The Drug War in the Workplace: Employee Drug Testing Under Collective Bargaining Agreements

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THE DRUG WAR IN THE WORKPLACE: EMPLOYEE DRUG TESTING UNDER COLLECTIVE BARGAINING AGREEMENTS

The national "war on drugs" has steadily intensified as the issue of drug abuse has moved to the forefront of the political agenda.¹

¹ See Text of President's Speech on National Drug Control Strategy, N.Y. Times, Sept. 6, 1989, at B6, col. 1. In a televised speech on September 5, 1989, President Bush outlined his $7.9 billion plan to combat the national drug crisis, in which he stated that "the gravest domestic threat facing our nation today is drugs." Id. The President's plan was the most comprehensive drug control strategy ever sent to Congress. Id. The President noted that there had been a 38% decline in overall drug use since 1985, when an estimated 23 million Americans were using drugs on a current basis. Id. That figure, however, obscured the more ominous figures detailing a sharp increase in cocaine usage. Id. Roughly eight million Americans used cocaine in 1988, almost one million of whom used the drug "frequently, once a week or more." Id. The President stressed four major elements of his drug strategy: (1) increased federal assistance to state and local law enforcement; (2) increased federal assistance to foreign nations battling drug cartels; (3) federal funding of drug treatment and rehabilitation facilities increased by $322 million; and (4) federal funding of school and community drug education and prevention programs increased by $250 million. Id.

President Bush was not the first President to declare war on drugs. See "Growing Menace" of Drugs - Nixon's Plan to Fight It, U.S. News & World Rep., July 28, 1969, at 60. President Nixon, in a 1969 message to Congress, declared that:

Within the last decade, the abuse of drugs has grown from essentially a local police problem into a serious national threat to the personal health and safety of millions of Americans.

A national awareness of the gravity of the situation is needed; a new urgency and concerted national policy are needed at the federal level to begin to cope with this growing menace to the general welfare of the United States.
The deleterious effects of the drug epidemic permeate many aspects of American society. One measure implemented to combat the drug problem which has commanded much attention and caused great controversy is mandatory drug testing in the workplace. Employers in both the public and private sectors have instituted drug testing programs to uncover and deter employee drug use. The reason for the proliferation of these programs is clear.

*Id.* See also *President Calls for Comprehensive Drug Control Program, 65 DEP'T ST. BULL. 58, 58* (July 12, 1971) (President Nixon announced $371 million multifaceted drug strategy); *Broader Attack on Drug Abuse, U.S. NEWS & WORLD REP., Mar. 23, 1970, at 38* (President Nixon announced a series of programs to combat drug abuse in schools).

The war on drugs continued under President Ford who acknowledged the failure of past actions to curb drug abuse; accordingly, he urged a shift in the national policy on controlling drug abuse. *See N.Y. Times, Oct. 15, 1975, at A1, col. 4.* President Ford released a “White Paper” which specified that federal drug control efforts be concentrated on those substances which pose the greatest risk to the public and the user; alternatively, “less destructive” drugs, such as marijuana, would be controlled with lower priority enforcement. *Id.*

In 1986, a flurry of political activity erupted as the Democratic and Republican parties sought to “seize” the drug issue. *See N.Y. Times, Aug. 8, 1986, at A1, col. 6.* The Reagan Administration was told by Republican congressmen to act quickly in proposing legislation to combat the use of drugs or they would feel forced to endorse a comprehensive 2-3 billion dollar antidrug bill proposed by House Democrats. *Id.* See also *N.Y. Times, Aug. 2, 1986, at A1, col. 3* (House Democrats prepared antidrug legislation).

*See, e.g.,* Fotos, *NTSB Asserts Captain's Cocaine Use Contributed to Crash of Continental Express Metro 3, AVIATION WEEK & SPACE TECH., Feb. 6, 1989, at 59* (National Transportation Safety Board cited cocaine use as contributing to commercial aviation accident); Morganthau, *Losing the War?*, NEWSWEEK, Mar. 14, 1988, at 16 (drug related street crime surged in urban areas); Sheets, *From Hot Tips to Hard Drugs-Another Wall Street Bust*, U.S. NEWS & WORLD REP., Apr. 27, 1987, at 55 (16 stock brokerage employees arrested for selling cocaine and trading drugs for stock “tips” and lists of preferred customers); Beck, *Nurses With Bad Habits*, NEWSWEEK, Aug. 22, 1983, at 54 (drug abuse among nurses 30 to 50 percent higher than general population, and manifests itself, in some instances, in diversion of medication from patient to personal use).

*See Finding a Middle Between Fairness and Efficiency,* N.Y. Times, Sept. 7, 1986, at A6, col. 1. The author noted that whatever the incidence of drug use in the American workplace, the incidence of drug testing by employers is rising rapidly. *Id.* In a poll released in September of 1986, 44 percent of those polled supported supported drug testing while 44 percent opposed such testing. *Id.* The proponents of drug testing stated that such tests were a reasonable requirement and would effectively deter drug use, while opponents contended that the tests were unreasonably invasive and unreliable. *Id.* See also Tolchin, *Government Still Waits to Test Millions for Drugs,* N.Y. Times, March 26, 1989, § 4, at 5, col. 1 (forty pending federal lawsuits seeking to block random drug testing of over 400,000 federal employees on constitutional grounds).

*See Exec. Order No. 12,564, 51 Fed. Reg. 32,889* (1986). The President’s order declared that the “Federal government, as the largest employer in the Nation, can and should show the way toward achieving drug-free workplaces through a program . . . [of rehabilitation, while demonstrating] . . . that drug use will not be tolerated in the Federal workplace.” *Id.* The Order called upon all executive agency heads to establish a drug testing program for agency employees in “sensitive positions.” *Id.* The program was to take
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when viewed in light of the dramatic decline in American productivity, and the concomitant increase in drug related incidents on the job.\(^5\)

The validity of drug testing programs has been challenged on various legal grounds by employees in both the public and private sectors.\(^6\) Recently, the National Labor Relations Board (NLRB) into account the nature of the agency’s mission, the employee’s duties and the potential consequences of employee drug use to public health and safety and the national interest. \(I d.\) See also Feature Report, President Issues Executive Order on Drug Testing of Federal Workers, 24 Gov’t Empl. Rel. Rep. (BNA) 1267, 1268 (1986) (one avowed purpose of Presidential Order was to establish federal programs as model for private sector); White House Fact Sheets on President’s Commitment to National Crusade Against Drugs, and Executive Order on Drug-Free Federal Workplace, 24 Gov’t Empl. Rel. Rep. (BNA) 1298, 1299 (1986) (Presidential Order to establish anti-drug policy and achieve drug-free workplace).

As President Reagan had hoped, many private sector companies instituted employee drug testing programs similar to those mandated by the Executive Order. \(S e e\) Kupfer, \textit{Is Drug Testing Good or Bad?}, \textit{FORTUNE}, Dec. 19, 1988, at 133. During 1988, American laboratories processed between 15 and 20 million drug tests and approximately half of those tests were for private sector companies of which 85% were for preemployment screening. \(I d.\) Businesses paid about $200 million in 1988 for drug testing, a figure experts believe will reach an estimated $500 million by 1991. \(I d.\) See also Cox, \textit{Workers Win One on Drug Tests}, \textit{NAT’L L.J.}, Feb. 29, 1988, at 3, col. 1 (almost 50% of Fortune 500 companies conduct drug tests).


The profile of a typical recreational drug user in today’s work force shows an individual born between 1948 and 1965. Brecher, \textit{ supra} at 57. This individual is “late three times more often than fellow employees, requests early dismissal or time off during work 2.2 times more often, has 2.5 times as many absences of eight days or more, uses three times the normal level of sick benefits, is five times more likely to file a workman’s compensation claim and is involved in accidents 3.6 times more often than other employees.” \(I d.\) See also \textit{Test for Drugs? Yes and No}, \textit{N.Y. Times}, Aug. 12, 1986, at A24, col. 1 (editorial) (drug use costs companies “tens of billions” in health insurance expenses yearly).

\(^6\) See, \textit{e.g.}, \textit{National Treasury Employees Union v. Von Raab}, 109 S. Ct. 1384, 1389 (1989) (government employees challenged drug testing program based on fourth amendment protection against unreasonable searches and seizures); Association of W. Pulp and Paper Workers \textit{v. Boise Cascade Corp.}, 644 F. Supp. 183, 185 (D. Or. 1986) (union challenged drug testing program as violation of state worker’s compensation and breathalyzer
decided two cases involving mandatory drug testing in the private sector which have more clearly defined the rights of employees and prospective employees under collective bargaining agreements.7

This Note will examine the safeguards available to employees in unionized workplaces against what are seen as unreasonable intrusions into their privacy. First, it will address the safeguards provided by federal labor law and collective bargaining agreements between employers and employees. The primary focus of this discussion will be upon employers’ unilateral implementation of employee drug testing programs under management rights provisions in collective bargaining agreements.8 Next, it will suggest a standard of uniformity in relation to unilateral implementation of drug testing programs under management rights provisions. Fi-


Collective bargaining as contemplated by the National Labor Relations Act has been defined as:

a procedure looking toward making of collective agreements between an employer and accredited representative of employees concerning wages, hours, and other conditions of employment, and requires that parties deal with each other with open and fair minds and sincerely endeavor to overcome obstacles existing between them to the end that employment relations may be stabilized and obstruction to the free flow of commerce prevented.


8 See generally M. HILL & A. SINICKI, MANAGEMENT RIGHTS (1986). Management rights provisions entail those rights reserved to management and are, in most instances, found in the collective bargaining agreement and labeled accordingly. Id. Rights retained by the union can be found throughout the agreement, classified according to subject matter. Id. at 134. In a Bureau of National Affairs survey of 400 labor agreements, 76% were found to include provisions regarding management rights. Id. These provisions preserved to management such items as direction of the working force, management of the business, and control of production methods. Id.
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nally, it will consider the role of arbitration in determining the scope of collective bargaining agreements with regard to agreements containing express drug testing provisions, as well as those silent as to employee drug testing.

BACKGROUND: THE RIGHT TO PRIVACY

Although the United States Constitution does not expressly provide individuals with a right to privacy, it has been established by the Supreme Court that individuals enjoy a fundamental right to be free from unreasonable intrusions into their privacy.\(^9\) Justice Brandeis, in his oft-quoted passage, described privacy as "the right to be let alone - the most comprehensive of rights and the right most valued by civilized men."\(^10\) An individual’s expectation of privacy is deemed legitimate if society is prepared to accept it as being reasonable.\(^11\) However, when determining what constitutes a reasonable expectation of privacy, there is no "bright-line" standard to be applied; rather, the standard differs according to

\(^9\) See Roe v. Wade, 410 U.S. 113, 152 (1973). “[T]he Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.” Id. “[O]nly personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty’ are included in this guarantee of personal privacy.” Id. (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)). The fourth amendment creates, at least derivatively, a right to privacy. Id.; Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (zones of privacy created by “penumbras formed by emanations” from specific Bill of Rights guarantees). See also Terry v. Ohio, 392 U.S. 1, 9 (1968) (“[W]herever an individual may harbor a reasonable expectation of privacy he is entitled to be free from unreasonable governmental intrusion.”); Katz v. United States, 389 U.S. 347, 350 (1967) (specific provisions of Constitution protect personal privacy from some forms of government intrusions). See generally Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890) (seminal dissertation on origins and scope of right of privacy).


\(^11\) See Katz, 389 U.S. at 361 (Harlan, J., concurring). Justice Harlan submitted that there is a twofold requirement with respect to an individual's expectation of privacy. Id. “[F]irst, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable.” Id. See also Terry, 392 U.S. at 9 (Court officially adopted Justice Harlan's “reasonable expectation of privacy” standard).

the context in which it is raised. Recently, privacy rights have been implicated in cases involving the mandatory drug testing of employees in the public sector, primarily because urinalysis infringes upon an activity which is considered to be among those that are the most personal and private in society.

I. LABOR UNIONS AND MANDATORY DRUG TESTING

A. Collective Bargaining - Safeguarding Employee Rights

Generally, employers in the private sector enjoy wide latitude in instituting mandatory drug testing programs. However, private

\[12\] See O'Connor, 480 U.S. at 715. The Court declared that there is no ""talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable." Id.; T.L.O., 469 U.S. at 337 (reasonableness of search depends on context in which it occurs); Terry, 392 U.S. at 9 ("[T]he specific content and incidents of this right [to be free from governmental intrusion] must be shaped by the context in which it is asserted."). See also Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967) ("[T]here can be no ready test for determining reasonableness other than balancing the need to search against the invasion which the search entails.").

\[13\] See Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1413 (1989). In Skinner, the Court stated that:

There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom. Id. (quoting National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987)). See also Lovvorn v. City of Chattanooga, Tenn., 846 F.2d 1539, 1543 (6th Cir. 1988) ("There are few other times where individuals insist as strongly and universally that they be let alone to act in private" than when urinating); Schail v. Tippecanoe County School Corp., 864 F.2d 1309, 1312 (7th Cir. 1988) (society expects urination to be performed in private); Fried, Privacy, 77 YALE L.J. 475, 487 (1968) (excretory functions shielded by absolute privacy and to extent this privacy is violated it "detract[s] from one's dignity and self esteem").

In addition to the privacy concerns inherent in conducting drug testing, "one clearly has a reasonable and legitimate expectation of privacy in personal information contained in his body fluids" that may be discovered upon analysis. McDonnell v. Hunter, 612 F. Supp. 1122, 1127 (D.C. Iowa 1985). See Miller, Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment, 48 U. PRR. L. REV. 201, 206-07 (1986). "[I]f allowed free reign over employees urine specimen, the employer can learn physiological secrets . . . which go far beyond the existence of drugs. A urine specimen can . . . reveal whether an employee is pregnant, is using licit medications, or is being treated for a heart condition, manic-depression, epilepsy, diabetes or schizophrenia." Id.

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sector employers of unionized workers are required to operate within certain constraints established by the National Labor Relations Act (NLRA)\(^\text{16}\) and the Railway Labor Act (RLA).\(^\text{16}\)

1. **National Labor Relations Act**

The NLRA mandates that employers bargain in good faith with unions on issues involving "wages, hours, and other terms and conditions of employment."\(^\text{17}\) The United States Supreme Court, in *Ford Motor Company v. NLRB*,\(^\text{18}\) espoused a two-prong test to determine when an issue is a mandatory subject of bargaining, considering first, whether the matter in dispute is "plainly germane to the 'working environment,'" and second, whether such matter is "not among those 'managerial decisions which lie at the core of entrepreneurial control.'"\(^\text{19}\)

In *Johnson-Bateman Company*,\(^\text{20}\) a concrete pipe manufacturer unilaterally implemented a work related rule requiring employees who receive medical treatment for injuries sustained on the job to


\(^{18}\) 29 U.S.C. § 158(d) (1982). The section provides, in pertinent part, that:

[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

\(^{19}\) See id. at 498 (quoting Fiberboard Corp. v. NLRB, 379 U.S. 203, 222-23 (1964) (Stewart, J., concurring)). The Court, in *Ford Motor Co.*, determined that where an employer had, on its own initiative provided its employees with an eating facility at their place of employment, the price at which food was offered was a mandatory subject of bargaining. *Id.* First, the Court noted that the circumstances under which the food was made available were clearly relevant to the working environment. *Id.* Second, the Court observed that the employer was not in the business of selling food for profit, and the pricing of the available food was not a managerial decision which involved the operation of the business. *Id.*

submit to drug testing. The employees' union filed an unfair labor practice charge claiming that their employer had implemented the drug testing program without providing the union with prior notice and an opportunity to bargain. In determining whether the work rule involved a mandatory subject of bargaining, the NLRB applied the two-prong test promulgated by the Supreme Court. First, the NLRB determined that since continued employment was potentially contingent upon test results, the drug testing program was "plainly germane to the working environment." Next, the NLRB found that the implementation of the drug testing program was not aimed at changing the nature of the employer's enterprise, therefore, it was "not among those 'managerial decisions, which lie at the core of entrepreneurial control.'" Based upon the two preceding determinations, the

21 Johnson-Bateman Co., 295 N.L.R.B. No. 26, 131 L.R.R.M. 1393, 1395 (June 15, 1989). On December 1, 1986, the Johnson-Bateman Company posted notice that, effective immediately, all injuries in the workplace which required medical treatment would be accompanied by a drug/alcohol test. Id., 131 L.R.R.M. at 1395. This notice was posted without prior notification to, or bargaining with, the union. Id., 131 L.R.R.M. at 1395.

22 See Johnson-Bateman Co., 295 N.L.R.B. No. 26, 131 L.R.R.M. 1393, 1395 (June 15, 1989). The union's complaint alleged that the unilateral implementation of a drug testing program violated Section 8(a)(5) and (1) of the National Labor Relations Act (codified at 29 U.S.C. § 158(a)(5) and (1)). Id., 131 L.R.R.M. at 1395.

23 29 U.S.C. § 160 (1976). The National Labor Relations Board (NLRB) is authorized to conduct investigations into unfair labor practice charges, hold adjudicatory hearings, issue cease and desist orders, award affirmative remedies and, in appropriate cases, petition the federal courts for injunctive relief to effect the goals of the National Labor Relations Act. Id.


25 See Johnson-Bateman Co., 295 N.L.R.B. No. 26, 131 L.R.R.M. 1393, 1397 (June 15, 1989). The company had existing rules against the use or possession of alcohol and drugs on company premises. Id., 131 L.R.R.M. at 1397. The rules further prohibited reporting for work while under the influence of alcohol or drugs. Id., 131 L.R.R.M. at 1397. Violation of these rules was punishable by disciplinary action, including discharge. Id., 131 L.R.R.M. at 1397.

26 Johnson-Bateman Co., 295 N.L.R.B. No. 26, 131 L.R.R.M. 1393, 1396 (June 15, 1989). The NLRB found drug testing to be most closely analogous to physical examinations and polygraph testing, both of which have been determined to be germane to the working environment. Id., 131 L.R.R.M. at 1396.

27 Johnson-Bateman Co., 295 N.L.R.B. No. 26, 131 L.R.R.M. 1393, 1397 (June 15, 1989). The institution of a drug testing program did not involve "the commitment of investment capital and could not be characterized as a decision taken with a view toward changing the scope or nature of the enterprise." Id., 131 L.R.R.M. at 1397. Rather, it was a more limited decision "directed toward reducing workplace accidents and attendant insurance rates." Id., 131 L.R.R.M. at 1397.
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NLRB concluded that the drug testing program was a mandatory subject of bargaining. Additionally, the NLRB held that the broad terms in the contract's "management rights" clause were not sufficient to constitute a "clear and unmistakable" waiver of the employees' right to bargain over the implementation of the drug testing program.

In Star Tribune, an employees' union demanded to bargain over an aspect of their employer's new drug and alcohol policy which required drug testing of all applicants for employment. The employer rejected the union's demand, and unilaterally implemented the new drug testing policy for prospective employees. The union filed an unfair labor practice charge alleging that the employer's refusal to bargain violated the bargaining provisions of the NLRA. The NLRB held that applicants for employment did not fall within the statutory definition of "employees."

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89 See Johnson-Bateman Co., 295 N.L.R.B. No. 26, 131 L.R.R.M. 1993, 1394 (June 15, 1989). The parties' contract contained the following provision:

Section 3: Management's Rights

1. The management of the plant, direction of the working forces, and work affairs of the Company, including but not limited to the right . . . to discipline or discharge for just cause . . . to issue, enforce and change Company rules [is reserved to the Company] . . . Thus, the Company reserves and retains, solely [sic] and exclusively, all of the rights, privileges and prerogatives which it would have in the absence of this Agreement, except to the extent that such rights, privileges and prerogatives are specifically and clearly abridged by express provision of this Agreement.

Id., 131 L.R.R.M. at 1394.

90 See Johnson-Bateman Co., 295 N.L.R.B. No. 26, 131 L.R.R.M. 1993, 1399 (June 15, 1989). The NLRB found that the management rights clause which permitted the employer to unilaterally issue and change company rules was expressed in extremely general terms and made no specific reference to any particular subject matter, much less specific reference to drug testing. Id., 131 L.R.R.M. at 1399. Based on this finding, the NLRB held that the clause did not constitute an express, clear, unequivocal and unmistakable waiver by the union of its right to bargain over the drug testing program. Id., 131 L.R.R.M. at 1399.

92 Star Tribune, 295 N.L.R.B. No. 63, 131 L.R.R.M. 1404, 1406 (June 15, 1989). On several occasions the union told the employer that it considered all components of the company's new drug testing policy, including the aspect regarding testing of prospective employees, to be mandatory subjects of bargaining and demanded bargaining over the policy. Id., 131 L.R.R.M. at 1406.

93 Id., 131 L.R.R.M. at 1406.
94 Star Tribune, 295 N.L.R.B. No. 63, 131 L.R.R.M. 1404, 1406-07 (June 15, 1989). The union alleged that the employer had violated Section 8(a)(5) and (1) of the National Labor Relations Act Id., 131 L.R.R.M. at 1406-07.
thus, the employer was under no obligation to bargain over this subject.\textsuperscript{36} In addition, the NLRB rejected the argument that the testing of prospective employees was a mandatory subject of bargaining because it "vitally affect[ed] the terms and conditions of employment" of current union employees.\textsuperscript{37} An indirect or incidental impact upon the bargaining unit was held insufficient to establish a matter as a mandatory subject of bargaining.\textsuperscript{38} Consequently, a prospective employee is left with little or no protection against an employer who elects to test for illegal drugs.\textsuperscript{39}

2. Railway Labor Act

The Railway Labor Act (RLA), like the NLRA, imposes obligations on the part of railway and airline employers to bargain over

The NLRB utilized a statutory definition of "employee" which provides:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . . .

\textit{Id.}, 131 L.R.R.M. at 1408 n.8. The NLRB stated that the legislative history of the NLRA indicated that the term "employee" was not to be "stretched beyond its plain meaning embracing only those who work for another for hire." \textit{Id.}, 131 L.R.R.M. at 1408. The NLRB noted that "applicants perform no service for the employer, are paid no wages, and are under no restrictions as to other employment or activities." \textit{Id.}, 131 L.R.R.M. at 1408. Furthermore, the NLRB distinguished the prospective employment situation from other intermittent employment situations such as those arising from union hiring halls. \textit{Id.}, 131 L.R.R.M. at 1408. \textit{Cf.} Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 165-68 (1971) (Court found retirees did not fall within statutory definition of "employees").

\textsuperscript{36} Star Tribune, 295 N.L.R.B. No. 63, 131 L.R.R.M. 1404, 1410 (June 15, 1989). Having found prospective employees were not "employees" as defined by statute, the Board held that the employer was under no obligation to collectively bargain over the unilaterally implemented drug testing program with those applicants. \textit{Id.}, 131 L.R.R.M. at 1410.

\textsuperscript{37} Star Tribune, 295 N.L.R.B. No. 63, 131 L.R.R.M. 1404, 1409 (June 15, 1989). The NLRB defined the "vitally affects" standard as "including only those matters that materially or significantly affect current employees' terms and conditions of employment." \textit{Id.}, 131 L.R.R.M. at 1409 (quoting United Technologies Corp., 274 N.L.R.B. 1069 (1985) \textit{enforced} 789 F.2d 121 (2d Cir. 1986)). "['T]erms and conditions of employment' . . . does not include all subjects that may merely be of interest or concern to the parties." \textit{Id.}, 131 L.R.R.M. at 1409. That applicant testing will to some degree affect current employees does not, standing alone, vitally affect the terms and conditions of their employment. \textit{Id.}, 131 L.R.R.M. at 1409 (emphasis added).


\textsuperscript{39} See \textit{Note, Employee Drug Testing-Issues Facing Private Sector Employees}, 65 N.C.L. REV. 832, 836 (1987) (absent employment contract or union contract private sector employers' freedom to test employees "mostly unfettered").
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"pay, rules, and working conditions." An important and unique aspect of RLA jurisprudence is the differentiation of "major" and "minor" disputes. Under the RLA, a "major" dispute occurs when a party seeks to create contract rights, while a "minor" dispute occurs when a party seeks to enforce existing contract rights. In the event a dispute between an employer and employee is classified as a major dispute, the RLA requires the parties to undergo a protracted process of bargaining and mediation. Until the completion of this process, the parties are obligated to maintain the status quo and the employer may not unilaterally implement the contested change in rates of pay, rules, or working conditions. In contrast, if an employer/employee

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41 See Elgin, Joliet & Eastern Ry. v. Burley, 325 U.S. 711, 723 (1945). The Court described a major dispute as relating to:
disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past. Id. The Court went on to describe a minor dispute as one which:
contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation . . . .
Id.
42 Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 109 S. Ct. 2477, 2480 (1989). See International Bhd. of Teamsters, Local 19 v. Southwest Airlines Co., 875 F.2d 1129, 1133 (5th Cir. 1989) (en banc), cert. denied, 110 S. Ct. 838 (1990). The terms major and minor do not refer to the relative importance of the dispute, rather they refer to the bargaining context in which the dispute arises. Id. The Southwest court described major disputes as involving "proposals for new agreements or for changes in existing agreements." Id. The court proceeded to describe minor disputes as involving "grievances over the application of an existing agreement." Id.
43 45 U.S.C. § 152 Sixth, Eighth, Ninth (1982). The RLA requires that carriers and unions representing carriers' employees to make a reasonable effort "to settle all disputes in order to avoid any interruption to commerce." 45 U.S.C. § 152 First (1982). The RLA specifically delineates the procedures of mediation. Id. at §§ 151-56. The RLA provides that major disputes must first be mediated; if not resolved, the parties may agree to binding arbitration, or there is a possibility of presidential intervention. Id. at §§ 157, 159-60.
44 45 U.S.C. §§ 155 First, 156, 160 (1982). See Burlington N. R.R. Co. v. Brotherhood of Maintenance of Way Employees, 481 U.S. 429, 445 (1987). The Court noted that during the major dispute resolution procedures, the parties must abide by the existing agreement; only if these steps fail may the parties resort to self help through economic measures, or in the case of management, unilateral implementation of the disputed program. Id. See also Southwest Airlines, 875 F.2d at 1133 (parties must abide by existing agreements during course of mediation or arbitration); International Ass'n of Machinists v. Frontier
dispute is classified as minor, the RLA requires compulsory and binding arbitration before the appropriate adjustment board. However, the RLA does not prohibit unilateral implementation by the employer of the contested change in work related rules pending the results of arbitration when a dispute is classified as minor.

Recently, in Consolidated Rail Corporation v. Railway Labor Executives’ Association, the Supreme Court articulated a standard for differentiating between major and minor disputes under the RLA. The Court declared that “where an employer asserts a contractual right to take a contested action, the ensuing dispute is minor if the action is ‘arguably justified’ by the terms of the parties collective bargaining agreement.” In contrast, the Court provided that where an employer’s assertion of a contractual right is “frivolous or obviously insubstantial,” the dispute is major.

In Consolidated Rail, the employer, Consolidated Rail Corp. (Conrail), had required, since its formation in 1976, that its employees undergo physical examinations both periodically and upon returning from a leave of absence. In 1987, Conrail unilaterally

Airlines, Inc. 664 F.2d 538, 540-41 (5th Cir. 1981) (preservation of status quo throughout major dispute resolution procedures extremely important).

See Consolidated Rail, 109 S. Ct. at 2480. “A minor dispute in the railroad industry is subject to compulsory and binding arbitration before the National Railroad Adjustment Board, § 3 (codified at 45 U.S.C. § 153), or an adjustment board established by the employer and the unions representing the employees. § 3 Second (codified at 45 U.S.C. § 153 Second).” Id. at 2480-81. See 45 U.S.C. § 184 (1982). The RLA, as applied to the airline industry, created no national adjustment board; a minor dispute is resolved by an adjustment board established by the airline and the unions. Id.

Arbitration is the “reference of a dispute to an impartial (third) person chosen by the parties to the dispute who agree in advance to abide by the arbitrator’s award issued after a hearing at which both parties have had an opportunity to be heard.” BLACK’S LAW DICTIONARY 96 (5th ed. 1979). See generally T. OEHMKE, EMPLOYMENT, LABOR & PENSION ARBITRATION (1989) (comprehensive treatise on arbitration and arbitral procedure).

See Southwest Airlines, 875 F.2d at 1133 (unilateral action based on party’s interpretation of existing provisions in collective bargaining agreement not prohibited under RLA); Frontier Airlines, 664 F.2d at 541 (same).

Id. at 2482 (quoting Brotherhood of Maintenance of Way Employees v. Burlington N. Ry., 802 F.2d 1016, 1022 (8th Cir. 1986)). The Consolidated Rail Court noted that the “arguably justified” standard represented a relatively light burden which the employer must overcome in order to establish a minor dispute within the exclusive jurisdiction of the adjustment board. Id.

Id.

Id. at 2485. Conrail conducted physical examinations in three categories of cases. Id. First, it has always conducted periodic physical examinations which have routinely included
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amended its work rules to include drug testing as part of all periodic and return-from-leave physical examinations. Conrail asserted that its existing policy of conducting physical examinations arguably gave it the discretion to include drug testing in all physical examinations. The Court held that the addition of a drug testing component to routine physical examinations was arguably justified by the terms of the collective bargaining agreement, and thus, the dispute was deemed minor. Therefore, Conrail was able to unilaterally implement the drug testing program pending compulsory and binding arbitration before the National Railroad Adjustment Board (NRAB).

B. Management Rights and the Duty to Bargain

A conflict has arisen in cases construing the NLRA and the RLA as to whether the unilateral implementation of drug testing programs is arguably provided for in management rights clauses within collective bargaining agreements. The NLRB has held

a urinalysis for blood sugar and albumin. Second, Conrail required train and engine employees who have been on furlough, leave, suspension, or other similar cause for at least thirty days to undergo return-to-duty physical examinations. These examinations also routinely included urinalysis. Third, when justified by the employees condition, Conrail routinely required follow up physical examinations. Any employee who failed to meet the prescribed standards of health may be held out of service without pay until the condition is corrected or eliminated. Id. at 2486.

Id. Drug testing has always been included in Conrail’s physical examinations if in the judgment of the examining physician the employee might have been using drugs. In addition, drug screens have been included in physical examinations of employees who have been taken out of service due to previous drug related problems. Id.

Consolidated Rail Corp. v. Railway Labor Executives’ Ass’n, 109 S. Ct. 2477, 2487 (1989). Conrail argued that “past practice reflected that drug use has been deemed relevant to job fitness, and that Conrail’s physicians have the discretion to utilize drug testing as part of their medical determination of job fitness.” Id. Conrail further asserted that the parties’ implied agreement regarding physical examinations justified its unilateral implementation of the mandatory drug testing program. Id.

Id. at 2489. The Court emphasized that Conrail had only met the light burden of showing that its drug testing practice is arguably justified by the terms of its collective bargaining agreement. Id. The Court further emphasized that it had not decided the case on the merits, and in no way did it suggest that Conrail was or was not entitled to prevail before the arbitral board on the merits of the dispute. Id.

Id. at 2480. See supra note 45 and accompanying text (discussing jurisdiction of appropriate adjustment boards under RLA).

Compare Johnson-Bateman Co., 295 N.L.R.B. No. 26, 131 L.R.R.M. 1393, 1399 (June 15, 1989). (NLRB held that broad management rights clause did not constitute clear and unmistakable waiver of employees’ right to bargain, nor did clause provide employer with sound arguable basis for claiming contractual right to unilaterally implement its drug test-
that under the NLRA a broad management rights clause does not constitute a clear and unmistakable waiver of a union's right to bargain over the implementation of drug testing programs. In addition, the NLRB held that the general provisions of a broad management rights clause do not provide an employer with a "sound arguable basis" for claiming a contractual right to implement drug testing programs. Under the NLRB approach a drug testing program is a mandatory subject of bargaining, and as such, unilateral implementation predicated upon a management rights clause constitutes an unfair labor practice under the NLRA.

In contrast, the Fifth Circuit, in *International Brotherhood of Teamsters, Local 19 v. Southwest Airlines Company*, held that within the context of the RLA, a broad management rights clause "arguably justified" an employer's claim that the clause granted them the power to unilaterally implement a disputed drug testing program. Moreover, the *Southwest Airlines* court determined that

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875 F.2d at 1135. (court held that in context of RLA, broad management rights clause "arguably justified" unilateral implementation of drug testing program without first bargaining with union). 

86 See supra note 30 and accompanying text (discussing management rights and waiver of right to bargain).

87 See *Johnson-Bateman Co.*, 295 N.L.R.B. No. 26, 131 L.R.R.M. 1393, 1400 (June 15, 1989). An employer has a sound arguable basis for ascribing a particular meaning to his contract when a clause in the contract is subject to more than one plausible interpretation. Id., 131 L.R.R.M. at 1400. The NLRB found that invoking general provisions of a management rights clause to justify unilateral implementation of a drug testing program was an implausible interpretation of the contract, and therefore no "sound arguable basis" existed for ascribing to that clause such power. Id., 131 L.R.R.M. at 1400 (quoting Southern Cal. Edison Co., 284 N.L.R.B. No. 142, 126 L.R.R.M. 1324 (July 23, 1987)). Because the employer's position was untenable, the NLRB found that it did not improperly enter the dispute merely to serve the function of the arbitrator who must determine the correct interpretation of the contract. *Johnson-Bateman Co.*, 295 N.L.R.B. No. 26, 131 L.R.R.M. 1393, 1400 (June 15, 1989).


89 875 F.2d 1129 (5th Cir. 1989) (en banc), cert. denied, 110 S. Ct. 838 (1990).

90 Id. at 1155. The *Southwest Airlines* court stated that the management rights clause in the collective bargaining agreement between Southwest and the employees' union at least arguably granted Southwest the right to unilaterally enforce its work policy by "promulgating rules, regulations and orders such as this drug testing program." Id. (emphasis in original). The court proceeded to show that Southwest complied with the four requirements necessary under the management rights clause. Id. The following facts were considered by the court in *Southwest Airlines*: (1) the program consisted of rules, regulations and orders within the meaning of the clause; (2) the program was issued by the proper authorities of the company; (3) no term or condition of the collective bargaining agreement conflicts with
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the management rights clause constituted an arguable waiver of the union's right to bargain. However, the final determination of whether the waiver was "clear and unmistakable" was left to the judgment of the arbitrator. Since the action of Southwest Airlines (Southwest) was found to be "arguably justified," it gave rise to a "minor" dispute under the RLA. As such, mandatory

the program; and 4) the program was available to employees before becoming effective. Id. Having complied fully with all the requirements of the management rights clause, the court held the unilateral implementation of the program was arguably justified. Id. But see Transport Workers' Union, Local 234 v. Southeastern Pa. Transit Auth., 863 F.2d 1110, 1124 (3d Cir. 1988) (broad management rights clause cannot justify implementation of changes in working conditions), vacated, 109 S. Ct. 3208, rev'd on other grounds, 884 F.2d 709, 713 (1989) (addition of random drug testing program to existing drug testing program was issue arguably covered by collective bargaining agreement); United Indus. Workers v. Board of Trustees, 351 F.2d 183 (5th Cir. 1965) (court rejected argument that management rights clause constituted waiver of union's right to bargain). See also Local 553, Transport Workers' Union v. Eastern Air Lines, Inc., 695 F.2d 658, 673 n.3 (2d Cir. 1982) (criticized major/minor distinction as unsatisfactory since management rights clause can arguably be invoked to support any action by management not in direct conflict with contractual right of union).

81 See Southwest Airlines, 875 F.2d at 1135. "In general, the contractual waiver of a statutory right under federal labor law must be clear and unmistakably expressed." Id. at 1135 (emphasis added). "[T]his general rule of construction has been applied to questions of the waiver of a duty to bargain." Id. The Southwest Airlines court noted, however, that this rule of construction has been applied exclusively to cases governed by the NLRA. Id. The court discussed the application of the NLRA "clear and unmistakable" waiver construction to the instant case and the RLA, but decided that it was a debatable matter of law as to whether the NLRA rule of construction applied to the RLA. Id. at 1135-36. The court found the question to be inconsequential, since even if it assumed that the management rights clause permitted Southwest to unilaterally implement the disputed program only if the clause is a "clear and unmistakable" waiver, Southwest's interpretation of the clause did "satisf[y] the minimal burden of arguably being a clear and unmistakable waiver." Id. at 1136. The fact that the two constructions of waiver, "arguable" and "clear and unmistakable," could not be easily reconciled, was, to the court, some indication that the clear and unmistakable waiver construction of the NLRA may not apply to the RLA. Id.

82 See id. at 1135-36. The court declared that the merits of Southwest's interpretation of the collective bargaining agreement were clearly for the arbitrator to decide. Id. See also Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 109 S. Ct. 2477, 2489 (1989) (White, J., concurring). If the arbitrator finds that Southwest's claim is without merit and that the union did not waive its right to bargain, the result would be that Southwest had sought a change in the collective bargaining agreement without invoking the procedures applicable to a major dispute. Id.

83 See Southwest Airlines, 875 F.2d at 1135. The Southwest Airlines court noted that since both parties presented arguable constructions of the contract's management rights clause, the dispute was minor. Id. The court recognized the arguable validity of the union's position that the management rights clause "[did] not speak at all to the right to bargain over rules, only the willingness to abide by rules validly enacted." Id. (quoting International Bhd. of Teamsters, Local 19 v. Southwest Airlines Co., 842 F.2d 794, 804 (5th Cir. 1988) (panel opinion), rev'd, 875 F.2d 1129 (5th Cir. 1989) (en banc), cert. denied, 110 S.Ct. 838 (1990)). Alternatively, Southwest asserted that the management rights clause "binds em-
bargaining was not required in the first instance, instead, Southwest was permitted to unilaterally implement the disputed program pending the decision of an arbitrator as to the relative rights of the parties under the collective bargaining agreement.\footnote{6} It is submitted that whether the management rights clause actually constituted a waiver by the union of its right to bargain under the RLA is a question more properly addressed in a federal court.\footnote{6} It is further suggested that it is only after the federal court decides whether the union has waived its right to bargain that the character of the dispute should be determined, and the appropriate channel of dispute resolution proclaimed.\footnote{6} Finally, it is submitted that a broad management rights clause, standing alone, should not constitute a waiver of the union's right to bargain, nor justify, arguably or otherwise, an employer's unilateral implementation of a drug testing program. This determination would result in the conflict being routed to the major dispute resolution process.\footnote{6}

Alternatively, if, as in *Southwest Airlines*, a court holds that a management rights clause arguably justifies an employer's unilateral implementation of a drug testing program,\footnote{6} an employees' union may seek injunctive relief in a federal district court. However, when a dispute is deemed to be "minor," under the RLA,
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courts are disinclined to interfere with the arbitral jurisdiction of the appropriate adjustment board.\textsuperscript{69} Generally, in the context of labor disputes, the issuance of injunctions is precluded by the jurisdictional limitations imposed upon federal courts by the Norris-LaGuardia Act.\textsuperscript{70} However, in \textit{Boys Markets, Inc. v. Retail Clerks Union, Local 770},\textsuperscript{71} the Supreme Court recognized a "narrow" exception to the Norris-LaGuardia Act.\textsuperscript{72} This exception allows courts to enjoin actions by either party to a dispute which will "frustrate" the arbitral process.\textsuperscript{73} In


\textsuperscript{71} 398 U.S. 235 (1970).

\textsuperscript{72} \textit{Id.} at 253. In \textit{Boys Markets}, the Court sought to "reconcile" the Norris-LaGuardia policy of protecting the nascent labor movement by mandating nonintervention of federal courts, with subsequent enactments, adopted without any substantial revision of the Norris-LaGuardia Act, that indicated a shift in congressional policy from protection of the emerging labor movement to the encouragement of collective bargaining and arbitration to peacefully resolve industrial disputes. \textit{Id.} at 251. The Court noted that the statutory mandate of arbitration imposed by the RLA, manifesting the important federal policy of peaceful resolution of labor disputes through arbitration, would be imperiled if equitable relief were not available to successfully implement the arbitral process. \textit{Id.} at 251-52 (citing \textit{Brotherhood of R.R. Trainmen v. Chicago & Ind. Ry.}, 353 U.S. 30 (1957)). See \textit{Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO}, 428 U.S. 397, 407-08 (1976) (refined \textit{Boys Markets} by clarifying that injunctive relief was available only when the underlying dispute was arbitrable and such arbitration would be frustrated in the absence of equitable relief). See generally \textit{Cantor, Buffalo Forge and Injunctions Against Employer Breaches of Collective Bargaining Agreements}, 1980 Wis. L. Rev. 247 (1980) (comprehensive discussion of injunctive relief pending arbitration and exception to Norris-LaGuardia Act); \textit{Payne, Enjoining Employers Pending Arbitration - From M-K-T to Greyhound and Beyond, 3 Indus. Rel. L.J.} 169 (1979) (discussing injunctive relief pending arbitration and exception to exclusive jurisdiction of adjustment board under RLA).

\textsuperscript{73} See \textit{Oil, Chem. & Atomic Workers Int'l v. Amoco Oil}, 885 F.2d 697 (10th Cir. 1989).
addition to satisfying this prerequisite, a court must also find that the “ordinary principles of equity” support the issuance of an injunction. Ordinary, for an injunction to issue, courts require a showing of some likelihood of success on the merits, that irreparable harm will be suffered in the absence of an injunction, and

Noting that Boys Markets and Buffalo Forge both involved employers seeking to enjoin employee activities allegedly in violation of collective bargaining agreements, the Amoco Oil court held that the “principles of those cases [were] equally applicable to analyzing whether injunctive relief was appropriate to restrain employers from acting so as to undermine the arbitration process.” Id. at 702. See also Aluminum Workers Int’l v. Consolidated Aluminum Corp., 696 F.2d 437, 441 (6th Cir. 1982) (injunction appropriate where employer action undermines integrity of arbitral process or deprives union of effective arbitral remedy); Local Lodge No. 1226, Int’l Ass’n of Machinists and Aerospace Workers v. Panoramic Corp., 668 F.2d 276, 282 (7th Cir. 1981) (same); Lever Bros. Co. v. International Chem. Workers Union, Local 217, 554 F.2d 115, 123 (4th Cir. 1976) (same). But see Utility Workers of America, Local No. 246 v. Southern Cal. Edison Co., 852 F.2d 1083, 1088 (9th Cir. 1988), (district court erred in enjoining employer’s unilateral implementation of drug testing program in absence of employer’s express or implied promise to maintain status quo pending arbitration) cert. denied, 109 S. Ct. 1530 (1989); Amalgamated Transit Workers, Div. 1384 v. Greyhound Lines, Inc., 550 F.2d 1237 (9th Cir.), (limited availability of Boys Markets injunction to situations in which employer expressly or impliedly promised to maintain status quo pending arbitration) cert. denied, 434 U.S. 837 (1977).

Boys Markets, 398 U.S. at 254. The district court must consider whether “breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of the injunction than the union will from its issuance.” Id. (quoting Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 228 (1962) (Brennan, J., dissenting)). If the equitable requirements are met, in addition to the Boys Markets requirement of frustration of arbitration, “the proper accommodation of the various conflicting national labor policies will not be undercut by the issuance of an injunction to maintain the status quo.” Amoco Oil, 885 F.2d at 703. See supra note 73 (noting that Boys Markets principle applies equally to employer breaches).

Amoco Oil, 885 F.2d at 703. The Amoco Oil court noted that a traditional application of the “likelihood of success on the merits” requirement would require courts to inquire into the merits of a labor dispute and to encroach on the role of the arbitrator, a result which is clearly prohibited by Boys Markets and Buffalo Forge. Id. The court, instead, adopted a modified standard which required that the plaintiff merely establish that “the position that he will espouse in arbitration is sufficiently sound to prevent arbitration from being a futile endeavor.” Id. at 704. Accord Lever Bros., 554 F.2d at 120; Panoramic, 668 F.2d at 284-85.

Boys Markets, 398 U.S. at 254 (irreparable harm as equitable principle warranting issuance of injunction). See Amoco Oil, 885 F.2d at 704. The irreparable injury requirement assumes a distinct character in the context of status quo injunctions for breaches of collective bargaining agreements. Id. In this context, irreparable injury has been construed as “an injury that would undermine the integrity of the arbitration process by making an eventual award only an ‘empty victory’” because the arbitrator will be unable to award an adequate remedy. Id. (quoting Brotherhood of Locomotive Eng’rs v. Missouri-Kan.-Tex. R.R., 363 U.S. 528, 534 (1960)). The clear overlap with the “frustration of arbitration” analysis “often elevates this assessment of irreparable injury into the central inquiry in status quo injunction cases.” Id.

Union attempts to enjoin drug testing programs pending arbitration have met with mixed results, because courts differ as to whether irreparable harm will result in the ab-
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don't favor its issuance.\cite{77}

It is submitted that if a broad management rights clause is found to arguably justify an employer's unilateral implementation of a drug testing program, implementation should be enjoined pending the arbitral result of the adjustment board concerning the rights of the parties under the collective bargaining agreement. It is suggested that injunctive relief is warranted first, to prevent frustration of the arbitral process, and second, because the issuance of an injunction is supported by ordinary principles of equity.

C. Arbitration

The proliferation of drug testing programs in unionized workplaces has steadily increased the role of arbitration in this area.\cite{78} In some instances, arbitrators have to examine contract provisions dealing expressly with drug testing to determine whether an employer has exceeded its authority by implementing an overreach-


\textit{See} Boys Markets, 398 U.S. at 254. The issue is whether one party will suffer more from the denial of the injunction than will the other party from its issuance. \textit{Id. See}, e.g., Amoco Oil, 885 F.2d at 709. The record contained no evidence of a drug problem in the workplace, but only of a societal drug problem. \textit{Id.} The district court found that no injury to the employer would occur except for a delay in the testing program. \textit{Id.} On the other hand, the district court found that the employees would be irreparably injured by implementation of the drug testing program. \textit{Id.} The Amoco Oil court held that the district court did not abuse its discretion by finding that the balance of hardships favored issuance of an injunction. \textit{Id.}

ing drug testing program. Additionally, arbitrators have to interpret collective bargaining agreements silent as to drug testing, and decide whether the drug testing program is authorized by another provision of the collective bargaining agreement such as a management rights clause or an implied agreement between the parties.

When management asserts its right to implement "reasonable" work related rules which govern its employees' conduct while on duty, and that rule leads to a dispute, an arbitrator considers several factors to balance the competing contractual interests of the employer and the employees. Many arbitrators, when determining the reasonableness of a drug testing program, have considered the standards of reasonableness that have developed in drug testing cases governed by the fourth amendment to the United States Constitution. Arbitrators have considered these standards not-

79 See, e.g., Dow Chem. Co., 91 Lab. Arb. (BNA) 1385, 1385-91 (1989) (Baroni, Arb.) (arbitrator determined whether employer violated collective bargaining agreement by implementing random drug testing program when agreement called only for "just cause" testing); Roadway Express, Inc., 86-2 Lab. Arb. Awards (CCH) ¶ 8467 (1986) (Cooper, Arb.) (arbitrator determined what constituted "just cause" for drug testing and decided whether discharge for positive result was proper disciplinary action under agreement).
80 See, e.g., Hopeman Bros., 88 Lab. Arb. (BNA) 373, 385-86 (1986) (Rothschild, Arb.) (arbitrator determined unilaterally implemented drug testing program in dangerous shipyard was authorized by management rights clause of collective bargaining agreement); Arkansas Power & Light Co., 88 Lab. Arb. (BNA) 1065, 1069 (1987) (Weisbrod, Arb.) (arbitrator decided rule, promulgated under management rights clause, which required drug testing of employees in nuclear power facility is reasonable one under collective bargaining agreement).
81 See Dow Chemical, 91 Lab. Arb. at 1388. There were many factors considered by the arbitrator in balancing the interests of the parties. Id. The arbitrator formed an opinion after reviewing the nature of the industry, evidence of an existing drug problem, and the accuracy of the test. Id. However, the arbitrator noted that "predominant weight [is placed] upon the provisions of the agreement." Id.; Boston Edison, 92 Lab. Arb. at 381. The arbitrator looked at many factors when balancing competing interests of parties including threat to productivity, safety and health, and availability of less intrusive means of testing. Id.; Marathon Petroleum Co., 89 Lab. Arb. (BNA) 716, 723 (1987) (Grimes, Arb.). The arbitrator upheld the random drug testing program after considering the nature of the industry and the work environment. Id. See generally Nolan & Abrams, The Labor Arbitrator's Several Roles, 44 Md. L. Rev. 873 (1985) (comprehensive view of arbitrator's role in labor disputes).
82 See, e.g., Dow Chemical, 91 Lab. Arb. at 1388. The arbitrator stated that a balancing test, similar to that applied to determine reasonableness under the fourth amendment, is applicable in arbitral disputes. Id.; Arkansas Power, 88 Lab. Arb. at 1072. The arbitrator cited two cases arising under the fourth amendment for analogy and support for his analysis of reasonableness. Id. The arbitrator noted that the balancing analysis utilized in the federal cases was not binding upon him, however, he concluded that they were the "most
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withstanding the fact that the fourth amendment does not apply to situations in which there is an absence of "state action." It is for this reason that an examination of the fourth amendment reasonableness standard, as applied in drug testing cases, is warranted.

II. REASONABILITY: BALANCING COMPETING INTERESTS

A. Standard of Reasonableness under the Fourth Amendment to the United States Constitution

Employees in the public sector, who have been required to submit to mandatory drug testing in the workplace, have challenged the validity of such programs by invoking the fourth amendment's protection against unreasonable searches and seizures. The fourth amendment safeguards an individual's legitimate expectation of privacy against unreasonable governmental invasions. Al-
though the standard of reasonableness under the fourth amend-
ment is not capable of precise definition, a balancing of the
government's need to conduct a search against the individual's
reasonable expectation of privacy is required.\textsuperscript{86} Two government
instituted mandatory drug testing programs have produced the
first Supreme Court decisions concerning the reasonableness of
drug testing under the fourth amendment.\textsuperscript{87}

essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of
reasonableness upon the exercise of discretion by government officials . . . in order to
'safeguard the privacy and security of individuals against arbitrary invasions . . . .' \textit{Id.}

The fourth amendment does not preclude all searches and seizures, but only those that
are unreasonable. \textit{See} Terry v. Ohio, 392 U.S. 1, 9 (1968). The Supreme Court has noted
that the framers of the Constitution recognized the usefulness of some government
searches; thus they sought to restrain the possible abuses attending such searches, but not
to abolish the power entirely. \textit{See} Boyd v. United States, 116 U.S. 616, 641 (1886) (Miller,
J., concurring). "Hence it is only \textit{unreasonable} searches and seizures that are forbidden . . . .
\textit{Id.} (emphasis in original).

\textsuperscript{86} Bell v. Wolfish, 441 U.S. 520, 559 (1979). \textit{See} New Jersey v. T.L.O., 469 U.S. 325,
337 (1985) (employs balancing test to determine reasonableness of search); Camara v. Mu-
nicipal Court, 387 U.S. 523, 537 (1967) (determining reasonableness involves "balancing
the need to search against the invasion which the search entails").
The "cardinal principle" of fourth amendment jurisprudence is that "searches con-
ducted outside the judicial process, without prior approval by a judge or magistrate, are \textit{per
se} unreasonable under the Fourth Amendment — subject only to a few specifically estab-
lished and well delineated exceptions." Mincey v. Arizona, 437 U.S. 385, 390 (1978) (quot-
ing Katz v. United States, 389 U.S. 347, 357 (1967) (footnotes omitted). \textit{See} Griffin v. Wis-
consin, 483 U.S. 868, 873 (1987) (except in carefully defined circumstances search is
unreasonable unless accomplished pursuant to judicial warrant issued upon probable
cause).

However, the Supreme Court noted that:

[when the balance of interests precludes insistence on a showing of probable cause,
we [the Supreme Court] have usually required 'some quantum of individualized sus-
picion' before concluding that a search is reasonable . . . . We [have] made it clear,
however, that a showing of individualized suspicion is not a constitutional floor, be-
low which a search must be presumed unconstitutional.

\textsuperscript{87} Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct 1402, 1417 (1989) (quoting United
States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976)); Accord National Treasury Employees
Union v. Von Raab, 109 S. Ct. 1384, 1390 (1989). The Von Raab Court stated "where a
Fourth Amendment intrusion serves special governmental needs . . . . it is necessary to bal-
ance the individual's privacy expectations against the Government's interests to determine
whether it is impractical [sic] to require a warrant or some level of individualized suspicion
. . . . .\textit{Id. See also} T.L.O., 469 U.S. at 351 (Blackmun, J., concurring) ('special needs' exist
where warrant and probable cause requirements are impracticable).

\textsuperscript{87} Skinner, 109 S. Ct. at 1422 (toxicological testing of railroad employees who work in
positions effecting public safety found reasonable under fourth amendment); Von Raab, 109
S. Ct. at 1390 (drug testing of United States Custom Service employees directly involved in
drug interdiction or who are required to carry firearm found reasonable under fourth
amendment).

22
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In *Skinner v. Railway Labor Executives' Association*, the Court upheld a Federal Railroad Administration regulation which required all employees involved in railroad accidents to undergo toxicological testing. The Court held that the government's compelling interest in public safety outweighed the individual privacy concerns of the railroad employee. In *National Treasury Employees Union v. Von Raab*, the balancing approach was again employed by the Supreme Court to determine the reasonableness of an employee drug testing program under the fourth amendment. A sharply divided Court upheld a United States Customs

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**Footnotes:**
89 49 C.F.R. § 219.201 (1988). The regulation provides in pertinent part:

<table>
<thead>
<tr>
<th>Post-accident toxicological tests shall be conducted after any event that involves one or more of the circumstances described in paragraphs (a)(1) through (3) of this section:</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) <strong>Major train accident.</strong> Any train accident that involves one or more of the following:</td>
</tr>
<tr>
<td>(i) A fatality;</td>
</tr>
<tr>
<td>(ii) Release of a hazardous material accompanied by—</td>
</tr>
<tr>
<td>(A) An evacuation; or</td>
</tr>
<tr>
<td>(B) A reportable injury resulting from the hazardous material release . . . ; or</td>
</tr>
<tr>
<td>(iii) Damage to railroad property of $500,000 or more.</td>
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<tr>
<td>(2) <strong>Impact accident.</strong> An impact accident resulting in—</td>
</tr>
<tr>
<td>(i) A reportable injury; or</td>
</tr>
<tr>
<td>(ii) Damage to railroad property of $50,000 or more.</td>
</tr>
<tr>
<td>(3) <strong>Fatal train incident.</strong> Any train incident that involves a fatality to any on-duty railroad employee . . . .</td>
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</tbody>
</table>

Id.

90 See *Skinner*, 109 S. Ct. at 1420.
91 Id. at 1421. In *Skinner*, the Court had evidence that on-the-job drug use was a substantial safety problem throughout the railroad industry. Id. at 1407. The Court had statistical data which showed that "at least 21 significant train accidents involving alcohol or drug use as a probable cause" occurred between the years 1972-83. Id. at 1407-08. *See also Which Drug Tests?*, Wash. Post, Mar. 22, 1989, at A18, col. 1. Statistics show that in an 8 year period, 45 railway accidents involving drug or alcohol impairment by crewmen occurred, causing 34 fatalities, 66 injuries and $28 million in property damage. Id.

The Court found that the employees subject to the toxicological testing had a diminished expectation of privacy due to their participation in an "industry that is regulated pervasively to insure safety . . . ." *Skinner*, 109 S. Ct. at 1418. The Court also noted that the regulations attempted to minimize the intrusiveness of the search. Id.

92 109 S. Ct. 1384 (1989) (companion case to *Skinner*).
93 See id. at 1390. The *Von Raab* majority found that ensuring the fitness, integrity, and judgment of front-line drug interdiction personnel was essential to national security and created a special need, which warranted a departure from traditional fourth amendment requirements. Id. at 1393. Justice Scalia, in a vigorous dissent, argued that there was no evidence of a drug problem among United States Customs Service employees sufficient to establish a special need requiring drug testing in the absence of particularized suspicion. Id. at 1399 (Scalia, J., dissenting). Therefore, Justice Scalia maintained that the majority misapplied the special needs rationale and erroneously applied a balancing test. Id. at 1400.
Service drug testing program which required current employees seeking transfer to certain sensitive positions within the Service to undergo urinalysis. The Court stated that the employees had a diminished expectation of privacy which was outweighed by the compelling governmental interest in ensuring that front line drug interdiction personnel were physically fit and had unimpeachable integrity and judgment. The aforementioned governmental interests were supported by a significant interest in preventing the promotion of drug users to sensitive positions within the United States Customs Service. 

The principal significance of these decisions was the Supreme Court's approval of testing in the absence of individualized suspicion of employee drug use. The Court has avoided an approach to drug testing cases based on precise bright-line standards; instead it has mandated a case-by-case balancing of individual and societal interests.

(Scalia, J., dissenting).

94 Id. at 1396. Drug tests were made a condition of placement for drug interdiction positions because they were viewed as jobs "fraught with obvious dangers to the mission of the agency and the lives of Customs agents." Id. at 1388. Drug tests were also made a condition of placement for employees seeking positions which required them to carry a firearm because "public safety demands that employees who carry deadly arms and are prepared to make instant life or death decisions be drug free." Id. Finally, drug tests were required of those employees seeking transfer to positions which required the handling of classified materials because the materials could fall into the hands of smugglers if employees, "by reason of their own illegal drug use, are susceptible to bribery or blackmail." Id. The majority agreed in principle to the testing of employees required to handle classified materials, however, the Court remanded this issue to determine whether the Service had "defined this category of employees more broadly than necessary to meet the purposes of the commissioner's directives." Id. at 1397.

95 Id. at 1394. The Court stated that customs officers involved in drug interdiction or who are required to carry firearms "should expect effective inquiry into their fitness and probity." Id. Moreover, the Court stated that employees "who seek promotion to these [covered] positions . . . enjoy a diminished expectation of privacy by virtue of the special, and obvious, physical and ethical demands of those positions." Id. at 1397-98.

96 Id. at 1395-96. The Court opined that in light of the extraordinary safety and national security hazards that would attend promotion of drug users to the covered positions, the Custom Service's policy of deterring drug users from seeking those positions cannot be deemed unreasonable. Id. at 1395.


99 Harmon v. Thornburgh, 878 F.2d 484, 490 n.9 (D.C. Cir. 1989). See Brown, 715 F.
Employee Drug Testing

B. Reasonableness in an Arbitral Context

Many of the concerns voiced by employees in the public sector have been similarly raised by private sector employees in binding arbitration. Collective bargaining agreements which include express drug testing clauses have often resulted in arbitrable disputes with employees maintaining that the employer had exceeded the scope of its authority. In those instances, the role of the arbitrator is to define the relative rights of the parties under the collective bargaining agreement. Similarly, where an employer utilizes his broad powers under a management rights clause to unilaterally implement reasonable work related rules and regulations to justify the imposition of drug testing requirements, it is the arbitrator’s task to determine the “reasonableness” of those requirements. In some instances, arbitrators have employed a balancing test substantially similar to that used in ascertaining reasonableness within the meaning of the fourth amendment to the United States Constitution. Although in many instances arbitrators have required some level of individualized suspicion to warrant drug screening, it is submitted that in situations where

Supp. at 196 (question of reasonableness dealt with on case-by-case basis). See, e.g., Hartness, 712 F. Supp. at 993 (court distinguished groups of employees upholding testing of employees required to carry firearms while enjoining testing of other employees).


101 See supra note 79 and accompanying text (cases in which mandatory drug testing programs were implemented based upon existing drug testing clause).

102 See, e.g., Dow Chemical Co., 91 Lab. Arb. (BNA) 1385, 1387 (1989) (Baroni, Arb.) (arbitrator must decide how reasonableness of “for cause” drug testing program is affected by suspicionless drug testing); Roadway Express, Inc., 86-2 Lab. Arb. Awards (CCH) ¶ 8467 (1986) (Cooper, Arb.) (arbitrator determined whether “probable cause” drug testing program in agreement reasonably allowed for mandatory, suspicionless drug testing).

103 See, e.g., Arkansas Power, 88 Lab. Arb. at 1068 (arbitrator determined whether drug testing program was “reasonable” within meaning of contract provision which allowed employer to promulgate reasonable rules and discipline employees); Hopeman Bros., 88 Lab. Arb. at 382 (arbitrator agreed employer could formulate own rules and regulations, if reasonable).

104 See supra note 82 and accompanying text (arbitrators applying fourth amendment standard).

safety or other compelling interests are involved, arbitrators will, in light of Skinner and Von Raab, be inclined to uphold the reasonableness of a disputed program in the absence of any level of suspicion.

C. Collective Bargaining, Arbitration and Public Policy

While arbitrators operate within the realm of the parties' collective bargaining agreement, and to that extent are beholden to private interests, it has been asserted that arbitrators also fulfill a public function. When the arbitrator has cause to look at the reasonableness of a drug testing program, the arbitrator's appraisal may be influenced by a number of different factors including the judgment of other arbitrators, court rulings, and public policy. The conscientious arbitrator may look to society in general to identify fundamental values shared by the parties involved in a dispute. One such value which is basic to a civilized

("without cause" drug testing program found unreasonable); Maple Meadow Mining, 90 Lab. Arb. (BNA) 875, 880 (1988) (Phelan, Arb.) (random testing impermissible as no reasonable cause for testing exists).

See Nolan & Abrams, The Labor Arbitrator's Several Roles, 44 Md. L. Rev. 873, 881-84 (1985). The authors note that an arbitrator's personal values inevitably affect his decisions in the arbitration. Id. at 882. "Even if the arbitrator views his task as purely interpretive, there is no way interpretation can be done mechanically; at some point, human judgment comes into play." Id.


See, e.g., City of Edina, 90 Lab. Arb. (BNA) 209, 211 (1987) (Ver Ploeg, Arb.) (arbitrator noted she was not bound by judicial decisions but agreed with "vast majority of arbitrators" that Supreme Court decision on point provided guidance on issue being decided); Arkansas Power & Light Co., 88 Lab. Arb. (BNA) 1065, 1072 (1987) (Weisbrod, Arb.) (although not bound by fourth amendment case on point, arbitrator found it most applicable authority due to factual similarities and, consequently, applied its standards).

See, e.g., Methodist Hosp., 91 Lab. Arb. (BNA) 969, 976 (1988) (Reynolds, Arb.) (arbitrator allowed smoking ban in hospital after noting effects of environmental smoke); Arkansas Power, 88 Lab. Arb. at 1072 (public interest in avoiding nuclear holocaust outweighs any rights employees have to use recreational drugs during off hours).

See Nolan & Abrams, supra note 106, at 882. "No one is immune from outside influences and thus to some degree, the arbitrator's values will reflect the communities' values. . . . [T]he arbitrator's judgment is influenced by the values . . . of the parties to the dispute; others in the industry; . . . the community of arbitrators; the broader society, and so on." Id.; Abrams, The Nature of the Arbitral Process: Substantive Decision-Making in Labor Arbitra-
society is the right to privacy. It is submitted that an employee's expectation of privacy should be treated similarly whether the individual works in the public or private sector.

Generally, individuals do not relinquish their fourth amendment rights merely by entering into an employment relationship in the public sector. An analogous concept has been applied to disputes arising in the private sector, where it has been observed that "an employee does not somehow abandon his right to privacy at the doorstep of the employer's premises." It has been established, however, that the right of privacy, when weighed against the safety of the public or some other compelling interest, may yield to the operational realities of the particular circumstances.

CONCLUSION

The validity of drug testing in the workplace has been exten-

10 See supra notes 9-13 and accompanying text.
11 See O'Connor v. Ortega, 480 U.S. 709, 716 (1987). The Court noted that "[a]s with the expectation of privacy in one's home, such an expectation in one's place of work is 'based upon societal expectations that have deep roots in the history of the [fourth] amendment.'" Id. (quoting Oliver v. United States, 466 U.S. 170, 178 n.8 (1984)).


An individual, by signing on to an employment relationship, does not generally expect his or her private life to be scrutinized by the employer, nor does the existence of an employment relationship automatically entitle an employer to reach beyond the workplace and dictate, by discipline, the private lifestyles, morals, and behavior of its employees.


sively debated over the past several years. Since it is clear that drug testing will remain an issue in the public and private sectors, employers and employees should be prepared to discuss and negotiate the terms and scope of a drug testing program and its attendant consequences. Employers must recognize that drug testing can be a significant invasion into the privacy and dignity of the individual and should therefore seek to minimize its intrusiveness. On the other hand, employees must recognize that drug testing is an effective tool in maintaining the efficiency and safety of the work environment.

Recent developments indicate a trend toward a more uniform standard of reasonableness. It is understandable that this uniformity should begin to manifest itself when it is recognized that the expectation of privacy an individual possesses in the dissemination of his or her bodily fluids remains the same whether the individual is employed in the public or the private sector. A careful balancing of these privacy interests with the employers' legitimate interests in conducting drug testing should accommodate the interests of the employee, the employer, and the public.

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