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Book Review [Drug Testing in the Workplace]

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BOOK REVIEW

DRUG TESTING IN THE WORKPLACE, by Robert DeCresce, Mark Lifshitz, Adrienne Mazura, and Joseph Tilson. American Society of Clinical Pathologists, Chicago, IL., and The Bureau of National Affairs, Inc., Washington, D.C. 1989. Pp. 278. Hard Cover. \$45.00.

*Reviewed by J. Victor Wayne**

The control of drug use is a pressing concern for nearly every employer. Drug use has been linked to a host of serious problems in the workplace, including excessive absenteeism, unsatisfactory performance, higher accident rates, and increased medical costs.¹

To control drug abuse, employers are increasingly turning to drug testing of job applicants and/or employees. For example, under Executive Order 12564,² signed by President Ronald Reagan in 1986, governmental agencies in the executive branch were required to conduct drug tests of employees in "sensitive positions." The Executive Order concluded that on- or off-duty illegal drug use by federal employees "evidences less than the complete reliability, stability, and good judgment that is consistent with access to sensitive information and creates the possibility of coercion, influence, and irresponsible action under pressure."³

Unsurprisingly the growth of drug testing has led to an increasing number of challenges to its legality. Those challenges are difficult

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1. R. DECRESCE, M. LIFSHITZ, A. MAZURA & J. TILSON, DRUG TESTING IN THE WORKPLACE 1-3 (1989) [hereinafter DRUG TESTING].

2. 3 C.F.R. § 224 (1987).

3. Congress' desire to control the abuse of illegal drugs among workers resulted in the recent passage of The Drug-Free Workplace Act of 1988, 71 U.S.C. §§ 701-707 (1988). That statute imposes a number of obligations upon certain federal contractors and federal grant recipients, including the publication of policy prohibiting illegal drug activities, communication of penalties for violating those prohibitions, and establishment of a drug-free awareness program informing employees of the dangers of drug abuse and the availability of rehabilitation programs.

to resolve because of the many settings in which they arise. Decisions considering the legality of drug testing programs have grappled not only with the diversity of programs, but also with the different legal rights that attach to various classes of employees. As the book points out, drug testing programs can take a wide variety of forms. They can be either random, periodic, or triggered by some event giving rise to suspicion of drug use. Testing may be administered to either job applicants, current employees, or both, and may be accomplished in a number of ways, including blood or urine analysis. Whether any of these programs are lawful may depend upon the nature of the employer and the type of work being performed. Because the extraction of blood or urine for testing has commonly been held to constitute a search, public employees, unlike those in the private sector, may enjoy the Fourth Amendment's protection from unreasonable searches and seizures. Unionized employees may have additional protections from drug testing under the National Labor Relations Act and perhaps by operation of a collective bargaining contract. Conversely, employees whose duties involve substantial health and safety concerns may be afforded less protection against drug testing.⁴

Too often, however, those who have designed drug testing programs and those involved in deciding the propriety of that testing have had an insufficient understanding of the operation and limitations of drug testing and their relationship to those challenges. *Drug Testing in the Workplace* provides the reader not only with a detailed understanding of drug testing programs, but also with a comprehensive, if not exhaustive, discussion of the principal legal claims which arise from the implementation and enforcement of drug testing programs. Perhaps the book's principal value is its extensive discussion of the mechanics and fallibilities of various types of drug testing. The book asserts, for example, that the thin-layer chromatography test, one of the two prevalent drug screening tests, may be prone to legal challenge because its subjectivity makes it relatively difficult to standardize.⁵ Since legal challenges to drug test programs often raise their inadequacy or susceptibility to erroneous results, a fundamental understanding of the nature and limitations of drug testing programs is essential to anyone involved in adjudicating the legality of their implementation or application.

Drug Testing in the Workplace begins with a discussion of the scope of drug abuse and drug testing programs, and a cursory over-

4. DRUG TESTING, *supra* note 1, at 5-11.

5. DRUG TESTING, *supra* note 1, at 78.

view of the accuracy and legality of drug testing. The book then provides an overview of legal considerations in constitutional issues, including Fourth Amendment right to be free from unreasonable searches and seizures, due process protections, the federal constitutional right to privacy, and the Fourteenth Amendment's right to equal protection. This section of the book then discusses Executive Order 12564, state and municipal laws regulating drug testing, and the potential application of discrimination laws, including Title VII of the Civil Rights Act of 1964,⁶ to drug testing. In general, Title VII prohibits discrimination in employment on the basis of race, color, religion, sex, and national origin. In the latter regard, the book states that, while no drug testing program has been challenged under Title VII, such suits would likely allege either that testing has been administered discriminatorily or has adversely affected a protected class.⁷

The legal considerations chapter then continues with an analysis of the legality of drug testing under federal handicap laws and a discussion of common law claims which have been brought in connection with drug testing or employee drug use. Following a short discussion of the viability of claims alleging wrongful discharge for refusing to take or failing a drug test, this section then reviews legal issues relating to drug testing for unionized employees. This discussion includes an analysis of whether an employer must bargain over the implementation of a drug testing program, and whether common law claims such as invasion of privacy should be heard either by the National Labor Relations Board or by an arbitrator pursuant to the grievance procedure of a collective bargaining contract. The last section of the book, entitled "Union Challenges To Testing," repeats the discussion of whether the implementation of a drug testing program would violate the National Labor Relations Act, and adds a discussion of unions' attempts to enjoin the implementation or enforcement of drug testing programs. It closes with an extensive analysis of arbitral decisions under collective bargaining contracts.

While the book touches all of the principal legal challenges to the implementation of a drug testing program or discipline thereunder, the book lacks an exhaustive analysis of those claims, except with regard to arbitral decisions under collective bargaining contracts. This is partly due to the paucity of judicial decisions in this area. Very few cases have dealt with the legality of drug testing,

6. 42 U.S.C. § 2000e (Supp. V 1987).

7. DRUG TESTING, *supra* note 1, at 25.

other than those discussing Fourth Amendment considerations. For example, as the book notes, there has been only one case discussing whether a termination violated a state's public policy.⁸ In addition, many of the decisions concerning whether drug testing violated the Fourth Amendment have been decided since the date of the book's publication. During the past year, for example, the United States Supreme Court issued two such decisions. In *National Treasury Employees Union v. Von Raab*,⁹ the Supreme Court upheld the validity of drug testing of United States Customs Service employees who were seeking transfer or promotion to particular positions, even in the absence of probable cause or individualized suspicion of drug use. Similarly, the Supreme Court held in *Skinner v. Railway Labor Executives' Association*,¹⁰ that since compelling government interests outweighed employees privacy concerns, mandatory drug testing of specified railroad employees' following certain train accidents, or the violation of certain safety rules, did not violate the Fourth Amendment.

The rapidity of legal developments in the area of drug testing has rendered obsolete the book's discussion on whether, under the National Labor Relations Act, the implementation of a drug testing program would be a mandatory subject of bargaining for unionized employers. Since the book's publication, the National Labor Relations Board has squarely addressed that issue, holding that, while drug testing for job applicants is not a mandatory subject of bargaining,¹¹ testing for current employees is.¹²

For those particularly interested in legal challenges to the implementation or enforcement of a drug testing program under California law, the book's primary weakness is the absence of any discussion of the California Constitution's right to privacy.¹³ Legal challenges to drug testing under California law have generally centered around that right, and it is widely believed that they will continue to do so. In *Wilkinson v. Times Mirror Corp.*,¹⁴ for instance, a California appellate court upheld drug testing of job applicants in the face of a claim that it violated that constitutional right. Vacating

8. DRUG TESTING, *supra* note 1, at 34.

9. 109 S. Ct. 1384 (1989).

10. 109 S. Ct. 1402 (1989).

11. Star Tribune, A Division of Cowles Median Co., 295 N.L.R.B. 63 (1989).

12. Johnson-Bateman Co., 295 N.L.R.B. 26 (1989).

13. CAL. CONST. art. I, § 1, provides in pertinent part, "All people are by nature free and independent and have inalienable rights. Among these are . . . pursuing and obtaining safety, happiness and privacy."

14. 215 Cal. App. 3d 1034, 264 Cal. Rptr. 194 (1989).

a lower court's injunction restraining such testing, the court explained that job seekers have a diminished right to privacy because they expect to disclose certain personal information to prospective employers. In fairness, however, the book does not purport to undertake a comprehensive analysis of California law, nor of the law of any particular state.

Besides reviewing the nature of abused drugs, the book also contains a comprehensive and thorough presentation of the mechanics of drug testing, and the characteristics and reliability of various types of testing. This discussion is the book's strength. An understanding of these areas is essential to anyone attempting to implement a drug testing program or involved in adjudicating the fairness and reliability of testing. For example, one challenging the reliability of a certain test must know the error rate of that test.

The book contains a chapter outlining employers' considerations in deciding whether to conduct drug testing. While the book does not attempt to recommend an "ideal" testing program (indeed there is none, for each employment situation is different), it does identify the most important components of a drug testing program, and the advantages and drawbacks of the options for each component.

An employer's decision to undertake drug testing cannot be made lightly. Drug testing can adversely affect morale, and lead to costly, time-consuming litigation. A primary lesson of the book, however, is that an employer who decides to implement drug testing must make the effort and undertake the expense to do so correctly. The adoption and enforcement of drug testing is not passive. There is a great deal that an employer can and must do to maximize the likelihood of defeating any claim arising under a testing program. For example, as the book points out, employers should take care to select a testing laboratory carefully and then periodically monitor the laboratory's accuracy by submitting blind testing samples. The book unequivocally recommends that employers should undertake the expense of a confirmatory test before deeming any result positive.¹⁵ Implicit in this effort, however, is the idea that an employer has a much greater chance of successfully defending litigation over drug testing, if it shows that it has made every reasonable effort to assure the reliability of a carefully crafted, well conceived drug testing program.

15. DRUG TESTING, *supra* note 1, at 9.

