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DRUG AND ALCOHOL TESTING IN THE
WORKPLACE: THE LEGISLATIVE RESPONSE

BARBARA JEAN D’AQUILA*

Defining employer and employee rights with respect to substance screening in the workplace has proved to be a rather difficult task for our legal system. Many states, including Minnesota, have recently enacted legislation designed to clarify this area of the law. This article discusses the triumphs and pitfalls of Minnesota’s new law entitled “Drug and Alcohol Testing in the Workplace.”

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Alcohol and drugs are unfortunately a pervasive part of American life. Today, the widespread use of alcohol and drugs concerns not only law enforcement agencies and social services, but employers as well. Over the past few decades, most employers have become acutely aware that alcohol and drug use significantly affects the workplace. Employers now recognize that they encounter numerous problems from employees’ substance use or abuse, including but by no means limited to the following: tardiness and excessive absenteeism; lost productivity; inconsistent or poor quality control; property damage; personal illness and injury; increased health insurance and workers’ compensation costs; employee theft and other crimes; employee turnover; and employee morale concerns.

In an effort to confront and combat the effects of alcohol and drugs in the workplace, many employers have begun using various detection measures such as undercover agents, video surveillance, trained drug-sniffing dogs, employee whistleblowing and drug testing. One source estimates that between thirty-five to forty percent of the Fortune 500 companies in America use drug tests or other detection measures. Predictably, in response to the increased activity on the part of the employer to curb the effects of alcohol and drugs in the workplace, courts and legislatures across the United States have begun to critically examine the rights of employers to control the work environments and the privacy and other expectations of employees.

The area receiving the most attention in the political arena is alcohol and drug testing; and the State of Minnesota is one of the first states to enact legislation on the subject. On June 3, 1987, the State of Minnesota enacted a law entitled “Drug and Alcohol Testing in the Workplace.” That statute became effective September 1, 1987. While Minnesota’s new drug and

alcohol testing law answers many questions regarding substance screening in the workplace, it fails to address some important questions and further creates conflicts with the Minnesota Human Rights Act. Unless clarified, this legislation will leave an already overburdened court system with the inevitable task of resolving the incongruities between Minnesota's new Act on Drug and Alcohol Testing in the Workplace and the Minnesota Human Rights Act.

This article focuses upon the critical provisions of Minnesota's new Act on Drug and Alcohol Testing in the Workplace, highlighting inconsistencies between this law and the Minnesota Human Rights Act, including subtleties that may trap the unwary employer. This article also raises issues that future legislation or legal decisions must resolve.

I. DRUG AND ALCOHOL TESTING IN THE WORKPLACE

A. General Overview

Minnesota's recent legislation entitled "Drug and Alcohol Testing in the Workplace" regulates drug and alcohol testing of job applicants and employees by an employer. The Act contains a number of definitions. It defines "drug or alcohol testing" as the "analysis of a body component sample" and provides that the Commissioner of the Department of Health for the State of Minnesota shall adopt rules by January 1, 1988, governing numerous things, including body component samples that are appropriate for testing. It is expected, however, that permissible body component samples for alcohol testing will include breath, blood, and urine and that permissible body component samples for drug testing will include blood and urine.

6. Id. § 181.953, subd. 1(b).
7. Telephone interview with John Icada, Laboratory Certification Development Supervisor for Division of Public Health Laboratories, Minnesota Department of Health (January 12, 1988). Mr. Icada indicated that the Department's rules should be published for notice and comment within three to four weeks from the date of the telephone interview [As of the date of this printing, the Department's rules remain unpublished].
8. Id. Mr. Icada stated that hair will not be considered a permissible body component for drug testing purposes. Hair has recently been recognized as a potential source of analysis for drug use and at least one corporation has developed a testing
Under the Act, a “job applicant” means a person or an independent contractor who applies to become an employee, including a person who receives an offer contingent upon successfully passing a drug or alcohol test. The Act defines an “employee” as a person or independent contractor who performs services in exchange for compensation in whatever form. An “employer” is defined as a person or entity (including the state or its subdivisions) located or doing business in Minnesota and having at least one employee.

B. Four Basic Limitations on Testing

The Act specifically provides that an employer has no legal duty to conduct any drug or alcohol testing. An employer desiring to request or require any of its employees or job applicants to submit to drug or alcohol testing, however, may only do so provided that it complies with the following four mandates: (1) the employer must have and give affected employees and job applicants notice of its written drug and alcohol policy containing, at a minimum, the six areas of information required by the Act; (2) once the Commissioner of Health adopts rules governing licensing of testing laboratories, the employer’s tests must be conducted by a licensed laboratory and during the interim, its tests must be conducted by a laboratory meeting the specified transitional licensing provi-
sions;\textsuperscript{14} (3) the employer may conduct the testing only as permitted in five different situations;\textsuperscript{15} and (4) the employer must not require or request testing on a basis that is arbitrary and capricious.\textsuperscript{16}

C. Situations in Which Testing May Be Requested or Required

The Act provides that testing may occur in five situations and the type of testing permitted in each situation is dramatically different. The five situations covered by the Act are: (1) job applicant testing;\textsuperscript{17} (2) routine physical examination testing;\textsuperscript{18} (3) random testing;\textsuperscript{19} (4) reasonable suspicion testing;\textsuperscript{20} (5) treatment program testing.\textsuperscript{21}

1. Job Applicant Testing

An employer may request or require a job applicant to undergo drug or alcohol testing only after the job applicant has been conditionally offered employment\textsuperscript{22} and has received notice of the employer's written drug and alcohol policy.\textsuperscript{23} An employer cannot withdraw an offer of employment unless it does a confirmatory test,\textsuperscript{24} and it must inform the job applicant of the reason for its action.\textsuperscript{25} The provision of the Act requiring an employer to inform the job applicant of the reason for its withdrawal of a conditional offer, however, fails to specify

\begin{itemize}
\item \textsuperscript{14} \textit{Minn. Stat.} \textsection 181.953, subd. 2 (Supp. 1987).
\item \textsuperscript{15} See \textit{Minn. Stat.} \textsection 181.951, subds. 2-6 (Supp. 1987). See also infra notes 17-37 and accompanying text (discussing the five different situations in which testing may be conducted).
\item \textsuperscript{16} \textit{Minn. Stat.} \textsection 181.951, subd. 1(c) (Supp. 1987). Since the Act does not define arbitrary and capricious, it must be recognized that courts or juries will make the determination of what is arbitrary and capricious on a case by case basis.
\item \textsuperscript{17} \textit{Id.} \textsection 181.951, subd. 2.
\item \textsuperscript{18} \textit{Id.} \textsection 181.951, subd. 3.
\item \textsuperscript{19} \textit{Id.} \textsection 181.951, subd. 4.
\item \textsuperscript{20} \textit{Id.} \textsection 181.951, subd. 5.
\item \textsuperscript{21} \textit{Id.} \textsection 181.951, subd. 6.
\item \textsuperscript{22} Under the Act, an employer must first offer the job applicant employment conditioned upon successfully passing the testing before that employer may request or require the job applicant to undergo the testing. \textit{Id.} \textsection 181.951, subd. 2. It is interesting to note that the concept of a conditional offer of employment is also contained in the Minnesota Human Rights Act. \textit{Id.} \textsection 363.02, subd. 1(7)(i) (Supp. 1987).
\item \textsuperscript{23} \textit{Id.} \textsection 181.952, subd. 2 (Supp. 1987).
\item \textsuperscript{24} \textit{Id.} \textsection 181.953, subd. 11. A confirmatory test means a method of analysis of a body component sample that is approved by the Commissioner of Health. \textit{Id.} \textsection 181.950, subd. 2.
\item \textsuperscript{25} \textit{Id.} \textsection 181.951, subd. 2.
\end{itemize}
how that information must be communicated. A careful reading of other provisions of the Act suggests that a written communication was intended. For example, the Act requires an employer to inform a job applicant in writing, within three working days after receiving a test result report, of (a) a negative test result on an initial screening or of any test result on a confirmatory test; (b) the applicant’s right to request and receive a copy of the test result report; and (c) in the case of a positive test result, the applicant’s rights.26

2. Routine Physical Examination Testing

The Act provides that an employer may request or require its employees to submit to routine physical examination testing once a year, at most, and then only after the employee has been given at least two weeks written notice that a test may be conducted as a part of that physical examination.27

3. Random Testing

An employer may request or require only employees in “safety sensitive” positions to undergo testing on a random selection basis.28 A random basis requires an equal probability that any employee from a group will be selected for testing and does not give the employer discretion to waive testing of any employee so selected.29

The Act defines a “safety sensitive” position to be “a job, including any supervisory or management position, in which an impairment caused by drug or alcohol usage would threaten the health or safety of any person.”30 This definition lacks cer-

26. Id. § 181.953, subd. 7, 8.
27. Id. § 181.951, subd. 3. The requirement that an employee receive at least two weeks written notice limits an employer’s ability to test for certain substances because the human body metabolizes substances at different rates and the detection periods vary significantly depending on such things as the physical and chemical property of the drug, its use history and characteristics of the user, such as age, weight and health. Employment Testing: A National Reporter on Polygraph, Drug, AIDS, and Genetic Testing, at D:6 (1987) (on file at the William Mitchell Law Review office).
29. Id. § 181.950, subd. 11.
30. Id. § 181.950, subd. 13. There is a similar but not exact concept of “safety” expressed in the Minnesota Human Rights Act. That statute defines disability to exclude any condition resulting from alcohol or drug abuse (not just usage) which constitutes a direct threat to property or safety of others or which prevents a person from performing the essential functions of the job. Id. § 363.01, subd. 25(a) (1986). A
tainty. At the very least, bus drivers, cab drivers, pilots and other public transportation operators should be considered to be employed in safety sensitive positions. Furthermore, because the definition refers to the safety of “any person,” it should include positions where the safety of the employee is at issue, such as a window-washer on a high-rise building. Unfortunately, it is unclear whether the majority of jobs held by employees involve safety sensitive positions. Arguably, jobs involving a great deal of contact with the public, such as utility meter readers who enter people’s homes, are safety sensitive positions. A further refinement of the legislative or judicial interpretation will most likely be needed resolve this issue.

4. Reasonable Suspicion Testing

An employer may request or require testing if it has a reasonable suspicion that the employee: (a) is under the influence of drugs or alcohol; (b) has violated the employer’s written work rules (contained in the drug and alcohol testing policy) that prohibit the use, possession, sale or transfer of drugs or alcohol at the workplace; (c) has sustained or caused another to sustain personal injury; or (d) has caused a work-related accident or was somehow involved in the operation of machinery, equipment or vehicles involved in a work-related accident. Under the Act, reasonable suspicion is defined as “a basis for forming a belief based upon specific facts and rational inferences drawn from those facts.”

It must be noted that the legislature stated the four bases for reasonable suspicion testing in the alternative. Therefore, while an employer may conduct testing after an occurrence such as an accident, it may also conduct tests where there is a
reasonable suspicion that the employee is merely under the influence of drugs or alcohol. Taken literally, that provision in the Act would allow selected testing of an employee as long as there are specific facts and reasonable inferences drawn from those facts to form a belief that the employee is under the influence of drugs or alcohol. Consequently, an employee's demeanor, appearance or even work record or performance on a particular day could be the basis for reasonable suspicion. This broad statutory authority conferred upon an employer will no doubt be the subject of considerable litigation by disgruntled employees who may, for example, bring claims of invasion of privacy, discrimination, disparate impact, wrongful discharge and intentional infliction of emotional distress.35

5. Treatment Program Testing

The Act provides:

An employer may request or require an employee to undergo drug and alcohol testing if the employee has been referred by the employer for chemical dependency treatment or evaluation or is participating in a chemical dependency treatment program under an employee benefit plan, in which case the employee may be requested or required to undergo drug or alcohol testing without prior notice during the evaluation or treatment period and for a period of up to two years following completion of any prescribed chemical dependency treatment program.36

This area of regulation perhaps contains the greatest pitfalls for uneducated employers. While many employers have never considered conducting alcohol or drug testing of their employees, they have nonetheless referred one or more of their employees to a hospital, clinic, or psychiatric or psychological center for evaluation, believing that there is some physical or psychological reason for an employee's poor performance. In the past, in order to conduct their evaluations, such hospitals, clinics or centers may have conducted drug or alcohol testing. Under the new Act, before any drug or alcohol testing can be done for an employer, even by an independent facility for the purpose of evaluation or chemical dependency treatment of any employee, an employer must have a written drug and alco-

36. MINN. STAT. § 181.951, subd. 6 (Supp. 1987).
hol policy.\textsuperscript{37}

\textbf{D. The Written Policy: Its Content and Notice}

\textit{1. Contents}

Section 181.952 of the Act provides that an employer’s written drug and alcohol policy must, at a minimum, set forth the following information:

(1) the employees or job applicants subject to testing under the policy;

(2) the circumstances under which drug or alcohol testing may be requested or required;

(3) the right of an employee or job applicant to refuse to undergo drug and alcohol testing and the consequences of refusal;

(4) any disciplinary or other adverse personnel action that may be taken based on a confirmatory test verifying a positive test result on an initial screening test;

(5) the right of an employee or job applicant to explain a positive test result on a confirmatory test or request and pay for a confirmatory retest; and

(6) any other appeal procedures available.\textsuperscript{38}

While these are statutorily-mandated minimal details of an employer’s written policy, any employer promulgating a policy should include additional items of information such as a policy statement and work rules detailing specifically the extent of the employer’s prohibition of the use, possession, sale or transfer of drugs or alcohol by an employee at the workplace.\textsuperscript{39} Further, an employer developing a written policy must recognize that in Minnesota a written policy may constitute a contract.\textsuperscript{40} The policy should therefore be written with the same care, precautions and disclaimers as is dictated by the caselaw and prudent practice governing employee handbooks or personnel manuals.

\textsuperscript{37} See id. § 181.951, subd. 6. While the Act does not specifically state this proposition, a careful reading of section 181.951, in conjunction with the other provisions of the Act, including section 181.951, subdivision 6, compels this conclusion.

\textsuperscript{38} Id. § 181.952, subd. 1.

\textsuperscript{39} See id. § 181.951, subd. 5(2). If an employer desires to conduct reasonable suspicion testing for a violation of its work rules, those rules must be specified in writing and contained in the employer’s drug and alcohol testing policy. Id.

\textsuperscript{40} Pine River State Bank v. Mettille, 333 N.W.2d 622, 626 (Minn. 1983).
2. Notice

The Act also requires that the employer provide written notice of its drug and alcohol policy to all affected employees upon the policy’s adoption, to all non-affected employees who subsequently become affected by a job transfer and to all job applicants upon a conditional hire before testing. Under the Act, an employer must post written notice in an appropriate and conspicuous location on its premises, stating that it has adopted a drug and alcohol testing policy and that copies of that policy are available for inspection during regular business hours in the employer's personnel office or other suitable location.

Employers are well advised to approach the issue of notice with the same care prescribed by the caselaw and prudent practice governing employee handbooks. Therefore, for example, upon adoption of a policy, an employer should consider disseminating its written policy to all employees together with a written acknowledgement of receipt of the policy and perhaps even the employee's understanding of the policy's contents, including the work rule requirements, the circumstances that may result in testing, and any disciplinary or other adverse personnel action that may be taken. The employer should require the employee to sign, date and return the written acknowledgement form.

E. The Testing Laboratory and Other Testing Standards

Section 181.953 of the Act provides that all testing must be performed by a testing laboratory licensed by the Commissioner of Health and, that by January 1, 1988, the Commissioner shall adopt rules governing:

1. standards for licensing, suspension and revocation of a license;
2. body component samples that are appropriate for drug and alcohol testing;
3. procedures for taking a sample that ensure privacy to employees and job applicants to the extent practicable, consistent with preventing tampering with the sample;
4. methods of analysis and procedures to ensure reliable

42. Id.
drug and alcohol testing results, including standards for initial screening tests and confirmatory tests;
(5) threshold detection levels for drugs, alcohol, or their metabolites for purposes of determining a positive test result;
(6) chain-of-custody procedures to ensure proper identification, labeling, and handling of the samples being tested; and
(7) retention and storage procedures to ensure reliable results on confirmatory tests or confirmatory retests of original samples.\(^4\)

In addition, section 181.953 authorizes the Commissioner to license laboratories in other states and to charge annual licensing fees.\(^4\) Furthermore, during the interim period before the rules are adopted, the Commissioner is authorized to enter into agreements with non-licensed testing laboratories as long as those laboratories agree to comply with the transitional requirements specified by the Act.\(^4\) As of the date of this writing, the Commissioner had not yet published rules for notice and comment.\(^4\)

The Act also provides that a laboratory must conduct a confirmatory test on all samples that produce a positive test result on an initial screening test.\(^4\) The phrase, "positive test result," is statutorily defined as a finding of drugs, alcohol or their metabolites at the levels set by the Commissioner.\(^4\) The legislation further prohibits employers from using any laboratory they own and operate, except one agency of the state is permitted to use the testing laboratory of another state agency.\(^4\)

Under the Act, the Commissioner must adopt chain-of-custody procedures that an employer must follow. However, during the interim, an employer conducting testing must have its own reliable procedures "to ensure proper record keeping, handling, labeling and indentification of the samples to be tested."\(^5\)

\(^{43}\) Id. § 181.953, subd. 1(b).
\(^{44}\) Id. § 181.953, subd. 1(c), (d).
\(^{45}\) Id. § 181.953, subd. 2.
\(^{46}\) See supra note 7.
\(^{47}\) Minn. Stat. § 181.953, subd. 3 (Supp. 1987).
\(^{48}\) Id. § 181.950, subd. 10.
\(^{49}\) Id. § 181.953, subd. 4.
\(^{50}\) Id. § 181.953, subd. 5.
F. Rights of Employees and Job Applicants

The Act provides employees and job applicants with certain pre-testing and post-testing rights and also contains limitations on discipline and discharge.

1. Pre-testing Rights

While the Act does not explicitly provide that an employee or job applicant may refuse to submit to testing, that right is implicit in the wording of the statute. The provision requiring that the employer's written drug and alcohol testing policy must set forth information concerning the right of an individual to refuse testing and the consequences of that refusal implies this right.51 No doubt, many employers will specify discharge as the consequence of a refusal to take a test.52

In addition, before an employer may conduct any testing, the Act requires that the employer must provide the employee or job applicant with a written form on which the employee or job applicant: (a) acknowledges that she has seen the employer's drug and alcohol policy; and (b) indicates any over-the-counter or prescription medications that she is currently taking or has recently taken and any other information relevant to the reliability of, or explanation for a positive test result.53

The above provision is intended to ensure that employees and job applicants are aware of the employer's written testing policy and have an opportunity to explain any positive test that may result. While designed to provide protection for individuals prior to undergoing testing, many individuals will, in all likelihood, hesitate before disclosing certain medical informa-

51. See id. § 181.952, subd. 1(3).
52. The Act does provide for limitations on discharge. See id. § 181.953, subd. 10. These limitations, however, apply only where there is a positive test result and do not govern situations where an individual refuses to submit to testing. Therefore, it appears that discharge may appropriately be a consequence of an individual's refusal to undergo testing. This does not mean, however, that an employer may safely discharge an employee who refuses to undergo testing simply because such adverse action is not prescribed by the Act. In fact, litigation may result. See L. A. Times, Oct. 31, 1987, at 33, col. 1 (discussing Luck v. Southern Pac. Transp. Co., No. C-84-3-230 (Cal. Super. Ct., filed Aug. 6, 1985), in which a jury awarded an employee in excess of $485,000 where the employee was fired for refusing to submit to a random drug test).
53. Minn. Stat. § 181.953, subd. 6(a) (Supp. 1987). The Act requires that the employer develop a form on which the employee acknowledges having seen the employer's drug and alcohol policy and indicates personal information that may affect or explain the test results. Id.
tion to an employer. For example, a pregnant woman or a diabetic may not wish to disclose her condition fearing that the employer will take some adverse action in response to learning of the individual's condition. The Act addresses this fear by prohibiting the employer from taking any adverse action based upon the medical history revealed on the form by an employee or job applicant, unless that individual was under prior affirmative duty to disclose the information. Moreover, the Minnesota Human Rights Act would operate to prohibit the discriminatory use of such information. Nonetheless, the individual's fear that this information will somehow be adversely used against her is a real fear.

2. Post-testing Rights

The Act provides employees and job applicants with several rights after the drug or alcohol testing has occurred and requires an employer to give the individual notice of these rights.

First, within three working days after receiving the test result report from a laboratory, an employer must inform an employee or job applicant in writing: (a) of a negative test result on an initial screening or of a negative or positive test result on a confirmatory test; and (b) of the individual's right to request and receive a copy of the test result report.

Second, in the event of a positive test result on a confirmatory test, the employer must additionally and simultaneously give the employee or job applicant written notice of her other

54. See, e.g., Luck v. Southern Pac. Transp. Co., No. C-84-3-230 (Cal. Super. Ct., filed Aug. 6, 1985) (employee refused to take test because she was three months pregnant and did not want her employer to know).
55. Minn. Stat. § 181.953, subd. 10(d) (Supp. 1987). Use of such information could be evidence of discrimination. For example, it is unlawful for an employer to discriminate against a person on the basis of sex or to discriminate against a qualified disabled person. Id. § 363.03, subd. 1 (Supp. 1987). A "qualified disabled person" is defined as someone who "with reasonable accommodation" can perform the job in question and does not constitute a threat to the property or safety of others. Id. § 363.01, subd. 25(a) (1986). It is difficult, if not impossible, to conceive of a lawful reason to place an affirmative duty on a female employee or job applicant to inform the employer that she is pregnant. In all likelihood it would therefore be unlawful to take adverse action against a female employee or job applicant on the basis of information that she is pregnant, regardless of when that information was revealed by the employee.
56. Id. § 363.03, subd. 1 (Supp. 1987).
57. See supra note 54; D'Aquila, supra note 35, at 23.
rights under the Act.59 Within three working days after receiving the employer's notice of a positive test result on a confirmatory test, the employee or job applicant has the right to explain the test result.60 The employee or job applicant also has the right to request a confirmatory retest by the original testing laboratory or another licensed laboratory and must, within five working days after the employer's notice of a confirmatory test result, notify the employer in writing of her request for a retest.61 The retest is conducted at the individual's own expense.62 The Act contains certain requirements with respect to retest procedures and provides that no adverse personnel action may be taken where the confirmatory retest does not confirm the original retest result.63 A conditional offer of employment may not be withdrawn based upon a positive test result unless that test result is verified by a confirmatory test.64 Where there is a positive test result, an employer may not take adverse personnel action except as provided by the Act.65

As has been indicated, the Act limits an employer's freedom to take action when a positive test result is received. The most absolute of all limitations is that an employer cannot take any adverse personnel action unless a positive test result on an initial screening is verified by a confirmatory test result.66 Notwithstanding this absolute limitation, an employer may suspend an employee with or without pay or transfer the employee to another position, pending outcome of the confirmatory test or retest, if the employer believes that it is reasonably necessary to protect the health or safety of others.67 An employee suspended without pay must be reinstated with backpay upon a negative confirmatory test result.68

Beyond that, the Act prohibits an employer from discharging an employee for whom a positive confirmatory test was the first such result unless: (a) the employer has first given the employee an opportunity to participate in a counseling or rehabil-

59. Id.
60. Id. § 181.953, subd. 6(b).
61. Id. § 181.953, subd. 6(b), 9.
62. Id.
63. Id. § 181.953, subd. 9.
64. Id. § 181.953, subd. 11.
65. Id. § 181.953, subd. 9, 10.
66. Id. § 181.953, subd. 10(a).
67. Id. § 181.953, subd. 10(c).
68. Id.
ulation program at the employee's own expense or pursuant to an employee benefit plan; and (b) the employee has either refused to participate in such a program or has failed to successfully complete it, as is evidenced by withdrawal from the program before completion or a positive test result on a confirmatory test conducted after completion of the program.69

In addition, an employer may not take any adverse personnel action on the basis of medical history revealed pursuant to a testing request, unless the employee or job applicant was under a prior affirmative duty to disclose that very information.70

G. Privacy, Confidentiality and Privilege Safeguards and the Employee's Right to Access

The Act addresses certain issues regarding privacy, confidentiality, privilege and access. Under the Act, a laboratory may only disclose to an employer the test result data regarding the absence or presence of drugs, alcohol or their metabolites in a sample.71 Test result reports and other information acquired in the testing process are private and confidential and may not be disclosed by an employer or laboratory to a third party without the written consent of the tested employee or job applicant.72 Notwithstanding any of the limitations on disclosure, however, evidence of a positive test result on a confirmatory test may be: (1) used in certain proceedings such as a trial or arbitration hearing; (2) disclosed as required by law; and (3) disclosed to a substance abuse treatment facility for treatment or evaluation purposes.73

The Act classifies positive test results as privileged for criminal law purposes and prohibits the use of such data in a criminal proceeding against the tested individual.74 It also provides that employees must be given access to certain information

69. Id. § 181.953, subd. 10(b). The Act is silent on how long after successful completion of the program a subsequent positive confirmatory test can result in discharge. It can be anticipated that employees will argue there is a two year limitation, bootstrapping on to the two year limitation provided pursuant to treatment program testing. See id. § 181.951, subd. 6.
70. See id. § 181.953, subd. 10(d).
71. Id. § 181.954, subd. 1.
72. Id. § 181.954, subd. 2. For public sector employees, such information is considered private data on individuals as defined by Minn. Stat. § 13.02, subd. 5 (1986).
73. Id. § 181.954, subd. 3 (Supp. 1987).
74. Id. § 181.954, subd. 4.
contained in their personnel files. Employees may have access to positive test result reports, as well as other information acquired in the testing process, conclusions drawn from such information and actions based thereon. 75

H. Collective Bargaining

The rights and duties discussed above are not to be construed to limit the parties to a collective bargaining agreement from agreeing upon a drug and alcohol testing policy that meets or exceeds the minimum standard set forth under the Act. 76 Moreover, the Act is not to be construed to interfere with existing collective bargaining agreements that provide greater employee protections than are statutorily mandated. 77

With respect to collective bargaining, the Act does not alleviate an employer's obligations concerning mandatory bargaining issues. A union may still claim that implementation of a drug or alcohol testing program constitutes a change in a term or condition of employment that cannot be lawfully implemented without giving the union prior notice and an opportunity to bargain. 78 In an organized labor setting, the Act only establishes the statutorily-mandated minimum protections that employers must provide to employees. The protections under the Act will, in all probability, constitute nothing more than a starting point for a union as it argues for greater employee protection during a collective bargaining session.

I. Remedies Under the Act

An employee or a collective bargaining agent is required to exhaust any contractual remedies or grievance procedures before bringing suit under the Act. 79 The Act allows any employee, job applicant, non-federal government attorney or collective bargaining agent who fairly and adequately represents the interests of a protected class to sue for injunctive relief enjoining an employer or a laboratory from violating the Act. 80 In addition, an aggrieved employee or job applicant has a stat-

75. Id. § 181.953, subd. 10(e).
76. Id. § 181.955, subd. 1.
77. Id. § 181.955, subd. 2.
78. See D'Aquila, supra note 35, at 22.
80. Id. § 181.956, subd. 3.
utory right to bring an action against an employer or laboratory for any damages or other relief allowable by law. This remedy includes, but is not limited to, reinstatement with back pay and an award of attorneys fees if the court finds that an employer or a laboratory recklessly or knowingly violated the Act.\textsuperscript{81} Furthermore, it is unlawful for an employer to retaliate against an employee asserting rights and remedies provided by the Act.\textsuperscript{82}

\section*{J. Federal Preemption}

The Act provides for federal preemption in specified circumstances. Except as noted below, the Act excludes from its protection all employees and job applicants where the specific work to be performed requires those individuals to be subject to drug and alcohol testing under:

\begin{itemize}
  \item[(1)] federal regulations that specifically preempt state regulation of drug and alcohol testing with respect to those employees and job applicants;
  \item[(2)] federal regulations or requirements necessary to operate federally regulated facilities;
  \item[(3)] federal contracts where the drug and alcohol testing is conducted for security, safety, or protection of sensitive or proprietary data; or
  \item[(4)] state agency rules that adopt federal regulations applicable to the interstate component of a federally regulated industry, and the adoption of those rules is for the purpose of conforming the nonfederally regulated intrastate component of the industry to identical regulation.\textsuperscript{83}
\end{itemize}

This exclusion is limited, however, and even with respect to individuals excluded by the above four categories, employers and testing laboratories must comply with the Act’s protections to the extent that the Act’s provisions establishing protections for employees or job applicants are not inconsistent with or specifically preempted by federal regulations, contract or other applicable requirements.\textsuperscript{84}

\textsuperscript{81} \textit{Id.} \textsuperscript{,} § 181.956, subd. 2, 4. In a case involving a discriminatory action by an employer, damages may include all damages recoverable under the Minnesota Human Rights Act, MINN. STAT. §§ 363.01-.14 (1986 & Supp. 1987).

\textsuperscript{82} \textit{Id.} \textsuperscript{,} § 181.956, subd. 5 (Supp. 1987). It is interesting to note that this provision does not specifically prohibit retaliation against a job applicant exercising rights and remedies under the Act. This is arguably an oversight by the legislature.

\textsuperscript{83} \textit{Id.} \textsuperscript{,} § 181.957, subd. 1.

\textsuperscript{84} \textit{Id.} \textsuperscript{,} § 181.957, subd. 2.
II. RECONCILING THE ACT WITH THE MINNESOTA HUMAN RIGHTS ACT

While the Act responds to a number of issues regarding certain aspects of the legality of drug and alcohol testing, employers must recognize that the Act by no means settles even the majority of the questions typically raised. In fact, the Act fails to resolve many constitutional, invasion of privacy, discrimination and other issues raised by drug and alcohol testing in the workplace. Thus, when formulating a drug and alcohol testing policy, employers should review and consider all of the attendant types of challenges typically raised by employees and job applicants.85 While a review of all such challenges is beyond the scope of this Article, there is one area that warrants specific mention. That area concerns the interplay and inconsistencies between Minnesota's new Act on Drug and Alcohol Testing in the Workplace and the Minnesota Human Rights Act.86

The Minnesota Human Rights Act regulates all employers that have one or more employees who reside or work in Minnesota.87 It provides that, except when based upon a bona fide occupational qualification, it is an unfair employment practice to discriminate against persons because of their disabilities “with respect to hiring, apprenticeship, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.”88

Under the Minnesota Human Rights Act, a disability means any condition or characteristic that renders a person a disabled person. A disabled person is any person who (1) has a physical, sensory, or mental impairment which substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.89

85. See D'Aquila, supra note 35, at 21.
86. The Minnesota Human Rights Act is contained in MINN. STAT. ch. 363. In the employment setting, it prohibits discrimination against qualified disabled persons. This Article will not discuss the interplay between Minnesota's new Act on Drug and Alcohol Testing in the Workplace and federal discrimination laws. With respect to those federal laws, many of the principles will be the same as they are for the Minnesota Human Rights Act. Nonetheless, the reader is cautioned to take account of federal laws such as the Federal Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1986), and applicable caselaw.
87. MINN. STAT. § 363.01, subd. 15, 39 (Supp. 1987).
88. Id. § 363.01, subd. 1(c) (1986).
89. Id. § 363.01, subd. 25 (Supp. 1987).
The Minnesota Human Rights Act further requires employers with fifty or more permanent, full-time employees to make a reasonable accommodation, that is to take steps to accommodate the known physical or mental limitations of a qualified disabled person or job applicant, unless to do so would impose an economic hardship on the employer. A qualified disabled person means "a disabled person who, with reasonable accommodation, can perform the essential functions required of all applicants for the job in question." This definition of disability excludes "any condition resulting from alcohol or drug abuse which prevents a person from performing the essential functions of the job in question or constitutes a direct threat to property or the safety of others."

Under the Minnesota Human Rights Act, reasonable accommodation may include, but is not limited to, steps such as making the workplace readily accessible and usable, restructuring the job or modifying the work schedule, acquiring or modifying equipment and providing aides on a temporary or periodic basis.

Factors to be considered in determining whether an employer would encounter an undue hardship in making a reasonable accommodation are:

(a) the overall size of the business or organization with respect to number of employees or members and the number and type of facilities;
(b) the type of the operation, including the composition and structure of the work force, and the number of employees at the location where the employment would occur;
(c) the nature and cost of the needed accommodation;
(d) the reasonable ability to finance the accommodation at each site of business; and
(e) documented good faith efforts to explore less restrictive or less expensive alternatives, including consultation.

90. Id. § 363.03, subd. 6 (1986).
91. Id. § 363.01, subd. 25(a).
92. Id.
93. Id. § 363.03, subd. 6. Reasonable accommodation may therefore include such steps as: (a) permitting an employee to use accrued sick leave, disability leave benefits, vacation and other benefits to leave work to attend a rehabilitation program; (b) adjusting an employee's job duties; and (c) reassigning employee's work or making other changes to alleviate stressful job conditions that may contribute to chemical dependency. Geidt, Drug and Alcohol Abuse in the Work Place: Balancing Employer and Employee Rights, Employee Rel. L. J., Autumn 1985, at 186.
with the disabled person or with knowledgeable disabled persons or organizations. 94

When implementing drug and alcohol testing in the workplace, employers must not ignore the critical provisions of the Minnesota Human Rights Act discussed above simply because Minnesota now has a law regulating drug and alcohol testing of employees and job applicants. 95 The wise employer will recognize that it must still square its drug and alcohol testing practices with the discrimination laws. The prudent employer will therefore attempt to reconcile the inconsistencies or may even view the new Act as further employment proscriptions in addition to the Minnesota Human Rights Act.

For example, 96 Minnesota’s new Act on Drug and Alcohol Testing in the Workplace permits an employer to request or require job applicants to undergo drug and alcohol testing provided that the applicant has been given a conditional offer of employment, and the same test is requested or required of all job applicants for the same position. 97 That statutory authority must be compared to the provisions in the Minnesota Human Rights Act which (a) prohibit an employer from using race or disability as a basis for refusing to hire a person or from maintaining a system of employment which unreasonably excludes a person seeking employment; 98 and (b) require that the physical examinations, used by an employer for the purpose of determining a person’s capability to perform an available job, test only for essential job-related abilities. 99 A comparison of such provisions of the two statutes reveals an ambiguity as to the intention of the Minnesota Legislature. Because both statutes discuss individuals seeking employment and require conditional offers before testing job applicants,

94. MINN. STAT. § 363.03, subd. 1(6) (Supp. 1987). A prospective employer is not required to pay for an accommodation for a job applicant if the accommodation is available from an alternative source without cost to the employer or applicant. Id.

95. See supra note 2.

96. The legal pitfalls an employer may encounter when conducting drug and alcohol testing, even if that employer follows the black letter of Minnesota’s new Act on Drug and Alcohol Testing in the Workplace, are too numerous to cover in this Article. This Article, therefore, highlights only a few of the conceived problems for the sole purpose of demonstrating that principles emanating from existing statutes and caselaw must still be considered.

97. MINN. STAT. § 181.951, subd. 2 (Supp. 1987). See also supra notes 22-26 and accompanying text (discussing job applicant testing).

98. MINN. STAT. § 363.03, subd. 1 (Supp. 1987).

99. Id. § 363.02, subd. 1(7)(i).
can one safely conclude that since the Act does not mention the "job-related abilities" requirement, the Minnesota Legislature expressly intended to omit the drug and alcohol testing that an employer requests or requires a job applicant to undergo be job-related? 100

Another instance of potential conflict between the two statutes exists in the area of dealing with the chemically dependent. The Minnesota Human Rights Act recognizes alcoholism as a disease. 101 It requires employers with fifty or more permanent, full-time employees to make a reasonable accommodation to individuals affected with this disability as long as it does not prevent them from performing the essential functions of their jobs or constitute a direct threat to the property or the safety of others. 102 While no reported Minnesota decisions exist concerning the reasonable accommodation that must be made for alcoholics, case law in other jurisdictions suggests that under certain circumstances reasonable accommodation may include providing affected employees with more than one opportunity to rehabilitate themselves. 103 Nonetheless, it can be anticipated that employers will cite provisions of Minnesota's new Act on Drug and Alcohol Testing in the Workplace in support of the position that affected employees need only be given one opportunity to rehabilitate themselves. 104

100. See, e.g., New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (public transportation employer held to have the right to test employees due to the nature of the employment).


102. MINN. STAT. §§ 363.01, subd. 25(a) (1986), 363.03, subd. 1(6) (Supp. 1987).

103. See, e.g., Whitlock v. Donovan, 598 F. Supp. 126 (D.D.C. 1984). In Whitlock, a government agency fired an employee whose alcoholism seriously affected his work performance and caused him to be repeatedly absent from work. Despite the fact that the government employer had made a number of accommodations, including reduced hours and referrals to rehabilitation programs, the court held that the employer had not done enough to reasonably accommodate the employee's handicap. The court stated the employer should have given the employee a "firm choice" between rehabilitation or discipline at an earlier stage and should have given the employee one more opportunity to rehabilitate himself before terminating his employment. Id. at 137.

104. See MINN. STAT. § 181.953, subd. 10(b) (Supp. 1987). This subdivision provides the circumstances under which an employer may discharge where a positive test result on a confirmatory test is the first such result. Arguably, discharge is permissible without additional accommodation where the positive test result on a confirmatory test is the second such result.
A third potential pitfall exists in the area of perceived disabilities. The Minnesota Human Rights Act generally prohibits discrimination against a disabled person and defines a disabled person to include an individual who is "regarded as having" a physical, sensory or mental impairment that substantially limits one or more major life activities.\textsuperscript{105} It can be anticipated that extensive litigation will stem from drug and alcohol testing situations where employees, who are not disabled, nonetheless claim disability discrimination on the ground that the employers perceived them to be disabled. Such plaintiff/employees will no doubt use the employer's drug and alcohol testing policies and procedures and the test results as evidence of the employer's perceptions.

**Conclusion**

Drug and alcohol testing in the workplace is certainly a controversial subject in Minnesota and other jurisdictions. Use of testing procedures in the workplace invites perhaps one of the greatest legal battles employers will encounter. Minnesota's new Act on Drug and Alcohol Testing in the Workplace definitely responds to many questions employers face when developing policies on drug and alcohol testing. Just the same, this Act unfortunately raises some additional issues and fails to resolve issues that could and should have been answered in a comprehensive legislative act on drug and alcohol testing in the work environment. Therefore, the uncertainty existing prior to enactment of this new Act remains and the resolution of the controversy surrounding drug and alcohol testing is left to future legislative sessions and the already overburdened court system in Minnesota.

\textsuperscript{105} Id. § 363.01, subd. 25 (Supp. 1987).