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THE ROLE AND RISKS OF A SUCCESSFUL EMPLOYER DRUG TESTING POLICY

Robert Fried*

I. INTRODUCTION

Drug testing of employees and applicants for employment presents the employer with a dual-faceted problem: (1) how to deal with the individual "obvious" employee problem where drug use may be a factor and, in that connection, how does the employer isolate this drug problem from others; (2) how to deal with the prevalence of drug use in our society and its inevitable effect on the safety and efficiency of the work place. Underlying each inquiry is a fundamental policy question as to how to isolate and deal with such problems in terms of drug use while fairly considering the parallel privacy rights of employees, practical issues of employers in ensuring tranquility in the workplace and the inevitable influence of lawyers and the courts on both.

Before seeking to implement a drug testing program, there are three questions every employer should ask: (1) is there a drug or alcohol related safety problem at the workplace or merely a suspicion that there might be one?; (2) in what ways has this problem been documented?; and (3) what formal policies, including work rules, safety policies and pre- and post-employment employee manuals have already been implemented which discuss or deal directly with the problem?

In answering these questions, there are at least four underlying assumptions that must be made: (1) testing employees can increase potential liability when disciplining or terminating an employee;
(2) when employers test for drugs on a random basis they are not reacting to demonstrated on-the-job behavior or poor job performance; (3) a positive drug test can do no more than allow the employer to presume a propensity for poor or hazardous job performance based on drug usage; and (4) while the employee may be deprived of his right to privacy, the employer can be deprived of the opportunity to document poor performance or substandard work behavior.

The intention of this article is to survey the options available to an employer against the background of legal and practical concerns the workplace presents. In this context, a survey of the options, in order of ascending risk, includes the following: (1) revising existing work rules to identify potential drug-related performance problems; (2) establishing condition of employment rules/policies informing all employees and applicants of the employer's drug policy; (3) pre-employment applicant testing and/or physical examination requirements; (4) "event specific," or "accident-based" testing; (5) employee physical examination requirements and/or reasonable cause "suspicion-based" testing; (6) random or mandatory testing; and (7) mandatory termination of employees for non-performance based violations of the above.

II. THE SOURCES OF LAW

There are at least six different layers of rules and regulations and case law that can apply to an employer which seeks to implement a drug testing program.1 These layers are: (1) the provisions of the Federal Rehabilitation Act of 1973,2 which protects applicants and employees from discrimination on the basis of handicapping conditions and which specifically applies to federal contractors3 and all other employers who either receive financial

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assistance or participate in programs whereby they directly receive federal funds; (2) the growing body of statutes at the state and local level that attempt to set the parameters for testing programs; (3) the constitutional law of privacy considerations made applicable to private employers by state constitutions, such as California's, which specifically provide for such protection; (4) general tort law considerations as represented by actions sounding in defamation, invasion of privacy, intentional or negligent infliction of emotional distress or in actions for wrongful or retaliatory discharge; 4 and (5) specific liability issues based on exceptions to the employment-at-will doctrine, such as the "public policy" rule, which sanction actions for wrongful discharge where the discipline would violate a rule of public policy. 5

Discharge for refusal to submit to testing arguably breaches an implied covenant of good faith and fair dealing in the employment relation and raises issues regarding, (6) workplace employment policies. In addition, existing employment manuals must be carefully reviewed to ensure that they do not expressly provide a contractual basis for resisting testing. 6 Other issues in this area include: (7) retaliatory discharges sounding in state-based worker's compensation claims, where discharge-related substance abuse can be linked to job stress; (8) unemployment compensation disqualification considerations based on testing; (9) National Labor Relations Act considerations for non-union employers which, if the employees act to protest testing policies as a group and thus potentially engage in protected concerted activity under section 7 of the Act, may discover an untapped and unwanted potential for inspiring union activity in a non-union shop; and (10) National Labor Relations Act considerations for the unionized employer, which must deal with the reality that, as reflected in the recent opinion of the General Counsel of the National Labor Relations Board, drug testing plans are a mandatory subject of bargaining. 7

A second broad category of questions can arise in connection with the implementation of a drug testing policy as an employer practice, at either the pre-employment and/or employment stages. To that end, the substantive legal questions the policy may raise will also highlight some of the practical implementation questions that

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4. See infra notes 60–62 and accompanying text.
5. See infra note 62 and accompanying text.
7. NLRB General Counsel memorandum of September 8, 1987, reported at 126 L.R.R.M. 69.
may arise as well. These include the establishment of specific performance based work rules which are sensitive to substance abuse problems, intra-company confidentiality and record keeping procedures; pre- and post-employment waiver and consent forms; and the myriad of practical claims of custody and testing method problems that can arise in a functioning program, including the emerging liabilities related to the testing entity chosen by the employer.

Most of the problems an employer will face when implementing such a policy inevitably arise from improperly drafted policies rather than any specific miscues by the employer. Second, the varying requirements that exist at the federal, state, and local levels may mean that no one “policy” may be uniformly applicable unless that policy is tailored to the most restrictive legal standard. The latter section of this article shall refer to a drug testing scheme recently adopted by the Minnesota legislature which probably represents the farthest any legislature may be able to go in achieving a reasonable reconciliation of these basic conflicts.

III. EMPLOYER PLANS

The regulation of drug use and employee job performance related to it through policy can cover at least five different areas of substance consumption. These areas are: (1) alcohol consumption or possession; (2) illegal or controlled substances; (3) prescription drugs which adversely affect job performance; (4) off-the-job drug use; and (5) off-the-job convictions.

Various consequences or sanctions can be provided if these conditions occur. These are: (1) administrative action where job performance is adversely affected; (2) a warning that off-the-job drug use may be a violation of company policy; (3) an acknowledgement that illegal use or possession is a dischargeable offense; (4) provision for reasonable suspicion-based drug and urine testing; (5) a warning that worker’s compensation rights may be affected; (6) an imposition of liability for accidentally caused damage; and (7) provision for random testing of employees.8

Employer plans may provide for different types of drug testing of applicants or employees. These types form an independent basis for liability and must be carefully reviewed. These tests are: (1) a physical examination, including a blood/urine sample by a recog-

8. Random testing, as an issue, typifies the controversy over drug testing. As a practice, however, it is little used. A recent nationwide study disclosed that of 718 companies and governmental agencies surveyed, 209 had some form of testing program, although only 14% included a random testing element. See 2 I.E.R. Reports 3 (1987).
nized hospital, clinic or laboratory; (2) a test or examination for drugs or drug abuse when on-the-job injuries occur; (3) witnessed testing — where sample chain of custody issues are likely to arise; and (4) provisions for retesting at the employee's option. The employer must be prepared to integrate the choice of a lab and/or testing method with the employer’s overall testing goals, which may raise the following issues: (i) will a standard for passive inhalation be set?; (ii) will a standard for non-impaired presence be set?; (iii) what tests are to be used?; and (iv) will confirmatory testing be used?

Immunoassay is the simplest first stage testing procedure. It serves to identify targeted drugs and other substances of similar molecular structure. It is also the source of the “false positive” controversy. Confirmatory testing means running a different scientific test on the same lab sample. Different methods of first stage testing are available, including gas chromatography, electrophoresis and spectrometry. Although more sophisticated than immunoassay, such tests are not sufficient by themselves. They identify compounds by molecular weight and charge. Since different compounds can be identical in this respect, confirmatory testing must still be used. Standard scientific practice may be to perform as many as three different tests, each measuring different chemical properties, and to perform confirmatory testing to match-up test results. A variant of immunoassay followed by gas chromatography/mass spectrometry called AKCMS has become the dominant form of confirmatory test, and has been favorably reviewed in the courts.9

Sanctions are an indispensible part of any effective drug testing policy. A typical plan may provide a sanction of immediate suspension from work without pay if an employee refuses to submit to testing. Additional sanctions may be provided if the employee refuses to participate in testing or an employee assistance program. If an employee submits to testing or examination and the results show consumption of an illegal or controlled substance, the employee would face immediate suspension from work with or without pay until the employee enrolls in and completes an employee assistance program and passes additional testing on an unannounced or random basis after completing such a program.

As is apparent from the model plans listed above, any realistic implementation of a safety policy which actually involves testing or examination of employees must include a detailed plan which speci-

fies the technicalities of testing, makes specific provision for employee consent and approval at every step, and provides detailed procedures for the examinations themselves and subsequent custody of the samples. Testing related to work performance or accidents must be integrated into a detailed set of work rules specifying not only which situations constitute performance problems, but the supervisory training, authority, and reporting procedures that will be used to implement actions when violations are observed. The concept of accident-based testing is a useful example of these requirements.

Accident-based testing properly focuses the employer's safety-related concerns, but a specific work rule setting forth the job hazards gives needed context to the approach. Moreover, an accident-specific testing program should properly focus on each employee involved to avoid premature questions concerning causation and liability.

In essence, there can be no such thing as a drug safety policy without a drug safety plan fully integrated into the employer's ordinary operations. This operational integration must begin with consent forms signed at the time of initial employment; continue through detailed work rules and specific testing and consent procedures; and finally must include appropriate confidentiality guarantees and a chain of custody record keeping system.

Once integration is complete, the program/policy can be properly reviewed for detailed compliance with existing laws and regulations. The remainder of this article sets forth the dominant areas of concern, beginning with rules respecting substance abuse as a protectible handicap.

IV. SUBSTANCE ABUSE AS A PROTECTIBLE HANDICAP

A. Qualifying Conditions

Alcoholism and drug abuse are included within the range of handicapping conditions that can invoke the anti-discrimination

10. See, e.g., CAL. LAB. CODE § 6400 (Specifically requires the employer to provide a "safe and healthful . . . place of employment.")

11. The CSX Corporation, for example, recently successfully negotiated an agreement with the United Transportation Union and the Brotherhood of Locomotive Engineers which permits only locomotive engineers, trainmen or yardmasters injured in or otherwise involved in an accident of at least $5,200 in damages to be tested.

12. Post accident testing was one of the issues before the Ninth Circuit in Railway Labor Executives v. Burnley (Case No. 85-2891, January 3, 1986) — F.2d — (9th Cir. February 11, 1988).
provisions of the Rehabilitation Act of 1973.\textsuperscript{13} Handicapped status applies to “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 impairment; or (iii) is regarded as having any impairment.”\textsuperscript{14} The act extends to contracts or subcontracts entered into by a prime contractor and the United States in excess of $2,500 for the procurement of personal property and nonpersonal services (including construction)\textsuperscript{15} and to employers who directly receive federal funds.\textsuperscript{16} Contracts entered into under § 503 must include a provision requiring “affirmative action to employ and advance in employment qualified individuals with handicaps.”\textsuperscript{17} Covered employees are entitled to reasonable accommodation of their handicaps, which can include treatment or time off to obtain it, and/or a warning that discipline will be imposed if treatment is not sought.\textsuperscript{18}

Evidence of substance abuse does not automatically qualify an individual for protection under the Act. Even if drug use is an “impairment” under the Act, it must impair a major life activity and “one particular job for one employer” probably falls short of constituting a major life impairment.\textsuperscript{19} Even if proof of the foregoing is assumed, the employer’s screening program may still survive attack if it can show that the challenged criteria were job related and required by job necessity.\textsuperscript{20} Satisfaction of such a test is consistent with the provisions of the Act which exclude from coverage those individuals 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 the property or safety of others.”\textsuperscript{21}

In view of the fact specific nature of handicap status determinations, an adverse hiring decision or work related substance abuse

\begin{itemize}
\item \textsuperscript{13} 29 U.S.C. §§ 701-796 (1987).
\item \textsuperscript{14} 29 U.S.C. § 706(7)(B) (1987).
\item \textsuperscript{15} 29 U.S.C. § 793 (1985).
\item \textsuperscript{16} Id. See also United States Department of Transportation v. Paralyzed Veterans of America, 477 U.S. 597 (1986).
\item \textsuperscript{17} 29 U.S.C. § 793(a) (1987).
\item \textsuperscript{18} Whitlock v. Donovan, 598 F. Supp. 126 (D.C. Cir. 1984).
\item \textsuperscript{20} Id.
\item \textsuperscript{21} 29 U.S.C. § 706(B). See also 41 C.F.R. § 60-61, (proposed) OFFCP Affirmative Action Regulations on Handicapped Workers; 29 C.F.R. § 32.3(6)(i)(iii), DOL Regulations on Handicap Discrimination in Federally Assisted Programs; 28 C.F.R. § 41.31.D05 Regulations.
\end{itemize}
discipline, the employer must proceed on a case-by-case basis. For instance, if an applicant admits previous abuse but denies a current problem, the Act may be violated even for jobs where public safety is a self-evident concern. Under the Handicap Rehabilitation Act, the employer's defenses must be founded on the current status of the employee, while the protection of the Act attaches on the basis of a past or perceived handicap of the employee. If an applicant can show that she meets minimum job qualifications and that employment was denied because of the handicap, then the employer must prove that the claimed handicap would prevent successful job performance. Employee discipline may be subject to review where it was premised on past or present alcohol or drug abuse and the employee is not currently on drugs and any alcohol consumption is normal.

B. Confidentiality Requirements

Regulations promulgated under the Act require that the results of comprehensive pre-employment medical examinations be used in accordance with the Act and that information derived therefrom be kept confidential except that (1) supervisors may be informed of work restrictions, (2) first aid personnel may be informed of possible emergency treatment needs, and (3) government officials investigating compliance with the Act "shall" be informed.

C. Private Civil Actions

The Department of Labor enforces the federal contractor's obligations under § 503. Courts have generally refused to imply a private right of action under the Act.

In contrast, federal contractors and recipients of federal financial assistance covered by 29 U.S.C. § 504 are subject to private civil actions including claims by employees or rejected applicants that employers have improperly maintained across-the-board prohibitions against employment of persons abusing toxic substances with-

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24. 41 C.F.R. § 60.741.6(c)(3) (1987).
out evaluating job performance.26

V. STATE STATUTES AND REGULATIONS

Many state laws provide special treatment for alcohol and drug problems, and such treatment naturally varies on a state-by-state basis. For example, California Labor Code § 1025-1028 requires employers with more than twenty-five employees to “reasonably accommodate” any employee who wishes to take time off to enter an alcohol or drug rehabilitation program.27 Employees may use accumulated sick leave but need not be given paid time off. Nonetheless, current usage which renders an employee unable to perform his duties, or unable to do so without endangering the health and safety of others, is clearly an adequate ground for discharge. In either case reasonable efforts are required to safeguard the employee’s privacy.28

California Civil Code § 56.10 et seq., the Confidentiality of Medical Information Act, imposes specific pre-release authorization requirements in connection with physical examinations and other medical information collected by the employer.29 Transgressions from these confidentiality requirements can afford a tangible basis for liability, even when drug testing is only at the pre-employment stage.

Regulations promulgated under the California Fair Employment and Housing Act permit pre-employment physical examinations, but give the applicant a right to submit independent reports if disqualified on the basis thereof.30 Moreover, the results of any examination must be kept separate from other employment records.31 Indeed, courts have founded liability arising from intra-corporate


27. CAL. LAB. CODE § 1025 (eff. Jan. 1, 1988) (amended to extend the requirement of “reasonable accommodation” to employees who wish to enter a drug rehabilitation program).

28. CAL. LAB. CODE § 1026.

29. Section 56.10(c)(8) mandates a release covering “employment-related health care servers,” 56.20(b) prohibits discrimination against employees refusing to sign such an authorization unless “such action is necessary in the absence of medical information due to the employee’s refusal to sign.” If the employer has paid for the health care or exam, he has a right to learn “the functional limitations . . . [of the employee’s] fitness to perform,” though the specific cause may not be disclosed. Id., at § 56.10(c)(8)(B).

30. CAL. ADMIN. CODE § 7245.6. This latter characteristic is also a feature of most successful drug testing programs. See section V, A-C, infra.

31. CAL. ADMIN. CODE § 7244(d).
communications about an employee.\textsuperscript{32} Where the employer is inclined to require its new employees to submit to a physical examination, it should be consistent and do so to all entering employees on an equal basis.\textsuperscript{33}

Application of the special handicap rules to alcohol and drug abusers poses special problems.\textsuperscript{34} For example, CFEH regulations define "physical handicap" to exclude "alcoholism or narcotics addiction."\textsuperscript{35} The employer is left to sort out, on a case-by-case basis, whether the subject employee is an addict, who is consequently not protected, or an abuser, who may be protected. Nonetheless, the recognition of alcohol dependency or even drug addiction as protectible conditions has superficial appeal. Since substance abuse might be the result of work-related stress, an integrated view of the workplace could lead to broader inclusion of such conditions when drug testing issues come up.\textsuperscript{36}

A. California

The California employer seeking to implement a drug testing program will find little help from statutory law when developing its program. Only the city of San Francisco currently has an ordinance on the subject: a ban on random drug testing of employees. Nonetheless, a significant body of legislation has passed before the California Senate and Assembly dealing with the issue.\textsuperscript{37} Of those introduced in recent sessions, two are particularly noteworthy because they have been proposed by employer groups and probably

\begin{itemize}
    \item \textsuperscript{32} Bratt v. IBM Corp., 467 N.E.2d 126 (Mass. 1984).
    \item \textsuperscript{33} \textit{Id.} See Jones v. McKenzie, 628 F. Supp 1500, 1 I.E.R. Cas. 1076 (D.C. Cir. 1987).
    \item \textsuperscript{34} At least one authority has suggested that pre-applicant testing, per se, may be illegal because it necessarily has an adverse impact on a class of applicants - \textit{e.g.}, those with handicaps. See 126 L.R.R. 151, 152 (November 9, 1987).
    \item \textsuperscript{35} \textsc{CAL. ADMIN. CODE} § 7293.6(a)(4).
    \item \textsuperscript{36} \textit{See, e.g.,} Athens v. Board of Education, 28 Fair Empl. Prac. Cas. 569 (N.D. Ill. 1980); Consolidated Freightways, Inc. v. Cedar Rapids Civil Rights Commission, 366 N.W. 2d 522 (Iowa 1985); Haylett v. Martin Chevrolet, Inc., 496 N.E. 2d 478, 25 Ohio St. 3d 279 (Ohio 1986) (holding that alcoholism and drug abuse are handicaps. A prima facie case before the Ohio Civil Rights Commission on a drug abuse discrimination basis must satisfy a three-part test: (1) substantial medical evidence of the addiction; (2) that the essential functions of the job can be safely and substantially performed despite the handicap; (3) an adverse employment action was based, in part, on such a handicap. Inability to perform, lack of reasonable accommodation, proof of a bona fide occupational qualification or that the handicap constitutes an occupational hazard will serve to rebut the presumption).
for that reason reflect a minimum acceptable position under California law.

One such proposal\textsuperscript{38} sets forth the following criteria for any plan to be implemented in a safety sensitive work environment. In the words of the Senate legislative analyst, the legislation would:

1) require the employer to inform employees and job applicants of his or her testing policies in writing either when the employee is hired or when the policy is adopted;

2) require all tests to be confirmed through a different test by a licensed laboratory;

3) prohibit an employer from refusing to hire a prospective employee or to discipline an existing employee on the basis of an initial test unless the test is confirmed by a different test by a licensed laboratory;

4) require laboratories to save positive test samples for 90 days and permit employees or job applicants to have the sample retested at his or her own expense by a licensed laboratory up to 30 days after notification of the test results;

5) require employers to take reasonable precautions to ensure the confidentiality of the test results;

6) prohibit the use of the tests for any other purpose such as testing for pregnancy, the presence of AIDS, or other medical or body conditions; and

7) ensure that employees have a right to request and receive a copy of the results of the tests.\textsuperscript{39}

In addition, this bill extends the requirement that employers and state and local public agencies provide reasonable accommodations to permit employees to participate in drug rehabilitation programs on the same basis that they are permitted to do so for alcohol rehabilitation. The employer would be required to protect the privacy of the employee and to allow him or her to use any available sick leave.

A second proposal\textsuperscript{40} would permit testing based on "reasonable suspicion" of impairment in accordance with collective bargaining agreements or other written employment agreements where the employer has an established employee assistance program. The plan provides for confirming tests and voiding of positive tests after a six month interval and negative retest. It adds the following criteria:

\textsuperscript{38} S.B. 1610.
\textsuperscript{39} Id.
\textsuperscript{40} S.B. 1611.
1) require all testing procedures to apply uniformly to all employees regardless of their salaried or non-salaried status;

2) prohibit employers from subjecting employees to a loss of salary or benefits from the period that a test is taken until the results are known in cases where the tests are negative, and when no disciplinary action was taken against the employee;

3) prohibit an employer from refusing to hire a prospective employee or to discipline an existing employee on the basis of an initial test unless (a) the test is confirmed by a gas chromatography, gas chromatography-mass spectroscopy, or another comparably reliable method by a duly licensed laboratory, and (b) the specimen was collected, transported, and tested within a documented chain-of-custody procedure to establish the identity of the specimen and to protect its integrity;

4) require the results of a test to be transmitted to the employer in a timely manner, and ensure that employees have a right to request and receive a copy of the results of the tests;

5) give an employee the right to submit a list of all medications that he or she is taking under a doctor's orders prior to submitting to a test;

6) require an employee to provide a doctor's verification of the prescribed medication at the request of the employer; and

7) make any person who violates any of the above provisions liable to the aggrieved party in accordance with applicable law; provide that an employee does not waive any rights to take legal action to recover damages by consenting to drug or alcohol testing; and prohibit employers from requiring an employee to waive his or her rights to take legal action to recover damages resulting from the tests.41

B. Utah

Several states have already enacted legislation regulating the implementation of drug and alcohol testing by employers: Utah has provisions that are widely regarded as the most favorable to employers. Utah's legislative scheme is particularly noteworthy because it specifically sanctions suspension of an employee without pay if an employee tests positive (the test must be confirmed) or refuses to take a test.42

The Utah statute does not employ a reasonable suspicion standard for testing. Bases for testing include investigations of individual employee impairment or of accidents in the workplace or

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41. Id.
42. UTAH CODE ANN. § 34-36-8 (1987).
incidents of workplace theft; maintenance of safety for employees or the general public; and "maintenance of productivity, quality of products and services, or security of property or information."43

In addition, the statute insulates the employer from liability for actions taken on the basis of incorrect test results if reliance on a false test result was reasonable and in good faith.44 This protection is extended to defamation actions founded on a disclosure of such test results unless notice is shown.45

C. Minnesota

Minnesota provides a comprehensive and fairly balanced approach to the implementation of testing which employers have begun to adopt for that purpose nationwide. Minnesota's extensive drug testing statute took effect on September 1, 1987. One if its most noteworthy elements is a list of specific minimum requirements for any posted drug testing policy:

1) identification of the employees or job applicants subject to testing under the policy;
2) the enumeration of circumstances under which drug or alcohol testing may be requested or required;
3) notification that an employee or job applicant has the right to refuse to undergo drug and alcohol testing and the consequences of such refusal;
4) enumeration of any disciplinary or other adverse personnel action that may be taken based on a confirmatory test or after verifying a positive test result of an initial screening test;
5) provision of an opportunity for an employee or job applicant to explain a positive test result or request and pay for a confirmatory retest; and
6) access to any other appeal procedure available.46

In addition, the statute permits testing as part of a routine physical examination, on an annual basis, provided that two weeks prior notice is given.47 Employees in safety sensitive positions may

be randomly tested. Furthermore, employers who develop a reasonable suspicion an employee is under the influence may conduct spontaneous tests. This reflects the policy of allowing testing to discourage drug possession and minimize work accidents. Testing is permitted if the employee:

1) has violated the employer's written work rules prohibiting the use, possession, sale, or transfer of drugs or alcohol while the employee is working or while the employee is on the employer's premises or operating the employer's vehicle, machinery, or equipment, provided the work rules are in writing and contained in the employer's written drug and alcohol testing policy;
2) has sustained a personal injury, as that term is defined in § 176.011(16), or has caused another employee to sustain a personal injury; or
3) has caused a work-related accident or was operating or helping to operate machinery, equipment, or vehicles involved in a work-related accident.

The statute also deals with the often sensitive issue of what happens after the initial positive drug test. One option available to the employer is to suspend the employee without pay after an initial positive test. Assuming that language respecting a confirmatory test is incorporated into the program, the question is raised as to how to deal with the interim period. The Minnesota statute provides for temporary suspension without pay but provides for reinstatement with backpay "if a requested confirmatory retest is negative." The statute states in detail how and when initial screening, testing, and confirmatory tests are to be conducted. In contrast, an unadorned policy of suspension without pay, without specific provision for backpay after a negative retest, while not per se improper, is likely to invite claims and/or litigation simply because it does not provide for this contingency.

VI. CONSTITUTIONAL AND TORT CONSIDERATIONS

A. Factual Background

The majority of newly proposed policies do not include a ran-
dom testing element. As such, they prudently avoid the most frequent and unsuccessfully litigated issue in the California courts. In a recent case involving a non-union employer, efforts to avoid preliminary injunctions proved unsuccessful. These efforts had an interesting by-product because in the course of resisting injunctions, the employers were able to persuade judges to approve modified injunctions that incorporated and permitted ongoing testing without the random element. Concededly, the cost of such judicial "approval" is high, notwithstanding the ongoing concern of pending wrongful termination lawsuits filed by employees who refused to be tested.

Lawsuits are currently pending against the laboratories who perform the testing. Any employer who carries out tests should be sensitive to the potential liability which can result from this relationship. With increasing frequency, the added factor of "witnessed testing," e.g., wherein the taking of the sample is observed by a neutral laboratory employee, has become an issue, despite the fact that this element was added to preserve employees' rights in anticipation of chain of custody problems. The decision of a San Francisco court and jury in Lueck v. Southern Pacific Transportation Co. are simultaneously troublesome and encouraging for employees who need submit to drug test.

In Lueck, the railroad implemented a random companywide drug testing program. Before the program was prematurely terminated by passage of a local ordinance severely restricting such testing, the rate of accidents at Southern Pacific had decreased. Litigation was triggered by a computer programmer who refused to take a test which had been scheduled for a group of managers and exempt personnel. Such department by department testing is a variant of random "mass" testing and is a common device for systematizing a top-to-bottom drug testing policy. Ironically, it is usually implemented to ensure the fair application of the overall program.

The railroad's program itself was premised on a sound safety-based accident prevention goal. Indeed, in a significant preliminary

52. This is an issue currently before a trial court in Hill v. NCAA (Santa Clara Superior Court, Case No. 619, 209). See also People v. Triggs, 8 Cal. 3d 844, 506 P.2d 232 (1973) (disapproved on other grounds); People v. Lillienthal, 22 Cal. 3d 891, 587 P.2d 706, 105 Cal. Rptr. 910 (1978). See also United States v. Westinghouse Corp., 638 F.2d 570 (3rd Cir. 1980); Olson v. Western Airlines, Inc., 143 Cal. App. 3d 1, 191 Cal. Rptr. 502 (1983); Caruso v. Wood, 506 N.Y.S. 2d 789 (S.Ct. 1986).

53. Inter alia, the San Francisco ordinance precludes testing absent both "reasonable suspicion" and "clear and present danger."

54. S.F. Superior Court Case No. 843,220.
ruling, the court concluded that the testing implemented a compelling state interest in ensuring public safety which took precedence over other prevailing state interests. Nevertheless, the court concluded that a factual issue remained—whether the inclusion of this particular employee within the testing program satisfied the same test. While a compelling need for the overall program had been shown, it remained for the jury to decide whether including this particular employee within the program satisfied the same test and, if the employee should have been included, whether the decision to terminate her for refusing to be tested was proper. The jury answered in the negative and awarded a total of $485,000 in compensatory and punitive damages.

_Lueck_ reinforces the basic principle that all testing policies should be firmly grounded in the employer’s work rules. In essence, whether courts impose a compelling need test or some lesser standard requiring a reasonable relationship between the testing and the need to test, there is likely to be a need to establish a reasonable, provable relationship between each application of testing policy and the specific aspect of job performance impacted by drug or substance abuse affected behavior.

**B. Specifics**

The constitutional rights of due process, equal protection, and privacy concerns are of particular relevance to and have

55. See e.g., Jones v. McKenzie 628 F. Supp 1500 (D.D.C. 1986). Discharge on the basis of a single unconfirmed test was “arbitrary and capricious” in derogation of due process. The Ninth Circuit is the leading advocate of a due process-based approach to invalidating drug testing programs. In a broadly based decision grounded in traditional warrant requirement language, the court, in Railway Labor Executives Association v. Burnley, No. 85-2891, slip op. at 38 (9th Cir. February 11, 1988), concluded that accident-based testing of railway personnel will meet due process muster “only when the specific articulable facts give rise to a reasonable suspicion that a test will reveal evidence of drug or alcohol impairment.” Based on the Fourth Amendment ban on “unreasonable searches and seizures,” a court may justifiably conclude that “in the absence of any individualized reasonable suspicion of drug abuse, the availability of . . . an equally successful but completely unintrusive means of identifying suspected drug abusers renders [testing] unconstitutional.” See Taylor v. O’Grady, 669 F. Supp. 1422 I.E.R. Cas. 897 (D.C. N. Ill. 1987); see also Policemen’s Benevolent Assoc. of New Jersey, Local 318 v. Township of Washington, 672 F. Supp. 779 (D. N.J. 1987).

56. The latter has been uniformly unsuccessful. See, e.g., Shoemaker v. Handel, 795 F.2d 1136 (3d Cir. 1986) cert. denied 107 S. Ct. 577 (1986).

largely been litigated in the arena of random drug testing. The federal government has itself begun to implement testing programs, with varying success.58 For instance, the Department of Transportation has notified some 30,000 of its employees, including air traffic controllers, test pilots, firefighters, railroad safety inspectors, and, most notably, motor vehicle operators, about potential testing. Although the state action requirement insulates private sector employees from direct application of decisions in this area, the developmental nature of the field gives some relevance to the decisions. In addition, for public and quasi-public employers59 working in closely regulated industries,60 testing of such employees at the mandate of the government can become an issue. For a contractor working at a sensitive defense installation, for instance, the unanswered question is whether the awarding agency (e.g., Department of Defense) can mandate testing independent of that required by the


60. It has been argued with some persuasiveness that when an industry is “closely regulated,” searches will be reasonable where three criteria are met: (1) the government has a substantial interest in the regulatory scheme/inspection; (2) the search is necessary to further that scheme; and (3) the inspection scheme can be applied with certainty and regularity. New York v. Burger, 107 S. Ct. 2636, 2643 (1987). Third Circuit applied this rationale to testing of jockeys in the horse racing industry in Shoemaker v. Handel, 795 F.2d 1136 (3rd Cir. 1986), cert. denied, 107 S. Ct. 577. The Ninth Circuit in Burnley distinguished Shoemaker on factual grounds, albeit, with little apparent justification. See Burnley, No. 85-2891 slip op. at 21 (9th Cir. 1988).
Constitutional choice of law issues become largely academic for employees in jurisdictions such as California that actively interpret their own parallel constitutional provisions and which, in addition, incorporate specific constitutional privacy rights.

The practical relevance of the foregoing for an employer seeking to implement a drug testing policy is that resourceful lawyers will be able to formulate challenges to most drug plans on constitutional grounds.

The answer, naturally enough, is that these rights are relevant when their invocation is a predicate to a civil lawsuit for damages. In this area, actions can sound in wrongful termination, retaliatory discharge (made independently actionable by so-called "whistle blower" statutes), intentional infliction of emotional distress, common law privacy and defamation torts, and negligence-based action connected with issues in the testing process. Of particular relevance is the ongoing significance of wrongful discharge cases which are litigating a public policy exception to the employment at will doctrine.

C. Consent

1. Post Employment

Most litigation in this area has arisen when an employee refuses to consent to drug testing and is subsequently terminated.

61. Shoemaker v. Handel, 608 F. Supp. 1151, 1155 (D. N.J. 1985). The Department of Transportation's proposed testing program may ultimately include a requirement that private truckers test their drivers. See 2 I.E.R. Rep. 1 (September 15, 1987). Such closely focused testing has also been proposed in California. See supra note 24 and accompanying text.

62. CAL. CONST. Art. I, § 1; Porten v. University of San Francisco, 64 Cal. App. 3d 825 (1976). See also, Long Beach City Employees Assoc. v. City of Long Beach, 41 Cal. 3d 937, 948 (1986) (polygraph testing of employees "intrudes upon the constitutionally protected zone of privacy").

63. "Eventually, all of these methods will end up in court." San Francisco Chron., Sep. 26, 1987 at A2, Col. 2. (Edward Chen, counsel for the American Civil Liberties Union).

64. CAL. LAB. CODE § 1102.5 (West Supp. 1987).

65. See, e.g., Tellez v. Pacific Gas and Electric Company, Inc., 817 F.2d 536 (9th Cir. 1987) (suspension letter). Tellez is noteworthy because the plaintiff was a union employee. Defendants had argued his claims were pre-empted under § 301 of the National Labor Relations Act. Compare Utility Workers of America, Local 246 v. So. Calif. Edison Co., — F.2d — (9th Cir. 1988) slip. op. No. 87-5674, 5702 (May 4, 1988) (§ 301 pre-empts claims that a drug testing program violates California's constitutional prohibitions against unreasonable searches and seizures and guarantees of privacy. CAL. CONST. ART. 1 §§ 1,13).

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This is consistent with the principle that a waiver cannot be truly voluntary where job security questions are raised. Waivers, therefore, are effectively restricted to the pre-employment applicant stage, where the job candidate is still free to exercise a choice of employer.

2. The Validity of Consent

Although no California cases are squarely on point, a federal court recently held that an otherwise unconstitutional drug testing program cannot be cured by consent obtained as a condition of continued employment.

3. Pre-employment Consent

Even if otherwise construed as voluntary, drug testing raises fundamental constitutional privacy questions that require pre-testing waivers to meet the same stiff constitutional standard as the testing itself.

VII. OTHER LIABILITY ISSUES

As with any drug testing plan seeking implementation, the prospect of resorting to the courts because most of the relevant issues have not been fully litigated remains a factor for the employer to consider when he does ultimately implement a plan. That proviso aside, additional features of various employer plans raise some novel questions which have received only sparse treatment, if any, in the courts thus far. These include sanctions for off duty drug use, questions as to supervisorial discretion, and the impact of drug testing sanctions on workers compensation claims. In addition, concerns relating to unemployment compensation and NLRB connected activity must be reviewed.

A. Off-The-Job Drug Use

One frequent component of employee plans is a provision for identification of off-the-job drug use and convictions as a basis for invocation of the testing program. The latter is obliquely and incompletely dealt with by California statutes and regulations prohibiting conviction related to pre-employment inquiries.

69. See, e.g., CAL. LAB. CODE § 432.7, 1132.7 (West Supp. 1987); CAL. ADMIN. CODE tit. 8, § 7287.3(d)(I)(A)(C).
Little pertinent case law has emerged on the issue.\textsuperscript{70} One case of note is \textit{Watts v. Union Pacific Railroad}.\textsuperscript{71} In \textit{Watts}, the employer had a work rule permitting discharge where conduct threatened safety or subjected the employer to criticism or loss of good will. The Court of Appeals for the Tenth Circuit approved discipline based on a violation of this rule, holding that discharge of an employee after a conviction for off-duty drug possession was proper.

Arbitration cases provide an additional perspective.\textsuperscript{72} An issue frequently confronted is the extent of the burden of proof borne by the employer. In \textit{In re Weyerhauser Co.},\textsuperscript{73} for example, the employee was suspected of drug use by the supervisor, who questioned him about it. The employee admitted to having “partied” the night before, admitted to drug use and offered to undergo rehabilitation and to take a drug test. The arbitrator ruled that a subsequent discharge was improper because by agreeing to rehabilitation, the employer implicitly agreed to withhold any decision until its completion. Discharge, when it came, would only be proper when based on detailed proof that the drug problem affected the employee’s current work performance, in accordance with the terms of the work rule that applied to his position.\textsuperscript{74}

B. \textit{Supervisorial Discretion}

One of the key attributes of a reasonable suspicion based program is deciding the who, what, and when of decisions by supervisors when an employee is observed to be under the influence of drugs or alcohol. Incorrect decisions, if they directly result in testing, can raise potential harassment issues and create a “wrongful discharge” climate, even if they are not per se improper.

One recently proposed solution to this problem is that of withdrawing authority to order drug tests from supervisory personnel. Instead, the supervisor will record an incident, such as an on the job accident, and then refer the involved employees to a physician for examination.

\textsuperscript{70} The California Supreme Court has recognized a privacy limit on “purely personal” aspects of the employee’s life. See Rulon Miller v. IBM, 162 Cal. App. 3d 241, 248 (1984) (employee questioned as to date with a competitor).

\textsuperscript{71} Watts v. Union Pac. Railroad, 796 F.2d 1240 (BNA) 122 L.R.R.M. 3036 (10th Cir. 1986).

\textsuperscript{72} California courts have looked to arbitration decisions for assistance in defining employee rights. See Pugh v. Sees Candies Inc., 116 Cal. App. 3d 311, 330 n. 26 (1981).

\textsuperscript{73} In re Weyerhauser Co., 86 Lab. Arb. Awards (CCH) 183 (1985).

\textsuperscript{74} \textit{But cf.} City of Milwaukee, 71 Lab. Arb. Awards (CCH) 329 (1978) (crane operator properly discharged when beer was consumed during an unpaid hour off site).
C. Worker's Compensation

There is an emerging trend towards regarding stress-related alcohol and drug abuse as a compensable injury. Thus, while the statement may arguably be made that drug use precludes coverage under the compensation statutes if the underlying discharge was proper, creative lawyering can effectively transform that result. For example, in Association of Western Pulp and Paper Workers v. Boise Cascade Corp., it was claimed that a drug testing program violated provisions of the worker's compensation statute that forbade discrimination against employees applying for benefits. It was argued that employees would be afraid to file injury reports because of fear of having to be tested or fear of the results. Although unsuccessful in the district court, the argument has a superficial appeal and is relevant because most states, like California, have an analogous protective statute, though no case has thus far been uncovered which raises the issue.

D. Unemployment Compensation

California specifically permits disqualification for misconduct if the employee fails to appear for work, or appears for work in an unfit condition. In addition, disqualification is permitted if an irresistible compulsion to consume was the cause of the absenteeism or other malfeasance. Nonetheless, the same statute allows the disqualification to be removed if the employee is treated successfully and certified to return to work. There is thus likely to be a direct relationship between the employer's EAP program and his/her ultimate responsibilities and liabilities on the compensation issues.

E. Unionization

One of the great ironies of the drug testing issue is that it can become an organizational rallying cry for action or protest in a work environment where no previous employee disharmony existed. This is particularly relevant for the merit contractor who may unexpectedly find himself dealing with organized or semi-organized protests, all of which would likely be qualified as protected concerted activities under § 7 of the National Labor Relations Act.

75. See, e.g., California Microwave, Inc., v. WCAB, 45 Cal. Comp. Cas. (MB) 125 (1980).
77. CAL. LAB. CODE § 132(a) (West Supp. 1987).
78. CAL. ADMIN. CODE tit. 22, § 1256-37.
79. Id. at § 1256.5.
ers considering drug testing under these circumstances, it is submit-
ted, should carefully evaluate the potential of worksites becoming
organizing sites, where “no drug-testing” can become a rallying cry
for union organizing.

In other respects, the opportunity to collectively bargain is ac-
 companied by the obligation to bargain over testing. In a landmark
opinion, the General Counsel of the National Labor Relations
Board recently concluded that drug testing is mandatory subject of
collective bargaining. This is consistent with National Labor Re-
lation Board and arbitration decisions which have refused to imply
a right to drug test from existing provisions for pre-employment
physicals or other in-place examination requirements. Indeed, the
question has come full circle, with the emergence of union proposed
testing plans. One such plan, proposed by the Laborer’s Union in
Arizona, contains extensive test and retest provisions while still
conceding the basic principle of suspicion-based testing.

VIII. CONCLUSION

The implementation of a functioning drug/alcohol safety pol-
icy incorporating substance testing is a prudent choice in today’s
social and business climate. However, it cannot be undertaken only
as a matter of principle. Instead, it must be fully integrated into the
ordinary pre- and post-employment procedures of the company. In
the course of this article, we have made several recommendations
along this line, foremost of which is the suggestion calling for the
promulgation of detailed drug/performance related work rules and
consent and testing procedures. While employee testing is not a
substitute for proper, detailed supervision of the workplace, it is
rapidly becoming an indispensable part of it. Utilization of these
and other proposals can help incorporate testing into the main-
stream of labor relations practices by ensuring that the litigation
risks it entails are no greater than any other exercise of management
discretion.

80. General Counsel memorandum of September 8, 1987, reported at 126 L.R.R.M. 69.
81. But see Railway Labor Executives v. Norfolk and Western, 45 E.P.D. Para. 37, 595
at 50,026 (7th Cir. 1987).
82. Laborer’s District Counsel of Arizona (proposal of Local’s 383 and 479).