

Drug Testing of Health Care Workers: Toward a Coherent Hospital Policy

Dana Devont†

I. INTRODUCTION

Spurred by President Ronald Reagan's 1986 Executive Order seeking to establish a drug-free workplace and by the growing empirical data purporting to show a loss of time, money and productivity due to the adverse effects of substance abuse,¹ employers in both the public and private sector have implemented drug testing programs on an unprecedented scale. Today, employers subject an estimated thirty million workers to some type of employer-sponsored drug and alcohol testing in the workplace.² A 1996 survey by the American Management Association³ reports that eighty-one percent of all major corporations now employ some type of drug testing program, a fourfold increase in nine years.⁴

† Lecturer in Constitutional Criminal Procedure and Criminal Justice Ethics, St. Joseph's University, Philadelphia; B.A., Brandeis University, 1976; J.D., Northeastern University School of Law, 1980. I am indebted to Eleanor Myers for her sound advice and tireless encouragement throughout the writing of this Article; Michael Letwin, Claire Renzetti, Janet Perry and David Sonenshein for their skillful editing and insightful comments on previous drafts; Bruce Gilbert and Andrea Gilbert for their professional perspectives; Joanie Gleiberman and Matt Wolff for their assistance in the preparation of the manuscript; and Kairsten Boynton and Patsy Reynolds for their sustenance. This Article is dedicated to my family, Neil, Perri, Will and Anna, for their love and forbearance.

¹ See Exec. Order No. 12,564, 51 Fed. Reg. 32,889, 32,889 (1986).

² See Leef Smith, *Want a U.S. Job? Take a Drug Test, or Don't Apply*, INT'L HERALD TRIB., Sept. 20, 1996, at 1. This figure includes approximately 8.5 million employees covered by federally mandated drug testing regulations, among them, rail, maritime, airline and other transportation workers, as well as pipeline workers. See *infra* note 34 and accompanying text. Also tested are workers employed by federal contractors with contracts of \$25,000 or more, and federal grantees, both of whom are required by the Drug-Free Workplace Act of 1988, 41 U.S.C. §§ 701-707 (1994), to certify maintenance of a "drug-free workplace." See James W. Fenton, Jr. & Jerry L. Kinard, *A Study of Substance Abuse Testing in Patient Care Facilities*, HEALTH CARE MGMT. REV., Fall 1993, at 87, 87.

³ The American Management Association has a corporate membership of 9500 organizations, which employ an aggregate quarter of the American workforce. See AMA RESEARCH, AMERICAN MANAGEMENT ASS'N, 1996 AMA SURVEY ON WORKPLACE DRUG TESTING AND DRUG ABUSE POLICIES 9 (1996) [hereinafter AMERICAN MANAGEMENT SURVEY].

⁴ See *id.* at 1. This increase is also recorded by smaller companies where, among those organizations employing 500 employees or fewer, 67% now drug test at least some class of employees, a 37% increase since 1990. See Mike Boyer, *Testing for Drugs on Rise: Small Firms Seeking to Protect Themselves*, CINCINNATI ENQUIRER, Sept. 15, 1996, available in LEXIS, News Library, Cinnqr File. Some commentators attribute the increase by smaller firms to a perception that testing is a necessary defense against applicants who have been previously screened out by another company's drug testing program. See *id.*

While drug testing in the health care sector is rising, it still lags behind other industries.⁵ When a hospital does test, it often exempts a crucial job classification—physicians. This Article's thesis centers on the potential liability hospitals face by failing to include drug testing in its hiring and credentialing process. The safety-sensitive nature of hospital services, compounded by drug testing's prevalence outside the health care industry, may heighten hospitals' exposure to negligent hire and retention claims when screening of medical staff and employees fails to include pre-employment and reasonable suspicion drug testing. Moreover, fair and sensible labor management considerations call for a testing policy that encompasses all job classifications, including the independent and hospital-based physicians who comprise a hospital's medical staff.

This Article begins with a summary of the common methodologies used in most drug testing schemes. The focus then shifts in Parts III and IV to some of the features unique to a hospital or patient care facility—most notably, the sensitive and compelling nature of patient care. Because the consequences of delivering substandard care to a patient as a result of a drug or alcohol impairment can be devastating, the hospital may be particularly vulnerable in its credentialing, hiring and retention of any employee or medical staff member whose job responsibilities require direct or indirect patient contact.⁶ The fact that many physicians are private practitioners and independent contractors, rather than employees, does not necessarily relieve the hospital of its responsibility to oversee the quality of patient care. Rather, the enhanced complexity in delivery of health care services has given rise to the doctrine of corporate hospital liability, wherein responsibility to render competent clinical care to the patient is apportioned between the private physician and the hospital administration.⁷

Part V contains a discussion of the privacy implications provoked by urinalysis testing, followed in Parts VI and VII by an examination of the legal challenges raised

Support for testing among employers remains strong notwithstanding the American Management Association's concession that there is little empirical data to show that drug testing promotes deterrence, *see id.*, and given the fact that few companies commit the time or resources necessary to document the costs and benefits of drug testing. *See* Molly R. Parrish, *Drug Testing Support Noted Even Without Proof of Benefit*, DRUG DETECTION REP., June 20, 1996, at 5, 5. Such documentation would include charting rates of absenteeism, on-the-job accidents or disability claims. *See* Marci M. DeLancey, *Creating a Successful Drug-Free Workplace Program*, EMPLOYMENT REL. TODAY, Summer 1995, at 53, 58. Support for employer-mandated testing has also grown among employees. *See* Smith, *supra* note 2, at 3. In a 1995 Gallup poll of 1006 white- and blue-collar workers, 38% believed drug testing was a necessity (up from 26% in 1989), and 70% favored denying a job to applicants who fail preemployment drug screening. *See id.*

Although support for drug testing has grown, the percentage of people testing positive continues to decline. Of the four million general workforce drug tests conducted by SmithKline Beecham PLC (one of the largest laboratories in the United States), only 5.8% resulted in a positive finding. *See Workplace Drug Test Positives Drop to a 10-Year Low*, PR NEWSWIRE, Jan. 30, 1997, available in LEXIS, News Library, Txtnws File. The lab first began tracking positive test rates in 1987. *See id.* Since that time, the percentage of positives has steadily declined. *See id.*

The American Management Association's 1996 survey shows that the overall rate of positive test results among the survey respondents has remained stable at 1.9% for the past two years, down from 4.2% in 1990. *See* AMERICAN MANAGEMENT SURVEY, *supra* note 3, at 5; Eric Rolfe Greenberg, *Drug-Testing Now Standard Practice*, HR FOCUS, Sept. 1996, at 24, 24. According to Eric Greenberg, the Director of Management Studies at the American Management Association, the lower rate of positives is not attributable to a decrease in drug use but to an increase in the number of employees subject to random and periodic testing and to the more widely used suspicion-based testing. *See id.*

⁵ *See* Fenton & Kinard, *supra* note 2, at 88.

⁶ *See* Kemp v. Claiborne County Hosp., 763 F. Supp. 1362, 1367-68 (S.D. Miss. 1991).

⁷ *See* Arthur F. Southwick, *Hospital Liability: Two Theories Have Been Merged*, 4 J. LEGAL MED. 1, 47 (1983).

by public and private employer initiated drug testing. As a government entity, a public sector employer is subject to constitutional constraints not applicable to the private sector employer.⁸ A government-mandated drug testing program establishes its constitutionality by weighing the competing interests of an individual's Fourth Amendment right to be free from unreasonable searches against an employer's interest in promoting a safe and productive workplace.⁹ Generally, the government's concerns will prevail if a job is deemed safety sensitive and the employer can demonstrate "special needs" for conducting the testing.¹⁰ "Safety sensitive" is a broadly defined concept, extending well beyond the operating engineer in a nuclear power reactor to include any number of positions in which on-the-job impairment can jeopardize the safety and welfare of the employee, fellow co-workers or the public.¹¹

In the private sector, the main tool in challenging an employer's drug testing program has been the common law tort for invasion of privacy. Although private employers enjoy more latitude than those in the public sector, the courts have generally found that an employer must establish a reasonable basis for testing absent safety concerns or individualized suspicion.

Parts VIII and IX of this Article briefly address, respectively, some of the federal statutory constraints imposed by the Americans with Disabilities Act and the Family and Medical Leave Act, as well as some of the labor law and arbitration issues raised by drug testing in a unionized workplace.

This Article concludes with model guidelines consistent with judicially prescribed limitations on public and private sector drug testing and with sound labor management policy. These guidelines attempt to reconcile and accommodate the hospital's interest in ensuring public and workplace safety with the physician's or employee's interest in minimizing the impact of drug testing on individual privacy and dignity.

II. DRUG TESTING STRATEGIES

Drug testing entails the collection and analysis of an individual's urine sample for the presence of the most commonly abused classes of drugs: marijuana, cocaine, barbiturates and amphetamines.¹² One of the first issues a hospital must evaluate in developing a drug testing policy is determining the type(s) of testing to include in a substance abuse program. Workplace testing can include one or more of the fol-

⁸ See *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921) (stating that the Fourth Amendment only applies to government agencies).

⁹ See Fenton & Kinard, *supra* note 2, at 88-89. Balancing the public's interests against the individual's constitutional rights is a classic analytical tool crafted by the Supreme Court, and one that implicitly engages both public policy and moral considerations. See David A. Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48 U. PITT. L. REV. 201, 212 (1986) (describing the purpose of the Fourth Amendment as one designed "to protect the privacy and dignity of the individual").

¹⁰ See *Skinner v. Railway Labor Ass'n*, 489 U.S. 602, 619-20 (1989) (holding that the "special needs" allow for departure from the Fourth Amendment's usual warrant and probable cause requirement).

¹¹ See *infra* notes 148-57 and accompanying text (discussing cases that adjudicated drug testing programs governing a variety of safety-sensitive employees).

¹² See Scott S. Cairns & Carolyn V. Grady, *Drug Testing in the Workplace: A Reasoned Approach for Private Employers*, 12 GEO. MASON L. REV. 491, 501-02 (1990). Urine sampling is by far the leading methodology used by employers to test for drugs. See AMERICAN MANAGEMENT SURVEY, *supra* note 3, at 6. Of the 961 respondents to the American Management Association's 1996 survey, 92% of those who tested their employees relied on urinalysis; another 15% used blood sampling (down from 22% in 1990); 2% used hair sampling; and 2% used performance testing (both up from 0% in 1990). See *id.* at 6, 9.

lowing testing methodologies: (1) preemployment; (2) suspicion-based; (3) post-accident; (4) random; (5) periodic; and (6) pursuant to a return-to-work agreement following treatment and rehabilitation for drug or alcohol abuse.

A. PREEMPLOYMENT TESTING

The most common and least controversial form of testing is preemployment testing. According to a recent survey by the American Management Association, the percentage of respondents who drug test new hires has climbed to seventy-seven percent.¹³ Legal challenges to applicant testing are fewer and less successful than those raised by other forms of testing, primarily because courts determined that a job applicant does not have the same recognized interest in the job as an incumbent employee.¹⁴ If a job applicant refuses to submit to a drug test, the applicant is free to walk away and seek employment elsewhere¹⁵ while an employee declining to take a drug test loses his or her existing job. Because an applicant is without a cognizable interest in the job, no violation of a constitutional or statutory right exists.¹⁶

Courts consider a job applicant's expectation of privacy also "diminished" when an employer administers the drug test in connection with a routine preemployment physical, because urinalysis is frequently incorporated into such an examination.¹⁷ This diminished expectation of privacy may also contribute to public acceptance of preemployment testing, because many Americans today have come to expect, and, in many instances, support the concept of submitting their urine for drug

¹³ See *id.* at 3. As a matter of comparison, the percentage of employers testing new hires in 1987 was 19%. See *id.* at 3. The American Management Association estimated that in 1996, one-third of all new hires had been drug tested. See *id.*

¹⁴ See Cairns & Grady, *supra* note 12, at 495.

¹⁵ See *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194, 204 (Ct. App. 1989) (stating that applicants for jobs have a simple choice, they "may consent to the limited invasion of their privacy resulting from the testing, or may decline both the test and the conditional offer of employment"). In evaluating a challenge to a private employer's preemployment drug testing of all applicants under the state constitution's privacy clause, the California Court of Appeals found that the inclusion of a drug urinalysis in a preemployment medical examination imposes only a minimal amount of intrusion on an applicant's expectation of privacy. See *id.*

¹⁶ See Michelle Lynn O'Brien, Comment, *Webster v. Motorola: Employees Reclaiming the Right to Privacy: Random Drug Testing for Safety-Sensitive Employees Only*, 30 NEW ENG. L. REV. 547, 553 (1996); see also *Loder v. City of Glendale*, 927 P.2d 1200, 1234-35 (Cal. 1997) (holding that an across-the-board drug and alcohol testing policy violates the Fourth Amendment as applied to current city employees seeking promotions to new positions, but the same program is constitutionally permissible as applied to city job applicants). In support of its conclusion, the *Loder* court reasoned:

[A]n employer has a significantly greater need for, and interest in, conducting suspicionless drug testing of job applicants than it does in conducting similar testing of current employees, and [also] a drug testing requirement imposes a lesser intrusion on reasonable expectations of privacy when the drug test is conducted as part of a lawful preemployment medical examination that a job applicant is, in any event, required to undergo. Because of these significant differences in both the strength of the interest supporting preemployment drug testing and in the diminished intrusion upon reasonable expectations of privacy implicit in the testing, we conclude that in the preemployment context, unlike the prepromotional context, such drug testing is reasonable, and hence constitutionally permissible, under the Fourth Amendment.

Id. at 1222. But see *O'Keefe v. Passaic Valley Water Comm'n*, 602 A.2d 760 (N.J. Super. Ct. App. Div. 1992) (holding that preemployment testing of all county water meter readers is unconstitutional absent showing of some nexus between the nature of the job and public safety interests).

¹⁷ See *Loder*, 927 P.2d at 1224.

analysis as a condition precedent to securing a job.¹⁸ Preemployment drug testing has, for better or worse, become a workplace norm.

B. SUSPICION-BASED TESTING

Suspicion-based testing refers to testing prompted by a reasonable belief that an employee is drug or alcohol impaired while at work.¹⁹ Second in popularity to pre-employment testing, nearly three-quarters of those employers who drug test use suspicion-based testing.²⁰ It has also proven more legally defensible than random or periodic testing.²¹ Like preemployment testing, suspicion-based testing enjoys broad public support.²² The danger of this form of testing lies in its potential for prejudicial enforcement when the discretionary authority to test is left unchecked and in the hands of one supervisor.²³ To protect against this danger, employers who engage in suspicion-based testing should draft clearly defined criteria for evaluating "reasonable suspicion," and require the corroboration of at least a second supervisor before reaching a determination to test.²⁴

The reasonable suspicion standard is both quantitatively and qualitatively less demanding than that of probable cause,²⁵ "but requires some quantum of individualized suspicion as opposed to an inarticulate hunch."²⁶ There must be articulable grounds for directing the test—objective facts that would lead a reasonable person to conclude that the individual is using drugs or is impaired by drug use.²⁷ Firsthand observation of actual use or possession of illegal substances, or observation of unusual or erratic behavior, may establish reasonable suspicion.²⁸ Information from reliable secondary sources may also verify reasonable suspicion.²⁹

¹⁸ See Cairns & Grady, *supra* note 12, at 495 (citing a Gallup Poll showing that 68% of employees believed that employers should have the right to drug test applicants).

¹⁹ See *id.* at 496. Suspicion-based testing is also referred to as for-cause or reasonable suspicion testing. See *id.* at 496–97; DeLancey, *supra* note 4, at 62.

²⁰ See Cairns & Grady, *supra* note 12, at 495–96 (reporting the results of a Gallup Poll which found that 73% of private employers utilized suspicion-based testing, compared to 94.5% of private employers who utilized preemployment testing); see also AMERICAN MANAGEMENT SURVEY, *supra* note 3, at 4 (reporting that 70.3% of polled companies test only for cause).

²¹ See Cairns & Grady, *supra* note 12, at 496; see also cases cited *infra* note 34 (discussing the various situations in which employers may implement a random drug testing program).

²² See Cairns & Grady, *supra* note 12, at 495–96 (reporting the results of a Gallup Poll which found that 68% of the employees polled believed employers should have the right to test job applicants, and 70% of the employees supported suspicion-based drug testing).

²³ See *id.* at 498–99; see also Miller, *supra* note 9, at 206–07 (discussing the potential abuse of drug test results).

²⁴ See James H. Kizziar & Robert S. Nichols, *Testing Health Care Workers for Drugs: Developing and Implementing a Program*, PERSP. HEALTHCARE RISK MGMT., Summer 1991, at 18, 21.

²⁵ See *Garrison v. Department of Justice*, 72 F.3d 1566, 1567 (Fed. Cir. 1995) (citing *Alabama v. White*, 496 U.S. 325, 330 (1990)), *cert. denied*, 117 S. Ct. 358 (1996).

²⁶ Cairns & Grady, *supra* note 12, at 496 (quoting *Smith v. White*, 666 F. Supp. 1085, 1089 (E.D. Tenn. 1987)).

²⁷ See *id.*

²⁸ See NATIONAL INST. ON DRUG ABUSE, U.S. DEP'T OF HEALTH AND HUMAN SERVS., COMPREHENSIVE PROCEDURES FOR DRUG TESTING IN THE WORKPLACE 5 (1991).

²⁹ See Cairns & Grady, *supra* note 12, at 496. For a case upholding reasonable suspicion drug testing on the basis of secondary sources, see *Garrison*, 72 F.3d at 1569. Outside the zone of safety-sensitive job positions, however, an employer cannot base the legitimacy of its drug testing scheme on evidence and statistics of drug use among the general population. See *Burka v. New York City Transit Auth.*, 739 F. Supp. 814, 828–29 (S.D.N.Y. 1990). The suspicion must be individualized and "directed to a specific person." *Id.* at 827 (quoting *Security and Law Enforcement Employees, Dist. Council 82 v. Carey*, 737 F.2d 187, 205 (2d Cir. 1984)).

C. POST-ACCIDENT TESTING

Post-accident testing is similar to suspicion-based testing, and is usually triggered when the employee has been involved in a workplace accident that resulted in death, injury or property damage.³⁰ It is increasing in almost direct proportion to newly enacted state legislation that bars workers' compensation benefits for employees who test positive for drugs after a workplace accident that resulted in substantial injury.³¹ Because a blood test yields a more accurate picture of recent drug or alcohol ingestion, employers often prefer blood tests over urinalysis in a post-accident setting.³² Some states require more than one such accident to trigger a drug test, particularly where employers are required to demonstrate a reasonable suspicion of on-the-job impairment before testing an employee.³³

D. RANDOM TESTING

Of all the testing options, random testing generates the most controversy. Pursuant to this policy, employers target individuals by a statistically random procedure, absent any individualized suspicion that the target is using drugs or alcohol while on the job. In the public domain, courts have sustained random drug testing in cases where a government worker occupies a safety-sensitive or high-risk position.³⁴ In

³⁰ See DeLancey, *supra* note 4, at 62.

³¹ See *id.*

³² See Cairns & Grady, *supra* note 12, at 497.

³³ See James H. Coil, III & Charles M. Rice, *State Limits on Drug-testing Programs After Accidents*; *State Regulations Update*, 20 EMPLOYMENT REL. TODAY 103 (1993), available in LEXIS, News Library, Asapii File.

³⁴ See American Fed'n of Gov't Employees, Council 33 v. Barr, 794 F. Supp. 1466, 1471 (N.D. Cal. 1992). Random testing has been upheld for a variety of federal employees. See, e.g., Railway Labor Executives' Ass'n v. Skinner, 934 F.2d 1096, 1100 (9th Cir. 1991) (railroad employees); International Bhd. of Teamsters v. Department of Transp., 932 F.2d 1292, 1306 (9th Cir. 1991) (commercial motor vehicle operators); International Bhd. of Elec. Workers, Local 1245 v. Skinner, 913 F.2d 1454, 1464 (9th Cir. 1990) (pipeline workers); Bluestein v. Skinner, 908 F.2d 451, 455-57 (9th Cir. 1990) (airline employees); Harmon v. Thornburgh, 878 F.2d 484, 496 (D.C. Cir. 1989) (employees of the U.S. Department of Justice (DOJ)). For a more complete list of cases where random testing of federal employees has been upheld, see Laura A. Lundquist, *Weighing the Factors of Drug Testing for Fourth Amendment Balancing*, 60 GEO. WASH. L. REV. 1151, 1179 n.161 (1992).

The necessity for a connection between the job responsibilities of the employee(s) to be randomly tested and the potential threat to the public was reaffirmed in *Harmon v. Thornburgh*. See 878 F.2d at 491-92. *Harmon* affirmed a district court's injunction that prohibited the DOJ from implementing those portions of a drug testing program that required random testing of all federal criminal prosecutors and all employees with access to grand jury proceedings. See *id.* at 496. Relying on *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), discussed *infra* notes 190-93 and accompanying text, the court of appeals held that random employee testing is justified only when a "clear, direct nexus exists between the nature of the employee's duty and the nature of the feared violation." *Id.* at 490.

The absence of a nexus between the nature of the employee's job and the potential public injury also formed the basis for rejecting random testing in the following cases: *Stanziale v. County of Monmouth*, 884 F. Supp. 140, 146 (D.N.J. 1995) (stating that "the nexus between the [sanitation] employee's blunder and the potential injury is so attenuated as to alleviate the risk of creating irremedial consequences"); *Burka v. New York City Transit Authority*, 739 F. Supp. 814, 846 (S.D.N.Y. 1990) (holding that the Fourth Amendment requires individual suspicion for drug testing of transit employees in non-safety-sensitive positions); *Loder v. City of Glendale*, 34 Cal. Rptr. 2d 94, 105 (Ct. App. 1994) (holding that city's burden of establishing a compelling interest in testing all municipal job applicants and promotional candidates is satisfied only where the jobs in question entail some "special (i.e., uncommon and unique) and obvious (i.e., conspicuous or easily discernible) physical or ethical demands which, if compromised, could have a disastrous consequence upon public safety or security").

the private sector, random testing is growing,³⁵ particularly where employees are engaged in public safety responsibilities or are tested pursuant to a federal drug testing statute mandating random testing.³⁶ Nevertheless, some states prohibit random testing while others restrict it to employees who perform safety-sensitive work.³⁷

Although considered by some observers to be the most effective deterrent against employee drug use, random testing evokes the most serious ethical concerns.³⁸ Subjecting an employee to urinalysis without any individualized suspicion of drug or alcohol impairment may exceed legitimate limits on an employer's right to exert control over employee behavior. Combined with infringement of employees' rights, the low morale often engendered by random testing undoubtedly contributes to the fact that such testing is the focus of most drug testing litigation. Ironically, because the selection process is an objective one, random testing has some advantage over reasonable suspicion testing. The neutral selection and testing of employees reduces the potential for discriminatory enforcement and the stigma attached to testing.³⁹

E. PERIODIC TESTING

Less controversial than random testing, periodic testing occurs at announced intervals, most often in conjunction with an employee's regularly scheduled physical examination.⁴⁰ Periodic testing elicits fewer employee challenges than random or suspicion-based testing, because the proffering of a urine sample is typically part of

Where random testing has been upheld, the circumstances are specific to a compelling government interest. See, e.g., *American Fed'n of Gov't Employees, AFL-CIO v. Roberts*, 9 F.3d 1464, 1466 (9th Cir. 1993) (upholding random testing of all federal correctional employees who have contact with inmates); *AFGE Local 1533 v. Cheney*, 944 F.2d 503, 506-07 (9th Cir. 1991) (upholding the Department of Navy's random testing of civilian employees with high level security clearance); *Keaveney v. Town of Brookline*, 937 F. Supp. 975, 984-87 (D. Mass. 1996) (upholding a city ordinance requiring the random testing of all commercial drivers); *Rushton v. Nebraska Pub. Power Dist.*, 653 F. Supp. 1510, 1524-25 (D. Neb. 1987) (upholding random testing of certain employees of nuclear power plant), *aff'd*, 844 F.2d 562, 566-67 (8th Cir. 1988).

³⁵ In 1987, companies surveyed by the American Management Association were five times more likely to drug test for cause only. See *AMERICAN MANAGEMENT SURVEY*, *supra* note 3, at 4. Since 1987, the use of random drug testing has increased 1200%, making its use equivalent to other forms of drug testing. See *id.*

³⁶ For example, the U.S. Department of Transportation (DOT) issued regulations, effective January 2, 1990, that require random testing in the aviation, motor carrier, railroad, maritime, mass transit and pipeline industries. See 49 C.F.R. §§ 40.1, 40.3 (1996); Henry D. Fellows, *Legal Aspects of Drug and Alcohol Testing in the Workplace*, *RISK MGMT.*, Mar. 1993, at 21, 25. These regulations cover approximately four million employees whose jobs are deemed safety- or security-sensitive, including

commercial airline pilots, mechanics; flight attendants, aircraft dispatchers and airport security screening personnel; drivers of buses, trucks (weighing 26,000 pounds or more) and trucks of any size carrying hazardous materials; railroad workers; state and local mass transit employees; merchant mariners; and employers performing operation, maintenance and emergency response functions at pipeline and liquefied natural gas facilities.

See *id.*

³⁷ At least eight states (Connecticut, Iowa, Maine, Minnesota, Montana, Oregon, Rhode Island and Vermont) restrict the right of private employers to randomly test employees absent reasonable suspicion or a safety concern. See Erica Sorohan, *Making Decisions About Drug Testing*, 48 *TRAINING & DEV.* 111, 112-13 (1994). An additional five states (Alaska, California, Massachusetts, New Jersey and West Virginia) confine random testing to only those employees working in safety-sensitive jobs. See O'Brien, *supra* note 16, at 554-55.

³⁸ See Kizziar & Nichols, *supra* note 24, at 19-20.

³⁹ See Cairns & Grady, *supra* note 12, at 499.

⁴⁰ See O'Brien, *supra* note 16, at 554.

a routine physical exam.⁴¹ Courts generally uphold urinalysis under these circumstances on the ground that the individual experiences no additional physical intrusion.⁴² The intrusion caused by a drug test performed in conjunction with a routine medical examination may also have less emotional impact on the employee because this form of testing excludes the element of surprise and is generally conducted across the personnel board.⁴³

F. POST-REHABILITATION TESTING

In the last type of testing, post-rehabilitation testing, employers identify and refer employees to counseling and treatment for substance abuse or dependency.⁴⁴ Conducted to ensure compliance with employee and workplace welfare rules, employers often incorporate post-rehabilitation testing into a return-to-work agreement.⁴⁵ As a condition of continued employment, the employee consents to undergo periodic, unannounced drug testing for a specified period of time, usually ranging from one to five years, following the employee's return to work.⁴⁶

III. DRUG TESTING IN THE HEALTH CARE INDUSTRY

A. REASONS TO TEST

There is no consensus regarding the pervasiveness of illicit drug use among health care workers. Features unique to the health care sector, including access to controlled substances and the high degree of stress associated with many health care jobs,⁴⁷ lead some to believe that the substance abuse rate among health care workers is higher than that of the general population.⁴⁸ Moreover, the moral and fiduciary obligations attendant to many health care jobs are not present to the same degree in most other professions. Charged with the responsibility of safeguarding the lives of their patients, the human toll resulting from negligent care delivered by a drug or alcohol impaired employee can be intolerably high. The AMA's Office of General Counsel implicitly recognizes these critical stakes in regard to mandatory alcohol and drug testing for physicians:

⁴¹ See Cairns & Grady, *supra* note 12, at 497.

⁴² See Michael J. Hudock, *Behind the Hysteria of Compulsory Drug Screening in Employment: Urinalysis Can Be a Legitimate Tool for Helping Resolve the Nation's Drug Problem If Competing Interests of Employer and Employee Are Equitably Balanced*, 25 DUQ. L. REV. 597, 746 (1987).

⁴³ See Cairns & Grady, *supra* note 12, at 497.

⁴⁴ See Connie L. Michaels, *Employment Law Considerations Stress Management and Elimination of Bias: The Risk Management Perspective*, in MCLE COMPULSORIES 1996, at 285, 368 (PLI Litig. & Admin. Practice Course Handbook Series No. H-555, 1996).

⁴⁵ See *id.*

⁴⁶ See DeLancey, *supra* note 4, at 61. For further discussion of return-to-work contracts, see *infra* Parts X.B, X.E.

⁴⁷ See Joanne Ossi, *Substance Abuse and Dependence in the Hospital Workplace: Detection and Handling*, PERSP. HEALTH CARE RISK MGMT., Spring 1991, at 21, 22-23; see also American Fed'n of Gov't Employees, L-2110 v. Derwinski, 777 F. Supp. 1493, 1499 (N.D. Cal. 1991) (stating that "[t]he constant presence and dispensing of medicinal preparations containing drugs is part of the currency of hospital life").

⁴⁸ See William N. Malatestinic & James A. Jorgenson, *Dealing with Substance Abuse in the Workplace*, 26 HOSP. PHARMACY 102, 102 (1991) (asserting that "casual drug use among health professionals in such a way as to expose them to the risks of drug abuse and addiction may be higher [than in the general workforce]"); see also *id.* (reporting that although substance abuse is estimated to affect 12% of the workforce at large, the reported percentage for health care employees is approximately 15%).

[W]hen physicians or other individuals who are employed to protect the health and safety of the public abuse drugs, the consequences are potentially life threatening

. . . .

While there are no good data on the extent to which drug abuse by physicians results in substandard patient care, even a small risk cannot be tolerated. The harm to a patient from an impaired physician can be life threatening.⁴⁹

Two widely accepted premises in connection with drug testing in the health care sector include: (1) employees providing direct patient care are engaged in safety-sensitive work;⁵⁰ and (2) the duty of care and responsibility owed to the patient will inevitably outweigh the privacy interests of the health care worker where the responsibilities performed by the health care worker directly intersects with the patient's welfare.⁵¹ Both of these premises are present in *American Federation of Government Employees, Local 2110 v. Derwinski*.⁵² In a challenge to the Veterans Administration's Drug Free Workplace Plan that included random drug testing of certain designated "safety-sensitive" medical positions, including those of a pharmacist, physician, nurse and two medical technicians, a federal district court concluded that "[t]he gravity of the responsibilities of such medical professionals is at least as great as that of the locomotive engineers, flight attendants, and pipeline workers, and the risks associated with drug-impaired performance equally catastrophic."⁵³ Given the "paramount consideration of safety" that must be granted to members of the public who use the Veterans Administration hospitals, and in light of the court's assessment that all medical positions at issue involved duties "fraught with such risk of injury to others that even a momentary lapse of attention can have disastrous consequences," the court deemed that the government's compelling interest in randomly testing superseded the workers' individual privacy interests.⁵⁴ This conclusion is further supported by the observation that the employees' privacy interests were diminished by virtue of their employment as licensed members of the health profession

⁴⁹ David Orentlicher, *Drug Testing of Physicians*, 264 JAMA 1039, 1039 (1990).

⁵⁰ Safety-sensitive positions in health care are staffed by professionals "who are responsible for direct patient care, either with direct patient contact or in the performance of diagnostic testing or therapeutic functions or the preparation and dissemination of drugs and medicines." *Derwinski*, 777 F. Supp. at 1498; see *Kemp v. Claiborne County Hosp.*, 763 F. Supp. 1362, 1368 (W.D. Miss. 1991) (holding that any hospital employee in hands-on patient care occupies a safety-sensitive position).

See also *American Federation of Government Employees, Council 33 v. Barr*, 794 F. Supp. 1466, 1471 (N.D. Cal. 1992), where the DOJ's random drug testing program for all physician and dentist employees of the Federal Bureau of Prisons (FBP) was upheld on public safety grounds. In emphasizing the physical and mental rigors of the medical profession, the court further stated:

It requires no detailed knowledge of the medical field to recognize that doctors must attend to each and every one of their patients with the utmost alertness and care. Public safety and, in some cases, life and death may hang in the balance. Doctors must correctly diagnose ailments and either treat patients or supervise others who do. Treatments may include surgery or the use of powerful drugs. Doctors must be able to respond immediately to emergencies, and when called to perform they may already be taxed by long hours or tedious procedures. Even when not actually on duty, doctors may be on call and prepared to perform services at a moment's notice. Their duties therefore raise obvious and undeniable safety hazards.

Id. at 1472 (citing *Derwinski*, 777 F. Supp. at 1499).

⁵¹ See *id.* 1472-73.

⁵² 777 F. Supp. 1493 (N.D. Cal. 1991).

⁵³ *Id.* at 1498.

⁵⁴ *Id.* at 1499.

because they voluntarily subjected themselves to "qualifications, examination and regulation."⁵⁵

In addition to arguing for the constitutionality of testing health care workers, testing proponents assert that when employers stringently adhere to the principles of confidentiality and due process, and when the aim is therapeutic rather than punitive, the benefits of a drug and alcohol screening program outweigh the privacy incursions.⁵⁶ To the extent that a testing program may identify employees and physicians with a drug abuse problem,⁵⁷ it may serve to hasten the treatment and recovery process, while concomitantly improving the quality of patient care and enhancing a hospital's public accountability.⁵⁸ Finally, as discussed in greater detail in the following section, instituting a drug and alcohol testing policy may reduce hospital liability when the result of negligent care administered by a drug- or alcohol-impaired health care provider harms a patient.⁵⁹

B. REASONS NOT TO TEST

Opponents of testing health care providers echo the arguments advanced by critics at large: (1) imperfection of technology and its yield of false results; (2) intrusion on personal privacy; and (3) lack of precision or limitation on potential inferences drawn from a positive urinalysis.⁶⁰ A positive urinalysis does not provide the tester with any information regarding the frequency, quantity or pattern of drug

⁵⁵ See *id.* But cf. *Glover v. Eastern Neb. Community Office of Retardation*, 867 F.2d 461, 464 (8th Cir. 1989) (holding that a health care worker's employment in a highly regulated state agency does not result in a diminished privacy interest justifying mandatory blood testing for acquired immune deficiency syndromes and hepatitis B when the risk of disease transmission is deemed negligible).

⁵⁶ See AMERICAN HOSP. ASS'N, *SUBSTANCE ABUSE POLICIES FOR HEALTH CARE INSTITUTIONS* 1-2 (1992) [hereinafter *AHA POLICIES*].

⁵⁷ There is no fixed consensus on what percentage of the physician population abuses drugs or alcohol. According to the American Medical Association (AMA), estimates on the rate of impairment among practicing physicians is 7-9%. See Harvey F. Wachsman, *Who Protects Patients' Rights?*, MED. WORLD NEWS, Oct. 23, 1989, at 57, 57. Other surveys go as high as 15%. See Dona De Sanctis, *Helping Health Care Professionals Confront Substance Abuse*, TRUSTEE, Dec. 1991, at 13, 13 (stating that the rate of drug addiction among health care professionals is 10-15%); Malatestinic & Jorgenson, *supra* note 48, at 102 (stating that alcohol and drug abuse affects 15% of health care professionals); *Should Hospitals Test Doctors for Drugs?*, WASH. POST, July 16, 1991 (Health), at 14 (noting an addiction specialist's claim that 15% of physicians are addicted to drugs and alcohol). The rate of drug and alcohol abuse among the general workforce has been estimated to be 12%. See Malatestinic & Jorgenson, *supra* note 48, at 102.

In any case, drug and alcohol abuse is the leading cause of suspension and revocation of physician licenses. See Larry Thompson, *Finding Doctors with Addictions*, WASH. POST, Feb. 20, 1990 (Health), at 9 (finding that 85% of licensure actions taken against doctors involve drugs or alcohol (quoting Michael Compton, Acting Director of the Maryland Board of Physician Quality Assurance)).

⁵⁸ Studies have indicated that health care workers, and in particular, physicians and dentists, have a higher recovery rate than those in other occupations. See Robert S. Walzer, *Impaired Physicians: An Overview and Update of the Legal Issues*, 11 J. LEGAL MED. 131, 134-36, 197-98 (1990); see also Michael F. Fleming, *Physician Impairment: Options for Intervention*, 50 AM. FAM. PHYSICIAN 41, 41 (1994) (stating that 80-90% of alcohol- and drug-addicted physicians recover and refrain from further abuse).

⁵⁹ See Cairns & Grady, *supra* note 12, at 511 (finding that drug testing is a way to reduce injuries caused by impaired employees and the cost to the employer of those injuries that do occur); Walzer, *supra* note 58, at 188-89 (discussing how in some jurisdictions a hospital will not be held responsible if it takes precautions to ensure that only professional, non-drug-using staff are hired).

⁶⁰ See Cairns & Grady, *supra* note 12, at 493.

use;⁶¹ the impact, if any, that the drug has on job performance or mental and physical abilities or whether the tested employee has a drug dependency or abuse problem.⁶² Additionally, a mandatory program may erode trust and damage morale, particularly if it calls for random testing or the collection methodology requires direct observation. The consequences of a positive drug test on a physician's or employee's reputation and career can likewise be devastating, particularly if the program's objective is punitive rather than rehabilitative, and/or is lacking necessary confidentiality safeguards.

Opponents of drug testing also point out that mechanisms are already in place to identify and treat drug or alcohol impaired health care providers. Currently all fifty states have established programs to treat physicians with drug and alcohol problems.⁶³ Also, most states have empowered the state licensing board or medical society with discretionary authority to investigate and rehabilitate (rather than discipline) suspected cases of physical impairment.⁶⁴ Guaranteeing anonymity and confidentiality for the good faith reporter, most states have enacted laws to identify and discipline impaired physicians, including mandatory reporting of physician impairment by colleagues, hospitals and medical societies.⁶⁵

Many commentators have observed that mandatory reporting requirements fail to overcome the "conspiracy of silence" or general reluctance on the part of medical professionals to "turn in" a colleague, particularly in light of the difficulty of identifying, with any degree of certainty, a drug- or alcohol-impaired person.⁶⁶ Therefore, the efficacy of these reporting statutes remains questionable. The statutes are not particularly popular among medical professionals, and enforcement is generally neg-

⁶¹ See *id.* at 506.

⁶² The lack of meaningful information offered by a positive drug test points to a weak correlation with impaired job performance. As pointed out by the AMA's Office of General Counsel, "a test that is positive for drug use may be falsely positive for drug impairment." Orentlicher, *supra* note 49, at 1039.

In explaining the lack of correlation between a positive urinalysis and on-the-job impairment, commentators Edward M. Chen, Pauline T. Kim and John M. True offered the following scientific background of urinalysis:

Unlike blood alcohol tests, which measure the psychoactive component of alcohol in the blood (concentration levels of which have been scientifically correlated with intoxication), urine tests typically only detect inert metabolites (and sometimes drug traces) in urine, which are the end products of drugs processed by the body. The concentrations of these metabolites (which themselves generally have no psychoactive effect) in urine fluctuate dramatically due to a multitude of factors such as liquid intake, urinary flow, metabolism rate, etc., and thus bear no relationship to current impairment. Moreover, as noted above, drug metabolites and traces are excreted in urine days and even weeks after the parent drug has left the brain and blood stream, and long after any psychoactive effect of the drug has subsided. Thus, urine drug tests are only capable of revealing *prior* use (which likely occurred off-duty), and *not* on-the-job impairment.

Edward M. Chen et al., *Common Law Privacy: A Limit on an Employer's Power to Test for Drugs*, 12 GEO. MASON L. REV. 651, 676-77 (1990) (citations omitted).

Passive inhalation of marijuana may also undermine testing validity, depending on the threshold required to trigger a positive result. See Mark A. Rothstein, *Workplace Drug Testing: A Case Study in the Misapplication of Technology*, 5 HARV. J.L. & TECH. 65, 75 (1991).

⁶³ See Fleming, *supra* note 58, at 43.

⁶⁴ See Walzer, *supra* note 58, at 131. Generally the state agency or licensing board retains the licensure and disciplinary functions, and the medical society manages the identification, investigation and treatment functions with a protocol for exchanging information, usually for a failed rehabilitative effort. See *id.* at 134. For a detailed description of some states' governance and regulation of physicians, see *id.* at 139-45.

⁶⁵ See *id.* at 145.

⁶⁶ See Fleming, *supra* note 58, at 41; Thompson, *supra* note 57, at 9.

ligible, with only a few states imposing sanctions for noncompliance, usually in the form of a monetary penalty.⁶⁷

Opponents of urinalysis drug testing, within and without the health care field, also endorse utilization of less invasive procedures to measure worker impairment, most notably neurobehavioral examination, such as physiological or psychomotor performance tests. These computerized tests measure eye-hand coordination and quick reaction times, and can be administered in a matter of minutes.⁶⁸ Moreover, proponents contend, performance tests, which do not trespass on an individual's privacy, can assess not only impairment resulting from ingestion of drugs or alcohol but also impairment caused by sleep deprivation, mental illness or physical disability.⁶⁹

C. AMERICAN HOSPITAL ASSOCIATION'S DRUG TESTING ADVISORY

Beginning with its prefatory declaration,⁷⁰ in 1992 the American Hospital Association (AHA) issued a management advisory urging its members to initiate a comprehensive drug testing program for all hospital personnel, including employees, physicians, volunteers and trustees.⁷¹ Prompting the recommendation were familiar concerns: employee absenteeism, loss of productivity and workplace accidents—all allegedly attributable to illegal substance abuse.⁷² The AHA advisory calls for pre-employment, for-cause and post-accident testing.⁷³ Hospitals should reserve random testing for return-to-work agreements following treatment and rehabilitation for substance abuse.⁷⁴ The scope of testing should also include commonly abused prescription drugs as well as alcohol and illegal drugs.⁷⁵

⁶⁷ See Walzer, *supra* note 58, at 169. The Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101–11152 (1994), overseen by the U.S. Department of Health and Human Services (HHS), also calls for the reporting of incompetent (but not specifically impaired) physicians to HHS and to the appropriate state licensing board, *see id.* § 11134(b)–(c), and requires that this information be made available to hospitals and other health care entities. *See id.* § 11137(a).

⁶⁸ See Orentlicher, *supra* note 49, at 1040.

⁶⁹ *See id.* The AMA's Council of Scientific Affairs (CSA) has addressed the issue of whether neurobehavioral tests would more accurately measure performance impairment. In a 1992 report, the CSA concluded that although application of neurobehavioral tests to health care professionals had not been fully explored, they appeared to lack the necessary sensitivity and specificity to identify current drug users with impaired job performance. *See COUNCIL ON SCIENTIFIC AFFAIRS, AMERICAN MED. ASS'N, CSA REPORT 2-1-95*, at 3 (1995) [hereinafter *CSA REPORT*]. The CSA, therefore, did not yet consider performance testing an appropriate substitute for urine testing. *See id.* Although acknowledging the limitations of drug tests, the CSA argues that drug tests can and do accomplish the specific task of identifying those whose drug use puts them at greater risk of mental or physical impairment. *See id.* at 2.

⁷⁰ "Because of its leadership role in the community, its mission of providing safe and effective health and medical care, and its responsibility as an employer, every health care institution should strive to establish and maintain an alcohol- and drug-free work environment." AHA POLICIES, *supra* note 56, at 1.

⁷¹ *See id.* at 3. Approximately six months after issuing this advisory report, the AHA implemented a similar testing policy for its 850 employees in Chicago and Washington, D.C. *See What's Good for the Goose . . .*, MOD. HEALTHCARE, Dec. 14, 1992, at 52, 52.

⁷² *See* AHA POLICIES, *supra* note 56, at 1.

⁷³ *See id.* at 2.

⁷⁴ *See id.* at 3.

⁷⁵ *See id.* One of the more recent comprehensive studies to measure physician substance abuse was based on a mailed, self-reporting anonymous survey of 9600 physicians across the country. *See* Patrick H. Hughes et al., *Prevalence of Substance Abuse Among US Physicians*, 267 JAMA 2333, 2334 (1992). The study found that physicians were less likely than the general population to use illicit drugs (such as cocaine, marijuana and heroin), but were more likely to use alcohol and to self-treat with prescription medications, most notably, opiate analgesics and benzodiazepine-like tran-

The AHA further advised that hospitals should conduct the testing of applicants and employees without regard to job description. With respect to physicians, the AHA counseled hospitals to test all medical staff members, "regardless of the type or nature of the member's privileges."⁷⁶ Members should be tested when first applying for privileges, but subject only to for-cause testing thereafter.⁷⁷ If a staff member tests positive, hospitals should condition continued membership and privileges on a return-to-work agreement.⁷⁸

The advisory further recommends that hospitals structure drug and alcohol testing policies on sound therapeutic/rehabilitative standards.⁷⁹ No policy should limit itself to testing.⁸⁰ It should also incorporate an educational program on substance abuse and treatment, and develop an employee assistance program to which employees can turn for referral, evaluation and treatment.⁸¹

D. AMERICAN MEDICAL ASSOCIATION'S DRUG TESTING POLICY

The American Medical Association (AMA) takes the position that drug and alcohol testing of employees in any industry may be appropriate in the following circumstances: (1) preemployment for health or safety-sensitive positions; (2) reasonable suspicion that performance is impaired by drugs or alcohol; and (3) follow-up testing to monitor rehabilitation.⁸² The AMA further states that urine drug and alcohol testing may be appropriate in comparable circumstances for physicians and other health care employees.⁸³ Like the AHA, the AMA opposes random testing.⁸⁴ In support of testing programs within the above parameters, the AMA states:

In keeping with the highest traditions of the profession, physicians have voluntarily accepted behavioral and ethical standards at least as stringent as those imposed on workers in other occupations. When the issue is encouragement of healthy behavior, designed to counter an illness (drug addiction) considered to be a scourge of modern society, only the most demanding standard would seem acceptable.⁸⁵

In addressing physician attitudes toward drug testing, the AMA cites a survey published in the *Archives of Internal Medicine* indicating that of 272 doctors surveyed in one Michigan county, 45% agreed with mandatory urinalysis drug testing of physicians who hold hospital privileges; 34% disagreed; and 21% remained uncertain.⁸⁶ The survey also revealed that, in the event a hospital implements a testing

quilizers. *See id.* at 2336. Prescription drugs rank third behind alcohol and tobacco as the most used substance among physicians. *See id.*

⁷⁶ AHA POLICIES, *supra* note 56, at 3.

⁷⁷ *See id.*

⁷⁸ *See id.*

⁷⁹ *See id.* at 1.

⁸⁰ *See id.*

⁸¹ *See id.*

⁸² *See CSA REPORT, supra* note 69, at 6.

⁸³ *See id.*

⁸⁴ *See id.* at 1-2.

⁸⁵ *Id.* at 3.

⁸⁶ *See* Stephen J. Lemon et al., *Physicians' Attitudes Toward Mandatory Work Place Urine Drug Testing*, 152 *ARCHIVES INTERNAL MED.* 2238, 2240 (1992). When broken down by age, the study revealed that older physicians were far more likely than their younger counterparts to approve of mandatory drug testing of physicians: 61% of the respondents between the ages of 45 and 60 supported such testing compared with 45% of the respondents between the ages of 30 and 44. *See id.*

program, respondents clearly preferred that the medical staff conduct the testing without the participation of the hospital administration.⁸⁷

The AMA takes these survey results a step farther by urging the medical staff's full involvement in the formulation and development of any drug and alcohol testing program, including:

- (a) selection of analytical methods to ensure scientific validity of the test results, (b) determination of measures to maintain confidentiality of the test results, (c) in for-cause post-incident/injury testing, definition of standards for determining whether cause exists and which incidents and/or injuries will result in testing, and (d) development of mechanisms to address the physical and mental health of medical staff members.⁸⁸

Finally, the AMA cautions against implementation of any drug and alcohol testing plan without first securing the necessary procedural and substantive due process guarantees, and advocates the establishment at all times of the "primacy of medical staff authority in substance abuse policy and procedures."⁸⁹

IV. DRUG TESTING AND CORPORATE HOSPITAL LIABILITY

A. HOSPITAL ACCOUNTABILITY FOR THE DELIVERY OF NEGLIGENT PATIENT CARE

1. Corporate Hospital Liability and the Independent Physician

In addition to enhancing workplace safety for both patient and health care providers, drug testing may also represent good risk management. The expansion in negligent hire and retention claims increases pressure on a hospital to implement stringent screening and monitoring procedures to help ensure the competency of all health care providers whose job responsibilities involve patient care. The doctrine of negligent hire or negligent retention imposes direct employer liability to third parties for negligently hiring or retaining incompetent, unsuitable or unfit employees in positions that pose an unreasonable risk of harm to others.⁹⁰ A hospital's liability for

⁸⁷ See *id.*

⁸⁸ CSA REPORT, *supra* note 69, at 6.

⁸⁹ *Id.*

⁹⁰ See Charles A. Odewahn & Darryl L. Webb, *Negligent Hiring and Discrimination: An Employer's Dilemma?*, 40 LAB. L.J. 705, 705 (1989). Liability for negligent hire or retention attaches if the employer knows of the employee's unfitness, or fails to take reasonable steps to discover it. See *id.*

Liability may also be imputed to the employer for the negligent actions of an employee under the doctrine of respondeat superior, provided the negligence occurred during the course of employment. See RESTATEMENT (SECOND) OF AGENCY § 219 (1958). This theory of liability applies to the negligence of such employees as interns, resident physicians, nurses and other hospital staff members. See Arthur L. Southwick, *supra* note 7, at 8; see also Diana Joseph Bearden & Bryan J. Maedgen, *Emerging Theories of Liability in the Managed Care Industry*, 47 BAYLOR L. REV. 285, 300 (1995) (noting that courts have recently recognized hospital liability for the negligence of the physicians over whom it has control). It does not, generally, reach the conduct of the negligent independent physician. See Bearden & Maedgen, *supra*, at 299-300; Southwick, *supra* note 7, at 5.

Liability under respondeat superior is vicarious and extends only to negligent employee conduct committed during the course of employment. See Odewahn & Webb, *supra*, at 705. In contrast, the doctrine of negligent hiring imposes direct employer liability and extends to intentional acts committed by employees outside the scope of employment. See *id.*

The negligent hiring doctrine has been followed in the following jurisdictions: Alaska, see *Svacke v. Shelley*, 359 P.2d 127, 130-31 (Alaska 1961); Arizona, see *Kassman v. Busfield Enters.*, 639 P.2d 353, 356-57 (Ariz. Ct. App. 1982); California, see *Virginia G. v. ABC Unified School Dist.*, 19 Cal. Rptr. 2d 671, 675-76 (Ct. App. 1993); Colorado, see *Colwell v. Oatman*, 510 P.2d

negligence in the hire or retention of an employee may also extend to physicians, notwithstanding the fact that many physicians are not salaried hospital employees, but independent contractors practicing autonomously, usually in a private, office-based setting.⁹¹ Over the years, the doctrine of corporate hospital liability has undermined the assumption that hospitals had no control over independent physicians and, therefore, could not be held legally accountable for their malfeasance.⁹²

Historically, courts have been highly reluctant to place any legal responsibility on a hospital for harm suffered by a patient at the hands of a negligent physician.⁹³ This reluctance was premised, in great part, on a perception of the hospital as merely an institution undertaking only to "furnish room, food, facilities for operation, and attendance."⁹⁴ But present day hospital operations are more complex, necessitating hospital administrators to play a much more active role in the provision of medical care.⁹⁵ Hospitals now routinely employ a large staff of personnel to provide patient

464, 466 (Colo. Ct. App. 1973); Connecticut, see *Shore v. Town of Stonington*, 444 A.2d 1379, 1383 (Conn. 1982); District of Columbia, see *Levy v. Currier*, 587 A.2d 205, 211-12 (D.C. 1991); Florida, see *Mallory v. O'Neil*, 69 So. 2d 313, 315 (Fla. 1954); Georgia, see *Mitchell County Hosp. Auth. v. Joiner*, 189 S.E.2d 412, 414 (Ga. 1972); Hawaii, see *Janssen v. American Haw. Cruises, Inc.*, 731 P.2d 163, 166 (Haw. 1987); Illinois, see *Johnson v. Mers*, 664 N.E.2d 668, 672-73 (Ill. App. Ct. 1996); Iowa, see *D.R.R. v. English Enters., CATV*, 356 N.W.2d 580, 583 (Iowa Ct. App. 1984); Kansas, see *Plains Resources, Inc. v. Gable*, 682 P.2d 653, 661-63 (Kan. 1984); Louisiana, see *Roberts v. Benoit*, 605 So. 2d 1032, 1044 (La. 1991); Maryland, see *Evans v. Morsell*, 395 A.2d 480, 483 (Md. 1978); Michigan, see *Hersh v. Kentfield Builders, Inc.*, 189 N.W.2d 286, 288 (Mich. 1971); Minnesota, see *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 910-13 (Minn. 1983); Missouri, see *Gaines v. Monsanto Co.*, 655 S.W.2d 568, 570 (Mo. Ct. App. 1983); New Jersey, see *DiCosola v. Kay*, 450 A.2d 508, 514-16 (N.J. 1982); New Mexico, see *F & T Co. v. Woods*, 594 P.2d 745, 747 (N.M. 1979); New York, see *Detone v. Bullitt Courier Serv., Inc.*, 528 N.Y.S.2d 575, 576 (App. Div. 1988); North Carolina, see *Moricle v. Pilkington*, 462 S.E.2d 531, 533 (N.C. Ct. App. 1995); Oklahoma, see *Jordan v. Cates*, 935 P.2d 289, 292-93 (Okla. 1997); Oregon, see *Chesterman v. Barmon*, 727 P.2d 130, 131-32 (Or. Ct. App. 1986); Pennsylvania, see *Dempsey v. Walso Bureau, Inc.*, 246 A.2d 418, 419-20 (Pa. 1968); Tennessee, see *Doe v. Rogers*, No. 03A01-9606-CV-00212, 1997 WL 36834, at *1 (Tenn. Ct. App. Jan. 31, 1997); Texas, see *Akins v. Estes*, 888 S.W.2d 35, 41-42 (Tex. App. 1994); Utah, see *Stone v. Hurst Lumber Co.*, 386 P.2d 910, 911-12 (Utah 1963); and Washington, see *Peck v. Siau*, 827 P.2d 1108, 1110 (Wash. Ct. App. 1992). The American Law Institute defines the doctrine as when "[a] person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless . . . in the employment of improper persons or instrumentalities in work involving risk of harm to others." RESTATEMENT (SECOND) OF AGENCY § 213 (1958).

⁹¹ See James B. Cohoon, *Piercing the Doctrine of Corporate Hospital Liability*, 17 SAN DIEGO L. REV. 383, 385 (1980).

⁹² See *id.* at 384-85.

⁹³ See Mark A. Hall, *Institutional Control of Physician Behavior: Legal Barriers to Health Care Cost Containment*, 137 U. PA. L. REV. 431, 457 (1988). Because it was difficult to determine the amount of control hospitals had over medical decision making, hospitals were originally held liable for administrative errors, not medical actions. See *id.*

⁹⁴ See *Smith v. Duke Univ.*, 14 S.E.2d 643, 647 (N.C. 1941), *overruled by Rabon v. Rowan Mem'l Hosp., Inc.*, 152 S.E.2d 485, 499 (N.C. 1967).

⁹⁵ See *Bost v. Riley*, 262 S.E.2d 391, 395 (N.C. Ct. App. 1980) (addressing the changing role of the hospital and its more intimate involvement in direct provision of medical care); see also *Johnson v. Misericordia Community Hosp.*, 301 N.W.2d 156, 164 (Wis. 1981) (challenging the notion that hospitals are merely treatment facilities and do not undertake the treatment of patients through its doctors and nurses).

The significance of the increased complexity of patient care is succinctly explained as follows:

In the delivery of health care services in an institutional setting, it is increasingly difficult to determine factually who is in control of whom. As allied health care professionals proliferate and are accorded a greater degree of independence from the direct supervision and control of the attending physician, the matter of the right to control another's actions becomes a very difficult question both as a matter of fact and of law.

care, including physicians, residents, nurses, technicians, as well as administrative and manual workers. Moreover, patients today have a reasonable expectation that the hospital is in charge of, and assumes overall responsibility for, the care they receive.⁹⁶

In view of this functional and operational shift, courts have become unwilling to shield hospitals from tort liability where a patient has received substandard care from a physician who, while not under the hospital's direct control, agency or employ, has nevertheless been accorded privileges to treat patients at the facility, in conformity with hospital rules and regulations.⁹⁷ Consequently, under the doctrine of corporate hospital liability (also referred to as corporate hospital negligence), a hospital may be liable for negligent care rendered by physicians, even where no direct employment or agency relationship exists.⁹⁸

Corporate liability focuses on a breach of duty owed directly to a third party. This translates in a corporate hospital setting to a hospital bearing direct responsibility to its patients for the quality of medical care delivered by members of its medical staff.⁹⁹ This duty obligates a hospital to exercise reasonable care both to "(1) insure that its medical staff is qualified for the privileges granted and/or (2) to evaluate the care provided."¹⁰⁰ A number of jurisdictions now adhere to the theory of corporate liability.¹⁰¹

Southwick, *supra* note 7, at 47.

⁹⁶ See Arthur F. Southwick, *The Hospital as an Institution—Expanding Responsibilities Change Its Relationship with the Staff Physician*, 9 CAL. W. L. REV. 429 (1973). Additionally, patients today may not have the opportunity to select their own physician; rather, the patient is often directed by an employer, hospital or insurance company to a particular physician or group of physicians. See *id.*

⁹⁷ See Southwick, *supra* note 7, at 5.

⁹⁸ Taking note of the operational changes that have marked the modern medical facility, some jurisdictions have proceeded on the doctrine of apparent agency to attach liability to the hospital for negligent treatment administered by an independent physician. See *id.* at 10. Courts have pointed out that hospitals have increasingly contracted with such medical specialists as radiologists, anesthesiologists and emergency room practitioners who receive a percentage of the department's income in exchange for services. See *id.* at 9-10. Under these circumstances, although physicians may remain independent contractors, liability for their tortious conduct may extend to the hospital under the doctrine of apparent agency. See *id.* Apparent agency can be demonstrated where it can be shown that: (1) the hospital has invited the patient to use the services of the medical specialists and may have left the patient with no choice but to do so; (2) the hospital represents that it provides a full range of medical care including those of the specialists; (3) patients rely on the hospital's representations; and (4) patients conclude, based on these representations, that the specialists are either employees or an integral part of the hospital. See *id.* at 10.

The theory of corporate hospital liability was first articulated in *Darling v. Charleston Community Memorial Hospital*, 211 N.E.2d 253 (Ill. 1965). The Supreme Court of Illinois affirmed a jury's verdict in favor of a patient-plaintiff whose leg amputation was necessitated by an emergency room physician's improper setting of a broken leg. See *id.* at 258. By finding the hospital negligent in its failure to require consultation or examination by a staff physician and to supervise properly the patient's treatment, *Darling* created an affirmative duty on the part of the hospital to exercise reasonable care in the supervision of physicians and to take proper action. See *id.* Such action might include a temporary or permanent revocation of privileges if a physician is subsequently found to be incompetent.

⁹⁹ See *id.* at 17.

¹⁰⁰ *Johnson v. Misericordia Community Hosp.*, 301 N.W.2d 156, 165 (Wis. 1980).

¹⁰¹ See, e.g., *Purcell v. Zimbelman*, 500 P.2d 335, 341 (Ariz. Ct. App. 1972); *Elam v. College Park Hosp.*, 183 Cal. Rptr. 156, 161 (Ct. App. 1982); *Kitto v. Gilbert*, 570 P.2d 544, 550 (Colo. Ct. App. 1977); *Mitchell County Hosp. Auth. v. Joiner*, 189 S.E.2d 412, 414 (Ga. 1972); *Johnson v. Saint Bernard Hosp.*, 399 N.E.2d 198, 204 (Ill. App. Ct. 1979); *Ferguson v. Gonyaw*, 236 N.W.2d 543, 550 (Mich. Ct. App. 1975); *Gridley v. Johnson*, 476 S.W.2d 475, 484 (Mo. 1972); *Foley v. Bishop Clarkson Mem'l Hosp.*, 173 N.E.2d 881, 884 (Neb. 1970); *Moore v. Board of Trustees of Carson-Tahoe Hosp.*, 495 P.2d 605, 608 (Nev. 1972); *Corleto v. Shore Mem'l Hosp.*, 350 A.2d 534,

2. Corporate Hospital Liability and the Duty to Exercise Reasonable Care in the Selection and Retention of Medical Staff Members

Like the tort of negligence, corporate liability is predicated on the existence of a duty, a breach of that duty and causation.¹⁰² A hospital's duty to safeguard the quality of medical care delivered at its facility stems from the "special relationship" between a hospital and its patients. "Special relationships" exist generally where concerns of public health or safety are implicated; e.g., landlord and tenant, public carrier and passenger, and police officer and citizen.¹⁰³ By virtue of this special relationship, a hospital implicitly promises to hire and retain only competent and reliable employees and medical staff.¹⁰⁴ State statutes that regulate hospital licensing and the Joint Commission on Accreditation of Healthcare Organizations' (JCAHO) accreditation requirements also infer the duty to oversee delivery of medical services.¹⁰⁵

In the vernacular of negligence law, the existence of a duty is sometimes defined by the foreseeability of risk.¹⁰⁶ A duty to a third party attaches if it is foreseeable that an act, or failure to act, may cause someone harm.¹⁰⁷ A corporate hospital's failure to exercise proper care when reviewing the credentials or background of applicants could foreseeably result in the appointment of unqualified physicians, thereby creating an unreasonable risk of harm to the patient. Thus, hospitals owe to their patients a duty to exercise reasonable care in the selection and retention of employees.¹⁰⁸ Moreover, the overall responsibility to ensure the competency of its medical staff is nondelegable.¹⁰⁹

537 (N.J. Super. Ct. Law Div. 1975); *Felice v. Saint Agnes Hosp.*, 65 A.D.2d 388, 396 (N.Y. App. Div. 1978); *Bost v. Riley*, 262 S.E.2d 391, 395 (N.C. Ct. App. 1980); *Capan v. Divine Providence Hosp.*, 430 A.2d 647, 648 (Pa. Super. Ct. 1980); *Brownsville Med. Ctr. v. Gracia*, 704 S.W.2d 68, 75 (Tex. App. 1985); *Pedroza v. Bryant*, 677 P.2d 166, 168 (Wash. 1984); *Utter v. Hospital Ctr.*, 236 S.E.2d 213, 215 (W. Va. 1977); *Johnson v. Misericordia Community Hosp.*, 301 N.W.2d 156, 164 (Wis. 1981).

¹⁰² See *Odehahn & Webb*, *supra* note 90, at 707 (citing *Scott v. Watson*, 359 A.2d 548, 552 (Md. 1976)).

¹⁰³ See *id.* at 708.

¹⁰⁴ See James W. Fenton, Jr. et al., *Negligent Hiring and Retention: Some Evidence of Hospital Vulnerability*, HEALTH CARE MGMT. REV., Winter 1991, at 73, 79.

¹⁰⁵ See *Johnson*, 301 N.W.2d at 168-69; see also *Martinez v. Lifemark Hosp.*, 608 So. 2d 855, 857 (Fla. Dist. Ct. App. 1992) (stating that "[t]he selection and review of health care personnel is a duty of hospitals under Florida's medical malpractice statute"). The JCAHO was previously known as the Joint Commission on the Accreditation of Hospitals. See BARRY R. FURROW ET AL., HEALTH LAW: CASES, MATERIALS AND PROBLEMS 99-100 (2d ed. 1991).

¹⁰⁶ See 57A AM. JUR. 2D *Negligence* § 83 (1989).

¹⁰⁷ See *id.* § 154.

¹⁰⁸ See *Elam v. College Park Hosp.*, 183 Cal. Rptr. 156, 161 (Ct. App. 1982). The distinction between negligent selection and negligent retention is discussed in *Garcia v. Duffy*, 492 So. 2d 435, 438-39 (Fla. Dist. Ct. App. 1986) (citation omitted).

The principal difference between negligent hiring and negligent retention as bases for employer liability is the time at which the employer is charged with knowledge of the employee's unfitness. Negligent hiring occurs when, prior to the time the employee is actually hired, the employer knew or should have known of the employee's unfitness, and the issue . . . primarily focuses upon the adequacy of the employer's pre-employment investigation into the employee's background. Negligent retention, on the other hand, occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further action such as investigating, discharge, or reassignment.

¹⁰⁹ See *Joiner v. Mitchell County Hosp. Auth.*, 186 S.E.2d 307, 308 (Ga. Ct. App.), *aff'd*, 189 S.E.2d 412, 414 (Ga. 1972) (holding that a hospital may not avoid liability for the negligent selec-

3. The Required Causal Link Between the Hospital's Breach of Duty and the Resultant Injury

Although hospitals have a duty to exercise reasonable care in the selection and retention of medical staff and employees, a breach of that duty is not sufficient to impose corporate liability under a theory of negligent hire or retention.¹¹⁰ The plaintiff must also show that the hospital's negligent credentialing or retention of a staff physician was the proximate cause of the resulting patient injury.¹¹¹ Hospitals have sought to avoid liability by arguing that physician malfeasance is an intervening event and the proximate cause of a patient-plaintiff's injury.¹¹² But most jurisdictions that adopted corporate hospital liability crafted a more flexible approach to the proximate cause requirement. Some require a plaintiff to show that hospital negligence in the hire or retention of a staff physician was a contributing or substantial factor in the plaintiff's injury. For example, in *Purcell v. Zimbelman*, the Arizona Court of Appeals affirmed hospital liability for its surgery department's failure to supervise properly a private surgeon and to alert the governing board to a possible problem.¹¹³ The court concluded that the plaintiff must introduce evidence "which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result."¹¹⁴

Other jurisdictions analyze proximate cause in terms of the foreseeability of the harm,¹¹⁵ a concept that is intertwined with the establishment of the duty to exercise reasonable care in the first instance.¹¹⁶ Predicating proximate cause on foreseeability of harm is consistent with the analysis most often employed in the general tort of negligent hiring, which asks whether the plaintiff's injury was the "natural, probable, and foreseeable result of the employer's negligence."¹¹⁷

tion of a physician based on delegating credentialing authority to a medical staff committee which acts as an agent of the hospital).

¹¹⁰ See Jack W. Shaw, Jr., Annotation, *Hospital's Liability for Negligence in Selection or Appointment of Staff Physician or Surgeon*, 51 A.L.R.3d 981, 983 (1973).

¹¹¹ See *id.*; see also Odewahn & Webb, *supra* note 90, at 707 (stating that "[t]he plaintiff must prove a causal connection (proximate cause) between the harm sustained and the negligence of the employer").

¹¹² Cf. *Portlock v. Perry*, 852 S.W.2d 578, 583 (Tex. App. 1993) (finding that negligent action by treating physician severed the causal connection between the medical facility's negligent hiring and the resulting harm to patient). See generally Odewahn & Webb, *supra* note 90, at 707 (discussing how employers often assert that their employees' criminal acts break the chain of causation).

¹¹³ 500 P.2d 335, 341 (Ariz. Ct. App. 1972); see also *Bost v. Riley*, 262 S.E.2d 391, 397 (N.C. Ct. App. 1980) (finding that hospital's failure to take any action against defendant-surgeon's failure to keep patient progress notes violated hospital rules and may be used as evidence of hospital's breach of duty to oversee quality of patient's care).

¹¹⁴ *Purcell*, 500 P.2d at 342.

¹¹⁵ See *Focke v. United States*, 597 F. Supp. 1325, 1351 (D. Kan. 1982) (stating that proximate cause involves a foreseeable injury); *Johnson v. Misericordia Community Hosp.*, 301 N.W.2d 156, 163-64 (Wis. 1980) (stating that the harm element of negligence must be foreseeable).

¹¹⁶ See *Elam v. College Park Hosp.*, 183 Cal. Rptr. 156, 161 (Ct. App. 1982) (citing *Weirum v. RKO Gen., Inc.*, 539 P.2d 36, 39 (Cal. Ct. App. 1975); *Dillon v. Legg*, 441 P.2d 912, 918 (Cal. Ct. App. 1968)).

¹¹⁷ Odewahn & Webb, *supra* note 90, at 709; see *Katrin U. Byford*, Comment, *The Quest for the Honest Worker: A Proposal for Regulation of Integrity Testing*, 49 SMU L. REV. 329, 359-60 (1996). When examining foreseeability, if "the plaintiff's injury could not be reasonably foreseeable by the employer at the time of the hiring, the employer's conduct will not be considered the proximate cause of the injury." Odewahn & Webb, *supra* note 90, at 709.

4. The Scope of the Hospital's Duty to its Patients

The doctrine of corporate liability imposes a duty to protect patients from negligent care by exercising reasonable care in the selection and retention of medical staff.¹¹⁸ The degree of care is that utilized by the average hospital in similar circumstances.¹¹⁹ The key relationship between a private physician and a hospital centers on a patient's admission. A physician may admit and treat patients only if the receiving hospital accords the physician the privilege to do so.¹²⁰ The responsibility for authorizing physician privileges rests with the hospital's governing body. But because the governing body is often composed of community lay members who lack the necessary knowledge and expertise to evaluate physician credentials, review of an application for privileges is often delegated to the medical staff, which in turn may delegate the responsibility to a credentialing committee.¹²¹ Ultimate responsibility for selection and retention of competent physicians, however, remains with the hospital's governing body.¹²² This sharing of authority and responsibility is consistent with the JCAHO standards for patient care,¹²³ which "place particular emphasis on the appointment/reappointment process, delineation of clinical privileges, and periodic appraisals of each physician staff member. In addition, the hospital is required to institute reliable and valid measures that continuously evaluate the quality of care rendered all patients."¹²⁴

With respect to the duty to investigate the qualifications and competency of a physician applicant, in *Joiner v. Mitchell County Hospital Authority*, the Georgia Court of Appeals implied that a hospital cannot rely solely on the existence of a

¹¹⁸ See *Elam*, 183 Cal. Rptr. at 164. Reasonable care in the selection of medical staff requires the screening of applicants pursuant to procedurally fair and established criteria. See *Moore v. Board of Trustees*, 495 P.2d 605, 608 (Nev. 1972); *Southwick*, *supra* note 7, at 47.

¹¹⁹ See *Johnson*, 301 N.W.2d at 171 (stating that a hospital will be liable if it "failed to exercise that standard of care usually exercised in similar situations by other members of the medical profession and thus breached that legal duty owed to the patient" (quoting *Mossey v. St. Luke's Hosp.*, 218 N.W.2d 514, 517 (Wis. 1974))).

¹²⁰ A large teaching hospital may typically have hundreds of private admitting physicians. See *id.* at 168-71.

¹²¹ See *Cohoon*, *supra* note 91, at 394. Following evaluation of an applicant's qualifications, the credentialing committee forwards a recommendation, sometimes in conjunction with a concurring recommendation from the staff executive committee, for the governing board's approval. See *id.* at 392.

¹²² See *Mitchell County Hosp. Auth. v. Joiner*, 189 S.E.2d 412, 414 (Ga. 1972) (stating that "[t]he delegation of authority to screen applicants for staff membership on the medical staff does not relieve the [hospital] of its responsibility, since the members of such staff act as agents for the [hospital]").

¹²³ See 1 JOINT COMM'N ON ACCREDITATION OF HEALTHCARE ORGS., ACCREDITATION MANUAL FOR HOSPITALS 213 (1996) (discussing the responsibility of the credentialing process to oversee appointments to the medical staff, clinical privileges granted to independent practitioners and practitioners' general ability to provide patient care services).

¹²⁴ *Pedroza v. Bryant*, 677 P.2d 166, 170 (Wash. 1984) (quoting Susan B. Koehn, *Hospital Corporate Liability: An Effective Solution to Controlling Private Physician Incompetence?*, 32 RUTGERS L. REV. 342, 369-70 (1979)). The state supreme court subscribed to the theory of corporate hospital negligence, but declined to apply it where a patient was treated in a staff physician's private office, outside hospital premises. See *id.* at 171-72. The court pointed to the defendant hospital corporation's by-laws, adoption of which are mandated by statutory and regulatory law, as an additional source for defining the standard of care owed by a hospital to its patients. See *id.* at 171. For additional cases in which courts held hospitals liable for the negligence of its staff or conferred on them a duty to supervise the quality of care provided by its staff, see *Purcell v. Zimbelman*, 500 P.2d 335, 341 (Ariz. Ct. App. 1972) (holding a hospital liable for medical staff's negligence in failing to supervise properly physician and in failing to alert board to possible problem); *Darling v. Charleston Community Memorial Hospital*, 211 N.E.2d 253, 261 (Ill. 1965) (holding that hospitals have an independent duty to supervise the medical treatment provided by its staff physicians).

medical license, but must also conduct some investigation of the physician's background.¹²⁵ But just how far a credentialing committee has to probe a physician-applicant's background is not clear. In another case, the Georgia Court of Appeals concluded that the duty does not extend to investigating rumors of a history of illegal drug use where the physician's denial was uncontroverted, and the physician's work record lacked any indication of a "pre-existing incompetency."¹²⁶ The standard of care for investigating an applicant's background is that which is deemed reasonable in like circumstances,¹²⁷ and that which corresponds to the hospital's own rules and procedures for evaluating applications for staff privileges.¹²⁸ At a minimum, the hospital should verify pertinent information contained in the physician's application, education, training and experience.¹²⁹

B. DRUG TESTING AND THE EXERCISE OF REASONABLE CARE—RECONSIDERING THE INDUSTRY STANDARD

The emergence of corporate hospital liability imposed on hospitals a duty to supervise the quality of medical care delivered within its four walls. A hospital can discharge this duty by exercising reasonable care in the selection and retention of medical staff members and other hospital employees, particularly those whose jobs require direct patient contact.¹³⁰ It is a duty that reflects a contemporary consensus of the hospital as a "comprehensive health center ultimately responsible for arranging and coordinating total health care."¹³¹ It is a duty grounded in statutory and regulatory law, common law negligence principles and a public policy that favors sharing the responsibility of delivering competent medical care between the treating physician and the hospital corporation which is "in a superior position to monitor and control physician performance."¹³²

Reasonable care is measured, in part, by the industry standard.¹³³ A 1996 study by the American Management Association reports that at least 81% of major compa-

¹²⁵ 186 S.E.2d 307, 309 (Ga. Ct. App. 1971), *aff'd*, 189 S.E.2d 412, 414 (Ga. 1972); *see also* *Focke v. United States*, 597 F. Supp. 1325, 1345 (D. Kan. 1982) (holding that the duty to exercise care in hiring may require an employer to conduct some "minimal" investigation, but not an "in-depth" investigation); *Johnson*, 301 N.W.2d at 164 (stating that "the failure to investigate a medical staff applicant's qualifications . . . gives rise to a foreseeable risk of unreasonable harm").

¹²⁶ *See Perryman v. DeKalb County Hosp. Auth.*, 398 S.E.2d 745, 746 (Ga. Ct. App. 1990).

While it may be negligent to hire or retain a physician whose performance is compromised by illegal drug use, it is not negligent to hire or retain a physician who is only rumored to use illegal drugs. Actionable negligence consists of hiring or retaining an otherwise incompetent physician, not in hiring an otherwise competent physician who has merely been the target of slanderous gossip.

Id.

¹²⁷ *See Focke*, 597 F. Supp. at 1345.

¹²⁸ *See Johnson v. Misericordia Community Hosp.*, 301 N.W.2d 156, 164 (Wis. 1981).

¹²⁹ *See id.* at 160. Reasonable care in the investigation of a physician's application for hospital privileges may include "education, training, health, ethics and experience through contacts with his peers in the specialty in which he is seeking privileges, as well as the references listed in his application to determine the veracity of his statements and to solicit comments dealing with the applicant's credentials." *Id.*

¹³⁰ *See infra* notes 151-57 (discussing *Kemp v. Claiborne County Hosp.*, 763 F. Supp. 1362 (S.D. Miss. 1991)).

¹³¹ Southwick, *supra* note 96, at 429.

¹³² *Pedroza v. Bryant*, 677 P.2d 166, 169 (Wash. 1984).

¹³³ *See*, for example, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 33, at 193-94 (5th ed. 1984) (footnotes omitted) which states:

[E]vidence of the usual and customary conduct of others under similar circumstances is normally relevant and admissible, as an indication of what the community regards as

nies employ some type of drug testing policy.¹³⁴ The numbers for hospitals are less conclusive.¹³⁵ Of the 120 hospitals responding to a 1993 nationwide survey, the majority of respondents (57.5%) reported that they employed some type of preemployment drug screening, covering all or some applicants.¹³⁶ An even higher percentage (75.8%) conducted for-cause testing and 14% tested following an on-the-job accident.¹³⁷ Only 6% conducted unannounced, random testing.¹³⁸ Most revealing about this study is that the overwhelming majority of facilities tested nearly all employees—except physicians, residents and anesthetists.¹³⁹ Of those respondents conducting preemployment testing, 83% tested custodial and maintenance workers, nurses, pharmacists and technicians—to name a few positions.¹⁴⁰ Only 54% of those same employers tested physicians, and an even smaller percentage (38%) tested residents.¹⁴¹

These findings are startling in light of the absence of any studies showing that custodial workers (or other hospital employees outside the medical staff) experience a higher rate of substance abuse than physicians. Moreover, it is unlikely that the harm resulting to a patient at the hands of a drug-impaired custodian would be more devastating than that inflicted by a similarly impaired physician. If the hospital's paramount concern is patient welfare, why would it test custodians and not doctors?¹⁴² It makes little sense as a practical matter, and less sense as a legal matter, because hospital liability resulting from incompetent care rendered by a drug- or alcohol-impaired physician is far more likely than liability from a substance-impaired custodial employee.

Although more hospitals have begun to implement drug and alcohol testing programs for medical staff,¹⁴³ most hospitals' screening and credentialing procedures

proper, and a composite judgment as to the risks of the situation and the precautions required to meet them. . . . If the actor does only what everyone else has done, there is at least an inference that the actor is conforming to the community's idea of reasonable behavior.

¹³⁴ See AMERICAN MANAGEMENT SURVEY, *supra* note 3, at 1.

¹³⁵ Neither the AMA nor the American Hospital Association has published any studies of drug testing in the health care sector. One 1988 hospital survey indicated that approximately 10% of those questioned had a drug screening policy for applicants. See Fenton et al., *supra* note 104, at 76 tbl.1. But the number of hospitals instituting some type of testing program is clearly on the rise. See Fenton & Kinard, *supra* note 2, at 93.

¹³⁶ See Fenton & Kinard, *supra* note 2, at 91. This survey is based on a questionnaire sent to a randomly selected group of 453 human resource personnel listed in the 1991–1992 membership directory of the American Society for Healthcare Human Resources Administration. See *id.* at 90. Responses were received from 120 institutions: 78 respondents represented private, for-profit hospitals and 36 represented public facilities. See *id.* at 91; see also Fenton et al., *supra* note 104, at 75, 76 tbl.1 (reporting the results of a 1988 survey of 93 responses from 394 randomly selected human resource managers in which approximately 10% used preemployment drug screening).

¹³⁷ See Fenton & Kinard, *supra* note 2, at 91.

¹³⁸ See *id.*

¹³⁹ See *id.* at 92. The other tested positions included custodial workers, maintenance workers, nurses, pharmacists, technicians, medical record personnel, nurse aides/orderlies, administrative personnel, food service personnel, therapists, phlebotomists, security personnel and others (e.g., emergency medical personnel and contract service personnel). See *id.* tbl.4.

¹⁴⁰ See *id.*

¹⁴¹ See *id.*

¹⁴² The authors of this study attributed the gap between testing of physicians and physician-related positions and the testing of other hospital employees to an assumption made by hospital administrators that "physicians, because of their medical training, represent less risk of illicit drug use." *Id.* at 94. But as the authors point out, the statistics on physician and resident physician impairment do not support this assumption. See *id.* at 92.

¹⁴³ See *id.* at 94.

for physicians do not include any type of testing for illegal drug use.¹⁴⁴ It would appear unlikely, therefore, that a hospital's credentialing process would be considered "unreasonable" for failing to include a drug screening program.¹⁴⁵ It is similarly unlikely that a court would impose an affirmative duty to drug test in an industry where no legislative mandate to do so exists.¹⁴⁶

Other emerging legal trends, however, might impact the industry standard; namely, the growing number of states adopting the doctrine of corporate hospital liability coupled with a general upsurge in negligent hire and retention actions.¹⁴⁷ Moreover, if drug testing has become a conventional screening tool in industries outside health care, the safety-sensitive conditions inherent in the health care setting require hospitals to reconsider the screening and credentialing procedures they rely on in fulfilling their due care responsibility in the hiring and retention process. Thus, even though a hospital may not yet fail the current industry standard test if its hiring and retention practices omit a drug testing program or policy, the industry standard could be shifting in that direction.

An industry standard of reasonable care also turns on the nature of the job and whether an impaired performance could pose a significant risk of harm to a third party. Generally, the greater the risk, the more rigorous a screening measure should be.¹⁴⁸ This principle played a central role in the U.S. Supreme Court's sanction of suspicionless drug testing for employees engaged in safety-sensitive jobs.¹⁴⁹ In upholding Federal Railroad Administration drug testing regulations in *Skinner v. Railway Labor Executives' Ass'n*, the Court characterized job duties of the affected employees as "fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences."¹⁵⁰

Similarly, *Kemp v. Claiborne County Hospital* addressed in detail the risk of harm to a patient by an impaired health care worker.¹⁵¹ In *Kemp*, a federal court considered the constitutionality of a county hospital's discharge of an employee

¹⁴⁴ See *id.* at 92.

¹⁴⁵ Although the omission of a drug screening program in a hospital employment setting may not be unreasonable, and is in fact consistent with current industry standards, the failure to test in individual circumstances may be considered negligent if the hospital had cause to test, i.e., the hospital knew or should have known of a reason to test a medical staff member. Cf. *Stephens v. A-Able Rents Co.*, 654 N.E.2d 1315, 1319 (Ohio Ct. App. 1995) (finding that a reasonable jury could have found employer negligent for not investigating employee's past history of drug use). But see *Perryman v. DeKalb County Hosp. Auth.*, 398 S.E.2d 745, 746 (Ga. Ct. App. 1990) (holding there was no negligence on hospital's part for failure to investigate physician's "rumored" drug use where physician denied such use and there was no evidence in physician's employment history, or otherwise, to controvert the denial). See generally *Odehahn & Webb, supra* note 90 (discussing the increasing number of employers held directly liable for harm to third parties for negligently hiring employees they knew or should have known were unfit).

Negative drug test results could become part of a hospital's defense in any future third-party hospital negligence claim, particularly if the alleged misconduct by a physician, nurse or technician stemmed from a purported drug problem. See, e.g., *Fenton & Kinard, supra* note 2, at 88 (advocating the use of drug testing to protect hospitals from patient care liability).

¹⁴⁶ See *Stephens*, 654 N.E.2d at 1320.

¹⁴⁷ See generally *supra* notes 108-29 and accompanying text (discussing negligent hiring and retention doctrine and recent case law).

¹⁴⁸ See *Odehahn & Webb, supra* note 90, at 707 (discussing *Welsh Mfg. v. Pinkerton's Inc.*, 474 A.2d 436 (R.I. 1984)).

¹⁴⁹ See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 634 (1989) (finding that the safety interests and diminished expectation of privacy made conducting drug tests reasonable in the absence of a warrant or reasonable suspicion).

¹⁵⁰ *Id.* at 628.

¹⁵¹ 763 F. Supp. 1362, 1367-68 (S.D. Miss. 1991).

based on her refusal to cooperate in a newly implemented facility-wide drug testing program.¹⁵² The *Kemp* court determined that the employee held a safety-sensitive position and, therefore, had a diminished expectation of privacy under the Fourth Amendment.¹⁵³ The employee worked as both purchasing agent and scrub technician, the latter job requiring her to wheel patients to the operating room and to assist in the surgery.¹⁵⁴

According to the district court, the critical factor in determining whether a position is safety-sensitive for purposes of evaluating a Fourth Amendment privacy challenge is "the 'immediacy' of the threat posed to the public by an employee whose judgment and perception is impaired by drug and/or alcohol use."¹⁵⁵ The court reasoned that "[t]he public safety rationale applies where a single misperformed duty could have irremediable consequences, such as where an employee could not rectify his mistake or other government employees would have no opportunity to intervene before harm occurs."¹⁵⁶ Pursuant to this analysis, the court held that any hospital employee whose job requires hands-on contact with patients should be considered a safety-sensitive employee for drug testing purposes.¹⁵⁷ Therefore, suspicionless testing of the employee, in her capacity as scrub technician, did not violate Fourth Amendment protection against unreasonable searches.

The analogue to a "safety-sensitive" employee (used to determine the bona fides of a drug testing program) is the "high risk" employee (used for assessing the quality of an employer's selection and retention practices). Both ask whether substantial risk to third parties exists if the employee performs his or her job duties in an impaired state. If the court considers a health care worker providing direct patient care as occupying a safety-sensitive position, then it also regards that employee as occupying a high-risk job for employee screening purposes. This is true of nurses, pharmacists, technicians and physicians.

It may be incumbent on hospitals, therefore, to establish more rigorous screening and monitoring devices, including some type of drug testing program.¹⁵⁸ This is particularly so given the expansion of the tort of negligent hire, now recognized in a

¹⁵² See *id.* at 1365. The program specified that all employees were to be given advance notice of the test and a date and time to report. See *id.* at 1364.

¹⁵³ See *id.* at 1368.

¹⁵⁴ See *id.* at 1364.

¹⁵⁵ *Id.* at 1367 (citing *American Fed'n of Gov't Employees v. Sullivan*, 744 F. Supp. 294, 300 (D.D.C. 1990)).

¹⁵⁶ *Id.*

¹⁵⁷ See *id.* at 1368. The court discussed other federal court decisions that had recognized that the jobs of certain nurses were "safety-sensitive." See *id.* at 1367 (citing *Plane v. United States*, 750 F. Supp. 1358, 1367-68 (W.D. Mich. 1990) (registered nurses); *Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1*, 909 F.2d 820, 832-33 (5th Cir. 1990) (licensed practical nurses)).

¹⁵⁸ In one of the few cases involving drug testing in the context of negligent hiring, *Stephens v. A-Able Rents Co.*, 654 N.E.2d 1315, 1319-20 (Ohio Ct. App. 1995), an Ohio appellate court determined that a truck rental company's failure to test its employee drivers did not constitute negligence per se because its duty to drug test was based on concerns for traffic safety rather than felonious assault and attempted rape. In that case, a driver-employee was accused of sexually assaulting a customer while making a delivery at her home. See *id.* at 1318. The employee admitted that he had smoked crack cocaine the day before and that ingestion of the drug was the motivating factor behind the assault. See *id.* at 1319. Because the employee's history of drug abuse was known and documented by his former employer, see *id.* at 1318, the court concluded that a reasonable jury could have found that the present employer's failure to conduct any type of preemployment investigation directly contributed to the plaintiff's injuries and reversed summary judgment as to the negligent hiring issue. See *id.* at 1319, 1322.

majority of states,¹⁵⁹ and given the concomitant growth of companies outside the hospital industry that utilize some type of drug testing, particularly at the pre-employment stage. Presumably, many of these companies employ individuals in positions that pose considerably less risk to third parties than the responsibilities of many health care workers. Hence, a hospital's responsibility to exercise care in selection and retention of employees and medical staff, compounded by the widespread institution of drug testing in the general employment sector, raises the distinct possibility that a hospital's failure to test, at least at the applicant level, may some day constitute evidence of a negligent credentialing or selection process.

V. PRIVACY IMPLICATIONS OF DRUG TESTING

Although preemployment and reasonable suspicion testing may be appropriate screening measures for hospitals to adopt, an appreciation of the privacy interests infringed on by drug testing may help foster testing policies that will accommodate the concerns of the hospital while respecting the integrity and autonomy of the health care provider. Whether in the private or public sector, the key issue in drug testing is the depth of intrusion visited on the individual. Drug testing has a double-barreled impact, implicating both bodily autonomy and informational privacy. Bodily autonomy refers to the right to be free from physical intrusion and to exert control over one's body.¹⁶⁰ Most testing programs require direct or indirect observation of the passing of a urine specimen,¹⁶¹ a mandate that undeniably trespasses on the extremely private nature of urination.¹⁶² Informational privacy is implicated because urine specimens reveal a wide array of information about the test subject, including pregnancy, diabetes and depression.¹⁶³ Moreover, to weed out inaccurate results, employers ask employees to disclose information regarding any prescription medications they are taking, thereby further compromising the employee's privacy.¹⁶⁴ Finally, inadvertent disclosure of testing results to a third party implicates a third privacy concern—employee confidentiality.

Although the right to privacy is widely assumed in our society, its legal underpinnings are less clear. Unlike freedom of speech, religion and association, there is

¹⁵⁹ See Byford, *supra* note 117, at 330 n.1 (citing Michael Silver, *Negligent Hiring Claims Take Off*, A.B.A. J., May 1, 1987, at 72, 72). In the health care setting, this tort translates into the doctrine of corporate hospital liability. See Mark Minuti, Note, *Employer Liability Under the Doctrine of Negligent Hiring: Suggested Methods for Avoiding the Hiring of Dangerous Employees*, 13 DEL. J. CORP. L. 501, 521 n.143 (1988).

¹⁶⁰ See *In re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 810-11 (S.D. Ohio 1995); Susan Clement et al., Note, *The Evolution of the Right to Privacy After Roe v. Wade*, 13 AM. J.L. & MED. 365, 381-82 (1987).

¹⁶¹ See Rothstein, *supra* note 62, at 67.

¹⁶² In *Skinner v. Railway Labor Association*, 489 U.S. 602, 617 (1989) (quoting National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987)), the Supreme Court commented:

There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.

See also *Kelley v. Schlumberger Tech. Corp.*, 849 F.2d 41, 42 (1st Cir. 1988) (affirming district court's \$125,000 damages award for invasion of privacy and negligent intentional infliction of emotional distress for compelling employee to urinate in the direct presence of another).

¹⁶³ See Miller, *supra* note 9, at 207.

¹⁶⁴ See Chen et al., *supra* note 62, at 673.

no express right to privacy in the Constitution.¹⁶⁵ As the Alaska Supreme Court stated in *Luedtke v. Nabors Alaska Drilling, Inc.*, "[t]he concept of privacy has become pervasive in modern legal thought. But a clear definition of this right, so fundamental to ordered liberty, has eluded both courts and legal scholars."¹⁶⁶

The concept of a "right to privacy" originated in common law jurisprudence, premised, in part, on an 1890 law review article by law partners Samuel Warren and Louis Brandeis,¹⁶⁷ later codified in the First Restatement of Torts,¹⁶⁸ subsequently refined in the Second Restatement.¹⁶⁹ It was not until the Supreme Court's opinion in *Griswold v. Connecticut* that the right to privacy was explicitly accorded constitutional status.¹⁷⁰ Having located within the penumbra of the Bill of Rights an implicit personal right to privacy, the *Griswold* Court struck down as "repulsive to the notions of privacy surrounding the marriage relationship"¹⁷¹ a Connecticut statute that prohibited married couples from using contraceptives.¹⁷²

Employee privacy in the workplace is a concept whose legal dimensions courts have not fully tested yet. Its development is due, in part, to the surge of increasingly sophisticated technology that employers now have at their disposal to surveil, monitor and test employees.¹⁷³ For example, it is estimated that as many as twenty-six

¹⁶⁵ Although lacking an explicit reference to privacy, a number of amendments are contained in the Bill of Rights that, when viewed in the aggregate, support a theoretical and legal basis for a privacy right: First Amendment's right to free speech, press, assembly and petition; Fourth Amendment's right against unreasonable search and seizure; Fifth Amendment's guarantee against self-incrimination, and a guarantee of due process prior to the deprivation of a liberty or property; Ninth Amendment's reservation to the people of other rights not enumerated in the Constitution; and Tenth Amendment's conference to the states and the people of all rights not expressly granted to the federal government. See Paul F. Gerhart, *Employee Privacy Rights in the United States*, 17 COMP. LAB. L.J. 175, 176 n.6 (1995).

¹⁶⁶ 768 P.2d 1123, 1128 (Alaska 1989). See generally Clement et al., *supra* note 160 (highlighting the development of the U.S. Supreme Court's definition of the right to privacy after *Roe v. Wade*, 410 U.S. 113 (1973)).

¹⁶⁷ Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); see also *Luedtke*, 768 P.2d at 1127 (accrediting Brandeis and Warren with creating the right to privacy).

¹⁶⁸ "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other." RESTATEMENT OF TORTS § 867 (1939).

¹⁶⁹ "[Intrusion upon Seclusion:] One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of privacy, if the intrusion would be highly offensive to a reasonable person." RESTATEMENT (SECOND) OF TORTS § 652B (1977).

¹⁷⁰ 381 U.S. 479, 484 (1965).

¹⁷¹ *Id.* at 486.

¹⁷² See *id.* at 485. The right to use contraceptives free from governmental intrusion was extended to unmarried individuals in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). The right of individuals to exercise control over their reproductive functions, a right premised on the Fourteenth Amendment's liberty guarantee, was further expanded in *Roe v. Wade*, 410 U.S. 113, 163 (1973), which upheld a woman's right to terminate a pregnancy, subject to certain limitations.

¹⁷³ See Kenneth A. Jenero & Lynne D. Mapes-Riordan, *Electronic Monitoring of Employees and the Elusive Right to Privacy*, 18 EMPLOYEE REL. L.J. 71, 71-72 (1992); see also Charles Piller, *Bosses with X-Ray Eyes*, MACWORLD, July 1993, at 118, 123 (polling corporate executives from 301 businesses of all sizes and industries to determine how many had engaged in electronic monitoring of employees).

Also contributing to the general erosion of employee privacy are government-mandated record-keeping requirements. Employers are required by a variety of federal and state statutes to retain records relating to "equal employment opportunity and affirmative action, minimum wages and overtime pay, industrial accidents and illnesses, job applications, and actual test papers" including other relevant categories such as "records of physical examinations, sex, date of birth, occupation,

million employees are subject to one or more forms of electronic surveillance.¹⁷⁴ Unlike other intrusions on employee privacy, drug testing, which has been likened to chemical surveillance, has the ability to reveal not only one's present metabolic status, but also what one did last Saturday night.¹⁷⁵ Even if accurate, a positive urinalysis reveals only if and not when a drug has been ingested. Urinalysis, therefore, cannot differentiate between an occasional recreational user and a drug abuser. Because tests can detect traces of marijuana in the urine for up to one month, drug testing allows an employer to monitor and record information about an employee's off-the-job behavior, potentially transforming a chemical surveillance into a moral one.¹⁷⁶

Notwithstanding the array of privacy infringements inflicted by a urinalysis, judicial and statutory law clearly sanction testing where public safety is threatened by the faulty judgment or perception of a substance-impaired employee.¹⁷⁷ Hospital employees and physicians unmistakably fall within this category, not just because of the safety-sensitive nature of their work, but also because their privacy expectation is considered diminished by virtue of their employment in a highly regulated field.¹⁷⁸ Nevertheless, recognition of the range of privacy issues challenged by a mandatory urine test promotes the fairness and efficacy of a hospital's drug testing program.

VI. THE SUPREME COURT AND DRUG TESTING IN THE PUBLIC SECTOR

A. THE FOURTH AMENDMENT STANDARD OF REASONABLENESS

Public hospitals' drug testing programs must comport with the requirements set forth in the Fourth Amendment. Because of its invasive impact on individual privacy, the Supreme Court found that government-mandated drug testing effects a "search" within the meaning of the Fourth Amendment.¹⁷⁹ This characterization

rate of pay, promotions, demotions, transfer, layoff, recall, selection for training, on-the-job injuries, pension contributions and immigration verification." Gerhart, *supra* note 165, at 193-94.

¹⁷⁴ See Jenero & Mapes-Riordan, *supra* note 173, at 71.

¹⁷⁵ Hair analysis, scientifically known as radioimmunoassay hair analysis, has the capability of testing for cocaine as far back as 90 days. See Nevada Employment Sec. Dep't v. Holmes, 914 P.2d 611, 613 (Nev. 1996). In Nevada Employment, the Nevada Supreme Court upheld the random drug testing of casino employees via hair sampling, concluding that the compelling reasons behind an employer-sponsored drug testing policy justifies the intrusion into an employee's off-the-job conduct in light of the "reasonable relationship" existing between the testing policy and job performance. See *id.* at 617.

¹⁷⁶ See Steven Hecker & Mark S. Kaplan, *Workplace Drug Testing as Social Control*, 19 INT'L J. HEALTH SERVICES 693, 701 (1989); see also Kurt H. Decker, *Employment Privacy Law for the 1990's*, 15 PEPP. L. REV. 551, 579 (1988) (discussing the importance of limiting "employee lifestyle regulation" to instances that would directly affect the employer's business).

¹⁷⁷ See Division 241, Amalgamated Transit Union v. Suscy, 405 F. Supp. 750, 751 (N.D. Ill. 1975). The court legitimized for the first time the use of urinalysis as a drug screening device in the workplace by upholding the Chicago Transit Authority's blood and urine testing following a driver's involvement in a serious accident or on reasonable suspicion. See *id.* at 751. The court's determination of the policy's reasonableness was based on a balancing analysis which concluded that the state's interest in safeguarding the safety of the public outweighed an individual interest in privacy. See *id.*

¹⁷⁸ See Kemp v. Claiborne County Hosp., 763 F. Supp. 1362, 1368 (S.D. Miss. 1991) (asserting that "expectation of privacy in the work place may also be diminished if the industry or position is subject to other regulations and requirements such as background investigations or medical examinations" (citing National Treasury Employees Union v. Von Raab, 489 U.S. 656, 677 (1989)); see also Shoemaker v. Handel, 795 F.2d 1136, 1142 (3d Cir. 1986) (stating jockeys' privacy interests are diminished by their voluntary employment in an intensely regulated industry).

¹⁷⁹ See Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 617 (1989) ("Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has

subjects testing programs to Fourth Amendment scrutiny. The Fourth Amendment restrains the government from interfering with an individual's right to be secure in his or her home and in his or her person and to be free from unreasonable searches and seizures.¹⁸⁰ Traditional Fourth Amendment jurisprudence held that a search was reasonable only if accompanied by a warrant and a showing of probable cause that the search will yield evidence of illegal activity.¹⁸¹

Current judicial construction, however, does not bar all warrantless and suspicionless searches, only those that are unreasonable.¹⁸² A court calculates "reasonableness" by using a balancing test that measures the governmental interest in conducting the search against the degree of intrusion inflicted on an individual's right to privacy.¹⁸³ This balancing test was first applied to preventive searches, which are distinguishable from law enforcement searches in that they are conducted for the

long recognized as reasonable . . . these intrusions must be deemed searches under the Fourth Amendment.").

The definition of a search often rests on a reasonable person's expectation of privacy under the circumstances; any infringement of that expectation triggers a Fourth Amendment inquiry. See *New Jersey v. T.L.O.*, 469 U.S. 325, 338 (1985) (stating that the Fourth Amendment protects expectations of privacy that society is "prepared to recognize as legitimate" (citing *Hudson v. Palmer*, 468 U.S. 517, 526 (1984))).

Holding a drug test to be a Fourth Amendment search is consistent with other Supreme Court decisions that have expanded the definition of a "search" to accommodate the pace of technological advancement. See, e.g., *Skinner*, 489 U.S. at 616-17 (holding that subjecting a suspect to a breathalyzer test for purpose of conducting chemical analysis infringes Fourth Amendment privacy expectations in one's bodily integrity); *Katz v. United States*, 389 U.S. 347, 353 (1967) (wiretapping held as search within the meaning of the Fourth Amendment); *Schmerber v. California*, 384 U.S. 757, 767 (1966) (holding that compulsory blood test to detect alcohol level constitutes a search and seizure within the meaning of the Fourth Amendment); *Barlow v. Ground*, 943 F.2d 1132, 1139 (9th Cir. 1991) (holding that HIV testing of suspect without a warrant, without consent and absent exigent circumstances violates Fourth Amendment).

¹⁸⁰ The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The Fourth Amendment is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. See *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949).

¹⁸¹ See Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. ST. L. REV. 483, 529 (1995) (stating how the Framers were "seeking to ensure that freedom from suspicionless intrusions were guaranteed" by prescribing the probable cause and particularity requirements necessary to procure a warrant).

¹⁸² See *Carroll v. United States*, 267 U.S. 132, 147 (1925). Generally, searches conducted without a warrant and without probable cause or individualized suspicion of illegal activity will be considered "reasonable" only if conducted for purposes unrelated to criminal law enforcement, such as preventive or administrative searches. See *infra* notes 186-98 and accompanying text.

¹⁸³ What is deemed reasonable is determined on a case-by-case basis, taking into consideration all the facts and circumstances—"the total atmosphere of the case." See *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1513 (D.N.J. 1986). For cases discussing how the Court uses the balancing test to determine reasonableness, see *T.L.O.*, 469 U.S. at 337-43 (holding that reasonableness of the search of students in the school context depends on whether the search was justified at its inception and if it was reasonably related to the circumstances surrounding the search); *United States v. Martinez-Fuerte*, 428 U.S. 543, 562-64 (1976) (holding that routine checkpoint stops by border patrol may be made in the absence of individualized suspicion because they serve legitimate state interests and were procedurally defensible); *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 533-34, 536-39 (1967) (holding that a warrant is required to support the reasonableness of an inspection for building code violations, but the inspections need not depend on specific knowledge of a dwelling's condition).

purpose of deterring illegal acts, rather than collecting evidence of such.¹⁸⁴ Because a preventive search is not expected to produce evidence of wrongdoing, the traditional requirements of probable cause and reasonable suspicion are inapposite, and in fact would defeat the very purpose of the search.¹⁸⁵

B. THE "SPECIAL NEEDS" OF DRUG TESTING IN THE WORKPLACE

Beginning in the mid 1980s, the preventive search exception to the probable cause and warrant requirement ripened into the "special needs" doctrine. Under this legal theory, the Supreme Court abandoned the warrant/probable cause and individualized suspicion requirement as a prerequisite to an intrusive personal or property search so long as the government could identify an important "special need," other than law enforcement purposes.¹⁸⁶ Application of this doctrine calls for a case-by-case appraisal, balancing the government's special need for the search against the nature of the privacy intrusion and the degree to which the search was tailored to minimize that intrusion.¹⁸⁷

A constitutional challenge to a public hospital's drug testing program requires balancing the hospital's "special need" to drug test physicians and employees against the scope of the individual privacy intrusion. This was the analytical model used in the Supreme Court's 1989 companion decisions addressing systemic drug testing in the federal workplace. At issue in *Skinner* were Federal Railroad Administration regulations requiring mandatory drug and alcohol testing of any employee involved in an accident or in a violation of certain safety regulations.¹⁸⁸ The Court sustained the constitutional reasonableness of the testing regulation on the following grounds: (1) the privacy interests implicated are minimal in this particular testing context; (2) the privacy expectations of those employed in the rail transportation industry are diminished given the nature and extent of safety regulations to which the industry is subject; (3) the need of the government to test without individualized suspicion is compelling in light of the safety interests at stake; and (4) the need for a warrant, probable cause or even individualized suspicion is not an inextricable component of a reasonable standard where the government can demonstrate special needs outside those related to law enforcement.¹⁸⁹

¹⁸⁴ See Craig M. Cornish & Donald B. Louria, *Employment Drug Testing, Preventive Searches and the Future of Privacy*, 33 WM. & MARY L. REV. 95, 97-98 (1991).

¹⁸⁵ See *id.*

¹⁸⁶ See Roger Richman, *Balancing Government Necessity and Public Employee Privacy: Reconstructing the Fourth Amendment Through the Special Needs Doctrine*, 26 ADMIN. & SOC'Y 99, 112 (1994).

¹⁸⁷ See *O'Connor v. Ortega*, 480 U.S. 709, 720 (1987) (plurality opinion) (upholding the validity of a public employer's warrantless and suspicionless search of an employee's work-related property based on a "special need" that makes the probable cause requirement "unsuitable" for workplace searches); see also *T.L.O.*, 469 U.S. at 332 n.2, 341 (holding that public school teachers and administrators are bound by the Fourth Amendment's prohibition against unreasonable searches and seizures, however, interests such as "providing a safe environment conducive to education" modify warrant and probable cause requirements so that a search is reasonable if justified at its inception and if its scope is reasonably related to the circumstances justifying the initial intrusion).

¹⁸⁸ 489 U.S. 602, 606 (1989).

¹⁸⁹ See *id.* at 626-31. In *Skinner*, employees subject to drug testing were delegated "duties fraught with such risk . . . that even a momentary lapse of attention can have disastrous consequences." *Id.* at 628. Emphasis on the safety-sensitive nature of the drug interdiction responsibilities was also present in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989): "The Government's compelling interests in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry outweigh the privacy interests of those who seek promotion to these positions"

National Treasury Employees Union v. Von Raab involved a challenge to the U.S. Customs Service rules that required suspicionless drug testing of all employees seeking promotion or transfer into positions that directly involved drug interdiction, that required carrying a firearm or that required handling classified materials.¹⁹⁰ The governmental interests in this case included deterring drug use and screening drug users from positions considered safety-sensitive—"special needs" which in turn justified relinquishing traditional Fourth Amendment requirements.¹⁹¹ In examining the circumstances that led to the enactment of the testing rules, the Court recognized the importance and magnitude of the Customs Service's mission in tackling "one of the greatest problems affecting the health and welfare of our population," and the critical role that employees played in pursuing that mission.¹⁹² Relying on a simple balancing test, the Court determined that the special governmental needs served by this testing program overrode individual privacy rights.¹⁹³

The companion decisions in *Skinner* and *Von Raab* established that a court must balance an individual's Fourth Amendment privacy expectations against the government's "special need" in securing a drug-free work environment. The "special need" link to public safety or drug deterrence was recently reinforced in *Chandler v. Miller*.¹⁹⁴ By an eight to one margin, the Supreme Court struck down as unconstitutional a Georgia statute requiring all state political candidates to submit to drug testing as a condition of appearing on the ballot.¹⁹⁵ In addition to noting the state's failure to submit any evidence of a drug problem among Georgia's elected officials, the Court observed that state politicians rarely engage in high-risk or safety-sensitive responsibilities.¹⁹⁶ Moreover, the statute's testing scheme was not particularly effective at rooting out drug-impaired candidates because candidates were permitted to select the date and time of testing.¹⁹⁷ The Court concluded that Georgia's "need" to drug test political candidates was symbolic, not "special," and thus barred by the Fourth Amendment's shield against state intrusions into personal privacy.¹⁹⁸

Courts have applied the balancing test used in *Skinner* and *Von Raab* to the health care profession. A hospital's "special need" to drug test physicians and employees involved in direct patient care derives from the "necessity that medical pro-

¹⁹⁰ 489 U.S. 656, 660-61, 663 (1989). There was insufficient evidence in the record for the Court to determine the validity of the testing requirements with respect to employees handling classified materials. See *id.* at 677. This issue was remanded to the court of appeals for further record development. See *id.* at 678. On remand by the court of appeals, see *National Treasury Employees Union v. Von Raab*, 876 F.2d 376, 376 (5th Cir. 1989), the district court reconsidered the issue and held that requiring drug testing of employees seeking jobs with secret or confidential clearances is reasonable under the Fourth Amendment. See *National Treasury Employees Union v. Hallett*, 756 F. Supp. 947, 952-53 (E.D. La. 1991).

¹⁹¹ See 489 U.S. at 670. For a discussion on the use of the Fourth Amendment's search and seizure clause as a tool of deterrence, see Cornish & Louria, *supra* note 184, at 97-98.

¹⁹² *Von Raab*, 489 U.S. at 668-69.

¹⁹³ See *id.* at 672. Justice Scalia's dissent in *Von Raab* pointed out that, unlike the record in *Skinner*, which indicated drug use among the targeted class of employees, the government in this case had failed to introduce any evidence linking drug use with employee performance, any evidence of a "drug problem" among Customs Service employees or evidence of even a single employee who had actually used drugs. See *id.* at 683-84 (Scalia, J., dissenting). Under these circumstances, Justice Scalia characterized the Customs Service drug testing rules as "a kind of immolation of privacy and human dignity in symbolic opposition to drug use." *Id.* at 681.

¹⁹⁴ 117 S. Ct. 1295, 1305 (1997).

¹⁹⁵ See *id.* at 1299.

¹⁹⁶ See *id.* at 1305. A similar observation underpins Justice Scalia's dissent in *Von Raab*, 489 U.S. at 681, 683.

¹⁹⁷ See *Chandler*, 117 S. Ct. at 1034.

¹⁹⁸ See *id.* at 1035.

professionals be scrupulously accurate in every phase of their relationships with patients and the great harm that can attend any misdiagnosis or mistreatment.¹⁹⁹ When addressing a constitutional challenge to the drug testing of a surgery scrub technician, a Mississippi district court concluded that hospital staff, not the patient, should bear the risks associated with drug-or alcohol-impaired medical judgment.²⁰⁰ Moreover, individuals who hold themselves out as medical professionals have a lesser expectation of privacy because of the very nature of their work, where life and death situations often arise, and because they voluntarily subjected themselves to rigorous licensing regulations.²⁰¹ Therefore, in the public sector, where hospital employees or physicians are directly involved in patient care, the government's interest in protecting the patient from the risks attendant to alcohol- or drug-impaired judgment is "compelling" and consequently trumps individual privacy concerns.²⁰²

VII. TESTING IN THE PRIVATE SECTOR: AVENUES OF CHALLENGE

Although not limited by the constitutional constraints imposed on a public hospital, a private hospital's discretion to drug test physicians and employees is not unbounded.²⁰³ Presently, twenty states have enacted legislation governing the imple-

¹⁹⁹ American Fed'n of Gov't Employees, Council 33 v. Barr, 794 F. Supp. 1466, 1472 (N.D. Cal. 1992) (upholding random testing of FBP's physician and dentist employees who had regular patient contact).

²⁰⁰ See *Kemp v. Claiborne County Hosp.*, 763 F. Supp. 1362, 1368 (S.D. Miss. 1991) (upholding suspicionless drug testing of public hospital employees involved in direct patient care).

²⁰¹ See American Fed'n of Gov't Employees, L-2110 v. Derwinski, 777 F. Supp. 1493, 1499 (N.D. Cal. 1991) (upholding random testing of medical professionals involved in direct patient care, including physicians, pharmacists and nurses).

²⁰² See *Kemp*, 763 F. Supp. at 1368.

²⁰³ Absent a finding of state action, courts have been reluctant to extend the guarantees of the Bill of Rights to constitutional transgressions experienced in the private sector workplace. See generally *Jenero & Mapes-Riordan*, *supra* note 173, at 100 n.11 (discussing that private actions "under color of state or federal law" are an exception to the general nonapplicability of Fourth Amendment protections to private sector employees, and citing *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 614-16 (1989) as an example).

Most state constitutions include analogues to the Fourth Amendment's proscription against unreasonable search and seizure. See *id.* at 80. Additionally, the following ten states have included in their constitutions specific guarantees addressing the right of privacy: Alaska, see ALASKA CONST. art. I, § 6; Arizona, see ARIZ. CONST. art. II, § 8; California, see CAL. CONST. art. I, § 1; Florida, see FLA. CONST. art. I, § 23; Hawaii, see HAW. CONST. art. I, § 6; Illinois, see ILL. CONST. art. I, § 6; Louisiana, see LA. CONST. art. I, § 5; Montana, see MONT. CONST. art. II, § 10; South Carolina, see S.C. CONST. art. I, § 10; and Washington, see WASH. CONST. art. I, § 7. Generally, these provisions apply only to public sector employees. See *Jenero & Mapes-Riordan*, *supra* note 173, at 80. However, in some instances, the courts have looked to a state constitutional privacy right as the basis for a public policy exception to at-will employment. See *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1132-33 (Alaska 1989) (holding that the Alaska Constitution's privacy provision applies only to public employees, but indicating that the clause may be considered "evidence of a public policy supporting privacy"); *Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11, 19 (N.J. 1992) (finding that "constitutional privacy protections may form the basis for a clear mandate of public policy supporting a wrongful discharge claim" arising from an employer's drug testing policy). But see *Gilmore v. Enogex, Inc.*, 878 P.2d 360, 365 (Okla. 1994) (declining to infer a public policy mandate from a state constitutional privacy provision that would prohibit employers from discharging employees for refusing to submit to a drug test); *Roe v. Quality Transp. Servs.*, 838 P.2d 128, 130-31 (Wash. Ct. App. 1992) (rejecting the state constitutional privacy right as the proper source for a public policy restricting a private employer's right to discharge an at-will employee for refusing to submit to random drug testing).

The California courts, on the other hand, have extended the state constitutional right of privacy to employees in both the public and private sector. See *Hill v. National Collegiate Athletic Ass'n*, 865 P.2d 633, 644 (Cal. 1994); *Luck v. Southern Pac. Transp. Co.*, 267 Cal. Rptr. 618, 628

mentation and enforcement of drug testing programs.²⁰⁴ In addition to addressing the mechanics of testing, these statutes generally reflect judicially mandated sensibilities regarding privacy of applicants versus privacy of existing employees.²⁰⁵ Thus, most state statutes, along with requiring publication and dissemination of the testing policy, permit preemployment testing, but require reasonable suspicion to test existing employees, and preclude random testing absent some "definitive employer or public interest."²⁰⁶ More recently enacted statutes direct employers to assume the cost of testing, require the licensing of testing centers and delineate circumstances under which an employer may test.²⁰⁷ Finally, state statutes often address the primacy of employee confidentiality in any drug testing scheme²⁰⁸ and mandate confirmatory tests for all initial positive test results.²⁰⁹

Apart from those states where drug testing has been subject to legislative oversight, the latitude to test randomly and without suspicion has generally been limited

(Ct. App. 1990); *Semore v. Pool*, 266 Cal. Rptr. 280, 283 (Ct. App. 1990); *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194, 198-200 (Ct. App. 1989); *Jenero & Mapes-Riordan*, *supra* note 173, at 80. To determine whether encroachments on individual privacy by nongovernment entities are justified, the California Supreme Court rejected the "compelling interest" standard and developed a legal standard that weighs the relative interests of private organizations and their willing participants. See *Hill*, 865 P.2d at 653, 656-57, 667 n.20 (reviewing California case law and observing that the compelling interest standard only applied to "obvious government action impacting freedom of expression or association" and that future claims for invasion of privacy in the employment context will be "subject to . . . careful consideration of reasonable expectations of privacy and employer, employee, and public interests arising in particular circumstances"); see also *Luck*, 267 Cal. Rptr. at 631-32 (discussing the various interests that must be "placed on the scale to balance against the employee's privacy right" and upholding a verdict for wrongful discharge of a nonsafety railroad employee who refused to take a urinalysis drug test); *Semore*, 266 Cal. Rptr. at 286 (appeal from demurrer stating that a dispute over drug testing in the workplace can only be resolved by "balancing an employee's expectations of privacy against the employer's needs to regulate the conduct of its employees at work"); *Wilkinson*, 264 Cal. Rptr. at 203 (balancing the relative interests of employers and job applicants, the court upheld as reasonable preemployment testing of all publishing company applicants).

²⁰⁴ States that have enacted drug testing laws regulating the type of tests and/or testing procedures employers may utilize are Arizona, Connecticut, Florida, Georgia, Hawaii, Iowa, Louisiana, Maine, Maryland, Minnesota, Mississippi, Montana, Nebraska, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, Utah and Vermont. See MARK DE BERNARDO ET AL., INSTITUTE FOR A DRUG-FREE WORKPLACE, LAWYERS' GUIDE TO STATE AND FEDERAL DRUG-TESTING LAWS 9-10 (4th ed. 1995).

²⁰⁵ See *New 'Road Map' to State Regulations Outlines Disparate Workplace Testing Laws*, 10 Nat'l Rep. on Substance Abuse (LRP) No. 4, at 1, 4 (Feb. 1, 1996) (stating that regardless of variation among states' attitudes toward employment drug testing, failure to observe properly the confidentiality and privacy rights of employees in formulating drug testing policies might expose employers to "substantial legal liability").

²⁰⁶ See *Fenton & Kinard*, *supra* note 2, at 88.

²⁰⁷ See Sandra N. Hurd, *Recent State Drug Testing Laws Depart from Early Statutes*, EMPLOYMENT TESTING L. & POL'Y REP., Jan. 1995, at 1, 5.

²⁰⁸ See, e.g., Sandra N. Hurd, *States Enact Comprehensive Drug Testing Laws in 1995-6*, EMPLOYMENT TESTING L. & POL'Y REP., May 1996, at 65, available in LEXIS, News Library, Emptst File (discussing how Georgia's statute "mandates confidentiality of all test results"); *id.* (two bills in the Massachusetts legislature would "require written consent for most disclosures [of test results]" and require that test results not "become part of an employee's personal record"); *id.* (New York bill would require the "confidentiality of test results"); *id.* (South Carolina bill "mandates confidentiality of test results"); Hurd, *supra* note 207, at 2 (Arizona's statute provides for "confidentiality of test results").

²⁰⁹ See, e.g., Hurd, *supra* note 208 (discussing how North Carolina is considering a law that would allow on-site drug testing provided employers sent positive test samples to an approved laboratory for confirmatory testing); Hurd, *supra* note 207, at 2 (Arizona's drug testing statute provides for confirmatory testing); *id.* at 3 (Georgia's statute requires follow-up testing for those who have "entered an employee assistance or rehabilitation program as the result of a positive test").

to those employees occupying safety-sensitive positions.²¹⁰ Even then, there must be a direct nexus between an employee's job duties and the harm feared.²¹¹ Additionally, the courts appear to look most favorably on drug testing programs that manifest some regard for individual privacy, both by the manner of drug testing and by the flow of personal information that accompanies it.²¹²

A. COMMON LAW INVASION OF PRIVACY

Because of the increasing number of employers engaged in some form of drug testing, there is a corresponding expansion in the body of law directed at private sector drug testing. Most private sector employees premise a challenge to an employer's drug testing program on a private cause of action, usually tortious invasion of privacy.²¹³ Application of common law tort principles to private sector employment practices that intrude on employee privacy is relatively new.²¹⁴ Courts have generally employed a four-part analysis in assessing the validity of such claims: "(1) the employer's business needs which prompted the testing; (2) the scope of the testing; (3) the manner of the testing; and (4) employee notice of, or consent to, the testing."²¹⁵

The invasion of privacy tort consists of four categories, three of which have relevance here.²¹⁶ The first consists of unreasonable intrusion on an individual's seclusion, either physical (e.g., sexual harassment) or nonphysical (probing an em-

²¹⁰ See, e.g., *Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11, 20-21 (N.J. 1992) (holding that random drug testing can violate common law and statutory right to privacy unless employee's duties "are so fraught with hazard that his or her attempts to perform them while in a state of drug impairment would pose a threat to co-workers, to the workplace, or to the public at large").

²¹¹ See *id.*; see also *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1133 (Alaska 1989) (holding that random drug testing of an employee working on a drilling rig was permissible because individual privacy right was outweighed by risk of harm posed to public); *Luck v. Southern Pac. Transp. Co.*, 267 Cal. Rptr. 618, 631 (Cal. 1990) (holding that railroad employer's application of random drug testing policy to computer programmer breaches employee privacy rights where there is an insufficient nexus between the programmer's job duties and the feared harm); *Twigg v. Hercules Co.*, 406 S.E.2d 52, 55 (W. Va. 1990) (holding that explosive manufacturer's interest in random drug testing of employee whose job duties included assisting in maintenance of stock supplies outweighs employee's privacy interests only if there exists reasonable suspicion to test, or job responsibilities directly implicate public health and safety concerns).

²¹² See *Hennessey*, 609 A.2d at 23 (holding that, with respect to safety-sensitive positions, public safety may outweigh individual privacy concerns, and consequently employers should "formulate and implement measures designed to minimize the intrusiveness of the testing process[.] . . . includ[ing] a testing procedure that allows as much privacy and dignity as possible"). But see *Baggs v. Eagle-Pitcher Industries, Inc.*, 957 F.2d 268, 275 (6th Cir. 1992) (holding that a "Michigan employer may use intrusive and even objectionable means to obtain employment-related information about an employee").

²¹³ At least four states have codified the common law tort for invasion of privacy: Massachusetts, see MASS. GEN. LAWS ch. 214, § 1B (1996); Nebraska, see NEB. REV. STAT. §§ 20-201 to -211 (1991); Rhode Island, see R.I. GEN. LAWS § 9-1-28.1 (1997); and Wisconsin, see WIS. STAT. ANN. § 895.50 (1997).

²¹⁴ See Frank J. Cavico, *Invasion of Privacy in the Private Employment Sector: Tortious and Ethical Aspects*, 30 Hous. L. Rev. 1263, 1266 (1993).

²¹⁵ *Id.* at 1312; see also *Folmsbee v. Tech Tool Grinding & Supply, Inc.*, 630 N.E.2d 586, 589 (Mass. 1994) (in evaluating whether employer's drug test unreasonably invaded employee privacy interests, court balanced the manner and scope of the testing program against the employer's legitimate interest to test and the 30-day notice given to the employees prior to the institution of the testing).

²¹⁶ The fourth is the tort of appropriation, wherein an individual's name or likeness is appropriated for personal use or benefit. See Cavico, *supra* note 214, at 1279 (citing RESTATEMENT (SECOND) OF TORTS § 652C (1977)).

ployee's private affairs).²¹⁷ This tort does not require possession or dissemination of private information, only an intentional intrusion that is highly objectionable to a reasonable person.²¹⁸ Drug testing may implicate this privacy invasion in two ways. First, the method of urine collection, particularly if conducted under direct observation, may violate some states' definition of intrusion on seclusion.²¹⁹ Second, the quantum of extraneous medical information obtained from a urinalysis might be deemed highly offensive to a reasonable person.²²⁰ Although the traditional conception of this privacy right is framed in terms of personal space, today it includes "an underlying legal right to control what others know about you."²²¹

The second category of tortious invasion of privacy centers on publication of private matters of a nature that would be highly objectionable to the reasonable person,²²² irrespective of its veracity.²²³ Thus an employer may be tortiously liable if he or she publicizes personal facts regarding an employee.²²⁴ An employer can defend against this tort if the disclosure was made to other workplace personnel who either had a legitimate interest in the information or had a job-related connection to the employee.²²⁵

The third prong of common law privacy protects an individual from being portrayed in a "false light."²²⁶ Thus, an employer who publicizes information casting an employee in a false light while knowing the information was false or with reckless

²¹⁷ See RESTATEMENT (SECOND) OF TORTS § 652B (1977) ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.")

²¹⁸ See *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 622 (3d Cir. 1992).

²¹⁹ See e.g., *Borse*, 963 F.2d at 623 (noting that "citizens' right to be protected against unwarranted intrusions into their private lives has been recognized in the law of Alaska" (quoting *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1133 (Alaska 1989)); *Kelley v. Schlumberger Tech. Corp.*, 849 F.2d 41, 44 (1st Cir. 1988) (holding that Louisiana's common law privacy right was violated by employer's drug testing program that required direct observation of urination); see also Mark A. Rothstein, *Drug Testing in the Workplace: The Challenge to Employment Relations and Employment Law*, 63 CHI.-KENT L. REV. 683, 729 (1987) (explaining that requiring the observation of a urine test might be an invasion of employee's privacy in violation of public policy). *But cf.* *Mares v. Conagra Poultry Co.*, 971 F.2d 492, 496 (10th Cir. 1992) (upholding summary judgment against employee-plaintiff's action for intrusion upon seclusion based on employer's request for pre-drug testing medical information, including a list of all prescription and over-the-counter medications currently utilized by employees).

²²⁰ See *Borse*, 963 F.2d at 621 (citing *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989)).

²²¹ John D. Blackburn et al., *Invasion of Privacy: Refocusing the Tort in Private Sector Employment*, 6 DEPAUL BUS. L.J. 41, 53 (1993).

²²² See *id.* at 54.

²²³ See RESTATEMENT (SECOND) OF TORTS § 652D (1977).

²²⁴ See Cavico, *supra* note 214, at 1272 & n.25.

²²⁵ See *Minckler v. Exxon Corp.*, No. 05-95-01015-CV, 1997 Tex. App. LEXIS 343, at *9 (Tex. App. Jan. 30, 1997) (noting that a defense is available if an "employer makes a statement in good faith, on a subject in which the person communicating has an interest or duty, to a person having a corresponding interest or duty"); Cavico, *supra* note 214, at 1274.

²²⁶ Closely akin to an action for casting an individual in a false light is an action for defamation, which enjoys many of the same defenses available in privacy tort actions. See, e.g., Blackburn et al., *supra* note 221, at 54 n.41 (noting that there is often, but not always, an "overlap" of the actions and defenses of false light and defamation). In a defamation action, a claimant must show that he or she was injured as a result of the negligent articulation and publication of a false and defamatory statement to a third party. See Roger B. Jacobs, *Defamation and Negligence in the Workplace*, 40 LAB. L.J. 567, 567 (1989) (discussing defamation and negligence claims in the employment context).

indifference for its truth may be liable.²²⁷ Successful recovery requires proof that the information was false, widely publicized and "highly offensive to the reasonable person."²²⁸

Not all such communication uttered by an employer to a third party will render the employer liable for tortious invasion of privacy.²²⁹ *Minckler v. Exxon Corp.* illustrates the qualified privilege employers enjoy in connection with public disclosure of an employee's drug testing results.²³⁰ In this Texas appellate decision, Harold Minckler, a production field foreman on an offshore platform, was terminated after failing a random drug test.²³¹ In announcing the discharge to Minckler's co-workers, a supervisor stated that Exxon had terminated Minckler after he tested positive for drugs.²³² In sustaining the lower court's summary judgment in favor of the employer,²³³ the court held that if the employer's statements are made "in good faith, on a subject in which the person communicating has an interest or duty, to a person having a corresponding interest or duty," then qualified privilege protects the communication.²³⁴ In this instance, the court reasoned that because Minckler's co-workers had "a legitimate interest in knowing what activities could result in their termination,"²³⁵ such information was pertinent to their morale, which in turn impacted on the employer's business interests.²³⁶

B. WRONGFUL DISCHARGE AND THE PUBLIC POLICY EXCEPTION TO EMPLOYMENT-AT-WILL

In states that recognize a public policy exception to employment-at-will, hospitals may face liability for wrongfully discharging an employee who refuses to submit to a hospital-mandated drug test. However, case law suggests that the safety-sensitive work performed by most physicians and hospital employees make it unlikely that a health care worker's discharge for failure to cooperate in a hospital's drug testing program would contravene public policy.²³⁷

²²⁷ See RESTATEMENT (SECOND) OF TORTS § 652E; Cavico, *supra* note 214, at 1276-77 n.43. For a detailed discussion of the interrelationship between defamation and false light publicity, see *id.* at 1276 & n.42.

²²⁸ See Cavico, *supra* note 214, at 1277-78.

²²⁹ See *id.* at 1281-83 (discussing the privileges, both absolute and qualified, that "constrain the tort of invasion of privacy").

²³⁰ No. 05-95-01015-CV, 1997 Tex. App. LEXIS 343, at *13 (Tex. App. Jan. 30, 1997). Absolute immunity from the tort of invasion of privacy is granted when the plaintiff gives consent to the privacy invasion and the scope of that consent was not exceeded, or "where the law requires the employer to intrude on the employee's solitude, or disclose information about the employee." Cavico, *supra* note 214, at 1281-82 & nn. 74-75.

²³¹ See *Minckler*, 1997 Tex. App. LEXIS 343, at *2.

²³² See *id.*

²³³ The trial court dismissed the action against the supervisor, and Minckler did not appeal that portion of the lower court's ruling. See *id.* at *3.

²³⁴ *Id.* at *9.

²³⁵ *Id.* at *10.

²³⁶ Minckler also lodged a defamation claim against Exxon based on the publication of his drug test results, but the appellate court concluded that the same qualified privilege applicable to invasion of privacy cases operates in defamation cases. See *id.* at *12 (citing *Hines v. Arkansas La. Gas Co.*, 613 So. 2d 646, 656 (La. Ct. App. 1993)). The court also dismissed Minckler's action for intentional infliction of emotional distress, concluding that such a cause of action could be maintained only on a showing of conduct "so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency." *Id.* at *18.

²³⁷ See *infra* notes 247-52 and accompanying text (discussing two cases upholding an employer's right to terminate employees in safety-sensitive positions who fail to submit to drug testing and applying that reasoning to the hospital employer).

The vast majority of the approximately ninety million employees in the United States are employees-at-will.²³⁸ This common law principle holds that employment is at the will of the employer, who is free to terminate the employment relationship at any time, with or without cause.²³⁹ Three main employee categories are not subject to this relationship: those covered by a collective bargaining agreement; those who work for local, state or federal government and those covered by an individual employment contract that expressly requires that termination be for-cause.²⁴⁰

One antidote to the sometimes harsh effects of employment-at-will is the tort of wrongful discharge, which gained currency in the 1980s.²⁴¹ A wrongful discharge suit is based on the assertion that the dismissal violates public policy, a federal or state anti-discrimination statute, an implied employment contract or an implied covenant of good faith and fair dealing.²⁴² The public policy exception protects an employee from discharge for refusal to comply with an employer policy or mandate that contravenes a public policy.²⁴³ In the drug testing arena, a discharge in contravention of public policy is rooted in an employee's right to privacy as articulated in common law, statute and the state constitution.²⁴⁴

²³⁸ See Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act*, 43 AM. U. L. REV. 849, 850 (1994) (stating that there are approximately 60 million at-will employees in the private sector work force).

²³⁹ See Michael A. DiSabatino, Annotation, *Modern Status of Rule That Employer May Discharge At-Will Employee for Any Reason*, 12 A.L.R. 4th 544, 549-50 (1981) (stating that the general rule is that employment for an indefinite term is terminable by the employer for any cause); see also BLACK'S LAW DICTIONARY 525 (6th ed. 1990) (defining "employment at will" as a relationship—absent an express agreement to the contrary—with "no specific duration" and terminable "at will by either the employer or the employee, for or without cause").

²⁴⁰ See Sara Needleman Kline, Comment, *Sexual Harassment, Wrongful Discharge, and Employer Liability: The Employer's Dilemma*, 43 AM. U. L. REV. 191, 211 (1993).

²⁴¹ See Cornelius J. Peck, *Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge*, 66 WASH. L. REV. 719, 727 (1991); John Jacob Kobus, Jr., Note, *Establishing Corporate Counsel's Right to Sue for Retaliatory Discharge*, 29 VAL. U. L. REV. 1343, 1345, 1356 n.68 (1995); Todd M. Smith, Note, *Wrongful Discharge Reexamined: The Crisis Matures, Ohio Responds*, 41 CASE W. RES. L. REV. 1209, 1209 (1991).

²⁴² See Edward L. Raymond, Jr., Annotation, *Liability for Discharge of At-Will Employee for Refusal to Submit to Drug Testing*, 79 A.L.R. 4th 105, 109 (1990) (stating that jurisdictions, when faced with a discharge for refusal to submit to a drug test, have recognized causes of action for wrongful discharge based on violation of public policy or breach of an implied covenant of good faith and fair dealing); see also BLACK'S LAW DICTIONARY 1612-13 (6th ed. 1990) (defining "wrongful discharge" as "[a]n at-will employee's cause of action against his former employer, alleging that his discharge was in violation of state or federal anti-discrimination statutes, public policy, or an implied covenant of good faith and fair dealing" (citations omitted)).

²⁴³ Twenty-five states have statutes protecting both private and public employees from an employer's retaliatory discharge as a result of an employee reporting the illegal conduct of an employer. See Richard J. Brightman, Note, 24 SETON HALL L. REV. 483, 496 n.77 (1993) (listing all 25 states and their respective statutes).

A claim of wrongful discharge has also been found where an employee was terminated following refusal to engage in a criminal act such as perjury or in retaliation for filing a worker's compensation claim. Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1937 (1983).

In addition, some states have enacted "whistle blowing" statutes, which bar discharge or other retaliatory action against an employee who reports an employer's unlawful activity to the authorities. See *id.*

²⁴⁴ See *Gilmore v. Enogex, Inc.*, 878 P.2d 360, 363 (Okla. 1994) (holding that "[a]t-will employees do not have a cognizable cause of action for wrongful discharge unless the claim falls within the narrow class of complaints in which the discharge is contrary to a clear mandate of public policy articulated by constitutional, statutory or decisional law"); see also *Johnson v. Carpenter Tech. Corp.*, 723 F. Supp. 180, 184 (D. Conn. 1989) (holding that statute limiting private sector drug testing to reasonable suspicion or safety-sensitive positions may form the basis of a wrongful discharge

In *Borse v. Piece Goods Shop, Inc.*, a federal appellate court concluded that an employer's discharge of an employee for refusing to consent to her company's policy of drug testing and personal searches might violate a public policy embodied in Pennsylvania's common law invasion of privacy tort, if the employee could show that the "discharge was related to a substantial and highly offensive invasion of the employee's privacy."²⁴⁵ The court identified two features of a drug testing program that might tortiously interfere with an individual's privacy right: (1) monitoring the collection of the urine specimen; and (2) submitting the urine specimen to a testing analysis designed to "[r]eveal a host of private medical facts about an employee."²⁴⁶

A court will not likely sustain a public policy exception to the discharge of an at-will employee for refusing to undergo drug testing where the employee's job involves risks to public safety. In *Hennessey v. Coastal Eagle Point Oil Co.*, the employer discharged a supervisory employee in an oil refinery after the employee failed an unannounced drug test.²⁴⁷ The discharged employee was responsible for overseeing the mixing of gasoline with additives and for charting the course of gasoline products throughout the refinery.²⁴⁸ The New Jersey Supreme upheld the discharge in light of the safety risks inherent in the job, but struck down, as violative of public policy, the random testing of employees who did not occupy similar safety-sensitive positions.²⁴⁹

Similarly, in *Luedtke*, where two brothers were discharged from their employment on a drilling rig following their refusal to submit to a company-mandated drug test, the Alaska Supreme Court recognized that a discharge in contravention of public policy may violate an implied covenant of good faith and fair dealing in an employment-at-will relationship.²⁵⁰ The court, however, concluded that privacy at work

in violation of public policy where employee was discharged for refusing to submit to a testing program); *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1132 (Alaska 1989) (stating that in the absence of any specific statute addressing private employees' privacy interests, court looked "to the entire body of law in the state of Alaska" in establishing a strong public policy supporting the protection of employee privacy); *Twigg v. Hercules Corp.*, 406 S.E.2d 52, 54-55 (W. Va. 1990) (stating that public policy prohibiting suspicionless private employment drug testing in non-safety-sensitive positions is derived from state statute prohibiting lie detector tests). *But see* *Roe v. Quality Transp. Servs.*, 838 P.2d 128, 132 (Wash. Ct. App. 1992) (rejecting state constitutional privacy right, common law tort for invasion of privacy and state statute prohibiting public or private sector use of lie detector tests as evidence of a public policy that would bar an employer from discharging an employee for refusing to take a drug test); *see also* *Jennings v. Minco Tech. Labs, Inc.*, 765 S.W.2d 497, 500 (Tex. Ct. App. 1989) (stating that absent legislative intent, there is no public policy against discharging worker for failing or refusing company drug test). *See generally* *Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11 (N.J. 1992) (holding that discharge of at-will employee in violation of clearly articulated public policy gives rise to cause of action for wrongful discharge); *Brightman*, *supra* note 243 (discussing in detail privacy and public policy issues implicated by *Hennessey* and other New Jersey cases).

²⁴⁵ 963 F.2d 611, 622 (3d Cir. 1992).

²⁴⁶ *Id.* at 621 (quoting *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989)). The case was remanded so plaintiff could amend her complaint in order to allege exactly how defendant's drug testing policy invaded her privacy. *See id.* at 626.

²⁴⁷ 609 A.2d 11, 13 (N.J. 1992).

²⁴⁸ *See id.* at 12-13.

²⁴⁹ *See id.* at 23. The court's recognition of an employee's privacy interest, in the absence of safety considerations, was grounded in part on a state constitutional provision that confers on all persons "material and unalienable rights." *See id.* at 18.

²⁵⁰ 768 P.2d 1123, 1130 (Alaska 1989) (citing *Knight v. American Guard & Alert Inc.*, 714 P.2d 788, 792 (Alaska 1986)). *But see* *Greco v. Halliburton Co.*, 674 F. Supp. 1447, 1450 (D. Wyo. 1987) (stating that although Wyoming has not determined that termination of an at-will employment contract violates an implied covenant of good faith and fair dealing and has not recognized public policy exceptions to the at-will doctrine, neither cause of action could be sustained where the em-

was not qualitatively on par with privacy in the home, and that community safety interests outweighed individual privacy rights in light of the hazardous nature of the jobs at issue.²⁵¹

A hospital, therefore, is unlikely to face liability for rescinding physician privileges or discharging an employee based on their refusal to cooperate in the hospital's drug testing program, provided their job entailed hands-on patient contact. Public policy under these circumstances favors the hospital's right to employ reasonable screening measures, including testing for illicit drug use of any hospital staff member charged with the patient's care and well being.²⁵²

VIII. FEDERAL STATUTORY CONSTRAINTS ON DRUG TESTING

A. AMERICANS WITH DISABILITIES ACT

Before implementing a substance abuse policy, hospitals should also refer to relevant federal statutes that potentially impact the manner in which they administer a drug testing program. The Americans with Disabilities Act of 1990 (ADA)²⁵³ protects qualified, disabled individuals from discrimination in the employment setting.²⁵⁴ Applicable to public or private employers with fifteen or more employees,²⁵⁵ this federal statute safeguards job applicants and employees from disability-based discrimination unless the disability poses a significant risk to others.²⁵⁶ Title I of the ADA, enforced by the Equal Employment Opportunity Commission (EEOC), prohibits discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employees' compensation, job training, and other terms, conditions, and privileges of employment."²⁵⁷ Hospitals should also consult corresponding state statutes modeled after the ADA, but which in some instances provide even more expansive protection for drug- and alcohol- dependent employees.²⁵⁸

ployer demonstrated a valid purpose for drug testing and the program was administered evenhandedly).

²⁵¹ See *Leudtke*, 768 P.2d at 1135-36.

²⁵² See *Kemp v. Claiborne County Hosp.*, 763 F. Supp. 1362, 1368 (W.D. Miss. 1991).

²⁵³ 42 U.S.C. §§ 12101-12213 (1994).

²⁵⁴ See *id.* § 12112(a).

²⁵⁵ See *id.* § 12111(5).

²⁵⁶ See *id.* § 12113(a)-(b). The ADA amends and expands on the coverage provided in the Rehabilitation Act of 1973, Pub. L. No. 93-112, § 503(a), 87 Stat. 355, 393 (codified as amended at 29 U.S.C. § 793(a) (1994)), which was limited to government entities and private employers who received federal funds or had federal contracts in excess of \$2500. See *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270, 1273 (1st Cir. 1993).

Disability is defined by the ADA as, "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

²⁵⁷ 42 U.S.C. § 12112(a).

²⁵⁸ See Robert M. Gault & Anne M. Kinnane, *Navigating the Maze of Employment Law*, MGMT. REV., Feb. 1996, at 9, 10 (1996). For a comprehensive analysis of judicial interpretation of the ADA following the first three years of its enactment, see generally James H. Coil III & Lori J. Shapiro, *The ADA at Three Years: A Statute in Flux*, EMPLOYEE REL. L.J., Spring 1996, at 5.

1. The ADA's Relationship to Drug and Alcohol Addiction

The ADA expressly excludes from its coverage current users of illegal drugs.²⁵⁹ The occasional or recreational drug user is also excluded from protected status on the grounds that such usage does not limit any "major life activities."²⁶⁰ However, individuals who are currently enrolled in, or have successfully completed, a supervised rehabilitation program, or who otherwise have been successfully rehabilitated and are no longer using drugs are protected by the statute.

On the other hand, the ADA considers alcoholism a disability, but only if it does not interfere with the employee's job performance.²⁶¹ Moreover, the statute expressly confers on employers the right to prohibit employees from being under the influence of drugs or alcohol while on the job,²⁶² and the right to terminate an employee for violating this prohibition, "even if any performance or behavior is related to the employee's alcoholism."²⁶³

2. Preemployment Drug Testing and the ADA

The ADA bars employer inquiries into an applicant's physical or mental medical history, including past or present drug use, absent a conditional offer of employment.²⁶⁴ Once such an offer is extended, the employer is free to inquire into the applicant's medical history and to conduct a medical examination, so long as the employer conducts similar questions and examinations of all offerees in similar or comparable job classifications.²⁶⁵ Employers may not withdraw an offer of employment based on information revealed during a medical history inquiry or examination unless it reveals an offeree's inability to perform the essential job functions, with or without reasonable accommodation.²⁶⁶

²⁵⁹ See 42 U.S.C. § 12114(a) (providing that "the term 'qualified individual with a disability' shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use"). Illegal drug use "includes the use of unlawful drugs, the unlawful use of prescription drugs, and the possession or distribution of these drugs." Todd J. Horn, *Federal Laws Affect Workplace Policies on Drug Use: Sorting Out FMLA and ADA Issues*, EMPLOYMENT TESTING L. & POL'Y REP., May 1995, at 65, 66.

²⁶⁰ See *Hartman v. Petaluma*, 841 F. Supp. 946, 949 (N.D. Cal. 1994) (citing 28 C.F.R. § 35.104 (1996)). "[A] person who casually used drugs illegally in the past, but did not become addicted is not an individual with a disability based on past [sic] drug use." *Id.* (citing U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § 8.5, at 8-4 (1992) [hereinafter EEOC TECHNICAL ASSISTANCE MANUAL]).

A protected disability under the ADA requires the employer to make reasonable accommodations to the employee's disability unless the employer can demonstrate that such accommodation would result in undue hardship on business operation. To evoke statutory protection, a disabled employee must otherwise be qualified to perform a job's essential functions, with or without reasonable accommodation. See 42 U.S.C. § 12111(8)-(10).

²⁶¹ See *Flynn v. Raytheon Co.*, 868 F. Supp. 383, 387 (D. Mass. 1994) (stating that known alcoholic employee's discharge "the very first time" he reports to work intoxicated does not violate the ADA because "[r]easonable accommodation does not extend to accommodating an alcoholic employee's showing up for work under the influence of alcohol or drinking alcohol on the job").

²⁶² See 42 U.S.C. § 12114(c)(2).

²⁶³ *Flynn*, 868 F. Supp. at 386 (citing *Canon v. Clark*, No. 94-8150-CIV-KING, 1994 WL 549759, at *2 (S.D. Fla. Sept. 21, 1994)).

²⁶⁴ See *Coil & Shapiro*, *supra* note 258, at 31.

²⁶⁵ See 42 U.S.C. § 12112(d)(3); 29 C.F.R. § 1630.14(b) (1996).

²⁶⁶ See 42 U.S.C. § 12112(d)(3)(C). See also Philip L. Gordon, *The Job Application Process After the Americans with Disabilities Act*, 18 EMPLOYEE REL. L.J. 185, 189-90 (1992), which states: [The ADA] limits the employer's right to withdraw a conditional offer of employment to two situations: (1) if the results of the examination indicate the applicant does not

Drug testing is not considered a "medical examination" under the statute, and theoretically employers can administer the testing before tendering an employment offer.²⁶⁷ However, because medical inquiries of an applicant are prohibited prior to an offer of employment, information that may be pertinent to evaluating the accuracy of a positive test result, particularly an applicant's recent use of medication, may be inaccessible to the employer or testing laboratory. The EEOC Enforcement Guidelines attempt to reconcile these inconsistencies by permitting such an inquiry if a pre-offer applicant registers a positive test result.²⁶⁸ Practical and cost considerations suggest that hospitals limit preemployment drug testing to applicants receiving conditional offers of employment.

3. Medical Record-Keeping Requirements

Information obtained from medical examinations and inquiries conducted of applicants subsequent to an offer of employment (including verification of urinalysis results) must be kept confidential and maintained in a safe location separate and apart from an individual's personnel file.²⁶⁹ Segregating drug testing results and other confidential medical information from general personnel information not only ensures compliance with the ADA, but also helps protect against inadvertent disclosure to third parties and the attendant possibility of defamation and privacy claims against the hospital.

B. FAMILY AND MEDICAL LEAVE ACT

Also affecting hospitals' substance abuse policies is the Family and Medical Leave Act of 1993 (FMLA),²⁷⁰ which covers employers with fifty employees or more.²⁷¹ This statute, enforced by the U.S. Department of Labor, requires employers to provide up to twelve weeks of unpaid leave per year for employees with serious health conditions that prevent performance of essential job functions.²⁷² The FMLA defines a serious health condition as an "illness, injury, impairment, or physical or mental condition" that requires continuing medical treatment or inpatient care in a hospital or comparable residential health facility.²⁷³

The FMLA specifically allows for leave, continuous or intermittent, for employees whose substance abuse constitutes a "serious health condition," provided the treatment is rendered by "a health care provider or by a provider of health care serv-

meet a physical or psychological standard that is job-related and consistent with business necessity, and no reasonable accommodation would permit the applicant to meet the standard; or (2) if the results of the examination indicate the existence of a condition that creates a direct threat to the safety of others, to the applicant, or to property, and no reasonable accommodation would eliminate the risk, or reduce it to an acceptable level.

²⁶⁷ See 42 U.S.C. § 12114(d)(1). In contrast, alcohol testing, according to the Equal Employment Opportunity Commission's Technical Assistance Manual, is deemed a medical examination under the ADA. See EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 260, § 8.9, at 8-7.

²⁶⁸ See Coil & Shapiro, *supra* note 258, at 35.

²⁶⁹ See 42 U.S.C. § 12112(d)(3)(B).

²⁷⁰ 29 U.S.C. §§ 2601-2654 (1994).

²⁷¹ See *id.* § 2611(4)(A)(i).

²⁷² See *id.* § 2612. To be eligible for FMLA leave, an employee must have worked at least one year and 1250 hours in the previous 12 months. See 29 C.F.R. § 825.110(a)(1)-(2) (1997). The FMLA also gives employees the right to a leave for the birth or adoption or foster care of a child, or to care for a spouse, parent or child who is suffering from a serious health condition. See *id.* § 825.112(a)(1)-(3).

²⁷³ See 29 C.F.R. § 825.114(a) (1997).

ices on referral by a health care provider."²⁷⁴ The statute prohibits retaliation against the employee for exercise of FMLA leave.²⁷⁵ However, the statute expressly provides that an employer is free to take adverse employment action, including termination, because of an employee's use of illegal substances, provided that such action is administered in a nondiscriminatory manner and implemented pursuant to an established and communicated policy that specifies discharge for substance abuse.²⁷⁶ Hence, if a hospital has a published policy that clearly communicates to its employees that they may be subject to discharge for drug and alcohol abuse, then the FMLA will not preclude such a discharge, even if the employee attempted to exercise the employee's statutory leave rights.²⁷⁷

IX. DRUG TESTING AND UNIONS

Approximately 1.2 million or eleven percent of the eleven million health care workers in this country are covered under collective bargaining agreements.²⁷⁸ Additionally, some 20,000 physicians, mostly residents, interns and HMO employees belong to one of eight physician unions,²⁷⁹ although only a small percentage of these physicians are eligible to engage in protected collective bargaining.²⁸⁰

Two recurring issues arise in regard to drug testing in a unionized workplace: initial implementation of the program and arbitration awards ordering reinstatement of an employee terminated for violating company drug policy. Concerning initial implementation of a drug testing policy, unions have focused on the employer's duty

²⁷⁴ See *id.* § 825.114(d).

²⁷⁵ See 29 U.S.C. § 2614(a)(2) (stating that "[t]he taking of leave . . . shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced"); 29 C.F.R. § 825.112(g).

²⁷⁶ See 29 C.F.R. § 825.112(g).

²⁷⁷ See *id.*

²⁷⁸ See *SEIU Announces Campaign Against Three Giant Health Care Companies*, Daily Lab. Rep. (BNA) No. 80, at CC-3 (Apr. 25, 1996).

²⁷⁹ See Darryl Van Duch, *Employed Physicians Unionizing*, NAT'L L.J., July 21, 1997, at A1.

²⁸⁰ Medical residents and interns are excluded from coverage under the National Labor Relations Act (NLRA) because they are considered graduate medical students rather than employees. See *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251, 253 (1976). Independent physicians who band together for collective bargaining purposes run the risk of violating federal antitrust laws. See Larry V. Sobol & James O. Hepner, *Physician Unions: Any Doctor Can Join, but Who Can Bargain Collectively?*, 35 HOSP. & HEALTH SERVICES ADMIN. 327, 330 (1990). And physicians, generally, have fallen outside the scope of the coverage of the NLRA because their responsibilities often include supervisory/managerial style functions, including directing the work of other employees and/or serving on committees that help formulate an institution's medical policies. See *FHP, Inc.*, 274 N.L.R.B. 1141, 1143 (1985); see also *NLRB v. Yeshiva Univ.*, 582 F.2d 686, 695 (2d Cir. 1978) (holding that employees who "formulate, determine, and effectuate an employer's policies" fall within the category of managerial employees and are thus exempt from NLRA coverage (quoting *Retail Clerks Int'l Ass'n v. NLRB*, 366 F.2d 642, 645 (D.C. Cir. 1966), *aff'd*, 444 U.S. 672, 691 (1979))).

However, the advent of managed care has changed the autonomy and independence of many physician practitioners, and interest is growing among physicians to engage in organized collective bargaining. See *AMA Delegates Direct Association to Find Ways for Doctors to Bargain*, Daily Lab. Rep. (BNA) No. 125, at C-1 (June 30, 1997). Recently, the National Labor Relations Board (NLRB) ordered Thomas-Davis Medical Centers, a health maintenance organization (HMO) operating offices in Tucson, Arizona, to bargain with the Federation of Physicians and Dentists/National Union of Hospital and Health Care Employees on behalf of 150 full-time salaried physicians. See *Health Care Employees: NLRB Orders Thomas-Davis Medical Center to Bargain with AFSCME for Tucson Doctors*, Daily Lab. Rep. (BNA) No. 150, at A-3 (Aug. 5, 1997). The issue of whether these HMO physicians are supervisors and managers, and not employees, is now pending before the Court of Appeals for the District of Columbia. See *id.*

to bargain over the program, and the federal preemption of state privacy claims pursuant to section 301 of the Labor Management Relations Act (LMRA).²⁸¹

A. DUTY TO BARGAIN

The legality of an employer's unilateral implementation of a drug testing program may hinge on whether the contractual source for the implementation is a general management rights clause or a managerial safety prerogative clause. In 1989, the National Labor Relations Board (NLRB) found that unilateral implementation of a drug testing program was subject to mandatory bargaining under section 8(a)(5) of the National Labor Relations Act (NLRA).²⁸² In *Johnson-Bateman Co.*, the NLRB rejected the employer's reliance on a general management rights clause to support its unilateral institution of a testing program.²⁸³ However, since that ruling, the NLRB has held that arbitration is the proper forum for contesting an employer-mandated drug testing policy, with respect to both implementation and enforcement.²⁸⁴ Moreover, the NLRB has shown reluctance to challenge or otherwise set aside unilateral implementation of testing programs where a clearly defined public policy predicated on employee health and safety is at issue.²⁸⁵

Thus, in *Southern California Edison Co.*, the NLRB refused to declare as "clearly repugnant" to the NLRA, an arbitration award that found a company's drug testing policy to be covered by management's contractual right to implement unilaterally rules relating to safety.²⁸⁶ In electing to defer to the arbitrator's decision, the NLRB cited the connection between drug testing and the need to safeguard workplace safety interests.²⁸⁷

B. FEDERAL PREEMPTION OF STATE CLAIMS ARISING OUT OF EMPLOYER'S DRUG TESTING PROGRAMS

The appropriate avenue for pursuing privacy-based challenges to an employer's drug testing program or to the implementation of other types of surveillance mechanisms is the collective bargaining agreement's grievance arbitration process. In *Johes v. Tokheim Corp.*,²⁸⁸ the Indiana Court of Appeals, relying on the Ninth Circuit's opinion in *Shlacter-Jones v. General Telephone of California*,²⁸⁹ determined that section 301 of the LMRA preempted state claims of invasion of privacy and defama-

²⁸¹ See Labor Management Relations Act of 1947, ch. 120, § 301(a), 61 Stat. 136, 156 (codified as amended at 29 U.S.C. § 185(a) (1994)).

²⁸² See *Johnson-Bateman Co.*, 295 N.L.R.B. 180, 188 (1989).

²⁸³ See *id.* at 184. In a companion case, *Star Tribune*, 295 N.L.R.B. 543, 546 (1989), the NLRB held that the drug testing of employment applicants is not subject to mandatory bargaining.

²⁸⁴ See *August A. Busch & Co., Inc.*, 309 N.L.R.B. 714, 716 (1992) (finding that availability of the grievance-arbitration mechanism triggers the NLRB's deferral doctrine); *Inland Container Corp.*, 298 N.L.R.B. 715, 716 (1990) (holding that deferral to arbitration is proper even though alleged unilateral change in collective bargaining of drug testing programs is not a dispute over the meaning of a specific contractual provision).

²⁸⁵ See *Southern Cal. Edison Co.*, 310 N.L.R.B. 1229, 1230-31 (1993) (deferring to arbitrator's finding that the challenged drug tests were directly and reasonably related to safety considerations).

²⁸⁶ See *id.* at 1230-31.

²⁸⁷ See *id.* at 1231.

²⁸⁸ 657 N.E.2d 145 (Ind. Ct. App. 1995).

²⁸⁹ 936 F.2d 435 (9th Cir. 1991). This case involved an employee who was fired for failing a unilaterally implemented drug testing program. See *id.* at 438. The court of appeals upheld the district court's dismissal of state privacy claims because the state claims were too entangled with the interpretation of the collective bargaining agreement. See *id.* at 440.

tion arising from the employer's drug test directive.²⁹⁰ That statute provides, in part, that: "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties."²⁹¹ The court held that state claims of privacy invasion and defamation were "inextricably intertwined with an analysis of the collective bargaining agreement," and as such, were preempted by section 301.²⁹²

In the case *In re Amoco Petroleum Additives Co.*, the union filed state tort claims for invasion of privacy and intentional infliction of emotional distress following the employer's installation of a video camera outside the women's locker room.²⁹³ The Court of Appeals for the Seventh Circuit rejected the union's assertion that the case was improperly removed to federal court, concluding that an individual's expectation of privacy in the workplace emanates from the contents of the collective bargaining agreement.²⁹⁴ Therefore, privacy, or one's expectation thereof, is a "condition" of employment, the resolution of which depends on interpretation of the collective bargaining agreement.²⁹⁵ Contract interpretation is the province of the arbitrator, not the state court, where resultant damage remedies would only "disrupt this process of accommodation and interpretation."²⁹⁶

C. PUBLIC POLICY CHALLENGES TO ARBITRATOR'S DECISIONS

A series of judicial decisions addressed public policy challenges to arbitration decisions that directed reinstatement of employees dismissed for violating employer drug policies. A favorable reaction on the part of some appellate courts to these employer-sponsored appeals contradicts a strong federal policy of encouraging private resolution of labor disputes, and thus generally insulating most arbitration decisions from judicial review.²⁹⁷ The public policy of promoting a workplace free of illicit drugs and alcohol may override the traditional integrity accorded arbitration awards. This public policy argument is particularly strong when the discharged employee occupied a safety-sensitive position, and where the award contravenes public safety concerns grounded in specific laws and statutes.

The leading case defining the scope of public policy exceptions to arbitration awards is *United Paperworkers International Union v. Misco, Inc.*²⁹⁸ In *Misco*, the

²⁹⁰ See *Jobes*, 657 N.E.2d at 149.

²⁹¹ 29 U.S.C. § 185(a).

²⁹² *Jobes*, 657 N.E.2d at 149. "Whether *Jobes* was improperly required to submit to a drug test is inextricably intertwined with management's control and regulation of the terms and conditions of her employment. Because *Jobes*' claims are inseparable from the parties' rights and obligations under the collective bargaining agreement, they are preempted by Section 301." *Id.* at 150 (citation omitted).

²⁹³ 964 F.2d 706, 707 (7th Cir. 1992).

²⁹⁴ See *id.* at 710.

²⁹⁵ See *id.*

²⁹⁶ *Id.*; see also *United Food & Commercial Workers Union, Local 588 v. Foster Food Prods.*, Nos. CV-F-93-5557 OWW, CV-F-93-5319 OWW, 1994 WL 570367, at *9-10 (E.D. Cal. May 23, 1994) (stating that the only occasions in which a court can overturn an arbitrator's award are when the arbitrator "has dispensed his or her 'own brand of industrial justice,' issu[ed] an award which 'fails to draw its essence' from the collective bargaining agreement" or has violated public policy (citing *Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173*, 886 F.2d 1200, 1208 (9th Cir. 1989))), *aff'd sub nom. United Food & Commercial Workers, Local 588 v. Foster Poultry Farms*, 74 F.3d 169, 175 (9th Cir. 1995).

²⁹⁷ See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987).

²⁹⁸ See *id.* at 43.

Supreme Court refused to vacate an arbitrator's decision to reinstate an employee discharged for violating the employer's drug policy.²⁹⁹ Reiterating a legal standard articulated in *W.R. Grace & Co. v. Rubber Workers*, the Court held that refusal to enforce arbitration awards on the basis of public policy should be limited to circumstances in which the award violates some "well defined and dominant" public policy supported by statutes and legal precedent.³⁰⁰

However, in more recent decisions involving safety, courts have shown more willingness to vacate arbitration decisions based on the public policy of discouraging drug use in the workplace. In *Exxon Shipping Co. v. Exxon Seaman's Union*, the Third Circuit vacated an award ordering reinstatement of a helmsman who failed a drug test administered after his oil tanker ran aground, concluding that the order violated public policy against operation of commercial vessels under the influence of drugs or alcohol.³⁰¹ Protection of the public and the environment from risks associated with the operation of commercial carriers by drug users was a "well defined" public policy specifically reflected in Coast Guard and other related federal regulations.³⁰²

In contrast, the Sixth Circuit found no public policy violation in an arbitrator's decision to reinstate an automobile mechanic in a non-safety-sensitive position where the employer discharged the mechanic for off-the-job drug use and for testing positive for marijuana metabolites in breach of the employer's drug policy.³⁰³ In *Monroe Auto Equipment v. United Auto Workers, Local 878*, the court noted the employer's failure to identify any law or legal precedent that established that the award violated a "well defined and dominant public policy."³⁰⁴ Moreover, the court made no finding that the discharged employee was performing his job while impaired or intoxicated.³⁰⁵

Therefore, although union representation may shield the physician or health care employee from a no-cause discharge, it is less likely to affect a member's discharge for refusing or failing a hospital's unilaterally administered drug test. Both

²⁹⁹ See *id.* at 33-34, 44-45.

³⁰⁰ See *id.* at 43 (citing *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983)).

³⁰¹ 993 F.2d 357, 364 (3d Cir. 1993).

³⁰² See *id.* In support of its holding, the Third Circuit cited to federal appellate decisions where arbitration awards had been vacated under similar circumstances, including *Delta Air Lines, Inc. v. Air Line Pilots Ass'n International*, 861 F.2d 665, 674 (11th Cir. 1988) (vacating, by reason of public policy, arbitrator's award reinstating airline pilot discharged for operating airplane under the influence of alcohol) and *Amalgamated Meat Cutters v. Great Western Food Co.*, 712 F.2d 122, 123, 125 (5th Cir. 1983) (vacating, by reason of public policy, arbitration order reinstating employee who had overturned a tractor trailer and admitted to drinking while on duty).

Likewise, the Court of Appeals for the Fifth Circuit, in *Gulf Coast Industrial Workers Union v. Exxon Co.*, 991 F.2d 244, 250 (5th Cir. 1993), concluded that an arbitration award directing reinstatement of an employee in a safety-sensitive position discharged for testing positive for cocaine while on the job, and for having twice before breached company drug policy, violates a national policy against drug use. The court emphasized the extremely safety-sensitive nature of the job at issue, which "had the capacity to place thousands of people, as well as the surrounding environment, at risk." *Id.* at 252.

³⁰³ See *Monroe Auto Equip. Co. v. International Union, Unit of Local 878*, 981 F.2d 261, 269 (6th Cir. 1992).

³⁰⁴ See *id.*

³⁰⁵ See *id.*; see also *United Food & Commercial Workers, Local 588 v. Foster Poultry Farms*, 74 F.3d 169, 174-75 (9th Cir. 1995) (holding that arbitrator's award for reinstatement of two employees who failed employer's unilaterally implemented random drug testing program did not violate public policy, notwithstanding DOT regulations requiring employers of all commercially operated vehicles to implement random drug testing programs, where regulations did not mandate discharge of employees who fail random drug tests and did not preclude employers from bargaining with unions over discretionary features of a testing program).

recent NLRB and court rulings imply a willingness to depart from traditional deference to the collective bargaining and arbitration process where a labor dispute centers on the employer's enforcement of a substance abuse and drug testing policy. Currently, the overriding concern is workplace and public safety.

X. GUIDELINES FOR IMPLEMENTING A HOSPITAL DRUG AND ALCOHOL TESTING PROGRAM

Even when taking into account differences among state testing statutes and case law, a broad consensus still exists on the right and wrong way to draft, implement and administer a drug testing program. The first admonition is to keep the program nonpunitive and nondiscriminatory. This approach is consistent with the recognition that drug abuse is a disease, the treatment of which requires remedial measures. Conducted in this spirit, drug testing not only enhances patient welfare and employee safety, but also helps to preserve the physician or employee's personal and professional life.

The quality and effectiveness of any testing policy hinges not just on a well-crafted and carefully implemented testing plan, but also on the comprehensiveness of the hospital's substance abuse policy, including its prevention, counseling and treatment components. Special attention should be paid to privacy infringement and accessibility to rehabilitative programs.³⁰⁶ A well-constructed testing policy should also include notice and education of the policy provisions, proven testing methods and adequate chain-of-custody procedures to ensure validity of test results.³⁰⁷

A. FORMULATING AND DRAFTING A SUBSTANCE ABUSE POLICY

Consistent with the autonomous nature of hospital medical staff, and in an effort to foster cooperation, the medical staff should play a prominent role in formulating a hospital's substance abuse policy.³⁰⁸ Similarly, to facilitate hospital-wide assimilation of a new testing policy, participation should draw from staff members of all major departments, and include representatives from all levels in the hospital organization.

The written policy should include: (1) a statement of purpose; (2) a general description of prohibited behaviors; (3) which substances are being tested; (4) under what circumstances tests are conducted; (5) protocol for conducting tests; and (6) consequences of a positive test result. The hospital should draft the policy language in clear and simple language. An educational program addressing both the issue of substance abuse and the organization's policy regarding that issue should accompany the institution of any testing policy.³⁰⁹ Prior to its initiation, the hospital should accord all affected hospital staff a window period to prepare and adjust to the new policy. This waiting period allows physicians and employees who may have a sub-

³⁰⁶ See Isaac D. Montoya & William N. Elwood, *Fostering a Drug-Free Workplace*, HEALTH CARE SUPERVISOR, Sept. 1995, at 1, 5.

³⁰⁷ See *id.*

³⁰⁸ See CSA REPORT, *supra* note 69, at 6.

³⁰⁹ Because of its demonstrated effectiveness in boosting the success of any drug testing program, inclusion of educational programs in drug testing policies have increased 170% over recent years. See DeLancey, *supra* note 4, at 57. According to Eric Rolfe Greenberg, Director of Management Studies at the American Management Association, companies that combine a testing policy with an educational program have positive drug testing rates 33-50% lower than those employers who simply drug test without benefit of any educational initiative. See Greenberg, *supra* note 4, at 24.

stance abuse problem to weigh carefully their options and, if necessary, to seek medical assistance.

AHA's management advisory also encourages employers to include information about the accessibility of treatment, including an employer assistance plan, if one is established,³¹⁰ and the availability of benefits to help defray treatment costs.³¹¹ The AHA also advises the provision of special training for managers and supervisors regarding both the hospital's substance abuse policy and the relevant provisions of the ADA.³¹²

If the policy provides for post-accident or for-cause testing, the hospital should clearly spell out the standards for triggering a test. Moreover, the hospital should limit in number the supervisors or medical staff members charged with making a for-cause determination and specially train them to identify behavioral characteristics associated with substance abuse.³¹³ Factors that typically prompt for-cause or reasonable-suspicion testing include erratic behavior, declining job performance and excessive absenteeism.³¹⁴ However, given the multiple personal and medical factors that could contribute to these characteristics, it is often difficult to determine when to administer a for-cause test.³¹⁵ Consequently, the hospital should give serious consideration to limiting testing to physicians and staff who occupy safety-sensitive positions where impaired performance can endanger the patient. Of course, prior to initiating for-cause drug testing, the hospital should provide the affected physician or employee with notice of the hospital's concerns regarding job performance, an opportunity to explain and time to redress the problem.

B. SCOPE AND APPLICATION

Fair employment practices dictate a drug and alcohol testing program that is equitable in its inception and application. If the goal is to ensure that any personnel entrusted with patient care remains unimpaired by drugs or alcohol, the policy's scope should be limited to those in safety-sensitive positions; to wit, those individuals whose responsibilities include the direct provision of patient care. Uniform, non-discriminatory application of the policy is imperative. If the orderly responsible for delivering a patient to the operating room is subject to testing, so too should the physician responsible for performing the surgery. Inclusion of all job positions and medical staff directly involved with patient care makes sense from a practical and labor relations perspective. It also is consonant with relevant case law and with current AMA policy.³¹⁶ If any individual or group charged with patient care responsibilities is exempt from testing, reasons for the exemption should be clearly stated in the published policy.

³¹⁰ See AHA POLICIES, *supra* note 56, at 1.

³¹¹ See *id.* at 5.

³¹² See *id.*

³¹³ See Kizziar & Nichols, *supra* note 24, at 21; see also *supra* Part II.B (discussing suspicion-based testing).

³¹⁴ See DeLancey, *supra* note 4, at 58.

³¹⁵ A study by the DOT showed that 85% of drivers tested pursuant to reasonable suspicion were negative. See Jonathan A. Segal, *Urine or You're Out*, HR MAGAZINE, Dec. 1994, at 30, 34.

³¹⁶ See CSA REPORT, *supra* note 69, at 4; see also American Fed'n of Gov't Employees, L-2110 v. Derwinski, 777 F. Supp. 1493, 1493 (N.D. Cal. 1991) (upholding random testing of any medical position that involved direct patient care, including physician, pharmacist and nurse); *Kemp v. Claiborne County Hosp.*, 763 F. Supp. 1362, 1368 (S.D. Miss. 1991) (stating that any job involved with direct patient care should be considered safety-sensitive for drug testing purposes).

Testing medical staff and employees in safety-sensitive positions should be limited to three scenarios: (1) application for employment or medical staff privileges; (2) on reasonable suspicion that employee/physician job performance is impaired by illicit drug use; and (3) as part of a return-to-work agreement.³¹⁷ Limiting drug testing to preemployment and thereafter, only for cause or post rehabilitation, helps ensure safe and competent patient care and a safe work environment. Preemployment and for-cause testing also allows for early identification and intervention of drug- or alcohol-impaired physicians and employees. Although random testing may be a more effective deterrent against workplace substance abuse, the absence of reasonable, individualized suspicion makes it more invasive and controlling than either preemployment or for-cause testing. As such, its use should be limited to individuals who are being monitored as part of a substance abuse rehabilitation program, and have consented to such testing as a condition of their continued employment.

C. PUBLICATION AND INFORMED CONSENT

Publication of a well-defined substance abuse testing policy is both an important procedural safeguard and a necessary criterion for informed consent. Prior to performing a drug or alcohol test, the hospital should furnish applicants and employees alike with a copy of the hospital's testing policy.

Unless mandated by federal or state law, the hospital must secure consent to testing prior to its administration.³¹⁸ Medical staff and employee applicants should be informed that submission to drug and alcohol tests is a condition precedent to an offer of employment or the granting of privileges. Testing of existing employees should include a signed acknowledgment of the testing policy.³¹⁹

D. METHODOLOGY AND ANALYSIS

Hospitals can help assure testing accuracy by carefully monitoring the quality of its testing procedures. Urinalysis is generally composed of two tests: screening and confirmation. Screening eliminates all tests that fail to show the presence of the targeted substance at a designated level.³²⁰ The most commonly used method of screening is enzyme multiplied immunoassay test, which has the capacity to test for a wide array of drugs.³²¹ If screening indicates the presence of a marked substance at a specified level, a confirmatory test is recommended.³²² A confirmatory test, generally utilizing a more sophisticated scientific analysis, is essential to accurately identify the substance and measuring quantity.³²³ It is also essential because of the variability in testing accuracy, often due to faulty storage or handling of the specimen.³²⁴ When coupled with an initial screening test, the most widely used confirmatory test, gas chromatography/mass spectrometry, produces the most accurate test analysis available today.³²⁵

³¹⁷ AMA COUNCIL ON LONG RANGE PLANNING AND DEV., AMERICAN MED. ASS'N, POLICY COMPENDIUM § 95.984 (1995).

³¹⁸ See Fellows, *supra* note 36, at 22.

³¹⁹ See *id.*

³²⁰ See Rothstein, *supra* note 219, at 691.

³²¹ See *id.* at 692.

³²² See *id.* at 691.

³²³ See *id.* at 692.

³²⁴ See Cairns & Grady, *supra* note 12, at 504-05.

³²⁵ See *id.* at 507.

The analysis of a specimen should be conducted off-site by a laboratory certified by the National Institute on Drug Abuse which is authorized to release only that data the test was purported to measure.³²⁶ Conducting the urinalysis off-site helps secure individual privacy and confidentiality. Rules restricting the hospital's access to information revealed by a urine sample, other than a drug or alcohol reading, must be strictly enforced. A chain of custody that tracks the specimen from its point of collection to its final destination also helps maintain control and accountability.³²⁷ Both safeguarding the medical information disclosed by a urinalysis and imposing strict quality controls for chain of custody procedures minimize hospital liability for privacy invasion claims. Hospitals should be vigilant in their compliance with these procedures.

E. TRANSMISSION AND CONSEQUENCES OF A CONFIRMED POSITIVE DRUG TEST

A credible testing program also requires transmission of an initial positive test result from the lab directly to an independent medical review officer (MRO) appointed by the hospital.³²⁸ The MRO reviews the testing data and meets confidentially with the physician or employee to determine whether a legitimate explanation exists for the positive result, such as ingestion of some food or medication. Tests results should be reevaluated in light of the information obtained from the physician or employee. If warranted, the hospital should perform a confirmatory test.

A verified positive test result should be transmitted to a designated person from personnel or management, who in turn meets with the physician or employee and a member of the employee assistance program. A trained MRO can also assist in the process, recommending individual treatment protocol, overseeing its implementation, as well as supervising the rehabilitative process in general. An employee assistance program, either internal or external to the hospital, should minimally include short-term counseling and a referral for impaired staff members.³²⁹

The hospital should only discipline or discharge a physician or employee who refuses to enter a rehabilitation program or has tested positive a second time.³³⁰ Otherwise, once a staff professional has been identified as impaired, the hospital may elect to intervene and assist with the selection of appropriate medical treatment.³³¹

³²⁶ See AHA POLICIES, *supra* note 56, at 3.

³²⁷ An appropriate "chain of custody" procedure includes sealing, labeling and numbering the sample in the presence of the tested employee, and recording the date and time of the sample, the date and time it was sent to the lab, the name of applicant/employee and the name of the sampler. See Cairns & Grady, *supra* note 12, at 537. A chain of custody document should accompany each sample to the lab and should contain the name of every person who has handled the sample, along with the date and time of transfer to the next person in the chain. See *id.*

³²⁸ See AHA POLICIES, *supra* note 56, at 4. In its 1996 drug testing survey, the American Management Association reported that 76% of their respondents now use an MRO, up from 48% in 1994. See AMERICAN MANAGEMENT SURVEY, *supra* note 3, at 6.

³²⁹ See Ossi, *supra* note 47, at 24.

³³⁰ See Jerry Kinard & James Fenton, *Drug-Testing Procedures Used by Hospitals: An Empirical Inquiry*, HEALTH CARE MGMT. REV., Summer 1993, at 75, 76. See generally Ossi, *supra* note 47, at 23-24 (stating that the impaired employee and employer should negotiate the terms of pre-treatment or return-to-work contracts and the consequences of an employee breach). A number of states have pending legislation that require certain classes of alcohol- or drug-impaired professionals to complete successfully rehabilitation programs as a condition of retaining their license. See Kinard & Fenton, *supra*, at 79.

³³¹ "Three elements of preparation for an intervention are (1) documentation of work performance, (2) careful selection of the intervention team, and (3) selection of a specific treatment option, which may include a written agreement intended to bind the impaired professional to seek and complete treatment in order to retain employment." Ossi, *supra* note 47, at 23.

The hospital and staff member will often enter into a "pretreatment agreement" that conditions the employee's return to work, or a physician's resumption of practice, on successful completion of a rehabilitation program.³³² On returning to work, the hospital and staff member may codify their respective expectations and the consequences for their breach in a return-to-work agreement. This agreement operates for a specified period of time, often includes a provision for random testing,³³³ and is fashioned so as not to compromise the safety of patients or the dignity and career of the employee/physician.

F. CONFIDENTIALITY

Failure to adhere rigorously to rules designed to safeguard confidentiality at every phase of the testing process can undermine the integrity of even the most soundly constructed program and set the stage for defamation or other tort claims. Neither the identities of tested employees nor their results should be revealed.³³⁴ Release of such information should be strictly confined to those with a legitimate need to know, e.g., supervisory staff involved in personnel decisions.³³⁵ Hospitals should also avoid releasing information concerning either the results of drug testing or any adverse action taken against an applicant or employee to any third party outside the hospital, unless such disclosure is mandated by law, e.g., to a state licensing or certification agency, or to a professional peer review committee.

Legal precepts surrounding confidentiality are consistent with the ADA guidelines requiring that information obtained from a medical examination (an alcohol test is considered a medical exam under the ADA, a drug test is not) or disability information learned from a nonmedical test (a drug test designed to detect the ingestion of illegal substances is considered a nonmedical test) be treated as a confidential medical record.³³⁶ The ADA requires that a hospital record information obtained from both medical and nonmedical tests on separate forms and store them in an area apart from the employee's personnel file.³³⁷ A breach of the strict confidentiality that at-

³³² "In many cases with health care workers, it is the threat of job loss that motivates them to seek help." *Id.* (citing Judith A. Pauwels & David G. Benzer, *The Impaired Health Care Professional*, 29 J. FAM. PRAC. 477, 479 (1989)).

³³³ The American Hospital Association Management Advisory also recommends that continued employment or privileges for the health care employee or medical staff member who has successfully completed rehabilitation be conditioned on a return-to-work agreement that includes "unannounced testing for a specified reasonable period to ensure that a relapse has not occurred." AHA POLICIES, *supra* note 56, at 4.

³³⁴ See *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1514 (D.N.J. 1986) (holding that plaintiffs' significant interest in safeguarding medical information disclosed by urinalysis was violated where City published to the media its suspension of firefighters, thereby "subject[ing] all Plainfield fire fighters to public suspicion and degradation"). *But cf.* *Minckler v. Exxon Corp.*, No. 05-95-01015-CV, 1997 Tex. App. LEXIS 343, at *9-10 (Tex. App. Jan. 30, 1997) (finding that no defamation or privacy violation arose from private employer's disclosure to former co-workers that discharged employee was terminated as a result of testing positive for drugs because statement was made in good faith and former co-workers had a basis to know such information).

³³⁵ See AHA POLICIES, *supra* note 56, at 4.

³³⁶ See Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(d)(3)(B) (1994).

³³⁷ See *id.* The ADA authorizes limited disclosure of confidential medical information to: (1) supervisors or managers with a legitimate need to know of necessary restrictions of employee's duties; (2) first aid and safety personnel when employee may require emergency treatment; and (3) government officials charged with investigating compliance with ADA requirements. See *id.* Release of confidential medical records may also be made to state workers' compensation offices or "secondary injury" funds and to organizations that provide employee health or life insurance coverage. See AHA POLICIES, *supra* note 56, at 4.

taches to these medical records may give rise to civil and criminal penalties under federal and state privacy laws.³³⁸

Exercising care and caution in the formulation of a testing program can mitigate potential liability and ill will that often accompany employer-mandated drug testing programs. A hospital's development of a responsible and effective program requires an initial commitment of time and resources, including the participation of legal counsel and other qualified testing experts. State and local drug testing laws may be controlling and should be consulted. And once in place, the hospital should continually monitor its testing program to ensure compliance with testing policies and procedures, particularly those relating to employee consent and confidentiality.³³⁹

XI. CONCLUSION

Analyzing urine for illicit substances is undeniably an invasive and fairly crude method for determining on-the-job impairment. The fact that workplace drug testing has become commonplace does not make it any less so. But the courts have held that individual privacy is a relative concept and, in the context of employment drug testing, must be measured against an employer's need to provide a safe and productive work environment. Using the Fourth Amendment balancing test, there are certain circumstances where it may be both reasonable and preferable to sanction an intrusion on individual privacy for the sake of safeguarding the public welfare.

Balanced against the privacy interests of the individual physician or hospital employee is the duty of care owed to the patient. Physicians or employees who abuse alcohol or drugs risk serious harm not only to themselves but also to their patients. The responsibility to ensure patient welfare and workplace safety lies with the hospital. Because of the adverse impact of substance abuse on the standard of patient care and on the health and safety of hospital physicians and employees, the AHA recommends that all health care institutions formulate a drug testing policy that includes preemployment, for-cause and post-accident testing.³⁴⁰

Additionally, because drug testing has become a conventional screening tool for employers engaged in less perilous work, a hospital may be more susceptible to allegations of corporate liability when it fails to include a drug testing scheme as part of its hiring and credentialing process. The expansion in negligent hire and retention claims coupled with the potentially life-threatening consequences posed by a drug-impaired health care worker call for hospitals to reevaluate their liability exposure for failing to drug test in certain circumstances. Also problematic is the substance abuse program that is carefully crafted and implemented, but that omits from its coverage physicians, residents and interns. Excluding these practitioners from a hospital's testing regimen makes for poor employment relations and risk management.

A drug testing program is not a cure-all for substance abuse, and is not without its attendant risks. It should be approached with great caution and concern for the competing privacy and patient safety interests at stake. In urging hospitals to initiate comprehensive substance abuse policies, the AHA argues that at its best, a testing program improves both patient care and worker safety. An effective program, however, must incorporate well-developed educational and rehabilitation components. It

³³⁸ See Donald H. Seifman & Craig W. Trepanier, *Electronic Administration of Personnel Records, Benefit Plans, and Direct Payroll Deposits: Evolution of the Paperless Office: Legal Issues Arising Out of Technology in the Workplace, Part II*, EMPLOYEE REL. L.J., Spring 1996, at 61, 77.

³³⁹ See Kizziar & Nichols, *supra* note 24, at 22.

³⁴⁰ See AHA POLICIES, *supra* note 56, at 2. Unannounced random testing should be limited to physicians and employees required to enter into a return-to-work agreement. See *id.* at 3.

requires cognizance of relevant legal and ethical issues. And most significantly, it must include precautions to ensure individual privacy and dignity.