Summary of the Assault Weapons Act

Section 1016 of H.R. 3371 contains a ban on the future manufacture and importation of twenty-two specifically listed semiautomatic assault weapons. This provision is similar to the assault weapons ban which was twice approved by the U.S. Senate.

The assault weapons legislation does the following:

(1) Prohibits the importation and domestic manufacture of new semiautomatic assault weapons of the following specific models:

(i) Action Arms Israeli Military Industries UZI and Galil; (ii) Auto Ordnance 27A1 Thompson, 27A5 Thompson, and M1 Thompson; (iii) Beretta AR-70 (SC-70); (iv) Colt AR-15 and CAR-15; (v) Fabrique Nationale FN/FAL, FN/LAR and FNC; (vi) INTRATEC TEC-9; (vii) MAC 10 and MAC 11; (viii) Norinco, Mitchell and Poly Technologies Avotomat Kalashnikovs (AK-47s); (ix) Springfield BM59, SAR48, and G3SA; (x) Steyr AUG; (xi) Streetsweeper and Striker 12; (xii) All Ruger Mini-14 models with folding stocks; and (xiii) Armscorp FAL.

Assault weapons lawfully owned before the effective date can still be possessed, transferred, transported, bought and sold. Agencies of federal, state and local governments, such as the military and police, are exempt from this act.

(2) Applies the prohibition to copies of the listed assault weapons.

So that manufacturers cannot evade the law by simply renaming their assault weapons, copies of assault weapons are treated the same as the listed firearms themselves.

(3) Requires a criminal background check for future buyers of assault weapons.

The Treasury Secretary would promulgate regulations requiring criminal background checks of future recipients of assault weapons to ensure that they are not felons, fugitives or otherwise prohibited from possessing firearms under current federal law. Current assault weapon owners would not be affected.

(4) Enhances penalties for the use of assault weapons during the commission of a violent or drug trafficking crime.

The penalty would be doubled from five to ten years in prison.

(5) Permits the Treasury Secretary to recommend to Congress that firearms be added to, or removed from, the list.

The Treasury Secretary can make recommendations to Congress, but the Secretary is given no discretion to add different firearms to the list.

Semi-Automatic Assault Weapons Listed in H.R. 3371

* Action Arms Israeli Military Industries UZI and Galil
* Armscorp FAL
* Auto Ordnance 27A1 Thompson, 27A5 Thompson, and M1 Thompson
* Beretta AR-70 (SC-70)
* Colt AR-15 and CAR-15
* Fabrique Nationale FN/FAL, FN/LAR, and FNC
* INTRATEC TEC-9
* MAC 10 and MAC 11
* Norinco, Mitchell, and Poly Technologies Avtomat Kalashnikovs
* Springfield BM59, SAR48, and G3SA
* Steyr AUG
* Street Sweeper and Striker 12
* Ruger Mini-14 models with folding stocks

Semi-Automatic Assault Weapons Listed in H.R. 3371

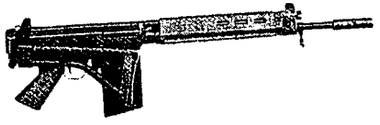
Semi-Automatic Assault Weapons Listed in H.R. 3371

UZI Pistol

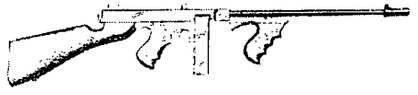
UZI Carbine

Galil

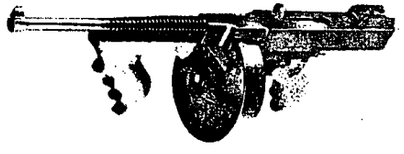
Armscorp FAL



Auto Ordnance 27A1 Thompson



Auto Ordnance 27A5 Thompson



Auto Ordnance M1 Thompson

Beretta AR-70 (SC-70)

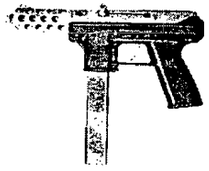
Colt AR-15

Colt CAR-15

Fabrique Nationale FN-FAL/FN-LAR

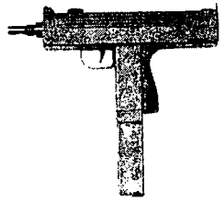
Fabrique Nationale FN-FNC

INTRATEC TEC-9



MAC 10

MAC 11



Avtomat Kalashnikovs (AK-47)

Springfield Armory BM-59

Springfield Armory SAR-48

Springfield Armory G-3

Steyr AUG

Street Sweeper/Striker 12

Ruger Mini-14 with folding Stock

DAVID G. EVANS
ATTORNEY AT LAW
35 COLD SOIL ROAD
LAWRENCEVILLE, N.J. 08648

(609) 896-3923
FAX (609) 844-0241

TO: Mr. Jose Cerda
Office of Domestic Policy
The White House

FROM: David G. Evans, Esq.

RE: On-site drug testing and the reduction of rising health care, employment, and criminal justice costs

DATE: April 29, 1993

CONCERN #1 DRUG ABUSING OFFENDERS REQUIRE INTENSIVE MONITORING UNTIL THEY CAN ADAPT TO A DRUG-FREE LIFE STYLE

Studies have shown that drug test monitoring is required for drug abusing offenders so they have the time to respond to treatment and adopt a drug-free life style.

On-site drug tests are a convenient and cost effective way to provide monitoring of an offender's drug-free status. On-site testing is useful in therapeutic confrontations. Very often there is an admission of drug use when an offender is confronted with a positive test result. Treatment can then result.

On-site drug testing has been approved by the American Probation and Parole Association Drug Testing Guidelines.

On-site testing reduces drug testing costs because there is no need to use expensive and time consuming laboratory procedures. See attached cost benefits analysis.

SOLUTION:

Increase the use of on-site testing within the criminal justice system by the use of technical assistance and research grants. This should include the use of on-site testing for DWI offenders.

CONCERN #2 CLIA MANDATES EXCLUSIVE USE OF LABORATORIES

On-site testing is an integral part of employment, prenatal, and school anti-drug programs to deter drug use and provide early treatment for employees, pregnant women, and children. Deterrence and early treatment reduce employment and health care costs. On-site testing can obtain immediate results when children are brought in with drug overdoses. Drug treatment programs use on-site drug testing extensively to monitor their patients.

HCFA's regulations implementing the Clinical Laboratory Improvement Act (CLIA) seek to create authority over all private employment and drug treatment drug testing by requiring exclusive use of federally certified laboratories to conduct drug tests, thus eliminating the use of on-site testing. Laboratory testing is expensive and time-consuming and only provides results within 24-48 hours or longer - much too late for public safety purposes and for situations such as detection of drug overdoses. On-site tests, which are approved by the F.D.A., provide immediate results without a laboratory. On-site tests are highly accurate, require minimal training, and are as simple to use as home pregnancy tests. Furthermore, independent clinical studies have proven they are equal to or better than laboratory screens.

The CLIA authorizing statute, intended to regulate medical diagnostic tests, does not mention drug testing. HCFA has claimed that a drug test is a "health assessment" and should be regulated by CLIA. The Americans With Disabilities Act, however, states that "a test to determine the illegal use of drugs shall not be considered a medical examination" (42 U.S.C. 12114(d). HCFA's interpretation is subject to legal challenge on a variety of grounds.

Pending further study, HCFA has temporarily exempted employment testing from CLIA. See, 58 Fed Reg 5220, January 19, 1993.

SOLUTIONS:

(a) Permanently exempt employment and drug treatment drug testing from the CLIA regulations. (b) Include on-site testing as part of the national health care package.

CONCERN #3 HHS GUIDELINES UNNECESSARILY REQUIRE THE USE OF LABORATORIES FOR INITIAL TESTS

Drug testing is a process consisting of an initial screen which, if positive, is confirmed by Gas Chromatography/Mass Spectrometry (GC/MS). HHS guidelines for federal drug testing programs require that initial screening and confirmation be performed in the same laboratory. Since about 95% of all initial screens are negative, this laboratory requirement does not allow employers to reduce costs by using on-site screens to immediately eliminate the negatives and only send the positives to a laboratory. The HHS guidelines, developed prior to on-site technologies being perfected, unnecessarily require employers to wait days for results, thus increasing costs and endangering public safety.

SOLUTION:

Modify the HHS guidelines to allow on-site testing for initial screens using F.D.A. approved test devices. All positives should still be confirmed by GC/MS in a laboratory and reviewed by a Medical Review Officer for accuracy.

CONCERN # 4 NIDA ON-SITE REPORT LACKS BALANCE

NIDA is working on a report concerning on-site drug testing in private industry. The report is clearly biased in favor of NIDA's laboratory constituency and may have an unfair impact on CLIA and other federal legislation. There was little representation from private industry in drafting the report. In addition to ignoring the technical literature, the report has not considered the accuracy or cost savings of on-site testing.

SOLUTION:

Assist NIDA in creating a new, broad based, report committee composed of laboratory specialists, private industry, test manufacturers and other technical experts to study the accuracy, policy, and cost savings aspects of on-site testing.

COST COMPARISONS OF A WORKPLACE ON-SITE DRUG TESTING MODEL VERSUS A LABORATORY MODEL

There are three phases of drug testing, (1) collection of the specimen, (2) testing which consists of a screening test and a confirmation test, and (3) the medical review of positive results of the confirmation test. If the screening test does not detect drugs, the process ends. If an illegal drug is detected and confirmed, the results can be sent to a Medical Review Officer (MRO) for verification.

An economic analysis of drug testing must consider the costs of specimen collection, screening and confirmation, specimen transportation, and the costs associated with time lost while employees submit themselves for specimen collection. With on-site testing many of these costs are avoided because collection costs are eliminated and only positive tests must be sent to a laboratory. The following economic analysis based on typical costs demonstrates these savings.

A typical private sector small business (about 300 employees) with employees located at several sites in the continental U.S. and headquarters at a major metropolitan area can expect to pay the following per specimen for a laboratory based urinalysis testing program.

Collection	Testing	MRO	Shipping	Total
$15.00	$27.00	$4.00	$6.00	$52.00

These figures are conservative estimates. [1]

Another private company with about 80 employees was able to contract for testing services by conducting most of its testing in the Baltimore metropolitan area. Since most collections were performed at laboratory collection stations, collection and shipping expenses were minimized and absorbed in the testing costs. The testing costs for this company are outlined in the following figures.

Collection	Testing	MRO	Shipping	Total
$0	$27.00	$6.00	$0	$33.00

The cost of screening and confirmation are determined using an average 5% positive rate.

In addition to the above costs, a company can expect to add a minimum of $20 per specimen to the costs due to loss of one to two hours of employee time while traveling to and from the collection site.

If the same small business met their drug testing program requirements by implementing on-site drug testing and performed its own specimen collection (assuming a 5% positive rate) the per specimen costs would approximate the following: [2]

Collection	Testing	MRO	Shipping	Total
$0	$13.75	$2.00	$.30	$16.05

To summarize: a complete laboratory program can cost $52.00 per test, a program which uses only laboratories but does its own specimen collection can cost $33.00 per test, a complete on-site program which does its own specimen collection can cost $16.05 per test.

On-site testing programs can have the same accuracy and privacy protections as laboratory based programs. All positive tests can still be sent to a laboratory for confirmation and review by an MRO. However, the vast majority of the 95% negative urines are resolved in minutes versus days of turnaround times due to laboratory processing. The "now" answer provided by on-site screening has an incalculable advantage over the laboratory model and it can be more cost effective.

References:

1. A GAO analysis of drug testing costs in the Federal sector indicates a range from $8.90 to over $87.00 for both screening and confirmation tests alone. (Employee Drug Testing (GAO/T-GCD-91-25, January 1991). Not included were the specimen collection costs, shipping charges and lost time of the employees who had to leave their jobs for periods up to several hours while providing a specimen for testing. Reports from companies who provide drug testing services show that specimen collections cost anywhere from $15 to $25 for walk-ins at the collection facility and from $30 to $40 if performed at the client site depending upon distance and time involved. In some cases agencies and companies have paid several hundred to several thousand dollars for collections at remote locations where extensive travel costs are involved.

General Dynamics Corporation, when asked about the cost of its drug testing program, estimated that the total cost per test including time away from the job while providing a sample approximates $100.00 per specimen.

2. Analysis of each of these costs is summarized:

Collection -- In order to maximize the full benefit of on-site testing, companies should perform the specimen collection themselves, thus reducing the overall costs.

Testing -- The cost of a typical on-site screening test for a five drug NIDA panel is about $12.00. The five drugs include opiates, marijuana, phencyclidine (PCP), amphetamine, and cocaine. The average cost assuming 5% positive GC/MS confirmations @ $35.00 per test when amortized over all tests adds $1.75 to each test for a total of $13.75.

MRO -- With on-site screening only positive tests require MRO review. A national MRO service offers review of positives only for $40.00. Using the same 5% rate for positives as above, MRO review adds $2.00 to each test cost.

Shipping -- Only specimens which have illegal drugs detected in the initial screening test need to be forwarded to a laboratory for confirmation. Thus, postage costs for 5% of the specimens are amortized over all specimens collected and add only $.30 per specimen.

ON-SITE DRUG TESTING - A PROVEN TOOL TO REDUCE HEALTH AND WORKPLACE COSTS

Drug-related health costs, crime, accidents, and erosion of worker productivity cost America billions annually. 1 As we face stronger European community and Pacific Rim competition, we need new and creative solutions to the drug crisis.

Reducing the demand for drugs should be our principle focus. Enlisting our citizen's animus against drugs and our workers' intrinsic desire to compete should be central to a new strategy. American workers support drug-free workplace programs which provide firm and compassionate education, rehabilitation, and drug testing. Drug testing is effective in deterring and detecting drug use and it has been overwhelmingly supported by the courts when properly administered.

On-site drug testing is a valuable tool in implementing this new approach. Recent improvements in technology have produced on-site tests with accuracy comparable to laboratory tests. On-site tests cost less than laboratory tests. Laboratory tests are expensive and it often takes days to get results, however, on-site tests are easy to use and provide rapid accurate results.

On-site drug testing reduces costs in health care, law enforcement, and in the workplace.

Health care

Health care costs have risen dramatically in the last decade. The escalating epidemic of drug abuse has contributed to these costs. Drug-free workplace programs reduce health care costs. 2 Drug testing, and in particular on-site testing, is essential to the success of these programs.

On-site testing is also an integral part of prenatal and school anti-drug health programs to detect drug use which result in early treatment for pregnant women and children. Early treatment reduces health care costs. Emergency rooms also find on-site testing useful to get immediate results when children are brought in with drug overdoses. 3 Drug treatment programs use on-site drug testing as a means of monitoring the drug-free status of patients.

Law enforcement

On-site drug testing can aid law enforcement by adding new levels of flexibility and accuracy to the detection and monitoring of drug-using offenders. For example, treatment programs or probation officers can use on-site testing to therapeutically confront offenders instead of having to wait days for a laboratory result. On-site drug testing has been approved by the American Probation and Parole Association Drug Testing Guidelines. 4

On-site testing can also be used to detect and reduce incidents of drugged driving. For example, nearly one quarter of the traffic fatalities in New York City are linked to cocaine. 5

Workplace

A 1987, NIDA study provided the following profile of drug users as employees. 6 Drug users were:

*2.2 times more likely to leave work early or take time off;
*2.5 times more likely to absent for 8 days or more;
*3 times more likely to be late to work;
*3.6 times more likely to be in a workplace accident;
*5 times more likely to file for worker's compensation.

Employee drug use creates higher health and workplace costs. All of these costs can be reduced by drug-free workplace programs which include drug testing.

On-site drug testing can reduce the costs of industrial drug testing programs. With on-site testing, fewer specimens are sent for expensive laboratory tests because on-site testing detects specimens that are drug-free and do not need laboratory confirmation. This saves the costs and staff time of shipping all specimens to a laboratory. In addition, on-site testing obtains results in minutes rather than days thus relieving worker anxiety about results. It is estimated that about 40-50 percent of the current costs of drug testing can be saved by on-site drug testing while continuing to use laboratories for confirmation of positives. Confirmation protects workers by using laboratories as a corroborative backup for positive specimens detected by the on-site test.

On-site testing has great value where public safety demands immediate results. Drug abuse in public transportation is an area of great concern because of the potential for loss of human life. The studies indicate we have much to be concerned about. 7 There are similar concerns in manufacturing, retail, and health care workplaces. 8 On-site testing can be used to test transportation personnel and health care workers before they operate equipment that can result in loss of life or massive property damage.

On-site testing is also useful in the construction industry. On-site testing can prevent drug abusing workers at remote construction sites from using dangerous equipment. 9

The studies indicate broad public support for workplace drug testing. 10 Many companies who have drug free workplace programs use on-site testing. 11

By use of drug testing and drug-free workplace programs we can reduce costs and provide a safer and more comfortable workplace for employees. 12

REFERENCES

1. In 1990, the estimated cost of illicit drug and alcohol abuse to the U.S. economy was $114.1 billion. In 1988, the estimated productivity loss was $7.2 billion for drug abuse, and $33 billion for alcohol abuse. Source: Rice, Dorothy P., Sander Kelman, Leonard S. Miller, and Sarah Dunmeyer. The Economic Cost of Alcohol and Drug Abuse and Mental Illness: 1985 Report submitted to the Office of Financing and Coverage Policy of the Alcohol, Drug Abuse, and Mental Health Administration, U.S. Department of Health and Human Services. San Francisco, CA: released by NIDA, November 1990.

2. Georgia Power Company found that drug using employees averaged $1,377 in medical benefits costs; a control group of employees averaged $163 and the company average was $590. Employees who tested positive for drugs averaged $264 in workers compensation claims, compared to $25 for the control group and $197 for the general workforce. Source: Sheridan, John and Howard Winkler. "An Evaluation of Drug Testing in the Workplace", Drugs in the Workplace: Research and Evaluation Data", NIDA, 1989 p. 195-216.

The CEOs of major U.S. companies credit their drug-free workplace programs consisting of EAPs (95 percent), job applicant drug testing (65 percent) and employee drug testing (44 percent), for reducing disciplinary problems, absenteeism, accidents, health costs, and in improving productivity. Source: Tysse, G. John and Garen Dodge. Winning the War on Drugs: The Role of Workplace Testing. Washington, D.C.: National Foundation for the Study of Employment Policy, 1989. p. 156)

3. For example, the New Jersey law which deals with substance abuse in schools provides for an examination which can include a drug test to see if a child is under the influence of drugs or alcohol (N.J.S.A. 18A:40A-12).

4. Section 18-2 to 18-4 of the Drug Testing Guidelines and Practices for Adult Probation and Parole Agencies, prepared by the American Probation and Parole Association in cooperation with the Council of State Governments, (Bureau of Justice Assistance, Washington, DC, December, 1990).

5. "Study Finds Cocaine in Many Motorists Killed in New York," New York Times, January 12, 1990. p. A-1)

6. Backer, Thomas E., Ph.D. Strategic Planning for Workplace Drug Abuse Programs, (National Institute on Drug Abuse, 1987. p. 4)

According to NIDA if workers between the ages of 18-40 were given drug tests, 14-25 percent would test positive. Source: (National Institute on Drug Abuse, NIDA Household Survey, 1989)

7. One study indicated that 18.4 percent of transportation workers use illegal drugs. Source: Kopstein, Andrea and Joseph Gfroerer. "Drug Use Patterns and Demographics of Employed Drug Users: Data from the 1988 NIDA Household Survey" Drugs in the Workplace: Research and Evaluation Data Vol. II. Eds. Steven W. Gust, Ph.D., J. Michael Walsh, Ph.D., Linda B. Thomas, and Dennis J. Crouch. Rockville, MD: National Institute on Drug Abuse, 1991.

An unannounced drug test of personnel by an airline indicated that 2.5 percent of pilots and 4 percent of mechanics tested positive. Source: "Anti-Drug Program for Personnel Engaged in Specified Aviation Activities: Final Rule," Federal Aviation Administration, 53 Federal Register 47030, November 21, 1988.

In a 1986 drug testing study of truck drivers in Tennessee, 15 percent tested positive for stimulants, 15 percent tested positive for marijuana, and 2 percent were positive for cocaine. Source: Lund, Adrian K., David F. Pruesser, Richard D. Blomberg, and Allan F. Williams "Drug Use by Tractor-Trailer Drivers", Drugs in the Workplace NIDA Monograph 91, 1989 p. 53-67)

Between 1975 and 1987, there were 50 train serious accidents due to substance abuse which resulted in 37 fatalities, and 34 million dollars in property damage. Source: "Battling the Enemy Within", Time, March 17, 1986, p. 52

8. 12.8 percent of manufacturing employees, 7.6 percent of retail employees, and 3.2 percent of hospital employees have reported being under the influence of drugs and/or alcohol. Source: Journal of Applied Behavioral Science, 24(4):439-54. 1988

9. In the 1988 NIDA Household Survey, over 28 percent of construction workers admitted drug use, the highest of any industry. Source: Kopstein, Andrea and Joseph Gfroerer. "Drug Use Patterns and Demographics of Employed Drug Users: Data from the 1988 NIDA Household Survey" Drugs in the Workplace: Research and Evaluation Data Vol. II. Eds. Steven W. Gust, Ph.D., J.Michael Walsh, Ph.D., Linda B. Thomas, and Dennis J. Crouch. Rockville, MD: National Institute on Drug Abuse, 1991. p. 11-24.

10. In a national survey, 90 percent of respondents thought testing airline pilots, workers in safety sensitive jobs, transportation workers and truck drivers was a good idea. In addition they favored testing factory workers (73 percent) and office workers (61 percent). Source: Institute for a Drug-Free Workplace/Gallup Survey 1989-1991 (Washington, DC)

11. In a survey of 33 major companies, 100 percent test job applicants, 85 percent test "for cause" 73 percent test employees as part of a post treatment monitoring, 55 percent test post accident, and 29 percent conduct "on-site" testing for drugs. Source: Biannual Corporate Member Survey, Institute for a Drug Free Workplace, 1991.

12. A 1990 survey of personnel executives reported that since implementing drug testing, 77 percent were seeing higher quality applicants and 63 percent said they had safer workplaces. Additional benefits included a better public image (58 percent) fewer drug problems (56 percent) improved morale (54 percent) increased use and credibility of EAPs (54 percent) and productivity gains (43 percent). Source: Axel, Helen, Corporate Experiences with Drug Testing Programs, Washington, DC: The Conference Board Inc. 1990.

The Chamberlain Construction company in Laurel, Maryland implemented a comprehensive program including pre-employment testing, random testing twice a year, regular education for all employees and an EAP. The program costs between $70 and $100 per employee annually. As a result of the program, the company estimates savings in excess of $60,000 a year which includes approximately $50,000 in reduced workers' compensation insurance premiums. The company has 75 employees. Source: Chamberlain Contractors, Laurel, Maryland

According to the American Management Association, most companies find testing relatively inexpensive. Source: American Management Association. "1992 AMA Survey: Workplace Drug Testing and Drug Abuse Policies" New York, AMA, 1992

THE ADVANTAGES OF ON-SITE DRUG AND ALCOHOL TESTING

On-site drug and alcohol testing produces rapid documentable results using simple procedures that do not require sending a specimen to a laboratory. An increasing number of companies are using on-site testing because they see the advantages of the immediacy of the test results and reduced costs. Employers, particularly small businesses, should have the option of being able to use on-site testing.

Under a laboratory based program most specimens tested and sent to a laboratory yield negative results i.e. there is no drug present. Even though most specimens are negative, in a laboratory based program specimens sent to a laboratory must all be accompanied by chain of custody forms and be in specially sealed tamper-proof containers or reliable tamper-evident collection devices. In contrast, on-site tests act as an initial screen which provides immediate and final results on the negative specimens. Although initial chain of custody is performed on all specimen collections, with on-site testing only the positive test results, which usually only constitute a small percentage of the samples, must be sent to the laboratory for confirmation, therefore, paper work and staff time are substantially reduced.

On-site testing has other advantages including its flexibility as to where testing is conducted. In addition, it increases the deterrent effect because it decreases the time between results and consequences. 1 On-site testing is a valuable tool because it can be performed right at the employment site or in a nearby doctor's office or occupational health clinic.

On-site testing protects the chain of custody - All specimens do not have to be sent to a laboratory with the potential to be damaged or contaminated in transit.

On-site testing does not require expensive laboratory equipment - Laboratory testing equipment can cost over $100,000. Laboratories pass these costs on to customers.

On-site testing reduces employee and supervisor anxiety about test results - The on-site test results are immediate which provides assurance to the drug-free employee that there is no threat to his or her livelihood. The employee can also have a union representative witness the test to insure fairness and accuracy. This reduces the chance of a grievance being filed.

On-site tests protect employee confidentiality - Since the results of the test are immediate and can be communicated to the employee directly, there is a reduced concern that test results will be released improperly in transit from the laboratory or from the company medical office. This protects the company from liability and the employee from embarrassment.

Drug-free employees can be immediately acknowledged - Since on-site testing produces immediate results, drug-free employees can be recognized in the presence of their supervisors. This builds morale and gains acceptance for the program.

On-site testing provides immediate identification of a drug - This can be crucial in drug overdose treatment or in an employment safety context. It is also very effective in drug and alcoholism treatment monitoring.

On-site testing allows testing to be conducted in a variety of sites - Easily transportable on-site tests can go where the employees go. Testing can be conducted at remote work sites thus avoiding the expense of transporting employees and of having to cease operations.

Employees who are under the influence can be removed at once from a work site - A dangerous work site does not allow the luxury of waiting for a laboratory test result. This reduces employer liability and increases employee safety by preventing accidents. The employee can be taken off-duty until the results are confirmed.

On-site testing eliminates the need to send large numbers of specimens to outside labs since most specimens are negative - Since negative results are eliminated, company staff do not have to process specimens for the laboratory. This saves staff time and specimen transportation costs as well as laboratory and Medical Review Officer (MRO) processing costs.

The NIDA small business expert panel has recommended the use of on-site testing. In 1992, the National Institute of Drug Abuse (NIDA) convened a panel of experts in small business to discuss issues related to small business and drugs in the workplace. One of the recommendations of the panel was to "make on-site drug testing available to small business". 2

The test should be documentable and easy to use and should have undergone an independent scientific clinical evaluation. A reasonable cost per test is also a factor to be considered.

If an on-site drug test is to be used, the safest test legally to use is an immunoassay approved by the Federal Food and Drug Administration (FDA) for commercial distribution. Such a test keeps you out of court by meeting rigorous FDA scientific standards, such as demonstration of substantial equivalence to proven reference methods and pre-market clearance. 3 The test should also, at a minimum, perform at the National Institute for Drug Abuse (NIDA) cut-off levels for drug detection. 4 The federal Mandatory Guidelines for Federal Workplace Drug Testing Programs require that any immunoassay used as a screening test must meet these standards. 5 The Guidelines apply to millions of employees nationally in both the private and public sectors. The use of an immunoassay under the Guidelines has been upheld by the U.S. Supreme Court in the case of N.T.E.U. v. Von Raab. 6

The immunoassay is an established technology which has been upheld in many other court decisions. All employment immunoassay screening tests that are positive should be confirmed by another test or GC/MS. In a pre-employment context, however, confirmation may not be necessary since there is no legal relationship between an applicant and an employer.

FOOTNOTES

1. McQueen v. State, 740 P.2d 744 (Okla. App. 1987); In one case, where the employee admitted using drugs, the employer was not required to present evidence of the actual drug test results or the chain of custody of the employee's specimen since the employee admitted using drugs. Barkley v. Peninsula Transp. Dist. Comm'n, 398 S.E.2d 94 (1990).

2. Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923)

3. Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 Fed Reg 11983

4. The NIDA Small Business Expert Panel, Summary of Panel Sessions (National Institute of Drug Abuse, Rockville, MD, February 10, 1992) p. 6

5. Mandatory Guidelines for Federal Workplace Drug Testing Programs (53 Fed Reg 11970, 11983)

6. N.T.E.U. v. Von Raab, 109 S. Ct. 1384, 1395 n. 2 (1989)

U.S. Department of Justice
Civil Division

Washington, D.C. 20530

June 10, 1993

MEMORANDUM

TO: Interagency Coordinating Group (ICG)
Agency Primary Liaisons

FROM: Colonel Timothy E. Naccarato
Special Counsel to the
Assistant Attorney General
Civil Division

SUBJECT: Supplement to Guidance For Selection Of Testing Designated Positions (TDPs)

Pursuant to a request during the April 20, 1993, ICG and Agency Primary Liaison meeting, this memorandum reviews several categories of TDPs which were the subject of recurring questions or additional court decisions during the TDP revision project that began in early 1992.

To date approximately 90% of all agencies have submitted TDP revisions based on the "Guidance For Selection Of Testing Designated Positions," which was issued by the ICG Executive Committee on January 24, 1992. This remains the primary reference for selecting TDPs. The following information is designed to supplement and further explain the TDP categories contained in that guidance. For ease of reference, a copy is attached and paragraph numbers coincide with the original guidance.

IV. Presumptively Included TDPs

1. Employees authorized to carry firearms. Issues have been raised about various types of investigators and guards who do not carry a firearm on a daily basis, but are authorized to carry firearms. To clarify, change the name of this category to "Employees who carry firearms." Employees who carry firearms on a daily or regular basis are included in this category and should be in all TDP pools.

2. Motor vehicle operators carrying passengers. This category can be expanded to cover operators of motor vehicles weighing more than 26,001 pounds and operators of motor vehicles transporting hazardous materials. Intern. Broth. of Teamsters v.

Dept. of Trans., 932 F.2d 1292 (9th Cir. 1991). Note: the Department of Transportation regulations, which are due out soon and implement the Omnibus Transportation Employee Testing Act of 1991, will require random testing for drugs and alcohol of federal employees who operate vehicles that require a commercial driver's license. A commercial license is required for vehicle operators who: 1) carry 16 or more passengers; 2) transport hazardous materials; or 3) operate vehicles weighing 26,001 pounds or more.

V. Preferred TDPs

A. Certain Health and Safety Positions.

1. Employees having access to firearms. Change this category to "Employees authorized to carry firearms." In many cases, there are guards or security personnel who do not regularly carry a firearm, but are authorized to carry one in some circumstances, e.g. emergencies. The rationale for including these employees as TDPs is the same as employees with a security clearance who see classified documents only rarely--granting security clearances in advance is to provide flexibility and ensure employees can be given access to classified material as soon as the need arises. See Harmon v. Thornburgh, 878 F.2d 484, 492 (D.C. Cir. 1989), cert. denied, 493 U.S. 1056 (1990).

3. Aviation maintenance personnel. In 1992, two federal district courts in California considered challenges to Air Force and Navy TDPs respectively. In AFGE v. Wilson, 5-89-1274 (E.D. Cal. Aug. 17, 1992), the Air Force had included an employee who made tools used by aircraft mechanics to maintain and repair their aircraft. The court held that the danger of a defective tool causing a crash was too remote to support random testing. Only Air Force employees with direct aircraft maintenance responsibilities were approved for random testing. In AFGE v. Cheney, C-89-4443 (N.D. Cal. Aug. 14, 1992), a different court considered several categories of employees who performed maintenance on Navy ships, submarines, and planes. Those approved as TDPs were able to show a nexus between the work performed and a "compelling government interest in safety," such that small errors or momentary lapses could have "catastrophic consequences for crew members." Once again, this case highlights the principle that agencies may randomly test employees with direct and critical responsibilities for maintenance, but not those in general support roles.

B. Presidential Appointees Requiring Senate Confirmation (PAS).

While including PAS positions as TDPs is strongly preferred, one category may qualify for an exemption. A few agencies have part-time presidential appointees who sit on commissions or boards that meet only three or four times a year.

An agency head may determine that random testing of these appointees is impractical.

D. **Drug Rehabilitation Employees.** A number of questions have arisen concerning which drug program employees may be included as TDPs. Although some agencies thought that all employees associated with the drug program should be included in the random testing pool, the courts have taken a narrower view. As cited in the original guidance, the leading case is NFFE v. Cheney, 884 F.2d 603 (D.C. Cir. 1989), cert. denied, 493 U.S. 1056 (1990). There the court approved drug counselors with direct client contact as TDPs; however, it refused to approve either drug laboratory testing personnel or those employees in the biochemical chain of custody. Regarding the latter two categories, the court found an insufficient nexus between a drug-related lapse and any irreparable harm. Based on the holding of this case, only drug program employees who have direct client contact should be included as TDPs. Unless supervisors of drug counselors meet this test, they should not be included as TDPs. In addition, computer employees who help select personnel for random tests do not qualify as a TDP. The court was not persuaded that the "credibility" or "integrity" of the drug testing program justified random testing for every employee associated with drug testing.

VI. Specifically Disfavored TDPs

2. Positions based on access to sensitive information not amounting to "truly sensitive." Many questions were raised about including inspector general employees because of their access to sensitive information and budget/financial employees because of their influence on large sums of money. Under present case law, neither group qualifies as a TDP. The rationale for excluding inspector general employees is contained in the Harmon case cited in the original guidance. There the court approved employees with top secret clearances as TDPs because of their access to "truly sensitive" information, but it refused to approve as TDPs federal prosecutors or employees with access to secret grand jury proceedings. The court stated that "truly sensitive" does not include all information which is confidential or closed to public view. The rationale for excluding budget/financial employees is found in AFGE v. Cavazos, 721 F. Supp. 1361 (D.D.C. 1989), where the court refused to approve as TDPs a group of computer employees involved with billions of dollars of government resources who might be subjected to bribery, fraud, waste, or mismanagement. The court concluded that program information which affects large sums of money does not necessarily mean the information is "truly sensitive." The clearest examples of "truly sensitive" remain information requiring a top secret or secret clearance, where by definition, national security would be seriously damaged by an unauthorized disclosure.

VII. Discretionary Designations

Health care professionals responsible for direct patient care were approved as TDPs in AFGE v. Derwinski, 777 F. Supp. 1493 (N.D. Cal. 1991) (cited as Hansen v. Derwinski in original guidance). Since that case was decided on July 31, 1991, two other federal district courts have upheld random testing for medical doctors (except doctors performing research or administrative duties), nurses, nursing assistants, pharmacists, and medical technicians because they were involved in direct patient care. The two court cases are cited under the discussion of aviation maintenance personnel in paragraph V,A,3.

Attachment

GUIDANCE FOR SELECTION OF TESTING DESIGNATED POSITIONS

I. Purpose.

The purpose of this document is to consolidate changes resulting from court decisions into guidance for selection of testing designated positions (TDPs), to provide agencies a guide for their reexamination of TDPs, and to simplify the steps necessary to make changes to agency testing programs that this review necessitates. Principally, the approval process is eased by establishing a core group of TDPs as presumptively to be included in all plans. Any agency desiring to exclude any of those TDPs must present justifications for doing so. This new guidance also eases review requirements when agencies include certain other positions in their drug plans. Where consultative review is required, it will be accomplished by members of the Interagency Coordinating Group (ICG) Executive Committee under the authority of the Office of National Drug Control Policy (ONDCP). ONDCP assumed lead oversight and policy responsibility for Executive Order 12564 in March of 1991 by designation of the President. This guidance supplements and, to the extent there is a conflict, supersedes previous guidance on identifying TDPs.

II. Background

In the early stages of the implementation of Executive Order 12564, Federal agencies were provided a decision guide entitled Drug Testing of Sensitive Positions, Optional Decision Guide for Selecting Testing Designated Positions, to assist them in identifying the "pool" of personnel potentially subject to random testing and in selecting from that "pool" the TDPs. The analysis in that guide centered upon the criteria of section 7(d) of the Executive Order. By applying these criteria, the agency identified the pool of sensitive positions which might be made subject to random drug testing. At the time the Executive Order was issued, all positions satisfying these criteria could appropriately be designated for testing. Since that time, however, the Executive Order has been upheld and TDP selection rationales for random testing at federal agencies have been examined and narrowed by the courts through five years of litigation and approximately 45 judicial opinions. Although they remain instructive in developing TDPs, the Decision Guide and Section IX of the Model Drug-Free Workplace Plan developed by the Interagency Coordinating Group should be used only consistent with this guidance.

One of the primary goals in the President's designation of the Office of National Drug Control Policy as the lead agency in coordinating implementation of Executive Order 12564 is the identification of appropriate areas where consistency in agency plans is warranted. With the clarity resulting from this multitude of court decisions, it is possible to identify TDPs that no longer need to be submitted for consultative review to the ICG Executive Committee because the criteria for such designations are unambiguous.

III. Current Legal Framework

During litigation of numerous agency programs, the courts have defined some limits on TDP justifications. As a result of these decisions, included in this guidance is a list of presumptively included, preferred, and disfavored TDPs. There is still a substantial gray area outside of the presumptive and preferred categories in which TDPs could be justified based upon the unique facts of a particular agency.

IV. Presumptively Included Testing Designated Positions.

In light of the well developed law and clear public interest applicable to the testing of certain categories of positions, those positions set forth below are approved for inclusion in agency testing plans without prior approval of the ICG Executive Committee. In order to improve consistency, it is essential that individual agencies include all positions in these categories in their plans unless very compelling reasons exist not to do so. Indeed, almost all agencies already test these positions. Since courts have consistently found that testing of these safety sensitive positions is justified, agencies need not submit for consultative review their plan to include these positions as TDPs. However, an information copy of implemented changes should be forwarded to the ICG Executive Committee. If an agency head is of the opinion that the unique circumstances of that agency warrant the **exclusion** of all or some of the positions in these categories, those circumstances should be presented to the ICG Executive Committee for consultative review. The positions that are to be included in every plan if such positions exist in the agency are the following:

1. Employees authorized to carry firearms. NTEU v. Von Raab, 489 U.S. 656, 109 S. Ct. 1384, 1393-94 (1989).

2. Motor vehicle operators carrying passengers. NTEU v. Yeutter, 918 F.2d 968, 972 (D.C. Cir. 1990). AFGE v. Skinner, 885 F.2d at 889 n.8.

3. Aviation flight crew members and air traffic controllers. Bluestein v. Skinner, 908 F.2d 451 (9th Cir. 1990). AFGE v. Skinner, 885 F.2d at 889 n.8.

4. Railroad operating crews. Skinner v. RLEA, 489 U.S. 602, 109 S. Ct. 1402 (1989). RLEA v. Skinner, 934 F.2d 1096 (9th Cir. 1991). AFGE v. Skinner, 885 F.2d at 889 n.8.

V. Preferred Testing Designated Positions.

The well developed law and clear public interest applicable to testing make it evident that the categories set out under this section represent strong interests for drug testing and will almost

always meet established judicial standards for testing. Inclusion of the following positions as TDPs is not presumptive. To ensure reasonable uniformity, agencies will still need to present for consultative review agency-specific justifications for testing of these positions. Ninety days after submission of a change in Appendix A of a plan, approval of testing of any TDP described under this section automatically occurs unless the agency is notified to the contrary by the ICG Executive Committee. Agencies choosing to exempt positions/functions specified below from drug testing are required to explain the decision not to designate one or more of these positions as TDPs.

A. The first major category includes certain health and safety responsibilities that could cause immediate, substantial physical injury if carried out under the influence of drugs, usually involving a potentially dangerous instrument or machine. These positions are:

1. Employees having access to firearms. NTEU v. Von Raab, 489 U.S. 656, 109 S. Ct. 1384, 1393-94 (1989).

2. Railroad employees engaged in safety sensitive tasks, including persons engaged in handling train movement orders, safety inspectors and those engaged in maintenance and repair of signal systems. Skinner v. RLEA, 489 U.S. 602, 109 S. Ct. 1402 (1989). RLEA v. Skinner, 934 F.2d 1096 (9th Cir. 1991). AFGE v. Skinner, 885 F.2d at 889 n.8.

3. Aviation personnel, including flight attendants, flight instructors, ground instructors, flight testing personnel, aircraft dispatchers, maintenance personnel, aviation security and screening personnel, and aircraft safety inspectors. Bluestein v. Skinner, 908 F.2d 451 (9th Cir. 1990). AFGE v. Skinner, 885 F.2d at 889 n.8.

B. The second major category is presidential appointees requiring Senate confirmation (PAS).

C. The third major category is front line law enforcement personnel with proximity to criminals, drugs, or drug traffickers. These positions are:

Guard and law enforcement personnel who carry or have access to firearms and those directly involved in drug-interdiction duties. Von Raab, 109 S. Ct. at 1393-94; Guiney v. Roache, 873 F.2d 1557 (1st Cir.), cert. denied, 110 S. Ct. 404 (1989).

D. The fourth major category is drug rehabilitation or equivalent employee assistance duties so inimical with illegal drug use that such employees can expect inquiry into their fitness. These positions are:

Direct service staff of alcohol and drug abuse treatment programs. NFFE v. Cheney, 884 F.2d 603, 614 (D.C. Cir. 1989).

E. The fifth major category is personnel having access to "truly sensitive information,"

for example, national security material that it is reasonable to assume may damage national interests if compromised. Von Raab, 109 S. Ct. at 1396. Specifically these positions are:

1. Top secret and higher clearances. Harmon v. Thornburgh, 878 F.2d 484, 492 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 865 (1990). AFGE Local 1533 v. Cheney, No. 90-15834 (9th Cir. Sept. 11, 1991)

2. Secret clearances. Hartness v. Bush, 919 F.2d 170, 173 (D.C. Cir. 1990), cert. denied, 59 USLW 3865 (U.S. 1991).

VI. Specifically Disfavored Testing Designated Positions

It is also possible to identify positions which to date have uniformly been found by the courts not to warrant random testing. If an agency has TDPs based solely on the criteria below, exceptional justifications will be required to be submitted to the ICG Executive Committee for consultative review in accordance with paragraph VIII. These positions are:

1. Positions designated based upon the need to foster public trust or generalized requirements for integrity, honesty, or responsibility. NTEU v. Yeutter, 918 F.2d 968, 972 (D.C. Cir. 1990). Harmon, cited below.

2. Positions designated based upon access to sensitive information not amounting to the "truly sensitive" criteria, e.g. personnel files, budget and financial information; also, grand jury information is inadequate. Harmon v. Thornburgh, 878 F.2d 484, 492 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 865 (1990).

VII. Discretionary Designations

In addition to the categories of positions identified for presumptive and preferred inclusion in agency plans, there are other agency specific sensitive positions which may warrant designation for testing. Sections IV and V are not exhaustive of TDPs supported by case law. For example, courts have supported testing for: confidential security clearances holders, NTEU v. Hallett, NO. 86-3522 (E.D. LA. Feb. 7, 1991); health professionals responsible for direct patient care and firefighters, Hansen v. Derwinski, (N.D. Cal. Jul. 31, 1991). Moreover, many TDPs that have not been court tested are also appropriate as required by agency needs. To the extent agencies identify positions not set forth in Sections IV and V of this guidance, the agency must submit Appendix A of its plan revising these TDPs to the ICG Executive Committee for consultative review. The agency's plan must contain a statement indicating the necessary causal connection between the employees duties and the feared harm for each TDP.

VIII. Agency Plan Revisions

In order to comply with the need for consistency of TDPs among the many federal agencies, all agencies shall, if necessary, revise their testing designated positions in accordance with this guidance. All agencies must report to the ICG Executive Committee within 90 days of the date of the issuance of this guidance and provide a copy of their revised Appendix A of their plan or a statement that no revisions have been made.

Normally, substantive changes to agency drug-free workplace plans require prior consultative review by the ICG Executive Committee. However, agencies adopting revisions that add positions described in Section IV may make those changes effective immediately. Agencies adopting revisions that add positions described in Sections V or delete positions described in Section VI may make those changes effective within 90 days of mailing them to the ICG Executive Committee unless notified to the contrary.

Any changes pursuant to Section VII still require prior consultative review.

Justifications for exceptions to sections IV and V by those agencies who desire to vary from this guidance must also be submitted to the ICG within 90 days.

Submit the above requirements applicable to your Agency to: The ICG Executive Committee, c/o ~~The Division of Applied Research, National Institute on Drug Abuse~~, Room 9A54, 5600 Fishers Lane, Rockville, MD, 20857.

SAMHSA, Division of Work Place Programs

ICG Executive Committee
1/24/92

Federal Register
Vol. 51. No. 180
Wednesday, September 17, 1986

Presidential Documents

Title 3—

The President

Executive Order 12564 of September 15, 1986

Drug-Free Federal Workplace

I, RONALD REAGAN, President of the United States of America, find that:

Drug use is having serious adverse effects upon a significant proportion of the national work force and results in billions of dollars of lost productivity each year;

The Federal government, as an employer, is concerned with the well-being of its employees, the successful accomplishment of agency missions, and the need to maintain employee productivity;

The Federal government, as the largest employer in the Nation, can and should show the way towards achieving drug-free workplaces through a program designed to offer drug users a helping hand and, at the same time, demonstrating to drug users and potential drug users that drugs will not be tolerated in the Federal workplace;

The profits from illegal drugs provide the single greatest source of income for organized crime, fuel violent street crime, and otherwise contribute to the breakdown of our society;

The use of illegal drugs, on or off duty, by Federal employees is inconsistent not only with the law-abiding behavior expected of all citizens, but also with the special trust placed in such employees as servants of the public;

Federal employees who use illegal drugs, on or off duty, tend to be less productive, less reliable, and prone to greater absenteeism than their fellow employees who do not use illegal drugs;

The use of illegal drugs, on or off duty, by Federal employees impairs the efficiency of Federal departments and agencies, undermines public confidence in them, and makes it more difficult for other employees who do not use illegal drugs to perform their jobs effectively. The use of illegal drugs, on or off duty, by Federal employees also can pose a serious health and safety threat to members of the public and to other Federal employees;

The use of illegal drugs, on or off duty, by Federal employees in certain positions evidences less than the complete reliability, stability, and good judgment that is consistent with access to sensitive information and creates the possibility of coercion, influence, and irresponsible action under pressure that may pose a serious risk to national security, the public safety, and the effective enforcement of the law; and

Federal employees who use illegal drugs must themselves be primarily responsible for changing their behavior and, if necessary, begin the process of rehabilitating themselves.

By the authority vested in me as President by the Constitution and laws of the United States of America, including section 3301(2) of Title 5 of the United States Code, section 7301 of Title 5 of the United States Code, section 290ee–1 of Title 42 of the United States Code, deeming such action in the best interests of national security, public health and safety, law enforcement and the efficiency of the Federal service, and in order to establish standards and procedures to ensure fairness in achieving a drug-free Federal workplace and to protect the privacy of Federal employees, it is hereby ordered as follows:

Section 1. *Drug-Free Workplace.*

(a) Federal employees are required to refrain from the use of illegal drugs.

(b) The use of illegal drugs by Federal employees, whether on duty or off duty, is contrary to the efficiency of the service.

(c) Persons who use illegal drugs are not suitable for Federal employment.

Sec. 2. *Agency Responsibilities.*

(a) The head of each Executive agency shall develop a plan for achieving the objective of a drug-free workplace with due consideration of the rights of the government, the employee, and the general public.

(b) Each agency plan shall include:

(1) A statement of policy setting forth the agency's expectations regarding drug use and the action to be anticipated in response to identified drug use;

(2) Employee Assistance Programs emphasizing high level direction, education, counseling, referral to rehabilitation, and coordination with available community resources;

(3) Supervisory training to assist in identifying and addressing illegal drug use by agency employees;

(4) Provision for self-referrals as well as supervisory referrals to treatment with maximum respect for individual confidentiality consistent with safety and security issues; and

(5) Provision for identifying illegal drug users, including testing on a controlled and carefully monitored basis in accordance with this Order.

Sec. 3. *Drug Testing Programs.*

(a) The head of each Executive agency shall establish a program to test for the use of illegal drugs by employees in sensitive positions. The extent to which such employees are tested and the criteria for such testing shall be determined by the head of each agency, based upon the nature of the agency's mission and its employees' duties, the efficient use of agency resources, and the danger to the public health and safety or national security that could result from the failure of an employee adequately to discharge his or her position.

(b) The head of each Executive agency shall establish a program for voluntary employee drug testing.

(c) In addition to the testing authorized in subsections (a) and (b) of this section, the head of each Executive agency is authorized to test an employee for illegal drug use under the following circumstances:

(1) When there is a reasonable suspicion that any employee uses illegal drugs;

(2) In an examination authorized by the agency regarding an accident or unsafe practice; or

(3) As part of or as a follow-up to counseling or rehabilitation for illegal drug use through an Employee Assistance Program.

(d) The head of each Executive agency is authorized to test any applicant for illegal drug use.

Sec. 4. *Drug Testing Procedures.*

(a) Sixty days prior to the implementation of a drug testing program pursuant to this Order, agencies shall notify employees that testing for use of illegal drugs is to be conducted and that they may seek counseling and rehabilitation and inform them of the procedures for obtaining such assistance through the agency's Employee Assistance Program. Agency drug testing programs already ongoing are exempted from the 60-day notice requirement. Agencies may take action under section 3(c) of this Order without reference to the 60-day notice period.

(b) Before conducting a drug test, the agency shall inform the employee to be tested of the opportunity to submit medical documentation that may support a legitimate use for a specific drug.

(c) Drug testing programs shall contain procedures for timely submission of requests for retention of records and specimens; procedures for retesting; and procedures, consistent with applicable law, to protect the confidentiality of test results and related medical and rehabilitation records. Procedures for providing urine specimens must allow individual privacy, unless the agency has reason to believe that a particular individual may alter or substitute the specimen to be provided.

(d) The Secretary of Health and Human Services is authorized to promulgate scientific and technical guidelines for drug testing programs, and agencies shall conduct their drug testing programs in accordance with these guidelines once promulgated.

Sec. 5. *Personnel Actions.*

(a) Agencies shall, in addition to any appropriate personnel actions, refer any employee who is found to use illegal drugs to an Employee Assistance Program for assessment, counseling, and referral for treatment or rehabilitation as appropriate.

(b) Agencies shall initiate action to discipline any employee who is found to use illegal drugs, *provided that* such action is not required for an employee who:

(1) Voluntarily identifies himself as a user of illegal drugs or who volunteers for drug testing pursuant to section 3(b) of this Order, prior to being identified through other means;

(2) Obtains counseling or rehabilitation through an Employee Assistance Program; and

(3) Thereafter refrains from using illegal drugs.

(c) Agencies shall not allow any employee to remain on duty in a sensitive position who is found to use illegal drugs, prior to successful completion of rehabilitation through an Employee Assistance Program. However, as part of a rehabilitation or counseling program, the head of an Executive agency may, in his or her discretion, allow an employee to return to duty in a sensitive position if it is determined that this action would not pose a danger to public health or safety or the national security.

(d) Agencies shall initiate action to remove from the service any employee who is found to use illegal drugs and:

(1) Refuses to obtain counseling or rehabilitation through an Employee Assistance Program; or

(2) Does not thereafter refrain from using illegal drugs.

(e) The results of a drug test and information developed by the agency in the course of the drug testing of the employee may be considered in processing any adverse action against the employee or for other administrative purposes. Preliminary test results may not be used in an administrative proceeding unless they are confirmed by a second analysis of the same sample or unless the employee confirms the accuracy of the initial test by admitting the use of illegal drugs.

(f) The determination of an agency that an employee uses illegal drugs can be made on the basis of any appropriate evidence, including direct observation, a criminal conviction, administrative inquiry, or the results of an authorized testing program. Positive drug test results may be rebutted by other evidence that an employee has not used illegal drugs.

(g) Any action to discipline an employee who is using illegal drugs (including removal from the service, if appropriate) shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act.

(h) Drug testing shall not be conducted pursuant to this Order for the purpose of gathering evidence for use in criminal proceedings. Agencies are not required to report to the Attorney General for investigation or prosecution any information, allegation, or evidence relating to violations of Title 21 of the United States Code received as a result of the operation of drug testing programs established pursuant to this Order.

Sec. 6. *Coordination of Agency Programs.*

(a) The Director of the Office of Personnel Management shall:

(1) Issue government-wide guidance to agencies on the implementation of the terms of this Order;

(2) Ensure that appropriate coverage for drug abuse is maintained for employees and their families under the Federal Employees Health Benefits Program;

(3) Develop a model Employee Assistance Program for Federal agencies and assist the agencies in putting programs in place;

(4) In consultation with the Secretary of Health and Human Services, develop and improve training programs for Federal supervisors and managers on illegal drug use; and

(5) In cooperation with the Secretary of Health and Human Services and heads of Executive agencies, mount an intensive drug awareness campaign throughout the Federal work force.

(b) The Attorney General shall render legal advice regarding the implementation of this Order and shall be consulted with regard to all guidelines, regulations, and policies proposed to be adopted pursuant to this Order.

(c) Nothing in this Order shall be deemed to limit the authorities of the Director of Central Intelligence under the National Security Act of 1947, as amended, or the statutory authorities of the National Security Agency or the Defense Intelligence Agency. Implementation of this Order within the Intelligence Community, as defined in Executive Order No. 12333, shall be subject to the approval of the head of the affected agency.

Sec. 7. *Definitions.*

(a) This Order applies to all agencies of the Executive Branch.

(b) For purposes of this Order, the term "agency" means an Executive agency, as defined in 5 U.S.C. 105; the Uniformed Services, as defined in 5 U.S.C. 2101(3) (but excluding the armed forces as defined by 5 U.S.C. 2101(2)); or any other employing unit or authority of the Federal government, except the United States Postal Service, the Postal Rate Commission, and employing units or authorities in the Judicial and Legislative Branches.

(c) For purposes of this Order, the term "illegal drugs" means a controlled substance included in Schedule I or II, as defined by section 802(6) of Title 21 of the United States Code, the possession of which is unlawful under chapter 13 of that Title. The term "illegal drugs" does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by law.

(d) For purposes of this Order, the term "employee in a sensitive position" refers to:

(1) An employee in a position that an agency head designates Special Sensitive, Critical-Sensitive, or Noncritical-Sensitive under Chapter 731 of the Federal Personnel Manual or an employee in a position that an agency head designates as sensitive in accordance with Executive Order No. 10450, as amended;

(2) An employee who has been granted access to classified information or may be granted access to classified information pursuant to a determination of trustworthiness by an agency head under Section 4 of Executive Order No. 12356;

(3) Individuals serving under Presidential appointments;

(4) Law enforcement officers as defined in 5 U.S.C. 8331(20); and

(5) Other positions that the agency head determines involve law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence.

(e) For purposes of this Order, the term "employee" means all persons appointed in the Civil Service as described in 5 U.S.C. 2105 (but excluding persons appointed in the armed services as defined in 5 U.S.C. 2102(2)).

(f) For purposes of this Order, the term "Employee Assistance Program" means agency-based counseling programs that offer assessment, short-term counseling, and referral services to employees for a wide range of drug, alcohol, and mental health programs that affect employee job performance. Employee Assistance Programs are responsible for referring drug-using employees for rehabilitation and for monitoring employees' progress while in treatment.

Sec. 8. *Effective Date.* This Order is effective immediately.

Ronald Reagan

THE WHITE HOUSE,
September 15, 1986.

[FR Doc. 86-21166
Filed 9-15-86; 3:47 pm]
Billing code 3195-01-M

Editorial note: For the President's remarks of September 15 on signing EO 12564, see the *Weekly Compilation of Presidential Documents* (vol. 22, no. 38).

federal register

Monday
April 11, 1988

Part IV

Department of Health and Human Services

Alcohol, Drug Abuse, and Mental Health Administration

Mandatory Guidelines for Federal Workplace Drug Testing Programs; Final Guidelines; Notice

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Alcohol, Drug Abuse, and Mental Health Administration

Mandatory Guidelines for Federal Workplace Drug Testing Programs

AGENCY: National Institute on Drug Abuse, HHS.

ACTION: Final Guidelines.

SUMMARY: The Department of Health and Human Services (DHHS) adopts scientific and technical guidelines for Federal drug testing programs and establishes standards for certification of laboratories engaged in urine drug testing for Federal agencies.

EFFECTIVE DATE: April 11, 1988.

FOR FURTHER INFORMATION CONTACT: Maureen Sullivan (301) 443–6780.

SUPPLEMENTARY INFORMATION: These Final Guidelines, titled "Mandatory Guidelines for Federal Workplace Drug Testing Programs" were developed in accordance with Executive Order No. 12564 dated September 15, 1986, and section 503 of Pub. L. 100–71, the Supplemental Appropriations Act for fiscal year 1987 dated July 11, 1987. The statute specifically requires that notice of proposed mandatory guidelines be published in the Federal Register; that interested persons be given not less than 60 days to submit written comments; and that after review and consideration of written comments, final guidelines be published which:

I. Establish comprehensive standards for all aspects of laboratory drug testing and laboratory procedures to be applied in carrying out Executive Order No. 12564, including standards which require the use of the best available technology for ensuring the full reliability and accuracy of drug tests and strict procedures governing the chain of custody of specimens collected for drug testing;

II. Specify the drugs for which Federal employees may be tested; and

III. Establish appropriate standards and procedures for periodic review of laboratories and criteria for certification and revocation of certification of laboratories to perform drug testing in carrying out Executive Order No. 12564.

Subpart A of this document contains general provisions. Subpart B, titled "Scientific and Technical Requirements," responds to the mandates in items I and II above. Subpart C, titled "Certification of Laboratories Engaged in Urine Drug Testing for Federal Agencies," responds to item III.

In substance, these Final Guidelines are very similar to those in the Notice of Proposed Guidelines published on August 14, 1987 (52 FR 30638). However, significant editorial and format changes have been made. The Guidelines have been edited as a single, integrated document organized in a more traditional format with subparts, numbered sections, and consistent paragraph designators. Definitions have been grouped together in Subpart A. Rather than repeat identical material, the document contains internal cross-references, particularly from Subpart C to Subpart B. This new organizational approach should add clarity to presentation of the material and aid the cross-referencing and citation of individual sections and paragraphs.

Prior to addressing comments on the specifics of the scientific and technical requirements and the certification program, it is worth noting that a number of commentors perceived the laboratory standards in these Guidelines as redundant, viewing existing regulations, guidelines, and certification/licensure mechanisms of the Medicare and Clinical Laboratory Improvement Act of 1967 (CLIA) interstate licensure program—also administered by DHHS—as sufficient to provide quality assurance for urine drug testing laboratories.

The Medicare and CLIA certification requirements apply to laboratories conducting a wide range of medical tests, having been designed for any medical testing laboratory receiving Medicare/Medicaid reimbursement or performing testing on specimens in interstate commerce, respectively.

The laboratory portion of the President's Drug-Free Federal Workplace Program can be distinguished from the Medicare/CLIA programs by important differences in policies, procedures, and personnel arising from standards appropriate to the application of analytical forensic toxicology for this program. Unique distinguishing features include:

- Rigorous chain of custody procedures for collection of specimens and for handling specimens during testing and storage.
- Stringent standards for making the drug testing site secure, for restricting access to all but authorized personnel, and providing an escort for any others who are authorized to be on the premises;
- Precise requirements for quality assurance and performance testing specific to urine assays for the presence of illegal drugs; and
- Specific educational and experience requirements for laboratory personnel to ensure their competence and credibility as experts on forensic urine drug testing, particularly to qualify them as witnesses in legal proceedings which challenge the finding of the laboratory.

Medicare and CLIA laboratory certification procedures do not provide for quality assurance and performance testing specific to urine drug testing laboratories. With few exceptions, the Medicare and CLIA certification programs do not have employees specifically trained in toxicology to perform the on-site surveys and evaluations of the laboratories and the technologies employed in the laboratories. The Medicare and CLIA standards do not address issues such as cutoff limits for drug detection, grading criteria for the performance testing programs, blind performance testing requirements, specifications for the analytical techniques to be employed, types of drugs to be detected (including metabolites), and detailed outcome measures of performance such as requiring assays of quality control samples and a large number of performance test samples as an initial and ongoing requirement for certification.

The need to assure the protection of individual rights within the context of a drug testing program—linked to both employee assistance programs and the management potential for taking adverse action against an employee—makes essential the development of a separate laboratory certification program to respond to the unique requirements of the program mandated by the President and the Congress. These Guidelines set standards for such a certification program.

The Final Guidelines make clear that they do not apply to drug testing under any legal authority other than E.O. 12564, including testing of persons under the jurisdiction of the criminal justice system, such as arrestees, detainees, probationers, incarcerated persons, or parolees (see § 1.1(e)). The testing of persons in the criminal justice system is different than testing under E.O. 12564 for several reasons: (1) The overriding purpose of the criminal justice system is to protect community safety through the apprehension, adjudication, and punishment of law violators; (2) the incidence of drug use among those under the jurisdiction of the criminal justice system is high; and (3) the legal interests at issue in the criminal justice system, including liberty, privacy, and property interests, are different and, therefore, are subject to established practices, constitutional protections, and evidentiary rules specific to the criminal

justice system. The Guidelines also do not apply to military testing of service personnel or applicants to the military.

Response to Comments

Written comments to the Notice of Proposed Guidelines published August 14, 1987, were received from approximately 150 individuals, organizations, and Federal agencies. All written comments were reviewed and taken into consideration in the preparation of the Final Guidelines. This section summarizes major comments and the Department's response to them. Similar comments are considered together.

1. Several commenters requested that the Guidelines require a split sample technique in which a second sample or a portion of a sample could be saved for further testing. Although this possibility was considered, it is viewed as a cumbersome and expensive process involving the collection of two separate sets of samples and the retention of one for an indefinite period of time in some type of secured long term refrigerated storage. The use of a split sample was suggested as a mechanism to overcome perceived problems arising out of situations such as sample mixups, erroneous identification of samples, and lost samples. The Department does not agree that split or additional sample proposal would have any scientific advantage over the current system nor would they increase reliability. In fact, such a system could increase the risk of administrative error by doubling the labeling, initialing, storage, and accountability requirements. Furthermore, the Guidelines already include sufficient safeguards to eliminate the problems the use of split or additional samples are thought to address; e.g., detailed safeguards for labeling and chain of custody of the urine sample. Accordingly, we do not project any real scientific, chain of custody, or reliability benefits sufficient to justify placing the added requirement of collection and storage of split samples of Federal agencies and have rejected the split sample requirement. Furthermore, these Guidelines specifically reject allowing the tested employee or anyone else from presenting to the Medical Review Officer a split sample or private sample that does not fully comply with these Guidelines.

2. A number of commentors said that specific educational and experience requirements for laboratory directors and supervisors were too restrictive and that specific board certifications, experience, and degree requirements were also too restrictive and did not provide any additional quality assurance. In many cases these individuals recommended that the current Medicare and CLIA personnel standards be used in place of the standards proposed in the Guidelines. Other individuals and organizations stated that the proposed personnel standards in the Guidelines were not stringent enough. Some recommended that specific standards also be adopted for the personnel performing the tests.

The Department carefully considered the comments about the personnel standards proposed in the Guidelines—most of which came from employees of clinical laboratories or organizations representing those employees—from the perspective of the intent of the Guidelines. It is not possible to reconcile the divergent viewpoint represented in the comments. In this connection it should be noted that credentialing standards for laboratory personnel have been an issue for a number of years in other laboratory programs administered by DHHS, as well as among those who commented on the Notice proposing these Guidelines.

The laboratory personnel requirements in the Guidelines are designated to assure that any individual responsible for test-review and result-reporting is qualified to perform the function and could appear as an expert witness in a court challenge of the results. This requires familiarity with a wide range of material related to test selection, quality assurance, interferences with various tests, maintenance of chain of custody, documentation of findings, interpretation of test results, validation and verfication of test results, and the ability to testify as an expert in legal proceedings. The Guidelines set personnel requirements for the individuals responsible for day-to-day management and operation of laboratories engaged in urine drug testing for Federal agencies aimed at ensuring those competencies.

While a consultant may be able to carry out some of these specialized functions, it is essential that comprehensive oversight and control of the responsibilities cited above be exercised by those who are directly responsible on a day-to-day basis for the laboratory, who are accountable for the test results, and who may be called on to consult with the agency for which testing is performed as well as to appear at any legal proceeding to defend the quality of testing in the laboratory. Therefore, the Guidelines set functional employee qualification standards which are essential to the mission of a drug testing laboratory and require that laboratory employees meet those standards. For the purpose of meeting laboratory personnel requirements, no provision is made for the use of consultants who are not involved in the day-to-day management or operation of the laboratory.

The Final Guidelines set functional requirements for individuals engaged in the day-to-day management and operation of laboratories engaged in urine drug testing for Federal agencies. They do not specify requirements for other personnel, including employees who perform the assays, but rather depend on the ability of those responsible individuals to select and oversee properly qualified employees in each specific laboratory, and they depend on outcome measures of laboratory performance such as performance testing. The individual responsible for day-to-day laboratory management is responsible for determining staffing needs and types of personnel required to perform particular functions in a specific facility. The individual responsible for day-to-day laboratory operations is responsible for supervision of analysts performing drug tests and related duties. Outcome measures will provide the responsible individual with feedback on the performance of laboratory employees. Within this framework, the Guidelines do not establish qualifications for additional laboratory positions.

The individuals who perform the tests are a vital part of any laboratory operation, and there is no intent to minimize their importance by omitting qualifications for them. However, by holding the appropriate laboratory officials responsible for review and certification of all test results before they are sent forward and by relying on various quality control and quality assurance measures, performance testing and on-site evaluations to provide direct measures of the quality of testing, the Department expects to ensure a standard of excellence in drug testing without setting additional personnel requirements. This reliance on the qualifications of the individuals responsible for the day-to-day management and operation of urine drug testing laboratories does not prohibit the laboratories themselves from setting additional employees standards which may include specific credentials, certifications, licenses, registries, etc., for specific functions.

However, once a laboratory is certified in accordance with these Guidelines, laboratory employees whose functions are prescribed by these

Guidelines are deemed qualified. These Guidelines establish the exclusive standards for qualifying or certifying these employees involved in urainalysis testing. Certification of a laboratory under these Guidelines shall be a determination that all appropriate qualification requirements have been met. Agencies may not establish or negotiate additional requirements for these laboratory personnel.

Some commentors felt that references to director, supervisor of analysts, certifying officials, and other analysts did not clearly distinguish between those positions. Other commentors criticized the establishment of specific position titles. We have clarified laboratory employee functions and dropped the use of specific position titles in 2.3 Laboratory Personnel. A laboratory engaged in urine drug testing for Federal agencies must have personnel to perform the following functions:

- Be responsible for the day-to-day management and for the scientific and technical performance of the drug testing laboratory (even where another individual has overall responsibility for an entire multispeciality laboratory).
- Attest to the validity of the laboratory's test reports. This individual may be any employee who is qualified to be responsible for the day-to-day management or operation of the drug testing laboratory.
- Be responsible for the day-to-day operation of the drug testing laboratory and for the direct supervision of analysts performing drug tests and related duties.

In response to those commentors who were concerned about the proposed requirement for a Ph.D. to qualify as a laboratory director, the Final Guidelines provide that the individual responsible for the day-to-day drug testing laboratory management may have education and experience in lieu of a Ph.D. to demonstrate an individual's scientific qualifications in analytical forensic toxicology (see 2.3(a)(2)(iii)). Together with the specific analytical forensic toxicology experience required in 2.3(a)(2)(iv), scientific qualifications may be demonstrated by showing "training and experience comparable to a Ph.D. in one of the natural sciences, such as a medical or scientific degree and in addition have training and laboratory or research experience in biology, chemistry, and pharmacology or toxicology." This Ph.D. comparability provision eliminates the utility of the "grandfather" clause in the proposed guidelines, a clause which would have qualified incumbent laboratory directors who have a graduate degee in the natural sciences followed by extensive experience (6 years postgraduate), in analytical forensic toxicology. Thus, the Final Guidelines omit the "Grandfather" clause.

The Ph.D comparability provision, while not requiring specific research experience, recognizes research as one mechanism for demonstrating scientific competency to be responsible for day-to-day laboratory management. Lack of research experience does not disqualify an individual for that function if he or she kas other appropriate training or experience. The Ph.D. comparability provision also makes explicit that a medical degree is an acceptable alternative to the Ph.D. for this purpose, provided, of course, that the M.D. has the other requisite training and experience.

The Final Guidelines do not require specific board certification for any laboratory employees. Some commentors were concerned particularly that individuals who supervise analysts would have to be on the registry of the American Society for Clinical Pathologists (ASCP). The proposed guidelines cited the ASCP registry, but only as an example of the type of experience and education that would qualify an individual to oversee the day-to-day operations of a urine drug testing laboratory, including the supervision of analysts. The important factors associated with day-to-day operation and supervision of analysts in a forensic toxicology laboratory are captured in 2.3(c). Therefore, the Final Guidelines omit any reference to a registry as a factor in qualifying an individual for this function. Likewise, the Guidelines do not refer to a registry for the individual responsible for day-to-day laboratory management or the individual responsible for attesting to the validity of the laboratory's test reports, but rely instead on education and experience qualifications set out in 2.3 (a) and (b), respectively.

Consistent with editorial revisions throughout the Final Guidelines, editorial changes in the personnel provisions are intended to clarify specific education, training, and experience requirements for individuals to carrying out vital laboratory functions, to simplify by adopting consistent terminology, and to eliminate the need to compare similar provisions by using identical provisions when appropriate. In this regard, the personnel provisions in Subpart B, which sets out the scientific and technical requirements, and in Subpart C, which sets out the standards for certification of laboratories, are identical: Subpart C simply cross-references the personnel provisions in Subpart B.

3. A number of commentors said that it was unnecessarily restrictive to require that the screening and confirmation tests be performed at the same site. They believed that the majority of tests would be negative and that would reduce the number of samples that must be shipped to another site and would, in turn, prevent sample mixup and loss.

After having carefully reviewed this issue, the Department has determined that both screening and confirmatory testing must be performed at the same time (3.5). Although use of separate screening and confirmation laboratories may produce adequate results, Pub. L. 100-71 mandates that the Secretary set standards which "require * * * strict procedures governing the chain of custody of specimens collected for drug testing." Same-site screening and confirmation is the best method for maintaining such strict control in the chain of custody.

Requiring the two tests to be performed in the same laboratory will reduce problems inherent in having two test sites, such as problems maintaining chain of custody forms at two test sites; need for having two separate laboratory forms; possible mix-ups and loss of samples in transit between sites; potential delays in reporting results; and potential for having results reported only on the basis of an initial screening test.

Several commentors indicated that if screening were done on-site this would reduce the number of subsequent requirements for rescreening and result in fewer samples being sent to another site. The Federal work force testing program does not envision performing initial tests at the collection site. Therefore, considerations concerning on-site initial screening tests are not relevant to the current Federal testing program.

4. Several commenters indicated that a number of terms were not defined or that there was no single section defining terms used in the Notice of Proposed Guidelines. The Final Guidelines include a section to centralize the definitions that appeared in the proposed document and add definitions to several previously undefined terms (1.2). The term "proficiency testing" has been edited throughout to read "performance testing" as a more precise reflection of the nature of the testing with which these Guidelines are concerned.

5. A number of commenters said that the cutoff limits for the reporting of positive results should be higher or

lower than those proposed (see 52 FR 30641). There also were commentors who believed that the cutoff limits for the screening and confirmation tests should be set at the same level.

The initial immunoassay test cutoff is established at levels generally similar to those used by the Department of Defense and available with commercial immunoassays. These levels are consistent with detection of recent drug use.

The second set of cutoff levels is for the gas chromatography/mass spectrometry (GC/MS) confirmatory test, chosen so that the specimens determined to be positive by the first technique (screening technique) could be confirmed at a reasonable level of analytical accuracy.

The Final Guidelines retain all the proposed initial test cutoff values (2.4(e)). Confirmation for marijuana is changed by 5 ng/ml in accordance with DOD experience. Likewise, confirmation for amphetamines reflects the cutoff intended for the notice of proposed guidelines consistent with DOD levels. Cutoffs for specific opiates (morphine and codeine) and amphetamines (amphetamine and methamphetamine) are delineated for clarity (2.4(f)).

In finalizing both screening and confirmation cutoffs, among the matters considered were prevalence rate; cross-reactivity; state of the art in drug detection; and the experience of the Department of Defense and other groups in large-volume drug testing programs.

6. Several commentors indicated that alcohol should be included among the substances to be tested. The Department acknowledges the significance of alcohol and its use as well as its potential impact on performance in the workplace. In any event, alcohol is not an illegal substance, and Executive Order 12564, which these Guidelines implement, only authorizes testing for illicit drugs listed in Schdule I and Schedule II of the Controlled Substances Act. However, nothing in these Guidelines restricts the authority of agencies to test for alcohol under authorities other than E.O. 12564.

7. Several commentors indicated that photo identifications should be required at the testing site to ensure that the tested individual is properly identified. We concur that proper identification should be provided by the individuals at the test site to assure that the correct individual will be tested. Since most Federal agencies already issue photo identification cards to their employees and most employees have a driver's license with photo identification, it is not unreasonable to require this form of identification for individuals presenting themselves for testing. In cases where the individual does not have a proper photo identification, the collection site person must get the employee's supervisor, coordinator of the drug testing program, or any other agency official who knows the employee to provide a positive identification (2.2(f)(2)).

8. Several commentors suggested that toilets, water faucets, and other sources of water which could be used as adulterants should be taped shut or sealed to prevent adulteration of the sample at the collection site. The Department acknowledges that sources of water should not be available which would enable an individual to adulterate the sample. However, there are also needs, such as hand washing, for a relatively convenient source of water. These Guidelines cannot anticipate the needs at each collection site and the hardship which would be imposed by sealing all sources of water at the site. However, the proposed and Final Guidelines do include in 2.2 precautions in specimen collection procedures to ensure the integrity and identity of the specimen. Because we have taken reasonable steps to ensure that specimens are not adulterated at the collection site and because there are practical reasons for having a convenient source of water, the Final Guidelines do not require that all sources of water be taped or sealed shut but rather require that precautions be taken to ensure that unadulterated specimens are obtained. Among the precautions included in 2.2(f) to ensure unadulterated specimens is a requirement to use a bluing agent so that the water in the toilet tank and bowl are colored blue and that there be no other source of water in the enclosure where the sampe is given.

9. Several commentors requested more specific guidelines to define "unusual behavior" at the urine collection site which would give reason to believe a particular individual may alter or substitute the specimen to be provided which, in turn, would trigger the requirement to obtain a second specimen under direct observation of a same gender collection site person (see 2.2(f)(16)). The guidelines focus on whether there is "reason to believe" (see 1.2 for definition) that a sample is adulterated. Observations of unusual behavior may bear on whether there is a "reason to believe" and for that reason the Guidelines require such observations to be documented in the permanent record book. While it may be desirable to provide specific descriptions of or guidelines to identify "unusual behavior," the Department cannot foresee or define every contingency which might occur. Thus, "unusual behavior" is not further defined in the Guidelines.

It should be noted, however, that other indicia of "reason to believe" are set out in 2.2(f). For example, 2.2(f)(12) and (13) require a temperature reading upon collection of the specimen and indicate those temperatures which would give rise to a reason to believe that a specimen may be altered or substituted. Elsewhere the Guidelines require the collection site person to inspect the sample for unusual color or other signs of contaminants (2.2(f)(14)). Likewise, if a collection site person sees unusual behavior which causes him or her to question the integrity of the sample such that it leads to a reason to believe that a particular individual may alter or substitute the specimen to be provided, the Guidelines require that such an observation be noted in writing in the permanent record book (2.2(f)(8)). The Final Guidelines also add a requirement that any "reason to believe" observation be concurred in by a higher level supervisor of the collection site person (2.2(f)(23).

With regard to reason to believe that a particular individual may alter or substitute the specimen based on the specimen's temperature falling outside the acceptable range, the Final Guidelines permit an individual to volunteer to have an oral temperature reading to provide evidence that the temperature of the specimen was consistent with the individual's body temperature, i.e., an individual's fever could cause an elevation in the temperature of the specimen (2.2(f)(13)).

10. Several commentors said that if the first specimen is subject to a reason to believe that the particular individual may alter or substitute the specimen which would require a second specimen to be collected, the second specimen should be collected immediately. The Department concurs that the second specimen should be collected as soon as the need for it is established. Therefore, the Guidelines provide that the second specimen shall be collected as soon as possible whenever there is reason to believe that the particular individual may alter or substitute the specimen. (2.2(f)(16)).

11. Several commentors wanted to know the basis for the choice of cocaine and marijuana as the drugs required to be screened by all agencies. The requirement that all agencies screen for cocaine and marijuana was based on the incidence and prevalence of their abuse in the general population and the experiences of the Department of

Defense and the Department of Transportation in screening their work forces. The choice of cocaine and marijuana as the only substances for which all agencies must test takes into account that the predictive value of any positive diagnostic test is a function of prevalence in the tested population. Agencies have also been authorized to test for phencyclidine, amphetamines, and opiates because their high incidence and prevalence in the general population may warrant testing of particular agency work forces for these illegal substances (2.1(a)).

Federal agency requests for screening drugs other than the five authorized in these Guidelines must be made in writing to the Secretary. The Secretary will review the requests on a case-by-case basis and make a determination of the acceptability of the plans, cutoff limits, and testing protocols. The Secretary's determination shall be limited to the use of appropriate science and technology and shall not otherwise restrict agency authority to test for drugs included in schedules I and II of the Controlled Substances Act (2.1(b)).

12. Several commentors wanted clarification of the procedures for the Medical Review Officer's (MRO's) protocols for performing the review function. They also wanted to know if individual employees would have an opportunity to discuss the Medical Review Officer's findings with him or her. Procedures for the conduct of the medical review function, including a handbook to cover the activities of the MRO, will be disseminated to all Federal agencies. While there is agreement that there should be an opportunity for some type of medical interview between the medical review officer and the employee prior to the MRO's final decision concerning a positive test result, a face-to-face interview may not always be feasible or possible. For example, they may be in widely distant geographic areas, and it may be more practical to arrange a telephone or teleconference interview than a direct meeting. Therefore, we have provided for flexibility in the mechanism for this communication and have stated at 2.7(c) that prior to making a final decision to verify a positive result, the MRO shall give the individual employee an opportunity to discuss the test result with him or her. The Medical Review Officer shall not, however, consider the results of urine samples that are not obtained or processed in accordance with these Guidelines.

13. Several commentors indicated that color blindness measurements for laboratory workers were not necessary since none of the currently approved methodologies involved the use of visual color measurements. The requirement that laboratories maintain files which include information on employee color vision was originally proposed because some immunoassay systems have color-coded components and the reliable manipulation of such systems requires good color vision. In view of the methodologies currently approved in the Guidelines, we agree that an across-the-board requirement to maintain files on color blindness is not warranted. However, the Department has a more general concern that laboratories employ individuals who have the ability to perform any necessary test procedures. Therefore, the Guidelines generally provide at 2.3(f) that laboratory personnel files shall include results of any tests which establish employee competency for the position he or she holds and provide, as a specific example, a test for color blindness if the employee will be using color coded analytical systems. Similarly, the final Guidelines do not require that laboratories maintain any other medical data about employees unless that data would be necessary to show the employee's competency to perform a specific job function.

While these Guidelines do not require laboratories to maintain general health or medical information in employee files, they do not preclude a laboratory from maintaining such files. What 2.3(f) is intended to do is require laboratories to maintain sufficient files to show employee competency for the position he or she holds.

14. One commentor requested that the laboratory notify agency management officials of a positive result at the same time the Medical Review Officer is notified, so that individuals in sensitive positions or in positions where they could pose a hazard to other individuals or the public could be temporarily removed from these positions, with no punitive action, until after the Medical Review Officer had completed the review process. After considering both the safety implications and the employee rights in this type of notification, the Department has determined that it would be inappropriate to report a result before the Medical Review Officer has the opportunity to review the facts and circumstances and make a decision on the meaning of the test results. In instances where an agency determines that it has a need for immediate action or might have such a need based on its mission, the agency should develop a mechanism to expedite the review process or allow the Medical Review Officer to require review of the individual's general fitness to continue performing a specific function. Circumventing the review system would abridge necessary protections for employees and could result in prejudging an individual employee's case (2.7).

15. Several commentors called for a medical review board instead of a single Medical Review Officer. A primary purpose of the Medical Review Officer position is to provide for the privacy and confidentiality of the employee's personal medical history during the course of reviewing positive test results. To call together a board which would be privy to that private information would increase the exposure of the employee's medical history to several other individuals. Furthermore, the Department views the physician in the Medical Review Officer's role in retaining overall responsibility for reviewing and interpreting positive test results. There is no restriction on the Medical Review Officer's seeking advice on an ad hoc or a continuous basis from an individual or group if he or she does not breach employee confidentiality during the course of the review and interpretation of the employee's test results. Because the Department is vitally concerned with maintaining confidentiality and privacy and because the Medical Review Officer is not now limited in seeking advice from persons who might have served on the proposed medical review board (e.g., the drug program coordinator, employee assistance program officials, or any other agency employee), the Guidelines will continue to call for review by a single medical officer rather than a board (2.7).

16. Several commentors requested that the term "inexpensive immunoassay" to describe the initial test be eliminated since cost should be left to the agency and the laboratory and techniques other than immunoassay should be used to test for certain drugs. The term "inexpensive" was not intended to set specifications for price; that is a matter for negotiation between the laboratory and the contracting Federal agency. It was meant to serve as part of a generic description of the procedure and purpose of a screening assay. The term "initial test" has been revised in 1.2 and does not use the word "inexpensive".

17. Several commentors indicated that more specific guidelines should be issued to assure the security of test results whether sent by mail or by electronic means. The Guidelines clarify

that the laboratory must ensure the security of data transmission and limit access to any data transmission, storage, and retrieval system (2.4(g)(4)).

18. Several commentors stated that individuals should have access to all records, data, and documents relating to their test results and the certification of the laboratory which performed the urine drug test. Section 503 of Pub. L. 100-71 provides that any Federal employee who is the subject of a drug test shall, upon written request, have access to any records relating to his or her drug test and any records relating to the results of any relevant certification, review, or revocation-of-certification proceedings. In response to this comment the provisions of the statute have been set out in a new paragraph at 2.9. The Department anticipates that individuals will be able to obtain information about their own test results from the agency's Medical Review Officer, employee assistance program, or other staff person designated by the agency. Any other relevant information will be made available in accordance with the statute.

19. Several laboratories indicated that the monthly statistical summary required of the testing laboratories would be costly and an excessive burden. The Department views the monthly data as necessary for several purposes including evaluating the laboratory testing program, gathering statistical data to evaluate the drug testing program's effectiveness, and providing demographic data on drug use by the Federal work force. The information will assist in making decisions concerning changes in policy or program implementation and identifying specific programs for attention. The Department anticipates that the cost of providing the data will be built into the contract the laboratory signs with each agency. Therefore, provision of the data will be a function for which the laboratory is duly compensated, not an undue cost or burden (2.4(g)(6)).

20. One commentor indicated that samples for which the initials on the specimen bottle and in the permanent record book do not match should not be rejected automatically, since that would provide an opportunity for individuals to attempt to have their specimens rejected when they knew the specimens would test positive. We have considered the fact that individuals might deliberately alter their initials in an attempt to have their samples rejected. However, we do not anticipate that samples should be thrown out solely on the basis of unmatched initials on the specimen bottle and in the permanent record book. If unmatched initials provide reason to believe that a particular individual may have altered or substituted the specimen, both the proposed and the Final Guidelines provide that the specimen be forwarded for testing along with a second sample obtained as soon as possible after reason to believe the individual may have altered or substituted the specimen is established (2.2(f) (15) and (16)). The Final Guidelines ensure the identification of the person from whom the specimen is collected through the requirement for photo identification (see 2.2(f)(2)). In addition, a principal responsibility of the collection site person is to gather and verify information on site and to detect any problems with the identification of the specimen. Until experience in the program indicates that misidentified samples arising out of unmatched initials is a significant problem, the Guidelines will require that the individual initial the specimen bottle and sign the permanent record book to certify that the identified sample is the one collected from the individual.

21. One commentor asked if the Guidelines apply to Federal contract employees. The Guidelines do not apply to Federal contract employees; however, any agency may require a contractor to test its own employees following the procedures in the Guidelines by making the requirement a term or condition of the contract.

22. One commentor indicated that the proposed requirement for signing a procedure manual on an annual basis was in conflict with current DHHS efforts in the Medicare and CLIA programs to delete the annual signing requirement and replace it with a requirement that the manual be signed initially and whenever changes are made. We concur with the comment that the important factor is that the manual be signed by the responsible individual whenever a procedure is instituted or changed or whenever a new individual becomes responsible for the day-to-day management of the drug testing laboratory. The Guidelines do not require annual signing of the procedure manual.

The on-site review of the laboratory together with the assignment to an individual of the overall responsibility for the testing will assure that the procedures in the manual are current and followed. If the procedures in the manual are not current or followed, it is an indication that the responsible individual is not performing the oversight function appropriate to the management of the laboratory.

We have also clarified that the individual responsible for the day-to-day management of the drug testing laboratory is the individual responsible for signing the manual (2.3(a)(5)). It is not appropriate for the individual who is responsible for day-to-day operations and supervision of analysts or for any other individual to be delegated this responsibility since the manual is the vehicle for selection of methodologies, and the approval of methodologies is a principal reason for requiring the individual responsible for day-to-day management of the drug testing laboratory to possess detailed knowledge in the area of toxicology.

23. One commentor indicated that laboratories should be notified when they may discard samples. We have reviewed the comment and concur that the agency should be able to notify the laboratory in writing if it determines that samples no longer need to be retained because no further action is pending which will require the samples. Both 2.4(g)(8) and 2.4(h) permit the agency to instruct or authorize storage for less than the period for which there is a storage requirement.

24. Several commentors indicated a discrepancy in the periods for maintenance of frozen samples in storage—1 year in the proposed guidelines and 6 months in Appendix B to the proposed guidelines. The time interval in the appendix was in error. The Final Guidelines consistently call for frozen storage of confirmed positive samples for 1 year (2.4(h)). Note that the Appendix has been omitted, although pertinent provisions from it are integrated in the Final Guidelines.

25. In response to concern that specimens may be misused to test for physiological states other than drug abuse (e.g., pregnancy), a provision has been added to the Final Guidelines to prohibit the specimens collected for urine drug testing from being used for any other types of analyses unless otherwise authorized by law. It is important to the integrity and goals of the President's program to achieve a drug-free work place that any specimens collected for that purpose not be analyzed or used for inappropriate purposes. To ensure that outcome, a paragraph has been added at 2.1(c) stating that specimens may be used only to test for those drugs included in the agency drug-free workplace plan and may not be used to conduct any other analysis or test unless the agency is authorized by law to perform other analyses.

26. One commentor indicated that the individuals permitted in the "secure test area" should include routine service and maintenance personnel and that these individuals should not require escorts. While providing escorts for all employees, including service and maintenance personnel, may cause considerable inconvenience, unless the facilities are secured at night and all materials locked away with no possible access, there is always the potential for tampering with the specimens or test results. The Guidelines make no provision for routine service and maintenance personnel to enter the secure test area without an escort (2.4(a)).

27. One commentor suggested that collection personnel be provided with gloves or other protective garments to prevent contamination of the personnel from the urine. The Department encourages a protected work environment for collection site personnel, including any necessary protective garments. Various State and Federal guidelines provide for the health and safety of employees. Collection agents are expected to be aware of and to comply with such provisions to safeguard their own health and the health and safety of employees. However, no requirement was added to the Guidelines to require provision of protective garments to collection personnel.

28. One commentor recommended that DHHS use its own personnel to investigate any quality assurance problems which arise with a particular laboratory instead of requiring each agency to have its own investigative staff. Other commentors viewed agencies as lacking the in-house expertise to perform this analysis, and it was not clear to them who in each agency should carry out such an investigation. The Final Guidelines reflect a decision that the Secretary (which might include a DHHS contractor or DHHS recognized certification program) shall assume this investigative responsibility and carry out the related coordinating activities. A coordinating mechanism within the National Institute on Drug Abuse (NIDA) will ensure that all agencies are aware of problems with any given laboratory. Conducting investigations and coordinating findings through DHHS will eliminate the need to provide a more complex mechanism for agencies to notify each other about laboratory performance (2.5(d)(4)).

29. Several commentors said that the format for reporting employee drug test results was not sufficiently clear and that while there was a discussion of the mechanism for reporting performance test results, there was no comparable discussion on reporting employee test results. 2.4(g), Reporting Results, clarifies that laboratories will not report quantitation on test results but will report whether a result is positive or negative and that this is indicative of a result being above or below a particular cutoff limit. A negative report does not signify the absence of a particular drug or metabolite but only that the particular drugs or metabolites screened for were not detected at a specified concentration (i.e., cutoff level).

Quantitation will not be reported to the agency for confirmed positive reports in order to provide for identical reporting by the laboratory of performance test specimens and employee specimens. However, quantitation may be obtained by the Medical Review Officer on request from the laboratory. In the case of the opiates, we have indicated that the particular opiate to be reported will depend on the amounts of morphine and codeine detected by the confirmation test. We have included the reporting scheme in the scientific and technical requirements as well as in the revision of the requirements for reporting performance test results (2.4(g), 3.11 which cross-references 2.4(g), and 3.17(f)).

30. The Final Guidelines attempt to clarify the purpose of the certification program, since the comments reflect uncertainty as to what certification implies and what would be surveyed in the process of certifying a laboratory. Subpart C permits DHHS to recognize certification programs run by other organizations. These programs may be private accrediting organizations that are recognized by the Secretary to determine whether laboratories meet the Guideline requirements. Any laboratory accredited by these organizations in accordance with these Guidelines is deemed to be a certified laboratory, thus making it eligible to perform urine drug testing for Federal agencies. DHHS is contemplating publishing standards for recognition of private accrediting organizations in the near future.

The provisions of Subpart C apply to any laboratory which has or seeks a contract to perform, or otherwise performs urine drug testing for Federal agencies under a drug testing program conducted under E.O. 12564. Only certified laboratories will be authorized to perform urine drug testing for Federal agencies. However, in order to create a pool of qualified laboratories to bid on agency contracts to perform such testing, the Secretary may certify laboratories as contract eligible that meet the requirements of Subpart C. This pool of qualified laboratories will lead to competitive pricing and better services for Federal agencies.

The certification process will be limited to the five classes of drugs (2.1)(a) (1) and (2)) and the methods (2.4 (e) and (f)) specified in these Guidelines. The laboratory will be surveyed and performance tested only for these methods and drugs. Certification of a laboratory indicates that any test result reported by the laboratory for the Federal Government meets the standards in these Guidelines for the five classes of drugs using the methods specified herein. The Guidelines require that a certified laboratory must inform its non-Federal clientele when testing procedures are to be those specified by these Guidelines. Non-Federal purchasers are free to bargain with a certified laboratory for any standards they may deem appropriate.

31. The Guidelines delete the checklist in Appendix B of the proposed certification standards. The checklist was initially intended to provide a tool for the inspectors of laboratories to use in conducting their on-site inspections and to enumerate the standards contained in the section on the certification program published in the **Federal Register**. However, there was confusion regarding whether the checklist represented an additional or different set of requirements. Relevant portions of the checklist have been integrated in the Guidelines. The checklist itself will be revised to correspond to the requirements in the Guidelines and will be made available to laboratories by the DHHS-recognized certification program(s).

32. Several commentors asked that the specific criteria used by the group(s) who will perform the certification function for the Department be detailed in these Guidelines. In response, the Guidelines include a new section explaining how performance testing will be evaluated for initial certification as well as for previously certified laboratories (3.19 (a) and (b)). All major aspects of the certification program, including personnel and quality assurance and quality control requirements, are included in Subpart C of these Guidelines. With the addition of 3.19 (a) and (b), we believe the Guidelines are appropriately specific and there is no need to include additional detail in the Guidelines concerning the certification process.

33. Some commentors indicated that the number of blind performance test samples required to be run by the

laboratories (i.e., 1,000) for initial certification and (i.e., 250 per quarter) for continuing certification was excessive and would be too costly. The commentors also indicated that it was not clear whether the laboratory or the submitting organization would bear the cost of the samples and if it were necessary for each submitting organization to submit this number of samples to each laboratory. In response to the comments, we have revised this section to indicate that each agency shall submit blind performance test specimens to each laboratory it contracts with in the amount of at least 50 percent of the total number of samples submitted (up to a maximum of 500 samples) during the initial 90-day period of program implementation and a minimum of 10 percent of all samples (to a maximum of 250) submitted per quarter thereafter. The Final Guidelines also clarify that approximately 80 percent of the blind performance test samples are to be blank (i.e., certified to be drug free) and the remaining samples are to be positives (2.52(d)(3) and 3.7). The cost of the blind performance test samples will be borne by the submitting agency.

34. Several commentors requested corrective action and reanalysis of previously run specimens in the case of discovered laboratory administrative error. They also requested that the union and all employees who tested positive be notified of the error in writing. The recommendation was to notify all employees with positive results who were tested between the time of resolution of the error and the preceding cycle of correct results. In the case of an administrative error, there are no plans to automatically have all specimens retested. The decision on whether to retest will be dependent on the type and extent of the error. For example, if a single employee's test results were transcribed incorrectly, nothing would be gained from rerunning all the specimens in a given timeframe since it would not change the values attributed to the specimens. If an error occurred such that it was not clear whose specimen was being tested and which results belonged to which specimen, this would require retesting of the group for which the values where uncertain and for those analytes for which the values were uncertain. However, it would be unproductive to require the automatic retesting of all specimens for any error.

Agency policy under which individuals are notified of errors will depend on the circumstances. If the error is corrected before the results are reported to any employee, it is unnecessary to notify each employee that an error was discovered and subsequently corrected. If a discovered error affects an employee after results have been reported, the Medical Review Officer will be notified and the affected employee will also be notified through the appropriate mechanisms established by each agency.

35. Several commentors indicated that the laboratory contract should be suspended if the laboratory committed the same administrative error twice and that the designated reviewing official's discretion to continue a laboratory in the program should be more limited or more clearly defined. The Department has reviewed the comments concerning the point at which a contract should be suspended because of an administrative error and submits that the current policy allows sufficient flexibility and protection to the employee and the laboratory and that it should not be changed. There are no circumstances under which administrative or human error can be entirely eliminated. The major assurance of accuracy in the overall program is the series of checks to assure that such errors are detected and corrected. The reviewing official has been given the necessary flexibility and definition of authority to make the appropriate technical and program judgments concerning the status of each facility and to assure that reasonable and responsible decisions are made. Nevertheless, the Final Guidelines add several features to put greater responsibility on the individual responsible for the day-to-day management of the drug testing laboratory for the quality assurance program and ensuring that quality assurance procedures are followed. These Guidelines also more clearly describe what constitutes a quality assurance and quality control program to detect and correct errors (2.5) and a program of performance testing (3.17–3.19).

We have chosen not to include a formal definition of administrative or clerical error in the Guidelines as was suggested. Among the errors to which either term refers are incorrect transcription of test results or errors in recording specimen identities, i.e., errors that are not due to the analysis of the specimens with regard to analytical accuracy, precision, interpretation of test results, or calibration of equipment. Clearly analytical errors are not considered "administrative." While it is not possible to write guidelines that cover every possibility, at no place in these Guidelines are incorrect analyses considered administrative error but rather are consistently treated as a basis for prompt action against the laboratory by the responsible officials.

36. Several commentors indicated that laboratory inspections should be conducted unannounced and that union representatives should be permitted to accompany the inspection teams. The Guidelines neither require nor prohibit unannounced inspections. They contemplate that agencies will, through their contract with a certified laboratory, specify the terms and conditions of inspections in accordance with the requirements in the Guidelines. If individuals other than members of the inspection team were entitled to accompany the inspectors, it would significantly complicate coordination and conduct of the inspections. More importantly, we see additional participants in the inspection as inhibiting the laboratory's freedom to provide complete cooperation out of concern for protecting proprietary information. While some laboratories may be willing to provide escorted tours to union officials to illustrate the quality of their processes, the Guidelines do not establish a right for union officials to participate in inspections incident to certification of laboratories under these Guidelines (2.4(1) and 3.20).

37. One commentor indicated that any of the five general factors indicated in 3.13(b) as a possible basis for revocation in the certification requirements should inevitably lead to revocation without any further determination that the revocation is "necessary." The issue of how many potential grounds for revocation are necessary to determine that revocation of a laboratory is necessary was considered when the list of grounds was developed. The Department views the nature and seriousness of the facts concerning the grounds for revocation as factors to be weighed in deciding to revoke a certification. It is difficult and would not contribute to the maintenance of high quality testing standards to develop *a priori* statements about the magnitude of an offense or a combination of violations and to formulate necessary actions in response to each possible violation of the provisions of 3.13. All five factors listed are considered serious violations of these certification criteria, and it is not necessary for more than one factor to be violated to take action against a laboratory. However, the Guidelines retain the flexibility for the Secretary to determine that revocation is necessary to ensure the full reliability and accuracy of drug tests and the accurate reporting of test results (3.13(b)).

38. Several commentors indicated that when a laboratory fails a performance test it would be inordinately expensive (especially in high volume laboratories) to retest all samples since the last performance test the laboratory passed and to test for all analytes rather than for the one analyte for which the laboratory had failed performance testing. The reason for retesting all positive samples since the last successful performance test is that the quality of the test results has been called into question. In order to verify test results for the period between a successful performance testing and the failed testing, it will be necessary to retest all specimens tested positive for which an incorrect analysis may have been performed. It is not routinely necessary to retest for all analytes but only for those on which the laboratory failed its performance testing. However, the laboratory may be required to test for other analytes if the performance test failure reflects broader problems (3.19(b)(1)(v)).

39. Several commentors indicated that performance testing every other month is excessive and that quarterly testing would be sufficient to assure the quality of the testing. Others indicated that fewer challenges per shipment would be adequate to determine the quality of the laboratory. Still other individuals stated that the limits for acceptable performance on performance tests were too high in terms of the concentrations used. Others said that the grading criterion of failure based on one false positive was too strict. We have reviewed the concerns that bimonthly performance testing is excessive and maintain that the use of performance tests is a valid outcome measure of performance and will assist in the evaluation of quality of the laboratory performance. If future experience with the program indicates that a lesser frequency will assure the quality of the testing, we will revise the frequency and the number of specimens accordingly. Relatively frequent performance testing reduces the time period for which samples may have to be rerun in case of performance test failure (3.17).

To the extent that the Guidelines amended the cutoff limits for drugs for which employees may be tested for consistency with those currently used by the Department of Defense, it was necessary to modify the values of the various performance test samples correspondingly. We have clarified that a laboratory must achieve an overall grade of 90 percent on the first three cumulative shipments of performance tests and that if such a poor grade is obtained on the first or second challenge that a laboratory cannot achieve an overall grade of 90 percent on the three successive performance test challenges, then the laboratory will fail at that point. Laboratories already in the program must achieve a grade of 90 percent on each shipment of performance testing. It was unclear in the proposed notice whether the grade of 90 percent referred only to the positive samples. We intend that the 90 percent refer only to positive samples, since any negative sample giving rise to a false positive would be the basis for automatic disqualification for initial certification. It also was unclear whether the 90 percent referred to performance on all drugs in the shipment, not on each drug tested. We have clarified the Guidelines in both these areas. We adopted a strategy requiring 90 percent for all drugs because it is not always feasible to have a sufficient number of challenges for each drug in each shipment to avoid a single failure on a drug leading to a failing grade of less than 90 percent (3.19(b)(2)).

40. Some commentors thought laboratories should be required to notify all users if their certification was revoked. Since the requirements in these Guidelines only apply to certification for Federal drug testing programs, it would be inappropriate to require laboratories to notify non-Federal users of revocation or suspension.

41. We have not adopted the recommendations that any changes in the Guidelines be accomplished by publication of a notice, review of comments, and then publication of final changes. (Section 503 of Pub. L. 100-71 required such steps for initial development of these Guidelines.) The time required for this process would not permit rapid adjustment to changes in technology. Accordingly, the Guidelines retain the provision permitting final revision of these Guidelines by publication of a notice in the Federal Register (1.3).

42. One commentor suggested that only positive tests be certified as to accuracy and validity before reporting. Although this practice would reduce paperwork, it does not reflect the potential impact on public safety of false negative results. The Guidelines continue to require that negative results be reviewed carefully and attested to by the proper officials in the same way as positive results (2.4(g)).

43. One commentor wanted us to specify the time the individual responsible for day-to-day management must spend in the laboratory. No change has been made in the Guidelines. The critical factor here is the quality of the work and not the absolute number of hours spent. The Department views the use of outcome measures of performance for the laboratory as more effective in assuring accurate and reliable test results than attempting to set hours for the responsible individual particularly in view of the qualifications which the Guidelines set for the individual responsible for day-to-day management of the drug testing laboratory.

44. The criterion for retesting specimens (i.e., those being challenged) was clarified to indicate that in performing a retest the laboratory must confirm the presence of the substance but does not have to confirm that it is present above the cutoff level. Since the drug levels may deteriorate with time, it is only necessary to show that the drug (or its metabolite) is present to reconfirm its presence during retesting (2.4(i)).

45. A provision has been added to the Guidelines requiring that laboratories be capable of testing for at least the five classes of drugs specified in the Guidelines. The laboratories are being required to possess the flexibility to test for all the specified classes of drugs in order to assure that they have a sufficient range of capabilities to respond to the agencies' testing protocols, including testing for reasonable suspicion (3.4).

46. Several Federal agencies commenting on the proposed guidelines sought waivers of particular provisions in reliance on the original Scientific and Technical Guidelines issued February 13, 1987, which provided that, "Agencies may not deviate from the provisions of these Guidelines without the written approval of the Secretary, Health and Human Services or his designee." This waiver statement, which was not explicit in the proposed guidelines, is included at 1.1(f). Absent such a waiver, these Guidelines represent the exclusive standard for urinalysis testing and agencies may not deviate from these established procedures.

In order to clarify that the laboratory certification standards apply to laboratories which have or seek certification to perform urine drug testing for Federal agencies, a paragraph was added to the applicability section, 1.1(c), stating that Subpart C of the Guidelines applies to any laboratory which has or seeks such certification and that certification is required to perform urine drug testing for Federal agencies.

Section 4(d) of E.O. 12564 states that "agencies shall conduct their drug testing programs in accordance with * * * [scientific and technical] guidelines" promulgated by the Secretary of Health and Human Services. Since the Guidelines impose mandatory requirements on a Government-wide basis, they are exempt from the duty to bargain under section 7117(a)(1) of the Federal Service Labor-Management Relations Statute.

Information Collection Requirements

Information collection and recordkeeping requirements which would be imposed on laboratories engaged in urine drug testing for Federal agencies concern quality assurance and quality control; security and chain of custody; documentation; reports; performance testing; and inspections as set out in 3.7, 3.8, 3.10, 3.11, 3.17, and 3.20. To facilitate ease of use and uniform reporting, standard forms have been developed for chain of custody records and the permanent record books as referenced in 2.2(c) and (f).

The information collection and recordkeeping requirements contained in these Final Guidelines have been approved by the Office of Management and Budget under section 3504(h) of the Paperwork Reduction Act of 1980 and have been assigned control number 09300130, approved through April 30, 1989.

Date: April 1, 1988.

Robert E. Windom,

Assistant Secretary for Health.

Date: April 1, 1988.

Otis R. Bowen,

Secretary.

These Final Mandatory Guidelines are hereby adopted in accordance with Executive Order 12564 and section 503 of Pub. L. 100-71 as set forth below:

MANDATORY GUIDELINES FOR FEDERAL WORKPLACE DRUG TESTING PROGRAMS

Authority: E.O. 12564 and sec. 503 of Pub. L. 100-71.

Subpart A—General

1.1 Applicability.

(a) These mandatory guidelines apply to:

(1) Executive Agencies as defined in 5 U.S.C. 105;

(2) The Uniformed Services, as defined in 5 U.S.C. 2101 (3) (but excluding the Armed Forces as defined in 5 U.S.C. 2101(2));

(3) And any other employing unit or authority of the Federal Government except the United States Postal Service, the Postal Rate Commission, and employing units or authorities in the Judicial and Legislative Branches.

(b) Any agency or component of an agency with a drug testing program in existence as of September 15, 1986, and the Departments of Transportation and Energy shall take such action as may be necessary to ensure that the agency is brought into compliance with these Guidelines no later than 90 days after they take effect, except that any judicial challenge that affects these Guidelines shall not affect drug testing programs subject to this paragraph.

(c) Except as provided in 2.6, Subpart C of these Guidelines (which establishes laboratory certification standards) applies to any laboratory which has or seeks certification to perform urine drug testing for Federal agencies under a drug testing program conducted under E.O. 12564. Only laboratories certified under these standards are authorized to perform urine drug testing for Federal agencies.

(d) The Intelligence Community, as defined by Executive Order No. 12333, shall be subject to these Guidelines only to the extent agreed to by the head of the affected agency.

(e) These Guidelines do not apply to drug testing conducted under legal authority other than E.O. 12564, including testing of persons in the criminal justice system, such as arrestees, detainees, probationers, incarcerated persons, or parolees.

(f) Agencies may not deviate from the provisions of these Guidelines without the written approval of the Secretary. In requesting approval for a deviation, an agency must petition the Secretary in writing and describe the specific provision or provisions for which a deviation is sought and the rationale therefor. The Secretary may approve the request upon a finding of good cause as determined by the Secretary.

1.2 Definitions.

For purposes of these Guidelines the following definitions are adopted:

Aliquot A portion of a specimen used for testing.

Chain of Custody Procedures to account for the integrity of each urine specimen by tracking its handling and storage from point of specimen collection to final disposition of the specimen. These procedures shall require that an approved agency chain of custody form be used from time of collection to receipt by the laboratory and that upon receipt of the laboratory an appropriate laboratory chain of custody form(s) account for the sample or sample aliquots within the laboratory. Chain of custody forms shall, at a minimum, include an entry documenting date and purpose each time a specimen or aliquot is handled or transferred and identifying every individual in the chain of custody.

Collection Site A place designated by the agency where individuals present themselves for the purpose of providing a specimen of their urine to be analyzed for the presence of drugs.

Collection Site Person A person who instructs and assists individuals at a collection site and who receives and makes an initial examination of the urine specimen provided by those individuals. A collection site person shall have successfully completed training to carry out this function.

Confirmatory Test A second analytical procedure to identify the presence of a specific drug or metabolite which is independent of the initial test and which uses a different technique and chemical principle from that of the intitial test in order to ensure reliability

and accuracy. (At this time gas chromatography/mass spectrometry (GC/MS) is the only authorized confirmation method for cocaine, marijuana, opiates, amphetamines, and phencyclidine.)

Initial Test (also known as Screening Test) An immunossay screen to eliminate "negative" urine specimens from further consideration.

Medical Review Officer A licensed physician responsible for receiving laboratory results generated by an agency's drug testing program who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's positive test result together with his or her medical history and any other relevant biomedical information.

Permanent Record Book A permanently bound book in which identifying data on each specimen collected at a collection site are permanently recorded in the sequence of collection.

Reason to Believe Reason to believe that a particular individual may alter or substitute the urine specimen as provided in section 4(c) of E.O. 12564.

Secretary The Secretary of Health and Human Services or the Secretary's designee. The Secretary's designee may be contractor or other recognized organization which acts on behalf of the Secretary in implementing these Guidelines.

1.3 Future Revisions.

In order to ensure the full reliability and accuracy of drug assays, the accurate reporting of test results, and the integrity and efficacy of Federal drug testing programs, the Secretary may make changes to these Guidelines to reflect improvements in the available scie ice and technology. These changes will be published in final as a notice in the Federal Register.

Subpart B—Scientific and Technical Requirements

2.1 The Drugs.

(a) The President's Executive Order 12564 defines "illegal drugs" as those included in Schedule I or II of the Controlled Substances Act (CSA), but not when used pursuant to a valid prescription or when used as otherwise authorized by law. Hundreds of drugs are covered under Schedule I and II and while it is not feasible to test routinely for all of them, Federal drug testing programs shall test for drugs as follows:

(1) Federal agency applicant and random drug testing programs shall at a minimum test for marijuana and cocaine;

(2) Federal agency applicant and random drug testing programs are also authorized to test for opiates, amphetamines, and phencyclidine; and

(3) When conducting reasonable suspicion, accident, or unsafe practice testing, a Federal agency may test for any drug listed in Schedule I or II of the CSA.

(b) Any agency covered by these guidelines shall petition the Secretary in writing for approval to include in its testing protocols any drugs (or classes of drugs) not listed for Federal agency testing in paragraph (a) of this section. Such approval shall be limited to the use of the appropriate science and technology and shall not otherwise limit agency discretion to test for any drugs covered under Schedule I or II of the CSA.

(c) Urine specimens collected pursuant to Executive Order 12564, Pub. L. 100–71, and these Guidelines shall be used only to test for those drugs included in agency drug-free workplace plans and may not be used to conduct any other analysis or test unless otherwise authorized by law.

(d) These Guidelines are not intended to limit any agency which is specifically authorized by law to include additional categories of drugs in the drug testing of its own employees or employees in its regulated industries.

2.2 Specimen Collection Procedures.

(a) Designation of Collection Site. Each agency drug testing program shall have one or more designated collection sites which have all necessary personnel, materials, equipment, facilities, and supervision to provide for the collection, security, temporary storage, and shipping or transportation of urine specimens to a certified drug testing laboratory.

(b) Security Procedures shall provide for the designated collection site to be secure. If a collection site facility is dedicated solely to urine collection, it shall be secure at all times. If a facility cannot be dedicated solely to drug testing, the portion of the facility used for testing shall be secured during drug testing.

(c) Chain of Custody. Chain of custody standardized forms shall be properly executed by authorized collection site personnel upon receipt of specimens. Handling and transportation of urine specimens from one authorized individual or place to another shall always be accomplished through chain of custody procedures. Every effort shall be made to minimize the number of persons handling specimens.

(d) Access to Authorized Personnel Only. No unauthorized personnel shall be permitted in any part of the designated collection site when urine specimens are collected or stored.

(e) Privacy. Procedures for collecting urine specimens shall allow individual privacy unless there is reason to believe that a particular individual may alter or substitute the specimen to be provided.

(f) Integrity and Identity of Specimen. Agencies shall take precautions to ensure that a urine specimen not be adulterated or diluted during the collection procedure and that information on the urine bottle and in the record book can identify the individual from whom the specimen was collected. The following minimum precautions shall be taken to ensure that unadulterated specimens are obtained and correctly identified:

(1) To deter the dilution of specimens at the collection site, toilet bluing agents shall be placed in toilet tanks wherever possible, so the reservoir of water in the toilet bowl always remains blue. There shall be no other source of water (e.g., no shower or sink) in the enclosure where urination occurs.

(2) When an individual arrives at the collection site, the collection site person shall request the individual to present photo identification. If the individual does not have proper photo identification, the collection site person shall contact the supervisor of the individual, the coordinator of the drug testing program, or any other agency official who can positively identify the individual. If the individual's identity cannot be established, the collection site person shall not proceed with the collection.

(3) If the individual fails to arrive at the assigned time, the collection site person shall contact the appropriate authority to obtain guidance on the action to be taken.

(4) The collection site person shall ask the individual to remove any unnecessary outer garments such as a coat or jacket that might conceal items or substances that could be used to tamper with or adulterate the individual's urine specimen. The collection site person shall ensure that all personal belongings such as a purse or briefcase remain with the outer garments. The individual may retain his or her wallet.

(5) The individual shall be instructed to wash and dry his or her hands prior to urination.

(6) After washing hands, the individual shall remain in the presence of the collection site person and shall not have access to any water fountain, faucet, soap dispenser, cleaning agent or

any other materials which could be used to adulterate the specimen.

(7) The individual may provide his/her specimen in the privacy of a stall or otherwise partitioned area that allows for individual privacy.

(8) The collection site person shall note any unusual behavior or appearance in the permanent record book.

(9) In the exceptional event that an agency-designated collection site is not accessible and there is an immediate requirement for specimen collection (e.g., an accident investigation), a public rest room may be used according to the following procedures: A collection site person of the same gender as the individual shall accompany the individual into the public rest room which shall be made secure during the collection procedure. If possible, a toilet bluing agent shall be placed in the bowl and any accessible toilet tank. The collection site person shall remain in the rest room, but outside the stall, until the specimen is collected. If no bluing agent is available to deter specimen dilution, the collection site person shall instruct the individual not to flush the toilet until the specimen is delivered to the collection site person. After the collection site person has possession of the specimen, the individual will be instructed to flush the toilet and to participate with the collection site person in completing the chain of custody procedures.

(10) Upon receiving the specimen from the individual, the collection site person shall determine that it contains at least 60 milliliters of urine. If there is less than 60 milliliters of urine in the container, additional urine shall be collected in a separate container to reach a total of 60 milliliters. (The temperature of the partial specimen in each separate container shall be measured in accordance with paragraph (f)(12) of this section, and the partial specimens shall be combined in one container.) The individual may be given a reasonable amount of liquid to drink for this purpose (e.g., a glass of water). If the individual fails for any reason to provide 60 milliliters of urine, the collection site person shall contact the appropriate authority to obtain guidance on the action to be taken.

(11) After the specimen has been provided and submitted to the collection site person, the individual shall be allowed to wash his or her hands.

(12) Immediately after the specimen is collected, the collection site person shall measure the temperature of the specimen. The temperature measuring device used must accurately reflect the temperature of the specimen and not contaminate the specimen. The time from urination to temperature measurement is critical and in no case shall exceed 4 minutes.

(13) If the temperature of a specimen is outside the range of 32.5°–37.7°C/90.5°–99.8°F, that is a reason to believe that the individual may have altered or substituted the specimen, and another specimen shall be collected under direct observation of a same gender collection site person and both specimens shall be forwarded to the laboratory for testing. An individual may volunteer to have his or her oral temperature taken to provide evidence to counter the reason to believe the individual may have altered or substituted the specimen caused by the specimen's temperature falling outside the prescribed range.

(14) Immediately after the specimen is collected, the collection site person shall also inspect the specimen to determine its color and look for any signs of contaminants. Any unusual findings shall be noted in the permanent record book.

(15) All specimens suspected of being adulterated shall be forwarded to the laboratory for testing.

(16) Whenever there is reason to believe that a particular individual may alter or substitute the specimen to be provided, a second specimen shall be obtained as soon as possible under the direct observation of a same gender collection site person.

(17) Both the individual being tested and the collection site person shall keep the specimen in view at all times prior to its being sealed and labeled. If the specimen is transferred to a second bottle, the collection site person shall request the individual to observe the transfer of the specimen and the placement of the tamperproof seal over the bottle cap and down the sides of the bottle.

(18) The collection site person and the individual shall be present at the same time during procedures outlined in paragraphs (f)((19)–(f)(22) of this section.

(19) The collection site person shall place securely on the bottle an identification label which contains the date, the individual's specimen number, and any other identifying information provided or required by the agency.

(20) The individual shall initial the identification label on the specimen bottle for the purpose of certifying that it is the specimen collected from him or her.

(21) The collection site person shall enter in the permanent record book all information identifying the specimen. The collection site person shall sign the permanent record book next to the identifying information.

(22) The individual shall be asked to read and sign a statement in the permanent record book certifying that the specimen identified as having been collected from him or her is in fact that specimen he or she provided.

(23) A higher level supervisor shall review and concur in advance with any decision by a collection site person to obtain a specimen under the direct observation of a same gender collection site person based on a reason to believe that the individual may alter or substitute the specimen to be provided.

(24) The collection site person shall complete the chain of custody form.

(25) The urine specimen and chain of custody form are now ready for shipment. If the specimen is not immediately prepared for shipment, it shall be appropriately safeguarded during temporary storage.

(26) While any part of the above chain of custody procedures is being performed, it is essential that the urine specimen and custody documents be under the control of the involved collection site person. If the involved collection site person leaves his or her work station momentarily, the specimen and custody form shall be taken with him or her or shall be secured. After the collection site person returns to the work station, the custody process will continue. If the collection site person is leaving for an extended period of time, the specimen shall be packaged for mailing before he or she leaves the site.

(g) Collection Control. To the maximum extent possible, collection site personnel shall keep the individual's specimen bottle within sight both before and after the individual has urinated. After the specimen is collected, it shall be properly sealed and labeled. An approved chain of custody form shall be used for maintaining control and accountability of each specimen from the point of collection to final disposition of the specimen. The date and purpose shall be documented on an approved chain of custody form each time a specimen is handled or transferred and every individual in the chain shall be identified. Every effort shall be made to minimize the number of persons handling specimens.

(h) Transportation to Laboratory. Collection site personnel shall arrange to ship the collected specimens to the drug testing laboratory. The specimens shall be placed in containers designed to minimize the possibility of damage during shipment, for example, specimen boxes or padded mailers; and those containers shall be securely sealed to eliminate the possibility of undetected tampering. On the tape sealing the

container, the collection site supervisor shall sign and enter the date specimens were sealed in the containers for shipment. The collection site personnel shall ensure that the chain of custody documentation is attached to each container sealed for shipment to the drug testing laboratory.

2.3 Laboratory Personnel.

(a) Day-to-Day Management.

(1) The laboratory shall have a qualified individual to assume professional, organizational, educational, and administrative responsibility for the laboratory's urine drug testing facility.

(2) This individual shall have documented scientific qualifications in analytical forensic toxicology. Minimum qualifications are:

(i) Certification as a laboratory director by the State in forensic or clinical laboratory toxicology; or

(ii) A Ph.D. in one of the natural sciences with an adequate undergraduate and graduate education in biology, chemistry, and pharmacology or toxicology, or

(iii) Training and experience comparable to a Ph.D. in one of the natural sciences, such as a medical or scientific degree with additional training and laboratory/research experience in biology, chemistry, and pharmacology or toxicology; and

(iv) In addition to the requirements in (i), (ii), and (iii) above, minimum qualifications also require:

(A) Appropriate experience in analytical forensic toxicology including experience with the analysis of biological material for drugs of abuse, and

(B) Appropriate training and/or experience in forensic applications of analytical toxicology, e.g., publications, court testimony, research concerning analytical toxicology of drugs of abuse, or other factors which qualify the individual as an expert witness in forensic toxicology.

(3) This individual shall be engaged in and responsible for the day-to-day management of the drug testing laboratory even where another individual has overall responsibility for an entire multispecialty laboratory.

(4) This individual shall be responsible for ensuring that there are enough personnel with adequate training and experience to supervise and conduct the work of the drug testing laboratory. He or she shall assure the continued competency of laboratory personnel by documenting their inservice training, reviewing their work performance, and verifying their skills.

(5) This individual shall be responsible for the laboratory's having a procedure manual which is complete, up-to-date, available for personnel performing tests, and followed by those personnel. The procedure manual shall be reviewed, signed, and dated by this responsible individual whenever procedures are first placed into use or changed or when a new individual assumes responsibility for management of the drug testing laboratory. Copies of all procedures and dates on which they are in effect shall be maintained. (Specific contents of the procedure manual are described in 2.4(n)(1).)

(6) This individual shall be responsible for maintaining a quality assurance program to assure the proper performance and reporting of all test results; for maintaining acceptable analytical performance for all controls and standards; for maintaining quality control testing; and for assuring and documenting the validity, reliability, accuracy, precision, and performance characteristics of each test and test system.

(7) This individual shall be responsible for taking all remedial actions necessary to maintain satisfactory operation and performance of the laboratory in response to quality control systems not being within performance specifications, errors in result reporting or in analysis of performance testing results. This individual shall ensure that sample results are not reported until all corrective actions have been taken and he or she can assure that the tests results provided are accurate and reliable.

(b) Test Validation. The laboratory's urine drug testing facility shall have a qualified individual(s) who reviews all pertinent data and quality control results in order to attest to the validity of the laboratory's test reports. A laboratory may designate more than one person to perform this function. This individual(s) may be any employee who is qualified to be responsible for day-to-day management or operation of the drug testing laboratory.

(c) Day-to-Day Operations and Supervision of Analysts. The laboratory's urine drug testing facility shall have an individual to be responsible for day-to-day operations and to supervise the technical analysts. This individual(s) shall have at least a bachelor's degree in the chemical or biological sciences or medical technology or equivalent. He or she shall have training and experience in the theory and practice of the procedures used in the laboratory, resulting in his or her thorough understanding of quality control practices and procedures; the review, interpretation, and reporting of test results; maintenance of chain of custody; and proper remedial actions to be taken in response to test systems being out of control limits or detecting aberrant test or quality control results.

(d) Other Personnel. Other technicians or nontechnical staff shall have the necessary training and skills for the tasks assigned.

(e) Training. The laboratory's urine drug testing program shall make available continuing education programs to meet the needs of laboratory personnel.

(f) Files. Laboratory personnel files shall include: resume of training and experience; certification or license, if any; references; job descriptions; records of performance evaluation and advancement; incident reports; and results of tests which establish employee competency for the position he or she holds, such as a test for color blindness, if appropriate.

2.4 Laboratory Analysis Procedures.

(a) Security and Chain of Custody. (1) Drug testing laboratories shall be secure at all times. They shall have in place sufficient security measures to control access to the premises and to ensure that no unauthorized personnel handle specimens or gain access to the laboratory processes or to areas where records are stored. Access to these secured areas shall be limited to specifically authorized individuals whose authorization is documented. With the exception of personnel authorized to conduct inspections on behalf of Federal agencies for which the laboratory is engaged in urine testing or on behalf of the Secretary, all authorized visitors and maintenance and service personnel shall be escorted at all times. Documentation of individuals accessing these areas, dates, and time of entry and purpose of entry must be maintained.

(2) Laboratories shall use chain of custody procedures to maintain control and accountability of specimens from receipt through completion of testing, reporting of results, during storage, and continuing until final disposition of specimens. The date and purpose shall be documented on an appropriate chain of custody form each time a specimen is handled or transferred, and every individual in the chain shall be identified. Accordingly, authorized technicians shall be responsible for each urine specimen or aliquot in their possession and shall sign and complete chain of custody forms for those specimens or aliquots as they are received.

(b) Receiving. (1) When a shipment of specimens is received, laboratory personnel shall inspect each package for evidence of possible tampering and compare information on specimen bottles within each package to the information on the accompanying chain of custody forms. Any direct evidence of tampering or discrepancies in the information on specimen bottles and the agency's chain of custody forms attached to the shipment shall be immediately reported to the agency and shall be noted on the laboratory's chain of custody form which shall accompany the specimens while they are in the laboratory's possession.

(2) Specimen bottles will normally be retained within the laboratory's accession area until all analyses have been completed. Aliquots and the laboratory's chain of custody forms shall be used by laboratory personnel for conducting initial and confirmatory tests.

(c) Short-Term Refrigerated Storage. Specimens that do not receive an initial test within 7 days of arrival at the laboratory shall be placed in secure refrigeration units. Temperatures shall not exceed 6°C. Emergency power equipment shall be available in case of prolonged power failure.

(d) Specimen Processing. Laboratory facilities for urine drug testing will normally process specimens by grouping them into batches. The number of specimens in each batch may vary significantly depending on the size of the laboratory and its workload. When conducting either initial or confirmatory tests, every batch shall contain an appropriate number of standards for calibrating the instrumentation and a minimum of 10 percent controls. Both quality control and blind performance test samples shall appear as ordinary samples to laboratory analysts.

(e) Initial Test. (1) The initial test shall use an immunoassay which meets the requirements of the Food and Drug Administration for commercial distribution. The following initial cutoff levels shall be used when screening specimens to determine whether they are negative for these five drugs or classes of drugs:

	Initial test level (ng/ml)
Marijuana metabolites	100
Cocaine metabolites	300
Opiate metabolites	[1] 300
Phencyclidine	25
Amphetamines	1,000

[1] 25ng/ml if immunoassay specific for free morphine.

(2) These test levels are subject to change by the Department of Health and Human Services as advances in technology or other considerations warrant identification of these substances at other concentrations. Initial test methods and testing levels for other drugs shall be submitted in writing by the agency for the written approval of the Secretary.

(f) Confirmatory Test. (1) All specimens identified as positive on the initial test shall be confirmed using gas chromatography/mass spectrometry (GC/MS) techniques at the cutoff values listed in this paragraph for each drug. All confirmations shall be by quantitative analysis. Concentrations which exceed the linear region of the standard curve shall be documented in the laboratory record as "greater than highest standard curve value."

	Con rma-tory test level (ng/ml)
Marijuana metabolite [1]	15
Cocaine metabolite [2]	150
Opiates:	
Morphine	* 300
Codeine	* 300
Phencyclidine	25
Amphetamines:	
Amphetamine	500
Methamphetamine	500

[1] Delta-9-tetrahydrocannabinol-9-carboxylic acid.
[2] Benzoylecgonine.

(2) These test levels are subject to change by the Department of Health and Human Services as advances in technology or other considerations warrant identification of these substances at other concentrations. Confirmatory test methods and testing levels for other drugs shall be submitted in writing by the agency for the written approval of the Secretary.

(g) Reporting Results. (1) The laboratory shall report test results to the agency's Medical Review Officer within an average of 5 working days after receipt of the specimen by the laboratory. Before any test result is reported (the results of initial tests, confirmatory tests, or quality control data), it shall be reviewed and the test certified as an accurate report by the responsible individual. The report shall identify the drugs/metabolites tested for, whether positive or negative, and the cutoff for each, the specimen number assigned by the agency, and the drug testing laboratory specimen identification number. The results (positive and negative) for all specimens submitted at the same time to the laboratory shall be reported back to the Medical Review Officer at the same time.

(2) The laboratory *shall report as negative* all specimens which are negative on the initial test or negative on the confirmatory test. Only specimens confirmed positive shall be reported positive for a specific drug.

(3) The Medical Review Officer may request from the laboratory and the laboratory shall provide quantitation of test results. The Medical Review Officer may not disclose quantitation of test results to the agency but shall report only whether the test was positive or negative.

(4) The laboratory may transmit results to the Medical Review Officer by various electronic means (for example, teleprinters, facsimile, or computer) in a manner designed to ensure confidentiality of the information. Results may not be provided verbally by telephone. The laboratory must ensure the security of the data transmission and limit access to any data transmission, storage, and retrieval system.

(5) The laboratory shall send only to the Medical Review Officer a certified copy of the original chain of custody form signed by the individual responsible for day-to-day management of the drug testing laboratory or the individual responsible for attesting to the validity of the test reports.

(6) The laboratory shall provide to the agency official responsible for coordination of the drug-free workplace program a monthly statistical summary of urinalysis testing of Federal employees and shall not include in the summary any personal identifying information. Initial and confirmation data shall be included from test results reported within that month. Normally this summary shall be forwarded by registered or certified mail not more than 14 calendar days after the end of the month covered by the summary. The summary shall contain the following information:

(i) Initial Testing:

(A) Number of specimens received;

(B) Number of specimens reported out; and

(C) Number of specimens screened positive for:

Marijuana metabolites
Cocaine metabolites
Opiate metabolites
Phencyclidine
Amphetamines

(ii) Confirmatory Testing:

(A) Number of specimens received for confirmation;

(B) Number of specimens confirmed positive for:

Marijuana metabolite

Cocaine metabolite
Morphine, codeine
Phencyclidine
Amphetamine
Methamphetamine

(7) The laboratory shall make available copies of all analytical results for Federal drug testing programs when requested by DHHS or any Federal agency for which the laboratory is performing drug testing services.

(8) Unless otherwise instructed by the agency in writing, all records pertaining to a given urine specimen shall be retained by the drug testing laboratory for a minimum of 2 years.

(h) Long-Term Storage. Long-term frozen storage (−20 °C or less) ensures that positive urine specimens will be available for any necessary retest during administrative or disciplinary proceedings. Unless otherwise authorized in writing by the agency, drug testing laboratories shall retain and place in properly secured long-term frozen storage for a minimum of 1 year all specimens confirmed positive. Within this 1-year period an agency may request the laboratory to retain the specimen for an additional period of time, but if no such request is received the laboratory may discard the specimen after the end of 1 year, except that the laboratory shall be required to maintain any specimens under legal challenge for an indefinite period.

(i) Retesting Specimens. Because some analytes deteriorate or are lost during freezing and/or storage, quantitation for a retest is not subject to a specific cutoff requirement but must provide data sufficient to confirm the presence of the drug or metabolite.

(j) Subcontracting. Drug testing laboratories shall not subcontract and shall perform all work with their own personnel and equipment unless otherwise authorized by the agency. The laboratory must be capable of performing testing for the five classes of drugs (marijuana, cocaine, opiates, phencyclidine, and amphetamines) using the initial immunoassay and confirmatory GC/MS methods specified in these Guidelines.

(k) Laboratory Facilities. (1) Laboratory facilities shall comply with applicable provisions of any State licensure requirements.

(2) Laboratories certified in accordance with Subpart C of these Guidelines shall have the capability, at the same laboratory premises, of performing initial and confirmatory tests for each drug or metabolite for which service is offered.

(l) Inspections. The Secretary, any Federal agency utilizing the laboratory, or any organization performing laboratory certification on behalf of the Secretary shall reserve the right to inspect the laboratory at any time. Agency contracts with laboratories for drug testing, as well as contracts for collection site services, shall permit the agency to conduct unannounced inspections. In addition, prior to the award of a contract the agency shall carry out preaward inspections and evaluation of the procedural aspects of the laboratory's drug testing operation.

(m) Documentation. The drug testing laboratories shall maintain and make available for at least 2 years documentation of all aspects of the testing process. This 2-year period may be extended upon written notification by DHHS or by any Federal agency for which laboratory services are being provided. The required documentation shall include personnel files on all individuals authorized to have access to specimens; chain of custody documents; quality assurance/quality control records; procedure manuals; all test data (including calibration curves and any calculations used in determining test results); reports; performance records on performance testing; performance on certification inspections; and hard copies of computer-generated data. The laboratory shall be required to maintain documents for any specimen under legal challenge for an indefinite period.

(n) Additional Requirements for Certified Laboratories.—(1) Procedure Manual. Each laboratory shall have a procedure manual which includes the principles of each test, preparation of reagents, standards and controls, calibration procedures, derivation of results, linearity of methods, sensitivity of the methods, cutoff values, mechanisms for reporting results, controls, criteria for unacceptable specimens and results, remedial actions to be taken when the test systems are outside of acceptable limits, reagents and expiration dates, and references. Copies of all procedures and dates on which they are in effect shall be maintained as part of the manual.

(2) Standards and Controls. Laboratory standards shall be prepared with pure drug standards which are properly labeled as to content and concentration. The standards shall be labeled with the following dates: when received; when prepared or opened; when placed in services; and expiration date.

(3) Instruments and Equipment. (i) Volumetric pipettes and measuring devices shall be certified for accuracy or be checked by gravimetric, colorimetric, or other verification procedure. Automatic pipettes and dilutors shall be checked for accuracy and reproducibility before being placed in service and checked periodically thereafter.

(ii) There shall be written procedures for instrument set-up and normal operation, a schedule for checking critical operating characteristics for all instruments, tolerance limits for acceptable function checks and instructions for major trouble shooting and repair. Records shall be available on preventive maintenance.

(4) Remedial Actions. There shall be written procedures for the actions to be taken when systems are out of accceptable limits or errors are detected. There shall be documentation that these procedures are followed and that all necessary corrective actions are taken. There shall also be in place systems to verify all stages of testing and reporting and documentation that these procedures are followed.

(5) Personnel Available To Testify at Proceedings. A laboratory shall have qualified personnel available to testify in an administrative or disciplinary proceeding against a Federal employee when that proceeding is based on positive urinalysis results reported by the laboratory.

2.5 Quality Assurance and Quality Control.

(a) General. Drug testing laboratories shall have a quality assurance program which encompasses all aspects of the testing process including but not limited to specimen acquisition, chain of custody, security and reporting of results, initial and confirmatory testing, and validation of analytical procedures. Quality assurance procedures shall be designed, implemented, and reviewed to monitor the conduct of each step of the process of testing for drugs.

(b) Laboratory Quality Control Requirements for Initial Tests. Each analytical run of specimens to be screened shall include:

(1) Urine specimens certified to contain no drug;

(2) Urine specimens fortified with known standards; and

(3) Positive controls with the drug or metabolite at or near the threshold (cutoff).

In addition, with each batch of samples a sufficient number of standards shall be included to ensure and document the linearity of the assay method over time in the concentration area of the cutoff. After acceptable values are obtained for the known standards, those values will be used to calculate sample data. Implementation of procedures to ensure that carryover does not contaminate the

testing of an individual's specimen shall be documented. A minimum of 10 percent of all test samples shall be quality control specimens. Laboratory quality control samples, prepared from spiked urine samples of determined concentration shall be included in the run and should appear as normal samples to laboratory analysts. One percent of each run, with a minimum of at least one sample, shall be the laboratory's own quality control samples.

(c) Laboratory Quality Control Requirements for Confirmation Tests. Each analytical run of specimens to be confirmed shall include:

(1) Urine specimens certified to contain no drug;

(2) Urine specimens fortified with known standards; and

(3) Positive controls with the drug or metabolite at or near the threshold (cutoff).

The linearity and precision of the method shall be periodically documented. Implementation of procedures to ensure that carryover does not contaminate the testing of an individual's specimen shall also be documented.

(d) Agency Blind Performance Test Procedures. (1) Agencies shall purchase drug testing services only from laboratories certified by DHHS or a DHHS-Recognized certification program in accordance with these Guidelines. Laboratory participation is encouraged in other performance testing surveys by which the laboratory's performance is compared with peers and reference laboratories.

(2) During the initial 90-day period of any new drug testing program, each agency shall submit blind performance test specimens to each laboratory it contracts with in the amount of at least 50 percent of the total number of samples submitted (up to a maximum of 500 samples) and thereafter a minimum of 10 percent of all samples (to a maximum of 250) submitted per quarter.

(3) Approximately 80 percent of the blind performance test samples shall be blank (i.e., certified to contain no drug) and the remaining samples shall be positive for one or more drugs per sample in a distribution such that all the drugs to be tested are included in approximately equal frequencies of challenge. The positive samples shall be spiked only with those drugs for which the agency is testing.

(4) The Secretary shall investigate any unsatisfactory performance testing result and, based on this investigation, the laboratory shall take action to correct the cause of the unsatisfactory performance test result. A record shall be make of the Secretary's investigative findings and the corrective action taken by the laboratory, and that record shall be dated and signed by the individuals responsible for the day-to-day management and operation of the drug testing laboratory. Then the Secretary shall send the document to the agency contracting officer as a report of the unsatisfactory performance testing incident. The Secretary shall ensure notification of the finding to all other Federal agencies for which the laboratory is engaged in urine drug testing and coordinate any necessary action.

(5) Should a false positive error occur on a blind performance test specimen and the error is determined to be an administrative error (clerical, sample mixup, etc.), the Secretary shall require the laboratory to take corrective action to minimize the occurrence of the particular error in the future; and, if there is reason to believe the error could have been systematic, the Secretary may also require review and reanalysis of previously run specimens.

(6) Should a false positive error occur on a blind performance test specimen and the error is determined to be a technical or methodological error, the laboratory shall submit all quality control data from the batch of specimens which included the false positive specimen. In addition, the laboratory shall retest all specimens analyzed positive for that drug or metabolite from the time of final resolution of the error back to the time of the last satisfactory performance test cycle. This retesting shall be documented by a statement signed by the individual responsible for day-to-day management of the laboratory's urine drug testing. The Secretary may require an on-site review of the laboratory which may be conducted unannounced during any hours of operations of the laboratory. The Secretary has the option of revoking (3.13) or suspending (3.14) the laboratory's certification or recommending that no further action be taken if the case is one of less serious error in which corrective action has already been taken, thus reasonably assuring that the error will not occur again.

2.6 Interim Certification Procedures.

During the interim certification period as determined under paragraph (c), agencies shall ensure laboratory competence by one of the following methods:

(a) Agencies may use agency or contract laboratories that have been certified for urinalysis testing by the Department of Defense; or

(b) Agencies may develop interim self-certification procedures by establishing preaward inspections and performance testing plans approved by DHHS.

(c) The period during which these interim certification procedures will apply shall be determined by the Secretary. Upon noticed by the Secretary that these interim certification procedures are no longer available, all Federal agencies subject to these Guidelines shall only use laboratories that have been certified in accordance with Subpart C of these Guidelines and all laboratories approved for interim certification under paragraphs (a) and (b) of this section shall become certified in accordance with Subpart C within 120 days of the date of this notice.

2.7 Reporting and Review of Results.

(a) Medical Review Officer Shall Review Results. An essential part of the drug testing program is the final review of results. A positive test result does not automatically identify an employee/applicant as an illegal drug user. An individual with a detailed knowledge of possible alternate medical explanations is essential to the review of results. This review shall be performed by the Medical Review Officer prior to the transmission of results to agency administrative officials.

(b) Medical Review Officer—Qualifications and Responsibilities. The Medical Review Officer shall be a licensed physician with knowledge of substance abuse disorders and may be an agency or contract employee. The role of the Medical Review Officer is to review and interpret positive test results obtained through the agency's testing program. In carrying out this responsibility, the Medical Review Officer shall examine alternate medical explanations for any positive test result. This action could include conducting a medical interview with the individual, review of the individual's medical history, or review of any other relevant biomedical factors. The Medical Review Officer shall review all medical records made available by the tested individual when a confirmed positive test could have resulted from legally prescribed medication. The Medical Review Officer shall not, however, consider the results of urine samples that are not obtained or processed in accordance with these Guidelines.

(c) Positive Test Result. Prior to making a final decision to verify a positive test result, the Medical Review Officer shall give the individual an opportunity to discuss the test result

with him or her. Following verification of a positive test result, the Medical Review Officer shall refer the case to the agency Employee Assistance Program and to the management official empowered to recommend or take administrative action.

(d) Verification for opiates; review for prescription mediation. Before the Medical Review Officer verifies a confirmed positive result for opiates, he or she shall determine that there is clinical evidence—in addition to the urine test—of illegal use of any opium, opiate, or opium derivative (e.g., morphine/codeine) listed in Schedule I or II of the Controlled Substances Act. (This requirement does not apply if the agency's GC/MS confirmation testing for opiates confirms the presence of 6-monoacetylmorphine.)

(e) Reanalysis Authorized. Should any question arise as to the accuracy or validity of a positive test result, only the Medical Review Officer is authorized to order a reanalysis of the original sample and such retests are authorized only at laboratories certified under these Guidelines.

(f) Result Consistent with Legal Drug Use. If the Medical Review Officer determines there is a legitimate medical explanation for the positive test result, he or she shall determine that the result is consistent with legal drug use and take no further action.

(g) Result Scientifically Insufficient. Additionally, the Medical Review Officer, based on review of inspection reports, quality control data, multiple samples, and other pertinent results, may determine that the result is scientifically insufficient for further action and declare the test specimen negative. In this situation the Medical Review Officer may request reanalysis of the original sample before making this decision. (The Medical Review Officer may request that reanalysis be performed by the same laboratory or, as provided in 2.7(e), that an aliquot of the original specimen be sent for reanalysis to an alternate laboratory which is certified in accordance with these Guidelines.) The laboratory shall assist in this review process as requested by the Medical Review Officer by making available the individual responsible for day-to-day management of the urine drug testing laboratory or other employee who is a forensic toxicologist or who has equivalent forensic experience in urine drug testing, to provide specific consultation as required by the agency. The Medical Review Officer shall report to the Secretary all negative findings based on scientific insufficiency but shall not include any personal identifying information in such reports.

2.8 Protection of Employee Records.

Consistent with 5 U.S.C. 522a(m) and 48 CFR 24.101–24.104, all laboratory contracts shall require that the contractor comply with the Privacy Act, 5 U.S.C. 552a. In addition, laboratory contracts shall require compliance with the patient access and confidentiality provisions of section 503 of Pub. L. 100–71. The agency shall establish a Privacy Act System of Records or modify an existing system, or use any applicable Government-wide system of records to cover both the agency's and the laboratory's records of employee urinalysis results. The contract and the Privacy Act System shall specifically require that employee records be maintained and used with the highest regard for employee privacy.

2.9 Individual Access to Test and Laboratory Certification Results.

In accordance with section 503 of Pub. L. 100–71, any Federal employee who is the subject of a drug test shall, upon written request, have access to any records relating to his or her drug test and any records relating to the results of any relevant certification, review, or revocation-of-certification proceedings.

Subpart C—Certification of Laboratories Engaged in Urine Drug Testing for Federal Agencies

3.1 Introduction.

Urine drug testing is a critical component of efforts to combat drug abuse in our society. Many laboratories are familiar with good laboratory practices but may be unfamiliar with the special procedures required when drug test results are used in the employment context. Accordingly, the following are minimum standards to certify laboratories engaged in urine drug testing for Federal agencies. Certification, even at the highest level, does not guarantee accuracy of each result reported by a laboratory conducting urine drug testing for Federal agencies. Therefore, results from laboratories certified under these Guidelines must be interpreted with a complete understanding of the total collection, analysis, and reporting process before a final conclusion is made.

3.2 Goals and Objectives of Certification.

(a) Uses of Urine Drug Testing. Urine drug testing is an important tool to identify drug users in a variety of settings. In the proper context, urine drug testing can be used to deter drug abuse in general. To be a useful tool, the testing procedure must be capable of detecting drugs or their metabolites at concentrations indicated in 2.4 (e) and (f).

(b) Need to Set Standards; Inspections. Reliable discrimination between the presence, or absence, of specific drugs or their metabolites is critical, not only to achieve the goals of the testing program but to protect the rights of the Federal employees being tested. Thus, standards have been set which laboratories engaged in Federal employee urine drug testing must meet in order to achieve maximum accuracy of test results. These laboratories will be evaluated by the Secretary or the Secretary's designee as defined in 1.2 in accordance with these Guidelines. The qualifying evaluation will involve three rounds of performance testing plus on-site inspection. Maintenance of certification requires participation in an every-other-month performance testing program plus periodic, on-site inspections. One inspection following successful completion of a performance testing regimen is required for initial certification. This must be followed by a second inspection within 3 months, after which biannual inspections will be required to maintain certification.

(c) Urine Drug Testing Applies Analytical Forensic Toxicology. The possible impact of a positive test result on an individual's livelihood or rights, together with the possibility of a legal challenge of the result, sets this type of test apart from most clinical laboratory testing. In fact, urine drug testing should be considered a special application of analytical forensic toxicology. That is, in addition to the application of appropriate analytical methodology, the specimen must be treated as evidence, and all aspects of the testing procedure must be documented and available for possible court testimony. Laboratories engaged in urine drug testing for Federal agencies will require the services and advice of a qualified forensic toxicologist, or individual with equivalent qualifications (both training and experience) to address the specific needs of the Federal drug testing program, including the demands of chain of custody of specimens, security, property documentation of all records, storage of positive specimens for later or independent testing, presentation of evidence in court, and expert witness testimony.

3.3 General Certification Requirements.

A laboratory must meet all the pertinent provisions of these Guidelines in order to qualify for certification under these standards.

3.4 Capability to Test for Five Classes of Drugs.

To be certified, a laboratory must be capable of testing for at least the following five classes of drugs: Marijuana, cocaine, opiates, amphetamines, and phencyclidine, using the initial immunoassay and quantitative confirmatory GC/MS methods specified in these Guidelines. The certification program will be limited to the five classes of drugs (2.1(a) (1) and (2)) and the methods (2.4 (e) and (f)) specified in these Guidelines. The laboratory will be surveyed and performance tested only for these methods and drugs. Certification of a laboratory indicates that any test result reported by the laboratory for the Federal Government meets the standards in these Guidelines for the five classes of using the methods specified. Certified laboratories must clearly inform non-Federal clients when procedures followed for those clients conform to the standards specified in these Guidelines.

3.5 Initial and Confirmatory Capability at Same Site.

Certified laboratories shall have the capability, at the same laboratory site, of performing both initial immunoassays and confirmatory GC/MS tests (2.4 (e) and (f)) for marijuana, cocaine, opiates, amphetamines, and phencyclidine and for any other drug or metabolite for which agency drug testing is authorized (2.1(a) (1) and (2)). All positive initial test results shall be confirmed prior to reporting them.

3.6 Personnel.

Laboratory personnel shall meet the requirements specified in 2.3 of these Guidelines. These Guidelines establish the exclusive standards for qualifying or certifying those laboratory personnel involved in urinalysis testing whose functions are prescribed by these Guidelines. A certification of a laboratory under these Guidelines shall be a determination that these qualification requirements have been met.

3.7 Quality Assurance and Quality Control.

Drug testing laboratories shall have a quality assurance program which encompasses all aspects of the testing process, including but not limited to specimen acquisition, chain of custody, security and reporting of results, initial and confirmatory testing, and validation of analytical procedures. Quality control procedures shall be designed, implemented, and reviewed to monitor the conduct of each step of the process of testing for drugs as specified in 2.5 of these Guidelines.

3.8 Security and Chain of Custody.

Laboratories shall meet the security and chain of custody requirements provided in 2.4(a).

3.9 One-Year Storage for Confirmed Positives.

All confirmed positive specimens shall be retained in accordance with the provisions of 2.4(h) of these Guidelines.

3.10 Documentation.

The laboratory shall maintain and make available for at least 2 years documentation in accordance with the specifications in 2.4(m).

3.11 Reports.

The laboratory shall report test results in accordance with the specifications in 2.4(g).

3.12 Certification.

(a) General. The Secretary may certify any laboratory that meets the standards in these Guidelines to conduct urine drug testing. In addition, the Secretary may consider to be certified and laboratory that is certified by a DHHS-recognized certification program in accordance with these Guidelines.

(b) Criteria. In determining whether to certify a laboratory or to accept the certification of a DHHS-recognized certification program in accordance with these Guidelines, the Secretary shall consider the following criteria:

(1) The adequacy of the laboratory facilities;

(2) The expertise and experience of the laboratory personnel;

(3) The excellence of the laboratory's quality assurance/quality control program;

(4) The performance of the laboratory on any performance tests;

(5) The laboratory's compliance with standards as reflected in any laboratory inspections; and

(6) Any other factors affecting the reliability and accuracy of drug tests and reporting done by the laboratory.

3.13 Revocation.

(a) General. The Secretary shall revoke certification of any laboratory certified under these provisions or accept revocation by a DHHS-recognized certification program in accordance with these Guidelines if the Secretary determines that revocation is necessary to ensure the full reliability and accuracy of drug tests and the accurate reporting of test results.

(b) Factors to Consider. The Secretary shall consider the following factors in determining whether revocation is necessary:

(1) Unsatisfactory performance in analyzing and reporting the results of drug tests; for example, a false positive error in reporting the results of an employee's drug test;

(2) Unsatisfactory participation in performance evaluations or laboratory inspections;

(3) A material violation of a certification standard or a contract term or other condition imposed on the laboratory by a Federal agency using the laboratory's services;

(4) Conviction for any criminal offense committed as an incident to operation of the laboratory; or

(5) Any other cause which materially affects the ability of the laboratory to ensure the full reliability and accuracy of drug tests and the accurate reporting of results.

(c) Period and Terms. The period and terms of revocation shall be determined by the Secretary and shall depend upon the facts and circumstances of the revocation and the need to ensure accurate and reliable drug testing of Federal employees.

3.14 Suspension.

(a) Criteria. Whenever the Secretary has reason to believe that revocation may be required and that immediate action is necessary in order to protect the interests of the United States and its employees, the Secretary may immediately suspend a laboratory's certification to conduct urine drug testing for Federal agencies. The Secretary may also accept suspension of certification by a DHHS-recognized certification program in accordance with these Guidelines.

(b) Period and Terms. The period and terms of suspension shall be determined by the Secretary and shall depend upon the facts and circumstances of the suspension and the need to ensure accurate and reliable drug testing of Federal employees.

3.15 Notice; Opportunity for Review.

(a) Written Notice. When a laboratory is suspended or the Secretary seeks to revoke certification, the Secretary shall immediately serve the laboratory with written notice of the suspension or proposed revocation by personal service or registered or certified mail, return

receipt requested. This notice shall state the following:

(1) The reasons for the suspension or proposed revocation;

(2) The terms of the suspension or proposed revocation; and

(3) The period of suspension or proposed revocation.

(b) Opportunity for Informal Review. The written notice shall state that the laboratory will be afforded an opportunity for an informal review of the suspension or proposed revocation if it so requests in writing within 30 days of the date of mailing or service of the notice. The review shall be by a person or persons designated by the Secretary and shall be based on written submissions by the laboratory and the Department of Health and Human Services and, at the Secretary's discretion, may include an opportunity for an oral presentation. Formal rules of evidence and procedures applicable to proceedings in a court of law shall not apply. The decision of the reviewing official shall be final.

(c) Effective Date. A suspension shall be effective immediately. A proposed revocation shall be effective 30 days after written notice is given or, if review is requested, upon the reviewing official's decision to uphold the proposed revocation. If the reviewing official decides not to uphold the suspension or proposed revocation, the suspension shall terminate immediately and any proposed revocation shall not take effect.

(d) DHHS-Recognized Certification Program. The Secretary's responsibility under this section may be carried out by a DHHS-recognized certification program in accordance with these Guidelines.

3.16 Recertification.

Following the termination or expiration of any suspension or revocation, a laboratory may apply for recertification. Upon the submission of evidence satisfactory to the Secretary that the laboratory is in compliance with these Guidelines or any DHHS-recognized certification program in accordance with these Guidelines, and any other conditions imposed as part of the suspension or revocation, the Secretary may recertify the laboratory or accept the recertification of the laboratory by a DHHS-recognized certification program.

3.17 Performance Test Requirement for Certification.

(a) An Initial and Continuing Requirement. The performance testing program is a part of the initial evaluation of a laboratory seeking certification (both performance testing and laboratory inspection are required) and of the continuing assessment of laboratory performance necessary to maintain this certification.

(b) Three Initial Cycles Required. Successful participation in three cycles of testing shall be required before a laboratory is eligible to be considered for inspection and certification. These initial three cycles (and any required for recertification) can be compressed into a 3-month period (one per month).

(c) Six Challenges Per Year. After certification, laboratories shall be challenged every other month with one set of at least 10 specimens a total of six cycles per year.

(d) Laboratory Procedures Identical for Performance Test and Routine Employee Specimens. All procedures associated with the handling and testing of the performance test specimens by the laboratory shall to the greatest extent possible be carried out in a manner identical to that applied to routine laboratory specimens, unless otherwise specified.

(e) Blind Performance Test. Any certified laboratory shall be subject to blind performance testing (see 2.5(d)). Performance on blind test specimens shall be at the same level as for the open or non-blind performance testing.

(f) Reporting—Open Performance Test. The laboratory shall report results of open performance tests to the certifying organization in the same manner as specified in 2.4(g)(2) for routine laboratory specimens.

3.18 Performance Test Specimen Composition.

(a) Description of the Drugs. Performance test specimens shall contain those drugs and metabolites which each certified laboratory must be prepared to assay in concentration ranges that allow detection of the analyte by commonly used immunoassay screening techniques. These levels are generally in the range of concentrations which might be expected in the urine of recent drug users. For some drug analytes, the specimen composition will consist of the parent drug as well as major metabolites. In some cases, more than one drug class may be included in one specimen container, but generally no more than two drugs will be present in any one specimen in order to imitate the type of specimen which a laboratory normally encounters. For any particular performance testing cycle, the actual composition of kits going to different laboratories will vary but, within any annual period, all laboratories participating will have analyzed the same total set of specimens.

(b) Concentrations. Performance test specimens shall be spiked with the drug classes and their metabolites which are required for certifications: marijuana, cocaine, opiates, amphetamines, and phencyclidine, with concentration levels set at least 20 percent above the cutoff limit for either the initial assay or the confirmatory test, depending on which is to be evaluated. Some performance test specimens may be identified for GC/MS assay only. Blanks shall contain less than 2 ng/ml of any of the target drugs. These concentration and drug types may be changed periodically in response to factors such as changes in detection technology and patterns of drug use.

3.19 Evaluation of Peformance Testing.

(a) Initial Certification. (1) An applicant laboratory shall not report any false positive result during performance testing for initial certification. Any false positive will automatically disqualify a laboratory from further consideration.

(2) An applicant laboratory shall maintain an overall grade level of 90 percent for the three cycles of performance testing required for initial certification, i.e., it must correctly identify and confirm 90 percent of the total drug challenges for each shipment. Any laboratory which achieves a score on any one cycle of the initial certification such that it can no longer achieve a total grade of 90 percent over the three cycles will be immediately disqualified from further consideration.

(3) An applicant laboratory shall obtain quantitative values for at least 80 percent of the total drug challenges which are ±20 percent or ±2 standard deviations of the calculated reference group mean (whichever is larger). Failure to achieve 80 percent will result in disqualification.

(4) An applicant laboratory shall not obtain any quantitative values that differ by more than 50 percent from the calculated reference group mean. Any quantitative values that differ by more than 50 percent will result in disqualification.

(5) For any individual drug, an applicant laboratory shall successfully detect and quantitate in accordance with paragraphs (a)(2), (a)(3), and (a)(4) of this section at least 50 percent of the total drug challenges. Failure to successfully quantitate at least 50 percent of the challenges for any individual drug will result in disqualification.

(b) Ongoing Testing of Certified Laboratories.—(1) False Positives and Procedures for Dealing With Them. No

false drug identifications are acceptable for any drugs for which a laboratory offers service. Under some circumstances a false positive test may result in suspension or revocation of certification. The most serious false positives are by drug class, such as reporting THC in a blank specimen or reporting cocaine in a specimen known to contain only opiates. Misidentifications within a class (e.g., codeine for morphine) are also false positives which are unacceptable in an appropriately controlled laboratory, but they are clearly less serious errors than misidentification of a class. The following procedures shall be followed when dealing with a false positive:

(i) The agency detecting a false positive error shall immediately notify the laboratory and the Secretary of any such error.

(ii) The laboratory shall provide the Secretary with a written explanation of the reasons for the error within 5 working days. If required by paragraph (b)(1)(v) below, this explanation shall include the submission of all quality control data from the batch of specimens that included the false positive specimen.

(iii) The Secretary shall review the laboratory's explanation within 5 working days and decide what further action, if any, to take.

(iv) If the error is determined to be an administrative error (clerical, sample mixup, etc.), the Secretary may direct the laboratory to take corrective action to minimize the occurence of the particular error in the future and, if there is reason to believe the error could have been systematic, may require the laboratory to review and reanalyze previously run specimens.

(v) If the error is determined to be technical or methodological error, the laboratory shall submit to the Secretary all quality control data from the batch of specimens which included the false positive specimen. In addition, the laboratory shall retest all specimens analyzed positive by the laboratory from the time fo final resolution of the error back to the time of the last satisfactory performance test cycle. This retesting shall be documented by a statement signed by the individual responsible for the day-to-day management of the laboratory's urine drug testing. Depending on the type of error which caused the false positive, this retesting may be limited to one analyte or may include any drugs a laboratory certified under these Guidelines must be prepared to assay. The laboratory shall immediately notify the agency if any result on a retest sample must be corrected because the critieria for a positive are not satisfied. The Secretary may suspend or revoke the laboratory's certification for all drugs or for only the drug or drug class in which the error occurred. However, if the case is one of a less serious error for which effective corrections have already been made, thus reasonably assuring that the error will not occur again, the Secretary may decide to take no further action.

(vi) During the time required to resolve the error, the laboratory shall remain certified but shall have a designation indicating that a false positive result is pending resolution. If the Secretary determines that the laboratory's certification must be suspended or revoked, the laboratory's official status will become "Suspended" or "Revoked" until the suspension or revocation is lifted or any recertification process is complete.

(2) Requirement to Identify and Confirm 90 Percent of Total Drug Challenges. In order to remain certified, laboratories must successfully complete six cycles of performance testing per year. Failure of a certified laboratory to maintain a grade of 90 percent on any required performance test cycle, i.e., to identify 90 percent of the total drug challenges and to correctly confirm 90 percent of the total drug challenges, may result in suspension or revocation of certification.

(3) Requirement to Quantitate 80 Percent of Total Drug Challenges at ±20 Percent or ±2 standard deviations. Quantitative values obtained by a certified laboratory for at least 80 percent of the total drug challenges must be ±20 percent or ±2 standard deviations of the calculated reference group mean (whichever is larger).

(4) Requirement to Quantitate within 50 Percent of Calculated Reference Group Mean. No quantitative values obtained by a certified laboratory may differ by more than 50 percent from the calculated reference group mean.

(5) Requirement to Successfully Detect and Quantitate 50 Percent of the Total Drug Challenges for Any Individual Drug. For any individual drug, a certified laboratory must successfully detect and quantitate in accordance with paragraphs (b)(2), (b)(3), and (b)(4) of this section at least 50 percent of the total drug challenges.

(6) Procedures When Requirements in Paragraphs (b)(2)–(b)(5) of this Section Are Not Met. If a certified laboratory fails to maintain a grade of 90 percent per test cycle after initial certification as required by paragraph (b)(2) of this section or if it fails to successfully quantitate results as required by paragraphs (b)(3), (b)(4), or (b)(5) of this section, the laboratory shall be immediately informed that its performance fell under the 90 percent level or that it failed to successfully quantitate test results and how it failed to successfully quantitate. The laboratory shall be allowed 5 working days in which to provide any explanation for its unsuccessful performance, including administrative error or methodological error, and evidence that the source of the poor performance has been corrected. The Secretary may revoke or suspend the laboratory's certification or take no further action, depending on the seriousness of the errors and whether there is evidence that the source of the poor performance has been corrected and that current performance meets the requirements for a certified laboratory under these Guidelines. The Secretary may require that additional performance tests be carried out to determine whether the source of the poor performance has been removed. If the Secretary determines to suspend or revoke the laboratory's certification, the laboratory's official status will become "Suspended" or "Revoked" until the suspension or revocation is lifted or until any recertification process is complete.

(c) 80 Percent of Participating Laboratories Must Detect Drug. A laboratory's performance shall be evaluated for all samples for which drugs were spiked at concentrations above the specified performance test level unless the overall response from participating laboratories indicates that less than 80 percent of them were able to detect a drug.

(d) Participation Required. Failure to participate in a performance test or to participate satisfactorily may result in suspension or revocation of certification.

3.20 Inspections.

Prior to laboratory certification under these Guidelines and at least twice a year after certification, a team of three qualified inspectors, at least two of whom have been trained as laboratory inspectors, shall conduct an on-site inspection of laboratory premises. Inspections shall document the overall quality of the laboratory setting for the purposes of certification to conduct urine drug testing. Inspection reports may also contain recommendations to the laboratory to correct deficiencies noted during the inspection.

3.21 Results of Inadequate Performance.

Failure of a laboratory to comply with any aspect of these Guidelines may lead to revocation or suspension of certification as provided in 3.13 and 3.14 of these Guidelines.

[FR Doc. 88-7864 Filed 4-8-88; 8:45 am]
BILLING CODE 4160-20-M

Office of Personnel Management

Federal Personnel Manual System

FPM Letter 792-19

FPM Letter 792-19

Published in advance of incorporation in FPM Supplement 792-2
RETAIN UNTIL SUPERSEDED

Washington, D. C. 20415
December 27, 1989

SUBJECT: Establishing a Drug-Free Federal Workplace

Heads of Departments and Independent Establishments:

1. PURPOSE

a. The use of illegal drugs by a significant proportion of the national workforce has major adverse effects on the welfare of all Americans, and results in billions of dollars of lost productivity each year. There is no reason to believe that there is a greater incidence of illegal drug use in the Federal workforce than in the private workforce. However, as the Nation's largest employer,the Federal government and its two million civilian employees must be in the forefront of our national effort to eliminate illegal drugs from the American workplace.

b. The use of illegal drugs by Federal employees, whether on or off the job, cannot be tolerated. Employees who use illegal drugs have three to four times more accidents while at work. Federal workers have a right to a safe and secure workplace, and all American citizens, who daily depend on the work of the Federal government for their health, safety, and security, have a right to a reliable and productive civil service. Federal agencies must take action for the protection of individual drug users, their co-workers, and the society at large. In recognition of this, President Reagan, in Executive Order 12564, set forth the policy of the United States Government to eliminate drug use from the Federal workplace.

c. Agencies will establish a comprehensive drug prevention program which is humane, responsible, and effective. In recognition that employees who use drugs are,themselves, primarily responsible for changing their behavior, the program will include drug education and training, employee counseling and assistance, and voluntary drug testing. However, where appropriate, there will be mandatory drug testing and disciplinary action.

d. This will be a balanced program which emphasizes offering a helping hand to employees who are using illegal drugs. At the same time, it must be clear to all that continued illegal drug use by employees will not be tolerated and may result in disciplinary action up to and including removal.

e. Under the Executive Order, OPM is directed to issue government-wide guidance to agencies on the implementation of the terms of the Order.

2. AGENCY RESPONSIBILITIES

a. The head of each Executive agency shall develop a plan for achieving the objective of a drug-free workplace with due consideration of the rights of the government, and the employee. Agencies should make every reasonable effort to ensure workforce understanding of, and employee organization cooperation with, their drug prevention programs. Communications should emphasize the importance of the drug prevention program for agency mission and the community at large. Further, agencies should ensure that their drug

---

Inquiries: Office of the General Counsel, (202) 632-4632

Code: 792, Federal Employees' Health and Counseling Programs

Distribution: Basic FPM and FPM Supplement 792-2

prevention programs complement agency programs to deal with alcohol abuse and related employee problems.

b. Each agency plan shall include:

(1) A statement of policy setting forth the agency's expectations regarding drug use and the action to be anticipated in response to identified drug use;

(2) Employee Assistance Programs (EAP's) with high level direction, emphasizing education, counseling, referral to rehabilitation, and coordination with available community resources;

(3) Supervisory training to assist in identifying and addressing illegal drug use by agency employees (agencies may wish to include material on alcohol abuse in this training);

(4) Provision for self-referral as well as supervisory referrals to counseling or rehabilitation with maximum respect for individual confidentiality consistent with safety and security requirements; and

(5) Provision for identifying illegal drug users, including testing on a controlled and carefully monitored basis in accordance with E.O. 12564 and the guidance contained below.

c. Agencies should consult with the Attorney General regarding their drug testing programs, as provided by Section 6(b) of the Order.

d. Each Federal agency will expedite the implementation of a Drug-Free Workplace plan. Those agencies with certified plans will fully implement them, consistent with the holdings in recent court decisions, by January 5, 1990, as required in the National Drug Control Strategy. This implementation is to include Employee Assistance Programs or other appropriate mechanisms, training for supervisors. rehabilitation for drug users, and drug testing. Agencies without currently certified plans will complete certification by January 5, 1990, and fully implement the plans by April 5, 1990.

3. AGENCY DRUG TESTING PROGRAMS

a. Comprehensive Testing for Employees in Sensitive Positions. In accordance with section 3(a) of Executive Order 12564, the head of each Executive agency shall establish a program to test for the use of illegal drugs by employees in sensitive positions.

(1) For purposes of this program, the term "employee(s) in a sensitive position" refers to:

i. An employee in a position that an agency head designates Special Sensitive, Critical-Sensitive, or Noncritical-Sensitive under Chapter 731 of the Federal Personnel Manual or an employee in a position that an agency head designates as sensitive in accordance with Executive Order No. 10450, as amended;

ii. An employee who has been granted access to classified information or may be granted access to classified information pursuant to a determination of trustworthiness by an agency head under Section 4 of Executive Order No. 12356;

iii. Individuals serving under Presidential appointments;

iv. Law enforcement officers as defined in 5 U.S.C. § 8321(20); and

v. Other positions that the agency head determines involve law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence.

(2) The head of each agency has discretion to determine which sensitive positions for which comprehensive testing is authorized ought to be subject to such testing. This determination should be based on the nature of the agency's mission, its employees' duties, the efficient use of agency resources, and the danger that could result from the failure of an employee to discharge his or her duties adequately. Thus, who will actually be tested is a function of a two step analysis by the agency head.

i. First, the criteria set forth in Section 7(d) of Executive Order 12564 must be applied to all employees in the agency to determine which employees fall into the "pool" of employees potentially subject to drug testing; this is the pool of "employees in sensitive positions" as defined in the Executive Order. While the definition of the pool of "employees in sensitive positions" is the same from agency to agency, the testing of all employees in that pool may be appropriate for some agencies and not for others depending upon the duties of the positions and the missions of the agencies. If an agency head decides not to test all employees in the pool, then a further determination must be made as outlined below.

ii. Second, a determination must then be made from this pool as to which positions will actually be tested. For the sake of clarity within this guidance, this second group of positions is referred to as Testing Designated Positions (TDPs). Thus, an agency head may determine not to designate all sensitive positions as TDPs, but may limit testing to certain positions. For instance, this may include positions where national security considerations are present, as well as positions where there is a clear impact on public health or safety (e.g., air traffic controllers; operators of motor vehicles; medical, nursing, and related health care personnel) or positions relating to illegal drug control (e.g., law enforcement officers such as customs agents and drug enforcement agents). Other positions should be reviewed with particular care when one or more of the following are present as regular, recurring duties: operation or maintenance of any transportation, motor vehicle, aircraft, or heavy or other large mechanical or electrical equipment; work with explosive, toxic, radioactive, or other dangerous materials; work with fluids or gases under heat or pressure; work by employees uniquely positioned to exploit highly sensitive computer or financial data for financial gain.

(3) When selecting TDPs, agencies should ensure that the selection process does not result in arbitrary, capricious, or discriminatory selections. Agencies must be able to justify their selection of TDPs as a neutral application of the selection criteria set forth in section 3(a)(2)(ii), above. Agencies are absolutely prohibited from selecting positions for drug testing on the basis of a desire to test particular individual employees.

(4) Individuals in TDPs may be selected for comprehensive testing in a variety of ways. For example, their names or social security numbers may be selected randomly by computer, they may be selected according to their birth dates, or they may be selected by the first letter in their surnames.

(5) Comprehensive testing may include unscheduled testing and random sampling of the employees within the group of TDPs. As an alternative to this method of selection, the head of an agency may, at his or her discretion, designate that all employees in TDPs shall be tested.

(6) In carrying out their responsibilities under Section 3 of Executive Order 12564, agency heads should review their testing designated positions periodically as significant new decisions on drug testing are issued by the courts.

b. Voluntary Testing. The head of each Executive agency shall establish a program for voluntary employee drug testing that allows employees to volunteer to participate in the drug

testing program. An agency should afford an opportunity for any employee to step forward and be tested at a time determined appropriate by the agency.

c. Reasonable Suspicion Testing. In addition to the testing outlined in subsections (a) and (b) of this section, the head of each Executive agency is authorized to test an employee when there is a reasonable suspicion that any employee uses illegal drugs. For the purposes of this program "reasonable suspicion" is an articulable belief that an employee uses illegal drugs drawn from specific and particularized facts and reasonable inferences from those facts.

(1) Prompt supervisory training to assist in identifying and addressing illegal drug use by agency employees should be provided to supervisors as each agency develops and implements its agency program. Such training will make supervisors more sensitive to employee behavior and help supervisors recognize those facts that give rise to a reasonable suspicion.

(2) "Reasonable suspicion" that an employee uses illegal drugs may be based upon, among other things:

i. observable phenomena, such as direct observation of drug use and/or the physical symptoms of being under the influences of a drug;

ii. a pattern of abnormal conduct or erratic behavior;

iii. arrest or conviction for a drug related offense; or the identification of an employee as the focus of a criminal investigation into illegal drug possession, use, or trafficking;

iv. information provided either by reliable and credible sources or independently corroborated; or

v. newly discovered evidence that the employee has tampered with a previous drug test.

(3) Where testing is conducted based on reasonable suspicion, each agency should promptly detail in writing the circumstances which formed the basis of its determination that reasonable suspicion exists to warrant the testing. Such documentation should be retained in the adverse action file compiled by the agency.

d. Accident/Unsafe Practice Testing. The head of each agency is also authorized to test an employee for illegal drug use in an examination authorized by the agency regarding an accident or unsafe practice.

e. Follow-up Testing. The head of each agency may also require agency-administered follow-up drug testing during or after counseling or rehabilitation for illegal drug use through an Employee Assistance Program. While follow up testing may be undertaken as a part of counseling or rehabilitation under the Employee Assistance Program, only the results of agency-administered follow-up testing may be used, if verified positive results are obtained, to support an adverse action taken under section 5(d)(2) of the Executive Order. To insure its integrity, such agency-administered follow-up testing ought to be unannounced.

f. Applicant Testing. The head of each Executive agency is authorized, but not required, to test any applicant for illegal drug use. Agency heads who choose to test applicants for illegal drug use have a variety of options. For example, depending on the mission of the agency, an agency may wish to test all applicants for employment. On the other hand, an agency may determine that it will limit applicant testing to applicants for TDPs. Where an applicant must submit to a physical examination as a condition of employment, an agency may wish to require a drug test as part of the physical examination procedures.

(1) Agencies should include notice of drug testing on vacancy announcements for those positions where drug testing is required. A sample notice provision for vacancy announcements or other information about the position would read as follows: "All applicants for this position will be required to submit to a urinalysis for illegal drug use prior to appointment in the Federal service."

(2) Where applicants are given preemployment physical examinations, drug testing may be performed as part of the physical examination procedures. Where no physical examinations are required, applicants should be contacted and directed to report to a designated contractor or agency facility for their drug test. Before a drug test is conducted, all applicants may be advised of the opportunity to submit medical documentation that may support a legitimate use of a specific drug. Aside from the general notice of the drug-testing requirement in vacancy announcements, applicants should receive as little notice as possible of the actual date and time of their drug test. A urine specimen should be taken no more than forty-eight hours after the applicant is contacted to set up the drug testing.

(3) In remote locations, applicants should be directed to report to the nearest contractor or agency facility. Agencies ought to provide for reimbursement to applicants for reasonable expenses incurred in travel to the drug testing facility. In extremely remote areas, the contractor
may be required to travel periodically to the region to perform drug-testing of applicants.

(4) All applicants with verified positive test results should be refused employment.

g. Hardship Exemption. Agencies may choose to exempt certain positions from the drug testing program on the basis of hardship due to the remote location of the duty station of the positions, the unavailability of on-site testing personnel, or the lack of an appropriate site for test administration. Agencies should, however, use reasonable means to overcome such hardships.

4. DRUG TESTING PROCEDURES

a. 60 Day General Notice to All Employees.

(1) Agencies which have not yet implemented a drug testing program shall ensure that at least sixty days elapse between a general one-time notice to all employees that a drug testing program is being implemented and the beginning of actual drug testing. Such notice should indicate the purpose of the drug testing program, the availability of counseling and rehabilitation assistance through the agency's Employee Assistance Program, when testing will commence, the general categories of employees to be tested, and the general parameters of testing. Agencies may decide to include with their notice a description of their drug program or a copy of the internal personnel rules establishing their program.

(2) Any agency may take action as described in parts 3c and 3d. of this letter without reference to the 60 day notice requirement.

b. Special Notice to Covered Employees. Agencies should ensure a specific notice is given, in writing, to each employee in a TDP no later than thirty days before testing commences. We recommend that agencies obtain a written acknowledgement of receipt of the notice. A sample acknowledgement for agency consideration is provided as attachment 1 to this letter. The notice should contain the following information:

(1) The reasons for the urinalysis test, consistent with agency policy formulated in accordance with sections 1 and 3a. of this letter.

(2) Notice of the opportunity for an employee to identify himself voluntarily as a user of illegal drugs willing to undertake counseling and, as necessary, rehabilitation, in which case disciplinary action is not required.

(3) Assurance that the quality of testing procedures is tightly controlled, that the test used to confirm use of illegal drugs is highly reliable, and that test results will be handled with maximum respect for individual confidentiality, consistent with safety and security.

(4) Notice of the opportunity and procedures for submitting supplemental medical documentation that may support a legitimate use for a specific drug.

(5) The circumstances under which testing may occur, consistent with the policy set forth in section 3 of this letter.

(6) The consequences of a verified positive result or refusal to be tested, including disciplinary action.

(7) The availability of drug abuse counseling and referral services, including the name and telephone number of the local Employee Assistance Program counselor.

c. Notice to Employees Tested Under Specific Conditions. Employees being tested under conditions outlined in section 3c, 3d, and 3e will receive notice that includes information contained in section 4b., paragraphs (1), (3), (4), (6), and (7). Employees being tested under conditions outlined in section 3c will also receive notice of the circumstances leading to the decision to test them for illegal drug use.

d. Agency Response to Persons Refusing to Participate in a Required Drug Test.

(1) To maintain the integrity of the testing and enforcement program, agencies should initiate disciplinary action for employees who refuse to be tested. Such action may include, but is not necessarily limited to, removal of such employees as failing to meet a condition of employment and/or refusing to comply with the requirements of the agency's drug-free workplace program.

(2) Applicants who are not current employees and who refuse to be tested must be refused that employment.

e. Technical Guidelines for Drug Testing. The Secretary of Health and Human Services, as directed by Executive Order No. 12564, issued Mandatory Scientific and Technical Guidelines for Federal Employee Drug Testing Programs. 53 Fed. Reg. 11970, April 11, 1988. Agencies must conduct their drug testing programs in accordance with those scientific and technical guidelines.

f. Confidentiality of EAP Treatment Records and Drug Test Results. Agency drug testing programs under E.O. 12564 shall contain procedures to protect the confidentiality of 1) medical and rehabilitation records and 2) drug test results. These two classes of information are contained in different systems of records and are subject to different confidentiality requirements. However, both EAP treatment records and drug test results may be utilized in the program. Thus, both are discussed below.

(1) Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with performance of a drug abuse prevention program conducted, regulated, or indirectly assisted by a Federal agency must be kept confidential and may be disclosed only under limited circumstances and for specific purposes. Agencies may wish to refer to regulations issued by the Department of Health and Human Services (42 C.F.R. § 2.1,et seq. (1987)) on maintaining the confidentiality of treatment records.

(2) Drug abuse treatment records may be disclosed without the consent of the patient only:

i. to medical personnel to the extent necessary to meet a genuine medical emergency;

ii. to qualified personnel for conducting scientific research, management audits, financial audits, or program evaluation, with all patient identifying information removed from the data; or

iii. if authorized by an appropriate court order granted after application showing good cause.

(3) Any other disclosure may be made only with the written consent of the patient, and only under the circumstances set out below. Such consensual disclosure may be made to the patient's employer for verification of treatment or a general evaluation of treatment progress.

(4) Agency drug testing programs should include confidentiality protections consistent with the above requirements. These protections should extend to drug testing results made a part of treatment and rehabilitation records.

(5) Accordingly, drug abuse treatment or rehabilitation records may not be otherwise disclosed by agencies without the consent of the employee involved. A sample consent for release of patient information during and after treatment or rehabilitation and a sample release memorandum are included in attachments 2 and 3, respectively. Any disclosure without such consent is strictly prohibited.

(6) As noted above, agencies will also obtain confirmed positive drug test results that are not part of treatment and rehabilitation records. As part of the drug testing procedure and in conformity with section 503 of the Supplemental Appropriations Act of 1987, Pub. L. 100-71, confirmed positive test results may only be released without prior written employee consent to the agency's medical review official (as defined in the HHS Mandatory Scientific and Technical Guidelines for Federal Employee Drug Testing Programs), the administrator of the agency Employee Assistance Program (EAP), to the management official(s) having authority to take adverse personnel action against such employee and pursuant to the order of a court of component jurisdiction where required by the United States Government to defend against any challenge against any adverse personnel action.

(7) Under the HHS Mandatory Scientific and Technical Guidelies for Federal Employee Drug Testing, after examination and verification by the medical review official, confirmed positive test results will be forwarded to the EAP program administrator and to the management official(s) having authority to take adverse personnel action against such employee. Drug test results should be protected under the provisions of the Privacy Act, 5 U.S.C. § 552a, et seq., and should not be released in violation of that Act.

g. Privacy in Drug Testing. Agency drug testing procedures under E.O. 12564 must allow individual privacy unless the agency has reason to believe that a particular individual may alter or substitute the specimen to be provided. Agencies should refer to the HHS Mandatory Scientific and Technical Guidelines for Federal Employee Drug Testing Programs for the specific procedures to be followed in conducting drug tests.

(1) The sample shall be provided in a rest room stall or similar enclosure so that the employee is not being viewed while providing the sample. However, this requirement does not restrict the ability of the employer to control the test area and to take other actions to ensure that the employee does not substitute or tamper with the sample. For example, the employer may: (a) control the test area to ensure that samples have not been hidden for substitution; (b) prohibit the carrying of bags, luggage, briefcases, or other containers into the test area; (c) prohibit the wearing of coats and/or jackets in the test area; (d) station a testing official in the rest room outside the stall where visual observation is not possible, but where the official can

monitor the setting for tampering; (e) examine the sample after it is provided for abnormalities in color, temperature, or other evidence that tampering may have occurred. Agencies should refer to the HHS Mandatory Scientific and Technical Guidelines for Federal Employee Drug Testing Programs for more specific information on sample collection.

(2) Generally, an employee or applicant may be required to provide a sample under observation only if there is reason to believe that the employee or applicant may alter or substitute the urine specimen. For example, employers may wish to require observation when facts and circumstances suggest that the person to be tested: (a) is an illegal drug user; (b) is under the influence of drugs at the time of the test; (c) has previously been confirmed by the agency to be an illegal drug user; (d) is seen to have equipment or implements used to tamper with urine samples; (e) has recently been determined to have tampered with a sample.

5. AGENCY ACTION UPON FINDING THAT AN EMPLOYEE USES ILLEGAL DRUGS

a. Drug Use Determination. The determination that an employee has used illegal drugs may be made on the basis of direct observation, a criminal conviction, verified positive results of the agency's drug testing program, the employee's own admission, or other appropriate determinations.

b. Mandatory Initiation of Removal from Sensitive Positions. While removal of an employee confirmed to have used illegal drugs is authorized under the Executive Order, initiation of an action to remove the employee from the Federal service is required after a second determination that the employee uses illegal drugs. Sections 5(b) and 5(d), respectively, of Executive Order 12564. If occupying a sensitive position, the employee must not be allowed to remain on duty status in that position. Section 5(c) of Executive Order 12564. Removal of an employee occupying a sensitive employee who is determined to use illegal drugs may be necessary if there are no non-sensitive positions to which the employee may be transferred in the agency, unless the agency head determines that maintaining the employee in the sensitive position would not pose a danger to public health or safety or the national security.

c. Mandatory EAP Referral. Upon reaching a finding that an employee uses illegal drugs, agencies will refer the employee to an Employee Assistance Program and give the employee an opportunity to undertake counseling and rehabilitation activities. Section 5(a) of Executive Order 12564. While agencies should provide reasonable support and assistance to employees who demonstrate a desire to become drug-free, the ultimate responsibility to be drug-free rests with the individual employee.

d.Discretionary Disciplinary Actions. Upon the first confirmed determination that an employee uses illegal drugs, there is a range of disciplinary actions available to an agency, from a written reprimand to removal. Except for employees who voluntarily identify themselves as users of illegal drugs, obtain appropriate counseling and rehabilitation, and thereafter refrain from illegal drug use, agencies are required to initiate some form of disciplinary action against employees who are found to use illegal drugs. Section 5(b) of Executive Order 12564. Agencies have discretion in deciding what disciplinary measures to initiate, consistent with the requirements of the Civil Service Reform Act and other appropriate factors. Among the disciplinary measures available to agencies are the following:

(1) Reprimanding the employee in writing.

(2) Placing the employee in an enforced leave status, consistent with the procedural requirements of 5 C.F.R. §§752.203 or 752.404 as appropriate.

(3) Suspending the employee for fourteen days or less consistent with the procedural requirements in 5 C.F.R. §752.203.

(4) Suspending the employee for 15 days or more consistent with the procedural requirements in 5 C.F.R. §752.404.

(5) Suspending the employee, consistent with the procedural requirements in 5 C.F.R. §752.404, until such time as he or she successfully completes counseling or rehabilitation or until the agency determines that action other than suspension is more appropriate to the individual situation.

(6) Reducing the employee in grade consistent with the procedural requirements in 5 C.F.R. §752.404.

(7) Removing the employee from Federal service, consistent with the procedural requirements of 5 C.F.R. §752.404, for: verified illicit use of an illegal drug; refusal to take a drug test authorized by E.O. 12564; refusal to obtain or successfully complete counseling or rehabilitation as required by the Executive Order; or once having completed counseling or rehabilitation, failing to refrain from illegal drug use.

(8) Initiating action to remove the employee from Federal service is mandatory upon a second verified finding of illegal drug use. Section 5(c) of Executive Order 12564.

e. Preponderance of Evidence Requirement. Agencies are reminded that any action, including removal, taken against an employee under title 5 United States Code, Chapter 75, must be supported by a preponderance of the evidence. Care should be taken in the conduct of tests and the handling of testing samples to ensure that requirements of evidentiary proof may be met.

6. STATISTICAL REPORTING. Agencies shall keep statistical records on: (1) the number of employees tested and the number of employees with verified positive tests; and (2) the number of applicants tested and the number of applicants with verified positive tests. Personally identifying information in these statistical records is strictly prohibited. The HHS Mandatory Scientific and Technical Guidelines for Federal Employee Drug Testing Programs contain additional requirements for statistical reporting.

7. EMPLOYEE COUNSELING AND ASSISTANCE

a. Program Requirement. Federal agencies are required by Public Law 92-255, as amended; Public Law 99-570; and by 5 C.F.R. Part 792 to establish programs for appropriate prevention, treatment and rehabilitation of Federal civilian employees with drug abuse problems. Agencies are authorized to establish Employee Assistance Programs to meet this mandate.

b. EAP Requirement. Executive Order 12564 identifies Employee Assistance Programs as an essential element to an agency's plan to achieve a drug-free workforce, and explicitly states that agencies shall refer all employees found to be using illegal drugs to their Employee Assistance Program for assessment, counseling, and referral for treatment or rehabilitation as appropriate.

c. EAP Role. Employee Assistance Programs play an important role in identifying and resolving employee substance abuse by: demonstrating the agency's commitment to eliminating illegal drug use; providing employees an opportunity, with appropriate assistance, to discontinue their drug use; providing educational materials to managers, supervisors and employees on drug abuse issues; assisting supervisors in confronting employees who have performance and/or conduct problems which may be based, in whole or in part, on substance abuse; assessing employee-client problems and making referrals to appropriate treatment and rehabilitation facilities; and following up with individuals during the rehabilitation period to track their progress and encourage successful completion of the program.

d. EAP Elements. In keeping with Executive Order 12564, agencies should ensure that:

(1) EAP's are available to all employees, including those located outside of the Washington metropolitan area and major regional cities. Agencies are encouraged to explore a variety of means for meeting this requirement, including private contractors and cooperative arrangements with other Federal agencies, State and local governments, and non-profit organizations.

(2) At sites where it is not feasible to establish a continuing EAP, agencies should arrange for employee access on a "needs" basis to comparable local resources or, through travel or private telephone calls, to services of established EAP's in other locations.

(3) EAP's, whether in-house or operated through contract, are adequately staffed with fully qualified individuals who can:

i. Provide counseling and assistance to employees who self- refer for treatment or whose drug tests have been verified positive, and monitor the employees' progress through treatment and rehabilitation;

ii. Provide needed education and training to all levels of the organization on types and effects of drugs, symptoms of drug use and its impact on performance and conduct, relationship of the employee
assistance program with the drug testing program, and related treatment, rehabilitation, and confidentiality issues;

iii. Ensure that the confidentiality of test results and related medical and rehabilitation records are maintained in accordance with the specific requirements contained in Public Laws 92-255 and 93-282, with regulations published in 42 C.F.R., Part 2, and with guidance contained in Section 4 of this Letter.

(4) Adequate treatment resources have been identified in the community in order to facilitate referral of drug abuse clients.

(5) All employees in the agency are informed about the EAP and its services.

(6) The Employee Assistance Program plays an appropriate role in the development and implementation of the agency's Drug-Free Workplace program. EAP's should not be involved in the collection of urine samples or the initial reporting of the results of drug tests, but rather be a critical component in the agency's efforts to counsel and rehabilitate drug- abusing employees, as well as in educating the workforce on drug abuse and its symptoms.

e. Further EAP Assistance.

(1) Attachment 4 provides a list of consortia throughout the United States. Agencies wishing to join an existing consortium should contact the individual listed regarding that possibility.

(2) Attachment 5 provides the names and addresses of agencies and organizations which can be contacted regarding treatment facilities and education materials throughout the U.S.

(3) The Model Employee Assistance Program provided as attachment 6 addresses those functions OPM considers essential for an EAP to provide in support of the President's drug-free workplace initiative. The model is intended to be of use to agencies in developing new EAP's and in assessing the adequacy of existing programs. OPM's Employee Health Services Branch (Tel. (FTS/202) 632-5558) is available for technical assistance on these provisions.

8. COMPLIANCE WITH SECTION 628 OF THE TREASURY, POSTAL, AND GENERAL GOVERNMENT APPROPRIATIONS ACT OF 1989

a. Background Information. On September 22, 1988, President Reagan signed into law the Treasury, Postal, and General Government Appropriations Act of 1989, Public Law No. 100-440. Section 628 sets forth drug-free workplace requirements for Federal departments, agencies, and instrumentalities. Section 8131(c) of the Defense Appropriations Act (Pub. L. No. 100-463), which was signed into law on October 1, 1988, extended the effective date of Section 628 until January 16, 1989.

b. Basic provision. Section 628 provides that:

> No department, agency, or instrumentality of the United States receiving appropriated funds under this Act for fiscal year 1989, or under any other Act appropriating funds for fiscal year 1989, shall obligate or expend such funds unless such department, agency, or instrumentality has in place, and will continue to administer in good faith, a written policy designed to ensure that all of its workplaces are free from the illegal use, possession, or distribution of controlled substances, (as defined in the Controlled Substances Act) by the officers and employees of such department, agency, or instrumentality.

c. Relationship to Executive Order 12564. Executive Order (E.O) 12564, dated September 15, 1986, required agencies to adopt drug-free workplace plans prohibiting the "use" of controlled substances contained in Schedules I and II, as defined in 21 U.S.C. 802(6) and listed in Part B, Subchapter 13 of that Title. In order to comply with Section 628, agencies may modify their drug-free workplace plans to cover (i) "possession, or distribution," in addition to "use," and (ii) controlled substances contained in Schedules III through V, in addition to Schedules I and II.

d. Limitation. The inclusion of all controlled substances among the scope of drugs covered under a drug-free workplace plan does not license agencies to test for drugs other than Schedule I and II controlled substances now authorized (such as marijuana, opiates, cocaine, phencyclidine, and amphetamines).

e. Agency Responsibilities:

(1) Agencies which were covered by Section 628 are required to comply with its provisions by January 16, 1989. All agencies which are covered by E.O. 12564 are included within the scope of Section 628; however, the scope of Section 628 is broader than E.O. 12564. If agency personnel are not sure whether or not an agency is covered by Section 628, they should consult with their agency General Counsel.

(2) If an agency or instrumentality is in the Executive Branch, and is not covered by E.O. 12564, but it is now required to produce and administer a written policy to satisfy the provisions of Section 628, the agency or instrumentality may wish to develop its policy in conformity with E.O. 12564, the Department of Health and Human Services (HHS) Mandatory Scientific and Technical Guidelines for Federal Employee Drug Testing Programs, and this FPM Letter. Although an agency is not required by Section 628 to follow the above mentioned guidelines and the Executive Order, it is recommended that agencies do so in order to help their written policies be legally sustained.

(3) Agencies which wish to implement Section 628 by amending their existing drug-free workplace plans may do so by adopting the appendix to this FPM Letter as an appendix to their plan. Agencies are not required to submit this amendment to HHS for certification or approval.

(4) Agencies which have already submitted their drug-free workplace plans to HHS for certification are not required to re-submit plans to HHS which have been amended to incorporate the provisions of Section 628.

f. Agency Compliance. Agencies or instrumentalities failing to comply with Section 628 by January 16, 1989, may be in violation of the Anti-deficiency Act. Agencies or instrumentalities which anticipate problems with compliance should immediately consult with their General Counsel.

Constance Berry Newman
Director

Attachments

-SAMPLE-

[AGENCY NAME]

ACKNOWLEDGEMENT OF NOTICE TO EMPLOYEES
WHOSE POSITION IS DESIGNATED SENSITIVE FOR DRUG TESTING PURPOSES

I acknowledge receiving notice of the establishment of [agency name]'s employee drug testing program. I understand that I may be selected for screening by urinalysis testing for the presence of controlled substances. I understand that a verified positive result of that testing or refusal to submit to testing may result in disciplinary action up to and including dismissal from the Federal service.

I have read the notice announcing the establishment of an employee drug testing program.

_____
Printed or Typed Name

_____
Signature of Employee

_____
Date

--SAMPLE-

CONSENT FOR RELEASE OF PATIENT INFORMATION
DURING OR AFTER TREATMENT OR REHABILITATION

I, _____, hereby consent to the disclosure of
(Employee/Patient name)
information concerning my progress in terminating illegal drug use. I authorize the _____ to disclose that information to
(Treatment/Rehabilitation Facility)
_____, director of the Employee Assistance Progra
(Name)
at _____ and to _____, my super
(Name of Agency) (Name of supervisor)
and to the agency Medical Review Official for drug use monitoring und Executive Order 12564, which provides for a drug-free Federal workpla

I understand that this consent is subject to revocation at any time except to the extent that action has been taken in reliance thereon, that it will expire without express revocation upon
_____.
(date, event, condition.)

This consent to disclose the above-described treatment records was freely given, without reservation, for the purpose set out above.

_____
(Signature of employee/patie

_____
(Date on which consent is si

CLAUSE FOR USE IF EMPLOYEE IS A MINOR OR LEGALLY INCOMPETENT

I, _____, the [parent/legal guardian or perso
(Name)
legal representative] of the above named employee/patient, hereby cons to the aforementioned release of information on his/her behalf.

_____
(Signature)

_____
(Date)

-SAMPLE-

RELEASE MEMORANDUM

SUBJECT: Release of Patient Information

FROM: [Program making the disclosure]

TO: [Name or title of the person or organization to which the disclosure is to be made]

In accordance with the attached "Consent for Release of Patient Information," we have released information to you on [Patient's name].

This information has been disclosed to you from records whose confidentiality is protected by Federal law. See 42 U.S.C. § 290ee-3. Federal regulations, at 42 C.F.R. Part 2, prohibit you from making any further disclosure of it without the specific written consent of the person to whom it pertains, or as otherwise permitted by those regulations. A general authorization for the release of medical or other information is NOT sufficient for this purpose.

The Federal rules restrict any use of the information to criminally investigate or prosecute any alcohol or drug abuse patient.

(Note: This memorandum is substantially the same as the one appearing in Appendix D of FPM Supplement 792-2.)

OPERATING EAP CONSORTIA CONTACTS

GEOGRAPHIC LOCATION	LEAD AGENCY	POINT OF CONTACT	FTS/AREA CODE
ANCHORAGE, AK	FAA	JAMES OLIVER	(907) 271-5875
ATLANTA, GA	PHS	REGINA BRONSON	242-0406 (404) 331-0406
BOSTON, MA	OPM	JODY HUBERT	835-6533
UP STATE NY	HHS	ROBERT POLLIO	264-2586
CHICAGO, IL	PHS	FRANCES WENCE	886-4215
CINCINNATI, OH	PHS	FRANCES WENCE	886-4215
DALLAS, TX	PHS	ROSALIE K. PHILLIPS	729-3577
DENVER, CO	PHS	DR. R. LORTSCHER	776-0078
KANSAS CITY, MO	CASU	JOHN MCCLAY	867-3501
LONG ISLAND, NY	HHS	ROBERT POLLIO	264-2586
STATE OF MICHIGAN	PHS	FRANCES WENCE	886-4215
STATE OF NEW JERSEY	HHS	ROBERT POLLIO	264-2586
NEW YORK CITY, NY	HHS	ROBERT POLLIO	264-2586
PHILADELPHIA, PA	HHS	BRENDA WELLS	596-4757
SEATTLE, WA	ARMY CORP OF ENG.	JOHN BARETT, JR.	(206) 764-3568
PUERTO RICO/VIRGIN ISL.	HHS	ROBERT POLLIO	264-2586
WASHINGTON, D.C.	PHS	PETER MAZZELLE	443-4357

TREATMENT FACILITY DIRECTORIES

1. National Directory of Drug Abuse and Alcoholism Treatment and Prevention Program, Stock No. 017024-01252-1, Cost: $16.00

   Available from: Superintendent of Documents
   Goverment Printing Office
   Washington, D.C. 20402
   Tele: (202) 783-3238

2. Washington Metropolitan Area Directory of Alcohol/Drug Treatment Resources, OPM WPS-01, September 1984, No Cost

   Available from: Office of Personnel Management
   Employee Health Services Branch (PSOG)
   1900 E. Street, N.W. Room 7H39
   Washington, D.C. 20415
   Tele: (202) 632-5558

3. Coping Catalog (listing resources available in the Washington Metropolitan Area for alcohol, drugs and other addictions problems) Updated catalog expected to be available December 1986. Cost to be determined.

   Available from: The Washington Area Council on Alcohol and Drug Abuse
   1221 Massachusetts Ave., N.W.
   Washington, D.C. 20005
   Tele: (202) 783-1300

MODEL EMPLOYEE ASSISTANCE PROGRAM IN SUPPORT OF A DRUG-FREE WORKPLACE

1. Purpose. To implement fully an effective Employee Assistance Program (EAP) within (agency) which provides short term counseling and referral services to employees with drug problems. This is in keeping with the President's policy, set forth in Executive Order 12564, to eliminate drug use from the Federal workplace and to offer an opportunity for rehabilitation to users of illegal drugs. This model is intended to supplement ongoing employee assistance programs which, in addition to drug abuse, address alcohol abuse and other employee problems.

2. Background. Public Law 92-255, as amended, requires Federal agencies to develop and maintain appropriate prevention, treatment and rehabilitation programs and services for drug abuse among Federal employees. Regulations implementing this requirement are contained in Title 5, Code of Federal Regulations (CFR) Part 792. Guidance is further provided in Subchapters 5 and 6 of Federal Personnel Manual (FPM) Chapter 792, and FPM Supplement 792-2. Executive Order 12564 of September 15, 1986, established further requirements for agencies and employees in order to obtain a drug-free Federal Workplace. On October 27, 1986, the President signed into law the Omnibus Drug Enforcement, Education, and Control Act of 1986, P.L. 99-570. That law reiterates Congressional concern about the prevention of illegal drug use and the treatment of Federal employees who use drugs.

3. Objective. The objective of the EAP is to assist employees with drug problems to find treatment, to follow up with them during recovery and rehabilitation, and to help them remain drug-free.

4. Policy.

A. As an employer, the (agency) is concerned with the well-being of its employees, the maintenance of workforce productivity, and the preservation of a safe and secure workplace. The use of illegal drugs by (agency) employees, whether on or off the job, is inconsistent with these goals and will not be tolerated.

B. The (agency) stands ready to assist employees in becoming drug free.

C. Employees who are users of illegal drugs are encouraged to seek counseling and other appropriate assistance voluntarily, including that available through the (agency's) Employee Assistance Program.

D. The confidential nature of client records will be safeguarded and only disclosed in accordance with the confidentiality provisions of Title 42 CFR, Part 2.

E. To the extent feasible, program services will be provided to family members dealing with the drug problem of an employee, or to an employee dealing with the drug problem of a family member.

5. Program Responsibilities.

A. Agency Employee Assistance Program Administrator. The Employee Assistance Program Administrator has the lead role in ensuring that the (agency's) EAP program meets the requirements of E.O. 12564, and is responsible for the development, implementation and review of the agency EAP. In addition to supervising the headquarters EAP Coordinator and counselor(s), the Administrator will provide advice and assistance in establishing field office EAP's. The EAP Administrator will advise agency components on the submission of annual statistical reports and will prepare consolidated reports on the agency's EAP activity for submission to the Office of Personnel Management on a fiscal year basis.

B. Employee Assistance Program Coordinators.

(1) The Employee Assistance Program Coordinator has responsibility for implementing and operating the EAP within an agency component, such as the Headquarters office or a field installation. More than one coordinator may be deemed necessary, depending on the size of the assigned component.[1] Where the EAP services are contracted out, the coordinator has responsibility for monitoring the contractor performance and verifying services rendered within (agency). The person(s) selected for such assignments will be allotted sufficient official time to:

(a) implement effectively the agency employee assistance policy and program as well as to assist in the development and implementation of the agency drug testing program as it relates to the counseling and rehabilitation of drug-abusing employees;

(b) determine appropriate supervisory training and other activities needed to educate and inform the workforce about drugs and symptoms of drug abuse;

(c) develop and maintain counseling capability (through personnel, medical, or other counseling resource, including contracting out);

(d) establish liaison with community education, treatment and rehabilitation facilities; and,

(e) evaluate the program and report to management on results and effectiveness.

C. Employee Assistance Counselors. (1) In some instances, the EAP Coordinator may have the necessary skills, time and motivation to function as the Employee Assistance Counselor. The Employee Assistance Counselor serves as the initial point of contact for employees who ask or are referred for counseling, and will be allotted sufficient official time to implement the program effectively. At a minimum, persons designated as Employee Assistance Counselors should be, or provisions should be made for them to be:

(a) Familiar with the provisions of Executive Order 12564, "Drug-Free Federal Workplace" and Federal Personnel Manual Letter 792-16, "Establishing a Drug-Free Federal Workplace".

(b) Trained in:

- counseling employees in the occupational setting,
- identification of drug abuse, and,
- administering the Employee Assistance Program.

(c) Able to communicate effectively with employees, supervisors and managers concerning drug use and its symptoms and consequences.

(d) Knowledgeable about community resources for treatment and rehabilitation of drug users, including information on fees and payment schedules.

(e) Able to discuss drug treatment and rehabilitation insurance coverage available to employees through the Federal Employee Health Benefits Program.

(f) Able to distinguish the occasional user from the addicted user and to suggest the appropriate treatment based on that information (e.g., after hours attendance at Narcotics Anonymous meetings to significant medical assistance).

(g) Able to provide training and education on drug abuse to employees, supervisors, union representatives, etc.

(2) In offices where counseling staff is not available within the agency, reasonable efforts should be made to provide employees with access to a qualified counselor outside of the agency. This may include authorizing official time for the employee to visit or be visited by a counselor personally, or other steps which may be appropriate.

(3) For employees referred as a result of drug-testing, counselors should document the treatment plan prescribed. Signature of this document by both the counselor and client will ensure mutual understanding of the treatment plan and the consequences of failure to remain drug free.

(4) In order for the counselor to be viewed as the source of assistance and understanding for employees, the person(s) performing these functions should not be involved in the actual drug testing of employees.

D. Employee's Role. All employees are encouraged to enhance their drug awareness through educational opportunities afforded by the EAP or the community at large. Employees who are illegal drug users are encouraged to seek counseling assistance voluntarily. Employees found to be users of illegal drugs are required to accept referral to the EAP and are urged to cooperate with medical treatment and/or rehabilitation programs that are indicated.

E. Medical Personnel.

(1) Employee health units provide emergency diagnoses and first treatment of injury or illness of employees during duty hours. Where indicated, the employee should be further referred to a private physician or community health service. If such cases ultimately are determined to have stemmed from abuse of drugs, medical personnel should discuss the facts of the situation with the supervisor and the employee and refer the employee for counseling. A close working relationship with the EAP Counselor(s) is essential for program success. The Health Unit staff is available for consultation with and assistance to personnel assigned EAP responsibilities.

(2) Where such facilities do not exist, these services are provided whenever possible through existing occupational health facilities and/or community physicians or clinics.

6. Training and Education.

A. Supervisory training. Employee counselors will conduct or otherwise provide training sessions for agency supervisors on the handling of problems of substance abuse. Appropriate topics include:

(1) Drug awareness and symptoms of drug use.

(2) Recommended methods for dealing with the suspected or identified drug user.

(3) Supervisory responsibilities under E.O. 12564.

(4) Confrontation and referral techniques.

(5) Explanation of the (agency) employee assistance program and its relationship with the (agency) drug testing program.

(6) General principles of rehabilitation including techniques for supervisors to assist employees in returning to the worksite, given specific (agency) needs and requirements.

(7) Personnel management issues (e.g., relationship of this program to performance appraisal and disciplinary programs; leave usage; and, supervisory notes and documentation).

B. Employee education. The Employee Assistance Coordinator will ensure that employee seminars on topics dealing with drug use are provided periodically. Managers and supervisors shall encourage employee attendance at these seminars and provide other appropriate support. On a continuing basis, educational materials and information on drug abuse will be available to individual employees.

7. Publicity of EAP to employees.

A. This policy and program will be made known to all (agency) employees. All new employees will be informed of the services available under this program as they enter on duty.

B. The names and locations of Employee Assistance Counselor(s) should be listed in telephone directories and displayed on employee bulletin boards.

C. Periodic employee memoranda and other appropriate publications should be used to keep employees informed of EAP services.

8. Short-term Counseling and Referral.

A. Referrals to the Employee Assistance Program are for the purposes of identifying the problem, referring the employee to the appropriate treatment resource in the community and following up with the employee during recovery and rehabilitation.

B. Voluntary referrals, or self referrals, are to be encouraged throughout EAP materials.

C. In the case of a management referral as a result of a verified positive drug screen, the employee assistance staff will interview and/or consult with supervisors and management officials, as requested, and provide them with guidance on how to refer the drug abusing employee to the assistance program. Once the referral is made, and the employee agrees to the appointment with the counselor, the counselor will require the employee to sign a consent for release of information to the supervisor before assistance will be provided. This consent will cover the release of information pertaining to the employee's compliance with the agreed upon treatment plan and the employee's progress during and at the end of treatment. Upon obtaining the signed consent, the counselor will assess the problem(s), review the employee's health insurance coverage and refer the individual to an appropriate treatment resource in the Community. The counselor will monitor the employee's treatment and keep the supervisor advised as to the progress being made. The counselor will periodically follow-up with the employee and his or her supervisor after any treatment which occurs and offer support and assistance as needed.

9. Community Resources. The EAP will develop a working relationship with community assistance resources. Program coordinators and counselors will determine which community agencies or individuals best meet employee and management needs. Contact should be established with specialized resources such as the following:

A. State drug authorities for help in identifying treatment resources for drug abusing employees;

B. Narcotics Anonymous for information on where and when meetings are held;

C. Hospital and clinic treatment facilities in order to establish a working relationship between the counselor and the receiving treatment source; and,

D. Drug abuse councils to keep abreast of the latest development regarding drug abuse.

10. Program Interrelationships.

A. Relationship with Drug Testing Program. As called upon, the EAP staff will work with the drug testing program staff in the development and implementation of the drug testing program. However, EAP staff are not to be involved in the collection of urine samples or the initial reporting of drug test results. EAP efforts are to focus on counseling and rehabilitating drug-abusing employees, as well as on educating the workforce regarding drug abuse and its symptoms.

B. Relationship of the Supervisor. Supervisors have explicit expectations of their employees in terms of job performance and behavior. When supervisors are advised of confirmed employee drug use, they are required to refer the employee to an Employee Assistance Program and to initiate an appropriate personnel action. In those situations involving illegal drugs, except as provided in Section 5(b) of Executive Order 12564, disciplinary action is required to be initiated against employees who are found to use illegal drugs. Supervisors should work with the Employee Assistance Counselor to monitor the employee's progress during treatment and rehabilitation and take appropriate personnel action should the employee fail to remain drug free.

C. Relationship with Labor Organizations. The support and active participation of labor organizations is a key element in the success of an employee assistance program. Therefore, where there are units of exclusive recognition, management should:

(1) Communicate to labor organizations a strong commitment to providing assistance to employees.

(2) Consult or negotiate, as appropriate, concerning the implementation of the EAP.

(3) Include union representatives in appropriate training and orientation programs to ensure a mutual understanding of program policy, referral procedures, and other program elements.

11. Recordkeeping and Reporting.

A. Counseling Records. Records on employees who have been referred for counseling will be maintained in a secure and confidential manner. Information on any drug abuse client will be released only to the management official empowered to recommend or take action, in accordance with the employee's consent to release, and for the reasons identified in section 8C above. Any information obtained by a supervisor from the counselor must be maintained, as with all employee records, in a strictly confidential manner. In addition, to the extent that

counseling records include employee treatment records, they shall be maintained in accordance with Public Law 93-579 (Privacy Act), Public Law 93-282 and Title 42 CFR, Part 2 (Confidentiality of Alcohol and Abuse Patient Records). Consequently, access to these records will be strictly limited. All appropriate steps, including necessary physical safeguards, will be taken to ensure against unauthorized disclosure.

B. Reports to OPM. The EAP Administrator will compile sufficient statistical and programmatic data to provide the basis for evaluating the extent of drug abuse problems and effectiveness of the assistance program. The EAP Administrator will also submit agency-wide reports to the Office of Personnel Management that contain data required by OPM to meet the statutory reporting requirements contained in P.L. 99-570.

12. Program Evaluation. The EAP Administrator and Coordinators will regularly evaluate their program to determine the effectiveness and efficiency of services. These evaluations will include: services to employees with drug abuse problems, referral procedures and effectiveness, supervisory training, employee orientation, reporting systems, availability and accessibility of EAP, records systems, outreach activities, staffing and qualifications procedures. Written evidence of program evaluations, identified deficiencies and correction plans will be available for review by the EAP Administrator. Documented modifications in the program's assessment and intervention services should be made based upon the findings of such evaluations.

1. The (agency name) hereby adopts the following amendments to the Drug-Free Workplace plan referenced and attached.

a. The following language is adopted as a free standing paragraph at the end of the section in the plan entitled "policy" or "statement of policy":

It is (agency name) policy that its workplace be free from the illegal use, possession, or distribution of controlled substances, (as specified in Schedules I through V, as defined in 21 U.S.C. 802(6) and listed in Part B, Subchapter 13 of that Title) by the officers and employees of (agency name) . The possession and distribution of controlled substances will be dealt with promptly in accordance with legal and administrative disciplinary procedures. However, the policy's primary goal is to ensure that illegal drug use is eliminated and that the (agency name) workplace be safe, healthful, productive, and secure.

b. In any references to grounds for "reasonable suspicion testing", the term "trafficking" shall also mean "distribution".

c. In addition to all grounds contained in this plan, there shall be grounds for reasonable suspicion testing of an employee if the employee is the focus of a criminal investigation into the illegal use, possession, or distribution of controlled substances.

d. Where authorities and guidance are cited in the plan as references, the following authority and guidance are added:

i). Authority: Section 628 of the Treasury, Postal Service, and General Government Appropriations Act of 1989, Pub. L. 100-440, as amended

ii). Guidance: Office of Personnel Management (OPM) Federal Personnel Manual (FPM) Letter 792-18, December 30, 1988, setting forth guidelines to agencies, departments, and instrumentalities in establishing a drug-free workplace pursuant to Pub.L. 100-440.

2. This amendment is effective upon the signature of the agency head or the senior management official authorized to sign for the agency head.

_____ _____

Date Agency Head or Senior Management Official

*U.S.GOVERNMENT PRINTING OFFICE:1989-260-587:00032

federal register

Monday
January 25, 1993

Part III

Department of Health and Human Services

Substance Abuse and Mental Health Services Administration

Mandatory Guidelines for Federal Workplace Drug Testing Programs; Notice

the impartiality and objectivity of the MRO in reporting testing deficiencies or errors to appropriate agency officials.

The Secretary proposes that a new Section 2.5(d)(1) be added which requires agencies to purchase only blind quality control materials that have been (a) certified by immunoassay and GC/MS, and (b) have stability data which verifies their performance over time. This proposed requirement is included because there is no current uniform criteria for the preparation, certification, and stability of urine samples provided by numerous vendors for use in agencies' blind performance testing programs. Requiring the certification data will assist in preventing the use of materials that may be unacceptable as blind quality control specimens.

In section 2.5(d)(2), the requirement to maintain a minimum of 10 percent blind samples is proposed to be reduced to 3 percent (with a maximum of 100 samples) submitted per quarter. This change could significantly reduce the costs associated with maintaining a blind sample program without affecting the ability to monitor a laboratory's performance. In addition, the 3 percent requirement coincides with that adopted by the Department of Transportation for their regulated industry programs.

The Secretary proposes to add a new section 2.6(h), as redesignated, to clarify that the Medical Review Officer must report the final results of drug tests to the agency in writing and in a manner designed to ensure confidentiality of the information. This provision is simply a clarification of existing practice. Requiring final results to be in writing assists in preventing reporting errors. The Department also believes that the Medical Review Officer must transmit drug test results in a manner designed to ensure confidentiality of the information, since this is sensitive information.

Subpart C—Certification of Laboratories Engaged in Urine Drug Testing for Federal Agencies

It is proposed that the last sentence of section 3.4 be amended to clarify that a certified laboratory must inform all clients when procedures followed for those clients do not conform to the standards specified in these Guidelines or when any action is taken which suspends or revokes the laboratory's certification. Most certified laboratories promote themselves as "NIDA certified" and many clients rely on this certification. Thus, it is essential that clients are aware of any departure from the Guidelines or problems with the laboratory's certification.

It is proposed that section 3.12(c) be added to clarify the existing authority of the Secretary to take whatever action is necessary to ensure that certified laboratories continue to satisfy all provisions of these Guidelines and to ensure the full reliability of drug testing. This includes issuing directives to any laboratory suspending the use of certain analytical procedures when necessary to protect the integrity of the testing process; ordering any laboratory to undertake corrective actions to respond to material deficiencies identified in inspections or proficiency testing; ordering any laboratory to send aliquots of urine specimens to be tested at another laboratory when necessary to ensure the accuracy of testing under these Guidelines; reviewing private sector drug testing data to the extent necessary to ensure the full reliability of drug testing for Federal agencies; and taking any other action necessary to address deficiencies in drug testing, analysis, sample collection, chain of custody, reporting of results, or any other aspect of the certification program.

The Secretary proposes that section 3.17(c) be amended to change the PT challenges for certified laboratories from 6 cycles per year to 4 cycles per year. Experience in this and other performance testing programs indicates that 4 cycles per year is sufficient to assess a laboratory's ability to forensically test and report results for PT specimens.

The Secretary proposes that section 3.19(b)(4) be amended to allow a certified laboratory to report one quantitative result differing by more than 50 percent from the target value within any 3 consecutive cycles of performance testing. This change would allow a certified laboratory to make one administrative or technical error on a performance testing sample and be given an opportunity to take corrective action to ensure that this kind of error will not reoccur.

The Secretary proposes that new sections 3.15(e) and 3.22 be added to provide that the Secretary will announce in the **Federal Register** when laboratories are certified, those whose certifications have been suspended, or those whose certifications have been revoked. These provisions coincide with existing HHS policy. The Secretary does not propose to publish in the **Federal Register** notices of proposed revocation of laboratories whose certifications have not been suspended. Unlike suspended laboratories, these laboratories do not pose an immediate threat to the public health and welfare and may continue Federal employee drug testing until such time that the revocation becomes effective. These laboratories would also have an opportunity to request internal review of the decision to revoke.

Section 3.15(e) also provides that the written notice of the suspension which is sent to the laboratory will be made available to the public upon request, as well as the reviewing official's written decision which upholds or denies the suspension or proposed revocation under the procedures of subpart D.

The Secretary proposes to revise section 3.16 to clarify how a laboratory who has had its certification revoked may seek recertification. The Department proposes to revise that section to provide that, unless otherwise provided by the Secretary in the notice of suspension or proposed revocation under section 3.13(a) or the reviewing official's decision under section 4.9(e) or 4.14(a), a laboratory which has had its certification revoked and seeks to be recertified must meet the criteria of section 3.12(b), as well as all other requirements of the Guidelines, including the successful participation in three cycles of performance testing (sections 3.17(b) and 3.19(a)) and a laboratory inspection (sections 3.2(b) and 3.20). Once recertified, the laboratory must undergo a second inspection within three months, after which biannual inspections will be required to maintain certification (section 3.2(b)), as well as participation in the quarterly performance testing program (sections 3.2(b) and 3.17(c)).

The Secretary proposes to revise section 3.20 to clarify that inspectors are to perform inspections consistent with the guidance provided by the Secretary. This revision also clarifies that laboratories are required to follow good forensic laboratory practice in all aspects of their drug testing operations and are required to be in compliance with these Guidelines. It is the laboratory's responsibility to correct all deficiencies identified during the inspection and to have the knowledge, skill, and expertise to correct deficiencies consistent with good forensic laboratory practice.

Subpart D—Procedures for Review of Suspension or Proposed Revocation of a Certified Laboratory

The Secretary proposes to add a new subpart F which sets forth more detailed procedures for the review of an immediate suspension or proposed revocation of a certified laboratory that is provided for in section 3.15(b). In general, these procedures describe how laboratories may request an informal review of the immediate suspension and the proposed revocation and how the review will generally be conducted. The

presiding official will review documents and briefs that are submitted and may provide for a hearing at which time each party may present witnesses as agreed upon in a prehearing conference and may question the opposing party's witnesses.

More specifically, the procedures provide that a laboratory has 30 days from the written notice of suspension or proposed revocation or 3 days from notification for an expedited review of the suspension to request a review. The National Laboratory Certification Program (currently located in the Division of Applied Research at the National Institute on Drug Abuse) bears the burden of proving by a preponderance of the evidence that its decision to suspend or propose revocation is appropriate. If the reviewing official upholds the suspension and proposed revocation, the revocation will become effective immediately and, if the suspension and proposed revocation are denied, the suspension will be lifted immediately.

The procedures also provide for an abeyance agreement. That is, the parties may agree, upon mutually acceptable conditions, to hold the informal review procedures in abeyance for a reasonable time while the laboratory attempts to regain compliance with the Mandatory Guidelines. For example, if a laboratory receives notice of an immediate suspension and a proposed revocation and prefers to remedy the deficiencies rather than proceed immediately with an informal review, the parties involved may agree, upon mutually acceptable conditions, to extend the time periods for requesting review of the suspension or proposed revocation. If the dispute has been resolved, the request for review will be dismissed.

It is the Department's view that these procedures will provide a timely and fair review of suspensions or proposed revocations.

Several sections have been redesignated and other minor proposed changes have been made for grammatical and procedural clarification. All changes are presented below in a section-by-section format.

Information Collection Requirements

Any comments related to the Paperwork Reduction Act of 1980 may be sent to Allison Eydt: HHS Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, room 3001, New Executive Office Building, Washington, DC 20503.

Information collection and recordkeeping requirements which would be imposed on laboratories engaged in urine drug testing for Federal agencies concern quality assurance and quality control; security and chain of custody; documentation; reports; performance testing; and inspections as set out in sections 3.7, 3.8, 3.10, 3.11, 3.17, and 3.20. To facilitate ease of use and uniform reporting, a chain of custody form has been developed as referenced in sections 2.2(c) and 2.2(f).

The information collection and recordkeeping requirements contained in these Guidelines have been submitted to the Office of Management and Budget for review under section 3504(h) of the Paperwork Reduction Act of 1980.

Dated: July 7, 1992.

James O. Mason,

Assistant Secretary for Health.

Dated: August 25, 1992.

Louis W. Sullivan,

Secretary.

Accordingly, the following amendments are proposed to the Mandatory Guidelines for Federal Workplace Drug Testing Programs published on April 11, 1988 (53 FR 11979):

PROPOSED AMENDMENTS TO THE MANDATORY GUIDELINES FOR FEDERAL WORKPLACE DRUG TESTING PROGRAMS

The Table of Contents with all proposed changes included will be revised to read as follows:

Subpart A

1. Section 1.1(b) is deleted; sections 1.1(c–f) are redesignated sections 1.1(b–e), respectively.

2. Section 1.1(b) as redesignated is amended by deleting "Except as provided in 2.6."

3. Section 1.2 is amended by adding the following new definitions in alphabetical sequence:

Calibrator A sample used to prepare a calibration curve or cutoff of the assay.

Certifying Scientist An individual with at least a bachelor's degree in the chemical or biological sciences or medical technology or equivalent who reviews all pertinent data and quality control results. The individual shall have training and experience in the theory and practice of all methods and procedures used in the laboratory, including a thorough understanding of quality control practices and procedures relevant to the results that the individual certifies. Relevant training and experience shall also include the review, interpretation, and reporting of test results; maintenance of chain of custody; and proper remedial action to be taken in response to test systems being out of control limits or detecting aberrant test or quality control results.

Control A sample used to check the accuracy of a calibration.

Laboratory Chain of Custody Form The form(s) used by the testing laboratory to document the security of the specimen and all aliquots of the specimens during testing and storage by the laboratory. The form, which may account for an entire laboratory test batch, shall include the names and signatures of all individuals who accessed the specimens or aliquots and the date and purpose of the access.

Specimen Chain of Custody Form A form used to document the security of the specimen from time of collection until receipt by the laboratory. This form, at a minimum, shall include specimen identifying information, date and location of collection, name and signature of collector, name of testing laboratory, and the names and signatures of all individuals who had custody of the specimen from time of collection until the specimen was prepared for shipment to the laboratory.

Standard A reference material or solution used to prepare a calibrator or control.

4. Section 1.2, definition of Chain of Custody, second sentence, is amended to read as follows:

These procedures shall require that an OMB approved specimen chain of custody form be used from the time of collection to receipt by the laboratory and that upon receipt by the laboratory an appropriate laboratory chain of custody form(s) account for the sample or sample aliquots within the laboratory.

5. Section 1.2, definition of Initial Test, is amended to read as follows:

An immunoassay test to eliminate "negative" urine specimens from further consideration and to identify the class of drugs that requires confirmation.

6. Section 1.2 is amended by deleting the definition of Permanent Record Book.

Subpart B

1. In all sections where the term ml is used for milliliters), it is replaced with the term mL.

2. Section 2.1(c) is amended as follows:

Urine specimens collected pursuant to Executive Order 12564, Public Law 100–71, and these Guidelines shall be used only to test for those drugs included in agency drug-free workplace plans and may not be used to conduct any other analysis or test unless otherwise authorized by law except if additional testing is required to determine the validity of the specimen. Urine that tests negative by initial or confirmatory testing may, however, be pooled for use in the laboratory's internal quality control program.

3. Sections 2.2 and 2.4 are amended by substituting the terms "in the record book" or "in the permanent record book," wherever they appear, with "on the specimen chain of custody form."

4. Section 2.2(f)(9) is amended by deleting "collection site" in the second sentence.

5. Section 2.2(f)(10) is amended by replacing 60 milliliters with 30 milliliters (mL), deleting the second and the third sentence, and changing "(a glass of water)" in the fourth sentence to read "(e.g., an 8 oz glass of water every 30 min)."

6. Section 2.2(f)(13) is amended by changing "32.5°–37.7°C/90.5–99.8°F" to read "32°C/90°–100°F."

7. Section 2.2(f)(13) is amended by changing the phrase "direct observation of a same gender collection site person" to read "direct observation by a person of the same gender."

8. Section 2.2(f)(16) is amended in its entirety to read as follows:

When there is any reason to believe that a particular individual may have altered or substituted the specimen to be provided, another specimen shall be obtained as soon as possible under the direct observation of a person of the same gender and both specimens shall be forwarded to the laboratory for testing.

9. Section 2.2(f)(17) is amended by revising the second sentence to read as follows:

If the specimen is transferred to a second bottle, the collection site person shall request the individual to observe the transfer of the specimen and the placement of the tamper-evident seal/tape on the bottle. The tamper-evident seal may be in the form of evidence tape, a self-sealing bottle cap with both a tamper-evident seal and unique coding, cap and bottle systems that can only be sealed one time, or any other system that ensures any tampering with the specimen will be evident to laboratory personnel during the accessioning process.

10. Section 2.2(f)(21) is amended by deleting the second sentence.

11. Section 2.2(f)(23) is amended in its entirety to read as follows:

Based on a reason to believe that the individual may alter or substitute the specimen to be provided, a higher level supervisor shall review and concur in advance with any decision by a collection site person to obtain a specimen under direct observation. The person directly observing the specimen collection shall be of the same gender.

12. Section 2.2(h), Transportation to Laboratory, is redesignated as § 2.2(i) and is amended by substituting the term "chain of custody documentation" with the term "specimen chain of custody form."

13. A new section 2.2(h) is added as follows:

Split Specimens. The employer may, but is not required to, use a split sample method of collection. If the urine specimen is split into two containers (hereinafter referred to as Bottle A and Bottle B), the following procedure shall be used:

(1) The individual shall urinate into a collection container. The collection site person, in the presence of the individual, after determining specimen temperature, pours the urine into two specimen containers labelled Bottle A and Bottle B.

(2) The first specimen bottle (Bottle A) is to be used for the drug test, and 30 mL of urine shall be poured into it. If there is no additional urine available for the second specimen bottle (Bottle B), the first specimen bottle (Bottle A) shall nevertheless be processed for testing.

(3) Up to 30 mL of the remainder of the urine shall be poured into the second specimen bottle (Bottle B).

(4) All requirements of this part shall be followed with respect to Bottle A and Bottle B, including the requirements that a copy of the chain of custody form accompany each bottle processed under split sample procedures.

(5) Any specimen collected under split sample procedures must be stored in a secured, refrigerated environment and an appropriate entry made on the specimen chain of custody form.

(6) If the test of the first specimen bottle (Bottle A) is positive, the individual may request that the MRO direct that the second specimen bottle (Bottle B) be tested in a different HHS-certified laboratory for presence of the drug(s) for which a positive result was obtained in the test of the first specimen bottle (Bottle A). The MRO shall honor such a request if it is made within 72 hours of the individual's having received notice that he or she tested positive. The result of this test is transmitted to the MRO without regard to the cutoff levels used to test the first specimen bottle (Bottle A).

(7) Any action taken by a Federal agency as a result of a positive drug test (e.g., removal from performing a safety-sensitive function) may proceed pending the result of the test on the second specimen bottle (Bottle B).

(8) If the result of the test on the second specimen bottle (Bottle B) is negative, the MRO shall void the test result for Bottle A. Any action taken under paragraph (7) shall be reversed and the individual shall re-enter the group subject to random testing as if the test had not been conducted.

14. Section 2.3(a) is amended by substituting the term "responsible person" for the term "qualified individual."

15. Sections 2.3(b) and 2.4(g) are amended by substituting the term "certifying scientist(s)" for the terms "qualified individual(s)" and "responsible individual" and by deleting the last sentence in § 2.3(b).

16. Section 2.4(a)(1), last sentence, is amended to read as follows:

The laboratory shall maintain a record that documents the dates, time of entry and exit, and purpose of entry of authorized visitors, maintenance, and service personnel accessing secured areas.

17. Section 2.4(b)(2), second sentence, is amended to read:

Aliquots and laboratory chain of custody forms shall be used by laboratory personnel for conducting initial and confirmatory tests while the original specimen and specimen chain of custody form remain in secure storage.

18. Section 2.4(d), third sentence, is amended to read as follows:

When conducting either initial or confirmatory tests, every batch shall contain an appropriate number of standards and controls (see section 2.5 (b) and (c)).

19. Section 2.4(e)(1), the initial test level for marijuana metabolites appearing in the table, is amended by changing the value of "100" to "50."

20. Section 2.4(e)(2), second sentence, is amended to read:

The agency requesting the authorization to include other drugs shall submit to the Secretary in writing the agency's proposed initial test methods, testing levels, and performance test program.

21. Section 2.4(e)(3) is added to read as follows:

Specimens that test negative on all initial immunoassay tests will be reported negative. No further testing of these negative specimens is permitted and the samples shall either be discarded or pooled for use in the laboratory's internal quality control program.

22. Section 2.4(e)(4) is added to read as follows:

Multiple screening tests (also known as rescreening) for the same drug or drug class may be performed provided that all tests meet all Guideline cutoffs and quality control requirements (see section 2.5(b)). For example, a test is performed by immunoassay technique "A" for all drugs using the HHS cutoff levels, but presumptive positive amphetamines are forwarded for immunoassay technique "B" to eliminate any possible presumptive positives due to structural analogues. All tests must include all the appropriate quality control samples and use the HHS cutoffs.

23. Section 2.4(f)(1), first sentence, is amended by deleting the word "techniques" and the phrase "for each drug" and by adding after the word "confirmed" the phrase "for the class(es) of drugs screened positive on the initial screen." The third sentence is amended by replacing the phrase "greater than highest standard curve value" with "exceeds the linear range of the test." The table is amended by deleting the two asterisks on the morphine and codeine lines. A new superscript 3 is added to the methamphetamine line of the table with a new footnote to read "Specimen must also contain amphetamine at a concentration ≥200 ng/mL."

24. Section 2.4(f)(2), the second sentence, is amended to read as follows:

The agency requesting the authorization to include other drugs shall submit to the Secretary in writing the agency's proposed confirmatory test methods, testing levels, and proposed performance test program.

25. Section 2.4(f)(3) is added as follows:

Specimens that test negative on confirmatory tests shall be reported negative. No further testing of these specimens is permitted and the samples shall either be discarded or pooled for use in the laboratory's internal quality control program.

26. In section 2.4(g)(1), the last sentence is deleted.

27. In section 2.4(g)(2), two new sentences are added to read:

For amphetamines, to report a specimen positive for methamphetamine only, the specimen must also contain amphetamine at a concentration equal to or greater than 200 ng/mL by the confirmatory test. If this criterion is not met, the specimen must be reported as negative for methamphetamine.

28. Section 2.4(g)(5) is amended by replacing the phrase "individual responsible for day to day management of the drug testing laboratory or the individual responsible for testing to the validity of the test reports" with "certifying scientist."

29. Section 2.4(i) is amended by revising the title to read as follows:

Retesting of a Specimen (i.e., the reanalysis by gas chromatography/mass spectrometry of a specimen previously reported positive or the testing of Bottle B of a split specimen collection).

30. Section 2.4(l) is amended by replacing the word "shall" in the last sentence with the word "may."

31. In section 2.4(n)(2), the title and first sentence are amended as follows:

Calibrators and Controls. Laboratory calibrators and controls shall be prepared with pure drug standards which are properly labeled as to content and concentration.

32. A new section 2.4(n)(6) is added to read as follows:

(6) Restrictions. The laboratory shall not enter into any relationship with an agency's Medical Review Officer that may be construed as a potential conflict of interest or derive any financial benefit by having an agency use a specific Medical Review Officer.

33. Section 2.5(a) is amended by revising the first sentence as follows:

Drug testing laboratories shall have a quality assurance program which encompasses all aspects of the testing process including but not limited to specimen acquisition, chain of custody, security and reporting of results, initial and confirmatory testing, certification of calibrators and controls, and validation of analytical procedures.

34. Section 2.5(b) is amended to read as follows:

Each analytical run of specimens to be screened shall include:

(1) Negative specimens certified to contain no drug;

(2) Positive controls fortified with known reference materials;

(3) Positive controls with the drug or metabolite at or near the threshold (cutoff);

(4) A sufficient number of calibrators to ensure and document the linearity of the assay method over time in the concentration area of the cutoff. After acceptable values are obtained for the known calibrators, those values will be used to calculate sample data;

(5) A minimum of 20 percent of all test samples shall be quality control specimens; and

(6) One percent of each run, with a minimum of at least one sample, shall be the laboratory's blind quality control samples to appear as normal samples to the laboratory analysts.

Implementation of procedures to ensure that carryover does not contaminate the testing of an individual's specimen shall be documented.

35. Section 2.5(d)(1), first sentence, is redesignated as section 1.1(f).

36. Section 2.5(d)(1), second sentence, is redesignated a new section 3.19(e) and the title "Other Performance Testing" is added prior to that sentence.

37. A new section 2.5(d)(1) is added to read as follows:

(1) Agencies shall only purchase blind quality control materials that have been certified by immunoassay and GC/MS and have stability data which verifies their performance over time.

38. Section 2.5(d)(2) is amended to read as follows:

During the initial 90-day period of any new drug testing program, each agency shall submit blind performance test specimens to each laboratory it contracts with in the amount of at least 50 percent of the total number of samples submitted (up to a maximum of 500 samples) and thereafter a minimum of 3 percent of all samples (to a maximum of 100) submitted per quarter.

39. Section 2.5(d)(4), the second sentence, is revised to read as follows:

A record shall be made of the Secretary's investigative findings and the corrective action taken by the laboratory, and that record shall be dated and signed by the individuals responsible for the day-to-day management and operation of the drug testing laboratory.

40. Section 2.5(d)(6), third sentence, is amended as follows:

This retesting shall be documented by a statement signed by the Responsible Person.

41. Section 2.6 on Interim Certification is deleted and sections 2.7 through 2.9 are redesignated as sections 2.6 through 2.8.

42. A new section 2.6(h) as redesignated is added to read as follows:

Reporting Final Results. The Medical Review Officer shall report the final results of the drug tests in writing and in a manner designed to ensure confidentiality of the information.

43. Section 2.6(b) as redesignated is amended by replacing the first sentence with the following sentences:

The Medical Review Officer shall be a licensed physician with knowledge of substance abuse disorders. The Medical Review Officer may be an employee of the agency or a contractor for the agency; however, the Medical Review Officer shall not be an employee or agent of or have any financial interest in the laboratory for which the Medical Review Officer is reviewing drug testing results. Additionally, the Medical Review Officer shall not derive any financial benefit by having an agency use a specific drug testing laboratory or have any relationship with the laboratory that may be construed as a potential conflict of interest.

44. The last sentence of section 2.6(d) as redesignated is amended to read as follows:

This requirement does not apply if the agency's GC/MS confirmation testing for opiates confirms the presence of 6-monoacetylmorphine since the presence of this metabolite is proof of heroin use.

45. Section 2.6(e) as redesignated is amended to read as follows:

Should any question arise as to the accuracy or validity of a positive test result, only the Medical Review Officer is authorized to order a reanalysis of the original sample or the analysis of Bottle B from a split specimen collection. Such retests are authorized only at laboratories certified under these Guidelines.

46. Section 2.6(f) as redesignated is amended to read as follows:

If the Medical Review Officer determines that there is a legitimate medical explanation for the positive test result, he or she shall take no further action and report the test result as negative.

Subpart C

1. In section 3.2(b), the fifth sentence is amended to read as follows:

Maintenance of certification requires participation in a quarterly performance testing program plus periodic, on-site inspections.

2. In section 3.4, the last sentence is corrected to read as follows:

Certified laboratories must clearly inform all clients when procedures followed for those clients do not conform to the standards specified in these Guidelines or when the laboratory undergoes a full or partial suspension or revocation.

3. A new section 3.12(c) is added to read as follows:

(c) Corrective Action by Certified Laboratories. A laboratory must meet all the pertinent provisions of these Guidelines in order to qualify for and maintain certification. The Secretary has broad discretion to take appropriate action to ensure the full reliability and accuracy of drug testing and reporting and to resolve problems related to drug testing and to enforce all standards set forth in these Guidelines. The Secretary shall have the authority to issue directives to any laboratory suspending the use of certain analytical procedures when necessary to protect the integrity of the testing process; order any laboratory to undertake corrective actions to respond to material deficiencies identified in inspections or proficiency testing; order any laboratory to send aliquots of urine specimens to be tested at another laboratory when necessary to ensure the accuracy of testing under these Guidelines; review private sector drug testing data to the extent necessary to ensure the full reliability of drug testing for Federal agencies; and take any other action necessary to address deficiencies in drug testing, analysis, sample collection, chain of custody, reporting of results, or any other aspect of the certification program.

4. Section 3.15, the title is changed from "Notice; Opportunity for Review" to read "Notice."

5. Section 3.15(a) is revised as follows:

(a) Written Notice. When a laboratory is suspended or the Secretary seeks to revoke certification, the Secretary shall immediately serve the laboratory with written notice of the suspension or proposed revocation by facsimile mail, personal service, or registered or certified mail, return receipt requested. This notice shall state the following:

(1) The reasons for the suspension or proposed revocation;

(2) The terms of the suspension or proposed revocation; and

(3) The period of suspension or proposed revocation.

6. In section 3.15(b), the second, third, and fourth sentences are deleted and the following added after the first sentence:

Subpart D contains detailed procedures to be followed for an informal review of the suspension or proposed revocation.

7. Section 3.15(e) is added to read as follows:

Public Notice. The Secretary shall publish in the **Federal Register** the name, address, and telephone number of any laboratory that has its certification suspended or revoked under section 3.13 or section 3.14, respectively, and the name of any laboratory which has its suspension lifted. The Secretary shall provide to any member of the public upon request the written notice provided to a laboratory that has its certification suspended or revoked, as well as the reviewing official's written decision which upholds or denies the suspension or proposed revocation under the procedures of subpart D.

8. Section 3.16, second sentence, is changed to read as follows:

Unless otherwise provided by the Secretary in the notice of suspension or proposed revocation under section 3.13(a) or the reviewing official's decision under section 4.9(e) or 4.14(a), a laboratory which has had its certification revoked and seeks to be recertified shall apply for recertification in accordance with this section. In order to be recertified, the laboratory shall meet the criteria of section 3.12(b), as well as all other requirements of these Guidelines, including the successful participation in three cycles of performance testing (sections 3.17(b) and 3.19(a)) and a laboratory inspection (sections 3.2(b) and 3.20). Once recertified, the laboratory must undergo

a second inspection within three months, after which biannual inspections will be required to maintain certification (section 3.2(b)), as well as participation in the quarterly performance testing program (sections 3.1(b) and 3.17(c)).

9. Sections 3.17 and 3.19 are amended by substituting "PT" as an abbreviation for performance testing, wherever that term appears.

10. Section 3.17(b) is amended by deleting the last sentence.

11. Section 3.17(c) is revised to read as follows:

(c) Four Challenges Per Year. After certification, laboratories shall be challenged with at least 10 PT specimens on a quarterly cycle.

12. The first sentence in § 3.18(b) is amended to read as follows:

PT specimens (as differentiated from blind quality control samples) shall be spiked with the drug classes and their metabolites that are required for certification (marijuana, cocaine, opiates, amphetamines, and phencyclidine) with concentration levels set by, but not limited to, one of the following schema: (1) At least 20 percent above the cutoff limit for the initial test; (2) near the cutoff limit as a directed specimen for confirmatory testing; and, (3) below the cutoff limit to assess the performance of analytical procedures at low concentrations.

13. The second sentence of section 3.18(b) is amended by adding "(directed specimens)" to the end of the sentence.

14. Section 3.18(b) is amended by including the following additional sentence at the end of the section:

Finally, PT specimens may be constituted with interfering substances.

15. Section 3.19(a)(2) is amended by deleting the phrase "for each shipment" in the first sentence. The second sentence of section 3.19(a)(2) is amended by changing the phrase "over the three cycles" to read "over the three consecutive PT cycles."

16. The first sentence of section 3.19(a)(3) is amended to read as follows:

An applicant laboratory shall obtain quantitative values for at least 80 percent of the total drug challenges which are ±20 percent or ±2 standard deviations (whichever range is larger) of the calculated reference group mean.

17. In section 3.19(b)(2) is amended to read as follows:

In order to remain certified, laboratories must successfully complete four cycles of performance testing per year. Failure of a certified laboratory to maintain a grade of 90 percent over the span of three consecutive PT cycles, i.e., to identify 90 percent of the total drug challenges and to confirm correctly 90 percent of the total drug challenges, may result in suspension or revocation of certification.

18. Section 3.19(b)(3) is amended to read as follows:

Quantitative values obtained by a certified laboratory for at least 80 percent of the total drug challenges must be ±20 percent or ±2 standard deviations (whichever range is larger) of the appropriate reference or peer group mean as measured over three consecutive PT cycles.

19. Section 3.19(b)(4) is amended to read as follows:

After achieving certification a laboratory is permitted one quantitative result differing by more than 50 percent from the target value within three consecutive cycles of PT. More than one error of this type within three consecutive PT cycles may result in a suspension or proposed revocation.

20. Section 3.19(b)(6), the first sentence, is amended to read as follows:

If a certified laboratory fails to maintain a grade of 90 percent over the span of three consecutive PT cycles after initial certification as required by paragraph (b)(2) of this section or if it fails to successfully quantitate results as required by paragraphs (b)(3), (b)(4), or (b)(5) of this section, the laboratory shall be immediately informed that its performance fell under the 90 percent level or that it failed to quantitate successfully test results and how it failed to quantitate successfully.

21. Section 3.20 is amended by adding the title "(a) Frequency" before the first sentence.

22. Section 3.20, the second and third sentences are replaced with the following:

(b) Inspectors. The Secretary shall establish criteria for the selection of inspectors to ensure high quality, unbiased, and thorough inspections. The inspectors shall perform inspections consistent with the guidance provided by the Secretary. Inspectors shall document the overall quality of the laboratory's drug testing operation.

(c) Inspection Performance. The laboratory's operation shall be consistent with good forensic laboratory practice and shall be in compliance with these Guidelines. It is the laboratory's responsibility to correct all deficiencies identified during the inspection and to have the knowledge, skill, and expertise to correct deficiencies consistent with good forensic laboratory practice. Consistent with sections 3.13 and 3.14, deficiencies identified at inspections may be the basis for suspending or revoking a laboratory's certification.

23. Section 3.22 is added to read as follows:

Listing of Certified Laboratories

A **Federal Register** listing of laboratories certified by HHS will be updated and published periodically. Laboratories which are in the applicant stage of HHS certification are *not* to be considered as meeting the minimum requirements in these Guidelines. A laboratory is not certified until HHS has sent the laboratory an HHS letter of certification.

Subpart D

1. A new subpart D describing procedures for review of suspension or proposed revocation is added to read as follows:

Subpart D—Procedures for Review of Suspension or Proposed Revocation of a Certified Laboratory

Section 4.1 Applicability.

These procedures apply when:

(a) The Secretary has notified a laboratory in writing that its certification to perform urine drug testing under these Mandatory Guidelines for Federal Workplace Drug Testing Programs has been suspended or that the Secretary proposes to revoke such certification.

(b) The laboratory has, within 30 days of the date of such notification or within 3 days of the date of such notification when seeking an expedited review of a suspension, requested in writing an opportunity for an informal review of the suspension or proposed revocation.

Section 4.2 Definitions.

Appellant Means the laboratory which has been notified of its suspension or proposed revocation of its certification to perform urine drug testing and has requested an informal review thereof.

Respondent Means the person or persons designated by the Secretary in implementing these Guidelines (currently the National Laboratory Certification Program is located in the Division of Workplace Programs, Substance Abuse and Mental Health Services Administration).

Reviewing Official Means the person or persons designated by the Secretary who will review the suspension or proposed revocation. The reviewing official may be assisted by one or more employees or consultants in assessing and weighing the scientific and technical evidence and other information submitted by the appellant and respondent on the reasons for the suspension and proposed revocation.

Section 4.3 Limitation of Issues Subject to Review.

The scope of review shall be limited to the facts relevant to any suspension or proposed revocation, the necessary interpretations of those facts, the Mandatory Guidelines for Federal Workplace Drug Testing Programs, and other relevant law. The legal validity of the Mandatory Guidelines shall not be subject to review under these procedures.

Section 4.4 Specifying Who Represents the Parties.

The appellant's request for review shall specify the name, address, and phone number of the appellant's representative. In its first written submission to the reviewing official, the respondent shall specify the name, address, and phone number of the respondent's representative.

Section 4.5 The Request for Informal Review and the Reviewing Official's Response.

(a) Within 30 days of the date of the notice of the suspension or proposed revocation, the appellant must submit a written request to the reviewing official seeking review, unless some other time period is agreed to by the parties. A copy must also be sent to the respondent. The request for review must include a copy of the notice of suspension or proposed revocation, a brief statement of why the decision to suspend or propose revocation is wrong, and the appellant's request for an oral presentation, if desired.

(b) Within 5 days after receiving the request for review, the reviewing official will send an acknowledgment and advise the appellant of the next steps. The reviewing official will also send a copy of the acknowledgment to the respondent.

Section 4.6 Abeyance Agreement.

Upon mutual agreement of the parties to hold these procedures in abeyance, the reviewing official will stay these procedures for a reasonable time while the laboratory attempts to regain compliance with the Mandatory Guidelines for Federal Workplace Drug Testing Programs or the parties otherwise attempt to settle the dispute. As part of an abeyance agreement, the parties can agree to extend the time period for requesting review of the suspension or proposed revocation. If abeyance begins after a request for review has been filed, the appellant shall notify the reviewing official at the end of the abeyance period advising whether the dispute has been resolved. If the dispute has been resolved, the request for review will be dismissed. If the dispute has not been resolved, the review procedures will begin at the point at which they were interrupted by the abeyance agreement with such modifications to the procedures as the reviewing official deems appropriate.

Section 4.7 Preparation of the Review File and Written Argument.

The appellant and the respondent each participate in developing the file for the reviewing official and in submitting written arguments. The procedures for development of the review file and submission of written argument are:

(a) *Appellant's Documents and Brief.* Within 15 days after receiving the acknowledgment of the request for review, the appellant shall submit to the reviewing official the following (with a copy to the respondent):

(1) A review file containing the documents supporting appellant's argument, tabbed and organized chronologically, and accompanied by an index identifying each document. Only essential documents should be submitted to the reviewing official.

(2) A written statement not to exceed 20 double-spaced pages, explaining why respondent's decision to suspend or propose revocation of appellant's certification is wrong (appellant's brief).

(b) *Respondent's Documents and Brief.* Within 15 days after receiving a copy of the acknowledgment of the request for review, the respondent shall submit to the reviewing official the following (with a copy to the appellant):

(1) A review file containing documents supporting respondent's decision to suspend or revoke appellant's certification to perform urine drug testing, tabbed and organized chronologically, and accompanied by an index identifying each document. Only essential documents should be submitted to the reviewing official.

(2) A written statement, not exceeding 20 double-spaced pages in length, explaining the basis for suspension or proposed revocation (respondent's brief).

(c) *Reply Briefs.* Within 5 days after receiving the opposing party's submission, or 20 days after receiving acknowledgment of the request for review, whichever is later, each party may submit a short reply not to exceed 10 double-spaced pages.

(d) *Cooperative Efforts.* Whenever feasible, the parties should attempt to develop a joint review file.

(e) *Excessive Documentation.* The reviewing official may take any appropriate step to reduce excessive documentation, including the return of or refusal to consider documentation found to be irrelevant, redundant, or unnecessary.

Section 4.8 Opportunity for Oral Presentation.

(a) *Electing Oral Presentation.* If an opportunity for an oral presentation is desired, the appellant shall request it at the time it submits its written request for review to the reviewing official. The reviewing official will grant the request if the official determines that the decision-making process will be substantially aided by oral presentations and arguments. The reviewing official may also provide for an oral presentation at the official's own initiative or at the request of the respondent.

(b) *Presiding Official.* The reviewing official or designee will be the presiding official responsible for conducting the oral presentation.

(c) *Preliminary Conference.* The presiding official may hold a prehearing conference (usually a telephone conference call) to consider any of the following: Simplifying and clarifying issues; stipulations and admissions; limitations on evidence and witnesses that will be presented at the hearing; time allotted for each witness and the hearing altogether; scheduling the hearing; and any other matter that will assist in the review process. Normally, this conference will be conducted informally and off the record; however, the presiding official may, at his or her discretion, produce a written document summarizing the conference or transcribe the conference, either of which will be made a part of the record.

(d) *Time and Place of Oral Presentation.* The presiding official will attempt to schedule the oral presentation within 30 days of the date appellant's request for review is received or within 10 days of submission of the last reply brief, whichever is later. The oral presentation will be held at a time and place determined by the presiding official following consultation with the parties.

(e) *Conduct of the Oral Presentation.*

(1) *General.* The presiding official is responsible for conducting the oral presentation. The presiding official may be assisted by one or more employees or consultants in conducting the oral presentation and reviewing the evidence. While the oral presentation will be kept as informal as possible, the presiding official may take all necessary steps to ensure an orderly proceeding.

(2) *Burden of Proof/Standard of Proof.* In all cases, the respondent bears the burden of proving by a preponderance of the evidence that its decision to

suspend or propose revocation is appropriate. The appellant, however, has a responsibility to respond to the respondent's allegations with evidence and argument to show that the respondent is wrong.

(3) *Admission of Evidence.* The rules of evidence do not apply and the presiding official will generally admit all testimonial evidence unless it is clearly irrelevant, immaterial, or unduly repetitious. Each party may make an opening and closing statement, may present witnesses as agreed upon in the prehearing conference or otherwise, and may question the opposing party's witnesses. Since the parties have ample opportunity to prepare the review file, a party may introduce additional documentation during the oral presentation only with the permission of the presiding official. The presiding official may question witnesses directly and take such other steps necessary to ensure an effective and efficient consideration of the evidence, including setting time limitations on direct and cross-examinations.

(4) *Motions.* The presiding official may rule on motions including, for example, motions to exclude or strike redundant or immaterial evidence, motions to dismiss the case for insufficient evidence or motions for summary judgment. Except for those made during the hearing, all motions and opposition to motions, including argument, must be in writing and be no more than 10 double-spaced pages in length. The presiding official will set a reasonable time for the party opposing the motion to reply.

(5) *Transcripts.* The presiding official shall have the oral presentation transcribed and the transcript shall be made a part of the record. Either party may request a copy of the transcript and the requesting party shall be responsible for paying for its copy of the transcript.

(f) *Obstruction of Justice or Making of False Statements.* Obstruction of justice or the making of false statements by a witness or any other person may be the basis for a criminal prosecution under 18 U.S.C. 1505 or 1001.

(g) *Post-hearing Procedures.* At his or her discretion, the presiding official may require or permit the parties to submit post-hearing briefs or proposed findings and conclusions. Each party may submit comments on any major prejudicial errors in the transcript.

Section 4.9 Expedited Procedures for Review of Immediate Suspension.

(a) *Applicability.* When the Secretary notifies a laboratory in writing that its certification to perform urine drug testing has been immediately suspended, the appellant may request an expedited review of the suspension and any proposed revocation. The appellant must submit this request in writing to the reviewing official within 3 days of the date the laboratory received notice of the suspension. The request for review must include a copy of the suspension and any proposed revocation, a brief statement of why the decision to suspend and propose revocation is wrong, and the appellant's request for an oral presentation, if desired. A copy of the request for review must also be sent to the respondent.

(b) *Reviewing Official's Response.* As soon as practicable after the request for review is received, the reviewing official will send an acknowledgment with a copy to the respondent.

(c) *Review File and Briefs.* Within 7 days of the date the request for review is received, but no later than 2 days before an oral presentation, each party shall submit to the reviewing official the following: (1) A review file containing essential documents relevant to the review, tabbed, indexed, and organized chronologically, and (2) a written statement, not to exceed 20 double-spaced pages, explaining the party's position concerning the suspension and any proposed revocation. No reply brief is permitted.

(d) *Oral Presentation.* If an oral presentation is requested by the appellant or otherwise granted by the reviewing official, the presiding official will attempt to schedule the oral presentation within 7–10 days of the date of appellant's request for review at a time and place determined by the presiding official following consultation with the parties. The presiding official may hold a pre-hearing conference in accordance with section 4.8(c) and will conduct the oral presentation in accordance with the procedures of section 4.8 (e), (f), and (g).

(e) *Written Decision.* The reviewing official shall issue a written decision upholding or denying the suspension or proposed revocation and will attempt to issue the decision within 7–10 days of the date of the oral presentation or within 3 days of the date on which the transcript is received or the date of the last submission by either party, whichever is later. All other provisions set forth in section 4.14 will apply.

(f) *Transmission of Written Communications.* Because of the importance of timeliness for these expedited procedures, all written communications between the parties and between either party and the reviewing official shall be by facsimile or overnight mail.

Section 4.10 Ex parte Communications.

Except for routine administrative and procedural matters, a party shall not communicate with the reviewing or presiding official without notice to the other party.

Section 4.11 Transmission of Written Communications by Reviewing Official and Calculation of Deadlines.

(a) Because of the importance of a timely review, the reviewing official should normally transmit written communications to either party by facsimile or overnight mail in which case the date of transmission or day following mailing will be considered the date of receipt. In the case of communications sent by regular mail, the date of receipt will be considered 3 days after the date of mailing.

(b) In counting days, include Saturdays, Sundays, and holidays. However, if a due date falls on a Saturday, Sunday, or Federal holiday, then the due date is the next Federal working day.

Section 4.12 Authority and Responsibilities of Reviewing Official.

In addition to any other authority specified in these procedures, the reviewing official and the presiding official, with respect to those authorities involving the oral presentation, shall have the authority to issue orders; examine witnesses; take all steps necessary for the conduct of an orderly hearing; rule on requests and motions; grant extensions of time for good reasons; dismiss for failure to meet deadlines or other requirements; order the parties to submit relevant information or witnesses; remand a case for further action by the respondent; waive or modify these procedures in a specific case, usually with notice to the parties; reconsider a decision of the reviewing official where a party promptly alleges a clear error of fact or law; and to take any other action necessary to resolve disputes in accordance with the objectives of these procedures.

Section 4.13 Administrative Record.

The administrative record of review consists of the review file; other submissions by the parties; transcripts or other records of any meetings, conference calls, or oral presentation; evidence submitted at the oral presentation; and orders and other documents issued by the reviewing and presiding officials.

Section 4.14 Written Decision.

(a) *Issuance of Decision.* The reviewing official shall issue a written decision upholding or denying the suspension or proposed revocation. The decision will set forth the reasons for the decision and describe the basis therefor in the record. Furthermore, the reviewing official may remand the matter to the respondent for such further action as the reviewing official deems appropriate.

(b) *Date of Decision.* The reviewing official will attempt to issue his or her decision within 15 days of the date of the oral presentation, the date on which the transcript is received, or the date of the last submission by either party, whichever is later. If there is no oral presentation, the decision will normally be issued within 15 days of the date of receipt of the last reply brief. Once issued, the reviewing official will immediately communicate the decision to each party.

(c) *Public Notice.* If the suspension and proposed revocation are upheld, the revocation will become effective immediately and the public will be notified by publication of a notice in the **Federal Register**. If the suspension and proposed revocation are denied, the revocation will not take effect and the suspension will be lifted immediately. Public notice will be given by publication in the **Federal Register.**

Section 4.15 Court Review of Final Administrative Action; Exhaustion of Administrative Remedies.

Before any legal action is filed in court challenging the suspension or proposed revocation, respondent shall exhaust administrative remedies provided under this subpart, unless otherwise provided by Federal law. The reviewing official's decision, under section 4.9(e) or 4.14(a), constitutes final agency action and is ripe for judicial review as of the date of the decision.

[FR Doc. 93–1575 Filed 1–22–93; 8:45 am]

BILLING CODE 4160–20–M

John

Office of Personnel Management

Federal Personnel Manual System

FPM Letter 339-18

FPM Letter 339-18

Published in advance of incorporation in FPM Chapter 339
RETAIN UNTIL SUPERSEDED

Washington, D. C. 20415
December 1, 1992

SUBJECT: OPM Adjudication of Objections to Preference Eligibles Based on Positive Drug Test Results

Heads of Departments and Independent Establishments:

1. Several agencies with positions in such fields as medicine and health, law enforcement and national security are requiring applicants, as part of the pre-employment medical clearance process, to undergo drug testing (urinalysis) to determine the presence of illegal drugs.

This letter discusses the role of the U.S. Office of Personnel Management (OPM) in the adjudication of medical objections to preference eligibles who test positive on a pre-employment drug screen. We hope this discussion will be useful in understanding OPM procedures for preference eligibles and clarifying how agency responsibilities differ for non-preference eligibles.

2. Agency objections to preference eligibles (TP, XP, CP, CPS), which are based on the results of a verified, confirmed positive pre-employment drug screen, are to be considered as medical disqualifications or passovers and referred to OPM for adjudication. They should not be processed as suitability cases.

Situations in which applicants refuse or ignore the requirement to take a pre-employment drug test are to be handled as declinations.

3. Please note that OPM decides pre-employment drug cases submitted as medical objections on the basis of the urinalysis results alone. If a confirmatory test proves positive, we will sustain the objection. This approach differs from our usual handling of medical objections in which the employment history, supporting medical documentation, position description, results of OPM or Agency investigation reports, and related materials are thoroughly analyzed to determine whether applicants are capable of carrying out the full range of duties of the position without endangering themselves or others.

4. In adjudicating medical cases involving illegal drug use, agencies that have a Medical Review Officer (MRO) should submit an MRO certification letter to OPM. As long as the MRO certifies that he or she has verified the confirmed positive test result and provides information on the type of test(s) used, OPM does not require the actual drug test results and accompanying Chain-Of-Custody (COC) documentation. An MRO verification is necessary to establish that the drug test result is accurate and not the result of legitimate drug use or some other medically supportable cause.

5. According to The Mandatory Guidelines for Federal Workplace Drug Testing Programs, April 11, 1988, Federal Register, Vol. 53, No. 69, page 11970, prepared by the Department of Health and Human Services, Alcohol, Drug Abuse, and Mental Health Administration, "The Medical Review Officer may be an agency or contract employee who is a licensed physician with knowledge of substance abuse disorders." The role of the MRO is to review and interpret positive drug test results obtained through the agency's testing program. In the conduct of this responsibility, the MRO should undertake the examination of alternate

Inquiries: Staffing Operations Division, Career entry Group, (202) 606-0950

Code: 339, Medical Qualification Determinations

Distribution: Basic FPM

6/92

medical explanations for a positive test result. This action could include employee medical interviews and review of employee medical history. The MRO is required to review all medical records made available by the tested employee when a confirmed positive test could have resulted from legally prescribed medication.

6. After the MRO has reviewed the pertinent information and the laboratory assessment is verified, the case will be referred, as determined by agency policy, to the Agency Employee Assistance Program, Personnel, or Administrative Office for disposition. Should any question arise as to the accuracy of a positive test result, the MRO is authorized to order a retest urinalysis of the original sample. If the MRO determines there is a legitimate medical explanation for the positive test result, the MRO may determine that the result is consistent with legitimate drug use, and take no further action.

7. If OPM sustains a drug-based medical disqualification, the preference eligible may appeal to OPM.

8. OPM will continue to adjudicate cases for Federal agencies that do not have the benefit of an MRO review. Our adjudication of these cases will involve reviewing the actual drug test results and COC documentation. OPM's medical disqualification determinations are communicated directly to the requesting agency. Medical records related to disqualification cases are kept by OPM for 3 years and then destroyed.

9. All pre-employment drug based medical objections to preference eligibles should be sent to:

Pre-Employment Medical Section
Staffing Operations Division
Career Entry Group
U.S. Office of Personnel Management
1900 E Street, NW., Room 6A12
Washington, DC 20415

10. Please note that the provisions mentioned in this letter are for preference eligibles only. However, OPM does review agency referrals of medical objections to non-preference eligibles in order to determine future eligibility on registers. In accordance with FPM Chapter 339, Medical Qualification Determinations, April 28, 1989, and FPM Bulletin No. 339-18, Medical Rejections of Preference Eligibles, May 7, 1991, agencies should establish procedures to ensure that non-preference eligibles who fail a pre-employment drug screen have the right to request a higher level review of the medical disqualification within the agency.

11. If you have any questions on this subject, please contact Phillip Spottswood on 202-606-1389.

Douglas A. Brook
Acting Director

* U.S. G.P.O.:1992-342-693:61160

Air Co l oller Charged in Va. Drug Case

Suspect Told Police He Tricked Federal Testers

Post 4-28-93

By Robert O'Harrow Jr.
Washington Post Staff Writer

An air-traffic controller at the regional center in Leesburg has been charged with possession of cocaine and heroin, and has told police that he kept bottles of drug-free urine to skirt random tests at his job, Loudoun County authorities say.

James Robert Odom, 43, is now in an administrative job at the Leesburg center, which is one of 20 such facilities in the country and controls some of the nation's busiest airspace.

Authorities say he was charged after being stopped in December by Loudoun patrol officers who suspected he had stolen cartons of cigarettes from a convenience store. Police said they found 31 cartons of cigarettes, several bags of drugs and syringes and bottles of urine in Odom's 1981 Oldsmobile.

Odom was charged with possession of a controlled substance and grand larceny. He told police he used the urine samples "to keep the narcotics from showing up" in tests conducted by the federal Department of Transportation to detect substance abusers, said Lt. Terry McCracken, a spokesman for the Loudoun sheriff's office.

Details about the incident emerged in a court hearing last week, in which a General District Court judge sent the case to a grand jury. If Odom is indicted and then convicted, he could face 10 years in prison on the drug charge and 20 years on the grand larceny charge, officials said.

Odom did not return telephone calls to his office, and his attorney, John Cherry, declined to comment. Robert Fulton, a spokesman for the Federal Aviation Administration, said the agency has begun an internal investigation of the allegations.

The case offers a glimpse of the challenges federal officials face in operating massive random drug-testing programs, which cover more than 4 million public and private transportation workers.

In the Transportation Department alone, there are 32,000 employees in safety or high-security jobs who are subject to testing, including air-traffic controllers, railroad and highway safety inspectors, mechanics

See CONTROLLER, B4, Col. 5

Air Controller Told Police He Cheated on Drug Tests

CONTROLLER, From B1

and others. The Transportation Department spends about $4 million a year to test its employees.

Under a department proposal released in December, the nation's truck and bus drivers, train operators, airline pilots and other transportation workers also would face random alcohol testing. More than 3 million additional people would be covered by the new program.

Under the federal drug-testing program, an employee who has tested positive may be removed from a safety or high-security job and allowed to seek rehabilitation, according to federal rules.

Air-traffic controllers must agree to random drug testing as a condition of employment, but most view the tests as an unnecessary intrusion, said James Morin, general counsel for the National Air Traffic Controllers Association.

Few controllers would consider using drugs that might impair their thinking, Morin said. "Air-traffic controllers, as well as the other people whose jobs are critical to aviation safety, are very much aware of their obligations and responsibilities."

Odom is an air-traffic control specialist at the FAA facilities in Leesburg, where several hundred traffic controllers helped to guide about 3 million commercial and private flights through the Washington region last year, Fulton said.

The primary responsibility of such centers is to keep airplanes spaced safely apart. Their work begins when aircraft leave the areas covered by control towers at local airports.

Loudoun prosecutors would not discuss details of Odom's case, but said the idea of an air-traffic controller involved with drugs was unsettling.

"Of course this office is concerned," said Assistant Commonwealth's Attorney Owen Basham. "We're concerned about any drug use by air-traffic controllers."

Fulton, the FAA spokesman, said Odom is currently working in an administrative job, but he declined to release other details about Odom's work record. Because Odom has not been convicted, Fulton said, his work history is protected by federal privacy laws.

Odom, of Leesburg, was arrested on Dec. 13 after two men went into a store in the northern Loudoun town of Lucketts, walked out without paying for several cartons of cigarettes and left in an Oldsmobile, police said.

A Loudoun sheriff's deputy chased the men, stopping them in Leesburg with the help of at least one other police cruiser, police said.

The driver was identified as Odom; the passenger as Carlton Bruce Allen, 42, of the District. Allen also was charged with possession of a controlled substance and grand larceny. He pleaded guilty to larceny, officials said.

89-384 A

CRS Report for Congress

Federally Mandated Drug Testing of Transportation Workers

Charles V. Dale
Legislative Attorney
American Law Division

June 16, 1989

Congressional Research Service • The Library of Congress

Federally Mandated Drug Testing of Transportation Workers

SUMMARY

Public employee drug-testing programs, a focal point of recent efforts to curb illegal drug use in the workplace, may gain added impetus from two U.S. Supreme Court decisions this term which upheld post-accident drug and alcohol testing of railway employees after major train accidents or incidents and of U.S. Customs employees seeking promotion to certain "sensitive" jobs. A key issue which had divided the federal appellate courts was whether public employee drug testing is ever permissible in the absence of "reasonable" or "individualized" suspicion of drug abuse or impairment. The High Court's latest rulings make clear that reasonable suspicion is not always required, at least not where the government's "compelling" interest in public safety outweighs the privacy interests of those being tested. However, these cases did not directly address another, and more controversial, aspect of the issue, that is, the constitutionality of random testing procedures.

Moving on parallel tracks, the Executive Branch and the Congress have each sought to implement programs which target employees in certain "sensitive" federal jobs or federally regulated industries for routine drug testing. On November 21, 1988, DOT published in the Federal Register interim final drug-testing rules that will affect about 4 million public and private sector transportation employees in the aviation, motor-carrier, railroad, maritime, mass-transit, and pipeline industries who hold safety- or security-sensitive positions. Five types of drug testing will be required under the final DOT rules: random testing, pre-employment testing for job applicants, periodic testing during routine physicals, "reasonable-cause" testing, and post-accident testing. Workers with confirmed positive test results are to be removed from their positions and may only return upon successful completion of a rehabilitation program, which employers are not required to sponsor.

S. 561 would provide statutory authority for a comprehensive program of alcohol and controlled substances testing of transportation workers in the air, rail, and commercial motor vehicle industries that coincides in some respects, but is broader in others, than the DOT final rules. First, the bill parallels the current DOT program as to the circumstances in which testing is authorized. Unlike the DOT regulation, however, which is strictly limited to controlled substances specifically identified by the rule, the bill gives the relevant federal administrator more discretion to test for any scheduled controlled substance that is deemed to "pose[ ] a risk to transportation." Significantly, the bill would also direct the random and other testing of transportation workers for "alcohol" use, "without lawful authorization." The DOT rules do not authorize alcohol testing.

Federally Mandated Drug Testing of Transportation Workers

Introduction

Mandatory public employee drug-testing programs have become a central focus of recent governmental efforts to combat drug abuse in the workplace on both the state and federal levels. Moving on parallel tracks, the Executive Branch and the Congress have each sought to implement programs which target employees in certain "sensitive" federal jobs or within federally regulated industries for routine drug testing. Together with similar programs adopted by state and local governments nationwide, these efforts have led to a proliferation of lawsuits challenging on constitutional grounds the authority of the government to impose mandatory, and primarily random, drug testing without reasonable suspicion of workplace drug abuse. These employee actions have been grounded principally in the guarantee against unreasonable searches and seizures found in the Fourth Amendment to the U.S. Constitution, with due process and equal protection overtones also evident in some cases.

Public employee drug-testing programs may gain added impetus from two U.S. Supreme Court decisions this term which upheld post-accident drug and alcohol testing of railway employees after major train accidents or incidents[1] and of U.S. Customs employees seeking promotion to certain "sensitive" jobs.[2] A key issue which had divided the federal appellate courts was whether public employee drug testing is ever permissible in the absence of "reasonable" or "individualized" suspicion of drug abuse or impairment.[3] The High Court's

---

[1] *Skinner v. Railway Labor Executives' Ass'n*, 109 S.Ct. 1402 (3-21-89).

[2] *National Treasury Employee's Union v. Von Raab*, 109 S.Ct. 1384 (3-21-89).

[3] See *Policemen's Benevolent Ass'n, Local 318 v. Township of Washington*, 850 F.2d 133 (3d Cir. 1988), *cert. denied* No. 88-706, 57 U.S.L.W. 3647 (S.Ct. 4-4-89)(random urinalysis testing of police officers upheld); *Lovvorn v. City of Chattanooga*, 846 F.2d 1539 (6th Cir. 1988)(random drug testing of firefighters prohibited by Fourth Amendment); *Penny v. Kennedy*, 846 F.2d 1563 (6th Cir. 1988)(random drug testing of police officers prohibited); *Rushton v. Nebraska Pub. Power Dist.*, 844 F. 2d 562 (8th Cir. 1988)(allowing random testing of nuclear power plant workers); *Copeland v. Philadelphia Police Department*, 840 F.2d 1139 (3d Cir. 1988), *cert. denied* No. 88-66, 57 U.S.L.W. 3647 (S.Ct. 4-4-89) (upholding reasonable suspicion testing

latest rulings make clear that reasonable suspicion is not always required, at least not where the government's "compelling" interest in public safety outweighs the privacy interests of those being tested. However, these cases did not directly address another, and more controversial, aspect of the issue, that is, the constitutionality of random testing procedures. In this regard, at least two federal appellate courts and a few federal district courts in other circuits have upheld random testing of certain public employees in safety sensitive or critical positions.[4] Other rulings are contrary, however, on the validity of random testing.[5]

The remainder of this report considers recent federal executive and congressional initiatives concerned with mandatory drug-testing of federal

---

of police officers); *Railway Labor Executive Ass'n v. Burnley*, 839 F.2d 1507 (9th Cir. 1988), *rev'd sub nom. Skinner v. Railway Labor Executives' Ass'n*, *supra* n. 1 (prohibiting testing of railroad employees after major accidents absent reasonable suspicion); *Everett v. Napper*, 833 F.2d 1507 (llth Cir. 1987)(allowing reasonable suspicion testing of a firefighter); *Jones v. McKenzie*, 833 F.2d 335 (D.C.Cir. 1987), *vacated and remanded sub nom. Jenkins v. Jones* No. 87-1706, 57 U.S.L.W. 3653 (S.Ct. 4-4-89)(allowing random testing of school bus attendants); *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *aff'd in part, rev'd in part* No. 86-1879, 109 S.Ct. 1384 (1989)(allowing drug tests of Customs employees who apply for transfer to certain sensitive jobs); *Mack v. United States*, 814 F.2d 120 (2d Cir. 1987)(allowing reasonable suspicion testing of FBI agent); *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987)(allowing random drug-testing of certain correctional officers); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 107 S.Ct. 577 (1986)(allowing random tests of jockeys); *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976)(allowing post-accident testing of bus drivers absent reasonable suspicion).

[4] Third Circuit: *Policemen's Benevolent Ass'n, Local 318*, *supra* n. 3 (police officers); *Shoemaker*, *supra* n. 3 (jockeys); Eighth Circuit: *Rushton*, supra n. 3 (power plant employees); *McDonell v. Hunter*, *supra* n. 3 (correctional officers). See also *Mullholland v. Department of Army*, 660 F. Supp. 1565 (E.D.Va. 1987)(civilian aircraft mechanics and attendants); *American Federation of Government Employees v. Dole*, 670 F. Supp. 445 (D.D.C. 1987)(upheld DOT random testing program of federal employees implemented pursuant to Reagan executive order).

[5] See, e.g., *NFEE v. Carlucci*, 680 F. Supp. 416 (D.D.C. 1988)(compulsory, mandatory urinalysis of Army civilian employees in critical positions invalid in absence of reasonable individualized suspicion of drug influence while on duty); *Harmon v. Meese*, 690 F. Supp. 65 (D.D.C. 1988)(Justice Department enjoined from randomly testing employees in sensitive positions pursuant to Reagan executive order in the absence of any evidence of drug problem among department employees).

employees and workers within federally regulated industries, mainly transportation. Specifically, final interim regulations of the Department of Transportation, as implemented by various DOT Division rules published on November 21, 1988, will be compared with bills before the current Congress, S. 561 and H.R. 1208, mandating drug-testing of transportation workers. This is followed by a brief discussion of judicial decisions pertinent to federally required drug-testing of transportation workers.

Recent Federal Legislative and Executive Actions

Since March 1986, when the President's Commission on Organized Crime issued a report which recommended employee drug-testing programs as one means of stemming the flood of illicit drugs, both Congress and the President have responded with concrete proposals of their own. As in the preceding Congress, several employee drug-testing bills are before the 101st Congress and, for its part, the Administration is moving forward with implementation of E.O. 12564 which calls for each executive branch agency to undertake mandatory drug testing of personnel in sensitive federal jobs. Similarly, the Department of Transportation (DOT) last year issued comprehensive regulations requiring industry-wide testing of workers in the trucking, bus, rail, air, and maritime transportation industries

Executive Order 12564, issued September 15, 1986, makes federal executive branch employees in "sensitive" positions subject to mandatory drug testing.[6] Specifically, the order defines "sensitive" positions as: 1) employees in designated critical/sensitive positions; 2) employees who have access to classified information; 3) Presidential appointees; 4) law enforcement officers; and 5) other positions that the agency head determines "involve law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust or confidence." Testing of any covered employee may be based on "reasonable suspicion," may result from a post-accident investigation, or may be part of an employee counseling or drug rehabilitation follow-up. Beyond these designated circumstances, however, the agency head is granted substantial discretion to determine:

> [t]he extent to which such employees are tested and the criteria for such testing. . ., based upon the nature of the agency's mission and its employees' duties, the efficient use of agency resources, and the danger to the public health and safety or national security that could result from the failure of an employee adequately to discharge his or her position.[7]

---

[6] 51 Fed. Reg. 32889 (Sept. 17, 1986).

[7] §3 of E.O. 12564, Id., at 32830.

The Office of Personnel Management, in consultation with the Justice Department, has since issued guidelines entitled "Establishing a Drug-Free Federal Workplace" to implement the executive order. The guidelines basically leave it to the discretion of the agency head to determine just which groups of employees in sensitive positions will be tested and whether random testing will be applied. These guidelines, however, were declared invalid by the federal district court in *Treasury Employees v. Reagan*[8] for the failure of OMB to follow the public notice and comment requirements of the Administrative Procedure Act in promulgating them. In a separate action, *Harmon v. Meese*,[9] the federal district court for the District of Columbia enjoined the Justice Department from randomly testing its "sensitive" employees pursuant to the executive order due to lack of evidence of any drug problems within the department.

Just prior to adjournment, the 100th Congress approved the omnibus drug bill, P.L. 100-690, which included provisions to require federal contractors and grantees to certify that they will maintain drug-free workplaces by fulfilling specific requirements.[10] The law covers all organizations receiving contract awards of $25,000 or more, all contracts awarded to individuals, and all recipients of federal grants, regardless of grant amount. Specifically, contractors and grantees must certify to the contracting or grantmaking agency that they will provide a drug-free workplace by publishing a statement prohibiting unlawful manufacture, distribution, possession, or use of a controlled substance in the workplace, and specifying actions that will be taken against offending employees. Also mandated are drug-free awareness programs to inform employees of the dangers of workplace drug abuse and any available drug counseling, rehabilitation, and employee assistance programs. Employees are to be required, as a condition of employment, to report any criminal conviction for drug-related activity in the workplace and the employer, in turn, must notify the contracting or granting agency and impose appropriate sanctions against convicted employees. Federal contracts or grants could be terminated or suspended in cases where the employer fails to make a "good faith" effort to maintain a drug-free workplace. The Act, however, does not mandate, or even mention, testing employees for illicit drug use.[11]

---

[8] 685 F.Supp. 1346 (E.D.La. 1988).

[9] 690 F. Supp. 65 (D.D.C. 1988).

[10] See the "Drug-free Workplace Act of 1988," 102 Stat. 4304 (Nov. 18, 1988).

[11] More detailed information on how federal contractors and grantees must comply with the provisions of the Drug-free Workplace Act may be found in implementing rules issued by the Office of Management and Budget at 54 Fed. Reg. 4946 (1-31-89).

U.S. defense contractors must establish and maintain a drug-free workplace program under a Department of Defense (DOD) rule that became effective October 31, 1988.[12] The DOD rule is designed to eliminate drugs from the workplace by compelling the agency's contractors to establish programs including the testing of employees in "sensitive" positions to ensure that they neither possess or use illegal substances. This is to be achieved by including a clause in all covered contracts binding the contractor to a program meeting stated criteria and objectives. The drug testing program covers all the contractor's "sensitive" positions, based upon a consideration of the work performed and duties of the employee, the efficient use of contractor resources, and potential risks to public health and safety or national security from improperly performed contract tasks. Testing is authorized in "reasonable suspicion" cases, when the employee is involved in an accident or an unsafe practice, or in connection with drug counseling, rehabilitation, or a voluntary testing program. Random testing is not addressed in the DOD rule. No covered employee who is found to be using drugs may be allowed to remain on duty or to continue performing contract work until the employer has determined that the worker is fit for duty.

On November 21, 1988, DOT published in the Federal Register interim final drug-testing rules that will affect about 4 million public and private sector transportation employees in the aviation, motor-carrier, railroad, maritime, mass-transit, and pipeline industries who hold safety- or security-sensitive positions.[13] Of those workers, only railroad employees are currently subject to limited alcohol and drug-testing. Five types of drug testing will be required under the final DOT rules: random testing, pre-employment testing for job applicants, periodic testing during routine physicals, "reasonable-cause" testing, and post-accident testing. Drugs for which testing is authorized include marijuana, cocaine, opiates, amphetamines, and phencyclidine.[14] Alcohol screening is not included. Workers with confirmed positive test results are to be removed from their positions and may only return upon successful completion of a rehabilitation program. Employer sponsored rehabilitation is not required, however, but will be left to collective bargaining. Large companies and agencies will be required to implement the new rules by December 1989 while smaller employers will have longer periods--up to two years--within which to comply.

Under the DOT rules, random drug testing must be conducted on half of the eligible employee pool so that every twelve months, half of the covered workforce is tested. Where a consortium arrangement exists, the 50 percent testing rate can be applied to the entire employee population covered by the

---

12 53 Fed. Reg. 37763.

13 53 Fed. Reg. 47002 (1-21-1988).

14 Id. at 47005.

consortium. Employers are required by the DOT rules to develop and maintain clear and well-documented procedures for the collection, handling, transfer, and testing of employee urine samples.[15] In addition, certain "minimum precautions" must be taken by the employer to guard against physical tampering either with the urine specimens or information on urine bottles and required "control and custody" forms.[16] For example, bluing agents are to be used in toilet bowls at the collection site and all other water sources in the area monitored to prevent adulteration of collected samples. Employees are also to be directed to remove unnecessary outer garments that might conceal items or substances that could be used to adulterate a urine sample.[17] Elaborate "chain of custody" procedures are also set forth in the rules.

The DOT rules also mandate personnel qualification, training, and "quality assurance" standards to be met by testing laboratories.[18] Only those laboratories approved and certified by the U.S. Department of Health and Human Services may provide testing services under the rules.[19] Certified test results must be reported to the employer within an average of five working days and must be available thereafter to the employee upon request. Specimens that yield a positive result on the initial immunoassay screen are subject to confirmatory testing by use of gas chromatography/mass spectrometry methods.[20] Any specimen that tests negative on initial screening or negative on confirmatory analysis must be reported as negative.[21] All specimens confirmed positive must be secured in long-term frozen storage for a minimum of one year, and documentation on all aspects of the testing process must be maintained and made available by the laboratory for at least two years. An employer's contract with a laboratory must provide for unannounced inspections by the employer and the DOT agency having jurisdiction over the employer.[22]

Other aspects of the DOT rules address concerns of personal privacy.[23] Thus, any employee subject to drug testing must generally be allowed to

---

15 Id. at 47006.

16 Id. at 47008.

17 Id. at 47007.

18 Id. at 47008-7011.

19 Id. at 47013.

20 Id. at 47010.

21 Id. at 47013.

22 Id. at 47016.

23 Id. at 47007.

provide a urine specimen within the confines of a restroom stall or other secure, partitioned "enclosure" free from third party observation. However, if there is reason to believe that an employee has altered or substituted a specimen, the employee can be required to provide a second urine sample under the direct observation of an authorized person of the same gender. A decision to collect a second specimen under direct observation must be reviewed and approved by a designated employer representative or higher level supervisor of the "collection site person."[24] Employees may be required to sign a consent or release form authorizing collection and analysis of the specimen, and disclosure of test results to the employer, but need not waive liability for any negligence in the collection, handling, or analysis procedures. Finally, employers may not provide any personal identification information other than an employee identification number to the testing laboratory and must ensure that only the employee and medical review officer responsible for reporting test results to the employer receive copies of the chain of custody form containing personal medical information.[25]

Six divisions within DOT--including the Federal Aviation Administration (FAA), the Federal Railroad Administration (FRA), the Coast Guard, the Federal Highway Administration (FHWA), and the Urban Mass Transportation Administration--have published individual, implementing regulations as part of the overall rule. The FAA final rule requires domestic and supplemental air carriers, commercial operators of large aircraft, air taxi and commuter operators, certain commercial operators and contractors to such operators, and air traffic control facilities not operated by the FAA or the U.S. military to have an anti-drug program for employees who perform sensitive safety- or security-related functions.[26] The rule specifically covers employees performing the following duties or functions: flight crewmembers, flight attendants, flight or ground instruction, flight testing, aircraft dispatcher or ground dispatcher, aircraft maintenance, security or screening, and air traffic control.[27] Pre-employment testing is required of all applicants for a covered position and periodic testing is to be a part of any required medical examinations. Post-accident testing must occur with 32 hours unless the employer determines that "the employee's performance could not have contributed to the accident." Testing based on reasonable cause may be administered where two of the employee's supervisors have "a reasonable and

---

[24] Id. at 47008.

[25] Id. at 47010.

[26] Id at 47057.

[27] Id. at 47058.

articulable belief that the employee is using a prohibited drug on the basis of specific, contemporaneous physical, behavioral, or performance indicators of probable drug use."[28] "Unannounced" random testing under the FAA final rule will be phased in so that only 25% of an employer's covered employee population are subject to testing the first year of the program, rather than the annualized rate of 50% required thereafter.[29] Each employer must establish an Employee Assistance Plan, including education and training on drug use for employees and supervisors, but the final rule does not require employer-sponsored rehabilitation.[30]

The final FRA rules supplement pre-existing regulations concerning the control of alcohol and drug use in railroad operations applicable to employees performing functions subject to the Hours of Service Act.[31] Those regulations currently prohibit any covered employee from performing duties while using, possessing, or under the influence of alcohol or a controlled substance; mandate post-accident toxological testing after certain significant train accidents and employee fatalities; provide for pre-employment drug screens; and authorize reasonable cause testing based on incidents involving human failure or enumerated safety rule violations.[32] The new rule adds to this regulatory structure the requirement that each railroad submit for approval a random testing program providing each covered employee a "substantially equal" statistical chance of selection within a specified time frame.[33] Prior to implementation, each covered employee must be afforded notice of the program, the consequences of a positive test results, and of the employee's right to self-refer for counseling and treatment without adverse consequences.[34] The final rule requires that an employee who refuses to be tested or who is determined to have used a controlled substance without appropriate medical authorization be removed from covered employment by his

---

[28] Id. at 47058.

[29] Id.

[30] Id. at 47059.

[31] 45 U.S.C. 61 et seq. The Act, generally, prescribes limits on the hours of duty that may be performed by any railroad employees "actually engaged in or connected with the movement of any train" or "engaged in installing, repairing or maintaining signal systems." The FRA final rule incorporates this same universe of employees for coverage by the newly mandated random drug-testing program.

[32] 49 CFR Part 219.

[33] 53 Fed. Reg. 47128.

[34] Id. at 47129.

present, or any subsequent, employer.[35] The employee may not be returned to covered service until having submitted a negative urine sample and successfully completed an appropriate rehabilitation program.[36] Nothing in the rule, however, requires that an employee determined to have violated the drug use prohibition be provided rehabilitative services or be retained by the railroad. Like the FAA rule, a gradual phase-in to a 50 percent testing rate is allowed during the first twelve months of the program.[37]

The FHWA final rules governing motor carriers and operators of commercial motor vehicles apply generally to drivers of vehicles with a gross weight rating over 26,000 pounds, vehicles transporting hazardous materials which must be placarded, and bus vehicles designed to transport more than 15 passengers.[38] A principal issue noted by the Administration in the formulation of this rule concerned the feasibility of random testing as applied to smaller motor carriers and independent owner-operators working as contractors rather than employees of corporate carriers. In lieu of roadside testing conducted by State enforcement officers, or other alternative mechanisms advanced by the comments, the final rule seems to opt for private testing through formation of "consortia" or other voluntary associations of small owner/operators.

> the FHWA envisions that many of the small motor carriers and owner-operators will form consortiums and other cooperatives to meet the requirements of this rule. The FHWA encourages this and intends to promote such consortiums. The arrangements agreed to by these drivers will be tailored to their specific operations and characteristics. The FHWA welcomes any type of arrangement as long as it complies with the requirements of this rule.[39]

The final rule also makes clear that a carrier would be required to verify that any independent owner-operator with whom it enters a lease agreement is participating in a bona fide drug testing program through a consortium or otherwise and is not currently unqualified because of a positive test result. If the motor carrier uses the same driver on a number of different trip

---

35 Id.

36 Id.

37 Id. at 47128.

38 Id. at 47151-52.

39 Id. at 47143.

contracts, it would have to verify the status of the driver once every six months.[40]

The air, rail, and commercial motor vehicle sectors of the domestic transportation industry are also the target of legislation pending in the current Congress that would establish standards and requirements for testing transportation workers for drug use. Two of those measures, S. 561 and H.R. 1208, are considered in the final portion of this report with a view to highlighting any major differences with the final DOT rules.

Mandatory Drug Testing of Transportation Workers Under S. 561 and H.R. 1208

S. 561 would provide statutory authority for a comprehensive program of alcohol and controlled substances testing of transportation workers in the air, rail, and commercial motor vehicle industries that coincides in some respects, but is broader in others, than the DOT final rules. First, the bill parallels the current DOT program by granting to federal administrators the authority to implement testing of "safety-sensitive" personnel in five situations: preemployment, periodic recurring, random, post-accident, and upon "reasonable suspicion." Unlike the DOT regulation, however, which is strictly limited to controlled substances specifically identified by the rule, the bill gives the relevant federal administrator more discretion to test for any scheduled controlled substance[41] that is deemed to "pose[ ] a risk to transportation." Significantly, the bill would also direct the random and other testing of transportation workers for "alcohol" use, "without lawful authorization." The DOT rules do not authorize alcohol testing.

Note that scope of the proposed stricture on unauthorized alcohol use may be ambiguous and in need of additional legislative clarification. On the one hand, the bill's reference to "lawful authorization" might be construed to mean other transportation regulations governing alcohol use by covered employees. For example, under FAA rules, pilots, flight attendants, flight engineers, and flight navigators may not act as a crewmember of a civil aircraft within eight hours after drinking an alcoholic beverage.[42] So interpreted the bill may mean only that alcohol use by covered employees within the eight-hour period designated by the regulation is prohibited by the bill. As to other covered employees, subject perhaps to no similar regulatory "authorization", the implication of the bill's ban on alcohol use may be less certain. Under the DOT final rules, by analogy, the only permitted authorization for use of a otherwise prohibited controlled substance is a

---

40 Id.

41 See 21 U.S.C. 802(6).

42 43 Fed. Reg. 47024.

physician's prescription for legitimate medical purposes. Viewed accordingly, the bill could be read to bar all but the medicinal use of alcohol as prescribed by a physician, that is, to bar all recreational use of alcohol by covered employees. Whatever the proper interpretation, some clarification of the bill in this regard may be advisable.

The bill would amend Title VI of the Federal Aviation Act of 1958[43] to direct the FAA Administrator to establish a testing program within the FAA and requiring foreign and domestic air carriers to conduct testing of their safety-sensitive employees. Besides designated employee classifications that largely track the coverage of the FAA final rule, the bill would leave for determination by the Administrator which employees are "responsible for safety-sensitive functions." Any employee who is confirmed positive for drug or alcohol use is subject to disqualification, dismissal, or suspension or revocation of certification, "as the Administrator considers appropriate." Further, the employee is apparently to be removed permanently from prior air transportation duties for refusal or failure to complete a rehabilitation program, for repeated drug use upon completion of a program, or for performing his former duties "while impaired or under the influence of alcohol or a controlled substance." In contrast to the DOT rules, which include no similar requirement, air carriers are required by the bill to establish rehabilitation programs which "at a minimum" are to provide for "identification and opportunity for treatment" of covered employees. Cooperative programs with other domestic or foreign carriers are permitted. Finally, standards incorporating DHHS scientific and technical guidelines are set forth to govern laboratory certification and inspections, test reliability and accuracy, chain of custody, privacy and confidentiality, and related issues that are elaborated in some greater detail by the DOT final rules.

The rail provisions of S. 561 would amend the Federal Railway Safety Act of 1970[44] to authorize review by the Secretary of Transportation of all "existing rules, regulations, standards, and orders governing alcohol and drug use in railroad operations" for adequacy to ensure safety. More specifically, however, that review shall "require" a random testing program for safety-sensitive functions and consider existing rules regarding classes of employees covered. This may respond certain FRA comments indicating that while the final rule conformed to the past practice of testing only Hours of Service Act employees, "from the point of view of ideal or optimum safety objectives," drug or alcohol testing should

> extend to those actually involved in moving freight and passengers, those responsible for inspection and maintenance of rail track and structures, employees who work on rolling stock or inspect it for compliance with

---

[43] 49 U.S.C. App. 1421 et seq.

[44] 45 U.S.C. 431.

> Federal standards, those who prepare shipping papers for hazardous materials, on board service personnel on passenger trains, and a variety of other employees who are few in number but whose responsibilities can affect safety.[45]

Also to be considered by that review are sanctions of suspension and dismissal for alcohol use or impairment while on duty or nonmedical use of a controlled substance on or off duty. Unlike the air carrier provisions of the bill, but similar to the FRA final rule, there is no apparent requirement that railroad employers implement rehabilitation programs. The Secretary, however, could presumably exercise his rulemaking authority under the bill to mandate rehabilitation. The railroad provisions again incorporate the DHHS scientific and technical standards for drug testing and laboratory procedures basically corresponding to the approach of the DOT final rules.

Rail carrier-sponsored rehabilitation programs are a requirement of H.R. 1208, the "Railroad Drug Abuse Prevention Act of 1989," which mandates drug and alcohol testing for safety-sensitive railroad employees but, unlike S. 561, does not apply to the air and commercial motor vehicle industries. Under the House measure, any employee who voluntarily enters the program, prior to notification that he will be tested or the occurrence of any of a series of specified incidents that may trigger post-accident or "reasonable suspicion" testing, is to be removed from his safety-sensitive position, but with pay if he accepts alternative duties. On the other hand, any employee who has a confirmed positive test result must be suspended without pay and referred for rehabilitation. If an employee fails to complete the programs, or thereafter again tests positive, he "shall" be discharged from employment. Rehabilitated employees may be subject to daily testing for a period of three years following completion of the program. The railroad employer may be subject to civil and criminal penalties if it discharges or otherwise disciplines any employee who successfully completes rehabilitation.[46]

---

[45] 53 Fed. Reg. 47107. Nonetheless the FRA final rule opted for a narrower approach because "Congressional attention to these functions through the Hours of Service Act has also established a strong precedent for focusing the alcohol/drug control program on persons performing these functions. Further, FRA has sought to focus its enforcement efforts on areas of most immediate need."

[46] On May 10, 1989, the House Subcommittee on Transportation and Hazardous Materials approved H.R. 1208 by voice vote after adopting an amendment to clarify that there would be no lapse between the FRA final rule that is to take effect on November 1, 1989 and the testing requirements of the bill. The amendment also specified that rail employees who tested positive for drugs or alcohol under pre-existing FRA rules would be subject to discharge if they failed a test required by the bill. Another aspect of the amendment provided that rehabilitation programs must include an education and prevention component, and that employees who complete a rehabilitation

S. 561 would also amend the Commercial Motor Vehicle Safety Act of 1986[47] to mandate DOT regulations within twelve months governing preemployment, periodic, recurring, random, and post-accident, and "reasonable suspicion" testing for controlled substance or alcohol use by commercial motor vehicle operators. Rehabilitation program requirements are to included in the authorized regulations with the DOT Secretary to "determine the circumstances under which such operators shall be required to participate in such program." Again, this would seem to require expansion of current DOT rules which omit provision for mandatory rehabilitation. The same DHHS scientific and technical standards are to apply to the testing program as in the air carrier and railroad aspects of the bill.

Finally, the Senate bill would require that a "pilot program" be developed and implemented by the Secretary within fifteen months to "consider alternative methodologies" for randomly testing independent commercial motor vehicle operators for drug and alcohol use. The program would continue for one year after which DOT would report to Congress on its results and recommendations for random testing of commercial operators. This appears to respond to FHWA comments concerning its views concerning "how such a testing program would work for smaller motor carriers and owners-operators who are not motor carriers."[48] As noted, in its final rule, the FHWA seemed to opt for some variant of the consortium approach over the alternative of

---

program must also perform 40 hours of community service in order to be reinstated. BNA, *Daily Labor Reporter*, A-4 (5-12-89).

[47] P.L. 99-570, 100 Stat. 5223.

[48] 53 Fed. Reg. 47141. Among the alternatives considered by the comments were the following:

> 1. Form consortiums made up of owner-operators and small carriers that would develop a centrally administered random testing program.
>
> 2. Form consortiums, and hire a contractor to develop and implement a random testing program.
>
> 3. Contract separately with an outside company that would setup these services.
>
> 4. Have existing industry-related groups (e.g., trade associations) set up drug programs in which small entities could participate.
>
> 5. Arrange to be included as a part of a larger company's drug testing program.

state-operated roadside testing stations advanced by some interest groups.[49]

Judicial Decisions Relevant to Federally Required Drug-Testing of Transportation Workers

During its current term, the U.S. Supreme Court sustained federally mandated drug-testing programs in two cases which, while not involving random testing, may portend the direction of future judicial decision-making on this controversial issue. *Skinner v. Railway Labor Executives Ass'n* concerned DOT mandated post-accident testing of railway workers like that required by current regulation and as proposed by S. 561. *National Treasury Employees Union v. Von Raab* involved the testing of customs service employees as a prerequisite to promotion to certain "sensitive" positions. As noted, the Supreme Court held that mandatory testing in these situations, even without individualized suspicion of drug use, was not an "unreasonable search or seizure" under the Fourth Amendment, because of the overarching public safety considerations involved.[50]

In *Skinner* a panel of the Ninth Circuit voided on Fourth Amendment grounds Federal Railroad Administration regulations requiring breath, blood, and urine tests of railroad workers who are involved in train accidents.[51] A federal district court had accepted the government's argument that public safety interests served by the rules outweighed any possible intrusion on privacy rights asserted by the contesting labor unions. However, because the post-accident drug and alcohol testing procedure applied to all covered employees without regard to "reasonable suspicion that a test will reveal evidence of current drug or alcohol impairment," a divided appeals court panel struck down the regulation. In so doing, it refused to find that rail employees enjoy a "diminished expectation of privacy" due to the "heavily regulated"

---

[49] Id.

[50] *Supra*, n. 1.

[51] Briefly, alcohol and drug testing is mandated for all covered employees involved in various events, including: major train accidents (involving a fatality, release of hazardous material with either evacuation or injury, or $500,000 damage to railroad property); impact accidents (involving a reportable injury or damage to railroad property of $50,000); and fatal accidents (involving fatality of an on-duty railroad employee). 49 *C.F.R.* §219.213. The FRA regulations require that blood and urine samples be taken from all crew members of a train involved in such an accident or incident as soon a possible afterwards. Blood samples are to be taken at independent medical facilities by qualified professionals or technicians. 49 *C.F.R.* §219.203. Refusal to provide a sample results in a nine-month period of disqualification. 49 *C.F.R.* §219.213.

nature of the railroad industry or that the program fit any of the traditional judicial exceptions to Fourth Amendment principles.

In reversing, the Supreme Court first held that the entire testing regulation, even portions applicable to certain employee rule infractions that were merely permissive rather than mandatory upon the railroads, carried sufficient government "encouragement, endorsement, and participation" to implicate the Fourth Amendment considerations. On the merits, Justice Kennedy wrote for the majority that because "the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable," FRA testing for drugs and alcohol was a "search" that had to satisfy constitutional standards of reasonableness. The "special needs" of railroad safety, however, made traditional Fourth Amendment requirements of a warrant and probable cause applicable to normal law enforcement "impracticable" in this context. Nor was "individualized suspicion" deemed by the majority to be a "constitutional floor" where the intrusion on privacy interests are "minimal" and an "important governmental interest" is at stake. According to Justice Kennedy, covered rail employees had "expectations of privacy" as to their own "physical condition" that were "diminished" by "their participation in an industry that is regulated pervasively to ensure safety." In these circumstances, the majority held, it was "reasonable" to conduct the tests, even in the absence of a warrant or reasonable suspicion that any employee may be impaired.

Justice Kennedy also rejected another line of attack against the challenged tests which proceeds from the generally accepted scientific and judicial view that standard test protocols are capable indicators only of prior drug use but are not a measure of current job impairment or drug influence. Because of this fact, a number of lower federal courts had voided the EMIT screen and confirmatory GC\MS for not being reasonably related to legitimate governmental interests in assuring employee fitness or competence.[52] In *Skinner*, however, the majority found the information provided by the tests to be a valid investigative tool which "may allow the [FRA] to reach an informed judgment as to how a particular accident occurred." In addition, opposition on these grounds "failed to recognize that the FRA regulations are designed not only to discern impairment but also to deter it," and according to the majority, the government "may take all necessary and reasonable regulatory steps to prevent and deter" forbidden drug use by the covered employees.

In the *Von Raab* case, decided the same day as *Skinner*, a Fifth Circuit panel had upheld drug testing of U.S. Customs Service personnel who sought transfer to certain "sensitive" positions, namely, those involving drug interdiction, carrying firearms, or access to classified information, without a

---

[52] *E.g., Jones v. McKenzie*, 833 F.2d 335, 340 (D.C.Cir. 1987); *Railway Labor Executive Ass'n v. Burnley*, 839 F.2d 1507 (9th Cir. 1988); *Harmon v. Meese*, 690 F. Supp. 65 (D.D.C. 1988).

requirement of reasonable individualized suspicion. The testing procedure was administered once, when the employee sought transfer to the sensitive position, and the Customs Service gave the qualified applicant five days notice of the test. Thus, the drug test in *Von Raab* was conditioned on the employee's own action in seeking a transfer and no adverse consequence flowed from a later withdrawn transfer application.

In a 5 to 4 ruling, Justice Kennedy again speaking for the majority affirmed the Customs Service policy with respect to the interdiction of illegal drugs and employees required to carry firearms. According to the Court, the government has a "compelling interest" in not promoting drug users to jobs where they could "endanger the integrity of our Nation's borders or the life of the citizenry." That interest outweighs the privacy interests of employees who seek promotions to those jobs, but who enjoy "a diminished expectation of privacy by virtue of the special physical and ethical demands of those positions." Neither the absence of "any perceived drug problem among Customs employees," nor the possibility that "drug users can avoid detection" by temporary abstinence, would defeat the program since deterrence of "highly hazardous conduct" as much as detection was a "substantial" justification and the risk of circumvention was "overstated." However, the Court found the record insufficient to determine whether searches of employees who would handle classified information was reasonable. It was not apparent that individuals in certain positions would actually have access to sensitive information, leading Justice Kennedy to question whether the category was too broad to meet Fourth Amendment requirements.

As noted in the introduction, before these High Court rulings, several courts had speculated whether employee drug testing could ever pass Fourth Amendment muster in the absence of a reasonable suspicion that a particular employee or group of employees were active drug users or impaired on the job. This concern seems largely put to rest by *Skinner* and *Von Raab* which make clear that individual suspicion is not invariably required, at least where overarching public safety or national security interests are at stake. Just how broadly this judicial approach of balancing the public and private interest extends, however, or whether it would tolerate the random testing of employees in these same circumstances, may not yet be settled. But considerable judicial support may be drawn from these cases for testing safety-sensitive transportation employees in many of the circumstances contemplated by S. 551.

Notably, perhaps, the Court subsequent to *Skinner* and *Von Raab* let stand lower court decisions allowing random and "reasonable suspicion" drug testing for police officers and mandatory, preemployment drug testing for applicants for nuclear power plant jobs. The Justices' determination to deny review of the decisions--two by the U.S. Court of Appeals for the Third Circuit and one by the Washington Supreme Court--came only a week after the post-accident testing and Customs Service cases.

Policemen's Benevolent Association v. Township of Washington involved a program which subjected local police officers to random urinalysis testing and mandatory drug tests administered during required annual physical examinations. In rejecting the challenge of a local police union, the Third Circuit relied upon its own earlier decision in *Shoemaker v. Handel*[53] which had upheld random testing of jockeys. The appeals court concluded that various state statutes and "detailed regulations" of the township governing police conduct and discipline had reduced the officers' justifiable privacy expectations which were outweighed by the strong public interest in averting police drug use. The Policemen's Benevolent Association, backed by the American Civil Liberties Union, had sought review of the appeals court ruling, contending that it "has effectively vitiated Fourth Amendment protection for public employees." In the other police case, *Copeland v. Philadelphia Police Department*, the Justices rejected the petition of a former Philadelphia police officer who was fired following a positive drug test. The appeals court ruled that the city had not violated the Fourth Amendment rights of the officer by ordering him to submit to a urinalysis based on "reasonable suspicion" as the result of information gained from an informer.

In the nuclear power plant case, *Alverado v. Washington Public Power Supply System and Bechtel Construction, Inc.*, the Washington Supreme Court ruled that the WPPSS did not violate the Fourth Amendment by requiring applicants for repair jobs to pass a pre-employment drug test to obtain access to secure areas at the plant. Bechtel Power had a contract with the system to perform the repair work and several members of Plumbers Local 598 who had applied for jobs with Bechtel challenged the drug testing requirement. The Washington Court unanimously held that job applicants could be required to undergo the drug screening under an administrative search exception to the Fourth Amendment. The court reasoned that the applicants have a substantially diminished expectation of privacy because of the "pervasive" federal regulation of nuclear power plants and that the employers interest in nuclear safety outweighed the limited intrusion on privacy interests.

In other significant action, the Court vacated and remanded for reconsideration in light of *Skinner* a 1987 ruling of D.C. Circuit in *Jones v. McKenzie*.[54] *Jones* was the first federal appellate court decision to void a public employee drug testing program for its inability to measure job impairment or drug influence. While upholding mandatory urinalysis testing of public school transportation employees as part of routine annual physical exams, it invalidated the EMIT test actually used because it failed to "measure . . . whether an employee has used or been under the influence of drugs" while on school premises. As noted, the Court appeared to take a contrary approach by rejecting the same argument by opponents of post-accident testing in *Skinner*.

---

[53] 795 F.2d 1136 (3d Cir.), *cert. denied*, U.S. (1986).

[54] *Supra* n. 3.

Brief mention should be made of the status of current judicial challenges to the drug-testing of federal workers under E.O. 12564 and of transportation workers pursuant to DOT regulations. To date, federal district courts have barred random drug testing of federal employees at the Justice,[55] Agriculture,[56] and Interior[57] Departments due to lack of a demonstrated drug problem sufficient to warrant invasion of employee privacy. On May 19, 1989, a federal district judge in *Hartness v. Bush*[58] issued preliminary injunctions against random drug testing of employees on the White House staff and at the General Services Administration who are in "sensitive" or safety-related position who do not carry firearms. The White House plan authorizes testing of all such employees in the Executive Office of the President, including the U.S. Trade Representative, the Office of Administration, and the Office of Management and Budget. To the contrary, random testing of DOT employees in sensitive position was permitted to go forward in *AFGE v. Dole*[59] while allowing the possibility of a later more specific challenge based on its actual implementation. Drug testing plans for air traffic controllers and for uniformed members of the Secret Services have also been upheld.[60]

Finally, various challenges have been filed against testing of transportation workers under the DOT final rules. Late last year, in *Owner-Operators Independent Drivers Association v. Burnley,*[61] a federal judge in San Francisco issued a preliminary injunction from the bench that excuses employers from implementing procedures for random and mandatory post-accident drug testing of commercial motor vehicle operators under the

---

[55] *Harmon v. Meese*, 690 F. Supp. 65 (D.D.C. 1988).

[56] *NTEU v. Lyng*, 706 F. Supp. 934 (D.D.C. 1988).

[57] *Bangert v. Hodel*, 705 F. Supp. 643 (D.D.C. 1989).

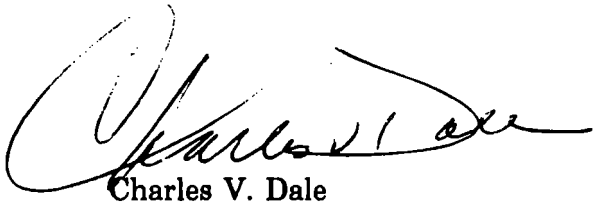
[58] Nos. 89-0040-LFO, 89-0950-LFO, and 89-1152-LFO (slip opinion)(D.D.C. 5-19-89).

[59] 670 F. Supp. 445 (D.D.C. 1987).

[60] See *National Air Traffic Controllers Ass'n v. Burnley*, 700 F. Supp. 1043 (N.D. Cal. 1988).

[61] 57 U.S.L.W. 2452 (N.D. Cal 12-30-88).

regulations. In *Amalgamated Transit Union v. Burnley*[62] several unions joined in a suit against implementation of random testing as it affects interstate bus drivers alleging lack of statutory authority and constitutional infirmities.



Charles V. Dale
Legislative Attorney
June 16, 1989

---

62 No. C89-0081 FMS (N.D. Cal 1-11-89).

CRS Report for Congress

Drug Testing and the Drug-Free Workplace:

A Bibliographic Guide and Reader

Peter Giordano
Senior Bibliographer, Government and Law
Library Services Division

January 1990

Congressional Research Service • The Library of Congress

The Congressional Research Service exists exclusively for the Congress, conducting research, analyzing legislation, and providing information at the request of committees, Members, and their staffs.

The Service makes such research available, without partisan bias, in many forms including studies, reports, compilations, digests, and background briefings. Upon request, CRS specialists and subject analysts may also make themselves available for personal consultations in their respective fields of expertise.

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

SUMMARY

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

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

This report would not have been produced without the assistance of John M. White, Senior Bibliographic Assistant, Library Services Division.

CONTENTS

PART ONE: SELECTED READINGS ON DRUG TESTING

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

Contents

INDUSTRY WEEK MAY 1, 1989

WHY WHO & HOW TO DRUG TEST

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

By Michael A. Verespej

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

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

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

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

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

"No two laws or regulations are the same. That can create inconsistent requirements and make it impossible for employers to adopt a single national policy," says Garen E. Dodge, labor law attorney with McGuiness & Williams, Washington. For example:

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

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

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

The court also stated unequivocally that, when the govern-

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

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

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

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

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

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

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

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

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

What's the best approach for an employer?

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

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

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

Obviously, companies under the thumb of DOD and DOT regulations must adopt programs that at the minimum meet those requirements. There is far more leeway for other government contractors and businesses that are not under any federal, state, or locally required obligation to test.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the situation as a job-performance problem.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

For what reasons should companies test workers?

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

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

"I don't think companies will be jumping on the random drug-testing bandwagon unless there is real evidence of widespread abuse," such as Dow Chemical Co. experienced at its Freeport, Tex., operation in 1987, says Mr. Dodge. (Dow instituted random testing—upheld by an arbitrator in March—in response to the sale and use of cocaine by a sizable number of machine-shop workers.) "Random drug testing is thought of by many employers as killing an insect with a bazooka," Mr. Dodge observes.

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

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

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

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

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

KEY STATE DRUG-TESTING REQUIREMENTS

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

GOVERNMENT EXECUTIVE / March 1989

FEDERAL URINALYSIS PLANS STALLED

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

BY CAROL MATLACK

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

The federal government's push for mandatory, random drug testing of civilian employees has moved to a new arena—the courtroom—and so far, the government seems to be taking a beating.

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

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

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

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

The Bush Administration

Although President Bush has not spelled out his drug policies in detail, his administration appears committed to continuing the Reagan drug testing initiative. J. Michael Walsh, director of the Office of Workplace Initiatives at the National Institute on Drug Abuse and an outspoken advocate of testing, continues to oversee agency testing programs.

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

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

Carol Matlack is a staff correspondent for National Journal.

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

Courtroom Successes

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

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

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

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

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

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

Private Sector Programs

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

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

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

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

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

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

Bureaucracy Run Amok

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

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

The Impact of Drug Testing

By Robert M. Preer, Jr.

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

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

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

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

Life also found the geographical spread to be interesting:

State	Percent
Alabama	0.7
Arizona	1.3
California	30.2
Colorado	1.3
District of Columbia	2.7
Florida	5.4
Illinois	4.0
Kentucky	0.7
Maryland	2.0
Massachusetts	1.3
Michigan	6.0
Minnesota	0.7
Mississippi	0.7
Nevada	1.3
New Jersey	4.7
New Mexico	4.0
New York	18.1
North Carolina	0.7
Oregon	2.7
Pennsylvania	4.7
Rhode Island	0.7
South Carolina	0.7
Texas	2.7
Utah	0.7
Virginia	0.7
Washington	1.3

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

On September 15, 1986, the Office of the Press Secretary released the text of President Reagan's Executive Order for a Drug-Free Federal Workplace. Implementation of the Executive Order was contained in a multi-part plan: (1) issuance of a policy against illegal drug use; (2) identification of drug users; (3) initiation of Employee Assistance Programs; (4) utilization of rehabilitative services. The program called for under the Executive Order, particularly testing to identify drug users, remains controversial. To this day, it has not been put into effect across the board in the federal workplace.

Private Sector Testing

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

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

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

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

Disparate Impact

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

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

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

[1] *Griggs v. Duke Power Co.*, 401 U.S. 424, 3 EPD ¶8137 (1971).

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

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

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

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

Selection Procedures

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

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

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

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

[2] *Id.*

[3] *Id*

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

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

[6] *Id.*, at 1272.

[7] *Reynolds v. Sheet Metal Workers, Local 102*, 498 F.Supp. 952, 22 EPD ¶ 30,739.

Some of the existing case law was summarized in *Smith v. American Service Co of Atlanta*, 611 F. Supp. 321 (DC GA 1984): "[There is] well settled case law invalidating the use of arrest records as a selection technique. *Gregory v. Litton Systems*, 472 F.2d 631 (CA 9, 1972); *Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290, (CA 8, 1975), *Johnson v. Goodyear Tire and Rubber Co.*, 491 F.2d 1364, 7 EPD 9233 (CA 5, 1974)."

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

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

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

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

"If it is established that the offense for which an applicant has been convicted is not job-related, it is unlawful under Title VII to disqualify the individual because of the conviction." [13]

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

Regulatory Guidelines

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

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

(Footnote Continued)

[8] EEOC Decision No 77-3, 19 FEP Cases 1129 at 1130 (1976)

[9] EEOC Decision No. 77-9, 19 FEP Cases 1146 at 1146, 1147 (1977), EEOC Decision No. 73-0133, 19 FEP Cases 1765 at 1766 (1972)

[10] EEOC Decision No 73-0133, 19 FEP Cases 1765 at 1767 (1972).

[11] EEOC Decision No. 73-0348, 19 FEP Cases 1775 at 1776 (1972)

[12] EEOC Decision No 78-35, 26 FEP Cases 1755 at 1756 (1978).

[13] *Id.*, at 1757

[14] EEOC Decision No 80-18, 26 FEP Cases 1802 at 1802 (1980)

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

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

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

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

Testing Policies

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

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

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

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

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

Constitutional claims aside, it is clear that mandatory testing may result in an impact problem for the employer if there can be shown to be a disproportionality between labor force demographics and drug user demographics. The conclusion is, moreover, the same whether the testing is undertaken at the pre-employment or the post-employment stage. Just as with wage garnishment and general record of arrest and/or conviction, the effect of implementing a testing policy is apt to result in litigation based on the disparate impact theory of discrimination under Title VII. Support for the logic of this statement is grounded in the reasonable inference that a statistical imbalance between the demographics of those treated for drug-related medical conditions and those of the general population is indicative of a comparable disparity between drug users and the general labor force.

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

Table 1[16]

DRUG USERS ADMITTED TO FEDERALLY-FUNDED DRUG TREATMENT PROGRAMS

1979

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

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

[15] *Wilkinson v. Times Mirror Books*, California Superior Court, #636361-3

[16] Sourcebook of Criminal Justice Statistics, USDOJ, BJS, 1982.

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

Table 2 [17]

CLIENTS OF FEDERALLY-FUNDED DRUG TREATMENT PROGRAMS

1983

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

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

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

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

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

[17] Report of the Secretary's Task Force on Black & Minority Health, USHHS, 1986

Conclusion

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

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

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

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

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

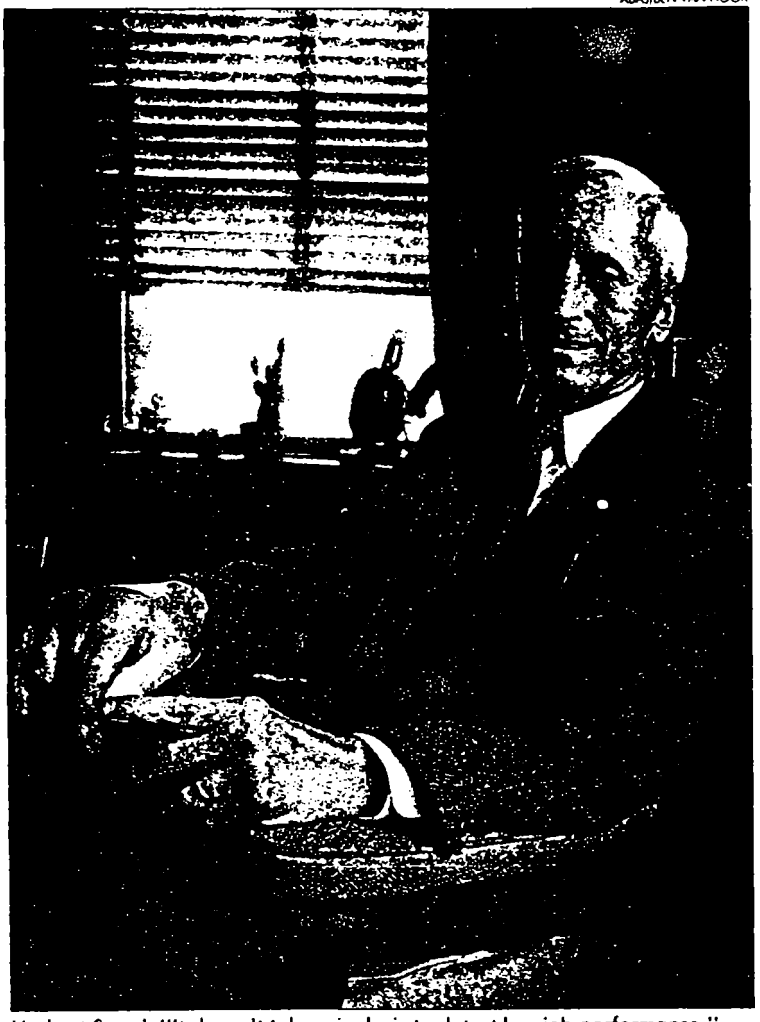
[The End]

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

DRUG SCREENING

Surveys show surprisingly few employers use testing

ABAJ/BEN VAN HOOK



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

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

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

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

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

Other key conclusions reached by the BLS researchers include.

- Of businesses with 5,000 or more employees, 59.8 percent had drug-testing programs, while only 2.7 percent of firms with less than 100 workers screened their employees.
- Only a quarter of the companies that tested workers used random drug testing at their job sites.
- The highest rate of positive drug-test results were found among workers in wholesale-trade careers, where 20 percent of current workers and 24 percent of job applicants tested positive. The lowest rate of drug use was discovered among service workers, with 3.1 percent of current workers testing positive.

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

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

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

Data from employers who gauged worker drug use, according to the BLS report, revealed that of 953,000 employees tested, about 8.8 percent had positive results. Job applicants, who were more apt to be screened than workers already on the payroll, showed an 11.9 percent rate of positive results from among the 3.9 million tested. Nearly 64 percent of all employers said they tested only those current employees suspected of drug use.

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

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

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

Others, however, were skeptical.

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

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

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

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

—*Charles-Edward Anderson*

THE ECONOMIST

Drug abuse at work

Mission just possible

NEW YORK

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

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

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

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

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

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

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

Unions are often critical of random testing, and some are challenging its legality. Many people find urine tests humiliating, especially when they are watched in order to prevent the switching of specimens. The unions parade medical evidence that the drug tests are not reliable. About one test in ten that proves positive is a false alarm. A person who has just eaten a poppy-seed bagel or taken a cold remedy can show up as a heroin addict. These controversies have limited the number of companies that have adopted random tests. Only about 5% of all respondents in a survey soon to be published by the Conference Board say they employ random testing.

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

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

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

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

Business Moves Against Drugs

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

By Donald C. Bacon

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

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

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

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

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

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

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

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

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

Anthony J. Gajda, a principal with the employee-benefits consulting firm of William M. Meidinger Hansen Inc., which conducted the survey, attributes the apparent discrepancy in part to a reluctance in many businesses to confront the drug issue. "We think there is denial among organizations," Gajda says. "Nobody wants to admit it's a problem in their own company." Nonetheless, he adds, "I think we're beginning to see a real improvement in perceptions of the drug problem among employers and workers in this country. Employers are beginning to take a more aggressive attitude."

So far, most private-sector activity against drugs in the workplace has been led by the large corporations. Nearly all of the nation's 500 largest corporations have adopted some type of drug program.

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

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

PHOTO: ©UNIPHOTO

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

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

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

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

Capital Cities/ABC, the media conglomerate, extended a substance-abuse policy to all of its broadcast and print properties after one of its employees died of a drug overdose. That policy includes employee assistance, educational efforts, and, as necessary, the use of drug tests, drug-sniffing dogs, and undercover operations.

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

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

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

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

Defense contractors, moreover, have been required since last spring to test certain employees for illegal drugs.

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

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

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

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

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

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

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

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

Signs Of Abuse In The Workplace

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

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

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

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

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

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

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

Using 'Spies to Win a War'

Corporations turn to detectives to catch workers with drug problems

THE DRUG CRISIS

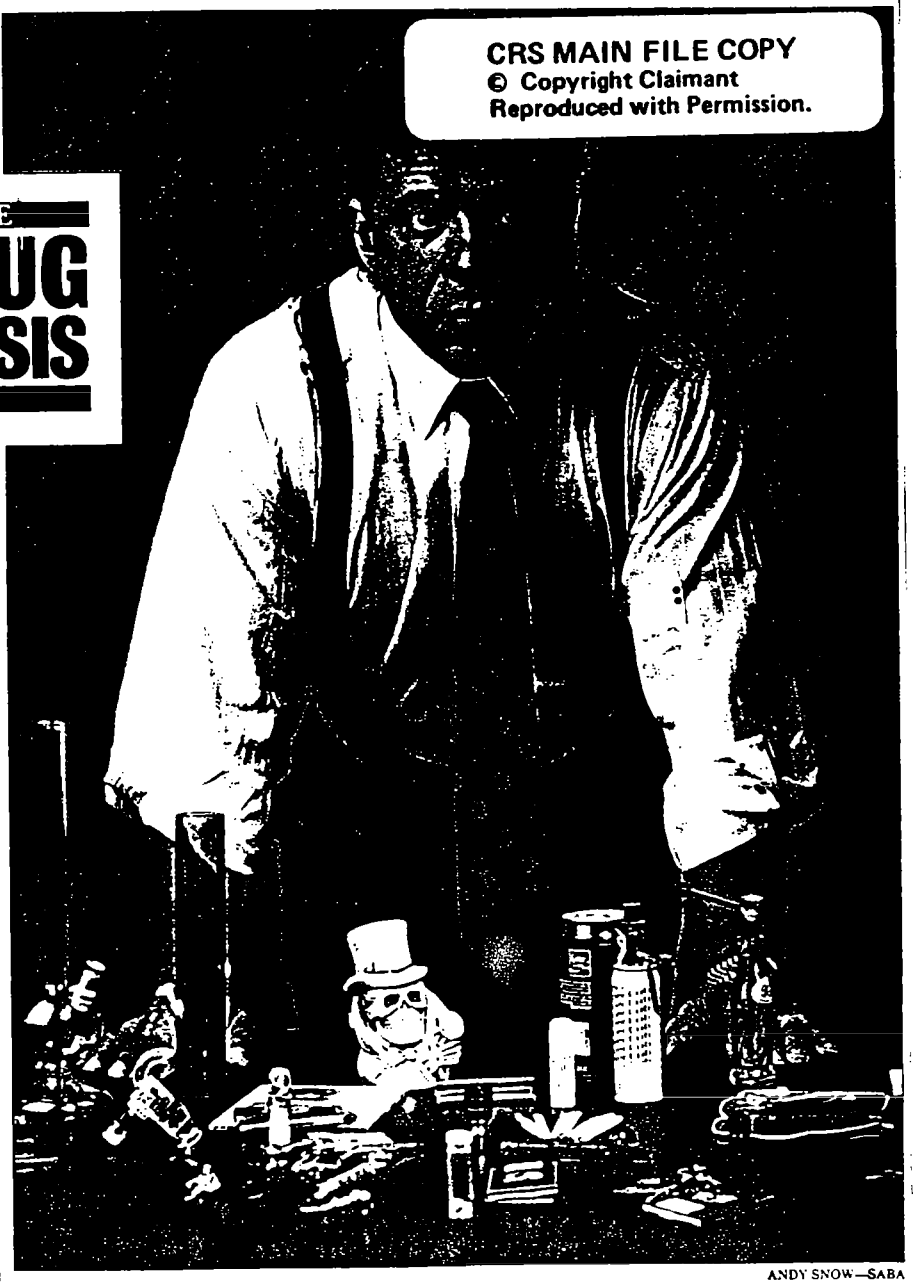
Something was wrong at the turkey-packaging plant. Worker Compensation claims were skyrocketing, mostly from the evening shift. So earlier this year, management called in undercover detectives, who soon found the cause. Employees were getting high on cocaine and jousting with forklifts, injuring themselves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

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

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

Even firms under no legal obligation are eying their ranks more closely. Just one stoned employee can do monumental damage. A January 1987 train wreck caused by an engineer who admitted smoking a joint at his post killed 16 people and injured 175 and cost Conrail and Amtrak $106 million. Most companies have more than one drug user to worry about: the Chamber of Commerce says that 44 percent of those entering the full-time work force have used illegal drugs in the past year. "There is not a company in the U.S. that does not have a drug problem, and if they say they don't, they're ignoring the fact," says Paul Leckinger, whose Chicago-based Midwest Consultants, Inc., helps companies set up drug-detection programs.

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



ANDY SNOW—SABA

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

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

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

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

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

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

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

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

JOHN SCHWARTZ *with* ELIZABETH BEARDEN *and* CAROLYN FRIDAY *in New York*

Warning Signals

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

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

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

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

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

SOURCE: U.S. CHAMBER OF COMMERCE

ROB LEWINE

A bonanza for Pinkerton's: *Wathen*

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

ROB NELSON—BLACK STAR

THE CHRISTIAN SCIENCE MONITOR

October 13, 1988; p. 17

Drug testing: legal, moral issues on a collision course

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

Here are the considerations:

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

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

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

JUSTICE

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

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

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

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

It is safe to say that there is consensus in society for this point of view. It has led to the recent tough stance by Olympic officials toward athletes found using steroids. And it is reflected in President Reagan's proposals for broad-based testing of federal workers and pending congressional legislation for a crackdown on drug dealers.

Some suggest that random drug testing should be imposed on prisoners and schoolchildren alike – and that criminal sanctions should be imposed on those found to be users.

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

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

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

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

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

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

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

A Thursday column

The Washington Times

November 2, 1988; p. F1, F4

Hoisted on their own constitutional petard

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

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

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

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

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

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

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

In Camara vs. Municipal Court (1967), the Supreme Court declared that rental properties may be searched to detect housing-code violations within a geographic area based on probable cause to believe some violations will be discovered. The court explained that effective housing-code enforcement would be infeasible if each multidwelling-unit search required a showing of probable cause.

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

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

see FEIN, page F4

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

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

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

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

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

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

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

USA TODAY

November 17, 1988; p. 8A

Testing for drugs makes liberties unsafe

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

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

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

Nor is this the full extent of the problem any fair-minded person will have with these drug tests. For these tests carry with them absolutely enormous margins of error. It is not uncommon for individuals who have never ingested any illegal drugs at all to test positive for one or more of these drugs. And it is even more common for individuals who are using non-psychoactive prescription drugs to test positive for one or more illegal drugs which they have not in fact used.

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

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

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

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

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

November 17, 1988 p. 8A

Drug abuse is not a victimless crime

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

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

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

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

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

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

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

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

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

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

Chicago Tribune

March 24, 1989; Sec. 1; p. 10

Drugs, privacy and public safety

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

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

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

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

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

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

THE CHRISTIAN SCIENCE MONITOR

March 24, 1989; p. 20

The Drug-test Swamp

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

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

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

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

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

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

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

The New York Times

March 25, 1989; p. 26

Drug Testing Passes a Test

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

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

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

•

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

But in these cases, the word to remember is "reasonable." Justice Anthony Kennedy, writing for the Court, found that it would be unreasonable to put railroad and customs managers through the rigors of search-and-seizure jurisprudence that the police must master.

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

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

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

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

Yes to Drug Tests

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

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

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

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

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

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

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

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

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

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

No to Intrusions

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

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

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

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

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

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

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

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

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

PART TWO: CRS REPORTS ON DRUG TESTING

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

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

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

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

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

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

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

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

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

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

Drug testing: the experience of the transportation industry. Jan. 11, 1989. Washington, Congressional Research Service, 1989. 12 p. 89-26 E

Drug testing in the workplace: an overview of employee and employer interests; issue brief. Regularly updated. Washington, Congressional Research Service. 8 p. IB87139

Randall, Blanchard, IV.

Drug testing for illegal substances. Jan. 20, 1987. Washington, Congressional Research Service, 1987. 7 p. 87-36 SPR

PART THREE: DRUG TESTING: BIBLIOGRAPHY-IN-BRIEF

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

Ackerman, Sandra.
Drug testing: the state of the art. American scientist, v. 77, Jan.-Feb. 1989: 19-23. LRS89-1689
Examines the reliability of currently available drug testing procedures, focusing on the extent of "false positive" and "false negative" findings.

American Medical Association. Council on Scientific Affairs.
Issues in employee drug testing. JAMA [Journal of the American Medical Association], v. 258, Oct. 16, 1987: 2089-2096. LRS87-8294
Addresses constitutional, statutory, regulatory, and common law principles involved in testing urine for drug use in the civilian workplace. Offers recommendations on drug testing policy to the American Medical Association.

Bensinger, Peter B.
Drug testing in the workplace. Annals of the American Academy of Political and Social Science, v. 498, July 1988: 43-50. LRS88-11168
Assesses the value and accuracy of drug testing procedures, reviews the development of drug testing programs for the workplace, and makes "specific suggestions for employers concerned with the drug problem in industry."

Bookspan, Phyllis T.
Jar wars: employee drug testing, the Constitution, and the American drug program. American criminal law review, v. 26, fall 1988: 359-400. LRS88-14948
"Suggests that since employee drug testing is only a tangential issue to the problem of drug abuse in our society, solutions should be based on attacking drug use, not on attacking constitutional protections."

Bradley, Gregory.
Drug testing in the workplace: a public sector concern. Howard law journal, v. 31, no. 1, 1989: 49-59. LRS89-4910
"Provides an overview of the legal issues and specific employee challenges of drug testing policies in the public sector."

Bureau of National Affairs.
Daily labor report. Washington, The Bureau, 1948-. HD4802.D3
Provides a daily summary and analysis of events in labor law, including legislation on drug testing.

Government employee relations report. Washington, The Bureau, 1963-. HD8008.A1B8
This weekly newsletter covers municipal, county, state, and federal developments. It includes discussion of drugs in the workplace.

Cone, Lorynn A.
Public policies against drug use: Paperworkers v. Misco. Labor law journal, v. 40, Apr. 1989: 243-247. LRS89-6365
Argues that because of recent Supreme Court decisions "the gap in protections afforded unionized workers, as opposed to public employees and non-union private workers, is likely to grow wider. This may result in different brands of justice, depending upon where one works."

Cooper, Charles J.
The constitutionality of drug testing. Federal Bar news & journal, v. 35, Oct. 1988: 359-363. LRS88-15019
"Former Assistant Attorney General of the United States presents a thorough analysis of the constitutional principles relating to drug testing, with a useful Appendix of relevant case law."

Drugs in the workplace: research and evalution data. Edited by Steven W. Gust and J. Michael Walsh. Rockville, Md., National Institute on Drug Abuse, 1989. 340 p. (NIDA research monograph 91) LRS89-8109
Based upon papers presented at a conference titled 'Drugs in the Workplace: Research and Evaluation Data' which was held on September 15th and 16th, 1988 in Washington, D.C. Topics covered are the prevalence of drug use by the workforce, relationship of use to performance and productivity, industry responses, and emerging issues and research directions.

Drug testing at work: a survey of American corporations. [S.l.] Hoffmann-LaRoche, 1988. 109 p. (Corporate initiatives for a drug free workplace) LRS88-4712
Reports the findings of "the first statistically representative survey of drug testing policies and practices in companies nationwide," conducted by the Gallup Organization for Hoffman-LaRoche as part of their national effort to keep America's corporate workplaces drug-free.

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

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

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

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

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

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

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

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

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

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

Heshizer, Brian. Muczyk, Jan P.
Drug testing at the workplace: balancing individual, organizational, and societal rights. Labor law journal, v. 39, June 1988: 342-357. LRS88-6268

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

Kemper, James D., Jr.
Drug testing in the military: issues of admissibility and sufficiency. Federal Bar news & journal, v. 35, Oct. 1988: 374-376. LRS88-15018

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

Matlack, Carol.
Boardroom vice squads? National journal, v. 20, June 25, 1988: 1680-1683. LRS88-5331

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

McDermott, Mark T. Jones, Kyle A.
Mandatory random drug-testing in the United States Department of Transportation--a Fourth Amedment analysis. Transportation law journal, v. 17, no. 1, 1988: 1-29. LRS88-14101

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

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

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

Simonsmeier, Larry M. Fink, Joseph L., III.
Legal implications of drug testing in the workplace. American pharmacy, v. NS28, July 1988: 30-37. LRS88-7061

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

Spieler, Louise.
The Drug-Free Work Place Act. Lexington, Ky., Council of State Governments, 1989. 5 l. (CSG backgrounder 048901) LRS89-3348
Concludes that "while states are taking steps to comply with the requirements outline in the Drug-Free Workplace Act, many do not have comprehensive policies in place."

Stewart, David O.
Slouching toward Orwell. American Bar Association journal, v. 75, June 1989: 44, 46, 48, 50. LRS89-3599
Argues that the Supreme Court's recent decisions on drug testing (Skinner v. Railway Labor Executives' Association and National Treasury Employees Union v. Von Raab) are not leading to an erosion of civil liberties.

Symposium: drug testing. University of Kansas law review, v. 36, no. 4, summer 1988: whole issue (641-951 p.) LRS88-10842
Partial contents.--Accuracy and reliability of urine drug tests.--The "scientific" justification for urine drug testing.--A question of America's future: drug-free or not?--Will employee's rights be the first casualty of the war on drugs?--Private sector drug testing: employer rights, risks and responsibilities.--Drug testing legislation: what are the States doing?

Testing for drug use in the American workplace: a symposium. Nova law review, v. 11, winter 1987: Whole issue (291-823 p.) LRS87-14325
This symposium on drug testing presents "a variety of experts--labor law attorneys, forensic scientists, legislators, arbitrators, civil libertarians, and other legal scholars--with varying views."

U.S. General Accounting Office.
Employee drug testing: agency costs may vary from earlier estimates; report to the Chairmen, Subcommittee on Civil Service and Subcommittee on Human Resources, Committee on Post Office and Civil Service, House of Representatives. May 30, 1989. Washington, G.A.O., 1989. 23 p. LRS89-8117
"GAO/GGD-89-75, B-223280"
Analysis of the Office of Management and Budget's cost estimates for drug-testing at the 12 civilian cabinet-level departments shows "that the OMB guidance to departments specifying the dollar amount to use in estimating certain cost categories may not be indicative of the amount some departments will spend."

U.S. General Accounting Office.

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

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

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

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

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

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

Watson, Tom.

Drug-testing laws are catching on. Governing, v. 1, June 1988: 60-63. LRS88-7054

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

Wrich, James T.

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

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

Zimmerman, Carita.

Urine testing, testing-based employment decisions and the Rehabilitation Act of 1973. Columbia journal of law and social problems, v. 22, no. 2, 1989: 219-267. LRS89-1646

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

PART FOUR: USING THE LIBRARY'S RESOURCES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Main Reference File

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

PART FIVE: ORDERING ADDITIONAL INFORMATION

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

To: Joseph E. Ross, Director
Congressional Research Service
The Library of Congress
LM 213
Washington, D.C. 20540

From: Member/Committee _____
_____
Your Name _____
Address _____
Phone _____ *Date* _____

DRUG TESTING AND THE DRUG-FREE WORKPLACE
(A Bibliographic Guide and Reader)

PLEASE send the following information:

CRS Products (List by Number)	*Books (List by Call Number and Title)*	*Articles (List by LRS Number)*

-- (FOR CONGRESSIONAL USE ONLY) --

CRS Report for Congress

Governmentally Mandated Drug Testing of Public Employees: A Survey of Recent Constitutional Developments

Charles V. Dale
Legislative Attorney
American Law Division

February 23, 1990

Congressional Research Service • The Library of Congress

Governmentally Mandated Drug Testing of Public Employees: A Survey of Recent Constitutional Developments

Summary

Recent federal, state, and local programs to test public employees, and workers in certain government-regulated industries, for illegal use of controlled substances have become a salient feature of the national campaign against drug abuse. At the same time, however, these efforts pose a delicate constitutional balance between the privacy rights of individual employees and the interests of the government in insuring a drug-free workplace. A torrent of litigation in the last decade has considered the constitutional limits of governmental authority to impose mandatory, and primarily random, drug testing without reasonable suspicion of workplace drug abuse. These employee actions have been grounded principally in the guarantee against unreasonable searches and seizures found in the Fourth Amendment to the U.S. Constitution, with due process and equal protection overtones also evident in some cases.

Added impetus for governmental drug-testing may come from two U.S. Supreme Court decisions last term which upheld post-accident drug and alcohol testing of railway employees after major train accidents or incidents, *Skinner v. Railway Labor Executives Ass'n*, and of U.S. Customs employees seeking promotion to certain "sensitive" jobs involving firearms use, drug interdiction duties, or access to classified information, *National Treasury Employee's Union v. Von Raab*. Previously, a key issue which had divided the federal appeals courts was whether public employee drug testing is ever permissible in the absence of "reasonable" or "individualized" suspicion of drug abuse or impairment. The High Court's latest rulings make clear that reasonable suspicion is not required where public safety or other "compelling" governmental interests outweigh any "diminished expectation of privacy" of the employees being tested. Not directly addressed by the Court in *Skinner* and *Von Raab*, however, was the constitutional fate of random testing programs, an issue which continues to vex lower federal and state courts. But in the wake of those decisions, the Court has denied review of cases upholding random drug testing of police officers, transit employees, nuclear power plant employees, and, just this term, Justice Department lawyers who hold top-secret security clearances and Army civilian drug counselors. This report analyzes these judicial developments and the current state of constitutional law concerning mandatory, and random, drug testing of public employees.

Governmentally Mandated Drug Testing of Public Employees: A Survey of Recent Constitutional Developments

Introduction

Recent federal, state, and local programs to test public employees, and workers in certain government-regulated industries, for illegal use of controlled substances have become a salient feature of the national campaign against drug abuse. At the same time, however, these efforts pose a delicate constitutional balance between the privacy rights of individual employees and the interests of the government in insuring a drug-free workplace. Moving on parallel tracks, the Executive Branch and the Congress have each sought to implement programs which target employees in certain "sensitive" federal jobs and federally regulated transportation industries for routine drug testing.[1] These federal efforts, combined with similar programs at the state and local level, have unleased a torrent of litigation challenging the constitutional authority of government to impose mandatory, and primarily random, drug testing without reasonable suspicion of workplace drug abuse. These employee actions have been grounded principally in the guarantee against unreasonable searches and seizures found in the Fourth Amendment to the U.S. Constitution, with due process and equal protection overtones also evident in some cases.

Added impetus for governmental drug-testing may come from two U.S. Supreme Court decisions last term which upheld post-accident drug and alcohol testing of railway employees after major train accidents or incidents, *Skinner v. Railway Labor Executives Ass'n*,[2] and of U.S. Customs employees seeking promotion to certain "sensitive" jobs involving firearms use, drug interdiction duties, or access to classified information, *National Treasury Employee's Union v. Von Raab*.[3] Previously, a key issue which had divided the

---

[1] For a detailed history of federal legislation and regulations related to public employee drug-testing, see: *Federally Mandated Drug Testing of Transportation Workers*, CRS Report No. 89-384 A (Dale), June 16, 1989; *Drug Testing in the Workplace: Federal Programs*, CRS Issue Brief 87174 (Gressle) (updated regularly); *Drug Testing in the Workplace: An Overview of Employee and Employer Interests*, CRS Issue Brief 87139 (McCallion)(updated regularly).

[2] 109 S.Ct. 1402 (1989).

[3] 109 S.Ct. 1384 (1989).

federal appeals courts was whether public employee drug testing is ever permissible in the absence of "reasonable" or "individualized" suspicion of drug abuse or impairment.[4] The High Court's latest rulings make clear that reasonable suspicion is not required where public safety or other "compelling" governmental interests outweigh any "diminished expectation of privacy" of the employees being tested. Not directly addressed by the Court in *Skinner* and *Von Raab*, however, was the constitutional fate of random testing programs, an issue which continues to vex lower federal and state courts. But in the wake of those decisions, the Court has denied review of cases upholding random drug testing of police officers,[5] transit employees,[6] nuclear

---

[4] See, *e.g.*, *Policemen's Benevolent Ass'n, Local 318 v. Township of Washington*, 850 F.2d 133 (3d Cir. 1988), *cert. denied* No. 88-706, 57 U.S.L.W. 3647 (S.Ct. 4-4-89)(random urinalysis testing of police officers upheld); *Louvorn v. City of Chattanooga*, 846 F.2d 1539 (6th Cir. 1988)(random drug testing of firefighters prohibited by Fourth Amendment); *Penny v. Kennedy*, 846 F.2d 1563 (6th Cir. 1988)(random drug testing of police officers prohibited); *Rushton v. Nebraska Pub. Power Dist.*, 844 F. 2d 562 (8th Cir. 1988)(allowing random testing of nuclear power plant workers); *Copeland v. Philadelphia Police Department*, 840 F.2d 1139 (3d Cir. 1988), *cert. denied* No. 88-66, 57 U.S.L.W. 3647 (S.Ct. 4-4-89) (upholding reasonable suspicion testing of police officers); *Railway Labor Executive Ass'n v. Burnley*, 839 F.2d 1507 (9th Cir. 1988), *rev'd sub nom. Skinner v. Railway Labor Executives' Ass'n*, *supra* n. 2 (prohibiting testing of railroad employees after major accidents absent reasonable suspicion); *Everett v. Napper*, 833 F.2d 1507 (llth Cir. 1987)(allowing reasonable suspicion testing of a firefighter); *Jones v. McKenzie*, 833 F.2d 335 (D.C.Cir. 1987), *vacated and remanded sub nom. Jenkins v. Jones* No. 87-1706, 57 U.S.L.W. 3653 (S.Ct. 4-4-89)(allowing random testing of school bus attendants); *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *aff'd in part, rev'd in part* No. 86-1879, 109 S.Ct. 1384 (1989)(allowing drug tests of Customs employees who apply for transfer to certain sensitive jobs); *Mack v. United States*, 814 F.2d 120 (2d Cir. 1987)(allowing reasonable suspicion testing of FBI agent); *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987)(allowing random drug-testing of certain correctional officers); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 107 S.Ct. 577 (1986)(allowing random tests of jockeys); *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976)(allowing post-accident testing of bus drivers absent reasonable suspicion).

[5] *Policemen's Benevolent Association v. Township of Washington*, *supra* n. 4.

[6] *United Transportation Union v. Southeastern Pennsylvania Transportaton Authority (SEPTA)*, 863 F.2d 1110 (3d Cir.), *cert. denied* 109 S.Ct. 3209 (1989)(approved random urinalysis testing of 2,600 transit "operating engineers" in "safety sensitive" positions over a one-year period, and breathalyzer tests for 5,400 such workers annually).

power plant employees,[7] and, just this term, Justice Department lawyers who hold top-secret security clearances[8] and Army civilian drug counselors.[9] The remainder of this report analyzes these judicial developments and the current state of constitutional law concerning mandatory, and random, drug testing of public employees.

Employee Privacy versus the Public Interest

The constitutional focus of public employee drug testing litigation has been the Fourth Amendment which protects the "right of the people" to be free from "unreasonable searches and seizures" by the government. This constitutional stricture applies to all governmental action--federal, state, and local--by its own force or through the Due Process Clause of the Fourteenth Amendment.[10] Thus, while private employers are not directly affected, the actions of government as employer are subject to Fourth Amendment scrutiny.[11] Governmental conduct will generally be found to constitute a "search" for Fourth Amendment purposes where it infringes "an expectation of privacy that society is prepared to consider reasonable."[12] If a search or seizure has occurred, the court must then determine whether the government's action was reasonable under the circumstances.[13]

Historically, the Court has developed various constitutional tests of reasonableness depending on the nature of the search and the underlying governmental purpose. The most demanding test is reserved for searches prompted by the normal needs of criminal law enforcement. Based on the literal text of the Fourth Amendment, and to safeguard individual interests in personal privacy, probable cause supported by a warrant is the usual

---

[7] *Alverado v. Washington Public Power Supply Systems and Bechtel Construction, Inc.*, 111 Wash.2d 424, 759 P.2d 427 (Wash. 1988), *cert. denied* 109 S.Ct. 1637 (1989).

[8] *Bell v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), *cert. denied*, No. 89-679, 58 U.S.L.W. 3468 (S.Ct. 1-23-90).

[9] *National Federation of Federal Employees v. Cheney*, 892 F.2d 98 (D.C. Cir. 1989), cert. denied, No. 89-635, 58 U.S.L.W. 3468 (S.Ct. 1-22-90).

[10] *Mapp v. Ohio*, 367 U.S. 643 (1961).

[11] *O'Connor v. Ortega*, 107 S.Ct. 1492 (1987).

[12] *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

[13] See *O'Connor*, *supra* n. 10, at 1495.

constitutional prerequisite for a criminal search.[14] Even in circumstances where warrantless searches are permitted, they ordinarily "must be based on 'probable cause' to believe that a violation of the law has occurred."[15] Yet despite these historical roots, the Supreme Court has determined that neither a warrant nor probable cause are irreducible minima of a valid search or seizure in all circumstances.[16]

While the Fourth Amendment protects against civil as well as criminal investigatory processes,[17] the need for protection against government intrusion decreases if the investigation is entirely unrelated to criminal law enforcement.[18] In such circumstances, a rule less restrictive on the government, based on "reasonable suspicion" of a civil or regulatory law violation, has become the constitutional norm. However, an exception from even this less demanding standard has been recognized for administrative searches by the government to enforce compliance with a regulatory scheme by persons engaged in a "highly regulated industry" on the theory that the very existence of the regulatory program diminishes reasonable expectations of privacy of those involved in the industry.[19] In such situations, a Fourth

---

[14] *See, e.g., Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967), where the Court states:

> one governing principle, justified by history and by current experience, has been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant.

[15] *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985).

[16] *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976)(Although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure. . .the Fourth Amendment imposes no irreducible requirement of such suspicion.").

[17] *O'Connor*, *supra* n. 20.

[18] *South Dakota v. Opperman*, 428 U.S. 364, 370 n.5 (1976)(When police undertake "routine administrative caretaking functions" like inventory searches, particularly when they are not a subterfuge for criminal investigations, "[t]he probable-cause approach" and its concommitant requirement of a warrant are not very "helpful."); *Wyman v. James*, 400 U.S. 309, 317-325 (1971)(Visits by government officials to the homes of welfare recipients for the purpose of evaluating their eligibility for benefits do not abridge the Fourth Amendment.).

[19] *Donovan v. Dewey*, 452 U.S. 594, 600 (1981).

Amendment standard based on a balancing test has been crafted by the Court. This "special need" approach appears to confer optimum power on the government to search where "compelling" reason exists and correspondingly less protection to the individual's "diminished expectation of privacy."

Even prior to *Skinner* and *Von Raab* there was virtual unanimity among the federal courts that governmental drug-testing constituted a search that could constitutionally be justified on reasonable suspicion grounds.[20] No similar consensus prevailed, however, as to the constitutional propriety of mandatory testing in other circumstances and, particularly, where random testing is imposed as a deterrent to illegal drug use by public employees or for some other governmental objective unrelated to criminal law enforcement. While the Court's rulings last term failed to specifically elucidate the constitutional status of random testing, they may portend the direction of future judicial decision-making on this controversial issue. Recall that *Skinner v. Railway Labor Executives Ass'n* concerned DOT mandated post-accident testing of railway workers while *National Treasury Employees Union v. Von Raab* involved the testing of customs service employees as a prerequisite to promotion to certain "sensitive" positions. As more fully explained *infra*, the Supreme Court held that mandatory testing in these situations, even without individualized suspicion of drug use, was not an "unreasonable search or seizure" under the Fourth Amendment, because of the overarching public safety considerations involved.

---

[20] The decisions indicate that "[r]easonable suspicion is a lesser standard than probable cause" but that some evidence of actual illicit drug use by an individual employee or employees remains a constitutional prerequisite. "There is a reasonable suspicion when there is some articulable basis for suspecting that the employee is using illegal drugs." *Lovvorn v. City of Chattanooga*, *supra* n. 4. Put another way, "there is reasonable suspicion when there is some quantum of individualized suspicion as opposed to an inarticulate hunch," and this may be "based on statements made by other employees and tips from informants. Even probable cause can be based on informants' tips when the totality of the circumstances indicates a fair probability of accuracy." *E.g.*, *Smith v. White*, 666 F. Supp. 1085 (E.D.Tenn. 1987). Some differences in judicial viewpoint may remain, however, as to whether the evidence must necessarily relate to individual as opposed to more generalized illegal drug use within the public employee group as a whole. *Compare, e.g., Wrightsell v. Chicago*, 678 F. Supp. 727 (N.D. Ill. 1988)("Reasonable suspicion does not require actual observed behavior," but it "must be individualized" and "cannot be directed against an entire group.") and *Penny v. Kennedy*, *supra* n. 4 (". . .for a mandatory drug test of police officers to be reasonable, there must be some evidence of a significant, department-wide drug problem or there must be individualized suspicion.).

The Constitutional Rulings in *Skinner* and *Von Raab*

In *Skinner* a panel of the Ninth Circuit had voided on Fourth Amendment grounds Federal Railroad Administration regulations requiring breath, blood, and urine tests of railroad workers who are involved in train accidents.[21] A federal district court had accepted the government's argument that public safety interests served by the rules outweighed any possible intrusion on privacy rights asserted by the contesting labor unions. However, because the post-accident drug and alcohol testing procedure applied to all covered employees without regard to "reasonable suspicion that a test will reveal evidence of current drug or alcohol impairment," a divided appeals court panel struck down the regulation. In so doing, it refused to find that rail employees enjoy a "diminished expectation of privacy" due to the "heavily regulated" nature of the railroad industry or that the program fit any of the traditional judicial exceptions to Fourth Amendment principles.

In reversing, the Supreme Court first held that the entire testing regulation, even portions applicable to certain employee rule infractions that were merely permissive rather than mandatory upon the railroads, carried sufficient government "encouragement, endorsement, and participation" to implicate the Fourth Amendment considerations. On the merits, Justice Kennedy wrote for the majority that because "the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable," FRA testing for drugs and alcohol was a "search" that had to satisfy constitutional standards of reasonableness. The "special needs" of railroad safety, however, made traditional Fourth Amendment requirements of a warrant and probable cause applicable to normal law enforcement "impracticable" in this context. Nor was "individualized suspicion" deemed by the majority to be a "constitutional floor" where the intrusion on privacy interests are "minimal" and an "important governmental interest" is at stake. According to Justice Kennedy, covered rail employees had "expectations of privacy" as to their own "physical condition" that were "diminished" by "their participation in an industry that is regulated pervasively to ensure safety." In these circumstances, the majority held, it was "reasonable" to conduct the

---

[21] Briefly, alcohol and drug testing is mandated for all covered employees involved in various events, including: major train accidents (involving a fatality, release of hazardous material with either evacuation or injury, or $500,000 damage to railroad property); impact accidents (involving a reportable injury or damage to railroad property of $50,000); and fatal accidents (involving fatality of an on-duty railroad employee). 49 *C.F.R.* §219.213. The FRA regulations require that blood and urine samples be taken from all crew members of a train involved in such an accident or incident as soon a possible afterwards. Blood samples are to be taken at independent medical facilities by qualified professionals or technicians. 49 *C.F.R.* §219.203. Refusal to provide a sample results in a nine-month period of disqualification. 49 *C.F.R.* §219.213.

tests, even in the absence of a warrant or reasonable suspicion that any employee may be impaired.

Justice Kennedy also rejected another line of attack against the challenged tests which proceeds from the generally accepted scientific and judicial view that standard test protocols are capable indicators only of prior drug use but are not a measure of current job impairment or drug influence. Because of this fact, a number of lower federal courts had voided the EMIT screen and confirmatory GC\MS for not being reasonably related to legitimate governmental interests in assuring employee fitness or competence.[22] In *Skinner*, however, the majority found the information provided by the tests to be a valid investigative tool which "may allow the [FRA] to reach an informed judgment as to how a particular accident occurred." In addition, opposition on these grounds "failed to recognize that the FRA regulations are designed not only to discern impairment but also to deter it," and according to the majority, the government "may take all necessary and reasonable regulatory steps to prevent and deter" forbidden drug use by the covered employees.

In the *Von Raab* case, decided the same day as *Skinner*, a Fifth Circuit panel had upheld drug testing of U.S. Customs Service personnel who sought transfer to certain "sensitive" positions, namely, those involving drug interdiction, carrying firearms, or access to classified information, without a requirement of reasonable individualized suspicion. The testing procedure was administered once, when the employee sought transfer to the sensitive position, and the Customs Service gave the qualified applicant five days notice of the test. Thus, the drug test in *Von Raab* was conditioned on the employee's own action in seeking a transfer and no adverse consequence flowed from a later withdrawn transfer application.

In a 5 to 4 ruling, Justice Kennedy again speaking for the majority affirmed the Customs Service policy with respect to the interdiction of illegal drugs and employees required to carry firearms. According to the Court, the government has a "compelling interest" in not promoting drug users to jobs where they could "endanger the integrity of our Nation's borders or the life of the citizenry." That interest outweighs the privacy interests of employees who seek promotions to those jobs, but who enjoy "a diminished expectation of privacy by virtue of the special physical and ethical demands of those positions." Neither the absence of "any perceived drug problem among Customs employees," nor the possibility that "drug users can avoid detection" by temporary abstinence, would defeat the program since deterrence of "highly hazardous conduct" as much as detection was a "substantial" justification and the risk of circumvention was "overstated." However, the Court found the

---

[22] *E.g., Jones v. McKenzie*, 833 F.2d 335, 340 (D.C.Cir. 1987), *vacated and remanded sub nom. Jenkins v. Jones*, 109 S.Ct. 1633 (1989); *Railway Labor Executive Ass'n v. Burnley*, 839 F.2d 1507 (9th Cir. 1988); *Harmon v. Meese*, 690 F. Supp. 65 (D.D.C. 1988).

record insufficient to determine whether searches of employees who would handle classified information was reasonable. It was not apparent that individuals in certain positions would actually have access to sensitive information, leading Justice Kennedy to question whether the category was too broad to meet Fourth Amendment requirements.

The High Court rulings in *Skinner* and *Von Raab* established several constitutional propositions that might be significant to the random testing issue. First, to reiterate, it can no longer be argued that reasonable suspicion is the constitutional benchmark for all governmental drug testing and may thus pose no insuperable obstacle to random testing in the public sector. Equally important, the balancing test in those cases, based on the "special needs" of the government for assuring transportation safety and the integrity of the federal drug interdiction effort, may as readily be transposed to other regulatory environments where public employees perhaps enjoy a "diminished expectation of privacy." Third, as noted above, the Court rejected a line of decisions which had faulted current drug testing methodologies due to their inability to detect *present* drug impairment as opposed to simple *past* drug use. This argument was summarily dismissed by the rulings last term which held that beyond *detection*, the government has a legitimate interest in *deterring* employee drug use and that drug test evidence was relevant to the government's "compelling" public safety concerns. Each of these major premises of the Court's analysis in *Skinner* and *Von Raab* may apply with equal force to the constitutional issues raised by random testing.

Judicial Action on Random Testing Since *Skinner* and *Von Raab*

Constitutional litigation of drug testing issues has continued unabated since the Supreme Court's rulings last term. The principal focus of judicial scrutiny has been random testing of federal employees in "sensitive" positions pursuant to E.O. 12564, and related federal regulations, as well as recent DOT rules mandating a comprehensive program for testing public and private employees of the nation's major transportation industries. In addition, state and local government programs to require mandatory testing of public employees, primarily in law enforcement and public safety-related positions, have spawned numerous court actions probing the constitutional limits of governmental authority.[23]

Notably, since *Skinner* and *Von Raab* the Supreme Court has taken summary action in several cases involving the constitutional validity of random or other mandatory drug testing rules. Prior to adjournment last term, the Justices let stand lower court decisions allowing random and "reasonable suspicion" drug testing for police officers and mandatory, preemployment drug testing for applicants for nuclear power plant jobs. The

---

[23] For more detail on these federal, state, and local programs, see authorities cited in n. 1 *supra*.

Court's determination to deny review of the decisions--two by the U.S. Court of Appeals for the Third Circuit and one by the Washington Supreme Court--came only a week after the post-accident testing and Customs Service cases.

Policemen's Benevolent Association v. Township of Washington[24] involved a program which subjected local police officers to random urinalysis testing and mandatory drug tests administered during required annual physical examinations. In rejecting the challenge of a local police union, the Third Circuit relied upon its own earlier decision in *Shoemaker v. Handel*[25] which had upheld random testing of jockeys. The appeals court concluded that various state statutes and "detailed regulations" of the township governing police conduct and discipline had reduced the officers' justifiable privacy expectations which were outweighed by the strong public interest in averting police drug use. The Policemen's Benevolent Association, backed by the American Civil Liberties Union, had sought review of the appeals court ruling, contending that it "has effectively vitiated Fourth Amendment protection for public employees." In the other police case, *Copeland v. Philadelphia Police Department*,[26] the Justices rejected the petition of a former Philadelphia police officer who was fired following a positive drug test. The appeals court ruled that the city had not violated the Fourth Amendment rights of the officer by ordering him to submit to a urinalysis based on "reasonable suspicion" as the result of information gained from an informer.

In the nuclear power plant case, *Alverado v. Washington Public Power Supply System and Bechtel Construction, Inc.*,[27] the Washington Supreme Court ruled that the WPPSS did not violate the Fourth Amendment by requiring applicants for repair jobs to pass a pre-employment drug test to obtain access to secure areas at the plant. Bechtel Power had a contract with the system to perform the repair work and several members of Plumbers Local 598 who had applied for jobs with Bechtel challenged the drug testing requirement. The Washington court unanimously held that job applicants could be required to undergo the drug screening under an administrative search exception to the Fourth Amendment. The court reasoned that the applicants have a substantially diminished expectation of privacy because of the "pervasive" federal regulation of nuclear power plants and that the employer's interest in nuclear safety outweighed the limited intrusion on privacy interests.

In other significant action, the Court last term vacated and remanded for reconsideration in light of *Skinner* a 1987 ruling of D.C. Circuit in *Jones v.*

---

[24] *Supra* n. 4.

[25] *Supra* n. 4.

[26] 840 F.2d 1139, *cert. denied* 109 S.Ct. 1636 (1989).

[27] *Supra* n. 6.

McKenzie.[28] *Jones* was the first federal appellate court decision to void a public employee drug testing program for its inability to measure job impairment or drug influence. While upholding mandatory urinalysis testing of public school transportation employees as part of routine annual physical exams, it invalidated the EMIT test actually used because it failed to "measure . . . whether an employee has used or been under the influence of drugs" while on school premises. As noted, the Court appeared to take a contrary approach by rejecting the same argument by opponents of post-accident testing in *Skinner*.

Similarly, during its current 1990 term, the Court has denied petitions for review of two federal appeals court rulings on the constitutionality of random testing of Department of Justice (DOJ) and Army civilian employees under the Reagan executive order and another appellate decision which approved random testing of Boston police officers. In the DOJ case, *Bell v. Thornburgh*,[29] the U.S. Court of Appeals for the District of Columbia partially dissolved a federal district court order that had enjoined the department's random testing of employees with top secret security clearances. Unaffected, however, was the district judge's ruling that criminal prosecutors and employees with access to grand jury proceedings could not be randomly tested. Circuit Judge Wald reasoned that protection of sensitive information--one of the governmental interests cited in *Von Raab*--justified the Department's need to test employees with top secret clearances, but not all federal employees involved in grand jury proceedings. The court elaborated:

> Whatever "truly sensitive" information includes, we agree that it encompasses top secret national security information. . . .We do not believe, however, that the government's interest in preserving all its secrets can justify the testing of all federal prosecutors or of all employees with access to grand jury proceedings. We recognize that every employee within the three categories will have access to information which he is duty-bound not to divulge. But whatever the precise contours of "truly sensitive" information intended by the *Von Raab* Court, we believe that the term cannot include all information which is confidential or closed to public view. A very wide range of government employees--including clerks, typists, or messengers--will potentially have access to information of this sort.

In their petition for certiorari, ten DOJ attorneys with top secret clearances argued that random testing as applied to them without any reasonable suspicion of illegal drug use violates the Fourth Amendment. If

---

[28] *Supra* n. 22.

[29] *Supra* n. 7.

the Circuit Court decision was permitted to stand, they claimed, "*Skinner* and *Von Raab* could easily become misinterpreted vehicles by which highly intrusive mandatory random testing is extended on a broad scale throughout the federal government." The department countered that the appellate ruling in *Thornburgh* was consistent with "general principles" of the earlier High Court cases and that six federal circuit courts of appeals had upheld random testing of employees in critical positions.

Based on the balancing test in *Skinner* and *Von Raab*, the D.C. Circuit in *National Federation of Federal Employees (NFFE) v. Cheney*,[30] had approved a random testing program by the U.S. Army of civilian employees in certain designated "critical" jobs. Thus, the government's compelling interest in safety was held to justify random testing of 2,800 civilian employees who fly and service Army aircraft and 3,700 civilians employed as police and security guards at Army facilities. Similarly, it upheld testing of "direct service" employees, mainly drug counselors, in the Army's alcohol and drug abuse prevention program. It rejected, however, the Army's contention that the "integrity" of that program required random testing of all employees in the "chain of custody" of urine samples. In seeking Supreme Court review, the NFEE urged that the government's interest in random testing of drug counselors was far weaker than the justification in *Skinner* and *Von Raab* which, in any event, fail to clarify the constitutional status of testing employees "who pose no direct or immediate threat to public safety or national security."

> The uncertainty left in the wake of *Skinner* and *Von Raab* not only invites additional litigation, but may result in a patchwork of conflicting decisions in which random testing of government employees goes forward in some agencies, while testing of employees in similar positions is blocked elsewhere. . . .[T]his case presents the Court with an appropriate vehicle for resolving unsettled issues of profound concern to hundreds of thousands of public employees across the land.

Nonetheless, the Supreme Court denied review in both *Thornburgh* and *Cheney* without opinion or comment.[31]

The other random drug testing case acted upon this term was *Guiney v. Roach*[32] where, again without comment, the Court denied review of a First

---

[30] 892 F.2d 98 D.C.Cir. 1989), *cert. denied* No. 89-635 (1-22-90)

[31] A denial of *certiorari* has no independent precedential value but simply leaves in effect the lower court decision and order from which review was sought.

[32] 873 F.2d 1557, *cert. denied* 110 S.Ct. 404 (1989).

Circuit decision to uphold random testing of Boston police officers. The case involved a city department rule which required "all sworn and civilian personnel," on a random basis, to submit to urinalysis testing. A federal judge struck down the plan, but on appeal, the First Circuit held that random testing did not offend the Fourth Amendment as applied to officers who carry firearms or who participate in drug interdiction. With respect to other types of employees, the court found the record unclear as to the rationale for including them in the testing program. It remanded the case for further consideration of this point. "Since we can find no relevant distinction between a customs officer and a police officer," the court said, "we hold the police department's drug-testing rule to be constitutional." In seeking Supreme Court review, the Boston Patrolmen's Association argued that the "case involves random and compelled (under threat of discharge and loss of a protected property right) drug testing by urinalysis of all of the presently employed police officers of a major city's police department in the absence of any accident or seeking of any promotion or transfer, and in the absence of any probable cause or even suspicion of any drug use or other wrong doing or dereliction of duty."

While most courts since *Skinner* and *Von Raab* have generally rejected broad-based random testing of federal employees under E.O. 12564 or other authority, they have tolerated programs more narrowly tailored to specific job categories demonstrably related to "compelling" public safety, national security, or federal law enforcement interests of the government. *Thornburgh, supra*, is one example, where the D.C. Circuit approved random testing of DOJ employees with top secret security clearances but refused to permit testing of criminal prosecutors and other employees having access to grand jury proceedings. Similarly, the D.C. Circuit last year, in *American Federation of Government Employees v. Skinner*,[33] upheld the DOT plan to require random testing of 30,000 of the Department's 62,000 workers because "the record aptly evidences the extraordinary safety sensitivity of the bulk of the covered positions." More than two thirds of those to be tested were air traffic controllers while the remainder consisted of various transportation operators, mechanics, engineers and safety specialists. In *Thomson v. Marsh*,[34] the Fourth Circuit dismissed a constitutional challenge to random drug testing of civilian employees of a chemical weapons plan at Aberdeen Proving Grounds because the "special" and "obvious" government safety concerns outweighed any "diminished" privacy interests of the affected employees.

On the other hand, a federal district judge in San Francisco renewed an earlier injunction barring a program of random testing, on two hours notice and with direct visual observation, of all Federal Bureau of Prisons employees because absent individualized suspicion, the government "simply has not demonstrated the special need for its indiscriminate testing program." In that

---

[33] 885 F.2d 884 (D.C. Cir. 1989)

[34] 884 F.2d 113 (4th Cir.1989).

case, *American Federation of Government Employees v. Thornburgh*,[35] the court distinguished *Skinner* and *Von Raab* since the Bureau's program called for mandatory, random testing of all employees regardless of job function. Similarly, in *National Treasury Employees' Union v. Watkins*,[36] federal district Judge Pratt preliminarily enjoined the Department of Energy from random testing of certain DOE employees in "critical" positions, including motor vehicle operators and computer specialists involved in security operations, because he found none of the extraordinary public safety, drug interdictions, and security interests highlighted by *Skinner* and *Von Raab* present in this case. Proposed random testing of 88 Department of Education data processing employees was also enjoined by the D.C. district court in *American Federation of Government employees v. Cavazos*,[37] for failure by the government "to demonstrate a compelling interest," while testing of 23 other employees, including an armed guard, nine motor vehicle operators, and thirteen employees with access to top secret information passed constitutional muster under the "balancing test" spelled out by the Court's latest rulings. Finally, random testing of "sensitive" employees at the Agriculture[38] and Interior[39] Departments, and within the Executive Office of the President,[40] had been the subject of a series of earlier injunction orders issued the D.C. district court.

Another area generating considerable legal controversy and some division in judicial opinion relates to the legality of random governmental testing of state and local law enforcement officers. Besides *Guiney v. Roach*,[41] where the High Court let stand the random testing of Boston Police officers, several other courts have recently ruled on the issue. For example, since *Skinner* and *Von Raab*, the Seventh Circuit in *Taylor v. O'Grady*[42] held that the Cook County Department of Corrections may constitutionally require corrections officers whose duties involve regular contact with jail inmates to submit to drug testing once a year with no advance warning as to when testing will occur. However, while unannounced testing of "contact" employees was held reasonable given the special governmental interest in prison security, the

---

35 884 F. Supp. 113 (N.D.Cal. 1989).

36 722 F.Supp 776 (D.D.C. 1989).

37 721 F. Supp. 1361 (D.D.C. 1989).

38 *NTEU v. Lyng*, 706 F. Supp. 934 (D.D.C. 1988).

39 *Bangert v. Hodel*, 705 F. Supp. 643 (D.D.C. 1989).

40 *Hartness v. Bush*, 712 F. Supp. 986 (D.D.C. 1989).

41 *Supra*, n. 31.

42 888 F.2d 1189 (7th Cir. 1989).

program was unconstitutional as applied to ordinary administrative personnel without inmate contact. Similarly, a state appeals court in New York has upheld a random testing program for the New York City Corrections Department,[43] but the City's plan to extend random testing of its narcotic division police to cover its entire uniformed force of 26,000 was preliminarily enjoined at trial level.[44]

Various challenges to DOT rules for mandatory drug testing of federally-regulated transportation industry workers are also before the federal courts. On January 3, 1990, the district court in *Transportation Institute v. U.S. Coast Guard*[45] struck down a federal requirement that all private employees aboard private commercial vessels be randomly tested, finding it unjustified by the "immediacy or gravity of the potential safety threat" involved, but upheld other aspects of the program concerned with pre-employment, periodic license application or renewal, post-casualty, and reasonable cause testing. The court examined the Coast Guard's interest in regulating the conduct of maritime employees to ensure safety as weighed against the diminished privacy interest of individuals subject to testing in each of the five situations. Finding different factors to control where random testing is applied, it observed:

> Unlike the pre-employment testing, the individuals who will be tested are not applicants for jobs, but are employees, whose privacy interests are greater than applicants. Unlike with periodic license application or renewal testing, the testing will not occur at a pre-determined time, with advance notice, as a part of a process which the individual initiates. . . .Random testing is not akin to post-casualty testing or reasonable cause testing, which are triggered by events or conduct of the individual. Instead, the regulations specifically provide that no employee will know in advance when [random] testing will occur.

The greater intrusion on employees' privacy interests posed by random testing heightened judicial concern for the Coast Guard's "broadly drawn" testing mandate covering "all" employees aboard the ship. "The court is uncomfortable relying upon the government's broad assertion that every crew member's safety related responsibilities are so direct and important that random testing. . .is constitutionally permissible." It therefore left to the

---

[43] *Seelig v. Kohler*, 1989 DLR A-5 (10-25-89). *See, also, Brown v. City of Detroit*, 715 F. Supp. 832 (E.D. Mich. 1989) which lifted a ten year-old injunction on random testing of Detroit police officers which will immediately affect 3,600 of the 5,000 member force.

[44] *Toal v. Ward*, 1989 DLR A-7 (9-25-89).

[45] 2 DLR E-1 (1-3-90)

Coast Guard the task of reformulating new, narrower random testing rules limited to employees whose "duties" are "directly" tied to safety.

In a nonconstitutional ruling on January 19, 1990 the D.C. Circuit Court of Appeals in *Amalgamated Transit Union v. Skinner*,[46] voided drug-testing regulations covering employees of mass transit operators that receive federal funds on the ground that the Urban Mass Transportation Administration (UMTA) lacked statutory authority to impose the rules on local transit authorities. In noting that the UMTA rules were "strikingly similar" to those of DOT's other operating agencies for safety related transportation employees, Judge Wald nonetheless found that "Congress has chosen not to give UMTA direct statutory authority over urban mass transit safety to the extent that would justify imposing a mandatory drug-testing program on the employees of state, local and private operating authorities." Observing that UMTA itself argued that it has never directly licensed or regulated industry employees for safety, the Court concluded that "Congress intended for such matters to continue to be handles locally, with UMTA's guidance, not with an iron fist."

On November 6, 1989, the Federal Highway Administration deferred implementation of its random and mandatory post-accident testing requirements for commercial vehicle operators as the result of six judicial challenges then pending in various federal courts.[47] In *Owner-Operators Indep. Drivers Ass'n v. Burnley*,[48] the court granted a preliminary injunction against implementation of procedures for random and mandatory post-accident testing of commercial motor vehicle operators under the regulations. Other challenges to the FHWA's drug testing regulations have been consolidated in the Ninth Circuit under the style *International Brotherhood of Teamsters, et al. v. DOT*.[49]

Conclusion

The constitutional status of mandatory public employee drug testing programs has recently been a subject of increasing judicial attention. While some basic principles emerged from the *Skinner* and *Von Raab* decisions last term, and their judicial progeny, less certain may be their implications in the random testing context. What seems fairly clear, however, is that the courts have settled upon a case-by-case approach to determine whether random testing is "reasonable" in the circumstances presented. Late last year, for

---

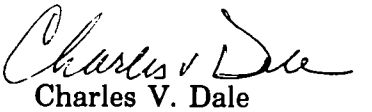
46 1990 U.S. App. LEXIS 700 (1-19-90)

47 54 Fed.Reg. 46616 (11-6-89).

48 705 F. Supp. 481 (N.D.Cal. 1989).

49 No. 89-70165.

example, the Fifth Circuit refused to rule on the "facial" validity of E.O. 12546, mandating random testing in the federal workplace, and directed that challengers should instead focus on individual agency plans as applied, a continuation of the practice to date.[50] Thus, it is probable that the constitutionality of programs to test public employees for illegal drug use will continue to be measured in situational terms, or a weighing of the government's "compelling" purpose against the privacy interests of affected employees. Where "special" governmental needs, beyond ordinary law enforcement, may be shown for testing the *specific* employee groups involved, the testing plan is likely to prevail over the "diminished" privacy interests of *those* employees. At the same time, however, broad-based testing programs that fail to account for distinctions among employees in terms of the safety or national security sensitivity of their duties will to that extent be in jeopardy. For this purpose, most lower court cases to date have applied the approach of *Skinner* and *Von Raab* directly to the random testing context. What remains for future judicial elaboration is the range of governmental interests that may be "compelling" for purposes of this Fourth Amendment analysis, and how close the required "nexus" to such interests must be to justify random testing of specific employees or employee groups.



Charles V. Dale
Legislative Attorney
February 21, 1990

---

50 *National Treasury Employees Union v. Bush*, 1990 DLR A-11 (1-8-90).

Clinton Presidential Records
Digital Records Marker

This is not a presidential record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

This marker identifies the place of a publication.

Publications have not been scanned in their entirety for the purpose of digitization. To see the full publication please search online or visit the Clinton Presidential Library's Research Room.

Research Reports

1993 AMA Survey

Workplace Drug Testing and Drug Abuse Policies

Summary of Key Findings

DRUG TESTING

The share of surveyed firms that test for drugs rose to 84.8% in January 1993 from 74.5% in January 1992. Since 1987, the date of AMA's initial survey, drug testing has increased nearly 300 percent:

	1.87	1.88	1.89	1.90	1.91	1.92	1.93
Test for drugs (%)	21.5	36.5	48.0	51.5	63.0	74.5	84.8
Increase from previous year (%)		68.8	51.5	7.3	22.3	18.2	13.8
Increase from 1.1987 (%)		68.8	123.3	139.5	193.0	246.5	294.4

Business category is the most important factor in the occurrence of testing programs. In macro terms, manufacturing firms (93%) are more likely to test than service firms (76%), for-profit companies (87%) more likely than nonprofits (71%). In specific industries, transportation companies are leaders (96%), while providers of business and professional services trail (59%). In terms of size, 88% of companies employing 500 or more people test, compared with 69% of smaller firms. Geographically, the South leads (91%), while the Pacific Coast states (77%) and New England (76%) trail.

The rate of increase, which leveled from 1989 to 1990, has risen again due to:

- Department of Transportation and Department of Defense regulations which, with local and state legislation, mandate testing for 33% of surveyed firms;
- The practical effects of the Federal Drug-Free Workplace Act;
- Court decisions that recognize an employer's right to test both employees and job applicants;
- Action by insurance carriers to reduce accident liability and control health care costs; and
- Corporate requirements that vendors and contractors certify that theirs is a drug-free workplace, a policy practiced by 22% of survey respondents.

More employees and more new hires were tested in 1992 than in 1991, and a lower percentage showed positive results (i.e., gave indication of drug use):

	Employees			Applicants		
	1990	1991	1992	1990	1991	1992
Avg. tested	157.6	273.8	515.5	182.8	260.6	448.1
Avg. test-positives	6.7	7.3	13.0	10.5	11.9	19.0
Test-positive ratio:	4.2	2.7	2.5	5.8	4.6	4.3

90-425 E

CRS Report for Congress

Transportation Industry Drug Testing

Gail McCallion
Analyst in Labor Economics
Economics Division

August 20, 1990

Congressional Research Service • The Library of Congress

TRANSPORTATION INDUSTRY DRUG TESTING

SUMMARY

In response to safety concerns and the issuance of President Reagan's Executive order requiring agency heads to establish drug policies, DOT established a drug testing policy for its employees on January 21, 1987.

In addition, on November 21, 1988, DOT published interim final regulations addressing testing policies for safety-sensitive airline, railroad, motor carrier, maritime and pipeline employees. Final regulations and procedures for the drug testing programs were issued on December 1, 1989. These regulations resemble the policy instituted for DOT employees and include pre-employment, post-accident, periodic, reasonable suspicion, and random testing. Employers are required to conduct random drug tests on 50 percent of covered workers each year. Costs of the testing will be incurred by employers. The DOT regulations do not require employers to pay for rehabilitation for employees who test positive for drugs. Provision of rehabilitation will be left up to labor-management bargaining. Workers covered by the regulations include approximately 3 million truck drivers, 90,000 railroad workers, 538,000 airline employees, 120,000 maritime employees, 116,500 pipeline employees, and 195,500 mass transit employees.

These rules have elicited both strong support and strong opposition, with the random testing requirements provoking the most controversy. Before the new rules were even published, the Owner Operators Independent Drivers Association, an organization that represents 9,000 truckers had filed suit challenging the new rules on constitutional grounds. Eventually, twenty-two lawsuits were filed challenging the DOT rules.

Several bills addressing transportation industry drug testing were introduced in the 101st Congress. H.R. 1208 would require the Secretary of Transportation to establish a program of drug and alcohol testing for safety sensitive railroad workers. H.R. 1208 passed the House, amended, by a voice vote on July 31, 1989. S. 561 would require establishment of drug and alcohol testing for safety sensitive airline and railroad employees, as well as commercial motor vehicle operators. S. 561 passed the Senate, amended, by a voice vote on Nov. 9, 1989. A measure very similar to S. 561 was included as an amendment to H.R. 3015, the Department of Transportation Appropriations bill. This amendment was approved by voice vote in the Senate on Sept. 27, 1989. Subsequently, this amendment was deleted from H.R. 3015, and was introduced and passed by the Senate as S. 1735 on Oct. 5, 1989.

CONTENTS

TRANSPORTATION INDUSTRY DRUG TESTING

Drug use by employees has become a pressing concern to employers and legislators in recent years. Since President Reagan's issuance of Executive Order 12564 in September 1986, calling for a drug free Federal workplace, workplace policies addressing employee drug use have received extensive press coverage. Particular attention has been focused on drug abuse by employees in the transportation industry due to the unique safety responsibilities of transportation employees, and as a consequence, the potentially serious impact on public safety of drug use by transportation employees.

The Department of Transportation (DOT) has established a drug testing policy for its employees in response to safety concerns and the issuance of the President's Executive order requiring agency heads to establish drug policies.[1] In addition, on November 21, 1988, DOT issued interim final drug testing rules for the industries it regulates. Final rules which included only slight changes from the interim final rules were issued December 1, 1989. A description of the current status of testing of DOT employees and other transportation workers, as well as relevant legislation, follows.

DRUG TESTING: DOT EMPLOYEES

On January 21, 1987, then Secretary of Transportation, Elizabeth Dole, announced a drug testing program for DOT employees. DOT was the first agency to respond to the President's September 1986 Executive order requiring agency heads to establish employee drug testing policies.

---

[1] Some employees in all of the following DOT organizational units may be covered by this policy: Office of the Secretary; United States Coast Guard; Federal Aviation Administration; Federal Highway Administration; Federal Railroad Administration; Saint Lawrence Seaway Development Corporation; Urban Mass Transportation Administration; National Highway Traffic Safety Administration; Research and Special Programs Administration; Office of Inspector General; and the Maritime Administration. *Drug-Free Departmental Workplace*. U.S. Department of Transportation. June 29, 1987. Appendix A, p. 1-6.

DOT's program includes the following types of testing: pre-employment; post-accident; periodic; reasonable suspicion; follow-up; and random.[2] All DOT employees are required to undergo reasonable suspicion and post-accident testing. Only personnel with safety or security related jobs are required to undergo random drug testing. DOT estimates that approximately 30,000 employees at 800 sites will be covered by random testing. Examples of positions deemed safety-sensitive, and therefore subject to random testing include: air traffic controllers; railroad safety inspectors; aircraft mechanics; firefighters; master ferryboat pilots; nurses; air traffic control specialists; motor vehicle operators; industrial hygienists; and many other positions as well.[3]

DOT issued a written notice on June 29, 1987 to all employees of its intention to commence testing 60 days thereafter, as required by the Executive order.[4] In addition the Executive order requires that those employees subject to random testing must receive a specific notice to that effect at least 30 days before testing. DOT began issuing notices of its intent to conduct random testing on August 6, 1987. The first random tests were performed in September 1987, on 23 employees.[5] DOT's random testing program was upheld by the D.C. Circuit Court last year.

As of August 11, 1990, 39,469 random tests had been conducted on DOT employees. Of these tests, there were 172 confirmed positive tests. This equals a positive rate of 0.44 percent. Total drug tests (including random, reasonable suspicion, post-accident, follow-up, pre-employment, and voluntary tests) conducted by DOT as of August 11, 1990 equalled 61,019 with 300 confirmed positive tests, a positive rate of 0.49 percent. Twenty-six employees with positive test results have been dismissed following failure to successfully complete rehabilitation or unwillingness to participate in rehabilitation. The cost of DOT's drug testing program was 2.8 million in 1989; costs are expected to be higher for 1990 once cost figures are all in.[6]

---

[2] Periodic testing occurs during regularly scheduled physical examinations for those employees required to undergo such exams. (*Drug-Free Departmental Workplace*. U.S. Department of Transportation. June 29, 1987. p. III-2.)

[3] Ibid., Appendix A, p. 1-6.

[4] The American Federation of Government Employees (AFGE) filed suit to restrain implementation of this program, but its request was denied by the U.S. District Court for the District of Columbia. Instead, Judge Gesell granted the defendant's motion for summary judgment. *American Federation of Government Employees v. Dole*, 670 F. Supp. 445 (D.D.C. 1987).

[5] U.S. Department of Transportation. *DOT Employee Drug Program Fact Sheet*. p. 1-2.

[6] U.S. Department of Transportation. Departmental Drug Office.

DOT policy is to give employees with positive test results the opportunity to participate in an Employee Assistance Program. During the course of treatment employees are relieved of safety and/or security related duties. Employees who fail to be rehabilitated or are found to be using drugs after rehabilitation will be dismissed.

DRUG TESTING OF TRANSPORTATION WORKERS

On November 21, 1988 DOT published interim final regulations addressing testing policies for safety-sensitive airline, railroad, motor carrier, mass-transit, maritime, and pipeline employees.[7] Final regulations and procedures for the drug testing programs were issued on December 1, 1989.[8] DOT received more than 80 comments in response to its interim final rules, and DOT's final rules include some minor modifications from the interim final rules. For example, the final rules expressly limit drug testing to the five specified drugs listed in the rule, although employers may submit a second, separate employer sample for testing of additional drugs if they wish. The final rules also: reduce the number of "blind performance" tests to monitor quality control that employers are required to submit; reduce the amount of urine required per sample; give the medical review officer the right to transmit additional information on the employee under some circumstances; and, clarify the conditions under which direct supervision of a sample could occur and who could supervise the provision of the sample.[9]

These drug testing regulations resemble the policy instituted for DOT employees and include pre-employment, post-accident, periodic, reasonable suspicion, and random.[10] Separate rules issued by each of the six Administrations within DOT also mandated follow-up testing for employees with positive drug tests. Employers will be required to conduct random drug tests on 50 percent of covered workers each year. Costs of the testing will be incurred by employers. DOT has estimated the cost of the drug testing program to be approximately

---

[7] These regulations were issued the next day as a special supplement to the Federal Register: *F.R. Special Supplement Rep. No. 225.* Nov. 22, 1988.

[8] U.S. Department of Transportation. *Procedures for Transportation Workplace Drug Testing Programs; Final Rule and Notice of Conference.* December 1, 1989. 49 CFR Part 40.

[9] Ibid.

[10] Periodic testing occurs during regularly scheduled medical examinations for those employees required to undergo such exams. The employer may elect to discontinue periodic testing after he/she has had the DOT mandated drug testing in place for a year, so long as the employer is conducting random testing of employees. (*F.R. Special Supplement Rep. No. 225.* November 22, 1988. p. S-57.)

$2.1 billion discounted over 10 years, with discounted benefits from drug testing (fewer accidents, reduced absenteeism, etc.) equalling approximately $8.7 billion. Large employers (those with more than 50 employees) were originally required to have a drug testing program in place by December 1989, but there have been several postponements. Federal Aviation Administration (FAA) mandated testing for large employers began December 18, 1989. Coast Guard, Urban Mass Transportation Administration (UMTA) and Federal Highway Administration (FHA) mandated testing for large employers was scheduled to begin December 21, 1989 -- however, all three programs are under legal challenge and each agency has had to put at least part of its testing rules on hold. (See legal challenges below.) The Federal Railroad Administration (FRA) implemented its testing of large employers on January 16, 1990 and the Research and Special Programs Administration (RSPA) implemented its testing of large employers on April 20, 1990. Small and medium employers (those with fewer than 50 employees) were given more time to implement the new rules. Some mandated testing of small and medium employers has already begun; all testing is scheduled to have begun by November 11, 1990. The drugs to be tested for are: marijuana, cocaine, opiates, amphetamines, and phencyclidine.

The new rules also include guidelines on the collection of urine samples, transmission of samples to laboratories, chain of custody and record keeping requirements, analysis of test results, quality control, and review of test results by a Medical Review Officer (MRO). These guidelines are based on Department of Health and Human Services (HHS) guidelines for drug testing of Federal workers published in April of 1988.[11] Only drug testing laboratories certified by HHS's National Institute on Drug Abuse (NIDA) may be used. Some transportation industry employers argue that this latter restriction unduly impedes their drug testing efforts and that laboratories certified elsewhere, such as those certified by the College of American Pathology, should also be allowed under the regulations. DOT maintains that there are sufficient numbers of NIDA certified laboratories to meet demand, and that limiting testing to these laboratories ensures the most accurate and reliable drug testing possible. A NIDA consensus conference report has recommended some changes to the drug testing guidelines. DOT testimony submitted for a June 1990 hearing indicated that: "The Department will continue to work with NIDA to consider changes in procedures mentioned in the NIDA preliminary report. Included in these discussions are issues of: testing for additional drugs; on-site testing; and positive cut-off levels."[12]

---

[11] *Mandatory Guidelines for Federal Workplace Drug Testing Programs.* U.S. Department of Health and Human Services. 53 FR 11970. April 11, 1988.

[12] U.S. Congress. House. Committee on Merchant Marine and Fisheries. Subcommittee on Coast Guard and Navigation. Statement submitted by Terrance W. Gainer, U.S. Department of Transportation. Hearings, 101st Congress, 2d Sess. June 26, 1990.

Workers with confirmed positive drug test results are to be removed from their positions and may only return if they successfully complete a rehabilitation program. The rules do not require employers to provide rehabilitation for employees. Provision of rehabilitation will be left up to labor-management bargaining. New alcohol screening is not mandated by the regulations, but preexisting alcohol testing programs are continued, such as the post-accident testing already required by the Coast Guard and the post-accident and reasonable suspicion testing already required by the Federal Railway Administration. Workers covered by the new regulations include approximately 3 million truck drivers, 90,000 railroad workers, 538,000 airline employees, 120,000 maritime employees, 116,500 pipeline employees, and 195,500 mass transit employees.[13]

The new rules have provoked strong opposition. Before the new rules were even published in the Federal Register, the Owner Operators Independent Drivers Association, an organization with a membership of 9,000 truckers, filed suit challenging the new rules on constitutional grounds.[14] Many other legal challenges followed.

Implementation of the DOT regulations involves six separate Administrations within DOT and testing of millions of employees. A recent GAO study indicated that only two of the Administrations (FAA and FRA) had adopted all of the management practices necessary for effective monitoring and guidance of drug testing. In addition, GAO noted that the definition of safety-sensitive positions is not consistent across the six Administrations. GAO also called for more guidance to the Administrations from DOT's Office of the Secretary on how to evaluate employer drug testing.[15]

In addition to the new industry-wide testing mandated by DOT, both the FAA and the FRA already had policies in place requiring drug testing of FAA personnel and rail employees in certain situations. Additionally, some private air carriers have longstanding policies regarding pre-employment and reasonable suspicion testing of employees; and, some private rail carriers have extensive drug and alcohol programs in place. The history of testing policies within each industry where such policies have been in existence, is briefly summarized below, followed by discussion of the new rules.

---

[13] *F.R. Special Supplement Rep. No. 225.* November 22, 1988.

[14] *Daily Labor Report.* January 5, 1989. p. A-2.

[15] U.S. General Accounting Office. *Drug Testing Management Problems and Legal Challenges Facing DOT's Industry Programs.* RCED-90-31, November 1989. Washington, 1989.

AIRLINES

Effective February 15, 1987, the FAA began incorporating drug testing into the annual physicals of safety-sensitive personnel. Affected personnel included: inspection/flight test pilots; air traffic control specialists; aviation safety inspectors; civil aviation security specialists; firefighters; mobile lounge operators; police; pilots who fly agency aircraft; and applicants for all of the aforementioned positions.[16] This program was challenged unsuccessfully in two separate cases brought before Federal district courts in Alaska and Virginia.

In June of 1987, four months after implementation of the FAA policy on periodic drug testing, the DOT implemented an extensive drug testing program covering all its employees. Since the FAA is part of DOT, FAA employees are now covered by the testing specified in the DOT program.

In addition, the rules issued by DOT on November 21, 1988 required establishment of a drug-testing program for all safety related airline personnel who are not DOT personnel and hence not covered by the DOT program. Testing began on December 18, 1989. Comments received by DOT before issuance of the final rule indicated that while there were many areas of employer concern, testing of contract employees, and overall costs of a testing program were especially troubling to employers. DOT retained the requirement that all safety-sensitive personnel, whether full–time employees or contract employees be tested. The final rules issued by DOT also clarified or modified several other provisions of the rule including strengthened requirements for test confidentiality. DOT's cost estimate for the drug testing program was $240.3 million for the airline industry as a whole for the decade of the 1990s or roughly $24 million a year (in 1987 dollars). FAA's total cost figure discounted over ten years equalled $135.2 million. These figures are considered too conservative by many industry spokespersons.[17]

In addition, new DOT regulations were issued partly in response to an incident involving three Northwest Airlines pilots who were found to have piloted a commercial aircraft while under the influence of alcohol. On July 26, 1990 DOT announced the new regulations which require the grounding of pilots who have been convicted or found through an administrative action to have used drugs or alcohol while driving. Pilots must provide the FAA a written notice of any such convictions or proceedings. Two or more such incidents may lead to suspension of the individual's pilot certificate.[18]

---

[16] *Action Notice*, U.S. Dept. of Transportation, Federal Aviation Administration. February 1987. p. 2.

[17] Parrish, Robert. A New Incentive to 'Just Say No'. *Business and Commercial Aviation.* February 1989. p 72.

[18] *Daily Labor Report.* July 30, 1990. A-3.

RAILROADS

The Federal Railroad Administration (FRA) has had a longstanding policy of drug and alcohol testing of railroad workers. The FRA initially promulgated a rule mandating drug and alcohol testing of railroad workers effective February 1986. This rule established a program for pre-employment drug testing and post-accident and probable cause drug and alcohol testing. The new DOT rules issued in November 1988 added random and periodic drug testing requirements to the preexisting rules. The final rule issued in December 1989 made some modifications to this rule including prohibiting the use of controlled substances at any time, and eliminating the requirement of follow-up alcohol tests for employees returning to work after treatment for alcohol or drug abuse. A one-time alcohol test is still required following return to duty. Comments received by FRA had objected to frequent alcohol tests due to the complex issues and difficulties involved in alcohol testing.

In testimony supporting the need for FRA's drug and alcohol testing program, then Administrator of the FRA, John Riley, argued that the testing is necessary as evidenced by the large number of employees testing positive following accidents. In testimony before the Senate Commerce Committee on February 25, 1988, Riley argued that:

> Over the past 13 months we have experienced 41 accidents in which one or more employees have tested positive for alcohol or illegal drugs. 29 people died in those accidents. 341 innocent people were injured. Property damage alone exceeded $28 million....[19]

In addition to the agency policy discussed above, some railroads had instituted their own drug programs. Two examples are the programs that were implemented by the Southern Pacific Railroad and CSX Transportation. The Southern Pacific Railroad began a program of pre-employment, reasonable suspicion, and post-accident drug and alcohol testing in August of 1984. A Southern Pacific spokesperson noted that since the implementation of drug testing the number of employees testing positive for drugs or alcohol declined from 23 percent to 6 percent a month.[20]

In August of 1987, two rail unions (the Brotherhood of Locomotive Engineers and the United Transportation Union) signed an agreement with CSX Transportation on drug and alcohol testing covering 19,000 employees. This

---

[19] U.S. Congress. Committee on Commerce, Science, and Transportation. *Developments in Drug and Alcohol Testing*. Hearings, 100th Cong., 2d Sess., February 25, 1988. Washington, U.S. Govt. Print. Off., 1988. p. 22.

[20] Lancaster, John. U.S. May Toughen Train Safety Rules. *The Washington Post*. January 19, 1987. p.A-1, A-12.

agreement specifies testing when an employee is injured or involved in an accident causing at least $5,200 in damages.[21]

The president of the United Transportation Union, Fred Hardin, characterized the agreement as a significant breakthrough. However, the union continues to oppose random drug testing. Hardin argued: "Random testing has legal and moral problems. With a program like this, there's no need for it."[22] He also expressed his belief that this agreement should help diminish support on Capitol Hill for random testing of transportation workers. Both management and the union have argued that the money that would be required to conduct random testing would be better spent on providing employee assistance programs.[23]

In addition, the Brotherhood of Railway Signalmen signed an agreement on June 27, 1988 with the Southeastern Pennsylvania Transportation Authority (SEPTA) allowing random drug and alcohol testing of the 60 members of BRS. This was the first labor-management agreement in the rail industry which includes random testing. [24]

TRUCKING, BUSES, MASS TRANSIT

The Federal Highway Administration (FHWA), has regulations under the Commercial Motor Vehicle Act of 1986, which prohibit drivers of interstate and intrastate commercial motor vehicles from driving under the influence of alcohol or controlled substances. The first violation results in a one year disqualification from operating a commercial motor vehicle; a second violation results in permanent disqualification.

A recent National Transportation Safety Board (NTSB) study examined how frequently alcohol and/or drugs were implicated in trucker fatalities. NTSB examined 182 fatal truck accidents that occurred between October 1, 1987 and

---

[21] *Daily Labor Report.* August 7, 1987. p. A-1.

[22] Ibid.

[23] *Daily Labor Report.* October 28, 1988. p. A-11.

[24] In a December 1988 decision, the U.S. Court of Appeals for the Third Circuit upheld SEPTA's plan to conduct random drug and alcohol testing of 4,400 SEPTA train, trolley and bus drivers covered only by Pennsylvania labor law. However the Court also held that SEPTA could not implement random testing of its regional rail division employees, including the signalmen, without first bargaining with the unions representing the employees, because these employees are covered under the Railway Labor Act which requires management to negotiate with employee unions over changes in contract terms. (*Transport Workers' Union Local 234 v. SEPTA*; CA 3, Nos. 88-1160, 88-1206, 88-1161, 88-1162, 88-1207, 88-1163, and 88-1208, December 28, 1988.)

September 30, 1988 in eight States. Drug and alcohol impairment was implicated in 33 percent of these accidents.[25]

While this is a high percentage, it is important to note that this does not mean one out of three truck accidents involves drugs or alcohol. The NTSB study only examined accidents in which the driver died. In addition, an American Trucking Association spokesperson argued that this time period preceded new industry and Government anti-drug abuse policies, and consequently the results of a similar study today might show lower drug and alcohol abuse levels.

Unlike preexisting rules in the industry, the new DOT rules require motor carriers to conduct pre-employment, post-accident, periodic, reasonable suspicion, and random testing to determine whether or not drivers are using controlled substances. The new rules apply to those motor carriers operating in interstate commerce that weigh over 26,000 pounds, or carry 15 or more passengers, or transport hazardous materials.[26] Much of the controversy regarding the mandated drug testing of commercial motor vehicle operators has concerned random testing of independent truckers. DOT has said that independent truckers may form voluntary testing pools with other truckers for testing purposes; critics argue random testing of independent truckers will be difficult to enforce. In addition, some project random testing will be very expensive for the industry:

> Once the program is in full operation, carriers will be required to conduct 1.5 million random tests per year, at an estimated cost of between $53 million and $75 million annually -- above and beyond costs of other mandated forms of drug testing.[27]

Currently the FHWA's random testing program and portions of its post-accident testing program are enjoined (see legal challenges). However, employers may elect to implement such testing themselves; only the FHWA random and post-accident are enjoined. FHWA mandated pre-employment, periodic, reasonable suspicion, and non-enjoined post-accident testing are proceeding. FHWA defines non-enjoined post-accident testing as follows:

> when there is any reasonable suspicion of drug usage, or reasonable cause to believe a driver has been operating a vehicle while under the

---

[25] Phillips, Don. Drugs, Alcohol Tied to 33% of Trucker Deaths. *The Washington Post.* February 6, 1990. p. A1, A14.

[26] *F.R. Special Supplement Rep. No. 225.* November 22, 1988. p. S-127.

[27] Kelly, Tom. Random Testing: It's Wait and See. *Heavy Duty Trucking.* January 1990. v. 69. p. 79.

influence of drugs, or reasonable cause to believe the driver was at fault in the accident and drug usage may have been a factor.[28]

FHWA attempted to respond to the concerns that prompted the Court's stay of portions of its testing program by modifying its post-accident testing rules in February 1990.[29] Tom Holien, chief counsel for FHWA, stated that modified rules specify that drug testing will only occur after accidents that were reportable, where the driver received a moving traffic violation citation, and where the employer had cause to believe that the driver was using drugs.[30]

There are currently several local transit authorities that have workplace drug abuse policies in place. Some of these transit authorities conduct drug testing under certain circumstances (examples of transit authorities that drug test are the Chicago Transit Authority and the York Area Transportation Authority). However, prior to the issuance of the DOT rules there was no national policy on workplace drug abuse covering all transit authorities. The new DOT rules establish a national policy which will require all recipients of Urban Mass Transit Authority funds to adopt a drug abuse policy which includes pre-employment, reasonable suspicion, post-accident, periodic, and random drug testing. However, UMTA's testing program is currently being held in abeyance following the issuance of a court injunction barring its implementation.

MARITIME AND PIPELINES

The November 21, 1988 drug testing regulations issued by the Coast Guard cover approximately 120,000 merchant seamen. Originally the Coast Guard's regulation called for random drug testing of all private employees on commercial vessels. This random testing requirement was overturned by the U.S. District Court for the District of Columbia for failing to sufficiently balance the privacy rights of employees versus the safety considerations underlying testing.[31] To address these concerns the Coast Guard amended its regulations on July 27, 1990 to require random testing only for employees in safety-sensitive positions.

Employer groups have expressed concern that in some crucial respects the Coast Guard rules unduly restrict employer drug testing programs. In light of the Exxon Valdez incident employers and the public are concerned that

---

[28] U.S. Department of Transportation. Federal Highway Administration. *Controlled Substances Testing; Implementation Dates*. November 6, 1989. 49 CFR Part 391.

[29] U.S. Department of Transportation. Federal Highway Administration. *Controlled Substances Testing*. February 1, 1990. 49 CFR 391.

[30] *Daily Labor Report*. February 27, 1990. p. A-18.

[31] *Transportation Institute v. U.S. Coast Guard*. 727 F. Supp. 648 (1989).

crews be drug and alcohol free. In testimony before the House Committee on Merchant Marine and Fisheries on June 26, 1990, employer representatives raised several issues regarding the new rules. Under the new rules employers are not aware that an employee has tested positive until they receive notification from a Medical Review Officer (MRO). Until notification from the MRO is received the employee continues to perform his or her duties. Only laboratories certified by the Department of Health and Human Services may be used -- employers argue this greatly increases their expenses and limits their options. And, employers argue that in fairness to U.S. industry, the rules should also be applied to foreign-flag ships operating in U.S. waters.

The drug testing regulations issued by the Research and Special Programs Administration Office of Pipeline Safety require pipeline operators to implement drug testing of employees:

> who perform on these facilities (gas and hazardous liquid pipelines and liquefied natural gas facilities) operating, maintenance, or emergency-response functions....[32]

Employers with more than 50 employees were required to implement testing effective April 20, 1990; small employers have until August 21, 1990 to implement testing.

LEGAL CHALLENGES

Two significant drug testing cases were decided by the Supreme Court in 1989, although they did not address random drug testing. In one case, rail unions had challenged the longstanding FRA post-accident drug testing rule. On February 11, 1988, the U.S. Court of Appeals for the 9th Circuit ruled that the FRA testing program violated the constitutional protection against unreasonable searches and seizures because it did not require that there be a particular reason to suspect crew members of drug use before testing.[33] The Supreme Court overturned the U.S. Court of Appeals and upheld FRA's post accident drug testing program. *[Skinner v. Railway Labor Executives Assn*, 109 S Ct. 1402 (1989)] The Supreme Court also upheld a Customs Service drug testing program requiring employees seeking promotion to sensitive jobs to undergo drug testing. [*National Treasury Employees' Union v. Von Raab*, 109 S Ct. 1384 (1989)] Although the Court did not address random drug testing

---

[32] U.S. Department of Transportation. Research and Special Programs Administration Office of Pipeline Safety. *Guidelines for Implementing an Anti-Drug Program for Pipeline Personnel.* September 1989. p. 1.

[33] For an indepth discussion of the legal challenges mentioned here please see: *Governmentally Mandated Drug Testing of Public Employees: A Survey of Recent Constitutional Developments*, CRS Report No. 90-103A, by Chuck Dale. [Washington]. February 9, 1990.

in these cases, it has subsequently declined to review several cases involving challenges to random drug testing. Recently it refused to review a challenge to random testing of lawyers with top-secret security clearance at the Department of Justice.

There have been twenty-two legal challenges to the DOT rules requiring drug testing of DOT employees and safety sensitive private-sector transportation employees, although none have yet reached the Supreme Court. Several of these challenges have recently been decided in lower Courts. DOT's random testing program for its own employees was upheld by the D.C. Circuit. [*American Federation of Government Employees v. Skinner*, 885 F. 2d 884. (1989)] UMTA's random testing program is currently enjoined following a January 19, 1990 D.C. Circuit Court of Appeals decision [*Amalgamated Transit Union v. Skinner*, 894 F. 2d. 1362 (1990)] finding that UMTA did not have the necessary statutory authority for its drug testing regulations. FHWA's random and post-accident drug testing rules are also on hold following a preliminary injunction issued by the Northern District Court of California. [*Owner-Operators Independent Drivers Association v. Burnley*, 705 F. Supp. 481 (1989)] Several other cases have been consolidated into one case challenging FHWA's random drug testing policy, and are awaiting a decision by the Ninth Circuit Court of Appeals. The Coast Guard's random drug testing policy for private employees on commercial vessels was overturned by the U.S. District Court for the District of Columbia. [*Transportation Institute v. U.S. Coast Guard.* 727 F. Supp. 648 (1989)] Finally, the Ninth Circuit Court of Appeals upheld FAA's random drug-testing policy for safety sensitive airline employees on July 10, 1989. [*Bluestein v. Department of Transportation,* CA 9, No. 88-7503 (1990)]

ALCOHOL TESTING

As discussed above, the DOT rules do not mandate new alcohol testing. However, concern about the link between employee alcohol abuse and transportation accidents led DOT to begin consideration of an alcohol testing policy. On November 2, 1989, DOT issued an advance notice of proposed rulemaking on alcohol abuse soliciting comments on the problem and how it might be addressed in the transportation industry.[34]

Currently, alcohol testing provisions vary within each of the DOT Administrations. FRA issued rules on alcohol testing (as well as drug testing) in 1985. FRA conducts alcohol as well as drug tests following serious accidents, following incidents linked to human error, following specific safety violations, and when there is reasonable suspicion that an employee is impaired. The Coast Guard rule establishes post accident and reasonable suspicion drug and alcohol testing to be conducted by employers and State law enforcement officials. If

---

[34] U.S. Department of Transportation. *Alcohol Abuse Prevention Program for the Transportation Industry; Advance Notice of Proposed Rulemaking.* November 2, 1989. 14 CFR Ch. 1 et al.

there are no applicable state standards, the Coast Guard finds intoxication to occur at a blood alcohol concentration limit of 0.04 for operators of commercial vessels and 0.10 for recreational boaters. Both the FAA and the FHWA prohibit operation of aircraft/commercial motor vehicles while under the influence of alcohol, but do not mandate testing. The FAA regulations, for example:

> prohibit any pilot from acting or attempting to act as a crewmember if he or she is under the influence of alcohol, or has consumed any alcoholic beverage within 8 hours of reporting for duty. FAA regulations also prohibit a pilot from flying with a blood alcohol concentration (BAC) of .04 or higher. The FAA can suspend or revoke a certificate or assess penalties for failure to comply with its regulations.[35]

Nevertheless, the lack of an explicit FAA rule mandating alcohol testing and the fact that FAA Flight Standards Operations Inspectors must rely on State and local officials to conduct alcohol testing, has caused some concern. In a recent incident, a phone tip led FAA Inspectors to believe three Northwest pilots flying out of Fargo, ND were intoxicated. While there was insufficient time for the FAA Inspectors to arrange with local officials in Fargo to conduct alcohol tests before the flight's departure, local officials at the destination of the flight did conduct the testing. Some observers are concerned that local officials may not always have the resources or personnel to conduct such testing in a timely fashion, and they argue that a more explicit mandate for FAA alcohol testing is needed.

FHWA also has regulations prohibiting alcohol use:

> FHWA regulations prohibit the use of alcoholic beverages within four hours of reporting to work, and prohibit a driver from working while having any measured BAC or any detected presence of alcohol in his or her system. These and related infractions carry a 24-hour out-of-service penalty.[36]

In addition, on September 30, 1988, as required by the Commercial Motor Vehicle Safety Act of 1986 (The Act), FHWA published new lower blood alcohol concentration levels (0.04) at which interstate and intrastate truck and bus drivers would be disqualified from operating a commercial motor vehicle. The new rule will be enforced by the States; failure to enforce the new rule will result in loss of Federal-Aid Highway Funds. States have until September 30, 1993 to enforce the new standards. The Act also implemented the Commercial Driver's License Information Service (CDLIS) which will serve as a national clearinghouse on driving records. CDLIS will provide information for States on driving records when States issue the State Commercial Driver's Licenses that are required

---

[35] Ibid., p. 46344.

[36] Ibid., p. 46345.

for all commercial motor vehicle operators by April 1, 1992. It is hoped this process will help eliminate the number of problem drivers on the road.

LEGISLATION

Several bills addressing transportation industry drug testing have been introduced in the 101st Congress. H.R. 1208 would require the Secretary of Transportation to establish a program of drug and alcohol testing for railroad workers. H.R. 1208 passed the House, amended, by a voice vote on July 31, 1989. H.R. 1208 would also require employer provided rehabilitation for employees who test positive. This requirement in not included in the Senate drug testing bill, S. 561. S. 561 would cover more transportation employees than H.R. 1208, requiring establishment of drug and alcohol testing for safety sensitive airline and railroad employees and commercial motor vehicle operators. S. 561 passed the Senate, amended, by a voice vote on Nov. 9, 1989.

Unlike the existing DOT regulations discussed above, these two bills would also mandate alcohol testing of covered workers, and would not expressly limit drug testing to the five drugs specified in the DOT regulations. A measure very similar to S. 561 was included as an amendment to H.R. 3015, the Department of Transportation Appropriations bill. This amendment was approved by voice vote in the Senate on Sept. 27, 1989. Subsequently, this amendment was deleted from H.R. 3015, and was introduced and passed by the Senate as S. 1735 on Oct. 5, 1989. In addition, S. 2434, introduced on April 5, 1990 would provide UMTA with statutory authority to mandate employee drug testing. This bill was introduced in response to the D.C. Circuit Court of Appeals decision finding UMTA lacked the necessary statutory authority to implement drug testing rules.

Drug testing of transportation workers was also addressed in several bills introduced in the 100th Congress. S. 1041 would have required the Secretary of Transportation to establish drug and alcohol testing for safety sensitive airline, FAA, and rail employees. S. 1041 was passed by the Senate Commerce, Science and Transportation Committee by a vote of 19-1 on March 10, 1987 and reported to the Senate.

In addition, a very similar proposal was added as an amendment to S. 1485, the Air Passenger Protection Act of 1987. This bill was passed by the Senate as H.R. 3051, in lieu of S. 1485. The only significant difference between S. 1041 and the drug testing amendment attached to S. 1485, was that the latter would have required testing laboratories to meet technical guidelines established by the Department of Health and Human Services. The drug testing amendment was adopted by the full Senate, but was not included in the version of the bill passed earlier by the House. Conferees failed to reach agreement on these drug testing provisions before the conclusion of the 100th Congress. A provision requiring drug testing (including random testing) of safety-sensitive transportation workers was also included in the Senate's Omnibus Drug Bill, but was not accepted by House negotiators because it did not include rehabilitation or

reinstatement rights for employees. The final Omnibus Drug Bill, therefore, did not include provisions requiring drug testing of transportation workers. This bill, P.L. 100-690, was signed into law by President Reagan on November 18, 1988.

A bill covering only rail workers, H.R. 4748, would have required the Secretary of Transportation to issue regulations establishing drug and alcohol testing of railroad employees. H.R. 4748 was passed by the House (amended) on September 20, 1988. Unlike S. 1041 and H.R. 3051, however, this bill would have required employers to refer employees with positive test results to a rehabilitation program. Employees who failed to be rehabilitated could be dismissed.

POLICY CONSIDERATIONS

Random drug testing of transportation workers continues to be the form of testing most subject to controversy and raises many important policy considerations. What follows is a list of some of the most significant.

- How should policymakers weigh the relative importance of employee privacy rights raised by random drug testing versus the need to ensure public safety in transportation? Under what circumstances are the privacy rights of transportation workers sufficiently diminished by their safety sensitive responsibilities to justify random testing? Employee representatives argue random testing is unnecessarily intrusive -- reasonable suspicion testing represents a more appropriate balance of employee privacy versus public safety considerations, and acts as an effective deterrent to drug use. Advocates of random testing argue that it is the only form of testing that truly serves as a deterrent to drug use, and further that the dire consequences of drug use by safety sensitive transportation workers makes random testing a necessity to ensure safety in the industry.

- The DOT regulations only cover drug testing, yet many transportation industry experts believe that alcohol abuse is a much more serious safety problem in the industry. Alcohol testing is a difficult issue to address for a variety of reasons. First, alcohol, unlike the drugs specified in the DOT regulations, is not an illegal substance. Second, since alcohol consumption is not illegal, how long prior to the employees' report for duty could an employer prohibit its consumption? Third, alcohol levels cannot be accurately measured with one urine sample, the current requirement in the DOT regulations. If urine testing is used, two samples are required to get an accurate reading. A frequently used method of measuring alcohol levels is breath testing, but this would require amending the current rules to add the requirement of a breath test. Another method of detecting alcohol levels is through

blood tests, but blood tests are considered by most experts to be more invasive than urine testing.

- Implementation of the DOT regulations involves six separate Administrations and the testing of millions of employees -- a massive and difficult undertaking to administer, monitor and evaluate. A recent GAO study indicated that only two of the Administrations (FAA and FRA) had adopted all of the management practices necessary for effective monitoring and guidance of drug testing. GAO also noted that the definition of safety-sensitive positions is not consistent across the six DOT Administrations and that more guidance to the Administrations by DOT on how to evaluate employer drug testing is needed.[37] In addition, industry representatives have complained about many of the requirements of the regulations -- for example many object to the requirement that they must use only NIDA certified laboratories, others argue that some Medical Review Officers are using the regulations to unfairly engage in "price gouging". All of these criticisms and suggestions are being studied by DOT -- but the effective implementation and monitoring of this program remains an enormous task.

- How can the accuracy of test results be ensured? There are two issues that must be considered in this regard – the accuracy of existing drug tests, and the adequacy of laboratory procedures for processing tests. Most experts agree that drug tests properly administered, using the best technology and with effective chain of custody controls are highly accurate. However, some commonly used drug tests may mistake a common substance or prescription drug for a prohibited drug -- thus an individual might test positive without having used an illegal drug. In order to minimize this possibility, more accurate follow-up tests are available, but at an increased cost. Inaccurate drug test results may also be due to improper laboratory procedures. For example, the Civil Aeromedical Institute (CAMI), a DOT laboratory that conducted many drug tests on Federal Railway Administration employees, was found to have reported positive drug test results in several cases in which tests were never actually performed.

- How cost-effective is random testing for reducing drug use in the transportation industry? Other forms of testing, such as reasonable suspicion testing, for example, are less expensive than random testing since fewer employees are tested. Industry and employee representatives argue that the DOT projections of the costs of random testing are

---

[37] U.S. General Accounting Office. *Drug Testing Management Problems and Legal Challenges Facing DOT's Industry Programs.* RCED-90-31, November 1989. Washington, 1989.

much too conservative. And, some analysts argue that so few workers test positive through the random drug testing screens that the program is not cost effective. Recently limited data on positive test results in the transportation industry has become available. SmithKline Beecham Clinical Laboratories, which conducted 118,000 drug tests of transportation workers between December 21, 1989 and June 30, 1990, reported that 3.1 percent of current employees and 4.2 percent of job applicants had positive drug tests results. However, these results do not differentiate by industry or occupation, and positive results may well differ among occupations and industries.[38] Many analysts argue that only random drug testing can effectively deter drug use, and therefore the high costs are justified. For example, the Coast Guard has stated that since it instituted random drug testing in 1983, positive drug tests have declined from 10.3 percent to 2.8 percent in 1988.

- How will random testing affect employee morale and labor relations in the transportation industry? Many lawsuits have been filed by employee groups objecting to the drug testing regulations, particularly the random testing provisions. Unions have argued that random testing is an unnecessary intrusion into employee privacy and most unions are strongly opposed to random testing. Imposition of random testing may cause a deterioration in the relationship that has been established over time between labor and management. William Wick, Director of Labor Relations for CSX Transportation, which has a joint labor-management testing and rehabilitation program, has stated that mandatory random testing will hurt "the trust and mutual respect" that has developed between labor and management at CSX.[39]

RELATED CRS PAPERS

U.S. Library of Congress. Congressional Research Service. Drug Testing for Illegal Substances, by Blanchard Randall IV. Jan. 20, 1987. [Washington] 7 p. CRS Report 87-36 SPR.

----- Drug Testing in the Workplace: Federal Programs, by Sharon S. Gressle. [Washington] 1987. (Updated regularly). CRS Issue Brief 87174.

----- Drug Testing in the Workplace: An Overview of Employee and Employer Interests, by Gail McCallion. [Washington] 1987. (Updated regularly). CRS Issue Brief 87139.

---

[38] *Daily Labor Report.* July 11, 1990. p. A-2.

[39] Abramson, Howard. CSX Supports Voluntary Programs. *The Journal of Commerce.* December 14, 1988. p. 2-B.

----- Railroad Safety: Selected Options that Might Promote Safety, by Paul F. Rothberg. [Washington] 1987. (Updated regularly). CRS Issue Brief 87138.

----- Governmentally Mandated Drug Testing of Public Employees: A Survey of Recent Constitutional Developments, by Charles V. Dale. February 9, 1990. [Washington] 16 p. CRS Report 90-103A.

----- Drug Testing and the Drug-Free Workplace: A Bibliographic Guide and Reader, by Peter Giordano. January 1990. [Washington] 39 p. CRS Report 90-6 L.