

2nd
**LABOR AND EMPLOYMENT
LAW SEMINAR**



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May 12, 2000

DRUG TESTING: IS IT ALL ITS CRACKED UP TO BE?

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I. THE GROWTH OF DRUG TESTING.

Since 1987, the number of employers who conduct some form of drug testing has almost tripled, from 21 percent (21%) in 1987 to 74 percent (74%) in 1998. The reasons for this dramatic increase are numerous, and include political, cultural, scientific, and financial issues and concerns. In the 1980s, the government announced its “war on drugs,” a battle which continues today. This “war” has included aggressive advertising campaigns which have influenced the public’s view on drug use. The cultural disdain for drug use is exhibited by corporate value statements demanding drug-free workplaces and the positive marketing tool such statements provide. In addition, since 1987, the drug-testing industry has made continued advancements in the science of drug testing, alleviating some reliability concerns.

The belief that drug testing is financially beneficial to employers, however, is probably the most significant reason for the increase in drug testing by employers. Over the last decade, the drug-testing industry, supported by the government and anti-drug organizations, have aggressively targeted employers touting the financial benefits of drug testing, such as increased productivity, reduced absenteeism, reduced medical benefit costs and workers compensation claims, reduction in workplace accidents, and reduction in turnovers and terminations.

In addition to the benefits claimed by drug laboratories, local issues contributed to the adoption of drug testing in southern Nevada. Specifically, the institution of testing at the Nevada Test Site during the 1980s, focused particularly on building trades employees, was a major impetus to the adoption of drug testing in the Las Vegas construction industry. The Test Site’s own requirement that all workers be drug tested affected not only the employees who applied to or worked on the Site, but also influenced the adoption of drug testing by those companies not involved with the Site. Contractors developed a concern that those who knew they could not pass the drug test administered by a Test Site contractor would instead seek work with local companies who did not drug test. This concern also influenced the adoption of drug testing by many of the hotels and casinos in Las Vegas.

Further, one of the reasons for drug testing touted by the drug-testing industry, reduced workers’ compensation claims, was an incentive adopted by some members of the local community of employers. Specifically, local employers

recognized that post-accident drug testing could have the effect of deterring at least some employees from filing workers’ compensation claims, ostensibly fraudulent claims. While not openly discussed, the issue of intimidation was a contributing factor in the adoption of drug testing here in southern Nevada.

II. HAS DRUG TESTING ACHIEVED ITS GOALS?

Over the past ten years, drug testing has become an established practice by a majority of employers. Given this passage of time, the benefits of drug testing should be obvious. However, as recognized in Drug Testing - A Bad Investment, a recent report by the American Civil Liberties Union (“ACLU”), there is little reliable empirical data regarding the effects of drug use on the workforce, and even less data concerning the benefits of employee drug testing.

According to a National Household Survey on Drug Abuse in 1998, just 6.4 percent (6.4%) of American workers admitted to using illicit drugs within the previous thirty days. This data is comparable to statistics reported by the drug testing industry, which found only a 4 percent (4%) positive rate in over 2 million samples tested between 1990 and 1992.

Drug testing has become a \$1 billion-a-year business. According to the ACLU report, 38 federal government agencies spent \$11.7 million in one year on drug testing, and Texas Instruments reportedly spent \$1,000,000 to test 10,000 employees. In addition to the direct costs of drug testing, the indirect costs, including the operation of drug testing programs and the legal ramifications of drug testing, are immeasurable.

Yet, despite the relatively low percentage of drug users in the workforce and the high costs of drug testing, relatively few employers have ever analyzed the costs and benefits of their drug-testing programs. According to the American Management Association (“AMA”), only 8 percent (8%) of employers in its 1996 survey had performed any such analysis.

While many employers have relied upon the data provided by the drug-testing industry, the ACLU has raised serious concerns relating to the reliability of such data. For example, according to the ACLU, the \$100 billion lost-productivity figure relied on by the drug-testing industry was based upon a seriously flawed 1984 estimate of \$33 billion. The original estimate was based on a comparison of annual incomes for households that contained a daily marijuana user to the annual

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incomes of households that did not. The result was that households without a daily marijuana smoker earned \$33 billion more. The \$100 billion figure is merely an adjustment for inflation. The ACLU also found that other data cited by the drug-testing industry is likewise flawed and/or unsupported by reliable evidence.

Due to the lack of reliable evidence to support the touted benefits of drug testing, it is imperative that employers evaluate their own drug-testing programs, considering not only the costs of testing, but also their pre- and post-drug testing absentee rates, turnover rates, and workers' compensation claims.

III. INDIRECT COSTS OF DRUG TESTING - LEGAL CHALLENGES RAISED AGAINST EMPLOYERS.

The increase in drug testing has not surprisingly been accompanied by an increase in legal challenges to both testing and employers' actions in connection with testing. There have been a wide range of challenges, some successful, some not. Irrespective of the result, an inescapable consequence is the employer's cost to defend against these claims.

A. Challenges Based on Collective Bargaining Agreements.

Bargaining unit employees have pressed grievances through arbitration to challenge discipline and discharge as a result of drug testing based upon a multitude of theories. A survey of recent arbitration decisions indicates that most grievances have been denied. In some circumstances, however, arbitrators have reinstated employees who had failed and/or refused to take drug tests.

For instance, arbitrators have reinstated employees where the employer failed to inform the employees that they were permitted to take a re-test, where the arbitrators found that re-tests were permitted under the employer's drug-testing policy. The arbitrators held that failure to inform the employees of their right to re-test was a due process violation. Coca-Cola Bottling Co. of New York, Inc., 25 LAIS 3446, Arbitrator Nadelbach (LRP) (Jan. 3, 1998); Duro-Teepak, Inc., 25 LAIS 3823, Arbitrator Goldstein (LRP) (Dec. 11, 1997).

Similarly, reinstatement has been ordered where it was found that the employer violated its policy in selecting the employee for drug testing, in that probable cause was not found to select the employee for testing. Houston Lighting & Power Co., 25 LAIS 3387, Arbitrator Howell (LRP) (July 16, 1997); see also Cincinnati Metropolitan Housing Auth., 25 LAIS 3108, Arbitrator Sergent (LRP) (Sept. 14, 1997) (delay in ordering drug test weakened contention that grievant was impaired). In addition, delay in disciplining an employee for

failing a drug test has been the basis for reinstating an employee. Manchester Transit Auth., 25 LAIS 3658, Arbitrator Bernstein (LRP) (June 6, 1997).

Employees have also been successful in challenging tests where the proper chain of custody was not followed and where the drug-testing policy is ambiguous. Eagle Energy, 25 LAIS 3535, Arbitrator Feldman (LRP) (Feb. 27, 1998); Independent Sch. Dist. 2154, 25 LAIS 2027, Arbitrator Daly (LRP) (Apr. 10, 1998). In Independent, for instance, while the employee had tested positive for marijuana and even admitted he took two puffs of a marijuana cigarette, the employer's policy provided for termination only for the "abuse" of drugs. The arbitrator found that there was no evidence the employee had "abused" drugs and ordered reinstatement. The arbitrator further rejected the employer's argument that it had a "zero tolerance" drug policy, finding that the written drug policy did not indicate "zero tolerance" of drug use.

Arbitrators have also reinstated employees who have undergone post-discharge drug abuse rehabilitation programs and employees who had asked the employer for assistance with a drug problem prior to a drug test being performed. City of Lakewood, 25 LAIS 3749, Arbitrator Minni (LRP) (Oct. 23, 1997); Riverside Cement Co., 25 LAIS 3237, Arbitrator Askin (LRP) (Apr. 23, 1997).

Some arbitrators have even reinstated employees because the arbitrators believed the penalty of discharge was too severe for a failed drug test, especially where the employer's drug policy did not mandate termination. Ohio Power Co., 25 LAIS 1017, Arbitrator Brown (LRP) (July 31, 1997); Montgomery Country Gov't, 25 LAIS 3136, Arbitrator Hockenberry (LRP) (Oct. 28, 1997).

While in most situations discipline or discharge of an employee who refuses to take or fails a drug test is ordinarily upheld by arbitrators, the above-referenced arbitration decisions indicate a willingness to reinstate offenders. Reinstatement is more likely where the employer has a poorly-worded or ambiguous policy, the employer has failed to properly apply its policy, or the employee sought assistance for a drug problem either before or after the test. Employers who weigh the costs of drug testing against the benefits of eliminating drug users from their workforce must consider the additional indirect costs and risks of arbitration and recognize that the perceived benefits may be minimized where arbitrators simply reinstate the employee.

B. Challenges Through Litigation.

Like arbitrators, courts generally support employers' use of drug testing. Initially, courts supported testing where affected employees held safety-sensitive positions. More

recently, however, this tolerance has expanded, supporting employers' decisions to attempt to maintain drug-free work places. Despite this seeming support from the courts, however, employers must remain cognizant that they walk a fine line between their interests and their employees' rights, which could easily leave them facing lawsuits. As such, it is important to be aware of the types of claims brought by employees challenging drug testing and the costs of defending, even successfully, such actions.

Employers have faced a myriad of legal challenges to drug testing, including constitutional, statutory, and common law tort and contract claims. These lawsuits have challenged the legality of drug testing in general, the selection of particular employees for testing, the method of testing, how the testing data was handled by the employer, and the consequences of refusing to take or failing a drug test.

1. Constitutional Challenges.

a. Fourth Amendment Challenge - Unreasonable Search and Seizure.

Employees have challenged the legality of government-employer drug testing on the basis that it violated the Fourth Amendment protection against unreasonable search and seizure. The United States Supreme Court heard such a challenge in National Treasury Employees Union v. Von Raab, 485 U.S. 656 (1989). In Von Raab, the Union challenged the constitutionality of mandatory drug testing of United States custom officers who sought positions involving interdiction of illegal drugs, positions which require the carrying of firearms, or positions which require handling of classified materials. The Supreme Court found that drug testing of individuals seeking positions involving interdiction of illegal drugs or positions which require the carrying of firearms is reasonable, inasmuch as the government has a compelling interest in safeguarding borders and public safety outweighs the individual's privacy expectations.

However, the Court found that the record was insufficient to determine whether such testing was reasonable for individuals who handle classified material, remanding the issue to the Court of Appeals for examination as to whether the category of employees was defined more broadly than necessary.

Under the Supreme Court's analysis in Von Raab, drug testing of government employees in safety sensitive positions would likely withstand a Fourth Amendment challenge so long as there exists a rational purpose for doing so.

b. Fifth Amendment Challenges - Right Against Self-Incrimination.

Employees have similarly challenged drug testing under the Fifth Amendment. In Blankenship v. O'Sullivan Plastics Corporation, 109 Nev. 1162 (1993), an employee of a private employer challenged his termination for refusal to sign a waiver of what he believed was his constitutional right against self-incrimination. Because his employer was a private company, rather than a governmental agency, the Nevada Supreme Court found there was no government action which would implicate his constitutional rights. Accordingly, the Court refused to create a public policy exception for refusing to sign a waiver which would have permitted the employer to require the employee to submit to a drug test.

2. Statutory Challenges.

a. Americans With Disabilities Act.

While the Americans with Disabilities Act ("ADA") specifically excludes current drug users from the definition of a "qualified individual with a disability" and thusly, from the ADA's protection, individuals who are included in this definition and remain protected by the ADA are those individuals who:

- (1) have successfully completed a supervised drug rehabilitation program and are no longer engaging in the illegal use of drugs, or have otherwise been rehabilitated successfully and are no longer engaging in such use;
- (2) are participating in a supervised rehabilitation program and are no longer engaging in such use; or
- (3) are erroneously regarded as engaging in such use, but are not engaging in such use.

42 U.S.C. § 12114(b). Thus, an employer may face challenges by those individuals defined above where their rights under the ADA have been violated by an employer's drug-testing policy.

Frequently, before or after testing, employers or laboratories require an employee to disclose any prescription drug he or she may be taking that might cause a positive test result. In many cases, this forces employees to disclose medical conditions, which not only violates their rights under the ADA, but also puts the employer on notice of a potential disability, which could later be relied upon to support an allegation of disability discrimination. This is a particular risk in the case of a mental condition for which an employee may

be taking medication. This disclosure provides the employer with sufficient knowledge to lead either to (A) a charge of discrimination due to the alleged disability, or (B) a charge of discrimination due to the employer's supervisor's perception of a disability, which is unlawful under the ADA's "regarded as disabled" definition of protected disability.

b. Title VII.

Drug testing potentially raises claims of discrimination under Title VII of the Civil Rights Act. Under Title VII, it is unlawful to discriminate either directly against an individual or through neutral actions, policies, or practices that have a disparate impact upon a protected class such as race.

Recently, challenges to drug testing on the basis of racial discrimination have arisen. Specifically, seven African-American applicants for the Chicago Police Department have filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC") claiming that drug testing through hair analysis has a disparate impact on minorities who have higher levels of melanin in their hair than Caucasians. In order to prove disparate impact, claimants will have to demonstrate that the test, from a scientific perspective, disproportionately impacts African-Americans. If they do so, and the police department excludes African-Americans from employment based upon a positive hair test, claimants will be able to rely on statistical data to prove their claims.

If such data supports a claim for disparate impact, the employer will be required to prove that its actions were taken out of a business necessity. This would include showing a strong link between the drug use and job performance of a police officer. Because of the law enforcement responsibilities, this may not be too difficult to accomplish, as in the Von Raab testing case discussed supra.

However, if the hair drug test can be demonstrated to have a disproportionate impact upon one racial group, employers will face risks when basing employment decisions upon hair drug testing results for jobs outside of law enforcement. Demonstrating a business necessity for the drug test could be difficult to prove if evidence is not found to support the benefits of drug testing. It is possible that some of the reasons for drug testing, such as company values and consumer preference for drug-free workplaces, may be insufficient when weighed against findings of disparate impact.

3. Common Law Claims.

a. Public Policy.

Individuals have challenged drug testing in general by claiming that it violates public policy. However, the Nevada Supreme Court specifically held that it was "unaware of any prevailing public policy against employers seeking to provide

safe and lawful working conditions through testing programs designed to identify and eliminate the use of illicit drugs and alcohol." Blankenship v. O'Sullivan Plastics Corp., 109 Nev. 1162, 1166 (1993). The court has since expanded this finding in Nevada Employment Security Department v. Holmes, 112 Nev. 275, 284 (1996), holding that "employers have compelling reasons, both economic and social, to test their employees for drugs."

However, it is important to note that the Nevada Supreme Court does consider the employer's interest in drug testing in relation to the position held by the employee when determining if drug-testing programs violate public policy. The court specifically considers whether the employer's drug testing policy has a reasonable relation to the work performed. The court found such a reasonable relation where the employer manufactured explosives, concluding that the employer had legitimate safety concerns with this type of business. Clevenger v. Nevada Employment Security Dept., 105 Nev. 145, 151 (1989). In Holmes, the court likewise found a reasonable relation where the employee was entrusted with the employer's computer system, handling of large amounts of cash, and had significant personal interaction with guests. Holmes, 112 Nev. at 284.

These decisions indicate that general public policy challenges will likely be unsuccessful in Nevada. However, it is possible that the court could carve out exceptions if the particular facts of a case warranted. As such, employers should not rely too heavily on the seeming support of employment drug testing by Nevada Courts.

b. Invasion of Privacy.

Various challenges have been brought under the rubric of privacy, including the manner in which the drug test is performed, disclosure of medical information, and intrusion into right of seclusion.

Where a drug test is more intrusive than necessary, such as where an employee is required to be observed while providing a urine sample, it is possible that an invasion of privacy could be found. Likewise, where employees are required to disclose medical information prior to a drug test relating to the types of medications they use or their medical conditions, especially if such disclosure requires more information than necessary to accurately analyze the sample, it is possible that invasion of privacy claim could be successful.

However, general claims of intrusion to the right of seclusion are not likely to be successful, especially in situations where consent to testing was given, there was probable cause for testing, or where less intrusive means were used in collecting the sample.

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c. Defamation.

Claims of defamation are generally unsuccessful where the defamatory statement, such as “the employee failed a drug test,” is in fact true. However, other statements could lead to claims of defamation, such as “the employee is a drug user.”

One of the most important aspects of a defamation claim is “publication.” Generally, publication between the company’s officials and communication to the employee himself are protected. However, the employer’s privilege to communicate must be applied as narrowly as possible. Even communications to company officials can be unprotected if that person did not have a valid interest in the matter, such as a “need to know,” or the person doing the speaking acted with “malice.”

In addition, under the doctrine of so-called “compelled self-publication,” some courts outside of Nevada have held that the employee’s own publication to prospective employers is actionable. Such self-publication is viewed as a foreseeable consequence of the initial communication to the employee.

As such, employers must be extremely careful in the handling of drug testing information, even when such information is disseminated to its own personnel.

d. Intentional and Negligent Infliction of Emotional Distress.

Generally, terminating an employee for failing a drug test is not actionable. However, if the drug test is found to be inaccurate the employer may be found liable for infliction of emotional distress. Likewise, it has been found that the requirement that an individual be observed in providing a urine sample constitutes negligent infliction of emotional distress.

e. Negligence.

Generally, at-will employees have been unsuccessful in claims against the employer for drug tests negligently performed by an independent contractor drug-testing laboratory. However, it is possible for the employer to face a claim of negligent hiring of the laboratory, especially where the laboratory is not certified or its procedures are not scientifically acceptable.

f. Covenant of Good Faith and Fair Dealing.

Most courts, including those in Nevada, have rejected claims of breach of the covenant of good faith and fair dealing where the employment is at-will.

As indicated above, courts are generally supportive of employment drug testing. However, even where an employer

successfully defends a drug testing case, the costs of doing so can greatly minimize the benefits received for testing at all. As such, employers must not only take into account the direct costs of drug testing, but the indirect costs of having to defend a challenge to their drug-testing policy and actions taken thereon.

C. Jury Verdicts.

While courts seem to support drug testing by employers, a jury may not necessarily be as supportive. It is commonly recognized that juries are unpredictable so that any generalities must be taken lightly.

In a survey of jury verdicts relating to employment drug testing, it was found that the verdicts ran the spectrum. Many verdicts found for the employer. However, there are also plenty of cases finding in favor of the employee. The size of damage awards in these cases ranged from \$1.00 to hundreds of thousands of dollars. The following cases illustrate possible jury verdicts:

- An employee was awarded over \$15,000 on a claim of invasion of privacy after being required to be observed, by another, while providing a urine sample. Hansen v. California Dept. of Corrections, No. C9502251, 1996 WL 760947, Sept. 20, 1996 (J.D. Cal. Jury).
- A sixteen-year employee was awarded \$416,000 after being discharged when her drug test was reported positive. A subsequent test taken the following day was reported as negative. Anderson v. Exxon Coal U.S.A., Inc., No. 94-CV-1029D, 1995 WL 796705, Oct. 1995 (LRP Jury, Wyo.).
- Another employee was awarded \$256,000 after he was forced to submit to a drug test of his urine and blood before he returned to work after a disciplinary suspension. The urine test was negative but the blood test revealed small traces of marijuana. The employee was discharged as a result. Bolden v. Septer, No. 88-9156, 1992 WL 530383, Aug. 1992 (LPR Jury, E.D. Penn.).
- A jury awarded \$240,000 to an employee whose random drug test came back positive. The employee argued that he was improperly tested because he did not hold a safety-sensitive position. Smith v. Fresno Irrigation Dist., No. 554161-O, 1997 WL 372097, May 1997, (LRP Jury, Ca. Sup.).
- Verdict of \$102,000 in favor of an employee who was terminated for refusing to submit to a drug test. Stegman v. Hunter Health Clinic, Inc., No. 95C1001, 1997 WL 914426, Jan. 1997 (LRP Jury, Kan. Dist. Ct.).

While these awards are anecdotal evidence and thus not conclusive, they indicate that employers could face tremendous liability if an employee's challenge to a drug test is taken before a jury. As such, employers must consider this potential cost when analyzing their drug-testing policies.

IV. PRECAUTIONARY MEASURES WHEN UTILIZING DRUG-TESTING.

After more than 10 years of employee drug testing in southern Nevada, the year 2000 is an opportune time for employers to evaluate their testing practices.

A. Analyze your Decision To Drug Test Employees.

The important inquiries should be: Why conduct drug testing at all? What was our original goal in implementing testing in the first place? Why do we test pre-employment, post-accident, based upon probable cause, or randomly?

If testing has been ongoing for some time, examine the rate of positive tests versus negative tests. What is the evidence that drug users or drug abusers have been eliminated from the workforce? Is there evidence that workers' compensation costs, or those related to employee accidents causing personal injury or property damage, have diminished since the implementation of pre-employment or post-accident testing? Is there evidence of increased productivity or decreased absenteeism since the implementation of testing?

What has been the cost to the employer of this testing, from out-of-pocket costs paid to testing laboratories to the effect upon employee morale? Have the benefits of employee drug testing to the company exceeded the costs, or vice versa?

B. Know the Laboratory Performing the Drug Test.

As indicated above, employers generally should not be held liable for the negligence of the drug-testing laboratory. However, this is not always the case and sometimes employers are left "holding the bag." One way to minimize the chances of this occurring, and to minimize claims of negligent hiring, is for the employer to adequately research the laboratory performing the test.

1. Methodology and Protocol.

One aspect which should be considered involves the expertise, as well as the methodologies and protocols utilized, by the laboratory. While the debate concerning the accuracy of drug testing continues, those laboratories who use scientifically-accepted methodologies are most likely to be able to successfully defend their testing. Specifically, only laboratories certified by the Substance Abuse and Mental Health Services Administration ("SAMHSA") (formerly certifications were made by the National Institute on Drug

Abuse ("NIDA")) should be retained. While such certification does not guarantee that all drug tests will not be negligently performed, certification at least ensures that the procedures are scientifically acceptable. Certified laboratories are inspected twice a year to document overall performance, and quarterly proficiency challenges are conducted by SAMHSA.

2. Ensure that Indemnification Agreements and Releases Are Worded To Protect the Employer.

In most cases, testing agreements between laboratories and companies include indemnification agreements and releases. These agreements typically are drafted by the drug-testing laboratory, and so as a consequence, these agreements, particularly the indemnification and release provisions, are often worded to provide maximum protection to the laboratory. In some cases, these agreements can leave the employer facing all the liability for any negligent testing, even if the laboratory is at fault.

Releases should release both the employer and the laboratory from any negligence related to the test, from the means and manner of sample collection to the reporting of results. The employer may wish to obtain a separate release from the employee who is tested, not only for negligently performed tests, but also for any employment decisions made as a result of the test.

Indemnification agreements should require the laboratory to indemnify the employer, not only for any liability for negligently performed tests, but also for any liability for actions taken by the employer in reliance on the test results. In addition, indemnification should cover, not just litigation support (providing expert and other testimony to support the test), but all legal costs incurred, and any judgment or settlement monies paid by the employer as well.

C. Review the Elements of the Employer's Policy.

As exemplified by the above-noted cases, the employer's policy should clearly inform employees regarding the employer's policy as to illegal drug use, or abuse, and relevant matters as to the testing. It is difficult to justify an adverse personnel action unless the employee is placed on notice of the relevant aspects of the employer's policy, as well as the consequences of a positive test or a refusal to submit to a test. First, the policy should be in writing and both distributed to employees and posted prominently. Second, the circumstances under which testing can or will occur should be spelled out, whether pre-employment, probable cause, random, or post-accident. Third, if the employer desires to take personnel action in the event that drugs are found to be present in the employee's body, such as with a "zero-tolerance policy," versus simply if the employee is found to be "under the influence" of the drug, the policy should so state. Fourth,

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the options available to the employer in the event of a positive test should be specified; if the employer's policy is to discipline, refuse to hire, or even terminate employment in the event of a positive test, those consequences should be clearly stated.

Using a well-thought-out policy that has been published to employees helps avoid invasion of privacy claims, as well as claims that disciplinary action was unfair because the employee had no knowledge of the strictness of the employer's policy.

D. Set Proper Procedures and Adequately Train Employees in Handling Drug Testing Information.

Employers should keep to an absolute minimum the individuals involved in the drug testing of employees. Specifically, to prevent ADA claims concerning disclosure of medical information, the employer should remove itself completely from this inquiry. Instead, the employer should have the employee make any necessary disclosures directly to the testing laboratory.

Similarly, access to drug testing information should be kept to a strict minimum, to those with a definite "need to know." Construe the notion of "need to know" strictly. For instance, even a supervisor need not be told that one of his/her subordinates was terminated for failing a drug test, but rather should simply be told "he is no long with the company." As with medical information required to be kept in a separate file pursuant to the ADA, drug testing results and reports likewise should be retained in a secure file separate from the personnel file accessible by supervisors and managers, even though technically such drug testing results are not a "medical record" under the ADA. This avoids inadvertent disclosure of either a positive test result for illegal drugs, or a positive test result for an anti-depressant or other medication that might lead to a claim that the supervisor "regarded" an employee as "disabled."

In addition, those individuals charged with the duty of conveying the information to the employee should not only be trained as to the appropriate way of doing so, but should also be able to respond to any questions the employee may have. This can be accomplished by ensuring that the individual is completely knowledgeable about the employer's policies, including any policy concerning re-testing.

V. CONCLUSION.

Drug testing by employers has grown three-fold in the last decade, mostly due to promises of financial benefits to employers. However, despite the overwhelming growth in drug testing by employers, there is little reliable data comparing the costs with the alleged benefits of drug testing. As such, it is imperative that employers make their own assessment as to whether the benefits of drug testing outweigh the costs. Both direct costs and indirect costs should be considered.

Where employers choose to continue their drug-testing policies, precautions should be taken to minimize potential liability. While there are many issues related to drug testing which an employer cannot control, the employer is best protected when it prepares itself to handle those aspects it can control, including selecting a certified laboratory, ensuring that it is protected by adequate indemnification agreements and releases, and establishing appropriate procedures and training for handling drug testing information. While these precautions cannot ensure that the employer will avoid challenges to its drug-testing policy, they may assist in successfully defending such challenges.