REPORT OF THE
DEPARTMENT OF LABOR AND INDUSTRY ON

DRUG TESTING IN THE WORKPLACE

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

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PREFACE

The **Virginia Department of Labor and Industry** (DLI) under the direction of Carol A. Amato, Commissioner, was requested by the 1993 General Assembly through House Joint Resolution 534 (HJR 534) to study drug testing in the workplace.

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The objective of this study was to obtain the most current and reliable data on drug testing in the workplace and provide recommendations based on an analysis of this information that will serve to assist policy makers in their decision making on workplace drug testing.

EXECUTIVE SUMMARY

In carrying out the study requested by the General Assembly in House Joint Resolution 534, the Department of Labor and Industry reviewed the relevant literature, collaborated with an Advisory Committee, collected information from other states, conducted a Virginia survey of employers, and sought public participation through public meetings, written comments and an ad hoc Focus Group. Throughout this study, the Department sought to obtain the most accurate data available for a comprehensive report on the practice of drug testing in the workplace.

PREVALENCE OF DRUG USE IN THE WORKPLACE

Trends in the use of illicit drugs by the general population 18 years of age or older typically show peaks in the late 1970s and early to mid 1980s. After this, the rates of use fall off significantly. Three major types of illicit drug use which may affect employers are marijuana, psychotherapeutics, and cocaine.

The National Institute on Drug Abuse (NIDA) annual household surveys on drug abuse provide the best estimates for information on drug use by employed individuals. Age appears to be the major predictor of drug use by employed people. Those employed individuals from the ages of 18 through 34 have higher levels of drug use than employed people 35 years or older.

Alcohol has significantly higher percentages of users than any of the illicit drugs. The trend in alcohol use had been declining from the late 1970s to the mid 1980s, however, from 1988 through 1991, levels of use appear to be remaining constant.

TESTING METHODS AND ACCURACY

Analysis of different fluids and tissues can provide a wide range of information on the extent of drug use depending on the sample availability, analytical sensitivity and specificity, and the nature of the drug itself. **Blood** concentrations of many drugs potentially provide insight into the degree of therapeutic effectiveness or intoxication of the individual. Blood has its limitations for drug testing purposes and requires more sensitive, time consuming and expensive techniques. Drug detection in **hair** is said to be from months to years depending on length and type of hair. It can be collected under close supervision, is easy to handle, store and mail. Toxicologists are not in support of this procedure and cite some studies which indicate environmental exposure can contaminate the hair. **Saliva** collection is non-invasive but many drugs are retained for shorter periods of time than other samples (urine). The sample volume may be less than optimal for drug testing. For decades **urine** has been the sample of choice for most drug detection programs. Sample collection is non-invasive, the volume is more than sufficient

or longer. Reduced costs associated with urine testing can be attributable to high drug concentrations together with large sample volummes. Testing urine for drugs or metabolites does not relate to their effect on an individual. High urinary drug concentrations do not mean that there is a high degree of impairment. Certain foods or legitimate medications can cause a misinterpretation of "positive" results. Use of a Medical Review Officer (MRO) in the urine screening program helps minimize misinterpretations.

Five analytical procedures are most commonly used for urine testing. Three **Immunoassay** methods are easily automated, relatively inexpensive and quick. Each drug or drug class must be tested separately and each positive must be independently confirmed because of the potential for cross-reactivity. **Thin-Layer Chromatograph** (TLC) and **Gas Chromatography/Mass Spectrometry** (GC/MS) are the two chromatographic methods available for drug testing. TLC requires multiple steps in processing as well as skills necessary for interpreting the results. Costs tend to be higher and the sensitivity and specificity of drug detection tends to be poorer. GC/MS is considered the most sensitive and accurate of the urinalysis technologies and is the standard against which results from the four others are compared. GC/MS is recognized by the drug testing industry as the preferred confirmatory technology for detecting drugs in urine and is the preferable method recommended by the NIDA guidelines. Confirmation by GC/MS provides the best protection against future legal challenges. Equipment and personnel costs are high, consequently, GC/MS is usually used only for follow-up, confirmatory testing where preliminary results were putatively positive.

Alcohol is the most widely used and abused drug in our society. Alcohol may persist in urine beyond the time that effects are felt. Blood, either directly or indirectly via breath, is the preferred sample for measuring impairment. Defining the blood alcohol concentration (BAC) where impairment is presumed may vary with the intent of the program and the task at issue. Some states define impairment for under age drivers at a BAC of 0.02%; whereas, certain occupations falling under federal regulations must abide by a limit of 0.04%.

REHABILITATION

Individual employers have the option of providing an employee assistance program (EAP) or some other type of rehabilitation. The National Institute on Drug Abuse (NIDA) recommends that an EAP be part of the back-to-work procedures in conjunction with the use of a Medical Review Officer, following a positive test result. EAPs can also provide needed education and training on types and effects of drugs, symptoms of drug use and it's impact on performance. Cost of rehabilitation depends on whether the employer has an in-house EAP or "contracts out" for services. Employees may be required to pay for rehabilitation services if the employer does not offer a health benefits package.

FEDERAL REQUIREMENTS

Federal agencies and the courts have taken the lead in employee drug testing. Since 1985, numerous federal agencies have promulgated drug testing regulations. The Federal Railroad Administration was the first to mandate blood and urine testing of its employees involved in train accidents. An Executive Order, "Drug-Free Federal Workplace," prohibits use of illegal drugs by federal employees, requires executive agencies to implement mandatory drug testing for employees in sensitive positions, and permits individualized testing on reasonable suspicion, following accidents or investigations, or as part of a drug rehabilitation program. The Federal Highway Administration requires interstate motor carriers to conduct pre-employment testing, reasonable cause testing, biennial testing, and annual mandatory random testing of 50 percent of drivers. Department of Defense rules apply to contracts involving access to classified information and other contracts concerning issues of national security, health, or safety. The Drug-Free Workplace Act requires all federal contractors and grantees to certify that they will provide a drug-free workplace. Under the U. S. Department of Transportation regulations, six agencies (Coast Guard, Federal Aviation Administration, Federal Highway Safety Administration, Federal Railroad Administration, Research and Special Projects Administration) are required to test employees whose jobs have an impact on public safety or security. Subsequent Congressional action included all state transportation departments. The Nuclear Regulatory Commission issued regulations to operators of nuclear power reactors and the Civil Space Employee Testing Act requires alcohol and drug testing of NASA employees and contractors whose duties include responsibility for safety-sensitive, security, or national security functions.

STATE BY STATE ANALYSIS

Among the 50 states, nine states have a Drug-Free Workplace Act/Policy primarily applicable to state government employees and/or state contractors. Governors in 12 states have issued Executive Orders in support of achieving drug-free workplaces which are similar to the Federal Executive Order. Seventeen states have laws specifically for private sector employers, many which only apply if the employer elects to initiate a drug testing program. And, 19 states have enacted legislation regulating drug abuse in public sector workplaces. Three states, including the Commonwealth of Virginia, have promulgated administrative rules or regulations that apply only to state employees. Nine states have not adopted any statewide policy, regulation or statute regarding drug-free workplaces or drug testing in the workplace.

LEGAL ISSUES AND COURT CASES

Constitutional restrictions and many statutory limitations do not apply to the private workforce. There is relatively little in the way of reported case authority dealing with claims made by private employees for workplace testing. Private employees must allege specific claims under previously existing enactments, common law causes of action, or employment agreements and may include defamation, invasion of privacy, and breach of contract. For public employees, two U. S. Supreme Court cases, *Skinner v. Railway Executives*

Association, 489 U.S. 602 and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, demonstrate that the Court will uphold some testing, at least in certain circumstances. In both federal and state courts, random drug testing of police officers, transportation workers, and correction officers generally have been affirmed. Recent court cases point to the difficult issues being raised today in drug testing litigation.

SURVEY OF VIRGINIA EMPLOYERS

The 1993 Virginia Employer's Survey reveal that most of the drug testing programs in the Commonwealth are conducted by small firms. Small size (1-99 employees) establishments in Virginia comprise 96.9% of all businesses. Fewer than ten percent of the state's businesses conduct drug testing. Twenty percent of construction industry businesses and twenty percent of wholesale businesses have drug testing programs; the Service Sector is third at 18%. Almost one-half of the firms conducting drug testing are doing so because of federal mandates, with Retail Trade and Transportation Sectors leading this list. Random drug testing is conducted by most of the firms under federal mandates; while less than a fourth of the non-mandated firms conduct random testing. Over three-quarters of the mandated and non-mandated firms conduct pre-employment testing. Most Virginia firms that have programs are testing for controlled substances; but fewer than half are testing for alcohol. Just over half of the firms indicate that they dismiss an employee who tests positive; however, most companies will assist an employee who voluntarily admits to having a substance abuse problem. Use of National Institute on Drug Abuse (NIDA) certified laboratories was reported by 95% of the respondent firms. Only about a third of all respondents (both testing and non-testing firms) believe that drug abuse, including alcohol, is a serious or very serious problem; and approximately another third felt that it was not a problem or not a very serious problem.

This survey was necessitated because the only available information was national data which did not include Virginia. The survey sample was selected to represent the state's business community, excluding federal employers. The survey achieved a 41% response rate.

EMPLOYERS AND EMPLOYEES

On behalf of employers, the Virginia Chamber of Commerce has provided an employer's perspective on drug testing in the workplace. The Virginia AFL-CIO and Virginia Governmental Employees Association have furnished their concerns on behalf of employees.

RECOMMENDATIONS

This report recommends that the state acknowledge the federal requirements as its policy and that the state's role be limited to education and information. In this capacity, it is recommended that the state provide for a central point of contract within existing resources

for employers and/or employees interested in achieving a drug free workplace. Among its possible duties are:

Establish a public-private partnership to develop a public awareness campaign aimed at decreasing the abuses of alcohol in the workplace.

Conduct a study to define the blood alcohol concentrations (BAC) where impairment is presumed for various tasks associated with the work environment. The study should also include effective testing methods and related costs.

Maintain up-to-date information on the various federal government drug testing mandates as well as congressional action affecting the state, its business community and employees.

Develop statewide educational conferences to assist businesses, especially small businesses, who are interested in establishing drug free workplaces. When necessary, conduct follow-up sessions on specific issues, such as EAPs, etc.

Follow-up on Virginia survey of employers with a survey of Virginia's employees.

I. INTRODUCTION

In January, 1990, the Institute of Bill of Rights Law assembled a Task Force of sixteen members to examine the issues surrounding drug-testing in the workplace. These members included leaders from the corporate world, organized labor, government, public health, higher education, criminology, the judiciary, and the bar. Out of their efforts, a report was prepared and published in the Fall, 1991 issue of the *William and Mary Law Review.* Among other recommendations, a model Substance Abuse Testing Act was developed for regulating substance abuse testing in the workplace.

During the 1992 Virginia General Assembly, Delegate George W. Grayson introduced House Bill Number 845 creating the Substance Abuse Testing Act. The House Committee on Labor and Commerce carried the legislation over to the 1993 Session. On January 18, 1993, at the request of Delegate Grayson, the House Committee on Labor and Commerce struck HB 845 from their docket.

Subsequently, the General Assembly agreed to House Joint Resolution 534 sponsored by Delegate Grayson directing the Virginia Department of Labor and Industry to study drug testing in the workplace.

The Department of Labor and Industry developed an action plan for carrying out the study which encouraged input from three significant groups: A Focus Group of labor and management; an Advisory Committee which assisted in developing this report; and the general public.

This report is presented in three sections: this Introduction, Findings, and Conclusions and Recommendations. The Findings section focuses on the extent of drug abuse in the workplace, testing methods, rehabilitation efforts, and federal requirements. A state-by-state analysis of drug testing laws, policies, and regulations is included, as well as a discussion of legal issues, and characteristics of drug testing in Virginia workplaces. It concludes with units on the employer and employee perspectives.

A. FOCUS GROUP

On May 25, 1993, Commissioner Carol Amato convened a meeting of labor and management representatives to hear their concerns on drug testing in the workplace. Two meetings were scheduled, one in the morning and another in the afternoon, at the offices of the Department of Labor and Industry. A total of 25 individuals attended one of the two sessions, representing 26 employer and employee organizations. Attendees expressed their concerns. These concerns included the need to recognize that drug testing was either a necessity or at least an important part of a drug-free workplace. Other concerns were over what happens to those employees who test positive; how to combat false positives, increase testing accuracy; that there could be unnecessary legislation that could inhibit companies from having any testing programs; and whether the need to drug test in the workplace is a product

of hysteria over drugs in society or vital to better business.

Written comments were also received from various individuals that attended the focus group meetings and are contained in Appendix B.

B. ADVISORY COMMITTEE

House Joint Resolution 534 provided for the creation of an appropriate advisory group to assist the Department of Labor and Industry in the preparation of the study report. This Advisory Committee, chaired by Marilyn Mandel, Director of Planning and Policy Analysis for the Department of Labor and Industry, held an organization meeting on June 25, 1993. The Advisory Committee established a work plan and schedule to carry out the study. In addition to those agencies specifically requested to assist, the Department also sought the technical advice from the Department of State Police and the Virginia Employment Commission. The Advisory Committee was responsible for identifying the topics to be included in the study and development of an employer's survey on drug testing among Virginia businesses. The Committee held an additional work session in August to review the input from the various committee members. In addition, the committee members reviewed a draft of this report and provided the Department with their comments.

C. PUBLIC MEETINGS

The Department of Labor and Industry and the Advisory Committee held a series of open meetings to collect public comments on drug testing in the workplace. These meetings were held in Charlottesville, Wytheville and Norfolk. Department and committee representatives were present at each of the meetings. Speakers were asked to comment on any issues related to drug testing in the workplace and specifically what role, if any, they thought the State should take in this issue.

Approximately 15 citizens attended the Charlottesville meeting on August 9. Committee members heard the following testimony.

Allan B. Kindrick, Safety Director, R. E. Lee & Son, Inc., Charlottesville. His company's drug-free workplace policy meets the minimum requirements for military work and some private industry work. They only test for cause and in all workers' compensation claims. Upon employment, the employee signs an agreement to be tested. They have less absenteeism and fewer workers' comp claims. The state could help by providing educational training/information to care providers.

Susan Cabell, Personnel Director, Martha Jefferson Hospital, Charlottesville. They do pre-placement drug screening. Have in-house training on drugs in the workplace. Drug policy provides for assistance through EAP. Supports continuation of workplace drug testing;

sees drug testing as a public safety issue; and drug testing should not be punitive. State could help in education and training and in recognition of outstanding drug testing programs.

James Craig, Nibco Inc., Stuarts Draft. Their drug testing began first with new hires, then second phase (year later) was testing of employees involved in accidents or those with cause or those with lengthy time off job. Believes that drug testing is a necessary tool to maintain a drug free workplace. Also stated that the State's role should be training and education.

Kevin L. Kennedy, Safety Director, Nibco, Inc., Stuarts Draft. Responsible for providing a safe workplace and drug testing enables him to do this. Stated that his employees are happy to have drug testing. Said that indiscriminate testing needs to be regulated.

Bill Nye, Charlottesville. Concern for violating Fourth Amendment rights.

Julie McConnell, ACLU, Richmond. Concerned about privacy issues and when testing employers could also be testing for other than drugs. Testing should be on employee's ability to perform and explained the various performance tests available to accomplish this.

Floyd Artrip, A-Systems, Inc., Charlottesville. Instituted drug testing program in August of 1989 and has been in court ever since. State law should be very simple; should spell out policies and procedures.

George Bates, Attorney, Charlottesville. Concerned over a number of issues most relating to drug trafficking with some remarks on drug testing.

Eleven citizens attended the public meeting held in Wytheville on August 16, 1993. The following speakers presented testimony on drug testing in the workplace.

Edward C. Bradley, Human Resource Director, Appalachian Power Co., Roanoke. Apco does random testing for three classes of employees: Coast Guard, Department of Transportation and those in safety sensitive positions through company program. They also do reasonable cause testing and pre-employment testing. Before initiating the drug testing program, the company announced its intention and provided assistance for employees who came forward. After initiation of the testing program, all positive tests resulted in dismissal. Out of 1,667 tests, 6 were positive, 3 filed grievances (1 arbitrated and upheld).

Thomas S. Bloss, IBEW Local President, Appalachian Power Co., Wayne, West Va. They recognized drug-free workplace and brought random drug testing to the bargaining table. They felt strongly about drug-free workplace due to the nature of the work they do. The IBEW had recommended to the company that any employee who tested positive should be immediately dismissed.

Brenda Minnick, Lewis-Gale Clinic Inc., Salem. Related the experience of a furniture manufacturer regarding drug testing stating that quality of work had improved, accident rates

down, etc. Said that the State should have a drug testing plan of its own.

At the Norfolk meeting on August 18, the Committee heard from eight of the 18 citizens attending.

Anne Hepler, Bumpass. Provided details of her personal experience with drug testing at her workplace. (Copy of testimony in Appendix C.)

John Languell, Now Care Health & Safety, Chesapeake. He performs 40-50 drug tests daily. Deals with NIDA certified labs. State needs to develop guidelines on what drugs to test for and at what levels, collection procedures as close to Federal DOT, require use of NIDA certified labs, provide for split specimens and standardization of forms used by laboratories.

Audrey P. Webb, Human Resource Director, Virginia International Terminals, Norfolk. They do random testing and testing for cause. Concerned for employees injured by someone using drugs. Sees no state role in drug testing.

Dan LeBlanc, President, State AFL-CIO, Richmond. Presented testimony on behalf of union employees. (Copy of testimony in Appendix C.)

William L. Sharkey, Human Resource Director, Lillian Vernon Corp., Va. Beach. Said safe workplace is a drug-free workplace. They do pre-employment drug testing and reject 1-2% of the applicants. Sees no benefit for state to regulate drug testing.

Herb DeGraff, Smithfield Packing Co., Smithfield. Concerned that any impingement on the right of the employer to do drug testing would be detrimental.

Peter Coleman, MD., Substance Abuse Practice, Richmond. The threat of loss of employment is big motivator in drug-free workplace.

John B. Vellines, Trident National Corporation, Richmond. Brief remarks with written statement to be furnished. (See Appendix C.)

II. FINDINGS

A. PREVALENCE OF DRUG USE IN THE WORKPLACE

ILLICIT DRUGS

The 1991 National Household Survey On Drug Abuse found that of all employed adults (18 years and older) surveyed, 13.5% reported they had used an illicit drug in the past year.

The 1990 National Household Survey On Drug Abuse found that 37% of the people in the United States aged 12 years and older had used illicit drugs at least once in their lives, 13.3% had used illicit drugs within the past year, and 6.4% had used illicit drugs within the past month. The most prevalent drug used was marijuana, with 33.1% of the people reporting they had used it at least once in their lifetime, 10.2% had used it within the past year, and 5.1% had used it within the past month. This was followed by psychotherapeutic drugs and cocaine, as illustrated in Table 1.

TABLE 1., Three Most Prevalent Types of Drugs Used, General Population (1990 Survey)

DRUG TYPE	AT LEAST ONCE IN LIFE	USED IN PAST YEAR	USED IN LAST 30 DAYS
Marijuana	33.1%	10.2%	5.1%
Psychotherapeutic	11.9%	<5%	<2%
Cocaine	11.3%	<5%	<2%

Source: National Household Survey on Drug Abuse: 1990

Trends in the use of illicit drugs by the general population 18 years of age or older typically show peaks in the late 1970s and early to mid 1980s. This is true for both annual and current (within the past month) drug use. After these dates the rates reported of use fall off significantly. For example, current use of marijuana by 18 - 25 year olds dropped from a high of 35.4% in 1979 to 13.0% in 1991 (see Table 3, below). The current use of cocaine by the same age group dropped from a high of 9.3% in 1979 to 2.0% in 1991. Throughout the period from 1972 to 1991, marijuana was the most prevalent illicit drug used.

TABLE 2., Annual Drug Use, Young Adults Age 18 - 25
(Bold Numbers, Highest Rate of Usage)

DRUG	1972	1974	1976	1977	1979	1982	1985	1988	1990	1991
MARIJUANA	_	34.2	35.0	38.7	**46.9**	40.4	36.9	27.9	24.6	24.6
COCAINE	_	8.1	7.0	10.2	**19.6**	18.8	16.3	12.1	7.5	7.7
STIMULANTS	_	8.0	8.8	10.4	10.1	**10.8**	9.9	. 6.4	3.4	3.4
SEDATIVES	_	4.2	5.7	8.2	7.3	**8.7**	5.0	3.3	2.0	1.9
TRANQUILIZERS	_	4.6	6.2	**7.8**	7.1	5.9	6.4	4.6	2.4	2.6
HALLUCINOGENS	_	6.1	6.0	6.4	**9.9**	6.9	4.0	5.6	3.9	4.8

TABLE 3., Annual Drug Use, Adults Age 26 and Older
(Bold Numbers, Highest Rate of Usage)

DRUG	1972	1974	1976	1977	1979	1982	1985	1988	1990	1991
MARIJUANA	_	3.8	5.4	6.4	9.0	**10.6**	9.5	6.9	7.3	6.8
COCAINE	_	*	0.6	0.9	2.0	3.8	**4.2**	2.7	2.4	2.5
STIMULANTS	_	*	0.8	0.8	1.3	1.7	**2.6**	1.7	1.0	1.1
SEDATIVES	_	*	0.6	*	0.8	1.4	**2.0**	1.2	0.8	0.9
TRANQUILIZERS	_	*	1.2	1.1	0.9	**11.1**	2.8	1.8	1.0	1.6
HALLUCINOGENS	_	*	*	*	0.5	0.8	**1.0**	0.6	0.4	0.6

TABLE 4., Current Drug Use, Young Adults Age 18 - 25
(Bold Numbers, Highest Rate of Usage)

DRUG	1972	1974	1976	1977	1979	1982	1985	1988	1990	1991
MARIJUANA	27.8	25.2	25.0	27.4	**35.4**	27.4	21.8	15.5	12.7	13.0
COCAINE	_	3.1	2.0	3.7	**9.3**	6.8	7.6	4.5	2.2	2.0
STIMULANTS	_	3.7	**4.7**	2.5	3.5	**4.7**	3.7	2.4	1.2	0.8
SEDATIVES	_	1.6	2.3	**2.8**	**2.8**	2.6	1.6	0.9	0.7	0.6
TRANQUILIZERS	_	1.2	**2.6**	2.4	2.1	1.6	1.6	1.0	0.5	0.6
HALLUCINOGENS	_	2.5	1.1	2.0	**4.4**	1.7	1.9	1.9	0.8	1.2

- Estimate Not Available
* Low Precision, No Estimate Shown
Source: National Household Survey on Drug Abuse: 1991

TABLE 5., Current Drug Use, Adults Age 26 and Older
(Bold Numbers, Highest Rate of Usage)

DRUG	1972	1974	1976	1977	1979	1982	1985	1988	1990	1991
MARIJUANA	2.5	2.0	3.5	3.3	6.0	**6.6**	6.1	3.9	3.6	3.3
COCAINE	_	*	*	*	0.9	1.2	**2.0**	0.9	0.6	0.8
STIMULANTS	_	*	*	0.6	0.5	0.6	**0.7**	0.5	0.3	0.2
SEDATIVES	_	*	0.5	*	*	*	**0.6**	0.3	0.1	0.3
TRANQUILIZERS	_	*	*	*	*	*	**1.0**	0.6	0.2	0.4
HALLUCINOGENS	_	*	*	*	*	*	*	*	**0.1**	**0.1**

_ Estimate Not Available
* Low Precision, No Estimate Shown
Source: National Household Survey On Drug Abuse: 1991

Knowledge about the general population does not necessarily permit one to extrapolate directly to the workplace. According to Royer F. Cook (1989) little is known regarding the use of drugs in the workplace. He states that both the employee samples and the variables measured have been severely limited.

It is important to note that most of the information regarding drug use in the workplace does not actually measure the use of drugs while at work, but the use of drugs by employed people or people applying for work. There have been 2 primary types of data used to study the use of drugs in the workplace: self-report inventories and drug testing results. Self-report inventories are most often questioned regarding their validity. The more sensitive the topic the more problematic is the issue of validity. The validity of self-report inventories completed in the workplace are especially troublesome in light of the interest employees have in retaining their job. Drug testing, on the other hand, was never intended to be used as a measure of the prevalence of drug use. It also suffers from significant sampling problems; most drug testing is of job applicants, and the random testing performed by organizations are often on small samples and are not truly random (Cook, 1989).

In spite of these technical problems with the studies, it is possible to glean some important information about drug use in the workplace. The studies reviewed suggest that the 3 major types of illicit drugs which may affect employers are marijuana, psychotherapeutics and cocaine. Age appears to be the major predictor of drug use by employed people.

Cook (1989) did an analysis of the 1985 National Household Survey On Drug Abuse data. Taking a sub-sample of working adults he looked at marijuana and cocaine use for the group. He found that 18% of the sample had used marijuana in the previous year, and 11% had used the drug during the previous 30 days. Six percent (6%) of the sample had used cocaine during the previous year and 2% had used it during the previous 30 days. Cook's analysis found that the most significant predictor of both marijuana and cocaine use was age. There was a significant difference in current (i.e., in the past 30 days) marijuana and cocaine

use between 18-34 year old employees and employees 35 or more years of age ($p<.001$ and $p<.01$, respectively). There was a significantly higher rate of use of marijuana and cocaine for male than for female employees. Within the 18-34 year old group Cook found a significant difference in educational level and the use of marijuana. Thirty-five percent (35%) of those who had not finished high school had used marijuana within the past 30 days, while 16% of those who had attended or graduated from college had used the drug recently ($p<.01$).

Normand and Salyards (1989) in their study of pre-employment drug testing by the Postal Service found that 9.4% of all applicants and 8.4% of all new hires tested positively for illicit drugs. Evidence of marijuana use represented the largest proportion of those individuals testing positive (6.2% applicants, 5.7% new hires). Evidence of cocaine use was found in 2.6% of the applicants and 2.2% of the new hires, while evidence of other illicit drugs was found in 1.2% of the applicants and 0.9% for new hires.

Osborne and Sokolov (1989) studied the results of the drug testing program at Southern California Edison Company's San Onofre Nuclear Generating Station. Their analysis used data from drug tests administered from October of 1984 to June, 1988. The employees were being screened annually because they had unescorted access to "Protected" and "Vital" areas of the facility. No employee over the age of 40 years failed the drug test. Of the drugs detected 60% was marijuana and 23% was cocaine. Amphetamines were 11%, benzodiazepines 3%, opiates 2%, and all others 1%.

Anglin and Westland (1989) used data from 4 high volume drug testing laboratories which provided the results from urinalyses to the UCLA Drug Abuse Information and Monitoring Project. They looked at data for employment, medical, drug treatment and criminal justice populations. The data on the employment population consisted of monthly pre-employment and "testing for cause" drug test results. Over a 1 year 1 month period (4/87 to 5/88) marijuana (THC) was the most prevalent drug found in the employment population (1.5% to 7.5%), while cocaine, opiates, and amphetamines were each 2% or less.

No study of drug use in the workplace in Virginia was found. The Virginia Department of Health's statistics for calendar year 1991 listed no deaths in the workplace attributable to drugs or alcohol. Statistics from the State Employees' Assistance Service (SEAS), an employee assistance program for state government employees, have shown a decrease in the number of referrals for drug and alcohol problems from FY 1990 to FY 1993 as can be seen in Table 6.

TABLE 6., SEAS Substance Abuse Referrals By Fiscal Year

REFERRAL TYPE	1990	1991	1992	1993
ALCOHOL	136	102	78	84
DRUGS	50	20	34	39
COMBINATION DEPENDENCY	44	34	20	22
SUBSTANCE ABUSE, FAMILY MEMBER	178	119	45	49
TOTAL	408	275	177	194

Source: State Employees' Assistance Services

With only this fragmentary data, it would appear that the best estimates for the Commonwealth are the national figures. The National Institute on Drug Abuse (NIDA) 1990 Household Survey On Drug Abuse provides relatively current information on national drug use. This was the ninth study of its kind since 1972. The 1990 study was funded by NIDA and by the National Institute on Alcohol Abuse and Alcoholism. Of special interest to the Northern Virginia area is the Household Survey's special review of the District of Columbia Metropolitan Statistical Area (DC MSA) which includes the Virginia counties of Arlington, Fairfax, Loudoun, Prince William, and Stafford; and the cities of Alexandria, Fairfax, Falls Church, Manassas, and Manassas Park (see Table 14).

The 1991 National Household Survey on Drug Abuse found that of all adult respondents who indicated they had used an illicit drug in the past year, 68% were employed (55% full-time, 13% part-time). Of all employed adults surveyed in 1991, 13.5% had used an illicit drug in the past year. The following tables present information on employment status and drug usage from the 1990 Household Survey on Drug Abuse. In them, persons falling in the "Other" category are either retired, disabled, homemakers, students, or do not fit into the 3 main categories listed.

TABLE 7., Percentage Reporting Marijuana Use, Past Year: 1990

CURRENT EMPLOYMENT STATUS	AGE GROUP (YEARS)			
	18-25	26-34	>=35	TOTAL
FULL-TIME	26.5	17.8	5.7	12.5
PART-TIME	21.4	20.8	1.7	10.6
UNEMPLOYED	32.9	31.3	6.1	20.5
OTHER+	19.0	11.1	1.4	4.0

+ Retired, disabled, homemakers, students, or do not fit 3 categories listed
Source: National Household Survey on Drug Abuse: 1990

TABLE 8., Percentage Reporting Marijuana Use, Past Month: 1990

CURRENT EMPLOYMENT STATUS	AGE GROUP (YEARS)			
	18-25	26-34	>=35	TOTAL
FULL-TIME	12.6	7.4	2.9	5.7
PART-TIME	12.0	12.8	*	6.2
UNEMPLOYED	17.1	20.8	*	12.3
OTHER+	11.4	7.3	*	2.4

+ Retired, disabled, homemakers, students, or do not fit 3 categories listed
Source: National Household Survey on Drug Abuse: 1990

A review of Tables 7 through 13 indicates that the patterns reported from the studies reviewed continue in the 1990 data. Marijuana was the illicit drug with the highest reported rates of use among the groups listed, with 12.5% and 5.7% of all full-time employees reporting they had used the drug in the past year or in the past month, respectively. Those employed individuals from the ages of 18 through 34 continued to have higher levels of drug use than employed people 35 years or older.

The 1990 Household Survey found that the proportion of employed people reporting cocaine use during the past year (4.0%) and month (1.1%) was approximately the same as the proportion reporting the illicit use of prescription-type psychotherapeutics during the past year (4.1%) and month (1.4%). (See Tables 9, 10, 11, and 12) By comparison, those reporting the use of hallucinogens in the past year were only 1.1% of the full-time employed people surveyed, and the number reporting use of these drugs in the past month was so small that it was not reported.

TABLE 9., Percentage Reporting Cocaine Use, Past Year: 1990

CURRENT EMPLOYMENT STATUS	AGE GROUP (YEARS)			
	18-25	26-34	>=35	TOTAL
FULL-TIME	8.2	6.8	1.4	4.0
PART-TIME	3.4	7.2	*	2.4
UNEMPLOYED	15.3	12.7	*	9.1
OTHER+	5.9	4.1	*	1.1

+ Retired, disabled, homemakers, students, or do not fit 3 categories listed
Source: National Household Survey on Drug Abuse: 1990

TABLE 10., Percentage Reporting Cocaine Use, Past Month: 1990

CURRENT EMPLOYMENT STATUS	AGE GROUP (YEARS)			
	18-25	26-34	>=35	TOTAL
FULL-TIME	2.5	1.9	0.3	1.1
PART-TIME	*	*	*	*
UNEMPLOYED	5.0	4.6	*	2.7
OTHER+	*	*	*	*

TABLE 11., Percentage Reporting Use Of Prescription-type Psychotherapeutics, Past Year: 1990

CURRENT EMPLOYMENT STATUS	AGE GROUP (YEARS)			
	18-25	26-34	>=35	TOTAL
FULL-TIME	7.5	4.9	2.8	4.1
PART-TIME	6.2	6.9	4.3	5.3
UNEMPLOYED	12.6	19.1	*	9.7
OTHER+	3.9	3.9	1.8	2.2

TABLE 12., Percentage Reporting Use Of Prescription-type Psychotherapeutics, Past Month: 1990

CURRENT EMPLOYMENT STATUS	AGE GROUP (YEARS)			
	18-25	26-34	>=35	TOTAL
FULL-TIME	2.0	1.3	1.2	1.4
PART-TIME	3.3	*	*	1.7
UNEMPLOYED	5.9	*	*	3.6
OTHER+	1.6	1.9	*	0.6

+Retired, disabled, homemakers, students, or do not fit 3 categories listed
Source: National Household Survey on Drug Abuse: 1990

TABLE 13., Percentage Reporting Hallucinogen Use, Past Year: 1990

CURRENT EMPLOYMENT STATUS	AGE GROUP (YEARS)			
	18-25	26-34	>=35	TOTAL
FULL-TIME	4.4	1.0	*	1.1
PART-TIME	3.3	*	*	1.1
UNEMPLOYED	4.7	*	*	2.1
OTHER+	3.0	*	*	0.6

+ Retired, disabled, homemakers, students, or do not fit 3 categories listed
Source: National Household Survey on Drug Abuse: 1990

When one compares the percentage of full-time employed people in the national sample reporting the use of marijuana in the past year to those in the District of Columbia Metropolitan Statistical Area (DC MSA) reporting any illicit drug use (Table 14, below), it is apparent that the figures are fairly similar. Of great concern are the figures for the unemployed, which are reported as significantly different from the full-time employed group.

TABLE 14., Percentage In DC MSA Reporting Use of Any Illicit Drug, Past Year: 1990

CURRENT EMPLOYMENT	AGE GROUP (YEARS)			
	18-25	26-34	>=35	TOTAL
FULL-TIME	29.2	19.2	5.1	13.2
PART-TIME	25.7	*	*	12.6
UNEMPLOYED	37.0	52.9	*	25.4
OTHER+	26.7	17.7	*	6.5

+ Retired, disable, homemakers, students, or do not fit 3 categories listed
Source: National Household Survey on Drug Abuse: 1990

TABLE 15., Trends in Percentage Reporting Use of Any Illicit Drug in the Past Year: 1988 and 1990

CURRENT EMPLOYMENT STATUS	AGE GROUP (YEARS)							
	18-25		26-34		>=35		TOTAL	
	1988	1990	1988	1990	1988	1990	1988	1990
FULL-TIME	31.7	30.1	23.3	21.4	8.3	8.2	16.6	15.4
PART-TIME	37.2	25.6++	15.7	26.9++	6.2	6.0	16.1	15.2
UNEMPLOYED	41.5	41.1	37.2	36.8	8.0	9.9	26.2	26.1
OTHER+	23.9	22.2	19.2	14.3	2.4	3.1	6.4	6.0

+ Retired, disabled, homemakers, students, or do not fit 3 categories listed
++ Significant at the .01 level
Source: National Household Survey on Drug Abuse: 1990

Limited trend data was found on the employment status of individuals and drug use. The 1990 National Household Survey On Drug Abuse did report some data (see Table 15). Comparing information from 1988 and 1990, the proportion of employed and unemployed people reporting any illicit drug use in the past year differed significantly only in 2 cases. A significant drop in past year drug use was found in part-time employees 18-25 years old, while a significant increase in past year drug use was found in part-time employees 26-34 years old. All other changes were not significant.

ALCOHOL

Alcohol remains the most used mind altering substance in the United States. A review of data from the 1990 and 1991 National Household Survey On Drugs Abuse (Tables 16 and 17, below) indicates that alcohol has significantly higher percentages of users than any of the illicit drugs reviewed.

As with illicit drugs, the general trend in alcohol use has been downward from highs in the late 1970s to the mid 1980s. However, levels of use appear to be relatively steady in the 1988, 1990, and 1991 surveys. (See Table 16)

TABLE 16., Proportion of Survey Respondents Using Alcohol 1991 Household Survey On Drug Abuse

GROUP	1972	1974	1976	1977	1979	1982	1985	1988	1990	1991
18 - 25 ANNUAL USE	-	77.1	77.9	79.8	86.6	87.1	87.2	81.7	80.2	82.8
26 AND OLDER ANNUAL USE	-	62.7	64.2	65.8	72.4	72.0	73.6	68.6	66.6	69.1
18 - 25 CURRENT USE	-	69.3	69.0	70.0	75.9	70.9	71.4	65.3	63.3	63.6
26 AND OLDER CURRENT USE	-	54.5	56.0	54.9	61.3	59.8	60.6	54.8	52.3	52.5

- Estimate Not Available
Source: National Household Survey on Drug Abuse: 1991

A review of Tables 17, 18 and 19 indicates that in <u>all</u> instances, the proportion of those people with full-time employment reporting alcohol use was higher than any of the other groups in <u>all</u> categories (current use, days of use, and heavy use). This should lead to concern on the part of employers because, as with illicit drugs, we may expect alcohol to have an impact on the workplace which is proportional to its use by those people employed.

TABLE 17., Percentage Reporting Alcohol Use, Past Month: 1990

CURRENT EMPLOYMENT STATUS	AGE GROUP (YEARS)			
	18-25	26-34	>=35	TOTAL
FULL-TIME	71.2	68.0	58.1	63.0
PART-TIME	58.9	54.6	57.9	57.6
UNEMPLOYED	64.6	66.8	38.4	53.3
OTHER+	46.7	43.8	35.8	37.6

TABLE 18., Percentage Distribution of Days of Alcohol Use In Past Month: 1990

CURRENT EMPLOYMENT STATUS	DAYS OF USE			
	NONE	1-4	5-19	20-30
FULL-TIME	38.5	31.1	22.9	7.5
PART-TIME	44.1	29.7	19.3	7.0
UNEMPLOYED	48.0	29.0	19.2	3.8
OTHER+	64.8	20.0	8.6	6.6

+ Retired, disabled, homemakers, students, or do not fit 3 categories listed
Source: National Household Survey on Drug Abuse: 1990

TABLE 19., Percentage Reporting Heavy Alcohol Use In Past Month: 1990

CURRENT EMPLOYMENT STATUS	AGE GROUP (YEARS)			
	18-25	26-34	>=35	TOTAL
FULL-TIME	13.9	8.4	4.0	6.8
PART-TIME	9.2	5.2	3.1	5.1
UNEMPLOYED	8.8	8.0	*	6.6
OTHER+	7.4	2.1	2.2	2.7

+ Retired, disabled, homemakers, students, or do not fit 3 categories listed

* Low Precision, No Estimate Reported

"Heavy Use" is defined as drinking 5 or more drinks per occasion on 5 or more days in the past 30 days.

Source: National Household Survey on Drug Abuse: 1990

B. TESTING METHODS AND ACCURACY

Agencies implementing drug testing programs may have concerns about the relative accuracy of different testing methods and whether accuracy varies by type of drug. Practitioners may lack unbiased information about the different methods and the frequency of errors associated with them. In addition, drug testing technologies vary in ease of use, suitability for use as a screening test, and relative costs.

Some definitions are necessary prior to an in-depth discussion:

> *Confirmation test.* A second test which is used to confirm positive results from an initial screening test. A confirmation test uses a different method than the screening test and provides a greater margin of certainty.
>
> *Cutoff level.* The concentration of a drug in urine, usually in nanogram (billionths of a gram) per milliliter (ng/mL), used to determine whether a specimen is positive (at or above the cutoff level) or negative (below the cutoff level) for the drug in question.
>
> *False positive.* A test result indicating positive for a given drug when that drug is actually absent in a urine sample or present in concentrations below the designated cutoff level.
>
> *False negative.* A negative test result for a given drug when that drug is present in a sample above the cutoff level for the test.
>
> *Screening test.* An initial test which is used to detect drugs of abuse in urine. Screening tests are rapid and less expensive, but generally not as accurate as confirmation tests.

DRUGS: CHOICE OF SAMPLE

Drugs and their metabolites are distributed throughout the human body and into various tissues and fluids following use. Analysis of different fluids and tissues can provide a wide range of information on the extent of drug use depending on the sample availability, analytical sensitivity and specificity, and the nature of the drug itself. Different samples have different potential benefits.

Blood

Blood concentrations of many drugs potentially provide insight into the degree of therapeutic effectiveness or intoxication of the individual. When drug concentrations in blood are proportional to drug concentrations at their primary site of action in the body, typically the brain, measurement of the former provides a quantitative assessment of whether the individual

is receiving too much drug or too little. This correlation between blood concentrations and effects holds true for many, but not all drugs. Nonetheless, blood is recognized as the most useful sample to assess impairment.

Blood has its limitations for drug testing purposes, however; it requires invasive sampling and blood concentrations of drugs are often considerably lower than other samples, e.g. urine, and therefore require more sensitive, time consuming and expensive techniques. Also the interval between drug use and its disappearance from blood is considerable shorter than that from other samples, typically on the order of hours versus days in the case of urine.

Hair

In recent years, hair has been recommended for drug detection by some proponents. It can be collected under close supervision without embarrassment. It is easily handled, stored and mailed. The window of drug detection in hair is said to be from months to years depending on the length and type of hair. And challenges of contamination or sample mix-up can be addressed by the collection of a second sample.

However a majority of toxicologists do not currently recommend the use of hair for drug detection. Certain studies have indicated that external contamination of hair by drugs in the environment is possible. Differentiation between external and internal drug exposure is problematic at present. Also questions have been raised about the potential for bias by age, sex, racial characteristics, hair color, hair type and hair treatment. More research is urged prior to the selection of hair as a recommended sample.

Saliva

Studies on the detection of drugs in saliva have been known for more than a decade. Some applications and advantages are known while others are still being investigated. It too is collectable by non-invasive techniques. Some studies also suggest that the saliva concentrations of certain drugs parallel those in the blood and may therefore offer a means to estimate the degree of impairment.

The two major disadvantages of saliva are that many drugs are retained there for shorter periods of time than in other samples, e.g. urine, and the drug concentrations in saliva are often equal to or less than those in blood. Further, the sample volume is often less than optimal.

Urine

For decades urine has been the sample of choice for most drug detection programs. The majority of commercially available "screening" (presumptive testing) techniques are applicable to urine without the necessity of preliminary sample extraction or treatment. Sample collection is non-invasive. Sample volume is more than sufficient for most purposes. Drugs

and/or metabolites persist in urine for up to several days or longer after last use and their concentrations often exceed those found in other samples. High drug concentrations together with large sample volummes help reduce the costs associated with urine testing.

The main disadvantage of testing urine for drugs or metabolites is that their concentrations in that sample are by and large unrelated to their effect. One cannot infer that high urinary drug concentrations mean a high degree of impairment. In fact the presence of drugs in urine usually extends far beyond the duration of impairment, if any.

Another area of concern involves the potential misinterpretation of "positive" results in urine testing. Certain foods or legitimate medications can actually yield detectable concentrations of drugs or metabolites in urine which are also derived from illegitimate sources. For example, poppy seeds contain morphine which is also a metabolite of heroin. If poppy seeds are consumed in sufficient quantities, the urine test results may not be distinguishable from those of a heroin user. Codeine use can produce similar confusion. Note that these are not "false positive" results. The drugs/metabolites themselves are actually present, but their source is variable. Consequently, the results of a urine drug screen can not always be taken at face value.

One approach often recommended to deal with this potential for misinterpretation is the incorporation of a medical review officer (MRO) in the urine screen program. The MRO is someone trained in the medical and toxicological aspects of drugs who acts as an intermediary between the employee and employer. The MRO receives the "positive" results first, assesses the employee's medical, pharmaceutical and possibly dietary history for legitimate sources of drug-producing substances, and then forwards the results to the employer when the source appears to be illegitimate. This approach helps minimize misinterpretations.

ANALYTICAL METHODS

Five analytical procedures are most commonly used for urine testing and have been evaluated in studies where samples were screened for opiates, cocaine, phencyclidine (PCP), amphetamines and marijuana. These procedures or methods are:

Immunoassay Methods

1) EMIT (Syva Company) Enzyme Multiplied Immunoassay Technique

2) TDx FPIA (Abbot Laboratories) Fluorescence Polarization Immunoassay

3) Radiommunossay RIA (Roche Diagnostic Systems, Inc. or Diagnostic Products Corp.)

Immunoassays (e.g. EMIT, TDx, RIA) are based on a reaction between a drug or metabolite and a specific antibody. The drug or metabolite will bind to the antibody

to the exclusion of almost all other substances that may be present in the sample. These techniques are extremely sensitive and typically require only a very small sample, e.g. one drop of urine. They are easily automated, relatively inexpensive and quick. Excluding equipment costs which are variable, reagent costs typically are less than several dollars per drug or drug class. However, each drug or drug class must be tested separately and each positive result must be independently confirmed because of the potential for cross-reactivity by substances with chemical structures similar to the drug(s).

Chromatographic Methods

4) Standard Thin-Layer Chromatograph (TLC)

Thin-layer chromatography (TLC) is another presumptive test which is based on different analytical principles. Samples are extracted, concentrated and applied to a resin that has been thinly coated on an inert (e.g. glass) plate. When dipped into a solvent, the solvent slowly migrates up the plate through the resin as though it were a wick. Different drugs migrate at different rates and are eventually visualized as spots when the plate is sprayed with chemical dyes. Batch analysis helps improve TLC efficiency, but the multiple steps in processing and the skill necessary for interpreting results raise costs. The sensitivity and specificity of drug detection by TLC tends to be poorer also.

5) Gas Chromatography/Mass Spectrometry (GC/MS)

This method (GC/MS) is considered the most sensitive and accurate of the urinalysis technologies and is the standard against which results from the four other technologies are compared. GC/MS is recognized by the drug testing industry as the preferred confirmatory technology for detecting drugs in urine.

Gas chromatography-mass spectrometry (GC/MS) is the most specific technique for testing drugs of abuse. This hyphenated technique relies on the excellent separating capacity of the gas chromatograph and the molecular identifying capability of the mass spectrometer. In the GC/MS procedure, sample extracts are injected in the gas chromatograph where individual drugs are separated from each other and then broken into electrically charged ion fragments in the mass spectrometer. Different drugs break into unique fragment patterns which may be matched by computer to known drug calibrators. Sample throughput by GC/MS is relatively slow but its specificity is unrivaled. Equipment and personnel costs are high. One source estimated GC/MS costs at $30 to $100 per sample. Consequently GC/MS is usually used only for follow-up, confirmatory testing where preliminary immunoassays or TLC results were putatively positive.

Accuracy of Methods

A 1987 publication "Drug Testing in the Workplace: Are Methods Legally Defensible?", surveyed expert opinion on the legal defensibility of the technical credibility of the above techniques, either alone or in combinations. Immunoassays with GC/MS confirmation received a higher ranking than any of the techniques alone or in other combinations.

The study of these technologies show a clear difference between the accuracy of the immunoassay as a group (EMIT, TDx, and RIA) and thin-layer chromatography (TLC). Standard thin-layer chromatography performed poorly in identifying the presence of illegal drugs.

TLC identified only 8 to 19 percent of the specimens containing opiates, cocaine, amphetamines, and PCP (in amounts at or above the National Institute on Drug Abuse (NIDA) cutoffs according to GC/MS) and only 48 percent of the specimens containing marijuana. All three immunoassay were more accurate than TLC. Among the immunoassays no one type of immunoassay is consistently superior in identifying positive and negative urine specimens for the five drugs.

A concern frequently voiced about drug testing is the possibility that the urinalysis technology being used will label as positive a urine specimen from an individual who has not used drugs (false positive). The study's average false positive rate, combining results for the five drug types and using the National Institute on Drug Abuse (NIDA) cutoff levels, was about 1 to 2 percent, based on the initial screening test, without GC/MS confirmation.

GC/MS confirmation of positive results from screening tests would eliminate virtually all false positive errors.

The study also examined the extent to which the current screening technologies miss the presence of drugs in urine, that is, the extent of false negative errors. For the three immunoassay techniques, the average false negative rate for the five drug types was about 20 percent (using the NIDA screening cutoff levels in Table 1). Screening tests are designed to minimize false positive results and, as a consequence, a larger number of false negative results will occur. Repeated testing of an individual on a weekly or monthly basis, however, most likely will detect illegal substances in a regular drug user.

Table 1
NIDA and Study Cutoffs for Immunoassay
(Screening Tests) and GC/MS

Drug	Immunoassy	GC/MS
Marijuana	100	15
Cocaine	300	150
Phencyclidine	25[a]	25
Opiates	300	300
Amphetamines	1,000[b]	500

[a]for EMIT, 75 ng/mL
[b]for EMIT, 300 ng/mL

The false negative rates for the five drugs clearly shows that standard TLC incorrectly identified as negative a much higher proportion (52-92%) of urine specimens than did the three immunoassay(2-41%).

The magnitude of the false negative rate was determined by the screening and confirmation cutoff levels, which followed the NIDA guidelines. A close examination of the data revealed that the immunoassay cutoffs were partly the reason for the technology's failure to identify the specimens designated as positive by GC/MS. Many of the false negative specimens contained some amount of the drug, but not at concentrations high enough for the immunoassay to label the specimen positive. The foregoing discussion established the need for confirmatory testing of immunoassay screening. Immunoassay urinalysis technologies for drug testing are not error-free. False positive test results will occur with any immunoassay technology. In practice, of 100 negative urine specimens tested using one of the immunoassay methods examined in this study, an average of one or two specimens may test positive.

Confirmation of initial immunoassay positive by an alternate method-preferably GC/MS-is recommended by the NIDA guidelines to avoid testing errors. If an individual contests a positive result from a screening test, however, and if that positive drug test will lead to serious punitive action, confirmation by GC/MS provides the best protection against future legal challenges. Users of urine tests must weigh the consequences of testing errors against the time and expense involved in confirming positive test results with GC/MS.

Repeat testing of urine specimens by the same method, or confirmation of screened positive specimens using a similar technology, probably will not eliminate all erroneous results. For instance, using another type of immunoassay if the initial screen was also an immunoassay may eliminate faulty procedural results, but not the errors inherent in the technology. This repeat practice is not considered a scientific confirmatory result, but courts in some jurisdictions have allowed this type of confirmation.

Cutoff Levels

The foregoing discussion regarding the accuracy of testing methods also demonstrates the effect and importance of cutoff levels on interpretation and accuracy of testing methods. Samples that contain a drug in a concentration below the cutoff level are considered negative, while specimens with greater amounts of a drug (or metabolite) are labeled positive. Therefore, a specimen that is reported as negative has less activity than the predetermined cutoff level although the drug may be present and could be detected by a lower cutoff or a more sensitive method. For example, a specimen containing 80 ng of cannabinoid (marijuana) would be negative for marijuana at the 100ng cutoff level but strongly positive if an alternative cutoff level of 20ng were used. Positive and negative values on screening tests must therefore be judged by the cutoff level. Positive and negative values on screening tests must therefore be judged by the cutoff level established for the method used. Negative samples are not subject to further (confirmatory) testing despite the fact that the drug may be present and detectable by alternative means. The cutoff level specified will affect the role of positive results since lower cutoff levels will by definition be more sensitive.

Confirmation testing (GC/MS) serves to eliminate false-positive results. The sensitivity and cutoff levels of confirmation methods are sufficiently low to ensure with reasonable certainty that true-positive screening results can be confirmed.

ALCOHOL TESTING

Alcohol (ethanol) is recognized as the most widely used and abused drug in our society. Consequently any drug testing program needs to consider, at least, including alcohol among its panel of drugs to be tested. However numerous technical and social factors require an analytical approach for alcohol testing that differs from that for the typical drugs of abuse.

Since alcohol use is legitimate, the mere presence of alcohol in a body fluid such as urine cannot be prohibited. Alcohol may persist in urine beyond the time where its effects are felt. Detecting alcohol induced impairment would be the obvious goal of a program. Blood, either directly or indirectly via breath, is the preferred sample for achieving this goal. (Alcohol in deep lung air is actually in equilibrium with alcohol in the blood of the lungs and enables a direct proportionality between the two samples.)

Numerous widely accepted techniques are available for alcohol determinations on blood or breath. In the case of blood, gas chromatography with flame ionization detection is the generally accepted standard in many forensic laboratories. Various enzymatic and chemical oxidation methods are also used for blood with nearly equal scientific acceptance. Less than five milliliters of sample is necessary. Using any of these techniques, commercial laboratories generally charge prices in the range of $25 to $75 per sample. Breath testing is often initiated with a hand-held, preliminary breath testing device, such as the Alcosensor. These are generally non-evidential, electronic fuel cell screening devices which provide an LED

reading of the equivalent blood alcohol concentration (BAC). The Alcosensors, costing about $500 each, provide a rapid, but only presumptive, BAC result. Subsequent evidential breath testing is better provided by other instruments such as chemical oxidation-type instruments (Breathalyzer Model 900A or Model 1000), infrared absorption devices (e.g. Intoxilyzer 5000, Intoximeter 3000) or even gas chromatographic devices. Prices for these instruments generally range from about $1000 to about $6000. Simulators used to calibrate breath testing devices may add about another $200.

Defining the BAC where impairment is presumed may vary with the intent of the program and the task at issue. Some states define impairment for under age drivers at a BAC of 0.02% (i.e. 0.02 grams ethanol/deciliter of blood). Certain occupations falling under federal regulations must abide by a limit of 0.04%. Most states allow the prosecution of drivers whose BAC exceed 0.04 or 0.05% and set presumed impairment at 0.08% to 0.10%. All of the evidential instruments are capable of detecting and measuring BACs of 0.02% or more. However, corroboration of low BACs, e.g. below 0.05%, by a second independent test may be a reasonable requirement.

C. REHABILITATION

AVAILABILITY

The "Drug-Free Workplace Act of 1988" outlines five key components that employers should have in their drug-free workplace plan:

1. a comprehensive written policy;
2. supervisory training;
3. employee education/awareness;
4. availability of an employee assistance program (EAP); and
5. identification of illegal drug users, including drug testing on a controlled and carefully monitored basis.

In spite of the Federal Drug-Free Workplace Act stating that the availability of an EAP should be a key component in all drug-free workplace plans, the National Institute on Drug Abuse (NIDA) does not require it as part of it's guidelines for drug testing. NIDA does recommend that an EAP be a part of the back-to-work procedures in conjunction with the Medical Review Officer, following a positive result.

Consequently, it is up to the individual employer as to whether they include rehabilitation as part of their drug testing policies.

Rehabilitation is available. It is most readily available through employee assistance programs who offer professionals that provide accurate assessments and make appropriate referrals. EAPs can also monitor back-to-work contracts that may call for the monitoring of mandatory random testing as a condition of continued employment, for a specific time period. There are many different types of EAPs available to both the private and public sector. They can either be "in-house" or "contracted out."

Rehabilitation is also available by directly referring an individual to a drug or alcohol treatment facility. This can be done by a Medical Review Officer (MRO) or some qualified individual designated by the employer.

EAPs ROLE UNDER NIDA GUIDELINES

Under NIDA guidelines, a Medical Review Officer (MRO) must certify all positive test results and, in return-to-work decisions, the MRO will interface with the EAP. The decision making process is meant to ensure that the individual who tested positive: (1) is drug-free, as determined by a drug test; (2) has been evaluated by a qualified professional (EAP); and, (3) complies with any conditions of the rehabilitation or aftercare program established by the physician in consultation with the EAP personnel.

In the Federal Government, employees who test positive for illegal drugs are subject to unannounced testing for as long as 60 months. Federal guidelines on mandatory testing do not require employers to offer a formal rehabilitation program. This absence offers a great challenge to the EAP community.

EAPs ROLE IN PREVENTION

EAPs have an important role in the prevention of employee drug use. According to the National Institute on Drug Abuse (NIDA), the EAP is responsible for providing needed education and training to all levels of the company on types and effects of drugs, symptoms of drug use and it's impact on performance. However, according to the United States Department of Labor, most EAPs provide referrals to treatment or counseling (97%), followed by direct counseling (77%). Drug prevention services were offered by fewer than half of the EAPs surveyed.

FINANCIAL

Cost of rehabilitation will vary depending on various components of the employers package. For example, if the employer has its own in-house EAP, the cost will be minimal for the assessment and referral. The EAP generally attempts to match the employee's health benefits to the services he is in need of. This procedure is already in place for state employees (State Employees Assistance Services-SEAS) and drug testing could aid in identifying more state employees in need of SEAS' services.

In the private sector, it could cost significantly more if employers have to contract out for assessment and referral services. There are many external EAP services that work for companies, on a fee-basis. These external EAPs operate very similar to the in-house EAP with regard to matching health benefits with services.

In the event an employer does not offer a health benefits package to it's employees and must foot the bill for rehabilitation costs, according to the Virginia Health Services Cost Review Council, they can anticipate a 1-day in-patient stay to be $818.47. If an employee is in need of detoxification, the average stay for detoxification is approximately three days. That figure would be approximately $2,455.41 per employee referred for detoxification.

D. FEDERAL REQUIREMENTS

Federal agencies and courts have taken the lead in employee drug testing. In 1985 the Federal Railroad Administration (FRA) became the first federal agency to promulgate drug testing regulations. Mandating blood and urine testing of railway employees involved in train accidents, the regulations also authorized breath and urine testing if certain safety rules were violated. Shortly thereafter, President Reagan issued an Executive Order entitled "Drug-Free Federal Workplace," prohibiting use of illegal drugs by federal employees, requiring executive agencies to implement mandatory drug testing for employees in sensitive positions, and permitting individualized testing on reasonable suspicion, following accidents or investigations, or as part of a drug rehabilitation program. The Federal Highway Administration (FHA) also promulgated regulations requiring interstate motor carriers to conduct pre-employment testing, reasonable cause testing, biennial testing, and annual mandatory random testing of 50 percent of drivers.

The Department of Defense (DOD) rule applies to DOD contracts involving access to classified information and other contracts concerning issues of national security, health, or safety. A contractor's drug-free workplace program must include training to assist supervisors in identifying illegal drug use by employees, and an employee assistance program to provide drug counseling and rehabilitation. Employees in sensitive positions must undergo drug testing and the contractor may test other employees or applicants at its discretion.

The Drug-Free Workplace Act of 1988 (Act) requires all federal contractors and grantees to certify that they will provide a drug-free workplace. To comply, an employer must distribute to all employees a statement prohibiting the possession or use of unlawful controlled substances in the workplace, require employees to abide by the prohibition as a condition of employment, specify the action that it will take against violators, and require employees to notify the employer within five days of any conviction for a criminal drug violation that occurred in the workplace. The employer must also establish a drug-free awareness program, notify the contracting agency within ten days of any employee convicted for a criminal drug violation in the workplace, take disciplinary action against any employee convicted of such a violation, and continue to make a good-faith effort to maintain a drug-free workplace. The Act does not require the employer to drug test or to discharge an employee convicted of a criminal drug violation in the workplace, nor does it require the employer to furnish drug rehabilitation or an employee assistance program.

In 1989, the U. S. Department of Transportation (DOT) established regulations covering six agencies--the Coast Guard, the Federal Aviation Administration, the Federal Highway Safety Administration, the Federal Railroad Administration, the Research and Special Projects Administration--and their regulated industries. The DOT regulations call for specific, mandatory, random drug testing for employees whose jobs have an impact on public safety or security. The regulations specify the procedures for the collection and

handling of samples (chain of custody), the laboratory testing services, results reporting and confidentiality, medical review of "positives," and record keeping. Congress' 1991 Omnibus Transportation Employee Testing Act makes most DOT drug-free workplace regulations public law and requires alcohol testing for employees in the transportation industry. It also requires employers to provide an opportunity for counseling to employees who test positive. The 1991 Act included all state transportation departments and preempts all state and local laws except for state criminal laws imposing sanctions for reckless conduct.

The Nuclear Regulatory Commission issued its regulations in 1989. These require licensees authorized to operate nuclear power reactors to implement fitness-for-duty programs aimed at a drug-free work environment within nuclear power plants, including a testing requirement.

The Civil Space Employee Testing (CSET) Act of 1991 requires alcohol and drug testing of NASA employees and contractors whose duties include responsibility for safety-sensitive, security, or national security functions (as determined by the NASA administrator). It also provides for pre-employment, reasonable suspicion, random, and post-accident testing programs; testing procedures for controlled substances which adhere to the Department of Health and Human Services (DHHS) "Mandatory Guidelines"; and provision for rehabilitation of employees testing positive. The CSET Act also preempts state and local laws except for state criminal laws imposing sanctions for reckless conduct.

E. STATE-BY-STATE ANALYSIS

Following in this section are state-by-state summaries of laws, regulations, and policies dealing with the drug-free workplace concept which exist in the individual states. At the conclusion of this section is a matrix depicting these requirements into five classifications for all 50 states.

Every attempt has been made to ensure the accuracy of this information. Various publications were utilized as well as the resources available through the U.S. Department of Labor Substance Abuse Information Date (SAID) Program. Each resource provided some element of the information, but for this report, Department of Labor and Industry staff personally contacted each state for final verification.

Alabama
Drug-Free Workplace Policy for public employees, and requires Employee Assistance Programs (EAP). Pre-employment and random drug testing are not permitted.

Alaska
No statutes, policies, or regulations regarding drug-free workplace.

Arizona
No statutes, policies, or regulations regarding drug-free workplace.

Arkansas
Executive Order 89-2 covers state agencies that receive certain grants, or act as contractor for the federal government. Each affected agency must certify that they will provide a drug-free workplace.

California
Drug-Free Workplace Act of 1990 requires persons and organizations awarded contracts or grants from any state agency to certify they maintain a drug-free workplace. State is also required to formulate a 5-year plan to respond to its drug and alcohol problems. Administrative responsibility for this rests with the Department of Alcohol and Drug Programs. Subsequent years of the master planning process will provide detailed information illustrating the statewide service system, reflect the outcomes of the State's and counties' efforts to address the legislative recommendations, and offer policy recommendations to the legislature and administration.

Colorado
Executive Order that establishes a Drug-Free Workplace Policy for state and other public employees.

Connecticut
State statute covering all private employers. The statute is restrictive for those employers

with a testing program. It contains requirements that must be met by the employer if drug testing is used to determine promotions, transfers, or terminations. Also regulates the employer's use of drug testing as a part of the application process; provides that all test results are private and may be disclosed to the employer and the tested employee only; and, in order to require testing, the employer must have a reasonable suspicion that employee is under the influence of drugs and/or alcohol. If no reasonable suspicion, employer may require a test if: (1) the test is authorized by federal law; (2) the employee is in a safety-sensitive position; or (3) the test is part of an employee assistance program offered by the employer and the employee voluntarily participates. The statute reserves the employer's right to conduct medical screenings, and to prohibit the use of alcohol and/or illegal drugs during work hours. Random testing is allowed for high risk or safety-sensitive positions.

Delaware

State policy requiring all state agencies receiving federal funds to provide a drug-free workplace.

Florida

Statutes that regulate both private and public sector. (1) Private Sector: if an employer has reason to believe that an injury was caused by the intoxication or drug use of an employee, the employer may require the employee to submit to a drug test; employer may establish a testing program if it includes provision for education and written notice to the employees; and, the employee is given the opportunity to challenge test results. Allows job applicant testing, reasonable suspicion testing, testing for routine fitness for duty, and follow-up testing. Sets up guidelines for testing and confirmation testing to protect the employee and to provide accurate results. (2) Public Sector: employers to provide proper notice and written policy to employees; same types of testing set out for private sector may conduct may be conducted; and, same guidelines for protecting the employee and insuring accuracy. Both laws require that employees with first time positives must be provided an opportunity to seek treatment, at the employees' expense. Employees in safety sensitive positions may be either placed on leave during treatment or placed in a non-safety sensitive occupation. The laws also set standards for labs and confidentiality.

Georgia

Drug-free Workplace Act covers state agencies' contractors, state employees and applicants for state employment. It requires that a representative of a state agency is not to enter into a contract with a contractor unless the contractor certifies that all employees will be provided with a drug-free workplace. All contractors who hire subcontractors must secure certification that the employees of the subcontractor will be provided with a drug-free workplace. The statute outlines what a contractor may do to provide a drug-free workplace. State employees working in high risk jobs are subject to random drug testing and are subject to dismissal if they refuse to be tested or found to have used an illegal drug. Any applicant who refuses to submit to a drug test or tests positive, shall be disqualified from state employment for two years.

Drug-free Public Work Force Act of 1990 sets out personnel action if a state employee is convicted of any criminal offenses involving the manufacture, distribution, sale or possession of a controlled substance, marijuana, or a dangerous drug.

Hawaii
Law requires that before being tested for drugs, employees must be informed in writing of which specific drugs they will be tested for, as well as a statement that prescription or over-the-counter drugs may cause a positive result. Employees, must receive a "disclosure form" to list any prescription or over-the-counter drugs taken in the last 30 days. Laboratories must meet standards issued by the State Director of Health.

Idaho
Executive Order establishing the Idaho Alcohol and Drug-Free Workplace Policy for state employees. It prohibits use of alcohol and other illegal drugs in the workplace and requires state agencies to provide all employees with information about the Alcohol and Drug-Free Workplace Policy. Each agency must submit a quarterly report to the Personnel Commission citing any violations of the Policy. Drug testing programs can be implemented for safety-sensitive positions if a drug problem has been documented.

Illinois
Drug Free Workplace Act applicable to those agencies and individuals receiving contracts or grants from the State. Provides that recipient must certify a drug-free workplace will be provided and sets out the methods for certifying that a drug-free workplace exists. The Act also prescribes what actions will result in suspension or termination of a grant or contract; however, such suspension or termination can be waived by the agency head if it would disrupt operation of the agency or be detrimental to the public.

Indiana
Executive Order that mirrors the federal policy for state contractors and sets up a state employee assistance program.

Iowa
State law prohibits drug testing of current employees unless the employer has probable cause to believe the employee is impaired; that such impairment presents a safety threat; that testing is done by state approved lab; use of a second alternative testing method for positive results; and provide substance abuse evaluations and treatment for employees who test positive. The employer may require drug tests as part of scheduled physicals, but must notify the employee of the test at least thirty days in advance. An applicant may be tested as part of a pre-employment physical, but the employer must include this information in all advertisements, on the application, and must verbally inform the applicant.

Kansas
Statute regulates drug testing of public employees. Department of Administration has authority to establish and implement a drug testing program for persons taking office

(governor, lieutenant governor, etc.) and safety sensitive positions in state government. No applicant for a state job may be tested unless the person is given an initial offer of employment. Advertisements for safety sensitive employment must include information concerning drug testing. No one shall be terminated due to a one time positive test result, but must undergo a drug evaluation and a treatment program.

Kentucky
Drug-Free Workplace Act stating that Kentucky shall follow federal law and will not establish state regulations.

Louisiana
Statute requiring that any drug test used for disciplinary purposes must be conducted by a lab certified by either NIDA or the College of American Pathologists (CAP). State law also provides that any employee who is fired for using illegal drugs is disqualified from unemployment insurance benefits, providing that the employer has a written substance abuse policy.

Maine
State statute covering both the public and private sector and regulates all drug testing in the workplace. It sets limitations on those who elect to implement a testing program. Prior to implementing a testing program, employer must have a functioning employee assistance program; a written policy; cannot require or request an employee to sign a consent form; and must use qualified testing labs. Before an employer may take action against an employee who refuses to submit to a test or shows a positive result, the employee must have the opportunity to enter a treatment program. No action may be taken while an employee is undergoing treatment. Employers must have their drug testing policies reviewed by the Maine Department of Labor. Violations include assessment of civil money penalties, triple damages to the employee, court costs, and attorneys fees.

Maryland
Governor's Executive Order indicates the adoption and establishment of a substance abuse policy by Maryland for all its employees, but applies only to state employees. Requires that employers testing for alcohol and controlled dangerous substances must use laboratories certified by the State Department of Health and Mental Hygiene. Also requires certification of a drug and alcohol free workplace in certain bid proposals and in purchase orders over $10,000.

Massachusetts
No statutes, policies, or regulations regarding drug-free workplace.

Michigan
No statutes, policies, or regulations regarding drug-free workplace.

Minnesota
State law covers private and public employers. Pre-employment testing is permitted if the employer has extended a conditional job offer to an applicant and as long as the same goes of all applicants. Current employees may be required to submit to a test as part of an annual physical exam, provided two weeks' notice is given. Safety sensitive employees may be required to undergo random drug testing, and employers may also test if there is reasonable suspicion. Law requires that employer must have a written policy and specifies what is to be contained in the policy. Employer must allow employee or applicant to fill out a form acknowledging that the employer has a policy and identify any over-the-counter or prescription drugs being taken. All testing must be done by a NIDA certified lab. Employee must have the opportunity to enter a treatment program, at the employer's expense, after a first-time positive test; employee refusal can result in dismissal

Mississippi
Statute regarding a drug-free workplace applies to both public and private employees. It prescribes procedures that must be followed for those who elect to initiate a drug test program. State law specifically absolves employers of liability from civil actions based on drug testing programs or procedures performed in compliance with the statute.

Missouri
No statutes, policies or regulations regarding drug-free workplaces.

Montana
State statute provides that no employer may require an applicant to submit to a drug or alcohol test unless employed in hazardous work or if primary responsibility in public safety. Current employees cannot be tested unless there is some reason to believe that the employee is under the influence during work hours. All employers must supply their employees with prior written notice detailing the testing procedures.

Nebraska
Law requires that the results of a drug test cannot be used as a determination for employment or continued employment unless the test has been confirmed by gas chromatography-mass spectrometry. All testing is to be conducted by a licensed lab; specimens must be kept refrigerated for a period of 180 days in a sufficient quantity for retesting; documentation of the chain of custody process; and employer assurances for keeping all test results confidential.

Nevada
Drug Free Workplace Act which provides that state employees may be fired for drinking or being under the influence of alcohol while on the job, as well as for use of any drugs which could impair job performance. Use of controlled substances on the job is a fireable offense, but in most cases, prescription medication is allowed. Tests must be conducted by a laboratory which is certified by NIDA. Employees must have the chance to have the sample retested, at their own expense, at another NIDA-certified lab.

New Hampshire
No statutes, policies or regulations regarding drug-free workplaces.

New Jersey
Executive Order applying the federal drug-free workplace provisions to all state agencies. The N.J. Department of Personnel has an EAP for all state employees.

New Mexico
The State Personnel Board promulgated rules for testing of state employees: (1) all applicants to safety sensitive positions are required to submit to a drug test once an offer for employment has been made; (2) current safety sensitive employees are required to submit to a test if they are being considered for promotion or transfer; (3) each agency shall require non-safety sensitive employees to submit to a test if there is reasonable suspicion or if the employee caused a work related accident. Procedures are included for sample collection, privacy safeguards, and reporting of test results. An employee must be given the opportunity to explain the results and to have the specimen retested. Applicants and current employees in safety sensitive positions shall be rejected or dismissed if they are unable to adequately explain a positive test result. Those in non-safety sensitive positions are given the opportunity to enter a treatment program. Refusal to submit to a test is cause for dismissal.

New York
No statutes, policies, or regulations for a drug-free workplace. The state's law enforcement agencies conduct pre-employment and current employee drug testing. Legislation has been introduced in the current session creating the Drug Free Workplace Act.

North Carolina
Controlled Substance Examination Act is intended for the protection of employees. The law sets guidelines for employers to follow in conducting drug testing, if they choose to test. These guidelines cover from the collection of the specimen, to a certified chain of custody, to revealing of test results. Employers are required to use labs certified by either NIDA or CAP.

North Dakota
Executive Order establishing a drug-free workplace policy for state employees.

Ohio
No statutes, policies, or regulations regarding drug-free workplaces.

Oklahoma
The law regulates both public and private employers. Any employer electing to set up a drug testing program must follow the guidelines set out in the statute. Applicant testing is allowed if there has been a conditional offer of employment and if all other applicants are subject to the same testing policy; reasonable suspicion testing is allowed; private employers may require random testing of any employee; public employers may conduct random testing only on such

jobs as police officers, where public safety is a threat, when the employee carries a firearm, or where employees are in direct contact with prison inmates; employer must supply employees a written drug testing policy; and employer must have an employee assistance program. The law also provides regulations for testing facilities and sample collection and storage.

Oregon

Law requires that licensed labs conduct tests and that discipline based on an unconfirmed screen is not allowed; a confirmation test must be conducted on any presumptive positives before adverse action is taken. Another law covers breathalyzer tests and states that the employer must have reasonable suspicion or employee consent to conduct a breathalyzer test. A 1986 Executive Order requires that final candidates for employment in State correctional facilities and current employees for which there is reasonable suspicion may be tested.

Pennsylvania

Executive Order which requires state agencies to establish employee assistance programs if the agency has a drug testing program. Nothing in the Executive Order requires an agency to have such testing program.

Rhode Island

The statute provides that an employer can test for cause if there are objective facts that drugs are impairing an employee's job performance; samples are collected in private; testing is in conjunction with a treatment program; positive results are accurately confirmed; the employer pays to have the sample retested by an independent lab; and the employee has the opportunity to explain the result. Pre-employment testing is permitted.

South Carolina

Drug-Free Workplace Act regulates only those contractors or associations who directly enter into contracts with or receive grants from the state in the amount of $50,000 or more. Requirements are similar to federal act. The provides the contractor or association with the choice of two required responses to an employee's drug offense conviction: (2) employee can be terminated; or (2) may enter into an approved rehabilitation program. If the contractor or association made false certification, violates the certification, or fails to take action against convicted employees, the state contract or grant may be suspended or terminated, and the contractor may be subject to suspension or debarment for a specified time period.

South Dakota

Executive Order (Drug-Free Workplace Policy), only applies to the consequences of being convicted of a criminal drug statute violation in the workplace. A state statute requires that a testing program be created for applicants of safety sensitive positions within state government and for current safety sensitive state employees under reasonable suspicion. Any advertisement for such a position must contain information concerning the drug testing qualifications. An applicant or employee must make a request, in writing, to have access to

the results.

Tennessee

The drug testing law in Tennessee applies only to the Commissioner of Correction's authority to require drug testing of security personnel employed by the Department of Corrections. The statute states that a positive initial test must be followed by a reliable confirmatory test. The Commissioner must have reasonable suspicion, and the employee must have the opportunity to explain the occurrences that provided for the suspicion. The employee shall be given a copy of all test results, and the opportunity to explain positive results. The Commissioner shall take appropriate action against an employee who tests positive and provide that employee with treatment. The Commissioner must provide employees with a written copy of the policy.

Texas

Requires all employers who have 15 or more employees and who maintain worker's compensation insurance coverage to adopt a policy designed to eliminate drug abuse and its effects in the workplace. A company policy must be provided to new employees at hiring and to current employees within 30 days of its adoption. The law further states that the policy must contain a statement of the purpose and scope; what drugs it includes; consequences an employee may suffer for drug or alcohol use or abuse; descriptions of available treatment programs; information on company alcohol and drug abuse education programs; and a description of the drug testing program in the company.

Utah

State statute provides that all employers may conduct drug testing as long as guidelines of the law are followed. Employers must submit to periodic testing themselves. Employers may require current employees and prospective employees to submit to drug tests if it is: (1) to investigate possible employee impairment; (2) to investigate employee accidents and thefts; (3) to ensure safety procedures; or (4) to maintain productivity, quality, and security. Guidelines are prescribed for sample collection and testing to insure privacy and proper documentation. All employees must receive a written drug testing policy. If an employee refuses to submit or tests positive, disciplinary action may include: an employer approved treatment program; suspension of employee without pay; termination; refusal to hire a prospective employee; or any other disciplinary action conforming with employer procedure, including collective bargaining. State law absolves employers of liability from civil actions based on drug testing programs or procedures performed in compliance with the state statute.

Vermont

Statute regulates the testing of both public and private employers. Pre-employment testing allowed if all of four conditions are met: (1) there is a conditional offer of employment; (2) the applicant receives a ten day notice; (3) the test is part of a physical exam; and (4) the test follows the guidelines of the statute. An employer may test current employees if all of the following conditions are met: (1) there is probable cause; (2) there is an employer provided treatment program; (3) the employee is not terminated due to a first time positive

test and the employee agrees to treatment (employee may be terminated for later positive test results); and (4) the tests follow guidelines of the law. Tests can only detect those drugs considered illegal or that may cause impairment on the job. Employees must be provided with a written drug testing policy. Only labs designated by the Department of Health may be used and a chain of custody must be established. Confirmation tests must be performed and the employee has the opportunity to draw blood at the time of sample collection to be tested. Finally, employees or applicants must have the opportunity to explain test results, and information must remain confidential. The law does not regulate any employer from prohibiting possession and use of illegal drugs or alcohol in the workplace.

Virginia
The State Department of Personnel and Training (DPT) developed policies and procedures for state government employees in compliance with the federal Drug Free Workplace Act. (Copy of DPT policy in Appendix D.)

Washington
The State Personnel Board allows state agencies to test employees if they meet the following requirements: (1) the agency states why it believes the employee's performance is affected by drugs; (2) the employee endangers the safety of others; and, (3) the agency must have a written policy establishing confidential testing procedures. Drug tests can be used only as a tool to identify poor job performance.

West Virginia
Drug-Free Workplace Executive Order which is parallel to the federal Act concerning state grants.

Wisconsin
No statutes, policies, or regulations regarding a drug-free workplace.

Wyoming
No statutes, policies, or regulations regarding a drug-free workplace.

STATUTES • POLICIES • REGULATIONS
STATE BY STATE ANALYSIS

	AL	AK	AZ	AR	CA	CO	CT	DE	FL	GA	HI	ID	IL	IN	IA	KS	KY
Drug Free Workplace Act/Policy	■				■			■		■		■	■				■
Executive Order				■		■						■		■			
Statutes: Private Employers							■		■		■				■		
Statutes: Public Sector									■	■	■				■	■	
Rules/Regulations: State Employees																	

	LA	ME	MD	MA	MI	MN	MS	MO	MT	NE	NV	NH	NJ	NM	NY	NC	ND
Drug Free Workplace Act/Policy											■						
Executive Order			■										■				■
Statutes: Private Employers	■	■				■	■		■	■						■	
Statutes: Public Sector	■	■				■	■		■	■						■	
Rules/Regulations-State Employees														■			

	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY	
Drug Free Workplace Act/Policy						■											
Executive Order			■	■			■							■			
Statutes: Private Employers		■	■		■				■	■	■						
Statutes: Public Sector		■	■		■		■	■			■						
Rules/Regulations-State Employees												■	■				

F. LEGAL ISSUES AND COURT CASES

PRIVATE WORKERS

To understand the questions raised under the law in connection with drug testing, one must be careful to distinguish between the testing of private employees and public employees. Constitutional restrictions and many statutory limitations (other than individual state statutes designed to cover private employees) do not apply to the private work force. Thus, for private employees to raise claims generally they must allege specific claims under previously existing enactments, common law causes of action, or employment agreements. Such claims might include defamation (when false information regarding testing is communicated to others), invasion of privacy (for the manner in which testing occurred, or for publication of true information), and breach of contract (for violations of agreements respecting testing in the work place). There are few reported cases dealing with such questions for they tend to be quite specific factually, limited to the particular situations involved in the cases. Other than the very limited number of cases involving state constitutional provisions for invasion of privacy, there is relatively little in the way of reported case authority dealing with claims made by private employees for workplace testing.

One legal issue involving private workers has received attention in Virginia courts. That is the issue of when a positive test for alcohol or drugs may constitute misconduct for purposes of disqualifying a worker for unemployment compensation. The VEC Guide to Effective Unemployment Adjudication addresses this issue and the applicable case law at pages 145-149 are in Appendix G.

GOVERNMENT WORKERS

As to public employees, however, while many of the same statutory and common claims can be made, the first, and certainly most important, question is whether Fourth Amendment restrictions relating to unreasonable searches and seizures could be applied in the employment setting. Traditionally, this provision was limited to the usual criminal justice situations. This matter, along with others, was resolved by the United States Supreme Court in two cases decided in 1989. In *Skinner v. Railway Executives Association*, 489 U.S. 602, the Court reviewed the United States Department of Transportation regulations which required that employees directly involved in a railroad accident submit to a mandatory drug test. In *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, the program for consideration dealt with the United States Customs Service requirement that certain employees -- those applying for promotion to positions directly involving the interdiction of illegal drugs, or requiring the carrying of firearms -- produce urine samples which would be analyzed for evidence of illegal drug use.

The initial inquiry was whether the Fourth Amendment even applied to such noncriminal justice activities; here the Court unanimously held the constitutional rules would apply. The

Justices found a sufficient interest in privacy such as to mandate the consideration of the Fourth Amendment, as incorporated to apply against state officials by the Fourteenth Amendment Due Process Clause.

Having concluded that the application of the Fourth Amendment was appropriate, however, the Court by divided vote found that in neither case did compelled testing violate the Fourth Amendment even though neither case involved the kind of individualized suspicion and issuance of a warrant as would normally be required. The Court in both cases held that such testing would be allowed because it served special governmental needs, the government's strong interest outweighed the individual's privacy expectation, and the testing was conducted in an even handed fashion.

Skinner and *Von Raab* are important cases because they demonstrate that while the Fourth Amendment must be considered in cases involving public employees and drug testing, the Court will uphold some testing, at least in certain circumstances. The programs may be validated even without the usually mandated individualized suspicion or judicially authorized warrant. The impact of the cases, however, may be viewed as somewhat limited. In both cases the covered employees arguably worked in areas involving public safety. Moreover, neither case raised the more intrusive random drug testing scheme found in some private employment programs. Here, employees were put on notice as to circumstances under which testing would be required, such testing was not done on a repeated basis throughout their careers, and the testing was linked to quite particularized governmental interests. In short, the programs in *Skinner* and *Von Raab* involved relatively unusual, and fairly narrowly constructed programs.

The programs which have been litigated since the two Supreme Court decisions have, however, dealt with broader and more typical sorts of testing. Recent decisions by courts throughout the country support the view that once the testing is required of employees who are not engaged in matters of public safety it would become more difficult to justify such testing. Surely reasonable minds can differ with respect to defining employees who are in safety sensitive positions. Without such justifications, however, it will be more difficult for constitutional challenges to be rejected when there is no reasonable suspicion of drug use either on or off the job.*

Thus, in both the federal and state courts, random drug testing of police officers, transportation workers, and correction officers generally have been affirmed. The more difficult questions have involved testing of employees who are not so directly related to clear safety sorts of considerations. The cases have been difficult ones for the courts to resolve for

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*This conclusion is consistent with two opinions of the Virginia Attorney General, one issued in 1987 before *Skinner* and *Von Raab* were decided and one issue in 1989. See, 1986-1987 Atty. Gen. Ann. Rpt. 189 and 1989 Atty. Gen. Ann. Rpt. 204 attached as Appendix F.

the fact patterns have been narrow, for instance, the closer cases have looked to different sets of employees who worked in nuclear regulatory operations, employees who were motor vehicle operators but did not necessarily carry passengers, and employees who were required to hold security clearances.

COURT CASES

These recent court cases discuss many of the difficult issues being raised today in drug testing litigation. They also contain good analyses of the legal matters previously set out.

Dimeo v. Griffin, 943 F.2d 679 (7th Cir. 1991)

A class action suit was brought against the Illinois Racing Board attacking a substance abuse rule that provided for the random drug testing of horse race participants. The United States District Court granted a preliminary injunction, and an appeal was taken. The Seventh Circuit, over a strong dissent, found the mandatory drug testing program, requiring all horse racing participants to submit to urinalysis, valid. The court looked to the safety concern to the race participants. It also emphasized the state's economic concern for lost tax revenues due to a decline in the racing business which would result if the public's belief in the fairness of the races was shattered by knowledge of drug use by jockeys and other race participants.

American Federation of Government Employees v. Martin, 969 F.2d 788 (9th Cir. 1992)

The public employees' union and two U. S. Department of Labor (USDOL) employees filed suit to enjoin the USDOL from conducting random drug testing, reasonable suspicion drug testing, and accident or unsafe practice drug testing. They further sought a declaration that the employee drug testing plan on its face violated the Fourth Amendment. The District Court held that the Fourth Amendment barred drug testing of USDOL employees in public health and safety sensitive or security sensitive positions based on a reasonable suspicion of off duty drug use. The USDOL appealed. The Court of Appeals, though recognizing "significant privacy interests," held that the Fourth Amendment did not bar drug testing of those employees based on a reasonable suspicion of off duty drug use.

Guiney v. Police Commissioner of Boston, 582 N.E.2d 523 (Mass. 1991)

A Boston police officer challenged the constitutionality of random drug testing of police department personnel. The Superior Court dismissed the action. The police officer appealed. The Supreme Judicial Court held that the police department rule, with its requirement of random urinalysis testing of Boston police officers, imposed an unreasonable search and seizure under the Massachusetts Declaration of Rights. The case focuses heavily on state, not federal, law in reaching its conclusion. In response to a vigorous dissent, the court stated: "Constitutional safeguards should not be abandoned simply because there is a drug problem in this country."

Fraternal Order of Police v. City of Miami, 609 So.2d 31 (Fla. 1992)

A police union filed unfair labor practice charges against the city in response to incidents in which the city required police officers to submit to drug testing as a condition of continued employment. The Public Employee Relations Commission found that the testing was the subject of mandatory collective bargaining and prohibited the city from requiring its employees to submit to chemical testing. The city appealed. The Supreme Court held that although mandatory collective bargaining is necessary for random drug testing of police officers absent express legislation, such testing is permissible and within the management's prerogative when there is some evidence of drug involvement by specific officers. The court emphasized that its holding was narrow, as "the officers were allegedly seen illegally using or buying drugs."

Hennessey v. Coastal Eagle Point Oil Company, 609 A2d 11 (N.J. 1992)

An "at will" employee of a private oil company who was discharged following a positive drug test brought an action for wrongful discharge. The Superior Court entered judgment for the employee, and the employer appealed. The Supreme Court held that the oil refinery's firing of an "at will" employee in a safety sensitive position, as a result of his failing a random urine test, did not violate the clear mandate of public policy, and thus did not give rise to a claim for wrongful discharge. "[S]afety outweighs a right to privacy in off-duty activities. The public has a compelling interest in safety." The court went on to write:

> We note, however, that the complex issues of drug-testing in the workplace are better addressed in the context of legislative action or labor-relations agreements.

G. SURVEY OF VIRGINIA EMPLOYERS

In the past decade, drug testing appears to have become widely accepted in the corporate community as an appropriate strategy for deterring or controlling substance abuse. In the early 1980s, very few companies had any experience with this practice, and those that did engage in employee drug testing only did so under certain specified (and limited) conditions. Pre-employment testing was minimal, almost nonexistent. The situation has changed dramatically. Some national surveys report that about half of all major corporations have now implemented drug testing programs designed to screen current employees and/or job applicants.

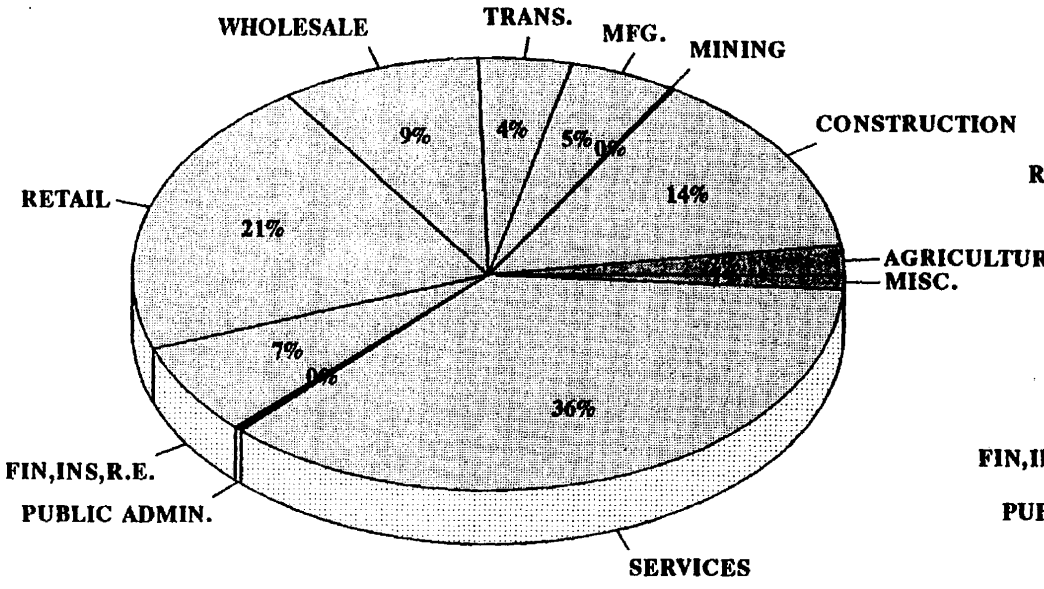
The HJR 534 Advisory Committee members were in agreement that data on the status of drug testing in corporations operating in the Commonwealth was necessary for this study. Consequently, a survey instrument was designed and in August, 1993, a random sample of 2,500 Virginia employers received the survey (copy in Appendix E). The survey sample, representing just over two (2%) percent of the total universe, was selected by the Virginia Employment Commission's Unemployment Insurance data base. Criteria selection included: proportional representation of all industries in the Commonwealth (excluding federal government, domestic workers, and self-employed); size (according to number of employees); and geographical distribution throughout the State.

The survey yielded 1,015 useable responses (14 were unusable), for a 41 percent response rate. Industry distribution was within two percent in each industry category (see Figure 1). These survey response rates are considered well above the average for surveys involving employers.

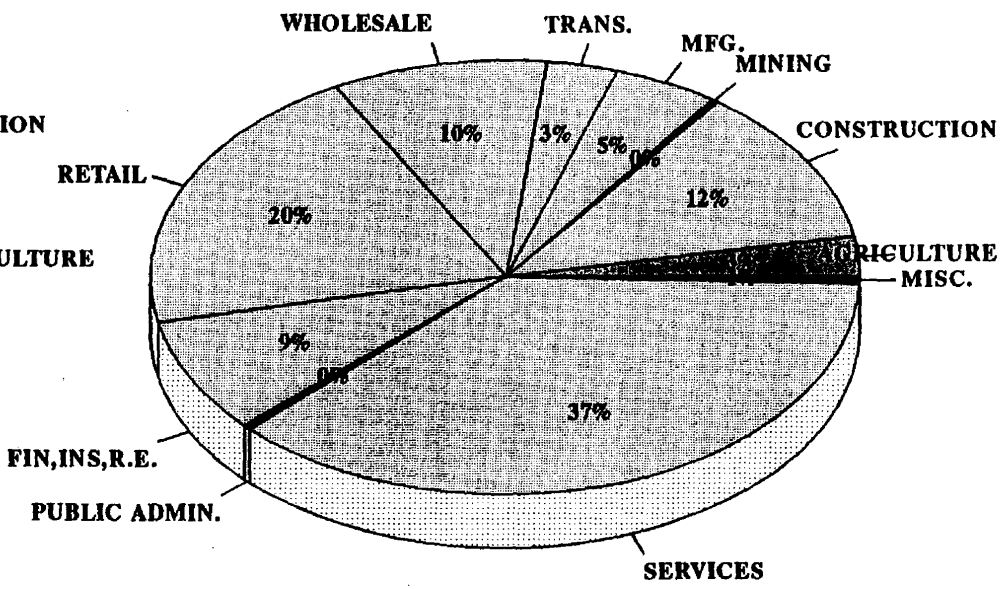
This analysis, based on the state survey, examines how companies in the Commonwealth are currently addressing workplace substance abuse. With a focus on drug testing, the survey obtained information on existing practices, employer initiatives, costs spent on company testing programs, and other measures to combat substance abuse in the workplace.

FIGURE 1

EMPLOYER SURVEY RESPONSE
By Industry



SURVEY SAMPLE



SURVEYS RECEIVED

Virginia Employer Survey, October 1993

DRUG TESTING

Several recent studies shed some light on the extent to which drug testing programs have been initiated by businesses. A 1993 survey by the American Management Association (AMA) indicates that 84.8% of their responding firms were currently testing for drugs. Based on the AMA's 1992 survey, this represented a 13.8% increase in the number of companies that initiated drug testing programs. Among AMA members, transportation leads the list of employee testing at 95.2%, followed by General Services (81.7%), Wholesale/Retail (79.9%), manufacturing (73.2%), public administration (70%), financial (66.1%), and ending with business/professional services (50.8%). Figure 2 shows that since the first survey in 1987, the 1993 results reflect at 294.4% increase in the number of AMA firms initiating drug testing programs.

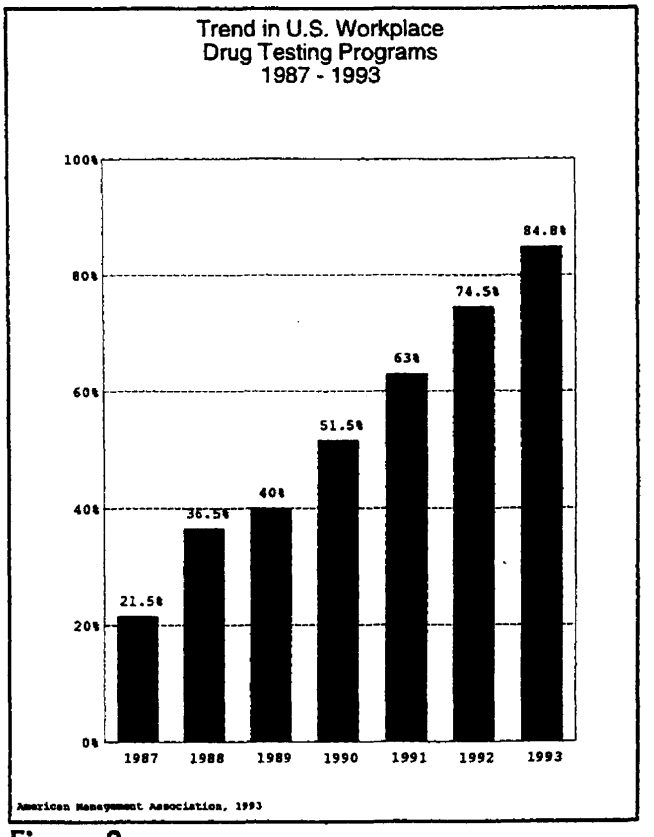


Figure 2

In 1990, the U. S. Bureau of Labor Statistics (BLS) conducted a follow-up survey of the approximately 6500 respondents to their 1988 survey of employer anti-drug programs. From this survey of private nonagricultural establishments, 4.4% of the respondents were doing drug testing as compared to 3.2% in 1988. Unfortunately, since the 1990 survey, BLS has not conducted any further surveys of this group. Closer to home, the Workplace Task Force of the Metro Richmond Coalition Against Drugs conducted a survey in 1991. Their survey revealed that of those companies in the metro Richmond area with 250 or more employees, over 79% have some type of substance abuse program, with almost half including drug testing as part of their program.

With such a variety of surveys, it is difficult to rely upon these studies to draw any conclusion about what is happening throughout the Commonwealth. Drug testing, however, does take place in Virginia and, to this extent, the results of the 1993 Virginia Employer Survey should be useful to policy makers, legislators, and program administrators.

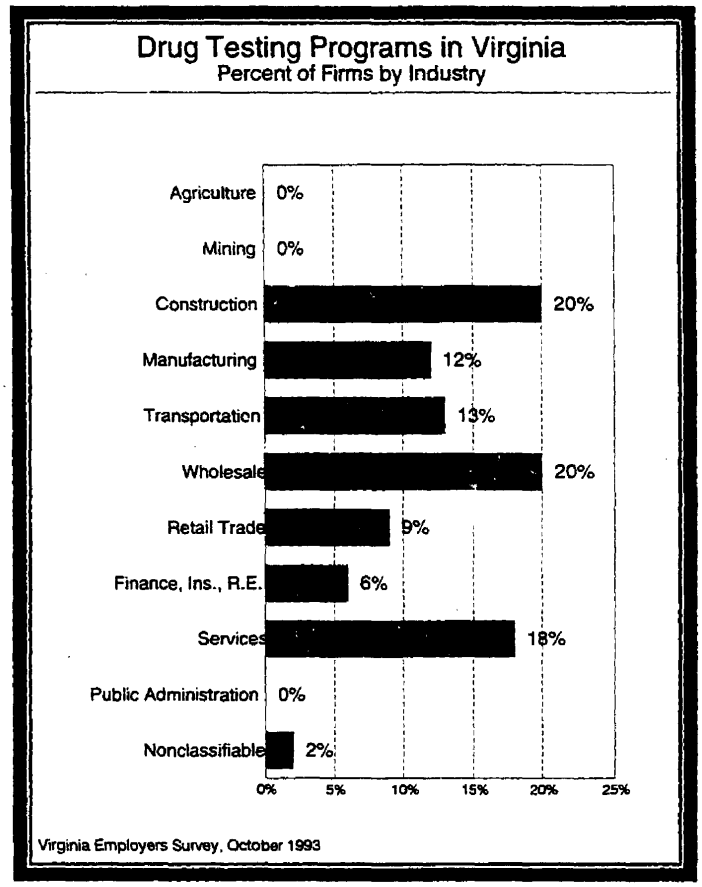
Results from the Virginia Employer Survey reveal that small firms (fewer than 100 employees) are one and a half times more likely to have a drug testing program than large firms (more than 250 employees).

Drug Testing Programs by Size	
Small (1-99 Employees)	54.7%
Medium (100-249 Employees)	9.5%
Large (250+ Employees)	35.8%

The Virginia survey reveals that nine (9%) percent of the firms in the Commonwealth have drug testing programs. A profile of the Commonwealth's business establishments shows that small size establishments represent 96.9% of all businesses; medium size firms comprise 1.8%; and large companies, 1.3%. Based on the survey responses, small size firms have over half of the state's workplace drug testing programs.

An examination of the various sectors of the economy indicates that the Construction and Wholesale sectors have the most firms with drug testing programs, with 20% responding that they have such programs. They are closely followed by the Service sector with 18%. Figure 3 shows the incidence of drug testing programs by type of industry. (Note: Public administration excluded the federal government which resulted in a significantly smaller response of only 4%.)

FIGURE 3



TYPES OF TESTING

Testing prior to employment is the drug program most universally applied. Of the firms with drug testing programs in the Virginia Survey (Figure 4), 8 out of 10 screen for drug use as part of the employment process; and almost 17% of these firms conduct only pre-employment testing. 39% of the respondent firms reported that for the 12-month period, September 1992-93, they had rejected 153 applicants for employment because of positive drug tests. Approximately one-half of the Virginia respondent firms conduct drug tests following accidents, random testing of employees, or for individualized suspicion.

Many companies have no choice regarding substance abuse testing. They are required to provide drug-free workplaces because their employees fall into one or more of the seven basic categories to which the federal government's anti-drug rules apply:

1. Employees of the federal government.
2. Employees of private businesses regulated by the six agencies of the U.S. Department of Transportation.

3. Employees of firms that receive contracts in excess of $25,000 from the federal government.
4. Employees of contractors that do business with the Department of Defense, Department of Energy, and NASA.
5. Employees of contractors regulated by the Nuclear Regulatory Commission.
6. Employees of organizations that receive grants from the federal government.
7. Employees with certain security clearances.

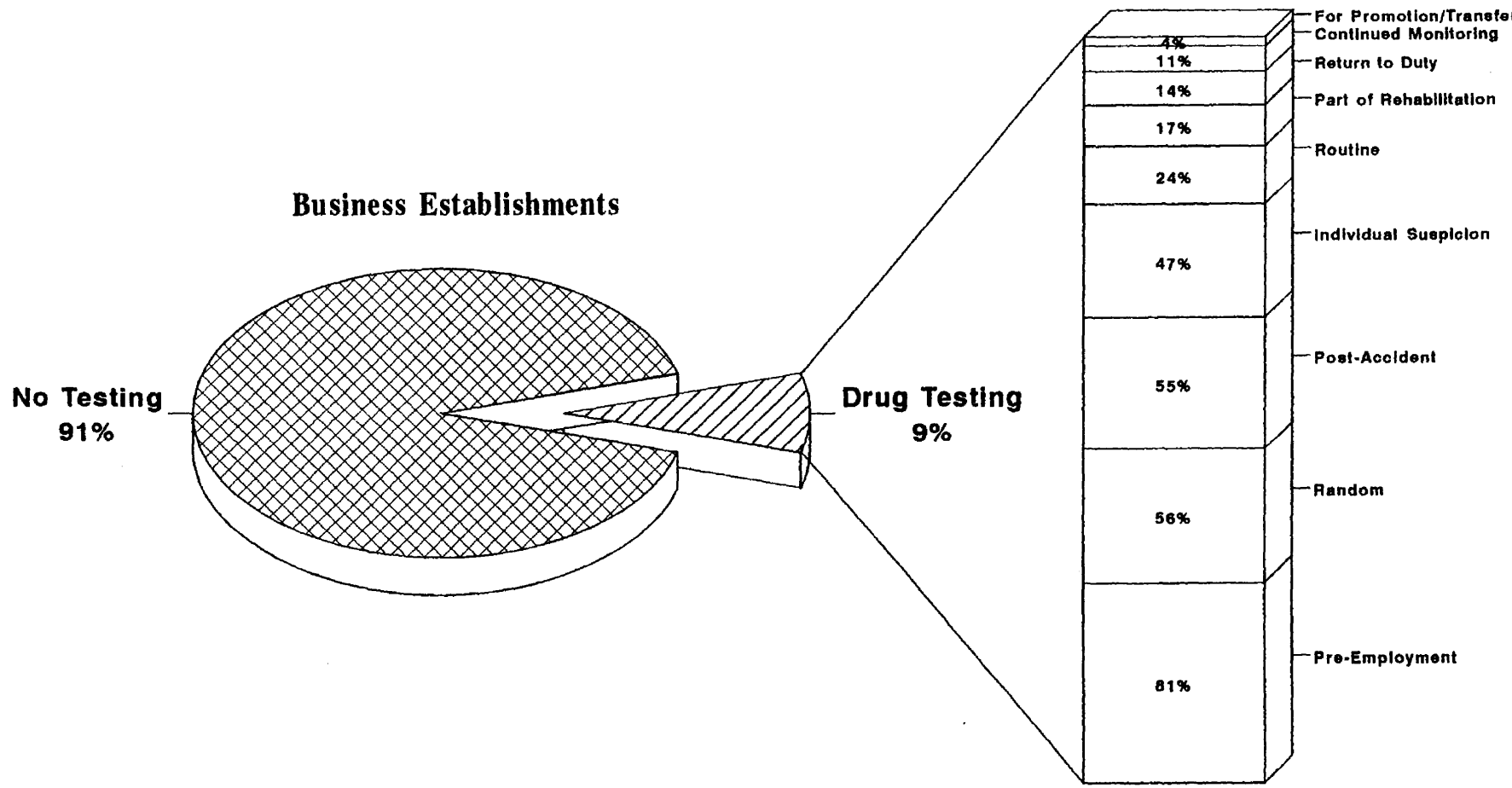
Almost half (49.5%) of the companies in the Commonwealth that perform drug testing do so under federal government mandate. In some sectors such as Retail and Transportation, only one-fourth of the firms are conducting tests for drug use on a voluntary basis.

Sector	% Mandated
Retail Trade	77.8%
Transportation	75.0%
Construction	47.4%
Manufacturing	45.5%
Wholesale	42.1%
Services	29.4%
Finance	16.7%

FIGURE 4

Prevalence of Drug Testing Programs in Virginia

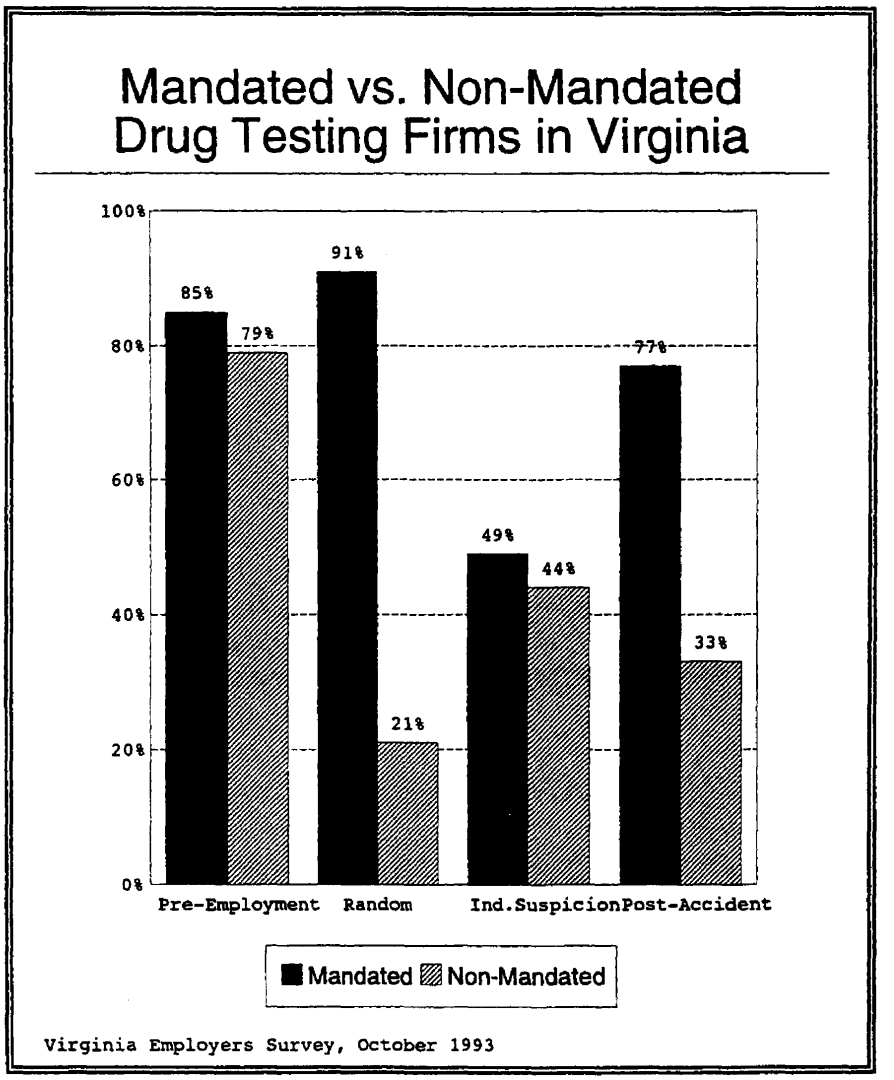
Type of Testing Conducted



Virginia Employers Survey, October 1993

Of the Virginia respondent firms that have established drug testing programs because of government mandates, over three-fourths conduct random and post-accident testing; while less than one-third of the non-mandated firms do random and post accident testing. Figure 5 compares these results.

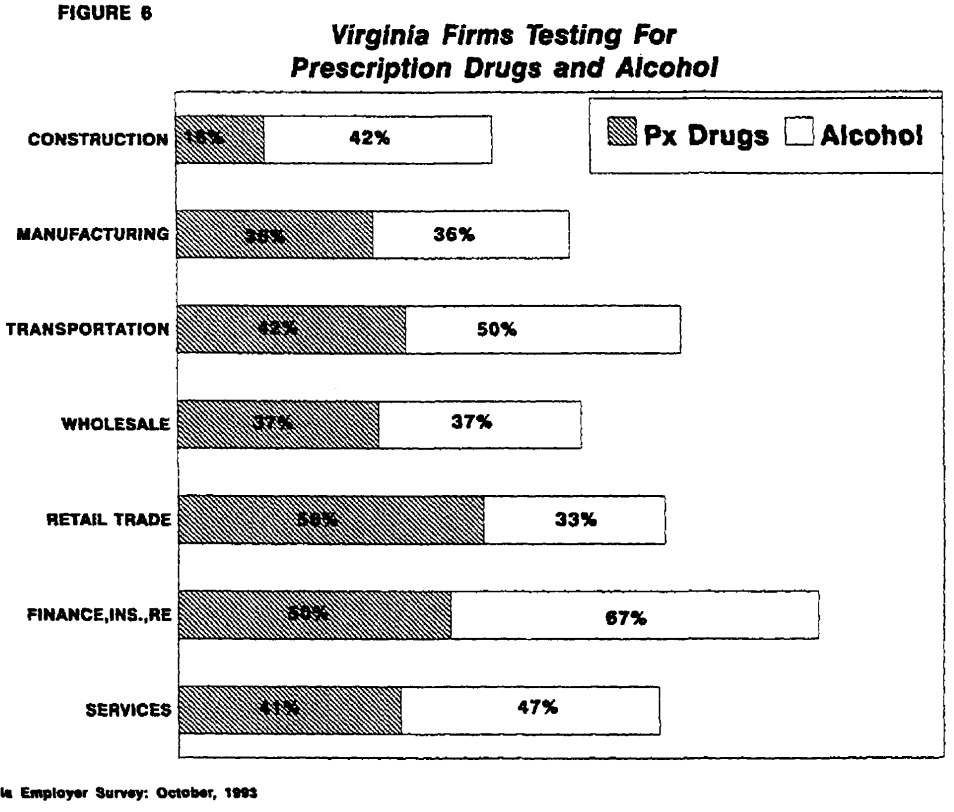
FIGURE 5



Pre-employment and individualized suspicion testing are similar among the state's drug testing firms. Random and post accident drug testing are highest among those firms that must comply with government mandates.

In Virginia, 43% of the firms with testing programs are currently testing for alcohol; whereas 99% are testing for controlled substances. Likewise, 41% are also testing for prescription drugs. Figure 6 depicts the industry breakout for alcohol and prescription drugs.

FIGURE 6



Virginia Employer Survey: October, 1993

ACTION ON TEST-POSITIVE EMPLOYEES

Responses from the Employer Survey reveal that the policy for 56% of the companies that test for drugs is immediate dismissal for employees who test positive the first time. In the 12-month period September 1992-93, 24% of the respondent firms dismissed 34 employees because of a positive drug test and 11% of the firms dismissed 19 employees due to a positive alcohol test.

In addition, the Virginia Employer Survey shows:

- 52% of respondent firms that test employees report that they refer test-positives for treatment and/or counselling.
- 17% take other action such as suspension until rehabilitated or pending investigation, or give 30 days and retest.
- 5% re-assign test-positives to other duties.

ADDITIONAL SURVEY FINDINGS

Along with drug testing, typical workplace initiatives include employee assistance and counseling, and drug and/or health education programs. Some companies may not provide employee assistance programs (EAPs), but have trained someone on-site who is qualified to assist an employee with substance abuse problems. Figure 7 reveals the results of the Virginia survey. Over half of the testing firms provide an EAP or have in-house staff available to assist employees.

Survey data depicted in Figure 7 show that a substantial percentage of companies are willing to provide assistance to an employee who voluntarily admits to having a substance abuse problem -- 73% One-third of the testing firms report that they provide their employees programs on health care, substance abuse, stress management, etc., and two-thirds of these firms provide on-going programs.

Seventy-five (75%) percent of the respondent firms indicated that the employee's agreement to being tested was a condition for continued employment. Construction and Wholesale sectors led with 16.8% requiring this agreement; followed by Services at 12.6%. Manufacturing, Transportation and Retail Trade were all at 8.4%; and Finance, at 5.3%.

8.4% of the firms indicated that the issue of drug testing was addressed in a collective bargaining agreement.

Designing a substance abuse policy is typically the first step for companies seeking to control the use of alcohol and other drugs in the workplace. A majority of the Virginia survey respondents with drug-testing programs have a written drug policy (Figure 8). Some firms, whose employees may be required to undergo a drug test prior to the issuance of licenses, such as Commercial Driver's License (CDL) may not feel the need for a written policy. This may explain why not all firms have an "officially written" drug testing policy.

A vital part of any drug testing program is the reliability of the test results. (See detailed discussion in Section B.) Laboratory selection and the quality of services provided often create a dilemma for the company. Although there are no national standards for proper drug testing by a laboratory, the most complete are the guidelines issued by the National Institute on Drug Abuse (NIDA). 95% of Virginia's respondent firms utilize NIDA certified labs. (Figure 8)

In addition to setting out testing procedures, employee assistance programs, and actions of positive drug testing, a company policy also sets out those employees subject to testing (Figure 8). 85% of the respondents indicated that they include the testing of management in their drug programs.

FIGURE 7

Assistance/Services Provided by Employers In the Commonwealth of Virginia

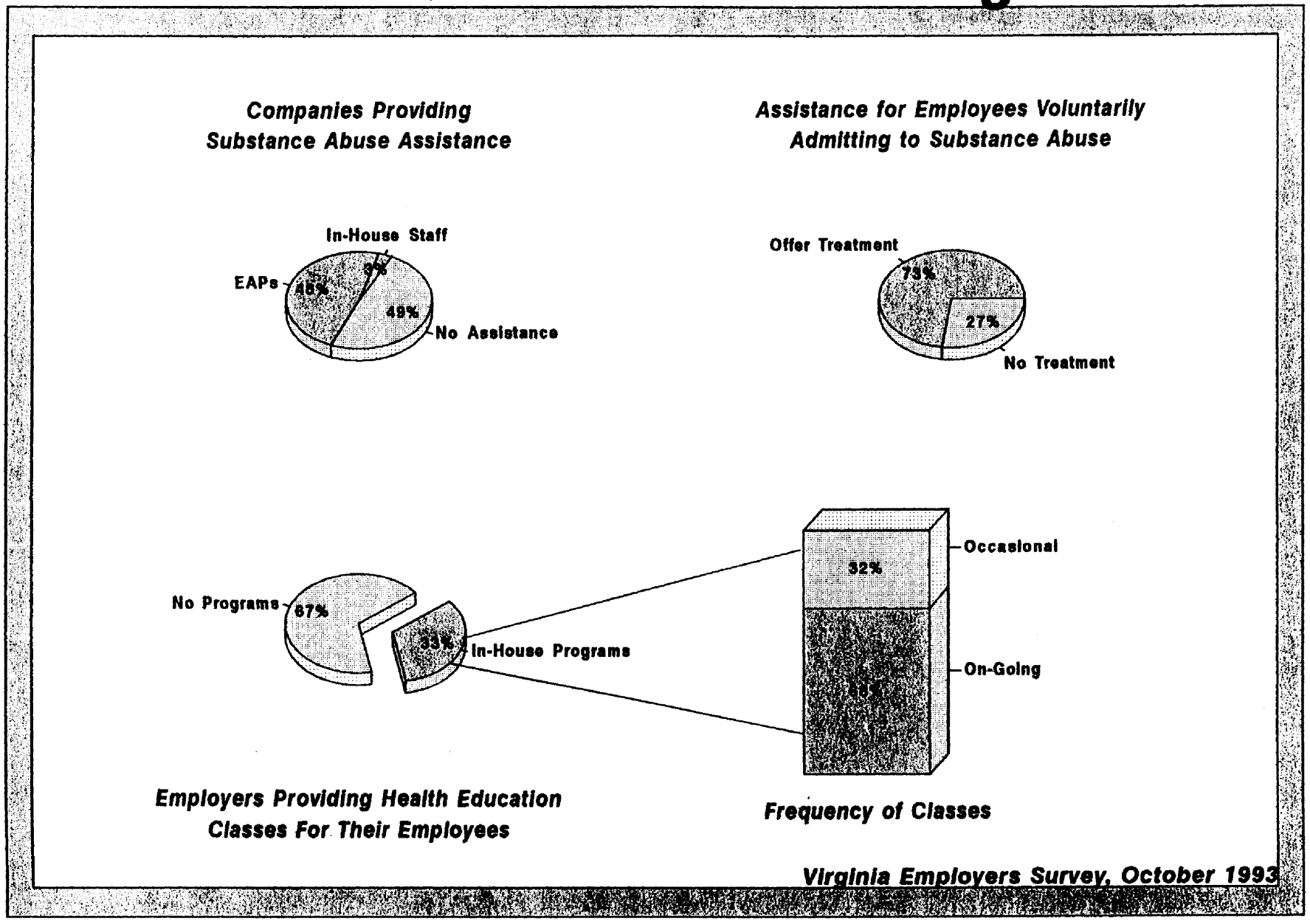
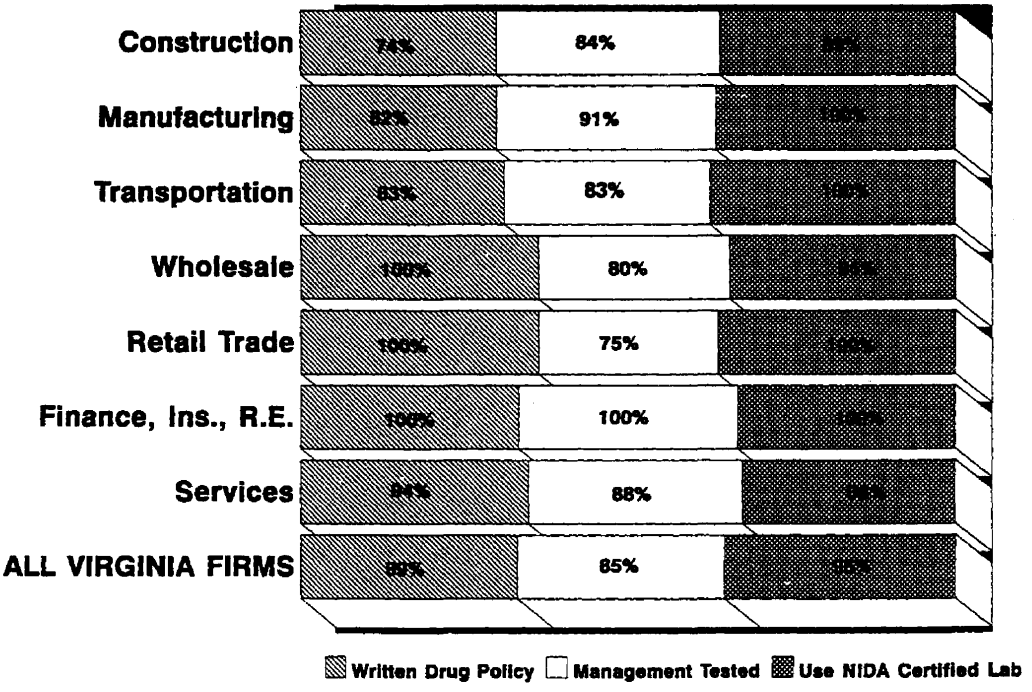


FIGURE 8

The Prevelance of Other Substance Abuse Measures in Drug Testing Firms



Virginia Employer Survey: October, 1993

COSTS

Because successful management of the substance abuse problem can make a big difference in a company's bottom line, many firms have classified expenses related to achieving a drug-free workplace not as overhead, but as a part of the cost of doing business. Obviously, the cost of a testing program is dependent on the size of the testing pool and type of tests. Although 12% of the respondents did not provide the data, the following table shows the estimated dollars spent and percentage of operating budget devoted to drug testing by the respondents to the Virginia Employer Survey.

Estimated $	% Va.Firms	% Operating Budget	% Va.Firms
Less than $1,000	38.9	Less than 1%	84.3
$ 1,000-$ 9,999	0	1% - 3%	12.4
$10,000-$49,999	10.0	4% - 5%	1.1
$50,000-$99,999	1.0	6% or more	2.2

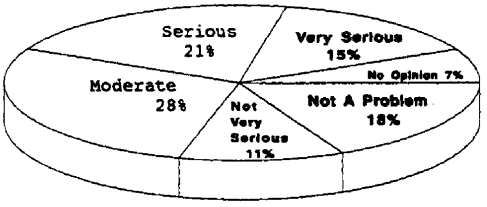
BENEFITS OF A TESTING PROGRAM

Even though companies may have little hard (long term) evidence to support their position, 929 of the firms in the Virginia survey responded as to the benefits of a drug testing program. Almost 55% of **all** respondent firms said that they did not consider it beneficial to have a drug testing program. Some of the reasons, in order of frequency cited, include too few employees, no problem exists, high costs, and violates privacy. Among the drug testing respondent firms, 95% indicated that it was beneficial to have such a program; whereas 31% of the non-testing firms considered it beneficial. Reasons cited from these groups included safety, protection of workplace and employees, improved productivity and performance, and to discourage drug use.

All companies in the survey were asked whether they believe drug abuse is a problem affecting the workplace. Among the non-testing firms, 93% responded; and 96% of the drug testing firms answered this question. Just over one-third of the Virginia firms considered drug abuse, including alcohol, a serious or very serious problem in the workplace. Almost 30% indicated it was not a problem or not a very serious problem; and 28% considered it a moderate problem (Figure 9).

FIGURE 9

DO YOU BELIEVE THAT DRUG ABUSE, INCLUDING ALCOHOL, IS A PROBLEM AFFECTING THE WORKPLACE?



Employer Survey October, 1993

H. EMPLOYERS AND EMPLOYEES

The problems caused by the abuse of drugs and alcohol, in addition to creating an economic burden for states, are costly for the private sector in terms of absenteeism, decreased productivity, and training costs necessitated by high rates of turnover among workers. Private industry has responded in various ways -- sponsoring alcohol and drug abuse prevention and treatment programs; developing model programs for employee assistance; and, methods for detecting substance abuse in the workplace.

There are numerous positions or philosophies toward substance abuse in the workplace. Most philosophies fall into one of two categories: they are either penalty-focused or performance-focused. While both philosophies prohibit the abuse of alcohol and other substances by employees, they are fundamentally different in how they approach their objective.

The first approach, the Penal Position, tends to use a law enforcement model that regards employees who abuse substances as criminals who have abused the system and the company. They rely heavily on surveillance, drug-sniffing dogs, and random drug testing to locate substance abusers. Once found, their corrective action is to terminate the abusers.

The Performance Position is a philosophy that views substance abuse as the impairment of otherwise capable workers. Here the employer attempts to make no moral judgments on the employees, but addresses substance abuse as a mental and physical health problem of importance to management because of its impact on the workers. Based on a "disease-recovery" model, this philosophy translates into a preventive management approach, with an emphasis on a clear, well-communicated policy, mutually supportable work rules and corrective action, employee education, supervisor training, performance documentation, testing for cause or for reentry, an active employee assistance program, and health benefits that allow for addiction treatment.

In the following two units, this study offers an employer's perspective, prepared by the Virginia Chamber of Commerce, on drug testing in the workplace and reports from the Virginia AFL-CIO and Virginia Governmental Employees Association regarding employees concerns about drug testing in the workplace.

AN EMPLOYER'S PERSPECTIVE: DRUG TESTING IN THE WORKPLACE
Virginia State Chamber of Commerce

OVERVIEW: IS THERE A NEED TO TEST?

No one would dispute that drug abuse is a monumental problem in America today. Quick readings of nearly any printed piece will reveal that the problem is not unique to any particular segment of the country or the Commonwealth. Survey after survey, poll after poll reveals that drugs and alcohol are as much a part of our society and workplaces today as are sports.

This problem is of vital interest to employers. Abuse of illegal or controlled drugs and alcohol just in the private sector alone is costing American businesses billions of dollars each year through decreased productivity and increased accidents, low employee morale, absenteeism, employee theft, product defects, health care, and workers' and unemployment compensation costs.

Scott S. Cairns and Carolyn V. Grady, both prominent Virginia attorneys writing in the 1990 Summer volume of the George Mason University Law Review, offered a number of discouraging, yet actual accounts of the problems drugs present just in our workplaces. Some are listed below:

> A 1988 Household Survey on Drug Abuse released by the National Institute on Drug Abuse (NIDA) revealed that 37% of the population of the United States have tried marijuana, cocaine, or other illegal drugs in just the past year.
>
> A 1988 Bureau of Labor Statistics (BLS) Survey found that 24.4% of all applicants for jobs in the retail trade who were tested for drugs, tested positive.
>
> NIDA has estimated that on any given day, 14% to 25% of current employees aged 18 to 40 would test positive.
>
> A 1991 Gallup Poll of some 1,007 full-time American workers, all 18 years of age or older, indicated that 22% of those surveyed said illegal drug use was at least "somewhat widespread" at their place of work. Forty-nine percent acknowledged that illegal drug use occurs at the place where they work. Forty one percent said that drug usage by employees in their organizations seriously affects their ability to get the job done. Twenty-four percent have "personally seen or heard" of illegal drug use by co-workers on the job. Eight percent of those polled had been offered drugs on the job; 7% had been approached to buy drugs while at work.

William F. Current, writing in a 1992 publication of the Institute For a Drug-Free

entitled Does Drug Testing Work?, offers yet another glimpse of the multitude of survey findings that exist around the country. All tend to validate the employer's perspective that substance abuse and work are incompatible activities. Listed below are a few of the findings contained in this one report:

> In a 1991 study, NIDA estimated that 66% of those who admitted to illicit drug use in the past year were employed---55% of that group were employed full-time. Nationwide, 95% of employers reported drug problems among their work forces. Almost one out of every ten full-time workers (9.7%) admitted to using drugs in the past month. For those who were unemployed, the figure rose to 21.5%.
>
> In another random survey of 5,800 municipal workers in a large southwestern city, 16% said they had personal knowledge of marijuana use by co-workers; 13% reported use of other drugs. Sixteen percent said drug dealing occurred in their workplaces.
>
> Other survey results revealed similar, disturbing findings. One reflecting the responses of 265 Fortune 1,000 CEOs, state governors and mayors showed that 79% said substance abuse within their companies was a "significant" problem. Forty-three percent estimated that substance abuse costs their companies as much as 10% of payroll, or $200 million each year.
>
> Another survey showed that just over 28% of construction workers admitted to illicit drug use, the highest of any industry. Other at risk industries, in decreasing order of risk, were finance (25.3%), repair services (22.7%), professional (21.6%), wholesale trade (20.6%), transportation (18.4%), manufacturing (14.8%), and retail trade (13%).

Occupational Health & Safety reported in April 1991 that 60% of all illegal drugs produced in the world are consumed in the United States, making for a $120 billion a year business---more than twice the combined profits of all Fortune 500 companies. The Office of National Drug Control Policy reported in June 1991 that Americans spent more than $40 billion in 1990 on cocaine ($18 billion), heroin ($12 billion), marijuana ($9 billion), and other illegal drugs ($2 billion). Kaim Associates reported in 1990 that alcoholics have an accident rate 2-4 times higher than that of other workers. Business & Health reported in July 1990 that more than 35 million Americans are addicted to prescription and non-prescription drugs.

While drug and alcohol abuse is clearly the problem of business and industry, business owners may very well hold the key to winning the "war on drugs". Carlton Turner, formerly President Reagan's Assistant on Drug Abuse Issues and Director of the Drug Policy Office at the White House, has stated that "the best tool available to eradicate drug abuse in the workplace is a sound, responsible diagnostic drug testing program." Mark A. de Bernardo, Executive Director of the Institute for a Drug-Free Workplace agrees, and has stated on more

than one occasion that "the most effective weapon in the war on drugs is in business' hands---the paycheck. If you or I believe that our jobs are contingent on being drug-free, it creates a very powerful incentive to get or stay off drugs."

SUBSTANCE ABUSE: ITS ECONOMIC IMPACT ON BUSINESS

The costs to society in general, and business more specifically, for substance abuse in this country are tremendous. One 1991 report placed the cost of drug abuse to business alone at $75 billion annually, or approximately $640 per employee. Certainly, such costs warrant the concern of employers.

Employee Productivity

Most studies indicate that drug abuse correlates significantly to reduced productivity, costing American businesses nearly $100 million a year. In one study published by NIDA, a variety of studies are described that correlate drug abuse to increased absenteeism, increased termination rates (for reasons unrelated to test results), and negative employee evaluations.

In another study conducted by the United States Postal Service in 1987 and 1988, it was found that employees who tested positive for drug abuse were more than 1.7 times as likely to be absent from work as those who tested negative.

This same study also concluded that employee turnover is significantly correlated to drug use. The study found that the odds of being involuntarily terminated were approximately 50% higher for drug users than for those who tested negative. Such turnover rates translate into a higher cost of doing business. By 1989, the Postal Service concluded that it could save approximately $4 million per year in lost productivity if job applicants who tested positive were denied employment---accounting for savings of $52,750 eventually for one class of new employees over their tenure.

Another NIDA published study conducted by Workplace Consultants, Inc. in 1987 provided a rather revealing profile of drug users as employees. The study found that drug-using employees were 2.2 times more likely to request early dismissal or time off, 2.5 times more likely to have absences of eight or more days, and 3 times more likely to be late for work than non drug-users.

More specifically, General Motors noticed in 1991 that drug-using employees just in the company's Employee Assistance Program (EAP) averaged 40 days of sick leave each year compared to just 4.5 days for non-users. Nationally, alcoholism alone cost employers 500 million lost workdays a year--a huge waste of human talent and productivity.

Safety

Prevention of work-related accidents and occupational illnesses are paramount responsibilities

of employers. When used as an accident prevention tool, drug testing can lead to reduced workplace accidents and decreased employer liability for injuries that may occur.

It should come as little surprise that drug use and substance abuse are not compatible activities. One study reported in 1990 that alcoholics have an accident rate 2-4 times higher than that of other workers. Another study indicated that drug-using employees were 3.6 times more likely to be involved in a workplace accident than non-users.

Safety also has long been recognized by the courts as a legitimate reason for implementing workplace drug testing programs, particularly in safety sensitive positions. Just in the past ten years, emphasis on testing has increased as federal agencies have moved to get tough on drug abuse. Since 1988, Congress, the Defense Department, and the Transportation Department have taken significant steps towards requiring private employers to implement drug screening programs.

Personal Injury Claims

Failure on the part of an employer to secure a safe workplace, either on or off premises, can be a source of unwanted liability. Courts have specifically held that employers can be held liable for the negligent acts of their intoxicated or drug-impaired employees, giving reason enough for many to implement testing as a means of reducing injuries caused by impaired employees.

Unemployment Compensation Claims

Employers may be exposed to additional costs in the form of higher unemployment compensation premiums when an employee is discharged for drug or alcohol abuse and receives unemployment compensation benefits. Additional costs related to the loss of an experienced employee, coupled with the expenses associated in recruiting and training a new person cannot be ignored either.

Generally, if an employer can establish that he/she had adopted a reasonable policy (against drug or alcohol use or abuse) and there was a deliberate violation of the rule, misconduct can be established and the employee's benefits denied. In the absence of a clear rule, it may be difficult to prevent benefits from being granted.

While the Virginia Employment Commission keeps no specific records regarding the number of cases involving discharge for violation of a drug policy, some claimants are successful in receiving benefits over the employer's objections.

Workers' Compensation

Every state in the country has enacted a workers' compensation act. Generally, these statutes

require that employers compensate injured employees for those injuries that are sustained while at work, regardless of fault.

Most states' statutes though, including Virginia's, provide for limited exceptions to the "at fault" rule by exempting employers from liability when an employee's injury is caused by his/her use of alcohol or illegal drugs. The employer who raises the defense, however, must show that the employee's drug or alcohol use was the proximate cause of the injury or death in order to be successful. If such a linkage cannot be established, the claim must generally be paid.

Since workers' compensation provides for wage replacement and full medical coverage in the case of injuries, or death benefits in the case of a death, claims can run into the thousands of dollars when claimants are successful, even when drug or alcohol use is involved.

Health Care Cost

While one study claims that substance abuse and related mental health treatment cost the nation some $38 billion in 1988, (where more than half the costs were paid by the employer through health insurance), a newer study indicates the figure has risen to nearly $200 billion a year. Former Chairman and CEO of Chrysler, Lee Iacocca, indicated several years back that the impact of drug and alcohol related use just on his health care costs added an additional $600 to the price of each new car he sold.

DOES DRUG TESTING WORK?

Yes! By almost any means one tries to measure success, drug testing in the workplace works. It works as a deterrent to further drug use among employees, says the Institute For a Drug-Free Workplace, and as a detection device, helping employers to identify workers with drug problems and, when possible, getting those employees the help they need.

How successful has drug testing been? Very. Workplace study after workplace study has shown positive results. Extensive studies at Utah Power & Light (1986), Southern Pacific Railroad (1984-88), and Georgia Power (1983-87) all reveal positive outcomes.

Similar case studies of some 29 corporate firms ranging in size from 75 to thousands of employees also have been documented--and published in the Institute's 1992 publication referenced earlier. One is of particular interest in that it describes the success of one Virginia giant--Mobil Oil.

Mobil Oil, located in Fairfax, first addressed the problem of substance abuse in the workplace in 1962. Nearly 22 years later, it is still very much involved in providing a drug-free workplace for its employees.

Appalachian Power, a public electric utility headquartered in Roanoke, employs

approximately 2,200 employees in Virginia alone. The Company reports a 10% reduction in workers' compensation claims, a decrease in absenteeism, and a safer workplace as a result of implementing drug-testing in the workplace.

Since implementing drug testing in its workplace, **BGF Industries** of Altavista, has seen a decrease in the number of applicants who test positive during pre-employment screenings, either suggesting that drug use is on the decline in that area or that drug users know they need not apply and risk detection and rejection. **Lillian Vernon Corporation**, located in Virginia Beach, has reported similar findings. Between 1-2% of those individuals who are tentatively offered employment fail to pass their drug screening program, and are not hired.

R. E. Lee and Son, Inc., one of Virginia's older and larger general contractors located in Charlottesville, reported in June 1993 that "(drug testing) has reduced job related injuries, workers' compensation insurance costs and improved employee productivity...it saves lives, it saves money ---it's the humane thing to do."

Tidewater Construction Corporation, located in Norfolk, has been testing for drugs and alcohol since 1986. It reports fewer cases of accidents, injuries, reduced productivity, and poor workmanship as a result of its program.

Grand Piano & Furniture, located in Roanoke, employs nearly 600 people in Virginia and surrounding states. Upon implementing its policy in November of 1991, the company experienced a "mass exodus of employees...., a clear indication of the drug problem just within one location." One warehouse manager reported that he had to interview 10 applicants before he found one that was willing to submit to a pre-employment drug test. Grand Piano also reports that just one year after implementation of its policy, workplace injuries have decreased 31% and continue to be in check. In June of 1993, the company received in excess of $50,000 for workers' compensation premium refunds for the 1992-93 plan years. Claims on its health insurance plan also decreased. From August 1991 through June 1992, substance abuse claims dropped 41.6%; from June 1992 through June, 1993, they dropped 89.5%.

Colonial Mechanical Corporation, located in Richmond, instituted its substance abuse program in June, 1989. Since that date, 136 personnel have tested positive for substance abuse. In one instance, 24% of an entire work-crew tested positive. The Company thinks testing "is important because it helps to eliminate the drug users from the work place and helps to promote a safe work environment for (our) employees."

R. R. Donnelley Printing Company, located in Lynchburg, implemented a drug testing program in January of 1990. Since implementing their program, pre-employment positives have declined from an initial high of 8% in 1990 to 4.6% for the first seven months of 1993.

Howard Shockey & Sons, Inc. of Winchester, another general contracting firm, indicates that

while testing is not inexpensive, employers must believe it has some value, or they wouldn't do it voluntarily.

EMPLOYEE CONCERNS: A UNION PERSPECTIVE
Virginia AFL-CIO

It is important to begin by pointing out that there are really two issues in this discussion. The first problem is substance abuse in the workplace and in society as a whole. On this, labor's position is clear. We do not encourage or condone employee use of drugs or alcohol. Unions work hard to ensure safe working conditions, the well-being of their members, and the safety of the general public. Unions want any worker suffering from substance abuse to get the help he or she needs. And further, union members in human services, public safety, health care, and other occupations are the very people that this State relies on to deal with the problems posed to society by alcohol and drugs.

There is very little useful or reliable data as to the extent of drug or alcohol use in the workplace. The media occasionally reports sensationalized estimates of tens and even hundreds of billions of dollars that substance abuse costs American businesses every year. These reports are more hype than fact. Repetition of such unsubstantiated reports has led to a commonly held, but greatly exaggerated, impression that there is a crisis of substance abuse in the workplace.

The sense of crisis has produced memorable catchy phrases such as "the war on drugs." Describing a problem in terms of a war can be very useful. In wartime, a country asks its citizens to make sacrifices, including the suspension of individual rights for the common good. The war on drugs has been used to justify unwarranted intrusions into citizens' privacy and an erosion of the presumption of innocence that is fundamental to our judicial system.

The second and quite separate issue is drug testing in the workplace. There is an adage that goes something like this: If you give a child a hammer, everything will begin to look like a nail to that child. Unfortunately, there is an analogy to the way employers have reacted to the advent of drug and alcohol testing methods. Many employers have taken the simplistic view that testing is a magic bullet they can easily and cheaply use to rid themselves of a liability.

The usefulness and/or appropriateness of such testing is very limited at best, and only when used as a component of a multifaceted prevention and treatment program. All too often, employers have decided that the best approach to substance abuse is to discharge anyone with a positive test and wash their hands of any further responsibility. That person becomes another employer's or society's problem. By contrast, unions regard substance abuse as an illness that can be treated. Both the individual and the employer can benefit by this more humane approach.

Before addressing specific issues as to when and how tests should be used, it is worth pointing out that current tests being used in drug screens are of questionable value in preventing substance abuse. Drug tests only detect past exposure to a substance, they

cannot assess impairment. Urinalysis does not indicate when a drug was taken, or whether a person is intoxicated or impaired. These tests cannot distinguish between a one-time or habitual user, nor predict effects on health or behavior. Due to the limited information drug tests yield, they fail to address many of the legitimate concerns everyone shares about public and employee safety.

In deciding upon the role of drug testing in the workplace, it is useful to divide the issue of drug testing into determining when tests are appropriate, obtaining accurate test results, and defining the consequences for an individual who tests positive on a drug test or who voluntarily admits to a substance abuse problem. Except for federally mandated testing, unions have generally tried to restrict the use of drug or alcohol testing to situations where there is reasonable suspicion that an individual is then under the influence of an intoxicating substance. Unions have argued that employers should not be given broader powers to conduct investigations into the possible use of drugs and alcohol than those given to law enforcement personnel. This is especially true for unions that represent public employees. The constitution prohibits the government, which is also an employer, from conducting unreasonable searches and seizures.

The next issue concerns the accuracy of drug and alcohol testing. All testing for drugs should be conducted by laboratories certified by the National Institute on Drug Abuse (NIDA), and follow the procedures contained in the Department of Health and Human Services (DHHS) guidelines for workplace testing. By contrast, a consensus has not yet been reached concerning the appropriate methodology for alcohol testing. This issue requires further investigation, including consideration of the U.S. Department of Transportation's proposal to require the use of evidential breath test (EBT) devices for workplace testing.

The last issue involves the consequences for employees who test positive or admit to a substance abuse problem. Employees should be helped, not disciplined. Rehabilitative services should be made available and offered to individuals in this situation. Employees who test positive should not be treated differently than those who voluntarily come forward and admit to a problem; they both need help. All employees should be aware that assistance will be available and confidentiality will be protected. Through prevention and treatment efforts, employees can receive help before substance abuse threatens their livelihood or well being. Any discipline which is included should be based on impaired job performance and principles of progressive discipline.

The Virginia AFL-CIO mailed a brief questionnaire to 474 of its local affiliates, representing 105,000 members. The sample included unions in the building trades, transportation industry, service industry, manufacturing, and the public sector. The survey inquired into the following areas:

- Whether the employer and the union have negotiated a drug testing policy;
- Under what circumstances employees are tested;

- Which substances employees are tested for;
- Whether employees who admit to a substance abuse problem or who test positive are offered an opportunity for treatment;
- Whether there is an EAP program;
- Whether benefit packages cover treatment; and
- What disciplinary actions are taken.

Seventy local unions, representing 38 percent of the membership, responded . Half the respondents said they had negotiated a policy. In twenty-five cases, the union said there was a drug policy, but it had not been negotiated with the union. Nine locals reported there was no drug testing at all.

The most common trends among those unions that have negotiated policies are as follows.

Virtually all unions reported that employers conduct pre-employment testing: and nearly all test where there is reasonable suspicion. The next most common types of tests, in just over half the cases, were those called for in post-accident situations and during or following rehabilitation. Fewer that one third reported random testing.

Almost all employers test for controlled substances and alcohol. Only one third test for the use of prescription medications. All unions with negotiated policies reported that employers use NIDA-certified laboratories.

As far as being offered treatment, it does not appear to make any difference whether employees voluntarily admit to substance abuse problems or those problems are detected through a positive test. About eighty percent of employees in either case are offered the opportunity for treatment.

By a three-to-one margin, employers who have negotiated policies also have an EAP. In about two-thirds of the cases where there are EAPs, the employee benefit package covers some level of treatment. The range of treatment varies widely. At the low end, some plans only cover 13 days of treatment, or have a lifetime maximum of $10,000. A number of plans provide payment for up to 30 days. Other plans reimburse at 80 percent for the cost of treatment. One plan covers 100 percent of the cost, for up to two treatments.

The other major issue concerns the consequences for those having a substance abuse problem and/or who have a positive test. Most striking, it is rare that employees are discharged for a first offense. In almost all cases, there is an offer of treatment and a chance to retain employment. Those going through treatment may also be suspended for a period of time, such as 30 days, or be reassigned to a position that is not considered safety-sensitive. Some

contracts have a traditional progressive discipline approach that goes from a warning, to suspension, and ultimately discharge for repeat offenders.

The results from unions in situations where the drug testing policy has NOT been negotiated are similar to the negotiated policies. Testing is done primarily on a pre-employment and reasonable suspicion basis. Only a few reported random or post-accident testing. Testing is done for controlled substances and alcohol, but very seldom for prescription medications. NIDA laboratories are used in almost all cases.

Again, by a nearly three-to-one margin, employers have EAP programs. However, those who admit to a substance abuse problem are offered an opportunity for treatment more often than those who are detected by a drug and/or alcohol test. In just over half the cases, the benefit package covers some level of treatment.

In summary, excluding situations where testing is mandated by the Federal government, most testing is done in pre-employment and reasonable suspicion situations. Random testing is not widespread regardless of whether the policy has been negotiated.

Virtually all controlled substances testing is performed by NIDA certified laboratories, even where there is no legal requirement to use such laboratories. Testing is common for controlled substances and alcohol, but not prescription medications.

EMPLOYEE CONCERNS: PUBLIC SECTOR
Virginia Governmental Employees Association

The Virginia Governmental Employees Association, representing state employed individuals, supports a comprehensive drug-free workplace policy. In addition, they espouse the following:

1. Require a minimum amount of classroom training for supervisors who will be enforcing the policy (usually 2-4 hours). Extra training (up to 8 hour course) is needed for supervisors who will be making "reasonable suspicion" referrals of employees for counseling or drug screening tests.

2. Privacy rights and due process should be strictly enforced.

3. Labs to be used should be NIDA certified.

4. Drug Specimen collection should be done with strict adherence to the HHS regulations.

5. The policy should require the use of a Medical Review Officer (MRO) who is a licensed physician with knowledge of substance abuse disorders. The role of the MRO is to review and interpret all positive test results to ensure a scientifically valid result and to determine whether a legitimate medical explanation could account for a confirmed positive result.

6. An Employee Assistance Program should be in place and accessible to all employees (both part-time and full-time) prior to implementation.

7. Incorporate testing for alcohol under the five categories of testing specified by UMTA.

8. Provide a standard definition of "reasonable cause".

9. The MRO should be designated the main repository for positive test results and individual medical histories.

III. CONCLUSIONS AND RECOMMENDATIONS

A. CONCLUSION

The Department of Labor and Industry conducted this study to procure accurate information regarding the practice of drug testing in the workplace. In this section, the Department summarizes the findings provided from the input of the Advisory Committee, the Commissioner's Focus Group, Public Meetings, and the 1993 Survey of Virginia Employers.

A. Prevalence of Drug Use in the Workplace

An analysis of several national studies on drug use by employed adults reveal:

- 13.5% of all employed adults used illicit drugs in the past year.
- Marijuana is the most prevalent of the illicit drugs used.
- Illicit drug use among employed adults has been decreasing.
- Alcohol use among full-time employed adults is almost five (5) times greater than illicit drugs.
- 18-25 year-olds use illicit drugs and alcohol more than those in the age categories 26-34 or 35 and older.

Statistics reported for state employees reveal:

- Alcohol referrals, on a four-year average, are almost three (3) times greater than drug referrals.
- A decrease in referrals for drug and alcohol problems from 1990-1993.

There are no studies specifically geared to measure the drug use in Virginia's workplaces.

Alcohol is the leading drug of abuse in the workplace. Diseases and medical disorders associated with the consumption of alcohol are well-documented: liver problems, the ninth leading cause of death; gastrointestinal disorders; etc. Health related drug abuse effects are not as well researched; however, drug abuse causes problems for society and affects the quality of life for the addicted individual.

B. Testing Methods and Accuracy

Among the various sample choices that are available for testing we find:

- Blood samples can assess impairment but are invasive and more costly to test.
- Hair samples can be obtained under supervision and without embarrassment. Environmental factors can affect testing and there is potential for bias.
- Saliva collection is less invasive but volume not optimal for testing. Concentrations of drugs remain for less time. This testing method needs more study.
- Urine continues to be the method of choice for drug testing. Drug use can be detected for several days after use, and provides sufficient volume for testing, but does not determine impairment.

Various testing methods are available for urine testing of drugs.

- Initial screenings that result in positive test should be confirmed through Gas Chromatography/Mass Spectrometry (GC/MS).
- NIDA cutoff levels for screening tests and confirming tests should be used by all laboratories.

Several techniques can detect alcohol but should be related to impairment.

- Blood, directly or indirectly, may be obtained for testing.
- Blood alcohol concentrations (BAC) must be determined for workplace impairment.

C. Rehabilitation

For most businesses, the decision to include rehabilitation as part of their drug testing program is left up to the employer. Firms with Defense Department contracts or those that come under the Department of Transportation rules are required to have EAPs in conjunction with drug testing.

- EAPs generally assist in matching employee's health benefits to the services needed.
- Effective EAPs can reduce levels of on-the-job injuries, absenteeism and medical costs.
- Employee education and training on the effects of drugs is an important role of EAPs.

- In-patient costs for an employee's drug treatment can average $800 per day and for detoxification, $2500 for three days.

D. Federal Requirements

The National Institute for Drug Abuse cites 10 major initiatives in the history of the federal government's attempts to rid U. S. work sites of substance abuse.

- 1986: Executive Order 12564 initiating the Drug Free Workplace Program.
- 1987: Public Law 100-71 outlining general provisions for drug testing programs with federal government.
- 1988: Publication of "Mandatory Guidelines for Federal Workplace Drug Testing Program."
- 1988: Department of Defense regulations affecting private industry.
- 1988: Department of Transportation issued regulations affecting public and private industries.
- 1988: Public Law 100-690, the Drug Free Workplace Act, for recipients of federal contracts.
- 1989: Nuclear Regulatory Commission issued regulations for its licensees.
- 1989: National Drug Control Strategy reaffirming federal government's commitment to drug free workplace.
- 1991: Omnibus Transportation Employee Testing Act making most DOT drug free workplace regulations public law.
- 1991: Civil Space Employee Testing Act requiring alcohol and drug testing of safety-sensitive employees of NASA and its contractors.

E. State By State Analysis

Among the 50 states, there are many diverse statutes and/or regulations addressing drug free workplaces and drug testing. For purposes of this study, however, they have been identified by five basic categories.

- 9 states have a Drug Free Workplace Act or Policy largely affecting state government employees and/or state contractors.

- 12 states have Executive Orders in support of achieving drug free workplaces. Some Orders cite specific criteria while others mirror the Federal Order.

- 17 states have statutes that impact drug testing programs in the private sector.

- 19 states have enacted laws regulating drug abuse in public sector workplaces.

- 3 states (including Virginia) have promulgated administrative rules/regulations for state employees.

- 9 states have not adopted any statewide policy, regulation or statute.

F. Legal Issues/Court Cases In Drug Testing

- Court cases involving private sector drug testing are limited to state constitutional provisions for invasion of privacy.

- Two U.S. Supreme Court decisions dealing with the Fourth Amendment have had a major effect on public sector drug testing.

- Federal and state courts generally affirm random drug testing of police officers, transportation workers, and correction officers.

G. Virginia Employer Survey

Until now, data regarding the extent of drug testing programs in Virginia had to be extrapolated from national statistics. The results of the 1993 Virginia Employer Survey are statistically valid in assessing the magnitude of such programs in the state's industries and businesses. Among the significant findings of this survey:

- Fewer than 10% of Virginia's businesses have substance testing programs.

- Drug testing is most prevalent in those firms employing fewer than 100 people.

- Almost half of the firms conducting drug testing are complying with federal government mandates.

- Among firms which drug test, pre-employment testing is the type most frequently conducted.

- 99% of the workplace testing programs test for controlled substances; 43% and 41% test for alcohol and prescription drugs, respectively.

- About one-half of the testing firms refer test-positives for treatment and/or counseling.

- Substance abuse assistance is available to employees in almost half of the firms that drug test.
- One-fourth of the companies that drug test provide on-going educational programs that include the risks associated with substance abuse.
- NIDA certified labs are used by 95% of the drug testing firms.
- Only one-third of respondents classify substance abuse as a "serious" or "very serious" problem.

B. RECOMMENDATIONS

The findings and conclusions documented in this report do not provide any compelling reason to adopt Virginia mandates that would be in addition to those of the federal government. Thus, it should be the state's policy to acknowledge the federal mandates as its policy. In addition, the state could be an important participant in providing information through educational and training programs. The following recommendation is based on the findings and conclusions of the study and are offered as measures to help achieve drug free workplaces in the Commonwealth of Virginia.

Provide for a central point of contract within existing state government resources for employers and/or employees interested in achieving a drug free workplace. Among its possible duties:

- Establish a public-private partnership to develop a public awareness campaign aimed at decreasing the abuses of alcohol in the workplace.

- Conduct a study to define the blood alcohol concentrations (BAC) where impairment is presumed for various tasks associated with the work environment. The study should also include effective testing methods and related costs.

- Maintain up-to-date information on the various federal government drug testing mandates as well as congressional action affecting the state, its business community and employees.

- Develop statewide educational conferences to assist businesses, especially small business, who are interested in establishing drug free workplaces. When necessary, conduct follow-up sessions on specific issues, such as EAPs, etc.

- Follow-up on the Virginia survey of employers with a survey of employees.

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Comments of Lillian Vernon Corp., delivered at the HJR 534 public hearing in Norfolk, Virginia on August 18, 1993.

Written comments of Howard Shockey & Sons, Inc., dated June 16, 1993 in regards to HJR 534.

Written comments dated August 5, 1993 from the Virginia Employment Commission in regards to unemployment compensation costs/claims.

APPENDIX A

GENERAL ASSEMBLY OF VIRGINIA--1993 SESSION

HOUSE JOINT RESOLUTION NO. 534

Requesting the Department of Labor and Industry, assisted by an appropriate advisory group, to study drug testing in the workplace.

Agreed to by the House of Delegates, February 18, 1993
Agreed to by the Senate, February 16, 1993

WHEREAS, the abuse of drugs is one of the nation's most serious domestic problems; and

WHEREAS, employment-related drug testing is being implemented with increasing frequency in both the public and private sectors; and

WHEREAS, although drug abuse should not be tolerated in the workplace, there should be some limit to testing and the invasion of privacy that testing entails; and

WHEREAS, House Bill No. 845, introduced at the 1992 Session of the General Assembly, provided guidelines for notice requirements, testing processes, testing safeguards, and permissible bases for drug and alcohol testing; and

WHEREAS, the interests of employers and employees should be balanced with regard to drug testing in the workplace; and

WHEREAS, there are many economic, legal, and technological questions regarding employment-related drug testing; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Department of Labor and Industry be requested to study drug testing in the workplace.

In conducting its study, the Department shall call for the assistance of an advisory group consisting of representatives from the (i) Department of Personnel and Training, (ii) Department of Health, (iii) Department of Mental Health, Mental Retardation and Substance Abuse Services, (iv) Division of Consolidated Laboratories of the Department of General Services, (v) Office of Attorney-General, (vi) Virginia Chamber of Commerce, (vii) Virginia State AFL-CIO, (viii) Marshall-Wythe School of Law, and (ix) Virginia Governmental Employees' Association.

The Department shall complete its work in time to submit its findings and recommendations to the Governor and the 1994 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

APPENDIX B

ROCCO, INC.

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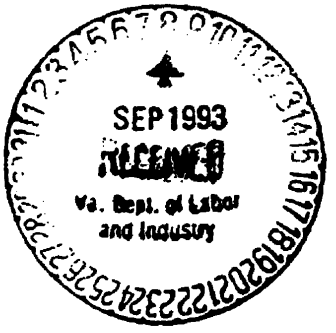

ROCCO

September 3 1993

Ms. Carol A. Amato, Commissioner
Department of Labor and Industry
Powers - Taylor Building
13 South 13th St.
Richmond, VA 23219

Dear Ms. Amato:

I am writing to share my views with you concerning the House Joint Resolution 534. As the vice president of human resources for Rocco, Inc., a poultry processing company located in Harrisonburg, Va., I am a strong supporter of drug testing in the workplace.

At Rocco we have a complete drug testing program. We find it is valuable to create a drug free environment for the vast majority of our 3,400 employees who do not use drugs and who do not want to work around drug users. We support drug testing in the workplace and resist any legislation that would restrict our ability to deal with this effective detection of a problem.

I am requesting that you please take these views into consideration as you are conducting you study of drug testing in the workplace.

Thank you for your time.

Sincerely,

William T. Christian
Vice President of Human Resources

VIRGINIA MANUFACTURERS ASSOCIATION
P.O. Box 412, Richmond, Virginia 23203, 804-643-7489, FAX 804-780-3853

May 25, 1993

Ms. Carol A. Amato, Commissioner
Department of Labor and Industry
Powers - Taylor Building
13 South 13th Street
Richmond, Virginia 23219

Dear Carol:

You have requested our views on the issues raised in HJR 534, which requests your department to undertake a study of drug testing in the workplace and to submit findings and recommendations to the Governor and the General Assembly.

Drug Abuse in the Workplace.

According to the National Institute on Drug Abuse, 70% of those admitting current illicit drug use are employed (55% full-time, 15% part-time). Overall, this constitutes 8.2% of the full-time work force. In certain demographic groups, however, the rate is significantly higher. Of males age 18 - 25 employed full-time, 24% are current users.

Obviously, drug abuse in the workplace presents a major threat to the health of the public, to fellow employees, and to the abuser. Recall the 1987 Conrail Amtrak crash, caused by a Conrail engineer who had drugs in his system. Sixteen people were killed and 178 were injured. So, safety is a major concern associated with drugs in the workplace.

Cost is also a legitimate concern. Employees who are substance abusers represent both a direct and indirect cost to employers. Substance abuse and related mental health treatment is frequently included in health insurance, and the bulk of health insurance premiums are paid by employers. And, according to an article in the April 1991 Monthly Labor Report published by the U. S. Department of Labor:

- Employees who test positive for drugs are absent 2.5 times more often than non-abusers.
- Job productivity is 25 to 33% lower for substance abusers.

- The probability of off-the-job accidents is 4 to 6 times greater for substance abusers.

- Claims for workers' compensation are 3 times greater for abusers.

As long ago as 1986, the Bureau of National Affairs estimated the cost of substance abuse to American business at $100 billion.

The point of this recitation is to emphasize that the core problem is drug abuse in the workplace, and that fact should remain dominant throughout any discussion of drug testing.

Business's Response.

As noted above, one response by business to the problem of drugs in the workplace has been the funding of treatment for abusers under employer provided health insurance. Many employers have also undertaken education campaigns or established Employee Assistance Programs. Other employers have declined to temporize with drug abuse and simply discharged offenders. Virginia law clearly allows this option. In fact, such employee misconduct constitutes a disqualification for unemployment compensation and may disqualify an employee from workers' compensation.

Federal law expresses a similar attitude toward drugs in the workplace. Look for example, at the Drug Free Workplace Act of 1988 and the regulations of the Departments of Transportation and Defense. Note the specific exclusion of current drug use from the protections of the Americans with Disabilities Act.

Drug Testing.

It is in this context of a desired drug free workplace, an object both of public policy and the business community, that drug testing must be approached. For it is clear that drug testing has a permissible role in this effort for the simple reason that it deters the forbidden conduct. This was amply demonstrated by the Department of Defense, which initiated drug testing in the early 1980's when 27% of those in the military admitted to illegal drug use, a figure reflective of society in general. As of 1988, this figure was reduced to 4.8% in the military. Deputy Assistant Secretary of Defense Michael Wermuth asserted that testing is a strong deterrent of drug use. And, drug testing has become a staple of other federal regulatory programs, including the Nuclear Regulatory Commission and the Department of Transportation.

According to the American Management Association, the private sector has enjoyed similar results. That Association's survey found that 75% of large and mid-size companies now engage in drug testing, and that the "test positive" ratio for employees declined from 4.2% to 2.7% between 1990 and 1991. (In manufacturing, 87.4% of the companies surveyed test for drugs.)

Numerous surveys reveal that the public supports drug testing. These include a Gallup poll (1989), a Lexus/National Law Journal poll (1989), and a USA Today survey (1986).

Public support for drug testing is evidence of the fair and judicious approach businesses have taken in implementing such programs. Of course, in many cases, federal regulations prescribe the details. Even where federal regulations are not mandatory, they have served as guidance. Employers certainly recognize that common law remedies, such as actions for defamation or infliction of emotion distress, might be available to address an ill considered program. And, where a bargaining unit has been recognized, a drug testing program for current employees is subject to bargaining, and thereafter to a grievance procedure.

It is of course possible to conjure up theoretical problems, especially involving privacy or inaccurate tests, and perhaps even to locate isolated employer errors. But, we are not persuaded that there are widespread abuses by Virginia employers necessitating a legislative response. We review newspapers from throughout the state, and I recall no specific instances. Our members have not reported grievances or other complaints. It is important, we believe, not to have a solution in search of a problem. We would be most wary of any legislative interference with matters deemed to be subject to the collective bargaining process. We would want to avoid any possibility of inconsistencies with federal approaches, even where the federal programs are not applicable to a particular employer. We would oppose any additional employer exposure to frivolous law suits, and to any erosion of the employment at will doctrine. Our overarching concern is that a drug free workplace must be encouraged, and employers must retain the flexibility to develop policies toward that end.

We look forward to working with you on your study, and appreciate the opportunity to offer this information.

Very truly yours,

Robert P. Kyle
Vice President - Human Resources

RPK/jmi
wpwin\bob\drugtstg.mem

July 2, 1993

Ms. Carol Amato
Commissioner
Department of Labor and Industry
13 South Thirteenth Street
Richmond, VA 23219

Dear Carol:

Following the May 25 meeting on HJR 534, I spoke with a few additional members about drug testing. As they were adament in their views on the subject, I asked them to put their thoughts in writing.

While I'm not certain these comments will help resolve the privacy issue, I'm enclosing copies for your general information.

As you are well aware, AGC strongly supports drug testing. To me, questions relating to privacy quickly pale when you consider all the bad things that could happen on a construction jobsite if someone was under the influence of drugs. Jobsite safety must be the first concern.

Please let me know when the next meeting is scheduled.

Sincerely,

Steven C. Vermillion
Executive Director

SCV/smh

R.E. Lee and Son, Inc.

J.A. KESSLER, JR., President
D.E. SOURS, Senior Vice President
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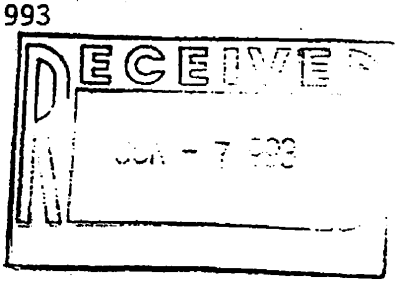
Please reply to: Charlottesville

June 3, 1993



Mr. Steven C. Vermillion
Executive Director
Associated General Contractors
of Virginia, Inc.
P. O. Box 6878
Richmond, VA 23230

RE: General Assembly of Virginia - 1993 Session
House Joint Resolution #534 "To Study Drug Testing in the Workplace"

Dear Mr. Vermillion:

We recently had the opportunity to read and learn more about this resolution. As one of the older and larger General Contractors based in Virginia, we are unalterably opposed to any legislation that would limit our rights as an employer to have employees tested for illegal drug use, or to take appropriate disciplinary action with any employee who is found to be under the influence of, or in possession of illegal drugs in the workplace. The sale and use of illegal drugs is the nation's most serious domestic problem. It is probably more prevalent in the construction industry than in other workplaces and therefore any effort to "go soft" on those that abuse our narcotics laws, is ludicrous.

As a large employer, working throughout the Commonwealth on construction projects for all levels of governments and the private sector, we simply will not be able to continue in business if we tolerate any level of illegal drug activity among any of our employees on any of our worksites or offices. The U.S. Department of Defense and several of Virginia's largest private sector employers are major clients. Contractually, they require us to have a drug-free workplace program, including employee drug testing. It would be out of the question for us as an employer to require our employees on those projects to work under a drug-free workplace requirement, while not requiring the same of all other employees.

Drug testing is important to us because it has reduced drug use among our employees, which in turn has reduced job related injuries, our Worker's Compensation insurance cost, and improved employee productivity. Our drug-free workplace and testing policy is common knowledge among construction workers and therefore we believe that potential job seekers with drug problems simply do not apply to us for work.

All of our employees sign an agreement with us consenting to random drug testing. Our employees recognize that if they are involved in accidents, injuries, serious incidents, or exhibit radical behavior in the workplace, they will be tested for drugs. Over the past three years approximately 1/3 of the employees tested for these reasons tested positive for drugs and were subjected

to disciplinary action including loss of their job. We cannot conceive of any logical reason that we should not be able to continue our drug testing program without government intervention or softening of the program. It saves lives, it saves money -- it's the humane thing to do. In two instances, employees who tested positive for drugs have been successfully rehabilitated, with our assistance.

On large construction projects, the sale and use of illegal drugs is more prevalent and under less control than in more structured workplaces such as offices, manufacturing and retail facilities. At the same time, the construction jobsite is a far more hazardous workplace than those with a more controlled environment. The construction industry employs transients and other workers for short durations of time, resulting in a high turnover rate. Pre-employment screening is usually less stringent, or non-existent in the construction industry when compared to more structured type jobs. As a result, the construction industry tends to attract workers who use or sell illegal drugs. Our industry has fought this problem for many years, and we are making progress. It would be pure stupidity to take any steps backwards.

R. E. Lee & Son, Inc. supports the effort of the Associated General Contractors and other employer associations working with the Virginia Department of Labor and Industry in the problems of drug abuse in the workplace. We will resist any efforts to soften the drug-free workplace requirements. The threat or reality of immediate economic loss for a person through job loss is a major deterent in the nation's efforts to combat its most serious problem. If we can be of further assistance, do not hesitate to contact us.

Sincerely,

D. E. Sours
Senior Vice President

/jsc:des2.321

cc: Associated General Contractors of America w/enclosure
Attention: H. Beatty

TIDEWATER

TIDEWATER CONSTRUCTION CORPORATION
P.O. BOX 57, NORFOLK, VA 23501 USA
TEL: 804 420 4140 FAX: 804 420 3551

June 9, 1993

Mr. S. C. Vermillion
Executive Director
Associated General Contractors of Virginia
P. O. Box 6878
Richmond, Virginia 23230

Subject: Joint House Resolution 534 on Drug Testing

Dear Steve:

Thank you for sending the Resolution to us for review.

Drug Testing is one of the ingredients in our highly successful safety program. We have been testing for drugs and alcohol post accident since 1986. Since 1989, Tidewater has successfully tested more than 5,200 new hires. There have been seven challenges. All seven have been confirmed positive. In fact, our testing lab has never issued a single false positive.

Our testing laboratory is certified by the National Institute on Drug Abuse, NIDA, the toughest standard to meet. They use the Gas Chromatography/Mass Spectrophotometry, GC/MS, confirmation procedure which is the accepted standard in legal proceedings and is considered to be 100% accurate.

Some employers doing drug testing choose non-NIDA certified labs that perform only a screen test, such as EMIT, ELIZA or RIA, and will alternate screen tests as confirmation. These types of tests identify a wide variety of drugs quickly and at low cost. However, they are not 100% reliable and are subject to cross-reactivity, that can mistake a harmless or legal substance for that of an illegal one resulting in a so-called "false positive."

The GC/MS eliminates this problem because it isolates and identifies the particular chemical make-up of a single drug. It is in effect a thumbprint of the component of a substance and therefore provides 100% confirmation that the individual has used an illegal or controlled substance.

The lab provides us with negative test results within 24 hours at the time of sample. Positive results are generally provided within 48 hours from the time of collection.

Our procedures provide our clients and jobsites with fast, accurate test results, and have been completely accepted by our employees and their unions and provides the individual employees fair and confidential treatment.

Here are some interesting statistics we have developed. In 1991, our preemployment drug testing resulted in 11.7% failure; this number dropped to 6.2% in 1992. Overall, since 1989, taking into consideration preemployment and post-accident testing, the positives are 7.6% company-wide.

Please keep in mind that the U.S. Department of Transportation, DOT, has mandated preemployment, annual and random drug testing for most transportation workers, recently including drivers of trucks over 26,000 lbs. DOT also requires NIDA-certified labs and has now developed an accepted program for selecting employees to be randomly tested.

DOT's standards have fast become preeminent and the standards to adopt or emulate as they are considered the most stringent and fairest to all concerned.

Our concern is that substance abuse and the use of illegal drugs causes accidents, injuries, reduced productivity and contributes to poor workmanship and quality. All to a lesser degree here at Tidewater due to our drug testing program and the support for it from our building trade unions.

However, there seems to be an acceptance in the general populace and an attitude of, "It's ok to abuse illegal drugs and other substances as long as you don't catch me." It is a game, like during the prohibition of alcohol. But the stakes are much higher now with the declining work ethic, quality concerns, and the high cost of on-the-job accidents and workers' compensation insurance.

We do not need to weaken drug testing, we need to strengthen it and assure quality testing programs.

Another way for the Commonwealth of Virginia and employers to send the message that substance abuse and illegal drug use is unacceptable is to make on-the-job injuries involving substance abuse and illegal drug use non compensable unequivocally, no if, ands, or buts about it.

This is a serious problem and the only way to stop it is for the Commonwealth and her employers to hit folks where it hurts...in the pocketbook.

Very truly yours,

TIDEWATER CONSTRUCTION CORPORATION

J. W. Dickens
Director of Safety

JWD:dp

cc: Carol Amato, Commissioner Labor & Industry
Hurley Smith, President Building Trades, Va.
Sarah Languell, President, Nowcare Mgmt. Corp.

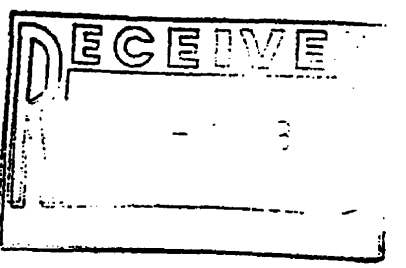
C
E
I

L. Y. GROVE, PRESIDENT

Contracting Enterprises Incorporated

2003 RUSSELL AVE., S.W. P.O. BOX 13725 ROANOKE, VIRGINIA 24036
PHONE 703-342-3175 • FAX 342-3177

June 4, 1993



Mr. Steve Vermillion
AGC of Virginia, Inc.
P. O. Box 6878
Richmond, VA 23230

Dear Steve,

Contracting Enterprises enacted a post accident/injury drug testing program in January of 1990 in an effort to control accident and injury cause and cost. With cost up to $59,000.00 for 37 claims you can see that we had a problem.

I'm happy to report that safety awards for 1992 and 1991 are proudly displayed in our lobby and the claims cost averaged $5000.00 for 6 claims per year! Drug testing did not do all of this, but combined with educational training and hands on follow up it played a major role.

During the three years we have tested we have experienced 2 positive test and one employee refused to take the test. We have our drug testing policy posted in the area where job applicants fill out employment applications and I expect that is a factor in the low positive test results.

With employees operating vehicles and equipment on the city streets we felt a responsibility to the other employees and the community to do everything we could to provide a safe working enviroment and drug testing is a very effective tool to do that. It has also helped reduce our insurance cost, boosted employee moral as well as reduce job related medical cost. I can't imagine operating without it now.

We are now required to do drug testing by DOT for pre-employment and random testing and this has produced two positive results, one pre-employment and one random.

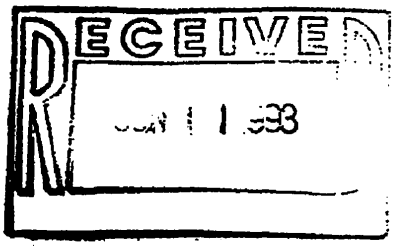
Drug testing has removed any questions about the condition of our work force and created a sense of confidence in all of the employees. Drug testing has had a very positive effect on the entire staff without any complaints about "invasion of privacy".

Sincerely,

Jack Watts

Jack Watts

JW/as



COLONIAL MECHANICAL CORPORATION

Mechanical and Electrical Contractors
3017 VERNON RD. • RICHMOND, VA. 23228 • (804) 264-5522

June 9, 1993

Mr. Steven C. Vermillion
Associated General Contractors of Virginia
2311 Westwood Avenue
Richmond, Virginia 23230

Dear Steve:

Thank you for your letter of May 28, 1993. Colonial Mechanical Corporation welcomes the opportunity to provide our views on the importance of a drug-free work place.

Our drug policy requires all new hires and re-hires to submit to a urine drug test before they are allowed to begin work. Applicants testing positive are not hired. Employees are required to submit to a urine drug test when:

1. injured on the job and seeking medical attention or
2. involved in an automobile accident while driving a company vehicle or
3. involved in a liability claim or
4. at any given jobsite, there is sufficient probable cause to suspect the use of drugs on that site or
5. the company's contracts with owners or general contractors require random testing.

Personnel testing positive will be subject to disciplinary action, typically, termination of employment.

We started drug testing in June 1989. Due to our high turnover rate, it is estimated that we test approximately 400 new applicants annually. Since inception of drug testing, we have had 136 personnel test positive. Of these, 25 personnel were tested as a result of condition #4 above, and 6 tested positive - 24% of a given work crew. As a result of post-accident tests, we had 7 personnel test positive.

The following information is provided in response to your four questions:

1. Drug testing is important because it helps to eliminate the drug users from the work place and helps to promote a safe work environment for our employees. Coupled with a safety program supported by top management, we reduced our pre-drug testing Experience Modification Rate (EMR) from 1.11 to our current 1992-93 rate of .78.

2. What works in drug testing? Pre-employment drug testing helps to minimize hiring habitual drug users. However, without other requirements for drug testing, the work force becomes subjected to peer pressures, and the danger of drug abuse on jobsites becomes a reality. When 24% of a work crew test positive, it is obvious drug users are on jobsites.

3. What doesn't work? Exceptions to stated disciplinary actions. In order for a drug testing policy to be effective, strict enforcement is a must.

4. What are concerns about drug testing? Concerns center primarily around the availability of safe urine samples and frequency of drug testing. Pre-employment and for-cause testing is not considered adequate.

We have no objection to your providing our comments to the Department of Labor and Industry. Please do not hesitate to contact me for further assistance.

Sincerely yours,

Richard V. Badzinski
Physical Resources/Loss
Control Manager

jr

c: Bill McAllister
Mike Wood

HOWARD SHOCKEY & SONS, INC.
General Contracting. Design. Construction Management
P.O. Box 2530/Winchester, Virginia 22601-1730
(703) 667-7700 FAX (703) 665-2329

June 16, 1993

Associated General Contractors of Virginia, Inc.
Attn: Steven Vermillion
P.O. Box 6878
2311 Westwood Ave.
Richmond, VA 23230

Dear Steve:

Ron Bowers asked that I reply to your letter of May 28, 1993, concerning drug testing in the work place.

It is not surprising some people, organized labor and others would raise the privacy issue. What they tend to forget is that non-government employers have privacy rights as well. Employees work on private property and use tools and equipment that is privately, not publicly owned. In fact, there is still judicial debate over whether there is a "constitutional" right to individual privacy. There is no similar debate in private property rights. You work on my property, using my tools, you follow my rules, as long as they do not violate recognized legal rights of the employee.

We do have a drug testing program at our Company. We test all people who accept a job offer. If accidents occur under suspicious circumstances, we test all involved, not just victims. We also test employees when we have reasonable suspicion controlled substances may be involved because of their behavior.

Substance abuse testing is important for several reasons. The first is safety in the workplace. It is well documented that many serious accidents and injuries have occurred due to intoxicated workers. While no guarantee of total abstinence, pre-employment testing and situational testing at least establishes which current or potential employees represent danger to themselves or others.

Secondly, unauthorized use of controlled substances is illegal, and there are several restrictions on the consumption of alcoholic beverages both in and outside the workplace. A testing program is one means in enforcing those legal restrictions.

Another reason for a testing program is compliance with contractual specifications. All federal and many state and municipal customers of construction services require us to have a

substance abuse program that includes testing. Many private industry customers also specify test requirements for bidding. Before the state legislature ventures into this field, they need to be sure any decision they make is compatible with current federal regulations and acceptable business practice.

Last but not least, most employees prefer to work in a drug free environment. It is good employee relations to have a testing program that helps to achieve that end.

What works best in a testing program is a clearly stated policy outlining the consequences of a positive test. Also, the test itself should be based on zero nannograms. There should be no implied level of impairment that is acceptable.

What doesn't work is ambivalence or lack of commitment. There should be no exceptions to the rules.

My personal concerns are that we will erode our commitment to a drug free workplace. Resolutions such as the one under review imply that something less than a 100% drug free workplace is acceptable. It undermines our law enforcement agencies by suggesting illegal substance use is OK for some people, some of the time in the name of "privacy".

Drug testing is not inexpensive. Employers must believe it has some value, or thy wouldn't do it voluntarily. This has to have some weight in this review. When we add the fact the government, at least at the federal level, requires it, there is strong evidence it is a worthwhile activity.

Please let me know if we can be of any further service is this matter.

Sincerely,

Richard J. Hart

Richard J. Hart
Vice President

RJH/ss

AQUALON
P.O. Box 271
Hopewell, VA 23860
Telephone (804) 541-4300
FAX (804) 541-4587

June 23, 1993

Ms. Carol A. Amato
Department of Labor and Industry
Powers - Taylor Building
13 South 13th Street
Richmond, VA 23219

Dear Commissioner Amato:

Enclosed is a copy of our Hopewell Plant's Substance Abuse Policy. We are forwarding it to you with the hope it will be of some assistance in your study of drug testing. It was developed with substantial input from our union and contains many features, such as an EAP, which protect and provide aid to our employees. The policy permits us to select anyone at random for testing, including the Plant Manager and management staff.

When we began to develop our policy, we knew random testing was quite controversial. We had enough experience with drug users however, to know they cannot be easily identified by observation. Unless the drug user is well known to the observer there are just not enough clearly identifiable signs to accuse someone of being under the influence. One of our employees, who is no longer with us, eventually confided to me that he had been paying over $15,000 a year for drugs. Even though I had met with him on several occasions, I had no idea until that moment he was a user.

Before finalizing our random policy, we investigated the leading non-invasive device which tested hand-eye coordination. The device was enormously expensive but, more importantly, there was no evidence to support its claim it could single-out substance abusers. We felt there was a significant chance innocent workers could fail the test and be mislabeled as drug users. If this happened, we would be forced to subject those workers to a "for cause" drug test to clear their names. This would be much more demeaning experience than being selected at random for testing.

The real key to our policy's acceptance by employees was the implementation of a split-specimen procedure. The procedure begins when the lab technician splits the specimen into two separate containers in front of the employee. Both containers are labeled, sealed, and signed by the employee. One specimen goes through the immunoassay tests in the hospital lab and confirmation by gas chromatography/mass spectrometry at the MCV lab. If a positive report is returned on the first specimen, the employee may request the second specimen, which has been retained unopened in safe storage, be tested at a lab of his or her choosing.

There is no question our policy, which is now fifteen months old, is a deterrent to drug use. It also seems to have been accepted by our employees, perhaps because there is no stigma associated with being tested when everyone knows you were selected at random.

Employers, particularly those in the chemical industry, must have some means of identifying drug abusers before they have an accident which could injure themselves, fellow workers, and even possibly people in our community. Subjecting yourself to the possibility of a drug test each time you report for work, as all of us here at Aqualon have, is a small price to pay.

We request that you not recommend restrictions on substance abuse testing which would effect policies such as ours which rely upon random testing.

Please do not hesitate to call on us if we can be of any assistance to you in this or any other matter. In the meantime, we appreciate your consideration of our request.

Very truly yours,

Tom Hamilton

A. Thomas Hamilton
Human Resources Manager

ATH:sen
6457J

February 11, 1992

SUBSTANCE ABUSE POLICY

Purpose:

This Substance Abuse Policy is adopted in order to ensure the safest possible work environment and in recognition of the fact that employees who are under the influence of alcohol or drugs in this chemical manufacturing plant endanger their own as well as their co-worker's safe and efficient job performance, the community, the environment, and the continuity of the Hopewell Plant operations. The policy is designed to:

Maintain a positive and productive work atmosphere for all employees which is free from the effects of drugs and alcohol and thereby reduces the possibility of serious accidents, chemical releases or spills which could injure fellow employees, the community, our environment, or the future of the Hopewell Plant;

Provide a positive setting to encourage individuals who have substance abuse problems to voluntarily seek rehabilitation free from attitudes of punishment or retribution;

Provide free confidential professional counseling through an Employee Assistance Program to help employees and their family members get the assistance they need to overcome substance abuse and other problems;

Minimize the employee's wage loss while he or she is seeking help for substance abuse problems by maintaining current wage rates during temporary reassignments and by providing 66-2/3% wage replacement payments for each day the employee is hospitalized to overcome addiction to drugs or alcohol; and

Avert the often tragic long-term effects of substance abuse on the employee and on his or her family.

Guidelines:

I. EMPLOYEE ASSISTANCE PROGRAM

A. The Program

The Aqualon Employee Assistance Program (EAP) provides Hopewell employees and their family members free access to trained, professional counseling services offered on a strictly confidential basis. The EAP is designed to provide assistance in dealing with drug or alcohol addiction, marital problems, emotional disorders, or any of the many types of problems which can trouble anyone on or off the job. It is a benefit paid for by Aqualon which is not associated with any medical insurance coverage.

B. How to Use the EAP

Any employee or family member who is covered by the employee's medical insurance can use the EAP's services by calling the Plan's toll-free number (1-800-223-7050). Each employee and each family member is entitled to use up to seven free counseling sessions each year.

C. Confidentiality

The contract for the EAP provides that all contacts between users and the EAP will be kept strictly confidential and not divulged to anyone in Plant Management without the advance approval of the employee. The Hopewell Plant Management is pledged to respect the Plan's confidentiality. In fact, anyone attempting to discover the identity of those using the Plan's services will be subject to severe corrective action.

D. Hospitalization

Employees who require hospitalization to break their addiction to drugs or alcohol are eligible to receive a maximum of one month of partial wage replacement payments subject to the following:

1. The hospitalization is recommended by a physician authorized by the employee's insurance plan to make recommendations concerning hospitalization;

2. Wage payments of 66-2/3% of the employee's Exhibit B hourly rate are made for all regularly scheduled hours missed up to maximums of 8 hours in a day and 40 hours in a week;

3. Each employee may receive wage replacement benefits under this policy two times in his or her lifetime provided the second occasion is separated from the first by a period of at least 3 years.

4. Wage payments start with the first scheduled work assignment missed due to the hospitalization and can continue up to a maximum of one month (30 days) as long as the employee is required by the attending physician to be hospitalized. If, after being released from a hospital for treatment for substance abuse problems, the attending physician recommends the employee to be absent from work, such absences will be compensable provided they are approved in advance by the Plant Medical Officer and the total time absent (hospital and at home) does not exceed the 30 day maximum;

5. An employee who leaves the hospital before his scheduled release date or without a proper release from the attending physician, and thereby fails to complete the prescribed treatment, must reimburse the Company for any and all payments received under this plan; and

6. Federal and State taxes as required by law must be deducted from these wage payments.

II. DRUG SCREENING TESTS

A. General

All employees may be required to take drug screening tests if the use of drugs is suspected or if they are involved in an accident, spill, or release at the Plant. Employees in "safety-sensitive" jobs are required to take drug screening tests when selected at random from among the employees eligible to be tested. An employee who refuses to submit to a drug screening test requested in accordance with the above is subject to immediate discharge.

B. Selection

The Company will select the number to be tested and the timing of tests to ensure, insofar as is practical, that all employees have approximately the same opportunity to be chosen during any one year.

Employees will be selected for testing in the following manner:

1. All salaried and wage roll employees will be entered on a roster in order determined by the last four digits of their social security number. The roster will begin with the highest number and end with the lowest.

2. The last four digits, including fractional digits, of the volume in pounds per hour of the steam entering the Plant will be used to select the employees who will be tested. The procedure will be as follows:

   At times selected for testing the Plant Shift Superintendent on duty, accompanied by an official of Local 13061, will open the cover of the steam recording device located in the Pilot Plant and press the appropriate switch to display the volume of steam entering the Plant. The last four digits of the number displayed will be the number for that test selection.

3. The employee on the plant at the time preselected for testing (excluding those working overtime) whose social security number is the same as the number developed in 2. above will be tested. If no one on the plant has that number, the individual with the next highest number will be tested. If the number in 2. above is higher than the social security numbers of all employees on the plant, the employee on the plant with the lowest social security number will be tested. If the procedure identifies two employees with the same social security number, both of them will be tested.

C. Testing Procedure

1. Escort to Hospital

   As soon as possible after the individual has been selected in II.B. above, he will be escorted to John Randolph Hospital by his supervisor or, if the individual is the highest ranking employee on Plant, by the next highest ranking supervisor on duty.

2. Hospital Release Forms

   The individual to be tested is required to sign the proper documents at the hospital to authorize the test.

3. Test Samples

   In all cases, the individual will provide the hospital with two specimens which will be signed and sealed in accordance with hospital procedures. One of the specimens will be retained by the hospital until it is determined the other specimen is negative. If the first specimen is shown to be positive, the employee may request the second specimen be tested in his presence.

D. The Drugs

The test identifies if the following drugs are present in the individual's system:

1. Amphetamines
2. Barbiturates
3. Benzodiazepines
4. Cocaine
5. Opiates
6. Methadone
7. Methaqualone
8. Phencyclidine
9. Propoxyphene
10. Tetrahydrocannabinoids

E. Corroborative Tests

If the initial immunoassay test identifies a specimen as positive for one or more of the drugs listed in II.B. above, the results are confirmed using gas chromatography/mass spectrometry (GC/MS) techniques at MCV Hospital. An employee may choose to have the second sample taken from the original test confirmed by Roche Labs if the GC/MS test performed by MCV is positive. Test results below the DOT cutoff values are considered to be negative.

F. Reporting Positive Results

All reports of positive test results are made directly to the Plant's Medical Officer, Dr. Peter Ault, on a strictly confidential basis to enable Dr. Ault to determine if the employee has a proper prescription from a physician for the substances identified. Positive test results are released to the Plant's Employee Relations Manager only after the Medical Officer has completed his evaluation. Dr. Ault may contact the employee and, if appropriate, a physician designated by the employee to determine if the drugs were properly prescribed and properly taken. In all cases, information about positive test results will be treated with strict confidentiality and released only on a need-to-know basis.

G. Negative Test Reports

The Plant's Medical Department will maintain a list of the names of employees who are tested for audit purposes only. No other notation or record of a negative test is retained.

III. IMPACT OF POSITIVE TEST

A. First Positive Test

1. Corrective Action

No disciplinary or corrective action of any type is given as the result of an employee's first positive test or for a subsequent positive test which occurs at least three years after the last positive test. Employees who test positive for drugs, alcohol, or a combination of both within three years of another positive test are subject to immediate discharge.

2. Assignments

a. Safety-Sensitive Jobs - Immediately upon receipt of a positive test report, an employee in a safety-sensitive job will be reassigned to another job which is not considered to be safety-sensitive. During such reassignment, the employee receives the higher of the rate of the job worked or his or her regular base hourly rate and is disqualified for overtime on any safety-sensitive job.

b. Jobs Not Considered Safety-Sensitive - Employees assigned or reassigned to a job which is not considered to be safety-sensitive are permitted to continue to work in that job after receipt of a positive test report, provided their conduct and job performance are satisfactory.

B. Testing After Positive Test Report

1. First Test After "Positive" Report

After a positive test, the employee is retested within two weeks following expiration of the period designated by the Plant's Medical Officer as reasonably needed for the drug or alcohol to leave his or her system.

2. Subsequent Testing

During the first year following a positive test report, the employee involved is subject to be tested at irregular intervals each month. At the conclusion of the first year, the employee's name is added to those eligible to be selected at random for testing.

3. Second Positive Report Within Three Years

Employees who test positive for drugs or alcohol a second time within three years of a positive test report are subject to immediate discharge.

IV. ALCOHOL

A. Suspected Use

Employees suspected of being under-the-influence of an intoxicant, while at the plant, may be required to take a blood test in addition to a drug screening test if there is reason to suspect that the use of alcohol may be involved.

B. Refusal To Submit to Testing

An employee who refuses to submit to a blood test when requested in accordance with the above is subject to immediate discharge.

C. Positive Test

The provisions of Section III, IMPACT OF POSITIVE TEST, will apply to employees determined to be under-the-influence of alcohol at work.

V. IMPLEMENTATION

The Employee Assistance Program provisions of this policy shall become effective January 15, 1992. Random testing, however, shall not begin earlier than March 16, 1992.

VI. GRIEVANCE PROCEDURE

Any matter arising from the implementation of this policy shall be subject to Section V of the Labor Agreement.

5788J
(SC of 5366J)

APPENDIX C

AUG 18 1993

GRAND
Piano and Furniture Co.

August 17, 1993

Marilyn Mandel
Director of Planning & Policy Analysis
Department of Labor and Industry
13 South Thirteenth St.
Richmond, VA 23219

RE: Open Meetings on Drug Testing

Dear Ms. Mandel:

I was unable to attend any of the recent public hearings on drug testing in the workplace; however, I do want to relay the experiences that we have had at Grand Piano & Furniture Co., Inc. since we implemented our Substance Abuse Policy November, 1, 1991.

Grand Piano & Furniture Co. employs approximately 600 people with locations in Virginia, Maryland and Tennessee. Approximately 250 of this 600 includes drivers of delivery trucks, warehouse staff, porters, and tractor trailer drivers. In December, 1990, the Department of Transportation made drug testing mandatory for about 7 of the employees (trailer drivers). At that time we felt that it was unfair that a small portion of our employees in the "warehouse" were expected to meet drug testing requirements while the rest of the "warehouse" could maintain any drug habits without concern. In addition, this "warehouse" group accounted for approximately 95% of the total workplace injuries. Our worker's compensation premiums had gotten completely out of control because our experience modification factor had risen to 1.71 -- 71 percent above the average for our industry! These were the main reasons we decided to implement a Substance Abuse Policy that would cover the entire "warehouse" division rather than just 7 employees.

We then contracted with an outside party to help us implement and administer the policy, as well as keep us in compliance with DOT. The substance abuse policy ran parallel with DOT requirements for drug testing so that all employees of the "warehouse" were treated equally (ie. NIDA approved lab and collection site, 5 panel test, strict chain of custody procedure, MRO, etc.). The policy required testing for pre-employment, post-accident, random, reasonable cause, and periodic for DOT drivers. The outside administrator would be responsible for selecting the random tests by social security number and at a rate of at least 50% per year. A verified positive result on any of these tests called for immediate termination of employment. Any employee admitting that he/she has a substance abuse problem and asking for assistance would be able to keep their position, and the Company would provide assistance on an individual basis. We then announced the implementation of the policy 30 days in advance and began holding employee meetings and training sessions on substance abuse. The

employees were given a copy of the policy and asked to sign a receipt page to be kept in the personnel file. A copy of the policy and a signature sheet for each employee to sign was posted in every warehouse. The majority of employees were pleased with the policy and viewed it as a benefit and an effort to provide a safe working environment --- not just a police action.

With few exceptions, the program has run very well since its implementation in November, 1991, and has had a tremendous impact. During his first interview process in November, 1991, one warehouse manager reported to me that he interviewed 10 applicants before he found one that was willing to submit to a pre-employment drug test. This was echoed throughout the chain during those first couple of months under the new policy. It was very clear that Grand Piano had been inviting substance abusers to apply for employment by not having this policy in place. One warehouse had a "mass exodus" of employees when the policy was implemented, a clear indication of the drug problem just within that one location. The random test has been the "glue" that holds the whole policy together. Most offenders will prepare themselves for a pre-employment or a scheduled periodic test. There have been several instances where an employee passed the pre-employment test, but was found positive on the first random test. Reasonable cause testing places the burden of detecting substance abuse on the employer who is not always qualified to make such judgments. Substance abuse is not always indicated by obvious behavior or physical symptoms. It is possible for a person to have a substance in their system and it go quite undetected by another --- until an accident occurs and a post-accident test is given. The random tests help to prevent these accidents from happening in the first place.

The policy has had a great impact on our workplace injuries and, consequently, on our worker's compensation premiums. At the 9/1/92 reneval of the worker's compensation package, one year after the implementation of the substance abuse policy, our workplace injuries had declined 31% and are continuing to be under control for the 1993 plan year. In addition, in June, 1993, Grand Piano received refunds of worker's compensation premiums in excess of $50,000 for the 1992 and 1993 plan years. After years of escalating injuries and premiums, I can only deduct that the substance abuse policy was a major factor in this turn around in injuries.

The group health plan also seems to have reaped some benefit from the substance abuse policy. September, 1993, marked the third consecutive plan year that we did not receive a rate increase. We changed carriers in 1990 after years of runaway claims and premium increases, and since 1991 there seems to have been a turn around in our group claims. From August, 1991, through June, 1992, substance abuse claims dropped 41.6%; and from June, 1992, through June, 1993, the substance abuse claims dropped 89.5%. The overall claims dropped 23% from June, 1992, through June, 1993. Again, I can only deduct that the substance abuse policy was a major factor in this change.

In summary, the substance abuse policy has had a tremendously positive effect on the workplace at Grand Piano & Furniture Co., Inc. Specifically, workplace injuries are down, worker's compensation premiums are down, group health claims (especially substance abuse claims) are down and group health premiums seem to be under control. In addition, employee turnover is down in the "warehouse" division, and there seems to be a much better spirit among the employees in the warehouses.

Thank you for allowing me to express the opinion of Grand Piano on the subject of drug testing in the workplace and for your time in reading this rather lengthy letter. Please do not hesitate to contact me if I can be of any assistance.

Sincerely,

GiGi Hall
Benefits Manager

cc: Keith Cheatham
Virginia Chamber of Commerce

August 18, 1993

Ann Hepler
Route 4, Box 140
Bumpass, VA 23024

I was a teacher of the John G. Wood School of The Virginia Home for Boys. I started teaching there 3 years ago at which time I had to sign a form which stated that I would permit random drug testing during my employment. Later during that first year I was asked to sign another form regarding drug testing and car and body searches based on probable cause. I spoke with the Executive Director about this form and told him that I did not agree with any drug testing and I did not feel I could sign this additional form. I believed it was against my 4th Amendment rights. We spoke for over an hour the outcome of which was that I was not required to sign this additional form. Finally, this past spring, my name came up for random drug testing. I had 48 hours to submit a specimen. I first went to the Executive Director and asked him to excuse me from the drug testing knowing how I felt about it. He denied my request.

Prior to this meeting I had thought that there were only 2 possible outcomes if he denied my request.

1. I would have to give them the urine sample and go against my principles.

2. I could refuse to give them a sample, lose my job and be presumed to be a drug user.

But then a thought came to me, I really had two options concerning choice #1, giving my urine specimen over for testing:

a. I could give it to them for free.

b. I could charge them for it.

I chose "b". I submitted a bill for $1,000 which was to be prepaid with no refunds. That way, I was agreeing to have them check my urine for drugs any time they liked, but they must first purchase it. I submitted the bill moments following his denial of my request to be excused from the testing and well within the 48 hour time period.

The Executive Director was unable to respond and I explained that since the 13th Amendment had been enacted, no human being was permitted to own another human being and therefore no person had a right to another person's body fluids. I had only signed a form agreeing that they could check my urine for drugs but the final arrangements on either side were not stated on the form I

signed, such as where it would be done, by whom, who would get the results, how much I was to be paid for my urine.

The end result was that he consulted with the Board of Directors and attorneys. They did not fire me at that time, but did say to me in a subsequent meeting, in front of a reliable witness, that they would not renew my contract to teach again unless I gave them my urine for free. In addition, the Executive Director said that if I changed my mind, he would be glad to rehire me as a teacher.

I believe very strongly that many people are trying to eat away at our Constitutional rights and most working people don't know what to do to stop this trend. I would really like to see this particular issue come to rest. I know that it has become an acceptable way of life to many, and even though the courts say it is not a 4th Amendment violation, I still believe that it is. I also believe that it is a violation of the 13th Amendment. No person may own another person and therefore no person may own the body fluids of another person.

If we permit the use of drug testing in the work place without compensation to the individuals involved, we are permitting a new form of slavery to evolve. This can only lead to other forms of searches such as strip searches, body cavity searches, and even video camera searches in our homes. You probably believe that I am being an alarmist, but if you will look at the code under which police may search a person, you will see that they must have probable cause to search someone and the closer they get in their search to the body of a person, the greater the probable cause must be that they will find something. You can not get any closer to a person than their body fluids. Body searches and home video cameras are much less intrusive than analysing urine which comes from within a person.

If you want to spend money to make sure that the workplace is safe, use the money spent on drug testing to hire supervisors and give employees quick neurologicals, have them count backwards by 3's, etc. These tests will tell you if the employee is functioning well, for whatever reason. You may discover that a person is having mild strokes and not able to function well on the job and you may be able to even save them from a large stroke.

Drug testing is degrading, demoralizing and dehumanizing. The majority of people in the work place do not use drugs and they are being stripped of the right of full ownership of their bodies. The current system of drug testing is very negative, assuming that all people use drugs until proven to be drug free.

The bottom line for employers, and I have been an employer as well, is : IF THE EMPLOYEE DOES A POOR JOB, (and your training is more than adequate) FIRE THEM. If I don't do my job well and

you have trained me well, then the responsibility is mine. If I perform poorly, you should fire me. It was never any business of mine as to what was in my employees urine. It was my business to see that they did their job well.

Finally, I would like to say, DON'T ALLOW DRUG TESTING

BUT

If you are going to do it, pay the people for the humiliation, degradation and acknowledge that the urine belongs to the individual and the employer does not have the right to take it. They must offer to purchase it.

Testimony of

DANIEL G. LEBLANC, PRESIDENT

VIRGINIA STATE AFL-CIO

before the

Department of Labor and Industry

HJR 534 Advisory Committee

August 18, 1993

On behalf of the 200,000 working families of the Virginia State AFL-CIO, I appreciate the opportunity to address the Committee this evening and share with you our perspective on the issue of drug testing in the workplace. I hope that the information provided to the Committee by Jim August of the American Federation of State, County and Municipal Employees (AFSCME) has assisted you in your deliberations. And I trust that the information obtained from the survey recently conducted of our affiliates has been of value as well.

Drug addiction and alcoholism are illnesses. Those suffering from these diseases need treatment, not punishment. At the same time, addicted individuals can pose health and safety hazards on the job if they come to work in an impaired state. Accordingly, the problem of substance abuse ought to be addressed squarely and cooperatively by employers and unions.

The AFL-CIO and its affiliates have long promoted prevention and rehabilitation programs in the workplace and the community. Labor unions have sponsored institutes on alcoholism and drug use, trained union volunteer counselors to offer guidance and referrals to those with drug and alcohol-related problems, supported community facilities for treating victims of drug and alcohol addiction, and established on-the-job treatment programs.

In recent years, however, it has become increasingly fashionable for employers -- public and private alike -- to use drug tests to screen all job applicants and all employees or to force applicants and employees to submit to such tests on a random basis.

Many of the tests companies use to screen workers for drugs and alcohol are very inaccurate, especially the ones companies use in volume. False positives -- showing drug usage even though a person has not used illegal drugs -- are 25 percent or higher for many tests, and the results of tests which purportedly screen for illegal drugs can be affected by the use of such common substances as cough syrup, caffeine, asthma medicine, and other common chemicals.

In addition, the laboratories which perform drug and alcohol screening tests often have very high false-positive error rates. According to the Centers for Disease Control (CDC), some labs have false-positive error rates as high as 66 percent. As a result, workers or job applicants may lose a job either because accurate tests are not available or because companies prefer to use less accurate, inexpensive tests in mass screening programs.

Even if such drug tests were reliable, the tests would reveal only which individuals had taken a drug during a prior interval of time, often encompassing a large amount of off-duty hours. Such tests cannot determine whether an individual is currently addicted to a drug, under the influence of a drug, or unable to perform job functions because of drug use. The employer's only legitimate interest is in judging an employee's ability to work.

Tests for drug and alcohol usage are thus of dubious value in dealing with the problem of impairment in the workplace. Few testing programs include procedures for workers to challenge inaccurate findings or secure relief from the results of error. The test results are too often used to discharge competent employees. Perhaps most important, the administration of these tests on a random or across-the-board basis is degrading to, and invades the privacy and physical integrity of, those tested, the vast majority of whom use no illegal drugs at all.

In addition, mandatory drug and alcohol testing programs raise serious legal questions. In many states, there are laws to protect personal privacy, laws which should be interpreted to prohibit overbroad testing programs. In addition, under federal law and the laws of many states, persons suffering from addiction, like persons suffering from other disabling conditions, are classified as handicapped and are protected from discrimination in employment based on their condition. To the extent drug and alcohol tests are aimed at disciplining addicted individuals without regard to whether the individual's impairment interferes with job performance or directly threatens harm to others, such tests may run afoul of the laws on discrimination against the handicapped.

The process of collective bargaining holds the best hope of developing lawful solutions which reconcile the sometimes competing interests of the addicted individuals with those of workers who do not use drugs and who wish to avoid the degradation of drug testing, yet at the same time do not want to be endangered by a co-worker who is impaired.

Through collective bargaining, unions and employers can develop carefully tailored and balanced programs which stress education and prevention of addiction and which also:

* place appropriate limits and conditions for the use of tests for alcohol and drugs, including focusing only on workers who exhibit symptoms of job-related impairment;

* establish safeguards for those who test positively, including guarantees of workers' rights to privacy and confidentiality;

* fully inform workers and their representatives of the testing methodology an employer administers;

* provide nonpunitive, on-the-job responses and helpful treatment for those who are, in fact, unable to perform their jobs because of drug addiction or alcoholism.

The AFL-CIO has urged its affiliates, through the collective bargaining process, to continue to develop constructive solutions to the addiction problem, solutions responsive the the legitimate needs for all parties.

We deplore the recent efforts by many employers in the hysteria of the moment, to bypass the collective bargaining process and require mandatory screening or impose punitive programs which ride roughshod over the rights and dignity of workers and are unnecessary to secure a safe and efficient workforce.

The AFL-CIO urges policy makers to vigorously resist these harsh and unjustifiable programs and to assist union members who are injured by such employer-imposed programs to invoke their rights under federal and state law. We call upon this Committee to strengthen the legal protection afforded the addicted and to ban testing that unnecessarily infringes on the privacy and dignity of workers.

Thank you.

OPEIU 334, AFL-CIO

TRIDENT NATIONAL CORPORATION

3500 Grove Avenue • Richmond, Virginia 23221 • 804-354-0697

August 19, 1993

Marilyn Mandel
Director of Planning and Policy Analysis
Department of Labor and Industry
13 South Thirteenth Street
Richmond, Virginia 23219

Dear Marilyn:

Thank you for letting me speak to your Open Meeting on Drug Testing in Norfolk last Wednesday evening. I hope that my brief remarks were helpful.

You had asked what role the state should play in drug testing, and now having had the time to reflect on it , I have an additional answer. I believe that the state should take notes from the DOT guidelines and require that a Medical Review Officer review each positive test result prior to the employer being informed of that result.

By requiring this, the legal rights of the innocent applicant or employee can be protected. Occasionally there are legitimate medical reasons why a laboratory result might be positive, and it is the MRO's role to identify these and declare the result negative if appropriate.

The function of the Medical Review Officer is a critical part in protecting the rights of the employee. The MRO is responsible for reviewing, interpreting, and recommending action based on the results of workplace testing.

Considering the multiple components of the drug screening process and the potentially devastating consequences to the individual tested, it is advised that all testing be reviewed by a licensed physician with appropriate knowledge of substance abuse disorders.

Because of the complexity of substance abuse testing , the physician must have medical training and/or experience in the field of duties associated with the MRO duties. The MRO should have the training to interpret and evaluate test results. He must also keep abreast of the federal and/or state regulations pertaining to drug testing.

Medical Review Officers are trained in the assessment of the collection procedures and verification of the appropriate documents through a uniform set of procedures.

The benefits of the use of a MRO not only pertain to results review but also include educational benefits to the employers. They, too, must understand the process and the need to protect the rights of the employee.

The addition of the MRO service would not add greatly to the cost, and the benefit would be enormous.

We feel that the general public needs to be made aware of the importance of continuing testing in the workplace, as a deterrent to substance abuse. We further recommend the use of a Medical Review Officer on all testing.

Sincerely,

John B. Vellines

AUG 13 1993

HAMPTON ROADS
UTILITY &
HEAVY CONTRACTORS
ASSOCIATION

August 12, 1993

Marilyn Mandel
Director, Planning & Policy Analysis
Dept. of Labor & Industry
13 South Thirteenth Street
Richmond, VA 23219

Dear Ms. Mandel:

Because of a major association meeting which is scheduled for the same time as your meeting at Old Dominion University on August 17, I am submitting comments to you and ask that this letter be read at the meeting at 7 P.M.

The Hampton Roads Utility and Heavy Contractors Association continues to support effective drug testing in the workplace. Our members recognized the values of a strong safety program and the influence drug testing plays in the overall success of a company's safety record. We do feel, however, that the federal criteria is sufficient. Additional criteria and mandates as issued by House Joint Resolution 534 will be a step in over regulation which in no way influences a company's safety record.

Thank you for allowing me to voice the opinion of the 160 member firms of the Hampton Roads Utility and Heavy Contractors Association.

Sincerely yours,

Alex W. Oliver
Executive Director

AWO/mjd

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AUG 2 0 1993

HAMPTON ROADS
CHAMBER • OF • COMMERCE

August 19, 1993

Ms. Marilyn Mandel
Director of Planning and Policy Analysis
Department of Labor and Industry
13 South Thirteenth Street
Richmond, VA 23219

Dear Ms. Mandel:

Please include the enclosed information with the formal comments solicited by the Department of Labor and Industry regarding House Joint Resolution 534, studying workplace drug testing.

In 1992 the Hampton Roads Chamber of Commerce requested comment on House Bill 845, as introduced by Delegate Grayson in the 1992 session of the Virginia General Assembly, from several of our member business firms who were involved in workplace drug testing programs. Generally their concerns were with apparent conflicts in the proposed regulations with existing federal drug testing regulations and more broadly questioned the need for such state regulation in light of existing federal controls. With focus being given to promoting "drug free work place" programs, concern was raised that adding regulation at the state level would serve as a deterrent to business wishing to implement a drug testing program by further complicating the process.

For your convenience, I have included a summary of the specific comments received by the Hampton Roads Chamber of Commerce as they relate to House Bill 845. For greater detail, I have also included a full listing of the comments received from these Hampton Roads business firms.

Sincerely,

Martha S. McClees

Martha S. McClees
Vice President
Governmental Affairs

c: James F. Babcock, Chairman of the Board
Hugh L. Patterson, Vice Chairman of the Board, Governmental Affairs
Thomas Lucas, Chairman, Employment Law Task Force
John A. Hornbeck, President

Enclosures (2)

HAMPTON ROADS 10th Year

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Updated
June 17, 1992

HAMPTON ROADS
CHAMBER • OF • COMMERCE

Summary of Comments Received on HB 845

SUBSTANCE ABUSE TESTING ACT

Patron: Delegate George Grayson
Status: Carried over by House Committee on Labor and Commerce

Code of Virginia: Chapter 3 of Title 40.1 - would add article 4.1, sections 40.1-40.1 through 40.1-40.8.

Companies offering comment:
1. Tidewater Regional Transit, Linda H. Tucker, Human Resources Manager
2. Dominion Terminal Associates, Daniel R. Wagoner, Manager Human Resources
3. Twin "B" Auto Parts, Sandi Clark, Human Resource Manager
4. First Laboratories, Dr. David Martin, Science Division
5. Norfolk Southern Corporation, Magda A. Ratajski, Vice President
6. Virginia Power, D. Keith Drohan, Director Personnel & Admin.
7. Norshipco, J.R. Wermeister, Director of Industrial Relations
8. Union Camp, Robert E. Downing, PHR
9. Now Care Management Corp., Sarah O. Languell, Vice President

COMMENTS RECEIVED RELATING TO EACH SECTION:

Section 40.1-40.1: Notice and written policy requirements

Recommendations in summation:
- (subsection 2d) - Testing method and collection procedure should not be left to the descretion of the employer but should follow guidelines of National Institute of Drug Abuse.
- (subsection 3) - Posting the policy should be sufficient. Giving each applicant and employee a copy is overly burdensome. Posting should be done thirty days prior to drug testing program being implemented to give employees ample notice.

Section 40-1-40.2: Permissible cases for testing

Recommendations in summation:
- There needs to be a provision added to allow for the termination or action against an employee or applicant who refuses to be drug tested.
- (subsection 1) - Reasonable suspicion is vague. Language should allow for testing based upon a reliable tip or "unusual behavior being witnessed whether or not it could "adversely affect job performance or the work environment".
- (subsection 2a) - Language should allow for random testing if the potential for damage to a company's ability to conduct business or the potential for injury to the public, an employee's person or co-workers.
- (subsection 3) - There should be no time limit on follow-up drug testing. A limitation of one year conflicts with the Federal Highway Administration regulations and the Federal Railroad Administration regulations, both specifying 60 months.

Section 40.1-40.3: Substances subject to testing

Recommendations in summation:
- Should define "controlled substances" by using list detailed by Department of Transportation.

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Section 40.1-40.4: Certification of laboratories, testing procedures, review officers

Recommendations in summation:

- (subsection A) - Should only require labs be certified by NIDA. Requiring certification by the state is unnecessary since the Department of Health and Human Services already has a certification program.
- (subsections B & C) - These provisions may well run contrary to Federal procedures and requirements.

Section 40.1-40.5: Testing safeguards

Recommendations in summation:

- Requirements expose employers to a potential of 7 days after positive test results are received before disciplinary or protective actions can be taken. Discharge or suspension of an employee who tests positive should be unrestricted.
- (subsection A) - "Disciplinary action" should be defined. Will the business be held immune from liability for any damages caused by an employee who has tested positive but all other requirements of this provision have not been satisfied at the time of the accident? Should allow for an employee who tests positive to be informed verbally. Who is responsible for paying for a third party test to be done and how are arrangements to be made and custody and integrity of the sample to be guarded.
- (subsection C) - Results should be released for inclusion in the company medical and personnel files and for the rehabilitation organization.
- (subsection E) - There should be no limitation on the employers ability to discharge or suspend an employee who tests positive. A maximum of a 30 day suspension conflicts with federal regulations.

Section 40.1-40.6: Educational and treatment programs

Recommendation:

This section charges the employer with the responsibility of educating and providing treatment for its employees. Placing the full burden for educational and/or treatment information on the employer is unfair.

Section 40.1-40.7: Remedies; statue of limitations

Recommendations in summation:

- This section makes the potential for litigation and associated expenses nearly limitless. There are currently sufficient protections and legal remedies available to the employee. This section should be eliminated.

Section 40.1-40.8: Waiver

Recommendation:

An employee who wishes to waive their rights and is willing to commit to this in writing should not be prohibited from doing so.

Updated
June 17, 1992

HAMPTON ROADS
CHAMBER • OF • COMMERCE

Comments Received on HB 845

SUBSTANCE ABUSE TESTING ACT

Patron: Delegate George Grayson
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COMMENTS RECEIVED RELATING TO EACH SECTION:

Section 40.1-40.1: Notice and written policy requirements

Recommendations in summation:
- ***(subsection 2d) - Testing method and collection procedure should not be left to the descretion of the employer but should follow guidelines of National Institute of Drug Abuse.***
- ***(subsection 3) - Posting the policy should be sufficient. Giving each applicant and employee a copy is overly burdensome. Posting should be done thirty days prior to drug testing program being implemented to give employees ample notice.***

2d. The testing method and collection procedure should not be left up to the policy writer. It should follow the guidelines which have been set by National Institute of Drug Abuse. (Source: Now Care)

3. Should not be necessary to provide a copy of the policy to every job applicant, but should only be required for those applicants who are offered employment. (Source: DTA)

3. Posting of the policy in places where notices are normally posted should be sufficient. Giving each applicant and each person a copy of the policy is overly burdensome. In some cases a relationship has been established with unions regarding the communication of information to employees which is in conflict with this section. (Source: Norshipco)

3. Posting Notice: Initial policy should give employee's time enough to "clean up their act". Recommend at least thirty days. (Source: Now Care)

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Section 40-1-40.2: Permissible cases for testing

Recommendations in summation:

- ***There needs to be a provision added to allow for the termination or action against an employee or applicant who refuses to be drug tested.***
- ***(subsection 1) - Reasonable suspicion is vague. Language should allow for testing based upon a reliable tip or "unusual behavior being witnessed whether or not it could "adversely affect job performance or the work environment".***
- ***(subsection 2a) - Language should allow for random testing if the potential for damage to a company's ability to conduct business or the potential for injury to the public, an employee's person or co-workers.***
- ***(subsection 3) - There should be no time limit on follow-up drug testing. A limitation of one year conflicts with the Federal Highway Administration regulations and the Federal Railroad Administration regulations, both specifying 60 months.***

1. Reasonable suspicion is vague - could include a reliable tip or "unusual behavior" and a prudent employer should be able to act under either circumstance.
(Source: DTA)

1. "...and such influence could adversely affect job performance or the work environment" should be stricken. Reasonable suspicion a person is under the influence of drugs or alcohol should be enough to trigger testing.
(Source: Norshipco)

1. "Reasonable suspicion" should (if possible) be witnessed by two or more supervisors who have received training in substance abuse and modified behavior recognition of an impaired employee. It should require these supervisors to document within 24 hours or before test results are received.
(Source: Now Care)

2a. Revise wording to include "...injury to the public or co-workers may occur..."
(Source: Va. Power)

2a. "catastrophic....injury to the public" should not be the criterion for validating random testing. The potential for damage to a company's ability to conduct business or the potential for injury to an employee's person or co-workers should be included.
(Source: DTA)

2a. This in effect says, unless the use results in an injury to the public with catastrophic results then random or chance basis testing cannot be done. Why only "public"? What is catastrophic? Subsection 2.a. should be stricken. It is nebulous and addresses only injury to the public not private concerns also. Random testing should be allowed because illegal drug use is against the law.
(Source: Norshipco)

2b. Who determines this? This requirement is already covered in 40.1-40.2.1.
(Source: Norshipco)

2b. Should be documented.
(Source: Now Care)

2c. This category is part of the regular work force that should be subject to random testing.
(Source: Norshipco)

3. Recommend a period of more than one year for follow-up testing after a positive test. TRT policy requires re-testing for 60 months at management's prerogative.
(Source: TRT)

3. There should be no time limit on drug testing. It doesn't make sense that employees who have tested positive may be tested for only 1 year while employees who have not previously been tested positive can be tested indefinitely. Rehab/treatment programs in most cases include random testing and run a minimum of 2 years. These subsections effectively reduce all rehab programs to no more than 1 year.
(Source: Norshipco)

3. Va. Power requires selective testing for a period of 3 years after a confirmed positive test which increases the chance that substance abuse will be detected. The longer follow-up period aids in ensuring long term rehabilitation of the individual.
(Source: Va. Power)

3. Follow-up testing period of one year is too limiting and appears to conflict with several regulations. 1) The Federal Highway Administration regulations for commercial vehicle operators in interstate commerce that test positive is 60 months of follow-up testing. 2) the Federal Railroad Admin. also uses 60 months.
(Source: Union Camp)

3. Recommend the MRO, in conjunction with a rehabilitation counselor, make the determination. Should have an option of at least two years. Also, this testing should be done at the expense of the employee or applicant.
(Source: Now Care)

4. Modify the criteria for testing to include "accident involving injury or property damage may be required to undergo testing..."
(Source: Va. Power)

4. The wording indicates there must be personal injury involved in an accident before testing can be considered. The criteria should be the employer's reasonable belief the employee's negligent performance resulted in the accident.
(Source: DTA)

4. What constitutes serious injury? What does "immediately" after the accident mean? Some injuries do not manifest themselves as serious until some time after the accident - strains & sprains. In some cases this criteria has already been negotiated with a union - what then? There should be provision for an accident that causes "serious" property damage but does not result in an injury.
(Source: Norshipco)

4. Should require documentation and some time frame (immediate; no later than...).
(Source: Now Care)

5. The bill would allow an applicant to be tested for drugs only after an "employer has determined that the applicant is otherwise qualified for hire." That would put drug tests on a par with pre-employment physical examinations under the Americans with Disabilities Act. Congress refused to consider a drug test as a physical examination that could be given only after the applicant was otherwise found qualified.
(Source: Norfolk Southern)

- "It is important we remember the usage of an illegal substance is illegal. It is imperative employers remain in the right for the testing of their employees who display a lack of ability based on their apparent drug use."
(Source: Twin "B")

- There needs to be a provision to terminate or take action against an employee or applicant who refuses to be drug tested.
(Source: Norshipco)

Section 40.1-40.3: Substances subject to testing

Recommendations in summation:

- ***Should define "controlled substances" by using list detailed by Department of Transportation.***

- Consideration should be given to testing for prescribed and over the counter medications at extreme dosage or those not prescribed to the individual tested.
  (Source: Va. Power)

- What about testing for uncontrolled substances such as cocaine and PCP?
  (Source: Norshipco)

- Reference to 54.1-3401 to define controlled substances is confusing. Recommend use of same list of substances as Dept. of Transportation (marijuana, cocaine, opiates, amphetamines and PCP)
  (Source: Union Camp)

- Alcohol is a legal entity and should not be tested from a urine sample. Urine is indicative of yesterday's action and does not tell you what alcohol was in the body at the time of testing. Would like to see the state use same guidelines as Federal government.
  (Source: Now Care)

Section 40.1-40.4: Certification of laboratories, testing procedures, review officers

Recommendations in summation:

- ***(subsection A) - Should only require labs be certified by NIDA. Requiring certification by the state is unnecessary since the Department of Health and Human Services already has a certification program.***
- ***(subsections B & C) - These provisions may well run contrary to Federal procedures and requirements.***

A. Norshipco currently must adhere to 3 substance abuse programs; the Drug Free Workplace Act, Dept. of Defense regulations and Dept. of Transportation regulations regarding substance abuse. Both DOD and DOT mandate drug testing. Section 40.1-40.7E. states that this act is in addition to and not in lieu of....other requirements, the other requirements must be reconciled with this act. EXAMPLE: DOT requires the samples be sent to a NIDA approved lab. There are none in Virginia therefore there is a conflict about sending the sample to a Virginia State approved lab.
(Source: Norshipco)

A. Recommend guidelines used by Dept. of Health and Human Services currently to certify lab sites and procedures be incorporated.
(Source: TRT)

A. Already have approximately 90 NIDA certified labs, certified by the Dept. of Health and Human Services. No need to duplicate this certification at the state level.
(Source: Now Care)

B. Should coincide with federal requirements.
(Source: Now Care)

B&C. These provisions may run contrary to Federal DOT NIDA approved procedures and requirements.
(Source: Norshipco)

C. There should be a review officer. It requires a physician to interpret positive results in some cases.
(Source: Now Care)

- ...the risk of over-regulation could be excessive cost to the employer. In strictly outlining the testing procedure, we could in essence carve out a group of employers who would like to institute a policy, yet find the cost prohibitive.
(Source: Twin "B")

- HR 33, federal legislation now pending congressional action specifies the National Institute on Drug Abuse (NIDA) criteria for certification of drug testing laboratories. Assuming passage, creating a regulatory Board at the state level would cause an administrative, costly burden.
(Source: First Lab.)

- Companies should be allowed to do pre-screening in house to reduce costs. Only apparent positive results should be required to be sent to the approved laboratories for confirmation testing. Depending upon laboratory certification and all the other administrative actions, procedures, controls, etc. which are yet to be developed in this section, the Act may become unworkable.
(Source: Norshipco)

- Not all laboratories used by employers are located in Virginia. Will the Board certify out-of-state labs? Will the Board grant automatic certification to laboratories certified at by the National Institute of Drug Abuse-Dept. of Health? Otherwise there will be unnecessary duplication.
(Source: Union Camp)

Section 40.1-40.5: Testing safeguards

Recommendations in summation:

- ***Requirements expose employers to a potential of 7 days after positive test results are received before disciplinary or protective actions can be taken. Discharge or suspension of an employee who tests positive should be unrestricted.***
- ***(subsection A) - "Disciplinary action" should be defined. Will the business be held immune from liability for any damages caused by an employee who has tested positive but all other requirements of this provision have not been satisfied at the time of the accident? Should allow for an employee who tests positive to be informed verbally. Who is responsible for paying for a third party test to be done and how are arrangements to be made and custody and integrity of the sample to be guarded.***
- ***(subsection C) - Results should be released for inclusion in the company medical and personnel files and for the rehabilitation organization.***
- ***(subsection E) - There should be no limitation on the employers ability to discharge or suspend an employee who tests positive. A maximum of a 30 day suspension conflicts with federal regulations.***

A. What constitutes disciplinary action? Are suspension or not hiring an applicant disciplinary? If no action can be taken, the cost to the business will escalate. Is the business immune from liability for damages for working an employee whom it has knowledge is a drug user?
(Source: Norshipco)

A1. Second confirmation should be Gas Chromatography/Mass Spectrometry.
(Source: Now Care)

A2. An employee who tests positive would have to be informed "in writing of the opportunity to explain...the positive confirmed test result;..." Federal regulations allow this to be done by a telephone call from the medical review officer to the employee.
(Source: Norfolk Southern)

A2. If a person admits to the drug usage after the first positive result, is a confirmation test still mandatory? Is written notification given after the first positive or positive confirmation?
(Source: Norshipco)

A2. It is not necessary to inform the employer in writing in addition to the copy of the policy. (Source: Now Care)

A2. Requiring an employee or applicant be informed in writing of the opportunity to explain positive test results is too restrictive. Should also allow a verbal explanation. (Source: Union Camp)

A3. Requires retesting of the same sample at another certified lab. How? Who is to have custody of the sample? Who is to make the arrangements? To whom will the results be reported?
(Source: Union Camp)

A3. Language is unclear as to who is responsible for paying for the third party test. (Source: DTA)

A3. If the state Board certifies and controls the first testing lab and the results are confirmed, why are 2nd and 3rd lab tests needed? The original specimen is not always large enough to run more than 2 tests and how is the chain of custody maintained in transporting the specimen from one lab to another? What if the parties cannot agree on a 3rd mutually acceptable lab? Who pays the cost of the 3rd analysis? Are the 2nd and 3rd labs required to confirm their results as is required of the 1st lab?
(Source: Norshipco)

A3. As of implementation date of the Omnibus Transportation Act all DOT samples will have to be given in a split sample, meaning one would remain sealed while one was tested. If necessary, the second sample could be sent to a second certified lab for testing. Use of three labs is unnecessary and very costly.
(Source: Now Care)

B. This could prove cost prohibitive. Is the employer immune from liability for damages from working an employee whom it has knowledge is a drug user?
(Source: Norshipco)

B. It is necessary to remove an employee from a safety security sensitive job as soon as possible.
(Source: Now Care)

C. Test results should be released to the employer for inclusion in its company medical files and personnel files and should be released to the rehabilitation organization for use.
(Source: Norshipco)

E. Would forbid the employer to discharge or suspend for more than 30 days an employee who tests positive for the first time. That is an unnecessary restriction on employer discretion.
(Source: Norfolk Southern)

E. Limiting penalities to a maximum of a 30 calendar day discharge or suspension for first time positive results appears to conflict with federal regulations. Urban Mass Transportation Administration regulations require workers must be removed from their jobs. Coast Guard rules require employer remove any current employee that fails a drug test. Federal Railroad Admin. requires a suspension of 9 months. Drug-Free Workplace Act requires employees to take appropriate action - to include discharge. Defense Department contract rules generally require that "no employee...may remain on duty or continue to perform contract work" until the contractor determines the employee is "fit for work".
(Source: Union Camp)

E. Unclear language. Does the last exclusionary sentence allow for the discharge of an employee who is responsible for an accident and tests positive?
(Source: DTA)

E. Company officers, supervisors, medical and security personnel should be discharged for first time positive tests for illegal substances. These individuals set and enforce company policy and should be held accountable for illegal activities.
(Source: Va. Power)

E. Employees may have other problems and the first positive test result may be the triggering mechanism to discharge. For example: an employee may admit to the employer that he has a drug problem and is placed in a rehab program which includes random/spot testing. If the employee tests positive during a spot test the company should not be prohibited from discharging the employee for non-compliance with its rehab program.
(Source: Norshipco)

E. Employers must have the right to not keep an employee whose test has been determined to be positive, confirmed by GCMS and verified by a qualified MRO. This would put an undue hardship on employers who do not have a non-safety sensitive position in which to place the employee.
(Source: Now Care)

- The safeguards described provide considerable protection to the individual while exposing the employer to a potential of 7 days delay in dealing with an employee who tests positive. Following a positive test, the employee should be placed on non-disciplinary non-paid leave while they pursue an independent analysis. If it is determined the employee received a false-positive result, the employee should be rewarded back pay.
(Source: Va. Power)

- The bill requires opportunities for a second and third test, explanations, and no suspension or disciplinary action for a "first time positive". This is in direct conflict with the illegality of drug usage. This bill demands the employer overlook the criminal act. If the employer has a drug policy making illegal drug usage against company policy, the employer should be allowed to discharge or suspend an offender.
(Source: Twin "B")

Section 40.1-40.6: Educational and treatment programs

- This section charges the employer with the responsibility of educating and providing treatment for its employees. Placing the full burden for educational and/or treatment information on the employer is unfair.
(Source: Twin "B")

Section 40.1-40.7: Remedies; statue of limitations

Recommendations in summation:

- ***This section makes the potential for litigation and associated expenses nearly limitless. There are currently sufficient protections and legal remedies available to the employee. This section should be eliminated.***

A. The act is ambiguous and unclear and will create a flood of law suits. Employees covered by collective bargaining agreements should resort only to the grievance procedure. Situations involving Workers' Comp. already have in place appeals through the judicial system.
(Source: Norshipco)

B. There are enough current remedies available and law to protect the interests of employees and applicants. This is in conflict with the standard of employment at will.
(Source: Norshipco)

C. This is unnecessary.
(Source: Norshipco)

D. Should provide for reasonable attorney's fees and costs to prevailing defendants. (Source: Norshipco)

- Gives persons the right to sue employers for employment, injunctive relief, reinstatement, promotion, back pay, and compensatory damages. The potential for litigation and associated expense would be nearly limitless. (Source: Norfolk Southern)

- The remedies seem harsh and extensive, with the statute of limitations extending for 1 year. 90 day time period would be more appropriate. Remedies should be employment-related ie. employment, reinstatement and payment of lost wages and benefits. (Source: Twin "B")

Section 40.1-40.8: Waiver

- An employee who wishes to waive their rights and is willing to commit to this in writing should not be prohibited from doing so. (Source: Twin "B")

Attn. Marilyn Mandel

VIA FAX (804)371-6524

4 pgs

15189 Wentwood Lane
Woodbridge, Virginia 22191

Marilyn Mandel, Director of Planning and Policy Analysis
Department of Labor and Industry
13 South 13th Street
Richmond, Virginia 23219

RE: DRUG TESTING IN THE WORKPLACE

Dear Miss Mandel:

Please enter, into the public record, my comments on drug testing in the workplace. I will not be able to attend any of the Department's meetings scheduled for Charlottesville, Wytheville, and Norfolk and I did not see a notice in the paper for a meeting in Northern Virginia.

While earning my Master's degree in Public Policy Analysis, I researched the policy implications of drug testing by employers. Although my work centered on a cost-benefit analysis from the employer's perspective, I did consider the impact to society. It is from this work, that I draw my conclusion and the supporting arguments. I trust that the Department will use my comments to augment its policy upon reaching the same conclusion.

CONCLUSION: From Both a Societal Standpoint and For Most Employers, Drug Testing, While Legal, is Technologically Suspect and Economically Unsound, Providing a Negative Net Cost.

Legality:

Traditionally in the employer-employee relationship, the law provides for termination of employment by either party at any time for any reason. The implicit contract between the two parties has been found by the courts to not to bind either party to providing the other a reason or advance notice. The courts have termed this the "at-will" doctrine. Both hiring and firing fall under this doctrine.

In the case of drug testing, employee who tested unfavorably would probably be terminated by the employer. This appears to be legal. Employees who are enrolled in an employer-sponsored rehabilitation program (commonly called an employee assistance program or EAP) and those who make the case that they are, in fact, addicted to drugs; MAY be protected by Federal law from being fired. For Federal and State employees, the Constitution MAY provide some legal protection, affording them a right to "due process" requiring the employer to exercise at least some caution before firing. What constitutes

"due process" in unclear in statutes, case law, or regulations. The courts have indicated that some factors to consider include the immediate threat to safety imposed by employee who tests unfavorably and whether the procedures for drug testing, including the implications for refusing or "failing" the test, are clear presented to the affected employees.

Some have made legal claims that the employee's "right to privacy" should provide a barrier between "work time" and "home time." Acceptance of this would preclude the employer from firing an employee for drug use outside of work. The courts have been split on accepting this "right" and how the "right" would limit private and public employers.

The courts have ruling, however, that drug testing is a condition of employment subject to negotiation by employers and affected employee unions. Employees covered by employer-union agreements cannot have drug testing unilaterally imposed upon them.

Virginia could limit the employer's "right to fire," by requiring that employers adopt a general or specific set of rules for drug testing. The consequences of refusing the test, the conditions under which the employer would test, the availability of a split sample, the test procedure to be used, the appraisal of the technical results, the opportunity for the employee to present other evidence, and the procedures to be followed upon learning of an unfavorable test result should be included in these regulations.

Scientific:

Drug testing begins with the collection of a sample, usually urine or blood. Collection is using conducted in the employer's bathroom for urine or a conference room or the employee's office for blood. Procedures vary as to who does the collection, the privacy afforded, and the advance warning provided. The integrity of the sample from employee to lab is very important. Switching of samples, contamination, and handling can affect test results. Privacy and advance warning can allow some employees in some situations to avoid an unfavorable test result by restraining from drug use just prior to the testing period, taking other drugs to confuse the lab, bowing out of the test, substituting a "clean" sample, diluting the sample, or switching sample vials.

Once the sample reaches the lab, the lab subjects the sample to a scientific test to determine if drugs are present. The accuracy of this step depends on the integrity of the sample, the handling conditions, the test selected, the equipment used, the qualifications of the personnel, and the sensitivity chosen. Some labs report results this on a pass/fail at the lab;, some report actual concentrations of drugs; and some test for concentration, then interpret the results, passing on a pass/fail score to the employers. Sensitivity, found in all scientific tests, can prove to be problemsome in drug testing. Some tests are not selective enough to distinguish between prescription drugs similar to illicit drugs. Also, since the test detects the concentration in the sample, but not how the concentration was acquired, no information is relayed as to the timing of the drug use. Some chemicals are retained in the fat cells and would show up in some tests well after any effect has worn off.

Never will a lab test indicate if the employee was impaired while on the job.

Testing of any sort involves taking a sample (i.e. urine) of a sample (the tested workers) of the general population. Generally, one does know how accurate the actual test is (i.e. 90%), but does not know in what proportion the trait is prevalent in the general population (i.e. 10% of the population uses drugs). This presents a problem with what significance to attach to a test which indicates that the employee uses drugs. In the example of a population of which 10% uses drugs and a test which is 90% accurate is used to distinguish between users and non-users; for a test of 100 employees one would expect to find 18 results indicating drug use of which nine, fully 50%, would be wrong. Instead of provoking action against the expected ten drug users, one would expect 18 employees (nine users and nine non-users) would be subject to adverse action, while one user escaped unharmed.

This problem is a function of the low usage rate of drugs in the working population and the relatively weak tests used. One could of course bias the test so that false negative would be tolerated and the false positive rate could be reduced. But this would allow more drug users to walk away. The tradeoff between implicating innocent productive employees and saddling them with the stigmas, and opening the possibility to a lawsuit for defamation/libel/slander, and reducing the cost-effectiveness and usefulness of the drug test is unavoidable.

Economics:

The most interesting argument against widespread drug testing is an economic one: that testing's cost outweigh its benefits. This is true for both a societal standpoint, capturing all cost and benefits, and from the individual employer's standpoint of out-of-pocket costs and unrealized benefits. The technological intricacies leading to false results add a cost payable by both the employer and employees: lawsuits, retraining, severance pay, job hunting, regaining one's reputation, etc.. In addition, the cost of the test is directly borne by the employer and some percentage is passed on to the employee. Society picks up the costs not allocated between the two involved parties, along with the transfer fees or transaction costs.

These costs contribute a lot to the costs of drug testing, because for the most part, the cost of employing a drug user is already captured! One of the biggest arguments from the proponents of drug testing is that testing allows employers to stop paying for under-productive employees. This is simply not true. The employee who abuses drugs earns a substantially lower salary, enjoys, less benefits, and other considerations solely because he is less productive. As an employer you base your valuation of an employee on the value they add to your product. If the employee abuses drugs, lowering productivity by increasing sick days, decreasing morale, increasing coffee/crack breaks, increasing errors in their work, etc. then their compensation package will reflect this lessened value. This is true is the drug use leads to chronic or acute losses in productivity. If one employee takes five hours at five dollars/hour to produce a widget which his partner produces in ten minutes, then the employer will react, no matter the cause. The employer then has to choose on how to resolve the loss in productivity: the employer could fire the employee, enroll him in a EAP, give warnings, reduce salary, etc. For this reason, the cost of the drug test, no matter how low, becomes a drain on the employer and society, in general.

There is only one instance in which drug testing of established employees makes economic sense. That is when there is an immediate, unforeseeable, and inescapable concern for safety. It is only then that, since the employee's impairment would be a post-experience good, testing saves money.

Testing does appear to be very useful for testing employees who have a known problem with drugs and applicants without a proven track record. In the first case the reasoning behind testing is obvious, for the second the economic value is derived from the substantial transaction costs involved in hiring.

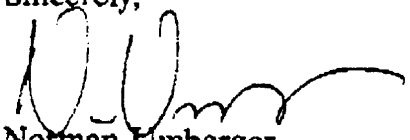
If drug testing is not economically for most employers, why did some employers test? There are two main reasons: public relations and ignorance. For some companies, the intangible value imparted by drug testing outweighs the costs involved. These companies hope to make up for the loss due to drug testing by increasing business, by appearing with the white hat, and morale amongst employees, by appearing concerned for the integrity of the workplace. Does this happen? I do not know. I do think that ignorance plays a bigger role in encouraging companies to drug test. Testing companies and the media have portrayed drug abuse as rampant and costly to industry.

Conclusion:

From my discussion of the economical, legal, and technological implications of drug testing in the workplace, I draw my conclusion: From both a societal standpoint and for most employers, drug testing, while legal, is technologically suspect and economically unsound providing a negative net cost.

I believe that the question of drug testing would best be handled by a two-pronged approach of educating the public as tho the problems inherent in any scientific test such as the drug test and the economic harm of most drug testing, along with incorporating drug testing restrictions in an overall Commonwealth of Virginia "worker's right-to-privacy" act/regulation/statement/policy. Only in cases where the overwhelming societal interest in public safety of the public outweighs the employee's right to be free from the intrusion of drug testing. For those case, Virginia should adopt regulations promoting an equitable tradeoff between worker privacy and public safety.

Sincerely,



Norman Umberger
(703) 878-1400

AUG 26 1993

FARM BUREAU VIRGINIA

VIRGINIA FARM BUREAU FEDERATION

200 West Grace Street • P.O. Box 27552 • Richmond, Virginia 23261 • (804) 788-1234

August 23, 1993

Ms. Marilyn Mandel
Director
Office of Planning and
Policy Analysis
Department of Labor and Industry
Power-Taylor Bldg.
13 S. 13th Street
Richmond, Virginia 23219

Re: HJR 534: Requesting the Department of Labor and Industry to study drug testing in the workplace.

Dear Marilyn:

Due to schedule conflicts, we were unable to participate in the public hearing process regarding HJR 534, which requests the Department of Labor and Industry to study drug testing in the workplace. Although, I understand that Jane Futch participated in your first meeting.

The Virginia Farm Bureau Federation, as you are well aware, represents 36,000 producer members across the Commonwealth. Our members are self-employed and their average yearly income is around $14,000. We recognize the severity of the problem regarding drug abuse and certainly do not condone the use of alcohol or drugs in the workplace. We strongly feel, however, that mandating drug testing would be extremely costly to our members.

Many of our members rely on the use of crews to work on the farm. The average crew size in Virginia is anywhere between twenty-five to fifty individuals. If drug testing was required for each member of the crew at a cost of forty to sixty dollars a test, as you can see, there would be significant cost implications. Further, many of our members use several crews a year, thus, the cost would be compounded.

Virginia Farm Bureau will support any type of *voluntary* employment-related drug testing and education program. In fact, several groups on the Eastern Shore, including agricultural employers, have instigated an educational program regarding the effects of drugs and alcohol. It is my understanding that this program has been met with tremendous success.

If you have any questions, please contact me. Again, thank you for this opportunity to provide comments.

Sincerely,

Wayne

C. Wayne Ashworth
President

August 17, 1993

Ms. Marilyn Mandel
Director of Planning and Policy Analysis
Department of Labor and Industry
13 South 13th Street
Richmond, VA 23219

Dear Marilyn:

As a follow-up to the May 25 meeting on HJR 534, and the public hearings that were conducted on drug testing, AGC wants to go on record as strongly supporting the rights of employers to test for use of drugs in the workplace.

Of all issues affecting jobsite safety, particularly in construction, drug testing is paramount. One drug impaired individual on a construction site is not only a danger to himself or herself, but also to his or her fellow workers. For example, imagine the injuries that would be caused if a tower crane operator was making lifts of steel on a project while drug impaired. Many other workers could be killed.

The other issue that should be keep in mind, we believe, is the fact that in most cases we are talking about the use of illegal drugs.

Privacy is certainly important. However, when protection of one person's privacy on a jobsite can kill or maim other workers, privacy cannot be the primary concern.

AGC looks forward to working with you and the study committee as this issue is examined.

Best regards.

Sincerely,

Steven C. Vermillion
Executive Director

APPENDIX D

ALCOHOL AND OTHER DRUGS

OBJECTIVE

It is the Commonwealth's objective to establish and maintain a work environment free from the adverse effects of alcohol and other drugs. The productivity of the Commonwealth's work force, one of Virginia's greatest assets, could be undermined by the effects of alcohol and other drugs in the workplace. The adverse effects of alcohol and other drugs create a serious threat to the welfare of fellow employees and to Virginia's citizens. The Commonwealth, therefore, adopts the following policy and procedures to address alcohol and other drug problems in the public work force.

I. EMPLOYEES TO WHOM POLICY APPLIES

This policy applies to all Executive Branch positions whether covered or non-covered under the Virginia Personnel Act, whether full-time or part-time, or paid on a salaried or on an hourly basis. This policy also includes all teaching, research and administrative faculty, employees of the Governor's Office, the Office of the Lieutenant Governor, and the Office of the Attorney General.

II. DEFINITIONS

A. Alcohol

Any product defined as such in the Alcohol Beverage Control Act, section 4.1-100 of the Code of Virginia, as amended.

B. Conviction

A finding of guilty (including a plea of guilty or nolo contendere), or imposition of sentence, or both, by any judicial body charged with the responsibility of determining violations of the federal or state criminal drug laws, alcohol beverage control laws, or laws that govern driving while intoxicated.

C. Criminal drug law

Any criminal law governing the manufacture, distribution, dispensation, use, or possession of any controlled drug.

D. Controlled drug

Any substance defined as such in the Drug Control Act, Chapter 34, Title 54.1 of the Code of Virginia, as amended, and whose manufacture, distribution, dispensation, use, or possession is controlled by law.

E. Employee

All Executive Branch employees, whether classified or non-classified, full-time or part-time, or paid on a salaried or on an hourly basis, to include all teaching, research and administrative faculty, employees of the Governor's Office, the Office of the Lieutenant Governor, and the Office of the Attorney General.

F. Management

The person(s) ultimately responsible for an employee's workplace and performance, e.g., an agency head, a secretarial branch cabinet secretary, the Governor for the Governor's office, or their official designees.

G. Other drug

Any substance other than alcohol that may be taken into the body and may impair mental faculties and/or physical performance.

H. State Employee Assistance Service ("SEAS")

The office of the Department of Personnel and Training that is available to assist employees in obtaining counseling and treatment referrals for alcohol and other drug-related problems, as well as for other personal problems.

I. Supervisor

The person immediately responsible for an employee's workplace and performance.

J. Workplace

Any state-owned or leased property, or any site where official duties are being performed by state employees.

III. EMPLOYEE RESPONSIBILITIES

A. Abide by policy

Employees shall abide by the Commonwealth of Virginia's Policy on Alcohol and Other Drugs, and applicable disciplinary policies.

B. Report convictions

1. Employees must notify their supervisors of any conviction of:

   a. a criminal drug law, based on conduct occurring in or outside of the workplace; or

b. an alcohol beverage control law or law that governs driving while intoxicated, based on conduct occurring in the workplace.

2. How notification given

Notification of a conviction must be made in writing and delivered no later than five calendar days after such conviction.

3. Effect of appeal of conviction

An employee's appeal of a conviction does not affect the employee's obligation to report the conviction.

IV. VIOLATIONS

Each of the following constitutes a violation of this policy:

A. The unlawful or unauthorized manufacture, distribution, dispensation, possession, or use of alcohol or other drugs in the workplace;

B. Impairment in the workplace from the use of alcohol or other drugs, except from the use of drugs for legitimate medical purposes;

C. A criminal conviction for a:

1. violation of any criminal drug law, based upon conduct occurring either on or off the workplace; or

2. violation of any alcohol beverage control law or law that governs driving while intoxicated, based upon conduct occurring in the workplace; and

D. An employee's failure to report to his or her supervisor the employee's conviction of any offense, as required in section III(B) above.

V. DISCIPLINARY ACTION

A. For policy violation(s)

Any employee who commits any violation, as described in section IV above, shall be subject to the full range of disciplinary actions, including discharge, pursuant to applicable disciplinary policies, such as Policy 1.60, Standards of Conduct.

B. Severity of discipline

The severity of disciplinary action for violations of this policy shall be determined on a case-by-case basis. Mitigating circumstances that may be considered in determining the appropriate discipline include whether the employee voluntarily admits to, and seeks assistance for, an alcohol or other drug problem.

VI. MANAGEMENT RESPONSIBILITIES

A. Fair application of policy

1. The Commonwealth is dedicated to assuring fair and equitable application of this policy. Therefore, management is encouraged to use and apply all aspects of this policy in an unbiased and impartial manner.

2. Any supervisor who knowingly disregards the requirements of this policy, or who is found to have deliberately misused this policy in regard to subordinates, shall be subject to disciplinary action, up to and including discharge.

B. Provide employees with copy of summary of policy or, upon request, copy of entire policy

1. Management must provide to every employee a copy of the Summary of the Commonwealth of Virginia's Policy on Alcohol and Other Drugs (see Attachment I), or, upon an employee's request, a copy of the entire policy.

2. Employees shall be required to sign a form indicating their receipt of either the Summary or the entire policy. This form shall be kept in the employee's personnel file.

C. Post policy

Management shall post a copy of the entire policy in a conspicuous place or places in the workplace.

D. Training of agency representatives and supervisors

The Department of Personnel and Training, in coordination with the Department of Employee Relations Counselors, shall instruct agency representatives, who in turn shall instruct agency supervisors, on the implementation of this policy, including:

1. how to recognize behaviors that may indicate impairment from alcohol and/or other drug use;

2. appropriate referral techniques; and

3. resources for rehabilitation for alcohol and other drug use.

E. Ongoing employee education

Agencies shall inform employees, on an ongoing basis, of:

1. the dangers of alcohol and/or other drug use or abuse in the workplace;

2. available counseling for alcohol and/or other drug use;

3. available rehabilitation and employee assistance programs; and

4. the penalties that may be imposed for policy violations, as set forth in section V above.

F. Appropriate action when notified of violations

1. Within 30 calendar days of receiving notice of an employee's criminal conviction, as specified in section IV(C) above, or of any other violation of this policy, management shall:

a. take appropriate disciplinary action against the employee; and/or

b. require the employee to participate satisfactorily in a rehabilitation program if a drug-related conviction is received, or recommend such a program if an alcohol-related conviction is received.

An employee's satisfactory participation in a rehabilitation program shall be determined by management after:

(1) the employee's presentation of adequate documentation (the agency has discretion to determine what documentation will be required); and/or

(2) consultation with SEAS or with any rehabilitation program, provided that the employee gives his or her consent when the consultation is to be with the rehabilitation program that treated the employee.

2. Within ten calendar days after receiving notice that an employee covered by the federal Drug Free Workplace Act has been convicted of a criminal drug law violation occurring in the workplace, the agency shall notify any federal contracting or granting agency.

G. Require contractor compliance

Management shall require contractors working on state agency workplaces to certify that they will not commit violations as described in sections IV (A) and (B).

VII. REHABILITATION PROGRAMS

Employees with problems related to the use of alcohol or other drugs are encouraged to seek counseling or other treatment.

A. Assistance from management

1. Management is encouraged to assist employees seeking counseling or other treatment.

2. Management should consult with SEAS before referring an employee to a rehabilitation program.

B. Assistance from SEAS

1. Employees are encouraged to consult with SEAS to determine appropriate rehabilitation programs.

2. SEAS or the Department of Personnel and Training's Health Benefits Office can provide information regarding health insurance coverage for rehabilitation programs. Not all programs are licensed, accredited or covered under employees' health insurance coverage.

C. Assistance from other agencies

Employees may contact other agencies, such as the Department of Mental Health, Mental Retardation and Substance Abuse Services, the Department of Health, the Department of Rehabilitative Services, and/or the Department for Rights of Virginians with Disabilities, for assistance.

D. Leaves of absence to seek rehabilitation

1. At the discretion of management, employees may be granted leaves from work to participate in treatment programs for alcohol and/or other drug use problems.

2. Employees covered under the Virginia Personnel Act (as defined in section II(A) of Policy 2.20, Types of Employment) may use their accrued sick leave for treatment programs, as appropriate, according to Policy 4.55, Sick Leave.

VIII. AGENCY POLICIES

Agencies may promulgate supplemental alcohol and other drug policies as needed to comply with federal or state law, and as provided below.

A. Content of policies

1. Agencies may promulgate policies that more strictly regulate alcohol and other drugs in the workplace provided such policies are not inconsistent with this policy.

2. The job duties of certain employees may be of such a nature that impairment from alcohol creates a great risk to the safety of others. Therefore, agencies which develop supplemental policies under this section may identify, by position classification, those positions where, because of the nature of the job duties, a conviction of an alcoholic beverage control law or law that governs driving while intoxicated that results from conduct occurring off the workplace must be reported to the agency.

B. Approval of policies

The Department of Personnel and Training, the Office of the Attorney General, and the Governor's Policy Office must approve any supplemental agency policies before their implementation.

IX. CONFIDENTIALITY AND MAINTENANCE OF RECORDS

All records and information concerning personnel actions related to this policy shall remain confidential and shall be disclosed only with the employee's permission, or when the agency determines that disclosure is necessary for its efficient operation.

X. AUTHORITY AND INTERPRETATION

A. This policy is issued by the Department of Personnel and Training pursuant to the authority provided in Chapter 10, Title 2.1, of the Code of Virginia and the federal Drug Free Workplace Act. This policy supersedes Policy 1.02, Alcohol and Other Drugs, issued July 1, 1991.

B. The Director of the Department of Personnel and Training is responsible for official interpretation of this policy, in accordance with section 2.1-114.5(13) of the Code of Virginia. Questions regarding application of this policy should be directed to the Department of Personnel and Training's Office of Policy and Personnel Programs. The Department of Personnel and Training reserves the right to revise or eliminate this policy as necessary.

Attachment I

SUMMARY OF THE COMMONWEALTH OF VIRGINIA'S POLICY ON ALCOHOL AND OTHER DRUGS

The Commonwealth of Virginia's Policy 1.05 on Alcohol and Other Drugs states that the following acts by employees are prohibited:

I. the unlawful or unauthorized manufacture, distribution, dispensation, possession, or use of alcohol and other drugs on the workplace;

II. the impairment on the workplace from the use of alcohol or other drugs, (except the use of drugs for legitimate medical purposes);

III. action which results in the criminal conviction for:
- a violation of any criminal drug law, based upon conduct occurring either on or off the workplace, or
- a violation of any alcoholic beverage control law, or law which governs driving while intoxicated, based upon conduct occurring on the workplace;

IV. the failure to report to their supervisors that they have been convicted of any offense, as defined in III above, within five calendar days of the conviction.

- Included under this policy are all employees in Executive Branch agencies, including the Governor's Office, Office of the Lieutenant Governor, and the Office of the Attorney General.

- The workplace consists of any state owned or leased property or any site where official duties are being performed by state employees.

- Any employee who commits any prohibited act under this policy shall be subject to the full range of disciplinary actions, including discharge, and may by required to participate satisfactorily in an appropriate rehabilitation program.

- A copy of the entire Commonwealth of Virginia's Policy on Alcohol and Other Drugs may be obtained from your agency human resource office.

CERTIFICATE OF RECEIPT

Your signature below indicates your receipt of this policy summary of Policy 1.05, Alcohol and Other Drugs. Your signature is intended only to acknowledge receipt, it does not imply agreement or disagreement with the policy itself. If you refuse to sign this certificate of receipt, your supervisor will be asked to initial this form indicating that a copy has been given to you.

Employee's Name _____

Signature _____ Date _____

APPENDIX E

EMPLOYER SURVEY
House Joint Resolution 534
Drug Testing in the Workplace

LABEL

Circle letter(s) next to your response.

1. **What is the size of your company?**
   a) 10 or less
   b) 11 to 25
   c) 26 to 99
   d) 100 to 249
   e) 250 to 499
   f) 500 to 999
   g) 1000 or more

2. **Does your company have a drug testing program?** a) Yes b) No
   If NO, skip to questions 25, 26, and 27 and return survey by September 1.

3. **Is your company currently required to participate in a drug testing program?**
   a) Yes b) No

   If YES, indicate the class of employees covered and authority(ies) requiring the program.

   Class:_____

   Authority(ies)_____

4. **Does your company have a written drug testing policy?** a) Yes b) No

5. **Is the issue of drug testing addressed in a collective bargaining agreement?**
   a) Yes b) No

6. **Under which circumstances are employees subject to drug testing:** (Select all that apply)

   a) pre-employment
   b) random testing of
      __selected employees
      __general employees
      __high-risk employees
   c) routine (on a regularly scheduled basis such as required physical exam)
   d) individualized suspicion
   e) post-accident
   f) for promotion or transfer
   g) as part of rehabilitation
   h) return to duty
   i) continued monitoring
   j) other (please specify)_____
      _____

7. **Is management tested?** a) Yes b) No

8. **What substances are employees tested for?** (Select all that apply)

   a) controlled substances
   b) prescription drugs
   c) alcohol
   d) other (please specify)_____

9. **What happens to employees who test positive for drugs?**

a) referred to treatment
b) terminated
c) temporary reassignment to other duties
d) other (please specify)_____

10. **Is employee agreement to being tested a condition for continued employment?**
a) Yes b) No

11. **Is testing performed by a laboratory certified by the National Institute on Drug Abuse (NIDA)?** a) Yes b) No

12. **Do you have or participate in an employee assistance program (EAP) for drug or alcohol abuse?** a) Yes (Skip to question 14) b) No

13. **Is there someone in your company who is qualified to assist employees with substance abuse problems?** a) Yes b) No
(Skip to question 17 and continue with the survey)

14. **Have the rehabilitative services obtained through your employee assistance program been effective in returning substance abusers to the workplace as productive employees?**
a) Yes b) No Give specific reasons for your response:

_____

_____

15. **What role does the EAP have in conjunction with drug testing?**_____

_____

16. **What is the source to fund the treatment?**_____

_____

17. **Are employees who voluntarily admit to having a drug abuse problem offered the opportunity for treatment?** a) Yes b) No

18. **Are employees offered health education classes, lunch-time seminars, etc. on drugs, alcohol, addictions, stress management, etc.?** a) Yes b) No (Skip to question 20)

19. **Is the health education on-going, or at least used as a follow-up to treatment and/or rehabilitation?** a) Yes b) No

20. **What is the estimated annual cost of your company's drug testing program as a percentage of operating budget?**

a) less than 1%
b) 1% to 3%
c) 4% to 5%
d) 6% or greater

21. **What is the total annual cost of your company's drug testing program?**

a) less than $1,000
b) $1,000 to $9,999
c) $10,000 to $49,999
d) $50,000 to $99,999
e) $100,000 or more

22. **In the past 12 months, have you discharged any employee for a positive drug test?**

a) Yes: How many?_____ b) No

23. **In the past 12 months, have you discharged any employee for a positive alcohol test?**

a) Yes: How many?_____ b) No

24. **In the past 12 months, have you rejected any applicant based on a pre-employment drug test?**

a) Yes: How many?_____ b) No c) Don't do pre-employment testing

25. **Do you believe that drug abuse, including alcohol, is a problem affecting the workplace?**
(Check one)

_____Very serious problem
_____Serious problem
_____Moderate problem
_____Not a very serious problem
_____Not a problem at all

26. **Would you, or do you, consider it beneficial to have a drug testing program?**
a) Yes b) No
Give specific reasons for your response

a)_____

b)_____

c)_____

27. **If you do not have a drug testing program, are you planning to initiate one within the next year?** a) Yes b) No

Please return BY SEPTEMBER 1, 1993 in the pre-addressed envelope or fax to (804) 786-8418.

APPENDIX F

I. Applicable Statute

Section 19.2-250 of the Code of Virginia, which is the successor to § 15.1-141, defines the jurisdiction of corporate authorities in criminal matters in adjoining jurisdictions. It states:

> Notwithstanding any other provision of this article, the jurisdiction of the corporate authorities of each town or city, in criminal cases involving offenses against the Commonwealth, shall extend within the State 1 mile beyond the corporate limits of such town or city; except that such jurisdiction of the corporate authorities of towns situated in counties having a density of population in excess of 300 inhabitants per square mile, or in counties adjacent to cities having a population of 170,000 or more, shall extend for 300 yards beyond the corporate limits of such town or, in the case of the criminal jurisdiction of an adjacent county, for 300 yards within such town.

II. Analysis

The particular questions you ask have been previously raised in the context of former § 15.1-141, and answered, in part, by this Office in a prior Opinion. In that Opinion, my predecessor agreed that former § 15.1-141 authorized a city police officer to make a criminal arrest in an adjoining jurisdiction if the arrest was within the one-mile limit prescribed in the statute. *See* 1973-1974 Report of the Attorney General at 273. Since Sussex County has a population density of fewer than 300 inhabitants per square mile, the jurisdiction of the Town of Waverly in criminal cases involving offenses against the Commonwealth does extend one mile beyond its corporate limits. I can find no statute or case law which defines "jurisdiction" so as to exclude either "patrolling" or "answering calls for assistance." Indeed, this extension of criminal jurisdiction by the General Assembly contemplates a cooperative law enforcement effort among the jurisdictions involved. Section 19.2-250 is a statute of enforcement of the effective law in the jurisdiction. Its purpose is "to prevent the territory contiguous to a city [or town] from becoming a refuge for criminals . . . ." *Murray v. Roanoke*, 192 Va. 321, 326, 64 S.E.2d 804, 808 (1951).

III. Conclusion

Based on the clear language of § 19.2-250 and the analysis above, I am of the opinion that there is no statute or case authority which prohibits Waverly town police officers from patrolling and answering calls for assistance pertaining to criminal activity within one mile outside the town's corporate limits and making arrests for this activity on a State warrant. It is important to understand, however, that effective law enforcement in any area of the Commonwealth depends largely on a cooperative effort among all appropriate departments.

DRUG TESTING. EMPLOYER MAY ADMINISTER DRUG TEST TO PUBLIC SAFETY EMPLOYEES BASED ON REASONABLE SUSPICION.

February 27, 1987

The Honorable John A. Rollison, III
Member, House of Delegates

You ask several questions regarding mandatory drug testing for public employees. It is important to note at the outset that legal issues involving drug testing are quite fact-oriented. Whether testing is appropriate, the extent of testing and the nature of the test all depend on the particular circumstances of each case. It would be inappropriate, therefore, to give a single answer to each question and represent that the answer has universal application. Each public employer considering a drug testing program should do so in light of that employer's own peculiar fact situation and the nature of its interest in

establishing a testing program. My responses are, therefore, general and may not be wholly applicable to every public employer situation or testing program.[1]

I. Discussion of Legal Issues in
Drug Testing Requires Specific Facts

You first ask whether there is any legal impediment to mandatory drug testing (urinalysis) for all State and municipal employees. As discussed above, the legal issues involving urinalysis testing for State and municipal employees are quite fact-oriented and, as a result, a case-by-case determination of these issues is required. Your inquiry has not detailed specific facts upon which a precise conclusion may be drawn. When such case-by-case determinations are required, this Office has refrained from rendering an Opinion on general, hypothetical questions without specific facts being set forth. *See* 1986-1987 Report of the Attorney General at 274.

II. Random Mandatory Drug Testing of Public Safety
Employees Suspect Under Existing Case Authority

You next ask whether random drug testing is permitted for State and local employees whose jobs are related to public safety. To date, the legality of random drug testing (testing in the absence of "reasonable suspicion" or "probable cause") has been upheld only with regard to an administrative search conducted in a highly regulated industry. *See Shoemaker v. Handel*, 619 F. Supp. 1089 (D. N.J. 1985), *aff'd*, 795 F.2d 1136 (3d Cir. 1986), *cert. denied*, __ U.S. __, 93 L. Ed. 2d 580, 107 S. Ct. 577 (1986) (testing of jockeys in horse racing industry).

Courts addressing this issue have pointed to several distinctions between this one industry where random testing was upheld and other occupations where such random testing has not been upheld. First, horse racing, unlike most public safety jobs, is an intensely regulated industry within the administrative search exception to the Fourth Amendment. *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1518 (D. N.J. 1986), and cases cited therein. Such pervasive regulation puts jockeys on notice that they will be subject to the intrusive authority of local regulatory racing commissions. *See id.*

Second, racing commissions have historically exercised their rule-making authority in ways that reduce the justifiable privacy expectations of participants in the horse racing industry. Therefore, jockeys who become involved in the sport do so with the full knowledge that racing commissions will exercise their authority to assure public confidence in the integrity of horse races. *Id.*

Finally, great emphasis is placed on the state's interest in maintaining the integrity of such races, and it is recognized that drug testing is the only effective means the state can employ to dispel long-standing public suspicion of criminal influence on race results. *Shoemaker*, 619 F. Supp. at 1141.

Public safety jobs are clearly distinguishable from the horse racing industry. Public safety jobs are not, in general, highly regulated. Historically, there has been no exercise of rule-making authority relating to public safety jobs that rises to the level of that traditionally exercised by a racing commission. Finally, there is no generalized public perception of criminal influences permeating public safety jobs. *See id.*

In light of the foregoing, it is clear that the balance of interests in most work situations requires that drug testing be conducted only on the basis of at least "reasonable suspicion." *See Lovvorn v. City of Chatanooga, Tenn.*, 647 F. Supp. 875, 881 (E.D. Tenn. 1986); *National Treasury Employees Union v. Von Rabb*, 649 F. Supp. 380 (E.D. La. 1986); *Capua v. Plainfield*; *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986); *McDonell v. Hunter*, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985). Therefore, it is my opinion that random drug testing is not permissible in most work settings, including public safety occupations. Moreover, any employer instituting random drug testing in appropriate circum-

stances should do so based on objective policy standards and preferably have the random selection computer-generated.

III. Drug Testing as Precondition to Employment for All State Employees Impermissible

As a third question, you ask whether the Commonwealth may impose mandatory drug testing for all new employees as a precondition to employment. The reasonableness of a drug test is based on several factors, one of which is the justification for initiating the search. *See Bell* v. *Wolfish*, 441 U.S. 520, 559 (1979). In determining whether sufficient justification for a search exists, courts generally consider the nature of the job and the stated reason for the search. Adequate justification is usually found either where an employee has significant involvement in maintaining public safety or where the job involves extremely hazardous duties and there is concern that an employee's drug use could endanger his safety or the safety of other employees or the general public. *See National Federation of Federal Employees, Local 2058* v. *Weinberger*, No. 86-0681, slip op. (D.D.C. filed June 23, 1986).

There is little basis for finding adequate justification where an employee's job is not, or is only tangentially, related to public safety and there is little or no potential for individual endangerment. *See Jones* v. *McKenzie*. Moreover, at least one federal court has ruled that it is unconstitutional for the federal government to condition public employment on consent to an unreasonable search. *See Treasury Employees* v. *Von Rabb*. It, therefore, is my opinion that the Commonwealth could not legally impose mandatory drug testing for all new employees as a precondition to employment. While an employer may, in my opinion, impose mandatory testing on all applicants for public safety jobs as part of a pre-employment physical, it is my opinion that to do so for applicants in all positions would violate the Fourth Amendment.

IV. Commonwealth Personnel Policy Based on Consensual Testing Must Ensure Voluntariness of Consent

Your fourth inquiry is whether the Commonwealth "[w]ill . . . adopt" a position that "a public employee who is told that drug testing is a condition of employment, and who does not quit his job has consented to the testing." It is not the function of this Office, of course, to mandate personnel rules for public employees. Several recognized legal principles may be helpful, however, in the consideration of such rules.

It is well settled that consent to drug testing which is "coerced" or which is not freely and intelligently given, will be ruled invalid by a reviewing court. *National Treasury Employees Union*, 649 F. Supp. at 387-88. The totality of the circumstances and the individual facts of each case must, therefore, be evaluated to determine the effectiveness and voluntariness of consent in this context.

It has been held that any coercion, whether immediate and explicit, or indirect and subtle, can invalidate consent. *See, e.g., McDonell* v. *Hunter*. Also, consent given under threat of substantial economic penalty has been held to be invalid. *See Lefkowitz* v. *Turley*, 414 U.S. 70 (1973). Finally, consent to an unreasonable search where the price of not consenting is loss of government employment or some other government benefit has been held to be involuntary and, therefore, invalid. *See National Treasury Employees Union*, 649 F. Supp. at 388. Although I cannot predict what rules, if any, the Commonwealth will adopt on this subject, any policy adopted and based on the premise of consensual testing must ensure that such consent is in fact voluntary based on the principles outlined above.

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[1]It is also important to note that mandatory drug testing for employees is a relatively new and rapidly developing area of the law. Most existing case authority results from federal district court decisions. Neither the Supreme Court of the United States nor the

Supreme Court of Virginia has yet ruled on the major questions with which this Opinion deals.

EDUCATION - PUBLIC SCHOOL FUNDS - STATE AND LOCAL FUNDS. COUNTIES, CITIES AND TOWNS - BUDGETS. CONSTITUTION OF VIRGINIA - EDUCATION - SCHOOL BOARDS. INSURANCE CLAIM PAYMENT RECEIVED BY SCHOOL BOARD SUBJECT TO APPROPRIATIONS AUTHORITY OF LOCAL GOVERNING BODY.

March 10, 1987

Mr. J. G. Overstreet
County Attorney for Bedford County

You ask whether an insurance claim payment made to the Bedford County School Board must be paid into the general fund of the county or may be assigned directly to the independent contractor who is to repair the property for which the claim was paid.

I. Facts

Several months ago, the school board was advised that a "Koppers" roof installed at Montvale Elementary School may be defective. The insurance carrier for Koppers has offered to pay the school board a sum in settlement of any claim it may have based on the defective roof. The school board has contracted with a contractor to replace the roof.

You ask whether the school board may have the insurance carrier pay its claim check directly to the roofing contractor rather than have the check paid to the school board and placed in the general fund of the county.

II. Statutes Govern Payment of School Expenses

The supervision of local schools is vested in the school board. *See* Art. VIII, § 7 of the Constitution of Virginia (1971). This supervisory authority includes the management, control and maintenance of all school property and holding title to this property. *See* §§ 22.1-79(3) and 22.1-125 of the Code of Virginia. The funding of school expenditures, however, is governed by a comprehensive statutory process. *See* Ch. 8 of Title 22.1, §§ 22.1-88 through 22.1-124. Section 22.1-88 defines school funds as

> [t]he funds available to the school board of a school division for the establishment, support and maintenance of the public schools in the school division [and] shall consist of state funds appropriated for public school purposes and apportioned to the school board, local funds appropriated to the school board by a local governing body or such funds as shall be raised by local levy as authorized by law, donations or the income arising therefrom, and any other funds that may be set apart for public school purposes.[1] [Emphasis added.]

Section 22.1-94 authorizes the local governing body to appropriate the funds necessary for school expenditures based on the estimate of the division superintendent developed pursuant to § 22.1-92. Section 15.1-162, concerning the development of budgets by local governing bodies, provides, in pertinent part, as follows:

> In no event, including public school budgets, shall such preparation, publication and, in the case of public school budget, approval be deemed to be an appropriation. No money shall be paid out or become available to be paid out for any contemplated expenditure unless and until there has first been made an annual, semiannual, quarterly or monthly appropriation for such contemplated expenditure by the governing body, except funds appropriated in a county having adopted the county executive form of government, out-

III. Contextual Limitations Apply to Teaching Contraception in FLE Programs

Section 22.1-207.1 requires that the FLE program be "comprehensive, sequential," and "appropriate for the age of the student" and, further, that it be "designed to promote parental involvement, foster positive self concepts and provide mechanisms for coping with peer pressure and the stresses of modern living according to the students' developmental stages and abilities." The Board also has required that instruction concerning contraception occur in the context of developing an understanding of, and responsibility for, family planning. *See Guidelines* § 7.9, at 16; § 9.11, at 22; § 11.8, at 28. Abstinence is to be emphasized as the most effective means of contraception, and abortion is not to be presented as a means of birth control. *Id.* § 8.11, at 20; § 9.11, at 22; § 10.5, at 23. It is my opinion that these contextual limitations would govern any instruction on contraception in the public schools.

EDUCATION: POWERS AND DUTIES OF SCHOOL BOARDS -- PUPILS.

CONSTITUTION OF VIRGINIA: EDUCATION - SCHOOL BOARDS.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY - DRUGS.

CRIMINAL PROCEDURE: BAIL AND RECOGNIZANCES.

No statutory prohibition against drug testing prior to readmission of students expelled for drug offenses; application of constitutional considerations.

December 22, 1989

The Honorable R. Edward Houck
Member, Senate of Virginia

You ask whether "the Code of Virginia prohibit[s] local school boards from adopting policies that require periodic drug testing for those students who seek readmission to school following suspension or expulsion as a result of violating school policies or state laws concerning the possession, consumption or distribution of controlled substances."

I. Statutes Do Not Prohibit Drug Testing of Students Suspended or Expelled for Drug Offenses Prior to Readmission

No Virginia statute expressly prohibits a local school board from adopting a policy requiring the periodic drug testing of students who seek readmission to school following their suspension or expulsion for violating school policies or state laws prohibiting the possession, consumption or distribution of controlled substances. On the other hand, no Virginia statute explicitly authorizes drug testing in the facts you present.[1] Nonetheless, local school boards have significant authority over the supervision of schools and the discipline of students. *See* Va. Const. Art. VIII, § 7 (1971); Va. Code Ann. §§ 22.1-79(1), (5), 22.1-279; 1982-1983 Att'y Gen. Ann. Rep. 448. It is my opinion that this general authority to supervise schools and enforce student discipline authorizes school boards to adopt such policies subject, of course, to constitutional limitations.[2]

II. Local School Board May Adopt Drug Testing Policy for Students Seeking Readmission After Suspension or Expulsion for Drug Violation; Testing Policy Must Satisfy Constitutional Requirements

The Fourth Amendment to the Constitution of the United States, which prohibits unreasonable searches and seizures, generally requires a warrant or a showing of "probable cause" before individual privacy interests are outweighed by governmental interests. Compulsory drug testing implicates privacy interests and constitutes a search for Fourth Amendment purposes. *See, e.g., Skinner v. Railway Labor Exec. Assn.*, 489 U.S. ___, 103 L. Ed. 2d 639, 109 S. Ct. 1402 (1989).

The supervision and operation of schools, however, "presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements." *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987) (warrantless search of probationer's home by probation officer upheld where founded upon "reasonable grounds" that contraband was present). Search warrants or a showing of "probable cause" is not required of school administrators seeking to maintain order in the public schools. *New Jersey v. T. L. O.*, 469 U.S. 325 (1985). On the other hand, "[a]lthough [the Supreme] Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy." *Id.* at 338. Consistent with the Fourth Amendment, therefore, individual privacy interests may be overcome, in the interest of school discipline, when there is a reasonable basis for suspecting that school rules are being violated. *Id.* The Supreme Court of the United States held in *New Jersey v. T. L. O.* that

> [w]e join the majority of courts that . . . the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the . . . action was justified at its inception,' *Terry v. Ohio*, 392 U. S., at 20; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place,' *ibid.* Under ordinary circumstances, a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.
>
> This standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of schoolchildren. By focusing attention on the questions of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense. At the same time, the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.

Id. at 341-43 (footnotes omitted).

The reasonableness of any search necessarily is dependent upon the facts of each particular case. *See* 1986-1987 Att'y Gen. Ann. Rep. 189. As the Supreme Court also acknowledged in *New Jersey v. T. L. O.*, "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." 469 U.S. at 341.

Based on the above, it is my opinion that a local school board may adopt a drug testing policy for students who are seeking readmission after suspension or expulsion for a violation of school policies or state laws concerning controlled substances. Any such policy must, of course, be drafted and implemented to satisfy the constitutional principles discussed above. In accord with those principles, it is further my opinion that a general policy of compulsory drug testing of all students seeking re-enrollment solely because of a prior drug offense in the school would be vulnerable to constitutional attack. *See, e.g., Odenheim v. Carlstadt-East Rutherford R. Sch.*, 211 N.J. Super. 54, 510 A.2d 709 (1985) (school's policy of requiring all students to submit urine samples for drug testing held unconstitutional); *Anable v. Ford*, 663 F. Supp. 149 (W.D. Ark. 1985) (school's policy of mandatory drug testing of all students held unconstitutional). In order to avoid such an attack, therefore, any policy decision to require the drug testing of a student as a condition of re-enrollment should be made on a case-by-case basis and be based upon a review of the individual student's disciplinary problems and a reasonable belief that the compulsory testing will reveal the continuing use of drugs by that student in violation of the law or school regulations.[4] *See In re William C.*, 40 Cal. 3d 550, 221 Cal. Rptr. 118, 709 P.2d 1287 (1985) (individualized suspicion is a requirement of "reasonable suspicion" to conduct a lawful school search).

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[1]The General Assembly has provided expressly for the drug testing of persons who are charged with a first drug offense and placed on probation. *See* Va. Code Ann. § 18.2-251. The General Assembly also has provided, in some circumstances, for the use of drug testing as an aid in determining appropriate conditions for the release of accused persons pending disposition of criminal charges. *See* § 19.2-123.

[2]Federal statutes that prohibit discrimination against the handicapped may be implicated in these policies when they are applied to students whose drug-related behavior constitutes a "handicapping condition." *See* 20 U.S.C.A. § 1412 (West Supp. 1989); 29 U.S.C.A. § 794 (West Supp. 1989); *Sch. Bd. of Prince William Cty. Va. v. Malone*, 762 F.2d 1210 (4th Cir. 1985).

[3]I am aware that some courts have upheld the use of dogs in schools to detect drugs, particularly in lockers, on the theory that this was not a search within the meaning of the Fourth Amendment or that students had no legitimate expectation of privacy in school lockers. *See, e.g., Horton v. Goose Creek Ind. School Dist.*, 690 F.2d 470 (5th Cir.), *reh'g denied*, 693 F.2d 524 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983); *Zamora v. Pomeroy*, 639 F.2d 662 (10th Cir. 1981). These decisions were rendered prior to the decision of the Supreme Court of the United States in *New Jersey v. T. L. O.*, however, and do not involve as intrusive a search as blood or urine testing of students for drugs.

[4]A reasonable suspicion of the continuing possession or distribution of controlled substances obviously is relevant in the context of the student's continuing use of these substances, since drug testing will not be helpful in determining whether a student continues to distribute these substances, or simply possesses them for distribution.

EDUCATION: PROGRAMS, COURSES OF INSTRUCTION, ETC.

Family life opt-out provision.

March 31, 1989

APPENDIX G

and the employer had been put on notice of the circumstances.

(4) Substance Abuse and Drug Testing -- Drug testing in the work place has become one of the most controversial, hotly contested issues in our society. Drug usage at work has an immediate impact on employers and the cost of doing business. Consequently, employers feel compelled to take action to combat the rising tide of drug abuse. The main weapon in their arsenal is drug testing.

In recent years, the Commission has been confronted with a growing number of cases involving substance abuse and drug testing. The vast majority of these cases involve employees who are discharged when they fail a drug test or refuse to take one in violation of an employer's drug testing policy.

When confronted with a case involving a drug testing issue, an adjudicator should explore the following areas. First, he should determine the nature of the employer's business operations and the company's rationale for having a drug testing policy. Second, the adjudicator should identify the specifics of the policy itself, including (a) when or under what circumstances testing is required; (b) whether a confirming test is done; and (c) any overriding safety concerns which may be involved. Third, it should be determined how the employer conducts the test, keeping in mind any chain of custody problems that may result. Fourth, if the test results are positive, inquiry should be made about the nature of ingestion (whether it was active or passive), and whether there was any objective evidence of impairment. Finally, if the employer has proven a prima facie case of misconduct, it must be determined whether the claimant has proven any mitigating circumstances.

Harris v. Tidewater Regional Transit Authority, Commission Decision 24516-C, (January 24, 1985), MT 485.45, repre-

sented the first drug test case to come before the Commission. In that case, a bus driver was discharged under an employer's rule which prohibited employees from using intoxicants within twelve hours of reporting for work. A single, unconfirmed drug test was positive; however, the claimant denied drug usage. Furthermore, the employer's evidence consisted only of the test result itself, which was unsigned, uncertified, and unconfirmed. There were other major chain of custody defects present. The Commission held that the employer's evidence was insufficient to prove misconduct.

Harris is noteworthy for two reasons. First, it sets out the Commission's expectation and quality of the evidence necessary to prove misconduct connected with work. Second, in dictum, the Commission states that if the chain of custody problems were solved and there was proof of a rule violation, a finding of work-connected misconduct would be made. This is important because it clearly implies that the lack of objective evidence of impairment will not be a factor that an employee can rely upon and expect to prevail.

Blake v. Hercules, Inc., 4 Va App. 270, 356 S.E.2d 453 (1987), MT 485.45, was the next case that the Commission confronted concerning drug testing. The employee in this case was discharged as a result of a positive drug test which indicated the presence of a marijuana derivative in his urine. The employer presented the drug test results, which were afflicted with many of the same defects as the test result in Harris. The Appeals Examiner and the Commission ruled in favor of the claimant on burden of proof grounds. The circuit court reversed the Commission's decision finding that Blake had been terminated for "cause."

On appeal, the Virginia Court of Appeals reversed the circuit court and reinstated the Commission's award of benefits. The primary basis for the reversal was the

circuit court's erroneous application of the termination "for cause" standard. The Court of Appeals concluded that no deliberate rule violation had been shown.

The Blake case does not establish a clear, concise standard for analyzing drug test cases. However, the Court did make some noteworthy observations. First, there was no evidence in the record of any impairment on Blake's part. Second, there was no evidence of when the marijuana was ingested and whether it was done actively or passively. Third, the Court expressly rejected the employer's argument that a trace of drugs in the urine constitutes possession. The Court affirmatively held that Blake would have to have known that he had marijuana in his system to deliberately violate the rule. See also Virginia Employment Commission v. Sutphin, 8 Va. App. 325, 380 S.E.2d 667 (1989).

From the language of the opinion, it would appear that the Blake court would have been interested in and influenced by evidence of impairment and the timing and manner of ingestion. In light of this, it is arguable that the Court of Appeals may, given the right case, adopt a standard in drug testing cases which would involve a more critical analysis of the issue of impairment than the Commission has given in recent cases.

In Otey v. Hercules, Inc., Commission Decision 28352-C, (July 2, 1987), the claimant was discharged under an employer policy which prohibited ". . . reporting to work with detectable levels of drugs or under the influence of alcohol." Under the policy, all tests which were positive would be confirmed by another test and all future annual physicals of company employees would include a drug screening test. The claimant was given a drug test with his annual physical which came back positive and was confirmed by other tests. On this occasion, the employer had solved the chain of custody problems which proved its undoing in the Blake case. In disqualifying the claimant for work-connect-

ed misconduct, the Commission discounted the issue of impairment and stated:

> . . . science has not progressed to the point where specific levels of drugs in an individual's system can be taken as evidence of impairment. . . . Furthermore, given the nature of the production operations involved, the employer cannot afford to wait until an individual is so impaired through the use of drugs that physical symptoms of this fact are made obvious. Lesser amounts of drugs could cause mental impairment which could lead to destruction of property, injury or even death."

It should be noted that the Commission placed substantial emphasis on the safety factor which was an underlying reason for the employer's rule. In cases where an employee's occupation or duties give rise to such safety factors, the Commission has been consistent in holding that drug testing would be warranted in conjunction with annual physicals, or after accidents or job-related injuries. Therefore, even if an employer did not have a reasonable suspicion that a particular employee may be using drugs, these safety factors could justify an employer requiring that an employee submit to a drug screening test.

In the case of Barkley v. Peninsula Transportation District Commission, 11 Va. App. 317, 398 S.E.2d 94 (1990) MT 485.45, the claimant was a bus driver who filed her claim during a suspension imposed by the employer for testing positive for the presence of marijuana in her system. Because she admitted to using the substance off duty prior to being tested, it was held that the lack of authenticated test results or a completed chain of custody document did not preclude a finding that the discharge was due to misconduct. This case also illustrates how the Commission has held that a

disciplinary suspension imposed by an employer is equivalent to a discharge when a claimant files for benefits during the suspension and meets the definition of being "unemployed".

In Parks v. American Furniture Company, Inc., Commission Decision 31069-C (December 30, 1988), MT 485.45, the claimant was asked to submit to a drug test under a rule which gave the employer the right to require one so long as there was "reason to believe" that an employee had violated a rule prohibiting being at work under the influence of illegal or unauthorized drugs or alcohol. Although she initially agreed to the test, she tampered with her specimen and was caught at it. She then admitted to having used marijuana over the weekend and was terminated. In that case, it was held that, despite the admission of recent use and the tampering with the specimen, the discharge was not due to misconduct since the employer had not shown the existence of a reasonable suspicion that the claimant was under the influence at work. The hearsay testimony concerning her actions at work was overcome by her direct testimony that they were simply reflections of her actual personality. Without this, she was under no obligation to cooperate in the test.

(5) Money Matters -- In Branch v. Virginia Employment Commission and Virginia Chemical Company, 219 Va. 609, 249 S.E.2d 180 (1978), MT 485.6, the Supreme Court of Virginia stated the following:

> Ordinarily, the way an employee manages his debts is a personal and private matter unconnected with his work. It is a different matter, however, when he mismanages his debts in a manner which impairs the status or function of the employer-employee relationship to the employer's detriment. When an employee forces his creditors

MISCONDUCT: 485.45
Violation of Company Rule --
Intoxicants, Use of.

Salem

VIRGINIA EMPLOYMENT COMMISSION
AND HERCULES, INC.

v.

TIMOTHY C. SUTPHIN

No. 0514-88-3

Decided June 6, 1989

SUMMARY

The employer and the VEC appealed the decision of the circuit court that held that the commission erred when it denied benefits because of alleged employee misconduct.

The Court of Appeals affirmed, holding that the evidence did not establish misconduct by the employee as defined by the Code and interpreted by prior decisions.

Affirmed.

HEADNOTES

(1) **Unemployment Compensation—Appeals from the Employment Commission—Standard.**—The findings by the commission as to the facts, if supported by evidence and in the absence of fraud, are conclusive and the jurisdiction of a court is confined to questions of law; whether an employee is disqualified from receiving benefits is a mixed question of law and fact and reviewable by a court.

(2) **Unemployment Compensation—Purpose—Defined.**— The purpose of the Unemployment Compensation Act is to provide temporary financial assistance to workmen who become unemployed without fault on their part; the statute as a whole should be so interpreted as to effectuate that remedial purpose implicit in its enactment.

(3) Unemployment Compensation—Benefits—Employee Misconduct.—An employee is guilty of misconduct connected with

his work when he deliberately violates a company rule reasonably designed to protect the legitimate business interests of his employer or when his acts or omissions are of such a nature or so recurrent as to manifest a willful disregard of those interests and the duties and obligations he owes his employer.

(4) **Unemployment Compensation—Benefits—Employee Misconduct.**—An employer cannot circumvent the statutory requirement by adopting a rule which makes involuntary or non-intentional behavior misconduct sufficient to disqualify an employee from benefits; in the absence of evidence that the employee knew that his conduct was in violation of a company rule, misconduct has not been established.

COUNSEL

Susan T. Ferguson, Assistant Attorney General (Mary Sue Terry, Attorney General, on brief), for appellant.

William H. Yongue, for appellee.

OPINION

DUFF, J.— The Virginia Employment Commission and Hercules, Inc. appeal the circuit court decision which reversed the commission's denial of unemployment compensation to Sutphin. The denial of benefits by the commission was based upon a finding of "misconduct in connection with his work" under the disqualification provisions of Code § 60.2-618.2. We affirm the trial court's order based on our finding that Sutphin's behavior was not misconduct connected with his work as defined by the Act and as construed by prior decisions of the Supreme Court and this Court.

Timothy Sutphin commenced working for Hercules in 1980. At the time of termination he was employed as a production foreman. Hercules produces explosives and propellants. On March 1, 1986, it amended its employment policies by promulgating a requirement that any employee detected with illegal substances in his body or in his possession would be discharged. Sutphin concedes that he was aware of this rule.

On April 28, 1986 Sutphin voluntarily took his annual physical examination two months early, due to a slow time at the plant. A part of the physical was a urinalysis test for the presence of drugs in his system. The test showed positive for the presence of cannabinoid, and Sutphin was discharged for violation of the company policy.

Sutphin testified that four days prior to his physical examination he had been invited, as the honoree, to a birthday party given for him by a group of friends. The party was unconnected with his work and was held in a small house with approximately twenty guests. Two or three of the guests were smoking marijuana cigarettes. A marijuana cigarette was offered to Sutphin, who refused it. Later in the evening, after several drinks, Sutphin smoked what he thought was a tobacco cigarette given to him by the same individual who had previously offered him the marijuana. After the positive urinalysis finding and his subsequent discharge, Sutphin confronted this individual, who told him that he had "laced" the cigarette with marijuana "as a gift to the birthday boy." Sutphin further stated that he had no idea that the cigarette contained marijuana. Sutphin's testimony was uncontradicted. From the record, the only possible source of the marijuana in Sutphin's system was either his direct ingestion by smoking the laced cigarette or passive ingestion by breathing the smoke from the guests at the party who were using marijuana. The record contains no evidence that Sutphin ever used drugs or had ever been under the influence of drugs. Likewise, there was no evidence that his work performance was other than satisfactory.

(1) Initially, we note that in any judicial proceeding "the findings of the commission as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law." Code § 60.2-625(A); see *Israel v. Virginia Employment Commission*, 7 Va. App. 169, 172, 372 S.E.2d 207, 209 (1988). However, analyzing an employee's behavior with the disqualification provisions of the statute is a mixed question of law and fact reviewable by this Court on appeal. *Israel*, 7 Va. App. at 172, 372 S.E.2d at 209; *Blake v. Hercules, Inc.*, 4 Va. App. 270, 356 S.E.2d 453 (1987).

(2) The purpose of the Unemployment Compensation Act is to "provide temporary financial assistance to workmen who [become] unemployed without fault on their part. The statute as a whole

. . . should be so interpreted as to effectuate that remedial purpose implicit in its enactment." *Ford Motor Co. v. Unemployment Compensation Commission*, 191 Va. 812, 824, 63 S.E.2d 28, 33-34 (1951). Code § 60.2-618(2)[1] disqualifies employees who are discharged from their employment due to work related misconduct.

(3) In *Branch v. Virginia Employment Commission*, 219 Va. 609, 611, 249 S.E.2d 180, 182 (1978), the Supreme Court, in defining the misconduct necessary to disqualify an employee from receiving benefits, observed:

> [A]n employee is guilty of "misconduct connected with his work" when he deliberately violates a company rule reasonably designed to protect the legitimate business interests of his employer, or when his acts or omissions are of such a nature or so recurrent as to manifest a willful disregard of those interests and the duties and obligations he owes his employer.

In a recent decision strikingly similar to the facts of this case, *Blake v. Hercules, Inc.*, 4 Va. App. 270, 356 S.E.2d 453 (1987), we reversed the trial court's denial of unemployment benefits to Blake. The record did not show that Blake knew, or should have known, that if he used marijuana or was in the presence of others who used marijuana, a trace of the substance would show up in his urine for a period of time. "Absent such evidence the commission could not have found that Blake deliberately violated company rules or willfully disregarded the interests, duties or obligations he owed Hercules." *Id.* at 274, 356 S.E.2d at 456. The same reasoning applies to the case at bar.

(4) Hercules argues, however, that Sutphin deliberately violated the company policy when he remained at the birthday party in the

[1] Code § 60.2-618 provides in pertinent part: An individual shall be disqualified for benefits upon separation from the last employing unit for whom he has worked thirty days or from any subsequent employing unit:

* * *

(2) For any week benefits are claimed until he has performed services for an employer during thirty days, whether or not such days are consecutive, and subsequently becomes totally or partially separated from such employment, if the Commission finds such individual is unemployed because he has been discharged for misconduct connected with his work.

presence of guests who were smoking marijuana, with full knowledge of the company rule prohibiting the presence of illegal substances in his system. We disagree. We interpret Code § 60.2-618(2) in line with *Branch* as requiring, as an element of misconduct, proof of a deliberate violation of a company rule. An employer cannot circumvent that statutory requirement by adopting a rule which makes involuntary or non-intentional behavior misconduct. In the absence of any evidence that Sutphin knew or should have known of the effect of passive ingestion of marijuana smoke, or that he knew that the cigarette he smoked had been laced with marijuana, the standard enunciated in *Branch* has not been met. While involving a different factual pattern, the description of "misconduct" found in the Pennsylvania case of *Schappe v. Unemployment Compensation Bd. of Review*, 38 Pa. Comwlth. 249, 253, 392 A.2d 353, 355-56 (1978) is instructive. There, it was described as involving "manifest culpability, wrongful intent, evil design, or intentional and substantial disregard for the employee's interests. . . ." This was not present in the case at bar.

The fact that Sutphin was terminated for violating company policy is not tantamount to the "misconduct" contemplated by Code § 60.2-618(2). As we noted in *Blake*, employees who are fired for what the employer considers good cause still may be entitled to unemployment compensation. In the absence of a showing that Sutphin deliberately violated the company rule, he is entitled to benefits.

For these reasons the judgment appealed from is

Affirmed.

Benton, J., and Coleman, J., concurred.

MISCONDUCT: 485.45
Violation of Company Rule -- Intoxicants, Use of.

Salem

EDWARD H. BLAKE

v.

HERCULES, INC.

No. 0818-86-3

VIRGINIA EMPLOYMENT COMMISSION

v.

HERCULES, INC.

No. 0823-86-3

Decided May 19, 1987

SUMMARY

Employee and the Employment Commission appealed the judgment of the circuit court which reversed the commission's award of unemployment compensation to the employee. The appellants argued that the court erroneously found that the employee was terminated for cause (Circuit Court of Montgomery County, Kenneth I. Devore, Judge).

The Court of Appeals reversed, holding that the commission correctly found that the employee was not dismissed for misconduct connected with his work. Accordingly, the Court held that the trial court erred in ruling that the employee was, as a matter of law, barred from receiving unemployment compensation.

Reversed.

HEADNOTES

(1) **Unemployment Compensation—Disqualification—Misconduct.**—An employee is guilty of misconduct connected with his work when he deliberately violates a company rule reasonably designed to protect the legitimate business interests of his employer, or when his acts or omissions are of such a nature or so recurrent as to manifest a willful disregard of

those interests and the duties and obligations he owes his employer.

(2) **Unemployment Compensation—Disqualification—Misconduct.—Even employees who are fired for what the employer considers good cause may be entitled to unemployment compensation; the question is whether a company rule was deliberately violated or whether the employee's acts were of such a nature or so recurrent as to manifest a willful disregard of those interests and the duties and obligations he owes his employer.**

COUNSEL

John F. Zink, Susan T. Ferguson, Assistant Attorney General (Mary Sue Terry, Attorney General, on briefs), for appellants.

Gail M. Waddell (Edwin C. Stone, Spiers, Stone & Hamrick, on brief), for appellee.

OPINION

MOON, J. — The Virginia Employment Commission and Edward H. Blake appeal the circuit court decision which reversed the commission's award of unemployment compensation to Blake. The court held that Blake was not, as a matter of law, entitled to the benefits because "his termination was for cause." We reverse because Blake was not dismissed for misconduct connected with his work.[1] *Branch v. Virginia Employment Commission*, 219 Va. 609, 249 S.E.2d 180 (1978). Code § 60.1-58(b),[2] effective at the time of these proceedings, provided: "An individual shall be disqualified for [unemployment compensation] benefits upon separation from the last employing unit . . . if the Commission finds such individual is unemployed because he has been discharged for misconduct connected with his work."

[1] This opinion does not address whether Hercules was justified in firing Blake because he tested positive for drugs, but only whether the positive drug test results constituted disqualification for unemployment benefits pursuant to Code § 60.1-58(b).

[2] Code § 60.1-58(b) was superseded by Code § 60.2-618(2) effective January 1, 1987.

(1) In defining the misconduct necessary to disqualify an employee from receiving benefits, the Supreme Court of Virginia stated:

> [A]n employee is guilty of "misconduct connected with his work" when he *deliberately* violates a company rule reasonably designed to protect the legitimate business interests of his employer, or when his acts or omissions are of such a nature or so recurrent as to manifest a *willful* disregard of those interests and the duties and obligations he owes his employer.

Branch, 219 Va. at 611, 249 S.E.2d at 182 (emphasis in original).

Blake worked for Hercules, Inc., a munitions factory in Radford, Virginia, as a solvent powder mixer from December 12, 1983, through April 2, 1985. Hercules manufactures explosives and of necessity maintains a stringent worker safety program. Its work rules preclude the use or possession of alcohol or drugs on company premises and further prohibit employees from being under the influence of alcohol or drugs while at work. Hercules makes all of the employees aware of these policies through the orientation process at the time of hiring, as well as through company newsletters and notices posted throughout the facility.

After receiving an anonymous telephone tip that Blake was using drugs, Hercules conducted a surveillance of Blake for two months, which included searches of Blake's person and his automobile. On March 22, 1985, at the direction of Hercules, Blake provided a specimen for urinalysis. The specimen tested positive for 161 nanograms per milliliter of cannabinoid, a derivative of marijuana. Blake denied using marijuana, but admitted that he had been in the presence of others who used it outside of working hours. Prior to receiving the urinalysis results, no evidence was discovered that Blake used or possessed drugs at work. Furthermore, there was no evidence that his work capacity was diminished during the period of surveillance or testing. Nevertheless, Blake was terminated on April 2, 1985, because of the positive drug test.

Blake filed for unemployment benefits. A deputy commissioner of the Virginia Employment Commission held that he had been terminated for misconduct connected with his work. After an evidentiary hearing before an appeals examiner, the examiner re-

versed the deputy's decision, stating:

> Even assuming the accuracy of the evidence [the urinalysis result] presented by the employer, there is no evidence which would indicate that claimant's actions, demeanor, conduct, or thought process was [sic] negatively affected. There is also a total lack of credible evidence, scientific, legislative, or otherwise, which would reasonably cause inference that the claimant was "under the influence" of a cannabinoid substance merely through the recitation of figures gleaned from chemical analysis.

This decision was affirmed on appeal to the commission which held that Hercules had not carried its burden of showing work-related misconduct. Hercules appealed to the Circuit Court of Montgomery County which reversed the commission, holding that Blake was "terminated for cause" and did not meet his burden of proving mitigating circumstances as required by *Branch*.

(2) However, the fact that Blake was "terminated for cause" as the trial court found, is not necessarily the equivalent of proving misconduct in contemplation of Code § 60.1-58(b). Even employees who are fired for what the employer considers good cause may be entitled to unemployment compensation. The question is whether a company rule was *deliberately* violated or whether Blake's acts were "of such a nature or so recurrent as to manifest *a willful* disregard of those interests and the duties and obligations he owes his employer." *Branch*, 219 Va. at 611, 249 S.E.2d at 182 (emphasis in original).

The only evidence in support of the dismissal was that Blake had 161 nanograms per milliliter of cannabinoid in his system. There was no evidence that this amount of cannabinoid would affect his duties at work. Further, there was no evidence to establish at what time he may have ingested the marijuana or whether it was done actively or passively. Medical literature in the record relied upon at the hearing stated that marijuana could be detected in the urine thirty days or more after use. In fact, there was no evidence (apart from the anonymous tip) to refute Blake's claim that he had not personally used marijuana, but had been merely in the presence of persons smoking marijuana while away from work.

Even if we assume, as Hercules contends, that a trace in the urine constituted possession as defined in company rules, Blake would have had to have known that he had the marijuana in his system to have deliberately violated the rule. From the record before us, we cannot determine that Blake knew or that he even should have known that if he used marijuana or was in the presence of others who used marijuana, a trace of the substance would show up in his urine for an appreciable time. Absent such evidence, the commission could not have found that Blake deliberately violated company rules or willfully disregarded the interests, duties, and obligations he owed Hercules. The commission could not have found that Blake deliberately violated a company rule because the rule only required that he not report to work "under the influence" and that he not possess alcohol or drugs on the premises.

Accordingly, we hold that the trial court erred in ruling that Blake was, as a matter of law, barred from receiving unemployment compensation. The judgment is reversed and the award of the Virginia Employment Commission is reinstated.

Reversed.

Koontz, C.J., and Keenan, J., concurred.

MISCONDUCT: 485.45
Violation of Company Rule-
— Intoxicants, use of.

Norfolk

SHIRL D. BARKLEY and

VIRGINIA EMPLOYMENT COMMISSION

v.

PENINSULA TRANSPORTATION DISTRICT COMMISSION

No. 0206-90-1

Decided November 20, 1990

SUMMARY

Employee appealed the decision of the circuit court that denied unemployment compensation benefits. She argued that the trial court erred in finding that the employer had met its burden of proving work-related misconduct on her part.

The Court of Appeals affirmed, holding that the evidence established an intentional violation of company rules.

Affirmed.

HEADNOTES

(1) **Unemployment Compensation—Statutory Construction—Standard.**— The purpose of the Act is to provide temporary financial assistance to workers who become unemployed without fault on their part; the statute as a whole should be interpreted as to effectuate that remedial purpose.

(2) **Unemployment Compensation—Benefits—Misconduct.**—Employees who are discharged from their employment due to work-related misconduct do not qualify for assistance; the employer bears the burden of showing there was misconduct connected with the work, either by violation of a rule or by an act manifesting a willful disregard of the employer's interest.

(3) **Unemployment Compensation—Benefits—Misconduct.**—An employee is guilty of misconduct in connection with his work when he deliberately violates a company rule reasonably designed to protect the legitimate business interests of the employer or when his acts or omissions are of such a nature or so recurrent as to manifest a willful disregard of those interests and the duties and obligations he owes his employer; an employer must provide proof of a deliberate violation of a company rule in order to show misconduct by an employee.

(4) **Unemployment Compensation — Benefits — Misconduct.** — Once the employer has met its burden of proof, the employee may produce evidence of mitigating circumstances that the trier of fact must balance against the employer's legitimate business interest being protected in order to determine whether the employee has demonstrated a willful disregard of the employer's interest; in order to establish misconduct, the total circumstances must be sufficient to find a deliberate act of the employee which disregards the employer's business interests.

(5) **Unemployment Compensation—Appellate Review—Standard.**— On appeal, the findings of the commission as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive and the jurisdiction of the court is confined to questions of law; however, whether an employee's behavior constitutes misconduct in connection with his work is a mixed question of law and fact reviewable by a court.

COUNSEL

Susan R. Stevick (Peninsula Legal Aid Center, on brief), for appellant, Shirl D. Barkley.

Thomas E. Glascock, for appellee.

OPINION

KOONTZ, C.J.—Shirl D. Barkley, appellant, was denied unemployment benefits by order of the Circuit Court of the City of Hampton dated December 12, 1989. On appeal, Barkley argues that the trial court erred in finding that the Peninsula Transporta-

tion District Commission (Pentran), appellee, met its burden of proof in establishing misconduct by appellant. We disagree and affirm.

In a hearing before a deputy commissioner of the Virginia Employment Commission, Barkley was found to be qualified to receive unemployment benefits. Pentran appealed the deputy commissioner's decision to the appeals examiner who conducted a hearing on Pentran's contention that Barkley was discharged for work related misconduct as defined in the Virginia Unemployment Compensation Act (Act). *See* Code § 60.2-618(2).[1] The appeals examiner reversed the deputy commissioner's decision and held Barkley was disqualified from receiving benefits under the Act. Barkley appealed that decision to the special examiner, who held Pentran failed to meet its burden of proof in establishing misconduct by Barkley. Pentran appealed the special examiner's decision to the circuit court, which in the hearing held December 12, 1989, reversed the special examiner's decision. This appeal followed.

The following undisputed facts were ascertained by the Employment Commission and the circuit court during the earlier appeals and hearings of this case. Barkley was employed as a part-time bus driver by Pentran, a public agency providing public mass transit services. Pentran had a Substance Abuse Policy prohibiting the use of drugs and alcohol both on and off duty, regardless of whether job performance was impaired. Barkley was alerted to Pentran's policy at an employee group meeting, although there is no evidence that she was personally handed a copy of the policy. Nonetheless, she was aware she would be subject to suspension if she tested positive for drugs or alcohol.

In her attempt to become reclassified as a full time employee, Barkley was required to submit to a physical examination pursuant to Pentran's Substance Abuse Policy. On February 15, 1989, Pentran advised Barkley she had tested positive for marijuana use in her alcohol/drug screening test administered on January 27, 1989. Pentran suspended Barkley from work without pay for sixty days and directed her to complete a drug rehabilitation program as a prerequisite to continued employment. Barkley entered a re-

[1] "An individual shall be disqualified for benefits . . . if the Commission finds such individual is unemployed because he has been discharged for misconduct connected with his work."

habilitation program in accordance with Pentran's Substance Abuse Policy and applied for unemployment benefits on February 26, 1989. However, Barkley failed to show Pentran or the Employment Commission that she completed the rehabilitation program as required for regaining employment.

During the administrative appeals process, Barkley admitted she smoked marijuana at a social gathering on January 7, 1989. She was not scheduled to work that day or the following day and was not on call during that time. While aware of the potential for being tested and suspended, she was unaware the marijuana would be detectable in her system three weeks later. Pentran never introduced evidence of the drug test results or evidence regarding the chain of custody of Barkley's test specimen. Based on these facts, the circuit court held that Pentran had met its burden of proving Barkley had deliberately violated a known company policy. Further, the court ruled that Pentran was not required to present evidence of the actual drug test results or the chain of custody of Barkley's specimen since Barkley admitted smoking marijuana.

On appeal, Barkley asserts that Pentran failed to produce sufficient evidence to meet its burden of proving misconduct by her. She also asserts that the circuit court abused its discretion by reversing the special examiner's decision that Pentran failed to carry its burden. We disagree.

(1-2) The purpose of the Act is to "provide temporary financial assistance to workmen who [become] unemployed without fault on their part. The statute as a whole . . . should be so interpreted as to effectuate that remedial purpose implicit in its enactment." *Ford Motor Co. v. Unemployment Compensation Comm'n*, 191 Va. 812, 824, 63 S.E.2d 28, 33-34 (1951). Thus, employees who are discharged from their employment due to work-related misconduct do not qualify for assistance. Code § 60.2-618(2); *see, e.g., Virginia Employment Comm'n v. Sutphin*, 8 Va. App. 325, 328, 380 S.E.2d 667, 669 (1989). Still, the employer bears the burden of showing there was "misconduct connected with the work, either by violation of a rule or by an act manifesting a willful disregard of the employer's interest." *Virginia Employment Comm'n v. Gantt*, 7 Va. App. 631, 635, 376 S.E.2d 808, 811, *affirmed en banc*, 9 Va. App. 225, 385 S.E.2d 247 (1989).

(3-4) In *Branch v. Virginia Employment Comm'n*, 219 Va. 609, 249 S.E.2d 180 (1978), the Virginia Supreme Court interpreted the phrase "misconduct in connection with his work." The court stated:

> [A]n employee is guilty of "misconduct in connection with his work" when he *deliberately* violates a company rule reasonably designed to protect the legitimate business interests of his employer, or when his acts or omissions are of such a nature or so recurrent as to manifest a *willful* disregard of those interests and the duties and obligations he owes his employer.

Id. at 611, 249 S.E.2d at 182. Consequently, an employer must provide "proof of a deliberate violation of a company rule" in order to show misconduct by an employee. *Sutphin*, 8 Va. App. at 329, 380 S.E.2d at 669. Once the employer has met its burden, the employee may produce evidence of mitigating circumstances that the trier of fact must balance against the employer's "legitimate business interest being protected to determine whether the employee demonstrated a willful disregard of the employer's interest." *Gantt*, 7 Va. App. at 635, 376 S.E.2d at 811. "Therefore, in order to constitute misconduct, the total circumstances must be sufficient to find a deliberate act of the employee which disregards the employer's business interest." *Id.*

(5) On appeal, "the findings of the Commission as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law." Code § 60.2-625(A); *see Sutphin*, 8 Va. App. at 327, 380 S.E.2d at 668; *Israel v. Virginia Employment Comm'n*, 7 Va. App. 169, 172, 372 S.E.2d 207, 209 (1988). However, whether an employee's behavior constitutes misconduct in connection with his work, according to Code § 60.2-618(2), "is a mixed question of law and fact reviewable by this court on appeal." *Sutphin*, 8 Va. App. at 327, 380 S.E.2d at 668; *Israel*, 7 Va. App. at 172, 372 S.E.2d at 209.

In the present case, Pentran has a legitimate business interest in ensuring that its employees are drug free. As a company supplying public transportation, Pentran is responsible for the lives of its passengers. Increased safety through the prohibition of drug use by its drivers is a business interest of great weight.

This court recently has decided two cases where employees were fired from their jobs after testing positive for marijuana use. *See Sutphin*, 8 Va. App. 325, 380 S.E.2d 667; *Blake v. Hercules, Inc.*, 4 Va. App. 270, 356 S.E.2d 453 (1987). In both cases, the employer had strong, legitimate business interests in prohibiting drug use, yet the employee was not disqualified from receiving benefits since the employer failed to show the employee deliberately violated a known company rule. In neither case was there any evidence indicating the employees intentionally ingested marijuana or were aware they were doing so. Here, the evidence established that Barkley intentionally violated a Pentran policy rule. The evidence shows she was informed of Pentran's Substance Abuse Policy at a group meeting and was aware she would be suspended if she tested positive for drugs. She admitted smoking marijuana. The fact she did not believe she would test positive three weeks after smoking the marijuana only indicates she did not believe she would be caught violating the rule; her belief provides no legitimate basis in mitigation of her conduct.

Finally, Barkley presented evidence in mitigation that she smoked the marijuana at a time when she was not scheduled to return to work for two days and was not on call. On this record, we cannot say the evidence in mitigation, when balanced against the employer's substantial interest in ensuring the safety of its passengers, was sufficient to excuse her intentional violation of company policy and thus excuse her from the bar of work-related misconduct. We also agree with the circuit court's holding that Pentran was not required to introduce the test results and establish a chain of custody.

For these reasons the judgment appealed from is

Affirmed.

Coleman, J., and Keenan, J., concurred.