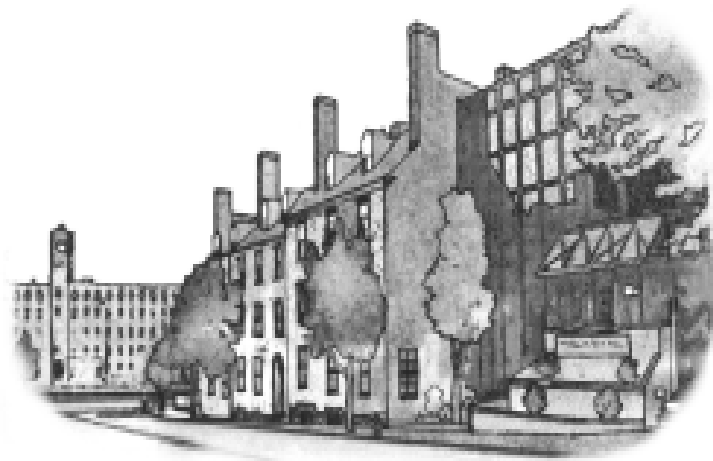


Drug and Alcohol Testing in the Workplace

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A Word of Caution

No two cases are exactly alike. This material is designed to provide human resource administrators with a broad understanding of the law pertaining to drug and alcohol testing in the workplace. This material does not include every aspect of the law, nor does it discuss every case involving drug and alcohol testing in the workplace. You are strongly encouraged to seek a legal opinion from your employer's legal counsel regarding any specific case.

I. OVERVIEW

The purpose of this material is to provide private and public sector human resource administrators with a broad understanding of the law pertaining to drug and alcohol testing in the workplace.

This material begins with a brief overview of the relevant Federal and State Statutes that pertain to drug and alcohol use by employees and job applicants. It then discusses various issues pertaining to drug testing, and includes relevant state and federal cases from our jurisdiction and other jurisdictions.

II. RELEVANT STATUTES

A. Federal Law

1. The American's with Disabilities Act ("ADA"), 42 U.S.C. § 1201 et seq., and The Rehabilitation Act, 29 U.S.C. § 701 et seq.

The ADA prohibits discrimination against qualified employees and job applicants with disabilities in organizations with 15 or more employees. 42 U.S.C. §§ 12111(5), 12112. The term "qualified individual with a disability"¹ is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The Rehabilitation Act also prohibits discrimination against qualified individuals with disabilities. 29 U.S.C. § 794 (nondiscrimination); 29 U.S.C. § 705(20)(A) (defining individual with a disability). Both of these laws contain provisions regarding drug and alcohol abuse; unless otherwise noted, the drug and alcohol provisions in the ADA and Rehabilitation Act are identical.

Employees or applicants who currently engage in the illegal use of drugs² are not "qualified individual[s] with a disability" for purposes of the ADA and the Rehabilitation Act. 42 U.S.C. § 12114(a); 29 U.S.C. § 705(20)(C)(i); see also 29 U.S.C. § 705(20)(C)(v) ("alcoholics whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason for such current alcohol

¹ The term "disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such impairment; or being regarded as having such an impairment." 42 U.S.C. § 12102(2).

² "Illegal use of drugs" means "the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C.A. § 801 et seq.]." The term "does not include the use of a drug taken under supervision of a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law." 42 U.S.C. § 12111(6)(A); see also 29 U.S.C. § 705(10)(B). "Drugs" are defined as "controlled substance[s], as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C.A. § 812]." 42 U.S.C. § 12111(6)(B); see also 29 U.S.C. § 705(10)(A).

abuse, would constitute a direct threat to property or the safety of others” are also excluded from the term “individual with a disability”).

Employees or applicants who:

1. have “successfully completed a supervised drug rehabilitation program and [are] no longer engaging in the illegal use of drugs, or [have] otherwise been rehabilitated successfully and are no longer engaging in such use,”
2. are “participating in a supervised rehabilitation program³ and [are]no longer engaging in such use,” or
3. are “erroneously regarded as engaging in such use, but [are] not engaging in such use”

are not excluded as “qualified individual[s] with a disability.” 42 U.S.C. § 12114(b); 29 U.S.C. § 705(20)(C)(ii). Employers may, however, “adopt or administer reasonable policies or procedures, including but not limited to drug testing,⁴ designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.” 42 U.S.C. § 12114(b); 29 U.S.C. § 705(20)(C)(ii).

Covered employers:

1. may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;
2. may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;
3. may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);
4. may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any

³ Rehabilitation programs include inpatient/outpatient programs, Employee Assistance Programs, or recognized self-help programs such as Narcotics Anonymous. See ADA and Rehabilitation Act, available at <http://www.dol.gov/asp/programs/drugs/workingpartners/regs/ada.asp> (accessed Jan. 4, 2008).

⁴ Tests “to determine the illegal use of drugs” are not “considered a medical examination.” 42 U.S.C. § 12114(d)(1). Thus, drug tests are not prohibited pre-employment medical examinations. 42 U.S.C. § 12112(d) (medical examinations).

unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and,

5. may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that –
 - a. employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);
 - b. employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and
 - c. employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

See 42 U.S.C. § 12114(c).

In the case of Mailhot v. FedEx Ground Package System, Inc. the United States District Court for the District of New Hampshire denied a motion for summary judgment on a retaliation claim involving drug-testing. 2003 DNH 147 (D.N.H. Aug. 29, 2003). Mr. Mailhot began working as delivery truck driver in January 1998, as an independent contractor. Id. at 1. In March 2001, he was diagnosed with bilateral degenerative arthritis in his hips; he informed his supervisor of his condition, which would “limit how

long he would be able to continue his work as a delivery truck driver.” Id. In August 2001, his Doctor recommended that he be given an easier route. Id. Mailhot sold his route in December 2001, and became unable to work in January 2002. Id. Mailhot filed suit against FedEx, raising various claims under the ADA. The court dismissed several of them, but held that there were genuine issues of fact as to the issue of retaliation under the ADA. Id. at 4.

With respect to the retaliation claim,⁵ Mailhot alleged that he engaged in protected activity by requesting that FedEx remind customers to leave packages in a predetermined area, providing a Doctor’s note that requested an easier route (which included prompt loading of his truck, removal of bulk stops from his route, and stop counts on his deliveries), and by informing FedEx that he was seeking legal assistance. Id. Mailhot alleged that, in response to his activities, his supervisor “berated him, threatened to fire him, and on one occasion, in retaliation for Mailhot seeking legal assistance,” sent him for drug testing. Id. FedEx argued that Mailhot’s selection for drug testing was random, not retaliatory. Id. The court denied FedEx’s motion for summary judgment, based on the supervisor’s “other behavior toward Mailhot.”

Key Points:

- The use of illegal drugs and alcohol may be prohibited;
- Testing for the use of illegal drugs is not prohibited by the ADA or the Rehabilitation Act;
- Employers may deny employment to prospective employees or terminate employees who currently engage in the use of illegal drugs;
- Employers may not discriminate against individuals who have previously been addicted to drugs and who are not currently using drugs;
- Employers may discipline, discharge or deny employment to alcoholics or drug users if the use of alcohol or drugs impairs the employee’s job performance or conduct to the same extent that such conduct would result in the same type of disciplinary action to all other employees.

2. The Drug-Free Workplace Act, 41 U.S.C. § 701 et seq.

Pursuant to the Drug-Free Workplace Act, all persons, other than individuals, seeking the award of a Federal contract, grant must agree to provide a drug-free

⁵ The elements of a retaliation claim are: 1) that the individual engaged in protected conduct; 2) that the individual suffered adverse employment action, and 3) there casual connection between the individual’s conduct and the adverse action. Mailhot, 2003 DNH 147.

workplace. 41 U.S.C. § 701(a)(1); id. at § 702(a)(1). The requirements for providing a drug-free workplace include:

- Publication of a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the person's workplace and must specify the actions that will be taken against employees for violations of such prohibition;
 - The statement must inform employees, that, as a condition of employment on the contract, the employee must:
 - Abide by the terms of the statement; and
 - Notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than 5 days after such conviction
 - The statement must be given to each employee to be engaged in the performance of the federal contract.
- Establishment of a drug-free awareness program to inform employees about:
 - The dangers of drug abuse in the workplace;
 - The person's policy of maintaining a drug free workplace;
 - Any available drug counseling, rehabilitation, and employee assistance programs; and
 - The penalties that may be imposed upon employees for drug abuse violations.
- Imposition of sanctions on, or requiring the satisfactory participation in a drug abuse assistance or rehabilitation program for any employees who are convicted⁶ of violating a criminal drug statute when the violation occurred in the workplace.⁷
- Making a good faith effort to maintain a drug-free workplace through the implementation of the above requirements.

41 U.S.C. § 701(a)(1)(A)-(G); id. at § 702(a)(1)(A)-(G). In addition, the Act prohibits Federal agencies from entering into contracts with, and awarding grants to individuals

⁶ The term "conviction" includes nolo contendere pleas. 41 U.S.C. § 706(4).

⁷ The contractor or grantee must either "take appropriate personnel action . . . up to and including termination" or require satisfactory participation in an approved drug abuse or rehabilitation program. 41 U.S.C. § 703.

unless the individual agrees that he/she will not engage in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in the performance of the contract. Id. at §§ 701(a)(2); 702(a)(2).

Employers covered by the ADA may require that their employees “behave in conformance with the requirements established under the Drug-Free Workplace Act.” 42 U.S.C. § 12114(c); 29 C.F.R. § 1630.16(b)(3).

3. The Family and Medical Leave Act, 29 U.S.C. § 2601 et seq.

Pursuant to the Family and Medical Leave Act (“FMLA”), covered employers⁸ must grant eligible employees⁹ up to 12 workweeks of unpaid leave during any 12-month period where an employee is unable to work because of a serious health condition. 29 U.S.C. § 2612(1)(D).

The term “serious health condition” is defined as “an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider.” 29 U.S.C. § 2611(11).

According to the federal regulations, substance abuse may be a serious health condition; “[h]owever, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider.” 29 C.F.R. § 825.114(d) (emphasis added). If an employee is absent because of his/her “use of the substance, rather than for treatment,” then that employee does not qualify for FMLA leave. Id.

B. New Hampshire Law

There are no New Hampshire State laws that prohibit drug testing of employees or job applicants.

1. Workers’ Compensation Act, RSA 281-A et seq.

Employers are not liable for injuries to workers caused in whole or in part by intoxication, unless the employer knew that the employee was intoxicated. RSA 281-A:14.

⁸ A covered employer is “any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year . . .” 29 U.S.C. § 2111(4)(A)(i).

⁹ An eligible employee is one who: 1) is employed by a covered employer; 2) has been an employee of the covered employer for at least 12 months; 3) has worked for the employer for at least 1,250 hours over the previous 12 month period; and, 4) works at a location in the United States or in a United States territory where the employer employs at least 50 employees within a 75 mile radius. 29 U.S.C. § 2111(2)(A)-(B).

Intoxication is defined as “intoxication by alcohol or controlled drug as defined in RSA 318-B:1.” 281-A:2(XII-a). The term “intoxication” does not include “an employee’s use of a controlled drug for which a prescription has been issued authorizing such drug to be dispensed to him, when the employee’s use of the controlled drug is in accordance with the instructions for use of the controlled drug.” Id.

RSA 318-B:1 defines “controlled drug” as “any drug or substance, or immediate precursor, which is scheduled [by the Commissioner of the Department of Health and Human Services] pursuant to RSA 318-B:1-a.” RSA 318-B:1(VI); see also He-C 501 (Scheduling of Substances). The Controlled Substance Schedule is available at the Department of Health and Human Services’ website: <http://www.dhhs.nh.gov/DHHS/ATOD/controlled-substance.htm> (accessed Dec. 19, 2007). The schedule includes, but is not limited to, the following substances: heroin, marijuana, morphine, methadone, cocaine, and anabolic steroids.

2. Unemployment Compensation Act, RSA 282-A et seq.

Unemployed individuals who have been “discharged for intoxication or use of controlled drugs as defined in RSA 318-B:1, VI, of such degree and rate of occurrence as to seriously hamper or interfere with the individual’s work, shall be disqualified for [unemployment] benefits. Such disqualification shall continue until a period of not less than 4 weeks nor more than 26 weeks from the date of discharge . . .” RSA 282-A:34.

III. PRE-EMPLOYMENT DRUG TESTING

As a general rule, it is unlawful for employers to conduct medical examinations of job applicants or employees and/or inquire as to whether a job applicant or employee is an individual with a disability. 29 C.F.R. § 1630.13(a)-(b). Testing to determine the current use of illegal drugs is not considered a medical examination, and is therefore not prohibited by the ADA. See 29 C.F.R. § 1630.16(c)(1). Employers choosing to administer drug tests to prospective employees do not have to establish that the administration of the test is job related and consistent with business necessity. See e.g. Equal Employment Opportunity Commission Facts, available at <http://www.eeoc.gov/facts/ada17.html> (accessed January 10, 2008). Although the administration of such tests to job applicants or employees is not a violation of the ADA, the ADA does not “encourage, prohibit, or authorize” a covered employer “to conduct drug tests of job applications or employees to determine the illegal use of drugs or to make employment decisions based on such test results.” Id. at § 1630.16(c)(1).

Employers may refuse to hire applicants who test positive for illegal drug use; current drug use is not protected by the ADA. Tests may reveal drugs that are being taken legally; in such cases, terminating an individual or denying employment on the basis of the test results would subject the employer to liability under the ADA.

Alcohol tests are considered medical examinations; therefore, covered employers are prohibited from conducting alcohol tests before making an offer of employment. 29 C.F.R. § 1630.16(c)(1) (stating that drug testing is not considered a medical examination; no exemption for alcohol testing). Employment offers may be conditioned upon the passing of an alcohol test, but employers cannot require that prospective employees take an alcohol test before they are offered a job. 29 C.F.R. § 1630.14(b) (medical examinations may be required after an offer of employment has been made and before the applicant begins work, and the job offer may be conditioned upon the results of the medical examination if all entering employees in the same job category are subjected to the medical examination, regardless of disability).

Information obtained as part of a drug test or medical examination must be kept separate from the employee's personnel file, and must be treated as a confidential medical record. 29 C.F.R. § 1630.14(b)(1). Medical examinations do not have to be job-related and consistent with business necessity, unless the results of the examinations are utilized to screen out employees with disabilities. In such cases, "the exclusionary criteria must be job-related and consistent with business necessity, and performance of the essential job functions cannot be accomplished with reasonable accommodations." 29 C.F.R. § 1630.14(b)(3).

The Constitution places additional constraints on public employers' ability to implement pre-employment drug tests. The United States Supreme Court has held that pre-employment drug tests performed by public employers (or by private employers if state actors are involved) are searches within the meaning of the Fourth Amendment. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989). That does not mean that public employers may not require drug testing; however, it does mean that public employers seeking to implement a drug testing policy must ensure that the policy does not violate the Fourth Amendment. Id. (discussed below).

Key Points:

- Prospective employees should be given advance notice if they will be required to submit to a drug-test
- All prospective employees should indicate, in writing, that they are aware that they will be required to take a drug test
- Test results must be kept confidential
- If one applicant is subjected to a drug or alcohol test, then all applicants seeking a position in the same job category must be subject to the same test

IV. DRUG TESTING: CURRENT EMPLOYEES

A. Overview

Public employers, and private employers if the testing involves state actors, may not conduct drug tests unless the testing does not violate the Fourth Amendment. See e.g. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (discussed below). In most cases, the Constitutional constraints will not apply to private employers; however, if a private employer involves a state actor (such as a police officer) in the testing process, then the same Constitutional considerations would be impacted.

Employers may test employees for the use of alcohol, provided that the tests are job related and consistent with business necessity. See e.g. Equal Employment Opportunity Commission Facts, available at <http://www.eeoc.gov/facts/ada17.html> (accessed January 10, 2008). If an employee informs you that he/she is an alcoholic, the duration and frequency of any alcohol testing must be designed to address safety concerns. Alcohol tests should never be conducted to harass, intimidate, or retaliate against an alcoholic employee. As a general rule, periodic testing of employees who return to work after participating in rehabilitation programs is prohibited unless the employer has a reasonable belief, based on objective evidence, that the employee poses a direct threat in the absence of periodic testing. See Equal Employment Opportunity Commission Guidance, available at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> (accessed January 10, 2008). Factors to consider when deciding whether to subject employees to periodic alcohol testing include: the safety risks associated with the employee's position; and, the consequences of the employee's inability or impaired ability to perform his/her job functions. Id.

Employers may test employees to determine if they are current drug users and may terminate the employment of employees who are current drug users as current drug use is not protected by the ADA. 29 C.F.R. §1630.16. As a best practice, an employer should have a policy setting forth its position regarding drug use, as well as the consequences for current illegal drug use. These policies should be written, made available to all employees, and uniformly applied. It is important to remember that individuals who "have successfully completed or are currently in a rehabilitation program and are no longer illegally using drugs and persons erroneously regarded as engaging in the illegal use of drugs" are protected by the ADA. See Equal Employment Opportunity Commission Facts, available at <http://www.eeoc.gov/facts/ada17.html> (accessed January 10, 2008).

Employers may also inquiry as to whether employees are currently using illegal drugs and may ask employees whether they have been drinking alcohol. See Equal Employment Opportunity Commission Guidance, available at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> (accessed January 10, 2008). Employers may not make

“disability-related inquiries,” such as whether employees are taking any prescription drugs or medications and whether they have a history of drug or alcohol use. These rules apply to current employees as well as to job applicants. Id.

Key Points:

- All drug and alcohol testing policies should be written, should be available to all applicants and/or employees, and should be uniformly applied.
- The results of drug tests should be kept confidential, and, as a general rule, should never be disclosed to third-parties, including law enforcement officials, without the employee’s written consent.

B. Industry-Specific Regulations

Certain industries, such as the transportation industry, are subject to specific federal regulations pertaining to drug and alcohol testing in the workplace. For example, pursuant to the Omnibus Transportation Employee Testing Act of 1991, 49 USC § 5331(b), the Department of Transportation has issued regulations pertaining to drug and alcohol testing in the workplace. See 49 C.F.R. § 40.1 *et seq.* The regulations apply to “transportation employers, safety-sensitive transportation employees (including self-employed individuals, contractors and volunteers) and service agents.”¹⁰ 49 C.F.R. § 40.1(b). These regulations include the following requirements:

- For employees seeking to begin performing safety-sensitive duties for the first time (new hires or transfers into a safety-sensitive position) the employer must obtain written consent from the individual, allowing the employer to request certain information about the individual. If the individual refuses to provide the written consent then it may not perform safety-sensitive functions. 49 C.F.R. § 40.25(a).
- Employees who have violated a DOT agency drug and alcohol regulation may not perform safety-sensitive functions unless and until the employer obtains information that the employee has complied with the DOT’s return-to-duty regulations. 49 C.F.R. § 40.25(e).
- Employees who test positive for drugs and wish to return to safety-sensitive positions must complete the return-to-work process, which includes participating in a treatment program and/or completing prescribed education and having a negative drug test. 49 CFR § 40.305.

¹⁰ These regulations apply to truck drivers and school bus drivers if employees hold a commercial driver’s license and operate a commercial vehicle.

V. CASE LAW

1. Random, Suspicionless Testing

On March 21, 1989, the United States Supreme Court decided two cases involving drug-testing in the workplace. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

The Skinner case involved a challenge to the regulations promulgated by the Federal Railroad Administration (FRA). 489 U.S. at 606. The regulations at issue required that railroads administer blood and urine tests to all employees who were involved in major train or impact accidents¹¹ and authorized railroads to administer blood and urine tests to employees who violated certain safety rules. Id. With respect to the mandatory testing, employees were notified of the results and given an opportunity to respond before a final investigative report was prepared. Id. at 611. Employees who refused to provide blood or urine samples were prohibited from performing “covered service for nine months,” and were afforded a hearing regarding their refusal to take the test. Id. Plaintiffs alleged that the regulations violated the Fourth Amendment; the District Court upheld the regulations and the Ninth Circuit Court of Appeals reversed that decision. Id. at 606.

The Supreme Court held that the urine and drug tests were a search under the Fourth Amendment, but that a warrant was not required before the search was conducted because “the compelling Government interests served by the FRA’s regulations would be significantly hindered if railroads were required to point to specific facts giving rise to a reasonable suspicion of impairment before testing a given employee.” Id. at 633. The Court also held that the tests were reasonable and did not violate the Fourth Amendment because the Government’s interest in ensuring safety outweighed the employee’s privacy concerns. Id.

In National Treasury, the Court was asked to decide “whether it violates the Fourth Amendment for the United States Custom Service to require a urinalysis test from employees who seek transfer or promotion to certain positions.” 489 U.S. at 659. The Court held “suspicionless testing of employees who apply for promotion to positions directly involving the interdiction of illegal drugs, or to positions that require the incumbent to carry a firearm, is reasonable [under the Fourth Amendment].” Id. at 679.

In 1985 the Commissioner of the Customs Service established a Drug Screening Task Force to explore the possibility of implementing a drug-screening program within Customs. Id. at 660. After receiving the task force’s conclusions, the Commissioner implemented a policy requiring “drug tests of employees who applied for, or occupied,

¹¹ Major train accidents included accidents: that involved a fatality (to an on-duty railroad employee or to a third party), that involved the release of hazardous material accompanied by an evacuation or a reportable injury, or damage to railroad property of \$500,000 or more. Skinner, 489 U.S. at 609. Impact accidents were defined as “a collision that results in a reportable injury, or in damage to railroad property of \$50,000 or more. Id.

certain positions with the Service.” Id. Following a job offer, “drug tests were made a condition of placement or employment for positions that m[e]t one or more of three criteria[:] . . . direct involvement in drug interdiction or enforcement of related laws, . . . [positions that required employees to] carry firearms . . . [and positions that required that employees] . . . handle ‘classified’ material.” Id. at 660-61. Employees who tested positive for drugs and who were not able to offer a “satisfactory explanation [were] subject to dismissal from the Service.” Id. at 663. Test results were kept confidential and were not disclosed to third parties, including law enforcement officers, without the employee’s written consent.

The union filed suit, alleging that the policy violated the Fourth Amendment. The District Court agreed and enjoined the program; the Fifth Circuit vacated the injunction on the basis that the searches were reasonable and that the Government had a strong interest in detecting drug use in the specified category of individuals. Id.

The United States Supreme Court held that the Government’s need to conduct the suspicionless searches (drug testing) outweighed the privacy interests of employees engaged directly in drug interdiction and who are required to carry firearms. Id. at 668. The Court noted that “[t]he Service’s program is designed to prevent the promotion of drug users to safety sensitive positions as much as it is designed to detect those employees who use drugs.” Id. at 674. It went on to state that “[w]here . . . the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government’s goal.” Id. at 674-75.

Key Points:

- Drug testing is a search under the Fourth Amendment
- In the public sector, for a policy requiring employee drug testing to be valid, the Government’s interest in conducting the test must outweigh the employee’s privacy interests
- If a private sector employer is acting “as an instrument or agent of the Government,” then the Fourth Amendment will apply and the drug test policy will need to comply with the Fourth Amendment.

In the case of Byrne v. Massachusetts Bay Transportation Authority, 196 F.Supp.2d 77 (D. Mass. 2002), plaintiffs, a group of individuals employed as police officers by the Massachusetts Bay Transportation Authority (MBTA), filed suit against the MBTA, alleging that the MBTA’s drug and alcohol policy violated federal and state law. Both parties filed cross motions for summary judgment; the court granted MBTA’s motion and dismissed the case. Id.

Pursuant to MBTA's policy, all employees holding safety sensitive positions were subject to random, suspicion-less drug and alcohol testing. The testing, which was administered by MBTA's Medical Operations staff, required employees to produce a urine sample; in certain limited circumstances, when there was reason to believe that a particular individual might alter or substitute the specimen, a staff member would observe the employee during urination. In most cases, however, the employees produced the sample in private. Id. Plaintiffs argued that the policy of permitting direct observation of the employees during urine collection was unreasonable. Id. MBTA argued that the limited circumstances that required direct observation (1) no adequate medical explanation for the invalidity of the prior sample; (2) the prior sample was adulterated or substituted; (3) the temperature of the prior sample suggests alteration; or (4) other indications that the prior sample had been tampered with. Id.

The court found that direct observation involved a significant intrusion on an employee's personal privacy, and therefore, the observation may be justified only if it serves a real and compelling governmental interest. The court accepted MBTA's argument, finding that the limited circumstances in which direct observation was permitted were narrowly focused on preventing tampering with samples. The direct observation did not "aim to do any more than assure valid tests when there [was] a reason for heightened concern about validity." Thus, the court held that the "greater level of intrusion [was] balanced by the greater concern for the integrity of the testing process," and that the policy did not violate the Fourth Amendment.

Key Points:

- Random drug testing of government employees engaged in safety-sensitive positions is permitted.
- Law enforcement officers are engaged in safety-sensitive positions.
- If a drug testing policy significantly intrudes on an employee's personal privacy, then the policy will be invalid unless the intrusion is outweighed by a legitimate employer concern.

2. Collective Bargaining Agreements

In Amalgamated Transit Union, Local 717, the union appealed a decision of the public employee labor relations board (PELRB), after the PELRB refused to implement an arbitrator's award. 144 N.H. 325, 325 (1999). The arbitrator ordered the Manchester Transit Authority (MTA) to reinstate two union employees who were terminated after they tested positive for drug use. Id.

In 1990, the MTA "adopted a policy stating that use of drugs in the workplace was prohibited and that employees who violated the policy were subject to discipline up to

termination.” On June 26, 1996, MTA adopted a “zero tolerance” drug policy, pursuant to which employees would be discharged the first time they tested positive for drug use. Id.

The employees, a mechanic responsible (in part) for bus repair and maintenance and a bus driver, were randomly selected for drug testing. The mechanic was first tested in 1995; at that time he tested positive for marijuana use. He was suspended and informed that he would be randomly tested six times in the next year and that he would be terminated if he tested positive a second time. In April 1996, he tested positive again; he was terminated in May 1996. The bus driver was randomly selected in May 1996; he too tested positive for marijuana use, and admitted smoking marijuana the weekend before the test. He was terminated on June 19. Id.

The union filed a grievance, and the arbitrator reversed the terminations, for several reasons, including the following: 1) the “zero tolerance” policy was not in effect at the time the employees were terminated; 2) termination after one positive test was inconsistent with a CBA provision that “declared when discipline is to be given, it shall be given in a fair and progressive manner for repeated offenses”; and, 3) “neither employee was under the influence while on the job.” Id. (internal quotations omitted).

The parties filed cross-unfair labor practice complaints with the PELRB; the PELRB reversed the arbitrator, finding that the arbitrator’s award was contrary to public policy, and the New Hampshire Supreme Court affirmed. Id. The court found that “a dominant public policy prohibits reinstatement to a safety-sensitive position,” and that the arbitrator’s award violated that policy because implementation of the “award would place two public transit employees . . . back in safety-sensitive positions after testing positive for drugs.” Id. Public policy may override the terms of a CBA, and in this case, public policy prevented reinstatement of the two employees to safety-sensitive positions “without a further determination that [they] have ceased drug usage.” Id. The court noted that:

Implementation of the arbitrator’s award would allow public transit employees testing positive for drugs to remain in their safety-sensitive positions until the employee was actually impaired on the job, foreseeably evidenced by an accident resulting in a catastrophic loss of life. . . .

Absent a clearly defined zero-tolerance drug policy, such as the 1996 ‘zero-tolerance’ drug policy adopted after the discharges, no dominant public policy compels termination after a public drugtest.

Id. The court agreed that the arbitrator’s decision to award reinstatement violated public policy, but stated that “the same policy preventing reinstatement does not automatically require termination.” Id. The court did not express an opinion on the appropriate remedy, and remanded the matter for a determination of an appropriate remedy. Id.

Shortly after Amalgamated Transit Union was decided, the United States Supreme Court decided a similar case. Eastern Associated Coal Corp. v. United Mine

Workers of America, 531 U.S. 57 (2000). Eastern and United were parties to a CBA with arbitration provisions that stated that, in order for an arbitrator to order a discharge, Eastern must have “just cause”; otherwise, the arbitrator will reinstate the employee. Id. James Smith was employed by Eastern as a member of a road crew; as part of his job, he was required to drive heavy vehicles on public highways. Id. As a truck driver, Smith was subject to the Department of Transportation’s regulations requiring random drug testing of workers engaged in “safety-sensitive” tasks. Id. (citing 49 CFR §§ 382.301,382.305 (1999)). In March 1996, Smith tested positive for marijuana and Eastern attempted to discharge him. The union requested arbitration, and the arbitrator concluded that the positive drug test did not amount to “just cause” for discharge, and ordered reinstatement, subject to Smith’s accepting a 30-day suspension without pay, participating in a substance-abuse program, and undergoing drug tests at the discretion of Eastern or an approved substance-abuse professional for the next five years. Id.

During the period of April 1996 and January 1997, Smith passed four random drug tests; he tested positive for marijuana in July 1997. Eastern attempted to terminate Smith, the union requested arbitration, and the arbitrator found that Eastern did not have just cause to discharge because of two mitigating circumstances: 1) Smith had been a good employee for 17 years, and 2) Smith had made a credible appeal under oath concerning a personal problem that caused his one time lapse in drug use. Id. The arbitrator ordered reinstatement, provided that Smith: 1) accept a new suspension without pay, for slightly more than three months; 2) reimburse Eastern and the union for the costs of both arbitration proceedings; 3) continue to participate in a substance-abuse program; 4) continue to undergo random drug testing; and 5) provide Eastern with a signed, undated letter of resignation to take effect if Smith tested positive within the next five years.

Eastern filed suit, seeking to have the arbitrator’s award vacated on the basis that it “contravened a public policy against the operation of dangerous machinery by workers who test positive for drugs.” Id. The District Court recognized a “strong public policy against drug use by workers who perform safety-sensitive functions,” but held that the conditional reinstatement did not violate that policy. Id. The Fourth Circuit Court of Appeals affirmed. Id. The Supreme Court affirmed, holding that Smith’s conditional reinstatement did not “run contrary to an explicit, well-defined, and dominant public policy.” Id.

Key Point:

- While there may be a strong public policy against drug use by employees, public policy does not require automatic termination of employees who violate that policy. It is important to note that the “zero tolerance” drug-free policies were not at issue in either of those cases.

3. Miscellaneous

In O'Brien v. Papa Gino's of America, Inc., O'Brien was awarded \$448,200 in damages arising from his dismissal from Papa Gino's; this award was affirmed by the First Circuit Court of Appeals. 780 F.2d 1067 (1986).

O'Brien was employed by Papa Gino's from 1973 until 1982. O'Brien alleged that "he was fired for failing to promote an employee under his supervision who was the son of one of plaintiff's superiors, and godson to the president of Papa Gino's." Papa Gino's alleged that "O'Brien was dismissed solely for poor job performance and for violating a company policy prohibiting employees from using illegal drugs." Id. Prior to his termination, O'Brien's superior confronted him with "rumors that he had been seen using drugs outside of work[;] O'Brien took a polygraph examination and answered questions relating to his alleged drug use." Id. O'Brien claimed that he was required to take the test under threat of losing his job; Papa Gino's argued that O'Brien volunteered to take the test "to dispel the suspicion that he used drugs." Id. The report from the test indicated that O'Brien lied about his drug use, and O'Brien was dismissed. O'Brien filed suit in the United States District Court for the District of New Hampshire, alleging wrongful termination, invasion of privacy and defamation. Papa Gino's appealed the jury's verdict on several grounds.

Papa Gino's first argued that the jury's answers to two of the seven special verdict questions were inconsistent with each other, and that remand was necessary to clarify the jury's findings. The two questions were as follows:

Question No. 2:

Based on a preponderance of the evidence, do you find that the discharge of the plaintiff O'Brien was in violation of public policy in that Mr. O'Brien was discharged for either performing an act which public policy favors or for refusing to perform an act which public policy condemns?

Answer: No

Question No. 3:

Based on a preponderance of the evidence, do you find that the actions of the defendant, Papa Gino's . . . with reference to allegations of drug abuse by plaintiff O'Brien and the methods adopted by the defendant in its investigation of such allegations would be highly offensive to a reasonable person and were invasive of the plaintiff's privacy?

Answer: Yes

Id. (italics in original). The court found that the answers to the two questions, which pertained to separate causes of action (wrongful termination and invasion of privacy) were consistent with each other in that the jury could have found that O'Brien's actions regarding the polygraph were not favored by public policy, while at the same time finding that Papa Gino's had improperly pressured O'Brien into taking the examination. Id.

Papa Gino's also argued that plaintiff's right to privacy could not have been invaded because he "contracted away such rights with regard to his use of drugs." Id. Papa Gino's argued that "[b]ecause the company personnel manual forbids drug use by employees, . . . that O'Brien impliedly gave permission in his employment contract for the company to make whatever investigations it deemed necessary, including the polygraph examination." Id. In rejecting this argument, the court stated "[e]ven if we were to read O'Brien's agreement with Papa Gino's so broadly as to give implied permission for polygraph examinations generally, it would not negate the jury's finding that the particular investigation conducted was 'highly offensive' and invasive of plaintiff's privacy." Id.

Finally, Papa Gino's argued that "it cannot be held liable under the defamation charge because (i) the statement 'O'Brien was terminated for drug use' was true, and (ii) even if false, the statement was conditionally privileged and not made with malice, recklessness or ill will." Id. The court rejected Papa Gino's claim that the statement was true on the basis that the jury found that: "O'Brien's termination was *largely* due to drug use, *but [Papa Gino's] also had retaliatory motives arising from a personal grudge.*" Id. (italics in original). The court also found that there was sufficient evidence to support a finding that Papa Gino's knew that O'Brien was terminated for retaliatory reasons as well as the polygraph results. Thus, Papa Gino's, by failing to explain all of the reasons for termination, falsely stated that O'Brien was terminated for drug use.

Key Points:

- A company policy prohibiting drug use by employees does not give an employer complete freedom and discretion to conduct tests to determine whether employees are using drugs; tests must be reasonable and conducted in accord with company policies.

The case of Webster v. Motorola, Inc. involved an invasion of privacy claim by an employee who was required to submit to a random drug test. 637 N.E.2d 203 (Mass. 1994). On January 1, 1991, Motorola instituted a drug testing program at all of its facilities. Prior to that date, Motorola's employees were subject to a urine test prior to their employment; after they were hired they were only tested for cause. Pursuant to the 1991 policy, employees would be randomly selected by a computer and then would receive drug tests. The program was structured such that all employees would be tested at least once in a three-year period. Id.

Upon selection, employees were required to report to a designated collection site, and were asked to sign a form authorizing the testing. All employees were given the opportunity to disclose recent medications, and were then directed to a private room where they were required to provide a urine sample. A technician stood immediately outside the room to listen while the employee urinated. After the sample was collected, the technician, in the presence of the employee, examined the sample for unusual characteristics and recorded the temperature. At that point, the employee was

permitted to leave. The sample was tested for illegal drugs; if a sample tested positive, the results were reported to an independent medical review officer (“MRO”), who would review the results, meet with employees, and inquire about medications and dietary information in an attempt to identify substances that might impact the results. The MRO would then re-examine the results to verify the positive result. Motorola instructed the MRO to rule on the side of the employee if there was evidence that would substantiate a negative instead of a positive test result.

Positive test results were reported to a designated individual in Motorola’s health services department at corporate headquarters; that individual would then disclose the results to an individual in the employee’s division. That individual would meet with the employee and Motorola’s employee assistance program (EAP). The employee’s supervisor was notified only if necessary to restrict duties or provide accommodations for the employee. The EAP professional would then meet with the employee, discuss the drug use, and then refer the employee to an outside drug counselor to recommend a treatment or rehabilitation program. Employees who refuse to undergo rehabilitation or who refused to comply with Motorola’s drug testing program were terminated.

Webster, an at-will employee, was employed as an account executive; his employment relationship was “terminable ‘with or without notice at any time, and for any reason.’” Id. When he joined Motorola, Webster signed a drug testing consent form, indicating that he agreed with pre-employment and “for-cause” testing. As an account executive, Webster’s responsibilities included substantial traveling in a company-owned vehicle. In March 1992, Webster was selected for random drug testing; he signed the authorization form under protest and proceeded with the test so that he would not face termination. Webster filed suit alleging various statutory violations, breach of contract and wrongful termination; Motorola filed a motion for summary judgment, which was granted as to all counts except as to the violation of the Massachusetts Civil Rights Act. Id. After a bench trial, the judge ruled that the program did not violate the Civil Rights Act because: 1) the continued employment of at-will employees was conditioned on their submission to the drug testing program; and, 2) the drug testing program applied to all employees and not a small class of employees. Id. The Massachusetts Supreme Court affirmed.

The court also affirmed the summary judgment dismissal, finding that the universal drug testing program did not violate the employee’s statutory right to privacy. In order to determine whether a drug testing policy violates employees’ right to privacy, Massachusetts courts balance “the employees’ interest in privacy against the employer’s competing interest in determining whether its employees are using drugs.” Id. The court acknowledged that it had previously recognized that requiring employees to submit “to urinalysis involves a significant invasion of privacy,” and that “to the extent that it may be requested to rebut an initial positive test result, information concerning an employee’s medical conditions is also within the realm of one’s privacy interest.” Id. (internal quotations omitted).

The court also reiterated that “an employer may have a substantial and valid interest in aspects of an employee’s health that could affect the employee’s ability effectively to perform job duties,” and stated that “[t]he nature of the employer’s business and the nature of the employee’s duties are relevant factors in determining the gravity of the employer’s interest.” Id. (internal quotations and citation omitted).

The court held that Motorola, like all businesses had an interest in protecting the safety of its employees and in providing a drug-free environment for all employees. That interest alone, however, would not justify a random drug-testing policy. Id. However, Motorola had an additional, legitimate interest that justified its random drug testing program: ensuring that its account executives, such as Webster, did not operate company vehicles while under the influence of illegal drugs. Id. Thus, those interests were sufficient to outweigh Webster’s privacy interest.

Key points:

- In order to justify a random drug-testing policy, there must be a legitimate business interest
- A legitimate business interests requires something more than protecting the safety of employees and providing a drug-free workplace
- Legitimate interests include: protecting the safety of others, protecting corporate property, and preventing corporate liability