.

180. See United States v. Bunkers, 521 F.2d 1217 (9th Cir.), cert. denied, 423 U.S. 989 (1975) (warrantless search of a postal employee’s locker for stolen C.O.D. parcels upheld because there was no reasonable expectation of privacy in the locker since (1) a regulation allowed for such searches when there was reasonable cause to suspect criminal activity; and (2) the defendant had been fully advised of the regulation and the conditions placed upon her use of the locker and the postal service’s right to search it); Los Angeles Police Protective League v. Gates, 579 F. Supp. 36, 44 (C.D. Ca. 1984); United States v. Donato, 269 F. Supp. 921 (E.D. Pa.), aff’d, 379 F.2d 288 (3d Cir. 1967) (warrantless search of a U.S. Mint employee’s locker by security guards was upheld when (1) there was a government regulation providing that lockers were not to be considered private lockers; (2) all employee lockers were subject to inspection and were regularly inspected by security guards for sanitation purposes; and (3) security guards had a master key that opened all the employee lockers); Schaffer v. Field, 339 F. Supp. 997 (C.D. Cal. 1972), aff’d, 484 F.2d 1196 (9th Cir. 1973) (no reasonable expectation of privacy existed in a deputy sheriff’s station house locker when (1) the locks had both keys and combinations but the commander kept a master key and the combination to all locks; (2) the lockers and locks were not permanently assigned but could be changed at will; and (3) on at least three occasions in the past, deputies’ lockers had been searched by commanders without the deputies’ permission).

181. 728 F.2d 721, 728 (5th Cir. 1984).
the investigation or a simple inventory of materials in the office, a
search of the employee's desk was within the outer perimeter of de-
fendants' line of duty.\footnote{182}

There are, however, cases holding that a reasonable expecta-
tion of privacy does exist in an employee's locker. In \textit{U.S. v.
Speights},\footnote{183} a policeman was held to have a reasonable expec-
tation of privacy in his locker even though it was owned by the police
department and could, absent an added personal lock, be opened
with a master key. The court stated that reliance on specific regula-
tions and practices can support a finding that an expectation of pri-
vacy was or was not reasonable.\footnote{184} In this case, there was no
regulation or practice that would have alerted an officer to expect
unconsented locker searches.\footnote{185} Additionally, the use of private
locks on a number of the lockers had been tacitly approved by the
department.

Similarly, in \textit{Tucker v. Superior Court},\footnote{186} a restaurant em-
ployee was held to have a reasonable expectation of privacy in his
closed but unlocked locker. There was no notice, regulation or
practice within the organization pertaining to locker searches and
each employee was allowed to use a personal lock on his locker if he
or she so desired.

It is difficult to draw conclusions to be drawn from these two
conflicting lines of authority. It is likely, however, that searches
will be upheld if the employer has an established policy of uncon-
sented locker or other property inspections. It appears that once
employees are notified that searches of lockers, desks or other prop-
erty may occur, they cannot have an expectation of privacy in that
property, particularly if the notice states what property is the target
of potential searches. The employer must take affirmative steps to
ensure that the employees are informed of the policy, and must be
sure to follow its policy.\footnote{187}

An even more difficult situation arises when a personal effect,
like a purse or lunch box, is stored in a company-supplied facility, such as a locker. It could be argued that the employee relinquishes some privacy interest in the personal effect by storing it in the locker. The better view, however, is that, since it is necessary to place the items somewhere and it would be unreasonable to forbid bringing any personal effects into the workplace, the items are entitled to the same respect as if they were personally held by the employee. In other words, without a properly announced search policy to the contrary, it may not be proper for an employer to search the purse or lunch box stored in the locker.\textsuperscript{188}

Despite this apparent limitation, several cases have permitted searches of a person's property or personal effects for contraband when the property or effects were placed in a locker.\textsuperscript{189} It should be noted that in these cases the issue presented was whether the drugs discovered by the search could be admitted into evidence or had to be suppressed at the criminal trial. As a result, the rules set forth in these cases do not apply directly, but must be analogized to apply in the civil context.

3. Practical Advice to Employer Conducting Searches

The practical effect of all of the above case law is that search procedures should be announced well in advance and should be described in detail in a written communication to all employees. Those who are subject to these policies will ordinarily be deemed to have consented to them, but employers should seek express written consent, whenever practical, before proceeding with an intrusive search. All searches should be conducted so that an employee's dignity is preserved. Searches of areas that are not explicitly permitted in the company policy manual should be governed by a strict policy requiring a reasonable or rational basis for believing that impermissible goods or evidence of impermissible activity are present, barring the existence of some other compelling business reason that supports such a search.\textsuperscript{190} As a general rule, a search of company

\begin{footnotes}
\footnotetext{188. See People v. Crowson, 33 Cal. 3d 623, 190 Cal. Rptr. 165 (1983).}
\footnotetext{189. See, e.g., K-Mart Corp. Store No. 7441 v. Trotti, 677 S.W. 2d 633 (Tex. App. 1984).}
\footnotetext{190. See, e.g., People v. Lanthier, 5 Cal. 3d 751 (1971) (janitor's search of student's locker in which he discovered drugs was lawful where there was immediate need to discover source of noxious odor); New Jersey v. TLO, 105 S.Ct. 733 (1985) (school authorities permitted to search student locker for contraband based upon lessened degree of probable cause, despite applicability of Fourth Amendment to the search); In re Donaldson, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969) (vice-principal's search of student's locker lawful; school acts \textit{in loco parentis}); People v. Dickson, 91 Cal. App. 3d 409, 154 Cal. Rptr. 116 (1979). \textit{See also} People v. McKinnon, 7 Cal. 3d 899, 500 P.2d 1097 (1972), \textit{cert. denied}, 411 U.S. 931 (1973), \textit{overruled on other grounds}; People v. Dalton, 24 Cal. 3d 850, 598 P.2d 467, \textit{cert. denied}, 445}
\end{footnotes}
property is considered less subject to privacy considerations than a search of employee personal property.

Investigations of possible illegal activities should be handled by trained security personnel, the police or outside experts, whenever practical. If prosecution is contemplated, the police should be consulted at an early stage. Employers should take the time to become acquainted with the local police practices in drug cases. This effort will assure better coordination when police help is needed.

Evidence of employee violations of company drug rules need satisfy only normal company disciplinary standards for discipline to be imposed. Generally, for employee relations reasons, the company standard for disciplinary action should require a good faith belief that a violation has occurred. Such a belief requires some credible evidence obtained in a reasonable investigation that conformed with company policies regarding investigations. Such evidence need not be convincing "beyond a reasonable doubt" since that standard applies only to criminal prosecutions. The employer should also be aware that, in taking possession of incriminating evidence prior to police involvement, any possible criminal prosecution will be affected by mishandling of the evidence that might occur.

IV. USING THE RESULTS OF INVESTIGATIONS: AVOIDING LEGAL PITFALLS

The conclusion of the above discussion is that when an employer conducts an investigation of an individual's drug or alcohol involvement, it must be aware of the applicable legal doctrines and concomitant potential liability. In particular, an employer must respect emerging privacy doctrines and related legal protections in statutes or in tort law. Similarly, an employer must consider privacy and search and seizure law when taking adverse action against an applicant or employee based on the results of such an investigation. Additionally, an employer must consider whether an adverse act would violate other legal rights. The most important of those potentially applicable legal principles — namely civil rights stat-

191. In many instances the search powers of the police may exceed those of the employer, particularly if no search policy covers the area that is to be searched. See, e.g., United States v. Place, 462 U.S. 696 (1983) (drug sniffing dogs may sniff luggage in public place without upsetting reasonable expectation of privacy); Terry v. Ohio, 392 U.S. 1 (1968) (police may "stop and frisk" for purpose of investigating possible illegal behavior even though there is not probable cause to make an arrest).
utes, handicap discrimination law and various tort theories are briefly reviewed below.

If one basic guideline emerges from a study of these doctrines, it is that an employer must apply its drug or alcohol policies in the same fair and nondiscriminatory manner as any other work rules. Such even-handedness may not prevent lawsuits in all circumstances, but it will go a long way toward a meritorious defense.

A. Civil Rights Statutes

To date, courts have considered very few civil rights claims in which an employee or employees challenge an employer's enforcement of a drug or alcohol policy. As work-related substance abuse increases, however, the number of cases will increase as well. The following briefly describes the most common sources of potential liability for civil rights violations relating to drug and alcohol programs in the workplace.

1. The Civil Rights Acts of 1866 and 1871

Congress enacted a series of civil rights statutes following the Civil War that provide some remedy against employment discrimination. The Civil Rights Act of 1866 and 1870, better known as section 1981, provides that "all persons" shall have the same right "to make and enforce contracts" and the same full and equal benefit of all "laws and proceedings for the security of persons and property as is enjoyed by white citizens." Section 1981 applies to acts of racial and alienage discrimination by private employers.

The Civil Rights Act of 1871, particularly section 1983, also provides protection. Section 1983 broadly provides a right of action when, under "color of law," an individual is deprived of any "rights, privileges, or immunities secured by the Constitution and laws . . . ." It is thus not limited to claims of race or alienage discrimination, but applies equally to discrimination based on sex or


religion, as well as other factors.  

In general, section 1983 covers only claims in which state or local governmental agencies or officials are involved in the challenged practice. Nonetheless, private employers may be implicated through state involvement in regulation, licensing, and/or receipt of public funds. Similarly, private employers that carry out functions normally exercised by the state or who participate in state-supported monopoly situations may come under the coverage of section 1983.  

Because of the unavailability of respondeat superior under section 1983, an employer who had no direct role in the constitutional violation may be able to avoid liability. An employer, however, may be forced to indemnify the individual actor under state law provisions.  

Under certain circumstances, then, sections 1981 and 1983 may provide a remedy if an employer's drug or alcohol policies have been discriminatorily or unlawfully applied. For example, in *Evans v. Roadway Express, Inc.*, a district court upheld the discharge of a black employee who had been fired because he had been under the influence of alcohol on the job and because he refused to take a sobriety test. The court dismissed the employee's section 1981 action because it found no evidence that similarly situated white employees had been treated differently.  

In another recent case, *Thorne v. City of El Segundo*, an employee brought a section 1983 claim against the city police department for failure to hire her into a police officer position. She argued

---

198. See, e.g., *Martin v. Pac. Northwest Bell Tel. Co.*, 441 F.2d 1116 (9th Cir.), cert. denied, 404 U.S. 658 (1978) (even though Pacific Bell is a private corporation that enjoys state-protected monopoly, there was insufficient showing of state action).  
199. *Monell v. Dep't of Social Serv.*, 436 U.S. 658 (1978); see also, *Traver v. Meshriy*, 627 F.2d 934 (9th Cir. 1980) (§ 1983 action brought against off-duty police officer who stopped plaintiff from leaving a bank when he mistakenly believed the plaintiff had defrauded the bank; court expressed reservations about holding the bank liable under § 1983 absent evidence of direct involvement, but upheld judgment because there were prudent state claims of false imprisonment and malicious prosecution).  
200. See, e.g., *CAL. LAB. CODE § 2802* (West 1971) (employer must indemnify employee for losses incurred as a "direct consequence of the discharge of his duties").  
that the defendants (two supervisors and a polygraph examiner) violated her constitutionally protected rights of privacy and free association when they rejected her application based on information about her sexual activities learned during a screening polygraph test. The court agreed, stating that while an employer may consider the sexual morality of its employees, it must set reasonable guidelines for inquiry and relevance to job performance. The same reasoning would apply to inquiries about drug or alcohol, although the illegal nature of most drugs makes inquiry somewhat less vulnerable to attack.

2. Title VII

Title VII of the Civil Rights Act of 1964 forbids discrimination on the basis of race, color, religion, sex or national origin. In the event an anti-alcohol or drug policy excluded a high proportion of minorities or women, an employer might be required under Title VII to demonstrate that the rule was "job related."

In the only major decision so far on this issue, New York City Transit Authority v. Beazer, the Supreme Court considered whether a transit authority’s policy of refusing employment to persons who use narcotics, including methadone, violated Title VII. The Court held the plaintiffs’ statistical proof of the policy’s discriminatory effect on Blacks and Hispanics was insufficient to state a claim.

Whenever enforcement of a drug or alcohol policy requires large scale actions, such as the termination of or the failure to hire numerous employees, an employer should be prepared to demonstrate that the policy is job-related and not instituted for a discriminatory purpose. In addition, an employer should be mindful of the significance of Title VII if arrest records are taken into account.

B. Handicap Discrimination Law

An employer who takes adverse action against an applicant for employment or an existing employee because of suspected drug or alcohol use or abuse also must consider whether this action violates

---

203. Id. at 471.
206. See supra notes 166-171 and accompanying text.
provisions protecting handicapped persons. Federal law\textsuperscript{207} and the laws of at least 36 states forbid discrimination against persons who meet the applicable statutory definitions of “handicapped” person.\textsuperscript{208}

1. Federal Handicap Discrimination Law

Title V of the Federal Rehabilitation Act of 1973\textsuperscript{209} protects handicapped individuals from discrimination by federal employers,\textsuperscript{210} recipients of federal financial assistance\textsuperscript{211} and certain federal contractors.\textsuperscript{212}

The Act defines a “handicapped individual” as “any person who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an


\textsuperscript{208} See B. SCHLEI & P. GROSSMAN, supra, note 204 at 277, n.87 (“Only Delaware, North Dakota, South Carolina, and Wyoming have no statutory or executive order prohibitions against discrimination on the basis of handicap”).


\textsuperscript{210} Id. at § 791.

\textsuperscript{211} Id. at § 794. See also 45 C.F.R. § 84.3(h) (1984), which provides that “federal financial assistance” is defined as:

any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department . . . makes available assistance in the form of: (1) Funds; (2) Services of Federal personnel, or (3) Real and personal property or any interest in or use of such property . . . .

The Supreme Court recently confirmed that a private individual may sue under this section even if the “primary objective” of the federal funding is not to promote employment. Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984). The Darrone court also clarified that the § 504 prohibition against discrimination does not apply to all of the employer’s activities, but only to those involving federal funds. Id. at 635. Each federal agency providing federal assistance enforces compliance of its own recipients. 29 U.S.C. § 794 (1976 and Supp. III 1979).

\textsuperscript{212} 29 U.S.C. § 793 (1976 & Supp. III 1979). Section 503 requires that all federal contracts and subcontracts in excess of $2,500 include clauses in which the contractor agrees (1) not to discriminate and (2) “to take affirmative action to employ, advance in employment and otherwise treat qualified handicapped individuals without discrimination based upon their physical or mental handicap in all employment practices such as the following: employment, upgrading, demotion or transfer, recruitment, advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.” 41 C.F.R. § 60-741.4(a) (1985); 29 U.S.C. § 793(a) (1976 and Supp. III 1979). The affirmative action requirement applies to any of the contractor’s facilities, even if not directly linked to the government contract, unless a waiver is sought and received. 41 C.F.R. § 60-741.3(a)(5).

impairment.” The term, however, expressly excludes “any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.” The legislative history of this exclusion indicates that Congress sought to “exclude alcoholics and drug abusers in need of rehabilitation from the definition of handicapped individual” for purposes of employment discrimination.

Thus, an employer is free to take appropriate adverse action if the individual in question (1) is an alcoholic or a drug abuser; and (2) is currently using alcohol or drugs; and (3) is unable to satisfactorily perform his or her duties as a direct result of the drugs or is a threat to property or safety. The obvious and serious problem for employers who seek to use this exclusion is how to prove that the individual meets each of the statutory requirements.

The Rehabilitation Act fails to mention rehabilitated alcoholics and former drug users or abusers, so it is not settled whether they are protected as “handicapped.” In Johnson v. Smith, a district court held a former drug abuser had stated a prima facie case under section 504 of the Act. In Johnson, an applicant for a job as a correctional officer with the Federal Bureau of Prisons listed his prior

214. Id.
216. The Court of Appeals for the Ninth Circuit has determined that § 504 handicap cases are to be decided using a modified Title VII allocation of proof. See Sisson v. Helms, 751 F.2d 991 (9th Cir. 1985). For cases considering various proof issues, see for example Healy v. Bergman, 37 EMPL. PRAC. DEc. (CCH) § 35,320 (D. Mass. 1985) (case remanded so federal agency could prove reasons why terminated employee's alcoholism did or did not prevent him from performing his job where employee was fired for voluntarily entering a treatment program); McCleod v. City of Detroit, 39 FEP Cas. 225 (E.D. Mich. 1985) (marijuana users not qualified because evidence showed use of the drug can adversely affect a firefighter's ability to perform); Huff v. Israel, 573 F. Supp. 107 (M.D. Ga. 1983) (city properly concluded alcoholic compliance officer was unable to perform when he received three convictions for driving while intoxicated in five year period); Guerrero v. Schultz, 557 F. Supp. 511 (D.D.C. 1983) (alcoholic foreign service officer unqualified for job because he admitted need for continuing therapy); Walker v. Weinberger, 600 F. Supp. 757 (D.D.C. 1985) (federal employee suit under 29 U.S.C. § 791, which requires reasonable accommodation and affirmative action for handicapped federal employees; former alcoholic's pre-rehabilitation discipline record could not be used in aid of non-alcohol-related subsequent discipline to justify dismissal). But see 45 C.F.R. § 84.61 app. A(4) (1985) (in § 504 cases the employer may consider “past personnel records, absenteeism, disruptive, abusive, or dangerous behavior, violations of rules and unsatisfactory work performance”).
217. 39 FEP Cas. 1106 (D. Minn. 1985).
drug use in detail on his application. The Bureau rejected his application because of his history of drug and alcohol dependency. The Johnson court held the plaintiff had stated a prima facie case and that whether he was as qualified as the other applicants or able to perform the job were questions to be decided at trial.

As a result, former abusers probably will be protected if they have a record of impairment or if they are incorrectly regarded as being presently unable to perform their duties. Curiously, former users who were not abusers may not be considered handicapped since it is possible they would have no record of impairment and, as mere former users, could not presently be considered or regarded as "disabled."

Even rehabilitated alcoholics and drug abusers, however, must demonstrate their impairments substantially limit one or more major life activities in order to prevail in an action under the Rehabilitation Act. "Major life activities" include such actions as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, learning and working." In Lake City Corp. v. Confer, a state court concluded that the mere privilege of working in one particular job for one particular employer could not be considered a "major life activity" for purposes of stating a claim under the Utah Anti-discrimination Act. The court suggested that to hold otherwise would subject every employer to a finding of discrimination. On the other hand, the court recognized that an impairment that precluded work altogether would surely fit the description. The court concluded:

Whether employment of a particular type in a particular industry is a "major life activity" is a question of fact, to be resolved upon consideration of the nature of the desired

218. The Johnson plaintiff had "used marijuana almost daily from 1969 to 1977 . . . had used speed 50 to 70 times, LSD 10 times, hashish 50 to 100 times, downers 5 times and alcohol frequently." Id.
219. See also Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978) (three former drug addicts denied employment by City solely on basis of prior use held to be protected by § 504 of the Act); 28 C.F.R. § 540 (1985); but cf; McGarvey v. D.C., 29 FEP Cases 954 (D.D.C. 1979) (drug addiction was related to qualification for ambulance technician job).
220. See, e.g., Stevens v. Stubbs, 576 F. Supp. 1409, 1414 (N.D. Ga. 1983) ("impairment" does not include transitory illnesses that have no permanent effect on the person's health); see also De La Torres v. Bolger, 781 F.2d 1134 (5th Cir.) (1986) (left-handedness is not an impairment).
222. 29 C.F.R. § 1613.702(C) (1985).
223. 674 P.2d 632, 636 (Utah 1983).
225. 674 P.2d at 636-37.
employment by comparison to related types of employment in
the same or other industries and the reasons for the applicant’s
preference for the job in question over all others.\footnote{226}

In the case of \textit{McCleod v. City of Detroit},\footnote{227} the district court
ruling on the same issue upheld pre-employment urinalysis screen-
ing for city firefighter applicants, where the plaintiffs were rejected
due to positive marijuana test results. Rejecting the claim that the
individuals were “handicapped,” the court found that no evidence
was introduced at trial that being a firefighter was a major life activ-
ity.\footnote{228} The court held that would be true even if the use of mari-
juana qualified as an impairment under the Act.\footnote{229}

The \textit{McCleod} plaintiffs sought to avoid this result by arguing
that the City’s presumption regarding the impairment from mari-
juana use (reduced memory, coordination and risk-taking ability)
was erroneous. Thus, plaintiffs argued they were not actually im-
paired but were impermissibly regarded as being impaired in viola-
tion of section 504 of the Act.

The court rejected this “impairment” argument, finding that
even if the plaintiffs had established a substantial impairment of a
major life activity, the City could establish that the criteria were job
related and required by job necessity.\footnote{230} The court held that use of
marijuana can adversely affect a firefighter’s ability to do his or her
job. The challenged criteria were job-related and required by busi-
ness necessity since they “implicated the possibility of endangering
the property and safety of others.”\footnote{231}

2. California Handicap Discrimination Law

California’s handicap statute is similar to federal law with re-
gard to alcoholism or drug abuse. California Government Code
Section 12920 prohibits an employer with five or more employees
from discriminating against an employee or applicant on the basis
of “physical handicap.”\footnote{232} “Physical handicap includes impair-

\begin{footnotes}
\footnote{226} Id. at 637.
\footnote{228} Id. at 228.
\footnote{229} Id.
\footnote{230} Id. \textit{See generally} Southwestern Community College v. Davis, 442 U.S. 397 (1979)
(a claimant must possess the necessary qualifications to be designated “handicapped”).
\footnote{231} Id.
\footnote{232} \textit{CAL. Gov’t. CODE} § 12920 (West 1982).
\end{footnotes}
ment of sight, hearing, or speech, or impairment of physical ability because of amputation or loss of function or coordination, or any other health impairment which requires special education or related services. By regulation, however, the definition of physical handicap excludes mental illness, alcoholism and narcotics addiction.

In *American National Insurance Co. v. Fair Employment and Housing Commission*, the California Supreme Court interpreted these provisions to protect any person having a serious, non-temporary physical disability that makes job achievement unusually difficult. The court held that high blood pressure falls within the meaning of "handicapped" even if the condition is not presently disabling.

California law requires employers with 25 or more employees to "reasonably accommodate any employee who wishes to voluntarily enter and participate in an alcoholic rehabilitation program, provided that this reasonable accommodation does not impose an undue hardship on the employer." Whether an "undue hardship" exists depends on "the size and type of the employer and facility, the nature and cost of the accommodation involved, notice to the employer of the need for the accommodation, and any reasonable alternative means of accommodation."

Under this new law, an employer need not provide time off with pay but must allow the employee to use any accrued sick leave to attend a rehabilitation program. Moreover, the statute specifically states that an employer need not hire or retain an employee whose "current use of alcohol" prevents performance of duties or endangers the safety of the employee or others.

Once an employee enters a rehabilitation program an employer has a responsibility to "make reasonable efforts to safeguard the pri-

---

233. Id. at § 12926(h).
234. CAL. ADMIN. CODE, Tit. 2, § 7293.6(a)(4) (West Supp. 1986).
235. 32 Cal. 3d 603, 651 P.2d 1151 (1982).
236. Id. at 610.
237. CAL. LAB. CODE § 1025-28 (West Supp. 1986). Two recently proposed legislative measures would have added "drug" rehabilitation to CAL. LABOR CODE §§ 1025-1028. See A.B. 4242 (Appendix C). (Klehs, Feb. 21, 1986) and S.B. 2175 (Appendix D) (Seymour, Feb. 20, 1986). A.B. 4242 was passed by the California legislature but was vetoed by the Governor.
240. Id. at § 1025.
vacy of the employee as to the fact that he or she is enrolled in an alcoholic rehabilitation program." An employee who believes an employer has failed to meet its obligation under these statutes may file a complaint with the Labor Commissioner, who is required to investigate and prosecute, if necessary. As yet, there are no cases interpreting these accommodation statutes.

3. Practical Considerations in Light of Handicap Law

As a practical matter, claims of handicap discrimination should be taken seriously even if they arise out of an employer's anti-drug policy. Neither the federal nor the California exclusion for alcohol and drug abusers is sufficiently clear or comprehensive to provide simple, consistent rules concerning these cases.

Until the law becomes settled, employers should let business needs guide their drug policies knowing that current abusers are not protected and that casual users not claiming to be addicted may not be considered to be "handicapped." In addition, since an employer need not hire any employee incapable of performing the job, employers should document an applicant's inability to perform competently or safely. Such documentation should consist of job-specific medical evaluations and facts, not assumptions, regarding competence or safety. This approach leaves room for effective, job-related employer action despite the inherent confusion contained in the various statutes.

C. Potential Liability Under Common Law Tort Theories

1. Defamation

A "common law tort" is simply a civil wrong for which the judiciary rather than the legislature has created a remedy. Em-
Employers should keep in mind potential tort issues as well as statutory rules when developing drug and alcohol programs. While a full analysis of tort law is beyond the scope of this article, a brief discussion of the major areas of concern follows.

Under the common law tort of defamation, an employer may be liable for communicating false information about an employee to a third party if the information is injurious to the business or personal reputation of the employee.245 In the drug and alcohol context, defamation claims will most likely arise if an employer (1) investigates an employee and shares its findings or suspicions with third parties including other employees who have no need to know, particularly if the findings are wrong or unreliable, or (2) explains to third parties the reason for any adverse action it takes against an employee, particularly if the third party is a prospective employer.246

Employers in California, however, may defend some claims of defamation with a statutory privilege. One such privilege applies to an official who communicates information relating to employee misconduct or breach of responsibility in order to take appropriate action against the employee or minimize the misconceptions of present employees concerning their own past conduct.247 Thus, even though a disclosure may result in emotional distress to the affected employee, courts are willing to protect the right of company officials to make good faith statements to protect the employer's economic self-interest.248 This privilege may be lost if the statement is false and not made in good faith or is made to individuals who do not have a legitimate need to know the information. Therefore,

tort theories are listed here. For example, a claim of emotional distress often accompanies claims based on other theories. See, e.g., supra note 151.


246. See, e.g., O'Brien v. Papa Gino's of America, Inc., 780 F.2d 1067 (1st Cir. 1986) (defamation award of $50,000 against employer who discharged an employee who reportedly failed a polygraph question about the use of cocaine); Houston Belt & Terminal Ry. Co. v. Wherry, 548 S.W.2d 743 (Ct. Civ. App. Tex. 1977) (jury awarded $150,000 in compensatory damages and $50,000 punitive damages against employer and two managers who reported that the discharged plaintiff's drug test contained methadone when in fact the sample had contained a chemical similar to methadone).

247. CAL. CIV. CODE § 47 (West 1983):

A privileged publication or broadcast is one made . . . 3. In a communication, without malice, to a person interested therein, (1) by one who is interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information.

even though truth is a defense to defamation claims, errors are often made in the fact gathering process. Thus, exposure to possible defamation claims is a real possibility if communications are not carefully limited both outside and inside company.

Another statutory defense, which merely codifies commonsense principles and well-recognized case law, is that the employer gave truthful information concerning the reasons for an employee's discharge or voluntary termination. While truthful statements are defensible, an employer must go to great effort and expense to prove the statements are true. And if the reasons for termination involve drug or alcohol use, abuse or sale, such proof may be difficult to marshal. The wisest policy, then, is to drastically limit the comments made to third parties, particularly prospective employers, and to issue no information without a signed release by the affected employee.

2. Negligent Hiring and/or Retention of Employees

There exists an emerging but solid line of cases holding employers directly responsible for failing to use care in screening applicants, in hiring or in supervising and/or retaining incompetent or

---

249. CAL. LAB. CODE § 1053 (West 1971) reads:

Nothing in this chapter shall prevent an employer or an agent, employee, superintendent or manager thereof from furnishing, upon special request therefor, a truthful statement concerning the reason for the discharge of an employee or why an employee voluntarily left the service of the employer. If such statement furnishes any mark, sign, or other means conveying information different from that expressed by words therein, such fact, or the fact that such statement or other means of furnishing information was given without a special request therefore is prima facie evidence of a violation of sections 1050 to 1053.

See also Pond v. Gen. Elec. Co., 256 F.2d 824 (9th Cir. 1958), cert. denied, 358 U.S. 818 (1958) (the court held that a statement by a former employer as to the qualifications of former employee in response to an inquiry by a potential employer is qualifiedly privileged); Williams v. Taylor, 129 Cal. App. 3d 745, 181 Cal.Rptr. 423 (1982) (in an action for slander by a former manager of an autobody shop against company officials, the court held that statements by the company president to the police concerning the manager's suspected criminal activities were absolutely privileged under § 47(3)). See also Deaile v. Gen. Tel. Co., 40 Cal. App. 3d 841, 115 Cal. Rptr. 582 (1974) (applying CAL. CIV. CODE § 47); but cf. CAL. LAB. CODE § 1050 (West 1971) ("any person, or agent or officer thereof, who, after having discharged an employee from service of such person or after having paid off an employee voluntarily leaving such service, by any misrepresentation prevents an attempts to prevent the former employee from obtaining employment, is guilty of a misdemeanor").

dangerous employees. Since the behavior of drug and alcohol abusers can present serious problems to co-workers and others, an employer must pay particular attention to any sign that an applicant or current employee may present such a danger. Failure to act reasonably when such information was available or could have been available can certainly expose an employer to substantial liability.

Even absent evidence of negligent screening or supervision, an employer may be held vicariously liable for the negligent and/or violent acts of an employee. When an employee commits a deliberate and willful tort, an employer will be more likely to be found liable if the act had some connection with the employment, such as furthering the interest of the employer's business, rather than if the employee is engaging in personal malice.

Taking those principles one step further, the California Supreme Court has held that one who holds a special relationship either to a potential perpetrator or potential victim of dangerous action may have a duty to warn the victim. This duty has not yet been extended to employers who learn that an employee has dangerous proclivities yet fail to warn those outside of the employer's workplace, but likely will if current trends continue. In particular

251. See Otis Eng'g Corp. v. Clark, 668 S.W.2d 307 (Tex. 1983) (wrongful death action against employer permitted when supervisor sent a seemingly intoxicated employee home and employee caused automobile accident killing two people); Brockett v. Kitchen Boyd Motor Co., 264 Cal. App. 2d 69, 70 Cal. Rptr. 136 (1983) (cause of action for automobile injury permitted against employer when employee left prolonged company Christmas party intoxicated and caused accident). See also Welsh Mfg. v. Pinkerton's, Inc., 474 A. 2d 436 (R.I. Supr. Ct. 1984) (holding an employer liable for theft by security guard because of negligent pre-employment screening and failure to adequately train and supervise in light of suspicion that employee had "sticky fingers"); Gaines v. Monsanto Co., 655 S.W. 2d 568 (Mo. Ct. App. 1983) (holding that an employer can be held liable for murder by one employee of another on a theory of negligent hiring and supervision of an employee; the employer had been previously convicted of rape and robbery and his assignments required him to circulate among employer's female employees); Kendall v. Gore Properties, Inc., 263 F.2d 673 (D.C. Cir. 1956) (landlord was held liable for death of tenant murdered by employee hired without adequate pre-employment investigation). A few federal courts have also allowed employees to recover damages for negligent and inaccurate maintenance of personnel records. See Quiñones v. United States, 492 F.2d 1269 (3d Cir. 1974); Bulkin v. Wester Kraft East, Inc., 422 F. Supp. 437 (E.D. Pa. 1976).

252. Gaines v. Monsanto Co., 655 S.W. 2d 568 (Mo. Ct. App. 1983) (not only was employer aware of employee's former convictions of rape and robbery, but it had received numerous complaints from other employees concerning the individual's behavior.)


254. Id. at 193.

255. See Tarasoff v. Regents of the Univ. of California, 17 Cal. 3d 425, 131 Cal. Rptr. 14 (1976) (treating psychiatrist had duty to warn potential murder victim).
the issue might be presented if an employer’s reference is requested regarding a current or former employee.

The potential liability and work disruptions facing employers dictate that they formulate a comprehensive drug and alcohol policy to deal with employees who are suspected of drug use. Since employees intoxicated by drugs may be more of a hazard to others or even more violent, the potential liability is compounded. Consequently, in order to guard against such liability, an employer suspecting drug usage by employees must act quickly and reasonably as dictated by the particular circumstances.

3. False Imprisonment

False imprisonment is a tort that is broadly defined as “the unlawful violation of the personal liberty of another.” False imprisonment occurs when an individual is restricted by an unlawful assertion of authority or physical restraint from leaving a room or area. Since interrogation sessions can lead to claims of false imprisonment, an employer should question an employee about drug or alcohol use, possession or sale only if the employee truly consents to the discussion and is otherwise free to leave the company premises.

4. False Arrest

A private citizen may lawfully make a citizen’s arrest and detain an individual until police arrive only if: the arrestee committed a misdemeanor in his or her presence; or committed a felony whether or not in his or her presence; or there is reasonable cause to believe that the arrestee has committed a felony. If a citizen’s arrest is unlawfully made, a civil damage action for false arrest or false imprisonment may be brought by the arrestee.

An individual who is “under the influence” of most controlled substances is guilty of a misdemeanor. However, marijuana con-

---

256. See Newport Beach v. Sasse, 9 Cal. App. 3d 803, 88 Cal. Rptr. 476 (1970); Parrott v. Bank of America Nat'l Trust & Sav. Ass'n, 97 Cal. App. 2d 14, 217 P.2d 89 (1950) (plaintiff recovered damages of $30,000 after showing that her employer interrogated her for three hours and threatened criminal prosecution unless she confessed to misappropriating a deposit); Moffatt v. Buffums', Inc., 21 Cal. App. 2d 371, 69 P.2d 424 (1937) (action for false imprisonment where an employer kept the plaintiff in an office for five hours to extract a confession that she had stolen money from the company).

257. See supra note 256 and accompanying text.

258. CAL. PENAL CODE § 837 (West 1982).


stitutes an exception to this rule.\textsuperscript{261} As a result, an employer can make a lawful citizen's arrest of an employee who is seriously impaired by a listed drug other than marijuana or alcohol. Employers should limit such arrests to situations where safety and security warrant detention pending police arrival. Since criminal prosecution solely for being "under the influence" may be unlikely except in aggravated circumstances, the employer should make an arrest only after careful deliberation.\textsuperscript{262}

5. Wrongful Discharge

A complete discussion of the emerging law of wrongful termination is beyond the scope of this article.\textsuperscript{263} However, to avoid liability for wrongfully discharging an employee as a result of an investigation or search, an employer must act reasonably in light of the specific constitutional, statutory and common law provisions set forth in this Article.

Similarly, in most jurisdictions an employer who discharges or disciplines an employee for suspected or proven drug use or abuse should act reasonably in light of stated personnel policies and the employee's work record in order to avoid liability. The employer must follow its own termination procedures when dealing with an employee suspected of illegal drug use or abuse in the workplace, as it would when terminating an employee for any other reason.

Employer discipline of an employee's refusal to undergo drug tests represents a particularly troublesome problem in states such as California. An employee who has been disciplined or discharged cannot logically claim that a violation of privacy rights has occurred if he or she refused to be tested. Such an employee can claim, however, that the testing program violates the public policy derived from California's constitutional right of privacy and related statutory privileges on the ground that to have submitted to the testing as requested or required would have violated his or her constitutional or statutory rights.\textsuperscript{264}

A public policy argument depends upon proving an underlying privacy or statutory violation that would have resulted from opera-

\textsuperscript{261} Id.
\textsuperscript{262} Cervantez v. J. C. Penney Co., 24 Cal. 3d 579, 156 Cal. Rptr. 198, 595 P.2d 975 (1979). The Cervantez court noted that a private citizen may arrest another for a misdemeanor only if the offense was committed in his presence. Further, in a false imprisonment/arrest case the burden of proving the legality of the arrest is on the defendant. \textit{See also} People v. Lee, 157 Cal. App. 3d 9, 204 Cal. Rptr. 667 (1984).
\textsuperscript{263} \textit{See generally} R. BAXTER \& G. SINISCALCO, \textit{supra} note 250.
\textsuperscript{264} \textit{See supra} notes 59-78 and accompanying text.
tion of the testing program. A program that is reasonably linked to workplace needs and is communicated in advance to employees ought not to cause such a violation, even if testing is required. Of course, no drug detection program can survive without providing some consequence for refusal to undergo testing. If employees who expect to test positive for drug use could escape testing that is reasonably work related, the strong public policy in favor of reducing employee drug use would be neutralized.

Presuming that employees can either consent to preannounced testing policies as a condition of employment or can resign in lieu of testing, there can never actually be a constitutional privacy violation. The courts ought not to bootstrap a constitutional or public policy violation from an event that can never occur, absent forcible administration of testing. Nevertheless, employers should be mindful that this is an unsettled issue of law. It depends for its resolution upon how a particular judge chooses to balance the complex privacy interests of employees against the employer and public interests in reducing workplace drug abuse and employee impairment.265

V. DISCIPLINING EMPLOYEES FOR DRUG AND ALCOHOL OFFENSES

Most employers who reasonably suspect or confirm job-related abuse of drugs or alcohol want to take some type of action. What action they choose should depend on previously communicated policies and practices tailored to their specific work environment. In turn, the employee-relations success and legal liability of those actions will depend upon whether those policies and practices are considered reasonable under the circumstances and whether in fact they were followed.

A. Formulating a Disciplinary Approach

Work environments, styles and needs vary significantly from

265. Related torts that may be claimed by aggrieved employees include assault, battery, intentional infliction of emotional distress and trespass to chattels. Assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." CAL. PENAL CODE § 240. (West 1970). Battery is "any willful and unlawful use of force or violence upon the person of another." Id. Intentional infliction of emotional distress may be claimed if an employer engages in outrageous conduct with the intention and effect of causing severe emotional suffering to an employee. Cervantez v. J.C. Penney Co., 24 Cal. 3d 579, 593, 156 Cal. Rptr. 198 (1979); Agarwal v. Johnson, 25 Cal. 3d 932, 160 Cal. Rptr. 141 (1979). See also Kamrath v. Suburban Nat'l Bank, 363 N.W. 2d 108 (Minn. 1985). Trespass to chattels is committed when one interferes with the personal property of another. See, e.g., Stapleton v. Superior Court, 70 Cal. 2d 97, 73 Cal. Rptr. 575 (1969); see also PROSSER, LAW OF TORTS § 14 (4th ed. 1971).
one employer to another. Consequently, disciplinary measures vary accordingly. Some employers may decide employees suspected drug or alcohol use or abuse must be terminated regardless of any potential for rehabilitation. At the opposite extreme, an employer may offer all such employees therapeutic or medical treatment with no disciplinary action whatsoever. Most employers, however, favor a flexible approach that permits treatment within a framework of discipline.

As a general matter, restrictive laws affect employers the least when the discipline relates to absenteeism, unacceptable performance or safety violations. Employers are accorded particularly wide latitude if health or safety is at issue. Since drug and alcohol use is commonly linked to increased hazards on the job, employers will have more freedom to discipline employees if the affected jobs involve safety risks to coworkers or the public, such as jobs related to public utilities, transportation or involving machinery.

1. Drug and Alcohol Policies Should be Communicated in Writing

Any drug eradication program should begin with a clear and reasonable policy effectively communicated to all employees and supervisors. All procedures and potential discipline for drug or alcohol infractions should appear prominently in the employer's personnel manual, and should be disseminated to all employees. If the employer has no formal manual, the same information should be communicated by written notice, memorandum or bulletin. In particular, the policy should cover all illegal drugs, including "fashionable" drugs such as marijuana and cocaine. Similarly, the policy should cover abuse of prescribed medications and alcohol.

Employers may amend written policies as circumstances change or the need arises. Those amendments, however, should be communicated to all employees and supervisors. Above all, once a policy is in place or unwritten practice established employers should follow it. Any deviation, particularly a significant one, may result in liability, particularly for a breach of contractual obligation.

266. See generally T. Denenberg & R. Denenberg, Alcohol and Drugs: Issues in the Workplace 3-4 (BNA, 1983) (describing three approaches to employee discipline programs: (1) pure discipline; (2) the therapeutic approach; and (3) the flexible intermediate approach).

2. Considering a Rehabilitative Option

Increasingly, employers are adopting some form of employee assistance program (EAP). Employers find that providing a rehabilitative treatment plan can salvage an employee whose performance is deteriorating but is not unacceptable or irremediable.268

The exact nature of the assistance provided varies considerably. Some employers offer confidential counseling and/or referral services through independent counseling firms.269 Other provide in-house services or simply offer employer-sponsored health insurance that covers rehabilitation program.

If an EAP of some type is offered, participation by the affected employee should not be made mandatory. Moreover, work performance should be judged separately from EAP participation, although such participation can be considered as a positive sign of an employee's willingness to work through personal problems.

Although no employer is obligated to offer an EAP, California employers should recall the legal obligation to reasonably accommodate persons who enter alcoholic rehabilitation programs.270

Employers also should train supervisors to intervene when work performance first becomes noticeably affected, even if the cause is not positively known to be drug or alcohol related. Once an employer has tolerated marginal or unacceptable behavior for a period of time without any action, it is often more difficult to deal with and is more likely to worsen rather than improve. If the employee's conduct or performance does not warrant termination, the employer should thoroughly document the situation and institute a treatment and/or corrective discipline approach.


268. Two recent surveys by Human Resources Group, Inc., a New York-based firm that develops and administers EAP's, indicate that drug and alcohol addictions constituted 14% of EAP usage in 1983 and 15% in 1984. In both years drug and alcohol addictions were the third most common reason for use of the EAP, behind psychological problems and legal problems. BNA DAILY LABOR REP'T, No. 27 (Feb. 8, 1985), p. A-6. See generally Delaney, Opportunities and Challenges Facing EAPs, in BNA SPECIAL REPORT, ALCOHOL & DRUGS, supra note 1, at 129.

269. A formal contract should spell out the desired services and provide indemnification for the employer against lawsuits arising from employee use of an independent EAP provider.

B. Supervisors Play a Key Role

Employers should not require that supervisors act as diagnosticians. Supervisors should concentrate on employee work performance. Their sensitivity to an employee's personal problems as they counsel or train the employee for better performance should be sufficient. And, if possible drug or alcohol problems are identified, the supervisor should refer the matter to trained personnel of employee assistance officials.

On the other hand, supervisors should be trained to identify the signs of drug and alcohol use. Such training is important both for purposes of employee rehabilitation and to minimize the likelihood that drug usage will spread. Typical signs of drug or alcohol use can be patterns of absences (especially periodic absences of several consecutive days), chronic tardiness or early departure, accumulations of excessive sick leave, accidents which result in personal injury or damage to equipment, theft and misrepresentations. Supervisors should keep records of such problems and review those records for possible patterns.

Clear and explicit personnel policies should govern each step of the investigation, discipline and termination process. Every supervisor should be thoroughly familiar with those procedures. Drug or alcohol use, sale or intoxication is often proved by circumstantial evidence. Usually there is little or no direct evidence unless drug testing has been performed. Nonetheless, employers should base decisions to terminate employees on objective evidence, not mere unconfirmed suspicions. Depending on the circumstances, the supervisor may send an offending employee home until an investigation can confirm the essential facts to support a later decision to suspend or terminate. If it appears that the supervisor or other employees may be in physical danger due to drug or alcohol-related activity, security personnel or the police should be called at once. Supervisors must be made to feel that their efforts to halt drug or alcohol offenses will be supported by management and that any threats to their personal safety or property will be dealt with swiftly. Thus, good personnel practice dictates that termination be specified as the consequence of intimidation or threats of physical abuse by any employee against supervisors or fellow employees.

An employer should handle any termination for drug or alcohol related offenses in the same reasonable manner as other termi-

---

271. See supra notes 3-6 and accompanying text. See also supra note 69 and accompanying text.
In brief, the personnel manager (or equivalent) should review the facts for objectivity and to ensure proper procedures have been followed and consistent discipline applied. In particular, employers should not allow a double standard in which executives are not subject to anti-drug and alcohol policies, while other employees are subject to discipline or discharge. Many experts consider executives and management employees among the best candidates for alcohol rehabilitation programs if the problems are recognized at an early stage, although "success" rates are reasonably high for blue collar workers as well. A checklist of procedures can be useful to review with legal counsel.

In that way, an employer may ensure consistent company procedures and practices and may minimize mistakes (especially when numerous managers are permitted to make termination recommendations). Indeed, if legal counsel is involved in the investigation it is possible to protect the confidentiality of the process and documentation through use of the attorney-client privilege or work-product doctrine.

An employer always should provide an employee under investigation with a full opportunity to be heard on the subject. It is also advisable to interview the affected employee to determine the nature and substance of any potential claims the employee may make and to clarify any misunderstandings. This interview should be documented with a file memorandum made immediately afterward.

In sum, sensitive or important business functions should not be in the hands of drug or alcohol abusers. While employers may handle minor and isolated infractions through counseling and discipline, recurrent or substantial employee drug or alcohol problems (particularly at the management level) may lead to costly mistakes, theft, embezzlement or other actions that are destructive to a business enterprise. Thus, strong disciplinary action, including termination, may be required and can be accomplished with minimal legal risk so long as the action is based on fair and reasonable policies that have been communicated and followed fairly and in good faith.

VI. CONCLUSION

This article has broadly surveyed the many diverse areas of law that impact upon employee drug testing and investigations. The ex-

---

272. See generally R. BAXTER & G. SINISCALCO, supra note 250.
273. See Upjohn v. United States, 449 U.S. 383 (1981); D.I. Chadbourne, Inc. v. Superior Court, 60 Cal. 2d 723, 388 P.2d 700 (1964). Caution should be exercised, however, because the attorney could become a material witness.
isting legal restrictions are not part of a coherent body of law solely applicable to drug testing. Instead, the restrictions come from virtually every area in the field of labor and employment law as well as from general privacy statutes and constitutional provisions.

Employee drug testing and modern techniques of investigation are a recent employer response to the problem of drug use and sale in the workplace. Most of these policies and programs are logical extensions of well-accepted employer practices regulating employee safety, behavior and work performance. On the other hand, the uses and limitations of such sophisticated testing technology are typically misunderstood by employers, employees and the public. As a result, the issue of drug and alcohol detection has generated emotional responses but little thoughtful analysis.

This lack of understanding has led to confusion among employers over how to handle the problem, and inconsistencies in the early court decisions and legislative initiatives concerning the propriety of particular testing programs. Consequently, the legality of various detection procedures and methods may be uncertain as employers await further judicial and legislative developments. This uncertainty poses some risk of liability to an employer who adopts such detection programs.

Nevertheless, drug and alcohol detection programs that are reasonably based upon legitimate workplace needs ultimately should be upheld as lawful and in the public interest. Employers willing to endure the legal and technical complexities involved in implementing detection programs can expect to increase productivity and reduce theft, absenteeism, workers compensation claims and accidents. Such a result benefits employer, employee and society as a whole.

Employers, however, should develop any drug or alcohol programs with considerable care and planning. First, an employer's policy should be reasonably calculated to meet actual and significant workplace needs. Second, an employer should obtain employee (or union) support for the program by explaining procedures, purposes and benefits and soliciting suggestions. Third, an employer should provide ample advance notice of the implementation of the program. Fourth, an employer should strive for fairness and accuracy in employee selection and testing methods as well as in other investigative techniques. Finally each employer should consider the full range of rehabilitative and disciplinary alternatives when confronted with employee violations of the drug and alcohol policies. A more humane approach to rehabilitation and discipline
can add to the reasonableness of a testing and investigation program and preserve an employer's investment in a valuable company resource, its employees.
APPENDIX A
ORDINANCE NO. 527-85 (1985), ART. 33A,
amending PART II, CHAPTER VIII
SAN FRANCISCO MUNICIPAL CODE (POLICE CODE)

The ordinance reads as follows:

SECTION 3300A.5 EMPLOYER PROHIBITED FROM TESTING OF EMPLOYEE. No employer may demand, require, or request employees to submit to, to take or to undergo any blood, urine, or encephalographic test in the body as a condition of continued employment. Nothing herein shall prohibit an employer from requiring a specific employee to submit to blood or urine testing if:

(a) the employer has reasonable grounds to believe that an employee's faculties are impaired on the job; and

(b) the employee is in a position where such impairment presents a clear and present danger to the physical safety of the employee, another employee or to a member of the public; and

(c) the employer provides the employee, at the employer's expense, the opportunity to have the sample tested or evaluated by State licensed independent laboratory/testing facility and provides the employee with a reasonable opportunity to rebut or explain the results.

In conducting those tests designed to identify the presence of chemical substances in the body, and not prohibited by this section, the employer shall ensure to the extent feasible that the test only measure and that its records only show or make use of information regarding chemical substances which are likely to affect the ability of the employee to perform safely his or her duties while on the job. Under no circumstances may employers request, require or conduct random or company-wide blood, urine or encephalographic testing.

In any action brought under this Article alleging that the employer had violated this section, the employer shall have the burden of proving that the requirements of Subsections (a), (b) and (c) as stated above have been satisfied.

SECTION 3300A.6 MEDICAL SCREENING FOR EXPOSURE TO TOXIC SUBSTANCES. Nothing in this article shall prevent any employer from conducting medical screening, with the express written consent of the employees, to monitor exposure to toxic or other unhealthy substances in the workplace or in the performance of their job responsibilities. Any such screenings or tests must be limited to the specific substances expressly identified in the employee consent form.
SECTION 3300A.7 PROHIBITING USE OF INTOXICATING SUBSTANCES DURING WORKING HOURS; DISCIPLINE FOR BEING UNDER THE INFLUENCE OF INTOXICATING SUBSTANCES DURING WORKING HOURS. Nothing in this Article shall restrict an employer's ability to prohibit the use of intoxicating substances during work hours, or restrict an employer's ability to discipline employees for being under the influence of intoxicating substances during work hours.

SECTION 3300A.8 ENFORCEMENT. (a) Any aggrieved person may enforce the provisions of this Article my means of a civil action. Any person who violates any of the provisions of this Article or who aids in the violation of this Article shall be liable to the person aggrieved for special and general damages, together with attorney's fees and the costs of action.

(b) Injunction.

(1) Any person who commits, or proposes to commit, an act in violation of this Article may be enjoined therefrom by any court of competent jurisdiction.

(2) An action for injunctive relief under this subsection may be brought by any aggrieved person, by the District Attorney, or by the City Attorney, or by any person or entity which will fairly and adequately represent the interests of the protected class.

SECTION 3300A.9 CITY UNDERTAKING LIMITED TO PROMOTION OF GENERAL WELFARE. In undertaking the adoption and enforcement of this ordinance, the City and County is assuming an undertaking only to promote the general welfare. It is not assuming, nor is it imposing on its officers and employees, an obligation for breach of which it is liable in money damages to any person who claims that such breach proximately caused injury.

SECTION 3300A.10 PREEMPTION. In adopting this Article, the Board of Supervisors does not intend to regulate or affect the rights or authority of an employer to do those things that are required, directed, or expressly authorized by federal or state law or administrative regulation or by a collective bargaining agreement between an employer and an employee labor organization. Further, in adopting this Article, the Board of Supervisors does not intend to prohibit that which is prohibited by federal or state law or administrative regulation or by a collective bargaining agreement between an employer and an employee labor organization.

SECTION 3300A.11 SEVERABILITY. If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of this Article, including
the application of such part or provision to other persons or circum-
stances, shall not be affected thereby and shall continue in full force
and effect. To this end, provisions of this Article are severable.
SECTION 1. Section 432.4 is added to the Labor Code, to read:

432.4. (a) Every private employer shall inform all employees and applicants for employment of the employer's policy regarding drug use and medical testing of employees to detect the presence of drugs.

(b) Every employee shall receive advance notice that medical testing to detect the presence of drugs may be a routine part of his or her employment before the employer may require medical testing of employees to detect the presence of drugs.

(c) Each employee has the right to choose his or her own physician, laboratory, clinic, or hospital to administer medical tests to detect the presence of drugs. The costs of the testing are the responsibility of the employer.

(d) The medical tests to detect the presence of drugs shall be administered within 48 hours after the employer request an employee to take the tests.

(e) Any employer who violates this section is guilty of a misdemeanor punishable by a fine of five hundred dollars ($500).

SECTION 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs which may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, changes the definition of a crime or infraction, changes the penalty for a crime or infraction, or eliminates a crime or infraction.

SECTION 5. Section 1027 of the Labor Code is amended to read:

1027. Nothing in this chapter shall be construed to require an employer to provide time off with pay, except that an employee may use sick leave to which he or she is entitled for the purpose of entering and participating in an alcohol or drug rehabilitation program.

SECTION 6. Reimbursement to local agencies and school districts for costs mandated by the state pursuant to this act shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code and, if the statewide cost of the claim for reimbursement does not exceed five hundred thousand dollars ($500,000), shall be made from the State Mandates Claims Fund.
APPENDIX C
CALIFORNIA ASSEMBLY BILL 4242

SECTION 2. Chapter 5 (commencing with Section 11998) is added to Part 5 of Division 10.5 of the Health and Safety Code, to read:

CHAPTER 5. SUBSTANCE ABUSE TESTING

11998. This chapter shall be known and may be cited as the "Substance Abuse Testing Act of 1986."

11998.1. The Legislature finds and declares all of the following:

(a) Employers are increasingly using substance abuse testing to screen job applicants and employees.

(b) The Centers for Disease Control report finds that some of these tests may not be conducted properly. In a 1985 study, the CDC found "serious shortcomings" in the quality controls of testing laboratories.

(c) Licensure of the state's laboratories which test on behalf of employers will balance the rights of employees with adequate protection for the public. Reducing illicit drug use in the workplace will improve the safety, health, and productivity of all Californians.

11998.2. If an employer requests or requires a job applicant or an employee to submit to a substance abuse test of any type, the employer shall use a clinical laboratory licensed by the State Department of Health Services under Chapter 3 (commencing with Section 1200) of Division 2 of the Business and Professions Code or a public health laboratory certified by the state department under Chapter 7 (commencing with Section 100) of Division 1.

11998.3. Notwithstanding any negotiated collective bargaining agreement between an employer and his or her employees which provides for additional substance abuse testing standards, employers shall inform employees and job applicants of the testing policies in writing upon the adoption of the policy or when the employee is hired, if the policy was previously adopted. An employee shall have the right to request a copy of the results of a substance abuse test conducted pursuant to this chapter.

11998.4. Employers, employees, and laboratories shall keep all samples and test results confidential in compliance with the Information Practices Act of 1977 provided for the Chapter 1 (commencing with Section 1798) of Title 1.8 of Part 4 of the Civil Code and the California Public Records Act provided for in Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code.
1198.5. This chapter shall apply to private employers and to state and local entities of government.

SEC. 3. The heading of Chapter 3.7 (commencing with Section 1025) of Part 3 of Division 2 of the Labor Code is amended to read:

CHAPTER 3.7. ALCOHOL AND DRUG REHABILITATION

SEC. 4. Section 1025 of the Labor Code is amended to read:

1025. Every public and private employer regularly employing 25 or more employees shall reasonably accommodate any employee who wishes to voluntarily enter and participate in an alcohol or drug rehabilitation program, provided that this reasonable accommodation does not impose an undue hardship on the employer.

Nothing in this chapter shall be construed to prohibit an employer from refusing to hire, or discharging an employee who, because of the employee's current use of alcohol or drugs, is unable to perform his or her duties, or cannot perform the duties in a manner which would not endanger his or her health or safety or the health or safety of others.

SEC. 5. Section 1026 of the Labor Code is amended to read:

1026. The employer shall make reasonable efforts to safeguard the privacy of the employee as to the fact that he or she has enrolled in an alcohol or drug rehabilitation program.

SEC. 6. Section 1027 of the Labor Code is amended to read:

1027. Nothing in this chapter shall be construed to require an employer to do either of the following:

(a) Provide time off with pay, except that an employee may use sick leave to which he or she is entitled for the purpose of entering and participating in an alcohol or drug rehabilitation program.

(b) Pay for the cost of an alcohol or drug rehabilitation program.

SEC. 7. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because this act does not mandate a new program or higher level of service on local government. It is recognized, however, that a local agency or school district may pursue any remedies to obtain reimbursement available to it under Chapter 4 (commencing with Section 17550) of Part 7 of Division 2 of Title 2 of the Government Code.
APPENDIX D
CALIFORNIA SENATE BILL 2175

SECTION 1. An employer shall have the right to request or require an employee, as a condition of continued employment, to submit to or undergo a blood, urine, breath or other chemical test to determine the presence in the body of alcohol or controlled substances, in any of the following circumstances:

(a) whenever the employer has a reasonable suspicion that an employee or group of employees is, or may be, impaired or affected on the job by alcohol or controlled substances; or

(b) whenever the employer has a reasonable suspicion that controlled substances are present in an employee's bodily system in violation of the employer's published rules or policy;

(c) whenever an employee has been involved in a work-related accident causing bodily injury or damage to property, however minor;

(d) as part of a physical examination which the employer, under its established policies, requires employees to undergo an a regular or periodic basis, or as a result of specified occurrences, such as declining performance or absenteeism, so long as employees are notified in advance that the examination will include testing for alcohol or controlled substances;

(e) in accordance with the terms of a collective bargaining agreement between the employer and the bargaining representative of its employees, or a written employment agreement between an employer and an employee;

(f) as part of the employer's program of rehabilitation or employee assistance;

(g) whenever an employee has tested positively for the presence of alcohol or illegal, controlled substances within the prior 12-month period; or

(h) as may be required or authorized by any federal or state health, safety or other law or regulation.

SECTION 2. In addition to the circumstances set forth in Section 1 above, an employer may conduct testing of employees, including random, on-the-spot or company-wide testing:

(a) once in any 12-month period, regardless of the employees' job classification, or

(b) up to three times in any 12-month period in the case of employees whose jobs involve the operation of vehicles in public transit, operation of heavy construction or off-shore oil drilling
equipment, the handling of hazardous substances, or any job in which impairment due to controlled substances would present a safety hazard to employees or members of the public; provided, however, that before testing of an employee may be conducted pursuant to this section, the employer must have advised the employee, in advance, of its policy that such testing may be required.

SECTION 3. Nothing in this Chapter shall prohibit an employer, or an agent thereof, from requiring an applicant for employment to undergo a blood, urine or other chemical test to determine the presence in the body of alcohol or controlled substances.

SECTION 4. Employers who conduct testing pursuant to this chapter shall take reasonable precautions to ensure the confidentiality of the test results. Employers shall also ensure that such substance abuse testing is not used for any other purpose, such as testing for pregnancy, presence of AIDS antibodies or other medical or bodily conditions.

SECTION 5. It is the Legislature’s intention to occupy the field of regulation of substance abuse testing in employment encompassed by the provisions of this chapter, exclusive of all other laws regulating such testing in employment by any city, county, city and county, or other political subdivisions of this state. This chapter shall preempt and take precedence over any local ordinance, law or regulation, in the event of any conflict between such local provision and the provisions of this chapter.

. . . . .
APPENDIX E
SAMPLE GUIDELINES FOR EMPLOYEE SEARCHES

The following is an example of a company policy issued to supervisory personnel that incorporates the suggestions made in the Article. It is meant to be illustrative only and should be carefully adapted to reflect each individual employer's needs.

GUIDELINES FOR EMPLOYEE SEARCHES
CONCERNING STOLEN GOODS OR PROHIBITED MATERIALS

The following guidelines should be observed by all supervisory personnel when they consider searching employees for possession of either (1) stolen goods or (2) prohibited materials such as alcohol or drugs.

These guidelines apply not only to searches of an employee's person, but also to searches of an employee's personal effects (such as lunch pails, purses, and automobiles) and equipment he or she uses that is supplied by the Company (such as lockers, tool boxes, and trucks).

These guidelines have been published for supervisory use only. They do not establish new rules for employees. Instead, they merely clarify the steps and precautions that supervisory personnel should take in enforcing our long-standing policies of employee conduct.

1. "Reasonable Cause"

Employee searches should be conducted only if there is reasonable cause to believe that the employee has stolen property or prohibited material in his possession.

You should search an employee (or his or her effects) only if you have reasonable cause to believe he or she is, at the time of the search, in possession of stolen property or prohibited materials. "Reasonable cause" means that, on balance, in light of all the facts you know, you have more reason to think the employee possesses the article than you have reason to think he or she does not. "Reasonable cause" does not mean that there is no doubt about the employee's guilt, but it means more than just a suspicion of misconduct.

There is no one type of evidence that will satisfy the requirement of reasonable cause. Obviously, the best evidence is personally observing the employee taking Company property, or being in possession of contraband. There are, however, other ways you can have reasonable cause to believe the employee. Another worker (whom you know to be reliable) may tell you he or she saw the
employee taking Company property. Or the employee may have a strong odor of alcohol on his breath or marijuana on his person. Or you may observe a pattern of items that belong to the Company disappearing after the employee has used them.

You may also have some suspicions but remain unsure. If possible, without letting other employees overhear you and without drawing attention, you may want to speak with the employee about your suspicions. His or her manner of response — visible signs of nervousness or guilt or the giving of clearly implausible explanations — may provide you with sufficient additional evidence to have reasonable cause to believe he or she is in fact guilty.

Each situation is different, and you should always exercise your good judgment and common sense. If you are unsure, and if you have time before you must act, discuss your suspicions with other supervisors or the legal department.

2. Permissible Employee Searches

If you have a reasonable cause to believe that an employee possesses stolen goods or prohibited materials, you may search the employee or his or her personal effects under the following circumstances:

a. Plain View

You may retrieve stolen property or prohibited material from the employee if it is in "plain view." "Plain view" simply means that the article can be seen without opening a pocket, lunch pail, tool box or purse. If an apparently stolen screwdriver is sticking out of the employee's pocket, or if what looks like a marijuana cigarette is stuck behind his or her ear, you may take it.

b. Authorized Searches

If the stolen goods or prohibited materials are not in "plain view", you may search the employee and/or his or her immediate personal effects (such as a purse, lunch pail, a personally-owned tool box, or automobile) if the employee gives you permission. You are entitled to ask the employee for permission for such a search.

If an employee declines your request to conduct a reasonable search of his or her person or personal effects, you may inform him or her that such a failure to cooperate may lead to disciplinary action, including possible termination. If the employee persists in refusing after such a warning, you should not make an involuntary search.

c. Searches of Company-Supplied Containers

You may search lockers, tool boxes, or other containers or storage areas which are supplied by the Company for work-related
employee use without permission. You should, nonetheless, first give the employee an opportunity to open the locker, tool box, etc. before proceeding to search. Any personal effects such as wallets, purses, or lunchboxes found within such containers or storage areas should not be searched without the employee's permission.

3. *All Searches must be Conducted in a Reasonable Manner*

   It is extremely important that these authorized searches be conducted in a *reasonable manner.* Among other things, you should: (1) avoid unnecessary touching of the employee's body; (2) avoid the use of unnecessary force; (3) search only those areas in which you have reason to believe that the article in question is located; and (4) conduct the search in a place which will minimize embarrassment to the employee. In addition, of course, all searches should be conducted by a person of the same sex as the employee being searched.

4. *When Not to Search*

   Employee searches which are not specifically authorized above should not be conducted. More particularly, unauthorized searches of an employee's person or personal effects (including automobiles) should not be made.
APPENDIX F
FORM OF NOTICE TO EMPLOYEES OF SEARCHES

NOTICE

In order to prevent theft of Company or employee property or use or possession of drugs or alcohol, all bags, purses, lunch boxes and other parcels are subject to inspection whenever an employee enters or leaves the premises.
APPENDIX G
FORM OF NOTICE EXPLAINING LOCKER POLICY
LOCKER POLICY

The Company provides lockers for the use of its employees during work. Each locker has a combination lock which may be opened with the Company's master key. No other lock may be placed on the locker.

The Company reserves the right to open and inspect the interior of each locker at any time. Prohibited materials including non-prescribed illegal drugs, alcohol or weapons, may not be placed in the locker. Lockers will be maintained in a neat and sanitary condition.

The Company is not responsible for any articles in the lockers that are lost or stolen.