

Ronald Reagan Presidential Library
Digital Library Collections

This is a PDF of a folder from our textual collections.

Collection: Turner, Carlton E.: Files
Folder Title: Ray Andrus, Frank Emig AFL-CIO
04/24/1986 10:00 am
Box: 9

To see more digitized collections visit:
<https://reaganlibrary.gov/archives/digital-library>

To see all Ronald Reagan Presidential Library inventories visit:
<https://reaganlibrary.gov/document-collection>

Contact a reference archivist at: reagan.library@nara.gov

Citation Guidelines: <https://reaganlibrary.gov/citing>

National Archives Catalogue: <https://catalog.archives.gov/>

Steve Staus ^{borgen}
Asst Sent Labor

Transfers

PRESERVATION COPY

PRESERVATION COPY

*what every worker
should know about—*

ALCOHOLISM



MESSAGE FROM LANE KIRKLAND, PRESIDENT, AFL-CIO

Interest in alcoholism is not new to the AFL-CIO. We have long been aware that the alcoholic worker is a problem to himself, his family, fellow workers and society. To cope with this problem, the AFL-CIO has urged its affiliated unions to negotiate alcohol and drug abuse programs at the bargaining table. We are convinced that a joint labor-management program in which both sides take equal responsibility and pursue the mutual goal of health and stability in the workplace is far the most effective method that exists.

WHY PEOPLE DRINK

When a thing gets out of hand it usually becomes a problem.

This is true of a flood-swollen river or a car in a traffic jam.

It's also true of drinking.

Alcoholic beverage isn't a bad thing in itself. But like a river at flood stage or a car in a traffic snarl, it can lead to problems if misused.

More than 100 million Americans drink. The great majority of them drink for purposes of sociability, relaxation and pleasure. For them drinking is a personal choice; a matter of individual taste. Moderation, common sense, and a respect for both self and others determine when and how they drink. The person who can stop at one or two drinks is not an alcoholic, even if he or she occasionally drinks to excess. Nor is the steady but moderate drinker.

WHAT THE ALCOHOLIC IS

He is one of more than 10 million Americans whose drinking interferes with his daily life.

He is a sick person. He can no more control his compulsion to drink than a diabetic can control his reaction to sugar. When he sobers up, the alcoholic intends to stay sober. But a single drink can start him on the same downward spiral.

He and over 10 million others, who have lost the freedom of choice in determining when they will

drink, how they will drink, or how much they will drink constitute one of the nation's top health problems.

WHAT THE ALCOHOLIC IS NOT

The alcoholic is not a moral weakling, but a victim of a progressive, insidious disease. He has a physical and psychological addiction to the drug alcohol. Once he takes a drink he can't stop drinking, no matter what the consequences to himself, his family, his friends or his job.

The majority of alcoholics are not "skid-row" types. They are not found in the Monday morning court lineup, or wandering dazed and shocked through back streets, or discovered in the emergency ward of the city hospital. Quite the contrary.

Over 95 percent of them on the surface lead normal lives, have homes and families, are employable and usually working. They often have exceptional skills.

Alcoholics do not represent any single group in our population. They are professional people, government officials, tradesmen, executives, skilled craftsmen and workers. Like all disease, alcoholism cuts across all lines, reaches all segments of society.

WHAT CAN BE DONE TO HELP?

We can check our own attitude toward the problem drinker. Here are some things to remember about alcoholism:

First, the alcoholic needs help.

Second, alcoholism is another form of illness. It can be successfully treated.

Third, the alcoholic is not morally or mentally less a man than others. He should not be an object of ridicule or contempt. He should not be shunned, scorned or hidden. Rather, he should be treated with understanding and urged to seek help.

Fourth, the local AFL-CIO community services program, while taking no position for or against the use of alcohol, has the responsibility to work with other organizations and individuals in providing professional services and community facilities to diagnose and treat the alcoholic.

IN-PLANT ALCOHOLISM PROGRAMS

The AFL-CIO encourages negotiated union-management programs which are included in the labor agreement on alcohol, drugs and other employee problems. Where the alcoholic employee is concerned, the program should be focused on helping the employee and not on a wide variety of behavior problems which often may not be related to alcoholism.

Guidelines for negotiated programs on alcohol, drugs and other problems have been prepared by the AFL-CIO Department of Community Services. Copies may be obtained from the AFL-CIO Department of Community Services upon request.

COMMUNITY PROGRAMS

National Council on Alcoholism: Many communities have voluntary citizen councils or committees on alcoholism associated and affiliated with the National Council on Alcoholism. These groups conduct educational programs for professionals and the general public in their communities. They maintain information and referral centers for guidance and counsel to alcoholics, their families and employers.

NCA member organizations also work for the establishment of community alcoholism resources such as out-patient clinics and, for acute cases, general hospital beds.

The AFL-CIO Community Services Committee of the central labor body can work with the local council on alcoholism to provide needed community services. If no local council exists, local labor bodies are urged to contact the AFL-CIO Department of Community Services.

Alcoholics Anonymous (AA): This is a major local resource for alcoholics who are willing to seek its help. There are over 11,000 AA groups throughout the United States and Canada, who can usually be located through the local telephone book.

Salvation Army: In many communities the Salvation Army has a long and successful record of working with alcoholics. A community program on alcoholism should be of interest to them.

STATE PROGRAMS

State and Local Health Departments: Most states now provide programs on alcoholism through either their state Health Department or a separate Commission on Alcoholism.

The local Community Services Committee (CSC) should check with the city or state Health Department to learn about public-provided services and facilities. Information on cost, types and length of treatment, and eligibility requirements should be passed along to union officers, shop stewards, business agents and union counselors.

Many state-provided treatment centers offer group therapy (group discussion and a sharing of experience) and often individual therapy, medical care and social services, psychological testing, plus pleasant and relaxing surroundings. Length of the course of treatment will vary.

LOCAL INFORMATION CENTER

Many communities have an Alcoholism Information and Referral Center that sponsors a community-wide, year-round educational campaign. Such centers are ready to assist and refer the alcoholic to the right treatment resources.

Organization of a local Alcoholism Information and Referral Center should be encouraged if a real community need exists. The AFL-CIO-CSC should request the local Community Welfare Council or Council of Social Agencies to study the need for such a center.

SPECIFIC ACTIVITIES

The Community Services Committee of the local central body can undertake a number of activities to improve community understanding and help provide local treatment facilities.

Union Counseling: The subject of alcoholism should be included in the union counseling training course. In addition to class discussion, literature available from the AFL-CIO Department of Community Services, the local Alcoholism Information Center and other appropriate sources can be distributed. Counselors should make themselves aware of all possible resources for referral and special treatment.

In some communities one of the monthly meetings of the graduate counselors is held at the local alcoholism center or clinic.

Institutes: In several communities, Community Services Committees have sponsored day-long institutes on alcoholism, either on their own or jointly with other interested groups. If assistance is needed to establish such a program, contact the AFL-CIO Department of Community Services.

Providing Treatment Facilities: If there is no community program on alcoholism in your city, a fine opportunity is offered to the local AFL-CIO Community Services Committee working with social agencies and the local Community Welfare Council to get one started.

For help in developing community alcoholism action programs, write to the AFL-CIO Department of Community Services, 815 16th St., N.W., Washington, D.C. 20006.

**AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS**

LANE KIRKLAND
President

THOMAS R. DONAHUE
Secretary-Treasurer

AFL-CIO

Department of Community Services

815 16th Street N.W., Washington, D.C. 20006

WALTER G. DAVIS, DIRECTOR

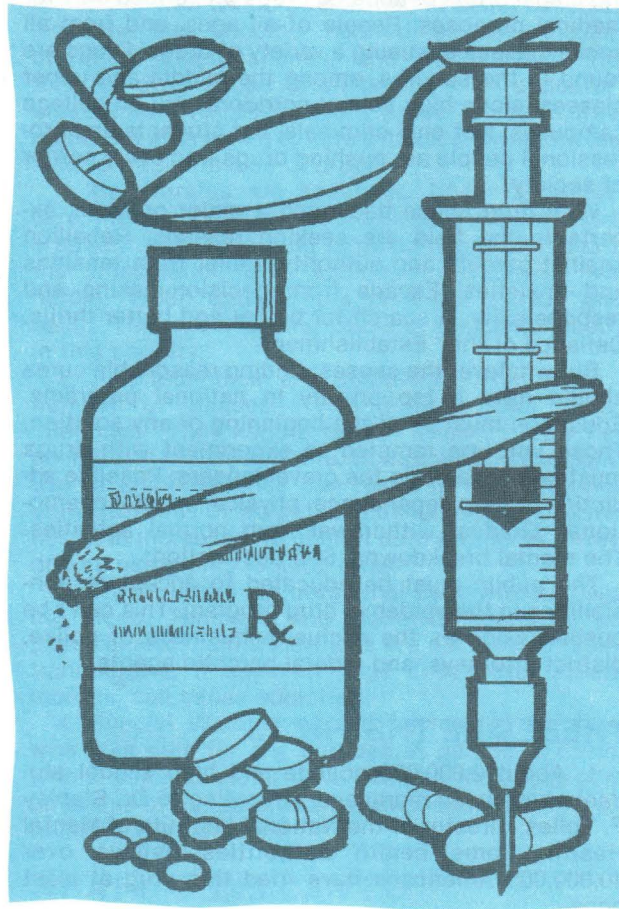
AFL-CIO PUBLICATION NO. 52

Revised February 1984



**What every worker
should know about**

DRUG ABUSE



**AFL-CIO COMMUNITY SERVICE ACTIVITIES
in cooperation with
AMERICAN SOCIAL HEALTH ASSOCIATION**

Not long ago, the American who used drugs was viewed as a hopeless outcast existing in the shadows of the criminal world. Drug addiction was considered a disease of the big-city slums. The person who became "hooked" on heroin never worked, lived only for his habit, and spent much of his life in jail.

A few drug-users were found among professional people, especially in the world of art and music. But these were the exceptions. Drug addiction didn't really touch the American community. It wouldn't happen in the average American family. This was the popular misconception.

IT HAS HAPPENED HERE

Today, millions of men, women and youth are taking illegal drugs or abusing drugs prescribed only for medical purposes. People of all ages, and from all social classes are using a variety of drugs. Drugs are found in the suburbs, among the middle and upper classes, along high school corridors, and on college campuses. Not only criminals, but students and professional people are pushing drugs into every corner of society.

With drug abuse becoming a major problem, experts in the field are seeking reasons: Rebellion against parents and authority. Relief from tensions and anxieties. Escape from decision-making and responsibility. A search for bigger and better thrills. Defiance of the "Establishment."

But whatever the causes, finding reasonable cures should have a top priority in national programs. Education must be at the beginning of any solution. Those who are tempted to experiment with drugs must be educated to the grave dangers: Possible addiction or drug dependence, physical, mental or emotional. Gradual withdrawal from normal activities. The mental breakdowns. Self destruction.

The public must be educated to accept responsibilities in the epidemic drug program. This can't be pushed aside as the exclusive business of police, district attorneys, and federal narcotic agents.

THESE ARE THE FACTS

1. About 2,000,000 college and high school students have used marijuana, according to Dr. Stanley F. Yolles, director of the National Institute of Mental Health. Some health authorities believe over 40,000,000 Americans have tried this drug at least once.

2. Another 500,000 abuse barbiturates, amphetamines, and tranquilizers. The housewife uses drugs

to reduce weight and ends up needing them to get through the day. The husband may take a pill to give him energy, a different one to relax him for an important meeting, and a third for sleep. And recent government surveys show young people among the habitual abusers of pills.

3. Hundreds of thousands use LSD and other mind-altering drugs and claim they learn a new religious experience "while under the influence."

4. Youngsters no older than 12 or 13 risk their health and lives by sniffing glue for "kicks."

5. Marijuana smoking is increasing among members of the armed forces.

IT'S EVERYBODY'S BUSINESS

Drug abuse involves everyone—young and old, rich and poor, union member and businessman. All families are exposed. There is good reason for alarm, but reaction to the alarm should lead to constructive action and not panic.

What can be done? First, there must be resistance to any call for a witch-hunt approach to the drug problem. Second, each individual must calmly recognize the possibility that a drug abuser may be living in the neighborhood, next door, or right in the house. And third, all must support sound community programs to study the drug problem and to find intelligent, workable solutions.

Experts in the field—representatives from government, medicine, social work, religion, and education—are becoming convinced that the fight against drug abuse can be won only if the entire community joins in. Elected officials on all levels have been urging a citizens' crusade to "stem the tide of drug abuse."

"It is imperative," said one governor, "that the community at large mobilizes to support and expand anti-drug programs."

CHARACTER OF THE DRUGS

Because drug abuse is everyone's business, unions will want to initiate or join in community efforts to meet the threat. But first, some basic knowledge of the drugs themselves is needed. Here are brief descriptions of those in common use:

Heroin—The Hard Drug. A derivative of opium, it is called "H," "Snow," or "Junk." It is smuggled into the United States from Europe. Heroin is usually taken by "mainlining," injecting the drug directly into the blood system. When the user becomes addicted, the body needs the drug two or three times a day. This condition means the user is "hooked." New

York medical reports have shown addiction caused more deaths among people between 15 and 35 than murder, suicide, accidents, or natural causes.

Law enforcement agencies say there are between 60,000 and 100,000 heroin addicts in the U.S. The count is believed to be closer to 200,000. The number seems relatively small, but heroin addiction is one of the nation's biggest crime headaches. It is a threat to everyone's pocketbook. A heroin addict needs \$40, \$60, or \$75 a day to feed his habit. Although not a hardened criminal, he must steal, rob, loot, and mug to get it. \$1,000,000,000 a year is one estimate of the goods and money stolen to buy heroin. Women addicts become prostitutes to obtain drug money. Money spent for drugs eventually flows into the crime syndicate and provides the money for their other operations.

LSD—Magic Carpet to Catastrophe. LSD, known as "acid" to users, is one of the psychedelic or hallucinogen drugs. Others are DMT, peyote, mescaline, psilocybin, and even morning glory seed. After taking LSD (lysergic acid diethylamide), the user "takes a trip" lasting from 4 to 12 hours. The "trip" produces hallucinations, impairs judgment, and can cause drastic changes in perception and personality. The American Medical Association has warned that LSD can produce uncontrollable panic and violence. There have been accounts of attempted suicide and homicide by persons taking LSD.

Marijuana—Hits Close to Home. Marijuana has been called a major social problem in the United States. It is sometimes called the "campus drug" because it has spread so quickly and widely among high school and college students. It has been known by 350 names, including "reefer," "pot," and "grass," the favorites today.

Once smoked, marijuana causes the body to feel light, especially the head and limbs. The user talks of "floating on air" and "falling on waves." He gets an exaggerated idea of his ability. Coordination may be difficult and the marijuana smoker at the wheel of a car can become a menace.

The American Social Health Association, which campaigns against drug dependence and abuse, frequently reminds the public that marijuana sale and possession are prohibited by the United Nations Single Convention on Narcotic Drugs, which the United States has ratified. Sale and possession are also prohibited by the laws of each of the 50 states.

Marijuana has its advocates who defend its use.

They claim it is less harmful than tobacco or alcohol. And demand that it be made legal.

But after a two-year study, committees of the American Medical Association and National Research Council condemned marijuana as a "dangerous drug" and said legalizing it would create more serious abuse.

Cocaine. Cocaine is a stimulant drug. It is a white crystalline powder and is extracted from the leaves of the coca plant. Being a psychoactive drug its effects upon the user are influenced by personality, expectations and the setting in which it is taken. Excessive doses of cocaine have caused death as a result of seizures followed by respiratory failure.

The Pills—Trouble In The Medicine Cabinet. There are adults who would be horrified at being called addicts, yet they become "hooked" on pills—the barbiturates, amphetamines, and tranquilizers. This form of drug abuse often begins with a doctor's prescription, for pills have a proper place in treatment. But attempting to cure a medical symptom may lead to tragic misuse of drugs.

1. Barbiturates are sedatives. Under a doctor's care, these pills bring needed sleep and calmness to a patient. But absorbing large amounts can lead to the intoxication and addiction associated with heroin. When abused, the pills are called "goof balls." They are a leading cause of accidental deaths in this country.

2. Amphetamines are stimulants. They have a number of aliases: "Pep Pills," "Diet Pills," "Bennies." They keep a person awake, supply new energy and kill the appetite. Continued and excessive use of amphetamines can result in hallucinations, unhealthy loss of weight, and dangerous aggressiveness. An increased number of auto accidents involve drivers using pills to keep awake.

3. Tranquilizers are drugs that calm without causing sleep. Tensions and anxieties decrease, but physical and mental alertness are not slowed. Some tranquilizers, if taken in large doses over several months, can cause addiction.

4. Special Warning should be heeded by those who take pills for any purpose. A person is flirting with physical disaster—even death—if he uses combinations of the barbiturates, amphetamines, or tranquilizers with alcohol.

WHAT UNIONS CAN DO

The Community Services Committee of the local central body can undertake a number of activities to

improve community understanding and to provide treatment facilities for drug abuse victims.

Union Counselling: The problem of drug abuse should be included in the union counselling training course. Course outlines and other materials are available from the AFL-CIO Department of Community Services, from the American Social Health Association and other public and voluntary agencies. Counsellors should be informed of all resources for referral treatment and follow through.

Institutes: A number of local Community Services Committees have sponsored day-long institutes on drug abuse—either on their own or jointly with other interested groups. Information is available from the AFL-CIO Department of Community Services.

In-Plant Drug Abuse Programs: Joint Union-Management programs to combat drug abuse should be developed. Suggested guidelines and program assistance can be obtained from the AFL-CIO Department of Community Services or from the local AFL-CIO-CSA Liaison Representative.

Providing Treatment Facilities: If there is no community program on drug abuse in your city, initiate one—or cooperate with other interested community groups in developing one. The local community planning council may be a good starting point.

WHERE TO LOOK FOR PROGRAM HELP

The American Social Health Association is a national voluntary health agency developing a comprehensive program to counter drug abuse. The association has a professional information center, evaluates present rehabilitation programs, has a list of pamphlets, books and films on the subject and distributes materials to keep people up to date on all aspects of the drug picture. The ASHA can offer guidance to unions and other groups organizing a community program. It also has information on people in your area who can speak and advise on approaches to drug abuse.

For help in developing community drug abuse programs and for drug abuse information write to the AFL-CIO Department of Community Services, 815 16th Street, N.W., Washington, D.C. 20006.

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

LANE KIRKLAND
President

THOMAS R. DONAHUE
Secretary-Treasurer

AFL-CIO DEPARTMENT OF COMMUNITY SERVICES

815 16th Street N.W., Washington, D.C. 20006

WALTER G. DAVIS, Director

Publication No. 147



Revised
December 1980

Employment Screening

WHEREAS, More companies than ever are screening workers and prospective workers with blood, urine, and genetic tests. Nearly 25 per cent of the fortune 500 companies perform routine urinalysis on all workers and applicants, up from 10% only three years ago; and

WHEREAS, These test range from screening for illicit drugs or alcohol on the job to determining if an applicant has ever had certain diseases or has a predisposition for certain illnesses, such as heart attacks, epilepsy, schizophrenia, or sickle-cell anemia; and

WHEREAS, These tests go far beyond testing employee suspected of impairment. These broad ranging tests assume all employees and applicants are guilty until proven innocent contrary to the fundamental precepts of our system of justice. They frequently are not job related, invasive of worker's privacy rights, and have in numerous instances proven to be inaccurate, and not subject to confirmation—resulting in thousands of innocent employees and applicants wrongfully losing employment opportunities; and

WHEREAS, Alcohol and drug use on the job is a serious problem, and no group suffers more than co-workers from the dangerous consequences of an employee who works while drug or alcohol impaired. Workers who suffer from drug or alcohol impairment whose condition may jeopardize the safety of their fellow workers, should be given assistance in rehabilitation through special programs devised through collective bargaining; and

WHEREAS, The Federal Rehabilitation Act prohibits dismissal of employees of companies doing business with the government who are addicted to drugs or alcohol unless their work is deficient. Federal law also prohibits job discrimination against workers or applicants who are handicapped. Employers should not be allowed to circumvent these laws by discharging workers who might have drug or alcohol dependencies yet no job impairment, or workers who might have future handicaps, by utilizing across the board screening tests—especially when experts have found many of these tests are wrong over 25% of the time; therefore, be it

RESOLVED: That the AFL-CIO urges labor and management to work together to reduce the incidence of alcohol and drug use in the workplace by improving the workplace, reducing the stress which often leads to such dependencies, and rehabilitating workers who have problems with addiction; and, be it further

RESOLVED: That the AFL-CIO urges Congress to investigate the rapidly increasing use of employee screening tests to insure workers' rights and dignity in the workplace, and to seek legislative remedy if those rights are being abused.

Statement by the AFL-CIO Executive Council

on

Alcohol Abuse

February 21, 1985
Bal Harbour, FL

Alcohol abuse is a threat to life, health, safety, productivity and the quality of life throughout America. Drunk driving is a leading cause of death and serious injury, especially among young people, and chronic alcoholism among all age groups ruins lives, disrupts families, classrooms and workplaces, and destroys property.

The AFL-CIO is deeply concerned about alcoholism and alcohol abuse in all its dimensions and is committed to finding solutions. At the same time, we remain opposed to any and all schemes that offer specious, short-term solutions that fail to address fundamental problems. Consequently, we oppose proposals to abolish all radio-television advertising of alcoholic beverages and to require mandatory "counter-advertising."

Such actions would not and could not solve the problem of alcohol abuse.

Responsible studies have shown that advertising has little or no impact on persons likely to abuse alcohol. The same studies identify family environment and peer pressure as the primary influences on alcohol consumption, especially among teenagers.

Therefore, the AFL-CIO advocates programs to increase public understanding of the real causes of alcohol abuse and supports projects designed to control and eliminate them.

To that end, while we reject solutions that do not address the real problems, we instruct the AFL-CIO Department of Community Services to continue to work with AFL-CIO affiliates and other interested national and community organizations in order to:

1. Encourage on-the-job programs for treatment and prevention of alcohol abuse and related problems.

2. Promote the development of community facilities for treatment and rehabilitation of victims of alcoholism.
3. Educate union members and their families about the danger of alcohol abuse.
4. Train union counselors to offer guidance and referral to those with alcohol-related problems.
5. Cooperate with communities in sponsoring institutes on alcoholism.

###

DRUG ABUSE POLICY OFFICE--DRAFT/March 12, 1986

TALKING PAPER

SUBJECT: URINALYSIS - DRUG TESTING

Drug abuse is a leading cause of lost productivity. Illicit drugs are widespread in the workplace. Compared to the normal employee, the drug-user employee:

- is only two-thirds as productive;
- is over three times as likely to be involved in an on-the-job accident;
- is absent from work more than twice as often; and
- incurs three times the average level of sickness costs.

Increased recognition of the problems caused by drugs in the workplace has led a growing number of corporations to institute "no drug use" policies, including the suitable use of urinalysis.

Drug testing is a diagnostic tool designed to create a healthier work environment, increase productivity, improve public safety, and protect national security. Proper testing will identify those individuals who need help and allow them to get help.

Urinalysis testing in our nation's workforce provides the opportunity for significant gains in fighting drug abuse. Testing has proven itself in our military forces and is essential in the workplace.

Testing may be done:

- as pre-employment screening (condition of employment);
- as part of a routine physical examination;
- as part of the investigation into the cause of an on-the-job accident; or
- for cause, when drug use may be the cause for a change in an employee's work pattern, (e.g. high absenteeism, low productivity, unexplained increased use of health benefits, or evidence supporting drug use/trafficking on-the-job).

DRAFT/March 12, 1986

THE DEPARTMENT OF DEFENSE DRUG TESTING PROGRAM:

Our military forces have benefited greatly from using drug testing as the principal tool in identifying drug users.

-Prior to instituting programs, some units of the Navy reported over half of the personnel in some units were drug users. Today, the Navy reports this to be less than 3%.

Civilian employees who serve in designated critical jobs in the Department of Defense are also subject to testing. For example, one military service includes the following classes of jobs in the urinalysis testing program:

-Employees involved in the identification and treatment process,

-All jobs pertaining to aviation or aviation safety, including air traffic controllers, pilots, and a range of aviation mechanics and servicing personnel.

-All jobs pertaining to law enforcement; to include police, guards, and security or administrative personnel whose jobs are directly related to law enforcement,

-Jobs which require special access certification, such as chemical and nuclear surety and includes supervisory personnel assigned to nuclear reactor operators, nuclear weapons technicians, chemical ammunition maintenance, quality assurance, material handlers, laboratory workers and intrusion detection system maintenance personnel

When handled properly, a firm policy of "no drug use" coupled with testing (urinalysis) has proved to be both an effective deterrent and a diagnostic tool. The Army has stated that drug testing is "one of the most valuable tools in the attack on illegal drug use."

EXISTING POLICY

The President's 1984 National Strategy for Prevention of Drug Abuse and Drug Trafficking addresses drugs in the workplace:

- o "Public safety considerations require prompt action to identify, remove and treat individuals who are in jobs where their drug abuse endangers the public safety."
- o "Employers must establish a clear policy, ensure that the policy is understood and applied, and include specific rules, procedures for identifying violators and uncompromising discipline consistent with the public trust."

DRAFT/March 12, 1986

- o "As the nation's largest single employer, the Federal government should serve as a model for dealing constructively with drug and alcohol abuse in the workplace."
- o "The Strategy sets a high priority for the establishment and operation of employee assistance programs in both the private and public sectors to save lives and reduce the health and economic costs of alcohol and drug-related problems."

THE PRESIDENT'S COMMISSION ON ORGANIZED CRIME

Allegations that the recommendations of the President's Commission on Organized Crime call for mandatory testing for all government employees have been used to sensationalize the issue. The publicity has helped create the perception that testing is a law enforcement initiative and involves punitive measures. However, the recommendations called for "suitable" and "appropriate" testing and are consistent with the 1984 National Drug Abuse Prevention Strategy. Specifically, the Commission's recommendations were:

- o "the President should direct the heads of all Federal agencies to formulate immediately clear policy statements, with implementing guidelines, including suitable drug testing programs, expressing the utter unacceptability of drug abuse by Federal employees.";
- o "State and local governments and government contractors should support a similar policy"; and
- o "Government and private sector employers who do not already require drug testing of job applicants and current employees should consider the appropriateness of such a testing program."

TESTING IN THE WORKPLACE

Since most of the U.S. drug-user population is also in the nation's workforce, the direct consequences of their behavior pose a threat to national security, safety, productivity, and economic recovery. Drug abuse programs, including pre-employment testing are already in action in many of the Fortune 500 corporations:

- o The objective of testing is to reduce drug use and recover the lost productivity -- by identifying those drug users and providing access to counselling/treatment to restore full productivity.

- o In the case of a critical position affecting public safety, a confirmed positive test should be the basis for non-selection in the case of a pre-employment test or for reassignment pending treatment if a current employee.
- o Testing can and should be done with full protection for individual rights, privacy, and confidentiality. It must be based on reasonable policies. Other safeguards include:
 - management, unions, and employees being fully informed regarding the established drug policies and the consequences of policy violations;
 - ensuring that employees are aware that being drug-free is condition of employment and drug testing is a part of their job requirements;
 - advance notice of intent to test when initiating a new program;
 - proper handling and rigorously accounted for samples and records;
 - testing performed by properly certified laboratories;
 - any screening test which results in a positive should be followed by a second (confirmation) test before any negative action is taken; and,
 - results of individual tests should be held confidential.

CONCLUSION:

Drug law enforcement initiatives are reducing the supply and availability of illegal drugs and providing an effective deterrent to drug use. Education and prevention efforts are causing young people to say "NO" to drugs. International cooperation is expanding and an awareness of the dangers of drug abuse is bring about action in many other nations.

Urinalysis testing in our nation's workforce provides the opportunity for significant gains in fighting drug abuse. Testing has proven itself in our military forces and is essential in the workplace. Identification of drug users provides immediate results in protecting individuals while cutting costs and improving productivity.

It is essential that both government and private employers take prompt action to identify, remove and treat individuals who are in jobs where their drug abuse endangers the public safety.

DRAFT/March 12, 1986

The message: 'We're fed up, tired of drugs'

Would you object to being tested?

Yes . . . 21%
No . . . 77%
Not sure 2%

By Sam Meddis
USA TODAY

Drug testing in the work place — a hot new front in the drug war — has broad support across the nation, a new USA TODAY poll shows.

In a week that a presidential commission called for drug tests on federal workers and asked private firms to consider the same, the poll

finds:

■ 62 percent of us support mandatory drug testing for federal workers and employees of government contractors; 29 percent oppose.

■ 43 percent are for drug testing in private firms, and 48 percent are against it.

■ But the overwhelming majority of us — 77 percent — would not object to being tested in the workplace.

"What you're seeing overall is that the American public is saying, 'We're fed up. We're tired of drugs. And whatever it takes to do it, let's do it,'" says Carlton Turner, director of the White House Drug Abuse Policy Office.

The survey of 762 adults randomly selected across the USA was conducted Tuesday and Wednesday nights by the Gordon S. Black Corp. of Rochester, N.Y. It has a margin of error of plus or minus 4 percent.

Drug-testing support comes from people like Gretchen Brenner, 40, of Kansas City, Mo., a Veterans Administration dental assistant — one of the people who could be screened if the commission's recommendation is adopted.

"If people feel their jobs are in jeopardy, they wouldn't be so willing to take drugs," she says.

Brenner and her co-workers have discussed the possibility that screening could violate constitutional rights.

"But I don't care," says Brenner. "I didn't want to be forced to put a smoke detector in my home, but I felt it was for my own good."

The survey findings come at a time when many sectors are feeling a big drug-testing push:

■ The National Collegiate Athletic Association introduces drug testing next school term in all sports championships. In the poll, 69 percent favor testing college athletes; 26 percent oppose.

■ The Federal Aviation Administration tests 24,000 air controllers and safety inspectors this fall.

■ By early summer, the Customs Service starts testing up to 14,000 employees.

■ The Drug Enforcement Administration plans to randomly test 2,400 staffers.

■ About 26 percent of Fortune 500 companies already screen applicants and employees.

Just March 1, Du Pont Co. — which employs 110,000 — began drug testing for new job applicants.

The number of companies testing will double within a year, says J. Michael Walsh of the National Institute of Drug Abuse.

Today, his panel of industry and drug abuse experts will issue a report on drugs in the workplace. It is expected to call for more research on tests and for policies that treat drug abuse as health and safety issues, not law enforcement ones.

"Technology has just reached the stage where testing has real utility," says National Institute of Justice head James Stewart.

For the past 18 months, the justice institute has sponsored testing of 24,000 people arrested in New York City and Washington, D.C. Accuracy of the test: 95-98 percent.

In general, most testing involves urine samples. If a drug is present, a chemical reaction occurs, and then a computer analyzes the result. Most commonly tested drugs: cocaine, barbituates, amphetamines, marijuana, Quaaludes, opiates and PCP.

Proponents call testing a powerful weapon in the drug war. The demand for illegal drugs is vast. The \$110 billion industry feeds more than 20 million regular marijuana users, 6 million regular cocaine users and about 500,000 heroin users, among others.

Some experts say testing could backfire.

Barbara Cooper-Gordon, who runs the drug treatment program at New York's Beth Israel Medical Center, daily sees such drug abusers as teachers, nurses, doctors, Wall Street lawyers and stockbrokers.

Cooper-Gordon calls mass screenings a "witch hunt."

Employers could better spend money educating managers on how to spot drug problems, she says, such as watching for declining job performance, increased absenteeism and mood swings.

John Hardgraves, 25, a tutor at Jersey City (N.J.) State College, disagrees. He is against "drugs for anybody." He believes workers should be tested "every two weeks."

Widespread testing could be expensive — between \$4 and \$10 per sample for the most common urine exams and about \$30 for a more sophisticated test.

Allan Adler of the American Civil Liberties Union says many of us — frustrated by the government's stalemated drug battle — are getting caught in an anti-drug frenzy.

"People are not aware of the fallibility of the test or the scope of the invasion of personal privacy," he says.

Medications for physical and psychological disorders can throw off results, and tests can't distinguish between a chronic user and an occasional off-the-job user, he says. A bad test could ruin someone's reputation.

But Arthur Brill of the President's Commission on Organized Crime — which proposed testing this week — says screening is "no different in concept than all of us taking vision tests before getting a driver's license."

The poll also found:

■ 55 percent agree testing would be a violation of privacy rights; 37 percent do not. "I think I would only object if I were guilty," says Marie McCawley, 67, a Dunedin, Fla. homemaker. "I'm in favor of anything that will get rid of drugs."

■ Most of us — 91 percent — would let first-time offenders off with a warning. Only 27 percent favored work suspension.

■ Most concern focused on jobs involving public safety — "things directly relating to life and death," says Lisa Quiambo, 24, a Wheaton, Ill., nurse.

And 64 percent favor testing for professional athletes. Baseball commissioner Peter Ueberroth, who recently disciplined 21 players for drug use, has vowed baseball will be drug-free this season.

Amateur sports ranked as high: 65 percent favor testing for high school players.

But National Federation of State High School Associations, which represents interscholastic sports programs across the USA, supports drug education rather than testing.

Forrest Varlin, a maintenance supervisor in Los Angeles, backs testing but thinks "people are picking on athletes a little more than other people. They are in the limelight a little more."

While everyone wants to end drug abuse, many wonder if the risks of drug testing outweigh the benefits.

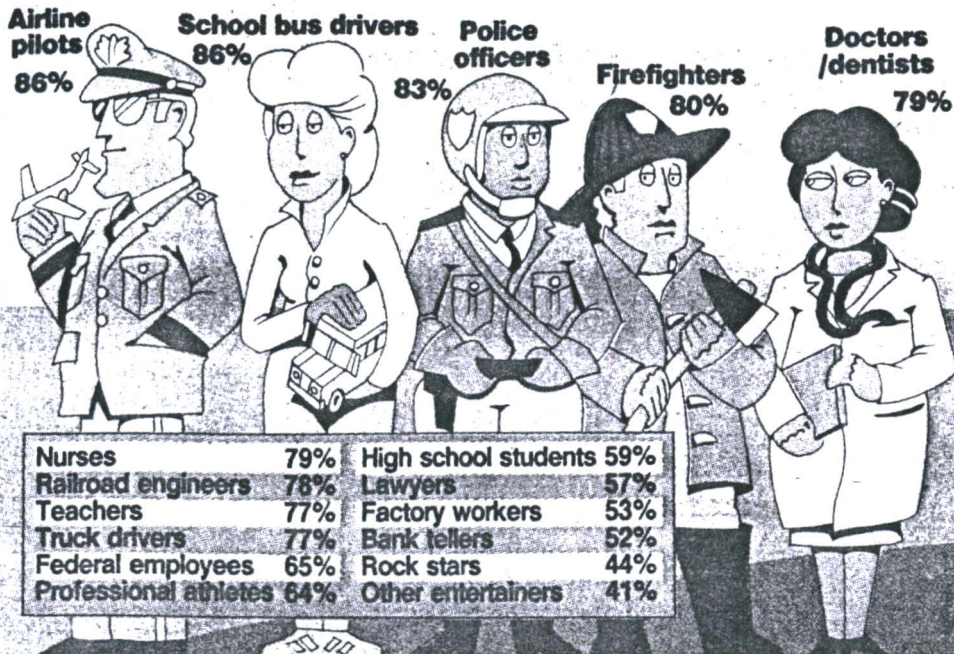
Former Justice Department official Jeff Harris worries that "wholesale" screenings could open the door to other personal intrusions — perhaps into workers' sex lives or finances.

"My concern," he says, "is where does it stop."

Contributing: Patrick O'Driscoll, Darcy Trick, Susan Allen, Wayne Beissert

Poll: We back drug tests

Who should be tested?



Source: Gordon S. Black Corp. - USA TODAY poll

By Bob Laird, USA TODAY

TODAY'S DEBATE: Fight drug pushers, don't test everybody, 10A



By Bob Riha Jr., USA TODAY
FORREST VARLIN: L.A. man favors testing but 'people are picking on athletes.'



By Daniel M. White
GRETCHEN BRENNER: Federal worker in Kansas City strongly backs tests.



By Robert Deutsch, USA TODAY
JOHN HARDGRAVES: New Jersey college tutor is against 'drugs for anybody.'

TESTING OUR FUTURE

A wall of denial is being torn down, the wall of denial about the seriousness of the drug abuse situation in this country. Simply put, drug abuse affects every U.S. citizen. If we are to solve our drug problem, every individual must take a firm stand against drug abuse .

Last week following the release of the final report by the President's Commission on Organized Crime, much of the media attention focused on the fact that the Commission dared to recommend a strong and consistent policy against drugs in the workplace, including "suitable" and "appropriate" drug testing. Urinalysis is a diagnostic tool to identify drug users, to assist the drug users in getting help and to keep drug users from contaminating the workplace.

There is nothing particularly new about urine testing for drugs. And as long as heroin was the target of the tests, few objected. But when similar testing is proposed for marijuana and cocaine users, the outcry is deafening. The question is why?

The answer is that drug testing makes it difficult for a drug user to deny that he or she uses drugs and forces them to be held responsible for their actions. When used with a few common sense rules, drug testing adds an important element-honesty.

Drug abuse reached a crisis level in the U.S. military in the early 1980's, although the military had used urinalysis to test for heroin abuse for years. In 1981, the military began to focus on the marijuana user. At that time, over half of the personnel in some units of the Navy were using drugs. Today, the Navy reports this to be less than 3 percent. The success of the program has overcome any initial objections.

Just as the military set the example, I believe that those people paid by the taxpayer to fight drug abuse should be among the first tested. I and members of my staff have already undergone testing. The Drug Enforcement Administration, U.S. Customs Service, the National Institute on Drug Abuse, and others are planning appropriate testing programs.

Private sector employers are well aware of the results of drug abuse in the workplace. They know that the drug user is only about two-thirds as productive as other employees. They have learned by hard experience that the drug-user is over three times as likely to be involved in an on-the-job accident; absent from work more than twice as often; and incurs three times the average level of sickness costs. You and I are paying the costs for sloppy workmanship, accidents and sickness.

We must also be concerned about public safety. Each of us has the right to feel safe. Drug use and its obvious dangers are unacceptable among air traffic controllers, pilots, bus drivers, train operators, doctors, security guards, and others responsible for our safety and well-being.

Employers, quite simply, are fed up with the problems and fears that drug abuse brings. They are doing something about it. Small businesses and large corporations alike are instituting strong "no drug use" policies which include urinalysis testing.

The recent debate has largely revolved around drug testing as a threat to the privacy and individual rights of the drug user. There is a more fundamental aspect of individual rights which is at the heart of the Commission's recommendations. The Constitution grants no citizen the right to break the law, to jeopardize the safety of co-workers and the public, or to force other individuals, including employers, co-workers, consumers and taxpayers, to pay the exorbitant social and economic "price tag" for another's drug abuse.

Few Americans recognize that when a user buys marijuana or cocaine, they are financing our nation's suicide. Drug dollars go to criminals who are determined to destroy our country--criminals who have publicly stated that their weapons are drugs. They have killed one of our agents in Mexico and vowed to kill our Ambassadors. This is not a rights issue, this is a survival issue.

The American worker, by supporting strong anti-drug programs, can improve the productivity of co-workers, decrease accidents, cut health-care costs, improve our security, and reduce on-the-job crime. It is a simple way for each American to make a significant contribution to his or her own quality of life, as well to a stronger future for our children and the Nation.

Carlton E. Turner, PhD
Director, White House Drug Abuse Policy Office
March 12, 1986

Drug testing in the workplace: Is it legal?

A drug law expert answers *the* vital question

Robert T. Angarola

“Is it legal?” This is the most commonly asked question about drug testing and it can be answered in general terms once you understand how our legal system is set up.

An activity is illegal if it's prohibited by the U.S. Constitution, which applies to the whole United States. It can also be illegal if the activity is prohibited by any one of the 50 state constitutions, which apply only to activities within a particular state. At the present time there is no federal or state constitutional provision that directly prohibits the use of drug detection programs. As we will see later, there may be some indirect constitutional references that might limit the use of drug screening devices, but these references haven't been clearly interpreted to apply to drug screening.

Drug detection might also be illegal if a federal or state law specifically declares it to be illegal. For example, several states have passed laws declaring that the use of lie detectors in employment situations is illegal. There has been discussion in at least one state on prohibiting drug detection devices under state law. But right now, there is no law declaring drug screening to be prohibited. Adopting well-thought out drug policies will help avoid future restrictive state legislation.

Finally, either a federal or state court could be asked to consider a specific factual problem involving the use of a drug detection device. There have been a few such challenges to the use of drug screening devices, and to date there has been no

court ruling on these challenges.

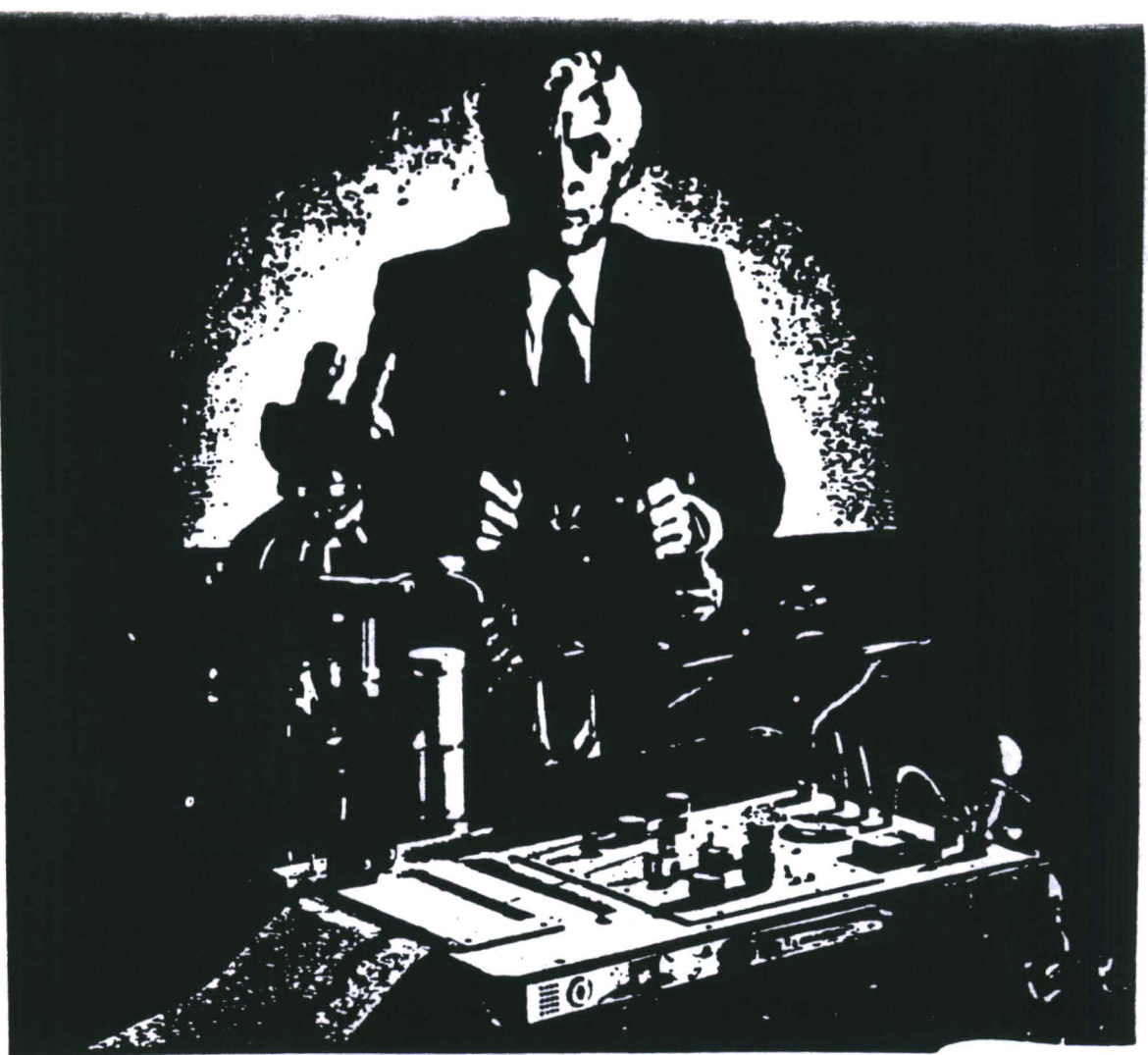
It's important to understand what the courts will look for in determining the “legality” of drug detection used in an industrial setting. The courts will look at the facts of a particular case, such as an employee who has been fired on the basis of a positive marijuana urinalysis, and will decide how these facts compare with past cases involving similar problems. The court will also relate the facts to general legal principles that govern the rights of an employee. The employer will have a great deal of leeway in avoiding an unfavorable court decision by structuring his drug detection program to avoid legal challenges.

In sum, drug detection programs are legal, but the employer must institute a few common sense procedures to avoid legal challenge. The employer must also realize that no program is foolproof. There is no guarantee that any employer will be completely free from exposure to an isolated lawsuit.

Employers do however need to understand that there is a minimal legal risk associated with all employment activities, for example, having an unsafe workplace. This minimal risk has to be budgeted into the risk/benefit evaluation that will guide the employer in his decision to institute a drug detection program. The legal risks associated with the use of drug detection must be weighed against their demonstrated benefit in improving workplace safety.

Robert T. Angarola is a member of the Washington, DC law firm of Hyman, Phelps & McNamara, which specializes in food and drug law. He has served as general counsel to the White House Office of Drug Abuse Policy and assistant director of the White House Domestic Policy Staff handling health and drug issues.

EMPLOYMENT TESTING



What about the employee's right to privacy?

This is a concern that is almost always raised and must be taken into consideration. There are two sources of our notion of the "right to privacy." The first is simply an individual's belief in what aspects of his life are private and what are public. Most people seem to have some feeling that urinalysis testing somehow invades their personal sense of privacy.

This is an important objection, and an employer may choose to honor it if he wishes. For example, several years ago the AFL-CIO published an official statement declaring workplace surveillance devices to be an invasion of privacy. The AFL-CIO did not need any legal authority to do this; it was simply making a statement about policy and beliefs. And if an employer chose to abide by this policy by inserting some provision in union collective bargaining agreements, he took on an obligation to honor this belief. He did not have to do so.

But this personal notion of right to privacy must

be distinguished from a legally enforceable right to privacy. To understand an employee's legal right to privacy, we've got to go back to our framework of constitutions, laws, and court decisions. If we cannot find some restriction against the use of drug screening tests in one of these places, then an employee probably has little chance of prevailing when he claims a legal right to privacy which would prevent drug screening.

The second notion of "right to privacy" comes from most people's belief that the United States Constitution guarantees a right to individual privacy.

In fact, there is no right to privacy mentioned in the U.S. Constitution. The courts have implied such a right by looking at the entire Bill of Rights and combining several of the provisions dealing with other rights, such as free speech and due process. But the "right to privacy" that the courts have established is strictly limited.

The federal right to privacy requires government action. A police officer or a teacher who works at a federally-funded school can violate your constitutional right to privacy, but, believe

it or not, your next door neighbor or your boss cannot. Most employers in industry act as private individuals in setting up a drug detection program. There is normally no government action when a private business conducts a drug screening test, and therefore no violation of the federal right to privacy.

The second restriction on the constitutional right to privacy is that the government (or its agent) must interfere with some fundamental right before there is an invasion of privacy. The Supreme Court has explained that fundamental rights include such activities as marriage, contraception, procreation, family relationships, child rearings, and education. The courts have specifically said that use and possession of illegal drugs are not fundamental rights protected by the U.S. Constitution. This means that an employee would have a very difficult time proving that a private employer violated his constitutional right to privacy by testing for drug use.

As an even further restriction, the courts have found that the government may invade your constitutional right to privacy if there is a compelling state interest. For example, a court recently ruled that the state of Hawaii could send inspectors into the offices of private psychiatrists to examine patient records. The state claimed that it needed this information to protect the public against Medicaid fraud. The court said that although patient records are normally protected by the right to privacy, the state's interest was strong enough to overcome the constitutional protection.

A drug detection program might be justified for similar reasons, for example, the Nuclear Regulatory Commission's proposed fitness for duty rule which is aimed at protecting the public safety.

When we talk about the legally enforceable right to privacy, there is another major source for a protected right to privacy—state law.

Many employees believe that if they smoke marijuana off the job, it is simply none of their employer's business—they have a "right to privacy". These employees may believe that local laws or court decisions protect them against an employer's questions about off-the-job behavior, even if the U.S. Constitution does not. This is not ordinarily the case.

State laws or court decisions protect the right to

privacy in a very limited way.

Claims to an invasion of privacy under most state laws have been limited to four specific areas, none of which include drug detection in the workplace.

In most states it is an invasion of privacy to interfere with legitimate activities conducted in physical seclusion, such as in the home. Activities in the workplace are not considered physically secluded. Employees naturally expect that their behavior on the job will be observed by their co-workers and employers.

The remaining bases for a state law claim to invasion of privacy are even further removed from the drug detection situation.

Appropriation of a name or likeness for commercial gain. This occurs, for example, when the photograph of a private individual is used in an endorsement for a product, without that person's permission.

Publicity given to private life. This is usually associated with some commercial use of details of someone's family or personal life. The claim requires public dissemination of the information. Information obtained by an employer about his employees, if revealed only to those persons who have a legitimate interest in obtaining such information (e.g. plant supervisors or medical personnel) is not considered an invasion of privacy.

Publicity placing a person in a false light. This claim also requires publicity beyond a legitimate employment relationship. It covers actions such as a magazine's overemphasizing negative aspects of a person's behavior, and thus harmfully distorting the public's impression of that person.

This review of state law claims to invasion of privacy illustrates how narrow the legal concept of privacy really is. Once again, many employees fail to understand that their personal notions or a right to privacy may not fit into legally enforceable standards.

The critical fact is that activities that take place in the workplace, or that affect an employee's performance on the job, are not private. An employee's working relationship with his employer and his workplace activities are not protected in the same way that his home activities are protected.

An employer has a legal right to ensure that his

Continued on page 84

EMPLOYMENT TESTING

Continued from page 81

employees perform their jobs competently. In addition, the employer has an obligation to ensure that no employee endangers the safety of other workers. So, if illegal drug use either on or off the job can reduce job performance and endanger co-workers, the employer has adequate legal grounds for conducting drug use tests.

Many employees believe that if they smoke marijuana off the job, it is simply none of their employer's business—they have a "right to privacy".

Absent a strange fact situation, it is unlikely that an employee would succeed in a legal action challenging a drug detection program for invasion of privacy. However, there are a few common sense procedures that all employers should follow to avoid even the appearance of privacy violations.

1. All employees and job applicants should be informed of the company's policy regarding drug use.
2. The program should be presented in a medical and safety context, e.g., drug screening will help improve the health of employees and help ensure a safer workplace.
3. The drug detection program should be clearly explained to all employees. It should be distributed in writing to all employees.
4. The drug policy, and the possibility of testing, should be included in all employment contracts.
5. Employees should be given advance notice that drug testing will be a routine part of their employment.

These precautions can provide substantial protection to an employer if he ever is sued by an employee. A recent court decision involved an employee who was fired for failure to take a periodic chest x-ray as required by his employer. The court looked at the employment contract and observed that the employee had consented to all general employment policies governing health and safety. The court said this was enough to support the employee's discharge. Therefore, employment contracts should have a drug testing clause.

An important sidelight. It may not be an invasion of privacy to test an employee for marijuana use, but it is an invasion of privacy to reveal test results to third parties. Employee medical records are protected under legal standards of privacy. Employers should be cautioned to include all drug detection results in their existing record protection programs. If a company does not have a system in effect to protect the confidentiality of employee records, the company should be advised to work with its own or outside lawyers and medical personnel to develop such a program before drug testing begins.

Is it fair?

When the Nuclear Regulatory Commission announced its intention to institute a drug and alcohol detection program for employees manning nuclear reactors, the most serious public objections were concerned with the fairness of such a program. The Commission proposed that outside employees would have to participate in surveillance programs, while NRC staff would not be required to do so. People thought this was unfair.

EMPLOYMENT TESTING

Like the privacy issue, many people believe that there is some general legal standard of fairness that would prohibit drug detection in the workplace. If pushed to define their objection, these people often point out that drug detection programs are aimed at blue-collar employees, while exempting executive and managerial personnel.

There is no legal requirement that an employer must test the entire company work force. It is not discriminatory to test only blue-collar workers or younger workers, as long as their employer has a reason for his decision to limit the testing program.

To avoid any questions about his procedures, the employer should be able to document the reasons for his choice of a limited testing system. Such documentation could include evidence of increased job absences or productivity problems among a particular group of employees.

Even with such documentation, however, an employer may find that he wishes to go beyond the strict legal requirements of fairness in order to meet his employee's conception of fairness. This may mean that through employee or union negotiations, the employer agrees to test all members of the company work force. An across-the-board testing program may have added benefits. Older workers and white-collar employees have been shown to be equally susceptible to drug-related problems. This across-the-board approach could be instituted most effectively through routine medical check-ups.

There is no legal requirement that an employer must test the entire company work force. It is not discriminatory to test only blue-collar workers or younger workers, as long as their employer has a reason for his decision to limit the testing program.

A second part of the fairness issue has to do with disciplining an employee who tests positive for drug use. State labor laws or employee contracts may place limits on an employer's ability to summarily fire a drug user.

Good public relations, good personnel practices, and most labor contracts require that an

employee be given some notice of the reason for any disciplinary action and some opportunity to discuss that action with a superior.

The best insurance against charges of unfairness in disciplinary actions is to advise employees in advance what will happen if they test positive for drug use. Then, give each employee who does have a confirmed positive test a chance to discuss his problem with supervisory personnel before discipline is instituted. Employers should re-test any worker who presents plausible objections to the results of a single positive test.

...local police may be able to provide valuable assistance in designing the drug program.

What about the unions?

Trade unions in each geographic section of the country differ in their outlook on labor policy issues. However, the general sense of the union leaders seems to be that drug use is dangerous in the workplace. Union members are also aware of the public concerns about declining American productivity. The unions tend to support, or at least will not oppose, programs that increase workplace safety and productivity.

From a practical point of view, it is a good idea to solicit union support during the planning stages of a drug detection program.

Legally, union members have a right to insist that existing labor contracts be followed. Most labor agreements make no mention of drug detection systems. Some unions might be willing to permit drug detection under general contract health and safety provisions, but an employer can't assume that this is true.

In a recent labor case, a railroad company began a new policy of testing employees for on-the-job alcohol intake with a breathalyzer. Railroad employees who were disciplined as a result of these new test methods argued that there was no specific provision in the union contract which permitted such tests. The judge agreed, and said that general safety clauses could not be used as a basis for the institution of new technology that was not in use at the time the contract had been negotiated. The same could apply to drug testing. In considering negotiations with union represen-

EMPLOYMENT TESTING

tatives, it is important to emphasize that the unions have a responsibility to assist their members in maintaining a safe work environment. Drug detection programs are a positive safety element in the workplace, and should be viewed as a means of assisting unions and management in achieving common goals.

Some employees have taken this union responsibility quite seriously. In a recent court case, a union had developed an advisory program to inform employees of proper safety and health procedures on the job. An employee suffered an injury while working. He sued the union for failure to fully inform him of the dangers and for failure to fully supervise the advisory program.

The injured employee lost that particular suit, but it does illustrate the point that unions are full participants in job safety programs.

Can job applicants be tested too?

Yes. Job applicants are generally not protected by union collective bargaining agreements or by the terms of private employment contracts. This means that an employer has a great deal of freedom in deciding how he wants to screen potential employees. While it might be unnecessary, an employer might wish to show that there is some relationship between job performance and drug use. Absent a specific law to the contrary, employers can require job applicants to take a drug screening test.

As was discussed previously, in the best of all possible situations the employer should avoid raising any questions about his drug testing policy. He should inform job applicants that they will be tested for drug use; he should refer to the company drug policy and the testing procedure in employment contracts; he should discuss the company drug policy with a potential employee before starting him on the job.

Employers have a legal right to hire only qualified employees. It is not discriminatory to refuse employment to drug users if there is some relation between drug use and job performance.

In fact, employers have a duty to find out whether potential employees are really competent to do the job.

This duty is reflected in the legal concept of negligent hiring. If an employer hires someone who is incompetent, and this incompetence causes

injury to another employee or to a member of the public, the employer can be held liable. Drug users can endanger the safety of others, and an employer needs to discover this fact before other workers are exposed.

Does the employer have to inform the police when someone tests positive?

It is not illegal for someone to be under the influence of drugs. It is, however, against the law to possess or sell drugs such as marijuana, cocaine, or heroin.

A positive drug screening test result shows evidence only that an employee had drugs in his system. Since this in itself is not an illegal act, the drug test results do not provide any basis for a report to the police. And remember, the test results should be part of an employee's private medical record and are protected against indiscriminate disclosure to third parties.

Drug users are frequently involved in drug possession and sales in the workplace. These activities are illegal and may be reported to the police. Employers should incorporate their relationship with law enforcement personnel into the announced company drug policy. Employees

Outside agencies are often willing to work with private employers to establish referral and treatment services at a cost much less than that of in-house counseling.

should be informed in advance, when and if drug-related activities will be reported to the police.

Law enforcement personnel should be informed of the company's drug detection program and should be invited to contribute suggestions. The local police may be able to provide valuable assistance in designing the drug program. And in the event that there ever is a need to call for immediate police assistance in dealing with a drug-related problem, the police response can be most effective if they are alerted to the company's drug policies in advance.

Does the employer have to start a drug treatment program?

Many smaller companies are hesitant to institute

drug detection programs because they don't want to fire drug users, but they also don't have the money to provide treatment services.

The best insurance against charges of unfairness in disciplinary actions is to advise employees in advance what will happen if they test positive for drug use.

Employers should be alerted to the public and private substance abuse counseling programs that are now available in most communities. Outside agencies are often willing to work with private employers to establish referral and treatment services at a cost much less than that of in-house counseling. Larger companies should be encouraged to review their existing occupational health programs and employee assistance pro-

grams to make sure these services reach drug abusers.

Private employers have no legal obligation to rehabilitate their employees. If the fairness procedures that we previously discussed are followed, employers can discipline or discharge drug users without offering treatment services.

But many companies have found that such summary dismissals no longer make business sense. Employers make major investments in selecting and training their employees. It's good business policy to retain valuable employees, where possible, through counseling for drug abuse problems. This approach also enhances the sense of job security for all employees, and can contribute to better relations between workers and management. □

Reprinted with permission from PharmChem Newsletter, July-August 1984. Published by PharmChem Laboratories, Menlo Park, CA.

DRUG TESTING

**LEGAL ISSUES OF A DRUG-FREE ENVIRONMENT:
TESTING FOR SUBSTANCE ABUSE IN THE WORKPLACE**

Robert T. Angarola, Esq. */

I. THE CONFLICT BETWEEN SOCIAL ATTITUDES AND LAW

In 1982, less than 5 percent of the Fortune 500 companies were screening employees for drug abuse. Today, about 25 percent of those companies are doing it in one form or another. A recent article in the Philadelphia Inquirer reported that last January, IBM, which employs almost a quarter of a million workers in the United States, began screening every job applicant for drug use. That article also stated that Ford Motor Co., Alcoa, Boise-Cascade, American Airlines and the New York Times were using urinalysis for drug detection.^{1/}

Private industry is not alone in using this technique to reduce drug abuse in the workplace. Drug screening of government employees also continues to increase. The military began testing for drugs using urinalysis 14 years ago. The services have been joined by such federal agencies as the United States Postal Service and the Federal Railroad Administration. Local fire fighters and police officers are being screened. Operators of

*/ Mr. Angarola is a member of the law firm of Hyman, Phelps & McNamara, P.C., 1120 G Street, N.W., Washington, D.C. 20005.

city and school buses, trains, and subways are being tested. Prison facilities all over the country are screening prisoners as well as correctional officers.

Perhaps Baseball Commissioner Peter Ueberroth's proposal to screen everyone connected with baseball -- except the players -- has done the most to bring drug testing into the public spotlight. Of course, Ueberroth had a positive experience with testing athletes when he was in charge of staging the 1984 Olympics.

"This may be the ultimate prevention device," according to Dr. Michael Walsh, Chief of Clinical and Behavioral Pharmacology at the National Institute of Drug Abuse. He predicts that "[w]ithin a year or two, in order to get a good job, you are going to have to be drug-free."^{2/}

This paper will discuss the kinds of legal challenges being brought against employers using urine testing for substance abuse, and the possible motives behind those challenges. It will also suggest ways for a private employer to defend these legal challenges or, better yet, to avoid them altogether. While most of the cases discussed concern urine testing, the issues they address extend beyond the tests themselves into all aspects of an employee substance abuse program. Any company with a drug abuse prevention program -- and that should be every company -- needs to follow the principles that these cases put forward for dealing with employees having drug and alcohol problems.

As the statistics show, drug screening is becoming a fact of employment. And employers using the tests in a reasonable manner

are not having serious difficulties in overcoming the legal challenges being brought against them. But why are employees filing these legal challenges?

The controversy surrounding drug screening results in large measure from a clash between changing social attitudes and law. The public is uneasy about drug screening. People are concerned that the testing will somehow be used against them and that, in a broader sense, it will be a starting point for increasing intrusions into their private lives.

Many workers themselves are aware of the serious problem of employee drug abuse afflicting this country. The more informed recognize that employers have limited alternatives to urine testing and that in many situations it is the most effective technique for detecting and preventing drug abuse. Nevertheless, a sizeable segment of the public does not want to accept the use of the tests in the employment context. People often argue that the tests are an unwarranted intrusion into their private lives, that they are "unconstitutional."

Are these people correct? The courts have usually said no. Judicial opinions tend to side with the employer on constitutionality issues. This is because the parties claiming that drug screening encroaches upon the boundaries of right to privacy, fairness, or due process are reflecting more their social attitudes than an understanding of the law as courts have interpreted it.

Why is this? Use of marijuana and so-called "soft" drugs is widespread in this country. Several states have decriminalized

possession of small amounts of marijuana for solely personal use. Users at one extreme believe that these legislative acts justify protecting such drug taking as a personal decision approaching a civil right. They are convinced that employer interference in this decision infringes upon their liberty and their right to privacy. A larger number of Americans are less tolerant of drug use but cannot justify the analysis of an individual's urine, breath or blood, or searches of his person or possessions by fellow humans or trained dogs, to identify the problem of drug use in the workplace for specific action. Drug use is somehow their own business and nobody else's. Everyone can identify with this feeling to some degree -- but can employers accept it as valid?

II. THE LEGAL ISSUES

The clash between changing social attitudes and law as it affects employee drug testing has led to several legal attacks on the tests. These challenges have centered in five areas: the right to privacy, the right to be free from unreasonable searches, the right to due process, negligence law, and contract law.

A. Right to Privacy

There are two common notions of "right to privacy." One encompasses each individual's personal belief concerning those aspects of his life that are private and that should not be subjected, involuntarily, to intrusion by others. Social attitudes are reflected in the lines we draw around our private lives; when we think these lines are crossed, there will be an outcry. "Don't tell me I have to wear seatbelts!"

But the constitutional "right to privacy" -- the right to privacy that is legally enforceable -- protects far fewer activities.

Surprisingly, there is no specific constitutional provision guaranteeing a right to privacy. The United States Supreme Court has held, however, that such a right is implied in the Constitution by reading several of its provisions together.^{3/} This constitutional right to privacy has been held to protect individual decisions on matters such as marriage, family and childrearing. While the use of marijuana, cocaine, and other abusable drugs has unfortunately become commonplace -- and even socially accepted in some circles -- it has never been held to come within that zone of activities protected by the constitutional right to privacy.^{4/} Moreover, this constitutional right to privacy protects people only against governmental intrusion. Individuals acting as private citizens are not bound by these constitutional restraints. And this applies to private employers.

This dichotomy between private and government actions explains why Norma Rollins, acting director of the New York Civil Liberties Union, when commenting on Baseball Commissioner Ueberroth's proposal to institute mandatory drug screening, is quoted as saying, "You're forcing, coercing people to accept an intrusive act. It's not justifiable. But it's not illegal because it's being done by a private employer -- not the government. I'm not saying [Ueberroth] has the right; I'm saying there's no law to prevent it."^{5/} The testing may violate

Ms. Rollins' personal attitudes of privacy, but it does not violate an employee's legally protected privacy zone.

B. Freedom from Unreasonable Searches

The words "right to privacy" often appear in lawsuits challenging employee drug screening, but in fact, most court claims of invasion of privacy have been based on the fourth amendment prohibition against unreasonable searches and seizures.^{6/} Plaintiffs are asserting that urine testing intrudes so far into an employee's sense of privacy that it constitutes an unreasonable search in violation of the fourth amendment. Workers raise this argument not only against government employers, but also against private employers. Once again, however, the fourth amendment's protection against unreasonable searches protects only against unreasonable governmental interference. When a private business is screening for drugs, there is no government involvement, and therefore no violation of this constitutional guarantee against unreasonable searches.

Indeed, urine testing by government employers also has withstood recent challenges that it violates the fourth amendment. In a case decided in a federal court in Georgia this year, city employees working around high voltage electric wires argued that urine testing violated their fourth amendment rights.^{7/} The court agreed with the terminated employees that the testing was a search, but said that because "the government has the same right as any private employer to oversee its employees and investigate potential misconduct relevant to the employee's performance of his

duties, ... the employee cannot really claim a legitimate expectation of privacy from searches of that nature."^{8/} The court balanced the intrusion of an employment-context urinalysis against the employer's need to determine whether employees engaged in extremely hazardous work are using drugs. It found that the constitution was not violated because the search was a reasonable one.

Because the fourth amendment does not constrain the private employer, he or she has more freedom to conduct searches in an effort to detect and deal with substance abuse in the company. For example, when investigations linked several tragic Burlington Northern train accidents to employee alcohol or drug abuse last year, the railroad unilaterally implemented a surveillance and search program, using dogs trained to detect drugs, in order to stop on-the-job alcohol and drug use. The union protested this action and argued that the dog surveillance program was an unconstitutional search.

A federal court specifically held that the search was not unconstitutional, since the railroad, a private entity, was not bound by the fourth amendment.^{9/} The court stated that there was "nothing prohibiting a private entity from requiring any person, including an employee, to submit to a 'search' by such a dog as a condition of entering that entity's premises, or refusing entry to any person believed to be in possession of an illicit substance."^{10/}

Arbitrators similarly recognize that the private employer's right to search is broad. A recent decision approved a company

search of employees' lunch boxes, trousers, shoes, socks, lockers and vehicles after reports that employees were bringing drugs and handguns onto company property.^{11/} The arbitrator explained:

Arbitrators have consistently held that the employer has a right to conduct a search of lunch boxes, lockers and persons and that [penalties for] refusal to permit a search may include discharge. These arbitrators have been attentive to the motivation for the search and the circumstances under which it was conducted, attempting to balance the legitimate interest of the employer and the personal dignity of the employee.^{12/}

The arbitrator found that the search was motivated by the company's justifiable alarm at reports that employees were carrying drugs and handguns onto company premises. The company hired a professional security consultant, who conducted the search with as much regard for personal privacy as the legitimate ends of the search permitted. This may have been reflected in the fact that only two employees had objected to the search. Although the timing of the search was unannounced, advance notice of the company's policy was posted on the company bulletin board, the production office, the change room and the gates to the plant.

The arbitrator upheld this search because the employer was justifiably concerned about the health and safety of all his employees and conducted the search with reasonable regard to the personal privacy and dignity of the worker. The arbitrator recognized that informing employees of the search immediately before it was conducted would destroy the effectiveness of the search. He acknowledged, however, that the employer could accommodate both his own and his workers' needs by notifying them that he would conduct such searches in the future.

This case illustrates an important concept. An employer often can implement many needed drug abuse prevention, identification and intervention programs without undue employee resistance if he clearly communicates what he intends to do, explains why a search program is necessary, and consistently enforces the policy that he has adopted.

C. Due Process

The fifth and fourteenth amendments of the Constitution require the government to provide a person with due process before depriving him "of life, liberty, or property."^{13/} This is a requirement that the government engage in a fair decision-making process before taking measures that affect an individual's basic rights.

The courts therefore have held that the actions a government employer takes toward its employees must be reasonably related to their jobs. When the government plans to penalize employees, it generally must notify them in advance and provide them with an opportunity to defend themselves. The requirements of due process will, of course, vary depending upon the situation.

Due process arguments made against government employers using drug testing generally claim that the tests are inaccurate, that the results are insufficiently related to work performance, or that the employee was punished as a result of a urinalysis without being afforded an adequate opportunity to contest the test results. Again, while private employers are not bound by the constitutional guarantee of due process, wise employers take into consideration workers' notions of what is fair and allow an

opportunity to discuss alleged drug use. Therefore, although the next few cases will deal with government workers, they have relevance to private industry.

1. Accuracy and Reliability

Courts that have passed on government employees' challenges of urine testing have consistently confirmed the accuracy and reliability of the tests. In a case decided in a Georgia federal court in 1984,^{14/} municipal fire fighters and police officers argued that both urine testing and polygraph examinations were so unreliable that their use violated protected constitutional rights. The court examined the polygraph issue in detail and agreed that, in spite of the city's need to maintain safe police and fire services, the tests were impermissibly unreliable. The urinalysis challenge, however, was presented, discussed, and dismissed in a brief footnote, with the explanation that "the court is not persuaded that use of such testing procedures will violate plaintiffs' constitutional rights."^{15/}

The court did not find the lack of perfect accuracy in urine testing to be significant enough to serve as the basis for a constitutional challenge. Indeed, in an analogous situation, the U.S. Supreme Court has accepted the reliability and accuracy of breath testing equipment.^{16/} The Court held last year that due process does not require state police to retain the breath samples of suspected drunk drivers tested on a medical device called an Intoxilyzer. The Intoxilyzer measures the alcohol level of the breath of the person tested. Although, like urine testing, it may not be perfectly accurate, the Court found that the possibility of

a false positive (registering the presence of alcohol when none was there) was so slim that the preserved sample would have virtually no exculpatory value to the drunk-driving defendant. Therefore, the California police, though technically capable of preserving breath samples, were not required to do so because of the accuracy of the testing equipment.

"The materiality of breath samples," the Court reasoned, "is directly related to the reliability of the Intoxilyzer itself." The Court continued, "... if the Intoxilyzer were truly prone to erroneous readings, then Intoxilyzer results without more might be insufficient to establish guilt beyond a reasonable doubt."^{17/} However, the justices believed that the testing device results were sufficient to establish guilt beyond a reasonable doubt because they found that the test was not prone to erroneous results.

A Supreme Court decision on urine testing would probably support the accuracy and reliability of that test as well. Like the Intoxilyzer, the accuracy of the urine tests themselves is nearly perfect. Inaccuracies in test results are also almost exclusively due to operator error.

In contrast to breath-alcohol testing and urine testing, courts and legislatures have found polygraph examinations -- lie detector tests -- too unreliable to use even to support employment-related decisions. Recall the fire fighters' and police officers' challenge of lie detectors and urine tests. The court ruled that the city could not use lie detector tests to combat drug use among

its police officers and fire fighters -- but it could use urine testing. One-third of the states have laws prohibiting private employers from requiring employees to take lie detector tests.^{18/} Results of lie detector tests are generally inadmissible in court.^{19/} Arbitrators also refuse to consider results of lie detector tests as proof of the truth of the tested person's response.^{20/}

2. Relationship to Work Performance

The relationship between test results and work performance presents a more difficult legal question than does the accuracy of the test itself. At present, urine screening detects the presence of substances in the body. Test results will be positive when a recently ingested substance is detected in the sample, even though the person tested may not presently be "impaired" or "intoxicated." Current technology cannot yet measure impairment. The courts are not, however, dismissing urine testing in its present state simply because it is not able to measure physical impairment perfectly. They recognize that it is probably the best tool we have today to spot drug abuse.

Opponents of the test have argued that ingestion of the tested substances does not necessarily cause impairment at the workplace or long-term intoxication. Employers, on the other hand, know that theft and drug dealing in the workplace, absenteeism due to substance abuse, accidents, worker's compensation claims, health care costs and employee morale are connected with employees who use drugs on and off the job. Nevertheless, the

relationship between test results and work performance at times presents difficult legal questions, both because of the oftentimes intangible, immeasurable nature of adequate performance and the inability of the tests to measure impairment.

Consider, for example, a recent Louisiana state court case involving a city van driver's disqualification for unemployment benefits due to misconduct on the job.^{21/} A co-worker had admitted leaving the company building to smoke marijuana in the company van, and was fired. The van driver, however, denied smoking marijuana on the job. When his urine test came up positive for marijuana, the city fired the driver for being under the influence of marijuana during working hours. The driver had testified that while he had not smoked marijuana on the job, he had smoked marijuana at 1:00 a.m. the day he was tested. He successfully argued at the administrative and trial court levels that the city had failed to prove that he was "intoxicated" on the job or that he was unable to perform his work in a safe manner because of his off-the-job behavior.

The state court of appeal reversed, ruling that it was an error to require the agency to prove intoxication or inability to work. "Merely smoking marijuana, or drinking alcohol or taking any other 'recreational' drug that may impair one's driving, while one is supposed to be working as a driver," the court explained, "is misconduct connected with the employment."^{22/}

The appellate court balanced the public interest against the employee's rights and found the test to present an acceptable

answer to a serious employment issue. Nevertheless, the two lower tribunals did hold against the city. An employer should therefore attempt to show that any drug use will affect job performance.

3. Opportunity to Contest Results

The due process guarantee of fair decision-making also means a government employer must provide an employee with a reasonable opportunity to contest charges against him before he is punished.

While an employer can rely upon statistics proving the accuracy of urine testing and its validity as a measure of job performance, this third area is one where an employee can prevail against an employer who has not been careful to weigh employee rights before taking action.

In a 1982 federal court case, the Federal Aviation Administration had fired several air traffic controllers based solely upon positive urine test results.^{23/} The agency had allowed the laboratory to throw away the urine samples before the controllers could independently inspect and test them. The court held that the agency had violated due process by destroying the samples before the controllers could conduct an analysis of them, and ordered the controllers' reinstatement.

In contrast, in a 1984 case a Chicago bus driver argued that the Transit Authority denied him due process by failing to give him a hearing to contest the results of a positive urine test before removing him from behind the wheel.^{24/} The court determined that a hearing after the bus driver was removed from driving would satisfy due process.

The principle behind these decisions is that the due process to be afforded the government employee must be a reasonable one -- reasonable based on all of the circumstances. Considering the ease in preserving a urine sample, the court found that the FAA had a duty to allow the controllers to defend themselves. Even the most rudimentary standards of due process required that the controllers be permitted to rebut the sole piece of evidence against them. On the other hand, the Chicago bus driver's due process rights had to be balanced against the public safety.

The same considerations of reasonableness and a balancing of factors should enter into any disciplinary decision based on drug testing. Private employers are not bound by the constitutional requirement of due process, but, as in other areas, they should act reasonably when they have evidence that an employee is abusing alcohol or drugs.

Good personnel practices, good public relations and most labor contracts require that an employee be given some notice of the reason for any disciplinary action and some opportunity to discuss that action with a superior. The private employer's best insurance against charges of unfairness in disciplinary actions is to advise employees in advance what will happen if they test positive for drug use or are otherwise identified as substance abusers. Supervisory personnel should offer to meet with an employee to discuss his work-related problems before discipline is instituted. (Caution: Supervisors should not discuss an individual's personal drug problems or accuse anyone of drug use -- this should be handled by trained personnel.) Employers should

consider re-testing any worker who presents plausible objections to the results of a single positive urine test.

D. Negligence Law

Unlike the constitutional claims just discussed, negligence claims can be brought against the private employer as well as government entities. Employee negligence actions against employers are generally of three types. First, an employer may be liable for negligence in hiring a substance abuser who harms another of his employees. Second, an employer may be liable for negligence if he fails to conduct the drug screening procedure with due care. Third, while an employer has a qualified privilege to communicate test results to those in the company who need to know about them, an employer who maliciously spreads untrue reports of positive test results will not be protected from his employees' charges of libel and slander.

1. Negligent Hiring

A 1984 New Mexico case involved a boy who was sexually assaulted by an intoxicated hotel employee.^{25/} The boy's parents sued the hotel, claiming that the hotel was negligent in hiring and retaining the employee. The employee had previously been fired from his job as a dishwasher because of drinking. The hotel later rehired him, even though other hotel employees knew that he regularly drank on the job.

The appellate court found that there was enough evidence for a jury to decide whether the hotel should have foreseen, and

therefore should be held responsible for, the employee's behavior. It sent the case back for a new trial so that a jury could decide on the hotel's liability and the amount of damages.

This case illustrates the importance of controlling substance abuse in the workplace. An employer has a duty to foresee the dangers presented by an impaired employee, and he can be held liable for substantial damages if he fails to do so.

This duty does not extend only to visitors or guests of the company, however. Every employer has an obligation to maintain a safe workplace for his employees.^{26/} This obligation is not met when an employer hires an individual who injures co-workers as a result of a substance abuse problem an employer carelessly failed to detect.

An established company policy and program against employee substance abuse, consistently enforced, could serve as an effective defense to a negligent hiring claim. An employer who has made clear that substance abuse on the job will not be tolerated, who has followed through with testing and other means of detection, and who has imposed sanctions and/or offered rehabilitative assistance to substance abusers will have a better chance of identifying and dealing with the impaired employee before he causes harm. Furthermore, the employer who has instituted and consistently enforced such a policy is also less likely to be held responsible for injuries caused by an employee who, without detection, violates the company's rules on substance abuse.

2. Negligent Testing

In 1982, two Michigan job applicants were refused employment after positive urine tests. They filed suit against the laboratory that performed the tests.^{27/} To support their claim that the laboratory was liable for negligent testing, they introduced into evidence the device manufacturer's instructions which suggested that results be confirmed by alternate testing methods. Because of its failure to follow the manufacturer's labeling, the laboratory agreed to a settlement with the two job applicants.

Also in Michigan, two applicants for fire fighting positions sued the City of Detroit and the laboratory that had returned positive test results for marijuana.^{28/} Based on these results, the city had revoked the applicants' certifications of eligibility for fire fighting positions. The city had confirmed the test results as suggested by the manufacturer. The federal court dismissed the negligent testing claims before the case reached trial.

These cases show the importance of following manufacturer's instructions in testing. But an employer's duty to test with care encompasses more than simply adhering to the instructions provided by a test manufacturer. It also includes proper training of employees who will administer the tests, assuring that the tests will be performed fairly and correctly and taking adequate care to protect the chain of custody over the urine samples.

3. Libel and Slander

A bus driver for a major private transportation company was suspended from work after a drug test given as part of the

required company physical was reported as positive for marijuana. News of his suspension and the test results spread to the bus driver's family, co-workers and acquaintances. Two weeks after the first urinalysis, the bus driver was tested again. The results were negative and the company reinstated him.

A state trial court awarded the bus driver \$5,000 damages for libel and slander.^{29/} The court held that the laboratory and the company physician, knowing the purpose of the test and the consequences of an erroneous report, showed reckless disregard for the truth by communicating the test results without having ensured that they were correct. The Tennessee court of appeals, however, reversed this decision, holding that there was no libel or slander because the plaintiff could not prove actual malice.^{30/}

On the other hand, in a Texas case, a railroad switchman sued his employer for libel and slander after urine test results falsely indicated the presence of methadone.^{31/} The company physician who administered the urine test had explained to the company that further investigation would be required before he could draw any conclusions on drug use. Without further investigation, however, the company instituted disciplinary proceedings. A second urinalysis, performed at the employee's request, indicated that a compound was present in the urine sample which had characteristics of methadone but was not in fact methadone or any other commonly abused drug. The company nonetheless issued a statement that the switchman had been using methadone, and that this justified his dismissal. This statement was circulated

throughout the company. The switchman collected \$150,000 for damage to his reputation and an additional \$50,000 in punitive damages from the railroad.

These cases demonstrate that employers should confirm test results and should not publicize results beyond those people who absolutely need to know. As the Texas decision proves, errors in this area can cost many thousands of dollars.

E. Contract Law

An employer who plans to institute a drug screening program or other means of detecting illegal drug use should determine whether the plan complies with employment or union contracts, and first renegotiate those contracts if it does not.

This paper earlier discussed, in the context of a private employer's right to conduct searches, a union's suit against the Burlington Northern Railroad. That case also raised a second issue of contract law. The union argued that the detector-dog program, unilaterally implemented by the railroad, was in violation of the Railway Labor Act because it was a major change in employment conditions, made without required union consultation.

The railroad had a safety rule prohibiting on-the-job use or possession of drugs or alcohol; employees were well aware of that rule. The railroad argued that use of a detector-dog search program was within its managerial discretion to enforce the no-alcohol, no-drugs rule.

The court halted the program, agreeing with the union that the employer had changed the employment contract without the

legally required union consultation. Even though there was already a rule banning drugs and alcohol on the job, a program to enforce that rule could be instituted only through collective bargaining between the railroad and the union.

The language in an employment or union contract binds an employer and must be carefully drafted. One arbitrator held that a clause in a union contract prohibiting the "sales or use of intoxicants or drugs" did not prohibit a union member's possession of marijuana.^{32/} Obviously that employer did not condone employees bringing drugs into the company as long as they did not sell or use them. He simply lacked the foresight to consider that the phrase he was using could technically be interpreted to exclude drug activity involving possession alone.

Whether judge or jury, a judicial decisionmaker is required to be objective. Labor arbitration cases often differ from court cases in this respect: the arbitrator's decisions may reflect conscious or unconscious bias in favor of allowing an employee to keep his job.^{33/} Companies should therefore be alert to the existence of any careless terminology in the employment contract that might permit an arbitrator to find a way to excuse instances of substance abuse.

III. PRIVATE EMPLOYERS CAN MEET -- OR, BETTER, AVOID -- THESE LEGAL CHALLENGES

The private employer is not bound by all of the legal restraints imposed upon the government employer. Nevertheless, private companies will be held accountable for failing to act

reasonably in conducting employee urine testing or other drug detecting programs. This paper began by pointing out the clash between changing social attitudes and law concerning drug testing. The private employer is legally entitled to do a great deal more than what may be socially accepted. Because social attitudes, however, can and do shape law -- and employee-employer relations -- a wise employer will be sensitive to these attitudes in structuring a testing program. A drug testing program, if carried out with reasonableness and discretion, can satisfy both social and legal standards.

There are two key threshold questions that a company considering a drug testing program should address. If a company can do so persuasively, its workers will in all probability accept the company's testing program and policy, and the company will be able to avoid most legal challenges.

The first question an employer must answer is "Why do I want to test?" A company should be able to justify the decision to test by clearly showing employees why drug use cannot be tolerated. Would drug use cause an employee to be unfit for his job? Would drug use endanger either the safety of co-workers or the safety of the public which depends on the company's product? Does an employee hold a position of public trust? Private companies are successfully testing across-the-board. But keep in mind that some employees -- the night janitor, the boy bagging groceries -- may be able to prove that they can perform their jobs, and perform them without endangering anyone's safety, after smoking

marijuana or taking so-called "soft" drugs. Both the courts and arbitrators will be more supportive of testing if employees concerned are working around high-voltage wires than if they are bagging groceries.

The second question an employer must answer is "What do I do when I find that someone is using drugs?" Before beginning testing, a company must develop clear procedures, based upon a fully articulated, written policy, for dealing with employees who test positive. These procedures must be clearly communicated, consistently enforced and fairly applied.

The principles of reasonableness that an employer should follow in establishing an employee substance abuse program have remained consistent over the past several years, and they have generally been sustained in court.

1. Demonstrate the need for drug testing in the company; document a relationship between job performance and substance abuse.

2. Develop a specific substance abuse policy and program in consultation with all parts of the company that may be affected. Union representatives, occupational health and safety personnel, security staff, personnel managers, legal advisors and, most importantly, top management all must be involved. Often companies have found it useful to bring in outside consultants to help identify problems and adopt a workable policy.

3. If necessary, modify private employment contracts and union contracts to reflect the company's substance abuse policy.

4. Notify employees of the policy. Tell them in advance the penalties that will be imposed for specified violations.

5. Follow through. Do not let a substance abuse program become a "paper" policy.

6. Test for substance abuse carefully. Follow the manufacturer's instructions. Make sure that persons who administer the tests and perform laboratory analyses are qualified to do so.

7. Notify employees of positive test results and provide them an opportunity to contest disciplinary actions taken on the basis of those results.

8. Keep test results confidential. Do not release positive test results until their accuracy has been verified by a confirmatory test and, if possible, by corroborating evidence of substance abuse. Do not let anyone who does not need to know have the results.

9. Consider setting up an employee assistance program or improving an existing one.

Statistics abound on what employee substance abuse is costing companies in decreased productivity, increased absenteeism, accidents at work, theft, higher health care premiums, and more union grievances. There are also costs that cannot be measured in dollars: the negative publicity suffered by affected companies; the damage to positions of public trust when a police officer or a corrections guard is using, or even rumored to be using, drugs; the lowered morale of nonabusers forced to work beside co-workers

who are not pulling their own weight, who are endangering others' safety, and who are committing crimes right in front of them -- stealing from the company, stealing from co-workers, dealing drugs. These realities make it relatively easy for most companies to answer the question, "Why do I need to test for drugs?" The more difficult question is the second one, "What do I do when I find out that someone is using drugs?"

Without a detection program, only the most obvious drug problems will be spotted -- and only if an alert supervisor is lucky to enough to be in the right place at the right time and has been trained to handle the situation properly. A drug screening program is just one of many ways of detecting drug problems. Undercover surveillance, use of drug-detector dogs, and searches of employees' lockers, lunch-pails, automobiles, and even their persons, can be used instead of -- or to supplement -- a drug screening program. But whatever the method or combination of methods a company decides to employ, the consequences remain the same. The company will be forced to adopt a program to deal with the abusing employee, either by firing him or by helping him to obtain treatment.

Helping the employee to obtain treatment is almost always a wiser course of action than firing him. The wise employer recognizes the need to provide health assistance to his impaired employees for morale, humane, and, perhaps most importantly, economic reasons. While private employers have no legal obligations to rehabilitate their employees, it is often better, and less expensive, to keep a worker working than to find

and train a replacement -- who may turn out to be a substance abuser himself.

There are several services available to industry today, including training programs, that can help companies handle drug and alcohol problems in a way that allows early intervention and effective treatment. This reduces absenteeism, prevents accidents and makes for a healthier and safer workplace. Working with trained counselors, employers can improve the health of their fellow employees -- and improve their job performance.

A substance abuse policy carefully planned and implemented will help a company avoid both the problems of employee substance abuse and the employee dissatisfaction that results in legal action against the company.

FOOTNOTES

1. Philadelphia Inquirer, April 7, 1985 (Fortune 500 statistics reported from interview with Peter B. Bensinger).
2. Id.
3. Griswold v. Connecticut, 381 U.S. 479, 483 (1965) ("the First Amendment has a penumbra where privacy is protected from governmental intrusion"); Roe v. Wade, 410 U.S. 113, 153 (1973) ("a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights, in the Ninth Amendment, or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment." (citations omitted)).
4. "The right to possess and use marijuana in one's home is not and cannot be classified as a fundamental right protected by a constitutional zone of privacy." Louisiana Affiliate of the Nat'l Org. For the Reform of Marijuana Laws v. Guste, 380 F.Supp. 404, 409 (E.D. La. 1974), aff'd. 511 F.2d 1400 (5th Cir. 1975), cert. denied, 423 U.S. 867 (1975).
5. Washington Post, May 9, 1985, p. D1.
6. "The right of the people to secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be searched. U.S. CONST. AM. IV.
7. Allen v. City of Marietta, No. C83-1878A, slip op. (N.D. Ga. 1985).
8. Id.
9. Engineers v. Burlington Northern R.R., 117 LLRM 2739 (D. Mont. 1984).
10. Id. at 2740.
11. Shell Oil Co. v. Oil, Chemical and Atomic Workers, 84-1 Lab. Arb. Awards (CCH) 3101 (1983) (Brisco, Arb.).

12. Id. at 3104.
13. The federal government is bound by the fifth amendment, which provides: "No person ... shall be deprived of life, liberty, or property, without due process of law." U.S. CONST. AM. V. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. AM. XIV § 1.
14. Hester v. City of Milledgeville, 598 F.Supp. 1456 (M.D. Ga. 1984).
15. Id. at 1457 n.2.
16. California v. Trombetta, _____ U.S. _____, 104 S.Ct. 2528 (1984).
17. Id. at 2534 n.10.
18. See Carr, Employer Use of the "Lie Detector": The Arbitration Experience, 1984 LAB. L.J. 701, 702-3.
19. See id.; see also 3 J. WEINSTEIN, EVIDENCE ¶ 607[04] for case survey.
20. See, e.g., Glen Manor Home for the Jewish Aged v. Union of Hosp. and Health Care Employees, 85-1 LAB. ARB. AWARDS (CCH) 3139, 3141-2 (1984).
21. New Orleans Public Service v. Masaracchia, 464 So. 2d 866 (La. Ct. App. 1985).
22. Id. at 868.
23. Banks v. Federal Aviation Admin., 687 F.2d 92 (5th Cir. 1982).
24. Harvey v. Chicago Transit Auth., No. 83-C-9074, slip op. (N.D. Ill. 1984).
25. Pittard v. Four Seasons Motor Inn, 688 P.2d 333 (N.M. Ct. App. 1984).
26. Breach of this duty may not only constitute negligence, but may also violate statutory law. For example, the Occupational Safety and Health Act requires that an employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654. A substance-impaired co-worker operating heavy and/or dangerous machinery could present such a hazard.

27. Triblo v. Quality Clinical Laboratories, No. 82-226166-CZ (Mich. Ct. App. filed July 15, 1982; plaintiffs Chase and Medina withdrew after settlement reached).
28. McLeod v. City of Detroit, No. 83/CV/2163/DT (E.D. Mich. jury verdict April 10, 1985).
29. Unreported decision.
30. Ivy v. Damon Clinical Laboratory, Shelby Law No. 41, slip op. (Tenn. Ct. App. 1984).
31. Houston Belt & Terminal Ry. Co. v. Wherry, 548 S.W. 2d 743 (Tex. Civ. App. 1976).
32. B. Green & Co. v. Warehouse Employers Union, 71 Lab. Arb. (BNA) 685 (1978) (Cushman, Arb.).
33. See, e.g., Dufek, Underhill, "Arbitration Can Thwart Employer No-Drug Policy," Legal Times, March 18, 1985, p. 21.



Department of Defense DIRECTIVE

April 8, 1985
NUMBER 1010.9

SUBJECT: DoD Civilian Employees Drug Abuse Testing Program

ASD (HA)

References: (a) DoD Directive 1010.1, "Drug Abuse Testing Program,"
December 28, 1984
(b) Public Law 91-513, "Controlled Substances Act," Section 202,
October 27, 1970 (21 U.S.C. § 812)
(c) Federal Personnel Manual Supplement 792-2, February 29, 1980
(d) Assistant Secretary of Defense Memorandum, "Drug Abuse
Control Policy," November 25, 1983

A. PURPOSE

This Directive:

1. Authorizes the establishment of the DoD Civilian Employees Drug Abuse Testing Program.
2. Provides policy, prescribes procedures, and assigns responsibilities for drug abuse urinalysis testing for DoD Civilian Employees (hereafter referred to as "employees").

B. APPLICABILITY

This Directive applies to the Office of the Secretary of Defense, the Military Departments (including their reserve components), the Organization of the Joint Chiefs of Staff, the Unified and Specified Commands, and the Defense Agencies (hereafter referred to collectively as "DoD Components").

C. DEFINITIONS

1. Confirmed Positive. Urine sample that has been tested positive under procedures required by this Directive and that has been reported as positive because it meets both initial and confirmatory test levels established under sections E. and F., enclosure 3, of reference (a).
2. Controlled Substances. Substances listed in the schedules published under reference (b).
3. Critical Jobs. Those jobs or classes of jobs sufficiently critical to the DoD mission or protection of public safety that screening to detect the presence of drugs is warranted as a job-related requirement.
4. DoD Civilian Employee. An employee of the Department of Defense who is paid from appropriated or nonappropriated funds.

D. POLICY

It is DoD policy that DoD Components may establish a drug abuse testing program for civilian employees in critical jobs to:

1. Assist in determining fitness for appointment or assignment to, or retention in, a critical job.
2. Identify drug abusers and notify them of the availability of appropriate counseling, referral, rehabilitation, or other medical treatment.
3. Assist in maintaining the national security and the internal security of the Department of Defense by identifying persons whose drug abuse could cause disruption of operations, destruction of property, threats to the safety of themselves and others, or the potential for unwarranted disclosure of classified information through drug-related blackmail.

E. RESPONSIBILITIES

1. The Assistant Secretary of Defense (Health Affairs) (ASD(HA)) is responsible for the administration of this program.
2. The Assistant Secretary of Defense (Manpower, Installations, and Logistics) (ASD(MI&L)) is responsible for the concurrence in the designation of jobs or classes of jobs identified as "critical jobs."
3. Heads of DoD Components that intend to institute civilian employee drug abuse testing, an optional program, shall issue implementing documents incorporating the guidelines and procedures set forth in this Directive before requesting designation of jobs or classes of jobs as "critical jobs."

F. PROCEDURES

1. Designation of Critical Jobs

- a. DoD Components shall submit 5 copies of requests for designation of jobs or classes of jobs as "critical jobs" to the ASD(HA). The ASD(HA) shall obtain the concurrence of the ASD(MI&L).
- b. The request from the DoD Component shall specify the job or classes of jobs, the justification for drug abuse testing of the specific job or class of jobs, the locations in which drug abuse testing is likely to be conducted, and the approximate number of persons within the job or class of jobs.
- c. Critical jobs come within one or more of the following categories:
 - (1) Law enforcement.
 - (2) Positions involving the national security or the internal security of the Department of Defense in which drug abuse could cause disruption of operations, destruction of property, threats to the safety of personnel, or the potential for unwarranted disclosure of classified information.

Apr 8, 85

1010.9

(3) Jobs involving protection of property or persons from harm.

2. Guidelines for Use of Urinalysis

a. Employees in or applicants for positions that have been designated in paragraph F.1.a., above, as critical jobs may be required to participate in urinalysis testing in the following circumstances:

(1) Before appointment or selection.

(2) Periodically after appointment or selection on the basis of neutral criteria.

(3) When there is probable cause to believe that an employee is under the influence of a controlled substance while on duty.

(4) In an examination authorized by the Department of Defense or the DoD Component regarding a mishap or safety investigation undertaken for the purpose of accident analysis and the development of countermeasures.

b. When a DoD Component establishes a urinalysis testing program, it shall inform, in writing, each employee in a critical job before the initial urinalysis test, of:

(1) The reasons for the urinalysis test.

(2) The consequences of a positive result or refusal to cooperate, including adverse action.

(3) The opportunity to submit supplemental medical documentation that may support a legitimate use for a specific drug.

(4) The availability of drug abuse counseling and referral services, including the name and phone number of the local employee assistance program counselor.

c. The information in paragraph F.2.b.(1), (2), (3), above, shall be given to each applicant who is required to undergo urinalysis testing. The information in paragraph F.2.b., above, shall be given to each employee who enters a critical job that is subject to urinalysis testing after the program is established.

d. An employee whose urinalysis has been confirmed as positive shall be offered counseling or treatment, or both, through the local employee assistance program in accordance with the Federal Personnel Manual Supplement (reference (c)), if qualified. Nothing in this provision precludes the use of a confirmed positive urinalysis result in an authorized adverse action proceeding or for other appropriate purposes, except as otherwise limited by rules issued by the DoD Component concerned.

e. The results of field tests may not be used in administrative or disciplinary proceedings except as permitted in subsection F.4., below.

3. Urinalysis Testing Procedures

a. Urine samples shall be processed under chain of custody procedures set forth in the DoD Component's implementing document. The ASD(HA) shall ensure that such procedures apply the principles set forth in enclosure 2 of DoD Directive 1010.1 (reference (a)), so far as the ASD(HA) deems practicable.

b. Urine samples shall be tested at a laboratory certified under enclosure 4 of reference (a), using procedures set forth in enclosure 3 of reference (a). The DoD Component's implementing document shall contain:

(1) Procedures for timely submission of requests for retention of records and specimens under sections H. and I., enclosure 3, of reference (a).

(2) Procedures for retesting. The ASD(HA) shall ensure that such procedures apply the principles set forth in section J., enclosure 3, of reference (a), so far as the ASD(HA) deems practicable.

4. Field Testing of Urine Samples

a. Field tests of urine samples may be conducted only if approved by the ASD(HA) for the DoD Component concerned under the principles in enclosure 5 of reference (a).

b. All urine specimens identified as positive by a field test shall be sent immediately to a laboratory certified under enclosure 4 of reference (a) for testing under enclosure 3 of reference (a).

(1) Positive test results from field tests are preliminary results until confirmed as positive (by both initial and confirmatory testing) or by an admission of the employee.

(2) Before receipt of the report of tests results under enclosure 3 of reference (a) or an admission by the employee, positive results of field tests may be used for temporary referral to a civilian employee assistance program, temporary detail to other duties or administrative leave, or temporary suspension of access to classified information.

c. If a positive field test result is not reported as positive by a certified laboratory or an admission of an employee:

(1) The result may not be used to take further action against the employee.

(2) Any temporary action based upon the field test shall be rescinded.

d. To the extent that an action is based upon evidence other than the field test result, nothing in this Directive prohibits continuation of a temporary action or other appropriate action.

Apr 8, 85
1010.9

G. EFFECTIVE DATE AND IMPLEMENTATION

1. This Directive is effective immediately for the purpose of preparing implementing documents. The ASD(HA) memorandum of November 25, 1983 (reference (d)) is canceled, effective June 1, 1985. This Directive applies to drug abuse testing of DoD civilian employees conducted on or after June 1, 1985, except that a DoD Component, with the approval of the ASD(HA), may implement this Directive before June 1, 1985.

2. Nothing in this Directive shall be construed to render invalid any test conducted before June 1, 1985, under a DoD Component's drug abuse testing program.

3. DoD Components that propose to conduct civilian employee drug abuse testing on or after June 1, 1985, shall forward two copies of proposed implementing documents to the Assistant Secretary of Defense (Health Affairs) at least 45 days before the date on which the Component plans to initiate such a program. Implementing documents are not required from other DoD Components.



William H. Taft, IV
Deputy Secretary of Defense