

The Basics of a Drug-free Workplace

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I. LIMITATIONS ON EMPLOYEE DRUG ABUSE PROGRAMS

In establishing a drug abuse program for its employees, an employer is normally seeking answers to two questions. First, how can it identify those persons in its work force who are abusing drugs. Second, what can it do with those employees identified as having a drug problem. Drug screening is becoming the tool of choice in attempting to identify the drug abusing employee.

At one time, an employer's right to deploy any of these or other tools was almost unlimited. Management had the inherent right to operate its business and maintain order. However, in recent years, this right to manage has seen increasing limitations imposed upon it. Courts and legislatures have attempted to balance management's right to manage against the employee's right to privacy. In dealing with this drug problem, an employer must attempt to predict how this balance will be struck in a specific situation.

A. Common Law Issues

One of the private employer's greatest exposures to liability in establishing and administering a drug abuse program are "torts" resulting from failing to administer an otherwise lawful program in a careful and confidential manner. A tort action brought against a company may entitle an employee to a jury trial. In a successful action, damages may include all actual losses, pain and suffering, general compensation, punitive damages, and fees and costs, designed to deter the company from any future violations.

1. Privacy Rights of Employees.

One area of common law that has received considerable attention is a legal claim labeled "invasion of privacy." Generally, the right of privacy represents the right of a person to be "let alone, to live a life of seclusion, or to be free from unwanted publicity." When this right is invaded, a lawsuit may be brought for the resulting damages.

Historically, a party was capable of invading an individual's privacy in one of four ways:

- (1) By placing an individual in false light in a manner which would be highly offensive to a reasonable person;
- (2) By publicizing private facts which may be truthful, but are not a legitimate concern to the public and would be highly offensive to a reasonable person;
- (3) By unreasonably intruding into the seclusion of an individual; or
- (4) By misappropriating a person's name or likeness for commercial purposes without his/her consent.

Although some state courts have not yet openly acknowledged the legal claim of invasion of privacy, other states have. Employers have been held liable under this cause of action in the contexts of both employee searches and employee drug screenings.

Does management have the unqualified right to order an employee whom it believes to be in possession of narcotics on company premises to submit to a search? Consider the situation where a supervisor observes an employee stuff a clear plastic bag which contains a dark, leafy tobacco-like substance into his pocket. The supervisor has reason to believe that the employee may be in possession of marijuana which is a clear violation of company rules. When asked by the supervisor to reveal the contents of his pocket, the employee is told that he will be terminated if he does not comply

with the request. The employee refuses and is terminated. Has management acted improperly in this situation?

Most authorities agree that an employee's right to privacy is not absolute; it often yields to the right of management to fully investigate violations of company rules. Generally, when employees violate rules against possession of narcotics on company property, the company's authority to search employees and to impose discipline for refusal to submit to a search has been upheld. However, in conducting these searches, an employer must be cautious to conduct the searches in as reasonable and nondiscriminatory a manner as possible. The most common basis of challenge in court proceedings is that the employer became overzealous and went beyond the scope of a permissible search.

Because the act of urination has been held by courts to be a purely private act, invasion of an employee's privacy is always a concern with drug testing. Frequently, the invasion of an employee's privacy may also lead to claims of intentional or negligent infliction of emotional distress.

In *Kelly v. Schiumberger Technology Corp.*, an employee was subjected to a urinalysis test. A central part of the employer's program was direct observation while the employee provided the sample. The employee failed two drug tests and was terminated. The employee sued claiming that he was wrongfully discharged. While no physical injuries were claimed, the employee contended that he was repulsed by the idea that someone was paid to watch him urinate. The jury awarded the employee over \$125,000 for invasion of privacy, wrongful discharge, and negligent infliction of emotional distress because the employer mandated that the employee be observed while providing the sample.

2. Defamation.

Another tort that is being increasingly applied in the employment context is defamation. A defamatory communication has been defined as a false statement, which "tends to hold the plaintiff up to hatred, contempt or ridicule." In the employment context, this means that if the employer says something false and derogatory to the employee in private, the employee has no claim for defamation. However, if the employer posts such a statement on the wall of the plant or publishes it in the company newsletter, then the employee might successfully sue for defamation.

For example, in *Houston Bolt and Terminal Railway Co.*, an employee fainted at work and was sent to a physician. The physician ran a series of tests which included one for drugs, to determine the reason for the employee's fainting. The drug test indicated that methadone was in the employee's urine. The employee consulted a physician who had another test performed. The physician then wrote a report stating that the employee's urine contained a compound similar to methadone but that it was not methadone. Despite this report, the employee was terminated for being a safety threat to other employees. Information relating to the results of the employer-administered test was then made known to third parties. The employee subsequently sued for defamation and was awarded \$200,000 in damages on the finding that the employer-administered test was false.

A principle which protects employers from employee defamation claims is the doctrine of "qualified privilege," which allows publication if there was a "need to know" reason for the particular communication. The purpose of this doctrine is to allow the free flow of legitimate business information without the fear of defamation suits. However, this privilege is not absolute.

The malicious publication of an employee's positive test result that later turns out to be negative would not be protected by the qualified privilege.

3. Negligence.

An additional private action that can be raised in the employment sector is negligence. The elements of a cause of action for negligence are: (1) a duty, (2) requiring a standard of conduct, (3) a failure to conform to that standard or a breach of the duties, (4) a connection between the conduct and the resulting injury, (5) and actual loss or damage. Thus, a drug screen that is incorrectly interpreted or conducted can satisfy the requisite elements of a negligence action.

Once the urine sample is given, the potential for human error begins. The most common error consists of confusing samples. However, there is also potential for operator error or error resulting from a previous sample that was strongly positive. Furthermore, some legally obtained or naturally occurring substances can sometimes test as if they are illegal

drugs, causing the problem of "cross-reaction." For example, false positives have been traced to many over-the-counter drugs.

In order to rely upon the results of drug tests, the employer must be able to establish that the test was properly administered. The employer must establish that the test was given by a qualified technician according to established clinical standards. Test results based on inadequate testing procedures or a failure by the employer to establish a proper "chain of custody" of the evidence have been rejected. For example, in one arbitration case, an employer's argument that an employee was impaired was rejected because the employer had kept the employee's blood sample in his home refrigerator overnight before having it analyzed.

4. *Wrongful Discharge.*

Until recently, the dominant rule in employment law has been the "employment-at-will" doctrine. Under the at-will doctrine, employers could fire employees for any reason or no reason at all. Today, the majority of states have adopted exceptions to the at-will doctrine. Most of these states recognize a "public policy" exception which generally prohibits discharge for reasons that would interfere with or violate public policy set forth in state or federal laws.

B. Federal Constitutional Limitations

1. *Fourth Amendment.*

An employer must determine whether its proposed actions are limited in some way by constitutional restrictions. These restrictions can come from the federal or state constitutions. Every citizen of the United States has certain rights that are protected by the U.S. Constitution and everyone in Tennessee receives certain protection from the Constitution of Tennessee. However, to say that an employee is constitutionally protected from some action or proposed action of an employer may not be strictly accurate.

Both the U.S. and many State Constitutions are intended to protect individuals from actions taken by the Government, not actions taken by its private citizens. Unless the employer is somehow acting as an agent of the Government (state or federal), there is probably no constitutional limitation on the actions it may take with respect to its employees. Therefore, an employee in the private sector will probably be unsuccessful in arguing that a search of his person or property, no matter what form it takes, is an unreasonable search prohibited by the Constitution. Of course, the employee will still have those common law actions discussed earlier, as well as, perhaps, one for battery (an unlawful or offensive touching).

This general rule of "no constitutional limits" cannot be assumed in the case of many businesses. Recent cases have suggested that private employers who implement drug testing programs because they are required by federal regulation or statute may be subject to constitutional limitations when administering the programs. Basically, the drug testing regulations are viewed as a connection between the Government and the private employer. Thus, drug testing implemented pursuant to, for example, the Department of Transportation regulations is probably controlled by constitutional limitations. However, the extent of these limitations is uncertain at this time.

The Supreme Court's two key drug testing decisions in the public sector came in *Skinner v. Railway Labor Executives Assn.* and *National Treasury Employees Union v. von Raab*. In those decisions, the Court reaffirmed that drug testing is a search within the meaning of the Fourth Amendment but that important governmental concerns can justify a reasonable search.

The *von Raab* case held that a drug testing program the United States Customs Service administered, without the requirements of any individualized suspicion of drug use, was constitutional. In 1986, the Customs Service had adopted a urinalysis drug testing program for positions requiring: (1) direct involvement in drug interdiction or enforcement, (2) the carrying of firearms, or (3) the handling of "classified" material. An injunction against the testing program was obtained on behalf of employees seeking promotion to the covered positions.

The Supreme Court held that the program was constitutional as it related to employees who carried firearms and those who helped enforce the drug laws because each could be directly linked to safety. However, the Court did not decide

whether the Service could apply its testing procedures to employees who handled "classified materials." Instead, the Court asked the lower court to develop a record that would permit the Court to weigh the significance of the reasons for including the latter category of employees in the drug testing program.

By a seven to two margin in *Skinner*, the Court determined that a mandated drug testing program did not violate the Fourth Amendment rights of rail employees, even though the regulations did not require any "individualized suspicion" of drug or alcohol use prior to testing. The Court held that the Government's compelling public safety interest in ensuring that its workers were not impaired on the job outweighed the intrusion on employee privacy rights.

The "compelling interest" test applied by the Court in these recent cases suggests that drug testing is not unconstitutional if an employer's safety interests outweigh any privacy interest of the employee. Generally, when a drug testing program has been upheld by courts, several factors have been present:

- (1) A heavily regulated industry;
- (2) Employees' reduced expectation of privacy;
- (3) Employer's responsibility for public safety or welfare;
- (4) Testing program reasonable in scope and manner;
- (5) No unreasonable invasion of privacy during collection; and
- (6) No criminal application of the results.

2. The Fifth Amendment and the Right Against Self Incrimination.

Some employees contend that blood and urine testing violate the Fifth Amendment's protection against self incrimination. This argument has two parts. Primarily, employees contend that the testing of bodily fluids reveals not only information that may be incriminating but also other personal medical information. Additionally, employees claim that divulging information on questionnaires prior to the test is incriminating.

The Court of Appeals for the Fifth Circuit addressed these issues in *Treasury Employees v. von Raab*. The court held that sample body fluids reveal only physical characteristics, and not any personal knowledge of the individual, which is the type of information protected by the Fifth Amendment. The information gathered from the evidence was not testimonial in nature; therefore, the constitutional provision was not applicable.

Secondly, the court held that the information requested by the questionnaire did not violate the Fifth Amendment because the information was not incriminating, but was merely private. Although the information was testimonial in nature, it did not fall within the proscription of the Fifth Amendment because the questions did not seek incriminating information from the individual. However, the court specifically refused to address the issue of whether the employee could invoke the Fifth Amendment protection as a basis to refuse to answer the written questions.

C. Americans With Disabilities Act/Federal Rehabilitation Act

Both the Americans with Disabilities Act ("ADA") and the Federal Rehabilitation Act ("FRA") can impact an employer's drug testing program. The ADA applies to any employer with at least 15 employees. The FRA applies to any federal contractor with contracts totaling at least \$2,500.

The ADA prohibits medical examinations of applicants prior to extending a conditional offer of employment. However, the ADA excludes testing for illegal drugs from the definition of medical examinations. Thus, an employer may conduct pre-offer testing for *illegal* drugs.

The FRA also permits medical examinations only after an employer has extended a conditional offer of employment. However, drug testing is not specifically exempted from the definition of "medical examination." This makes it unclear

as to the parameters of testing by employers covered by both the ADA and the FRA. Final ADA regulations have not clarified the issue. No cases have clarified the issue.

The ADA may also present employers with an interesting dilemma. While allowing an employer to test and discipline for current use, it prohibits discrimination against workers who are impaired -- or perceived to be impaired -- by drug or alcohol addiction; i.e., recovered or rehabilitated addicts. The former category has no protection; an employer must attempt to reasonably accommodate the latter. The problem arises in determining whether a person is a "current drug user." According to the EEOC Guidelines, Section 1630.3(a)-(c) The term currently engaging" is not intended to be limited to the use of drugs on the day of, or within a matter of days or weeks before". However, the use must be recent enough to indicate that the individual is actively engaged in such conduct. Id. While it is probable that one who tests positive is a current user, it is possible that a recovered or rehabilitated addict will test positive even though he has not used drugs in months.

What does an employer do if an employee or applicant claims to be addicted? Does an employer have to inquire of each positive test as to whether the person is an addict? Is the employee permitted to rebut the positive test by proving non-use? Does the employer have an obligation to accommodate the employee by paying for the rehabilitation? The answers to these and similar questions will probably depend on the circumstances of each situation.

II. FEDERALLY MANDATED DRUG PROGRAMS

There has recently been promulgated certain federal requirements mandating what is referred to as a "drug-free workplace." These mandates include: (1) the Drug-Free Workplace Act of 1988 ("DFWA"); (2) the Department of Defense Federal Acquisition Regulation Supplement; Drug-Free Work Force ("DoD rule"); and (3) the Department of Transportation regulations on Workplace Drug Testing Programs ("DoT rule").

A. The Drug-Free Workplace Act

The DFWA applies to every federal contract for procurement of property or services of a value of \$25,000 or more¹. It applies only to employees "directly engaged in the performance" of work pursuant to the provisions of the contract. It does not apply to subcontracts or subcontractors.

It is a relatively simple matter to comply with the DFWA. A federal contractor must only certify (and act on this certification) that it will do the following seven things:

1. Publish a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the workplace and specifying the actions that will be taken against employees for violations of such prohibition;
2. Establish a drug-free awareness program to inform employees about:
 - (a) The dangers of drug abuse in the workplace;
 - (b) The contractor's policy of maintaining a drug-free workplace;
 - (c) Available drug counseling, rehabilitation, and employee assistance programs (if any); and
 - (d) The penalties that may be imposed upon employees for drug abuse violations;
3. Provide each employee with a copy of the drug-free workplace statement;
4. Notify each employee, in the drug-free workplace statement, that as a condition of employment on the contract, the employee must abide by the terms of the drug-free workplace statement and notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than five days after such conviction;
5. Notify the contracting agency within ten days after receiving notice from an employee of such a drug conviction or otherwise receiving notice of such conviction;
6. Within thirty days after receiving notice of such a drug conviction, take appropriate personnel action (up to and including termination) against, or require the satisfactory

participation in a drug abuse assistance or rehabilitation program by, the convicted employee;
and

7. Make a good faith effort to continue to maintain a drug-free workplace through implementation of the foregoing six requirements.

Nothing in the DFWA requires drug testing of employees. Further, the DFWA does not require that any employee be offered the opportunity for rehabilitation. Rather, the DFWA only leaves open the possibility of either of these options.

Similar to the DFWA requirements, the DoD rule's requirements apply only to a limited number of contracts. Basically, the rule applies only to those contracts "involving access to classified information" or "where the contracting officer determines [it] is necessary in the interest of National Security, health or safety." The rule does not apply to contracts, or those parts of contracts, to be performed outside the United States or its territories and possessions, except as otherwise determined by the contracting officer.

Because the clause is poorly drafted, it is impossible to say with certainty what must be a part of a drug policy complying with the DoD rule. Almost every requirement of the rule is set out so that "appropriate alternatives" can be used. However, no indication is given as to how one determines what would be an appropriate alternative. Further, even if the requirements suggested by the rule are the ones an employer decides to implement, there is limited guidance provided to enable an employer to know how much must be done to satisfy each requirement.

Among the requirements of the DoD rule are: (1) An employee assistance program (EAP) which must emphasize high level direction, education, counseling, rehabilitation, and coordination with available community resources; (2) Supervisory training; (3) referrals to treatment for drug abuse; (4) drug testing for "employees in sensitive positions;" (5) adoption of appropriate personnel procedures to deal with employees who are found to be using drugs illegally; and (6) the contractor may also establish a program for drug testing of applicants for employment; when there is a reasonable suspicion that an employee uses illegal drugs; when an employee has been involved in an accident or unsafe practice; as part of or as a follow up to counseling or rehabilitation for illegal drug use; and as part of a voluntary employee drug testing program.

C. Department of Transportation Rules

The DoT rule requires testing of certain individuals in each of the six regulated areas: the United States Coast Guard (crew-members in positions which affect safety), the Federal Aviation Association (for employees who perform safety or security-sensitive functions), the Federal Railroad Administration (employees covered by the "Hours of Service Act"), the Federal Highway Administration (drivers only), and the Urban Mass Transportation Administration and the Research and Special Programs Administration (employees who perform safety-sensitive functions).

The DoT and agency rules set out specific guidelines for determining who is to be tested for drug use, the method by which these persons are to be tested, and the drugs for which an employer is to test. There are five instances when testing is required under the DoT rule: (1) Pre-employment testing; (2) biennial (periodic) testing; (3) reasonable cause testing; (4) random testing; and (5) post-accident testing.

The only drugs authorized for testing at this time are (1) marijuana, (2) cocaine, (3) opiates, (4) amphetamines, and (5) phencyclidine. Without prior authorization, an employer can not test for other drugs unless it does so by use of a separate urine sample.

Tests must be administered by a laboratory certified by the Department of Health and Human Services pursuant to the Mandatory Guidelines for Federal Workplace Drug Testing Programs. The employer and the certified laboratory must develop and maintain a clear and well-documented procedure for the collection, shipment, and accessioning of urine specimens. The rule sets out very specific requirements for the collection site for a urine sample. It also sets specific procedures to ensure proper chain of custody of the specimen.

The DoT rule also requires the use of a Medical Review Officer ("MRO") for reporting and evaluating the test results. Under the rules, the MRO must be a licensed physician with knowledge of substance abuse disorders. The MRO has the

responsibility of reviewing the results of all positive tests performed on employees, at least those performed pursuant to the DoT rule. He must verify and report the results according to DoT procedures. Similarly, he has the power to reanalyze the results if necessary. Records of the test results must be kept in strict confidence. This includes records kept by the MRO.

D. Omnibus Transportation Employee Testing Act of 1991

With relatively little fanfare, on October 28, 1991, the Omnibus Transportation Employee Testing Act of 1991 ("the Act") was signed by President Bush and became law. It provides for both drug and alcohol testing of employees in various transportation industry positions, including those employed by air carriers (airmen, crew members, airport security screening contract personnel, and others in safety-sensitive functions), railroads (all employees in safety-sensitive positions), motor carriers (all operators), and mass transportation operations who receive certain financial aid from the federal government (all employees who perform safety-sensitive functions). The covered employees are subject to preemployment, reasonable suspicion, random, and post-accident testing.

III. THE "BASICS" OF A DRUG-FREE WORKPLACE PROGRAM

Few subjects in the realm of employee management have received more recent attention than that of creating and maintaining a drug-free workplace. Over the last few years, there have been numerous attempts made by government, both federal and state, to encourage the implementation of drug-free workplace programs. Indeed, some government entities have even gone so far as to require the institution of such programs. This article examines the "basics" of any drug-free workplace program. The article is not intended as a comprehensive and exhaustive statement of the law; neither is it intended to encourage the adoption of any specific type of program for your workplace. The decision as to the type, if any, of program required for your employees is best examined on a case-by-case basis.

A. Examine State and Local Restrictions

The first area any employer considering the adoption of a drug-free workplace must look to is its own state and local laws. Often, there will exist laws which will limit an employer's discretion in the area of drug-testing and employee privacy. Assuming no such laws exist in your state or locality, an employer must still be aware of possible limitations imposed by federal laws. These can come in the form of constitutional limits, statutes, and agency rules, for example. Significantly, the United States Constitution does not prohibit such testing by a private employer. Constitutional limits, if any, usually apply only to employers acting for or as the state or federal government.

However, there always exists the possibility that such protection will be extended to this area in the future. As such, it is always best to administer any such program in as reasonable a fashion as is practicable. While it is always impossible to completely prevent a lawsuit attacking the program, or challenging an action taken as a result of the program, the reasonable administration of a narrowly tailored and clear policy will increase the probability of successfully defending any civil lawsuits brought against an employer based on such theories as battery or invasion of privacy.

B. The Elements

Certain basic elements should be a part of any considered program of testing include:

- 1. Use plain language.*

The policy should be short and concise. It should be simply stated and easy to understand. The employees should understand not only when they will be tested, but for what substances they will be tested.

- 2. Decide whether rehabilitation will be offered.*

If an employee will be given an opportunity for rehabilitation, the limits of this opportunity should be clearly and concisely stated in the notice to employees. While the inclusion of what is often referred to as an "employee assistance program" or EAP as part of the overall testing program may make it more palatable to employees, it can also add some confusion to the application of a policy. Anytime an employer

makes reference to an employee assistance program, it must clearly outline the parameters of the program. Whether an EAP should be made available must be judged on the facts of each particular employer's business; it must be very carefully thought through.

An employer may not wish to give every employee, under every circumstance, the opportunity to participate in an EAP. Unless this is the desire, an employer should make it clear that the ultimate decision on who will participate and when they can participate will be made by management. An employer must decide whether participation in the EAP will shield the employee from discipline. The decision must be clearly stated in the policy. While an employee should not be disciplined for participation in an EAP, an employer may not wish to excuse misconduct merely because an employee has agreed, after-the-fact, to participate in an EAP. If an EAP program acts like that, it will amount to excusing misconduct of an abusing employee while not excusing similar misconduct by a nonabusing employee. One often used technique to prevent such misuse of the EAP is to permit participation only before an act has been committed justifying dismissal.

3. Decide what the penalty will be for violation.

The policy must clearly state the consequences of noncompliance by an employee. An employer must first decide what the penalty will be for violation of the company's drug policy. If everyone is going to be given a second chance for any violation, than it should clearly say so in the policy. If there will be varying degrees of penalties for different types of misconduct, the policy should say so. Of course, management should also make clear that nothing in the policy is intended to create a contract of employment. All discipline is at the discretion of management; each case will be judged individually and on its own facts. All employees are on notice that they are "employees at will." Otherwise, employees will be free to argue that the policy creates a contract of employment; they may be discharged only in accordance with the procedures set out in the policy. While an employer may fully intend to follow all procedures it sets out in its policy, often, something unexpected or unusual happens, the policy does not clearly cover the situation, but management decides to discipline anyway; the employee sues. This situation should be avoided.

4. Avoid vague or uncertain language.

Unless required by statute or rule, certain phraseology should be avoided. There are certain words or phrases that, although often used by employers in their drug testing policies, can add ambiguity and uncertainty to the policy. In the event the policy is challenged (in court or elsewhere), these can increase the chances of a successful attack. Also, ambiguity can lead to uncertainty in application. In turn, this can lead to discontent among employees who may erroneously perceive these as allowing for disparate treatment.

These phrases include "impaired" and "under-the-influence." Instead of using the phrase "under-the-influence" or the word "impairment," a policy should prohibits the "presence" of the drug in the employee's system. It is often very difficult to prove that an employee is "impaired" by or "under-the-influence" of a drug. Not only do different persons have different tolerances for the same drug, but many are often affected differently by different drugs. Also, screening or drug tests can not always determine impairment. Urinalysis tests only for the presence of drugs. Urinalysis can not detect alcohol. While blood tests can show the concentration of a particular drug, including alcohol, in the bloodstream, that concentration alone is often insufficient to establish impairment. The ambiguities inherent in this type of language can lead to litigation.

If the under-the-influence phraseology is to be used, some standard should be set, in advance, to put employees on notice as to what level of concentration will violate the company's drug prohibitions. For example, the company could borrow the .01 blood alcohol content standard (used in most states as the standard for driving under-the-influence laws) as its standard for determining when an employee is "under-the-influence" of alcohol. A standard should be set for each drug for which the employee will (or could) be tested. This could prove to be unwieldy. Nonetheless, the laboratory you choose to use for testing should be able to help you settle on acceptable standards for most prohibited drugs.

Similarly, references to discipline for "possession" should be avoided, unless they are only cumulative. The law is unclear as to whether presence of a drug in the urine or bloodstream amounts to "possession."

5. Separate applicants from employees.

Often, it is best to have two separate programs for testing applicants and employees. Employees need not be told that applicants will be tested. Many employers find it too expensive to test every applicant. Consistent with the Americans with Disabilities Act, applicants may be tested only following a conditional offer of employment.

6. Train supervisors.

If "reasonable cause" or "suspicion" testing is to be included, an employer should require their supervisors to participate in drug detection educational courses. This will lend credibility to both the program and the decisions made by supervisors during implementation.

7. Be consistent.

If an employer wants to reserve the right to treat each case differently, it can do so, as long as legitimate reasons exist to defend each action. However, this discretion should be exercised in the most even-handed manner that is practical. To the extent possible, treat all similarly situated employees the same.

8. Conduct no test or search without consent.

No employee test (or search, if included in the program) should be conducted without the written consent of the employee to be tested; however, any employee who refuses to submit to a test (or reasonable search) should understand that he will be subject to immediate discharge. Each employee should be required to sign an individual consent form prior to each time he is tested or searched.

9. Preserve confidential information.

The results of any drug testing should be kept confidential. Only those persons who need to know should be informed of the results. The more limited the pool of persons told of the result, the less chance that an employer will be held liable for unnecessary, reckless or negligent publication of the results. There is always the possibility that the results will be erroneous; an employer should limit the potential risk. If the supervisor does not need to know, do not tell him.

10. Choose labs and collection sites carefully.

Finally, care should be taken in choosing the testing methods and the laboratory that will be used. The lab must follow very strict procedures when testing to ensure the validity of the test. These should include the need for using state of the art testing facilities as well as following strict chain of custody procedures. The lab must have established procedures to ensure the confidentiality of the information obtained through testing. Also, because the possibility of challenge always exists, an employer should make certain that the lab will stand behind its results by testifying in court, or otherwise, if this ultimately becomes necessary.

A number of different certifications and/or licenses are possible for these testing laboratories. Most federally-mandated programs and the TDFWP require the use of laboratories that have been certified by the Department of Health and Human Services pursuant to the Mandatory Guidelines For Federal Work Place Drug Testing Programs.

The typical method for drug testing is by an initial screening test, usually an immunoassay test or thin layer chromatography, to exclude the drug-free specimens. Those showing positive are then confirmed by Gas Chromatography/Mass Spectrometry ("GC/MS"). If expense is an important factor, you should discuss these methods with your laboratory. It is always a good idea to use a confirming test on every positive result before it is treated as legitimate .

CASE STUDY I

Canuk Manufacturing is a business located in Sunny, Tennessee. In the last five years, Canuk has had an increasing concern with drug problems. In order to achieve its goal of a drug-free work environment, Canuk inaugurated a program for drug awareness and control which included all employees.

As part of its new program, lunch boxes and packages are opened for inspection as the employee enters and leaves the plant. In addition, employees' personal vehicles are inspected on a spot-check basis. The company's right to inspect personal effects and vehicles was explained in a company memorandum which was posted on all bulletin boards at the facility. The memorandum stated:

Company rules and regulations including the Company's rule on drug abuse apply on all Company property including Company property outside the primary work areas such as the parking lots, entry roads, cafeterias, etc.

The Company continues to reserve the right to carry out reasonable searches of all individuals and their personal effects (including vehicles) on all company property. Inspections of employee vehicles will only be conducted when the employee/owner is present and consent is obtained. Refusal to submit to a search will be cause for appropriate disciplinary action.

One day, Pete Perfect reported for work and parked his car in the employees' parking lot. Later that day, a security man observed two "roaches" in the ashtray and a "roach clip" on the dashboard of a 1967 Buick. The security guard notified Mark Master, the head of the company and an investigation followed.

After discovering that Pete was the owner of the Buick, Mark contacted Pete and instructed him to report to his automobile with his keys. When he arrived, Mark Master asked Pete for permission to inspect his car. Pete refused to grant permission to inspect his car. He became loud and belligerent and stated: "OK, so you see a couple of roaches in my car. What's the big deal, I'm not smoking on the job."

Pete continued to refuse permission to inspect his car. He claimed that the drugs were left in his car by friends who had borrowed his car the night before. After he repeatedly refused Mark's request to allow the car to be inspected, Mark told Pete that his refusal constituted insubordination and that he was subject to disciplinary action, including termination.

Several days later, Mark informed Pete that the company had reviewed the incident and determined that Pete be discharged for insubordination. Pete, thereafter, filed a grievance, pursuant to an applicable collective bargaining agreement, over the matter.

Subsequently, Mark provides Pete's story to the local newspaper's editorial staff to prove that Canuk is fighting drugs in the community.

Questions

1. Was Pete's termination proper?
2. Should Mark have published Pete's story?
3. Did the company's actions violate the Fourth or Fifth Amendments to the United States Constitution?

CASE STUDY II

Bill Murray is a supervisor for the Flubbet & Fixit Mechanical Contractors. A couple of days ago, Murray was leaving the site and as he drove out of the parking lot, he noticed two employees, Steve Allen and Edie Gourmet, sitting in Steve's car in a deserted corner of the parking lot. Upon closer inspection, Murray noticed Steve and Edie passing a cigarette-shaped object back and forth. Each would take a long puff and hold the smoke in for several seconds before exhaling. Murray approached the car and knocked on the window. When Steve opened the door to the smoke-filled car, Murray smelled a pungent aroma which was not tobacco smoke. He assumed it was marijuana smoke. Even though Murray found no marijuana in the car, he discharged Steve and Edie.

QUESTIONS

1. Would Murray's observations constitute just cause for discharge?

Case Study III

Cyclops Computers, Inc. has recently received a contract from the Internal Revenue Service for the installation of a new computer system in the Metropolis area. The contract was entered into in February 1991. The cost of the project will be in the millions. The contract provides that Cyclops will comply with all requirements of the Drug Free Workplace Act of 1988. Phoenix Subcontracting has been obtained to do a substantial part of the installation; the services to be rendered will exceed \$500,000. The contract between Cyclops and Phoenix does not mention the DFWA.

Last week, Charles X, an employee of Phoenix, was arrested for possession of two pounds of cocaine. X was in a local hotel at the time of the arrest. A search of his house and his auto showed no other evidence of drug use or possession. Both Cyclops and Phoenix heard of the arrest two days ago.

QUESTIONS

1. Does the DFWA require either Phoenix or Cyclops to report this arrest? Explain your answer.
2. Would your answer be different if the arrest turns into a conviction for cocaine possession?

1 The DFWA also applies to every federal grant and to all contracts awarded to individuals, regardless of the amount.