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## Employee Drug Testing: Federal Courts Are Redefining Individual Rights of Privacy, Will Labor Arbitrators Follow Suit?

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# Employee Drug Testing: Federal Courts Are Redefining Individual Rights of Privacy, Will Labor Arbitrators Follow Suit?

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## I. INTRODUCTION

Public and private sector employers, often acting unilaterally, have responded to the increased use of drugs and alcohol in the workplace by implementing substance detection programs.<sup>1</sup> Inevitably, the implementation of these programs pits the interests of employers and society in a drug free work environment against the privacy interests of employees.<sup>2</sup>

The way courts and arbitrators respond when management unilaterally implements an employee drug testing program, either as a new program or as an addition to an existing substance abuse policy,

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1. Courts and arbitrators have both observed this marked increase in drug use. As one federal judge stated:

The prevention of illicit drug use has become a major national concern. Congress has appropriated unprecedented sums to interdict drug smuggling, the President has issued an executive order requiring all federal agencies to adopt programs that will eliminate drugs from the federal workplace, and hundreds of private employers, including more than a quarter of the Fortune 500 companies, have instituted some kind of program for urinalysis testing of employees. Employee drug use costs the United States an estimated \$33 billion per year. The seriousness of the problem has led to efforts to combat drug use by the use of novel methods, such as compulsory testing.

National Treasury Employees Union v. Von Raab, 816 F.2d 170, 172-73 (5th Cir. 1987) (footnotes omitted), *aff'd in part and modified in part*, 109 S. Ct. 1384 (1989). Similarly, one arbitrator noted: "Both drug and alcohol abuse are rampant in America and are a major industrial problem, adversely affecting productivity growth, which is in turn the basis for real increases in worker income." South Carolina Elec. & Gas Co., 89 Lab. Arb. (BNA) 845, 849 (1987) (Boals, Arb.).

2. See, e.g., *infra* text accompanying note 279.

can be described in terms of entitlement theory.<sup>3</sup> If a judge or arbitrator allows management to impose a drug testing program on employees without bargaining before implementation, then management has the entitlement to unilaterally implement such a program. If a judge or arbitrator voids the program and holds that employees shall be free from having to submit to a management imposed drug test, then the employees have the entitlement not to be forced to submit to an imposed nonconsensual drug test.<sup>4</sup>

An entitlement that radically favored management would allow management to subject all employees to drug tests randomly, at any time and at any place, regardless of cause and without requiring management either to bargain with the employees or to obtain their consent. An entitlement that radically favored employees would not allow management to test employees for drugs without either the voluntary, noncoerced consent of the employee or without a collective bargaining agreement that allowed the testing. Judicial and arbitral opinions place the entitlement somewhere between these two extremes. Management imposed drug testing schemes have varied widely, including: testing based upon individualized suspicion;<sup>5</sup> random or surprise testing absent individualized suspicion;<sup>6</sup> testing with less than individualized suspicion pursuant to either a regularly scheduled job physical or other specific event that is tied to safety concerns;<sup>7</sup> and testing absent individualized suspicion in work settings

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3. Under entitlement theory, if management has the unequivocal right to test employees for drug use, then employees who value the right to be free from drug testing must bargain with management and give something up in exchange for the right not to be tested. Conversely, if unions have the right not to have employees subjected to drug testing absent voluntary consent, then management that seeks to test its employees for drugs must bargain for the entitlement and give something up. *See generally* Schwab, *Collective Bargaining and the Coase Theorem*, 72 CORNELL L. REV. 245 (1987) (discussing entitlement theory).

4. *See id.*

5. *See, e.g.,* Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985) (testing of electric line workers who were directly observed smoking marijuana was reasonable); Citgo Petroleum Corp., 88 Lab. Arb. (BNA) 521 (1986) (Allen, Arb.) (drug testing at a petroleum facility after direct observation of a confused, stumbling, unsteady employee with slurred speech and blinking eyes was reasonable).

6. *See, e.g.,* Rushton v. Nebraska Pub. Power Dist., 844 F.2d 562 (8th Cir. 1988) (Nuclear power is a highly regulated industry, and it was reasonable to randomly test certain employees with access to critical areas.); International Bhd. of Elec. Workers, Local Union No. 647, 87-2 Lab. Arb. Awards (CCH) ¶ 8570 (1987) (Weisbrod, Arb.) (It is reasonable to randomly test nuclear power plant workers who have access to sensitive areas.).

7. *See, e.g.,* Jones v. McKenzie, 833 F.2d 335, 341 (D.C. Cir. 1987) (testing bus drivers and attendants of handicapped school children during a "routine . . . employment-related medical examination" was reasonable),<sup>1</sup> *vacated sub nom.* Jenkins v. Jones, 109 S. Ct. 1633 (1989), *replaced*, 878 F.2d 1476 (D.C. Cir. 1989) (affirming and modifying its earlier decision); Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1267 (7th Cir.) (reasonable to test bus drivers involved in a serious accident), *cert. denied*, 429 U.S. 1029 (1976); Concrete

that have a strong impact on public health and safety.<sup>8</sup>

The General Counsel of the National Labor Relations Board ("NLRB" or "Board") has declared the imposition of any drug testing program to be a mandatory subject of bargaining under the National Labor Relations Act ("NLRA" or "Act").<sup>9</sup> Accordingly, without employee consent or a clear and unequivocal waiver,<sup>10</sup> management's imposition of a drug testing scheme without first bargaining to impasse<sup>11</sup> may violate the NLRA.<sup>12</sup> The Board has recently

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Pipe Prods. Co., 87 Lab. Arb. (BNA) 601 (1986) (Caraway, Arb.) (reasonable to test any driver of a tractor-trailer involved in an accident).

8. See, e.g., *Transport Workers' Union, Local 234 v. Southeastern Pa. Transp. Auth.*, 863 F.2d 1110 (3d Cir. 1988) (*SEPTA*) (random testing of transit operators for public safety reasons was upheld), *vacated and remanded on other grounds*, 109 S. Ct. 3208 (1989); *Mullholland v. Department of the Army*, 660 F. Supp. 1565 (E.D. Va. 1987) (random testing of certain civilians that were responsible for maintaining helicopters involved with national security was reasonable); *South Carolina Elec. & Gas Co.*, 89 Lab. Arb. (BNA) 845 (1987) (Boals, Arb.) (reasonable to randomly test public bus drivers).

9. The NLRB General Counsel, appointed by the President with the approval of the Senate, is empowered to investigate and prosecute violations of unfair labor practices under the National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1982)) (NLRA). See R. GORMAN, *BASIC TEXT ON LABOR LAW* 7 (1985). As such, it can be inferred that the General Counsel's Advice Memorandums would have a persuasive effect on the NLRB. In a recent Advice Memorandum, the General Counsel stated that:

(1) [D]rug testing for current employees and job applicants is a mandatory subject of bargaining under Section 8(d) of the [NLRA]; (2) in general, implementation of a drug testing program is a substantial change in working conditions, even where physical examinations previously have been given, and even if established work rules preclude the use or possession of drugs in the plant; (3) the established Board policy that a union's waiver of its bargaining rights must be clear and unmistakable is to be applied to drug testing; (4) normal Board deferral policies under *Dubo* and *Collyer* will apply to these cases; however, if Section 10(j) relief is otherwise warranted, deferral will not be appropriate.

Daily Lab. Rep. (BNA) No. 184, at D-1 (Sept. 24, 1987) (citing *Collyer Wire*, 192 N.L.R.B. 837 (1971); *Dubo Mfg. Corp.*, 142 N.L.R.B. 431 (1963)).

10. See *Laidlaw Transit*, 89 Lab. Arb. (BNA) 1001, 1019 (1987) (Allen, Arb.). The arbitrator stated:

General Counsel Collyer discounted claims by employers that a union has waived its negotiating rights per a zipper clause, past practice, or a management rights provision. Instead Collyer contends that any such waiver regarding drug testing procedures must be clearly expressed in agreement language, or that past negotiations reveal that the subject matter was specifically discussed and was "consciously yielded" by the union.

*Id.*

11. Impasse occurs when parties bargaining in good faith have become deadlocked over the issue in dispute. Once impasse is reached, the employer may impose any changes that have been previously offered to the union. Either party may discontinue further negotiations at that point. A party bargaining to good faith impasse avoids violating Section 8(a)(5) of the NLRA. See NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5); R. GORMAN, *supra* note 9, at 445-50.

12. Section (8)(a)(5) of the NLRA states: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject

affirmed this position in *Johnson Bateman Co.*,<sup>13</sup> holding that drug testing is a mandatory subject of bargaining under Section 8(a)(5) of the Act.<sup>14</sup> The NLRB stated that "the drug/alcohol testing requirement [imposed by the employer is] both germane to the working environment, and outside the scope of managerial decisions lying at the core of entrepreneurial control."<sup>15</sup> In practice, however, employers have not followed the General Counsel's Advice Memorandum; instead, they have implemented drug testing programs unilaterally during the terms of existing collective bargaining agreements, thereby causing the unions to seek outside judicial and arbitral relief.<sup>16</sup>

In contrast to the NLRB's position giving employees the entitlement not to be subjected to management imposed drug testing absent a contractual waiver, the United States Supreme Court in three recent opinions has effectively given management the entitlement to unilaterally impose drug testing upon employees in certain work environments. In *Skinner v. Railway Labor Executives' Association*,<sup>17</sup> the Court upheld management's right to unilaterally impose drug testing upon railroad operating employees that have been in an accident, regardless of individualized reasonable suspicion.<sup>18</sup> Similarly, in

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to the provisions of section 9(a)." NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5). In addition, in *NLRB v. Katz*, 369 U.S. 736 (1962), the Supreme Court stated:

The duty to "bargain collectively" enjoined by § 8(a)(5) is defined by § 8(d) as the duty to "meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment." . . . We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of § 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal.

*Id.* at 742-43.

13. Daily Lab. Rep. (BNA) No. 117, at F-1 (June 20, 1989).

14. *Id.* at F-2. In that case, a concrete pipe manufacturer unilaterally implemented a drug and alcohol testing program for all employees who are injured on the job. *Id.* The administrative law judge held that the program of testing involved a "work rule" and not a "Company rule" in which the union had not contractually waived its rights; thus, the company's implementation without first bargaining with the union violated Section 8(a)(5) of the NLRA. *Id.* The NLRB affirmed. *Id.* at F-5.

15. *Id.* at F-2. The Board analogized its earlier decisions in which it held that both physical examinations and polygraph testing are mandatory subjects of bargaining. *Id.*

16. See, e.g., *Bangert v. Hodel*, 705 F. Supp. 643 (D.D.C. 1989) (The Department of Interior unilaterally implemented a random drug testing program for approximately a quarter of its employees where no prior drug abuse was shown.); *Department of the Army, 91 Lab. Arb. (BNA) 137, 138 (1988) (Huffcut, Arb.)* (The Army unilaterally implemented a random drug testing program for certain of its civilian personnel at an Army facility where no prior evidence of drug abuse was shown.).

17. 109 S. Ct. 1402 (1989).

18. *Id.* at 1422. The Court focused on both the importance of public safety and confidence involving railroads and the operating employees' diminished expectation of privacy by virtue of their positions. *Id.*

*National Treasury Employees Union v. Von Raab*<sup>19</sup>, the Court upheld management imposed drug testing of all employees entering certain positions within the United States Customs Service.<sup>20</sup> The Supreme Court in these cases gave great deference to the need for public confidence in these industries and to the compelling need to promote general public safety; the Court found that these needs outweighed employee privacy concerns.<sup>21</sup> Finally, in *Consolidated Rail Corp. v. Railway Labor Executives' Association*,<sup>22</sup> the Court held that management imposed drug testing of all railroad employees during their physical examinations is a "minor dispute" under the Railway Labor Act,<sup>23</sup> thus allowing the dispute to be decided by an arbitration adjustment board.<sup>24</sup> Because these decisions will guide lower federal courts toward upholding management imposed drug testing programs when public policy issues are implicated, their impact will likely be reflected in forthcoming arbitration opinions.

This Comment examines the values that inform the decisions of arbitrators confronted with the issue of where to place the entitlement when employees are subjected to management imposed drug testing. Section II focuses on the backdrop of federal precedent in the area of drug testing in the public sector. Section III looks at what arbitrators have decided when confronted with situations in which management unilaterally imposes drug testing on employees. Section IV reasons that arbitrators implicitly and explicitly exhibit many of the same values displayed by their judicial counterparts in balancing the personal privacy and dignity of the employee against concerns for a safe and healthy workplace. Finally, Section V concludes that arbitrators will continue to follow federal precedent in resolving drug testing issues—a body of law that is shifting away from individual rights and toward public concerns.

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19. 109 S. Ct. 1384 (1989).

20. *Id.* at 1387-98. In this case, the Court emphasized the public importance of the maintenance of the integrity of our borders and the maintenance of public safety by those Customs employees carrying firearms; as a result, it held that it was reasonable under the fourth amendment to subject these employees to drug testing although individualized suspicion was lacking. *Id.*

21. *Skinner*, 109 S. Ct. at 1422; *Von Raab*, 109 S. Ct. at 1393-95.

22. 109 S. Ct. 2477 (1989).

23. *Id.* at 2479-80.

24. *Id.* at 2480-81. In the case of "minor disputes," there is no general requirement to maintain the status quo pending resolution of an adjustment board's decision, but the courts may grant injunctive relief to prohibit employees from striking during this period. *Id.* In the case of "major disputes," however, the parties must go through a time consuming process of "bargaining and mediation" during which they must maintain the status quo. *Id.* at 2480.

## II. THE PUBLIC SECTOR: DRUG TESTING AND THE COURTS

Unlike their private sector counterparts, public sector employees are protected from having their employers unilaterally act in a way that may infringe upon their constitutional rights.<sup>25</sup> Public employees have challenged management imposed drug testing under theories of unreasonable search and seizure,<sup>26</sup> procedural and substantive due

25. See generally Bible, *Employee Urine Testing and the Fourth Amendment*, 38 LAB. L.J. 611, 617-40 (1987) (discussing fourth amendment issues applicable to drug testing); Survey, *Survey of the Law on Employee Drug Testing*, 42 U. MIAMI L. REV. 553, 567-609 (1988) (discussing the constitutional implications of employee drug testing); Note, *Mandatory Drug Testing of Public Sector Employees: Constitutional Implications*, 65 U. DET. L. REV. 315, 315-31 (1988) (discussing constitutional issues of employee drug testing).

26. E.g., *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1407 (1989); *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1389 (1989); *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989); *Transport Workers' Union, Local 234 v. Southeastern Pa. Transp. Auth.*, 863 F.2d 1110, 1115 (3d Cir. 1988) (*SEPTA*), *vacated and remanded on other grounds*, 109 S. Ct. 3208 (1989); *Policeman's Benevolent Ass'n of N.J. v. Township of Wash.*, 850 F.2d 133, 134 (3d Cir. 1988); *Rushton v. Nebraska Pub. Power Dist.*, 844 F.2d 562, 566 (8th Cir. 1988); *Jones v. McKenzie*, 833 F.2d 335, 337 (D.C. Cir. 1987), *vacated sub nom. Jenkins v. Jones*, 109 S. Ct. 1633 (1989), *replaced*, 878 F.2d 1476 (D.C. Cir. 1989) (affirming and modifying its earlier decision); *National Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935, 938 (D.C. Cir. 1987); *McDonnell v. Hunter*, 809 F.2d 1302, 1305 (8th Cir. 1987); *Shoemaker v. Handel*, 795 F.2d 1136, 1141 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986); *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1266 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976); see also *National Fed'n of Fed. Employees v. Cheney*, 884 F.2d 603 (D.C. Cir. 1989), *modifying* *National Fed'n of Fed. Employees v. Carlucci*, 690 F. Supp. 46 (D.D.C. 1988); *Bangert v. Hodel*, 705 F. Supp. 643 (D.D.C. 1989); *Owner-Operators Indep. Drivers Ass'n v. Burnley*, 705 F. Supp. 481 (N.D. Cal. 1989); *Ensor v. Rust Eng'g Co.*, 704 F. Supp. 808 (E.D. Tenn. 1989); *Weicks v. New Orleans Police Dep't*, 706 F. Supp. 453 (E.D. La. 1988), *aff'd mem.*, 868 F.2d 1269 (5th Cir. 1989); *National Air Traffic Controllers Ass'n v. Burnley*, 700 F. Supp. 1043 (N.D. Cal. 1988); *Ford v. Dowd*, 697 F. Supp. 1085 (E.D. Mo. 1988); *Amalgamated Transit Union Div. 1279 v. Cambria County Transit Auth.*, 691 F. Supp. 898, 899 (W.D. Pa. 1988); *American Fed'n of Gov't Employees, Council 33 v. Meese*, 688 F. Supp. 547, 548 (N.D. Cal. 1988); *Poole v. Stephens*, 688 F. Supp. 149 (D.N.J. 1988); *Guiney v. Roache*, 686 F. Supp. 956 (D. Mass. 1988), *vacated and remanded*, 873 F.2d 1557 (1st Cir. 1989); *Thomson v. Weinberger*, 682 F. Supp. 829 (D. Md. 1988), *rev'd sub nom. Thomson v. Marsh*, 878 F.2d 1431 (4th Cir. 1989); *Burka v. New York City Transit Auth.*, 680 F. Supp. 590 (S.D.N.Y. 1988); *Wrightsell v. City of Chicago*, 678 F. Supp. 727 (N.D. Ill. 1988); *Uniform Div. Officers Ass'n Local 17 v. Brady*, No. 88-3377 (D.D.C. Dec. 23, 1988) (WESTLAW, Allfeds library); *American Fed'n of Gov't Employees v. Dole*, 670 F. Supp. 445, 447 (D.D.C. 1987); *Taylor v. O'Grady*, 669 F. Supp. 1422 (N.D. Ill. 1987); *Mullholland v. Department of the Army*, 660 F. Supp. 1565 (E.D. Va. 1987); *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875 (E.D. Tenn. 1986), *aff'd*, 846 F.2d 1539 (6th Cir.), *vacated on reh'g*, 861 F.2d 1388 (6th Cir. 1988); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986); *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985).

process,<sup>27</sup> equal protection,<sup>28</sup> self-incrimination,<sup>29</sup> the right of privacy,<sup>30</sup> and even infringement of religion.<sup>31</sup> This Comment focuses on the fourth amendment's right against unreasonable search and seizure<sup>32</sup> and, to a lesser extent, on the fourteenth amendment's guarantee of due process.<sup>33</sup> Together, these two rights represent the majority of constitutional challenges to drug testing.

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27. *E.g.*, *Von Raab*, 816 F.2d 170, 181 (5th Cir. 1987) (The procedures utilized in testing, storing, and handling plaintiff's urinalysis sample did not violate due process.), *modified on other grounds*, 109 S. Ct. 1384 (1989); *Burka*, 680 F. Supp. at 610-11. (Applicants for employment do not have a protected property right, and those employees' due process rights are satisfied by fair hearings and accurate drug tests.); *Lovvorn*, 647 F. Supp. at 883 (Municipal firefighters have a property interest in their jobs and a liberty interest in their reputation, and they are procedurally entitled to know the charges against them.), *aff'd*, 846 F.2d 1539 (6th Cir.), *vacated on reh'g*, 861 F.2d 1388 (6th Cir. 1988); *Capua*, 643 F. Supp. at 1520-21 (Civil servants have a protected property interest in their jobs, and their government employer violated these interests without due process by failing to give prior notice and an opportunity to be heard.); *Allen*, 601 F. Supp. at 495 (City employees were given a "full and fair hearing" on the reasons for their discharge and were not deprived of procedural or substantive due process.).

28. *E.g.*, *Shoemaker*, 795 F.2d at 1143 (subjecting only jockeys—not trainers, grooms, or officials—to random testing did not violate the equal protection clause); *Poole*, 688 F. Supp. at 156 (court rejected plaintiff's equal protection challenge that only recruits were subjected to random testing while neither regular guards nor similarly situated civilians were tested); *Burka*, 680 F. Supp. at 601-03 (alcohol and drug users are not similarly situated, therefore equal protection claims are precluded).

29. *E.g.*, *Von Raab*, 816 F.2d at 181 (The court held that the employee's fifth amendment rights were not violated.), *modified on other grounds*, 109 S. Ct. 1384 (1989); *Burka*, 680 F. Supp. at 611 (Results from urinalysis are not testimonial evidence and hence are not violative of the fifth amendment.); *Rushton*, 653 F. Supp. 1510, 1528 (D. Neb. 1987) (A urine sample is neither testimonial nor communicative and hence is not protected by the fifth amendment right against self-incrimination.), *aff'd*, 844 F.2d 562 (8th Cir. 1988). The courts relied on the Supreme Court decision of *Schmerber v. California*, 384 U.S. 757 (1966), which held that the drawing of blood is neither protected speech nor writing.

30. *E.g.*, *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575, 591 (9th Cir. 1988) (finding a privacy right to have "certain information about drug use private," but because the employees' confidentiality had not yet been violated, the issue was not "ripe" for disposition), *rev'd on other grounds sub nom.* *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402 (1989); *Shoemaker*, 795 F.2d at 1144 (employee's privacy right was not violated because regulations provided for confidentiality of test results); *Burka*, 680 F. Supp. at 606 (privacy claims were not "ripe" for adjudication); *Rushton*, 653 F. Supp. at 1528 (privacy claims were without merit because the giving of the test samples was not witnessed and the test results were not disclosed), *aff'd*, 844 F.2d 562 (8th Cir. 1988).

31. In *Rushton*, the plaintiffs asserted that the drug testing program challenged their free exercise of religion because the program classified alcoholism as a disease rather than a sin, thereby imposing a heretical idea on them. 653 F. Supp. at 1519. They argued that this classification put them at odds with God, the Bible, and the elders of their church; moreover, it questioned their personal integrity. *Id.* The court acknowledged that although the programs might burden plaintiffs' religious practice, "either program is the least restrictive alternative available to [the government employer] to satisfy its compelling interest in assuring the health and welfare of the public and its employees." *Id.* at 1516.

32. *See supra* note 26.

33. *See supra* note 27.



### A. Reasonableness Under the Fourth Amendment

The fourth amendment requires that all searches conducted by the government be reasonable.<sup>34</sup> Federal courts have agreed that drug testing is a search within the meaning of the fourth amendment.<sup>35</sup> In *National Treasury Employees Union v. Von Raab*,<sup>36</sup> the United States Court of Appeals for the Fifth Circuit characterized urinalysis as a search under the fourth amendment because it infringes upon the employee's reasonable expectation of privacy.<sup>37</sup> As the court stated: "There are few activities in our society more personal or private than the passing of urine."<sup>38</sup>

A search must be reasonable in order to comport with the fourth amendment because only "unreasonable" searches are prohibited.<sup>39</sup> In determining the reasonableness of a search absent a warrant by a neutral magistrate, the federal courts perform a balancing test that is exemplified by the Supreme Court in *Von Raab*:

[O]ur cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.<sup>40</sup>

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34. The fourth amendment states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.

35. *E.g.*, *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1413 (1989). In *Skinner*, the Court stated: "Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment." *Id.*; *accord* *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1390 (1989); *see also* *Transport Workers' Union, Local 234 v. Southeastern Pa. Transp. Auth.*, 863 F.2d 1110, 1115 (3d Cir. 1988) (*SEPTA*), *vacated and remanded on other grounds*, 109 S. Ct. 3208 (1989); *Rushton v. Nebraska Pub. Power Dist.*, 844 F.2d 562, 566 (8th Cir. 1988); *Jones v. McKenzie*, 833 F.2d 335, 338 (D.C. Cir. 1987), *vacated sub nom. Jenkins v. Jones*, 109 S. Ct. 1633 (1989), *replaced*, 878 F.2d 1476 (D.C. Cir. 1989) (affirming and modifying its earlier decision); *National Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935, 942 (D.C. Cir. 1987); *McDonell v. Hunter*, 809 F.2d 1302, 1307 (8th Cir. 1987); *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986).

One federal judge, in defining urinalysis as a search, stated that "[a] reasonable person would not expect 'animals, children, snoops, and other members of the public' to rummage through one's urine, unlike garbage left at the curb." *Amalgamated Transit Union Div. 1279 v. Cambria County Transit Auth.*, 691 F. Supp. 898, 902 (W.D. Pa. 1988) (Diamond, J.).

36. 816 F.2d 170 (5th Cir. 1987), *aff'd in part and modified in part*, 109 S. Ct. 1384 (1988).

37. *Id.* at 175.

38. *Id.*

39. *See supra* note 34.

40. 109 S. Ct. 1384, 1390 (1989); *accord* *Skinner v. Railway Labor Executives' Ass'n*, 109

According to the Supreme Court, "[w]hat is reasonable, of course, 'depends on all the circumstances surrounding the search or seizure and the nature of the search and seizure itself.'"<sup>41</sup>

The federal courts generally have upheld drug or alcohol testing when an employer subjects an employee to testing based upon individualized suspicion that the employee is impaired;<sup>42</sup> however, the majority of disputes involve employees who are subjected to drug testing without individualized suspicion.<sup>43</sup> Until recently, the federal courts were divided as to whether individualized suspicion was required in order to uphold warrantless drug testing by employers under the fourth amendment.<sup>44</sup> The Supreme Court has put the issue to rest in

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S. Ct. 1402 (1989). With regard to this balancing approach, the Supreme Court has also stated:

A determination of the standard of reasonableness applicable to a particular class of searches requires "balancing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." . . . In the case of searches conducted by a public employer, we must balance the invasion of the employee's legitimate expectations of privacy against the government's need for supervision, control and the efficient operation of the workplace.

O'Connor v. Ortega, 480 U.S. 709, 719 (1987) (citation omitted).

41. *Skinner*, 109 S. Ct. at 1414 (1989) (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)); accord *Von Raab*, 109 S. Ct. at 1390 (companion opinion in which the Court also used an overall balancing approach). In the past, however, the Court has also used a two-part analysis to balance the respective interests:

[P]ublic employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances. Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable: "Determining the reasonableness of any search involves a two fold inquiry: first, one must consider 'whether the . . . action was justified at its inception,' *Terry v. Ohio*, [392 U.S. 1, 20 (1968)]; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'" *New Jersey v. T.L.O.*, [469 U.S. 325, 341 (1985)].

O'Connor, 480 U.S. at 725-26.

42. See, e.g., *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1267 (7th Cir.) (reasonable to test bus drivers involved in a major accident or when reasonably suspected of drug use), *cert. denied*, 429 U.S. 1029 (1976); *Burka v. New York City Transit Auth.*, 680 F. Supp. 590 (S.D.N.Y. 1988) (proper to test transportation workers pursuant to reasonable suspicion); *Wrightsell v. City of Chicago*, 678 F. Supp. 727, 734 (N.D. Ill. 1988) (proper to test police officers pursuant to reasonable suspicion); *Allen v. City of Marietta*, 601 F. Supp. 482, 484, 491 (N.D. Ga. 1985) (reasonable to test electric line workers who were directly observed smoking marijuana).

43. See *infra* notes 54-100 and accompanying text.

44. The United States Court of Appeals for the Third Circuit upheld testing with less than individualized suspicion, allowing random testing of transit operators. *Transport Workers' Union, Local 234 v. Southeastern Pa. Transp. Auth.*, 863 F.2d 1110 (3d Cir. 1988) (*SEPTA*), *vacated and remanded on other grounds*, 109 S. Ct. 3208 (1989). The Fifth Circuit similarly upheld testing with less than individualized suspicion, and permitted testing of employees who

two recent companion cases, *Skinner v. Railway Labor Executives' Association*<sup>45</sup> and *National Treasury Employees Union v. Von Raab*,<sup>46</sup> holding that individualized suspicion is not a mandatory component of the fourth amendment reasonableness requirement. In *Skinner*, the Court stated that "a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable,"<sup>47</sup> thereby holding that individualized suspicion is not mandated in all cases.<sup>48</sup> In both *Skinner* and *Von Raab*, the Court further held that the government may require drug testing of certain employees without particularized suspicion when the testing is tied to the happening of a certain event or circumstance that reduces an employee's reasonable expectation of privacy while furthering strong governmental interests such as public safety.<sup>49</sup>

Even prior to the Court's recent rulings, the federal courts have generally allowed three distinct categories of drug testing absent individualized suspicion: (1) testing within certain highly regulated industries;<sup>50</sup> (2) testing pursuant to a regularly scheduled job-related physical or other specific event;<sup>51</sup> and (3) testing justified by concerns for safety or national security.<sup>52</sup> In the first and third categories, society has such an overwhelming concern for protecting the public safety and the integrity within certain workplaces that the scales weigh in favor of permitting testing without individualized suspicion. In the second category, the weight on the side of the employee is lessened by minimizing the degree of personal intrusion, such as by testing only during a regularly scheduled job-related physical or upon the happening of a specific event. It is in the latter category that the Supreme Court has recently settled the split among the federal courts and

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transfer to sensitive positions within the U.S. Customs Service. *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987) (2-1 decision), *aff'd in part and modified in part*, 109 S. Ct. 1384 (1989). The Ninth Circuit, however, struck down an employer drug testing program in which railroad employees were subjected to post-accident drug testing absent individualized suspicion; the court held that it was an unreasonable violation of the fourth amendment. *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir.) (2-1 decision), *rev'd sub. nom.* *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402 (1989).

45. 109 S. Ct. 1402 (1989).

46. 109 S. Ct. 1384 (1989).

47. *Skinner*, 109 S. Ct. at 1417 (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976)).

48. *Id.* ("In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.").

49. *Id.* at 1422; *Von Raab*, 109 S. Ct. at 1393-95.

50. See *infra* notes 54-62 and accompanying text.

51. See *infra* notes 63-80 and accompanying text.

52. See *infra* notes 81-92 and accompanying text.

established that individualized suspicion is not a mandatory requirement for testing.<sup>53</sup>

Certain highly regulated industries comprise the first category in which the federal courts have upheld drug testing without individualized suspicion. This "administrative search" exception to the fourth amendment is a creature of case law that advocates the government's ability to search certain premises in a non-criminal context, and it is typically used when governmental interests would be frustrated by requiring a warrant in areas where people generally have a lower expectation of privacy.<sup>54</sup> In the seminal case of *Shoemaker v. Handel*,<sup>55</sup> the United States Court of Appeals for the Third Circuit extended the administrative search exception to permit drug testing of persons engaged in the highly regulated horseracing industry.<sup>56</sup> The court upheld regulations by the New Jersey Racing Commission that subjected jockeys to random drug and alcohol testing.<sup>57</sup> The pervasiveness of governmental regulation and the need to have those in the horseracing industry untarnished by drug influence suggested to the court that strong governmental and societal concerns in the integrity of public wagering outweighed the privacy interests of the participating individuals.<sup>58</sup> After *Shoemaker*, the federal courts have applied the administrative search exception to other highly regulated work-

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53. *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402 (1989).

54. The federal courts have carved out an exception to the warrant requirement normally imposed to comport with the reasonableness requirement of the fourth amendment; this exception applies when the government has a compelling interest to perform certain searches for administrative purposes. See, e.g., *Transport Workers' Union, Local 234 v. Southeastern Pa. Transp. Auth.*, 863 F.2d 1110 (3d Cir. 1988) (*SEPTA*), *vacated and remanded on other grounds*, 109 S. Ct. 3208 (1989). The administrative search exception permits "warrantless inspections of commercial property in cases in which the government interest in conducting the search would be frustrated by requiring prior notice." *Id.* at 1116. The *SEPTA* court further stated that "[c]ases applying the administrative search exception generally involve statutory schemes aimed at insuring safety or other 'substantial' government interests." *Id.* According to the Court in *Von Raab*, "[w]e have recognized before that requiring the Government to procure a warrant for every work-related intrusion 'would conflict with the common-sense realization that government offices could not function if every employment decision became a constitutional matter.'" *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1391 (1989) (quoting *O'Connor v. Ortega*, 480 U.S. 709, 722 (1987) (citation omitted)).

55. 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986).

56. *Id.* at 1142.

57. *Id.* at 1144.

58. *Id.* at 1142. In *Shoemaker*, the court used a two-part test in applying the administrative search exception: "First, there must be a strong state interest in conducting an unannounced search. Second, the pervasive regulation of the industry must have reduced the justifiable privacy expectation of the search." *Id.*

places including nuclear power plants,<sup>59</sup> police departments,<sup>60</sup> and prisons.<sup>61</sup> The administrative search exception espoused in *Shoemaker* has become well entrenched as part of federal doctrine; moreover, it has become an established exception to the individualized suspicion standard.<sup>62</sup>

Courts have also allowed drug testing without individualized reasonable suspicion where the testing is tied to a job-related physical or a specific event. Within this second category of permissible testing, the Supreme Court has solidified the proposition that drug testing based upon certain circumstances is constitutional although individu-

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59. The United States Court of Appeals for the Eighth Circuit upheld the random testing of employees with access to sensitive areas of a nuclear power plant. *Rushton v. Nebraska Pub. Power Dist.*, 844 F.2d 562, 567 (8th Cir. 1988), *aff'g* 653 F. Supp. 1510 (D. Neb. 1987). The plant had implemented random testing as a response to a newly published policy of the Nuclear Regulatory Commission that expressed the Commission's concern that a person under the influence of drugs or alcohol might cause or fail to properly react to an accident, even though inadvertently. 653 F. Supp. at 1514. In affirming the trial court, the court of appeals found that the nuclear industry is highly regulated; it thus applied the *Shoemaker* administrative search exception. *Rushton*, 844 F.2d at 566. The court held that the random drug testing policy at issue was reasonable under the fourth amendment without a showing of individualized suspicion. *Id.* at 567.

60. *See* *Policeman's Benevolent Ass'n v. Township of Wash.*, 850 F.2d 133, 141 (3d Cir. 1988) (Police officers, as members of a highly regulated industry, were subject to the administrative search exception.); *Weicks v. New Orleans Police Dep't*, 706 F. Supp. 453 (E.D. La. 1988) (The court, analogizing in part to highly regulated industries, upheld random testing of police officers working in certain specialized positions, as well as those seeking transfer into those positions, as reasonable under the fourth amendment.), *aff'd mem.*, 868 F.2d 1269 (5th Cir. 1989); *Ford v. Dowd*, 697 F. Supp. 1085, 1087 (E.D. Mo. 1988) (Law enforcement was recognized as a highly regulated occupation.).

In *Guiney v. Roache*, 873 F.2d 1557, 1558 (1st Cir. 1989), *vacating* 686 F. Supp. 956 (D. Mass. 1988), the First Circuit held that random drug testing of police officers who must carry a firearm was reasonable—analagizing to customs agents who carry firearms. The court of appeals vacated the district court's ruling that random testing of police officers was unreasonable and remanded for consideration in light of *Skinner v. Railway Labor Executives' Association*, 109 S. Ct. 1402 (1989), and *National Treasury Employees v. Von Raab*, 109 S. Ct. 1384 (1989).

61. *See* *McDonell v. Hunter*, 809 F.2d 1302, 1308 (8th Cir. 1987) (The state's interest in the regulation of prisons is at least as strong as its interest in the horseracing industry.); *Poole v. Stephens*, 688 F. Supp. 149, 155 (D.N.J. 1988) (Prison guard recruits were held to be "similarly situated" to jockeys and those in sensitive areas of nuclear plants.). *But see* *American Fed'n of Gov't Employees, Council 33 v. Meese*, 688 F. Supp. 547, 555 (N.D. Cal. 1988) (The court granted a temporary injunction against mass random testing of all employees of the Federal Bureau of Prisons because the program was unreasonable under the fourth amendment; it failed the two-part reasonableness test in *O'Connor* because no evidence of prior drug abuse was demonstrated.); *Taylor v. O'Grady*, 669 F. Supp. 1422, 1431, 1438 (N.D. Ill. 1987) (Randomly testing county correction officers was unreasonable because urinalysis does not prove "on-duty impairment" and because there were less intrusive means (such as trained supervision) for determining chronic drug use.); *see also supra* note 41 for the reasonableness test used in *O'Connor*.

62. *See supra* notes 54-61.

alized suspicion is lacking.<sup>63</sup> In these cases, the federal courts have balanced testing absent individualized suspicion in favor of the employer. This balance is the result of a lesser intrusion on the employee's expectation of privacy coupled with a strong governmental interest. A minimized expectation of privacy may result from a job-related accident or injury, and testing is necessary to further a public interest in safety.<sup>64</sup> In *Skinner v. Railway Labor Executives' Association*,<sup>65</sup> the Supreme Court addressed the issue of post-accident testing of railroad operating employees involved in a train accident.<sup>66</sup> The employer, responding to regulations promulgated by the Federal Railroad Administration,<sup>67</sup> implemented a program of post-accident drug and alcohol testing for its operating employees.<sup>68</sup> The United States Supreme Court granted certiorari to resolve the union's challenge that the testing program violated the employee's fourth amendment right against unreasonable search and seizure.<sup>69</sup> In reversing

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63. *Skinner*, 109 S. Ct. at 1417; accord *Von Raab*, 109 S. Ct. at 1391, 1397. For decisions applying *Skinner* and *Von Raab*, see *Jenkins v. Jones*, 878 F.2d 1476 (D.C. Cir. 1989); *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989); *Guiney v. Roache*, 873 F.2d 1557 (1st Cir. 1989); *National Fed'n of Fed. Employees v. Cheney*, Daily Lab. Rep. (BNA) No. 168, at D-1 (D.C. Cir. Aug. 31, 1989).

64. See, e.g., *Skinner*, 109 S. Ct. at 1418-19, 1422 (upheld post-accident drug testing of railroad operating employees); *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.) (reasonable to test bus drivers involved in a serious accident), *cert. denied*, 429 U.S. 1029 (1976); *National Air Traffic Controllers Ass'n v. Burnley*, 700 F. Supp. 1043 (N.D. Cal. 1988) (upheld drug testing of air traffic controller when there was reason to believe the employee contributed to the cause of an accident); *Burka v. New York City Transit Auth.*, 680 F. Supp. 590 (S.D.N.Y. 1988) (reasonable to administer drug tests to transit operators following a job-related incident).

65. 109 S. Ct. 1402 (1989), *rev'g* *Railroad Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir. 1988).

66. *Id.*

67. The Federal Railroad Administration (FRA) had acted pursuant to the Federal Railroad Safety Act of 1970, which authorized the Secretary of Transportation to promulgate the appropriate standards and rules necessary for railroad safety and prescribe regulations that require drug testing of employees involved in "certain train accidents." *Skinner*, 109 S. Ct. at 1407. The FRA found that "from 1972 to 1983 'the nation's railroads experienced at least 21 significant train accidents involving alcohol or drugs as a probable cause or contributing factor,' and that these accidents 'resulted in 25 fatalities, 61 non-fatal injuries, and property damage estimated at \$19 million (approximately \$27 million in 1982 dollars).'" *Id.* at 1407-08 (citations omitted).

68. *Id.*

69. The union had sought to enjoin the employer from drug testing absent individualized suspicion. The district court found, however, that the government's interest in the testing outweighed the intrusion to the employee. *Id.* at 1410. The United States Court of Appeals for the Ninth Circuit reversed, holding that drug testing of any employee must be based upon individualized suspicion in order to meet the reasonableness requirement of the fourth amendment. *Id.*; see also *Railroad Labor Executives' Ass'n v. Burnley*, 839 F.2d 575, 592 (9th Cir. 1988). The *Burnley* court made an initial determination that the administrative search exception did not apply because the railroad industry, and not its employees, were the principal subject of regulation. The court contrasted this with the jockeys in *Shoemaker v.*

the Ninth Circuit, the Supreme Court balanced in favor of the required drug testing because of a minimized expectation of privacy by operating employees<sup>70</sup> and because of strong public safety concerns.<sup>71</sup>

In other cases within the second category of testing, intrusion into an employee's privacy is lessened, for example, where drug testing accompanies a routine job-related physical by medical personnel<sup>72</sup>

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Handel, 795 F.2d 1136 (3d. Cir.), *cert. denied*, 479 U.S. 986 (1985), who were the principal subject of regulation. *Burnley*, 839 F.2d at 585. The court of appeals then applied the reasonableness test used in *O'Connor v. Ortega*, 480 U.S. 709, 719 (1987). *Burnley*, 839 F.2d at 586. The court concluded that testing employees for drugs merely because they were involved in an accident, rather than upon individualized suspicion, was not reasonable at its "inception." *Id.* at 587.

70. *Skinner*, 109 S. Ct. at 1422. The Court found that the "collecting and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable." *Id.* at 1413. The Court focused on the primary issue of "whether the Government's need to monitor compliance with these restrictions justifies the privacy intrusions at issue absent a warrant or individualized suspicion." *Id.* at 1415. The Court recognized that the warrant requirement in this instance would frustrate the governmental purpose in detecting drug or alcohol consumption. *Id.* at 1416. The Court stated:

In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion. We believe this is true of the intrusion in question here.

*Id.* at 1417. In this case, the Court found that "the expectations of privacy by covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent in substantial part, on the health and fitness of covered employees." *Id.* at 1418.

71. The Court found "compelling" public interests at stake, stating:

Employees subject to the [drug] tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences. Much like persons who have routine access to dangerous nuclear power facilities, employees who are subject to testing under the FRA regulations can cause great human loss before any signs of impairment become noticeable to supervisors or others.

*Id.* at 1419 (citations omitted). The Court concluded that the regulations promulgated by the FRA were reasonable in its aim to protect public safety. *Id.* at 1421.

In a somewhat similar situation, a transportation company had a policy of requiring any bus driver involved in a serious accident to submit to a drug test. *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1266 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976). The United States Court of Appeals for the Seventh Circuit balanced the public interest in safety against the intrusion into the privacy of an operating employee involved in a serious accident and held that the testing program was reasonable under the fourth amendment. *Id.* at 1267.

72. *See, e.g.,* *Policeman's Benevolent Ass'n v. Township of Wash.*, 850 F.2d 133 (3d Cir. 1988) (upheld drug testing of police officers during annual job physical); *Jones v. McKenzie*, 833 F.2d 335, 341 (D.C. Cir. 1987) (upheld drug testing of bus drivers and attendants of handicapped school children that is "conducted as part of a routine, reasonably required, employment-related medical examination"), *vacated sub nom. Jenkins v. Jones*, 109 S. Ct. 1633 (1989), *replaced*, 878 F.2d 1476 (D.C. Cir. 1989) (affirming and modifying its earlier decision); *Amalgamated Transit Union Div. 1279 v. Cambria County Transit Auth.*, 691 F. Supp. 898

or where the testing is conditioned upon an employee voluntarily transferring to a sensitive position.<sup>73</sup> In *National Treasury Employees Union v. Von Raab*,<sup>74</sup> the Commissioner of Customs implemented a policy that called for the drug testing of any employee who entered or transferred into a position meeting certain criteria in three distinct categories.<sup>75</sup> Specifically, any employee that has "direct involvement in drug interdiction or enforcement of related laws,"<sup>76</sup> carries a firearm, or handles certain classified materials is subjected to drug testing.<sup>77</sup> The Supreme Court upheld the drug testing of those employees who enter or transfer to positions encompassed by the first two criteria, but vacated the portion of the case that dealt with the testing of employees who may have come into contact with "classified" materials.<sup>78</sup> The Court concluded that "the Government's need to conduct the suspicionless search required by the Customs program outweighs the privacy interests of employees engaged directly in drug interdiction, and of those who otherwise are required to carry firearms."<sup>79</sup> In addition to the testing based on situations like *Von Raab*, there is a strong line of federal opinions establishing the proposition that drug testing by medical personnel during a regularly scheduled job-related physical for safety purposes is reasonable under the fourth amendment.<sup>80</sup> In these cases, the employee knows well in advance when the

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(W.D. Pa. 1988) (upheld drug testing of bus drivers and mechanics during their annual physicals); *Burka v. New York City Transit Auth.*, 680 F. Supp. 590 (S.D.N.Y. 1988) (upheld drug testing of transit operators during their annual physicals); *Wrightsell v. City of Chicago*, 678 F. Supp. 727, 734 (N.D. Ill. 1988) (upheld drug testing of police officers as part of "routine, employment-related medical examinations").

73. *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989), *aff'g and modifying* 816 F.2d 170 (5th Cir. 1987).

74. *Id.*

75. *Id.* at 1387.

76. *Id.* at 1388.

77. *Id.*

78. *Id.* at 1397-98. On the latter issue, the Court remanded for further clarification as to "whether the category defined by the Service's directive encompasses only those Custom employees likely to gain access to sensitive information." *Id.* at 1397. Positions to be tested under the government's program include those of: accountant, accounting technician, animal caretaker, attorney (all), baggage clerk, co-op student (all), electric equipment repairer, mail clerk/assistant, and messenger. *Id.*

79. *Id.* at 1392; *cf. Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402 (1989) (In a companion opinion, the Court upheld the post-accident drug testing of railroad operating employees absent individualized suspicion.).

80. *See supra* note 72. In *Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987), for example, a school system unilaterally implemented a program of testing bus drivers, mechanics, and bus attendants whose principal duty was transporting handicapped school children. *Id.* at 336. The drug testing was made a part of the employees' "routine, reasonably required, employment-related medical examination." *Id.* The court applied a fourth amendment balancing test to determine the reasonableness of the program. *Id.* at 338. On the individual rights side of the balance, the court noted that strong privacy interests of the employees were



test will take place. The drug screening is merely added to other medical tests performed during a routine physical examination.

The cases in this second category of testing create an exception for drug testing when public confidence and safety concerns are at stake in connection with either a job-related event or injury—post-accident testing or voluntary transfers to sensitive positions, for example—or as part of a routine job-related physical. The questions remaining unanswered by the Supreme Court are, however, the constitutionality of purely random drug testing and the constitutionality of drug testing of employees who do not directly affect public safety or national security. These questions remain unanswered by the Court although, in the case of the former question, particular circumstances may warrant both a lower expectation of privacy by an employee and a stronger governmental interest or, in the case of the latter question, the testing of employees not affecting safety or security may be made by less intrusive means than purely random testing.

In the third category of testing, the lower federal courts and at least one appellate court have upheld random drug testing of employees holding certain positions due to the exceptional public safety and national security concerns associated with the positions.<sup>81</sup> In *Trans-*

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involved, and that the "privacy interests can be outweighed only by strong governmental concerns." *Id.* at 340. The court found, however, that this concern was lessened because testing as part of the employee's physical examination minimized the intrusion into his privacy. *Id.* In looking at the public interest side of the balance, the court noted that the government has a strong concern for "safely transporting" handicapped students whose welfare could be jeopardized by transportation employees who are impaired. *Id.* In balancing both sides, the court upheld the school system's drug detection program. *Id.* at 341. The court further noted that "the test employed is one that has a nexus to the employer's legitimate safety concern." *Id.* On certiorari, the Supreme Court vacated and remanded in light of *Skinner* and *Von Raab*. *Jenkins v. Jones*, 109 S. Ct. 1633, 1633 (1989). On remand, the District of Columbia Circuit reaffirmed its earlier decision with slight modification, stating that "a drug testing program by the school system 'is not an undue infringement on the justifiable expectations of privacy of covered employees,' and, therefore, 'the Government's compelling interests outweigh privacy concerns.'" *Jones v. Jenkins*, 878 F.2d 1476, 1477 (D.C. Cir. 1989) (citations omitted).

81. See, e.g., *National Fed'n of Fed. Employees v. Cheney*, 884 F.2d 603 (D.C. Cir. 1989) (In recognizing public safety and security concerns, the court permitted mandatory random drug testing by the Army of all personnel who are in aviation, guard/police, or the treatment staff of the Alcohol and Drug Abuse Prevention and Control Program.); *modifying National Fed'n of Fed. Employees v. Carlucci*, 690 F. Supp. 46 (D.D.C. 1988); *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989) (The court, relying upon *Skinner* and *Von Raab*, held that the random drug testing of all Department of Justice personnel having "top secret" security clearance was constitutional.); *Ensor v. Rust Eng'g Co.*, 704 F. Supp. 808, 813-16 (E.D. Tenn. 1989) (Ruling upon a fourth amendment claim, the court applied the two-part reasonableness test used in *O'Connor v. Ortega*, 480 U.S. 709 (1987), and upheld the random drug testing of construction workers with access to sensitive areas of a government nuclear weapons plant.); *Uniform Div. Officers Ass'n Local 17 v. Brady*, No. 88-3377 (D.D.C. Dec. 23, 1988) (WESTLAW, Allfeds library) (Denying a preliminary injunction to halt random drug testing

*port Workers' Union, Local 234 v. Southeastern Pennsylvania Transportation Authority (SEPTA)*,<sup>82</sup> the United States Court of Appeals for the Third Circuit expanded the permissibility of employee drug testing absent individualized suspicion, if the impairment of an employee had the potential to cause serious injury to the general public.<sup>83</sup> The court addressed the constitutional validity of a random drug testing program that was unilaterally imposed on the operating personnel of a public transportation company operating trains, subways, streetcars, and buses.<sup>84</sup> The court found that the administrative search exception was not applicable,<sup>85</sup> and it performed a two-part balancing analysis to determine the reasonableness of the program.<sup>86</sup> The first inquiry was whether the program was reasonable at its inception.<sup>87</sup> The court found that the testing program was justified at its inception because a number of serious accidents had occurred at the company and a high percentage of employees had tested positive for drugs.<sup>88</sup> The second inquiry was whether the means employed to accomplish the purpose

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of secret service agents, the court found "strong," "significant," and "compelling" governmental interests to justify the program.); *American Fed'n of Gov't Employees v. Dole*, 670 F. Supp. 445, 446-49 (D.D.C. 1987) (It was reasonable to randomly test "Category I" Department of Transportation personnel in law enforcement, aviation, and other related positions.); *Mullholland v. Department of the Army*, 660 F. Supp. 1565, 1570 (E.D. Va. 1987) (The random testing of civilians who are responsible for maintaining helicopters that are critical to our national security was reasonable.).

82. 863 F.2d 1110 (3d Cir. 1988) (*SEPTA*).

83. *Id.* at 1113.

84. *Id.* at 1112. The union challenged the testing program as an unreasonable and therefore unconstitutional search and seizure under the fourth amendment. *Id.* The company had established that of the 262 employees that the company tested "with cause" between the beginning of 1985 and the middle of 1987, "thirty one percent tested positive for drug metabolites or alcohol." *Id.* at 1120. Additionally, the company experienced six major accidents in 1986-87 after which the operators tested positive for drugs. *Id.* As a result of drug abuse among its employees, the company added random drug testing to its existing substance abuse program. *Id.*

85. *Id.* at 1117. The court found that although the transportation industry itself was highly regulated, the regulation scheme was not aimed at the individual employees; hence, the employees did not have the decreased expectation of privacy that was a prerequisite of the administrative search exception. *Id.*

86. The court stated the two part balancing test:

When justification for a warrantless search conducted without probable cause is sought on the basis of the balancing of the government interest and the individual's privacy expectations, we must apply a two-part test. Courts must look, first, to whether the search as actually conducted was "justified at its inception," and second, to whether the search "was reasonably related in scope to the circumstances which justified the interference in the first place."

*Id.* at 1118.

87. *Id.*

88. *Id.* at 1121. In 1986 and 1987, six operators tested positive for drugs after being involved in accidents. *Id.* at 1119-20. Furthermore, of the "new hires" given drug tests during that same period, 12% tested positive for drugs. *Id.* at 1120.

of the program were reasonable.<sup>89</sup> The court found that the need to test was related to the program's purpose, which was to uncover drug users in positions affecting public safety and not to detect impairment.<sup>90</sup> Moreover, the court found that the program was reasonably designed to meet those ends.<sup>91</sup> The court held in favor of the employer and entered a new order that allowed random testing if certain conditions were met.<sup>92</sup> Although *SEPTA* and a handful of district court opinions carve out an exception where there is a great concern for public safety, it is still premature to predict if this exception will be constitutionally affirmed upon further review. Although the Supreme Court has not yet addressed purely random drug testing, exceptionally strong public safety and national security interests weigh in its favor under the balancing approach adopted by the *Skinner* and *Von Raab* Court.

In cases which do not have dominant elements from any of the

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89. *Id.* at 1118.

90. *Id.* at 1122.

91. The court noted that management discretion was minimized through computerized random selection of those who were to be tested. Moreover, the program had specific safeguards that protected employees by regulating the chain of custody, verification, and confidentiality. *Id.* at 1121-22.

92. The testing program was "limited to employees whose job performance implicates public safety." *Id.* at 1121. The court held the rule requiring employees who were absent more than 30 days from work to be subjected to drug testing as unconstitutional because these employees were also subjected to the random testing program. *Id.* at 1122.

The Third Circuit, however, exempted railway employees from random testing, holding that they were entitled to the status quo pursuant to Sections 5 and 6 of the Railway Labor Act, Ch. 247, §§ 5-6, 44 Stat 577 (1926) (codified as amended at 45 U.S.C. §§ 155, 156 (1982 & Supp. IV 1986)). *SEPTA*, 863 F.2d at 1122-24 (relying on *Railway Labor Executives' Ass'n v. Conrail*, 845 F.2d 1187 (3d Cir. 1988), which held that drug testing is a "major dispute"). Subsequent to this decision, the Supreme Court reversed *Conrail* and held that management imposed drug testing of railroad employees during their physical examinations was a "minor," not "major," dispute under the Railway Labor Act. *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2477, 2479-80 (1989); see *supra* note 24.

On June 26, 1989, the Supreme Court granted petitioners' writ of certiorari from the Third Circuit's decision in *SEPTA*. *Southeastern Pa. Transp. Auth. v. Transport Workers' Union, Local 234*, 109 S. Ct. 3208 (1989). The Court vacated the Third Circuit's opinion and remanded "for further consideration in light of *Consolidated Rail Corp. v. Railway Labor Executives Ass'n*." *Id.* Because *Consolidated Rail* applies only to those *SEPTA* employees covered under the Railway Labor Act, it is unlikely that the remainder of the Third Circuit's original opinion pertaining to the constitutionality of the random testing program will be affected. Had the Supreme Court disagreed with the reasoning of the court of appeals on the fourth amendment issue, the Court probably would have also cited its recent opinions, *Skinner v. Railway Labor Executives' Association*, 109 S. Ct. 1402 (1989), and *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989), both involving employee drug testing. Furthermore, because the Supreme Court in *Consolidated Rail* classified drug testing as a "minor dispute," on remand, the Third Circuit will have the latitude to lift the injunction excluding railway employees from management ordered drug testing—something it could not do if the issue was a "major dispute." *Consolidated Rail*, 109 S. Ct. at 2480-81.

previous categories, the federal courts generally have struck down drug testing programs that are not founded upon individualized suspicion and that are void of strong governmental interests.<sup>93</sup> In *Bangert v. Hodel*,<sup>94</sup> for example, the Department of Interior unilaterally implemented an employee drug testing program with a random testing component in addition to a reasonable suspicion component.<sup>95</sup> The union contested the program as an unreasonable search and seizure under the fourth amendment.<sup>96</sup> The court found that the program was not designed to promote the government's objective of eliminating or reducing drug impairment in the workplace because the government failed to demonstrate any significant amount of previous drug abuse within the designated positions.<sup>97</sup> Moreover, the court found that the program was overly broad in selecting those employees to be subjected to random testing, explaining that it is hardly credible that there were thousands of employees occupying sensitive positions.<sup>98</sup> Many of the employees targeted for random testing did not occupy positions that directly affected either national security or public safety.<sup>99</sup> The district court gave great deference to the concept of

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93. See, e.g., *Owner-Operators Indep. Drivers Ass'n v. Burnley*, 705 F. Supp. 481 (N.D. Cal. 1989) (The court granted a temporary injunction on mass random testing and post-accident testing of commercial vehicle drivers because the tests were unreasonable under the fourth amendment.); *Harmon v. Meese*, 690 F. Supp. 65, 69-70 (D.D.C. 1988) (The court granted a temporary injunction preventing mass random testing in the "Offices, Boards and Litigating Divisions of the Department of Justice" because the employer could show no history of employee drug abuse nor show a "nexus between what the search is expected to produce and the governmental interest."), *aff'd in part and rev'd in part sub nom.* *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989) (The court upheld an injunction prohibiting drug testing of all federal prosecutors and all employees who have access to grand jury proceedings.); *Thomson v. Weinberger*, 682 F. Supp. 829 (D. Md. 1988) (The testing of civilian employees of the Army without individualized suspicion was unreasonable under the fourth amendment.), *rev'd sub nom.* *Thomson v. Marsh*, 878 F.2d 1431 (4th Cir. 1989); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986) (The mass testing of all firefighters and policemen without individualized suspicion was unreasonable under the fourth amendment.); *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875 (E.D. Tenn. 1986) (The mass testing of all firefighters without individualized suspicion was unreasonable under the fourth amendment.).

94. 705 F. Supp. 643 (D.D.C. 1989).

95. *Id.* at 645.

96. *Id.* at 645, 647.

97. *Id.*

98. *Id.* at 649.

99. *Id.* The sensitive positions included clerical assistants, mail and file clerks, secretaries, personnel officers, auditors, and "some 3,753 Bureau of Indian Affairs teachers, education specialists, counselors, dormitory attendants and social workers." *Id.* The court estimated that only about one out of every 2000 employees would be uncovered as a drug user under the government's drug testing program. *Id.* at 652. The court stated: "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." *Id.* at 654.

individual privacy from unwarranted searches and, in a sternly worded opinion, granted the union a temporary injunction against the random testing portion of the program.<sup>100</sup> In contrast to the second category of cases previously mentioned, none of the cases in this group involved testing as part of a job-related physical nor were they limited only to post-accident situations. Within this group, no increased weight is given to the state interest nor is there a lessening of an employee's reasonable expectation of privacy. In applying the outright balancing approach used by the Supreme Court in *Skinner* and in *Von Raab*, it is unlikely that the testing of employees in positions that have no bearing on public safety, national security, or other overriding state interests will be constitutionally valid absent individualized reasonable suspicion.

The current body of federal case law seems to be slowly shifting the scales in favor of the broader societal concern of eradicating drugs from the workplace by expanding the areas in which drug testing is constitutionally permissible absent individualized suspicion. *Transport Workers' Union, Local 234 v. Southeastern Pennsylvania Transportation Authority (SEPTA)*<sup>101</sup> represents the outer limit of these cases. The *SEPTA* court went beyond the exception for highly regulated industries that was articulated in *Shoemaker v. Handel*<sup>102</sup> and *Rushton v. Nebraska Public Power District*,<sup>103</sup> and beyond the exception for drug testing in which personal intrusion is minimized by circumstances such as the annual job-related physicals illustrated in *Jones v. McKenzie*.<sup>104</sup> The *SEPTA* opinion draws its strength from the assertion that, in public transportation, safety concerns for the daily travelling public outweigh the personal intrusions of random

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100. *Id.* at 654-56. Judge Green posed a hypothetical scene that might occur if the testing was upheld:

[A]s the tourists view the majestic Interior Department buildings from the outside, there being lectured by their tour guides on the freedoms under our system of government, on the inside of these buildings platoons of bureaucrats will march in unending streams toward the Department's toilets for their next urination procedure under the steady gaze of the government's urination inspectors. As the toilets are reached, these inspectors will make certain that the candidates' outer garments are removed and nothing untoward has been hidden, that the water in the bowl is sufficiently blue, the urine is at the correct temperature of between 90.5 and 99.8 degrees Fahrenheit, and the cup is sufficiently full.

*Id.* at 655.

101. 863 F.2d 1110 (3d Cir. 1988) (*SEPTA*), *vacated and remanded on other grounds*, 109 S. Ct. 3208 (1989).

102. 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986).

103. 844 F.2d 562 (8th Cir. 1988).

104. 833 F.2d 335 (D.C. Cir. 1987).

drug testing.<sup>105</sup> The Supreme Court has reinforced this shift in the law of drug testing through their recent opinions in *Skinner*<sup>106</sup> and *Von Raab*.<sup>107</sup> A discernable trend is emerging in which the federal courts are increasingly diluting individual rights of privacy when drug testing is at issue.

### B. *Substantive and Procedural Due Process Under the Fourteenth Amendment*

Employees have also challenged drug testing programs as violative of their constitutional right of due process.<sup>108</sup> Pursuant to the fifth and fourteenth amendments, the government may not act to deprive any person "of life, liberty or property without due process of law."<sup>109</sup> The fifth amendment restricts the federal government from violating an individual's right of due process, and the fourteenth amendment similarly bars state governments—and their political subdivisions—from depriving any person of due process of law.<sup>110</sup> Due process has both a procedural and a substantive component.<sup>111</sup> Procedural due process provides that the government must use a fair procedure before depriving a person of "life, liberty or property."<sup>112</sup> Substantive due process analysis, on the other hand, focuses on the constitutionality of the "substance" or effect of a governmental action or law and not on the actual process used.<sup>113</sup>

Under procedural due process analysis, a two-step approach is used to ascertain if an individual's rights have been violated.<sup>114</sup> First, the employee must have a constitutionally protected property or liberty interest at stake.<sup>115</sup> Second, the court must determine what process the individual is due before that property or liberty interest may

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105. 863 F.2d 1110, 1124 (3d Cir. 1988). The court held: "[T]here are some public interests that carry sufficient weight to justify even a more than minimal privacy intrusion. Public health and safety concerns have traditionally been considered of the highest magnitude of public interest considerations." *Id.*

106. 109 S. Ct. 1402 (1989).

107. 109 S. Ct. 1384 (1989).

108. See *supra* note 27 and accompanying text.

109. The fifth amendment states: "No person shall . . . be deprived of life, liberty or property, without due process of law . . . ." U.S. CONST. amend V. The fourteenth amendment states: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend XIV, § 1.

110. See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 314-16 (3d ed. 1986).

111. *Id.* at 321-22.

112. *Id.* at 322.

113. *Id.*

114. *Id.* at 452-53.

115. *Id.*

be taken away.<sup>116</sup> In the context of drug testing of public sector employees, the first question is whether the employee has a liberty or property interest in his job or reputation.

The concept of liberty within the fourteenth amendment includes "those provisions of the Bill of Rights which the Court deems to be 'incorporated' into the due process clause as well as 'fundamental' rights which are derived either from the concept of liberty or other constitutional values."<sup>117</sup> According to one constitutional law text:

When the government acts as an employer there are special issues regarding the existence of liberty and property rights in employment. If the individual employee has not been granted a term of guaranteed employment, absent removal for just cause, he will have no property right or entitlement to continue employment in that position. . . .

However, if dismissing the employee, the government also forecloses the individual's possible employment in a wide range of activities in both the public and private sectors, this dismissal will constitute a deprivation of liberty sufficient to require that the individual be granted a fair hearing.<sup>118</sup>

Also, if a government official impugns a person's reputation so as to limit his "freedom of choice or action," such as by distributing false information about the person, this may constitute a violation of a person's liberty under due process.<sup>119</sup> The harm to the person's reputation must be so severe, however, that it restricts the person's ability to gain employment or to associate with others.<sup>120</sup>

The scope of property under due process centers on the concept of "entitlement."<sup>121</sup> An individual has an entitlement in public sector employment if the individual has been hired for a position and is guaranteed continued employment by applicable law.<sup>122</sup> An employee possessing an entitlement must receive fair process before the public sector employer may withdraw a benefit.<sup>123</sup> Additionally, an

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116. *Id.*

117. *Id.* at 459. According to the authors of one constitutional law treatise: "The most significant implied 'fundamental rights' are the right to freedom of association, the right to interstate travel, the right to privacy (including some freedom of choice in marital, family, and sexual matters), and the right to vote." *Id.* at 465. Procedural due process requires that the government not limit a person from exercising a "fundamental constitutional right" without a procedure to determine the basis for the limitation. *Id.* at 465-66.

118. *Id.* at 469.

119. *Id.* at 470-71.

120. *Id.* at 471.

121. *Id.* at 474.

122. *Id.*

123. *Id.* at 475. Entitlement theory applies to government employees. *Id.* at 478-79. The authors stated: "If the government gives the employee assurances of continual employment or

employee can be deprived of a property interest in his reputation if governmental action so injures the employee's reputation as to deprive him of the liberty to seek other associations or "employment opportunities."<sup>124</sup>

The second question within procedural due process is: What process is the employee due?<sup>125</sup> The guarantee of due process is that it "must be fundamentally fair to the individual in the resolution of the factual and legal basis for governmental actions which deprive him of life, liberty, or property."<sup>126</sup> In *Mathews v. Eldridge*,<sup>127</sup> the Supreme Court established a balancing test to determine what procedures are due an individual.<sup>128</sup>

In the drug testing context, one federal judge has stated that "[t]he essential elements of [procedural] due process are notice and a fair opportunity to be heard."<sup>129</sup> In *Capua v. City of Plainfield*,<sup>130</sup> the city subjected all firefighters to a surprise drug test via urinalysis.<sup>131</sup> The firefighters who had tested positive for drugs were immediately fired.<sup>132</sup> The *Capua* court found that the firefighters had "constitutionally protected property interests" in their jobs under state stat-

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dismissal for only specified reasons, then there must be a fair procedure to protect the employee's interests when the government seeks to discharge him from the position." *Id.* at 479. The entitlement may be created as a matter of statute, contract, or supervisory action. *Id.*

124. *Id.* at 480.

125. *Id.* at 485.

126. *Id.* at 487.

127. 424 U.S. 319 (1976).

128. The *Mathews* Court formulated a three prong balancing test, stating:

[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requisites would entail.

*Id.* at 335.

129. *Allen v. City of Marietta*, 601 F. Supp. 482, 494. (N.D. Ga. 1985) (There was no violation of procedural due process for employees who were fired for smoking marijuana on the job—the procedures for "appeal of termination are sufficient to satisfy the requirements of notice and fair opportunity to be heard."); see also *Poole v. Stephens*, 688 F. Supp. 149, 158 (D.N.J. 1988) ("Post-determination hearing" satisfied due process requirements for correction officer recruits who tested positive for drugs.); *Burka v. New York City Transit Auth.*, 680 F. Supp. 590, 610 (S.D.N.Y. 1988) (Applicants for employment do not have a protected property right, and employed plaintiffs are given fair hearings within the meaning of due process.).

130. 643 F. Supp. 1507 (D.N.J. 1986).

131. *Id.* at 1511.

132. *Id.* at 1512.



ute.<sup>133</sup> The court held that the city's unilateral action was "completely lacking in procedural safeguards."<sup>134</sup> Procedural due process in the drug testing context also requires that test results that lead to the disciplining of an employee must be based upon accurate procedures.<sup>135</sup> The court must weigh the "risk of an erroneous deprivation of [a property or liberty] interest through the procedures used" against the government's interests in light of possible alternatives.<sup>136</sup> In this context, the chance of the drug testing program yielding inaccurate results due to laboratory procedures or misidentified samples must be considered in deciding whether the employee's procedural due process rights have been violated.

Under substantive due process analysis, the courts look to see if the challenged activity is tailored to fit the government's objective.<sup>137</sup> In the context of drug testing, the objective is a safer workplace that is free of drugs. One constitutional text stated: "[W]hile due process still protects a person's liberty in society, only those liberties or rights of 'fundamental' constitutional magnitude will be actively protected by the Supreme Court. . . . Only when a law is a totally arbitrary deprivation of liberty will it violate the substantive due process guarantee."<sup>138</sup> Hence, a drug testing program would only violate the substantive due process rights of an employee if the drug testing program were so arbitrary or unreliable as to deprive the employee of a funda-

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133. *Id.* at 1520. The court stated that the firefighters, as municipal employees, had "a reasonable expectation of continued employment unless and until 'just cause' is established for their termination [under state statute]." *Id.* The court added that the state's "statutory scheme bestows a property interest upon plaintiffs which cannot be abrogated by their government employer without due process." *Id.* (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985)).

134. *Id.* The court stated:

Such testing was unilaterally imposed by [the city] as a condition of employment without prior notice to plaintiffs and without opportunity for plaintiffs to voice objection or seek advice of counsel. There were no standards promulgated to govern such department-wide drug raids, nor any provisions made to protect the confidentiality interests of firefighters whose personal physiological information unexpectedly came into the hands of government authorities.

*Id.* at 1521.

135. *See, e.g., National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 181 (5th Cir. 1987) (The procedures utilized in testing, storing, and handling the urinalysis sample did not violate the plaintiff's right to due process.), *aff'd and modified on other grounds*, 109 S. Ct. 1384 (1989); *Rushton v. Nebraska Pub. Power Dist.*, 653 F. Supp. 1510, 1525-27 (D. Neb. 1987) (The court held that the procedures were reliable because the union had failed to show any harm caused or likely to be caused by the possibility of a third party tampering with or confusing the urinalysis sample.), *aff'd*, 844 F.2d 562 (8th Cir. 1988).

136. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

137. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 110, at 357.

138. *Id.*

mental right such as privacy.<sup>139</sup> In *Rushton v. Nebraska Public Power District*,<sup>140</sup> for example, the union challenging a mandatory drug testing program advanced the claim that the procedures used were so unreliable as to violate substantive due process.<sup>141</sup> The *Rushton* court looked at the procedures used and ascertained that there was not a major risk of "false positives" that could act as an arbitrary or capricious deprivation of liberty.<sup>142</sup> The court concluded that the drug testing program did not violate the employee's rights to due process.<sup>143</sup>

In sum, a public sector employer may not discipline or discharge an employee under a substance abuse program unless the employee was accorded fair notice and the opportunity to be heard. Additionally, the employer is constrained from acting in an arbitrary or capricious manner when sanctioning the employee; otherwise, fundamental rights of fairness are violated.

### III. PRIVATE SECTOR: DRUG TESTING AND ARBITRATORS

The Constitution restricts the government from infringing upon certain individual rights and liberties.<sup>144</sup> Absent state action, however, private sector employers are not constrained by the Constitution.<sup>145</sup> Non-union employees subjected to management imposed drug testing must therefore seek relief through state statutes, where

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139. *Id.*

140. 653 F. Supp. 1510 (D. Neb. 1987), *aff'd*, 844 F.2d 562 (8th Cir. 1988).

141. *Id.* at 1525.

142. *Id.*

143. *Id.*

144. The majority of "individual rights and liberties" provided for by the Constitution and its amendments are restrictions only on government action. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 110, at 421. Generally, private persons, such as private sector employers, are not constrained by the Constitution. "State action" arises any time a government entity is involved, either federal or state, including the actions of any legislative, executive, or judicial body. In some instances, however, a private entity's actions are so connected to a governmental entity as to subject the private entity to constitutional limitations. *Id.* at 422. The courts look to see if the government has "commanded, encouraged or otherwise directed" the private actor in performing a "state" function; if it has, the private action falls within the purview of the Constitution. *Id.* at 432.

The cases where the relationship between the governmental entity and the private actor may bring the Constitution into play generally fall into one of three categories: (1) the private actor is extensively regulated or licensed by the government; (2) there are numerous "physical and economic contacts" between the government and the private actor; or (3) the private actor was provided some form of direct aid or subsidy by the government. *Id.* at 438. In essence, the courts generally balance the various factors in deciding if the private actor is constrained by the Constitution under the doctrine of "state action." For a complete discussion of state action, see generally *id.* at 421-50; Schneider, *State Action—Making Sense Out of Chaos—An Historical Approach*, 37 U. FLA. L. REV. 737 (1985).

145. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 110, at 421-50; see, e.g., Skinner

they exist, and through common law tort actions.<sup>146</sup> In addition to having rights afforded non-union workers, union employees in the private sector have rights under subsections 8(a)(5) and 8(d) of the NLRA with which they may challenge management imposed drug testing programs.<sup>147</sup> Unions may further claim that management unilaterally breached a collective bargaining agreement by exceeding the scope of management's enumerated rights.<sup>148</sup> A union may proceed simultaneously against management under both the NLRA and the collective bargaining agreement.<sup>149</sup>

The initial question in determining whether management may unilaterally impose a drug testing program is whether management must first bargain with the union before establishing such a program. The obligation to bargain with a union prior to implementing a drug testing policy can arise as a matter of statute,<sup>150</sup> as a matter of con-

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v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989). The *Skinner* Court applied constitutional law to a private railroad under "state action" doctrine, stating:

A railroad that complies with the provisions of Subpart C of the [FRA regulations] does so by compulsion of sovereign authority, and the lawfulness of its acts is controlled by the Fourth Amendment. . . . [Petitioner argues that nothing in the regulations] compels any testing by private railroads . . . . Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities, . . . a question that can only be resolved "in light of all of the circumstances." . . . Here, specific features of the regulations combine to convince us that the Government did more than adopt a passive position toward the underlying private conduct.

*Id.* at 1411 (citations omitted).

146. For a complete discussion of state statutory actions and common law tort actions against management for unilaterally imposed drug testing on employees, see Survey, *Survey of the Law on Employee Drug Testing*, 42 U. MIAMI L. REV. 553, 650-80 (1988).

147. The National Labor Relations Act was established to promote both industrial peace and commerce. See R. GORMAN, *supra* note 9, at 1. An employer can violate Section (8)(a)(5) of the Act by failing to bargain with the union over implementation of a substance abuse program, it can violate Section (8)(d) by unilaterally changing the terms and conditions of the collective bargaining agreement, or it can violate both sections. See *id.* at 455-66; see also Lynch, *Deferral, Waiver, and Arbitration Under the NLRA: From Status to Contract and Back Again*, 44 U. MIAMI L. REV. 237, 259-64 (1989).

148. The collective bargaining agreement by its terms may require a duty to bargain. See, e.g., *infra* note 149. In addition to the parties' possible obligations to bargain, arbitrators will interpret the management rights provisions of collective bargaining agreements under basic notions of contract interpretation when deciding where to place the entitlement to drug test.

149. See, e.g., Laidlaw Transit, 89 Lab. Arb. (BNA) 1001 (1987) (Caraway, Arb.) (The union filed both an unfair labor practice with the NLRB pursuant to the NLRA and an arbitration grievance under the collective bargaining agreement.).

150. NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5); see *supra* note 12. See generally Casey, *Drug Testing in a Unionized Environment*, 13 EMPLOYEE REL. L.J. 599 (1988) (discussing the duty to bargain under the NLRA); Morikawa, Hurtgen, Connor, & Costello, *Implementation of Drug and Alcohol Testing in the Unionized Workplace*, 11 NOVA L.J. 653 (1987) (discussing the duty to bargain with the union under the NLRA); Survey, *Survey of the Law on Employee*

tract,<sup>151</sup> or possibly both.<sup>152</sup> When a labor dispute involves both statutory issues pursuant to the NLRA and contractual issues pursuant to a collective bargaining agreement, both the NLRB and the arbitrator have jurisdiction.<sup>153</sup> Arbitrators will additionally inquire whether management's program is reasonable as a matter of contract interpretation.<sup>154</sup> The first part of this Section will focus upon management's duty to bargain in the unionized private sector. The second part of

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*Drug Testing*, 42 U. MIAMI L. REV. 553, 609-34 (1988) (discussing the rights and duties of collective bargaining under the NLRA).

151. A contractual duty to bargain may be created in at least three different ways. First, a clause in a collective bargaining agreement may incorporate a duty to bargain into the collective agreement by reference. Second, the arbitrator may infer the requirements of the NLRA into the contract. Generally, however, arbitrators see themselves as interpreters of collective bargaining agreements rather than enforcers of affirmative statutory duties to bargain under the NLRA; they thus avoid resolving statutory conflicts in this area. See F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 336 (3d ed. 1977). Third, the terms and conditions of an agreement may place a duty upon management to give the union notice and bargain over any changes in the rules, such as a safety requirement, before they are implemented. See, e.g., *Gem City Chems., Inc.*, 86 Lab. Arb. (BNA) 1023 (1986) (Warns, Arb.) (Management may not unilaterally implement drug testing as a safety matter when the labor agreement required bargaining over all safety matters.).

152. See F. ELKOURI & E. ELKOURI, *supra* note 151, at 334 (discussing the NLRA, the arbitrator, and the NLRB).

153. *Id.*; see also Comment, *Distinguishing Arbitration and Private Settlement in NLRB Deferral Policy*, 44 U. MIAMI L. REV. 341 (1989).

154. Arbitrators have often focused on the reasonableness of particular drug testing programs. See *Boston Edison Co.*, 92 Lab. Arb. (BNA) 374 (1989) (Nicolau, Arb.); *Dow Chem. Co.*, 91 Lab. Arb. (BNA) 1385 (1989) (Baroni, Arb.); *Southern Cal. Rapid Transit Dist.*, 89-1 Lab. Arb. Awards (CCH) ¶ 8117 (1989) (Jones, Arb.); *Regional Transp. Dist.*, 91 Lab. Arb. (BNA) 213 (1988) (Goldstein, Arb.); *Department of the Army*, 91 Lab. Arb. (BNA) 137 (1988) (Huffcut, Arb.); *Vulcan Materials Co.*, 90 Lab. Arb. (BNA) 1161 (1988) (Caraway, Arb.); *Utility Workers Union, Local No. 387*, 89-2 Lab. Arb. Awards (CCH) ¶ 8406 (1988) (Fraser, Arb.); *Warehouse Distrib. Centers, Inc.*, 90 Lab. Arb. (BNA) 979 (1987) (Weiss, Arb.); *Sanford Corp.*, 89 Lab. Arb. (BNA) 968 (1987) (Wies, Arb.); *North County Transit Dist.*, 89 Lab. Arb. (BNA) 768 (1987) (Collins, Arb.); *Trailways, Inc.*, 88 Lab. Arb. (BNA) 1073 (1987) (Goodman, Arb.); *Day & Zimmermann, Inc.*, 88 Lab. Arb. (BNA) 1001 (1987) (Heinsz, Arb.); *Cincinnati Gas & Elec. Co.*, 88-1 Lab. Arb. Awards (CCH) ¶ 8204 (1987) (Kindig, Arb.); *International Bhd. of Elec. Workers, Local Union No. 647*, 87-2 Lab. Arb. Awards (CCH) ¶ 8570 (1987) (Weisbrod, Arb.); *Marathon Petroleum Co.*, 87-2 Lab. Arb. Awards (CCH) ¶ 8549 (1987) (Grimes, Arb.); *Metropolitan Transit Auth.*, 87-2 Lab. Arb. Awards (CCH) ¶ 8472 (1987) (Baroni, Arb.); *Albuquerque Mailers Union Local No. 156*, 87-2 Lab. Arb. Awards (CCH) ¶ 8427 (1987) (Fogleberg, Arb.); *Union Plaza Hotel*, 88 Lab. Arb. (BNA) 528 (1986) (McKay, Arb.); *Citgo Petroleum Corp.*, 88 Lab. Arb. (BNA) 521 (1986) (Allen, Arb.); *Hopeman Bros.*, 88 Lab. Arb. (BNA) 373 (1986) (Rothschild, Arb.); *Concrete Pipe Prods. Co.*, 87 Lab. Arb. (BNA) 601 (1986) (Caraway, Arb.); *Gem City Chems., Inc.*, 86 Lab. Arb. (BNA) 1023 (1986) (Warns, Arb.); *Indianapolis Power & Light Co.*, 86-2 Lab. Arb. Awards (CCH) ¶ 8507 (1986) (Volz, Arb.); *Weyerhaeuser Co.*, 86 Lab. Arb. (BNA) 182 (1985) (Levin, Arb.); *CFS Continental, Inc.*, 86-1 Lab. Arb. Awards (CCH) ¶ 8070 (1985) (Lumbley, Arb.); *Gulf Oil Prods. Co.*, 85-2 Lab. Arb. Awards (CCH) ¶ 8481 (1985) (Holman, Arb.).

One arbitrator, in deciding whether a unilaterally imposed drug testing program violated the parties' collective bargaining agreement, stated: "[The reasonableness test] stems, not just from general principles of industrial relations and the balancing of interests inherent therein,

this Section will consider what values arbitrators have assigned in interpreting a collective bargaining agreement absent a duty to bargain.

### A. *Duty to Bargain*

If management is under a duty to bargain with a union but it implements a drug testing program before doing so, then management may be charged in court with an unfair labor practice under the NLRA and risk having the drug testing program enjoined.<sup>155</sup> Similarly, an arbitrator may void the program pursuant to the collective bargaining agreement because of management's failure to bargain with the union prior to the program's implementation.<sup>156</sup> Moreover, the NLRB General Counsel's Advice Memorandum<sup>157</sup> has mandated that the implementation of any drug testing policy be a subject of bargaining between the employer and the unions.<sup>158</sup> The majority of published arbitrators' opinions,<sup>159</sup> however, make no mention of the employer's duty to bargain with the union, as the opinion by the NLRB General Counsel's Advice Memorandum would require, prior to the implementation of testing.<sup>160</sup>

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but from the specific provisions of the Parties' collective agreement." *Boston Edison*, 92 Lab. Arb. (BNA) at 380.

155. See *supra* note 147. The NLRB may seek to enjoin management's unilateral program pursuant to Section 10(j) of the NLRA until the parties bargain to agreement or to a good faith impasse. See NLRA § 10(j), 29 U.S.C. § 160(j). It is unclear, however, what remedy would be available to an employee who is disciplined after testing positive under a program initiated in the absence of such bargaining.

156. See, e.g., *Philips Indus., Inc.*, 90 Lab. Arb. (BNA) 222 (1988) (DiLeone, Arb.) (The employer's drug testing program was void for failure to bargain with the union.); *Laidlaw Transit*, 89 Lab. Arb. (BNA) 1001 (1987) (Caraway, Arb.) (same).

157. See *supra* note 9.

158. *Id.*; see also *infra* note 162. The NLRB has affirmed the position of the General Counsel that drug testing is a mandatory subject of bargaining. *Johnson Bateman Co.*, Daily Lab. Rep. (BNA) No. 117, at F-1 (June 20, 1989). But see *Star Tribune*, Daily Lab. Rep. (BNA) No. 117, at E-1 (June 20, 1989) (a companion opinion in which the NLRB held that the drug testing of applicants is not a mandatory subject of bargaining because job applicants are not part of the bargaining unit).

159. This research includes labor arbitration cases that involve mandatory employee drug testing, as published in Labor Arbitration Awards (CCH) and Labor Arbitration Reports (BNA) principally between 1985 and 1989.

160. See *Regional Transp. Dist.*, 91 Lab. Arb. (BNA) 213 (1988) (Goldstein, Arb.); *Department of the Army*, 91 Lab. Arb. (BNA) 137 (1988) (Huffcut, Arb.); *Vulcan Materials Co.*, 90 Lab. Arb. (BNA) 1161 (1988) (Caraway, Arb.); *Maple Meadow Mining*, 90 Lab. Arb. (BNA) 873 (1988) (Phelan, Arb.); *Boise Cascade Corp.*, 90 Lab. Arb. (BNA) 791 (1988) (Nicholas, Arb.); *International Union of Operating Eng'rs, Local Union No. 351*, 88-2 Lab. Arb. Awards (CCH) ¶ 8318 (1988) (Williams, Arb.); *Warehouse Distrib. Centers, Inc.*, 90 Lab. Arb. (BNA) 979 (1987) (Weiss, Arb.); *Sanford Corp.*, 89 Lab. Arb. (BNA) 968 (1987) (Wies, Arb.); *South Carolina Elec. & Gas Co.*, 89 Lab. Arb. (BNA) 845 (1987) (Boals, Arb.); *North County Transit Dist.*, 89 Lab. Arb. (BNA) 768 (1987) (Collins, Arb.); *Trailways, Inc.*,

In spite of this situation, at least one arbitrator has expressly followed the mandate of the General Counsel's Advice Memorandum. In *Laidlaw Transit*,<sup>161</sup> the arbitrator held that the employer was under a duty to bargain over a drug testing program as required by the General Counsel.<sup>162</sup> The union had filed both a class action grievance pursuant to the collective bargaining agreement and an unfair labor practice charge with the NLRB under Subsections 8(a)(1) and 8(a)(5) of the NLRA;<sup>163</sup> these claims were based on management's refusal to bargain over the implementation of the policy.<sup>164</sup> The NLRB deferred the violations of the NLRA to the arbitrator.<sup>165</sup> The arbitrator found that the union had "never explicitly or implicitly surrendered its Section 8(a)(5) rights to negotiate the change of conditions of employment inherent [in] implementing a drug testing program."<sup>166</sup>

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88 Lab. Arb. (BNA) 1073 (1987) (Goodman, Arb.); Day & Zimmermann, Inc., 88 Lab. Arb. (BNA) 1001 (1987) (Heinsz, Arb.); Young Insulation Group, Inc. 88-1 Lab. Arb. Awards (CCH) ¶ 8205 (1987) (Boals, Arb.); ITT Barton Instruments Co., 88-1 Lab. Arb. Awards (CCH) ¶ 8013 (1987) (Draznin, Arb.); Texas City Ref., Inc., 87-2 Lab. Arb. Awards (CCH) ¶ 8609 (1987) (Milentz, Arb.); Marathon Petroleum Co., 87-2 Lab. Arb. Awards (CCH) ¶ 8549 (1987) (Grimes, Arb.); Amalgamated Transit Union, Local 1433, 87-2 Lab. Arb. Awards (CCH) ¶ 8510 (1987) (Speroff, Arb.); Metropolitan Transit Auth., 87-2 Lab. Arb. Awards (CCH) ¶ 8472 (1987) (Baroni, Arb.); Union Plaza Hotel, 88 Lab. Arb. (BNA) 528 (1986) (McKay, Arb.); Citgo Petroleum Corp., 88 Lab. Arb. (BNA) 521 (1986) (Allen, Arb.); Hopeman Bros., 88 Lab. Arb. (BNA) 373 (1986) (Rothschild, Arb.); Union Oil Co., 88 Lab. Arb. (BNA) 91 (1986) (Weiss, Arb.); Deaconess Medical Center, 88 Lab. Arb. (BNA) 44 (1986) (Robinson, Arb.); Concrete Pipe Prods. Co., 87 Lab. Arb. (BNA) 601 (1986) (Caraway, Arb.); Gem City Chems., Inc., 86 Lab. Arb. (BNA) 1023 (1986) (Warns, Arb.); Indianapolis Power & Light Co., 86-2 Lab. Arb. Awards (CCH) ¶ 8507 (1986) (Volz, Arb.); Weyerhaeuser Co., 86 Lab. Arb. (BNA) 182 (1985) (Levin, Arb.); Inspiration Consol. Copper Co., 85-2 Lab. Arb. Awards (CCH) ¶ 8534 (1985) (Tamoush, Arb.); Gulf Oil Prods. Co., 85-2 Lab. Arb. Awards (CCH) ¶ 8481 (1985) (Holman, Arb.).

161. 89 Lab. Arb. (BNA) 1001 (1987) (Allen, Arb.).

162. *Id.* at 1018. The arbitrator concluded:

[A] drug testing policy goes beyond the scope of a mere "work rule;" rather it is a dramatic and significant change in terms and conditions of employment, involving particularly safety and disciplinary actions, which should be negotiated in accordance with Sections 8(a)(5) and 8(d) of the National Labor Relations Act.

....  
Probably the most significant form of support for the undersigned's determination herein comes from a very recent ruling by NLRB General Counsel Rosemary Collyer.

*Id.*; see *supra* note 9.

163. NLRA § 8(a)(1), (5), 29 U.S.C. § 158(a)(1), (5); see *supra* note 12.

164. *Laidlaw Transit*, 89 Lab. Arb. (BNA) at 1005. The union asserted that "unilateral changes by an employer during the course of a collective bargaining relationship concerning matters which are mandatory subjects of bargaining are generally regarded as *per se* refusals to bargain." *Id.* at 1010.

165. *Id.* at 1005.

166. *Id.* at 1020. The arbitrator further found that although the management rights clause of the collective bargaining agreement gave the company the right to adopt "reasonable work

The arbitrator held that the parties are to negotiate to an agreement or to a "good faith impasse," in which case testing can be resumed.<sup>167</sup> Implicit in the arbitrator's opinion is the conclusion that if management implements its drug testing policy after reaching impasse, the union's only recourse is to re-arbitrate the issue; however, the effect of this would be to preclude the union from "striking."

In contrast to *Laidlaw Transit*, the arbitrator in *Donaldson Mining Co.*<sup>168</sup> based his ruling on the interpretation of the collective bargaining agreement and not on the NLRA.<sup>169</sup> The *Donaldson* arbitrator specifically stated: "While the Union has taken the position that the Company's actions constitute a violation of the National Labor Relations Act, the findings in this matter flow from an application of the terms and conditions of the agreement."<sup>170</sup> The arbitrator held, however, that the employer must cease its drug testing program because it had acted unreasonably in not giving the employees prior notice of the program's implementation.<sup>171</sup>

Aside from a possible statutory duty to bargain under the

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rules," there was nothing in the agreement that mentioned drug testing. *Id.* Because "the labor agreement [did] not specifically grant to management the right to unilaterally establish and enforce a drug testing policy, then it should be considered a 'condition of employment' requiring joint negotiations." *Id.*

167. *Id.* at 1022.

168. 91 Lab. Arb. (BNA) 471 (1988) (Zobrak, Arb.).

169. *Id.* at 475. The union had filed an unfair labor practice charge with the NLRB over the company's refusal to bargain over the implementation of drug testing. *Id.* at 473. The NLRB Regional Director chose not to issue a complaint on the matter and instead "administratively deferred" the matter to the arbitrator. *Id.*

170. *Id.* at 475. The arbitrator recognized the position stated by the NLRB General Counsel:

In Memorandum GC-87-5 issued September, 1987, the General Counsel took the position that drug testing for current employees and job applicants is a mandatory subject for bargaining under Section 8(d) of the NLRA. The General Counsel also took the position that implementation of a drug testing program is a substantial change in working conditions, even where physical examinations previously have been given.

*Id.* The arbitrator then stated, however, that the opinion of the General Counsel was subject to approval and that he was basing his findings on the agreement. *Id.*

171. *Id.* at 476; see also *Albuquerque Mailers Union Local No. 156*, 87-2 Lab. Arb. Awards (CCH) ¶ 8427, at 5629 (1987) (Fogleberg, Arb.). The arbitrator stated that:

[T]he Grievant and his [union] representative allege that the Employer, by unilaterally putting its Start from Scratch [drug testing] program into effect, violated the National Labor Relations Act by refusing to bargain over these subjects, and therefore the program itself is not valid. This position however, must be rejected in the light of the specific language set forth in the parties' Master Agreement . . . which . . . reserves with the Company the right to establish, amend and enforce reasonable rules and regulations provided they do not conflict with the express provisions of the Contract or applicable law.

*Id.*

NLRA, a collective bargaining agreement may provide that the parties are to negotiate any changes in certain working conditions. In *Gem City Chemicals, Inc.*,<sup>172</sup> for example, the employer tried to unilaterally implement a drug testing policy as part of the employees' annual safety physicals.<sup>173</sup> An employee refused to be tested for drugs during his scheduled physical exam and was subsequently discharged.<sup>174</sup> The union objected to the unilateral implementation of the policy, arguing that employee drug testing was a safety matter and that it was subject to bargaining as were all other safety matters under the collective bargaining agreement.<sup>175</sup> Examining the agreement's purpose in requiring physicals, the arbitrator concluded that the purpose of the rule was to determine if the employee had suffered any adverse effects from the handling of toxic chemicals.<sup>176</sup> Management argued that drug testing was necessary to promote a safe workplace.<sup>177</sup> The arbitrator used management's argument, however, to conclude that if the purpose of drug testing was safety, then management was prohibited from implementing the policy because the collective bargaining agreement required the parties to bargain over all changes to safety matters.<sup>178</sup> Management argued alternatively that drug testing could be imposed as a management right pursuant to the provision of the collective bargaining agreement that prohibited illegal drugs or intoxication on the job.<sup>179</sup> The arbitrator held that management could test for drugs under its management's rights clause if management had probable cause to believe that the employee was under the influence and if management gave the employee fair and adequate notice prior to testing.<sup>180</sup> In sum, the arbitrator concluded that management had exceeded its contract rights by requiring all employees to be tested for drugs without a showing of individualized probable cause.<sup>181</sup>

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172. 86 Lab. Arb. (BNA) 1023 (1986) (Warns, Arb.).

173. *Id.* at 1024.

174. *Id.*

175. *Id.* at 1023-24.

176. *Id.* at 1025.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 1026. The arbitrator also ordered the employer to reinstate the employee. *Id.*

Another example of this general approach can be seen in *Philips Industries, Inc.*, 90 Lab. Arb. (BNA) 222 (1988) (DiLeone, Arb.). The company unilaterally implemented a drug and alcohol testing policy for all employees without consulting with the union. *Id.* at 224. The arbitrator concluded:

Whenever there is an implementation of a program which is not expressly provided for in the agreement, and it directly affects the conditions of



Notwithstanding the cases discussed, the majority of published arbitration opinions examined make no mention of a duty to bargain under either the NLRA or the parties' contract.<sup>182</sup> Instead, arbitrators apply notions of reasonableness in interpreting collective bargaining agreements.<sup>183</sup>

### B. Reasonableness of the Drug Testing Program

In addition to challenges based on either a statutory or contractual duty to bargain, a union may challenge the validity of a drug testing program by bringing a Section 8(d) claim with the NLRB; this type of claim would be based on a unilateral change in working conditions during the term of a collective bargaining agreement.<sup>184</sup> A union may also dispute management's action pursuant to a grievance and arbitration clause in its collective bargaining agreement. The union may even pursue both remedies simultaneously. Regardless of the theory used, the majority of the cases are ultimately disputed in arbitration.<sup>185</sup> The balance of this Section will therefore focus on how

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employment, one cannot go so far as to conclude that Management can superimpose certain conditions of employment under a plant rules clause or a Management rights clause without Union participation.

*Id.* at 225. The arbitrator held that the drug policy unilaterally implemented by management was a violation of the agreement. *Id.*

182. See *supra* notes 159-60.

183. See *supra* note 154.

184. Section 8(d) of the NLRA states:

Obligation to bargain collectively. For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement . . . .

NLRA § 8(d), 29 U.S.C. § 158(d). For a discussion of drug testing as a mandatory subject of bargaining, see *supra* note 9.

185. If the union brings a Section 8(d) claim before the NLRB, the NLRB can either hear the complaint and issue a ruling or defer the dispute to the arbitrator. Under the deferral doctrine enunciated in *Collyer Wire* and its progeny, the tendency of the NLRB has been to defer action in those cases in which the collective bargaining agreement provides for arbitration. See *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971) (policy of the NLRB to defer to arbitrators all unfair labor practice disputes in which there was an arbitration provision in the labor agreement). See generally Edwards, *Deferral to Arbitration and Waiver of the Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB*, 46 OHIO ST. L.J. 23 (1985) (discussing deferral theory); Peck, *A Proposal to End NLRB Deferral to the Arbitration Process*, 60 WASH. L. REV. 355 (1985) (discussing deferral theory). The General Counsel noted in her Advice Memorandum that, absent injunctive relief, deferral policies still apply. Daily Lab. Rep. (BNA) No. 184, at D-1 (Sept. 24, 1987). Thus, should the Board exercise its option to defer under *Collyer Wire*, the union may be worse off—in terms of time spent—than if the union initially sought arbitration.

If the NLRB decides to hear the complaint, the Board may read the management rights clause liberally and rule in favor of the employer. See *Milwaukee Spring Div. of Ill. Coil Spring Co.*, 268 N.L.R.B. 601 (1984) (*Milwaukee Spring II*) (rights not specifically granted to

arbitrators have interpreted the validity of management imposed drug testing programs.

Within a collective bargaining agreement, even in those cases in which arbitrators have given management the entitlement to implement drug testing unilaterally pursuant to a broad reading of a "management rights" clause or other contractual language, the nature and scope of drug testing is often constrained by contractual language that provides that employers may not discipline or terminate employees without "just cause."<sup>186</sup> In *Vulcan Materials Co.*,<sup>187</sup> for example, an employer had unilaterally implemented a drug testing policy that included random testing.<sup>188</sup> A provision of the collective bargaining agreement provided that the employer could not discipline or discharge an employee without "just cause," a situation that led the arbitrator to conclude: "The just cause rule is an integral part of the Drug and Alcohol Program. Any rule or regulation imposed by the company is subject to the individual rights of the employee. The necessity of the program and its adoption does not abdicate these rights."<sup>189</sup>

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the union in the collective bargaining agreement are retained by management), *aff'd sub nom.* *UAW v. NLRB*, 765 F.2d 175 (D.C. Cir. 1985). Although the union would argue that the implementation of the drug testing program was not based upon the economic factors that precipitated *Milwaukee Spring II*, management could argue strongly that economic losses caused by employee absenteeism, decreased productivity, accidents, and increased liability to third persons justified the program. See Lynch, *supra* note 147, at 285-92.

186. See Department of the Army, 91 Lab. Arb. (BNA) 137 (1988) (Huffcut, Arb.); Vulcan Materials Co., 90 Lab. Arb. (BNA) 1161 (1988) (Caraway, Arb.); Sanford Corp., 89 Lab. Arb. (BNA) 968 (1987) (Wies, Arb.) (employer had "just cause" to discipline but not to discharge employee); North County Transit Dist., 89 Lab. Arb. (BNA) 768 (1987) (Collins, Arb.); Trailways, Inc., 88 Lab. Arb. (BNA) 1073 (1987) (Goodman, Arb.); Day & Zimmermann, Inc., 88 Lab. Arb. (BNA) 1001 (1987) (Heinsz, Arb.); Union Plaza Hotel, 88 Lab. Arb. (BNA) 528 (1986) (McKay, Arb.) (employer had "just cause" to discipline but not to discharge employee); Gem City Chems., Inc., 86 Lab. Arb. (BNA) 1023 (1986) (Warns, Arb.); Weyerhaeuser Co., 86 Lab. Arb. (BNA) 182 (1985) (Levin, Arb.); CFS Continental, Inc., 86-1 Lab. Arb. Awards (CCH) ¶ 8070 (1985) (Lumley, Arb.); Gulf Oil Prods. Co., 85-2 Lab. Arb. Awards (CCH) ¶ 8481 (1985) (Holman, Arb.).

Some arbitrators have held, however, that the employer had "just cause" to discharge its employee. See Regional Transp. Dist., 91 Lab. Arb. (BNA) 213 (1988) (Goldstein, Arb.); Cincinnati Gas & Elec. Co., 88-1 Lab. Arb. Awards (CCH) ¶ 8204 (1987) (Kindig, Arb.); Texas City Ref., Inc., 87-2 Lab. Arb. Awards (CCH) ¶ 8609 (1987) (Milentz, Arb.); Metropolitan Transit Auth., 87-2 Lab. Arb. Awards (CCH) ¶ 8472 (1987) (Baroni, Arb.); Albuquerque Mailers Union Local No. 156, 87-2 Lab. Arb. Awards (CCH) ¶ 8427 (1987) (Fogleberg, Arb.); Citgo Petroleum Corp., 88 Lab. Arb. (BNA) 521 (1986) (Allen, Arb.); Concrete Pipe Prods. Co., 87 Lab. Arb. (BNA) 601 (1986) (Caraway, Arb.); Indianapolis Power & Light Co., 86-2 Lab. Arb. Awards (CCH) ¶ 8507 (1986) (Volz, Arb.).

187. 90 Lab. Arb. (BNA) 1161, 1161 (1988) (Caraway, Arb.).

188. *Id.*

189. *Id.* at 1166. Because the company had violated the "just cause" provision of the collective bargaining agreement, the arbitrator directed that the company cease its policy of random drug testing. *Id.* at 1167.

In the drug testing context, arbitrators have defined "just cause" in a variety of ways. One arbitrator has defined "just cause" as "essentially a standard of reasonableness and fairness."<sup>190</sup> Another arbitrator, emphasizing the necessity that all drug testing programs be reasonable, has stated: "[A]n Employer generally has the right to make *reasonable* rules of conduct for its Employees, and it may enforce those rules through disciplinary action. . . . [I]t is also generally accepted that the rules of conduct for Employees must *reasonably* be related to the safe and efficient operations of the Employer."<sup>191</sup> Yet another arbitrator has stated: "The basic tests for reasonableness are those of arbitrariness, capriciousness and discrimination. It is also fair to say that its method of application is implicit, as no law is any better than its application."<sup>192</sup> Thus, once arbitrators determine that a contract entitles management to require drug testing, the reasonableness of the program determines whether the employer has the ultimate entitlement to test or the employee has the ultimate entitlement not to be tested.

The reasonableness of a drug test is best examined from two perspectives: (1) whether it is reasonable to require a drug test of the individual employee; and (2) whether the procedures used before, during, and after the drug test are reasonable in all aspects.<sup>193</sup> The first inquiry concerns whether there is reasonable suspicion or other unique circumstances to justify the testing of an employee. The sec-

190. Indianapolis Power & Light Co., 86-2 Lab. Arb. Awards (CCH) ¶ 8507, at 5140 (1986) (Volz, Arb.).

191. Maple Meadow Mining, 90 Lab. Arb. (BNA) 873, 879 (1988) (Phelan, Arb.) (emphasis added).

192. South Carolina Elec. & Gas Co., 89 Lab. Arb. (BNA) 845, 848 (1987) (Boals, Arb.).

193. See, e.g., Dow Chem. Co., 91 Lab. Arb. (BNA) 1385 (1989) (Baroni, Arb.). In *Dow*, the arbitrator stated:

[The] "*balancing of interests*" approach, which has developed within the federal circuits, assesses whether a drug test is *justified*, from a need perspective, based upon two identified factors:

- a) The nature of the industry and work environment;
- b) The evidence of an existing drug problem, in terms of the seriousness and extent of it. Once a test has been justified as needed, the courts inquire into the reasonableness of the *process* itself. Among the many factors affecting the outcome of this inquiry are:
  - a) The extent to which the employer may exercise discretion in choosing subjects or interpreting results;
  - b) The accuracy of the testing;
  - c) The uniformity of the testing . . . ;
  - d) The degree to which the testing procedure intrudes upon the subject's privacy expectation.

*Id.* at 1388.

ond inquiry concerns the reasonableness of the application of the drug testing process as a whole.

# 1. WAS THERE A REASONABLE BASIS TO TEST FOR DRUGS?

Arbitrators have upheld drug testing administered pursuant to an existing labor agreement,<sup>194</sup> pursuant to an employee's consent to be tested,<sup>195</sup> or pursuant to a union's waiver of its right to protest the program.<sup>196</sup> Absent these factors, arbitrators generally require individualized reasonable suspicion before an employer may require an employee to submit to a drug test.<sup>197</sup> Arguably, arbitrators are implicitly following similar standards enunciated in public law doctrine. Like the federal courts, arbitrators have upheld drug testing programs that were based upon a showing of reasonable suspicion that the employee to be tested is under the influence of drugs or alcohol prior to the administering of the drug test.<sup>198</sup>

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194. See *Cincinnati Gas & Elec. Co.*, 88-1 Lab. Arb. Awards (CCH) ¶ 8204 (Kindig, Arb.) (The discharge of an employee was upheld because the employee had refused to be tested pursuant to the terms of the collective bargaining agreement.).

195. See *Deaconess Medical Center*, 88 Lab. Arb. (BNA) 44 (1986) (Robinson, Arb.) (A nurse's admission to having used marijuana provided reasonable cause for a hospital to require the nurse's consent to random testing.).

196. A union may be held to have consented to a management imposed drug policy by failing to object in a timely manner. See *Texas City Ref., Inc.*, 87-2 Lab. Arb. Awards (CCH) ¶ 8609 (1987) (Milentz, Arb.) (The union could not challenge the implementation of a drug policy that had been in place for eight months without being contested; hence, the arbitrator limited the issue to whether the program was reasonable.).

197. As stated by one arbitrator:

Arbitrators are not requiring employers to have sufficient evidence to support a criminal indictment before they compel an employee to undergo a drug test. Nor do they seek evidence beyond a reasonable doubt. They do not even look for a preponderance of the evidence to show that the employee is guilty of the charge against him. All they want to know is that the employer has some rational grounds for testing the employee, not whim or caprice, not unfounded suspicion or discriminatory motive, not ancient superstitions or old wives' tales. In short, is the employer acting like a reasonable man, seeking to protect his business and recognizing that the employees also have rights which are entitled to protection?

*Warehouse Distrib. Centers, Inc.*, 90 Lab. Arb. (BNA) 979, 982 (1987) (Weiss, Arb.); *see also infra* notes 198-203 and accompanying text.

198. See *Regional Transp. Dist.*, 91 Lab. Arb. (BNA) 213 (1988) (Goldstein, Arb.) (Erratic behavior coupled with an accident provided reasonable suspicion to test a bus driver.); *Metropolitan Transit Auth.*, 87-2 Lab. Arb. Awards (CCH) ¶ 8472 (1987) (Baroni, Arb.) (Direct observation of erratic behavior, red eyes, and slurred speech provided reasonable cause to test a bus driver.); *Albuquerque Mailers Union Local No. 156*, 87-2 Lab. Arb. Awards (CCH) ¶ 8427 (1987) (Fogleberg, Arb.) (Observed abnormal behavior provided reasonable suspicion to test at a publishing company.); *Citgo Petroleum Corp.*, 88 Lab. Arb. (BNA) 521 (1986) (Allen, Arb.) (Direct observation at a petroleum facility of a confused, stumbling, unsteady employee with slurred speech and blinking eyes provided reasonable suspicion to test.).

In support of an individualized suspicion standard, arbitrators have placed a high value on the interests of employees in doing as they please when off duty; this holds true, however, only as long as the employees' behavior does not adversely affect the employer and as long as the employees are not impaired at work.<sup>199</sup> Many arbitrators find that subjecting employees to drug testing not based on individualized suspicion is an attempt to regulate the employees' off duty conduct.<sup>200</sup> Many of the published opinions examined hold that there must be a nexus between a positive test result and job impairment before an employee may be discharged.<sup>201</sup> Additionally, several arbi-

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199. See *Maple Meadow Mining*, 90 Lab. Arb. (BNA) 873 (1988) (Phelan, Arb.) (sustaining union's grievance in which management had unilaterally implemented a policy that required all employees returning to work from absence or layoff to be tested for drugs although there was no reasonable suspicion). The arbitrator in *Maple Meadow* stated that "[employers] may not regulate the conduct of Employees away from the job except where such conduct has some relation to job performance or workplace operations or where it may adversely affect the Employer's business." *Id.* at 879; see also *Trailways, Inc.*, 88 Lab. Arb. (BNA) 1073, 1083 (1987) (Goodman, Arb.) (Employee's discharge was unjust because neither the company's rules nor DOT regulations banned the use of marijuana off-premises or during non-working hours, and "there [was] not a scintilla of evidence to establish that the employee was under the influence when he reported for work."); *Weyerhaeuser Co.*, 86 Lab. Arb. (BNA) 182, 189 (1985) (Levin, Arb.) ("[T]he Company must prove the employee cannot perform his work because of drug use. That is the whole point in the rule. The 'off duty' conduct must affect the work performance."); *CFS Continental, Inc.*, 86-1 Lab. Arb. Awards (CCH) ¶ 8070, at 3297 (1985) (Lumbley, Arb.) (There was no basis to discharge an employee for drug use away from work absent a showing that drug use impaired the employer's reputation, the employee's ability to perform, or the employee's willingness to work with the employer.).

200. See *supra* note 199.

201. See *Department of the Army*, 91 Lab. Arb. (BNA) 137 (1988) (Huffcut, Arb.); *Vulcan Materials Co.*, 90 Lab. Arb. (BNA) 1161 (1988) (Caraway, Arb.); *Maple Meadow Mining*, 90 Lab. Arb. (BNA) 873 (1988) (Phelan, Arb.); *International Union of Operating Eng'rs, Local Union No. 351*, 88-2 Lab. Arb. Awards (CCH) ¶ 8318 (1988) (Williams, Arb.); *North County Transit Dist.*, 89 Lab. Arb. (BNA) 768 (1987) (Collins, Arb.); *Trailways, Inc.*, 88 Lab. Arb. (BNA) 1073 (1987) (Goodman, Arb.); *Day & Zimmermann, Inc.*, 88 Lab. Arb. (BNA) 1001 (1987) (Heinsz, Arb.); *ITT Barton Instruments, Co.*, 88-1 Lab. Arb. Awards (CCH) ¶ 8013 (1987) (Draznin, Arb.); *Gem City Chems., Inc.*, 86 Lab. Arb. (BNA) 1023 (1986) (Warns, Arb.); *Weyerhaeuser Co.*, 86 Lab. Arb. (BNA) 182 (1985) (Levin, Arb.); *CFS Continental, Inc.*, 86-1 Lab. Arb. Awards (CCH) ¶ 8070 (1985) (Lumbley, Arb.); *Inspiration Consol. Copper Co.*, 85-2 Lab. Arb. Awards (CCH) ¶ 8534 (1985) (Tamoush, Arb.).

One arbitrator noted "that many arbitrators take the position that nexus with work or employer interests must also be present along with evidence of alcohol or other substance symptoms; i.e. a positive test standing alone is not just cause for discharge in their thinking." *Young Insulation Group, Inc.*, 88-1 Lab. Arb. Awards (CCH) ¶ 8205, at 4030 (1987) (Boals, Arb.). For example, a positive test for marijuana only means that the person was exposed to the drug at some time during the past month. *Marathon Petroleum Co.*, 87-2 Lab. Arb. Awards (CCH) ¶ 8549, at 6223 (1987) (Grimes, Arb.). Thus, a person can test positive based upon "off duty" conduct and not necessarily be currently impaired, and as arbitrator Grimes noted:

It is recognized that the higher the nanogram reading [measuring a substance's presence], the more recent the use, although experts agree it is not possible to pinpoint time of use from urine test data. The marijuana metabolites have a

trators have placed great value upon the right of the employee not to be forced to give incriminating and highly personal evidence against himself, via drug testing, without just cause.<sup>202</sup> As one arbitrator stated:

The difficulty involved in requiring all employees involuntarily to take a drug screen is that this is requiring employees to submit to a test and place their medical situation on record with the consequent possibility of incriminating themselves in terms of illegal drugs without probable cause on the job to suspect that any of the individuals are in fact taking drugs.<sup>203</sup>

These arbitrators have given to private sector employees an additional entitlement that is not found in the breadth of current judicial interpretations, which hold that urinalysis is neither testimonial nor communicative under the fifth amendment.<sup>204</sup>

Like the preceding federal opinions, the cases in which individualized suspicion is absent can be divided generally into three categories: (1) testing within highly regulated industries; (2) testing pursuant to either a job-related physical or the happening of an accident; and (3) testing that is justified by societal concerns for public safety. Although a direct comparison between federal and arbitral decisions is not always possible,<sup>205</sup> there are strong similarities between the decisions of the two forums.

In cases involving heavily regulated industries, such as nuclear power plants, at least one arbitrator has expressly followed federal precedent to uphold drug testing with less than individualized suspi-

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"half-life" in the body that means significant traces of them diminish enough to produce a negative reading in a "recreational" user in 10 days to two weeks. A heavy user of marijuana might possibly have traces in his body for up to 30 days.

*Id.*

One scholar in this area has argued that drug tests do not address the difficulty in measuring a person's impairment caused by drug use, stating: "The bias against 'experiential' models of drug effects reflects a conceptual reductionism of human beings to mere components or parts (body or mind) reacting like machines to drug stimuli in standardized fashion." S. WISOTSKY, *BREAKING THE IMPASSE IN THE WAR ON DRUGS* 19-20 (1986).

202. See *Vulcan Materials Co.*, 90 Lab. Arb. (BNA) 1161, 1166 (1988) (Caraway, Arb.) ("When an employee is required to undergo urinalysis for a drug or alcohol test without probable cause or reasonable suspicion, he is required to give evidence against himself. He must prove his innocence before any discipline is imposed."); *Day & Zimmermann, Inc.*, 88 Lab. Arb. (BNA) 1001, 1008 (1987) (Heinsz, Arb.) ("[T]he Grievant's reasonable right not to have the burden of proof to demonstrate her fitness or of proving her innocence of a rule violation and the highly intrusive nature of mandatory, random testing outweigh the Company's interest in such a rule."); see also *infra* note 203 and accompanying text.

203. *Gem City Chems., Inc.*, 86 Lab. Arb. (BNA) 1023, 1025 (1986) (Warns, Arb.).

204. See *supra* note 29 and accompanying text.

205. In contrast to numerous published federal court opinions, for example, there are few published drug testing cases involving heavily regulated industries in the arbitration reporters.

cion.<sup>206</sup> In *International Brotherhood of Electrical Workers, Local Union No. 647*,<sup>207</sup> the arbitrator gave management the entitlement to randomly test employees who had unescorted access to the sensitive areas of a nuclear power plant.<sup>208</sup> The arbitrator drew heavily from *Rushton v. Nebraska Public Power District*<sup>209</sup> and found that the employees had "a diminished expectation of privacy given the nature and place of their employment."<sup>210</sup> The arbitrator balanced public interest and safety over the privacy intrusion caused by urine testing without probable cause.<sup>211</sup>

The second category of cases involves testing that was conducted pursuant to either a regularly scheduled physical or the happening of a specific event. In these cases, the employer is given the entitlement to test because a regular job physical or the increased suspicion resulting from a job-related accident or injury results in a reduction of the intrusion into an employee's privacy. This lessening of individual rights in favor of societal concerns for drug testing in the absence of particularized suspicion has been followed by some arbitrators.<sup>212</sup> In *Griffin Pipe Products Co.*,<sup>213</sup> the employer, a foundry, unilaterally amended its work rules to require employees injured on the job to be tested for drugs as part of their medical treatment.<sup>214</sup> In support of the employer, the arbitrator stated that "there is no doubt that the Company has a serious responsibility to provide for the welfare and safety of its employees."<sup>215</sup> The arbitrator noted that the program

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206. International Bhd. of Elec. Workers, Local Union No. 647, 87-2 Lab. Arb. Awards (CCH) ¶ 8570 (1987) (Weisbrod, Arb.); see also *Utility Workers Union, Local No. 357*, 89-2 Lab. Arb. Awards (CCH) ¶ 4992 (1988) (Fraser, Arb.) (The portion of management's program that required drug testing of office and clerical personnel who had unrestricted access to a nuclear power plant was unreasonable under the collective bargaining agreement.).

207. 87-2 Lab. Arb. Awards (CCH) ¶ 8570 (1987) (Weisbrod, Arb.).

208. *Id.* at 6323-24.

209. 653 F. Supp. 1510 (D. Neb. 1987), *aff'd*, 844 F.2d 562 (8th Cir. 1988).

210. 87-2 Lab. Arb. Awards (CCH) ¶ 8570, at 6323.

211. *Id.*

212. In these cases, strong safety concerns coupled with a minimized privacy intrusion supported the drug testing policy. See *Marathon Petroleum Co.*, 87-2 Lab. Arb. Awards (CCH) ¶ 8549 (1987) (Grimes, Arb.) (The discovery of marijuana in the control room of a petroleum plant justified the testing of all workers assigned to that area.); *Concrete Pipe Prods. Co.*, 87 Lab. Arb. (BNA) 601 (1986) (Caraway, Arb.) (It is reasonable to test any driver of a tractor-trailer involved in an accident.); *Griffin Pipe Prods. Co.*, 83-1 Lab. Arb. Awards (CCH) ¶ 8616 (1982) (Daly, Arb.) (Although there was no specific grievant in this case, the arbitrator upheld a company's right to test those involved in accidents as a matter of policy.). But see *Gem City Chems., Inc.*, 86 Lab. Arb. (BNA) 1023 (1986) (Warns, Arb.) (sustaining grievance because the testing of all employees at a chemical plant during their safety physicals was not justified by individualized suspicion).

213. 83-1 Lab. Arb. Awards (CCH) ¶ 8616 (1982) (Daly, Arb.).

214. *Id.* at 5742.

215. *Id.* at 5746.

only intrudes minimally upon the employees because: "[T]he drug test is not given to all employees or indiscriminately to some employees. It is given only to those employees who have had an accident in the plant."<sup>216</sup> Although there were no individual grievants in *Griffin Pipe*, the arbitrator sustained the entitlement of the employer to test for drugs pursuant to job-related injuries.<sup>217</sup> The cases in this category, although few in number, are reasoned in a manner analogous to the corresponding court cases that uphold the testing.

Within the third group of arbitration cases, the inherently dangerous nature of certain businesses poses a significant risk of injury to people and property. In these cases, arbitrators have been divided over permitting non-individualized or random testing. In *Day & Zimmermann, Inc.*,<sup>218</sup> the arbitrator gave to the employees the entitlement not to be tested without individualized reasonable suspicion.<sup>219</sup> The arbitrator struck down the employer's random testing program, concluding that the employer's interest in the test was outweighed by the degree of intrusion into the employee's privacy and by the necessity of an employee to prove his own fitness or innocence.<sup>220</sup> The arbitrator did note that because of the nature of the job—manufacturing explosives for the United States Army—the threshold for testing employees was very low and employers could test when employees showed the slightest signs of possible impairment.<sup>221</sup> In contrast, in *South Carolina Electric & Gas Co.*,<sup>222</sup> the employer implemented a random drug testing program for "all" bus drivers.<sup>223</sup> The arbitrator upheld the random testing of bus drivers as reasonable when balanced against public safety concerns:

An employer whose employees possess the potential to be a safety threat to the general public because of physical condition . . . has both the obligation and the right to assure that the danger does not exist by requiring appropriate tests of employees in such jobs. In short, public safety assurance is a proper and reasonable restriction on privacy rights regarding bus drivers, as it is a privilege and not a right to carry passengers for economic gain.<sup>224</sup>

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216. *Id.*

217. *Id.* at 5746-47.

218. 88 Lab. Arb. (BNA) 1001 (1987) (Heinsz, Arb.) (grievance sustained).

219. *Id.* at 1008.

220. *Id.*

221. *Id.*

222. 89 Lab. Arb. (BNA) 845 (1987) (Boals, Arb.).

223. *Id.* at 847.

224. *Id.* at 848. Note that there is a strong similarity between the values given to public safety by the arbitrator in *South Carolina Electric* and by the court in *Transport Workers' Union, Local 234 v. Southeastern Pennsylvania Transportation Authority*, 863 F.2d 1110 (3d



Similarly, in *Texas City Refining, Inc.*,<sup>225</sup> the arbitrator gave the employer the entitlement to randomly test employees at a petroleum facility.<sup>226</sup> The arbitrator noted the potential for great disaster at a petroleum facility, stating: "[T]he presence of drugs on the job must be recognized as a potential cause for serious emergency and cannot be ignored. Therefore, this type of off the job behavior is *not beyond the control of the Company*."<sup>227</sup> Within this category, the arbitrators have not defined any trend as to where to place the entitlement. Even the more recent opinions go both ways.<sup>228</sup> Because federal precedent is not yet rooted in this area, it can be predicted that these cases will continue to be divided.

Finally, absent individualized suspicion or deference to heavily regulated industries or safety concerns, arbitrators, like the courts, have struck down employer imposed sanctions when employees were tested unreasonably.<sup>229</sup> In these instances, arbitrators have affirmed the requirement of individualized suspicion as a standard upon which to test. The relative rights of employers and employees seem to depend upon the nature of the workplace in which the drug testing is to occur and upon the personal intrusion that could occur. Both arbitrators and the courts agree that an employer can require an employee to submit to a drug test when there is individualized reasonable suspicion that the employee is impaired due to drugs or alcohol and the

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Cir. 1988) (*SEPTA*), *vacated and remanded on other grounds*, 109 S. Ct. 3208 (1989). *See infra* notes 254-60.

225. 87-2 Lab. Arb. Awards (CCH) ¶ 8609 (1987) (Milentz, Arb.).

226. *Id.* at 6504.

227. *Id.* at 6503.

228. Although the industry may be hazardous and pose safety concerns, arbitrators are still unsettled as to where to place the entitlement. One arbitrator, for example, recently held that it was reasonable to randomly drug test all employees at a plant that manufactures both toxic and explosive chemicals. *Dow Chem. Co.*, 91 Lab. Arb. (BNA) 1385 (1989) (Baroni, Arb.). In contrast, in a case involving a nuclear power plant, another arbitrator held that it was unreasonable to subject office and clerical employees to drug testing during their annual physicals although the employees had unescorted access to the plant. *Utility Workers Union, Local No. 387*, 89-2 Lab. Arb. Awards (CCH) ¶ 8406 (1988) (Fraser, Arb.).

229. *See* *Department of the Army*, 91 Lab. Arb. (BNA) 137 (1988) (Huffcut, Arb.) (sustaining grievance in which certain civilians in security related positions at an army depot were tested without individualized suspicion and no evidence of prior drug abuse existed); *Vulcan Materials Co.*, 90 Lab. Arb. (BNA) 1161 (1988) (Caraway, Arb.) (holding that random testing of all employees at a chemical plant absent individualized suspicion was not reasonable); *Trailways, Inc.*, 88 Lab. Arb. (BNA) 1073 (1987) (Goodman, Arb.) (sustaining grievance because an unsubstantiated assertion by a another employee did not constitute reasonable suspicion to test bus drivers); *CFS Continental, Inc.*, 86-1 Lab. Arb. Awards (CCH) ¶ 8070 (1985) (Lumbley, Arb.) (sustaining grievance for lack of individualized suspicion where a food distributor tested only specific groups).

resulting impairment affects the workplace.<sup>230</sup> Likewise, arbitrators have reasoned analogously to the courts in upholding drug testing mandated by employers with less than individualized suspicion when the industry is highly regulated and poses societal concerns.<sup>231</sup> Also like the courts, arbitrators have upheld drug testing absent individualized suspicion when the nature of a business poses safety concerns to others, and the drug testing program is coupled with a less intrusive means of testing (such as testing during job-related physicals or testing based upon a higher level of suspicion resulting from the happening of a specific event).<sup>232</sup> Similarly, the potential impairment of an employee within certain workplaces poses significant public safety concerns that justify testing absent particularized suspicion.<sup>233</sup> Finally, absent individualized suspicion or one of the above-mentioned exceptions, both the courts and arbitrators are divided as to where to place the entitlement in the drug testing area.<sup>234</sup> Generally, the greater the potential harm from a possibly impaired worker, the lesser the degree of individualized suspicion that is required for testing to occur.<sup>235</sup>

## 2. IS THE APPLICATION OF THE PROGRAM REASONABLE?

Like the courts, arbitrators focus upon whether the procedures

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230. Compare *supra* note 42 and accompanying text (federal courts) with *supra* note 198 and accompanying text (arbitration).

231. Compare *supra* notes 54-62 and accompanying text (federal courts) with *supra* notes 206-11 and accompanying text (arbitration).

232. Compare *supra* notes 63-80 and accompanying text (federal courts) with *supra* notes 212-17 and accompanying text (arbitration).

233. Compare *supra* notes 81-92 and accompanying text (federal courts) with *supra* notes 218-28 and accompanying text (arbitration).

234. Compare *supra* notes 93-100 and accompanying text (federal courts) with *supra* note 229 and accompanying text (arbitration).

235. See, e.g., *Ensor v. Rust Eng'g Co.*, 704 F. Supp. 808, 813-14 (E.D. Tenn. 1989). In *Ensor*, the district court adopted the Sixth Circuit's balancing approach:

We believe there must be a focus on the *particular nature of the employment sector to be tested*. More specifically, there must be an inquiry into the harm that will result to society if mandatory drug tests are not allowed in *that industry*. The higher the cost and the more irretrievable the loss, the stronger the argument for finding reasonable the initiation of a drug testing program. . . . As the harm to society of not conducting the search of an individual increases to potentially catastrophic levels, the less willing is society to consider reasonable that individual's subjective expectations of privacy.

*Lovvorn v. City of Chattanooga*, 846 F.2d 1539, 1546-47 (6th Cir. 1988) (emphasis added), quoted with approval in *Ensor*, 704 F. Supp. at 813-14. Compare *Ensor*, 704 F. Supp. at 813-14 with *Dow Chem. Co.*, 91 Lab. Arb. (BNA) 1385, 1389 (1989) (Baroni, Arb.) ("The reasonableness of drug tests must largely be determined by *safety considerations involving the nature of the industry and work environment*, and any evidence of a drug problem within the work areas.") (emphasis added).

used before, during, and after drug testing are reasonable and whether the testing program is applied in an arbitrary or capricious manner.<sup>236</sup> Arbitrators have held that employees who must submit to a drug test are entitled to a test that is accurate, reliable, procedurally just, and given in a fair and nondiscriminatory manner.<sup>237</sup>

Arbitrators accord private sector employees many of the same procedural due process protections that their public sector counterparts receive.<sup>238</sup> Arbitrators have overturned employee discharges when the employees were not given fair and adequate notice of management's drug testing policy,<sup>239</sup> the consequences of a positive test,<sup>240</sup> or the prohibition against the off duty use of drugs.<sup>241</sup> Likewise, arbitrators have held it improper to discharge an employee without giving him the requisite number of warnings pursuant to the employer's pol-

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236. Compare *supra* notes 108-43 and accompanying text (due process in federal courts) with *infra* notes 237-44 (arbitration).

237. One arbitrator has stated the requirements for an employee to be discharged with "just cause:"

(1) The employee must be forewarned. (2) Employer's position with respect to employee's conduct must be reasonable. (3) Employer investigated before discharge. (4) Investigation was fair. (5) Substantial evidence supports the charge against the employee. (6) There was no discrimination. (7) The degree of discipline was reasonably related to the nature of the offense and the employee's past record.

Misco, Inc., 88-2 Lab. Arb. Awards (CCH) ¶ 8503, at 5506 (1988) (Milden, Arb.) (citations omitted).

Due process concerns were raised in many of the arbitration cases involving employee drug testing. See *International Union of Operating Eng'rs, Local Union No. 351*, 88-2 Lab. Arb. Awards (CCH) ¶ 8318 (1988) (Williams, Arb.); *Sanford Corp.*, 89 Lab. Arb. (BNA) 968 (1987) (Wies, Arb.); *Young Insulation Group, Inc.*, 88-1 Lab. Arb. Awards (CCH) ¶ 8205 (1987) (Boals, Arb.); *Amalgamated Transit Union, Local 1433*, 87-2 Lab. Arb. Awards (CCH) ¶ 8510 (1987) (Speroff, Arb.); *Union Plaza Hotel*, 88 Lab. Arb. (BNA) 528 (1986) (McKay, Arb.); *Union Oil Co.*, 88 Lab. Arb. (BNA) 91 (1986) (Weiss, Arb.); *Bay Area Rapid Transit Dist.*, 87-1 Lab. Arb. Awards (CCH) ¶ 8084 (1986) (Concepcion, Arb.); *Inspiration Consol. Copper Co.*, 85-2 Lab. Arb. Awards (CCH) ¶ 8534 (1985) (Tamoush, Arb.).

238. For a discussion of federal due process, see *supra* notes 109-36 and accompanying text

239. See *Union Oil Co.*, 88 Lab. Arb. (BNA) 91 (1986) (Weiss, Arb.). The employer had subjected all of its employees at two of its remote petroleum sites to surprise drug testing. *Id.* at 92. The arbitrator held that the program was void because the union had no notice of the program and because the program was not implemented pursuant to any published policy of management. *Id.* at 95; see also *Donaldson Mining Co.*, 91 Lab. Arb. (BNA) 471, 476 (1988) (Zobrak, Arb.) ("[T]he Company cannot demand compliance with a policy that has not been communicated to the affected employees nor can the affected employees be disciplined for violating a policy they do not know exists.").

240. See *Sanford Corp.*, 89 Lab. Arb. (BNA) 968 (1987) (Wies, Arb.) (The employer failed to communicate the consequences of refusing to take a drug test to the employee.).

241. See *Trailways, Inc.*, 88 Lab. Arb. (BNA) 1073 (1987) (Goodman, Arb.) (unfair to punish the employee for using drugs off duty when neither the company nor the Department of Transportation had any rules or published policy to that effect).

icy<sup>242</sup> or without allowing him the opportunity to participate in a rehabilitation program in accordance with company policy.<sup>243</sup> A testing program can be procedurally unreasonable if proper procedures are not followed to insure the validity of the results. As stated by one arbitrator, in order to demonstrate that the procedures were "reliable and proper,"<sup>244</sup> an employer must show that the chain of custody and storage of the testing sample were proper and that false readings were minimized.<sup>245</sup>

Arbitrators have used an analysis similar to constitutional substantive due process when striking down drug testing programs that were applied in a discriminatory or capricious manner.<sup>246</sup> For example, in cases in which employers have treated employees arbitrarily or unfairly, arbitrators have reduced the penalties by ordering the employees to be reinstated.<sup>247</sup> Additionally, a drug testing program can be substantively unreasonable in the administration of the test. In *Union Plaza Hotel*,<sup>248</sup> for example, a hotel required a waitress to submit to a drug test because of her erratic behavior.<sup>249</sup> The arbitrator found that forcing the employee to provide a urine sample in a highly embarrassing manner was unreasonable.<sup>250</sup> The arbitrator stated that

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242. See *Warehouse Distrib. Centers, Inc.*, 90 Lab. Arb. (BNA) 979 (1987) (Weiss, Arb.) (Although the company had reasonable cause to test, it was required to reinstate the employee because the company had not followed its own procedures, which required two warnings prior to any discharge.).

243. See *Boise Cascade Corp.*, 90 Lab. Arb. (BNA) 791 (1988) (Nicholas, Arb.) (An employee was reinstated because the employee had not been given the opportunity to participate in the company's rehabilitation program.); *South Carolina Elec. & Gas Co.*, 89 Lab. Arb. (BNA) 845 (1987) (Boals, Arb.) (A discharge was reduced to a disciplinary layoff because the employer had denied the employee an opportunity to participate in the contractually provided rehabilitative program.).

244. *Metropolitan Transit Auth.*, 87-2 Lab. Arb. Awards (CCH) ¶ 8472, at 5873 (1987) (Baroni, Arb.).

245. *Id.*

246. See, e.g., *ITT Barton Instruments, Co.*, 88-1 Lab. Arb. Awards (CCH) ¶ 8013 (1987) (Draznin, Arb.) (It was arbitrary to treat employees that had been laid off for more than 30 days as "new hires."); *Bay Area Rapid Transit Dist.*, 87-1 Lab. Arb. Awards (CCH) ¶ 8084, at 3342 (1986) (Concepcion, Arb.) (A drug testing program was arbitrarily applied only to union employees, and the program did not account for job classifications—such as clerical—that had no bearing on safety.). For a similar view, compare *supra* notes 137-43 and accompanying text which discuss federal substantive due process.

247. See *Young Insulation Group, Inc.*, 88-1 Lab. Arb. Awards (CCH) ¶ 8205 (1987) (Boals, Arb.) (employee was reinstated and awarded back pay and benefits); *Inspiration Consol. Copper Co.*, 85-2 Lab. Arb. Awards (CCH) ¶ 8534, at 5207 (1985) (Tamoush, Arb.) (employee was reinstated, but without back pay).

248. 88 Lab. Arb. (BNA) 528 (1986) (McKay, Arb.).

249. The waitress was wandering around with a coffee pot, but she did not pour any coffee for the customers. *Id.* at 530. Moreover, the waitress was sullen, had glassy eyes, and was dancing before the customers claiming to be a gazelle. *Id.*

250. Although the arbitrator held that directly monitoring the giving of the urine sample is

"[w]hen the Union agreed to drug testing, it did not waive its members' rights to preserve a reasonable amount of privacy and dignity in the testing process."<sup>251</sup> The arbitrator ordered the employee reinstated, but without back pay.<sup>252</sup>

In sum, although an employer may have cause to test an employee, the test employed must be procedurally reliable and properly administered, and the test must be applied in a fair and nondiscriminatory manner; otherwise, the test will not withstand scrutiny when challenged. The values that arbitrators have exhibited are very similar to the procedural and substantive due process rights given to public employees by the courts.<sup>253</sup>

#### IV. ANALYSIS

The ongoing tension between society's interest in eradicating drugs in the workplace and the individual right of privacy can be best demonstrated in two conflicting opinions involving bus and transportation operators. In *South Carolina Electric & Gas Co.*,<sup>254</sup> management had unilaterally implemented random drug testing of all bus drivers whose duties fell under governmental regulations.<sup>255</sup> In interpreting the collective bargaining agreement, the arbitrator focused on whether the test was reasonable as administered.<sup>256</sup> The arbitrator placed a very high value on safety for the public good, finding that it outweighed the privacy rights of the individual:

It is not mere dicta to say that a person has natural rights of privacy in addition to 4th Amendment protections of unlawful search and seizure and 5th Amendment immunity from testifying against oneself. Although these protections ordinarily apply to threatened government intrusions, it is appropriate to extend them to employers who are franchised natural monopolies . . .

Now the rights mentioned above are not unlimited rights. Just as one cannot shout "fire" in a crowded theater, one cannot use those rights to jeopardize the safety of others.<sup>257</sup>

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not unreasonable in itself, it was unreasonable in this instance because the employee was wearing only a leotard undergarment and she would have had to completely disrobe. *Id.* at 534. Denying her request for a robe or a private room was unreasonable. *Id.*

251. *Id.* Pursuant to the parties' collective bargaining agreement, "the Employer can generally require that employees suspected of substance abuse provide a urine sample while under observation by clinic personnel." *Id.* The arbitrator qualified this, however, by requiring that the test be applied in a reasonable manner. *Id.*

252. *Id.* at 535.

253. *Cf. supra* notes 108-43 and accompanying text.

254. 89 Lab. Arb. (BNA) 845 (1987) (Boals, Arb.).

255. *Id.* at 846.

256. *Id.* at 848.

257. *Id.*

The arbitrator noted that scientific data indicated that habitual users of marijuana could experience a “*deleterious and lingering effect on physical dexterity and mental acuity*.”<sup>258</sup> Further, because it is impossible to determine when marijuana was last used, it therefore follows that it is “reasonable” to prohibit the employee from using it at all.<sup>259</sup> In responding to the union’s complaint regarding the validity of the test, the arbitrator found that the tests were accurate and noted that if the screening test result was positive, the procedure called for a second test of greater accuracy.<sup>260</sup>

In comparison, in *Trailways, Inc.*,<sup>261</sup> the company’s District Manager of Operations required six of its bus drivers to submit to urinalysis testing.<sup>262</sup> The manager ordered the tests when two employees informed him that the six particular drivers were using

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258. *Id.* at 849; compare *id.* with *infra* note 260.

259. *Id.*

260. *Id.* While upholding the employer’s right to subject bus drivers to random drug testing, the arbitrator in this case reduced the discharge to a penalty of suspension because the employee had not been given an opportunity to participate in the company’s rehabilitation program pursuant to established policy. *Id.* The arbitrator found that the employer had violated its employee’s right to “due process” by failing to follow its own procedures. *Id.*

The arbitrator’s reasoning compares with that of the Third Circuit in *SEPTA*, a case in which the court upheld random drug testing of bus and train operators. *Transport Workers’ Union, Local 234, v. Southeastern Pa. Transp. Auth.*, 863 F.2d 1110 (3d Cir. 1988) (*SEPTA*). There, the Third Circuit supported the drug testing policy upon a finding that the public transportation company had suffered numerous train accidents resulting in great injury to the public; the accidents had been caused by operating employees impaired by drugs or alcohol. *Id.* at 1120. The court limited the random testing to those employed in sensitive positions such as driver and engineer. *Id.* The court applied the two-part reasonableness test as set out by the Supreme Court in *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985). *SEPTA*, 863 F.2d at 1118. In first examining the reasonableness of the drug test in its inception, the court stated: “[W]e conclude that under the balancing required by the reasonableness analysis, if the state’s interest is substantial enough it may override even the intrusive searches required by urinalysis.” *Id.* at 1119. The court found that the necessity to protect the travelling public is a higher state interest than merely insuring a safe and efficient workplace. *Id.* The court further found that “in light of the evidence connecting impairment with drug use,” it was proper for the employer to create a program to “detect drug users.” *Id.* at 1120. Additionally, “the evidence of the *deleterious* effect of drug use, and SEPTA’s showing of positive tests for drugs or alcohol by operating personnel at fault in accidents are sufficient bases . . . to conclude that the random testing policy is constitutionally justified at its inception.” *Id.* at 1121 (emphasis added). In looking at the second part of the test, the court focused on whether there were sufficient procedural safeguards to protect the employees from unfettered abuse by employers. *Id.* at 1121-22. The court found that the program was reasonably applied to accomplish its purpose of ferreting out drug users from sensitive positions. *Id.* at 1122. On certiorari, the United States Supreme Court vacated and remanded the case pursuant to its holding in *Consolidated Rail Corp. v. Railway Labor Executives’ Association*, 109 S. Ct. 2477 (1989). *SEPTA*, 109 S. Ct. at 3208. On remand, the constitutionality of the random testing program should not be affected.

261. 88 Lab. Arb. (BNA) 1073 (1987) (Goodman, Arb.).

262. *Id.* at 1075.

drugs.<sup>263</sup> The employees who supplied the tip did not give any details or specifics to justify their suspicion.<sup>264</sup> No one in management had seen the employees using drugs or acting in any impaired manner while on the job.<sup>265</sup> In examining the contract, the arbitrator found no provision that allowed the employer to test for drugs at will.<sup>266</sup> The primary issue was whether there was probable cause to require the grievants to submit to a drug test.<sup>267</sup> In contrast to *South Carolina Electric & Gas*, the *Trailways* arbitrator started with the basic premise that an employee is entitled to his privacy away from the work setting as an inherent right. The arbitrator specifically stated:

[W]e start with the basic observation that an employee does not somehow abandon his right to privacy at the doorstep of the employer's premises. . . .

. . . .

It is submitted that an individual, by signing on to an employment relationship, does not generally expect his or her private life to be scrutinized by the employer, nor does the existence of an employment relationship automatically entitle an employer to reach beyond the workplace and dictate, by discipline, the private lifestyles, morals and behavior of its employees.<sup>268</sup>

The arbitrator valued the individual's rights of privacy as preeminent over safety concerns and concluded that there was no probable cause to require the six bus drivers to undergo a urinalysis test for drugs.<sup>269</sup> Even if the grievants were tested with probable cause, there remained the issue of whether there was just cause for the employees' discharge. The arbitrator, in giving great weight to the employees' presumptive right of innocence, concluded that there was no nexus between the mere positive test result and the conclusion that the grievants were impaired while on the job.<sup>270</sup> The arbitrator held that the grievants were not discharged for just cause and ordered them reinstated with full back pay.<sup>271</sup>

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263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at 1080.

267. *Id.*

268. *Id.*

269. *Id.* at 1081. The arbitrator noted that the company lacked any personal knowledge that the grievants were using drugs or were impaired by drugs; moreover, the company never attempted to corroborate the tip prior to ordering the grievants to be tested. *Id.*

270. *Id.* at 1083. The arbitrator stated that "the contract, and not the scientific and medical data, provided the necessary connection between test results and job impairment issues." *Id.*

271. *Id.* at 1084. The arbitrator also ordered that all personnel records of the previous action be expunged. *Id.*

The reasoning employed by the arbitrator in *Trailways* should be compared with the

A strong parallel may be drawn between what arbitrators have explicitly and implicitly reasoned in deciding drug testing issues that private employers face and similar reasoning used by the courts in deciding comparable issues affecting public employers. Although arbitrators are not bound to follow judicial precedent,<sup>272</sup> it is more than mere coincidence that arbitrators share many of the same concerns and values as their judicial counterparts.

Arbitrators differ in the way that they interpret contract clauses detailing management rights or health and safety in the workplace in much the same way that language differs between contracts.<sup>273</sup> The vast majority of the published decisions give employers the entitlement to impose drug testing programs on their employees. Arbitrators place a high value on the need to eradicate drug and alcohol abuse from the workplace and to provide a safe work environment.<sup>274</sup> This concern for safety is particularly evident in cases in which an

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rationale of the Ninth Circuit in *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir. 1988), *rev'd sub nom. Skinner v. Railway Labor Executives' Association*, 109 S. Ct. 1402 (1989). In *Burnley*, the court struck down a drug testing program that subjected transportation employees to drug testing absent individualized suspicion. *Id.* at 592. The employer, a railroad, had amended its drug and alcohol program unilaterally to require that all employees involved in certain job-related accidents or injuries be tested. *Id.* at 577. As in *SEPTA*, the court performed a two-part balancing test to ascertain the reasonableness of the program under the fourth amendment. *Id.* at 587. The *Burnley* court, however, gave greater weight to individual privacy than to public safety concerns and held that the testing program was not justified at its inception. *Id.* The court stated:

We hold that particularized suspicion is essential to finding toxicological testing of railroad employees justified at its inception. Accidents, incidents, or rule violations, by themselves, do not create reasonable grounds for suspecting that tests will demonstrate alcohol or drug impairment in any one railroad employee, much less an entire train crew.

*Id.* The court invalidated the drug testing program because it was not founded on individualized suspicion. *Id.* at 592. On certiorari, the Supreme Court reversed and held that individualized suspicion is not an absolute requirement under the fourth amendment. *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402 (1989).

One arbitrator, applying the rule of individualized suspicion established in *Burnley*, struck down a management policy that randomly tested bus drivers who had been involved in an accident. *Southern Cal. Rapid Transit Dist.*, 89-1 Lab. Arb. Awards (CCH) ¶ 8117, at 3590 (1989) (Jones, Arb.). The arbitrator may have arrived at a different result, however, if the case had been heard after *Skinner* was decided.

272. See generally F. ELKOURI & E. ELKOURI, *supra* note 151, at 321-28 (discussing the use of substantive law by arbitrators).

273. Compare *Philips Indus., Inc.*, 90 Lab. Arb. (BNA) 222 (1988) (DiLeone, Arb.) (contract read narrowly favoring the union) with *Sanford Corp.*, 89 Lab. Arb. (BNA) 968 (1987) (Wies, Arb.) (contract read broadly favoring management).

274. See, e.g., *South Carolina Elec. & Gas Co.*, 89 Lab. Arb. (BNA) 845 (1987) (Boals, Arb.); *International Bhd. of Elec. Workers, Local Union No. 647*, 87-2 Lab. Arb. Awards (CCH) ¶ 8570 (1987) (Weisbrod, Arb.); *Hopeman Bros.*, 88 Lab. Arb. (BNA) 373 (1986) (Rothschild, Arb.); *Concrete Pipe Prods. Co.*, 87 Lab. Arb. (BNA) 601 (1986) (Caraway, Arb.).



employee is unsupervised and an error in judgment—or even mere inattentiveness—can cause severe injury to others.<sup>275</sup> As one arbitrator noted: “[I]t is my finding that even though there is something inherently offensive about the type of testing required by the rule, the balancing of the public interest in this case favors the imposition of the rule.”<sup>276</sup>

Absent collective bargaining provisions to the contrary, arbitrators have essentially given management the right to implement drug testing unilaterally. This right, however, is not absolute. Arbitrators have constrained this right by applying a notion of reasonableness pursuant to a contractual “just cause” provision or similar language that protects employees. It is by way of this constraint upon employers that arbitrators have emphasized the rights of employees: a right to reasonable privacy, a right to be treated fairly, and a right to be free from discriminatory or arbitrary treatment.

Thus, arbitrators examine drug testing programs in view of their reasonableness by balancing the needs of health and safety in the workplace against the privacy and fairness concerns of an employee.<sup>277</sup> In *Hopeman Brothers, Inc.*,<sup>278</sup> the arbitrator balanced the opposing interests:

Two primary factors must be recognized in current industrial society, first, that alcohol and illicit drug use and abuse constitute a significant safety hazard in the workplace and, second, that our medical procedures are not as yet infallible. We are, therefore, required to balance the needs and hazards of a safe workplace against our deep and abiding concern for individual privacy.<sup>279</sup>

Similarly, in recent federal decisions such as *Transport Workers' Union, Local 234 v. Southeastern Pennsylvania Transportation Authority (SEPTA)*,<sup>280</sup> *Rushton v. Nebraska Public Power District*,<sup>281</sup> and *National Treasury Employees Union v. Von Raab*,<sup>282</sup> the federal courts

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275. See *International Bhd. of Elec. Workers*, 87-2 Lab. Arb. Awards (CCH) ¶ 8570, at 6321.

276. *Id.*

277. See, e.g., *CFS Continental, Inc.*, 86-1 Lab. Arb. Awards (CCH) ¶ 8070, at 3297-98 (1985) (Lumbley, Arb.).

278. 88 Lab. Arb. (BNA) 373 (1986) (Rothschild, Arb.).

279. *Id.* at 385; see also *Utility Workers Union, Local No. 387*, 89-2 Lab. Arb. Awards (CCH) ¶ 8406, at 4997 (1989) (Fraser, Arb.) (“[T]he task of the Arbitrator is to strike the proper balance between the competing interests: the Company’s concern with . . . maintaining a drug-free workplace, and with its responsibility to its employees and the public; and the Union’s concern with its contractual rights and the employee’s expectation of privacy.”).

280. 863 F.2d 1110 (3d Cir. 1988), *vacated and remanded on other grounds*, 109 S. Ct. 3208 (1989).

281. 844 F.2d 562 (8th Cir. 1988).

282. 109 S. Ct. 1384 (1989).

have performed a balancing of interests to determine if the drug test, which they defined as a search, was reasonable under the fourth amendment.<sup>283</sup>

Likewise, a strong comparison can be made between procedural and fairness issues raised by arbitrators and by courts. For example, the arbitrator in *Day & Zimmermann, Inc.*<sup>284</sup> stated: "[T]he Grievant, as a private employee, is not directly subject to [fourth amendment search and seizure] constitutional guarantees. However, Arbitrators have always considered the just cause protection of collective bargaining agreements to include basic notions of due process as to individual employee rights and protection against unreasonable employer action."<sup>285</sup> Another arbitrator stated that it must be proved that "the testing procedures were reliable and proper."<sup>286</sup> On the judicial side, the *Rushton* court went to great lengths to examine the validity of the drug testing program under procedural and substantive due process analyses pursuant to the fourteenth amendment.<sup>287</sup> The court looked at both the procedures used to insure that the chain of custody of a test specimen was reliable and the propriety of the consequences to an employee who tested positive.<sup>288</sup> The court noted: "Substantive due process provides a shield against arbitrary and capricious deprivation of liberty. . . . [T]he evidence shows that the EMIT procedure [a chemical process by which the sample is tested for drug content] utilized in conjunction with such confirmatory tests as gas chromatography/mass spectrometry is accurate and reliable."<sup>289</sup>

Arbitrators occasionally go beyond implicitly following the reasoning of the courts, and they do so explicitly.<sup>290</sup> In *Department of the Army*,<sup>291</sup> for example, the arbitrator deciding the reasonableness of the drug testing of certain civilian employees actually stated that his reasoning was primarily based on federal precedent:

The Arbitrator employs three controlling principles adopted by District and Circuit Courts across the land in reaching his determi-

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283. *E.g.*, *Von Raab*, 109 S. Ct. at 1390; *SEPTA*, 863 F.2d at 1118; *Rushton*, 844 F.2d at 566; *see also supra* notes 40-41.

284. 88 Lab. Arb. (BNA) 1001 (1987) (Heinsz, Arb.).

285. *Id.* at 1008.

286. Metropolitan Transit Auth., 87-2 Lab. Arb. Awards (CCH) ¶ 8472, at 5873 (1987) (Baroni, Arb.).

287. *Rushton v. Nebraska Pub. Power Dist.*, 653 F. Supp. 1510, 1525-27 (D. Neb. 1987), *aff'd*, 844 F.2d 562 (8th Cir. 1988).

288. *Id.*

289. *Id.* at 1525.

290. *See, e.g.*, Southern Cal. Rapid Transit Dist., 89-1 Lab. Arb. Awards (CCH) ¶ 8117, at 3588 (1988) (Jones, Arb.) (The arbitrator expressed that "[i]n this arbitration, the precepts of the Fourth Amendment are directly implicated.").

291. 91 Lab. Arb. (BNA) 137 (1988) (Huffcut, Arb.).

nation of unconstitutionality: First, compulsory urinalysis of public sector employees qualifies as a search and seizure within the structure of the 4th Amendment. Second, such a search must be a reasonable one, grounded on specific facts that give rise, except where privacy interests are minimal, to a reasonable suspicion directed to the individual being searched, that is individualized suspicion. Where there is no suspicion involved, reasonableness must be assessed by evaluating the need to search and the effectiveness of the search. Third, if the search is not a reasonable one, exaction of a spurious consent will not make it so.<sup>292</sup>

## V. CONCLUSION

Arbitrators, although not always explicitly, give strong weight to judicial precedents in deciding complex drug testing cases, as evidenced by the similarities between the judicial and arbitral opinions. Private sector employees are enjoying many of the same substantive and procedural rights that their public sector brethren enjoy, and the private sector employees may arguably be better off because arbitrators are not constrained by precedent. The tension between the notions of safety in the workplace and the privacy rights of an employee is slowly shifting in favor of society's desire to eradicate drugs, a desire evidenced within the federal judicial opinions. If the scales of the federal judiciary continue to shift so as to place more weight on societal concerns and less weight on individual rights and liberties, then arbitrators in the private sector are likely to follow.

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292. *Id.* at 151 (citations omitted). In examining the totality of the program (including its purpose, effectiveness, and application in this case), the arbitrator concluded that the drug test was an unreasonable search and seizure. *Id.* at 154.