1988

Unions and Urinalysis

Deborah A. Schmedemann
Mitchell Hamline School of Law, deborah.schmedemann@mitchellhamline.edu

Publication Information

Repository Citation
http://open.mitchellhamline.edu/facsch/56
Unions and Urinalysis

Abstract
Many private employers seem to be busy deciding whether and how to test employees for drug use. Presumably most of these decisions are made by management acting alone. However, in unionized workplaces—one out of five private sector employees are represented by unions—federal labor law prescribes a different method. That method features collective bargaining by unions and management to set the rules, the use of a private third-party neutral to resolve disputes which arise under those rules (arbitration), and relatively little involvement by the government (the National Labor Relations Board, legislatures, and the courts). This system that labor law prescribes for dealing with the problem of drug testing is complex. Part I of this article describes that system, with a focus on the prominence of private standards and methods compared to the minor impact of public law and processes. Part II comments on this system, addressing two related questions: First, is the labor law system a wise one for resolving the issue of drug testing in unionized workplaces? The short answer is yes, although the role of public law should be increased. Second, are there lessons for the non-unionized sector? The short answer is that some features of the system used in unionized settings could be used in non-unionized settings, but only with modifications. Throughout, the article focuses on the issue of whether to test employees for drug use, although it touches on related issues, such as discipline for drug use, as well.

Keywords
Employment law, drug testing, National Labor Relations Act, NLRA, arbitration, drug use, invasion of privacy, conditional disclosure, preemption, labor law, alternative dispute resolution, ADR

Disciplines
Constitutional Law | Dispute Resolution and Arbitration | Human Rights Law | Labor and Employment Law

This article is available at Mitchell Hamline Open Access: http://open.mitchellhamline.edu/facsch/56
UNIONS AND URINALYSIS

DEBORAH A. SCHMEDEMANN*

INTRODUCTION .................................................. 277
I. LABOR LAW AND DRUG TESTING ........................... 279
   A. Collective Bargaining to Set the Rules ............. 279
      1. Introduction ....................................... 279
      2. The Basic Obligation and Bargaining Subjects .... 280
      3. Bargaining in a Statutory Context ................ 286
      4. Bargaining During the Contract Term ............... 288
   B. Arbitration to Enforce the Rules .................... 291
      1. Introduction ....................................... 291
      2. Arbitral Awards ................................... 292
      3. “Enforcement” of Arbitral Awards ................. 299
         a. Board Deferral ................................ 299
         b. The Courts .................................... 302
      4. Private Judges versus Public Lawmakers ............ 309
   C. An Aside: The Duty to Furnish Information .......... 311
   D. State Law and Preemption ............................. 315
      1. Introduction ....................................... 315
      2. Setting Contract Terms by Statute ................ 317
      3. Creating a Civil Cause of Action .................. 320
II. COMMENTARY: PRIVATE ORDERING VERSUS PUBLIC
    PROCESSES ............................................... 325
   A. Basic Principles of Dispute Resolution .............. 325
   B. The Unionized Setting ................................ 328
   C. The Non-Unionized Setting ............................ 333
CONCLUSION .................................................... 336

INTRODUCTION

Many private employers seem to be busy deciding whether and how to test employees for drug use. Presumably most of

---

* Professor of Law, William Mitchell College of Law. Thanks go to my research assistants, James Denzer and Rod Smeltzer.
1. The term "drug" is used to refer to alcohol as well as other chemical substances workers may ingest.
2. According to the National Institute on Drug Abuse, three percent of Fortune 500 companies employed drug testing in 1982; by 1985, the figure had risen to al-

277
these decisions are made by management acting alone. However, in unionized workplaces—one out of five private sector employees are represented by unions—federal labor law prescribes a different method. That method features collective bargaining by unions and management to set the rules, the use of a private third-party neutral to resolve disputes which arise under those rules (arbitration), and relatively little involvement by the government (the National Labor Relations Board, legislatures, and the courts). Is this a wise system? If so, does it have any lessons for the non-unionized sector?

The problem of drug testing is complex. It raises many questions: Will drug testing promote sobriety and lead to better performance on the part of employees? Will drug testing also lead to a more orderly workplace with fewer occasions calling for discipline of employees? Will drug testing reduce workplace accidents caused by intoxicated employees? Will drug testing lead to healthier lifestyles among employees, thereby reducing absenteeism and health care costs? Does drug testing violate the employee’s legal or moral rights to privacy? Could drug testing and subsequent actions taken by management lead to disability discrimination?

The dynamics of a unionized setting are also complex. Most think of labor relations as entailing a struggle between labor and management. But things are rarely so simple. On the labor side, for example, there are at least two distinct entities: the union, which represents the employees and has its own institutional goals, and the employees, who are not likely to be of one mind on drug testing. Chemically dependent employees will presumably have a different view than abstainers. Furthermore, while management may at first glance appear monolithic, drug testing is controversial enough to provoke differences of opinion among members of management as

---

5. The National Labor Relations Board [hereinafter the Board] bears the primary responsibility for enforcing the federal private sector labor law. See generally id. at § 153(b) (powers of the Board); § 159 (determination of bargaining unit by and election regulation duties of the Board); § 160 (powers of the Board to determine and act on unfair labor practices); § 161 (investigatory powers of the Board).
6. Institutional goals would include staying in power.
well. Thus, each "side" holds many competing views. Finally, the public has a stake, albeit not as direct as that of labor and management, in drug testing. Drug use is a major concern in our society.\textsuperscript{7}

The system labor law prescribes for dealing with the problem of drug testing is also complex. Part I of this article describes that system, with a focus on the prominence of private standards and methods compared to the minor impact of public law and processes. Part II comments on this system, addressing two related questions: First, is the labor law system a wise one for resolving the issue of drug testing in unionized workplaces? The short answer is yes, although the role of public law should be increased. Second, are there lessons for the non-unionized sector? The short answer is that some features of the system used in unionized settings could be used in non-unionized settings, but only with modifications. Throughout, the article focuses on the issue of whether to test employees for drug use, although it touches on related issues, such as discipline for drug use, as well.\textsuperscript{8}

I. LABOR LAW AND DRUG TESTING

A. Collective Bargaining to Set the Rules

1. Introduction

As the Supreme Court has explained, "[t]he object of [the National Labor Relations] Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions."\textsuperscript{9} Beyond requiring collective bargaining, American labor law takes a laissez-faire stance towards the establishment of employment terms for unionized employees. Few employment terms are directly set by the labor statute or other federal

\textsuperscript{7} \textit{See generally} Castro, Battling the Enemy Within, \textit{Time}, Mar. 17, 1986, at 52.


laws. The law does set parameters on what the parties bargain about, but leaves the terms of the deal to the parties themselves. The scope of the bargaining obligation during the contract term is also set by the parties through the language of their contract.

Thus, federal law has not determined for unions and management what the rules on drug testing should be. Rather, the law requires the parties to bargain over the subject and thereby set their own rules. As a result, different rules apply in different workplaces.

2. The Basic Obligation and Bargaining Subjects

A cornerstone of American labor law is the mutual obligation of union and management to negotiate the terms of employment for employees. The National Labor Relations Act (NLRA) imposes a duty to "confer in good faith," and most of the law on collective bargaining pertains to the good faith

---

10. The impact of state laws purporting to set employment terms is discussed in part I.D. below.

11. For examples of union-management negotiated programs, see ALCOHOL AND DRUGS, supra note 2, at 36, 51-58. The AFL-CIO has published a booklet, DRUG & ALCOHOL TESTING ON THE JOB (1987), setting guidelines for union negotiators, including the prohibition of random testing, safeguards for tested employees, the use of grievance systems to challenge test procedures, treatment for dependent workers, and safeguards on worker privacy.

12. This duty arises once a majority of employees has selected a union. See 29 U.S.C. § 159(a) (1982). A union may acquire the right to represent employees through an election run by the Board. See id. See also THE DEVELOPING LABOR LAW 341-421 (C. Morris 2d ed. 1983 & Supp. 1982-85) [hereinafter THE DEVELOPING LABOR LAW] (processes and procedures of electing and certifying a bargaining unit). Or a union may be recognized by an employer or acquire representation rights through a Board order requiring the employer to bargain with the union. See generally THE DEVELOPING LABOR LAW, supra note 12, at 488-540. Regardless of the method of selection, the union represents the employees in an "appropriate bargaining unit," that is, a group of employees having common interests such that joint representation is justified. See 29 U.S.C. § 159(b) (1982); THE DEVELOPING LABOR LAW, supra note 12, at 413-87.

The union then has the right to be the employees' exclusive representative. 29 U.S.C. § 159(a) (1982). The union's exclusivity closes out competing efforts to bargain by other groups, see Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 62 (1975), and by individual employees acting for themselves, see J.I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944).

13. [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obli-
requirement.\textsuperscript{14}

The law does, however, have some impact on the outcome of bargaining by setting parameters on what the parties may and must bargain about. The statute requires the parties to bargain "with respect to wages, hours, and other terms and conditions of employment."\textsuperscript{15} Under \textit{NLRB v. Wooster Division of Borg-Warner Corp.},\textsuperscript{16} bargaining subjects fall into three categories: illegal, permissive, and mandatory (or statutory).\textsuperscript{17} Bargaining over illegal subjects leads to unenforceable contracts.\textsuperscript{18} Bargaining over both mandatory and permissive

\textsuperscript{14} Negotiation does not compel either party to agree to a proposal or require the making of a concession.

29 U.S.C. § 158(d) (1982). It is a violation of the law, called an unfair labor practice, for union or management to refuse to bargain collectively. \textit{Id.} at § 158(a)(5) (management unfair labor practice); § 158(b)(3) (union unfair labor practice).

\textsuperscript{15} This is evaluated by assessing the totality of the alleged violator's conduct. For a classic—and controversial—example, see General Elec. Co., 150 N.L.R.B. 192 (1964), enforced, 418 F.2d 736 (2d Cir. 1969), cert. denied, 397 U.S. 965 (1970). \textit{See generally The Developing Labor Law}, supra note 12, at 570-606. The Board and courts do look at the parties' proposals and concessions as evidence of good faith. The classic case is \textit{NLRB v. Reed & Prince Mfg. Co.}, 205 F.2d 131 (1st Cir. 1953), cert. denied, 346 U.S. 887 (1953). As the court stated, "the employer is obliged to make some reasonable effort in some direction to compose [sic] his differences with the union, if § 8(a)(5) is to be read as imposing any substantial obligation at all." \textit{Id.} at 134-35 (emphasis in original). \textit{See generally The Developing Labor Law}, supra note 12, at 583-93. However, the statute "does not compel either party to agree to a proposal or require the making of a concession . . ." 29 U.S.C. § 158(d). And the Supreme Court has held that the Board has no power to impose particular contract terms, even on a party which has clearly negotiated in bad faith. \textit{H.K. Porter}, 397 U.S. at 108.

\textsuperscript{16} Only a few misdeeds qualify as per se violations. \textit{See Medo Photo Supply Corp. v. NLRB}, 321 U.S. 678, 683-85 (1944) (employer bargaining directly with employees); \textit{NLRB v. Midvalley Steel Fabricators, Inc.}, 243 N.L.R.B. 516, 517 (1979), enforced as modified, 621 F.2d 49 (2d Cir. 1980) (refusing to execute a written contract once agreement has been reached). For other examples, \textit{see generally The Developing Labor Law}, supra note 12, at 569-70. On the Board's lack of authority to create per se violations beyond those clearly anticipated by the statute, \textit{see NLRB v. Insurance Agents' Int'l Union}, 361 U.S. 477, 498 (1960).

\textsuperscript{17} The Board has the power to order violators to "cease and desist" from committing unfair labor practices and "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act]." 29 U.S.C. § 160(c) (1982). In most cases of refusals to bargain, the Board's only remedy is to order the violator to bargain in good faith. \textit{See H.K. Porter}, 397 U.S. at 108 n.5.

\textsuperscript{18} 29 U.S.C. § 158(d) (1982).

\textsuperscript{19} 356 U.S. 342 (1958) [hereinafter \textit{Borg-Warner}].

\textsuperscript{20} \textit{Id.} at 349. The four dissenting justices argued that the majority decision would interfere with the evolution of collective bargaining and give the Board too much control over the terms of the contract. \textit{Id.} at 358-59 (Harlan, J., dissenting).

\textsuperscript{21} \textit{See id.} at 349-50.
subjects leads to enforceable contracts. A refusal to bargain over mandatory subjects is a per se violation of the law; that is not true of permissive subjects. Insisting on a permissive subject to the point negotiations come to an impasse is also a per se violation, although similar insistence on a mandatory subject is legal. Finally, making a change in a mandatory subject without negotiating, i.e., a unilateral change, is a per se violation, although such changes in permissive subjects are permitted.

Nothing in the NLRA or other federal law renders drug testing an illegal subject. Thus, the real question is whether drug testing is a permissive or mandatory subject of bargaining. There is no decision on point. The precedents, however, point strongly toward the conclusion that drug testing is a mandatory subject. In an advisory memo, the General Counsel recently took this position.

None of the Supreme Court's decisions on bargaining subjects touches on matters particularly analogous to drug testing. The Court's most concrete guidance is found in First National Maintenance Corp. v. NLRB.

---

19. Id. at 349.
23. See infra notes 69-73 and accompanying text.
24. Indeed there are few clearly identified illegal subjects. The statute does fairly clearly prohibit contracts calling for closed shops, 29 U.S.C. §§ 158(a)(3), 158(b)(2), and "hot cargo" clauses, id. § 158(e). For examples of other illegal subjects, see generally THE DEVELOPING LABOR LAW, supra note 12, at 863-69.
25. The union at the Minneapolis Star & Tribune brought charges based on the paper's alleged unilateral imposition of drug testing. The case has been referred to arbitration. Telephone interview with James Fox, Staff Attorney of the NLRB Regional Office, Minneapolis, Minn. (Nov. 18, 1987).
26. The General Counsel is the chief prosecutor under the NLRA. 29 U.S.C. § 153(d).
29. 452 U.S. 666 (1981) (holding that the decision to close a part of the business is permissive).
The Court in *First National Maintenance* established three categories of subjects.\textsuperscript{30} Drug testing falls most clearly into the category where bargaining is required.\textsuperscript{31} The decision to test scarcely has “only an indirect and attenuated impact on the employment relationship,”\textsuperscript{32} the hallmark of the category where bargaining is not required. Drug testing is done to employees and may determine whether they will keep their jobs or undergo treatment. Nor does the decision to test go to the size of the company or what it produces; drug testing thus does not involve “a change in the scope and direction of the enterprise,”\textsuperscript{33} the hallmark of the category where bargaining may be required. Rather the decision to test is one likely to be made by the personnel department to address concerns about employee safety, productivity and discipline. Such a decision pertains to “work rules” and is “almost exclusively ‘an aspect of the relationship’ between employer and employee,”\textsuperscript{34} the hallmark of the mandatory category.

This position is supported by the Board’s treatment of analogous matters as a mandatory subject. Various features of a disciplinary program, including procedures and the grounds for discipline, are mandatory subjects.\textsuperscript{35} Board decisions in-

\textsuperscript{30} The Court summarized its case law:

Some management decisions, such as choice of advertising and promotion, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship. Other management decisions, such as the order of succession of layoffs and recalls, production quotas, and work rules, are almost exclusively ‘an aspect of the relationship’ between employer and employee. The present case concerns a third type of management decision . . . [which involves] a change in the scope and direction of the enterprise . . . . At the same time, this decision touches on a matter of central and pressing concern to the union and its member employees . . . .

*Id.* at 676-77 (citations omitted). The Court implied that the first category is not mandatory, while the second is. The third category consists of close calls to be resolved under a balancing test. Bargaining is required when “the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business.” *Id.* at 679.

\textsuperscript{31} For an interesting analysis of drug testing and the three categories in the context of professional sports, where arguably a sober employee is the product being sold, see Lock, *Drug Testing in the NFL and the Obligation to Bargain Under the NLRA*, 3 LAB. LAW 239 (1987).

\textsuperscript{32} *First Nat’l Maintenance*, 452 U.S. at 677.

\textsuperscript{33} *Id.*

\textsuperscript{34} *Id.*

\textsuperscript{35} See, e.g., RAHCO, Inc., 265 N.L.R.B. 235, 257 (1982) (formalized system of written warnings and discipline); Ciba-Geigy Pharmaceuticals Div., 264 N.L.R.B. 1013, 1016 (1982), enforced, 722 F.2d 1120 (3d Cir. 1983) (absenteeism rules); Rob-
volving polygraph and medical exams are very close on point.

In Medicenter, Mid-South Hospital, the Board adopted the decision of the administrative law judge (ALJ) finding that polygraph testing is mandatory. The ALJ reasoned first that an employer’s method of investigating employee misconduct is mandatory:

[T]his sort of change in an employer’s investigatory method, substantially varying both the mode of investigation and the character of proof on which an employee’s continued job security might hinge, is a bargainable change in the terms and conditions of his employment. The existing technique for investigating and determining guilt of misconduct involved the application of human skill, judgment, and experience. Onto this scale, and perhaps in lieu of naked human assessment, Respondent was introducing a chart based on variations in bodily functions, which . . . has never been considered sufficiently trustworthy to be deemed probative in criminal proceedings. The employees’ jobs were on the other scale.

Second, the program created a new ground for discharge, refusal to take the test. Work rules which may lead to discharge when broken are mandatory subjects. The ALJ rejected the employer’s argument that it was merely exercising its inherent right to investigate employee misconduct, pointing out that this right “has been cabined in many ways by the Act.”

The ALJ in Medicenter relied on the Board’s decision in LeRoy Machine Co. There the Board agreed with the ALJ that re-


37. Id. at 670.
38. Id. at 678. The employer instituted the polygraph program in response to a wave of vandalism during difficult contract negotiations, and employees who refused to take the test were discharged. The ALJ went on to find that the union had waived its right to bargain over the subject by inaction and so dismissed the charges. Id. at 680. Member Murphy would have held for the employer as well on the grounds the employer’s actions were justified by an emergency situation. Id. at 670 n.2.
39. Id. at 675.
40. Id. at 677.
41. Id. at 676.
43. LeRoy Mach. Co., 147 N.L.R.B. at 1432. The Board found no violation of the
quiring employees with bad absenteeism records to submit to a doctor’s exam is a mandatory bargaining subject.\textsuperscript{44} The employer required the doctor’s exams in order to determine whether to transfer or terminate the employees.\textsuperscript{45} The ALJ reasoned that the new requirement jeopardized the employees’ job security.\textsuperscript{46} In dictum, the ALJ distinguished an employer requirement that employees undergo exams “for reasons unconnected with the employment status,”\textsuperscript{47} such as to obtain treatment where no report is made to the employer and no change in employment status could result.\textsuperscript{48}

Drug testing is analogous to Medicenter’s polygraph tests and LeRoy Machine’s physical exams. All three measure physiological features of employees. All three assess an employee’s condition, conduct, or integrity. All three are used not only to improve productivity and protect the employer’s property, but also to establish the employer’s basis for disciplining employees. It could be argued that drug testing instituted solely for rehabilitative purposes is distinguishable from the tests of Medicenter and LeRoy Machine, which were designed for disciplinary purposes. This argument should fail. It is doubtful that any drug testing program would be solely for rehabilitative purposes. Treatment prompted by an employer’s drug testing program should not be viewed as “unconnected with the employment status.”

This analysis applies whether the drug testing program affects current employees or job applicants. The NLRA requires bargaining over terms and conditions of employment of “employees,”\textsuperscript{49} and the statute’s definition of “employee” encompasses not only current employees but also other active members of the workforce.\textsuperscript{50} Indeed, the Board recently

\textsuperscript{44} Id. at 1438-39.
\textsuperscript{45} All employees took the exams, and the employer took no actions in response to the results. Id. at 1437.
\textsuperscript{46} Id. at 1439.
\textsuperscript{47} Id. at 1438 n.14.
\textsuperscript{48} Id. at 1438.
\textsuperscript{50} As the Board reasoned in holding union hiring halls to be a subject of mandatory bargaining, Houston Chapter, Assoc. Gen. Contractors, Inc., 143
found a violation where an employer refused to bargain over a medical screening program used to terminate new employees or to support refusals to hire applicants. The same rule should apply to drug testing of applicants.

In some situations, an employer may contend that it is not obligated to bargain over drug testing, even though it is mandatory, because the testing is an insignificant addition to pre-existing practices. The Board has on occasion found that employers need not bargain over certain terms because the changes are not "material, substantial, or significant." Drug testing should not be viewed as immaterial or insubstantial, given the wide impact it has on the work lives of employees and productivity. The General Counsel of the NLRB has indicated that, generally, implementation of drug testing will be considered a substantial change even where the employer has established work rules against drug use or a policy requiring physical exams.

3. Bargaining in a Statutory Context

Drug testing is not only a disciplinary measure. It also bears on safety in the workplace and raises the possibility that chemically dependent employees will suffer discrimination. Both safety and discrimination are mandatory subjects. The precedents in these two areas show how collective bargaining operates where there are federal statutory requirements.

The Supreme Court has stated in dictum that safety issues are mandatory bargaining subjects, and Board law is in accord. In Hanes Corp., for example, the employer unilaterally

---

N.L.R.B. 409, 425 (1963), enforced sub nom., NLRB v. Houston Chapter, Assoc. Gen. Contractors, Inc., 349 F.2d 449 (5th Cir. 1965), cert. denied, 382 U.S. 1026 (1966), "since 'employment' connotes the initial act of employing as well as the consequent state of being employed the hiring hall relates to the conditions of employment." 143 N.L.R.B. at 412; see also 349 F.2d at 452.


53. Memorandum GC-87-5, supra note 27.


imposed a requirement that employees wear respirators and forbade facial hair that would interfere with their use. The employer acted pursuant to Occupational Safety and Health Administration (OSHA) rules, although it offered fewer choices than OSHA recognized. The Board agreed with the ALJ that the employer had violated the Act. The ALJ observed that the employer was not obligated to bargain over whether employees must wear respirators, concluding that the OSHA regulations governed that point. However, because the regulations left an employer significant flexibility in implementing the regulations, the employer was obligated to bargain over such matters as which respirators could be used and who would bear their cost.

Federal law prohibits employment discrimination based on race, color, religion, sex, national origin, and age. The Supreme Court has suggested that employment discrimination is an appropriate subject for collective bargaining. The Board has decided as well that the elimination of race, sex, or other forms of prohibited discrimination constitutes a mandatory subject. Thus, a union violates the NLRA by negotiating discriminatory terms.

Currently federal law does not regulate drug testing of pri-

---

731 (1978) (disciplinary rule related to wearing safety glasses); Miller Brewing Co., 166 N.L.R.B. 831, 832 (1967), enforced sub nom, NLRB v. Miller Brewing Co., 408 F.2d 12, 14 (9th Cir. 1979) (safety rules).


57. Id. at 562 n.12.

58. Id. at 562.

59. Id.


62. See generally Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 66 (1975) (holding that an employer may discharge employees who try to circumvent the exclusive representative by pressuring the employer on race discrimination issues).


65. See id. at 273 (dictum).

vate employees directly or on a broad basis. Federal law does prohibit discrimination based on disability, but only by federal contractors and recipients of federal funds, under the Rehabilitation Act of 1973. The statute does not protect chemically dependent employees "whose current use of alcohol or drugs prevents [them] from performing the duties of the job in question or whose employment . . . would constitute a direct threat to property or the safety of others," but protects other dependent employees. In the case of federal government contractors, regulations provide that employers may conduct complete medical examinations before hiring if the exams are not used to discriminate.

Should federal lawmakers augment this slim regulation with more extensive or pointed regulation, the new regulation would provide a framework for collective bargaining. A broad federal ban on discrimination against chemically dependent employees would render dependency discrimination a mandatory subject and discriminatory clauses illegal. Negotiators would need to take care not to agree to drug testing programs that could facilitate discrimination. It would be wise to provide that the employer shall not discriminate against employees identified by a testing program as drug users. Furthermore, under Hanes, a federal statute or OSHA regulation specifically addressing drug testing would provide a framework for negotiations. The parties could negotiate details left unsettled by the law.

4. Bargaining During the Contract Term

In many unionized workplaces, a collective bargaining agreement is already in force. A labor contract exerts a powerful influence over the scope of the bargaining obligation during its term. The NLRA provides that the parties need not discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such mod-

---

67. There is, however, proposed federal legislation along these lines. H.R. 691, introduced Jan. 21, 1987.
69. Id. § 706(7)(B).
71. 41 C.F.R. § 60-741.6(c)(3) (1986).
72. Employers covered by the current Rehabilitation Act now operate under these rules.
ification is to become effective before such terms and conditions can be reopened under the provisions of the contract.\textsuperscript{73}

In \textit{NLRB v. American National Insurance Co.},\textsuperscript{74} the Supreme Court determined just how powerful the contract can be. The Court found no per se violation where the employer bargained for a very broad management rights clause,\textsuperscript{75} reasoning:

Whether a contract should contain a clause fixing standards \ldots or should provide for more flexible treatment \ldots is an issue for determination across the bargaining table, not by the Board. If the latter approach is agreed upon, the extent of union and management participation in the administration of such matters is itself a condition of employment to be settled by bargaining.\textsuperscript{76}

Thus parties may not only foreclose further bargaining by setting out specific rules on a subject to govern during the contract term; they also may provide for management power to act unilaterally.

The Board requires contract language to be "clear and unmistakable" before it will be construed as a waiver of the right to bargain.\textsuperscript{77} These cases can make for close judgment calls. In the \textit{LeRoy Machine}\textsuperscript{78} case on medical exams, for example, the management rights clause stated, "[t]he Company retains the sole right to \ldots hire, layoff, assign, transfer, promote and determine the qualifications of employees; subject only to such regulations governing the exercise of these rights as are expressly provided in this Agreement."\textsuperscript{79} The Board majority found that the emphasized language removed physical exams from the scope of bargaining during the contract term.\textsuperscript{80} Board member Fanning disagreed.\textsuperscript{81} He wrote that the language should be read more restrictively, citing other contract provisions requiring physical exams of qualified employees and the lack of

\textsuperscript{73} 29 U.S.C. § 158(d) (1982).
\textsuperscript{74} 343 U.S. 395 (1952).
\textsuperscript{75} The clause gave the employer unilateral control over employee selection, promotion, demotion, discharge, discipline, and work scheduling. \textit{Id.} at 398.
\textsuperscript{76} \textit{Id.} at 409.
\textsuperscript{77} \textit{See generally The Developing Labor Law, supra} note 12, at 641-44.
\textsuperscript{78} \textit{LeRoy Mach. Co.,} 147 N.L.R.B. 1431 (1964).
\textsuperscript{79} \textit{Id.} at 1432 (emphasis in original).
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} \textit{Id.} at 1433-34 (Fanning, J., concurring and dissenting).
discussion of the subject during the contract negotiations.\footnote{Id. at 1434. On the role of negotiations in interpreting contract terms, see Jacobs Mfg. Co., 94 N.L.R.B. 1214, 1216 (1951), \textit{enforced sub nom.}, NLRB v. Jacobs Mfg. Co., 196 F.2d 680 (2d Cir. 1952).}

The General Counsel has indicated in her memorandum to the regional offices that the “clear and unmistakable” waiver rule applies to drug testing cases.\footnote{Memorandum GC-87-5, \textit{supra} note 27.} The advice letter issued by the Board’s associate general counsel in \textit{California Cedar Products Co.}\footnote{280 N.L.R.B. No. 137, 123 L.R.R.M. (BNA) 1355 (1986).} shows the rule in application. The contract stated that the employer may make “reasonable rules” on the “possession or use of alcoholic beverages or drugs” and that it should “advise the Union thereof.”\footnote{Id. at 1355.} The employer, without bargaining, incorporated drug testing into the pre-employment physical.\footnote{Id. at 1356.} Current employees were subjected to drug testing if the employer had reason to suspect they were under the influence of illegal drugs.\footnote{Id.} The associate general counsel determined that the contract carried “two equally plausible interpretations”\footnote{Id.} that the contract gave the employer power to act unilaterally, and that the employer remains obligated to bargain.\footnote{Id.} Since the employer had “a substantial claim of contractual privilege,”\footnote{Id.} the Board should not pursue the case.\footnote{Id.}

The \textit{California Cedar Products} letter thus demonstrates the hierarchy of rules labor law uses to set employment terms in unionized settings. The parties’ own contract sets the primary rules. The contract is negotiated against the backdrop of the law on good faith bargaining and bargaining subjects. Nowhere is there a substantive rule on drug testing. The \textit{California Cedar Products} dispute will not go unresolved as a result of the Board’s action. Rather the case should proceed to arbitration,\footnote{Id.} the subject discussed in the next section.
B. Arbitration to Enforce the Rules

1. Introduction

Collective bargaining agreements are not self-enforcing. They generally contain gaps and ambiguities. Consequently, almost all labor contracts call for the use of arbitration to close the gaps and clear up the ambiguities. As the Supreme Court has observed:

Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

Arbitration is an adjudicatory process, although it is simpler than civil litigation and subject to the control of the parties. The arbitrator is generally a lawyer or other trusted professional. Lawyers may or may not serve as advocates on behalf of the parties. Although the proceedings loosely resemble a trial, formal rules of evidence do not apply, and the presentation of evidence is generally unstructured. Briefs are fairly rare. The award is generally concise and untechnical. Despite the general lack of guidelines, however, it appears that arbitration is becoming more cumbersome and legalistic.

---

93. Arbitration is called for in 99% of the contracts according to a BNA survey. GRIEVANCES & ARBITRATION, 2 COLLECTIVE BARGAINING NEGOT. & CONT. 51:5 (BNA) (1986) [hereinafter COLLECTIVE BARGAINING].


95. Arbitration is indeed “a system of private laws.” It is a “simple proceeding voluntarily chosen by parties who want a dispute determined by an impartial judge of their own mutual selection, whose decision, based on the merits of the case, they agree in advance to accept as final and binding.” F. Elkouri & E.A. Elkouri, How Arbitration Works 2 (4th ed. 1985) [hereinafter Elkouri] (citing Chappell, Arbitrate . . . and Avoid Stomach Ulcers, 2 ARB. MAG. NOS. 11-12, 6, 7 (1944)).


97. See generally Jennings, The Crossroads of the Future, 31 LAB. L.J. 498 (1980);
Arbitrators approach drug testing cases with the same concerns in mind as they bring to other discipline and work rule cases: Did the employer act reasonably and fairly? Is there a contractual basis for the employer's actions? Was the employee afforded due process? Some arbitrators display particular concern for the privacy rights and rehabilitation of the employee.

Although arbitrators do not necessarily decide cases according to public law, labor law provides powerful reinforcement to the arbitration system. The courts readily compel the use of arbitration, and the Board holds off its enforcement of the NLRA in favor of arbitration. While the courts and the Board review awards for compliance with law and public policy, this review is highly deferential. This deference is intriguing, as there are fairly distinct differences between arbitrators’ approaches to drug use and testing issues and that of public law. Broadly put, arbitrators thus far are more likely to protect employees than are public lawmakers.

2. Arbitral Awards

As the Supreme Court has noted with approval, "[t]he labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts."98 An arbitrator may rely not only on the express language of the written contract, but also on industry practices, the conduct of the parties involved, and judgments as to the impact various results will have on the parties and the workplace.99

There is much debate over whether arbitrators should rest decisions on public law.100 Most arbitrators rely on public law where the contract is loosely drawn, where the contract may be

---

99. See id. at 582. The "parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs." Id.
100. See United Steelworkers of Amer. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960), where the Supreme Court indicated that an award "based solely upon the arbitrator's view of the requirements of enacted legislation" would mean that the arbitrator exceeded his authority. Id. at 597.
equally and credibly interpreted in two possible ways with at least one in violation of the law, or where the parties want an award based on the law.\textsuperscript{101} Arbitrators differ when there is a clear conflict between the contract’s requirements and those of the law. Some would respect the agreement and ignore the law;\textsuperscript{102} others would follow the law;\textsuperscript{103} and still others would write an award permitting, but not ordering, illegal conduct.\textsuperscript{104}

This primary reliance on factors outside the law is evident in awards in cases involving discipline of employees for drug use.\textsuperscript{105} In these cases, arbitrators ask the classic questions used in just cause termination cases: “Was the employer’s action arbitrary or capricious or discriminatory? Was the rule allegedly violated by the employee reasonable and uniformly enforced? Was the collective bargaining agreement violated by the employer in imposing the penalty? Was the grievant accorded basic due process rights?”\textsuperscript{106}

In a survey of arbitral awards issued from early 1980 to early 1985, discharges were upheld for use or possession of illicit drugs in only twenty-one of the forty-six cases.\textsuperscript{107} In forty per-

\begin{footnotesize}
\textsuperscript{101} Elkouri, supra note 95, at 370.
\textsuperscript{102} See, e.g., Meltzer, Ruminations About Ideology, Law, and Labor Arbitration, reprinted in The Arbitrator, the NLRB and the Courts 1, 16-17 (proceedings of Twentieth Annual Meeting of the National Academy of Arbitrators (BNA) (1967).
\textsuperscript{103} See, e.g., Howlett, The Arbitrator, the NLRB, and the Courts, reprinted in, The Arbitrator, the NLRB, and the Courts 67, 83 (proceedings of Twentieth Annual Meeting of National Academy of Arbitrators (BNA) (1967).
\textsuperscript{104} See, e.g., Mittenthal, The Role of Law in Arbitration, reprinted in Developments in American and Foreign Arbitration 42, 50 (proceedings of Twenty-first Annual Meeting of National Academy of Arbitrators (BNA) (1968). Arbitral reliance on the law may vary depending on the precedential force of the relevant law. Codified law may be given greater weight than general principles of substantive law; decisions of higher courts may be given greater weight than those of lower courts, and settled rules may be given greater weight than uncertain ones. Elkouri, supra note 95, at 368.
\textsuperscript{105} Alcohol or drug use was the major issue in seven percent of the 3,600 labor cases handled by the American Arbitration Association in 1985-86. Denenberg & Denenberg, Drug Testing from the Arbitrator’s Perspective, 11 Nova L. Rev. 371, 372 (1987) (citing memo from Richard M. Reilly, Regional Director, Boston AAA, Jan. 7, 1987).
\textsuperscript{106} Id. at 372.
\textsuperscript{107} Geidt, Drug and Alcohol Abuse in the Work Place: Balancing Employer and Employee Rights, 11 Emp. Rel. L.J. 181, 193 (1985). For examples of different arbitral approaches, compare United States Aluminum Corp., 81 Lab. Arb. (BNA) 174, 175-76 (Darrow, Arb. 1983) (discharge affirmed on the ground that employee clearly violated plant rules by storing marijuana in his car parked on plant property); Pacific Tele. & Tele. Co., 80 Lab. Arb. (BNA) 419, 426-28 (Killion, Arb., 1983) (discharge affirmed on the ground that it was within employer’s sole discretion to discharge an
\end{footnotesize}
cent of the cases lost by employers, arbitrators ruled that the employer had insufficient evidence of guilt. Arbitrators use a high standard of proof in drug use cases—beyond a reasonable doubt or clear and convincing, compared to the traditional preponderance of the evidence—on the theory that the employee stands accused of criminal behavior and may face particular difficulty finding another job. In another forty percent of the cases, arbitrators found that the offense had been proven, but discharge was too severe a penalty in light of the employee's record; in some cases, arbitrators required the employees to undergo rehabilitation prior to reinstatement. Employers lost other cases for failure to afford employees full procedural rights: failure to provide adequate notice of the rules against drug use or the intention to enforce them, disparate enforcement of the rules, failure to spell out which drugs were forbidden, failure to allow an employee to be represented by a union.

The survey also found that off-duty possession or use of drugs is normally not grounds for discharge. There is a general rule that off-duty employee conduct should not lead to discipline unless there is a clear, adverse impact on the employer's business or reputation, the employee's performance, or the employee's working relationships.

---

108. Geidt, supra note 107, at 194.
109. Corroborating witnesses may be required as well. Id. at 193-94.
110. Id. at 194.
111. Id. at 194-95.
112. Id. at 195-96. The survey also found employers unsuccessful in arguing that illicit drug use should be treated more harshly than alcohol abuse. Id. at 195. But see Denenberg, The Arbitration of Alcohol and Drug Abuse Cases, 35 Arb. J., No. 4, 16, 19-20 (Dec. 1980) (arbitrators disagree widely on this issue).

The same survey found that employers won 32 of 49 cases involving employee abuse of alcohol. Geidt, supra note 107, at 196. Employers had fewer problems in
Certainly some of these concerns—considerations of equity, procedural fairness, problems of proof, rehabilitation versus discipline, employee privacy—are likely to appear as well in cases challenging drug testing programs. These cases may arise in either of two postures.

First, a union may challenge an employer’s drug testing program as part of a just-cause case. For example, an employee may refuse to comply with a new program and face discipline. Or, an employee may undergo testing and challenge a testing program as a way to challenge the use of adverse test results.

Second, a union may charge that the employer did not comply with its duty to negotiate over the new policy and the contract does not permit unilateral employer action, i.e., that the

alcohol cases under the laxer evidentiary standards used for alcohol cases. Only two discharges were overturned for insufficient evidence. Geidt, supra note 107, at 196-97. In almost all of the cases in which employers lost, the arbitrators determined that discharge was too severe a penalty. These determinations were based upon factors such as disparate or lax enforcement of the rule against alcohol use, the lack of prior warnings, or the employee’s good work record. Id. at 197. For examples of just cause termination, see Lone Star Pennsuc Inc., 80 Lab. Arb. (BNA) 875 (Kanzer, Arb., 1983); Dahlstrom Mfg. Co., 78 Lab. Arb. (BNA) 302 (Goettick, Arb., 1982); Cities Serv. Co., 77 Lab. Arb. (BNA) 1180 (Brisco, Arb., 1982).

Arbitrators frequently expressed concern in these cases with rehabilitation of employees. Geidt, supra note 107 at 197-99. Another survey, this time of over 200 arbitral decisions published between 1950 and 1980, found that the issue of discipline versus rehabilitation in drug cases appears to divide arbitrators. One school applies traditional progressive discipline, by which an employee is judged by his or her performance, not condition. A second school modifies the progressive discipline approach, allowing the dependent employee a second chance and an opportunity to undergo rehabilitation while remaining broadly accountable. The third school applies a therapeutic approach which focuses on rehabilitation and regards slip-ups as inevitable and acceptable. Denenberg, supra note 112, at 16-17. It is perhaps not surprising that this range of views exists, given the ambivalence of American society on alcohol and drug use, the likelihood that arbitrators are a representative sample of society, and the generally weak force of precedent in arbitration. See generally Elkouri, supra note 95, at 414-36 (stating that “the great mass of awards are considered to have persuasive force only”). Id. at 430. For additional discussion of arbitral awards in drug cases, see generally Bornstein, Drug and Alcohol Issues in the Workplace: An Arbitrator’s Perspective, 39 Arb. J., No. 3, 19 (Sept. 1984); Levin & Denenberg, How Arbitrators View Drug Abuse, 31 Arb. J., No. 2, 97 (June 1976); Marmo, Arbitrators View Alcoholic Employees—Discipline or Rehabilitation?, 37 Arb. J., No. 1, 17 (Mar. 1982); Wynns, Arbitration Standards in Drug Discharge Cases, 34 Arb. J., No. 2, 19 (June 1979).


employer exceeded its management rights. Arbitrators tend to believe that management retains rights not contracted away. Arbitrators have found contractual limitations in express contract clauses, implied obligations derived from general contract provisions, or the parties' past practices. The broadest limitation arbitrators recognize is that employer actions must be reasonable; arbitrators may well overturn actions taken arbitrarily, capriciously, or in bad faith, even if seemingly within management's prerogative. Thus, arbitrators generally uphold management's unilateral right to establish plant rules that are reasonable and consistent with the contract.

Tia Schneider Denenberg and Richard Denenberg, experts in arbitration and drug use issues, have listed points that unions may raise, and succeed with, in challenging drug testing programs. The lengthy list should be daunting to employers: Is a program that targets illegal drugs, but not alcohol, discriminatory? Is it reasonable to target illegal, but not legal, drugs? Is it arbitrary to screen for only the small sample of abused drugs that drug screens now cover? Is it reasonable to add drug testing to a workplace already overcharacterized by intrusion on the employee's privacy when other forms of supervision are available? Did the employer have sufficient cause to test this grievant? Was there reasonable suspicion to believe that the employee was under the influence of drugs, or might the test have been ordered by a biased supervisor acting on improper motives? Were proper confirma-

117. *Id.* at 461-62.
118. *Id.* at 462.
119. *Id.* at 553-56. These general principles apply to a requirement that employees undergo physical exams. *Id.* at 580-81 (the test is one of reasonableness under proper circumstances).
120. *See* Denenberg & Denenberg, *supra* note 105, at 371, for a summary of their credentials.
122. *See id.* at 373-77.
123. *See id.* at 377-79.
124. *See id.* at 379-83.
125. *See id.* at 383-87.
126. *See id.* at 387-90.
128. *See id.* at 392-94.
atory tests run?129 Were the levels for a finding of "positive" properly set?130 Does the result prove impairment?131 Was the testing protocol sound?132 Is the laboratory reputable?133 Has a proper chain of custody been established?134

The Denenbergs' predictions are coming true. In *Day & Zimmermann Inc.*,135 for example, the arbitrator sustained a battery of union challenges to random drug testing by a munitions manufacturer which were raised in a just-cause discharge case. The arbitrator viewed his task as determining whether the drug test was reasonable.136 The arbitrator found the test to be unreasonable, as it was highly invasive of employees' privacy rights, would not prove impairment, could lead to discipline for off-duty conduct, and was unnecessary given the employer's broad powers of supervision.137 The arbitrator suggested that a test based on individualized cause would fare better.138 Furthermore, the testing of the grievant was fatally flawed in three respects. First, the employer failed to run a confirmatory test using an alternative technology.139 Second, there was no evidence establishing a sufficient chain of custody regarding the grievant's sample.140 Finally, the employer did not provide the counseling required by its drug abuse program, but rather discharged the employee.141

In other cases, arbitrators have overturned drug testing programs or rejected the use of test results on a variety of grounds. For example, the program may have affronted normal principles of just cause;142 the tests did not prove impairment, which is the only grounds for discharge under the

---

129. *See id.* at 395.
130. *See id.* at 395-98.
131. *See id.* at 405.
132. *See id.* at 404-06.
133. *See id.*
134. *See id.* at 406-08.
136. *Id.* at 1007-08.
137. *Id.* at 1008.
138. *Id.*
139. *Id.* at 1009.
140. *Id.*
141. *Id.*
contract;\textsuperscript{143} the program encompassed employees whose work did not raise concerns of safety or public relations;\textsuperscript{144} the circumstances involving the individual employee did not afford reasonable grounds to test him;\textsuperscript{145} the tests were medically unsound;\textsuperscript{146} the test procedure excessively invaded the employee's privacy;\textsuperscript{147} the procedures did not call for confirmatory testing or afford the employee the chance to have the sample retested;\textsuperscript{148} the employer denied the employee's request to have a union steward present.\textsuperscript{149}

Employers do not lose all of these cases, of course.\textsuperscript{150} One employer has successfully argued that a policy prohibiting the mere presence of drugs in an employee's system is reasonable given the hazards of the industry.\textsuperscript{151} Others have succeeded in showing that it was reasonable to test where there was individualized cause;\textsuperscript{152} indeed this fact-specific argument generally prevails. It is rarer for employers to stave off challenges to the medical\textsuperscript{153} or procedural\textsuperscript{154} soundness of testing programs.

Given the wide variety of fact situations and arguments made in these cases, it is difficult to spot any specific, clear trends. It is safe to say, however, that arbitrators are taking the Denenberg's arguments seriously and that the awards broadly seek to assure that the employer has acted reasonably, fairly,

\textsuperscript{143} Union Oil Co., 88 Lab. Arb. (BNA) 91, 94 (Weiss, Young, & Fernandez-Lopez, Arbs., 1986).
\textsuperscript{144} Bay Area Rapid Transit Dist., 88 Lab. Arb. 1, 4 (Concepcion, Arb., 1986).
\textsuperscript{146} Chase Bag Co., 88 Lab. Arb. (BNA) 441, 446-47 (Strashefer, Arb., 1986).
\textsuperscript{147} Union Plaza Hotel, 88 Lab. Arb. (BNA) 528, 534 (McKay, Arb., 1986). The employee would have had to disrobe almost completely. \textit{Id}. at 534.
\textsuperscript{148} Bay Area Rapid Transit Dist., 88 Lab. Arb. (BNA) 1, 6 (Concepcion, Arb., 1986).
\textsuperscript{149} Trailways, Inc., 88 Lab. Arb. (BNA) 941, 947 (Heinsz, Arb., 1987).
\textsuperscript{150} For a good example of an employer's defense of its program, see Amoco Oil Co., 88 Lab. Arb. (BNA) 1010, 1014-15 (Weisenberger, Arb., 1987).
\textsuperscript{151} Hopeman Bros., 88 Lab. Arb. (BNA) 373, 377 (Rothschuld, Arb., 1986).
\textsuperscript{154} Washington Metro. Area Transit Auth., 82 Lab. Arb. (BNA) 150, 151-52 (Bernhardt, Arb., 1983) (employee was denied the chance to retest the sample).
within the contract, and according to sound principles of due process.

3. "Enforcement" of Arbitral Awards

A dispute during a contract term may well raise issues of public law, as well as issues under the contract. The labor statute states a general preference for "[f]inal adjustment by a method agreed upon by the parties . . . for [the] settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 155 Under the current intricate system, public lawmakers defer to arbitration in varying degrees, depending on which public law issue is presented. The issue may be whether the employer fulfilled its bargaining obligations under the NLRA, obligations generally enforced by the Board. 156 Or, the issue may be more generally whether the program offends public policy, an issue for the courts. Overall, labor law does prefer the private process, although the public processes provide a check of sorts on arbitration in some situations.

a. Board Deferral

The Board generally defers to the decisions of arbitrators in cases involving breaches of labor contracts as well as violations of the labor statute, such as a failure to bargain in good faith. The Supreme Court has determined that arbitrators and the Board have concurrent jurisdiction in such cases 157 and has left to the Board the task of accommodating its operations and arbitration. As a result, the Board has developed two so-called "deferral" doctrines.

Under Collyer Insulated Wire, 158 the Board declines to hear a case which could be handled through, but has not yet

156. For a discussion of the substantive law on this point, see the discussion in part I.A.1 supra.
157. Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 272 (1964) (arbitrators may resolve cases also involving violations of the law); see also NLRB v. Strong, 393 U.S. 357, 360-61 (1969) (the Board may prescribe conduct deemed to be an unfair labor practice even though such conduct may also be a breach of contract remediable by arbitration and in the courts); NLRB v. Acme Indus. Co., 385 U.S. 432, 438 (1967) (the Board may construe labor contracts as necessary to enforce the NLRA).
158. 192 N.L.R.B. 837 (1971) (plurality opinion). The case involved changes in wages which the employer believed it could make without bargaining, and for which
reached, arbitration. The Board does so where the respondent has no animosity toward the employees' statutory rights, the respondent asserts its willingness to arbitrate under a clause "unquestionably broad enough to embrace" the dispute, and the contract and its meaning are "at the center" of the dispute. The Board dismisses the complaint, but retains jurisdiction to assure that the dispute has been resolved promptly and properly.

Cases involving an employer's imposition of drug testing during the contract term are likely to be "Collyerized." Most arbitration clauses will be broad enough to cover such disputes. The issue will be whether the employer has a contractual privilege for the change, putting the contract "at the center" of the dispute. The General Counsel has recommended that drug testing cases be "Collyerized," and the regional offices are apparently following this recommendation.

Under Spielberg Manufacturing Co., the Board also defers retrospectively to arbitration awards, declining to review the case de novo. For the Board to defer, all parties must have agreed to be bound, the proceedings must have been fair and regular, and the award may not be repugnant to the purposes and policies of the NLRA. In its recent decision in Olin...
the Board defined the words "clearly repugnant" to mean "palpably wrong," and "not susceptible to an interpretation consistent with the Act." Thus, the Board deferred to an award which did not apply the Board's requirement that a waiver of statutory rights be clear and unmistakable. Olin also sets out how clearly the arbitrator must consider the NLRA violation: if the NLRA and contract issues are factually parallel and the arbitrator was generally presented with the facts relevant to the NLRA violation, the Board will defer.

The Board will likely defer to arbitration awards in drug testing cases. If there is a standard arbitration clause calling for the award to be "final and binding" and no procedural problems arise, only the "clearly repugnant" and factual parallelism tests remain. It would be difficult to try a breach of contract case without exploring the contract language, which is at the heart of a unilateral change case under the NLRA. And the "clearly repugnant" standard would permit the Board to defer to most awards. The major difference between the Board and arbitral approaches would likely be that arbitrators may not apply the Board's requirement of a clear and unmistakable waiver. But that difference did not stop the Board from deferring in Olin.

The Supreme Court seems to approve of the Board's deferral policies. The Court has, however, crafted a different approach to accommodate arbitration and claims of employment discrimination. This approach could be used in cases involving claims under possible future statutes Congress might enact to forbid dependency discrimination or regulate drug testing.

In Alexander v. Gardner-Denver Co., the Supreme Court held that prior submission of a claim to final arbitration does not foreclose an employee's right to a de novo trial under Title VII, which forbids employment discrimination based on

169. Id. at 574.
170. Id. at 576.
171. Differences between the contract and NLRA standards are to be considered under the "clearly repugnant" test. Id. at 574. Finally, Olin places the burden of proof on the party seeking to avoid deferral. Id.
174. Id. at 59-60.
race, color, religion, sex, or national origin.\textsuperscript{175} The Court relied on the strong public policy against employment discrimination, observing that an individual’s right to be free from discrimination is absolute and should not be subject to “waiver” through the “majoritarian process” of collective bargaining.\textsuperscript{176} The Court expressed concern that arbitration focuses on the parties’ contract, not the law,\textsuperscript{177} and is much less formal than civil litigation.\textsuperscript{178} Furthermore, the union, which controls arbitration, could improperly subordinate the employee’s interest to that of the collective.\textsuperscript{179} Nonetheless, “[t]he arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate.”\textsuperscript{180} The lower federal courts have read \textit{Alexander} to permit employees to pursue Title VII litigation not only in spite of adverse arbitral awards but also before pursuing arbitration.\textsuperscript{181}

\textit{b. The Courts}

Contract rights and public law also intersect in the vague arena of public policy, the province of the courts. Congress has granted the federal courts\textsuperscript{182} jurisdiction over cases alleging breaches of labor contracts\textsuperscript{183} but provided no guidance as to which substantive principles of law are applicable. The Supreme Court has instructed the courts to develop a federal


\textsuperscript{176} The “waiver” would be accomplished through the union’s agreement to the arbitration clause or the actual use of arbitration. \textit{Alexander}, 415 U.S. at 49-52.

\textsuperscript{177} \textit{Id.} at 53, 56-57.

\textsuperscript{178} \textit{Id.} at 57-58.

\textsuperscript{179} \textit{Id.} at 58 n.19. The Court also noted that Title VII assigns plenary enforcement power to the courts and does not mention completion of arbitration as a prerequisite to the employee’s lawsuit. \textit{Id.} at 45 n.5.

\textsuperscript{180} \textit{Id.} at 60. The court should evaluate whether there is a contract clause conforming to Title VII, the procedural fairness of the arbitration proceedings, the adequacy of the record, the competence of the arbitrator, and whether the issue is one of fact or law. \textit{Id.} at 60 n.21.


\textsuperscript{182} State courts have concurrent jurisdiction. \textit{Charles Dowd Box Co. v. Courtney}, 368 U.S. 502, 505-06 (1962). However, they must apply federal law. \textit{Local 174, Teamsters v. Lucas Flour Co.}, 369 U.S. 95, 102 (1962).

\textsuperscript{183} 29 U.S.C. § 185(c) (1982).
law of labor contracts, drawing on federal statutes, the "penumbra" of those statutes and "judicial inventiveness." This federal law greatly favors the use of arbitration and minimizes the role of the courts. Federal courts commonly encounter labor contract cases in three postures: suits to compel arbitration, suits to enjoin contested union or employer activity pending arbitration, and suits to enforce awards. Drug use and testing cases have arisen in the latter two contexts.

Thirty years ago, the Supreme Court decided that federal law favors specific enforcement of an agreement to arbitrate labor disputes. In two of the 1960 Steelworkers Trilogy cases, the Court also established a presumption of arbitrability. Furthermore, courts are to compel arbitration of even patently frivolous claims. Given this standard, the courts should compel arbitration of drug testing disputes.

Several courts have addressed drug testing disputes in the second category of litigation—suits to enjoin challenged conduct pending arbitration. In Boys Markets, Inc. v. Retail Clerks Union Local 770, the Supreme Court held that federal courts may enjoin strikes in breach of contract concerning matters

185. Where there is no provision for arbitration, the courts are responsible for resolving the dispute. These cases are rare due to the prevalence of arbitration.
187. "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." United Steelworkers of Amer. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960) (footnote omitted). The question of arbitrability is for the court in the first instance. Id. at 583 n.7. Accord AT&T Technologies, Inc. v. Communications Workers of Amer., 106 S. Ct. 1415, 1418 (1986). Questions of procedural arbitrability, however, are for the arbitrator. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557 (1964).
subject to mandatory arbitration.\textsuperscript{191} For an injunction to be issued, there must be a current or threatened breach of contract that will continue or occur, the employer must suffer irreparable injury absent the injunction, and the employer must suffer more from denial of the injunction than the union would from its issuance.\textsuperscript{192} The court must also be sure that the arbitration clause covers the dispute and order arbitration.\textsuperscript{193} Although the Supreme Court has not extended \textit{Boys Markets} to injunctions against employers' actions which threaten arbitration,\textsuperscript{194} the circuit courts have.\textsuperscript{195} The circuit courts' test is whether the injunction is necessary to prevent arbitration from becoming "a hollow formality" because the arbitrator's award would not be able to restore the status quo.\textsuperscript{196} Some of the circuit courts, in analyzing the equity factors of \textit{Boys Markets},\textsuperscript{197} have also softened the classic requirement of likely success on the merits to avoid interpretation of the contract.\textsuperscript{198}

Following these principles, district courts have both granted and denied injunctions against drug testing programs. In \textit{International Brotherhood of Electrical Workers, System Council U-9 v. Metropolitan Edison Co.},\textsuperscript{199} the court granted an injunction.\textsuperscript{200} The

\begin{itemize}
\item \textsuperscript{191} \textit{Boys Markets}, 398 U.S. at 254.
\item \textsuperscript{192} \textit{Id.} (quoting Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 228 (1962)).
\item \textsuperscript{193} \textit{Id.}
\item \textsuperscript{194} \textit{Cf.} Brotherhood Locomotive Eng'rs v. Missouri-Kansas-Texas R.R. Co., 363 U.S. 528, 531 (1960) (approving a district court order requiring an employer to preserve the status quo as a condition of an injunction under the Railway Labor Act). In Gateway Coal Co. v. United Mine Workers of Amer., 414 U.S. 368, 387 (1974), the Court seemed to approve such an order in an NLRA case.
\item \textsuperscript{195} \textit{E.g.}, Gulf Coast Indus. Workers' Union v. Exxon Co., 712 F.2d 161, 165 (5th Cir. 1983); Local Lodge No. 1266 Int'l Ass'n of Machinists v. Panoramic Corp., 668 F.2d 276, 286 (7th Cir. 1981); Lever Bros. Co. v. International Chem. Workers Union Local 217, 554 F.2d 115, 120 (4th Cir. 1977).
\item \textsuperscript{196} \textit{Lever Bros. Co.}, 554 F.2d at 123.
\item \textsuperscript{197} \textit{E.g.}, \textit{Lever Bros. Co.}, 554 F.2d at 122; Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18, 471 F.2d 872, 876 (6th Cir. 1972), \textit{cert. denied}, 411 U.S. 967 (1973).
\item \textsuperscript{198} According to one circuit, the claim need only be "sufficiently sound to prevent the arbitration from becoming a futile endeavor." Teamsters Local 71 v. Akers Motor Lines, Inc., 582 F.2d 1336, 1342 (4th Cir. 1978) (quoting \textit{Lever Bros. Co.}, 554 F.2d at 120), \textit{cert. denied}, 440 U.S. 929 (1979). \textit{Cf.} Hoh v. PepsiCo, Inc., 491 F.2d 556, 561 (2d Cir. 1974) (the injunction is not appropriate where the grievance is "plainly without merit").
\item \textsuperscript{200} For another decision granting an injunction, see Oil, Chem. & Atomic Workers Union Local 2-286 v. Amoco Oil Co., No. 86-C-09880 (D. Utah Oct. 29, 1986).\
\end{itemize}
employer had already tested employees reasonably believed to be under the influence of drugs. The employer apparently intended to add tests on a random basis, as part of routine physical exams and as follow-up to rehabilitation programs. The court found that the dispute was clearly arbitrable.\textsuperscript{201} The union established its burden regarding success on the merits by showing its claim was "not frivolous."\textsuperscript{202} The employer relied on a clause giving it the power to amend and enforce rules for the safety, continuous service, and efficient and orderly operation of the company.\textsuperscript{203} The court, however, focused on the wide-ranging impact on all employees and the comprehensiveness of the program.\textsuperscript{204} The crux of the opinion is the court's assessment of the equity factors. The court gave credence to the union's argument that employees would suffer "real and irreparable" harm from the invasion of privacy, humiliation, and damage to reputation brought about by the drug testing.\textsuperscript{205} The court recognized that the irreparable harm to the union outweighed the harm to the company and the public because the delay would be brief and the employer already had the right to test in certain circumstances.\textsuperscript{206}

By contrast, in \textit{Oil, Chemical \& Atomic Workers Union v. Amoco Oil Co.},\textsuperscript{207} the court denied an injunction\textsuperscript{208} where the employer proposed to test all non-clerical employees and applicants as part of already mandatory physical exams and for

\textsuperscript{201} An arbitrable grievance was defined as "a violation of the terms of this agreement, or any type of supervisory conduct which unjustly causes any employee to lose his/her job or any benefits arising out of his/her job." \textit{Metropolitan Edison Co.}, No. 86-4426 at 5.

\textsuperscript{202} \textit{Id.} at 6.

\textsuperscript{203} \textit{Id.}

\textsuperscript{204} \textit{Id.}

\textsuperscript{205} \textit{Id.} at 7.

\textsuperscript{206} The court noted that the employer had operated for years without the program and had already delayed its implementation nearly a year. \textit{Id.} at 8.

\textsuperscript{207} 651 F. Supp. 1 (D. Wyo. 1986).

\textsuperscript{208} \textit{Id.} at 1. For other decisions denying injunctions, see, e.g., \textit{Oil, Chem. \& Atomic Workers, Local 6-10 v. Amoco Oil Co.}, 123 L.R.R.M. (BNA) 2934, 2936 (D.N.D. 1986) (finding that the union would not win on the merits where all arbitration would yield is an order to refer the dispute to an advisory joint committee and that the union lacked irreparable harm from the addition of a measurement tool to the procedures for establishing just cause); \textit{International Bhd. of Elec. Workers, Local 1900 v. Potomac Elec. Power Co.}, 634 F. Supp. 642, 644 (D.D.C. 1986) (finding that harsher penalties for drug use proven by drug tests could be handled adequately through arbitration).
cause at other times.\textsuperscript{209} The program called for confirmatory testing and rehabilitation of employees who tested positive.\textsuperscript{210} The union argued that the employer was contractually obligated to take the program to the joint health and safety committee and that the program violated the just cause clause as the program could lead to discipline of employees who were not under the influence of drugs at work.\textsuperscript{211} The court found that the union had made a sufficient showing of a contract violation.\textsuperscript{212} However, the court rejected the union's arguments that employees would be irreparably harmed through invasions of privacy resulting from the test itself and release of test results.\textsuperscript{213} The court noted that some urinalysis was already required for the physical exams and that wronged employees could use the grievance procedures to obtain reinstatement and backpay.\textsuperscript{214}

The reasons for the different results in these cases are fairly clear. The scope of the employer's proposed testing program has a major impact on the result: random testing is more likely to prompt an injunction than testing for cause or physical exam testing. The court's response to the claim that privacy violations matter and are not compensable by arbitration's traditional remedies also tends to determine the result.

A similar split in judicial outlook is present in the third category of cases, where the courts review awards in enforcement proceedings. The third case in the Steelworkers Trilogy, \textit{United Steelworkers of America v. Enterprise Wheel \\& Car Corp.},\textsuperscript{215} instructs the courts to enforce an award "so long as it draws its essence from the collective bargaining agreement."\textsuperscript{216} In \textit{W.R. Grace \\& Co. v. Local Union 759},\textsuperscript{217} the Supreme Court added the caveat that courts should not enforce awards contrary to a public policy that is "well defined and dominant, and . . . ascertained 'by reference to the laws and legal precedents and not

\begin{enumerate}
\item \textsuperscript{209} 651 F. Supp. at 2.
\item \textsuperscript{210} \textit{Id}. at 3.
\item \textsuperscript{211} \textit{Id}. at 4.
\item \textsuperscript{212} \textit{Id}. at 5.
\item \textsuperscript{213} \textit{Id}.
\item \textsuperscript{214} \textit{Id}.
\item \textsuperscript{216} \textit{Enterprise Wheel}, 363 U.S. at 597.
\item \textsuperscript{217} 461 U.S. 757 (1983).
\end{enumerate}
from general consideration of supposed public interests. "

This public policy limitation has come into play as courts review arbitration awards reinstating employees in drug use cases. The courts generally give great weight to the public policy against drug use in the workplace, although, the contours and source of this policy are not always clearly articulated. On the other hand, in one recent case the Fifth Circuit Court of Appeals credited as a competing public policy the rehabilitation of drug users. Arguments based on the limited role of courts and the broad powers of arbitrators can be persuasive.

In December of 1987, the Supreme Court decided one such case, United Paperworkers International Union v. Misco, Inc. In Misco, certain employees had a chronic problem with drug use; the employer had a rule forbidding bringing drugs into the plant, consuming them there, and reporting for duty under the influence of drugs. An employee who operated a dangerous machine had been reprimanded twice for shoddy work. The employee was discharged after being found in a co-employee’s car with marijuana smoke in the air and a lighted joint in the ashtray; other employees had also been seen in the car. After the discharge, the employer learned that a plastic bag containing a scales case with marijuana residue had been found in

218. Id. at 766 (quoting Muschany v. United States, 324 U.S. 49, 66 (1945)). In W.R. Grace, the Court upheld an award of backpay for layoffs which violated the labor contract but were carried out pursuant to a conciliation agreement in a discrimination case. Id. at 772. A public policy must be weighty indeed to override an arbitration award.


222. For a classic example, see Super Tire Eng’g Co. v. Teamsters Local Union, 721 F.2d 121, 123-25 (3d Cir. 1983), cert. denied, 469 U.S. 817 (1984).


224. Id. at 368.

225. Id.

226. Id.
the employee’s car.\textsuperscript{227} A divided Fifth Circuit overturned the arbitrator’s reinstatement award on public policy grounds.\textsuperscript{228} The Supreme Court unanimously\textsuperscript{229} reversed the Fifth Circuit and reinstated the arbitrator’s award.\textsuperscript{230} The Court began by firmly stating that the role of the courts in reviewing arbitral awards is very limited; the arbitrator’s view of the facts, the meaning of the contract, and the remedies to be afforded in the event of a breach of contract should not be overturned even if the court is convinced that the arbitrator committed serious error.\textsuperscript{231} Thus, the Fifth Circuit erred when it refused enforcement in part because it viewed the evidence as clearly supporting a violation of the rule against possession of drugs\textsuperscript{232} and because it deemed improper the arbitrator’s refusal to consider evidence unknown to the employer at the time of discharge.\textsuperscript{233} As for the public policy doctrine, the Court faulted the Fifth Circuit for relying on “general considerations” rather than “laws and legal precedents” against the operation of dangerous machinery by persons under the influence of drugs.\textsuperscript{234} Nor was there a clear violation of the public policy which the Fifth Circuit had identified because the connection between the evidence of marijuana residue in the employee’s car and workplace use was “assumed” and “tenuous at best.”\textsuperscript{235} Finally, it was not the court’s task to draw that factual inference, but rather the arbitrator’s.\textsuperscript{236}

While the \textit{Misco} decision provides valuable guidance on drug use issues, it does not answer all of the hard questions. The Fifth Circuit misapplied the public policy exception in several

\begin{itemize}
\item \textsuperscript{227} \textit{Id.}
\item \textsuperscript{228} \textit{Misco, Inc. v. United Paperworkers Int'l Union}, 768 F.2d 739, 743 (5th Cir. 1985), \textit{rev'd}, United Paperworkers Int'l Union \textit{v. Misco, Inc.}, 108 S. Ct. 364 (1987).
\item \textsuperscript{229} Justices Blackmun and Brennan concurred in the judgment and opinion, but wrote an additional opinion as well. They noted that the Court’s decision does not provide definitive answers to the issues of whether the courts may overturn an award on public policy grounds only when the award “itself violates positive law or requires unlawful conduct by the employer” or whether the courts’ power vis-a-vis arbitration awards differs from their power to refuse to enforce contracts on public policy grounds. \textit{Misco, Inc.}, 108 S. Ct. at 375 (Blackmun, J., concurring).
\item \textsuperscript{230} \textit{Id.} at 364.
\item \textsuperscript{231} \textit{Id.} at 370.
\item \textsuperscript{232} \textit{Id.} at 371.
\item \textsuperscript{233} \textit{Id.}
\item \textsuperscript{234} \textit{Id.} at 373.
\item \textsuperscript{235} \textit{Id.} at 374.
\item \textsuperscript{236} \textit{Id.}
\end{itemize}
fairly clear respects, as the Court pointed out. And the facts of the case were reasonably favorable for the employee. It remains unclear how the Court will rule when the facts present a closer call, although the Court did note with apparent respect that arbitrators are accustomed to handling workplace safety issues. 237 Similarly, it remains unclear how the Court will evaluate a well-framed public policy argument. The Court reserved the issue of whether an award may be overturned only when the award itself violates positive law or compels the employer to do so. 238

4. Private Judges versus Public Lawmakers

There are both differences and similarities in how private arbitrators and public judges approach drug use and testing issues. First, arbitrators and the Board vary somewhat in their approaches toward changes in employment conditions during the term of the contract. 239 Both use the contract's terms as a point of departure. Yet Board doctrine, such as the clear and unmistakable waiver requirement, 240 assumes that there is a continuing obligation to bargain. Arbitrators, on the other hand, generally assume that management discretion remains unfettered, absent a contractual limitation. Nonetheless, the Board defers readily to arbitration in these cases. 241

On the other hand, there is fundamental agreement on a more basic and specific point: that drug testing is an issue for joint labor-management cooperation. Board law strongly implies that drug testing is a mandatory subject. 242 Arbitrators seem to accept that unions act within their province in bringing challenges to drug testing programs.

There is less consensus on the best way to treat drug users and which drug testing programs are valid. Arbitrators, of course, are not of one mind on either of these issues; nor are public lawmakers. As a group, arbitrators may be more liberal

237. Id. at 374 n.11.
238. Id. at 374 n.12.
239. See generally Elkouri, supra note 95, at 463-75.
240. See supra notes 77-92 and accompanying text, which discusses the unmistakable waiver requirement.
241. For an interesting comparison of how the Board and arbitrators would come out in actual cases, see Wilkinson, The Impact of the Callyer Policy of Deferral: An Empirical Study, 38 Indus. & Lab. Rel. Rev. 377 (1985). Wilkinson argues that if a congruent result is the goal, bargaining cases should not be "Callyerized." Id. at 387.
242. See supra notes 30-48 and accompanying text.
than public lawmakers. Certainly, arbitrators are more protective of employees' rights than Congress has been. While there is no federal law generally protecting dependent employees or regulating drug testing, arbitrators have provided a range of employment rights to dependent employees and employees subject to drug testing.

The just cause cases decided by arbitrators can be compared to the public policy cases decided by the courts. The most consistent thread in the public policy cases is a staunch opposition to drug use in the workplace. Arbitrators, however, are not as adamant as the courts and many of them favor attempting to rehabilitate employees while allowing the employees to retain some employment rights. Furthermore, arbitrators afford employees significant procedural rights, in some sense valuing procedural fairness more than a drug-free workplace.

The awards in drug testing cases can be compared to the injunction cases decided by courts, although they arise in different postures. While some courts have found the invasion of privacy and the scope of certain drug testing programs very troublesome, most have been willing to allow challenged programs to be implemented, relying on the grievance process to resolve any problems which may arise. Arbitrators, by contrast, seem to be more willing to check a program in advance. They also have recognized a broader range of challenges to drug testing programs than have the courts, expressing doubts about medical soundness, testing procedures, and the reasonableness of both the employer's grounds for testing and the conclusions drawn from test results. It may well be that arbitrators have a heightened and more refined sense of industrial justice than the courts have.

---

243. But see supra notes 67-71 and accompanying text.

244. The Supreme Court's actual attitude toward drug use and testing is not easy to glean from Misco. Misco is more a strong statement in favor of arbitration and limited judicial review than anything else.

245. The courts operate before the fact under the stringent irreparable harm test and know that their decisions are not the last ones to be made. Arbitrators may have a concrete set of facts to evaluate in a just cause case; they have more leeway to contain employer actions, and they likely have the final word.

246. An assumption along these lines underlies the Steelworkers Trilogy. See United Steelworkers of Amer. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960); United Steelworkers of Amer. v. Warrior & Gulf Navigation Co., 363 U.S.
C. An Aside: The Duty to Furnish Information

A major issue arising out of drug testing is the confidentiality of test results. In the non-unionized sector, concerns about claims alleging defamation and invasion of privacy discourage employers from revealing such information. In the unionized sector, labor and management have a mutual obligation to furnish information, which most likely includes test results.

In NLRB v. Truitt Manufacturing Co., the Supreme Court determined that the employer's duty to bargain in good faith includes the duty to provide requested information regarding claims made by negotiators. In NLRB v. Acme Industrial Co., the Court extended the duty to provide information to include the contract term. Thus, a union is entitled to the information it needs to process grievances. Acme Industrial also sets the standard for judging requests for information: the information must be likely to be relevant and be of use to the union in carrying out its statutory duties and responsibilities.

The duty is not absolute, however, and one limitation is the need for confidentiality. In Detroit Edison Co. v. NLRB, an employer refused to hand over the questions used on employee aptitude tests, the actual answer sheets, and the scores identified by employee name. Industrial psychologists had devised and validated the tests, and employees were assured that their scores would be kept confidential. The Court first


247. See Note, To Test Or Not To Test: Is That The Question? Urinalysis Substance Screening of At-Will Employees, 14 WM. MITCHELL L. REV. 393 (1988).

248. See THE DEVELOPING LABOR LAW, supra note 12, at 606-29 (discussing the duty of management and labor to provide information).


250. Id. at 153.


252. Id. at 436.

253. Id. at 435-39.

254. Id. at 437. The duty to exchange information also applies to unions. Local 13, Detroit Newspaper Printing and Graphic Communications Union, 233 N.L.R.B. 994, 996, aff'd, 598 F.2d 267 (D.C. Cir. 1979).


256. 440 U.S. 301 (1979).

257. Id. at 303.

258. Id. at 306.
rebuked the Board for ordering the employer to turn over the questions and answers directly to the union, apparently approving the company's proposal to provide the information to an intermediary.\(^{259}\) The Court cited the need for secrecy in standardized tests.\(^{260}\) Second, the Court found sufficient the company's offer to disclose the scores identified by employee name only if the examinee consented.\(^{261}\) The Court cited "[t]he sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence"\(^{262}\) and the fact that the employer had promised confidentiality for legitimate reasons.\(^{263}\)

The Board has since applied *Detroit Edison* in contexts parallel to drug testing. In *Johns-Manville Sales Corp.*\(^{264}\) for example, the union requested the names of employees who had been diagnosed as having a specific occupational disease so that it could represent them better.\(^{265}\) The employer submitted consent forms to employees and released the names of those who consented. The Board found that the employer's actions sufficed under *Detroit Edison*.\(^{266}\) The Board reasoned that the information was confidential, even though it did not amount to full medical records and it had been revealed to various supervisors.\(^{267}\) Furthermore, the union could fulfill its obligation to pursue the interests of the ill employees by expressing its intentions to all employees as a group; individual contact was not necessary.\(^{268}\) In other cases in which unions have sought medical records to assess occupational hazards, the Board and courts have ordered the release of edited records, deleting information which would identify individual employees.\(^{269}\)

The Board and courts take a similar, restrictive approach to

\(^{259}\) *Id.* at 314-15.

\(^{260}\) *Id.* at 316-17.

\(^{261}\) *Id.* at 317.

\(^{262}\) *Id.* at 318.

\(^{263}\) *Id.* at 319. Previous disclosure of test scores had led to harassment of employees. There was no evidence that the employer promised confidentiality to avoid its obligations to the union. *Id.* The Court rejected the argument that the psychologists' ethics prevented disclosure. *Id.* at 317.

\(^{264}\) 252 N.L.R.B. 368 (1980).

\(^{265}\) *See id.*

\(^{266}\) *Id.* at 368-69.

\(^{267}\) *Id.* at 368.

\(^{268}\) *Id.*

\(^{269}\) *See Oil, Chem. & Atomic Workers v. NLRB*, 711 F.2d 348, 363 (D.C. Cir. 1983); Plough, Inc., 262 N.L.R.B. 1095, 1096 (1982). *See also* Goodyear Atomic
union access to the disciplinary records or personnel files of co-employees of grievances in discipline cases. In Washington Gas Light Co.,\textsuperscript{270} the employer was ordered to turn over the disciplinary records of four employees who had been disciplined, but not discharged, for intoxication. The union sought the records in preparing the case of an employee who was discharged for intoxication.\textsuperscript{271} The employer in Washington Gas was, however, ordered to delete references to medical problems.\textsuperscript{272} The Board rejected the employer's confidentiality claim on the grounds that there was no employer practice regarding confidentiality; employees had not been promised confidentiality; company officials had ready access to the files; and the union had received information from the files.

Corp. v. NLRB, 116 L.R.R.M. (BNA) 3023, 3024 (6th Cir. 1984) (finding no inconsistency between the Board's order and the requirements of the federal Privacy Act).

The Board and courts also have developed guidelines on the release of information bearing on employment discrimination. In Westinghouse Elec. Corp., 239 N.L.R.B. 106 (1978), modified and enforced, 648 F.2d 18 (D.C. Cir. 1981), the union sought a wide range of statistical data on the demographics of the workforce, discrimination complaints filed against Westinghouse, and the employer's affirmative action plan. The Board ordered the employer to provide the statistical data, a list of the complaints, and copies of the complaints with the names deleted if the employer so chose insofar as they covered unit employees. \textit{Id.} at 115. The Board also ordered the employer to furnish the union with copies of the work force analyses filed with the most recent affirmative action plans. Citing the union's legal and contractual obligations to eradicate discrimination, the Board found the data generally relevant under the \textit{Acme Industrial} standard. \textit{Id.} at 107-08. However, the Board found that the union did not need the affirmative action plan to carry out its obligations. \textit{Id.} at 115. Most important here, the Board credited the argument that the complaints should be considered confidential to some extent, namely that the complainant's name should be protected; therefore the employer could purge that information. \textit{Id.} at 113-14. This argument relied on federal regulations. \textit{See} 29 C.F.R. § 1601.22 (1987) (regarding confidentiality of the identity of complaining parties). The court of appeals modified the Board order to provide that the employer need provide only a compilation of the complaints, but not the complaints themselves. \textit{See} 648 F.2d at 26-27. The court reasoned that the union may be able to discern the complainant's identity from the facts of the complaint, that employees have a \textit{Detroit Edison} concern for confidentiality in such complaints, that employees may not wish complaints that name union officials to be revealed to them, and that employees should not be deterred from pursuing discrimination claims by such disclosures. \textit{Id.} A different court of appeals has sided with the Board on this issue, however. Safeway Stores, Inc. v. NLRB, 691 F.2d 953, 958 (10th Cir. 1982) (data on handicapped employees). In a companion case to \textit{Westinghouse Elec.}, East Dayton Tool & Die Co., 239 N.L.R.B. 141 (1978), the Board ordered the employer to provide statistical information on applicants, but found the employer's refusal to state its reasons for not hiring more women and minorities justified. \textit{Id.} at 142-44.


\textsuperscript{271} \textit{Id.} at 117.

\textsuperscript{272} \textit{Id.}
before.\textsuperscript{273} In a comparable case with a different cast, \textit{New Jersey Bell Telephone Co. v. NLRB},\textsuperscript{274} the court found that the employer had complied with its legal obligation by conditioning release of personnel files on the subjects’ consent.\textsuperscript{275} The court first determined that the files contained sensitive medical information, although not doctor’s reports.\textsuperscript{276} Next, the court found that the company’s “employee privacy protection plan” was not designed to frustrate the union but rather applied to all persons requesting information.\textsuperscript{277} In addition, the court concluded that the burden on the union of obtaining the employees’ consent was minimal.\textsuperscript{278}

Drug testing data\textsuperscript{279} will also likely come under a rule of conditional disclosure. The data, whether aggregate or individual, would be relevant to the union’s legitimate concerns regarding safety, discrimination, and discipline. Yet these data call into play “[t]he sensitivity of any human being to disclosure of information that may be taken to bear on his or her competence.”\textsuperscript{280} Drug testing results reflect on the subject’s medical condition, personal habits, and ability to perform the job, if there is an established link between the presence of drugs and impairment.

The form of conditional disclosure required will vary, depending on the nature of the request and the employer’s policies on data disclosure. If the union seeks general information on overall drug use patterns, a likely result would be an order to release aggregate data minus individual identifiers. At the least, employee names could be deleted; other telltale infor-

\textsuperscript{273} \textit{Id.}
\textsuperscript{274} 720 F.2d 789 (3d Cir. 1983). \textit{See also} Salt River Valley Water Users’ Ass’n v. NLRB, 769 F.2d 639, 643 (9th Cir. 1985) (upholding a Board order requiring disclosure even without the employee’s consent where the confidentiality factors are not as compelling); NLRB v. Pfizer, Inc., 763 F.2d 887, 889-91 (7th Cir. 1985) (requiring disclosure of co-employee files so that the union could assess the employer’s general response to employee fighting).
\textsuperscript{275} \textit{New Jersey Bell Tel. Co.}, 720 F.2d at 791-92. In an unusual twist, the requested files were those of the grievants themselves. Apparently the union told the employees not to consent so that it could test the validity of the consent requirement.
\textsuperscript{276} Namely the employees’ own statements of their medical conditions. \textit{Id.} at 791.
\textsuperscript{277} \textit{Id.} at 790-91.
\textsuperscript{278} \textit{Id.} at 791.
\textsuperscript{279} Information about test procedures, (e.g., chain-of-custody requirements, decision levels), is relevant and non-confidential. Thus it should be disclosed readily.
\textsuperscript{280} \textit{Detroit Edison}, 440 U.S. at 318.
mation could be deleted as well. Where the union seeks individualized information, the employer could likely impose the condition of employee consent, depending on the employer’s general policies on data disclosure.281 If the employer has a tight confidentiality policy, e.g., one permitting disclosure only on a need-to-know basis, the employer will have an easier case than if the employer has permitted ready access. The Detroit Edison intermediary option seems to be used only rarely, perhaps because it inserts an outsider into the collective bargaining relationship.282

D. State Law and Preemption

1. Introduction

As the discussion thus far demonstrates, the rules on drug testing are largely of private origins, i.e., contract terms and decisions of arbitrators. Federal regulation of drug testing is indirectly accomplished through the imposition of the duty to bargain283 and the limited judicial oversight of arbitration.284 On the other hand, the states have begun to regulate drug testing directly through the enactment of statutes on drug testing.285 The coexistence of this general federal regulation and specific state law raises the issue of preemption.

Consider, for example, the new Minnesota law on drug testing.286 The statute provides that employers287 may288 only test employees pursuant to a written policy, through a properly licensed laboratory,289 and in one of five specified circumstances.290 The statute also regulates disciplinary action based

281. This restriction may also apply where the union seeks aggregate data.
282. See id. at 310.
283. See supra notes 9-92 and accompanying text.
284. See supra notes 182-222 and accompanying text.
287. “Employer” is broadly defined and would include unionized employers. Id. § 181.950, subd. 7.
288. Employers need not test employees. Id. § 181.951, subd. 7.
289. Id. § 181.951, subd. 1(b).
290. They are: where a conditional job offer has been made to an applicant and all such applicants are required to undergo the test; as part of an employee’s routine physical exam; on a random basis for persons in safety-sensitive positions (jobs
on test results and establishes procedural rights of employees. Test results are generally confidential. The statute provides for civil actions for damages, injunctive relief, and equitable remedies such as reinstatement.

The accommodation of this state statute and federal labor law is governed by the rather murky doctrine of preemption. Ideally, Congress provides guidance on the intended preemptive effect of its enactments. Congress, however, has been non-committal on this point in the labor statute. Justice Frankfurter described the statute’s guidance as “of a Delphic nature, to be translated into concreteness by the process of litigating elucidation.” Unfortunately, the Supreme Court decisions have not proved particularly illuminating. The puzzling case law has led somewhat inevitably to a case-by-case, or at least class-by-class, analysis.
The Minnesota statute gives rise to at least two distinct preemption questions: Does the statute impermissibly set contract terms, impinging on the NLRA’s regulation of collective bargaining? Does the statute, in creating a state law civil cause of action, impermissibly impinge on the federal arbitration system and law of labor contracts? The Supreme Court recently has provided some general guidance on the solution to both of these problems. The likely answers are that the statute may set minimum standards on drug testing and that some but not all causes of action involving employer drug testing are allowable.

2. Setting Contract Terms by Statute

As set out above, the Minnesota statute regulates in detail when and how employers may test employees, the procedural rights of employees, and the use of test results for discipline or discharge. In recognition of the impact of these rules on unionized settings, the legislature also provided that the statute:

[S]hall not be construed to limit the parties to a collective bargaining agreement from bargaining and agreeing with respect to a drug and alcohol testing policy that meets or exceeds, and does not otherwise conflict with, the minimum standards and requirements for employee protection provided in [the statute].

Thus, the statute is intended to act as a floor: unions and management may agree to more, but not less, protection of employees. Does the statute impermissibly set contract terms?

The answer to this question derives from the 1985 decision in Metropolitan Life Insurance Co. v. Massachusetts. There, the

---

301. No doubt there are less obvious preemption problems that may eventually come to light. For example, the statute provides that test results generally may not be disclosed by an employer “to a third-party individual” without the subject’s written consent. Minn. Stat. § 181.954, subd. 2. (Supp. 1987). The statute also provides that a positive test result on a confirmatory test may be “used in an arbitration proceeding pursuant to a collective bargaining agreement.” Id. § 181.954, subd. 3. The statute thus appears to shield test results from disclosure to a union in circumstances where labor law could require disclosure, e.g., in aggregate form, in bargaining as well as arbitration contexts. See supra notes 249-284 and accompanying text. On the related issue of preemption of defamation causes of action, see Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53, 55 (1966) (a state court may award damages for defamation where the plaintiff has proved malice and injury).


Court determined that federal labor law does not preempt a state statute requiring minimum mental health care benefits for Massachusetts residents covered under various forms of insurance or by employee health care plans.\textsuperscript{304} Massachusetts enacted the statute to control the costs of mental health care, promote outpatient services, and relieve its heavy financial burden. The effect of the statute is to require the parties to a labor contract to purchase the mandated benefits, or forego health care benefits, or self-insure.

The Court first noted that there was no claim that the state was regulating conduct governed by the Board, given the absence of language in the NLRA on health care benefits.\textsuperscript{305} Rather, the question was whether the statute interferes with Congress' judgment that collective bargaining be left unregulated.\textsuperscript{306} The insurer argued that states could set minimum employment terms only where explicitly authorized by Congress.\textsuperscript{307} The Court disagreed. Congress did not consider this preemption issue.\textsuperscript{308} What it did focus on, however, was remedying the bargaining inequalities between employers and employees by constructing a process for determining employment terms, rather than setting substantive terms.\textsuperscript{309} Thus, federal law on the bargaining process and state law on minimum em-

\textsuperscript{304} Id. at 755. The Court further held that the Employee Retirement Income Security Act of 1974 does not preempt the statute. Id. at 758.

\textsuperscript{305} Id. at 748-49.

\textsuperscript{306} Id. at 751.


\textsuperscript{308} 471 U.S. at 753.

\textsuperscript{309} The Court cited the NLRA's statement of purpose contained in section 151 of the Labor-Management Relations Act. Id. at 753-54. Section 151 states in part:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

* * *

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the
ployment terms are not incompatible, even where those terms relate to mandatory bargaining subjects.\textsuperscript{310} Furthermore, the Court reasoned that state minimum standard laws neither encourage nor discourage unionization. They protect employees as individuals, not as union members.\textsuperscript{311} It would be counter to the purpose of federal labor law to penalize employees who opt for unionization by depriving them of protections under state law.\textsuperscript{312} Finally, the Court determined that Congress did not mean to displace the many state laws “promoting public health and safety.”\textsuperscript{313} The Court considered the Massachusetts law to be a valid insurance regulation which also addresses mental health care.\textsuperscript{314} Thus, “[w]hen a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act.”\textsuperscript{315}

More recently, in \textit{Fort Halifax Packing Co. v. Coyne},\textsuperscript{316} the Court followed \textit{Metropolitan} in upholding a state statute requiring severance payments in the event of plant closings or relocations.\textsuperscript{317} The statute imposes the payments where there is no express contract concerning severance pay. The Court noted that the case for upholding the statute in \textit{Fort Halifax} was even stronger than the mandate of health care benefits upheld in \textit{Metropolitan}.\textsuperscript{318} The statute promotes bargaining and respects the parties’ contract.\textsuperscript{319}

Although there is some room for debate, the Minnesota drug testing statute should survive a preemption challenge. Nothing in the federal labor statute addresses drug testing. Like the health care and severance pay statutes, the Minnesota statute is a minimum labor standards law which sets substan-

\begin{footnotesize}
\begin{enumerate}
\item[311.] \textit{Metropolitan Life Ins. Co.}, 471 U.S. at 754-55.
\item[312.] \textit{Id.} at 755.
\item[313.] \textit{Id.} at 756.
\item[314.] \textit{Id.} at 758.
\item[315.] \textit{Id.} at 757.
\item[316.] 107 S. Ct. 2211 (1987).
\item[317.] \textit{Id.} at 2223.
\item[318.] \textit{Id.}
\item[319.] See \textit{id.}.
\end{enumerate}
\end{footnotesize}
tive terms. The statute's impact on the bargaining process is comparable to that in *Metropolitan*: the Minnesota statute sets employment terms that can be avoided only by foregoing drug testing. Like the law in *Fort Halifax*, the statute promotes collective bargaining, albeit starting from the statute's minimums. The statute protects employees as individual workers, not as union members.

The Minnesota statute also comes under the rubric of a state law "promoting public health and safety." Admittedly, the health care law addresses a public concern much broader than employee benefits, namely mental health care, and the severance pay statute addresses the broad problem of plant closures. The Minnesota statute is narrower in scope and more directly focused on employee rights. Nonetheless, the statute does have an impact as well on safety and health issues, at least within the workplace.

In any event, the Court has drafted its rule broadly to permit minimum employment standards not inconsistent with the federal labor statute's general goals. The Minnesota statute seems no less inconsistent with the NLRA than the two statutes the Court has reviewed and should therefore stand.

3. *Creating a Civil Cause of Action*

Whether the statutory cause of action is preempted is a more difficult question. The statute grants an aggrieved employee a civil cause of action for damages, including attorneys' fees for reckless or knowing violations, injunctive relief, and equitable relief, such as reinstatement and back pay. However, the employee may bring the action "only after first exhausting all applicable grievance procedures and arbitration proceeding requirements under a collective bargaining agreement; provided that, an employee's right to bring an action under this section is not affected by a decision of a collective bargaining agent not to pursue a grievance." Does this remedies scheme impermissibly infringe on the federal law of arbitration?

Under section 301 of the Labor Management Relations Act,

321. Minn. Stat. § 181.956, subds. 2, 4 (Supp. 1987). A union may also sue for injunctive relief and obtain equitable relief. Id. at subd. 3.
322. Id. § 181.956, subd. 1.
federal courts have jurisdiction over breaches of labor contracts. Several decades ago, the Court determined that section 301 requires the federal courts to fashion and apply a federal law of labor contracts, which preempts state law. Federal law must govern so that the parties can negotiate and administer their contracts under one consistent set of rules. Since then, the courts have developed an extensive body of federal law on labor contracts, including the Steelworkers Trilogy and related cases favoring arbitration, described earlier. Under federal law, an employee must exhaust the procedures under a labor contract before bringing a lawsuit, absent a breach of the union’s duty to represent the employee fairly.

In Allis-Chalmers Corp. v. Lueck, the Court analyzed the pre-emptive effect of section 301 on lawsuits involving labor contracts not framed as breach of contract cases per se. The employee sought disability payments under the group health and disability plan funded by Allis-Chalmers. Lueck claimed that Allis-Chalmers harassed him in various ways and filed a lawsuit alleging the tort of bad faith handling of an insurance claim. The insurance plan was incorporated by reference in the contract between Allis-Chalmers and Lueck’s union. The plan provided a special procedure, including arbitration, for resolving disputes regarding disability.

The Supreme Court framed the question as “whether this particular Wisconsin tort, as applied, would frustrate the federal labor-contract scheme established in § 301.”

326. Id. at 103-04.
328. Vaca v. Sipes, 386 U.S. 171, 185-86 (1967). Generally the employee will prefer to sue under state law. The remedies available through arbitration will generally be of the equitable sort. As in the case of Minnesota’s drug testing statute, state law may afford damages. Also the statute of limitations in section 301 actions is short. See DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 169 (1983) (the statute for hybrid section 301/duty of fair representation action is only six months).
330. Id. at 206.
331. Lueck claimed Allis-Chalmers harassed him by cutting off benefits and by requiring frequent re-examinations by different doctors. Id. at 205.
332. Id. at 206.
333. Id. at 204.
334. Id.
335. Id. at 209.
Court found that it would and held the action preempted.\textsuperscript{336} The Court first noted that a state rule purporting to define a term in a contract action would be preempted.\textsuperscript{337} To assure uniformity, the preemptive reach of section 301 must extend beyond suits for breach of contract per se to include suits, even in tort, "relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement . . . ."\textsuperscript{338} Applying federal law,\textsuperscript{339} the Court found that the duties established for the Wisconsin tort derive from the rights and obligations set forth in the labor contract.\textsuperscript{340} The Court expressed a desire to prevent claimants from circumventing the arbitration systems provided for in labor contracts.\textsuperscript{341} Thus, a suit is preempted "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract . . . ."\textsuperscript{342}

Equally important is the \textit{Allis-Chalmers} dictum. The Court observed that Congress did not intend to allow unions and management to exempt themselves from state labor standards through contract terms that would be illegal under state law.\textsuperscript{343} Congress did not intend to preempt state rules "that proscribe conduct, or establish rights and obligations, independent of a labor contract."\textsuperscript{344} The Court clearly intimated that a lawsuit over an independent, non-negotiable duty under state law would not be preempted.\textsuperscript{345}

Under \textit{Allis-Chalmers}, employee lawsuits over employer drug testing in Minnesota should be divided into two categories for preemption purposes. First, the employee may sue over an employer's failure to follow the procedures negotiated with the union. Those procedures may amount to the statutory re-

\begin{thebibliography}{9}
\bibitem{336} \textit{Id.} at 220.
\bibitem{337} \textit{Id.} at 210.
\bibitem{338} \textit{Id.} at 211.
\bibitem{339} \textit{Id.} at 214.
\bibitem{340} \textit{Id.} at 217.
\bibitem{341} \textit{See id.} at 219.
\bibitem{342} \textit{Id.} at 220.
\bibitem{343} \textit{Id.} at 212.
\bibitem{344} \textit{Id.}
\bibitem{345} \textit{Id.} at 217 n.11. \textit{Accord} International Bhd. of Elec. Workers v. Hechler, 107 S. Ct. 2161, 2168 (1987) (holding a lawsuit alleging union negligence in assigning the employee to a dangerous job preempted because the source of the duty, if any, would be the union-management contract).
\end{thebibliography}
quirements or exceed them, and the employee may frame the lawsuit as a breach of contract action or an action brought under the statute. Second, the employee may sue for the employer's failure to follow the statutory requirements quite apart from any agreement on drug testing negotiated with the union.

Most cases involving failure to follow the terms agreed to by union and management would be preempted under Allis-Chalmers. The form the case takes—breach of contract, tort, or as here, statutory violation—should not matter. It also does not matter that the state law remedies would vary from those available in a section 301 action.\textsuperscript{346} Rather, the key is whether the lawsuit involves what the parties agreed to and the consequences of failing to follow the agreement. If so, the Court's concern with uniformity in interpretation of labor contracts calls for preemption. Almost all cases where there is a labor contract would be preempted as "substantially dependent on analysis of the terms of an agreement."\textsuperscript{347} A rare exception may arise if the labor agreement clearly does no more and no less than adopt the requirements of the Minnesota statute.\textsuperscript{348}

This exception and cases challenging an employer's failure to follow statutory requirements, quite apart from any negotiated terms, would not be preempted under the dictum in Allis-Chalmers. In these two situations, state law and the state courts would not be concerned with the parties' agreement. Rather, the focus would be on the rules of minimum conduct which the Minnesota statute renders non-negotiable. This result is consistent with the Metropolitan Life Insurance Court's conclusion that the statute's minimum requirements are not preempted.\textsuperscript{349}

One rationale for the holding in Allis-Chalmers is the concern that allowing a state tort action permits the employee to circumvent arbitration. The Minnesota statute addresses this concern in the puzzling provision which requires exhaustion of the grievance procedures but permits the employee's suit

\textsuperscript{346} The Court did not address Lueck's loss of tort damages brought about by its decision in Allis-Chalmers.

\textsuperscript{347} Allis-Chalmers, 471 U.S. at 220.

\textsuperscript{348} For example, the contract would contain a simple, unelaborated cross-reference to the Minnesota statute.

where the union has decided not to pursue the grievance.\footnote{350}{MINN. STAT. § 181.956, subd. 1 (Supp. 1987).} This provision does not alter the conclusions set forth above. Where the suit arises under the labor contract, the provision does promote conformity to federal law in calling for the use of arbitration first. That conformity, however, is not enough to save the first category of lawsuit from preemption. Inconsistencies remain between the federal and state rules. For example, the state rule would seem to allow the suit to proceed where the union has declined to pursue the grievance for very good reasons, contrary to the federal rule that employee suits may proceed only where the union has breached its duty to represent the employee fairly.\footnote{351}{See Vaca, 386 U.S. at 184-86.} In the second type of case, where the employee suit relies on the statute, rather than on the labor contract, preemption should not pose a problem, and the attempt at conformity is, therefore, not needed.\footnote{352}{The state should be able to call for use of the grievance procedure as part of its minimum labor standard. Arbitration in this context may be ineffectual if the rules being applied are those of the statute, not the labor contract.}

Insofar as the Minnesota statutory cause of action paralleled a tort, the cases from other jurisdictions dealing with preemption of tort claims\footnote{353}{Another analogy could be drawn to state law causes of action for discharge contrary to public policy or retaliatory discharge. Here, too, the law is in disarray. Compare Johnson v. Hussmann Corp., 805 F.2d 795, 797 (8th Cir. 1986); Vantine v. Elkhart Brass Mfg. Co., 762 F.2d 511, 517-18 (7th Cir. 1985); Oglesby v. RCA Corp., 752 F.2d 272, 276 (7th Cir. 1985) (holding that these state law claims are preempted) with Baldacchi v. Pratt & Whitney Aircraft Div., United Technologies Corp., 814 F.2d 102, 104-05 (2d Cir. 1987) (holding that these claims are not preempted). The Supreme Court has granted certiorari in Lingle v. Norge Div. of Magic Chef, 823 F.2d 1091 (7th Cir. 1987), cert. granted, 108 S. Ct. 226 (1987).} arising out of drug testing are of some interest. The Fifth Circuit found preempted various tort claims brought by two employees who were suspected of drug use, suspended, tested, and restored to duty when the tests proved negative.\footnote{354}{Strachan v. Union Oil Co., 768 F.2d 703, 704-05 (5th Cir. 1985).} The court followed Allis-Chalmers and relied heavily on the availability of the grievance process for remedying any wrongs.\footnote{355}{Id. at 705. The court also applied the rule set out for defamation claims in Linn v. United Plant Guard Workers, 383 U.S. 53 (1966), that requires malice for the claims not to be preempted. Strachan, 768 F.2d at 706.} The federal district court for Oregon also followed Allis-Chalmers in preempting a suit for invasion of privacy triggered by an employer's decision to test employees.
involved in accidents.\textsuperscript{356} The court noted that the tort case required an assessment of the reasonableness of the employer's conduct and concluded that this standard could be fixed by contract and evaluated by an arbitrator.\textsuperscript{357} Furthermore, the court stated that the issue of drug testing is national and calls for a uniform policy.\textsuperscript{358}

As Allis-Chalmers clearly demonstrates, labor law is a fine mix of federal and state law. Labor law also seeks to mesh private rules and resolutions of disputes with public law and processes. Part II assesses whether the law has struck the proper balance between private rules and public law in the drug testing area.

II. COMMENTARY: PRIVATE ORDERING VERSUS PUBLIC PROCESSES

A. Basic Principles of Dispute Resolution

Labor law's approach to drug testing focuses on form over substance; that is, the law quite clearly sets out how to resolve drug testing disputes, but not what the resolution should be. The system instituted by labor law is one of "private ordering,"\textsuperscript{359} where negotiations by private parties set the rules and private adjudicators resolve disputes. These private activities may occur "in the shadow of the law,"\textsuperscript{360} in that there may be limited judicial review of the results in certain disputes. But the law has shed little light on the problem of drug testing, and the public processes—legislative, administrative, and judicial—are involved only on the periphery.


\textsuperscript{357} See id. at 186. By contrast, the Ninth Circuit allowed a claim for defamation as well as negligent and intentional infliction of emotional distress to proceed where the employee was suspended for purchasing cocaine based on a co-employee's accusation. Tellez v. Pacific Gas & Elec. Co., 817 F.2d 536, 557-38 (9th Cir. 1987). The court distinguished Allis-Chalmers on the grounds that the right to be free of defamation is not negotiable. Id. at 538. The contract in question did not address when and how to use suspension notices, and an arbitrator could not adjudicate a defamation claim. See id. Nor could the arbitrator handle the malice issues in or provide an adequate remedy for intentional infliction of emotional distress. Id. at 540.


\textsuperscript{359} The term "private ordering" comes from Eisenberg, Private Ordering through Negotiation: Dispute-Settlement and Rulemaking, 89 Harv. L. Rev. 637 (1976).

Thus, this type of system is a prime example of what has come to be called "alternative dispute resolution." Note 361 Negotiation, mediation, and arbitration, as alternatives to public processes, are thought to be superior for a variety of reasons: they are less expensive, work more quickly, intimidate disputants less and address their underlying problems more, dispense more complete justice, and produce less alienation. Note 363 There are, however, a variety of perceived risks: that outcomes will be unpredictable and favor the stronger party due to the lack of reliance on the law; that the law will not be enforced if disputes are processed outside the courts; that there will soon be one set of methods for the rich and another set for the poor; that society will become excessively contentious if finding a forum for resolving disputes becomes too easy. Note 364 Given these advantages and risks, the difficult task is to assess whether private ordering is preferable to the public processes for a particular type of dispute. Note 365 At least three factors merit consideration: (1) the subject matter of the dispute, (2) the identity of the disputants, and (3) their relationship. Note 366

First, by virtue of their subject matter, certain disputes are better suited to a private ordering than others. When the issue has a "broad societal dimension," the public processes should be used. As Judge Edwards has urged, issues involving


Note 362. In particular, these techniques are alternatives to civil litigation.

Note 363. E.g., Paths to Justice, supra note 361, at 1.

Note 364. E.g., Dispute Resolution, supra note 361, at 51-56. See also Delgado, Dunn, Brown, Lee, & Hubert, Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution, 1985 Wis. L. Rev. 1359, 1391-99 [hereinafter DELGADO]; Paths to Justice, supra note 361, at 15-16.

Note 365. For a fairly elaborate proposal, see Bush, Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice, 1984 Wis. L. Rev. 893. For a more straightforward approach, which includes comparison of different ADR methods, see Paths to Justice, supra note 361, at 8-9, 35.

Note 366. Other factors one could look to range from pragmatic concerns, such as the cost of resolving a dispute a particular way compared to the amount at stake, to immeasurable concerns such as the risk that a major problem will go unresolved if it is hidden away in alternative dispute resolution. See Sander, Alternative Methods of Dispute Resolution, 37 U. Fla. L. Rev. 1, 14 (1985); see generally Nader, Disputing Without the Force of Law, 88 Yale L.J. 998 (1979).

Note 367. Delgado, supra note 364, at 403-04.
significant public rights and duties—constitutional issues, issues of governmental regulation, and issues of great public concern—are the proper province of the courts.\textsuperscript{368} "One essential function of law is to reflect the public resolution of . . . irreconcilable differences; lawmakers are forced to choose among . . . differing versions of the public good."\textsuperscript{369} Allowing private parties to resolve these disputes risks an outcome based on securing peace, not the public good.\textsuperscript{370} By contrast, where the dispute involves private rights that are governed by non-legal or extra-legal norms, private ordering is appropriate. Then the parties may choose their own dispute resolvers who will be experts in the relevant norms.\textsuperscript{371} In addition, once the public processes have set a legal norm and disputes become matters of applying settled law to disputed facts, private processes are appropriate.\textsuperscript{372}

Second, as Professor Delgado has argued, informal procedures—which characterize alternative dispute resolution as compared to the courts—increase the risk that prejudice will determine the outcome of disputes. Therefore, alternative dispute resolution should be used with caution where there may be class-based prejudice.\textsuperscript{373} Professor Delgado reasoned that the rituals and formalities of litigation reduce the role which prejudice can play, while alternatives lack such checks.\textsuperscript{374} Furthermore, people perceive a full-fledged adversarial process as the fairest system, inducing minorities to participate more readily than in less formal and less trusted systems.\textsuperscript{375} Judge Edwards has also identified civil rights disputes as requiring adjudication.\textsuperscript{376}

\textsuperscript{368} Products liability is an example of the third category. Edwards, \textit{Alternative Dispute Resolution: Panacea or Anathema?}, 99 HARV. L. REV. 668, 671 (1986).
\textsuperscript{369} See id. at 679.
\textsuperscript{370} Id.; see also Edwards, \textit{Hopes and Fears for Alternative Dispute Resolution}, 21 WILLAMETTE L. REV. 425, 430-33 (1985) (noting the pluralism of our society).
\textsuperscript{371} Judge Edwards cited labor arbitration as a good example. Edwards, \textit{supra} note 368, at 676.
\textsuperscript{372} Judge Edward's example is federal labor arbitration. \textit{Id.} at 680; see also Sander, \textit{supra} note 366, at 13 (courts should be used for novel constitutional claims, arbitration for applying established rules to facts); \textit{PATHS TO JUSTICE, supra} note 361, at 10.
\textsuperscript{373} DELGADO, \textit{supra} note 364, at 1360-61. At one point, the authors phrase their concerns as arising whenever the dispute pits ingroup against outgroup. \textit{Id.} at 1402.
\textsuperscript{374} See \textit{id.} at 1367-74.
\textsuperscript{375} See \textit{id.} at 1388-90.
\textsuperscript{376} A private decision-maker may not fully understand the issues and allow the
A third crucial factor, related to the second, is the relationship between parties. Generally, as Professor Sander has observed, where the parties share an ongoing relationship, private ordering is appropriate. The outcome will be more acceptable to them and address their underlying problem, thereby strengthening the relationship.\footnote{Sander, supra note 361, at 120-24 (addressing the use of negotiation or mediation). The grievance process under a labor contract may strengthen an ongoing relationship. \textit{Id. at 121; see also Paths to Justice, supra note 361, at 13 (arguing for the use of arbitration where there is an on-going relationship).}} Where the parties are substantially unequal in power, information, or resources, however, private ordering is risky. Informal methods of resolving disputes are not likely to check such disparities, and thus, may yield results based more on power than on the merits.\footnote{See Sander, supra note 361, at 127; see also Paths to Justice, supra note 361, at 14-15 (discussing mediation in particular). For an interesting discussion of the problem of power disparity in resolving consumer disputes through a variety of mechanisms, see Nader, supra note 366, at 998.} It is difficult to have both equity and informality.\footnote{Delgado, supra note 364, at 1395.}

If any of the factors—a broad social issue, a disadvantaged disputant, or a power disparity—is present, is private ordering out of the question? The answer is no. Rather, these factors call for bolstering and monitoring private ordering through complementary involvement by public processes. Thus, Judge Edwards has argued, for example, that alternative dispute resolution may be viable even for disputes raising public law issues as long as the informal mechanisms operate as adjuncts to the traditional legal system.\footnote{Edwards, supra note 368, at 671-72; see also Delgado, supra note 364, at 1403 (arguing that it would help to have certain legal mechanisms, such as higher review and involvement by attorneys, if certain delicate disputes are to be resolved informally); Nader, supra note 366, at 1019-20 (arguing that there must be “the force of law” if consumer disputes are to be resolved fairly).}

The following sections analyze then, whether drug testing disputes should be processed through private ordering, and if so, the safeguarding role of the legal system.

\section*{B. The Unionized Setting}

Drug testing disputes in the unionized setting should not be handled entirely through private ordering. Although the parties are involved in an ongoing relationship between relative
equals, the issue has a broad societal dimension, and there is a potential class of disadvantaged disputants. The current system favors private ordering too much, although the changes that should be made are simple.

The first factor to consider is the subject matter of drug testing. As noted in the introduction, the issue of drug testing has many facets: productivity, discipline, safety, employee health, employee privacy, and discrimination. Some facets clearly call for resolution according to public law, others less clearly. It is helpful to divide the question into two parts: Should dependent employees be protected? And may employers test employees?

Public law should resolve the question of whether dependent employees should be protected. Initially, there is the difficult question of public policy: Should dependency be viewed in our society as an illness whose victims deserve help, or as a form of misbehavior totally subject to the employee's control? In other words, is dependency a disability or not? Then one must balance several conflicting goals: a safe, productive workplace on the one hand versus humane treatment of persons with real problems on the other. The result not only determines the employment rights and well-being of dependent persons, but also bears on the cost of doing business, the quality of our products, and workplace safety for all employees—matters of great public concern. Furthermore, the question of dependency discrimination is analogous to other issues of employment discrimination long resolved by the Constitution\textsuperscript{381} and statutes.\textsuperscript{382}

The second, narrower question of an employer's right to test employees is less clearly a question with broad societal dimensions. Once the question of protecting dependent employees is separated out, the question of drug testing becomes one of employee privacy. This privacy interest is largely a matter between employer and employee. And yet there is a public policy concern of a philosophical sort: how our society measures the

\textsuperscript{381} U.S. Const. amend. XIV, § 1.

\textsuperscript{382} Long ago Congress acted to forbid many forms of employment discrimination. \textit{See}, e.g., 42 U.S.C. § 2000e-17 (1982) (forbidding discrimination based on race, color, religion, sex, or national origin). \textit{See also} Minn Stat. §§ 363.01-14 (1986) (tracking the federal law and also forbidding discrimination based on creed, marital status, status with respect to public assistance, membership or activity in a local commission, disability, or age).
right to be left alone. Looking to the law's treatment of privacy questions only confirms that this is a close call. The Constitution's protection of privacy is murky at best. Common law and statutes are only now protecting employee privacy interests, but there is a clear trend toward legal protection. Furthermore, drug testing raises many scientific and technical issues which may be best dealt with by technical experts, rather than the generalists who serve as American lawmakers.

The second factor to consider is the identity of the disputants. Some employees involved in drug testing disputes are certain to be chemically dependent, members of a disadvantaged group. It may be very tempting for private parties to treat harshly those who abuse drugs, out of prejudice or ignorance. Thus this factor clearly argues for the use of public processes.

The third factor is the relationship between the parties, which, by contrast, favors private ordering. Labor and management share an ongoing relationship based in part on mutual interests. Labor and management may not be equal in resources, information, and power in particular instances. But it is reasonable to assume that there generally is rough parity, as management holds the power of the purse and labor the power of the strike. Furthermore, labor law imposes certain minimal obligations on both sides. This assessment assumes, of course, that the union is effectively representing the employees, including those likely to be hurt by drug testing.

383. See generally J. Nowak, R. Rotunda, & J. Young, Constitutional Law §§ 14.26-30 (3d ed. 1986) (although the Court has not been able to agree on the source of the right, it is settled that the right does exist).

384. At least five states have passed fairly comprehensive drug testing legislation. See supra note 285. In addition, a great number of states have attempted to pass legislation which is still pending or has been rejected on a variety of grounds. To understand the latitude on the issue, one only has to look at examples from two states that have passed drug testing statutes. Utah passed a drug testing bill that permits drug testing under a broad array of circumstances. Utah Code Ann. § 34-38-1 (Supp. 1987). The Utah statute includes a number of safeguards that protect an employer's rights to test. Id. §§ 34-38-1, 34-38-8. On the other end of the spectrum, Vermont has passed a drug testing bill that prohibits drug testing of job applicants and employees. VT. STAT. ANN. tit. 21, §§ 512(6), 513(c). These Utah and Vermont statutes show the two extremes of the legislation spectrum. Utah's statute gives employers wide latitude and protection in exercising their options to test. Vermont, on the other hand, protects the rights of the employee and almost totally restricts employers in their ability to test.

385. See generally The Developing Labor Law, supra note 12, at 553-681.

386. On the general problem of a representative failing to truly represent a con-
Again, this assumption may not be true in particular instances, but the suggestions set out below would impose clearer duties on unions to protect dependent employees.

Consideration of the three factors thus yields a mixed message. There is room for private ordering and yet a clear requirement that public law be involved. Currently the role of public law is minor compared to that of private ordering. There is no broadly applicable law on discrimination against dependent employees\(^{387}\) and only a few states have statutes on drug testing\(^{388}\) leaving the rules to the parties’ negotiations. The NLRB generally refers to arbitration, and the courts exercise only a limited review of arbitration. How can the role of public law be increased without unduly cramping private ordering? The key is to strengthen the law’s role in setting a framework for collective bargaining and arbitration.

At a minimum, the law should determine whether chemically dependent employees are to be protected. Should the approach be one of rehabilitation, punishment, a combination, or something else? The ideal vehicle is a federal statute of broad application\(^{389}\) Federal legislation would produce a uniform national rule and provide the opportunity for a centralized, expert administration, as with the NLRB. The statute could, for example, provide that employers must make a reasonable effort to accommodate chemically dependent employees who do not pose a danger to themselves or others or present a serious risk of substantial property damage.\(^{390}\) The judgment of how to balance safety, productivity and humanitarian concerns should be made by federal lawmakers.

It is desirable but not imperative that the law also sets rules on drug testing.\(^{391}\) As argued above, certain aspects of the

\(^{387}\) As noted above, text accompanying notes 69-71 supra, the federal statute has limited coverage.

\(^{388}\) Cf. Title VII, 42 U.S.C. § 2000e (generally applying to employers engaged in industries affecting commerce with 15 or more employees each work day in at least 20 weeks in the current or preceding year.

\(^{389}\) See supra note 285.

\(^{390}\) This is the gist of the Rehabilitation Act, which has a limited scope. See supra text and accompanying notes 68-70.

\(^{391}\) There is a pending federal bill on drug testing: H.R. 691 (introduced Jan. 21, 1987). For a thorough discussion of the general topic of drug testing legislation,
drug testing issue, such as the weight to be given the privacy interest, can be viewed as public issues. The ideal vehicle is the state statute. To a great extent, regulation of privacy in the workplace is currently a matter of state law.\textsuperscript{392} This is appropriate because the issues are still novel and the answers are uncertain. There may be different approaches taken in different states of course,\textsuperscript{393} but this lack of uniformity should prove advantageous. As Justice Brandeis observed over fifty years ago, “It is one of the happiest incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”\textsuperscript{394}

These statutes would then form a public law framework for the private process of collective bargaining. As with other federal laws on employment discrimination and workplace safety, the federal law on discrimination against dependent employees would serve as a floor or framework; collective bargaining would fill in the details. And the federal law would frame the union’s duty in representing the dependent employee. The state statute on drug testing, as a minimum labor standard, would not be preempted, but rather would serve as a starting point for negotiations.

While drug use and testing disputes would acquire a distinct legal dimension, this change does not render arbitration inapt. Rather, the rules would be set by public law and augmented by the contract; the arbitrator’s task would be to find facts and apply the rules. Most arbitrators would take the legal norms into account. The problem may well be technical, e.g., what does a test result prove and, hence, especially well suited to an arbitrator expert in such areas.

While the NLRB’s deferral policies would not be altered by those statutes, the courts would assume a more activist role. The courts would continue to compel arbitration of disputes where labor contracts address drug testing or drug use issues, under the Steelworker’s Trilogy.\textsuperscript{395} The courts would also


\textsuperscript{393} See supra note 384 and accompanying text.

\textsuperscript{394} New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

\textsuperscript{395} See supra note 187 and accompanying text.
continue to entertain requests for injunctions pending arbitration, and they should be more amenable to granting these requests than they currently are. The existence of statutes on discrimination and drug testing should add some weight to the union's side of the balance in that the statutes would signify that there is injury recognized by law when employers run afoul of their legal and contractual obligations.396 Finally, the courts would continue to review arbitration awards under the W.R. Grace standard, which requires public policy that is "well defined and dominant, and . . . ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interest.' "397 The two statutes suggested above should ease the courts' task of defining public policy by stating a choice between the rehabilitation and punishment approaches and by outlining when testing is permissible.

The courts would also likely gain a stronger role through the creation of statutory causes of action. Presumably, a federal statute prohibiting discrimination against dependent employees would carry remedies and procedures comparable to those afforded under Title VII.398 Thus the rule of Alexander v. Gardner-Denver Co.399 should apply to allow the employee to proceed with litigation under the discrimination statute apart from any arbitration proceedings under the union contract. And state courts would be permitted to enforce their minimum labor standards to the extent those standards are independent of any negotiated contract provisions.

The changes recommended here are fairly simple and straightforward. These changes would provide public law on these matters of public concern and afford public law a more prominent role without destroying the roles of collective bargaining and arbitration.

C. The Non-Unionized Setting

Where there is no union, employers make decisions about drug testing unilaterally, in most jurisdictions, unrestricted by

the law and in a few jurisdictions guided by state law. Unfettered employer action is too much private ordering.

Consideration of the three facets of these disputes yields a consistent conclusion that the law and public processes should be involved. The subject matter and identity of the disputants are the same whether the setting is unionized or not; these factors favor the use of public processes. In addition, in the non-union setting, the public process is needed due to the relationship between the parties. As in the unionized setting, non-unionized employers and employees are bound together in ongoing relationships. However, the ties are more easily severed in the non-unionized setting. It is more likely that one employee will quit than all employees represented by a union will quit, more likely that an employer will fire one employee than an entire bargaining unit. Furthermore, the non-unionized employee, as an individual or even as a member of an uncoalesced group of employees, is rarely equal to the employer.

The statutes recommended here thus are especially important to protect the rights of employees in the non-unionized setting and to bring about a resolution based on public policy. This does not mean that negotiations and arbitration are out of the question.

Employers may well wish to involve employees in the formulation of drug testing policies. Employees who have participated in a policy's creation may comply better with its requirements. Furthermore, employees may well have valuable insights and ideas. The law should not mandate such negotiation, however. If the employees have not opted for legally enforceable bargaining rights for unionizing, the law should not impose bargaining.

The use of arbitration presents a more complex issue. Judge Edwards has recommended that discharges be arbitrated even in non-union settings. But one should be concerned about power disparity, for the employer is likely to have greater experience and possibly control over the process than the employee, a one-time participant. The answer lies in ready and

401. Cf. Fiss, supra note 386, at 1079-80 (discussing the disadvantages of settlement where litigation pertains to the interests of a group lacking a formal structure).
402. Edwards, supra note 368, at 681 (unjust dismissal); Edwards, supra note 370, at 436.
403. The employer might occupy a position comparable to that of the manufac-
fairly rigorous judicial review.

How are the courts likely to treat arbitration awards in non-union settings? The Steelworker's Trilogy is inapt, as those cases arise under a provision of the federal labor law.\textsuperscript{404} Rather, the courts most likely would proceed under various arbitration statutes.\textsuperscript{405} In Minnesota, for example, courts may vacate awards only due to fraud or corruption, partiality on the part of arbitrator, the arbitrator's exceeding his powers, serious procedural irregularities, or lack of an agreement to arbitrate the dispute.\textsuperscript{406} That a court would not grant the relief afforded is not grounds for overturning an award.\textsuperscript{407} Unless the excess of authority ground is construed to include an award in violation of public policy, there would be no clear basis for overturning an award on the merits. Certainly there is nothing in the statute to parallel the \textit{W.R. Grace} principle. There should be, given the public policy aspects of the drug testing issue.

This judicial review would be assured if the arbitration proceeding were conducted pursuant to one of the statutes recommended above. In creating the substantive right, the legislature could provide as well for procedural rights, perhaps indicating that arbitration may be used at the election of the parties or by court order with the courts providing appellate or compulsory review.\textsuperscript{408} It is imperative, of course, that the standard of judicial review permit overturning arbitration awards that run contrary to the statutory standards, by analogy to \textit{W.R. Grace}.

Should legislators decide to address dependency discrimination or drug testing, they should address processes to be used to resolve these disputes. So long as the legal framework is

\textsuperscript{404} Section 301 applies to "[s]uits for violation of contracts between an employer and a labor organization . . ." 29 U.S.C. § 185(a) (1982).


\textsuperscript{406} \textit{Minn. Stat.} § 572.19, subd. 1 (1986).

\textsuperscript{407} \textit{Id.}

\textsuperscript{408} A system like this may be what Judge Edwards had in mind. \textit{See} Edwards, \textit{supra} note 370.
clearly drawn, they would do well to encourage or permit negotiation and arbitration in the non-union setting, although not require it as forcefully as in the union setting.

**Conclusion**

The issue of drug testing of employees is interesting for many reasons. It joins legal doctrine and high technology. It entails thorny sub-issues of employee privacy and workplace safety. It also is interesting because it raises questions of legal process in the employment setting, important questions in light of the rapidly increasing regulation of employment.\(^{409}\)

The thesis of this article is that public law and processes, as well as private rules and methods of resolving disputes, should be involved in this area. At some point, what goes on in the workplace becomes a public matter. At that point, public lawmakers should set rules to guide the conduct of employers (and employees), before the fact in the form of legislation and, as necessary, after the fact in the form of judicial review. These rules should not determine every aspect of how drug testing will be handled, however. Lawmakers should afford union and management, employers and employees some latitude to craft systems and rules tailored to their own workplaces. Given appropriate parameters, employers and employees, like the states Justice Brandeis referred to, should be able to “try novel social and economic experiments.”\(^{410}\)

---
