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Drug and Alcohol Abuse in Mining: An Employer's Dilemma

BARBARA L. KRAUSE*

INTRODUCTION

Workplace substance abuse is a serious and increasingly widespread problem. It is estimated that in 1987 alone substance abuse in the workplace cost employers as much as one hundred billion dollars in lost productivity and increased medical costs, as well as an unknown amount in employer liability.


1 Substance Abuse includes the legal use of alcohol or controlled substances to the extent the use results in impairment, as well as any use of an illegal drug.

2 According to the National Institute on Drug Abuse: [Drug abuse today is a cancer that threatens our society at every level . . . The health and safety of our workforce, and indeed the future of America, may well depend on the extent to which business, labor and industry can develop an appropriate response to the epidemic use of drugs that plagues this Nation.]

NATIONAL INSTITUTE ON DRUG ABUSE, CONSENSUS SUMMARY INTERDISCIPLINARY APPROACHES TO THE PROBLEM OF DRUG ABUSE IN THE WORKPLACE, (1986) [hereinafter CONSENSUS SUMMARY]. NIDA, a division of the Department of Health and Human Services, has been the principal information source on drug and alcohol abuse in the United States since its establishment in 1972. From 1972 to 1981, when the alcohol and drug abuse and mental health services block grant was established, full responsibility for carrying out treatment and prevention service functions was within NIDA. In 1981, this function was transferred from NIDA to the states. The current principal goal of NIDA is to reduce demand through education, prevention and treatment and to assist in the private sector as well as at the state and local government level in implementation and support of drug abuse, prevention and treatment programs. See President's Comm'n. on Organized Crime, Report to the President and the Attorney General, America's Habit: Drug Abuse, Drug Trafficking, and Organized Crime, 16 (March 1986) [hereinafter PRESIDENT'S COMMISSION REPORT].

3 CONSENSUS SUMMARY, supra note 2, at 1.

While no specific technical or statistical analysis has been performed in the mining and mineral industry, it is undoubtedly true that these problems occur in the same proportion as elsewhere in the industrial sector. In fact, because of the reality of substance abuse problems in the mining industry, a Mining Industry Committee on Substance Abuse was formed in July, 1985. The Committee, consisting of representatives from industry, labor and both state and federal government, has concluded that "there is reason to believe that alcohol and drug abuse within the mining community reflects the experience of American industry in general."

Statistical information regarding the effects of substance abuse throughout the industrial sector illustrates the breadth of the problem. For example, it has been reported that nearly two-thirds of those individuals entering the workplace have used illegal drugs, forty-four percent within the year 1985. Further,
as many as ten to twenty-three percent of all workers abuse drugs on the job. In the trucking industry it is reported that as many as 34.5% of fatalities involving medium and heavy trucks are drug or alcohol related. The average age of the first-time drug user is twelve and one-half years; one-third of all eighteen to twenty-five year olds regularly use illegal drugs. As of 1982, fifty to sixty million Americans had tried marijuana; twenty million use it at least once a month. As many as 25-30 million Americans have tried cocaine, which is used to varying degrees by nearly forty percent of twenty-seven year olds; five to six million people are regular users, and as many as three million people are addicted. Additional studies show that substance abuse in the workplace accounts for as much as ten times more absenteeism and three times more accidents than where there is no substance abuse. Additionally, companies report that theft of property increases where there is drug use.

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11 Podolsky, "Alcohol, Other Drugs, and Traffic Safety", 9 No. 4 ALCOHOL HEALTH AND RESEARCH WORLD, 16, 19 (Summer 1985). This statistic related to fatalities involving drug or alcohol abuse and trucking is of particular significance in mining where heavy haulage equipment is regularly operated. In 1986, in all mines, including coal, metal and non-metal, 1742 powered haulage accidents resulting in either fatalities or lost days were reported. Mine Injuries and Worktime Quarterly, MINE SAFETY AND HEALTH ADMIN., 1986, at 18. If the 34.5% incident rate is applied, this suggests that perhaps as many as 600 of those mining accidents were related to substance abuse.
13 President's Comm'n Report, supra note 2, at 47-48.
14 National Institute on Drug Abuse Research Monograph Series No. 73, Urine Testing for Drug of Abuse 1 (1986).
15 President's Comm'n Report, supra note 2, at 16.
16 Bible, "Employee Urine Testing and the Fourth Amendment", LAB. L. J. 611, 612 (1987). According to the Federal Railroad Administration, 48 railway accidents occurring between 1975 and 1984 were directly attributable to drug or alcohol abuse, resulting in 80 employee injuries and 37 fatalities. The resultant monetary damages exceeded $34 million. BUREAU OF NAT'L AFFAIRS SPECIAL REPORT, ALCOHOL & DRUGS IN THE WORKPLACE: COSTS, CONTROLS AND CONTROVERSIES 9 (1986). In spite of statistics documenting the relationship between railway accidents and substance abuse, the Department of Transportation's regulations providing for mandatory testing have been overturned as unreasonable. See Railway Labor Executives Ass'n v. Burnley, 56 U.S.L.W. 2461 (9th Cir. Feb.11, 1988).
17 Castro, supra note 10, at 53. In the construction industry it has been reported that one New York construction worker, high on angel dust, died after he stepped off a highrise. Rubin, Defusing a Construction Time Bomb: Management and Labor Join
Of particular concern in the mining sector are the accident and injury statistics which reveal the inherently dangerous nature of the industry. Mining is widely recognized as a hazardous industry and, in fact, the Federal Mine Safety and Health Act of 1977\(^\text{18}\) was enacted in reaction to the inherent hazards. The hazardous nature of mining is reflected in comparative industry statistics which show, for example, that while for all industries the injury and illness rate is 7.7 per 100 workers, in mining the rate is 10.5 per 100 workers.\(^\text{19}\) Further, overall industry statistics show 58.7 lost workdays per 100 workers as compared to 137.3 in mining.\(^\text{20}\) In fact, in the first three quarters of 1987, coal mining sector employers reported forty-four fatalities and all other mining sector employers reported forty-seven fatalities.\(^\text{21}\) Total occurrences of mining accidents, both coal and non-coal, in the same period were 19,261 events.\(^\text{22}\) More specifically, an overview of Federal Mine Safety and Health Administration statistics and accident investigations reveal a recurring theme of accidents resulting from substance abuse.\(^\text{23}\) Accordingly, the


\(^{20}\) Id.


\(^{22}\) Id.

\(^{23}\) As evidence of the existence of abuse, the Committee cites the following examples of mining accidents which are directly attributable to substance abuse and are reported as such by the Federal Mine Safety and Health Administration:

- At an underground mine, a truck driver and his passenger were killed when their vehicle drove head-on into a pillar. The company later reported that the driver had traces of marijuana in his blood.

- During the construction of a cement plant, a laborer was killed when she slipped through a hole in the work deck and then fell 72 feet to the floor beneath. An investigation of the accident showed that she had a couple of marijuana cigarettes hidden.
Mining Industry Committee's focus has been not only on the effect of substance abuse on increased health care costs, reduced morale and productivity, absenteeism and social costs, but also, and most importantly, on workplace safety.24

Many employers, in and out of the mining industry, are seeking ways to curtail the costs associated with substance abuse. They are looking to Substance Abuse Policies and Employee Assistance Programs as methods of constructive intervention to stop escalating costs and concerns. In March 1987, the American Medical Association reported survey results showing that 93.5% of the firms which responded to the survey reported dealing with drug abuse.25 As many as one-half of the Fortune 100 companies now have some kind of pre-employment testing and other substance abuse or employee assistance programs.26 One company estimated that for every one dollar spent on its Employee Assistance Program, its return is seven dollars in reduced benefit usage and absenteeism.27 Commonwealth Edison reports that its treatment program has resulted in a twenty-five percent reduction in absenteeism, a decline in the accident rate and a decline in medical claims.28

Mining employers are also adopting comprehensive programs. The Substance Abuse Committee's Resource Manual recommends that prompt, concrete attention be given by all operators to the problems of substance abuse in the mining industry. The strategy recommended includes Employee Assis-

in her hard hat. A fellow worker also reported seeing the victim smoking pot prior to the accident.

-At a sand and gravel pit, a worker suffocated in six feet of sand when a highwall collapsed engulfing him. A jar of whiskey and seven empty beer cans were later found in a cooler in a nearby unloading truck. An autopsy revealed that the victim's blood alcohol content was twice the legally accepted intoxication range.

-A truck driver at a midwest quarry was drowned when he backed a haul truck over the bank of the quarry. He had apparently decided to dump a load of waste over the bank rather than at the dump site he had been instructed to use. An autopsy disclosed a blood alcohol content of twice the legal limit.

RESOURCE MANUAL, supra note 6, at 2.

24 Id.


26 Id.


28 Castro, supra note 10, at 61.
tance Programs and drug screening, combined in "an overall identification and treatment program to reduce the adverse consequences of substance abuse in the workplace." Consistent with this mandate, many mining companies are taking steps to adopt policies and programs.

In all industries, the principal concerns behind employers' policies designed to deal with substance abuse are in the areas of health and safety, security, public confidence, and productivity. In addition to those concerns, there are legal issues such as liability to the employee, co-employees and third parties. This Article will concentrate first on the legal issues of concern to employers. The discussion then turns to methods and program guidelines for developing and implementing effective workplace policies to deal with the problem. Finally, the legal implications of adopting a substance abuse policy, employee assistance program or drug testing program are addressed.

I. LEGAL ISSUES ATTENDANT TO HAVING A SUBSTANCE ABUSER IN THE WORKPLACE

Any employer faced with an intoxicated employee or one under the influence of drugs could be subject to lawsuits brought not only by outside persons harmed by the employee, but also by the employee himself or by other employees. In mining, potential liability is increased since an operator is also apt to receive citations or orders issued by the Federal Mine Safety and Health Administration or by the appropriate state government agency. The types of suits which may be filed against the employer are numerous and varied; creative theories and causes of action are being developed regularly. The most widely used theories of liability are agency, negligent hiring and negligent supervision.

29 Resource Manual, supra note 6, at 3.
30 See infra notes 47-63 and accompanying text.
31 While the problems associated with substance abuse in the mining industry certainly are not relegated only to the bituminous coal mines of Kentucky and West Virginia, the discussion of law herein focuses largely on those two states which are the source of the highest mining capacity. The legal principles, however, apply throughout all states. Therefore, as specific problems arise, relevant state case law and statutes should be consulted. For example, in Utah a comprehensive Drug and Alcohol Testing
A. Agency

An employer may be held liable under the theory of agency for acts committed by an employee when intoxicated.³² Thus, if the employee is acting within the scope of his employment, the employer also may be liable for the employee's acts of negligence. In both Kentucky and West Virginia, if an employee, while working, becomes intoxicated or under the influence of drugs and later inflicts an injury on a third person, even if the employee was in violation of the employer's instructions, the employer may be held liable for the wrong.³³ In response to the implications of agency liability, many companies have instituted comprehensive testing programs. For example, when a South-eastern Pennsylvania Transportation Authority (SEPTA) trolley driver was convicted of reckless endangerment as a result of cocaine use which caused an accident injuring twenty-seven passengers, SEPTA became the defendant in multiple private damage suits. As a result, SEPTA instituted random drug testing.³⁴

B. Negligent Supervision

Even if the employee is not acting within the scope of his employment at the time he harms the third person, the employer nevertheless may be found responsible for the off duty conduct of the employee under a theory which is commonly known as "negligent supervision."³⁵ Thus, if a supervisor detects that an employee is intoxicated or under the influence of drugs and

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³² Drunkenness on the part of an agent is an act of negligence for which his master becomes liable if the servant otherwise is acting within the scope of his employment. 53 A.M. Jur. 2d Master and Servant § 422 (1970).
³³ See generally, Central Truckaway System, Inc. v. Moore, 201 S.W.2d 725 (Ky. 1947); See also Musgrove v. Hickory Inn, Inc. 281 S.E.2d 499 (W. Va. 1981).
³⁵ Otis Engineering Corp. v. Clark, 668 S.W.2d 307, 311 (Tex. 1983) ("[W]hen, because of an employee's incapacity, an employer exercises control over the employee, the employer has a duty to take such action as a reasonably prudent employer under the same or similar circumstances would take to prevent the employee from causing an unreasonable risk of harm to others.")
sends the employee home, the subsequent negligent acts of the employee may remain the employer's responsibility if the employer did not act in a reasonable and prudent fashion in determining the correct method of dealing with the impaired employee. For example, if an impaired employee is allowed to drive himself home and harms another, the employer may be held responsible for damages or even death. Under this theory, an employer may be held liable for injuries caused by an employee who becomes intoxicated or uses drugs at an office Christmas party or other type of employer-sponsored function.

In one reported case, for example, an employer required an employee to work twenty-seven consecutive hours; when the employee complained that he was too tired to work any longer, his foreman let him drive home, a distance of fifty miles. The employee fell asleep and had a collision with the plaintiff. On the issue of whether the employer's conduct prior to the accident created a foreseeable risk of harm, the court found that a cause of action had been stated against the employer.

C. Negligent Hiring

An employer's potential liability, however, does not end there. The failure of an employer to take proper care in the selection and hiring of applicants can result in a suit, brought either by other employees or by outside third parties, for negligent hiring. It is widely recognized that "an employer may be liable to a third person for employer negligence in hiring or retaining a servant who is incompetent or unfit." In Kentucky, it has been held that the exercise of reasonable or ordinary care in the selection of competent servants is not a defense and that

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36 Id.
37 Id.
41 Restatement (Second) of Agency, § 213 (1958).
an employer is still liable for the negligent or tortious acts of an employee acting within the scope of his employment.\(^4\)

In related cases, where a legally insane employee is hired and ends up hurting customers or patrons, the employer may be held liable.\(^4\) Similarly, where a diabetic becomes involved in an on-the-job accident, an employer may be subject to suit if the condition and its attendant risks should have been known to the employer.\(^4\) In Rhode Island, a Pinkerton's security guard stole $200,000; the victim sued Pinkerton, which was found to be a co-conspirator because of its failure to adequately research the guard's background before hiring him.\(^4\)

By logical extension of this doctrine, an employer who hires or retains a known substance abuser may incur liability to a third party harmed as a result of the abuser's conduct.

D. Statutory Liability

1. Health and Safety Statutes

Employers may also be subject to liability under relevant safety and health statutes. Under the Occupational Safety and Health Act, employers have regularly been fined and found liable for wrongful acts of their employees.\(^4\) The same is true under the Federal Mine Safety and Health Act [hereinafter the Act].\(^4\)

Regulations promulgated under the Act are particularly germane to the question of drug and alcohol abuse in the mining workplace. Interestingly, there is no Mine Safety and Health


\(^4\) I.T.O. Corp. of New England v. Occupational Safety and Health Review Comm'n, 540 F.2d 543, 545 (1st Cir. 1976) (employer liable for employee's misconduct when "demonstrably feasible measures" exist for reducing incidents of violations but are not taken); see also, Usury v. Marquette Cement Mfg. Co., 586 F.2d 902 (2d Cir. 1977).

\(^4\) Allied Products Co. v. Federal Mine Safety and Health Review Comm'n, 666 F.2d 890 (5th Cir. 1982).
Administration [hereinafter MSHA] regulation specifically prohibiting the use of drugs or alcohol in a coal mine. However, with respect to metal and non-metal mines, such regulations do exist in three contexts. The regulations for surface metal and non-metal mines as well as underground metal and non-metal mines provide: "Intoxicating beverages and narcotics shall not be permitted or used in or around mines. Persons under the influence of alcohol or narcotics shall not be permitted on the job."48

Additionally, regulations have been promulgated regarding substance abuse and the use of explosives.49 It is provided that: "All blasting operations shall be conducted by experienced, trained, and competent persons who understand the hazards involved. Persons working with explosive materials shall . . . be in good physical condition and not addicted to intoxicants, narcotics or other similar types of drugs." This particular regulation does not literally prohibit the use of explosives by a person under the influence of drugs or alcohol, but stresses the non-existence of an addiction.

There are also regulations promulgated with regard to substance abuse and the certification of blasters.50 The regulation provides that:

Suspension and revocation. (1) The regulatory authority, when practicable, following written notice and opportunity for a hearing, may, and upon finding of willful conduct, shall suspend or revoke the certification of a blaster during the term of the certification or take other necessary action for any of the following reasons: (b)(ii) Unlawful use in the workplace of, or current addiction to, alcohol, narcotics, or other dangerous drugs.

This regulation provides yet another view of drug and alcohol abuse in the mining workplace. Under these mandatory regulations, a blaster’s certification must be suspended or revoked either for addiction or use in the workplace.

These cited regulations, and the nature of the mining industry in general, result in a unique problem. It is generally accepted that mining industry employees frequently suffer from ailments such as bad back conditions and other physical afflictions associated with mining. For these afflictions, health care professionals throughout the mining industry customarily prescribe drugs to employees in order to enable them to work more comfortably. Historically, therefore, employees have worked under the influence of prescription drugs, which may result in impairments similar to those caused by taking illegal drugs.\(^5\)

When addressing the issue of employer liability for employee use of drugs, therefore, one must understand the dichotomy between legal and illegal use of drugs.\(^5\) While no cases have been tried on this theory, it seems that a mining employer who knowingly allows an employee to use a prescription muscle relaxant while operating dangerous equipment would be potentially subject to the same sort of liability to a third party or to MSHA as would an employer who knowingly allows an employee to use marijuana or another type of non-prescription controlled substance. It is even possible that knowledge of drug abuse, whether by prescription or otherwise, could be imputed to an operator in the mining industry based on the status of health insurance provided. Many mining industry employers are provided with information related to prescription drug coverage. Thus, an employer may be charged with implied knowledge of excessive drug usage based simply on record information. It follows that if an employee under the influence of drugs were to have an accident, the employee or his estate could sue the employer for damages.\(^3\)

\(^{31}\) See Alcohol and Drugs in the Workplace: Costs, Controls and Controversies 11 (BNA Special Report 1986).

\(^{32}\) The Mining Industry Committee on Substance Abuse recognizes this problem and "does not distinguish between legal drugs, such as alcohol and prescription medicines, and illegal drugs, such as marijuana or cocaine." Resource Manual, supra note 6, at 1.

\(^{33}\) For example, fellow employees of an intoxicated employee or one under the influence of drugs may sue an employer for injuries occurring as a result of the troubled employee's negligence. This is particularly true in West Virginia where Mandolidis actions have proliferated since it was determined that workman's compensation does not provide the sole means of damage recovery for on-the-job compensable injuries or death. See Mandolidis v. Elkins Indus., 246 S.E. 2d 907 (W. Va. 1978).
a third party could sue under a theory of negligence, and possible civil and criminal sanctions could be sought by MSHA.

The Federal Mine Safety and Health Administration could issue a 104(a) citation or an unwarrantable failure order if it determines that the employer knew or should have known of the drug abuse violation. Such cited violation could result in a civil penalty assessment of up to $10,000.

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If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this chapter has violated this chapter, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this chapter, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter.

55 Id. at § 814(d). This provision states:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this chapter. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection(c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

56 Id. at § 820(a). This provision states:

The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this chapter, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation. Each
In more serious cases, MSHA could initiate a willful investigation. A willful violation of the Act may be found to occur if MSHA (1) finds a violation of the standard and (2) that violation is willful.\textsuperscript{57} A willful investigation may result in either civil or criminal sanctions and such criminal enforcement provisions are directed at mine operators.\textsuperscript{58} Moreover, agents of the operator may be found to be personally liable for willful violations of the Act.\textsuperscript{59} While no cases have been tried on an employer's liability under the Federal Mine Safety and Health Act for employee drug or alcohol abuse, the system is in place for imposition of such sanctions. As the problem becomes more apparent or as MSHA determines to curtail the use of drugs, it is not unlikely that both civil and criminal sanctions will be invoked by the agency.

2. \textit{Workers' Compensation Statutes}

Workers' compensation statutes provide a means by which an employer may become liable for the abusing employee's negligence. Workers' compensation may be awarded to both injured co-employees and the abusing employee. Workers' compensation is one method for obtaining financial relief. Some employees are even suing their employers, blaming the employers and stressful working conditions for their addiction or alcohol abuse.\textsuperscript{60}

The most celebrated case in which an employee was awarded workers' compensation arose in \textit{California Microwave, Inc. v. Workers Compensation Appeals Board}.\textsuperscript{61} There, an employee became brain damaged as a result of alcoholism and claimed that the alcoholism was induced by tension at work.\textsuperscript{62} Workers' compensation benefits were awarded. Similarly, in a Pennsylv
vania case, *University of Pittsburgh v. Workmens' Compensation Appeals Board*, death benefits were awarded where an employee committed suicide. It was found that even though the employee was already mentally ill, the stress of the job exacerbated the condition to the point where compensation was appropriate.

The Kentucky Workmen's Compensation Board, by applying its statutory occupational disease definition, likewise has found that job-related stress is compensable. Applying this definition, compensation was awarded to a production worker with a dormant neurotic condition who suffered a nervous breakdown as a result of the concentration required by her job. Similarly, if a direct causal link can be established between a mental disturbance which leads to an employee's suicide and a prior work-related injury, compensation may be awarded.

It is important to note that the Kentucky Workers' Compensation Statute grants an employer a defense to liability for injuries primarily caused by the employee's intoxication or the employee's willful intention to injure himself or another. An

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63 University of Pittsburgh v. Workmen's Compensation App. Bd., 405 A.2d 1048 (Pa. 1979); see also, Kelly's Case, 462 N.E.2d 348 (Mass. Ct. App. 1984) (holding that emotional breakdown resulting from layoff and transfer was compensable.)
64 405 A.2d 1048.
65 Under KY. REV. STAT. ANN. § 342.620 (Michie/Bobbs-Merrill 1983 & Supp. 1986) [hereinafter KRS with all cites to Michie/Bobbs-Merrill], an occupational disease is defined as:
(2) "Occupational disease" means a disease arising out of and in the course of the employment.
(3) An occupational disease as defined in this section shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all circumstances, a causal connection between the conditions under which the work is performed and the occupational disease, and which can be seen to have followed as a natural incident to the work as a result of the exposure occasioned by the nature of the employment and which can be fairly traced to the employment as the proximate cause. The occupational disease shall be incidental to the character of the business and not independent of the relationship of employer and employee. An occupational disease need not have been foreseen or expected but, after its contraction, it must appear to be related to a risk connected with the employment and to have flowed from that source as a rational consequence.

*Id.*
66 Yocum v. Pierce, 534 S.W.2d 796 (Ky. 1976).
employee may be denied benefits based on the theory that in becoming intoxicated, an employee is guilty of willful misconduct and has left the scope of his employment. 69

West Virginia has at least a fifty-year history of awarding compensation for job-related stress. 70 In 1935, when a miner who was lost in a mine suffered a nervous disorder as a result of the incident, compensation was awarded. 71 Similarly, if an employee’s suicide arises from a mental disorder which developed as a result of an injury sustained in the course of employment, compensation may be awarded. 72 Where harassment on the job, including a continuous course of physical and verbal abuse from the employee’s supervisor, leads to such emotional distress that sustained emotional and mental injury is caused, the injury will be found to be compensable. 73

On the basis of the findings in these cases, it is established that in both Kentucky and West Virginia a cause of action resulting in an award favorable to an employee will be granted provided that (1) the employee sustained an injury which itself arose in the course of employment and resulted from the employment, and (2) without that injury the employee would not have developed a mental disorder of such a degree as to impair the employee’s normal and rational judgment. The question of drug or alcohol abuse or addiction allegedly resulting from job-related stress as a compensable injury under workmen’s compensation has not been tested in Kentucky or West Virginia but is a logical extension of the prevailing law.

II. WHAT CAN AN EMPLOYER DO?

Employers are beginning to develop comprehensive programs to deal with workplace abuse. The following discussion includes suggestions of essential components for a workable, meaningful and legally sound program. 74
A. Establishing a Substance Abuse Policy

Every employer in every workplace should establish a firmly and consistently administered Substance Abuse Policy. In developing such a policy, the employer must first establish the principle upon which such policy is based, determining why it wishes to deal with substance abuse in the workplace.

The policy established for any particular workplace must be based on reasonable workplace considerations. These include the safety and health of all employees, the productivity and efficiency of the operation, individual employee performance and productivity, and the employer's commitment to prevention of substance abuse, particularly the illegal use, sale or possession of drugs.75

Establishing a Substance Abuse Policy means, in general terms, developing a policy whereby the use, sale or possession of alcohol and/or any other controlled substance in the workplace is prohibited. With this as a basic Substance Abuse Policy, the employer may then make determinations whether to extend its Substance Abuse Policy to include an Employee Assistance Program and whether to test for drug or alcohol usage. The difficult legal issues associated with and evolving from Employee Assistance Programs and testing will be considered separately below. These programs are additions to a standard Substance Abuse Policy and are based upon additional policy considerations and commitments than those dictating the use and implementation by every employer of the Substance Abuse Policy.76

The following are essential components of a basic Substance Abuse Policy:

1) Every Substance Abuse Policy must include a statement of the policy and a clear understanding, communicated by the employer to all supervisors and to all employees, of why the program is being effectuated.
2) The Substance Abuse Policy must be clearly written and communicated.

3) The Substance Abuse Policy must be firmly and consistently administered.

4) Where the Substance Abuse Policy is a disciplinary policy, warnings, followed by discipline, up to and including discharge, are appropriate.\(^7\)

5) Where employees are represented by a union, the union must be informed of and involved with development and administration of the Substance Abuse Policy.\(^7\)

6) The Substance Abuse Policy should include a statement as to the usage of prescription drugs in the workplace.

7) The Substance Abuse Policy should address the issue of off duty illegal use, sale or possession of drugs because of the presumed effect on job performance, the safety and health of others and the good will of the business. Because alcohol is legal, an employer may not prohibit off-the-job alcohol usage, but only such usage which affects job performance.

8) The Substance Abuse Policy should include a training component whereby supervisors are trained to recognize drug and alcohol abuse and to intervene where appropriate and consistent with the overall Substance Abuse Policy.

B. Establishing an Employee Assistance Program

A Substance Abuse Policy is designed to eliminate workplace abuse and to impose discipline upon non-conforming employees. An Employee Assistance Program (EAP) adds a rehabilitation component to a standard Substance Abuse Policy. It is intended that the “troubled” employee will be rehabilitated in order to resume a productive and meaningful place in the workforce. Moreover, an EAP allows an employer to deal with employee stress, in addition to substance abuse. A long term benefit of

\(^7\) As will be discussed below, even if an Employee Assistance Program is being administered, the disciplinary procedure should not be altered but should have built into it a method by which involvement of the EAP will be invoked. See supra notes 25-27 and accompanying text.

\(^7\) For a more comprehensive discussion of labor law implications and union involvement, see supra notes 44-54 and accompanying text.

MINING ENGINEERING, at 998.
an EAP is reduced insurance benefit usage and reduced absenteeism, resulting in increased productivity and safety.\textsuperscript{79}

A study cited by the Mining Industry Committee on Substance Abuse\textsuperscript{80} disclosed five fundamental reasons employers are adopting EAP's. These reasons are that an EAP: 1) "allows employees in whom the employer has a considerable investment to return to adequate job performance"; 2) "relieve[s] supervisors, managers, and shop stewards of 'treating' employees"; 3) "offer[s] the employee . . . a pattern of due process thus minimizing the chances of future litigation"; 4) "help[s] to reduce health care costs"; and 5) "provide[s] an additional employee benefit."\textsuperscript{81}

Any company considering implementation of an EAP must take into account the great degree of commitment required of the employer and of supervisors at all levels. This is a commitment of emotional and physical energy as well as of time and money, and will depend largely on the size of the workplace and the ability of the employer to operate without an employee who is in rehabilitation. It is important to note that EAP's must be administered in conjunction with firmly and consistently applied Substance Abuse Policies.

The primary components of an Employee Assistance Program to which an employer must be committed, in addition to those discussed above with respect to Substance Abuse Policies, are:\textsuperscript{82}

1) Constructive intervention and confrontation by supervisors;
2) Encouraging or obtaining willing employee participation;
3) Obtaining support of supervisors and co-workers;
4) Training of supervisors, support staff and co-workers in recognition and intervention techniques;
5) Making available professional consultants or qualified in-house personnel;
6) Maintaining awareness of community support services;

\textsuperscript{79} See \textit{Alcohol & Drugs in the Workplace}, \textit{supra} note 15, at 45-46.
\textsuperscript{80} \textit{Resource Manual}, \textit{supra} note 6, at Part I, 1.
\textsuperscript{82} Fantauzzo & Smith, \textit{Employee Assistance Programs: What They Are, How They Benefit Employees and Companies}, \textit{Mining Engineering}, Nov. 1987 at 997-998.
7) Strong confidentiality component;\textsuperscript{83}  
8) Follow-up procedures and continuing support;  
9) Alternatives to an EAP for an employee who does not wish to participate.

C. Establishing an Employee Testing Program

The issue of employee testing for drugs and alcohol in blood and urine is perhaps one of the hottest issues in employment law today.\textsuperscript{84} From the highest levels of the federal government to the smallest employer, the policy and legal implications proliferate. In the public sector there are constitutional protections against testing. In the private sector where constitutional protections do not apply,\textsuperscript{85} the courts and lawmakers have found other ways to inhibit what is often viewed as an employer’s intrusion into an employee’s private life.\textsuperscript{86}

In September, 1986, President Reagan announced a mandatory drug testing program for federal workers who hold sensitive positions involving a high degree of public trust and confidence.\textsuperscript{87} Under President Reagan’s announced policy, if the results of an employee’s drug tests are shown to be positive that employee must be subjected to counseling or be dismissed.\textsuperscript{88} The constitutional and legal ramifications of this policy are enormous. Cases which have resulted from implementation of this policy are announced almost every day.\textsuperscript{89}

\textsuperscript{83} This is critical due to legal consideration. See supra 995, notes 42-44 and accompanying text.


\textsuperscript{86} See discussion at supra notes 5-6, 35-39 and accompanying text.

\textsuperscript{87} Exec. Order No. 12, 564, 3 C.F.R. 224 (1987).

\textsuperscript{88} Id. at 227.

Experiences of employers which have implemented testing programs show that testing works. For example, in Washington, D.C. METRO (Washington Metropolitan Area Transit Authority), in response to a multiplicity of unexplained accidents, instituted an Employee Assistance Program including post-incident testing based on concern for public safety. METRO reports positive results. At first, all grievances were disputed and most employees won. However, since learning the results of the drug testing policy, both management and the union agree that the policy is in the best interest of all concerned.

Employers must distinguish between testing applicants and testing employees. The law is generally much more tolerant where an applicant is being tested than where a current employee is being tested. With respect to employee testing, an employer must distinguish between "just cause" testing, which is post-incident, based on observation of an employee's behavior, and random testing, which is done at the whim of the employer based on random selection procedures.

As in all other phases of Substance Abuse Policies, no matter who is being tested there must be a clear statement of policy, presenting when and under what circumstances testing will be done. Therefore, before instituting a drug testing program, the employer should determine the reason for implementing a drug testing program and carefully consider all of its potential legal implications. The questions to be considered include: why to test, who to test, how often to test, and what to do if the test results are positive.

An employer which adopts a testing program should incorporate the following components in order to increase the likelihood of withstanding judicial scrutiny:

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92 For a more detailed discussion of this dichotomy, see infra note 192.
93 For a discussion of the law explaining why these criteria are important to a balanced and legally sustainable testing program, see supra notes 24-43 and accompanying text.
1) An accredited qualified laboratory must be consulted and retained.94

2) The employer must adopt specific, consistent and objective guidelines for test results and usage.95

3) Uniform testing methods and confirmation tests should be established.96

4) The employer must develop a list of prohibited substances for which employees will be tested.97

5) The employer should develop consent forms and use them. Absent consent, tests should not be performed because of legal privacy considerations.98

6) Random testing should be avoided for the legal reasons discussed below except in cases of highly sensitive or safety-related jobs. Testing should be based on reasonable suspicion, as derived from facts and inferences.99

7) The testing program, coincident with the EAP, should give the employee an opportunity to disclose any drugs which may have been ingested, including prescription or non-prescription drugs, and should give the employee an opportunity to explain their use.100

8) Careful recordkeeping is essential, and proper forms should be used. Supervisory training must be done in conjunction with recordkeeping.101

9) Confidentiality of results must be assured.102

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94 Consensus Summary, supra note 2, at 9; Resource Manual, supra note 6, at Part IV.

95 Resource Manual, supra note 6, at Part IV, 2.

96 There are two basic types of urine tests. The EMIT-screen (Enzyme Multiplied Immunoassay Technique) is less sensitive, and less expensive. A positive EMIT result should always be followed-up by a GCMS (Gas Chromatography/Mass Spectrometry). See also Consensus Summary, supra note 2. Failure to perform this sensitive second test may result in a court’s overturning the employment action where policy regulations are confirmed by an alternative method. See, Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986); see generally Storms v. Coughlin, 600 F. Supp. 1214 (S.D.N.Y. 1984) (testing of inmates in state prison).

97 Consensus Summary, supra note 2, at 13.

98 Resource Manual, supra note 6 at Part IV, 2.

99 Consensus Summary, supra note 2, at 12, 13.

100 Resource Manual, supra note 6 at Part IV, 3-4.

101 Id. at 3.

102 Id. at 12.
10) Where appropriate, the union should be involved at all stages of implementation of a testing procedure.\textsuperscript{103}

11) For job applicants there are three requirements. First, the tests should not be used until the later stages of the screening process; second, the screening program should be openly published and explained to the applicant early in the job screening process; third, no test should be administered without a written consent form.

12) In adopting a testing program it is very important that no discrimination be inherent in the process.\textsuperscript{104}

III. LEGAL IMPLICATIONS OF IMPLEMENTING A SUBSTANCE ABUSE POLICY, EMPLOYEE ASSISTANCE PROGRAM OR DRUG TESTING PROGRAM

In deciding whether to implement a Substance Abuse Policy and testing procedure, an employer must be aware that employees may bring a multitude of legal claims to challenge that policy. Further, in assessing the potential legal ramifications of developing and implementing a Substance Abuse Policy, employers should be aware of the crucial distinction made between public and private sector employers. Public sector employers are government employers or employers whose business depends upon government contracts or who are otherwise regulated by federal laws\textsuperscript{105} (e.g.: nuclear power facilities such as Three Mile Island). Private sector employers are everyone else. Mining and mineral companies, as a whole, fall within the private sector.

The reason for this distinction is that constitutional protection, specifically the right to privacy and probable cause, the protection against unwarranted searches and seizures and the right to certain administrative formalities, apply only in the public sector.\textsuperscript{106} While it is true as a general statement of law that the constitutional protections apply only in the public sector,\textsuperscript{107} as a matter of practice the scope of those protections has

\textsuperscript{103} Id. at 16.
\textsuperscript{104} Id. at 12.
\textsuperscript{105} See, e.g., Shelley v. Kraemer, 334 U.S. 1, 13 (1948).
\textsuperscript{106} Id.
\textsuperscript{107} Id.
been expanded to cover private employers in many instances. In both Kentucky and West Virginia, for example, as will be discussed below, private employers would be well advised to be aware of and follow the guidelines established in federal cases since it appears that the same principles provide the basis for decisional case law in the private sector.108

A. Legal Implications of Substance Abuse Policies in the Public Sector

To date, many cases have been decided regulating the conduct of public employers, and clear guidelines are beginning to emerge.109 These guidelines are based on the problems attendant to the constitutional protections which are meaningful in the public sector: the first amendment right to privacy, and the fourth amendment right to be free from unwarranted searches and seizures.

Some of the litigation has been sparked as a result of Executive Order No. 12564 issued by President Reagan on September 15, 1986.110 On that date, the President ordered that all federal agencies must subject their employees to mandatory drug testing if those employees are in jobs which are particularly sensitive or critical to the public trust and welfare. This Order and its implementation throughout the federal sector have become the subject of heated debates by policymakers and in the courts. Several cases are now pending.111 Three main policies

108 In Kentucky, for example, the state constitutional protections parallel those of the United States Constitution. KRS § 10 (1982). West Virginia Article III, Section 6 of the Constitution also guarantees against unreasonable searches and seizures. In both states the right of privacy is within the penumbra of Constitutional protections. See Roach v. Harper, 105 S.E.2d 564 (1958); Commonwealth v. Campbell, 117 S.W. 383 (1909).


110 See Exec. Order, supra note 86.

111 See, e.g., Von Raab, 816 F.2d 170; National Treasury Employees Union v. Regan, 651 F. Supp. 1199 (E.D. La. 1987). In National Treasury Employees Union v. Regan, the Union challenged the Executive Order on several grounds, including whether it is a program or a guideline, whether it violates Fourth Amendment search and seizure
intersect in these cases and a balancing of these policies must be made. First, the thrust of every case and every decision is the same — employers, in their own interest, must be allowed a certain degree of flexibility in regulating the conduct of their employees. Second, the employer's interest must be balanced against the individual's right to privacy. The public trust and welfare is a third, very critical component taken into consideration by interested parties and the courts in determining the direction which should be followed in the drug testing policies of the United States.

1. Privacy Considerations

A constitutional privacy issue arises when positive readings in drug tests measure only off-duty conduct and not on-the-job impairment. Current drug tests are designed to measure only the amount of drugs in the body, and not the extent of impairment. An employee who smokes marijuana at home on Sunday may test positive on Tuesday. If the employer has no independent reason to believe that the employee is affected by drug use, but takes action against the employee because of Tuesday's prohibitions, whether it is an unconstitutional invasion of privacy, and whether it violates the job security protections of the Civil Service Reform Act of 1978. The District Court denied the defendant's Motion to Dismiss for lack of jurisdiction on January 14, 1987. Oral argument on the merits of the case was held on October 7, 1987 and a decision is expected imminently. Pending also, and contingent upon highly similar issues attacking the Department of Health and Human Services' program, is American Fed'n of Gov't Employees v. Bowen, No. 87-0779 (E.D. La. Feb. 23, 1987).

See, e.g., discussion at supra notes 28-31 and accompanying text.

The experts are in considerable disarray on the so-called 'hangover effects' of various drugs . . . 'the fact is that there are very few studies that look beyond the acute affects of drugs, i.e., the direct pharmacological effects of drugs in the first three to four hours after the drug is ingested' . . . 'the data collected were suggestive of such residual effects, not conclusive as no single study of this sort can be conclusive . . . [A] substantial body of literature in support of residual drug effects does not currently exist.' National Fed'n of Fed. Employees v. Carlucci, No. 86-0681 (D.D.C. March 1, 1988) (emphasis in original).
positive reading, the employer may be interfering with the employee's constitutional right to privacy.\textsuperscript{117}

The individual's constitutional right to privacy has been balanced against an employer's right to effective job performance, taking into account the prohibition against illegal drug use.\textsuperscript{118} In this connection, the Supreme Court's holding that "Congress has decided...to treat the interest in 'privately' possessing [unlawful drugs] as illegitimate,"\textsuperscript{9} is significant because general constitutional privacy considerations are analyzed in the context of illegal employee activity.

An employer's interests are many. First, it is documented that ingestion of drugs undoubtedly affects job performance\textsuperscript{20} by impacting upon coordination, concentration and comprehension. Further, it is recorded that habitual users can spend thousands of dollars per week on their habits.\textsuperscript{121} This may result in a drug economy in the workplace with drugs being bought and sold on company property. This cost sometimes results in increased theft in the workplace. Further, the cocaine hotline reports that seventy-five percent of those who call say that they sometimes use the drug at work, and sixty-nine percent of those report regular use at work.\textsuperscript{22} The employer's interest in keeping

\textsuperscript{117} See generally Shawgo v. Spradlin, 701 F.2d 470 (5th Cir.), cert. denied, 464 U.S. 965 (1983); Bosari v. Fed. Aviation Admin., 699 F.2d 106, 110-111 (2d Cir.), cert. denied, 464 U.S. 833 (1983); Division 241, Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.), cert. denied, 429 U.S. 1029 (1976); Shoemaker v. Handel, 795 F.2d 1136 (3rd Cir.), cert. denied, 107 S.Ct. 577 (1986) (random testing of jockeys allowed). However, this difficulty may be obviated as a new mechanism for testing human hair for drug use becomes further developed. As hair grows, the drug residue remains. Thus, based on the length of hair and presence of the drug, the time of drug usage may be detected. Detection of Phencyclidine, 142 American J. of Psychiatry 950 (1985). W. Baumgartner, Radioimmunoassay of Cocaine in Hair, 23 J. of Nuclear Medicine, 790 (1982).

\textsuperscript{118} Id. at 123; see also Louisiana Affiliate of the Nat'1 Org. for Reform of Marijuana Laws (NORM) v. Guste, 380 F. Supp. 404, 407 (E.D. La. 1974), aff'd, 511 F.2d 1400 (5th Cir.) (no opinion), cert. denied, 423 U.S. 867 (1975) (marijuana use held unequivocally prohibited).

\textsuperscript{120} Substance Abuse: The Bottom Line, The Business Review, Apr. 13-17, 1987, at 20, Col. 3.

\textsuperscript{121} One cocaine user reports spending about $30,000 per year on his habit. See Braham, supra note 12, at 37.

\textsuperscript{122} Castro, supra note 10, at 53.
drugs out of its workplace is further supported by the negative effect such usage would have on fellow employees.

2. Search and Seizure

The second constitutional safeguard at issue is the guarantee of freedom from unreasonable searches and seizures. The Supreme Court has held that the taking of blood from the body constitutes a search and seizure within the meaning of the fourth amendment.¹²³ This principle has been extended to the taking of urine samples.¹²⁴ Fingerprinting may also be an unlawful search and seizure.¹²⁵ Surveillance by dogs, cameras or undercover agents also may be deemed either an invasion of the right to privacy or an unlawful search and seizure.¹²⁶

Courts confronted with search and seizure questions balance the established constitutional protections against the importance of the intrusion to the public welfare and to the employer in determining the reasonableness of the intrusion under the circumstances.¹²⁷ Thus, the Supreme Court has held:

The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.¹²⁸

The concept of unlawful search and seizure does not stop with drug testing. It also includes matters related to the searches of

¹²⁸ Id. at 559.
lockers and other personal items which belong to an employee, but are used at the workplace. Generally speaking, after balancing the relative interests of the individual and the employer, a court will look to the employee's constitutional expectation of privacy.

In short, in the government sector, the individual's privacy rights must be balanced against the public interest. As a result, the courts have imposed an essentially blanket restriction on random drug testing except for those individuals in sensitive or critical jobs. However, where objective considerations result in just cause for believing an employee is under the influence of drugs or suffering from alcohol abuse, testing may be allowed.

The Fifth Circuit has issued an important decision, now pending certiorari, in which the constitutional aspects of drug testing through urinalysis were evaluated. Pursuant to the Pres-
ident’s Executive Order, the U.S. Customs Service adopted a drug testing policy. Under this policy, applicants and transfers for certain sensitive positions were subject to mandatory drug testing. The jobs covered by the plan were positions that either directly involved the interdiction of illicit drugs, required the carrying of a firearm or involved access to classified information. The court held,

[The Customs Service testing program constitutes a search within the meaning of the fourth amendment, but, because of the strong governmental interest in employing individuals for key positions in drug enforcement who themselves are not drug users and the limited intrusiveness of this particular program, it is reasonable and therefore, is not unconstitutional.]

While the decision turned largely on the facts, it provides necessary and useful guidance in evaluating the privacy rights of employees subjected to drug testing and for this reason merits detailed discussion.

First, the court evaluated the fourth amendment claims and held that “drug screening by urinalysis infringes the employee’s reasonable expectation of privacy and thereby constitutes a search under the Fourth Amendment” in part because other personal information about an employee (such as other drugs which may have been taken, or the existence of epilepsy or even of pregnancy) may be disclosed. Having decided that drug testing constitutes a search for the purposes of the fourth amendment,
the court went on to evaluate whether the search was nevertheless reasonable and, therefore, constitutionally valid. The court considered the following factors in determining that under the specific facts of the case the testing program was reasonable and constitutional:

1) **Scope and Manner.** The intrusiveness of the search was limited in that the tester did not watch the employee urinate; advance notice of the screening test was given; and all other portions of the job screening process were completed prior to the giving of the test. Moreover, there was no exercise of discretion concerning who was to be tested. Only employees seeking to transfer to sensitive positions were subjected to the test.

2) **Justification.** The court found that use of controlled substances by employees of the Customs Service may seriously frustrate the Agency’s efforts to enforce the drug laws.

3) **Place.** The search was conducted in the most private facility practicable.

4) **Voluntariness.** It was found that the test was largely consensual because only individuals voluntarily seeking employment in the covered positions were given the test, and they were given advance notice of the requirement.

5) **Employment Relationship.** Work-related searches that are most closely related to the primary business of an Agency may satisfy the fourth amendment’s reasonableness requirement. The law is still developing in this area to determine where a line will be drawn between allowable and prohibited drug testing. The employment relationship does not permit the government to impose unconstitutional conditions; the government cannot, therefore, undertake searches of its employees simply by making consent a condition of employment, but where the search is a reasonable condition of employment, it will be held to be constitutional.

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141 *Id.* at 176-181.
142 *Id.* at 177.
143 *Id.*
144 *Id.* at 178.
145 *Id.*
146 *Van Raab*, 816 F.2d at 178.
147 *Id.* at 178-79.
6) **Administrative Nature of the Search.** The urine testing serves primarily the administrative function of assessing suitability for employment in a sensitive position and is not intended to uncover criminal conduct.\(^{148}\)

7) **Analogy to Regulated Industry.** "Individuals seeking employment in drug interception know that inquiry may be made concerning their off-the-job use of drugs and that the tolerance usually extended for private activities does not extend to them if investigation discloses their use of drugs."\(^{149}\)

8) **Availability of Less Intrusive Measures.** There is no less intrusive measure available.\(^{150}\)

9) **Effectiveness.** While drug testing is not always effective, particularly when employees are given five day's notice, the risk of detection may deter drug-using employees from seeking more sensitive positions.\(^{151}\)

In rendering a decision in this case, the court determined that testing urine for the presence of drugs "is not so unreliable as to violate due process of law."\(^{152}\) For all of these reasons, the drug testing of the Customs Service, which serves as a guideline for all drug testing programs in the public and private sector, was found by the circuit court to be constitutionally permissible. It remains to be seen how the Supreme Court will ultimately determine the issues.

### 3. Other Public Sector Concerns

Another aspect of public sector law involves review of federal statutes which regulate conduct of both public and certain private employers, such as the Federal Rehabilitation Act\(^{153}\) and related handicap statutes.\(^{154}\) As of this date, there are no federal

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\(^{148}\) Id. at 179.

\(^{149}\) Id. at 179-180.

\(^{150}\) Id. at 180.

\(^{151}\) Id.

\(^{152}\) Van Raab, 816 F.2d at 181 (The court did not state any opinion on the privilege against self-incrimination since it was not raised as an issue in the case. It did note, however, that those rights are limited by state interests.).


\(^{154}\) Most states have enacted statutes to address the issue of discrimination on the basis of handicap. See *supra* notes 46-48 and accompanying text.
laws explicitly prohibiting drug testing. However, the Federal Rehabilitation Act, which applies to federal contractors and subcontractors, includes an anti-discrimination provision prohibiting discrimination against otherwise qualified handicapped individuals. The statute does not apply to any individual whose current use of alcohol or drugs prevents such individual from performing the duties of the job or whose employment, by reason of such current use of alcohol or drug abuse, would constitute a direct threat to property or the safety of others. However, reformed alcoholics or drug users may be deemed to be handicapped within the meaning of the Act by virtue of the fact that alcoholism and drug abuse are categorized as diseases. Thus, care should be taken in screening applicants and in dealing with current employees who may be reformed alcoholics or even current addicts whose status as handicapped is unclear.

B. Legal Implications of Substance Abuse Policies in the Private Sector

While the Constitution does not regulate private employers, courts and lawmakers have often seen fit to extend constitutional protections to those employers. Therefore, drug testing pro-

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155 29 U.S.C. § 739 (1982) provides, in relevant part, that:
(a) Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services . . . for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals. . . .
(b) If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor.

Id. 29 U.S.C. § 794 (1982) provides a similar no discrimination provision for any program receiving federal financial assistance.

156 29 U.S.C. § 706(7)(B) provides that the term handicapped individual does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

Id.; see Crewe v. Office of Personnel Management, 834 F.2d 140 (8th Cir. 1987).


158 See text accompanying supra notes 34-36.
grams which do not satisfy the constitutional mandates in the public sector also may not withstand scrutiny in the private sector. However, the private sector probably may establish and implement somewhat more rigid testing and related policies because of the absence of constitutional protections.

Generally speaking, the right to privacy as it affects drug and alcohol testing in the private sector is not settled. The legality of random drug testing remains an open question, but has been decided in favor of the employee in several cases. In *Luck v. Southern Pacific Transportation Co.*, for example, a computer operator who was discharged for refusing to submit to a urine test was awarded $485,000.00 in damages by a jury. The company had instituted, without notice, a random testing program. The award was based upon findings of wrongful discharge in violation of public policy, breach of the implied duty of good faith and fair dealing, and intentional infliction of emotional distress. The jury verdict consisted of $237,000.00 punitive damages, $32,000.00 compensatory damages and $180,000.00 backpay damages.

Another court has awarded not only back wages, but also $448,000.00 in punitive damages, for invasion of an employee's right to privacy under similar circumstances. Thus, although the efficacy of random testing remains an open question, based on constitutional precedent as it might be applied to private employers, it seems that random testing should not be undertaken except as to sensitive or safety-related jobs.

"Just cause" testing, which is testing based on observed behavior or occurring after an on-the-job accident, however, has been allowed by the courts in several cases. In such a case, courts balance the employer's interest in its workplace against the employee's common law right of privacy.

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1. The Tort of Privacy

Most states have developed a common law right to privacy. For example, invasion of privacy as an actionable tort has been part of Kentucky law since 1969. Although Kentucky courts have not expressly ruled on whether or when an employer's actions or requirements could be considered an invasion of an employee's right to privacy, it is well recognized that an individual has the right to be "let alone." Employers can expect legal development of this issue in the future.

West Virginia serves as a particularly useful model for examining the privacy issue due to its stringent policy prohibiting intrusions based on a recognized common law right to privacy. The leading West Virginia case, *Cordle v. General Hugh Mercer Corp.*, involves employees who were terminated for refusing to take a polygraph test. This case merits careful review because of future implications with respect to the legalities of drug and alcohol testing.

In *Cordle*, employees without a collective bargaining agreement and without employment contracts reluctantly signed statements agreeing to take a polygraph whenever such was requested by the employer. When the employees ultimately refused to take the test, they were terminated. The Supreme Court of West Virginia held that it is contrary to public policy for an employer to require or request that an employee submit to a polygraph or similar test as a condition of employment.

In West Virginia it is also true that surveillance by an employer violates public policy, that alleged immoral conduct is not grounds for discharge absent a showing of a negative impact of fitness for job, and that employees cannot be fired for refusing to violate the law on behalf of their employer.

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164 Foster-Millburn Co. v. Chinn, 120 S.W. 364 (Ky. 1909).
167 Id. at 112-113. Since the time of the *Cordle* decision, West Virginia has enacted a statute, W. Va. Code § 21-5-5(b) (1983), which prohibits polygraph tests for employees or applicants to determine whether to employ or continue employment.
Kentucky, like West Virginia, recognizes a legally protected interest in privacy and there is a public policy to be free from, at the least, polygraph examinations. In Kentucky, an employer may not require an employee to submit to a polygraph examination for the purpose of determining unemployment compensation benefits. In Douthitt v. Kentucky Unemployment Insurance Commission, the court found the employer’s requirement unreasonable in light of the unreliability of the tests. It also held that the Commission’s reliance on the test was inappropriate because the results of polygraph examinations are inadmissible in both civil and criminal actions. Whether an employee would have a claim for relief because he was terminated for refusal to submit to a polygraph examination was not addressed.

Another area in which the right to privacy is recognized involves publication of information otherwise deemed to be private. In reviewing whether disclosed information violates an employee’s right to privacy, a court will review why and to whom the information was conveyed. In employment cases, the courts are concerned with whether the persons to whom the disclosure was made had a need for the information in the course of their duties for the employer. A separate requirement is

1981) (no showing that off the job “immoral” conduct affected teaching ability or school community).

170 Harless v. First Nat’l Bank in Fairmont, 246 S.E.2d 270, 275 (W. Va. 1978). An employee of a bank was fired for attempting to get the bank to follow consumer credit laws. The court reversed the discharge and held that the rule that an employer has an “absolute right to discharge an at will employee must be tempered by the principle that where the employer’s motivation for the discharge contravenes some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by this discharge.” Id.


172 Id.

173 Id.

174 Id. at 475.

175 The Employee Polygraph Protection Act (H.R. 1212) is now pending. Passage of the bill would result in a ban on the use of polygraph examinations by most private employers.


177 Id. at 421-22. The employee alleged tortious invasion of privacy in connection with the employer’s disclosure of information to a mental health professional. Id. at
that the information passed on must have been actually private — that is, information as to which the employee had a reasonable expectation that it would not be disclosed.\textsuperscript{178} Finally, the disclosure must be offensive to a person of ordinary sensibilities and it must actually result in injury to the plaintiff's feelings.\textsuperscript{179}

The employer's investigation into private matters of the employee, even when no adverse employment action results, also may be the subject of a lawsuit alleging invasion of privacy.\textsuperscript{180} Cases dealing with surveillance by the employer of employees both on and off the job, testing of employee's personality and intelligence, searching of lockers, desks and parked cars, and monitoring of telephone calls, reach unpredictable results and establish no apparently consistent rule.\textsuperscript{181} If there is any thread of consistency, it is that the employer may not intrude without liability into circumstances in which the employee has a reasonable expectation of privacy.

2. \textit{Wrongful Discharge Actions Under the Employment at Will Doctrine}

An employee who is subject to testing in contravention of a right to privacy and who is discharged based on those test results may bring a wrongful discharge action against the employer.\textsuperscript{182} It is a generally held principle of law that absent a contractual obligation to the contrary, an employer may terminate any em-

\textsuperscript{178} \textit{Id.} at 421; see also Laborers Int'l Union of North America, Local 374 v. City of Aberdeen, 642 F.2d 418 (Wash. Ct. App. 1982); Barr v. Arco Chemical Corp., 529 F. Supp. 1277, 1280 (S.D. Tex. 1982) (citing \textit{Restatement (Second) of Torts §§652 B-E (1976)}).


ployee "at will," for any reason or no reason at all.\textsuperscript{183} However, many case decisions are chipping away at this rule and holding in favor of employees in wrongful discharge actions.\textsuperscript{184}

Wrongful or retaliatory discharge has been recognized in both West Virginia and Kentucky.\textsuperscript{185} Thus, where an employer's motivation for discharge would contravene a fundamental and well-defined public policy principle, the employer may be liable to the employee for damages occasioned by his discharge.

For example, in \textit{Cordle},\textsuperscript{186} the West Virginia court's holding and rationale may be so broad as to open the door to wrongful discharge suits for a refusal to submit to any drug testing when such testing can be shown to contravene either privacy interests or any other acknowledged public policy. The court stated:

\begin{quote}
We hold that it is contrary to the public policy of West Virginia for an employer to require or request that an employee submit to a polygraph test or similar test as a condition of employment, and though the rights of employees under that public policy are not absolute, in that under certain circumstances ... such a polygraph test or similar test may be permitted, the public policy against such testing is grounded upon the recognition in this State of an individual's interest in privacy (emphasis added).\textsuperscript{187}
\end{quote}

The use of the term "similar test" could conceivably be broadened to include urinalysis, blood and other chemical tests for drug and alcohol content or use.

The question of whether discharging an employee for refusing to submit to polygraph, drug or alcohol testing violates public policy has not been addressed by Kentucky courts.\textsuperscript{188}

\begin{flushleft}
\textsuperscript{184} See, e.g., Woolley v. Hoffman-LaRoche, Inc. 491 A.2d 1257 (N.J. 1985).
\textsuperscript{186} See supra notes 166-167 and accompanying text.
\textsuperscript{187} 325 S.E.2d at 117.
\end{flushleft}
3. **Tort Actions**

An additional potential legal liability faced by an employer who institutes drug testing is that tort actions may be brought by employees who feel that some civil wrong has been done to them. One type of action which may be brought is a suit for defamation, which prohibits an employer from communicating false information about an employee to a third person if the information injures the business or reputation of the employee.\(^{189}\) The courts are divided as to whether publication which goes no further than the employee's workplace will be violative defamation. For example, where an employer explained that an employee was discharged for drug abuse, but failed to include other reasons for the termination, the employee sued and was awarded damages for defamation even though the communication was only internal.\(^{190}\) On the other hand, no defamation cause of action was found where an employer conducted a strictly internal investigation.\(^{191}\) The state of the law with respect to defamation actions for publication of drug related information has not been tested in Kentucky or West Virginia. However, it may be assumed that if information is inaccurately and negligently published outside of the workplace, a defamation action will be appropriate.\(^{192}\)

Another tort action which may be brought by employees subjected to testing is that of intentional infliction of emotional distress. It seems, however, that where a policy allows for a consistent application of drug testing, no cause of action will be stated.\(^{193}\) In general, to prove intentional infliction of emotional

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\(^{189}\) O'Brien v. Papa Gino's of America, Inc., 780 F.2d 1067 (1st Cir. 1986) ($50,000 awarded for defamation).

\(^{190}\) Id. at 1076.

\(^{191}\) Strachan v. Union Oil Co., 768 F.2d 703, 706 (5th Cir. 1985).

\(^{192}\) See Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70 (W. Va. 1983); McCall v. Courier-Journal, 623 S.W.2d 882 (Ky. 1981). But see Wheeleer v. P. Sorensen Mfg. Co., 415 S.W.2d 582 (Ky. 1967) (Appellant alleged that employer's publication and distribution to fellow employees of copy of her pay check in order to discourage unionizing, violated her right to privacy. Court dismissed her complaint because the publication and distribution was not unreasonable or unwarranted, the information was a matter of interest to employer and employees, and it did not contain threats, contempt, ridicule, aversion or disgrace.).

distress an employee must show that the employer caused severe emotional distress to the employee through extreme and outrageous conduct. Moreover, in the context of a discharge, there is some indication that the courts will subsume this tort into the tort of retaliatory discharge or wrongful discharge.

Negligence actions and actions for assault and battery may be brought both against the employer and against the employer's testing agent. In one published case a polygraph examiner hired by the employer made sexual advances to an employee. A cause of action was stated. A cause of action for negligence was also stated when an employee was discharged as a result of an inaccurate polygraph examination. Similarly, if the consultant injures an employee or gives out wrong test results, liability may result. Negligence may also occur if the employer does not disclose test results in which a harmful contagious condition has been discovered. This is established under OSHA regulations, at least for current employees.

Negligence cases have already arisen in the context of drug and alcohol testing. As discussed, one of the problems with drug testing is that often the tests measure past usage, not current impairment. In fact, one lower court has held that an employee who was discharged because of a single unconfirmed positive EMIT test result had grounds for a finding of negligence against his employer. The court held that the employer's failure to perform a confirmatory gas chromatography/mass spectrometry test resulted in an arbitrary and capricious discharge.

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194 Craft v. Rice, 671 S.W.2d 247 (Ky. 1984).
200 For a discussion of the two basic urine tests, see supra note 96.
202 Jones, 628 F. Supp. at 1505-06.
Similarly, if tests are not properly conducted, documented or reported, a negligence cause of action may be stated.203

4. State Statutory Protection

Another fruitful area for litigation is in the unemployment compensation arena. A generally held principle is that benefits will be denied on the basis of misconduct where an employee is excessively absent due to alcoholism,204 has been drinking on the job,205 fails to attend a drug rehabilitation program,206 or engages in off duty conduct contrary to acceptable standards of behavior, which conduct directly reflects upon the claimant's ability to perform his assigned duties.207 However, where an employee's emotional and psychological stress resulted in his quitting after the employer failed to accommodate the employee's medical limitations, benefits have been awarded.208 Neither Kentucky nor West Virginia cases have addressed the issue of when, and under what circumstances, unemployment compensation will be granted to employees whose termination from employment involves or is related to results of a substance abuse test.

This matter, however, has been addressed in two cases by the Oregon Court of Appeals. In one instance, the court remanded a case to the Oregon Employment Appeals Board, holding that the Board had applied the incorrect standard in determining whether an employee who quit rather than submit to a drug test should have been awarded unemployment benefits.209 The Board had granted benefits on the basis that the

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random testing program was unreasonable. The court adopted a standard requiring an analysis of whether the employee’s reason for quitting was “of such gravity” that “he had no reasonable alternative but to leave work.” In the other case, the court affirmed an award of benefits holding that the off-duty use of drugs is not misconduct warranting denial of unemployment compensation.

In determining whether to take action against an employee suspected or known to be a drug or alcohol abuser, the relevant state human rights statute also must be taken into account. Under Kentucky’s 1976 Equal Opportunities Act, for example, employment discrimination against a handicapped individual is prohibited unless the handicap restricts the individual’s ability to perform the job. The definition of handicap covers physical impairment which constitutes a substantial disability to that person and is demonstrable by medically accepted clinical or laboratory diagnostic techniques. Further, the law specifies that an employer is not prohibited from rejecting an applicant on the basis of alcoholism or drug addiction.

Similarly, the rules and regulations of the West Virginia Human Rights Commission, propounded pursuant to the West Virginia Human Rights Act, are instructive. The West Virginia definition of handicap for physical or mental impairment includes “drug addiction...and alcoholism. However, use or abuse of alcohol...or drugs in the absence of medically verifiable addiction does not constitute a physical or mental impairment.” Further, the Commission rules clarify that alcohol and drug use are not handicaps and provide:

It is the medically verifiable condition of addiction which constitutes a handicap, and not the person’s unwillingness to

20 Id.
23 Id. at § 207.150.
24 Id. at § 207.130(2).
25 Id. at § 207.140(2)(b).
27 Id. at § 2.4 (series 1, 1985).
refrain from alcohol, tobacco, or drugs. Furthermore, a reading of the regulations as a whole make it apparent that it is not the intention of the Commission to prohibit restrictions or discrimination against persons whose current use of drugs, alcohol, or tobacco constitutes a direct threat to the property or safety of others; or in the case of employment, prevents the individual from performing the duties of the job.\footnote{Id. at note 5.}

Absent specific state court decisions which deal with a discharge related to drug or alcohol use, the Federal Rehabilitation Act provides a useful guide to what an employer may expect.\footnote{For a discussion of Federal Rehabilitation Act, see supra note 143.} The scope of the issues which should be considered include (1) whether drug abusers are qualified employees; (2) whether accommodations must be made for drug abusers;\footnote{It seems unlikely that the Rehabilitation Act would require any accommodation to a current drug abuser based on the fact that drug usage, sale and possession is unlawful.} and (3) whether current users of drugs and alcohol are deemed to be handicapped individuals.

Under the West Virginia Act, as stated above, the medical condition constitutes a handicap and the current use of drugs or alcohol may be grounds for discharge if such use constitutes a threat or prevents the individual from performing his duties. These facts strongly suggest that the main intention of the West Virginia Act is to prohibit discrimination against persons who had previously been addicted to drugs or alcohol. In fact, the comparable Federal regulations provide that, "Discrimination against persons who suffered handicapping conditions in the past but who have overcome their handicaps is a particularly invidious form of discriminatory attitude the Legislature intended to address in the 1981 Amendments to the Human Rights Act."\footnote{The Rehabilitation Act of 1973, 29 U.S.C.A. § 706(7) (1985 & Supp. 1987).}

Another relevant statute in West Virginia covers rights of patients.\footnote{W. VA. Code § 27-5-9(a)(1986). "No person shall be deprived of any civil right solely by reason of his receipt of services for . . . addiction. . . ." Id.} It has been determined that this statute creates an implied cause of action against a private employer who denies employment to an otherwise qualified applicant on the sole basis that such individual has received services for mental illness,
mental retardation or addiction. Therefore, it is entirely possible that a prospective applicant for a position who is denied employment because of a former addiction, but is now otherwise qualified to perform the functions of the position, could sue and receive damages.

It should be noted that some employees have attempted to use other types of discrimination statutes to force employers to return them to work or to hire them. Universally, these discrimination related claims have been rejected. Even the Supreme Court has stated that there is no race discrimination under Title VII for a justifiable business policy of excluding all methadone users from safety sensitive transit jobs.

C. Labor Law Issues

The adoption of employment policies to address workplace substance abuse must be accomplished in compliance with relevant labor law and labor agreement requirements. The policies which are adopted and implemented by mining industry employers must comport with precedent developing under the National Labor Relations Act of 1947 (NLRA), and, in the case of a unionized employer, its collective bargaining agreement.

1. National Labor Relations Act

Under the National Labor Relations Act, an employer whose employees are represented by a union has a duty to bargain with the union about any unilateral change in terms and conditions of employment, absent express provision to the contrary in a collective bargaining agreement or waiver by the union. Thus,

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226 Since the majority of mining industry employers in the unionized sector are signatory to the National Bituminous Coal Wage Agreement, or some close facsimile of it, the discussion herein will deal specifically with the provisions of that Agreement. See supra notes 50-53.
227 See supra note 225, at § 157(d).
a union employer wishing to adopt a Substance Abuse Policy must look at the existing collective bargaining agreement, assess its scope and determine whether unilateral adoption of a drug and alcohol policy is contemplated within its terms. If it is, implementation may occur without union consent, although cooperation with the union may be warranted as a matter of good labor relations policy.

Based upon this well-established law, the General Counsel of the National Labor Relations Board has issued a guideline memorandum concerning drug or alcohol testing of employees. In setting forth the General Counsel's policy, the following was summarized:

1) Drug testing for current employees and job applicants is a mandatory subject of bargaining under Section 8(d) of the Act;
2) In general, implementation of a drug testing program is a substantial change in working conditions, even where physical examinations previously have been given, and even if established work rules preclude the use or possession of drugs in the workplace;
3) The established Board policy that a Union's waiver of its bargaining rights must be clear and unmistakable is to be applied to drug testing;
4) Normal Board deferral policies [to arbitration] will apply in these cases; however, if [injunctive] relief is otherwise warranted, deferral will not be appropriate.

The General Counsel's memorandum is comprehensive. Basically, it establishes that absent bargaining, an employer is not free to unilaterally establish a Substance Abuse Policy, Employee Assistance Program or testing program. Further, specifically with respect to physical examinations and polygraphs the General Counsel instructs as follows:

The bargaining obligation extends not only to whether there will be a 'testing' requirement but also, if so, to the particulars of any such testing. Thus, an employer is also obligated to bargain over the content of a physical examination, the purpose for which the examination is to be used, and how test

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228 General Counsel's Memorandum, supra note 91.
229 Id. at D-1.
In short, the implementation of a drug testing program is not within management's discretion or entrepreneurial prerogative. Rather, it is a matter for union/employer collective bargaining.

The question of whether applicants for employment are covered by this duty to bargain with respect to drug and alcohol testing programs remains open. The General Counsel has determined to issue a complaint against an employer which instituted a pre-hire drug test, not because the General Counsel had determined that a violation had in fact occurred, but because she determined to place the question before the National Labor Relations Board for resolution.

The General Counsel also considers that: "[i]n cases where an employer has an existing program of mandatory physical examinations for employees or applicants, an issue arises as to whether the addition of drug testing constitutes a substantial change in the employees' terms and conditions of employment."231

Another very important aspect of the General Counsel's memorandum is its discussion of deferral to arbitration. Under certain appropriate circumstances, the NLRB will defer to arbitration awards which are consistent with relevant labor precedent or inconsistent, but contemplated by the parties within the terms of the collective bargaining agreement. The General Counsel has determined that "[i]f a dispute arguably raises issues of contract interpretation cognizable under the grievance provision of the parties' collective bargaining agreement and subject to binding arbitration, it may be appropriate to defer the case."232 The policy of the NLRB and the courts to defer to arbitration is based on the fact that arbitrators as a rule will decide the same questions as would be decided by the NLRB under the NLRA.

A case that is bound to have an impact upon how the NLRB, arbitrators and the courts treat issues concerning discipline of

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230 Id. at D-1. For a discussion of the implications of this policy to the terms of the National Bituminous Coal Wage Agreement, see infra notes 50-53.

231 GENERAL COUNSEL'S MEMORANDUM, supra note 91 at D-2.

abusers is *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, recently decided by the Supreme Court.\(^{233}\) This case, on *certiorari* from the 5th Circuit,\(^{234}\) concerned an arbitrator’s decision to reinstate an employee with full back pay and employment benefits when the employee had been discharged for smoking marijuana on the employer’s premises. As a result of the award the employee returned to work on a dangerous machine. The District Court had overturned the arbitration award on public policy grounds and the Circuit affirmed that,

The public policy involved today is . . . one against the operation of dangerous machinery by persons under the influence of drugs or alcohol. Gazing at the tree, and oblivious of the forest, the arbitrator has entered an award that is plainly contrary to serious and well-founded public policy.

Such an award overrides the employer’s attempt to protect the safety of its employees, including Cooper, in the name of safeguarding Cooper’s abstract procedural rights against a determination by the employer that the arbitrator knew was in fact true: that Cooper did bring marijuana onto his employer’s premises.\(^{235}\)

The Supreme Court overruled the Circuit Court, reinstating the arbitrator’s award after balancing general public policy considerations favoring safety and curtailment of the use of controlled substances against a private employee’s procedural safeguards and the labor law’s “preference for private settlement of labor disputes [by an arbitrator] without the intervention of the government.”\(^{236}\) In upholding the arbitrator’s award, the Supreme Court found that,

the Court of Appeals did not comply with the statement that such a policy must be ‘ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. . . .’ The Court of Appeals made no attempt to review existing law and legal precedents in order to demonstrate that they establish a ‘well defined and domi-
nant' policy against the operation of dangerous machinery while under the influence of drugs. Although certainly such a judgment is firmly rooted in common sense, we [have] explicitly held . . . that formulation of public policy based only on 'general considerations of supposed public interests' is not the sort that permits a court to set aside an arbitration award that was entered in accordance with a valid collective-bargaining agreement.237

Other courts also have upheld an arbitrator’s ruling overturning discharges for drug usage. For example, an arbitrator’s return of an employee who was terminated because he was arrested for selling drugs was found not to be void as against public policy.238 One of the reasons that a court may defer to an arbitrator’s ruling of discharge for an employee’s use of drugs when off duty was stated by the Fifth Circuit in *Oil Chemical and Atomic Workers Union v. Union Oil Company of California*: “This court has recognized the strong public policy against the operation of dangerous equipment by persons using drugs or alcohol. . . . Off duty/off premises conduct involving the illegal use and sale of drugs is not *per se* justification for a worker’s discharge. . . . It was within the discretion of the arbitrator. . . . (citations omitted)239

However, should an employee bring a case alleging that the adverse employment action taken by the employer was discriminatory in that it was motivated, not by the results of a drug or alcohol test or because of on-the-job use, but by union or concerted activity protected under the NLRA, the NLRB will not defer to an arbitrator. In such a case, the NLRB will look to the specific facts and determine whether the employer’s alleged reason for discharging or taking negative action against the employee is merely pretextual or whether the employee would have been discharged even in the absence of union activity.240

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237 *Id.* at 374 (citations omitted).
238 *Oil, Chem. and Atomic Workers v. Union Oil Co. of Cal.*, 818 F.2d 437 (5th Cir. 1987).
239 *Id.* at 442.
2. National Bituminous Coal Wage Agreement

In mining, the general labor policies and laws developing under the NLRA with respect to handling of drug issues in the workplace must be considered in conjunction with applicable provisions of the National Bituminous Coal Wage Agreement [hereinafter NBCWA]. Coal industry arbitrators have reviewed substance abuse policies adopted by many different companies and have reached inconsistent conclusions. Nevertheless, certain concepts, many of which are useful in interpreting the scope of an employer's obligation under the NBCWA, run through all of these cases.

The provisions of the NBCWA which are germane to determining whether a company may implement a substance abuse program are Article IA9(d), Management of the Mines, which reserves to management the right to implement reasonable rules; Article III(a), Right to a Safe Workplace, which mandates that an employer do whatever is necessary to maintain a healthy and safe workplace; Article III(g), Safety Rules and Regulations,

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241 Compare, e.g., Boone Energy and United Mine Workers of America, Dist. 17, No. 84-17-85-123 (July 2, 1985) (Employer's knowledge that one employee used drugs provides reasonable cause for testing entire workforce) with United States Steel Corp. and United Mine Workers of America, Dist. 29, Local 1713, No. 82-29-82-141 (Feb. 17, 1986) (Reasonableness of testing to be determined on the basis of objective observable behavior of each individual).

242 National Bituminous Coal Wage Agreement, Article IA(d) (19) provides as follows: "The management of the mine, the direction of the working force and the right to hire and discharge are vested exclusively in the Employer."

243 National Bituminous Coal Wage Agreement, Article III(a) provides as follows: Every Employee covered by this Agreement is entitled to a safe and healthful place to work, and the parties jointly pledge their individual and joint efforts to attain and maintain this objective. Recognizing that the health and safety of the Employees covered by this Agreement are the highest priorities of the parties, the parties agree to comply fully with all lawful notices and orders issued pursuant to the Federal Mine Safety and Health Act of 1977, as amended, and pursuant to the various state mining laws.

244 National Bituminous Coal Wage Agreement, Article III(g) provides as follows: Reasonable rules and regulations of the Employer, not inconsistent with federal and state laws, for the protection of the persons of the Employees and the preservation of property shall be complied with. After the effective date of this Agreement, at least ten (10) days prior to the implementation of any new or revised safety rule or regulation, the
which allows an employer unilaterally to implement safety policies; and Article III(j), Physical Examinations,\textsuperscript{245} which permits an employer to require employees to undergo physical examinations.

Arbitrators who have evaluated the policies adopted by various companies have focused their attention primarily on Article III(g). They assess the reasonableness of each component of the employer's program (particularly testing), as well as its overall impact in light of NBCWA obligations.\textsuperscript{246} In most of these cases,

Employer shall provide copies of the proposed rule or regulation to the Mine Health and Safety Committee and shall meet and discuss it with Committee members in an attempt to resolve any difference between the parties. If the Committee or any Employee believes that any such new rule or regulation or revision is unreasonable, arbitrary, discriminatory or adversely affects health or safety, they may file and shall process a grievance.

\textsuperscript{247} National Bituminous Coal Wage Agreement, Article III(j) provides as follows:

1. Physical examination, required as a condition of or in employment, shall not be used other than to determine the physical condition or to contribute to the health and well-being of the Employee or Employees.

2. When a physical examination of a recalled Employee on a panel is conducted, the Employee shall be allowed to return to work at that mine unless he has a physical impairment which constitutes a potential hazard to himself or others.

3. That once employed, an Employee cannot be terminated or refused recall from a panel or recall from sick or injured status for medical reasons over his objection without the concurrence of a majority of a group of an Employer-approved physician, an Employee-approved physician, and a physician agreed to by the Employer and the Employee, that there has been a deterioration in physical condition which prevents Employee from performing his regular work. Each party shall bear the cost of examination by the physician it designates and shall share equally the cost of examination by the jointly designated physician.

4. Where an Employee challenges the physical ability of an Employee or panel member to perform his regular work and is subsequently proven wrong, the Employee shall be compensated for time lost due to the Employer's challenge, including medical examination expenses incurred in proving his physical ability to perform the requirements of the job.

\textsuperscript{246} See Castlegate Coal Co. Mine No. 5 and District 22, United Mine Workers of America, No. 84-22-86-54 (March 3, 1987); Boone Energy and United Mine Workers of America, Dist. 17, No. 84-17-85-123 (July 2, 1985); Zeigler Coal Co. and United Mine Workers of America, No. 81-12-84-1336 (July 12, 1984); Jim Walter Resources Corp. and United Mine Workers of America, Local 1928, No. 84-20-87-194 (June 8, 1987); Jim Walter Resources Corp., No. 4 Mine and United Mine Workers of America, Local 2245, Case No. 84-20-87-185 (April 13, 1987); United States Steel Corp. and United Mine Workers of America, Dist. 29, Local 1713, No. 81-29-82-141 (Feb. 17, 1986).
the validity of the employer's unilateral implementation has been held to be an appropriate exercise of Article III(g) as a safety related rule or regulation.247

Article III(g) requires that employees must comply with an employer's rules and regulations provided they are not unreasonable, arbitrary or discriminatory and do not adversely affect health or safety.248 Given the acceptance of mining as a hazardous industry,249 the fact that many mining companies are developing programs to address safety concerns,250 and the charter and findings of the Mining Industry Committee,251 the nexus between a substance abuse policy and safety is clear.

Whether a given policy is reasonable, however, requires a somewhat more complex analysis and, in particular, the testing component of a program is subject to the strictest scrutiny with respect to its reasonableness.252 Under the NBCWA, controlling precedent has not yet been developed which would guarantee that the testing requirements of a drug and alcohol program will be held. However, it is clear that for a policy to be upheld by an arbitrator it must be grounded in a rational basis and the employer must have just cause to test. Just cause may be found on the basis of one employee's having been found under the influence of drugs (this finding carrying with it the implication that other employees are involved),253 or just cause may be more individualized based on a case-by-case analysis of an employee's behavior and work record.254 Regardless of the way in which an arbitrator will impose the requirement, no employer intending to implement a new policy under the NBCWA should do so without assuring some reasonable cause basis. In this connection, a comprehensive policy which takes a more conservative approach in that it does not include a random testing component will more likely be upheld than one with a random testing aspect.

247 See supra note 231.
248 See supra note 229.
249 See supra notes 18-24 and accompanying text.
250 See, e.g., supra note 231. (These arbitration decisions are evidence of such programs in action.).
251 See supra notes 6-8 and accompanying text.
252 See supra notes 23-44.
253 See Boone Energy, No. 84-17-85-123 (July 2, 1985).
254 See United States Steel, No. 81-29-82-141 (Feb. 17, 1986).
The other issue of primary importance arises in connection with Article III, Section (j) of the Wage Agreement, which entitles employers to require physical examinations for employees provided the physical examination is not used for discriminatory purposes. Up until now, in most mine employment settings, drug and alcohol testing was not integrated into the physical examination, although many other types of tests were. Determining the addition of drug testing under the provisions of the NBCWA is a unilateral change which will violate the Agreement; the NLRA requires a balancing of two viewpoints. The first of these is the General Counsel's determination that "the implementation of such a test, therefore, is a 'material, substantial, and...significant change in [an employer's] rules and practices...which vitally [affects] employee tenure and conditions of employment generally.'" The second is the finding of Arbitrator Phalen in Castlegate Coal, the leading arbitration case rendered under the NBCWA dealing with the issue of drug testing in the context of physical examination requirements.

In Castlegate Coal it was determined that under the NBCWA an employer is free to include a drug screening test in return-to-work physical examinations, provided that such drug screening is neither an invasion of privacy nor used for discriminatory or wrongful monitoring of off-the-job drug usage. According to the arbitrator, the drug test is no different from any other physical examination test and the employee has a right under the contract to challenge the test results. Further, under the NBCWA arbitration precedent, an employer is free to use the results to take appropriate adverse employment action.

Had the arbitrator's determination in Castlegate been that the NBCWA does not allow for the imposition of a Substance Abuse Policy or a drug testing program, then the arbitrator would have ordered revocation of the policy and required col-

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255 See supra note 230.

256 See General Counsel's Memorandum, supra note 91 at D-2; S.D. Warren Co. v. Local 1069, 632 F. Supp. 463 (D. Me. 1986).

257 Castlegate Coal and United Mine Workers of America, Arbitration Case No. 84-22-86-54 (March 3, 1987).

258 Id.; see also Virginia Western, Ltd. and United Mine Workers of America, Dist. 17, Local Union 1078, No. 81-17-83-556 (Sept. 16, 1983); Zeigler Coal Co. No. 84-20-87-194 (June 8, 1987).
collective bargaining with the union, as well as reinstatement and backpay for any employee harmed by the unilateral implementation of the policy. This is the same remedy as would be ordered by the NLRB.259

3. Miscellaneous Labor Law Considerations

Another reason that many unionized companies are adopting policies in accordance with collective bargaining agreements is that courts are finding that tort actions, such as those for negligence and invasion of privacy, are pre-empted by collective bargaining remedies. Thus, such civil suits have been dismissed by reviewing courts on the basis that questions and disputes are subject to the arbitration process.260

Where there is no collective bargaining agreement, an employee policy manual will provide the basis for many employee lawsuits alleging wrongful discharge. Even in the absence of an employee policy manual, the employee may look to the employment-at-will doctrine as a method to return to his job after discharge because of drug or alcohol usage or abuse. Under the Kentucky employment-at-will doctrine, for example, this means that if an employment contract or employment policy manual provides for termination for cause, that contract will not be a bar to a discharge for drug or alcohol abuse.261 However, even under this at-will theory, an employee cannot be discharged if the discharge violates public policy.262

Conclusion

Drug and alcohol abuse by employees has only negative implications in the mining workplace. Increased absenteeism,

259 See General Counsel's Memorandum supra note 91 at D-3.
262 Grzyb v. Evans, 700 S.W.2d 399 (Ky. 1985) (explaining exceptions to the "terminable-at-will" doctrine).
illness, accidents and a host of inefficiencies all result from substance abuse. Substance abuse by employees may also present an employer with increased legal liabilities.

These economic and legal costs, as well as important labor relations considerations, have led many employers in both the public and private sectors to initiate comprehensive Substance Abuse Policies, which sometimes include testing of employees and applicants. Such programs can be successful when developed and administered with sensitivity and with careful consideration for consistency, fairness and privacy.

Ironically, however, these programs, and particularly drug or alcohol testing, often expose the employer to numerous legal liabilities. While testing in the private sector does not present the serious constitutional question that it does in the public sector, it can leave an employer open to other statutory or common law claims. Thus, an employer must be circumspect in initiating a drug abuse program and careful and consistent in executing it. It is therefore incumbent on an employer to be informed about the developing law in this area, particularly in the employer’s own jurisdiction.