REPORT OF THE
JOINT COMMISSION ON HEALTH CARE

DRUG-TESTING POLICIES IN CERTAIN HEALTH CARE SETTINGS STUDY

(SB 557)

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Preface

Senate Bill 557, which was introduced during the 2000 Session of the General Assembly, would have required all health care providers who are regulated by the Board of Health to initiate drug-free workplace programs. The Senate Committee on Education and Health approved a motion to carry SB 557 over to the 2001 Session and to request a study by the Joint Commission on Health Care (JCHC) of the issues presented in the bill.

Based on our research and analysis during this review, we concluded the following:

- Substance abuse in the workplace is an important issue – eight percent of fulltime workers between the ages of 18 and 49 report use of illicit drugs and heavy alcohol use within the last month. The U. S. Department of Labor estimates that 71 percent of drug users over age 18 are employed (more than 10 million Americans).
- Three major pieces of federal legislation are relevant when considering drug testing of health care staff. These pieces of legislation include the Drug-Free Workplace Act of 1988, the Americans with Disabilities Act of 1990, and the Omnibus Transportation Employee Testing Act of 1991.
- The federal Drug-Free Workplace Act (DFWA) of 1988 requires federal contractors and grantees to establish a drug-free workplace program. The program must include employee notification of the policy that "unlawful manufacture, distribution, dispensation, possession or use of a controlled substance is prohibited in the...workplace" and of the consequences of any violations of that policy. DFWA does not require the employer to complete drug testing on employees and there is no requirement to dismiss or fire employees convicted of drug offenses. (DFWA was referenced in SB 557 as a potential model for the Board of Health in designing its regulations.)
- The Americans with Disabilities Act (ADA) of 1990, prohibits employment discrimination that is based on an individual's physical or mental impairment. ADA includes protections for individuals who suffer from alcoholism or who are currently participating in or have successfully completed a drug rehabilitation program. Under ADA provisions, employers are prohibited from requiring job applicants to submit to

medical examinations, including alcohol testing, although testing for illegal drugs is allowed.

- The Omnibus Transportation Employee Testing Act of 1991 requires certain transportation employers to conduct drug and alcohol testing of their "safety-sensitive" employees. However, the federal government has not established requirements for health care employers regarding drug-free workplace policies or employee drug testing.
- Although employee drug testing is not required in order to receive funding from Medicare or Medicaid or to receive accreditation by the Joint Commission on the Accreditation of Healthcare Organizations, most hospitals and nursing homes have adopted drug-free workplace programs.
- Courts have examined employee drug-testing programs conducted or required by the government to ensure that protections guaranteed under the Fourth Amendment to the *U. S. Constitution* are not violated. Drug testing "for cause" and for "safety-sensitive" positions has been consistently upheld by the courts. Random testing has been viewed as the most contentious type of testing. JCHC staff were unable to find any applicable court cases that specifically address drug testing for health care workers.
- Virginia has adopted the requirements of DFWA for all executive branch positions. In addition, DMHMRSAS, and the hospitals at VCU and UVA have employee drug-testing programs in place. The Virginia Health Care Association and the Virginia Association of Nonprofit Homes for the Aging reported that most of their members conduct drug testing. The Virginia Hospital and Healthcare Association and The Medical Society of Virginia indicated that their members have drug-free workplace policies and safeguards in place.
- Health care practitioners in Virginia are regulated by 13 health regulatory boards. Each of the boards has statutory authority to discipline providers for alcohol or drug abuse. The Department of Health Professions also has implemented the Health Practitioners' Intervention Program to assist providers with substance abuse problems. There were 563 providers participating in the intervention program as of July 2000.
- If drug testing is required as provided in SB 557, the Board of Health will need to promulgate policies to: (1) ensure adequate notice and employee privacy, (2) delineate disciplinary consequences and provisions for

employees to contest results, (3) address allowable differences in testing requirements, and (4) include quality assurance provisions.

- Requiring health care providers to administer drug-testing programs likely would entail significant costs for some providers, and would incur additional costs for the Commonwealth in terms of monitoring and enforcement activities.

Public comments were solicited on the draft report. A summary of the public comments is attached at Appendix C.

Four policy options (pages 39 and 40) addressing drug testing by health care providers were identified for consideration by the Joint Commission on Health Care. The Joint Commission voted to "take no action," which is consistent with a recommendation that SB 557 not be reported by the Committee on Education and Health.

On behalf of the Joint Commission on Health Care and its staff, I would like to thank the Department of Health, the Office of the Attorney General, Virginia Monitoring Inc., the Department of Health Professions, the Department of Mental Health, Mental Retardation and Substance Abuse Services, Virginia Commonwealth University, the Department of Human Resource Management, University of Virginia, the Virginia Health Care Association, the Virginia Association of Nonprofit Homes for the Aging, the Virginia Hospital and Healthcare Association, the Medical Society of Virginia, the Virginia Nurses Association, the Virginia Pharmacists Association, and the other state agencies and associations who provided input and information during this study.

Patrick W. Finnerty
Executive Director

December 2000

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Authority for the Study

Senate Bill 557, which was introduced during the 2000 Session of the General Assembly, would have required all health care providers who are regulated by the Board of Health to initiate drug-free workplace programs. The Senate Committee on Education and Health approved a motion to carry SB 557 over to the 2001 Session and to request a study by the Joint Commission on Health Care (JCHC) of the issues presented in the bill. The letter from the chairman of the Senate Committee on Education and Health to the chairman of JCHC states:

> Senate Bill 557 "would have required every health care provider regulated by the Board of Health to initiate drug-free workplace initiatives. Although the members [of the Senate Committee on Education and Health] considered this bill to have merit, they felt that the many issues relating to the federal Drug-Free Workplace Act, state and federal constitutional constraints on allowable drug-testing policies, and employee and employer concerns required additional study. Thus upon the recommendation of the Health Care Subcommittee, the Committee approved a motion to carry this bill over to the 2001 Session and to request the Joint Commission on Health Care to study the issues presented by SB 557."

A copy of this letter is included in Appendix A. SB 557, as introduced, is included in Appendix B.

Organization of Report

This report is presented in four major sections. This section discusses the authority for the study. Section II provides background information concerning drug testing in the workplace, including federal and state legislation and the prevalence of workplace drug testing. Section III addresses issues to be considered in establishing drug-testing policies including judicial decisions and the experience of employers that have established drug-testing programs. Section IV provides a series of policy options the Joint Commission on Health Care may wish to consider in addressing the issues raised in this study.

II.
Background

In 1997, the U. S. Department of Labor (DOL) completed a survey of full-time workers age 18 through 49 to determine the prevalence of "heavy alcohol use" and of illicit drug use. Illicit drug use reflects the use of both illegal drugs and controlled substances that the drug user obtains illegally. The DOL survey found that eight percent of full-time workers between the ages of 18 and 49 reported using illicit drugs within the last month. Moreover, nearly eight percent of respondents indicated "current heavy alcohol use." Examining all responses according to the occupation of the respondents revealed significant differences. The four occupational categories with the highest levels of reported incidence of using illicit drugs within the previous month were:

- food preparation workers, waiters, and bartenders (19 percent);
- construction workers (14 percent);
- service workers, which would include a number of health service workers (13 percent); and
- transportation and material moving workers (10 percent).

The rates of "current illicit drug use and heavy alcohol use were higher among workers age 18 to 25 than among older workers, and higher among males than females." User rates were also higher for workers who had not graduated from high school than for workers who had a high school degree or more advanced degrees. DOL estimates that 71 percent of drug users over the age of 18 – more than 10 million Americans – are employed.

A Number of Arguments Have Been Advanced Both in Support of and in Opposition to Employee Drug Testing

The arguments for testing typically focus on the effect drug and alcohol use may have on employee absenteeism, productivity, health status, accidents on the job, and liability lawsuits resulting from having employees who are impaired while working. Furthermore, there is the fear that employees who use drugs will be more likely to steal or reveal confidential information for drugs or money. A detailed study by The Lewin Group found that "[s]hortfalls in productivity and employment

among individuals with alcohol and drug abuse disorders accounted for estimated losses of $80.9 billion in 1992, of which $66.7 billion is attributed to alcohol abuse and $14.2 billion is attributed to drug abuse."

Arguments against drug testing in the workplace often focus on the effect testing has on individual rights and employee morale, on the validity of the tests, and on the possible misuse of test results by the employer. Most labor unions have publicly opposed the imposition of mandatory drug testing and instead favor employee assistance programs (EAPs) as non-punitive, treatment-focused alternatives.

Three Major Pieces of Federal Legislation Related to Drug-Testing Policies in the Workplace Are Relevant When Considering Testing of Health Care Staff

Three major pieces of federal legislation are relevant when considering drug testing of health care staff. These pieces of legislation include the Drug-Free Workplace Act of 1988, the Americans with Disabilities Act of 1990, and the Omnibus Transportation Employee Testing Act of 1991.

The Drug-Free Workplace Act Applies to Entities That Have Contracts or Grants with the Federal Government

The Drug-Free Workplace Act of 1988 requires federal contractors and grantees to adhere to the requirements for a drug-free workplace as defined in the *United States Code*, Title 41 Chapter 10. Chapter 10 contains seven sections with the first two sections addressing the specific requirements that contractors and grantees, respectively, must follow. Figure 1 contains the language included in the first section which is Sec. 701. (The language in the second section includes the same workplace requirements as the first section but applies to grantees rather than contractors.) In general, the Act requires federal contractors and grantees (hereafter referred to as employers) to establish a drug-free workplace program. The program must include employee notification of the policy that "unlawful manufacture, distribution, dispensation, possession or use of a controlled substance is prohibited in the...workplace" and of the consequences of any violations of that policy. Employees are required to notify the employer of "any criminal drug statute convictions for a violation occurring in the workplace no later than 5 days after such conviction." In turn, the employer is required to notify the federal

Figure 1
Provisions of the *United States Code*, Title 41 Section 701

Sec. 701. Drug-free workplace requirements for Federal contractors

(a) Drug-free workplace requirement

- Requirement for persons other than individuals
  No person, other than an individual shall be considered a responsible source...unless such person agrees to provide a drug-free workplace by –
  (A) publishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the person's workplace and specifying the actions that will be taken against employees for violations of such prohibition;
  (B) establishing a drug-free awareness program to inform employees about-
    (i) the dangers of drug abuse in the workplace;
    (ii) the person's policy of maintaining a drug-free workplace;
    (iii) any available drug counseling, rehabilitation, and employee assistance programs; and
    (iv) the penalties that may be imposed upon employees for drug abuse violations;
  (C) making it a requirement that each employee to be engaged in the performance of such contract be given a copy of the statement required by subparagraph (A);
  (D) notifying the employee in the statement required by subparagraph (A), that as a condition of employment on such contract, the employee will -
    (i) abide by the terms of the statement; and
    (ii) notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than 5 days after such conviction;
  (E) notifying the contracting agency within 10 days after receiving notice under subparagraph (D)(ii) from an employee or otherwise receiving actual notice of such conviction;
  (F) imposing a sanction on, or requiring the satisfactory participation in a drug abuse assistance or rehabilitation program by, any employee who is so convicted, as required by section 703 of this title; and
  (G) making a good faith effort to continue to maintain a drug-free workplace through implementation of subparagraphs (A), (B), (C), (D), (E), and (F).
- Requirement for individuals
  No Federal agency shall enter into a contract with an individual unless such individual agrees that the individual will not engage in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in the performance of the contract.

contracting agency within ten days of receiving an employee's conviction notification.

The Drug-Free Workplace Act does not require the employer to complete drug testing of employees. Further, there is no requirement in the Act to dismiss or fire employees convicted of drug offenses although some type of consequence must be imposed. Consequences may include requiring the employee to maintain "satisfactory participation" in a rehabilitation program. Failure on the part of the employer to adhere to the requirements of the Act is cause for "suspension, termination, or debarment" for a period of up to five years.

The five remaining sections of the Act address additional provisions including allowable employee sanctions (including job termination), the option for the federal contracting agency to waive the suspension, termination, or disqualification of a contractor or grantee, and the stipulation that the Act does not apply to undercover law enforcement operations.

The Americans with Disabilities Act Includes Some Protections for Employees Who Have Substance Abuse Problems

The Americans with Disabilities Act (ADA) of 1990, prohibits employment discrimination that is based on an individual's physical or mental impairment. This prohibition covers most employment decisions including recruitment, hiring, job duties, compensation, benefits, promotion, training, lay off, and termination. Employers are also prohibited from asking about an applicant's disabilities.

The ADA includes protections for individuals who suffer from alcoholism or who are currently participating in or have successfully completed a drug rehabilitation program. Individuals who continue to use illegal drugs are not included in the definition of a disabled person so they are not protected under ADA. In contrast, individuals who suffer from alcoholism are considered to be disabled, even if they continue to use alcohol. Employers are allowed to require the same performance standards of individuals who suffer from alcoholism or are recovering drug users, but reasonable accommodations must be made for these individuals. Reasonable accommodation may include a flexible work schedule that would allow an individual to receive drug treatment.

Under ADA provisions, employers are prohibited from requiring job applicants to submit to medical examinations prior to being offered employment. However, drug testing is not deemed to be a medical examination as long as the testing is designed to identify only the presence of illegal drugs. Testing for alcohol is considered to be a medical examination and can only be completed after an employment offer has been made. An employer is allowed to make a conditional employment offer that is contingent upon the results of a medical examination of the applicant. However, any required medical examination, including any testing for alcohol must be completed for all applicants receiving conditional employment offers for equivalent positions. Furthermore, the employer is not allowed to reject an applicant on the basis of an identified disability, including alcohol use, unless a job-related reason can be identified. Once an individual has been employed, any medical questions and examinations must be related to the job to be allowed by ADA regulations.

Job applicants who test positive for illegal use of drugs must be allowed to present evidence that the test actually indicated the presence of a legitimately-obtained, legal medication. Absent such evidence, the applicant can be considered to be using illegal drugs meaning that the applicant would not be protected under the ADA.

The Omnibus Transportation Act Requires Drug Testing to Address Safety Risks Inherent in the Transportation Industry

Concern about the increasing rate of substance abuse and the effect that impaired operators could have on the safety of travelers, Congress passed the Omnibus Transportation Employee Testing Act of 1991. The Act requires certain transportation employers to conduct drug and alcohol testing of their "safety-sensitive" employees. The Act applies to transportation providers regulated by the U. S. Department of Transportation (including aviation, motor carriers, mass transit, railroads, and the Coast Guard) and the Research and Special Programs Administration (the pipeline industry). According to the U. S. Department of Labor, more than eight million employees, most of whom are truck and bus drivers, are subject to Omnibus Transportation Act regulation.

U. S. Department of Transportation (DOT) regulations require drug and alcohol testing for employees who drive vehicles that weigh at least 26,001 pounds, that are designed for 16 or more riders (including the

driver), or transport certain hazardous materials. DOT regulations have been established to delineate specific procedures for employers to follow in collecting urine samples, in testing for illicit drugs and alcohol, in requiring a review by a physician, and in reporting test results.

The Federal Government Has Not Established Drug-Free Workplace Requirements for the Health Care Industry

In contrast with the requirements placed on the transportation industry, the federal government does not specifically require drug-free workplaces or mandatory drug testing for health care providers. There are no requirements within Medicare or Medicaid regulations for drug testing of health care providers. Likewise, the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO), which accredits a number of health care providers, has no drug-testing requirements. As a part of the accreditation process, however, JCAHO reviews personnel policies to ensure that both the use of and impairment from alcohol and drugs while at work are prohibited. Moreover, hospitals and nursing homes have generally adopted drug-fee workplace programs voluntarily because of the responsibility and liability they have for patient care. In addition, some health care providers have come under the requirements of the Drug-Free Workplace Act by accepting federal grant funding while other health care providers have been required to drug test their transportation workers.

States Have Enacted Legislation and Established Policies to Address Specific Drug-Free Workplace Provisions

The National Conference of State Legislatures (NCSL) completed a review in 1998 to determine how many states had statutorily addressed drug-free workplace policies. NCSL examined whether the state had established drug-free workplace provisions related to: 1) general policy, 2) drug-testing requirements, 3) workers' compensation, and 4) unemployment insurance. The results of that review are summarized in Figure 2. As indicated, states have taken a variety of legislative actions regarding drug-free workplace policies. With regard to drug-testing policies, seven states provide protection against liability for employers with drug-testing programs, and, conversely, seven states have placed restrictions on private employers who want to conduct employee drug testing. In addition, two states have specifically provided for testing of certain state employees. The majority of states, including Virginia, have

Figure 2
State Statutes Addressing Drug-Free Workplace Policies

General Policy	Drug-Testing Requirements	Workers' Compensation	Unemployment Insurance
6 states	**21 states**	**43 states**	**25 states**
California, Georgia, Illinois, and South Carolina require contractors and/or grantees to have some drug-free workplace provisions. Florida gives preference to contractors who have drug-free workplace programs in any case of two or more bids "of equal merit." Louisiana grants a state tax credit for employers of 5 percent of qualified expenses for substance abuse treatment services.	**Seven states protect employers** who test for substance abuse (Alaska, Arizona, Idaho, Iowa, Louisiana, Mississippi, Utah). Seven states **restrict private employers** in testing (Connecticut, Maine, Minnesota, Montana, Oregon, Rhode Island, Vermont). Three states **require state or federal approval of testing laboratories** (Hawaii, Maryland, Oregon). Two states **allow testing of certain state employees** (Florida, Georgia). Two states **define procedures or require EAPs** (North Carolina, Oklahoma). Nebraska **provides for termination** for refusing or tampering with test or for positive test results.	Forty-two states **reduce or deny** workers' compensation benefits for employees who were intoxicated and/or impaired due to drug use at the time of the accident. (**All states except** Arizona, Delaware, Illinois, Mississippi, Michigan, Montana, Vermont, Washington.) Eight of those 42 states plus Mississippi, provide a premium discount to employers that have a drug-free workplace program (Alabama, Florida, Georgia, Mississippi, Ohio, South Carolina, Tennessee, **Virginia**, West Virginia).	Twenty-four states **reduce or deny** benefits for employees released due to intoxication or impairment (Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Jersey, New York, North Carolina, **Virginia,** Washington, West Virginia). Oklahoma denies benefits for employees discharged for refusing a drug test or testing positive.

Source: National Conference of State Legislatures "Drug Testing in the Workplace State Statute Chart."

legislatively allowed for workers' compensation benefits to be reduced or denied for employees who were intoxicated or drug-impaired at the time of a work-related accident. Similarly, almost one-quarter of the states,

including Virginia, allow for unemployment benefits to be reduced or denied if the employee was released due to intoxication or drug use. Virginia also allows for unemployment benefits to be denied for "any week that such individual, in connection with an offer of suitable work, has a confirmed positive test for a nonprescribed controlled substance...if the test is (i) required as a condition of employment" and the sample was properly collected and tested by an accredited laboratory.

Information concerning the drug-free workplace provisions that had been established by executive order or by policy in the 50 states was collected in 1994 by the Virginia Department of Labor and Industry (DIL). A study concerning drug testing in the workplace was requested of DIL by HJR 534 (1993). DIL was assisted in the study by an advisory group including representatives from four state agencies, the Office of the Attorney General, the Virginia Chamber of Commerce, the Virginia State AFL-CIO, the Marshall-Wythe School of Law, and the Virginia Governmental Employees Association.

The DIL study indicated that most of the policies enacted by various states extended the provisions of the drug-free workplace to either state contractors or grantees (Alabama, Delaware, Illinois, Indiana, Kentucky, Maryland, and West Virginia) or to state agencies (Arkansas, Delaware, Colorado, Idaho, Kentucky, Nevada, New Jersey, North Dakota, and Virginia). Six states addressed requirements related to drug testing of state employees. Idaho, Kansas, and Washington allowed for "safety sensitive" positions to be tested. Oregon and Tennessee only provided for testing of employees working within their corrections departments. New Mexico allowed drug testing of: (1) "safety sensitive" positions prior to any change in employment conditions (prior to employment, promotion or transfer); (2) any employee believed to be the cause of a work-related accident; and (3) any employee for whom there was reasonable suspicion of drug or alcohol use.

Neither the NCSL study nor the Virginia Department of Industry and Labor study specifically examined drug-testing policies related to health care providers. In terms of recommending changes in general drug-free workplace policies in Virginia, the DIL report stated:

> "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 Department of Personnel and Training (now the Department of Human Resource Management) adopted in December 1993 a policy on drugs and alcohol incorporating the requirements of the federal Drug-Free Workplace Act (with the exception of reporting drug convictions to the federal government). This policy is still in force and applies to all executive branch positions (including salaried and hourly positions whether working full- or part-time), "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."

The American Hospital Association Supports Employee Drug Testing as A Component of a Drug-Free Workplace

In 1992, the American Hospital Association (AHA) revised its management advisory on "Substance Abuse Policies for Health Care Institutions." The recommendations contained in the advisory are still in force and include:

- developing policies that would be "equitably administered to all employees and medical staff" and would address the use of alcohol, prescription drugs, and illegal substances;
- advising all current and prospective staff of established substance abuse policies;
- training all managers and supervisors on the substance abuse policies and in identifying indicators of abuse;
- adopting a rehabilitative approach which emphasizes the use of employee assistance programs (EAPs) or other professional treatment programs to assist employees in acknowledging and addressing their substance abuse;
- requiring employees who have positive substance abuse tests to "enter into a return-to-work agreement" and to successfully complete an approved treatment program; and

- using laboratories that are either certified by the National Institute on Drug Abuse (NIDA) or that use NIDA's procedures for analyzing specimens.

In terms of employee drug testing, the AHA advisory states,

"A key component of the [drug-free workplace] policy should be a provision for drug and alcohol testing of all employees and medical staff. AHA recommends that this include preemployment testing, for-cause testing, post-accident testing, and unannounced testing (as part of a return-to–work agreement)."

The American Medical Association Recommends Limitations and Procedural Safeguards in Drug Testing

Figure 3 contains the American Medical Association's (AMA) ethical statements and policies on substance abuse and drug testing of medical staff. As indicated, the AMA considers it to be unethical to practice medicine while under the influence of a substance that could impair the physician. With regard to drug-testing, the AMA policies:

- support continuing to monitor the legal issues related to drug testing,
- support limiting drug-testing programs to pre-employment testing for positions that "affect the health and safety of others" and to reasonable suspicion testing when job performance problems are suspected to be because of drug or alcohol use, and
- recommend taking a treatment- or assistance-oriented approach rather than a punitive approach regarding positive test results.

Figure 3 also includes two management advisories released in response to AHA's revision in its drug-testing policy. In the advisories, the AMA emphasizes the importance of physician involvement and authority regarding policy and procedures that affect physician evaluation. Moreover, the "AMA states that medical staff must be involved in the development of...substance abuse policy" and that "all drug and alcohol testing must be performed only with substantive and procedural due process safeguards in place."

Recent Studies Indicate Nearly 50 Percent of U. S. Employers Have Drug-Testing Programs

JCHC staff were unable to find any studies specifically addressing drug-testing programs in health care facilities in America. One recent study that provided national estimates regarding drug testing by employers surveyed a sample of private, non-agricultural employers with at least 50 employees. The study, which was published in the *Monthly Labor Review* in June 1998, was conducted in 1995 and involved telephone calls to 2,098 employers.

The study compared the prevalence of testing for alcohol with the prevalence of testing for drug use. The study indicated that while nearly 54 percent of employers tested for drug use, only 36 percent tested for alcohol use. The researchers noted: "Given the relatively pervasive nature of alcohol misuse and its associated work-related problems, it is ironic that alcohol testing is much less prevalent than illicit drug screening programs." With the services industry, which would include health care providers, an even lower percentage of employers tested for alcohol – 26.5 percent. The study did not include a comparable estimate of the percentage of employers conducting drug tests by type of industry.

A 1997 study of American workers conducted by the U. S. Department of Labor found similar results with 49 percent of surveyed workers reporting they were subject to drug testing. This reflected an increase of five percent from the survey results in 1994. Further in the 1997 survey, 39 percent of the workers reported their employer drug-tested prior to hiring, 30 percent tested if there was suspicion of drug use, 29 percent tested following an accident at work, and about one-fourth tested on a random basis. Questions about being willing to work for an employer who drug-tested revealed substantial differences between respondents who were considered to be current drug users and those who were not.

Figure 3
American Medical Association Policies on Substance Abuse and Drug Testing

E-8.15 Substance Abuse

"It is unethical for a physician to practice medicine while under the influence of a controlled substance, alcohol, or other chemical agents which impair the ability to practice medicine."

H-95.984 Issues in Employee Drug-Testing

"The AMA (1) affirms its commitment to educate physicians and the public about the scientific issues of drug testing; (2) supports monitoring the evolving legal issues in drug testing of employee groups, especially the issues of positive drug tests as a measure of health status and potential employment discrimination resulting therefrom; (3) takes the position that urine drug and alcohol testing of employees should be limited to (a) preemployment examinations of those persons whose jobs affect the health and safety of others, (b) situations in which there is reasonable suspicion that an employee's (or physician's) job performance is impaired by drug and/or alcohol use, (c) monitoring as part of a comprehensive program of treatment and rehabilitation of alcohol and drug abuse or dependence, and (d) urine, drug, and alcohol testing of all physicians and appropriate employees of health care institutions may be appropriate under these same conditions; (4) urges employers who choose to establish drug testing programs to use confirmed positive test results in employees primarily to motivate those employees to seek appropriate assistance with their alcohol or drug problems, preferably through employee assistance programs."

H-225.966 American Hospital Association Management Advisory on No-Cause Drug Testing of the Medical Staff

"The AMA establishes the primacy of medical staff authority in substance abuse policy and procedures covering any pre-employment, credentialing, or other phase of physician evaluation."

H-225.967 American Hospital Association Management Advisory on No-Cause Drug Testing of the Medical Staff

"(1) Policy of the AMA states that medical staff must be involved in the development of the institution's substance abuse policy, including: (a) selection of analytical methods to ensure scientific validity of the test results, (b) determination of measures to maintain confidentiality of the test results, (c) in for-cause post-incident/injury testing, definition of standards for determining whether cause exists and which incidents and/or injuries will result in testing, and (d) development of mechanisms to address the physical and mental health of medical staff members. (2) The AMA believes all drug and alcohol testing must be performed only with substantive and procedural due process safeguards in place."

Source: American Medical Association.

"[A] larger percentage of current illicit drug users than non-users said that they would be less likely to work for an employer who tested for drug use

upon hiring (22% vs. 4%), randomly (29% vs. 6%), upon suspicion (24% vs. 10%), or after accident (13% vs. 4%)."

The Virginia Department of Labor and Industry, in completing its 1994 study of workplace drug testing, conducted a survey of 2,500 Virginia employers. (A total of 1,015 "usable responses" were received for a response rate of 41 percent.) The survey responses indicated a much lower prevalence of employee drug testing than the figures produced in the two national studies that were referenced above. The DIL study found that only nine percent of all employers had drug-testing programs. Of these employers:

- 99 percent tested for controlled substances,
- 43 percent tested for alcohol use,
- 41 percent tested for prescription drugs,
- 81 percent conducted pre-employment testing,
- 56 percent conducted random testing,
- 55 percent conducted post-accident testing,
- 47 percent conducted testing based on "individual suspicion,"
- 24 percent conducted routine testing,
- 17 percent conducted testing as part of rehabilitation efforts,
- 14 percent conducted testing as part of return to work policies,
- 11 percent conducted testing due to continued monitoring needs, and
- 4 percent conducted pre-employment testing.

When employers within the services industry (which would include health care) were examined, the study found that 18 percent had drug-testing programs. Of these employers, 29 percent reported being required by federal mandate to conduct employee drug testing. Only employers within the manufacturing and construction industries had a higher percentage of respondents who conducted drug testing (20 percent).

III.
Drug-Free Workplace Considerations

When considering the issues involved in a statutory mandate to require drug-testing in the workplace, it is important to recognize that there are significant protections provided for three types of employees – government employees, union members, and contract employees.

Courts have closely examined employee drug-testing programs conducted by federal, state, or local agencies to ensure that protections guaranteed under the Fourth Amendment to the *U. S. Constitution* are not being violated. The Fourth amendment protection against "unreasonable searches and seizures" by the government has been interpreted to mean that searches of the person and belongings of a government employee are not allowed unless there is reason to believe the employee has committed an illegal act. The U. S. Supreme Court has allowed for drug testing of government employees, even in the absence of suspected drug use, only when the employees' jobs involve safety issues, require the use of weapons, or provide access to classified information. Thus, government employees are provided some protection from job termination if that termination is not directly related to job performance.

While union members do not enjoy the aforementioned constitutional protections, collective bargaining agreements typically protect them from being disciplined or fired for reasons other than unsatisfactory job performance. In a similar fashion, individuals who work on a contract basis also typically include protections in their employment contracts against discipline or termination that is not based on job performance. These protections may limit employers from taking disciplinary actions based solely on the results of positive drug tests. Drug tests actually identify the residue or "metabolics" of drugs remaining in the urine, blood, hair or breath of the user. The metabolics of illicit drugs can be identified for varying lengths of time. It is reported that cocaine can be detected in the urine for about 72 hours while marijuana can be detected for at least three weeks. Moreover, drug residues can be detected in hair for several months. Since drug tests are not capable of determining when a drug was used, a positive test does not prove that an employee was impaired while at work. The positive test may indicate that the employee used some type of drug several days or weeks before and had no residual impairment while at work.

In enacting statutory requirements for mandatory employee drug-testing programs, it is important to consider court rulings regarding employment protections. Because the basis for most employee protections is the *U. S. Constitution*, relevant cases have been heard in federal court.

U. S. Supreme Court Rulings Indicate Governmentally-Mandated Drug Testing Must Demonstrate that Governmental Interest Outweighs Fourth Amendment Protections

Two decisions rendered by the U. S. Supreme Court in 1989 have significant implications for government-mandated drug testing of employees. The decisions were rendered in *Skinner v. Railway Labor Executives' Association* and *National Treasury Employees v. Von Raab*. Both cases examined whether drug testing constituted unreasonable "searches or seizures" as defined in the Fourth Amendment, and whether such "searches or seizures" would require a search warrant based on probable cause to conduct.

The *Skinner* case involved employee drug testing conducted by a private railroad company. Following any fairly serious railroad accident, the railroad company required all of the employees involved in the accident to have both blood and urine tests conducted. Although the Fourth Amendment addresses the "right of people to be secure in their persons...against unreasonable searches and seizures" by a governmental entity, the U. S. Supreme Court ruled that Fourth Amendment protections were relevant in the *Skinner* case also. This ruling was based on the grounds that the private railroad company was enforcing government regulations mandated by the Federal Railroad Administration.

The U. S. Supreme Court also found that the administration of both blood and urine tests in the *Skinner* case constituted a "search" as defined by the Fourth Amendment. The Court noted, however, that only unreasonable searches are prohibited by the Fourth Amendment. In most criminal cases, the reasonableness of the search is determined by the issuance of a warrant which is based on the judgement of an unbiased magistrate that probable cause exists. The Court noted, however, that previous Supreme Court decisions made exceptions to this rule when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." In the *Skinner* case, the Court indicated that requiring a warrant would be impracticable

and that the governmental interest outweighed Fourth Amendment protections because the railroad "[e]mployees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences...." These employees were considered to be "in safety-sensitive positions" whose privacy interests were "diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees."

In the *Van Raab* case, the U. S. Customs Service, a federal agency, made drug tests "a condition of placement or employment for positions that meet one or more of three criteria." The case decision stated:

> "The first [criterion] is direct involvement in drug interdiction or enforcement of related laws, an activity the Commissioner deemed fraught with obvious dangers to the mission of the agency and the lives of Customs agents....The second criterion is a requirement that the incumbent carry firearms, as the Commissioner concluded that '[p]ublic safety demands that employees who carry deadly arms and are prepared to make life or death decisions be drug free.'...The third criterion is a requirement for the incumbent to handle 'classified' material, which the Commissioner determined might fall into the hands of smugglers if accessible to employees who, by reason of their own illegal drug use, are susceptible to bribery or blackmail."

The Court ruled that a search warrant was not needed to require the testing because every employee requesting promotion or transfer was tested so there were "no special facts for a neutral magistrate to evaluate." Further, the Court determined "the Government's need to conduct the suspicionless searches required by the Customs program outweighs the privacy interests of employees engaged directly in drug interdiction, and of those who otherwise are required to carry firearms."

These two cases indicate that employee drug testing is considered to be a search and is therefore subject to Fourth Amendment provisions. Consequently, conducting drug testing that is not based on suspicion of illegal activity may be less defensible than testing for cause or after an accident has occurred. In both the *Skinner* and the *Von Raab* cases, the U. S. Supreme Court determined that drug testing in the absence of "individualized suspicion" was justified given the substantial interest of the government in those two narrow instances presented. The ruling in

the *Skinner* case indicates that Fourth Amendment protections apply to employees of private companies when those companies conduct drug testing that is required by a governmental body. The U. S. Supreme Court emphasized that drug testing without probable cause to suspect illegal activity would only be allowed in instances in which the governmental interest outweighs the Fourth Amendment protections. No Supreme Court cases were found that dealt with this governmental interest as it may apply to employees in health care facilities.

Considering the numerous legal issues surrounding drug-testing policies, it will be important to work closely with the Office of the Attorney General in designing any drug-testing program that the Commonwealth may require of health care providers.

In Virginia, Several Health Care Providers in the Public Sector Have Established Employee Drug-Testing Programs

The Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS) and the hospitals at Virginia Commonwealth University (VCU) and the University of Virginia (UVA) have employee drug-screening programs in place.

DMHMRSAS implemented its policy regarding drug testing employees who are in safety-sensitive positions on January 1, 1997. DMHMRSAS worked closely with staff of the Office of the Attorney General (OAG) in crafting a policy to address Constitutional requirements. In addition to the U. S. Supreme Court decisions in *Skinner v. Railway Labor Executives' Association* and *National Treasury Employees v. Von Raab,* additional federal and state court cases were considered.

An OAG official indicated that in most of the federal cases that were reviewed, health care was found to be an appropriate area to require drug testing based on the "safety-sensitive" standard. One significant case involving a health care facility that was used in structuring the drug-testing policy for DMHMRSAS was *American Federation of Government Employees v. Derwinski.* The case was heard in 1991 by a federal district court in California and involved federal employees working within a Veterans Administration (VA) hospital. The federal court in California ruled that the VA's health care professionals meet the criteria set for "safety sensitive" positions given their responsibilities for patient care and in some cases, their access to controlled substances. The VA hospital's

policy of testing employees who were not health care professionals was not upheld by the court because they did not satisfy the federal court's criteria related to patient safety. For "safety sensitive" positions, the court determined that the VA's policies which included testing on a random basis and on a "reasonable suspicion" basis were appropriate. The court declared random drug testing to be appropriate in part because it is "the best potential deterrent to drug use." The VA hospital's post-accident drug testing was disallowed by the court because there were no restrictive criteria for determining when testing would be conducted. Instead, the decision to initiate testing was left to the discretion of the employee's immediate supervisor which the court considered to leave "an impermissibly broad spectrum of the exercise of judgment."

The alcohol- and drug-testing program at DMHMRSAS involves testing any employee in a safety-sensitive position including full-time, part-time, wage, and contract employees. Employees may be tested under any of the following circumstances:

- prior to "employment, re-employment, promotion, demotion, reallocation, or transfer;"
- because of "reasonable suspicion of alcohol or drug use;"
- following an accident or incident on the job that results in the employee being off from work for more than the day of the injury;
- following suspension of the employee based on "an allegation of patient or resident abuse"; or
- on a random basis.

VCU has drug-tested all newly hired staff who work in the Medical College of Virginia hospitals since 1998. All hospital staff, whether they are health care providers or not, are tested. Physicians who have practicing privileges but are not considered to be hospital staff are not subject to drug testing. An MCV official indicated that a policy and procedure to allow "for cause" testing of hospital staff is currently being developed.

The UVA medical center instituted a drug-testing policy in April of this year. The policy only applies to designated "safety-sensitive" positions within the hospital. Generally all of the physicians who practice

within the hospital are subject to drug testing either because they are hospital staff or they are members of the Health Services Foundation which also has a drug-testing program. UVA's drug-testing program includes being tested prior to any change in employment status (such as being hired, promoted, transferred, etc.), for reasonable suspicion, or as part of a return-to-work agreement after successful completion of a treatment program.

A 1993 Study Indicated Most Health Care Providers in Virginia Had a Substance Abuse Policy and Supported Employee Drug Testing Under Certain Circumstances

In response to HJR 678 (1993), the Virginia Department of Health (VDH) conducted a survey of organizations interested in health, mental health or mental retardation issues. The survey sought to determine the extent to which these organizations conducted various types of drug testing (random testing in particular) or would support the use of such testing. Figure 4 summarizes the survey responses of 137 organizations that employed more than 93,000 staff. As shown, 72 percent of the organizations had a written substance abuse policy and 62 percent had an employee assistance or referral program. Both "for cause" and pre-employment drug testing were reported to be either conducted or supported by more than one-half of the responding organizations. (The survey did not identify separately those respondents who supported drug testing from those that actually conducted drug testing.) The barriers reported by organizations that did not conduct random drug testing included: cost (51.1 percent), regulatory barriers (35.8 percent), a lack of need (31.4 percent), and termination for cause (13.9 percent).

Many of Virginia's Health Care Providers Already Have Policies in Place Regarding Employee Drug and Alcohol Use

A number of protections are already in place to address health care practitioners who have substance abuse or other types of impairment. As noted previously, a number of health care providers already adhere to federal requirements under the Drug-Free Workplace Act or under the Omnibus Transportation Act. In addition, *Code of Virginia* § 54.1-2906 requires hospitals and other health care institutions to report to the appropriate regulatory board on any impaired health professionals. The chief administrative officer and/or the chief of staff of these institutions are required to report any health care professional who is in need of or is

Figure 4
Responses to VDH Survey Regarding Employee Drug Testing

Responses Regarding Substance Abuse Policies and Employee Assistance

- 98 (71.5%) had a written policy on substance abuse
- 14 (10.2%) "planned to implement a written policy" within the year
- 85 (62.0%) had an employee assistance or referral program

Responses Regarding the Types of Employee Drug Testing that Were Conducted or Considered to Be Appropriate

- 94 (68.6%) conducted or supported "for cause" testing
- 69 (50.4%) conducted or supported pre-employment testing
- 15 (10.9%) conducted or supported random testing
- 1 (7.3%) conducted or supported annual testing
- 18 (13.1%) responded employee drug testing was not appropriate

Responses Regarding Substances that Tests Were Designed to Identify

- 115 (83.9%) tested for illegal drugs
- 87 (63.5%) tested for alcohol
- 52 (38.0%) tested for prescription drugs
- 3 (2.2%) tested for all classes of drugs or type of testing was "unknown"

Responses Regarding What Actions Could Be Taken When Employees Were "Found to Use Illegal Drugs or Test Positive"

- 98 (71.5%) responded termination
- 75 (54.7%) responded counseling
- 71 (51.8%) responded rehabilitation
- 60 (43.8%) responded suspension without pay
- 28 (20.4%) responded reassignment of duties

Responses Regarding Barriers to Random Drug Testing

- 70 (51.1%) cited cost
- 49 (35.8%) cited regulatory barriers
- 43 (31.4%) cited lack of need
- 19 (13.9%) cited policy of "immediate termination for cause"
- 35 (25.5%) cited some other type of barrier

Source: Virginia Department of Health Memorandum Dated November 22, 1993.

receiving treatment, including treatment for substance abuse "which may render the health professional a danger to himself, the public or his patients."

Representatives of the Virginia Health Care Association (VHCA) and the Virginia Association of Nonprofit Homes for the Aging (VANHA) informally surveyed their members and found that all have policies regarding being under the influence of drugs or alcohol at work and strict controls over controlled substances. VHCA found that the larger facilities typically have pre-employment testing, and testing for reasonable suspicion and after accidents. Many of the smaller facilities have "for cause" drug testing only. VANHA's survey indicated that nearly all members completed pre-employment testing and/or random testing.

The Virginia Hospital and Healthcare Association indicated that its members also have drug-free workplace policies and safeguards regarding access to controlled substances; however, no estimate of the number of members conducting drug-testing could be given.

The Medical Society of Virginia advised JCHC staff that:

> "We contacted a representative number of group practices and learned that each has addressed the issue either as a workplace drug policy in their employee manual or has drug testing as a condition of employment. We do not know the extent of the drug testing and/or drug workplace policies that are currently in place in thousands of physician offices throughout the Commonwealth."

As previously noted, drug-testing programs are already in place within the Department of Mental Health, Mental Retardation and Substance Abuse Services and the hospitals at Virginia Commonwealth University and the University of Virginia.

Senate Bill 557 Would Require Drug-Free Workplace Policies and Drug-Testing to Be Implemented by a Wide Range of Health Care Facilities/Providers

SB 557 delineated a number of components that the Board of Health would have to consider in promulgating regulations for allowable drug-testing policies.

Drug testing would be required of any provider required to apply for a Certificate of Public Need (COPN) in order to construct a medical facility, expand a medical facility, or convert the use of approved beds in a medical facility. "Medical facility" for purposes of COPN is defined in *Code of Virginia* § 32.1-102.1 to include: hospitals, sanitariums, nursing homes, intermediate care facilities, extended care facilities, mental hospitals, mental retardation facilities, psychiatric hospitals and intermediate care facilities "established primarily for the medical, psychiatric, or psychological treatment and rehabilitation of alcohol or drug addicts... specialized centers or clinics or that portion of a physician's office developed for the provision of outpatient or ambulatory surgery, cardiac catherization, computed tomographic (CT) scanning, gamma knife surgery, lithotripsy, magnetic resonance imaging (MRI) magnetic source imaging (MSI), positron emission tomographic (PET) scanning, radiation therapy, nuclear medicine imaging." (In a subsequent provision, it is indicated that "medical facility" does not include: (1) facilities that are part of DMHMRSAS or provide residential treatment for substance abuse under the supervision of a community services board; (2) physicians' offices that do not perform the procedures noted previously; or (3) the Woodrow Wilson Rehabilitation Center.) In addition, any provider who begins to perform or adds certain equipment in order to perform any of 18 different medical procedures such as cardiac catherization, neonatal special care, or radiation therapy would be subject to drug-testing requirements.

Senate Bill 557 Would Require the Board of Health to Promulgate Regulations on Various Components of the Drug-Free Workplace Policies and Drug Testing to Be Implemented by Various Health Care Providers

SB 557, as introduced, would have required the Board of Health to promulgate regulations that would specify the type of drug-free workplace and drug-testing policies that would have to be implemented by health care providers. To facilitate discussion of these requirements, the pertinent components of SB 557 have been excerpted and grouped into three categories of issues as shown in Figure 5.

Figure 5
SB 557: Components to Be Considered by the Board of Health in Promulgating Regulations for Allowable Drug-Testing Policies

Notice and Privacy Considerations

- Proper notice and disclosure of the drug-testing policy
- Privacy assurances during and after testing
- Confidentiality protections for test results

Disciplinary Consequences and Employee Rights to Contest Results

- Consequences of refusing to take any drug test
- Appropriate disciplinary actions and consequences
- Employees' rights to contest or explain the test results

Drug Testing Parameters

- Differentiated requirements for various categories of health care providers
- Types of testing that may be required
- Appropriate bases and situations for drug testing including the circumstances that may be presumed to give rise to reasonable suspicion of substance abuse

Source: Senate Bill 557 (2000).

If Drug Testing Is Required, Policies and Procedures Would Need to Ensure Adequate Notice Prior to Drug-Testing and to Protect Employee Privacy

Giving proper notice regarding drug-testing policies and ensuring employee privacy and the confidentiality of test results are important aspects of a drug-testing program. Providing proper notice is particularly important if the employer is instituting drug testing as a new policy. A well-developed drug-testing policy should be developed and distributed to all employees. The policy should at a minimum explain:

- conditions under which testing will be undertaken (prior to employment, based on random selection, after any significant accident or allegation, for suspicious conduct, etc.);
- types of tests that will be administered (urine, blood, hair, breathalyzer);

- consequences of refusing to be tested or of having a positive drug test; and
- safeguards that have been instituted to protect the confidentiality of drug test results.

If testing is going to be instituted for newly hired employees, all of the job applicants should be advised of the requirement. Similarly, if random testing is going to be instituted, all current employees should be provided notice of the random testing well in advance of the initiation of any testing.

As noted previously, federal courts have taken the invasion of privacy that drug testing represents quite seriously under the principle that drug testing constitutes a search as defined by the Fourth Amendment. Some federal court cases have specifically noted that urine and breathalyzer tests are less invasive than a blood test and are therefore more acceptable to the court. A 1994 survey by the American Management Association found that 82 percent of its "drug-testing" members used urine testing, 12.9 percent tested blood, 1.1 percent tested hair, and the rest used some other form of testing such as performance testing. Cognizant of the privacy issue, employers typically do not require direct observation of the specimen collection but instead allow employees to give urine specimens within a "controlled collection environment" designed to minimize the ability to contaminate the sample. Provisions are also typically made to allow laboratories to use a "split sample" to allow for future testing to confirm any positive test. A split sample involves a portion of the original sample being maintained separately in a secure manner so the employee will not be required to give a new sample in order to receive confirmation of a positive test.

Drug-test results are considered to be employee medical records that must be kept confidential. Procedures should be instituted to limit the information about the drug-test results that is forwarded by the testing laboratory. In addition to indicating that an employee is using an illegal drug, urine testing may also reveal health-related information that the employee may not want disclosed. This information may include that the employee is receiving treatment for a medical reason such as a heart condition or diabetes, a psychological condition such as depression, or that the employee is pregnant. The laboratory should be instructed to only transmit the information that the employer needs to determine illicit drug or alcohol use by the employee. The testing laboratory should receive

samples that have identifying codes or numbers with no employee names attached. The employer should ensure that only authorized staff have access to the results of employee drug tests and that the results are maintained in a secure manner.

Disciplinary Consequences and Employee Rights to Contest Results Would Need to Be Specifically Delineated

The possibility that an employee could be terminated from his job based on failing to cooperate with drug testing or based on the results of a positive test underscores the need for careful and specific delineation of disciplinary consequences and of provisions for employees to contest results. Many employers, including DMHMRSAS, VCU, and UVA retain employees who have positive drug tests if the employees agree to successfully complete an approved rehabilitation program and agree to ongoing drug testing. This policy is in compliance with the requirements of the U. S. Department of Transportation (DOT) for employees covered under the Omnibus Transportation Act. Employees who refuse to submit to drug testing are typically moved out of "safety-sensitive" positions or are terminated from their jobs.

Drug tests can be unreliable in properly identifying the kind of drug that is present in urine. Some common, legal drugs have been reported as being identified as illegal drugs in urine including codeine being mistaken for heroin, Advil for marijuana, and Nyquil for amphetamines. In addition, employees may be taking legitimate controlled substances under the guidance of a physician. Provisions must be made to allow employees to explain the presence of legitimate drugs in their samples. To provide for proper oversight and interpretation of drug-test results, a medical review officer is often employed. DOT regulations define a "medical review officer" as "a licensed physician (medical doctor or doctor of osteopathy) responsible for receiving laboratory results generated by an employer's drug testing program who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's confirmed positive test result together with his or her medical history and any other relevant biomedical history." DOT regulations require the use of a medical review officer to ensure the validity of drug test results.

If Health Care Providers Are Required to Conduct Employee Drug Testing, Regulations Would Need to Address Allowable Differences in Testing Requirements and Include Quality Assurance Provisions

If enacted, drug-testing policies should address whether different testing requirements will be allowed for different categories of health care providers, the basis on which drug tests may be conducted, and quality assurance of the testing process.

It may be appropriate for any potential drug-testing regulations to have different requirements for different types of health care providers. In addition to health care providers licensed by the Virginia Department of Health (i.e. hospitals, nursing homes, etc.), SB 557 would require any provider, who performs procedures or operates equipment subject to Certificate of Public Need approval, to initiate a drug-free workplace program. This would include a number of relatively small physician offices. The need to require drug testing by these physician offices on the same basis as health care providers licensed by VDH should be considered. Similarly, if SB 557 is approved, the Board of Health may want to consider whether different requirements should be made for drug-testing physicians who may have practicing privileges but are not "medical staff" of any hospital. Requiring these physicians to submit to drug testing in each of the hospitals in which they practice could be quite onerous for some physicians.

Another issue that should be reviewed is whether drug testing should be required at all. As noted in Section II, the federal Drug-Free Workplace Act does <u>not</u> require employee drug testing. As such, health care facilities can implement policies that comply with the federal Drug-Free Workplace Act without requiring any drug testing.

If drug testing is required, the way in which a drug-testing program is structured affects the way the program is viewed by the courts. Court decisions have typically indicated that pre-employment drug testing is the least controversial form of testing. This is because the courts typically rule no one is forced to apply for a particular job so pre-employment drug testing is less burdensome than other forms of required drug testing. This argument may be weakened, however, due to the application of the requirement for entire classes of employees. For example, any individual who wants to be an emergency room nurse in Virginia would be required to submit to drug testing, meaning that the drug-testing requirements

would be applied to an entire class of employees. On the other hand, federal courts in California and Michigan have ruled that health care professionals by their choice of profession have diminished what would be a "reasonable expectation of privacy" in allowing for drug testing of health care providers.

Courts have also tended to see drug testing on the basis of reasonable suspicion that abuse is interfering with an employee's job performance to be justified on the basis of "individualized" probable cause. Likewise, other types of "for cause" drug-testing programs are often seen by the courts as being justified on the basis of probable cause. In establishing "for cause" drug testing, very specific policies should be established to delineate the circumstances that will denote either reasonable suspicion or "for cause" occurrences such as an accident or an allegation involving patient care.

The most contentious type of drug testing is typically considered to be random testing because it is not based on any "individualized" reason or on probable cause. Courts have allowed random testing of positions that are considered to be "safety sensitive" particularly when a truly random selection process has been established. If random testing is required under any legislative mandate, consideration should be given to limiting such testing to "safety-sensitive" employees.

It is important for drug-testing programs to follow stringent procedures related to sample collection, chain of custody and testing of those samples, and the interpretation of the samples. It is important for confirmatory tests, which use advanced analyses to rule out false positives, to be used for every positive test result received. DOT has extensive regulations regarding required procedures that could be used as guidelines if such testing is required of health care providers.

The Costs Associated with Drug-Testing Operations Must Be Considered in Establishing the Program

Requiring health care providers to establish and administer drug-testing programs will entail significant costs for providers and could incur additional costs for the Commonwealth. The actual amount of the costs would be affected by the regulations that are promulgated.

DMHMRSAS coordinates a drug-testing contract with Commonwealth Occupational Safety and Health Associates (COSHA) on behalf of four other state agencies and 11 local entities. Despite the high volume of tests that are being performed, the costs are not insignificant. COSHA charges about $54 per test. DMHMRSAS reported conducting 2,348 drug tests between January 1, 1999 and October 15, 2000. Fewer than two percent or 46 drug tests (33 of which were pre-employment tests of job applicants) had positive test results. The cost of testing the 2,348 applicants and employees, which does not include the administrative costs that DMHMRSAS incurred, was $126,792 or $2,756 for each positive test result. Depending on the type of drug testing that might be required, this could incur significant costs for some health care providers. It is reasonable to assume that at least a portion of these costs could be passed on to patients through higher provider fees.

The types of testing requirements that are established will significantly impact the cost of drug testing for health care providers. For example, a requirement to randomly test 25 percent of all "safety-sensitive" positions every three months is likely to be more costly than requiring only pre-employment and "for cause" drug testing.

Enforcing any drug-testing requirements will also incur costs. Compliance with drug-testing requirements could be readily determined by the Virginia Department of Health for those health care providers it currently regulates. Those providers include hospitals, nursing facilities, ambulatory surgery centers, home health care providers, and hospice programs. However, as currently written, SB 557 also would require testing by a considerable number of physician offices. Monitoring and enforcing drug testing conducted by these providers would incur additional costs.

Virginia's Health Regulatory Boards Have the Authority to Discipline Health Care Practitioners

In Virginia, regulation regarding the impairment of health care practitioners is focused on the individual practitioner level. VDH, in licensing a number of health care providers, does not have standards that specifically address the issue of alcohol- or drug-impairment of health care staff. Instead, facilities are expected to have appropriate policies regarding such impairment. Any allegations that a facility was not addressing problems would be investigated by VDH with the facility being cited for

the deficiency and the impaired practitioner being reported to the appropriate regulatory board. Virginia's 13 health regulatory boards have the authority to discipline regulated health care practitioners. Any regulated practitioner who suffers from substance abuse problems may be required to receive treatment or face disciplinary action. *Code of Virginia* § 54.1-2400 grants the health regulatory boards the authority to "revoke, suspend, restrict, or refuse to issue or renew a registration, certificate or license" for violation of any law or Board Regulation. In addition, Board action can be taken promptly before any hearing is held, "if the relevant board finds that there is a substantial danger to the public health or safety which warrants this action." Moreover, any practitioner who continues to practice without a valid license can be charged with a Class 6 felony.

Unprofessional conduct or specific instances of prohibitions against alcohol- or drug-use by health care professionals are defined within each profession's individual chapter of the *Code of Virginia*. Section 54.1-3007 states that the Board of Nursing may refuse to issue, revoke, or suspend a certificate or license because of evidence of "use of alcohol or drugs to the extent that such use renders him unsafe to practice...." Language in § 54.1-3316 includes similar language noting that the "Board of Pharmacy may revoke, suspend or refuse to issue or renew any license, permit, or registration or may deny any application if it finds that the applicant...[u]ses drugs or alcohol to the extent that he is rendered unsafe to practice pharmacy...." Section 54.1-2914 which addresses the Board of Medicine indicates that a practitioner "shall be considered guilty of unprofessional conduct if he...[i]s unable to practice with reasonable skill or safety because of illness or substance abuse...."

The Health Practitioners' Intervention Program Assists Health Care Professionals in Addressing Substance Abuse Problems

The Health Practitioners' Intervention Program (HPIP) is one innovative way that health care professionals in Virginia are assisted in addressing substance abuse problems. Legislation passed during the 1997 Session of the General Assembly established the HPIP in *Code of Virginia*, Title 54.1 Chapter 25.1. By statute, the Director of the Virginia Department of Health Professions (VDHP) was required to establish a comprehensive intervention program which would be "an alternative to disciplinary action" for health practitioners suffering impairments. "Impairment" is defined within the statute as "a physical or mental disability, including, but not limited to substance abuse, that substantially alters the ability of

the practitioner to practice his profession with safety to his patients and the public."

HPIP is overseen by a Health Practitioners' Intervention Committee composed of seven health care practitioners appointed by the Director of VDHP. VDHP has contracted with Virginia Monitoring, Incorporated to work with practitioners who have impairments that involve substance abuse, mental health, or physical problems that interfere with their ability to practice their profession. Practitioners may directly request assistance from Virginia Monitoring, may be referred by other practitioners, or may be required to work with Virginia Monitoring. In some instances, practitioners who have been reported to their respective regulatory Boards because of significant impairment may receive a hearing stay if they agree to receive help through Virginia Monitoring. This stay of hearing is only available for practitioners who have not violated any law (with the one exception being the diverting of drugs for one's own use) and have not harmed any patients because of their impairment. Practitioners who have Board hearings due to impairment may be directed as a requirement for full reinstatement to receive help through Virginia Monitoring.

Virginia Monitoring determines treatment needs, makes referrals to treatment providers, monitors treatment compliance, and establishes the recovery contract for each practitioner in the program. Practitioners who are referred for substance abuse problems will be required to submit to substance abuse testing as part of the treatment regimen and as part of the recovery contract. The recovery contract includes continued monitoring of the practitioner for five years after his return to work. Virginia Monitoring reports to the appropriate regulatory Board on any practitioner who does not satisfactorily participate in Board-mandated treatment.

Figures 6 and 7 describe some characteristics of the practitioners who were receiving services from Virginia Monitoring in July of this year. Figure 6 presents some demographic information including data which indicate 359 or 64 percent of the participants were women. Eighty-six percent of the participants were being treated for substance abuse problems with nearly one-half reporting opiate use and nearly one-third reporting alcohol use. ("Polysubstance" use indicates that more than one substance such as alcohol and cocaine were abused in combination.) Figure 7 indicates the regulatory Board affiliation for each of the practitioners receiving services. As shown, 355 or 63 percent of the practitioners were regulated by the Board of Nursing, 131 or 23 percent

Figure 6
Health Practitioners' Intervention Program Report
on Cases Active as of July 31, 2000

SEX	FEMALE			MALE	
	359			204	
AGE	18-30	31-40	41-50	51-60	>60
	62	191	226	72	10

PRIMARY DIAGNOSIS	CHEMICAL DEPENDENCY	PSYCHOLOGICAL PROBLEMS	DIAGNOSIS PENDING
	484	76	3

REASON FOR REFERRAL	SUBSTANCE ABUSE DEFINITELY INVOLVED	SUBSTANCE ABUSE MAY NOT BE INVOLVED
Diversion of Drugs	159	
Prescription Forgery	51	
Suspected Use at Work	31	
Use at Work	22	
Illegal Drug Use	16	
Positive Urine Drug Screen	10	
Licensure Issues		141
Request for Help		92
Psychiatric Issues		13
Arrest		13
Other		9
Impairment		5
Unknown		1
TOTAL	**289**	**274**

DRUG USED*	NUMBER OF CLIENTS	PERCENTAGE OF CLIENTS
Opiates	268	48%
Alcohol	164	29%
Cocaine	44	8%
Benzodiazopine	35	6%
Polysubstances	28	5%
Marijuana	11	2%
Amphetamines	4	1%
Other	2	<1%
Barbituates	1	<1%
PCP	1	<1%
TOTAL	**558**	

*Some clients used more than one type of drug.

Source: Health Practitioners' Intervention Committee Report.

Figure 7
Health Practitioners' Intervention Program Report
on Board Affiliation for Active Cases as of July 31, 2000

Regulatory Board		No. Licensees in HPIP	Total No. Licensees	% of Total
Nursing		**355**	**149,184**	**0.24%**
	RNs	231		
	LPNs	89		
	CNAs	22		
	Nurse Practitioners and Certified Registered Nurse Anesthetists	12		
	Massage Therapists	1		
Medicine		**131**	**44,390**	**0.30%**
	Medicine and Surgery	112		
	Respiratory Therapists	5		
	Physician's Assistants	4		
	Interns and Residents	4		
	Chiropractic	3		
	Radiological Technologists	2		
	Podiatry	1		
Pharmacy		**37**	**11,135**	**0.33%**
Dentistry		**16**	**8,297**	**0.19%**
Social Work		**8**	**3,915**	**0.20%**
Counselors, Marriage and Family Therapists, and Substance Abuse Professionals		**5**	**6,304**	**0.08%**
Veterinary Medicine		**5**	**4,150**	**0.12%**
Psychology		**2**	**1,914**	**0.10%**
Physical Therapy		**2**	**5,264**	**0.04%**
Optometry		**1**	**1,386**	**0.07%**
Funeral Directors and Embalmers		**1**	**2,405**	**0.04%**
Nursing Home Administrators		**0**	**910**	**0%**
Audiology and Speech Pathology		**0**	**2,226**	**0%**
TOTAL		**563**	**241,480**	**0.23%**

*All of the numbers of regulated licensees reflect the number who were regulated in 1998, except the figures for the Board of Physical Therapy, a Board that was established in July 2000.

Source: Health Practitioners' Intervention Committee Report, JLARC Report *Final Report: Review of the Health Regulatory Boards*, and Virginia Department of Health Professions staff.

were regulated by the Board of Medicine, and 37 or 6 percent were regulated by the Board of Pharmacy. When these participation figures are examined as a percentage of the number of providers regulated by each of the Boards, fewer than one percent are currently in the program.

VDHP officials indicated that they consider the program to be a very worthwhile means of helping practitioners receive assistance with their problems. The overwhelming majority of practitioners agree to participate in treatment rather than go through a lengthy Board hearing.

The State Health Commissioner Identified Several Issues that Should Be Considered Regarding SB 557; A Recent JLARC Report Identified an Action that Potentially Could Increase the Number of Impaired Practitioners Who Are Identified for Treatment

The State Health Commissioner identified issues to consider in contemplating whether drug-testing requirements should be imposed on health care providers. The Commissioner indicated that it seems the current regulatory system which is based on providing oversight at the practitioner level through the various regulatory boards is working well. If the current system is not working well, it would be important to determine the magnitude of the problem and whether the level of government involvement that drug-testing mandates would represent is needed. Finally, it would be important to determine whether mandatory drug testing would be a cost-effective means of addressing any problems that exist.

The findings of a recent study by the Joint Legislative Audit and Review Commission (JLARC) of Virginia's Health Regulatory Boards are relevant to the issue of impaired health care practitioners. The JLARC study concluded that the Boards' disciplinary process "generally works well." In the report, however, JLARC recommended an action that would be useful in helping to identify practitioners who are impaired. That recommendation involves extending requirements to report any unprofessional conduct by a practitioner which would include substance abuse to VHDP. Currently only practitioners licensed by the Board of Medicine are required to make such reports. These practitioners are also granted immunity from civil or criminal action for making such reports. (As previously noted, § 54.1-2906 of the *Code of Virginia* requires hospitals and other health care institutions to report on any impaired health professionals.) The JLARC report cited the concerns of one Board director who indicated she received "a number of calls from practitioners...who have serious concerns about fellow practitioners but are unwilling to make such reports under current law because they have no immunity." Requiring all licensed individuals to report unprofessional, incompetent,

or substandard care by any other individual licensed by the same board likely would increase the number of impaired providers who are reported to their respective boards.

IV.
Policy Options

The following Policy Options are offered for consideration by the Joint Commission on Health Care. They do not represent the entire range of actions that the Joint Commission may wish to pursue with regard to the issue of drug-free workplace policies and drug testing for health care providers in Virginia.

Option I **Take No Action**

Option II **Recommend that Senate Bill 557 be reported by the Senate Committee on Education and Health as introduced.**

Option III **Recommend that Senate Bill 557 be reported by the Senate Committee on Education and Health with one or more of the following amendments:**

A. **Adding language to require that the regulations drafted and promulgated by the Board of Health be developed in conjunction with the Office of the Attorney General;**

B. **Adding language that requires drug testing only for "safety-sensitive" positions as defined in the regulations adopted by the Board of Health;**

C. **Adding language that would require drug testing only in certain circumstances such as "for cause" or pre-employment;**

D. **Adding language that clarifies drug testing includes testing for alcohol impairment;**

E. **Modifying the provisions of the bill such that health care providers would be required to adopt drug-free workplace policies consistent with applicable provisions of the federal Drug-Free Workplace Act, but would not be required to conduct employee drug testing.**

Option IV

Introduce legislation requiring all individuals licensed by Virginia's health regulatory boards to report unprofessional, incompetent, or substandard conduct or care by any other individual licensed by the same board; and providing immunity from liability resulting from such report. ***[This option would implement a 1999 recommendation of the Joint Legislative Audit and Review Commission.]***

APPENDIX A

SENATE OF VIRGINIA

WARREN E. BARRY
37TH SENATORIAL DISTRICT
PART OF FAIRFAX AND
PRINCE WILLIAM COUNTIES, AND
PART OF THE CITY OF FAIRFAX
POST OFFICE BOX 1146
FAIRFAX, VIRGINIA 22030-1146

COMMITTEE ASSIGNMENTS:
EDUCATION AND HEALTH, CHAIR
COMMERCE AND LABOR
FINANCE
TRANSPORTATION
RULES

May 11, 2000

The Honorable Kenneth R. Melvin, Chairman
Joint Commission on Health Care
1001 East Broad Street
Richmond, Virginia 23219

Dear Delegate Melvin:

During the 2000 Session, the Senate Committee on Education and Health considered SB 557, patroned by Senator Potts, relating to drug-testing policies in certain health care settings (see enclosed bill). This bill would have required every health care provider regulated by the Board of Health to initiate drug-free workplace initiatives. Although the members considered this bill to have merit, they felt that the many issues relating to the federal Drug-Free Workplace Act, state and federal constitutional constraints on allowable drug-testing policies, and employee and employer concerns required additional study. Thus, upon the recommendation of the Health Care Subcommittee, the Committee approved a motion to carry this bill over to the 2001 Session and to request the Joint Commission on Health Care to study the issues presented by SB 557.

Therefore, I respectfully request, on behalf of the members of the Senate Committee on Education and Health, that the Joint Commission on Health Care include this matter in its study plan for the 2000 interim and provide the Committee with any recommendations on this matter at the Commission's earliest convenience in order for the Committee to make an informed decision before December 20.

Thank you in advance for your consideration of this request.

Sincerely,

Warren E. Barry

Senator Warren E. Barry
Chairman
Senate Committee on Education and Health

cc: Members, Senate Committee on Education and Health
Mr. Patrick W. Finnerty, Executive Director, Joint Commission on Health Care

APPENDIX B

005411512

SENATE BILL NO. 557

Offered January 24, 2000

A BILL to amend the Code of Virginia by adding a section numbered 32.1-11.5, relating to drug testing in health care institutions.

Patron—Potts

Referred to Committee on Education and Health

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 32.1-11.5 as follows:

§ 32.1-11.5. Drug-testing policies required in certain settings; Board to promulgate regulations.

A. Every health care provider required to comply with Chapter 4 (§ 32.1-102.1 et seq.) or Chapter 5 (§ 32.1-123 et seq.) of this title shall, on and after July 1, 2001, initiate a drug-free workplace program in accordance with the regulations of the Board.

B. The Board shall promulgate regulations establishing the components of the drug-free workplace programs required by this section. The Board's regulations shall include, but need not be limited to:

1. Differentiated requirements for various categories of health care providers in compliance with the federal Drug-Free Workplace Act (41 U.S.C. § 701), as amended;

2. Allowable drug-testing policies, in compliance with the federal Drug-Free Workplace Act (41 U.S.C. § 701), as amended, and any applicable federal court decisions, including appropriate policies relating to proper notice and disclosure of the drug-testing policy, privacy assurances during and after testing, confidentiality protections for test results, the consequences of refusing to take any drug test, appropriate disciplinary actions and consequences, the employees' right to contest or explain the test results, the types of testing that may be required, and the appropriate bases and situations for drug testing, including the circumstances which may be presumed to give rise to reasonable suspicion of substance abuse; and

3. Recommendations for substance abuse education and assistance programs.

2. That the Board of Health shall promulgate regulations to implement the provisions of this act to be effective within 280 days of its enactment.

005411512

SB557

1/25/00 11:18

Official Use By Clerks

Passed By The Senate		Passed By The House of Delegates	
without amendment	☐	without amendment	☐
with amendment	☐	with amendment	☐
substitute	☐	substitute	☐
substitute w/amdt	☐	substitute w/amdt	☐

Date: _____ Date: _____

Clerk of the Senate

Clerk of the House of Delegates

APPENDIX C

JOINT COMMISSION ON HEALTH CARE

SUMMARY OF PUBLIC COMMENTS:
Drug Testing Study
SB 557

Individuals/Organizations Submitting Comments

A total of five organizations submitted comments in response to the Drug Testing Report.

- The Medical Society of Virginia
- Virginia Association of Nonprofit Homes for the Aging
- Virginia Dental Association
- Virginia Health Care Association
- Virginia Hospital and Healthcare Association

Policy Options Included in the Drug Testing Issue Brief

Option I **Take No Action on Senate Bill 557**

Option II **Recommend that Senate Bill 557 be reported by the Senate Committee on Education and Health as introduced.**

Option III **Recommend that Senate Bill 557 be reported by the Senate Committee on Education and Health with one or more of the following amendments:**

A. Adding language to require that the regulations drafted and promulgated by the Board of Health be developed in conjunction with the Office of the Attorney General;

B. Adding language that requires drug testing only for "safety-sensitive" positions as defined in the regulations adopted by the Board of Health;

C. Adding language that would require drug testing only in certain circumstances such as "for cause" or pre-employment;

D. Adding language that clarifies drug testing includes testing for alcohol impairment;

E. Modifying the provisions of the bill such that health care providers would be required to adopt drug-free workplace policies consistent with applicable provisions of the federal Drug-Free Workplace Act, but would not be required to conduct employee drug testing.

Option IV: Introduce legislation requiring all individuals licensed by Virginia's health regulatory boards to report unprofessional, incompetent, or substandard conduct or care by any other individual licensed by the same board; and providing immunity from liability resulting from such report. *[This option would implement a 1999 recommendation of the Joint Legislative Audit and Review Commission.]*

Overall Summary of Comments

Option I was supported by four of the five commenters. The fifth commenter (the Virginia Hospital and Healthcare Association) supported Option IV. Although The Medical Society of Virginia prefers taking no action (Option I), Option IV was supported if "any action should be taken."

Summary of Individual Comments

The Medical Society of Virginia

Marni Langbert Eisner, Director of Legislative Affairs, indicated that the "best course of action would be Option I – Take no action" with Option IV being recommended if some type of action were to be taken. Ms. Eisner stated: "It seems clear from the draft report that, at least where the physician community is concerned, there are many programs in place that capture that population. First, many hospitals in the Commonwealth indicated that they already have workplace drug policies in place....This coupled with what we see as a trend among our membership of more pre-employment testing and workplace policies would lead us to believe that the problem is already being responsibly and proactively addressed by the entire health care community....It is our contention that the medical community has been very responsive to the concerns addressed in this report. If any actions should be taken, the Medical Society would recommend the implementation of Policy Option IV which would hold all individuals licensed by Virginia's health regulatory boards to report unprofessional conduct, which would include substance abuse, like the licensees of the Board of Medicine are already required to do."

Virginia Association of Nonprofit Homes for the Aging

Marcia A. Melton, Vice President of Public Policy commented in support of Option I.

Virginia Dental Association

Terry Dickinson, D.D.S., Executive Director, commented in support of Option I. Dr. Dickinson stated: "The Virginia Dental Association has a high level of concern for maintaining a drug-free workplace, especially as it relates to health care providers. The VDA has a standing committee in place to do what is possible to ensure that drug-free environments are the standard in dental offices....It is also the feeling of the Virginia Dental Association that the statutes in Virginia provide the Virginia Board of Dentistry with sufficient regulatory ability to investigate any suspicions and restrict/suspend the license of an impaired practitioner. With these policies in place, the Virginia Dental Association believes that action is not necessary at this time."

Virginia Health Care Association

Mary Lynne Bailey, Vice President, Legal and Government Affairs, indicated support for Option I. In commenting on Option I, Ms. Bailey stated: "Members of the Virginia Health Care Association do not tolerate employees working while under the influence of drugs or alcohol....The fact is that employers already have the tools to address the problem of substance abuse in the workplace. Employees can be tested (both before employment and after) and can be disciplined or even terminated. We support Policy Option I: Take No Action. We see no reason to place this additional mandate on health care employers."

Virginia Hospital and Healthcare Association

Susan C. Ward, Vice President and General Counsel, commented in support of Option IV. Ms. Ward indicated: "We support Option IV which suggests that legislation be introduced to require all licensed health care providers to report inappropriate conduct of any peer to the governing health professions regulatory board and to provide immunity from liability for such reports. Hospitals already are required to submit such reports; the change recommended in Option IV will close a gap by encouraging reporting by those individuals who may be most likely to identify practitioners' substance abuse problems. Identified problems can then be remedied using existing programs."

JOINT COMMISSION ON HEALTH CARE

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