

William & Mary Law Review

Volume 33 (1991-1992)
Issue 1 *Drug Testing in the Workplace*

Article 3

October 1991

Proposal for a Substance Abuse Testing Act

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Labor and Employment Law Commons](#)

Repository Citation

Proposal for a Substance Abuse Testing Act, 33 Wm. & Mary L. Rev. 5 (1991),
<https://scholarship.law.wm.edu/wmlr/vol33/iss1/3>

Copyright c 1991 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/wmlr>

PROPOSAL FOR A SUBSTANCE ABUSE TESTING ACT: THE REPORT OF THE TASK FORCE ON THE DRUG-FREE WORKPLACE, INSTITUTE OF BILL OF RIGHTS LAW*

ABOUT THE REPORT

This is the Report of the Task Force on the Drug-Free Workplace, sponsored by the Institute of Bill of Rights Law of the College of William and Mary, Marshall-Wythe School of Law. The Report contains an introduction describing the mission of the Task Force and the guiding philosophical principles it embraced, an Executive Summary providing a summary overview of the proposed model statute, the formal text of the proposed model Substance Abuse Testing Act, including commentary illuminating the intent and rationales underlying each provision of the Act, biographical information on all members of the Task Force, and a brief individual statement by each Task Force member.

ABOUT THE INSTITUTE

The Institute of Bill of Rights Law was established at William and Mary in 1982 to support research and education on the Constitution and Bill of Rights. Today the Institute is a dynamic center for mediating the past and the future, making debate over the meaning of the Bill of Rights relevant to policy conflicts in the modern world.

ABOUT THE 1991 CONFERENCE

The Institute of Bill of Rights Law will conduct a conference on drug-testing in the workplace, and the recommendations contained in this report, on November 16, 1991, at the College of William and Mary. The papers generated for that conference will be published in the Annual Bill of Rights Symposium issue of the *William and Mary Law Review*, which will be distributed at the conference. For further information on this Report, the November 1991 conference, or the law review symposium issue on drug-testing in the workplace, contact the staff at the Institute of Bill of Rights Law, Marshall-Wythe School of Law, Williamsburg, VA 23185; 804/221-3810, fax 804/221-3775.

* Reprinted with permission of the Institute of Bill of Rights Law of the College of William and Mary, Marshall-Wythe School of Law, 1991.

MEMBERS OF THE TASK FORCE

PAUL MARCUS

Task Force Chair and
Principal Draftsman;
Professor of Law, University
of Arizona College of Law

RODNEY A. SMOLLA

Arthur B. Hanson Professor
of Law and Director,
Institute of Bill of Rights
Law, The College of William
and Mary, Marshall-Wythe
School of Law

JAMES J. BRUDNEY

Chief Counsel and Staff
Director for the United
States Senate Subcommittee
on Labor

CRAIG M. CORNISH

Cornish & Dell'Olio
Colorado Springs, Colorado

MICHAEL R.**GOTTFREDSON**

Professor of Management
and Policy and Professor of
Psychology, University of
Arizona

R. CLAIRE GUTHRIE

Deputy Attorney General of
the Commonwealth of
Virginia

JONATHAN V. HOLTZMAN

Special Assistant to the City
Attorney of San Francisco

DR. DONALD B. LOURIA

Chairman of Preventive
Medicine and Community
Health, University of
Medicine and Dentistry of
New Jersey—New Jersey
Medical School

JUDGE PRENTICE H.**MARSHALL**

United States District Court
for the Northern District of
Illinois

ALAN C. PAGE

Assistant Attorney General
for the State of Minnesota

JESSE PHILIPS

Founder and Chairman
Emeritus of Philips
Industries, Inc.

DAVID M. RABBAN

Vinson and Elkins Professor
of Law, University of Texas
School of Law

DAVID M. SILBERMAN

Associate General Counsel,
AFL-CIO

MARGARET P. SPENCER

Professor of Law, The
College of William and Mary,
Marshall-Wythe School of
Law

CARLTON TURNER

President and Chief
Executive Officer, Princeton
Diagnostic Labs of America

LEROY S. ZIMMERMAN

Eckert, Seamans, Cherin &
Mellott
Harrisburg, Pennsylvania

Disclaimer: Titles and organizations are listed for identification purposes only. The contents of this document and any opinions expressed herein reflect the views of the individual and not those of the organization with which the individual is affiliated.

INTRODUCTION

In January, 1990, the Institute of Bill of Rights Law first assembled a Task Force of sixteen members, from a wide variety of backgrounds and viewpoints, to examine the issues surrounding drug-testing in the workplace. The members included leaders from the corporate world, organized labor, government, public health, higher education, criminology, the judiciary, and the bar. Out of their efforts this report emerged, setting forth a model Substance Abuse Testing Act, regulating substance abuse testing in the workplace.

Concern over drug abuse is widespread, and drug-testing programs have recently gained momentum in response to that concern. A growing number of public agencies and private sector corporations are implementing testing programs. While concern over drug abuse runs high, comprehensive and reliable data demonstrating the costs of drug abuse in the workplace or the efficacy of testing is relatively scarce. The rhetoric surrounding drug-testing is not always matched by hard supporting evidence. The members of the Task Force were nevertheless convinced that drug-testing is a reality in contemporary society, and is probably here to stay. It is therefore appropriate to recommend legislation reconciling the competing interests in a balanced and comprehensive manner.

The members of the Task Force began by reaching a consensus on a number of guiding principles. As a threshold matter, it was agreed that drug-testing implicated privacy interests of the highest order, and therefore testing should be regulated to preserve individual privacy and dignity. A majority of the Task Force members were convinced that testing in the workplace may be justified only by concerns relevant to the workplace, such as the safety of workers or the public. Drug-testing in the workplace thus should not be implemented merely as a general aid to law enforcement. The Task Force also concluded that it was improper to ignore alcohol abuse in coming to grips with drug-testing. The social costs of alcohol abuse substantially exceed the costs of illegal drug abuse. If employers are serious about addressing the safety and health problems associated with substance abuse, they should therefore include alcohol among the substances to be detected through testing.

The Task Force members believe that this is a propitious time for balanced, uniform legislation on drug-testing. 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 substantial public concern. Now that the rhetoric surrounding the war on drugs has cooled, the time is ripe for level-headed and even-handed legislation. The current legal picture governing drug-testing is chaotic. A significant number of states have adopted drug-testing statutes in recent years, but the approaches taken differ widely. Drug-testing procedures have also been imposed on a number of industries by federal law. The uneven patchwork of state and federal legislation creates a maze of conflicting regulations, placing a considerable burden on corporations doing business in interstate commerce. Drug abuse is a national problem, drug-testing is a national phenomenon, and a national approach to both is required. The Task Force members therefore propose that the model Act set forth in this report be considered either as federal legislation, or as state legislation enacted by individual states as a prelude to eventual adoption by all states as uniform legislation.

Current law also fails to provide adequate protection for employees. Court challenges to drug-testing by employees have recently proliferated. Litigation attacking drug-testing on constitutional and common law grounds has created a volatile legal picture in which it is impossible to predict with confidence what types of drug-testing programs courts will or will not approve. The general trend, however, has been for courts, including the United States Supreme Court, not to intervene to set rigorous procedural or substantive standards governing drug-testing. The courts have not imposed a judicially created balance of competing interests on society, but have instead left that task to the political process. The members of the Task Force have approached this dynamic and often confusing array of court decisions as an invitation to place into the arena of public debate a proposal that reflects American society's legitimate concerns with public health and safety, as well as its deeply embedded tradition of respect for individual privacy and dignity. The members of the Task Force are convinced that the vast majority of Americans do indeed want balance: they are concerned with drug abuse, but they also regard drug-testing as a very serious incursion on individual privacy. Americans want and expect drug-testing procedures that are fair, accurate, and dignified.

The model legislation set forth in this report strives to achieve that balance. The Chair and principal draftsman of the proposal was Professor Paul Marcus, a distinguished American law professor and former Dean of the University of Arizona College of Law. The substance of the proposal was a collective effort, reflecting the energetic and well-considered contributions of an exceptionally thoughtful and conscientious group of leading citizens. The Institute of Bill of Rights Law and the College of William and Mary are deeply indebted to their spirited public service.

RODNEY A. SMOLLA
Arthur B. Hanson
Professor of Law and
Director, Institute of Bill
of Rights Law

EXECUTIVE SUMMARY

THE PRINCIPAL FEATURES OF THE PROPOSAL

Who May Be Tested and When

The Act applies to employers and employees in both the public and private sectors. Section 6 contains the substantive core of the Act, describing the circumstances in which testing is permitted. Testing is permitted in only five situations.

(1) *Testing for Cause.* An employee may be required to undergo testing if reasonable suspicion exists that the employee is currently under the influence and that job performance or the work environment may be adversely affected.

(2) *Random Testing.* The Act authorizes random testing for only a narrow range of employees. Random testing is permitted in three situations: when an employee occupies a job in which impairment could cause catastrophic injury to the public; when a plant, facility, or operating unit has exhibited a recent history of substance abuse and physical injury may well result from employees coming to work impaired; or when the employment position involves activities directly connected to the interdiction, detection, punishment, or treatment of illegal drug use.

It should be emphasized that the Act does not authorize indiscriminate random testing but rather seeks to confine such testing to situations in which the social interests served by random testing are especially high. The Task Force rejected the view, for example, that random testing should be permitted whenever impairment might create "safety" risks, because such an elastic formulation could be stretched to encompass virtually all employees. Thus, the Act limits random testing on safety grounds to situations in which the safety concerns are of an unusually high magnitude—such as certain mass transportation employees—or situations in which the probability of harm is unusually high—as when prior evidence establishes a widespread drug abuse problem at a particular plant or facility.

The Task Force did believe that employees directly connected to drug interdiction, detection, punishment, or treatment present a unique case for permitting random testing, because of the high public interest in deterring corruption and dishonesty relating to drug use in such positions.

The limited approval of random testing reflects the judgment of the majority of the Task Force that the justifications for substance abuse testing in the workplace should have a nexus to the workplace, and not become a general tool of law enforcement, as well as the judgment that the other forms of testing authorized under the Act, such as testing for cause, post-accident testing, testing after prior detected use, and applicant testing, combine to provide employers with adequate opportunities to vindicate their interest in achieving a drug-free workplace.

(3) *Testing After Prior Use.* The Act permits unscheduled testing of individuals who have received a confirmed positive test result for up to one year following the positive test or return to work, whichever comes later.

(4) *Post-Accident Testing.* Employees may be tested immediately following an accident involving serious injury if they occupy a position in which they may have caused the accident.

(5) *Applicant Testing.* The Act addresses the issue of whether to allow employers to test all applicants for initial hire. The members of the Task Force were more deeply divided over this issue than any other policy conflict raised by drug-testing, with the sentiments for and against applicant testing virtually even. Two alternatives are offered. The arguments for each side of this issue are presented in the commentary to section 6 of the Act, and in the individual statements of several Task Force members, appearing at the end of this report.

Procedures for Drug-Testing

The Act contains extensive procedural regulation of the drug-testing process. Among the most significant are the following requirements:

(1) *Written Policy.* All employers must adopt a formal written drug-testing policy if they wish to engage in drug-testing. The Act sets forth in detail the elements that must be addressed in all policies.

(2) *Notice.* Employers must provide extensive notice of their drug-testing policy.

(3) *Substances.* The substances for which employees may be tested must be specified by statute and in the employer's policy.

(4) *Laboratories.* Testing laboratories must be regulated for accuracy and quality control.

(5) *Confirmation of Test Results.* All positive screening tests must be confirmed by a second more accurate test.

(6) *Limited Suspension for First Offense.* Employees may not be terminated for a first offense. The maximum sanction for the first positive confirmed test result is suspension for up to 30 days.

(7) *Collection Procedures.* The actual process of collection must be regulated to ensure accuracy, privacy, and dignity.

(8) *Confidentiality and Access.* Test results are confidential; employees must be given access to all information concerning their test results.

Education and Treatment

The Act imposes an affirmative duty on all employers who undertake a testing program to educate employees about the dangers associated with substance abuse. It further requires that employers have the capacity to refer individuals to treatment and rehabilitation programs. Participation in these programs is at the employees' own expense, unless otherwise provided by agreement or employee benefit program.

Remedies and Enforcement

The Act permits the attorney general, an employee, an applicant, or any other aggrieved person to bring a civil court action to effectuate the purposes of the Act, and authorizes courts to provide appropriate declaratory, injunctive, or compensatory relief. When knowing or reckless violations of the Act occur, damages in the amount of two times compensatory relief may also be awarded. The Act provides for an award of reasonable attorneys' fees to prevailing plaintiffs.

The Act does not contemplate the creation of any new administrative agency to supervise its enforcement, nor does it require any substantial additional enforcement burdens to be absorbed by existing agencies. The Act does, nevertheless, require the intervention of an administrative agency (such as the Department of Health and Human Services) to perform such tasks as the designation of approved testing laboratories, promulgation of specific regulations governing specimen collection procedures, and promulgation of standards for the qualifications and training of Review Officers who participate in the test evaluation process.

THE SUBSTANCE ABUSE TESTING ACT

PREAMBLE.

The abuse of illegal drugs and alcohol is a matter of substantial public concern. This Act was created to develop uniform standards and requirements regarding the testing of employees and job applicants for use of such substances in the work setting. It is the legislative purpose that this Act ensure the protection of the public, the safety of the workplace, and the preservation of privacy and dignity.

COMMENT

Widespread concern over substance abuse exists in the United States. Current data appear to support the notion that actual use of both alcohol and unlawful drugs is declining rather considerably across the country compared to use in recent years. But public concern persists, and this concern has been reflected in statutes passed throughout the country and in the willingness of courts to allow drug-testing. At the same time, because testing implicates serious concerns over the preservation of individual privacy and dignity, rules controlling testing are vital.

Testing for the abuse of alcohol is included here because the actual impact of alcohol use in the employment setting is far more adverse than the impact of unlawful drugs.

The preamble makes clear that the statute is designed not simply to protect any particular constituency or special interest group. Rather it is enacted to ensure that public safety will be promoted, and the rights of individuals will be preserved and protected.

SECTION 1. NOTICE AND WRITTEN POLICY REQUIREMENTS.

No employer may request or require an employee or an applicant for employment to undergo a substance abuse test unless the employer has satisfied the following minimum requirements:

(a) ADOPTION OF A WRITTEN POLICY. In order to establish a substance abuse testing program, the employer must adopt in writing a detailed policy setting forth the specifics of such a program, as indicated in section (c).

(b) *NOTICE TO EMPLOYEES AND APPLICANTS.* The employer must post notice of the policy in prominent employee access areas in the place of employment and must give a written copy of the policy to each affected employee, and each job applicant. Notice must also be posted, and the policy distributed, any time the policy is changed.

(c) *REQUIRED INFORMATION IN THE WRITTEN POLICY.* The written policy must include at least the following information:

- (1) a statement of the employer's policy respecting drug and alcohol use by employees;
- (2) the job classifications for which employees or job applicants are subject to testing;
- (3) the circumstances under which testing may be required;
- (4) the substances as to which testing may be required;
- (5) the testing methods and collection procedures to be used;
- (6) the consequences of a refusal to participate in the testing;
- (7) any adverse personnel action that may be taken based on the testing procedure or results;
- (8) the right of an individual to explain, in confidence, positive test results;
- (9) the right of an individual to obtain all information related to the testing of that individual;
- (10) the confidentiality requirements for the testing;
- (11) the available appeal procedures, remedies, and sanctions;
- (12) the substance abuse programs for education and treatment available to the individual.

COMMENT

This section sets forth in detail the minimum notice requirements that must be satisfied in order for an employer to establish and maintain a testing program. Rather than give broad policy formulations, the section establishes specific standards that both allow for testing by employers and protect the rights of employees. The notion that an administrative agency should, at the outset, review and approve these standards, was considered and was rejected, principally out of a desire to avoid undue delay and expense for employers seeking to comply with the Act.

It is essential that the employer adopt a written policy and that the policy be distributed to all concerned employees and applicants. This notice also must be provided in the form of posted information both at the time of the adoption of a drug-testing plan and whenever changes are made in such a plan. The particular items required should provide necessary information

concerning the type of testing, the impact on individual employees, and the remedies and educational programs available in connection with the plan. Other parts of the Act are not overly specific, but instead show deference to administrative decision-makers—such as the provisions concerning specimen collection procedures, or the qualifications of review officers. But the detailed discussion in this section reflects a need for legislative judgments that will balance the interests of the public, the employers, and the employees.

SECTION 2. THE TESTING PROCESS.

(a) *SUBSTANCES SUBJECT TO TESTING.* Testing shall be permitted only for the following substances:

[to be supplied by the legislature]

COMMENT

The decision regarding which substances are to be tested should be made by the legislature, not the overseeing administrative agency. Individual legislatures, however, may choose to identify different substances that can impair workers in the employment setting.

The consensus of the Task Force was that alcohol abuse is a substantially greater workplace problem than drug abuse, and that alcohol should be among the substances for which testing is authorized. If employers choose to implement a testing program, testing for alcohol abuse should be part of the program.

(b) *REQUIREMENT OF USE OF DESIGNATED LABORATORY.* An employer maintaining a testing program shall adopt testing procedures that are performed only by laboratories designated by the Department.¹

COMMENT

The variation in qualitative procedures offered by drug-testing laboratories is a serious problem in the United States. Some laboratories operate at the highest level of efficiency and quali-

1. Throughout the Act the term "Department" is used to refer to the appropriate state or federal agency designated by the legislature to administer the Act.

tative maintenance while others have significant error rates. The only way to ensure uniform high quality practices is to mandate that an appropriate governmental agency adopt rules for designating substance abuse testing laboratories and direct that no employment testing program may function without the use of such designated laboratories.

(c) SPECIMEN COLLECTION PROCEDURES. All testing pursuant to this Act must follow specimen collection procedures established by the Department.

SECTION 3. ADMINISTRATIVE RULEMAKING.

The Department shall develop rules to effectuate the purposes of this Act. At a minimum the rules must address three areas:

(a) CERTIFICATION OF LABORATORIES. The Department shall adopt rules regarding the certification of laboratories and the development of specific testing procedures. The Department shall certify those laboratories that have satisfied these requirements. The rules shall be designed to ensure the highest quality laboratory practices. The rules must include standards that are at least as rigorous as the standards and practices of national accrediting agencies in the field. The Department shall review these rules on an annual basis and modify them as necessary. The Department's rules shall address at least the following:

- (1) credentials and training of laboratory personnel;*
- (2) types of screening and confirmatory tests required;*
- (3) procedures as to maintenance of confidentiality;*
- (4) quality control;*
- (5) avoidance of tampering with samples;*
- (6) chain of custody;*
- (7) specimen retention;*
- (8) threshold detection levels for purposes of determining positive test results;*
- (9) procedures for identifying and maintaining test samples and records; and*
- (10) methods of reporting results.*

COMMENT

The rules to be adopted by the agency shall establish standards for the credentials and training of laboratory employees and the

testing of identified substances in order to guarantee that high quality practices are used. These rules must meet or exceed standards established by national accrediting agencies such as the National Institute for Drug Abuse. The rules should be specific regarding the certification of testing procedures that promote and maintain high quality practices with respect to particular types of testing, confidentiality, maintenance of test results, retention of records and specimens, and establishment of threshold detection levels. The government shall publish a list identifying laboratories that satisfy the standards.

(b) SPECIMEN COLLECTION. The Department shall adopt rules regarding the process of specimen collection, so as to promote accuracy in the process and preserve individual privacy, dignity, and confidentiality to the maximum extent practicable.

COMMENT

The potential for abuse of individual privacy and dignity in the specimen collection process is of genuine concern. The appropriate agency, therefore, must develop rules regarding collection, giving particular attention to this concern.

(c) REVIEW OFFICERS. The Department shall adopt standards as to the qualifications and training of Review Officers.

COMMENT

Because the Act requires the involvement of Review Officers (section 4(c)), standards must be set to determine the particular experience and training needed.

SECTION 4. TESTING SAFEGUARDS.

(a) CONFIRMATION OF POSITIVE TEST RESULTS. No disciplinary actions may be taken by an employer against an employee or an applicant based on a positive substance abuse test result unless:

- (1) the test result has been confirmed by a second test of that sample meeting the level of sophistication required by the Department;*

- (2) *the employee or applicant has been informed in writing of the opportunity to explain, in confidence, the positive, confirmed test result; and*
- (3) *the employee or applicant has been given the test results and been notified of the right, at the employee's own expense, to secure, within seven days of receipt of the notice and results, an independent analysis of that sample by another certified laboratory.*

If the employee exercises the right to secure an independent analysis of the sample by another certified laboratory, and if the results of that analysis contradict the results obtained from the employer's second confirmed test, the employee's certified laboratory and the employer's certified laboratory shall submit the sample to a third mutually acceptable certified laboratory, which shall make a final determination.

COMMENT

Confirmation of positive test results is essential to the maintenance of a high quality testing program. As a result of problems with accuracy in testing, no disciplinary employment actions (whether discharge, suspension, failure to hire, or any other such action) may be taken unless a positive test of the same sample is confirmed by a second test meeting the agency's requirements. In the majority of cases, the second test will be more sophisticated than the first, but it is not the intent here to approve inferior tests at the screening stage. In addition, to limit error with respect to such problems as food consumed by the individual or the use of lawful drugs, an employee or applicant who tests positive must be given the opportunity to explain the positive test results and the right to have an independent confirmation of the same sample by another laboratory. In the event that the employer's and employee's certified laboratories make contradictory determinations, a "tie-breaker" mechanism is provided, in which the sample is submitted to a third certified laboratory.

It should be noted that some members of the Task Force believed that if a specimen is positive, the employee or applicant should have the right to provide a fresh specimen because of the possibility of mislabeling of specimens. According to this view, if that test turned out to be negative, an employee or applicant could not be disciplined or refused employment but would have to agree to a given number of unannounced tests during the following year of employment.

(b) *INTERIM SAFETY TRANSFERS.* Nothing in this section shall prevent a nondisciplinary transfer of an employee for precautionary safety purposes, with no reduction in pay, to another job duty, pending the completion of all procedures provided for in section 4(a).

COMMENT

While the employer may not discipline solely on the basis of the initial test result, he or she may immediately transfer the employee for safety considerations.

(c) *CONFIDENTIALITY.* Substance abuse testing results shall be kept private and confidential. These results may be disclosed only to:

- (1) the tested employee or applicant, or such other person designated, in writing, by that employee or applicant;
- (2) a Review Officer designated by the employer to receive and evaluate test results and hear the explanation of the employee or applicant;
- (3) the employer, if the designated Review Officer determines that the test is positive and confirmed, and that no adequate explanation of the positive confirmed result has been forthcoming from the employee or applicant; and
- (4) an arbitrator or mediator, a court, or a governmental agency as otherwise authorized by state or federal law.

COMMENT

General agreement exists concerning the need to maintain privacy and confidentiality in the testing process. Accordingly, there is a strong restriction against making public the results of testing. The only exceptions to the confidentiality rule are tailored narrowly to coincide with the interests of both the employee and the employer and to comply with applicable provisions of state or federal law.

The debate within the Task Force on disclosure to the employer was intense. Most members believed that disclosure to the employer should be permitted only if the results first receive the scrutiny of a Review Officer. Under the Act, the testing information is transmitted to the Review Officer who will turn over the information to the employer only if the Review Officer believes the positive confirmed result indicates illegal use of drugs

or alcohol abuse and is not persuaded as to any legitimate explanation for the result. The Review Officer may be a medical officer or other qualified person. The phrase "other qualified person" is intended to permit small businesses, which may not have the resources to hire a medical officer, to designate a person within the business to evaluate test results. The administrative agency shall promulgate instructional material sufficient to train such a designated person in making a qualified evaluation.

(d) ACCESS TO RECORDS. The tested employee or applicant shall have a right of access to all records that pertain to the testing of that individual, subject to the maintenance of confidentiality for other individuals.

COMMENT

It is vital that individuals who are tested be given all records concerning their testing. Such information may correct errors and assist in the prompt resolution of questions arising under the Act.

(e) EMPLOYEE SANCTIONS. No employee may be discharged or suspended for more than 30 calendar days on the basis of the employee receiving for the first time a positive, confirmed result to the substance abuse test. This section shall not apply to discharges or suspensions for more than 30 calendar days based on grounds independent of a test result.

COMMENT

This section gives the employer the right to transfer or suspend an employee immediately based on a single positive, confirmed substance abuse test result. An employer may not, however, terminate an employee or suspend the employee for longer than 30 calendar days for a confirmed first offense. This section merely prohibits dismissal or suspension beyond 30 days based on a positive, confirmed test alone. When an employer has grounds independent of a test result that would justify discharge or a longer suspension, this section would not apply. The employer may undertake appropriate actions based upon such independent grounds.

SECTION 5. EDUCATION AND TREATMENT PROGRAMS.

No substance abuse testing program may be developed unless the employer has taken steps to educate employees about the dangers associated with substance abuse. In addition, the employer must have the capacity to refer individuals to programs that treat, rehabilitate, or counsel those who use illegal drugs or misuse legal drugs, including alcohol. Participation in such programs may be at the employee's own expense unless otherwise provided in a collective bargaining agreement, in coverage under an employee benefit program, in the employment agreement, or by law.

COMMENT

It is appropriate to require the establishment of an education program concerning the dangers associated with substance abuse. The specific nature and limits of that program remain to be worked out in the employment setting. There has been considerable debate, however, on whether treatment programs should be required in connection with the establishment of an employment testing program. Some states require the establishment of treatment programs, but ultimately such a requirement is rejected in this Act. The data in support of the success rate of treatment programs are limited and individual employees may not need a treatment program in order to comply with the policy rationale for the Act. The employer is required to be able to refer employees to rehabilitation, treatment, or counseling programs but is not forced to make such referrals.

SECTION 6. THE PERMISSIBLE BASES FOR DRUG AND ALCOHOL TESTING.

Testing conducted pursuant to the requirements and procedures of this Act is permissible in only five situations: (a) testing for cause, (b) random testing, (c) testing after prior use, (d) post-accident testing, and (e) applicant testing.

COMMENT

Section 6 contains the substantive core of this legislation. The statute prohibits all forms of drug and alcohol testing in the workplace unless the testing falls within one of the five categories

that are set forth with specificity in section 6(a), (b), (c), (d), and (e).

(a) TESTING FOR CAUSE. An employee may be required to undergo substance abuse testing if reasonable suspicion exists to believe that such individual is currently under the influence of drugs or alcohol and such influence could adversely affect job performance or the work environment.

COMMENT

While some individuals have raised questions as to the propriety and efficacy of individualized suspicion testing, such testing is appropriate if a fair degree of individual suspicion exists to believe that the employee is presently under the influence of drugs or alcohol. Reasonable suspicion is not a requirement of absolute certainty: "sufficient probability, not certainty is the touchstone of reasonableness." "Reasonable suspicion" has been defined by the Supreme Court as a less demanding standard than probable cause.

The testing here would be restricted to those situations in which individuals appear to be under the influence and such influence could adversely affect job performance or the work environment. The Task Force members assumed that in order to avoid liability questions, employers would be encouraged to develop training programs for personnel who will supervise the gathering of information in the for-cause testing area.

(b) RANDOM TESTING. Employees, or groups of employees, may be required to undergo substance abuse testing on a random or chance basis when no individualized suspicion is present in the following situations:

COMMENT

Random or chance testing will not be allowed for all employees routinely, nor for all employees undergoing periodically scheduled physical examinations. Instead, such random or chance testing will be permitted only in the three situations presented here which can be justified as linked to employment safety and, in narrowly defined positions, workplace integrity.

- (1) *The employees occupy a category or classification whose duties are such that if any employee is impaired by drug or alcohol use, an injury to the public may occur which will involve catastrophic results.*

COMMENT

Random or chance testing would be permitted under this section even in employment classifications or categories where there is a low probability that individuals would come to work impaired by substance abuse. The testing is permitted, however, because even if the likelihood of use is not great and a causal relationship between such use and injury to the public has not been shown, the magnitude of the harm is so grievous that random testing would be appropriate. This form of random testing would be limited to extremely serious safety concerns involving workers such as nuclear power plant supervisors, commercial airline pilots, or others who directly operate or control some form of mass transportation. Some statutes refer to random testing of individuals in "safety sensitive" positions. The Task Force rejected this formulation as being overbroad because almost any job in some situations might involve safety concerns. The term "catastrophic results" is intended to convey the notion that this is to be a narrow category involving workers in extremely dangerous areas.

- (2) *The employees work in a plant, facility, or operating unit as to which there is a high probability, based on evidence of drug use or distribution in the plant, facility, or operating unit within the past 3 months, that a significant number of the employees in such a plant, facility, or operating unit have come to work impaired, and because of such impairment physical injury may occur to those employees or other employees or the public.*

COMMENT

The basis for testing here is not linked to the great magnitude of the harm as in section 6(b)(1). It is based upon evidence of significant drug use in a particular plant, facility, or operating unit. This evidence would have to be particularized and limited to the specific employer's own experience with the plant, facility

or operating unit, rather than industrywide experiences and findings.

- (3) *The employees occupy a position that involves activities directly connected to the interdiction or detection of illegal drugs or the punishment or treatment of users of illegal drugs.*

COMMENT

While concern has been expressed as to individual rights of personnel involved in the illegal drug area, a special random testing category is appropriate here due to the strong public interest in eliminating drug use in this area. An especially high public interest exists in deterring corruption and dishonesty in employment positions directly connected to unlawful drug interdiction or detection, and punishment or treatment of illegal drug users. Moreover, substance abuse by individuals in these positions is especially likely to compromise job performance. To preserve the integrity of, and enhance public confidence in, workers charged with these responsibilities, random testing is permitted.

(c) *TESTING AFTER PRIOR USE. Employees or applicants who have received a confirmed positive test result within the past year may be required to submit to testing at reasonable intervals for a period of one year following the test result or one year following their return to, or commencement of, work, whichever comes later.*

COMMENT

The employer has the right to feel confident that a worker returning to work after a positive test result is now drug-free. Similarly, an employer hiring an applicant who has earlier tested positive should be able to assume no further drug use has occurred. In this setting, therefore, testing without individual suspicion is allowed. The section establishes a one-year time limit for such tests and dictates that the testing may occur only at reasonable intervals.

(d) *TESTING AFTER AN ACCIDENT. Employees may be required to undergo substance abuse testing if the test is taken*

immediately after an accident involving serious injury and the test is made of employees whose performance the employer reasonably believes may have caused the accident.

COMMENT

Testing of employees who may have caused an accident involving serious injury is justified. Such testing is permitted, however, only when there is a possible causal connection between drug use and the accident. Train employees, for example, could not be tested after an accident caused by a bridge collapse. Similarly, only workers who may have been responsible for the accident may be tested. Thus, in a rail crash the engineer normally could be tested, but the porter normally could not be tested.

(e) APPLICANTS FOR EMPLOYMENT.

[Alternative A.]

The employer may require an applicant for initial hire to be tested, as a condition of employment, once the employer has determined that the applicant is otherwise qualified for hire.

[Alternative B.]

The employer may require an applicant for initial hire to be tested, as a condition of employment, only in those situations in which testing would be permitted under this Act if the applicant were already an employee.

COMMENT

All members of the Task Force agreed that some testing of applicants should be permitted. There was disagreement, however, over which applicants should be tested. Many of the members of the Task Force concluded that applicant testing should be allowed as a condition of employment for initial hire. Alternative A of the Act does not permit testing of any applicant who "walks in the door," but only of those applicants who are serious candidates for hire. Under Alternative A, however, any qualified applicant may be tested before the applicant acquires the legal status of an employee.

Several reasons support Alternative A. First, the applicant has no legally vested interest in privacy vis-à-vis the employer prior to the establishment of a work relationship with the employer. Second, the applicant's unilateral expectations of privacy are

diminished when the applicant is given notice, at the time of the application, of the employer's applicant testing program. A potential applicant given such notice may choose not to apply for the position at all, or to avoid using forbidden drugs prior to the application. Finally, an employer should be permitted to screen applicants for drug problems prior to undertaking the potential legal and financial disabilities attendant to substance abuse.

Many other members of the Task Force urged adoption of Alternative B. Under Alternative B, some applicants may be tested, but only if they would be subject to testing if they were already employees. For example, a job applicant for a position as a nuclear power plant operator could be tested, because such a person would be subject to random testing under section 6(b)(1) of this Act.

Several reasons support their view. First, the privacy interest of the applicant is the same as that of the employee; the invasion is no greater if a work relationship exists. Second, the notice given does not eliminate the individual's expectation of privacy, it simply establishes an inappropriate condition of employment. Finally, while the employer's economic concern may be legitimate, the social interest in protecting privacy justifies the placement of this risk on the employer as a cost of doing business.

Some members suggested a compromise position. They believed that applicant testing should be allowed only as part of a pre-employment physical examination. This alternative was regarded as less intrusive of privacy interests, because it is incident to the already intrusive physical examination. Furthermore, it permits the employer, by undertaking to pay for the costs of the examination, to reduce substantially the potential financial and legal risks associated with hiring an applicant with substance abuse problems.

Once the applicant is included in the testing program, all protections under the Act (notice, required procedures, etc.) come into force.

SECTION 7. WAIVER.

The rights and procedures provided by this statute may not be waived by contract or otherwise unless such waiver is part of a written settlement to an action brought under this Act and is agreed to and signed by the parties.

COMMENT

This Act provides important protection to individuals and reflects society's strong interest in regulating substance abuse testing in the employment setting. Hence, waiver of these rights would be inappropriate and is not allowed. The one exception is when an individual has brought a cause of action under this Act and the individual makes a knowing waiver of his or her statutory rights as part of a settlement of the litigation.

SECTION 8. REMEDIES.

(a) *CIVIL ACTIONS.* The attorney general, an employee, an applicant, or any other aggrieved person may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act. Such an action may be brought against an employer, a laboratory, a governmental agency, or any other person alleged to have violated the provisions of this Act.

COMMENT

Existing drug-testing legislation often fails to include adequate remedies. This section creates a civil action for aggrieved persons. The Act does not provide for any administrative agency clearance of a drug-testing program at the "front-end" of the implementation of the program. This section, however, permits the attorney general to bring actions to ensure compliance with, and effectuate the purposes of, the Act.

(b) *AUTHORIZED RELIEF.* A prevailing party shall be awarded declaratory or injunctive relief, or compensatory damages, as appropriate. Such relief may include, but is not limited to, employment, reinstatement, promotion, and the payment of lost wages and benefits. A governmental entity shall be subject to declaratory or injunctive relief, and when acting as an employer, shall also be liable for compensatory damages, the same as a private entity.

COMMENT

This section should be read in conjunction with section 8(c), which provides for liquidated damages in cases of knowing or

reckless violations, and with section 8(d), permitting reasonable attorneys' fees and costs for prevailing plaintiffs. This section also makes clear that considerations of sovereign immunity shall not immunize the government from liability under the Act. The government is always subject to declaratory or injunctive relief under the Act. In addition, when the government acts in its capacity as an employer, this section specifically authorizes the same relief applicable to private entities, including compensatory damages.

(c) DAMAGES FOR KNOWING OR RECKLESS VIOLATIONS. If a person knowingly or recklessly violates the provisions of this Act, damages may be awarded in the amount of two times compensatory damages.

COMMENT

To deter the knowing or reckless violation of the Act, damages of two times compensatory damages are authorized.

(d) ATTORNEYS' FEES AND COSTS. In any action brought pursuant to this Act, the court may award reasonable attorneys' fees and costs to any prevailing plaintiff. A governmental entity shall be liable for such fees and costs the same as a private person.

COMMENT

This section, permitting the award of reasonable attorneys' fees and costs to prevailing plaintiffs, reflects the strong public interest in the enforcement of the provisions of this Act. Once again, this section rejects any governmental exemption based on considerations of sovereign immunity.

(e) OTHER RIGHTS AND REMEDIES. The rights and remedies provided in this Act are in addition to, and not in lieu of, any other contractual or statutory rights and remedies accorded to employees and applicants, and are not intended to alter or affect such contractual or statutory rights and remedies. No cause of action arising from employment-related drug-testing, other than the contractual or statutory causes of action preserved in this section, and the causes of action created by this Act, may be maintained. The remedies provided in this Act shall be the exclusive remedies for violation of this Act.

COMMENT

This section deals with the difficult problem of the relationship of the rights and remedies of this Act to other legal causes of action. The Act does not preempt any other contractual or statutory causes of action. Apart from the contractual and statutory causes of action preserved in this section, however, the Act does preempt any other cause of action arising from employment-related drug-testing, including specifically the remedies provided at common law. The remedies provided in this Act are the exclusive remedies for violation of the Act.

(f) LIMITATIONS PERIOD. An action arising under this Act must be commenced within one year of the date on which the alleged violation of the Act occurred.

COMMENT

The one-year limitations period in this section is intended to incorporate by reference the general limitations principles of the jurisdiction, including principles governing such issues as discovery and notice of violations, and the tolling of limitations periods.

COMMENTS BY MEMBERS

Paul Marcus is Professor of Law and former Dean of the University of Arizona College of Law. He is a distinguished national scholar with expertise in, among other areas, criminal law. He is Chair of the Institute of Bill of Rights Law's Task Force on the Drug-Free Workplace.

Mr. Marcus received his A.B. degree, cum laude, from UCLA and his J.D. from UCLA School of Law, where he was articles editor of the *UCLA Law Review* and a member of the Order of the Coif. Mr. Marcus' publications include, among others: *Nimmer, Copyright and Other Aspects of Law Pertaining to Literary, Musical and Artistic Works* (with D. Myers and D. Nimmer; 4th ed. West Publishing, 1990), *The Law of Entrapment* (Michie & Co., 1989; Supplement, 1990), *The Prosecution and Defense of Criminal Conspiracy Cases* (Matthew Bender & Co., 1978, revised, 1985, 1989; Annual Supplements 1979-1990), *Criminal Procedure: Cases and Materials* (with J. Cook; Matthew Bender & Co., 1981, 2nd Edition, 1986, Annual Supplements 1982-1989), and, *Criminal Law: Cases and Materials* (with J. Cook; Matthew Bender & Co., 1982, 2nd Edition, 1988).

For more than a year this Task Force attempted to come to grips with the very serious questions which confront any observer analyzing the phenomenon of substance abuse testing in the workplace in the United States. The focus was on the preservation of individual privacy and dignity, on legitimate concerns of safety and liability. The Task Force attempted to balance the not always harmonious interests of employers, employees, and the public. The plan offered in this report is a thoughtful and sensitive approach to both the broad policy matters and the quite specific procedural questions which arise in connection with the debate over drug-testing.

The members of the Task Force worked diligently, sometimes agreeing with one another, often times disagreeing. The end product is, in my judgment, worthy of serious legislative consideration and debate as we look to the problems our country faces in the area of substance abuse.

Rodney A. Smolla is the Arthur B. Hanson Professor of Law and Director of the Institute of Bill of Rights Law at the College of William and Mary, Marshall-Wythe School of Law.

He is a graduate of Yale College and of the Duke Law School, and he clerked for Chief Judge Charles Clark of the United States Court of Appeals for the Fifth Circuit. His books include: *Suing the Press: Libel, the Media, and Power* (Oxford University Press, 1986), *Law of Defamation* (Clark Boardman Publishing Co., 1986), *Jerry Falwell v. Larry Flynt: The First Amendment on Trial* (St. Martin's Press, 1988), and *Constitutional Law: Structure and Rights in Our Federal System* (with Daan Braveman and William C. Banks) (Matthew Bender Pub. Col. 1991). His latest book, *Free Speech in an Open Society*, will be published in 1992 by Alfred A. Knopf.

I wear two hats in relation to this report. As the Director of the Institute of Bill of Rights Law, I was, in a sense, the "executive producer" of this enterprise, with a vested interest in coaxing the process along and encouraging the participants to keep their minds open, as this very diverse group sought consensus on the many difficult policy conflicts posed by drug-testing in the workplace. As an active participant in the Task Force, however, I was an actual actor in the drama, caught up in the give and take of intense debate. I look back at the whole process now with a great measure of pride. I am proud of the Institute, for taking on an issue such as this, and for going about this project in a manner calculated to have a positive and concrete influence on the evolution of public policy. And I am proud of my colleagues on the Task Force, for their energy, imagination, and selfless public service.

James J. Brudney is Chief Counsel and Staff Director for the United States Senate Subcommittee on Labor chaired by Senator Howard Metzenbaum. He is also an Adjunct Professor of Law at Georgetown University Law Center in Washington, D.C.

Mr. Brudney received his B.A. degree, summa cum laude, from Amherst College, graduating Phi Beta Kappa, and his J.D. degree from Yale Law School, where he was an editor of the *Yale Law Journal*. He also has a degree in philosophy and politics from Oxford University. After law school, Mr. Brudney served as a law clerk to United States District Judge Gerhard A. Gesell and to United States Supreme Court Justice Harry A. Blackmun. After clerking for Justice Blackmun, he spent four years at the firm of Bredhoff & Kaiser in Washington, D.C. and has been with the Senate Subcommittee on Labor since 1985.

With one notable exception, I believe that the Task Force has done a reasonable job in a difficult area: balancing the interests of

employers and the needs of the public against the privacy rights of individual Americans.

The exception involves the testing of applicants. I am prepared to allow applicant testing on the same basis as we permit testing of employees (e.g., for cause, after prior use, or for positions of extreme public safety sensitivity). But I do not believe we should allow testing of applicants under a lesser standard, and certainly not in the absence of any standard at all.

One hardly needs the Report to appreciate that being tested for drugs constitutes a significant invasion of privacy. Chemical analysis of urine may disclose a wide range of private medical facts about an individual. Moreover, the process of collecting the sample generally involves close monitoring of a highly personal act.

This invasion of privacy is as serious for an individual who applies for a job as it is for one who already holds the position. Absent evidence of prior use or individualized suspicion, there simply is no reason to allow testing of men and women just because they aspire to hold jobs as office secretaries, gravediggers, architects, or computer technicians. Once the market produces less expensive screening methods, allowing unrestricted applicant testing would invite an assault on the privacy of virtually every adult in the country. Such a step is both drastic and unwarranted.

Craig M. Cornish practices law with the firm of Cornish & Dell'Olio in Colorado Springs, Colorado. His practice consists mainly of civil rights and employment litigation. Mr. Cornish is the author of a book on employee drug-testing, *Drugs and Alcohol in the Workplace: Testing and Privacy*, and is listed in the latest edition of Best Lawyers in America under the category of Employment Law - Individual.

Mr. Cornish is a graduate of Creighton University and of Washburn University Law School. He is a member of the bars of the State of Alaska, Colorado, and Kansas and of the District of Columbia. He currently serves as plaintiff co-chair of the American Bar Associations's Employee Privacy and Collateral Torts Sub-Committee of the Employee Rights and Responsibilities Committee.

I believe mass drug-testing will be effective in reducing illegal drug use among persons who are involved in the workforce, and thus, will make a significant contribution to the War on Drugs. However, nothing is free. The means used in employment drug-testing will be costly and may transform society in several ways.

First, mass drug-testing has already resulted in the United States Supreme Court's sanction of systematic preventive searches—searches aimed at groups and intended primarily to deter wrongful behavior. Preventive searches essentially make an end-run around the Fourth Amendment because they do not require a search warrant, probable cause or even individualized suspicion of wrongdoing. By their systematic nature, the role of a neutral magistrate is displaced by a legislature, administrative agency or human relations department.

Second, mass drug-testing has resulted in the systematic biochemical search of millions of individuals for the purpose of monitoring and regulating off-duty behavior. Our acceptance of mass biochemical testing for illegal drugs will pave the way for new biochemical searches to regulate employee health and to discriminate against persons with certain genetic traits.

Third, mass drug-testing has shown employers how they can learn more about individuals through systematic toxicological testing, such as whether women are pregnant and what prescription medications employees are taking, which in turn discloses what illnesses or diseases they may have hidden from employers. This will necessarily increase employers' appetites for more biochemical information about applicants and employees in order to make more group-based predictive judgments in screening employees.

Fourth, the efficacy of economic sanctions to induce abstinence from illegal drug use will spawn the conditioning of other basic needs, such as education, housing, licenses, or even medical care, upon conformity to a behavioral profile.

Fifth, by enlisting the private sector in regulating off-duty behavior of applicants and employees, the government's model of privatizing government surveillance and punishment functions will partially succeed in evading constitutional restraints on the coercive powers of society.

Sixth, as mass drug-testing is presently conducted, it has made a mockery of the presumption of innocence and created a suspect in every individual who is not willing to submit to a biochemical test of his or her blood or urine.

Finally, by submitting millions of Americans to systematic biochemical surveillance of their blood or urine, our level of expectations of individual privacy will greatly diminish, and we will, thereby, surrender a considerable amount of autonomy, dignity and sovereignty. We have allowed the government and employers to transcend an invisible shield which stood at the edge of our bodies. This line is now crumbling like the Berlin Wall. John Stuart Mill's

aphorism, "Over himself, over his own body and mind, the individual is sovereign," no longer sounds relevant.

Michael R. Gottfredson is Professor of Management and Policy and of Psychology, and Head of the Department of Management and Policy at the University of Arizona. His areas of expertise include criminology, delinquency, crime and public policy, statistics, and the criminal justice system.

Dr. Gottfredson received an A.B. from the University of California at Davis and an M.A. and a Ph.D. from the State University of New York at Albany. He is the author of numerous articles and books on criminology and the criminal justice system, including *A General Theory of Crime* (with Travis Hirschi; Stanford University Press, 1990), *Decisionmaking in Criminal Justice: Toward the Rational Exercise of Discretion* (with Don Gottfredson; revised edition, New York: Plenum, 1988), and *Positive Criminology* (with Hirschi; Newbury Park: Sage, 1985). He has served as Director of the Criminal Justice Center in Albany, New York.

The American public is greatly concerned about illegal drug use, a concern that has generated enormous expenditures for law enforcement, has greatly increased rates of imprisonment, and has enhanced federal involvement in state and local criminal justice systems. Drug-testing in the workplace is, of course, another manifestation of this public concern. But unlike the expanded efforts to combat drugs through the criminal justice system, with its established rules of procedure, the effort to test bodily fluids of employees and job applicants seeks to use private citizens and their businesses to reduce the incidence of drug use by threatening the loss of employment and reputation. The public popularity of these programs, and the zeal with which many sponsors of the programs advocate them, caution us to look hard at the deprivations that they may cause citizens and to design strong protections against unwarranted intrusions. In my view, such programs are irrelevant to the fight against illegal drug use, are financially unwise for most businesses, and are an especially unseemly invasion of personal privacy. I believe that the model statute is an exceptionally well-crafted document that balances such concerns against the reality of widespread, and largely unregulated, workplace drug-testing.

R. Claire Guthrie is Deputy Attorney General of the Commonwealth of Virginia. She is a graduate of Michigan State University and of the University of Virginia School of Law.

Prior to assuming her present position, Ms. Guthrie was in private practice in Washington, D.C., was University Counsel and Assistant Secretary of Princeton University, and was a staff attorney for the Civil Rights Division of the Office of General Counsel with the U.S. Department of Health, Education and Welfare. She also served as interim president of Chatham College in Pittsburgh, Pennsylvania.

The Task Force's ultimate recommendations reflect, in part, the public's schizophrenia about the subject of drug-testing. While the Task Force recommendations restrict testing to situations in which performance in the workplace would be affected, it sets up a system in which employers would be prohibited from testing workers for many substances, including alcohol, which while not illegal can adversely affect performance. Legislatures, not employers, are left with the task of defining which substances may be the subject of testing. Prescription medications and alcohol may well be left off the statutory list.

The consequence of this is that the drug-testing program that an employer may be permitted to implement will address only "street drugs." Such a program, in my view, ultimately becomes no more than an extension of law enforcement, an outcome I think a majority of this Task Force thought it was trying to avoid. Moreover, the limitation of random testing to narrowly defined safety and law enforcement situations means all routine testing of professional athletes for performance enhancing or detracting drugs would be barred. Such testing is obviously work-related. Its prohibition defies common sense.

The fundamental questions here are "is drug-testing justified and, if so, why?" The Task Force said yes, but like the public, it couldn't really agree why.

Jonathan V. Holtzman is Special Assistant to the City Attorney for the City and County of San Francisco and, as such, serves as the chief labor and employment attorney for the city. In that capacity, Mr. Holtzman has been instrumental in fashioning the city's drug-related policies.

Mr. Holtzman received his B.A. degree from Haverford College, where he was a member of Phi Beta Kappa, and his J.D. from Stanford Law School. After law school, he clerked for Justice Otto Kaus of the California Supreme Court and practiced law in the San Francisco area, with a focus on employment litigation.

The Task Force Report is the product of a challenging, sometimes animated debate. I am delighted with the result. The Report recognizes the compelling nature of employees' privacy interests, and that drug testing constitutes a significant invasion of privacy. The Task Force's limitations on random testing and procedural rules are well considered, strike a fair balance, and should serve as a model for future legislation.

I remain troubled in two significant areas. First, while the Report correctly recognizes that safety concerns can be compelling, it is less clear that such compelling concerns actually motivate employers to use random testing. Many employers claim to base their testing on safety concerns, but do not require periodic physical examinations, do not test for alcohol or legal drug use, and do not examine their equipment nearly as closely as their employees. If employees are required to leave their privacy rights at the workplace door, they are entitled to receive something of equal value on the other side—an ultra-safe workplace. I would not permit random or across-the-board testing unless an employer, based on the totality of circumstances, could demonstrate a comprehensive scheme designed to prevent life-threatening accidents.

Second, I fail to see any justification for the alternative of permitting across-the-board testing of job applicants while limiting the testing of incumbent employees.

The public will to battle drugs is strong. But the precedent of using the workplace to foster the goals of law enforcement is dangerous. In bending to the public will and establishing this precedent, we can only hope that it will not become a road map for other forms of biochemical surveillance by employers.

Dr. Donald B. Louria is Chairman of Preventive Medicine and Community Health at the University of Medicine and Dentistry of New Jersey-New Jersey Medical School. He is one of the leading medical scholars and public health experts in the United States.

Dr. Louria is a graduate of Harvard University and of the Harvard Medical School. He has written extensively on matters relating to drug and alcohol abuse, including three books on the subject: *Nightmare Drugs* (in association with *This Week Magazine*; Pocket Books, Inc. New York, 1966), *The Drug Scene* (McGraw-Hill Book Co., New York, 1968), and *Overcoming Drugs: A Program for Action* (McGraw-Hill Book Co., New York, 1971).

At about the half-way point of our first meeting there seemed to be no possibility that a proposal for a model bill could be formulated by 16 people from such divergent backgrounds, with such different perceptions about the problem of workplace drug abuse. By the end of the first meeting we had stripped away the arguments about the testing that on careful analysis could not be sustained. Thereafter, it became clear that the proposed bill would have to satisfy those on the one hand who felt that the paramount issues related to employer rights to a drug-free workplace as well as society's obligatory firm response to the drug abuse epidemic; and on the other hand those whose concerns related primarily to protection of the rights to privacy of the employee. The latter group contained those who visualized drug-testing as possibly the vanguard of a whole new series of biochemical and genetic tests that will be developed over a period of decades that, if misused, could undercut severely the individual freedoms that are the bedrock of a democratic society.

Under the skillful prodding of Rodney Smolla and Paul Marcus, I believe we have formulated a very good bill that will be helpful in society's battle against drug abuse, recognize the rights of employers, reduce the danger to the public and the working population from workplace accidents due to drug abuse, and yet, simultaneously, limit the testing so as to protect individual workers against inordinately intrusive examinations. This careful balancing act that helps a given workplace problem and still protects the individual should serve our society well as a prototype when, in the future, technological advances make it possible by body fluid analysis to determine in great detail and to place in computer banks the biochemical and genetic makeup of any individual.

Judge Prentice H. Marshall is Senior Judge of the United States District Court for the Northern District of Illinois. Since his appointment in 1973, Judge Marshall has had an illustrious career on the federal bench.

He received his undergraduate and law degrees from the University of Illinois. Prior to his appointment to the bench, Judge Marshall was a distinguished lawyer in Chicago and a professor of law at the University of Illinois, the University of Chicago, and Harvard University.

All wars produce more collateral casualties than combatant casualties. The war on drugs is no exception. Principal among the casualties has been the loss of personal dignity. From childhood we

are taught that urination is an act which should be performed in private. As a consequence of the war on drugs, huge numbers of persons are told they must urinate in the presence of a stranger in order to obtain or retain a job.

The Fourth Amendment provides an ever dwindling modicum of protection to the government applicant/employee. But the private sector applicant/employee enjoys no protection under the federal Constitution or legislation and very little under the constitutions and laws of the several states. Organized labor has made a none too successful effort through collective bargaining contracts but they do not reach the job applicant and provide no protection to those millions of private sector applicants/employees who do not work in union affiliated employment.

This proposed Act will, if adopted and enforced, staunch the flow of collateral casualties. Furthermore, it recognizes that the causes of the use of mood altering drugs are the root of the evil and requires that we do something about them.

Alan C. Page is Assistant Attorney General for the State of Minnesota assigned to the Employment Law Division. In that capacity, he has primary responsibility for providing client advice interpreting the State's statute on drug-testing.

Mr. Page is a graduate of the University of Notre Dame and of the University of Minnesota Law School. Prior to joining the Minnesota Attorney General's staff, he was in private practice. Mr. Page also had an outstanding fifteen-year career as a professional football player with both the Minnesota Vikings and the Chicago Bears. He served as a players' representative and as a member of the Executive Committee for the National Football League Player's Association. In 1971 he became the first defensive player in the history of the NFL to receive the Most Valuable Player Award, and he was inducted into the Pro Football Hall of Fame in 1988.

Over the past ten years, workplace drug and alcohol testing has become a common weapon in the war on drugs. Such testing has taken on the characteristics of a giant steamroller picking up momentum that flattens everything in its course whether necessary or not. I am philosophically opposed to workplace drug and alcohol testing. That opposition is rooted in the belief that simply because an individual seeks to obtain or maintain employment, the individual should not be required to choose between a loss of his or her right to privacy and the opportunity to work. A person should not

be required to share the content of his or her urine with strangers. My opposition is also based on the belief that testing for drugs and alcohol in the workplace will not result in victory in the "war on drugs." The substance abuse problems that we have as a society are far too complex to be solved by simple solutions. Especially where the simple solutions are not necessarily directed at the source of the problems. Finally, one must ask the question: where are the limits on workplace biochemical testing? Today the issue is workplace drug and alcohol testing. Tomorrow it will be testing for communicable diseases and genetic defects. These questions raise the issue of where an employer's legitimate interests lie.

Even though I am philosophically opposed to workplace drug and alcohol testing, I have concluded that legislation regulating such testing is absolutely necessary. It is necessary because without such legislation the legitimate interests of employees and job applicants relating to privacy, confidentiality, reliability, and fairness would be left unprotected from the drug-testing steamroller. The fact is that in both the public and private sectors workplace drug and alcohol testing is here to stay. The U.S. Supreme Court has made clear that under certain circumstances drug and alcohol testing is permissible in the public sector. There is no reason to believe that the Court would treat private sector workplace biochemical testing any differently. Currently, the only protection available to most employees is to be found in common law tort and contract law. The protections afforded by the common law are not adequate to protect employee rights in this instance. Thus, legislation which protects the legitimate interests of employees and job applicants is necessary. The Substance Abuse Testing Act as proposed by the Task Force goes a long way towards providing that protection.

Jesse Philips, Founder and Chairman Emeritus of Philips Industries, Inc., is a pioneer in the development of a national model antidrug program for industry.

Mr. Philips was appointed by President Reagan as a member of the White House Conference for a Drug Free America. He was Chairman of the "Drugs in the Workplace" section of the Conference. He has briefed President Bush on the demand side of drug policy. He has appeared on The Today Show and the MacNeil-Lehrer Report discussing his anti-drug program. His remarks have been circulated in over 200 newspapers. He has written on this subject for the *Wall Street Journal* and Random House Books. The American Management Association and others

have reprinted and distributed the Philips Industries model program.

I was the only member from business and industry on the committee.

Unfortunately, the majority of the committee had little first hand knowledge of or experience with the problems as they actually exist in the many diverse work environments. The original thrust of the committee was to protect our perceived civil liberties at almost any cost.

A review of the proposed law might give one the impression that the thrust of the proposed law is not to encourage the elimination of the use of drugs nor to encourage drug-testing as a proven effective means of helping to eliminate the use of drugs in the workplace.

I hope that this law will not discourage the small scale employer from adopting a drug abuse program, which to be effective, has to encompass drug-testing.

This law as a practical matter prohibits prehiring tests. Applicants may only be tested after they are hired and have the rights of an employee. I strongly oppose this section.

Also, the penalties proposed in the law on the employer are much too harsh. The employee, however, is subject to a maximum of 30 days suspension if he tests positive. There is no safeguard provision that he is clean before he may return to the workplace.

The committee worked very hard, diligently, sincerely, and in good faith to secure a working compromise. I believe the final draft, although flawed in a few aspects, is a good document which can be a helpful tool in forging national drug-testing legislation.

David Rabban is the Vinson and Elkins Professor of Law at the University of Texas School of Law. He is an expert in labor law and in constitutional history.

Mr. Rabban received his B.A., magna cum laude, from Wesleyan University and his J.D. from Stanford Law School, where he served as articles editor of the *Stanford Law Review*. Prior to joining the faculty of the University of Texas, Mr. Rabban was Counsel of the American Association of University Professors and was in private practice, specializing in labor law, in New York City.

The members of the Task Force, representing a broad range of backgrounds and views, worked effectively together in addressing

the complicated and important issues raised by testing for substance abuse in the workplace. The Task Force reached a remarkable degree of consensus regarding many controversial issues. Like many members of the Task Force, I compromised some of my own positions to reach this consensus. With one significant exception, section 6(e) dealing with testing applicants for employment, I believe that the statute proposed by the Task Force is a fair and pragmatic compromise that can serve as an excellent model for legislation.

I strenuously oppose testing all job applicants as a condition of employment, as section 6(e) provides. Indeed, I believe that this provision is inconsistent with the fundamental justification for the entire statute. As the introduction emphasizes, the Task Force agreed that "drug-testing implicated privacy interests of the highest order, and therefore testing should be regulated to preserve individual privacy and dignity." The Task Force thus concluded that "testing in the workplace may only be justified by concerns relevant to the workplace, such as the safety of workers or the public." Interests in privacy and dignity, in my opinion, do not depend on whether an individual is an employee or an applicant. The workplace concerns that have prompted the Task Force to permit even random testing in a number of situations apply equally to employees and to potential employees. I find no workplace concern that justifies testing applicants for jobs in which existing employees may not be tested.

David M. Silberman is Associate General Counsel of the AFL-CIO. Prior to assuming his current position, Mr. Silberman was a partner with the law firm of Bredhoff & Kaiser in Washington, D.C. and an adjunct professor of law at George Washington University School of Law.

He received his B.A., summa cum laude, from Brandeis University and his J.D., magna cum laude, from Harvard University. After law school, Mr. Silberman clerked for Chief Judge David Bazelon of the United States Court of Appeals for the District of Columbia and for Justice Thurgood Marshall of the United States Supreme Court.

It is with a great deal of ambivalence that I join in supporting the provisions of the model law which authorize drug-testing of incumbent employees without cause.

The premise of the "non-cause" provisions is that a positive test result identifies a dangerous or unreliable employee. That premise is fundamentally flawed.

Marijuana users account for upwards of 90 percent of all positive drug test results; that is because, due to a fluke of biology, marijuana—unlike alcohol—leaves an inactive by-product that remains in the urine for days or even weeks after the marijuana was ingested. Thus, the very most that a positive test for marijuana signifies—assuming that the test result is a true positive and not the result of human or mechanical error—is that the employee in question is a marijuana user who has ingested marijuana within some prior period of time. That fact is no more probative of an individual's fitness for employment than the fact that an individual is an "alcohol drinker"—a description which fits large numbers of persons in the workforce today. It is only because of our social mores—mores which, I suspect, reflect more than a small amount of anti-youth, anti-black bias—that we view marijuana use so differently than alcohol use.

For all these reasons I would have much preferred a model statute, which like the law of Vermont, prohibits testing without cause. I join in supporting this model act, however, because in the current climate I doubt that many states, or the federal government, would agree to such a prohibition, and because the model statute at least places strict limits on random testing and provides important protection to employees.

In the latter regard, I believe the model bill would be greatly strengthened if it: (i) required advance notice of random testing so as to lessen the en terrorem effect of such tests (ii) excused from random testing employees who had completed a specified level of service and who therefore were beyond the years of drug use; and (iii) permitted random testing only where attempts to establish individualized suspicion were impractical or unavailing. I regret that I was unable to persuade my colleagues to include such additional protections in the model law.

Margaret P. Spencer is a Professor of Law at the College of William and Mary, Marshall-Wythe School of Law, and Senior Administrative Law Judge of the Department of Medical Assistance Services of the Commonwealth of Virginia.

Ms. Spencer is a graduate of Howard University and of the University of Virginia School of Law. Prior to joining the faculty at William and Mary, she was Assistant Attorney General for the Commonwealth of Virginia, a Senior Appellate Attorney with the Civil Rights Division of the U.S. Department of Justice and an Assistant U.S. Attorney for the District of Columbia, and was in private law practice in Richmond, Virginia.

As Rod Smolla's introduction suggests, the need for a "level-headed and even-handed" drug testing statute is a reality, rather than a possibility. This Substance Abuse Testing Act is such a statute. It represents a much needed balance between the obvious invasion of privacy which accompanies substance abuse testing and the equally obvious need to detect and prevent drug and alcohol use in the workplace. More importantly, this Act requires fair procedures for regulating substance abuse tests, and forces employers to recognize that employees who use drugs and alcohol need treatment, counseling and rehabilitation.

There will be opposition to this statute. Many of us are concerned about false positive test results and the adverse impact of "blanket" applicant testing. However, experience has taught us that the "war on drugs" must be fought from within—by the users or potential users. To the extent that this statute will have the residual effect of curbing drug and alcohol use, its benefits outweigh any detriments. The statute is a positive step in the right direction.

Carlton E. Turner is President and Chief Executive Officer of Princeton Diagnostic Laboratories of America (PDLA). Prior to joining PDLA in 1987, Dr. Turner served for five and a half years as President Reagan's principal advisor on domestic and international drug issues. He oversaw the drafting of the Executive Order (12564) requiring drug-testing for federal employees, and was instrumental in the development of Nancy Reagan's "Crusade for a Drug Free America".

Dr. Turner was also responsible for developing and implementing the military's successful drug-testing program which reduced illegal drug use among military personnel by 67 percent in two years. Dr. Turner also served as Research Professor and Director of the Research Institute of Pharmaceutical Sciences School of Pharmacy at the University of Mississippi. He has earned an international reputation as a scientist for his expertise in drug-related matters and has published over 125 scientific papers on drug-abuse subjects and policy issues.

This diverse group was heavily weighted toward the legal profession. Thus, originally, concepts of drug-testing were from published articles and not based on first-hand knowledge of actual state of the art practices. Through much debate this was overcome and a viable document was drafted, revised and published. While I cannot agree with every sentence in the document, I can, however, accept

the honest dialogue and approach that allowed a philosophically divergent group to reach a consensus on most issues.

In my opinion, if this draft legislation is accepted by legislative bodies, it will not put an unfair burden on employers or employees but rather will protect individual rights, maintain confidentiality, and give employers a mechanism to ensure a drug-free workplace.

Leroy S. Zimmerman, now in private practice in Pennsylvania with the firm of Eckert, Seamans, Cherin & Mellott, is a former Attorney General of the Commonwealth of Pennsylvania and was, prior to that, chief prosecutor for Dauphin County, Pennsylvania.

Mr. Zimmerman is a graduate of Villanova University and of the Dickinson School of Law. He serves as a member of the Board of Trustees of the Dickinson School of Law. He has been an active participant in the debate over drug-testing and has substantial expertise from a law enforcement perspective. He is a past chairman of the Criminal Law Committee of the National Association of Attorneys General and the Executive Working Group comprised of federal, state and local prosecutors throughout the United States.

Mr. Zimmerman served as a member of the White House Conference for a Drug Free America during the Reagan Administration.

The creation of this Task Force represents the best evidence that the discussion and debate concerning substance abuse in our country has properly shifted from an emphasis on "supply side" solutions to "demand side" realities.

As the District Attorney of Dauphin County, Pennsylvania, during the early 1970's, I found that parent, business, service and community groups were reluctant to acknowledge that drugs were a problem in their communities. Most people were convinced that drugs were an inner city problem for law enforcement to solve. Today, our educators, labor and business leaders are not just discussing the impact of substance abuse on our children, our workforce and the corporate bottom line, but are working together and sharing the responsibility for developing solutions to this problem.

I believe that drug-testing is an important component of any comprehensive attack on substance abuse. It has become the centerpiece in the continuing effort to find a creative, effective and fair way to make our workplaces safe, secure and more productive. In

reality our workplaces are our communities. The people in those communities expect leadership on the tough issues like substance abuse. That leadership must come from all disciplines in our society.

The Report of this Task Force combines the interdisciplinary expertise and thinking of individuals who have been involved in leadership roles in this important national debate.