CORPORATE DRUG TESTING: PRIVATE EMPLOYERS' RIGHT TO TEST

I. INTRODUCTION

The omnipresent specter of drug use among millions of Americans, and the apparent inability of law enforcement to control it, has forced many employers in both the public and private sectors to screen applicants and employees in order to detect the presence of drugs in their systems. Among those who test employees are corporations, federal agencies, local governments, and the military. More recently, the President's Commission on Organized Crime recommended mandatory random drug testing for all employees of companies doing business with the government and for all government employees. It is apparent that employee drug and alcohol abuse is one of the major employment concerns of the 1980s. Employers are finding evidence of an increase in drug-related problems in the work place.

2. Id. (citing Stille, Drug Testing: The Scene Is Set for a Dramatic Legal Collision Between the Rights of Employers and Workers, Nat'l L.J., Apr. 7, 1986, at 1, col. 1 [hereinafter Stille]).
3. President's Commission on Organized Crime, America's Habit: Drug Abuse, Drug Trafficking, and Organized Crime (Mar. 1986). In this report the panel states: The President should direct the heads of all Federal agencies to formulate immediately clear policy statements, with implementing guidelines, including suitable drug testing programs, expressing the utter unacceptability of drug abuse by Federal employees. State and local governments and leaders in the private sector should support unequivocally a similar policy that any and all use of drugs is unacceptable. Government contracts should not be awarded to companies that fail to implement drug programs, including suitable drug testing.

Government and private sector employers who do not already require drug testing of job applicants and current employees should consider the appropriateness of such a testing program.
4. See Schachter & Geidt, Controlling Workers' Substance Abuse, Nat'l L.J., Nov. 11, 1985, at 20, col. 1 [hereinafter Schachter & Geidt].
Corporations are fighting back and the principal weapon chosen is drug testing. This comment will discuss the legal considerations that private employers must confront when implementing drug testing programs for job applicants and present employees. Further, this article will attempt to develop guidelines to assist corporations in the adoption and utilization of such programs.

Due to the substantial increase in the use of chemical testing procedures, there have been serious concerns that drug testing may infringe upon the statutory and constitutional rights of employees.

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6. Id. See Murphy & Treacy, Drug Testing and Urinalysis in the Workplace: Legal Aspects (Wash., D.C.); Congressional Research Service, The Library of Congress, Pub. No. IP0350D (G0), Apr. 16, 1986 [hereinafter Murphy & Treacy]. See also BUREAU OF NATIONAL AFFAIRS SPECIAL REPORT ALCOHOL & DRUGS IN THE WORKPLACE: COST, CONTROLS AND CONTROVERSES 31 (1986) [hereinafter BNA SPECIAL REPORT]. That report states:

Urine tests are by far the most common tests used to detect employee drug use, but they are not the only ones. Tests range from skill-based tests, such as walking a straight line, to a number of sophisticated biomedical tests. The bodily fluids, tissues, and responses purported to be able to show drug or alcohol use include urine, blood, saliva, breath, hair, and brain waves. They can be the source of the following information:

- Blood: Drugs can [be] detected in the blood, where they are capable of causing impairment. But what quantity of particular drugs constitute impairment is a matter of scientific debate and uncertainty. In addition, the tests are costly and relatively complicated.
- Saliva: The active ingredient in marijuana, THC, can be detected in saliva two to eight hours after consumption. The test does not demonstrate impairment, only consumption.
- Breath: Alcohol use can be detected in breath. Corollary information on blood-alcohol levels can be obtained.
- Hair: Drug use over a period of weeks or months can be profiled by tests conducted on hair; the tests cannot demonstrate impairment.
- Brain waves: The current effects of drug use may be discernable in the brain’s electrical charges. By monitoring these charges, a test known as the Veritas 100, manufactured by National Patent Analytical Systems, Inc., is purported to be able to show current impairment due to a number of drugs.

Id.

7. The majority of case law relevant to drug testing involves public employees. This note does not fully address this issue because federal constitutional protections are designed to protect against government and state action, not action by private entities or individuals. A state constitution, however, may provide broader coverage than the United States Constitution regarding an individual's right to privacy. See, e.g., CALIF. CONST. art. 1, § 1 (setting forth as a natural and unalienable right—enjoying and defending life and liberty); N.J. CONST. art. 1, ¶ 1 (same). See infra text accompanying footnotes 22-37.

Predictably, the courts will be the battleground for resolution of the many issues raised by such drug testing. Numerous suits have been commenced in state and federal courts challenging the legality of various drug testing programs. However, a private employee's rights regarding drug testing, as will be seen, are not as expansive as those of employees in the public sector.

II. BACKGROUND

A. Legislative History

To date there is no federal law or constitutional provision specifically prohibiting drug testing. However, there is state and local legislation specifically dealing with employer drug testing. On the local level, San Francisco passed the nation's first ordinance barring employers from administering urine, blood, or electroencephalogram tests at random. A similar bill was recently passed in Suffolk County, New York, on August 26, 1986. However, on September 24, 1986, this bill was vetoed by the Republican County Executive, Peter F. Cohalan. The legislation, if enacted, would have prohibited all

9. See Burka, 110 F.R.D. at 598 n.4.  
10. BNA Special Report, supra note 6, at 74. This report sets forth the current status of drug testing with respect to expansion of use in the public and private sectors, its deterrent effect, test validity, civil liberties, privacy issues, and arguments of proponents and opponents of drug testing.  

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; (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 same evaluated by State licensed independent laboratory[sic]testing facility and provides the employee with a reasonable opportunity to rebut or explain the results . . . .

Id. § 3300A.5, reprinted in Ind. Emp. Rights Man. (BNA), at 545:15.  
employers from screening or testing either current employees or job applicants.\textsuperscript{14} State legislation to restrict or regulate drug testing has been passed in six states.\textsuperscript{15} Other jurisdictions have proposed legislation or have issued opinion letters regarding drug testing.\textsuperscript{16} These statutes will probably encourage other states to formulate similar legislation. However, in the absence of legislation, the courts have been left with the difficult task of balancing employers' rights to a drug free workplace with the employees' right to privacy.\textsuperscript{17} Thus, several law suits are pending throughout the country in which employers' drug testing is being challenged.\textsuperscript{18} These cases, which have yet to be decided, may define what a private employer can do with regard to testing and under what circumstances it may be done.\textsuperscript{19}

\begin{enumerate}
\item[14.] See Suffolk County, supra note 12, at 1221.
\item[16.] New Jersey was among the forerunners in this area. On November 13, 1986 the New Jersey Senate adopted a bill establishing uniform standards for preemployment and employment drug testing. State of N.J. Assembly No. 2850, "Pre-employment and Employment Drug Testing Standards Act" (1986). New Jersey has also introduced legislation that would require all drug testing facilities to be licensed. State of N.J. Assembly No. 3769 (1987).


\item[17.] Bishop, \textit{Drug Testing Comes to Work}, CAL. LAW., Apr. 1986, at 29 [hereinafter Bishop].
B. Private Employees and Their Constitutional Rights

The rights of employees being tested and the circumstances under which tests can be performed depend on whether the employer instituting the test is public or private.20

The outcome of legal issues implicated in drug and alcohol testing in the private sector is for the most part speculative due to the absence of any clearly defined legal precedent.21 Workers in private industry are not afforded the same constitutional protections as workers in the public sector.22 Federal constitutional rights, such as those set forth in the fourth23 and fourteenth24 amendments, protect the individual solely against the activities of the state.25 Therefore, unless the employer is a governmental entity, the employee generally does not have a constitutional right protecting him against employer-initiated searches.26 Private employers have successfully raised the "state action" requirement to defend against constitutional claims.

21. BNA Special Report, supra note 6, at 1.
22. Stille, supra note 2, at 23, cols. 2-3.
23. The fourth amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend IV. It is generally recognized that drug testing by public employers implicates fourth amendment protections. See United States v. Williams, 787 F.2d 1182, 1185 (7th Cir. 1986).

24. The fourteenth amendment states in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV.


The U.S. Constitution, more particularly, The Bill of Rights, generally does not limit the actions of a private employer opposite its employees unless a local, state or federal government has so far insinuated itself into a position of interdependence (with a private employer) that it must be recognized as a joint participant in the challenged activity.

by employees disciplined for drug use.27

Thus, unless the employee can show a "nexus between the state and the challenged action,"28 the private employer will not be subject to the constitutional restraints of the fourth and fourteenth amendments in implementing and conducting drug testing.29 A private employer is therefore afforded more flexibility than a public employer when testing employees for drugs.30 "However, to withstand legal challenge under common law privacy theories, employers' policies must, at minimum, be carefully drawn, accompanied by reasonable safeguards, necessitated by legitimate business considerations, and applied in a non-discriminatory fashion."31

Legal commentators also advise that a private employer keep abreast of judicial developments affecting the scope of the public employer's right to test for drugs.32 In the area of drug testing by public employers, the courts have generally attempted to balance employees' constitutional rights to due process and freedom from unreasonable searches and seizures against employers' right to a safe and drug-free environment, also taking into consideration the nature of the testing policy implemented.33 The courts have generally upheld testing of public employees in the transportation industry or other hazardous industries when the test is implemented "for cause"34 or

F.2d 1219 (5th Cir. 1982) (private company hired to play a dominant role in managing the U.S. Siani Field Mission held to be engaged in state action).

To establish that so-called "state action" existed, a complaining party must show that there was a sufficiently close nexus between the state and the challenged action so that the action of the private party may be treated as that of the state itself. Pursuant to this requirement, "constitutional standards are invoked only when it can be said that the state is responsible for the specific conduct of which the plaintiff complains."

Id. at 522 (citations omitted).
28. Trigg, supra note 26, at 220. See also Stevens, 576 F. Supp. at 522.
29. Id.
30. See Schachter & Geidt, supra note 4, at 20, col. 2.
31. Id. Across the nation a consensus seems to be forming that the workplace is an appropriate place to intervene in the problem of individual substance abuse. A responsibility is being imposed upon American businesses to take a more active role than ever before in bringing the national drug problem under control. Thus, since workplace substance abuse programs may well be one of the nation's best hopes for deterring drug abuse, they must be carried out intelligently and properly if they are to be effective. Id.
32. See Trigg, supra note 26, at 221.
33. See BNA SPECIAL REPORT, supra note 6, at 61.
34. See generally Feerick, Employee Rights and Substance Abuse, 195 N.Y.L. J. at
where there is reasonable suspicion to believe that the employees are under the influence of drugs or alcohol. Presently, there are too few cases from which to generalize. However, one might conclude that “reasonable suspicion” seems to be the standard that courts have applied in validating drug testing by governmental employers.

While the fourth and fourteenth amendments may not dictate reasonableness in testing by private employers, tailoring a testing program to a reasonableness standard may help to avoid subsequent legal problems. Thus, to the extent that a private employer’s testing programs can withstand scrutiny under strict constitutional standards (although likely not applicable), the private employer will be in a far better position to defend its program under less stringent common law standards.

C. Rehabilitation Act of 1973

Discrimination against the handicapped is one legal concern that an employer must consider when establishing a testing program to detect substance abuse among applicants or employees. The Rehabilitation Act of 1973 (Act) is a broad and comprehensive statute

1, col. 1 (1986) (No. 26). Testing that is triggered by an incident indicating possible drug use, for example, an accident while on the job is considered to be “for cause.” See id.


36. See McDonel v. Hunter, 612 F. Supp. 1122 (D. Iowa 1985) (holding that an acceptable balance between an employee’s fourth amendment rights and the employer’s concern could be realized by allowing blood and urine tests on the finding of a reasonable suspicion, based on objective facts indicating that the employee is then under the influence of alcoholic beverages or controlled substances). See also Allen v. City of Marietta, 601 F. Supp. 482 (D. Ga. 1985) (upholding federal government’s right to conduct urinalysis testing for employees engaged in extremely hazardous work); Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264 (7th Cir.), cert. denied, 429 U.S. 1029 (1976) (upholding state’s right to require bus drivers to submit to blood or urine tests after their involvement in an accident or when they are suspected of being under the influence of alcohol or narcotics); Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. Ct. App. 1985) (supporting the reasonable suspicion standard).

37. See Trigg, supra note 26, at 221.

38. As of the date of publication, it appears that no court has yet ruled directly on the issue of whether the Rehabilitation Act prohibits an employer from enforcing policies against substance abuse in the workplace. But see 45 C.F.R. pt. 84, app. A, 4 (1983). The Department of Health & Human Services, in its official explanation of its regulations implementing § 504, has stated that “employers may enforce rules prohibiting the possession or use of alcohol or drugs in the workplace, provided that such rules are enforced against all employees.” Id.
designed to protect handicapped individuals from discrimination.\textsuperscript{39} The Act is not directly applicable to private employers. However, federal contractors\textsuperscript{40} and employers receiving federal assistance\textsuperscript{41} are subject to the Act. The Act prohibits governmental contractors and recipients of federal grants from discriminating against “qualified handicapped individuals.”\textsuperscript{42} Additionally, laws in forty-five states and the District of Columbia prohibit employment discrimination by

\begin{itemize}
  \item \textsuperscript{39} 29 U.S.C. §§ 791-794 (1985).
  \item \textsuperscript{40} Id. § 793. Section 793 states in pertinent part:
    \begin{enumerate}
      \item Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(7) of this title. The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States.
    \end{enumerate}
  \item Id. § 794. Section 794 states:
    \begin{itemize}
      \item No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1973. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.
    \end{itemize}
  \item Id. §§ 793, 794.
  \item Definition of “Handicapped Individual” under the Rehabilitation Act of 1973 (29 U.S.C. 706(7))
    \begin{enumerate}
      \item Except as otherwise provided in subparagraph (B), the term “handicapped individual” means any individual who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (ii) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter.
      \item Subject to the second sentence of this subparagraph [sic], the term “handicapped individual” means, for purposes of subchapters IV and V of this chapter, 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 impairment. For purposes of sections 793 and 794 of
private sector employers based on an individual's handicap.\textsuperscript{43} Addiction to or abuse of alcohol or drugs may be protected handicaps under many of these state laws.\textsuperscript{44}

Most of the state laws are modelled after the Federal Rehabilitation Act.\textsuperscript{45} Two provisions—sections 503 and 504—are particularly applicable to the employment of present and former alcohol and drug users.\textsuperscript{46} The Act expressly excludes from the anti-discrimination provision:

Any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevent 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.\textsuperscript{47}

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this title as such sections relate to employment, such term does not include 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.

\textsuperscript{43} See Rothstein, supra note 26, at 432.


\textsuperscript{45} There are numerous differences among state statutes as to the coverage of drug abusers and alcoholics. For example, in the Texas statute the definition of “handicap” specifically excludes drug addiction. Texas Commission on Human Rights Act, Tex. Rev. Civ. Stat. Ann. art. 5221(k) (Vermont Supp. 1984). While the California handicap discrimination statute does not cover drug abusers and alcoholics, the state recently enacted an “alcoholic rehabilitation” law requiring all employers with 25 or more employees to reasonably accommodate alcoholic employees by affording them the opportunity to take unpaid time off from work to enter and participate in an employee assistance program. Cal. Lab. Code §§ 1023-1028 (1985). For a general discussion, see Walsh & Yohay, Drug & Alcohol Abuse in the Workplace: A Guide to the Issues, pt. V, at 17 (1986) (unpublished).

It is beyond the scope of this comment to describe in detail the state laws affecting drug testing programs in the workplace. The reader is strongly advised to consult state and local handicap laws prior to drawing any conclusions as to the legality of any particular program or its implementation, because the laws of many states differ considerably. See Fair Empl. Prac. Man., 8A Lab. Rel. Rep. (BNA) (compilation of state handicap laws).


\textsuperscript{47} Id. § 706(7)(B). The legislative history indicates that this 1978 amendment
Therefore, the Act limits the extent to which an individual may argue that his alcohol or drug use constitutes a protected handicap. 48

The statutory language does not exclude all current drug or alcohol users from the workplace. 49 Literally read, the language seems to mandate a demonstration that the "current use" of drugs or alcohol prevents employees from performing their jobs properly or that it creates a present threat to property or safety of others. 50 "Thus, the 'catch-22' for employees is that they must simultaneously prove that they are handicapped by their chemical dependency, but not so handicapped as to be unqualified to perform their jobs. 51

Accordingly, it appears that federal employees who have successfully conquered their drug or alcohol addictions are protected as handicapped individuals under section 504 of the Act. 52 Furthermore, federal employees who qualify as "handicapped individuals" are also protected under section 501 of the Act. 53 Under this section, federal agency employers have a duty to take affirmative action to aid


48. See Murphy & Treacy, supra note 6, at 7.

49. The U.S. Department of Health and Human Services has advised employers receiving federal aid as to their obligations:

With respect to the employment of a drug addict or alcoholic, if it can be shown that the addiction or alcoholism prevents successful performance of the job, the person need not be provided the employment opportunity in question. For example, in making employment decisions, a recipient may judge addicts and alcoholics on the same basis it judges all other applicants and employees. Thus, a recipient may consider—for all applicants including drug addicts and alcoholics—past personnel records, absenteeism, disruptive, abusive or dangerous behavior, violations of rules, and unsatisfactory work performance.


50. Husband, Drug and Alcohol Abuse in the Workplace, Lab. & Empl. Rev. 31-33 (Jan. 1986) [hereinafter Husband].

51. See Geidt, supra note 44, at 184.


53. Section 791(b) provides in pertinent part:

Each department, agency, and instrumentality . . . in the executive branch shall . . . submit to the Office of Personnel Management and to the Committee . . . an affirmative action plan program for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met.

handicapped employees and applicants. This obligation of affirmative action is more than a requirement of non-discrimination or even-handed treatment. These federal agency employers are required to make "reasonable accommodations" to assist handicapped employees unless they can show that such accommodations would impose an "undue hardship" on their businesses.

Due to the fact that federal employers are governed by a different set of laws and regulations regarding handicapped individuals than are private sector employers, the reasonable accommodation requirements found applicable to federal employers are not necessarily coextensive with those controlling private employers. These federal regulations, however, may foreshadow the kinds of measures that may be necessary in the private sector.

On the other hand, the Act has never been held to protect current substance users who may be identified by testing programs because these individuals do not necessarily meet the definition of an otherwise qualified "handicapped individual" under the Act.

Current substance abusers in the private sector will receive no statutory protection under the various state discrimination laws provided employers have followed three essential guidelines. First, employers should "relate any actions taken on account of drug test results to such things as overall poor performance, violations of rules governing being 'under the influence' in the workplace, and the safety impact of the individual." Second, employers should grant individuals showing signs of alcohol or drug dependence the opportunity to seek and obtain rehabilitative treatment. Third, in accommodating these handicaps, employers should not distinguish between alcohol and drug dependent individuals.

Finally, these handicap laws do not preclude employers' enforcement of rules prohibiting the possession or use of alcohol or

54. Id.
57. See Geidt, supra note 44, at 186.
58. Id.
60. Trigg, supra note 26, at 218.
61. Id.
62. Id.
drugs in the workplace, provided that such rules are enforced even-handedly against all employees.63

D. The Anti-Discrimination Laws

In addition to the restrictions imposed by the Rehabilitation Act of 1973, Title VII of the Civil Rights Act of 1964 and similar state laws prohibit discrimination in employment on the basis of race, religion, color, sex, or national origin.64 To avoid challenge under Title VII and similar state laws an employer implementing drug testing should apply these programs equally to both protected and nonprotected groups:

If the employer's policies with respect to its test can be shown to be applied equally to protected and nonprotected groups, and if it can be shown that no intention to discriminate can be demonstrated by having such rules, an individual employee claiming intentional discrimination faces a stiff legal challenge.65

However, were an employer to adopt a drug testing program which had a disparate impact upon a protected group, the employer would be required to show that the testing program was compelled by a business necessity and was the least burdensome method of achieving its objective.66 The most prominent case in this area is Beazer v. New York City Transit Authority.67

In Beazer, the United States Supreme Court addressed the issue of whether the denial of employment to methadone users violated the fourteenth amendment or Title VII.68 The New York City Transit Authority instituted a policy of not hiring past or present drug users, including former users receiving methadone maintenance treatment for their heroin addiction. The certified class instituting the suit consisted of individuals presently in methadone maintenance programs, but the class did not include applicants or employees currently using drugs. Relying primarily on two statistics,69 the trial court

65. Husband, supra note 50, at 32.
66. Rothstein, supra note 26, at 432.
68. Id. at 570.
69. These statistics are: first, that 81% of employees referred to the Transit
found that the policy adopted by the Transit Authority pertaining to individuals in methadone maintenance programs violated the fourteenth amendment of the United States Constitution as well as Title VII. The United State Supreme Court reversed and held that enforcement of the policy did not constitute a denial of equal protection. Furthermore, in rejecting the class Title VII claim, the Supreme Court held that even if the statistics established a \textit{prima facie} case of discrimination, it was rebutted by the employer's demonstration that its narcotics rule was "job related."

The \textit{Beazer} case has led commentators to conclude that actions based on drug test results of employees or applicants will not run afoul of state or federal anti-discrimination laws so long as employers select employees/applicants to be tested in a nondiscriminatory manner \textit{and} can show that the testing was compelled by a "business necessity," i.e., was reasonably necessary in the context of an overall approach of detecting and controlling the deleterious effects of drug abuse in the workplace.

Moreover, lower courts and administrative agencies which have been confronted with the issue have refused to recognize similar claims of disparate impact where the policy of not hiring a drug user is

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\textit{Id.} at 587. In this regard, the Court stated: [Plaintiffs] recognize, and the findings of the District Court establish, [the employer's] legitimate employment goals of safety and efficiency require the exclusion of all users of illegal narcotics, barbiturates, and amphetamines, and of a majority of all methadone users. . . . [T]hose goals are sufficiently served by—even if they do not require—[employer's] rule as it applies to all methadone users including those who are seeking employment in non-safety sensitive positions. . . . The record thus demonstrates that [employer's] rule bears a "manifest relationship to the employment in question."
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\textit{Id.} at 587 n.31.

72. See Trigg, supra note 26, at 217.
applied evenly to both blacks and whites, 74 and where, as in Beazer, refusal to place drug users in safety-sensitive positions is deemed proper as a business necessity. 75 Thus, with substance abuse affecting all socio-economic groups, common sense dictates that an individual would have little chance to establish disparate impact under recent interpretations of the Title VII theory. 76

III. Analysis

Massive drug testing, which was initiated by the military in 1981, is now being conducted by approximately one-third of all Fortune 500 companies in the United States, with drug tests being administered to almost 5 million Americans in 1986. 77 The cost of drug abuse in the workplace has caused corporations to take a new and aggressive approach to the problem of drug abuse. 78 The growing corporate trend is to require job applicants and employees to submit to urinalysis, blood assays, or breathalyzer tests. 79

76. See Trigg, supra note 26, at 217.
77. See Stille, supra note 2, at 1, col. 1. See also Abramowitz & Hamilton, Drug Testing on Rise: Corporate Concern Up But Abuse is Down, Washington Post, Sept. 21, 1986, at D1, col. 1 [hereinafter Abramowitz & Hamilton].
78. Abramowitz & Hamilton, supra note 77, at D4, col. 1. These authors noted that:
   [a]ccording to the study by the Research Triangle Institute, funded by the Department of Health and Human Services, drug abuse in 1980 cost $25.7 billion in reduced productivity and alcohol abuse cost $50.6 billion. Lost employment due to drug abuse cost $312 million, while lost employment due to alcohol abuse cost $4.1 billion. Treatment of drug abuse, often funded by employer-provided health insurance, cost $1.2 billion, while treatment of alcohol abuse cost $9.5 billion.
   Id. at D5, col. 1.
79. BNA Special Report, supra note 6, at 27.

Today, drug tests are being used by hundreds if not thousands of employers around the United States, according to testing laboratories and other observers. The exact number is unknown. However, recent surveys of the nation’s private employers shed some light on the developments. These include:

1. Surveys cited by the National Institute on Drug Abuse in a 1986 booklet on drug testing. According to the surveys, the percentage of Fortune 500 companies screening employees or job applicants for drug use rose from 3 percent to almost 30 percent between 1982 and 1985.
CORPORATE DRUG TESTING

A. Corporate Concerns

Corporations see new inexpensive drug tests as the cure to many work related ailments: absenteeism, rising health care costs, employee theft, accidents, poor workmanship, and low productivity.\(^{\text{63}}\) Thus, corporations are taking preventative measures, in the form of drug testing, in order to arm themselves against these substance-abuse-related problems. Four primary reasons have been cited by corporations to justify the implementation of such screening programs: (1) increased costs, (2) security threats, (3) potential liability, and (4) the lingering effects of drug use.\(^{\text{61}}\)

1. Increased Costs

Employers’ primary objective is to achieve the highest possible productivity from their employees. In order to accomplish this goal, employers must minimize the economic cost of substance abuse in the workplace.\(^{\text{62}}\) Several studies have shown that employees who engage in drug use are far less productive than their co-workers. For example, drug abusers are ten times more likely to be absent or late and are three times as likely as non-users to injure themselves or someone else.\(^{\text{63}}\) Moreover, employees using drugs have increased health care needs and are more likely to require disciplinary action.\(^{\text{64}}\)

As a result of the increased number of industrial accidents caused by employee substance abuse, there has been an increase in employer liability for workmen’s compensation benefits.\(^{\text{65}}\) Studies have esti-

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laboratory. It found that 18 percent of the firms acknowledged testing employees or job applicants, with another 20 percent saying they expected to begin testing within the next two years.

- A 1985 survey by the American Society of Personnel Administrators (ASPA). Answered by 390 firms, it found the following: 12 percent of firms screen current employees for drug use; 9 percent screen current employees for alcoholism; 17 percent screen applicants for drug use; and 13 percent screen applicants for alcoholism.

Id. 80. Stille, supra note 2, at 1, col. 2.
82. Id. at 407.
84. Lehr & Middlebrooks, supra note 81, at 407. See generally Bookspan, supra note 16.
mated that substance abusers file five times as many workers’ compensation claims as other employees.\textsuperscript{86} In general, where an employee is injured due to his or her own intoxication, the employer may use this as a defense in a worker’s compensation claim.\textsuperscript{87} However, for an employer to use this as a defense, the level of intoxication must be higher than the level required for conviction of drunk driving.\textsuperscript{88} Thus, an employee’s limited involvement with alcohol during industrial accidents will usually not relieve an employer of liability for an injury to the employee.\textsuperscript{89} Furthermore, this intoxication defense seems to be limited to alcohol and may not be applicable to drugs.\textsuperscript{90}

Under new worker’s compensation theories, a potentially more threatening expense may arise. Where an employee claims his or her narcotics addiction or alcoholism is due to an industrial injury, an employer may be held liable for causing the employee’s problem.\textsuperscript{91} The case of California Microwave, Inc. & Pacific Indemnity Co. \textit{v.} Worker’s Compensation Appeals Board\textsuperscript{92} exemplifies this very problem. In Microwave, an employee who claimed he was disabled as a result of a drinking problem which was created and aggravated by the pressures of his job was awarded benefits by the California Worker’s Compensation Appeals Board (WCAB).\textsuperscript{93} When the employee began his job as a mailroom clerk, he was a non-drinking alcoholic. The company grew in size over the next several years and as a result, the employee’s workload increased. After requesting additional help from his employer, and being refused, the employee began to drink. The employee’s drinking became so problematic that on one occasion he attempted suicide while intoxicated. The employee was hospitalized for a short period of time and then returned to work. However, soon after his return, the employee began to drink again and was rehospitalized. The diagnosis showed that the employee was suffering from depression and organic brain damage which rendered him totally

\textsuperscript{86} See Madonia, \textit{Managerial Responses to Alcohol \& Drug Abuse Among Employees}, \textit{Personnel Administration} 134 (June 1984).
\textsuperscript{87} \textit{BNA Special Report}, supra note 6, at 67.
\textsuperscript{88} \textit{Id}. The level required for a conviction of drunk driving varies from state to state, and ranges from 0.05 to 0.10 blood alcohol content (BAC). \textit{See, e.g., Ala. Code} § 32-5A-191(a)(1) (1983) (0.10 BAC); \textit{N.J. Stat. Ann.} § 39:4-50.1 (West Supp. 1987) (same).
\textsuperscript{89} \textit{BNA Special Report}, supra note 6, at 67.
\textsuperscript{90} \textit{See J A. Larson, Worker’s Compensation Law} §§ 34.00-.39 (1985).
\textsuperscript{91} \textit{BNA Special Report}, supra note 6, at 67.
\textsuperscript{92} 45 Cal. Comp. Cas. 125 (1980).
\textsuperscript{93} \textit{See Geidt, supra note 44, at 192.}
disabled. The employee was awarded benefits by the California WCAB based on the fact that he had suffered an industrial injury and nervous tension that caused his drinking problem and ultimately his total disability. The California court subsequently upheld the WCAB’s ruling. 94

“This decision may portend a general recognition of drug and alcohol dependency as ‘industrial’ illness—or at least as by-products of compensable industrial stress—plus expanding employees’ entitlement to compensation and treatment within the frame work of the Workers’ Compensation Laws.” 95 Thus, it is apparent that drug and alcohol use by employees is a costly expense to any business.

2. Security Threat

Second, employers are concerned about the security of their businesses. 96 One such security problem is theft. According to a recent article, addicts with expensive habits are much more likely to steal products from a storeroom, money from a register, or equipment from a warehouse than are those without a drug problem. 97 More importantly, larger corporations fear that substance abusers may disclose confidential information. 93 For example, an employee working for a corporation in the defense industry may sell defense secrets to support his drug habit. “Moreover, because criminal narcotics-possession charges could lead to a loss of security clearance necessary for many jobs in the defense industry, drug abusers are extremely vulnerable to blackmail.” 99

3. Potential Liability

A third factor cited by employers to support drug testing is the recent expansion of the employer’s duty to the general public regarding the actions of its employees. 100 In the past few years, there has been a substantial increase in litigation resulting in liability of

94. Id.
95. Id.
96. Lehr & Middlebrooks, supra note 81, at 408.
97. Castro, supra note 83, at 53. In a telephone conversation with Peter Gold, Administrator of the National Drug Abuse Cocaine hotline, it was disclosed that cocaine users, for example, become obsessed with obtaining money to buy cocaine. This fuels the problem of theft, crime, drug sales, and other criminal activity.
98. Castro, supra note 83, at 53.
99. Id.
100. See Lehr & Middlebrooks, supra note 81, at 407.
employers for the actions of their employees. For example, in the 1983 case of Otis Engineering Corp. v. Clark, the Texas Supreme Court took an expansive view of an employer's duty to control employees who are under the influence of alcohol or drugs. In Otis, a machine operator who was discovered to be intoxicated on the job was dismissed early because his intoxication was a safety hazard. While escorting the employee to his vehicle, the supervisor asked if he was able to drive home. The employee stated that he could make it home on his own. While driving home the employee was involved in a fatal accident killing two occupants of another vehicle, as well as himself. The court held that the families of the two victims had a right to sue the company for wrongful death, even though the employee was off duty when the accident occurred. The court stated:

When, because of an employee's incapacity, an employer exercises control over the employee, the employer has a duty to take such action as a reasonably prudent employer under the same or similar circumstances would take to prevent the employee from causing an unreasonable risk of harm to others. Such a duty may be analogized to cases in which a defendant can exercise some measure of control over a dangerous person when there is a recognizable great danger of harm to third persons.

Traditionally, employers have been held vicariously liable for employees' acts committed in the scope of their employment. Under the doctrine of respondeat superior, the employer may be held liable for negligence in selecting or dealing with an employee, or for the actions of an employee which the employer authorized. However, in the Otis case, the employee was not acting within the scope of his employment and, therefore, the company could not be held vicariously liable. Instead, the plaintiffs argued that the company was directly liable due to the supervisor's failure to control the

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101. 668 S.W.2d 307 (Tex. 1983).
102. Id. at 309.
103. Id. at 311.
104. Geidt, supra note 44, at 191.
intoxicated employee. The Otis decision implies that an employer may have an affirmative duty to control an employee who is under the influence of drugs or alcohol. Despite this decision, an employer has seldom been found to have an obligation to control its employee in this type of situation.

It is still an open question whether the reasoning applied by the Otis court will be adopted by other courts. Meanwhile, employers should be prepared to take appropriate measures to prevent employees who are noticeably impaired by alcohol or drugs from causing injury to themselves or others.

Another similar concern of corporations is the safety of their employees. Both the Occupational Safety and Health Act (OSHA) and state employment safety statutes require employers to provide a safe workplace. Thus, the safety hazards posed to co-workers by employees using drugs or alcohol at work are of grave concern to employers. Failure to deal with an employee’s substance abuse may violate certain legal duties owed to other employees under these safety laws.

108. Otis, 668 S.W.2d at 309.
110. But see Brockett v. Kitchen Boyd Motor Co., 264 Cal. App. 2d 69, 70 Cal. Rptr. 136 (Cal. Ct. App. 1968) (employer was held liable for injuries sustained by third parties in an accident caused by its intoxicated minor employee on the way home after an office Christmas party). Both the Texas and California courts treat an intoxicated employee as a dangerous instrumentality as to whom the employer must exercise reasonable care to protect the public. Id. See also Otis, 668 S.W.2d at 309.
111. Geidt, supra note 44, at 191.
112. 29 U.S.C. §§ 651-678 (1982). Under the Act all rulemaking and enforcement authority is vested in the Secretary of Labor (Secretary) and is administered by the Occupational Safety and Health Administration (OSHA), id. §§ 655-659. The Act authorizes the Secretary to conduct inspections, id. § 657, and to issue citations, 29 U.S.C. § 658 (1976), against employers found to be in violation of the Act’s “general duty clause,” id. § 654(a)(1), or specific standards promulgated by the Secretary, id. § 654(a)(2). The employer or any employee may challenge a citation by filing a notice of contest within 15 working days. Id. § 659.
113. Schachter & Geidt, supra note 4, at 21, col. 2. See, e.g., 29 U.S.C. § 654(a)(1) (1982) which provides: “Each employer—(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” See generally M. Rothstein, OCCUPATIONAL SAFETY AND HEALTH LAW ch. 6 (2d ed. 1983).
114. Schachter & Geidt, supra note 4, at 21, cols. 1-2.
115. Id.
4. The Lingering Effects of Drugs

Finally, employers today believe that their employees represent the corporation twenty-four hours a day, 365 days a year.116 Corporations no longer accept the argument that what employees do on their own time is none of the company's business.117 This "private time" concept has been further undermined by new evidence of lingering effects of drug use.118 In November 1986, the results of a study on the effect of marijuana use on the ability of pilots to land aircrafts was published.119 The pilots in the experiment tested their skills in flight simulators after smoking one marijuana cigarette containing 19 milligrams of tetrahydrocannabinol (THC).120 The results showed that even a full day later, long after any sensation of intoxication had passed, the pilots were still swerving dangerously when attempting to land; one pilot even lost control and crashed beside the runway.121 The researchers concluded that marijuana users may have trouble performing "complex behavior and cognitive tasks" or doing work that demands quick reactions for up to twenty-four hours after using the drug.122 The researchers also noted that some results may be analogous to other tasks performed by employees in the business sector.123

Employers must realize that marijuana and alcohol affect employees differently. Unlike alcohol which is quickly metabolized to water and carbon dioxide, THC is fat soluble and thus remains in the body for longer periods of time.124 This is the key factor causing

116. Lehr & Middlebrooks, supra note 81, at 408.
117. Castro, supra note 83, at 61. See also Geidt, supra note 44, at 195. It is a widely accepted principle of arbitral law that what employees do on their own time is their own business and is not an appropriate subject of disciplinary action, unless the conduct could reasonably be said to affect the company's business, reputation, or product; render the employee unable to perform properly the duties of the job; or affect other employees' morale or willingness to work with the employee. Today, however, this principle has deteriorated with regard to drug and alcohol use. Id.
118. See Castro, supra note 83, at 61.
120. SYVA Company, Marijuana and the Emit Cannabinoid Assay (June 1981). (THC is the active compound in marijuana which is responsible for the mind-altering effect of the drug.)
121. Id. See Yesavage, supra note 119, at 1328.
122. Id.
123. Id.
124. Dupont, Dr., Substance Abuse in the Construction Industry: The Problem & its
positive urine tests for marijuana several days (or sometimes several weeks) after use of the drug.\textsuperscript{125} Opponents of drug testing and civil libertarians argue that because the results do not show present intoxication, but mere use of the drug, the tests are unfair and an invasion of privacy.\textsuperscript{126} However, this argument presupposes that drug use away from work does not affect an employee's productivity. As one study has indicated, this argument may no longer be valid.\textsuperscript{127}

\textbf{B. The Employee and Applicant Perspective}

Employees and applicants perceive drug testing as an invasion of their privacy, arguing that the tests are inaccurate and, furthermore, do not reveal whether an employee is impaired on the job.\textsuperscript{128} Opponents of testing have argued that:

\begin{quote}
\begin{center}
\textit{drug programs are a seductive, quick-fix answer that is, in fact, incapable of solving the drug problem and sure to create a series of negative side effects. Citing instances of testing abuse, they challenge both the reliability and constitutionality of such testing and predict it will ruin the careers of tens of thousands of innocent people and trample the civil liberties of millions more}.\textsuperscript{129}
\end{center}
\end{quote}

\textbf{1. Job Applicants}

Job applicants are the most frequently tested group in the employment field. A recent survey by the Council on Marijuana and Health shows that 29\% of the thirty-five (35) companies surveyed test job applicants, compared to the 26\% that screen employees under certain conditions.\textsuperscript{130} The pre-employment medical examination has long been a recognized practice in American industry.\textsuperscript{131}

\footnotesize
\textit{Identification} 9 (July 17, 1986) (presented at the National Conference on Substance Abuse in Construction, Minneapolis, Minn.).
\textsuperscript{125} See SYVA Company Marijuana and the Emit Cannainoid Assay (June 1981).
\textsuperscript{126} Castro, \textit{supra} note 83, at 59.
\textsuperscript{127} See \textit{supra} notes 119-23 and accompanying text.
\textsuperscript{129} Stille, \textit{supra} note 2, at 1, col. 2.
\textsuperscript{130} \textit{Id.} at 23, col. 3.
\textsuperscript{131} Rothstein, \textit{Employee Selection Based on Susceptibility to Occupational Illness}, 81
Extensively used, its purpose "apparently was to select only physical and mental paragons" and to exclude individuals with psychological, medical, or "other" problems. The proclaimed purposes of pre-employment screening exams are (1) to protect the employer from unfit workers; (2) to protect the employee from assignment to a job which may be harmful; and (3) to correct remediable physical defects. The pre-employment medical examination also provides an essential function of health surveillance, by giving a composite of the employee's state of health prior to work, a background of previous exposures, and a baseline for comparison with later observations.

Many companies conduct drug screening as part of the physical examination that is required for employment. As a result, applicants may never know that they have been tested for drug use. Furthermore, there is no legal requirement to inform an applicant of the results of a drug screen or to disclose why the applicant was not hired. However, although pre-employment drug screening appears to be perfectly legal, it is still advisable to inform the applicant prior to testing.

Labor attorneys state that a private employer may impose any type of employment restriction so long as the restriction imposed does not violate the employee's civil rights or other discrimination statutes.

Mich. L. Rev. 1379, 1412 (May 1983) [hereinafter Rothstein]. Rothstein set out the following statistics:

19.2% of employees in small plants (8-249 workers) are required to undergo a preplacement examination, 48.9% of employees in medium-sized plants (250-500 workers) and 83.3% of employees in large plants (over 500 workers) are required to undergo examination.

Furthermore, in several industries, such as petroleum and coal products (93.5%), primary metal industries (92.4%), and transportation equipment (90.8%), preplacement medical examinations are even more prevalent. Individuals who refuse to cooperate with the examination are rejected.

Id. at 1412 n.251 (citations omitted).

133. Id.
134. Rothstein, supra note 131, at 1412 (citing Cooper, Health Surveillance Programs in Industry, 3 Patty's Industrial Hygiene & Toxicology 595, 596 (1979)).
136. Id.
137. BNA Special Report, supra note 6, at 73. "Pre-employment drug screens do not violate any existing state or federal statute or any common law doctrine if performed reasonably." Id.
138. Id.
139. Trigg, supra note 26, at 223.
140. O'Boyle, supra note 135, at 6, col. 4.
"Generally, pre-employment testing is permissible since job applicants do not have the vested employment rights of current employees. Employers may properly establish freedom from use of illicit drugs as a condition of employment." For this reason, job applicants have very few rights in the area of private pre-employment screening. This may be the reason that so few, if any, lawsuits have been instituted by job applicants who were not hired due to the results of a drug test.  

2. Present Employees

Employees may have more expansive rights than applicants with regard to drug testing by private employers. Private employers must be careful not to violate any of the employees' common law rights based on tort or contract law. Improperly conducted drug testing may give rise to causes of action such as wrongful discharge, invasion of privacy, defamation, and intentional infliction of emotional distress. However, these common law causes of action are not as protective as they may at first seem.

a. Wrongful Discharge

Employees who have been terminated from employment on the basis of alcohol and drug screening can assert a tort remedy for wrongful discharge, based on any one of the several exceptions to the employment-at-will doctrine. The employment-at-will doctrine allows an employer to terminate employees at any time, for any reason or for no reason at all, unless the employees are protected by an employment contract of fixed duration. Courts are split on the issue of whether handbooks or manuals constitute a binding

142. See O'Boyle, supra note 135, at 6, col. 4.
143. See Rothstein, supra note 26, at 433.
144. See infra text accompanying notes 145-92 (discussing the various causes of action available such as: wrongful discharge, invasion of privacy, defamation, and intentional infliction of emotion distress).
146. See Satterfield v. Lockheed Missiles & Space Co., 617 F. Supp. 1359, 1361 (D.S.C. 1985). Under the employment-at-will doctrine, a contract for permanent employment of an indefinite duration, which is not supported by any consideration other than the obligation of services to be performed on the one hand, and wages to be paid on the other, is terminable at the will of either party. Id.
Therefore, it is difficult to predict whether the discharge of an employee subject to the employment-at-will rule will give rise to liability for breach of contract.

When a breach of contract argument fails, employees will look to other exceptions to the employment-at-will doctrine. One such exception to the doctrine is the claim that the employer-instituted action, in this case drug testing resulting in termination of employment, is in contravention of a significant public policy. In the area of employee protection, the general trend has been to look to specific state statutes which protect employees against certain practices of employers that are deemed intrusive. However, no state court has found discharges arising from drug testing or refusal to submit to drug testing to be in contravention of public policy. Because there are few state bans on drug testing, and therefore generally no public policies to contravene, there generally is no basis for a public


149. Lehr & Middlebrooks, supra note 81, at 413. In this context, polygraph examinations provide an excellent source of comparison with drug screens. Approximately one-half of the states have enacted statutes banning the use of polygraph tests in employment situations. Id.

150. Trigg, supra note 26, at 219.

151. See supra note 15.
policy exception to the employment-at-will doctrine.\textsuperscript{152}

Another exception to the employment-at-will rule is known as the implied covenant of good faith and fair dealing.\textsuperscript{153} It is argued that an implied covenant of good faith and fair dealing requires, \textit{inter alia}, each party in the relationship to act with good faith and fairness toward the other concerning all matters related to the employment.\textsuperscript{154} Further, neither party should take any action to unfairly prevent the other from obtaining the benefits of the employment relationship.\textsuperscript{155} However, in the context of employment at will, where the law accords the employer an unfettered right to terminate the employment at any time, "it would be incongruous to say that an inference may be drawn that the employer impliedly agreed to a provision which would be destructive of his right of termination."\textsuperscript{156} Thus, a number of jurisdictions have refused to extend the covenant of good faith and fair dealing found in the commercial setting to the at-will employment area.\textsuperscript{157} "So long as employers develop and follow clear policies and procedures regarding submission to drug testing and are careful not to 'guarantee' such procedures to employees such that a contract will be found, discipline of 'at will' employees will not be subject to the recognized exceptions."\textsuperscript{158}

b. \textit{Invasion of Privacy}

Employees terminated for refusal to submit to an alcohol or drug test or based upon the results of such a test may assert a claim for invasion of privacy.\textsuperscript{159} The employee would probably rely on the

\textsuperscript{152} See Trigg, \textit{supra} note 26, at 219.
\textsuperscript{153} See BNA \textit{Special Report}, \textit{supra} note 6, at 75-76.
\textsuperscript{154} \textit{Id.}
\textsuperscript{155} \textit{Id.}
\textsuperscript{158} Trigg, \textit{supra} note 26, at 219.
\textsuperscript{159} Connolly & Kahan, \textit{supra} note 145, at 1, col. 1. The law of privacy comprises four distinct types of privacy invasions. These are linked together by a
type of invasion of privacy known as "intrusion upon seclusion," arguing that he was coerced into submitting, and that the intrusion upon his physical seclusion or solitude was unreasonable. However, in order to succeed under this theory, the plaintiff must show that the intrusion would be highly offensive and objectionable to the reasonable person. Since employers have legitimate workplace concerns about drug use and the reasonable person would not find these tests highly offensive, blood and urine tests should not be deemed an unreasonable intrusion or invasion of one's privacy. Furthermore, for private sector employees, "actions for invasion of privacy are unlikely to be successful because the employee is under no compulsion to submit to the test even though refusal may mean discharge."

A similar cause of action may exist under the tort of invasion of privacy when an employer publicly discloses private facts about an employee. There are, however, certain obstacles confronting an employee relying on this cause of action. Under a cause of action for the publicizing of one's private affairs with which the public has no legitimate concern, an essential element of recovery is a showing of a public disclosure of private facts. Therefore, in order to

common name, but otherwise have almost nothing in common, except for the fact that they involve various aspects of a plaintiff's claimed "right to be let alone." These four different torts are: (1) appropriation, (2) intrusion upon seclusion, (3) public disclosure of private facts, and (4) false light in the public eye. See W. Prosser, Law of Torts 802-18 (4th ed. 1971).

160. As defined in the Restatement (Second) of Torts 652B (1977), Intrusion upon Seclusion, provides: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."

161. Connolly & Kahan, supra note 145, at 1, col. 1.
162. See Restatement (Second) of Torts 652B comment (a).
163. BNA Special Report, supra note 6, at 66.

165. The publicizing of details of one's private life may be an invasion of his or her privacy. As in the case of "intrusion upon seclusion," the effect here must also be "highly offensive to a reasonable person." Restatement (Second) of Torts 652D (1977).

166. See, e.g., Beard v. Akzona, Inc., 517 F. Supp. 128 (E.D. Tenn. 1981) (communication to an individual or small group will not give rise to liability absent breach of contract, trust, or other confidential relationship).
maintain this cause of action, an employee must show that such private facts were publicized.\textsuperscript{167} Courts have held that dissemination of private information to a few co-workers will not satisfy the public disclosure requirement.\textsuperscript{163} Furthermore, employers have a qualified privilege to disseminate information in order to protect their own interests.\textsuperscript{169} Thus, in the area of drug testing, it appears that an employee faces an almost impossible challenge in succeeding under a cause of action for invasion of privacy.

An employer, however, should review the applicable state constitution and other related laws dealing with privacy before implementing a drug testing program.\textsuperscript{170} At least nine states have express constitutional provisions that refer to a right to privacy.\textsuperscript{171}

Since there is no case law discussing the relationship between drug testing programs and state privacy statutes, it is difficult to predict whether any of these statutes will provide individual protection to employees against such testing programs.\textsuperscript{172} In general, employers will not run afoul of state privacy laws if they follow three essential guidelines. First, employers should advise employees well in advance of the possibility of testing,\textsuperscript{173} and obtain the employees' written consent to test as well as consent to release the test results to the employer.\textsuperscript{174} Second, the tests should be conducted in a reasonable manner as part of a comprehensive drug program under conditions designed to minimize potential offensiveness.\textsuperscript{175} Third, availability of

\textsuperscript{167} Satterfield, 617 F. Supp. at 1370.
\textsuperscript{168} See, e.g., Eddy v. Brown, 715 P.2d 74 (Okla. 1986) (an employer's notifying a small number of co-workers that an employee was receiving psychiatric treatment was not sufficient to allow recovery based upon invasion of privacy). See also Satterfield, 617 F. Supp. at 1370.
\textsuperscript{169} The Restatement (Second) of Torts holds that the absolute and qualified privileges allowable in defamation actions are also available in invasion of privacy actions. Restatement (Second) of Torts 652F, G (1977).
\textsuperscript{170} Trigg, supra note 26, at 216.
\textsuperscript{171} Murphy & Treacy, supra note 6, at 10. The nine state constitutions are: ALAS. Const. art I, sec. 22; ARIZ. Const. art II, sec. 8; CAL. Const. art. I, sec.1; HAW. Const. art I, sec. 5; ILL. Const. art I, sec. 12; LA. Const. art. I, sec. 5; MONT. Const. art. II, sec. 9; S.C. Const. art. I, sec. 10; and WASH. Const. art. I, sec. 7.
\textsuperscript{172} See Murphy & Treacy, supra note 6, at 11.
\textsuperscript{173} See Trigg, supra note 26, at 216.
\textsuperscript{174} Id. See, e.g., Jeffers v. City of Seattle, 23 Wash. App. 301, 597 P.2d 899 (1979) (employee's written consent may be a knowing waiver to privacy rights). Cf. Rothstein, supra note 26, at 433 (privacy action unlikely to succeed because employee's written consent does not compel submission to testing).
\textsuperscript{175} Trigg, supra note 26, at 216.
test results should be limited to a strict need-to-know basis; only those representatives of the employer who are involved in the decision-making process concerning test results should be told.\textsuperscript{176} Finally, employers must be cautious when disclosing the results of drug tests. If the results of the test are incorrect, the employer may be held liable for defamation.\textsuperscript{177}

c. **Defamation**

Defamation in the employment setting occurs when an employer communicates false information to a third person which tends to injure the reputation of an employee.\textsuperscript{178} Employers who blindly rely on the results of a laboratory drug test and then act hastily on the basis of such results might find themselves embroiled in costly litigation. For example, employers may face a defamation claim when they negligently disseminate false information concerning alcohol or drug use by current or former employees.\textsuperscript{179} However, employers have a qualified privilege to "defame" employees by communicating information within the corporation to individuals who have a legitimate, job-related interest in the statement.\textsuperscript{180} As a general rule, if

\textsuperscript{176} Id. Employers may be held liable for invasion of privacy when potentially acceptable actions have been done in an offensive, extreme, or outrageous manner. Id. See, e.g., O'Brien v. Papa Gino's of Am., Inc., 780 F.2d 1067 (1st Cir. 1986) (polygraph of employee relating to private drug use); Love v. Southern Bell Tel. & Tel. Co., 263 So. 2d 460 (La. Ct. App.), cert. denied, 262 La. 1117, 266 So. 2d 429 (1972) (uninvited entry into employee's living quarters after employee had not reported to work). Cf. Gretencord v. Ford Motor Co., 538 F. Supp. 331 (D. Kan. 1982) (employee cannot sue employer for damages for invasion to privacy when he successfully prevented employer from searching his car).

\textsuperscript{177} Trigg, supra note 26, at 216-17.

\textsuperscript{178} Lehr & Middlebrooks, supra note 81, at 410. The elements of defamation have been stated to be:

1. The defamatory words must concern the plaintiff;
2. The words must be published; the intent to publish, not the intent to defame, is the required intent;
3. The published material must be false and must damage the plaintiff's reputation (in some cases damages may be presumed); and
4. Regarding fault . . . in the case of "private" individuals, the plaintiff [must prove] negligence.

\textsuperscript{179} Connolly & Kahan, supra note 145, at 2, col. 4. See also Rothstein, supra note 26, at 429.

\textsuperscript{180} Connolly & Kahan, supra note 145, at 2, col. 5. An employer is conditionally privileged to protect his own interests, if these interests are determined to be sufficiently important, and the defamation is sufficiently related to those interests. See Restatement (Second) of Torts 594. See generally Comment, Qualified Privilege to Defame Employees and Credit Applicants, 12 Harv. C.R.-C.L. L. Rev. 143 (1977).
an employer communicates a statement properly limited in scope to someone with a legitimate interest in the information, in good faith and on a proper occasion, the statement will be regarded as privileged and not defamatory. 181

Employers will most likely be protected from defamation liability if they follow three important guidelines. First, employers should implement drug testing procedures designed to eliminate false positives. 182 Second, all positive results should be tested a second time for confirmation before any action is taken. 183 Finally, employers should release the test results only to those persons who have the “need to know.” 184

d. Intentional Infliction of Emotion Distress

An employee who has been dismissed due to either the refusal to submit to a drug test or due to the results of such a test may argue that the dismissal caused severe emotional distress. For an employee to recover under the tort of intentional infliction of emotional distress, there are certain elements which must be proven. 185 These elements are as follows:


182. Trigg, supra note 26, at 217. False positives are positive test results which occur even though the person tested has never used the drug. One way that a false positive is said to occur is through passive inhalation of marijuana by a non-smoker. Hunter, supra note 128, at 1458-59 (footnote omitted). False positives can also result from cross-reactivity (where the test is unable to distinguish two chemically similar substances and operator error). Morgan, The Problems of Mass Urine Testing for Misused Drugs, 16 J. Psychoactive Drugs 305, 306-08 (1984).


184. Id. at 226. See Rothstein, supra note 26, at 429 (limited privilege for employers to disclose false information). See also Houston Belt & Terminal Ry. v. Wherry, 548 S.W.2d 743 (Tex. App.), cert. denied, 434 U.S. 962 (1977) (employer found liable for defamation after it published written statements regarding drug screen results allegedly showing a trace of methadone); Andrews v. Mohawk Rubber Co., 474 F. Supp. 1276 (E.D. Ark. 1979) (elements of qualified privilege defined).

185. See Restatement (Second) of Torts 46 (1977).
(1) The defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct . . . .

(2) The conduct was so "extreme and outrageous as to exceed 'all possible bounds of decency' and must be regarded as 'atrocious, and utterly intolerable in a civilized community . . . .'"

(3) The actions of the defendant caused the plaintiff's emotional distress; and

(4) The emotional distress suffered by the plaintiff was "severe" so that "no reasonable man could be expected to endure it." 186

As one can see, these three elements clearly limit the opportunity for an individual to recover under the tort of intentional infliction of emotional distress. 187

The case of Satterfield v. Lockheed Missiles & Space Co. 188 exemplifies the difficulty which confronts an employee who wishes to recover under this cause of action. In Satterfield, an electronics missile technician was terminated from his position based on two positive test results. As part of Satterfield's employment, he was required to have an annual physical examination. Certain employees at the facility, including Satterfield, were also required to submit to urinalysis testing for marijuana. Satterfield took a urine drug screen test on July 28, 1981 and tested positive. A retest conducted less than one week later confirmed the positive result. Lockheed informed Satterfield of both positive test results and termination of his employment. He and his wife subsequently brought suit based on four causes of action, including intentional infliction of emotional distress. 189

The United States district court, relying on section 46 of Restatement (Second) of Torts, rejected plaintiffs' claim of intentional infliction of emotional distress allegedly caused by his termination from employment. 190 The court cited the business-like fashion in which the employer advised Satterfield of the positive test results and of

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186. See id. at 46, Comments d, i, j (1977).
189. Id. at 1360. The other causes of action were wrongful termination, breach of implied covenant of good faith and fair dealing, and invasion of privacy. Id.
190. Id. at 1365-69.
his termination; and it also noted the employer’s subsequent conversations with Satterfield concerning the test results, even after his termination. The court concluded that the employer, “Lockheed, did not act outrageously toward the plaintiff and, in fact, that it acted properly and within the parameters of civilized conduct in terminating Satterfield.” Thus, if an employer handles testing discreetly and acts within the parameters of acceptable conduct as it relates to the common law principles of privacy and defamation, the employer will not be susceptible to a successful challenge based upon the tort of intentional infliction of emotional distress.

C. Employer Guidelines

Should an employer decide to institute drug screening procedures, then certain practical guidelines should be followed in order to protect the confidentiality and privacy of any applicant or employee as well as to protect the employer from potential liability. To begin with, testing should be conducted in the least intrusive and most confidential manner possible under the given constraints of each procedure. Secondly, the program should attempt to ensure the accuracy of the test. This includes selection of a reputable laboratory, use of confirmatory tests in order to reduce the risk of false positives, and ensuring proper chain of custody procedures to prevent claims that the wrong sample was tested. Furthermore, the number of persons involved in the procedure should be minimized, and all information related to the testing should be communicated to others only on a strict need-to-know basis. Supervisors should be properly trained and sensitized as to the handling of testing procedures and the results of such procedures. Finally, supervisors and other management personnel involved in any testing procedures should be explicitly warned not to disseminate confidential information regarding such tests or the results of such tests to persons not specifically authorized to receive such information, including family and friends.

191. Id. at 1367-68.
192. Id. at 1369.
194. Id.
195. Id.
196. Id.
197. Id. In addition to this requirement, there should be no written memoranda
IV. Union Employers

A. Collective Bargaining

Unions have responded in various ways to employer drug testing programs. Generally speaking, a number of unions, rather than opposing all testing procedures, have insisted that employers bargain over drug screening programs. Union demands usually include limitations on the time, place, and circumstances of testing. Furthermore, unions want employers to allow employees who test positive to retain their jobs and enter employee assistance programs (EAP), rather than be terminated. Thus, "[i]f the issue of private sector drug testing is not settled in court or by legislation, there is a good chance it will be resolved by collective bargaining agreements." When implementing and enforcing drug testing programs, a unionized employer must adhere to certain legal duties which may be directly or indirectly applicable to testing procedures. The National Labor Relations Act (NLRA) is the most important statute concerning testing except as positively necessary and as authorized by the company.

Id.

199. BNA Special Report, supra note 6, at 33. For example, the International Brotherhood of Teamsters has insisted that management bargain over the terms of drug testing programs. Id. See also Connolly & Kahan, supra note 145, at 1.
200. BNA Special Report, supra note 6, at 33.
201. Id.
202. Bishop, supra note 17, at 31-32. This author states: Nowhere has this process been under more public scrutiny than in the world of professional sports. [For example, in May of 1985] Baseball Commissioner Peter Ueberroth [announced] a mandatory drug testing program for cocaine, amphetamines, marijuana, heroin and morphine. The program, which would cover managers, coaches, trainers, minor league players and management personnel, was viewed as a thinly veiled attempt to pressure the major league players' union to either encourage players to voluntarily participate in the testing or include the testing in players' contracts. [In November of 1985], a survey of all 26 [baseball] clubs showed that little testing had actually been done. Nevertheless, an increasing number of clubs are attempting to include mandatory testing clauses in guaranteed contracts. [Thus], if anything, the controversy shows that professional athletes are not so different from other mortals in the workday world. And for that matter, drug abuse may not be so different from alcohol abuse on the job.

Id.

203. Rothstein, supra note 26, at 430.
regulating labor-management relations in the private sector. According to the NLRA, it is an unfair labor practice for an employer to refuse to collectively bargain with the employees' representative concerning mandatory subjects of bargaining. The NLRA defines the duty to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment..."

It seems clear that the implementation of testing, as well as most aspects of a comprehensive screening program, would be considered a change in the terms and conditions of employment. As such, the decision of whether and how to implement a drug testing program would be a mandatory subject of bargaining. Furthermore, if an employer were to impose a change in the working conditions by unilaterally implementing a testing program, this would, in effect, constitute a refusal to bargain. Thus, by requiring employee drug testing without notice to the union, or without any bargaining over the extent of the program, a unionized employer would be violating the NLRA.

The requirement that an employer collectively bargain with the union is exemplified in the recent case of International Brotherhood of...
Electrical Workers v. Potomac Electric Power Co. On March 18, 1986, the United States District Court for the District of Columbia issued a temporary restraining order which prevented the Potomac Electric Power Company (PEPCO) from unilaterally implementing new drug testing rules. The new rules, which were implemented without negotiation with the employees' representative, Local 1900 of the International Brotherhood of Electrical Workers (IBEW), required termination of employees who refused to submit to a blood or urine test. The rules further mandated the discharge of any employee who refused to consent to a search of his person, locker, or lunch box. Moreover, the rules mandated discharge if a urine or blood sample revealed any detectable level of drugs. These new drug testing rules superceded the company's prior policy.

The judge concluded that the union would most likely prevail on its contention that management could not unilaterally impose a new policy "[w]ithout exhaustion of some procedures under the collective bargaining agreement and particularly arbitration." However, he refused to grant the union a preliminary injunction after PEPCO agreed to abide by certain conditions in implementing the new set of drug testing rules. The judge concluded that the conditions that


213. Id. at 644.

214. Id. at 644-45. The court ordered that:

[un]til an arbitration decision is issued:

1) PEPCO will not engage in generalized random testing for drugs and alcohol, except as to employees on disciplinary probation;

2) PEPCO will not randomly search employees' persons;

3) PEPCO will conduct confirmatory testing of all tests which show positive for controlled substances;

4) PEPCO will abide by the established procedures for ensuring the confidentiality of employee test results.

5) PEPCO will conduct drug testing of an employee only upon [a] report of drug or alcohol use or abnormally potentially dangerous behavior from police, customers, or other employees; [b] when visual observations of an employee suggest that he may be unfit for duty; [c] upon medical information, such as "track" marks; [d] where management has reason to believe that an employee is in possession of drugs or alcohol; [e] as part of a disciplinary probation for employees who have violated the
the company agreed to abide by "guarantee that the scope of testing of PEPCO employees will remain essentially unchanged from the policy prior to March 13, 1986 pending an arbitral decision, and should dispel plaintiff's fears arising from the potentially broad language of the new rules."215 Subsequently, the union filed two grievances relating to the drug policy and the company agreed to proceed to arbitration.216

The lesson to be learned from this case is quite simple: prior to implementation of a drug-testing program in a company where a collective-bargaining agreement exists, management should discuss any drug testing policies or procedures with the employees' union representative.217 Furthermore, employers should attempt to obtain the cooperation of the union in the formation and implementation of workplace substance abuse rules, even where these rules may not be a subject of "mandatory" bargaining.218 The cooperation of the union can be a fundamental aspect in the effectiveness of enforcing such rules.

B. Grievances and Arbitration

Unions frequently challenge employer disciplinary action for drug and alcohol problems under the just cause provisions of their collective bargaining agreements.219 Employers should review arbitrators' decisions in cases of disciplinary action for alcohol and drug infractions in determining how to effectively deal with such infractions.220 Although arbitrators generally accept drug testing as a "legitimate exercise of management's responsibility to maintain safety, efficiency, and discipline," they may closely scrutinize the circumstances surrounding the test and the use of the test results.221 A review of the recently reported arbitration decisions has revealed that

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215. Id. at 645. The judge further noted that the arbitrator's freedom to decide on the validity of the rules was unaffected by his decision. Id.
216. Id. at 643. One grievance contested several specific employee drug and alcohol screening procedures, and the other directly contested the validity of the new rules. Id.
217. BNA SPECIAL REPORT, supra note 6, at 69.
218. Connolly & Kahan, supra note 145, at 2, col. 2.
219. Id.
220. Geidt, supra note 44, at 192-93.
221. BNA SPECIAL REPORT, supra note 6, at 68.
arbitrators have overruled more drug-related discharges than they have upheld. Thus, although substance abuse is now recognized

as a serious employment concern, it seems that employers may have difficulty sustaining disciplinary action for drug-related conduct.223 This result is partially explained by the fact that arbitrators hold employers to a high standard of proof in drug cases.224 In non-drug-related offenses, the employer need only show by a “preponderance of the evidence” that the events which occurred supported the employee’s termination.225 On the other hand, in drug-related cases the employers are required to establish that an employee violated company rules by either “clear or convincing evidence” or “beyond a reasonable doubt.”226

The primary reason for applying these higher standards of proof is the “stigma” which attaches to a person when disciplined for a drug offense. This stigma is due to the criminal nature and general societal disapproval of such activity.227 Furthermore, arbitrators realize that an employee discharged for a drug offense will have difficulty obtaining another job.228 The higher standard makes it imperative that employers be accurate in their allegations.229 In cases involving drugs, arbitrators have tended to “resolve all reasonable doubts in favor of the employee.”229

C. Union Employer’s Guidelines

In order to successfully defend any disciplinary actions, it is essential for union employers to review all collective bargaining obligations before making any decisions.231 To further ensure that discipline resulting from an employee’s refusal to submit to a drug test or a positive test result will be upheld, employers should follow certain additional procedures.232 First, employers should properly

223. Geidt, supra note 44, at 193. See also infra notes 224-27 and accompanying text.
224. See Schachter & Geidt, supra note 4, at 21.
225. See Geidt, supra note 44, at 193.
226. Id. Beyond a reasonable doubt is the standard of proof required in a criminal case. Clear and convincing evidence is a standard of proof somewhat more stringent than the preponderance-of-the-evidence standard. See McConnell on Evidence 339 (3d ed. 1984).
229. See Geidt, supra note 44, at 194.
230. Id.
231. See Trigg, supra note 26, at 219.
232. Id.
notify all employees in advance of any policies regarding drug (or alcohol) testing and the consequences of refusing to submit to such tests.233 Second, employers should ensure that requests for testing are made on a nondiscriminatory basis and fairly applied.234 Third, employers must attempt to "implement accurate testing and confirmatory testing as well as a chain of custody procedure so as to assure a defensible positive result attributable to the employee."235 Fourth, employers should "thoroughly investigate all circumstances surrounding any positive result which includes input from both the employee and the union."236 Finally, in terms of discipline and, where appropriate, rehabilitation, employers must act consistently in their treatment of employees found to have violated the company's drug-use policy.237

V. Conclusion

"Illegal drugs have become so pervasive in the U.S. workplace that they are used in almost every industry. . . . Their presence on the job is sapping the energy, honesty and reliability of the American labor force, even as competition from foreign companies is growing tougher."238 Corporations are no longer remaining idle in their efforts to stop the drug plague. Corporations today are taking pervasive steps to aid the war on drugs. The key weapon in their arsenal is drug testing.

Drug testing of applicants and current employees is rapidly increasing in corporate America. As this discussion has indicated, there are numerous benefits which can be obtained by private employers from proper testing programs. The implementation of drug testing by employers has coincided with improvements in work quality, productivity, discipline, employee morale, and accident and absenteeism rates. However, private employers must be cautious of the potential legal pitfalls involved when testing is improperly conducted.

Corporations which implement drug screening programs must not misconceive these procedures as a substitute for effective drug education and rehabilitation. Any such testing program must be

233. Id.
234. Id.
235. Id.
236. Id.
237. Id.
238. Castro, supra note 83, at 52.
conducted as part of a comprehensive drug prevention program aimed at preventing and dealing with substance abuse in the workplace. Finally, because of the novelty and complexity of the legal issues involved, private employers should monitor judicial developments and legislative action relating to drug testing in order to comply with any and all future developments in the law. 239

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