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The Evolving Legal Context for Drug Testing Programs

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IN EARLY 1990, the trustees and medical staff of Johns Hopkins Hospital in Baltimore approved a program by which all 1,500 members of the medical staff will be subjected to mandatory, random drug testing. Although several hospitals had been previously reported to maintain drug-testing programs for employment applicants or employed personnel who have completed drug rehabilitation programs, the Johns Hopkins program is believed to be the first institution-wide program for mandatory "suspicionless" testing of physicians.

Physicians have for some time been targeted as high-risk candidates for the development of chemical dependence. Although current and accurate data are scarce, and although the study protocols have been criticized,[1] the prevalence of chemical substance abuse among physicians has been often estimated at 10%.[2] Anesthesiologists may present an even greater source for concern, since they are reported to represent a disproportionate number of the physicians seeking rehabilitation treatment.[2]

In 1986, President Reagan signed an executive order directing federal agencies to develop drug testing programs for federal employees in "sensitive positions."[3] As a result, a number of federal agencies are implementing drug testing programs in accordance with "drug-free workplace" plans. Federal health care providers, including physicians and nurses, who are employed by the federal government are not immune from testing. The military currently performs random drug testing on all of its members, including health care personnel. In addition, the plan proposed by the Department of Veterans Affairs (VA) would authorize random testing of persons in positions involving "public health or safety." The VA has specifically included physicians and nurses in the body of employees subject to such testing.

In 1988, Congress passed the Drug-Free Workplace Act.[4] This law requires that individuals or institutions that receive federal grants certify that they will provide drug-free workplaces. The law does not, however, require drug testing as a condition to receiving a grant. Accordingly, nonfederal health care providers who receive financial support from federal grants would not be required to submit to drug testing as a condition to receiving the grants.

As of this date, no state legislature or executive has followed the federal government's initiative and mandated drug testing for physicians or other health care providers. In 1989, a bill was introduced in Texas that attempted to legislate mandatory random drug testing for personnel in both private and public hospitals.[5] Although never enacted, the bill would have required frequent mandatory random testing for all hospital personnel providing direct patient care. In 1990, a bill was introduced in Colorado that would require health care professionals to include in their professional license applications proof that they had taken a drug screening test within 30 days prior to applying and that the results of the test were negative.[6] This bill also was never enacted.

As noted, some private hospitals are independently implementing drug testing programs. These programs are, however, very much the exception to the norm. One study, conducted in 1988, found that only 9% of surveyed hospitals had mandatory drug screening policies for applicants and that only 7% had policies requiring screening of current employees.[7] In 1987, the American Hospital Association (AHA) implemented a policy encouraging health care institutions to "establish and maintain an alcohol- and drug-free work environment."[8] In the accompanying statement, the AHA specifically discussed drug testing as one method of detecting impaired employees.

Institutional concern about an impaired staff physician is well justified from the legal standpoint. Court decisions suggest that a hospital or medical staff administration may be held liable for the actions of an impaired physician if the hospital or administrator had reason to know of the impairment.[9] In addition, some states *require* hospitals to monitor the performance of medical staffs. Michigan's hospital licensure statute, for example, requires that the governing board of each hospital be responsible for "the operation of the hospital, selection of the medical staff and the quality of care rendered."[10] This statutory assignment of responsibility provides an easy basis for imposing liability on a hospital for the errors or omissions of an impaired physician.

Any institution that seeks to implement a drug testing program must be aware of the applicable legal restraints

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that protect the rights of individuals subjected to testing. Substantial, but as yet incomplete, guidance concerning drug testing is found in recent court decisions and federal and state legislation. To date, all of the court challenges concerning drug testing have involved testing of urine; testing of blood, which is more invasive and less common, would be subject to the same legal concerns, if not greater concerns, than urine testing.

Public Institutions

By far the greatest number of court challenges to drug testing programs to date have involved employees of public entities. Most of the challenges have been based on the Fourth Amendment to the United States Constitution, which prohibits "unreasonable" search and seizure. This constitutional restraint applies to (and only to) actions by governmental agencies, and in unusual circumstances, to private parties or institutions that are acting for the government.

Public hospitals owned or operated by the federal government or a state or local government normally are deemed the "state" for Fourth Amendment purposes. Some private hospitals also may be so treated, but only in those unusual circumstances in which there exists a sufficiently close relationship between an agency of government and the challenged hospital action that the latter may be fairly treated as the action of the government itself.[11] Extensive government regulation, receipt of federal Hill-Burton construction funds and Medicare and Medicaid funds, and tax-exempt status regularly have been held not sufficient to turn a private hospital into a "state" actor.[12] In essence, in order for a private hospital to be deemed the "state" or government for Fourth Amendment analysis of drug testing, the testing program must have been conducted because of legislative mandate or be so closely regulated by the government that the government initiative and private action cannot readily be separated.

If an institution is or is deemed a state actor, then the Fourth Amendment protects individuals against "unreasonable" searches by it or by its representatives. The Supreme Court recently has held that collection of urine samples is a "search" for Fourth Amendment purposes.[13] Accordingly, a drug testing program involving urinalysis must be found to be "reasonable." In this context, the key issue has been whether the constitutional standard of reasonableness of search requires a reasonable basis for *suspicion* of drug use before testing, or whether "suspicionless" testing of employees—or certain types of employees—is permissible.

In 1989, the Supreme Court, in decisions of two cases involving drug testing of public employees, stated that individualized suspicion was not required in order to make drug testing "reasonable." One case involved after-accident testing of railroad crews, and the other, testing of Customs Service employees seeking to transfer to positions involving drug interdiction or carrying of firearms. Both decisions upheld testing procedures as reasonable searches under the Fourth Amendment.

In the first case, *Skinner v. Railway Labor Executives' Association,*[13] the Federal Railroad Administration had issued regulations that mandated blood and urine tests of employees involved in certain train accidents. The Court ruled the search "reasonable" even though the Federal Railroad Administration regulations did not require a showing of individualized suspicion:

> 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 [individualized] suspicion.[13]

The court stated that railroad employees were already highly regulated and that therefore the testing procedures posed only limited threats to the justifiable expectations of privacy of the covered employees.

In the second case, *National Treasury Employees Union v. Von Raab,*[14] the United States Customs Service had implemented a drug testing program for employees seeking transfer or promotion to drug interdiction positions or positions that involved carrying firearms or handling "classified" materials. Under the program, employees were notified that final selections for the positions were contingent upon "successful completion of drug screening." The Court upheld the testing of employees who were to be directly involved in drug interdiction or required to carry firearms; given the ambiguous nature of the word "classified," however, the Court remanded the third classification to the Court of Appeals to clarify the identity of employees who would be subject to testing.

The Court concluded that the "need to conduct the suspicionless searches 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."[14]

The *Skinner* and *Von Raab* decisions, considered together, identified three governmental interests that could justify suspicionless drug testing—maintaining the integrity of the federal work force; enhancing the public safety; and protecting truly sensitive information. Neither of these cases involved purely *random* drug testing of employees: in each instance, the drug testing was required only for a certain category of employees. Within the past year, however, the Supreme Court has declined to hear appeals from three lower courts upholding random testing in certain circumstances, that is, of police officers who carry firearms or participate in drug interdiction; of employees who fly and service airplanes; of civilian police,

guards and drug counselors employed by the Army; and of Department of Justice employees holding top-secret security clearances.[15]

Although refusal by the Supreme Court to hear an appeal is not tantamount to Court approval of the lower court decisions, the two decided Supreme Court cases, *Skinner* and *Von Raab*—when coupled with the additional cases the Court has declined to hear—strongly suggest that suspicionless and even random testing of federal employees whose duties affect public safety will probably be permissible under the Fourth Amendment. Stated more particularly for health care purposes, a random drug testing program of hands-on health care providers, including physicians, in a public hospital probably would be sustained by the courts. The safety issue is simply too obvious.

Public hospitals undoubtedly would be on somewhat more risky ground should they determine to test randomly only certain hands-on providers in the institution. Refusal of the Supreme Court in the *Skinner* decision to approve the testing of employees handling "classified matter" suggests that the hospital would need to show a serious basis for distinguishing among hands-on providers, such as clear evidence by a particular group of a significantly higher incidence of drug abuse.

Preemployment testing of applicants for public employment positions also may be subject to a "reasonableness" standard. Although testing of job applicants is the most common form of suspicionless drug testing,[16] there had been no direct challenges to preemployment testing prior to the *Von Raab* and *Skinner* decisions. However, since these recent Supreme Court decisions, several courts have analyzed applicant drug testing programs under a Fourth Amendment "reasonableness" standard.[17] Therefore, although institutional drug testing of applicants for safety-sensitive positions probably would be upheld, public institutions should be aware that their preemployment testing procedures may not automatically be sustained, particularly for personnel who are not engaged in hands-on care.

In addition to anticipating the need to meet Fourth Amendment standards, public employers must also be prepared to deal with a second legal restraint on drug testing of employees—the Due Process Clause of the federal Constitution. The Supreme Court has stated that an employee who can be terminated only "for cause" has a "property" interest in his employment, a property interest that cannot be taken away without giving him some form of due process review.[18] In addition, since a positive drug test may have a deleterious effect on one's employment reputation, due process considerations also require protection of this "liberty" interest.

Several courts have addressed the due process issue. One court held that employees' due process rights had been violated when city officials conducted unannounced mass urinalysis testing of city fire fighters.[19] The testing was imposed without prior notice, and there were neither standards to govern the testing nor provisions to ensure confidentiality of the results. The court stated the city's conduct was a "flagrant violation" of due process rights, and said:

> Assuming a program of drug testing is warranted, before it may be implemented, its existence must be made known, its methods clearly enunciated, and its procedural and confidentiality safeguards adequately provided.[19]

In an earlier decision, a federal appeals court held that two discharged air traffic controllers were denied due process when their urine samples were destroyed and the results could not be verified by independent testing.[20]

In sum, procedures that involve public employees, that do not hold promise of highly accurate results, that do not appear sensitive to legitimate employee interests in procedural fairness, or that do not provide significant protection against unnecessary disclosure, will risk condemnation on due process grounds. In the *Von Raab* decision, the Supreme Court noted that the employees had advance notice of testing, that there was no direct observation of provision of the urine specimen, and that the testing procedures were highly accurate. In the companion *Skinner* decision, there was no direct observation, and the sample was collected by personnel not associated with the employer. These procedures minimized the intrusion on privacy interest. With reference to federal drug testing programs involving testing of its own employees, the federal government has issued detailed regulations imposing strict guidelines designed to ensure accuracy, fairness and confidentiality.[21]

The message of the above discussion is clear: if a drug testing program is to be implemented by a public employer, that program must contain certain fundamental features to ensure fairness, accuracy of results, and confidentiality. Due process and reasonableness are flexible concepts, depending on the circumstances and interests involved, but a testing program of public employees that is not scrupulously fair and reliable almost certainly will be condemned.

Private Institutions

Because they are not constrained by United States constitutional limitations, private employers have considerably more leeway than do public employers in the implementation of drug testing procedures. However, private employers (and indeed public employers, including possibly federal agencies) may be subject to certain *state* restrictions with regard to drug testing. These restrictions may be based upon state constitutional provisions or state drug testing legislation.

At least ten states have recognized in their constitutions a "right to privacy." These states are Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana,

South Carolina, and Washington. Only California, however, has held that the constitutional privacy provision restrains the actions of *private,* as well as public, employers.

The California constitution provides that "all people are by nature free and independent and have inalienable rights." Among these are pursuing and obtaining privacy.[22] Two California appeals courts have stated that this privacy provision protects current private employees from being dismissed solely for refusing to submit to random drug tests.[23,24] The California Supreme Court refused to hear the employers' appeals, and thereby in effect made random drug testing of current employees by private employers illegal in California.

In contrast, however, another California appeals court recently held that a private employer's *preemployment* drug testing program does not violate the California constitution. In *Wilkinson v. Times Mirror Corp.,*[25] a private employer required all job applicants to consent to a urinalysis test as a condition of an offer of employment. The court, emphasizing that the plaintiffs were applicants for employment and not current employees, held that the drug testing program was reasonable. In addition, the applicants had advance notice that testing would be required; the collection procedures minimized intrusiveness; and procedural safeguards restricted access to the test results.

Some employees have challenged private drug testing programs on the basis of a state constitutional ban on unreasonable searches and seizures. In Michigan, a federal court judge refused to invalidate a drug testing program under such a provision in the Michigan constitution, stating that the private employer was not governed by the state constitution.[26] In New Jersey, however, a superior court judge held that a private employer's random drug testing program violated New Jersey's public policy against unreasonable searches and seizures.[27]

A private employer considering implementing a drug testing program must also be aware of state legislation that may regulate drug testing. To date, drug testing statutes have been adopted in at least 17 states. These states are Arizona, Connecticut, Florida, Georgia, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Montana, Nebraska, Rhode Island, South Dakota, Tennessee, Utah, and Vermont.[28] Although most of the statutes attempt to ensure procedural fairness and minimize intrusion on the employee's privacy, there is no real uniformity of approach.

The state statutes vary in their application. Some statutes apply only to public employee testing; most cover all testing. Four states—Arizona, Iowa, Maine, and Vermont—require an employer to have probable cause before testing existing employees; nine others (Connecticut, Florida, Kansas, Louisiana, Minnesota, Montana, Rhode Island, South Dakota, and Tennessee) have established a "reasonable suspicion" standard. However, most of these thirteen statutes do not specify what conduct constitutes sufficient grounds to establish either probable cause or reasonable suspicion. The statutes in Connecticut, Georgia, Maine, and Minnesota also allow testing on a random basis for employees in "high-risk" or safety-sensitive positions.

The laws in Maryland and Nebraska do not establish statutory guidelines as to when testing is allowed, but only discuss procedural protections when a testing program is implemented. Although Utah requires reasonable suspicion before state employees can be tested, the statute regulating private employment testing has few limitations and allows employers to test employees or prospective employees as long as employers and management in general submit to the testing themselves on a periodic basis.

Although all of the drug testing statutes prescribe the conditions under which testing must take place, they differ in their terms. Some statutes deal with preemployment or testing in conjunction with physical examinations (Connecticut, Florida, Georgia, Iowa, Kansas, Maine, Minnesota, Montana, South Dakota, Utah, and Vermont), but even these impose different requirements. Montana limits testing of applicants to those positions involving "hazardous work environments" or "security, public safety, or fiduciary responsibility." Maine, Kansas, Minnesota, and Vermont require that an employer not test an applicant unless an offer of employment has been extended; Vermont, however, makes an exception if the applicant lives more than 200 miles from the place of testing. Other statutes are silent on the subject of preemployment testing and deal only with testing of actual employees.

Many of the statutes (Florida, Iowa, Kansas, Maine, Minnesota, Rhode Island, Tennessee, and Vermont) forbid an employer from taking disciplinary action against an employee who tests positive for drug use if the employee agrees to submit to a substance abuse treatment program. The Maine statute specifically requires any employer with over 20 full-time employees to maintain a functioning employee assistance program before implementing a drug testing program.

Almost all of the statutes both require employers to give notice to employees and applicants that a drug testing program is in effect as well as require retesting to confirm initial positive results. Connecticut and Montana require three tests before any adverse action is taken against the employee. Maine, Minnesota, Montana, Rhode Island, and Vermont allow employees to have a portion of the sample retested by their own approved laboratory.

The Rhode Island statute illustrates the various state legislatures' concerns regarding procedure and privacy. In Rhode Island, testing of urine and blood of employees is illegal *unless* all of the following criteria are met:

1) the employer has reasonable grounds to believe, based on specific objective facts, that the employee's use of

controlled substances is impairing his ability to perform his job;
2) the employee provides the test sample privately, outside the presence of any person;
3) the testing is conducted in conjunction with a *bona fide* rehabilitation program;
4) positive tests are confirmed by means of gas chromatography/mass spectrometry or technology recognized as being at least as scientifically accurate as gas chromatography/mass spectrometry;
5) the employee has an opportunity to have the sample retested by an independent facility; and
6) the employer provides the employee with a reasonable opportunity to rebut or explain the results.

Legitimate questions may be raised concerning the efficacy of a drug-testing program that ensures the employee total privacy, as does the Rhode Island statute, in providing a urine specimen. Based on its own experience with deceptive practices, the National Collegiate Athletic Association requires that athletes be directly observed when providing a specimen. There is little or no reason to believe that deception would not equally be possible in the employment context.

At least two cities, San Francisco, California and Boulder, Colorado, have adopted drug testing ordinances. Both ordinances have adopted reasonable suspicion standards. State and local regulation of drug testing will continue to be an active topic among state legislatures, and health care institutions considering drug testing programs must be aware of applicable state laws as they develop.

Members of Congress also are showing interest in the regulation of private plans. One currently pending bill[29] would require private employer drug testing programs to implement the same testing procedure guidelines applicable to federal programs. In addition to providing for procedural protections, other proposed bills[30] would limit the circumstances in which a private employer could require testing.

Common Law Liability

Any drug testing program, public *or* private, may be challenged by employees under a variety of common law theories. These may include wrongful discharge, defamation (libel or slander), intentional infliction of emotional distress, or a common law privacy theory. In a 1976 Texas case, for example, an employee received $200,000 in a defamation action against an employer who stated that the employee was a methadone user based on a urinalysis test that later proved to be a "false positive."[31] In California, a computer operator discharged for failure to take a random drug test was awarded $485,000 in an action based on a breach of implied covenant of good faith and fair dealing.[23]

An employee may challenge a drug testing program also by raising a common-law invasion-of-privacy claim. This claim has not been well litigated in the employment area. In a recent South Carolina case, an employee brought an action against his employer for wrongful termination, intentional infliction of emotional distress, and invasion of privacy as a result of being terminated from his job based on a positive drug test.[32] His claim failed essentially because the court found he had not shown a "blatant and shocking disregard of his rights" and had not shown that the employer had in fact publicized the test or his dismissal. Nonetheless, this case is instructive in reminding employers that in addition to statutory or possibly state constitutional grounds for complaint, an employee also has the common law available as a possible basis for suit.

Handicap Laws

Institutions considering implementing a drug testing program also should be aware of the potential application of handicap discrimination laws. The Federal Rehabilitation Act of 1973,[33] the Americans with Disabilities Act of 1990,[34] and statutes in virtually all states prohibit employment discrimination against handicapped persons. Under the 1973 Act, persons with a history of drug use and those currently participating in a rehabilitation program are considered "handicapped" and are protected against discrimination by federal employers, federal contractors, and recipients of federal funds.[35] However, this Act does *not* protect persons whose use of alcohol or drugs prevents him or her from performing the duties of the job in question or whose abuse of alcohol or drugs may constitute a direct threat to the safety of others because of the nature of his or her employment.[36] The proposed Americans with Disabilities Act contains similar provisions which would apply to private employers and employees.[34]

There is very little uniformity among the states in the application of the handicap statutes to alcohol and drug users. Some statutes treat drug use or abuse as a handicap, and others do not. Some statutes contain provisions requiring the employer to hire and make accommodations for a handicapped individual; however, there is wide variation as to the degree of accommodation that may be required. It does seem certain, however, that employers who attempt to rehabilitate employed alcohol and drug abusers will confront lesser legal risks than if the abuser is terminated from his or her position. This was illustrated in a recent Ohio case, in which it was held that drug addiction was a handicap under Ohio's discrimination law and that the employer violated the law when it terminated the addicted employee from his or her position instead of granting disability leave.[37]

Absence of uniformity of law applicable to public and private institutions clearly suggests that any hospital ad-

ministration considering a drug testing program should avail itself of expert legal counsel in advance. Legal commentators in this area agree that there are far more questions unanswered by the courts and legislatures to date than there are questions answered. Available data are beginning to demonstrate, however, that both random drug testing and testing upon reasonable cause serve as effective deterrents against drug abuse in the workplace. For example, a survey of military personnel showed that drug use declined rapidly after urinalysis testing was introduced.[38] Hospital administrators therefore may determine that even given the legal pitfalls, maintenance of such a program, particularly for hands-on providers, is worth the effort.

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