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DRUG TESTING IN THE WORKPLACE

INTRODUCTION: A BALANCED APPROACH TO DRUG TESTING IN THE WORKPLACE

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The national preoccupation with the "war on drugs" has subsided somewhat as other public issues have come to the fore, but drug abuse remains a matter of great public concern, and debate over drug policy is likely to heat up again as the 1992 presidential elections approach. Everyone, of course, is against drug abuse, and it would be political suicide for any national leader not to support the "war." Once one gets past the political rhetoric, however, difficult and complex policy issues must be faced. Among them is the extent to which employers—both in the private sector and in government—may administer drug tests to existing employees and to applicants for employment.

The Institute of Bill of Rights Law at the College of William and Mary, Marshall-Wythe School of Law, has just published a task force report on "Drug Testing in the Workplace." Over the course of the last two years, the Institute sponsored a task force of distinguished American leaders, including representatives from government, business, organized labor, the judiciary, the bar,

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universities, and professional sports, for the purpose of proposing model legislation governing drug testing in the workplace. The report calls for a careful balance between the laudable goal of achieving a drug-free workplace and the vital task of individual privacy and dignity.

Virtually no one disputes that employers may legitimately test employees "for cause." The proposal authorizes testing whenever the employer reasonably suspects that a particular employee is under the influence and that the employee's conduct may adversely affect his job performance or the work environment. Nor is there much debate over the legitimacy of testing employees who have previously tested positive for drug use (the proposal authorizes random follow-up tests for up to one year), or over the need to test employees immediately following an accident (the proposal authorizes tests when the accident causes serious injury and the employee may have caused it).

The proposal, however, is far more circumspect about so-called "random testing" of employees, authorizing such testing in only three circumstances: (1) when an employee occupies a job in which impairment could cause catastrophic injury to the public; (2) when a specific plant, facility, or operating unit has exhibited a recent history of drug abuse and physical injury may result from employees coming to work impaired, or (3) if the employment position involves activities directly connected to the interdiction, detection, punishment, or treatment of illegal drug use.

The proposal prohibits indiscriminate random testing and rejects specifically the view that random testing should be permitted whenever impairment might create "safety" risks. Such an elastic formulation could be stretched to encompass virtually all employees. The proposal also sets forth elaborate procedural requirements designed to safeguard the dignity and privacy of employees subjected to testing and to insure accuracy and confidentiality in the evaluation of test results. Although the proposal does permit employers for safety reasons to transfer employees testing positive, it forbids the firing of employees for their first positive test, instead limiting punishment to a maximum of thirty days' suspension for such "first offenses."

The task force members were most deeply divided over the issue of "applicant testing," and the proposal sets forth two alternative solutions to the problem. One approach, which about half of the task force members support, permits all job applicants to be given a drug test if they are serious candidates for hire. The alternative approach, also which about half the task force

members support, would permit applicants to be tested only in situations in which testing would be permitted if the applicant was already an employee. On this point, the committee members were driven by fundamental differences in philosophy. Those favoring relatively unrestricted applicant testing viewed the matter from what might be thought of as an "employer's rights" perspective—an employer, the argument goes, ought to have the freedom to take steps to insure that would-be employees are drug free before the employee acquires vested rights. Other task force members felt that the issue should be approached primarily from an individual privacy perspective, arguing that the privacy interests are identical for both applicants and existing employees, and that the same rules should govern testing for both.

The proposed legislation does not distinguish between government and private-sector employees. The nature of the job itself, not the identity of the employer, ought to influence the rules governing drug testing. Moreover, in today's world, the lines between these two sectors is increasingly blurred. It makes sense to permit random drug testing for a person controlling a nuclear facility or operating a commuter train with large numbers of passengers, without regard to whether the nuclear plant or commuter train line happens to be a government or a private-sector operation. Similarly, it makes no sense to subject an office secretary or a mail room clerk to random drug testing, regardless of whether that person happens to work in a government office.

The task force also recommended that whenever drug-testing programs are implemented, they should test for alcohol in addition to illegal substances such as marijuana and cocaine. The social costs of alcohol abuse far exceed the costs of illicit drug use. Although society has long accepted alcohol as our legal drug of choice, when abused, it fractures families, impairs work performance, and destroys lives every bit as effectively as illegal drug use. Alcohol consumption is exponentially more pervasive than drug use, and it is at once foolish and hypocritical to ignore alcohol when implementing employee drug-testing programs.

Although they did not agree on all issues, the members of the task force reached an extraordinary degree of consensus; a consensus largely borne of the conviction that Americans are concerned with drug use, but also regard drug testing as a serious incursion on individual privacy. Americans want and expect drug-testing programs that are limited in scope and procedures that are fair, accurate, and dignified. We believe the task force's proposal achieves these important goals.