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# CRS Report for Congress

## Drug Testing and the Drug-Free Workplace: A Bibliographic Guide and Reader

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ACQUISITION

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**DRUG TESTING AND  
THE DRUG-FREE WORKPLACE:  
A Bibliographic Guide and Reader**

**SUMMARY**

Because of the alleged loss of productivity and the potential for damage caused by drug-using employees, many employers are turning to drug testing in an effort to eliminate drug users from the work force. The tests may include pre-employment screening, regularly scheduled testing, and testing on demand warranted by accidents or work failures. Public policy issues in drug testing include test implementation and standardization, as well as employee rights and civil liberties. At least three cases have been heard by the Supreme Court and many concerns are still emerging.

This reader and bibliographic guide has been designed to help Members of Congress and their staff in their efforts to control and monitor the growing amount of information on drug testing available from the Congressional Research Service and the Library of Congress. Part one presents a selected group of articles and editorials on drug testing; these are drawn from the CRS Main Reference files. Part two is a list of related CRS reports. Part three is a short bibliography of current articles in the CRS Public Policy Literature file. Part four describes the information resources available through the Library's automated catalogs. An order form is included so that any of the documents mentioned in this guide may be requested for the use of Members of Congress and their staff.

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## PART ONE: SELECTED READINGS ON DRUG TESTING

These articles and editorials have been drawn from the CRS Main Reference files. They have been selected to provide an overview of the policy issues involved in drug testing in the workplace and to illustrate the wide range of opinions on this subject. This material was elected by Peter Giordano, Bibliographer, Library Services Division; it was assembled by Ann Eschete, Bibiographic Assistant, Library Services Division.

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## WHY WHO & HOW TO DRUG TEST

Conflicting  
federal  
government  
rules, state  
laws, and  
court  
decisions  
have  
complicated  
the task.

By  
Michael A.  
Verespej

**A** little more than six months ago the decision whether to test employees for drug use—while excruciatingly difficult—was still one over which employers had a great deal of control.

Granted, there were state laws that set parameters for companies that chose to test workers for drug use, and there were court decisions that served as a buffer against testing abuses. But generally the employer was able to decide if drug testing—usually through urine samples—was the avenue it wanted to take to curb workplace drug problems.

Now, that freedom of choice is quickly vanishing—at least for the vast number of companies that do business with the federal government.

First, the Dept. of Defense (DOD)—which (along with the Armed Services) last year granted \$142 billion in contracts—last October put in place drug-testing rules for its contractors. A month later the Dept. of Transportation (DOT) issued its drug-testing rules—different, of course—that cover 4 million transportation workers in safety or security jobs in the private sector and require five types of drug testing. And six weeks ago, federal legislation went into effect that requires any company with a contract of \$25,000 or more with the federal government to maintain a drug-free workplace.

Toss in 11 different state laws and two city ordinances (San Francisco and Berkeley) and you get an idea of the confusion that surrounds drug testing.

"No two laws or regulations are the same. That can create inconsistent requirements and make it im-

possible for employers to adopt a single national policy," says Garen E. Dodge, labor law attorney with McGuiness & Williams, Washington. For example:

- DOD regulations give companies the authority to test applicants. DOT rules *require* it.
- DOD rules require testing of employees in "sensitive positions," but leave the extent and criteria to the employer's discretion. DOT mandates five types of testing including random testing at a 50% rate.
- DOT's rules preempt both state laws and labor agreements. DOD's don't.
- The Drug-Free Workplace Act of 1988 has more than a half-dozen requirements, but the term drug testing isn't even mentioned in the law.

And, unfortunately for employers, any hope for a quick end to all this confusion was dashed when two U. S. Supreme Court rulings in late March on drug-testing cases (involving railroad workers and Customs Dept. employees) provided employers some guidance, but stopped far short of being definitive.

In these two cases involving public-sector drug testing the court O.K.'d testing in post-accident investigations, even without individualized suspicion. And it gave the go-ahead to test workers in jobs involving security or in safety-sensitive jobs. "It is a cue to arbitrators that an employer does not need individualized suspicion to test and that it is O.K. to set up a program to deter drug use," says Mr. Dodge.

The court also stated unequivocally that, when the govern-



**DODGE:**  
"Random drug testing is thought of by many employers as killing an insect with a bazooka."

ment requires or even encourages private employers to initiate drug testing, those private employers are acting as an agent of the government, and constitutional rights such as invasion of privacy and unlawful search and seizure become issues that affect the legality of private-sector drug testing.

But the court qualified both decisions by using phrases such as "in the present context" and observing that both government agencies "define narrowly and specifically the circumstances justifying testing."

The court also left unanswered whether it would permit testing of workers who have access to classified information or are in positions that require a high degree of confidence and trust—two key aspects of the DOD regulations—and it did not address the highly controversial issue of random testing—a main feature of the DOT regulations which has been stayed by a district court in San Francisco.

Neither did the court "delineate all the other jobs they would construe as safety jobs," or specify the scope of jobs where access to classified information could trigger drug testing, says Mr. Dodge.

He adds: "There is still a great deal of uncertainty in the middle as to whom you can test. When you get into positions where there are no safety-sensitive concerns or security duties involved, the authority to test is less clear."

"It will be interesting to see how

far the court will be willing to go if the employee being tested is not in position to hurt someone," agrees labor law attorney John Lewis at Arter & Hadden, Cleveland. "These decisions are just the beginning. You're going to see a lot more cases [there are currently 44 pending in federal courts alone] in order to flesh out the bones relative to other occupational positions."

But, unfortunately, until that time—which may be as long as three to five years from now—there will be "no lead-pipe cinch way" to guarantee that a company's drug testing "is legally permissible," says Mr. Lewis.

"There are still too many unknowns and too many ways in which drug testing can be challenged"—both on constitutional grounds (when an employer is, in effect, acting as an agent of the government) and on common-law grounds, Mr. Lewis points out.

What's the best approach for an employer?

**M**ost experts recommend that an employer assess its situation to see whether there is a need for testing because of a severe drug problem in the workplace or a federal-government obligation.

"Before you even consider testing," says Mr. Dodge, "you must determine whether you have drug problems in the workplace, what your federal obligation is, what your state-law requirements are, and how it will appear to your employees."

Currently, only transportation companies and defense contractors have an obligation to test; there are no drug-testing requirements for other government contractors. The drug-free workplace law says only that companies with a government contract of \$25,000 or more must publish a drug-free workplace policy, inform workers of that policy, educate them about drug abuse, and make a good-faith effort to maintain a drug-free workplace.

Obviously, companies under the thumb of DOD and DOT regulations must adopt programs that at

the minimum meet those requirements. There is far more leeway for other government contractors and businesses that are not under any federal, state, or locally required obligation to test.

"The first reaction from most companies when they hear of the drug-free workplace requirements is that testing is easy, testing is clean, let's do it," says Philip Rosen, labor law attorney in the New York office of Jackson, Lewis, Schnitzler & Krupman. "But the intent of the drug-free workplace law is not to mandate drug testing, but to force employers to ask themselves tough questions about what should be included in a comprehensive drug-free workplace policy. And when companies learn that drug testing is not a requirement and they start to grasp all the personnel ramifications, they shy away and try other alternatives first."

Today, most companies that don't drug test (except for new job applicants) simply have a policy that prohibits the use, purchase, sale, distribution, or transfer of drugs on company premises.

That's why Donald Woodcock, labor attorney with Calfee, Halter & Griswold, Cleveland, expects that the ultimate impact of the drug-free workplace law will be more thought-out, comprehensive policies, and not necessarily automatic drug testing. "Employers will amend their programs to add education about the dangers of drug abuse, to offer employee assistance and rehabilitation, and to tell employees upfront what the penalties are for workplace drug use."

As Arter & Hadden's Mr. Lewis explains, if there is no requirement to test, "the first question an employer must ask is, 'Why test?'" He suggests that an employer ask himself: "Am I in an industry where drug use or abuse is prevalent? Can drug use or abuse negatively impact safety? Can it have a disastrous effect on quality? Has there been a sizable drop in productivity unexplained by equipment malfunctions? Has there been a rise in workplace theft? Have drug paraphernalia been



**WOODCOCK:**  
"The primary  
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testing should  
be to stop a  
problem in the  
workplace."

seen with increasing frequency in the workplace or parking lot?"

"Because of the possibility of potential lawsuits that erupt in the wake of the introduction of drug testing, companies should drug test only for a very good reason," says Mr. Lewis. "Don't just do it because it's fashionable."

Mr. Woodcock agrees. "The pri-

mary motivation for testing should be to stop a problem in the workplace." And, in Mr. Woodcock's experience, that's generally been the case. "The majority of firms want to avoid drug testing if they can," he contends. "They don't want to expose themselves to morale problems or litigation."

Smaller companies are the most opposed to testing. "They feel they can educate frontline supervisors to spot drug problems," says Mr. Lewis, "and they are aware that a lawsuit can be disastrous."

A recent Bureau of Labor Statistics' (BLS) survey confirms those suspicions. Only 2.2% of the more than 4.2 million workplace establishments with fewer than 50 employees have drug-testing programs. (Such workplaces account for over 90% of all workplace establishments.) But, because the other 318,200 establishments employ 63% of all workers and because drug testing increases with the size of employment, 19.6% of all U. S. workers—and 42.1% of all

manufacturing workers—are employed in companies with drug-testing programs, says the BLS.

But that clear reluctance—except among larger firms—to drug test (unless required) is why Jackson, Lewis' Mr. Rosen thinks employers should hold drug testing in reserve and use other alternatives first.

What are some of the options available? Employers can conduct educational campaigns, tighten company rules on drug use, train managers in how to detect and deal with drug users, handle it as a performance problem when a worker has a drug problem, or—if a situation is out of control—possibly resort to using undercover agents.

"If an employer hasn't done so already," suggests Mr. Lewis, "tighten up company and plant rules to make it clear that the use of drugs is prohibited."

Adds Mr. Rosen: "Thoroughly review existing employment policies and practices regarding workplace drug use, including disciplinary procedures, employee handbooks, supervisory manuals, and past practices."

Mr. Lewis also advises that companies add a statement that "disciplinary procedures for drug use can be modified only in writing by something signed by a high-ranking official of the company."

The next step: Conduct an educational campaign dealing with the problems of drug and alcohol abuse.

It's also imperative, says Mr. Rosen, that companies "train supervisors to detect the symptoms of drug abuse." Such training, he says, should have three components. First, have a policy in place so that managers understand the company position on drugs in the workplace. Second, have a training session for managers in which a qualified medical person describes how to spot persons with substance-abuse problems. Third, "do role-playing with managers on how to handle drug problems and what to do when the situation comes up."

He also suggests that when companies have workers with drug problems, they first try to handle





LEWIS: "There are still too many unknowns and too many ways in which drug testing can be challenged."

the situation as a job-performance problem.

"Tell the employee what he has been doing wrong—and right—on the job," says Mr. Rosen. "Ask whether there is any reason why his work has not been up to par or why he's been late frequently. And tell him the company has people who can help on a confidential basis." An employer, he says, can also refer people it suspects to be drug users to its medical department to determine whether they should continue working.

Some companies even turn to undercover agents, says Mr. Rosen. An example: One company became suspicious about a mailroom employee with a beeper who was always getting beeped and who took extra time to make his deliveries. An undercover agent garnered enough evidence to nail the individual as a drug pusher.

When alternatives don't succeed, a company should investigate the use of drug testing. One caveat: Where there's a union workforce involved, companies have a legal obligation to negotiate with it regarding the parameters of the program.

What's emerging as the two safest—and most likely—areas for employers to test are applicant and for-cause testing. The BLS survey found that 85% of the companies that drug test do so with job applicants, and that 64% test current

employees, largely "for cause."

Should a company decide to test job applicants, there are very few legal restrictions, and most of them are state laws. In Montana, for example, only applicants for hazardous work environments or for jobs involving safety, security, or fiduciary responsibilities can be tested. Connecticut requires three urinalyses. Vermont requires a ten-day written notice; Minnesota, a two-week notice.

"The safest way to test applicants," says Arter & Hadden's Mr. Lewis, "is to set up a written program and notify applicants either before or while they fill out their applications. That part of the application process is a physical exam that includes a drug screen. And by making this job application, they consent to a drug screen." At that point, some applicants will simply go away. And the test will catch many others. At Goodyear Tire & Rubber Co., for example, nearly 12% of its job applicants in 1988 tested positive—61% for marijuana, 18% for cocaine, and 21% for other drugs.

**W**hen a company believes that its situation merits drug testing, in some fashion, of its current employees, that's when it needs to brush up on legal precedents to create a program that not only will be effective, but also free of legal entanglements.

The reason? Although private-sector employers are not bound to protect constitutional rights, there are numerous common-law grounds for suing these employers. They include defamation of character, discrimination, wrongful discharge, intentional or negligent infliction of emotional distress, or negligence in the procedures used to test.

"The public-sector cases have taught us a few lessons about what drug-testing procedures employers should use," says Mr. Lewis. "You need a reputable lab and a second test to confirm an initial drug screen. And there has to be a chain of custody similar to the methods used in criminal procedures," he says.

To wit, the Supreme Court made

a point in the Customs Dept. drug-testing decision to praise the procedures that were set up. The department, said the court, "sets forth procedures for collection and analysis of the requisite samples . . . designed both to ensure against adulteration or substitution of specimens and to limit the intrusion on employee privacy, and provides that test results may not be turned over . . . without the employee's written consent."

"Any program needs the five Cs," says Jackson Lewis' Mr. Rosen. *Confidentiality* of testing itself (no one observes); *chain of custody* (to ensure that the right sample is tested); *confirmation* (not just a screen, but a gas chromatography/mass spectrometry test); *communication* (with employees); and *counseling*.

Beyond these basic procedures, however, companies must also determine whom they are going to test, for what reasons, and what to do with the first positive result and the first person who refuses to be tested.

Although the first reaction of companies is usually that testing is most critical for bluecollar workers, what companies really need to determine is where drug problems can impact safety, says Arter & Hadden's Mr. Lewis.

"A whitecollar employee in a safety-sensitive position can do just as much damage as a bluecollar employee," he says. "The supervisor on the dock or the whitecollar employee monitoring dials on plant equipment—while not cutting off fingers in a lathe—might be subjecting scores of people to being impaired."

Besides, failure to think through who needs to be tested can trigger discrimination lawsuits. That's especially true if a firm decides to test a group of employees, for example, that is largely black, while a support group of employees, largely white, goes untested.

"If a company makes an arbitrary judgment on testing, it would be subject to a challenge on an employment-discrimination charge," asserts Mr. Lewis.

For what reasons should companies test workers?

"Absent any government regulation, I think companies testing current employees are looking to test for reasonable suspicion and when impairment can impact safety," says McGuinness & Williams' Mr. Dodge. "That's what's emerging from the courts as O.K. to do."

By and large, most companies avoid random testing. It's almost certain to bring a lawsuit and "incur the wrath of workers," says Calfee, Halter's Mr. Woodcock.

"I don't think companies will be jumping on the random drug-testing bandwagon unless there is real evidence of widespread abuse," such as Dow Chemical Co. experienced at its Freeport, Tex., operation in 1987, says Mr. Dodge. (Dow instituted random testing—

upheld by an arbitrator in March—in response to the sale and use of cocaine by a sizable number of machine-shop workers.) "Random drug testing is thought of by many employers as killing an insect with a bazooka," Mr. Dodge observes.

Employers also need to firmly establish what the penalties and discipline will be for drug users.

"You have to tell employees upfront what the penalties are," asserts Jackson, Lewis' Mr. Rosen. Some state laws spell out how companies must discipline first-, second-, and third-time offenders. "We recommend a combination of discipline and rehabilitation, heavily weighted toward rehabilitation."

"If your first response is to help

the individual, your company will be in a better position to defend its policy in court," says Arter & Hadden's Mr. Lewis. "You'll be much safer than the company whose first reaction is to fire the individual."

In addition, he suggests that companies "structure the drug-testing program so that the employee knows what the ground rules are," and develop safeguards to minimize the most common court challenges: wrongful discharge, breach of contract, tort claims, and defamation of character.

"To the degree that you can spell out when and to what extent employees will be tested, the greater your protection will be," Mr. Lewis declares.

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## KEY STATE DRUG-TESTING REQUIREMENTS

	CT	IA	LA	MN	MT	NE	OR	RI	UT	VT
<b>Test Restrictions</b>										
Requires probable cause		✓								✓
Requires reasonable grounds								✓		
Requires reasonable suspicion	✓			✓						
Requires reason to believe					✓					
Permits as part of regularly scheduled physical			✓	✓						
Prohibits random testing		✓			✓			✓		✓
Permits random testing for safety-sensitive positions	✓			✓						
Regulates pre-employment testing	✓	✓		✓	✓				✓	✓
<b>Procedural Requirements</b>										
Requires written policy			✓	✓	✓				✓	✓
Requires confirmatory test	✓	✓		✓	✓	✓	✓	✓	✓	✓
Requires state certification of lab		✓	✓	✓		✓	✓			✓
Requires privacy during testing process	✓		✓	✓	✓	✓	✓	✓		
Requires chain of custody procedures		✓	✓	✓	✓	✓			✓	✓
Requires confidentiality of test results	✓	✓	✓	✓	✓	✓			✓	✓
Requires employer establish EAP*		✓						✓		✓
<b>Post-Test Issues</b>										
Allows employee rebuttal		✓		✓	✓			✓	✓	✓
Prohibits discharge for first offense		✓		✓						✓
Provides civil remedies	✓	✓	✓	✓				✓		✓
Establishes criminal penalties		✓			✓			✓		✓
Permits federal law to preempt	✓	✓		✓						✓

# FEDERAL URINALYSIS PLANS STALLED

**A series of successful courtroom challenges to the federal government's random drug testing authority places the whole workplace testing program in question.**

BY CAROL MATLACK



**J. Michael Walsh** of the National Institute on Drug Abuse oversees the development and implementation of agency drug testing programs.

**T**he federal government's push for mandatory, random drug testing of civilian employees has moved to a new arena—the courtroom—and so far, the government seems to be taking a beating.

Employees and their unions have won preliminary injunctions in federal courthouses from Washington to San Francisco, effectively stalling a Reagan Administration plan to conduct surprise, random urine tests of about 345,000 employees in "sensitive" positions. (See *"The Age of Urinalysis," March 1988*.) Among 42 agencies covered by the plan, only one, the Office of Personnel Management (OPM), has actually started testing; 650 of its employees have been subject to random tests since last fall.

By late January, the courts had temporarily blocked testing at the Departments of Agriculture, Commerce, Interior, Veterans Affairs and Justice, as well as the Bureau of Prisons and the Immigration and Naturalization Service. Suits are pending against the Health and Human Services Department, the Navy, the Executive Office of the President, and OPM. Most other agencies have not yet issued formal notices to affected employees, the action that generally triggers the filing of a suit.

On the other hand, federal judges have allowed testing to continue at a few agencies that had started testing before the Administration plan was announced last May. These include the Transportation Department, the Secret Service, and the Army, which tests some civilians along with active-duty personnel. (Active-duty personnel in all the military services have been subject to random testing since the 1970s.)

"What courts are doing at this point is saying 'Let's maintain the status quo until we get some guidance,'" says a Justice Department spokesman. The U.S. Supreme Court is expected to rule this spring on its first major drug testing case involving federal civilian workers. The case involves employees of the U.S. Customs service who must submit to drug tests before qualifying for promotions. Justice officials hope that a strongly worded opinion in their favor will remove some of the uncertainty now facing agency managers.

## The Bush Administration

Although President Bush has not spelled out his drug policies in detail, his administration appears committed to continuing the Reagan drug testing initiative. J. Michael Walsh, director of the Office of Workplace Initiatives

at the National Institute on Drug Abuse and an outspoken advocate of testing, continues to oversee agency testing programs.

Attorney General Richard Thornburgh has already signaled strong support for federal employee testing by appearing in person before the Supreme Court—a highly unusual step—to argue the government's defense in the Customs Service case. The Justice Department also is encouraging all agency managers to move forward with testing plans—even if they are certain to be slapped with an employee lawsuit.

Officials at NIDA say that they expect to work closely with former Education Secretary William J. Bennett, whom Bush has nominated for the newly created position of "drug czar." But Bennett has expressed mixed views on drug testing. In 1986, after President Reagan first announced his intention to seek government-wide random testing, Bennett told *The New York Times* through a spokesman that while he favored strict enforcement of tough drug policies, he did "not feel routine drug testing is appropriate or necessary" in most situations. Bennett also has opposed random testing for

*Carol Matlack is a staff correspondent for National Journal.*

public school teachers. But during last year's campaign he endorsed a suggestion by Republican presidential candidate Pierre S. (Pete) DuPont that driver's license applicants be required to pass a drug test.

### Courtroom Successes

Federal employee unions and civil liberties groups, meanwhile, are pleased and somewhat surprised by their courtroom successes. "I'm actually quite optimistic," says Arthur Spitzer, legal director for the American Civil Liberties Union of the National Capital Area, whose office serves as a clearinghouse for plaintiffs' lawyers in the drug testing cases. "We've been convincing some pretty conservative judges on this issue."

One of the victories that drug testing foes savor most is a ruling last July by Judge George Revercomb, a Reagan appointee to the U.S. District Court for the District of Columbia, who threw out the drug testing plan at the Justice Department—the agency that had taken the lead in promoting government-wide testing.

Spitzer concedes that the courts may eventually uphold random testing of air traffic controllers, Secret Service agents and others with direct responsibility for public safety. But as for most other government workers, he says, "The courts are really hard put to distinguish why these people are so special that the Fourth Amendment has no meaning for them." Opponents contend that random testing violates the Fourth Amendment ban on "unreasonable" searches and seizures by the government. Many agencies have long been able to test employees who are suspected of drug use, but with widespread, random testing, new legal ground is being broken.

Most of the lawsuits have been filed by federal employee unions, including the American Federation of Government Employees, the National Treasury Employees

Union and the National Federation of Federal Employees. The anti-testing forces increasingly are coordinating their efforts, Spitzer says, holding regular strategy meetings to decide when and where to file lawsuits, and sharing information about expert witnesses. Many of the injunctions won so far have been in the Northern District of California, which has a reputation for having a liberal federal bench. Most of the other wins have been in the District of Columbia.

But courtroom battles are only part of the reason for the government's delay in drug testing. At some agencies, managers are still negotiating the issue with employee unions. And at others, there appears to be a reluctance to move quickly on a project likely to antagonize employees. Last November, when only a handful of agencies appeared ready to begin testing, presidential drug adviser Donald Ian MacDonald tried to speed up the action by summoning several dozen agency representatives to a White House meeting, where he extolled the benefits of testing and said there was no valid reason for further delay. After that, a few more agencies announced plans to begin testing, but most still have not.

So far, the only large-scale civilian testing program is at the Transportation Department, where an estimated 30,000 employees, chiefly air traffic controllers, are subject to testing. The agency's experience so far suggests few problems with drug abuse. As of mid-January, 9,884 employees had been tested, and only 79—less than .01 percent—were confirmed positive for drug use. All 79 were referred to counseling or rehabilitation programs; 14 were later fired from their jobs after they tested positive a second time. Early in Transportation's testing program, an employee was wrongly accused of drug use because of a laboratory error, but there have been no similar problems since then, a spokesman says.

### Private Sector Programs

With many agencies' testing plans on hold, attention increasingly has turned to the private sector, where the Reagan Administration launched a major campaign to encourage workplace drug testing by employers. The effort appears to have succeeded in some large corporations; the Bureau of Labor Statistics (BLS) reported recently that nearly 60 percent of businesses with 5,000 or more employees had drug testing programs. But smaller businesses have been far less enthusiastic, and the BLS estimated that overall, only about 1 percent of workers on private payrolls were actually being tested. What's more, most businesses did not follow the government's example of random testing, choosing instead to test only job applicants and those employees suspected of drug abuse.

Among private-sector workers who were tested, the BLS found that 9 percent tested positive for drug use. However, the BLS cautioned that the results "should not be generalized as representative of the entire work force, because only a small proportion of all employers test, and so much of the testing is performed on persons suspected of drug use."

Drug testing presents fewer legal risks to private-sector employers than to government agencies, because the Fourth Amendment ban applies only to searches and seizures by the government. But that has created a dilemma for drug testing proponents who want to expand private-sector testing: If they enact laws or regulations requiring private employers to set up testing programs, those programs will be vulnerable to Fourth Amendment challenges.

That is what happened last year, when a federal appeals court in California struck down federal regulations requiring drug and alcohol tests for railroad workers involved in accidents. The ruling has been appealed to the Supreme Court. The Transportation Department also has announced plans to require testing of workers in the airline, rail, transit and trucking industries; the plan has already been challenged in court by a truckers' group.

Still, drug testing proponents are hopeful that they will ultimately prevail. "It's a novel constitutional question," says a Justice Department lawyer. "The judges are all over the map at this point." Once the Supreme Court rules on the Customs Service case, the lawyer says, "The law will be better established."

But the pending Customs Service case does not directly address the question of unannounced, random tests. Lawyers on both sides agree that it may be a long time before that question—which lies at the heart of the controversy—is resolved. □

### Bureaucracy Run Amok

**W**ith an acerbic blast at "bureaucracy run amok," U.S. District Court Judge Harold H. Greene on Jan. 30 blocked the Interior Department's plan to begin random drug testing of 17,000 of its 70,000 employees. Only .05 percent of Interior's workers have been identified as drug users, Greene said. "What these figures demonstrate is what anyone thinking about the problem knows intuitively—there are few, if any concentrations of individuals... that are freer of illegal drugs than the faithful, loyal, perhaps somewhat stolid, not very

'hip' members of the federal-bureaucracy," he wrote.

"There must be thousands of places in this country where drug users congregate and can be located with a far greater degree of certainty than in the offices of the Department of Interior... Yet the government has singled out its loyal, almost completely drug-free public servants for a vast, intrusive testing program as the only one where the drug menace must be fought without the normal constitutional protection of individualized cause."

## The Impact of Drug Testing

By Robert M. Preer, Jr.

Mr. Preer is the Personnel Manager with Stone & Webster Engineering Corporation in Boston.

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Many readers will recall the death of college basketball star, Len Bias, reported in newspapers around the country on June 19, 1986. The headlines did much to shock the nation and considerably increase the anti-drug sentiment.

Perhaps even more alarming were the statistics reported by *Life* magazine in its special January 1987 issue. In an effort to underscore the magnitude of the drug problem, *Life* summarized the cocaine death toll in America for a mere nine-day period, beginning with the day Bias died:

Date	Deaths
06/19/86	12
06/20/86	20
06/21/86	18
06/22/86	13
06/23/86	15
06/24/86	15
06/25/86	11
06/26/86	19
06/27/86	25

*Life* also found the geographical spread to be interesting:

State	Percent
Alabama	0.7
Arizona	1.3
California	30.2
Colorado	1.3
District of Columbia	2.7
Florida	5.4
Illinois	4.0

Kentucky	0.7
Maryland	2.0
Massachusetts	1.3
Michigan	6.0
Minnesota	0.7
Mississippi	0.7
Nevada	1.3
New Jersey	4.7
New Mexico	4.0
New York	18.1
North Carolina	0.7
Oregon	2.7
Pennsylvania	4.7
Rhode Island	0.7
South Carolina	0.7
Texas	2.7
Utah	0.7
Virginia	0.7
Washington	1.3

While, for many years, there has been anti-drug sentiment in America, it was not until the mid-1980s that it grew into a national cause. In 1986, with the Reagan Administration sounding the battle cry, the movement gained substantial momentum, to the point where there was a general call for drug-free workplaces.

On September 15, 1986, the Office of the Press Secretary released the text of President Reagan's Executive Order for a Drug-Free Federal Workplace. Implementation of the Executive Order was contained in a multi-part plan: (1) issuance

of a policy against illegal drug use; (2) identification of drug users; (3) initiation of Employee Assistance Programs; (4) utilization of rehabilitative services. The program called for under the Executive Order, particularly testing to identify drug users, remains controversial. To this day, it has not been put into effect across the board in the federal workplace.

### Private Sector Testing

While the government was struggling with a drug testing dilemma, the private sector seemed to be moving ahead with its concept of the solution. Unlike the public sector, private employers are not constrained by such considerations as "unreasonable search and seizure." Absent a collective bargaining agreement with unionized employees, then, it would appear that companies have, for all intents and purposes, a free rein in deciding whom, how, and when to test.

Moreover, the private sector, in recent years, has probably been feeling some pressure from the realization that drug abuse is its problem too. *Fortune Magazine*, for example, pointed out in its June 6, 1985, issue that drugs, to a previously unpublicized extent, have permeated the corporate workplace. Articles in other publications lead to the same conclusion.

Consequently, many companies have embarked upon a program of drug testing, with the usual testing to include not only employees at all levels, but potential employees (applicants) as well. According to statistics released by the National Institute of Drug Abuse, approximately 30 percent of all Fortune 500 companies are employing some form of drug testing. This figure represents an increase over the 25 percent level of the previous year. The American Management Association asserts that the proportion rises to 50 percent when one restricts consideration to the Fortune 100.

<sup>1</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 3 EPD 18137 (1971).

Whether the longer-term trend is up or down, and whether the rate of increase is tapering off, is unclear at present. Notwithstanding what the future might hold, there is one certainty: testing will produce trials. Litigation is a sure result either of drug testing per se, or of some particular aspect of a particular testing procedure. While the focus of most other articles has been the constitutional issue or topics stemming from a putative violation of a union contract, this article centers on the heretofore ignored subject of the adverse impact implications of drug testing.

### Disparate Impact

A proper review of drug testing as a potential disparate impact issue necessarily begins with a brief look at the 1971 *Griggs* decision of the U.S. Supreme Court. Without delving too deeply into the factual controversy at the center of this now well-known case, it suffices to say that the Court focused on a single issue:

"We ... resolve the question whether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify (blacks) at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a long-standing practice of giving preference to whites."<sup>1</sup>

Thus, while ruling on the specifics of a particular company's employee selection procedures, the Court, as it usually does, was interpreting the will of Congress in the passage of the Civil Rights Act of 1964. It had already been made clear that deliberate, intentional discrimination was

### Drug Testing

illegal. What had been somewhat ambiguous was whether unintentional, inadvertent discrimination, that which "merely" had a disparate impact or differential effect, was equally violative of the law.

In *Griggs*, the Court decided that it had been Congress' intent to strike down all impediments to a bias-free workplace, including "practices that are fair in form, but discriminatory in operation."<sup>2</sup> However, it was not that business management prerogatives as to decision-making were being usurped. Rather, the legal precedent only required that selection procedures be subject to a "business necessity" test. If the criterion for inclusion, say hiring or promotion, were related to the job function in question, then the existence of any differential effect was irrelevant. If, on the other hand, the criterion could not be justified, its effect would weigh heavily against the employer.

The Court, then, had balanced the needs of the employer against the desires of Congress; and it had forged a compromise with which all could live: "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant."<sup>3</sup>

In the aftermath of the *Griggs* decision, there came a flurry of activity in the lower courts which sought to apply it in their own determinations. Hence, the disparate, or adverse, impact theory of discrimination was not only born but given full life. As this previously grey area of law became the core issue on frequent challenges to employment decisions, the grey gradually disappeared.

## Selection Procedures

One of the first selection procedures to be challenged was the use of arrest records to disqualify applicants for employment. It was pondered in *City of Cairo v. Illinois Fair Employment Practices Commission*: "We now consider the central issue in this case of whether the hiring policy of excluding persons from employment because they had arrest records was inherently racially discriminatory, regardless of lack of motive or intent to discriminate or evenness of application of this policy so as to constitute an unfair employment practice."<sup>4</sup>

It was directly confronted in *U.S. v. City of Chicago*: "The fact that blacks and other racial minorities are so often subject to garnishment action is related to the fact that they are to a disproportionate extent from the lower social and economic segments of our society .... A policy of dismissing employees whose wages are attached has (an) impermissible effect."<sup>5</sup>

"The Chicago Police Department also inquire(s) into an applicant's social status, family history, and military background. Consideration of these factors has been held to violate Title VII."<sup>6</sup>

The legality of other selection criteria was later scrutinized in *Reynolds v. Sheet Metal Workers, Local 102*: "When particular selection criteria, e.g., height or weight requirements or high school diploma, operate to disproportionately exclude minority members as a group, or minority representation in the (employer's) workforce differs markedly from general population figures, a prima facie case of discrimination may be established."<sup>7</sup>

While the courts were firmly establishing the adverse impact principle in modern jurisprudence, the EEOC was doing the same on the administrative/quasi-judicial side. It took an early look at conviction record and concluded that conviction records could be used only when absolutely necessary due to the disproportionate effect of a policy which forbade hiring anyone with a felony conviction record.<sup>8</sup>

It concluded that use of arrest record information was violative of Title VII for the reasons noted above.<sup>9</sup> It saw arrest record information and unnecessary educational standards in the same light: "Since (the employer's) educational standards have a substantial disproportionate impact on minority group persons, we conclude in the absence of a valid business justification for their use ... that they discriminate against ... (the) class because of race and national origin."<sup>10</sup>

It also took a similar view of arrest record and wage garnishment record.<sup>11</sup> It took a later look at conviction record and reached the same conclusion it had earlier. "Partially because they are arrested more frequently, blacks are convicted at a rate significantly in excess of their percentage in the population.

"Thus, an employment practice of disqualifying persons from employment because of conviction can be expected to have a disproportionate adverse impact upon blacks and would therefore be unlawful under Title VII in the absence of a justifying business necessity."<sup>12</sup>

"If it is established that the offense for which an applicant has been convicted is not job-related, it is unlawful under Title

VII to disqualify the individual because of the conviction."<sup>13</sup>

As if there were a need for clarification, the EEOC noted in detail, "The percentage of blacks convicted of crimes significantly exceeds the percentage of blacks in the population. Thus, an employment practice of discharging an employee because of a conviction can be expected to have a disproportionate adverse impact upon blacks. Consequently, such a practice is unlawful under Title VII in the absence of justifying business necessity."<sup>14</sup>

## Regulatory Guidelines

Finally, in 1978, many federal agencies, top among them the EEOC, agreed on a uniform interpretation of *Griggs*. The consensual language was codified in, among other places, 29 CFR 1607. It was specifically noted that, "These guidelines apply to tests and other selection procedures which are used as a basis for any employment decision. Employment decisions include but are not limited to hiring, promotion, demotion, membership, (for example, in a labor organization), referral, retention .... Other selection decisions, such as selection for training or transfer, may also be considered employment decisions if they lead to any of the decisions listed above (29 CFR 1607.2B).

With coverage of the regulations clarified, it was simple to rely on the message of *Griggs*, then, to define discrimination as "the use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group ... unless

*Systems*, 472 F.2d 631 (CA 9, 1972); *Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290, (CA 8, 1975); *Johnson v. Goodyear Tire and Rubber Co.*, 491 F.2d 1364, 7 EPD 9233 (CA 5, 1974)."

<sup>8</sup> EEOC Decision No. 77-3, 19 FEP Cases 1129 at 1130 (1976).

<sup>9</sup> EEOC Decision No. 77-9, 19 FEP Cases 1146 at 1146, 1147 (1977); EEOC Decision No. 73-0133, 19 FEP Cases 1765 at 1766 (1972).

<sup>10</sup> EEOC Decision No. 73-0133, 19 FEP Cases 1765 at 1767 (1972).

<sup>11</sup> EEOC Decision No. 73-0348, 19 FEP Cases 1775 at 1776 (1972).

<sup>12</sup> EEOC Decision No. 78-35, 26 FEP Cases 1755 at 1756 (1978).

<sup>13</sup> *Id.*, at 1757.

<sup>14</sup> EEOC Decision No. 80-18, 26 FEP Cases 1802 at 1802 (1980).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *City of Cairo v. Illinois Fair Employment Practices Commission*, 21 Ill. App. 3d 358, 315 NE2d 344, 8 EPD ¶ 9682 (Ill. App. Ct., 1974).

<sup>5</sup> *U.S. v. City of Chicago, Police Dept.*, 385 F. Supp. 543, 7 EPD ¶ 9370 (DC IL, 1974).

<sup>6</sup> *Id.*, at 1272.

<sup>7</sup> *Reynolds v. Sheet Metal Workers, Local 102*, 498 F.Supp. 952, 22 EPD ¶ 30,739.

Some of the existing case law was summarized in *Smith v. American Service Co. of Atlanta*, 611 F. Supp. 321 (DC GA 1984): "[There is] well settled case law invalidating the use of arrest records as a selection technique. *Gregory v. Litton*

the procedure has been validated in accordance with these guidelines" (29 CFR 1607.3A).

Having proceeded so far as to outline its view of this theory of discrimination, the EEOC certainly had to stipulate record keeping standards. Absent such standards and employers' adherence to them, it would be impossible to assess violation. Thus the EEOC mandated, in 29 CFR 1607.4A, the maintenance of employer records which would disclose the impact of selection procedures.

The final link in the chain was forged when the EEOC indicated the precise manner in which adverse impact would be measured. It said that when there is an imbalance greater than 20 percent, that imbalance would lead to a rebuttable presumption of discrimination. It also said that the failure to analyze impact could lead to the same presumption.

"Where the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the federal enforcement agencies may draw a inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor market or, in the case of jobs filled from within, the applicable workforce (29 CFR 1607.4D)."

### Testing Policies

Thus, a decade ago, this stage was finally set for the drug testing controversy to be played out. History indicates that Title VII violations were considered under a discriminatory treatment theory prior to the development of the adverse impact theory. Similarly, drug testing is currently challenged as, inter alia, invasion of privacy. It is logical to assume, therefore, that the next step would be to attack

the effect of a drug testing policy on employees or prospective employees.

Thus, it remains to review employer rationale for implementing such a policy; for the EEOC or the courts will turn to that in order to decide the legality of such a policy. There are, in general, only three classifications that employers might utilize in instituting drug testing: (1) probable cause testing; (2) mandatory testing; (3) random testing.

**Probable Cause Testing:** There is, and has been, little controversy surrounding employers' utilization of drug testing in the first of these three circumstances, so-called probable cause testing. This fortunate result comes, no doubt, because of the clarity and focus of the testing itself. It is only instituted in the face of an observable safety, conduct, or performance problem. In the first instance, safety, the reason for testing is obviously supportable. In the second two, it is justifiable, case by case, based on deviations from the empirical norm established by the employee him/herself.

**Mandatory Testing:** Mandatory testing has, perhaps, generated the greatest legal debate. One side argues that it is necessary in order to attain a drug-free workplace. The other contends it is an unwarranted and unauthorized intrusion into private and personal lives. Furthermore, say opponents, the employer has no right to pass judgment on matters outside the workplace.

Recently, a California judge, in what appears to be the first private sector decision in this regard, has ruled against a company's mandatory pre-employment drug testing. In *Wilkinson v. Times Mirror Books*,<sup>15</sup> Superior Court Judge Michael Ballachey enjoined Matthew Bender and Co., a subsidiary of Times Mirror Books, from proceeding with its urinalysis program. The injunction was issued under the provisions of the right-to-privacy sec-

tion of the California Constitution, although the company had contested the applicability of the section.

Constitutional claims aside, it is clear that mandatory testing may result in an impact problem for the employer if there can be shown to be a disproportionality between labor force demographics and drug user demographics. The conclusion is, moreover, the same whether the testing is undertaken at the pre-employment or the post-employment stage. Just as with wage garnishment and general record of arrest and/or conviction, the effect of implementing a testing policy is apt to result in litigation based on the disparate impact theory of discrimination under

Title VII. Support for the logic of this statement is grounded in the reasonable inference that a statistical imbalance between the demographics of those treated for drug-related medical conditions and those of the general population is indicative of a comparable disparity between drug users and the general labor force.

And, in fact, such is abundantly clear from data pertaining to known drug users. According to statistics compiled by the National Institute on Drug Abuse, minorities are represented among known drug users at a level approximately two times their representation in the general labor force (See Table 1).

Table 1<sup>16</sup>  
DRUG USERS ADMITTED TO FEDERALLY-FUNDED DRUG TREATMENT PROGRAMS

1979	PERCENT
<b>DEMOGRAPHIC</b>	
White Male	
18-19 yrs	3.7
20-24 yrs	10.0
25-29 yrs	9.6
30 yrs and older	10.2
White Female	
18-19 yrs	1.5
20-24 yrs	4.5
25-29 yrs	4.0
30 yrs and older	3.8
Black Male	
18-19 yrs	0.8
20-24 yrs	3.7
25-29 yrs	6.6
30 yrs and older	9.1
Black Female	
18-19 yrs	0.3
20-24 yrs	1.7
25-29 yrs	2.5
30 yrs and older	2.2

In January of 1986, the Secretary of the Human Services' Task Force on Black and Minority Health reached even more dramatic conclusions. The Task Force reported the 1983 distribution of clients of these same programs and found almost an

<sup>15</sup> *Wilkinson v. Times Mirror Books*, California Superior Court, #636361-3.

<sup>16</sup> Sourcebook of Criminal Justice Statistics, USDOJ, BJS, 1982.



even split between minority and non-minority, meaning a demographic multiplier of almost four (See Table 2).

Table 2<sup>17</sup>  
CLIENTS OF FEDERALLY-FUNDED DRUG TREATMENT PROGRAMS  
1983

DEMOGRAPHIC	PERCENT
White	54.1
Black	23.4
Hispanic	22.3
Asian	0.8
Native American	0.6

Given the obvious disproportionality implications of this category of drug testing, one needs to review the viability of any legal defense to a challenge formulated under the adverse impact theory of discrimination. Such a defense, of course, would be based on a possible claim of business-relatedness. As will be recalled, when the differential effect of a policy is demonstrated, the employer must establish the absolute necessity of maintaining the policy. For some companies, the ability to proffer a blanket rebuttal is elusive, if it is possible at all. For others, the objective is more likely to be attainable. By way of example for the latter group, one might consider contractors and licensees of the Nuclear Regulatory Commission (NRC). Such employers are obligated under regulations codified at 10 CFR 10. In particular, one finds among the criteria required to be used to determine employee clearance for access to restricted areas whether an individual, "[h]as been, or is, a user of drugs or other substances listed in the schedules of Controlled Substances established pursuant to the Controlled Substances Act of 1970, except as prescribed by a physician licensed to dispense drugs in the practice of medicine, without adequate evidence of rehabilitation." (10 CFR 10.11 (11)).

It would appear, then, that certain employers might be able to respond to charges of disparate impact in the implementation of a mandatory drug testing policy by pointing to NRC regulation. These seem to mandate, if only by implication, such a policy. For other employers, the route of the affirmative defense may not be as clearly delineated.

*Random Testing.* Somewhat akin to mandatory testing, random testing has its legal advantages and disadvantages. Among the pitfalls for employers, there is, of course, the same adverse impact implication as there is for mandatory testing. And there is the possibility of the same affirmative defense.

However, with random testing the potential problem is compounded because another issue presents itself, that of differential treatment. Allegedly random testing, which over time tends to focus on a particular employee or group of employees, can easily be seen as violative of Title VII. The onus then reverts to the employer to produce evidence that indicates the absence of discriminatory motive. Such a task may well prove difficult.

## Conclusion

In general, therefore, drug testing, however implemented, forces the employer into an interesting maze because of the backdrop of Title VII against which it might all be viewed. The key to the solution lies equally in two areas: maintenance of appropriate process and mitigation of potential claims.

In terms of process, companies should keep in mind the same rules that apply, perhaps as an outgrowth of discrimination litigation, to good human resource management: (1) clarity of policy; (2) consistency of implementation; and (3) completeness of documentation. Adhering to these practices has always been shown to be judicious. The drug testing arena should prove no different.

In terms of theories of discrimination, companies should keep in mind the lessons learned through affirmative action compliance. In order to mitigate liability in the face of potential claims of discriminatory treatment there should exist an internal system of checks and balances. Decisions related to demotion, suspension, termination, or the like should be reviewed by a third party prior to being put into effect. Likewise, the individual(s) affected by the decisions should have available some mechanism through which a question or a challenge might be raised.

Mitigation of liability in the face of potential claims of discriminatory impact, on the other hand, should be the objective of a system of ongoing internal monitoring. The cumulative and/or aggregate effect of decisions by race, for example, should be analyzed to ensure that they neither mask invidious intent nor suffer from lack of justification.

Drug testing litigation certainly represents something of a new frontier. Both the plaintiffs' and the defendants' bars are exploring the legal grey areas, building up case law in the process. Lawsuits predicated upon the disparate impact theory of discrimination are just such an area. A June, 1988, decision by the Eleventh Circuit is precisely on point.<sup>18</sup> The case will be watched closely, since the appeals court panel remanded it for "full consideration" of the disparate impact aspect of the employer's drug testing process. Companies, thus, would be well advised to include drug testing on the agenda for equal employment opportunity self-critical analysis. The alternative is far more costly and fraught with unnecessary risk.

[The End]

<sup>17</sup> Report of the Secretary's Task Force on Black & Minority Health, USHHS, 1986.

<sup>18</sup> *Chaney v. Southern Railway*, 46 EPD ¶38,054, 847 F.2d 718 (CA-11, 1988).



## DRUG SCREENING

Surveys show surprisingly few employers use testing

ABA/BEN VAN HOOK



Herbert Segal: "It doesn't take urinalysis to detect low job performance."

Recently released surveys show that surprisingly few of the nation's private employers have been wielding the paper cup to ferret out drug abuse.

Between the summers of 1987 and 1988, only one in every 100 workers had been tested, and only 3 percent of all private-sector employers had drug screening programs in progress, the two surveys conclude. Agricultural workers and govern-

ment employees were omitted from the studies.

The surveys were taken before recent U.S. Supreme Court decisions permitting the federal government to drug-test certain workers. (See Supreme Court Report, page 44.) It's still too early to gauge how private employers will respond to the high court's lead.

The most comprehensive of the surveys, conducted during the fall of

1988, was overseen by the U.S. Department of Labor's Bureau of Labor Statistics (BLS). Researchers there made projections based upon the drug-testing habits of 7,502 private-sector employers out of an estimated total of 4.5 million.

Other key conclusions reached by the BLS researchers include:

- ▶ Of businesses with 5,000 or more employees, 59.8 percent had drug-testing programs, while only 2.7 percent of firms with less than 100 workers screened their employees.

- ▶ Only a quarter of the companies that tested workers used random drug testing at their job sites.

- ▶ The highest rate of positive drug-test results were found among workers in wholesale-trade careers, where 20 percent of current workers and 24 percent of job applicants tested positive. The lowest rate of drug use was discovered among service workers, with 3.1 percent of current workers testing positive.

A much smaller sample taken during the same time period by the private Connecticut publishing firm, Business and Legal Reports, generally supports conclusions drawn by the BLS.

"Despite what the Supreme Court says and despite the panic button being pushed by so much public attention to drug testing, these statistics suggest that employers generally don't feel a great need to institute drug-screening programs," said Herbert Lee Segal, a Louisville, Ky., attorney and chair-elect of the ABA's Section on Labor and Employment Law.

"Personnel managers have traditionally reserved the power to discipline workers who show signs of inefficiency for whatever reason," he added. "It doesn't take urinalysis to detect low job performance and exercise the power employers already have. It's been my experience that employers who do have testing programs use them to rehabilitate, rather than punish those who test positive."

Data from employers who gauged worker drug use, according to the BLS report, revealed that of 953,000 employees tested, about 8.8 percent had positive results. Job applicants, who were more apt to be screened than workers already on the payroll, showed an 11.9 percent rate of positive results from among the 3.9

million tested. Nearly 64 percent of all employers said they tested only those current employees suspected of drug use.

David G. Evans, a Lawrenceville, N.J., attorney who is chair of the ABA's Committee on Alcohol and Drug Law Reform, said the low incidence of employee drug testing may reflect private employers' indifference to the public controversy over drug testing.

"Many employers are not assuming that they have to react to screaming media headlines that are making drug testing a public issue," Evans said. "As the surveys show, most of them are relying more heavily on pre-employment drug testing to clean up their job site and are using caution in testing workers already on the job only as the need arises."

Labor Department spokesmen warned that the survey findings were not intended to reflect on the prevalence of drug abuse by workers, but solely to disclose how many employers tested their personnel.

Others, however, were skeptical.

"Despite the good intentions of the Labor Department, I'm concerned that these statistics may mislead some employers to believe that drug abuse isn't as widespread as it is," said Lee I. Dogoloff, executive director of the American Council for Drug Education. "Consequently, they could dismantle drug testing and education programs under the mistaken belief that such programs are ineffective."

"Drug testing is a powerful shaper of employee behavior," Dogoloff added, "and its use should not be diminished by findings like these."

New York labor attorney Donald W. Savelson said he believes the surveys were outdated long before the Supreme Court issued its recent decisions on drug testing.

"Since last summer many private employers have followed the lead of the public sector in establishing some form of testing to meet Congressional directives to maintain a drug-free workplace," he said. "Moreover, a higher percentage of drug usage has been detected among workers since technological methods of conducting such tests have now become more sophisticated and less costly to employers."

—Charles-Edward Anderson

## Drug abuse at work

## Mission just possible

NEW YORK

Corporate America is in the frontline of the "war" on drugs. After losing billions through drug abuse, companies are now screening job applicants, random-testing employees and offering cures to the repentant

ACCORDING to USX, it has "a severe drug problem" at its Fairless steel plant in Pennsylvania. Georgia Power in Atlanta has found drug use steadily increasing during six years of testing its workers. Advanced Micro Devices, a California chip maker, reckons addiction to hard drugs—especially crack—now causes it more trouble than alcoholism. Estimates of how much drug abuse costs American business each year range from \$33 billion to more than \$100 billion. Whatever the right guess, almost every big American company is having to confront drug addiction because it is getting much worse.

Most companies say drug abuse is most serious among blue-collar workers, particularly those in boring or menial jobs. Mrs Helen Axel, the drug expert at the Conference Board, a business think tank, is sceptical. She says that the scale of drug abuse and alcoholism among senior managers and professional people is always underestimated; they can swallow their pills or swill their liquor behind closed office doors.

American companies are helping those employees who want to be helped, but sacking those who will not or cannot be cured. To keep the number manageable, more and more companies are making the offer of a job conditional on the applicant being found drug-free in medical tests.

Citicorp, America's biggest bank, is typical in declining to hire anybody who tests positive for amphetamines, barbiturates, cocaine or heroin. The number of job applicants testing positive at Fluor Daniel, a construction company with 40,000 employees, has fallen from 12-14% to 7-8% since word got around that the company weeds out drug users.

The tests are better at detecting marijuana smokers than cocaine sniffers and crack smokers. Addicts have learned that traces of cocaine can be flushed out of their systems within a couple of days by some diuretics that

are sold over the counter in America.

More controversial than screening job applicants are tests of a company's existing workforce, as is shown by studies issued by the Bureau of National Affairs, a publisher in Washington, DC. But some companies have insisted on their right to test even long-serving workers. Adolph Coors, a Colorado brewer, refuses to renounce its use of undercover agents to help detect workers using or selling drugs. Georgia Power is just as unapologetic about using trained dogs to sniff for drugs in its employees' lunch-boxes and cars. At Fluor Daniel, drug searches have not just found narcotics; they have turned up some weapons and stolen property as well. 3M, the Minnesota-based adhesives company, has pried into the desks, files and lockers of employees it suspects of drug abuse.

Unions are often critical of random testing, and some are challenging its legality. Many people find urine tests humiliating, especially when they are watched in order to prevent the switching of specimens. The

unions parade medical evidence that the drug tests are not reliable. About one test in ten that proves positive is a false alarm. A person who has just eaten a poppy-seed bagel or taken a cold remedy can show up as a heroin addict. These controversies have limited the number of companies that have adopted random tests. Only about 5% of all respondents in a survey soon to be published by the Conference Board say they employ random testing.

Several big companies believe it is a big mistake simply to sack an employee who has a drug problem. This causes employees to hide their drug addiction and makes supervisors, union officials and fellow workers reluctant to comment on an employee's erratic behaviour, let alone draw it to the attention of senior managers. Companies are instead offering drug addicts the same kind of employee-assistance programmes originally set up to help alcoholics.

Confidentiality is essential if workers are to seek help voluntarily. A few years ago a worker at AT&T, America's biggest telephone company, would be grilled by his boss if he asked for a couple of hours off each week to deal with a personal problem. Nowadays a boss at AT&T would be in trouble if he demanded to know more about that personal problem. At Coors, says a spokesman, "you could easily lose your job if you betrayed a confidence" from a worker seeking help for drugs, alcohol or anything else.

IBM's approach to drug use is widely regarded as a model. Its "voluntary and completely confidential" employee-assistance services are provided by two independent firms—Human Affairs International and Personal Performance Consultants. Neither has offices on IBM premises. IBM gives its employees a telephone number to call counselors from these firms when they or members of their immediate family need help. But not all IBM employees undergoing treatment are volunteers. An employee who behaves irrationally and erratically has to undergo a drug test when this is recommended by a company doctor. If the test proves positive, the employee has to accept treatment, followed by frequent random drug tests, to keep his job.

A debate rages on whether drug abuse is a more serious problem for business than alcoholism. Drug addiction is frowned upon by almost everybody, but people feel prudish about reacting to a fellow worker's heavy drinking. Yet all agree that drug addiction is harder to cure than alcoholism. Professionals are sceptical about anti-drug programmes that claim a cure rate of 50%. They say Advanced Micro Devices is much more realistic and truthful when it reports a cure rate of less than half that.

# Business Moves Against Drugs

By Donald C. Bacon

**T**he nation's drug problem hit home for William A. Stone not long ago when he found some marijuana cigarette butts in the parking lot of his 40-employee business in Louisville, Ky.

"We made such a big issue of it that now everybody here knows it is 'adios' if you get caught with drugs," says Stone, president and owner of Louisville Plate Glass Co. "We put it officially in our work rules: Anybody caught with alcohol, drugs, or any mind-altering substance is absolutely dismissed." Stone is now "thinking about initiating" a formal drug program, including "a drug test for every hire."

Employers say it is often a single incident that helps them see for the first time how vulnerable their businesses are to the plague of substance abuse. Such awakening has led thousands of companies since the mid-1980s to develop their own policies and programs for a drug-free workplace.

"It's nothing short of phenomenal the extent to which employers have gotten religion on the drug issue in the last five years," says Mark A. de Bernardo, special counsel for domestic policy of the U.S. Chamber of Commerce and executive director of the Institute for a Drug-Free Workplace, a coalition of corporations that seeks to shape public debate over drug legislation.

The importance of business's role in the overall battle against drugs was underscored by President Bush in September. In announcing his anti-drug strategy, the president coupled a call for a drug-free workplace with a blunt warning to federal contractors to implement "tough but fair" drug policies for their employees or face losing their federal contracts.

"Businesses and employers must make it clear that drug use and employment are incompatible," Bush added in his report to Congress.

Observes de Bernardo: "Employers have a legitimate role in the war on drugs, not only as good corporate citizens of their communities but also because drug abuse affects their bottom line. They realize that the cost, quality, and amount of the goods and services they produce are directly related to whether or not they have drug abusers in the workplace."

Experts estimate that drug and alcohol abuse together cost the business community as much as \$100 billion a year through increased absenteeism, added health-care costs, and accident rates that are as much as 10 times higher for abusers than for nonabusers.

Even so, and despite a wealth of evidence on the pervasiveness of drugs,

*Vulnerability to the effects of substance abuse by workers has led thousands of companies to develop programs for drug-free workplaces.*

problem in their own company." Nonetheless, he adds, "I think we're beginning to see a real improvement in perceptions of the drug problem among employers and workers in this country. Employers are beginning to take a more aggressive attitude."

So far, most private-sector activity against drugs in the workplace has



PHOTO: © LAMP PHOTO

*Deciding if drug tests for employees belong in a firm's anti-drug program can be hard for employers because of concerns about worker privacy and morale.*

surveys show that some employers still find it hard to accept the idea that substance abuse could thrive in their own businesses. In one recent survey of 265 corporate chief executive officers, 88 percent said they found "substance abuse to be a very significant problem in the nation today." But in the same survey, only 22 percent of the CEOs said they believe the misuse of drugs and alcohol is very significant in their own organizations.

Anthony J. Gajda, a principal with the employee-benefits consulting firm of William M. Meidinger Hansen Inc., which conducted the survey, attributes the apparent discrepancy in part to a reluctance in many businesses to confront the drug issue. "We think there is denial among organizations," Gajda says. "Nobody wants to admit it's a

been led by the large corporations. Nearly all of the nation's 500 largest corporations have adopted some type of drug program.

Midsized and smaller businesses have responded more slowly, perhaps partly for the reasons Gajda cites but also because they often lack the incentives and the resources to implement full-scale anti-drug programs. Programs can be expensive and time-consuming. And they must be skillfully shaped and administered to be effective while protecting employee concerns, particularly where testing is involved.

Private-sector drug policies vary widely. They range from comprehensive programs—including educational campaigns, pre-employment and employee testing, and employee assistance—down to concise formal state-

ments of company policy regarding drugs in the workplace. Such statements, added to company work rules and communicated to all employees, in their simplest form may merely make clear that the company expects employees to be free of drugs at all times and that those who fail to comply with the rule are subject to disciplinary action and possibly dismissal.

"There's really no excuse for a company not to have a drug policy, even if it is only one sentence long," says de Bernardo. "Having a company policy against drugs is in everybody's interest." De Bernardo is the author of *Drug Abuse in the Workplace: An Employer's Guide for Prevention*, which provides information and advice for dealing with workplace drug issues. (See the sidebar below.)

**S**ome corporations have established elaborate policies and procedures to control drug and alcohol abuse inside their organizations. General Dynamics Corp., for instance, spells out its program in a 10-page document that seems to cover almost every contingency from educating employees on the dangers of drug and alcohol use to disciplining drug and alcohol abusers. The policy requires General Dynamics to advise its employees, in writing, on "the reasons for the program, benefits for the employees and the company, employee assistance programs, effects of alcohol and drugs on individuals and their families, [and] use of inspection, alcohol tests, and drug tests."

Capital Cities/ABC, the media conglomerate, extended a substance-abuse policy to all of its broadcast and print properties after one of its employees

died of a drug overdose. That policy includes employee assistance, educational efforts, and, as necessary, the use of drug tests, drug-sniffing dogs, and undercover operations.

Spurring some employers to keep their workplaces drug-free in recent months have been new legal requirements for most businesses selling goods or services to the federal government. Businesses with government contracts of less than \$25,000 are not covered.

The Drug-Free Workplace Act of 1988, which became effective last March, requires contractors to publish and distribute to employees a statement prohibiting illegal drug activity in the workplace and specifying actions that will be taken against those who violate the policy. It also says contractors must make employees aware of the dangers of drugs and punish any employees convicted of criminal drug violations occurring in the workplace. Failure to comply can cost contractors their federal payments or contracts and disqualify them for future awards for five years.

That law does not require employers to include testing as part of their drug programs. But through other regulatory means, the government is beginning to lean on employers in certain key industries to test at least those employees involved in areas of defense and those whose performance could affect public safety.

Employers in the airline, railroad, bus, and trucking industries currently are scrambling to prepare for sweeping new rules, which are slated to take effect in December and which could require random drug testing of up to 4 million transportation employees.

Defense contractors, moreover, have been required since last spring to test

certain employees for illegal drugs.

For most employers who are free to choose, their most crucial decision in setting up a drug program is whether to include testing. Employee and union concerns over privacy rights, the effect on workplace morale, the pressure for accuracy, and the \$25 to \$100 it costs to test each employee all must be considered when an employer initiates a testing program.

About 60 percent of companies with 5,000 or more employees have drug programs that include some form of testing, mostly of job applicants and employees in key positions involving workplace or public safety, according to a 1988 Department of Labor survey.

Among businesses with 50 to 99 employees, only 12 percent had drug programs in place in 1988, the latest year for which estimates are available. However, some 15 percent of the companies said they were considering implementation of a testing program.

While drug testing is not for everybody—"Testing should be done right, or not at all," de Bernardo advises—more and more employers are concluding that it can be one of their most effective tools in keeping drugs out of the work environment.

Today, companies of all sizes are joining such giants as IBM, Kodak, and DuPont in initiating drug programs that include a testing component.

Drug testing's increased acceptance extends even to business and other private organizations. Last August, the U.S. Chamber of Commerce began to screen out job applicants who use illegal drugs and notified employees that it would extend testing to employees if "there is cause to suspect an employee of drug or alcohol abuse."

## Signs Of Abuse In The Workplace

In his book *Drug Abuse in the Workplace: An Employer's Guide for Prevention*, Mark A. de Bernardo, executive director of the Institute for a Drug-Free Workplace, advises employers on how to spot warning signs of drug abuse. Some clues:

**Drug paraphernalia:** Glassine envelopes, crudely wrapped cigarette butts, cigarette papers, razor blades, medicine droppers, and bent teaspoons.

**Suspicious behavior:** Frequent visits to the washroom, secretive phone calls, dressing inappropriately for the season, wearing sunglasses indoors. Long-sleeve shirts can hide needle marks;

sunglasses can cover bloodshot or dilated eyes.

**Personality changes:** Sudden and erratic mood or personality shifts, excessive giddiness, aggressive or depressed behavior, loss of appetite or memory.

None of these traits necessarily means a person is a drug user, of course, and employers are advised to respond to suspicions cautiously.

*Drug Abuse in the Workplace: An Employer's Guide for Prevention* is available from the U.S. Chamber of Commerce, 1615 H Street, N.W., Washington, D.C. 20062. Ask for Publication 6972. The price is \$20 for Chamber members, \$33 for nonmembers.

For more information on the Institute for a Drug-Free Workplace, write to Mark A. de Bernardo at the above address.

**A**s a next step, many members of the business community are looking at the drug problem beyond their own organizations. Local business people in several cities, including Jacksonville, Fla., and Washington, D.C., are forming groups to help small companies in their areas set up anti-drug programs. Meanwhile, active coalitions such as the Institute for a Drug-Free Workplace are working through Congress and state legislatures to make sure business's voice is heard and its concerns are addressed in the unfolding war on drugs.

No one doubts that the war will be long and expensive. But signs of progress are appearing. As Dr. Carleton E. Turner, a former White House adviser on drug abuse, has put it: "The fact that corporations realize they must fight drug abuse in the workplace is another significant step forward in the battle." ■

# Using 'Spies to Win a War'

Corporations turn to detectives to catch workers with drug problems

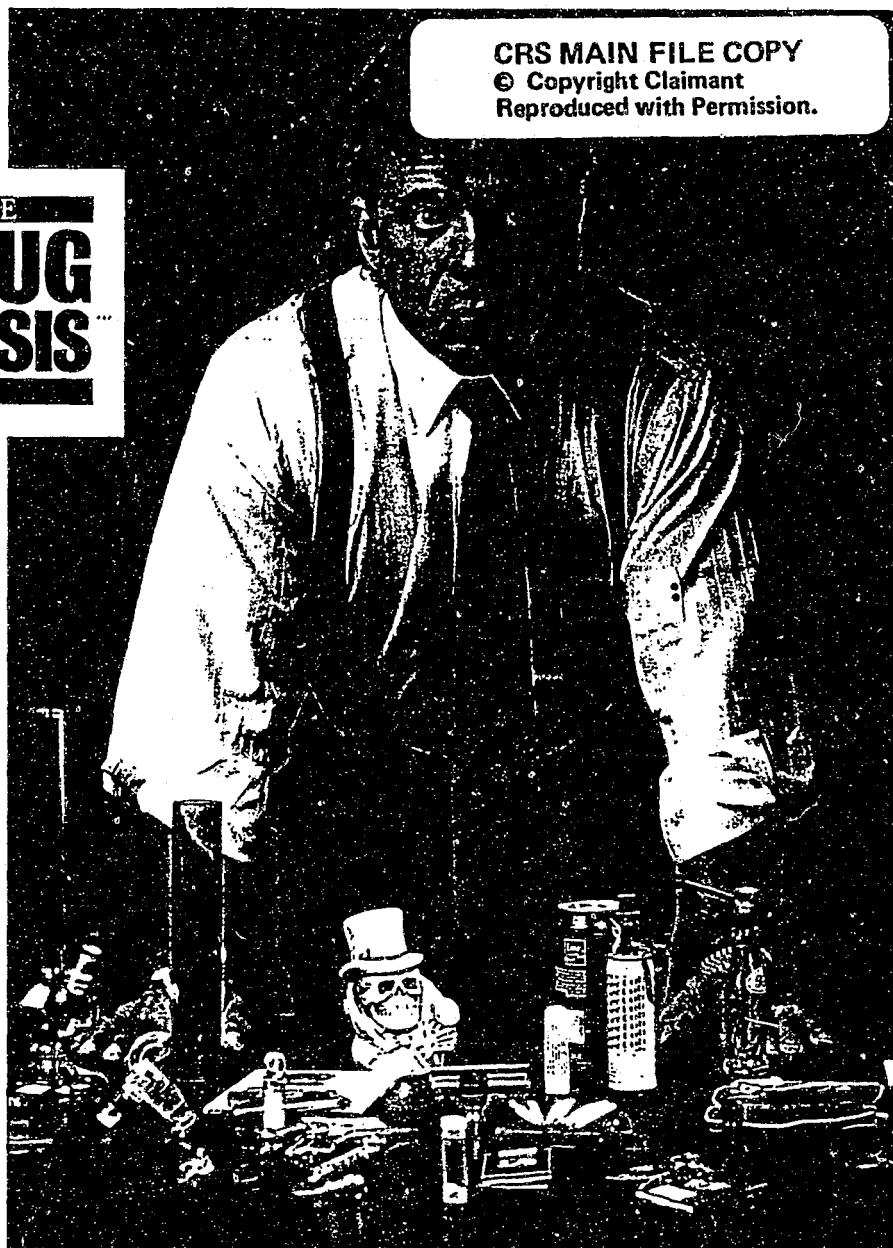
**S**omething was wrong at the turkey-packaging plant. Worker Compensation claims were skyrocketing, mostly from the evening shift. So earlier this year, management called in undercover detectives, who soon found the cause. Employees were getting high on cocaine and jousting with forklifts, injuring themselves and damaging equipment. "It was absolutely demolition derby," says Ron Schmidt, vice president of investigations for Pinkerton's, the agency hired by the company. (The firm didn't want its name used.) As a result of the probe, nearly 20 workers were fired.

With drug abuse on the job increasing every year, corporations are escalating the battle to root out users and dealers. More and more, they're supplementing education programs and random testing with full-scale undercover work. The get-tough trend has created a bonanza for the drug snoops—now a \$250 million industry, by some estimates. While hiring detectives is still often viewed as a last resort, some companies say they have no choice. Says William Huston, security chief for paper manufacturer Boise Cascade: "It takes spies to win wars, and we're in a war."

Business is fighting harder because it can't afford not to. The crack epidemic has compounded longstanding corporate problems with cocaine, marijuana and speed. The U.S. Chamber of Commerce has found that recreational drug users are a third less productive than other employees and more than three times likelier to injure themselves or others at work (chart). Uncle Sam is also forcing the issue: the Drug-Free Workplace Act of 1988 requires companies with substantial federal contracts to clean house or lose contracts.

Even firms under no legal obligation are eying their ranks more closely. Just one stoned employee can do monumental damage. A January 1987 train wreck caused by an engineer who admitted smoking a joint at his post killed 16 people and injured 175 and cost Conrail and Amtrak \$106 million. Most companies have more than one drug user to worry about: the Chamber of Commerce says that 44 percent of those entering the full-time work force have used illegal drugs in the past year. "There is not a

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Calling in investigators when 'the barn's on fire': Carroll with some confiscated drugs

company in the U.S. that does not have a drug problem, and if they say they don't, they're ignoring the fact," says Paul Leckinger, whose Chicago-based Midwest Consultants, Inc., helps companies set up drug-detection programs.

The companies say that police rarely have the time or manpower to mount work-

place investigations. "Local enforcement doesn't want to mess with us," says Richard Kerner, head of security at Pillowtex, a Dallas-based pillow and comforter manufacturer. "We're not that big." A growing number of private companies, large and small, are finding that enlisting as mercenaries in the corporate drug wars can

highly profitable. Pinkerton's reports a 40 percent jump in drug-related business in the past six months alone. The detective agency estimates that 80 percent of its undercover jobs are now drug related—including many that begin as simple theft investigations. "We start out looking for what happened to the property and we find drugs," says CEO Tom Wathen. Another drug-detection agency, Dayton-based Professional Law Enforcement, has watched its revenues double every year since 1985.

Clients range from small companies with disappearing inventories to some of America's biggest corporate giants. General Motors and Whirlpool have used spies as part of their anti-drug programs. Houston-based Compaq Computer Corp. flushed out 22 employees who have been accused of trading stolen computer chips for drugs. PLE alone has 54 undercover agents now at work in Fortune 200 companies. Few companies will admit they hire snoops, and most try to keep undercover work under wraps. "People feel you're spying on them," says one company security officer who employs snoops. "We are, but do you want people to know that?"

**'Playing ostrich':** Companies that avoid confronting their drug problems find they don't just go away. One firm realized that a forklift driver was causing damage, but didn't order an investigation until he killed a co-worker, says Richard Rose, vice president of New York-based Management Safeguards. Another company called Rose to find out if one of its partners was abusing drugs: he was, but the firm opted not to fire him because he was still bringing in \$3 million in business a year. "Some play ostrich, and they back away from confronting the problem," Rose says. "But they'll be calling me back in a few years, and it'll be a lot harder and more expensive to get rid of the problem then."

Hardball methods can sometimes create as many problems as they solve. While no one is for drug abuse—and workers are often the first to demand that management clean up drug problems—workers' rights can get trampled in the rush to uncover users. The same investigators who look for drug abuse can be used to check up on union activity and whistleblowers. "It really begins to shift the balance of power away from individuals who have a right not to be abused by their government to a nation of people who are constantly being spied upon," says Loren Siegel, a spokesperson for the American Civil Liberties Union.

Some professionals believe the cops-and-robbers approach

## Warning Signals

**A**long with hard evidence, investigators look for telltale behavior when searching for workers with drug problems. Some signals:

**Low Productivity:** On average, recreational users are one-third less productive than other workers.

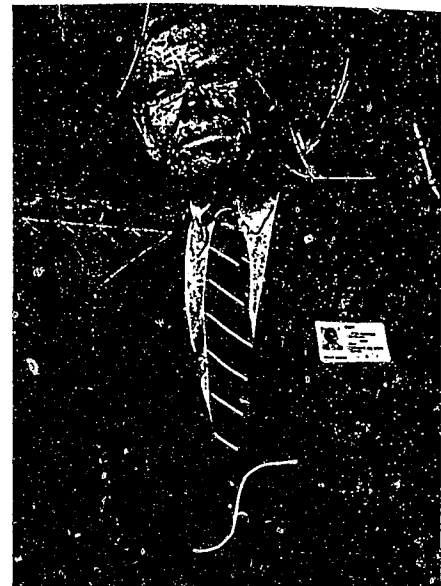
**Tardiness:** Users are three times more likely to arrive late and twice as likely to ask to leave early.

**Frequent Absences:** Workers using drugs are two and a half times more likely to be out eight days or more.

**Accidents:** Users are almost four times more likely to be involved in injuries on the job.

SOURCE: U.S. CHAMBER OF COMMERCE

encourages too much emphasis on punishment. Since federal law treats addiction as a handicap covered by antidiscrimination statutes, companies can't simply fire workers because they use drugs. Though skeptics question the cost-effectiveness of rehabilitation programs, a new study based on data from North Carolina's Research Triangle Institute shows that treatment can reduce drug use as well as abuser crime. And David Conney, a psychiatrist who founded the New York-based Conney Medical Associates to offer a broad array of drug-prevention and treatment services to corporations, points out that treatment saves the cost of training new workers. "It's good business to treat the employee," Conney says. "It's good from the humanitarian point of view of benefit to the employee, and it's also good business financially." Charlie Carroll, a cofounder of PLE who broke with the firm to found a new company, ASET Corp., agrees. "Why throw all the money



ROB LEWINE

A bonanza for Pinkerton's: Wathen

invested in the person out the door," he asks, "when the next person you hire might have the same problem?"

Because of the rancor that undercover investigations can cause, some corporations—and even some investigators—try to avoid them. Edward Cass, a 30-year Drug Enforcement Agency veteran who now runs Boston-based Cass Associates, says that not all detective firms have the staff to conduct sensitive operations, and that botched investigations can harm innocent workers and lead to lawsuits. "Some of these companies are hiring kids, they're getting young people with a cop complex, they'll stand on their head just to be a detective," Cass says. "A whole lot of people are out there that are all fluff and no stuff." Cass prefers surveying workers in confidential interviews.

Other drug fighters have grown frustrated with police tactics because they often come too late. Carroll says he left PLE partly because he felt that it was overemphasizing investigations. "I changed my philosophy. Drug busts are generally reactive in nature. When they call you in, it's because the barn's on fire." His new firm spends 90 percent of its energies on drug education and prevention. But even Carroll admits that prevention alone isn't enough these days. In companies across America, the barn is on fire, and corporations are willing to do whatever is necessary to put out the flames.

JOHN SCHWARTZ with  
ELIZABETH BRADBURN and  
CAROLYN FRIDAY in New York

Relying on police isn't enough: Kerner at a Pillowtex plant

ROB NELSON—BLACK STAR





October 13, 1988; p. 17

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The Christian Science Monitor

## Drug testing: legal, moral issues on a collision course

**A** WHOLE range of issues swirls around employee drug-testing. Among them are legal, moral, and practical questions.

Here are the considerations:

**Legal.** The courts seem to have reached a consensus that such probes fall into the category of searches and seizures. What they are divided over is what kinds of drug testing should be considered constitutional under Fourth Amendment proscriptions against *unreasonable* searches.

The United States Supreme Court will soon consider a trio of cases to try to reach some judicial consensus in this area.

Two of these matters are scheduled for hearing in early November — one involving railroad workers and the other the US Customs Service. In the former, the justices will have to decide whether the constitutional privacy rights of individuals are violated by federal regulations requiring blood and urine tests for those involved in serious railroad accidents. A lower appellate court struck down this search as unreasonable.

A similar issue arises in reference to mandated Customs Service tests for those seeking drug enforcement jobs. Here the lower court ruled the testing to be reasonable, citing that intrusiveness of the search was minimal and limited in scope.

The third case, just added to the docket, also involves railroad workers. Here the court will review a ruling that barred the Consolidated Rail Corporation (Conrail) from imposing drug tests without permitting collective bargaining over the issue.

The Conrail dispute, however, seems to center more on jurisdiction than on personal privacy. The US Court of Appeals for the Third Circuit has already ruled that the Railroad Labor Act, which governs the railroad and airline industries, requires collective bargaining in this situation.

**Moral.** In upholding drug testing in the Customs Service case, the US Court of Appeals for the Fifth Circuit proclaimed that drugs are an evil in society that government has a legitimate interest in protecting against.

It is safe to say that there is consensus in society for this point of view. It has led to the recent tough stance by Olympic officials toward athletes found using steroids. And it is reflected in President Reagan's proposals

for broad-based testing of federal workers and pending congressional legislation for a crackdown on drug dealers.

Some suggest that random drug testing should be imposed on prisoners and school-children alike — and that criminal sanctions should be imposed on those found to be users.

Yet, there is no evidence that this type of probe of a person's blood and body fluids is a major deterrent to substance use and abuse.

The important test is the one provided by society — moral leadership provided by the home, the community, the school, and the church. It is a test of spiritual strength to resist that which is destructive to the dominion of the individual. The war on drugs can best be won at this level.

**Practical.** Drug testing may well be practical for railroad workers, Customs employees, pilots, school bus drivers, and others whose impairment by chemicals could lead to serious accidents and public risks. But even in these situations, random testing is constitutionally questionable unless attended by strict guidelines that take into account individual dignity and privacy.

The burden must always be on government or private employers to justify why such intrusion is necessary. The tests themselves must be technically competent and professionally administered. Results must not be used to punish but as a guide toward rehabilitation.

Gerald Uelmen, dean of the Santa Clara University School of Law, recently commented in a Los Angeles Times op-ed column that court rulings do not get to the issue of whether drug testing is worth the cost.

Dean Uelmen says that the estimated \$8 billion to \$10 billion annual price tag that would be attached to testing of every employee in the US far exceeds what is currently spent on all drug-treatment programs combined. He also points out that drug testing is fast becoming a multibillion-dollar industry. Uelmen adds that "many employers who are jumping on the drug-testing bandwagon are chiefly concerned with corporate images rather than wayward employees."

Profit and profile are not reason enough for engaging in this highly controversial practice.

### JUSTICE

A Thursday column

## Hoisted on their own constitutional petard

The carping of labor unions and liberals over comprehensive drug-testing regulations issued Nov. 14 by the Department of Transportation is ill-becoming. Previously, they ardently championed constitutional doctrines that support these regulations. This irony of evenhanded justice should warn any group against untempered constitutional zeal.

DOT Secretary James Burnley's final drug-testing rules apply to approximately 4 million transportation employees entrusted with safety or security-related responsibilities: 3 million truck drivers, 538,000 aviation employees, 90,000 railroad workers, 200,000 mass-transit personnel, 120,000 seamen and 116,500 pipeline laborers.

Industry testing costs approximate \$2.1 billion, but are dwarfed by the estimated \$8.7 billion savings from fewer accidents, less absenteeism, sick leave, theft and workmen's compensation payments.

The rules generally mandate employee drug testing for marijuana, cocaine, opiates, amphetamines and PCP prior to hiring, after an accident, at periodic intervals, randomly and when reasonable suspicion of illicit use surrounds an individual. Employees testing positive must be

removed from their safety- or security-related duties.

The foremost constitutional complaint against the DOT rules is the wholesale testing of employees without any particularized reason to believe drug use will be detected. The testing, it is said, is akin to the odious general writs of assistance brandished by the British prior to the Revolutionary War to enforce customs laws against American colonists. The writs authorized open-ended searches and were issued without individualized suspicion of wrongdoing. The Fourth Amendment's ban on all unreasonable searches, and its warrant requirement of probable cause to suspect misconduct and particularity in identifying places to be searched or persons to be seized were animated by American antipathy toward writs of assistance.

Accordingly, unions and liberals contend, the unfocused, warrantless drug testing mandated by the DOT regulations flouts the intent of the amendment.

Zealously pursuing strict enforcement of their favored regulatory programs, however, the critics of random and comprehensive drug testing have subverted that constitutional objection.

In *Camara vs. Municipal Court* (1967), the Supreme Court declared that rental properties may be searched to detect housing-code violations within a geographic area

based on probable cause to believe some violations will be discovered. The court explained that effective housing-code enforcement would be infeasible if each multidwelling-unit search required a showing of probable cause.

The liberal infatuation with strict controls on guns precipitated a Fourth Amendment inroad in *United States vs. Biswell* (1972). There the court sustained a 1968 Gun Control Act provision authorizing warrantless searches of the premises of firearms or ammunition dealers during business hours to inspect records, documents or inventory. If inspections are to be effective and serve as a credible deterrent to gun-law violations, the court explained "unannounced, even frequent inspections are essential," without the prerequisite of a warrant.

Writing for the court in *Colonnade Corp. vs. United States* (1975), liberal icon Justice William O. Douglas sustained a federal statute authorizing warrantless searches of retail liquor dealers to enforce excise-tax laws. Liberal Justice Thurgood Marshall authored the opinion in *Donovan vs. Dewey* (1981) upholding unannounced, warrantless inspections of underground and surface mines to enforce the Federal Mine Safety and Health Act. A search warrant requirement, Justice Marshall insisted, would frustrate effective enforcement, because safety or health

see FEIN, page F4

hazards can be readily concealed if mine operators are alerted in advance.

Former liberal Rep. Elizabeth Holtzman, Democrat of New York, orchestrated a crabbled Fourth Amendment decree in *New York vs. Burger* (1987). Arguing as district attorney for Brooklyn, she successfully defended a statute permitting warrantless searches of automobile junkyards to detect illicit commerce in stolen vehicles and parts. The Burger decision stressed the acute community menace of motor vehicle theft and the necessity of surprise searches to prevent law evasion by junkyard dealers.

The DOT drug-testing regulations satisfy the Fourth Amendment jurisprudence engineered by liberals and unions. Drug use is pandemic and dangerous when transportation employees are implicated. In January 1987, 16 persons died in a Conrail-Amtrak crash involving a drug-impaired Conrail engineer. Since that date, 60 major rail accidents causing deaths and hundreds of injuries involved employees who tested positive for illegal drug use.

In July 1988, a tour-bus driver impaired by cocaine injured 44 passengers in a crash. The Federal Aviation Administration has dismissed 13 air traffic controllers for drug abuse after abortive rehabilitation efforts. A cocaine-using commuter aircraft pilot and eight others recently died in an accident.

Truckers estimate that 36 percent of their numbers occasionally drive under the influence of drugs.

To ensure a drug-free work force in safety or security-related transportation jobs, random testing without warrants is imperative. Notice would enable employees to conceal traces of drug use and mandatory individual search warrants would be impracticable, because drug abuse ordinarily is undetectable without testing.

The DOT regulations thus fit snugly within the Supreme Court's prevailing Fourth Amendment framework. Opponents have been hoisted on their own constitutional petard. Macbeth's prescient brooding should tame these feverish litigators in the future: "that we but teach bloody instructions, which being taught return to plague the inventor: This evenhanded justice commends the ingredients of our poison'd chalice to our own lips."

Bruce Fein is a lawyer and freelance writer specializing in legal issues.



November 17, 1988; p. 8A

## Testing for drugs makes liberties unsafe

ORANGE, Calif. — The 9th U.S. Circuit Court of Appeals is absolutely right. Our constitutionally guaranteed freedom from unreasonable search and seizure is more important than our misguided, idiotic "war on drugs." And, yes, the Fourth Amendment is also more important than the so-called "safety" issue, which the current popularity of illegal drugs is said to raise.

If the truth be told, however, that much-vaunted "safety" issue is little more than a red herring. The drug tests at issue cannot tell if the testee is high at the time of the test. Nor can they detect if the testee was high at any particular time in the past. At their best, all such tests can reveal is whether any residue of a particular drug remains in the testee's body at the time of the test. What this means is that an individual who takes a couple of hits off a joint at a party in January can turn up positive for marijuana on a drug test in February.

Knowing that the marijuana "high" wears off after a few hours, is there anyone in the USA so out of touch with reality as to believe such an individual cannot safely operate a plane or a train one month later?

Nor is this the full extent of the problem any fair-minded person will have with these drug tests. For these tests carry with them absolutely enormous margins of error. It is not uncommon for individuals who have never ingested any illegal

*Jeff Riegenbach is writing a book for the Cato Institute on U.S. drug policy.*

drugs at all to test positive for one or more of these drugs. And it is even more common for individuals who are using non-psychoactive prescription drugs to test positive for one or more illegal drugs which they have not in fact used.

The 9th Circuit Court's ruling does not, therefore, put constitutional rights above the safety of rail and airline passengers, because the drug tests the court ruled against do not, by any reasonable standard, tell us anything at all about safety.

But even if the court had put constitutional rights above safety, it would have been right to do so. It may be that a police state can assure its citizens perfect, mishap-free transportation. Mussolini is said by some to have achieved that in Italy in the 1930s. But at what cost?

Are we to permit our government to stop us, search us and seize whatever it likes whenever it likes, even in the absence of any evidence suggesting we have been involved in criminal behavior? Are we to allow this government intrusion into our lives on no basis whatever but the government's belief, however foolish or groundless, that someone in the area around us might have been guilty of such criminal behavior?

Our Founding Fathers refused to tolerate that kind of legal system. And so should we.

November 17, 1988 p. 8A

## Drug abuse is not a victimless crime

CHICAGO — The recent decision overturning drug testing for railroad workers after accidents or rule violations contrasts dramatically with decisions by four other federal appeals courts upholding random drug testing for prison guards, jockeys, bus drivers and customs officials. It is a bad decision that contributes to the confusion and misinformation being spawned by those advocating drug use as a freedom-of-choice issue.

Drugs are not only illegal, they do work and they do cause accidents. Cocaine is stronger, more available and cheaper today than at any time in the last decade. While marijuana use is decreasing, the potency of today's pot is eight times greater than in 1975.

Drug tests do not document impairment. Drug tests document use of a particular substance. If there is a serious accident, why shouldn't we investigate the cause? Out of 179 railroad accidents in 1987, 39 railroad employees tested positive for drugs — an increase of 34% over 1986.

And supervisors can't always tell when employees are taking drugs. Drugs like marijuana do not always cause erratic behavior, particularly several hours after use when they can still have an impact on peripheral vision, judgment and vigilance. A study by Jerome Yesavage at Stanford University documented that one full day after smoking one marijuana joint, pilots' ability to land safely on the center of a runway was dramatically impaired, even though the pilots looked fine and thought they were performing well.

*Peter B. Bensinger, former federal drug enforcement administrator, is a consultant on drugs in the work place.*

One principal value of drug testing is as a deterrent, just as the placement of metal detectors at airports serves as a deterrent to terrorists. The detector warning does not document degree of danger or percentage of damage that could be caused by a bomb or a gun. The drug test, like the metal detector, reports the presence of a prohibited substance.

And the rules are clear. The railroads have said: "Don't come to work with drugs or alcohol in your system." And the way to reduce drug abuse is to test people for drugs, including after accidents.

The chairman of the National Transportation Safety Board maintains that post-accident drug and alcohol testing in safety-sensitive railroad jobs is critical. The U.S. District Court in Washington denied a petition to overturn the Department of Transportation drug-testing rules, which included random testing for specific safety-sensitive positions.

Drug testing does have an impact on reducing drug use on and off the job. Such testing can be done scientifically and accurately, and the testing methodology and results can be reviewed and examined.

Drug abuse is not a victimless crime. Look at the recent report on the relationship between drug use and criminal behavior published by the Department of Justice or ask the families of the innocent victims killed in the Conrail-Amtrak collision in Chase, Md.

## Drugs, privacy and public safety

The Supreme Court has given the Bush administration the go-ahead for a program of drug testing for some railroad workers and Customs Service employees. Civil libertarians may protest, but the court didn't completely ignore their complaints. It also suggested warning that the war against drugs will have to be pursued without undue zeal and with some regard for the privacy of those tested.

Two cases were decided Tuesday. One addressed the drug tests required by federal law for rail personnel involved in serious accidents. The other concerned Customs Service rules, which provide for tests of more than 8,000 employees who work directly in drug interdiction, carry guns or handle classified material.

Justice Anthony Kennedy, who wrote both majority opinions, argued that the railroad tests are justified by the government's strong interest in assuring public safety. A similar concern applies to many of the Customs workers, in addition to the need to assure that people enforcing drug laws aren't themselves breaking drug laws. But the court refused to endorse the testing

of workers simply because of their access to classified documents, saying it lacked sufficient information.

The most cogent dissent came from a surprising source, conservative Justice Antonin Scalia. Though he supported the railroad rules, he denounced the Customs policy as "a kind of immolation of privacy and human dignity in symbolic opposition to drug use." The government didn't demonstrate a problem in Customs that demanded this remedy, he complained. Its program was based on "nothing but speculation."

Scalia raises pertinent questions that apply beyond this case. They may also figure in another major case now in the lower courts—the government's unprecedented plan to test four million workers in the airline and trucking industries.

The court was right to rule that individual rights must sometimes give way to more urgent government interests. It has an equally solemn duty to assure that when the interests are not so urgent, the need to safeguard privacy will prevail.

March 24, 1989; p. 20

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The Christian Science Monitor

## The Drug-test Swamp

**I**N permitting drug tests of railway employees after a major accident or safety violation, the Supreme Court was on eminently safe ground. In allowing drug tests of certain categories of Customs Service officers, the court pushed into that squishy bog that borders quagmire.

Some civil libertarians find both of Tuesday's rulings defective in not requiring "individualized suspicion" of drug use before testing workers. They say that violates the Fourth Amendment protection against "unreasonable searches and seizures."

Yet individualized suspicion as an element of "reasonableness" is a judge-created standard, not explicit in the Constitution, and judges can adapt it.

The balance struck by the high court in the case of railway workers makes good sense. For one thing, there is in fact a record of drug-related accidents on the rails, resulting in death and injury. For another thing, the fact that testing is triggered by a safety lapse means that there is at least what might be called "regionalized suspicion" of drug abuse: Hence, the testing net can't be cast too widely.

With regard to testing certain Customs officers engaged in intercepting drugs or who carry guns, though, the court had less of an empirical basis. Data indicate that drug abuse among such officers is minuscule. Noting this, Justice Scalia objected that the testing program appears to be simply a symbolic gesture.

We're not prepared to say that the court ventured too far into quicksand in the Customs case. There is some rational basis for the court's distinctions, and the testing is circumscribed — though much more loosely than in the railway case. Also, we're not convinced that drug testing, when conducted under dignified conditions, is quite the Gestapo-like invasion of privacy that opponents depict it to be. At least, the privacy concern is not sufficient alone to outweigh in every case society's compelling need to combat the drug menace.

But we do say that the Customs decision comes about as close to random testing as we would like to see. The Supreme Court is expected to face many more challenges to drug tests in the years ahead, but it has already begun to map the edge of the swamp.

## Drug Testing Passes a Test

In upholding two Federal programs that test employees for drug use in the workplace, the Supreme Court properly balanced privacy rights against public safety.

The majority supported drug testing by a vote of 7 to 2 in the case of railroad workers involved in accidents and by 5 to 4 in the case of Customs Service employees who intercept drugs or carry firearms. Concerns for rail safety and a sober force to guard the border gateways from smugglers are real enough. Complaints about the indignity of submitting to tests are exaggerated given that urine testing has become a routine part of a physical examination.

Even if the programs were motivated by politics as well as need, they are legitimate public policy as long as they are properly managed.

Drug tests are undeniably searches subject to the Fourth Amendment's ban on unreasonable searches and seizures. Railroad and Treasury Department unions argued that warrants, legal probable cause or at least individualized suspicion should be required before any worker could be forced to undergo testing.

But in these cases, the word to remember is "reasonable." Justice Anthony Kennedy, writing

for the Court, found that it would be unreasonable to put railroad and customs managers through the rigors of search-and-seizure jurisprudence that the police must master.

Enough that a rail accident has occurred and investigators at the chaotic scene need information quickly. Enough that the customs agency needs to satisfy itself about the sobriety of an employee who is being promoted or transferred to the front lines of drug interdiction or who is carrying a sidearm.

In the customs case, the vote was close because the Government had to admit that the Customs Service doesn't have an obvious drug problem. The railroad industry, by contrast, has a lamentable history of drug- and alcohol-related accidents. But the majority rightly refused to require Customs to accumulate such a history before protecting clearly sensitive jobs. The Court's task was to rule on the power to test, not the wisdom of testing.

This broad approval for two fledgling programs suggests that well-managed testing plans, including some random testing in important job categories, can survive constitutional review. It bolsters the principle that Government programs promoting public safety can pass their own constitutional tests. For holding that the rules for criminal prosecution need not blind the protection of the workplace, the justices also deserve high praise.

*After months of consideration, the editorial board of AVIATION WEEK & SPACE TECHNOLOGY remains divided over the advisability of random drug testing for air transport employees. Accordingly, this week's editorial page is given over to summary statements in support of and in opposition to the new government program. We welcome reader responses.—Ed.*

## Yes to Drug Tests

**P**ilots and aviation professionals the world over should drop their pride a notch and support drug testing for airline industry personnel in safety-critical jobs. The stakes are too high to do otherwise.

Even one death or injury resulting from a drug-related aircraft accident—whether it involves a pilot, mechanic, dispatcher or controller—is too many. Aviators hold a sacred public trust to provide safe transportation, and it is a credit to the international airline industry that so many take this responsibility so seriously. This is a trust that hundreds of thousands of aviation professionals have labored for decades to build. But it can be shattered by just one accident.

It cannot be argued that drug users never reach the cockpit, maintenance shop or control tower cab. In January, 1988, nine people died in a commuter transport crash near Durango, Colo. The National Transportation Safety Board later ruled that the pilot's cocaine use was a contributing factor.

A newspaper survey of emergency room staffs manning Pittsburgh area hospitals in the fall of 1986 found 23 cases of drug abuse by airline flight crews. Hospital workers also reported treating numerous additional cases of drug abuse by flight-critical workers such as mechanics.

The Transportation Dept.'s drug testing rules—although not perfect—are a good place to start. They apply to 538,000 U.S. aviation workers who fill safety-critical positions. They specify pre-employment, post-accident, periodic, reasonable cause and random testing. When fully instituted in two years, employers will be required to have 50% of their covered workforce checked via random urine samples annually.

Employees testing positive on both an initial and more-accurate confirming test are to be removed from their posts immediately.

There is proof that drug testing works. When the U.S. Coast Guard began its drug test program five years ago 10.3% of its employees tested positive. Now that rate is 2.9%. Drug test programs in other U.S. military services produced similar results.

Although controversial, random tests should be instituted for particularly sensitive positions. Otherwise, employees can modify their intakes to pass scheduled tests. Reasonable-cause testing fails to protect the public adequately; post-accident checks are of little use to the injured and of none at all to the dead.

To ease the transition to regular drug testing, the Transportation Dept. should take further steps to address employee concerns. Strict testing guidelines must be drawn up and publicized. Workers need to be guaranteed that the tests, even random checks, are conducted in an appropriate medical environment. Independent third party organizations should conduct the tests on their own schedules to ensure impartiality.

More importantly, the Transportation Dept. should fund further research to determine the exact accuracy of the program and to establish appropriate toxicity levels. And, it surely should address concerns that such over-the-counter medicines as Advil and NyQuil can trigger "false positives."

## No to Intrusions

**T**he U.S. government has found airline pilots suspect of drug abuse—not based on their record as individuals, but on the fact that they fly aircraft and are responsible for the safety of air travelers. New rounds of government-ordered drug tests are a hysterical reaction to our society's inability to conquer this modern-day scourge.

Because of their sensitive public safety role, airline pilots are checked by government and company doctors more than anyone else in the commercial sector. These include pre-hire screenings, two FAA physicals a year and an annual company physical. In addition to these probes there are reviews of their work by check pilots, usually twice a year, and the peer review that comes through the welcome development of cockpit resource management.

Another check, particularly one run by the government, simply is not needed. It will be an expensive duplication of effort. Random testing in particular raises the specter that a mistake will jeopardize someone's career. And, the odds are that mistakes will be made and that pilots will be hurt in the bureaucratic entanglements.

Pilots' basic rights are being eroded, and without cause. No evidence has been produced that pilot drug abuse is eroding airline safety levels. Drug abuse has been cited in one commercial aviation accident. This isolated event does not justify a large government program to test 40,000 other commercial pilots one more time.

What is behind this government dictum is a misguided notion of egalitarianism in the workplace. Public pressures have increased for random testing since government investigators blamed an Amtrak accident on drugged railroad engineers. Although there is no evidence that pilots are guilty (or even suspect), they are being treated as such without probable cause.

Other ways of handling the safety issue ought to be explored. Pre-hiring psychological screenings should take the drug question into consideration if they do not already. Such a focus could select individuals who may be prone to take drugs or otherwise endanger aircraft safety.

Uses and abuses of alcohol have presented the same challenges to the government, industry and the pilot community, as does the use of drugs. In its handling of alcohol issues, each sector has acquitted itself well.

Government regulations restrict alcohol use. Pilot abusers can turn themselves in without wrecking their careers. Fellow pilots can turn in another pilot for abuse or violation of regulations. But jobs are not immediately at stake in this process since the alcohol victim can be rehabilitated and returned to the cockpit. The rehabilitation program, a model for all industries, is a credit to both airlines and pilots.

As entrenched as alcohol abuse is in this country, pilots are not required to take pre-flight urine tests for alcohol. Drug abuse is a scourge. But it should be treated like alcohol abuse. Establish the process for abusers to turn themselves in, promote a no-fault system to conquer the problem on an individual basis under personal care, and do it with dignity.

## PART TWO: CRS REPORTS ON DRUG TESTING

This is a list of current reports by analysts in the Congressional Research Service of the Library of Congress. To order any of these items use the order form found at the end of this report.

Dale, Charles V.

Constitutional analysis of proposals to establish a mandatory public employee drug-testing program. Revised Nov. 3, 1988. Washington, Congressional Research Service, 1988. 44 p. 88-293 A

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Coverage of Congress by the drug-free workplace provisions of section 628 of P.L. 100-440, the Fiscal 1989 Treasury, Postal Service, and General Appropriations Act. Aug. 10, 1989. 6 p. 89-477 A

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Federally mandated drug testing of transportation workers. June 16, 1989. Washington, Congressional Research Service, 1989. 19 p. 89-384 A

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Legal analysis of recent appropriation riders to insure a "drug-free workplace". June 20, 1988. Washington, Congressional Research Service, 1988. 16 p. 88-450 A

Drug testing: the response to drugs in the workplace; info pack. Updated as needed. Washington, Congressional Research Service. IP350D

Gressle, Sharon S.

Drug testing in the workplace: Federal programs; issue brief. Updated regularly. Washington, Congressional Research Service. IB87174

Lane, Elizabeth S.

Drug abuse: selected references, 1986-1988. Sept. 1988. Washington, Congressional Research Service, 1988. 45 p. 88-625 L

Mazur, Rebecca.

Drug testing: selected references, 1986-1987. Revised Jan. 1988. Washington, Congressional Research Service, 1988. 11 p. 88-33 L

McCallion, Gail.

Drug free workplace initiatives: Federal legislation affecting the private sector. July 13, 1988. Washington, Congressional Research Service, 1988. 7 p. 88-508 E

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Drug testing: the experience of the transportation industry. Jan. 11,  
1988. Washington, Congressional Research Service, 1989. 12 p.

89-26 E

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Drug testing in the workplace: an overview of employee and employer  
interests; issue brief. Regularly updated. Washington, Congressional  
Research Service. 8 p.

IB87139

Randall, Blanchard, IV.

Drug testing for illegal substances. Jan. 20, 1987. Washington,  
Congressional Research Service, 1987. 7 p.

87-36 SPR

### PART THREE: DRUG TESTING: BIBLIOGRAPHY-IN-BRIEF

This bibliography cites material found in the CRS Public Policy Literature file. It includes articles and reports from 1987 to 1989 focusing on the most current material; for earlier works see *Drug Testing: Selected References, 1986-1987*, by Rebecca Mazur (CRS report no. 88-033). For a list of current published hearings see *Drug Testing in the Workplace: An Overview of Employee and Employer Interests*, by Gail McCallion (IB87139), and *Drug Testing in the Workplace: Federal Programs*, by Sharon S. Grassele (IB87174). To order any material cited in this bibliography use the order form at the end of this report.

Ackerman, Sandra.

Drug testing: the state of the art. *American scientist*, v. 77, Jan.-Feb. 1989: 19-23. LRS89-1689

Examines the reliability of currently available drug testing procedures, focusing on the extent of "false positive" and "false negative" findings.

American Medical Association. Council on Scientific Affairs.

Issues in employee drug testing. *JAMA [Journal of the American Medical Association]*, v. 258, Oct. 16, 1987: 2089-2096. LRS87-8294

Addresses constitutional, statutory, regulatory, and common law principles involved in testing urine for drug use in the civilian workplace. Offers recommendations on drug testing policy to the American Medical Association.

Bensinger, Peter B.

Drug testing in the workplace. *Annals of the American Academy of Political and Social Science*, v. 498, July 1988: 43-50. LRS88-11168

Assesses the value and accuracy of drug testing procedures, reviews the development of drug testing programs for the workplace, and makes "specific suggestions for employers concerned with the drug problem in industry."

Bookspan, Phyllis T.

Jar wars: employee drug testing, the Constitution, and the American drug program. *American criminal law review*, v. 26, fall 1988: 359-400. LRS88-14948

"Suggests that since employee drug testing is only a tangential issue to the problem of drug abuse in our society, solutions should be based on attacking drug use, not on attacking constitutional protections."



Bradley, Gregory.

Drug testing in the workplace: a public sector concern. Howard law journal, v. 31, no. 1, 1989: 49-59. LRS89-4910

"Provides an overview of the legal issues and specific employee challenges of drug testing policies in the public sector."

Bureau of National Affairs.

Daily labor report. Washington, The Bureau, 1948-. HD4802.D3

Provides a daily summary and analysis of events in labor law, including legislation on drug testing.

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Government employee relations report. Washington, The Bureau, 1963-. HD3008.A1B8

This weekly newsletter covers municipal, county, state, and federal developments. It includes discussion of drugs in the workplace.

Cone, Lorynn A.

Public policies against drug use: Paperworkers v. Misco. Labor law journal, v. 40, Apr. 1989: 243-247. LRS89-6365

Argues that because of recent Supreme Court decisions "the gap in protections afforded unionized workers, as opposed to public employees and non-union private workers, is likely to grow wider. This may result in different brands of justice, depending upon where one works."

Cooper, Charles J.

The constitutionality of drug testing. Federal Bar news & journal, v. 35, Oct. 1988: 359-363. LRS88-15019

"Former Assistant Attorney General of the United States presents a thorough analysis of the constitutional principles relating to drug testing, with a useful Appendix of relevant case law."

Drugs in the workplace: research and evaluation data. Edited by Steven W. Gust and J. Michael Walsh. Rockville, Md., National Institute on Drug Abuse, 1989. 340 p. (NIDA research monograph 91) LRS89-8109

Based upon papers presented at a conference titled 'Drugs in the Workplace: Research and Evaluation Data' which was held on September 15th and 16th, 1988 in Washington, D.C. Topics covered are the prevalence of drug use by the workforce, relationship of use to performance and productivity, industry responses, and emerging issues and research directions.

Drug testing at work: a survey of American corporations. [S.l.] Hoffmann-LaRoche, 1988. 109 p. (Corporate initiatives for a drug free workplace) LRS88-4712

Reports the findings of "the first statistically representative survey of drug testing policies and practices in companies nationwide," conducted by the Gallup Organization for Hoffman-LaRoche as part of their national effort to keep America's corporate workplaces drug-free.

Eisner, Neil.

Drug testing: regulatory and legal issues confronted by the Department of Transportation. Federal Bar news & journal, v. 35, Oct. 1988: 364-368. LRS88-15017

Assistant General Counsel for Regulation and Enforcement at DOT discusses the basic concepts behind the Department's initiatives, describes the internal program, and discusses some of the legal and practical issues of implementation.

Extejt, Marian M.

The use of pre-employment drug testing: pros and cons. SAM advanced management journal, v. 52, autumn 1987: 10-14, 47. LRS87-14722

"Few employers can ignore the loss of productivity and potential for costly damage caused by drug-using employees. Testing job applicants for drug use is the most common--and most controversial--method for eliminating drug users from the work force."

Farber, Daniel A.

Drug-testing cases. Trial, v. 25, June 1989: 14, 16, 18-19. LRS89-7048

Examines two Supreme Court decisions (Skinner v. Railway Labor Executives Association and National Treasury Employees Union v. Von Raab) and concludes that "courts have now become sufficiently comfortable with mass searches that they no longer even require a serious justification, so long as the search is neither too intrusive nor totally gratuitous."

Felman, James. Petrini, Christopher J.

Drug testing and public employment: toward a rational application of the Fourth Amendment. Law and contemporary problems, v. 51, winter 1988: 253-297. LRS88-14323

"Article focuses on the fourth amendment issues presented by the drug testing of public employees . . . . The authors believe that this inquiry leads to the conclusion that testing public employees should be impermissible in the absence of individualized suspicion."

Glantz, Leonard H.

A nation of suspects: drug testing and the Fourth Amendment. American journal of public health, v. 79, Oct. 1989: 1427-1431. LRS89-8966

"In our well-intended desire to stop the flow of drugs into the country and reduce drug abuse . . . . Perfectly law abiding citizens who are under no suspicion of drug use are increasingly being called upon to prove their innocence", the author concludes in reviewing recent legal cases on the topic.

Heshizer, Brian. Muczyk, Jan P.

Drug testing at the workplace: balancing individual, organizational, and societal rights. Labor law journal, v. 39, June 1988: 342-357.

LRS88-6268

Article asserts that mandatory drug testing ordered by President Reagan may affect Federal employees more than private citizens. Examines relevant drug testing case law and its bearing upon public vs. private sectors.

Kemper, James D., Jr.

Drug testing in the military: issues of admissibility and sufficiency.

Federal Bar news & journal, v. 35, Oct. 1988: 374-376. LRS88-15018

Legal advisor to the judges of the Court of Military Appeals provides "a brief historical overview of the admissibility and sufficiency of drug test results in military trials by court-martial to prove wrongful use of a prohibited substance."

Matlack, Carol.

Boardroom vice squads? National journal, v. 20, June 25, 1988: 1680-1683.

LRS88-5331

"Given a choice on drug testing, most businesses just say no. Many cite costs and potential legal troubles; some resent the government's forcing them to play policeman."

McDermott, Mark T. Jones, Kyle A.

Mandatory random drug-testing in the United States Department of Transportation--a Fourth Amendment analysis. Transportation law journal, v. 17, no. 1, 1988: 1-29.

LRS88-14101

Contents.--Introduction.--The Fourth Amendment.--Drug testing.--Mandatory drug-testing by the United States Department of Transportation.--Summary.

Sanders, Arlene.

Intoxication and the law: drug testing in the workplace. Annual survey of American law, v. 1987, June 1988: 167-193. LRS88-11899

Discusses problems with employee drug testing and argues that courts, legislators, and employers should "regulate testing in accordance with clearly articulated standards and guidelines. Only when this occurs can drug testing become one of the acceptable means of handling employee drug abuse."

Simonsmeier, Larry M. Fink, Joseph L., III.

Legal implications of drug testing in the workplace. American pharmacy, v. NS28, July 1988: 30-37.

LRS88-7061

"This article focuses on the legal implications of drug testing in the workplace, including the reliability of testing procedures, search and seizure, due process, right to privacy, and others."

Spieler, Louise.

'The Drug-Free Work Place Act. Lexington, Ky., Council of State Governments, 1989. 5 l. (CSG backgrounder 048901) LRS89-3348

Concludes that "while states are taking steps to comply with the requirements outline in the Drug-Free Workplace Act, many do not have comprehensive policies in place."

Stewart, David O.

Slouching toward Orwell. American Bar Association journal, v. 75, June 1989: 44, 46, 48, 50. LRS89-3599

Argues that the Supreme Court's recent decisions on drug testing (Skinner v. Railway Labor Executives' Association and National Treasury Employees Union v. Von Raab) are not leading to an erosion of civil liberties.

Symposium: drug testing. University of Kansas law review, v. 36, no. 4, summer 1988: whole issue (641-951 p.) LRS88-10842

Partial contents.--Accuracy and reliability of urine drug tests.--The "scientific" justification for urine drug testing.--A question of America's future: drug-free or not?--Will employee's rights be the first casualty of the war on drugs?--Private sector drug testing: employer rights, risks and responsibilities.--Drug testing legislation: what are the States doing?

Testing for drug use in the American workplace: a symposium. Nova law review, v. 11, winter 1987: Whole issue (291-823 p.) LRS87-14325

This symposium on drug testing presents "a variety of experts--labor law attorneys, forensic scientists, legislators, arbitrators, civil libertarians, and other legal scholars--with varying views."

U.S. General Accounting Office.

Employee drug testing: agency costs may vary from earlier estimates; report to the Chairmen, Subcommittee on Civil Service and Subcommittee on Human Resources, Committee on Post Office and Civil Service, House of Representatives. May 30, 1989. Washington, G.A.O., 1989. 23 p. LRS89-8117

"GAO/GGD-89-75, B-223280"

Analysis of the Office of Management and Budget's cost estimates for drug-testing at the 12 civilian cabinet-level departments shows "that the OMB guidance to departments specifying the dollar amount to use in estimating certain cost categories may not be indicative of the amount some departments will spend."

U.S. General Accounting Office.

Employee drug testing: information on private sector programs; report to the Honorable Charles Schumer, House of Representatives. Mar. 2, 1988. Washington, G.A.O., 1988. 26 p. LRS88-5974

"GAO/GGD-82-32, B-223280"

Reviews ten published surveys for information on "(1) the extent of drug testing, (2) which testing methods are most often used, (3) who receives drug testing and why, (4) the reasons for having a drug testing program, and (5) what happens to those individuals who test positive."

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Employee drug testing: regulation of drug testing laboratories; fact sheet for the Honorable Charles E. Schumer, House of Representatives. Sept. 2, 1988. Washington, G.A.O., 1988. 7 p. LRS88-11028

"GAO/GGD-88-127FS, B-223280"

Surveys "all 50 states on the nature of laws, regulations, and other legally enforceable provisions they have in effect to govern laboratories that do applicant and employee drug testing."

Watson, Tom.

Drug-testing laws are catching on. Governing, v. 1, June 1988: 60-63.

LRS88-7054

Discusses business leaders' objections to state laws regulating employee drug testing and explains why civil libertarians are pleased with the same laws.

Wrich, James T.

Beyond testing: coping with drugs at work. Harvard business review, v. 66, Jan.-Feb. 1988: 120-122, 124, 126-127, 130. LRS88-4694

Explores alternatives to drug testing for decreasing substance abuse in the workplace. Author supports employee assistance programs as more effective and reliable methods for identifying and helping chemically dependent employees.

Zimmerman, Carita.

Urine testing, testing-based employment decisions and the Rehabilitation Act of 1973. Columbia journal of law and social problems, v. 22, no. 2, 1989: 219-267.

LRS89-1646

"Considers whether urine testing and testing-based employment decisions violate the employment discrimination provisions of the Rehabilitation Act of 1973."

## PART FOUR: USING THE LIBRARY'S RESOURCES

**SCORPIO** Issues and legislation on drug testing can be monitored using files available in the Library of Congress's SCORPIO system. For general information on getting started and searching in SCORPIO call the CRS Automation Office (707-6447). Search strategies for finding information on drug testing are provided below. By monitoring the SDI Service and the SCORPIO files you will have access to the most current information on drug testing available in the Library of Congress computerized files. You can request a search by a bibliographer by calling the *Inquiry Section* (707-5700).

**PPLT** The *CRS Public Policy Literature file (PPLT)* contains citations and abstracts of selected magazine and journal articles as well as some monographs, reports, and congressional publications. Many recent GAO reports on drug abuse can be located in this file. Publications listed in PPLT may be obtained from CRS by phoning the Inquiry Section (202-707-5700) or by filling out the form included in this guide. To search in PPLT use the following terms:

- \* **Key term**      **Drug testing**  
Includes all aspects of drug testing: random testing, pre-employment testing, test standards, etc.
- \* **Related term**    **Drugs and employment**  
Includes other aspects of "the drug-free workplace" such as prevention and treatment.
- \* **Focus terms**     **Employee rights**  
**Federal employees**  
**Medical screening**  
**Medical tests**  
**Railroad safety**  
**Railroad employees**  
**Searches and seizures**  
**Transportation safety**  
**Transportation workers**  
Combine these terms with **Drug testing** to find information on narrower aspects of the topic. For example, to find information on drug testing and Federal employees use the following commands:
- \* **Sample search**    1- **S subj/drug testing** (creates Set 1)  
2- **S subj/federal employees** (creates Set 2)  
3- **C 1 and 2** (creates Set 3 which contains articles about drug testing and Federal employees).

Locate information on Supreme Court decisions related to drug testing by combining the term **Supreme Court decisions** with **Drug testing**.

Articles about specific decisions are found under the name of the case; for example:

**Skinner v. Railway Labor Executive Association, National Treasury Employees Union v. von Raab, United Paperworkers International Union v. Misco, inc., and Railway Labor Executives Association v. Burnley**

Use the terms **Drug testing** and **Law and legislation** to find articles and congressional documents on this topic. Proposed legislation and material about specific public laws are found under the short title of the act; for example:

**Railroad Drug Abuse Prevention Act  
Rehabilitation Act  
Drug-free Workplace Act**

**ISSU** The *CRS Issue Brief file (ISSU)* contains the full text of reports on issues of congressional concern written by analysts in CRS. They are updated regularly and they provide general background on issues and identify legislative action. Use the term **Drug testing** when searching in this file.

Other CRS reports and products are listed in the *CRS Update* under **Law, crime, and justice**, **Labor**, and **Transportation**; and in the *Guide to CRS Products* under **Drug abuse--Drug testing** or they can be found in the *CRS Products File (CRSP)*.

**C101** To find current legislation on drug testing in the *CRS Bill Digest file (C101)* search under the subject heading **Drug testing**. This file includes a digest of each bill, sponsors and cosponsors, committees of referral, and status.

**LCCC** Use the *Library of Congress Computerized Catalog (LCCC)* to find books about drug testing. Because of the small number items in this file (42 books as of 12-6-89) you can browse the list under **Drug testing** instead of doing a complicated search. To order books call the Inquiry Unit at 707-5700.

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|----------------|---|
| * Key term     | <b>Drug testing</b><br>Includes all aspects of drug testing: random testing, pre-employment testing, test standards, etc. |
| * Related term | <b>Drugs and employment</b><br>Includes other aspects of "the drug-free workplace" such as prevention and treatment.      |

\* Focus terms     Athletes  
                     Officials and employees  
                     Merchant seamen  
                     Prisoners  
                     Truck drivers

SDI     Members of Congress, congressional staff, and committee staff can track information on drug testing in the workplace by subscribing to the CRS SDI Service. This service will provide a weekly update on articles and reports included in the *CRS Public Policy Literature File*. To track drug testing include the term **Drug abuse** in your profile. For information on the SDI Service or to add **Drug abuse** to your profile call Barbara Sanders in the Library Services Division (707-1661).

**Main Reference File**

The Library Services Division also maintains a file of clippings from major newspapers and journals organized by topic. Generally the four most current years' worth of material are saved. The most current clippings on drug testing are found in the *CRS Main Reference file* under the index number **HV5822**. For information on using these files call 707-7535.



## PART FIVE: ORDERING ADDITIONAL INFORMATION

**Congressional offices may request copies of any of the articles, books, or CRS products listed in the SCORPIO database or in this bibliography by calling 7-7132 (for articles of CRS products) and 7-5445 (for books) or by filling out the attached form and returning it to the *Inquiry Section, Congressional Reference Service*.**

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# DRUG TESTING AND THE DRUG-FREE WORKPLACE

## (A Bibliographic Guide and Reader)

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