
1987

A Management Perspective on the Controlled Substance Testing Issue: Management's Newest Pandora's Box

Jan P. Muczyk
Cleveland State University

Brian P. Heshizer
Cleveland State University

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/jlh>



Part of the [Health Law and Policy Commons](#)

[How does access to this work benefit you? Let us know!](#)

Recommended Citation

Jan P. Muczyk & Brian P. Heshizer, A Management Perspective on the Controlled Substance Testing Issue: Management's Newest Pandora's Box2 J.L. & Health 27 (1987-1988)

This Article is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Journal of Law and Health by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

A MANAGEMENT PERSPECTIVE ON THE
CONTROLLED SUBSTANCE TESTING ISSUE:
MANAGEMENT'S NEWEST PANDORA'S BOX

Jan P. Muczyk*
and
Brian P. Heshizer**

INTRODUCTION

The President of the United States has insisted recently that his urine sample be tested for presence of illegal drugs. In addition, the President has required his cabinet officers and vice president to submit to the same testing, and is threatening one-third to one-half of federal workers with mandatory drug testing in the workplace.¹ Numerous congressmen and senators have voluntarily submitted to urinalysis in the great "jars wars" of the 1986 elections. Moreover, approximately one-third of *Fortune* 500 companies have some sort of drug testing program in place.² Furthermore, we read that drug abuse has reached epidemic proportions, and that the economic loss resulting from drug abuse, excluding alcohol, might be as high as \$26 billion per year.³ Finally, we are told by legal experts that drug testing is legal in the private sector in all circumstances, and legal in the public sector under many circumstances (if employees are unionized, drug testing must be negotiated by the parties).⁴

A new literal meaning has been given to the adage of offering one's sweat and blood to the employer — to which is added as well, one's urine. Little wonder then that so many private and public employers have rushed into drug screening programs. Given the trend of recent events, it would seem that an imperative does exist for drug testing at the workplace. However,

* Professor of Management, Cleveland State University; B.S., M.B.A., D.B.A., University of Maryland.

** Associate Professor of Management, Cleveland State University; Ph.D., University of Wisconsin.

¹Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986). See also *Authorization of Federal Worker Drug Testing*, 123 Lab. Rel. Rep. (BNA) No. 7, at 73 (Sept. 22, 1986).

²Trost, *For Firms That Do Test, The Pitfalls Are Numerous*, Wall St. J., Nov. 11, 1986, at 35, col. 4.

³Abramowitz & Hamilton, *Companies Get High On Drug Tests*, Cleveland Plain Dealer, Oct. 5, 1986, at 1-E, col. 1.

⁴Angarola, *Drug Testing in the Workplace: Is It Legal?*, PERSONNEL ADMIN., Sept. 1985, at 79.

before organizations establish testing programs, management should consider the known problems associated with substance testing and the organizational implications of such testing.

Problems Associated With Controlled Substance Screening

1. *Definition of a controlled substance.* A controlled substance is any narcotic, depressant, stimulant, hallucinogen or cannabis as defined by the Drug Enforcement Administration of the United States Department of Justice. A number of controlled substances are legal when prescribed by a physician and obtained with a prescription. The best examples are barbiturates (depressants) and amphetamines (stimulants), which are widely prescribed by physicians as mood-altering medications. Methadone is legal for those who are on methadone maintenance programs. Possession of small quantities of cannabis (marijuana) for personal use is also legal in thirteen states.⁵ How will the employer determine if the employee who has tested positive for a drug is taking that drug legally or illegally?

Typically, controlled substance testing identifies the following commonly abused drugs: amphetamines, barbiturates, benzodiazepines (such as librium and valium), cocaine, marijuana, opiates, PCP, methaqualone, and methadone.⁶ Alcohol, the drug of choice among white collar employees and top management, is not a controlled substance by definition, and therefore, is usually omitted from the list of drugs to be detected by tests. Since the economic costs (estimated at approximately \$51 billion per year)⁷ of alcohol abuse is about twice as great as the economic costs associated with abusing all other drugs combined, it is poor economics and quite hypocritical to leave alcohol off the list.⁸

Moreover, it is perfectly legal to be under the influence of controlled substances, even though illegally obtained. It is only illegal to traffic in controlled substances and to possess them, and being under their influence is not within the legal definition of possession.⁹

⁵Nahas, *Marijuana Legalization Flouts U.N. Treaty*, Wall St. J., Oct. 17, 1986, at 28, col. 4.

⁶Fay, *New Directions in Drug Screening*, SECURITY MGMT., Nov. 1986, at 47, 48.

⁷Abramowitz & Hamilton, *supra* note 3, at 6-E.

⁸ALCOHOL AND DRUGS IN THE WORKPLACE: COSTS, CONTROLS, AND CONTROVERSIES (BNA Special Report, 1986) [hereinafter ALCOHOL AND DRUGS IN THE WORKPLACE].

⁹Angarola, *supra* note 4, at 88.

2. *Reliability of drug tests.* Currently three tests are widely used to detect the presence of controlled substances in urine: 1) Radio Immunoassay (RIA), 2) Enzyme-multiplied Immunoassay Technique (EMIT), and 3) Gas Chromatograph Mass Spectrometer Test (GCMS). The RIA and EMIT tests pose serious problems because they are nonspecific, broad-spectrum tests. In other words, they identify a broad class of organic chemicals, not a particular molecule of a specific chemical. With these nonspecific, broad-spectrum tests a poppy seed strudel or poppy seed bagel lover will test positive for opium, which is a derivative of the opium poppy, as are heroin and morphine. The same is true for a person taking codeine (which also is a derivative of the opium poppy) as prescribed by a physician. With RIA and EMIT, persons taking over-the-counter medications such as Advil and Nuprin can be mistaken for marijuana users, while users of over-the-counter cough medications such as dextromethorphan can test positive for morphine. Amoxicillin, a prescription antibiotic, produces a false positive reading for cocaine.¹⁰

The Gas Chromatograph Mass Spectrometer Test (GCMS) is a narrow-spectrum test that identifies the precise molecule of a specific drug and is free of the reliability problems that plague RIA and EMIT. Although GCMS costs between \$100 and \$200 per specimen,¹¹ as opposed to RIA and EMIT which cost between \$25 and \$40 per test,¹² it is essential that GCMS be used either in the initial screening or in the confirmation test.

3. *Competence of laboratories conducting the drug tests.* At the present time, laboratories that conduct drug testing operate in an unregulated environment. Because drug testing has spread so rapidly, drug testing laboratories have sprung up like weeds to meet the demand. As a result, many laboratories lack the expertise to conduct the tests properly and to interpret the results correctly, even though the tests themselves may be reliable if performed by competent individuals under ideal conditions.

A survey conducted by the U.S. Centers for Disease Control in 1981 illustrates the serious problems in this area. As part of the survey, C.D.C. sent spiked urine samples to thirteen drug screening laboratories without informing the labs of the test. "Some labs performed very poorly, with false negatives (samples included drugs but tested nega-

¹⁰Rust, *Drug Testing: The Legal Dilemma*, A.B.A. J., Nov. 1, 1986, at 50, 51.

¹¹*Id.* at 52.

¹²Matteson, *Drugs on the Job: Abuse on the Bottom Line*, SECURITY WORLD, May 1985, at 42.

tive) running as high as 100 percent on cocaine and amphetamines. False positives (samples were free of drugs but tested positive) ran as high as 37 percent on amphetamines.¹³

4. *Integrity of the chain of custody of the evidence.* A vial of urine free of traces of controlled substances now sells for approximately \$50 on the streets of most metropolitan areas.¹⁴ It takes only a second to make the switch, when an individual is asked by an employer to provide a urine specimen. How closely and by how many persons will job candidates and employees be watched while urinating into the specimen vial?

Most specimens are mailed to the laboratory conducting the tests. The possibility of mislabeling, misfiling, assigning the wrong results to a particular specimen, and a host of other clerical errors is quite high.

5. *The relationship between positive test results and job impairment.* An individual is considered driving while under the influence of alcohol if the blood alcohol content is .10% (one-tenth of one percent) or more.¹⁵ A lower level does not constitute driving impairment. Many employers use the .10% figure as a measure of job impairment as well.¹⁶ No analogous relationships have been developed between amount of controlled substances present in the urine specimen and job impairment. Tests for controlled substances show just the presence not the quantity of a substance in the body. These tests do not have the capability of providing that information.¹⁷ Someone who smoked one or two marijuana cigarettes on his or her own time Friday evening will not have his or her job performance impaired the following Monday. Yet, that person will test positive for marijuana the following Monday. Certain controlled substances whose metabolites are fat soluble, such as marijuana, can remain in the body and be detected in a urine specimen weeks or months after being ingested; and by no stretch of the imagination can those persons be considered intoxicated on the job.

Controlled substances last much longer in the urine than in the blood. Therefore, only a blood test can determine whether or not an employee

¹³ALCOHOL AND DRUGS IN THE WORKPLACE, *supra* note 8, at 30.

¹⁴Muczyk & Heshizer, *Managing the Latest Managerial Pandora's Box — Mandatory Drug Testing in the Work Place* (1987) (unpublished manuscript).

¹⁵*Id.* at 6.

¹⁶*Id.*

¹⁷Address by Dr. Edward Kaufman, Vice President, Industrial Affairs, SmithKline Beckman Corp., *Journal of Law and Health Symposium on Drug Testing in the Workplace* (Nov. 21, 1986), and in comments made to Brian Heshizer at the Symposium.

has ingested a controlled substance on the employer's time or on his own time.¹⁸ However, blood tests are seldom used because they are considered much more intrusive.

6. *The possibility of a libel suit.* Even though a controlled substance that is illegally obtained is detected in the specimen of an employee, the employer still has a legal obligation to keep this information confidential.¹⁹ If the information leaks out, if the employee is falsely accused because of testing error, if the employer cannot defend the reliability of the test or the chain of custody of the evidence, then the employer is likely to lose a defamation of character law suit, and juries tend to value a person's character very highly.
7. *Lowering employee morale.* Most employers that have mandatory drug testing programs report that drug abuse is not a problem in their work places.²⁰ When asked to rank their problems, drug abuse does not even appear on the list.²¹ How many loyal, competent, and drug-free employees will be insulted by a random, blanket drug screening program and toward what end? There is accumulating evidence that employee loyalty has waned in recent years.²² Do companies actually believe that mandatory drug testing conducted without any substantiating cause will enhance employee morale? It is far more likely that employees will respond cynically to such policies.

Evidence indicates that with the exception of cocaine, drug abuse has either leveled off or begun declining.²³ Hence, there is no compelling societal reason to adopt such extreme measures as random, blanket drug screening at the work place. The current thrust in the business literature has been to emphasize the positive benefits to the organization of drug testing.²⁴ As the discussion above indicates, however, the potential for harm should cause organizations to weigh carefully their need for a testing program. Where the organization can define some

¹⁸Professor Warns Against Reliance on Urinalysis, Nat'l Rep. on Substance Abuse (BNA) No. 4, at 5 (Jan. 21, 1987).

¹⁹Drug and Alcohol Screening for Current Employee Testing for Cause, Empl. L. Update, at 3 (1986) (available in *Journal of Law & Health* office).

²⁰Muczyk & Heshizer, *supra* note 14, at 7, 8.

²¹*Id.*

²²O'Boyle, *Loyalty Ebbs At Many Companies As Employees Grow Disillusioned*, Wall St. J., July 11, 1985, at 27, col. 4.

²³Drug Epidemic Called Misconception, The Cleveland Plain Dealer, Oct. 28, 1986, at 1-A, col. 1.

²⁴See Matteson, *supra* note 12.

compelling need for testing, management can more legitimately justify the policy to employees and as well provide a stronger defense if legal action is taken as a result of the policy's application.

Situations Justifying Mandatory Drug Testing

For legal and business related reasons, employers may have substantive grounds to establish a drug screening program. If an employer fails to take all the necessary precautions to hire a competent employee (drug use may very well diminish competency), the employer through his negligence has contributed to the injury that the incompetent employee has caused to others, and may be held liable.²⁵ Therefore, employers are advised to institute controlled substance screening programs for those employees on inherently dangerous jobs.²⁶ For example, a transit authority would be well advised to adopt a drug screening program for those employees who operate and maintain buses and subways. Along similar lines, airline companies would be well advised to implement such programs for pilots, copilots and maintenance people.

Organizations which depend strongly on maintaining a public image of integrity and trust have also instituted mandatory screening programs. Several major Manhattan law firms are expected to establish drug screening programs in the near future. Recently, the investment banking firms of Kidder, Peabody & Company and Smith Barney Upham Harris, Inc. announced testing for new employees and random testing of current employees.²⁷ Accord-

²⁵Angarola, *supra* note 4, at 88.

²⁶It is important to note that most courts which have ruled upon the validity of drug testing for public employees have required as a prerequisite some articulable basis for suspecting that the employee was using illegal drugs, usually framed as "reasonable suspicion." See *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986) (fire fighters); *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986) (school bus drivers); *McDonell v. Hunter*, 612 F. Supp. 1122 (S.D. Iowa 1985) (correctional officers); *Turner v. Fraternal Order of Police*, 500 A.2d 1005 (D.C. 1985) (police officers).

However, exceptions to the requirement of individualized reasonable suspicion have been recognized in certain narrowly defined circumstances. See *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986) (administrative search exception to the fourth amendment warrant requirement applied to urine testing of jockeys in the heavily regulated racing industry); *Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir. 1976), *cert. denied*, 429 U.S. 1029 (1976) (no fourth amendment violation in urine testing of bus drivers who were involved in serious accidents or suspected of being under the influence of drugs or alcohol in view of the transit authority's paramount interest in protecting the public); *Rushton v. Nebraska Public Power District*, 653 F. Supp. 1510 (D.Neb. 1987) (annual and random drug screening of public utility employees who had access to "vital areas" of a nuclear power plant was reasonable given the public need for such testing and the diminished expectation of privacy of employees who were already subject to random pat-downs, electronic searches, and constant surveillance).

²⁷Goldberg, *Drug Testing for Lawyers*, A.B.A. J., Nov. 1, 1986, at 54.

ing to these firms, the purported reason for these programs is to reassure clients that the firm which handles their business is drug-free. These organizations are concerned about the financial temptations posed by drug use which could lead employees to violate positions of trust, especially when large sums of money are involved. Also of concern is the presumed loss of image that would occur if employee drug use became public knowledge. Thus, in some situations the business impact of suspected or real employee drug use might serve as a legitimate reason for drug testing.

Jumping to a Dangerous Conclusion

Just because it is legal to conduct drug screening, especially in the private sector, does not mean that it is legal to terminate automatically an employee who has used a controlled substance or to refuse to hire a job candidate who has used a controlled substance.²⁸ Testing and hiring are separate issues. "Wrongful discharge" law is rapidly evolving, thereby providing employees greater job security than was heretofore possible. The following cases illustrate the recent trends in this area of law.

The insurance and finance manager of an Ohio automobile dealership informed his superior that he had an alcohol and cocaine problem and requested time off to participate in a rehabilitation program. The manager was fired after making this admission. He then sued claiming that his addiction was a handicap. The Ohio Supreme Court reinstated the manager with back pay on the grounds that he was protected by the Ohio handicap statute. Judge Locher, speaking for the Ohio Supreme Court, said "[where] a dependency exists and has not yet compromised work skills ... individuals are still productive [and] can ... be helped. ..."²⁹

A 1974 New York state court decision provides another concrete example. The State Board of Regents' Committee on Discipline revoked the license of a practical nurse who denied during two employment interviews with the Flower Fifth Avenue Hospital that she ever used illegal drugs. In fact, she had been a heroin addict, but was progressing well in a methadone maintenance program. The court overturned the license revocation and recommended a five-year probation period for the practical nurse. The judge stated as part of his reasoning that

²⁸Rothstein, *Screening Workers for Drugs: A Legal and Ethical Framework*, 11 EMPLOYEE REL. L.J. 422 (Winter 1985-86).

²⁹*Hazlett v. Martin Chevrolet, Inc.*, 25 Ohio St. 3d 279, 282, 496 N.E.2d 478, 481 (1986).

"nothing ... indicate[s] that the petitioner's addiction affected the performance of her duties....[H]er supervisors at the ... Hospital testified that she was a competent nurse, that her performance evaluation contained ratings of 'very good' or 'satisfactory' in all categories, and that she had been given a merit raise in the course of her work."³⁰

These two cases along with other recent case law,³¹ suggest that in many states discharging an employee solely because he tests positive is unlikely to stand if reviewed in court. An employee who tests positive on a drug screening test has not violated any federal or state law (the penalties apply to possession and trafficking in an illegal substance). Summarily discharging an employee because of a positive drug test would violate good faith standards of treatment which many courts now recognize for at-will employees.³² Companies which plan to take punitive action against employees for having a positive drug test result had better provide rehabilitation as a first option, and then only on the employee's refusal to participate or successfully complete the program take action.³³

Recommended General Policy

The safest and most legally justifiable reason to test for drugs is over performance-related problems. Drug testing is not *per se* a job performance measure. However, controlled substance abuse results in economic loss because it is often related to diminished performance, increased absenteeism, tardiness, and accidents.³⁴ Thus, the employer can always discipline the abuser for unsatisfactory performance — the safest of all legal grounds. Nevertheless, many, if not most, organizations do not effectively discipline un-

³⁰*In re Ahsaf v. Nyquist*, 44 A.D.2d 624, —, 353 N.Y.S.2d 561, 563 (1974).

³¹*See also Evans v. Casey*, No 86-1217 (E.D.Pa Sept. 10, 1986) (class action consent decree under which the Philadelphia Division of the U.S. Postal Service agreed to halt urinalysis drug testing of job applicants and to pay damages of \$5,000 each to eleven persons rejected because their test results were positive given preliminary approval).

³²Heshizer, *The Implied Contract Exception To At-Will Employment*, 35 LAB. L.J., 131 (1984).

³³*See Hazlett*, 25 Ohio St. 3d at 279, 496 N.E.2d at 478 (employer's summary termination of an employee, upon request for a leave of absence to obtain medically recommended care and treatment for chemical addiction, was unlawful discrimination against the employee on the basis of handicap, where the employer had, on several occasions, granted disability or sick leave for other employees, and the employer indicated that the employee had been doing a good job).

³⁴*Fortune 500 Firms Use Urinalysis Tests to Stem Employee Drug Abuse*, ADMIN. MGMT., Jan. 1986, at 12.

satisfactory performers because they have difficulty defending their disciplinary actions as the result of tolerating seriously inadequate performance appraisals.³⁵ The reluctance to discipline unsatisfactory performers is especially acute with respect to members of legally protected groups, as defined by Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, since the law makes it so much easier for these groups to litigate.³⁶

The fact that many organizations have deficient performance appraisals is not due to the lack of knowledge pertaining to the design and implementation of sound performance evaluation systems, but to the lack of desire to expend the necessary time, energy, and money. Let us face reality! Sloppy management is easy, and that is why we have such an abundance of it. Good management, on the other hand, requires hard work, and that accounts for its relative scarcity. Consequently, many employers are always looking for a quick, easy, and inexpensive panacea for dealing with a complex issue. The latest such nostrum is screening employees and/or job applicants for evidence of controlled substance usage.

The recommended policy focuses on performance evaluation (quantity of work, quality of work, meeting deadlines, tardiness, early departures, absenteeism, interpersonal relations, and learning new methods and procedures). The first step in dealing with a performance problem is to document the nature and extent of the deficiency. After documentation, the employee should be confronted with the issue of performance inadequacy, and the consequences of continued unsatisfactory performance should be presented convincingly but unemotionally.

The second step consists of identifying the cause(s) of unsatisfactory performance. Ineffective performance can be caused by inadequate recruitment, selection, placement, and training. Poor performance can also result from lack of motivation, emotional disorders, family crises, and physical impairment. It would be most irresponsible to assume automatically that all performance deficiencies are chemically induced.

Organizations would be well served if their executives, managers, and supervisors were trained in the identification of drug abuse symptoms. The symptoms of alcoholism are well known: the frequent smell of alcohol or breath fresheners on an employee's breath, red eyes, flushed face, unsteady walk, hand tremors, loss of coordination, and a variety of unlikely excuses for coming to work late, leaving early, long lunch breaks, absenteeism, and

³⁵Muczyk & Heshizer, *supra* note 14, at 19.

³⁶R. ARVEY, FAIRNESS IN SELECTING EMPLOYEES 41-57 (1979).

an assortment of personal problems.³⁷ Heavy drug usage produces symptoms such as dilated pupils, disorientation, hallucinations, prolonged and serious lethargy, and unexplainable states of apathy or elation.³⁸ Excessive consumption of alcohol or large dosages of other drugs alters intellectual functioning, impairs psychomotor skills, affects mood and judgment, and frequently diminishes performance.

The third step requires action on the part of the superior and the unsatisfactory performer who is suspected of controlled substance abuse. If the subordinate admits his or her dependence, then the person should be referred to an employee assistance program and monitored closely. In the absence of such a program, the employee should be referred to the appropriate community agency. If the employee refuses treatment or does not respond to it in a satisfactory manner, then the employee should be dismissed for unsatisfactory performance. The basis for employer action then is deficient job performance—not a positive test result on a drug screening test. When economically feasible, organizations that lack in-house employee assistance programs should participate in community assistance programs or expand the insurance coverage to include treatment for chemical addiction.

The following guidelines are recommended for employers electing to adopt this approach towards controlled substance testing:

1. All employees and job applicants should be informed in writing of the employer's policy pertaining to controlled substance use, including details about medical screening.
2. The screening program should be presented in a medical and safety context, *e.g.*, improvement of health and safety of the employees.
3. The controlled substance abuse policy, including specifics of testing, should be included in all employment contracts and collective bargaining agreements.
4. If any doubt exists whatsoever regarding the outcome of drug testing, the individual should be retested more thoroughly. Many employers are reluctant to take this step because of the added expense. If the individual claims to be taking medication, that person should be given every opportunity to document his assertion.

³⁷Matteson, *supra* note 12, at 43.

³⁸*Id.* See also *Marijuana-Practical Information*, Nat'l Rep. on Substance Abuse (BNA) No. 2, at 3 (Dec. 24, 1986); *Cocaine and Crack: Practical Information*, Nat'l Rep. on Substance Abuse (BNA) No. 1, at 3 (Dec. 10, 1986).

Perspective On Controlled Substance Testing

The central function of management is to maximize firm performance to increase stockholder equity. Management functions should be judged from the perspective of achieving this objective. Undertaking drug testing as an end unto itself without linkage to this basic objective raises the question of the purpose of the testing being done. This is not to gainsay the seriousness of the drug problem in our society. However, from a managerial perspective drug use becomes a problem when it affects the organization's strategic performance objective.

The current popularity of drug testing at the workplace has the all too familiar sound of any number of past management "miracles" — nostrums that promise facile solutions to problems at work.³⁹ Before organizations in lemming-like fashion plunge into a testing program, the reason for the program and its relationship to achieving organizational objectives ought to be understood.

As laudable a goal as a drug-free society is, it is not likely to be achieved. Drug testing at work becomes another easy answer for a complex societal problem that may in circumstances also concern business. The evidence hardly exists to argue as the prevailing "wisdom" that a pervasive drug problem plagues the workplace thereby requiring mandatory testing. For society, the drug problem may be one for which there is no perfect solution. For management, drug testing as the answer to employee drug use is a poor substitute for the good management practices that most organizations are unwilling to implement.

The safest premise upon which to predicate management's control function has been, is now, and will continue to be performance. Yet, most organizations do a poor job managing performance. In too many cases there is either a weak relationship or no relationship at all between performance and rewards.⁴⁰ The major reason for an inadequate nexus between performance and rewards is the inability of many organizations to measure accurately performance differences.⁴¹ Designing, implementing, and maintaining sound performance evaluation systems requires the expenditure of time, continuous effort, and money, a price that many organizations are unwilling to pay. The American way seems to be to go for the quick fix, which currently is screening employees for controlled substance use.

³⁹Rust, *supra* note 10, at 51.

⁴⁰Muczyk & Hastings, *In Defense of Enlightened Hardball Management*, BUS. HORIZONS, July/Aug. 1985, at 23, 24-26.

⁴¹*Id.* at 26.

Although random, blanket medical screening is legal in the private sector in all cases where employees are unorganized, and in the public sector in many instances, it is unlikely to remain so once the issue is thoroughly tested in the courts. Once the courts weigh the employer's right to operate a safe and productive work place against the individual's right to privacy, due process, and other "Bill of Rights" guarantees, they will likely make public safety, reasonable suspicion, probable cause, and compelling interest the tests of legality in the private sector, much as they already have in the public sector.⁴² A performance-based policy towards drug testing would further legitimate organizational objectives and thereby withstand legal challenge.

Summary

Drug testing at work should be undertaken only if an employee performance problem exists, with the exception of those work situations in which drug usage would result in a clear danger to coworkers or threaten public safety. Blanket, random screening can lower employee morale, motivation, and commitment to the organization.

Drug screening integrated within the legitimate performance monitoring function of management does not pose a threat. Effective and satisfactory performance is an essential component of success in business. Drug testing falls within the proper and necessary scope of management responsibility when the cause of deficient job performance is suspected to be drug usage. On the other hand, testing for controlled substances in the absence of a performance deficiency is both poor management practice and bad organizational policy.

⁴²Muczyk & Heshizer, *supra* note 14, at 19.