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Drug Testing: The Union Perspective

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DRUG TESTING: THE UNION PERSPECTIVE

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I. *INTRODUCTION*

The rapid increase in employer-mandated drug testing for workers raises significant questions concerning individual privacy and liberty. Yet, drug testing questions are not limited to individual claims by affected employees. The sweeping move to test workers through urinalysis also presents serious issues for labor unions in the public and private sectors. The developing concerns and issues for labor organizations are outlined in this presentation.

II. *AN EMPLOYER'S OBLIGATIONS TO COLLECTIVELY BARGAIN DRUG TESTING PROCEDURES WITH LABOR UNIONS*

Section 8(a) of the National Labor Relations Act[1] compels employers to negotiate with recognized labor organizations on matters relating to wages, hours, and working conditions. The same obligation is imposed on public sector employers in states which have adopted statutory provisions mandating collective bargaining by public employers and labor organizations.[2]

The federal and state statutes obligating employers to bargain with labor organizations on wages, hours, and working conditions clearly apply to the negotiation of an initial contract with a newly recognized union. The obligation to bargain also applies to the negotiations of succeeding contracts with previously recognized unions. Moreover, the statutes have been interpreted

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[1] 29 U.S.C.A. § 158(a) (West 1973).

[2] *See, e.g.*, OHIO REV. CODE ANN. § 4117.08 (Baldwin 1983); MO. ANN. STAT. § § 295-300 (Vernon 1965); CONN. GEN. STAT. ANN. §§ 31-105 (West 1987).

to require employers to commence negotiations with the labor organization about proposed changes to wages, hours, and working conditions which arise during the term of an effective collective bargaining agreement.[3]

Further, employers who are parties to a collective bargaining agreement may not unilaterally change terms and conditions of employment without good faith bargaining with the labor organization. Despite the fact that employers are mandated to negotiate changes in terms and conditions of employment with the recognized labor organization, some employers have unilaterally adopted policies and procedures for the drug screening of employees before entering into any discussions with the recognized unions. Employers have been seemingly eager to overlook the fact that union input into the development and implementation of drug-testing policies may be helpful and necessary. Employers apparently have been willing to disrupt otherwise harmonious labor-management relations in their eagerness to join the ranks of employers using drug testing as a personnel management tool.

Employers would be hard-pressed to argue that a drug-testing policy for existing employees does not impact on wages, hours, or terms of employment. With few exceptions, drug-testing policies adopted by employers have imposed some form of disciplinary sanction on employees who fail to pass the urinalysis screenings. Sanctions may range from the entry of reprimands or critical comments in personnel files, to suspension, and even to automatic discharge.

Employers who seek to initiate drug screening as part of a selection process for *new employees* are generally not required to engage in any discussions with labor organizations before implementing *pre-hire* testing procedures. As a general rule, labor unions receive bargaining rights for existing employees through the recognition clauses in collective bargaining agreements. Few, if any, labor organizations in the public and private sectors are granted any right or duty to bargain for prospective employees or job applicants.[4]

In some situations, unions may successfully restrain an employer from unilaterally imposing mandatory drug-testing procedures for existing employees without having engaged in bargaining procedures. This approach

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[3]*See, e.g.*, National Labor Relations Bd. v. Dant, 534 F.2d 844 (9th Cir. 1976); Murphy Diesel Co. v. National Labor Relations Bd., 454 F.2d 303 (5th Cir. 1971).

[4]*See* Shield Club v. City of Cleveland, 647 F. Supp. 274 (N.D. Ohio 1986), *appeal pending* No. 86-4108 (6th Cir.) (Pre-hire drug screening for police cadets considered by trial court having continuing jurisdiction over police hiring as a result of consent decree in this case alleging employment discrimination in the safety forces; employee organizations did not object to the pre-hire drug screening inasmuch as unions had no bargaining rights for job applicants.) The author represents the Fraternal Order of Police, a labor organization representing sergeants, lieutenants and captains within the police department. The Fraternal Order of Police is an intervenor defendant in the case.

was applied in *International Brotherhood of Electrical Workers v. Potomac Electric Power Company*.[5] In that case the employer sought to unilaterally implement changes to its negotiated mandatory drug-testing procedures. The union applied for and obtained a temporary restraining order barring implementation of the amended mandatory drug-testing procedures. The employer also stipulated that the amended testing procedures would not be implemented until after the union's grievance was heard and decided by an arbitrator.

III. *CONSTITUTIONAL CHALLENGES BY LABOR ORGANIZATIONS*

The mandatory drug testing of employees raises significant questions of individual rights under the fourth and fifth amendments to the United States Constitution. A growing number of labor organizations have joined with individual members in suing employers who have arguably violated *individual* rights by the implementation of mandatory drug testing.

Union challenges to alleged deprivation of individual liberties through drug testing have met with a notable lack of success in situations where 1) the employer did not uniformly screen existing employees without probable cause; or 2) where the employer demonstrated an overriding public interest in effecting drug-testing procedures. For example, in *Turner v. Fraternal Order of Police*,[6] a union joined with individual members to challenge drug testing for police officers. The union and the individual plaintiffs contended that the city's implementation of drug testing for police officers violated the individual officers' fourth amendment right of privacy. The claims of the union and the individual members were rejected by the court. The court determined that the public interest in maintaining the integrity of the police and safety forces outweighed any *individual* privacy interests.[7]

Similarly, in *Division 241 Amalgamated Transit Union v. Suscy*,[8] another union challenged a drug-testing policy. In that case, the municipal employer implemented drug testing for public bus drivers who were involved in serious accidents or who were suspected by two supervisors of being under the influence of narcotics. The court, in upholding the drug-testing policy, recognized that the public interest in highway safety out-

[5]No. 86-717 (D.D.C. Mar. 18, 1986). However, plaintiff's motion for a preliminary injunction was ultimately denied. IBEW v. Potomac Elec. Power Co., 634 F. Supp. 642 (D.D.C. 1986).

[6]500 A.2d 1005 (D.C. Cir. 1985).

[7]*See also* Shield Club v. City of Cleveland, 647 F. Supp. 274 (N.D. Ohio 1986).

[8]538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976).

weighed any individual privacy claims. Moreover, the court found that the employer had adopted adequate safeguards to insure against the random testing of employees without probable cause. Because the employer only tested bus drivers involved in serious accidents or drivers suspected by two concurring supervisors of being under the influence of narcotics, the court determined that sufficient procedural safeguards existed.

However, individual public employees have successfully challenged drug-testing policies which have contained no procedural safeguards.[9] Such blanket testing of all existing employees, regardless of their safety or job records, has been found to create a danger that employees will be tested without any cause. On the other hand, those testing policies which focus only on employees with poor safety or performance records may be upheld, regardless of challenge by labor unions or individual employees.

Labor unions probably lack standing to raise arguments that drug-testing procedures violate *individual* constitutional rights, because the labor union, as an entity, does not have any interest that may be enforced or protected under the fourth and fifth amendments.[10] At the same time, individual union members affected by constitutionally defective drug-testing procedures seldom have the financial resources to pursue vigorous litigation. In this situation, labor unions may play an important role in assisting individual employees to challenge drug-testing policies, especially where the vindication of the one employee's claim will resolve issues for large groups of similarly affected employees. Specifically, unions should strongly consider pursuing its claim of failure to negotiate unilaterally imposed employer drug-testing policies in a combined action *with individual employees* alleging deprivation of their personal constitutional interests. By including such claims, unions will demonstrate standing necessary to present such essential issues to the courts.

If the union does not have grounds for a "failure to bargain" claim, the union may be left with the sole option of providing financial assistance to an individual employee who seeks to challenge application of a drug-testing policy. In the alternative, the union may consider joining in an employee's suit as a amicus curiae or "friend of the court."

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[9]Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986); McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985).

[10]*E.g.*, George Campbell Painting Corp. v. Reed, 392 U.S. 286 (1968); United States v. B.D. Layman, Inc., 544 F.2d 526 (9th Cir. 1976); NLRB v. Trans Ocean Export Packing, Inc., 473 F.2d 612 (9th Cir. 1973). *Reed*, 392 U.S. at 286 and *Trans Ocean*, 473 F.2d at 612, discuss the *personal* nature of the fifth amendment's privilege against self-incrimination. Thus it cannot be claimed by a corporation.

IV. *FAIR REPRESENTATION QUESTIONS*

Labor union officials need to remain watchful of their obligations to fairly represent union members even if the members' claims are unpopular. It may not be popular to support an individual or group of employees who test "positive" for serious narcotics, such as cocaine or heroin, through urinalysis. In all likelihood, union officials will be uncomfortable in arguing that a worker labeled through testing as a cocaine user or heroin user should be maintained on the job. Moreover, unions may be uncomfortable in devoting their already limited resources to the litigation or other pursuit of an individual's claim regarding testing.

At the same time, labor unions must be mindful of the fact that an individual employee could have a legitimate claim that she or he was unfairly tested and registered a "false positive" through the employer's drug screening. No employee should be treated unfairly. Employees should not be removed from their positions or otherwise disciplined through arbitrary or haphazard drug testing.

A labor union may properly conclude that an individual employee has no claim which can be pursued through litigation, collective bargaining, or the grievance and arbitration mechanisms of a collective bargaining agreement. However, before making such an assessment, the unions should take sufficient steps to determine that the drug-testing procedures were properly implemented and that all feasible steps were taken to determine whether the employee was or was not a drug user. If a union makes this review and concludes that an employee received sufficient procedural safeguards before removal, the union may exercise its good faith judgment and determine that a drug-testing procedure or a particular job action against an employee should not be the subject of union challenge.

On the other hand, if the procedures used by a particular employer do not fall within the accepted standards for drug testing, the union and its officials should be reluctant to withhold action on behalf of an affected employee or group of employees. After all, the failure to represent employees creates liability for a labor union and, potentially, for its officials. Labor unions must exercise all appropriate steps to safeguard the rights of members in the increasingly complex area of employee drug testing.

V. *UNION CONCERNS FOR A NEGOTIATED DRUG-TESTING PROCEDURE: A SUGGESTED ANALYTICAL FRAMEWORK*

With the growing trend toward mandatory drug testing for employees, labor unions will surely receive proposals by employers for drug-testing pro-

cedures during collective bargaining. Other unions may seek to compel negotiations about procedures, especially if an employer has already attempted to unilaterally initiate drug testing. The development of language for collective bargaining agreements for drug testing is a difficult process. From the standpoint of a labor organization, an ideal drug-testing policy, if one is adopted at all, must address various issues including probable cause, type of testing, and standards for discipline of employees who test "positive."

The job-relatedness of drug testing and/or use of certain categories of drugs by employees needs to be addressed by any labor organization before entering into negotiations about drug testing procedures. If employees work in the public safety forces, drug use in any form may legitimately affect job performance. An employee working under the influence of drugs may jeopardize the safety of the public and of his or her fellow workers. The loss of credibility with the general public, upon discovery of drug use by a member of the safety forces, may cause insurmountable difficulties for the municipal employer and the members of the safety force.

Testing for employees outside the safety forces may also be job-related. For example, if employees work with dangerous equipment, the impairment of employees by narcotics could cause dangers for other workers on the job site. Drug testing may also be job-related for workers who handle significant amounts of cash or securities in the performance of routine duties. The danger of theft by an employee who must support an expensive drug habit will detrimentally affect co-workers as well as the individual employee.

On the other hand, recreational, occasional use of illicit substances by workers has not been proven to affect performance in all situations. For example, employers will be hard put to convincingly argue that a clerical worker who uses marijuana on the weekends will suffer any measurable impairment when he or she returns to work on Monday morning. Testing of workers who could not plausibly create a danger to themselves, to other workers, to the public, or to the employer's property, may not be job-related and should be permitted reluctantly by a labor organization.

Assuming drug testing is determined to be job-related for a particular group of employees, the union must consider whether or not a proposed policy contains sufficient safeguards for employees. Ideally, a drug-testing procedure will define particular circumstances under which an employee can be tested, such as after a serious accident during employment or after developing a repeated and otherwise inexplicable history of absences or tardiness. A fair drug-testing procedure will insure that a particular employee will not be subjected to arbitrary testing because of personality conflicts with

supervisors — who might "single out" a particular employee and impose drug testing for harassment. The ideal drug-testing policy will guard against use of drug testing to retaliate against an employee who annoys supervisors or who challenges an employer's management decisions.

Many union contracts contain provisions to insure that employees are not terminated without just cause or subject to discipline without reason. With such contracts, employers retain the power to discipline or terminate workers. However, "just cause" provisions for removal place burdens on management to periodically evaluate employees and to document violations of work rules by employees. A "positive" result in drug testing may provide an easier, less burdensome way for employers to terminate workers deemed undesirable by management. Unions, in negotiations for drug-testing policies, should insure that drug testing cannot be used as a subterfuge by management to weed out employees in management's uncontrolled discretion.

The goal of insulating employees from the arbitrary, capricious, or retaliatory application of drug-testing policies may be satisfied if the employer is only permitted to require tests for workers who have serious accidents on employer's property during working hours. The goal may also be met if more than one supervisor is required to concur, through the exercise of *independent* judgment, on the need to test a particular employee. Such supervisors should be required to document the reasons for initiating testing of particular employees, such as by recording improper uses of sick leave, repeated tardiness, suspected thefts of employer property, or clear instances of damage to property or danger to workers on the job site. By requiring two supervisors to concur in the request for testing of a particular employee, with supporting documentation, individual employees should have some protection against being required to undergo testing because of a personality conflict or vendetta by a particular supervisor.

In addition to fixing safeguards against the misapplication of drug testing to particular employees, unions should be concerned about the type of test which employees will undergo. Unions should seek to have tests administered through reputable laboratories. At minimum, an employee should not be subject to any job action unless a "positive" test is confirmed by a second screening procedure. Employees (and their personal physicians or union representatives at the employees' request) should be given an opportunity to inspect test results and to evaluate the manner in which a laboratory ultimately issued a "positive" result on the test of a particular employee.

In negotiating drug-testing procedures with management, unions should take steps to insure that test results will remain confidential and not be released unnecessarily to supervisors within the company or to outside parties. Data showing that an employee tested "positive" on a particular em-

ployer's test should not be released by the employer to any prospective employers who might seek personnel information about the employee in the future. Without question, records of testing on employees which reflect no positive results should not be maintained in any shape or form by the employer.

As part of the guarantees to employees in a drug-testing procedure, employees should be afforded an expeditious hearing to contest the laboratory report by presenting contrary results developed by the employee. The employee should be given an early opportunity to demonstrate that he or she tested "positive", not from the use of an illicit substance, but because he or she had a prescription or medical authorization for the use of the drug that appeared in the results. The negotiated language should afford employees the right to be represented by union officials at any hearing regarding the test or the test results. The application of drug-testing policies to a particular employee and the results of such application should be made the subject of any grievance or arbitration procedure established by the collective bargaining agreement.

Finally, unions need to consider types of sanctions which might be imposed against employees who test "positive" under a negotiated drug-testing procedure. The ideal drug-testing procedure should provide sanctions other than termination for employees who test "positive." Unions may want to consider establishing a graduated discipline policy for employees who test "positive." For example, an employee may receive a reprimand or brief suspension for the first proven use of "low level narcotics" such as marijuana. The union may agree to permit harsher sanctions, including termination, for employees who test "positive" for the "lesser level" narcotics on subsequent dates.

Unions may agree, through negotiation, to permit immediate termination of employees who test "positive" for dangerous narcotics, such as heroin. In such cases, the employees should not be deprived of their benefit to challenge removal through grievance and arbitration. Without question, drug dependency of any employee raises serious concerns for the individual's health and for the safety and morale of co-workers. Yet, the imposition of harsh sanctions, such as discharge or protracted suspension without pay, does not seem to fairly address the needs of the individual.

Unions would be well-advised to negotiate for employer-paid treatment plans for drug dependent employees. Employees should be afforded an option to seek treatment or counseling before facing the harsh sanction of removal. Nevertheless, removal might be viewed as an appropriate remedy for employees who refuse to participate in a treatment program funded by the employer as part of the fringe benefits package.

VI. *CONCLUSION*

The advent of mandatory drug testing of workers by employers presents difficult challenges for labor organizations. Labor unions will be asked to balance the needs and rights of individual employees against fellow members' concerns for a safe workplace and against the employer's concern for integrity of the workforce. Through the process of collective bargaining, unions will be able to assist in the promulgation of fair, uniform, and scientific drug-testing procedures. Collective bargaining provides unions with the mechanism for insuring that drug testing is not used sporadically, haphazardly, or arbitrarily by management. Through negotiations, unions can insure that employees with no history of drug use are not subjected to the embarrassing, unsettling drug-testing procedures. Collective bargaining allows labor and management to afford counseling and treatment for drug-dependent employees, while protecting employees who do not use drugs from unwarranted intrusions into their personal right of privacy.