It's Time to Rein in Employer Drug Testing

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INTRODUCTION

Drug testing by employers has become so common that few question its effect on privacy. Even fewer question its effectiveness in identifying unqualified applicants or making retention decisions. At the same time, use of at least some drugs has become more common[1] and is sometimes legal. Even "illegal" use sometimes occurs as an extension of prescription drugs[2] or avoids criminal prosecution under the growing number of state statutes allowing the use of marijuana for medical[3] or even recreational purposes.[4] This

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[1] NAT'L INST. ON DRUG ABUSE, DRUG FACTS: NATIONWIDE TRENDS (June 2015), https://www.drugabuse.gov/publications/drugfacts/nationwide-trends [https://perma.cc/R8H4-T9YY] (noting illicit marijuana use is increasing and most other drug use has stabilized).

[2] NAT'L SAFETY COUNCIL, THE PROACTIVE ROLE EMPLOYERS CAN TAKE: OPIOIDS IN THE WORKPLACE 2, 4 (2014) [hereinafter NSC] (stating that 27.3% of chronic users received pills from prescriptions written for them, often for work-related injuries); *see also* TRUST FOR AM.'S HEALTH, PRESCRIPTION DRUG ABUSE: STRATEGIES TO STOP THE EPIDEMIC 4 (2013), http://healthyamericans.org/assets/files/TFAH2013RxDrugAbuseRpt16.pdf [https://perma.cc/23LR-7F3M].

[3] ALASKA STAT. ANN. § 17.37.010 (West, Westlaw through 2016 Second Reg. Sess. through Fifth Spec. Sess. of 29th Legis.); ARIZ. REV. STAT. ANN. §§ 36-2811, 2813 (West, Westlaw through Second Reg. Sess. of Fifty-Second Legis. (2016)); Ark. Const. Amend. No. 98 Medical Marijuana Amendment of 2016; CAL. HEALTH & SAFETY CODE § 11362.5 (West, Westlaw urgency legislation through Ch. 3 of 2017 Reg. Sess.); COLO. CONST. art. XVIII, § 14 (West, Westlaw through Nov. 8, 2016 General Election); CONN. GEN. STAT. ANN. § 21a-408 (West, Westlaw through all 2016 Public Laws); DEL. CODE ANN. tit. 16 § 4903A (West, Westlaw through 80 Laws 2016, ch. 430); FLA. CONST. art. X, § 29 (West, Westlaw through Nov. 8, 2016, General Election); HAW. REV. STAT. ANN. §§ 329-121–125 (West, Westlaw through Act 1 (End) of 2016 Second Spec. Sess.); 410 ILL. COMP. STAT. ANN. 130 (West, Westlaw through P.A. 99-934 of 2016 Reg. Sess) (repeal pending, set to take effect July 1, 2020); ME. REV. STAT. ANN. tit. 22 §§ 2383-B, 2426 (West, Westlaw through emergency legis. through Ch. 1 of 2017 First Reg. Sess. of 128th Legis.); MD. CODE ANN., HEALTH–GEN. § 13-3301 (West, Westlaw through all legis. from 2016 Reg. Sess. of General Assemb.); MICH. COMP. LAWS ANN. §§ 333.26421 (West, Westlaw through P.A.2016, No. 563 of 2016 Reg. Sess., 98th Legis.); Mass. Gen. Laws ch. 941 § 34A; MINN. STAT. ANN. § 256B.0625 (West, Westlaw through ch. 4 of 2017 Reg. Sess.); MONT. CODE ANN. § 50-46-319 (West, Westlaw through 2015 sess., including ballot measure I-182); NEV. REV. STAT. ANN. § 453A.200 (West, Westlaw through end of 78th Reg. Sess. (2015) and 30th Spec. Sess. (2016) of Nev. Legis.); N.M. STAT. ANN. §§ 26-2B-3–5 (West, Westlaw through Ch. 5 of 1st (2017) Reg. Sess. of 53rd Legis.); N.Y. PUB. HEALTH LAW Tit. 5-A §§ 3360, 3362; N.D. CENT. CODE ANN. § 19-24-01 (West, Westlaw through emergency effective laws from 2017 Reg. Sess. of 65th Legis. Assemb. approved through Feb. 24, 2017); OHIO REV. CODE ANN. § 3796.01 (West, Westlaw through all laws of 131st General Assemb. (2015–2016)); OR. REV. STAT. ANN. §§ 475.302–.346 (West, Westlaw through End of 2016 Reg. Sess. and ballot measures approved at 11/8/16 General Election, pending classification of undesignated material and text

raises the important question of whether a positive drug test, without other evidence of negative effects of drug usage, should be the basis for important employment decisions.

Despite widespread legalization, all drug users continue to be at risk of losing employment or never getting hired based on their legal use of marijuana, because most legalization statutes fail to address employment rights.[5] Some states regulate the process of drug testing, but very few place any limits on employers' decisions based on those test results.[6] With little regulation, employers continue to drug test both applicants and employees on a regular basis.[7] Before any of these legalization statutes, a model Substance Abuse Testing Act proposed national standards for drug testing procedures that are "fair, accurate and dignified."[8] This model act aimed to protect the privacy interests of people subjected to drug testing, while recognizing employers' concerns over drug abuse among employees.[9] The model act also strove to address "[t]he uneven patchwork of state and federal legislation" which had placed "a considerable burden on corporations doing business in interstate commerce."[10]

That patchwork remains today. Some states have adopted limited guidelines for or restrictions on drug testing of employees without regulating employers' decisions based on test results.[11] At the same time, courts have imposed very few constraints on drug testing by private sector employers, deferring to the notion of employment at will.[12] In the public sector, the

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revision by Or. Reviser); PA. 21-2103 (2016); R.I. GEN. LAWS ANN. § 21-28.6-3 (West, Westlaw through Ch. 542 of Jan. 2016 sess.); VT. STAT. ANN. tit. 18, § 4472 (laws of Adjourned and Spec. Sess. of 2015–2016 Vt. General Assemb. (2016)); WASH. REV. CODE ANN. § 69.51A.010 (West, Westlaw through amendments approved 11-8-2016).

[4] ALASKA STAT. ANN. § 17.38 (West, Westlaw through 2016 Second Reg. Sess. through Fifth Spec. Sess. of 29th Legis.); CAL. HEALTH & SAFETY CODE §§ 11357-111360 (West, Westlaw through all 2016 Reg. Sess. laws, Ch. 8 of 2015-2016 2nd Ex. Sess., and all propositions on 2016 ballot.); COLO. CONST. art. XVIII, §16 (West, Westlaw through Nov. 8, 2016 General Election); MASS. GEN. LAWS ch. 94C § 31 (2016); NEV. REV. STAT. ANN. § 453.336 (West, Westlaw through end of 78th Reg. Sess. (2015) and 30th Spec. Sess. (2016) of the Nev. Legis. and all technical corrections received by Legis. Counsel Bureau); OR. REV. STAT. ANN. § 475B.005 (West, Westlaw through End of 2016 Reg. Sess. and ballot measures approved at 11/8/16 General Election); WASH. REV. CODE ANN. §§ 9A.20.021, 69.50.4013–.4014 (West, Westlaw through amendments approved 11-8-2016); Wash., D.C. Ballot Initiative 71 (codified as D.C. Code Ann. § 48-904.01 (West, Westlaw through Mar. 12, 2017)). For more information, see *Legal Issues,* NORML: WORKING TO REFORM MARIJUANA LAWS, http://norml.org/legal [https://perma.cc/JJ3N-9TUC].

[5] Stacy A. Hickox, *Clearing the Smoke on Medical Marijuana Users in the Workplace*, 29 QUINNIPIAC L. REV. 1001, 1010–17 (2011).

[6] *See infra* text accompanying notes 113–30.

[7] *See Drug Testing Efficacy SHRM Poll*, SOC'Y FOR HUMAN RES. MGMT. (Sept. 7, 2011) [hereinafter SHRM], http://www.shrm.org/Research/SurveyFindings/Articles/Pages/lDrugTestingEfficacy.aspx [https://perma.cc/Y46Q-F3JK].

[8] TASK FORCE ON THE DRUG-FREE WORKPLACE, PROPOSAL FOR A SUBSTANCE ABUSE TESTING ACT 8 (1991) [hereinafter TASK FORCE], http://scholarship.law.wm.edu/ibrlevents/2 [https://perma.cc/9KJF-85CM].

[9] *Id.* at 7.

[10] *Id.* at 7–8.

[11] *See infra* text accompanying notes 113–30.

[12] *See infra* text accompanying notes 133–52.

Fourth Amendment generally limits drug testing to those suspected of being under the influence or working in a safety-sensitive position,[13] but does little to limit employers' decisions based on those tests.

Suspicionless drug testing infringes upon employee privacy and has not been shown to benefit employers.[14] Therefore, employers should be required to limit drug testing to employees reasonably suspected of being impaired, or situations in which the impairment of an employee would cause substantial harm. Drug testing clearly implicates the privacy interests of applicants and employees by forcing them to provide a urine or hair specimen to obtain or retain employment and then analyzing that sample for not only illegal but also prescribed medications. Both private and public sector employers should have some justification for requiring such an intrusion as a condition of employment. But employers' reliance on drug testing is also concerning because it is both under-inclusive and over-inclusive: it does not accurately identify potentially risky or unproductive employees while it often excludes potentially productive employees who pose no risk at all.

This article begins by describing employers' reliance on drug testing to target perceived poor character and address safety. The second part outlines research on the unreliability of drug testing to make significant employment decisions, given the inability to measure impairment. The third part provides a review of the limited regulation of drug testing at state and federal levels, followed by an analysis of the limited protections of employees' privacy interests which are only enjoyed by public sector employees.

The final part recommends more regulation of employer drug testing to fulfill two goals: protection of the privacy interests of applicants and employees and promotion of more effective means of avoiding the selection or retention of drug users who truly threaten the employers' interests. These policy changes are needed to protect applicants and employees who use drugs for medical or even the occasional recreational legal purpose, but who can still perform well in the workplace.

I. Prevalence of Drug Testing by Employers

Employers in both the public and private sectors regularly test employees and applicants for illegal drug use for a variety of reasons. In 2011, 57% of surveyed employers drug tested all job applicants, and an additional 10% tested applicants for selected jobs, while 36% tested current employees.[15] Most recently, employers have expanded the testing of employees on a random basis, and often test all applicants.[16] This widespread use of drug testing

[13] *See infra* text accompanying notes 153–219.

[14] Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 617 (1989) ("[T]he process of collecting the sample to be tested . . . implicates privacy interests."); *see infra* text accompanying notes 37–74 for discussion of the ineffectiveness of drug testing.

[15] SHRM, *supra* note 7, at slide 9.

[16] *See id.*

means that approximately 43% of all applicants and almost 30% of current employees are drug tested.[17]

A. Why Employers Test

Drug testing has been adopted by employers to protect the safety of employees and the general public, and to reduce costs associated with absenteeism, medical claims, and reduced productivity associated with drug use.[18] Interestingly, actual drug abuse among employees generally is not a reason for testing,[19] perhaps because the rate of illicit drug use among full time employees is only about 9%,[20] and only a small percentage of illegal drug users are considered "problem drug users."[21]

Current employees are subjected to drug testing for a variety of reasons. Employers most often test current employees based on reasonable suspicion of impairment at work (35%), as a follow up to rehabilitation (20%), and employees indicating a possible substance abuse problem (8%).[22] Employers also often test current employees involved in a workplace accident, suggesting a performance-related purpose; however, the random testing practiced by 47% of employers likely reflects a broader goal.[23]

Employer testing of applicants is more common than testing of current employees, with 10% testing for selected positions in 2011, a decrease from 17% in 2010.[24] In contrast, 29% of employers indicated in 2011 that they did not test any applicants, compared to 21% of employers in 2010.[25] Drug testing of applicants is more common among employers of more than 500 employees,[26] suggesting that it may be used as an easy screening tool for larger numbers of applicants.

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[17] SHARON L. LARSEN ET AL., DEP'T OF HEALTH & HUMAN SERVS., WORKER SUBSTANCE USE AND WORKPLACE POLICIES AND PROGRAMS 45–46 (2007), http://calabria.dronet.org/comunicazioni/news/samhsa_work.pdf [https://perma.cc/59BY-4L6D].

[18] Thomas E. Geidt, *Drug & Alcohol Abuse in the Workplace: Balancing Employer & Employee Rights*, 11 EMP. REL. L.J. 181, 181 (1985); Janice Castro, *Battling Drugs on the Job*, TIME, Jan. 27, 1986, at 43; *see also* Deborah J. La Fetra, *Medical Marijuana and the Limits of the Compassionate Use Act: Ross v. Raging Wire Communications*, 12 CHAP. L. REV. 71, 73–74 (2008) (describing how drug testing is used to address attendance issues, propensity to make mistakes, and employers' potential liability for misconduct).

[19] KEVIN B. ZEESE, DRUG TESTING LEGAL MANUAL AND PRACTICE AIDS 1.1 (2d ed. 1997).

[20] U.S. DEP'T OF HEALTH & HUMAN SERVS., SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., RESULTS FROM THE 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS fig. 2.13 [hereinafter SAMHSA], https://www.samhsa.gov/data/sites/default/files/NSDUHresultsPDFWHTML2013/Web/NSDUHresults2013.htm#2.10 [https://perma.cc/2WZ4-SBBR].

[21] U.N. OFFICE ON DRUGS & CRIME, 2007 WORLD DRUG REP. 15 (2007), https://www.unodc.org/pdf/research/wdr07/WDR_2007.pdf [https://perma.cc/RB5F-PV6Q].

[22] SHRM, *supra* note 7, at slide 12; *see also* AM. MGMT. ASSOC., MEDICAL TESTING 2004 SURVEY, [hereinafter AMA SURVEY], http://www.amanet.org/training/articles/2004-Medical-Testing-Survey-17.aspx [https://perma.cc/3VH2-4AZW].

[23] AMA Survey, *supra* note 22.

[24] SHRM, *supra* note 7, at slide 7.

[25] *Id.*

[26] *Id.* at slide 8.

Expansion of drug testing while drug use among employees remains low suggests that employers are relying on drug testing as a relatively easy way of "distinguishing the reputable from the disreputable,"[27] particularly in larger organizations.[28] Drug testing may be seen as a way to address immorality and restore the image of an employer's control,[29] or even a broader form of social control.[30] Hence, employers rely on testing to deter drug and alcohol use among their employees, or to discourage drug users from applying. However, comparisons of drug use in companies that do or do not test have not established a lower usage rate among testing employers, and industries with higher rates of testing also have higher rates of drug usage.[31]

Some drug testing can be attributed to government mandates,[32] including regulations applicable to the transportation industry[33] as well as more general discouragement of drug use among government contractors adopted in the 1980s.[34] Employers may also be encouraged to drug test employees because of cost savings or requirements under their workers' compensation insurance plans.[35] These discounts are conditioned on the administration of drug tests in certain situations, such as post-accident testing.[36] However, it is important to note that these programs do not dictate that the employer discharge or even discipline an employee based on a positive drug test.

Employers have adopted drug testing as the norm for both applicants and current employees for a variety of reasons. This raises the question of whether drug testing actually achieves the purposes for which it has been adopted, which is dependent on the accuracy of drug testing and its ability to identify impairment of employees at work or the potential for applicants to be impaired at work.

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[27] KEN D. TUNNELL, PISSING ON DEMAND: WORKPLACE DRUG TESTING AND THE RISE OF THE DETOX INDUSTRY 99, 104 (2004).

[28] Marian J. Borg & William P. Arnold, *Social Monitoring as Social Control: The Case of Drug Testing in a Medical Workplace*, 12 SOC. F. 441, 444–45 (1997).

[29] J. Michael Cavanaugh & Pushkala Prasad, *Drug Testing as Symbolic Managerial Action: In Response to* A Case Against Workplace Drug Testing, 5 ORG. SCI. 267, 269 (1994).

[30] TUNNELL, *supra* note 27, at 98, 102–03.

[31] LEWIS MALTBY, NAT'L WORKRIGHTS INST., LATEST RESEARCH REVEALS NEW PROBLEMS WITH DRUG TESTING 10, http://workrights.us/wp-content/uploads/2012/03/NewInformationDrugTesting.pdf [https://perma.cc/5WV8-Y9HS].

[32] *See id.* at 23 (showing a government mandate influenced fifty-three percent of employers who drug test); SHRM, *supra* note 7, at slide 7 (showing four percent of employers test applicants when required by law).

[33] 49 C.F.R. §§ 391.41(12), 382.101, et. seq., 392.4 (2017) (aviation, trucking, mass-transit, pipeline, other transportation industries).

[34] *See* La Fetra, *supra* note 18, at 73, 74.

[35] Genevieve Douglas, *Employers Must Be "Nimble" Navigating State Marijuana Laws*, BLOOMBERG BNA: DAILY LAB. REP. (Feb. 14, 2017), http://laborandemploymentlaw.bna.com/lerc/2453/split_display.adp?fedfid=105660080&vname=dlrnotallissues&jd=a0k8v6k0d1&split=0 [https://perma.cc/T2V7-62FR].

[36] *See, e.g.*, MISS. CODE ANN. § 71-3-209 (West, Westlaw through laws from 2017 Reg. Sess. effective upon passage as approved through Mar. 13, 2017); WORKERS' COMPENSATION: DRUG-FREE WORKPLACE PREMIUM CREDIT PROGRAM, http://riskinnovationsllc.com/wp-content/uploads/2015/12/NC_Drug-Free_Workplace_Form-INSTRUCTIONS.pdf [https://perma.cc/538P-3PT5] (explaining a program in North Carolina).

II. Effectiveness of Drug Testing

Because drug testing does not measure impairment and frequently provides false positive test results, it fails to fulfill the interests for which employers rely on it. Drug testing can only fulfill employers' goals if testing accurately measures prior usage of a substance and indicates some impairment at work that affects performance or the safety of the workplace. Attorneys providing advice to employers have rationalized drug testing based on American Medical Association (AMA) studies finding that marijuana ingested for medicinal purposes may have the same biological side-effects as marijuana ingested for recreational purposes.[37] Yet the AMA also has supported the development of more sophisticated testing methods that can demonstrate impairment rather than just previous use.[38]

A. Accuracy

Drug tests are frequently inaccurate, with accuracy inversely related to the frequency of their usage. Employers most often opt for urine testing, either at the workplace or a laboratory.[39] In addition, almost a quarter of employers report using breath-alcohol testing, while only eight percent report using hair or blood testing.[40] The "instant" urine test, often performed at the workplace,[41] is the least reliable.[42] This test results in false positive rates as high as sixty-five percent because the test often cannot distinguish one type of drug from another.[43] Saliva can also be used to detect prior use of drugs in the previous twenty-four to forty-eight hours.[44] Despite this high rate of false positives, positivity rates for urine tests of U.S. employees average only four percent.[45]

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[37] *See* La Fetra, *supra* note 18, at 75 (describing AMA studies that demonstrate medical marijuana users may experience increased heart rate, decreased blood pressure when standing, intensified senses, and increased talkativeness).

[38] Tunnell, *supra* note 27, at 8.

[39] SHRM, *supra* note 7, at slide 20 (showing that seven percent of employers use only in-house testing, compared to seventy-seven percent who use only off-site drug testing); Tunnell, *supra* note 27, at 39 (showing that 82.1% of employers use urine tests, 12.9% use blood tests, 1.1% use hair tests, and 0.9% use performance tests).

[40] HireRight, 2016 HireRight Emp. Screening Benchmark Rep. 10 (2015), http://www.hireright.com/assets/uploads/files/HireRight2016BenchmarkingReport.pdf [https://perma.cc/5RFW-D9Y5].

[41] SHRM, *supra* note 7, at slide 21.

[42] Hassan A. Kanu, *Hair-Follicle Drug Testing: Lessons for Employers*, Bloomberg BNA: Daily Lab. Rep. (Oct. 19, 2016), https://www.bna.com/hairfollicle-drug-testing-n57982078835/ [https://perma.cc/6USS-W48Q].

[43] Mark Stevens & James Addison, *Interface of Science & Law in Drug Testing*, 23 Champion, Dec. 1999, at 18, 19–21 (charting lengths of time between ingestion and testing positive).

[44] Lolita M. Tsanaclis et al., *Workplace Drug Testing, Different Matrices Different Objectives*, 4 Drug Testing & Analysis 83–88 (2012).

[45] News Release, Quest Diagnostics, Workforce Drug Test Positivity Rate Increases for the First Time in 10 Years, Driven by Marijuana and Amphetamines, Find Quest Diagnostics Drug Testing Index Analysis of Employment Drug Tests (2014), http://www.questdiagnostics.com/home/physicians/health-trends/drug-testing.html [https://perma.cc/UX73-MFKE].

Hair testing will identify drug use for as long as three previous months,[46] but false positive results are common in part because hair can test positive without ingestion of the drug.[47] Hair testing also can have a disparate impact on African Americans, because dark-haired people with higher concentrations of melanin are far more likely to test positive.[48] None of these tests indicate impairment or the amount of drug that has been detected.[49]

Because of the unreliability of urine testing, both experts and the Department of Health and Human Services (HHS) agree that the results of a urine test must be confirmed by an alternative testing technique.[50] Some employers have followed this advice.[51] Follow-up tests may cost more, but are much more accurate in identifying the level of a drug in someone's system.[52]

Use of a medical review officer (MRO) is another important piece of the drug testing process to ensure the reliability of test results, as recommended by federal regulations.[53] MROs ensure that a drug test is not reported as positive if resulting from a prescribed medication and sometimes report a negative result for medical marijuana users.[54] Despite the importance of using MROs, the majority of employers relying on urinalysis do not use a MRO to analyze results.[55] The absence of MRO review has been described as a "source of legal liability and problems for companies and laboratories."[56]

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[46] *See* Tsanaclis, *supra* note 44, at 83–84.

[47] *See* Mark Frankel, *Mom and Pop Test for Drugs*, NATION, Jan. 29, 1996, at 21; Kanu, *supra* note 42, at 1; *see also* Koch v. Harrah's Club, No. 23740, 1990 WL 448060 (Nev. Dist. Ct. Sept. 12, 1990) (holding that a hair test alone cannot support discharge of employee).

[48] *See* Kanu, *supra* note 42, at 2; ACLU, *Hair Tests: Unreliable and Discriminatory* (June 27, 1999), https://www.aclu.org/news/hair-tests-unreliable-and-discriminatory?redirect=drug-law-reform/hair-tests-unreliable-and-discriminatory [https://perma.cc/42JY-KXXV]; *see also* Jones v. City of Boston, 118 F. Supp. 3d 425, 465, 467–68 (D. Mass. 2015), *aff'd*, 845 F.3d 28 (1st Cir. 2016) (discussing the claim that hair tests have a disparate impact on African Americans).

[49] Stevens & Addison, *supra* note 43, at 19.

[50] 49 C.F.R. § 40.89 (2008); Mandatory Guidelines for Federal Workplace Drug Testing Programs, 73 Fed. Reg. 71858 § 3.1 (Nov. 25, 2008) [hereinafter HHS Guidelines]; ZEESE, *supra* note 19, at 2.02[1]; Scott Macdonald et al., *Testing for Cannabis in the Work-place: A Review of the Evidence*, 105 ADDICTION 408, 410, 413 (2010).

[51] Patricia S. Wall, *Drug Testing in the Workplace: An Update*, 8 J. APPLIED BUS. RES. 127, 129 (1992).

[52] TERRENCE R. COWAN, *Drugs and the Workplace: To Drug Test or Not to Test?* 164 Pub. Pers. Mgmt. 313, 317–18 (1987).

[53] 49 C.F.R. § 40.129 (2010); HHS Guidelines, *supra* note 50, at § 3.4.

[54] Matthew Levine & William Rennie, *Pre-Employment Urine Testing of Hospital Employees: Future Questions and Review of Current Literature*, 61 OCCUPATIONAL & ENVTL. MED. 318, 321 (2004); *see, e.g.*, Kollmer v. Jackson Tenn. Hosp. Co., No. 15–1132, 2016 WL 6638002, at *7–8 (W.D. Tenn. Nov. 9, 2016) (holding that a MRO should determine if there is legitimate explanation for positive result).

[55] TUNNELL, *supra* note 27, at 40.

[56] Kim Broadwell, *The Evolution of Workplace Drug Screening: A Medical Review Officer's Perspective*, 22 J.L. MED. & ETHICS, 240, 241 (1994).

B. Measuring Impairment

Even with reliable drug testing processes, positive test results do not indicate impairment at work,[57] because a drug test only establishes some prior use.[58] Consequently, a positive drug test will not predict performance issues or any threat to safety.[59] Urine, drug, and metabolite concentrations do not correlate with behavior,"[60] because they "cannot ascertain the quantity of a drug consumed, the time of consumption, or its effect on the user."[61] For this reason, even the manufacturer of the widely-used EMIT urine test has warned that the test "does not indicate intoxication."[62] Conversely, recent ingestion that can cause impairment may not result in a positive drug test because the drug has not metabolized.[63]

Employers justify testing employees and applicants based on the known effects of recent usage, such as marijuana's effect on cognitive function and reaction times[64] which can negatively affect driving ability.[65] Even for those who test positive and might be under the influence at work, a drug's impairing effects depend on dosage and frequency of use,[66] as well as the user's weight, gender, age, and mental state.[67]

Employers may rely on drug testing to identify applicants and employees who are more likely to be impaired at work based on their off-duty use

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[57] *See* Stevens & Addison, *supra* note 43, at 18; *see also* Levine & Rennie, *supra* note 54, at 319 (explaining that the presence of a banned substance does not establish cognitive impairment or effect on performance).

[58] Stevens & Addison, *supra* note 43, at 20; CARL HART & CHARLES KSIR, DRUGS, SOCIETY & HUMAN BEHAVIOR 364 (14th ed. 2011); *see also* Karen Moeller, *Urine Drug Screening: Practical Guide for Clinicians*, MAYO CLINIC PROCEEDINGS (Jan. 2008), http://www.mayoclinicproceedings.org/article/S0025-6196(11)61120-8/abstract [https://perma.cc/N9WS-39K4] (noting marijuana is detectable for up to one week after a single use, 10–15 days after daily use).

[59] Cowan, *supra* note 52, at 314; NSC, *supra* note 2, at 11 ("drug test does not prove impairment").

[60] UNDER THE INFLUENCE?: DRUGS AND THE AMERICAN WORK FORCE 193 (Nat'l Acad. of Scis. et al. eds., 1994).

[61] Debra Comer, *A Case Against Workplace Drug Testing*, 5 ORG. SCI. 259, 261 (1994).

[62] ZEESE, *supra* note 19, at § 3.02; *see also* DAVID GRILLY, DRUGS AND HUMAN BEHAVIOR 241 (1st ed. 1989) (stating that no practical method has been developed for determining levels of intoxication based on detectable cannabinoids and metabolites).

[63] *See* TUNNELL, *supra* note 27, at 54; *see also* ZEESE, *supra* note 19, at § 2.03[1].

[64] *See* Johannes G. Ramaekers et al., *High-Potency Marijuana Impairs Executive Function and Inhibitory Motor Control*, 31 NEUROPSYCHOPHARMACOLOGY 2296, 2301 (2006) (noting acute effects of smoking marijuana on cognitive function and psychomotor function).

[65] HART & KSIR, *supra* note 58, at 374; *see also* Macdonald, *supra* note 50, at 411 (noting mixed results in studies of impact of marijuana use on driving accidents).

[66] Harrison Pope et al., *Neuropsychological Performance in Long-Term Cannabis Users*, 58 ARCHIVES GEN. PSYCHIATRY 909, 912–14 (2001); *see also* MARIJUANA AND THE WORKPLACE: INTERPRETING RESEARCH ON COMPLEX SOCIAL ISSUES 39 (Charles R. Schwenk & Susan L. Rhodes eds., 1999) [hereinafter MARIJUANA AND THE WORKPLACE] (noting decreases in productivity or performance levels is a direct function of quantity of marijuana consumed).

[67] TUNNELL, *supra* note 27, at 54 (individual metabolic rates differ); ME. LEGISLATURE, REPORT OF THE MAINE COMMISSION TO EXAMINE CHEMICAL TESTING OF EMPLOYEES 20–21 (1986) ("Science is presently incapable of relating urine concentration levels of substances of abuse, or their metabolites, with actual impairment.").

of drugs,[68] even if the drug test does not establish such impairment alone. However, relying solely on a drug test to predict potential future impairment is overly inclusive and can result in the rejection of applicants and loss of current employees who are productive and will never come to work while impaired. Actual impairment can be identified much more accurately by direct observation of behavior as well as through the use of various impairment and skills tests.[69]

In contrast to impairment on the job, off-duty use of an illegal substance has little or no measurable effect on productivity.[70] Numerous studies have failed to find a definitive link between drug testing and organizational gains in safety or productivity.[71] Some illegal drug users may be more likely to be unproductive, miss work, be involved in on-the-job accidents, file workers' compensation claims, and have greater health care costs consider; however, any demonstrated effects have been among regular or habitual illegal drug users, not those who might test positive on a drug test because of a prescription drug or medical marijuana use.[72] Employee-specific personal characteristics and situational factors have been shown to have a much larger influence than a positive drug test on absenteeism and other performance issues.[73]

Even without direct effects on performance or reducing accidents, employers may hope that testing will deter drug use. However, research does not show any consistent deterrent effect of drug testing on drug use, even when combined with employee-assistance programs and written policies.[74]

Some courts have recognized drug tests' limited ability to measure impairment. Such courts have rejected evidence of metabolites detected by a

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[68] *See, e.g.*, Ramaekers et al., *supra* note 64 at 230.

[69] Stacy A. Hickox, *Drug Testing of Medical Marijuana Users in the Workplace: An Inaccurate Test of Impairment*, 29 HOFSTRA LAB. & EMP. L.J. 272, 304–06 (2012).

[70] MARIJUANA AND THE WORKPLACE, *supra* note 66, at 20–21 (citing numerous studies); *see also* John Kagel et al., *Marijuana and Work Performance: Results from an Experiment*, 15 J. HUM. RES. 373, 386–87 (1980) (finding no relationship between marijuana and productivity); Adam D. Moore, *Drug Testing and Privacy in the Workplace*, 29 J. MARSHALL J. COMPUT. & INFO. L. 463, 480–81 (2012) (noting drug use not necessarily associated with decrease in productivity).

[71] Comer, *supra* note 61, at 260; *see also* R. Cropanzano & M. Konovsky, *Drug Use and Its Implications for Employee Drug Testing*, *in* RESEARCH IN PERSONNEL AND HUMAN RESOURCES MANAGEMENT 11 (Gerald Ferris & Kendrith Rowland eds., 1993).

[72] *See generally* SHRM, *supra* note 7; Am. Council for Drug Educ., *Why Worry about Drugs and Alcohol in the Workplace*? (2009), http://sobertransitions.typepad.com/sobertransitions/2009/11/american-council-for-drug-education-asks-why-worry-about-drugs-and-alcohol-in-the-workplace.html [https://perma.cc/P4UL-ZYR2]; *see also* Dennis Crouch et al., *A Critical Evaluation of the Utah Power & Light Company's Substance Abuse Management Program: Absenteeism, Accidents and Costs*, *in* DRUGS IN THE WORKPLACE: RESEARCH AND EVALUATION DATA 169 (Steven Gust & Michael Walsh eds., 1989).

[73] *See* GRILLY, *supra* note 62, at 243 (importance of motivation); Scott Macdonald et al., *The Limitations of Drug Screening in the Workplace*, 132 INT. LAB. REV. 95, 102 (1993); *see also* TUNNELL, *supra* note 27, at 8 (noting the importance of situational factors such as fatigue, stress, and illness); Melvin Holcom et al., *Employee Accidents: Influences of Personal Characteristics, Job Characteristics, and Substance Use in Jobs Differing in Accident Potential*, 24 J. SAFETY RES. 205, 218 (1993) (noting that testing does not add to prediction of accidents).

[74] *See* Macdonald et al., *supra* note 50, at 412.

drug test as evidence of THC-related impairment to support criminal charges for driving under the influence.[75] For example, following this reasoning, Ontario courts have significantly limited the role of both urine and saliva test results in establishing an employee's impairment.[76] Employers should be cautious in relying on drug testing to determine impairment, given the potential for both false positive and false negative test results. Employers could better address their interests in regulating performance and other more general selection goals by using more accurate measures of both impairment and performance. Perhaps more importantly, these limitations call for a close analysis of public policy and judicial protection of employees' rights, which are significantly impacted by employers' widespread use of drug testing to make hiring and retention decisions.

III. Statutory Protection

Both employees and applicants lack adequate protection from adverse employment decisions based on their legal use of marijuana or prescription drugs. Most state statutes that have legalized the use of marijuana for recreational or medicinal purposes have focused on removing criminal penalties rather than protecting employment. Despite court decisions recognizing these limitations, state legislatures have failed to add protection for applicants and employees who are using marijuana legally. Before this legalization trend, federal regulators and some states adopted standards for the administration of drug tests. However, these standards typically do not provide employees or applicants with grounds to challenge an adverse employment action based on a positive drug test, regardless of whether they were impaired at work or the interview.

A. Legalization Versus Lack of Protection

Recreational use of marijuana enjoys the support of a majority of Americans,[77] and medical marijuana has been legalized in twenty-three states and the District of Columbia because of its palliative effects.[78] The

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[75] *See* People v. Feezel, 783 N.W.2d 67, 82 (Mich. 2010).

[76] Entrop v. Imperial Oil Ltd., (2000) 50 O.R. 3d 18 (Can. Ont. C.A.); *see also* Graeme McFarlane, *Human Rights & Workplace Woes: The Perils of Impairment Testing*, HR Voice: PeopleTalk (July 18, 2010), http://www.hrvoice.org/human-rights-workplace-woes-the-perils-of-impairment-testing/ [https://perma.cc/3JAW-DRPN]; Ont. Human Rights Comm'n, Policy on Drug and Alcohol Testing 7 (2009), http://www.ohrc.on.ca/sites/default/files/Policy%20on%20drug%20and%20alcohol%20testing_revised_2016_accessible_1.pdf [https://perma.cc/VP6G-7RHM].

[77] Abigail Geiger, *Support for Marijuana Legalization Continues to Rise*, Pew Research Ctr.: FactTank (Oct. 12, 2016), www.pewresearch.org/fact-tank/2016/10/12/support-for-marijuana-legalization-continues-to-rise [https://perma.cc/Q8XA-SU6E].

[78] *See* Elizabeth Rodd, *Light, Smoke, and Fire: How State Law Can Provide Medical Marijuana Users Protection from Workplace Discrimination*, 55 B.C. L. Rev. 1759, 1766–68 (2014).

state laws that have legalized the use of marijuana for recreational or medical purposes, however, often do not protect the employment of those users. At the same time, more than half of employers lack a policy to address medical marijuana usage, and only five percent report that they accommodate those users.[79] By allowing employers to continue to make employment decisions based on a positive drug test, an applicant or employee can lose out on employment based on their legal use of marijuana.

Like legalization statutes themselves, courts interpreting these statutes are often "unsympathetic" to the claims of employees who use medical marijuana.[80] Perhaps because drug testing has been so common, these statutes give employers "the unfettered right to drug test and subsequently terminate employees for legal marijuana use, even marijuana use that takes place outside of work."[81] For example, Illinois's medical marijuana statute explicitly allows employers to enforce policies concerning drug testing.[82] This apparent contradiction allows employers to continue to screen both applicants and employees based on broader moral grounds, rather than just more job-related safety concerns.

TABLE 1: NUMBER OF STATES WITH EMPLOYMENT-RELATED MEDICAL MARIJUANA REGULATION

Use in Workplace Not Protected/Need Not Accommodate	Excluding Work Under the Influence/ Impaired	Prohibiting Civil Penalty or Disciplinary Action by Licensing Board	No Action by Employer Based on Status as Cardholder
14 states[83]	4 states[84]	9 states[85]	4 states[86]

Of the twenty-eight states that have legalized medical marijuana, half specifically exclude employees' use in the workplace and four additional states exclude employees who report to work under the influence. Very few medical marijuana statutes prohibit the discipline or discharge of an

[79] HIRERIGHT, *supra* note 40, at 11.

[80] *See* Alexis Gabrielson, *The "Right To Use" Takes Its First Hit: Marijuana Legalization and the Future of Employee Drug Testing*, 18 EMP. RTS. & EMP. POL'Y J. 241, 243 (2014).

[81] *See* Kayla Goyette, *Legalizing Marijuana: State and Federal Issue: Recreational Marijuana and Employment: What Employees Don't Know Will Hurt Them*, 50 GONZ. L. REV. 337, 340 (2014).

[82] 410 ILL. COMP. STAT. ANN. 130/50 (West, Westlaw through P.A. 99-938 of 2016 Reg. Sess.).

[83] For statutes from Alaska, Arizona, California (use need not be accommodated in the workplace), Colorado, Hawaii, Maine, Maryland, Montana, Nevada, North Dakota, Oregon, Rhode Island, Vermont, Washington, see *supra* note 5.

[84] For statutes from Arizona (not under the influence based solely on positive drug test), Maine, Maryland, Vermont, see *supra* note 5.

[85] For citations for statutes from Arizona, Arkansas, Maine, Michigan, Montana, Nevada, New Jersey, Oregon, Rhode Island, see *supra* note 5.

[86] For citations for statutes from Arizona, Arkansas, Maine, Rhode Island, see *supra* note 5.

employee who uses medical marijuana outside of work and then tests positive on a drug test.[87] Colorado goes one step farther stating that the statute does not "affect the ability of employers to have policies restricting the use of marijuana by employees."[88] Without specific statutory language requiring that an employer accommodate medical marijuana use, courts have refused to protect the employment of a medical marijuana user who is discharged based on a positive drug test.[89]

Employers may be inclined to discipline legal marijuana users like any other illegal drug user because they assume that a drug test is a good indicator of impairment, which is not a valid assumption. If a drug test is being used instead as an indication of good character, then the legalization of the use of marijuana would undercut that justification. Employers may worry that they should not treat employees who test positive differently, fearing that disparate treatment and unjust dismissal claims could result. In fact, the public policy grounds supporting the legalization of marijuana use, particularly for medical treatment, suggest that employers should treat those employees differently than others who test positive for truly illegal drugs.

For now, most medical marijuana statutes lack any clear statutory protection for medical marijuana users' employment, which has led to the dismissal of multiple claims of employees who were discharged based on their medical marijuana use without any evidence that their use affected their work performance.[90] For example, a Wal-Mart employee was discharged after a positive drug test resulting from his medical marijuana use, without any indications of impairment.[91] Michigan's Medical Marihuana Act's states that a medical marijuana user:

> shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act . . . .

was not intended to "regulate private employment."[92]

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[87] *See* Martin Berman-Gorvine, *Employers Must Weed Through Thicket of Marijuana Laws*, BLOOMBERG BNA: DAILY LAB. REP. (Oct. 21, 2016, 7:48 PM), https://convergenceapi.bna.com/ui/public/content/articlePrint/245737876000000016/303068?ReportGuid=57E36B2B-FA4E-420D-8F4C708F9ACD0EB7?emailaddr [https://perma.cc/7LT5-6MBS].

[88] COLO. CONST. art. XVIII, § 16.

[89] *See, e.g.*, Ross v. RagingWire Telecommc'n, Inc., 174 P.3d 200, 208 (Cal. 2008); Emerald Steel Fabricators v. Bureau of Labor & Indus., 230 P.3d 518, 535 (Or. 2010); Roe v. Teletech Customer Care Mgmt., LLC, 257 P.3d 586, 591–93 (Wash. 2011); Johnson v. Columbia Falls Aluminum Co., No. DA 08-0358, 2009 Mont. LEXIS 120, at *5–7 (Mont. Mar. 31, 2009).

[90] *See RagingWire Telecomm'n, Inc.*, 174 P.3d at 208; *Emerald Steel Fabricators*, 230 P.3d at 535; *Teletech Customer Care Mgmt*., 257 P.3d at 591–93; *Columbia Falls Alumninum Co.*, 2009 Mont. LEXIS, at *5–7.

[91] *See* Casias v. Wal-Mart Stores, Inc., 764 F. Supp. 2d 914, 916 (W.D. Mich. 2011), *aff'd*, 695 F.3d 428 (6th Cir. 2012).

[92] MICH. COMP. LAWS ANN. § 333.26424(a) (West, Westlaw through P.A.2016, No. 563 of 2016 Reg. Sess., 98th Legis.).

Like the other state courts that have dismissed similar claims, the Sixth Circuit held that such an interpretation would "mark a radical departure from the general rule of at-will employment in Michigan."[93] Since multiple other medical marijuana statutes include the same language, the same result can be expected in those states as well.[94]

More expansive protection is provided in the small number of medical marijuana statutes that include specific employment protection for medical marijuana users.[95] For example, Arizona prohibits an employer's discrimination against a medical marijuana user in hiring, terminating, or imposing employment conditions, including penalizing the employee for a positive drug test, unless failing to do so would cause the employer to lose a monetary or licensing benefit under federal law.[96] Similarly, Maine and Arkansas protect against "discrimination" and Rhode Island prohibits refusal of employment solely because of the person's status as a medical marijuana user.[97]

Even these statutes could still allow discipline based on a positive drug test if that discipline was not deemed to be based on the employee's "status as a cardholder," which could in theory include testing positive on a drug test. Arguably, these protections for medical-marijuana-using employees and applicants appropriately "balance the competing interests of the employer and the employee" and provide clarity for employers facing decisions about medical marijuana users who might fail a drug test but otherwise be productive employees.[98] Given the potential complications for employers operating in multiple states, and the apparent unfairness of taking adverse action against an employee based on legal activity outside of work, some experts are advising employers to cease drug testing for marijuana unless the employee has been involved in a workplace accident or otherwise appears to be impaired.[99] If states genuinely wish to legalize the use of marijuana for medical or recreational purposes, then those legalization statutes should prevent an employer from taking an adverse employment action against a legal drug user without accurate evidence that the employee was impaired at work.

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[93] Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 437 (6th Cir. 2012).

[94] *See* Table 1, *supra* (last column).

[95] ARIZ. REV. STAT. ANN. §§ 36-2811, 2813 (West, Westlaw through the Second Reg. Sess. of Fifty-Second Legis. (2016)); R.I. GEN. LAWS ANN. § 21-28.6-4 (West, Westlaw through Ch. 542 of Jan. 2016 sess.); ME. REV. STAT. ANN. tit. 22 §§ 2383-B, 2426 (West, Westlaw through emergency legis. through Ch. 1 of 2017 First Reg. Sess. of 128th Legis.).

[96] ARIZ. REV. STAT. ANN. § 36-2813 (West, Westlaw through the Second Reg. Sess. of Fifty-Second Legis. (2016), and includes Election Results from Nov. 8, 2016 General Election). Neither Rhode Island nor Maine specifically addresses a positive drug test.

[97] ARK. CONST. amend. 98, § 3(f)(3) (West, Westlaw through end of 2016 Third Extraordinary Session of 90th Ark. General Assemb., the Nov. 8, 2016, election, and Acts effective through Feb. 7, 2017, from 2017 Reg. Sess. of the 91st Ark. General Assemb., and include changes made by Ark. Code Revision Comm'n received through Feb. 6, 2017); ME. REV. STAT. ANN. tit. 22 §§ 2383-B, 2426 (West, Westlaw through emergency legis. through Ch. 1 of 2017 First Reg. Sess. of 128th Legis.); 21 R.I. GEN. LAWS ANN. § 28.6-4 (West, Westlaw through Ch. 542 of Jan. 2016 sess.).

[98] Rodd, *supra* note 78, at 1793.

[99] *See* Douglas, *supra* note 35, at 2.

Where medical marijuana statutes do not include protection of a user's employment, users have sometimes turned to protections against discrimination based on disability. However, the Americans with Disabilities Act (ADA) excludes current users of any drug which is illegal at the federal level, automatically barring ADA protection against discrimination and any requirement to accommodate.[100] Similarly, in states without medical marijuana statute that explicitly require accommodation, state disability discrimination prohibitions have not supported claims by medical marijuana users.[101] A denial of accommodation of medical marijuana use has been justified by its illegality at the federal level, and has even been characterized as a burden on a national employer to modify its drug policy based on the differences in state law covering marijuana usage.[102]

Because marijuana use continues to be prohibited under federal law,[103] in Colorado—a state that has legalized the recreational use of marijuana—marijuana users still lack protection against discharge based on a positive drug test under Colorado's protection against discharge based on "any lawful activity" outside of work.[104] The Colorado legislature could amend its medical marijuana and recreational use statutes to clarify that activity that is lawful under state law is protected, but to date it has not done so.[105]

These decisions demonstrate that without specific statutory language protecting the employment of a drug user, adverse action based on legal use will be allowed. Unless the employee or applicant can take advantage of some other protection under state drug testing regulations or protection of their privacy interests, an employer can rely on a positive drug test in making significant employment decisions, regardless of whether the drug use has affected performance or other employer interests. For these reasons, employers should be required to consider alternatives to drug testing to measure performance and impairment, adopt practices that improve the accuracy of drug tests, and limit the influence of drug testing in making adverse employment decisions.

B. General Regulation of Drug Testing

While states continue to legalize at least some drug use, the federal government and some states continue to promote drug testing by employers with some limited standards for employers' administration of drug tests.

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[100] 42 U.S.C. § 12114 (2012).

[101] *See, e.g.*, Garcia v. Tractor Supply Co., 154 F. Supp. 3d 1225, 1228–29 (D.N.M. 2016); Washburn v. Columbia Forest Prod., Inc., 104 P.3d 609, 613 (Or. Ct. App. 2005), *rev'd on other grounds*, 134 P.3d 161 (Or. 2006).

[102] Task Force, *supra* note 8, at 8.

[103] *See* Curry v. MillerCoors, Inc., No. 12-cv-02471-JLK, 2013 WL 4494307, at *5–6 (D. Colo. Aug. 21, 2013).

[104] *See id.*

[105] Colorado courts have also refused to require the payment of unemployment benefits to a medical marijuana user discharged under his or her employer's drug policy. *See* Beinor v. Indus. Claim Appeals Office, 262 P.3d 970 (Colo. App. 2011).

These regulations attempt to address some of the accuracy concerns raised earlier. However, these standards generally fail to provide applicants and employees with any private cause of action through which they can challenge an employer's employment decision based on a drug test that does not adhere to these standards. More importantly, none of these standards protect the employment of one who tests positive on a drug test but shows no sign of impairment at work. Both federal regulations and the courts could expand the protection of privacy interests by limiting employers' reliance on drug tests in making adverse employment decisions without impacting employers seeking to exclude those who are truly impaired.

1. Federal Regulations

The main components of federal regulation of drug testing are found in the Drug Free Workplace Act (DFWA), which discourages drug use among employees of the federal government and government contractors, and the regulation of federal employees and employers in the transportation industry. The expansion of drug testing corresponded with the passage of the DFWA in 1988, which then led to broader testing in the private sector.[106] Testing may be viewed as a means to fulfill the DFWA's requirement that recipients of a federal contract or grant encourage a drug-free workplace.[107] The DFWA expressly prohibits the unlawful use or possession of drugs in the workplace,[108] but it does not require drug testing[109] or require that an employer take any disciplinary action against an employee who tests positive for illegal drugs.[110] Thus, an employer could still obtain drug-free workplace certification even if it retains employees who test positive on a drug test but do not use or possess drugs at work.[111] At the same time, the DFWA provides no grounds for challenging an adverse action based on a positive drug test.

Like the DFWA, Department of Transportation (DOT) regulations provide no protection against adverse actions taken under its testing processes. DOT regulations not only directly affect testing on employees in transportation, but have also influenced testing in a broad range of industries in the private sector, such as energy and manufacturing.[112] DOT specifically re-

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[106] *See* Lesley Benware, Note, *But See Guiney: Revisiting Mandatory Random Suspicionless Drug Testing of Massachusetts Public-Sector Safety-Sensitive Employees in Light of House Bill 2210*, 44 SUFFOLK U. L. REV. 477, 481–82 (2011).

[107] *See* La Fetra, *supra* note 18, at 73–74.

[108] Michael D. Moberly & Charitie L. Hartsig, *The Arizona Medical Marijuana Act: A Pot Hole For Employers?*, 5 PHX. L. REV. 415, 441 (2012).

[109] *See* Drug-Free Workplace Requirements for Federal Contractors, 41 U.S.C. § 8102 (2012).

[110] *Id.*

[111] *See* Moberly & Harstig, *supra* note 108, at 441–42; *see also* Washburn v. Columbia Forest Products, Inc., 104 P.3d 609, 614–15 (Or. Ct. App. 2005), *rev'd on other grounds*, 134 P.3d 161 (Or. 2006) (finding medical marijuana-using employee had not caused employer to violate Federal Drug-Free Workplace Act).

[112] Benware, *supra* note 106, at 482.

quires random testing of employees in the transportation industry to save lives and prevent injuries, as well as to avoid related liability and facilitate treatment of drug-dependent employees.[113] DOT regulations require that employers conducting drug and alcohol testing must adhere to certain standards,[114] including the collection and analysis of specimens and the use of a MRO.[115]

It is important to note that DOT regulations do not compel employers to discharge or even discipline employees who test positive on a drug test; the regulations only require removal of such employees from safety-sensitive duties until they pass a subsequent drug test and engage in other required activities.[116] The DOT has taken the position that its regulations are not superseded by states' legalization of medical marijuana,[117] meaning that employers should remove a medical—marijuana—using employee from a safety-sensitive position, but need not discharge or even discipline that employee.

Despite these protective standards, DOT regulations do not provide employees with a private cause of action against an employer that fails to follow them.[118] At the same time, an employer can be liable under state law for its negligence in failing to select a qualified service agent or the failure of a third party testing service to adhere to the requirements of the DOT regulations.[119] For example, a truck driver who was discharged based on a false positive drug test could pursue a claim against the drug testing facility to address "the severe consequences for employees from a false positive report resulting from such a test."[120] In addition, an employer cannot require that an employee waive the right to bring such a claim.[121] This potential for liability presumably inspires employers to conduct more accurate tests, but in no way limits their response to a positive test result.

While the general duty to maintain a safe workplace supports some oversight of employees' impairment, overly broad drug testing could violate the Occupational Safety and Health Administration's (OSHA) recently adopted rule stating that drug testing, or the threat thereof, cannot be used to deter employees from reporting workplace injuries.[122] Consequently, employers may not be allowed to enforce a blanket post-injury drug testing

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[113] U.S. DOT, Best Practices for DOT Random Drug & Alcohol Testing 1, https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/Best_Practices_for_DOT_Random_Drug_and_Alcohol_Testing_508CLN.pdf [https://perma.cc/5FRN-JTT2].

[114] 49 C.F.R. § 382.105 (2017); 49 C.F.R. § 40.11 (2017).

[115] 49 C.F.R. § 40 (2017).

[116] Moberly & Hartsig, *supra* note 108, at 446.

[117] *Id.* at 444–45.

[118] *See* Parry v. Mohawk Motors of Mich., 236 F.3d 299, 308–09 (6th Cir. 2000); *see also* McDowell v. J.B. Hunt Transp. Inc., No. 03 C 6590, 2004 WL 1878334, at *2–4 (N.D. Ill. Aug. 10, 2004) (finding no private right of action under FOTETA regulations).

[119] 49 C.F.R. § 40.15(b) (2017).

[120] *See* Spiker v. Sanjivan PLLC, No. CV-13-00334-PHX-GMS, 2013 WL 5200209, at *10–11 (D. Ariz. Sept. 16, 2013).

[121] 49 C.F.R. § 40.27 (2017).

[122] 229 C.F.R. §§ 1902, 1904 (2016).

policy that could deter reporting of injuries.[123] Drug tests are still allowed after an injury if the employer has reason to believe that employee drug use contributed to the incident, if a drug test can accurately identify impairment caused by such use.[124] This may curtail use of some of the more unreliable testing methods outlined above. Yet like the DFWA and DOT regulations, nothing in this rule prevents an employer from disciplining an employee based on a positive drug test.

2. State Drug Testing Standards

As with the federal standards outlined above, concerns about employee privacy, accuracy, and confidentiality have led to some states adopting statutes that impose procedural regulations on employee drug tests conducted by private employers. Overall, fewer restrictions apply to testing of applicants than to testing of current employees. In general, these state standards allow employers to conduct drug testing of applicants who are notified that a drug test is part of the hiring process, if the drug test is administered after an offer is made, and tests are conducted by state-certified or approved facilities.[125] In contrast, only two states further restrict the testing of applicants by private employers.[126] Like the federal standards outlined above, few of these state standards regulate employer decisions resulting from a positive drug test, including a decision not to hire an applicant who tests positive.

Overall, only eleven state statutes include any regulation of the testing of current private sector employees, and in three of those states compliance is voluntary.[127] Thus, only approximately eight percent of the U.S. popula-

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[123] *OSHA, Drugs, and Rock 'n' Roll: A Musical Soundtrack to the New Drug Testing Rule*, FISHER PHILLIPS: NEWSLETTER (Jan. 3, 2017) [hereinafter FISHER PHILLIPS], https://www.fisherphillips.com/resources-newsletters-article-osha-drugs-and-rock-n-roll-a?click_source=sitepilot06!1078!aGlja294c0Btc3UuZWR1 [https://perma.cc/9RP3-MKJN].

[124] *OSHA Says Automatic Post-Accident Drug Testing a Violation of Law*, OPTIMUM SAFETY MGMT.: OSHA (Aug. 29, 2016), http://www.oshasafetymanagement.com/blog/osha-says-automatic-post-accident-drug-testing-violation-law/ [https://perma.cc/PL4Z-G8YP].

[125] *See* TUNNELL, *supra* note 27, at 36, 39.

[126] *See* MONT. CODE ANN. § 39-2-205 (West, Westlaw through 2015 sess., including ballot measure I-182. Statutory changes are subject to classification and revision by Code Commissioner. Court Rules in Code current with amendments received through Sept. 1, 2016) (intrastate motor carrier jobs, for jobs in hazardous environments, or jobs that primarily involve security, public safety, or fiduciary responsibility); OR. REV. STAT. ANN. § 438.435 (West, Westlaw through End of 2016 Reg. Sess. and ballot measures approved at 11/8/16 General Election, pending classification of undesignated material and text revision by Or. Reviser. See ORS 173.160).

[127] ALASKA STAT. ANN. § 23.10.615 (West, Westlaw through 2016 Second Reg. Sess. through Fifth Spec. Sess. of 29th Legis.) (voluntary; job-related purpose, consistent with business necessity); CONN. GEN. STAT. ANN. § 31-51 (West, Westlaw enactments of 2016 Feb. Reg. Sess., 2016 May Special Sess., and 2016 Sept. Spec. Sess.) (reasonable suspicion or high-risk/safety-sensitive jobs); FLA. STAT. ANN. § 440.102 (West, Westlaw through 2016 Second Reg. Sess. of Twenty-Fourth Legis.) (voluntary; reasonable suspicion, fitness for duty, after injury or rehabilitation); MD. CODE ANN., HEALTH–GEN. § 17-214 (West, Westlaw through all legis. from 2016 Reg. Sess. of General Assemb.) (job-related reason); MINN. STAT. ANN. § 181.951 (West, Westlaw with legis. through ch. 4 of 2017 Reg. Sess. The statutes are subject to change as determined by Minn. Revisor of Statutes. (These changes will be incorporated

tion is protected by mandatory restrictions on reasons for conduct of employer drug tests.[128] An additional five states list conditions for testing, while also allowing random testing.[129]

As shown in the table below, there are a wide variety of statutory limitations on which employees can be tested for what reasons.[130]

TABLE 2: NUMBER OF STATES RESTRICTING TESTING OF PRIVATE EMPLOYEES TO THESE REASONS

Testing Allowed for These Reasons	**Number of States**
Reasonable Suspicion/ Probable Cause	8
After Rehabilitation/ EAP	6
Job-Related/ Legitimate Reason	5
After Injury/Accident	5
Part of Medical Exam	2
Allowed Under CBA	1
Fitness for Duty	1

later this year)) (after accident, part of EAP, reasonable suspicion, safety-sensitive position, annual exam); MISS. STAT. ANN. § 71-7-7 (West, Westlaw with laws from 2017 Reg. Sess. effective upon passage as approved through Jan. 18, 2017. The statutes are subject to changes provided by J. Legis. Comm. on Compilation, Revision and Publication of Legis.) (reasonable suspicion, rehabilitation, physical exam or under CBA); OHIO ADMIN. CODE § 4123-17-58 (West, Westlaw through Jan. 31, 2017) (voluntary; reasonable suspicion, accident, after treatment); OR. REV. STAT. ANN. § 438.435 (West, Westlaw through End of 2016 Reg. Sess. and ballot measures approved at 11/8/16 General Election, pending classification of undesignated material and text revision by Or. Reviser) (reasonable suspicion); 28 R.I. GEN. LAWS ANN. § 6.5-1 (West, Westlaw through Ch. 542 of Jan. 2016 sess.) (reasonable suspicion or with rehabilitation); UTAH CODE ANN. § 34-38-1 (West, Westlaw through 2016 Fourth Spec. Sess.) (suspicion of impairment, accident, theft, safety, productivity); VT. STAT. ANN. tit. 21, § 511 (West, Westlaw through laws of Adjourned and Spec. Sess. of 2015–2016 Vt. General Assemb. (2016)) (part of EAP, probable cause).

[128] *See National Population Totals Tables: 2010–2016*, U.S. CENSUS BUREAU, https://www.census.gov/data/tables/2016/demo/popest/nation-total. html [https://perma.cc/N6NH-HUET] (showing population estimates taken from United States Census Bureau for 2016).

[129] ARIZ. REV. STAT. ANN. § 23-493.04 (West, Westlaw through Second Reg. Sess. of Fifty-Second Legis. (2016), and includes Election Results from Nov. 8, 2016 General Election) (both job-related purpose, consistent with business necessity); ARK. CODE ANN. § 11-14-106 (West, Westlaw through end of 2016 Third Extraordinary Sess. of 90th Ark. General Assemb., Nov. 8, 2016, election, and Acts effective through Feb. 7, 2017, from 2017 Reg. Sess. of 91st Arkansas General Assemb., and include changes made by Ark. Code Revision Comm'n received through Feb. 6, 2017) (reasonable suspicion, fitness-for-duty, after EAP, post-accident); IOWA CODE ANN. § 730.5(8) (West, Westlaw through legis. from 2016 Reg. Sess) (after rehabilitation, accident); ME. REV. STAT. ANN. tit. 26, § 684 (West, Westlaw through Ch. 1 of 2017 First Reg. Sess. of 128th Legis. The First Reg. Sess. convened Dec. 7) (probable cause, safety sensitive, returning after positive test or under CBA); MONT. CODE ANN. § 39-2-205 (West, Westlaw through chs. effective Mar. 15, 2017, 2017 sess. Statutory changes are subject to classification and revision by Code Commissioner. Court Rules in Code are current with amends. received through Sept. 1, 2016) (reasonable suspicion, accident, exam for motor carriers, after positive test); OKLA. STAT. ANN. tit. 40 § 554 (West, Westlaw through Ch. 395 (End) of Second Sess. of 55th Legis. (2016) (reasonable suspicion, accidents, exam, post-rehabilitation).

[130] Wall, *supra* note 51, at 127.

In contrast to limiting who can be tested, many more states place restrictions on the drug testing process itself, aimed at providing more accurate test results. Minnesota provides a model for regulating drug testing by employers in that testing must be conducted by an approved laboratory and only prescribed levels can support a positive test result.[131] It is encouraging that seventeen states require a confirmatory test of an initial positive test result, sometimes at the employee's expense, and ten require the involvement of a MRO. These states' regulations provide some assurance to applicants and employees who use medical marijuana or a prescription drug that their drug test results are accurate and will not result in a damaging report to their employer. However, even these states have not dictated whether a MRO must report a negative result based on medical marijuana use not based on a prescription. Overall, it is concerning that in the overwhelming majority of states, a single hair or urinalysis can result in an adverse employment decision, without any involvement of a MRO.

TABLE 3. NUMBER OF STATES REGULATING PRIVATE SECTOR EMPLOYER DRUG TESTING PROCESS

Requirement	**Number of States**
Notice to Employees/Applicants	16*[132]
Confirmatory Test Required	21*[133]
MRO Required	15*[134]
Chance to Explain Positive Result	13*[135]

*5 voluntary

[131] MINN. STAT. ANN. §§ 181.950(10), 181.953(1) (West, Westlaw through legis. through ch. 4 of 2017 Reg. Sess. The statutes are subject to change as determined by Minn. Revisor of Statutes. (These changes will be incorporated later this year)).

[132] ALA. CODE § 25-5-334 (West, Westlaw through Act 2017-81 of 2017 Reg. Sess.) (voluntary); ALASKA STAT. ANN. § 23.10.620(a) (West, Westlaw through 2016 Second Reg. Sess. through Fifth Spec. Sess. of 29th Legis.) (voluntary); ARIZ. REV. STAT. ANN. § 23-493.04 (West, Westlaw through legis. effective Mar. 22, 2017 of First Reg. Sess. of Fifty-Third Legis. (2017)); ARK. CODE ANN. § 11.14.105(a) (West, Westlaw through end of 2016 Third Extraordinary Sess. of 90th Ark. General Assemb., Nov. 8, 2016, election, and Acts effective through Mar. 6, 2017, from 2017 Reg. Sess. of 91st Arkansas General Assemb., and include changes made by Ark. Code Revision Comm'n received through Feb. 6, 2017) (voluntary); CONN. GEN. STAT. ANN. § 31-51v (West, Westlaw through General Statutes of Conn., Revision of 1958, Revised Jan. 1, 2017); FLA. STAT. ANN. § 440.102 (West, Westlaw through chs. from 2017 First Reg. Sess. of 25th Legis. in effect through Mar. 13, 2017) (voluntary); HAW. REV. STAT. ANN. § 329B-5 (West, Westlaw through Act 1 (End) of 2016 Second Spec. Sess.) (by lab); IDAHO CODE ANN. § 72-1705 (West, Westlaw through immediately effective legis. through Ch. 58 of First Reg. Sess. of 64th Legis.) (voluntary); IOWA CODE ANN. § 730.5(7)(f)(2), (9) (West, Westlaw through legis. from 2016 Reg. Sess.); KAN. STAT. ANN. § 75-4362 (West, Westlaw through laws enacted during 2017 Reg. Sess. of Kan. Legis. effective on or before Mar. 9, 2017); ME. REV. STAT. ANN. tit. 26 § 683(2) (West, Westlaw through emergency legis. through Ch. 1 of 2017 First Reg. Sess. of 128th Legis. The First Reg. Sess. convened Dec. 7); MINN. STAT. ANN. § 181.952 (West, Westlaw through legis. through ch. 6 of 2017 Reg. Sess. The statutes are subject to change as determined by Minn. Revisor of Statutes. (These changes will be incorporated later this year.)); MISS. CODE ANN. § 71-7-3(2) (West, Westlaw through laws from 2017 Reg. Sess. effective upon passage as approved

through Mar. 13, 2017. The statutes are subject to changes provided by J. Legis. Comm. on Compilation, Revision and Publication of Legis.); MONT. CODE ANN. § 39-2-208(2) (West, Westlaw through chs. effective Mar. 15, 2017, 2017 sess. Statutory changes are subject to classification and revision by Code Commissioner. Court Rules in Code are current with amendments received through Sept. 1, 2016); OKLA. STAT. ANN. tit. 40 § 555(B) (West, Westlaw through emergency effective provisions through Ch. 1 of First Reg. Sess. of 56th Legis. (2017)); VT. STAT. ANN. tit. 21 § 512(b)(2) (West, Westlaw through Law No. 3 of First Sess. of 2017–2018 Vt. General Assemb. (2017)).

[133] ALA. CODE § 25-5-335(c)(8), (f) (West, Westlaw through Act 2017-81 of 2017 Reg. Sess.); ALASKA STAT. ANN. § 23.10.620(b)(5) (West, Westlaw through 2016 Second Reg. Sess. through Fifth Spec. Sess. of 29th Legis.); ARIZ. REV. STAT. ANN. § 23-493.03 (West, Westlaw through legis. effective Mar. 22, 2017 of First Reg. Sess. of Fifty-Third Legis. (2017)); ARK. CODE ANN. § 11.14.107 (West, Westlaw through end of 2016 Third Extraordinary Sess. of 90th Ark. General Assemb., Nov. 8, 2016, election, and Acts effective through Mar. 6, 2017, from 2017 Reg. Sess. of 91st Arkansas General Assemb., and include changes made by Ark. Code Revision Comm'n received through Feb. 6, 2017); CONN. GEN. STAT. ANN. § 31-51u (West, Westlaw through General Statutes of Conn., Revision of 1958, Revised Jan. 1, 2017); FLA. STAT. ANN. § 440.102 (West, Westlaw through chs. from 2017 First Reg. Sess. of 25th Legis. in effect through Mar. 13, 2017) (voluntary); HAW. REV. STAT. ANN. § 329B-4(c)(6) (West, Westlaw through Act 1 (End) of 2016 Second Spec. Sess.); IDAHO CODE ANN. § 72-1704(7) (West, Westlaw through immediately effective legis. through Ch. 58 of First Reg. Sess. of 64th Legis.); IOWA CODE ANN. § 730.5(7)(g) (West, Westlaw through legis. from 2016 Reg. Sess.); ME. REV. STAT. ANN. tit. 26 § 683(2)(G), (7) (West, Westlaw through emergency legis. through Ch. 1 of 2017 First Reg. Sess. of 128th Legis. The First Reg. Sess. convened Dec. 7); MD. CODE ANN., HEALTH–GEN. § 17-214 (West, Westlaw through all legis. from 2016 Reg. Sess. of General Assemb.); MINN. STAT. ANN. § 181.953(9) (West, Westlaw through legis. through ch. 6 of 2017 Reg. Sess. The statutes are subject to change as determined by Minn. Revisor of Statutes. (These changes will be incorporated later this year.)); MISS. CODE ANN. § 71-7-9(13) (West, Westlaw through laws from 2017 Reg. Sess. effective upon passage as approved through Mar. 13, 2017. The statutes are subject to changes provided by J. Legis. Comm. on Compilation, Revision and Publication of Legis.); MONT. CODE ANN. § 39-2-207 (West, Westlaw through chs. effective Mar. 15, 2017, 2017 sess. Statutory changes are subject to classification and revision by Code Commissioner. Court Rules in Code are current with amendments received through Sept. 1, 2016); NEB. REV. STAT. ANN. § 48-1903(1) (West, Westlaw through legis. effective Feb. 16, 2017, of the 1st Reg. Sess. of 105th Legis. (2017)); N.C. GEN. STAT. ANN. § 95-232(c) (West, Westlaw through end of 2016 Reg. Sess., with addition of S.L. 2016-126 from 2016 Fourth Extra Sess. and through 2017-1 of 2017 Reg. Sess. of General Assemb.); OKLA. STAT. ANN. tit. 40 § 559(8) (West, Westlaw through emergency effective provisions through Ch. 1 of First Reg. Sess. of 56th Legis. (2017)); OR. REV. STAT. ANN. § 438.435(3) (West, Westlaw through End of 2016 Reg. Sess. and ballot measures approved at 11/8/16 General Election, pending classification of undesignated material and text revision by Or. Reviser. See ORS 173.160); 28 R.I. GEN. LAWS ANN. § 6.5-1(a)(4) (West, Westlaw through Ch. 542 of Jan. 2016 sess.); UTAH CODE ANN. § 34-38-6(6)(b) (West, Westlaw through 2016 Fourth Spec. Sess.); VT. STAT. ANN. tit. 21 § 514(6)(a) (West, Westlaw through Law No. 3 of First Sess. of 2017–2018 Vt. General Assemb. (2017)).

[134] ALA. CODE § 25-5-335(d)(1)(c)(2) (West, Westlaw through Act 2017-81 of 2017 Reg. Sess.); ALASKA STAT. ANN. § 23.10.620(b)(5) (West, Westlaw through 2016 Second Reg. Sess. through Fifth Spec. Sess. of 29th Legis.); ARK. CODE ANN. § 11.14.107 (West, Westlaw through end of 2016 Third Extraordinary Sess. of 90th Ark. General Assemb., Nov. 8, 2016, election, and Acts effective through Mar. 6, 2017, from 2017 Reg. Sess. of 91st Arkansas General Assemb., and include changes made by Ark. Code Revision Comm'n received through Feb. 6, 2017); FLA. STAT. ANN. § 440.102(5)(h) (West, Westlaw through chs. from 2017 First Reg. Sess. of 25th Legis. in effect through Mar. 13, 2017); HAW. REV. STAT. ANN. § 329B-4(c)(4) (West, Westlaw through chs. from 2017 First Reg. Sess. of 25th Legis. in effect through Mar. 13, 2017); IDAHO CODE ANN. § 72-1701 (West, Westlaw through immediately effective legis. through Ch. 58 of First Reg. Sess. of 64th Legis.); IOWA CODE ANN. § 730.5 (West, Westlaw through legis. from 2016 Reg. Sess.); KAN. STAT. ANN. § 75-4362 (West, Westlaw

Eight states require that an employee be given an opportunity to explain a positive test result, meaning that an employee should be able to justify a positive result based on a prescribed medication or possibly medical marijuana. However, only a few states control an employer's response to a positive drug test. Only three states limit an employer's decision to discharge an employee based on one positive test result without an opportunity to participate in rehabilitation,[136] and employers in Ohio can gain a workers' compensation discount by committing to retain "an employee who tests positive for the first time, who comes forward voluntarily to indicate he or she has a substance problem, or who is referred by a supervisor for an assessment."[137] However, even in these most protective states, an employee

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through laws enacted during 2017 Reg. Sess. of Kan. Legis. effective on or before Mar. 9, 2017); ME. REV. STAT. tit. 26 § 683(6)(D)(2) (West, Westlaw through emergency legis. through Ch. 1 of 2017 First Reg. Sess. of 128th Legis. The First Reg. Sess. convened Dec. 7); MD. CODE ANN., HEALTH-GEN. § 17-214(j) (West, Westlaw through all legis. from 2016 Reg. Sess. of General Assemb.); MONT. CODE ANN. § 39-2-207(5) (West, Westlaw through chs. effective Mar. 15, 2017, 2017 sess. Statutory changes are subject to classification and revision by Code Commissioner. Court Rules in Code are current with amendments received through Sept. 1, 2016); N.Y. COMP. CODES R. & REGS. tit. 16 § 262.109 (West, Westlaw through amends. included in N.Y. State Reg., XXXIX, Issue 13 dated Mar. 29, 2017); TENN. CODE ANN. § 41-1-122 (West, Westlaw through end of 2016 Second Reg. and Second Extraordinary Sess. of 109th Tenn. General Assemb.); VT. STAT. ANN. tit. 21 § 514(9), (11) (West, Westlaw through Law No. 3 of First Sess. of 2017–2018 Vt. General Assemb. (2017)).

[135] ALA. CODE § 25-5-335(c) (West, Westlaw through Act 2017-81 of 2017 Reg. Sess.); ALASKA STAT. ANN. § 23.10.620(b)(9) (West, Westlaw through 2016 Second Reg. Sess. through Fifth Spec. Sess. of 29th Legis.); ARIZ. REV. STAT. ANN. § 23-493.04(A)(9) (West, Westlaw through legis. effective Mar. 22, 2017 of First Reg. Sess. of Fifty-Third Legis. (2017)); ARK. CODE ANN. § 11.14.105(7)(A) (West, Westlaw through end of 2016 Third Extraordinary Sess. of 90th Ark. General Assemb., Nov. 8, 2016, election, and Acts effective through Mar. 6, 2017, from 2017 Reg. Sess. of 91st Arkansas General Assemb., and include changes made by Ark. Code Revision Comm'n received through Feb. 6, 2017); FLA. STAT. ANN. § 440.102) (West, Westlaw through chs. from 2017 First Reg. Sess. of 25th Legis. in effect through Mar. 13, 2017); IDAHO CODE ANN. § 72-1706 (West, Westlaw through immediately effective legis. through Ch. 58 of First Reg. Sess. of 64th Legis.); IOWA CODE ANN. § 730.5 (West, Westlaw through legis. from 2016 Reg. Sess.); ME. REV. STAT. ANN. tit. 26 § 681(West, Westlaw through emergency legis. through Ch. 1 of 2017 First Reg. Sess. of 128th Legis. The First Reg. Sess. convened Dec. 7); MINN. STAT. ANN. § 181.953(6)(b) (West, Westlaw through legis. through ch. 6 of 2017 Reg. Sess. The statutes are subject to change as determined by Minn. Revisor of Statutes. (These changes will be incorporated later this year.)); MISS. CODE ANN. § 71-7-9(12) (West, Westlaw through laws from 2017 Reg. Sess. effective upon passage as approved through Mar. 13, 2017. The statutes are subject to changes provided by J. Legis. Comm. on Compilation, Revision and Publication of Legis.); MONT. CODE ANN. § 39-2-210 (West, Westlaw through chs. effective Mar. 15, 2017, 2017 sess. Statutory changes are subject to classification and revision by Code Commissioner. Court Rules in Code are current with amendments received through Sept. 1, 2016); 28 R.I. GEN. LAWS ANN. § 6.5-1(a)(6); WYO. STAT. ANN. 27-14-101 (West, Westlaw through chs. 4, 5, 6, 11, 14, 17, 27, 31, 34, 40, 45, 46, 59, 67, 69, 72, 75 (part), 84, 87, 90, 91, 96, 98, 113, 114, 115, 126, 129, 132, 134, 139, 140, 147, 149, 151, 160, 163, 165, 170, 171, 173, 174, 176, 177, 179 of 2017 General Sess. of Wyo. Legis.) (workers' compensation discount only).

[136] *See* MINN. STAT. ANN. § 181.953(10)(b) (West, Westlaw through ch. 4 of 2017 Reg. Sess.); 28 R.I. GEN. LAWS ANN. § 6.5-1(a)(3) (West, Westlaw through Ch. 542 of Jan. 2016 sess.); VT. STAT. ANN. tit. 21, § 513 (West, Westlaw through laws of Adjourned and Spec. Sess. of 2015–2016 Vt. General Assemb. (2016)).

[137] OHIO ADMIN. CODE 4123-17-58 (West, Westlaw through Jan. 31, 2017).

can still be discharged based on conduct associated with his or her drug use, even without an offer of rehabilitation.[138]

Eleven state standards for drug testing include a private right of action for the employee subjected to a test that violates those standards,[139] four of which allowing action only based on false test results, while others do not.[140] Thus, even if the state provides guidelines, and certainly if it does not, most private employers who are not subject to federal regulation are free to purchase and administer various drug tests on their own. If they choose to test on site without using a certified laboratory, there is no requirement that a confirmatory test be used. In almost all states, employers can also take an adverse action against an employee without a confirmatory test or the input of a MRO.[141] This means that someone who tests positive due to a prescription drug or medical marijuana use may have no opportunity to take a confirmatory test or explain a positive test result to a MRO. Instead, the test would be reported as positive and employers can respond as they see fit.

IV. Protection of Employees' Privacy Interests

Drug testing significantly implicates employees' privacy interests because of concerns about bodily integrity.[142] A person's privacy interests are implicated both when he or she is required to produce a blood, urine, or hair

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[138] *See, e.g.*, Vt. Stat. Ann. tit. 21, § 517 (West, Westlaw through laws of Adjourned and Spec. Sess. of 2015–2016 Vt. General Assemb. (2016)); *In re* Copeland, 455 N.W.2d 503, 507 (Minn. Ct. App. 1990).

[139] *See, e.g.*, Conn. Gen. Stat. Ann. § 31-51y (West, Westlaw through enactments of 2016 Feb. Reg. Sess., 2016 May Spec. Sess., and 2016 Sept. Spec. Sess.); Haw. Rev. Stat. Ann. § 329B-7 (West, Westlaw through Act 1 (End) of 2016 Second Spec. Sess., pending revision by revisor of statutes); Idaho Code Ann. § 72-1711 (West, Westlaw current with emergency effective and retroactive legis. through Chapter 37 of 2017 First Reg. Sess. of 64th Idaho Legis.); Minn. Stat. Ann. § 181.956 (West, Westlaw through with legis. through ch. 4 of 2017 Reg. Sess. The statutes are subject to change as determined by Minn. Revisor of Statutes. (These changes will be incorporated later this year)); Miss. Code Ann. § 71-7-23 (West, Westlaw through laws from 2017 Reg. Sess. effective upon passage as approved through Jan. 18, 2017. The statutes are subject to changes provided by J. Legis. Comm. on Compilation, Revision and Publication of Legis.); Okla. Stat. Ann. tit. 40, § 563 (West, Westlaw current with emergency effective provisions through Ch. 1 of First Reg. Sess. of 56th Legis. (2017)); 28 R.I. Gen. Laws Ann. § 6.5-1(c) (West, Westlaw through Ch. 542 of Jan. 2016 sess.); Vt. Stat. Ann. tit. 21, § 519 (West, Westlaw through laws of Adjourned and Spec. Sess. of 2015–2016 Vt. General Assemb. (2016)). For those involving false results only, *see* Iowa Code Ann. § 730.5 (West, Westlaw through legis. from 2016 Reg. Sess.); La. Stat. Ann. § 49:1012 (West, Westlaw through 2016 First Extraordinary, Reg., and Second Extraordinary Sess.); Utah Code Ann. § 34-38-10 (West, Westlaw through 2016 Fourth Spec. Sess.).

[140] *See, e.g.*, Torres v. Eagle Techs. Inc., No. 8:09-cv-756-T-30EAJ, 2010 WL 2243700 (M.D. Fla. June 4, 2010) (voluntary compliance).

[141] *See, e.g.*, Minn. Stat. Ann. § 181.953(10)(b) (West, Westlaw through ch. 4 of 2017 Reg. Session. The statutes are subject to change as determined by Minn. Revisor of Statutes. (These changes will be incorporated later this year.)); 28 R.I. Gen. Laws Ann. § 6.5-1(a)(3) (West, Westlaw through Ch. 542 of Jan. 2016 sess.); Vt. Stat. Ann. tit. 21, § 513 (West, Westlaw through laws of Adjourned and Spec. Sess. of 2015–2016 Vt. General Assemb. (2016)).

[142] *But see* Skinner v. Ry. Labor Execs.' Ass'n., 489 U.S. 602, 616–17 (1989).

sample, and when the sample is analyzed, which can reveal a wide range of private medical facts.[143] People subjected to drug testing can suffer significant employment consequences from a positive result, in addition to potential criminal prosecution and loss of public benefits, which greatly expands the impact of the invasion of their privacy from the original test.

Even though the potential effects on both privacy and employment are the same in the public and private sectors, the judicial protections are significantly different. Aside from the procedural requirements adopted by some states, as outlined above, state law provides very little limitation on employers' use of drug testing or decisions based thereon. In contrast, applicants and employees in the public sector enjoy the protection of the Fourth Amendment, prohibiting unreasonable search and seizure by a state actor.[144]

A. Limited State Privacy Protections

Beyond the federal regulations and state standards outlined above, private-sector employees' opportunities to challenge their subjection to drug testing are very limited. Invasions of employees' privacy interests are justified by employers' concerns about safety and productivity, as well as broader moral concerns related to drug use.[145] The act of invading privacy interests by way of drug testing assumes, however, that drug testing will advance these employer interests. Where this connection fails to exist, public policy dictates protection of privacy interests by limiting the administration and reliance of employers on drug testing.

Since most employees are not in a position to negotiate protection of their privacy interests as an exception to employment at will, either legislation or a judicial public policy exception to employment at will should be recognized to protect employees who may test positive on a drug test but present no safety or performance concerns at the workplace. At minimum, employees who test positive based on their legal use of marijuana but are not impaired at work should be provided with such protection of their privacy and health concerns at no cost to employers' interests.

Private sector employees sometimes have turned to contractual protections to dispute discipline based on a drug test. These claims are unsuccessful without proof that the parties mutually agreed to privacy protections as

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[143] *Id.* at 617 ("[T]he process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests"); Arizona v. Hicks, 480 U.S. 321, 324–25 (1987) (holding that a chemical analysis of a body fluid sample to obtain physiological data constitutes invasion of tested employee's privacy interests).

[144] U.S. CONST. amend. IV.

[145] *See, e.g.*, Dolan v. Svitak, 527 N.W.2d 621, 623, 626 (Neb. 1995) (denying unemployment benefits because drug testing requirement will improve work safety, ensure quality production for customers, and enhance employer's reputation in community).

an exception to employment at will under a binding contract.[146] Some courts have found a breach of the covenant of good faith and fair dealing if a drug test is administered without prior notice to the employee subjected to testing.[147] However, many state courts have refused to recognize such an implied covenant to adhere to certain expectations because such a cause of action would inappropriately expand on the exceptions to employment at will.[148] In the rare situations in which individual employees manages to prove that such a contractual protection of privacy exists, they may be able to challenge discipline for use of medical marijuana and prescribed medications, but only if they can show that their employers' policies did not clearly prohibit their use of those substances.[149]

In contrast to the rarity of individual bargaining to protect privacy, collective bargaining agreements (CBAs), covering a dwindling percentage of unionized workers in the United States, often include provisions on drug and/or alcohol testing, which can justify an adverse action based on a positive drug test.[150] At the same time, a CBA may also provide access to a rehabilitation program in lieu of discharge for a first-time offender.[151] In addition, a CBA typically gives employees (but not applicants) access to a grievance and arbitration system to challenge discipline or discharge based on a positive drug test under a just cause provision.[152] A unionized employee can invoke his or her right to union representation to challenge a questionable administration of a drug test and ensure adherence to any contractual protections.[153]

Without specific contractual protections, private sector employees often fail to establish a public policy exception to employment at will which would allow them to challenge an adverse action based on their drug test.[154]

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[146] *See, e.g.*, Wiggins v. Kimberly-Clark Corp., No. 3:12-CV-115, 2012 WL 4863158, at *5–6 (E.D. Tenn. Oct. 12, 2012), *aff'd*, 641 F. App'x 545, 547–48 (6th Cir. 2016) (dismissing claim even though employer failed to follow its own drug testing procedures).

[147] *See, e.g.*, Luedtke v. Nabors Alaska Drilling, Inc., 834 P.2d 1220, 1224 (Alaska 1992); *see also* Thomas C. Kohler & Matthew W. Finkin, *Bonding and Flexibility: Employment Ordering in a Relationless Age*, 46 Am. J. Comp. L. 379, 382–83 (1998) (noting that an implied covenant of good faith and fair dealing is consistent with an at-will relationship, according to many state courts).

[148] *See, e.g.*, Murphy v. Bancroft Constr. Co., 135 F. App'x 515, 518 (3d Cir. 2005) (recognizing implied covenant of good faith and fair dealing but noting narrow application); White v. State, 929 P.2d 396, 407 (Wash. 1997) (en banc) (refusing "to adopt a broad 'bad faith' exception to employment-at-will rule which would imply covenant of good faith and fair dealing in every employment contract").

[149] *See, e.g.*, Wilson v. Cal. Dep't of Corr., No. H037281, 2012 WL 4127322, at *11–16 (Cal. Ct. App. Sept. 20, 2012); Valenzuela v. Cal. State Pers. Bd., 63 Cal. Rptr. 3d 529, 536 (Ct. App. 2007).

[150] *See, e.g.*, Williams v. United Steel Workers, 487 F. App'x. 272, 273–74 (6th Cir. 2012) (upholding discharge based on drug test allowed by CBA).

[151] *See* Bloomberg BNA, Collective Bargaining and Contract Clauses.

[152] *See* Bloomberg BNA, Basic Patterns in Union Contracts 7–10, 125 (14th ed. 1995).

[153] *See, e.g.*, Ralphs Grocery Co., 361 N.L.R.B. No. 9 (2014) (finding an employee has right to union representation before submitting to drug & alcohol test).

[154] Gabrielson, *supra* note 79, at 268–70; *see, e.g.*, Baggs v. Eagle-Picher Indus., 957 F.2d 268 (6th Cir. 1992); Johnson v. Carpenter Tech. Corp., 723 F. Supp. 180 (D. Conn. 1989);

Even the refusal of a private sector employee to submit to a drug test has not been protected in most states that lack clear public policy against drug testing.[155]

In contrast, a few state courts have recognized a public policy restriction on drug testing under general protections of privacy, stressing that the privacy interests must be balanced against other competing public policies, including the health and safety of others.[156] Under this reasoning, a constitutional right of privacy has justified the recognition of a public policy protection against drug testing without reasonable suspicion or safety concerns associated with a particular position.[157] Thus, if an employee is tested without any showing that his or her duties were safety related, then an exception to employment at will under public policy might be recognized.[158]

Despite these rare instances of recognizing a public policy protection of privacy, legal marijuana users have been unable to establish a public policy exception to employment at will.[159] For example, Washington's medical marijuana statute did not "proclaim a public policy that would remove any impediment (including employer drug policies) to the decision to use medical marijuana."[160] Thus far, the general public support for legalization and medical use of marijuana has not translated into a public policy exception to employment at will to protect employees who test positive on an employer's drug test.[161]

Like any public policy interest, privacy interests of private-sector employees will likely give way to an employer's interest in conducting drug testing. An invasion of privacy claim rests on a reasonable expectation of privacy and conduct by an employer that constitutes a serious invasion of that privacy interest.[162] Notice that employees are subject to testing and informed consent to be tested will reduce employees' expectations of privacy.[163] Under these standards, a medical marijuana user who was

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Ensor v. Rust Eng'g Co., 704 F. Supp. 808 (E.D. Tenn. 1989); Greco v. Halliburton Co., 674 F. Supp. 1447 (D. Wyo. 1987); Singleton v. Searail Indus., Inc., 674 F. Supp. 1451 (S.D. Ala. 1987); Satterfield v. Lockheed Missiles & Space Co., 617 F. Supp. 1359, 1363–64 (D.S.C. 1985); Casse v. La. Gen. Servs., Inc., 531 So. 2d 554 (La. Ct. App. 1988); Stein v. Davidson Hotel Co., 945 S.W.2d 714, 719 (Tenn. 1997); Jennings v. Minco Tech. Labs., Inc., 765 S.W.2d 497 (Tex. Ct. App. 1989).

[155] *See* Roe v. Quality Trans. Servs., 838 P.2d 128, 130–31 (Wash. Ct. App. 1992).

[156] *See* Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1135–36 (Alaska 1989).

[157] *See* Twigg v. Hercules Corp., 406 S.E.2d 52, 55 (W. Va. 1990) (holding that employees can be tested based on reasonable, good faith suspicion or when the job involves public safety); *see also* Hennessey v. Coastal Eagle Point Oil Co., 609 A.2d 11, 19 (N.J. 1992); Webster v. Motorola, Inc., 637 N.E.2d 203, 207–08 (Mass. 1994) (both approving testing for safety-sensitive positions).

[158] *See* Luck v. S. Pac. Transp. Co., 267 Cal. Rptr. 618, 621 (Ct. App. 1990).

[159] *See* Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 437 (6th Cir. 2012) (no clear public policy mandate); Ross v. RagingWire Telecommc'ns, Inc., 174 P.3d 200, 208 (Cal. 2008).

[160] Roe v. TeleTech Customer Care Mgmt. LLC, 257 P.3d 586, 597 (Wash. 2011).

[161] *See* Gabrielson, *supra* note 80, at 272–80 (arguing that public policy exception should be expanded).

[162] *See, e.g.*, Kraslawsky v. Upper Deck Co., 65 Cal. Rptr. 2d 297, 300 (Ct. App. 1997).

[163] *See, e.g.*, Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 659 (Cal. 1994); Smith v. Fresno Irrigation Dist., 84 Cal. Rptr. 2d 775, 784 (Ct. App. 1999).

discharged based on a positive drug test after he or she was injured at work could not establish encroachment of any protected expectation of privacy.[164] Employees have also failed to show that private-sector drug testing involves a violation of privacy based on an intentional intrusion upon "the solitude or seclusion of another or his private affairs or concerns."[165] For example, a Colorado court rejected a medical marijuana user's claim of intrusion on seclusion, based on the "forced" revelation of his marijuana use through a mandatory drug test of his saliva, because the legalization of medical marijuana did not give users "the unfettered right to violate employers' policies and practices regarding use of controlled substances."[166] Likewise, claims of intentional infliction of emotional distress have failed where the employee is unable to show that the drug testing was intentionally or recklessly administered so as to impose severe emotional distress.[167]

The invasiveness of drug testing has often been justified based on how employees' drug and alcohol use affects employers' interests,[168] including health and safety concerns.[169] However, this justification fails to distinguish between an employee who tests positive on a drug test while impaired on the job compared to an employee who tests positive from previous use but shows no sign of impairment. If the employee is not impaired at work, the employer's business interests in controlling drug use are reduced or eliminated.

Negligence standards can apply to a MRO's interpretation of test results, as in a MRO's misinterpretation of a positive urinalysis that could be explained by the employee's prescribed medication.[170] One employee was able to establish through a medical expert that "one cannot determine the drug dose based on the urine concentration from a workplace test result."[171] However, an employer may not be liable for that negligence.[172]

As demonstrated by this review, state law provides very limited privacy protection for private sector employees against decisions by employers based on a drug test, regardless of whether that test result demonstrates impairment or demonstrates an infringement on an employer's interests in

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[164] *See, e.g.*, Shepherd v. Kohl's Dep't Stores, Inc., No. 1:14-CV-01901-DAD-BAM, 2016 WL 4126705, at *21–22 (E.D. Cal. Aug. 2, 2016).

[165] RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977).

[166] Curry v. MillerCoors, Inc., No. 12-CV-02471, 2013 WL 4494307, at *5 (D. Colo. Aug. 21, 2013); *see also*, Casillas v. Clark Cty. Sch. Dist., No. 2:12-CV-1769, 2013 WL 2179279, at *9 (D. Nev. May 17, 2013) (allowing tests supported by reasonable suspicion or last chance agreement).

[167] *See* RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW INST. 1965); *see, e.g.*, Satterfield v. Lockheed Missiles & Space Co., 617 F. Supp. 1359, 1365–66 (D.S.C. 1985).

[168] *See, e.g.*, Dolan v. Svitak, 527 N.W.2d 621, 624, 626 (Neb. 1995) (holding drug testing requirement will improve work safety, ensure quality production for customers, and enhance employer's reputation in community).

[169] *See* Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1136–37 (Alaska 1989).

[170] *See* King v. Garfield Cty. Pub. Hosp. Dist. No. 1, 17 F. Supp. 3d 1060, 1071 (E.D. Wash. 2014), *rev'd*, 641 F. App'x 696 (9th Cir. 2015).

[171] *Id.*

[172] *See, e.g.*, *King*, 641 Fed. App'x. at 699.

maintaining a productive workforce. Only a few states have recognized a public policy protection for testing of employees who do not occupy a safety-sensitive position, which parallels the constitutional protection for public sector employees outlined below.

B. Constitutional Protection

Mandatory drug testing can constitute an unreasonable search and seizure under the Fourth Amendment.[173] Despite this protection against invasive state action, drug testing of public sector employees has been justified under the Fourth Amendment based on reasonable suspicion that the employee is under the influence at work, while testing of both employees and applicants has been supported by the safety-sensitive nature of the work. In judicial review of drug testing, public employees' privacy interests in avoiding the invasiveness of drug testing are balanced against an employer's interests in engaging in such testing, centering on protecting the safety interests of other employees and the general public.[174] Thus, a public employer's ability to drug test depends both on the employees' expectations of privacy and the validity of the justification for the testing.

Most Fourth Amendment claims arise against a public employer, invoking the constitution's application to state action.[175] Interestingly, state action may also occur if a worker's compensation claim is denied based on the results of a drug test authorized under a state's workers' compensation statute.[176]

In striking this balance, employees with a diminished expectation of privacy can more easily be subjected to drug testing, but government employment alone does not extinguish expectations of privacy.[177] Instead, a public employer needs to demonstrate why employees in a particular job category have a diminished expectation of privacy.[178] Some public sector employees, such as police officers, have a diminished expectation of privacy because their positions are heavily regulated.[179] In contrast, U.S. Forest Service Job Corps employees did not have a diminished expectation of privacy simply because they worked with at-risk youth in residential settings, even

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[173] *See* U.S. CONST. amend. IV.

[174] *See* Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 665–66 (1989); Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 628–29 (1989); Chandler v. Miller, 520 U.S. 305, 313–14 (1997).

[175] *See Nat'l Treasury Emps. Union*, 489 U.S. at 665–66; *Skinner*, 489 U.S. at 628–29; *Chandler*, 520 U.S. at 313–14.

[176] *See, e.g.*, State ex rel. Ohio AFL-CIO v. Ohio Bureau of Workers' Comp., 780 N.E.2d 981 (Ohio 2002).

[177] *See* Walker Newel, *Tax Dollars Earmarked for Drugs? The Policy and Constitutionality of Drug Testing Welfare Recipients*, 43 COLUM. HUM. RTS. L. REV. 215, 227–28 (2011).

[178] *See* Am. Fed'n of State Emps. Council 79 v. Scott, 717 F.3d 851, 867 (11th Cir. 2013).

[179] Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 628 (1985); *see also*, Policeman's Benevolent Ass'n, Local 318 v. Wash. Twp., 850 F.2d 133, 135 (3d Cir. 1988) (police officers subject to pervasive regulation).

though they had responsibility for driving and maintaining a zero-tolerance drug policy.[180]

Regardless of the nature of the work, employees or applicants who are aware that they may be drug tested have a diminished expectation of privacy.[181] For example, a city's testing of applicants was allowed in part because there is less of an intrusion on expectations of privacy when a drug test is conducted as part of a pre-employment medical examination.[182] The court relied in part on the ADA's allowance for examinations for applicants, which shows "the general societal understanding that a requirement that all job applicants submit to a medical examination prior to hiring does not violate a job applicant's reasonable expectation of privacy."[183]

Unlike anticipated testing, inadequate notice may support a claim that testing is overly invasive. Employees should be fully aware that they will be subjected to random testing, which carries the potential for "arbitrary and oppressive interference with privacy and personal security of individuals."[184] In addition, testing for drugs not listed in the DOT regulations or an employer's own policy could be overly invasive, where "uniform standards for testing for the additional drugs"[185] do not exist and test may reveal unanticipated information. Moreover, testing may be unconstitutional if it prohibits an employee from reporting to work with any detectable traces of a drug, making the testing "remarkably intrusive"[186] because an employee would be open to discipline without any evidence of impairment at work. This logic suggests that even private employers should provide both applicants and current employees with notice that they will be subjected to drug testing to lower their expectations of privacy.

Beyond providing notice, a public employer must respect employees' privacy rights in administering the testing.[187] To do so, testing should be conducted in a way that limits direct observation, including viewing an employee's genitalia.[188] Greater intrusion into employees' privacy may be warranted to produce more accurate test results, such as the direct observation of employees suspected of falsifying test results.[189] Confirmation of the integ-

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[180] *See* Nat'l Fed'n of Fed. Emps.-IAM v. Vilsack, 681 F.3d 483, 489 (D.C. Cir. 2012).
[181] *See* Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 672 (1989).
[182] *See* Loder v. City of Glendale, 927 P.2d 1200, 1222 (Cal. 1997)
[183] *Id.* at 1225.
[184] Smith Cty. Educ. Ass'n v. Smith Cty. Bd. of Educ., 781 F. Supp. 2d 604, 618 (M.D. Tenn. 2011).
[185] Knox Cty. Educ. Ass'n v. Knox Cty. Bd. of Educ., 158 F.3d 361, 381–82 (6th Cir. 1998); *see also* Smith Cty. Educ. Ass'n, 781 F. Supp. 2d at 619–20.
[186] *Smith Cty. Educ. Ass'n*, 781 F. Supp. 2d at 619; *see also* Jones v. Graham Cty. Bd. of Educ., 677 S.E.2d 171, 180 (N.C. Ct. App. 2009).
[187] *See, e.g.*, Allen v. Schiff, 586 F. App'x 759, 761 (2d Cir. 2014) (describing how a department took substantial measures to minimize intrusion of privacy by providing seclusion during provision of sample).
[188] *See id.*
[189] *See* BNSF Ry. v. U.S. Dep't of Transp., 566 F.3d 200, 205–06 (D.C. Cir. 2009).

rity of the sample is also important to justifying an employer's drug testing program.[190]

Medical review is another important aspect of ensuring that drug tests are not overly intrusive, because an MRO protects against reporting a positive result based on an employee's use of a prescription drug or some other innocuous reason.[191] More research is needed to determine whether MROs are reporting positive results for legal users of medical marijuana. Without disclosing private information to the employer, the MRO should interview the person tested and review his or her medical records and medical history to determine if the positive test result could have been caused by a legally prescribed medication.[192] The privacy interests of employees, as determined by the factors outlined above, are balanced against the government's reason to conduct the test based on reasonable suspicion or the safety-sensitive nature of the job.

1. Testing Based on Suspicion

Under the Fourth Amendment, a government search such as a drug test generally "must be based on individualized suspicion of wrongdoing."[193] Requiring reasonable suspicion promotes the government's interest in protecting public safety as well as the integrity of government service, while still protecting the privacy interests of public employees as much as possible.[194] For example, the testing of police officers suspected of using illegal drugs has been upheld as a way to protect public safety, which is seen as justification for infringement on the privacy interests of those officers.[195]

Approximately thirty-seven percent of employers test based on reasonable suspicion.[196] Generally, reasonable suspicion can justify drug testing based on objective evidence "that the individual to be tested was inhibited in performing his or her duties," considering the nature of the information received, the reliability of the source, and the degree of corroboration.[197] Under this approach, a city was justified in testing of police officers suspected of taking steroids based on "verifiable information from a reliable source."[198] In contrast, an uncorroborated anonymous tip that a city employee was smoking marijuana in a city truck relayed to the department by a news re-

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[190] *See* Swaters v. Osmus, 568 F.3d 1315, 1327–28 (11th Cir. 2009) (describing how a pilot initialed sealed bottles, signed certification that samples were sealed in his presence, and bottles showed no sign of tampering).

[191] Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 662 (1989); Knox Cty. Educ. Ass'n v. Knox Cty. Bd. of Educ., 158 F.3d 361, 380 (6th Cir. 1998).

[192] *See Knox Cty. Educ. Ass'n*, 158 F.3d at 368, 380.

[193] Chandler v. Miller, 520 U.S. 305, 313 (1997).

[194] *See* Kevin C. Miller, *Mandatory Drug Testing for Federal Employees and Private Employees in Government-Regulated Industries: Is Drug Testing without Probable Cause Unconstitutional*?, 44 WASH. & LEE L. REV. 1443, 1450 (1987).

[195] *See* Carroll v. City of Westminster, 233 F.3d 208, 212 (4th Cir. 2000).

[196] *See* TUNNELL, *supra* note 27, at 29.

[197] Kramer v. City of Jersey City, 455 F. App'x 204, 208 (3d Cir. 2011)

[198] *Id.*

porter, was insufficient to establish reasonable suspicion to justify testing that employee.[199] It should be noted that advances in technology might provide information to an employer that would justify a subsequent drug test.[200] Overall, requiring reasonable suspicion limits the testing of employees to situations where the employee has shown some indications of impairment in the workplace.

2. Testing of Safety-Sensitive Positions

Limitations on random testing in the public sector provide some guidance for appropriate limitations on private sector testing, as seen in the public policy decisions outlined above. The Supreme Court has allowed drug testing without individualized reasonable suspicion "where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion."[201] Generally, the government has been able to justify suspicionless testing by showing a "clear, direct nexus exists between the nature of the employee's duty and the nature of the feared violation."[202]

Despite this burden, courts continue to expand the scope of positions which present a "special need" to justify random testing of employees.[203] In 1989, the Supreme Court allowed post-accident testing of railroad employees, without reasonable suspicion, where "even a momentary lapse of attention can have disastrous consequences."[204] Simultaneously, the Court approved random testing of customs agents that carry firearms and have direct involvement in drug interdiction, based on the government's interest in their physical fitness and "unimpeachable integrity and judgment."[205] In contrast, the Court later curtailed the drug testing of political candidates without "any indication of a concrete danger," despite concern that illegal drug use is incompatible with public office.[206] A "concrete danger" was absent without any evidence of past drug abuse among public officials, or an inability to supervise elected officials, as with some of the employees in the Court's earlier decisions.[207]

Since 1989, the public employer continues to bear the burden of demonstrating a special need to test employees in safety-sensitive positions.[208] Safety must be "genuinely in jeopardy" to establish that a position is safety sensitive.[209] In addition, the employer must establish "a clear, direct nexus

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[199] *See* Greer v. McCormick, No. 14-13596, 2015 WL 1181675, at *9 (E.D. Mich. Mar. 13, 2015).
[200] *See* Braun v. Maynard, 652 F.3d 557, 563 (4th Cir. 2011).
[201] Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 624 (1989).
[202] Harmon v. Thornburgh, 878 F.2d 484, 490 (D.C. Cir. 1989).
[203] *Skinner*, 489 U.S. 602, 636–37 (1989).
[204] *Id.* at 628.
[205] Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 669–70 (1989).
[206] *See* Chandler v. Miller, 520 U.S. 305, 319 (1997).
[207] *See id.* at 318–21.
[208] *See* Neumeyer v. Beard, 421 F.3d 210, 214 (3d Cir. 2005).
[209] Am. Fed'n of State Emps. Council 79 v. Scott, 717 F.3d 851, 876 (11th Cir. 2013).

. . . between the nature of the employee's duty and the nature of the feared violation"[210] by presenting specific facts establishing that nexus.[211]

The scope of positions open to random testing has been expanding[212] despite the requirement of a deliberative process to establish that positions are safety sensitive.[213] After some early decisions in which courts were reluctant to uphold broad testing of public sector employees,[214] lower courts have consistently found that a variety of public sector positions fall into the safety-sensitive category, including police officers,[215] firefighters,[216] corrections officers who carry firearms and monitor drugs at jails,[217] nuclear power and chemical weapons plant workers,[218] operators of natural gas pipelines,[219] aviation maintenance employees,[220] and various operators of motorized vehicles.[221] The dismissal of a claim by drivers of a city's heavy equipment is typical, based on the substantial risk of injury to others if large vehicles were operated by someone under the influence of drugs or alcohol.[222]

Related to drug testing of employees based on the safety-sensitive nature of the position, employers can sometimes justify drug testing of employees who have been involved in an incident resulting in injury, such as an accident or the discharge of a firearm.[223] Such responsive testing can be justified under the Supreme Court's rationale for drug testing to ensure the "safe and responsible performance of hazardous duties."[224] However, courts sometimes have disallowed testing of public employees involved in any in-

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[210] Knox Cty. Educ. Ass'n v. Knox Cty. Bd. of Educ., 158 F.3d 361, 378 (6th Cir. 1998).

[211] *See Scott*, 717 F.3d at 873; s*ee also* Int'l Union v. Winters, 385 F.3d 1003, 1009 (6th Cir. 2004) (requiring context-specific inquiry); Taylor-Failor v. Cty. of Haw., 90 F. Supp. 3d 1095, 1099–100 (D. Haw. 2015) (finding no nexus for urine testing of applicant for legal clerk position); Prof'ls Guild of Ohio v. Butler Cty. Bd. of Developmental Disabilities, No. 1:14-CV-161, 2014 WL 4774805, at *3–4 (S.D. Ohio Nov. 26, 2014) (finding no nexus shown for drug testing of drivers of persons with developmental disabilities).

[212] *See* TUNNELL, *supra* note 27, at 12 (describing how courts have relied on *Skinner* when upholding drug testing).

[213] *See* Mollo v. Passaic Valley Sewerage Comm'rs, 406 F. App'x 664, 667 (3d Cir. 2011).

[214] *See, e.g.*, Burka v. N.Y.C. Transit Auth., 751 F. Supp. 441, 443–44 (S.D.N.Y. 1990) (finding that elevator operators, carpenters, masons, plumbers, sign painters, and power distribution maintainers were not in safety-sensitive positions); Nat'l Treasury Emps. Union v. Lyng, 706 F. Supp. 934, 947 (D.D.C. 1988) (granting preliminary injunction to Department of Agriculture employees who drove shuttle bus, mail van, and passenger cars).

[215] *See* Carroll v. City of Westminster, 233 F.3d 208, 213 (4th Cir. 2000).

[216] Hatley v. Navy, 164 F.3d 602, 604 (Fed. Cir. 1998).

[217] Int'l Union v. Winters, 385 F.3d 1003, 1013 (6th Cir. 2004).

[218] *See* IBEW, Local 1245 v. U.S. Nuclear Regulatory Comm'n, 966 F.2d 521, 525–26 (9th Cir. 1992); Thomson v. Marsh, 884 F.2d 113, 115 (4th Cir. 1989).

[219] *See* IBEW, Local 1245 v. Skinner, 913 F.2d 1454, 1461–63 (9th Cir. 1990).

[220] *See* Aeronautical Repair Station Ass'n v. FAA, 494 F.3d 161 (D.C. Cir. 2007).

[221] *See* Bryant v. City of Monroe, 593 Fed. Appx. 291, 299 (5th Cir. 2014) (city vehicles); Transp. Workers' Union, Local 234 v. S.E. Pa. Transp. Auth., 884 F.2d 709, 711–12 (3d Cir. 1989) (subway operators).

[222] *See* Kreig v. Seybold, 481 F.3d 512, 518 (7th Cir. 2007).

[223] *See* TUNNELL, *supra* note 27, at 29 (twenty-six percent of employers report using post-accident testing); *see, e.g.*, Lynch v. City of New York, 737 F.3d 150, 157 (2d Cir. 2013) (discharging firearm resulting in death or injury); Tanks v. Greater Cleveland Reg'l Transit Auth., 930 F.2d 475, 479 (6th Cir. 1991) (accidents involving fixed object).

[224] *Lynch*, 737 F.3d at 160.

jury-producing incident, regardless of fault, because testing for those reasons was viewed as both under- and over-inclusive.[225]

The expansion of safety-sensitive positions is exemplified by the allowance of random testing of school employees.[226] The random testing of both current school employees and applicants has been justified based on the school's responsibility as a guardian of students[227] and teachers' *in loco parentis* responsibility "to secure order and to protect students from harm while in their custody."[228] Testing was further justified because teachers' conduct and daily direct interactions with students affect students' "perceptions, and thoughts and values."[229] In contrast to these decisions, a West Virginia school failed to justify randomly testing its teachers and other school employees despite a general concern for student safety, because school employees did not perform duties so "fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences."[230] This conclusion was supported by testimony that drug testing does not detect current impairment.[231] These school decisions demonstrate the variance in definitions for safety-sensitive positions across different courts, but arguably the variation in approaches allows both lower courts and local school boards the flexibility to further restrict the rights of school employees.[232]

At the same time, the obligation to justify suspicionless testing based on the duties of the position has sometimes limited testing among public sector employees. Some public employers have failed to establish that positions are safety sensitive based on a general interest in maintaining a drug-free workplace.[233] Even more specific concerns that illegal drug use leads to "problems of diminished efficiency, increased absenteeism, and added health expenses," and a desire to "preserve the integrity of a workforce that is paid at public expense" have been insufficient to justify testing.[234] Even a small number of drug-related incidents across a large agency has been found insufficient to justify the random testing of all employees involved with the

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[225] *See* United Teachers v. Orleans Parish Sch. Bd., 142 F.3d 853, 856–57 (5th Cir. 1998).

[226] *See e.g.*, Aubrey v. Sch. Bd., 148 F.3d 559 (5th Cir. 1998); *United Teachers*, 142 F.3d 853.

[227] *Aubrey*, 148 F.3d at 565.

[228] Knox Cty. Educ. Ass'n v. Knox Cty. Bd. of Educ., 158 F.3d 361, 375 (6th Cir. 1998).

[229] *Id.* at 374–75; *see also* Donegan v. Livingston, 877 F. Supp. 2d 212, 221–22 (M.D. Pa. 2012) (allowing breathalyzer by school); Crager v. Bd. of Educ., 313 F. Supp. 2d 690, 695 (E.D. Ky. 2004) (allowing suspicionless drug testing of teachers in high intensity drug trafficking area). *But see* Jakubowicz v. Dittemore, No. 05-4135-CV-C-NKL, 2006 U.S. Dist. LEXIS 68639, at *23–24 (W.D. Mo. Sept. 12, 2006) (holding that not every employee in caretaking position is a role model for clients).

[230] Am. Fed'n of Teachers-W. Va. v. Kanawha Cty. Bd. of Educ., 592 F. Supp. 2d. 883, 902–03 (S.D. W. Va. 2009).

[231] *Id.*

[232] Amanda Harmon Cooley, *Controlling Students and Teachers: The Increasing Constriction of Constitutional Rights in Public Education*, 66 BAYLOR L. REV. 235, 289 (2014).

[233] Lanier v. City of Woodburn, 518 F.3d 1147, 1150–51 (9th Cir. 2008) (finding testing of library page is not justified by societal drug abuse).

[234] *See* Loder v. City of Glendale, 927 P.2d 1200, 1219 (Cal. 1997).

program.[235] Similarly, random testing of current city employees was rejected where they could be observed at work, allowing monitoring of their performance and absenteeism without testing for drugs.[236]

In contrast to testing of current employees, testing of applicants for public sector jobs appears to be easier to justify because they cannot be observed prior to their hire so that testing could be based on reasonable suspicion.[237] For example, a California court allowed a city's drug testing of all applicants for all positions because of a greater need to test applicants who could not be observed prior to hire, and an employer "may lack total confidence in the reliability of information supplied by a former employer or other references."[238] However, the State of Florida was unable to justify random testing of all future applicants for any state position, as well as the majority of its current employees.[239] This testing was proposed to maintain discipline, health, and safety in state workplaces, avoid adverse effects on work performance, and to avoid any public risk from interactions with state employees.[240] Such a broad justification was rejected; instead, the appellate court remanded for a determination of which positions should fall under the "special needs" exception, based on "specific concerns relating to particular job categories," rather than on its broadly stated objectives.[241]

These constitutional protections for public sector employees help ensure that a government employer has some justification for drug testing an employee, whether that justification is reasonable suspicion or the safety-sensitive nature of their work. At minimum, these protections force public sector employers to consider why the test is being administered and whether the test fulfills those purposes. These same standards should be applied to private sector employees with the same privacy interests at stake.

V. Policy Implications

It has been said that "[t]he free man is the private man."[242] Drug testing provides a stark example of how freedom is infringed upon in the interest of promoting employers' interests. Privacy protections vary significantly between private and public sector employees, across different courts, and from state to state. Instead of this ad hoc approach, a standardized approach to drug testing should be adopted to advance the privacy interests of both applicants and employees. A more consistent approach would also provide

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[235] *See* Nat'l Fed'n of Fed. Emps.-IAM v. Vilsack, 681 F.3d 483, 496–97 (D.C. Cir. 2012).
[236] *Loder*, 927 P.2d at 1223.
[237] *Id.*
[238] *Id.* at 1238.
[239] *See* Am. Fed'n of State Emps. Council 79 v. Scott, 717 F.3d 851, 858–59 (11th Cir. 2013).
[240] *Id.* at 876.
[241] *Id.* at 877.
[242] Clinton Rossiter, *The Pattern of Liberty*, *in* Aspects of Liberty 17 (1958).

employers with assurance that they can address performance issues among employees and make hiring decisions without risk of litigation.

Business ethicists have argued that access to information about the drug use of an applicant or current employee is justified, assuming that drug use has an impact on the employee's ability to fulfill the terms of the employment contract, where such impact cannot be determined by direct observation.[243] To be ethical, however, the conduct of the drug test should not be unnecessarily harmful or intrusive, and should be an accurate, efficient, and specific method to gain relevant information.[244] Employers must also consider that strict drug testing policies may hinder recruitment of younger employees.[245]

To achieve employers' goals of a safe and productive workforce and meet these ethical standards, employers first should consider alternative methods of assessing performance that do not impinge on employees' privacy interests, regardless of whether they work in the public or private sector. Thus, employers should not rely on drug testing to recognize impairment, but should instead strive to "identify those individuals for which illicit drug use does become problematic."[246] If such performance assessment or direct observation cannot always ensure a safe and productive workforce, employers should be required to adhere to certain standards for drug testing to assure the accuracy of the test results and protect against overly exclusive decisions that negatively impact persons with disabilities and others who rely on prescribed medication or medical marijuana to relieve various symptoms of medical impairments.

A. Alternatives to Reliance on Testing

Employers need not rely on drug testing to achieve their goal of maintaining a productive and safe workforce. According to the National Workrights Institute, an employer can achieve these goals by utilizing other methods of assessing performance.[247] Rather than conducting imperfect and overly exclusive drug tests to measure impairment, employers should be required to use alternative methods of testing employees for impairments associated with illegal drug and alcohol use. Such alternatives include

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[243] Michael Cranford, *Drug Testing and the Right to Privacy: Arguing the Ethics of Workplace Drug Testing*, 17 J. BUS. ETHICS 1805, 1807 (1998).

[244] *Id.* at 1808–09.

[245] Bob Salsberg, *State Marijuana Laws are Changing, But Employer Attitudes, Federal Law Aren't*, INS. J. (Jan. 9, 2017), http://www.insurancejournal.com/magazines/features/201 [https://perma.cc/HU5T-M9XK].

[246] Robert Kaestner, *The Effect of Illicit Drug Use on the Labor Supply of Young Adults*, 24 J. HUM. RESOURCES 126, 145 (1994).

[247] *See* Nat'l Workrights Inst., Drug Testing in the Workplace (2010) [hereinafter NWI, DRUG TESTING], http://workrights.us/?products=drug-testing-in-the-workplace. [https://perma.cc/ZG3H-G7ZS].

impairment testing in conjunction with direct observation, testing for employability traits, and opinions of independent experts.

Alternative methods of testing impairment address the over- and under-inclusiveness of drug testing. Tying testing directly to performance will advance employers' interests, since "[f]iring a productive employee because of a test result that's wrong hurts the bottom line."[248] Impairment testing can be tailored to the duties of a particular position, and will identify deficits associated with fatigue or personal issues as well as use of drugs or alcohol.[249] Employers should consider alternatives to drug testing that focus on individuals' performance and threats to safety. Impairment testing can indicate whether an employee is capable of working safely even if a drug screen might be negative, while protecting those employees who may be using controlled substances legally and are still fully capable of working.

Impairment testing can fulfill employers' job-related purposes for drug testing because it is "directly related to job performance."[250] In one study, over eighty percent of the employers using impairment testing reported that it improved safety and was superior to urine testing.[251] Experts recommend focusing on psychomotor functioning rather than relying on drug testing to measure performance and to prevent accidents at work.[252] For example, computer-assisted tests to measure eye-hand coordination and reaction time, compared to employees' previous performances, have been described as "practical" by employers who use them.[253] Similarly, skills tests can assess reaction time and coordination and provide immediate results,[254] such as requiring that an employee keep a cursor on track during a computer simulation.[255] Performance tests use mock situations simulating real work conditions to single out problem areas for individual employees; employers can also analyze an individual employee's performance data to identify problem areas and their underlying causes.[256]

A performance-based approach answers questions about the ability of an applicant or a current employee to perform on a more individualized basis, rather than rejecting any applicant or discharging any employee who tests positive on a drug test. This approach will identify risks posed by individuals who, for example, suffer from certain health problems that might be

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[248] Kanu, *supra* note 42; *see also* Moore, *supra* note 69, at 478–79 (discussing costs of high false positive rates).

[249] *See* Moore, *supra* note 69, at 477.

[250] *Impairment Tests: An Alternative to Drug-Testing in the Workplace*, HR (Feb. 22, 2001), http://hr.com/en/communities/benefits/impairment-tests—an-alternative-to-drug-testing-i_eacuzt03.html [https://perma.cc/LU8Y-F2LD].

[251] *See* Nat'l Workrights Inst., Impairment Testing—Does It Work? (2008), http://workrights.us/?products=impairment-testing-does-it-work [https://perma.cc/4P7T-XKLF].

[252] George Bohlander & Scott Snell, Managing Human Resources 518–20 (2009).

[253] NWI, Drug Testing, *supra* note 247.

[254] *See* Comer, *supra* note 61, at 263.

[255] *See* Bohlander & Snell, *supra* note 252, at 580.

[256] *See* Zeese, *supra* note 19, at § 2:43; EEOC, Employment Tests and Selection Procedures, http://www.eeoc.gov/policy/docs/factemployment_procedures.html [https://perma.cc/M3BV-DU55].

undetectable by a drug test.[257] To focus on performance and safety, employers can test for traits such as apathy, lowered motivation, impaired cognitive performance, altered perceptions, as well as impairment of short-term memory, attention, motor skills, reaction time, and the organization and integration of complex information.[258] Such tests can be administered to any applicant who will be performing tasks that might be affected by impairment. Current employees can also be given impairment tests if they show any signs of underperformance or when starting different job duties.

Like impairment testing, direct observation will also identify impairment among current employees, which can be apparent to a trained observer.[259] A major law firm has suggested that its employer-clients train supervisors to observe signs that an employee is under the influence, including observation of gait, speech, demeanor, eyes, appearance, breath, and movements.[260] Documentation of impaired performance can justify an employer's discipline or other techniques to enhance performance without resorting to an inaccurate and invasive drug test.

Alternatives to drug testing also exist for employers who are using drug testing as a general screening device to search for traits of employability, such as timeliness, motivation, perseverance, and self-control.[261] Observations in the workplace or during an interview, as well as tests of personality, motivation, interpersonal skills, and other traits which can contribute to employee performance,[262] can be much more accurate than a drug test in measuring these employability traits.

To predict the potential effects of prescribed or illegal drugs on an employee, independent medical review boards can "make an informed determination of whether an individual meets the medical qualifications for employment."[263] Such a determination can be based on information from the person's health care provider, as well as information on side effects of the medication, the employee's work history and personal experience with the condition, and the particular demands of the job and work environment conditions. As much as possible, this evidence should include medical testing that more accurately assesses the risk of a particular individual experiencing

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[257] Elisa Y. Lee, *An American Way of Life: Prescription Drug Use in the Modern ADA Workplace*, 45 COLUM. J.L. & SOC. PROBS. 303, 347 (2011).

[258] *Id.*; *see also* Jonathan Katz, *Impairment Tests as a Drug-Screen Alternative*, INDUSTRYWEEK (Feb. 17, 2010) (advocating for tests that measure basic cognitive functions).

[259] *See* Jerome Jaffe, *Drug Addiction and Drug Abuse*, *in* GOODMAN AND GILMAN'S THE PHARMACOLOGICAL BASIS OF THERAPEUTICS, 551 (Pergamon et al. eds., 8th ed. 1990).

[260] *See* FISHER PHILLIPS, supra note 123.

[261] NAT'L ASSOC. OF MFRS & THE MFG INST., THE SKILLS GAP 2001 2, 8, http://www.themanufacturinginstitute.org/~/media/624B19FCA94E457AA1AF29FDF399652B/2001_Skills_Gap_Report.pdf [https://perma.cc/HVK9-HDC4].

[262] *See* Kimberly West-Faulcon, *Fairness Feuds: Competing Conceptions of Title VII Discriminatory Testing*, 46 WAKE FOREST L. REV. 1035, 1069 (2011).

[263] Jeffrey A. Van Detta, *"Typhoid Mary" Meets the ADA: A Case Study of the "Direct Threat" Standard Under the Americans with Disabilities Act*, 22 HARV. J.L. & PUB. POL'Y 849, 949 (1999).

side effects from drug use, rather than simply speculation based on the individual's history and general data on a particular drug.[264]

Testing for employability traits and the involvement of independent medical experts can raise issues of privacy for subjects of testing, particularly if these approaches involve the release of health information. These privacy interests can be protected as required by the ADA, where release of private information is limited to relevant information and only to those who need to know.[265]

Any of these alternatives, or some combination thereof, will provide employers with accurate information regarding the impairment of an applicant or employee, as well as specific information about the employee's performance that will help assess the person's future productivity much more accurately than a drug test.

B. Standards for Testing

Before taking action based on a drug test alone, an employer should establish that the more informative and less intrusive methods described above are either impossible or insufficient. If an employer can establish a need to rely on drug testing to ensure a safe and productive workforce, certain standards are crucial to protect the privacy interests of both applicants and employees. In addition, these standards will ensure that employers do not exclude or discharge individuals who may rely on a prescription or medical marijuana to address symptoms of a medical condition but could still function safely and productively in a workplace.

Courts have long ensured that public employees' Fourth Amendment right to be free from unreasonable searches and seizures is protected against unwarranted employer drug testing.[266] Greater standardization was recommended more than twenty-five years ago and again in more recent model legislation,[267] which would help extend these protections to employees in the private sector. This model includes notice to employees, limitations of when employees can be tested, standards for conduct of the testing, and limitations on employer responses to a positive test.[268]

Guidelines can be based on the standards already developed for testing public sector employees under the Fourth Amendment. Courts already analogize between the private sector privacy frameworks and the Fourth Amendment framework "when it suits them."[269] Constitutional notions of reasonable expectations of privacy guide testing practices in the private sec-

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[264] *See* Lee, *supra* note 257, at 341.
[265] *See* 42 U.S.C. § 12112(d) (2012).
[266] *See supra* notes 154–221 and accompanying text.
[267] *See* TASK FORCE, *supra* note 8, at 10–12; NWI, DRUG TESTING, *supra* note 247.
[268] *See* TASK FORCE, *supra* note 8, at 10–12; NWI, DRUG TESTING, *supra* note 247.
[269] Victoria Schwartz, *Overcoming the Public-Private Divide in Privacy Analogies*, 67 HASTINGS L.J. 143, 147 (2015).

tor because the interests of employees are the same, and private sector employers can be just as invasive of those interests.[270]

Guidelines should address providing notice to both applicants and employees subjected to testing. In addition, clear standards should be established for whom to test and how those tests will be conducted. Perhaps most importantly, employers should be limited in how they respond to a positive drug test to protect the privacy interests of both applicants and employees who may have a medical reason for testing positive, and yet do not pose a threat to the employer's interest in maintaining a safe and productive work environment.

1. Before the Test

Notice of drug testing is critical to managing employees' expectations of privacy. In 2014, the National Safety Council recommended notifying employees of how and when a drug test will be given, which drugs will be detected, and possible consequences of failing a drug test.[271] Employees should be notified that if they are using prescribed drugs or medical marijuana, they should take necessary steps to avoid unsafe workplace practices.[272] Notice should also inform employees that they may be required to sign releases and waivers to allow their participation in counseling and/or rehabilitation programs offered as an alternative to discipline for a positive drug test.[273] In addition to adopting a drug testing policy, employers should train supervisors and managers regarding that policy, ensuring they can recognize signs of impairment and implement drug testing appropriately.[274]

2. Whom to Test

Standards for drug testing should follow the extensive guidance provided by case law developed under the Fourth Amendment regarding which employees and applicants should be subjected to drug testing. More stringent limitations on testing current employees is appropriate because employers have significantly greater opportunities to observe any signs of impairment and measure the performance of current employees, whereas drug testing can provide one method of selecting qualified applicants for certain positions.

Both the 1991 Task Force on the Drug-Free Workplace and the model legislation developed by the National Workrights Institute have recommended that employees be tested based on reasonable suspicion that an em-

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[270] *See id.* at 169–70, 181–84.

[271] *See* NAT'L SAFETY COUNCIL, *supra* note 2, at 10; *see also* TASK FORCE, *supra* note 8, at 10–12 (recommending that all employers should have written drug testing policy and provide notice to employees).

[272] *See* NAT'L SAFETY COUNCIL, *supra* note 2, at 6.

[273] *See, e.g.*, Men of Color Helping All Soc'y, Inc. v. City of Buffalo, 529 F. App'x 20, 26 (2d Cir. 2013).

[274] *See* NAT'L SAFETY COUNCIL, *supra* note 2, at 7.

ployee is currently under the influence, based on either job performance or the occurrence of an accident.[275] Similarly, experts on business ethics have suggested that drug testing should only be required of current employees "when probable cause exists to suspect that an employee is using a controlled substance."[276] Thus, drug testing of current employees would be warranted only if other factors, such as absenteeism or tardiness, indicate that drug use is a major problem among those employees.[277] Of course, testing based on suspicion requires that supervisors and managers observe and acknowledge when an employee is impaired at work.[278]

For applicants, drug testing could be allowed for a "narrow range of employees" when impairment could cause catastrophic injury to the public, job duties are connected to controlling illegal drug use among others, or the work unit has a recent history of substance abuse and impairment could cause injury to employees.[279] The 1991 Task Force was split on its recommendation for testing applicants, with some advocating testing based only on reasonable suspicion, while other members recommended allowing testing as an allowed condition of employment for any position.[280]

This disagreement could be resolved by identifying those positions where pre-employment testing would be warranted because of the safety-sensitive nature of the work. Case law developed under the Fourth Amendment for public sector employees provides guidance on this determination, allowing testing for applicants who could cause serious harm to the public or other employees if they came to work under the influence of illegal drugs or alcohol.

The question of who to test is also informed by the OSHA's Improve Tracking of Workplace Injuries and Illnesses regulation that recently barred blanket drug testing of any employee who is involved in an accident at work.[281] OSHA has suggested that employees should only be tested if their drug use was likely to have contributed to the incident, and the test can accurately identify such impairment.[282] Testing should be based on "observation and a good-faith belief" that the employee was under the influence of drugs or alcohol.[283]

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[275] *See* Task Force, *supra* note 8, at 9, 20–21; NWI, Drug Testing, *supra* note 247.

[276] Cranford, *supra* note 243, at 1808–09; *see also* Cowan, *supra* note 59, at 320 (arguing safest and best standard is probable cause supported by documented job impairment).

[277] *See* Cowan, *supra* note 59, at 315.

[278] *See* Mark A. Abramson et al., *Exposing The "Dirty Little Secret": Random Drug Testing of Health Care Workers in the Wake of the Hepatitis C Outbreak*, 54 N.H.B.J. 10, 14 (2014).

[279] *See* Task Force, *supra* note 8, at 9, 22–23.

[280] *See id.* at 24–25.

[281] *See* 29 C.F.R. § 1904.35 (2017).

[282] *See id.*

[283] *See* Gloria Gonzalez, *Post-injury Drug Testing Under Fire*, Bus. Ins. (June 5, 2016, 12:00 AM), http://www.businessinsurance.com/article/00010101/NEWS08/306059985/Post-injury-drug-testing-under-fire [https://perma.cc/A99D-Y7TV].

3. How to Test

Protection of privacy interests of both applicants and employees requires consistent guidelines for the conduct of drug testing.[284] The HHS Mandatory Guidelines for Federal Workplace Drug Testing Programs provide such guidance, including protections of the testee's privacy,[285] limiting testing to specified drugs, and requiring confirmatory tests.[286] Employees should be provided with seclusion in providing a urine sample,[287] which involves a very intimate process of bodily functioning. The interests of people with disabilities should also be respected, including alternative testing for those who cannot complete a urine test,[288] and prohibition against revealing one's disability or medication to an employer.[289]

Like the HHS guidelines, DOT regulation of drug testing provides for confidentiality for test results and medical histories and promotes nondiscriminatory testing methods.[290] DOT standards include chain-of-custody requirements to ensure the integrity and accuracy of the testing process,[291] as well as a MRO to provide a quality assurance review of the drug testing process.[292] The MRO is required to discuss with the employee any legitimate medical explanation for the presence of the drugs or metabolites in his or her system, which may require verifying the test result as negative if the MRO determines that there is a legitimate medical explanation.[293] This review process can be particularly important for a medical marijuana user or a person using prescribed medications.

Review of test results by a MRO is particularly important to protect testees' rights as well as ensuring the accuracy of the test results. Some states require MRO involvement when an employer asserts an employee's impairment as a defense in a worker's compensation claim.[294] In addition, an employee should have the opportunity to contest the accuracy of test results and any adverse decisions based on those results,[295] which allows the presentation of information relevant to the positive test result, such as use of a prescribed medication.[296]

An opportunity to contest test results with other information showing a lack of impairment at work is important to protect the interests of both appli-

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[284] *See id.* at 10–12, 14–19; NAT'L SAFETY COUNCIL, *supra* note 2, at 10.
[285] *See* HHS Guidelines, *supra* note 50, at 71863.
[286] *See id.* at 71880, 71893–94.
[287] *See, e.g.*, Allen v. Schiff, 586 F. App'x 759, 761 (2d Cir. 2014).
[288] *See, e.g.*, Consent Decree, EEOC v. Wal-Mart Stores East, No. JKB-14-862, 2014 WL 6608585 (D. Md. Oct. 21, 2014).
[289] *See, e.g.*, Connolly v. First Pers. Bank, 623 F. Supp. 2d 928, 931 (N.D. Ill. 2008).
[290] *See* Fed. Highway Admin., Controlled Substances Testing, Policy Statement, 53 Fed. Reg. 47134, 47135 (1988).
[291] *See* 49 C.F.R. § 40.31 (2016).
[292] 49 C.F.R. § 40.123(b) (2017).
[293] 49 C.F.R. §§ 40.123, 40.137 (2011).
[294] Hickox, *supra* note 69, at 320–21.
[295] *See* NWI, DRUG TESTING, *supra* note 247.
[296] Hickox, *supra* note 69, at 320.

cants and employees. Workers' compensation statutes that exclude coverage for injuries occurring to an impaired employee still provide that an employee may overcome a presumption of impairment by submitting other evidence that he or she was not impaired.[297] Without this opportunity, users of both prescription drugs and medical marijuana could be discharged without any influence of the treatment on their performance. Given the concerns regarding the accuracy of drug testing and the need for confirmatory tests outlined above, the processes outlined above to enhance the accuracy of test results while protecting testees' privacy interests should be extended to all public and private employee, whose interests in privacy and accuracy are the same, rather than limiting such protections to employees or applicants in certain professions or who live in particular states.

C. Responses to a Positive Test

The most important reform concerning drug testing concerns employers' responses to a positive drug test. Employers should be redirected to focusing on whether an employee is impaired at work rather than imposing discipline based on a positive drug test alone. Employers currently react to positive drug tests in a variety of ways, with very little regulation. Some employers impose immediate discipline, such as suspension or even discharge, while other employers require participation in rehabilitation programs; applicants typically are not hired and some may be prevented from ever even applying again.[298] Employers see these responses as the way to keep their workplaces drug free.[299]

While different employers can react to positive drug tests differently, the same employer often reacts to any positive drug test with the same discipline, regardless of why the positive result occurred. For example, under a zero-tolerance approach, a medical marijuana user and a heroin addict would both face discharge based on a positive drug test. Rather than treating all positive drug test results as the basis for discharge or rejecting an applicant, employers should be required to focus on whether the employee is or would be impaired at work. Some state statutes provide a model for how impairment can be used as the basis for employer decision making. In Arizona, for example, the legislature has attempted to define "impairment" by measuring the extent that the employee's job performance abilities are "decreas[ed] or lessen[ed]," and describes "symptoms" an employer can consider in attempting to determine whether an individual is impaired, including perceived changes in the individual's behavior.[300]

Litigation under state workers' compensation statutes provides a comprehensive examination of what it means to be impaired.[301] Judicial interpre-

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[297] *Id.* at 328.
[298] TUNNELL, *supra* note 27, at 32, 99.
[299] *Id.* at 35.
[300] Moberly & Hartsig, *supra* note 108, at 448–49.
[301] Hickox, *supra* note 69, at 314–16, 322–33.

tation of these statutes—which commonly bar coverage for an employee who was impaired at the time of an injury—focuses on the conduct of the employee rather than on a positive drug test alone.[302] Using this guidance, employers can rely on the measures of performance impairment outlined above to determine whether a positive drug test should result in discipline or discharge, or a refusal to hire.

In addition to focusing on impairment, employers should provide access to an Employee Assistance Program (EAP) to help identify drug abuse and provide confidential access to treatment.[303] Studies of EAPs show a positive return on investment, given the positive effects on productivity realized from addressing any effects of drug use on an employee. Rehabilitation through an EAP also avoids the high costs associated with replacing an employee, which range from twenty-five to two hundred percent of a person's annual compensation, as well as the loss of investment in training and institutional knowledge.[304] Managers and supervisors should encourage use of EAPs to take advantage of their benefits,[305] rather than punishing or harassing employees who use them, and employees' privacy should be protected.

Discipline based on a positive drug test should be progressive, allowing an opportunity for rehabilitation or reassignment as provided under the DOT regulations. An employer's response should also take into account other evidence of impairment, or the lack thereof, as well as other positive characteristics of the employee. A reassignment of an employee who tests positive on a drug test provides an opportunity for testing and observation to determine if the employee is impaired at work in the future, while protecting the employer's interests in maintaining a safe work environment.

Appropriate employer response to a positive drug test can also be guided by litigation in disparate treatment claims that have involved drug testing. In such disparate treatment claims, prior adequate performance by a current employee may support the claim of discrimination that arises based on a positive drug test alone. For example, an alcoholic employee who was discharged based on a positive test result defeated a summary judgment motion because the employer could not establish that the testing and discharge would have occurred if she had not admitted that she was an alcoholic, because there was no evidence of deficiency in her job performance.[306]

Employers have defeated claims of disparate treatment by relying on a positive drug test result to establish an honest belief that the employee was using illegal drugs.[307] Such a defense may be successful where the employer

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[302] *Id.* at 317–18, 322–26.

[303] *See* NWI, Drug Testing, *supra* note 247; Task Force, *supra* note 8, at 10–11.

[304] *See* Nat'l Safety Council, *supra* note 2, at 8.

[305] *Id.*

[306] A.D.P. v. Exxonmobile Research & Eng'g Co., 54 A.3d 813 (N.J. Super. Ct. App. Div. 2012).

[307] *See, e.g.*, Bailey v. Real Time Staffing Servs., 543 F. App'x 520, 520–24 (6th Cir. 2013).

acted with "due diligence" in verifying the drug test results.[308] However, such reliance is unwarranted if the discharge decision was not "reasonably informed" or if the employer's deliberation was "marred by 'an error too obvious to be unintentional.'"[309]

Disparate treatment litigation also emphasizes the need for individualized analysis rather than blanket reliance on drug test results. A threat to health or safety should be established by objective evidence such as a valid medical analysis.[310] Under this individualized approach, employers should not make generalized assumptions that employees who test positive for a prescribed or illegal drug or alcohol pose a direct threat in the workplace. Instead, an employer should "carefully assess the individual's recent conduct, current symptoms, prognosis, ability to sense and prepare for the impending occurrence of a side effect, and other factors" that could affect the viability of the alleged risk.[311]

In the case described above concerning the alcoholic employee, the employer failed to establish a safety risk to justify her discharge, since there was no individualized assessment as to whether that employee posed such a risk.[312] Likewise, under a settlement with the EEOC, Georgia Power is required to refrain from discharging an employee or rejecting an applicant based on a positive drug test resulting from his or her use of a legal drug or medication without an "individualized assessment of that individual's present ability to safely perform the essential functions" of the job.[313] The individualized assessment includes the timing of the medication, the effects of the medication, identification of a specific threat posed by the use of the medication, and whether any accommodation could reduce or eliminate that threat.

In addition to borrowing from disparate treatment analysis, the ADA model for accommodation could be used by employers as a guide in determining whether to refrain from discharging an employee based on a positive drug test, considering whether the employee can do the job despite a positive test result.[314] Users of prescribed medication and medical marijuana can assert the right to accommodation under the ADA and state nondiscrimination laws, respectively,[315] but other employees using prescribed medication or

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[308] *See, e.g.*, Kollmer v. Jackson Tenn. Hosp. Co., No. 15-1132, 2016 WL 6638002, at *7 (W.D. Tenn. Nov. 9, 2016).

[309] *Bailey*, 543 F. App'x at 524 (quoting A.C. *ex rel.* J.C. v. Shelby Cty. Bd. of Educ., 711 F.3d 687, 705 (6th Cir. 2013)).

[310] *See* 29 C.F.R. § 1630.2(r) (2011); *see, e.g.*, Mantolete v. Bolger, 767 F.2d 1416, 1424 (9th Cir. 1985) (finding that harm must be based on valid medical analyses and other objective evidence).

[311] *See* Lee, *supra* note 257, at 338–39.

[312] *See* A.D.P. v. ExxonMobil Research & Eng'g Co., 54 A.3d 813, 826–27 (N.J. Super. Ct. App. Div. 2012).

[313] *See* Consent Decree, EEOC v. Ga. Power Co. (No. 1:13-CV-3225-AT, N.D. Ga., Nov. 15, 2016).

[314] *See* Berman-Gorvine, *supra* note 87, at 1.

[315] Hickox, *supra* note 5, at 1041–44.

medical marijuana should also have the opportunity to seek a reasonable accommodation before being discharged based on a positive drug test.

Accommodations could include a temporary reassignment to a vacant non-safety-sensitive position while the employee completes outpatient treatment. In addition, employers could be required to provide exceptions to a drug-free workplace policy as a reasonable accommodation. One court reviewing such a policy prevented an employer from discharging an alcoholic employee outright, and held that a leave of absence to allow the employee to obtain treatment for alcoholism was a reasonable accommodation, where the employee would have been able to safely perform his duties after the leave.[316] In contrast, a leave of absence could be unreasonable if it is unlikely that the employee would successfully complete treatment and return to work.[317] Moreover, an undue hardship was not established based on the employer's fear that retaining that employee would undermine the employer's substance abuse deterrence program.[318]

Conclusion

Drug testing is a common tool used by employers to screen applicants and identify risky employees, but it lacks the accuracy and reliability to predict future performance or identify risks to safety. Focus on performance rather than reliance on drug testing in both selection and retention of employees will provide more accurate information to employers while protecting the interests of those who may test positive based on their use of a prescribed medication or medical marijuana. Employers should be required to limit drug testing to employees reasonably suspected of being impaired, or situations where the impairment of an employee would cause substantial harm. The testing process itself should protect the privacy interests of testees and ensure accurate results. Most importantly, employers should be limited in their responses to a positive drug test.

Employers should take a more individualized approach rather than discharging or rejecting anyone who tests positive, focusing on impairment and performance issues. If the person's actual performance or other attributes warrant discipline or rejection as an applicant, then the employer's decision should be respected. But public policy should not allow an employer to blindly rely on a positive drug test in making important employment decisions. Instead, employers should ensure that drug test results are accurate and reflect an inability to perform the essential duties of a particular position. By doing so, employees who might otherwise be excluded from employment based on their use of a prescription drug or legalized marijuana will enjoy continued employment despite their need for such treatment.

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[316] *See* Schmidt v. Safeway, Inc., 864 F. Supp. 991, 996–97 (D. Or. 1994).
[317] *Id.*
[318] *Id.* at 997.